

MEMORANDUM

TO: Arkansas Legislative Council
Litigation Reports Oversight Subcommittee
Sen. Bob Ballinger, Co-Chair
Rep. Lanny Fite, Co-Chair

FROM: Susan Fowler, Attorney Specialist
Arkansas Department of Finance & Administration

DATE: February 27, 2020

RE: Firestone Building Products Co., LLC v. Larry Walther, Secretary, DFA
Pulaski County Circuit Court No. 60CV-18-782

REQUEST FOR REVIEW AND APPROVAL OF SETTLEMENT BY
THE LEGISLATIVE COUNCIL OF THE ARKANSAS GENERAL ASSEMBLY
Ark. Code Ann. §10-3-312(d) (Repl. 2012)

SETTLEMENT AGREEMENT
Refund of Interest Paid in the Amount of \$121,529.94

Firestone Building Products Co., LLC ("Firestone"), a subsidiary of Bridgestone Americas, Inc., filed a Complaint in Pulaski County Circuit Court on February 8, 2018 claiming the purchase of devulcanization technology is exempt from sales and use tax under the manufacturing exemption set out in Ark. Code Ann. §§ 26-52-402 and 26-53-114 and Arkansas Gross Receipts Tax Rule GR-55.

Firestone is a manufacturing company located in Prescott, AR. On December 16, 2015, the Department of Finance & Administration (the "Department") completed a routine sales and use tax audit which resulted in a total assessment of \$1,239,991.72 in tax and interest. The audit captured a number of fixed assets, utilities and expenses but the only issue presented in this matter is the taxability of the devulcanization technology purchased by Firestone during the audit period. The tax assessed for this asset was \$222,024.41.

The devulcanization technology allows Firestone to recycle rubber waste trimmings created in the production of EPDM rubber roofing. The recycled trimmings are then reused as raw material in production of EPDM products. The Administrative Law Judge previously found that Firestone did not qualify for the exemption because the devulcanization technology did not produce an article of commerce and was not used directly in the manufacture of EPDM. Firestone subsequently paid the entire assessment under protest on February 10, 2017. The amount related to the devulcanization technology at the time of payment was \$343,554.35, of which \$121,529.94 was interest. Firestone filed suit in Circuit Court seeking a refund of the assessed sales and use tax and interest paid under protest.

The case was originally scheduled for a two-day bench trial on February 19 and 20, 2020. Prior to trial, the parties reached a settlement agreement. A copy of the Settlement Agreement is attached. The Department has agreed to refund the interest paid on the devulcanization technology in the amount of \$121,529.94 as full and final settlement of the issues presented. The trial court agreed to cancel the scheduled bench trial pending review of the settlement agreement by the Legislative Council. If settlement is approved, the matter will be dismissed per the terms of the settlement agreement.

The parties request that this matter be placed on the Legislative Council's agenda for review for the earliest possible date.

SETTLEMENT AGREEMENT

This agreement ("Agreement") is entered into by and between Firestone Building Products Company, LLC, an Indiana limited liability company (hereafter referred to as "Taxpayer") and the Arkansas Department of Finance and Administration, an administrative body of the State of Arkansas (hereafter referred to as "DFA");

WHEREAS, DFA issued a proposed assessment to the Taxpayer dated December 16, 2015 with respect to gross receipts (sales) tax, compensating use tax, food consumer use tax, utilities and interest in Audit No. A573007872 for the period beginning April 1, 2009 and ending December 31, 2011. The proposed assessment was made with regard to the Taxpayer's operation of the Firestone Building Products Co., LLC -- Sales Tax Account No. 00302572-SLS. The proposed assessment totaled \$1,239,991.72 (comprised of \$823,906.40 tax and \$416,085.32 interest); and

WHEREAS, during the course of the administrative review of the proposed assessment requested by the Taxpayer, Taxpayer challenged the taxability of certain assets which are related to its devulcanization technology and which were purchased during the audit period (the "Assets"). Taxpayer claimed its purchase of the Assets should be exempt from compensating use tax under Ark. Code Ann. § 26-53-114. On July 29, 2016, the Administrative Law Judge determined Taxpayer did not qualify for the stated exemption. Thereafter, Taxpayer paid the proposed assessment in-full on or about February 10, 2017 in the amount of \$1,326,582.77.

WHEREAS, as of the date of the \$1,326,582.77 payment, the amount of the proposed assessment related to the Assets was \$343,554.35 (comprised of \$222,024.41 tax and \$121,529.94 interest); and

WHEREAS, on February 8, 2018, Taxpayer filed its Complaint to Recover Compensating Use Tax and Interest Paid Under Protest in the Circuit Court of Pulaski County, Arkansas – *Firestone Building Products Company, LLC v. Arkansas Department of Finance and Administration and Larry Walther, Director*, No. 60CV-18-782 (hereafter referred to as the "Lawsuit") challenging the assessment of use tax and interest for its purchase of the Assets during the audit period; and

WHEREAS, the parties wish to resolve and settle the issues between them without the need for further proceedings or litigation; and

WHEREAS, this Agreement must be approved by the Legislative Council of the Arkansas General Assembly before payment made pursuant to the Agreement can be issued to the Taxpayer.

NOW THEREFORE, in consideration of the terms set forth herein, it is agreed that:

1. DFA will waive and refund the interest paid by Taxpayer in connection with the purchase of the Assets in the total amount of \$121,529.94.
2. Taxpayer will not further contest the application of the Arkansas compensating use tax to

the Assets and, therefore, the Taxpayer's payment of \$222,024.41 in tax shall be retained by DFA.

3. Each party is responsible for its own costs, fees and expenses incurred during the course of this litigation.

4. Taxpayer and DFA hereby acknowledge and agree that this Agreement shall serve as a full settlement and satisfaction of all issues raised or that could have been raised in its Lawsuit, provided that the Legislative Council of the Arkansas General Assembly approves the terms of this Agreement. Taxpayer shall submit to the Court for consideration an agreed-upon order of dismissal of the Lawsuit, with prejudice, upon approval of this Agreement by the Legislative Council of the Arkansas General Assembly and refund of the \$121,529.94 in interest as provided for in Section 1.

5. DFA shall in good faith pursue the approval of this Agreement before the Legislative Council of the Arkansas General Assembly and shall take all necessary steps to present in good faith such Agreement for approval to the Legislative Council of the Arkansas General Assembly as promptly as is practicable. Should DFA be unable to obtain approval of this Agreement from the Legislative Council of the Arkansas General Assembly, DFA agrees and will not object to the continuing jurisdiction of the Circuit Court of Pulaski County, Arkansas over the Lawsuit.

6. Each party denies any wrongdoing or liability, and it is understood and agreed by the parties that this Agreement will not be construed as an express or implied admission or acknowledgement as to the merits of any party's claims or defenses, or of liability or fault. The terms of this Agreement are to be performed solely as a compromise of disputed claims.

Signature Page to Follow

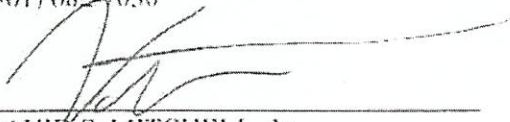
APPROVED By:



SUSAN M. FOWLER

Office of Revenue Legal Counsel
Arkansas Department of Finance and Administration
P. O. Box 1272, Room 2380
Little Rock, AR 72203
(501) 682-7030

2-11-2020
DATE



DAVID S. MITCHELL, Jr.

