

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

_____)	
WILLIAM W. MCGEE, on behalf of himself)	
and all others similarly situated,)	
)	
Plaintiff,)	
)	Civil Action No. 2:06-6234(GEB)
- v. -)	
)	CLASS ACTION
CONTINENTAL TIRE NORTH AMERICA, INC.,)	
1800 Continental Boulevard)	
Charlotte, NC 28273,)	
)	
Defendant.)	
_____)	

AMENDED CLASS ACTION COMPLAINT

Plaintiff, William McGee, brings this class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, individually and on behalf all others similarly situated, and alleges the following:

INTRODUCTION

1. This class action seeks damages, injunctive and declaratory relief on behalf of a class of all persons who purchased Continental “ContiSeal” tires, during 2004 through the present, either as part of original equipment installed on newly purchased or leased cars or as replacement tires.

2. Through a common and uniform course of conduct, Defendant Continental Tire North America, Inc. (“CTNA” or “Continental”) manufactured, supplied, promoted, and sold ContiSeal tires when it knew or should have known that these tires would incur premature and/or abnormal tread wear.

3. Through a common and uniform course of conduct, Defendant Continental, acting individually and collectively through its agents and dealers, failed to adequately disclose to the

consuming public the fact that its ContiSeal tires would incur premature and/or abnormal tread wear, often requiring replacement within 20,000 miles of first use.

4. Furthermore, through a common and uniform course of conduct, Defendant Continental failed to honor both federally mandated and voluntarily offered warranties that would have required them to repair or correct, at no cost to the consuming public, the nonconforming and/or defective tires.

5. The purpose of this action is to hold accountable, and to obtain maximum legal and equitable relief from, Continental for producing and placing into the stream of commerce ContiSeal tires. These ContiSeal tires do not conform to the durability and longevity of tires reasonably expected by retail consumers or to the statements and affirmations made by Continental in connection with the sale and delivery of the tires to retail consumers.

JURISDICTION

6. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act 28 U.S.C. § 1332(d)(2), as the claims alleged herein are asserted on behalf of a class of all persons in the United States who purchased ContiSeal tires from 2004 to the present. The amount in controversy is satisfied because, according to responses to discovery requests served on defendant, Continental sold over one million ContiSeal tires in the United States during the proposed Class Period and, therefore, damages herein plausibly exceed \$5 million.

7. Venue is proper in this district because Plaintiff resides in this District and the claims arose in this District.

THE PARTIES

8. Plaintiff William McGee is a retail consumer residing at 100 Ocean Avenue, Laurence Harbor, NJ 08879.

9. In December 2004, Plaintiff purchased a new Chrysler 300C equipped with Continental ContiSeal tires.

10. The ContiSeal tires were separately warranted by Continental to be free of defects in materials, workmanship and design. The warranty was in place for 48 months.

11. At all times relevant to this Complaint, Defendant Continental Tire North America, Inc. was a foreign corporation headquartered in Charlotte, NC. Continental Tire North America, Inc. is a wholly owned operating subsidiary of Continental AG, a German corporation having publicly traded securities that are traded on United States securities exchanges pursuant to registered American Depositary Receipts with registered principal executive offices of the depository disclosed as Continental Tire North America, Inc., 1800 Continental Boulevard, Charlotte, NC 28273.

12. At all times relevant herein, Continental, through its parent, agents, distributors, servants and/or employees, engaged in the design, manufacture, marketing, sale and delivery of ContiSeal tires nationally and internationally, or have agreed to be responsible as if they had.

13. Continental conducts business throughout New Jersey and the United States.

CLASS ALLEGATIONS

14. Plaintiff brings this action pursuant to Fed. R. Civ. P. 23 on behalf of himself and all others similarly situated, comprising a class for Counts I-IV consisting of “all persons in the United States who purchased (or received as part of an automobile purchase or lease transaction), during 2004 through the present, Continental ContiSeal tires (the “Class”)”. Plaintiff also seeks certification of a subclass for Count V, asserted under the New Jersey Consumer Fraud Act, of all persons in the State of New Jersey who purchased (or received as part of an automobile

purchase or lease transaction), during 2004 through the present, Continental ContiSeal tires (the "Subclass").

