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13
14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**
16

17 HAROLD J. PHILLIPS and GEORG-ANNE
PHILLIPS,

18
19 Plaintiffs,

20 vs.

21 THE GOODYEAR TIRE & RUBBER
22 COMPANY, an Ohio Corporation, and DOES 1
THROUGH X, Inclusive,

23
24 Defendants.

) CASE NO.: 02 CV 1642 B (NLS)
)
) **OBJECTIONS OF THE GOODYEAR**
) **TIRE & RUBBER COMPANY TO THE**
) **MAGISTRATE JUDGE'S ORDER**
) **DENYING AS MOOT INTERVENORS'**
) **MOTION TO MODIFY THE COURT'S**
) **PROTECTIVE ORDER**
)
) DEPT: "F"
) JUDGE: Hon. Nita Stormes

25
26 TO THE HONORABLE COURT AND ALL PARTIES OF RECORD:

27 COMES NOW defendant, THE GOODYEAR TIRE & RUBBER COMPANY (hereinafter
28 referred to as "Goodyear") and submits these objections to the Magistrate Judge's Order of

1 January 28, 2008 Denying as Moot Intervenor's Motion to Modify the Court's Protective Order
2 Entered on June 13, 2003.

3 Goodyear brings the following objections on the grounds that the Magistrate Judge's order
4 is clearly erroneous in several respects and contrary to established law directly on point.

- 5 1. The analysis engaged in by the Magistrate Judge leading to the conclusion that the
6 deposition testimony of Kim Cox was not confidential under the Protective Order was
7 erroneous in that the intervenors motion sought only to modify the Protective Order and
8 did not request such an analysis. Consequently, Goodyear did not have an opportunity to
9 brief this issue or establish good cause for maintaining the confidentiality of the deposition
10 evidence.
- 11 2. The Magistrate Judge was in error in finding a dispute existed as to whether the deposition
12 of Kim Cox was designated as confidential.
- 13 3. The Magistrate Judge was in error in finding that the subject matter of Mr. Cox' testimony,
14 Goodyear's procedure in the handling of a prior property damage claim, was not
15 confidential under the protective order. This finding is contrary to established law in that
16 information concerning a tire manufacturer's claims review procedures and the processing
17 of consumer complaints is recognized as being confidential under federal law. See
18 provisions of The TREAD Act 49 C.F.R. 512 *et seq.*
- 19 4. The Magistrate Judge was in error in finding that there is no continuing need to keep Mr.
20 Cox deposition testimony confidential under the protective order. This finding is contrary
21 to established law in that information concerning a tire manufacturer's claims review
22 procedures and the processing of consumer complaints is recognized as being confidential
23 under federal law. See provisions of The TREAD Act 49 C.F.R. 512 *et seq.*
- 24 5. The Magistrate failed to properly consider Goodyear's reliance upon the existing protective
25 order which is a well established basis for not modifying protective orders after settlement
26 of litigation.

27 ///

28 ///

II.

THE MAGISTRATE JUDGE'S FINDING THAT THE TESTIMONY OF KIM COX WAS NOT CONFIDENTIAL IS CLEARLY ERRONEOUS AND SHOULD BE SET ASIDEA. The Intervenors Did Not Move to Unseal Testimony or Records Covered by the Protective Order

The Intervenors filed their motion to modify the court's protective order in order to use the discovery at issue in collateral litigation. (See Magistrate's Order [Doc. No. 65] page 2, lines 13 to 15). As set forth in Intervenor's Reply In Support of Their Motion to Modify the Court's Protective Order [Doc. No.53], the "Intervenors request that the Court modify its Protective Order to allow them to learn what Mr. Cox said or admitted under oath in his 2003 deposition..." (Reply at page 2 line 28 to page 3 line 2). The Intervenors did not challenge, and for that reason Goodyear did not brief, the fact that the deposition testimony of Mr. Cox was confidential. Similarly, the intervenors did not move to unseal matters presumed to fall under the Protective Order and therefore Goodyear did not address, and the magistrate could not have properly considered, factors necessary to determine issues of confidentiality and sealing.

