

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY BATES and PATRICIA	:	
MIDDLETON BATES,	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO.
	:	1:09-CV-3280-AT
v.	:	
	:	
MICHELIN NORTH AMERICA, INC.,	:	
	:	
Defendant.	:	

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ORDER

On September 19, 2011, this Court held a hearing on Plaintiffs’ Motion for Sanctions [Doc. 180, 181]. This is the Plaintiffs’ second Motion for Sanctions arising out of Defendant Michelin North America Inc.’s (“Michelin”) violation of the Court’s multiple Orders requiring the production of certain documents.¹ Plaintiffs request that the Court enter an Order establishing issue preclusion as a discovery sanction – specifically, a determination that the subject tire was

¹ Plaintiffs did not request that the Court impose sanctions against Michelin’s counsel because in Plaintiffs’ view the conduct giving rise to the sanctions request is part of a larger pattern of discovery abuse and disregard for the legal process by Michelin. Michelin was initially represented only by Robert Monyak, Bonnie Lassiter and Benjamin Chastain of Peters and Monyak, LLP. On April 5, 2010, Elizabeth C. “Kate” Helm, of Nelson Mullins, Riley & Scarborough, LLP entered an appearance on behalf of Michelin. (See Doc. 27.) Ms. Helm is Michelin’s national discovery counsel. As a result of her participation on behalf of Michelin in the discovery process, Ms. Helm ultimately became a material witness on the sanctions issue. Thus, after Plaintiffs made their second request for sanctions, Richard K. Hines of Nelson Mullins, Riley & Scarborough, LLP and Susan A. Cahoon of Kilpatrick Townsend & Stockton, LLP-GA entered appearances on behalf of Michelin.

defective and unreasonably dangerous and that the subject tire failed as a result of its defective and unreasonably dangerous condition.

Viewed in isolation, Michelin's failure to produce certain documents in response to Plaintiffs' discovery requests and this Court's Orders could be seen as legitimate mistakes and misunderstandings. However, Plaintiffs have demonstrated that Michelin has engaged in a pattern of subterfuge and withholding relevant and responsive documents until Plaintiffs are forced to seek the Court's intervention. In light of this pattern of prejudicial discovery abuse by Michelin throughout the course of the litigation, the Court finds that Michelin acted willfully in violating the Court's discovery Orders. Therefore, a more substantive sanction than the previous monetary sanction imposed by the Court is warranted.

Accordingly, after careful consideration of the evidence and the record of this case, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Sanctions as set forth below. Because the district court must clearly state its reasons for imposing sanctions under Federal Rule of Civil Procedure 37 to allow for meaningful appellate review, the Court provides a detailed discussion of the record as background and in its analysis. *See Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir.1985).

I. Background of Previous Discovery Disputes

Plaintiffs brought this products liability and negligence action on November 23, 2009, alleging a defect in a tire designed and manufactured by Michelin.² Plaintiffs served Michelin with their Requests for Production of Documents (“RPDs”) on January 15, 2010. In addition to objecting to Plaintiffs’ requests as not being limited to the tire, plant, and time period relevant to this action, Michelin asserted a blanket objection that the requested documents contained confidential trade secrets and were protected from disclosure. On April 5, 2010, the parties agreed upon a Stipulated Confidentiality Order to govern the production and use of such documents which was entered by the Court on April 7, 2010. (*See* Docs. 28, 29.) Michelin produced documents on April 23, 2010, subject to the Stipulated Confidentiality Order. Michelin initially produced a strikingly small number of documents in response to Plaintiffs’ discovery requests.³ A dispute ensued between the parties over certain of Plaintiffs’ RPDs, and Plaintiffs presented the dispute to the Court in the form of a letter-motion as instructed on November 10, 2010. (*See* Pls.’ Reply Ex. B, Doc. 215-3.)

² This case was originally assigned to Hon. Richard Story after its initiation and was reassigned to the instant judge on March 7, 2011.

³ At the time of the December 20, 2010 discovery hearing before the Court, Michelin had not even produced a full banker’s box of documents, a fact which was admitted by Michelin’s counsel at the June 3, 2011 hearing on Plaintiffs’ first request for sanctions. (Dec. 20, 2010 Disc. Hr’g Tr. at 5:5-13, Doc. 104; June 3, 2011 Sanctions Hr’g Tr. 32-33, Doc. 169.)

Prior to bringing the discovery dispute before the Court, the parties negotiated an “agreed scope” to govern Plaintiffs’ discovery requests generally.⁴ The parties agreed to limit Michelin’s document production to (1) the subject tire, a P235/7OR15 Uniroyal Laredo AWR ORWL tire, and (2) the time period of 1998-2001, a four year period surrounding the date the Bates tire was manufactured.⁵ However, Plaintiffs made clear to Michelin (and subsequently to the Court) that discovery requests seeking information that transcends a particular tire line such as alternate designs and information about conditions at the manufacturing plant should not be limited to the agreed scope. (*See* Pls.’ Ex. B, Sept. 19, 2011 Sanctions Hr’g, (June 7, 2010 “Meet and Confer” Tr. 6:8-20); Dec. 20, 2011 Disc. Hr’g Tr. 5-11, Doc. 104; Pls.’ Reply Ex. B (November 10, 2010 Letter to J. Story), Doc. 215-3.)

Plaintiffs sought an order compelling Michelin to produce documents responsive to, *inter alia*, RPD 16 (specific documents listed by name), RPDs 25 and 35 (design and production tolerances), RPD 37 (adjustment data), and RPD

⁴ Michelin repeatedly asserted at the September 19, 2011 sanctions hearing that Plaintiffs proposed the discovery time scope of 1998-2001 and that Michelin agreed to the scope as reasonable. However, Michelin’s representation is misleading. Plaintiffs only ultimately agreed to limit the scope of their requests after Michelin objected that the requests were not limited in scope to the tire, plant, and time period relevant to this action and refused to produce documents on those grounds. Further, Plaintiffs clearly did not agree to this limited time frame in connection with all of their Requests for Production.

⁵ Michelin began designing the P235/7OR15 Uniroyal Laredo AWR ORWL tire in October 1995. The P235/7OR15 Uniroyal Laredo AWR ORWL tire was manufactured solely at the Ardmore Plant. The first P235/7OR15 Uniroyal Laredo AWR ORWL tire was manufactured in April 1998. The Bates tire was manufactured in August 2000. The last P235/7OR15 Uniroyal Laredo AWR ORWL tire was manufactured in April 2007. (Sept. 19, 2011 Sanctions Hr’g Tr. 91:9-24, Doc. 230.)

50 (documents relating to specific defects). (*See* Pls.’ Reply Ex. B (November 10, 2010 Letter to J. Story), Doc. 215-3.) The Court heard argument on the Plaintiffs’ request on December 20, 2010, and on January 3, 2011, the Court entered an Order compelling Michelin to produce nearly all of the documents sought by Plaintiffs.

A. Plaintiffs’ RPD 37 for Adjustment Data

Plaintiffs’ RPD 37 (which was the subject of Plaintiffs’ first request for sanctions and remains a subject of Plaintiffs’ second request for sanctions) asks Michelin to:

Produce any documents containing, discussing or summarizing by calendar year tire adjustment or exchange data for the Uniroyal Laredo series of tires, any tires with the same or similar specifications as that series regardless of name or branding, or any tire made from the same or similar “green” tire as that used in that series for tires manufactured at the Ardmore, Oklahoma, [sic] facility as compared to other manufacturing facilities of defendants.

In response to Plaintiffs’ request for adjustment⁶ data, Michelin initially produced a chart summarizing by month (from 1998 to 2001) the number of tires produced and the total number of tires returned for tread belt separation – the alleged condition at issue.⁷ Plaintiffs objected to the creation of the chart for

⁶ “Adjustment” is the term Michelin uses to describe the process of issuing credits or payments to consumers or dealers when its tires are returned for alleged defects and failures. Plaintiffs’ discovery requests seek internal information possessed by Michelin regarding how it “adjusts” credits for tires returned for alleged defects and failures.

⁷ Prior to production of the documents, the parties agreed, at least initially, to narrow the scope of the request to cover only the alleged defective condition at issue in this case – tread belt separation. At the discovery hearing, the Court recognized that a variety of adjustment codes

purposes of the litigation without the production of accompanying information that was used to create the chart. Plaintiffs argued to the Court that the information provided by Michelin was useless without the raw data, the codes, and the accompanying documents about how the data is collected, tabulated, and analyzed. In addition, Plaintiffs requested that Michelin be compelled to produce the internal manuals that Michelin uses for classifying the various types of manufacturing and design conditions for which tires are returned. Plaintiffs also requested documents used to interpret the adjustment data in order to determine whether additional codes may cover the alleged tread belt separation condition at issue. (Dec. 20, 2010 Disc. Hr'g Tr. 17-18, Doc. 104.)

The Court addressed Plaintiffs' request for these documents at the December 20, 2010 discovery hearing specifically as follows:

The Court: [M]y concern is if they are input by a code and there's no other information other than entry of a code . . . if [Michelin] would provide the list of codes and what those codes represent so that if [Plaintiffs] wanted to ask for additional codes to be checked, you could do that, fearing that tread separation covers more than one code and it may not have been covered, because what I understand is if you push in . . . the code for tread separation, it will tell you how many there were, but it doesn't tell you specifics. It's just that this tire, this date, tread separation; but there's not a picture, there's not an analysis beyond someone having categorized it as tread separation.

(*Id.* at 57-58.) On January 3, 2011, the Court ordered that

might potentially be relevant to the tread belt separation condition. (See Dec. 20, 2010 Disc. Hr'g Tr. 57-58, Doc. 104.)

RPD 37: Defendant shall provide to Plaintiff the codes that are used for identifying the causes for adjustment. As for any adjustment identified in association with components and processes at issue in this case, Defendant shall provide all data available to it concerning that adjustment, including the date the tire was returned, the age of the tire, the mileage, etc.

(Doc. 90 at 5.) Accordingly, the Court ordered production of the documents as a two step process. First, Michelin was required to “provide to Plaintiff[s] the codes that are used for identifying the causes for adjustment,” such that Plaintiffs could identify which codes and conditions are potentially relevant to the alleged defect at issue in this case. (*Id.*) Second, with respect to any adjustment codes identified by Plaintiffs as being at issue, Michelin was required to “provide all data available to it concerning that adjustment, including the date the tire was returned, the age of the tire, the mileage, etc.” (*Id.*)

B. Michelin’s Motion for Reconsideration Regarding Adjustment Codes

Michelin sought reconsideration of the Court’s January 3rd Order only so far as it compelled production of adjustment code data in response to RPD 37 contending that the information contains trade secrets. Consequently, Michelin did not produce the adjustment codes as ordered on January 3, 2011. On April 28, 2011, the Court denied Michelin’s motion for reconsideration on the grounds that (1) the trade secret issue was discussed and considered by the Court at the December 20th hearing and (2) Michelin offered no reason or change in law warranting reconsideration of the Court’s prior ruling compelling production of

the adjustment data. (*See* Doc. 123.) In fact, at the December 20th hearing the Court rejected Michelin's trade secrets objection stating that documents could be produced in accordance with the terms of the parties' Stipulated Confidentiality Order and that counsel would be expected to abide by the terms of that Order as approved and entered by the Court. (Dec. 20, 2010 Disc. Hr'g Tr. 8:9-13, Doc. 104.)

