

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

* * * * *
IN RE: AQUEOUS FILM-FORMING *
FOAMS PRODUCTS LIABILITY * MDL No. 2:18-mn-2873
LITIGATION *
* * * * * April 5, 2019
* * * * *

REPORTER'S OFFICIAL TRANSCRIPT OF THE
STATUS CONFERENCE HELD BEFORE THE
HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE
APRIL 5, 2019

Appearances:

For the Plaintiffs: Fred Thompson
Erin Dickinson
Gale Pearson
Ann Saucer
Nancy Christensen
Matt Edling
David McDivitt
Kevin Hannon
Daniel Osborn
Joshua Cohan
Larry Cohan
Tope Leyimu
David Hoyle
Dick Ortega
James Ferraro
John Paul Portal
Carl L. Solomon
Ben Kaplan
Charles Crueger
Charles Schaffer
Richard Head
John Gilmour
Frank Gallucci
Marie Napoli
Jim Ferraro
Joseph Feliciani
Rich Lewis
Christina Cossich

Appearances:

For the Plaintiffs:

Kyle McGee
Mihir Desai
Alan Knauf
Michael London
Scott Summy
Phil Cossich
Carla Burke Pickrel
Rebecca Newman
Paul Napoli
Tate Kunkle
Roe Frazer

For the Defendants:

Mike Olson
Brian Duffy
Dan Ring
Liat Rome
Liam Montgomery
Joe Petrosinelli
Sarah Williams
Lee Berlinsky
Jerald C. Thompson
Samuel Dolinger
Michael Carpenter
Christopher Welchel
Ellen Nunno Corbo
Nicholas Mino
Mihir Desai
Elizabeth Knauer
Courtney Enloe
Lyn Pruitt
Jennifer Huang
Eugene Massamillo
Amanda Kitts
Julie Moore
David Dukes
John Cerreta
Jonathan Handler
Keith Smith

Official Court Reporter:

Tana J. Hess, CRR, FCRR, RMR
U.S. District Court Reporter
85 Broad Street
Charleston, SC 29401
843.779.0837
tana_hess@scd.uscourts.gov

Proceedings recorded by mechanical stenography using
computer-aided transcription software.

1 10:09AM 1 like to be heard separately on a couple of --

2 10:09AM 2 THE COURT: Ms. Williams, we will make sure you get
3 10:09AM 3 heard. Thank you.

4 10:09AM 4 MS. WILLIAMS: Thank you, Your Honor.

5 10:09AM 5 THE COURT: Yes?

6 10:09AM 6 MS. KNAUER: Your Honor, Elizabeth Knauer from Sive,
7 10:09AM 7 Paget and Riesel for the Port Authority --

8 10:09AM 8 THE COURT: We can't hear you up here.

9 10:09AM 9 MS. KNAUER: Sorry. Elizabeth Knauer for the Port
10 10:09AM 10 Authority of New York and New Jersey. I don't anticipate
11 10:09AM 11 speaking, but I may -- I may want to.

12 10:10AM 12 THE COURT: Very good. And by the way, for other
13 10:10AM 13 people who may -- you know, something may be raised that you
14 10:10AM 14 want to be heard on, and you'll just simply -- you know, you
15 10:10AM 15 don't have just to anticipate that maybe something could come
16 10:10AM 16 up. Just stand up so my court reporter knows who you are,
17 10:10AM 17 okay?

18 10:10AM 18 And one of the things I think is like important
19 10:10AM 19 is that you don't get pushed down in an MDL where you just
20 10:10AM 20 don't have the capacity to be heard. If you have an interest
21 10:10AM 21 distinct from other plaintiffs, other defendants, et cetera, I
22 10:10AM 22 want to afford you the opportunity to be heard if necessary. I
23 10:10AM 23 don't want -- you know, it's important to have organization, to
24 10:10AM 24 have leadership. It's hard to do this without it, but, on the
25 10:10AM 25 other hand, there may be parties with distinct interests, and I

1 want to make sure they don't feel like the MDL bubbles them.

2 So I will -- I'll try to make myself available for them.

3 Let me -- I was asked to try to designate six
4 months in advance future status conference dates, and I'm going
5 to apologize that I just don't -- you know, that I have a very
6 heavy docket, and I'm sure there are dates that I could
7 probably be more accommodating to some than others, but I have
8 really got a load of stuff on my docket here.

9 So the next -- and I'm going to keep them on
10 Fridays. We're going to keep that the best we can. Friday,
11 May 17th, 9:00 a.m., will be our next one, and we'll post these
12 after the hearing today. The June conference will be on June
13 21, 2019. The July conference on July 26th, 2019. I know this
14 is going to break everybody's heart, but we're going to skip
15 August. It's just unbearable here. You won't be able to
16 explain to your family that it's this hot if you bring them
17 here, and it's -- times with kids going back to school and
18 ending vacations, and I just don't want to disrupt people's
19 lives. We're going to do September on September 6th, so early
20 in September we'll get back together. And then October will be
21 October 11th. And then in a couple of months, I'll do it again
22 for the next six months, okay?

23 Okay. I have -- let me first address the
24 proposed scheduling order, which -- and no criticism of it.
25 It's more like what we're planning to do in the near future

10:12AM 1 than a scheduling order, but that's okay, because there are
10:12AM 2 important issues here that need to get resolved, and my
10:12AM 3 philosophy on things like confidentiality orders, ESI protocols
10:12AM 4 and all of that, I would rather y'all work it out if you can,
10:12AM 5 because you're going to know your case better than I do.

10:12AM 6 And, I mean, in the Lipitor thing, I got into
10:12AM 7 key words for -- they couldn't agree on anything, and it was
10:13AM 8 driving me kind of crazy that I had to get there and do this,
10:13AM 9 but if I do, I will do it, if we can't make a decision, but I
10:13AM 10 want to give y'all enough time and space to work it out,
10:13AM 11 because you will always know your case better than I do.

10:13AM 12 In a little while, I'm going to raise with y'all
10:13AM 13 just to give y'all -- give me some little background into sort
10:13AM 14 of people's approach and philosophy and where the case is
10:13AM 15 going, so I kind -- as we deal with discovery issues and so
10:13AM 16 forth, I can get an idea of what's important, what's not
10:13AM 17 important, and so forth.

10:13AM 18 Okay. First of all, as to the ESI protocol,
10:13AM 19 who's going to speak, Mr. Thompson? I just want sort of an
10:13AM 20 idea from someone on the plaintiff's side and someone from the
10:13AM 21 defense sort of what are we thinking about, what are we doing,
10:13AM 22 just a general idea. Who might be able to address that?

10:13AM 23 **MR. THOMPSON:** Your Honor, let me -- it's always good
10:13AM 24 to speak on a subject that you only know a certain amount
10:13AM 25 about.

10:13AM 1 THE COURT: Right. Then if you make a mistake, you
10:13AM 2 can blame somebody else for it; right? Or ignorance.

10:13AM 3 MR. THOMPSON: And once you run out of things to say,
10:14AM 4 you shut up.

10:14AM 5 THE COURT: Right. Some people don't do that,
10:14AM 6 Mr. Thompson.

10:14AM 7 MR. THOMPSON: well --

10:14AM 8 THE COURT: Present company is excluded.

10:14AM 9 MR. THOMPSON: I'm speechless on that, Judge. Judge,
10:14AM 10 we have a -- a situation where we are -- we have existing
10:14AM 11 documents that have been produced --

10:14AM 12 THE COURT: Right. We're going to talk about that in
10:14AM 13 a minute. I want to understand that.

10:14AM 14 MR. THOMPSON: We have -- I think there may be as
10:14AM 15 many as nine defendants that we are going to be making
10:14AM 16 discovery from. And it's -- and we also have plaintiffs with
10:14AM 17 different perspectives. And so we -- it's not a very
10:14AM 18 straightforward thing to simply create a depository and figure
10:14AM 19 out which is the cheapest and which is the most resilient.

10:14AM 20 We do have sort of basic issues, and it's our
10:14AM 21 intention -- and we did this yesterday at some length -- to
10:14AM 22 identify a committee to reach these decisions, how we bring in
10:15AM 23 data, what search engine and what storage we use, and certainly
10:15AM 24 the cost of it is very important to us.

10:15AM 25 THE COURT: I mean, you don't want to be the dog that

1 caught the tire; right? You get -- I mean, you know, I -- I've
2 seen sometimes we get discovery where the party requesting gets
3 so much, it just overwhelms them. They don't have any capacity
4 for it. It was very expensive to get it, and then processing
5 it is challenging. I do think refining your -- you know, what
6 you're looking for, and I want to know a little bit sort of
7 where the parties sort of see their major issues. I'm not
8 trying to bind anybody. I'm just going to have a better feel
9 about where discovery is going to go.

10 I will tell you this about my inclination on
11 discovery disputes at this point. You're going to be
12 litigating the claims of probably in the end thousands,
13 maybe -- maybe even tens of thousands of people, potential
14 claims. And I don't want a feeling at the end of this that
15 somehow something that was potentially probative and relevant
16 to the claims of all these people somehow didn't get
17 discovered. So I'm going to be inclined -- you know, we're
18 supposed to do this cost benefit. What is the -- when you get
19 vast numbers of claims, that lends a lot towards discovery. I
20 mean, it just does. So as -- you know, as people are kind of
21 getting a little stingy about coughing up something, I'm
22 probably not going to be your best friend on that, because I do
23 think -- and I ask all the parties to restrain themselves,
24 because, you know, you don't want to be overwhelmed, and I know
25 on some of these issues we could be talking about 70 years of

10:16AM 1 history; right? I mean, you just do not want to overwhelm
10:16AM 2 yourself.

10:16AM 3 I will tell you in the Lipitor litigation, I
10:16AM 4 would run into young lawyers who used to tell me, "I can't get
10:16AM 5 a job. I worked hard in law school. I have this huge debt. I
10:16AM 6 am so sad." I then started getting told, "I just got hired to
10:17AM 7 do contract work." Guess what they were all doing? They were
10:17AM 8 all doing Lipitor discovery work; right? I employed the entire
10:17AM 9 unemployed group of lawyers in all of South Carolina, okay?
10:17AM 10 There were people from North Carolina and Georgia getting
10:17AM 11 hired, okay?

10:17AM 12 But, you know, and I never really talked to the
10:17AM 13 lawyers about was that cost effective, but I did think that one
10:17AM 14 ought to have the prerogative in this situation to really have
10:17AM 15 discovery. We feel like if -- if someone doesn't succeed, they
10:17AM 16 want, you know -- have this idea that somehow I will interfere
10:17AM 17 with their ability to get to the truth. So just sort of
10:17AM 18 remember that in these -- but that's not a license just to go
10:17AM 19 without any discipline and without any real thought to just
10:17AM 20 discover the world, because that's not -- that's not
10:17AM 21 appropriate either.

