IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IVON TOE, Individually and as Next Friend of RICHMOND WRIGHT and PAULEEN TOE, minors; ACHOL DENG MAWIEN; SEKOU JAI; JAILAH NAYOU; JOSEPHINE COLE; and THE ESTATE OF ASSATA KARLAR, By its Administrator GAYE KARLAR, GAYE KARLAR, Individually, and as father and Next Friend of TARLEY Karlar, ESTER KARLAR, NIONBIAO KARLAR, KULEY KARLAR and LOVETTA KARLAR, Plaintiffs, vs. COOPER TIRE & RUBBER CO.; DAIMLER CHRYSLER CORP.; STEW HANSEN DODGE CITY; and ALFRED LANG, Defendants.	Law No. CL 106914 **THE CENTER FOR AUTO SAFETY'S OPPOSITION TO COOPER TIRE & RUBBER COMPANY'S MOTION TO SEAL TRIAL RECORDS** ORAL ARGUMENT REQUESTED

COMES NOW the Center for Auto Safety, proposed intervenor, by and through its attorneys Riccolo & Semelroth, P.C. and Public Justice, P.C. (*pro hac admission pending*), and states the following in support of its Opposition to Cooper Tire & Rubber Company's Motion to Seal Trial Records:

TABLE OF CONTENTS

SUMMARY OF ARGUMENT

This case pits the private interests of Cooper—the company that was found by a Polk County jury to have exhibited "willful and wanton disregard for the rights or safety of another"—against the public's right of access to court records that contain critical safety information. In defending its motion to seal the records of the trial, Cooper emphasized that "no 'member of the public' has intervened in this case to seek public disclosure of Cooper's documents used in the litigation." Cooper's Reply in Supp. of Mot. to Maintain Protective Order ("Cooper's Reply") at 6. The Center for Auto Safety has since moved to intervene in order to advocate for the public's strong interest in ensuring that the records of this trial are not sealed.

The tragic facts that gave rise to this case are well known to the Court. In September 2007, a Plymouth Grand Voyager carrying six passengers spun out of control and rolled over after its left rear Cooper tire suffered catastrophic tread separation. The crash killed one passenger, left another a quadriplegic, and severely injured the others. Plaintiffs sued Cooper, alleging that the tire had design defects that caused it to fail catastrophically under normal, foreseeable driving conditions.

During discovery, Plaintiffs obtained key documents that reportedly prove not only that the Cooper tire in question was defective, but also that Cooper knew about dangerous defects in several of its tire lines and decided not to fix them because the costs would reduce the company's profits.[1] The parties stipulated to a protective order. When the case went to trial, Cooper sought to have the courtroom sealed—and even went so far as to request that the Court order that any member of the public wanting to enter the courtroom must agree to the protective order. The Court emphatically rejected that proposal, emphasizing that "this courtroom is open to the public." *See* Pls.' Resp. to Mot. to Maintain Protective Order ("Pls.' Resp.") at 8–9. At the trial—which was observed by members of the press, high school students, and attorneys with other cases involving Cooper—many of the documents obtained in discovery were used as

[1] Because the documents and testimony themselves are currently still sealed, this Brief's factual assertions are based on the portions of the record that are not confidential.

exhibits, displayed on large screens in open court in full view of the gallery, and discussed in testimony. On March 20, 2010, the jury found 7-1 for Plaintiffs and returned a special verdict form confirming that Cooper Tire's fault was a proximate cause of the crash and that the tire did not comply with state of the art when it was designed and manufactured.

Cooper is now asking this Court to seal the courtroom after the fact. Emboldened by the still-secret status of the evidence that influenced this Court and the jury, Cooper has publicly denied the jury's findings, claiming that "the tire was not defective" and that the "plaintiffs did not prove that any tire defect caused this accident."[2] But as the U.S. Court of Appeals for the Eleventh Circuit explained, "[o]nce a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the *public*'s case." *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) (emphasis added).

The public has a presumptive and well-recognized right of access to court records under both the First Amendment and common law. That interest is even stronger where, as here, the documents contain information critical to public safety. According to Cooper's affidavits, the company is the ninth largest tire manufacturer in the world and has manufactured over 600 million tires since 1992. Supplemental Brinkman Affidavit at 3. This is by no means the first time tread separation on a Cooper tire caused a fatal accident. And as this Court observed, the evidence in this case shows that "Cooper knew as early as 1996 that they had a problem with their skim stock [that] could cause separation between the tires, which would cause the wires to come out and cause the tire to totally fail," and that this was a "dangerous situation." Partial Tr. of Trial Proceedings at 23–24 (Mar. 5, 2010). But Cooper "put off" fixing the problem "because of the costs." *Id.* Keeping this evidence in the public record where it belongs is not only required by law; it may literally save lives.[3]

---

[2] Andrew Harris & Deb Wiley, *Cooper Tire Is Liable for Fatal Minivan Rollover, Jury Finds*, Bloomberg News, Mar. 20, 2010, *at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aMqqH8qA8F2Y.

[3] Johnny Bradley told a congressional subcommittee that he believes his wife would still be alive today if courts had not allowed Cooper to hide the evidence of the tire defect from the public. In

The presumption of public access to judicial records—stronger here because of the safety interest—can be overcome only by a "compelling reason" for secrecy that is strong enough to outweigh the public's interest in accessing the court documents and testimony. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). "[A]bsent a showing of extraordinary circumstances . . ., the court file must remain accessible to the public." *Advantage Engineering*, 960 F.2d at 1016.

There is no extraordinary circumstance here—only a company eager to prevent the public from knowing the truth. Cooper offers two theories: that it has already demonstrated "good cause" for confidentiality, and that the documents and testimony contain "trade secrets." Neither rationale is sufficiently compelling to justify the radical measure of sealing the trial records.