C. Michelin's Failure to Produce Adjustment Codes and Supporting Data

After its motion for reconsideration was denied on April 28, 2011, Michelin again did not produce the adjustment data as ordered by the Court. Rather, Michelin informed Plaintiffs two weeks later, on May 12, 2011, that it no longer agreed that Plaintiffs' expert could receive or maintain copies of the documents, as contemplated by the Stipulated Confidentiality Order, due to Michelin's concerns regarding the expert's protection of the confidential nature of the documents. Michelin unilaterally determined it could defer compliance with the Court's Order requiring production of the documents after reconsideration was denied and refused to produce the documents unless Plaintiffs agreed to modify the terms of the Stipulated Confidentiality Order previously entered by the Court. On May 13, 2011, Plaintiffs insisted that Michelin immediately comply with the Court's Order compelling production of the documents and notified Michelin that they would seek sanctions if the documents were not produced.

D. Plaintiff's First Request for Sanctions

Plaintiffs made their request for sanctions on May 19, 2011, after Michelin failed to produce the adjustment codes and data under the current terms of the parties' Stipulated Confidentiality Order. Plaintiffs asked the Court to impose issue preclusion sanctions upon Michelin for its failure to produce the adjustment code data ordered by the Court. On May 20, 2011, only after Plaintiffs made their request for sanctions, Michelin produced a list of conditions identifying, by name only, the causes for adjustment, but not the numeric codes for the adjustments. (Pls.' Reply Ex. E, Doc. 215-6.)

1. June 3, 2011 Hearing

The Court held a hearing on Plaintiffs' request for sanctions on June 3, 2011. At the beginning of the hearing, counsel for Michelin informed the Court that the adjustment code data had been produced and that the parties had reached an agreement allowing Plaintiffs to provide the documents to their expert. (June 3, 2011 Sanctions Hr'g Tr. 16:18-17:13, Doc. 169.) Based on these circumstances, Michelin argued that Plaintiffs' continued request for sanctions at the hearing was premature and improper without a "meet and confer" session.⁸ (*Id.* at 17:17-19:6.) Nonetheless, the Court proceeded with the hearing based on

⁸ At the hearing and again in the June 24, 2011 Order, the Court rejected this argument and found that Michelin was obligated to comply with the Court's January 3, 2011 Order compelling the production of the documents and that no "meet and confer" was required prior to Plaintiffs seeking sanctions for Michelin's failure to fully comply with the Court's prior orders. (June 3, 2011 Sanctions Hr'g Tr. 19:13-14, Doc. 169; June 24, 2011 Order at 5 n.4, Doc. 173.)

Plaintiffs' contention that Michelin's late production of the six pages of adjustment conditions produced **without** codes (or the explanatory photos or descriptions anticipated by Judge Story) did not fully comply with the January 3rd Order requiring Michelin to provide the numeric "codes that are used for identifying the causes for adjustment." (Doc. 90). The Court found that this issue was the continuation of the same discovery dispute addressed in its Order of April 28, 2011, and Judge Story's Order of January 3, 2011. (June 3, 2011 Sanctions Hr'g Tr. 19:7-14, Doc. 169.)

Michelin's counsel repeatedly represented that the list of adjustment conditions produced to Plaintiffs was "how the conditions are maintained in the regular course of business." (*Id.* at 36:17-18, 37:6-8, 58:14-22.) However, Michelin's counsel subsequently admitted in response to the Court's question at the hearing that there were numbers that corresponded with the conditions and that Michelin (not she) redacted the code numbers from the document produced to Plaintiffs. (*Id.* at 40:7-41:4.) In addition, in response to further inquiry by the Court, Michelin's counsel revealed that additional documents describing the adjustment conditions existed. Michelin maintained that it was not ordered to produce such documents and that the Court's January 3rd Order required only production of the codes. (*Id.* at 43:8-17, 59:1-10.)

The Court found that Michelin's redaction of the codes from the list of adjustment conditions violated the express terms as well as intent of the January

3rd Order and that the list of adjustment conditions alone did not provide a sufficient documentary basis or description from which Plaintiffs could identify all codes that might be relevant to the alleged tire defect in this case. (*Id.* at 52:8-55:1; 62:23-64:7.) Therefore, the Court ordered Michelin to produce the numeric codes by June 8, 2011, and all available documentary information describing the nature and causes for each adjustment code by June 13, 2011. At the conclusion of the hearing, the Court warned Michelin that “any further delays, manipulation of discovery ... or basically failure to function in good faith in producing fully all information requested or ordered ... will result in a substantive sanction ... comparable to what Plaintiffs have asked the next time it comes in front of [the Court].” (*Id.* at 65:15-66:4.) The Court also cautioned Michelin’s counsel about her client’s hairsplitting, narrow construction of the Court’s January 3, 2011 Order stating “I’m not going to waste our time for us to go through another conference where you argue about . . . what’s really intended.” (*Id.* at 54:15-25, 63:20-64:7.)

2. June 24, 2011 Order on Sanctions

On June 24, 2011, the Court issued a written Order on Plaintiff’s first request for sanctions. (*See* Doc. 173.) The Court found sanctions were warranted based on Michelin’s failure to fully and timely comply with the Court’s discovery Orders but declined to impose issue preclusion sanctions. The Court instead awarded Plaintiffs attorney’s fees incurred in connection with their request for

sanctions and ordered Michelin to produce additional documents in response to Plaintiffs' discovery request for adjustment data. (*Id.*) The Court reiterated its finding at the hearing that Michelin's extremely limited production "essentially side-stepped by its narrow parsing and production response an essential purpose of the Court's original January 3, 2011, discovery order regarding production of the adjustment code data and information." (*Id.* at 10.) With respect to any additional relevant adjustment codes identified by Plaintiffs, Michelin was ordered to produce all tire data and documents available to it concerning those adjustment codes, including the internal manuals Michelin uses for classifying or discussing the conditions and issues arising in connection with application of a specific adjustment code. (*Id.* at 11.) Finally, the Court again cautioned Michelin that "any failure to respond fully in producing these documents and tire data may result in the imposition of sanctions, including the Court's entry of default, determination of issue preclusion relative to the tire defect at issue, or other sanctions authorized by Fed. R. Civ. P. 37(b)(2)(A)." (*Id.*)

II. Plaintiffs' Second Request for Sanctions

Just five days after the Court issued its written Order imposing sanctions, Plaintiffs made a second request for issue preclusion sanctions on June 30, 2011, that was supplemented in further submissions in connection with the Court's

sanctions hearing conducted on September 19, 2011.⁹ (Docs. 180, 215, Hr'g Exs. A-X). Plaintiffs' second sanctions request is based on additional alleged discovery abuses by Michelin since the Court's June 3rd sanctions hearing. Plaintiffs seek the sanction of issue preclusion as to the defectiveness of the tire because, at the time of their second sanctions request, Plaintiffs assert that: (1) Michelin had not produced all the adjustment codes as ordered by the Court on June 3, 2011, and June 24, 2011, and, (2) Plaintiffs learned during the depositions of two Michelin employees that Michelin had withheld documents directly relevant to the defect issue previously covered by the Court's Orders.

Plaintiffs contend that a finding that the tire at issue was defective is warranted for several reasons. First, Michelin withheld numerous documents in violation of Court Orders compelling their production. Second, Michelin made repeated misrepresentations to the Court that all responsive documents had in fact been produced and thereby obstructed and altered the course of discovery. Finally, the Court's prior monetary sanction proved insufficient to ensure compliance with the Court's Orders.

On the other hand, Michelin contends that Plaintiffs have fabricated a discovery dispute where none exists in order to avoid proving the merits of their case. Michelin asserts that no responsive documents were withheld under its

⁹ The Court ordered that Plaintiffs' letter request for sanctions be filed as a formal motion on the CM/ECF system. (See Doc. 180.)

interpretation of Plaintiffs' discovery requests and the Court's Orders. To the extent any documents were withheld, Michelin contends it was the result of human error as opposed to any willful violation of the Court's Orders. In addition, Michelin contends it never made any intentional misrepresentations to the Court. Finally, Michelin asserts that Plaintiffs have not been prejudiced because it has now produced all the documents Plaintiffs requested, despite Michelin's belief that such production was not required, in a good faith effort to resolve a manufactured discovery dispute.

As Plaintiffs asserted in their second sanctions request, and more keenly demonstrated at the second sanctions hearing and in response to Michelin's motion for partial summary judgment, Michelin withheld nearly all probative documents for over one and a half years after Plaintiffs served their discovery requests. These documents would likely never have emerged but for Plaintiffs' persistence in seeking the Court's intervention. For the reasons set forth below, Michelin's serial abuses, misrepresentations, and willful violations of the Court's discovery Orders warrant substantive sanctions.

A. Standard of Review

When a party fails to obey a court order to provide discovery, the court is authorized to sanction the party by "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims [or] prohibiting the disobedient party from

supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.” *See* Fed. R. Civ. P. 37(b)(2)(A)(i)&(ii). District courts have broad discretion to fashion appropriate sanctions for violations of discovery orders. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1048 (11th Cir. 1994). “A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Chambers v. NASCO, Inc.*, 501 U.S. 2, 44-45 (1991).

However, this broad discretion is governed by the most fundamental due process safeguard of fairness. *See Ins. Corp. of Ireland*, 456 U.S. at 707. To ensure the provision of due process in the review of a sanctions request, a court must impose sanctions that are both “just” and “specifically related to the particular ‘claim’ which was at issue in the order to provide discovery.” *Id.* “Due process requires that the party be given fair notice that its conduct may warrant sanctions and the reasons why.” *In re Sunshine Jr. Stores*, 456 F.3d 1291, 1306 (11th Cir. 2006). A party can be given notice from either the court or from the party seeking sanctions. *Id.* Moreover, a party’s “blatant disregard for the [] Court’s orders is itself notice.” *Id.*

Rule 37(b)(2) does not require the court to make a finding of bad faith before it may impose sanctions for a party’s failure to comply with a court order. *Devaney v. Continental American Ins. Co.*, 989 F.2d 1154, 1162 (11th Cir. 1993).

Although not a necessary precursor for sanctions, bad faith is a relevant factor in determining the magnitude of a sanction. *Id.* (noting Court's discussion of bad faith in *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir. 1985). "A party . . . demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Byrne v. Nezhad*, 261 F.3d 1075, 1121 (11th Cir. 2001).

B. September 19, 2011 Sanctions Hearing

On September 19, 2011, the Court conducted a full day evidentiary hearing on Plaintiffs' second request for sanctions. Extensive argument was heard and the parties submitted additional exhibits including hundreds of pages of documents produced by Michelin after Plaintiffs filed their second sanctions request. Michelin's national discovery counsel Ms. Helm took the stand as the sole witness at the hearing to testify in Michelin's defense and to accept personal responsibility for all of the alleged discovery "errors."

