

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al.,

Plaintiffs,

vs.

Goodyear Tire and Rubber Co., et al.,

Defendants.

No. CV-05-02046-PHX-ROS

**ORDER**

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

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

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

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

## 4 FINDINGS OF FACT

### 5 I. The Accident

6 In June 2003, Leroy and Donna Haeger, along with Barry and Suzanne Haeger  
7 (collectively “the Haegers”), were traveling in a motor home owned by Leroy and Donna.  
8 It was manufactured by Gulf Stream Coach (“Gulf Stream”) on a chassis manufactured by  
9 Spartan Motors, Inc. (“Spartan”). The motor home had “G159” tires manufactured by  
10 Goodyear Tire and Rubber Company (“Goodyear”). While traveling on the highway, one  
11 of the motor home’s front tires failed, followed immediately by the motor home leaving the  
12 road and tipping over.<sup>2</sup> The Haegers suffered serious injuries as a result. The motor home  
13 was insured by Farmers Insurance Company (“Farmers”).

### 14 II. Initial Proceedings

15 In 2005, the Haegers and Farmers sued Gulf Stream, Spartan, and Goodyear. The  
16 Haegers and Farmers alleged various product liability and negligence claims, including a  
17 claim that G159 tires were defective if used on motor homes. (Doc. 13). The Haegers were  
18 represented by David Kurtz. Goodyear was represented by Graeme Hancock of Fennemore  
19 Craig PC and Basil Musnuff of Roetzel & Andress in Akron, Ohio. Because Goodyear was  
20 being sued throughout the country based on alleged defects in the same G159 tire, it had  
21 appointed Mr. Musnuff as “national coordinating counsel” on all G159 cases. (Doc. 1014  
22 at 93). In that role, Mr. Musnuff was responsible for reviewing discovery requests,  
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26 <sup>2</sup> The cause of the accident was never definitively determined. Goodyear claimed the  
27 tire failed due to a previous impact which had severely damaged the tire and the accident was  
28 a result of driver error after that failure. The Haegers claimed there had been no impact, the  
tire failed because it was defective, and the accident was unavoidable.

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

3 On December 15, 2005, Goodyear served its Initial Disclosure Statement. (Doc. 992-  
4 1 at 20). According to that statement, "Plaintiffs' allegations with regard to the subject tire  
5 [were] unclear." (Doc. 992-1 at 23). Based on the alleged uncertainty, Goodyear's  
6 disclosure statement contained no meaningful information. In fact, it appears Goodyear's  
7 disclosure statement largely referenced witnesses and documents previously provided to  
8 Goodyear by Plaintiffs. Mr. Kurtz was not satisfied with Goodyear's initial disclosure and  
9 he wrote to Mr. Hancock and asked that Goodyear "take a more reflective look at your  
10 disclosure statement and comply with both the spirit and intent of the rule." (Doc. 992-1 at  
11 27). In particular, Mr. Kurtz asked Goodyear to provide more meaningful disclosures  
12 regarding individuals who might have relevant information regarding the tire. Mr. Kurtz also  
13 asked Goodyear to produce "[t]esting documentation regarding the G159 tires." (Doc. 992-1  
14 at 29). Goodyear did not supplement its initial disclosure in any relevant way.

### 15 **III. Plaintiffs' Responses to Interrogatories**

16 On August 18, 2006, Plaintiffs responded to a set of interrogatories from Goodyear.<sup>4</sup>  
17 Goodyear's interrogatory number 5 asked for "each legal theory under which you believe  
18 Goodyear is liable." (Doc. 963-1 at 19). In response, Plaintiffs stated it had been  
19 inappropriate to market the G159 tire for use on motor homes. According to Plaintiffs:  
20 "Prolonged heat causes degradation of the tire which, under appropriate circumstances, can  
21 lead to tire failure and tread separation even when the tire is properly inflated." (Doc. 963-1  
22 at 20). Because the G159 was originally designed "for pick-up and delivery trucks,"  
23 Plaintiffs claimed using the tire on motor homes meant it was "operating at maximum loads  
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26 <sup>3</sup> There were other attorneys involved in representing Goodyear, but the parties agree  
these were the attorneys responsible for Goodyear's behavior during this case.

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28 <sup>4</sup> There was a significant delay early in the case while the parties briefed, and the  
Court decided, whether to transfer the case to New Mexico. (Doc. 40).

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

#### 5 IV. First Discovery Dispute and Protective Order

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

13 At the conference, Plaintiffs were represented by David Kurtz and Goodyear was  
14 represented by Mr. Hancock. When asked to explain the parties’ disputes, Mr. Kurtz began  
15 by stating he was concerned Goodyear would abuse the provision allowing for documents  
16 to be designated “confidential.” In effect, Mr. Kurtz wanted the protective order to contain  
17 a provision that would allow Goodyear’s counsel located elsewhere to designate documents  
18 as “confidential.” Local counsel, however, would be required to make “a reasonable inquiry  
19 to verify that in fact those confidentiality designations have been thoughtfully made by  
20 appropriate people.” (Doc. 53 at 8). The Court rejected Mr. Kurtz’s request and stated local  
21 counsel would not have to personally verify all “confidential” designations. But the Court  
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24 <sup>5</sup> In an email from Mr. Hancock to Mr. Musnuff dated October 18, 2006, Mr. Hancock  
25 explained Plaintiffs’ theories in some detail. (Plaintiffs’ Statement of Fact in Support of  
26 Supplemental Brief (“PSOF”) Ex. 4). And in an email from Mr. Musnuff to Ms. Okey dated  
27 November 9, 2006, Mr. Musnuff discussed the “new theory of liability in Haeger.” (PSOF  
28 Ex. 5). Therefore, the repeated representations by Goodyear and its counsel that Plaintiffs  
did not state the legal theory of their case until January 7, 2007 is incorrect, contradicted by  
their own statements, and now appears to have been part of a general strategy to obstruct and  
delay discovery. (Doc. 983 at 4).

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

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

#### 13 **V. Plaintiffs’ First Request for Production of Documents**

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

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

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

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

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

7 RESPONSE: See General Objections. Goodyear objects to this  
8 Request for the reasons and on the grounds that it is Overly Broad,  
9 Unduly Burdensome and seeks Irrelevant and Confidential Information,  
10 seeks information about tires Not Substantially Similar, and Plaintiffs  
11 have identified No Defect Theory.

12 SUPPLEMENTAL RESPONSE: Subject to and without waiving the  
13 foregoing objections, and in a good faith spirit of cooperation,  
14 Goodyear will produce, subject to the Protective Order entered in this  
15 case, the DOT test data for the Subject Tire for the Subject Time  
16 Frame.

17 (Doc. 948-1 at 54).

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

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

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

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

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

8 Request for Production No. 14. We asked for test records for the G159  
9 275/70R 22.5, including road tests, wheel tests, high speed testing, and  
10 durability testing. You objected, suggesting the test records were  
11 overly broad and unduly burdensome. You have only produced the  
12 DOT test data showing the tires were tested at 30 mph. My interest is  
13 in finding the rest of the test data. If there is any, it is your obligation  
14 to disclose it.

15 (Doc. 1044-2 at 25).

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

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

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

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

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

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

## 18 VI. Goodyear Discovers High Speed Testing

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

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

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

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

13 Around this same time, Mr. Musnuff was working with Sherman Taylor, a Goodyear  
14 tire engineer, “to locate documents and test data regarding the G159 Tire.”<sup>6</sup> (Doc. 984-1 at  
15 9). Based on receipt of Mr. Osborne’s opinion, Mr. Musnuff asked Mr. Taylor “to locate the  
16 test data that the Radial/Medium Truck Tire Development Group used to release the G159  
17 Tire for use at highway speeds.” (Doc. 984-1 at 10). Mr. Taylor was not able to find  
18 “electronic or paper copies of the actual W84 high speed test data Goodyear used to release  
19 the G159 Tire for production.” (Doc. 984-1 at 10). But on January 24, 2007, Mr. Taylor  
20 located “electronic post-production W84 high speed test data (“High Speed Tests”) on the  
21 G159 Tire.” (Doc. 984-1 at 11). When he discovered that data, Mr. Taylor also “discovered  
22 L04 heat rise test results (“Heat Rise tests”) for the G159 Tire in the same electronic  
23 database.” (Doc. 984-1 at 11). Mr. Taylor had another “employee pull the test results data  
24 into text files, which [he] then printed.” (Doc. 984-1 at 11). According to Mr. Taylor,  
25 “[w]ithin a day or two of printing the test data, I delivered a copy to Mr. Musnuff.” (Doc.  
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27 <sup>6</sup> It was only after receiving the expert report that Mr. Musnuff began looking for any  
28 test results. (Doc. 1014 at 86-87).

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

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

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

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

23 <sup>7</sup> Interestingly, Mr. Musnuff notes that the G159 underwent a "significant design  
24 change" shortly before the "Haeger accident tire" was manufactured. That change "was a  
25 revision to the tread compound that allowed this tire to withstand the heat of high speed  
26 operation. The tire already was sufficient to be rated at 75 mph, but this revision would have  
27 improved its performance at high speed even more." (PSOF Ex. 12). Clearly, as of February  
28 2007, Mr. Musnuff understood there was a relationship between a particular compound, the  
heat produced in high speed applications, and the G159's durability. Simply, Mr. Musnuff  
knew that the specific compound used in a tire relates to that tire's durability. Thus, his later  
attempted explanations that the Heat Rise test was merely a compounders' test with no  
bearing on durability is not believable.

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

## 12 **VII. Statements Made After Learning High Speed Tests Existed**

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

18 The Court: Let me ask defense counsel, is there any internal  
19 documentation that is available that has been requested that your client  
20 has — clients have not provided?

21 Mr. Hancock: Your Honor, speaking on behalf of Goodyear, we have  
22 responded to all outstanding discovery and those responses have been  
23 outstanding for some time and, you know, if a document shows up,  
24 we'll of course produce it and supplement our answers but I think we're  
25 done or nearly done.

26 The Court: And your client has provided certification as is required by  
27 the rule?

28 Mr. Hancock: Correct.

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

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

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

4 **VIII. Third Request for Production of Documents**

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

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

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

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

1 The Court: Mr. Hancock, are there any tests that are available to show  
2 when this tire was tested for speeds above 30 miles an hour?