Indeed, the Intervenor's Motion to Modify the Protective Order [Doc. No. 27] was based upon *Foltz v State Farm Mutual Auto Ins. Co* 331 F.3d 1122 (9th Cir. 2003) and the finding therein, that "a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted." (Motion at page 16 lines 3 -5 citing *Foltz*, supra at 1131-32). That is, the Intervenors did not request a finding that the Cox testimony was not confidential. Rather the relief requested was to access the court reporter's notes and deposition exhibits or, alternatively, to depose those in attendance at the Cox deposition "without Goodyear refusing to allow such discovery by invoking the terms of the Court's June 13, 2003 Protective Order." (Intervenor's Motion to Intervene and Modify the Court's Protective Order [Doc. No. 27] page 1, line 25 to page 2 line5)

The Magistrate Judge's finding that the testimony was not confidential addressed an issue not raised by the Intervenors nor briefed by Goodyear. Moreover, Goodyear submits the authority for the Magistrate's finding is misplaced. More specifically, the Magistrate Judge cites *Foltz* at

1 1133 for the proposition that the court issuing the protective order “must in the first instance
2 determine whether the Protective Order should apply to specific documents or information under
3 Rule 26(c).” (Order [Doc. No. 65] at page 7 lines 3 to 4). *Foltz* makes no such statement on page
4 1133 or anywhere else in its opinion. Rather, the *Foltz* court explained that in the event of a
5 challenge to a confidential designation, the Court must require the proponent of continuing
6 confidential treatment to “make an actual showing of good cause” *Foltz* at 1131.

7 Here there has been no challenge by the intervenors to the confidential status of the
8 discovery at issue.

9 Rather, the *Foltz* court noted at page 1133 that in the case of a blanket protective order,
10 such as the one at issue here, a reliance argument, without more, will not justify a refusal to modify.
11 Further, the *Foltz* court found “(a)ny legitimate interest ... in continued secrecy as against the
12 public at large can be accommodated by placing [the collateral litigants] under the same restrictions
13 on use and disclosure contained in the original protective order.” (citing *United Nuclear Corp. v*
14 *Cranford Ins. Co.*, 905 F. 2d 1424, 1426 (10 Cir.1990). As to the first point, Goodyear presented
15 evidence not only of reliance but of the fact all parties recognized and treated the testimony of Mr.
16 Cox as confidential. On the second point, this is precisely what the intervenors sought: to modify
17 the protective order to allow them access to discovery in the Phillips case. Goodyear submits that it
18 has a legitimate interest in the continued confidentiality of the testimony of Mr. Cox and hereby
19 requests the opportunity to establish good cause for the continued confidentiality of the deposition
20 evidence.

21 Unlike the intervenors in *Foltz* who sought, among other things, to unseal certain documents
22 that had been subject to the blanket protective order, no such effort was made by the intervenors
23 here. Therefore, the analysis engaged in by the Magistrate Judge was beyond the scope of the
24 intervenor’s motion and beyond the issues Goodyear anticipated or briefed.

25
26 **B. Evidence Presented Supports the Presumption of Confidentiality**

27 As noted above, the intervenors did not challenge the understanding that the deposition
28 testimony of Mr. Cox was confidential. Indeed, the Magistrate’s finding that the parties “*tacitly*

1 *assumed* that Cox's testimony is presently protected as "confidential information" under the June
2 13, 2003 Protective Order" (January 28, 2008 Order at page 7 lines 7-8; emphasis added) is an
3 understatement of the first order. Not only did the parties *tacitly assume* the deposition testimony
4 was confidential, they expressly confirmed the confidential nature of the testimony and of the
5 physical deposition transcript. Accordingly, there can be little doubt that the testimony was
6 presumed by all to not only be confidential but falling within the protections of the protective order.