C. Michelin's Post-Sanctions Production of Adjustment Data

Plaintiffs contend that Michelin's continued failure to produce the adjustment codes and adjustment data in violation of the Court's January 3rd, June 3rd, and June 24th Orders warrants issue preclusion sanctions. After Plaintiffs' first request for sanctions, the Court ordered Michelin to produce three things: (1) a list of the numeric adjustment codes that correlate to the list of adjustment conditions produced on May 20, 2011; (2) documents containing

explanations and photographs of the adjustment codes and conditions; and (3) for each adjustment code identified by Plaintiffs, all available tire adjustment data and the internal manuals Michelin uses for classifying or discussing the conditions and issues arising in connection with application of the specific adjustment codes. (*See* Doc. 173.)

As ordered, Michelin produced a list of the numeric adjustment codes on June 6, 2011. On June 13, 2011, Michelin produced 313 pages of adjustment conditions with codes, pictures and descriptions in purported compliance with the Court's Order. At that time, Michelin informed Plaintiffs it had fully complied with the Court's orders to produce all the codes. Upon review of these documents however, Plaintiffs discovered there were discrepancies between the May 20th list of adjustment conditions, the June 6th list of conditions with numeric codes, and the June 13th production of the conditions with codes, pictures and descriptions. Accordingly, Plaintiffs contend that Michelin failed to produce all the codes as ordered by the Court on January 3rd, June 3rd, and again on June 24th.

The Court held a status conference on July 7, 2011, to determine whether Michelin was in fact obligated to produce additional documents identified by Plaintiffs in their second sanctions request. At the July 7th status conference Michelin vehemently denied that it had not produced all the adjustment codes, despite the fact that Plaintiffs detailed the discrepancies in the two prior

productions. (July 7, 2011 Status Conf. Tr. 27, Doc. 183.) However, on July 14, 2011, Michelin produced another 144 pages of adjustment conditions with codes, pictures, and descriptions.¹⁰

Plaintiffs assert that Michelin wrongfully withheld the adjustment codes in violation of the Court's June 24th sanctions Order. In its defense, Michelin contends that the incomplete production was the result of human error. At the September 19th sanctions hearing, Ms. Helm testified that after receiving the adjustment conditions with codes, pictures and descriptions from Michelin to be produced on June 13, 2011, she compared them to the June 6th list of adjustment codes and conditions and noticed that the two did not match. (Helm Aff. ¶ 56, Doc. 192-6; Sept. 19, 2011 Sanctions Hr'g Tr. 171:21-175:12, Doc. 230.) There were codes on the June 6th list for which Michelin did not have additional descriptions, and there were additional descriptions of conditions that were not listed on the June 6th code list. (Sept. 19, 2011 Sanctions Hr'g Tr. 171:21-175:12, Doc. 230.)

Ms. Helm testified that she made several mistakes on June 13, 2011. (*Id.*) First, Ms. Helm made mistakes regarding which adjustment codes were missing in her June 13th transmittal letter to Plaintiffs when the additional descriptions

¹⁰ Out of the 144 pages produced by Michelin on July 14, 2011, 113 new conditions with codes, pictures and descriptions were produced that had previously been withheld (MNA 8436-8548) and 31 were duplicates of conditions that were produced on June 13, 2011 (MNA 8560-8590).

were produced.¹¹ (Helm Aff. ¶ 58.) In her attempt to sort through the documents to compare them and determine the differences, Ms. Helm testified she segregated out the documents for the conditions that were not on the June 6th code list. (Sept. 19, 2011 Sanctions Hr'g Tr. 171:21-175:12, Doc. 230.) Ms. Helm further testified that when she compiled the documents to produce to Plaintiffs, the documents for the conditions that were not on the June 6th list were inadvertently left out of the production. (*Id.*) According to Ms. Helm, she did not discover any of this until after Plaintiffs made their second request for sanctions. (*Id.*) Therefore, Michelin contends that its failure to produce all the codes as ordered by the Court, the result of human error, amounts to excusable neglect that does not warrant the imposition of the severe sanction requested by Plaintiffs. However, Plaintiffs contend that Michelin continued to produce the adjustment data documents in bad faith after the Court's June 3rd sanctions hearing.

At the September 19th hearing, Michelin requested that it not be sanctioned for any misconduct, essentially asserting that it should be rewarded for counsel's self-corrective actions. In response to Plaintiffs' contention that Michelin failed to produce all the adjustment conditions with codes, descriptions, and pictures in bad faith, Michelin's counsel claimed that "the only reason they knew of those

¹¹ Ms. Helm admitted these mistakes during the July 7th status conference, but had not yet discovered her failure to produce all the codes as outlined in her July 14, 2011 letter to Plaintiffs.

missing items was that there was a self reporting.” (*Id.* at 89.) Michelin contended that the additional 144 pages were produced on its own initiative and not because Plaintiffs had caught Michelin red-handed. (*Id.* at 145.) However, Michelin’s alleged “self reporting” did not occur until after Plaintiffs pointed out there were missing codes and sought sanctions for Michelin’s withholding of the documents. Michelin did not simply discover the error on its own and voluntarily come forward with the documents as it would have the Court believe. While this conduct alone would not warrant issue preclusion sanctions, the Court is doubtful of whether Michelin would have discovered this oversight and voluntarily produced the additional 113 adjustment codes that had previously been withheld in the absence of Plaintiffs’ second request for sanctions.

1. Michelin’s multiple misrepresentations regarding adjustment codes and conditions

Unfortunately, the veracity of Michelin’s contentions regarding its conduct in the discovery process for a variety of reasons has proven unreliable. It appears Plaintiffs are correct in their assertion that every one of Michelin’s counsel’s representations to the Court regarding the production of the adjustment codes and adjustment data has proven to be inaccurate.

First, as noted above, Ms. Helm told the Court at the June 3rd hearing that the six-page list of adjustment conditions “are the codes” and that these are the way the codes are maintained “in the regular course of business.” (June 3, 2011

Sanctions Hr'g Tr. 36:11-19, Doc. 169.) However, when pressed, Ms. Helm eventually admitted that the numeric codes had been redacted from this list but that "I didn't do it, Your Honor."¹² (*Id.* at 40:24-41:4.) She further stated that "[b]ut there's been no condition of a tire redacted from this list." (*Id.*) Then, much to the Court's surprise, at the September 19th Sanctions hearing, Ms. Helm denied that Michelin redacted the codes and instead took personal responsibility for the redactions' occurrence.¹³ (Sept. 19, 2011 Sanctions Hr'g Tr. 191:17-196:7, Doc. 230.) Ms. Helm was evasive in response to Plaintiffs' questioning of who redacted the list, stating repeatedly that she did not recall. (*Id.*) When asked who provided her with the document that had been redacted, Ms. Helm again testified she did not recall. (*Id.*) Ms. Helm further testified at the September 19th sanctions hearing that when she told the Court on June 3rd that the list contained the adjustment codes as regularly maintained by Michelin, she in fact knew the codes had been cut off the side of the document. (*Id.*)

Ms. Helm admitted that "we should have produced the codes with the numbers." (*Id.*) When asked where was the mistake or human error in the redaction of the codes, Ms. Helm testified "the mistake and human error was

¹² Michelin's redaction of the codes was the subject of the Court's June 24th Order on sanctions and does not form the basis for the Court's imposition of sanctions herein. However, the redaction is relevant to the larger pattern of Michelin's abuse of the discovery process as further demonstrated by Michelin's counsel's subsequent evasive testimony regarding who actually made the decision to redact the codes.

¹³ It is clear that Ms. Helm attempted to take the blame for the redaction in order to protect Michelin from further sanctions.

making the decision to redact the numbers off or to produce the document with the numbers redacted off.” (*Id.*) After repeated questions by Plaintiffs as to who made that decision, Ms. Helm stated she made the decision despite her previous representation to the Court on June 3, that “I didn’t do it.”¹⁴ (*Id.*) When asked whether she spoke with anyone at Michelin about the decision, Ms. Helm further evaded the issue by responding she did not recall. (*Id.*)

In addition, Michelin’s June 13th production of the conditions with codes, pictures and descriptions revealed the falsity of its representations to the Court at the June 3rd hearing that the redacted six-page list of adjustment conditions were the codes and that this skeletal listing constituted the way the codes are kept in the regular course of business. Ms. Helm subsequently confirmed that the full production – including the codes, pictures and verbal descriptions of how to identify the tire conditions represented by each code – are “the documents used by the inspectors in the adjustment centers to evaluate and code returned tires.” (Helm Aff. ¶ 55, Doc. 192-6.)

Furthermore, Michelin’s counsel represented to the Court at the June 3rd hearing that while the numeric codes may have been redacted, no adjustment conditions were redacted from the May 20th list of adjustment conditions. (June 3, 2011 Sanctions Hr’g Tr. 40:24-41:4, Doc. 169.) This representation turned out

¹⁴ Before taking responsibility for the decision, Helm attempted to assert the attorney-client privilege. (Sept. 19, 2011 Sanctions Hr’g Tr. 195, Doc. 230.)

to be only partially true. While certain conditions may not have been redacted from the list, Michelin now admits that 113 adjustment conditions were not included on the original list. (Helm Aff. ¶¶ 56-59, Doc. 192-6; Sept. 19, 2011 Sanctions Hr'g Tr. 171-176, Doc. 230.)

Although the Court originally believed Ms. Helm's affidavit testimony that the failure to produce the missing adjustment codes was an innocent oversight, and while this may very well be true, the credibility of her statements over time has been eroded by the actual course of discovery events. In light of Ms. Helm's evasive and inconsistent testimony at the September 19th hearing and Defendant Michelin's shifting representations made to the Court since June 3, 2011, the Court cannot simply rely on Michelin's avowals of good faith regarding any of these discovery issues.

2. Michelin's failure to produce graphs and other interpretive adjustment data

In accordance with the Court's two-step process for the production of the adjustment data, after Michelin produced all the codes that are used for identifying the causes for adjustment and Plaintiffs identified the additional codes for which they sought adjustment data, Michelin was required to provide all data available to it concerning the identified adjustment codes. (Doc. 90 at 5; Doc. 173 at 11.)

On July 19, 2011, Michelin produced a large chart of indecipherable adjustment data along with a glossary created for the litigation. After Plaintiffs were unable to make any sense of the information, they questioned Michelin's employee-expert Mr. Charles Patrick, who regularly reviewed adjustment data, about the chart. (Patrick Dep. 76-90, July 28, 2011.) Mr. Patrick testified he had never seen the information in that format. (*Id.* at 76.) Mr. Patrick was unable to interpret the chart during his deposition. (*Id.* at 84-90.) Indeed, Michelin's own employee could not decipher the chart using the glossary created by Michelin to decode the chart. (*Id.* at 90-95.)

