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.

COOPER TIRE & RUBBER COMPANY, and AUDON ONTIVEROS,

Defendants.

CASE NO. 99-CP-25-214

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CLERK OF COURT
HAMPTON COUNTY

ORDER

This matter is before the Court on Plaintiffs' Second Consolidated Motion for Sanctions against defendant Cooper Tire and Rubber Co. ("Cooper Tire"). The Court held a lengthy hearing on this motion on September 27, 2001. The hearing began at approximately 2:30 p.m. and continued until almost 8:00 p.m. The Court allowed the proceedings to continue to ensure that all parties had ample opportunity to present any evidence or argument they believed was pertinent. The Court has also reviewed the extensive briefs, affidavits, and other pleadings filed by the parties on this motion.

The Court believes the issues raised in this motion implicate the very core of our system of civil litigation. This motion addresses the truthfulness and candor the Court has a right to

expect from a party as well as the obedience a party must show to the orders of this Court. Both ingredients are indispensable if our system of administering justice in civil litigation is to properly function.

This products liability suit involves the deaths of two adults and two children who were seriously injured when a tire on their vehicle allegedly suffered a catastrophic tread and/or belt separation at highway speeds, causing the vehicle to go out of control and crash. Plaintiffs contend the tire failure was a result of design and/or manufacturing defects in the tire. The tire was designed and manufactured by defendant Cooper Tire. Cooper Tire denies these allegations of defect.

In this second motion for sanctions, plaintiffs first contend they have discovered the defendant Cooper Tire has made a series of willful misrepresentations to this Court in both sworn affidavits and other filings in opposition to the entry of the Court's prior orders compelling Cooper Tire to make discovery. Second, plaintiffs contend Cooper Tire has willfully disobeyed prior orders of this Court, including some actually obtained by Cooper Tire itself, to obfuscate discovery, to conceal evidence to which the plaintiff was entitled under this Court's orders, and to otherwise perpetrate a willful pattern of discovery abuse designed to hinder the plaintiffs in their proof of the allegations of defect.[1]

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[1] Plaintiffs noted at the hearing that their motion was not directed at Cooper Tire's attorneys. Instead, plaintiffs sought sanctions against the party, Cooper Tire, alone. Plaintiffs contend that Cooper Tire itself--not its attorneys--has controlled, directed, and/or ratified the misconduct at issue in this motion. Based on the evidence adduced at the hearing as well as the briefs of the parties, the Court agrees with that contention. The Court further notes that corporate representatives from Cooper Tire, including one from its general counsel's office, were present for the entirety of the hearing and that the hearing contained several examples of misconduct about which Cooper Tire's attorneys professed total ignorance.

Having carefully considered the briefs, arguments, and evidence of the parties, the Court finds the plaintiffs' second consolidated motion for sanctions should be granted. For the reasons also more fully discussed below, however, the Court defers ruling on the ultimate sanction(s) to be levied against Cooper Tire pending a further court-ordered inquiry to determine the full extent of this misconduct.

At the hearing, the Court reminded the parties our Supreme Court had recently reiterated the importance of full discovery to our system of civil litigation and the strong approbation for discovery abuse in any form. As the Supreme Court stated in In re Anonymous Member of the South Carolina Bar, No. 25346 (S.C. Aug. 20, 2001),

> "The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986-87 (1958).
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> . . . .
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> In addition to their traditional contempt powers, judges may issue orders as a sanction . . . (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees. . . . Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.

(emphasis added.)

The Court is deeply disturbed that Cooper Tire's conduct from the commencement of this case has reflected a pattern of deliberate discovery abuse, including misrepresentations, obfuscation, concealment, and disobedience to the discovery orders of this Court and the discovery obligations imposed by the South Carolina Rules of Civil Procedure.

I. PATTERN OF DISCOVERY ABUSES

1. Cooper Tire's Initial Discovery Responses

At the outset of this case, plaintiffs served interrogatories and requests for production on Cooper Tire with the initial Complaint on June 29, 1999. Cooper Tire served responses to both sets of discovery on September 13, 1999. Cooper Tire objected to virtually every single request and failed to provide any substantive information about its tires or the processes used in designing, manufacturing or evaluating them. Additionally, Cooper Tire did not produce a single document to plaintiffs despite having some 75 days to gather responsive documents.

As a result, plaintiffs filed their first motion to compel on December 13, 1999 and their second motion on October 13, 2000. Even by the time of the hearing on plaintiffs' motion before this Court on November 1, 2000 (some 17 months after the discovery was filed), Cooper Tire still had not produced a single document in response to plaintiffs' requests.

Following that hearing, the Court granted plaintiffs' two motions to compel and Cooper Tire was ordered to produce responsive documents to requests and to respond to interrogatories. The Court further ordered Cooper Tire to allow inspection by plaintiffs' counsel of the Cooper Tire Albany, Georgia manufacturing plant, and to preserve, and allow inspection of, tires returned for separations to Cooper Tire.

2. Illegibility of Documents

The first disobedience by Cooper Tire to the Court's orders occurred even before the documents were produced as a result of this Court's orders. Specifically, Cooper Tire attempted to reduce the legibility of the documents the Court ordered produced by applying an extremely large "confidential" stamp across the entirety of the document so as to obscure text and photographs, 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." (See Protective Order dated December 11, 2000.)

Cooper Tire's violation of that order required an emergency telephone hearing with the Court wherein 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 document."

3. Inspection of the Albany Plant

The next discovery abuse by Cooper Tire dealt with Cooper Tire's disobedience to the Court's orders allowing plaintiffs' inspection of the Albany, Georgia manufacturing plant. Specifically, 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 asking for dates for the court-ordered plant inspection.

