

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

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IN RE: AQUEOUS FILM-FORMING *
FOAMS PRODUCTS LIABILITY * MDL No. 2:18-mn-2873
LITIGATION *
* * * * * May 17, 2019
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REPORTER'S OFFICIAL TRANSCRIPT OF THE
STATUS CONFERENCE HELD BEFORE THE
HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE
MAY 17, 2019

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1 (Call to order of the Court.)
2 **THE COURT:** Good morning. Please be seated. We are
3 in the matter of the AFFF products liability MDL monthly status
4 conference, 2:18-2873.
5 Could those counsel who will be speaking here
6 today identify themselves for the record, beginning with
7 plaintiffs' counsel?
8 **MR. THOMPSON:** Your Honor, my name is Fred Thompson.
9 I'm the plaintiffs' liaison counsel.
10 **MR. LONDON:** Good morning, Your Honor. Michael
11 London. I'm one of the plaintiffs' co-lead counsel on the PEC.
12 **MR. SUMMY:** Good morning, Your Honor. Scott Summy.
13 **THE COURT:** Good to see you again, Mr. Summy. I
14 didn't see you last night. You must have been hiding.
15 **MR. SUMMY:** I'm sorry, Judge. I got in late.
16 **THE COURT:** Yes.
17 **MR. NAPOLI:** Good morning, Your Honor. Paul Napoli.
18 **THE COURT:** Yes. Thank you. Okay.
19 **MR. PETROSINELLI:** Your Honor, good morning. Joe
20 Petrosinelli, one of the defendant's co-leads.
21 **THE COURT:** I noticed you were there early and stayed
22 late.
23 **MR. PETROSINELLI:** Shall I not do that in the future?
24 **THE COURT:** Oh, no. That's just fine. I just
25 observed.

9 : 0 8 A M 1 MR. DUKES: Good morning, Your Honor. David Dukes.

9 : 0 8 A M 2 THE COURT: Yes.

9 : 0 8 A M 3 MR. OLSEN: Good morning, Your Honor. Mike Olsen. I
9 : 0 8 A M 4 just stayed late with Joe.

9 : 0 8 A M 5 THE COURT: You wanted to make sure he got home.

9 : 0 8 A M 6 MR. DUFFY: Good morning, Your Honor. Brian Duffy.

9 : 0 8 A M 7 THE COURT: Yes, sir. Okay, folks.

9 : 0 8 A M 8 And, Ms. Perry, we have folks on the line, I
9 : 0 8 A M 9 take it?

9 : 0 8 A M 10 COURTROOM DEPUTY: Yes, sir.

9 : 0 8 A M 11 THE COURT: Good. Thank you.

9 : 0 8 A M 12 COURTROOM DEPUTY: 40.

9 : 0 8 A M 13 THE COURT: Okay. Very good. Okay. Just confirming
9 : 0 8 A M 14 of course as a preliminary matter that our next status
9 : 0 8 A M 15 conference is Friday, June 21st, and I've by previous order
9 : 0 8 A M 16 given those other dates.

9 : 0 9 A M 17 Somebody asked me last night, he says, "Are we
9 : 0 9 A M 18 not doing August because it is so hot in Charleston?" And I
9 : 0 9 A M 19 said, "well, yeah. Maybe because if you came in August, you
9 : 0 9 A M 20 wouldn't ever return. You'd do it only by phone."

9 : 0 9 A M 21 Okay. Let's go through a couple of these -- I
9 : 0 9 A M 22 have a checklist of things that I wanted to cover, and then --
9 : 0 9 A M 23 then I'll -- any other matters that -- that counsel want to
9 : 0 9 A M 24 raise with me, I'm certainly available to hear that.

9 : 0 9 A M 25 ESI protocol. Mr. Thompson, I've got something

9 : 0 9 A M 1 that came over the transom last night as I was walking out the
9 : 0 9 A M 2 door.

9 : 0 9 A M 3 **MR. THOMPSON:** Yes, sir. Mr. Duffy conveyed an
9 : 0 9 A M 4 agreed ESI and a protective order to the Court yesterday that
9 : 0 9 A M 5 we were able to negotiate in good faith and good humor, and
9 : 0 9 A M 6 we've gotten those for your consideration.

9 : 1 0 A M 7 **THE COURT:** Thank you. And I will -- I will review
9 : 1 0 A M 8 them in due course. If they look okay to me, I will sign them,
9 : 1 0 A M 9 and if I have any questions, we'll -- you know, I'll address
10 them with counsel if I have any questions or concerns.

9 : 1 0 A M 11 Talk to me about fact sheets. Where are we on
9 : 1 0 A M 12 developing fact sheets?

9 : 1 0 A M 13 **MR. THOMPSON:** Judge, if I could go ahead and
9 : 1 0 A M 14 introduce Mr. London, who -- let me preface it by saying I went
9 : 1 0 A M 15 to see Hamilton, and I saw the thing that said, "Talk less,
9 : 1 0 A M 16 smile more."

9 : 1 0 A M 17 **THE COURT:** Yes.

9 : 1 0 A M 18 **MR. THOMPSON:** So I'm going to try to talk less. So
9 : 1 0 A M 19 let me just hand it--

9 : 1 0 A M 20 **THE COURT:** He hasn't see Hamilton yet.

9 : 1 0 A M 21 **MR. THOMPSON:** But we have been negotiating at a
9 : 1 0 A M 22 strong pace, but let me let Mr. London --

9 : 1 0 A M 23 **THE COURT:** Let me hear about it, because I think it
9 : 1 0 A M 24 ties, I know, Mr. London, into sort of discovery strategy and
9 : 1 0 A M 25 everything else, right, I mean about how you organize

9 : 1 0 A M 1 discovery?

9 : 1 1 A M 2 MR. LONDON: I think so, Your Honor. And I think --
9 : 1 1 A M 3 I guess there are two components obviously. There's the
9 : 1 1 A M 4 plaintiff fact sheets which we received from the defense,
9 : 1 1 A M 5 excuse me, and we have volleyed back and forth various red
9 : 1 1 A M 6 lines. I think the ball is in the defense court to respond to
9 : 1 1 A M 7 our red lines. We had a productive meet and confer telephone
9 : 1 1 A M 8 call yesterday afternoon. I think we expect some edits back
9 : 1 1 A M 9 from them. I don't want to speak for them, but I think we're
9 : 1 1 A M 10 anticipating to be able to have fact sheets for the Court to
9 : 1 1 A M 11 approve as a discovery device in the next two weeks.

9 : 1 1 A M 12 THE COURT: Good.

9 : 1 1 A M 13 MR. LONDON: I think that's what we're shooting for.
9 : 1 1 A M 14 With the fact sheet, there will also be an implementing order.
9 : 1 1 A M 15 I'm being mindful now to try and speak less; an implementing
9 : 1 1 A M 16 order which will govern the parameters of how quickly they need
9 : 1 1 A M 17 to be responded to.

9 : 1 1 A M 18 THE COURT: Right.

9 : 1 1 A M 19 MR. LONDON: And obviously there will be two tiers,
9 : 1 1 A M 20 those plaintiffs who have already filed cases out there, and
9 : 1 1 A M 21 maybe a little bit more of a lag time for them to answer just
9 : 1 2 A M 22 to get the momentum going --

9 : 1 2 A M 23 THE COURT: Yes.

9 : 1 2 A M 24 MR. LONDON: -- and then obviously for future filed
9 : 1 2 A M 25 cases when this discovery device, the fact sheet, becomes due.

9 : 1 2 A M

1 THE COURT: Yes.

9 : 1 2 A M

2 MR. LONDON: We also envision some cure process or if
3 there's an objection or a deficiency, some process within --

9 : 1 2 A M

4 THE COURT: I want you to know, I went through this
5 in my prior MDL, and we dismissed them without prejudice
6 allowing them to restore, but they had to come back in with the
7 completed fact sheet. That's how they came back in. Not one
8 person did it. Not a single person came back in. It was just
9 very interesting. I don't like disposing on people's --
10 adjudicating their rights on technicalities, and sometimes you
11 worry maybe somebody didn't see it, someone was away, et
12 cetera, but, you know, it's kind of telling that -- and I got
13 to say one of the benefits of the plaintiff fact sheet, it's
14 not just for the defense. It's for the plaintiffs' PEC, to get
15 people who really have claims, right? I mean, that those who
16 just on their face don't have claims, you're having to manage
17 this, and it's a burden on you as well.

9 : 1 3 A M

18 MR. LONDON: Absolutely, Your Honor. We agree with
19 that, and I think it makes -- it's important to put a point
20 here. There are at this point four different and distinct fact
21 sheets. There's --

9 : 1 3 A M

22 THE COURT: Tell me about that.

9 : 1 3 A M

23 MR. LONDON: Yeah, I think that's important here.
24 There's obviously the personal injury fact sheets that I think
25 Your Honor has experience with from Lipitor.

9 : 1 3 A M

9 : 1 3 A M

9 : 1 3 A M 1 THE COURT: Yes.

9 : 1 3 A M 2 MR. LONDON: And is far more common in these
9 : 1 3 A M 3 contexts, and those will be addressed. Those plaintiffs
9 : 1 3 A M 4 alleging personal injury claims and medical backgrounds, health
9 : 1 3 A M 5 histories and whatnot.

9 : 1 3 A M 6 There's also fact sheets, a separate fact sheet
9 : 1 3 A M 7 for those plaintiffs claiming property damage.

9 : 1 3 A M 8 THE COURT: Okay.

9 : 1 3 A M 9 MR. LONDON: And that's obviously a very distinct
9 : 1 3 A M 10 type of question.

9 : 1 3 A M 11 THE COURT: It is.

9 : 1 3 A M 12 MR. LONDON: There's also a plaintiff fact sheet
9 : 1 3 A M 13 designed and designated for the plaintiffs, the water
9 : 1 3 A M 14 providers, both government and private.

9 : 1 3 A M 15 THE COURT: We're going to talk about that, because
9 : 1 3 A M 16 the provider claims are a distinct class of claims all to
9 : 1 4 A M 17 themselves, have different sort of elements you have to prove,
9 : 1 4 A M 18 and in some ways are not as arduous as some of these other
9 : 1 4 A M 19 claims are to get to the end of the game on them.

9 : 1 4 A M 20 MR. LONDON: We agree.

9 : 1 4 A M 21 THE COURT: But they are preliminary to everybody's
9 : 1 4 A M 22 claims, but they -- you know, we're able early on to sort out
9 : 1 4 A M 23 some issues that are very important for all the claims.

9 : 1 4 A M 24 MR. LONDON: Agreed. And then the fourth, Your
9 : 1 4 A M 25 Honor, category of fact sheet right now that's being discussed

9 : 1 4 A M 1 is a plaintiff fact sheet for those plaintiffs who are simply
9 : 1 4 A M 2 claiming medical monitoring, and they -- I think most of those
9 : 1 4 A M 3 plaintiffs have come to this Court through various other courts
9 : 1 4 A M 4 and through the Colorado class cases that were filed for
9 : 1 4 A M 5 particular reasons there. So these are really going to be in
9 : 1 4 A M 6 our view -- and this is still being negotiated -- truncated,
9 : 1 4 A M 7 simple fact sheets if, in fact, we even need them.

9 : 1 4 A M 8 **THE COURT:** Do they live in an area that's allegedly
9 : 1 4 A M 9 in a zone of danger or something, right? I mean, you kind of
9 : 1 4 A M 10 need to know that. How long have they lived there?

9 : 1 5 A M 11 **MR. LONDON:** That's really it, because there's no
9 : 1 5 A M 12 medical history needed, because there's no claimed injury.

9 : 1 5 A M 13 **THE COURT:** Correct.

9 : 1 5 A M 14 **MR. LONDON:** It's where do they live and for how
9 : 1 5 A M 15 long? If the zone of danger is here, if they're saying they
9 : 1 5 A M 16 lived here --

9 : 1 5 A M 17 **THE COURT:** I mean, whether they are in a zone of
9 : 1 5 A M 18 danger or something will be later determined, but at this point
9 : 1 5 A M 19 you got to be arguably somewhere nearby, and if you don't or --
9 : 1 5 A M 20 you know, if you were only there incidentally, then you don't
9 : 1 5 A M 21 go to some other levels which will require greater effort to
9 : 1 5 A M 22 establish. So --

9 : 1 5 A M 23 **MR. LONDON:** Yeah, and that's really what that fact
9 : 1 5 A M 24 sheet is --

9 : 1 5 A M 25 **THE COURT:** And what I'm interested in, and we've

9 : 1 5 A M 1 been reading a little bit about medical monitoring. Obviously
9 : 1 5 A M 2 it's not universally recognized, right? So some of the
9 : 1 5 A M 3 jurisdictions don't recognize it. Others do. And in some ways
9 : 1 5 A M 4 like the water district, it has elements common to all claims,
9 : 1 5 A M 5 but you don't -- as you just said, you don't have to prove
9 : 1 5 A M 6 individual causation, which is in these cases often the most
9 : 1 5 A M 7 challenging of all proofs.

9 : 1 6 A M 8 And -- and let me say this, and we'll get into
9 : 1 6 A M 9 more of this as we go along in this and others. I've read
9 : 1 6 A M 10 everybody's -- thank you for those notebooks. They were -- you
9 : 1 6 A M 11 know, how y'all -- nobody gave me the same ten articles, which
9 : 1 6 A M 12 I found fascinating. It's like y'all live on two different
9 : 1 6 A M 13 planets, you know. And -- but I read everything, and, you
9 : 1 6 A M 14 know, even the argument that -- you know, that the C8 study
9 : 1 6 A M 15 doesn't -- C8 studies don't tell us much, if you argue that,
9 : 1 6 A M 16 all of them say, "There's something going on, and we need more
9 : 1 6 A M 17 study." I mean, that's a lot of what they say is, "we need
9 : 1 6 A M 18 more study." And I didn't see -- y'all can point it out to me.
9 : 1 6 A M 19 I didn't see much work out there on -- on exposure that might
9 : 1 6 A M 20 have not been as intense as the manufacturing plaintiffs in the
9 : 1 7 A M 21 MDL in Ohio and West Virginia, and it doesn't mean they're not
9 : 1 7 A M 22 injured, but there's -- the data has focused on a more intense
9 : 1 7 A M 23 dosing. I use the term "dosing" as more of a pharmaceutical
9 : 1 7 A M 24 thing, but it's kind of relevant as how much exposure did you
9 : 1 7 A M 25 have, and how long did you have it? That's like probably

9 : 1 7 A M 1 important. May not be. Maybe just a single exposure may cause
9 : 1 7 A M 2 injury. That may show it, but all those studies that the
9 : 1 7 A M 3 plaintiff showed me, necessarily almost all of them came out of
9 : 1 7 A M 4 the C8 data, you know, the very important data that came --
9 : 1 7 A M 5 maybe one of the great benefits of that suit is that you got
9 : 1 7 A M 6 all this data from those communities, but we then need to
9 : 1 7 A M 7 establish -- they say in Colorado, you know, "How much -- how
9 : 1 7 A M 8 intense was that exposure?" And I know the government has done
9 : 1 7 A M 9 some studies itself. I'm sure y'all are getting some of that
9 : 1 8 A M 10 now; is that right? Some of that -- the government is
9 : 1 8 A M 11 providing some of that data, Mr. London?

9 : 1 8 A M 12 **MR. LONDON:** We received one CD or DVD about a month
9 : 1 8 A M 13 ago, and we understand that there should be more coming.

9 : 1 8 A M 14 **THE COURT:** Good. I mean, I think -- you know, so we
9 : 1 8 A M 15 need to sort of get a sense of how much got exposed and, you
9 : 1 8 A M 16 know, what evidence is there of the contamination of water
9 : 1 8 A M 17 supply? I mean, what is that evidence? So a lot of this is
9 : 1 8 A M 18 like to me -- I guess what I'm saying is that some of the
9 : 1 8 A M 19 things you would do to look that you might gather in medical
9 : 1 8 A M 20 monitoring, first determining whether there's a basis for a
9 : 1 8 A M 21 class -- I can't imagine classes that wouldn't be site specific
9 : 1 8 A M 22 because so much of this is site specific, but even if you got
9 : 1 8 A M 23 there, and you decided, "Hey, maybe there's something to this,"
9 : 1 8 A M 24 the data you might receive could be very important for the rest
9 : 1 8 A M 25 of the case. And you lawyers would have to be doing something

9 : 1 9 A M 1 every lawyer hates to do, asking a question you don't know the
9 : 1 9 A M 2 answer to, right? You don't know what you're going to get.