3 Mr. Hancock: Yes, Your Honor.

4 The Court: And they have been produced?

5 Mr. Hancock: No, Your Honor. They have been requested from the  
6 plaintiffs in a Request for Production that arrived in my office I believe  
7 last week where the discovery response is due in mid-June. And they  
8 will be – I have requested them from my client and they will be  
9 produced at that time.

10 The Court: All right. So Mr. Kurtz –

11 Mr. Kurtz: Your Honor, if I may, we have, as have lawyers across the  
12 country, they have asked for these tests. My requests for these speed  
13 tests have been outstanding for well over a year and Mr. Hancock  
14 himself told me the reason they haven't been produced is because  
15 nobody can find them anywhere.

16 The Court: Well, he's found them. He apparently has found them so  
17 you're going to have what you want.

18 Mr. Kurtz: Well, I'll be looking forward to reading them but that won't  
19 change the issue, Your Honor. You know, I think – you know, this is  
20 discovery, Judge. We ought to be able to ask some questions and I'm  
21 pleased to provide the court with a detailed factual record about these.  
22 These are not things that I'm making up. They are not things that  
23 experts divined. They are tied to hard documents prepared by  
24 Goodyear.

25 The Court: It seems to me that the issue has been narrowed after our  
26 lengthy conversation to the tests that have been used or were engaged  
27 in by Goodyear for the purpose of establishing for their purposes and  
28 for consumers that these tires could be used for – based upon the weight  
and pressure that they have indicated that they were or that they could  
hold for traveling above 75 or at 75 miles an hour.

Mr. Hancock: At and below Your Honor, thank you.

The Court: At and below. At no more than 75 miles an hour.

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

The Court: Is there any question in your mind, Mr. Hancock, what I am  
going to allow in terms of discovery? And that is the deposition  
questions that I will allow?

Mr. Hancock: Your Honor, I believe the court is saying . . . my  
witnesses should be deposed about the [testing] done on this [specific]  
tire with respect to the speed in which it can be operated and what

1 records they have, what records they don't have and what those records  
2 show?

3 The Court: That's exactly right.

4 Mr. Hancock: Thank you, Your Honor.

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

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

11 On May 21, 2007, Goodyear deposed Plaintiff's expert, Mr. Osborne. As Mr.  
12 Hancock and Mr. Musnuff knew, Mr. Osborne had opined that "no high speed testing of the  
13 tire was done." (Doc. 983-1 at 5). As evidenced by their email traffic in early February  
14 2007, Mr. Hancock and Mr. Musnuff both knew high speed testing existed, Plaintiffs'  
15 expert's report directly implicated that testing, and the testing needed to be produced. Mr.  
16 Hancock and Mr. Musnuff decided to withhold the High Speed tests for at least three months,  
17 and proceed with Mr. Osborne's deposition, knowing that Mr. Osborne was operating under  
18 incorrect assumptions and an incomplete record. The only plausible interpretation of this  
19 behavior is that Mr. Hancock and Mr. Musnuff decided to delay production of the tests in  
20 hopes of gaining a tactical advantage.

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

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

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

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

3  
4 (Doc. 243 at 13).

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

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

16 Subject to and without waiving the following objections, and in a good  
17 faith spirit of cooperation, Goodyear states that it is producing, subject  
18 to the Protective Order entered into this case, copies of electronically-  
19 maintained high speed durability test results conducted on [G159]  
20 production tires since August 1996. After diligent search, to date  
21 Goodyear has not been able to locate additional paper records for the  
22 tests that are recorded electronically, and it is believed that those paper  
23 records have been discarded pursuant to the Company’s document  
24 retention practices. Also, after diligent search, to date Goodyear has  
25 not been able to locate the paper records for the high-speed durability  
26 tests which it conducted on the [G159] tire prior to August 1996, which  
27 were not recorded electronically, and it is believed that those paper  
28 records have been discarded pursuant to the Company’s document  
retention practices. Goodyear will supplement this Response to  
produce these paper records if they are subsequently located.

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

25 (Doc. 938-1 at 36).

1           **IX. Repeated Statements that Goodyear Withheld High Speed Tests**

2           Around the same time Goodyear responded to Plaintiffs' Third Request, the Court  
3 ordered the parties to "confer and set dates for all remaining depositions and discovery."  
4 (Doc. 251). On June 26, 2007, Plaintiffs filed a document stating the parties had complied  
5 with the Court's Order by establishing dates to complete discovery. Because a status hearing  
6 was scheduled for the near future, Plaintiffs' filing also addressed various discovery  
7 problems they were still having with Goodyear. According to Plaintiffs, Goodyear's June  
8 21, 2007 disclosures were the "first time" it had disclosed "evidence which relates to the  
9 inability of the subject tire to operate at freeway speeds." Plaintiffs stated they were still  
10 waiting for Goodyear to produce additional testing information and they requested the Court  
11 "inquire and determine whether additional testing data is in Goodyear's possession to assure  
12 that Goodyear's disclosures are complete." (Doc. 256 at 3).

13           On June 28, 2007, Plaintiffs submitted a status report.<sup>9</sup> In that report, Plaintiffs stated:

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

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

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

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<sup>9</sup> The docket does not reflect a status report from Goodyear.

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

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

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

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26 <sup>10</sup> The document states June 24, 2007 but from other evidence in the record it appears  
27 Goodyear produced the testing on June 21, 2007.

28 <sup>11</sup> That document was not signed by an attorney for Goodyear.

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

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

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

10 Mr. O'Connor (Plaintiffs' Counsel): To the best of your knowledge,  
11 [were] only these four high-speed tests available to Goodyear prior to  
rating this tire as a 75 mile an hour tire[?]

12 \*\*\*

13 Mr. Olsen: No.

14 Mr. O'Connor: What other high-speed tests are available?

15 Mr. Olsen: I think we talked at length this morning when we first  
16 started getting into the high-speed test data that I've spoken with the  
17 people who were involved in the release of this tire, and they've  
confirmed to me that high-speed tests were run in the development  
process of this tire before it was released to production. We just don't  
18 have any paperwork available for that.

19 Mr. O'Connor: Okay. So there were tests run, but those have either  
20 been discarded or thrown away, and we don't have the results of those  
tests. Correct?

21 Mr. Olsen: We don't have them here today, but the people making the  
decision at that time likely had them available to them at that time.

22 Mr. O'Connor: Okay. So they had them available, apparently, in 1998  
23 and have somehow discarded them since 1998. Is that what you're  
trying to tell me?

24 Mr. Olsen: I'm just saying that they're not available today.

25 Mr. O'Connor: Okay. So based on the record we have, we only know  
26 of four available high-speed tests that we can look at as to whether or  
not Goodyear could justify speed rating this tire at 75 miles an hour in  
June of 1998. Correct?

27 Mr. Olsen: We have four available today to us.  
28

1           \*\*\*

2           Mr. O'Connor: **Okay. So there's any – any separate testing that**  
3           **would have been done on this car – on this particular tire, sir?**

4           Mr. Olsen: **There's a number of different test procedures that are**  
5           **run in the development process of a new tire before it goes into**  
6           **production.**

7           Mr. O'Connor: **Do we have any of those tests, sir?**

8           Mr. Olsen: **I don't have them, no.**

9           Mr. O'Connor: **Are they still available?**

10          Mr. Olsen: **I don't believe so.**

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

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

15               Mr. Hancock: Okay. The – earlier on, the plaintiffs' counsel asked you  
16               about an exhibit . . . it is the test data for high-speed wheel tests  
17               performed on this tire. Do you have that?

18               Mr. Olsen. Yes. . . .

19               Mr. Hancock: . . . There are other numbered tests that are not on the  
20               exhibit. Is that correct? Do you recall the testimony the plaintiffs'  
21               counsel asked you about saying, "Well, we don't have tests, for  
22               example, 4 through 7," that sort of thing?

23               Mr. Olsen: Yes, sir.

24               Mr. Hancock: As far as you know, are all of the tests that were in the  
25               databases that were searched that were on the – this, the tire at issue in  
26               this case, this specification tire, in that database, in what you have  
27               there?

28               Mr. Olsen: Yes. They're all included here.

            (Doc. 938-1 at 40-47).

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

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

8 At that hearing, Mr. Hancock made a number of unequivocal statements. Mr.  
 9 Hancock averred that “Goodyear has searched for and produced all of the high-speed testing  
 10 in its possession concerning the tire that is at issue in this case.” (Doc. 361 at 45). After the  
 11 Court learned Mr. Olsen may not have been qualified to state that all high speed testing data  
 12 had been produced, the Court ordered Mr. Hancock to “ask [Mr. Olsen] just to make sure that  
 13 . . . that everything that relates to the high-speed testing of this tire has been produced.” Mr.  
 14 Hancock responded: “I will do that, Your Honor. I will supplement our record. I believe that  
 15 to be the case. I have checked with my client and confirmed that that is the case.”<sup>12</sup> (Doc.  
 16 361 at 46). Mr. Hancock then went on to “flesh out the record.” He stated:

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

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

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

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27 <sup>12</sup> The record does not reflect whether Mr. Hancock asked Mr. Olsen about the High  
 28 Speed tests but the record is clear that Mr. Hancock did not provide any additional test results  
 after this discussion.

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

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

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

#### 15 **XI. Post-Discovery Activity**

16 Discovery formally ended shortly after the October 2007 hearing and the parties began  
17 briefing dispositive motions. The dispositive motions involved a wide array of complicated  
18 issues which, for purposes of this Order, are irrelevant. While those motions were pending,  
19 Plaintiffs agreed to dismiss Gulf Stream. (Doc. 635). Eventually, the Court issued a lengthy  
20 order denying Plaintiffs' motion for summary judgment and denying in part and granting in  
21 part Goodyear's motion for summary judgment. (Doc. 651). The Court also granted  
22 Spartan's motion for summary judgment, dismissing Spartan from the case. (Doc. 652).  
23 Plaintiffs and Goodyear then prepared for trial by inundating the Court with motions in  
24 limine and other pretrial filings. The Court devoted substantial time and effort to resolving  
25 those motions. (Doc. 842, resolving over thirty motions). On April 14, 2010, the first day  
26 of trial, Plaintiffs and Goodyear informed the Court they had reached a settlement. (Doc.  
27 926). As a result, the case was closed.  
28

1           **XII. Other G159 Cases**

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

15           **A. *Woods v. Goodyear***

16           *Woods v. Goodyear* involved an accident with a Monaco Diplomat motor home and  
 17 was filed in Alabama. (Doc. 938-1 at 84). Mr. Musnuff worked directly on the case in his  
 18 role as national coordinating counsel. Sometime prior to July 2007, the *Woods* plaintiffs  
 19

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20           <sup>13</sup> Goodyear has been subject to a number of suits involving the G159 tire. According  
 21 to a list provided by Plaintiffs, Goodyear was first sued regarding the G159 in 1999. (Doc.  
 22 938-1 at 83). Given this long history of litigation, it is surprising that Goodyear did not even  
 23 begin to look for certain testing information until January 2007 when Mr. Musnuff made a  
 24 request based on the *Haeger* case. Mr. Musnuff’s internal correspondence hints, but does  
 25 not establish, that he knew about other testing long before January 2007. In his January 11,  
 26 2007 email to Mr. Hancock, Mr. Musnuff states “perhaps we need to supplement our  
 27 discovery responses to show the testing of this tire at various speeds.” (PSOF Ex. 8). If Mr.  
 28 Musnuff actually did not know any other tests existed, his email musing that “perhaps we  
 need to supplement” is, to say the least, a strange way of phrasing the matter. But it is  
 possible Mr. Musnuff’s current claim that he first went looking for test data in January 2007  
 is true because Goodyear’s obstructive discovery practices prior to 2006 were successful in  
 keeping the additional testing concealed. (Doc. 1014 at 120).