10:17AM 22 So are you talking about -- Mr. Thompson, about
10:18AM 23 the ESI protocol now?

10:18AM 24 **MR. THOMPSON:** Judge, I was first talking about our
10:18AM 25 own internal --

10:18 AM 1 THE COURT: Right, internally figuring it out.

10:18 AM 2 MR. THOMPSON: I don't want to speak for the defense
10:18 AM 3 side --

10:18 AM 4 THE COURT: They won't let you anyway.

10:18 AM 5 MR. THOMPSON: -- but we have a meeting that's
10:18 AM 6 already scheduled for April the 18th, and that is one of the
10:18 AM 7 topics that we will address, and I'm hopeful that -- you know,
10:18 AM 8 the -- we're thrown into the river, but the river has many,
10:18 AM 9 many -- has a lot of other times through, so I don't think
10:18 AM 10 we're reinventing the wheel. I think that we can use some
10:18 AM 11 successful things that have been used in other litigations as a
10:18 AM 12 go-by.

10:18 AM 13 THE COURT: There have been some -- obviously some
10:18 AM 14 work in this area. I mean, sometimes people think about, "Oh,
10:18 AM 15 this term is going to be a humdinger," and it ends up being,
10:18 AM 16 you know, you get the universe of information or you get
10:18 AM 17 nothing. And, you know, so as y'all are doing ESI protocols
10:19 AM 18 and looking for key words, just know that some level of
10:19 AM 19 experimentation -- and y'all ought to be open if y'all agree on
10:19 AM 20 something, and you come back and say, "This is like enormous
10:19 AM 21 what you're about to get," that y'all keep talking about it,
10:19 AM 22 because you're burdening each other, you know, when you do
10:19 AM 23 something like that.

10:19 AM 24 So if the answer is y'all are getting ready to
10:19 AM 25 meet on it, I think that's great. Mr. Petrosinelli or whoever

10:19 AM 1 from the defense?

10:19 AM 2 **MR. PETROSINELLI:** Yes, Your Honor. That is right.
10:19 AM 3 I think -- as Mr. Thompson said and I think as often happens in
10:19 AM 4 MDLs, there was one case in particular where we actually
10:19 AM 5 produced hundreds of thousands --

10:19 AM 6 **THE COURT:** Colorado, right, vail?

10:19 AM 7 **MR. PETROSINELLI:** Yes, sir. And so we had search
10:19 AM 8 terms and ESI and that was produced. Now, the plaintiffs have
10:19 AM 9 said quite rightly that obviously that's not the whole shebang
10 10 here.

10:19 AM 11 **THE COURT:** But it's instructive, and I'm sure the
10:19 AM 12 plaintiffs will talk to the lawyers from Colorado about what
10:19 AM 13 they learned from that, and it's a good start, but I don't want
10:19 AM 14 any of y'all to feel like you get one bite at the apple and
10:20 AM 15 then whatever happens, tough.

10:20 AM 16 **MR. PETROSINELLI:** Of course.

10:20 AM 17 **THE COURT:** We want to -- we want to -- and I keep
10:20 AM 18 telling the parties who like don't like me doing this, I'll
10:20 AM 19 say, "Later you may thank me that it's not an issue on appeal
10:20 AM 20 that you didn't produce discovery on both sides." I'm just
10:20 AM 21 saying you don't want that to be a defense, and I assure you
10:20 AM 22 with me you will not have that problem. Okay? It'll be just
10:20 AM 23 the opposite, and -- but we're going to show some restraint.

10:20 AM 24 Confidentiality order. That ought to be pretty
10:20 AM 25 straightforward. Where is that, Mr. Thompson?

10:20AM 1 MR. THOMPSON: Judge, it's a -- if I could punt until
10:20AM 2 April the 18th as well.

10:20AM 3 THE COURT: I'm fine on that. I just kind of want to
10:20AM 4 know -- I want you to know it's all on my radar.

10:20AM 5 MR. THOMPSON: Yes, sir.

10:20AM 6 THE COURT: Because in our May meeting, I want to
10:20AM 7 kind -- this is like minor stuff that I feel like we just need
10:20AM 8 to get out of the way so we can get on to the real issues of
10:20AM 9 discovery.

10:20AM 10 MR. THOMPSON: Judge, I don't sense that that's
10:20AM 11 controversial. I think that that's on the plate of things
10:21AM 12 to --

10:21AM 13 THE COURT: Good. Y'all talked about --

10:21AM 14 MR. THOMPSON: Oh, oh, oh. I do want --

10:21AM 15 THE COURT: Yes.

10:21AM 16 MR. THOMPSON: Mike points out, Judge, there are
10:21AM 17 multiple defendants. There are plaintiffs that are not exactly
10:21AM 18 in the same situation, and so there is a complexity to the
10:21AM 19 confidentiality and the protective order.

10:21AM 20 THE COURT: Y'all need to work that out. And let me
10:21AM 21 say this. I know that some parties would say, "You know, I'm
10:21AM 22 being dumped in with a group of people that I may sue myself.
10:21AM 23 Okay? That we are -- we're not really compatible. We're kind
10:21AM 24 of competitors in some way." Folks, the defense and plaintiff
10:21AM 25 structure in my mind -- I know there are other purposes, but

1 for the Court the major purpose is to have some coherence in
2 the organization of discovery. It's got to be a traffic cop
3 somewhere, and that's the traffic cop with this caveat. If the
4 team that you're somehow put on, you think you're not being
5 allowed to pursue discovery, you let me know that. We'll talk
6 about it, but what we can't have is 19 people wanting to depose
7 the same person on different days and all of that. We just
8 can't have that, and we got to have some coherence.

9 There needs to be someone in charge, and the way
10 we do is we have the leadership of the house -- of the
11 plaintiff and defense committees, being the traffic cops, with
12 an appeal to me. So if you're concerned that your discovery is
13 not getting done because perhaps -- you would feel like perhaps
14 these leadership have conflicts with you and won't let do you
15 that, you let me know. We're having monthly meetings. You
16 just come in and tell me, let me know that, and we'll make
17 sure -- we don't have to have a third and fourth and fifth
18 committee to accomplish this. I'll deal with that. And, you
19 know, to the extent -- I'm not really anticipating that
20 problem, because the folks will know that you're coming to me,
21 and usually these things get worked out. And if there's a
22 problem one time, there probably won't be a problem after that.

23 So everybody lighten up about all of this.
24 Nobody is giving anything away by being on one committee or
25 another committee. It's just some rough organization so that

1 liaison counsel can talk to each other and the Court about --
2 if we're having problems about scheduling depositions and when
3 are we going to get things done and all of that.

4 A central depository. Y'all thinking about
5 doing a joint central depository, one for the plaintiff, one
6 for the defendant? what are y'all thinking about?

7 **MR. THOMPSON:** Judge, that -- that is a product of
8 Joe Rice's fertile imagination. I don't think that that is
9 going to be a -- doable.

10 **THE COURT:** That's okay. I mean, whatever -- I mean,
11 obviously one of the major functions of the leadership is to
12 make the documents -- you know, is to gather them and to make
13 them available, and everybody pays for that. I mean, that's
14 sort of the structure of these -- of these committees. And I'm
15 not pushing you to do it. I have not seen anyone to do it
16 jointly before, but whatever y'all want to do will suit me fine
17 as long as it works for y'all.

18 Plaintiff and defense fact sheets. The -- they
19 were giving to me what I thought was a pretty ambitious date of
20 April 30th, and then I saw a note that the plaintiffs'
21 committee was wondering whether there was enough time to do --
22 someone talk to me about sort of what your goals are on the
23 fact sheets. What are you trying to generally obtain by them?
24 who wants to speak from the plaintiff?

25 **MR. LONDON:** Your Honor, Michael London for the

10:24 AM 1 plaintiff.

10:24 AM 2 THE COURT: Yes, sir.

10:24 AM 3 MR. LONDON: I frankly think what is going to be
10:24 AM 4 gained from the fact sheets is a question for the defendants.
10:24 AM 5 However, what I do think they want to use them for, the
10:24 AM 6 questions directed to the plaintiff's set, is they're in lieu
10:24 AM 7 of interrogatories. We see them in mass torts for 25 years.

10:24 AM 8 THE COURT: Well, I see them, Mr. London, on the --
10:24 AM 9 for -- to be a benefit to both of you. I do agree that it's
10:25 AM 10 very important for the plaintiffs to say, "If you have a
10:25 AM 11 personal injury claim, what is the claim?" I think they're
10:25 AM 12 entitled to that. "And to the extent there's a property claim,
10:25 AM 13 when did you live there and what -- what's the basis? You
10:25 AM 14 know, why do you think you have a property claim?" If you are
10:25 AM 15 medical monitoring, that might be a different fact sheet
10:25 AM 16 because that's a whole 'nother sort of -- again, you got to
10:25 AM 17 kind of put your place in the zone of danger, so to say.

10:25 AM 18 MR. LONDON: And that's -- we agree, Your Honor.
10:25 AM 19 They are devices for case-specific plaintiff-specific
10:25 AM 20 information.

10:25 AM 21 THE COURT: Well, here's the thing, is you may want
10:25 AM 22 to do this -- all of these are discovery devices. You may want
10:25 AM 23 to do your interrogatories or requests to produce to the
10:25 AM 24 defendants more in interrogatories rather than a fact sheet,
10:25 AM 25 but I don't care how you do it.

1 I had the troubling experience in Lipitor that a
2 fair number of the identified plaintiffs would never produce
3 fact sheets, and there were certain law firms that seemed to
4 have more of those than others. And it was extremely
5 burdensome to both the leadership of the defense and the
6 leadership of the plaintiffs. And I want to kind of get that
7 out of the way, because I don't want y'all similarly burdened.

8 **MR. LONDON:** Your Honor, we've seen unfortunately
9 that in other mass plaintiff cases, and I think there are a few
10 ways to address that, and we hope to talk to the defendants
11 about that. I did think this time might be short to accomplish
12 such a goal, because stepping back, I think there are going to
13 be multiple levels of fact sheets if, in fact, that's the
14 discovery device defense use. There's, as Your Honor alluded
15 to, the plaintiff injury fact sheet. Where were you injured?
16 Where did you drink the water? Personal facts. There's the
17 municipality.

18 **THE COURT:** Right.

19 **MR. LONDON:** Injury is very different. You know,
20 those case-specific --

21 **THE COURT:** You got to have different fact sheets.

22 **MR. LONDON:** Precisely, and I think 25 days is a
23 little aggressive.

24 **THE COURT:** Well, what --

25 **MR. LONDON:** Your Honor, to the other point on

1 deficiencies, and that is, you know, the government term,
2 that's something that we need to explore with the defendants,
3 because we don't want that problem. And one correction that
4 I've seen recently is instead of a robust 27-page plaintiff
5 fact sheet where you identify the aunts and uncles and --

6 **THE COURT:** We do not need that.