15. Plaintiff is a member of the Class and the Subclass.

16. Excluded from the Class and Subclass are judicial personnel involved in considering the claims herein, all persons and entities with claims for personal injury, the Defendant, any entities in which the Defendant has a controlling interest, and all of its legal representatives, heirs and successors.

17. It is estimated that the Class consists of thousands of persons throughout the continental United States and the Subclass hundreds throughout the State of New Jersey. The members of the Class and the Subclass are so numerous that joinder of all members, whether otherwise required or permitted, is impracticable. The exact number of Class and Subclass members is presently unknown to Plaintiff, but discovery to date has revealed that some one million ContiSeal tires have been sold during the class period.

18. There are numerous questions of law or fact common to the members of the Class and Subclass which predominate over any questions affecting only individual members and which make class certification appropriate in this case, including:

a. whether Defendant, acting individually or collectively with its agents, failed to conduct appropriate, reasonable and adequate testing of the ContiSeal tires to determine the durability and longevity of the tires and their conformity to the reasonable expectations of consumers in the United States and New Jersey;

b. whether Defendant, acting individually or collectively with its agents, failed to warn or otherwise inform Plaintiff and other members of the Class and Subclass

of the premature and abnormal wear caused by degradation of the tread on the ContiSeal tires;

c. whether Defendant omitted to adequately disclose and/or affirmatively concealed, in its affirmations and promotional materials, among other things, the premature and/or abnormal wear associated with the use of ContiSeal tires;

d. whether Defendant violated the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, the Uniform Commercial Code and common law; and

e. whether Defendant engaged in unconscionable commercial practices, including the failure to abide by the terms of a written warranty and/or bait and switch tactics, in connection with warranty assertions, interpretations, claims and denials, in violation of the New Jersey Consumer Fraud Act.

19. The claims asserted by the named Plaintiff are typical of the claims of the members of the Class and the Subclass.

20. This class action satisfies the criteria set forth in Fed. R. Civ. P. 23(a) and 23(b)(3) in that Plaintiff is a member of the Class and Subclass; Plaintiff will fairly and adequately protect the interests of the members of the Class and Subclass; Plaintiff's interests are coincident with and not antagonistic to those of the Class and Subclass; Plaintiff has retained attorneys experienced in class and complex litigation; and Plaintiff has, through his counsel, access to adequate financial resources to assure that the interests of the Class and Subclass are adequately protected.

21. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

a. it is economically impractical for most members of the Class to prosecute separate, individual actions; and

b. after the liability of Defendant has been adjudicated, the individual and aggregate claims of all members of the class can be determined readily by the Court.

22. Litigation of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to the individual Class members which would substantially impair or impede the ability of other Class members to protect their interests.

23. Class certification is also appropriate because Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory and/or injunctive relief with respect to the claims of Plaintiff and the Class members.

FACTUAL BACKGROUND

24. Paragraphs 1 through 23 are incorporated herein by reference as though the same were set forth below at length.

25. Defendant sells Continental tires throughout the United States and the world.

26. Beginning in 2004, Defendant began marketing a self-sealing (“run-flat”) tire referred to as “ContiSeal.” The tires were delivered as part of the original equipment on at least the following new cars: 2005-2006 Chrysler 300C; LX-300; LX-Magnum; and LX-Charger. The tires were offered as part of a “safety package,” and Defendant represented and affirmed them as having the wear characteristics of ordinary touring performance tires with the added self-sealing (“run-flat”) benefits of premium class tires.

27. In December 2004, Plaintiff purchased a new Chrysler 300C equipped with ContiSeal tires as part of the original equipment on the car. Within the first year of ownership and within 14,000 miles on the car, the ContiSeal tires were unserviceable, as the tread had worn

so quickly on the tires that they had become questionable to use any further. At 18,700 miles, Plaintiff was advised that the tires were unserviceable and required replacement.

28. Plaintiff raised the issue of premature tread wear on the tires with the dealer from whom Plaintiff had purchased the new car. The dealer referred Plaintiff to STS Tire and Auto Centers in Hazlet, NJ, which was represented as a registered dealer/agent for Defendant Continental.