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

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

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

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

25 Mr. Musnuff included a comment regarding this request:

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

1 Specification, but we need to consider whether it serves our best  
2 interest to produce it.<sup>14</sup>

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

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

- 7 • DOT FMVSS-119 Extended Certification
- 8 • Heat Rise test;
- 9 • Bead durability test;
- 10 • Crown durability test;
- 11 • W16 test;
- 12 • W64 test;
- 13 • G09 test; and
- 14 • L04 test.

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

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

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

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

5 **B. *Schalmo v. Goodyear***

6 *Schalmo v. Goodyear* involved an accident with a Fleetwood motor home and was  
7 filed in Florida. (Doc. 938-1 at 84). Again, Mr. Musnuff worked directly on the case in his  
8 role as national coordinating counsel. During discovery, the *Schalmo* plaintiffs' sought "all  
9 documents reflecting studies, analysis or testing . . . associated with determining the  
10 appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc.  
11 992-1 at 4). In April 2008, Goodyear responded to this request with a list of over twenty-five  
12 tests. Included in those tests were the Heat Rise tests. (Doc. 992-1 at 5).

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

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

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24 <sup>15</sup> This position also means Goodyear's document production in *Woods* was wrong.

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

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

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

### 19 C. *Bogaert v. Goodyear*

20 *Bogaert v. Goodyear* involved an accident with a Fleetwood motor home and was  
21 filed in Maricopa County Superior Court in 2005. (Doc. 938-1 at 84). Goodyear was  
22 represented by Mr. Hancock as local counsel and Mr. Musnuff served as national  
23 coordinating counsel. As with all the other Goodyear cases which have been brought to the  
24 Court's attention, the *Bogaert* matter involved extreme difficulty in convincing Goodyear to  
25 produce documents. In early 2008, dissatisfied with Goodyear's discovery responses, the  
26 *Bogaert* plaintiffs filed a motion to compel. (Doc. 992-1 at 49). On March 20, 2008, the  
27 discovery special master ordered Goodyear to "produce the requested documents." (Doc.  
28 992-1 at 66). In particular, Goodyear was ordered to produce the "testing conducted by

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

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

7 In meeting with [Goodyear Engineer] Jim Stroble yesterday, we came  
8 to conclude that we might be best served by producing data from  
9 additional tests of the Subject Tire.<sup>17</sup> As you know, we have produced  
10 the available electronically maintained high-speed test data in this case  
11 (and in Haeger and Haley [another G159 case] as well) along with the  
12 current protocol.

13 One of the 30(b)(6) topics relates to testing done to make sure the tire  
14 was suitable for RV usage. There was no testing specifically done on  
15 RVs, **but our whole testing package was to ensure that the tire was**  
16 **suitable for over-the-road applications, including RV.**

17 In the Woods case, we were compelled to produce other testing  
18 data/protocols in addition to High Speed. There, we produced (i)  
19 **extended DOT testing data, (ii) heat-rise test data, (iii) bead**  
20 **durability (aka Runflat) test data, and (iv) crown durability test**  
21 **data,** along with the current (evergreen) protocol for each of those tests.  
22 ...

23 Jim thinks that it may be helpful to produce these documents so that he  
24 can review them in preparation for his deposition. That seems ok with  
25 me. Do you agree? Thoughts?

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

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<sup>17</sup> As with his email in the *Woods* case, Mr. Musnuff was concerned with what would  
“best serve[]” Goodyear’s interests rather than producing responsive documents.

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

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

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

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

28

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

### 6 **XIII. Plaintiffs' Counsel Writes to Goodyear About Undisclosed Tests**

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

21 Mr. Kurtz sent a follow-up letter, which Mr. Musnuff responded to by claiming Mr.  
22 Kurtz' allegations were "unprofessional and without merit." (Doc. 938-1 at 66). Mr.  
23 Musnuff stated Goodyear had "abided by all of Judge Silver's rulings and we take issue with  
24 any suggestion that we were disrespectful or misled the court in any manner or that we failed  
25 to comply with any of her rulings in this case." Mr. Musnuff admitted "it is true there are  
26 testing records regarding the [G159] tire that were not produced in the *Haeger* litigation.  
27 *That fact was clear during the course of the litigation*, and certainly at the time plaintiffs  
28

1 chose to resolve this case.”<sup>18</sup> (Doc. 938-1 at 66) (emphasis added). Mr. Musnuff then  
 2 offered a disturbing explanation of what happened.

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

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

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

#### 18 **XIV. Plaintiffs File Their Motion for Sanctions**

19 On May 31, 2011, Plaintiffs filed a motion for sanctions based on alleged “discovery  
 20 fraud.” (Doc. 938). Plaintiffs argued Goodyear had “knowingly concealed crucial ‘internal  
 21 heat test’ records related to the defective design of the G159.” (Doc. 938 at 1). Plaintiffs  
 22

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23  
 24 <sup>18</sup> There is no plausible way to read the record as supporting this contention. It  
 25 certainly was *not* clear to the Court that Goodyear was withholding documents regarding the  
 26 G159’s performance in “highway” testing. Had it been “clear” to the Court what Goodyear  
 27 and its counsel were doing, the Court would have immediately ordered disclosure and  
 28 imposed sanctions for misconduct. To claim this Court would *knowingly* allow Goodyear  
 to withhold relevant and discoverable information is outrageous. In addition, the claim by  
 Goodyear’s counsel that Plaintiff’s allegations were “unprofessional and without merit” is  
 preposterous. (Doc. 938-1 at 66).

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

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

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

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

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

21 Before filing their reply, Plaintiffs asked the Court to order Goodyear to produce "the  
22 requested tests." (Doc. 949 at 2). Goodyear opposed that motion and argued it should not  
23 have to produce the "heat test" documents because "Goodyear has committed no discovery  
24 violation." (Doc. 951 at 4). On October 5, 2011, the Court concluded there were "serious  
25 questions regarding [Goodyear's] conduct in this case" and, based on the Court's power to  
26

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27 <sup>19</sup> According to the Court's calculations, the parties spent approximately sixteen hours  
28 in court on discovery matters. This is an extraordinary amount of time.

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

#### 6 **XV. Explanation of Undisclosed Test Results**

7 The initial motion for sanctions centered on the Heat Rise tests. Those tests are titled  
8 “Laboratory Durability Testing–Heat Rise” and were conducted on four G159 tires on April  
9 21, 1996. The tests were meant to “determine the dynamic heat build-up at specific loads,  
10 speeds, and inflations.” (Doc. 963-1 at 7). The Heat Rise tests were conducted on a “67.23  
11 [inch] diameter flywheel” and consisted of running the tires at 35 miles per hour and  
12 checking the temperature of the tire at certain intervals. (Doc. 963-1 at 7). The Heat Rise  
13 tests describe 35 miles per hour as reflecting “highway use.” Even though 35 miles per hour  
14 seems substantially slower than highway speeds, the rationale for this description is  
15 explained by Goodyear’s 30(b)(6) witness. Testing a tire on a 67-inch flywheel places  
16 “upwards of double the speed” impact on a tire as the tire impact of “a vehicle on a road  
17 surface.” In other words, “if you run 45 miles an hour on the steel flywheel [that] is the  
18 equivalent temperaturewise of 70, 80 miles an hour on the public highway as far as the heat  
19 history goes.” (Doc. 963-1 at 61). Under this logic, testing tires at 35 miles per hour on a  
20 flywheel would be the equivalent of 55-65 miles per hour on the highway.

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

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

3 **XVI. Court's Preliminary Order**

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

9 The proposed order first concluded the First Request seeking "all tests" remained in  
10 place and Goodyear's attempt to respond by objecting and providing a limited set of  
11 documents was inappropriate. (Doc. 970-1 at 18). Therefore, the Heat Rise tests should have  
12 been produced in response to the First Request. Next, the proposed order recounted that the  
13 Heat Rise tests also were responsive to the Third Request where Plaintiffs sought "documents  
14 which relate to any speed or endurance testing to determine that the [G159] was suitable for  
15 [65 and 75] mph highway purposes." (Doc. 970-1 at 18-19). The proposed order focused  
16 on the argument made by Goodyear that the Heat Rise tests did not qualify as "high speed  
17 testing." The Court rejected this position because Plaintiffs had never limited their request  
18 to "high speed testing." Moreover, the Heat Rise tests themselves were labeled as "highway  
19 testing," meaning they easily qualified as "high speed testing." In fact, the Court  
20 preliminarily concluded the tests were "*obviously* responsive" to a request for testing to  
21 determine suitability for "highway purposes." (Doc. 970-1 at 22). The Court did not  
22 address, because Goodyear did not argue, that the Heat Rise tests were not responsive  
23 because Goodyear had not relied on them when determining the G159's suitability for  
24 highway use.

25 The proposed order noted that despite clear evidence that someone had behaved  
26 inappropriately, the record was not sufficiently clear to determine who was "responsible for  
27 each instance of misconduct" nor was it sufficiently clear to determine "the appropriate  
28

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

### 3 **XVII. Briefing After Preliminary Order**

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

#### 8 **A. Mr. Hancock’s Response**

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

#### 16 **B. Mr. Musnuff’s Response**

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

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26  
27 <sup>20</sup> This is misleading as Mr. Musnuff’s January 11, 2007 email to Mr. Hancock  
28 admitted Goodyear might need to supplement its prior responses “to show the testing of this  
tire at various speeds.”

