STATE OF SOUTH CAROLINA }		IN THE COURT OF COMMON PLEAS
}		
COUNTY OF HAMPTON }		
ALFRED MIDDLETON, as Personal	*	
Representative of the Estate of	*	
Maria Hernandez-Ontiveros,	*	
WILFREDO LEON, as Personal	*	
Representative of the	*	
Estate of Jose Ontiveros, and	*	
CHARLES L. LAFFITTE,	*	
as Guardian Ad Litem of Minors	*	
Janie Ontiveros and	*	
Francisca Ontiveros,	*	
	*	
Plaintiffs,	*	
	*	
vs.	*	CASE NO. 99-CP-25-214
	*	
COOPER TIRE & RUBBER COMPANY, and	*	
AUDON ONTIVEROS,	*	
	*	
Defendants.	*	

PLAINTIFFS' SECOND CONSOLIDATED MOTION AND SUPPORTING MEMORANDUM FOR SANCTIONS AGAINST DEFENDANT COOPER TIRE & RUBBER CO.

TO: Christopher J. Daniels, Esq., and Nelson Mullins Riley & Scarborough, LLP, and W. Wray Eckl, Esq., and Drew, Eckl & Farnham, Attorneys for the Defendant Cooper Tire & Rubber Company, and the Defendant, Cooper Tire & Rubber Company:

Plaintiffs hereby move, pursuant to S.C. R. Civ. Pro. 37(b)(2), for an order sanctioning defendant Cooper Tire & Rubber Company ("Cooper Tire") for its willful failure to comply with the Court's orders relating to discovery and for its continued obfuscation and misrepresentations to the Court and counsel. This motion also requests that, prior to the entry of such order, the

Court allow plaintiffs to conduct the further inquiry described below in order to determine the full extent of the wrongdoing, including the nature of the evidence hidden in violation of the orders of this Court.

The recent, egregious example of concealment of evidence at the Findlay adjustment center is not the first time defendant Cooper Tire has engaged in sanctionable conduct. Since the inception of this case, Cooper Tire has sought to obfuscate the truth, to withhold documents and material evidence (which the Court ordered produced), and to unilaterally rewrite the orders of this Court. This pattern of discovery abuse culminated in plaintiffs' recent discovery at the Findlay adjustment center that Cooper Tire has intentionally withheld critical, material evidence in this case relating to other tires suffering tread and belt separations that were returned to Cooper Tire and that plaintiffs were supposed to be allowed to inspect under this Court's prior orders. Because of this disturbingly flagrant misconduct and the fact this is not the first violation, plaintiffs believe the Court should issue severe sanctions commensurate with the level of Cooper Tire's behavior in this case—but only after the full extent of that concealment and misconduct has been brought to light.

At this point and as shown below, plaintiffs believe they have uncovered only a small portion of the total evidence Cooper Tire has concealed in this case. Accordingly, plaintiffs respectfully request that the Court enter an order allowing plaintiffs to conduct a thorough investigation into the extent of this misconduct by deposing employees at Cooper Tire in charge of this evidence and searching Cooper Tire's available databases to discover this withheld evidence. As part of this sanctions order, plaintiffs also request that this Court order Cooper Tire to produce certain categories of documents and things enumerated below that Cooper Tire has

intentionally withheld from production in violation of this Court's orders. At the conclusion of plaintiffs' investigation, plaintiffs request the opportunity to present at another hearing the full scope of Cooper Tire's misconduct so that the Court can determine the appropriate remedy for Cooper Tire's willful disobedience of the orders and rules of this Court.

I. CASE FACTS RELEVANT TO THIS MOTION

On May 21, 1998, Maria Ontiveros and Jose Ontiveros were killed, and minor children Janie and Francisca Ontiveros were seriously injured, after a tire separation occurred on the van in which they were traveling and the vehicle went out of control and crashed. Cooper Tire designed, manufactured, marketed and sold the failed tire. The tire failure, and the resulting injuries and deaths, were proximately caused by Cooper Tire's defective design and/or manufacture of the subject tire.

On December 17, 1999, plaintiff Leon filed her Second Requests for Production. (Exhibit 1). These demanded that Cooper Tire "maintain possession" of and "allow plaintiffs to inspect and photograph" tires "returned to Cooper Tire by a consumer, dealer, wholesaler, distributor or agent of Cooper Tire" and which demonstrate a "separation" condition. (See id.) Defendant Cooper Tire's responses to plaintiff Leon's Requests for Production were filed on February 17, 2000. (Exhibit 2). In these responses, Cooper Tire objected to each of plaintiffs' requests and refused to preserve the critical evidence sought by the plaintiffs. Because of Cooper Tire's total stonewalling in the discovery process, plaintiffs had already filed their first motion to compel on December 13, 1999, to address Cooper Tire's failure to answer the first requests and interrogatories. On October 13, 2000, plaintiffs filed their second motion to compel to address the refusal to preserve and allow inspection of the tires returned for separation failures. After an

exhaustive hearing, the Court granted both of plaintiffs' motions to compel in its detailed orders filed on December 15, 2000. (Exhibits 3 and 4). These orders required Cooper Tire to surrender critical documents, to preserve and to allow the inspection of tires returned for belt or tread separations at its four regional adjustment centers, and to allow access to its Albany, Georgia, manufacturing plant.

Before and since the Court's orders filed on December 15, 2000, defendant Cooper Tire has engaged in a deliberate and willful pattern of discovery abuse, including clear misrepresentations to the Court and opposing counsel and the intentional withholding of material evidence that was responsive to plaintiffs' discovery requests and that was clearly compelled by the orders of this Court.

II. LEGAL BASIS FOR FILING MOTION

S.C.R.C.P. Rule 37 (b)(2) provides for sanctions when a party fails to obey an order of the court to provide or permit discovery. "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." Karpi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (S.C. Ct. App. 1997). "Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 122, 123, 512 S.E.2d 510, 524 (S.C. Ct. App. 1998). "If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." Griffin Grading and Clearing, Inc. v. Tire Service Equip. Manufacturing Co., Inc., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (S.C. Ct. App. 1999) (emphasis added) (holding that the trial court did not abuse its

discretion in striking the defendant's answer when the defendant engaged in a pattern of discovery non-compliance, which was evidence of bad faith and willful and intentional disobedience of the court's orders).

