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DEPT OF ENV PROTECTION
WEST PALM BEACH

Janet E. Bowman, Esquire
Office of General Counsel
Florida Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Re: Resolution of issues re Fla. Tire Motion on Injunction
Case No. 93-895CA17 (St. Lucie Co.);


Dear Janet:

Enclosed please find a Motion we have mailed today for filing on behalf of Florida Tire seeking to have the Circuit Court enforce, modify or dissolve the Injunction of January 14, 1994 and to grant Fla. Tire additional relief in the circumstances explained in the Motion.

I believe that Fla. Tire, itself, has also written to advise Mr. Kahn of this filing. I am writing to you to inquire if DEP is interested in a prompt meeting to attempt to amicably resolve the matters raised in Fla. Tire's Motion prior to any request by Fla. Tire to obtain a hearing on the Motion?

Please advise me promptly of DEP's response.

Sincerely,


Donald J. Beuttenmuller, Jr.

cc: Jim Brindell
Skip Robinson

IN THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR ST.
LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Plaintiff,

CASE NO. 93-895 CA-17

vs.

FLORIDA TIRE RECYCLING INC.,

Defendant.

**FLORIDA TIRE RECYCLING, INC.'S MOTION TO
ENFORCE INJUNCTION, FOR SUPPLEMENTAL
RELIEF AND APPOINTMENT OF SPECIAL MASTER**

Florida Tire Recycling, Inc. (hereinafter, "Fla. Tire") makes the following motion for relief pursuant to Rules 1.610(d), 1.490, 1.200(a)(9), and, alternatively, 1.540(b)(5) or (b)(3), Fla.R.Civ.P. and ¶17 of this Court's "Consent Injunction Order" of January 14, 1994 (hereinafter the "Stipulation/Order"). Fla. Tire requests the Court's intervention to enforce, interpret or modify the Stipulation/Order on account of non-compliance, unreasonableness or misconduct on the part of the State of Florida, Department of Environmental Protection (hereinafter, "DEP") and/or changed circumstances. In support thereof, Florida Tire alleges:

1. First, lest the rubrics of this motion convey any impression to the contrary, Fla. Tire assures the Court that it is currently, and intends to continue to be, in substantial compliance with the referenced Stipulation/Order in all material respects.

This compliance has been achieved in spite of Fla. Tire's hereinafter asserted claims and requests relating to DEP. Fla. Tire regrets the requirement that it seek the relief requested herein, because virtually all such matters clearly should and could be amicably resolved between reasonable persons dealing with each other in good faith. The Court will see and Fla. Tire will demonstrate that it has rigorously followed and implemented the Stipulation/Order, investing substantial funds to do so, in utmost good faith. Fla. Tire would, but for DEP'S hereinafter described inconstancy and inflexibility, rising to the level of bad faith, be in absolute and undisputed compliance.

BACKGROUND TO THE STIPULATION/ORDER

DEP'S COMPLAINT AND MOTION FOR TEMPORARY RELIEF:

2. On August 18, 1993 DEP filed herein its Complaint and Motion for Temporary Injunction seeking, in part, to close down Fla. Tire's St. Lucie County operations, seize and expropriate its tire assets, and dispose of them in landfills at the expense of Florida's taxpayers, via DEP'S proposed misuse of a legislatively created Trust Fund intended only for actual emergency situations of imminent hazzard to public health and safety where a facility owner or operator was refusing to take appropriate action itself.

FLA. TIRE COUNTERCLAIMED AND SOUGHT RELIEF FOR ITSELF:

3. Fla. Tire denied the material allegations of DEP'S Complaint, asserted multiple affirmative defenses, made a Counterclaim against DEP on account of its denying Fla. Tire a perfunctory

permit amendment and sought other injunctive and equitable relief which still pends before this Court.

PARTIES RESOLVE DEP'S TEMPORARY INJUNCTION CLAIM:

4. To avoid the litigation costs which would have made ultimate judicial vindication illusory, Fla. Tire, without prejudice to any of its pending claims and defenses herein, entered into the Stipulation/Order, attached hereto as composite Exhibit "A", to resolve DEP'S then pending Motion For Temporary Injunction.

FLA. TIRE SEEKS HEREIN JUDICIAL INTERVENTION AND ENFORCEMENT:

5. This Court has, and the Stipulation/Order specifically reserved, jurisdiction to enforce its terms and this Court has the further power, under Rule 1.610(d), Fla.R.Civ.P., *inter alia*, to amend or modify the Stipulation/Order to the extent that there are changed circumstances or it is no longer equitable due to DEP's misconduct or otherwise.