1           Somewhat bizarrely, Mr. Musnuff's response also argued that the objections which  
2 accompanied the responses to Plaintiffs' Third Request were "asserted for technical reasons  
3 only, and [were] not indicative that additional responsive documents were located." (Doc.  
4 983-1 at 8). In his letters to Mr. Kurtz before the sanctions motion was filed, Mr. Musnuff  
5 had repeatedly taken the position that the objections to the First Request *were* an indication  
6 that other documents existed. Thus, Mr. Musnuff seemed to be arguing Plaintiffs should  
7 have realized Goodyear's objections to the First and Third Requests were conveying  
8 precisely opposite positions. Mr. Musnuff provided no explanation how Plaintiffs should  
9 have arrived at this conclusion.

### 10                   C. Goodyear's Response

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

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

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

1 That request did not contain a request for “all tests” and Ms. Okey’s statement to the contrary  
2 is wrong. The decision to submit a written declaration containing such a statement—a  
3 situation where careful review and drafting is possible—shows an unfortunately casual  
4 attitude to the issues presented by Plaintiffs’ motion.

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

15 Finally, in making its various arguments against the proposed order, Goodyear  
16 inadvertently disclosed that there were *other* tests which it had not disclosed in this case. In  
17 its response, Goodyear attempted to explain that it gave Mr. Musnuff “the only W84 high  
18 speed test data [it] was able to locate.” (Doc. 984 at 6). In a footnote, Goodyear provided  
19 further context, stating it “produced 16 different high speed test results, but 12 of those test  
20 results were performed in 2000 and relate to G159 Series tires used by NASCAR. Moreover,  
21 Goodyear also produced several crown durability, bead durability and DOT endurance tests.”  
22 (Doc. 984 at 6). In support of this latter statement, Goodyear cited to a declaration by  
23 Richard J. Olsen, the individual Goodyear had used as its 30(b)(6) witness. (Doc. 984-1 at  
24 13).

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

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

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

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

27

28

1           **XVIII. Additional Briefing**

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

5           **A. Production in *Schalmo***

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

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

18           **B. Other Tests**

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

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

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

### 20                   **C. Heat Rise Tests Conflict with Representations**

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

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

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

5 **D. Party Responsible for Not Producing Heat Rise Tests**

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

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

25 **E. Not Produced in *Bogaert***

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

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

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

16 Goodyear’s position is equally perplexing in that it refuses to admit the obvious, *i.e.*  
17 that the Heat Rise tests should have been produced in *Bogaert*. Goodyear’s failure to  
18 straightforwardly admit that its counsel committed such an obvious error gives the  
19 impression that Goodyear lacks remorse for the mistakes made on its behalf. As with its  
20 response to the false testimony by its 30(b)(6) witness, Goodyear is not behaving responsibly.

21 And finally, Mr. Hancock’s response was evasive in that the record now establishes  
22 Mr. Hancock knew of the Heat Rise tests (and other tests) while *Bogaert* was being litigated.  
23 There is no explanation for Mr. Hancock’s willingness to aid Mr. Musnuff and Goodyear in  
24 flouting Arizona’s disclosure rules.

### 25 **XIX. Evidentiary Hearing**

26 The Court held an evidentiary hearing on March 22, 2012. At that hearing, Mr.  
27 Musnuff and Mr. Hancock testified. Mr. Musnuff’s testimony conflicted with the  
28 documentary evidence and was not credible. Mr. Hancock’s testimony, while more reliable

1 than Mr. Musnuff's, still conflicted with the underlying evidence and was not entirely  
2 credible.

3 **A. Mr. Musnuff's Testimony**

4 Mr. Musnuff's testimony covered a variety of topics, including his explanation for  
5 when he first received the Heat Rise tests and what he understood the Heat Rise tests to  
6 mean. Despite the written declaration by Mr. Taylor that he gave the Heat Rise tests to Mr.  
7 Musnuff in January 2007, Mr. Musnuff testified he first learned of the Heat Rise tests  
8 sometime in August 2007. (Doc. 1014 at 97). When pressed, Mr. Musnuff explained that  
9 Mr. Taylor's representations that the Heat Rise tests were located and provided to Mr.  
10 Musnuff in January 2007 was a mistake. (Doc. 1014 at 122). Moreover, according to Mr.  
11 Musnuff, the January 24, 2007 date printed on the Heat Rise tests was inaccurate and no one  
12 could figure out what it meant.

13 Next, Mr. Musnuff testified that he determined the Heat Rise tests were not responsive  
14 to Plaintiffs' Third Request based on statements made to him by "numerous Goodyear  
15 engineers" that the tests had "nothing to do with the durability of the tire or its ability to  
16 function at highway speeds." (Doc. 1014 at 29). Mr. Musnuff asserted he was "repeatedly  
17 told by Goodyear that the only test determined for suitability for 65 and 75 mile an hour  
18 highway use was the W84 tests." (Doc. 1014 at 29-30). When asked to explain this in more  
19 detail, Mr. Musnuff stated:

20 As was explained to me by the Goodyear engineers, the heat rise test is  
21 not a test to evaluate the tire itself. It's a compounder's test used to  
22 evaluate different compounds that might be used in different tires; or  
23 if you're trying to improve a compound or such, you might test one and  
24 then test another. You have to test them in something so you test them  
25 in a tire, but they're really evaluating the compound rather than the tire.

26 (Doc. 1014 at 34). The Court could not understand this statement and pressed Mr. Musnuff  
27 for a more precise explanation:

28 The Court: If one compound is better than one, but the purpose [of the  
Heat Rise tests] is to improve the quality of the tire; right?

Mr. Musnuff: I would think that all of the engineering that Goodyear  
does is to ultimately to try to improve the quality of the products.

1 The Court: So, then, in essence, then, it does have something to with its  
2 endurance or durability because that is, at bottom, what is important to  
Goodyear; right?

3 Mr. Musnuff: Well, no. Your Honor, if I can disagree. As it was  
4 explained to me, that this is in no way a durability test or an endurance  
test. . . . It's just to provide – it's like an information point only. . . .

5 The Court: So if one of the compounds was found . . . to be better than  
6 another compound, what would the engineering group do?

7 Mr. Musnuff: That I don't know.

8 \*\*\*

9 The Court: But what was [the Heat Rise test] designed to do?

10 Mr. Musnuff: Just to provide information that a compounder could look  
at.

11 The Court: Was it academic or was it for recreation? What was it for?

12 Mr. Musnuff: No, not academic but there's no qualified – there's no  
13 standard that applies to it. . . . It's just to provide a point of information  
so that you can compare one compound you're testing versus another  
14 compound you're testing.

15 Mr. Musnuff explained that he talked to Mr. Taylor and Mr. Stroble regarding the Heat Rise  
16 tests and they informed him the tests were not responsive because Goodyear had not relied  
on them when determining the suitability of the G159 for highway use. (Doc. 1014 at 40).

17 On cross-examination, Mr. Musnuff testified that the Heat Rise tests were not even  
18 relevant to Plaintiffs' allegations. (Doc. 1014 at 45). Mr. Musnuff did concede, however,  
19 that the Heat Rise tests qualified as "wheel tests" which were requested by Plaintiffs in their  
20 First Request. Mr. Musnuff admitted Goodyear never supplemented its responses to the First  
21 Request nor did it otherwise alert Plaintiffs that tests were being withheld. (Doc. 1014 at 46,  
22 54). Mr. Musnuff also stated he did not recall questioning why the Heat Rise tests were  
23 labeled "durability tests" if they were not, in fact, durability tests. (Doc. 1014 at 50).

24 Towards the end of the cross-examination, Mr. Musnuff admitted he attended the  
25 deposition of Goodyear's expert where that expert expressed the opinion that "heat in excess  
26 of 200 degrees for a prolonged period of time . . . can lead to tread separations." (Doc. 1014  
27 at 79). Despite the fact that the Heat Rise test established the G159 "was running at 229  
28

1 degrees,” Mr. Musnuff maintained it was utterly irrelevant because the Heat Rise test had  
2 “nothing to do with measuring the durability of the tire.” (Doc. 1014 at 80).

3 After all counsel concluded their questioning of Mr. Musnuff, the Court asked a series  
4 of questions. First, the Court asked why the Heat Rise tests were turned over in *Schalmo* but  
5 not in *Haeger*. Mr. Musnuff explained that he came to believe Mr. Kurtz had narrowed his  
6 discovery request such that the Heat Rise tests were not responsive to any outstanding  
7 request. (Doc. 1014 at 128-29). Next, the Court asked why there were no efforts to locate  
8 any testing before January 2007. Mr. Musnuff explained that there had been no case before  
9 2003 that “required . . . production of further testing beyond the compliance testing”  
10 Goodyear routinely produced. (Doc. 1014 at 131). Third, the Court confirmed Mr. Musnuff  
11 had been present for the depositions of the various experts. (Doc. 1014 at 133). Mr.  
12 Musnuff confirmed that he was present for Goodyear’s expert’s deposition and that the  
13 expert had stated “anything over 200 [degrees] could cause separation.” (Doc. 1014 at 134).  
14 Despite the Heat Rise tests casting serious doubt on this opinion, Mr. Musnuff stated he had  
15 behaved properly because the Heat Rise tests were not responsive to any discovery request.  
16 When the Court expressed some confusion how Mr. Musnuff believed it was proper for him  
17 to allow Goodyear’s expert to provide testimony directly undercut by Goodyear’s own  
18 testing, Mr. Musnuff repeated that the Heat Rise tests had absolutely no practical application  
19 other than providing a “data point” to compare two compounds. (Doc. 1014 at 137). The  
20 results of the Heat Rise tests “mean[] nothing, essentially nothing in terms of durability on  
21 the road.” (Doc. 1014 at 139).

22 Finally, the Court confirmed that the Heat Rise tests had been used during the  
23 *Schalmo* trial to show the G159 was defective. (Doc. 1014 at 138). Based on a question  
24 from Plaintiff’s counsel, Mr. Musnuff confirmed that in *Schalmo*, Goodyear never  
25 disclosed that its expert in *Haeger* had “said the tire would foreseeably fail at  
26 [temperatures] above 200 degrees.” (Doc. 1014 at 144). Based on the entire record, Mr.  
27 Musnuff’s testimony was not credible.