9 : 1 9 A M 3 And -- but in some ways the medical monitoring
9 : 1 9 A M 4 may produce information that would be -- first of all,
9 : 1 9 A M 5 determining whether there's a basis for a class would be very
9 : 1 9 A M 6 important, and discovery needs to be directed towards that, and
9 : 1 9 A M 7 then even if you did it, what evidence do we have of any effect
9 : 1 9 A M 8 of this exposure that you would think at least some threshold
9 : 1 9 A M 9 showing might be in medical monitoring.

9 : 1 9 A M 10 So I just say that that -- so it's interesting
9 : 1 9 A M 11 that, Mr. London, apparently the lawyers are thinking about it
9 : 1 9 A M 12 in the same way I am in terms of this sequence of -- and you
9 : 1 9 A M 13 just gave it to me in this order. I might -- actually in terms
9 : 1 9 A M 14 of where you go in proof, you might do just the reverse.
9 : 1 9 A M 15 Medical monitoring, water providers, and then you would do, you
9 : 1 9 A M 16 know, the individual injury.

9 : 1 9 A M 17 **MR. LONDON:** I -- that is actually how we -- I chose
9 : 1 9 A M 18 that order simply because the plaintiff personal injury fact
9 : 2 0 A M 19 sheet was served on us first.

9 : 2 0 A M 20 **THE COURT:** Sure.

9 : 2 0 A M 21 **MR. LONDON:** And I feel as though that probably is
9 : 2 0 A M 22 the --

9 : 2 0 A M 23 **THE COURT:** And everybody is more familiar with
9 : 2 0 A M 24 those. It's easy.

9 : 2 0 A M 25 **MR. LONDON:** It is what it is, and -- but no. We

9 : 2 0 A M 1 agree, and then that's -- Mr. Summy might address that later as
9 : 2 0 A M 2 points related to science day, but we certainly agree with that
9 : 2 0 A M 3 position of that this is a contaminant out there or alleged
9 : 2 0 A M 4 contaminant, I think we both agree, and we should remediate and
9 : 2 0 A M 5 address its issues in the environment.

9 : 2 0 A M 6 The other aspects of it in the claims, the
9 : 2 0 A M 7 injury claims, as Your Honor just alluded to, that science is
9 : 2 0 A M 8 developing, and that science is going to develop through the
9 : 2 0 A M 9 monitoring precisely what happened in the Ohio cases --

9 : 2 0 A M 10 **THE COURT:** Correct.

9 : 2 0 A M 11 **MR. LONDON:** -- when it took the 72,000 people. They
9 : 2 0 A M 12 monitored them for seven years, and they -- this incredibly
9 : 2 0 A M 13 body of science came out.

9 : 2 0 A M 14 **THE COURT:** And I'm sure you can go back now and look
9 : 2 0 A M 15 at some of that data more precisely as you're looking as is
9 : 2 0 A M 16 relevant to this case. People who may not have had quite as
9 : 2 0 A M 17 intense exposure in one way, you might -- you know, you might
9 : 2 0 A M 18 want to see what that data shows you on human injury based on
9 : 2 1 A M 19 level of exposure. I didn't read the articles precisely
9 : 2 1 A M 20 looking for that, but it struck me that they were dealing with
9 : 2 1 A M 21 people that really had a lot of exposure. I mean, it was -- it
9 : 2 1 A M 22 was -- and whether that is or is not similar to what folks say
9 : 2 1 A M 23 in Colorado or New York, I don't know. I just don't know.

9 : 2 1 A M 24 **MR. LONDON:** I think -- and this will obviously be
9 : 2 1 A M 25 discussed at science day, but, you know, one important element

9 : 2 1 A M 1 here, I don't want to get too much into it, is this exposure
9 : 2 1 A M 2 component that Your Honor has alluded to. This is a chemical,
9 : 2 1 A M 3 an agent that doesn't go away. So it's not as if there's one
9 : 2 1 A M 4 blast of exposure or one big dose or you've taken a pill that
9 : 2 1 A M 5 goes away.

9 : 2 1 A M 6 **THE COURT:** That's why duration is going to be
9 : 2 1 A M 7 important.

9 : 2 1 A M 8 **MR. LONDON:** Duration is, but it's also biopersistent
9 : 2 1 A M 9 and bioaccumulative, which means when you take a 400 milligram
9 : 2 1 A M 10 pill -- and that might be a really big dose -- versus a 100
9 : 2 2 A M 11 milligram, in 48, 72 hours, that half-life is gone. Here if
9 : 2 2 A M 12 you take a smidgen of a dose, it never goes away. And then the
9 : 2 2 A M 13 next day when you brush you teeth --

9 : 2 2 A M 14 **THE COURT:** But here's going to be the question, is
9 : 2 2 A M 15 when does that smidgen, even daily smidgen, become medically
9 : 2 2 A M 16 significant? And I didn't see any articles on either side
9 : 2 2 A M 17 trying to get us where it becomes material, and I'm hoping on
9 : 2 2 A M 18 science day and some of your experts and defense experts will
9 : 2 2 A M 19 help us deal with that issue about when -- because listen, we
9 : 2 2 A M 20 know from -- from data that just is the broad exposure of
9 : 2 2 A M 21 humanity to this chemical, there's a -- for people who have not
9 : 2 2 A M 22 had any exposure in their water have a certain very small
9 : 2 2 A M 23 amount in their bloodstream. I mean, it's common. So one of
9 : 2 2 A M 24 the things we want to -- I'm interested in looking at is what
9 : 2 2 A M 25 is that baseline that's sort of commonly out there versus what

9 : 2 2 A M 1 people who have had a -- you know, have had exposure in their
9 : 2 3 A M 2 water supply, how does it differ?

9 : 2 3 A M 3 MR. LONDON: And in Ohio -- and I believe this is
9 : 2 3 A M 4 going to be discussed later -- it was .05 parts per million
9 : 2 3 A M 5 exposure for one year was enough to cause the disease at issue.
9 : 2 3 A M 6 So right now what we're looking at, Your Honor --

9 : 2 3 A M 7 THE COURT: well, that's why on science day, I want
9 : 2 3 A M 8 both sides to be able to address that. I mean, that's an issue
9 : 2 3 A M 9 I'm interested in.

9 : 2 3 A M 10 MR. LONDON: Great. The states are setting right now
9 : 2 3 A M 11 various state levels in their states.

9 : 2 3 A M 12 THE COURT: Yeah, because the EPA hasn't really done
9 : 2 3 A M 13 it, right?

9 : 2 3 A M 14 MR. LONDON: New Jersey has the lowest. I think
9 : 2 3 A M 15 Michigan is -- well, it varies, but New Jersey right now is the
9 : 2 3 A M 16 lowest.

9 : 2 3 A M 17 THE COURT: But remember now, what they might do to
9 : 2 3 A M 18 set a level for safe water might not also be the number that
9 : 2 3 A M 19 you can say most probably causes human injury, because you're
9 : 2 3 A M 20 going to have a margin of -- you're going to hope to have some
9 : 2 3 A M 21 margin of safety there.

9 : 2 3 A M 22 MR. LONDON: And that goes back to the point, Your
9 : 2 3 A M 23 Honor, that this is evolving greatly, and right now -- which is
9 : 2 3 A M 24 what Your Honor said, and we agree with -- look at the
9 : 2 4 A M 25 monitoring, almost group them, and then let's talk about the

9 : 2 4 A M 1 ratio that's really at bar, and the public safety issue is
9 : 2 4 A M 2 remediation and getting it out of the providers, the water
9 : 2 4 A M 3 providers, public and private, who are delivering water that
9 : 2 4 A M 4 has state-based unsafe levels or levels that are too high.
9 : 2 4 A M 5 That's -- that's an issue with us.

9 : 2 4 A M 6 **THE COURT:** which is one of the reasons -- this is
9 : 2 4 A M 7 one reasons why the water districts are a unique component here
9 : 2 4 A M 8 because, you know, if a state or even if the water districts
9 : 2 4 A M 9 themselves based on reasonable scientific data determine that
9 : 2 4 A M 10 after a certain level it is unsafe and they will not sell it,
9 : 2 4 A M 11 then that's injury, right? I mean, as long as that's a
9 : 2 4 A M 12 reasonable basis for it, and particularly if it's a state that
9 : 2 4 A M 13 has already set that limit, and -- but you could see a scenario
9 : 2 4 A M 14 where maybe a state hadn't set a limit, but the water district
9 : 2 4 A M 15 hires consultants, and they say, "Beyond this level, we don't
9 : 2 5 A M 16 think -- you know, we're not going to sell a tainted product.
9 : 2 5 A M 17 we're just not going to do it." well, that might be enough,
9 : 2 5 A M 18 you know, to establish the -- the injury of the -- of the water
9 : 2 5 A M 19 district if they can then demonstrate that these defendants
9 : 2 5 A M 20 were a proximate cause of that contamination.

9 : 2 5 A M 21 So that's why I really see those cases as being
9 : 2 5 A M 22 kind of an early kind of common -- common MDL turn on
9 : 2 5 A M 23 bellwether. It could well be an early bellwether, is to get to
9 : 2 5 A M 24 those cases kind of early, and if they don't make it, then your
9 : 2 5 A M 25 chance of not making the others go up. And if you make it, it

9 : 2 5 A M 1 doesn't mean they're going to get further, but they're pretty
9 : 2 5 A M 2 important all by themselves, because they're mass effect,
9 : 2 5 A M 3 right? I mean, their population is going to be exposed if they
9 : 2 5 A M 4 don't -- and are -- these water districts, Mr. London, what are
9 : 2 5 A M 5 they doing now? Let's say in a state that has set a limit and
9 : 2 5 A M 6 it's been determined at least some of their wells are at a
9 : 2 6 A M 7 point above that number, what -- is there a universal response
9 : 2 6 A M 8 of how they're dealing with this? Are they --

9 : 2 6 A M 9 **MR. LONDON:** You know, Your Honor, remediation is --
9 : 2 6 A M 10 is -- what I understand, the -- New Jersey and the lawyer
9 : 2 6 A M 11 representing who's just filed on behalf of New Jersey is here,
9 : 2 6 A M 12 I believe, can address that question, what the state of New
9 : 2 6 A M 13 Jersey is doing who has set the lowest limit in the state.
9 : 2 6 A M 14 They have filed I believe a few lawsuits. If you would like to
9 : 2 6 A M 15 address the state of New Jersey --

9 : 2 6 A M 16 **THE COURT:** Well, I don't want to get too much away.
9 : 2 6 A M 17 I'm talking more generally here, and I'm really trying to give
9 : 2 6 A M 18 the lawyers sort of a signal here about how I -- you know, to
9 : 2 6 A M 19 me just logically how this -- you know, if we try to bite all
9 : 2 6 A M 20 this off in one bite, we're all going to choke, right? There's
9 : 2 6 A M 21 just no way you can do all of these multifold issues at one
9 : 2 6 A M 22 time, and -- but there are kind of issues I've thought about
9 : 2 6 A M 23 that seem to be in common, and many of the water district
9 : 2 6 A M 24 issues are common to all the claims, but they have less to
9 : 2 7 A M 25 prove than the other claimants, and -- and they also have a

9 : 2 7 A M 1 potentially large amount of social good to the extent there's a
9 : 2 7 A M 2 merit to their position.

9 : 2 7 A M 3 So, you know, it seems to me that as we're
9 : 2 7 A M 4 organizing discovery -- and I don't want people to say, "Oh,
9 : 2 7 A M 5 because the judge said something in the May conference, we're
9 : 2 7 A M 6 not going to allow discovery in a certain area," because I'm
9 : 2 7 A M 7 not trying to do that. What I'm trying to say is I think it
9 : 2 7 A M 8 would be prudent among early issues to address is the -- is
9 : 2 7 A M 9 what would be necessary for a water district to prove its
9 : 2 7 A M 10 claims, because I think that's a -- if you can't survive that,
9 : 2 7 A M 11 you're not going to survive much else. If you do survive it,
9 : 2 7 A M 12 it's kind of signal where we might be going, right? I just
9 : 2 7 A M 13 think it's an important early element.

9 : 2 7 A M 14 And while we're talking about early elements,
9 : 2 7 A M 15 let me just say another issue that I think we need to go ahead
9 : 2 7 A M 16 and get the discovery done and get this addressed up or down,
9 : 2 8 A M 17 and that is the governmental contractor immunity issue, and I'm
9 : 2 8 A M 18 aware from reading enough so far that there are issues about
9 : 2 8 A M 19 whether the government actually mandated this. That seems to
9 : 2 8 A M 20 be disputed. There could be issues about did the -- did the
9 : 2 8 A M 21 defendant manufacturers disclose to the government adequate --
9 : 2 8 A M 22 make adequate disclosures? All those issues, to me the facts
9 : 2 8 A M 23 just aren't developed yet, and I think -- and we're talking
9 : 2 8 A M 24 about a period, but I think the patent is in the late sixties
9 : 2 8 A M 25 or something. We're talking a lot of work needs to be done,

9 : 2 8 A M 1 and I think early on, y'all need to get on with that, because
9 : 2 8 A M 2 it's one of those issues that to the extent the contractor
9 : 2 8 A M 3 defense is valid, it affects the case tremendously, and if it
9 : 2 8 A M 4 doesn't apply, it also affects the case tremendously. And it
9 : 2 8 A M 5 just seems to me one of those sort of pivot issues early in the
9 : 2 9 A M 6 case that y'all need to get on with it, get it over with, fully
9 : 2 9 A M 7 develop the record on it. You got a lot of people in y'all's
9 : 2 9 A M 8 plaintiff and defense teams, and I think y'all need to get to
9 : 2 9 A M 9 work, go different places, get these depositions done, get the
9 : 2 9 A M 10 documents.

9 : 2 9 A M 11 Did any of the -- in the C8 litigation, did they
9 : 2 9 A M 12 get into what the manufacturers knew and when they knew it?
9 : 2 9 A M 13 Was that something that was relevant in that litigation?

9 : 2 9 A M 14 **MR. LONDON:** It was, Your Honor. It's important to
9 : 2 9 A M 15 point out that C8 was DuPont only was the only plaintiff.

9 : 2 9 A M 16 **THE COURT:** That's right.

9 : 2 9 A M 17 **MR. LONDON:** And it was plant -- Washington works
9 : 2 9 A M 18 plant.

9 : 2 9 A M 19 **THE COURT:** Right. But is there much -- in other
9 : 2 9 A M 20 cases, has there been discovery about what these defendants
9 : 2 9 A M 21 knew or should have known about -- about -- and did they
9 : 2 9 A M 22 disclose it to the government? Yes, sir, Mr. Summy?

9 : 2 9 A M 23 **MR. SUMMY:** Your Honor, Scott Summy. I've taken a
9 : 2 9 A M 24 look at the other cases. The other cases, especially the one
9 : 2 9 A M 25 where all of these studies came out, it was a direct release

9 : 3 0 A M 1 from the manufacturer.

9 : 3 0 A M 2 THE COURT: Yes.

9 : 3 0 A M 3 MR. SUMMY: And so there was not really a focus on
9 : 3 0 A M 4 what the product manufacturers knew about the environmental
9 : 3 0 A M 5 effects.

9 : 3 0 A M 6 THE COURT: I get that, yes.

9 : 3 0 A M 7 MR. SUMMY: So I think it's extremely important that
9 : 3 0 A M 8 we delve into that, like you said, and that's got to be done
9 : 3 0 A M 9 quickly so we can get to this government contractor defense.

9 : 3 0 A M 10 THE COURT: I mean, it's important.

9 : 3 0 A M 11 Mr. Petrosinelli, don't you agree this is something we just
9 : 3 0 A M 12 need to get on with?

9 : 3 0 A M 13 MR. PETROSINELLI: Absolutely, Your Honor. I was
9 : 3 0 A M 14 going to make a comment about that. The other PFOS litigation,
9 : 3 0 A M 15 the C8 litigation and so on, didn't -- the government contract
9 : 3 0 A M 16 defense was not an issue --

9 : 3 0 A M 17 THE COURT: Right. It wasn't present.

9 : 3 0 A M 18 MR. PETROSINELLI: -- number 1. And number 2, those
9 : 3 0 A M 19 are PFOS cases, as Mr. Summy said, manufacturers of the
9 : 3 0 A M 20 chemical.

9 : 3 0 A M 21 THE COURT: Right.

9 : 3 0 A M 22 MR. PETROSINELLI: This is a AFFF case.