Rose Law Firm
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131
Counsel for Taxpayer, Firestone Building Products Company, LLC

2-12-2020
DATE

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

DIVISION

FIRESTONE BUILDING PRODUCTS COMPANY, LLC

PLAINTIFF

v.

Case No. _____

**LARRY WALTHER, DIRECTOR,
DEPARTMENT OF FINANCE AND
ADMINISTRATION OF THE STATE OF
ARKANSAS**

DEFENDANT

**COMPLAINT TO RECOVER COMPENSATING USE TAX
AND INTEREST PAID UNDER PROTEST**

Comes now Plaintiff, Firestone Building Products Company, LLC, ("Plaintiff"), by and through its attorneys, Rose Law Firm, a Professional Association, and for its Complaint against Larry Walther, Director, Department of Finance and Administration of the State of Arkansas ("Defendant" or "Director") to recover Arkansas compensating use taxes and interest erroneously assessed against and paid by Plaintiff under protest, respectfully states as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. This is an action for judicial relief and recovery of assessed compensating use tax paid under protest as outlined by the Arkansas Tax Procedure Act at Ark. Code Ann. § 26-18-406(a).

2. Plaintiff is an Indiana limited liability company qualified to do business in Arkansas. Its principal place of business is 200 4th Avenue South, Nashville, Tennessee 37201 and it has a registered agent in the State of Arkansas, National Registered Agents, Inc. of Arkansas, at 124 W. Capitol Avenue, Suite 1900.

3. Plaintiff operates a manufacturing plant at 1406 Hwy 371 N., Prescott, Arkansas 71857, where it manufactures Ethylene Propylene Diene Terpolymer (“EPDM”) rubber roofing.

4. Defendant, Larry Walther, is the Director of the Department of Finance and Administration of the State of Arkansas (“Department”). Director is named as Defendant in his capacity as the Director of Department and in regard to his specific duties with respect to suits and other proceedings concerning taxes, fees, or licenses administered by the Director.

5. This Court has jurisdiction over the parties and the subject matter of this action pursuant to Ark. Code Ann. § 26-18-406.

6. Venue is proper in this Court pursuant to Ark. Code Ann. § 26-18-406(c)(1) as this is an action to contest a determination of the Director of the Department of Finance and Administration under Ark. Code Ann. § 26-18-406.

II. PROCEDURAL HISTORY

7. During an examination of Plaintiff’s purchases for the audit period of April 2009 through December 2011, the Department determined that certain equipment purchased by Plaintiff and used in Plaintiff’s manufacturing process (the “De-Vulcanization Technology” or “Technology”) was subject to Arkansas Compensating Use Tax.

8. On December 16, 2015 the Department issued an audit Summary of Findings determining that Plaintiff owed the Department Compensating Use Tax in the amount of \$823,906.40 and interest in aggregate amount of \$416,085.32. A copy of the Summary of Findings is attached hereto and incorporated as **Exhibit 1**.

9. At issue in this Complaint is \$823,857.75 in Compensation Use Tax and \$416,059.32 in interest, such amounts having already been paid by Plaintiff to Defendant.

10. Plaintiff does not contest \$48.65 in Food Consumer Use Tax charged to it or the \$26.00 associated interest.

11. An administrative hearing on the above matters was held on April 6, 2016.

12. On July 29, 2016, the Administrative Law Judge issued a decision finding that the De-Vulcanization Technology used by Plaintiff is not equipment used directly in manufacturing and that Compensating Use Tax was due on the De-Vulcanization Technology purchased by Plaintiff. A copy of the Administrative Decision is attached hereto and incorporated herein as **Exhibit 2**.

13. Defendant issued his final ruling on September 2, 2016 denying Plaintiff the benefit of the exemption to the Compensating Use Tax under Ark. Code Ann. § 26-53-114. A copy of Defendant's final ruling is attached hereto and incorporated herein as **Exhibit 3**.

14. On February 10, 2017, Plaintiff paid the entire amount of assessed taxes and interest, under protest, by check issued to the Department. A copy of Plaintiff's check issued to the Department and transmittal letter are attached hereto and incorporated herein as **Exhibit 4**.

15. The Department is currently holding as trustee or escrow agent all amounts paid by Plaintiff under protest. *See McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W. 2d 114 (Ark. 1943).

16. Plaintiff has exhausted all administrative remedies under Ark. Code Ann. §§ 26-18-401 *et seq.*

17. This complaint is filed within one (1) year from Plaintiff's payment of the entire amount of tax due under the final assessment, as required by Ark. Code Ann. § 26-18-406(a)(1)(A).

III. FACTS

18. Plaintiff incorporates by reference paragraphs 1 through 17 as if fully set forth herein.

19. Plaintiff manufactures EPDM rubber roofing at its facility located at 1406 Hwy 371 N. in Prescott, Arkansas.

20. By utilizing a complex, multi-step process, Plaintiff produces large sheets of non-reinforced EPDM rubber roofing.

21. The process of cutting the roofing down to size during the manufacturing process creates trimmings of rubber that are suited well for recirculation back into the early stages of the manufacturing process.

22. Due to a company-wide eco-friendly strategy and the available cost-savings opportunities, Plaintiff purchased the De-Vulcanization Technology to expand its manufacturing facilities by reincorporating rubber trimmings as an expansion of the EPDM roofing production process.

23. After the roofing sheets are cut to size during the manufacturing cycle, the rubber trimmings are cycled through the De-Vulcanization Technology and subjected to a thermo-mechanical process.

24. This thermo-mechanical process facilitates and causes a chemical change in the trimmings which breaks down sulfur cross-linked bonds formed in the main rubber-curing process.

25. The trimmings are transformed from excess material into rubber gum, and then formed into reusable pellets.

26. The pellets exiting the De-Vulcanization Technology are a substantially different product than that which enters the Technology.

27. Plaintiff's expanded production process allows the processed trimmings material to be recirculated into the materials input in the EPDM manufacturing process at specified amounts, significantly increasing production utility while also vastly reducing production waste material sent to the landfill.

28. The de-vulcanization process occurs between the beginning and the end of the overall EPDM manufacturing process.

29. As a whole, the De-Vulcanization Technology operates as part of the EPDM roofing production process and is fully integrated with the manufacturing of EPDM roofing at Plaintiff's facility.

30. The De-Vulcanization Technology is fully integrated into Plaintiff's manufacturing process, without which Plaintiff's expanded manufacturing operation would cease to operate.

**IV. COMPENSATING USE TAX
EXEMPTION AT ARK. CODE ANN. § 26-53-114**

31. Plaintiff incorporates by reference paragraphs 1 through 30 as if fully set forth herein.

32. Ark. Code Ann. § 26-53-114 governs certain exemptions to the payment of Compensating Use Tax in Arkansas.

33. The Arkansas Administrative Code supplements Ark. Code Ann. § 26-53-114 at Ark. Admin. Code §§ 006.05.212-UT-1 *et seq.*

34. Pursuant to Ark. Admin. Code § 006.05.212-UT-2, the Gross Receipts Rules found at Ark. Admin. Code §§ 006.05.212-GR-1 *et seq.* apply to the collection of Compensating Use Tax when there is no conflict between the administrative rule sections.

35. Ark. Code Ann. § 26-53-114 provides an exemption from tax on purchases of machinery or equipment used directly in producing, manufacturing, assembling, processing, finishing or packaging an article of commerce.