28

1 To begin, the Court concludes Mr. Musnuff received the Heat Rise tests in January  
2 2007. As stated by Mr. Taylor, the High Speed tests and Heat Rise tests were uncovered  
3 in the same database and, according to the date printed on all those documents, printed in  
4 January 2007. While Mr. Musnuff may not remember getting the Heat Rise tests at that  
5 time, Mr. Taylor's version of events makes more sense and is supported by the date  
6 printed on the Heat Rise tests.

7 Next, Mr. Musnuff's repeated position that he did not turn over the Heat Rise tests  
8 because he was told by individuals at Goodyear that they were not responsive cannot be  
9 taken seriously. The claim that the Heat Rise tests were merely to "provide information  
10 that a compounder could look at" is not reasonable. Goodyear performed the test for  
11 some purpose and Mr. Musnuff's own statements reflect this. For example, in his  
12 February 11, 2007 memo, Mr. Musnuff observed that a change in the compound of the  
13 G159 improved performance. (PSOF Ex. 12). Moreover, his June 5, 2008 email to Mr.  
14 Hancock stated Goodyear's "whole testing package" was to ensure the G159 was suitable  
15 for "over-the-road applications, including RV." (PSOF 31). And in an email dated May  
16 8, 2009, Mr. Musnuff stated the Heat Rise tests were "taken during the *durability* testing  
17 of the G159." (PSOF Ex. 34) (emphasis added). Accordingly, prior to these sanctions  
18 proceedings, Mr. Musnuff knew the Heat Rise tests were part of Goodyear's testing used  
19 to determine the durability and suitability of the G159 for use on the road. His testimony  
20 to the contrary during the hearing cannot be believed.

21 Finally, Mr. Musnuff's claim that the Heat Rise tests were not even relevant to  
22 Plaintiffs' claim is frivolous. Mr. Musnuff knew Plaintiffs' theory and knew that  
23 Plaintiffs believed high temperatures caused tire separations. Mr. Musnuff also knew that  
24 Plaintiffs' expert had stated the temperatures at which tire degradation would occur and  
25 knew the temperature Goodyear's own expert had testified about which would be cause  
26 for concern. Maintaining that the Heat Rise tests were irrelevant when they showed the  
27 temperature the G159 operated at when used at highway speeds is so obviously relevant  
28

1 that Mr. Musnuff's current position to the contrary is clear evidence he is operating in bad  
2 faith.

3 **B. Mr. Hancock's Testimony**

4 Mr. Hancock's testimony began with a discussion of his representation of  
5 Goodyear in the *Bogaert* case. (Doc. 1014 at 145). Mr. Hancock stated he had  
6 conversations with Mr. Musnuff regarding the requirements of Arizona Rule of Civil  
7 Procedure 26.1. (Doc. 1014 at 149). As the record now shows, Goodyear did not even  
8 attempt to locate testing data as part of its initial disclosure in *Bogaert*. Thus, either Mr.  
9 Hancock did not explain the requirements of Arizona Rule 26.1 to Mr. Musnuff and  
10 Goodyear or Mr. Musnuff and Goodyear chose to ignore that rule. Based on the entirety  
11 of the record, Mr. Hancock appears to have made no meaningful effort to ensure  
12 Goodyear was complying with the Rule.

13 Next, Mr. Hancock's testimony focused on his in-court statements in the present  
14 case. Mr. Hancock was adamant that at the time he made certain in-court statements, he  
15 had no prior exposure to the Heat Rise tests. At one point during cross-examination, Mr.  
16 Hancock stated: "I have never heard, before [Plaintiffs'] motion was filed in this case for  
17 sanctions, of a heat rise durability test." And at another point, "I never saw the heat rise  
18 test until it was ordered produced in this case after [Plaintiffs'] motion. I did not know  
19 the contents of the heat rise test at any time prior to its production here. I did not know it  
20 was called anything other than a heat rise test, and no one mentioned it to me ever during  
21 any of the times referenced in the Court's order." (Doc. 1014 at 168).

22 On the topic of the High Speed tests which were eventually produced in response  
23 to Plaintiffs' Third Request, Mr. Hancock stated he learned of their existence "sometime  
24 prior to the third Request for Production," probably in "April or May of 2007." (Doc.  
25 1014 at 158). Mr. Hancock admitted, however, that he was unclear on the exact date.  
26 (Doc. 1014 at 158). Mr. Hancock was asked why there had been a five month delay  
27 between when Mr. Musnuff said he first learned of the high speed tests in February 2007  
28 and when they were produced in June 2007. The response was: "I don't know the answer

1 to that, sir, because that would have been between Goodyear and Mr. Musnuff. I know  
2 that I received the documents with clearance to produce them on June 20, 2007.” (Doc.  
3 1014 at 159).

4 Mr. Hancock then recounted the series of events regarding the eventual production  
5 of the High Speed tests as follows. At the April 6, 2007 hearing, Mr. Hancock was  
6 “taken aback” by the Court’s question regarding outstanding discovery because “nobody  
7 had been after [him] for any discovery.” (Doc. 1014 at 164). When asked whether he  
8 knew about the High Speed tests at that time, Mr. Hancock responded “I haven’t  
9 reviewed my records. I don’t believe so but I don’t know for certain. I apologize.”  
10 Then, according to his testimony, sometime prior to May 17, 2007, he received Plaintiffs’  
11 Third Request. As of May 17, 2007, Mr. Hancock had sent the Third Request to Mr.  
12 Musnuff and Mr. Hancock “knew there was [high speed] testing.” Mr. Hancock  
13 produced some of the high speed testing on June 6, 2007. (Doc. 1014 at 160). And  
14 produced the remaining tests on June 21, 2007. (Doc. 1014 at 159).

15 Finally, Mr. Hancock was asked regarding his behavior in connection with the  
16 deposition of Plaintiffs’ expert Mr. Osborne. That deposition occurred on May 24, 2007.  
17 (Doc. 1014 at 164). At the time, Mr. Hancock knew Mr. Osborne “was under the  
18 impression that there was no high-speed testing at all.” (Doc. 1014 at 166). When asked  
19 whether he told Plaintiffs prior to Mr. Osborne’s deposition “that Goodyear had located  
20 those high-speed tests,” Mr. Hancock admitted he did not. (Doc. 1014 at 167). Overall,  
21 Mr. Hancock was more credible than Mr. Musnuff but Mr. Hancock’s testimony also  
22 established certain instances of inappropriate behavior.

23 It is now clear beyond dispute that Mr. Hancock knew in February 2007 that  
24 Goodyear had located the High Speed tests. Therefore, at the time of the April 6, 2007  
25 hearing, Mr. Hancock had known about the high speed tests for two months and he had  
26 even acknowledged in an email to Mr. Musnuff that the tests should be produced. His  
27 statements at that hearing that Goodyear had “responded to all discovery” and Goodyear  
28 was “done or nearly done” were false.

1 Next, as of February 2007 Mr. Hancock knew Goodyear had the High Speed tests  
2 and, as acknowledged in his own email, those tests were important in response to  
3 Plaintiffs' expert's report. Long before that expert's deposition, Mr. Hancock knew  
4 Plaintiffs and the expert had been materially misled regarding the scope of Goodyear's  
5 testing. Despite this knowledge, Mr. Hancock proceeded with the deposition of Mr.  
6 Osborne and only produced the High Speed tests after the deposition was complete. At  
7 best, this behavior was aimed at prolonging the litigation. At worst, this behavior was  
8 meant to prevent Plaintiffs from obtaining information which would help their case until  
9 it was too late for them to do anything with it.

10 And finally, Mr. Hancock's testimony that he had "never heard . . . of a heat rise  
11 durability test" before the present sanctions proceedings was false. As evidenced by the  
12 emails from *Bogaert*, Mr. Hancock was informed in 2008 that Goodyear had produced  
13 "heat-rise test data" in another G159 case. It is possible Mr. Hancock merely forgot  
14 about the *Bogaert* emails but, in the context of this case, it appears more likely that Mr.  
15 Hancock was not expecting Plaintiffs to gain access to the *Bogaert* emails and his  
16 testimony was an attempt to paint himself in a sympathetic light.

#### 17 ANALYSIS

18 What above all else is eroding public confidence in the Nation's  
19 judicial system is the perception that litigation is just a game, that the  
20 party with the most resourceful lawyer can play it to win, that our  
seemingly interminable legal proceedings are wonderfully self-  
perpetuating but incapable of delivering real-world justice.

21 *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2274 (2009) (Scalia, J.,  
22 dissenting).

23 Mr. Hancock, Mr. Musnuff, and Goodyear engaged in repeated and deliberate  
24 attempts to frustrate the resolution of this case on the merits. From the very beginning,  
25 Mr. Hancock, Mr. Musnuff, and Goodyear adopted a plan of making discovery as  
26 difficult as possible, providing only those documents they wished to provide, timing the  
27 production of the small subset of documents they were willing to turn over such that it  
28 was inordinately difficult for Plaintiffs to manage their case, and making false statements

1 to the Court in an attempt to hide their behavior. In the end, that plan succeeded in  
2 making this case far more complicated than necessary, requiring an absurd expenditure of  
3 resources by Plaintiffs and the Court.<sup>21</sup> Goodyear also succeeded in obtaining a  
4 settlement from Plaintiffs, a settlement Plaintiffs now believe was less than they would  
5 have been able to achieve had Mr. Hancock, Mr. Musnuff, and Goodyear complied with  
6 their discovery obligations.

7 The necessity for sanctions in these circumstances is obvious. But the form those  
8 sanctions should take presents a very difficult question. As set out below, the Ninth  
9 Circuit case law does not provide clear guidance for remedying a years-long course of  
10 misconduct such as that presented here. If the misconduct had come to light while the  
11 case was ongoing, entry of default judgment with a trial on damages would have been the  
12 obvious solution. *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012)  
13 (affirming striking of answer and entry of default judgment because of discovery  
14 misconduct). But this case is closed and the issue is the permissible scope of sanctions in  
15 this context. The Ninth Circuit seems to allow an award of sanctions only in the amount  
16 of harm directly caused by the sanctionable conduct. In the present circumstances, it  
17 would be impossible to draw the precise causal connections between the misconduct and  
18 the fees Plaintiffs incurred. Neither the Court nor the Plaintiffs could separate the fees  
19 incurred due to legitimate activity from the fees and costs incurred due to Goodyear's  
20 refusal to abide by clear and simple discovery obligations. For example, if Goodyear had  
21 responded to Plaintiffs' First Request with all responsive documents, Goodyear might  
22  
23

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24 <sup>21</sup> Prior to these sanctions proceedings, the parties filed approximately 163 motions,  
25 the Court issued 254 orders, and the case had close to 1,000 docket entries. By way of  
26 comparison, a patent case filed around the same time, and which included a twelve-day jury  
27 trial, ended with approximately 700 docket entries. *Dupont Air Products Nanomaterials,*  
28 *LLC v. Cabot Microelectronics Corp.*, CV-06-2952. And an incredibly complex ERISA  
class action, filed a year earlier than the present case, ended this year with just over 750  
docket entries. *Allen v. Honeywell*, CV-04-424.