In response, on January 22, 2001, Cooper Tire wrote plaintiffs' counsel 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 protocol did not comply with the Court's order and which the Court had rejected in entering its order). On January 24, 2001, plaintiffs' counsel again wrote Cooper Tire's counsel asking for a date to inspect the Albany facility pursuant to the terms of the Court's order. Cooper Tire never provided any date within the time frame set by this Court's order, as extended by agreement.

On March 13, 2001, eleven days after the deadline had expired, Cooper Tire sent a letter to plaintiffs' counsel claiming that Cooper Tire had not "heard from plaintiffs" in regard to scheduling the plant inspection, notwithstanding plaintiffs' two written requests.[2] More disturbing, however, was the fact that the letter also stated 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. On April 19, 2001, plaintiffs filed their first 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. Thirteen days after plaintiffs' first sanctions motion addressing the blocking of the plant inspection was filed, defendant Cooper Tire's counsel wrote plaintiffs' counsel that the "common green" tire was, coincidentally, now

[2] At the most recent hearing, Cooper Tire's counsel acknowledged they had, in fact, received plaintiffs' counsel's letters.

scheduled for production and would be in production for the next month so as to allow an inspection.

Based on these facts, the Court finds that Cooper Tire did not permit the plant inspection within the court-ordered time frame despite repeated requests. Cooper Tire also sent a letter incorrectly claiming plaintiffs had not timely requested the inspection, when they had requested it twice. Cooper Tire then represented that the tire wasn't currently scheduled for production so as to indefinitely delay the inspection the Court ordered under circumstances causing the Court to suspect that representation was not true. Cooper Tire also left plaintiffs with no choice but to file a motion for sanctions to force the defendant to do what the Court had previously ordered, and only after the plaintiffs' motion for sanctions was filed did Cooper Tire allow the Court ordered inspection to go forward.

4. Cooper Tire's Refusal of "Photography"

When plaintiffs were finally allowed to tour the Albany plant, Cooper Tire attempted to bar plaintiffs' counsel and their consultant from the plant because plaintiffs' counsel had a video camera, notwithstanding the Court's order granting the plant inspection allowed "photography." This necessitated another emergency telephone conference with the Court wherein the Court explained that "photography" includes "video photography" and again ordered Cooper Tire to allow plaintiffs to inspect and "photograph" the plant.[3]

5. Misrepresentations as to Returned Tires

Plaintiffs also claim Cooper Tire misled the Court at the hearing on the second motion to compel when Cooper Tire opposed the plaintiffs' request that Cooper Tire be required to retain

[3] The plaintiffs had previously entered into a protective order which clearly protects Cooper Tire against the use or dissemination of proprietary and confidential information.

tires returned for separations for plaintiffs' inspection on the ground that the storage of such returned tires would run afoul of state statutes prohibiting the storage of tires.

In its opposition to plaintiffs' second motion to compel and at the hearing, Cooper Tire made this representation: "Georgia law prohibits the storage of over 100 scrap tires. . . . Cooper's investigation suggests that this request may run afoul of regulations in other states where Cooper has inspection facilities, as well."

At the hearing on the instant motion, however, it was established that when plaintiffs toured the Albany inspection center, 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 included hundreds or thousands of other returned tires. At Findlay, Ohio Cooper Tire produced 60 returned tires to plaintiffs that it claimed were retained pursuant to Court order, while thousands of other returned tires were also stored there. These facts alone make it abundantly clear that Cooper Tire's representation, both orally and in writing, to this Court regarding the retention of returned tires was untrue.

AA#8

6. Misrepresentations Regarding Inspection of the Subject Tire at the Findlay Facility

One of the more troubling allegations of misrepresentation and discovery abuse relates to Cooper Tire's conduct in response to the Court's order, which Cooper Tire obtained, whereby the plaintiffs were required to bring the subject tire to Cooper Tire's Findlay, Ohio facility for Cooper Tire's own inspection. Specifically, in response to Cooper Tire's motion to force plaintiffs to bring the tire to the Findlay, Ohio facility for inspection, the Court ruled in an order filed on December 15, 2000 that plaintiffs had to bring the tire to the Findlay facility, that Cooper Tire could examine the subject tire at its Findlay, Ohio facility not to exceed 10 hours, and this

examination must take place in the presence of plaintiffs' representatives. 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 plaintiffs to bring the subject tire to Findlay for Cooper Tire's inspection. In response, on January 22, 2001, defendant Cooper Tire wrote to plaintiffs' counsel attempting unilaterally to move the inspection of the subject tire to Standard Testing Laboratories near Akron, Ohio. This attempt came after Cooper Tire had represented to the Court that Cooper Tire's Findlay facility had the proper equipment and facilities to do the correct analysis. In the January 16, 2001 letter, Cooper Tire also demanded 70 hours to conduct its inspection when the Court's order clearly allowed 10 hours. In response, plaintiffs' counsel informed defendant Cooper Tire that they would have the subject tire available at the Findlay facility for 10 hours of examination in compliance with the Court's order; however, Cooper Tire never provided any date for plaintiffs to bring the tire to the Findlay facility for Cooper Tire's own court-ordered inspection before the inspection deadline expired on March 2, 2001.

Defendant Cooper Tire made no other request to inspect the subject tire until April 4, 2001, when it again tried to move the inspection of the tire away from the Findlay facility and to Akron, Ohio, in clear contravention of this Court's order. On July 27, 2001, defendant Cooper Tire again tried to move the tire inspection away from the Findlay facility in violation of this Court's order by claiming it had insufficient equipment to examine the tire at its Findlay facility and by attempting to convince the plaintiffs to keep the tire in Ohio for an extra day for additional testing in Akron and Cleveland.

