No. 15-1406

In The
Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit's determination that the monetary sanctions awarded to the Haegers, based on the attorneys' fees and costs they were forced to incur in a "sham litigation," were compensatory does not conflict with a decision of this Court or another circuit of the Court of Appeals.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit's affirmance of sanctions on Goodyear was based on numerous findings that, commencing almost immediately and continuing throughout the litigation, Goodyear directly participated in bad faith conduct (and not based solely on the misconduct of Goodyear's attorneys) does not conflict with a decision of this Court or another circuit of the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The underlying proceedings and resulting decisions by the district court and the Ninth Circuit address carefully-orchestrated fraud involving years of willful deceptions, including bad faith discovery conduct, repeated misrepresentations to the court and the Haegers, and false deposition testimony during discovery, none of which was discovered until after the case had been settled. These deceptions concealed, for the entire five years of litigation, critically-important test data which the Haegers had requested regarding the Goodyear G159 tire, and sent the Haegers on a completely misdirected frolic. The district court found these deceptions so extensive that they "permeated the entirety of this case," App. 180a, and the Ninth Circuit agreed that Goodyear's misconduct "caused significant harm in forcing the Haegers to engage in sham litigation and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses." App. 30a.

During more than two years of post-settlement, sanctions-related litigation in the district court, Goodyear and its lawyers filed fifteen briefs, participated in discovery and presented testimony at a six-hour evidentiary hearing. After that thorough process, the district court painstakingly detailed in a 66-page order a long list of sanctionable misconduct, which "continued throughout the entire litigation, including post-dismissal." App. 159a; *see generally* App. 83a-172a. The order included 49 pages of findings of fact and 17 pages of legal analysis and conclusions. App. 6a. At the heart

of the district court's findings was a recognition that Goodyear's in-house attorney "was always the final decision maker regarding discovery responses" (App. 88a), and she knew "that Goodyear's responses in the present case were grossly inaccurate." App. 139a.

Ultimately, relying upon the date of the first definitive proof that Goodyear was treating litigation as a game of hide and seek, the district court held that "the most appropriate sanction is to award Plaintiffs [the Haegers] *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request."[1] App. 152a (emphasis in original). The court found Goodyear responsible for 80% of that amount, or $2,192,960.93. App. 169a-170a, 185a.

The Ninth Circuit unanimously upheld the district court's findings that Goodyear and its attorneys engaged in bad faith, sanctionable misconduct. App. 18a ("the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case"); App. 43a (Watford, J., dissenting) (stating that the district court "approached the task . . . with great thoroughness and care," and "I agree with the majority that the district court's misconduct findings are supported by the record"). The panel also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 21a

[1] Goodyear's supplemental responses were provided on November 1, 2006, seventeen months after the suit was commenced. App. 89a.

("We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case,"); App. 43a (Watford, J., dissenting) ("The district court's finding of bad faith authorized it to levy sanctions under its inherent power.").

Goodyear has presented no compelling reasons for granting its petition. *See* Sup. Ct. R. 10. It first claims that the Ninth Circuit's decision conflicts with this Court's decision in *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), and decisions of other circuits, which hold that compensatory sanctions must be causally connected to the sanctioned misconduct. Contrary to Goodyear's assertion, there is no conflict; the Ninth Circuit held that there was an appropriate causal link between the fees and costs awarded to the Haegers and Goodyear's egregious misconduct. Moreover, Goodyear fails to disclose in its petition that even Goodyear (and its attorneys) admitted in the district court that all but approximately $722,000 of the fees and costs for which the Haegers sought reimbursement "result[ed] from Goodyear's allegedly sanctionable conduct," ER1352; *see also* ER1352-1354, and that admission resulted in an alternative, contingent award which effectively moots most of Goodyear's argument.

Petitioners also claim that the Ninth Circuit's decision conflicts with this Court's decisions and the Eleventh Circuit by allowing sanctions to be imposed against Goodyear based solely on the bad faith misconduct of Goodyear's attorneys. Again, there is no

conflict. Sanctions were not imposed against Goodyear based solely on the bad faith misconduct of its attorneys. Instead, the district court found numerous instances in which Goodyear itself directly engaged in bad faith misconduct, and Goodyear did not challenge most of those findings as clearly erroneous in the Ninth Circuit, and has not asked this Court to review the Ninth Circuit's unanimous affirmance of those findings here. Accordingly, this Court's review is unwarranted, and the Petition should be denied.