1 have decided to settle the case immediately.<sup>22</sup> In these circumstances, one could conclude  
2 practically all of Plaintiffs' fees and costs were due to misconduct (*i.e.*, the case would  
3 have been resolved in an easy and straightforward manner absent Goodyear's  
4 obstructionism). Alternatively, one could conclude practically none of Plaintiffs' fees  
5 and costs were due to misconduct (*i.e.*, even if Goodyear had disclosed every responsive  
6 document in its possession, Goodyear could have refused to settle and prolonged the  
7 litigation through other tactics).

8 While there is some uncertainty how the litigation would have proceeded if  
9 Goodyear and its attorneys were acting in good faith, based on Goodyear's pattern and  
10 practice in G159 cases, the case more likely than not would have settled much earlier. In  
11 these circumstances, the most appropriate sanction is to award Plaintiffs *all* of the  
12 attorneys' fees and costs they incurred after Goodyear served its supplemental responses  
13 to Plaintiffs' First Request.<sup>23</sup> That was the first definitive proof that Goodyear was not  
14 going to cooperate in the litigation process. Instead, Goodyear believed discovery would  
15 consist of a "game of hide and seek." *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 790 (9th  
16 Cir. 2011); *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 579 (9th Cir.  
17 1992) (faulting party for "treating discovery as a game instead of a serious matter");  
18 *United States v. \$42,500*, 283 F.3d 977, 983 (9th Cir. 2002) ("A court is not a place to  
19 play hide-and-go-seek with relevant evidence and information ."). Goodyear and its  
20 counsel must now pay the price for adopting this approach.

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22  
23 <sup>22</sup> Of course, the evidence might have made Plaintiffs realize they had a winning trial  
24 and they would have refused to settle.

25 <sup>23</sup> The Court recognizes that Plaintiffs might have a contingency agreement with their  
26 counsel. The amount of sanctions will be calculated pursuant to the lodestar method and will  
27 not be limited to the amount paid by Plaintiffs as a percentage of the settlement. *Cf. Van*  
28 *Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court  
may not rely on a contingency agreement to increase or decrease what it determines to be a  
reasonable attorney's fee.").

As permitted by Arizona law, Plaintiffs may wish to affirm their settlement agreement and pursue an independent cause of action for fraud based on Mr. Hancock, Mr. Musnuff, and Goodyear's behavior. But the present case has long been closed and it would be inappropriate to allow Plaintiffs to litigate their fraud claims here. *Cf. Applying v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (allowing judgment to be set aside only upon showing of "grave miscarriage of justice").

### **I. Standard for Awarding Sanctions**

Given that this case was closed pursuant to the parties' agreement, there are two possible bases for imposition of sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear: 28 U.S.C. § 1927 and the Court's inherent power.<sup>24</sup> As set out below, sanctions are appropriate under both.

#### **A. 28 U.S.C. § 1927 Cannot Reach Goodyear's Conduct**

Pursuant to 28 U.S.C. § 1927: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this statute, an attorney's conduct is sanctionable only if it multiplies the proceedings in both an "unreasonable and vexatious manner." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002). In addition, an attorney must have acted in bad faith or engaged in conduct tantamount to bad faith. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The imposition of sanctions under § 1927 requires a finding of bad faith."). But this statute allows for sanctions *only* against "an attorney or otherwise admitted representative of a party." *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986). Therefore, any sanctionable conduct by Goodyear itself is beyond the reach of § 1927.

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<sup>24</sup> Sanctions pursuant to Federal Rule of Civil Procedure 11 should be imposed before the case is closed. See Moore's Federal Practice § 11.22(2)(a) ("[T]he court should ordinarily impose [Rule 11] sanctions before issuing a final order.").

**B. Court's Inherent Power Reaches Goodyear and Counsel**

"Under its inherent powers, a district court may . . . award sanctions in the form of attorneys' fees against *a party or counsel* who acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (emphasis added). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Thus, as with sanctions under Section 1927, before awarding sanctions under its inherent power, the Court "must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." *Id.*

**C. Definition of Bad Faith**

A comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible, but the type of conduct at issue "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). Such conduct includes "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991). And "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F.3d at 994. Therefore, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. *Id.*; *see also B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002) (same); *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith). It is of particular importance to note that it is "permissible to infer bad faith from [a party's] action[s] plus the surrounding circumstances." *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011). Accordingly, Mr. Hancock, Mr. Musnuff, and Goodyear are incorrect when they repeatedly claim the Court must, in effect, obtain a confession before imposing sanctions.

## II. Type of Sanctions

Sanctionable conduct may result in both monetary and non-monetary relief.

### A. Sanctions Under § 1927

Sanctions pursuant to § 1927 are limited to an amount equal to the additional expenditures incurred “as a result of the multiplicity of the proceedings.” *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Any amount awarded pursuant to § 1927 must have been directly caused by the sanctionable conduct. *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983) (“Section 1927 only authorizes the taxing of excess costs arising from an attorney’s unreasonable and vexatious conduct; it does not authorize imposition of sanctions in excess of costs reasonably incurred because of such conduct.”). But this rule is softened by the recognition that it is often “impossible to determine with mathematical precision the fees and costs generated only by” the sanctionable conduct. *Lahiri v. Universal Music and Video Distribution Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010). District courts are permitted to exercise their discretion and make reasonable adjustments when attempting to determine the appropriate size of sanctions. *Id.* (affirming “reasoned exercise of discretion” regarding amount of fees awarded pursuant to § 1927).

### B. Monetary Sanctions Under Court’s Inherent Power

The Ninth Circuit recently ruled that compensatory sanctions under a Court’s inherent power must be limited to the amount necessary to compensate the opposing party for the harm caused by the misconduct. *Miller*, 661 F.3d at 1029. In so ruling, the Ninth Circuit concluded a district court erred by awarding all of the attorneys’ fees and costs to a plaintiff when the court did not make an explicit finding that the defendant’s conduct caused plaintiff to incur all of those fees. *Id.* This holding seems to be in direct conflict with Supreme Court authority.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the district court had relied on its inherent power and sanctioned NASCO a sum equal to “the entire amount of NASCO’s litigation costs paid to its attorneys.” *Id.* at 40. At the Supreme Court,

1 Chambers challenged this amount by arguing “the fact that the entire amount of fees was  
2 awarded means that the District Court failed to tailor the sanction to the particular  
3 wrong.” *Id.* at 57. The Supreme Court rejected this argument, finding “the frequency and  
4 severity of Chambers’ abuses of the judicial system” meant “[i]t was within the court’s  
5 discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for  
6 all attorney’s fees.” *Id.* at 57. This is a rejection of the position that only monetary harms  
7 incurred as a direct result of sanctionable conduct can be remedied.

8 It is difficult to reconcile *Chambers* with the Ninth Circuit’s recent *Miller*  
9 decision. *See Miller*, 661 F.3d at 1039 (Ikuta, J., dissenting) (noting *Chambers* is contrary  
10 to holding in *Miller*). In an attempt to do so, the Court concludes monetary sanctions  
11 under the Court’s inherent power *usually* must be premised on a specific factual finding  
12 of a direct causal link between the sanctionable conduct and the alleged harm. Only when  
13 the sanctionable conduct rises to a truly egregious level can all of the attorneys’ fees  
14 incurred in the case be awarded. *Chambers*, 501 U.S. at 57. In less egregious cases, a  
15 court must tailor its award more carefully. *See, e.g., Lasar v. Ford Motor Co.*, 399 F.3d  
16 1101, 1111 (9th Cir. 2005) (affirming award of sanctions “designed to compensate  
17 [plaintiff] for unnecessary costs and attorney’s fees”). Of course, there is no requirement  
18 that a court limit its sanctions award to the amount of attorneys’ fees and costs because  
19 sanctions can be awarded for other types of harm incurred as a result of the sanctionable  
20 conduct. For example, sanctions can compensate a party for the “pain and suffering”  
21 caused by the sanctionable conduct. *See B.K.B. v. Maui Police Dept.*, 276 F.3d 1091,  
22 1109 (9th Cir. 2002) (affirming award of “compensatory damages” sanctions pursuant to  
23 court’s inherent power due to “the embarrassment and pain suffered by Plaintiff” as a  
24 result of the sanctionable conduct).

25 Finally, under its inherent power the Court may award non-compensatory  
26 monetary sanctions “to vindicate the court’s authority and deter future misconduct.”  
27 *Miller*, 661 F.3d at 1030. But large non-compensatory monetary sanctions “are akin to  
28 criminal contempt and may be imposed only by following the procedures applicable to

1 criminal cases, including appointment of an independent prosecutor, proof beyond a  
2 reasonable doubt and a jury trial.” *Id.*

### 3 **C. Non-Monetary Sanctions**

4 In addition to monetary sanctions, courts imposing sanctions under their inherent  
5 power have a wide variety of other sanctions at their disposal. Courts have the inherent  
6 power to: vacate judgments, order dismissal of a suit, strike an answer and enter default  
7 judgment. *Chambers*, 501 U.S. at 45; *Thompson v. Housing Authority of City of Los*  
8 *Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (inherent power includes power to “impose  
9 sanctions including, where appropriate, default or dismissal”); *Anheuser-Busch, Inc. v.*  
10 *Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (dismissal pursuant to  
11 inherent powers); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming  
12 order striking answer and entering default judgment). But these type of sanctions are  
13 usually employed to vacate a fraudulently obtained judgment or where the litigation is  
14 ongoing. These sanctions are not a good fit for situations, such as the present one, where  
15 Plaintiffs have released their underlying claims and they do not wish to rescind that  
16 agreement. Because of that release, there are no pending claims which the Court could,  
17 for example, enter default judgment on.