The Court finds Cooper Tire's representations to plaintiffs' counsel that the Findlay facility had insufficient equipment and was ill-suited for inspecting the tire directly contradicted the sworn representations Cooper Tire had previously made to this Court when it was trying to convince the Court to permit it to inspect the tire at the Findlay plant.[4] In Cooper Tire's motion to compel, it represented to this Court the following:

- 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.

(emphasis added).

Furthermore, the representations to plaintiffs' counsel were also in direct contradiction to the sworn Affidavit filed in this case on September 8, 2000, and given by Bruce Currie, who represented himself to be Cooper Tire's Manager, Technical Standards. Mr. Currie provided the following sworn testimony:

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- 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

[4] The Court also recalls Cooper Tire originally requested permission to have the tire inspection without plaintiffs' counsel being present.

> referenced equipment is available at Cooper Tire's Findlay, Ohio facility.
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> . . . .
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> - 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.

(emphasis added).

Notwithstanding these representations to the Court, Cooper Tire next tried to move the inspection away from the Findlay facility by requesting plaintiffs' counsel to bring the tire to a hotel room in Findlay, Ohio. As part of that effort, Cooper Tire represented that all of its equipment could be easily moved to a hotel room for the tire inspection. Plaintiffs' counsel refused to agree to this and insisted the inspection take place at the Findlay facility pursuant to the Court's order. When the inspection finally did take place at Cooper Tire's Findlay adjustment center, none of the "specialized equipment" was even located in the building. Instead, defendant Cooper Tire used a portable tire spreader and allowed its five consultants to examine the tire with the portable tire spreader and their own portable equipment.

7. Misrepresentations Regarding the Albany Plant Inspection

Cooper Tire also made misrepresentations to the Court in opposition to plaintiffs' motion to compel an inspection of the Albany plant. In an effort to persuade the Court to deny plaintiffs' request to inspect the plant, Cooper Tire filed a sworn affidavit of Tim R. Grilliot on October 26, 2000 in which it represented the following:

> The inspection Plaintiff seeks would require not only the disclosure of secret production processes, but also would require disclosing the nature of secret machinery, configurations of machinery, and secret operating procedures that are used to produce Cooper Tire's radial tires.

. . . .

> These security measures have been designed by Cooper Tire to maintain the high degree of confidentiality of Cooper Tire's trade secrets and to ensure that no outside source gains access to such information.

. . . .

> Not even a limited inspection of the premises could ensure that these invaluable trade secrets would not be divulged to Cooper Tire's competitors, many of whom may not be subject to this Court's jurisdiction because they are foreign corporations. Consequently, it is possible that there will be no deterrent (such as potential sanctions) to prevent the gain of potentially enormous benefits to be reaped by disclosing this information to Cooper Tire's competitors.

The clear message of these sworn statements, as well as Cooper Tire's arguments in its brief and at the hearing, was that the Court should deny plaintiffs' request to inspect the plant since Cooper Tire zealously guards the secrecy of its plants' operations from the public and any competitors, which are never allowed in the plants. Cooper Tire thus argued that, by allowing plaintiffs' counsel and their consultant to inspect the plant, information about the plant might reach one of its competitors. The Court believed these representations and even threatened plaintiffs with future sanctions (during an emergency hearing when Cooper Tire blocked plaintiffs' counsels' attempt to video the Albany plant) if the video was disseminated.

At the hearing on the instant motion, however, plaintiffs presented the Court with evidence of a newsletter from the American Society of Mechanical Engineers that orchestrated a tour of Cooper Tire's Findlay plant. This tour apparently allowed members of this professional society access to all aspects of tire manufacturing at the plant, from design through production, and even included people employed elsewhere in the tire industry. This evidence directly contradicts the sworn representations made to this Court by Cooper Tire in its attempt to dissuade the Court from compelling a plant inspection.

This pervasive pattern of misrepresentations by Cooper Tire to the Court and opposing counsel is more than disturbing and cannot be tolerated in our legal system. For our system of justice to function properly, the Court and opposing counsel must be able to rely on the sworn and unsworn representations of litigants. The conduct of Cooper Tire demonstrates that Cooper Tire is not bounded by the truth and will make whatever representation it believes is expedient to oppose the requested discovery regardless of the truth of such representations.

8. Concealment of Material Evidence

The Court next moves to plaintiffs' contentions that Cooper Tire willfully concealed evidence that this Court ordered produced in its orders granting plaintiffs' first and second motions to compel. Plaintiffs contend Cooper Tire intentionally withheld evidence the Court ordered produced in its order dated December 15, 2000, which granted plaintiffs' second motion to compel, when Cooper Tire failed to preserve and produce for plaintiffs' inspection all "common green" tires that customers had returned for tread and belt separations, which is the identical defect alleged by the plaintiffs in this case.

Since the record is disputed by the parties, the Court makes the following findings in this regard:

When plaintiffs' counsel arrived at the Findlay, Ohio regional inspection point (RIP) on August 10, 2001 for their court-ordered inspection of the tires Cooper Tire was required to preserve at this location, the plaintiffs' group walked into an area in the front part of a large warehouse. The back part of the RIP was separated from the front area of the warehouse by a wall and large steel door. Shortly after plaintiffs entered the RIP, Cooper Tire employees closed the door separating the front area from the large back part of the warehouse. In the front area of

the RIP, defendant Cooper Tire had assembled approximately 60 tires which it identified as the tires that were to be inspected pursuant to the Court's order.

Later, during the day, as plaintiffs' consultant was examining the 60 proffered tires, plaintiffs' counsel requested access to the rear part of the RIP since plaintiffs' counsel had observed other tires located in the back part of the RIP before the steel door had been closed by Cooper Tire employees. Plaintiffs' counsel waited for approximately an hour while Cooper Tire's counsel was trying to get "permission" for plaintiffs' counsel to enter this area. Cooper Tire's counsel then informed plaintiffs' counsel the door was "locked" and there was no one present to access the area. Plaintiffs' counsel then offered to access the back part of the RIP by going through a small opening where tires on a conveyor belt were transported into the back of the RIP.