STATEMENT OF THE CASE

Even though the district court's findings of fact must be accepted as true on review unless clearly erroneous, *see Amadeo v. Zant*, 486 U.S. 214, 225-226 (1988) ("where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"), Goodyear improperly disregards the district court's findings. Instead (without even arguing that the district court's findings are clearly erroneous), Goodyear presents its own, one-sided and highly selective version of the facts, which the district court already rejected. *See, e.g.*, Petition at 4 (relying on facts "[a]s explained in Goodyear's Ninth Circuit briefing"). Indeed, the district court specifically found that many aspects of Goodyear's version of the facts are unreasonable, not credible and even untruthful.[2]

[2] For example, Goodyear asserts that it did not produce the concealed tests in response to the Haegers' first discovery requests because its attorneys had "concluded that Plaintiffs' counsel had

Accordingly, many of Goodyear's assertions of fact are contrary to the actual, controlling facts.

The Haegers commenced this action against Goodyear in June 2005, alleging that defects in the design of Goodyear's G159 tire resulted in a motor home accident which caused severe harm to the Haegers. App. 8a. Goodyear was represented by Basil Musnuff ("Musnuff") (an attorney with Roetzel & Andress, LPA, who acted as lead trial counsel and national coordinating counsel for all G159 cases throughout the country between 2003 and 2010), and Graeme Hancock ("Hancock") (an attorney with Fennemore Craig, P.C., who served as local counsel for Goodyear). App. 8a. Goodyear was embroiled in G159 tire litigation commencing in 1999. App. 113a, n.13.

The Haegers' case theory was that, when the G159 tire is used on motor homes at highway speeds, the tire produces a level of heat which it was not designed to endure, leading to tire failure. App. 9a. The Haegers repeatedly requested production of test data which would have revealed the operating temperature of the tire. App. 85a-86a, 89a-91a, 98a, 105a, 108a-110a. None was disclosed. "Goodyear's obstructive discovery practices prior to 2006 were successful in keeping the additional testing concealed." App. 113a, n.13. The concealed tests later revealed that Goodyear knew the tire

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agreed to narrow the scope of their first request." Petition at 5. But the district court rejected this "fact," finding instead that "it is now clear [Goodyear and Musnuff] did not adopt this position until they were faced with sanctions." App. 160a.

was generating temperatures far in excess of 200 degrees at highway speeds. Knowing that Goodyear and its attorneys had concealed all test data revealing the operating temperature of the tire at highway speeds, Goodyear's experts admitted that "anything over 200 [degrees] could cause separation." App. 145a.

Thus, the egregious misconduct of Goodyear and its attorneys deprived the Haegers of the crucial temperature evidence supporting their claims. Consequently, after five years of litigation based on a false set of facts Goodyear and its attorneys had created, resulting in completely misguided discovery and misdirected expert disclosures, the Haegers and Goodyear reached a settlement on April 14, 2010. App. 13a.

Sometime after the settlement, the Haegers' counsel saw an article stating that Goodyear had produced in a Florida suit ("*Schalmo*") internal heat and speed testing related to the G159 tire which the Haegers had repeatedly requested but never received. App. 13a. Goodyear eventually admitted that it had not disclosed the requested tests, but Goodyear and its attorneys attempted to justify that concealment with "a dizzying array of misstatements and simple falsehoods." App. 137a.

On May 31, 2011, the Haegers filed a motion for sanctions. App. 13a. After that motion had been fully briefed, the district court found that there were "serious questions regarding [Goodyear's] conduct in this case," and ordered Goodyear to produce "the test results at issue." App. 14a. Even then, Goodyear disclosed only

a single test (the Heat Rise test), "but kept numerous other tests concealed" which showed temperatures well in excess of 200 degrees at highway speeds. App. 14a, 128a.

On February 24, 2012, the district court issued a proposed order, in which the court described possible sanctionable misconduct, but also stated that the record did not indicate who was responsible for each instance of misconduct or the amount and allocation of sanctions. App. 14a, 81a-82a. The district court then allowed Goodyear and its attorneys ample opportunity to respond to the matters addressed in the proposed order. Between March and July of 2012, Goodyear, Musnuff and Hancock each filed multiple briefs, totaling 1,111 pages.[3] The district court also held an evidentiary hearing on March 22, 2012, at which both Hancock and Musnuff testified under oath. App. 15a. At the conclusion of the hearing, the district court granted the Haegers' requests to conduct additional discovery to address representations made at the hearing.