7 First, the language of the protective order itself [Doc. No. 22] covers the very testimony at
8 issue. More specifically, section I. paragraph A defines "confidential information" as including
9 information which contains trade secrets and proprietary matters including methodology and
10 evaluation "which any party believes in good faith pertains to its trade or business and has
11 independent value from not being generally known and not being readily ascertainable by other
12 persons who may obtain economic value from its disclosure or use. In addition, such information is
13 not normally revealed to others except in confidence and is not revealed to others in the party's
14 trade or business and is of a type that the party has made efforts to maintain as secret."

15 When the Magistrate inquired about trade secret treatment of claims information at the
16 January 11, hearing, it was explained that Goodyear, like other tire manufacturers, takes great
17 efforts to maintain its claims information, including processing guidelines, customer complaints
18 and adjustment information as confidential. Goodyear's counsel, Walter Yoka, spoke at length
19 about the nature of this specific confidential information and the efforts tire companies go to in
20 order to maintain this competitive information confidential. This discussion was unrefuted.
21 Significantly, the Department of Transportation's National Highway Transportation and Safety
22 Administration (NHTSA) has determined that reports and data relating to warranty claim
23 information, data related to field reports, including dealer reports and data and reports relating to
24 consumer complaints is to be maintained as confidential and would cause substantial competitive
25 harm if released. 49 C.F.R. § 512.3(c) and Appendix C to 49 C.F.R. Part 512.

26 Further, paragraph 3 of the Protective Order specifically explains, in relevant part:

27 Deposition testimony relating to or discussing Goodyear's
28 confidential information shall be protected under the ORDER and the
transcript of such testimony shall be marked with the Confidential legend of

1 Paragraph 1. The transcripts of such deposition testimony shall be treated
2 the same under this ORDER as other documents Goodyear marks as
3 confidential.

4 Accordingly, the deposition testimony was presumptively confidential.

5 C. It is Undisputed that Goodyear and the Phillips Attorneys Considered the Testimony
6 Confidential

7 The Magistrate Judge erroneously found a “dispute” as to whether the deposition was
8 designated and treated as confidential. Goodyear submits there was no such dispute and that the
9 key undisputed facts point to a clear understanding by all concerned that testimony was designated
10 and treated as confidential.

11 In his Declaration, Goodyear’s counsel John McCormick affirmatively states “(b)ecause Mr.
12 Cox was being deposed regarding Goodyear’s confidential information relating to its handling and
13 evaluation of a property claim, the deposition was declared to fall within the protections of the
14 Protective Order, and Plaintiffs’ counsel, Mr. Ricciardulli, agreed to this designation and did not
15 challenge it.” [Doc. No. 26, Exhibit #3] No competent evidence has been provided ot challenge this
16 fact.

17 Similarly, Mr. Ricciardulli acknowledged that the transcript was in fact confidential after the
18 deposition was concluded. In this regard, Tim Casey, lead counsel for the intervenors stated in his
19 affidavit under penalty of perjury his understanding from Mr. Ricciardulli that Mr. Ricciardulli
20 “agreed to seal the deposition” of Mr. Cox. [Doc. No. 26, Exhibit D paragraph 6(h)]. This
21 statement has gone unchallenged.

22 Mr. Casey’s affidavit makes it clear that Mr. Ricciardulli told him that the deposition of Mr.
23 Cox had been sealed under the Protective Order. In fact, Mr. Casey also notes that Mr. Ricciardulli
24 declined Mr. Casey’s request to provide documents from the Phillips case citing to the Protective
25 Order and the settlement agreement. [Doc. No. 26, Exhibit D paragraphs (h) and (i)]. Only when
26 later responding to the motion for order to show cause for violating the Protective Order did Mr.
27 Ricciardulli suggest a possible contrary understanding. And even that was equivocal. Mr.
28 Ricciardulli did not refute the statement that he agreed that the deposition of Mr. Cox was covered

1 by the Protective Order. Rather, Mr. Ricciardulli stated that he does not recall any such discussion.
2 This “evidence” does not amount to equipoise but clearly weighs in favor of a finding that the
3 testimony was considered to be confidential.