Once through the opening and in this back area, plaintiffs' counsel observed thousands of returned tires exhibiting graphic belt and tread separations. Although plaintiffs' counsel made only a cursory examination of several stacks of tires, they immediately found two "common green" tires of the same model number, size and type which the defendant Cooper Tire had produced for plaintiffs' inspection in the front room of the RIP. Based upon photographs provided to the Court and representations by plaintiffs' counsel, many of these tires also exhibited what appeared to be severe tread or belt separations.

Cooper Tire has since admitted at the hearing on plaintiffs' second motion for sanctions that there are 33 such "common green" tires that were returned to the Findlay RIP for tread or belt separations that were not produced to plaintiffs in compliance with this Court's order. The identification tags on the two tires plaintiffs found indicated they were returned to Cooper Tire in

July 2001, and had actually been <u>inspected</u> by Cooper Tire at the Findlay Center since their return.

Plaintiffs contend these 33 tires were intentionally withheld from plaintiffs' counsel in violation of the Court's order. The Court agrees. The direct and circumstantial evidence clearly shows Cooper Tire willfully failed to produce these tires and even made efforts to prevent their discovery by plaintiffs' counsel. First, Cooper Tire attempted to segregate the plaintiffs away from the larger cache of other separated tires. Upon plaintiffs' counsel's arrival, Cooper Tire closed the door separating the areas, further limiting plaintiffs' counsel's ability to view the numerous returned tires stored in the rear area. Finally, Cooper Tire attempted to delay plaintiffs' counsel's access to this area.

However, what is most troubling to the Court is that, had the plaintiffs not been persistent in their request to view the other area, neither they nor the Court would have discovered that Cooper Tire was concealing at least 33 tires returned for separations in violation of this Court's order. In other words, Cooper Tire was concealing an additional 50% more failed tires which were responsive to the Court's order than it actually produced.

KA #15

It is also clear that the withheld, separated tires were required by the Court's order to be produced initially along with the 60 tires tendered by Cooper Tire. 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) <u>in order to inspect tires returned for belt or tread separation defects</u>; and (3) <u>that Cooper Tire maintain tires exhibiting separation defects at their adjustment centers for inspection by Plaintiffs per (2) above</u>.

(emphasis added).

The requests for inspection (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." It is irrefutable that the 33 withheld tires were tires within the scope of the Court's order. Each was a tire returned to Cooper Tire for a separation. In fact, at the hearing, the Court twice asked Cooper Tire's lead counsel whether he acknowledged these tires were within the scope of the order, and each time he responded in the affirmative.[5]

Cooper Tire's willful action of concealing this evidence from plaintiffs' counsel and their consultant is indefensible. Included within these withheld tires are at least 33 "common green" tires by Cooper Tire's own admission 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 the Court's order. Defendant Cooper Tire's failure to produce these tires or even to inform plaintiffs of their existence, until caught withholding them, is a clear violation of the Court's order and a willful attempt to conceal potentially damaging material evidence.

Cooper Tire argues that it innocently believed these tires were not within the scope of the Court's order because Cooper Tire labels these tires as "claims" tires and not "adjustment" tires. The Court, however, is not persuaded by Cooper Tire's distinction between "claims" and "adjusted" tires. If a "common green" tire were returned to Cooper Tire and exhibited a separation, it was within the scope of the order. Whether Cooper Tire set up internal distinctions is immaterial. Further, Cooper Tire never informed plaintiffs' counsel or the Court that it was

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[5] He also professed to be totally ignorant of the existence of these tires until plaintiffs' discovery of them, further reinforcing the distinction between the knowledge and conduct of Cooper Tire and that of its counsel. See *supra* n.1.

withholding separated, returned tires within the scope of the Court's order based on this distinction. Regardless of any excuse or explanation, Cooper Tire has now conceded the withheld tires were within the scope of the order.

9. Withholding of Documents and Computer Records

Plaintiffs also contend Cooper Tire's concealment of evidence in violation of this Court's orders extends beyond the alleged "claims" tires themselves to other information or documents regarding "claims" by consumers relating to separations and failures of Cooper Tire. Plaintiffs contend Cooper Tire has avoided producing any tires or copies of any information regarding "claims" or "claims" tires.

In plaintiff Middleton's First Interrogatory No. 15 (compelled by the Court in section B.6 of its order), 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.

Pl# 17

Defendant Cooper Tire did not provide this information for "claims" tires or "claims," although it did provide some information (but not tires) for claims that had resulted in litigation. Nor did Cooper Tire provide copies of the underlying complaints and related documents for "claims" tires or other customer complaints in response to Middleton Request for Production of Documents No. 17, which was also compelled by the Court at section B.6 of the order dated December 15, 2000, 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 . . .

Though plaintiffs requested copies of this information, plaintiffs did not receive complete information regarding these "claim tires" or these "claims" in discovery even though this information is clearly responsive to plaintiffs' discovery requests, and there is no question that it exists. The fact that Cooper Tire withheld both documents and tires relating to "claims" tires provides further evidence that Cooper Tire's intent was to keep all evidence of these claims from plaintiffs in violation of the Court's order.

In addition to responsive pre-existing paper "documents," plaintiffs also presented compelling evidence that Cooper Tire has intentionally withheld, again in violation of this Court's order, documents that discuss the specifics of tires returned for separation failures and which are stored on Cooper Tire's computer system. Middleton Request for Production 17, which the Court compelled be produced (at Section B.1) as to any "common green" tire, requested:

ul #18

> 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 . . .

