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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ESTATE OF LEROY HAEGER; DONNA HAEGER, individually and as personal representative of the Estate of LeRoy Haeger; BARRY HAEGER and SUSAN HAEGER,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER COMPANY, an Ohio corporation; FENNEMORE CRAIG, P.C., an Arizona professional corporation; ROETZEL & ANDRESS, a legal professional association; GRAEME HANCOCK; BASIL MUSNUFF; DEBORAH OKEY,

Defendants.

No. CV2013-052753

COMPLAINT

(Jury Trial Demanded)

Plaintiffs, allege as follows

I. INTRODUCTION

This case arises out of Goodyear and its lawyers' willful concealment of test data regarding the Goodyear G159 tire and the damages caused by that concealment, which spanned a period of years. The complaint is necessarily long as the misconduct involves multiple actors and multiple cases. After briefing and an evidentiary hearing, the United States District Court provided its instructive comment:

> Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principals in favor of their own interests. The little voice in every attorney's conscience that murmurs *turn over all material information* was ignored. (Emphasis in original)
>
> . . . The Court is aware of the unfortunate professional consequences that may flow from this order. Those consequences, however, are a direct result of repeated, deliberate decisions by Mr. Hancock, Mr. Musnuff and Goodyear to delay the production of relevant information, make misleading and false in-court statements, and conceal relevant documents. Mr. Hancock, Mr. Musnuff, and Goodyear will surely be disappointed but they cannot be surprised. **(Exhibit 1)**

Such was the introduction by Chief Judge Roslyn Silver of the United States District Court for the District of Arizona in her final Order of November 8, 2012, addressing the fraudulent misconduct by Goodyear and its attorneys. Thereafter the Court's discussion spanned 66 pages of critical commentary, including analysis of years of misrepresentations and deceptions to the Court, the Haeger family and other victims related to their simple quest for the truth regarding why Goodyear G159 tires suffered tread separations, which caused devastating injuries and deaths.

As set forth hereafter in detail, Goodyear and its attorneys engaged in a conspiracy, which spanned years, to conceal critical test data that revealed the G159 was predictably prone to tread separations from the destructive consequence of heat

generated by the tire when used for prolonged periods of time in highway applications, like the Haeger's motorhome. As Judge Silver noted in her preliminary order:

> If the tests had been disclosed, Goodyear's defense would have been severely compromised; it would have been difficult, if not impossible for Goodyear to claim the G159 was suitable for use on a motorhome . . . The conduct at issue appears to have stemmed from a deliberate corporate strategy adopted by Goodyear to prevent the disclosure of . . . test results.

This suit seeks redress and punishment for Goodyear's 15-year history of acts of deception, related to the Goodyear G159 275 70R 22.5 tire (the G159) and the damages it caused.

II. BACKGROUND

1. Goodyear commenced manufacture of the G159 in 1996, which was designed for metro service (inner city pickup and delivery trucks), but was subsequently also sold for use on motorhomes which regularly travel long distances on freeways and highways throughout the country. In this application, the G159 was prone to heat induced failure, which regularly manifested in the form of tread separations, which caused countless deaths and injuries.

2. The G159 failures resulted in a cascade of claims and lawsuits. Rather than recall the tire, inform users of the limitations of the G159, or reveal the truth regarding the tire's limitations as was known to Goodyear from its own testing, the company employed its vast resources in concert with its willing attorneys to conceal the truth.

3. The deceptions saved Goodyear untold millions of dollars, while they lied for years to the victims of G159 tread separations, unjustifiably blaming tire failures on the innocent motorhome drivers causing them even further damage.

4. By fraud and deception, Goodyear was able to secretly settle cases for a small fraction of the just compensation victims were entitled to and would have

received if the truth were disclosed. Such was the damage caused to the Haeger family by this conspiratorial enterprise.

III. THE PARTIES

5. Plaintiff Estate of LeRoy Haeger is represented by and through its executor and personal representative Donna Haeger. The decedent LeRoy Haeger was a resident of New Mexico until his passing in 2008.

6. Plaintiff Donna Haeger was the wife of LeRoy Haeger and is a resident of Pima County, Arizona.

7. Plaintiffs Barry Haeger and Susan Haeger are husband and wife and are residents of Pima County, Arizona. Barry is the son of LeRoy and Donna Haeger and Susan is their daughter-in-law.

8. Defendant Goodyear Tire and Rubber Company ("Goodyear") is an Ohio corporation, which does business throughout the United States, including Arizona. Defendant Goodyear's acts and omissions caused events to occur in Maricopa County, Arizona, which are the subject to this Complaint.

9. Defendant Roetzel & Andress, a Legal Professional Association, is an Ohio corporation that does business in various states throughout the United States, including Arizona. Defendant Roetzel & Andress' acts and omissions caused events to occur in Maricopa County, Arizona, which are the subject of this Complaint.

10. Defendant Basil Musnuff is a resident of the State of Ohio. Defendant Musnuff was a shareholder of Defendant Roetzel & Andress until 2011. Defendant Musnuff's acts were within the course and scope of his employment with Roetzel & Andress and in furtherance of its business. Defendant Musnuff's actions caused events to occur in Maricopa County, Arizona, which are the subject of this Complaint.

11. Defendant Fennemore Craig, P.C., is an Arizona professional corporation with its principal offices in Maricopa County, Arizona. Defendant Fennemore Craig's acts and omissions caused events to occur in Maricopa County, Arizona, which are the subject of this Complaint.

12. Defendant Graeme Hancock is a resident of Maricopa County, Arizona. Defendant Hancock has been a shareholder of Defendant Fennemore Craig at all material times. Defendant Hancock's acts were within the course and scope of his employment with Defendant Fennemore Craig, P.C., and in furtherance of its business. Defendant Hancock's acts and omissions caused events to occur in Maricopa County, Arizona, which are the subject of this Complaint.

13. Defendant Deborah Okey is a resident of the State of Ohio. Defendant Okey was Associate General Counsel for Defendant Goodyear at all material times. Defendant Okey's acts were within the course and scope of her employment with Goodyear and in furtherance of its business. Defendant Okey's acts and omissions caused events to occur in Maricopa County, Arizona, which are the subject of this Complaint.

14. The acts and omissions of Defendants Musnuff, Hancock, Okey, Roetzel & Andress and Fennemore Craig were also undertaken on behalf of and within the scope and course of their employment and agency as attorneys for Goodyear and in furtherance of its business.

15. Goodyear authorized each of the acts and omissions of Roetzel & Andress, Fennemore Craig, Musnuff, Hancock and Okey as its authorized agents.

16. Goodyear ratified each of the acts and omissions of Roetzel & Andress, Fennemore Craig, Musnuff, Hancock and Okey as its authorized agents.

17. Roetzel & Andress authorized each of the acts and omissions of Musnuff as its authorized agent.

18. Roetzel & Andress ratified each of the acts and omissions of Musnuff as its authorized agent.

19. Fennemore Craig authorized each of the acts and omissions of Hancock as its authorized agent.

20. Fennemore Craig ratified each of the acts and omissions of Hancock as its authorized agent.

IV. THE HAEGER ACCIDENT

21. In June 2003, the Haeger family was traveling along Interstate 25 in New Mexico at freeway speed in the family's 38-foot motorhome, when the right front tire failed as a result of a tread separation. The tires on the motorhome were all Goodyear G159s. The sudden failure caused the motorhome to veer violently to the right off the freeway where it flew over an embankment and subsequently flipped, skidding along its side.

22. The driver, LeRoy Haeger was trapped between the steering wheel and his seat and his right leg was torn apart beneath his knee as a result of impact with debris that entered the motorhome as it slid on its side. The family Great Dane was ejected through the front windshield.

23. The impact caused the inside of the motorhome to completely break apart. Susan Haeger and Donna Haeger were occupants of the rear of the motorhome. They were buried and pinned in the debris inside the motorhome, and were unable to escape after the accident.

24. When the motorhome skidded on its side to a stop, Barry Haeger was hanging in his seat by his seatbelt. Although Barry Haeger was able to get out of the motorhome, he was unable to help any of his family members who remained entrapped after the accident.

25. What followed was a slow systematic extraction of the Haeger family members by responding emergency personnel. In order to extricate Donna and Susan Haeger, paramedics needed to first extract LeRoy Haeger from the debris. They were required to saw off the steering wheel to release him. They thereafter jacked up a portion of the motorhome to release his leg. He was finally dragged free and airlifted from the accident site to the closest hospital in El Paso.

26. Donna and Susan Haeger remained buried under the debris while LeRoy Haeger was extricated. To reach Donna and Susan, much of the internal components of the motorhome had to be taken off them first. After each was finally

released from their entanglements with remnants of the motorhome, Donna was airlifted to the hospital in Albuquerque. Susan was transported by ground ambulance to the closest town, Las Cruces, New Mexico, and thereafter airlifted to the hospital in El Paso.

V. THE INJURIES

27. At the time of the accident, LeRoy Haeger was 70-years of age. He suffered chest and abdominal trauma, a dislocated elbow, lacerations, and open (externally visible) tibia/fibula fractures. In an effort to save the leg from amputation, he subsequently underwent 17 separate surgeries, including multiple bone and skin grafts and rod placement and removal in his leg. He endured an open wound in his leg for 20 months following the original accident. He developed life-threatening osteomyelitis and experienced multiple infections and abscesses in his leg during his course of recovery. For the rest of his life, he endured chronic leg pain and died from unrelated causes five years following the accident. His medical expenses were $338,610.00. He lost the consortium of his wife and suffered severe emotional distress from his injuries and witnessing the injuries to his family.

28. Donna Haeger was 69-years-old at the time of the accident. She suffered a severed Achilles tendon, fractured wrist, fractured ankle, five fractured toes, multiple jaw fractures, fractured teeth and multiple lacerations. She was wheel chair and home bound for approximately two months, with her jaws wired shut subsequent to the accident. She suffers from permanent facial nerve damage affecting speech and eating. She has endured an aggravation of a pre-existing condition, essential tremors, thereafter requiring her use of special utensils to eat and drink. She suffers from permanent jaw and ankle pain and has ongoing emotional issues associated with the loss of consortium of her husband and emotional distress from her injuries and witnessing the injuries of other family members. Her medical expenses totaled $52,021.00.

29. Susan Haeger was 42-years-old as of the date of the accident. She suffered head trauma with a resulting hematoma, lacerations and scarring on her legs, chest arms and hands. She experienced a significant crush injury to her left arm, which required two surgeries. She has permanent left arm numbness and associated weakness in her hand, arm and shoulder after reaching maximum medical improvement approximately 15 months after the accident. She suffers from permanent pain from her injuries. She has lost 60% of the function of her left arm. Her participation in daily activities has been permanently altered. Her medical expenses totaled $21,928.00.

30. Barry Haeger was 45-years-old as of the date of the accident. Mr. Haeger witnessed the accident and the entrapment of his family members as well as their limited recovery related to their injuries. He has experienced the loss of consortium related to injuries his wife incurred and endured the emotional distress associated with witnessing the accident and the injuries and entrapment of his family members. His participation in daily activities with his wife has been permanently altered.

VI. THE UNDERLYING LAWSUIT OF HAEGER V. GOODYEAR

31. In the late Summer 2003, the Haegers advised Goodyear of its responsibility for the tread separation and the accident. Goodyear refused to acknowledge any responsibility. In the summer of 2005, the Haegers sued Goodyear. The Complaint included claims for a defective and/or negligent design of the G159 tire involved in the tread separation, failure to warn of the temperature limitations of the G159 and its speed limitations, post-sale failure to warn and negligent failure to warn. The lawsuit sought compensation for their personal injuries and punitive damages.

VII. THE RULES OF PROFESSIONAL CONDUCT SET FORTH THE ETHICAL STANDARDS FOR THE CONDUCT OF ATTORNEYS IN LITIGATION.

32. A lawyer, is a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

33. A lawyer's conduct should conform to the requirements of the law, both in professional services to clients and in the lawyer's personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. It is also a lawyer's duty to uphold legal process.

34. A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

35. A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely. A lawyer shall not fail to make reasonably diligent effort to comply with legally proper discovery requests by an opposing party.

36. A lawyer shall not knowingly make a false statement of fact or law to a court or fail to correct a false statement of material fact or law previously made to the court by the lawyer. A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take necessary remedial measures including, if necessary, disclosure to the Court.

37. A lawyer who represents a client and who knows that the person intends to engage, is engaging or has engaged in criminal or fraudulent conduct

relating to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the Court. The duties of candor continue throughout a proceeding and apply even if compliance requires a disclosure of what would otherwise be confidential information.

38. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation or to otherwise engage in conduct that is prejudicial to the administration of justice.

VIII. THE FEDERAL RULES OF PROCEDURE SET FORTH THE LEGAL DUTIES OF ATTORNEYS AND PARTIES TO LITIGATION

39. The Haegers' lawsuit was prosecuted in the United States District Court, for the District of Arizona, before Judge Roslyn Silver. The Federal Rules of Civil Procedure regulated the conduct of the parties and the lawyers appearing before the Court in the *Haeger* litigation.

40. The Federal Rules of Civil Procedure set forth both the obligations and the entitlements of parties to litigation.

41. Pursuant to the Federal Rules of Civil Procedure, the Haegers were entitled to request and be provided information regarding matters that were relevant to their claims or Goodyear's defenses. The information requested is deemed relevant if it appears reasonably calculated to lead to the discovery of evidence which may be admissible in the trial of the action.

42. When a party, like Goodyear, makes a response to a request to produce relevant documentation, it must supplement or correct its disclosure or response if the party, like Goodyear, learns that in some material respect the disclosure or responses are incomplete or incorrect and the corrected information has not otherwise been made known to a party, like the Haegers.

43. These are some of the Federal Rules of Civil Procedure that guided the disclosure obligations of Goodyear and its attorneys. These were among the rules upon which the Haegers relied to discover the truth regarding the G159.

IX. GOODYEAR CRAFTED A NATIONAL STRATEGY TO CONCEAL THE TRUTH REGARDING THE G159 TIRE BEFORE THE HAEGER CASE WAS FILED

44. Although the G159 was designed for and primarily used for metro service vehicles, it fit motorhomes and Goodyear subsequently sold the tire for that application.

45. Unknown to the Haegers, when their accident occurred in 2003, there had already been countless reported tread separations involving the G159 when used on a motorhome. Plaintiffs have not identified the number because Goodyear has claimed the number is confidential.

46. Countless G159 tires suffering tread separations when used on motorhomes were returned to Goodyear under Goodyear's warranty, due to the failures which occurred in that application. Plaintiffs have not identified the number because Goodyear has claimed the number is confidential.

47. Separate from the tires returned to Goodyear for warranty replacement, there were countless reported bodily injury and additional property damage claims (beyond damage to the tire itself) arising from tread separation of the G159 when utilized in a motorhome application. Plaintiffs have not identified the number because Goodyear has claimed the number is confidential.

48. By 2005, when the Haegers filed their lawsuit, there had already been at least twenty (20) lawsuits filed against Goodyear for tread separations involving the G159 when utilized in motorhomes, resulting in multiple fatalities.

49. The G159 first went into production in 1996. Public records revealed that by 1998, there had been dozens of G159 tread separations involving Fleetwood motorhomes, which had been reported to Goodyear, many of which caused fatalities or serious injuries.

50. Goodyear denied any responsibility for the tread separations.

51. Goodyear advised Fleetwood that "running hotter can take its toll on rubber." Goodyear represented that at 55 MPH the belt edge temperatures of the

G159 tire averaged 160° Fahrenheit, whereas running continuously at 75 MPH increased those temperatures to 185° Fahrenheit. Goodyear knew the G159 was generating temperatures vastly in excess of these representations at those speeds but concealed that information from Fleetwood.

52. In November 1998, in an effort to place blame on motorhome drivers for the continuous failures of the G159 and escape any responsibility, Goodyear wrote to Fleetwood advising that tire blowouts can relate to a number of factors, however the key ones being overload, under inflation, vehicle speed and road hazards, each of which were the driver's responsibility. Goodyear explained how these circumstances could result in a tread separation:

> Fatigue and separation are somewhat allied properties of tire endurance. Both can be adversely affected by excessive conditions of load, deflection, inflation and speed. All of these conditions relate to heat buildup, and heat is the greatest enemy of a tire. Excessive heat will cause a degradation of material properties which in turn can impact the tire's endurance and durability.
>
> Tires are designed to perform at specific operating temperatures, which is sometimes called 'equilibrium temperature.' At equilibrium the heat generated within the tire structure is equal to the heat dissipated from the tire surfaces. Exceeding this temperature for short periods of time is not a problem but exceeding it for long periods begins to cause loss of strength in the material components and eventually separation of the tires structure.

53. Goodyear's November 1998 letter to Fleetwood quoted almost verbatim from a publication authored by Goodyear engineers Thomas Ford and Fred Charles entitled *Heavy Duty Truck Tire Engineering*. The pertinent language from the publication, upon which Goodyear was relying in its communication to Fleetwood states:

> Fatigue and separation are somewhat allied properties of tire endurance. Both can be adversely affected by excessive conditions of load, deflection, inflation and speed.
>
> * * *

> Heat is the great enemy of tires. Excessive heat will cause the degradation of material properties. Heat is generated by the tire due to the work expended during operation. An equilibrium temperature is developed during continuous operation of a truck tire. The temperature rises very rapidly initially and then gradually levels off to an equilibrium value. At equilibrium temperature, the heat generated within the tire structure is equal to the heat dissipated from the tire surfaces.
>
> *Tires are developed to withstand this equilibrium temperature which for radial heavy duty truck tires is a maximum of 90° Centigrade (194° Fahrenheit). Exceeding this temperature for short periods of time is not a problem but exceeding it for long periods begins to cause loss of strength in the material components and eventually separation of the tire's structure.* (Emphasis supplied)

54. Although Goodyear quoted directly from this publication in its communications with Fleetwood, it intentionally omitted the language that revealed that the tires are developed to withstand only 194° and that exceeding that temperature for long periods of time will cause a loss of strength in the material components and eventually separation of the tire's structure.

55. At the time Goodyear communicated with Fleetwood it knew that its secret test data revealed the G159 was generating temperatures well in excess of 194° Fahrenheit when used at highway speeds, explaining the repeated failures and resulting injuries and deaths.

56. In June 1998, before misleading Fleetwood, Goodyear had increased the speed rating of the G159 to 75 MPH as a result of increase in speed limits across the country. By approving the tire for 75 MPH Goodyear assured continued sales for all highway applications. Fleetwood questioned whether construction changes in the G159 and/or the approval of the tire for utilization of 75 MPH were related to the tread separations the tire was experiencing. Goodyear informed Fleetwood:

> A question was raised relative to the possibility of 75 MPH compromising the tire's safety margin. Goodyear evaluates the test results and then determines whether to authorize 75 MPH or keep the tire at 65 MPH. To date if a tire did not meet our standards, the tire remained at a maximum speed rating of 65 MPH. In the case of the tire in question,

> the tire performed to the level that satisfied our high speed requirements and we approved the tire to 75 MPH.

57. In June 1998, Goodyear knew its tests revealed the G159 was producing heat up to 229°, vastly beyond 194°, at highway speeds.

58. Goodyear advised Fleetwood that in relation to construction changes between 1996 to May 1999, as follows:

> Relative to the subject tire, our production facility in Danville, Virginia developed the tire in December 1995 and began full production in February 1996. Our design engineers have analyzed all of the tire construction changes and have determined that the changes would not have impacted tire performance relative to tread separations, belt edge separations or high speed durability.

59. Although concealed from Fleetwood, Goodyear was actually modifying construction and compounds in the G159 in a failed attempt to rectify heat induced failures in the tire.

60. Tread separations of the G159 in highway applications continued. On August 23, 2000, Goodyear communicated with the Monaco Corporation regarding tread separations involving the G159 when utilized on Monaco motorhomes. Again, Goodyear provided an almost identical explanation as was provided to Fleetwood. Once again, Goodyear failed to disclose the 194° design limitations of the G159. Again, Goodyear blamed the failures on motorhome drivers.

61. At no time did Goodyear disclose to either Fleetwood or Monaco the test results it possessed which revealed heat generated by the G159 at highway speeds was far in excess of 194° Fahrenheit. Rather, Goodyear actively concealed its test data from these two motorhome manufacturers.

62. Although Goodyear was well aware of the relationship between the heat produced by the G159 in highway applications and its failure, it made no subsequent effort to warn users of the limitations of the G159, made no effort to inform the Government what Goodyear knew about the heat that the tire was generating in these high speed applications and made no effort to otherwise recall the tire or

provide any post-sale warning to individuals utilizing the G159 on their motorhomes. Rather, Goodyear chose to "run out" the tire and solve one claim at a time while it employed its national strategy to conceal all critical information from those victimized by the G159 and to similarly conceal such data from those governmental entities with the capacity to regulate and punish Goodyear for its conduct. Goodyear knew this strategy would cause future deaths and injuries from G159 tread separations.

63. By 2003, as a result of the number of claims and lawsuits arising from tread separations involving the G159 in motorhome applications, Goodyear coordinated the defense of Goodyear's G159 tread separation lawsuits and claims at a national level. It retained the law firm of Roetzel & Andress and its attorney Musnuff to operate as National Coordinating Counsel for all G159 claims and litigation.

64. As a result of ongoing failures, Goodyear ceased manufacture of the G159 in 2003. Rather than recall the tire, Goodyear chose to leave the tires in the market, secretly settling cases as they arose as a result of continued tread separations causing injuries and deaths.

65. Musnuff and Roetzel & Andress were specifically tasked with defending and confidentially settling every G159 tread separation failure involving motorhomes.

66. In cases where lawsuits were filed relating to G159 tread separations, Goodyear's Associate General Counsel, Okey, would retain local counsel in each state, as is required by applicable rules of procedure, to represent Goodyear's interests and instruct those local attorneys to work with National Coordinating Counsel. Thus, Goodyear, through National Coordinating Counsel, kept close control over all aspects of litigation.

67. In litigation matters involving the tread separations of the G159 on motorhomes, Roetzel & Andress and Musnuff, maintained responsibility for identifying witnesses, selecting experts, preparing experts and witnesses for

deposition and trial and making preliminary recommendations to Goodyear as to disclosures of documents and answers to specific questions raised in those litigation matters. Okey was the final decision-maker regarding what documents would be disclosed and how and if questions would be answered. Similarly, Okey was the decision-maker regarding what objections Goodyear would voice to various requests for information by those victimized by tread separations involving the G159 in motorhomes. Regardless of where the case was filed or which local counsel was retained, Goodyear kept tight control over the G159 cases and nothing was done without the knowledge and consent of its Associate General Counsel.

68. As part of Goodyear's national defense of the G159 tread separation cases, Goodyear required Roetzel & Andress, Musnuff and local counsel to request that each court issue a protective order, approved by Goodyear, which allowed Goodyear to designate documents as "confidential" and to claim testimony as "confidential." The protective orders specifically prohibited victims of G159 tread separations and their attorneys from sharing information produced by Goodyear during the course of litigation, which Goodyear claimed to be "confidential," including sharing it with other individuals injured by G159 tread separations. To assure no documents were ever disclosed, each protective order required that all confidential documents be returned to Goodyear after the case was resolved.

69. In every G159 litigation matter a "Goodyear form protective order" was issued by each Court. In each instance, those protective orders prohibited sharing any information disclosed which was claimed to be "confidential." The terms of the protective orders allowed Goodyear to unilaterally determine what should be "confidential" by simply stamping each document they did not want others to know about as "confidential." Goodyear similarly could unilaterally declare testimony "confidential" to assure any damning admissions were never disclosed to others victimized by the tire.

70. When an attorney representing a victim of Goodyear sought even the limited ability to share alleged confidential matters with only other lawyers representing other victims of G159 tread separations, Goodyear objected. It persuaded every court involved in G159 litigation to enter a protective order which allowed Goodyear to prohibit any sharing of any documents or testimony that Goodyear claimed to be "confidential" amongst those victimized by G159 tread separations.

71. Whenever Goodyear disclosed any documentation relating to test data or failure data relating to the G159, Goodyear would claim in each case that those disclosures were confidential.

72. Whenever a Goodyear witness testified, Goodyear regularly designated most, if not all, of such deposition testimony as confidential such that Goodyear was able to make dissimilar disclosures and representations in similar cases regarding failures of the G159 in motorhome applications.

73. Although Goodyear claimed the protective orders were necessary to protect trade secrets, the truth is that the protective orders were designed and utilized to conceal the truth regarding the cause and number of G159 failures so as to minimize Goodyear's damage exposure and minimize settlement payments in defending the G159 in litigation cases across the country.

74. By concealing the truth, Goodyear saved tens if not hundreds of millions of dollars in settlements and verdicts and simultaneously evaded regulatory penalties and brand damage which would have accrued if it disclosed the truth regarding the G159. By participating in this deception, attorneys representing Goodyear were handsomely rewarded.

75. When the Haegers filed their Complaint in Arizona in the summer of 2005, Goodyear, by and through Okey, retained Fennemore Craig and Hancock to act as local counsel. Goodyear had historically and continuously used this firm and Hancock to defend G159 cases filed in Arizona.

76. Like all other G159 cases, Goodyear and its attorneys requested the Court enter a protective order in the *Haeger* case, crafted by Goodyear and its National Coordinating Counsel. Goodyear and its attorneys advised Judge Silver "this form of protective order is used throughout the country." The Haegers objected to the protective order as drafted and requested that the protective order include a sharing provision, suggesting it was necessary to insure that all parties litigating cases against Goodyear would receive appropriate and complete data in similarly situated cases.

77. The Court rejected Plaintiffs' request for a sharing provision emphasizing that "every officer before this Court has an obligation to provide all relevant discovery" and observed that the Federal Rules of Civil Procedure already provided that anything that is relevant must be turned over to counsel and to all parties so there was no need for a sharing provision.

78. As a result of the Court's comments and admonitions, as of August 2006, all counsel were expressly aware of the Court's expectations regarding discovery and disclosure and that as officers of the Court, all relevant information was to be appropriately identified and disclosed.

79. As of August 2006, the Haegers reasonably relied upon the Court's comments, the Court's orders, the Federal Rules of Procedure and the ethics of the attorneys representing Goodyear, as well as Goodyear's obligations as a party to the litigation to be sure that relevant information would be disclosed to facilitate a trial based upon the truth regarding the G159.

80. In spite of the Haegers justified reliance, Goodyear and its attorneys, as part of a continuous national deception, concealed the truth regarding testing, temperature limitations and failure history of the G159, while simultaneously blaming the accident on LeRoy Haeger, willfully causing further damage to the Haeger family.

X. THE HAEGERS IDENTIFIED THEIR THEORY OF DEFECTIVE NATURE OF THE G159 IN 2006 AT THE BEGINNING OF THE CASE

81. Goodyear had submitted written questions (interrogatories) to the Haegers that required them to set forth their theories as to the defective nature of the G159. On August 18, 2006, the Haegers advised Goodyear in response to its interrogatory:

> The tire was specifically designed for pick-up and delivery trucks in commercial service. Nonetheless Goodyear marketed this tire for Class A motorhome use, which was an inappropriate use of the original design of the G159 . . . There are fundamental differences between a tire which is designed for pick-up and delivery trucks and those used in Class A motorhomes. Delivery trucks start and stop on a regular basis and travel at predominately lower speeds. As a consequence, the tire is exposed to significantly less heat. Prolonged heat causes degradation of the tire which, under appropriate circumstances, can lead to tire failure and tread separation even when the tire is properly inflated. When the G159 is utilized in a freeway application it regularly travels at freeway speeds of approximately 75 MPH . . . when utilized in Class A motorhomes/freeway applications, the tire is operating at maximum loads and at maximum speeds, producing heat and degradation to which the tire was not designed to endure, leading to its premature failure.

XI. FROM THE BEGINNING OF THE HAEGER CASE GOODYEAR AND ITS ATTORNEYS FAILED TO COMPLY WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND MAKE MEANINGFUL DISCLOSURE OF RELEVANT INFORMATION

82. Goodyear was required to provide an initial disclosure statement to the Haegers which identified all documents which may be utilized in its defense of the case and to identify all individuals with information that Goodyear might use to support its defense.

83. Goodyear and its attorneys filed its initial disclosure statement on December 15, 2005. The disclosure statement failed to identify a single individual in Goodyear's employ who knew of relevant information regarding the G159. It failed to identify a single Goodyear document generated that it expected to utilize in the defense of the *Haeger* litigation, even though Goodyear maintained that the tire was

state of the art and had been adequately tested to insure its safe utilization at 75 MPH.

84. The failure to provide required disclosures was part of an orchestrated joint endeavor by Goodyear and its attorneys to conceal relevant information regarding the G159.

XII. GOODYEAR AND ITS ATTORNEYS SUBSEQUENTLY DISCLOSE ONLY DEPARTMENT OF TRANSPORTATION (DOT) ENDURANCE TESTS IN RESPONSE TO THE HAEGERS' PRELIMINARY REQUEST FOR RELEVANT TEST DATA

85. Plaintiffs submitted a request for the production of documents and written questions (interrogatories) to Goodyear on September 22, 2006.

86. Plaintiffs submitted 39 separate requests for production of documents. Goodyear specified 16 "general objections" applicable to all requests and thereafter voiced additional objections to each separate request for the production of documents, while it failed to identify a single responsive document.

87. Plaintiffs submitted 20 separate interrogatories to Goodyear. Goodyear objected to each and every interrogatory and failed to provide any substantive response to a single question.

88. Plaintiffs' First Request for Production had sought among other things:

> All test records from the G159 tires, including, but not limited to road tests, wheel tests, high speed testing and durability testing.

89. On November 1, 2006, Goodyear provided "supplemental" responses to Plaintiffs' First Request for Production of Documents. Goodyear represented that "in a good faith spirit of cooperation" Goodyear was willing to produce test documentation. Its supplemental response stated:

> Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation, Goodyear will produce, subject to the Protective Order entered in this case the DOT test data for the Subject Tire for the Subject Time Frame.

90. DOT refers to a class of tests required by the Department of Transportation prior to the sale of commercial medium truck tires like the G159.

91. Goodyear thereafter identified nine (9) pages of documents representing the body of DOT test data referenced in Goodyear's supplemental response to Plaintiffs' First Request for Production, representing DOT tests which were performed between October 1998 and December 2002.

92. The DOT tests that were disclosed, revealed no temperature information whatsoever. Rather, each test was performed at 30 MPH per hour for a period of 1,710 miles as part of the required government endurance testing for the tire prior to sale.

93. Goodyear limited disclosure of DOT test data to the "subject time frame" which was unilaterally determined by Goodyear to be the time frame commencing on the date the G159 tires on the Haeger motorhome were manufactured in 1998 and ending on the date of the Haegers' accident in 2003.

94. On December 20, 2006, counsel for the Haegers wrote a letter to Hancock, local counsel for Goodyear, demanding if any test data other than the disclosed DOT test data existed, it was incumbent upon Goodyear to disclose such test data.

95. Goodyear never denied its duty to disclose requested relevant test data. Neither Goodyear nor any of its attorneys responded to Plaintiffs' December 20, 2006 demand. No further tests were disclosed in response.