36. Plaintiff is exempt from the Compensating Use Tax assessed against it and collected from it because it (1) purchased machinery or equipment (2) used directly in producing, manufacturing, processing, finishing, or packaging (3) of an article of commerce.

Machinery or Equipment

37. The Department, under Ark. Admin. Code § 006.05.212-GR-55(F)(1), defines machinery as “mechanical devices or combinations of mechanical powers and devices purchased or constructed by a taxpayer or his agent and used to perform some function and to produce a certain effect or result. Machinery includes electrical, mechanical, and electronic components which are part of machinery and are necessary for the machine to produce its effect or result.”

38. The Department, under Ark. Admin. Code 006.05.212-GR-55(F)(2), defines equipment as “any tangible personal property other than machinery . . . used directly in the manufacturing process except those items specifically excluded from the exemption as provided in [Ark. Admin. Code 006.05.212-]GR-55(B)(3).”

39. The word “equipment,” according to the Arkansas Supreme Court, is “an exceedingly elastic term, the meaning of which depends on context.” *Weiss v. Bryce Co., LLC*, 2009 Ark. 412, 330 S.W.3d 756 (2009). To be equipment, the tool or device must have some degree of complexity and continuing utility. *Id.*

40. Machinery and equipment need not be neatly arranged or entirely systematic to qualify for the exemption. *See Ark. Ry. Equip. Co. v. Heath*, 257 Ark. 651, 519 S.W.2d 45 (1975).

Used Directly in Producing, Manufacturing, Processing, Finishing or Packaging

41. The term “manufacturing” includes those operations commonly understood within their ordinary meaning. Ark. Code Ann. § 26-53-114(b).

42. Black’s Law Dictionary (9th ed. 2009) defines the word “manufacture” as follows: “all artificial products of human industry . . . whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery.”

43. Ark. Code Ann. § 26-53-114(c)(2) defines “directly” to include equipment that is used in actual production during processing or assembling raw materials or semi-finished materials into the form in which the product is to be sold.

44. To meet the requirement of being used directly in the manufacturing process, the General Assembly has laid out its intent to include such machinery or equipment that causes a recognizable and measurable mechanical or chemical action to take place as an integral part of manufacturing, the absence of which would cause the operation to cease. Ark. Code Ann. § 26-53-114(c)(3)(A)(i).

45. Ark. Code Ann. § 26-53-114(c)(1)(A) provides that while machinery and equipment which handle materials prior to or after the manufacturing process are not directly involved in the manufacturing process, machinery and equipment used to transport or handle product while the manufacturing is taking place are used directly in the manufacturing process.

46. To account for the conceptual issue of exempting from taxation machinery or equipment that is “necessary and integral” for the manufacturing operation when such machinery or equipment was not utilized prior to its purchase, Ark. Code Ann. § 26-52-114(a)(1)(B) provides

that the machinery and equipment will be exempt if it is purchased and used to expand existing manufacturing or processing facilities or create new manufacturing or processing facilities.

47. Pursuant to Ark. Admin. Code § 006.05.212-UT-2, Ark. Admin. Code § 006.05.212-GR-55 is the rule accompanying and clarifying this allowance for machinery or equipment used in new or expanded facilities.

48. If the machinery or equipment is utilized in new manufacturing facilities, it is exempt from Compensating Use Tax if the machinery or equipment: (1) performs at least one essential function and is utilized directly in the manufacturing process; (2) is utilized in actual manufacturing operations at any time from where the initial stage to the packaging of the article of commerce; and (3) does not consist of excluded items such as hand tools, buildings, or office equipment. *See* Ark. Admin. Code 006.05.212-GR-55(B).

49. Additionally, Ark. Admin. Code § 006.05.212-GR-55(C)(1) states that machinery or equipment used to expand facilities is exempt from Compensating Use Tax if the three criteria in Ark. Admin. Code § 006.05.212-GR-55(B) are met and the purchase of the machinery or equipment also: (1) results in an economic expansion of the taxpayer's plant or facility (defined as an increase in (a) production (b) volume (c) employment or (d) models or types of product that can be manufactured); or (2) results in a physical expansion of the plant or facility regardless of whether there is an economic expansion.

50. Ark. Code Ann. § 26-53-114(c)(3)(B)(v) specifically and without limitation deems certain machinery and equipment to fall within the category of being "used directly in the manufacturing process."

51. Ark. Code Ann. § 26-53-114(c)(3)(B)(v) states that machinery or equipment which produce chemical catalysts and solutions which are essential to the manufacturing process but

which are not consumed during the course of the manufacturing process are deemed statutorily to be “used directly in the manufacturing process.”

52. Webster’s Dictionary defines a catalyst as an agent that provokes or speeds significant change or action. *Merriam-Webster’s Dictionary* (online) (last accessed on January 30, 2018 at 12:07 P.M.).

53. Webster’s Dictionary defines a solution as an act or process by which a solid . . . substance is homogeneously mixed with a liquid or sometimes a gas or solid. *Merriam-Webster’s dictionary* (online) (last accessed on January 30, 2018 at 12:07 P.M.).

Article of Commerce

54. An article of commerce includes: (1) any property to be placed on the market for retail sale; or (2) which becomes a recognizable integral part of a manufactured product in its finished and packaged form ready to be placed on the market for retail sale. *See* Ark. Admin. Code § 006.05.212-GR-55(F)(6).

V. PLAINTIFF’S DE-VULCANIZATION TECHNOLOGY IS EXEMPT FROM COMPENSATING USE TAXATION

55. Plaintiff incorporates by reference paragraphs 1 through 54 as if fully set forth herein.

56. The burden of proof applicable to matters of fact and evidence under Title 26 of the Arkansas Code Annotated is preponderance of the evidence. *See* Ark. Code Ann. § 26-18-313(c).

57. During the time period in question, Plaintiff purchased “machinery or equipment used directly in producing, manufacturing, assembling, processing, finishing, or packaging an article of commerce.” *See* Ark. Code Ann. § 26-53-114.

58. In accordance with Ark. Code Ann. § 26-53-114, Plaintiff is exempt from the Compensating Use Tax assessed against it and collected from it because it (1) purchased machinery or equipment (2) used directly in producing, manufacturing, processing, finishing, or packaging (3) of an article of commerce.

59. Thus, it should be entitled to refund for Compensating Use Tax paid to Defendant.

The De-Vulcanization Technology Purchased by Plaintiff is Machinery or Equipment

60. During the time period in question, Plaintiff purchased the De-Vulcanization Technology to utilize in its expanded manufacturing process.

61. The De-Vulcanization Technology qualifies as machinery or equipment.

62. The De-Vulcanization Technology utilized by Plaintiff in its manufacturing process qualifies as machinery because the Technology consists of “mechanical devices or combinations of mechanical powers and devices . . . used to perform some function and to produce a certain effect or result.” See Ark. Admin. Code § 006.05.212-GR-55 (F)(1).

63. The Technology is a group of mechanical devices which collectively perform the transformation of trimmings into material integrated into the EPDM manufacturing process.

64. Alternatively, to the extent that the De-Vulcanization Technology does not qualify as machinery, it qualifies as equipment because it is “tangible property [other than machinery] . . . used in the manufacturing process.” See Ark. Admin. Code § 006.05.212-GR-55 (F)(2).

65. Plaintiff meets the requirements of the Compensating Use Tax exemption at Ark. Code Ann. § 26-53-114 regarding purchase of machinery or equipment because the De-Vulcanization Technology Plaintiff purchased during the time period in question is machinery or

equipment as defined in Ark. Admin. Code § 006.05.212-GR-55 and by Arkansas case law cited above.