4 Finally, it was established that documents for the deposition of Mr. Cox would not be
5 produced until the Protective Order was in place. [Doc. No. 48, Declaration of John McCormick
6 paragraph 7]. Given that the content of the documents produced for use in the deposition were
7 treated as confidential, it follows that the testimony related to the documents was covered by the
8 Protective Order. (Protective Order, Section I, paragraph B; paragraph 3)

9 In summary, ample evidence was presented by Goodyear and unrefuted by the intervenors
10 that the deposition of Mr. Cox was confidential under the Protective Order and was understood by
11 the parties to be confidential under the Protective Order. For the Magistrate Judge to conclude
12 otherwise is contrary to the evidence presented and is clearly erroneous.

13
14 D. The Subject Matter of Mr. Cox Deposition is Presumptively Confidential:

15 Pursuant to the provisions of the TREAD Act, set forth at 49 C.F.R. § 512 et seq., the
16 National Highway Traffic Safety Administration (“NHTSA”) considers automotive and tire
17 manufacturer claims information, including reports and data relating to warranty claim information,
18 data related to field reports, including dealer reports and data and reports relating to consumer
19 complaints to be presumptively confidential and the type of information that would cause
20 substantial competitive harm if released.

21 In this regard, 49 C.F.R. § 512.3(c) defines confidential information as follows:

22 “Confidential business information means trade secrets or
23 commercial or financial information that is privileged or confidential,
24 as described in 5 U.S.C. 552(b)(4).

25 (1) A trade secret is a secret, commercially valuable plan, formula,
26 process, or device that is used for the making, preparing,
27 compounding, or processing of trade commodities and that can be
28 said to be the end product of either innovation or substantial effort.

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(2) Commercial or financial information is considered confidential if it has not been publicly disclosed and:

(i) If the information was required to be submitted and its release is likely to impair the Government's ability to obtain necessary information in the future, or is likely to cause substantial harm to the competitive position of the person from whom the information was obtained; or

(ii) if the information was voluntarily submitted and is the kind of information that is customarily not released to the public by the person from whom it was obtained.

Appendix C to 49 C.F.R. Part 512 specifically finds that automotive and tire manufacturer claims data and information is “confidential business information”.

(a) The Chief Counsel has determined that the following information required to be submitted to the agency under 49 CFR 579, subpart C, will cause substantial competitive harm and will impair the government's ability to obtain this information in the future if released:

- (1) Reports and data relating to warranty claim information;
- (2) Reports and data relating to field reports, including dealer reports and hard copy reports;
- (3) Reports and data relating to consumer complaints; and
- (4) Lists of common green identifiers. (Appendix C to Part 512-- Early Warning Reporting Class Determinations)

As noted above, the trade secret content of Mr. Cox deposition was at a minimum tacitly assumed in the briefing of intervenors’ motion. When discussed at the hearing on January 11, Goodyear explained the confidential nature of consumer claims information which was at the heart of Mr. Cox testimony. Significantly, the Magistrate’s order found that this type of claim information was the subject of Mr. Cox testimony and was akin to manufacturer “records” falling

1 under NHTSA's regulations. However, the Magistrate overlooked the fact that NHTSA recognizes
2 the trade secret nature of such "records" and explicitly provides manufacturers with confidential
3 treatment of the same.

4 Accordingly, the finding that Mr. Cox, *was* a witness produced to specifically discuss the
5 handling of a consumer claim and the finding that such testimony *was not* entitled to trade secret
6 protection, or that Goodyear should not be given the opportunity to establish the same as trade
7 secret is inconsistent, contrary to law and constitutes error.