The chart appears to contain information about the number of tires returned under the relevant adjustment codes identified by Michelin. At the September 19, 2011 sanctions hearing, Plaintiffs maintained that Michelin was still continuing to withhold internal documents necessary to analyze and explain the data in the chart. Like the original list of adjustment conditions provided, the chart was a meaningless listing in and by itself, as demonstrated by Mr. Patrick's deposition testimony.¹⁵

¹⁵ The chart does however highlight the importance for the numeric adjustment codes that were originally redacted by Michelin. The chart references the numeric adjustment code only and not the name of any of the conditions for which the tires were returned. The Court notes that at the June 3rd hearing regarding production of the adjustment codes Michelin's Counsel stated "what is important is not whether we call it number 1, it's whether we call it unsticking or leaking at the joint." (June 3, 2011 Sanctions Hr'g Tr. 41:5-10, Doc. 169.) Yet, it is clear, that without the numeric codes, the subsequently produced chart purportedly summarizing the adjustment data would have been even more incomprehensible.

The July 19th chart of adjustment data does not comply with the Court's June 24th Order. The June 24th Order provided that:

With respect to each adjustment code identified by Plaintiffs, Michelin shall provide to Plaintiffs all tire data and documents available to it concerning that adjustment. To ensure full compliance with this directive, the Court notes that Michelin should produce the internal manuals it uses for classifying or discussing the conditions and issues arising in connection with application of the specific adjustment code.

(Doc. 173 at 11.) Moreover, the Court warned Michelin that “any failure to respond fully in producing these documents and tire data may result in the imposition of sanctions, including the Court's entry of default, determination of issue preclusion relative to the tire defect at issue, or other sanctions authorized by Fed. R. Civ. P. 37(b)(2)(A).” (*Id.*)

An essential purpose of the Order was to ensure that Plaintiffs were provided the information necessary to analyze and evaluate the adjustment data to determine how many tires were being returned for the conditions at issue in this case. Not only did Michelin produce the adjustment data in a format that was indecipherable to Plaintiffs, not even a Michelin employee who was experienced in analyzing adjustment data could understand the information provided in the chart. Indeed, as Mr. Patrick admitted in his deposition, in order to understand the meaning of every column and code in the chart, he would need more than just the glossary prepared by Michelin. (Patrick Dep. 95, July 28, 2011.) In light of the Court's prior directives with respect to the adjustment codes

and data, Michelin's production of the adjustment data in this completely unusable format was patently unacceptable. Michelin's mode of production of the chart is yet one more strand in its pattern of failing to produce meaningful responses to Plaintiffs' discovery requests in violation of both the letter and spirit of the Court's Orders.

According to Mr. Patrick, Michelin itself actually did not use the chart form that was produced to Plaintiffs in this litigation but instead compiled its tire adjustment and return data into graphs for comparison and analysis at quarterly meetings. (*Id.* at 76.) As Mr. Patrick testified, these graphs compared the return rates of Laredo tires to other tire lines and to Michelin's overall rates. (*Id.* at 76, 79, 112, 182-83.) No such graphs were produced by Michelin in response to RPD 37 requesting information summarizing Michelin's adjustment data.

At the sanctions hearing, Michelin contended that it did not keep these graphs and that they were destroyed after their use at these quarterly meetings. Ms. Helm testified at the hearing that after Mr. Patrick's deposition, Michelin searched for the graphs and determined that no such graphs exist. (Sept. 19, 2011 Sanctions Hr'g Tr. 185-86, Doc. 230.) Ms. Helm further testified that the graphs were created as demonstratives for the employee meetings and are not maintained after the staff meetings. (*Id.* at 241.)

These graphs would obviously be highly probative of the issue of what Michelin knew about its tires' comparative failure rates, why certain tires were

failing, and what changes in the design or manufacturing process may have been initiated to prevent future failures. As Mr. Patrick testified, by using this information Michelin could determine whether it was “starting to see something new when we put in high-tensile steel, I mean, are the tires lasting longer, does it look like the wear rates are lasting longer, things like that.” (Patrick Dep. 80, July 28, 2011.) And indeed, Mr. Patrick as Michelin’s key design representative testified that this data was supposedly an essential tool used by Michelin’s staff in guiding its tire design and quality assurance work on an ongoing basis. (*Id.*) Furthermore, this testimony serves as the basis for Michelin’s summary judgment motion asserting that Michelin cannot be found to have engaged in the necessary bad faith to warrant the imposition of punitive damages because it employed design and manufacturing quality assurance procedures. (*See Doc. 205.*)

The adjustment data would be extremely relevant to Plaintiffs’ ability to establish whether Michelin knew of identified defects in its tires based on the return information through the warranty process. As Mr. Patrick confirmed, the adjustment data could be analyzed to determine whether tires were being returned for conditions resulting from a manufacturing versus a design issue. (*Id.* at 100-105.) Accordingly, at the conclusion of the September 19th sanctions hearing, the Court ordered Michelin to provide further clarification of the chart’s data and mode of information presentation. Until the Court’s Order at the

conclusion of the September 19, 2011 sanctions hearing, Michelin delayed in producing information essential to assessing the comparative data it finally produced in the chart it provided to Plaintiffs on July 19, 2011, thus seriously impeding Plaintiffs' preparation of their case.

By withholding the information necessary to understand the adjustment data in the chart, Michelin effectively attempted to prevent Plaintiffs from using the adjustment data to establish whether the tire at issue was being returned for certain manufacturing or design conditions, whether Michelin was aware of these conditions in the tire, and whether Michelin made any changes to the tire as a result of a high return rate. Moreover, the "special" chart that Michelin has now provided is clearly not a full substitute for producing the actual graphs or graph data that Michelin's staff used to review and assess comparative return and failure rates of its various tire lines. Given the centrality of this data to Michelin's design and quality assurance processes – processes that Michelin seeks to use as a lynchpin of its product liability defense in this case – the Court is skeptical that Michelin would not maintain such documents and data.

D. Michelin's Misrepresentations About Reaction Limits and Production Tolerances and the Failure to Produce Those Documents

Plaintiffs contend that Michelin also made misrepresentations to the Court regarding reaction limits and production tolerance documents so as to persuade Judge Story to limit his January 3, 2011 Order based on a false factual predicate.

They also maintain that Michelin failed to fully produce all available relevant documents responsive to the three Requests for Production covering these documents.

The documents at issue here were initially the subject of the discovery dispute that led to the December 20, 2010 discovery hearing and the January 3, 2011 Order compelling production of documents. Plaintiffs requested “reaction limits” documents in RPD 16, “design and production tolerances” in RPD 25, and “tolerances for plies and belt materials” in RPD 35.¹⁶ Reaction limits and tolerances are used by tire builders during the manufacturing process to determine whether the tires comply with their design specifications. Michelin defines “reaction limits” as “the maximum variation allowed in product, process, or material and still be considered fit for ‘right the first time.’”¹⁷ (MNA 9636.)

¹⁶ The full text of these Requests to Produce are set forth below:

RPD 16: Produce the following documents, any similar documents and any documents discussing the listed documents specifically identified in the complaint: (a) The Bad Habits List of manufacturing issues; (b) Decision Tree documents; (c) Asset Specifications documents; (d) Reaction Limits documents; (e) Product Standards and Guidelines Manual for Required Tire Dimensional Tolerances; (f) Documents relating to and including an internal study by Tokita entitled “Long Term Durability of Tires”; and (g) All witness statements from current or former Michelin employees or sworn depositions from current or former Michelin employees in *Ford v. Uniroyal* from Georgia, *Carver v. Uniroyal* from California, *Toscano v. Uniroyal* from Texas, *Adams v. Uniroyal* from Texas, and *Castillo v. Uniroyal* from Texas.

RPD 25: Provide the design and production tolerances for the subject tire in effect at the time of its manufacture.

RPD 35: Produce all documents providing specifications for the splice overlaps standards and tolerances for plies and belt materials in the subject tire.

¹⁷ Michelin’s training documents discuss “reaction limit” as being “the lower and upper limits allowed for product or process variation from spec without receiving intervention from a quality technician. Product or processes outside ‘reaction limits’ but within tolerance limits – the operator must stop production and notify the Quality Technician who must make the decision

Michelin defines “product/process tolerance” as “the range of variation that by design defines nonconformity. A product or process outside the tolerance limits is non-conforming.”¹⁸ (*Id.*)

While the reaction limits and tolerances are related concepts, it is possible for a product or process to be outside of reaction limits but within a tolerance. According to Michelin’s internal documents, “a product running outside reaction limits but within the tolerance is considered to be the ‘Range of Expertise.’¹⁹ Approval from authorized personnel is needed to continue production within this range.” (MNA 9637.) On the other hand, “product variation outside of the tolerance limits is non-confirming; this product must be tagged and placed in the non-conforming area. Operator must immediately react to out of tolerance conditions to bring product in control, if unable to bring product in control, the operators must stop production immediately.”²⁰ (*Id.*)

whether to continue with the product or process. If the Quality Tech gives the authorization to continue, the builder must ensure that the authorization is recorded in the comments section of the logbook.” (MNA 8779.)

¹⁸ Michelin’s training documents discuss “tolerance limits,” as “the range above or below the lower and upper reaction limits that a quality tech has the authority to authorize a builder to use products or processes. A builder should never use a product or process that is outside of the tolerance limit – a quality tech cannot approve use of a product or process outside of tolerance limit.” (MNA 8779.)

¹⁹ “Variation Range of Expertise” is defined as “the variation in product, process or material that is outside the reaction limits but within the tolerance limits. Approval is required from authorized personnel to continue production with this variation range.” (MNA 9636.)

²⁰ Michelin’s internal documents discuss a similar procedure for “process variation outside of reaction limits but within tolerance” and “process variation outside of tolerance.” (MNA 9637-9638.)

At the December 20th discovery hearing, Michelin's counsel led the Court to believe that the reaction limits and tolerance data and documents requested by Plaintiffs were duplicative and had already been produced as part of the design file (also referred to as the development file that contains manufacturing specifications and decision trees).²¹ (*Id.* at 42:12-21) Specifically, Michelin's counsel represented to the Court that RPDs 25 & 35 which ask for design and production tolerances were duplicative of RPD 16 because a "reaction limit" is "really a tolerance for a tire before its cured." (Dec. 20, 2010 Disc. Hr'g Tr. 38-39, 42-43, Doc. 104.) In response, the Court inquired: "If you gave the reaction limits and the decision trees, that would cover those tolerances."²² (*Id.* at 42:22-23.) Ms. Helm responded: "That would [cover] the manufacturing tolerances because that's really what they are, Your Honor. So I believe that's duplicative of the earlier discussion." (*Id.* at 42:24-43:1.)

Based on Michelin's representations that the reaction and tolerance limits documents had in fact been produced, the Court did not order any further

²¹ Michelin counsel advised the Court, "We've produced the entire design file ... We've produced the specifications which show how the tire is to be manufactured and the measurements and the components and all of that." (Dec. 20, 2010 Disc. Hr'g Tr. 42:15-21, Doc. 104.)