Before a default or dismissal is ordered, "the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." Karpi, 327 S.C. at 543, 489 S.E.2d at 681. "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Downy v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 319 (S.C. Ct. App. 1987). "Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery." Samples v. Mitchell, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (S.C. Ct. App. 1997).

Even up to this point, with only the limited information uncovered by plaintiffs, it is clear Cooper Tire's conduct so far clearly demonstrates "willful disobedience," "bad faith," and "gross indifference" to plaintiffs' rights. But plaintiffs have only begun to uncover the full story. As a result, plaintiffs request that this Court enter an order requiring Cooper Tire to provide plaintiffs with information sufficient for them to determine the full scope of Cooper Tire's misconduct.

As aptly said by the South Carolina Supreme Court:

> If there was ever a case where striking a party's pleading was an appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery.

Griffin Grading and Clearing, Inc., 344 S. C. at 199, 511 S.E.2d at 719. Plaintiffs submit that, based upon Cooper Tire's egregious conduct, it will not stop until the Court brings an end to it in unmistakable terms.

A. EARLY DISCOVERY ABUSES

Defendant Cooper Tire's behavior in discovery reveals a pattern of willful violations of Court orders and intentional and prejudicial delays of the discovery process. The timeline of events discussed in detail below shows that defendant Cooper Tire does not believe it is required to follow the orders of this Court or the discovery rules provided in the South Carolina Rules of Civil Procedure.

Plaintiffs served interrogatories and requests for production on Cooper Tire with the initial Complaint for Damages on June 29, 1999. Utilizing the entirety of a 30-day extension granted by plaintiffs as a professional courtesy, Cooper Tire served "responses" to both sets of discovery on September 13, 1999, which, in fact, were not "responses" at all. Cooper Tire objected to every single request. Cooper Tire's "responses" failed to provide any substantive information about its tires or the processes used in designing, manufacturing or evaluating them. In fact, Cooper Tire did not produce a single document to plaintiffs -- not one, internal or otherwise -- despite having some 75 days to gather responsive documents. Because of Cooper Tire's intransigence, plaintiffs were forced to file their first motion to compel on December 13, 1999. Even by the time of hearing on that motion on November 1, 2000 (some 17 months after the discovery was filed), Cooper Tire still had not produced a single document, not one piece of paper, in response to plaintiffs' requests. That was, and is, unheard of in the collective 60 years of experience represented among plaintiffs' counsel in this case. (Exhibit 5 at 20-21, 29).

Then, and even though this Court granted plaintiffs' two motions to compel and Cooper Tire was ordered to produce responsive documents and to preserve, and allow inspection of, tires returned for separations, Cooper Tire's discovery abuse did not end. In fact, it got worse. At

every opportunity, Cooper Tire has tried to unilaterally rewrite this Court's orders and arrogate unto itself the right to do whatever it wants to irrespective of this Court's orders.[1]

B. MISREPRESENTATIONS ABOUT THE NHTSA INVESTIGATION AND COOPER TIRES'S WITHHOLDING ALL DOCUMENTS RELATED THERETO

Cooper Tire made misrepresentations to the Court in its briefs and at the hearing to oppose the entry of any order against it. One of the most egregious of these was when Cooper Tire denied to the Court that it was involved in a NHTSA investigation. Cooper Tire affirmatively denied the existence of a NHTSA investigation in its Response to Plaintiffs' Second Motion to Compel. (See Exhibit 6 at 1-2). Following the hearing on that motion, the Court ruled against Cooper Tire and explicitly required the production to plaintiffs of documents Cooper Tire had exchanged with NHTSA or documents Cooper Tire had in its possession relating to any NHTSA investigation. (See Exhibit 3 at section B.5). Then in violation of that order, Cooper Tire unilaterally determined to withhold such documents from production and then purported to list them on a "privilege log."

[1] The first violation of the Court's orders, after the motion to compel was granted, occurred even before the documents were produced. Cooper Tire insisted on obliterating the legibility of the documents by applying a giant "confidential" stamp across the entirety of the document, notwithstanding that this had been expressly prohibited by the protective order already entered by the Court that provided "Cooper Tire shall apply any stamp of confidentiality to the documents to be produced so as not to obscure any information contained on said documents, preserving the legibility of all such documents in their entirety." (Exhibit 7 at 3). This required an emergency telephone hearing with the Court where the Court re-ordered Cooper Tire to comply with the directive in the protective order as follows: "any stamp of confidentiality which Cooper Tire may use on documents to be produced shall be placed in a manner which will not cover or have contact with any writing, print, photograph, graphics, chart, figures or any other information contained on said documents." (Exhibit 8).

But it gets worse: the alleged "privilege log" was based (and Cooper Tire withheld the documents the Court ordered produced) upon an alleged "privilege" incident to an ongoing NHTSA investigation! In Cooper Tire's own duplicitous words:

> The NHTSA material is compiled data gathered and assembled specifically for Cooper Tire & Rubber Company to defend itself regarding any potential legal issues with NHTSA and related to legal advice to the company on all issues which can arise in litigation related to these issues. These NHTSA documents contain information, opinions, contentions, etc. regarding other cases, the tires involved, on pending cases as well as closed files.

(See Exhibit 9).

That represents at least four levels of misconduct. The obvious first level of misconduct is telling the Court there is no NHTSA investigation (and, implicitly, no NHTSA investigation documents) to avoid the granting of the motion to compel, then upon losing, continuing to hide the documents by concocting a bogus "privilege" that they were compiled as a result of a NHTSA investigation!