9 : 3 0 A M 23 THE COURT: Correct.

9 : 3 0 A M 24 MR. PETROSINELLI: We don't manufacture --

9 : 3 0 A M 25 THE COURT: It's just one of the products.

9 : 3 0 A M 1 MR. PETROSINELLI: Right. It's a product that uses
9 : 3 0 A M 2 the chemical.

9 : 3 0 A M 3 THE COURT: Correct.

9 : 3 0 A M 4 MR. PETROSINELLI: And so this issue about what was
9 : 3 0 A M 5 known -- and remember, the government contractor defense, it's
9 : 3 0 A M 6 not "should have known". It's "actual knowledge" and what was
9 : 3 0 A M 7 communicated to the government and what did the government know
9 : 3 0 A M 8 and when. And remember, it's defendant specific, because it
9 : 3 1 A M 9 focuses on individual defendant knowledge or manufacturer
9 : 3 1 A M 10 knowledge in this case, the answer could be different for
9 : 3 1 A M 11 different defendants.

9 : 3 1 A M 12 THE COURT: That's correct.

9 : 3 1 A M 13 MR. PETROSINELLI: And so --

9 : 3 1 A M 14 THE COURT: I really think it's -- you know, we've
9 : 3 1 A M 15 got -- if we had to sit back for a minute and say, "How do we
9 : 3 1 A M 16 do all of this," it would be -- it would -- to get your arms
9 : 3 1 A M 17 entirely around it is just sort of -- we'd just say, "All
9 : 3 1 A M 18 right. I don't know how we will do it." But you break into
9 : 3 1 A M 19 manageable pieces, and that's why I think to me a couple of the
9 : 3 1 A M 20 sort of early manageable pieces, one would be the water
9 : 3 1 A M 21 district cases, because I think it kind of goes to a certain --
9 : 3 1 A M 22 some threshold facts that are very important. I think the
9 : 3 1 A M 23 federal contractor immunity defense is something that really
9 : 3 1 A M 24 affects a lot of the case, and you kind of need to know the
9 : 3 1 A M 25 answer to that. And I got to say, I think some of the medical

9 : 3 1 A M 1 monitoring issues are important as well. Is there really a --
9 : 3 1 A M 2 can you class it? I mean, is there a basis to class it? Can
9 : 3 2 A M 3 we meet the Rule 23 standards to even class it? How would you
9 : 3 2 A M 4 do it? And even if you did it, maybe you even ought to think
9 : 3 2 A M 5 about doing it in one or two places and just sort of see if
9 : 3 2 A M 6 it's actually giving you information that's worth something.

9 : 3 2 A M 7 **MR. PETROSINELLI:** I think that's what these early
9 : 3 2 A M 8 fact sheets are for. You just used an expression that Judge
9 : 3 2 A M 9 Fallon uses which is, "I want to get my arms around the
9 : 3 2 A M 10 docket," and that's why he uses these early fact sheets.

9 : 3 2 A M 11 **THE COURT:** Yeah, he talked -- that's one of the
9 : 3 2 A M 12 first things on my first MDL he talked to me about was, "Get
9 : 3 2 A M 13 those fact sheets. They really help everybody to know what you
9 : 3 2 A M 14 got and what you don't have."

9 : 3 2 A M 15 **MR. PETROSINELLI:** Because before you decide how to
9 : 3 2 A M 16 structure litigation, Your Honor may -- Your Honor's instinct
9 : 3 2 A M 17 may be right, that maybe the water provider cases and the
9 : 3 2 A M 18 medical monitoring cases are a good place to start, but you
9 : 3 2 A M 19 won't know that until you get the fact sheets and you see --
9 : 3 2 A M 20 because it might be when you look at the fact sheets -- for
9 : 3 2 A M 21 example, there are about 20 medical monitoring putative class
9 : 3 2 A M 22 actions. It's not just Colorado, and so --

9 : 3 3 A M 23 **THE COURT:** And there are states that don't have
9 : 3 3 A M 24 them.

9 : 3 3 A M 25 **MR. PETROSINELLI:** There are states that don't have

9 : 3 3 A M 1 -- you know, and so I think from our perspective, getting -- as
9 : 3 3 A M 2 Mr. London said, we agree that I think within a couple of
9 : 3 3 A M 3 weeks, we ought to have agreed fact sheets for perhaps all
9 : 3 3 A M 4 these categories or at least some of these four categories, and
9 : 3 3 A M 5 then we'll have to talk about when people have to answer those,
9 : 3 3 A M 6 you know, how many days.

9 : 3 3 A M 7 **THE COURT:** How about defense fact sheets, about
9 : 3 3 A M 8 getting the information about -- you know, one of the things --
9 : 3 3 A M 9 let's say you determine one of the air bases in Colorado has
9 : 3 3 A M 10 contamination, and I know there's not a sheet out there that
9 : 3 3 A M 11 says, "Okay. This is where -- these are the manufacturers who
9 : 3 3 A M 12 sent the --" I mean, it's going to take some work. Hopefully
9 : 3 3 A M 13 you can trace to see who -- whose product actually was in
9 : 3 3 A M 14 Colorado and when it was there and how long it was there. I
9 : 3 3 A M 15 mean, all these things, but it seems to me that that
9 : 3 3 A M 16 information is also important.

9 : 3 3 A M 17 **MR. PETROSINELLI:** Absolutely. I think in
9 : 3 3 A M 18 Colorado -- I mean, we can talk about it, but we had huge
9 : 3 4 A M 19 document productions in the Bell case, and we can talk about
9 : 3 4 A M 20 what those were and so on, but one of the things we produced in
9 : 3 4 A M 21 Colorado that I would expect would be part of a defendant fact
9 : 3 4 A M 22 sheet here or informal discovery would be where else did you
9 : 3 4 A M 23 ship? Because obviously in the Colorado case, we provided
9 : 3 4 A M 24 evidence of -- to the extent there were shipments into Colorado
9 : 3 4 A M 25 and we had them, had evidence of that, we produced it. But for

9 : 3 4 A M 1 all of these sites in this case, you're -- I assume the
9 : 3 4 A M 2 plaintiffs are going to want to know and we're going to want to
9 : 3 4 A M 3 know, are there records to show whether each defendant shipped
9 : 3 4 A M 4 products here or there?

9 : 3 4 A M 5 I think as you know and you've heard with the
9 : 3 4 A M 6 military products, which is about 80 percent of the MDL so far,
9 : 3 4 A M 7 which would be subject to the government contractor immunity --

9 : 3 4 A M 8 **THE COURT:** Right.

9 : 3 4 A M 9 **MR. PETROSINELLI:** -- generally you ship those not to
9 : 3 4 A M 10 the site where they're going to be used. You ship those to the
9 : 3 4 A M 11 central depot called the Defense Logistics Agency.

9 : 3 5 A M 12 **THE COURT:** And do they keep good records?

9 : 3 5 A M 13 **MR. PETROSINELLI:** And that's the question. I know
9 : 3 5 A M 14 Ms. Williams is working on that.

9 : 3 5 A M 15 **THE COURT:** Yeah. Well, it just seems to me that
9 : 3 5 A M 16 among those sort of foundational pieces of information we need
9 : 3 5 A M 17 is we got to trace the product from the defendants to the
9 : 3 5 A M 18 ground, right? I mean, we gotta -- we just -- how did it get
9 : 3 5 A M 19 there? Who was involved? All of that. I mean, maybe some of
9 : 3 5 A M 20 it will be unknowing, and we'll have to figure out methods to
9 : 3 5 A M 21 get a reasonable determination of that.

9 : 3 5 A M 22 **MR. PETROSINELLI:** Particularly if you're talking
9 : 3 5 A M 23 about the sixties and seventies --

9 : 3 5 A M 24 **THE COURT:** Correct.

9 : 3 5 A M 25 **MR. PETROSINELLI:** -- or records going back that far.

9 : 3 5 A M 1 **THE COURT:** And they're going to be -- they're not
9 : 3 5 A M 2 going to be computers. They're going to be manual records, and
9 : 3 5 A M 3 so I do think it's -- so talk to me about the defendant fact
9 : 3 5 A M 4 sheets. What are y'all doing on that?

9 : 3 5 A M 5 **MR. PETROSINELLI:** We're -- we've talked to
9 : 3 5 A M 6 Mr. London about that, and the plaintiffs haven't sent us a
9 : 3 5 A M 7 draft yet, but I think they're still working through internally
9 : 3 5 A M 8 how they're going to do that.

9 : 3 5 A M 9 One thing I thought was helpful to my mind is
9 : 3 5 A M 10 we -- at one of the initial meet and confers we had, we
9 : 3 6 A M 11 suggested that they send us just some informal, like by email,
9 : 3 6 A M 12 basic questions about what are the names of the products you
9 : 3 6 A M 13 sold, when did you sell them, and so on, which are the kinds of
9 : 3 6 A M 14 things I think -- not only things, but the kind of things that
9 : 3 6 A M 15 would be in a defendant fact sheet, and I'm inclined -- and
9 : 3 6 A M 16 this would be my practice generally -- just to provide that to
9 : 3 6 A M 17 them informally without waiting for a fact sheet.

9 : 3 6 A M 18 **THE COURT:** And I just think y'all need to have
9 : 3 6 A M 19 Ms. Williams in the loop here, because -- and telling her what
9 : 3 6 A M 20 y'all are looking for, and I think you've already started that.

9 : 3 6 A M 21 **MR. PETROSINELLI:** Yes, Your Honor.

9 : 3 6 A M 22 **THE COURT:** Where is Ms. Williams here today? Oh,
9 : 3 6 A M 23 there you are. And so she -- I mean, obviously tracing it, if
9 : 3 6 A M 24 you trace 80 percent of it to this Defense Logistics thing,
9 : 3 6 A M 25 then that's just a start, and then we've got to figure out

9 : 3 6 A M 1 where it went and when it went and all of that, and I think
9 : 3 6 A M 2 that's like -- again, just like some of the threshold things
9 : 3 6 A M 3 we're talking here about the plaintiffs, I think that's
9 : 3 6 A M 4 something really important early on everybody needs to get on
9 : 3 7 A M 5 the same page about.

9 : 3 7 A M 6 **MR. PETROSINELLI:** Well, because -- to Your Honor's
9 : 3 7 A M 7 point, the government contractor defense applies to all types
9 : 3 7 A M 8 of cases, including water provider cases, right? If the source
9 : 3 7 A M 9 of exposure in the water provider case was an Air Force base,
9 : 3 7 A M 10 it's a cross -- as Judge Fallon, another term he uses, a
9 : 3 7 A M 11 cross-cutting issue. Like it cuts across all the claims, and
9 : 3 7 A M 12 so we totally agree that that's --

9 : 3 7 A M 13 **THE COURT:** That's one reason I think we got to get
9 : 3 7 A M 14 to the -- and I've seen different defenses in one claim. I
9 : 3 7 A M 15 think it was in the -- maybe the New York's Motion on Remand.
9 : 3 7 A M 16 By the way, whoever is from New York, I'm not remanding it.
9 : 3 7 A M 17 Rule. But it kind of made the point that -- that the -- the
9 : 3 7 A M 18 argument -- whether it's true or not I have no way of
9 : 3 7 A M 19 knowing -- that the government did not specify the use of PFOS
9 : 3 7 A M 20 and PFOA. That was something the manufacturers did, and there
9 : 3 8 A M 21 were other alternatives. I looked at the patent. I couldn't
9 : 3 8 A M 22 figure out what was in it and what was mandated. It was beyond
9 : 3 8 A M 23 my ability to do it, but that seems to me a very important
9 : 3 8 A M 24 issue to know is, you know, there's clearly what is it, like
9 : 3 8 A M 25 the Naval Research Center is like very involved in developing

9 : 3 8 A M 1 the foam. I mean, there's clearly government activity in that,
9 : 3 8 A M 2 but it seems to me pretty probative is the chemicals at issue
9 : 3 8 A M 3 here, whether that was required by the government.

9 : 3 8 A M 4 **MR. PETROSINELLI:** well, I think you'll have to read
9 : 3 8 A M 5 our opposition to the Motion to Remand, and actually in a case
9 : 3 8 A M 6 that you have in this MDL now, Judge Seybert in the Eastern
9 : 3 8 A M 7 District of New York, she ruled on this.

9 : 3 8 A M 8 **THE COURT:** Tell me what was the ruling.

9 : 3 8 A M 9 **MR. PETROSINELLI:** So her ruling -- she issued a
9 : 3 8 A M 10 40-page opinion that someone moved to remand a case that was --
9 : 3 8 A M 11 we had removed to the Eastern District in New York, and she --
9 : 3 9 A M 12 it was fully briefed and looked at the law and said, "It's not
9 : 3 9 A M 13 part of the government contractor defense that -- that the
9 : 3 9 A M 14 government specifies exactly the type of chemical that you
9 : 3 9 A M 15 use."

9 : 3 9 A M 16 **THE COURT:** But it's got to be reasonably precise is
9 : 3 9 A M 17 the language.

9 : 3 9 A M 18 **MR. PETROSINELLI:** Correct.

9 : 3 9 A M 19 **THE COURT:** And the question though is it just seems
9 : 3 9 A M 20 really relevant to this case though, and the way this has
9 : 3 9 A M 21 normally arisen is, you know, the government says -- it's
9 : 3 9 A M 22 usually like a piece of military equipment, right? It's like a
9 : 3 9 A M 23 piece of a helicopter, part of a helicopter, and the government
9 : 3 9 A M 24 says, "We need for this to happen." And they didn't literally
9 : 3 9 A M 25 draw the engineering plans out, but they basically told them

9 : 3 9 A M 1 what they needed, and there wasn't a lot of discretion. The
9 : 3 9 A M 2 manufacturer had to get in there and do it.

9 : 3 9 A M 3 And what I don't know enough -- and this is one
9 : 3 9 A M 4 of the reasons I'm going to learn a lot at science day -- is
9 : 3 9 A M 5 how much of this patent is the recipe? You know, what else is
9 : 3 9 A M 6 there? And, you know, was -- and the decision to add these
9 : 4 0 A M 7 particular chemicals that are at issue in this litigation,
9 : 4 0 A M 8 how -- so let's say that was just a discretionary call by the
9 : 4 0 A M 9 manufacturer. That was what they -- that was what they added
9 : 4 0 A M 10 to the mix. I mean, that's just a really important issue, and
9 : 4 0 A M 11 I -- I tried. I read the patents. I said, you know, I was
9 : 4 0 A M 12 trying to figure out comparing these -- the information I had,
9 : 4 0 A M 13 and I just couldn't figure it out, whether that assertion by
9 : 4 0 A M 14 New York was correct or not.

9 : 4 0 A M 15 **MR. PETROSINELLI:** But the key thing is to focus
9 : 4 0 A M 16 on -- the military specification says you have to use a
9 : 4 0 A M 17 fluorinated surfactant, which is a very specific term about
9 : 4 0 A M 18 what that means, and it has to meet all of these performance
9 : 4 0 A M 19 requirements, and the fact is, as you'll see, and part of our
9 : 4 0 A M 20 reason why the remand motion should be denied, is you get into
9 : 4 0 A M 21 the merits of the case.

9 : 4 0 A M 22 **THE COURT:** Oh, completely. It's not even close.
9 : 4 0 A M 23 Don't worry.

9 : 4 0 A M 24 **MR. PETROSINELLI:** And so --

9 : 4 0 A M 25 **THE COURT:** How's that for argument, right?

9 : 4 1 A M 1 MR. PETROSINELLI: Shall I leave now or -- but the
9 : 4 1 A M 2 fact is -- and part -- this could be part of science day, in
9 : 4 1 A M 3 fact. The fact is that there are only certain chemicals that
9 : 4 1 A M 4 are fluorinated surfactants that could meet those standards.

9 : 4 1 A M 5 THE COURT: Well, that's one of the things I want to
9 : 4 1 A M 6 know.

9 : 4 1 A M 7 MR. PETROSINELLI: Exactly.

9 : 4 1 A M 8 THE COURT: You know, what were they and, you know,
9 : 4 1 A M 9 how many were they, and why one would be picked over another,
9 : 4 1 A M 10 and what was known at the time about potential risk, all of
9 : 4 1 A M 11 that.