²² According to Ms. Helm, decision trees (or aspect specifications) are the criteria used by tire builders to test the production quality for cured tires whereas reaction limits (used interchangeably by Helm with tolerances) are the criteria used by tire builders to test the production quality for uncured tires. (Dec. 20, 2010 Disc. Hr'g. Tr. 33:14-24; 39:19-22, Doc. 104.)

production by Michelin of reaction limits and production tolerances. Specifically, the Order stated as follows:

RPD 16: Defendant shall produce documents responsive to (b) [Decision Tree Documents] and (c) [Asset Specifications documents] that were in effect during the agreed upon time frame and which relate to processes at issue: trapped air, placement of steel belts, molding issues, and adhesion issues. Should other components and processes be identified in the future by Plaintiffs, Defendant shall be required to produce documents related to those components and processes as well. The Court finds that the information sought in [(d) Reaction Limits Documents] has been provided by Defendant in the development files already produced. Therefore no further production is required.

RPDs 25 and 35: The documents requested [tolerances] are covered by the Court's rulings as to RPD 16.

(Doc. 90 at 4-5.)

On July 28, 2011, Michelin's former employee tire-design expert, Mr. Patrick was deposed and testified that he had reviewed the development file produced by Michelin and it did **not** in fact contain the reaction limits or tolerances as had been represented to the Court at the December 20th hearing. (Patrick Dep. 64-65, July 28, 2011.) Nine days earlier, on July 19, 2011, in response to Plaintiffs' second request for sanctions for withholding documents responsive to RPD 50 (documents discussing specific tire defects), Michelin for the first time produced documents (MNA 8779, MNA 9634-9658) that defined the notable difference between tolerances and reaction limits and made clear that Plaintiffs' requests for tolerance and reaction limit data and documents would

not be duplicative. Until that time, Plaintiffs had accepted the accuracy of the representations of Michelin's counsel to the Court at the December 20th hearing. However, these new internal Michelin documents revealed that Michelin's representations to the Court at the December 20th conference were inaccurate and had effectively restricted discovery of substantive information bearing on Michelin's tire design and manufacturing process.

The Court recognizes that the reaction and tolerance limit tire manufacturing terms – however significant for this case – are terms of art that Michelin counsel might have confused at the December 20, 2010, hearing, as Ms. Helm maintained in her testimony at the September 19, 2011 hearing. (Sept. 19, 2011 Sanctions Hr'g Tr. 161:4-6, Doc. 230.). However, Ms. Helm testified at the September 19th hearing that immediately upon reviewing the Court's January 3, 2010 discovery Order, she realized the Court "put reaction limits in the development file" and that she knew that was not correct. (Sept. 19, 2011 Sanctions Hr'g Tr. 161-62, Doc. 230.) Most significantly, in response to the Court's inquiry at the September 19th hearing Ms. Helm testified that in January 2011 or thereafter she did not advise the Court that the Order was incorrect because of her earlier erroneous representation to the Court nor did she go back and clarify the issue for the Plaintiffs – despite Michelin's later filing a motion for reconsideration of the ruling on RPD 37 (with respect to the adjustment data). (*Id.* at 161-62). Rather, Ms. Helm testified that she simply confirmed for herself

that no such reaction limit documents were still available from the 1998-2001 timeframe (because that was the time scope which the Court had applied to the production under RPD 16 after being advised the reaction limit data and documents would be included in the development file produced).²³

While Ms. Helm may not have originally on December 20, 2010, intentionally misled the Court, her subsequent failure to correct the mistake once she realized the Court relied on her statements to conclude that the documents had been produced in the development file is plainly unacceptable. As of the September 19th sanctions hearing, more than eight months after Michelin's counsel's review of Judge Story's Order of January 3, 2011, Michelin had not produced the reaction limits or tolerances despite its realization that it had represented to the Court that those documents had previously been produced. Michelin effectively kept the Plaintiffs and the Court in the dark by allowing them to rely on inaccurate information, which Michelin knew to be false upon its receipt of the January 3rd Order. In essence, Michelin thereby precluded the Plaintiffs from asking the Court to reconsider its application of a restricted time scope for these specific production requests.²⁴

²³ According to Ms. Helm's testimony at the September 19th hearing, Michelin did not produce the reaction limits for an uncured ("green") P235/70R15 Uniroyal Laredo AWR ORWL tire because these documents for the 1998-2001 timeframe were outside their document retention period and were not captured by any prior litigation hold. (Sept. 19, 2011 Sanctions Hr'g Tr. 93:15-17; 99:2-10, Doc. 230.)

²⁴ Plaintiffs had argued for an unlimited time scope to apply to these specific document requests (RPD 16). However, the January 3rd Order provided a limited time scope to RPD 16, but not to

Indeed, Michelin was aware that, although reaction limits no longer existed for the parties' agreed scope, documents concerning reaction limits for other tires manufactured at the Ardmore plant post-2001 existed that had been caught by a prior litigation hold and were produced in other cases. (*Id.* at 228:18-229:10.) While Michelin disputes the relevance of these documents, the Plaintiffs have persuasively argued that they are directly relevant to their proof of Michelin's defective manufacturing and inspection process. (*Id.* at 255-257.) In any event, until these issues came to light in July 2011 after the Court's Orders, Michelin neither clarified the record nor made responsive documents available. Yet, at the December 20, 2010 discovery hearing, Michelin's counsel assured the Court that she was not seeking to limit the production of the tire manufacturing and inspection process documents "so narrow that it ends up I produce zero These documents exist and I know they exist." (Dec. 20, 2010 Hr'g Tr. 35-36.) Moreover, Mr. Patrick's testimony confirmed that reaction limits and tolerances are not tire specific, but relate to the particular processes used at the individual plants and therefore these documents should not have been subject to the 1998-2001 temporal scope. (Patrick Dep. 25-26.) For the foregoing reasons, the Court finds Michelin improperly manipulated the course of discovery and the Court's

multiple others requested by Michelin. As discussed below, the Court limited the production responsive to RPD 16 in an effort to address Michelin's concerns regarding disclosure of confidential trade secrets and a potentially over-inclusive document production in light of the evolution of the tire design and manufacturing process.

review of the discovery disputes at issue in the December 20, 2010 discovery hearing and the Court's Order of January 3, 2011.

After learning that Michelin had produced reaction limits in other cases at the September 19th sanctions hearing, Plaintiffs requested that the Court order Michelin to produce these documents. On September 23, 2011, the court ordered Michelin to produce the reaction limits documents identified although they fell outside the 1998-2001 time scope. Michelin produced the documents as ordered on September 28, 2011.²⁵ Plaintiffs assert in their response to Michelin's motion for partial summary judgment that it became clear after Michelin produced the documents why it fought production for so long. According to Plaintiffs, the subject tire failed to meet the tolerance limits and should have been scrapped. Accordingly, Plaintiffs persuasively argued that these documents would go directly to the defect issue. Michelin would never have produced these documents to Plaintiffs in this case without the Court's intervention. Without these documents, Plaintiffs' ability to prove a defect in the tire would be hampered and the delayed production resulted in prejudice to Plaintiffs as discussed more fully below.

²⁵ Indeed, Michelin voluntarily produced 700 pages of documents it deemed nonresponsive to Plaintiffs' discovery requests after receiving Plaintiffs' second sanctions request but did not produce the reaction limits until ordered to do so by the Court after the September 19th sanctions hearing.

E. Michelin's Failure to Produce Certain Documents in Response to RPD 50

A substantial part of Plaintiffs' second sanctions request centers around Michelin's alleged failure to produce documents in response to Plaintiffs' RPD 50.²⁶ RPD 50 identified several defects that Plaintiffs believed existed in the subject tire and asked for documents discussing how design and manufacturing problems or deficiencies can result in those defects in tires generally. Michelin initially objected to RPD 50 on the basis that it was not limited in scope to the tire, plant, and time period relevant to this action and refused to produce documents on those grounds. Plaintiffs opposed these limitations because RPD 50 was not crafted to be tire or plant specific.

Consequently, the parties addressed the scope of RPD 50 with the Court at the December 20th discovery hearing. Plaintiffs' counsel expressly argued that RPD 50 should not be limited to the 1998-2001 timeframe because RPD 50 is broader in scope than the tire at issue.²⁷ (*See* Dec. 20, 2010 Disc. Hr'g Tr. 23:24-

²⁶ RPD 50 provides as follows "Please produce any documents which discuss how design or manufacturing problems or deficiencies can result in the following conditions: a) air pockets; b) oxidation; c) internal belts not lined up; d) spreading in internal belts; e) tire overshaped in mold; f) brassy wires with poor adhesion to belts and rubber; and g) reversion."

²⁷ Michelin's assertion that its interpretation of the Court's Order on RPD 50 as being subject to the 1998-2001 temporal scope applied to RPD 16 "given that plaintiffs' counsel had not clearly stated anything to the contrary" at the December 20 hearing is flatly contrary to the hearing transcript. (*See* Dec. 20, 2010 Disc. Hr'g Tr. 24:20-25:18, Doc. 104.) Michelin's contention that its interpretation of RPD 50 and the Court's January 3rd Order was also based on statements by Plaintiffs' counsel that there was no longer a dispute regarding the agreed scope is likewise spurious. In their November 10, 2010 letter-motion to the Court, Plaintiffs asserted that Michelin narrowed its production of documents to one year before and one year after the date the subject tire was manufactured despite the parties' negotiation of an agreed scope of 1998-

25:11, Doc. 104.) Indeed, the Court recognized that not all of Plaintiffs' requests were tire specific requests and that it was clear that some of Plaintiffs' requests sought information "generally on the part of Michelin as opposed to how it may specifically relate to a given tire." (*Id.* at 10:8-13.) Michelin's counsel did not provide any response in support of limiting the scope of RPD 50.²⁸ While Plaintiffs were ultimately interested in whether certain design and manufacturing deficiencies resulted in the defects in the Bates tire, it is clear from the language of the request itself and Plaintiffs' counsel's statements at the December 20th

2001. As a result, Plaintiffs requested that the Court order Michelin to expand its production to the scope as originally agreed of 1998-2001 for specific requests. In its December 16, 2010 response to the Court, counsel for Michelin acknowledged that not all documents covered by the agreed scope had been produced and represented that Michelin had supplemented its response and produced all documents subject to the agreed scope. Based on this response, Plaintiffs informed the Court at the December 20th hearing that the parties had resolved this issue with the agreed scope for specific RPDs and it need not be addressed by the Court. Michelin's reliance on this statement by Ms. May addressing which years were covered by the agreed scope as support for its assertion that RPD 50 was subject to the 1998-2001 agreed time scope is misplaced. As discussed *infra*, Plaintiffs' counsel also continued to argue for an unlimited time and plant scope for other specific RPDs, including RPD 50.