96. Plaintiffs brought Goodyear's effort to limit disclosure of test data to a "subject time frame" of its sole design to the Court's attention. In January 2007, the Court ordered Goodyear to produce additional test data commencing on the date the G159 was first produced in 1996 and ending on the date of Goodyear's response to Plaintiffs' request for production.

97. In response to the Court's Order, on March 7, 2007, Goodyear produced an additional three (3) pages of DOT test data. These DOT tests were limited to three (3) tests performed between April 1996 and October 1997, again performed at 30 MPH for 1,710 miles, which did not record any temperature data whatsoever.

98. In spite of Goodyear's obligation to supplement its production of test data, in the event Goodyear discovered it had failed to disclose requested relevant data, at no time did Goodyear ever supplement its response to Plaintiffs' First Request for Production, other than as referenced in ¶¶ 91 and 97.

99. The decision to limit disclosure of test data to the DOT tests was part of the endeavor by Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock to conceal other relevant test data regarding the G159, of which the Haegers were unaware.

100. In Goodyear's Answer to Plaintiffs' Complaint, Goodyear asserted that its G159 represented the "state of the art."

101. Goodyear's "state of the art" defense meant that Goodyear was claiming the G159 matched the technical and scientific knowledge of designing and testing tires that was in existence at the time of manufacture.

102. The Haegers' original interrogatories requested that Goodyear identify every fact that supported its state of the art defense.

103. Goodyear objected to Plaintiffs' question and provided no substantive response. At no time did Goodyear supplement its answer to Plaintiffs' request that Goodyear identify the facts that supported its state of the art defense.

104. In the Haegers' original written interrogatories, they requested that if Goodyear ever maintained any files of any tests regarding the G159, that Goodyear identify the nature of such files and the present custodian of such files.

105. Although Goodyear had originally objected to answering the question, in Goodyear's supplemental response filed on November 1, 2006, it stated:

> Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation, Goodyear states that it will produce for deposition a corporate representative knowledgeable about the DOT testing for the Subject Tire, subject to the Protective Order entered in this case, that the Subject Tire was subjected to all necessary DOT testing, and that in response to Plaintiffs' request that for production Goodyear will produce, subject

> to the Protective Order entered in this case the DOT test data for the Subject Tire for the Subject Time Frame.

106. In spite of Goodyear's obligation to provide further supplementation to its response if it discovered the identity of any additional test data, at no time did Goodyear ever further supplement its response to this interrogatory.

107. Plaintiffs had submitted their requests for the production of relevant test documents and written questions regarding the custodian of all test files in order to acquire relevant information relating to Goodyear and the G159 tire. The answers Goodyear provided to such questions and documents produced by Goodyear were provided to Plaintiffs' retained expert David Osborne.

108. Mr. Osborne was Plaintiffs' retained tire engineer. He prepared and disclosed his report on January 1, 2007. It set forth his opinions, in reliance upon the limited information disclosed by Goodyear.

109. Mr. Osborne's report opined that the disclosed DOT testing at 30 MPH represented inadequate testing for a tire intended to be utilized in a highway application like the G159 was when utilized in motorhomes.

110. Mr. Osborne expressed his opinion that the G159 failed as a combination of load and speed.

111. Mr. Osborne had evaluated the tires on the Haeger motorhome and excluded any other explanations for the failure, including impact damage to the tire preceding its failure.

112. No further disclosures of relevant information relating to tests of the G159 were disclosed by Goodyear between March 7, 2007 and June 6, 2007.

113. At no time did Goodyear or its attorneys disclose the publication of Goodyear engineers, Thomas and Ford, Heavy Duty Truck Tire Engineering, which revealed the maximum operating temperature of the G159 of 194° Fahrenheit.

XIII. GOODYEAR'S EXPERT REPORTS MADE NO MENTION OF TESTING OF THE G159 OR ITS TEMPERATURE LIMITATIONS

114. The Federal Rules of Procedure required Goodyear to disclose all opinions of Goodyear experts to be expressed at trial and to identify all documents, facts and data those experts considered in forming those opinions.

115. Goodyear disclosed its expert opinions on April 6, 2007, identifying Richard Olsen, a Goodyear tire engineer and James Gardner, a former Firestone tire engineer, as its expert witnesses regarding the design of the G159, its strengths and its limitations.

116. The reports of Olsen and Gardner made no mention of Goodyear tests.

117. Neither Olsen nor Gardner considered Goodyear test data in forming the opinions expressed in their written reports. All test data was ignored.

118. Mr. Olsen claimed the tread separation was caused by impact damage.

119. Mr. Gardner claimed the tread separation was caused by impact damage.

120. Olsen's report represented that the G159 was designed and rated to be operated at continuous highway speeds of 75 MPH.

XIV. GOODYEAR AND ITS ATTORNEYS UNTIMELY DISCLOSE PREVIOUSLY CONCEALED HIGH SPEED DURABILITY TESTS

121. On May 8, 2007, the Haegers served their Third Request for Production of Documents. The request asked that Goodyear disclose all documents which relate to any speed or endurance testing to determine that the subject tire was suitable for 65 or 75 MPH highway purposes and all documents which relate to the approval by Goodyear of the G159 for 75 MPH, including but not limited to all testing records relating to suitability of the subject tire for that speed.

122. Goodyear knew the Haegers' expert was critical of the absence of any testing at highway speeds when the G159 was allegedly designed for that application. Goodyear needed to fill that void if it was to defend the G159.

123. Goodyear responded:

> Subject to and without waiving the following objections, and in a good faith spirit of cooperation, Goodyear states that it is producing, subject to the Protective Order entered in this case, copies of electronically maintained high speed durability test results conducted on [the G159] since August 1996. . . . Goodyear objects to this request for the reasons and on the grounds that it is overly broad, seeks irrelevant information regarding tires that are not substantially similar and seeks confidential information.

124. Thus, on June 21, 2007, Goodyear for the first time disclosed four (4) high speed durability tests, related to the G159 tire in production, like the tire on the Haeger motorhome. The Haegers had requested that Goodyear disclose all high speed testing on September 22, 2006. Goodyear and its attorneys concealed the high speed tests for nine (9) months.

125. The four (4) high speed durability tests that related to the Haegers' G159 were performed in 1996, months after Goodyear started selling the G159. These were the only tests Goodyear alleged it relied upon to approve the G159 for 75 MPH use.

126. The tests recorded temperatures of the tires tested. The temperatures recorded are not disclosed in this Complaint because Goodyear claimed the test results are confidential.

XV. GOODYEAR THROUGH ITS ATTORNEYS REPETITIVELY REPRESENTED TO THE COURT THAT THERE WERE NO OTHER TESTS THAN THOSE WHICH HAD BEEN DISCLOSED TO THE HAEGERS

127. The parties attended several hearings before Chief Judge Silver of the United States District Court for the District of Arizona.

128. On multiple occasions Goodyear, through its attorneys, specifically represented to the Court that it had looked for, located and disclosed all available test data to the Haegers.

129. The repetitive representations to the Court led the Court to believe that no other test data regarding the G159 existed and that all available test data had appropriately been disclosed regarding the G159.

130. The repetitive representations to the Court led the Haegers' counsel to believe that no other test data regarding the G159 existed and that all available test data had appropriately been disclosed regarding the G159.

XVI. GOODYEAR AND ITS EXPERTS EXPLAINED THE TEMPERATURE LIMITATIONS OF THE G159 AND THE MEANING OF AVAILABLE TEST DATA

131. The Federal Rules of Procedure allowed the Haegers to request that Goodyear designate an individual to testify on behalf of the corporation in referenced to specific topics.

132. The Haegers had requested that Goodyear designate a witness to testify about testing of the G159.

133. Goodyear designated its employed tire engineer, Richard Olsen, to testify on behalf of the corporation as to testing known to Goodyear or otherwise available to Goodyear regarding the G159.

134. When Mr. Olsen testified he was speaking on behalf of Goodyear.

135. It was Mr. Olsen's obligation to review all corporate documentation that was relevant to the deposition topic of testing and he did so prior to answering questions posed by the Haegers' counsel.

136. Musnuff and Hancock met with and prepared Mr. Olsen for this deposition.

137. Goodyear, by and through the testimony of Mr. Olsen, represented that all available test records had been disclosed and produced to the Haegers.

138. Goodyear, by and through Mr. Olsen, represented that there were a number of different test procedures ran during the development process for a tire, but no documentation of these tests was available regarding the G159.

139. Based upon the testimony of Goodyear, by and through its designated representative Mr. Olsen, the Haegers again were led to believe that the only available testing was the Department of Transportation 30 MPH tests, previously

disclosed, and the more recently disclosed high speed testing, which was limited to four tests performed in 1996 on the G159.

140. Goodyear's tire engineering expert James Gardner authored Chapter 15 to the Pneumatic Tire, a 29-chapter treatise published by NHTSA in 2005. Chapter 15 is titled "*Introduction to Tire Safety, Durability and Failure Analysis"* and includes the following observations:

> 3.4 Heat.
>
> . . . Elevated and extended heat generation is a primary factor in the breakdown of a tire. Increased heat decreases rubber tear resistance which promotes crack initiation and propagation . . .
>
> * * *
>
> . . . Rubber deterioration (reversion) from excessive heat buildup results in decrease in tensile strength and general softening. This breakdown from heat is an additive effect that can drive the temperature higher still. Ultimately a component or portion of the tire can reach a critical temperature range where the deterioration of the rubber can cause detachment of the tire in pieces or whole sections of the tread . . .
>
> 3.6 Speed.
>
> Changing the speed of tire rotation affects the centrifugal force and frequency of the deflection cycle. Corresponding changes in the stresses and strains developed in the tire components affects the tire's heat buildup characteristics.
>
> The fundamental effect of speed is its influence on the frequency of cyclical deformation. With each rotation, a given radial section of the tire undergoes a stress strain cycle as it passes through the contact patch. Increasing the cyclical frequency increases the heat that develops and hence affects the performance of the tire as a whole, particularly parameters of the link to durability.
>
> . . . Testing has verified that increasing speed causes an increase in tire temperature, particularly in the shoulder area.

141. Goodyear's separately retained expert, Mr. Gardner, testified that a medium commercial truck tire, like the G159, should operate between 140 to 150° Fahrenheit at 75 MPH continuous speed on the highway when properly inflated.

142. Mr. Gardner testified that if a medium commercial truck tire, like the G159, was exposed to prolonged temperatures in excess of 200° Fahrenheit, that it would experience diminishing properties, which could lead to tread separations.

143. Mr. Olsen agreed with Mr. Gardner's opinion that the G159 would be prone to tread separation if continually operated at temperatures in excess of 200° Fahrenheit.

144. The Haegers' expert, Mr. Osborne, opined that elevated temperatures can break down the adhesion system of a steel belted radial tire, like the G159, and that high temperatures reduce the tire's tear strength.

145. Goodyear, by and through its designated representative Mr. Olsen, explained the high speed tests and the test results.

146. Goodyear explained that the high speed tests of the G159 were performed on a 67" steel wheel and explained that this environment is dissimilar to the stresses placed upon the tire in a real world environment like operating on a freeway.

147. Goodyear asserted that the nearest equivalent to the stress of running at 75 MPH on a roadway is a 67" wheel test at 42 MPH which was alleged to create the equivalent stresses that would be experienced by the G159 when operated on a highway at 75 MPH.

148. In the four high speed durability tests disclosed by Goodyear, the temperature generated by the tire at certain speeds was identified.

149. Accepting Goodyear's representations regarding equivalent stresses for testing on a 67" wheel, the four (4) high speed durability tests disclosed by Goodyear regarding the G159, only recorded temperatures at speeds vastly beyond 75 MPH highway use.

150. Since Goodyear claimed that 42 MPH on the 67" steel wheel was the equivalent of 75 MPH on a highway, a temperature recorded at 75 MPH on the steel

wheel was merely reflective of a G159 operating at 133 MPH in a highway environment.

151. None of the disclosed high speed tests recorded temperatures at 42 MPH, the equivalent of the temperature which would be generated at 75 MPH.

152. None of the disclosed testing recorded temperatures at any speed which would be equivalent to highway speed of 75 MPH or less.

153. Goodyear represented under oath that no other test data existed which recorded temperatures of the G159 at lower speeds.

154. Based upon Goodyear's testimony under oath that no other test data was available, Plaintiffs had no Goodyear test data that reflected the G159 was running too hot (greater than 200°) when utilized at freeway speeds between 65 and 75 MPH.

XVII. GOODYEAR UTILIZED ITS LIMITED DISCLOSURES OF TEST DATA TO EXPLOIT JUDICIAL DETERMINATIONS BEFORE TRIAL

155. The parties were entitled to make arguments to the Court to limit the introduction of evidence at the time of trial based upon the disclosures and testimony provided before trial.

156. Goodyear and its attorneys had never disclosed the full number of bodily injury and property damage claims arising from tread separations of the G159 on motorhomes to the Court or the Haegers.

157. Goodyear and its attorneys utilized the limited test data that it had disclosed in an attempt to persuade the Court that there was no evidence of a defect in the design of the G159.

158. Goodyear and its attorneys utilized the limited test data to advance its defense that the G159 in the Haeger accident failed as a result of impact damage caused by LeRoy Haeger, alleging the tire failed as a result of Mr. Haeger's striking some unknown object, at an unknown speed, which Goodyear claimed could result in a tread separation thousands of miles later. Goodyear made this claim even though

Mr. Haeger was the only person who drove the motorhome and testified no such impact ever occurred.

159. Goodyear advanced this "impact damage" defense even though commercial truck tries, like the G159, are the toughest and strongest tires Goodyear makes.

160. This "impact damage" defense was regularly used by Goodyear in the G159 cases, where Goodyear regularly blamed the motorhome drivers for the accidents and injuries their families suffered.

161. Goodyear and its attorneys advanced its primary defense that the limited test data disclosed did not support a heat-related failure of the tire in the Haeger accident pointing out the absence of any recorded test temperature results at highway speeds of 75 MPH or less.

162. In reliance upon the representations made by Goodyear and the existing record, the Court dismissed Plaintiffs' claims for failure to warn users of the speed limitations of the tire. The Court also entered an order precluding Plaintiffs from the introduction of evidence of any other accidents, lawsuits, bodily injury or property damage claims.

163. When LeRoy Haeger died in 2008 from lung cancer, Goodyear and its attorneys continued to blame him for his family's devastating injuries. Goodyear and its attorneys told the Haeger family members that their injuries were LeRoy's fault.

164. Goodyear attorney, Hancock, made it clear that Goodyear would appeal any adverse result at trial when he stated that Donna Haeger would be dead before Goodyear was finished.

165. The claims left for a jury were limited to Plaintiffs' claims of negligent or defective design of the G159, claims for negligent infliction of emotional distress and claims for loss of consortium as a result of the injuries incurred in the tread separation accident.

166. Goodyear and its attorneys had dragged the Haegers through the litigation process for seven (7) years, in an effort to exhaust them financially and emotionally.

XVIII. THE *HAEGER* CASE SETTLED ON THE FIRST DAY OF TRIAL JUST BEFORE THE JURY WAS SEATED IN RELIANCE UPON REPRESENTATIONS MADE BY GOODYEAR AND ITS ATTORNEYS TO THE COURT AND THE HAEGERS

167. Reasonably relying upon the accuracy of the testimony under oath by Goodyear witnesses, the truthfulness of representations made by Goodyear through its attorneys to the Court, the Federal Rules of Civil Procedure, compliance by Goodyear with orders entered by the Court, conduct consistent with the ethical obligations of counsel as officers of the Court, and considering the remaining disputes between the experts and limited test data, the Haegers entered into a settlement with Goodyear by and through its attorneys.

168. Okey, Musnuff and Hancock each participated in the settlement discussions.

169. Neither Okey, Musnuff or Hancock advised the Haegers of misrepresentations made to the Court or that it had presented false testimony through its witnesses.

170. Unaware of a vast array of deceptions, misrepresentations and concealed data, the Haegers and Goodyear entered into the settlement agreement, but that agreement did not release Goodyear or its attorneys from damages caused or claims for fraud, perjury, misrepresentations, failure to comply with Court orders or applicable rules of procedure, fraud in the inducement, abuse of process, civil conspiracy, aiding and abetting or for knowingly concealing crucial requested data.

171. Had the Haegers known of these deceptions and misrepresentations they would not have settled the case for the consideration provided but the case would have settled for a sum vastly in excess of that provided as these deceptions would have revealed the indefensible nature of the G159 and that Goodyear and its attorneys had been engaged in a conspiracy spanning years, which knowingly caused

countless deaths and injuries, including the devastating injuries suffered by the Haegers. The settlement would have been consistent with the true value of Goodyear's damage liability exposure.

XIX. SUBSEQUENT TO THE SETTLEMENT THE HAEGERS DISCOVER THAT GOODYEAR'S DISCLOSURES REGARDING TEST DATA WERE KNOWINGLY AND WOEFULLY INCOMPLETE AND DESIGNED TO DECEIVE THE HAEGERS AND THE UNITED STATES DISTRICT COURT

172. As of the date of the Haeger settlement, in spite of the dozens of lawsuits related to G159 tread separations on motorhomes, in no case had Goodyear proceeded to trial. Rather each of the G159 tread separation motorhome cases was secretly settled pursuant to the terms of various protective orders and all settlements were deemed confidential and therefore unknown to others victimized by G159 tread separations on motorhomes.

173. In the summer 2010, months after the *Haeger* case settled, the first and only G159 trial occurred in Florida, in the matter of *Schalmo v. Goodyear*. The Schalmo family was seriously injured as a result of a right front tire tread separation, just like the Haegers, which resulted in a crash of their motorhome. Like the Haegers, the Schalmo motorhome was occupied by four (4) Schalmo family members, each of which suffered injuries similar to those of the Haeger family.

174. The jury in *Schalmo v. Goodyear* rendered its verdict in the amount of $5.6 million, finding that the G159 was defective in design and was not suitable for highway use.

175. Like the *Haeger* case, Musnuff and Roetzel & Andress represented Goodyear in the *Schalmo* case in the capacity of Goodyear's National Coordinating Counsel.

176. Like all G159 cases, the *Schalmo* matter proceeded under a protective order, which prohibited the *Schalmo* plaintiffs from disclosing to others any of the confidential documents that were disclosed by Goodyear during the course of discovery.

177. Subsequent to the entry of the verdict in the *Schalmo* case, the Haegers' counsel became aware of an article authored by SAFETY RESEARCH regarding the *Schalmo* trial. The article stated:

> A failed Goodyear G159 was the cause of an August 11, 2004 crash that seriously injured the driver and two occupants. The tire was the original equipment on a . . . motorhome owned by John Schalmo. Schalmo was on State Road 8 . . . when the right front tire of his motorhome suffered a catastrophic tread separation . . . . He died of unrelated causes two years before trial.
>
> This was the first G159 case to be resolved in a public trial. Goodyear has quietly settled as many as a dozen G159 tread separation cases involving serious injuries and death, in exchange for confidentiality. The Schalmo . . . famil[y] refused to agree to a confidential settlement and have expressed their hope that Goodyear will recall the tire.
>
> At trial [plaintiffs] presented Goodyear documents, including *internal heat* and speed *testing* and failure rate data that [plaintiffs] argued showed that Goodyear knew the G159 was improperly approved for 75 MPH continuous highway use. Excessive heat in the tire will break down its internal components over time and is a leading cause of tread belt detachment failures as typified by the Schalmo crash. (Italics supplied)

178. In January 2011, Haegers' counsel brought the article to the attention of Goodyear's counsel, Musnuff, providing Goodyear and its attorneys with a copy of the article, which suggested the disclosure of dissimilar testing material in the *Schalmo* case. The correspondence stated:

> I have attached for your review a copy of an article I discovered which causes me great concern regarding the adequacy and honesty of disclosures made in the *Haeger* case. . . . We forwarded our First Request for Production on September 22, 2006, which required the production of **all** test records for the G159 tire at issue. At the same time, we forwarded a separate set of Nonuniform Interrogatories which required the identification of any tests, studies or research performed on the G159 tire at issue.
>
> Goodyear's first response to the Request for Production and Nonuniform Interrogatories was a global objection. Subsequently, Goodyear filed supplemental responses, which suggested that the only tests for the G159 were the DOT endurance tests, which you now know were limited to testing the tire at 30 MPH.

Since you were active in all phases of discovery in this case, you will appreciate the frolic that followed. Goodyear produced the limited 30 MPH endurance testing which was submitted to our expert and upon which he based his opinions. It wasn't until after his deposition was taken and his rebuttal prepared that Goodyear untimely disclosed the high speed tests. . . . At no time did Goodyear further supplement its responses to the interrogatories to requests for production submitted at the very inception of this case in 2006, which required disclosure of all tests. Regardless, although I am not in possession of these internal heat tests, they are no doubt part of any Goodyear analysis as endurability of the G159 and its intended application for motorhomes.

Further, we spent countless hours deposing Goodyear's 30(b)(6) deponent and Goodyear's experts. No internal heat tests were ever referenced by Goodyear's deponents or experts in their reports or depositions. . . .

You have been in control of the *Haeger* case as National Coordinating Counsel since 2003. You have been the only person in the country acting as coordinating counsel in these G159 cases. Your job includes review and approval of all discovery responses by local counsel. Moreover, your role as coordinating counsel and certainly part of your role as lead trial counsel includes the admitted participation and the preparation of experts to testify in deposition or trial. You know what has and what has not been disclosed and discussed in each of these cases.

You have been in charge of the preparation of Protective Orders, the objection to sharing agreements, the production of test data and selection of experts in all of the G159 cases, every one of which was settled, except the *Schalmo* case, which proceeded to trial. Only you know what was produced in these varied cases, but this newly discovered evidence clearly suggests that dissimilar test data was produced in the *Haeger* and *Schalmo* file.

You utilized different lawyers, different 30(b)(6) deponents and different experts in both *Schalmo* and *Haeger* cases. . . . All of this appears to have been regulated and blessed by Goodyear, as I know you reported to the same Goodyear employee throughout these many years who surely knew that dissimilar test data was being disclosed. Further, it is my understanding after the jury awarded $5.6 million, based upon disclosure of all the test data, that Goodyear has now settled *Schalmo* pursuant to a new confidential agreement and has or will seal that trial record, if allowed. Such an endeavor seems a willful effort to bury the complete test data which was introduced at trial in *Schalmo*.

I ask you to be direct in your response and advise me whether there are any internal heat test records as

> suggested by this article which were not produced to us in the *Haeger* case. As you can appreciate, if that is the case, I spent over five (5) years working on a case with an erroneous set of assumptions based upon disclosure of a fraction of the truth which had significant adverse effects.

179. On January 13, 2011, Musnuff of Roetzel & Andress, on behalf of Goodyear responded to the letter. His letter stated:

> While I take issue with many of the statements and position stated in your January 6, 2011 letter, I do not believe it would be productive to respond to them in detail at this time. . . . Goodyear stands behind its discovery responses in the *Haeger* case . . . You and your clients had every opportunity to raise any and all discovery issues with the Court while the case was pending.

180. On January 27, 2011, counsel for the Haegers wrote again to Musnuff. Counsel's letter provides:

> Your January 13, 2011 letter fails to answer the simple question posed. Did you disclose the existence of internal heat test records [or other test records] in the *Schalmo* case which were not disclosed in *Haeger*?
>
> Your letter dances around the issue but clearly implies that different test records were in fact disclosed in *Schalmo* which were concealed from the Haeger Plaintiffs. . . .
>
> Your comment about my ability to have previously raised this with the Court is disingenuous. I cannot raise an issue about concealed data/witnesses unless I was aware that such was concealed in the first instance.

181. On February 7, 2011, Musnuff responded:

> While I take issue with the statements in your email I do not believe it would be productive to debate these issues further. The *Haeger* case is settled and dismissed.

182. The Haegers' counsel responded:

> Your response is evasive and unacceptable. Please provide me the courtesy of an answer to my questions. This case has not been fully litigated if you concealed information for which there was a disclosure obligation. Absent cooperation I will have no choice but to involve the Court. Your failure to provide a simple answer causes me great concern that you have willfully deceived me.

183. In follow-up correspondence of February 21, 2011, the Haegers' counsel advised Musnuff:

I have set forth a straightforward and simple question to Goodyear. I have asked you to disclose whether there were any internal heat test records or other test records regarding the G159 which were not produced in our case as was suggested by a recent publication regarding the *Schalmo* trial. Rather than providing me an honest response you have claimed . . . "the fact that a particular type of information may have been ruled discoverable in the *Schalmo* case does not mean that it was discoverable in *Haeger*."

I am left with only one conclusion considering your response. Specifically, Goodyear and its counsel knowingly failed to disclose requested test records regarding the G159 from the Haeger Plaintiffs. Your suggestion that the requested test records were not discoverable is ludicrous. It is particularly inane, considering the testing records were the heart of the defective design determinations by Goodyear's own admission and thus were repetitively requested in requests for production and interrogatories.

* * *

Apparently, Goodyear has blessed your refusal to answer my simple question and supports the unjustifiable position that you assert as to why and how Goodyear can and will get away with this, which just makes it worse.

It is particularly reprehensible that you knew exactly what was concealed, as you reviewed and controlled discovery responses in both the *Schalmo* and *Haeger* cases in your capacity as National Coordinating Counsel for all of the G159 cases since 2003. Further, you participated in discovery in both cases and acted as lead trial counsel and actually selected the 30(b)(6) deponents and experts to advance this deception.

* * *

Goodyear has displayed a significant history of deception in discovery, not only in this case, but in other matters for which Goodyear has been severely sanctioned. Goodyear and its counsel's flippant attitude towards its obligations is wholly unacceptable.

This case and others around the country have to do with the defective design of the G159. Goodyear testified that defect determinations are based solely upon test data and failure statistics. Goodyear directly represented to Judge Silver, repetitively, that it had disclosed all test data. Moreover, Goodyear, through its counsel, represented to the Court that Goodyear's 30(b)(6) deponent had reviewed all available test data in expressing his opinions. Regardless, Goodyear never disclosed internal heat test records, which are directly relevant in the design suitability

> of the G159 . . . . That conduct is fraudulent. The record in your recent communications make clear that Goodyear was fully participant and aware of the concealment of this data. . . .
>
> While willfully concealing the test data, Goodyear and its counsel have invited Plaintiffs to expend thousands of hours of time and hundreds of thousands of dollars for costs developing their case based upon a fraction of the truth regarding G159 tests. The majority of the motion practice, including motions for summary judgment and motions in limine (all of which were anchored upon fraudulent deposition testimony by Goodyear's in-house expert and 30(b)(6) deponent) represented expenditures inappropriately incurred and which obviously failed to set forth a proper record for the Court, with Goodyear's knowing participation. Goodyear's conduct knowingly deceived the Court regarding the evidence and no doubt impacted Her Honor's rulings. Goodyear harvested this misleading information through settlement with the Haegers, knowing full well that the settlement was premised upon fraudulent misrepresentations and represented settlement well beneath what would have been (presumably was provided) in other cases where full test data was disclosed.
>
> * * *
>
> Your suggestion that the Release provides sanctuary for Goodyear is completely mistaken. A fraudulently induced settlement and known violation of court orders entitles the Haegers to not only request appropriate sanctions, but to separate claims for damages, including those associated with the conspiracy, abuse of process, fraudulent inducement of the settlement and aiding and abetting Goodyear in this wrongful endeavor.
>
> As an officer of the court, the first rule is that you are obligated to advance the just, speedy and inexpensive determination of every action or proceeding. Fraudulent concealment of test data is the worst kind of conduct and defeats the very purpose of the rules while shaming the profession. Every party is entitled to reasonably rely that the parties have complied with court orders in their obligations as officers of the court. Similarly, the court and parties justifiably relied upon Goodyear's representations to the Court regarding complete production of test data . . .
>
> I have taken the time to dictate this letter, so that Goodyear will be provided a final opportunity to address this wrongful conduct.

184. On March 11, 2011, Goodyear, through Roetzel & Andress responded as follows:

> This letter responds to your letter of February 21, 2011. . . .
>
> . . . We take issue with any suggestion that we . . . misled the Court in any manner . . .
>
> Prior to writing this letter Goodyear analyzed this matter and your claims. . . . [t]hat time allowed us to thoroughly review the course and history of discovery in the *Haeger* case. Based on that evaluation Goodyear stands by its conduct throughout the *Haeger* case. *To answer your primary question it's true there were testing records regarding the . . . G159 tire . . . that were not produced in the Haeger litigation*.
>
> * * *
>
> . . . Goodyear will not produce any further documents to you, or identify cases in which additional testing records were produced. Goodyear will not provide any documents, expert reports, deposition transcripts or trial transcripts from the *Schalmo* case many of which are subject to protective orders and other orders of confidentiality entered by the Court in that case, nor will Goodyear stipulate to lifting any protective order in the *Schalmo* case. (Italics supplied)

XX. THE HAEGERS BRING THE MISCONDUCT OF GOODYEAR AND ITS ATTORNEYS TO THE ATTENTION OF THE UNITED STATES DISTRICT COURT AND THE COURT COMPELS DISCLOSURE OF CONCEALED TESTS

185. Because Goodyear admitted that it had concealed requested test data, the Haegers brought this matter to the attention of the United States District Court advising the Court of the history of requests for disclosure of test data, the representations of complete disclosure by Goodyear's attorneys, and the deposition testimony of Goodyear that it had disclosed all test data, setting forth the prolonged nature of Goodyear and its attorneys' deception. The Haegers requested the Court enter a sanction for the misconduct of Goodyear and its attorneys.

186. Goodyear requested that the Court seal the Haegers' motion and the supporting attachments so no one would become aware of these developments. The Court refused stating that such a request was improper.

187. Goodyear renewed its request that the Court seal at least select portions of the Haegers' Motion and the supporting exhibits. Again, the Court

refused finding there was no basis for Goodyear's request and that Goodyear had not come close to overcoming the strong presumption that the public is entitled access to judicial records.

188. Goodyear and its attorneys ultimately responded to the Haegers' Motion for Sanctions and set forth Goodyear's varied alleged justifications for the failure to disclose test data.

189. In Goodyear's response, it admitted it had concealed requested tests but asserted that disclosure of the tests would not have affected the outcome in the case while it continued to refuse to disclose concealed tests to the Haegers.

190. The Haegers requested the Court enter its order compelling Goodyear to disclose previously requested test data that had been concealed from the Haegers so that the Haegers could fully address Goodyear's assertion that the test data it concealed was meaningless and its deception harmless.

191. The Court entered its order regarding the Haegers' Motion to compel the disclosure of test data and ruled:

> There are serious questions regarding [Goodyear's] conduct in this case and it is well-established that "a court has the power to conduct an independent investigation in order to determine whether it has been a victim of fraud" . . . Pursuant to that power, [Goodyear] will be ordered to produce to [Haegers] and file with the Court the test results at issue.

192. The Court's order made clear that Goodyear was to disclose *all* tests that had been concealed.

193. October 7, 2011, Goodyear for the first time disclosed to the Haegers the test protocol and test results for its Laboratory Durability Testing – Heat Rise.