First, because judicial records are presumptively public, the standard for sealing them is markedly higher than the "good cause" standard for issuing a protective order during discovery. Unlike discovery, where only the litigants' private interests are at stake, with judicial records there is a strong presumption of public access because the public's interest in a transparent judicial system is implicated. Second, even assuming this Court finds that specific documents or testimony (or portions thereof) contain trade secrets as Cooper suggests, that is not enough to outweigh the strong public interest in accessing the judicial records in this case. The Court must still balance Cooper's desire to hide the truth against the presumptive public right of access *and* the public's heightened interest in safety information. Only if the Court finds that Cooper's

---

2004, Bradley and his wife embarked on a cross-country drive from California to Mississippi to visit relatives on the way to new Navy recruiter assignments in Florida. Before the trip, Bradley decided to equip his Ford Explorer with new tires. Having heard recent publicity about the dangers of Firestone tires, he chose Cooper tires. On a New Mexico highway, the tread on one of the rear tires separated, rolling the Explorer four times, putting Bradley into a coma for two weeks, and killing his wife instantly. *The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety?: Hearing on S. 2449 Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (Dec. 11, 2007), written testimony of Johnny Bradley, *at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3053&wit_id=6819.

interests outweigh the public's interests can it lawfully seal the trial records—and then only to the narrowest extent necessary.

Lastly, in evaluating the strength of Cooper's interests and the veracity of its "trade secret" claims, the Court should be cognizant of the many other cases in which courts found that Cooper overreached in its zeal for confidentiality. The company has a checkered history of destroying discoverable evidence, refusing to disclose relevant documents, and sealing documents with secret settlements. This case presents a rare and important opportunity. The victims in this case prevailed in a public trial. Cooper has no right to now re-bury the evidence and silence the testimony that the jury found so persuasive. This is the public's case.

ARGUMENT

I. THE PUBLIC HAS A PRESUMPTIVE RIGHT OF ACCESS TO TRIAL RECORDS AND HAS A PARTICULARLY STRONG INTEREST IN ACCESS TO RECORDS CONCERNING PUBLIC SAFETY.

The right to access court proceedings and documents in civil cases is firmly protected by the First Amendment and common law. *See Nixon v. Warner Commc'ns*, 435 U.S. 1306, 1312 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents."); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659–60 (3d Cir. 1991). The presumption of public access is even stronger where, as here, the documents and testimony were relied on at trial. *Cf.*, *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252–53 (4th Cir. 1988) (because "summary judgment adjudicates substantive rights and serves as a substitute for a trial," documents submitted in support of a summary judgment motion are subject to public right of access).

A. The Public Has a First Amendment Right of Access to Court Records.

Under the First Amendment, there is a presumption of public access to court records, because court proceedings have "historically been open to the press and general public." *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986). The First Amendment right of access "fosters an appearance of fairness," ensures "public respect for the judicial process," and "permits the

public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066, 1070–71 (3d Cir. 1984).

Iowa has consistently recognized the presumption of public access to courts and court records under the First Amendment. For example, in *Des Moines Register & Tribune Co. v. Iowa Dist. Ct.*, 426 N.W. 2d 142, 143 (Iowa 1988), a defendant charged with arson and murder requested that his preliminary hearing be closed to the public and press. He argued that his "right to a fair trial would be jeopardized if the preliminary hearing was open to the public and press because pretrial publicity of prejudicial evidence would harm the ability to find a fair jury." *Id.* The trial judge granted the defendant's request. *Id.* On appeal, the Iowa Supreme Court held that the trial court had erred in closing the preliminary hearing to the public and press. *Id.* at 148. The court reasoned that, because there is a First Amendment right of public access to preliminary hearings, the hearing could not be closed unless "specific findings are made on the record demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 147–48 (internal quotation marks and citations omitted). The trial court failed to articulate any such specific findings, and the "record reflect[ed] that there was no specific evidence submitted concerning prejudicial effects or alternatives to closure." *Id.* at 148. Further, the court emphasized the "positive impact that public access has on public confidence in the criminal justice system" because "[p]ublic access to the preliminary hearing will tend to operate as a curb on prosecutorial and judicial misconduct and will further the public's interest in understanding the criminal justice system." *Id.* at 147.

Similarly, in *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W. 2d 493 (Iowa 1976), the Supreme Court concluded that a trial court erred when it restrained disclosure of jurors' identities in a murder trial. The court held, *inter alia*, that the jury list was a public record and that any prior restraint on its dissemination was a violation of the First Amendment because "[i]nformation which is revealed in public documents is in the public domain." *Id.* at 503.

The strong presumption of public access applies equally in civil cases. In *Des Moines Register & Tribune Co. v. Hildreth*, 181 N.W. 2d 216, 220 (Iowa 1970), a newspaper publisher requested permission from the Polk County sheriff to examine records revealing the names of persons whom had been issued concealed weapon permits. *Id.* at 217. After the sheriff refused, the publisher sued to compel defendant to disclose the records. *Id.* Pursuant to sheriff's request, the lower court ordered a closed hearing and sealed the record. *Id.* at 218. The Iowa Supreme Court reversed, holding that the lower court was without authority to order a closed hearing and seal the record. *Id.* at 220. The court concluded that the rationale for the right to public access in criminal cases equally applies to civil cases. *Id.* at 220.

"The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position." *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). This presumption of public access can only be overcome by an "overriding interest based on findings that [secrecy] is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co.*, 464 U.S. at 510. Since the presumption of public access to court records under the First Amendment right is firmly established under Iowa law, this Court cannot seal the records of the trial unless it finds that there is an overriding interest based on findings that closure is essential to preserve higher values. The court must "weigh and balance" the First Amendment presumptive right of public access to court records against the proposed overriding interest. *Virginia Dept. of State Police*, 386 F.3d at 579.