7 **MR. LONDON:** It's a plaintiff profile form that's two
8 pages and gets to the core of the information and the
9 medical --

10 **THE COURT:** I'm not going to tell you if it's 2 pages
11 or 27 pages, but I will tell you that you do not need the
12 proctology report, okay? And you don't need everything about
13 them, and that's what other discovery is for.

14 And I got to tell you, I think in this case, I
15 want to hear y'all later about what you're thinking about
16 discovery. I think we ought to be looking at sort of the
17 general area initially rather than individual claims, about
18 what we would generally refer to as general causation, and
19 let's get all of that down, and we'll at some point need to
20 focus on the individual claims. But I think initially we
21 got -- we need to get -- we just can't do everything at one
22 moment, and I kind of think that we're going to have our hands
23 full just on getting the history here, and I know there are --
24 that some parties want to pursue certainly immunities that go
25 back maybe 70 years of history. I just kind of think we need

1 to do the -- and if y'all feel strongly otherwise, I'm glad to
2 talk about that, but I do think we need to go and get the
3 plaintiff fact sheets, get the people out that have no claims,
4 get that out of the way, but that we initially try to focus on
5 the sort of general causation issues and general what are the
6 facts here rather than individual injury. Does anybody have
7 like any heartburn about that approach?

8 **MR. OLSON:** Your Honor, not at all. We agree I think
9 with everything you've just said, Your Honor. The only issue
10 on the plaintiff fact sheets where we wanted to move a little
11 faster than the plaintiff's group, we just want to get started
12 with that practice.

13 **THE COURT:** I want you to get started. I'm not
14 worried about April 30th. May 17th is when we're getting
15 together. You know, you'll have a couple more weeks, and if
16 you come back, and if y'all aren't together by then, we'll talk
17 about it, okay? But I do think that everybody -- I found on
18 reflection the plaintiff fact sheets were to the benefit of
19 everybody, but we're not going to overdo the plaintiff fact
20 sheets. We're not -- you know, there will be other times,
21 because in the end, the level of detail you're going to need to
22 drill down on might be -- I mean, if we get to some point where
23 we're looking for some bellwether cases, the better thing to do
24 is just really focus on the bellwether cases and do serious
25 discovery on those.

10:29AM 1 MR. LONDON: And we couldn't agree more, Your Honor.
10:29AM 2 And I think frankly our position on the fact sheet was
10:29AM 3 certainly not to delay. It was to -- this is unique. This is
10:29AM 4 not Lipitor or another pharmaceutical mass tort where you've
10:29AM 5 got a plaintiff injury. If we're creating five to six
10:29AM 6 different unique fact sheets, our position is let's not rush
10:30AM 7 and now have to have the third amended plaintiff profile fact
10:30AM 8 sheet.

10:30AM 9 THE COURT: I'm okay with that. I'm just saying, Mr.
10:30AM 10 London, hear me out on this. We're meeting monthly.

10:30AM 11 MR. LONDON: Oh, absolutely.

10:30AM 12 THE COURT: And we're making progress. I'm okay.
10:30AM 13 And it may be that we got agreement on 3 of the 6 in May and 3
10:30AM 14 of the -- the last 3 in June. I'm okay with that. The key
10:30AM 15 reason I'm meeting is to keep the process moving and keep my
10:30AM 16 hands on it to make sure it keeps moving.

10:30AM 17 MR. LONDON: Thank you.

10:30AM 18 MR. OLSON: Your Honor, the only last point I'll
10:30AM 19 make, I won't belabor it, I think we agree on a lot with
10:30AM 20 respect to we may decide that defendant fact sheets, we're
10:30AM 21 going to accomplish a lot of that through discovery. Certain
10:30AM 22 plaintiff groups, we're going to accomplish a lot of that
10:30AM 23 through discovery, but in particular with respect to the
10:30AM 24 personal injury plaintiffs, I think we want to get a fact sheet
10:30AM 25 process underway so that we can get to the point where we're

10:30 AM 1 talking about --

10:30 AM 2 **THE COURT:** You're not starting --

10:30 AM 3 **MR. OLSON:** Tracking, bellwethers eventually, and we
10:30 AM 4 know who we're talking about.

10:30 AM 5 **THE COURT:** Correct. And I'm going to tell you
10:30 AM 6 something. The fact sheets help you -- if both sides are
10:30 AM 7 trying to figure out about appropriate bellwethers, you need
10:31 AM 8 some information that you don't get a case that's not
10:31 AM 9 representative or whatever.

10:31 AM 10 **MR. LONDON:** Agreed.

10:31 AM 11 **THE COURT:** Enough talk on fact sheets. I will talk
10:31 AM 12 about it again in May.

10:31 AM 13 Talk to me about what was done in those -- you
10:31 AM 14 know, in the Colorado case and how adequate that discovery was
10:31 AM 15 versus what else we need to do in terms of getting the
10:31 AM 16 information.

10:31 AM 17 **MR. PETROSINELLI:** Your Honor, so in the Bell case,
10:31 AM 18 there was a class certification phase of the case. In that
10:31 AM 19 phase of the case, there were, as I mentioned earlier, in terms
10:31 AM 20 of document requests several of the defendants -- I know I can
10:31 AM 21 speak for Tyco and Chemguard, and 3M I know is in the same
10:31 AM 22 boat -- produced hundreds of thousands of pages of documents
10:31 AM 23 that went to general liability, I'll call it. There was --
10:31 AM 24 there were search terms negotiated. There were custodians, you
10:31 AM 25 know, email custodians in each company for again Tyco,

1 Chemguard, and 3M at a minimum. Those documents were produced,
2 and then there were interrogatories. There were expert reports
3 that even touched upon -- even though it was in the class
4 certification phase, touched upon some of the general causation
5 issues that we're going to deal with here. And then there were
6 depositions of -- the depositions of the plaintiffs that
7 focused on class certification kinds of issues. And so there
8 was an ESI protocol. There was a protective order. We just
9 talked about protective orders, and that's what there was.

10 I know -- I was not involved in the AFFF
11 litigation at that point, at least until the very end of the
12 Colorado case. I know Mr. Napoli, who was the plaintiff's
13 lawyer in that case, is one of the co-leads here, which I think
14 is helpful. I know the plaintiffs had objections to certain of
15 the --

16 **THE COURT:** I mean, not surprising. We're not --
17 Mr. Napoli, tell me about the adequacy of the production and
18 what else we -- what we've learned from that experience.

19 **MR. NAPOLI:** So in that case in front of Judge
20 Jackson, we were limited to class certification issues. There
21 were about ten plaintiffs that were representative for class
22 purposes. They were deposed over a series of weeks. We had
23 expert reports specific to Colorado, expert from the defendants
24 and plaintiffs. They were deposed as well. We received
25 documents from some of the defendants, not all of the

10:33 AM 1 defendants, but they were limited in time and location.

10:33 AM 2 **THE COURT:** To Colorado.

10:33 AM 3 **MR. NAPOLI:** well, to Colorado, which was
10:33 AM 4 insufficient for us for a variety of reasons, but also in time.
10:33 AM 5 Some of the defendants took the position that they weren't
10:33 AM 6 going to provide documents before I believe 1995, which was an
10:34 AM 7 issue. It wasn't the most important issue for the class
10:34 AM 8 certification issues, but I believe it's certainly going to be
10:34 AM 9 an issue here with the government contract defense that we're
10:34 AM 10 going to need to go back further.

10:34 AM 11 Judge Jackson had two hearings and wrote two
10:34 AM 12 opinions regarding medical monitoring, and there are several
10:34 AM 13 transcripts which we could provide to the Court on that
10:34 AM 14 specific issue. He had a hearing the day before the JPML and
10:34 AM 15 said that he was inclined to certify the class, but he would
10:34 AM 16 like some testimony from several of the experts, and he was
10:34 AM 17 waiting upon the JPML's decision before he had that hearing.
10:34 AM 18 So we were ready to go back in Colorado, and Judge Jackson was
10:34 AM 19 ready to decide the final order on medical monitoring class
10:34 AM 20 certification, and to me there's an open issue of, you know,
10:34 AM 21 where do we go from here since we're at that 11th hour.

10:35 AM 22 **THE COURT:** We'll sort that out. I -- we got -- you
10:35 AM 23 know, we're doing something for the whole country, not just
10:35 AM 24 Colorado --

10:35 AM 25 **MR. NAPOLI:** Of course.

1 10:35 AM THE COURT: -- which makes it a bit more challenging.

2 10:35 AM MR. OLSON: Your Honor, just one clarification. I
3 think Mr. Napoli went a little too far in characterizing what
4 Judge Jackson suggests about class cert, but --

5 10:35 AM THE COURT: Don't worry. I already know about that
6 issue, okay? That's okay. What he -- what he would have
7 decided or did decide is of no moment to me frankly. I got to
8 start de novo on this thing.

9 10:35 AM How hard is it from a discovery standpoint to
10 determine from the manufacturer to the end user how much was
11 used of the product and when it was used?

12 10:35 AM MR. NAPOLI: We're still trying to sort that out. In
13 the -- in the discovery in Colorado, we were repeatedly faced
14 with the answers from the defendants that, "We do not know
15 where our products went; that we've sold them to a central Air
16 Force purchasing location, and we do not know where they went."

17 10:36 AM We have -- we have filed FOIA requests to the
18 U.S. Government who seem to not know where their product went
19 as well. In some locations, we actually have purchase orders
20 and invoices. Just this morning, the U.S. Attorney, Assistant
21 U.S. Attorney provided me with some documents that were a
22 voluntary disclosure on a disk, and I asked if those purchase
23 orders were there, and she told me for the first time that they
24 are publicly available somewhere, and hopefully we can get
25 those --

10:36AM 1 THE COURT: I would be -- let me tell you this. It
10:36AM 2 may prove that somehow everything is gone. You know, anybody
10:36AM 3 who has ever sued the V.A., it's always about some fire in St.
10:36AM 4 Louis in 19 -- no matter nothing has ever been near St. Louis.
10:37AM 5 So I would be skeptical on the idea that they weren't
10:37AM 6 substantially traceable.

10:37AM 7 MR. NAPOLI: And let me just say it's not just the
10:37AM 8 Air Force. So you have different locations where you have this
10:37AM 9 AFFF foam used.

10:37AM 10 THE COURT: Right, at airports.

10:37AM 11 MR. NAPOLI: Airports, fire training facilities in
10:37AM 12 counties and cities.

10:37AM 13 THE COURT: Right.

10:37AM 14 MR. NAPOLI: In the fire suppression systems in a lot
10:37AM 15 of buildings and hangars. And so some of -- so depending upon
10:37AM 16 the defendant and -- or the location and their record keeping,
10:37AM 17 some of the records are better than others.

10:37AM 18 THE COURT: Were you going to speak, Ms. Williams?