194. The disclosure by Goodyear represented to the Haeger Plaintiffs and the Court that these additional tests which were being disclosed represented the remaining body of requested but previously concealed test data.

195. The newly disclosed test results which had been concealed for years from the Haegers were previously printed from a Goodyear database on January 24, 2007 at 2:26 p.m.

196. The previously disclosed high speed tests were also printed from the same database on January 24, 2007 at 2:26 p.m.

197. Goodyear and its attorneys made a purposeful decision to conceal the heat rise test results at the time it decided to disclose the high speed test results. Goodyear made this decision because the heat rise tests recorded temperatures predictive of imminent failure of the G159 in a highway application.

198. The purpose of the newly disclosed tests was to determine dynamic heat buildup at specific speed, load, and inflation for the G159.

199. The test is run, like the high speed tests, on a 67" steel wheel.

200. The test is run at 35 MPH.

201. The newly disclosed tests revealed that four tires were subjected to this test on April 21, 1996.

202. The tests revealed temperatures up to 229° Fahrenheit.

203. For the first time, more than five (5) years after they were requested, Goodyear disclosed tests where temperatures were recorded on a 67" steel wheel at the equivalent of highway speed. According to Goodyear's previously disclosed expert testimony, the temperatures generated at 35 MPH on the 67" steel wheel are the equivalent of 62.5 MPH in highway use. The newly disclosed test revealed that at 62.5 MPH, the G159 was generating heat up to 229° Fahrenheit, a temperature which Goodyear experts had admitted was predictive of tread separation failures if the tire was exposed to prolonged operating conditions at that speed, like what would regularly occur in motorhome use.

204. Plaintiffs refreshed the Court's recollection regarding the history of Goodyear's representations, including the Goodyear's engineers publication that established the G159 would predictably suffer tread separations if it was exposed to

prolonged operating temperatures in excess of 194°, that Goodyear's experts had testified that when a medium commercial truck tire, like the G159, is exposed to prolonged temperatures over 200° it would experience diminishing properties that can lead to tread separations and that Goodyear's experts had testified that the G159 traveling at 75 MPH should display average temperatures between 140 and 150°, all of which revealed the depth of Goodyear's deception and the critically relevant nature of this previously concealed test data as it related to the defective design of the G159 and its suitability for utilization in a highway application.

XXI. THE UNITED STATES DISTRICT COURT FINDS GOODYEAR AND ITS ATTORNEYS WERE PARTICIPANT IN A CONSPIRACY

205. On February 24, 2012, the United States District Court entered its order setting forth its proposed findings of fact and conclusions of law regarding Plaintiffs' Motion for Sanctions and ordered that Goodyear and its attorneys file either joint or separate briefs addressing the Court's proposed findings.

206. The Court's proposed findings of fact and conclusions of law provided:

> *According to the test results*, after running at 35 MPH, the G159 tires generated temperatures of up to 229°. Goodyear's internal documents, own expert, and the 30(b)(6) witness all agree that this temperature is high and would be cause for concern. *Thus, if these tests had been disclosed Goodyear's defense would have been severely compromised; it would have been difficult, if not impossible, for Goodyear to claim the G159 was suitable for use on a motorhome* given its own testing data that the G159 tires reached temperatures well above 200° at speeds of 55 to 65 MPH. (Italics supplied)
>
> * * *
>
> *This conduct at issue appears to have stemmed from a deliberate corporate strategy adopted by Goodyear to prevent the disclosure of* the internal heat *test results*. This is supported by the fact that Goodyear's 30(b)(6) witness did not disclose the test results and even testified they did not exist. Also, Goodyear apparently did not disclose these test results in other pending cases across the country. (Italics supplied)
>
> * * *

> *The troubling behavior by Goodyear and its counsel began almost immediately after the case was filed and continued throughout the pretrial proceedings*. The behavior included inappropriate responses to requests for production as well as false testimony by Goodyear's 30(b)(6) witness. (Italics supplied)
>
> * * *
>
> [T]here was no good faith basis for Goodyear's objections to the first request. The internal heat tests were performed on the *exact* tire at issue, they were *directly* relevant to Plaintiffs' defect theory, and they were performed at the *same time* other tests, which were produced, were performed. . . . (original emphasis)
>
> * * *
>
> Goodyear's behavior during discovery is sufficient to support an award of sanctions under the Court's inherent power. In addition, Mr. Hancock's in-court statements qualify as evidence of additional misconduct. Those statements show *clear and repeated* attempts to mislead Plaintiffs and the Court. (Original emphasis)
>
> * * *
>
> Given the behavior by Goodyear and its counsel, the Court must impose sanctions. Unfortunately, the present record does not indicate who is responsible for each instance of misconduct . . . The amount and allocation of sanctions will be determined after further briefing by the parties.

XXII. THE LAWYERS HIRE LAWYERS TO REPRESENT THEM IN RESPONSE TO THE UNITED STATES DISTRICT COURT'S CONSPIRACY CONCLUSION

207. The Court's proposed findings of fact and conclusions of law made clear that it intended to enter sanctions for the misconduct of Goodyear and its attorneys. The Court ordered further briefing to provide Goodyear and its attorneys an opportunity to explain who exactly was responsible for these deceptions. Although Goodyear had historically been represented by Roetzel & Andress and Fennemore Craig and their attorneys Musnuff and Hancock, it retained new counsel for the sanctions proceeding.

208. Fennemore Craig and Hancock retained separate counsel to represent their interests.

209. Roetzel & Andress and Musnuff retained separate counsel to represent their interests.

210. The Court's proposed findings of fact and conclusions of law spanned 23-pages of findings and analysis, setting forth repetitive instances of misconduct and misrepresentations by Goodyear and its attorneys, Musnuff and Hancock.

211. Management of the law firm of Roetzel & Andress authorized the retention of a separate law firm to act as its authorized agent in all future proceedings. Roetzel & Andress, by and through its management, either authorized or ratified all representations which occurred in future pleadings its attorneys filed and testimony presented to the Court by Musnuff.

212. Roetzel & Andress, through its management and authorized attorneys, prepared Musnuff for the evidentiary hearing and the declarations he filed with the Court.

213. Management of the law firm of Fennemore Craig authorized the retention of a separate law firm as its authorized agent in all future proceedings. Fennemore Craig, through its management, either authorized or ratified all representations which occurred in future pleadings its attorneys filed and testimony presented to the Court by Hancock.

214. Fennemore Craig through its management and authorized attorneys, prepared Hancock for the evidentiary hearing and the declarations he subsequently filed with the Court.

215. Goodyear, Okey, Roetzel & Andress and Musnuff had access to all the G159 files, which they reviewed or otherwise ignored, to prepare future submittals to the Court. Those files contained countless communications which they considered privileged that were unknown to the Court or the Haegers. Based on their belief that these communications were privileged, Goodyear, Okey, Roetzel & Andress and Musnuff had no concern that those communications would ever be discovered and thus believed they could craft their submittals to the Court without fear that those

documents would ever be revealed or used to impeach what they intended to represent to the Court and the Haegers.

216. Fennemore Craig and Hancock had access to all the G159 files they handled as local counsel for Goodyear, which they reviewed or otherwise ignored, to prepare future submittals to the Court. Those files contained countless communications which they considered privileged which were unknown to the Court or the Haegers. Based on their belief that those communications were privileged, Fennemore Craig and Hancock had no concern that those communications would ever be discovered and thus believed they could craft their submittals to the Court without fear that those documents would ever be revealed or used to impeach what they intended to represent to the Court and the Haegers.

217. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock worked in concert to advance the representations contained in all future pleadings, declarations under oath and during the evidentiary hearing and final briefing prior to the entry of the Court's final order. Those efforts focused upon persuading the Court and the Haegers that the Court's preliminary findings of fact and conclusions of law were clearly erroneous, should be vacated, that Goodyear and its attorneys had always been honest and that all preceding acts or omissions were in full compliance with ethical and legal requirements.

218. Plaintiffs believe, based upon existing disclosures, that Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock withheld and/or misrepresented both the facts and existing evidence to their new attorneys to facilitate the presentation of false evidence to the Haegers and the United States District Court in future filings.

XXIII. GOODYEAR, OKEY, ROETZEL & ANDRESS, FENNEMORE CRAIG, MUSNUFF AND HANCOCK DEVELOP A NEW STRATEGY, IN CONCERT, IN FURTHERANCE OF THEIR CONSPIRACY

219. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock were involved in a joint endeavor to conceal crucial test data for years.

220. Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock each were involved in assisting Goodyear in responding to Plaintiffs' original Motion for Sanctions. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock each either expressly authorized or otherwise ratified all representations contained in Goodyear's initial responsive pleading to the Haegers' Motion for Sanctions and in opposition to the Haegers' Motion to Compel previously concealed test data.

221. The new strategy adopted by Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock involved the coordinated effort to present arguments never previously expressed and advance new misrepresentations in an effort to extricate themselves from the Court's findings of misconduct and misrepresentation and to persuade the Court of an absence of conspiratorial conduct. The conduct of Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock included a concerted strategy to present false testimony and claims in the future evidentiary hearing and in pleadings supported by declarations under oath which contained material misrepresentations of fact. Plaintiffs believe, based upon existing disclosures, that the new attorneys representing these defendants, unknowingly participated in these acts of deception.

222. In furtherance of this conspiracy, in spite of legal and ethical obligations, at no time did Roetzel & Andress, Fennemore Craig, Musnuff or Hancock advise the Court that false evidence was being presented.

XXIV. DURING THE COURSE OF BRIEFING GOODYEAR SUBMITTED A DECLARATION UNDER OATH WHICH MISTAKENLY REVEALED THAT GOODYEAR HAD CONCEALED ADDITIONAL TESTS FROM THE COURT AND THE HAEGERS, IN SPITE OF THE COURT'S ORDER COMPELLING DISCLOSURE OF ALL TESTS

223. In the fall of 2011, the Court had entered an order that required Goodyear to disclose to the Haegers any tests which were previously requested but not disclosed.

224. Goodyear's subsequent Court ordered disclosure on October 7, 2011, was limited to disclosing only the heat rise durability tests performed in 1996.

225. On March 8, 2012, Mr. Olsen, Goodyear's expert witness and its 30(b)(6) deponent, submitted an additional declaration with a Goodyear brief attempting to justify its conduct. In that declaration Mr. Olsen testified under oath that in 2007 in the *Haeger* case, Goodyear disclosed and produced crown durability tests, bead durability tests and DOT endurance tests.

226. At no time had Goodyear previously disclosed these tests in *Haeger*. Goodyear had represented under oath, that no such test data existed. Goodyear and its attorneys had made the same representations, repetitively, to the Court.

227. Subsequent to the filing of the new Olsen declaration, Musnuff privately reminded his attorneys that no such test data had ever been disclosed in *Haeger*.

228. Although Hancock also knew that Olsen's declaration was false, he remained silent, in spite of his obligation to advise the Court of Olsen's misrepresentation.

229. Goodyear subsequently filed a "Notice of Correction" stating:

> Late in the day on March 12, counsel for Roetzel & Andress advised Goodyear's counsel that a statement in Goodyear's March 9, 2012 response to the Court's February 24, 2012 proposed order, and in the March 8, 2012 Declaration of Richard Olsen may have been incorrect. In particular, footnote 3 on page 6 of the response states that Goodyear had produced crown durability, bead durability and DOT endurance tests as well as the high speed tests. That statement was based upon ¶ 18 of Mr. Olsen's declaration, which includes the same statement.
>
> Goodyear does not have copies of the documents produced in the *Haeger* case. Immediately upon learning of the potential error, Goodyear began investigating the issue by requesting copies of documents from Fennemore Craig, through its counsel and spoke with Mr. Olsen regarding his statement. Mr. Olsen advised that his statement was premised upon a summary of those test result contained in his current files.
>
> During Goodyear's investigation of the possible error . . . it discovered the bead durability, crown durability and DOT endurance test results that were produced in the *Schalmo*

> case. The crown durability, bead durability and DOT endurance tests reports (consisting of one page each) were printed on January 24, 2007, along with other test reports printed that same day. These test reports, along with other test reports printed on January 24, 2007 were provided to Coordinating Counsel within a few days of that date.
>
> Goodyear was unable to determine what had been produced except by seeking this information from its former outside counsel, which Goodyear has done. Goodyear's former outside counsel had advised that they do not believe these test reports were produced in *Haeger.* Thus, Goodyear now believes that the crown durability, bead durability and DOT endurance tests were not produced in this case.

230. Goodyear, through its witnesses and its attorneys, had previously repeatedly represented that these newly disclosed tests did not exist.

231. These tests were all printed from Goodyear's test database on January 24, 2007, at 2:26 p.m. the same day and time that the high speed durability tests and the heat rise durability tests were also printed.

232. Mr. Olsen then submitted an additional declaration under oath wherein he advised the Court that his prior declaration of March 8, 2012 was based on a summary of the tests contained in his file.

233. Goodyear and its attorneys represented to the Haegers before the case was settled that they had produced Mr. Olsen's complete file in 2007. There was no summary of the tests provided with the earlier alleged complete disclosure of Mr. Olsen's file. Thus, that summary of the tests had also been concealed from the Court and the Haegers.

234. Goodyear subsequently disclosed this new bundle of previously concealed test data to the Haegers.

235. These previously concealed tests included multiple additional temperature test results regarding the G159. Those temperatures are not identified in this Complaint as Goodyear claims they are confidential.

236. Like the other tests, each of these previously concealed tests were also printed from Goodyear's database on January 24, 2007, but never provided to the Haegers.

XXV. THE UNITED STATES DISTRICT COURT ORDERED FURTHER BRIEFING TO RECTIFY EVASIVE FILINGS BY GOODYEAR AND ITS ATTORNEYS

237. After Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock filed their supplemental briefs, the Court ordered each of the parties to submit an additional brief as a result of their evasive filings and failure to provide frank meaningful guidance to the Court as to who was responsible for the deceptive conduct which spanned a period of years.

238. The Court ordered Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock to each file a supplemental brief to specifically address the following issues:

1. Why the heat rise tests were produced in *Schalmo* but were not produced in *Haeger* in response to request for information in both cases which sought the identification of tests associated with determining the appropriate speed rating for the G159.

2. To state in *unequivocal* terms (i.e., "yes" or "no") whether the crown durability, bead durability and DOT endurance tests should have been produced in *Haeger*, further instructing that Goodyear and its attorneys provide an explanation for its response.

3. To state in "*unequivocal terms*" whether the results of the heat rise test conflicted with *any* representations made during the *Haeger* litigation.

4. To state in *unequivocal* terms who was responsible for not producing the heat rise tests. The Court instructed Goodyear and its attorneys to assume the Court believes the tests should have been produced and instructed Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock to specify which of the entities should be held responsible for the failure to do so.

5. To state whether the heat rise test was produced in the *Bogaert v. Goodyear* case, which was a pending case in the Arizona State court being handled by

> Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock. (Original emphasis)

XXVI. IN THE SUPPLEMENTAL BRIEFING IN RESPONSE TO THE COURT'S SPECIFIC QUESTIONS, ROETZEL & ANDRESS AND MUSNUFF REVEAL ADDITIONAL TESTS WHICH WERE CONCEALED

239. Goodyear, Okey, Roetzel & Andress and Musnuff, Fennemore Craig and Hancock filed three separate supplemental briefs to respond to the specific questions the Court demanded be answered.

240. In the supplemental briefing in response to the Court's specific questions, Roetzel & Andress and Musnuff revealed additional tests that had been requested by the Haegers on September 22, 2006, but had remained concealed.

241. Musnuff filed an additional declaration under oath with their brief.

242. In Musnuff's declaration, he admitted that eleven (11) separate tests were concealed from the Haegers.

243. Musnuff admitted that as of March 16, 2012, certain tests remained concealed from the Haegers. To date, those tests have never been disclosed.

XXVII. ON THE EVE OF THE EVIDENTIARY HEARING, THE UNITED STATES DISTRICT COURT WARNS GOODYEAR AND ITS ATTORNEYS ABOUT CONTINUING DECEPTION

244. On March 21, 2012, the day before the evidentiary hearing, the Court issued an order to the parties.

245. The order provides:

> The parties have completed briefing the Motion for Sanctions. Based on those submissions, *it is clear that Goodyear and its counsel remain committed to advocating seemingly untenable positions*. For example, Goodyear and its counsel seek to justify withholding heat testing of the tire at issue in this case despite the fact that Plaintiffs, the Court and defense counsel knew Plaintiffs' defect theory involved heat issues. *Rather than appearing contrite, Goodyear and its counsel have sought to justify their actions through hyper-technical parsing of their actions during discovery. . . . Attempting to justify the unjustifiable strengthens the Court's belief that sanctions are appropriate*. . . .

> The approach taken by Goodyear and its counsel risks grave harm to their reputations. Shakespeare famously identified the folly of such actions:
>
> > Good name in man and woman, dear my lord,
> > is the immediate jewel of their souls.
> > Who steals my purse steals trash; tis something, nothing;
> > Twas mine, tis his, and has been slave to thousands.
> > But he that filches from me my good name
> > robs me of that which not enriches him
> > and makes me poor indeed.
>
> * * *
>
> *If they plan on continuing their actions on the merits, Goodyear and its counsel should be prepared to present substantially more compelling justifications than those that they have proffered to date. If such justifications are not available, Goodyear and its counsel should give serious consideration to settling this matter with Plaintiffs*. (Italics supplied)

XXVIII. GOODYEAR, OKEY, ROETZEL & ANDRESS, FENNEMORE CRAIG, MUSNUFF AND HANCOCK PRESENT FALSE TESTIMONY DURING THE EVIDENTIARY HEARING BELIEVING THAT THERE WOULD BE NO FURTHER DISCLOSURES REQUIRED OF THEM WHICH WOULD JEOPARDIZE THIS STRATEGY

246. The Court had ordered the filing of supplemental briefs following its proposed findings of fact of and conclusions of law to assist the Court in its final sanction determinations. Goodyear and Okey filed supplemented briefs and declarations in an endeavor to justify its prior misrepresentations and deceptions.

247. Roetzel & Andress and Musnuff filed supplemental briefs and declarations in an endeavor to justify their prior misrepresentations and deceptions.

248. Fennemore Craig and Hancock filed supplemental briefs and declarations in an endeavor to justify their prior misrepresentations and deceptions.

249. The Court held an evidentiary hearing on March 23, 2012.

250. During the evidentiary hearing, Musnuff testified and made material misrepresentations under oath.

251. Although Goodyear, Roetzel & Andress, Fennemore Craig, and Hancock knew what was being misrepresented, and in spite of their obligations, each failed to

bring to the Court's attention the nature of the misrepresentations and/or material omissions made during the course of the evidentiary hearing.

252. During the evidentiary hearing, Hancock made material misrepresentations under oath.

253. Although Goodyear, Roetzel & Andress, Fennemore Craig, and Musnuff knew what was being misrepresented, and in spite of their obligations, each failed to bring those misrepresentations and/or material omissions to the attention of the Court.

254. Based upon existing information, Plaintiffs believe that the new attorneys representing Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock unknowingly facilitated the presentation of false evidence and material misrepresentations to the United States District Court.

XXIX. THE TESTIMONY INTRODUCED BY GOODYEAR AND ITS ATTORNEYS DURING THE EVIDENTIARY HEARING RESULTED IN THE WAIVER OF CLAIMS OF PRIVILEGE AND RESULTED IN ADDITIONAL DISCOVERY OF COMMUNICATIONS RELATING TO TEST DATA IN OTHER G159 CASES WHICH THEY THOUGHT WOULD NEVER BE DISCLOSED

255. During the evidentiary hearing, Hancock and Musnuff both testified.

256. Hancock and Musnuff testified without objection about communications which would otherwise have been potentially privileged communications.

257. At the conclusion of the evidentiary hearing, as a result of the testimony introduced, the Court allowed the Haegers to acquire additional information regarding the G159 from Goodyear.

258. The Court specifically ruled that Goodyear's behavior in other litigation was relevant and that Goodyear's behavior regarding tests other than the heat rise test was also relevant, ordering Goodyear to produce from all the G159 cases since January 1, 2000:

> All documents, including all written and electronic communications including all attachments thereto, which address, discuss or relate to: (1) requests for test data; (2) all proposed and final discovery responses and proposed and final supplemental discovery responses to

> requests for such test data; (3) the objection to or withholding of test data; (4) the contents and/or meaning of such test data; and, (5) disclosure obligations pursuant to applicable state or federal rules of civil procedures.

259. The Court also ruled that Goodyear's objections to the production of the requested information were not well taken as Goodyear did not assert attorney/client privilege during the evidentiary hearing and submitted a declaration under oath of its in-house counsel, Defendant Okey, in an attempt to defeat liability. Having taken these actions, the Court ruled that Goodyear could not now use the attorney/client privilege as a shield to protect the Haegers from exploring in-house counsel's behavior and ruled that Goodyear cannot withhold documents based on privilege.

260. The Court also ordered that Plaintiffs be allowed to take the deposition of Goodyear's Associate General Counsel, Okey and Goodyear employee Sherman Taylor, who was involved in the location and production of test data to Musnuff in the Haeger case.

261. The depositions were taken and Goodyear produced some of the Court-ordered additional documentation regarding the G159 that was requested by the Haegers.

XXX. THE COURT-COMPELLED DISCLOSURES FOLLOWING THE EVIDENTIARY HEARING REVEALED AND DOCUMENTED A NATIONAL PATTERN OF DECEPTION CONCEALING THE MOST CRUCIAL FACTS REGARDING THE G159 AND ITS SUSCEPTIBILITY TO HEAT INDUCED TREAD SEPARATIONS

262. The newly disclosed documents contain countless admissions. All of the documents have been declared "confidential" by Goodyear and therefore the contents are not disclosed herein, except as referenced by the Court in public filings or otherwise available in the public domain.

263. Upon information and belief, Goodyear was not initially concerned about tread separations because the G159 was designed as a pick-up and delivery tire, where its primary application would be inner city use where the tire was not exposed to an environment of continued high speed operation, but rather would regularly

start and stop allowing the tire to cool. In that environment, the G159 traveled at predominantly lower speeds such that the tire would not be exposed to continuous high speed use resulting in temperatures which threatened the tire's integrity.

264. In 1996 Goodyear knew that the G159 would be prone to tread separations if it was utilized in a prolonged high speed highway application.

265. Of the 26 tests performed on the G159, 24 were wheel tests concealed by Goodyear and its attorneys, which were requested to be disclosed and produced in September 2006 in the *Haeger* case. Goodyear, Okey, Roetzel & Andress and Musnuff knew those tests were wheel tests but willfully concealed them from the Haegers throughout the litigation.

266. Upon information and belief, Hancock also knew there were wheel tests regarding the G159 which had been requested but were not disclosed.

267. The newly disclosed documents revealed that by October 18, 2006, Fennemore Craig and Hancock knew the Haegers' defect theory was that the G159 was producing heat and degradation for which the tire was not designed to endure, leading to premature failure. These documents directly contradicted the repetitive representations of Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock in pleadings, declarations and testimony presented to the Court that they did not know the Haegers' defect theory until 2007.

268. The newly disclosed documents revealed that by November 2006, Goodyear, and specifically Okey, was informed of the Haegers' defect theory by Roetzel & Andress and Musnuff, fully cognizant that the Haegers were claiming the G159 was inappropriate for use in motorhomes because it was designed for pick-up and delivery use and not designed for prolonged use at highway speeds. The documents directly contradicted Goodyear's representations in multiple pleadings submitted to the Court that neither Goodyear nor its attorneys knew the Haegers defect theory.

269. Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff, Hancock, and Okey worked in concert to develop a story to combat the Haegers' theory as to why the G159 was failing.

270. The newly disclosed documents revealed that Fennemore Craig and Hancock were fully aware that speed or endurance testing was at issue in the *Haeger* case and knew that all related testing needed to be disclosed, but nonetheless participated, in concert with Roetzel & Andress, Musnuff, Goodyear and Okey to conceal the test data in *Haeger* and in other pending cases in the State of Arizona, including *Bogaert v. Goodyear* and *Haley v. Goodyear*.

271. The full body of newly disclosed test data revealed that Goodyear knew from the tests undertaken commencing in 1996 that the G159 was producing temperatures predictive of tread separation failure if used for prolonged periods in a highway application but acted in concert with Roetzel & Andress, Musnuff and Fennemore Craig and Hancock to avoid the disclosure of this test data and keep it concealed from victims of tread separations with a right to know.

272. Goodyear and its attorneys first disclosed all tests regarding the G159 only when compelled to do so by Court order in *Woods v. Goodyear* in August 2007. The *Woods* plaintiffs waited three (3) years and four (4) months for Goodyear to finally disclose the requested test data.

273. In spite of 41 reported tread separations involving the G159 on Fleetwood motorhomes, at no time did Goodyear disclose to Fleetwood the testing data that Goodyear possessed which revealed that the tire would predictably fail in a highway motorhome application.

274. In spite of 93 tread separations involving the G159 on Monaco motorhomes, at no time did Goodyear disclose test data to Monaco in its possession which revealed that the tire would predictably fail when utilized in a highway motorhome application.

275. The newly disclosed documents revealed that Goodyear disclosed the required test data in August 2007 as the result of an Alabama Court's (the *Woods* case) total frustration with Goodyear's discovery conduct, ordering Goodyear to disclose all testing regarding the G159, which Goodyear used to determine the suitability of the tires to be driven at highway speeds. Goodyear and its attorneys admit they "tried hard to avoid this."

276. By August 2007, Goodyear, Okey, Roetzel & Andress and Musnuff were fully cognizant of the full scope of testing used by Goodyear to make suitability determinations regarding the G159 and were wholly participant in concealing this data from the Haegers in spite of the clarity of requests for production, interrogatories, representations to the Court and the clarity of Goodyear's obligations to promptly supplement prior representations to the extent they were misleading or new information had been discovered, not previously disclosed.

277. On the date that the *Woods* court issued its order compelling Goodyear to produce all tests used to determine the suitability of the G159 to be driven at highway speeds, the Haegers asked Goodyear to provide the documents produced in the *Woods* case in response to the *Woods* Court order. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock acting in concert, refused claiming the production was unduly burdensome and that the tests were confidential, privileged and subject to a protective order which prohibited discovery.

278. Musnuff's testimony at the evidentiary hearing verified that Goodyear, Roetzel & Andress and Musnuff engaged in a conspiracy to conceal the admissions made by Olsen and Gardner during their expert depositions in the *Haeger* case, when both experts admitted the G159 was prone to tread separations if it experienced prolonged temperatures in excess of 200°. Thereafter, these defendants utilized Goodyear employee Mr. Stroble as Goodyear's expert witness in other G159 cases. Goodyear never used Mr. Olsen again as a witness in an effort to further conceal his admissions.

279. Upon information and belief, Fennemore Craig and Hancock acted in furtherance of this conspiracy by allowing Stroble to falsely testify under oath in at least one other G159 case.

280. In spite of Goodyear's disclosure of all tests pursuant to court order in the *Woods* case, Goodyear and Okey continued to conceal the tests when requested in other pending G159 cases as part of its conspiratorial conduct, in conjunction with National Coordinating Counsel Roetzel & Andress and Musnuff and local counsel Fennemore Craig and Hancock in the Arizona cases.

281. *Bogaert v. Goodyear* was filed in the Maricopa County Superior Court in the State of Arizona on July 18, 2005. Like *Haeger*, *Bogaert* involved a tread separation of a G159 on a motorhome at highway speeds. It was a multiple fatality case. Goodyear retained Fennemore Craig and Hancock to defend its interests in conjunction with Roetzel & Andress and Musnuff acting as National Coordinating Counsel.

282. On April 13, 2007, *Haley v. Goodyear* was filed in the Maricopa County Superior Court in the State of Arizona. Again, like *Haeger*, it involved tread separation on a motorhome traveling at highway speeds involving a fatality. Goodyear retained Fennemore Craig and Hancock to represent Goodyear in conjunction with Roetzel & Andress and Musnuff acting as National Coordinating Counsel.

283. On November 12, 2007, Fennemore Craig and Hancock joined Goodyear, Okey, Roetzel & Andress and Musnuff in a conspiracy to suppress the disclosure of previously disclosed test data in the *Woods* case by refusing to comply with the Haley's request that Goodyear identify all the test documents produced in *Woods* pursuant to that Court's August 2007 order. Goodyear, by and through the acts of its attorneys refused to produce the documents claiming they were confidential, subject to a protective order, privileged and were not subject to discovery.

284. The disclosure obligations of Goodyear in the *Bogaert* and *Haley* cases were regulated by the Arizona Rules of Civil Procedure. Those rules required Goodyear to promptly disclose the names of all persons that Goodyear believed may have knowledge or information relevant to the action, specifying the nature of that knowledge. Moreover, Goodyear was required to identify all documents and witness testimony known by Goodyear to exist which may be relevant to the subject matter of the lawsuits and those reasonably calculated to lead to the discovery of admissible evidence. These disclosures were required to be made within 40 days of Goodyear filing its answer to the Complaints in *Bogaert* and *Haley.* Otherwise, Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock were required to timely supplement prior disclosures within no later than 30 days after the discovery of new responsive information.

285. In spite of Goodyear's disclosure obligations, at no time did Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff or Hancock disclose the tests previously produced in the *Woods* case nor comply with obligations to identify those individuals with relevant knowledge about tests and test results in *Bogaert* or *Haley*.

286. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock thereafter settled the *Haley* and *Bogaert* cases without ever disclosing test data which they were required to disclose as a matter of law, having successfully conspired to conceal that information, just as they did in *Haeger*.

287. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock were well aware that disclosure of the test data would render the G159 virtually indefensible and substantially change the exposure of Goodyear for damages significantly in excess of funds paid in settlement of those matters.

288. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock also concealed the deposition testimony of Gardner and Olsen from the plaintiffs in the *Haley* and *Bogaert* matters due to the damning nature of the admissions contained therein. Both Musnuff and Hancock prepared these witnesses

for their depositions. Both Musnuff and Hancock were present during the depositions of Gardner and Olsen. Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock all knew that the applicable rules of civil procedure required the disclosure of this testimony to the *Bogaert* and *Haley* families, but nonetheless ignored their legal obligations of disclosure, and participated in concealing that information for Goodyear, the law firms and the lawyers' financial gain.

289. Although Goodyear, Okey, Roetzel & Andress and Musnuff all knew of the existence of all relevant tests in early 2007, Fennemore Craig and Hancock have asserted that they did not know about the existence of any tests other than the DOT tests and high speed tests which were disclosed to the Haegers, nor their relevance. The newly discovered evidence revealed that on June 5, 2008, Hancock was specifically informed by Roetzel & Andress and Musnuff:

> . . . our whole testing package was to ensure that the tire was suitable for various over the road applications, including RV. In the *Woods* case we were compelled to produce other testing data/protocols in addition to high speed. There, we produced: (i) extended DOT testing data; (ii) heat rise test data; (iii) bead durability test data; and, (iv) crown durability test data . . .