As this Court noted when it denied Cooper's request to seal the courtroom, "this courtroom is open to the public." Pls.' Resp. at 8–9. The First Amendment requires that the Court likewise deny Cooper's request to seal the documents and testimony that were used in open court and relied on by the jury.

B. The Public Has a Common-Law Right of Access to Court Records.

In addition to the First Amendment right of access to court records, the public's common-law right demands that the records of this trial not be sealed. This common-law right to access court records "is beyond dispute." *Publicker Indus.*, 733 F.2d at 1066, 1071; *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010); *Rushford*, 846 F.2d at 253.[4] "Access means more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (citation omitted).

The common law right to access court documents "helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies." *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (internal quotation marks and citations omitted). Based on the common law right to access court records, a court's analysis of a motion to seal court records begins with the "strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135 (citations omitted). A party attempting to seal a court record "bears the burden of overcoming this strong presumption." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). "A failure to meet that burden means that the default posture of public access prevails." *Id.* at 1182.

In order to overcome this strong presumption, the moving party must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure[.]" *Id.* at 1178–79 (internal quotation marks and citations omitted).[5] A "court must conscientiously balance the competing interests of the

---

[4] *See also Press-Enterprise Co.*, 478 U.S. at 27-28; *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005); *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096 (9th Cir. 1999).

[5] *See also In re Gitto*, 422 F. 3d at 6 ("only the most compelling reasons can justify the non-disclosure of judicial records"); *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) ("[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification"); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 11 (1st Cir. 2002) (compelling reason standard).

public and the party who seeks to keep certain judicial records secret." *Id.* at 1179 (internal quotation marks, brackets and citation omitted). If a court grants a motion to seal, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citation omitted).

For example, in *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004), parties in underlying litigation entered into a confidential settlement agreement and filed a stipulation of dismissal with the lower court. Subsequently, the lower court issued an order unsealing summary judgment documents that were previously filed under seal. *Id.* at 141. With respect to these court records, the Second Circuit agreed with the lower court that they should remain unsealed. *Id.* at 142. The court stated that the documents "related to the court's ruling on a motion for summary judgment," and therefore they were subject to the common law presumption of public access. *Id.* Since the proponent of secrecy had not demonstrated that there was a "compelling reason" to keep the documents under seal, the Second Circuit concluded that the lower court was correct to unseal the court records. *Id.*

Here, likewise, the public has an indisputable and historic common-law right to view the documents and testimony used in open court at trial. Cooper has not and cannot provide a sufficiently compelling reason to justify this Court's sealing of the courtroom after the fact.

C. The Public Interest in Court Records is Heightened When the Documents and Testimony at Issue Concern Matters of Safety.

The public's interest in the records of this trial is especially strong because the documents and testimony at issue concern public safety. In particular, the Center for Auto Safety and its constituents have an interest in seeing the evidence that led the jury and this Court to conclude that Cooper knew of safety problems with specific tire lines and decided not to make the changes necessary to make its tires less dangerous. As this Court noted when it denied Cooper's motion to dismiss the plaintiffs' punitive damages claim, there was evidence not only that Cooper had safety problems with its tires, but also that the company was aware of those problems. *See*

Partial Tr. of Trial Proceedings at 23–24 (Mar. 5, 2010) ("We're talking about a problem that would cause separation of the internal parts of the tire and cause it to immediately fail. They knew that. They knew or should have known that was a dangerous situation. . . . They had a solution to the problem and they put it off because of the costs.").

Courts have uniformly held that the public's interest in access to court records is strongest when those records concern public safety. Thus, in *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), the trial court had sealed judicial records relating to the content of tar and nicotine in various brands of cigarettes. The Sixth Circuit vacated the lower court's orders, emphasizing that the public had a particularly strong interest in the documents because they involved public health and safety:

> The public has a strong interest in obtaining the information contained in the court record. The subject of this litigation potentially involves the health of citizens who have an interest in knowing the accurate "tar" and nicotine content of the various brands of cigarettes on the market. The public has an interest in knowing how the government agency has responded to allegations of error in the testing program. The public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions.

Id. at 1180–81.

In *United States v. General Motors*, 99 F.R.D. 610 (D.D.C. 1983), likewise, the court weighed the public's interest in disclosure of documents regarding auto safety against an auto manufacturer's interest in avoiding adverse publicity. In this case, the National Highway Traffic Safety Administration (NHTSA) conducted an administrative investigation of General Motors. During the investigation, GM submitted information to the NHTSA under seal. *Id.* Subsequently, the U.S. brought an action alleging that GM had failed "to reveal or to remedy a safety-related defect in the braking mechanism" of over a million of its vehicles. *Id.* at 612. The U.S. filed a motion to unseal the records that GM had previously submitted to the NHTSA. GM argued that the records should remain sealed because releasing them would "generate adverse publicity and do harm to its reputation." *Id.*

The court held that, in order to justify sealing the records from public scrutiny, the court would have to find that unsealing would cause GM "substantial and serious harm;" that any sealing order would need to be "narrowly drawn and precise;" and there must be "no alternative means of protecting GM's interest . . . which intrudes less directly on the constitutionally protected interests served by conducting judicial proceedings in public." *Id.* The court found that GM's embarrassment from unsealing the record was *not* a substantial and serious harm that "justif[ied] concealing what would otherwise be in the public domain altogether." *Id.* In granting the motion to unseal, the court emphasized that the "greater the public's interest in the case the less acceptable are restraints on the public's access to the proceedings." *Id.* (citation omitted).