9 : 4 1 A M 12 MR. PETROSINELLI: Exactly. And it's only -- if you
9 : 4 1 A M 13 look at the *Sawyer* case in the Fourth Circuit which is the key
9 : 4 1 A M 14 government contractor case, defense case, because -- and it
9 : 4 1 A M 15 actually -- it was on a motion -- it was on a remand issue.
9 : 4 1 A M 16 The question was should the case have been remanded? The
9 : 4 1 A M 17 standard is that the government has exercised some -- not all,
9 : 4 1 A M 18 not all-encompassing -- some control and guidance over what the
9 : 4 1 A M 19 manufacturers do. And so -- and one of the many factors you
9 : 4 1 A M 20 look at is what ingredients are, you know, put in the
9 : 4 1 A M 21 specification? But it's not a dispositive issue that it didn't
9 : 4 2 A M 22 say exactly this ingredient.

9 : 4 2 A M 23 THE COURT: I get that. I just think that is
9 : 4 2 A M 24 something that on my own, I can't figure out about --

9 : 4 2 A M 25 MR. PETROSINELLI: Definitely.

9 : 4 2 A M 1 THE COURT: -- you know, what were the potential
9 : 4 2 A M 2 products, and what were the options, and why was one picked
9 : 4 2 A M 3 over another, and did it matter? That is, do all these
9 : 4 2 A M 4 products produce the same result? what was known at the time?

9 : 4 2 A M 5 MR. PETROSINELLI: And so I think we need to get to
9 : 4 2 A M 6 all those issues early in discovery.

9 : 4 2 A M 7 THE COURT: Correct. We do. It's not the only
9 : 4 2 A M 8 issue --

9 : 4 2 A M 9 MR. PETROSINELLI: No, no.

9 : 4 2 A M 10 THE COURT: -- but it is an issue that we need to get
9 : 4 2 A M 11 to.

9 : 4 2 A M 12 MR. PETROSINELLI: Definitely.

9 : 4 2 A M 13 THE COURT: So it sounds like I'm pushing a little
9 : 4 2 A M 14 bit on defense fact sheets too. I think that plaintiffs needs
9 : 4 2 A M 15 to do their part of that, because I do think the tracing
9 : 4 2 A M 16 process is something we need to get on with, because it may
9 : 4 2 A M 17 take a while.

9 : 4 2 A M 18 MR. LONDON: And we agree. That's one of the central
9 : 4 2 A M 19 elements in the defense fact sheets that we hope to get to them
9 : 4 2 A M 20 in draft shortly.

9 : 4 2 A M 21 THE COURT: And I would urge you all not just to do
9 : 4 2 A M 22 it among yourselves, but to keep the Department of Justice
9 : 4 3 A M 23 involved, because I think they can help facilitate and may be
9 : 4 3 A M 24 able to tell you ways to shortcut what you're trying to do.
9 : 4 3 A M 25 Ms. Williams is learning about this herself, and she may tell

9 : 4 3 A M 1 you, "This is a way -- a path to this rather than the way you
9 : 4 3 A M 2 may be thinking about." So I think y'all need to stay in touch
9 : 4 3 A M 3 and keep her involved.

9 : 4 3 A M 4 I know that we had -- we had some discussion
9 : 4 3 A M 5 earlier about deposition protocols. Where are we on all of
9 : 4 3 A M 6 that?

9 : 4 3 A M 7 **MR. THOMPSON:** Judge, I had an opportunity to talk
9 : 4 3 A M 8 with your law clerk. This is an issue that may represent some
9 : 4 3 A M 9 distinction between the two sides. We -- and when I say "we",
9 : 4 3 A M 10 I mean "me" -- we view the Federal Rules as providing
9 : 4 3 A M 11 sufficient framework to conduct depositions, and an elaborate
9 : 4 3 A M 12 protocol is really not needed as prerequisite to --

9 : 4 4 A M 13 **THE COURT:** We got to have some order to it. This is
9 : 4 4 A M 14 why we have a PEC and a defense committee, is to coordinate
9 : 4 4 A M 15 with each other, but I agree with you that I don't need to
9 : 4 4 A M 16 micromanage, authorize you to take a deposition. We've stayed
9 : 4 4 A M 17 discovery initially here just, you know, to get ourselves
9 : 4 4 A M 18 organized but, you know, I'm not intending to micromanage when
9 : 4 4 A M 19 you're going to take depositions and so forth. That's
9 : 4 4 A M 20 something y'all need to work out. And to the extent there's a
9 : 4 4 A M 21 problem, somebody will move for either a protective order or
9 : 4 4 A M 22 compel, and I'll address it at the next status conference.

9 : 4 4 A M 23 I mean, but I agree with you that I think
9 : 4 4 A M 24 it's -- and listen, you don't want to start your depositions in
9 : 4 4 A M 25 a way that -- that if you didn't have the underlying

9 : 4 4 A M 1 information, you can't be as effective as you would be, so you
9 : 4 4 A M 2 need some information. Obviously some 30(b)(6)s may be
9 : 4 4 A M 3 appropriate to get to some of that information that you can't
9 : 4 5 A M 4 get other -- just by written discovery, but if you don't feel a
9 : 4 5 A M 5 need for a -- a deposition protocol, I personally don't -- I'm
9 : 4 5 A M 6 not going to micromanage your discovery, and the rules provide
9 : 4 5 A M 7 for a party's right to do -- you know, gather evidence by
9 : 4 5 A M 8 deposition. So --

9 : 4 5 A M 9 **MR. PETROSINELLI:** Your Honor, could I be heard on
9 : 4 5 A M 10 that for one second?

9 : 4 5 A M 11 **THE COURT:** Yes, sir.

9 : 4 5 A M 12 **MR. PETROSINELLI:** I think just so you understand
9 : 4 5 A M 13 from a defense perspective, what we were talking about on the
9 : 4 5 A M 14 deposition protocol is not so much timing or things that are
9 : 4 5 A M 15 covered by the rules, but in a case where you have multiple
9 : 4 5 A M 16 plaintiff constituencies, state, federal, different kinds of
9 : 4 5 A M 17 cases, water provider cases, and you have multiple defendants,
9 : 4 5 A M 18 some structure -- at least it's been my experience in multiple
9 : 4 5 A M 19 plaintiff constituencies and multiple defendant cases, some
9 : 4 5 A M 20 structure on how many lawyers can question and that kind of
9 : 4 5 A M 21 thing; not so much --

9 : 4 5 A M 22 **THE COURT:** Here's my proposal to you. If you
9 : 4 5 A M 23 think -- and I -- you'd like to think you could just sort of
9 : 4 6 A M 24 work that out. You can't have -- I mean, you can't have an
9 : 4 6 A M 25 army of people asking questions. You can't do that.

9 : 4 6 A M 1 MR. PETROSINELLI: Right.

9 : 4 6 A M 2 THE COURT: That y'all try to work it out informally.
9 : 4 6 A M 3 You might -- if you've got an idea, I'm sure if this has been
9 : 4 6 A M 4 done before, y'all had some written protocols. You give it to
9 : 4 6 A M 5 the plaintiffs. If y'all can't reach a resolution, I'll help
9 : 4 6 A M 6 you get to the end. We'll decide it if we need it, but there
9 : 4 6 A M 7 needs to be -- I mean, a lot of this is -- the whole structure
9 : 4 6 A M 8 we're doing here, the fact that the two of you are standing up
9 : 4 6 A M 9 instead of all the people in the room standing up is that you
9 : 4 6 A M 10 just can't run litigation with a hundred chiefs. You got to
9 : 4 6 A M 11 have people running it, and the same thing with depositions.
9 : 4 6 A M 12 You can't have just a lineup of people like a tag team in a
9 : 4 6 A M 13 wrestling match, you know. But there are differences -- you
9 : 4 6 A M 14 know, different groups may have different needs to talk to
9 : 4 6 A M 15 certain witnesses, and, you know, someone might get deposed
9 : 4 6 A M 16 more than once because the discrete set of facts and different
9 : 4 7 A M 17 constituencies that you're talking about might have completely
9 : 4 7 A M 18 different issues they need to address.

9 : 4 7 A M 19 MR. PETROSINELLI: For the record, I don't want to
9 : 4 7 A M 20 wrestle Mr. Thompson. That's the last thing I'd want to do.

9 : 4 7 A M 21 THE COURT: You wouldn't win.

9 : 4 7 A M 22 MR. PETROSINELLI: I've heard you say about his
9 : 4 7 A M 23 elbows in the basketball courts.

9 : 4 7 A M 24 THE COURT: Yes.

9 : 4 7 A M 25 MR. PETROSINELLI: But anyway, that's what we plan to

9 : 4 7 A M 1 do. Just send them something and break it up.

9 : 4 7 A M 2 **MR. THOMPSON:** Judge, when I'm talking, I sound so
9 : 4 7 A M 3 good, and then when Mr. Petrosinelli was talking, he sounds
9 : 4 7 A M 4 good. It sounds like we're talking a little bit past each
9 : 4 7 A M 5 other. I would suggest that they write us out a protocol, and
9 : 4 7 A M 6 we will --

9 : 4 7 A M 7 **THE COURT:** I think that's what we need to do,
9 : 4 7 A M 8 because he raises an important issue. There's got to be some
9 : 4 7 A M 9 basic rules here. All of us have been in litigation where
9 : 4 7 A M 10 somebody didn't want to abide by those rules, and you create
9 : 4 7 A M 11 utter -- one person can create utter chaos. Part of my job is
9 : 4 7 A M 12 to keep the train running down the track here.

9 : 4 7 A M 13 So, Mr. Petrosinelli, you'll submit something on
9 : 4 8 A M 14 that?

9 : 4 8 A M 15 **MR. PETROSINELLI:** Yes, Your Honor, we will.

9 : 4 8 A M 16 **THE COURT:** Good. Okay. Direct filing. United
9 : 4 8 A M 17 States objected, Ms. Williams, to if you were brought in as
9 : 4 8 A M 18 a -- a defendant in a direct file case?

9 : 4 8 A M 19 **MS. WILLIAMS:** Yes, Your Honor. Specific to the
9 : 4 8 A M 20 Federal Tort Claim Act, the Federal Tort Claim Act has a
9 : 4 8 A M 21 specific venue provision that cannot be satisfied by --

9 : 4 8 A M 22 **THE COURT:** I'm fully familiar with it. Let me tell
9 : 4 8 A M 23 you my take. The case you cited is pure dicta. I do not -- I
9 : 4 8 A M 24 have not had a change of venue based on the MDL. If I did, it
9 : 4 8 A M 25 would be lexicon issues all day long. We haven't done that.

9 : 4 8 A M 1 It's not correct. And a loose sentence in that one case you
9 : 4 9 A M 2 cited, it's -- just for our purposes is inadequate.

9 : 4 9 A M 3 I am helping pretrial my colleagues who are the
9 : 4 9 A M 4 transferor judges. I mean, it's their cases, not my case, and
9 : 4 9 A M 5 I'm going to handle these things, and hypothetically if
9 : 4 9 A M 6 somebody names the United States as a defendant, and you object
9 : 4 9 A M 7 to it, you can file a motion, but I want to tell you, I'm not
9 : 4 9 A M 8 impressed with the idea that venue has been changed. I think
9 : 4 9 A M 9 absolutely it has not been changed. That's why I can't sit
9 : 4 9 A M 10 here and try cases. When this thing was filed, the MDL thought
9 : 4 9 A M 11 it wise enough in his wisdom to send me all the cases. I had
9 : 4 9 A M 12 no South Carolina cases, so I could literally try no cases
9 : 4 9 A M 13 myself.

9 : 4 9 A M 14 **MS. WILLIAMS:** Your Honor, our position isn't there's
9 : 4 9 A M 15 a problem with venue in any of the existing cases. We believe
9 : 4 9 A M 16 that --

9 : 4 9 A M 17 **THE COURT:** File a motion, and I'll rule.

9 : 4 9 A M 18 **MS. WILLIAMS:** It's if they direct file here, that
9 : 4 9 A M 19 1402 --

9 : 5 0 A M 20 **THE COURT:** I understand your argument. If somebody
9 : 5 0 A M 21 does it and you object, file a motion. The parties will brief
9 : 5 0 A M 22 it, and I'll rule, okay?

9 : 5 0 A M 23 Okay. There was an issue raised about the
9 : 5 0 A M 24 direct filing with a Pennsylvania group, 700 plaintiffs in
9 : 5 0 A M 25 Pennsylvania. What's going on with all of that?

9 : 5 0 A M 1 MR. THOMPSON: Judge, this was -- I believe it was a
9 : 5 0 A M 2 motion that was put to you to allow -- these cases were filed
9 : 5 0 A M 3 in Pennsylvania under their court rule which allows filing of
9 : 5 0 A M 4 multiple plaintiff complaints.

9 : 5 0 A M 5 THE COURT: There wasn't even like a summons, wasn't
9 : 5 0 A M 6 even a lawsuit filed. Who would let that happen? But anyway,
9 : 5 0 A M 7 does that toll the statute or something? You just put names on
9 : 5 0 A M 8 a piece of paper, and it tolls the statute?

9 : 5 0 A M 9 MR. THOMPSON: Yes, Your Honor.

9 : 5 0 A M 10 MR. OLSEN: We don't love it either.

9 : 5 0 A M 11 THE COURT: Let me tell you what I don't like about
9 : 5 0 A M 12 it, Mr. Thompson. I get 700 names on a piece of paper. How am
9 : 5 1 A M 13 I to manage that litigation? It's sort of chaotic, and if
9 : 5 1 A M 14 actually they waived lexicon and I was to try it, I would -- I
9 : 5 1 A M 15 can't try 700 people. I'm going to be severing every -- each
9 : 5 1 A M 16 one of them into -- I mean, it's kind of a -- that's why we're
9 : 5 1 A M 17 going to allow a direct filing, but it's going to be one case
9 : 5 1 A M 18 at a time or a family really. I define what that is. I'm not
9 : 5 1 A M 19 going to have 700 cases just dumped here collectively as one
9 : 5 1 A M 20 case.

9 : 5 1 A M 21 MR. THOMPSON: Judge, this is limited to that venue.
9 : 5 1 A M 22 There is a case lawyer who's present, Mr. Cohan, and with your
9 : 5 1 A M 23 permission, if he wants to address the Court on that --

9 : 5 1 A M 24 THE COURT: I would just say y'all need to file a
9 : 5 1 A M 25 formal motion relating to that.

9 : 5 1 A M 1 MR. THOMPSON: Yes, sir.

9 : 5 1 A M 2 THE COURT: And let me brief it. I just -- I had --
9 : 5 1 A M 3 you say it's unique. Let me just say this. I had it in the
9 : 5 1 A M 4 Lipitor case. They had people from Missouri with all of
9 : 5 1 A M 5 these -- I mean, this is not unique to Pennsylvania. And it
9 : 5 1 A M 6 just -- you know, it's just a really -- you know, we talk in
9 : 5 2 A M 7 here about direct filing. If the -- if they move to have it
9 : 5 2 A M 8 transferred, I guess it goes to Federal Court, and then it's
9 : 5 2 A M 9 transferred. Is it sitting in State Court right now? Is that
9 : 5 2 A M 10 where --

9 : 5 2 A M 11 MR. THOMPSON: Judge, I've exhausted my knowledge.

9 : 5 2 A M 12 THE COURT: Yes, sir?

9 : 5 2 A M 13 MR. COHAN: Your Honor, Josh Cohan. I represent many
9 : 5 2 A M 14 of the plaintiffs in Pennsylvania. The cases are currently
9 : 5 2 A M 15 pending in State Court. Complaints have not been filed. Writs
9 : 5 2 A M 16 of summons have been filed in PA.

9 : 5 2 A M 17 THE COURT: Yeah. So is your idea to remove it to
9 : 5 2 A M 18 Federal Court and then transfer it, or how would you do this?

9 : 5 2 A M 19 MR. COHAN: We've been working with defendants to
9 : 5 2 A M 20 come up with this joint agreement, and we would directly file
9 : 5 2 A M 21 into the MDL.

9 : 5 2 A M 22 THE COURT: You're going to do one -- you're going to
9 : 5 2 A M 23 do one at a time. If they're family related, I define what
9 : 5 2 A M 24 direct file is. I'm just not -- I'm just not going to do this.
9 : 5 2 A M 25 It produces problems down the road that I can avoid by saying

9 : 5 2 A M 1 if you're going to do direct filing, you're going to do it the
9 : 5 3 A M 2 way we do it. Okay?

9 : 5 3 A M 3 **MR. COHAN:** Okay, Your Honor.

9 : 5 3 A M 4 **THE COURT:** It's based on logic and experience.

9 : 5 3 A M 5 Science day. I saw the proposed order. I may
9 : 5 3 A M 6 refine it a little bit. I was -- some of my discussion here
9 : 5 3 A M 7 today was to guide the lawyers about issues that kind of
9 : 5 3 A M 8 interest me.