Nonetheless, after becoming aware of the existence and relevance of these tests, Fennemore Craig and Hancock joined in continued conspiratorial conduct with Goodyear, Okey, Roetzel & Andress and Musnuff by knowingly failing to disclose the tests in the *Bogaert* and *Haley* cases in spite of their clear obligation to do so. Similarly, Fennemore Craig and Hancock continued to conceal these tests from the Haegers and the United States District Court, in spite of a clear obligation to advise Judge Silver and the Haegers of this new test data.

290. The newly discovered documents revealed that four (4) days later, on June 9, 2008, in a pleading prepared by Fennemore Craig and Hancock, which was authorized to be filed by Goodyear, Okey, Roetzel & Andress and Musnuff in the *Haeger* litigation, Goodyear asserted that there was "absolutely no support for Ms. Bogaert's unsupported, unverified accusation that Goodyear has somehow

produced different documents in different cases in response to identical discovery requests. None." This authorized representation by Fennemore Craig and Hancock was part of a continued conspiracy to conceal the production of dissimilar test materials in different cases in response to identical requests for disclosure. It was a willful and intentional material misrepresentation designed to deceive the Bogaerts as well as the *Bogaert* court. Having been filed in the *Haeger* litigation, it represented another step in the conspiracy to lead the Haegers and the U.S. District Court to conclude that all tests had been disclosed in *Haeger* when Fennemore Craig and Hancock knew this was false.

291. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock also engaged in conspiratorial conduct to conceal the disclosure of test data by failing to comply with a special discovery master's order in *Bogaert* that required the disclosure of tests utilized to determine the suitability of the G159 to operate at highway speeds. Again, this decision to conceal the information was a willful one where the defendants acted in concert to conceal this damning evidence from those entitled to know.

292. Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock acted in concert to conceal test and failure data to facilitate the settlement of the *Haeger* case for a fraction of its value knowing the full value of the case would have to be paid if the truth had been disclosed. These defendants knew that if they could successfully conceal the countless injury and property damage claims arising from failures from tread separations on motorhomes involving the G159 and conceal all test data which revealed that the tire ran too hot in a highway application so it would predictably fail when utilized in a motorhome highway setting that they would be able to artificially hold down the value of the case and did just that for the gain of all defendants.

293. Roetzel & Andress and Musnuff, acting as National Coordinating Counsel had a long-term relationship with Goodyear in the G159 cases, and in a variety of

other Goodyear tire litigation matters. Roetzel & Andress and Musnuff assisted Goodyear and Okey in concealing relevant information in the G159 cases to assure a continuous stream of business and revenue for the law firm in direct violation of its legal and ethical obligations.

294. Fennemore Craig and Hancock were involved in continued representation of Goodyear in the G159 cases handling at least four (4) such matters. Fennemore Craig and Hancock had also historically worked for Goodyear in various other tire litigation matters and hoped to continue to do so. Fennemore Craig and Hancock engaged in the concealment of relevant information in the G159 cases for its financial gain and a continuous stream of revenue from Goodyear cases.

295. There have been countless documented tread separations involving the G159 in a motorhome application. At no time has Goodyear ever disclosed a single failure of the G159 when utilized in its original design metro/inner city application where the tire would run cooler at predominantly lower speeds.

296. Although Goodyear was fully aware of the deceptive endeavors of Roetzel & Andress, Fennemore Craig, Musnuff and Hancock, and its Associate General Counsel Okey, it has never objected to their actions or omissions.

297. It was Goodyear, by and through the acts of its Associate General Counsel Okey, that insisted that protective orders prohibit sharing of information be sought in every G159 case.

298. Musnuff's testimony at the evidentiary hearing revealed that Okey, operating as Associate General Counsel for Goodyear, assumed a primary role for supervising and directing the activities of National Coordinating Counsel Roetzel & Andress and Musnuff. Okey was the decision-maker regarding objections to discovery requests in all the G159 cases.

299. The newly discovered documents and testimony verified that the decisions regarding what would and would not be disclosed in the G159 cases was a process of joint decision-making between Roetzel & Andress, Musnuff, Okey and

Goodyear. Fennemore Craig and Hancock adopted such decisions without regard to their legal and ethical obligations for their financial gain.

300. On no occasion did Goodyear ever voluntarily produce all of the tests in any of the G159 cases.

301. Between February 2012 through July 2012, Goodyear, Okey, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock acted in concert to continue to deceive the Haegers and the Court regarding why the test data was not disclosed during the *Haeger* case. This concerted action included a coordinated false presentation, in both pleadings and during the evidentiary hearings by claiming:

(a) that the newly disclosed heat rise durability test was not a durability test;

(b) That the concealed tests were never utilized to determine the suitability of the G159 for highway purposes;

(c) That the *Haeger* Plaintiffs had narrowed the first request for production which sought all test data and were seeking only high speed tests.

(d) That Goodyear and its attorneys disclosed the high speed tests in a timely fashion in response to Plaintiffs' Third Request for Production.

(e) That Fennemore Craig and Hancock were not aware of test data other than the previously disclosed DOT 30 MPH endurance test and the high speed test;

(f) That at no time did Fennemore Craig and Hancock, as authorized agents on behalf of Goodyear, make any misrepresentations to the Court;

(g) That at no time did Fennemore Craig and Hancock know of the *Woods* court order compelling disclosure of all test data to determine the suitability of the G159 for high speed application, which was issued in August 2007;

(h) That Goodyear and its attorneys' conduct was all ethical, appropriate and in compliance with applicable rules of civil procedure.

302. Each of the representations contained in ¶301 constituted misrepresentations in furtherance of a conspiracy to mislead both the Haegers and the Court regarding the concealment of crucial test data regarding the G159.

303. Based upon existing disclosures, Plaintiffs believe the new attorneys representing these defendants unknowingly participated in these acts of deception.

XXXI. ON NOVEMBER 8, 2012, THE COURT ISSUED ITS 66-PAGE ORDER FINDING GOODYEAR AND ITS ATTORNEYS ENGAGED IN PROLONGED AND REPETITIVE ACTS OF FRAUD AND DECEPTION

304. On November 8, 2012, Chief Judge Roslyn Silver, Chief Justice for the United States District Court for the District of Arizona issued her 66-page order setting forth the Court's conclusions regarding the misconduct of Goodyear and its prior attorneys. **(Exhibit 1)**

305. Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock filed 13 separate briefs relating to the sanction proceedings, between May 2011 and July 2012, which included multiple declarations under oath.

306. The Court also evaluated the testimony under oath provided by Musnuff and Hancock during the evidentiary hearing and evaluated the documents disclosed by Goodyear following the evidentiary hearing, pursuant to the Court's Order.

307. The Court also considered the testimony of Mr. Taylor and Okey, both Goodyear employees. The Court's findings were based upon a record characterized as presenting clear and convincing evidence of false testimony and misrepresentations by Goodyear and its attorneys.

308. The Court determined that Roetzel & Andress and Musnuff worked directly with Goodyear's in-house Associate General Counsel Okey in preparing discovery responses and disclosures in G159 cases.

309. The Court found that Goodyear's initial disclosure statement in the *Haeger* case in 2005 contained no meaningful information as was otherwise contemplated by the Federal Rules of Civil Procedure and that in spite of the Haegers' objection and request for supplementation, Goodyear did not supplement any of its initial disclosures in any relevant way.

310. The Court held that as of August 18, 2006, Goodyear and its attorneys knew the Haegers' liability theory and that heat would be a central issue in the *Haeger* case.

311. The Court held that the repeated representations by Goodyear and its attorneys, that the Haegers did not identify the defect theory of their case until January 7, 2007, was incorrect and contradicted by Goodyear's and its attorneys' statements and appears to have been part of a general strategy to obstruct and delay discovery.

312. The Court stated it had rejected the Haegers' request for a sharing provision in the protective order approved by the Court but noted it emphasized and instructed Goodyear and its attorneys that every officer before the Court had an obligation to provide all relevant discovery and observed that the Federal Rules of Procedure provided that anything that was relevant must be turned over so there was no need for a sharing provision as was requested by the Haegers.

313. The Court held that Goodyear, by and through the acts of Okey, operating as Associate General Counsel, was always the final decision-maker regarding discovery responses in the G159 cases. The Court found that the Haegers had never entered into any agreement with Goodyear or its attorneys, to relieve them of the obligation to produce the requested test records originally requested in September 2006, as they alleged.

314. The Court found that Fennemore Craig and Hancock knew that Plaintiffs had never withdrawn or narrowed their original requests for test records and that Roetzel & Andress and Musnuff similarly knew that Plaintiffs' initial request for test records remained active throughout the litigation.

315. The Court found that by January 2007, Roetzel & Andress, Musnuff and Goodyear, by and through communications with Okey, considered whether prior disclosures should have been supplemented but none ever occurred.

316. The Court found that representations made by Musnuff during the evidentiary hearing that the concealed heat rise test data was merely an irrelevant compounders test with no bearing on durability of the G159 was not believable testimony.

317. The Court found that Musnuff knew that compounds used in the tire related to its durability.

318. The Court found that because Goodyear, Roetzel & Andress, Fennemore Craig, Musnuff and Hancock were aware of the existence of the high speed tests no later than February 19, 2007, there was no acceptable explanation why those tests were not disclosed and produced at that time.

319. The Court found that Hancock made false representations to the Court in April 2007, when he represented to the Court and the Haegers that Goodyear had responded to all outstanding discovery and "if a document shows up we will of course produce it or supplement our answers."

320. The Court found that Hancock was untruthful in his representations to the Court in April 2007, because as of that date he was well aware of the existence of Goodyear's high speed durability tests and that they had not been disclosed.

321. The Court found that Hancock intentionally misled the Court and the Haegers in May 2007 when he represented that tests over 30 MPH would be produced, which he suggested were solely limited to high speed tests.

322. The Court found that Hancock and Musnuff decided to delay production of the tests in hopes of gaining a tactical advantage of the Haegers.

323. The Court found that Hancock's representations to the Court and the Haegers that there were "no other documents" beyond those that had already been produced was seriously misleading.

324. The Court found that Goodyear and its attorneys were concealing a wide variety of other test documents.

325. The Court found that Goodyear and its attorneys knew by August 2007, of the existence of all the tests which related to the suitability of the G159 to be driven at highway speeds and concealed those tests from the Haegers.

326. The Court found that Goodyear and its attorneys clearly had no intention of complying with their discovery obligations unless those obligations were in the best interests of Goodyear.

327. The Court found that no later than June 5, 2008, Fennemore Craig and Hancock knew the test disclosures in the *Haeger* case had been woefully inadequate.

328. The Court found Goodyear, Hancock and Musnuff had knowingly concealed crucial documents in the *Haeger* litigation.

329. That Court found that testing at 35 MPH on a steel wheel is the equivalent of 55 to 65 MPH on the highways.

330. The Court found the heat rise durability tests should have been produced in response to the very first request for production in *Haeger* in September 2006.

331. The Court found that Okey, Associate General Counsel for Goodyear, testified falsely when she explained why the documents were ultimately produced in other G159 cases, intentionally misrepresenting the content of Court orders to disclose test data in the *Woods* and *Schalmo* cases, in an attempt to mislead the Court.

332. The Court found that Goodyear's 30(b)(6) deponent, Mr. Olsen, had testified falsely during his deposition and filed false declarations under oath in the pending proceedings.

333. The Court found that Mr. Olsen, on behalf of Goodyear, falsely testified that he did not have other tests, other than the tests which were disclosed and produced to the Haegers.

334. The Court found that Goodyear's 30(b)(6) witness, Mr. Olsen, provided false testimony, but the falsity emerged only as a result of Goodyear's inability to keep its falsehoods straight.

335. The Court found that Hancock testified falsely when he represented to the Court that he did not know about the additional tests.

336. The Court found that the claims by Goodyear that it did not deliberately conceal any G159 test results was false.

337. The Court found that Okey, Goodyear's Associate General Counsel, retained final say regarding production decisions and discovery responses and must have known that Goodyear's responses in the *Haeger* case were grossly inadequate.

338. The Court found that the testimony provided by Musnuff and Hancock during the evidentiary hearing conflicted with documentary evidence and was not credible.

339. The Court found that Musnuff and Hancock failed to alert the Haegers that tests were being withheld during the course of the *Haeger* litigation.

340. The Court found that Musnuff admitted that Goodyear's experts testified that heat in excess of 200° for a prolonged period of time could lead to tread separations.

341. The Court found that the heat rise durability test concealed in the *Haeger* case was utilized in the *Schalmo* case to show that G159 was defective.

342. The Court found that Goodyear never disclosed in *Schalmo* the expert witness testimony from the *Haeger* case that admitted the tire would foreseeably fail if it was exposed to prolonged operating temperatures above 200°.

343. The Court found that Hancock's testimony that he had never heard of a heat rise durability test before the present sanction proceedings in this case was false and was an attempt to paint himself in a sympathetic light.

344. The Court found that Goodyear, Musnuff and Hancock engaged in repeated and deliberate attempts to frustrate the resolution of the *Haeger* case on

the merits. The Court found that from the very beginning Hancock, Musnuff and Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of a small set of documents they were willing to turn over such that it was an inordinately difficult for Plaintiffs to manage their case and making false statements to the Court in an attempt to hide their behavior.

345. The Court determined based upon clear and convincing evidence that the troubling behavior by Goodyear and its attorneys began almost immediately after the *Haeger* case was filed and continued throughout the entire litigation, including following its settlement in 2010.

346. The Court ruled that Hancock and Musnuff's decision to not produce the other tests, allegedly learned of in the context of other cases, was a willful and improper attempt to hide responsive documents.

347. The Court determined that Okey, Associate General Counsel for Goodyear, knew that Goodyear was not cooperating in discovery and was engaging in willful and improper behavior.

348. The Court ruled that Goodyear and Musnuff created frivolous arguments for not disclosing and producing the tests that they adopted only after they were faced with sanctions.

349. The Court found that Musnuff and Hancock's decision not to produce tests learned of in the context of other cases was a willful and improper attempt to hide responsive documents and because Goodyear retained final approval authority for discovery responses, it knew the attorneys were acting improperly.

350. The Court ruled all the concealed tests had been used by Goodyear to determine the suitability of the G159 for highway use and that Goodyear, Musnuff and Hancock knew this.

351. The Court ruled that when Hancock was informed of the existence and purpose of previously concealed test data he willfully participated in keeping the

tests concealed by his failure to disclose the tests during the following 22 months until the *Haeger* case settled, representing culpable conduct.

352. The Court ruled that Goodyear, through its Associate General Counsel, Okey, acted together with Musnuff making materially false and misleading statements in Court and withholding documents they knew required disclosure.

353. The Court ruled that Goodyear and its attorneys adopted a strategy, implemented to great effect, to withhold test data which obviously was required to be disclosed and mislead the Haegers such that they were operating under erroneous facts.

354. The Court ruled that the Haegers were entitled to affirm their settlement with Goodyear and pursue an independent course of action for fraud based upon the conduct of Goodyear, Musnuff and Hancock.

XXXII. THE FOUNDATION FOR PUNITIVE DAMAGES

355. Goodyear and its attorneys deceived the Haegers for years for their private gain.

356. Goodyear claims in its public filings that its core value is to operate as a socially responsible corporate entity.

357. Goodyear claims in its public filings that it conducts business in accord with the highest applicable legal and ethical standards.

358. Goodyear claims in its public filings that it will not tolerate illegal or unethical behavior of any kind.

359. Goodyear claims in its public filings that its business is committed to doing the "right" thing.

360. Goodyear was legally required to notify the Haegers, Government, owners, purchasers and dealers if it learned that the G159 had a "defect" related to "motor vehicle safety." A "defect" is defined to include any defect in the performance of the tire. "Motor vehicle safety" means the performance of the tire in a way that protects the public against unreasonable risk of accidents occurring

because of the design or performance of the tire and against unreasonable risk of death or injury in an accident.

361. Goodyear was legally required to provide notification to the Haegers, owners, purchasers and dealers which described the defect in the G159, evaluated the risk to motor vehicle safety and specified the measures Goodyear would take to remedy the defect.

362. A separate violation is deemed to occur for each tire for which notification was not provided with a maximum civil penalty of $17,350,000.00.

363. At no time has Goodyear provided notification to the Haegers, Government, owners, purchasers and dealers regarding the defect in the G159 related to motor vehicle safety.

364. Goodyear failed to act as a socially responsible corporate entity, failed to comply with the highest applicable legal and ethical standards and failed to do the "right" thing.

365. Goodyear's decision to provide no notification to the Haegers, owners, purchasers or dealers knowingly exposed the public and the Haegers to foreseeable injuries and death.

366. Goodyear operates approximately 1,400 tire centers.

367. Goodyear willfully failed to provide such notification in an effort to avoid the expenses associated with recalling the tire.

368. Goodyear concealed the defective nature of the G159 and avoided recalling the tire in order to protect its brand from the stigma which would arise from admitting the G159 was defective as a result of the recall.

369. Goodyear's annual sales total approximately $21 billion.

370. Goodyear's assets total approximately $17 billion.

371. Goodyear has issued approximately 255,000,000 shares of stock.

372. Goodyear knew truthful disclosure and recall could directly affect annual sales and affect public perception as to the value of Goodyear's stock.

373. Goodyear concealed the truth regarding the G159 from the Haegers, the public and victims of tread separations and thereby saved hundreds of millions of dollars in potential losses from brand damage, decline in stock price and regulatory penalties.

374. Goodyear concealed the defective nature of the G159 for years in order to evade and/or minimize responsibility for compensatory damages it was proximately causing from tread separations resulting in deaths and injuries of those victimized by G159 tread separations.

375. If Goodyear admitted the G159 was defective, then it would be required to pay for all damages caused by G159 failure.

376. Goodyear knew that with each passing year, its responsibility and exposure to punitive damage awards increased as a result of years of concealing the defective nature of the tire and willfully exposing the public to deaths and injuries. This increasing exposure resulted in Goodyear's decision to continue to deceive the public in hope to run out the tire without ever disclosing the truth.

377. Goodyear's discovery fraud in *Haeger* was part of a pattern and practice of Goodyear. In January 2007, Goodyear was sanctioned by the District Court of Nevada in the matter of *Bahena v. Goodyear; et al.* The Court found that throughout that litigation Goodyear was engaged in "hiding the ball" and not acting in good faith on multiple occasions involving discovery issues. The Court found that the degree of willfulness of Goodyear to defeat or obstruct the discovery process to be extreme, that its objections to discovery were not expressed in good faith and that Goodyear had taken the approach of stalling, obstructing and objecting finding Goodyear's responses to discovery requests to be "nothing short of appalling." The Nevada court found an overwhelming need to deter Goodyear from continuation of abusive discovery practice and struck Goodyear's Answer. Like *Haeger,* Okey was supervising and directing the conduct of the lawyers in *Bahena v. Goodyear*.

378. *Bahena v. Goodyear* proceeded through trial and involved damage claims arising out of the death of three individuals and injuries of seven passengers arising from a tread separation, which resulted in a $30 million compensatory damage verdict.

379. As a result of the sanction striking Goodyear's answer, Goodyear appealed the result in *Bahena v. Goodyear*, attempting to justify its discovery misconduct and seeking a reversal of the District Court's sanction determination and a new trial.

380. The Nevada Supreme Court found the District Court did not abuse its discretion in issuing the sanction striking Goodyear's Answer for discovery misconduct.

381. Goodyear was also sanctioned in the matter of *Ruiz v. Goodyear*, which was before the Pima County, Arizona Superior Court, for discovery abuse on October 25, 2006. Fennemore Craig and Hancock represented Goodyear.

382. In *Ruiz v. Goodyear*, Judge Harrington found:

> Goodyear so narrowly construed the discovery requests and disclosure rules that it has frustrated both the letter and spirit of the rules. In fact, . . . Goodyear has not produced documents because Goodyear has unilaterally decided that the documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence even when that interpretation or conclusion is not justifiable. . . . Sanctions against Goodyear are appropriate and overdue.

383. Like the *Bahena* and *Haeger* maters, Okey was supervising the discovery actions of Hancock in the *Ruiz v. Goodyear* matter.

384. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, utilized the litigation process in *Haeger* for illegitimate purposes.

385. In addition to the deceptive actions of Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, Goodyear's Associate General Counsel Bertram Bell also approved of Goodyear's discovery misconduct in the *Haeger* case

by verifying and representing that facts stated in Goodyear's discovery responses were true in furtherance of the conspiracy to suppress disclosure of test data.

386. Upon information and belief, Bertram Bell has regularly approved Goodyear's discovery responses in G159 cases, which failed to comply with legal and ethical disclosure requirements.

387. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, willfully obstructed the Haegers access to evidence.

388. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, intentionally concealed evidence from the Haegers.

389. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, presented false evidence to the Court.

390. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, assisted Goodyear witnesses to testify falsely.

391. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, knowingly made false statements of fact to the Court in the *Haeger* case.

392. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, failed to correct false statements of fact previously made to Judge Silver.

393. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, knowingly offered evidence they knew to be false.

394. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock, acting in concert, engaged in conduct prejudicial to the administration of justice.

395. Roetzel & Andress, Musnuff, Fennemore Craig and Hancock knew that Goodyear was engaged in fraudulent conduct related to the *Haeger* proceedings, yet failed to take remedial measures, including disclosing such knowledge to Judge Silver.

396. Roetzel & Andress, Musnuff, Fennemore Craig and Hancock failed to comply with their duty of candor to Judge Silver and the United States District Court, which required them to disclose information which might have otherwise been confidential information in order to comply with their obligations as officers of the Court.

397. As a matter of corporate policy, Goodyear had knowingly tolerated and ratified discovery abuse authorized by its legal department without intervention or reprimand continuously between 2006 and 2013.

398. Goodyear, Okey, Roetzel & Andress, Musnuff, Fennemore Craig and Hancock knew that their failure to change their litigation tactics in the *Haeger* case was reckless and exposed the Haeger family to significant risk of harm and which caused the Haegers harm financially and emotionally.

399. Defendants individually and collectively pursued a course of conduct guided by an evil mind.

400. The Defendants engaged in reprehensible conduct which was outrageous, malicious, and/or otherwise fraudulent.

401. The Defendants' misconduct was repetitive and spread over a period of years.

402. The Defendants each actively concealed their acts and omissions from the United States District Court, the Haegers, other victims of G159 tread separations and all regulatory authorities.

403. Defendants' acts and omissions substantially increased the litigation expenses incurred by the Haegers and associated costs, while it increased the profitability for each of the Defendants as a result of their wrongful endeavors.

404. Defendants' repeated misrepresentations and deceptions were designed to facilitate Goodyear's ability to wrongfully blame LeRoy Haeger for the accident and the injuries suffered by family members.

405. Defendants' acts were designed to exhaust the finances and emotions of the Haeger Family.

406. The Haegers were entitled to know the truth regarding the failure history of the G159 and what Goodyear's test data revealed.

407. By concealing the truth, Defendants were able to fraudulently induce a settlement for a small fraction of the true value of the Haegers' damage claims and evade trial on the merits.

408. Defendants' deceptive endeavors in the G159 cases, and in particular the *Haeger* case, were consistent with the pattern of other similar deceptive activities in other Goodyear tire litigation cases.

409. Goodyear developed a national pattern and practice of abusing the litigation process for its private gain and has utilized willing lawyers across the country to facilitate the implementation of its wrongful objectives for its private gain.

410. Goodyear's course of conduct is grounded in its corporate policy.

411. Goodyear's conduct in the *Haeger* case and other cases is clear evidence of its motive and its state of mind.

412. Each of the Defendants intended to damage the Haegers or deliberately interfere with the Haegers' rights, consciously disregarding the unjustifiably substantial risk of significant harm to the Haegers.

413. Goodyear's conduct surrounding the G159 reflects an abandonment of all human ethics as it has knowingly and willfully allowed countless citizens to be killed or injured in pursuit of profit.

414. Each of the Defendants knew the years of deception caused harm to the Haegers.

415. The Defendants have made no endeavor whatsoever to remedy their willful misconduct. Because of the outrageous, willful, prolonged, deceptive and damaging nature of Defendants' underlying acts, Plaintiffs are entitled to an award of punitive damages to be determined by a jury at the time of trial in this action.

416. Defendants are jointly and severally liable for compensatory and punitive damages as a result of their concerted actions.

417. Defendant Fennemore Craig is vicariously liable for compensatory and punitive damages awarded against Hancock.

418. Defendant Roetzel & Andress is vicariously liable for compensatory and punitive damages awarded against Musnuff.

419. Goodyear is vicariously liable for compensatory and punitive damages awarded against Hancock, Musnuff and/or Okey.

420. Goodyear is vicariously liable for compensatory and punitive damages awarded against Roetzel & Andress and/or Fennemore Craig.

421. An award of punitive damages would serve to deter and punish Goodyear for its wrongful conduct.

422. An award of punitive damages would serve to deter and punish Roetzel & Andress for its wrongful conduct.

423. An award of punitive damages would serve to deter and punish Musnuff for his wrongful conduct.

424. An award of punitive damages would serve to deter and punish Fennemore Craig for its wrongful conduct.

425. An award of punitive damages would serve to deter and punish Hancock for his wrongful conduct.

426. An award of punitive damages would serve to deter and punish Okey for her wrongful conduct.

XXXIII. LEGAL CLAIMS

COUNT ONE - Fraudulent Misrepresentation

427. Plaintiffs incorporate the preceding allegations.

428. Defendants each made misrepresentations for the purpose of inducing the Plaintiffs to act or to refrain from action in reliance upon those misrepresentations. Each of the representations was false and material. Each of the

Defendants knew of the falsity of such representations or were otherwise ignorant of their truth. Defendants intended the misrepresentations should be acted upon by the Plaintiffs. The Plaintiffs were ignorant of the falsity of the representations and relied on the truth of such representations. Plaintiffs had the right to rely upon the truth of such representations.

429. As a result of Plaintiffs' reliance, Plaintiffs have been proximately injured.

430. As a result of these material misrepresentations, Plaintiffs were deceived into entering into a settlement agreement which was fraudulently induced to their damage. As a result of the settlement, the funds received were disseminated in reliance upon prior representations and omissions of Defendants precluding the return of those payments.

431. Plaintiffs are entitled to affirm the settlement agreement and pursue this claim for damages.

432. Plaintiffs are entitled to damages reflecting the difference between what they were deceived into accepting as a settlement and the true value of their claims against Goodyear as of the date of the fraudulently induced settlement.

433. Plaintiffs are entitled to an award of attorneys' fees pursuant to A.R.S. § 12-341.01.

434. Plaintiffs are entitled to an award of punitive damages.

435. Defendants are jointly and severally liable for all damage awards.

COUNT TWO - Fraudulent Nondisclosure

436. Plaintiffs incorporate the preceding allegations ¶¶ 1 through 435.

437. Defendants failed to disclose to the Plaintiffs facts which they knew could justifiably induce the Plaintiffs to act or refrain from acting in conjunction with the settlement of the underlying litigation.

438. Defendants each had a duty to the Plaintiffs to exercise reasonable care to disclose matters concealed from the Haegers prior to the settlement arising out of

their obligations as officers of the court, in accord with Ethical Rules, the Rules of Civil Procedure, pursuant to Court orders, and as a result of representations made to the United States District Court.

439. Defendants knew that the failure to disclose matters previously concealed and misrepresented was necessary to prevent prior statements provided to the Court and to the Haegers from being misleading.

440. Defendants knew that absent further disclosures, that previous representations were untrue or misleading and that the Plaintiffs believed prior representations to be true.

441. Defendants knew that the Haegers would enter into a settlement under a mistaken understanding and that because of the relationship between Plaintiffs and Defendants, and requirements of the practice of law, the Haegers would reasonably expect, and Defendants were required to provide a complete disclosure and failed to do so.

442. Defendants' misrepresentations and omissions were either false or created a false impression, were material and each of the Defendants knew of the falsity of such representations or the materially misleading nature of their omissions. Defendants intended that the misrepresentations and/or omissions should be acted upon by the Haegers. The Plaintiffs were ignorant of the falsity of the representations and unaware of the nature of material omissions and relied upon the truth of such representations. Plaintiffs had the right to rely upon the truth of such representations.

443. As a result of Plaintiffs' reliance and the settlement agreement entered into between Plaintiffs and Goodyear, the Plaintiffs have been proximately injured.

444. As a result of these material misrepresentations and omissions, Plaintiffs were deceived into entering into a settlement agreement which was fraudulently induced to their damage. As a result of the settlement, the funds

received were disseminated in reliance upon prior representations and omissions of Defendants precluding the return of those payments.

445. Plaintiffs are entitled to affirm the settlement agreement and pursue this claim for damages.

446. Plaintiffs are entitled to damages reflecting the difference between what they were deceived into accepting as a settlement and the true value of their claims against Goodyear as of the date of the fraudulently induced settlement.

447. Plaintiffs are entitled to an award of attorneys' fees pursuant to A.R.S. § 12-341.01.

448. Plaintiffs are entitled to an award of punitive damages.

449. Defendants are jointly and severally liable for all damage awards.

COUNT THREE - Fraudulent Concealment

450. The Plaintiffs incorporate the preceding allegations of ¶¶ 1 through 449.

451. The Haegers and Goodyear entered into a settlement agreement in 2010.

452. The Defendants, by concealment, intentionally prevented the Haegers from acquiring material information related to the settlement of the *Haeger* action.

453. The concealment of the material information by the Defendants caused pecuniary loss to the Haegers.

454. Defendants intentionally prevented the Haegers from learning of material facts that were significant.

455. Defendants' deceptive acts were intended to hide information, mislead, avoid suspicion and prevent further inquiry into material matters related to the settlement of the underlying action.

456. The Defendants actively concealed material facts by words or acts which created a false impression, covering up the truth, including the false denials of knowledge by the Defendants who were in possession of the facts.

457. As a result of Defendants' acts, Plaintiffs have been proximately injured in an amount to be proven at the time of trial.

458. As a result of these material misrepresentations, Plaintiffs were deceived into entering into a settlement agreement which was fraudulently induced to their damage. As a result of the settlement, the funds received were disseminated in reliance upon prior representations and omissions of Defendants precluding the return of those payments.

459. Plaintiffs are entitled to affirm the settlement agreement and pursue this claim for damages.

460. Plaintiffs are entitled to damages reflecting the difference between what they were deceived into accepting as a settlement and the true value of their claims against Goodyear as of the date of the fraudulently induced settlement.

461. Plaintiffs are entitled to an award of attorneys' fees pursuant to A.R.S. § 12-341.01

462. Plaintiffs are entitled to an award of punitive damages.

463. Defendants are jointly and severally liable for all damage awards.

COUNT FOUR - Negligent Misrepresentation

464. Plaintiffs incorporate the preceding allegations of ¶¶ 1 through 463.

465. Roetzel & Andress, Fennemore Craig, Musnuff and Hancock each owed a duty to Plaintiffs as officers of the Court and lawyers to disclose requested relevant evidence, to not assist witnesses to testify falsely, to answer and/or supplement discovery responses in accord with applicable rules of procedure and to make truthful representations to the Court.

466. Defendants, by failing to exercise reasonable care in obtaining or communicating information, negligently supplied false information to Plaintiffs.