In *In re Air Crash at Lexington, Ky., August 27, 2006*, No. 5:06-CV-316-KSF, 2009 WL 1683629, at *1 (E.D. Ky. June 16, 2009) (attached), the court again noted the strong public interest in accessing documents involving public safety. The plaintiffs alleged that the airline's pilots were negligent and that their negligence had caused a fatal accident. *Id.* The airline filed a motion for a protective order making all depositions confidential. In denying the motion, the court emphasized that the "public has an interest in ascertaining what evidence and records the ... Court [has] relied upon in reaching [its] decisions," and that "the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety." *Id.* at 8 (citation omitted).

In this case, the public has an overwhelmingly strong interest in knowing why, in a 7-to-1 verdict, the jury found that Cooper's mass-produced product was responsible for Plaintiffs' fatal and catastrophic car accident, and what evidence led the Court to conclude that Cooper's tires had safety problems that would cause tires to "immediately fail;" that Cooper knew about the problems; and that Cooper chose to put off fixing them in order to save money. *See* Partial Tr. of Trial Proceedings at 23–24 (Mar. 5, 2010).

II. COOPER HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT A COMPELLING REASON OUTWEIGHS THE PUBLIC'S INTEREST.

To overcome the strong presumption of public access to the trial records—and the heightened public interest due to the safety information they contain—the burden is on Cooper, the proponent of secrecy, to come forth with a compelling reason that outweighs the public's interest. *Kamakana*, 447 F.3d at 1178. Cooper argues that it has already shown "good cause" for confidentiality and that the court records contain trade secrets. Neither argument is sufficiently compelling to overcome the public's right of access.

A. A Showing of "Good Cause" for A Discovery Protective Order Is Not a Sufficient Legal Basis for Sealing the Trial Records.

In its motion to seal, Cooper argues that it has shown "good cause" for the stipulated protective order entered during discovery, and that the Court can now simply "maintain" that protective order in order to seal the court records in this case. Mot. to Maintain Protective Order at 5. That argument fails on every level.

First, this Court never determined that "good cause" under Rule 1.504 existed for the original protective order. Under Iowa law, as in other jurisdictions, courts can issue protective orders to protect the secrecy of documents produced during discovery for "good cause shown." *See* Iowa R. Civ. P. 1.504 (court may enter a protective order [u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown"); *Mediacom Iowa, L.L.C. v. Inc. City of Spencer*, 682 N.W. 2d 62, 67–68 (Iowa 2004); *Farnum v. G.D. Searle & Co.*, 339 N.W. 2d 384, 389 (Iowa 1983). However, as Cooper concedes, the parties here agreed to a stipulated protective order without the Court ever making such a ruling. *See* Mot. to Maintain Protective Order at 5.

As the Iowa Supreme Court has explained, a stipulation by the parties does not discharge a court's duty to determine whether good cause indeed exists for making specific documents confidential. *See Comes v. Microsoft Corp.*, 775 N.W.2d 302, 306 (Iowa 2009); *see also Mediacom*, 682 N.W. 2d at 68 (district court abused its discretion when it failed to apply the

required three-part test); *see also San Jose Mercury News*, 187 F.3d at 1103 (noting that a "blanket stipulated protective order" is "inherently subject to challenge . . . as the party resisting disclosure generally has not made a particularized showing of good cause"). Rather, courts must "insist on particular and specific demonstration of fact" in order to balance "the policy favoring discovery and free expression on one side and a party's interest in avoiding commercial damage . . . on the other." *Comes*, 775 N.W.2d at 305–06 (internal citations omitted). No such balancing was undertaken in this case.

Furthermore, even if the Court were to now find that Cooper has demonstrated "good cause" for making specific documents and testimony confidential under Rule 1.504, a "good cause" showing alone does not meet the more demanding "compelling reasons" standard required in order to seal court records. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532–33 (1st Cir. 1993). Once a document or testimony is used in open court or relied on by a jury or judge, that document is part of the public record and the strong presumption of public access is implicated.

In *Poliquin*, a man was injured while using a shredder manufactured by the defendant. *Id.* at 529. He and his wife brought suit, alleging the injury was due to the defective design of the shredder. *Id.* Prior to trial, the lower court entered a protective order limiting disclosure of the defendant's materials produced during discovery. *Id.* A trial commenced, but the parties eventually agreed to settle the case. *Id.* at 530. After the settlement, the plaintiff requested that the lower court release evidence admitted during trial. *Id.* The lower court denied the request, however, finding that the requested materials were subject to the protective order.

With respect to sealing the evidentiary materials, the First Circuit applied the compelling reason standard, recognizing the much higher burden for sealing court records than discovery materials. The court stated: "the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial." *Id.* at 533 (emphasis in original). This is because "[o]pen trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by

its courts in all matters, civil as well as criminal." *Id.* (citation omitted). The court emphasized that there is "an abiding presumption of access to trial records and ample reason to distinguish materials submitted into evidence from the raw fruits of discovery." *Id.* Because the defendant did not meet the more difficult compelling reason standard, the court held the evidentiary materials must remain accessible to the public. *Id.* at 533–34.

Likewise, in *Kamakana*, the Ninth Circuit recognized that a "good cause showing will not, without more, satisfy a compelling reasons test." 447 F.3d at 1180 (internal quotation marks and citations omitted). In this case, a police officer filed suit against the City and County of Honolulu (the "City"), claiming retaliation for his whistleblower activities. *Id.* at 1175. During the litigation, volumes of materials were filed with the lower court under seal in accordance with a stipulated protective order. *Id.* The case ultimately settled, but a motion to intervene was filed by a local newspaper, requesting the release of the sealed court records. *Id.* Pursuant to the request, the magistrate judge "unsealed virtually all of the pleadings and documents" related to the lawsuit. *Id.*

In affirming the magistrate judge's decision to unseal the record, the Ninth Circuit emphasized the difference between the "good cause" standard for discovery materials and "compelling reason" standard for court records. The court stated:

> Different interests are at stake with the right of access than with Rule 26(c); with the former, the private interests of the litigants are not the only weights on the scale. Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default. This fact sharply tips the balance in favor of production when a document, formerly sealed for good cause under Rule 26(c), becomes part of a judicial record. Thus a "good cause" showing alone will not suffice to fulfill the "compelling reasons" standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments.