Second, Cooper Tire had no right to withhold documents after the Court compelled production of these very documents with such a belated "privilege" claim. The Court's order granting the motion to compel (Exhibit 3 at section B.5) explicitly applied to information exchanged with "regulatory entities" and compelled production responding to requests for "documents submitted by Cooper Tire (or generated in connection with the submission of documents by Cooper Tire) to any agency, organ, or official of the United States government" (Middleton 1st RPD 25, Exhibit 10) and "any documents…which comment on, reflect, or contain information about …any type of government investigation…concerning tires manufactured by Cooper Tire" (Middleton 1st RPD 24, Exhibit 10). Manifestly, after entry of such an order, it is outrageous for a litigant to unilaterally refuse to comply with the order and refuse to produce the

documents on the very ground that the documents are exactly what this Court ordered produced. The fact that Cooper Tire falsely denied the existence of the investigation it finally admitted only makes matters worse.

Third, Cooper Tire waived whatever "privilege"—real or made up—by failing to timely raise, file a log contemporaneous with its initial response, and get a ruling upon such claims.

> A party seeking to assert the privilege must make a clear showing that it applies. Failure to do so is not excused because the document is later shown to be one which would have been privileged if a timely showing had been made .... It is not enough that a document would have been privileged if an adequate and timely showing had been made. The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.

Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir. 1984) (emphasis added); see also Eureka Financial Corp. v. Hartford Acc. & Indem. Co., 136 F.R.D. 179, 182 (E.D. Cal. 1991) (holding that when a privilege is asserted but no evidence is provided, the privilege is deemed waived).

Fourth, there is no "NHTSA privilege" as plaintiffs' pending motion addressed to this issue proves. (Exhibit 11). Cooper Tire withheld documents the Court ordered produced by concocting a totally bogus "privilege." Id.

C. THE ALBANY PLANT AND ADJUSTMENT CENTER INSPECTION

In the Court's December 15, 2000 order, the Court granted plaintiffs' second motion to compel and clearly articulated its reasons for allowing plaintiffs access to the Albany facility to inspect the plant and the adjustment center. The deadline for the plant and adjustment center inspections was extended to March 2, 2001 by agreement of the parties. On January 16, 2001, plaintiffs wrote defendant Cooper Tire's counsel for dates for the plant inspection. (Exhibit 12). In response, on January 22, 2001, counsel for defendant Cooper Tire wrote plaintiffs' counsel

obviously trying to delay the inspection by suggesting that plaintiffs postpone the plant inspection until the documents had been reviewed so that plaintiffs would be agreeable to a limited inspection of the plant subject to Cooper Tire's suggested protocol (which violated the Court's order and which the Court had rejected in entering its order). (Exhibit 13). On January 24, 2001, only two days later, plaintiffs' counsel again wrote asking for a date to inspect the Albany facility pursuant to the terms of the Court's order. (Exhibit 14). Cooper Tire never provided any date within the time frame set by this Court's order.

Then, out of the blue, plaintiffs received a March 13, 2001, letter from Cooper Tire's counsel falsely claiming they had not "heard from plaintiffs" in regard to scheduling the plant inspection! (Exhibit 15). The letter then conveniently indicated that the "common green" tire at issue in this case was not currently scheduled for future production on the current schedule, thus indefinitely delaying any plant inspection. In response, plaintiffs' counsel wrote to counsel for Cooper Tire on March 14, 2001 reminding them about the repeated prior requests from plaintiffs to schedule the plant inspection and demanding to know when the tire went off the production schedule. (Exhibit 16). No explanation was forthcoming.

On April 19, 2001, plaintiffs filed a motion for sanctions based, in part, on Cooper Tire's failure to comply with the Court's order compelling the inspection of the Albany, Georgia facility. Low and behold, on May 2, 2001, a mere 13 days after plaintiffs' sanctions motion addressing the blocking of the plant inspection was filed, defendant Cooper Tire wrote plaintiffs that the "common green" tire (that it had previously stated would not be on the production schedule) was, after all, now scheduled for production and would be in production for the next month. (Exhibit 17).

After a motion to compel has been granted ordering a plant inspection within a specified time, it is abusive for a defendant (1) not to permit it within the specified time despite repeated requests, (2) to send a letter falsely claiming the plaintiffs hadn't asked for the inspection as an obvious attempt to excuse the violation of the Court order, (3) to represent that the tire wasn't currently scheduled for production so as to indefinitely delay the inspection the Court ordered, (4) to leave plaintiffs with no choice but to file yet another motion for sanctions to force the defendant to do what the Court ordered, and (5) then, only after the motion is filed, to allow the inspection the Court ordered months earlier to go forward, while revealing facts creating a strong suspicion the prior representations about the production schedule were not even true.[2]

D. MISREPRESENTATIONS RELATED TO STORAGE OF ADJUSTED TIRES

Another misrepresentation to the Court at the hearing on the second motion to compel concerned consequences incident to the storage of tires. In urging the Court not to order the retention and inspection of tires returned for separations, Cooper Tire affirmatively attempted to mislead the Court about circumstances surrounding the storage of tires. In truth, Cooper Tire will stop at nothing to attempt to avoid a Court order requiring production and preservation of evidence.

In its Opposition to Plaintiffs' October 13, 2000, (Second) Motion to Compel, Cooper Tire made this representation: "Georgia law prohibits the storage of over 100 scrap tires. . . .

[2] When plaintiffs finally got to the Albany plant, the visit was initially punctuated by Cooper Tire's violation of the inspection order by barring plaintiffs and their consultant from the plant because plaintiffs had a camera for video photography—notwithstanding that the Court's order allowed "photography." This necessitated another emergency telephone conference with the Court in which the Court re-ordered Cooper Tire to allow plaintiffs to "photograph" the plant and processes, including video photography, and explained what any grade schooler would already

Cooper's investigation suggests that this request may run afoul of regulations in other states where Cooper has inspection facilities, as well." (Exhibit 6 at 12-13). The same story was repeated at the hearing. (Exhibit 5 at 89).

The truth was revealed when plaintiffs toured the adjustment centers at the Albany, Georgia and Findlay, Ohio, plants. In Albany, Cooper Tire presented a total of two tires it claimed were stored pursuant to the Court's order, while the room containing those two tires also contained hundreds to thousands of other stored tires. At Findlay, Cooper Tire presented 60 tires to plaintiffs that it claimed were retained pursuant to Court order, while thousands of other tires were also stored there. The representation made orally and in writing to this Court that retaining tires required by Court order was burdensome and would violate various state statutes is thus rendered false--and patently absurd.