467. Plaintiffs justifiably relied upon the information.

468. Plaintiffs were damaged by justifiable reliance.

469. Defendants are liable for Plaintiffs' proximately caused damages.

470. As a result of these negligent misrepresentations, Plaintiffs were deceived into entering into a settlement agreement which was induced to their damage. As a result of the settlement, the funds received were disseminated in reliance upon prior representations and omissions of Defendants precluding the return of those payments.

471. Plaintiffs are entitled to affirm the settlement agreement and pursue this claim for damages.

472. Plaintiffs are entitled to damages reflecting the difference between what they were deceived into accepting as a settlement and the true value of their claims against Goodyear as of the date of the negligently induced settlement.

473. Plaintiffs are entitled to an award of attorneys' fees pursuant to A.R.S. § 12-341.01.

474. Plaintiffs are entitled to an award of punitive damages.

475. Defendants are jointly and severally liable for all damage awards.

COUNT FIVE - Abuse of Process

476. Plaintiffs incorporate the preceding allegations of ¶¶ 1 through 475.

477. Defendants willfully utilized judicial process for purposes not proper in the regular conduct of the proceedings in the matter of *Haeger v. Goodyear*, Cause No. 2:05-cv-02046-ROS.

478. Defendants utilized a process in the United States District Court for illegitimate purposes, including filing false declarations, purposely deceptive pleadings, obstructing access to evidence, which required a disclosure pursuant to applicable rules of procedure, testifying falsely, assisting other witnesses to testify falsely, knowingly making false statements of fact to the Court, failing to correct false statements of fact previously made to the Court, knowingly offering evidence which they knew to be false, knowingly engaging in fraudulent conduct relating to judicial process and failing to take remedial measures, including disclosure to the

Court, failing to comply with the duty of candor and otherwise engaging in acts prohibited which were prejudicial to the administration of justice.

479. Defendants' acts were undertaken for improper purposes and utilized the process for purposes for which it was never intended.

480. Defendants' acts caused the Haegers to suffer emotional distress, inconvenience, anxiety and frustration to their damage.

481. Plaintiffs are entitled to an award of punitive damages.

482. Defendants are jointly and severally liable for all damage awards.

COUNT SIX -Civil Conspiracy

483. Plaintiffs incorporate the preceding allegations of ¶¶ 1 through 482.

484. Defendants agreed to conceal material information from the Haegers, which was required to be disclosed by the applicable Rules of Civil Procedure, the Rules of Professional Conduct and Court orders.

485. Defendants agreed to make misrepresentations to the Court and the Haegers.

486. Defendants' deceptive acts and misrepresentations represented a concerted plan to engage in fraudulent misrepresentations, fraudulent nondisclosure, fraudulent concealment, and abuse of process.

487. Defendants' agreements and resulting conduct were for unlawful purposes or to otherwise accomplish unlawful participation in the litigation process by unlawful means.

488. The acts of Defendants have caused the Haegers damages for which Defendants are jointly and severally liable.

489. Plaintiffs are entitled to an award of punitive damages.

COUNT SEVEN - Aiding and Abetting

490. Plaintiffs incorporate the preceding allegations of ¶¶ 1 through 489.

491. Defendants Roetzel & Andress, Fennemore Craig, Musnuff, Hancock and Okey engaged in knowing acts that substantially aided Goodyear to commit wrongful

and prohibited conduct which damaged the Haegers, including fraudulent misrepresentations, fraudulent nondisclosure, fraudulent concealment, negligent misrepresentations and abuse of process.

492. Defendants are jointly and severally liable for aiding and abetting Goodyear in committing these tortious acts and for the resulting damages that the Haegers suffered.

493. Plaintiffs are entitled to an award of punitive damages.

WHEREFORE, Plaintiffs request that the Court enter its Order:

A. Awarding Plaintiffs their damages incurred as a result of the wrongful acts and omissions of these Defendants;

B. Awarding Plaintiffs' attorneys' fees and costs incurred as a result of the wrongful acts and omissions of Defendants;

C. Awarding Plaintiffs' pre-judgment interest;

D. Awarding punitive damages in an amount sufficient to punish and deter Defendants for their willful, outrageous and evil misconduct.

E. Finding Defendants jointly and severally liable for any compensatory and punitive damage awards.

DATED this 20th day of May, 2013.

THE KURTZ LAW FIRM

By: _____

David L. Kurtz
7420 East Pinnacle Peak Road, Suite 128
Scottsdale, AZ 85255
Attorney for Plaintiffs

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al., Plaintiffs, vs. Goodyear Tire and Rubber Co., et al., Defendants.	No. CV-05-02046-PHX-ROS **ORDER**

Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests.[1] The little voice in every attorney's conscience that murmurs *turn over all material information* was ignored.

Based on a review of the entire record, the Court concludes there is clear and convincing evidence that sanctions are required to be imposed against Mr. Hancock, Mr. Musnuff, and Goodyear. The Court is aware of the unfortunate professional consequences that may flow from this Order. Those consequences, however, are a direct result of repeated, deliberate decisions by Mr. Hancock, Mr. Musnuff, and Goodyear to delay the production

[1] *See Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (lawyer's "duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

of relevant information, make misleading and false in-court statements, and conceal relevant documents. Mr. Hancock, Mr. Musnuff, and Goodyear will surely be disappointed, but they cannot be surprised.

FINDINGS OF FACT

I. The Accident

In June 2003, Leroy and Donna Haeger, along with Barry and Suzanne Haeger (collectively "the Haegers"), were traveling in a motor home owned by Leroy and Donna. It was manufactured by Gulf Stream Coach ("Gulf Stream") on a chassis manufactured by Spartan Motors, Inc. ("Spartan"). The motor home had "G159" tires manufactured by Goodyear Tire and Rubber Company ("Goodyear"). While traveling on the highway, one of the motor home's front tires failed, followed immediately by the motor home leaving the road and tipping over.[2] The Haegers suffered serious injuries as a result. The motor home was insured by Farmers Insurance Company ("Farmers").

II. Initial Proceedings

In 2005, the Haegers and Farmers sued Gulf Stream, Spartan, and Goodyear. The Haegers and Farmers alleged various product liability and negligence claims, including a claim that G159 tires were defective if used on motor homes. (Doc. 13). The Haegers were represented by David Kurtz. Goodyear was represented by Graeme Hancock of Fennemore Craig PC and Basil Musnuff of Roetzel & Andress in Akron, Ohio. Because Goodyear was being sued throughout the country based on alleged defects in the same G159 tire, it had appointed Mr. Musnuff as "national coordinating counsel" on all G159 cases. (Doc. 1014 at 93). In that role, Mr. Musnuff was responsible for reviewing discovery requests,

[2] The cause of the accident was never definitively determined. Goodyear claimed the tire failed due to a previous impact which had severely damaged the tire and the accident was a result of driver error after that failure. The Haegers claimed there had been no impact, the tire failed because it was defective, and the accident was unavoidable.

coordinating the search for documents, and drafting responses. (Doc. 1014 at 124-25). Mr. Musnuff worked directly with Goodyear's in-house counsel Deborah Okey.[3]

On December 15, 2005, Goodyear served its Initial Disclosure Statement. (Doc. 992-1 at 20). According to that statement, "Plaintiffs' allegations with regard to the subject tire [were] unclear." (Doc. 992-1 at 23). Based on the alleged uncertainty, Goodyear's disclosure statement contained no meaningful information. In fact, it appears Goodyear's disclosure statement largely referenced witnesses and documents previously provided to Goodyear by Plaintiffs. Mr. Kurtz was not satisfied with Goodyear's initial disclosure and he wrote to Mr. Hancock and asked that Goodyear "take a more reflective look at your disclosure statement and comply with both the spirit and intent of the rule." (Doc. 992-1 at 27). In particular, Mr. Kurtz asked Goodyear to provide more meaningful disclosures regarding individuals who might have relevant information regarding the tire. Mr. Kurtz also asked Goodyear to produce "[t]esting documentation regarding the G159 tires." (Doc. 992-1 at 29). Goodyear did not supplement its initial disclosure in any relevant way.

III. Plaintiffs' Responses to Interrogatories

On August 18, 2006, Plaintiffs responded to a set of interrogatories from Goodyear.[4] Goodyear's interrogatory number 5 asked for "each legal theory under which you believe Goodyear is liable." (Doc. 963-1 at 19). In response, Plaintiffs stated it had been inappropriate to market the G159 tire for use on motor homes. According to Plaintiffs: "Prolonged heat causes degradation of the tire which, under appropriate circumstances, can lead to tire failure and tread separation even when the tire is properly inflated." (Doc. 963-1 at 20). Because the G159 was originally designed "for pick-up and delivery trucks," Plaintiffs claimed using the tire on motor homes meant it was "operating at maximum loads

[3] There were other attorneys involved in representing Goodyear, but the parties agree these were the attorneys responsible for Goodyear's behavior during this case.

[4] There was a significant delay early in the case while the parties briefed, and the Court decided, whether to transfer the case to New Mexico. (Doc. 40).

and at maximum speeds, producing *heat* and degradation to which the tire was not designed to endure, leading to its premature failure." (Doc. 963-1 at 20) (emphasis added). Accordingly, as of approximately August 18, 2006, Goodyear and its counsel knew Plaintiffs' liability theory and that heat would be a central issue in this case.[5]

IV. First Discovery Dispute and Protective Order

In August 2006, the parties filed their first notice of a discovery dispute. (Doc. 49). That disagreement centered on the terms of a protective order. The parties could not agree on how material designated "confidential" should be handled and on whether the protective order should include a provision allowing Mr. Kurtz to "share" information with other counsel litigating G159 claims against Goodyear elsewhere in the country. (Doc. 49). On August 22, 2006, the Court held a scheduling conference and also addressed the pending disagreements.

At the conference, Plaintiffs were represented by David Kurtz and Goodyear was represented by Mr. Hancock. When asked to explain the parties' disputes, Mr. Kurtz began by stating he was concerned Goodyear would abuse the provision allowing for documents to be designated "confidential." In effect, Mr. Kurtz wanted the protective order to contain a provision that would allow Goodyear's counsel located elsewhere to designate documents as "confidential." Local counsel, however, would be required to make "a reasonable inquiry to verify that in fact those confidentiality designations have been thoughtfully made by appropriate people." (Doc. 53 at 8). The Court rejected Mr. Kurtz's request and stated local counsel would not have to personally verify all "confidential" designations. But the Court

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[5] In an email from Mr. Hancock to Mr. Musnuff dated October 18, 2006, Mr. Hancock explained Plaintiffs' theories in some detail. (Plaintiffs' Statement of Fact in Support of Supplemental Brief ("PSOF") Ex. 4). And in an email from Mr. Musnuff to Ms. Okey dated November 9, 2006, Mr. Musnuff discussed the "new theory of liability in Haeger." (PSOF Ex. 5). Therefore, the repeated representations by Goodyear and its counsel that Plaintiffs did not state the legal theory of their case until January 7, 2007 is incorrect, contradicted by their own statements, and now appears to have been part of a general strategy to obstruct and delay discovery. (Doc. 983 at 4).

also observed that local counsel remained "responsible for anything that's filed in this court . . . [and] they have a good-faith obligation to the Court and they are officers of the Court." (Doc. 53 at 8).

As for the sharing provision, Plaintiffs argued it was necessary to ensure that all parties litigating cases against Goodyear would receive "the appropriate and complete data in similarly situated cases." (Doc. 53 at 10). The Court rejected this request, emphasizing that "every officer before this Court has an obligation to provide all relevant discovery." (Doc. 53 at 10). The Court observed that the Federal Rules already provide "that anything that is relevant must be turned over to counsel and to all the parties," so there was no need for the sharing provision. Therefore, as of August 2006 all counsel were expressly aware of the Court's expectations regarding discovery. The Court signed the scheduling order and the parties began discovery in earnest.

V. Plaintiffs' First Request for Production of Documents

In September 2006, Plaintiffs served Goodyear with their First Request for Production of Documents ("First Request"). (Doc. 59). Approximately thirty days later, Goodyear provided its responses. As later explained by Mr. Musnuff, in preparing discovery responses Mr. Musnuff would draft the responses, send them to Ms. Okey for approval, and after Ms. Okey approved them, they would be sent to local counsel for filing and service. (Doc. 1014 at 65-66). While Mr. Musnuff was tasked with drafting responses, Ms. Okey was always the final decision maker regarding discovery responses. (Doc. 1014 at 67).

The initial responses drafted by Mr. Musnuff, approved by Ms. Okey, and signed by local counsel consisted of sixteen "general objections" and then specific objections to each request which largely referenced the general objections. (Doc. 938-1 at 19). For example, Plaintiffs' Request for Production No. 14 sought: "All test records for the G159 tires, including, but no[t] limited to, road tests, wheel tests, high speed testing, and durability testing." (Doc. 938-1 at 24). Goodyear's response was:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information,

> seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.

The record does not reflect any communications between Plaintiffs and Goodyear until Goodyear provided supplemental responses on November 1, 2006. (Doc. 62, 63). Most relevant here is Goodyear's supplemental response to the same "Request for Production No. 14." The supplemental response was:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.
>
> SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation, Goodyear will produce, subject to the Protective Order entered in this case, the DOT test data for the Subject Tire for the Subject Time Frame.

(Doc. 948-1 at 54).

The sequence of events following Goodyear's supplemental responses is intensely disputed. On December 5, 2006, Mr. Kurtz and Mr. Hancock spoke on the phone. That conversation was about the difficulties the parties were having regarding discovery. According to a memorandum to the file Mr. Hancock prepared, during the call:

> I explained to [Mr. Kurtz] that the 'testing' universe he had asked for was overly broad and included all kinds of tests done on component parts or on design criteria that had nothing to do with anything we had seen involving this case. I anticipate [Mr. Kurtz] will send us a revision that asks for testing that has to do with high speed.

(Doc. 1032-2 at 51). On the particular issue of Request for Production No. 14, the memorandum stated Mr. Kurtz "agreed to be more specific about what kinds of tests he was looking for." (Doc. 1032-2 at 53). Mr. Kurtz has submitted an affidavit disputing Mr. Hancock's interpretation of that phone call. According to Mr. Kurtz, he "never withdrew or otherwise narrowed the scope of [the] original discovery requests." (Doc. 992-1 at 40). Mr. Kurtz states he "had no phone conversation with Mr. Hancock in December" where he made such an agreement. In short, according to Mr. Kurtz: "Nothing like [the events described by Mr. Hancock] ever occurred." (Doc. 992-1 at 40). The Court need not decide whose

recollection of the December 5, 2006 phone call is accurate. Any question of whether there was an understanding evaporated after a letter from Mr. Kurtz to Mr. Hancock.

On December 20, 2006, Mr. Kurtz sent Mr. Hancock a letter. That letter was meant as "a follow up of our recent discussions regarding discovery disputes." (Doc. 1044-2 at 17). The letter is lengthy and goes through numerous discovery disputes the parties were having. Most relevant here is the portion of the letter devoted to Request for Production No. 14. The letter states:

> Request for Production No. 14. We asked for test records for the G159 275/70R 22.5, including road tests, wheel tests, high speed testing, and durability testing. You objected, suggesting the test records were overly broad and unduly burdensome. You have only produced the DOT test data showing the tires were tested at 30 mph. My interest is in finding the rest of the test data. If there is any, it is your obligation to disclose it.

(Doc. 1044-2 at 25).

After receiving this letter, Mr. Hancock wrote an email to Mr. Musnuff. That email opened by stating: "We should either respond to any portions of Kurtz' 12.20 letter or figure out that we have a fight on our hands on these points and prepare a counter argument." (PSOF Ex. 7). The email goes through the entirety of Mr. Kurtz' letter but contains a specific reference to the Request for Production No. 14 and asks for guidance from Mr. Musnuff:

> RTP 14. Test records for all testing on this size G159 tire. Again, was the only testing at 30 mph or less? What speed testing/fleet testing did Goodyear rely on? Can/should we supplement since his theory is that this tire can't operate at 75 mph in the southwest for long periods?

(PSOF Ex. 7). The record does not contain Mr. Musnuff's response to this email.

Based on this evidence, the December 5, 2006 phone call may have led to confusion on Mr. Hancock's part whether the Request for Production No. 14 remained in place. But Mr. Kurtz's December 20, 2006 letter cleared up any possible confusion. Upon receiving that letter, Mr. Hancock undoubtedly knew Plaintiffs' Request for Production No. 14 had not been withdrawn or narrowed. In particular, this is evidenced by Mr. Hancock's email to Mr. Musnuff stating Goodyear needed to "figure out if we have a fight on our hands." Mr.

Hancock could not have simultaneously believed that Mr. Kurtz withdrew the request but also that Goodyear might have "a fight on [its] hands." Moreover, Mr. Hancock explicitly acknowledged that Mr. Kurtz continued to request "[t]est records for **all** testing." (Emphasis added). Mr. Hancock's email establishes Mr. Musnuff knew about Mr. Kurtz's letter and that Mr. Musnuff knew Plaintiffs' Request for Production No. 14 was still active.

For simplicity and clarity, as of December 20, 2006 Mr. Hancock and Mr. Musnuff *knew* there was an outstanding request for: "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." Any suggestion by Mr. Hancock and Mr. Musnuff that Mr. Kurtz had withdrawn his First Request is belied by the evidence of what they knew in December 2006. In addition, the position later advanced by Goodyear that it was relieved of any further obligation to respond to the First Request because it had lodged objections cannot be taken seriously. Mr. Hancock's email establishes Goodyear's counsel did not believe Mr. Kurtz needed to seek relief from the Court to obtain any further information from Goodyear. And finally, as of January 2, 2007, the date of Mr. Hancock's email, Mr. Musnuff *knew* the theory of Plaintiffs' case, and *knew* the request for additional test data was outstanding, but he neglected to even begin a search for responsive documents.

VI. Goodyear Discovers High Speed Testing

On January 5, 2007, Plaintiffs disclosed their expert witnesses. (Doc. 103). One of Plaintiffs' experts was David Osborne. Mr. Osborne's expert report identified the speed at which the tire was operated as a contributing factor to its failure. Mr. Hancock and Mr. Musnuff exchanged emails after reviewing Mr. Osborne's report. Mr. Musnuff wrote to Mr. Hancock:

> Osborne appears to draw the conclusion that the subject tire was only tested at speeds up to 30 mph from the fact that the only test data we produced is the DOT test data. Of course, our discovery response was limited to DOT test data because plaintiff had not yet identified their defect theory at that time. Now that plaintiffs are pinpointing speed as an issue, perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds. Thoughts?

(PSOF Ex. 8). Mr. Hancock responded: "Yes, we should produce the testing that shows this tire was capable of prolonged speed use and was built for the rated load and had a wide safety margin." (PSOF Ex. 8).

On January 11, 2007, Mr. Musnuff emailed Ms. Okey to give her a copy of Mr. Osborne's report. That email contained the same paragraph Mr. Musnuff sent to Mr. Hancock and concluded that "we should consider supplementing our discovery responses to show the testing of this tire at various higher speeds." (PSOF Ex. 9). Therefore, as of January 11, 2007, Mr. Hancock, Mr. Musnuff, and Ms. Okey were aware Plaintiffs had "pinpoint[ed] speed as an issue" and that Goodyear needed to "consider supplementing" its prior discovery responses. The record does not contain any indication whether Mr. Hancock, Mr. Musnuff, or Ms. Okey had further conversations on this point. The record is clear, however, that no supplementation ever occurred.

Around this same time, Mr. Musnuff was working with Sherman Taylor, a Goodyear tire engineer, "to locate documents and test data regarding the G159 Tire."[6] (Doc. 984-1 at 9). Based on receipt of Mr. Osborne's opinion, Mr. Musnuff asked Mr. Taylor "to locate the test data that the Radial/Medium Truck Tire Development Group used to release the G159 Tire for use at highway speeds." (Doc. 984-1 at 10). Mr. Taylor was not able to find "electronic or paper copies of the actual W84 high speed test data Goodyear used to release the G159 Tire for production." (Doc. 984-1 at 10). But on January 24, 2007, Mr. Taylor located "electronic post-production W84 high speed test data ("High Speed Tests") on the G159 Tire." (Doc. 984-1 at 11). When he discovered that data, Mr. Taylor also "discovered L04 heat rise test results ("Heat Rise tests") for the G159 Tire in the same electronic database." (Doc. 984-1 at 11). Mr. Taylor had another "employee pull the test results data into text files, which [he] then printed." (Doc. 984-1 at 11). According to Mr. Taylor, "[w]ithin a day or two of printing the test data, I delivered a copy to Mr. Musnuff." (Doc.

[6] It was only after receiving the expert report that Mr. Musnuff began looking for any test results. (Doc. 1014 at 86-87).

984-1 at 11). Mr. Taylor's statement refers to both the High Speed tests and the Heat Rise tests. Thus, according to Mr. Taylor, no later than early February 2007, Mr. Musnuff had actual copies of the High Speed and Heat Rise tests, not merely some knowledge that the tests had been conducted.

On February 12, 2007, Mr. Musnuff emailed Mr. Hancock a memo with a summary of the High Speed tests attached. (PSOF Ex 12). According to the memo, "Goodyear did test the [G159] at speeds greater than the 30 mph standard" as reflected in the High Speed tests. (PSOF Ex. 12). Based on that testing, the "tire was capable of being rated as a 75 mph tire."[7] (PSOF Ex 12). That same day, Mr. Musnuff emailed Mr. Taylor and asked about the "list of High Speed Test Results" Mr. Taylor had given to him. Mr. Musnuff asked whether the ten "High Speed Test Results" Mr. Taylor had provided represented "ALL occasions on which the subject tire was subjected to [the] High Speed Test." (PSOF Ex. 15). Mr. Taylor responded there were "66 [High Speed] test[s] performed between 1996 & 2002." Mr. Musnuff then asked Mr. Taylor to gather that additional data because "if we disclose any of the [High Speed] testing – which is in our best interest – then we need to produce all of it." (PSOF Ex. 15).

On February 19, 2007, Mr. Hancock emailed Mr. Musnuff to discuss the "Schedule for Haeger." (PSOF Ex. 16). That email stated:

> We need to gather and produce documents re high speed testing as soon as reasonably practicable. No deadline, but we want to produce them promptly, given the accusation of no high speed testing in the January report that put that at issue in the case.

---

[7] Interestingly, Mr. Musnuff notes that the G159 underwent a "significant design change" shortly before the "Haeger accident tire" was manufactured. That change "was a revision to the tread compound that allowed this tire to withstand the heat of high speed operation. The tire already was sufficient to be rated at 75 mph, but this revision would have improved its performance at high speed even more." (PSOF Ex. 12). Clearly, as of February 2007, Mr. Musnuff understood there was a relationship between a particular compound, the heat produced in high speed applications, and the G159's durability. Simply, Mr. Musnuff knew that the specific compound used in a tire relates to that tire's durability. Thus, his later attempted explanations that the Heat Rise test was merely a compounders' test with no bearing on durability is not believable.

(PSOF Ex. 16). Therefore, no later than February 19, 2007, Mr. Hancock, Mr. Musnuff, and numerous Goodyear employees knew the High Speed tests needed to be produced. Even assuming Mr. Musnuff decided to wait for Mr. Taylor to search for and locate additional test results, there is no acceptable explanation, or one even offered, why Mr. Musnuff did not produce the results he had at that time. While the record establishes Mr. Musnuff and Mr. Hancock both believed the High Speed tests needed to be produced, there is no indication which discovery request Mr. Musnuff and Mr. Hancock believed the tests were responsive to. But given that Plaintiffs had not yet propounded their Third Request for Production of Documents, Mr. Musnuff and Mr. Hancock could not have believed the High Speed tests were responsive only to that later request. Finally, as of February 19, 2007, Mr. Hancock knew that Plaintiffs' expert was relying on the alleged lack of high speed testing.

VII. Statements Made After Learning High Speed Tests Existed

On April 6, 2007, approximately two months after Mr. Hancock knew the High Speed tests existed, the Court held a status conference. (Doc. 146). During that conference, the Court inquired whether the parties were on schedule to complete discovery by the applicable deadline. Plaintiffs' counsel stated he was on schedule. The Court then asked Mr. Hancock for his opinion on whether all discovery could be completed on time.

> The Court: Let me ask defense counsel, is there any internal documentation that is available that has been requested that your client has — clients have not provided?
>
> Mr. Hancock: Your Honor, speaking on behalf of Goodyear, we have responded to all outstanding discovery and those responses have been outstanding for some time and, you know, if a document shows up, we'll of course produce it and supplement our answers but I think we're done or nearly done.
>
> The Court: And your client has provided certification as is required by the rule?
>
> Mr. Hancock: Correct.

(Doc. 146 at 12-13). These statements were false.

Mr. Hancock received notice of the existence of the High Speed tests on February 12, 2007 and sent an email on February 19, 2007 stating Goodyear "need[ed] to gather and

produce" them "as soon as reasonably practicable." As of the April 6, 2007 status conference, the High Speed tests had not been disclosed, Mr. Hancock knew this, and his in-court statements at the April 6, 2007 were untruthful.

VIII. Third Request for Production of Documents

On May 8, 2007, Plaintiffs served their Third Request for Production of Documents ("Third Request"). Three of Plaintiffs' requests are relevant here: numbers 3, 4, and 10. Requests 3 and 4 sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." And Request 10 sought: "All documents which relate to the approval by Goodyear of the [G159] for 75 mph, including, but not limited to, all testing records relating to suitability of the subject tire for that speed." (Doc. 938-1 at 36). In an affidavit, Mr. Kurtz explained why he propounded the Third Request:

> My Third Request for Production utilized alternative language in a request for test records, which followed the language utilized in Goodyear's expert disclosures, which were received in my office in mid-April 2007. Mr. Olsen, Goodyear's in-house expert, specifically expressed his opinion that the G159 tire was designed for general highway use and designed to be operated at continuous highway speeds of 75 mph.

(Doc. 992-1 at 40-41). The Third Request for Production was not intended "to relieve Goodyear of any obligation to properly respond to Plaintiffs' First Request for Production of Documents and Interrogatories" nor was it intended to release Goodyear from "its obligations to timely supplement discovery responses." (Doc. 992-1 at 41). Before Goodyear responded to the Third Request, the Court held a hearing on a separate discovery dispute.

At the discovery dispute hearing on May 17, 2007, the Court addressed a dispute involving Plaintiffs' attempts to obtain information from Gulf Stream and Spartan regarding other motor home accidents. During discussion of the dispute, Plaintiffs' counsel expressed his belief that this "tire was never tested above 30 miles an hour." (Doc. 201 at 48). Because of this statement, the Court asked a specific question of Goodyear's counsel and received an unequivocal response.

> The Court: Mr. Hancock, are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?
>
> Mr. Hancock: Yes, Your Honor.
>
> The Court: And they have been produced?
>
> Mr. Hancock: No, Your Honor. They have been requested from the plaintiffs in a Request for Production that arrived in my office I believe last week where the discovery response is due in mid-June. And they will be – I have requested them from my client and they will be produced at that time.
>
> The Court: All right. So Mr. Kurtz –
>
> Mr. Kurtz: Your Honor, if I may, we have, as have lawyers across the country, they have asked for these tests. My requests for these speed tests have been outstanding for well over a year and Mr. Hancock himself told me the reason they haven't been produced is because nobody can find them anywhere.
>
> The Court: Well, he's found them. He apparently has found them so you're going to have what you want.
>
> Mr. Kurtz: Well, I'll be looking forward to reading them but that won't change the issue, Your Honor. You know, I think – you know, this is discovery, Judge. We ought to be able to ask some questions and I'm pleased to provide the court with a detailed factual record about these. These are not things that I'm making up. They are not things that experts divined. They are tied to hard documents prepared by Goodyear.
>
> The Court: It seems to me that the issue has been narrowed after our lengthy conversation to the tests that have been used or were engaged in by Goodyear for the purpose of establishing for their purposes and for consumers that these tires could be used for – based upon the weight and pressure that they have indicated that they were or that they could hold for traveling above 75 or at 75 miles an hour.
>
> Mr. Hancock: At and below Your Honor, thank you.
>
> The Court: At and below. At no more than 75 miles an hour.

(Doc. 201 at 48-49). After further discussion with counsel regarding the appropriate scope of discovery and depositions, the Court made sure Mr. Hancock understood his obligations.

> The Court: Is there any question in your mind, Mr. Hancock, what I am going to allow in terms of discovery? And that is the deposition questions that I will allow?
>
> Mr. Hancock: Your Honor, I believe the court is saying . . . my witnesses should be deposed about the [testing] done on this [specific] tire with respect to the speed in which it can be operated and what

> records they have, what records they don't have and what those records show?
>
> The Court: That's exactly right.
>
> Mr. Hancock: Thank you, Your Honor.

(Doc. 201 at 51). Mr. Hancock's statements were misleading.

As evidenced by the early February 2007 email traffic, Mr. Hancock knew about the High Speed tests and knew the tests needed to be produced. This was three months prior to Plaintiffs' Third Request. Thus, Mr. Hancock's in-court statement that the High Speed tests had only recently been requested in May 2007 was misleading and an apparent attempt to obscure the fact that Goodyear had been withholding the tests for approximately four months.

On May 21, 2007, Goodyear deposed Plaintiff's expert, Mr. Osborne. As Mr. Hancock and Mr. Musnuff knew, Mr. Osborne had opined that "no high speed testing of the tire was done." (Doc. 983-1 at 5). As evidenced by their email traffic in early February 2007, Mr. Hancock and Mr. Musnuff both knew high speed testing existed, Plaintiffs' expert's report directly implicated that testing, and the testing needed to be produced. Mr. Hancock and Mr. Musnuff decided to withhold the High Speed tests for at least three months, and proceed with Mr. Osborne's deposition, knowing that Mr. Osborne was operating under incorrect assumptions and an incomplete record. The only plausible interpretation of this behavior is that Mr. Hancock and Mr. Musnuff decided to delay production of the tests in hopes of gaining a tactical advantage.

Still prior to production of the High Speed tests, the parties filed a notice of yet another discovery dispute. (Doc. 225). That notice recounted a variety of disputes, including a dispute involving Plaintiffs' request that Goodyear provide a 30(b)(6) witness.[8] At the discovery dispute hearing, Plaintiffs began by explaining the main theory of their case:

> Mr. Kurtz: And the tire can't carry the weight of the motor home at [freeway] speed. And it causes the tire to degrade and fail. And we

[8] On May 11, 2007, Plaintiffs noticed a 30(b)(6) deposition of Goodyear. The subjects of that deposition were to include the "history of testing of the subject tire for speed capacity and weight capacity during the years of its production." (Doc. 175 at 4).

> believe – and we're in the middle of this in this case – that that is part of the reason that we saw all these motor home failures with the G159 tire, is that when they get up to freeway speed, they're just not put together to operate in that environment.

(Doc. 243 at 13).

The parties then discussed with the Court the 30(b)(6) issue. Plaintiffs' counsel described the proposed deposition topics as including "the design history of this tire" and "testing for speed and weight." (Doc. 243 at 21). The Court ruled that the 30(b)(6) deposition could occur. (Doc. 243 at 27). The Court also clarified with Goodyear's counsel that the witness would be speaking on behalf of Goodyear. (Doc. 243 at 29).