Id. at 1180 (internal citation and footnote omitted). Because the City failed to articulate a compelling reason that the records should remain sealed, the court found the records must remain public. *Id.* at 1182.[6]

Moreover, courts have concluded that a protective order to maintain secrecy does not justify granting a motion to seal judicial records. For example, in *Union Oil*, 220 F.3d at 567, almost all documents in the lower court were filed under seal—even the "court's opinions, orders, and judgment"—pursuant to a confidentiality agreement between the parties. The lower court "kept not only the details but also the existence of this case from public view." *Id.* (emphasis in original). The Seventh Circuit unsealed the record, stating that the "parties' confidentiality agreement cannot require a court to hide a whole case from view." *Id.* The court further stated:

> People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Id. at 568 (internal citations omitted). The court found that the parties' confidentiality agreement was not a "compelling justification" to seal the court record.[7]

---

[6] *See also Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002) (even if a court finds "good cause" under Rule 26(c) to issue a protective order, it must still determine whether the common law right of access compels production); *Foltz*, 331 F.3d at 1135–36 (same); *Copeland v. Copeland*, 966 So.2d 1040, 1045 (La. 2007) (the "relatively low standard" for entering a protective order in discovery "does not apply to motions to seal documents contained in the court's public record").

[7] *See also Baxter Intern., Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002) ("dispositive documents in any litigation enter the public record notwithstanding any earlier agreement"); *Brown & Williamson*, 710 F.2d at 1180 (the "confidentiality agreement between parties did not bind the court in any way"); *Advantage Engineering*, 960 F.2d at 1016 (it is "immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties"

In sum, the fact that the parties here entered into a stipulated protective order should have no effect on this Court's analysis of whether the court records in this case can be sealed.

B. A Finding That the Documents Contain Trade Secrets Is Not a Sufficient Legal Basis for Sealing the Trial Records.

The Center for Auto Safety has not seen the documents and testimony used at trial in this case and does not take any position on whether the specific records Cooper seeks to seal do or do not contain trade secrets. However, even if the Court determines that a specific document or part of the record *does* contain trade secrets, that finding does not end the inquiry.[8] Rather, in order to take the drastic step of sealing court records, the records must not be sealed unless the Court determines that Cooper has demonstrated "compelling reasons" for keeping a particular document or portion of the record secret and that those reasons outweigh the public's right of access with respect to that particular document.

A California court recently confronted a similar situation in a consumer class action. In *Ayyad v. Sprint Spectrum, L.P.*, No. A122709, 2009 WL 2197276 (Cal. Ct. App. July 24, 2009) (attached), documents and testimony were presented in open court in a jury trial and admitted into evidence. In the midst of the trial, Sprint moved to seal the documents and testimony on grounds that "sealing was required to protect its trade secrets." 2009 WL 2197276 at *1. Like Cooper, Sprint submitted declarations asserting various reasons for confidentiality, including the risk of harm to Sprint if certain information became available to its competitors. *Id.* at *6. The trial court permitted partial redaction of some documents, but otherwise denied the sealing request. The court of appeal affirmed:

---

because "[o]nce a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case" and therefore "absent extraordinary circumstances . . . the court file must remain accessible to the public"); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (parties' agreement to seal court records did not justify closure of the trial record).

[8] Other courts have noted Cooper's propensity for claiming that certain documents are "trade secrets" when in fact they are nothing of the kind. See part III, *infra*.

> [T]he ultimate issue before the trial court was not whether the information in the exhibits was a trade secret. Rather, the question it was required to decide was whether Sprint's interest in protecting its trade secret information *outweighed* the public's constitutionally-protected interest in access to civil trial proceedings and overcame the presumption of public access.

Id. at *6. Likewise, in *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292 (Cal. Ct. App. 2002), the Hearst Corporation intervened in a consumer class action and moved to unseal documents that the defendant bank claimed contained trade secrets. Like Cooper here, the bank presented declarations in support of its trade secret claim. The bank further argued that since Hearst had not submitted its own evidence to counter that claim, the bank's evidence was undisputed and thus dispositive on the trade secret question. *Id.* at 301. The trial court granted the motion to unseal.

Affirming, the court of appeal held that "[t]he mere presence of a claimed trade secret does not carry a mandatory confidentiality requirement." *Id.* at 298. The court further explained that the trial court was "not obliged" to accept the defendant's declarations as dispositive, but rather was entitled to consider the entire record. *Id.* at 301. The court rejected the bank's proposal that its request for secrecy be granted solely on the basis of its own declarations:

> We must note a profoundly unsettling consequence to the logic of defendants' uncontradicted evidence argument. According to defendants, the only relevant evidence are the two declarations it submitted against Hearst's motion to unseal. *Those declarations are based on a knowledge of the documents that nonparty Hearst, having never seen the heretofore sealed documents, could never have.* If defendants' argument were to prevail, it would mean that the scope of relevant evidence would be defined by the party resisting disclosure . . . . [and] the party resisting disclosure would enjoy an advantage that virtually guarantees success.

Id. at 301 n.7 (emphasis added); *see also id.* at 307 ("[G]iven the fact that only defendants knew the contents of the documents, Hearst could not be expected to produce any such counter declarations."). Although the *Providian* court ultimately unsealed the documents in question on grounds that they were not trade secrets, the court's reasoning applies here in spades.