9 : 5 3 A M 9 Do not send people in just to repeat what's in
9 : 5 3 A M 10 those articles. I've read the articles, okay? Don't -- you
9 : 5 3 A M 11 know, don't spoon feed me what I have already read. There are
9 : 5 3 A M 12 issues here that we need to get to -- I've talked about some of
9 : 5 3 A M 13 them -- that are important to understand, and the parties have
9 : 5 3 A M 14 distinctly different positions on the science, and I want to
9 : 5 3 A M 15 talk about those. And y'all ought to talk about -- think about
9 : 5 3 A M 16 the issues where you know there is dispute. The things y'all
9 : 5 3 A M 17 have in common, I mean, that's not -- I'm not worried about
9 : 5 3 A M 18 those. Where y'all dispute things, to identify those, and what
9 : 5 4 A M 19 is the science on both sides of those issues? I'm talking
9 : 5 4 A M 20 about scientific causation, and what level is -- is it harmful
9 : 5 4 A M 21 to humans? At what level is it safe or unsafe in water, et
9 : 5 4 A M 22 cetera? I mean, those -- those are some of the really
9 : 5 4 A M 23 important issues in the case. The parties have distinctly
9 : 5 4 A M 24 different positions, I take it, on it, and the science ought to
9 : 5 4 A M 25 drive my resolution of these things. So I'm -- I'm interested

9 : 5 4 A M 1 in discussing those.

9 : 5 4 A M 2 I think we're probably going to do it in
9 : 5 4 A M 3 September. I just think in timing of the -- I think that's a
9 : 5 4 A M 4 better time for doing this and give y'all plenty of sort of
9 : 5 4 A M 5 advanced notice, and we'll do it on the day of the September
9 : 5 4 A M 6 status conference. We will -- we will do it -- you know, we'll
9 : 5 4 A M 7 have the status conference, and then we'll proceed.

9 : 5 5 A M 8 Let me tell you one area where -- where I know
9 : 5 5 A M 9 we will not agree with each other, and that is there was a
9 : 5 5 A M 10 proposal to close my hearing. I don't close my hearings unless
9 : 5 5 A M 11 there's some really critical public purpose like a cooperator
9 : 5 5 A M 12 who might get shot, okay, something like that. I don't close
9 : 5 5 A M 13 hearings. I remember Judge Perry, my dear friend, was once
9 : 5 5 A M 14 asked to close it. He says, "This is not Russia. You know, we
9 : 5 5 A M 15 don't close hearings." So I'm not closing it.

9 : 5 5 A M 16 On the other hand, it's not something either
9 : 5 5 A M 17 side is to use against the other. I will get a transcript.
9 : 5 5 A M 18 You will not get a transcript. I will get a transcript of that
9 : 5 5 A M 19 for me, because I refer to it and go back to it from time to
9 : 5 5 A M 20 time, but you're not going to have authorization to get a
9 : 5 5 A M 21 transcript, and there's not going to be a transcript. Don't
9 : 5 6 A M 22 bring in a court reporter to surreptitiously take it down, and
9 : 5 6 A M 23 you cannot use it in any way against each other. That is not
9 : 5 6 A M 24 the purpose of this. It's to help me understand, and y'all
9 : 5 6 A M 25 might want to talk among yourselves about the issues where

9 : 5 6 A M 1 there is dispute, kind of focus on what might be most useful so
9 : 5 6 A M 2 you don't have one side coming in and saying, "This is a big
9 : 5 6 A M 3 issue to us," and I don't hear from the other side about that
9 : 5 6 A M 4 same issue. I mean, where there's dispute, I want to hear in
9 : 5 6 A M 5 some logical way the presentation so I can -- I can understand
9 : 5 6 A M 6 the basis of each party's position. So we might even want to
9 : 5 6 A M 7 think about getting together and kind of listing some of the
9 : 5 6 A M 8 issues where we recognize there's a dispute, and in some
9 : 5 6 A M 9 coherent way I know we're addressing them, so I can kind of --
9 : 5 6 A M 10 we don't have to do point/counterpoint during the presentation,
9 : 5 6 A M 11 but we can do things in a way that we know that we're
9 : 5 6 A M 12 addressing things that are material to the case, and I'm
9 : 5 7 A M 13 hearing both sides of the science. Okay?

9 : 5 7 A M 14 **MR. PETROSINELLI:** Your Honor, could I ask you one
9 : 5 7 A M 15 question about that?

9 : 5 7 A M 16 **THE COURT:** Yes.

9 : 5 7 A M 17 **MR. PETROSINELLI:** Because it sounds like if it's
9 : 5 7 A M 18 going to be in September, we have more time to meet and
9 : 5 7 A M 19 confer --

9 : 5 7 A M 20 **THE COURT:** Yes.

9 : 5 7 A M 21 **MR. PETROSINELLI:** -- about topics and so on, but
9 : 5 7 A M 22 just procedurally one thing that we seem to have a difference
9 : 5 7 A M 23 on, and we just wanted to -- I wanted to at least get your
9 : 5 7 A M 24 guidance, which is the plaintiffs' proposal had something in
9 : 5 7 A M 25 the order that said that the lawyers could do direct -- might

9 : 5 7 A M 1 do direct exam.

9 : 5 7 A M 2 **THE COURT:** No, no, no, no.

9 : 5 7 A M 3 **MR. PETROSINELLI:** No, I thought you said no on that.

9 : 5 7 A M 4 **THE COURT:** No, this is -- you got to have experts
9 : 5 7 A M 5 who speak English, right? And I don't mean because they're
9 : 5 7 A M 6 from a foreign country. It's because they talk in jargon, and
9 : 5 7 A M 7 if they sit there and talk in abbreviations and things that I
9 : 5 7 A M 8 don't recognize, they're not very helpful to me. They need to
9 : 5 7 A M 9 speak in a way in which lay people can understand the science
9 : 5 7 A M 10 they're explaining.

9 : 5 7 A M 11 **MR. PETROSINELLI:** And would you anticipate so then
9 : 5 7 A M 12 the expert would just get up there and say, "Here's what I'm
9 : 5 7 A M 13 going to talk about," and just start talking?

9 : 5 7 A M 14 **THE COURT:** Correct. And what the benefit will be is
9 : 5 8 A M 15 maybe y'all will have agreed on the topics that are going to be
9 : 5 8 A M 16 addressed, and so Expert A may address -- he's going to say,
9 : 5 8 A M 17 "I'm going to address these three issues," and so I know that
9 : 5 8 A M 18 that's the issues we're addressing, and when -- you'll have
9 : 5 8 A M 19 people who will have the kind of counterpoint to those issues.
9 : 5 8 A M 20 And we're not having argument afterwards or anything else. I'm
9 : 5 8 A M 21 trying to hear, I'm trying to absorb the science, and where
9 : 5 8 A M 22 there is -- where there are differences, I want an
9 : 5 8 A M 23 interpretation of what the science teaches us, that I can hear
9 : 5 8 A M 24 both sides not from the lawyers, but from experts in those
9 : 5 8 A M 25 fields.

9 : 5 8 A M 1 MR. OLSEN: Your Honor, one more question.

9 : 5 8 A M 2 THE COURT: Yes.

9 : 5 8 A M 3 MR. OLSEN: If you would give a little guidance on
9 : 5 8 A M 4 the scope of that hearing. I think our biggest concern is that
9 : 5 8 A M 5 we don't want to be two ships passing in the night where we
9 : 5 8 A M 6 both are talking about the same topics so Your Honor can get
9 : 5 8 A M 7 the benefit of --

9 : 5 8 A M 8 THE COURT: Yes.

9 : 5 8 A M 9 MR. OLSEN: And in our initial meet and confer
9 : 5 9 A M 10 process, I think the two sides have very different views as to
9 : 5 9 A M 11 what we should be covering substantively at science day, and we
9 : 5 9 A M 12 will continue to meet and confer and hopefully work it out.

9 : 5 9 A M 13 THE COURT: Hopefully you can share with me what
9 : 5 9 A M 14 y'all are thinking, and I might tell you, "Don't bother on that
9 : 5 9 A M 15 issue."

9 : 5 9 A M 16 MR. OLSEN: All right.

9 : 5 9 A M 17 THE COURT: "This is the one I really think is
9 : 5 9 A M 18 important," or if I think y'all are not addressing an issue. I
9 : 5 9 A M 19 tried to raise some today. I wasn't casual about it. I was
9 : 5 9 A M 20 just trying to tell you some of the issues that that mean
9 : 5 9 A M 21 something, to me mean something, and in which -- but there may
9 : 5 9 A M 22 be science issues fundamental to this case that I don't know
9 : 5 9 A M 23 y'all disagree on. You know it. I don't know it, and I need
9 : 5 9 A M 24 to understand those issues.

9 : 5 9 A M 25 MR. OLSEN: Are you still thinking one or two experts

9 : 5 9 A M 1 per side for a few hours?

9 : 5 9 A M 2 **THE COURT:** Yes. Yeah, two hours each side. I can't
9 : 5 9 A M 3 absorb more than that.

9 : 5 9 A M 4 **MR. THOMPSON:** Judge, my mind is racing with a
9 : 5 9 A M 5 variety of things, one of which would be to come up with not an
9 : 5 9 A M 6 agenda, but simply a series of topic areas --

1 0 : 0 0 A M 7 **THE COURT:** Correct.

1 0 : 0 0 A M 8 **MR. THOMPSON:** -- and then run that by you, but it
1 0 : 0 0 A M 9 strikes me that we should use our best efforts to do that and
1 0 : 0 0 A M 10 then have input from the Court so that we have that organized.

1 0 : 0 0 A M 11 **THE COURT:** I would love for you -- because you know
1 0 : 0 0 A M 12 better than me the issues in dispute. I think I know some of
1 0 : 0 0 A M 13 them. I don't know all of them, and it may well be things that
1 0 : 0 0 A M 14 I have perceived to be disputed aren't really disputed, but
1 0 : 0 0 A M 15 some portion of that issue is in dispute, and I just need some
1 0 : 0 0 A M 16 help from you, because I don't want to waste any of our time
1 0 : 0 0 A M 17 here. I want it to be something that we're kind of zeroing in
1 0 : 0 0 A M 18 on the important scientific questions here.

1 0 : 0 0 A M 19 And so yeah, I would hope that maybe -- you
1 0 : 0 0 A M 20 know, we got a little time between now and September; that
1 0 : 0 0 A M 21 y'all would meet and confer, you'd share with me your list. If
1 0 : 0 0 A M 22 y'all disagree fundamentally, you can share with me both lists,
1 0 : 0 0 A M 23 and I might go through and say -- and you might explain to me
1 0 : 0 0 A M 24 why you think that -- if you don't have an agreement, why you
1 0 : 0 1 A M 25 think one side or the other thinks that's an important issue to

1 address. And so we got to give a little structure to our
2 experts. We don't just say, "Go for it." Right? I mean, they
3 know they all have assignments. So if you have two experts,
4 one of them may -- knows he's taking issues A, B, and C. The
5 other one is C, D, and E. You know, they know what they're
6 doing.

7 And I will say also that if the expert thinks
8 there might be some preliminary reading, not to the volume
9 you've already given me, but something that I might read ahead
10 of time, I'm game for doing that, but not -- but not ten
11 articles each or 20 articles. Let me just say after a while,
12 they're pretty tiresome, okay? You know, but I have to
13 appreciate that y'all probably read a hundred articles each to
14 get to the 10 that -- but I did note with interest that not one
15 of you -- not one article did y'all both put in. Completely
16 different set of authorities. Yes?

17 **MR. LONDON:** Your Honor, yes. Just in terms of --
18 and we will with this time certainly meet and confer over our
19 two lists that are set forth in the status report, topic areas.
20 In terms of the presentation by the experts, having done a
21 bunch of these science days before historically, and these
22 parameters all make sense, while the expert is lecturing, it's
23 not a direct exam, but it has helped if there is --

24 **THE COURT:** We're not doing that.

25 **MR. LONDON:** No, I mean, it's not a direct, but if

10:02 AM 1 one --

10:02 AM 2 THE COURT: They're going to stand right here at the
10:02 AM 3 podium.

10:02 AM 4 MR. LONDON: Okay.

10:02 AM 5 THE COURT: And they're going to talk.

10:02 AM 6 MR. LONDON: Not in the witness box?

10:02 AM 7 THE COURT: No, no, not in the witness -- they're
10:02 AM 8 going to stand right there at that podium, and they're going to
10:02 AM 9 talk, and I'm going to ask them questions.

10:02 AM 10 MR. LONDON: Okay.

10:02 AM 11 MR. THOMPSON: Judge, I don't think I can reach him
10:02 AM 12 from here. Will I be able to --

10:02 AM 13 THE COURT: Y'all get one of those long sticks. But
10:03 AM 14 no, this is not lawyer driven. This is -- you know, I'm
10:03 AM 15 looking to -- and, you know, I'm going to be asking questions,
10:03 AM 16 that will leave one side or the other uncomfortable. Tough.
10:03 AM 17 Okay? I'm just trying to figure the science out.

10:03 AM 18 Just responses here today, I know there's really
10:03 AM 19 significant differences on a lot of issues that are important,
10:03 AM 20 and I hear both sides, and I just -- you know, I'm going to one
10:03 AM 21 day have to address these issues, and I'd like to do it in a
10:03 AM 22 more informed way than I'm capable of doing right now.

10:03 AM 23 So written discovery. Where are we on written
10:03 AM 24 discovery?

10:03 AM 25 MR. LONDON: Your Honor, in terms of the plaintiffs'

1 side, we had provided -- and I think we've talked about this --
2 informal discovery six questions by email following a meet and
3 confer about three plus weeks ago. Maybe we'll get some
4 answers. They were really done to avoid 30(b)(6) questions.
5 Really simple.

6 **THE COURT:** Yes.

7 **MR. LONDON:** which products did you make, the names,
8 over what years?

9 **THE COURT:** Correct.

10 **MR. LONDON:** Hopefully we'll get some answers. In
11 terms of the other discovery, the master discovery on behalf of
12 the personal injury claimants, the government entities, the
13 private well owners, states, et cetera, we hope to serve a
14 master set of discovery, keeping with Your Honor's suggestions
15 at the last conference, serve it informally on the defendants
16 within a few weeks, discuss that with them, see if there's
17 anything that may need to be fine tuned, and then short order
18 after that, it's deemed officially served and --

19 **THE COURT:** Okay. You know, I entered a stay
20 initially just while we got organized. Does anybody oppose me
21 lifting the stay on discovery? I just think I will do it. I
22 didn't intend to do it for any other reason other than to not
23 have people noticing depositions while I'm trying to pick a
24 Plaintiffs' Executive Committee, right? So I'm going to -- I'm
25 going to lift the stay.

1 But I do think a lot of times -- and this is why
2 I suggested talking to Ms. Williams, is that a lot of times you
3 could ask the question in a certain way that makes it really
4 hard to answer it, but there's an easier way to get exactly the
5 same information. You don't even know that it's available, but
6 if you talk to the other lawyer and that lawyer talks to his or
7 her people, then suddenly you're -- I had this hearing the
8 other day where some lawyer asked a not particularly important
9 question in the case, and his opposing counsel gave him a
10 million documents back, and his excuse was, "well, I just put
11 in some search words. This is what I got." Of course it's on
12 six CDs. I was like, "That's like giving nothing. I mean,
13 it's just ridiculous." And even if they had gotten what they
14 wanted, it wasn't important. So I said, "You got to use some
15 judgment here and talk to each other, and if it's going to
16 produce -- if a search is going to produce a million documents,
17 your search words aren't good, right? I mean, you're just too
18 general."

19 So anyway, I do think consulting back and forth,
20 and to the extent you can't work it out, make motions. I'll
21 rule. I'm glad to do that. I'll do it expeditiously.

22 **MR. OLSEN:** Your Honor, the only other point I would
23 like to make on this, and we're not -- we haven't in the meet
24 and confer process suggested to the PEC to limit themselves to
25 what they ask for, and we've been conducting it informally, but

1 we're about to produce as soon as Your Honor enters a
2 protective order to compel production just for the benefit of
3 some context here, just 3M, for example, produced 250,000
4 documents and 3 million pages. We searched 124 custodians.
5 Search terms were negotiated. There were 65 or so substantive
6 search terms around foam, around the topics that are in issue
7 here. We would suggest rather than getting just master
8 discovery that asks for everything and millions and millions of
9 pages of documents, that the PEC look at what they have
10 already, and that might narrow the focus --

11 **THE COURT:** Well, you ought to direct that to them,
12 Mr. Olsen, and talk to them. I will tell you that the worst
13 thing that a lawyer could get when they ask for millions of
14 documents is to actually receive them, right?

