

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: ZURN PEX PLUMBING PRODUCTS) MDL NO. 08-1958
LIABILITY LITIGATION) (ADM/RLE)
)
) Courtroom 13 West
) Fri., February 26, 2010
) Minneapolis, Minnesota

**HEARING ON
PLAINTIFFS' MOTION TO CERTIFY CLASS**

[DOCKET NO. 115]

- and -

**DEFENDANTS' MOTION TO EXCLUDE PORTIONS OF THE
EXPERT TESTIMONY OF WALLACE BLISCHKE & ROGER STAEHLE**

[DOCKET NO. 120]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP
Official Court Reporter - United States District Court
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1 (8:30 a.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 THE COURT: Good morning. Please be seated.

5 THE CLERK: The matter before the Court is In re:
6 Zurn Pex Products Liability Litigation.

7 Counsel, would you please note your appearances for
8 the record.

9 MR. RAITER: Good morning, your Honor. Shawn Raiter
10 on behalf of the plaintiffs.

11 MR. SHELQUIST: Good morning, your Honor. Rob
12 Shelquist on behalf of the plaintiffs.

13 MR. RUDD: Good morning, your Honor. Gordon Rudd
14 for Plaintiffs.

15 MR. BLACK: And David Black on behalf of Plaintiffs.

16 THE COURT: All right. Over to the defense side.
17 Mr. O'Neal.

18 MR. O'NEAL: Jim O'Neal for the defendants.

19 MS. FREESTONE: Good morning, your Honor. Amy
20 Freestone on behalf of the defendants.

21 MR. CONNOLLY: Good morning, your Honor. Dan
22 Connolly on behalf of the defendants.

23 MR. CARLSON: Good morning, your Honor. Rob Carlson
24 on behalf of the defendants.

25 MR. SNIEG: Good morning, your Honor. David Snieg

1 on behalf of the defendants.

2 THE COURT: Those are all the counsel?

3 All right. I think we're probably one attorney
4 short of being able to do business. Maybe we have sufficient
5 numbers of attorneys present to hear the motions.

6 Before the Court this morning is obviously the
7 motion to certify the class as well as two Daubert motions.

8 Counsel, I know you've conferred regarding
9 scheduling. Did you have a thought in mind with regard -- I
10 know you were both requesting an hour and a half -- or two and
11 a half hours. Excuse me.

12 MR. RAITER: Your Honor, my guess is that on the
13 plaintiffs' side of things, depending on how the argument goes
14 and obviously questions from the bench, we're talking two
15 hours maybe.

16 THE COURT: Okay. That's on the certification
17 motion or for both?

18 MR. RAITER: Both.

19 THE COURT: Okay. Good.

20 Mr. O'Neal, does that make sense?

21 MR. O'NEAL: I'd say two and a half hours, maybe a
22 little bit more.

23 THE COURT: Okay. That's certainly within the
24 parameters of what I have planned, so that should not be a
25 problem. I think it makes sense at least in my mind to begin

1 with the certification motion, so let's proceed with that.

2 MR. RAITER: Thank you, your Honor.

3 THE COURT: Were you going to divide up your time
4 then and we'll do certification first and then go to the
5 Daubert issue?

6 MR. RAITER: I think that makes sense, your Honor.

7 Shawn Raiter on behalf of the plaintiffs' class and
8 the MDL Plaintiffs Steering Committee. We're here, as you
9 know, on the motion for class certification. Your Honor has
10 deep experience with Rule 23 motions. I do not intend to go
11 through the 23 factors unless your Honor has questions about
12 particular --

13 THE COURT: No, I think I've got that down.

14 MR. RAITER: I think you know the background and the
15 standard. So we have a PowerPoint, as you see, in front of
16 you. I'll try to work from that, and obviously if you have
17 questions as we go, certainly knock me off of the PowerPoint
18 and I'd be happy to answer your questions.

19 THE COURT: Okay.

20 MR. RAITER: We're here, your Honor, because we have
21 a problem with these brass Pex fittings. You're familiar with
22 the background of the case.

23 The issue is really one of science before you. On
24 the plaintiffs' side of the case there is ample science and
25 ample testing and ample evidence that indicates that these

1 brass Pex fittings will fail in water, any water. On the
2 other side of the case, you're going to hear conjecture,
3 anecdotal evidence, warranty claim rate evidence, speculation,
4 and you're not going to hear anything from a scientific
5 standpoint that says that these fittings will not fail in
6 normal drinking water. They don't have it. It doesn't exist.
7 So the question before you, your Honor, is, do we have common
8 evidence that can be used to prove the plaintiffs' claims. As
9 you know, that's the standard on a Rule 23 motion. Can we
10 show you that the issues of law and fact that predominate can
11 be proven on a class-wide basis fairly to both the plaintiffs
12 and the defense and do it in a way that's efficient, that
13 avoids inconsistent results, and that provides resolution once
14 and for all for this problem that has been going on for quite
15 some time and is going to continue into the future.

16 So, I'm going to start with an overview of where
17 we're going. This is a common problem with common evidence,
18 and as I said, Zurn's opposition is going to be based on
19 hypotheticals and anecdotes. They're not going to put a
20 scientific, peer-reviewed piece of paper in front of you that
21 says that these won't fail. They can't even talk about their
22 own testing that says that they didn't cause stress corrosion
23 cracking. What they're going to talk about is not that many
24 people made claims and maybe there's some hypothetical
25 individual issues. There might be some issues with

1 installation even though we don't have expert opinions that
2 support that. That's what they're going to try to defend this
3 motion on.

4 This is an unusual case, I would imagine, for the
5 Court where you have the plaintiffs, who have the science and
6 have the testing that shows that the product is defective and
7 the defense doesn't have it, and they're resting on, as I
8 said, hyperbole, hypotheticals, speculation. It's an unusual
9 case.

10 We have before you a standard product. It's an
11 ASTM product.

12 The same mode of failure, stress corrosion cracking.
13 There's no dispute about that.

14 There's consistent field performance among the
15 suppliers of these fittings, consistent field performance
16 among the styles of fittings: T's, elbows, couplings. We've
17 covered that with their witnesses. It's in the record. They
18 don't see any difference among suppliers. They don't see any
19 difference among types of fittings. Some of the cases that
20 they've cited raise those issues as a reason not to certify a
21 class. You can set those aside.

22 We have the same operative warranty language. In
23 their responsive brief they attach some different versions of
24 the warranty. Now, that really contradicts some requests for
25 admissions that we had submitted in the case, but nonetheless,

1 the operative terms, "corrosive water conditions exclusion,"
2 are the same. There's no difference. The operative terms
3 about what is warranted and what is covered are virtually the
4 same. There may be differences in extent of warranty coverage
5 in terms of time period. We don't believe there is given the
6 facts of this case, because we have not argued that the
7 Oetiker clamps are at issue here, so we set aside the time
8 frame issue, and what we have perhaps is a remedy issue with
9 one or two of the types of warranties that they've provided.
10 That's something that we can deal with subclasses or as we go
11 forward we can deal with that, that if you're a certain person
12 who bought a product pursuant to a certain warranty and you
13 don't get this remedy, we can deal with that, but the basic
14 operative language is the same.