Even if the Court determines that a specific document or part of the record does contain trade secrets, "the judicial officer must consider alternatives to sealing," *Press-Enterprise*, 464

U.S. at 501, such as redaction or other less drastic measures. *See In re Iowa Freedom of Info. Council*, 724 F.2d 658, 659–65 (8th Cir. 1983) (affirming decision disclosing all but 62 pages of a 649-page transcript). If, as a last resort, the Court decides to issue a sealing order, the order must be narrowly tailored. *Press-Enterprise*, 464 U.S. at 510. A blanket sealing of an entire trial record would not be justified if Cooper's interests could be protected by sealing only a small portion of the record. *See, e.g.*, *Woven Elecs. Corp. v. Advance Group, Inc.*, 930 F.2d 913, 1991 WL 54118, at *6 (4th Cir. May 6, 1991) (table decision) (ordering trial court to "review the entire record of the trial, including the exhibits and transcripts if any, and seal only those portions necessary to prevent the disclosure of trade secrets") (attached). Thus, even if the court finds that the court records contain trade secrets, the court must first look to alternatives to sealing, and then issue a narrowly tailored sealing order.

C. The Trade Secrets Exception to the Iowa Freedom of Information Act Does Not Require Sealing the Trial Records.

Cooper has recently switched strategies, suggesting that an exception to Iowa's Freedom of Information Act ("FOIA") in Iowa Code § 22.7 licenses it to block disclosure of any court documents that contain trade secrets. Cooper's Reply at 4–5. That argument fails on several levels.

First, it is not clear that Iowa's FOIA governs public access to court records at all. "The federal and many state freedom of information acts do not apply to court records." 37A Am.Jur.2d 42, Freedom of Information Acts § 17 (2010). Iowa's FOIA does not list courts among the various "government bod[ies]" to which it applies. Iowa Code §22.1 Indeed, Title I of the Iowa Code, in which Chapter 22 appears, includes subtitles that specifically address both the legislative and executive branches of state government, but not the judicial branch. *See* Iowa Code Tit. I, Subtitles 2 and 4. The judicial branch is addressed separately, in Title XV of the code and the Iowa Court Rules. And the court rules provide specifically that they—not the FOIA—"govern the creation, storage, retention, duplication, reproduction, disposition, destruction of, *and public access to* records of the judicial branch of government," including

court records. Iowa Ct. R. 20.1 (emphasis added). Notably, the court rules contain no exception to public access for trade secrets. Rather, the only provision in the court rules for "confidential material" concerns juvenile court records. *See* Iowa Ct. R. 21.28.

This makes sense. Given that court records are already available to the public under the First Amendment and common law, the Iowa Legislature would not have needed to create a public right of access to such documents. *See, e.g.*, *Smith v. U.S. Dist. Ct.*, 956 F.2d 647, 649–50 (7th Cir. 1992) (denying FOIA request for memo read aloud by judge in open court on grounds that federal FOIA does not apply to courts, but emphasizing that the memo was "part of the court proceedings," and thus presumptively public because the "common law right of access to judicial records and documents is well recognized").

Second, if Iowa's FOIA does apply to any judicial records, it likely applies only to the kind of administrative records to which members of the public did not already have access, rather than documents and testimony relied on by judges and juries in reaching decisions. *See Foltz*, 331 F.3d at 1135. The Connecticut Supreme Court recently reached that conclusion, finding that the Connecticut FOIA applies only to courts' administrative records and not to "records created in the course of carrying out the courts' adjudicatory function." *Clerk of Super. Ct. v. Freedom of Info. Comm'n*, 895 A.2d 743, 750–51 (Conn. 2006). The court stressed, however, that the inapplicability of the FOIA did not mean that the plaintiff had no right to obtain the requested information. On the contrary, the court held, "[h]e may have such a right under the first amendment." *Id.* at 751.

Third, even if chapter 22 were to apply to court records, it could not supplant the existing public right of access to court records rooted in the First Amendment and common law. Therefore, any exemptions to public access created by chapter 22 would not affect the public's constitutional and common-law rights. *See Head v. Colloton*, 331 N.W.2d 870, 874 (Iowa 1983) (exemptions in Iowa's FOIA do not preclude right of access based on authority outside that law). Consistent with this, the Iowa Supreme Court has suggested that the trade secrets exception to Iowa's FOIA does not limit a court's authority to require a defendant to disclose documents in

discovery. In *Mediacom Iowa*, the court considered whether a city could refuse to produce documents in discovery on grounds that they contained trade secrets under § 22.7. The court held that the trial court should have ordered the city to turn over the documents:

> Even assuming the [city] had established its trade secret claim, section 22.7 would not automatically dictate absolute protection of the information sought through discovery. Iowa Code chapter 22 pertains to parties seeking access to government documents and ordinarily has no application to discovery of such information in litigation. . . . We conclude, contrary to the district court, that section 22.7 does not trump our discovery rules.

682 N.W.2d at 69. While *Mediacom* concerned a discovery dispute in a case where the government was a party rather than a motion to seal court records in a case between private parties, it stands to reason that if the trade secret exception in section 22.7 does not trump the discovery rules, it certainly does not trump the public's First Amendment and common-law right of access to judicial records. Indeed, Section 22.7 expressly acknowledges that courts have authority to order that public records be disclosed even if they contain trade secrets. Iowa Code § 22.7 (trade secrets "shall be kept confidential, *unless otherwise ordered by a court*") (emphasis added). In *Brown v. Legislative Council*, 490 N.W.2d 551, 554 (Iowa 1992), the Iowa Supreme Court explained that this language provides an "escape clause" for a court:

> [W]e note that a trial court is not helpless, in an appropriate case, to fashion a tentative remedy, one that would allow an exploration of the materials while protecting the trade secret. If the [documents] are found to be exempt from disclosure under Iowa Code section 22.7 they must be kept confidential "unless otherwise ordered by a court." Under this provision, even if the [documents] are exempt from disclosure under section 22.7, a court could order their disclosure notwithstanding the exemption.