²⁸ On the other hand, Michelin opposed Plaintiffs' argument that RPD 16 should not be limited to documents in effect at the time the subject tire was manufactured because Plaintiffs sought to identify what Michelin knew about problems with its tires and its manufacturing processes before the time the subject tire was specifically manufactured. (*Id.* at 6:7-11.) Based on an Affidavit from a Michelin employee detailing the evolving design and manufacturing process for Michelin tires, the Court expressed concern that if RPD 16 (which called for documents subject to protection as trade secrets) were not limited to some extent, it would require the production of a voluminous amount of documents concerning unrelated tires and unrelated components and processes at issue. (*Id.* at 7:19-5.) The parties ultimately agreed at the hearing to limit the scope of RPD 16 to passenger tires. Michelin requested that the Court limit its production of documents in response to RPD 16 to the components and processes at issue and (although not limited to the subject tire itself) to the documents that were in use at the time the subject tire was made (rather than the agreed four year scope). (*Id.* at 33-35.) With the assurance that a complete development file had been produced, the Court entered its January 3rd Order with respect to RPD 16 requiring Michelin to "produce documents . . . that were in effect during the agreed upon time frame and which relate to the processes at issue: trapped air, placement of steel belts, molding issues, and adhesion issues." (Doc. 90 at 4.)

discovery hearing that RPD 50 was crafted to reach Michelin's knowledge about tire defects in general. Although the Court expressly applied the temporal limitation requested by Michelin to other RPDs (i.e., 16, 47 & 48) in the January 3rd Order, the Court delineated no temporal limit for the scope of RPD 50 and ordered Michelin to "produce the requested documents for the components and processes at issue." (Doc. 90 at 5.)

According to Plaintiffs, Michelin produced very few documents following the Court's January 3rd Order. In fact, Michelin confirmed at the September 19th sanctions hearing that the only documents initially produced in response to RPD 50 were the aspect specifications and decision trees (terms used interchangeably) that were specifically identified by Plaintiffs in RPD 16.²⁹ (Sept. 19, 2011 Sanctions Hr'g Tr. 98:19-23; 156:21-157:19, Doc. 230.) At the December 20, 2010 discovery hearing, Ms. Helm represented to the Court that Michelin was not trying to limit the scope of the requests so narrowly so as to end up having to

²⁹ Michelin limited its response to RPD 50 to these documents because of its admitted "interpretation" of RPD 50 as asking for the same documents as RPD 16. Michelin's interpretation is unreasonable for a number of reasons. First, RPD 16 and RPD 50 call for different documents. RPD 16 requests production of seven specific categories of documents identified by name. RPD 50 requests production of all documents relating to certain design and manufacturing defects. Second, Plaintiffs addressed RPD 16 and RPD 50 separately at the December 20th hearing and described the differences between the requests. Ms. May discussed RPD 16 as being a more narrow request targeting specific documents, (*Id.* at 5:18-6:20), and characterized RPD 50 as asking for a broader scope of documents tied to the specific defects at issue in the case, (*Id.* at 10:24-11:12.) Finally, the Court compelled production separately under RPD 16 and RPD 50, in contrast to its treatment of RPD 16 (calling for reaction limits) as being synonymous with RPDs 25 and 35 (calling for tolerances). (Doc. 90 at 4-5.)

produce essentially nothing in response.³⁰ (Dec. 20, 2010 Disc. Hr’g Tr. 35:17-36:6, Doc. 104.) However, at the September 19, 2011 sanctions hearing, Michelin’s counsel (Ms. Cahoon), stated that because the subject tire went out of production by April 2007 “many of the documents, in fact as we’ll see later, virtually all of the documents about manufacture [sic] are gone under retention policies before there’s ever a lawsuit about the Bates’ tire.” (Sept. 19, 2011 Sanctions Hr’g Tr. 92:2-9, Doc. 230.) Counsel further stated that “there was a pretty clear, we thought, understanding with opposing counsel that there were going to be very few, if anything, by way of documents still available from the ’98 to 2001 agreed time frame.” (*Id.* at 104:13-16.) Michelin’s position at the September 19th sanctions hearing presented a remarkable about-face from its counsel’s representation to the Court ten months earlier that if RPD 50 was framed to cover the summary processes ultimately identified in the Court’s January 3rd Order, she could say that “[t]hese documents exist and I know they exist.”) (Dec. 20, 2010 Hr’g Tr. 35-36, Doc. 104).

However, during the deposition of Michelin’s in-house experts in June and July 2011, Plaintiffs learned that internal documents such as tire production standards, training manuals, and Design Failure Mode and Effect Analysis (FMEAs) existed that Plaintiffs contend should have been produced in response

³⁰ Michelin admittedly has an aggressive document destruction policy and retains apparently only the narrowest range of documents necessary for business and regulatory reasons.

to RPD 50. Michelin responded that it had not been required to produce these documents because in its view the January 3rd Order on RPD 50 was limited to the tire at issue, the temporal scope of 1998-2001, and documents from the Ardmore plant.³¹ Accordingly, Michelin represented to the Court at the July 7th discovery conference that it had produced all documents (almost none) that existed subject to those limitations.

The Court finds that Michelin's interpretation of RPD 50 and the Court's January 3rd Order is neither reasonable nor supported by the record as Michelin contends. Michelin interpreted RPD 50 as being redundant of RPD 16.³² Consequently, because the Court's January 3rd Order limited RPD 16 to the 1998-2001 time scope, Michelin treated RPD 50 as also being subject to the 1998-2001 time scope. As discussed in footnote 29 above, RPD 16 and RPD 50 call for different documents. Ms. Helm testified at the September 19th sanctions hearing as to her reading of the Court's January 3rd Order:

The first thing I interpreted was [the Court] had not limited it to the documents in effect at the time the tire was made, which would have been the documents in use on the 32nd week of 2000. But I read it

³¹ Nonetheless, Michelin contends that even though it does not believe the training manuals and production standards were responsive to RPD 50, it has since produced (after Plaintiffs' second sanctions motion) what is currently available, although not those documents contemporaneous in time with the design and manufacture of the tire because those documents no longer exist.

³² However, the Court notes that Michelin asserted in its December 16, 2010 response to Plaintiffs' letter-motion seeking to compel documents separately under RPD 16 and RPD 50, that RPD 50 "is inconsistent with Plaintiffs' demand for documents on numerous conditions relating to Request No. 16(b)-(e). If the conditions and components identified in Request No. 50 are those at issue, MNA will search for and produce the documents in place when the Subject Tire was manufactured that address those conditions and components." (Ex. 3 to Resp. to Motion for Sanctions, Doc. 193-4.)

as the broader temporal scope of all documents in use from '98 to 2001 that related to the components and processes at issue, which we had addressed in the hearing were the aspect specifications or the decision trees, because those were the documents that specifically addressed components or processes.

(Sept. 19, 2011 Sanctions Hr'g Tr. 156-57, Doc. 230.) The January 3rd Order specifically limited Michelin's response to RPD 16 to documents "in effect during the agreed upon time frame." (Doc. 90 at 4.) However, with respect to RPD 50, the January 3rd Order contains no temporal limitation. Ms. Helm acknowledged at the September 19th hearing that the January 3rd Order did not contain the words "1998 to 2001" with respect to the production required for RPD 50 but that she limited the Order to that time frame. (Sept. 19, 2011 Sanctions Hr'g Tr. 238, Doc. 230.) Ms. Helm never sought further clarification from the Court on this issue in the event there was actual confusion.

Michelin's interpretation is completely unsupported by the language of the Order differentiating between RPD 16 and RPD 50 and the essence of counsel's discussion with the Court at the December 20, 2010 hearing.³³ (Doc. 90 at 4-5.) By interpreting RPD 50 as requesting the same documents as RPD 16, Michelin limited its production to only those specific documents already known and identified by Plaintiffs. Michelin thereby avoided producing any other documents which discuss how design or manufacturing problems or deficiencies

³³ Michelin asserts that Plaintiffs acquiesced to its interpretation by failing to interpose any objection. This is inaccurate. Rather than acquiescing to Michelin's treatment of RPD 16 and RPD 50 as being synonymous, Plaintiffs sought an order compelling production of documents in response to both RPD 16 and RPD 50.

can result in the alleged defective conditions at issue, i.e. the training documents and tire production standards discovered by Plaintiffs as having been withheld. The Court therefore must conclude that Michelin made a calculated decision to “interpret” the Court’s discovery order in the narrow way it saw fit so as to justify withholding entire categories of documents that were unambiguously responsive to Plaintiffs’ request in violation of the Court’s direct Order.

F. Michelin’s July 19th Production in Response to RPD 50

Despite its steadfast position at the July 7th conference with the Court that it had complied with the Court’s January 3rd Order and previously produced all required documents, on July 19, 2011, Michelin produced over 700 pages of documents in connection with RPD 50 in response to Plaintiffs’ second request for sanctions.³⁴

One category of documents Michelin produced on July 19th after Plaintiffs moved for sanctions referred to as “Failure Mode and Effects Analysis” (FMEAs)

³⁴ Plaintiffs contend that the adjustment data (specifically requested in RPD 37) should have also been produced as responsive to RPD 50 because: (1) the adjustment conditions described a reason for which a tire might be returned; (2) some adjustment sets addressed problems originating with the manufacturing process; and (3) most adjustment conditions listed evolutions associated with the adjustment condition, i.e. problems that could develop if the returned tire was not repaired or replaced. Therefore, according to Plaintiffs, “when an adjustment condition belonged to a **‘manufacturing’** set and was expected to evolve into **‘oxidation’** or the **‘infiltration of air’** into the rubber, that adjustment condition was directly responsive to RPD 50.” (Doc. 180 at 8.) While the Court agrees that the adjustment data may have been responsive to RPD 50, Michelin sought reconsideration of the January 3rd Order compelling production of the adjustment code data regardless of which of Plaintiffs’ RPDs the documents were responsive to. The Court therefore does not find that Michelin’s failure to produce the adjustment code data in response to RPD 50 *prior to* the Court’s Order on Defendant’s Motion for Reconsideration (Doc. 123) was done in bad faith or warrants sanctions for any documents not produced prior to April 28, 2011.

are internal Michelin documents demonstrating how Michelin evaluates its manufacturing process to determine the different ways tires can fail, the effect of the failure, and how to fix the identified deficiency.³⁵ Michelin contends that it produced these documents in good faith, even though Michelin does not believe them to be responsive to Plaintiffs' requests, and that its subsequent production of these documents should not be used as a basis for imposing the sanction requested by Plaintiffs.³⁶ To the contrary, these documents are clearly very relevant to Plaintiffs' claims and are directly responsive to RPD 50. The FMEAs discuss the precise conditions identified by Plaintiffs in RPD 50, i.e., trapped air, adhesion, molding, how those conditions develop in the manufacturing process, and the methods for detection and prevention of those conditions in a tire before it leaves the plant.

As Plaintiffs noted at the September 19th sanctions hearing, Michelin characterized RPD 50 as calling for "cause and effect" documents and the FMEAs

³⁵ Although Michelin produced FMEAs that deal with the manufacturing process on July 19th, Plaintiffs contend that Michelin is still withholding FMEAs that deal with the design process. Plaintiffs learned about the existence of these documents during the July 28th deposition of Mr. Patrick who testified that Michelin also creates and uses FMEAs that deal with problems that arise during the design phase. At the September 19th sanctions hearing Michelin admitted the design FMEAs were not in the design file that was produced: "We agree they were not in that file, but we never represented that the file was complete at all. But what we were able to locate, it was produced. . . So, there's a lot to evaluate how the tire was designed, even though we can't say that we've got everything." (Sept. 19, 2011 Sanctions Hr'g Tr. 118: 10-20, Doc. 230.)