15 THE COURT: Expand on that a little bit. In terms
16 of subclasses and dealing with that, are you saying subclasses
17 as to time or the extent of the warranty, or how do you
18 envision --

19 MR. RAITER: Exactly, exactly. If they're going to
20 claim and can prove on the merits -- because we're not to the
21 merits yet -- that they actually issued this warranty -- and
22 there's no proof that they have. They give us some copies,
23 but there no proof in the record that those were ever used or
24 ever issued in the field. But if they do later and they show
25 that up to the year 2000, for example, which is one of the

1 time frames they use, their warranty didn't allow for certain
2 repair or replacement damages, okay, well, we can say that if
3 you're a claimant before 2000, your remedy is limited as such
4 under that warranty claim. It wouldn't be limited under our
5 other claims, but it would be limited as such under the
6 warranty claims. So, you could carve that out very easily,
7 very bright line, if such proof ever comes in, but the
8 operative terms are the same. The corrosive water conditions
9 exclusion to the extent it's applicable will be construed once
10 and for all, we hope, in this case, and it will apply to all
11 of those versions of the warranty, as it should.

12 So, we have the same defects here. We have a defect
13 in material and we have a defect in the manufacture of the
14 fittings. As we'll see as we go along here, those are the two
15 main issues that lead to stress corrosion cracking in this
16 case. It is the same. There's no allegation that stress
17 corrosion cracking is caused by anything else other than the
18 water. It's really going to boil down, as you'll see, to is
19 it any water or is it aggressive water, yes or no?

20 So, we have the same omissions and
21 misrepresentations. There's no allegation here, as you'll
22 see, that they told some people about certain of the omissions
23 that we believe are actionable or that they made different
24 misrepresentations throughout the course of the case. We'll
25 talk about that later as we talk about St. Jude and your

1 decision in Allianz.

2 Common evidence here, as I said, it's an issue of
3 metallurgy and engineering. It's whether the fittings are
4 going to fail in drinking water, whether they are failing
5 right now. This is not a question of people's intent, of
6 their state of mind, of anything like that. It's an
7 up-or-down question on can we prove that these things are not
8 suitable for this use.

9 As we said, we believe it's poor design and
10 manufacture. They're going to say it's aggressive water.

11 There's no evidence in this record, no competent
12 evidence in this record, that anything else causes stress
13 corrosion cracking in this product. It's either the water or
14 it isn't.

15 As you know, your Honor, we need to prove
16 superiority here. We believe that the class mechanism is
17 going to be the superior method of resolution, superior to the
18 alternatives. It's efficient, consistent, and it's
19 manageable. There's really been no argument here that it's
20 not manageable. We're talking about a single state class,
21 applying the laws of one state. They made one argument about
22 superiority. I'll raise that and deal with that toward the
23 end of my presentation.

24 But the alternatives here are that people will
25 continue to have problems, continue to submit claims to Zurn,

1 continue to have Zurn deny them, say that they're caused by
2 aggressive water as they have for years, when in fact they
3 know at least as a result of this case, no less, that you
4 don't need aggressive water to make these fail.

5 So, if we don't do something here, people are going
6 to continue in the future to have this problem, they're going
7 to continue to get their claim denied and they're going to
8 continue to have no recourse, because as you can see, bringing
9 a claim against Zurn will bring to bear upon you resources
10 that most people can't compete with.

11 So, we know for a fact given the number of claims
12 that have been made and the consistent denial of those claims
13 and the lack of individual lawsuits against Zurn that people
14 won't bring this claim individually. The people who have
15 brought them individually are insurance companies. So they'll
16 continue to deny warranty claims and continue to deny there's
17 a problem, deny their 25-year warranty covers this, and go off
18 into the sunset leaving people to fend for themselves. That's
19 not right, that's not consistent with Rule 1 of the Federal
20 Rules of Civil Procedure, it's not consistent with the class
21 mechanism and the case law that interprets the class
22 mechanism.

23 All right. Overview of Zurn's arguments, really
24 four of them in particular.

25 It's the water. It might be installation. You'll

1 see they don't have any competent expert evidence of that, but
2 they're going to argue it today anyway. They argued it in
3 their brief, completely ignoring what their expert said.

4 They're going to talk about the warranty claim rate,
5 which it's anecdotal evidence, it's bad evidence at that,
6 certainly has nothing to do with the certification of this
7 class, but that's their defense because they don't have
8 another one.

9 And then they argue about the scope of the class,
10 try to fit the square peg in the round hole, claim that this
11 is a no-injury case, argue ascertainability, argue standing,
12 mash them all together, hopefully come up with something that
13 says people who haven't had a leak yet cannot proceed at this
14 time. We'll talk about that.

15 Rule 23, you certainly know the factors. We believe
16 common issues of law and fact predominate here. There are
17 many aspects of common issues, common evidence, common facts,
18 common questions of law, including the construction of that
19 warranty, which by and large will be a question of law for
20 your Honor. May have some fact questions in there, but we're
21 going to need to do it and we're going to need to do it once.
22 So, now on to my argument. I'm through the overview.

23 The evidence produced thus far indicates that these
24 fittings are inherently defective. The plaintiffs' experts
25 say that clearly. The defense experts really don't rebut that

1 with any science or any accepted engineering or any accepted
2 testing.

3 These fittings are made from brass that Dr. John
4 Beavers, one of Zurn's own experts, said in the 1990s is
5 highly susceptible to stress corrosion cracking. That's their
6 own guy. It's well before I brought this first lawsuit.
7 Highly susceptible to stress corrosion cracking is what they
8 used for these fittings that they have sold on a mass basis.
9 The literature clearly established that these brasses were
10 prone and susceptible to stress corrosion cracking in water.
11 In different types of water the engineering literature, well
12 before they ever sold these fittings for the first time in
13 1996 or 1997, clearly indicated that water could cause this
14 type of problem. They have no evidence to the contrary, none,
15 other than field performance, which in most settings your
16 Honor would not accept field performance over the engineering
17 and the science. We're here on class certification. We're
18 not to merits yet. It's a big part of our case, obviously,
19 when we get to merits. We'll prove the rest of this, but they
20 don't have it because it doesn't exist.

21 In 2004 they were having problems and they
22 commissioned a lab, IMR Test Labs, to do an ASTM standard
23 stress corrosion cracking test on their fittings as assembled.
24 In other words, they put a piece of tube on it, they crimped
25 the fittings, and they then carry out an ASTM standard test.

1 All 15 of the fittings they tested cracked in 2004.
2 When we step back and we hear the argument today and we look
3 at their brief and they cast aspersions on the plaintiffs like
4 we're making this up, it's a no-injury case, we're just making
5 this up, in 2004 they knew that these fittings were highly
6 susceptible -- the case -- their own expert knew that, the
7 engineering literature showed that, and the actual product
8 itself as manufactured and as assembled cracked in all 15
9 joints. Excuse me. Not all 15 joints. All 15 of the
10 fittings cracked.

11 The environment in which they cracked was a
12 simulated moderately corrosive environment that was supposed
13 to simulate four years of outdoor exposure in a temperate
14 climate. In other words, let the fittings sit outside where
15 it rains a bit, it's temperate.