FLA. TIRE'S GROUNDS FOR JUDICIAL ENFORCEMENT

6. Fla. Tire is in need of enforcement and interpretation of the Stipulation/Order because DEP has been unreasonable and arbitrary in its interpretation of the terms of the Stipulation/Order, harmfully dilatory with respect to its own concomitant duties and obligations thereunder, and DEP further threatens to take future adverse actions against Fla. Tire, based upon DEP'S improper behavior and illegal motives. Specifically, but without limitation, DEP has:

A. failed to use its best efforts to process Fla. Tire's permit applications, when Fla. Tire's performance of its obligations under the Stipulation/Order was dependent in whole or part upon the issuance of such permits, all as required by ¶¶ 10(B) and 10(L) of said Stipulation/Order; and

B. improperly contended that Fla. Tire should perform acts in a time and manner not contemplated by the Stipulation/Order and specifically discussed and negotiated between the parties in agreeing thereto; and

C. failed to give written permission to Fla. Tire to proceed with important portions of work associated with or involving DEP permits and which could, nevertheless, have proceeded prior to issuance of the permits, all in contravention of ¶ 10(L) of the Stipulation/Order; and

D. anticipatorily breached ¶ 15 of the Stipulation/Order by notifying Fla. Tire that it will not consider extensions of the time periods provided for therein in the event of circumstances beyond Fla. Tire's reasonable control and by otherwise acting inequitably and in bad faith with respect to achieving the principal purposes of the Stipulation/Order which were to abate potential fire hazards and cause the reconfiguration of tire materials on the Site in a manner complying with Rules 17-330, 40E-4, 40E-40, and 17-312, Florida Administrative Code (1993); and

E. failed to timely process and resolve any outstanding issues relating to Fla. Tire's related Waste Tire

Processing Permit for a facility in Lakeland, Florida - as DEP promised to do in its negotiations for the Stipulation/Order; and

F. improperly asserted that Fla. Tire's compliance with the Stipulation/Order as to certain material provisions is not sufficient to otherwise entitle it to qualify for continued permitting as a processing facility; and

G. improperly declared that Fla. Tire has not satisfied certain portions of the Stipulation/Order when, in fact, the provisions have been satisfied or cannot reasonably be satisfied at the precise time or in the exact manner originally contemplated; and

H. generally conducted itself in a manner which compels that this Court apply its equitable judicial powers to counterbalance an inherent bias or institutional inability of DEP, as an agency, to act in a non-arbitrary, balanced, and rational manner, taking into account the actual legislative purpose of Florida's Waste Management Act.

ADDITIONAL GROUNDS OF CHANGED CIRCUMSTANCES

7. Fla. Tire is further in need of relief on account of the fact that there are several material circumstances which existed at the time of the Stipulation/Order and the negotiations therefore which have changed and would make enforcement of the Stipulation/Order, as interpreted by DEP, inequitable and wasteful. Though

Fla. Tire contends that the Order itself, in an atmosphere of good faith and with reference to the letter and spirit of the Stipulation/Order, provides the mechanisms for adjusting to such changed circumstances - DEP has clearly not evidenced or acted with such spirit. Therefore, in the alternative, Fla. Tire is requesting that certain provisions of the Stipulation/Order be modified to avoid such inequities or waste or to relieve Fla. Tire of the inequitable burdens imposed by DEP'S failure to comply with the spirit of the Stipulation/Order. Such circumstances include but are not limited to:

A. certain matters encompassed within Paragraph 6 (A) through (H), above; and

B. the now unnecessary requirement for a stabilized 24' road around the entire perimeter of the property, when the purpose of such road was to position fire-fighting equipment adjacent or proximate to locations where tire materials were to be stored. The requirement for the stabilized road around the entire perimeter was barely justifiable, originally. However, due to DEP surface water management requirements causing the previously proposed larger tire storage areas to be limited to a discreet and smaller portion of the property, a perimeter road (for the entire property) no longer serves such a purpose; and

C. the order, sequence and timing within which certain requirements of the Stipulation/Order must be achieved.

SPECIAL MASTER APPOINTMENT REQUESTED

8. In the Court's discretion and if DEP concurs, Fla. Tire requests that the Court appoint a special master to hear testimony and report to the Court concerning certain matters which are material to resolving the issues between the parties raised herein, to include:

A. Whether or not Fla. Tire is at the time of the making of this motion and at the time of the master's report in substantial compliance with the site stabilization provisions of ¶ 10(D) of the Stipulation/Order, but for matters which were affected or delayed by permitting requirements, acts or omissions of DEP, or other matters not reasonably within the control of Fla. Tire.

B. Whether or not Fla. Tire is in substantial compliance with the Financial Responsibility portions of ¶ 10(F) the Stipulation/Order at the time of this motion and the time of the master's report.

C. Whether or not Fla. Tire is in substantial compliance with the fire protection and control measures described in ¶ 10(C) of the Stipulation/Order or, if not, whether such reasons are due to matters beyond Fla. Tire's reasonable control or on account of changed circumstances.

D. Whether or not Fla. Tire is in substantial compliance with the Monitoring provisions of the Stipulation/Order set forth in ¶¶ 10(G) and (H) at the time of this

motion and the time of the master's report.

E. Whether or not Fla. Tire is in substantial compliance with the removal requirements of ¶ 10(E) of the Stipulation Order.