### 18 **III. Sanctionable Behavior**

19 The troubling behavior by Goodyear and its counsel began almost immediately  
20 after the case was filed and continued throughout the entire litigation, including post-  
21 dismissal. Without recounting the entire factual history already outlined, the following  
22 are the most egregious instances where Mr. Hancock, Mr. Musnuff, and Goodyear  
23 engaged in sanctionable behavior.

#### 24 **A. First Request for Production of Documents**

25 One of the core arguments presented by Mr. Musnuff and Goodyear is that they  
26 had no further obligation to respond to Plaintiffs’ First Request after they sent their  
27 objections and a small subset of responsive documents. This position is necessitated by  
28 the fact that there can be no serious dispute that the Heat Rise tests, the extended DOT

1 tests, the crown durability test, and the bead durability test were all responsive to the First  
2 Request. Mr. Musnuff and Goodyear have no choice but to claim the response to the First  
3 Request was appropriate. Mr. Musnuff and Goodyear also have to maintain that the First  
4 Request was withdrawn by Mr. Kurtz. Their arguments are not convincing and, in fact, it  
5 is now clear they did not adopt this position until they were faced with sanctions.

6 Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs served their First  
7 Request shortly after the case began. (Doc. 59). That request sought "All test records for  
8 the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed  
9 testing, and durability testing." When responding to this request, Goodyear had two  
10 options. First, Goodyear could serve an objection to the request as a whole. Fed. R. Civ.  
11 P. 34(b)(2)(B). Second, Goodyear could serve an "objection to part of [the] request"  
12 *provided* it specified the part it was objecting to and it responded to the non-objectionable  
13 portions. Fed. R. Civ. P. 34(b)(2)(C). What Goodyear could not do, but what it did, was  
14 combine its objections with a partial response, without any indication that the response  
15 was, in fact, partial.<sup>25</sup> Goodyear apparently believes that its response to the First Request  
16 was sufficient to signal to Plaintiffs that other potentially responsive material was not  
17 being produced. This position finds absolutely no support in the Federal Rules, federal  
18 case law, or common sense.

19 The language of Rule 34 is clear. The rule states: "An objection to part of a  
20 request must specify the part and permit inspection of the rest." Fed. R. Civ. P.  
21 34(b)(2)(C). As clarified in the 1993 Advisory Committee notes, this language is meant  
22 to "make clear that, if a request for production is objectionable only in part, production  
23 should be afforded with respect to the unobjectionable portions." The natural corollary of  
24 this is that any objection must identify the particular portion which is not being responded  
25 to on the basis of the objection. As stated in Moore's Federal Practice, "If the party  
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27 <sup>25</sup> It is especially troubling that Goodyear claimed its secretly partial response was  
28 being made "in a good faith spirit of cooperation."

1 objects to the production of an item or category in part rather than in its entirety, *the*  
2 *objection must specify the part to which the objection pertains.*” Moore’s Federal  
3 Practice § 34.13(2)(b) (emphasis added). And in Federal Practice and Procedure: “The  
4 responding party may object to some or all of the discovery sought. In this case it must  
5 state, with respect to each item or category to which objection is made, the reason for the  
6 objections. *One who objects to part of an item or category should specify to which the*  
7 *objection is directed.*” Federal Practice and Procedure § 2213 (emphasis added). The  
8 plain language of Rule 34 requires a partial response be identified as such.

9 This plain language analysis is supported by case law. For example, in *Rodriguez*  
10 *v. Simmons*, 2011 WL 1322003, at \*7 (E.D. Cal.), the plaintiff had served a Rule 34  
11 request for medical records. The defendants served objections and indicated they had  
12 already produced some responsive documents. The court observed this response was  
13 inadequate. In the court’s view, the defendants had to “clearly state that responsive  
14 documents do not exist, have already been produced, or exist *but* are being withheld”  
15 based on an objection. *Id.* It was especially critical if the documents existed but were  
16 being withheld that plaintiff “be made aware of this fact.” *Id.* at \*7 n.9. This would allow  
17 the parties to confer and attempt to resolve whether the unproduced documents should be  
18 produced prior to any court involvement.

19 Similarly, in *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, 2011 WL  
20 939226, at \*9 (D. Kan.), a defendant had produced documents “subject to” certain  
21 objections. The plaintiff believed this response was inappropriate because it was left  
22 “wondering whether all documents [had] been produced, or if some documents [were]  
23 still being withheld.” *Id.* at \*8. The court agreed the response was insufficient. The  
24 court observed the defendant could “object to part of a document request,” but production  
25 “subject to” general objections was not permitted because such objections failed “to  
26 specify exactly what part of the document requests [was] being objected to.” The failure  
27 to comply with Rule 34 left the plaintiff “guessing as to whether Defendant has produced  
28 all documents, or only produced some documents and withheld others.” *See also GMAC*

1 *Real Estate, LLC v. Joseph Carl Sec., Inc.*, 2010 WL 432318, at \*1 (D. Ariz.)

2 (“Objections must be in writing and identify the particular portions of the request subject  
3 to the objection; all other portions should be made available for inspection.”).

4 Plain common sense also supports this reading of Rule 34. Were Goodyear correct  
5 that Rule 34 allows litigants to make undisclosed partial document productions, discovery  
6 would break down in practically every case. A litigant with *any* viable objection to a  
7 discovery request would make that objection and then produce whatever portion of  
8 otherwise responsive documents it wished to produce. Under this approach, a party  
9 would have no obligation to indicate that its production was partial and the opposing  
10 party would have no way of knowing the production was partial. Absent an indication of  
11 what, exactly, the responding party was objecting to, courts would have no way of  
12 assessing the propriety of the objections. Instead, courts would be flooded with motions  
13 to compel by litigants seeking to confirm that undisclosed responsive documents did not  
14 exist. And courts would then be forced to ask counsel, over and over again, “Do other  
15 documents exist?”

16 Accordingly, the plain language of Rule 34, case law, and common sense show  
17 Goodyear’s response to the First Request was not complete or accurate. But Goodyear  
18 has other problems regarding the First Request in that the facts show its limited response  
19 was not made in good faith and Mr. Hancock, Mr. Musnuff, and Goodyear knew the  
20 responses were inadequate.

21 As is now clear, the Heat Rise tests, extended DOT tests, crown durability test, and  
22 bead durability test were performed on the *exact* tire at issue, were *directly* relevant to  
23 Plaintiffs’ defect theory, and were performed around the *same time* other tests, which  
24 were produced, were performed. Goodyear claims that its boilerplate objections in  
25 response to the First Request were appropriate, but it is clear no one made even a casual  
26 attempt to determine what responsive documents existed. There has been no acceptable  
27 explanation for Goodyear’s belief that these tests were irrelevant or why Goodyear  
28 claimed that locating these tests would have been unduly burdensome. Thus, despite

1 knowing the precise defect theory and issues presented in the case, Mr. Musnuff and  
2 Goodyear decided to make no effort to provide responsive documents. That decision is  
3 evidence that Mr. Musnuff and Goodyear were not operating in good faith.

4 The record also establishes that Mr. Hancock and Mr. Musnuff knew Mr. Kurtz  
5 had not withdrawn his First Request. In fact, there is indisputable evidence that Mr.  
6 Hancock and Mr. Musnuff knew the First Request remained outstanding and  
7 supplementation was needed. Mr. Hancock and Mr. Musnuff's failure to produce the  
8 High Speed tests in a timely manner was a tactical decision made in bad faith in an  
9 attempt to prolong this litigation and multiply the proceedings. Mr. Hancock and Mr.  
10 Musnuff's decision not to produce the other tests, allegedly learned of in the context of  
11 other cases, was a bad faith attempt to hide responsive documents. Goodyear is equally  
12 responsible for this behavior because despite giving documents to Mr. Musnuff, Ms.  
13 Okey retained final approval authority on discovery responses. Therefore, Ms. Okey  
14 knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior.

#### 15 **B. Third Request for Production of Documents**

16 The response by Goodyear and its counsel to the Third Request is further proof of  
17 bad faith conduct. Plaintiffs' Third Request sought: "All documents which relate to any  
18 speed or endurance testing to determine that the subject tire was suitable for [65 and 75]  
19 mph highway purposes." (Doc. 938-1 at 17). In response to this request, Mr. Hancock,  
20 Mr. Musnuff, and Goodyear eventually produced the High Speed tests. Waiting until a  
21 response to the Third Request was due was a bad faith attempt by Mr. Hancock, Mr.  
22 Musnuff, and Goodyear to prolong the litigation and make Plaintiffs incur additional  
23 costs. In particular, Mr. Hancock and Mr. Musnuff engaged in bad faith behavior by  
24 proceeding with Plaintiffs' expert's deposition before disclosing the High Speed tests.

25 In addition, Mr. Musnuff and Goodyear engaged in a bad faith attempt to conceal  
26 documents when they did not produce the Heat Rise tests or the other concealed tests in  
27 response to the Third Request. Mr. Musnuff and Goodyear had previously taken the  
28 position in other litigation that these tests were responsive to an almost identical

1 discovery request. That is, the Heat Rise tests and other concealed tests were used by  
2 Goodyear to determine the G159's suitability for use on the highway. In fact, there is  
3 correspondence reflecting Mr. Musnuff and Goodyear employees knew the Heat Rise  
4 tests and other tests were responsive to the Third Request. (PSOF Ex. 24). There is no  
5 acceptable justification for the failure to provide all responsive documents to the Third  
6 Request.

7 Finally, even accepting Mr. Hancock did not learn about the Heat Rise tests and  
8 other tests until the June 5, 2008 email in *Bogaert*, Mr. Hancock's failure to immediately  
9 correct his statements and the disclosures in the present case were motivated by a bad  
10 faith desire to keep the tests concealed.

### 11 C. Goodyear's 30(b)(6) Witness

12 In September 2007, Plaintiffs deposed Richard Olsen as Goodyear's 30(b)(6)  
13 witness. Prior to this deposition, the Court confirmed with Goodyear's counsel that Mr.  
14 Olsen would be speaking on behalf of Goodyear. (Doc. 243 at 29). During his  
15 deposition, Mr. Olsen was asked if there was "any separate testing" besides the tests  
16 Goodyear had produced. Mr. Olsen responded there were a "number of different test  
17 procedures" run during the development process but no documentation of those other  
18 tests was available. That was false.