16 The conclusion of that test, which is in the record,
17 was that the crimp and the residual stress alone in those
18 fittings caused stress corrosion cracking in every one of
19 them. What did they do? They just kept on selling them, just
20 kept on selling them. They didn't warn anybody, they didn't
21 change their materials, they didn't refigure, rethink this,
22 see if they could do something to minimize this potential.
23 They just kept selling them. In 2004, that's the evidence
24 that we need to proceed with, as I'll show you as we go, for
25 all members of this class.

1 This is from Dr. Staehle's report. He talks about
2 the two major contributors to stress corrosion cracking. Up
3 at the top, moving left to right on the top row, he talks
4 about poor alloy choice. The reason it's a poor alloy choice
5 is that in 1944 there was a paper that showed that the range
6 of stress needed to cause stress corrosion cracking in alpha
7 beta brass, which is what this brass is, was as low as ten or
8 so percent of the yield stress in the material. Zurn's brass
9 is about 36 or 37 percent zinc, if you look at the
10 right-hand --

11 THE COURT: The pink line? Is that where I'm
12 looking at?

13 MR. RAITER: You're in the pink band is essentially
14 what we're saying. In other words, you don't need a lot of
15 stress in this brass to cause it to crack. That's been known
16 since 1944. You can get as low as ten or 15 percent of the
17 yield, which means, as we'll talk later, the crimp alone can
18 cause the cracking, which is what we saw in the 2004 testing
19 that they did themselves. Crimp alone is all you need. In
20 other words, you don't need installation variances, you don't
21 need to bend the tube, you don't need to do anything, because
22 it will crack based on the crimp alone. They did it again in
23 their test. This paper in 1944 shows it. In other words, if
24 you use high zinc-content brasses, you drop the amount of
25 stress needed to cause the cracking. If you look above the

1 pink shaded area, you'll see that you need more stress to
2 crack different types of copper zinc alloys.

3 The next middle display there, diagram, talks about
4 the effect of chloride concentration on stress corrosion
5 cracking, again, of brass. It just so happens that the upper
6 band there, which shows stress corrosion cracking, the lower
7 band shows dezincification. The upper band peaks right in the
8 range that you normally see the chloride in normal drinking
9 water. Again, red flag. You shouldn't use this for this use.

10 The final diagram looks at the stress corrosion
11 cracking of copper alloys as a function of pH. That's from
12 1985. Now, what they're looking at on the left-hand side is
13 reduction in area, which is, as you're pulling these brass
14 bars apart, the greater the reduction in area, the less
15 susceptible it is to stress corrosion cracking. So actually
16 here, the bottom swoop of that curve tells us that this brass
17 is more susceptible so that the lower bounds of that --

18 THE COURT: I don't understand what you said by
19 pulling them apart.

20 MR. RAITER: This is based on slow strain rate
21 testing where you pull the material until it fails and you
22 look at how much reduction in diameter you get as a result of
23 pulling it, and the amount of reduction in diameter that you
24 get in pulling it -- because it's like taffy.

25 THE COURT: Stretching it out.

1 MR. RAITER: It's like taffy. They measure the
2 reduction in diameter and that tells them something about what
3 stress was needed to cause that reduction and the
4 susceptibility of the material to stress corrosion cracking.
5 It's a complicated test, but the point of it is this: The
6 literature existed that showed that the pH range of 6.5 to
7 8.5, which is where we see most drinking water, again results
8 in the most susceptibility to stress corrosion cracking.
9 Again, the bottom bound of this chart actually shows an
10 increase in susceptibility. That's part of Dr. Staehle's
11 report. So his point is simply this: This literature is out
12 there and it tells you, if you're reading it, that it's a bad
13 idea to use this material. Now, you can couple that with the
14 other tests where they actually cracked it in water, these
15 other engineering reports and papers that we've cited and that
16 were cited in Dr. Staehle's report, even cited in their own
17 expert's report.

18 The other part of this problem is the way they make
19 the fittings, the way they machine the fittings. And we'll
20 see more of this, but on the left-hand side middle column is a
21 cutaway of one of the intersections of the fitting and from
22 there it doesn't look too bad. From a pulled-out view it
23 looks like it's fine, but as you zoom in right beneath it, at
24 the intersection you can see this very rough surface. And all
25 of the experts in the case who know anything about stress

1 corrosion cracking admit that rough surfaces like this
2 increase the susceptibility and increase the initiation of
3 stress corrosion cracking. Nobody disputes that.

4 The middle photo is a different fitting. Again,
5 you'll see the rough intersection as they're machining through
6 there. And as you zoom in to where we can find cracks, you
7 can see the beginning of a very rough machining edge.
8 Dr. Staehle talks about that as the intrados, which is
9 essentially the intersection of where parts of the interior of
10 the fitting come together, so it's the inside of the T's of
11 the elbows. And because they didn't take that into mind and
12 they didn't do anything to manage this, they again increased
13 the susceptibility of these fittings and essentially doomed
14 them to failure. That's what our experts say. And it's well
15 documented. We'll see more of it as we go.

16 The common evidence here, we've got Dr. Roger
17 Staehle on our side of the case. Even Zurn concedes he is
18 literally one of the world's experts in stress corrosion
19 cracking. He's written many of the seminal papers. He has
20 consulted on incredibly complicated and noteworthy stress
21 corrosion cracking problems. He's been hired by Mr. O'Neal,
22 he's been hired by Rexnord, who is now Zurn's parent company,
23 to provide advice previously. There's no question that he is
24 one of the experts.

25 His conclusions are in his report. We provided your

1 Honor with the entire report and I don't need to go through
2 it, but that these are doomed to fail. The failure process
3 begins upon installation. There is some period of time of
4 incubation as we'll see before the cracking really becomes
5 visible and incipient, but it's there and it's under way. And
6 it's, again, science and engineering.

7 Common evidence here of Zurn's own testing. We have
8 testing that preexisted these cases and we have testing done
9 within the case.

10 They did stress corrosion cracking testing in the
11 case. They cracked the brass in every water they tested.
12 They tested the water from the class representatives' homes.
13 They tested the water from their own facility in Commerce,
14 Texas. They tested the water from the Alexandria municipal
15 supply. They tested laboratory waters all the way down to
16 just deionized or distilled water; in other words, H₂O with
17 nothing else in it. They cracked the brass in every one of
18 those tests and cracked the brass -- it's important to note,
19 your Honor, slow strain rate testing, which they did, will
20 always crack or will always cause failure of the material,
21 because you pull it until it fails. What's important is that
22 in stress corrosion cracking testing using slow strain rate
23 testing is that if it's susceptible to stress corrosion
24 cracking in that environment, it will stress corrode crack
25 before it fails from a ductile failure. And so, yes, these

1 tests will always cause cracking, but they will not always
2 cause stress corrosion cracking, but they did always cause
3 stress corrosion cracking in this case.

4 At one time, the first round of testing, they did
5 some testing with the objective to try to determine the
6 threshold stress needed to crack this brass rod. Now, again,
7 these were not fittings that they actually tested, but it's
8 finely machined brass rod that they use to make these fittings
9 from. They don't actually make the fittings from the rod, but
10 they use the same brass that they use to make the fittings.