66. Such claims were not disputed by Defendant in Defendant's summary of findings.

The De-Vulcanization Technology Produces an Article of Commerce

67. Arkansas Administrative Code § 006.05.212-GR-55(F)(6) defines an article of commerce in two ways: (1) property to be placed on the market for retail sale; or (2) property which becomes a recognizable integral part of a manufactured product in its finished and packaged form ready to be placed on the market for retail sale.

68. Plaintiff's manufacturing and production activities, including the use of the De-Vulcanization Technology, result in the production of an article of commerce under both definitions.

69. Plaintiff produces EPDM rubber roofing which is a good sold to third-parties for profit.

70. The De-Vulcanization Technology constitutes an integral part of the process to manufacture and produce the EPDM roofing.

71. Plaintiff's De-Vulcanization Technology is used directly in the manufacturing process of an article of commerce because the de-vulcanized material becomes a "recognizable integral part of a manufactured product in its finished and packaged form." *See* Ark. Admin. Code § 006.05.212-GR-55(F)(6).

72. After the Technology has completed its function in the middle of the overall expanded manufacturing process, the de-vulcanized trimmings become mixed, in proprietary amounts, with the input materials at the early stages of the EPDM roofing production process.

73. Such incorporation process makes the de-vulcanized trimmings articles of commerce because they are incorporated into the final EPDM roofing, which goes out for sale on the market. *See* Ark. Admin. Code § 006.05.212-GR-55(F)(6).

74. Defendant did not dispute this assertion, but focused on the sale of the de-vulcanized material to reach his conclusion denying to Plaintiff the benefit of the exemption.

75. Thus, Plaintiff pleads in the alternative that Ark. Admin. Code § 006.05.212-GR-55(F)(6) defines an article of commerce to include an item which may be sold independently of the final EPDM product.

76. The de-vulcanized material constitutes an article of commerce which may be sold on the marketplace prior to incorporation into the final EPDM product. *See* Ark. Admin. Code § 006.05.212-GR-55(F)(6).

77. In reviewing the implementation of the De-Vulcanization Technology in 2010, Plaintiff included this concept of sale to third-parties in its analysis of the project.

78. Such de-vulcanized material constitutes product which could readily be sold to third-party manufacturers of EPDM product.

79. Such product would be sold by Plaintiff on the marketplace if it were not utilized by Plaintiff in the final EPDM product.

80. Ark. Admin. Code § 006.05.212-GR-55(F)(6) does not require an article of commerce actually be sold, only that it could be sold or that it will be sold.

81. Further, such de-vulcanized materials are in fact sold as part of the roofing product that exits the manufacturing process in final form.

82. Plaintiff meets the requirements of the Compensating Use Tax exemption regarding the production of an article of commerce by the machinery or equipment at issue because

Plaintiff's use of the De-Vulcanization Technology results in the production of an article of commerce.

The De-Vulcanization Technology is Used Directly in Making EPDM Product

83. The De-Vulcanization Technology is used by Plaintiff directly in producing, manufacturing, processing, finishing or packaging of EPDM rubber roofing.

84. Defendant contested this assertion in reaching his conclusion denying the benefit of the exemption to Plaintiff.

85. Plaintiff is involved in manufacturing because it creates an "artificial product . . . by the employment of machinery." *See* Black's Law Dictionary (9th ed. 2009) (Manufacture).

86. The artificial product is the EPDM roofing.

87. The De-Vulcanization Technology is used directly in the manufacturing process because it is used in "actual production during processing or assembling raw materials or semifinished materials into the form in which the personal property is to be sold." *See* Ark. Code Ann. § 26-53-114(c)(2).

88. As part of the aggregated process, the Technology takes raw or semifinished materials (trimmings) and transforms them into a material which is integrated into the final EPDM roofing product.

89. The Technology performs this transformation during the processing of raw or semifinished materials.

90. The De-Vulcanization Technology is used in actual production because it causes a "recognizable and measurable mechanical [and] chemical . . . action to take place as a necessary and integral part of manufacturing." *See* Ark. Code Ann. § 26-53-114(c)(3)(A)(i).

91. The Technology facilitates and causes a thermo-mechanical change in raw or semi-finished materials, without which the materials would not be able to be integrated into the expanded manufacturing process.

92. In accomplishing this transformation, the De-Vulcanization machinery transports and handles product while the manufacturing process takes place—not after or before the manufacturing process. *See* Ark. Code Ann. § 26-53-114(c)(1)(A).

93. If the trimmings were not integrated into the manufacturing process as integral to the manufacturing process, Plaintiff's expanded manufacturing operation would cease to operate as it currently does. *See* Ark. Code Ann. § 26-53-114(c)(3)(A)(i).

94. Machinery or equipment may be categorized as being directly used in producing, manufacturing, processing, finishing or packaging of an article of commerce if such machinery or equipment is used in new or expanded facilities. *See* Ark. Code Ann. § 26-53-114(a)(1)(B).

95. The De-Vulcanization Technology purchased by Plaintiff was used in new facilities. *See* Ark. Code Ann. § 26-53-114(a)(1)(B).

96. Plaintiff housed the Technology in leased facilities which were new to Plaintiff and located in close proximity to the remainder of the manufacturing equipment utilized by Plaintiff at its Prescott, Arkansas facility.

97. Plaintiff's occupancy of the new facilities was specifically as a result of the addition of the De-Vulcanization Technology.

98. Plaintiff expended considerable capital to integrate the new facilities into its existing manufacturing process, including the execution of a twenty-year lease.

99. The qualification of tax exemption for machinery or equipment used in new facilities is determined by meeting three criteria found at Ark. Admin. Code § 006.05.212-GR-55(B)(1).

100. As established by facts pleaded previously in this Complaint, Plaintiff meets the criteria of Ark. Admin. Code § 006.05.212-GR-55(B)(1), which requires that machinery or equipment perform essential functions and is used directly in the manufacturing process.

101. As required by Ark. Admin. Code § 006.05.212-GR-55(B)(2), the De-Vulcanization Technology purchased by Plaintiff is used in the middle stages of the manufacturing process to circulate processed materials back to the earlier stages of the manufacturing cycle. The Technology is specifically used after the initial stages of the manufacturing process and before the final packaging of the product for delivery to end-consumers.

102. The De-Vulcanization Technology at issue does not consist of any excluded items listed at Ark. Admin. Code § 006.05.212-GR-55(B)(3).

103. If machinery or equipment was not used in new facilities, it may still qualify for the Compensating Use Tax Exemption if it is used in expanded facilities. *See* Ark. Admin. Code § 006.05.212-GR-55(C).

104. In the alternate to pleading that the Technology was used in new facilities, the Technology was in the very least used in connection with expanding existing facilities. *See* Ark. Admin. Code § 006.05.212-GR-55(C)(1).

105. Plaintiff leased space near its existing plant for the purpose of expanding its operations.

106. Such expansion was required to house the De-Vulcanization Technology.

107. Ark. Admin. Code § 006.05.212-GR-55(C), governing exemptions based upon machinery or equipment used in expanded facilities, requires that certain criteria are met in addition to the criteria required for machinery or equipment used in new facilities.

108. As established by facts pleaded previously in this Complaint, Plaintiff meets the criteria of Ark. Admin. Code § 006.05.212-GR-55(C)(1) which mandates that machinery equipment used to expand facilities meet the same threshold of that required of machinery or equipment used in new facilities. *See* Ark. Admin. Code § 006.05.212-GR-55(B)(1).