E. THE DELETION (WITHHOLDING) OF PARTS OF DOCUMENTS ORDERED PRODUCED

Cooper Tire has made photocopies of original documents so as to delete portions of documents the Court ordered produced. (See Exhibit 18 for a list of documents that contain deleted information). Cooper Tire euphemistically refers to the process in which it unilaterally deletes portions of responsive documents as "redaction." First, the order of the Court did not provide for deletion (or "redaction") of any portion of any document ordered produced. If a "document" falls within the scope of discovery, the entire "document" must be produced. A defendant has no right (before a court order and certainly not after an order compelling their production) to go around deleting portions of documents where the defendant has "decided" certain portions are irrelevant or outside the scope of discovery. In plaintiffs' counsel's

---

know—that "photography" includes video photography too.

experience, the only time any portion of a document is deleted is when the deletion is necessary to preserve an attorney client privilege and a log with the deletion is immediately filed with the court so the privilege can be tested. It is unheard of, especially after a court order, for a defendant to cut and paste "documents" ordered produced by the court in order to remove what the defendant has decided is not within the scope of discovery or not "relevant." Yet that is exactly what Cooper Tire has done.

The reasons prohibiting this practice should be obvious. First, deleting portions of documents ordered produced violates the Court's order on a motion to compel. The Court compelled production of "documents" (Exhibit 3 at 3, 5) and the requests, which the Court compelled, required production of "documents." Neither the requests nor the order compelled "parts" of documents. Neither the requests nor the order allowed the defendant unilaterally to delete "parts" of responsive "documents." The second practical reason that the practice is forbidden is that the plaintiffs have no ability to check what has been deleted to know whether or not it is relevant to what remains, or necessary to allow the document to be fully understood. Third, redacting documents ordered produced by the Court affects the understandability, readability and context of the document. Neither this nor any other litigant has the right to "rule" that what it removes from documents ordered produced by the Court is either "outside the scope of discovery," irrelevant, or unnecessary to a full understanding of the document.

For example, in defendant Cooper Tire's Supplemental Response to Plaintiff Middleton's First Requests for Production of Documents, defendant Cooper Tire indicated in its introduction that it would "redact" information "having to do with tires not 'common green' (for example, tolerances pertaining to truck tires, etc.)" outside the Court's definition of "common green" tires.

Cooper Tire, however, has gone well beyond its stated "redaction" policy and has "redacted" countless documents in a manner purposefully designed to make it more difficult for plaintiffs to identify what information has been improperly withheld and to understand the context of the document

As shown in several examples provided in Exhibit 19, the context of Cooper Tire's deletions makes it unlikely that these deletions are limited to information relating to light trucks. Furthermore, defendant Cooper Tire has made its deletions in fine print and hidden these deletions amongst other text in a manner that makes it difficult to notice, especially amongst thousands of documents.

F. DOCUMENTS STORED ON THE COMPUTER SYSTEM FOR MANAGING INFORMATION RELATING TO ADJUSTED TIRES

Cooper Tire has intentionally withheld, in violation of this Court's order, documents that discuss the specifics of tires returned for separation failures and that are stored on Cooper Tire's computer system. Middleton RPD 17, which the Court compelled (Exhibit 3 at Section B.1) as to any "common green" tire, requested:

> Any documents or electronic records contained on a computer (on an ASCII disk) for each tire …since 1990, which relates to the return by, or for which a refund, credit, or other compensation was sought by, any customer, user, dealer, wholesaler or distributor, or other person…

(Exhibit 10).

In response to that and other requests for documents on computer, Cooper Tire produced only four pages containing summary information relating to the total number of returned tires versus production figures and how those total adjustments were broken down between the various defects. (See Exhibit 20). Further, on June 4, 2001, after plaintiffs had complained to

Cooper Tire that sufficient computerized adjustment data had not been produced, Cooper Tire also wrote plaintiffs and represented that these four pages were all the documents responsive to the request. (Exhibit 21).

Not only did Cooper Tire lead plaintiffs to believe that these four pages were all the responsive data, but also Cooper Tire engaged in a ruse with plaintiffs designed to make them believe that the only way to obtain the individual information at Cooper Tire's disposal about common green tires returned by dealers for separation failures was for plaintiffs to pay somewhere between $272,000 to $340,000 to copy the 800,000 to 1,000,000 pages at a warehouse in Ohio. (Exhibit 22). When plaintiffs' counsel suggested there must be an easier way than to copy every form in the warehouse (Exhibit 23), Cooper Tire responded that the difficulty was that the information came in on forms from the dealer and multiple tires were covered on the same form, so that one form might have truck tires and common green tires on the same form. (Exhibit 24). As shown on a copy of the form produced in a recent deposition (Exhibit 25), for each tire returned by a dealer (and as many as 15 such tires can be described on one form), the form contains a line for each tire containing the following information: size and type, D.O.T./serial number, condition code, tread depth, replacement price, date adjusted, and name and address of consumer.

The discussion of what is on the form is true—as far as it goes. What Cooper Tire did not reveal to plaintiffs (but what plaintiffs' investigation has revealed) was that Cooper Tire doesn't need to copy a million pages to produce the requested information for each common green tire returned for a separation problem. Cooper Tire doesn't need to search through hundreds of boxes in a warehouse to find the information plaintiffs requested and the Court

compelled. In fact, Cooper Tire has the information only keystrokes away and safely stored in its computer system.

Furthermore, whenever a Cooper Tire technician processes a returned tire for adjustment, the technician enters into Cooper Tire's computer system the line of information for that specific adjusted tire (by serial or DOT number) off the multi-line form. (See Photograph of computer station in the Findlay adjustment center attached as Exhibit 26). That allows Cooper Tire to recall and independently sort and reproduce the information entered off the multi-line form as it relates to one tire, every common green tire, or exactly what plaintiffs asked for and the Court compelled—the information relating to each common green tire returned for a separation problem.