In response to this 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.

In addition to Cooper Tire not producing documents stored on computer, plaintiffs also contend Cooper Tire engaged in a subterfuge designed to lead plaintiffs to believe the only way to obtain the individual information about "common green" tires returned by dealers for

separation failures was for plaintiffs to pay between $272,000 to $340,000 to copy the 800,000 to 1,000,000 pages stored in a warehouse in Ohio. The underlying result would have been that plaintiffs would simply give up asking for the information which this Court's order required because of the enormous expense. Having examined the correspondence, the Court must agree with plaintiffs. Further, when plaintiffs' counsel suggested there must be an easier way than to copy every form in the warehouse, Cooper Tire rejected this notion. Cooper Tire claimed 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. As shown on a copy of the form provided to the Court at the hearing, for each tire returned by a dealer, 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.[6]

As was established at the hearing, however, Cooper Tire doesn't need to copy over a half million pages to produce the requested information for each "common green" tire returned for a separation problem, nor does it need to search through hundreds of boxes in a warehouse to find the information plaintiffs requested and the Court compelled be produced. Cooper Tire has the information stored in its computer system.

Cooper Tire acknowledges that whenever a Cooper Tire technician processes a returned tire for adjustment or claim payment, the technician enters into Cooper Tire's computer system the line of information for that specific tire by serial or DOT number from the multi-line form. That allows Cooper Tire to recall and independently sort and reproduce the information entered

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[6] As many as 15 tires can be described on each form.

from the multi-line form as it relates to one tire, all tires, or exactly what plaintiffs asked for and the Court compelled be produced--the information relating to passenger radial tires returned for a separation problem.

It is evident to the Court that Cooper Tire had the capacity to readily produce this information for plaintiffs. In fact, Cooper Tire brought to the hearing on the second motion for sanctions a large stack of materials printed from its computer system which it claims represent all "common green" tires returned for separation failures. Cooper Tire's withholding of these documents on computer is even more problematic for the Court in light of Middleton Interrogatories Nos. 17-18, responses to which the Court compelled of Cooper Tire, (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 distributor, or other person, please identify each document relating to such, including specifically any computerized records that compile, summarize or otherwise manage this information." (emphasis added).

Cooper Tire could have produced a printout (or diskette) containing the information requested in Middleton Request for Production of Documents No. 17, which the Court previously 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.

Cooper Tire argues that plaintiffs did not "raise" the issue of requesting Cooper Tire's computerized data until the motion for sanctions. The Court disagrees with this contention. The plaintiffs' request for production specifically requested data on computer, and the Court's order compelled requests specifically addressed to information stored on computer. The plaintiffs'

request and the Court's order sufficiently "raised" the issue for Cooper Tire. Nothing further was required except Cooper Tire's compliance with that order, which was not forthcoming.

Cooper Tire's argument, that it was incumbent on the plaintiffs to "raise" or "alert" Cooper Tire of its own withholding or concealment of evidence that was ordered to be produced, permeates Cooper Tire's responsive briefs and its own arguments before the Court. Cooper Tire suggests this scenario: Even though the requests for production and interrogatories specifically request information, and even though the Court's order on the motion to compel requires the production of this precise information, Cooper Tire does not have to provide it until plaintiffs discover Cooper Tire has not produced it. Then upon plaintiffs' discovery, plaintiffs should not move for sanctions but should, instead, tell Cooper Tire what plaintiffs have discovered Cooper Tire is withholding in violation of court order. Then Cooper Tire can produce what plaintiffs have caught it hiding and thus avoid ever being subject to sanctions for violating this Court's orders. The Court categorically rejects any such suggestion, as it would defeat the purposes of the discovery rules and reward, rather than punish, discovery abusers that disobey court orders pertaining to discovery.

Also troubling to the Court is Cooper Tire's apparent attitude that having been discovered withholding evidence in violation of court order and having a motion for sanctions filed against it, Cooper Tire may now simply offer to produce the withheld material so as to avoid the entry of sanctions. The Court rejects that suggestion as well. Adopting Cooper Tire's argument would reward recalcitrant parties. See Singleton v. Eastern Carriers, Inc., 192 Ga. App. 227, 228, 384 S.E.2d 202 (1989) ("Once a motion for sanctions has been filed, their imposition cannot be precluded by a belated response made by the opposite party."); Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561, 564 (1996) ("untimely discovery responses served after the service of a

motion seeking sanctions . . . can support sanctions."); see also Poole ex rel. Elliott v. Textron, Inc., 192 F.R.D. 494, 506 (D. Md. 2000) ("If the only sanction for failing to comply with the discovery rules is having to comply with the discovery rules if you are caught, the diligent are punished and the less than diligent, rewarded.").

10. Withholding of NHTSA Documents

Plaintiffs also contend that Cooper Tire attempted both to improperly withhold documents relating to a NHTSA (National Highway Traffic Safety Administration) investigation of Cooper Tire and to mislead the Court and plaintiffs' counsel about such an inquiry in order to oppose the Court's granting of a motion to compel Cooper Tire to produce documents exchanged between Cooper Tire and NHTSA or documents relating to any NHTSA investigation. Specifically, Cooper Tire affirmatively denied the existence of a NHTSA investigation (and implicitly the existence of any responsive documents) in its Response to Plaintiffs' Second Motion to Compel. Following a 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. Following the entry of that order, Cooper Tire unilaterally determined to withhold these exact documents from production and purported to list them on a "privilege log."

The "privilege log" contained cursory descriptions of the withheld NHTSA documents. Even with those cursory descriptions, however, it is clear the withheld documents contain evidence within the scope of discovery and the Court's prior orders on the two motions to compel, since they contain evidence of what Cooper Tire knew of belt and tread separations from the field, numerous statistics on tire failures, and other information going to the heart of the allegations in this case.