109. By utilizing the De-Vulcanization Technology, Plaintiff can increase both production and volume of final product by freeing operating capital, which is normally taken by input materials costs, to apply to other areas of operation. *See* Ark. Admin. Code § 006.05.212-GR-55(C)(2)(a). This freeing of capital permits efficiencies to be achieved in other areas of the production process.

110. The achievement of such efficiencies permits an increase of production and volume of final product.

111. By utilizing the De-Vulcanization Technology, Plaintiff increased employment.

112. While Plaintiff's human resource strategy for plant operations is demand-driven, Plaintiff hired approximately twelve employees to oversee the operations of the De-Vulcanization Technology.

113. Plaintiff has achieved substantial cost savings by utilizing the De-Vulcanization Technology. Such savings allow Plaintiff to further increase employment by utilizing freed operating capital achieved from its cost savings.

114. By utilizing the De-Vulcanization Technology, Plaintiff has increased the number of different types of models of EPDM rubber roofing that can be produced. *See* Ark. Admin. Code

§ 006.05.212-GR-55(C)(2)(c). Plaintiff's use of the De-Vulcanization Technology allows it to modify the percentage of integrated material into the final product, making Plaintiff able to produce EPDM rubber roofing product of varying compositions.

115. In addition to the economic expansion discussed in the preceding paragraphs, Plaintiff's purchase and utilization of the De-Vulcanization Technology resulted in a physical expansion of Plaintiff's facility. *See* Ark. Admin. Code § 006.05.212-GR-55(C)(2)(c).

116. The manufacturing process has been physically expanded with machinery or equipment. Plaintiff acquired new machinery or equipment, and as such, expanded its facility operations.

117. Plaintiff also experienced a physical expansion of its operations because the acquisition of the De-Vulcanization Technology required additional facilities to house the expanded manufacturing operations.

118. When Plaintiff entered into a lease to house the De-Vulcanization Technology, it increased the real estate footprint upon which its operations are situated.

119. As such, Plaintiff's De-Vulcanization Technology was used in connection with new facilities or used in connection with expanding existing facilities, whether by economic or physical means.

120. In addition to the above pleadings establishing that Plaintiff's De-Vulcanization Technology is used directly in manufacturing or producing of an article of commerce, Ark. Code Ann. § 26-53-114(c)(3)(B)(v) provides that machinery or equipment which produce chemical catalysts and solutions are statutorily deemed to fall within the category of "being used directly in the manufacturing process."

121. The De-Vulcanization Technology produces a thermal catalyst which facilitates the process of transformation of the cuttings of EPDM.

122. The De-Vulcanization Technology's catalyst causes the production of a solution of rubber which is consumed during the course of the EPDM manufacturing process and becomes part of the finished product.

123. The De-Vulcanization Technology is accordingly used directly in manufacturing pursuant to statutory categorization.

124. Plaintiff meets the requirements of the Compensating Use Tax exemption because Plaintiff uses the De-Vulcanization Technology directly in manufacturing, processing, finishing or packaging.

125. Pursuant to the facts alleged in the preceding paragraphs, the De-Vulcanization Technology utilized by Plaintiff (1) is machinery or equipment (2) used directly in its producing, manufacturing, processing, finishing or packaging processes (3) resulting in production of an article of commerce within the meaning of Ark. Code Ann. § 26-53-114 and Ark. Admin. Code §§ 006.05.212 *et seq.*, and as applied by this court and the Arkansas Supreme Court.

126. Plaintiff is therefore exempt from Arkansas Compensating Use Tax for the amounts claimed in the preceding paragraphs.

127. After a fair and reasonable review of the law and facts applicable to this case, should there be any doubt with respect to the imposition of a tax, the rule of strict construction requires that the doubt be resolved against the imposition of the tax. *See* Ark. Code Ann. § 26-18-313(f)(2).

128. Because Plaintiff is exempt from Arkansas Compensating Use Tax for the amounts described in the preceding paragraphs, Plaintiff is entitled to a refund of all taxes and interest that

it paid for the purchase and use of the De-Vulcanization Technology, plus accrued interest from the date of its payment.

VI. GROSS RECEIPTS TAX EXEMPTION

129. Plaintiff incorporates by reference paragraphs 1 through 128 as if fully set forth herein.

130. To the extent that there has been any mischaracterization of tax and interest assessed against Plaintiff by Defendant, and to the extent there will be any re-characterization of tax and interest assessed against Plaintiff by Defendant, Plaintiff asserts provisions of Arkansas law exempting machinery and equipment from Gross Receipts Tax and associated interest.

131. As related to mischaracterized or re-characterized taxation and interest, Plaintiff asserts that the facts alleged in paragraphs 1 through 128, specifically including those relevant to the exemption found at Ark. Code Ann. § 26-52-402, prove that Plaintiff is exempted from Gross Receipts Tax and associated interest on the De-Vulcanization Technology.

VII. DEFENDANT ACTED *ULTRA VIRES* AND IN AN ILLEGAL MANNER TO LEVY A TAX AGAINST PLAINTIFF'S USE OF PROPERTY

132. Plaintiff incorporates by reference paragraphs 1 through 131 as if fully set forth herein.

133. Arkansas levies a tax or excise, at the rate of three percent (3%) of sales price, for the privilege of storing, using, distributing, or consuming tangible personal property within the State of Arkansas. *See* Ark. Code Ann. § 25-53-106(a).

134. Such taxation is called the Compensating Use Tax and its administration is promulgated at the Arkansas Compensating Tax Act of 1949 (the "Act"). *See* Ark. Code Ann. § 26-53-101 *et seq.*

135. However, certain exemptions from taxation under the Act are provided by statute.

136. Such exemptions include, among others, those for certain machinery and equipment as previously described in Section IV of this Complaint. *See* Ark. Code Ann. § 26-53-114.

137. Levying of taxes by Defendant upon property exempt from taxation under any statutory exception is beyond the scope of Defendant's authority because such property is exempt property. *See* Ark. Code Ann. §§ 26-18-301(a); 26-18-401(b); and 26-53-114(a).

138. Defendant's breaching the outer boundaries of his authority constitutes one or more *ultra vires* act(s).

139. Further, levying of taxes by Defendant upon machinery or equipment used directly in manufacturing an article of commerce is illegal under Ark. Code Ann. § 26-53-114(a).

140. To the extent that any claim contained in this Complaint is adversely affected by the Arkansas Supreme Court's recent decision in *Board of Trustees of University of Arkansas v. Andrews*, ---S.W. 3d---, 2018 Ark. 12, 2018 WL 458031 (Ark. 2018), Plaintiff asserts that Defendant's actions are illegal and are outside the scope of any immunity afforded to him under sovereign immunity jurisprudence protecting the State of Arkansas.

141. Defendant's actions are outside the scope of any sovereign immunity protection afforded to him because his actions are *ultra vires*. *See Solomon v. Valco, Inc.*, 702 S.W.2d 6, 288 Ark. 106 (Ark. 1986).

142. Defendant may be made a party to this action if Defendant's actions were illegal. *See Solomon v. Valco, Inc.*, 702 S.W.2d 6, 288 Ark. 106 (Ark. 1986) (providing illegal acts are an exception to the defense of sovereign immunity).