³⁶ Michelin redacted "nonresponsive information" from several pages of the FMEA document. (MNA 9234- 9271.) Based on the discovery record thus far, Plaintiffs question the propriety of these redactions and whether the redacted information pertains to the alleged tire defect. The Court therefore **DIRECTS** Michelin to submit these un-redacted pages for the Court's in-camera inspection.

are Michelin's ultimate "cause and effect" documents. These documents should have been produced in response to RPD 50 and without question in response to the January 3rd Order compelling production under RPD 50.³⁷ Michelin was obligated to produce these documents in discovery without the threat of sanctions but failed to do so. The Court finds that Michelin's excuses fall short in light of its obligation to cooperate fully in discovery following an order compelling production, an order imposing monetary sanctions, and the court's prior warning that additional evidence of discovery abuse would not be tolerated. *See Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1543 (11th Cir. 1993) (rejecting the defendants' claim that they simply misunderstood the scope of the discovery orders because defendants failed to offer credible explanations and failed to ask the court for clarification of allegedly confusing orders). Moreover, as the Court in *Malautea* noted, "ultimately, the [plaintiffs] had to file a motion for sanctions to force the [defendant] to comply with the court's orders." *Id.* at 1540. Thus, Michelin's post-sanctions production of documents does not excuse its conduct or obviate the need for sanctions.

Another category of documents Plaintiffs discovered had not been produced in response to the Court's January 3rd Order were tire building training materials and production standards identified by Michelin's in-house

³⁷ During the sanctions hearing, Plaintiffs discussed the relevance of other types of documents that were produced on July 19 that described how certain manufacturing processes resulted in the precise defects at issue. The Court has reviewed these documents and finds that these documents likewise should have been produced far earlier in response to RPD 50.

manufacturing expert Jack Glazener.³⁸ At the hearing, Ms. Helm testified that Michelin decided to produce the training materials³⁹ and tire production documents referenced by Mr. Glazener in his deposition even though Michelin did not regard those documents as being responsive to RPD 50 because Plaintiffs asked for them specifically in their request for sanctions. (Sept. 19, 2011 Sanctions Hr'g Tr. 163-64, Doc. 230.) Ms. Helm further testified that Michelin has produced such training manuals in the past when specifically requested to do so. (*Id.* at 164:2-12.) It appears that Michelin's modus operandi here has been – at very best – to only produce documents specifically identified by Plaintiffs despite the fact a broader set of documents would be responsive to a general discovery request. This case is eerily similar to *Malautea* in this regard where the Court imposed the sanction of default.

Another technique the Defendants have used to avoid revealing the truth is to refuse to answer general questions, choosing instead to limit the question to a narrower field. The Plaintiff sought, in

³⁸ Ms. Helm testified at the hearing that Michelin did not characterize tire production standards (also referred to as tire building procedures) as discussing cause and effect type relationships because “they are placed [sic] – this – this component on this drum at this angle, check this, move on the next step, do this. It's very much a – it's kind of like following a recipe.” (Sept. 19, 2011 Sanctions Hr'g Tr. 167, Doc. 230.) This explanation is unavailing – the failure to follow the proper procedures is a prime example of a cause and effect relationship. As anyone with cooking experience is well aware, the failure to follow certain recipes or to add ingredients in the right order can prove disastrous to the final product.

³⁹ On July 19th, Michelin produced quizzes that it gave employees, but only produced answer keys to some of them. For example, Michelin produced a quiz with the following question “_____ is used to prevent a tread separation.” (Pls.' Ex. X Sept. 19, 2011 Sanctions Hr'g, MNA 9034) At the hearing Ms. Helm testified that the answers to the quizzes were located on the opposite side of the quiz page and could be found in the other materials produced (MNA 8796 to 8828) but that no separate answer keys were available for these particular quizzes. (Sept. 19, 2011 Sanctions Hr'g Tr. 168:8-169:3, Doc. 230.)

numerous interrogatories and requests for production of documents, information not only about the 1988 1/2 Samurai, but also about other model years and about similar sport utility vehicles . . . In all of the early responses to interrogatories, the Defendants steadfastly insisted that Plaintiff was entitled only to information concerning the 1988 1/2 model year Suzuki Samurai. Accordingly, the Defendants refused, prior to the status conference, to divulge any information about the [other makes and models]. By restricting their answers in this manner, the Defendants managed to avoid revealing a great deal of discoverable information.

Malautea v. Suzuki Motor Co., 148 F.R.D. 362, 366-67 (S.D. Ga. 1991). Such conduct leaves Plaintiffs and this Court continually uncertain whether all responsive documents have been produced.

G. Michelin's Failure to Produce Expert Reports for Employee Experts Patrick and Glazener

A final issue for which Plaintiffs seek sanctions is Michelin's failure to produce expert reports for its two in-house employee experts identified in its Rule 26 Expert Disclosures on April 29, 2011. Fed. R. Civ. Proc. 26(a)(2)(B) requires a written report if the witness is "one whose duties as the party's employee regularly involve giving expert testimony." Michelin's Rule 26 Expert Disclosures identifies Charles Patrick and Jack Glazener as corporate representatives having technical knowledge and experience regarding certain subject areas pertinent to the litigation. (Doc. 232-14 at 4-5.) See Fed. R. Evid. 702. However, Michelin produced no expert reports for these two witnesses.

Contrary to its representation at the September 19th sanctions hearing, Michelin did not ever identify Patrick or Glazener as fact witnesses. At the

hearing Michelin contended that although it had not identified Glazener and Patrick in their mandatory disclosures, they were specifically identified as fact witnesses on May 11, 2011, in its supplemental responses to Plaintiff's Interrogatories. (Sept. 19, 2011 Sanctions Hr'g Tr. 134:11-13, Doc. 230.) However, Glazener and Patrick were only identified at that juncture in response to Plaintiffs' Interrogatory #4 requesting the identification of Michelin's expert witnesses.⁴⁰ Indeed, in response to Plaintiffs' Interrogatory # 12 which asked Michelin to identify the corporate representatives with the most knowledge of the design and manufacturing process, Michelin did not identify Glazener or Patrick or any other employee or former employee by name.

Michelin's counsel, Ms. Cahoon, contended that very early in the litigation, "there was an indication that Michelin would have some witnesses as fact witnesses who would talk about the manufacture and design of the tire. Quite frankly, I think Michelin was waiting to see who the tire expert was and what he was saying in his report to determine who would be the best fact witnesses to call, particularly on the design side, to deal with whatever one could say about manufacturing through some knowledgeable witness." (*Id.* at 147.) Ms. Helm confirmed it was in fact true and that Michelin waited until after Plaintiffs' tire expert's report was served to name Glazener and Patrick as fact witnesses "so that

⁴⁰ Although Michelin only identified Patrick and Glazener at the end of discovery as experts, it simultaneously proclaimed they were not actually experts subject to the requirements of Fed. R. Civ. P. 26(a)(2)(B).

[Michelin] identified fact witnesses who could address the issues in his report.”⁴¹ (*Id.* at 223.) But Glazener and Patrick were never identified as fact witnesses. In response to the Court’s concern at the sanctions hearing that Glazener and Patrick should have been identified earlier as fact witnesses, and while maintaining they are fact witnesses, Michelin responded that “it was a timely identification as to experts.” (*Id.* at 133:22-23.)

Michelin identified Mr. Patrick as a Michelin corporate representative expected to testify regarding the design of the subject tire and related issues. (Doc. 232-14 at 4.) Mr. Patrick was disclosed as having technical knowledge and experience regarding the following areas: tire components and nomenclature; tire design generally; the developmental design process; monitoring of tire quality and performance; and industry standards and practices regarding tire design. *Id.* Despite counsel’s statement at the September 19th sanctions hearing to the contrary, Michelin also designated Mr. Patrick to testify that “the subject tire’s design was not defective.” *Id.* Michelin further stated that Mr. Patrick “may also be called to address issues raised by plaintiffs’ experts.” (Doc. 232-16 at 18.)

Michelin identified Mr. Glazener as a Michelin corporate representative expected to testify regarding the manufacture of the subject tire and related

⁴¹ Michelin maintains this was its strategy despite Ms. Helm’s representation at the December 20th hearing that “I’m national discovery counsel for Michelin, and ... I can take a one-in-three shot as to who their expert is and get it right, at least I – you know, and I probably know what his theories are and I haven’t even seen the tire yet.” (Dec. 20, 2010 Disc. Hr’g Tr. 34:20-35:1, Doc. 104.)

issues. (Doc. 232-14 at 4.) Mr. Glazener was disclosed as having technical knowledge and experience regarding the following areas: tire components and nomenclature; tire design generally; manufacturing and quality assurance processes in place at the Ardmore, Oklahoma plant at the time the subject tire was manufactured; the Ardmore, Oklahoma manufacturing plant generally; industry standards and practices regarding tire manufacturing; and MNA generally. *Id.* Michelin further stated that Mr. Glazener “may also be called to testify in rebuttal regarding issues raised by plaintiffs’ experts.” (Doc. 232-16 at 19.)

Plaintiffs have separately filed motions to exclude the testimony of Messrs. Patrick and Glazener. Therefore, the Court will address the admissibility of testimony of these witnesses in a separate order. However, the Court is troubled by Michelin’s extremely late identification of Messrs. Patrick and Glazener, to the extent they qualify solely as fact witnesses and finds that such a late identification was not in good faith and provides further indication of Michelin’s pattern of discovery abuse.

H. Prejudice to Plaintiffs

As Michelin recognized at the sanctions hearing, the issue in this case is whether the Bates tire was defective – either defective in its design or in its manufacturing – and therefore unreasonably dangerous. The wide array of documents Michelin withheld, is potentially still withholding, and has

unquestionably previously destroyed under its internal document “retention” policy, all go to determining this issue. Michelin claims that the Plaintiffs have not been prejudiced in preparing their case to a jury on the merits of the claim because all extant documents have now been produced.

Michelin’s conduct has certainly resulted in delay and disruption of this litigation and has hampered the enforcement of this Court’s discovery Orders. *See Malautea v. Suzuki Motor Corp.*, 987 F.2d at 1540 (finding that defendants engaged in an unrelenting campaign to obfuscate the truth by improperly objecting to interrogatories, providing incomplete, evasive and unreasonably narrow discovery responses, delayed compliance with court orders and thus hampered the discovery process and showed disdain for the court’s orders). First, Michelin’s initial production refusal followed by its ongoing delay and obstruction of discovery central to the case have affected the integrity of the legal process. For example, Michelin’s misrepresentations at the December 20, 2010 discovery hearing regarding its production of reaction limits and tolerances resulted in a substantive error in the January 3, 2011 Order that was perpetuated by Michelin’s counsel’s failure to correct the Court’s misunderstanding about what documents had actually been produced. Michelin refused to produce the documents until ordered to do so by the Court on September 19, 2011, thereby precluding the Plaintiffs from seeking a more expansive production of these documents for over a year and a half. Moreover, Michelin seeks to limit

Plaintiffs' potential recovery on the grounds that there is no evidence to support a claim for punitive damages after attempting to withhold the very documents on which Plaintiffs rely to demonstrate a conscious indifference to the tire's defective design and manufacture. (Sept. 19, 2011 Sanctions Hr'g Tr. 54, Doc. 230.)