Cooper Tire's concealment of this capability, the existence of these documents on computer, and these documents themselves is even more egregious in light of Middleton Interrogatories No. 17-18, responses to which the Court compelled (Exhibit 3 at Section B.1), requesting that Cooper Tire identify any computer records that contained this information: "for each tire…that was returned by, or for which a refund, credit or other compensation was sought by any customer, user, dealer, wholesaler, or other person, please identify each document relating to such, including specifically any computerized records that compile, summarize or otherwise manage this information." (Exhibit 27) (emphasis added).

Cooper Tire could have produced a printout (or diskette) containing the information requested in Middleton RPD 17 (Exhibit 10), which the Court compelled. Instead, it withheld that information in violation of this Court's order and, worse yet, affirmatively misled plaintiffs

into believing they could obtain the equivalent information only by paying astronomical copying costs.

G. NHTSA COMPLAINTS

Cooper Tire has also withheld consumer complaints to NHTSA, forwarded to Cooper Tire, regarding the safety of its tires. These were ordered to be produced in section B.6 of the Court's order on the motion to compel for "common green" tires and for any other radial passenger tires where separation failures were alleged. (See Exhibit 3 at 2-3; see also Exhibit 28). Middleton Interrogatory 5, compelled by the Court, also required Cooper Tire to identify these incidents:

> For any complaint, letter, claim, notice, or other report or document since 1990 known to Cooper Tire… state for each a detailed description of the incident, including the date and location of the incident, the date you first became aware of the incident, the manner in which you first became aware of the incident and the identity and address of each person who was involved in the incident.

(Exhibit 27).

In responding to that interrogatory, Cooper did not produce these documents or identify these incidents. Middleton RPDs 14 and 15 (also compelled by the Court in Exhibit 3 at section B.6) demanded copies of these complaints as well. (Exhibit 10). Even though Cooper Tire had notice of these complaints from NHTSA because they are provided to the manufacturer by NHTSA, Cooper Tire has violated this Court's order by its failure to provide information about these complaints to plaintiffs in discovery.

H. THE INSPECTION OF THE SUBJECT TIRE

Defendant Cooper Tire's misconduct concerning the inspection of the subject tire (and in violation of this Court's order Cooper Tire itself obtained governing the same) defies the

imagination. At every turn, defendant Cooper Tire has sought to unilaterally rewrite the orders of this Court relating to the inspection of this tire, including the terms it specifically requested! Rather than abide by the terms of the tire inspection contained within the Court's order, defendant Cooper Tire has continually attempted to force plaintiffs to agree to demands outside the scope of the order.

In response to Cooper Tire's motion to force plaintiffs to bring the tire to the Findlay, Ohio plant for inspection, the Court ruled in an order filed on December 15, 2000 that plaintiffs had to bring the tire to the Findlay plant, that Cooper Tire could examine the subject tire at its Findlay, Ohio plant not to exceed 10 hours, but that this examination must take place in the presence of plaintiffs' representatives. (Exhibit 29). The Court further ordered that this examination should be completed within 45 days from the date the order was entered, which, by agreement of counsel, would have expired March 2, 2001.

On January 16, 2001 plaintiffs requested defendant Cooper Tire provide dates for their inspection of the tire at the Findlay plant. (See Exhibit 12). In response, on January 22, 2001, defendant Cooper Tire wrote to plaintiffs' counsel attempting to unilaterally move the inspection of the subject tire to Standard Testing Laboratories near Akron, Ohio. This surprising suggestion came after Cooper Tire had obtained the Court's order by representing to the Court the Findlay plant had the "only" facilities to do proper testing. Cooper Tire also demanded 70 hours to conduct its tests when the Court's order allowed 10 hours. (Exhibit 13). In response, plaintiffs' counsel informed defendant Cooper Tire that they would have the subject tire available at the Findlay plant for 10 hours of examination in compliance with the Court's order. (Exhibit 14). Defendants made no other request to inspect the subject tire until April 4, 2001, when defendant

Cooper Tire's counsel again tried to move the inspection of the tire away from the plant and to Akron, Ohio, in clear contravention of this Court's order. (Exhibit 30).

On July 27, 2001, defendant Cooper Tire again tried to move the tire inspection away from the plant in violation of the order Cooper Tire itself obtained by claiming it had insufficient equipment to examine the tire at its Findlay plant and trying to make the plaintiffs keep the tire in Ohio for an extra day for additional testing in Akron and Cleveland. (Exhibit 31).

Most significant to this motion, however, these belated representations to plaintiffs (that the Findlay plant had insufficient equipment and was ill-suited for inspecting the tire) were false and directly contradicted the representations Cooper Tire made to the Court when it was trying to convince the Court to permit it to inspect the tire at the Findlay plant without plaintiffs' counsel present. At that time, Cooper Tire represented to the Court in its motion:

- "Cooper Tire's testing facility in Findlay, Ohio, is the most suitable place for inspection of this product."
- "Cooper Tire's Testing Facility in Findlay, Ohio, is the proper place for inspection."
- "Cooper Tire has equipment in Findlay, Ohio, which it requires to examine these artifacts."

(Exhibit 32 at 4-5) (emphasis added).

Furthermore, these belated assertions were also in direct contradiction to the sworn Affidavit filed in this case on September 8, 2000, and given by Bruce Currie, who is allegedly Cooper Tire's Manager, Technical Standards. Mr. Currie provided the following sworn testimony:

- "In order to perform a complete forensic inspection and analysis of a tire and wheel, for the purpose of forming an expert opinion as to the mode of failure, the

following equipment may be needed and must be available: (a) high intensity movable lighting; (b) a tire spreader; (c) industrial type radiography equipment; (d) a scanning electron microscope; (e) an energy dispersive x-ray analyzer; (f) an infrared spectrometer; (g) gas chromatography with mass selective detector particulates; (h) a high quality camera capable of magnification; and (i) a disc tape. Additionally, proper inspection of the subject tire's valve stem requires a special tool to measure retention properties, as well as an air compressor. All the above referenced equipment is available at Cooper Tire's Findlay, Ohio facility."