29. Upon presenting his claim to the Defendant's agent, Defendant's agent first advised Plaintiff that Defendant would discount a set of identical replacement tires by 33%. Plaintiff protested this proposed adjustment and called Continental directly.

30. During the course of this claims process, Plaintiff obtained from the Chrysler dealer a copy of the attached (Exhibit A) "Solution Number K85299291," indicating a "Modification Date" of "6/9/05" and describing the following "Vehicle Issue" for model year 2005 and 2006 Chrysler 300s, Magnums and Chargers: "Premature or rapid tire wear on the 17 and 18 inch continental tires."

31. Plaintiff stated to the Continental Customer Relations personnel that it appeared from the "Solution" document dated in June 2005 that the premature wear his tires had incurred was a defective condition uniform to all of the ContiSeal tires, and not a condition unique to his vehicle.

32. In response, Continental did not dispute Plaintiff's assessment and instead offered a 50% discount on a full set of replacement ContiSeal tires, with plaintiff paying for all mounting, balancing and related costs. Though not satisfied, Plaintiff accepted the replacement ContiSeal tires, as alternative tires at full cost would have been even more expensive.

Nonetheless, the replacement ContiSeal tires are equally defective and have incurred the same premature and rapid tire wear as was incurred by the original equipment ContiSeal tires.

33. Plaintiff paid to Defendant's agent \$333.21 for a full set of four (4) replacement ContiSeal tires, purportedly representing a discount of 50% on the manufacturer's suggested retail price for the purchase of the ContiSeal tires.

34. In connection with the delivery of the ContiSeal tires with the car Plaintiff purchased in December 2004, Defendant delivered to Plaintiff and the Class a glossy warranty booklet containing affirmations of fact as to the absence of defects in materials and workmanship, including design, and the durability and longevity of the tires. A copy is appended hereto as Exhibit "B". In particular, Defendant's affirmations and warranties stated as follows:

CONTINENTAL TIRE NORTH AMERICA INC. LIMITED WARRANTY
AND ADJUSTMENT POLICY FOR CONTISEAL TIRES

This Limited Warranty ("Limited Warranty") and Adjustment Policy ("Policy") is issued by Continental Tire North America, Inc. ("CTNA"), and is applicable for Continental brand ContiSeal tires and is a promise of replacement under certain specified conditions. This Limited Warranty and Policy applies to tires in normal service displaying adjustable conditions (see Section 4) and does not require the existence of a workmanship-or material-related condition in order to qualify for adjustment. **THIS LIMITED WARRANTY AND POLICY IS NOT A WARRANTY THAT YOUR TIRE WILL NOT FAIL OR BECOME UNSERVICEABLE IF NEGLECTED OR MISTREATED OR THAT A TIRE WITH CONTISEAL CANNOT FAIL FROM AIR LOSS.**

WHAT IS THE ADJUSTMENT POLICY AND HOW LONG IT IS APPLICABLE?

A. BASIC COVERAGE

Eligible tires are covered by this Limited Warranty and Policy for a maximum of 48 months from the date of purchase*. If a ContiSeal Eligible tire becomes unserviceable from a condition other than those listed under Section 4 within 48 months from date of purchase* or before the tire tread wears down to the tread wear indicators (2/32nds of an inch or 1.6 mm of tread remaining), indicating treat is worn out, whichever comes first, the tire will be replaced with a

comparable** new Continental brand tire free of charge, including mounting and balancing. Owner pays all applicable taxes.

At the point the tire tread is worn out, the Basic Coverage portion of this Policy ends, regardless of the time period remaining.

35. Defendant failed to comply with the foregoing warranty with respect to Plaintiff and with respect to Class members. Among other things, Defendant has not provided “free replacement tires” to Class members as required by the terms of the express warranty and instead has instituted selective “adjustments,” requiring Plaintiff and Class members to accept discounts on the purchase of new, but equally defective, tires.

36. Defendant’s unilateral limitation of warranty also has caused a failure of the essential purpose of the warranty, as that term is used in the Uniform Commercial Code, because Defendant has failed to replace the defective tires with non-defective conforming tires and because Defendant has executed the warranty in such a way as to replace the defective tires with other defective tires. In addition, Defendant has construed and executed the warranty so as to require consumers to purchase replacement tires from Defendant, albeit at an allegedly discounted price, even though those replacement tires are also defective and Defendant’s warranty otherwise requires a free replacement of the nonconforming tires with conforming tires.