143. Defendant may be made a party to this action if Defendant's actions were *ultra vires*. *See Solomon v. Valco, Inc.*, 702 S.W.2d 6, 288 Ark. 106 (Ark. 1986) (providing *ultra vires* acts are an exception to the defense of sovereign immunity).

144. The Arkansas Supreme Court noted in *Williams v. McCoy*, ---S.W.3d---, 2018 Ark. 17, 2018 WL 458013 that the decision in *Andrews* has not affected any exception to sovereign immunity revolving around illegality, unconstitutionality, or refusal to do a purely ministerial action required by statute.

145. Accordingly, to the extent that any claim contained in this Complaint is adversely affected by the Arkansas Supreme Court's recent decision in *Andrews*, Plaintiff asserts that Defendant may be properly brought before this Court without regard to the doctrine of sovereign immunity as interpreted by *Andrews*.

VIII. REQUESTED RELIEF

WHEREFORE, Plaintiff prays that it be awarded a judgment for a refund of all taxes and interest erroneously assessed for purchase of the De-Vulcanization Technology, plus interest, at the maximum rate allowed by law, accruing from the date of Plaintiff's payment under protest on this amount; that it be awarded a judgment for attorneys' fees and costs pursuant to Arkansas Code Annotated § 26-18-406(e); and for all other just, proper, and appropriate relief to which it may be entitled.

Respectfully submitted,

ROSE LAW FIRM,
a Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131
(501) 375-1309 (fax)

By: 

Paul Parnell, Ark. Bar No. 2008199

pparnell@roslawfirm.com

David S. Mitchell, Jr. Ark. Bar No. 2010271

dmitchell@roslawfirm.com

Michael K. Goswami, Ark. Bar No. 2016132

mgoswami@roslawfirm.com



STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
SOUTHWEST AUDIT DISTRICT
400 LAUREL ST STE 314, TEXARKANA, AR 71854-5208

Summary Of Findings

December 16, 2015

FIRESTONE BUILDING PRODUCTS
535 MARRIOTT DR
NASHVILLE TN 37214-5092

Letter ID: L1337827216
Account ID: 00302572-SLS
Audit ID: A573007872
Audit From: April 01, 2009
Audit To: December 31, 2011

Sales and Use Tax Audit

Date Completed: 12/15/15

Tax Type	Tax	Penalty	Interest	Total
Compensating Use Tax	\$823,906.40	\$0.00	\$416,085.32	\$1,239,991.72
	\$823,906.40	\$0.00	\$416,085.32	\$1,239,991.72

Amount Paid To Auditor: _____

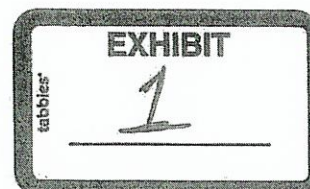
This audit has been performed applying Arkansas laws enacted by the General Assembly, rules promulgated by the Director of the Department of Finance and Administration, and Arkansas court decisions that were effective during the audit. Any future audit will be conducted according to the then prevailing laws, rules, and decisions.

Your signature does not imply either acceptance or disagreement with the audit, but does acknowledge your being informed of the audit results, the basis for any proposed tax adjustment, and the basis for assessment of penalty and interest.

A Notice of Proposed Assessment will be mailed to you at a later date which will reflect the total amounts of tax, penalty and interest due. If this summary is provided to you because of an adjustment that was made after you received a Notice of Proposed Assessment, a Final Assessment will be mailed to you at a later date. Interest at the rate of 10% per annum will continue to accrue until the time the tax is paid in full.

MaryBess Cunningham
Tax Auditor
Phone: (870) 772-5271

Signature (Taxpayer or Agent): _____ Date: _____



	Taxable	Rate	Tax	Penalty Amt / Type	Interest Amt	Total	Credit
Compensating Use Tax							
0016	STATE CONSUMER USE TAX						
Apr-09	\$202,025.80	6.0000%	\$12,121.55	\$0.00	\$7,971.13	\$20,092.68	\$0.00
May-09	\$197,108.71	6.0000%	\$11,826.52	\$0.00	\$7,876.87	\$19,503.39	\$0.00
Jun-09	\$771,783.42	6.0000%	\$46,307.01	\$0.00	\$29,677.51	\$75,984.52	\$0.00
Jul-09	\$330,841.80	6.0000%	\$19,838.50	\$0.00	\$12,545.71	\$32,384.21	\$0.00
Aug-09	\$242,157.77	6.0000%	\$14,528.47	\$0.00	\$9,084.81	\$23,594.38	\$0.00
Sep-09	\$258,438.88	6.0000%	\$15,508.20	\$0.00	\$9,548.83	\$25,053.03	\$0.00
Oct-09	\$194,480.93	6.0000%	\$11,668.86	\$0.00	\$7,085.16	\$18,754.01	\$0.00
Nov-09	\$486,583.84	6.0000%	\$29,195.83	\$0.00	\$17,846.51	\$47,042.34	\$0.00
Dec-09	\$323,287.02	6.0000%	\$19,397.22	\$0.00	\$11,453.48	\$30,850.70	\$0.00
Jan-10	\$275,348.28	6.0000%	\$16,520.78	\$0.00	\$9,614.70	\$26,135.48	\$0.00
Feb-10	\$222,249.86	6.0000%	\$13,334.98	\$0.00	\$7,658.33	\$20,993.31	\$0.00
Mar-10	\$351,040.88	6.0000%	\$21,062.46	\$0.00	\$11,817.35	\$32,878.81	\$0.00
Apr-10	\$183,513.48	6.0000%	\$11,010.81	\$0.00	\$6,139.52	\$17,150.33	\$0.00
May-10	\$341,712.86	6.0000%	\$20,502.78	\$0.00	\$11,257.89	\$31,760.77	\$0.00
Jun-10	\$238,905.20	6.0000%	\$14,214.31	\$0.00	\$7,688.18	\$21,902.49	\$0.00
Jul-10	\$259,216.19	6.0000%	\$15,552.97	\$0.00	\$8,280.12	\$23,833.09	\$0.00
Aug-10	\$383,503.82	6.0000%	\$22,810.20	\$0.00	\$11,428.10	\$33,238.30	\$0.00
Sep-10	\$245,705.48	6.0000%	\$14,742.33	\$0.00	\$7,802.15	\$22,344.48	\$0.00
Oct-10	\$279,611.05	6.0000%	\$16,778.86	\$0.00	\$8,508.69	\$25,286.35	\$0.00
Nov-10	\$407,883.20	6.0000%	\$24,472.98	\$0.00	\$12,210.80	\$36,683.88	\$0.00
Dec-10	\$1,044,344.31	6.0000%	\$62,660.66	\$0.00	\$30,732.55	\$93,393.21	\$0.00
Jan-11	\$168,457.22	6.0000%	\$9,387.43	\$0.00	\$4,524.42	\$13,911.85	\$0.00
Feb-11	\$385,121.80	6.0000%	\$22,087.30	\$0.00	\$10,475.87	\$32,563.17	\$0.00
Mar-11	\$385,172.85	6.0000%	\$23,110.38	\$0.00	\$10,764.81	\$33,875.17	\$0.00
Apr-11	\$232,784.70	6.0000%	\$13,967.68	\$0.00	\$6,391.33	\$20,359.01	\$0.00
May-11	\$525,085.52	6.0000%	\$31,883.93	\$0.00	\$14,228.81	\$45,912.74	\$0.00
Jun-11	\$343,354.58	6.0000%	\$20,601.27	\$0.00	\$9,082.40	\$29,683.67	\$0.00
Jul-11	\$345,463.18	6.0000%	\$20,727.18	\$0.00	\$8,961.88	\$29,689.05	\$0.00
Aug-11	\$554,888.74	6.0000%	\$33,281.98	\$0.00	\$14,107.50	\$47,389.48	\$0.00
Sep-11	\$848,204.33	6.0000%	\$56,772.28	\$0.00	\$23,587.84	\$80,370.10	\$0.00
Oct-11	\$523,869.00	6.0000%	\$31,420.14	\$0.00	\$12,793.15	\$44,213.29	\$0.00
Nov-11	\$483,080.04	6.0000%	\$27,783.80	\$0.00	\$11,084.10	\$38,867.70	\$0.00
Dec-11	\$1,022,553.55	6.0000%	\$61,353.21	\$0.00	\$23,955.36	\$85,308.57	\$0.00
Total	\$13,097,153.95		\$785,829.24	\$0.00	\$385,871.83	\$1,181,701.17	\$0.00
0016	FOOD CONSUMER USE TAX						
Apr-09	\$74.15	3.0000%	\$2.22	\$0.00	\$1.48	\$3.68	\$0.00
May-09	\$74.15	3.0000%	\$2.22	\$0.00	\$1.44	\$3.66	\$0.00
Jun-09	\$74.15	3.0000%	\$2.22	\$0.00	\$1.42	\$3.64	\$0.00
Jul-09	\$74.15	2.0000%	\$1.48	\$0.00	\$0.94	\$2.42	\$0.00
Aug-09	\$74.15	2.0000%	\$1.48	\$0.00	\$0.92	\$2.40	\$0.00
Sep-09	\$74.15	2.0000%	\$1.48	\$0.00	\$0.91	\$2.39	\$0.00
Oct-09	\$74.15	2.0000%	\$1.48	\$0.00	\$0.90	\$2.38	\$0.00
Nov-09	\$30.00	2.0000%	\$0.60	\$0.00	\$0.36	\$0.96	\$0.00
Dec-09	\$74.15	2.0000%	\$1.48	\$0.00	\$0.87	\$2.35	\$0.00
Jan-10	\$151.25	2.0000%	\$3.03	\$0.00	\$1.76	\$4.79	\$0.00
Feb-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.85	\$2.33	\$0.00
Mar-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.84	\$2.32	\$0.00