According to Cooper Tire, the "privilege log" was based upon an alleged "privilege" incident to Cooper Tire's alleged attempts to defend itself from some type of NHTSA inquiry. In Cooper Tire's own 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 . . . .

The Court is troubled on at least four levels with this conduct. The obvious first level of misconduct is leading the Court and plaintiffs to believe there was no NHTSA investigation, inquiry or consideration of Cooper Tire (and, implicitly, no NHTSA investigation documents or any documents exchanged with NHTSA) to avoid the granting of the motion to compel such documents. Upon losing that argument, Cooper Tire unilaterally withheld the precise documents this Court compelled by claiming a "privilege" that the documents were compiled to defend itself from some sort of NHTSA inquiry.

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Second, Cooper Tire had no right to unilaterally withhold these documents after the Court compelled production of these very documents with a belated "privilege" claim. The Court's order granting the motion to compel 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 First Request for Production of Documents No. 25) or "any documents . . . which comment on, reflect, or contain information about . . . any type of government investigation . . . concerning tires manufactured by Cooper Tire" (Middleton First Request for Production of Documents No. 24).

After entry of such an order, a litigant may not 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 misled the court and plaintiffs' counsel about the existence of some species of the NHTSA inquiry it finally admitted existed only makes matters worse.

Third, Cooper Tire waived whatever "privilege" it belatedly attempted to claim by failing to timely raise the privilege claim at the earliest opportunity. Cooper Tire should have promptly filed a privilege log, argued the issue at the hearing, and requested a ruling upon such claims before the Court ordered the documents to be produced.

> 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 <u>and timeliness of the showing</u> as well as on the nature of the document.

<u>Peat, Marwick, Mitchell & Co. v. West</u>, 748 F.2d 540, 542 (10th Cir. 1984) (emphasis added); <u>see also Eureka Fin. Corp. v. Hartford Accident & Indem. Co.</u>, 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).

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Fourth, based on the circumstances of the assertion of this privilege, the Court does not believe it likely that the documents are subject to any privilege such as to prevent production in this case. Cooper Tire's "privilege log," under which it purported to withhold these documents after the Court ordered them produced, stated that these documents were "gathered and assembled specifically for Cooper Tire & Rubber Company to defend itself regarding any potential legal issues with NHTSA . . . ." However, the log also stated that these documents were <u>hand delivered</u> to NHTSA. Thus, Cooper Tire argues a "work product" protection for the assembly of materials to defend itself from a NHTSA inquiry, but acknowledges these same

materials were assembled for the express purpose of being given to NHTSA. The Court finds no work product or privilege protection extends to such materials. See 8 Moore's Federal Practice § 2024 ("If documents otherwise protected by the work-product rule have been disclosed to others with an actual intention that an opposing party may see the documents, the party who made the disclosure should not be subsequently able to claim protection for the documents as work product."); see also U.S. v. AT&T, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980), also cited by Cooper Tire, (the purpose of the work product doctrine "is to protect material from an opposing party . . . ."; privilege not waived "unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary."). Further, the Court notes that, even at the hearing on the instant motion, Cooper Tire has not supported its belated claims of privilege with admissible evidence. Accordingly, the Court also finds that Cooper Tire has failed to properly support those allegations of privilege.

Cooper Tire next argues its denial of any "investigation" by NHTSA was not misleading because NHTSA has not yet opened a formal "defect investigation" on Cooper Tire. It is clear to the Court, however, that at the time Cooper Tire denied the existence of any kind of NHTSA investigation, and by implication any responsive documents, Cooper Tire was engaged in some types of inquiry with NHTSA. The record shows the following: The plaintiffs' counsel in this case represented to the Court at the hearing they had received telephone calls from NHTSA investigators about Cooper Tire tire failures and incidents; Cooper Tire has refused to produce documents it exchanged with NHTSA on grounds the documents were assembled "to defend itself regarding any potential issues with NHTSA"; Cooper Tire in its log says such documents were "submitted to NHTSA at its request"; and executives of Cooper Tire were meeting with NHTSA as shown in exhibits in Cooper Tire's responsive brief. Under these circumstances,

Cooper Tire's blanket denial to the Court and plaintiffs' counsel was misleading. Once Cooper Tire undertook to make representations about NHTSA, candor required informing the Court and plaintiffs' counsel of the precise nature of the inquiry, rather than leaving the false impression, as Cooper Tire did, that no inquiry of any kind existed.

Cooper Tire also argues that it did not waive its alleged NHTSA investigation privilege claims by failing to urge such claims in its responsive briefing on the motion to compel, by representing no investigation existed, or by not arguing such claims at the hearing on the grounds that it did not know of the NHTSA documents at the time of the hearing and briefing and thus could not have waived such claims or be guilty of misleading the Court. Cooper Tire also claims it raised the privilege claims at the earliest opportunity with its "log" and responses on February 26, 2001.

The record, however, shows this argument is incorrect. In Cooper Tire's brief in response to plaintiffs' second motion for sanctions (at p. 20), Cooper Tire admits that the relevant documents were submitted to NHTSA at NHTSA's request on September 29, 2000. Cooper Tire's brief in opposition to plaintiffs' second motion to compel, in which it denied any NHTSA investigation and never raised a NHTSA privilege, was dated October 30, 2000, almost 30 days after the documents were submitted to NHTSA. The hearing date on plaintiffs' two motions to compel, during which Cooper Tire never urged any NHTSA privilege was November 1, 2000, more than 30 days after Cooper Tire's submission to NHTSA.