37. Defendant failed to disclose at the time it marketed, warranted, sold or delivered the ContiSeal tires to consumers that the tires would incur abnormal and premature treadwear, often requiring replacement within the first 20,000 miles of use. Despite having knowledge of this premature wear problem since at least June 2005, Defendant has not recalled the subject tires, has required affected class members to pay at least the pro rata cost of replacement tires, and has continued to market the tires for replacement on cars. (For the 2006 model year,

Chrysler apparently no longer installs the ContiSeal tires as an OEM component on its 300C model vehicle).

38. On information and belief, Defendant has ceased production of the ContiSeal tires in issue, but it has been using the remaining inventory of the defective tires as replacements for the existing defective tires installed on cars before Defendant stopped production of the ContiSeal tires.

39. At all relevant times, Plaintiff and other members of the Class were, and continue to be, misinformed, misled and deceived by Defendant with respect to the safety, durability and longevity of the ContiSeal tires in light of the reasonable expectations for tire wear among the consuming public.

40. At all relevant times, Defendant controlled the design, manufacture, marketing, lease and sale of ContiSeal tires.

41. The Owners Manuals provided to consumers and the interval service policies followed by dealers in effect during the period relevant to this Complaint, were wholly inadequate to alert Plaintiff and the Class to the increased costs, servicing requirements and duration and longevity limitations associated with the use of the ContiSeal tires.

42. Defendant has not adequately informed the Class about the increased costs, servicing requirements and duration and longevity limitations of the ContiSeal tires, including the premature and abnormal wear characteristics of the tire and the virtual certainty that the tires would become unserviceable after less than 20,000 miles of normal use.

43. Defendant knew, or should have known, that the design, materials and workmanship utilized for the ContiSeal tires were insufficient to handle the heat, friction and conditions that characterize every day tire use on roadways in the United States.

44. At all times relevant to the claims herein, Defendant failed to conduct adequate testing and research regarding the ContiSeal tire. Not only did the Defendant fail to engage in adequate pre-market testing, but after introducing the ContiSeal tire in the marketplace, Defendant continued to fail to fulfill its ongoing obligation to fully disclose the results of this testing and research regarding the premature and abnormal wear incurred by the ContiSeal tires.

45. Under the Uniform Commercial Code (“UCC”), “A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance ... the cause of action accrues when the breach is or should have been discovered.” U.C.C § 2-725(b); N.J.Stat.Ann. § 12A:2-725(2). Standard motor vehicle warranties, including tire warranties, explicitly extend to future performance of the goods.

46. The tires purchased and delivered with vehicles leased by the Class were delivered with standard future performance warranties. Here, Class members exercising due diligence were unable to discover the nonconformity of the tires and the injury because Defendant did not disclose the premature and abnormal wear characteristics and injury when the vehicles were delivered or brought in for service.

47. By their affirmations, representations and nondisclosures, Defendant portrayed and warranted the ContiSeal tires as having the wear, durability and longevity of ordinary touring tires with the added benefit of the “run flat” automatic sealing feature. Defendant failed to deliver tires having these characteristics, as the ContiSeal tires lacked the design, materials and workmanship necessary to meet the minimum wear characteristics reasonably expected by ordinary consumers in the United States.

48. Defendant also breached its express and implied warranties, as it did not deliver ContiSeal tires having the characteristics, uses and benefits portrayed by Defendant, and

Defendant has failed to replace the tires in accordance with the express promises of its written warranties.

49. To the extent it is suggested that the written warranty is limited based on wear beyond 2/32nds of an inch within 20,000 miles of use, the warranty as so interpreted is unfair, deceptive and unconscionable, particularly given the premature wear characteristics of the ContiSeal tires and the reasonable expectation of consumers that a tire should not go bald within 20,000 miles of normal driving. Defendant's failure to disclose the subpar wear characteristics of the ContiSeal tires renders the warranty objectively and materially misleading, as the warranty indicates that 48 months of serviceability could reasonably be expected from the tires when, in fact, Defendant knew, or recklessly disregarded the fact, that the ContiSeal tires were incapable of achieving that service level under ordinary driving conditions. Therefore, to the extent the warranty is so limited, Defendant has engaged in an unfair and deceptive warranty practice, including a bait and switch scheme.