On June 21, 2007, Goodyear responded to Plaintiffs' Third Request. The responses were provided to Ms. Okey for her explicit approval. (PSOF Ex. 19, 20). Goodyear's responses opened with the same or substantially similar boilerplate objections as those made in response to Plaintiffs' First Request. Goodyear then provided three identical responses to Plaintiffs' three requests for the "speed or endurance testing" Goodyear used to determine the G159 was suitable for use at 65 and 75 mph. That response was:

> Subject to and without waiving the following objections, and in a good faith spirit of cooperation, Goodyear states that it is producing, subject to the Protective Order entered into this case, copies of electronically-maintained high speed durability test results conducted on [G159] production tires since August 1996. After diligent search, to date Goodyear has not been able to locate additional paper records for the tests that are recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Also, after diligent search, to date Goodyear has not been able to locate the paper records for the high-speed durability tests which it conducted on the [G159] tire prior to August 1996, which were not recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Goodyear will supplement this Response to produce these paper records if they are subsequently located.
>
> Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome, seeks Irrelevant and Confidential Information.

(Doc. 938-1 at 36).

IX. Repeated Statements that Goodyear Withheld High Speed Tests

Around the same time Goodyear responded to Plaintiffs' Third Request, the Court ordered the parties to "confer and set dates for all remaining depositions and discovery." (Doc. 251). On June 26, 2007, Plaintiffs filed a document stating the parties had complied with the Court's Order by establishing dates to complete discovery. Because a status hearing was scheduled for the near future, Plaintiffs' filing also addressed various discovery problems they were still having with Goodyear. According to Plaintiffs, Goodyear's June 21, 2007 disclosures were the "first time" it had disclosed "evidence which relates to the inability of the subject tire to operate at freeway speeds." Plaintiffs stated they were still waiting for Goodyear to produce additional testing information and they requested the Court "inquire and determine whether additional testing data is in Goodyear's possession to assure that Goodyear's disclosures are complete." (Doc. 256 at 3).

On June 28, 2007, Plaintiffs submitted a status report.[9] In that report, Plaintiffs stated:

> [T]he speed tests . . . were **finally produced last week** by Goodyear. They were originally requested in September of 200[6]. The documents had been in **Goodyear's possession since January 2007** but not disclosed until after Plaintiffs had disclosed their experts' opinions, including rebuttal opinions, and Plaintiffs' expert's deposition was taken.

(Doc. 260 at 2-3). A second status report from Plaintiffs submitted that same day referenced the High Speed tests and alleged: "All of the test data has been the subject of outstanding discovery requests since last September." (Doc. 262 at 2). These repeated statements reflect Plaintiffs' belief that their First Request remained in effect and that the High Speed tests were responsive to the First Request.

On August 9, 2007, the parties filed a joint statement regarding a request to modify the scheduling order. In that document, Plaintiffs stated they were still attempting "to gather information from Goodyear on the design and testing of this tire." (Doc. 301 at 5). In addition, Plaintiffs claimed "Goodyear did not produce any testing on the speed of the tire

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[9] The docket does not reflect a status report from Goodyear.

until June [21], 2007,[10] despite the fact such testing was requested in Plaintiffs' First Request to Produce on September 20, 2006." (Doc. 301 at 6). In response, Goodyear argued Plaintiffs were attempting to "distract[] the Court with a series of red herrings regarding as yet unpresented and inchoate discovery disputes." (Doc. 301 at 7). Goodyear did not provide any substantive response regarding its late disclosure of testing data nor did Goodyear explain that its disclosure of the test data was timely based on Mr. Kurtz withdrawing his First Request in a phone conversation with Mr. Hancock in December 2006. Instead, Goodyear argued the discovery deadline had passed and requested the Court limit the amount of remaining discovery. Without addressing the testing data issue, the Court imposed new discovery deadlines. (Doc. 311).

On September 10, 2007, the parties submitted another joint statement of discovery dispute.[11] (Doc. 319). Plaintiffs were seeking to brief the issue regarding the "proper scope of discovery." Plaintiffs also wished to present "information that Goodyear improperly withheld high-speed test data from the court." (Doc. 319 at 2). On the issue of test data, Goodyear responded: "Nothing suggests this Court has ever ordered production of any test data to it." (Doc. 319 at 5). Goodyear also claimed it had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." This latter statement was misleading.

As of February 2007, Mr. Hancock and Mr. Musnuff knew the High Speed tests were responsive to Plaintiffs' First Request. The statement in the status report that the High Speed tests had been produced in a "timely response to Plaintiff's Third Request" was intended to mislead the Court into believing those tests had been requested *only* in the Third Request. That was plainly not true and contrary to Mr. Hancock and Mr. Musnuff's own knowledge as shown in their emails. Based in part on Goodyear's deception, the Court denied Plaintiffs'

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[10] The document states June 24, 2007 but from other evidence in the record it appears Goodyear produced the testing on June 21, 2007.

[11] That document was not signed by an attorney for Goodyear.

request to brief these issues and ordered the parties to comply with prior rulings regarding the appropriate scope of discovery. (Doc. 320).

X. Deposition of Goodyear's 30(b)(6) Witness

On September 12, 2007, Plaintiffs deposed Richard Olsen. Mr. Olsen had been designated as Goodyear's 30(b)(6) witness. Mr. Olsen was asked about the "high speed" tests Goodyear performed on the tire prior to Goodyear determining it could be released as a tire able to perform at speeds up to 75 miles per hour. In particular, Mr. Olsen was given the four High Speed tests which had been turned over to Plaintiffs in June 2007 and was asked whether they constituted the entire universe of such tests.

> Mr. O'Connor (Plaintiffs' Counsel): To the best of your knowledge, [were] only these four high-speed tests available to Goodyear prior to rating this tire as a 75 mile an hour tire[?]
>
> ***
>
> Mr. Olsen: No.
>
> Mr. O'Connor: What other high-speed tests are available?
>
> Mr. Olsen: I think we talked at length this morning when we first started getting into the high-speed test data that I've spoken with the people who were involved in the release of this tire, and they've confirmed to me that high-speed tests were run in the development process of this tire before it was released to production. We just don't have any paperwork available for that.
>
> Mr. O'Connor: Okay. So there were tests run, but those have either been discarded or thrown away, and we don't have the results of those tests. Correct?
>
> Mr. Olsen: We don't have them here today, but the people making the decision at that time likely had them available to them at that time.
>
> Mr. O'Connor: Okay. So they had them available, apparently, in 1998 and have somehow discarded them since 1998. Is that what you're trying to tell me?
>
> Mr. Olsen: I'm just saying that they're not available today.
>
> Mr. O'Connor: Okay. So based on the record we have, we only know of four available high-speed tests that we can look at as to whether or not Goodyear could justify speed rating this tire at 75 miles an hour in June of 1998. Correct?
>
> Mr. Olsen: We have four available today to us.

> ***
>
> Mr. O'Connor: **Okay. So there's any – any separate testing that would have been done on this car – on this particular tire, sir?**
>
> Mr. Olsen: **There's a number of different test procedures that are run in the development process of a new tire before it goes into production.**
>
> Mr. O'Connor: **Do we have any of those tests, sir?**
>
> Mr. Olsen: **I don't have them, no.**
>
> Mr. O'Connor: **Are they still available?**
>
> Mr. Olsen: **I don't believe so.**

(Doc. 938-1 at 40-45) (emphasis added).

Mr. Hancock then asked Mr. Olsen some questions based on a document previously examined during the deposition. That document described the High Speed tests produced by Goodyear:

> Mr. Hancock: Okay. The – earlier on, the plaintiffs' counsel asked you about an exhibit . . . it is the test data for high-speed wheel tests performed on this tire. Do you have that?
>
> Mr. Olsen. Yes. . . .
>
> Mr. Hancock: . . . There are other numbered tests that are not on the exhibit. Is that correct? Do you recall the testimony the plaintiffs' counsel asked you about saying, "Well, we don't have tests, for example, 4 through 7," that sort of thing?
>
> Mr. Olsen: Yes, sir.
>
> Mr. Hancock: As far as you know, are all of the tests that were in the databases that were searched that were on the – this, the tire at issue in this case, this specification tire, in that database, in what you have there?
>
> Mr. Olsen: Yes. They're all included here.

(Doc. 938-1 at 40-47).

Based on Plaintiffs' dissatisfaction with Mr. Olsen's testimony, the parties submitted another joint statement of discovery dispute. One of the disputes centered on Plaintiffs' belief that Mr. Olsen "was not sufficiently knowledgeable" on various topics. (Doc. 345 at 1). Plaintiffs also claimed that Goodyear had not produced "all high-speed testing on the

G159 tire and has improperly redacted responsive G159 high speed test results." Goodyear claimed it had "produced all 'high speed testing' data more than three months ago." (Doc. 345 at 3). Goodyear also represented that it had not redacted any tests but it had "simply omitted tests with other tires not at issue in the case, which were not part of Plaintiffs' request for the high speed tests ('any speed or endurance testing to determine that the subject tire was suitable for 75 mph highway purposes')." (Doc. 345 at 3). The Court held a hearing on these disputes on October 19, 2007. (Doc. 361).

At that hearing, Mr. Hancock made a number of unequivocal statements. Mr. Hancock averred that "Goodyear has searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). After the Court learned Mr. Olsen may not have been qualified to state that all high speed testing data had been produced, the Court ordered Mr. Hancock to "ask [Mr. Olsen] just to make sure that . . . that everything that relates to the high-speed testing of this tire has been produced." Mr. Hancock responded: "I will do that, Your Honor. I will supplement our record. I believe that to be the case. I have checked with my client and confirmed that that is the case."[12] (Doc. 361 at 46). Mr. Hancock then went on to "flesh out the record." He stated:

> Goodyear's normal document retention policy means we don't have those records anymore. These are not government-required tests. You don't keep them. . . . So there were tests done. Mr. Olsen can testify about those tests but **there are no documents for him to be questioned about other than the documents that have been produced** and we will supplement with direct confirmation of that.

(Doc. 361 at 47) (emphasis added). After a break, Mr. Hancock affirmed that Plaintiffs had asked for "documents which relate to any speed or endurance testing to determine that the subject tire was suitable for 65 miles per hour." (Doc. 361 at 53). Mr. Hancock affirmed yet again that Goodyear:

> has searched for and produced all of the high-speed testing on this tire. The original discovery request, which is how we got here, were all

[12] The record does not reflect whether Mr. Hancock asked Mr. Olsen about the High Speed tests but the record is clear that Mr. Hancock did not provide any additional test results after this discussion.

> documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced.

(Doc. 361 at 58-59). Mr. Hancock continued: "The discovery request is what did you rely on and tell the public that this tire could go 75 miles an hour? All of that testing has been produced. This tire goes out for sale and we produced all of the testing on any tire that was the same as any of the tires for sale." (Doc. 361 at 63).

All of these statements by Mr. Hancock were seriously misleading. Mr. Hancock knew, as evidenced by his February 2007 email to Mr. Musnuff, that the high speed tests were responsive to Plaintiff's First Request and they needed to be produced. By repeatedly relying on the tests being responsive only to the Third Request, Mr. Hancock was misleading the Court into thinking that Goodyear had been timely in producing the tests. But more importantly, Mr. Hancock repeatedly represented that there were *no other documents* beyond those already produced. As Mr. Olsen would inadvertently reveal later, Goodyear and its attorneys were concealing a wide variety of other testing documents.

XI. Post-Discovery Activity

Discovery formally ended shortly after the October 2007 hearing and the parties began briefing dispositive motions. The dispositive motions involved a wide array of complicated issues which, for purposes of this Order, are irrelevant. While those motions were pending, Plaintiffs agreed to dismiss Gulf Stream. (Doc. 635). Eventually, the Court issued a lengthy order denying Plaintiffs' motion for summary judgment and denying in part and granting in part Goodyear's motion for summary judgment. (Doc. 651). The Court also granted Spartan's motion for summary judgment, dismissing Spartan from the case. (Doc. 652). Plaintiffs and Goodyear then prepared for trial by inundating the Court with motions in limine and other pretrial filings. The Court devoted substantial time and effort to resolving those motions. (Doc. 842, resolving over thirty motions). On April 14, 2010, the first day of trial, Plaintiffs and Goodyear informed the Court they had reached a settlement. (Doc. 926). As a result, the case was closed.

XII. Other G159 Cases

Having recounted the factual history of this case, the Court must very briefly outline certain events which occurred in other cases also involving G159 tires.[13] There were three other G159 cases of particular relevance here. Those cases involved actions by some combination of Mr. Hancock, Mr. Musnuff, and Goodyear. The three cases are *Woods v. Goodyear* in Alabama, *Schalmo v. Goodyear* in Florida, and *Bogaert v. Goodyear* in Maricopa County Superior Court. This Court cannot and would not issue sanctions based on actions taken in these other cases. But given that they bear directly on issues presented in this case, it is appropriate to look to them in some detail. *See, e.g.*, *Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992) ("The totality of the circumstances [relevant to a request for sanctions] can include events which did not occur in the case proper but occurred in other cases and are, by their nature, relevant to the pending controversy."). In particular, these other cases are relevant when determining the credibility and state of mind of individuals involved in the present case.

A. *Woods v. Goodyear*

Woods v. Goodyear involved an accident with a Monaco Diplomat motor home and was filed in Alabama. (Doc. 938-1 at 84). Mr. Musnuff worked directly on the case in his role as national coordinating counsel. Sometime prior to July 2007, the *Woods* plaintiffs

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[13] Goodyear has been subject to a number of suits involving the G159 tire. According to a list provided by Plaintiffs, Goodyear was first sued regarding the G159 in 1999. (Doc. 938-1 at 83). Given this long history of litigation, it is surprising that Goodyear did not even begin to look for certain testing information until January 2007 when Mr. Musnuff made a request based on the *Haeger* case. Mr. Musnuff's internal correspondence hints, but does not establish, that he knew about other testing long before January 2007. In his January 11, 2007 email to Mr. Hancock, Mr. Musnuff states "perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds." (PSOF Ex. 8). If Mr. Musnuff actually did not know any other tests existed, his email musing that "perhaps we need to supplement" is, to say the least, a strange way of phrasing the matter. But it is possible Mr. Musnuff's current claim that he first went looking for test data in January 2007 is true because Goodyear's obstructive discovery practices prior to 2006 were successful in keeping the additional testing concealed. (Doc. 1014 at 120).

served on Goodyear their "Fifth Request for Production of Documents." That request sought, among other things: "All other testing conducted by Goodyear . . . that was undertaken, at least in part, to determine the suitability of [G159] tires to be driven at 65 mph." (Doc. 992-1 at 100). Goodyear's "Responses and Objections to Plaintiffs' Fifth Request for Production of Documents" were very similar to the responses served in *Haeger*. Those responses started out with sixteen general objections and then individual objections incorporating the general objections. Upon receiving Goodyear's responses, plaintiffs' counsel in *Woods* sent a letter asking Goodyear to "reconsider" its objections. Goodyear did not and the parties presented the issue to the court.

In late August 2007, the judge handling the *Woods* case resolved the discovery dispute. The court began by noting the case had "been pending for over 3 years and [had] been marked by disagreements over production of documents on first one issue then another." The court said it was "disgusted with the whole thing" and ordered Goodyear "to produce to the Plaintiff every document requested regarding the [G159] tire." (Doc. 992-1 at 127).

After receiving this order, Mr. Musnuff sent an email to numerous individuals at Goodyear explaining the judge had required Goodyear to "fully and completely respond to the Requests for Production." (PSOF Ex. 23). Mr. Musnuff included a "plan of action for responding to each RFP" and a "list of documents that need to be assembled for production in order to comply with the court's ruling." (PSOF Ex. 23). As recounted by Mr. Musnuff, the *Woods* plaintiffs' request number 7 sought:

> All other testing conducted by Goodyear of its [G159] tire that was undertaken, at least in part, to determine the suitability of such tires to be driven at 65 mph without an undue risk of tread or belt edge separations.

Mr. Musnuff included a comment regarding this request:

> We will need to produce documents regarding ALL types of testing of the [G159] tire. That is the unfortunate reality of the judge's decision. **We already have the high speed test data**, but we should go through the release checklist and identify all available testing data. We have already produced the W84 Test Protocol in other litigation. We have not previously produced the protocol set forth in the Master

> Specification, but we need to consider whether it serves our best interest to produce it.[14]

(PSOF Ex. 23, August 20, 2007 email) (emphasis added).

One week later, Goodyear employee Sherman Taylor responded by stating, "Below are the responses to [RFP] # 7." (PSOF Ex. 24). Mr. Taylor attached the following documents:

- DOT FMVSS-119 Extended Certification
- Heat Rise test;
- Bead durability test;
- Crown durability test;
- W16 test;
- W64 test;
- G09 test; and
- L04 test.

That email was sent to Mr. Musnuff and Goodyear engineer Jim Stroble. There is no record that Mr. Stroble subsequently clarified that Mr. Taylor's email was wrong. And, presumably relying on Mr. Taylor's opinion, Mr. Musnuff later supervised the production of the Heat Rise tests and the other tests listed.

The following point is critical and must be emphasized. As of August 27, 2007, Mr. Taylor and Mr. Musnuff knew that *all* of the tests listed in Mr. Taylor's email were responsive to a request for those tests which Goodyear conducted "to determine the suitability of [the G159] to be driven at 65 mph." This is in direct conflict with the position Mr. Musnuff and Goodyear adopted in the present case. According to Mr. Musnuff and Goodyear, their position in the present case was based on a belief that *only* the High Speed

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[14] Stating "we need to consider whether it serves our best interest to produce" an otherwise responsive document reflects precisely Goodyear's attitude toward its discovery obligations. Rather than conveying a concern that all responsive documents be produced, Mr. Musnuff's statement conveys that Goodyear's primary interest was to produce only those documents which would be in Goodyear's "best interest."

tests were responsive to Plaintiffs' request for: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." Mr. Taylor's email shows Mr. Musnuff and Goodyear previously believed many other tests were responsive to such a request.

B. *Schalmo v. Goodyear*

Schalmo v. Goodyear involved an accident with a Fleetwood motor home and was filed in Florida. (Doc. 938-1 at 84). Again, Mr. Musnuff worked directly on the case in his role as national coordinating counsel. During discovery, the *Schalmo* plaintiffs' sought "all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc. 992-1 at 4). In April 2008, Goodyear responded to this request with a list of over twenty-five tests. Included in those tests were the Heat Rise tests. (Doc. 992-1 at 5).

Just as in the *Woods* matter, Goodyear's discovery response in *Schalmo* was an affirmative statement that the Heat Rise tests were responsive to a request for the testing Goodyear had used to determine the "appropriate speed rating, Load Range, and/or vehicle application of the G159 tires." As with *Woods*, the position taken in *Schalmo* is inconsistent with that taken in the present case. Rather than merely concede the response in the current case was inaccurate, Mr. Musnuff and Goodyear now claim the response in *Schalmo* was inaccurate.[15]

According to Mr. Musnuff and Goodyear, when local counsel in *Schalmo* responded to the discovery request, he simply listed the same test data for each request for production, even though each of the tests listed was not responsive to each request.[16] As stated by Mr.

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[15] This position also means Goodyear's document production in *Woods* was wrong.

[16] In fact, Mr. Musnuff goes further and states that some of the testing provided in *Schalmo* was not responsive to any of the requests. (Doc. 1000 at 9). It is strange and troubling that Mr. Musnuff expresses no concern that in a litigation he was supervising, discovery responses were served which allegedly provided clearly misleading lists of documents, including totally non-responsive documents.

Musnuff's current counsel, "the fact that the same lists were included with the responses to the first three discovery requests did not indicate that each listed test was responsive to each specific type of data requested." (Doc. 1000 at 3). Neither Goodyear nor Mr. Musnuff gives an acceptable explanation why, after being so precise in its discovery responses elsewhere, Goodyear suddenly decided to produce documents in this manner. Mr. Musnuff has attempted to explain that the *Schalmo* discovery response was complicated by Florida law and the need to submit certain documents for *in camera* review prior to production. That explanation is senseless. Even assuming Florida law requires extra procedures, there is no requirement in Florida law that litigants provide grossly inaccurate discovery responses.

A final point regarding *Schalmo* involves Mr. Musnuff's admission that the Heat Rise tests were a type of "durability test." On May 8, 2009, Mr. Musnuff emailed Goodyear engineer Jim Stroble to discuss the Heat Rise tests. That email states "plaintiffs in Schalmo are now trying to cite our Heat Rise Testing as evidence that the tire is defective for generating excessive temperatures." As recounted by Mr. Musnuff, the *Schalmo* plaintiffs were "highlight[ing] the Heat Rise testing **taken during the durability testing of the G159**." (PSOF Ex. 34) (emphasis added). Thus, as of May 2009, Mr. Musnuff knew the Heat Rise tests were a type of durability testing and that plaintiffs suing Goodyear in a G159 motor home case believed the Heat Rise tests were of great significance.

C. *Bogaert v. Goodyear*

Bogaert v. Goodyear involved an accident with a Fleetwood motor home and was filed in Maricopa County Superior Court in 2005. (Doc. 938-1 at 84). Goodyear was represented by Mr. Hancock as local counsel and Mr. Musnuff served as national coordinating counsel. As with all the other Goodyear cases which have been brought to the Court's attention, the *Bogaert* matter involved extreme difficulty in convincing Goodyear to produce documents. In early 2008, dissatisfied with Goodyear's discovery responses, the *Bogaert* plaintiffs filed a motion to compel. (Doc. 992-1 at 49). On March 20, 2008, the discovery special master ordered Goodyear to "produce the requested documents." (Doc. 992-1 at 66). In particular, Goodyear was ordered to produce the "testing conducted by

Goodyear of its [G159] tires that was undertaken, at least in part, to determine the suitability of such tires to be driven at 65 mph without an undue risk of tread or belt edge separations." (Doc. 992-1 at 70). This was *identical* to the discovery request in *Woods* that led Mr. Taylor to list as responsive the various tests, including the Heat Rise tests.

On June 5, 2008, Mr. Musnuff emailed Mr. Hancock regarding the *Bogaert* case. That email stated, in relevant part:

> In meeting with [Goodyear Engineer] Jim Stroble yesterday, we came to conclude that we might be best served by producing data from additional tests of the Subject Tire.[17] As you know, we have produced the available electronically maintained high-speed test data in this case (and in Haeger and Haley [another G159 case] as well) along with the current protocol.
>
> One of the 30(b)(6) topics relates to testing done to make sure the tire was suitable for RV usage. There was no testing specifically done on RVs, **but our whole testing package was to ensure that the tire was suitable for over-the-road applications, including RV.**
>
> In the Woods case, we were compelled to produce other testing data/protocols in addition to High Speed. There, we produced **(i) extended DOT testing data, (ii) heat-rise test data**, **(iii) bead durability (aka Runflat) test data, and (iv) crown durability test data**, along with the current (evergreen) protocol for each of those tests. . . .
>
> Jim thinks that it may be helpful to produce these documents so that he can review them in preparation for his deposition. That seems ok with me. Do you agree? Thoughts?

(PSOF Ex. 31) (emphasis added). The first bolded portion above is a statement by Mr. Musnuff that as of June 5, 2008, he believed Goodyear's "whole testing package" was done to ensure the G159 was "suitable for over-the-road applications, including RV." That testing package included the Heat Rise tests. And the second bolded portion shows Mr. Hancock knew as of June 5, 2008 that "extended DOT testing data," "heat-rise test data," "bead durability . . . test data," and "crown durability test data" existed and it had been produced in another G159 case. Mr. Hancock responded to the email with "Let's discuss." Three months later, Mr. Hancock asked "Basil–Did you come to a conclusion on this?" And one

[17] As with his email in the *Woods* case, Mr. Musnuff was concerned with what would "best serve[]" Goodyear's interests rather than producing responsive documents.

month after that, Mr. Hancock said "Need to discuss this." The Heat Rise tests were never produced in *Bogaert*.

The history of *Bogaert* establishes three critical facts. First, *Bogaert* was filed in Arizona state court in 2005. Under Arizona Rule of Civil Procedure 26.1, Goodyear had affirmative disclosure obligations. Mr. Hancock claims to have explained these affirmative disclosure obligations to Mr. Musnuff but Mr. Musnuff now claims that prior to early 2007, he "was unaware of any test records relating to the G159 tire other than the DOT test data" Goodyear produced in every case. (Doc. 983-1 at 6). Mr. Musnuff stated under oath that he only started looking for test results in January 2007. Thus, the present record is clear that either Mr. Hancock did not explain Rule 26.1 or Mr. Musnuff and Goodyear chose to ignore it. Either way, Goodyear and its attorneys clearly had no interest in complying with their discovery obligations unless those obligations were in the "best interest[s]" of Goodyear. (PSOF Ex. 23, August 20, 2007 email) (emphasis added).

The second fact that the *Bogaert* record establishes is that long after its responses were served in the present case, Mr. Musnuff believed Goodyear's "whole testing package" was to ensure the suitability of the G159 for "over-the-road applications." That testing package included the Heat Rise tests, the extended DOT test, crown durability test, and the bead durability test. Therefore, prior to the present sanctions proceedings, Mr. Musnuff was of the opinion that *all* of these tests were responsive to a request for the data Goodyear used to determine the G159's suitability for use "over-the-road." In other words, in June 2008 Mr. Musnuff was of the opinion that the Heat Rise tests, extended DOT test, the bead durability test, and the crown durability test were responsive to Plaintiffs' Third Request.

And the third fact established by the *Bogaert* record is that no later than June 5, 2008 Mr. Hancock knew of the existence of additional test data not produced in the present case. While there is no evidence that Mr. Hancock actually had copies of the underlying test results referenced in Mr. Musnuff's email, he knew that the tests existed and he either knew or should have known that the disclosures in the present case had been woefully inadequate.

Viewed together, Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. As explained below, this means Goodyear, Mr. Hancock, and Mr. Musnuff knowingly concealed crucial documents in the present litigation.

XIII. Plaintiffs' Counsel Writes to Goodyear About Undisclosed Tests

Close to one year after the present case settled, Mr. Kurtz wrote to Mr. Musnuff and stated he had "great concern regarding the adequacy and honesty of the disclosures made" in this case. (Doc. 938-1 at 49). This concern was based on a newspaper article regarding *Schalmo*. That case had proceeded to trial and resulted in a 5.6 million dollar award against Goodyear. (Doc. 938-1 at 12). According to the newspaper article, during trial the *Schalmo* plaintiffs had presented "Goodyear documents including internal heat and speed testing and failure rate data." (Doc. 938-1 at 12). Mr. Kurtz observed that no such data was produced in this case and he asked Mr. Musnuff whether such records actually exist. In response, Mr. Musnuff stated "Goodyear stands behind its discovery responses in the *Haeger* case, and we stand behind the properly-stated objections to the scope of the discovery requests propounded by the plaintiffs in this case." (Doc. 938-1 at 53). Mr. Kurtz then emailed Goodyear's counsel, asking for a direct answer whether "internal heat test records" existed. (Doc. 938-1 at 56). Mr. Musnuff responded that it would not be "productive to debate these issues further." (Doc. 938-1 at 56).

Mr. Kurtz sent a follow-up letter, which Mr. Musnuff responded to by claiming Mr. Kurtz' allegations were "unprofessional and without merit." (Doc. 938-1 at 66). Mr. Musnuff stated Goodyear had "abided by all of Judge Silver's rulings and we take issue with any suggestion that we were disrespectful or misled the court in any manner or that we failed to comply with any of her rulings in this case." Mr. Musnuff admitted "it is true there are testing records regarding the [G159] tire that were not produced in the *Haeger* litigation. *That fact was clear during the course of the litigation,* and certainly at the time plaintiffs

chose to resolve this case."[18] (Doc. 938-1 at 66) (emphasis added). Mr. Musnuff then offered a disturbing explanation of what happened.

> Plaintiffs propounded a request that Goodyear produce all testing data related to the Subject Tire. However, that did not automatically create an obligation that Goodyear produce all testing data in this case. Goodyear responded to plaintiffs' request by objecting to the scope of the request on several good-faith grounds. . . . Goodyear did produce DOT testing data in response to plaintiffs' request, showing that the Subject Tire was in full compliance with FMVSS 119, but Goodyear objected to the production of any other testing data. We never represented that this DOT testing data comprised the totality of testing done with regarding to the Subject Tire, a fact which you have conceded.

Mr. Musnuff stressed that Goodyear's objections to the First Request did "not set or establish the appropriate scope of discovery. That is the province of the court." (Doc. 938-1 at 67). Because Plaintiffs never filed a motion to compel regarding "all testing data," Goodyear had no obligation to produce all such data.

Mr. Musnuff also explained that the High Speed tests eventually produced were in response to "additional requests for production" but Goodyear "never represented that this high speed endurance testing data comprised the totality of testing done with regard to the Subject Tire." (Doc. 938-1 at 67). There was no mention in Mr. Musnuff's letter that Mr. Kurtz had withdrawn or narrowed his First Request.

XIV. Plaintiffs File Their Motion for Sanctions

On May 31, 2011, Plaintiffs filed a motion for sanctions based on alleged "discovery fraud." (Doc. 938). Plaintiffs argued Goodyear had "knowingly concealed crucial 'internal heat test' records related to the defective design of the G159." (Doc. 938 at 1). Plaintiffs

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[18] There is no plausible way to read the record as supporting this contention. It certainly was *not* clear to the Court that Goodyear was withholding documents regarding the G159's performance in "highway" testing. Had it been "clear" to the Court what Goodyear and its counsel were doing, the Court would have immediately ordered disclosure and imposed sanctions for misconduct. To claim this Court would *knowingly* allow Goodyear to withhold relevant and discoverable information is outrageous. In addition, the claim by Goodyear's counsel that Plaintiff's allegations were "unprofessional and without merit" is preposterous. (Doc. 938-1 at 66).

pointed to their First Request as evidence that they had sought "all test records for the G159 tires." (Doc. 938 at 5). Plaintiffs claimed they had been misled by Goodyear's tactic of objecting and answering the First Request. (Doc. 938 at 8). This led Plaintiffs to believe "that the responsive information [was] being disclosed and Goodyear [was] simply preserving objections." (Doc. 938 at 8).

Goodyear filed a lengthy response to the motion. (Doc. 948). That opposition began with an attempt to recount the history of discovery. As recited by Goodyear, Plaintiffs' First Request sought "all test records." (Doc. 948 at 3). Goodyear admitted it responded to this request by objecting and by providing the DOT test but argued it "never represented that the DOT test data comprised the totality of testing with regard to the G159 tire." (Doc. 948 at 3). Goodyear next explained that the High Speed tests it did produce were in response to the Third Request. (Doc. 948 at 3-4). According to Goodyear, the tests Plaintiffs were now referencing, *i.e.*, the Heat Rise tests, did not qualify as "high speed testing" responsive to the Third Request and, therefore, were not produced. (Doc. 948 at 4). This last statement requires detailed scrutiny.