15 **MR. OLSEN:** Yep.

16 **THE COURT:** Then how do you -- how do you manage
17 those millions of documents? They don't want a bunch of stuff
18 that's not relevant to their case either. So talk to them, and
19 obviously the production -- we'll quickly look at this
20 protective order, because I do think it's important that the
21 prior discovery in the Bell case will certainly -- not only
22 will it give them substantively a lot of information, it may
23 give them ideas about what to ask for and how that information
24 is organized and what seems to be better than others.

25 Okay. I guess one could say that I perhaps have

1 not -- have jumped the gun on the State of New York Motion to
2 Remand. Who's here from New York on this issue?

3 **MR. SINKMAN:** Good morning, Your Honor.

4 **THE COURT:** You got anything to add not in the brief?

5 **MR. SINKMAN:** Well, Your Honor, expectations are low,
6 so I have that going for me. We will be filing a reply, and I
7 prefer to put my arguments in that reply.

8 **THE COURT:** Okay. I won't rule until your reply
9 comes in. Replies are optional in our district, but I will
10 await your reply with bated breath.

11 **MR. SINKMAN:** Thank you, Your Honor.

12 **THE COURT:** I will not do this, however. My -- one
13 of my colleagues has a red stamp. It says "Denied". I promise
14 not to return your reply with a stamp that says "Denied".

15 **MR. SINKMAN:** I appreciate that, Your Honor. And I
16 will say that we do disagree with some of the points you made,
17 and I hope you look at our papers with an open mind.

18 **THE COURT:** Very good. I will look for it.

19 **MR. PETROSINELLI:** We can get you a yellow stamp,
20 Your Honor.

21 **THE COURT:** Yes.

22 **MR. SINKMAN:** For the court reporter, my name is
23 Matthew Sinkman.

24 **THE COURT:** Thank you very much. I hope you got a
25 good meal last night. I don't want -- your trip won't be

10:09AM 1 totally wasted to Charleston.

10:09AM 2 what is our information we have about -- I know
10:09AM 3 there have been numbers bandied around about the number of
10:09AM 4 sites that are allegedly contaminated. How much information do
10:10AM 5 we have about the number of sites and how much alleged
10:10AM 6 contamination there is? I mean, the testing of wells, what has
10:10AM 7 been done? What's sort of out there already that we know
10:10AM 8 about? Mr. Napoli, you know something about all of this?

10:10AM 9 **MR. NAPOLI:** We have been following it pretty
10:10AM 10 closely. I would say in the MDL, I think Your Honor is right.
10:10AM 11 We probably have about 15 to 20 sites identified where there's
10:10AM 12 either medical monitoring or there is some action filed, but
10:10AM 13 there have been various reports by the Department of Defense
10:10AM 14 that have identified upward of 400 military sites that have
10:10AM 15 findings of PFOS with AFFF foam, and in our office we've been
10:10AM 16 looking state by state. I know in New York, New York has
10:10AM 17 identified not only Air Force bases, but civil aviation that
10:10AM 18 have AFFF foam and county firefighting facilities. In New
10:11AM 19 York, we have 62 counties. Each of them have their own
10:11AM 20 firefighting training facility. Each of them have been
10:11AM 21 identified with firefighting foam.

10:11AM 22 I've talked to other states and other attorneys
10:11AM 23 in other states. Some states have a centralized fire training
10:11AM 24 center. Others have county by county. We believe those are
10:11AM 25 going to be issues.

10:11AM 1 There's also industrial sites. For example, one
10:11AM 2 case we have here out of Marinette, Wisconsin with Chemguard,
10:11AM 3 they would produce their AFFF foam and then test it in the
10:11AM 4 neighborhood, and that contaminated some wells. That case is
10:11AM 5 in front of Your Honor as well.

10:11AM 6 So it's not only going to be government sites.
10:11AM 7 It will be industrial sites. There will also be civil fire
10:11AM 8 training sites.

10:11AM 9 The products were also used, Your Honor, in the
10:11AM 10 fire suppression systems in many buildings. We have a number
10:12AM 11 of cases where that may be the source.

10:12AM 12 Car fires in some counties that we've --

10:12AM 13 **THE COURT:** I saw a video of a building online where
10:12AM 14 the foam went way up in the building. I don't know where it
10:12AM 15 went after.

10:12AM 16 **MR. NAPOLI:** So Newburgh, for example, which is a
10:12AM 17 case before Your Honor, they did use it for training. They did
10:12AM 18 use it --

10:12AM 19 **THE COURT:** Yeah, I think it was a training film is
10:12AM 20 what I saw.

10:12AM 21 **MR. NAPOLI:** well, they used it for training, and
10:12AM 22 that specific site had an exposure involving training, an
10:12AM 23 exposure just involving the firefighters by accident spilling
10:12AM 24 it, an actual emergency situation with a FedEx airplane, and
10:12AM 25 then a hangar situation where the fire suppression system

1 released the foam from floor to ceiling, and all of them have
2 been identified as potential reasons why --

3 **THE COURT:** Now, Mr. Napoli, here is the next
4 question. For those sites, however many number we're talking
5 about, how much study has been done on whether there is
6 abnormal levels of PFOS or PFOA in the water supply?

7 **MR. NAPOLI:** Okay. It varies site by site. Taking
8 Newburgh as an example, they shut the water system down for a
9 period of time. There was an extensive study by the New York
10 State EEC. I believe the DOD has also been involved in some of
11 the studies. There's been community groups and lawyers
12 involved in looking at what's going on.

13 If we go back for a second in Bell and Your
14 Honor's idea of a progression in the cases from the water
15 provider to medical monitoring, personal injury, I think that
16 is what Judge Jackson had implemented in our Colorado case. We
17 began with -- there wasn't a water provider that brought suit,
18 even though it was a second most contaminated site in the
19 country. The water provider at that time did not bring a suit.
20 They recently have, one of the three, which will be -- is on
21 transfer to Your Honor.

22 So we began with the monitoring case. We told
23 all the other personal injury cases and the monitoring cases
24 because of the unique nature of the law of monitoring in
25 Colorado, and Judge Jackson wanted to address monitoring. So

10:14AM 1 what we did is we did 30(b)(6)s of the water districts. We
10:14AM 2 learned how their distribution system worked. We then took
10:14AM 3 that information, understanding all their testing, who was
10:14AM 4 exposed. The class then got limited to those people who would
10:14AM 5 have had exposure from those wells that were contaminated.

10:14AM 6 we then did a dosing analysis with our experts
10:14AM 7 who then would identify based on duration and time under the
10:14AM 8 existing HAL, which was 70 parts per trillion, whether or not
10:14AM 9 these people were at risk for any of the --

10:14AM 10 **THE COURT:** And were they above -- did you find
10:14AM 11 whether there were some above that number?

10:14AM 12 **MR. NAPOLI:** Some were above. Some were not, and we
10:14AM 13 were in the process of arguing that. The judge had issued two
10:15AM 14 decisions I believe that sort of addressed the state of what he
10:15AM 15 believed medical monitoring was in Colorado. There's no law
10:15AM 16 for medical monitoring, legislation that allows medical --

10:15AM 17 **THE COURT:** It's almost all case law is what I see
10:15AM 18 out there.

10:15AM 19 **MR. NAPOLI:** There's case law. It was a District
10:15AM 20 Court, well respected District Court Judge had issued an
10:15AM 21 opinion, and then Judge Jackson made his determination that he
10:15AM 22 believed that Colorado would recognize medical monitoring, and
10:15AM 23 we were proceeding into the hearing. And he was at the stage
10:15AM 24 where Your Honor is where he was about to hear testimony from
10:15AM 25 some of the experts to make a determination how broad the

10:15 AM 1 medical monitoring should be, who it would encompass, what
10:15 AM 2 level of exposure --

10:15 AM 3 **THE COURT:** You know, you keep talking, they're going
10:15 AM 4 to jump up and say, "well, he didn't rule," so don't do that.
10:15 AM 5 I've actually read all the transcripts, okay? So I'm not --

10:15 AM 6 **MR. NAPOLI:** He did rule in the sense that he wrote
10:15 AM 7 an opinion that I think is instructive, at least on what was
10:16 AM 8 going on in his courtroom. Some -- and we're certainly --

10:16 AM 9 **THE COURT:** But I'm going to make my own independent
10:16 AM 10 determination on this --

10:16 AM 11 **MR. NAPOLI:** Sure.

10:16 AM 12 **THE COURT:** -- but I read the transcript. It was
10:16 AM 13 very interesting frankly. I thought the whole discussion on
10:16 AM 14 both sides was very interesting, and it gives us a lot -- so, I
10:16 AM 15 mean, that's the kind of -- and I'll -- you know, you never
10:16 AM 16 quite know how in your own brain you sort of come to think
10:16 AM 17 about things, but a lot of what you just described is sort of
10:16 AM 18 where I want to get and to see -- okay. We've got Colorado.
10:16 AM 19 Are there other sites as well in which -- I know the government
10:16 AM 20 is doing a fair amount of testing. You know, I don't know how
10:16 AM 21 much you guys in the Bell case had the government's testing.
10:16 AM 22 Did you have access to that?

10:16 AM 23 **MR. NAPOLI:** The government water district was doing
10:16 AM 24 testing. The --

10:16 AM 25 **THE COURT:** How about the U.S. -- I mean, I know the

1 U.S. Government has been doing some testing itself trying to
2 determine the scope of the problem.

3 MR. NAPOLI: Yes.

4 THE COURT: Did you in Colorado have access to that
5 information?

6 MR. NAPOLI: Yes.

7 THE COURT: Okay.

8 MR. NAPOLI: So there were private contractors of --
9 for the water districts that also accumulated information.
10 There was the government information. Right now the federal
11 government has set aside money and -- to do health testing.
12 They're doing it at PC Air Force Base and another -- other
13 bases around the country.

14 THE COURT: Are they doing it to people who do not
15 reside on the base but live nearby?

16 MR. NAPOLI: But they're doing former military, I
17 believe people on the base, and in certain circumstances I
18 believe people nearby. In Colorado, Colorado School of Mines,
19 which is a state entity, but with people that are very
20 knowledgeable on environmental health and occupation, they did
21 testing of people's blood in the community. We also did our
22 own testing.

23 THE COURT: See, I think all this information is
24 going to end up -- the accumulation of this information here
25 from all different kinds of sources is going to end up being

1 really important to sorting out a lot of these issues. And I
2 kidded y'all a little bit we're asking the question we don't
3 know the answer to. We don't know -- you know, I don't know
4 the answer to it, and I imagine we're going to have a fair
5 amount of scholarship out there, people studying the data y'all
6 are gathering trying to figure out what it tells us. And let
7 me just say, folks, I know that you can't yourselves, the
8 lawyers, control what scholarship gets published in
9 peer-reviewed literature. You shouldn't control it, right?
10 And as we all say in some cases, you had suspicions some of it
11 was driven by lawyers, but, you know, it would be like really
12 good to have scholars, researchers not tied to either side here
13 analyze some of this data and share with us some of the
14 findings. I mean, I would find that very helpful. I mean, it
15 may well be that I will consider down the road appointing my
16 own science expert to help me, you know, organize all of this,
17 because we really do need independent assessment.

18 And, folks, you're going to be gathering really
19 cutting edge information here that is largely unknown right
20 now. I mean, literally they're drawing blood in Colorado. I
21 mean, has anybody actually done a -- written an article on that
22 and what it tells us? I mean, that would be pretty important.
23 I didn't have it in my ten articles. You know, I think that
24 would be a valuable thing to know.

25 Mr. London, you --

10:19 AM 1 MR. LONDON: I was just going to add, Your Honor,
10:19 AM 2 that's precisely what happened out of the settlement
10:19 AM 3 previously, and there were the 72,000 members that were studied
10:19 AM 4 by three epidemiologists.

10:19 AM 5 THE COURT: Yes.

10:19 AM 6 MR. LONDON: Plaintiff/defense unified picked, and it
10:19 AM 7 yielded -- it was one of the largest epidemiological studies.
10:19 AM 8 72,000 people in the community --

10:19 AM 9 THE COURT: Right. And y'all think -- legitimate
10:19 AM 10 point. This was the manufacturer of the chemical. It's not
10:19 AM 11 exactly the same, but it would be -- you know, I think in some
10:20 AM 12 ways in what we're going to be doing here, we may be gathering
10:20 AM 13 the underlying data that would answer a lot of the scientific
10:20 AM 14 questions that I think frankly are in dispute, but the data may
10:20 AM 15 answer the question for us if we just, you know, organize it.

10:20 AM 16 Yes, sir?

10:20 AM 17 MR. NAPOLI: The CDC is also doing a study on
10:20 AM 18 children, and I don't know to the extent that Ms. Williams can
10:20 AM 19 help us identify what studies are going on and what stage
10:20 AM 20 they're at. I mean, that -- the government is doing more
10:20 AM 21 testing than anyone at the moment.

10:20 AM 22 THE COURT: Correct. Y'all, I might be missing
10:20 AM 23 something. I think Ms. Williams is trying to be a facilitator,
10:20 AM 24 giving -- kind of a neutral presenter of whatever data she has.
10:20 AM 25 Is that fair, Ms. Williams, that you're trying to do that?

10:20AM 1 MS. WILLIAMS: Yes, Your Honor. And in the voluntary
10:20AM 2 disclosures, the CDC section speaks to what they're doing now.
10:20AM 3 One of the biggest things they're doing is these environment
10:20AM 4 assessments, and those are -- one of those is at Peterson Air
10:20AM 5 Force base. They've identified sites around the country for
10:21AM 6 those assessments.

10:21AM 7 THE COURT: And I know Congress has -- you and I
10:21AM 8 talked last night about this. Congress has a lot of interest
10:21AM 9 in this as well. They're --

10:21AM 10 MS. WILLIAMS: There has been a lot of congressional
10:21AM 11 interest, yes, sir.

10:21AM 12 THE COURT: Yeah. So I think we're -- you know,
10:21AM 13 we're going to be in the middle of the -- in some ways this is
10:21AM 14 going to be a very dynamic process as this litigation goes on,
10:21AM 15 and some things which are very unfocused right now may soon
10:21AM 16 become very focused as we come to learn more about this.

10:21AM 17 Let me ask a question about the -- let's say
10:21AM 18 hypothetically that you wanted to do some monitoring. Are
10:21AM 19 there tests, screening tests that would be not particularly
10:21AM 20 involved -- blood tests, et cetera -- that may provide as a
10:21AM 21 screening device some information about AFFF toxicity? Are
10:21AM 22 there tests out there?

10:22AM 23 MR. LONDON: Yes, Your Honor. It's a blood test, and
10:22AM 24 it's not necessarily the AFFF toxicity.

10:22AM 25 THE COURT: PFOS?

1 10:22AM MR. LONDON: Precisely. That's the acronym. PFOS,
2 PFOA. Yes, that was -- that's the model.

3 10:22AM THE COURT: And that's just a simple blood draw?

4 10:22AM MR. NAPOLI: There is a protocol that -- I'm sorry.

5 10:22AM MR. LONDON: Go ahead.

6 10:22AM MR. NAPOLI: So in New York there has been appointed
7 by the governor several physicians, one whom my partner had
8 mentioned to me who is -- the state is actually referring
9 people to this physician who has a whole protocol. As I stand
10 here today, I do not know the protocol, but --

11 10:22AM THE COURT: You know, I saw in one of these things --
12 I know it's early in the process -- somebody proposed, "well,
13 we're just going to send everybody over for a physical." That
14 doesn't make any sense to me. You'd over-evaluate people, and
15 you would have all these conditions. "Oh, they have
16 hypertension. I guess that's caused by PFOS." I mean, that
17 wouldn't be very helpful to anybody. But there are things that
18 to me -- and I'd like -- very much like to see this New York
19 protocol the doctor's come up with, and you could get it, share
20 it with defense, and share it with the Court. I mean, I'm
21 interested, but to me what would make most sense -- and maybe
22 somebody will tell me it doesn't, some expert will tell me it
23 doesn't -- you'd have some kind of threshold screening of that
24 test that would not be particularly expensive or involved, and
25 if it produced a -- a positive result, that is a result showing

1 some elevated blood levels or whatever, then you might have a
2 second wave of evaluation based upon that finding. Yes, sir?