- "If Cooper Tire is permitted to do the inspection of the subject tire and wheel at its facility in Findlay, Ohio, a complete forensic inspection and analysis of the subject tire and wheel can be conducted efficiently, properly and non-destructively."

(Exhibit 33) (emphasis added).

As the last straw, Cooper Tire finally requested plaintiffs' counsel to bring the tire to a hotel room in Findlay, Ohio! (Exhibit 34). As part of that effort, Cooper Tire represented that all of its equipment could be moved easily from the plant to a hotel room for the tire inspection. (Id.) Plaintiffs' counsel refused to agree to this and insisted the inspection take place at the Findlay plant. Furthermore, when the inspection was done, defendant Cooper Tire did not use any of the "specialized equipment" it swore to the Court it desperately needed for a proper tire inspection. Instead, defendant Cooper Tire merely moved a portable tire spreader to the adjustment center and allowed its five consultants to examine the tire with the portable tire spreader and their own portable equipment. All of these activities could have been easily conducted in plaintiffs' counsel's offices in Atlanta, Georgia, where plaintiffs had been offering the tire to defendants (with defendants refusing) since the inception of this lawsuit--all without requiring the trouble and expense of transporting the tire—and plaintiffs' counsel—to Findlay, Ohio. The foregoing shows beyond a doubt: Cooper Tire cannot even abide by the terms of the orders it requests and cannot be trusted in the representations it makes to attain them!

III. THE INSPECTION OF THE FINDLAY ADJUSTMENT CENTER

A. COOPER TIRE CONCEALED RETURNED, SEPARATED TIRES IN VIOLATION OF COURT ORDER

Remarkably, the most condemning conduct of Cooper Tire has yet to be discussed. Defendant Cooper Tire intentionally withheld evidence the Court ordered produced in its order of December 15, 2000, when Cooper Tire failed to preserve and present for plaintiffs' inspection common green tires that customers had returned for tread and belt separations—the identical defect alleged by the plaintiffs in this case.

When plaintiffs' counsel arrived at the Findlay, Ohio adjustment center on August 10, 2001 for their Court-ordered inspection of the tires Cooper Tire was required to preserve at this adjustment center, they walked into a room in the front part of a large warehouse. (See Affidavit from Robert C. Ochs, attached as Exhibit 35, for testimony relating to the events at the inspection of the Findlay adjustment center). The back part of the adjustment center was separated from the front part of the warehouse by a large steel door. As plaintiffs entered the adjustment center, Cooper Tire employees quickly closed and locked the door separating the front and back parts of the warehouse. In the front part of the adjustment center, defendant Cooper Tire had stacked approximately 60 tires it identified as those for plaintiffs' inspection. (See Photograph attached as Exhibit 36).

As plaintiffs' consultant was examining these tires, plaintiffs' counsel, including Messrs. Parker, McCutchen, and DelCampo, and Ms. Martin, requested access to the other part of the adjustment center (counsel had observed tires through the door before it had been hurriedly closed by Cooper Tire employees). Defendants' counsel delayed access to this other room for at least an hour, claiming they were trying to get "permission" for plaintiffs' counsel to enter this

area. Defendants' counsel then claimed the door was "locked" and they did not have anyone there to access the area. When no key was forthcoming, plaintiffs' counsel offered to access the back part of the warehouse by going through a small opening where tires on a conveyor belt passed into the warehouse. Only then did plaintiffs' counsel, accompanied by defense counsel, finally enter the back part of the adjustment center by funneling themselves through this conveyor belt opening.

There plaintiffs' counsel confronted what could only be described as the "Mother Lode" of failed, separated tires. (See Videotape of Findlay adjustment center enclosed as Exhibit 37). Plaintiffs' counsel observed hundreds and perhaps thousands of defective tires which included belt and tread separations stored in this back area. In the back corner of this area, hundreds to thousands of tires with large blue tags were stacked together. (See Photographs attached as Exhibit 38). Although many of the stacks were secured with plastic wrap or were stacked too high for inspection, plaintiffs' counsel made a cursory examination of several stacks of tires. Immediately, plaintiffs' counsel found two "common green" tires of the same size and type defendant Cooper Tire had provided to plaintiffs for their inspection in the front part of the adjustment center—the model numbers, size, and tire names were identical. (See Photographs attached as Exhibit 39). These tires also exhibited what appeared to be severe tread or belt separations. The tags on these tires indicated that they were returned to Cooper Tire in July 2001, and had been inspected by Cooper Tire at the Findlay adjustment center since their return.

Cooper Tire deliberately withheld this secret stash of separated tires. These withheld tires were exactly the types of tires Cooper Tire was required to preserve for plaintiffs' inspection. The fact that plaintiffs' counsel were able to search only a few of the stacks makes it impossible

to know how many other "common green" tires were withheld from inspection and how many other similar tires had been transported off-site or may have been destroyed, especially given the thousands of failed and separated tires stored in this section of the adjustment center.

The blue claim tag on each of these withheld tires lists the Cooper Tire internal claim number for the return along with the date of the return and the location from which the tire was returned. It also shows the date of inspection and the name of the inspector. (See Photographs attached as Exhibit 39). There is no justifiable reason for Cooper Tire's conscious decision to violate the Court's order and to withhold these tires. The terms of the Court's order are clear:

> (2) to enter upon Cooper Tire's property at Cooper's "adjustment centers" (where tires returned by customers to dealer for "adjustment" (or refund) are inspected and stored by Cooper) in order to inspect tires returned for belt or tread separation defects; and (3) that Cooper Tire maintain tires exhibiting separation defects at their adjustment centers for inspection by Plaintiffs per (2) above.

(Exhibit 4) (emphasis added). The requests (plaintiff Leon's second request for production Nos. 1 and 2), which the Court granted, were similarly quite clear: tires "returned to Cooper Tire by a consumer, dealer, wholesaler, distributor, or agent of Cooper Tire" and exhibiting "separation." (Exhibit 1).