50. Similarly, Defendant has perpetuated this abuse by refusing to replace the defective ContiSeal tires with more durable touring tires. Instead, on information and belief, Defendant is attempting to exhaust the remaining inventory of the defective and otherwise unmarketable ContiSeal tires by using them as replacements for the defective ContiSeal tires originally delivered with newly purchased or leased automobiles.

COUNT I
Violation of Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1)

51. Paragraphs 1 through 50 are incorporated herein by reference as though the same were set forth below at length.

52. Congress enacted the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* (the "Act") in 1975 in response to widespread complaints from consumers that many warranties

were misleading and deceptive, and were not being honored. To remedy this problem of deception and failure to honor warranties, the Act imposes civil liability on any “warrantor” for, *inter alia*, failing to comply with any obligation under a written warranty and/or implied warranty. *See* 15 U.S.C. § 2310(d)(1). The Act authorizes a “suit for damages and other legal and equitable relief.” *Id.* The Act authorizes the award of attorneys’ fees *Id.*, and expressly authorizes class actions. 15 U.S.C. § 2310(e).

53. Defendant is a “warrantor” within the meaning of § 2301(5) of the Act. Plaintiff and other members of the Class are “consumers” within the meaning of § 2301(3) of the Act.

54. As set forth in Count II below, the allegations of which are incorporated herein by reference, Defendant expressly warranted the ContiSeal tires, which warranties are “written warranties” within the meaning of § 2301(6) of the Act and the Uniform Commercial Code. Defendant breached its express warranties in the manner described above and below.

55. As set forth in Count III below, the allegations of which are incorporated herein by reference, Defendant impliedly warranted the ContiSeal tires as being merchantable and fit for a particular purpose, which warranties are implied warranties within the meaning of § 2301(7) of the Act, and §§ 2-314 and 2-315 of the Uniform Commercial Code, and §§ 12A: 2-314, 315 of the New Jersey Statute. Defendant breached these implied warranties in the manner described above and below. Any limitation period, limitation on recovery or exclusion of implied warranties is unconscionable within the meaning of § 2-302 of the Uniform Commercial Code and § 12A: 2-302 of the N.J.Stat. Ann. and, therefore, is unenforceable, in that, among other things, Plaintiff and members of the Class lacked a meaningful choice with respect to the terms of the written warranties due to unequal bargaining power and a lack of warranty competition.

56. Defendant's knowledge of the fact that its ContiSeal tires would incur premature and/or abnormal wear and tear has given Defendant more than adequate opportunity to cure the problem, which opportunity it has not taken to date.

57. Plaintiff and other members of the Class were damaged by Defendant's failure to comply with its obligations under the applicable express and implied warranties. As a direct and proximate cause of Continental's breaches of express and implied warranties, Plaintiff and other Class members have suffered actual economic damages and are threatened with irreparable harm.

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 23 of the Federal Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing Plaintiff as the representative of the Class, and Plaintiff's counsel as counsel for the Class;

b. enter judgment in favor of Plaintiff and the Class against Defendant Continental, as may be apportioned by the Court or finder of fact, for damages consisting of, among other things, compensation for excess tire wear and/or depreciation in tire value (including reimbursing Class members who already have incurred repair and/or maintenance costs), and the remediation costs of replacement tires other than the ContiSeal tires as well as interest, attorneys' fees, expert fees and costs of suit;

c. enter declaratory and injunctive relief against Defendant Continental, requiring written Notice to all owners of vehicles upon which the ContiSeal tires were

originally installed who may have incurred costs of repairs as to their right to recoup those monies; and

d. award such further relief as the Court deems just and proper.

COUNT II
BREACH OF EXPRESS WARRANTY

58. Paragraphs 1 through 57 are incorporated herein by reference as though the same were fully set forth at length.

59. Continental ContiSeal tires were subject to express warranties as described herein, including affirmations, nondisclosures and related representations as to the ordinary wear characteristics that may be reasonably expected from the ContiSeal tires.