11 In round one they tried to figure out what the
12 threshold stress was needed to cause stress corrosion
13 cracking, and they did it in these different water
14 environments, and the idea is that the lower stress needed to
15 cause the cracking, the more prone to cracking the material is
16 in that environment, in other words, the more aggressive,
17 according to their terminology.

18 And the testing clearly, as I said, was intended to
19 talk about threshold stress needed to initiate. They did that
20 testing and the number one, the number one -- if you rank them
21 all, the number one most likely to cause stress corrosion
22 cracking water was right from their own facility in Commerce,
23 Texas, their own water that their expert says is not
24 aggressive and is not unusual. Dr. Korshin says that water is
25 good water, it's fine, but yet in their round one testing,

1 that supposedly was the most susceptible or most likely to
2 cause the cracking.

3 It turns out -- they also tested softened water and
4 unsoftened water as we'll see here in a minute. It turns out
5 there's no difference between softening and not softening when
6 they look at threshold stress.

7 They didn't like those results, so they do round two
8 testing. By the way, they didn't tell us about those results.
9 They produced them. It's nowhere in their report. It wasn't
10 anywhere in the report to the Court. We found it in the
11 materials they provided to us. They then do round two testing
12 where they talk about time to failure. Now, time to failure,
13 there's some variation and some of the results are
14 inconsistent with and different from the threshold stress
15 results. The point is in round two they again cracked the
16 brass in all water. Really what that tells us is it's a
17 question of when these will fail, not if.

18 Now, the field performance here we think also
19 provides some common evidence. Regardless of the number of
20 warranty claims or the number of sites at which these have
21 failed, we know that it's well into the hundreds. It might be
22 a thousand reported claims or nearly a thousand reported
23 claims if you look at the plaintiffs' analysis of the claims.
24 Zurn says it's 600 and some. We say it's 884 plus change.
25 There are problems with the data. And there's no doubt that

1 there have been more failures out there that have never been
2 reported, but what that tells us is these things have failed
3 in at least a thousand different water chemistries in
4 Minnesota. Zurn says water chemistry is different from site
5 to site. We don't disagree. It is. The fact that it'll fail
6 and leak in more than a thousand different locations tells you
7 something about the scope of the problem, tells you something
8 about the nature of the product.

9 Again, they're going to talk later, I'm sure, about
10 number of claims. Some of the descriptions that their own
11 people have made here -- this is not us. This is from their
12 people. They're failing at an alarming rate. That's in
13 reference to Minnesota. They're ticking time bombs. Several
14 of their suppliers have called them ticking time bombs.
15 Epidemic status is from their own vice president of sales.
16 The failures have reached epidemic status in Minnesota.
17 Somebody else likened this, putting these fittings in your
18 house, to playing Russian roulette.

19 The common evidence in the case, your Honor, that
20 these will fail in any water consists of the engineering
21 literature, consists of Zurn's stress corrosion cracking
22 testing, plaintiffs' stress corrosion cracking testing, the
23 expert opinions in the case, our expert opinions, and
24 approximately a thousand reported leaks in Minnesota. That
25 tells us that these will fail in any water.

1 What do they have to show that they will fail only
2 in aggressive water? They don't have any engineering
3 literature. Don't have any of their own testing. They don't
4 have any of our testing. They don't have any expert opinions
5 that say you only need aggressive water. What they have is,
6 well, we don't have that many claims yet. That's their
7 position. That's what they've got.

8 So, it's not scientific. There's a bunch of
9 confusion. They don't know, they can't define it, they don't
10 understand it, it's not well defined. At the end of the day,
11 essentially what they say is: We don't know why they fail,
12 but it must be complicated. It must be too complicated to
13 handle in one case, because we don't know. We can't figure it
14 out. We've been selling them for 13 years, but we just don't
15 know. Well, our people know and we're ready to prove it on
16 the merits.

17 Zurn's approach to this Phase I bifurcated class
18 certification discovery has itself been classwide. Their
19 water characterizations are statewide generalizations. You
20 read that brief, they don't talk about the water at any of the
21 class representative homes, and the reason for that is because
22 as we'll see in a minute, their own experts say there's
23 nothing about the water that should cause stress corrosion
24 cracking. So they go to statewide. They go: Well, Minnesota
25 generally has highly corrosive water, Minnesota generally

1 violates the lead and copper rule, Minnesota generally does
2 this. That's classwide evidence.

3 Installation. They don't have an expert who says
4 this installation variation or this installation practice
5 causes stress corrosion cracking. They don't have that. So
6 what do they do? They throw a bunch of stuff in their brief
7 about, well, there were installation variances, they didn't
8 comply with the manual, these things might have impacted
9 stress corrosion cracking, all the while ignoring the fact
10 that their experts say: I'm not offering any opinion that
11 installation caused stress corrosion cracking, much less
12 caused it in a particular fitting, much less caused it in the
13 class representatives' homes. The fact that they'll actually
14 come up here and talk about installation is quite frankly
15 shocking to me when the record is so clear that there's no
16 basis whatsoever. They tested it. They tried to move the
17 crimp rings around. They tried to bend the tube. They did
18 computer simulation and testing. They tried to prove that
19 installation plays a role and they failed, and yet they still
20 will argue it in this case.

21 Stress corrosion cracking testing done in the case.
22 Both sides tested this broadly. Both sides didn't take the
23 fittings that failed at the plaintiffs' homes and analyze
24 those particular fittings and say why did these fittings fail.
25 What they did was broad testing. Just like we did, they did

1 the same thing. Common classwide evidence, will this fail in
2 water, what kind of water, are there variations in water.
3 They used testing that applies to everyone. They didn't focus
4 in on the class representatives. They didn't focus in on any
5 particular fitting. They offer no opinions about any
6 particular fitting or any particular leak.

7 Their warranty positions. Completely uniform. Very
8 easy. Corrosive water conditions are not covered. Stress
9 corrosion cracking is only caused by corrosive water
10 conditions. That's their warranty position. It has been from
11 day one. It still is. That is a classwide common evidence
12 problem.

13 The cause of SCC. I think I just covered this.
14 They have uniformly concluded it is stress corrosion cracking.
15 They've been handling these claims individually for a long
16 time, and as we step back later and we talk about how do we
17 proceed, how do we resolve this problem, they've been handling
18 these claims individually. They get them, they look at them,
19 they analyze the fitting. They conclude the same thing over
20 and over again. If it's not a Zurn fitting, that's not part
21 of our case. If it is another manufacturing defect, that
22 should be covered by their warranty, so that's not at issue.
23 The issue is stress corrosion cracking. If it is something
24 that is caused by plumber error or a misinstallation, that's
25 not part of our case either and we're not asking them to

1 answer for that, but they've taken a uniform position and a
2 uniform approach to handling these claims individually and now
3 it's time to resolve these claims individually rather than
4 simply deny them.