On November 8, 2012, the district court issued a 66-page order, which carefully cataloged the sanctionable misconduct, which included concealing critical test data, making intentional misrepresentations to

[3] ER288-339, ER340-356, ER357-372, ER395-408, ER409-412, ER413-496, ER497-510, ER511-533, ER573-706, ER873-1065, ER1066-1085, ER1086-1108, ER1200-1242, ER1247-1250, ER2163-2250, ER2392-2513, ER2541-2595, ER2596-2600, SER082-127, SER277-303, SER304-318, SER917-931, SER953-973, SER974-996, SER997-1017, SER1018-1035.

the court and the Haegers' counsel throughout all five years of the underlying litigation, and even lying to the court during the sanctions proceedings. App. 83a-172a. The following is just a sample of the district court's numerous findings specifically as to Goodyear's own bad faith misconduct:

- Goodyear's in-house attorney, Deborah Okey, "retained final say regarding discovery responses." App. 139a. "Ms. Okey was always the final decision maker regarding discovery responses." App. 88a. The district court found that Goodyear's objections to the Haegers' discovery requests – which Ms. Okey reviewed and approved – were "not made in good faith." App. 160a-163a.
- Even though both Musnuff and Hancock recommended to Goodyear that Goodyear's responses to the Haeger's first request should be supplemented with testing of the tire at various speeds, "the record is clear . . . that no supplementation ever occurred." App. 93a-94a.
- Ms. Okey knew that Goodyear's responses "were grossly inaccurate." App. 139a. She also "knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior." App. 164a.
- "[T]he repeated representations by Goodyear . . . that Plaintiffs did not state the legal theory of this case until January 7, 2007 is incorrect . . . and now appears to have been part of a general strategy to obstruct and delay discovery." App. 87a, n.5.

- "[D]espite knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith." App. 163a.

- "Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. . . . [T]his means Goodyear . . . knowingly concealed documents in the present litigation." App. 122a.

- During the sanction proceedings, Ms. Okey made statements in a sworn declaration regarding production of test data which the district court found "were either misleading or false." App. 133a.

- "It is now clear that Goodyear's 30(b)(6) witness [Richard Olsen] testified falsely at his deposition regarding the [concealed tests]. Therefore, the claim that Goodyear itself did not deliberately conceal *any* 'G159 Tire test results' is not true." App. 139a (emphasis in original); *see also* App. 166a. When Mr. Olsen offered a declaration in the sanctions proceedings in an attempt "to explain how his testimony during his deposition was accurate . . . Mr. Olsen accidentally revealed it was not." App. 134a. "In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity

emerged only as a result of Goodyear's inability to keep its falsehoods straight. . . . The only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith." App. 135a-136a.

- "Goodyear employees knew the Heat Rise tests and other tests were responsive to the Third Request. There is no acceptable justification for the failure to provide all responsive documents to the Third Request." App. 165a. "Goodyear engaged in a bad faith attempt to conceal documents when they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request." App. 164a.
- Goodyear's "outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests." App. 169a.
- "Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, . . . Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior." App. 150a-151a.

- When the district court ordered Goodyear to produce "the test results at issue" during the sanction proceedings, Goodyear continued to conceal most of them. App. 128a.

In short, the district court found that Goodyear's sanctionable misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal," and "permeated the entirety of this case." App. 159a, 180a.

The district court then turned to the task of crafting an appropriate sanction to compensate the Haegers for the harm caused by Goodyear's (and the others') pervasive misconduct. As the Ninth Circuit stated, "[t]he district court then conducted an exhaustive analysis of the documentation submitted by Plaintiffs," "spent considerable time reviewing *each* time entry," and "with painstaking attention to detail, made adjustments based on Goodyear's objections." App. 17a (emphasis in original). Ultimately, the district court reduced some of the fees and costs the Haegers sought, and found that the Haegers should be "reimbursed" a total of $2,741,201.16. *Id*. The district court held Hancock responsible for twenty percent of that amount, and "Musnuff and Goodyear were held jointly responsible for the remaining eighty percent of the fees and costs." *Id*.