10:37AM 19 MS. WILLIAMS: Yes, Your Honor. I just wanted to say
10:37AM 20 I did speak to Mr. Napoli this morning. He has not exactly
10:37AM 21 characterized what I said, but we are willing to work with him
10:37AM 22 on finding those records, and I do believe that some of them
10:37AM 23 are available. The central location that processes those
10:37AM 24 records has not received a Touhy request from them. They sent
10:38AM 25 it to a nonexistent Air Force entity, so I think that might be

1 part of the problem that occurred.

2 **THE COURT:** We're going to be more than FOIA requests
3 now. We're going to have discovery powers, subpoena powers and
4 so forth. And, you know, I just think that's like a really
5 important just sort of factual foundation for everybody to
6 have, is sort of to trace the product from the manufacturer to
7 the end user. And I think it's in everybody's interests as
8 soon as we can kind of get our arms around that that we need to
9 do that. As y'all are prioritizing your discovery here, I
10 think that ought to be towards the front so that everybody
11 knows just, you know, the basis of this. You know, I'm
12 remembering the old story of the mayor who's called by a
13 constituent who says, "Ever since you put fluoride -- the city
14 put fluoride in the water, my teeth have turned green." And
15 the mayor says, "Well, man, we haven't put the fluoride in
16 yet."

17 So the -- you know, we do need to know sort of
18 the lay of the land, and it's an important element for
19 everybody to assess their respective positions. And it's like
20 a lot of things, it's just -- it's just the facts. There's no
21 partisan view of it. There's no plaintiff's facts or defense
22 facts here. They're just facts, you know, and we need to know
23 that. So I think we all ought to endeavor -- and if I can help
24 you, if you're realizing that anywhere along the way you're not
25 getting cooperation, I want to know about it, because I just

1 think that's just one of those threshold issues we all need to
2 know so that everybody feels comfortable that we're basically
3 working off the same under -- factual understanding about which
4 defendants produced what product and where it went and when it
5 was used. Maybe that won't be perfect, but I'd be surprised if
6 we can't get substantially there.

7 Standard written and document discovery.

8 Mr. Thompson, where are we on thinking about that? Or
9 Mr. London, whatever.

10 **MR. LONDON:** Your Honor, the plaintiff group is
11 working on propounding a master set of that discovery to the
12 defendants, and --

13 **THE COURT:** May I suggest also before y'all send it
14 out, talk to lead counsel, because they may say to you, "This
15 is going to be crushing, but let me give you another idea about
16 how we might do the same thing," so that we don't have these
17 endless discovery wars that are easily resolved by just asking
18 the question or getting -- I mean, I think we all kind of know
19 what you need, you know --

20 **MR. LONDON:** Right.

21 **THE COURT:** -- and we just need to figure the most
22 economically efficient way to get that information.

23 **MR. LONDON:** Your Honor, that is one of the topics
24 for our April meet and confer.

25 **THE COURT:** Good.

1 10:40 AM MR. LONDON: We'd love to invite you actually.

2 10:40 AM THE COURT: Well, I'm going to pass on that. I'm
3 getting more of y'all than I could take.

4 10:40 AM MR. LONDON: Seems like you should write the agenda.
5 And, you know, to that end, we are -- the master discovery that
6 we're working on, that we're starting to draft, is going to --
7 and it's sort of what Your Honor has been talking about --
8 garner the input from the various committees, from the
9 injury -- the lawyers who are representing the injury clients
10 to those representing the private well owners to those
11 representing the municipalities, and hopefully those who are
12 representing the states and the sovereigns. As Your Honor
13 said, we want to not draft it but organize it, put it all into
14 one master set of interrogatories, one master set of requests
15 for production, and then talk to defense, and then propound
16 that so everybody's interests are unified, and the defendants
17 aren't getting eight from this person --

18 10:41 AM THE COURT: We do not want that.

19 10:41 AM MR. LONDON: Right.

20 10:41 AM THE COURT: And it gives everybody a little more
21 control on trying to restrain it. It may well be you say,
22 "Let's do these right now," and -- I mean, for instance, the
23 next thing on my list are depositions. Well, I would think
24 before we are launching into depositions other than really
25 related to how we get discovery, we probably don't want to take

10:41 AM 1 depositions until we got the written documentation; isn't that
10:42 AM 2 right? I mean --

10:42 AM 3 **MR. LONDON:** I think that's true. One, we
10:42 AM 4 contemplate a protocol deposition so as to again marshal the
10:42 AM 5 questioning on our side and perhaps on their side as well; and
10:42 AM 6 two, some 30(b)(6) foundational questions, they may be able --
10:42 AM 7 we may tell them what we like when we meet.

10:42 AM 8 **THE COURT:** And they may say, "You don't need
10:42 AM 9 anybody. We're going to give you the material."

10:42 AM 10 **MR. LONDON:** Precisely, or that might not be
10:42 AM 11 sufficient, and then we need a discrete topic or topics, but
10:42 AM 12 that's --

10:42 AM 13 **MR. OLSON:** Your Honor, jumping to the next topic,
10:42 AM 14 that's how we -- to your point, Your Honor, as I suggested to
10:42 AM 15 Mr. London in our many discussions, and I think they agree, is
10:42 AM 16 we need to get some of the documents underway so we can figure
10:42 AM 17 out what topics we do or don't need.

10:42 AM 18 **THE COURT:** Yeah, I -- folks, this may be like
10:42 AM 19 stunning, but a lot of times discovery is just getting the
10:42 AM 20 documents. You already know what's going to come. You're just
10:42 AM 21 kind of making the other side cough it up. I think there's
10:42 AM 22 going to be some real discovery here on both sides, and I think
10:42 AM 23 we need to get on with it, and -- because I think that'll help
10:43 AM 24 shape and -- what issues are really in contest and what are not
10:43 AM 25 in contest.

1 The motions to join new parties, the suggestion
2 was by June 7, sort of the drop dead date, other than for new
3 parties would have 60 days. I know the goal here is -- is that
4 we're getting ready to undertake this huge effort, and we don't
5 want parties to be brought in, defendants to be brought in
6 later and say, "Oh, no. I've got to go take all these
7 depositions again," or whatever, or, "I have a discovery
8 right," and all of that. So I agree with that, but I don't
9 want to foreclose, and I'm fine with that -- doing a deadline
10 like that, but I want you to know that if in the course of
11 discovery we discover people who may have -- or entities that
12 have potential culpability here that we didn't know about until
13 we took depositions, we can't foreclose these people being
14 brought in. I mean, it would be imprudent to do that.

15 So with that caveat that we recognize that there
16 may be genuinely -- there may be parties genuinely culpable who
17 we don't know about yet, I don't want to foreclose the ability
18 to bring them in.

19 I want to -- if I could, I want just a little
20 bit of feel from both sides about what do you sort of see
21 your -- your discovery strategy, and sort of what are we
22 looking for? I know that's a kind of broad topic, but I'm just
23 trying to get a feel of sort of where the parties are going
24 here and what are they kind of looking for in discovery?

25 **MR. SUMMY:** Your Honor --

10:44 AM 1 **THE COURT:** Yes, Mr. Summy.

10:44 AM 2 **MR. SUMMY:** Yes, I can chime in on that. I think one
10:44 AM 3 of the things that -- from a plaintiff's prospective in a
10:44 AM 4 products liability case that we want to know is what did the
10:44 AM 5 defendants know, especially the manufacturers and the
10:44 AM 6 distributors, about the environmental effects of these
10:45 AM 7 chemicals as well as the public health effects of these
10:45 AM 8 chemicals. And it's not only what they knew, but when did they
10:45 AM 9 know it, and what did they say, and who did they tell about the
10:45 AM 10 dangers associated with these chemicals, and I think that's
10:45 AM 11 going to be a huge primary focus of our discovery.

10:45 AM 12 **THE COURT:** Well, it's relevant, Mr. Summy, both
10:45 AM 13 generally to liability issues; it's also got a lot to do with
10:45 AM 14 the contractor immunity issue.

10:45 AM 15 **MR. SUMMY:** And that's one of the reasons that we're
10:45 AM 16 going to focus on that, is because there are many exceptions to
10:45 AM 17 the government defense and -- the government contractor
10:45 AM 18 defense, and part of those exceptions are what did they tell
10:45 AM 19 the government? What did the government know? What did they
10:45 AM 20 know when they specified its use? And so we've got to get to
10:45 AM 21 that early in this case, because that's vitally important,
10:45 AM 22 because the Court has to weigh those exceptions. And so we've
10:46 AM 23 got to get to that. I'm calling it general liability, but that
10:46 AM 24 has to be part of our general liability --

10:46 AM 25 **THE COURT:** Well, I don't think we're going to make

1 any progress, anybody stepping up and trying to get this case
2 resolved until those immunity issues are resolved.

3 **MR. SUMMY:** I agree with that, Your Honor.

4 **THE COURT:** I mean, we just got to get to them, and
5 in some ways you're talking about, you know, going back many
6 years.

7 **MR. SUMMY:** Correct.

8 **THE COURT:** And you've got the issue did the
9 government actually specify, to whom did they specify and all
10 of that.

11 **MR. SUMMY:** Correct.

12 **THE COURT:** And then post whatever that is, even if
13 the answer is the government was controlling it, you then got
14 to hold this whole issue about, "well, when it was discovered
15 there were potential toxic effects, was that known to the
16 government?"

17 **MR. SUMMY:** Correct.

18 **THE COURT:** "was that disclosed? were the proper
19 warnings given?" There are just lots of issues. I'm -- you
20 know, I've been reading a little bit on this issue, and I was
21 really kind of referring to that, that -- you know, there's
22 going to be a lot that nobody in this room really knows right
23 now.

24 **MR. SUMMY:** I think that's right, Your Honor, but it
25 not only goes to the government contractor defense, but it also

1 goes to claims for failure to warn and design defect, and so we
2 have to get those facts into the record before we can really
3 decide all these key issues.

4 **THE COURT:** Well, I'm not sure the defendants are
5 going to particularly -- I mean, there have been some
6 defendants voicing this issue, "We really want to get to the
7 immunities issues first." I'm not crazy about kind of limiting
8 something in a way that has everybody fighting about, "Are you
9 violating the judge's order on discovery?"

10 **MR. SUMMY:** Right.

11 **THE COURT:** I've done this before, and I -- it just
12 drives you crazy having people complaining about that issue.
13 Saying that, I think everybody is like really prudent early on
14 to try to get their arms around these issues, to dig into that
15 history.

16 **MR. SUMMY:** I think that's right.

17 **THE COURT:** Gather the documents. It's -- it's
18 important I think to every party's claim.

19 **MR. SUMMY:** I agree with that.

20 **THE COURT:** And every party's defenses, and it
21 just -- it needs to be discovered, and a lot of it is going to
22 be people who probably are no longer available or, you know,
23 it's going to be document --

24 **MR. SUMMY:** It's going to be document-intensive, yes.

25 **THE COURT:** Sensitive documents. So as y'all are

1 working together, I just think that's going to be something
2 that everybody ought to really roll their sleeves up and be
3 planning to explore those issues. I do not intend to say
4 that's the only issue to discover. That's not my style to do
5 that, but part of it is strategic prudence here, and until -- I
6 mean, I've been reading. Thank you y'all for those two huge
7 notebooks, okay? what a gift. I told Blaise, "You cannot put
8 it in my office. It's just so big. It's going to depress me."
9 But I've been reading them, and, you know, the science is sort
10 of -- it is what it is, and it highlighted to me these defenses
11 are like really important and I think largely unknown. I'll be
12 surprised if we all really know -- anybody really knows that
13 history. And it may really help or really hurt one party or
14 another. Tough, okay? We're getting to it. Whatever it is,
15 it is. And we're going to have robust discovery to get to it.
16 We're not going to have strategic efforts in discovery to
17 obstruct the ability of one party or the other to get this
18 information. We're going to get to the bottom of it, and --
19 and I suspect that once we get there, the shape of this case
20 will be significantly affected by it, you know, whatever those
21 facts are.

22 **MR. OLSON:** Your Honor, first I agree with Mr. Summy,
23 these issues are going to be front and center. In fact, the
24 military invented these products, and the Naval Research Lab
25 was doing extensive investigation for years, so it's going to

1 go back for a long period of time for various branches of the
2 government.

3 Our other focus from a defense perspective is
4 really understanding what the other buckets of cases look like.
5 So the water municipality cases, we want to get enough
6 discovery, not overwhelming discovery, but for us to
7 appreciate --

8 **THE COURT:** That's exactly why I don't limit to one
9 thing, because I think there are issues -- there are going to
10 be very distinct groups here with very distinct interests, and
11 we need to get on -- we got a lot of people in this room.
12 There is going to be a lot of capacity to do things parallel
13 with each other, but -- and y'all are going to know it better.
14 I'm not going to try to dictate it, because y'all know it
15 better than I do, but -- but I do think we need -- we need to
16 know exactly -- I mean, just basically the elements of the case
17 law on contract, governmental contractor immunity and just
18 going down each the elements. Did the government actually
19 dictate or control the development of this product?

20 I see Ms. Williams shaking her head. I'd be
21 stunned if she wasn't; right? And -- and -- or was it bought
22 off the shelf, or was it, you know, something that was approved
23 after it was designed? I mean, all of those are like really
24 important issues, and then the -- you know, the knowledge
25 evolves, who knew it and what did they say and all of that. I

1 mean, all of that is really -- I would think it's going to be
2 quite an effort to get to all of this, because we're talking
3 about, you know, across all these military branches and all
4 these companies, and many of them are people who are long gone,
5 and I mean -- and we need to get to this.

6 And, Ms. Williams, you just need to tell your
7 colleagues in the federal government I'm not going to take,
8 "well, you know, we need a year to look." No, we're going
9 to -- we're going to bring people in. If I got to bring them
10 to this courtroom and me sit here while they do it, we're going
11 to get to the bottom of this story, because it obstructs
12 everything else about solving this case, is to know what those
13 facts are.

14 The -- I had expression of concern from the
15 folks in New York about being on the -- either the plaintiff or
16 defense committee. You want to share with me your thoughts?
17 You can come forward if you'd like. You're hiding in the back.
18 Come on up before the rail here to speak.

19 **MR. DESAI:** Well, I'm not quite sure which counsel
20 table to approach, but we are in the middle here.

21 **THE COURT:** Yes.

22 **MR. DESAI:** Thank you.

23 **THE COURT:** State your name for the record, please.

24 **MR. DESAI:** Mihir Desai from New York.

25 **THE COURT:** Yes, Mr. Desai. You filed -- I think

1 expressly -- I think you were -- New York is either the
2 plaintiff or defense committee. Which committee?

3 **MR. DESAI:** Well, we are with the -- normally with
4 the plaintiffs' committee. We are -- as of this week, we are
5 both plaintiffs and defendants in this --

6 **THE COURT:** Congratulations.

7 **MR. DESAI:** Thank you so much. Very nice to be here
8 in Charleston. This week as well, Ohio has been brought into
9 this MDL case.

10 **THE COURT:** Yes, I saw that.

11 **MR. DESAI:** You know, we are concerned. You know,
12 certainly we appreciate the need for coherence and organization
13 in this MDL, and we very much appreciate the Court's invitation
14 to raise concerns that we have to the --

15 **THE COURT:** After you've asked the committee your own
16 to -- you want to do certain discovery, and they obstruct it,
17 then come to me, but don't -- you know, you're on that
18 committee because we got to have some government structure, and
19 if they are obstructing your ability to develop your case and
20 your defenses, you let me know that.

21 And I know that you voiced the idea about maybe
22 the states having their own committee. You can caucus any way
23 you want to, just like I'm sure within the water districts I
24 think are going to kind of caucus their own, and if the states
25 come in -- and I suspect Ohio and New York are not going to be

1 the only states here -- y'all can caucus. I'm not just going
2 to have a third rail planning discovery. Y'all work it out.
3 If you're having problems getting your discovery done, I'm
4 going to make sure you get robust discovery like everybody
5 else, but I need for you to be -- you're not giving up your
6 sovereignty. You're not giving up anything. All you're doing
7 is having -- you're going to the traffic cop before you drive
8 into the intersection. That's all I'm asking you to do, and if
9 it doesn't work out, just like I just brought you up here,
10 you'll come in here, and you'll tell me, "They won't let me do
11 A, B, C." I'll listen to the leadership, why they've taken
12 such a position, and we'll work it out. I assure you at the
13 end of the day that you're not going to be denied your right to
14 do discovery and to assert every defense for New York. Okay?

15 **MR. DESAI:** Thank you. Thank you. We do have
16 concerns about conflicts of interests potentially and
17 sovereignty concerns, but we're very open to coordinating as
18 Your Honor has described.

19 I'll just note that to date we haven't received
20 a lot of coordination from the plaintiffs' committee. We were
21 provided very little time to weigh in to review the documents
22 that have been submitted recently, and this morning is the
23 first time that I've heard of the binders that were submitted
24 to Your Honor which, you know, we wanted to have a role in
25 participating and selecting. And so I would ask the Court

10:55 AM 1 direct the --

10:55 AM 2 **THE COURT:** But let me just say this. There's got to
10:55 AM 3 be leadership, you know. And there are all these people down
10:55 AM 4 line who are not going to have as much input, but you can't
10:55 AM 5 consult with everybody on every issue. I frankly think giving
10:55 AM 6 me the 10 articles is not that big a deal, okay? That's just a
10:55 AM 7 preliminary look at this stuff, and I'm looking at footnotes
10:55 AM 8 and going to other articles myself, okay? So don't worry about
10:55 AM 9 that, but if I had just invited everybody to send me articles,
10:55 AM 10 Blaise would have brought in 40 notebooks, okay? We just
10:56 AM 11 can't -- we can't -- you know, we just got to have some central
10:56 AM 12 control.

10:56 AM 13 So some things are going to be more important
10:56 AM 14 than the others. I would prioritize on things that you think
10:56 AM 15 are really important. Sit down with these folks. They're very
10:56 AM 16 experienced litigators. They don't want to be embarrassed to
10:56 AM 17 come in here and say that they got -- you got blown off. They
10:56 AM 18 don't want that either. So they'll work with you. Can I count
10:56 AM 19 on that, Mr. London?

10:56 AM 20 **MR. LONDON:** Absolutely. Absolutely, and we gave
10:56 AM 21 counsel opportunity to comment on the scheduling order, but we
10:56 AM 22 worked -- I was one of the people working late on Tuesday
10:56 AM 23 night, and that's when we were finalizing, on Tuesday at 3:30.

10:56 AM 24 **THE COURT:** See, that's part of the problem here, is
10:56 AM 25 you got to have leadership, and some of this stuff is time

1 sensitive, and you just can't keep consulting all the time.
2 I've represented people in complex litigation, and sometimes
3 you just -- you know, I was the lead, and you just had to make
4 decisions, and you just don't have time and it's just not
5 practical to consult on things that are not particularly
6 important.

7 And right now what they have done, for instance
8 on the scheduling order -- it's not really a scheduling order.
9 It is, "we're meeting soon to talk about things;" right? I
10 mean, that's basically the scheduling order, which I'm not
11 really surprised. That's okay. And if you've got ideas
12 about -- I mean, you've been hearing here today and that's part
13 of these meetings is I want everybody to hear kind of where
14 we're going, so it's just not me know, you know. And if you
15 feel like, "You know, I think there's another issue we need to
16 be addressing early," voice that.

17 I do think these central issues about exactly
18 how much product was used and whose product it was and when it
19 was used is really important to everybody, including New York,
20 and these issues about are there certain immunities out there
21 that might be relevant to this, and those facts that go to what
22 the federal government knew and what the defendants knew and
23 all of that, the defendant manufacturers knew, that's really
24 important to New York, too. I mean, those are like I would
25 think all important parts of your case. And so -- but if you

1 feel like there are other issues that need to be addressed
2 early on, from here out, talk to the lead counsel. They got to
3 make strategic judgments. You can't do everything at once.
4 You'll be at the bottom of all the discovery if you do that.
5 So -- but be heard. Talk to them, consult with them, and if at
6 the end you're not satisfied, you can come in here on any
7 monthly meeting and let me know that, okay?

8 **MR. DESAI:** Perfect. Thank you. Appreciate it.

9 **THE COURT:** The United States had voiced a concern
10 about, first of all, you wanted to sever and remand the City of
11 Newburgh case. There was a motion about that.

12 **MS. WILLIAMS:** That is correct, Your Honor. The City
13 of Newburgh motion though is not fully briefed, and the case is
14 waiting for an amended complaint. So --

15 **THE COURT:** Let me make it really easy for you. Read
16 the MDL panel decision of April 2nd. Denied. You're here,
17 okay? You don't need more briefing right now. We got to keep
18 this thing central. It's not going to be the City of Newburgh.
19 It's going to be right here with the rest of us when we finish
20 discovery, and then it can go back, and if you want to try it,
21 you'll have every opportunity to do that, and I'll enter an
22 order today denying the motion.

23 Direct filing. You know, direct filing doesn't
24 prejudice anybody the best I can tell, but it allows -- it just
25 takes a step out of getting the case here; that is, if you're

10:59 AM 1 sitting in Utah, you don't have to file with the District Court
10:59 AM 2 in Utah to then have it transferred to the District Court in
10:59 AM 3 South Carolina. I intend to enter an order that says you're
10:59 AM 4 not waiving lexicon or any other rights that you would have,
10:59 AM 5 choice of law, anything else from Utah. I do want you to state
10:59 AM 6 right up in the complaint your state, you know, that -- you
10:59 AM 7 know, where your claims arise so we will know those issues, so
11:00 AM 8 we can quickly identify that -- the choice of law if that ends
11:00 AM 9 up being relevant or whether you're a South Carolina case or
11:00 AM 10 not.

11:00 AM 11 But I'm going to -- I'm going to enter an order
11:00 AM 12 that says y'all have the right -- you don't have to. If you
11:00 AM 13 want to file it in the District Court of Utah first, that's
11:00 AM 14 your business, but I'm going to make it very clear, there's no
11:00 AM 15 prejudice to anybody who does that, and it is easier for my
11:00 AM 16 clerks just to get the direct filing.

11:00 AM 17 I believe we were talking a little bit about the
11:00 AM 18 discovery strategy. Mr. Olson, you or any of the other
11:00 AM 19 defendants have any additional things in terms of y'all's
11:00 AM 20 priorities beyond what we've talked about?

11:00 AM 21 **MR. OLSON:** I think Your Honor has already described
11:00 AM 22 a lot of this. I think we'd like to identify kind of issues
11:00 AM 23 that cut across the litigation, whether those are government
11:00 AM 24 contractor, certain science-based causation issues, and then
11:01 AM 25 get a sense of who's who and what's what so that the two sides

1 can then talk about how we more definitively structure the MDL
2 and --

3 **THE COURT:** But your experts are going to need a lot
4 of this information.

5 **MR. OLSON:** Completely agree.

6 **THE COURT:** I mean, we've got a -- that's why kind of
7 this initial effort to just know who produced what and when it
8 was sold and when was it used and all of that, it's just --

9 **MR. OLSON:** Not pushing back on that at all, Your
10 Honor.

11 **THE COURT:** Yeah. It's going to hold up everything
12 else until we know that.

13 I had mentioned to y'all Judge Fallon's famous
14 order number 6, which among -- yes, sir? You were waiting to
15 speak.

16 **MR. COHAN:** I apologize, Your Honor. Larry Cohan
17 from Pennsylvania.

18 **THE COURT:** I want you to come forward, because my
19 court reporter will have trouble.

20 **MR. COHAN:** Larry Cohan from Pennsylvania on the
21 direct filing issue.

22 **THE COURT:** Yes, sir.

23 **MR. COHAN:** May I speak here, Judge?

24 **THE COURT:** Come on above the -- just as a practice,
25 come before the rail before you speak.

11:01 AM 1 MR. COHAN: We've had a number of conversations with
11:02 AM 2 the defense about the filing of the 500 plus cases in
11:02 AM 3 Pennsylvania, and we're trying to work out an understanding. I
11:02 AM 4 think we have one in principle. I think the issue, Your
11:02 AM 5 Honor -- and we looked at your prior order from Lipitor.

11:02 AM 6 THE COURT: which I said you only knew one or -- you
11:02 AM 7 know, you had to be, you know, the person, the entity or the
11:02 AM 8 person themselves, yes.

11:02 AM 9 MR. COHAN: Yes, and it says no multi-plaintiff
11:02 AM 10 filings without --

11:02 AM 11 THE COURT: Correct.

11:02 AM 12 MR. COHAN: -- leave of Court. So in Pennsylvania
11:02 AM 13 we've got a number of group filings under the Pennsylvania
11:02 AM 14 procedures with a summons. So we'd like to get these here
11:02 AM 15 quickly without having to file, you know, five or six hundred
11:02 AM 16 individual full-sized complaints. We don't have yet short form
11:02 AM 17 pleadings or master complaint. So we'd like to get them
11:02 AM 18 here --

11:02 AM 19 THE COURT: Y'all can try to work it out, but, you
11:02 AM 20 know, the -- I know some states allow these multi-party things.
11:02 AM 21 It's kind of chaotic for us in federal court. We kind of need
11:03 AM 22 -- so if y'all can work it out, I'm not going to get in the
11:03 AM 23 middle of that, but it is -- it is not -- we're not really set
11:03 AM 24 up in the federal court system for this, you know. I know --
11:03 AM 25 and I've had it before in other cases where like Missouri had

1 all these multi-filings, Pennsylvania and New York. It's just
2 we don't do it in federal court, so --

3 MR. COHAN: When we get short form pleadings, can we
4 break them up at that time?

5 THE COURT: Give me a proposal, okay?

6 MR. COHAN: Okay.

7 THE COURT: I'm glad to talk to you about that.
8 okay?

9 MR. COHAN: Very good. Thank you.

10 THE COURT: Okay. Famous Judge Fallon order number
11 6. It is also -- also on my Lipitor case, I had some
12 additional things like direct filing in that order. Is there
13 anything about any of that that causes any heartburn for
14 anybody?

15 MR. THOMPSON: Judge, in particular, the -- the
16 common fund process and the internal controls, that's -- we
17 don't have any real trouble with that. We do notice that from
18 Vioxx, that was about 13, 14 years ago, and that there are a
19 series of revisiting that over the years that we may want to
20 offer some refinements.

21 THE COURT: Within 10 days, if you've got proposed
22 revisions, file them.

23 MR. THOMPSON: Yes, sir.

24 THE COURT: And I'll be glad to consider them.
25 Consult with your opposing counsel before you file them.

1 11:04 AM
2 11:04 AM
3 11:04 AM
4 11:04 AM
5 11:04 AM
6 11:04 AM
7 11:04 AM
8 11:04 AM
9 11:04 AM
10 11:04 AM
11 11:05 AM
12 11:05 AM
13 11:05 AM
14 11:05 AM
15 11:05 AM
16 11:05 AM
17 11:05 AM
18 11:05 AM
19 11:05 AM
20 11:05 AM
21 11:05 AM
22 11:05 AM
23 11:05 AM
24 11:05 AM
25 11:05 AM

1 **MR. THOMPSON:** That would be -- that's perfect.
2 Thank you.

3 **THE COURT:** Yeah. And among defense, any heartburn
4 on the -- on number -- on Judge Fallon's order number 6?

5 **MR. PETROSINELLI:** Not at all, Your Honor.

6 **THE COURT:** Very good. Let me hear from you. I'm
7 open to -- to tweaks and refinements, but it is a good basic
8 structure, and I think anybody who -- who's from the
9 plaintiffs' side, it creates some governing structure for you
10 and some control by the leadership that I think is essential to
11 organize this. Defendants don't have as much of a challenge.
12 It's a smaller group, but the plaintiffs definitely, you know,
13 it's important for them.

14 Mr. Thompson, I had some message that you had a
15 proposed CPA and a depository to recommend, and I'm going to
16 heavily defer to y'all. If you've got somebody who --

17 **MR. THOMPSON:** Yes, Your Honor. I think you had
18 mentioned that you would want to personally interview that
19 person. He will be available at your pleasure.

20 **THE COURT:** Very good. We'll have -- Blaise will
21 follow up and bring him in.

22 **MR. THOMPSON:** Yes, sir.

23 **THE COURT:** It is an important person in all of this,
24 and we do monitor -- Judge Fallon and Judge Barbier have both
25 recommended to me strongly that we monitor this, just to --

1 just to -- again, to have someone making sure that the
2 leadership has control over the thing, that we don't have
3 random work going on that people don't seem to be, you know,
4 under the control of the committee and all of that, so we're
5 trying to prevent problems later is all, about who's doing
6 authorized work. The key, of course, is you can't do common
7 fund work unless you're authorized to do it.

8 **MR. THOMPSON:** Yes, sir. And the CPA that we're
9 going to nominate is an audit CPA and not a business
10 development CPA.

11 **THE COURT:** Good.

12 **MR. THOMPSON:** So he's --

13 **THE COURT:** I mean, I'm very likely to defer. I just
14 want to have a relationship so I can pick up the phone and call
15 him if I've got an issue or question. And Blaise will follow
16 up, and we will get -- we'll get the CPA in the courthouse.

17 where are we on the master complaint idea?
18 where are we on that?

19 **MR. LONDON:** Your Honor, I don't think it's something
20 that we're going to pursue on behalf of the plaintiffs' side.
21 I think there's so many disparate claims. I appreciate the
22 direct filing. I think that will be helpful, and folks can --

23 **THE COURT:** I understand why the master complaint is
24 sort of complicated here.

25 **MR. LONDON:** We've got a lot to do, and then you've

1 got a master answer, potential master motions to dismiss, and
2 it doesn't seem necessary in these circumstances.

3 **THE COURT:** Okay. Fine. I had -- I placed in my
4 earlier -- I believe it was CMO-2, I mentioned that I wanted a
5 little more diversity, and I can see this room is a little more
6 diverse than it was last month. Thank you very much.

7 You know, the lead counsel on both sides are
8 more like my age than my children's age, and we need to help
9 lift up the next generation here and get good experience, so I
10 thank everybody for the spirit -- I'm going to approve the
11 parties' recommended -- yes?

12 **MR. THOMPSON:** Your Honor, let me add one more thing.
13 We forwarded four recommended names that we think are very
14 highly qualified. There was one additional candidate who
15 filed. I think they filed directly, and I made sure that she
16 would have an opportunity to make her candidacy known. She is
17 not one of the four people that the leadership has recommended,
18 but it's Ms. Ann Saucer from the Fears Nachawati firm and I
19 think sent something directly to you.

20 **THE COURT:** Ms. Saucer, you want to come forward, if
21 you could?

22 **MS. SAUCER:** Yes, sir.

23 **THE COURT:** Yes, ma'am. Glad to hear you.

24 **MS. SAUCER:** I am Ann Saucer from the Fears Nachawati
25 Law Firm. Thank you, Your Honor, for raising this important

11:08 AM 1 issue.

11:08 AM 2 In paragraph 29 of your CMO number 2, you
11:08 AM 3 identified not just a need for diversity, but as Your Honor
11:08 AM 4 just said, a need to usher in to provide opportunities for the
11:08 AM 5 next generation. Fears Nachawati is in addition to being a
11:08 AM 6 diverse firm, it's also somewhat younger. It's a rapidly
11:08 AM 7 expanding next generation new guard firm. I personally am not
11:09 AM 8 young. They hired me for my decades of experience.

11:09 AM 9 **THE COURT:** I know at my age, you're looking younger
11:09 AM 10 every day.

11:09 AM 11 **MS. SAUCER:** I received my first bar license in 1992,
11:09 AM 12 and I've had decades of experience working in multidistrict
11:09 AM 13 litigation on the plaintiff's side, in complex torts, in --
11:09 AM 14 with common fund benefit work, on committees. I've worked with
11:09 AM 15 briefing committees. I co-chaired a committee recently,
11:09 AM 16 drafting pleadings, and -- well, we just heard there won't be a
11:09 AM 17 master complaint. Drafting briefs and other common benefit
11:09 AM 18 work. I'm very experienced and well-versed in briefing with
11:09 AM 19 committees. And --

11:09 AM 20 **THE COURT:** Does your client -- does your law firm
11:09 AM 21 have clients in this litigation?

11:09 AM 22 **MS. SAUCER:** We have the town of the Vienna, Maryland
11:09 AM 23 in Dorchester County, and that case was filed in federal court,
11:09 AM 24 filed in Maryland. I don't think it's here yet, but it will
11:09 AM 25 come here. It's an AFFF case, and we are signing up more

1 public entity cases.

2 THE COURT: And have you -- and I know you
3 directly -- but did you talk to the leadership before you
4 applied? Did you talk to them first?

5 MS. SAUCER: I personally did not. Majed Nachawati
6 reached out to them. Originally both of us were proposed.
7 Both of our names were proposed.

8 THE COURT: To both -- both their names are proposed
9 to whom?

10 MS. SAUCER: Oh, to lead counsel, to Mr. --

11 THE COURT: Okay. And neither were selected?

12 MS. SAUCER: That's correct.

13 THE COURT: Okay.

14 MS. SAUCER: And then Majed decided that it would be
15 a good idea for me to try to talk -- introduce myself, Your
16 Honor, to the Court and just to let you know that this is a
17 young up and coming firm, and I have experience in the area of
18 multidistrict litigation.

19 THE COURT: Ms. Saucer, not to have any comment on
20 you personally, because you seem like an articulate and fine
21 person. I kind of think an important part of my job is to
22 support the leadership of the plaintiff and defense committees,
23 to give them some authority. I will tell you this. You go get
24 other towns involved. You go back to talk to the leadership.
25 we can add people later if we need to, but at this point I'm

1 going to defer to the leadership selections, okay? But thank
2 you, and as we would say, denied without prejudice, okay?

3 **MS. SAUCER:** Thank you, Judge. Thank you very much.

4 **THE COURT:** Let me talk to you about a science day.
5 I haven't done this a lot. I did it in a patent case that was
6 very complex, and I found the process helpful. I'll tell you
7 the process we did. We had the parties get together and kind
8 of list the issues that -- the key science issues in the case.
9 There was in that case at least some consensus of what those
10 issues were, and rather than have -- the lawyers were basically
11 witnesses like me. They sat there and watched, and their
12 experts came in. In one case, it was one expert, addressed
13 each of the like four questions we had. And another one, I
14 think they had two experts. But they basically said, you know,
15 "Your Honor, here's how -- I'm going to talk to you about this
16 issue," and they were professors. They were in that case
17 medical school professors. They were good teachers. They were
18 instructed to speak English and not medicalese to me, and I
19 found it extremely helpful. There's no record created, no
20 cross-examination, no impeachment later. "Didn't you say at
21 the science day X, Y, Z?" None of that. It's off the record.
22 But I want your help. I want y'all to confer with each other
23 about what you think those issues -- those key issues are. I
24 have some ideas myself, but I want y'all to confer with each
25 other, and if you have a consensus, I would tend to defer to

1 the leadership consensus on those issues. And, you know, what
2 I'm thinking about is that perhaps on the July 26th status
3 conference, we might do our science that day as well.

4 But I want to -- I want to -- so when we meet
5 again in May, if y'all can submit to me, if y'all have reached
6 a consensus, or if you have a difference, let me know what the
7 differences are. It might be all of the above. Don't
8 overwhelm me. It is daunting to get, you know, 18 different
9 issues. That's not really that helpful. There's probably
10 already three or four key issues here. I would hope we limit
11 it to that just so I can absorb it and kind of read the
12 underlying -- the underlying materials you have. We might
13 supplement some. To the extent y'all think once you've
14 formulated those questions about other things that you might
15 want me to read before, again not breaking my back on reading
16 materials. But I want to -- I think I'd get more out of it if
17 I'd read some of the underlying science that we would be
18 addressing.

19 Did anybody have any heartburn over that
20 approach, Mr. Thompson from the plaintiff's side?

21 **MR. THOMPSON:** I'm going to defer to Mr. London.

22 **THE COURT:** Mr. London?

23 **MR. LONDON:** No heartburn. Certainly not heartburn,
24 perhaps just to Your Honor's general thinking on the concept so
25 when we do meet and confer, this might be significant as well.

1 we've done these before, and I think they can be very
2 successful. would Your Honor be contemplating generally
3 that -- perhaps like a morning? Like one party would take
4 three hours or so in the morning, the second party three
5 hours --

6 **THE COURT:** No three hours, no.

7 **MR. LONDON:** Strike one.

8 **THE COURT:** We're not doing that. I'll kind of
9 evaluate it once I see the nature of the questions and the
10 length, but I would do about an hour each frankly is what I'm
11 thinking about. I'm not trying to get a medical degree --

12 **MR. LONDON:** I understand.

13 **THE COURT:** -- or a chemistry degree. I'm -- what
14 I'm trying to do -- and I will have read a fair amount, and I
15 will have my own questions for these folks. And if it takes
16 longer, that's fine, too.

17 **MR. LONDON:** Your Honor, I guess one other thought,
18 and maybe I would like to put this out, because we have -- Your
19 Honor, we have thought about this on our end, how are we going
20 to grapple with this science. It is something on the
21 Plaintiff's group we are glad the Court's interested in. Given
22 the complex natures and transport, how this stuff moves
23 around -- air, water, ground -- the history of this stuff, as
24 Your Honor alluded to 70 plus years, and even the toxicity of
25 this stuff, I won't even --

1 11:16 AM 1 THE COURT: We may need to now identify the three
2 questions.

3 11:16 AM 3 MR. LONDON: We may be talking -- like even that
4 alone might be three experts, three disciplines. I don't
5 think -- I don't want to do three. I think -- I don't -- I'm
6 not sure if I've ever done a science day with three, but there
7 might be the need to do two.

8 11:16 AM 8 THE COURT: I am open to doing more. The idea that
9 I'm going to sit here for six hours is not that interesting to
10 me.

11 11:16 AM 11 MR. LONDON: well, you can leave after ours.

12 11:16 AM 12 THE COURT: Somebody says to me, "Your Honor, I see
13 you have this 25-page limit. Is it okay if I write a 40-page
14 brief?" And I say, "You can write a 40-page brief. I just
15 quit reading after 25."

16 11:16 AM 16 MR. LONDON: That helped. Thank you, Judge.

17 11:16 AM 17 THE COURT: So, but -- you know, something as complex
18 as this, if you have six hours of it, it will just be so
19 exhausting --

20 11:17 AM 20 MR. LONDON: Right.

21 11:17 AM 21 THE COURT: -- you wouldn't absorb it. So I do think
22 there's some priority about what's the most important points to
23 make, and we can be a little strategic about what I might read.
24 Instead of giving me 17 things to read, here are the two best
25 articles on each of these things from each side. And so -- and

1 we may end up sort of discovering -- I know I did in my other
2 science day -- there were a lot of areas of common sort of
3 consensus on what the science was. We really kind of got down
4 to what -- where the difference is. I found that helpful,
5 about where the really disputes -- and it may well be in this
6 case that the disputes lie more on -- you know, many of those
7 are going to be resolved by just figuring out what the facts
8 are, and I think it'll help us.

9 Okay. Obviously we're going to have a busy May;
10 right? We got a lot of things. Yes, Ms. Williams?

11 **MS. WILLIAMS:** Your Honor, is this a good time to
12 hear separately from the United States?

13 **THE COURT:** I'd be glad to hear from you separately
14 for the United States.

15 **MS. WILLIAMS:** Your Honor, I don't think I've had a
16 chance to properly introduce myself. For the past two and a
17 half years, I've been DOJ's lead counsel over all
18 administrative tort claims regarding AFFF fire suppressants.
19 I've worked --

20 **THE COURT:** Did it ever occur that someone didn't
21 like you?

22 **MS. WILLIAMS:** It's happened from time to time, but I
23 have been working closely with various components of our
24 Environment and Natural Resources Division, although as a
25 specialist in tort, I'm in the civil division, and we've worked

1 with talented AUSAs around the country.

2 I'm here today with my agency counsel, Mr. Jerry
3 Thompson. Mr. Thompson is the Chief of Air Force's
4 Environmental Law Center.

5 I also hope that Your Honor has a chance to
6 review the voluntarily disclosures that we filed on Wednesday.
7 Those voluntary disclosures were filed with the help of
8 attorneys at Navy, at EPA, at CDC. It's not an effort that I
9 could have done by myself.

10 **THE COURT:** Tell me about the nature of these. I did
11 not notice the filing.

12 **MS. WILLIAMS:** This is a disclosure from the United
13 States that lays out our position on sovereign immunity and
14 discovery, and it also lays out a lot of public resources. So
15 our hope is to provide to the parties and to the Court
16 reliable, relevant, accurate information that's widely
17 available in the public record, but sometimes hard to find.

18 This is things like the defense environmental
19 websites; things like the DOD reports to Congress. Last week
20 there was a congressional hearing with all three of my involved
21 agencies: DOD, EPA, CDC. They all testified before the
22 Senate. You can watch all two hours of that testimony at any
23 time at the Senate website. The link is in the voluntary
24 disclosures.

25 CDC's position on these issues is in the

1 11:19 AM 1 voluntary disclosures. A collection of articles that CDC found
2 11:19 AM 2 that they believe the ATSDR scientists who are working on this
3 11:19 AM 3 found interesting is in this disclosure.

4 11:20 AM 4 So there's a lot of good stuff in there, and we
5 11:20 AM 5 hope that Your Honor has an opportunity to look at it.

6 11:20 AM 6 When you do, we hope that you see that the
7 11:20 AM 7 United States Government is investing considerable resources in
8 11:20 AM 8 this case, and we are not investing those resources so that we
9 11:20 AM 9 can come and play second fiddle in somebody else's private
10 11:20 AM 10 products liability litigation. We're investing those resources
11 11:20 AM 11 here because we believe we found a home for many of our own
12 11:20 AM 12 cases. You have, in fact, just made my life enormously easier
13 11:20 AM 13 with regard to the City of Newburgh.

14 11:20 AM 14 We also don't oppose transferring any claims
15 11:20 AM 15 from Suffolk and Dubreski [phonetically] and even independently
16 11:20 AM 16 moved to transfer our Air Force claims. That's significant,
17 11:20 AM 17 because Air Force is our biggest agency of liability, so we
18 11:20 AM 18 have claims at Peterson, at Fairchild and Eielson that we're
19 11:20 AM 19 all moving to transfer in here.

20 11:20 AM 20 I want to be really clear with everybody that
21 11:20 AM 21 these are not products liability claims. The United States
22 11:20 AM 22 Government did not manufacture and sell these products. We
23 11:20 AM 23 have firefighting use claims and environmental remediation
24 11:21 AM 24 claims. So if that's beyond the scope of this Court's
25 11:21 AM 25 intention or the panel's intention --

11:21AM 1 THE COURT: Say what you just said before. United
11:21AM 2 States had its own claims; correct?

11:21AM 3 MS. WILLIAMS: It has claims against us, not claims
11:21AM 4 that we're bringing. We're entirely defensive, yes.