5 Their warranty claim rate argument, again, is a
6 common classwide piece of evidence. You can only talk about
7 warranty claim rate if you talk about how many fittings did we
8 sell within the class, how many claims have been reported
9 within the class, and what do those numbers tell us about what
10 class of sales and that class of product. That is a classwide
11 common evidence approach and they're entitled to make it and
12 we'll defend it, but the approach is not one of an individual
13 approach. If they're going to go defend these cases using
14 this type of evidence, we may as well do it one time.

15 They talk about the use of brass in plumbing. It's
16 widely used, it's all over the place, there's lots of it, you
17 have a lot of it in your home. Okay, take you up on that too.
18 You want to talk about the use of brass? Let's talk about the
19 use of this brass in this type of product -- and we'll talk
20 about that later, the litigation, the withdrawals from the
21 market and the fact that they won't sell these fittings
22 anymore themselves, but again, that evidence is classwide. It
23 applies to everyone. They're the ones advancing this, not us.
24 So most of these approaches are their choice in defending this
25 Phase I process, and if that's how they're going to litigate

1 the case, they've shown us that it's easily done on a
2 classwide basis.

3 All right. It's the water. Their own expert,
4 John Beavers, says there's nothing about the water quality at
5 the class representatives' homes that indicates that there's a
6 potent stress corrosion cracking environment. End of story,
7 their own expert. Our expert says the same thing. Both
8 Dr. Staehle and Dr. Cotruvo say the same thing. We pretty
9 much agree that at the class representatives' homes there's
10 nothing that jumps out at you that says: Ah-ha. This is the
11 cause, this is why they failed. They tested for nitrates,
12 nitrites, sulfates. They tested for ammonia. They tested for
13 all kinds of things that might have been the answer to the
14 question and those things were not found in the class
15 representatives' homes.

16 So, they do some testing. And again, I've already
17 mentioned this. They fail to mention and they ignore the
18 initial testing that showed that actually waters that were
19 more likely to cause stress corrosion cracking more quickly or
20 with less stress were waters that were not at the class
21 representative homes, so they're going to claim that ours are
22 really aggressive and this is really bad water, but yet their
23 own testing actually disputes that. Now, to be honest and to
24 be frank, some of their data supports our argument and some of
25 their data perhaps supports theirs. I don't necessarily agree

1 that it does, but there's a dispute there. There's no basis
2 to say, though, that the plaintiffs' water is more aggressive
3 than anyone else's at this point. There just isn't.

4 And so what do they do? They go to hypotheticals
5 and conjecture. So I asked their experts at deposition: Can
6 you describe a water chemistry in which these fittings will
7 not fail? Answer from both Dr. Beavers and Dr. Stevenson,
8 their two metallurgists -- Dr. Beavers actually knows
9 something about stress corrosion cracking. I'm not so sure
10 about Dr. Stevenson. But both of them say: No, I cannot tell
11 you a water in which these will not fail. Can you describe
12 the water conditions in which they will fail? No. Well, when
13 you look at the engineering literature and you look at the
14 testing done in this case and you look at the field
15 performance, what does that tell you? What is the one common
16 denominator? It's water. It's any water.

17 I asked their experts: Can you make any prediction
18 about how these fittings are going to perform tomorrow, the
19 ones that are in the field? No, I offer no prediction. Okay.
20 So the record before you is, Dr. Staehle, Dr. Blischke say:
21 Going to be a bad problem. Their people say: We can't
22 predict. We don't know. That's the state of the record.

23 Again, they use classwide evidence, they make broad
24 characterizations. Most of their briefing, most of their
25 argument is not related to the class representatives' water.

1 It's not even specific to stress corrosion cracking. They
2 talk about principles of general corrosion.

3 For example, the Langelier and Ryzner Indices, they
4 talk about those in their brief. I asked their experts: Have
5 you tested any -- is there any relationship? Have you done
6 any testing? No. There's nothing in the reports that says
7 Langelier and Ryzner relate to stress corrosion cracking. Is
8 there any literature that supports the notion that some
9 finding on the Langelier and Ryzner Indices relate to stress
10 corrosion cracking? No, there isn't. So, they have a
11 hypothesis, they speculate, they throw up some arguments about
12 water that have nothing to do with stress corrosion cracking.
13 It's a different process.

14 The lead and copper rule, the same thing. The lead
15 and copper rule is really a health standard to make sure that
16 you don't have too much lead and too much copper in your
17 drinking water, and it does have some application to general
18 corrosion, but it has no application to stress corrosion
19 cracking. They have no opinion that says that it does, they
20 have no literature that says that it does, but yet that will
21 be part of their argument. That's been part of their
22 argument.

23 They talk about water treatment, in particular water
24 softening. There's one peer-reviewed paper on the topic and
25 it says: We don't see any relationship between water

1 softening and the corrosivity of water. It's a peer-reviewed
2 paper done by EPA representatives. Their expert disagrees
3 with the conclusions. That's fine, he can disagree, but the
4 one peer-reviewed paper actually says there's no difference.
5 But then they tested it here. They tested softened water and
6 unsoftened water and their testing showed no difference, but
7 yet they're going to argue about water treatment, water
8 softening, water conditioning, and they're going to try to
9 make that an individual issue that predominates when there's
10 no scientific basis for it. And again, even if there were,
11 it's a classwide issue.

12 The best they can do on water is from some opinions
13 of Dr. Korshin, who could not have tried to disclaim any
14 expertise in stress corrosion cracking any more than he did at
15 his deposition, and he says: Well, it might be related to
16 carbonate in the water, or it might be the absence of
17 orthophosphates which some municipal water systems use for
18 corrosion control. So it would only be city systems, not well
19 systems, not private wells. So he describes it -- and we
20 briefed this -- as a hypothesis. He hasn't tested his
21 hypothesis. There's no literature to support his hypothesis.
22 He thinks it's an intellectually interesting idea and issue
23 that maybe warrants some further investigation, but what he
24 doesn't have is any basis to say that high carbonates cause
25 stress corrosion cracking or that the lack of orthophosphates

1 cause stress corrosion cracking. There is some literature
2 that says orthophosphates may minimize or may mitigate stress
3 corrosion cracking. That's the best they can come up with:
4 Maybe if you use it, it might mitigate.

5 The problem with all of this is they didn't warn or
6 instruct anyone about any of it. They didn't tell people
7 don't use this on wells. They didn't tell people don't use it
8 if you have high carbonates. They didn't tell people you
9 better have orthophosphates or you might have a problem. They
10 uniformly failed to warn and failed to instruct. So even if
11 the argument has any legs, which we don't think it does, you
12 have a uniform omission and a uniform set of instructions that
13 should have been given and weren't.

14 Installation is not an issue. I've covered that.
15 There's no expert in the case who says that it is. They
16 tested it, they tried. They actually put in their report, ESI
17 does, pictures of bent tube, but what they don't tell the
18 Court is those fittings didn't fail. They don't tell the
19 Court that there's no evidence that any of the class
20 representative fittings that failed were attached to a bent
21 tube. There's no evidence that any fitting in particular
22 failed because of an installation variance. They've thrown it
23 out there hoping you'll bite on it.

24 Maintenance is not an issue because there is no
25 maintenance. Unlike some of the other cases they cite,

1 siding, windows, some of those things, you might have a
2 maintenance defense that you didn't maintain it properly.
3 These systems are put in and there's no maintenance. No
4 dispute about that.