60. Defendant Continental breached the express warranties in the manner described above.

61. The express warranties were part of the “basis of the bargain” as that term is used in the Uniform Commercial Code and are presumed to be a part of the contract among each of the Class members and the warrantor, Continental. Plaintiff and the Class have been damaged by Defendant Continental’s breaches of the express warranties in the manner described above.

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 23 of the Federal Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing Plaintiff as the representative of the Class, and Plaintiff’s counsel as counsel for the Class;

b. enter judgment in favor of Plaintiff and the Class against Defendant Continental, as may be apportioned by the Court or finder of fact, for damages consisting

of, among other things, compensation for excess tire wear and/or the difference in tire value between the defective tire delivered and the non-defective tire promised (including reimbursing Class members who already have incurred repair and/or maintenance costs), and the remediation costs of for the replacement of all ContiSeal tires with replacement tires having ordinary wear, durability and longevity characteristics as well as interest, attorneys' fees, expert fees and costs of suit;

c. enter declaratory and injunctive relief against Defendant Continental, requiring written notice to all owners of Vehicles upon which ContiSeal tires were originally installed who may have incurred costs of repairs as to their right to recoup those monies; and

d. award such further relief as the Court deems just and proper.

COUNT III
BREACH OF IMPLIED WARRANTY

62. Paragraphs 1 through 61 are incorporated herein by reference as though the same were fully set forth below at length.

63. Under common and statutory law, a warranty of merchantability and a warranty of fitness for particular purpose are implied in all sales transactions where the seller has reason to know the particular purpose for which the product is to be used and that the consuming public is relying on the skill or judgment of the seller to furnish a suitable product. A warranty of merchantability is a warranty implied by law that a product is fit for the ordinary purposes for which it is used, is properly labeled and conforms to the representations made about it. See U.C.C. § 2-314; N.J.Stat.Ann. § 12A: 2-314. A warranty of fitness for a particular purpose is a warranty implied by law that a product is fit for its intended use. See U.C.C. § 2-315; N.J.Stat.Ann. § 12A: 2-315.

64. Continental ContiSeal tires were subject to both an implied warranty of merchantability and an implied warranty of fitness for a particular purpose.

65. Defendant Continental breached these warranties in the manner described above. In particular, the ContiSeal tires would not have been merchantable or fit for their particular purpose at the premium prices charged by Continental had Continental disclosed the premature and abnormally rapid wear characteristics, design, materials and construction of the tires.

66. Plaintiff and other Class members have been damaged by Defendant's breaches of warranties in the manner described above.

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 23 of the Federal Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing Plaintiff as the representative of the Class, and Plaintiff's counsel as counsel for the Class;

b. enter judgment in favor of Plaintiff and the Class against Defendant as may be apportioned by the Court or finder of fact, for damages consisting of, among other things, compensation for excess tire wear and/or the difference in value between the defective tire delivered and the non-defective tire promised (including reimbursing Class members who already have incurred repair and/or maintenance costs), and the remediation costs for the replacement of all ContiSeal tires with tires having ordinary wear characteristics as well as interest, attorneys' fees, expert fees and costs of suit;

c. enter declaratory and injunctive relief against Continental requiring written Notice to all owners of Vehicles upon which ContiSeal tires were originally

installed who may have incurred costs of repair and advising as to their right to recoup those monies; and

d. award such further relief as the Court deems just and proper.

COUNT IV
DECLARATORY RELIEF

67. Paragraphs 1 through 66 are incorporated herein by reference as though the same were fully set forth below at length.

68. This claim is asserted on behalf of Plaintiff and other Class members in accordance with the Declaratory Judgments Act.

69. Plaintiff and other Class members are entitled to declaration that Defendant Continental's conduct described herein constitutes violations of applicable Statutory and common law. The declaratory relief requested includes an order declaring Defendant Continental's conduct, as alleged herein, to be unlawful, and requiring Defendant Continental to compensate Plaintiff and other Class members in the manner described herein and to supply Class members with replacement tires having ordinary wear characteristics.