Second, Michelin delayed producing its most relevant documents and data for over a year and a half while seeking to exclude the testimony of Plaintiffs' tire expert, in part, on the grounds that his opinions are based on insufficient or unreliable data. (Doc. 203, 204) Yet, Michelin refused to produce documents and data that might potentially support Plaintiffs' expert's opinions regarding the defectiveness of the subject tire.

Finally, Michelin's dilatory discovery gamesmanship has hampered Plaintiffs' pursuit of a swift judicial process to provide a remedy addressing the extreme nature of Mr. Bates' physical injuries. Plaintiffs' steadfast efforts to move this case forward to resolution at trial, including their streamlined discovery⁴², has been needlessly deferred by Michelin's haggling and endless parsing over the production of its evidence on its own time schedule. Not only has this delay and disruption of the litigation prejudiced Plaintiffs, it demonstrates Michelin's bad faith. *Byrne v. Nezhat*, 261 F.3d at 1121. Thus, Michelin's course of conduct described herein warrants the imposition of

⁴² Plaintiffs submitted only one set of Interrogatories and Request for Production of Documents and took a limited number of fact depositions.

sanctions to remedy the impact of repeated violations of the Court's Orders, inaccurate representations to the Court, and prolonged abusive discovery conduct.

III. Conclusion

The Court does not impose sanctions lightly and has taken great care in the review of the record before it in its determination of this matter. The pattern of abuse by Michelin is extremely troubling. The Court is obligated to uphold the integrity of the legal and discovery process to ensure that Plaintiffs here and all parties have the opportunity to fairly present their claims in a reasonably efficient and prompt manner. Plaintiffs would not have uncovered the majority of the most probative documents in existence in this case but for their persistence in pursuing discovery motions and seeking the Court's intervention. Contrary to Michelin's assertion that this belated production demonstrates its good faith, it is precisely this ongoing belated production, in conjunction with Michelin's multiple violations of the Court's Orders and its evasive, hair-splitting and inaccurate representations to the Court that demonstrate Michelin's bad faith and why a serious, substantive sanction is warranted.

A determination that the tire at issue in this case is defective and unreasonably dangerous is an appropriate sanction to remedy the discovery abuses perpetrated by Michelin in bad faith and in disregard of this Court's prior discovery Orders. First, Michelin made multiple misrepresentations to the Court

that it had produced documents as ordered by the Court when it in fact had not. Second, Michelin repeatedly refused to produce documents in direct violation of the Court's January 3rd, June 3rd and June 24th Orders. Third, Michelin intentionally engaged in an extremely narrow, unjustified interpretation of the Court's Orders in order to limit, or altogether avoid, producing relevant and useful documents in response to Plaintiffs' discovery requests.

Furthermore, a finding that the tire was defective and unreasonably dangerous is properly tailored to address Michelin's sanctionable discovery conduct as set forth below:

- Michelin's failure to produce adjustment codes and data: This is the second round of the parties' dispute over the production of the adjustment codes and data. After the Court's June 24, 2011 Order sanctioning Michelin for its improper redaction of the adjustment codes and failure to produce the documents necessary to interpret the list of adjustment codes and conditions, Michelin again failed to produce all documents ordered by the Court. Despite its spirited representations to the Court on July 7, 2011, that all the adjustment codes had been produced as ordered on June 13, 2011, an additional 113 adjustment codes had been withheld and later had to be produced. While this initial failure may not have been intentional, Michelin's repeated misrepresentations to the Court during the course of discovery call into serious doubt the credibility of Michelin's assertions that the failure to produce the

adjustment code documents was an innocent, inadvertent mistake that would have been cured without Plaintiffs pointing to gaps in the production.

Moreover, after providing Plaintiffs with a complete list of the codes and conditions for adjustment, Michelin was required to produce the data demonstrating the number of tires returned under Michelin's adjustment process. Subsequent to the Court's June 24, 2011 Order directing Michelin to "produce all available tire adjustment data and the internal manuals Michelin uses for classifying or discussing the conditions and issues arising in connection with the application of the specific adjustment codes," (Doc. 173 at 11), Michelin instead produced an indecipherable chart along with a glossary created for the litigation.

Despite being previously sanctioned for producing a meaningless list of adjustment conditions without the necessary interpretative documents, Michelin again produced a chart of adjustment data that could not even be interpreted by Michelin's own in-house expert. Mr. Patrick testified that Michelin does not analyze its adjustment data in the format produced to Plaintiffs in this litigation and confirmed that the adjustment data, if presented in a meaningful format, could be used to determine whether (and how many) tires were being returned for conditions resulting from a manufacturing or design issue, whether Michelin was aware of such conditions in the tire, and whether any changes were made to the tire as a result of a high return rate. Michelin's production of the adjustment

data in this indecipherable format flies in the face of the Court's June 24, 2011 Order warning Michelin "that any failure to respond fully in producing these documents and tire data may result in the imposition of sanctions, including ... determination of issue preclusion relative to the tire defect at issue." (Doc. 173 at 11.)

- Michelin's failure to produce reaction limits and tolerances: The reaction limits and tolerances used by tire builders to determine whether and how much a tire deviates from its manufacturing specifications and whether the tire must be scrapped are directly probative of the defect issue. Nonetheless, Michelin's counsel allowed the Court and Plaintiffs to rely on her inaccurate statements at the December 20, 2010 discovery hearing that the reaction limits and tolerances had been produced in the design file, when they in fact had not been. When counsel realized she had misled the Court after her review of the Court's January 3, 2011 Order upon immediate receipt, she failed to contact the Court or Plaintiffs' counsel to clarify this seminal issue. Even after Plaintiffs discovered the error during the July 28, 2011 deposition of Mr. Patrick who testified that the file did not contain the reaction limits or tolerances, Michelin refused to produce relevant documents until ordered by the Court after the September 19, 2011 sanctions hearing.

- Michelin's failure to produce documents responsive to RPD 50 as compelled on January 3, 2010:

For nearly two years Michelin failed to produce 700 pages of relevant documents in response to RPD 50 requesting information discussing specific defects that may arise in a tire's components and processes based on Michelin's self-imposed limitation of the temporal scope of the Court's January 3, 2010 Order. Despite Michelin's repeated insistence at the December 20, 2010 discovery hearing that it was not attempting to limit the scope of Plaintiffs' discovery requests so that it was left having to produce nothing, Michelin's counsel's statements at the September 19, 2011 sanctions hearing confirmed that Michelin knew there were very few documents still in existence within the 1998-2001 time frame. Thus, Michelin's convenient "interpretation" of the Court's January 3, 2011 Order compelling production of "the requested documents for the components and processes at issue" as being subject to the 1998-2001 temporal scope, was calculated to justify its withholding hundreds of documents that were unquestionably responsive to Plaintiffs' request.

Because the adjustment codes and data, reaction limits and tolerances, and the documents responsive to RPD 50 all specifically relate to Plaintiffs' claim that the tire at issue was defective, an order establishing that the subject tire was defective and unreasonably dangerous as manufactured and sold to Plaintiffs is

narrowly tailored to remedy Michelin's violations and therefore appropriate under Fed. R. Civ. P. 37(b). *See Ins. Corp. of Ireland*, 456 U.S. at 707.

Michelin objects to Plaintiffs' sanctions request on the grounds that Plaintiffs did not first initiate a "meet and confer" on each of these discovery issues. The Court previously rejected this argument in its June 24, 2011 Order, and found that Michelin was obligated to comply with the Court's January 3, 2011 Order compelling the production of the documents and that no "meet and confer" session was required prior to Plaintiffs seeking sanctions for Michelin's failure to fully comply the Court's prior orders.⁴³ *Malautea*, 987 F.2d at 1542-43 (finding that defendants "richly deserved the sanction of default judgment" where the discovery orders clearly encompassed the information requested by plaintiffs"); *In re Sunshine Jr. Stores*, 456 F.3d at 1306. In addition, Michelin received more than adequate notice from (1) the Court's multiple warnings that it would not tolerate any further hampering of the discovery process or violations of its Orders; (2) Plaintiffs' multiple sanctions requests; and (3) its own flagrant disregard of the federal discovery rules and the Court's discovery orders. *In re Sunshine Jr. Stores*, 456 F.3d at 1306. Therefore, the sanction of issue preclusion is warranted by the record in this case. Finally, the Court's previous monetary

⁴³ Moreover, after the Court entered the January 3, 2011 Order compelling production of the various RPDs, Plaintiffs contend they had no reason to believe that documents were being withheld. Plaintiffs were unaware that other internal Michelin documents existed until the deposition of Michelin's in-house expert Glazener – six months later – who testified about his knowledge of certain documents based on his past work as the Ardmore plant manager. Michelin did not identify Mr. Glazener as a witness until close to the end of discovery.

sanction did not serve to remedy Michelin's cavalier attitude toward its obligations to comply with the Court's Orders and the discovery process.

In sum, Michelin's bad faith conduct caused serious prejudice to the integrity of the legal process and to Plaintiffs' orderly, effective development and proof of their case. Michelin's course of conduct described herein warrants the imposition of sanctions to remedy the impact of repeated violations of the Court's Orders, inaccurate or false representations to the Court, and prolonged abusive discovery conduct. Under the circumstances presented here, a finding of issue preclusion as to the subject tire's defective and unreasonably dangerous condition is authorized as an appropriately tailored sanction remedy. *See Ins. Corp. of Ireland*, 456 U.S. at 707. However, the Court declines to move beyond this serious sanction and will not impose Plaintiffs' additional request for an issue preclusion determination that the subject tire failed as a result of its defective and unreasonably dangerous condition.⁴⁴ The sanction applied is sufficient under the circumstances to address the scope of Michelin's discovery abuse.

⁴⁴ The Court recognizes that Michelin has now produced a more complete set of documents and data in response to Plaintiffs' Requests for Production and the Court's Orders. Though the credibility of Michelin's representation as to the completeness of this production remains in question for the reasons discussed in this Order, the Court has recognized Michelin's corrective production as a factor in its decision to refrain from imposing Plaintiffs' requested sanction of total issue preclusion – a determination that the tire failed *as a result of* its defective and unreasonably dangerous condition. That determination would be the death knell of any Michelin defense to liability. Instead, the Court has left open the question of whether the failure of the tire in fact was the proximate cause (or partial cause) of Mr. Bates' car accident.

Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Sanctions [Doc. 180, 181]. The court further **DIRECTS** Michelin to submit an unredacted copy of MNA 9234-9271 for the Court's *in-camera* inspection. Finally, Plaintiffs may file a petition for reimbursement of their attorney's fees associated with their second request for sanctions pursuant to Fed. R. Civ. P. 37 (b)(2)(C) within 15 days of this Order. Michelin may file its objection, if any, to the reasonableness of the fees requested by Plaintiffs within 15 days after receipt of Plaintiffs' petition.

It is so **ORDERED** this 13th day of January, 2012.



AMY TOTENBERG
UNITED STATES DISTRICT JUDGE