19 The record is clear that Mr. Olsen knew about the Heat Rise tests as well as the  
20 crown durability test, bead durability test, and DOT endurance tests at the time of his  
21 deposition. The record is also clear that those tests still existed. Mr. Olsen made clear  
22 false representations when he stated otherwise. Because he was speaking on behalf of  
23 Goodyear, that means Goodyear made false representations. Fed. R. Civ. P. 30(b)(6)  
24 (corporation must designate person "to testify on its behalf"). Mr. Olsen had an  
25 obligation to "review all corporate documentation" that was relevant to the deposition  
26 topics and it appears he did so as the summary in his files contains references to all the  
27 concealed tests. *Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D.  
28 33, 37 (D. Mass. 2001). His deposition testimony, therefore, can only be explained as

1 *consistent misrepresentations* about the available testing. This easily qualifies as conduct  
2 tantamount to bad faith.<sup>26</sup>

### 3 **D. Misleading In-Court Statements**

4 Plaintiffs first requested Goodyear's testing data in September 2006. Goodyear,  
5 through its counsel, decided not to comply with its obligation to produce some of that  
6 testing data until June 2007. And it decided to withhold completely a wide variety of  
7 testing data. Therefore, any statement prior to June 2007 that Goodyear had produced all  
8 requested documents was false. On April 6, 2007, the Court asked whether Goodyear had  
9 "any internal documentation" that had been requested but not produced. Mr. Hancock  
10 responded that it had produced all the requested documents. (Doc. 146 at 13). That was  
11 false. On May 17, 2007, the Court asked Goodyear "are there any tests that are available  
12 to show when this tire was tested for speeds above 30 miles an hour?"<sup>27</sup> Mr. Hancock  
13 responded that there were, but they had only been requested "last week." That was  
14 false.<sup>28</sup> Mr. Hancock also stated the tests would be produced in mid-June. Given the  
15 apparent plan to never produce the Heat Rise tests, this statement was misleading at best.

16 After Goodyear produced the High Speed tests, it continued to make untruthful  
17 statements to the Court. For example, on September 10, 2007, Mr. Hancock stated  
18 Goodyear had "produced all the high speed test data on this tire in its possession in a  
19 timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). That was  
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21 <sup>26</sup> The Court recognizes that testimony by a 30(b)(6) witness may not absolutely bind  
22 "a corporate party to its designee's recollection." *See A.I. Credit Corp. v. Legion Ins. Co.*,  
23 265 F.3d 630, 637 (7th Cir. 2001) (finding 30(b)(6) testimony does not act as binding judicial  
24 admission). But Goodyear has not claimed Mr. Olsen simply made a mistake or was not  
25 aware of the other tests. Moreover, excusing this type of behavior based on its witness's  
26 faulty recollection would reward Goodyear for not adequately preparing that witness to  
27 discuss the very material topics identified in the deposition notice.

26 <sup>27</sup> The Heat Rise tests were conducted at 35 mph, meaning they were directly  
27 implicated by the Court's question.

28 <sup>28</sup> The tests had been requested in September 2006.

1 false. At a hearing on October 19, 2007, Mr. Hancock stated Goodyear had “searched for  
2 and produced all of the high-speed testing in its possession concerning the tire that is at  
3 issue in this case.” (Doc. 361 at 45). That was false. At that same hearing, Mr. Hancock  
4 also stated there were “no documents for [its 30(b)(6) witness] to be questioned about  
5 other than the documents that have been produced.” That was false. And finally, Mr.  
6 Hancock stated Goodyear had “searched for and produced all of the high-speed testing on  
7 this tire. The original discovery request [was for] all documents which relate to any speed  
8 testing to determine that the tire was suitable for highway purposes. All of that has been  
9 produced.” That was false.

10 Mr. Hancock now claims that he did not know these statements were false at the  
11 time they were made. For some of them, he is correct. But it should go without saying  
12 that *someone* must be responsible when an attorney makes these type of repeated false  
13 statements in Court. Mr. Hancock, Mr. Musnuff, and Goodyear seem to believe sanctions  
14 are inappropriate if there is a claim, however implausible, that the false statements can be  
15 attributed to communication breakdowns. That cannot be the case. The question is, who  
16 should be responsible?

17 It appears Mr. Hancock did not know of the Heat Rise tests, extended DOT test,  
18 bead durability test, and crown durability test until June 2008 when he learned of them in  
19 the context of the *Bogaert* case.<sup>29</sup> (PSOF Ex. 31). Therefore, the Court is sympathetic to  
20 his position that he should not be held responsible for certain statements he made after  
21 Mr. Musnuff and Goodyear knew about those tests and had made the decision not to  
22 disclose them. The problem is that Mr. Hancock did not correct the record when he  
23 subsequently learned these other tests existed. The *Haeger* case continued for  
24 approximately twenty-two months after he learned of these other tests. Accordingly,  
25 while his culpability is reduced, it is not purged.

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28 <sup>29</sup> Mr. Hancock knew of the High Speed tests long before they were produced.

1 As for Mr. Musnuff, he claims he was unaware of the in-court representations Mr.  
2 Hancock was making. That is not true. Mr. Hancock averred he “discussed any and all  
3 court appearances and discovery disputes with [Mr. Musnuff] both before and after such  
4 events.” (Doc. 980-2 at 3). The Court finds this portion of Mr. Hancock’s credible.  
5 Based on accepting that testimony, Mr. Musnuff was informed that Mr. Hancock was  
6 repeatedly representing in court that no further documents existed. Mr. Musnuff knew  
7 that other documents existed but he never corrected Mr. Hancock. That failure was a bad  
8 faith attempt to suppress the documents.

9 And as for Goodyear, its outside counsel and in-house counsel were, acting  
10 together, making materially false and misleading statements in court and withholding  
11 documents they knew to be responsive to discovery requests. Allowing Goodyear to  
12 escape the consequences of the statements made by its “freely selected agent[s] . . . would  
13 be wholly inconsistent with our system of representative litigation, in which each party is  
14 deemed bound by the acts of his lawyer-agent[s] and considered to have notice of all  
15 facts.” *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962). Ms. Okey remained  
16 responsible for discovery responses and, ultimately, she remained responsible to keep  
17 informed regarding the conduct of this litigation and the representations Mr. Hancock was  
18 making in court.

#### 19 **IV. Amount and Apportionment of Sanctions**

20 Plaintiffs will be directed to file documentation establishing the amount of  
21 attorneys’ fees and costs incurred after Goodyear served its supplemental responses to  
22 Plaintiffs’ First Request. Based on his relatively limited involvement, but in light of his  
23 repeated misstatements and his failure to correct the record once he learned his  
24 representations were false, Mr. Hancock will be held responsible for twenty percent of  
25 those fees and costs. Mr. Musnuff and Goodyear will be held jointly responsible for  
26 eighty percent of the fees. The Court makes this allocation decision based on its belief  
27 that Mr. Hancock is less culpable but Mr. Musnuff and Goodyear are equally culpable.  
28

1 This allocation decision is, of necessity, somewhat imprecise. Goodyear and its  
2 attorneys adopted a strategy, implemented in this case to great effect, to resist all  
3 legitimate discovery, withhold *obviously* responsive documents, allow Plaintiffs and their  
4 experts to operate under erroneous facts, disclose small subsets of documents as late as  
5 possible, and otherwise attempt to turn this case based on a motor vehicle accident into an  
6 Arizona version of *Jarrydce and Jarndyce*. Cf. *United States v. Washington*, 573 F.3d  
7 701, 709 (9th Cir. 2009) (citing Charles Dickens, *Bleak House* 3 (1853)). As observed  
8 earlier, it would be impossible to point to precise causal links between all the sanctionable  
9 behavior and the expenses incurred by Plaintiffs. In a case of repeated egregious conduct  
10 such as the present, the Court must be free to fashion an appropriate remedy. The Court  
11 has done so.

12 Goodyear will also be required to file a copy of this Order in any G159 case  
13 initiated after the date of this Order.<sup>30</sup> Based on Goodyear's history of engaging in  
14 serious discovery misconduct in every G159 case brought to this Court's attention, filing  
15 this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in  
16 the past, not operated in good faith when litigating such cases. It will also serve as notice  
17 of the existence of certain tests Goodyear attempted to conceal in previous cases.

#### 18 **V. Spartan's Request for Sanctions**

19 The final issue is whether to award sanctions against Mr. Hancock, Mr. Musnuff,  
20 and Goodyear in favor of Spartan. Over the years, Spartan was involved as a co-  
21 defendant in numerous G159 cases. Spartan believes the G159 test data recently revealed  
22 by Goodyear establishes "the tire would be indefensible in any action." (Doc. 1071 at 3).  
23 In particular, Spartan points to Goodyear representations that the G159 was appropriate  
24 for motor home use despite Goodyear's knowledge that the G159 operated at too high of  
25 temperature in that setting. (Doc. 1048 at 5). Based on Goodyear's misrepresentations,  
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27 <sup>30</sup> Goodyear may apply to the court hearing the case to be excused from this  
28 requirement.

1 Spartan seeks to recover *all* the attorneys' fees and expenses it incurred as a result of  
2 G159 litigation it was involved in with Goodyear. It would be inappropriate to sanction  
3 Mr. Hancock, Mr. Musnuff, and Goodyear for actions taken in other cases. Therefore, the  
4 only issue is whether Spartan should recover any expenses incurred in the present case.

5 Spartan did not serve any discovery in this case. Spartan did receive copies of the  
6 discovery papers provided by Plaintiffs and Goodyear, but Spartan has not pointed to  
7 *specific* evidence establishing when and how it relied on those discovery papers in  
8 formulating its actions in this case. Absent some evidence of a causal connection  
9 between misconduct and Spartan's defense, Spartan is not entitled to an award of fees in  
10 this case. Spartan likely would have a viable case of fraud against Goodyear based on  
11 Goodyear's misrepresentations, but that claim should be litigated in as separate action  
12 where Spartan can introduce evidence regarding all the G159 litigation it was involved in  
13 over the years.

14 Accordingly,

15 **IT IS ORDERED** the Motion for Sanctions (Doc. 938) is **GRANTED IN PART**.

16 **IT IS FURTHER ORDERED** the Motion for Hearing (Doc. 1034) is **DENIED**.

17 **IT IS FURTHER ORDERED** no later than December 14, 2012 Plaintiffs shall  
18 file their application for attorneys' fees as required by Local Rule.

19 DATED this 8<sup>th</sup> day of November, 2012.

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21   
22 Roslyn O. Silver  
23 Chief United States District Judge  
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