Id. As Plaintiffs here point out, interpreting chapter 22.7 as prohibiting disclosure of court records would render the statute unconstitutional. *See* Pls.' Resp. at 3–4.

* * *

In sum, Cooper's argument that the Court should simply seal the trial records based on the company's cry of "trade secrets" falls flat. Furthermore, as we explain below, Cooper's

propensity to make overbroad claims for secrecy—including wrongly asserting that documents contain trade secrets—are well documented.

III. COOPER HAS A HISTORY OF EXCESSIVE SECRECY TACTICS.

Because Cooper has been able to enter into secret settlements with many accident victims and their survivors, very few specific details are known about the dangers of Cooper tires and the company's responses to those risks. Virtually every published report of a settlement involving allegedly defective Cooper tires notes that the terms are confidential. *See, e.g.*, *Franco Flores v. Cooper Tire & Rubber Co.*, 178 P.3d 1176, 1179 (Ariz. Ct. App. 2008) (confidential settlement of case arising from fatal tread separation); *Cooper Settles Rollover Case Linked to Alleged Tire Blowout*, 28 No. 21 Andrews Auto. Litig. Rep. 9 (Apr. 14, 2009) (confidential settlement of case involving sudden Cooper tire blowout) (attached); *Cooper Settles Texas Rollover Case*, BNA Automotive Litig. Rep. (Mar. 20, 2007) (secret settlement of fatal tread separation case) (attached); *Cooper Tire Settles Arkansas Case Five Days Before Trial*, 2 No. 10 Andrews Tire Defect Litig. Rep. 3 (June 2002) (secret settlement of fatal tread separation case) (attached).

In addition to secret settlements, Cooper is known for its willingness to bend discovery rules and conceal evidence from litigants and courts alike. For example, in *Mann ex rel. Akst v. Cooper Tire Co.*, 816 N.Y.S. 2d 45 (N.Y. App. Div. 2006), the plaintiffs filed a personal injury action against Cooper, alleging their automobile accident was caused by Cooper's defective tires. Cooper fought every step of the way to maintain secrecy. For example, instead of furnishing documents to legitimate disclosure demands during discovery, Cooper's response was that "the demand was overly broad and burdensome." *Id.* at 49 (internal quotation marks omitted). The New York appellate court found that Cooper had exhibited "wilful disobedience, bad faith and gross indifference to plaintiffs' rights in the discovery process." *Id.* at 51 (internal quotation marks omitted). Similarly, the court noted that Cooper's responses to interrogatories were unhelpful and "in total contravention of any disclosure standard." *Id.*

Further, Cooper attempted to hide information by claiming the documents requested contained trade secrets, arguing (as it does here) that disclosure would "put them out of business" and cause "irreparable harm." *Id.* at 54. The court concluded that Cooper was making "conclusory assertions" and that there was no support for their argument that the records contained trade secrets. *Id.* at 52. Finally, the court emphasized that that at least five separate courts "have found that Cooper Tire has committed numerous discovery violations, including improperly withholding documents; wilfully concealing evidence; wilfully concealing the existence of discoverable information; and destroying documents it knew or should have known would become material in litigation." *Id.* at 49.

Likewise, in *McGill v. Ford Motor Co.*, a Mississippi court found that "Cooper Tire engaged upon a course of conduct exhibiting an attitude that it does not have to provide documents or even the barest information about them unless and until plaintiffs discover from other sources that they exist." No. 02-114, at 4 (Miss. Cir. Ct., July 30, 2002) (attached). The court described Cooper's discovery abuses as "systemic," stating that Cooper not only withheld documents, "but misled the Court in representing that it had, in fact, furnished them, [and] is further evidence of just how far Cooper is willing to go to rape discovery requirements." *Id.* at 7.

Similarly, a South Carolina court stated that it was "deeply disturbed that Cooper Tire's conduct from the commencement of this case has reflected a pattern of deliberate discovery abuse, including misrepresentations, obfuscation, concealment, and disobedience to the discovery orders of this Court[.]" *Middleton v. Cooper Tire & Rubber Co.*, No. 99-CP-25-214, at 4 (S.C. Ct. Common Pleas Nov. 6, 2001) (attached). The court found that Cooper "intentionally withheld, again in violation of this Court's order, documents that discuss the specifics of tires returned for separation failures and which are stored on Cooper Tire's computer system." *Id.* at 18. Further, the court discovered that Cooper was intentionally withholding key evidence:

> [H]ad plaintiffs not been persistent in their request to view the other area [of Cooper's plant], neither they nor the Court would have discovered that Cooper Tire was concealing at least 33 tires returned for separations in violation of this

> Court's order. In other words, Cooper Tire was concealing more failed tires which were responsive to the Court's order than it actually produced. . . . Cooper Tire's willful action of concealing this evidence from plaintiffs' counsel and their consultant is indefensible.

Id. at 15. Therefore, the court sanctioned Cooper, noting that "misrepresentations by Cooper Tire to the Court and opposing counsel . . . cannot be tolerated in our legal system." *Id.* at 13.

In *Whitaker v. Cooper Tire & Rubber Co.*, No. 2:99CV00212, at 11 (E.D. Ark. May 22, 2002) (attached), the Eastern District of Arkansas sanctioned Cooper for destroying documents related to plaintiffs' lawsuit pursuant to the company's "retention policy." The court found that plaintiffs' lawsuit had put Cooper on notice that documents related to the design and manufacture process of the tire involved in the accident "would be relevant and or could reasonably be calculated to lead to admissible evidence." *Id.* at 8. The court concluded that Cooper "knew, or should have known, that these documents would become material, and, thus, should have been preserved" and that the plaintiffs were prejudiced by the destruction of these documents. *Id.* Earlier this year, responding to a suit brought by the widow of a professor who was killed along with eight students in a rollover crash, Cooper's attorneys fought discovery, arguing that the widow's attorneys were trying to "'ferret into' Cooper's confidential data and trade secrets." *Cooper Says Family of Utah Crash Victim Sued Too Late*, 29 No. 21 Westlaw J. Automotive 4 (Apr. 13, 2010) (attached).