8
9 E. The Court Failed to Properly Consider Goodyear's Reliance Upon the Existing
10 Protective Order

11 The Magistrate failed to properly consider and give weight to Goodyear's reliance upon the
12 protective order. To undo the provisions of the protective order four years after Goodyear had acted
13 in conformity with the order and in the absence of any objection to Goodyear's conduct under the
14 protective order is manifestly unfair to Goodyear.

15 Goodyear had a right to believe from the outset, that confidential materials produced in
16 discovery in this matter would be used only for this case and would not become the subject of
17 dispute in future litigation. Indeed, had Goodyear foreseen the instant controversy and the undoing
18 of the protective order as contemplated by the Magistrate Judge, it certainly would have sought
19 additional and/or different protections from the Court and guided its actions accordingly.

20 A party's reliance upon the existing provisions of the protective order was recently dealt
21 with in the Missouri Supreme Court case of *Ford Motor Company v. Manners*, 239 S.W.3d 583
22 (MO. 2007), holding that the trial court abused its discretion in vacating a non-sharing protective
23 order. The Court reasoned that defendant Ford's "reliance on the non-sharing protective order was
24 manifest." *Id.* at 588. The plaintiffs argued, as the intervenors do here, that changing or vacating
25 the protective order would avoid duplicative discovery. *Id.* The Court declared that "the discovery
26 process is primarily designed to facilitate an orderly and efficient resolution of individual lawsuits,
27 not to provide a national database." *Id.* at 589. The Court rejected plaintiffs' arguments by
28 observing that "failure to respect the production of documents subject to protective orders would

1 hinder, not further, the goal [of conducting discovery in the most practical and cost-efficient way
2 possible]. If parties could not rely upon the protective orders and agreements, during and after the
3 trial process, all productions of sensitive material would require litigation to this Court.” *Id.*

4 The evidence presented to the Magistrate on the motion to intervene establishes that the
5 protective order in this matter was properly utilized to “facilitate an orderly and efficient resolution”
6 of this individual lawsuit. Goodyear’s conduct with respect to the protective order, within the
7 context of the Phillips lawsuit, was in no way improper. The return or disposal of confidential
8 materials produced in discovery is contemplated by the Protective Order itself. Goodyear relied
9 upon its protections in producing documents in this case, in allowing its employee to be deposed on
10 confidential topics, and in working with Mr. Ricciardulli regarding the handling the disposition of
11 confidential materials following settlement. Goodyear was reasonably entitled to rely upon the
12 Protective Order to assume that the confidential discovery materials were only for use in the
13 Phillips’ case and that once the case was over those materials were not required for any other
14 purpose. To hold Goodyear to a standard of conduct inconsistent with Goodyear’s proper reliance
15 on the protective order is erroneous and should be not followed.

16 III.

17 **GOODYEAR’S ADDITIONAL OBJECTIONS TO FINDINGS NOT SUPPORTED BY THE** 18 **RECORD SHOULD BE SUSTAINED AND THE MAGISTRATE’S ORDER SHOULD BE** 19 **MODIFIED ACCORDINGLY.** 20

- 21 A. The Court’s Inquiry Into and Findings Regarding the Status of Kim Cox as a
22 Witness Were in Error, There is No Evidence in the Record That Kim Cox was a
23 “High Level” Employee of Goodyear and Such an Inquiry is Irrelevant to
24 Determining Whether the Content of the Deposition is Entitled to Protection

25 In her order, Judge Stormes asserted: “Goodyear argued that any statements made by Cox
26 during his deposition concerning the G159 tire’s performance would have included proprietary
27 information because of his high level position within the company and his base of knowledge
28 concerning Goodyear products.” (Order [Doc. No. 65] at page 11 lines 4-7). The Magistrate Judge

1 also focused on whether Mr. Cox was a fact witness or truly a 30(b)(6) witness to testify on behalf
2 of Goodyear. In truth, these considerations are distinctions without a difference as it is the content
3 of the testimony rather than the title attached to the witness that brings his testimony within the
4 parameters of the Protective Order.

