CAUSE NO. 2008-54588

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INTERVENORS' RESPONSE TO DEFENDANT CONTINENTAL TIRE NORTH AMERICA, INC.'S, MOTION TO COMPEL PRODUCTION OF TIRE AND WHEEL

TO THE HONORABLE JUDGE OF SAID COURT:

The Defendant Continental Tire North America, Inc. ("Continental") has filed its motion to compel, seeking this court's order compelling the plaintiffs to respond to a request for production that seeks to remove from the possession of the plaintiffs the pivotal evidence in this product liability case. Specifically, this is a product liability and negligence case involving a defective P275/60R17 General Grabber AW tire made in the

24th week of 2000. The defective tire is the key piece of evidence in this case, and it is in the possession and custody of the Olvera family. Continental has asked to inspect the tire, and the Olvera family has offered the tire for inspection, but the parties have been unable to agree upon the terms of an inspection. Specifically, Continental will not agree to allow a representative of the Olvera family to be present during the inspection and testing of the tire in the family's possession and — in the alternative will not agree to videotape the inspection in lieu of having a representative of the Olvera family present (despite the fact that Continental has agreed to this in the past see Exhibit 1). Moreover, Continental will not agree to be responsible for loss or damage to the tire if it is allowed out of the Olvera family's possession, and will not agree to "state the time, place, manner, conditions, and scope of the inspection, and ... specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made." Cf. Tex. R. Civ. P. 196.7 Plaintiffs respond:

1. The defendants' request for production is controlled by Texas Rules of Civil Procedure, Rule 196 ("Requests for Production and Inspection to Parties"). That rule controls this motion to compel:

Time and place of production. [T]he responding party must produce the ... tangible things within the person's possession, custody or control at either the time and place requested or the time and place stated in the response ... and must provide the requesting party a reasonable opportunity to inspect them.... If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them....

Tex. R. Civ. P. 196.3 (emphasis added); see also Tex. R. Civ. P. 196.7 (requiring property inspection protocols to "state the time, place, manner, conditions, and scope of the inspection, and ... specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made").

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- 2. Under the rule, the plaintiffs have the right to maintain possession of the original tire and wheel during the inspection. Here, the plaintiffs have chosen to exercise that right, being careful to maintain the availability and the original condition of the evidence that is pivotal in this product liability case.
- 3. Permitting the defendants to take possession of the physical evidence in this product liability case is ceding control of the plaintiffs' ability to present their case. If the defendants were to lose the evidence, the plaintiffs would be severely hampered in presenting their case that the tire was defective if for no other reason than they could not show the defective tire to the jury.
- 4. Additionally, if the defendants are allowed to take possession of the tire and inspect outside the presence of the plaintiffs, questions about the condition of the evidence arise. When the tire is returned with an artifact (such as a minute but critical hole) that was not present when Plaintiffs' expert examined the tire, a screaming swearing match ensues between plaintiffs and defendants and their experts about whether the artifact introduced while in the possession of the defendants. And there is no practical way for the plaintiffs to protect against this occurrence.

Counsel for the Olvera family is motivated to seek these protections 5. because of counsels' past experiences in other tire cases where inspections of the tire caused damage to the tire that had a significant impact on the case. In Martha Rodriguez, et al. v. Firestone Tire & Service Centers et al., No. C-115,396 (244th Dist., Ct. Ector County Tex.), a defense expert damaged the bead of the tire dismounting it after the crash, and while the plaintiffs understood this damage to have been the result of the defense inspection, the defendants claimed it was pre-crash damage that contributed to the tire failure. This dispute became an overwhelming distraction at trial. In Kimberly Dee Hargrove et al. v. Hankook Tire America Cotp. et al., No. 42940 (118th Dist. Ct. Howard County Tex.), the plaintiffs' retained expert found no tear in the tire carcass which penetrated the tire's innerliner, and the defense's retained expert found no tear in the tire carcass which penetrated the tire's innerliner, but the third and final inspection by defendant's in-house forensic analyst found that a tear in the carcass which penetrated the innerliner. The in-house analyst claimed to have "found" this innerliner puncture which experts for both sides did not detect in their earlier inspections - by using a sharp instrument to "probe" a tear in the carcass to "see" if that tear penetrated through the innerliner. The question whether this in-house analyst found the innerliner puncture with his sharp probe or created the puncture with that probe became the issue that dominated the case from that point forward. In Sara Cruz et al. v. Michelin North America et al., No. 2007-CV-0141-A (197th Dist. Ct. Willacy County Tex.), the defense expert identified red paint marks on the detached tire tread as a paint mark transferred from the vehicle to the tire during the crash sequence, and the defense expert then used this transfer mark as