Cooper's apparent willingness to bend the rules and make overbroad "trade secret" assertions in other cases is relevant to this Court's analysis of Cooper's claims in this case. The observation of a California court that recently confronted a similar situation is particularly on point here:

> In light of defendants' history of defining confidential material as broadly as possible, it would not be improper for the trial court to view their latest effort with considerable skepticism and conclude that the scope of their proposed record sealing was neither "narrowly tailored" nor the least restrictive means to protect any interest against disclosure.

In re Providian, 96 Cal. App. 4th at 309. This Court, likewise, should view Cooper's assertions with skepticism, particularly given the strong public interest at stake.

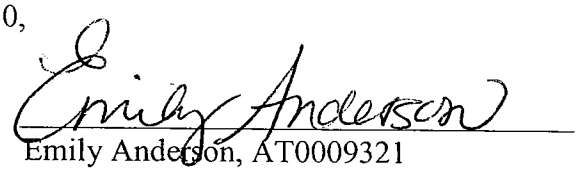
CONCLUSION

Cooper seeks to keep under lock and key the trial evidence that led a Polk County jury and this Court to conclude that Cooper's mass-produced tire was defective, and that Cooper knew of the dangers in its tire skim stock for years but chose to keep the danger secret rather than fixing it—a decision that could have prevented the death and devastating injuries that gave rise to this case. Cooper has no right to require this Court to participate in its ongoing cover-up.

Two interests mandate that the Court reject Cooper's efforts to suppress the evidence presented at trial. First, consumers have a strong interest in information about public dangers, including dangers in mass-produced products and processes used across product lines. Many tires with the same characteristics that the jury here found defective remain on the road, on cars driven by American families. Second, our Constitution and common-law history strongly favor an open court system, a benchmark of our democracy that sets our nation apart from so many others. Our courts do not operate in secret, as this Court properly recognized in its pretrial rulings. Cooper has no legitimate interest in having this Court lock up the evidence presented in open court, especially given it has been found to evidence ongoing dangers.

The Court should deny Cooper's Motion to Seal Trial Records and order that the documents and testimony used at trial be unsealed.

Respectfully submitted this 12th November 2010,



Emily Anderson, AT0009321
Timothy S. Semelroth, AT0007057
Pressley Henningsen, AT0003402
John Riccolo, AT0006656
Riccolo & Semelroth, P.C.
425 Second Street S.E., Suite 1140
Cedar Rapids, IA 52401
(319) 365-9200
eanderson@riccololaw.com

Leslie A. Bailey (*pro hac vice pending*)
Public Justice, P.C.
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-8150 ext. 203
lbailey@publicjustice.net

Stuart Ollanik
Gilbert, Ollanik, And Komyatte, P.C.
5400 Ward Road, Building IV, Suite 200
Arvada, CO 80002
(303) 431-1111
sollanik@auto-law.com

CERTIFICATE OF SERVICE

The undersigned attorney, as the attorney of record for the Plaintiffs, certifies that true and correct copies of the foregoing documents have been forwarded to all counsel of record, as listed below, by the method of service indicated, on this ____ day of _____, 2010.

_____
Signature

VIA U.S. MAIL TO:

Richard J. Sapp
Randall D. Armentrout
NYEMASTER, GOODE, WEST,
HANSELL & O'BRIEN, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309-3899

Troy Vancil
FULBRIGHT & JAWORSKI
300 Convent Street, Suite 2200
San Antonio, Texas 78205-3792

Joseph Thacker
THACKER MARTINSEK, LPA
1415 Panther Lane, Suite 208
Naples, FL 34109

ATTORNEYS FOR DEFENDANT COOPER TIRE & RUBBER CO.

Frederick W. James
THE JAMES LAW FIRM, P.C.
604 Locust Street, Suite 630
Des Moines, IA 50309

John Blaise Gsaner
THE EDWARDS LAW FIRM
802 N. Carancahua, Suite 1400 (78470)
P.O. Box 480
Corpus Christi, TX 78403

Wesley Todd Ball
Kyle W. Farrar
FARRAR & BALL
1010 Lamar, Suite 1600
Houston, TX 77002

Bruce R. Kaster
Skip Edward Lynch
KASTER & LYNCH, P.A.
125 N.E. 1st Avenue, Suite 3
Ocala, FL 34470

ATTORNEYS FOR PLAINTIFFS

R. Jeffrey Lewis
Brett C. Redenbaugh
LEWIS WEBSTER VAN WINKLE & KNOSHAUG LLP
3900 Ingersoll Ave., Suite 202
Des Moines, IA 50312

ATTORNEYS FOR DEFENDANT ALFRED LANG

Richard E. Mull
Assistant Attorney General
IOWA DEPARTMENT OF TRANSPORTATION
900 Lincoln Way
Ames, IA 50010

ATTORNEY FOR CIVIL REPARATIONS TRUST FUND-INTERVENOR

Ronald E. Clark
CLARK & ROBERTS, PLC
P O Box 2138
Palatka, FL 32178-2138

ATTORNEY FOR DEFENDANT ROCKY'S TIRE CENTER

E. W. Shepherd
ALLEN, SHEPHERD, LEWIS, SYRA & CHAPMAN, P.A.
P.O. Box 94750
Albuquerque, NM 87199-4750

ATTORNEY FOR DEFENDANT THE PEP BOYS