Penalty Types: 1 - Delinquency 2 - Failure to File/Pay 3 - Fraud

	Taxable	Rate	Tax	Penalty Amt / Type	Interest Amt	Total	Credit
Apr-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.83	\$2.31	\$0.00
May-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.81	\$2.29	\$0.00
Jun-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.80	\$2.28	\$0.00
Jul-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.79	\$2.27	\$0.00
Sep-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.76	\$2.24	\$0.00
Oct-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.76	\$2.23	\$0.00
Nov-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.74	\$2.22	\$0.00
Dec-10	\$74.15	2.0000%	\$1.48	\$0.00	\$0.73	\$2.21	\$0.00
Jan-11	\$74.15	2.0000%	\$1.48	\$0.00	\$0.71	\$2.19	\$0.00
Feb-11	\$74.15	2.0000%	\$1.48	\$0.00	\$0.70	\$2.18	\$0.00
Mar-11	\$74.15	2.0000%	\$1.48	\$0.00	\$0.69	\$2.17	\$0.00
Apr-11	\$74.15	2.0000%	\$1.48	\$0.00	\$0.68	\$2.16	\$0.00
May-11	\$74.15	2.0000%	\$1.48	\$0.00	\$0.66	\$2.14	\$0.00
Jun-11	\$74.15	2.0000%	\$1.48	\$0.00	\$0.65	\$2.13	\$0.00
Jul-11	\$189.49	1.5000%	\$2.84	\$0.00	\$1.23	\$4.07	\$0.00
Aug-11	\$74.15	1.5000%	\$1.11	\$0.00	\$0.47	\$1.58	\$0.00
Sep-11	\$74.15	1.5000%	\$1.11	\$0.00	\$0.46	\$1.57	\$0.00
Nov-11	\$74.15	1.5000%	\$1.11	\$0.00	\$0.44	\$1.55	\$0.00
Dec-11	\$74.15	1.5000%	\$1.11	\$0.00	\$0.43	\$1.54	\$0.00
Total	\$2,446.94		\$48.65	\$0.00	\$26.00	\$74.65	\$0.00
5000	NEVADA COUNTY						
Apr-09	\$50,843.74	1.0000%	\$508.44	\$0.00	\$333.03	\$839.47	\$0.00
May-09	\$49,343.69	1.0000%	\$493.44	\$0.00	\$320.29	\$813.73	\$0.00
Jun-09	\$70,937.30	1.0000%	\$709.37	\$0.00	\$454.63	\$1,164.00	\$0.00
Jul-09	\$70,561.84	1.0000%	\$705.62	\$0.00	\$446.23	\$1,151.85	\$0.00
Aug-09	\$45,010.85	1.0000%	\$450.11	\$0.00	\$280.62	\$730.73	\$0.00
Sep-09	\$80,148.51	1.0000%	\$801.49	\$0.00	\$370.32	\$971.81	\$0.00
Oct-09	\$49,406.10	1.0000%	\$494.06	\$0.00	\$300.00	\$794.06	\$0.00
Nov-09	\$99,287.27	1.0000%	\$992.87	\$0.00	\$594.69	\$1,587.56	\$0.00
Dec-09	\$43,928.64	1.0000%	\$439.27	\$0.00	\$269.38	\$698.65	\$0.00
Jan-10	\$57,136.84	1.0000%	\$571.37	\$0.00	\$332.52	\$903.89	\$0.00
Feb-10	\$44,828.01	1.0000%	\$448.28	\$0.00	\$266.30	\$702.58	\$0.00
Mar-10	\$44,845.31	1.0000%	\$448.45	\$0.00	\$254.30	\$703.75	\$0.00
Apr-10	\$43,888.31	1.0000%	\$438.88	\$0.00	\$244.70	\$683.58	\$0.00
May-10	\$44,256.31	1.0000%	\$442.56	\$0.00	\$243.01	\$685.57	\$0.00
Jun-10	\$43,371.48	1.0000%	\$433.71	\$0.00	\$234.58	\$668.29	\$0.00
Jul-10	\$44,256.31	1.0000%	\$442.56	\$0.00	\$235.81	\$678.17	\$0.00
Aug-10	\$30,034.11	1.0000%	\$300.34	\$0.00	\$187.34	\$487.68	\$0.00
Sep-10	\$50,118.00	1.0000%	\$501.18	\$0.00	\$268.43	\$759.59	\$0.00
Oct-10	\$87,010.90	1.0000%	\$870.11	\$0.00	\$339.86	\$1,009.97	\$0.00
Nov-10	\$82,829.94	1.0000%	\$828.30	\$0.00	\$313.49	\$941.79	\$0.00
Dec-10	\$51,758.31	1.0000%	\$517.58	\$0.00	\$263.84	\$771.40	\$0.00
Jan-11	\$45,429.13	1.0000%	\$454.29	\$0.00	\$218.95	\$673.24	\$0.00
Feb-11	\$49,687.79	1.0000%	\$496.88	\$0.00	\$235.57	\$732.25	\$0.00
Mar-11	\$54,130.79	1.0000%	\$541.31	\$0.00	\$252.14	\$793.45	\$0.00
Apr-11	\$44,515.99	1.0000%	\$445.16	\$0.00	\$203.70	\$648.86	\$0.00
May-11	\$45,178.57	1.0000%	\$451.77	\$0.00	\$202.88	\$654.65	\$0.00
Jun-11	\$45,218.31	1.0000%	\$452.18	\$0.00	\$199.34	\$651.50	\$0.00
Jul-11	\$39,381.67	1.0000%	\$393.82	\$0.00	\$170.19	\$563.81	\$0.00
Aug-11	\$58,572.31	1.0000%	\$585.72	\$0.00	\$248.27	\$833.99	\$0.00