Cooper Tire's blatant and willful actions in concealing this evidence from plaintiffs' counsel and their consultant is indefensible and outrageous. Contained within these withheld tires are clearly common green tires exhibiting a belt or tread separation that a customer has returned to Cooper Tire's custody and that Cooper Tire has inspected, cataloged and stored within the period of time in which the Court's order was in force. Defendant Cooper Tire's refusal to allow the plaintiffs to inspect these tires—indeed, conceal the tires—is a clear and blatant violation of the Court's order and a willful attempt to conceal damaging material

evidence. There is not even a colorable basis for Cooper Tire's deliberate decision to withhold these tires from discovery in violation of the Court's explicit order to retain and allow the inspection of them.

Caught withholding crucial evidence, Cooper Tire's parade of excuses has already begun. In a letter of August 17, 2001 (Exhibit 40), Cooper Tire seeks to distinguish "claims tires" from "adjusted tires." This is an utterly ridiculous distinction with no support in the request or in the Court's order compelling the request. The Court's order and the request applied to any common green tires "returned" and exhibiting separations. It didn't exclude "claims" tires. Cooper Tire's bogus attempt to articulate this distinction provides even more evidence of sanctionable conduct.

B. COOPER TIRE CONCEALED COMPLAINTS AND CLAIMS OF SEPARATION FAILURE

The truth is Cooper Tire has avoided producing <u>any</u> tires <u>or information</u> regarding "claims" or "claims" tires. In Plaintiff Middleton's First Interrogatory No. 15 (compelled by the Court in Exhibit 3 at section B.6), plaintiffs asked defendant Cooper Tire the following:

> For any complaint, letter, claim, notice, or other report or document since 1990 known to Cooper Tire … state for each a detailed description of the incident, including the date and location of the incident, the date you first became aware of the incident, the manner in which you first became aware of the incident and the identity and address of each person who was involved in the incident.

(Exhibit 27).

Defendants did not provide this information for "claims" tires or "claims," (though they did provide some information for claims that had resulted in litigation). Nor did they provide the underlying complaints and related documents for "claims" tires or other customer complaints in response to Middleton RPD 17, which was also compelled by the Court in Exhibit 3 at section

B.6, for common green scope and also as to any radial passenger tires with allegations of separation (the "separation" scope):

> Any documents or electronic records contained on a computer (on an ASCII disk) for each tire… which relates to the return by, or for which a refund, credit, or other compensation was sought by, any customer, user, dealer, wholesaler or distributor, or other person…

(Exhibit 10).

Plaintiffs have received absolutely no information regarding these "claim tires" or these "claims" in discovery even though this information is clearly responsive to plaintiffs' discovery requests. Cooper Tire's response to Middleton RPD 17 even incorrectly claims these have been offered for examination to plaintiffs. (Exhibit 10). No such claims files were ever offered. In truth, there must be a huge volume of responsive, separation complaints, and Cooper Tire simply doesn't want plaintiffs to get their hands on them.

Moreover, buried within one of the boxes of documents Cooper Tire provided to plaintiffs in this case is a document called "'Privilege Log' for Notices of Accidents." (Exhibit 41). In this document, Cooper Tire lists fifteen separate incidents, the name of the party, the date of the accident, the location of that accident, and the date on which Cooper Tire became aware of the accident. This document contains the following assertion: "Cooper has received no claims or lawsuits based on these accidents. Cooper investigated the following accidents at the direction of/in conjunction with legal counsel in anticipation of litigation." First, this isn't a "privilege log" at all as it identifies no documents and gives no information sufficient to evaluate the "privilege." Although these documents clearly pertain to incidents of which Cooper Tire has notice, plaintiffs have not received any documents regarding these incidents. If Cooper Tire sought to assert a real "privilege" in response to these documents, it was required to make that

argument and file a proper log prior to the Court's ruling on plaintiffs' motion to compel. It cannot withhold documents after the Court grants the motion to compel. Also, Cooper Tire knows that it is improper to assert even a bogus "privilege" by burying a "privilege log" in a box of documents rather than properly filing it with the Court. Accordingly, it has waived all privilege claims in regard to these documents, and this entire course is abusive. In truth, this one piece of paper is nothing more than Cooper Tire's thumbing its nose at the plaintiffs and the Court relating to documents reflecting these separation incidents.

The paper trail on the hidden claims/customer complaint documents is also telling. First, Cooper Tire tried early on to lump the "claims" documents with the threatened, whopping $300,000 copy bill tied to the multi-line dealer adjustment forms to dissuade plaintiffs from ever asking for copies of the customer complaints and claims. (Exhibit 22). When plaintiffs made it clear they wanted copies of the non-litigation claims files even if they didn't get the multi-line dealer adjustment forms, Cooper Tire wrote that they would begin assembling those. (Exhibit 24). Such documents, however, were never produced. In fact, the way the "claims" tires were hidden also makes it clear that the failure to produce the "claims" documents was willful and intentional. Like the "claims" tires, the "claims" documents remain hidden behind a locked door somewhere in Ohio.

What is especially troubling about this unbelievable discovery of withheld tires and documents relating to other incidents of separation is that it is only by plaintiffs' persistence in gaining access first to the Findlay adjustment center and second, to the back room at the adjustment center that this discovery was even made. Defendant Cooper Tire nearly got away with its deception. Absent plaintiffs' counsel's discovery of this hidden cache of tires in Findlay,

there would have been no other way for plaintiffs to find out about this withheld evidence, and plaintiffs' counsel and their consultant would have departed the Findlay facility with much less than the whole truth. This is clearly an abuse of the discovery process of the highest order—it is a deliberate violation of this Court's order and a nearly successful attempt to withhold essential, critical, and material evidence in this case. There is no question that this type of egregious conduct, coupled with the pattern of discovery abuses discussed in the preceding section, warrants severe sanctions.

IV. REQUESTED RELIEF

Although the conduct discussed in detail in the preceding section provides enough evidence of willful discovery abuse, including multiple, intentional violations of this Court's orders, to warrant serious sanctions up to and including default, plaintiffs request that this Court enter an order allowing plaintiffs additional avenues to conduct a thorough investigation into the scope of Cooper Tire's misconduct before ruling on plaintiffs' motion for sanctions. After this investigation is concluded, plaintiffs will brief the extent of any additional revelations about Cooper Tire's sanctionable conduct, and plaintiffs will request that the Court hold a hearing to consider the most appropriate sanction to address Cooper Tire's gross misconduct.