5 Pursuant to 30(b)(6), the corporation must designate one or more “officers, directors, or
6 managing agents, **or other persons who consent to testify on its behalf**” ... (emphasis added).
7 In this case Mr. Cox was the witness produced and his production by the company does not *ipso*
8 *facto* make him a “high level employee.” In fact, Goodyear *never* described Mr. Cox as holding a
9 “high level position” within the company in its briefing papers or during oral argument.

10 Indeed, Mr. Ricciardulli’s counsel Mr. Goldstein acknowledged the level of Mr. Cox
11 position by referring to Mr. Cox as an “underling”. (Transcript of January 11, 2008 hearing at page
12 19, line5-8). This characterization of Mr. Cox was apparently created in an attempt to imply that as
13 a low level employee, Mr. Cox could not have information that could be considered as confidential
14 or proprietary. In truth, Mr. Cox was indeed simply an employee of Goodyear’s claims department
15 who happened to be the one who handled the previous claim of the Phillips’. Despite the fact that
16 he does not hold a high-level position, Mr. Cox’s capacity as a claims department representative
17 made him aware of the claims processing practices of Goodyear, certain consumer complaints and
18 certain claims information, all of which Goodyear and other tire companies consider confidential.

19 The Magistrate’s statement that Mr. Cox was a “high level” employee is erroneous.
20 Goodyear never represented him to hold a “high level” position. The Magistrate Judge’s
21 conclusion on this point is wholly unsupported by the record, irrelevant, and improperly creates the
22 impression that Mr. Cox, as a representative of Goodyear, may have had the ability or authority to
23 speak to issues beyond those which were the subject of the Phillips’ deposition notice. For these
24 reasons the Magistrate’s “finding” on this subject should be stricken and not adopted by the court.

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IV.

CONCLUSION

The evidence in the record establishes that the subject matter of Mr. Cox’s deposition was recognized as being confidential. In this regard, the conduct of the deposition, including the actions of counsel were consistent with the confidential nature of the deposition topic, including withholding documents until the Protective Order was in place. Moreover, the treatment of the testimony after the deposition was concluded was consistent with the conclusion by the parties that it was confidential. The Magistrate’s inquiry into the whether the testimony was confidential was not an issue before the court and the finding that the testimony was not confidential is clearly erroneous based on the record developed. Therefore, Goodyear respectfully requests that the objections as outlined above be sustained and that the District Court enter an order finding: (1) that the deposition of Mr. Cox is confidential pursuant to the terms of the protective order; (2) that the filings referring to Mr. Cox deposition testimony will remain under seal pursuant to the terms of the protective order; and (3) denying the intervenors’ Motion to Modify the protective order.

DATED: February 22, 2008

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PROOF OF SERVICE

PHILLIPS v. GOODYEAR TIRE & RUBBER COMPANY
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA
Case No.: 02 CV 1642 B (NLS)

GOOD.31886

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **777 S. Figueroa Street, Suite 4200, Los Angeles, California 90017.**

On February 22, 2008 I served the foregoing document described as **OBJECTIONS OF THE GOODYEAR TIRE & RUBBER COMPANY TO THE MAGISTRATE JUDGE'S ORDER DENYING AS MOOT INTERVENORS' MOTION TO MODIFY THE COURT'S PROTECTIVE ORDER** on the interested party or parties in this action by placing [] the original and/or [XX] a true copy thereof, enclosed in a sealed envelope, and addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

- (BY MAIL) I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
- (E-FILE).
- (VIA OVERNIGHT MAIL) I deposited such envelope in the Overnite Express box at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
- (BY FACSIMILE) In addition to regular mail, I sent this document via facsimile, number(s) as listed on the attached mailing list, on _____.
- (BY PERSONAL SERVICE) Such envelope was delivered by an agent of Document Delivery Service by hand to the office of the addressee.
- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 22, 2008, at Los Angeles, California.



Salvador Quintero

PHILLIPS v. GOODYEAR TIRE & RUBBER COMPANY
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA
Case No.: 02 CV 1642 B (NLS)

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