Penalty Types: 1 - Delinquency 2 - Failure to File/Pay 3 - Fraud

	Taxable	Rate	Tax	Penalty Amt / Type	Interest Amt	Total	Credit
Sep-11	\$66,379.65	1.0000%	\$663.80	\$0.00	\$275.91	\$939.71	\$0.00
Oct-11	\$52,818.67	1.0000%	\$528.19	\$0.00	\$215.06	\$743.25	\$0.00
Nov-11	\$81,203.17	1.0000%	\$812.03	\$0.00	\$244.17	\$856.20	\$0.00
Dec-11	\$97,945.85	1.0000%	\$979.46	\$0.00	\$382.43	\$1,361.89	\$0.00
Total	\$1,783,914.47		\$17,839.16	\$0.00	\$9,331.98	\$27,171.13	\$0.00
5001	PRESCOTT						
Apr-09	\$50,643.74	2.3750%	\$1,202.79	\$0.00	\$790.85	\$1,993.74	\$0.00
May-09	\$49,343.69	2.3750%	\$1,171.91	\$0.00	\$760.89	\$1,932.80	\$0.00
Jun-09	\$70,937.30	2.3750%	\$1,684.76	\$0.00	\$1,079.74	\$2,764.50	\$0.00
Jul-09	\$70,581.84	1.0000%	\$705.82	\$0.00	\$448.23	\$1,151.85	\$0.00
Aug-09	\$45,010.85	1.0000%	\$450.11	\$0.00	\$280.82	\$730.93	\$0.00
Sep-09	\$60,148.51	1.0000%	\$601.49	\$0.00	\$370.32	\$971.81	\$0.00
Oct-09	\$49,409.10	1.0000%	\$494.09	\$0.00	\$300.00	\$794.09	\$0.00
Nov-09	\$99,287.27	1.0000%	\$992.87	\$0.00	\$594.69	\$1,587.56	\$0.00
Dec-09	\$43,925.54	1.0000%	\$439.27	\$0.00	\$259.38	\$698.65	\$0.00
Jan-10	\$57,136.84	1.0000%	\$571.37	\$0.00	\$332.52	\$903.89	\$0.00
Feb-10	\$44,828.01	1.0000%	\$448.28	\$0.00	\$256.30	\$702.58	\$0.00
Mar-10	\$44,945.31	1.0000%	\$449.45	\$0.00	\$254.30	\$703.75	\$0.00
Apr-10	\$43,886.31	1.0000%	\$438.86	\$0.00	\$244.70	\$683.56	\$0.00
May-10	\$44,256.31	1.0000%	\$442.56	\$0.00	\$243.01	\$685.57	\$0.00
Jun-10	\$43,371.48	1.0000%	\$433.71	\$0.00	\$234.68	\$668.29	\$0.00
Jul-10	\$44,256.31	1.0000%	\$442.56	\$0.00	\$235.61	\$678.17	\$0.00
Aug-10	\$30,034.11	1.0000%	\$300.34	\$0.00	\$157.34	\$457.68	\$0.00
Sep-10	\$50,116.00	1.0000%	\$501.16	\$0.00	\$258.43	\$759.59	\$0.00
Oct-10	\$67,010.90	1.0000%	\$670.11	\$0.00	\$339.88	\$1,009.97	\$0.00
Nov-10	\$62,829.94	1.0000%	\$628.30	\$0.00	\$313.49	\$941.79	\$0.00
Dec-10	\$51,758.31	1.0000%	\$517.58	\$0.00	\$253.84	\$771.40	\$0.00
Jan-11	\$45,428.13	1.0000%	\$454.28	\$0.00	\$218.95	\$673.24	\$0.00
Feb-11	\$49,667.79	1.0000%	\$496.68	\$0.00	\$235.57	\$732.25	\$0.00
Mar-11	\$54,130.79	1.0000%	\$541.31	\$0.00	\$252.14	\$793.45	\$0.00
Apr-11	\$44,515.99	1.0000%	\$445.16	\$0.00	\$203.70	\$648.86	\$0.00
May-11	\$45,178.57	1.0000%	\$451.77	\$0.00	\$202.88	\$654.65	\$0.00
Jun-11	\$45,216.31	1.0000%	\$452.16	\$0.00	\$199.34	\$651.50	\$0.00
Jul-11	\$39,961.67	1.0000%	\$399.62	\$0.00	\$170.19	\$569.81	\$0.00
Aug-11	\$58,572.31	1.0000%	\$585.72	\$0.00	\$248.27	\$833.99	\$0.00
Sep-11	\$66,379.65	1.0000%	\$663.80	\$0.00	\$275.91	\$939.71	\$0.00
Oct-11	\$52,818.67	1.0000%	\$528.19	\$0.00	\$215.06	\$743.25	\$0.00
Nov-11	\$81,203.17	1.0000%	\$812.03	\$0.00	\$244.17	\$856.20	\$0.00
Dec-11	\$97,945.85	1.0000%	\$979.46	\$0.00	\$382.43	\$1,361.89	\$0.00
Total	\$1,783,914.47		\$20,199.36	\$0.00	\$10,855.41	\$31,044.77	\$0.00
Total Compensating Use Tax			\$823,988.40	\$0.00	\$416,085.32	\$1,239,981.72	\$0.00

Basis for Adjustment

FIRESTONE BUILDING PRODUCTS CO., LLC

Account ID: 00302572-SLS
 Audit ID: A573007872
 Audit From: April 01, 2009
 Audit To: December 31, 2011

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Use

0015	STATE CONSUMER USE TAX	
	Fixed Assets/Capital Expenses	7,297,492.37
	Additional Taxable Expenses using Actual Amounts for Test Months & Average for Remaining Months	2,603,478.59
	Additional Taxable Utilities	3,196,182.99
		<hr/>
		13,097,153.95
0016	FOOD CONSUMER USE TAX	
	Additional Taxable Food Items using Actual Amounts for Test Months & Average for Remaining Months	2,446.94
		<hr/>
		2,446.94
5000	NEVADA COUNTY	
	Additional Taxable Food Items using Actual Amounts for Test Months & Average for Remaining Months	2,446.94
	Additional Taxable Expenses using Actual Amounts for Test Months & Average for Remaining Months	963,011.27
	Additional Taxable Utilities	165,000.00
	Fixed Assets/Capital Expenses	653,456.26
		<hr/>
		1,783,914.47
5001	PRESCOTT	
	Fixed Assets/Capital Expenses	653,456.26
	Additional Taxable Expenses using Actual Amounts for Test Months & Average for Remaining Months	963,011.27
	Additional Taxable Utilities	165,000.00
	Additional Taxable Food Items using Actual Amounts for Test Months & Average for Remaining Months	2,446.94
		<hr/>
		1,783,914.47

Interest at the rate of 10% per annum is calculated in accordance with Ark. Code Ann. § 28-18-508.