The district court also made an alternative, smaller, "contingent award" which was intended to apply only if the full award was found on appeal not to have a sufficient causal link to the misconduct of

Goodyear and its attorneys. App. 180a, 185a; ER1272. Specifically, based on the admission by Goodyear (and its attorneys) that all but $722,406.52 of the fees and costs for which the Haegers sought reimbursement "result[ed] from Goodyear's allegedly sanctionable conduct," ER1352; *see also* ER1352-1354, the district court's alternative award reduced the sanction by $722,406.52 (or a total of $2,018,794.64). App. 185a.

On appeal, the Ninth Circuit unanimously upheld the district court's findings that Goodyear (and the others) engaged in bad faith, sanctionable misconduct. App. 18a, 43a. It also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 21a, 43a. The dissenting judge parted ways with the majority solely on the issue of whether there was a sufficient causal link between all the fees and costs awarded and the sanctioned misconduct. App. 49a-50a. Relying on this Court's holding in *Chambers v. NASCO*, *Inc.*, 501 U.S. 32, 57 (1991), that "the full attorney's fees were warranted [as a sanction] due to the frequency and severity of Chambers's abuses of the judicial system," the majority held that the district court "appropriately awarded the Haegers all their attorneys' fees and costs in prosecuting the action once the Sanctionees began flouting their clear discovery obligations and engaging in frequent and severe abuses of the judicial system." App. 31a-32a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING THAT A CAUSAL LINK EXISTS BETWEEN FEES AWARDED THE HAEGERS AND GOODYEAR'S MISCONDUCT DOES NOT CONFLICT WITH *BAGWELL* OR OTHER CIRCUITS.

Goodyear's contention that the Ninth Circuit's decision conflicts with decisions by this Court and other circuits is built on the erroneous assertion that "the Ninth Circuit majority in this case expressly declined to require a causal connection between the sanctioned conduct and the civil monetary sanction imposed." Petition at 1; *see also id.* at 14 (accusing the Ninth Circuit of altogether "[d]ispensing with a 'linkage' requirement"). That assertion is simply not true; the Ninth Circuit did not ignore the causal-link requirement. To the contrary, the Ninth Circuit expressly concluded that "there is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation, and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses of the Sanctionees."[4] App. 30a (emphasis added).

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[4] Goodyear contends that the district court's finding that "the case more likely than not would have settled much earlier" if Goodyear and its attorneys had not engaged in the sanctioned misconduct (thereby saving the Haegers from incurring the fees and costs awarded to them), App. 152a, should be rejected because when Goodyear produced the concealed tests in *Schalmo*, that case did not immediately settle. Petition at 16. This contention fails for at least two reasons. First, Goodyear did not challenge this finding as "clearly erroneous" on appeal to the Ninth Circuit,

Furthermore, in addition to acknowledging the causation requirement, the Ninth Circuit also carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded when a court invokes its inherent power." App. 30a (emphasis added). Relying on this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Ninth Circuit held that the district court had appropriately awarded:

> the amount the court reasonably believed it cost the Haegers to litigate against a party and attorneys during the time when that party and those attorneys were acting in bad faith. Nothing more is required under *Chambers* or our case law. . . .

App. 33a. Indeed, the Ninth Circuit concluded that Goodyear's argument that something more is needed to establish causation is "virtually identical to the causation requirement claim" this Court rejected in *Chambers*. App. 31a (quoting *Chambers*, 501 U.S. at 57 (rejecting the argument that "the fact that the entire amount of fees was awarded means that the District

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and similarly has not asked this Court to review the underlying findings for clear error. Second, Goodyear ignores the uncontested finding that "in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had 'said the tire would foreseeably fail at [temperatures] above 200 degrees.' " App. 145a. Disclosure of the concealed tests showing that the temperature of the G159 tire when operated at highway speeds greatly exceeded 200 degrees "more likely than not" would have forced Goodyear to settle this case because, unlike in *Schalmo*, Goodyear's experts had already admitted that heat in excess of 200 degrees "can lead to tread separations." App. 144a.

Court failed to tailor the sanction to the particular wrong," and upholding the district court's conclusion "that full attorney's fees were warranted due to the frequency and severity of Chamber's abuses")). Goodyear's actions rendering the entirety of five years of litigation a "sham" unquestionably supports a sanction of all the attorneys' fees and costs which the Haegers were forced to incur.

Accordingly, the Ninth Circuit correctly held that "the district court did all it was required to do" to compensate the Haegers for the damages "they suffered as a *result* of Sanctionees' bad faith." App. 28a (emphasis added). Thus, contrary to Goodyear's assertion, the Ninth Circuit's decision does not conflict with *Bagwell*, 512 U.S. 821 (1994), or any of the cases from other circuits on which Goodyear relies. Thus, this Court's review is not warranted.