Plaintiffs' Third Request sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." Goodyear's response to the motion for sanctions argued the Heat Rise tests were not responsive because they were "not high speed testing at all." (Doc. 948 at 4). As a preliminary matter, Goodyear's response is confusing given that the Third Request did not seek "high speed testing." It sought documents which related to *any* speed or endurance testing to determine the G159 was suitable for highway purposes; a test conducted at low speeds would be responsive to this request. Thus, Goodyear's claim that it did not need to produce the Heat Rise tests in response to the Third Request because the Heat Rise tests were not "high speed testing" was, in large part, a non-sequitur. But even more importantly, Goodyear's opposition to the sanctions motion did not argue the tests were non-responsive due to Goodyear's decision not to rely on them as proof the G159 was suitable for highway use. That is, Goodyear argued only that the "internal heat tests" were not "high speed

testing;" it did not argue the tests were withheld because Goodyear had not relied on them to determine suitability for highway purposes. As set forth later, the failure to make this argument is telling.

Finally, Goodyear's opposition to the sanctions motion claimed its behavior during discovery had "unambiguously indicat[ed] that it would not produce *all* test data." (Doc. 948 at 4). The Court is at a loss to determine what Goodyear believed was an "unambiguous" indication that it was withholding certain tests performed on the G159 tire. Both Plaintiffs and the Court were unable to perceive this "unambiguous" indication and Goodyear's statement is incredibly inaccurate. Throughout the numerous discovery dispute filings and hearings, the Court was under the impression that Goodyear had produced *all* test data relevant to Plaintiffs' claims.[19] In fact, at various points the Court became exasperated with Plaintiffs' apparently unsubstantiated claims that additional information must exist. Based on personal observation and discussions with Mr. Hancock during in-court hearings, the Court came to believe Mr. Hancock thoroughly understood his discovery obligations and that he was making every effort to comply with them. There simply was no reason for the Court to question Mr. Hancock's representations and Plaintiffs' repeated attempts to cast aspersions on Mr. Hancock appeared misguided. Of course, now that Goodyear has been forced to admit additional information does exist, that exasperation was misplaced. Suffice it to say, had there ever been an "unambiguous" indication that Goodyear was withholding certain test data, the Court would have immediately addressed it and taken appropriate action.

Before filing their reply, Plaintiffs asked the Court to order Goodyear to produce "the requested tests." (Doc. 949 at 2). Goodyear opposed that motion and argued it should not have to produce the "heat test" documents because "Goodyear has committed no discovery violation." (Doc. 951 at 4). On October 5, 2011, the Court concluded there were "serious questions regarding [Goodyear's] conduct in this case" and, based on the Court's power to

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[19] According to the Court's calculations, the parties spent approximately sixteen hours in court on discovery matters. This is an extraordinary amount of time.

conduct an independent investigation, ordered Goodyear to produce "the test results at issue." (Doc. 954 at 1). Goodyear produced the Heat Rise tests but kept numerous other tests concealed. After obtaining the Heat Rise tests, Plaintiffs filed their reply and explained the importance of the tests. (Doc. 963). Spartan subsequently joined the motion for sanctions, arguing it also suffered harm as a result of Goodyear's alleged misconduct. (Doc. 966).

XV. Explanation of Undisclosed Test Results

The initial motion for sanctions centered on the Heat Rise tests. Those tests are titled "Laboratory Durability Testing–Heat Rise" and were conducted on four G159 tires on April 21, 1996. The tests were meant to "determine the dynamic heat build-up at specific loads, speeds, and inflations." (Doc. 963-1 at 7). The Heat Rise tests were conducted on a "67.23 [inch] diameter flywheel" and consisted of running the tires at 35 miles per hour and checking the temperature of the tire at certain intervals. (Doc. 963-1 at 7). The Heat Rise tests describe 35 miles per hour as reflecting "highway use." Even though 35 miles per hour seems substantially slower than highway speeds, the rationale for this description is explained by Goodyear's 30(b)(6) witness. Testing a tire on a 67-inch flywheel places "upwards of double the speed" impact on a tire as the tire impact of "a vehicle on a road surface." In other words, "if you run 45 miles an hour on the steel flywheel [that] is the equivalent temperaturewise of 70, 80 miles an hour on the public highway as far as the heat history goes." (Doc. 963-1 at 61). Under this logic, testing tires at 35 miles per hour on a flywheel would be the equivalent of 55-65 miles per hour on the highway.

According to the Heat Rise tests, after running at 35 miles per hour, the G159 tires generated temperatures of up to 229 degrees. The parties now dispute whether these temperatures were cause of concern. Plaintiffs have cited to Goodyear's internal documents, Goodyear's expert, and Goodyear's 30(b)(6) witness as stating this temperature was sufficiently high to be cause for concern. Goodyear counters that these temperatures were no more damning than other evidence already in Plaintiffs' possession. Whether Plaintiff or Goodyear is correct, it is clear that Plaintiffs believe the Heat Rise tests would have been helpful to their case. And regardless of the position now adopted by Goodyear and its

counsel, there can be no serious dispute that the Heat Rise tests were relevant to Plaintiffs' claims.

XVI. Court's Preliminary Order

On February 24, 2012, the Court issued "Proposed Findings of Fact and Conclusions of Law." (Doc. 970). After recounting the behavior by Goodyear and its counsel, the proposed order concluded sanctions were appropriate. The proposed order focused on Goodyear's failure to produce the Heat Rise tests and the repeated statements by Mr. Hancock that all responsive documents had been produced.

The proposed order first concluded the First Request seeking "all tests" remained in place and Goodyear's attempt to respond by objecting and providing a limited set of documents was inappropriate. (Doc. 970-1 at 18). Therefore, the Heat Rise tests should have been produced in response to the First Request. Next, the proposed order recounted that the Heat Rise tests also were responsive to the Third Request where Plaintiffs sought "documents which relate to any speed or endurance testing to determine that the [G159] was suitable for [65 and 75] mph highway purposes." (Doc. 970-1 at 18-19). The proposed order focused on the argument made by Goodyear that the Heat Rise tests did not qualify as "high speed testing." The Court rejected this position because Plaintiffs had never limited their request to "high speed testing." Moreover, the Heat Rise tests themselves were labeled as "highway testing," meaning they easily qualified as "high speed testing." In fact, the Court preliminarily concluded the tests were "*obviously* responsive" to a request for testing to determine suitability for "highway purposes." (Doc. 970-1 at 22). The Court did not address, because Goodyear did not argue, that the Heat Rise tests were not responsive because Goodyear had not relied on them when determining the G159's suitability for highway use.

The proposed order noted that despite clear evidence that someone had behaved inappropriately, the record was not sufficiently clear to determine who was "responsible for each instance of misconduct" nor was it sufficiently clear to determine "the appropriate

amount to be awarded." (Doc. 970-1 at 23). The Court directed Goodyear and its counsel to "file either joint or separate briefs" addressing the proposed order. (Doc. 970).

XVII. Briefing After Preliminary Order

Based on the proposed order, Mr. Hancock, Mr. Musnuff, and Goodyear retained new counsel and filed separate responses. The contents of that briefing must be analyzed in some detail to show the different positions adopted by Mr. Hancock, Mr. Musnuff, and Goodyear once they realized that the Court was taking the matter seriously.

A. Mr. Hancock's Response

Mr. Hancock's response focused on the timing of his statements to the Court and his knowledge about the Heat Rise tests. Mr. Hancock explained that he "did not see the Heat Rise test until it was ordered to be produced following Plaintiffs' Motion for Sanctions" and he was not involved in any discussions to determine whether the Heat Rise tests were responsive to a discovery request. (Doc. 980 at 3). Mr. Hancock claimed it would be inappropriate to sanction him for any of his in-court statements because, at the time he made the statements, he did not know they were false.

B. Mr. Musnuff's Response

Mr. Musnuff's response focused on the fact that he allegedly held a good faith belief that the Heat Rise tests were not responsive to Plaintiffs' Third Request. According to Mr. Musnuff, as of early 2007 Goodyear's only outstanding discovery obligation was to respond to Plaintiffs' Third Request.[20] (Doc. 983 at 5). As allegedly understood by Mr. Musnuff, Plaintiffs' Third Request was limited to those tests which Goodyear relied upon "to determine suitability of the G159 for 65 and 75 miles per hour." (Doc. 983 at 8). Allegedly based on conversations with Goodyear employees, Mr. Musnuff came to believe that the *only* testing data Goodyear relied upon to determine suitability were the High Speed tests which were produced to Plaintiffs in June 2007.

[20] This is misleading as Mr. Musnuff's January 11, 2007 email to Mr. Hancock admitted Goodyear might need to supplement its prior responses "to show the testing of this tire at various speeds."

Somewhat bizarrely, Mr. Musnuff's response also argued that the objections which accompanied the responses to Plaintiffs' Third Request were "asserted for technical reasons only, and [were] not indicative that additional responsive documents were located." (Doc. 983-1 at 8). In his letters to Mr. Kurtz before the sanctions motion was filed, Mr. Musnuff had repeatedly taken the position that the objections to the First Request *were* an indication that other documents existed. Thus, Mr. Musnuff seemed to be arguing Plaintiffs should have realized Goodyear's objections to the First and Third Requests were conveying precisely opposite positions. Mr. Musnuff provided no explanation how Plaintiffs should have arrived at this conclusion.

C. Goodyear's Response

As with Mr. Musnuff's response, Goodyear's response focused on its position that it did not use the Heat Rise tests to determine the G159 was suitable for highway purposes. Accordingly, Goodyear argued that the Heat Rise tests were not responsive to Plaintiffs' Third Request. Goodyear made no serious attempt to explain why the Heat Rise tests were not produced based on Plaintiffs' First Request. Instead, Goodyear merely noted that it had objected to the First Request. (Doc. 984 at 4). Goodyear also argued there was no deliberate strategy to conceal the Heat Rise tests because it produced the Heat Rise tests in two other cases where the plaintiffs "sought 'heat testing' or . . . obtained a Court order compelling production of 'all tests.'" (Doc. 984 at 7).

Goodyear's response was supported by the declaration of Ms. Okey. According to that declaration, the Heat Rise tests were "produced in the *Woods* case in August 2007 in response to a court order requesting production of *all* tests. Moreover, the same report was produced in the *Schalmo* case in August 2008, where the plaintiffs specifically sought discovery relating to, among other things, heat testing." (Doc. 984-1 at 5). These two statements were either misleading or false.

First, there was never an order in the *Woods* case requiring the production of "*all* tests." Instead, the order required Goodyear to "produce to the Plaintiff every document requested" in the plaintiffs' Fifth Request for Production of Documents. (Doc. 992-1 at 127).

That request did not contain a request for "all tests" and Ms. Okey's statement to the contrary is wrong. The decision to submit a written declaration containing such a statement–a situation where careful review and drafting is possible–shows an unfortunately casual attitude to the issues presented by Plaintiffs' motion.

And second, Ms. Okey's statement regarding the *Schalmo* case may not qualify as false but it is at least a deliberate attempt to mislead. As explained earlier, Goodyear's responses to the discovery requests in *Schalmo* specifically listed the Heat Rise tests as responsive to a request for "all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc. 992-1 at 4). Ms. Okey, perhaps hoping the Court would not look to the underlying documents, makes no effort to explain the situation in *Schalmo* or that the Heat Rise tests were not produced *only* in response to a request for "heat testing." Again, Ms. Okey's casual attitude to the underlying facts in *Schalmo* do not reflect well on her or Goodyear.

Finally, in making its various arguments against the proposed order, Goodyear inadvertently disclosed that there were *other* tests which it had not disclosed in this case. In its response, Goodyear attempted to explain that it gave Mr. Musnuff "the only W84 high speed test data [it] was able to locate." (Doc. 984 at 6). In a footnote, Goodyear provided further context, stating it "produced 16 different high speed test results, but 12 of those test results were performed in 2000 and relate to G159 Series tires used by NASCAR. Moreover, Goodyear also produced several crown durability, bead durability and DOT endurance tests." (Doc. 984 at 6). In support of this latter statement, Goodyear cited to a declaration by Richard J. Olsen, the individual Goodyear had used as its 30(b)(6) witness. (Doc. 984-1 at 13).

In his declaration, Mr. Olsen tried to explain how his testimony during his deposition was accurate but, in doing so, Mr. Olsen accidentally revealed it was not. Mr. Olsen's declaration stated that during his deposition, he had been "asked if there [were] 'any separate testing' besides the tests Goodyear produced, which included DOT tests, crown durability

tests, bead durability tests and high speed tests." (Doc. 984-1 at 17). During the deposition, Mr. Olsen had responded "that a number of different tests are run in the development process but they could not be found." (Doc. 984-1 at 17). Because Mr. Olsen apparently believed that Goodyear had disclosed "crown durability tests, bead durability tests and high speed tests," his deposition testimony that no other testing existed was, in his mind, accurate. Mr. Olsen's declaration stated he stood by that deposition testimony. (Doc. 984-1 at 17). Unfortunately for Mr. Olsen, his deposition and declaration were both false.

Four days after filing Mr. Olsen's declaration, Goodyear filed a "Notice of Correction." That notice stated "the crown durability, bead durability and DOT endurance tests were not produced in this case." (Doc. 989 at 2). The notice provided no explanation why Mr. Olsen had submitted a false declaration here or how Mr. Olsen's deposition testimony could be viewed as accurate given that other tests existed. In fact, it is no longer possible that Mr. Olsen's deposition testimony was even close to accurate.

The present record shows that Mr. Olsen knew about "the crown durability, bead durability, and DOT endurance tests" at his deposition. Those tests had not been produced to Plaintiffs. During his deposition, he was asked if there was "any separate testing that would have been done on this . . . particular tire" other than that already produced by Goodyear. Mr. Olsen responded there were other tests, but he did not have them. That was false. He was then asked if the other tests were still available. He stated "I don't believe so." That was false. In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity emerged only as a result of Goodyear's inability to keep its falsehoods straight. A responsible corporation would have corrected the false deposition testimony immediately after the fact. At the very least, a responsible corporation would not compound the problem by submitting a false declaration affirming the false deposition testimony. Goodyear has not offered an explanation for Mr. Olsen's testimony or its own inexplicable behavior. The only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith.

XVIII. Additional Briefing

Dissatisfied with Mr. Hancock, Mr. Musnuff, and Goodyear's inability to provide clear answers on certain issues, the Court directed additional briefing addressing five questions. This briefing included further evolution of certain positions.

A. Production in *Schalmo*

The first question the Court asked was why Goodyear produced the Heat Rise tests in *Schalmo* but withheld them in *Haeger*. (Doc. 995 at 1). Goodyear and Mr. Musnuff responded that the *Schalmo* responses were prepared by Florida counsel and neither Mr. Musnuff nor anyone at Goodyear knew, in particular, why the Heat Rise tests were produced. (Doc. 1000 at 3; Doc. 1001 at 3). Mr. Hancock claimed he had not been involved in *Schalmo* and could not opine on anything that happened in that case. (Doc. 999 at 11).

Mr. Musnuff and Goodyear's inability to provide a reasonable explanation for the differences between *Schalmo* and *Haeger* is telling. Given the attempt to shift the blame to Florida counsel, it is manifestly clear the *Schalmo* disclosure was a result of Goodyear inadvertently giving the Heat Rise tests to local counsel and that counsel then producing the tests, unaware that Goodyear did not want to produce them (allegedly because they were totally irrelevant and conducted for no reason).

B. Other Tests

The second question posed by the Court was whether the "'crown durability, bead durability and DOT endurance test reports' should have been produced" in the present case. (Doc. 995 at 2). Mr. Musnuff responded that they "should *not* have been produced in the *Haeger* litigation" because they were not responsive to Plaintiffs' Third Request. (Doc. 1000 at 10). Goodyear also maintained that they were not responsive to Plaintiffs' Third Request. (Doc. 1001 at 4). Goodyear admitted, however, that "if Plaintiffs' First Request for Production remained operative," the tests "should have been produced." (Doc. 1001 at 5). Mr. Hancock responded that he had "no knowledge concerning these new tests, the purpose of these tests, or what these tests represent." (Doc. 999 at 12). These positions present a dizzying array of misstatements and simple falsehoods.

The positions argued by Mr. Musnuff and Goodyear cannot be reconciled with the facts. As evidenced by the proceedings in *Woods*, both Mr. Musnuff and Goodyear (through its employees), knew the Heat Rise tests, the crown durability test, the bead durability test, and the DOT endurance tests were all responsive to a request for the testing Goodyear used to determine the G159's suitability. Thus, all these tests were responsive to Plaintiffs' Third Request. Mr. Musnuff also knew these tests were responsive to Plaintiffs' First Request. Moreover, the record demonstrates that Mr. Musnuff believed the First Request remained in place and Goodyear's admission that these documents should have been produced in response to that request means Mr. Musnuff deliberately withheld these responsive documents in the "best interest[s]" of Goodyear. It is only now, after having been caught withholding the documents, that Mr. Musnuff is formulating his convoluted argument that he withheld them because they were not responsive to the Third Request. And while Goodyear can be commended for its candor in admitting these tests are responsive, it failed to provide any explanation why its 30(b)(6) witness testified falsely at his deposition that no tests other than those already produced to Plaintiffs existed.

As for Mr. Hancock, his claim that he did not know about these additional tests is false. As shown by the email from Mr. Musnuff to Mr. Hancock in the *Bogaert* matter, Mr. Hancock *did* know about these tests and *did* know they were part of Goodyear's "whole testing package" to determine the G159 was suitable for "over-the-road" use.

C. Heat Rise Tests Conflict with Representations

The third question posed by the Court was whether "the results of the Heat Rise tests conflict with any representation made during" the present case. In response, Mr. Hancock admirably admitted that the mere fact that the Heat Rise tests exist meant some of his statements were incorrect. (Doc. 999 at 12). Mr. Musnuff and Goodyear responded they were unable to determine whether the Heat Rise test results conflict with any representation.

Mr. Musnuff and Goodyear's responses were not good faith responses. At the time they filed their responses, Mr. Musnuff and Goodyear knew that Mr. Hancock had made various in-court statements which were later proven false. For example, Mr. Hancock had

represented that Goodyear had responded to all discovery and that no other documents existed. The existence of the Heat Rise tests means that Mr. Hancock's statements were incorrect and Mr. Musnuff and Goodyear's inability to acknowledge that basic fact is disturbing.

D. Party Responsible for Not Producing Heat Rise Tests

The fourth question was who was responsible for not producing the Heat Rise tests. Mr. Hancock responded that he could not be held responsible as he was unaware that the tests existed. Mr. Musnuff claimed he was jointly responsible with Goodyear because Goodyear had informed him that it did not use the Heat Rise tests to determine the G159's suitability for highway use. Thus, based on this information, Mr. Musnuff allegedly decided not to produce the test in response to Plaintiffs' Third Request. Goodyear argued that only Mr. Musnuff should be held responsible because it provided the Heat Rise tests to Mr. Musnuff and it relied on him "to prepare discovery responses, to identify documents responsive to discovery requests and to handle day-to-day management of the *Haeger* case." (Doc. 1001 at 8). In Goodyear's view, there was "no evidence that Goodyear itself acted in bad faith or deliberately concealed G159 Tire test results." (Doc. 1001 at 8). This latter statement is of some interest.

It is now clear that Goodyear's 30(b)(6) witness testified falsely at his deposition regarding the Heat Rise tests, the crown durability test, the bead durability test, and the DOT endurance tests. Therefore, the claim that Goodyear itself did not deliberately conceal *any* "G159 Tire test results" is not true. (Doc. 1001 at 8). In addition, Ms. Okey retained final say regarding discovery responses and she must have known that Goodyear's responses in the present case were grossly inaccurate. Goodyear's attempt to shift blame entirely onto its counsel is not supported by this record.

E. Not Produced in *Bogaert*

The final question posed by the Court was why the Heat Rise tests were not produced in the Arizona state case of *Bogaert v. Goodyear*. Mr. Hancock responded he informed Mr. Musnuff and Goodyear about the "affirmative disclosure obligations under the Arizona Rules

of Civil Procedure" but he had no idea the Heat Rise tests even existed at the time *Bogaert* was litigated. Goodyear stated it did not know for certain if the Heat Rise tests had been produced in *Bogaert*. And Mr. Musnuff responded the Heat Rise tests were not produced because the *Bogaert* plaintiffs "sought testing used by Goodyear to determine the tire's suitability for 65 and 75 miles per hour." (Doc. 1000 at 11).

In effect, neither Mr. Musnuff nor Goodyear were able to offer *any* plausible basis for not producing the Heat Rise tests in *Bogaert*. Mr. Musnuff's explanation that he only produced tests specifically sought by the *Bogaert* plaintiffs in a discovery request shows such a fundamental misunderstanding of his disclosure obligations under Arizona law that it is surprising Mr. Musnuff would assert such a position without some further explanation. *See Norwest Bank (Minnesota), N.A. v. Symington*, 3 P.3d 1101, 1105-06 (Ariz. Ct. App. 2000) (explaining disclosure obligations and specifically rejecting claim that information need only be produced in response to precise discovery request). Mr. Musnuff's failure to acknowledge that the failure to disclose the Heat Rise test in *Bogaert* was improper shows he still has not grasped that his behavior was inappropriate.

Goodyear's position is equally perplexing in that it refuses to admit the obvious, *i.e.* that the Heat Rise tests should have been produced in *Bogaert*. Goodyear's failure to straightforwardly admit that its counsel committed such an obvious error gives the impression that Goodyear lacks remorse for the mistakes made on its behalf. As with its response to the false testimony by its 30(b)(6) witness, Goodyear is not behaving responsibly.

And finally, Mr. Hancock's response was evasive in that the record now establishes Mr. Hancock knew of the Heat Rise tests (and other tests) while *Bogaert* was being litigated. There is no explanation for Mr. Hancock's willingness to aid Mr. Musnuff and Goodyear in flouting Arizona's disclosure rules.

XIX. Evidentiary Hearing

The Court held an evidentiary hearing on March 22, 2012. At that hearing, Mr. Musnuff and Mr. Hancock testified. Mr. Musnuff's testimony conflicted with the documentary evidence and was not credible. Mr. Hancock's testimony, while more reliable

than Mr. Musnuff's, still conflicted with the underlying evidence and was not entirely credible.

A. Mr. Musnuff's Testimony

Mr. Musnuff's testimony covered a variety of topics, including his explanation for when he first received the Heat Rise tests and what he understood the Heat Rise tests to mean. Despite the written declaration by Mr. Taylor that he gave the Heat Rise tests to Mr. Musnuff in January 2007, Mr. Musnuff testified he first learned of the Heat Rise tests sometime in August 2007. (Doc. 1014 at 97). When pressed, Mr. Musnuff explained that Mr. Taylor's representations that the Heat Rise tests were located and provided to Mr. Munsuff in January 2007 was a mistake. (Doc. 1014 at 122). Moreover, according to Mr. Musnuff, the January 24, 2007 date printed on the Heat Rise tests was inaccurate and no one could figure out what it meant.

Next, Mr. Musnuff testified that he determined the Heat Rise tests were not responsive to Plaintiffs' Third Request based on statements made to him by "numerous Goodyear engineers" that the tests had "nothing to do with the durability of the tire or its ability to function at highway speeds." (Doc. 1014 at 29). Mr. Musnuff asserted he was "repeatedly told by Goodyear that the only test determined for suitability for 65 and 75 mile an hour highway use was the W84 tests." (Doc. 1014 at 29-30). When asked to explain this in more detail, Mr. Musnuff stated:

> As was explained to me by the Goodyear engineers, the heat rise test is not a test to evaluate the tire itself. It's a compounder's test used to evaluate different compounds that might be used in different tires; or if you're trying to improve a compound or such, you might test one and then test another. You have to test them in something so you test them in a tire, but they're really evaluating the compound rather than the tire.

(Doc. 1014 at 34). The Court could not understand this statement and pressed Mr. Musnuff for a more precise explanation:

> The Court: If one compound is better than one, but the purpose [of the Heat Rise tests] is to improve the quality of the tire; right?
>
> Mr. Musnuff: I would think that all of the engineering that Goodyear does is to ultimately to try to improve the quality of the products.

> The Court: So, then, in essence, then, it does have something to with its endurance or durability because that is, at bottom, what is important to Goodyear; right?
>
> Mr. Musnuff: Well, no. Your Honor, if I can disagree. As it was explained to me, that this is in no way a durability test or an endurance test. . . . It's just to provide – it's like an information point only. . . .
>
> The Court: So if one of the compounds was found . . . to be better than another compound, what would the engineering group do?
>
> Mr. Musnuff: That I don't know.
>
> ***
>
> The Court: But what was [the Heat Rise test] designed to do?
>
> Mr. Musnuff: Just to provide information that a compounder could look at.
>
> The Court: Was it academic or was it for recreation? What was it for?
>
> Mr. Musnuff: No, not academic but there's no qualified – there's no standard that applies to it. . . . It's just to provide a point of information so that you can compare one compound you're testing verus another compound you're testing.

Mr. Musnuff explained that he talked to Mr. Taylor and Mr. Stroble regarding the Heat Rise tests and they informed him the tests were not responsive because Goodyear had not relied on them when determining the suitability of the G159 for highway use. (Doc. 1014 at 40).

On cross-examination, Mr. Musnuff testified that the Heat Rise tests were not even relevant to Plaintiffs' allegations. (Doc. 1014 at 45). Mr. Musnuff did concede, however, that the Heat Rise tests qualified as "wheel tests" which were requested by Plaintiffs in their First Request. Mr. Musnuff admitted Goodyear never supplemented its responses to the First Request nor did it otherwise alert Plaintiffs that tests were being withheld. (Doc. 1014 at 46, 54). Mr. Musnuff also stated he did not recall questioning why the Heat Rise tests were labeled "durability tests" if they were not, in fact, durability tests. (Doc. 1014 at 50).

Towards the end of the cross-examination, Mr. Musnuff admitted he attended the deposition of Goodyear's expert where that expert expressed the opinion that "heat in excess of 200 degrees for a prolonged period of time . . . can lead to tread separations." (Doc. 1014 at 79). Despite the fact that the Heat Rise test established the G159 "was running at 229

degrees," Mr. Musnuff maintained it was utterly irrelevant because the Heat Rise test had "nothing to do with measuring the durability of the tire." (Doc. 1014 at 80).

After all counsel concluded their questioning of Mr. Musnuff, the Court asked a series of questions. First, the Court asked why the Heat Rise tests were turned over in *Schalmo* but not in *Haeger*. Mr. Musnuff explained that he came to believe Mr. Kurtz had narrowed his discovery request such that the Heat Rise tests were not responsive to any outstanding request. (Doc. 1014 at 128-29). Next, the Court asked why there were no efforts to locate any testing before January 2007. Mr. Musnuff explained that there had been no case before 2003 that "required . . . production of further testing beyond the compliance testing" Goodyear routinely produced. (Doc. 1014 at 131). Third, the Court confirmed Mr. Musnuff had been present for the depositions of the various experts. (Doc. 1014 at 133). Mr. Musnuff confirmed that he was present for Goodyear's expert's deposition and that the expert had stated "anything over 200 [degrees] could cause separation." (Doc. 1014 at 134). Despite the Heat Rise tests casting serious doubt on this opinion, Mr. Musnuff stated he had behaved properly because the Heat Rise tests were not responsive to any discovery request. When the Court expressed some confusion how Mr. Musnuff believed it was proper for him to allow Goodyear's expert to provide testimony directly undercut by Goodyear's own testing, Mr. Musnuff repeated that the Heat Rise tests had absolutely no practical application other than providing a "data point" to compare two compounds. (Doc. 1014 at 137). The results of the Heat Rise tests "mean[] nothing, essentially nothing in terms of durability on the road." (Doc. 1014 at 139).

Finally, the Court confirmed that the Heat Rise tests had been used during the *Schalmo* trial to show the G159 was defective. (Doc. 1014 at 138). Based on a question from Plaintiff's counsel, Mr. Musnuff confirmed that in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had "said the tire would foreseeably fail at [temperatures] above 200 degrees." (Doc. 1014 at 144). Based on the entire record, Mr. Musnuff's testimony was not credible.

To begin, the Court concludes Mr. Musnuff received the Heat Rise tests in January 2007. As stated by Mr. Taylor, the High Speed tests and Heat Rise tests were uncovered in the same database and, according to the date printed on all those documents, printed in January 2007. While Mr. Musnuff may not remember getting the Heat Rise tests at that time, Mr. Taylor's version of events makes more sense and is supported by the date printed on the Heat Rise tests.

Next, Mr. Musnuff's repeated position that he did not turn over the Heat Rise tests because he was told by individuals at Goodyear that they were not responsive cannot be taken seriously. The claim that the Heat Rise tests were merely to "provide information that a compounder could look at" is not reasonable. Goodyear performed the test for some purpose and Mr. Musnuff's own statements reflect this. For example, in his February 11, 2007 memo, Mr. Musnuff observed that a change in the compound of the G159 improved performance. (PSOF Ex. 12). Moreover, his June 5, 2008 email to Mr. Hancock stated Goodyear's "whole testing package" was to ensure the G159 was suitable for "over-the-road applications, including RV." (PSOF 31). And in an email dated May 8, 2009, Mr. Musnuff stated the Heat Rise tests were "taken during the *durability* testing of the G159." (PSOF Ex. 34) (emphasis added). Accordingly, prior to these sanctions proceedings, Mr. Musnuff knew the Heat Rise tests were part of Goodyear's testing used to determine the durability and suitability of the G159 for use on the road. His testimony to the contrary during the hearing cannot be believed.

Finally, Mr. Musnuff's claim that the Heat Rise tests were not even relevant to Plaintiffs' claim is frivolous. Mr. Musnuff knew Plaintiffs' theory and knew that Plaintiffs believed high temperatures caused tire separations. Mr. Musnuff also knew that Plaintiffs' expert had stated the temperatures at which tire degradation would occur and knew the temperature Goodyear's own expert had testified about which would be cause for concern. Maintaining that the Heat Rise tests were irrelevant when they showed the temperature the G159 operated at when used at highway speeds is so obviously relevant

that Mr. Musnuff's current position to the contrary is clear evidence he is operating in bad faith.

B. Mr. Hancock's Testimony

Mr. Hancock's testimony began with a discussion of his representation of Goodyear in the *Bogaert* case. (Doc. 1014 at 145). Mr. Hancock stated he had conversations with Mr. Musnuff regarding the requirements of Arizona Rule of Civil Procedure 26.1. (Doc. 1014 at 149). As the record now shows, Goodyear did not even attempt to locate testing data as part of its initial disclosure in *Bogaert*. Thus, either Mr. Hancock did not explain the requirements of Arizona Rule 26.1 to Mr. Musnuff and Goodyear or Mr. Musnuff and Goodyear chose to ignore that rule. Based on the entirety of the record, Mr. Hancock appears to have made no meaningful effort to ensure Goodyear was complying with the Rule.