5 Intended use is not an issue. They're intended to
6 be used for potable water. We didn't misuse them. If we used
7 them for potable water, that's what they're supposed to be
8 used for.

9 The case law is clear that you can't use
10 hypothetical and anecdotal evidence to create individual
11 issues to predominate. That's what they're going to try to
12 do. They're going to be talking about all kinds of stuff,
13 but they won't talk about the science.

14 Warranty claims. This is one of their defenses.
15 Again, it's a classwide argument. It's a remarkable argument
16 given the record that they actively discouraged claims. They
17 told people not to submit to Zurn, but to submit to the
18 insurance companies or to someone else. They routinely denied
19 claims. So if you're a plumber, how many times do you have to
20 have a claim denied before you just say, "I'm not doing that
21 anymore. It's a waste of my time"? We have the record
22 evidence, the record testimony from Tom Hills that he stopped
23 submitting claims, that he didn't submit several hundred
24 claims was his testimony. After he had submitted several
25 hundred he stopped.

1 They destroyed claim files. The corporate designee
2 actually testified about that. Mark Samples was his name.
3 That's in the record. They're missing claim files for three,
4 four, five years.

5 In the course of this case they redact plumber and
6 claimant information to preclude us from contacting anyone and
7 exploring the nature of the problem. Judge Erickson agreed
8 with their position that they could keep that information
9 redacted. The problem, of course, is, there may be plumbers
10 out there who have had more failures that we don't know about,
11 more leaks we don't know about, and their own conduct in the
12 case has precluded us from actually trying to discover this.

13 Now, they put in the record information that we're
14 out there on the Internet, we're out there beating the bushes
15 trying to find people, and that's largely true. That's our
16 job. Our job is to represent people in this class, and to the
17 extent we can find them, we're going to get them in here and
18 we're going to either bring a claim in this case or some other
19 case, but the point is that Zurn should not benefit from this
20 conduct, telling people, "File your claim elsewhere. Don't
21 file it with us. Go to your insurance company," and then come
22 in here and say, "Oh, the warranty claim rate is low;
23 therefore, you shouldn't proceed on a classwide basis."
24 That's just patently unfair. We don't know how many failures
25 have resulted in leaks in the field because of this conduct.

1 The only warranty expert in the case is Dr. Wallace
2 Blischke. He's literally written five or six books on the
3 topic. He stated unequivocally -- and there is no rebuttal
4 from Zurn -- that claim rate does not equal failure rate.
5 That stands unrebutted.

6 He analyzed what data is available and quite frankly
7 Zurn does not keep good warranty claim data, and his analysis
8 using accepted methodology that we'll talk about later today
9 was that based on the data already available, the claims
10 already submitted and reported, 98.7 percent of systems in the
11 state of Minnesota will experience a leak, which is different
12 than failure, within the 25-year warranty. That testimony is
13 unrebutted.

14 What they did on the other side was put a
15 statistician up who's not a warranty expert, doesn't really
16 know much about warranty -- you can read his deposition -- and
17 he simply said of the fittings that have been sold, this is
18 how many claims have been made. Here's your claim rate. But
19 he doesn't talk at all about prediction. He doesn't try to
20 say, well, if you run these numbers, this is what you can
21 predict for failures. People do that. People who sell
22 automobiles and computers and high-ticket items have on staff
23 statisticians and warranty experts who can say, "If we're
24 getting this many claims now, we can predict this many over
25 time." That's exactly what Dr. Blischke did here. His

1 opinions are entirely consistent with the engineering
2 literature and Dr. Staehle's opinions. They don't have any
3 opinion to rebut it. They're going to tell you about warranty
4 claim rate, which is great. They're going to talk about how
5 many fittings they've sold. They don't really know where they
6 are or how they've sold them, but they can talk about claim
7 rate. That is anecdotal evidence. That is not scientific
8 evidence.

9 If you actually look at Minnesota, which is what
10 we're here to talk about, they've sold about 5.2 million
11 fittings from 1998 to 2008. Now, this cuts off because of the
12 data they provided us in 2008, and it only starts in 1998
13 because of the data that they provided us, but that's what
14 everyone's worked from, their expert and ours.

15 That gross number includes radiant heating
16 applications, RVs, motor homes, boats, other uses of these
17 fittings perhaps. They don't distinguish when they sell them
18 how they're going to be used, so of those we don't really know
19 how many are installed in systems that would be at issue here.
20 Dr. Blischke makes some estimates simply to be conservative,
21 takes ten percent off the top and says okay, we'll go with ten
22 percent off the top.

23 Some of those, of course, have not been installed or
24 were not installed. They sit in inventory, they just weren't
25 used, whatever. The numbers -- this is an estimation. We're

1 not precise here, nobody claims to be, but these are sold as a
2 system. And unlike other products where you have one in your
3 house or you have one car, these are sold with a system where
4 you may have dozens or as many as a hundred on average. I
5 asked Gary Runyan, the Zurn engineer in charge of product
6 development, how many fittings you might on average have in a
7 home. He testified a hundred. Now, if we divide that
8 5.2 million by a hundred systems, now we have 52,000 systems
9 in Minnesota without any numbers being pushed aside for uses
10 other than potable water and we have 52,000 systems in the
11 state. Well, we know there have been nearly a thousand
12 warranty claims or reported failures. Dr. Blischke used 884,
13 which was the information he was provided at the time he
14 started his work on these opinions. So we're right around a
15 thousand, maybe a little under. I don't think anybody's going
16 to quibble with that estimate. If that is the number, we've
17 got already about one in 50 reported to have leaked.

18 Dr. Blischke testifies and he gives opinions without
19 rebuttal that warranty execution rates are low. In other
20 words, if you have one claim reported, you likely have
21 multiples more that were failures that have not been reported
22 for some reason, and he goes through a whole litany of reasons
23 why here: People may not know they have the warranty, you may
24 be a subsequent purchaser even though the warranty covers you,
25 you may not know you have it. There are all kinds of reasons

1 why as time goes on people are less likely to submit a
2 warranty claim.

3 But the point is, if you're at one in 50 right now
4 and multiples more are likely out there in the field and
5 you've got a 25-year product here, a 25-year warranted
6 product, what you're seeing is the front end of a big problem,
7 and that's what Dr. Blischke says. You're seeing the front
8 end of a very big problem. It would be consistent with not
9 selling it in the state anymore, would be consistent with not
10 selling it nationwide anymore.

11 So, if you actually look at the warranty claim rate
12 data and you apply it properly as a system, it doesn't look
13 anything like what Zurn's going to tell you about in a little
14 bit. They're going to talk about a per piece or a per fitting
15 failure rate. I asked the president of the company: Are
16 these sold as a system? Yes. Is a failure of one fitting a
17 failure of the system? Absolutely. That's what Carl Nicolia
18 said at deposition.

19 So, that drives Dr. Blischke's analysis, by the way,
20 that you need all 50 or you need all 100 of these fittings to
21 perform or you're going to have a failure of the system. So
22 you can't look at the per piece or per part failure rate, you
23 need them all to perform, and that's how you get to 98.7
24 percent failure. They all have to perform for 25 years or
25 you're going to have a system leak or a system failure that

1 results in a leak.