To conduct this investigation, plaintiffs request that the Court order the following:

(1) That Cooper Tire be directed to produce to plaintiffs the documents, including but not limited to the specific categories of concealed documents discussed above, that Cooper Tire failed to produce.

(2) Cooper Tire permit plaintiffs' counsel and consultants to inspect and copy any documents in the repository of documents set up by Cooper Tire for production in

the class action pending against Cooper Tire in Talalai v. Cooper Tire & Rubber Co., No. MID-L-8839-00 MT (N.J. Super. Ct., Middlesex County).

(3) That Cooper Tire produce a full copy of any document it deleted (or "redacted") any part of.

(4) That Cooper Tire be directed to preserve and to produce for inspection any tires within the scope of the Court's prior orders that it hasn't already produced, including but not limited to the concealed tires discussed above.

(5) That Cooper Tire produce for deposition at an agreed upon time the employee(s) responsible for the adjustment centers and/or "claims tires" inspection/storage and/or handling at both the Findlay, Ohio and Albany, Georgia plants. These employees should be knowledgeable about the computer databases used to track adjusted and/or "claims" tires, the inspection procedures used in evaluating these tires, and the retention policy regarding these tires.

(6) That Cooper Tire produce for deposition the employee(s) most knowledgeable about the contents, searching, hardware, and software of all databases containing information on "adjusted" and/or "claims" tires, any other customer, dealer, or consumer complaints about tires, quality assurance information, and meeting minutes; and that after plaintiffs have deposed such employee(s), that Cooper Tire should be ordered to allow plaintiffs to make a database search of Cooper Tire's relevant databases pursuant to S.C. R. Civ. P. 34 by making available a computer with multiple screens and a knowledgeable operator or operators with access to these databases. Plaintiffs' counsel and any representatives of their choosing shall

be allowed to appear and to provide search requests for information within the scope of discovery. Cooper Tire's representatives shall conduct searches of the databases in accordance with requests formulated by Plaintiffs' counsel and Plaintiffs' representatives, on topics relevant to this litigation. The database search and documents produced therefrom shall go forward pursuant to the proposed order attached as Exhibit 42.

(7) That Cooper Tire produce for deposition the employee(s) responsible for the compiling of documents pursuant to the Court orders in this case.

(8) That Cooper Tire produce for deposition Steve Kramer of Consumer Relations and Brian Siferd within a reasonable time after entry of the Court's order. Plaintiffs have reason to believe that Mr. Kramer and Mr. Siferd have relevant knowledge regarding the "claims tires" stored at the Findlay, Ohio plant.

(9) That Cooper Tire produce for deposition Roger Russell within a reasonable time after entry of the Court's order. Mr. Russell is the Cooper Tire employee who inspected the common green "claims tires" plaintiffs found in the back part of the Findlay, Ohio adjustment center.

CONCLUSION

Plaintiffs believe this prolonged and disturbing pattern of discovery abuse warrants the imposition of the severest of sanctions. Despite numerous Court orders, defendant Cooper Tire continues to persist in its pattern of obstructing and delaying discovery in this case. Defendant Cooper Tire's behavior just continues getting worse and worse and culminated with this most recent and outrageous episode of willful concealment of evidence. This case was filed on June

19, 1999, nearly two years ago, and defendant Cooper Tire has successfully delayed discovery by its blatant refusal to follow this Court's orders and the discovery rules provided in the South Carolina Rules of Civil Procedure. Such blatant abuse of the discovery process warrants the most serious of sanctions.

Defendant Cooper Tire's blatant efforts to avoid compliance with this Court's orders should not go unpunished. Accordingly, plaintiffs request the Court's assistance in determining the extent of Cooper Tire's discovery abuse before imposing an appropriate sanction to provide a meaningful remedy for Cooper Tire's egregious behavior.

This _____ day of _____, 2001.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY:_____
John E. Parker

307 1st Street, East
P.O. Box 457
Hampton, South Carolina 29924
(803) 943-2111

MCCUTCHEN, BLANTON,
RHODES & JOHNSON, L.L.P.

BY:_____
T. English McCutchen III

1414 Lady Street
P. O. Drawer 11209
Columbia, SC 29211-1209
(803) 799-9791

BUTLER, WOOTEN, SCHERFFIUS,
FRYHOFER, DAUGHTERY & SULLIVAN

BY:_____
James E. Butler, Jr.
George W. Fryhofer III
Leigh H. Martin

2719 Buford Highway
Atlanta, GA 30324
(404) 321-1700

NIX, DELCAMPO, THORNTON
& GRADDOCK

BY:_____
Keenan R.S. Nix
Antonio DelCampo

124 Church Street
Decatur, GA 30030
404-377-7600

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record with a copy of PLAINTIFFS' SECOND MOTION FOR SANCTIONS AGAINST DEFENDANT COOPER TIRE & RUBBER CO. by depositing it in the United States mail with adequate postage affixed thereon or by hand delivery or by Federal Express and addressed as follows:

VIA HAND DELIVERY
Christopher J. Daniels, Esq.
Nelson Mullins Riley & Scarborough, LLP
Keenan Building, Third Floor
1330 Lady Street
Columbia, South Carolina 29201

VIA U.S. MAIL
Lee S. Bowers, Esq.
Bowers & Siren
P.O. Box 40
Estill, South Carolina 29918

VIA FEDERAL EXPRESS
W. Wray Eckl, Esq
Melanie C. Eyre, Esq.
Drew, Eckl & Farnham
880 W. Peachtree Street
Atlanta, GA 30309

VIA U.S. MAIL
H. Woodrow Gooding, Esq.
Gooding and Gooding, P.A.
P.O. Box 1000
Allendale, South Carolina 29810

DATED:_____, 2001.

MCCUTCHEN, BLANTON, RHODES
& JOHNSON, L.L.P.

BY:_____
T. English McCutchen III