Next, Mr. Hancock's testimony focused on his in-court statements in the present case. Mr. Hancock was adamant that at the time he made certain in-court statements, he had no prior exposure to the Heat Rise tests. At one point during cross-examination, Mr. Hancock stated: "I have never heard, before [Plaintiffs'] motion was filed in this case for sanctions, of a heat rise durability test." And at another point, "I never saw the heat rise test until it was ordered produced in this case after [Plaintiffs'] motion. I did not know the contents of the heat rise test at any time prior to its production here. I did not know it was called anything other than a heat rise test, and no one mentioned it to me ever during any of the times referenced in the Court's order." (Doc. 1014 at 168).

On the topic of the High Speed tests which were eventually produced in response to Plaintiffs' Third Request, Mr. Hancock stated he learned of their existence "sometime prior to the third Request for Production," probably in "April or May of 2007." (Doc. 1014 at 158). Mr. Hancock admitted, however, that he was unclear on the exact date. (Doc. 1014 at 158). Mr. Hancock was asked why there had been a five month delay between when Mr. Musnuff said he first learned of the high speed tests in February 2007 and when they were produced in June 2007. The response was: "I don't know the answer

to that, sir, because that would have been between Goodyear and Mr. Musnuff. I know that I received the documents with clearance to produce them on June 20, 2007." (Doc. 1014 at 159).

Mr. Hancock then recounted the series of events regarding the eventual production of the High Speed tests as follows. At the April 6, 2007 hearing, Mr. Hancock was "taken aback" by the Court's question regarding outstanding discovery because "nobody had been after [him] for any discovery." (Doc. 1014 at 164). When asked whether he knew about the High Speed tests at that time, Mr. Hancock responded "I haven't reviewed my records. I don't believe so but I don't know for certain. I apologize." Then, according to his testimony, sometime prior to May 17, 2007, he received Plaintiffs' Third Request. As of May 17, 2007, Mr. Hancock had sent the Third Request to Mr. Musnuff and Mr. Hancock "knew there was [high speed] testing." Mr. Hancock produced some of the high speed testing on June 6, 2007. (Doc. 1014 at 160). And produced the remaining tests on June 21, 2007. (Doc. 1014 at 159).

Finally, Mr. Hancock was asked regarding his behavior in connection with the deposition of Plaintiffs' expert Mr. Osborne. That deposition occurred on May 24, 2007. (Doc. 1014 at 164). At the time, Mr. Hancock knew Mr. Osborne "was under the impression that there was no high-speed testing at all." (Doc. 1014 at 166). When asked whether he told Plaintiffs prior to Mr. Osborne's deposition "that Goodyear had located those high-speed tests," Mr. Hancock admitted he did not. (Doc. 1014 at 167). Overall, Mr. Hancock was more credible than Mr. Musnuff but Mr. Hancock's testimony also established certain instances of inappropriate behavior.

It is now clear beyond dispute that Mr. Hancock knew in February 2007 that Goodyear had located the High Speed tests. Therefore, at the time of the April 6, 2007 hearing, Mr. Hancock had known about the high speed tests for two months and he had even acknowledged in an email to Mr. Musnuff that the tests should be produced. His statements at that hearing that Goodyear had "responded to all discovery" and Goodyear was "done or nearly done" were false.

Next, as of February 2007 Mr. Hancock knew Goodyear had the High Speed tests and, as acknowledged in his own email, those tests were important in response to Plaintiffs' expert's report. Long before that expert's deposition, Mr. Hancock knew Plaintiffs and the expert had been materially misled regarding the scope of Goodyear's testing. Despite this knowledge, Mr. Hancock proceeded with the deposition of Mr. Osborne and only produced the High Speed tests after the deposition was complete. At best, this behavior was aimed at prolonging the litigation. At worst, this behavior was meant to prevent Plaintiffs from obtaining information which would help their case until it was too late for them to do anything with it.

And finally, Mr. Hancock's testimony that he had "never heard . . . of a heat rise durability test" before the present sanctions proceedings was false. As evidenced by the emails from *Bogaert*, Mr. Hancock was informed in 2008 that Goodyear had produced "heat-rise test data" in another G159 case. It is possible Mr. Hancock merely forgot about the *Bogaert* emails but, in the context of this case, it appears more likely that Mr. Hancock was not expecting Plaintiffs to gain access to the *Bogaert* emails and his testimony was an attempt to paint himself in a sympathetic light.

ANALYSIS

> What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting).

Mr. Hancock, Mr. Musnuff, and Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, Mr. Hancock, Mr. Musnuff, and Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements

to the Court in an attempt to hide their behavior. In the end, that plan succeeded in making this case far more complicated than necessary, requiring an absurd expenditure of resources by Plaintiffs and the Court.[21] Goodyear also succeeded in obtaining a settlement from Plaintiffs, a settlement Plaintiffs now believe was less than they would have been able to achieve had Mr. Hancock, Mr. Musnuff, and Goodyear complied with their discovery obligations.

The necessity for sanctions in these circumstances is obvious. But the form those sanctions should take presents a very difficult question. As set out below, the Ninth Circuit case law does not provide clear guidance for remedying a years-long course of misconduct such as that presented here. If the misconduct had come to light while the case was ongoing, entry of default judgment with a trial on damages would have been the obvious solution. *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming striking of answer and entry of default judgment because of discovery misconduct). But this case is closed and the issue is the permissible scope of sanctions in this context. The Ninth Circuit seems to allow an award of sanctions only in the amount of harm directly caused by the sanctionable conduct. In the present circumstances, it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred. Neither the Court nor the Plaintiffs could separate the fees incurred due to legitimate activity from the fees and costs incurred due to Goodyear's refusal to abide by clear and simple discovery obligations. For example, if Goodyear had responded to Plaintiffs' First Request with all responsive documents, Goodyear might

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[21] Prior to these sanctions proceedings, the parties filed approximately 163 motions, the Court issued 254 orders, and the case had close to 1,000 docket entries. By way of comparison, a patent case filed around the same time, and which included a twelve-day jury trial, ended with approximately 700 docket entries. *Dupont Air Products Nanomaterials, LLC v. Cabot Microelectronics Corp.*, CV-06-2952. And an incredibly complex ERISA class action, filed a year earlier than the present case, ended this year with just over 750 docket entries. *Allen v. Honeywell*, CV-04-424.

have decided to settle the case immediately.[22] In these circumstances, one could conclude practically all of Plaintiffs' fees and costs were due to misconduct (*i.e.*, the case would have been resolved in an easy and straightforward manner absent Goodyear's obstructionism). Alternatively, one could conclude practically none of Plaintiffs' fees and costs were due to misconduct (*i.e.*, even if Goodyear had disclosed every responsive document in its possession, Goodyear could have refused to settle and prolonged the litigation through other tactics).

While there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith, based on Goodyear's pattern and practice in G159 cases, the case more likely than not would have settled much earlier. In these circumstances, the most appropriate sanction is to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request.[23] That was the first definitive proof that Goodyear was not going to cooperate in the litigation process. Instead, Goodyear believed discovery would consist of a "game of hide and seek." *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 790 (9th Cir. 2011); *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 579 (9th Cir. 1992) (faulting party for "treating discovery as a game instead of a serious matter); *United States v. $42,500*, 283 F.3d 977, 983 (9th Cir. 2002) ("A court is not a place to play hide-and-go-seek with relevant evidence and information ."). Goodyear and its counsel must now pay the price for adopting this approach.

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[22] Of course, the evidence might have made Plaintiffs realize they had a winning trial and they would have refused to settle.

[23] The Court recognizes that Plaintiffs might have a contingency agreement with their counsel. The amount of sanctions will be calculated pursuant to the lodestar method and will not be limited to the amount paid by Plaintiffs as a percentage of the settlement. *Cf. Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court may not rely on a contingency agreement to increase or decrease what it determines to be a reasonable attorney's fee.").

As permitted by Arizona law, Plaintiffs may wish to affirm their settlement agreement and pursue an independent cause of action for fraud based on Mr. Hancock, Mr. Musnuff, and Goodyear's behavior. But the present case has long been closed and it would be inappropriate to allow Plaintiffs to litigate their fraud claims here. *Cf. Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (allowing judgment to be set aside only upon showing of "grave miscarriage of justice").

I. Standard for Awarding Sanctions

Given that this case was closed pursuant to the parties' agreement, there are two possible bases for imposition of sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear: 28 U.S.C. § 1927 and the Court's inherent power.[24] As set out below, sanctions are appropriate under both.

A. 28 U.S.C. § 1927 Cannot Reach Goodyear's Conduct

Pursuant to 28 U.S.C. § 1927: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this statute, an attorney's conduct is sanctionable only if it multiplies the proceedings in both an "unreasonable and vexatious manner." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002). In addition, an attorney must have acted in bad faith or engaged in conduct tantamount to bad faith. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The imposition of sanctions under § 1927 requires a finding of bad faith."). But this statute allows for sanctions *only* against "an attorney or otherwise admitted representative of a party." *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986). Therefore, any sanctionable conduct by Goodyear itself is beyond the reach of § 1927.

[24] Sanctions pursuant to Federal Rule of Civil Procedure 11 should be imposed before the case is closed. *See* Moore's Federal Practice § 11.22(2)(a) ("[T]he court should ordinarily impose [Rule 11] sanctions before issuing a final order.").

B. Court's Inherent Power Reaches Goodyear and Counsel

"Under its inherent powers, a district court may . . . award sanctions in the form of attorneys' fees against *a party or counsel* who acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (emphasis added). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Thus, as with sanctions under Section 1927, before awarding sanctions under its inherent power, the Court "must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." *Id.*

C. Definition of Bad Faith

A comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible, but the type of conduct at issue "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). Such conduct includes "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991). And "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F.3d at 994. Therefore, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. *Id*; *see also B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002) (same); *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith). It is of particular importance to note that it is "permissible to infer bad faith from [a party's] action[s] plus the surrounding circumstances." *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011). Accordingly, Mr. Hancock, Mr. Musnuff, and Goodyear are incorrect when they repeatedly claim the Court must, in effect, obtain a confession before imposing sanctions.

II. Type of Sanctions

Sanctionable conduct may result in both monetary and non-monetary relief.

A. Sanctions Under § 1927

Sanctions pursuant to § 1927 are limited to an amount equal to the additional expenditures incurred "as a result of the multiplicity of the proceedings." *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Any amount awarded pursuant to § 1927 must have been directly caused by the sanctionable conduct. *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983) ("Section 1927 only authorizes the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct; it does not authorize imposition of sanctions in excess of costs reasonably incurred because of such conduct."). But this rule is softened by the recognition that it is often "impossible to determine with mathematical precision the fees and costs generated only by" the sanctionable conduct. *Lahiri v. Universal Music and Video Distribution Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010). District courts are permitted to exercise their discretion and make reasonable adjustments when attempting to determine the appropriate size of sanctions. *Id.* (affirming "reasoned exercise of discretion" regarding amount of fees awarded pursuant to § 1927).

B. Monetary Sanctions Under Court's Inherent Power

The Ninth Circuit recently ruled that compensatory sanctions under a Court's inherent power must be limited to the amount necessary to compensate the opposing party for the harm caused by the misconduct. *Miller*, 661 F.3d at 1029. In so ruling, the Ninth Circuit concluded a district court erred by awarding all of the attorneys' fees and costs to a plaintiff when the court did not make an explicit finding that the defendant's conduct caused plaintiff to incur all of those fees. *Id.* This holding seems to be in direct conflict with Supreme Court authority.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the district court had relied on its inherent power and sanctioned NASCO a sum equal to "the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. At the Supreme Court,

Chambers challenged this amount by arguing "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong." *Id.* at 57. The Supreme Court rejected this argument, finding "the frequency and severity of Chambers' abuses of the judicial system" meant "[i]t was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* at 57. This is a rejection of the position that only monetary harms incurred as a direct result of sanctionable conduct can be remedied.

It is difficult to reconcile *Chambers* with the Ninth Circuit's recent *Miller* decision. *See Miller*, 661 F.3d at 1039 (Ikuta, J., dissenting) (noting *Chambers* is contrary to holding in *Miller*). In an attempt to do so, the Court concludes monetary sanctions under the Court's inherent power *usually* must be premised on a specific factual finding of a direct causal link between the sanctionable conduct and the alleged harm. Only when the sanctionable conduct rises to a truly egregious level can all of the attorneys' fees incurred in the case be awarded. *Chambers*, 501 U.S. at 57. In less egregious cases, a court must tailor its award more carefully. *See, e.g.*, *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1111 (9th Cir. 2005) (affirming award of sanctions "designed to compensate [plaintiff] for unnecessary costs and attorney's fees"). Of course, there is no requirement that a court limit its sanctions award to the amount of attorneys' fees and costs because sanctions can be awarded for other types of harm incurred as a result of the sanctionable conduct. For example, sanctions can compensate a party for the "pain and suffering" caused by the sanctionable conduct. *See B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1109 (9th Cir. 2002) (affirming award of "compensatory damages" sanctions pursuant to court's inherent power due to "the embarrassment and pain suffered by Plaintiff" as a result of the sanctionable conduct).

Finally, under its inherent power the Court may award non-compensatory monetary sanctions "to vindicate the court's authority and deter future misconduct." *Miller*, 661 F.3d at 1030. But large non-compensatory monetary sanctions "are akin to criminal contempt and may be imposed only by following the procedures applicable to

criminal cases, including appointment of an independent prosecutor, proof beyond a reasonable doubt and a jury trial." *Id.*

C. Non-Monetary Sanctions

In addition to monetary sanctions, courts imposing sanctions under their inherent power have a wide variety of other sanctions at their disposal. Courts have the inherent power to: vacate judgments, order dismissal of a suit, strike an answer and enter default judgment. *Chambers*, 501 U.S. at 45; *Thompson v. Housing Authority of City of Los* Angeles, 782 F.2d 829, 831 (9th Cir. 1986) (inherent power includes power to "impose sanctions including, where appropriate, default or dismissal"); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (dismissal pursuant to inherent powers); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming order striking answer and entering default judgment). But these type of sanctions are usually employed to vacate a fraudulently obtained judgment or where the litigation is ongoing. These sanctions are not a good fit for situations, such as the present one, where Plaintiffs have released their underlying claims and they do not wish to rescind that agreement. Because of that release, there are no pending claims which the Court could, for example, enter default judgment on.

III. Sanctionable Behavior

The troubling behavior by Goodyear and its counsel began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal. Without recounting the entire factual history already outlined, the following are the most egregious instances where Mr. Hancock, Mr. Musnuff, and Goodyear engaged in sanctionable behavior.

A. First Request for Production of Documents

One of the core arguments presented by Mr. Musnuff and Goodyear is that they had no further obligation to respond to Plaintiffs' First Request after they sent their objections and a small subset of responsive documents. This position is necessitated by the fact that there can be no serious dispute that the Heat Rise tests, the extended DOT

tests, the crown durability test, and the bead durability test were all responsive to the First Request. Mr. Musnuff and Goodyear have no choice but to claim the response to the First Request was appropriate. Mr. Musnuff and Goodyear also have to maintain that the First Request was withdrawn by Mr. Kurtz. Their arguments are not convincing and, in fact, it is now clear they did not adopt this position until they were faced with sanctions.

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs served their First Request shortly after the case began. (Doc. 59). That request sought "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." When responding to this request, Goodyear had two options. First, Goodyear could serve an objection to the request as a whole. Fed. R. Civ. P. 34(b)(2)(B). Second, Goodyear could serve an "objection to part of [the] request" *provided* it specified the part it was objecting to and it responded to the non-objectionable portions. Fed. R. Civ. P. 34(b)(2)(C). What Goodyear could not do, but what it did, was combine its objections with a partial response, without any indication that the response was, in fact, partial.[25] Goodyear apparently believes that its response to the First Request was sufficient to signal to Plaintiffs that other potentially responsive material was not being produced. This position finds absolutely no support in the Federal Rules, federal case law, or common sense.

The language of Rule 34 is clear. The rule states: "An objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). As clarified in the 1993 Advisory Committee notes, this language is meant to "make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions." The natural corollary of this is that any objection must identify the particular portion which is not being responded to on the basis of the objection. As stated in Moore's Federal Practice, "If the party

[25] It is especially troubling that Goodyear claimed its secretly partial response was being made "in a good faith spirit of cooperation."

objects to the production of an item or category in part rather than in its entirety, *the objection must specify the part to which the objection pertains*." Moore's Federal Practice § 34.13(2)(b) (emphasis added). And in Federal Practice and Procedure: "The responding party may object to some or all of the discovery sought. In this case it must state, with respect to each item or category to which objection is made, the reason for the objections. *One who objects to part of an item or category should specify to which the objection is directed.*" Federal Practice and Procedure § 2213 (emphasis added). The plain language of Rule 34 requires a partial response be identified as such.

This plain language analysis is supported by case law. For example, in *Rodriguez v. Simmons*, 2011 WL 1322003, at *7 (E.D. Cal.), the plaintiff had served a Rule 34 request for medical records. The defendants served objections and indicated they had already produced some responsive documents. The court observed this response was inadequate. In the court's view, the defendants had to "clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld" based on an objection. *Id.* It was especially critical if the documents existed but were being withheld that plaintiff "be made aware of this fact." *Id.* at *7 n.9. This would allow the parties to confer and attempt to resolve whether the unproduced documents should be produced prior to any court involvement.

Similarly, in *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, 2011 WL 939226, at *9 (D. Kan.), a defendant had produced documents "subject to" certain objections. The plaintiff believed this response was inappropriate because it was left "wondering whether all documents [had] been produced, or if some documents [were] still being withheld." *Id.* at *8. The court agreed the response was insufficient. The court observed the defendant could "object to part of a document request," but production "subject to" general objections was not permitted because such objections failed "to specify exactly what part of the document requests [was] being objected to." The failure to comply with Rule 34 left the plaintiff "guessing as to whether Defendant has produced all documents, or only produced some documents and withheld others." *See also GMAC*

Real Estate, LLC v. Joseph Carl Sec., Inc., 2010 WL 432318, at *1 (D. Ariz.) ("Objections must be in writing and identify the particular portions of the request subject to the objection; all other portions should be made available for inspection.").

Plain common sense also supports this reading of Rule 34. Were Goodyear correct that Rule 34 allows litigants to make undisclosed partial document productions, discovery would break down in practically every case. A litigant with *any* viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial and the opposing party would have no way of knowing the production was partial. Absent an indication of what, exactly, the responding party was objecting to, courts would have no way of assessing the propriety of the objections. Instead, courts would be flooded with motions to compel by litigants seeking to confirm that undisclosed responsive documents did not exist. And courts would then be forced to ask counsel, over and over again, "Do other documents exist?"

Accordingly, the plain language of Rule 34, case law, and common sense show Goodyear's response to the First Request was not complete or accurate. But Goodyear has other problems regarding the First Request in that the facts show its limited response was not made in good faith and Mr. Hancock, Mr. Musnuff, and Goodyear knew the responses were inadequate.

As is now clear, the Heat Rise tests, extended DOT tests, crown durability test, and bead durability test were performed on the *exact* tire at issue, were *directly* relevant to Plaintiffs' defect theory, and were performed around the *same time* other tests, which were produced, were performed. Goodyear claims that its boilerplate objections in response to the First Request were appropriate, but it is clear no one made even a casual attempt to determine what responsive documents existed. There has been no acceptable explanation for Goodyear's belief that these tests were irrelevant or why Goodyear claimed that locating these tests would have been unduly burdensome. Thus, despite

knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith.

The record also establishes that Mr. Hancock and Mr. Musnuff knew Mr. Kurtz had not withdrawn his First Request. In fact, there is indisputable evidence that Mr. Hancock and Mr. Musnuff knew the First Request remained outstanding and supplementation was needed. Mr. Hancock and Mr. Musnuff's failure to produce the High Speed tests in a timely manner was a tactical decision made in bad faith in an attempt to prolong this litigation and multiply the proceedings. Mr. Hancock and Mr. Musnuff's decision not to produce the other tests, allegedly learned of in the context of other cases, was a bad faith attempt to hide responsive documents. Goodyear is equally responsible for this behavior because despite giving documents to Mr. Musnuff, Ms. Okey retained final approval authority on discovery responses. Therefore, Ms. Okey knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior.

B. Third Request for Production of Documents

The response by Goodyear and its counsel to the Third Request is further proof of bad faith conduct. Plaintiffs' Third Request sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). In response to this request, Mr. Hancock, Mr. Musnuff, and Goodyear eventually produced the High Speed tests. Waiting until a response to the Third Request was due was a bad faith attempt by Mr. Hancock, Mr. Musnuff, and Goodyear to prolong the litigation and make Plaintiffs incur additional costs. In particular, Mr. Hancock and Mr. Musnuff engaged in bad faith behavior by proceeding with Plaintiffs' expert's deposition before disclosing the High Speed tests.

In addition, Mr. Musnuff and Goodyear engaged in a bad faith attempt to conceal documents when they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request. Mr. Musnuff and Goodyear had previously taken the position in other litigation that these tests were responsive to an almost identical

discovery request. That is, the Heat Rise tests and other concealed tests were used by Goodyear to determine the G159's suitability for use on the highway. In fact, there is correspondence reflecting Mr. Musnuff and Goodyear employees knew the Heat Rise tests and other tests were responsive to the Third Request. (PSOF Ex. 24). There is no acceptable justification for the failure to provide all responsive documents to the Third Request.

Finally, even accepting Mr. Hancock did not learn about the Heat Rise tests and other tests until the June 5, 2008 email in *Bogaert*, Mr. Hancock's failure to immediately correct his statements and the disclosures in the present case were motivated by a bad faith desire to keep the tests concealed.

C. Goodyear's 30(b)(6) Witness

In September 2007, Plaintiffs deposed Richard Olsen as Goodyear's 30(b)(6) witness. Prior to this deposition, the Court confirmed with Goodyear's counsel that Mr. Olsen would be speaking on behalf of Goodyear. (Doc. 243 at 29). During his deposition, Mr. Olsen was asked if there was "any separate testing" besides the tests Goodyear had produced. Mr. Olsen responded there were a "number of different test procedures" run during the development process but no documentation of those other tests was available. That was false.

The record is clear that Mr. Olsen knew about the Heat Rise tests as well as the crown durability test, bead durability test, and DOT endurance tests at the time of his deposition. The record is also clear that those tests still existed. Mr. Olsen made clear false representations when he stated otherwise. Because he was speaking on behalf of Goodyear, that means Goodyear made false representations. Fed. R. Civ. P. 30(b)(6) (corporation must designate person "to testify on its behalf"). Mr. Olsen had an obligation to "review all corporate documentation" that was relevant to the deposition topics and it appears he did so as the summary in his files contains references to all the concealed tests. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001). His deposition testimony, therefore, can only be explained as

consistent misrepresentations about the available testing. This easily qualifies as conduct tantamount to bad faith.[26]

D. Misleading In-Court Statements

Plaintiffs first requested Goodyear's testing data in September 2006. Goodyear, through its counsel, decided not to comply with its obligation to produce some of that testing data until June 2007. And it decided to withhold completely a wide variety of testing data. Therefore, any statement prior to June 2007 that Goodyear had produced all requested documents was false. On April 6, 2007, the Court asked whether Goodyear had "any internal documentation" that had been requested but not produced. Mr. Hancock responded that it had produced all the requested documents. (Doc. 146 at 13). That was false. On May 17, 2007, the Court asked Goodyear "are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?"[27] Mr. Hancock responded that there were, but they had only been requested "last week." That was false.[28] Mr. Hancock also stated the tests would be produced in mid-June. Given the apparent plan to never produce the Heat Rise tests, this statement was misleading at best.

After Goodyear produced the High Speed tests, it continued to make untruthful statements to the Court. For example, on September 10, 2007, Mr. Hancock stated Goodyear had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). That was

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[26] The Court recognizes that testimony by a 30(b)(6) witness may not absolutely bind "a corporate party to its designee's recollection." *See A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (finding 30(b)(6) testimony does not act as binding judicial admission). But Goodyear has not claimed Mr. Olsen simply made a mistake or was not aware of the other tests. Moreover, excusing this type of behavior based on its witness's faulty recollection would reward Goodyear for not adequately preparing that witness to discuss the very material topics identified in the deposition notice.

[27] The Heat Rise tests were conducted at 35 mph, meaning they were directly implicated by the Court's question.

[28] The tests had been requested in September 2006.

false. At a hearing on October 19, 2007, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). That was false. At that same hearing, Mr. Hancock also stated there were "no documents for [its 30(b)(6) witness] to be questioned about other than the documents that have been produced." That was false. And finally, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing on this tire. The original discovery request [was for] all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced." That was false.

Mr. Hancock now claims that he did not know these statements were false at the time they were made. For some of them, he is correct. But it should go without saying that *someone* must be responsible when an attorney makes these type of repeated false statements in Court. Mr. Hancock, Mr. Musnuff, and Goodyear seem to believe sanctions are inappropriate if there is a claim, however implausible, that the false statements can be attributed to communication breakdowns. That cannot be the case. The question is, who should be responsible?

It appears Mr. Hancock did not know of the Heat Rise tests, extended DOT test, bead durability test, and crown durability test until June 2008 when he learned of them in the context of the *Bogaert* case.[29] (PSOF Ex. 31). Therefore, the Court is sympathetic to his position that he should not be held responsible for certain statements he made after Mr. Musnuff and Goodyear knew about those tests and had made the decision not to disclose them. The problem is that Mr. Hancock did not correct the record when he subsequently learned these other tests existed. The *Haeger* case continued for approximately twenty-two months after he learned of these other tests. Accordingly, while his culpability is reduced, it is not purged.

[29] Mr. Hancock knew of the High Speed tests long before they were produced.

As for Mr. Musnuff, he claims he was unaware of the in-court representations Mr. Hancock was making. That is not true. Mr. Hancock averred he "discussed any and all court appearances and discovery disputes with [Mr. Musnuff] both before and after such events." (Doc. 980-2 at 3). The Court finds this portion of Mr. Hancock's credible. Based on accepting that testimony, Mr. Musnuff was informed that Mr. Hancock was repeatedly representing in court that no further documents existed. Mr. Musnuff knew that other documents existed but he never corrected Mr. Hancock. That failure was a bad faith attempt to suppress the documents.

And as for Goodyear, its outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests. Allowing Goodyear to escape the consequences of the statements made by its "freely selected agent[s] . . . would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent[s] and considered to have notice of all facts." *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962). Ms. Okey remained responsible for discovery responses and, ultimately, she remained responsible to keep informed regarding the conduct of this litigation and the representations Mr. Hancock was making in court.

IV. Amount and Apportionment of Sanctions

Plaintiffs will be directed to file documentation establishing the amount of attorneys' fees and costs incurred after Goodyear served its supplemental responses to Plaintiffs' First Request. Based on his relatively limited involvement, but in light of his repeated misstatements and his failure to correct the record once he learned his representations were false, Mr. Hancock will be held responsible for twenty percent of those fees and costs. Mr. Musnuff and Goodyear will be held jointly responsible for eighty percent of the fees. The Court makes this allocation decision based on its belief that Mr. Hancock is less culpable but Mr. Musnuff and Goodyear are equally culpable.

This allocation decision is, of necessity, somewhat imprecise. Goodyear and its attorneys adopted a strategy, implemented in this case to great effect, to resist all legitimate discovery, withhold *obviously* responsive documents, allow Plaintiffs and their experts to operate under erroneous facts, disclose small subsets of documents as late as possible, and otherwise attempt to turn this case based on a motor vehicle accident into an Arizona version of *Jarnydce and Jarndyce*. *Cf. United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009) (citing Charles Dickens, *Bleak House* 3 (1853)). As observed earlier, it would be impossible to point to precise causal links between all the sanctionable behavior and the expenses incurred by Plaintiffs. In a case of repeated egregious conduct such as the present, the Court must be free to fashion an appropriate remedy. The Court has done so.

Goodyear will also be required to file a copy of this Order in any G159 case initiated after the date of this Order.[30] Based on Goodyear's history of engaging in serious discovery misconduct in every G159 case brought to this Court's attention, filing this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in the past, not operated in good faith when litigating such cases. It will also serve as notice of the existence of certain tests Goodyear attempted to conceal in previous cases.

V. Spartan's Request for Sanctions

The final issue is whether to award sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear in favor of Spartan. Over the years, Spartan was involved as a co-defendant in numerous G159 cases. Spartan believes the G159 test data recently revealed by Goodyear establishes "the tire would be indefensible in any action." (Doc. 1071 at 3). In particular, Spartan points to Goodyear representations that the G159 was appropriate for motor home use despite Goodyear's knowledge that the G159 operated at too high of temperature in that setting. (Doc. 1048 at 5). Based on Goodyear's misrepresentations,

[30] Goodyear may apply to the court hearing the case to be excused from this requirement.

Spartan seeks to recover *all* the attorneys' fees and expenses it incurred as a result of G159 litigation it was involved in with Goodyear. It would be inappropriate to sanction Mr. Hancock, Mr. Musnuff, and Goodyear for actions taken in other cases. Therefore, the only issue is whether Spartan should recover any expenses incurred in the present case.

Spartan did not serve any discovery in this case. Spartan did receive copies of the discovery papers provided by Plaintiffs and Goodyear, but Spartan has not pointed to *specific* evidence establishing when and how it relied on those discovery papers in formulating its actions in this case. Absent some evidence of a causal connection between misconduct and Spartan's defense, Spartan is not entitled to an award of fees in this case. Spartan likely would have a viable case of fraud against Goodyear based on Goodyear's misrepresentations, but that claim should be litigated in as separate action where Spartan can introduce evidence regarding all the G159 litigation it was involved in over the years.

Accordingly,

IT IS ORDERED the Motion for Sanctions (Doc. 938) is **GRANTED IN PART**.

IT IS FURTHER ORDERED the Motion for Hearing (Doc. 1034) is **DENIED**.

IT IS FURTHER ORDERED no later than December 14, 2012 Plaintiffs shall file their application for attorneys' fees as required by Local Rule.

DATED this 8th day of November, 2012.

Roslyn O. Silver
Chief United States District Judge

Rusboldt, K.C.

From: azddb_responses@azd.uscourts.gov
Sent: Thursday, November 08, 2012 1:18 PM
To: azddb_nefs@azd.uscourts.gov
Subject: Activity in Case 2:05-cv-02046-ROS Haeger et al v. Goodyear Tire & Rubber Company et al Order on Motion for Sanctions

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U.S. District Court

DISTRICT OF ARIZONA

Notice of Electronic Filing

The following transaction was entered on 11/8/2012 at 1:18 PM MST and filed on 11/8/2012
Case Name: Haeger et al v. Goodyear Tire & Rubber Company et al
Case Number: 2:05-cv-02046-ROS
Filer:
WARNING: CASE CLOSED on 04/14/2010
Document Number: 1073

Docket Text:
ORDER granting in part Plaintiffs' [938] Motion for Sanctions. IT IS FURTHER ORDERED denying Defendant Goodyear's [1034] Motion for Hearing. IT IS FURTHER ORDERED no later than 12/14/2012 Plaintiffs shall file their application for attorneys' fees as required by Local Rule. Signed by Chief Judge Roslyn O Silver on 11/8/12.(CLB)

2:05-cv-02046-ROS Notice has been electronically mailed to:

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