11. "Deleted" Documents

Plaintiffs also argue Cooper Tire has withheld portions of documents ordered to be produced by deleting portions of the documents. Cooper Tire 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. Cooper Tire admits in its responsive papers that it also has modified documents before production to plaintiffs so as to delete handwritten marginalia from the documents.

The Court finds if a "document" fell within the scope of the Court's orders, the entire "document" was to be produced. A party has no right, particularly after it has been court ordered to produce a document, to unilaterally delete portions of documents. Further, this Court is unaware of any rules or other authority that makes such handwriting not discoverable or subject to deletion by Cooper Tire. The Court recognizes that in some circumstances a deletion or "redaction" may be necessary to preserve an attorney client privilege, in which case a log addressing the deletion is immediately filed with the Court so the privilege can be considered. It is not permissible, however, after a Court order for a party to selectively remove portions of the document, including handwritten entries, which the party has decided is not within the scope of discovery or not "relevant."

The reasons prohibiting this practice should be obvious. First, deleting portions of documents which a party has been ordered to produce violates the Court's order on a motion to compel. The Court compelled production of "documents," requested by the plaintiffs. Neither the requests nor the order compelled "parts" of 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, deleting portions of documents which have been ordered produced by the Court affects the understandability, readability and context of the document. Neither Cooper Tire nor any other litigant has the right to unilaterally decide what portions of a document <u>ordered produced by the Court</u> are irrelevant or "outside the scope of discovery." As a result, the

Court finds Cooper Tire has deleted portions of documents ordered produced in violation of this Court's orders.

12. Withholding of Consumer Complaints

Plaintiffs also contend that Cooper Tire has withheld consumer complaints sent to NHTSA and forwarded to Cooper Tire, regarding the safety of its tires. Cooper Tire does not dispute this allegation. In fact, Cooper Tire brought to the last hearing copies of these NHTSA consumer complaints concerning Cooper Tire's products which it had not produced until that very hearing. In section B.3 of the Court's order dated December 15, 2000, the Court ordered these documents be produced for "common green" tires and for any other radial passenger tires where separation failures were alleged. Middleton Interrogatory No. 15, which the court ordered Cooper Tire to answer, specifically 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.

Middleton Request for Production of Documents Nos. 14 and 15, which the Court compelled, required Cooper Tire to produce copies of these complaints as well. Cooper Tire again admittedly violated this Court's order by its failure to provide information about these complaints to plaintiffs until after plaintiffs moved for sanctions.

Cooper Tire also made some additional arguments at the hearing and in its responsive brief that the Court must address. Cooper Tire argues that "it didn't interpret the Court's order" in a manner to bring within the ambit of the order documents which were called for under the plain meaning of the requests. Cooper Tire also argues it gave plaintiffs' counsel what Cooper Tire thought plaintiffs "wanted" or "needed" or what Cooper Tire had historically produced to

other plaintiffs notwithstanding Cooper Tire was withholding documents which were included in the requests and ordered by this Court to be produced.

Contrary to Cooper Tire's interpretation of our rules, parties are not entitled to substitute their interpretation for the plain meaning of terms. Nor are parties allowed to substitute their "judgment" about what the opposing party "wants" or "needs" for the language of the requests and the Court's order compelling such discovery. Finally, parties are not allowed to rely on what they have gotten away with producing in some other case(s), regardless of Court intervention, as full compliance with the Court's order in this or any other case. Such conduct is clearly abusive and in violation of the discovery rules of our State.

Cooper Tire also argues that, rather than filing a motion for sanctions, plaintiffs should have contacted Cooper Tire to "discuss" these matters once they discovered Cooper Tire was concealing evidence in violation of Court order. As discussed above, however, the onus is not on plaintiffs to discover evidence being hidden in violation of a Court order and then give Cooper Tire a "second chance" to produce it.

Moreover, in this case, the Court notes the particular irony of that contention. Prior to the first motion to compel, plaintiffs tried to get Cooper Tire to attend a "meet and confer" with a court reporter, where the parties' agreements and representations on discovery could be transcribed and memorialized so as to reduce the issues for the Court on motion to compel. Cooper Tire refused to attend such a conference and stated its refusal was precisely because its representations would be transcribed by a court reporter.

At the time of the hearing, the Court expressed its disappointment that Cooper Tire would refuse to participate in such a conference with a court reporter. In light of subsequent events revealing the misrepresentations to the Court and plaintiffs' counsel, however, the Court now

understands Cooper Tire's reluctance of having discussions pertaining to discovery on the record. The Court finds the plaintiffs have been more than willing to discuss discovery prior to the Court's entry of orders compelling the same. Once the parties could not agree, the Court ruled on the scope of discovery in its two orders. When Cooper Tire made the decision to withhold evidence the Court ordered produced, the plaintiffs had no choice but to file a motion for sanctions.

II. APPROPRIATE RELIEF

As the Supreme Court recently reaffirmed in In Re Anonymous Member, *supra*, 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. In addition to Rule 37, under S.C.R.C.P. Rule 11 and the inherent power of the Court, the Court also has power to control the proceedings before the Court, including punishing parties that mislead the Court and repeatedly violate the Court's orders.

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." Karppi v. Greenville Terrazzo Co., 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. P'ship, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (S.C. Ct. App. 1998 (quoting Karppi, 327 S.C. at 545, 489 S.E.2d at 683)). "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 & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 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." Karppi, 327 S.C. at 543, 489 S.E.2d at 682. Essentially, "[t]he 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 . . . ." Downey v. Dixon, 294 S.C. 42, 46, 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).

As discussed above, the Court finds Cooper Tire's conduct clearly demonstrates "willful disobedience," "bad faith," and "gross indifference" to the plaintiffs' rights. The plaintiffs, however, contend they have only begun to uncover the full extent of the misrepresentations by Cooper Tire and the evidence that may still be concealed in violation of this Court's orders. The plaintiffs also have requested this Court's assistance in rectifying the defendant's discovery abuses.