F. Whether or not there are any circumstances which have changed since the drafting of the Stipulation/Order which equity and good faith would require to be changed or modified.

G. Whether or not DEP has used its best efforts to rapidly process the Surface Water Management and Dredge and Fill permit applications of Fla. Tire, upon which aspects Fla. Tire's performance may have depended.

H. Whether or not DEP has made good faith efforts to timely process Fla. Tire's Lakeland Facility permit which was the subject of negotiations between the parties and ¶ 12 of the Stipulation Order; and, if not, the equitable adjustments which should be made on account of any adverse impact caused thereby.

I. The approximate amount of waste tire materials stored on the Fla. Tire Site as at the effective date of Ch. 93-207, Laws of Florida.

J. Whether or not the Financial Responsibility mechanism set forth in the Stipulation/Order is a sufficient and equitable mechanism to provide increasing financial assurance with respect to the ultimate disposition of waste tires currently located at the Fla. Tire Site, in light of all past

circumstances and facts.

K. Whether or not there exist other equitable and legal factors which this Court ought consider in determining the relief sought under this motion and in connection with other issues which remain pending between the parties and before this Court.

PRAYER FOR RELIEF

WHEREFORE, Fla. Tire. requests that this Court grant it the following relief:

A. That a special master be appointed to take evidence and report to the Court upon the matters set forth above and that thereafter the Court hear the parties on any remaining issues of fact and with respect to arguments and the law pertaining to this motion.

B. Alternatively, that the Court adequately notice and hold an evidentiary trial on the issues relating to this motion and that the Court thereafter issue an order for the relief hereinafter requested.

C. That the Court determine that Fla. Tire is at the time of this motion and at the time of its ruling in substantial and full compliance with the Stipulation/Order, but for those matters which were or may have been dependent upon the issuance of permits by DEP or which were otherwise delayed by matters not reasonably within the control of Fla. Tire.

D. That the Court determine new and equitable dates and terms for compliance by Fla. Tire with any provisions of the Stipulation/Order which have been or may be adversely affected by: (i) permitting requirements; or (ii) approvals from regulatory agencies or entities over which Fla. Tire has no reasonable control; or (iii) changed circumstances; or (iv) the impact of DEP's non-cooperation and the consequent necessity for Fla. Tire to incur the expense of seeking judicial relief as that expense may impact upon Fla. Tire's ability to expend funds on remedial or compliance activities; or (v) other factors not reasonably within the control of Fla. Tire.

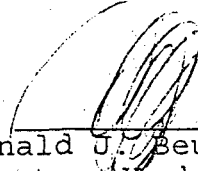
E. That the Court make preliminary determinations on such other issues as are raised in Fla. Tire's Counterclaims herein and as are necessarily related to the relief herein sought;

F. That the Court modify or dissolve the Stipulation/Order to the extent that any changes in circumstances have made the enforcement of provisions contained therein inequitable or unjust.

G. That the Court issue such interim, intermediate or further orders or temporary injunctions as will maintain the status quo between the parties until such time as the Court has had the opportunity to fully consider the issues herein raised.

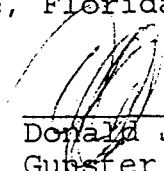
H. That the Court issue such other and further orders and grant Fla. Tire such other relief and adjudications as shall be necessary to provide full and complete relief with respect to the matters herein and by previous pleadings alleged.

Date: July 11, 1994

By 
Donald J. Beuttenmuller
Gunster, Yoakley & Stewart, P.A.
777 South Flagler Drive
Suite 500 East
West Palm Beach, FL 33401
(407) 650-0509
Florida Bar No. 141224

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Janet E. Bowman, Esquire, Office of General Counsel, Florida Department of Environmental Protection, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400 this 11th day of July, 1994.


Donald J. Beuttenmuller
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Composite Exhibit A

IN THE CIRCUIT COURT OF THE
THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR
ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Plaintiff,

CASE NO.: 93-895 CA

v.

FLORIDA TIRE RECYCLING, INC.,

Defendant.

CONSENT INJUNCTION ORDER

THIS CAUSE came before this Court upon the Stipulation executed by the parties in this action entitled "Stipulation and Consent for Injunction" to resolve Plaintiff's "Motion for Temporary Injunction," and the Court having considered the Stipulation, reviewed the file and being otherwise duly informed,

IT IS HEREBY ORDERED AND ADJUDGED that:

The terms and conditions of the "Stipulation and Consent for Injunction" are hereby accepted and ratified by this Court, and this Court retains jurisdiction of this cause to enforce the terms thereof.

DONE AND ORDERED in chambers in Fort Pierce, St. Lucie County, Florida, this 4th day of January, 1994.

/s/ RUPERT JASEN SMITH

HONORABLE RUPERT J. SMITH
CIRCUIT JUDGE

Copies Furnished to:

JAMES BRINDELL, ESQ.
JANET E. BOWMAN, ESQ.