3 **MR. NAPOLI:** And, Your Honor, that's exactly our
4 medical monitoring claim and what we were talking about in
5 front of Judge Jackson and he was talking about; is to have
6 that initial testing, determine whether they -- those people
7 need additional follow-up and what exactly that follow-up was.

8 **THE COURT:** Correct. That's exactly my thinking on
9 this. And, you know, you tell me we have 15 to 20 sites. If
10 we got to the point where we could -- I mean, there are all
11 these issues. Can you define the class? Is there a meaningful
12 way to define this class that would meet Rule 23 requirements?
13 And are there tests that would give us meaningful information?

14 Then my idea would be not to pick to do this in
15 15 to 20 sites. We couldn't do them in states that don't allow
16 medical monitoring, but we might pick one or two, and let's
17 just test drive the thing and see what it teaches us. And it
18 may be after, you know, 18 months of this, we'll say, "This is
19 like not giving us anything worth having," or it might tell us
20 we're on to something, or might tell us that we're not doing it
21 exactly right but there's a better way to do it.

22 But I think we need to be thinking about --
23 these are the kind of questions I have. Is there a meaningful
24 way to define a zone of danger if you were going to do a --
25 based on location at a site? And how would you define that?

1 10:25 AM And then if you were going to allow medical monitoring, what
2 10:25 AM could you do that would not be incred -- that would produce
3 10:25 AM information worth having, you know? I mean, I don't want to do
4 10:25 AM it just for the sport of doing a medical monitoring.

5 But, you know, if we did medical monitoring and
6 10:25 AM you found out A, there are a lot of people with elevated blood
7 10:25 AM levels, a lot more than you'd expect in the general population,
8 10:25 AM that's a finding that would be very meaningful. Here's another
9 10:25 AM finding. It's not, right? It's not elevated, even where
10 10:25 AM places -- it's not elevated. Maybe there will be arguments
11 10:25 AM that the test isn't the right test or whatever. I mean, I'm
12 10:25 AM hoping to hear anything, but I just -- I think that's
13 10:25 AM potentially valuable information to have and something that
14 10:25 AM could help guide the litigation and help inform the lawyers
15 10:26 AM about -- I mean, I know if you ask the plaintiffs' counsel,
16 10:26 AM they would say, "This is like one of the greatest environmental
17 10:26 AM tragedies in the history of man." And the defense lawyers
18 10:26 AM said, "I'll drink it by the bottle, and it won't hurt us." You
19 10:26 AM know, so somewhere the truth may lie, you know, and we've got
20 10:26 AM to figure out what is it, what it is, you know, unemotionally,
21 10:26 AM rigorously, scientifically looking at the data. You know,
22 10:26 AM what's the answer here?

23 10:26 AM **MR. PETROSINELLI:** Can I give you one thought on
24 10:26 AM that, Judge?

25 10:26 AM **THE COURT:** You're not offering to drink it.

10:26AM 1 MR. PETROSINELLI: No, I'm not. I'm not. I would
10:26AM 2 say two things, because Colorado, that's a good example. What
10:26AM 3 we found in the plaintiffs who -- or putative class members,
10:26AM 4 it's all over map in terms of their blood level who got blood
10:26AM 5 tests. Some of them had none. Some of them had in the single
10:26AM 6 digit parts per trillion, and some of them had, as Mr. Napoli
10:26AM 7 said, over 70 parts per trillion. That's one thing.

10:26AM 8 The second thing --

10:26AM 9 THE COURT: 70 parts per trillion. That's the water
10:26AM 10 supply you're talking about?

10:26AM 11 MR. PETROSINELLI: Yeah, people who the claim was
10:27AM 12 that they drank water from --

10:27AM 13 THE COURT: But we're not talking about their blood
10:27AM 14 serum levels. We're talking -- are we talking about blood
10:27AM 15 serum levels?

10:27AM 16 MR. PETROSINELLI: Yes, sir.

10:27AM 17 THE COURT: Okay. So we're talking about people who
10:27AM 18 were identified living in an area which had contaminated water,
10:27AM 19 and then we're talking about they took blood tests, and some of
10:27AM 20 them had elevated in their blood, accumulated levels above even
10:27AM 21 the 70 parts whatever.

10:27AM 22 MR. PETROSINELLI: But a lot didn't, and then the
10:27AM 23 question is -- and you hit on it earlier -- what does that
10:27AM 24 mean? Because you can be sure that the EPA when they do this
10:27AM 25 as a regulatory matter, if they think the level that causes

10:27AM 1 harm is 71 parts per trillion, they don't set the level at 70
10:27AM 2 parts per trillion. There's a massive --

10:27AM 3 **THE COURT:** But, you know, they originally set it at
10:27AM 4 400, and then they went to 70, and they haven't issued a final,
10:27AM 5 so it may be very dynamic about what that number is. New
10:27AM 6 Jersey is what? What's New Jersey's number?

10:27AM 7 **MR. PETROSINELLI:** 13 or something.

10:27AM 8 **THE COURT:** So, I mean, again, what is it worth? I
10:27AM 9 mean, I think we got to -- you know, I think --

10:27AM 10 **MR. PETROSINELLI:** But it gets to the general
10:27AM 11 causation question, which is I guess what science day will get
10:28AM 12 you a start on, which is what is the level -- you know, in
10:28AM 13 toxicology you have the basic principle of dose matters, right?
10:28AM 14 Every substance is toxic.

10:28AM 15 **THE COURT:** You've read my Lipitor order. Dose
10:28AM 16 matters.

10:28AM 17 **MR. PETROSINELLI:** And so the question is at what
10:28AM 18 level is there evidence that these compounds cause any --

10:28AM 19 **THE COURT:** well, that was one of my first questions
10:28AM 20 I raised here today when I was talking about this, is at what
10:28AM 21 level is this harmful to humans? I think we know from the C8
10:28AM 22 work that at very high levels, it is really bad, okay? But at
10:28AM 23 what level when you're not having that type of intense exposure
10:28AM 24 is it most probably something that causes injury?

10:28AM 25 Mr. London?

10:28 AM 1 MR. LONDON: Your Honor, the proposal or outline of
10:28 AM 2 or thinking that -- I don't want them to jump up and call it
10:28 AM 3 proposal that Your Honor is thinking in terms this quasi
10:28 AM 4 monitoring, and Mr. Napoli alluded to it starting in New York,
10:28 AM 5 this is precisely what's going on and has gone on since '05 or
10:28 AM 6 '06 in West Virginia with those 72,000 people.

10:29 AM 7 THE COURT: Right.

10:29 AM 8 MR. LONDON: Ongoing monitoring, simple blood draw.
10:29 AM 9 And it really -- it wasn't lots and lots of stuff, this dose
10:29 AM 10 that matters. It was .05 parts per million. That's nothing
10:29 AM 11 for one year. That was the exposure level. So living there
10:29 AM 12 and then still having .05 parts per --

10:29 AM 13 THE COURT: But it has the accumulated effect.

10:29 AM 14 MR. LONDON: It has accumulation, which is why you
10:29 AM 15 can be removed, you can move to New York, and still have it in
10:29 AM 16 you despite not living in a contaminated area.

10:29 AM 17 THE COURT: But what harm -- I mean, we're being
10:29 AM 18 told -- and I don't know if it's true or not, but we're being
10:29 AM 19 told that the whole world has some part of this; that somehow
10:29 AM 20 this product through indirect, Teflon, whatever, we've all been
10:29 AM 21 exposed to it, and then there's some minimal level, and I don't
10:29 AM 22 know if it's been demonstrated having that sort of de minimis
10:29 AM 23 level that everybody in this room has caused harm. But you
10:29 AM 24 didn't bring this suit because the universe has it. You are
10:29 AM 25 claiming that there are people who have a great deal more

10:29 AM 1 exposure than that.

10:29 AM 2 **MR. LONDON:** And that's correct. And where we are
10:29 AM 3 now -- and this is really what Your Honor started today's
10:30 AM 4 discussion on, is these water providers -- and basically it's
10:30 AM 5 to go backwards a little bit, the precautionary principles is
10:30 AM 6 what's at play here. If you know something is toxic, you must
10:30 AM 7 remove it first and remediate and get what's toxic out. We may
10:30 AM 8 argue for some time -- and in fact they argued for seven years
10:30 AM 9 down in -- eight years down in West Virginia about which
10:30 AM 10 injuries were caused by .05 parts per million for one year. It
10:30 AM 11 turned out these three scientists ruled out close to 200 other
10:30 AM 12 ailments, other cancers, other conditions.

10:30 AM 13 **THE COURT:** I saw that.

10:30 AM 14 **MR. LONDON:** And only found six. And so right now
10:30 AM 15 we're in this public health situation where this stuff is
10:30 AM 16 toxic. This stuff is bioaccumulative. The precise injuries,
10:30 AM 17 maybe we still need --

10:30 AM 18 **THE COURT:** well, this is one of the reasons I
10:30 AM 19 pointed out about medical monitoring in the water district
10:30 AM 20 cases; that, you know, to the extent there is reasonable
10:30 AM 21 science to support injury at a certain level of exposure, then
10:31 AM 22 the water districts say, "We don't want to sell a contaminated
10:31 AM 23 product, a contaminated product." That's all -- as long as
10:31 AM 24 that's a reasonable scientific basis for that, that's a claim.

10:31 AM 25 **MR. LONDON:** That's a claim.

10:31 AM 1 THE COURT: But the person who drank that water may
10:31 AM 2 not have a claim if you can't prove more likely than not that
10:31 AM 3 it caused them injury. Now, that's a different case, and they
10:31 AM 4 may live in the same community and drink that water, but that's
10:31 AM 5 a different issue, a more demanding issue for the plaintiffs to
10:31 AM 6 prove.

10:31 AM 7 MR. LONDON: And in those Ohio cases, those injury
10:31 AM 8 claims took --

10:31 AM 9 THE COURT: Years.

10:31 AM 10 MR. LONDON: -- eight years.

10:31 AM 11 THE COURT: Right.

10:31 AM 12 MR. LONDON: -- to -- for that science to
10:31 AM 13 materialize.

10:31 AM 14 THE COURT: But I agree with you. That's why the
10:31 AM 15 sequencing here makes sense to me.

10:31 AM 16 MR. LONDON: Absolutely.

10:31 AM 17 THE COURT: And I really want to know -- you know,
10:31 AM 18 obviously there's some -- there's no consensus out there on
10:31 AM 19 what level is dangerous. New Jersey's found one place. The
10:32 AM 20 original EPA is 400. Then it's 70. New Jersey is now 13. I
10:32 AM 21 mean, I want to hear the basis of this. I mean, I don't think
10:32 AM 22 people just threw a dart at a wall and picked a number. I
10:32 AM 23 mean, they had their own reasons, and my understanding is the
10:32 AM 24 EPA is in the middle of trying to look at this itself, right?
10:32 AM 25 And issued a -- I think -- what is done, an advisory, but not a

1 prohibition; kind of mandated standard, is that correct?

2 **MR. PETROSINELLI:** Yeah, they have a health advisory
3 level in drinking water. That's the 70 parts per trillion, and
4 they're looking now at whether they're going to establish an
5 actual MCL, a maximum contaminant level, which would actually
6 be a requirement. It wouldn't just be an advisory.

7 **THE COURT:** So water districts would prohibited from
8 selling.

9 **MR. PETROSINELLI:** Correct.

10 **THE COURT:** well, let me ask you this. If a water
11 district comes in and says, "We've looked at the science. We
12 think New Jersey is right. This is 13 parts. That's our
13 judgment, and we've hired consultants, and it's our good faith
14 belief that if we sell more than that, we're irresponsible, and
15 we have to remediate. We have to get it below that level." Is
16 that a claim?

17 **MR. PETROSINELLI:** It's a claim. It's not a
18 dispositive claim.

19 **THE COURT:** So, I mean, obviously you got issues
20 about who caused it and all of those; right?

21 **MR. PETROSINELLI:** There's different sources of PFOS
22 contamination --

23 **THE COURT:** Correct. You have to get all that, but
24 if you were -- if they were able to carry their burden of
25 proving whoever was responsible and they were -- happened to be

1 a party in this lawsuit, potential claim; right?

2 MR. PETROSINELLI: Potential claim.

3 THE COURT: Yeah.

4 MR. PETROSINELLI: Subject to -- but there's the
5 government contractor defense.

6 THE COURT: I get all that.

7 MR. PETROSINELLI: And number 2, remember that's just
8 the nuisance claim. They've asserted in this case negligence,
9 design defect. Those are subject to the same -- you have to
10 prove causation. It's not -- it's no different than the
11 personal injury claims. You have to prove that these --

12 THE COURT: But if their product is contaminated and
13 they can't sell it --

14 MR. PETROSINELLI: They'd have a potential claim.

15 THE COURT: -- they have a potential claim.

16 Mr. Summy?

17 MR. SUMMY: Your Honor, I would like to address this.
18 Having represented public water providers for the last 20
19 years, this has been a very big issue in litigation and out of
20 litigation. I think it's important to note that when you're
21 talking about MCLs that are set by different state
22 legislatures, those are really political numbers.

23 THE COURT: They can be.

24 MR. SUMMY: They very well can be, and so public
25 water providers, if they make a decision that, "Look, we're not

10:34 AM 1 going to put our constituents at risk or much less us at risk,"
10:34 AM 2 they make these decisions. They definitely have a claim, and
10:34 AM 3 we want --

10:34 AM 4 **THE COURT:** Well, Mr. Summy, let me say this. It's
10:34 AM 5 got to be -- have a reasonable scientific basis.

10:34 AM 6 **MR. SUMMY:** Sure.

10:34 AM 7 **THE COURT:** They can't do -- they can't also pick a
10:34 AM 8 number and just say, "That's our number." They have -- they
10:34 AM 9 will have to come -- that's why I kept prefacing this that they
10:34 AM 10 have to have a reasonable scientific basis for their number.

10:34 AM 11 **MR. SUMMY:** Absolutely.

10:34 AM 12 **THE COURT:** And they're just going to say, "While you
10:35 AM 13 guys are over here litigating whether -- how much harm this
10:35 AM 14 causes, we're not selling the product. We are not engaging in
10:35 AM 15 this."

10:35 AM 16 **MR. SUMMY:** That's correct.

10:35 AM 17 **THE COURT:** "You know, and putting -- letting our
10:35 AM 18 customers be canaries in the mine to figure out when it kills
10:35 AM 19 them."

10:35 AM 20 **MR. SUMMY:** Or what they do is they also will raise
10:35 AM 21 money to filter it out, which is extremely expensive to filter
10:35 AM 22 it out, and that becomes the basis of their claim is to get
10:35 AM 23 reimbursement for the cost of treating the water.

10:35 AM 24 **THE COURT:** It could be, or it could be a claim that
10:35 AM 25 they -- you know, prospectively they have to do something.

10:35 AM 1 **MR. SUMMY:** That's correct, Your Honor, because I
10:35 AM 2 think one of the things that's very important here is to
10:35 AM 3 realize that while these cases are going on -- and this Court
10:35 AM 4 and the lawyers are going to play an incredible role in the
10:35 AM 5 development of this -- there is exposure going on all over the
10:35 AM 6 country, and these water providers have to make a choice of
10:35 AM 7 whether or not to filter this water and to spend the money or
10:35 AM 8 to at least make claims to address it, and I think the Court is
10:35 AM 9 looking at this appropriately in that I think we should be
10:36 AM 10 focused in the sequencing on stopping the exposure or
10:36 AM 11 addressing the claims that are attempting to stop the exposure,
10:36 AM 12 and then secondly address the medical monitoring, because that
10:36 AM 13 sort of comes before we can get to the personal injuries. And
10:36 AM 14 so I think the Court is looking at the sequencing of this
10:36 AM 15 exactly right, and I think it's the appropriate way to do it.

10:36 AM 16 **THE COURT:** I'm not sure anybody -- yes, sir,
10:36 AM 17 Mr. Napoli?

10:36 AM 18 **MR. NAPOLI:** I just want to add in New York and New
10:36 AM 19 Jersey, there were science committees of epidemiologists and
10:36 AM 20 public health officials who helped come up to make a
10:36 AM 21 determination on their levels of 10 parts per trillion, 13
10:36 AM 22 parts per trillion. At the federal side, people on the ATSTR
10:36 AM 23 came out with a report.