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evidence to support the defense of the case. Analysis of the photographs taken before the detached tread was shipped to the defendant confirmed that the red paint mark was not on the tread at that time, and analysis of the red paint on the tire as compared with the paint on the red truck confirmed that the two paints were chromatically similar but chemically different. This issue became a significant and time consuming distraction at trial. In *Bertha Orozco et al. v. Michelin North America et al.*, No. 06-02-0007-CYL (81st Dist. Ct. La Salle County Tex.), a tire was lost in shipping on its return to the plaintiffs' counsel's office. These are just a few examples of the difficulties that can arise from a defense inspection of a tire that is conducted without proper safeguards of the evidence, and counsel for the Olvera family has personal experience with each of these cases as plaintiffs' counsel. In light of these experiences, the Olvera family must insist on enforcing their right to protect the tire at issue by the full measure of safeguards allowed under Texas law or by some alternative agreement as they have proposed.

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6. The American Law of Products Liability 3d Treatise confirms that Texas law imposing restrictions on the inspection of evidence in the other party's possession (including the restriction that the party in possession of the evidence must be allowed to retain custody during the inspection) is a mainstream proposition of law:

In permitting the nondestructive inspection and testing of products, the courts have typically imposed a number of conditions on the inspection and testing, normally to protect the rights of the party who will be required to produce the product for discovery. Accordingly, one of the most common conditions imposed is that the party with custody and control of the product be given the opportunity to be present during the inspection or testing of the product by the opposing party or to have his or her expert, attorney, or representative present during the inspection or testing. The examining party may also be required, as a condition of any testing, to give

reasonable notice of the time and place of the testing to the opposing party and to deliver to the opposing party, upon its request, copies of the reports of all tests and analyses of the product made by or on behalf of the examining party.

In other products liability actions, the courts, in permitting the inspection or testing of a product, have required, among other things, that -

- the examination or testing not adversely affect the product.
- the expert and representative of the party required to produce the product have the right to photograph the product before and after each stage of any test conducted.
- the inspection and testing be completed within a specified time.
- the defendant assume the plaintiffs reasonable expenses of having a qualified representative present at the defendant's inspection of the product at the defendant's facility and that the expenses be considered a taxable disbursement by the defendant if it ultimately succeeded in the action.

Am. L. Prod. Liab. 3d § 53:107 (Updated 2010)

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Conclusion and Prayer

7. The Olvera family asks this Court to order Continental to comport with the rules regarding the inspection of original evidence set forth in Tex. R. Civ. P. 196.3 in its inspection of the tire at issue; specifically, the family asks (1) to retain custody of the tire during Continental's inspection of the tire at issue, (2) to require Continental to specify in advance exactly what inspection, examination, or testing it will perform as well as the exact methodology for such tasks, including specifying the time (to be mutually agreed), place (to be mutually agreed), and the person who is to perform each task (to be designated at Continental's election), and (3) to limit the inspection to non-destructive means (to be mutually agreed that the specific means of inspection are, in fact, non-destructive). In the alternative, the Olvera family prays that

the Court order Continental to conduct its inspection of the tire according to the previously agreed inspection protocol which has been implemented in prior cases against this same defendant and which has been proposed by the Olvera family in this case and which is attached as Exhibit 1.

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Respectfully submitted,

THE EDWARDS LAW FIRM

By:

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ATTORNEYS FOR INTERVENORS

CERTIFICATE OF SERVICE

The undersigned attorney, as the attorney of record for the Intervenor, certifies that a true and correct copy of the foregoing document has been forwarded the locument of record, as listed below, by the method of service indicated, on this day of day of 2010.

John Blaise Gsanger

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VIA FAX:

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VERIFICATION

STATE OF TEXAS §
COUNTY OF NUECES §

BEFORE ME, the undersigned authority, on this day personally appeared John Blaise Gsanger, one of the attorneys for Intervenors, known to me to be the person whose name is subscribed to the foregoing instrument entitled Intervenors' Response to Continental Tire North America, Inc., Motion to Compel Production of Tire and Wheel, and having been by me first duly sworn, the said John B. Gsanger, did state to me on his oath that he is one of the attorneys for the Intervenors and is duly qualified and authorized to make this affidavit, and that the statements in Intervenors' Response to Continental Tire North America, Inc., Motion to Compel Production of Tire and Wheel are within his personal knowledge and are true and correct.

Further affiant sayeth not.

John Blaise

_, 2010,

DAYNA D. DIERINGER
Notary Public

1y Comm. Exp. 12-19-2013

Notary Public, State of Texas