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

a. enter an order pursuant to Rule 23 of the Federal Rules of Civil Procedure permitting this Count to be maintained as a class action on behalf of the Class as specified herein, appointing Plaintiff as the representative of the Class, and Plaintiff's counsel as counsel for the Class;

b. enter an order declaring Defendant Continental's conduct, as alleged herein, to be unlawful, compensating Plaintiff and other Class member in the manner

described herein and requiring Defendant to furnish Plaintiff and other Class members with notice of their right to a free set of replacement tires for the ContiSeal tires;

- c. award Plaintiff and the Class attorneys' fees, litigation expenses and costs;
- and
- d. award such other and further relief as the Court deems just and proper.

COUNT V
NEW JERSEY CONSUMER FRAUD ACT
(On Behalf of Subclass)

70. Plaintiff hereby incorporates all facts and allegations set forth above by reference as if fully set forth at length herein.

71. Plaintiff and all members of the Subclass are each a "person" as defined by N.J.Stat.Ann. § 56:8-1(d).

72. Defendant is a "person" as defined by N.J.Stan.Ann. § 56:8-1(d).

73. Plaintiff and the members of the Subclass each purchased ContiSeal tires for personal, family or household purposes and have suffered ascertainable losses as a result of Defendant's breach of express warranty and other unlawful conduct as detailed herein.

74. The conduct of the Defendant, as set forth above, is violative of the Consumer Fraud Act ("CFA") and Defendant's actions surrounding the affirmations, warranty representations and claims processes of the subject tires were unconscionable. Defendant's agents acted with a reckless and callous disregard regarding Plaintiff's and the Subclass's warranty claims involving the tire defects, after Defendant represented or affirmed that the ContiSeal tires had characteristics or benefits, including reasonably expected durability, longevity and warranty benefits, that they do not have. Defendant has otherwise acted in an unconscionable way by using bait and switch, deception, fraud, false pretense, false promise

and/or material omission involving tire warranty coverage and claims involving the defect. Defendant and its agents acted affirmatively in such a manner in violation of the CFA.

75. Defendant knowingly concealed, suppressed, or omitted facts; was aware of the defect(s)/condition(s); would not replace and repair the tires as warranted with conforming tires; refused to verify the tire defects; and/or refused to execute its warranty responsibility as promised in writing. Plaintiff and the Subclass aver that such acts constitute a refusal to perform the repairs and replacements in accordance with the warranty, in violation of the CFA, N.J. Stat. Ann. § 56: 8-2.

76. As a result of Defendant's conduct, Plaintiff and the Subclass have suffered ascertainable losses and are entitled to the remedies prayed for above and recapitulated in the prayer for relief below.

WHEREFORE, Plaintiff and the Subclass respectfully pray for the following relief:

- (a) An Order certifying the Class as defined above and appointing the undersigned as counsel for the Plaintiff and the Class, pursuant to Rule 23;
- (b) Judgment in favor of Plaintiff and the Class and against Defendant, awarding actual damages in the form of (i) the variance in value between Defendant's tires as warranted and Defendant's tires containing the premature and rapid wear defect; (ii) those funds necessary to repair and replace each affected tire using proper touring tires and adequately trained labor; and (iii) compensation for out-of-pocket monies spent on repair and replacement attempts and loss of use of the vehicle;
- (c) An Order requiring Defendant to provide notice to the Class under Rule 23;

- (d) An Order declaring Defendant's conduct as set forth herein to be a violation of the the CFA, a breach of the implied warranty of merchantability, a breach of express warranty, and a violation of the MMWA;
- (e) An Order affording the Class final injunctive relief compelling Defendant to notify members of the Class of the defect complained of herein and providing them a right of free repair and replacement;
- (f) An Order awarding Plaintiff and the Subclass treble damages on applicable Counts;
- (g) An Order awarding Plaintiff and the Class the costs and expenses associated with the prosecution of this action, including reasonable attorney's fees; and
- (h) Such other and further legal or equitable relief as to the Court shall seem just, proper and fair.

JURY DEMAND

Plaintiff hereby demands trial by jury of all issues properly triable thereby.

Respectfully submitted,

/s/ Cary L. Flitter
Cary L. Flitter CF0273

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DATED: August 31, 2007

Attorneys for Plaintiff, the Class and Subclass