2 Now, the widespread use defense. This is: Well,
3 there's lots of brass. Again, it's a classwide defense. The
4 NSF standards that they're proud of, that they comply with,
5 that they say, well, that shows that this product is a good
6 one, now requires the same stress corrosion cracking testing
7 that Zurn's fittings failed in 2004. The test I told you
8 about earlier is now part of the NSF standard. So if you want
9 to talk about the use of the fittings, you want to talk about
10 the brass, you should keep in mind that people know there's a
11 problem, the standards organization knows there's a problem,
12 and they now say if you're going to use a high zinc-content
13 brass, you need to pass that test. They can't, they didn't,
14 they wouldn't going forward.

15 Recently, they made a new line of fittings, bigger
16 diameter for commercial purposes. They didn't use the same
17 brass. They went to a low zinc-content brass, again, evidence
18 of a problem. They stopped selling them in Minnesota. We
19 know that for sure. I've been told that they don't sell them
20 anywhere anymore as of the end of 2009, that they stopped
21 selling brass pex fittings nationwide. I'm not sure if that's
22 true or not, maybe Mr. O'Neal will tell us, but I've been told
23 that by people, including Mr. O'Neal, that they were going to
24 stop selling brass pex fittings nationwide.

25 Since they raised the issue of, well, we use a lot

1 of this brass, we should talk about these types of products,
2 brass pex fittings. We should talk about what is happening
3 out there.

4 The product called Kitec. Enormous amount of
5 litigation in Las Vegas. The class was certified for
6 litigation purposes by the Nevada state court. There's been
7 multiple settlements in that case involving builders and
8 contractors, and Kitec itself paid \$90 million on a
9 countywide class.

10 Rehau is another pex manufacturer, makes yellow
11 brass fittings, no longer sells them, withdrew that line from
12 the market. Zurn's lawyers, including Mr. Carlson on behalf
13 of another client, have sued Rehau in Nevada claiming that the
14 use of high zinc-content brass was actionable. Their own
15 lawyers are on file right now litigating the use of high
16 zinc-content brass fittings in a brass pex system.

17 Uponor you're familiar with, your Honor, stopped
18 selling those fittings, in some court pleadings admitted that
19 they were defective.

20 There's a case in Hawaii against Watts, we have that
21 in the record, and then here we are about Zurn.

22 So, if we want to talk about the use of brass, we
23 should talk about brass used for this application, because one
24 of the biggest engineering mistakes you can make is to say,
25 well, you used it over there. It must work here. You have to

1 test that and they didn't, and so these people are finding out
2 that this is a bad idea.

3 Scope of the class. This is going to be a big issue
4 as you I'm sure are well aware.

5 The simple question is do people who have not yet
6 had -- who have not yet had a leak have an actionable claim at
7 this time. Our position, as you'll see, is that for our
8 claims that we're seeking to advance on a classwide basis, you
9 don't need to have an actual leak in order to maintain your
10 claim right now. We're not here on the merits. We're here to
11 talk about can we prove this on a common classwide basis.

12 The warranty claims, as your Honor knows from the
13 Uponor case, we believe are actionable upon the delivery of a
14 nonconforming good, malfunction is not required, and here we
15 have express warranty coverage for failure or leaks. They use
16 the disjunctive "or," two different things. We've submitted a
17 case that's part of our reply brief that talks about failure.
18 Failure may be partial, it may be imminent, it may be
19 progressive. We're going to have to construe the term
20 "failure" within their warranty, and our position right now
21 is, as you're going to see in just a few slides, that these
22 are failing as we speak and we have an actionable warranty
23 claim classwide right now. We don't need to have an actual
24 leak, damage somebody's home, in order to come forward and
25 say, "We want these fittings out of our home. We want them

1 replaced."

2 Consumer protection. We briefed this. You know
3 this very well. You have to show you've been injured by --
4 the Minnesota case law is very broad about what type of injury
5 you can show, including even the loss of your opportunity to
6 bargain or not purchase the product. In other words, had you
7 not made these misrepresentations or omissions, we would not
8 have not purchased this product. That's actionable in
9 Minnesota.

10 The negligence claim, because of the Uponor
11 decision, I'm sensitive to this and should talk about this.

12 We believe that all we need to show at this point is
13 that damage is reasonably certain to occur in the future and
14 that that complies with Minnesota's tort law for future damage
15 claims. Rolled on top of that, of course, is the economic
16 loss doctrine, and damage to the product itself is generally
17 not actionable in tort. We understand that. What we believe
18 the Court should do is certify the negligence claims right now
19 because a decision on economic loss doctrine is a decision on
20 the merits. We believe that this should be fully briefed and
21 that issues, for example, of whether the damage caused and the
22 damage necessitated to other property to replace these failed
23 fittings is in fact damage to other property. You have to cut
24 into drywall. You have to do some things to replace these
25 systems. We believe under case law and under reasonable

1 analysis and application of the economic loss statute in
2 Minnesota, because it has been codified, that that is damage
3 to other property and that is sufficient to proceed at this
4 point. That's our issue. We think we should do this on the
5 merits for tort claims. We think we've certainly met the
6 reasonably-certain-to-occur standard with Dr. Staehle and
7 Dr. Blischke's opinions at this point and with the other
8 evidence in this case. So those are the claims.

9 Now, the basis is that this is a progressive
10 process, that damage has occurred, failure is under way, the
11 defect is manifest, as you know -- we'll talk about Briehl and
12 O'Neil in a minute -- and that there is SCC failure long
13 before there is a leak. That is scientific and that is
14 un rebutted and we'll show you that as we go.

15 This is from Dr. Staehle's report. It talks about
16 the -- what he calls the incubation stage, the initiation
17 stage, and the propagation of stress corrosion cracking. Some
18 of this actually comes from a presentation he gave in I
19 believe Japan in 2008.

20 His point is, when you have a susceptible material
21 and you have the machining and manufacturing defects that
22 these fittings have, it takes some time for this process to
23 start. So while it's under way, it's in an incubation stage
24 and it's such that you may have a difficult time seeing the
25 cracking in the process on microscope, but it's started.

1 That picture down in the middle shows a very tiny
2 crack that has just started in a fitting. The picture to the
3 right-hand side of the diagram shows a crack that has almost
4 perforated through the wall; in other words, it's close to
5 being a leak.

6 Now, our evidence -- and they really don't have any
7 evidence to rebut this -- that this is the process, that as
8 soon as you put these in, you crimp them and expose them to
9 water, this starts. The question becomes when are you going
10 to actually have have a complete leak, complete failure.

11 This is from Dr. Staehle's report. This is showing
12 us how we actually did some of this, how we made lab cuts to
13 look at these cracks, and now we'll look at some fittings.

14 This is from a fitting that comes out of a home that
15 happens to be in Montana. We didn't know at the time that it
16 was from Montana, but later we found out that it was. This
17 fitting looks pretty good from the outside, doesn't have any
18 appearance that it's leaked, but as you look inside, they can
19 see some cracks there and there are little arrows pointing to
20 these cracks. The reason it's called "House" is that this
21 particular bag or box of fittings had fittings that clearly
22 had leaked and had fittings that were clearly removed but had
23 not yet leaked, so we had a nice houseful of fittings that we
24 could look at.