Even if a conflict existed, this case is not a proper vehicle to resolve it because Goodyear itself admitted in the district court that most of the monetary sanction awarded to the Haegers was caused by the sanctionable misconduct of Goodyear and its attorneys. Specifically, Goodyear and its attorneys admitted that all but $722,406.52 of the fees awarded to the Haegers "result[ed] from Goodyear's allegedly sanctionable conduct." ER1352; *see also* ER1352-1354. That admission resulted in the district court's alternative, contingent award (App. 180a, 185a) which effectively moots most of Goodyear's argument. Thus, for this additional reason this Court's review is unwarranted.

II. THE NINTH CIRCUIT'S HOLDING THAT GOODYEAR DIRECTLY ENGAGED IN BAD FAITH CONDUCT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

Goodyear also erroneously contends that this Court's review is needed because "the Ninth Circuit rejected the prevailing rule that inherent authority sanctions must be based on subjective bad faith of the individual party, rather than premised on the conduct of others." Petition at 17. But the Ninth Circuit did not reject the individualized bad faith requirement. To the contrary, the Ninth Circuit expressly acknowledged that "bad faith [is] an essential requirement for invoking the district court's inherent powers," App. 28a, and that "[b]efore awarding sanctions pursuant to its inherent power, the court must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." App. 21a (internal quotes omitted).

Furthermore, the Ninth Circuit held that "the district court did not abuse its discretion in concluding that Goodyear participated *directly* in the discovery fraud." App. 27a (emphasis added). Indeed, the dissenting member of the panel agreed that "[t]he district court's finding of bad faith authorized it to levy sanctions under its inherent power." App. 43a. Thus, the Ninth Circuit did not reject the bad-faith requirement, and its decision does not conflict with decisions of this Court.

Moreover, Goodyear is also wrong in asserting that the Ninth Circuit's refusal to allow Goodyear to "pass[] the blame on to its attorneys" (App. 26a) conflicts with the Eleventh Circuit's decision in *Byrne v. Nezhat*, 261 F.3d 1075 (11th Cir. 2001). Petition at 20-21. In *Byrne*, the court overturned sanctions imposed on a client because the district court had "impermissibly relied solely on the actions of counsel." 261 F.3d at 1123. That clearly is not what occurred here. To the contrary, the district court specifically found that Goodyear had directly engaged in numerous instances of its own bad faith conduct, including by its in-house counsel and Rule 30(b)(6) witness. Indeed, the district court found that Goodyear "was always the final decision maker regarding discovery responses." App. 85a. And the Ninth Circuit unanimously affirmed those findings. App. 43a ("I agree with the majority that the district court's misconduct findings are supported by the record,"); *see also Chambers*, 501 U.S. at 41 (affirming sanctions against a party holding that his assertion that the district court "failed to conduct any inquiry into whether he was personally responsible for the challenged conduct . . . is flatly contradicted by the District Court's detailed factual findings").[5] Thus, there is no conflict

[5] Goodyear's criticism of a few of the underlying findings of its direct misconduct (Petition at 22-23) must be rejected because Goodyear did not specifically challenge most of these findings as clearly erroneous on appeal, nor is there any basis to overturn the Ninth Circuit's unanimous affirmance of those findings. Additionally, Goodyear's criticism has no merit in any event. For example, with respect to the district court's finding that Goodyear's representatives gave false testimony, Goodyear cites *Byrne* for the

with the Eleventh Circuit, and this Court's review is not warranted.

CONCLUSION

Goodyear has not established any compelling reason for this Court to grant the Petition. Therefore, the Haegers respectfully request that the Petition be denied.

Respectfully submitted,

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proposition that "[s]tanding alone, a false or inconsistent statement in a deposition does not compel the conclusion of bad faith." Petition at 22 (quoting *Byrne*, 261 F.3d at 1125). But the findings of false statements by Ms. Okey and Mr. Olsen do not stand alone; instead, they are among a long list of findings of Goodyear's sanctionable misconduct. Moreover, the district court did not merely find that false statements had been made, but also properly determined that the falsity was deliberate, intentional and part of a calculated plan. *See, e.g.*, App. 135a-136a (finding that Goodyear's 30(b)(6) witness "provided false testimony" and, given the circumstances, "[t]he only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith").