

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING) MDL NO: 2:18-MN-2873
FOAMS PRODUCTS LIABILITY)
LITIGATION) October 4, 2019

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

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Friday, October 4, 2019

(WHEREUPON, court was called to order at 9:02 a.m.)

THE COURT: Good morning. Please be seated.

I think we've attracted a crowd. Is it the good weather in Charleston?

You know, seeing counsel sitting in the jury box reminds me of a story which I tell in Unexampled Courage in which Judge Waring, who used this courtroom, summoned all the members of the democratic party's executive committee who had defied an earlier order to allow African-Americans to vote in the democratic primary. He summoned them to this courtroom for an emergency hearing and they were in here. And, boy, it was so crowded lawyers were sitting in the jury box. And he told them, he says, You know, a federal judge faced with contempt has two choices. He can impose a fine or incarceration. He said, If you violate my orders anymore, there will be no fines. (Laughter) Pretty powerful message, I think. It worked.

Well, folks, we're going to do -- our agenda here today is we're going to do -- we'll do our normal monthly status conference. And then we will just immediately, I don't think there are too many weighty issues, unless something surprises me, and then we will proceed right on with our Science Day. And I'll talk a

1 little bit more about the format for Science Day just
2 confirming our understanding about things when we get to
3 that.

4 So first of all, could counsel identify who will
5 be speaking today, identify themselves for the record
6 beginning with plaintiff's counsel?

7 **MR. THOMPSON:** Your Honor, my name's Fred
8 Thompson from Motley Rice, plaintiff's liaison counsel.

9 **MR. NAPOLI:** Good morning, Your Honor. Paul
10 Napoli.

11 **MR. LONDON:** Good morning, Your Honor. Michael
12 London.

13 **MR. SUMMY:** Good morning, Your Honor. Scott
14 Summy.

15 **THE COURT:** Good to see my Plaintiff's Executive
16 Committee all here bright and alert.

17 Yes, sir, Mr. Petrosinelli?

18 **MR. PETROSINELLI:** Good morning, Your Honor.
19 Joe Petrosinelli of Williams and Connolly, one of the
20 defendant co-leads.

21 **MR. OLSEN:** Good morning, Your Honor. Michael
22 Olsen, Mayer Brown, one of the defense co-leads.

23 **MR. DUFFY:** Good morning, Your Honor. Brian
24 Duffy here from Duffy and Young, liaison counsel,
25 co-liaison.

1 **MR. DUKES:** Good morning, Your Honor. David
2 Dukes, Nelson Mullins, co-liaison counsel.

3 **THE COURT:** I saw you hiding back there but I
4 didn't miss you.

5 **MR. LONDON:** Excuse me, Your Honor. We have two
6 others that might be presenting.

7 **MR. DOUGLAS:** My name's Gary Douglas for
8 plaintiffs at Douglas London.

9 **THE COURT:** Thank you, Mr. Douglas.

10 **MS. COSSICH:** Christina Cossich for plaintiffs.

11 **THE COURT:** Thank you very much.

12 Okay. First of all, let me talk about the
13 schedule for future monthly status conferences because I
14 think our schedule went through this month. Our next
15 monthly conference will be in the fall, November 1. I'm
16 trying to maintain the Friday's here. November 1.

17 And the next one I have scheduled is
18 December 13. And I understood that there were some
19 counsel who had a potential conflict for that day. The
20 only problem with my only alternative date is December 20,
21 and I don't want my lawyers traveling on the Friday before
22 Christmas. I just think that's crazy. So if some can't
23 be here, we'll just have to deal with that. I just think
24 the alternative is just not -- and then -- it's just not
25 acceptable.

1 And then what I will do is we will issue after
2 today an order that takes us through September 2020. And
3 again, counsel, if there's some date that just creates a
4 huge problem for people, let's talk about it and we'll try
5 to do everything we can. I think the Fridays work pretty
6 well. Is that right?

7 **MR. NAPOLI:** Absolutely.

8 **THE COURT:** I know folks are coming in a little
9 early. It seems to be a system that's working. I don't
10 want to disrupt it unless we have to.

11 Okay. On discovery, who wants to report first
12 from the plaintiffs and then the defendants on where we
13 are? Because I want discovery moving here and I know
14 y'all are working. So tell me whose here.

15 **MR. LONDON:** Your Honor, Michael London.
16 There's not much to report on discovery, although it is
17 moving. We have got -- the PFC has propounded master
18 discovery demands on the defendants.

19 **THE COURT:** What a surprise.

20 **MR. LONDON:** What a surprise, right? We've
21 started to get initial responses from the defendants. I
22 think they've been rolling in in the last week to ten
23 days. Certain other defendants, as alluded to or set
24 forth in the joint status report, have asked for and the
25 PFC has given, second extensions. I think there may be a

1 typo in there involving DuPont as well as National Foam,
2 and Buckeye defendants were given until October 14th -- or
3 16th, excuse me, to provide their initial responses.

4 **THE COURT:** Okay.

5 **MR. LONDON:** The documents have been coming in
6 from prior productions. We expect the more responsive
7 documents to start flowing from -- to start flowing
8 towards the plaintiffs from the defendants in the coming
9 weeks. We hope at the November conference to have a more
10 robust answer to this question, where we are on the
11 discovery responses. We have meet and confers set up, I
12 believe, with all of the defendants concerning their
13 responses and potential objections we may have.

14 **THE COURT:** Mr. London, here's what I want is if
15 there's a snag, I, obviously, want the lawyers to meet and
16 confer and do their very best to resolve matters. If you
17 cannot, I want to promptly address it at the next status
18 conference. I don't want our discovery held up while
19 y'all spend several months talking about an issue. I want
20 it resolved. I want y'all to make your best efforts. I
21 don't mind making a decision. Okay? So I want to go
22 ahead and keep discovery moving.

23 I know there's a voluminous amount of discovery
24 to be done in this case. And I'm sure that as the
25 plaintiffs receive large amounts of information, which are

1 invariably coming -- and you're going to have to manage
2 it, too, which I know has its own challenges and process
3 it. But we need to keep this process moving because we
4 need to get beyond the production stage, the initial
5 production stage to move on.

6 I've mentioned before, I want to deal with
7 the -- as soon as we can reasonably gather the information
8 necessary, I want to be able to deal with these immunity
9 issues, both governmental and governmental contractor.
10 The governmental contractor in particular seems to be very
11 discovery intensive. I mean, this is going to be a big
12 job, not only documents but depositions and so forth.

13 **MR. LONDON:** Right.

14 **THE COURT:** And the longer we spend chasing
15 documents, the longer it'll be before we address those
16 issues. So it's important to me that part of -- I use
17 these monthly conferences to push y'all along. And where
18 there is conflict, I want to promptly address these
19 things. That's my goal.

20 So y'all also were working on a privilege log.
21 What's going on with that?

22 **MR. LONDON:** And Your Honor, we appreciate those
23 comments. And behind the scenes, I'll just add, we have
24 put together, there's a team of folks here and some who
25 haven't traveled to Charleston who have got the PFCs, the

1 plaintiff's group, infrastructure to receive these
2 documents up and ready. So there is no -- there should be
3 and there will be no lag time on our end to receive these
4 documents, upload them into the platforms, whereby
5 plaintiff lawyers representing the various plaintiffs in
6 this litigation can start reviewing. So we certainly
7 appreciate Your Honor's comments and we intend to move
8 forward quickly.

9 **THE COURT:** And how about on the privilege log?

10 **MR. LONDON:** The privilege log, the plaintiff's
11 group and defense groups have been meeting. I believe we
12 are very close to an agreement. And I hope to have an
13 agreement on the disputed issues. I was hoping today but
14 I think, Your Honor, we can probably have it to the Court
15 within two weeks.

16 **THE COURT:** Good. I just -- you know, it's just
17 one of those mechanics that we need to take care of here.

18 **MR. LONDON:** And that's why keeping a shorter
19 leash, rather than the next status conference, would be
20 great.

21 **THE COURT:** That'd be great. And by the way, in
22 addition, and this may become more relevant say we're
23 sitting in a deposition or something. If I'm not tied up
24 in court, you can call in. And if you've got, you know,
25 something that would be helpful to resolve it right then,

1 you can call in. Now, what I may well do is say, you
2 know, be at ease for 30 minutes or focus on another issue
3 at the deposition, let me think about it a bit. I'm not
4 real big on just sort of spontaneously responding to
5 something. These issues are complicated. But one of my
6 goals here is not to have the litigation slow up because
7 of discovery disputes that don't get brought to the Court
8 and/or the Court doesn't resolve them promptly. I think
9 that's my -- part of my role is to do that. Okay?

10 **MR. LONDON:** Great.

11 **THE COURT:** Very good.

12 How about the Federal Government discovery?

13 Where is that going?

14 **MR. LONDON:** I should probably --

15 **MS. FALK:** Yes, Your Honor. We've been
16 producing documents --

17 **THE COURT:** Could you state your name for the
18 record, please?

19 **MS. FALK:** Oh, I'm sorry. Christina Falk on
20 behalf of the United States of America.

21 **THE COURT:** Yes, ma'am.

22 **MS. FALK:** Your Honor, we've already begun our
23 production in addition to the original disclosures we've
24 made. We produced some documents to the manufacturing
25 defendants and are getting ready to respond to some of the

1 plaintiff's discovery requests.

2 **THE COURT:** Thank you very much.

3 **MR. OLSEN:** Your Honor, only thing I would add
4 to that is we just received the Government's objections to
5 the discovery we issued. So we will be meet and
6 conferring with them. And if we have issues, we'll try to
7 get that on the next go round.

8 **THE COURT:** Good. I'm delighted to do that. I
9 know that the Government is going to have documents that
10 are unique to the Government. Nobody else would possibly
11 have them. And this is important litigation and I want to
12 work with everyone to get them. I think the voluntary
13 production is a far better way to do it. But if we don't
14 get there, I'm ready to address some of those issues. And
15 I understand what they are.

16 Who is going to speak for the defense in terms
17 of their sort of view on discovery?

18 **MR. OLSEN:** The only thing I would add, Your
19 Honor, is we received the first plaintiff fact sheet this
20 week. We anticipate that those will start to role in in
21 earnest. But as Mr. London said, we are working through
22 issues and producing lots of documents. And to the extent
23 we can't work stuff out, we'll bring it to your attention.

24 **THE COURT:** Thank you very much, Mr. Olsen.

25 Okay. There was a -- I received a proposed

1 order on service of process. Who wants to address that?

2 **MR. LONDON:** Your, Michael London for the
3 plaintiff's group. It's a proposed order to address the
4 timely and efficient service of summons and complaints.

5 **THE COURT:** I didn't have any issues with it.
6 Looked fine to me. Anybody want to say anymore about
7 that?

8 **MR. LONDON:** No.

9 **THE COURT:** I'll sign that today.

10 **MR. LONDON:** It's by consent by all the parties.

11 **THE COURT:** Very good. Thank you.

12 Okay. Talk to me about tolling the statute of
13 limitations. I know y'all are working among yourselves on
14 that. And you've asked me to sign an order sort of on the
15 ancillary issue of certain responses that are due for
16 parties. Tell me where we are on the tolling agreement.

17 **MR. LONDON:** Your Honor, Michael London. I can
18 address this as well. This is a tolling agreement with
19 respect to certain defendants in certain actions that are
20 coming here. And it's, I guess, the best way to say it is
21 boots and suspenders to address the leave to amend that
22 could have been impacted by CMO 3.B. But there is no --

23 **THE COURT:** There's no global --

24 **MR. LONDON:** This is no universal tolling. This
25 is for discrete cases -- a discrete set of defendants --

1 or, excuse me, discrete cases for discrete defendants.

2 **THE COURT:** I want to say, and I've said it
3 before, I do think it's in everybody's interests not to
4 have thousands of plaintiffs filing lawsuits and people
5 responding to that, which I think will be a great
6 distraction to all the parties. But I do not have the
7 authority to toll the statute of limitations sua sponte.
8 And it's up to the parties to do it. And if -- it's the
9 defendant's prerogative. If they don't want to do it,
10 that's their right not to do it. And we'll manage it.

11 But I do, you know, urge defense counsel to give
12 some careful thought to this issue because it's kind of
13 like the tire -- the dog who catches the tire. What are
14 you going to do with all those tens of thousands of
15 potential plaintiffs who show up here and how are you
16 going to manage all that?

17 And in my view of this, and I've been candid
18 about it, I think the individual party claims are probably
19 towards the end of this process, that I see the water
20 district claims, for instance, being an earlier kind of
21 threshold issue. I've said before, if the water districts
22 can't survive, can't produce claims that survive, I don't
23 see how the individual plaintiffs would. They don't have
24 as many issues.

25 So burdening us with things that are kind of

1 down the road, I think it just takes everyone some
2 reflection of what's the best way to manage it. But I'm
3 going to leave it to the good -- the offices of all
4 counsel here to address that issue. The CMO 3.C proposal
5 is fine. I'm going to sign that.

6 There was also a discussion about a procedure
7 for filing -- there was a filing statement on affirmative
8 defenses. Who wants to address that issue?