11:21AM 5 THE COURT: Okay.

11:21AM 6 MS. WILLIAMS: So these are people who are suing
11:21AM 7 right now either the Air Force, mostly the Air Force, or
11:21AM 8 National Guard for their use of the product. They're not suing
11:21AM 9 Navy or they're not related to product development, not related
11:21AM 10 to product sale or manufacture, although certainly the
11:21AM 11 government has involvement there. They're related to how did
11:21AM 12 Air Force use this product in fire training? How was this fire
11:21AM 13 training area set up? Why did Air Force, you know, dispose of
11:21AM 14 the product in the way it did? And then there's a separate
11:21AM 15 level of how is Air Force responding to it now? So there's a
11:21AM 16 group of people at Air Force called AFCEC, the Air Force Civil
11:21AM 17 Engineering Command. They have been pretty instrumental in
11:21AM 18 responding to over 200 Air Force sites across the country. And
11:21AM 19 so they're, you know, a big player from an AFFF perspective,
11:21AM 20 and these are cases about their responses and their use.

11:22AM 21 THE COURT: I get that. I had a sense from the
11:22AM 22 last -- and again, I'm going to learn some of this as time goes
11:22AM 23 on, but I understood that some of the plaintiffs were
11:22AM 24 contemplating bringing in the United States as a defendant.
11:22AM 25 Mr. London, what's sort of the status of that?

11:22 AM 1 MR. LONDON: Actually the City of Westfield is
11:22 AM 2 bringing them in, so a motion -- and I'll be filing an amended
11:22 AM 3 complaint I believe probably tomorrow.

11:22 AM 4 THE COURT: And will that be a water contamination
11:22 AM 5 case?

11:22 AM 6 MR. LONDON: That's correct.

11:22 AM 7 MS. WILLIAMS: Their six-month deadline was on
11:22 AM 8 April 7th, so it should be tomorrow.

11:22 AM 9 MR. LONDON: That's why it's on the agenda for today.
11:22 AM 10 We spoke to the defendants.

11:22 AM 11 THE COURT: Well I appreciate the United States' role
11:22 AM 12 here, and I have observed from time to time that you can often
11:22 AM 13 get the plaintiff and non-governmental defendants together to
11:22 AM 14 blame the United States for everything. That's -- you may find
11:22 AM 15 them in united agreement that you should get the bill.

11:22 AM 16 MS. WILLIAMS: I may unify with one of them as well
11:22 AM 17 though, Your Honor.

11:23 AM 18 THE COURT: That's fine. And I think we all -- we
11:23 AM 19 all are on this journey together to figure out what the facts
11:23 AM 20 are, and you may have a head start on part of this, because
11:23 AM 21 you've been doing it for two and a half years and focused,
11:23 AM 22 trying to figure out.

11:23 AM 23 I do want to make it clear. I fully appreciate
11:23 AM 24 the United States saying, "You can go to these websites and get
11:23 AM 25 this information." That is not excusing the United States to

1 respond to discovery, and the answer isn't going to be, "Go
2 look on our website." You need to be prepared. It's not an
3 Easter egg hunt. You know, when they ask for specific
4 information, if there's a -- if there are objections the
5 government has to responding, you'll let me know that. I know
6 you will, but it is not an answer, "Go look on our website."

7 **MS. WILLIAMS:** Your Honor, that is not going to be
8 the only answer. The government understands the importance of
9 the information it has in this case, and we have no intention
10 to be stingy, but we do have sovereign immunity defenses to
11 discovery, and I view it as part of my job to help navigate
12 through those so people can get the information they need. I
13 may have to raise those defenses though. The government is not
14 subject to party discovery in 89 products liability cases where
15 we're not a party, and our position and the relevant case law
16 from the Fourth Circuit and the Supreme Court is laid out there
17 in the voluntary disclosures.

18 I'm not trying to avoid discovery. I'm just
19 saying that sovereign immunity gives the government the right
20 to do it on its own terms, and that's what we intend to do.

21 **THE COURT:** well, I will hear -- if you have an
22 objection, I'm the one that makes that determination, not the
23 United States, about whether sovereign immunity bars certain
24 discovery. You need to understand that.

25 **MS. WILLIAMS:** I will be very happy to discuss that

1 case law with Your Honor if it comes up.

2 **THE COURT:** I'm glad to hear it, but I want you to
3 know that there are important information, relevant probative
4 information that goes to the rights and claims of perhaps tens
5 of thousands of people, and you're going to have to make a
6 strong case if you want to withhold something that's
7 potentially probative and relevant to this case.

8 **MS. WILLIAMS:** Your Honor, right now I believe that
9 our interests are aligned. The Navy -- I am in possession of
10 documents from a case called *Pena v. the United States*
11 [phonetically]. That's a federal claims court case, though it
12 can be transferred here. They have completed discovery, and I
13 can share those documents, which go a lot to the Navy's
14 knowledge, as soon as we have a confidentiality order in place.

15 The Air Force and the Navy are both also
16 collecting documents. This is not -- this is very much not the
17 case that we plan to sit on this information. We want this
18 information to get out. We just want to make sure that it does
19 that in the right way.

20 **THE COURT:** I think you're doing exactly what you
21 should be doing, Ms. Williams. I'm not complaining in any way.
22 I just want you to know that we've got a lot of true discovery
23 to do in this case, and it may be that the hard work you've
24 been doing for the last two and a half years can shortcut a lot
25 of this and just get us to the chase about -- for instance, do

1 you know whether the -- as a general proposition the Air Force
2 can trace from receiving the AFFF product about where it went
3 and how it -- when it was used and how much was used? Is that
4 know-able?

5 **MS. WILLIAMS:** I have people I can ask.

6 **THE COURT:** Okay. I mean, I think that's going to be
7 like a really important issue, and anyone that could help us
8 get that quicker rather than -- it could be very painful to get
9 it, or it could be efficiently obtained, and you can play a
10 role in helping us centralize those requests and getting that
11 information in, because until we know it, it's just really
12 going to be hard to get this case really moving.

13 **MS. WILLIAMS:** I appreciate that, Your Honor. There
14 is one additional point that I need to speak to, and that also
15 goes to sovereign immunity and the separation of powers and the
16 representation of the United States.

17 I want to be clear that I'm not unhappy with the
18 common defense committee and the way that it's structured and
19 my role there, but the United States has several interests that
20 are in conflict with the manufacturing defendants, and those
21 interests make it difficult for them to be the traffic cops
22 over our discovery. So those issues are things like our focus,
23 we're not a products liability case; our sovereign immunity
24 issues, as I'm sure they disagree on many points; and also
25 their qualified immunity defense. I think all of the

1 defendants are going to agree that the government has immunity.
2 That's a common issue, but as Your Honor has already
3 identified, whether they qualify to claim that immunity, that's
4 a whole series of separate questions.

5 **THE COURT:** It is, and it's going to be one we got to
6 get to.

7 I appreciate that there is conflict on both
8 sides for the United States. I get that. State of New York,
9 State of Ohio, they're going to have the same issues; right?
10 They're going to be both -- they're going to be on both sides
11 of this, and as I told the gentleman from the State of New
12 York, here's what we're going to do. You're sitting on the
13 defense committee. You're going to voice your views to your
14 committee and your concerns, and if you don't get a
15 satisfactory response, you're going to step right up here at
16 the next -- or future status conferences and let me know that,
17 and I will address those. I want the United States' legitimate
18 interests to be protected, but I got to have order in this --
19 in this could be incredibly chaotic case without leadership.
20 So I assure you that in the end of this, that we will -- we
21 will respect the rights, the legitimate rights of the United
22 States, but we will get the discovery that we all need to get
23 this litigation to a -- to an end. Okay?

24 Thank you for speaking. I'll look forward to
25 working with you again in the future.

1 11:28 AM 1 MS. WILLIAMS: Thank you, Your Honor.

1 11:28 AM 2 THE COURT: Okay, folks. You know now the lady who
1 11:28 AM 3 has all the information, right? You might want to just hand
1 11:28 AM 4 your cell phone out, Ms. Williams. I think you're going to be
1 11:28 AM 5 getting a lot of calls now. I think they've all learned how --
1 11:28 AM 6 how thoroughly you're inmeshed in this already, and hopefully
1 11:28 AM 7 that will help us, that the government is on top of this and is
1 11:28 AM 8 looking at this.

1 11:28 AM 9 Are there other matters I need to address today,
1 11:28 AM 10 first from the plaintiff?

1 11:29 AM 11 MR. THOMPSON: I don't believe so, Your Honor.

1 11:29 AM 12 THE COURT: From the defense?

1 11:29 AM 13 MR. PETROSINELLI: No, Your Honor.

1 11:29 AM 14 THE COURT: Very good. Folks, I want you to know I
1 11:29 AM 15 know that everybody was -- seemed to be enjoying the reception
1 11:29 AM 16 yesterday, and I had trouble figuring out who were the
1 11:29 AM 17 plaintiffs' lawyers and who were defense lawyers because
1 11:29 AM 18 everybody was being so thoroughly sociable with each other, and
1 11:29 AM 19 I many times would say, "what side are you on?" And there were
1 11:29 AM 20 plaintiffs and defense lawyers standing there talking to each
1 11:29 AM 21 other, having a drink together, and I think that is just
1 11:29 AM 22 wonderful.

1 11:29 AM 23 You know, there's a story told that -- that
1 11:29 AM 24 Charles Kuralt came to -- was doing a book called -- eventually
1 11:29 AM 25 became a book called America, and the theme of the book was the

1 12 greatest places in the United States to spend a month, and
2 the best month to spend in each of those places. Charleston
3 was picked for April, and he commented that -- for those too
4 young, Charles Kuralt was a CBS reporter who was just a
5 wonderful character, and he wrote the book in the mid nineties.
6 He said he was walking around Charleston, and the first day
7 someone said "hello" to him, and he, a New Yorker, he was like,
8 "What, is the guy going to pick my pocket?" And then a few
9 minutes later, a second person came by and said "good morning",
10 and he said "good morning" back, and the third person walked
11 by, and he initiated "good morning". And he just said that
12 Charleston's courtesy was infectious, and I think we're
13 hopefully going to have some of that in this case, and
14 hopefully -- if y'all keep having these receptions, I'll keep
15 showing up. Yes, sir?

16 **MR. CARPENTER:** Your Honor, Mike Carpenter for
17 Buckeye Fire. I had one item on the agenda. I think it's --

18 **THE COURT:** Come on up in front of the rail here.

19 **MR. CARPENTER:** Your Honor, again, Michael Carpenter
20 for Buckeye Fire Equipment.

21 **THE COURT:** Yes, sir.

22 **MR. CARPENTER:** One of the manufacturers. We had one
23 item on the agenda. It was there were some stipulations of
24 dismissal and tolling agreements --

25 **THE COURT:** Yes.