10:36 AM 24 **THE COURT:** What is ATS -- you're now doing what I
10:36 AM 25 said -- you gotta tell me --

10:36AM 1 MR. NAPOLI: I couldn't tell you what the acronym
10:36AM 2 stands for, but they are the part of the --

10:36AM 3 THE COURT: The worst part, to use an acronym, and
10:36AM 4 you don't even know what it means.

10:36AM 5 MR. NAPOLI: It is the -- of the EPA. It's the
10:36AM 6 health arm of the EPA.

10:36AM 7 THE COURT: I gotcha. I gotcha. Okay.

10:37AM 8 MR. NAPOLI: They came out with 7 and 11 parts per
10:37AM 9 trillion. What's going on now politically, to Mr. Summy's
10:37AM 10 point, federally, even though they've set a 70 parts per
10:37AM 11 trillion, the Department of Defense is going to have to clean
10:37AM 12 up the sites that are at whatever level is set as an MCL. So
10:37AM 13 there is argument -- the DOD is arguing that 400 parts per
10:37AM 14 trillion should be the cleanup level, and so there is political
10:37AM 15 aspect. So each of these standards --

10:37AM 16 THE COURT: I can assure you of this. We will not be
10:37AM 17 making here a political decision.

10:37AM 18 MR. OLSEN: Your Honor, I think that's the only point
10:37AM 19 the defense is going to make throughout here, is there's a lot
10:37AM 20 of politics going on in what's being discussed, and all we're
10:37AM 21 looking for is some scientific basis for those levels.

10:37AM 22 THE COURT: Right. If y'all know anything about me,
10:37AM 23 I'm going to go to the science, and I'm going to -- we're going
10:37AM 24 to be rigorous about the science.

10:37AM 25 Yes, sir. Could you state your name, please?

10:37 AM 1 MR. JACKSON: Bill Jackson. I represent the state of
10:37 AM 2 New Jersey. We have filed an AFFF case, excuse me, on Tuesday,
10:38 AM 3 so it's not made its way here yet, but it will. As everyone is
10:38 AM 4 discussing, New Jersey has set levels right now at 13 parts per
10:38 AM 5 trillion for PFOS, and 14 for PFOA in a rule making decision.
10:38 AM 6 There are interim levels of 10 parts per trillion each while
10:38 AM 7 that rule making is finished. Another report that has come
10:38 AM 8 down, PFNA has already been set at 14 parts per trillion. So
10:38 AM 9 these are based upon years of science and data and process.

10:38 AM 10 THE COURT: well, I would hope -- you know, we're
10:38 AM 11 talking about science day, I would hope that both sides would
10:38 AM 12 address the underlying scientific basis of these various
10:38 AM 13 numbers. I mean, I -- they're obviously distinctly different
10:38 AM 14 from each other, and what was the reasoning and -- you know,
10:39 AM 15 and where do they part ways? what is it that is causing them
10:39 AM 16 to part ways?

10:39 AM 17 MR. JACKSON: The science has evolved over time.
10:39 AM 18 It's the Agency for Toxic Substances and Disease Registry which
10:39 AM 19 is the United States agency that is under --

10:39 AM 20 THE COURT: Mr. Napoli, did you write that down?

10:39 AM 21 MR. JACKSON: It's under the Department of Health,
10:39 AM 22 and in 2018, in the summer -- last summer 2018, they issued an
10:39 AM 23 800-page report that was accumulating the --

10:39 AM 24 THE COURT: Is this CDC? Is this a CDC agency?

10:39 AM 25 MR. JACKSON: Yes.

10:39 AM 1 THE COURT: Okay.

10:39 AM 2 MR. JACKSON: And they didn't give you the number in
10:39 AM 3 the document. They told you how to calculate the math
10:39 AM 4 basically.

10:39 AM 5 THE COURT: And that number comes out to be what?

10:39 AM 6 MR. JACKSON: Between 7 and 11 parts per trillion on
10:39 AM 7 a cumulative basis. So you've got a lot of the weight of the
10:39 AM 8 science moving to these smaller and smaller levels. As you
10:39 AM 9 noted, originally the numbers were much higher, and it has
10:39 AM 10 dropped over time. So anyway, that's the evolution of it.
10:39 AM 11 There's a great deal of scientific work that is going on, and
10:40 AM 12 these state levels that are being set are based upon that data.

10:40 AM 13 MR. PETROSINELLI: Your Honor, could I throw one
10:40 AM 14 other number at you?

10:40 AM 15 THE COURT: Absolutely.

10:40 AM 16 MR. PETROSINELLI: Just so you understand the range
10:40 AM 17 here, today as we sit here, the United States Government, the
10:40 AM 18 military says, "We still need this foam," and it can have in
10:40 AM 19 it -- they just changed this in 2017, for PFOS and PFOA 800,000
10:40 AM 20 parts per trillion. 800,000 parts per trillion. They say, "As
10:40 AM 21 long as the foam has less than that, we need it." And that's
10:40 AM 22 what the mil spec says today, and it says, "By the way, we'll
10:40 AM 23 still use the stuff in inventory that has more than that," but
10:40 AM 24 they set the level in 2017 at 800,000 parts per trillion.

10:40 AM 25 MR. OLSEN: Rather than addressing back and forth, I

1 mean, Mr. Jackson says the science has evolved to establish
2 these lower numbers. The defense vehemently disagrees with
3 that.

4 **THE COURT:** That's why we're going to have a science
5 day.

6 **MR. OLSEN:** I was just going to say, I think both
7 sides agree we will address this at science day rather than
8 keep going back and forth as to what the right number is.

9 **THE COURT:** well, I think it just highlights that
10 everybody's view of this, nobody took a dart out and threw it
11 against a wall. So someone's view on science may be more
12 persuasive than others. I think I'm going to have to get to
13 this.

14 But I make the point about the water districts.
15 Let's say there's this variance between the Department of
16 Defense and the state of New Jersey and epidemiologists, but
17 the water district says, "We have weighed all of this, and we
18 as an entity cannot sell a product that we have deemed at this
19 level to be tainted." Even though the Department of Defense
20 might say, "well, we would -- we're willing to use the stuff,"
21 I'm not sure the water district doesn't have a claim. They
22 don't have to -- they're not bound by the Department of
23 Defense's -- which has maybe some very important military
24 purposes and so forth that justify the use of this. I mean,
25 you got a jet fuel fire on an aircraft carrier, you got one

1 heck of a problem, and so there may be real justifications for
2 the military willingness to use it, but not sufficient to make
3 a water district in Colorado use it. You know, I mean, those
4 are really two different factors.

5 But I'm hoping early on that we can at least
6 come to understand why these numbers are so greatly different
7 and what are the underlying presumptions. Everybody is making
8 presumptions, right? They're taking data, and they're
9 extrapolating from known data. Where exactly are those pivot
10 points? And I'd like to know where they are. Where are people
11 reaching different -- or assuming different points? So where
12 is the government getting its -- its foam with PFOA or PFOS in
13 it? Are the defendants still manufacturing it for them?

14 **MR. PETROSINELLI:** Yes, the government still needs --
15 the military needs it, so they issue government contracts or
16 purchase orders --

17 **THE COURT:** Are there products without those two
18 chemicals in it?

19 **MR. PETROSINELLI:** You can make fluorine-free foam,
20 but the government has said, "It doesn't meet our
21 specifications." So that's the issue. In other words, there
22 are fluorine-free foams that are used in commercial
23 applications that are used overseas, but for the U.S. Military,
24 they have -- it's actually right in the new mil spec, the one I
25 just mentioned to Your Honor, the 2017 amendment. It says,

1 "We're still looking at trying to come up with fluorine-free
2 foams, but none of them is able to meet our specifications.

3 **THE COURT:** And that is to be able to retard fire or
4 whatever, right?

5 **MR. PETROSINELLI:** You know, to put out a certain
6 level of fire in 30 seconds. You know, if you're on a military
7 airplane and you have a fire that comes up under the airplane,
8 you want it out in 30 seconds, not three minutes, which is what
9 it takes with fluorine-free foams. And so there -- I think --
10 I don't think there's any disagreement that there is no foam
11 that is fluorine-free that can meet the mil specs.

12 **THE COURT:** But is there going to be an argument that
13 what you might need on a plane crashing into an aircraft
14 carrier might not be the same thing you need in an airport in
15 the United States on land? I'm just saying --

16 **MR. PETROSINELLI:** It may be, but again with a
17 military base or an FAA airport, they require mil spec foam.
18 You cannot supply them fluorine --

19 **THE COURT:** And what is mil spec?

20 **MR. PETROSINELLI:** Military specification is the, you
21 know, jargon for what the Naval Research Lab came out with to
22 say that if you're going to sell foam to the United States
23 Government or an FAA airport, it must meet this specification.

24 **THE COURT:** Okay. Y'all need to be able to address
25 all of that, about what alternatives there are and so forth.

10:45 AM 1 And we need to, you know -- obviously another
10:45 AM 2 piece of the evidence is going to be -- in discovery is who
10:45 AM 3 knew what when, and what they did do? what the disclosure was?
10:45 AM 4 what the government knew already? what the government learned?
10:45 AM 5 Et cetera.

10:45 AM 6 Okay. I've gone through my list. First from
10:45 AM 7 the plaintiffs, Mr. Thompson, anything else plaintiffs' counsel
10:45 AM 8 wishes to raise?

10:45 AM 9 **MR. THOMPSON:** Your Honor, we have completed our
10:45 AM 10 agenda. I had mentioned to Blaise that there was a
10:45 AM 11 representative from Grant and Eisenhofer who wanted to address
10:45 AM 12 the Court about CMO 3 briefly.

10:45 AM 13 **THE COURT:** Okay.

10:45 AM 14 **MR. THOMPSON:** wanted to place a statement on the
10:45 AM 15 record.

10:45 AM 16 **THE COURT:** Okay. Let me go to Mr. Petrosinelli
10:45 AM 17 first. Anything further from the defense?

10:45 AM 18 **MR. PETROSINELLI:** Nothing further from the defense.

10:46 AM 19 **THE COURT:** Yes.

10:46 AM 20 **MS. VETTER:** Good morning, Your Honor. My name is
10:46 AM 21 Viola Vetter.

10:46 AM 22 **THE COURT REPORTER:** I'm sorry, could you come up to
10:46 AM 23 the microphone, please?

10:46 AM 24 **THE COURT:** Come to the microphone, yes. If you
10:46 AM 25 could state your name please.

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1 MS. VETTER: Sure. It's Viola Vetter.
2 THE COURT: Yes.
3 MS. VETTER: With Grant and Eisenhofer. We are
4 counsel to the state of Ohio.
5 THE COURT: Yes.
6 MS. VETTER: We just wanted to raise really briefly
7 an issue of concern for the state, and we just want to make
8 sure it's out there, the Court's aware of it, just so there's
9 no surprise to the extent we do file a formal objection.
10 THE COURT: Okay.
11 MS. VETTER: So in brief, the state of Ohio has some
12 concerns about the amount of the attorney fee holdback that's
13 included in CMO 3. The state of Ohio ultimately believes its
14 damages claims in this case will be comparatively large, and
15 with that potential payment of attorney's fees would also be
16 comparatively large and in the state's view potentially too
17 large, and so we just wanted to raise this issue. It's the
18 state's intention to work with co-lead counsel to the extent
19 we're able to on a potential exception or workaround, and we
20 would only address it with the Court if it's absolutely
21 necessary.
22 THE COURT: Let me say this. Number 1, you're doing
23 exactly what you need to do, which is to raise it with the
24 Plaintiffs' Executive Committee, and a holdback is not a final
25 determination. It is simply a holdback. There will be -- if

1 there's a recovery at the end, the reasonableness of fees would
2 be a subject of discussion. And I don't intend to rubber stamp
3 anything, and if at that time Ohio feels like the recovery is
4 excessive and unreasonable in light of the result, then that
5 would be -- seems to me the time, so you're not committing
6 yourself to that is the absolute award, because -- am I correct
7 on that, Mr. London, that that's the way the system -- the
8 thing is designed?

9 **MR. LONDON:** That's correct, Your Honor. Absolutely.

10 **THE COURT:** It's just a holdback now so that money
11 doesn't go out and then you have to go claw money back in to
12 get the fee. But let me say this. To the extent there's a
13 very large recovery brought about by these -- this Plaintiff
14 Executive Committee, if you had a complaint they're getting
15 paid too much, as my grandmother used to say, "You should have
16 such problems." And, you know, the basis of a contingency fee
17 is that it rewards effort, and it rewards talent and rewards
18 result. Yes, at times it can be completely out of proportion
19 to what it should be, and I don't hesitate if I think we
20 reached that that we will -- that I wouldn't allow it. And --
21 but I think at this point if you feel urgency, you can file a
22 motion now about it. I will tell you that my view of it is
23 it's just a temporary holding of funds so that later we can
24 make the determination. I assure you I would hear out for Ohio
25 and everybody else who would question a proposed fee. Of

1 course, the plaintiffs haven't even asked for a fee yet, so we
2 don't know what they -- they may surprise you and actually show
3 restraint. I wouldn't count on it, but -- but that's also
4 possible, okay? But thank you.

5 MS. VETTER: Thank you very much, Your Honor.

6 THE COURT: Yes.

7 MS. VETTER: I understand it's a fluid situation.

8 THE COURT: Yes. Thank you.

9 MS. VETTER: We just wanted to make sure we bring it
10 to your attention in a timely fashion.

11 THE COURT: You've been heard on it, okay? Yes.

12 MS. VETTER: Thanks very much.

13 THE COURT: Thank you. Anything further?

14 MR. THOMPSON: well, Judge, after listening to
15 Mr. Petrosinelli, I'm thinking that they don't think we're
16 going to get any fee out of this at all, but --

17 THE COURT: Yeah, he wasn't complaining about the
18 holdback. He wasn't worried about it at all.

19 MR. PETROSINELLI: X percent of zero is zero.

20 MR. THOMPSON: Judge, you've determined a trillion,
21 and I have tried to get my mind around what a trillion is,
22 and --

23 THE COURT: Don't fall in love with that number
24 regarding your fee award.

25 MR. THOMPSON: well, I was thinking, and a trillion

10:50 AM 1 liters of water makes a cubic kilometer of water. That's what
10:50 AM 2 -- and that is --

10:50 AM 3 **THE COURT:** well, I read in one of the articles y'all
10:50 AM 4 gave me that -- and I don't remember which side -- that 70
10:50 AM 5 parts per trillion was the equivalent to one drop of PFOS in a
10:50 AM 6 swimming pool 100 yards long and 43 feet deep. That's how much
10:50 AM 7 one 70 per trillion is. It's a very small amount. Tells you
10:50 AM 8 something that everybody seems to recognize, that at some
10:50 AM 9 higher -- at some level, it is a very potent and potentially
10:51 AM 10 toxic chemical. So what it is actually, you know, and whatever
10:51 AM 11 the number is is fine. It's just a question at what point does
10:51 AM 12 it have a material effect on human health? And that's
10:51 AM 13 something I really want -- I want everybody to address, and I
10:51 AM 14 got a feeling, as our Ohio lawyer just mentioned, it's a very
10:51 AM 15 dynamic thing here. This whole case is very dynamic, and we
10:51 AM 16 got -- we all have a lot to learn.

10:51 AM 17 Now, Mr. Thompson facilitated this wonderful
10:51 AM 18 reception last evening at the Bennett Hotel, and I believe the
10:51 AM 19 ball passes to the defense counsel to find an equally
10:51 AM 20 spectacular location, and that seems to me Mr. Duffy's special
10:51 AM 21 role here will be as a local to meet that challenge.
10:51 AM 22 Mr. Duffy, are you up for such a challenge?

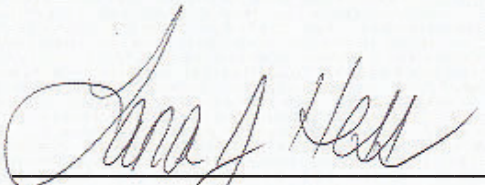
10:51 AM 23 **MR. DUFFY:** well, Your Honor, we would cede the title
10:52 AM 24 to Mr. Thompson if he'd like to take it. But I will do my
10:52 AM 25 best.

1 THE COURT: Good. Okay. If nothing further, this
2 hearing is adjourned. Thank you.

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9 CERTIFICATE

10 I, Tana J. Hess, CCR, FCRR, Official Court Reporter
11 for the United States District Court, District of South
12 Carolina, certify that the foregoing is a true and correct
13 transcript, to the best of my ability and understanding, from
14 the record of proceedings in the above-entitled matter.

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18 Tana J. Hess, CRR, FCRR, RMR
19 Official Court Reporter
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