9 Mr. Petrosinelli?

10 **MR. PETROSINELLI:** Yes, Your Honor. This one,
11 again, is on consent. We had to have a mechanism for when
12 new cases come to the MDL having a deadline for the type
13 of affirmative defenses that have already been filed in
14 the existing cases. So the parties --

15 **THE COURT:** I presume they're going to
16 essentially cut and paste yours, your responses?

17 **MR. PETROSINELLI:** That might be a fair
18 assumption. So I think we came up with this 30-day
19 mechanism. It seemed like it was fine.

20 **THE COURT:** I think that sounds perfectly fine.

21 I understood that some of the non-manufacturing
22 defendants wanted to talk about a potential defense
23 subgroup?

24 Come on forward.

25 **MR. REILLY:** Good morning, Your Honor.

1 THE COURT: If you'd come to the podium here.

2 THE COURT REPORTER: Would you give me your
3 name, please?

4 THE COURT: State your name for the record.

5 MR. REILLY: Sure. I'm Ken Reilly from Shook
6 Hardy and Bacon. And I represent Chemours and DuPont.

7 THE COURT: Thank you, sir, for being here. I
8 met you last evening. Welcome to the litigation.

9 MR. REILLY: Thank you, Your Honor, I think.
10 I'm not sure. I look around the room and I'm just not
11 sure.

12 THE COURT: Everyone else has a smile on their
13 face.

14 MR. REILLY: Right. So what we're asking Your
15 Honor is we're not manufacturers of AFFF. We're not
16 sellers of AFFF. There are a few of us, Chemours, DuPont,
17 I think that Dynax, Sulvey, and --

18 How do you pronounce the other one?

19 Dycon -- I'm sorry, I don't know them -- all
20 fall into this same category. And --

21 THE COURT: They are making products that are
22 ultimately used in the foam but are not manufactured by
23 your clients; is that right?

24 MR. REILLY: Exactly, for some people's, some
25 people's foam products but it's --

1 **THE COURT:** It's a discrete group.

2 **MR. REILLY:** It's a very discrete group. We
3 don't have a seat on the steering committee or the defense
4 committee. And I understand, I've had this conversation
5 with the executive committee of that committee, and I
6 understand there's no objection to us being added as a
7 special group with a seat on the committee if that would
8 be --

9 **THE COURT:** I think that's fine. I've been
10 big -- and counsel can tell you this -- on supporting the
11 leadership of both the plaintiff and defense committees
12 because I think it's hard to manage it without it, but to
13 add you as a subgroup and to be part of the executive
14 committee.

15 Mr. Petrosinelli, I take it you don't have any
16 objection to this?

17 **MR. PETROSINELLI:** No. Mr. Reilly made the
18 request to be added to this group, to the Defense
19 Coordination Committee, and discussed it with Mr. Olsen.
20 We don't have any objection.

21 **THE COURT:** So done.

22 **MR. REILLY:** Thank you, Your Honor.

23 **THE COURT:** Thank you, sir.

24 Okay. Are there any other issues for the Court
25 to address for the status conference before we proceed to

1 Science Day?

2 **MR. THOMPSON:** Your Honor, I do believe that
3 they reached an agreement.

4 **MR. LONDON:** That's what we were just
5 mentioning.

6 Your Honor, the issue is the Pennsylvania State
7 Court cases on the agenda. Just simply, at the venue last
8 night, I'm happy to report it was successful having the
9 parties together. And an agreement was reached that the
10 outstanding 700 or so individual plaintiffs will be filing
11 suit in short order in the coming four months in an
12 orderly fashion in coming to --

13 **THE COURT:** It's 700 individual plaintiffs, but
14 there are not as many suits in Pennsylvania. Some of them
15 are collective actions.

16 **MR. LONDON:** That's correct.

17 **THE COURT:** But they will now be individual
18 claims.

19 **MR. LONDON:** Correct.

20 **THE COURT:** Very good. Good work. Thank you
21 very much.

22 **MR. LONDON:** I think the backdrop of the last
23 evening helped.

24 **THE COURT:** A few drinks never hurt anyone in
25 the negotiating process. (Laughter)

1 Okay. Let's proceed then, if we might, to
2 Science Day.

3 (End of status conference transcript.)

4 ***

5 I certify that the foregoing is a correct transcript from
6 the record of proceedings in the above-entitled matter.

7 s/Karen E. Martin 10/11/2019

8 _____ Date _____
Karen E. Martin, RMR, CRR

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