As an interim sanctions and discovery order, the plaintiffs request that this Court enter an order requiring Cooper Tire to provide plaintiffs and the Court with sufficient information to determine the full extent of the additional evidence, if any, hidden in violation of this Court's orders. After the further investigation ordered below, plaintiffs request the opportunity to brief the Court on the full extent of any additional matters pertaining to Cooper Tire's misconduct and discovery abuses and then have the opportunity to argue to the Court what would be the most

appropriate sanction commensurate to the total spectrum of Cooper Tire's misconduct. Now, therefore, it is hereby ORDERED:

(1) The plaintiffs' Second Consolidated Motion for Sanctions against the defendant Cooper Tire and Rubber Company is GRANTED. Within fifteen (15) days from the date of this order, Cooper Tire shall provide copies to plaintiffs of any documents it withheld that should have been produced under the Court's prior orders, including but not limited to, the specific categories of concealed documents discussed above. As to the withheld NHTSA inquiry or investigation or "exchanged" documents, Cooper Tire is ordered to produce those instanter to the Court so that the Court can conduct an *in camera* review to determine whether the documents should be turned over immediately to plaintiffs.

(2) Cooper Tire shall permit plaintiffs' counsel and consultants to inspect and copy any documents in the repository of documents created by Cooper Tire for production in the class action pending against Cooper Tire, captioned Talalai v. Cooper Tire & Rubber Co., No. MID-L-8830-00 MT (N.J. Super. Ct., Middlesex County). Said inspection shall be scheduled as soon as practicable and can continue periodically until completed by plaintiffs' counsel.

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(3) Within fifteen (15) days, Cooper Tire shall produce to plaintiffs' counsel a full copy of any document which it had deleted (or "redacted") any part thereof.

(4) Within ninety (90) days, Cooper Tire shall preserve and produce to plaintiffs' counsel for inspection any radial passenger car tires returned to Cooper Tire and exhibiting any "separation."

(5) Cooper Tire shall immediately make available 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) Cooper Tire shall immediately make available 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, Cooper Tire internal memoranda and correspondence, any other customer, dealer, or consumer complaints or claims about tires, quality assurance information, including, but not limited to, tracking of scrap tires, and meeting minutes.

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(7) Cooper Tire is also directed to make available to plaintiffs a computer with multiple screens and a knowledgeable operator or operators with access to the below listed computer databases. Cooper Tire shall also provide microfiche and microfilm read printers if any underlying documents are stored on microfilm or microfiche. The search of the below listed databases will be conducted as follows:

A. Cooper Tire shall provide a facility with a computer and a knowledgeable operator with access to all computer databases containing the following information:

(1) adjustment data;

(2) customer/dealer/user correspondence;

(3) customer/dealer/user claims;

(4) customer/dealer/user complaints;

(5) Cooper Tire internal correspondence and memoranda;

(6) location/storage/shipping/or disposal of adjusted or "claims" tires or other returned tires;

(7) all quality assurance information, including; but not limited to, tracking of scrap tires; and

(8) meeting minutes.

B. Plaintiffs' counsel and any representatives of their choosing shall be allowed to appear and to provide search requests within the scope of discovery.

C. Cooper Tire's representatives shall conduct searches of the databases in accordance with requests formulated by plaintiffs' counsel and plaintiffs' representatives, on the topics relevant to this litigation. Prior to exhibiting any document, database entry, or microfiche record to plaintiffs' counsel and their representatives, Cooper Tire shall have the opportunity to review the document, database entry, or microfiche record out of the view of plaintiffs' counsel and their representatives only for the purpose of determining whether a privilege objection will be made. As to any such document on which Cooper Tire intends to assert a privilege, Cooper Tire shall provide a detailed privilege log to plaintiffs within five (5) days. Then, after the log is provided, as to any document plaintiffs wish to challenge as an incorrect assert of privilege, upon plaintiffs request, Cooper Tire shall provide any such document to the Court

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for *in camera* review within five (5) days of plaintiffs' request that such document be forwarded to the Court.

D. If Cooper Tire raises no privilege objection to a particular document or database entry during the search, plaintiffs' counsel and their representatives shall be allowed to review the text of the document or database entry on the screen and/or by printout or microfiche.

E. Copies of documents, database entries, or microfiche records selected by plaintiffs' counsel and their representatives for production, and to which no privilege objection is made, shall be produced by Cooper Tire to plaintiffs within thirty (30) days of plaintiffs request for such documents during the search.

(8) Cooper Tire shall immediately make available for deposition the Cooper Tire employee(s) responsible for the compiling of documents pursuant to the Court orders in this case.

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(9) Cooper Tire shall immediately make available for deposition Steve Kramer, Brian Siferd, and Roger Russell.

(10) Any person(s) who violates, hinders, delays or obstructs the discovery proceedings set forth herein shall be held in contempt of court and punished accordingly.

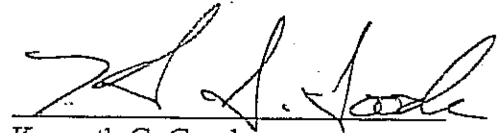
IT IS FURTHER ORDERED the plaintiff and defendant shall conduct and conclude all proceedings enumerated herein within 120 days of the date of this order. Plaintiffs shall thereafter have 20 days to file any additional brief with the Court and the defendant shall have 15

Days to file a responsive brief. The Court will then hold a hearing to determine the appropriate sanction(s) to apply to the defendant Cooper Tire's misconduct and discovery abuses.

AND IT IS SO ORDERED.

November 5, 2001.

Winnsboro, South Carolina



Kenneth G. Goode
Judge, 6th Judicial Circuit