25 So if we look at this fitting -- here's a cutaway of

1 it. It's Specimen 1237. The CB ID talks about the reference
2 of the cut. ID is interior diameter. CB is just where it was
3 cut from. Here it doesn't look too bad. You can see what
4 appear to be some marks down there toward the intrados. You
5 start to zoom in on those and lo and behold you've got stress
6 corrosion cracking under way.

7 Now, I'm going to click through these fairly
8 quickly, your Honor.

9 THE COURT: Back up a minute one slide.

10 MR. RAITER: Sure. (Complies).

11 THE COURT: Is there any way I can tell how much
12 magnification there's been? I mean, how far do you have to go
13 to show that degree of cracking in terms of magnification, or
14 is there --

15 MR. RAITER: Well, the magnification is shown on
16 those slides, times eight on the top left, times 30 on the one
17 right beneath it, and then it continues. Times 500, times 500
18 is what those say.

19 THE COURT: So 500 meaning?

20 MR. RAITER: Five hundred zooms.

21 THE COURT: All right.

22 MR. RAITER: So this fitting by outward appearances
23 looks just fine, but when you look at it there's damage under
24 way. There is failure under way. Now, we'll keep going
25 because we've got more cuts --

1 THE COURT: Do you have some slides that show what
2 500 amplifications or magnifications of the thing looks like
3 in a fitting that's not failing? Won't there always be if you
4 zoom in on it, you'll see some things?

5 MR. RAITER: Well, you can see -- I think as we go,
6 your Honor -- the answer to your question succinctly is no, I
7 don't have photos of that right now, but I think as you see as
8 we go here, you'll see some better zooms where you'll see the
9 cracking and you won't see any problems adjacent to the
10 cracking.

11 So, this is a different cut. This is BC of Specimen
12 1237. We start to zoom in again and you can see fissuring and
13 cracking as well. There are better photos. I've got a whole
14 bunch of these and we'll click through them.

15 Again, these start at the machining abuse at the
16 intrados and then they propogate up into the fitting itself.
17 Different cuts --

18 THE COURT: Tell me again what you mean by intrados,
19 the T part of it?

20 MR. RAITER: The intrados -- (indicating). It's the
21 corner.

22 THE COURT: Okay.

23 MR. RAITER: It's where the drill comes through one
24 side, comes through the other side, it gets rough and abused
25 where they meet.

1 So, this is the CA ID. Again, small cracks are
2 under way. And we can continue to do this.

3 This is a new specimen. This happens to be from
4 Minnesota. It's the interior of the fitting. You're going to
5 see on the right-hand side -- excuse me. We're going to start
6 on the left. There's a good zoom for you on the bottom right.
7 At 500 you can see the crack plain as day. The material next
8 to it is fairly clean and isn't cracked. So the zoom doesn't
9 create the cracking. The zoom shows you the actual detail of
10 the cracking.

11 More cracks again from Specimen B0003 -- this is the
12 Minnesota fitting -- coming from the machining abuse.

13 Same fitting. This is a more pronounced crack
14 running up the right-hand side.

15 Same specimen, different cut. Cracking well under
16 way.

17 These are fittings that did not appear to have
18 leaked. That's the -- the point here is that from the
19 outside, you look at these and they look fine, but the
20 metallurgist looks at them and says, "There's a problem here."
21 These things are on their way. There's damage under way."

22 This is B0003 again, different ID. Again, different
23 zooms. These are all in Dr. Staehle's report. The figures
24 that are referenced here are his figure references.

25 Same B0003 specimen, cracking, cracking.

1 Specimen 304. This is a different fitting. We
2 don't know where this one was from. You can see the crack
3 visible right there to the naked eye right up the middle.
4 There's also one running horizontally from the application of
5 the crimp ring. So there you've got what he calls an intrados
6 crack and then you have a crimp ring crack going horizontally
7 as well.

8 That's a look at the intrados crack.

9 Same specimen again, 304. Different area zoomed in,
10 some of the cracking on the surface. Some of those deposits
11 we analyzed to try to see whether that tells us anything about
12 the water, is there something in those deposits that indicates
13 that it was the water that caused this other than simply it
14 was H₂O. The conclusion is no, there's nothing about those
15 deposits that leads you to conclude there's something
16 aggressive or unusual about the water. Their experts did the
17 same thing and didn't conclude that there was anything about
18 the deposits.

19 This is a different specimen, Specimen 1506. If you
20 look at the top left-hand corner, you can see that that
21 actually fractured at the crimp. That's why it's ragged and
22 jagged at the top, but there's also an intrados crack running
23 north and south on it as well.

24 This process takes time. This is not an immediate
25 process. The question is how much time.

1 These are some different views of specimens with
2 cracking at various stages. The top left-hand corner
3 obviously has not yet penetrated the wall.

4 Our analysis of this is that this is a manifest
5 defect for purposes of Briehl or O'Neil, that this is damage
6 that's under way, it's damage that actionable. That's our
7 evidence and we can prove it classwide.

8 Some more pictures, same issues. Top two are the
9 same cracking with different magnification.

10 There are a couple that have gone all the way
11 through. That's what it looks like when they do make it
12 through and that's where you're going to have water leaking.
13 Once it does that, water is on its way out.

14 Top right-hand corner are some cracks that are very
15 new and just under way, obviously have not made their way
16 through the wall thickness of the material.

17 Again, more of the same, different fittings. This
18 is all Specimen 1506.

19 This is a specimen that we call Z-2 and you can see
20 that crack with the naked eye running right through the
21 middle. That particular fitting cracked above where it's
22 sheared off, it cracked at the crimp ring above that, but
23 there was yet another crack running underneath there that had
24 not yet leaked from what we could tell. It's an interesting
25 photo here, because the idea that this is aggressive water,

1 that this is water that causes something to rust or break
2 down, really doesn't get played out in this type of specimen.
3 Now, there's some fittings that look bad because there's all
4 kinds of junk on the outside of them. What we'll see is that
5 that is really junk that comes from the water evaporating as
6 it's slowly leaking out. That's what the experts said.

7 So, looking at those photos and looking at the
8 evidence, the question is should everyone be in the class
9 right now. That is going to be one of your major issues that
10 you're going to have to decide.

11 Zurn makes an ascertainability argument. The case
12 law, especially the case law -- the decision by Judge Posner
13 down in the Seventh Circuit, makes it very clear that
14 ascertainability is really a question of can we figure out who
15 should be in the class. It is not an injury concept. There
16 may be some decisions that have improperly dealt with it as an
17 injury concept, but it really isn't.

18 One of their arguments on ascertainability is, well,
19 we don't keep any records of where these were sold, we don't
20 know who has them. We don't believe it would be fair to
21 penalize potential class members because Zurn didn't keep
22 records of where they sold their fittings or how they were
23 used.

24 Putting that aside, these fittings have "Q Pex"
25 stamped in their side. They're easily identified. I asked

1 their people at deposition: Are they easily identified? They
2 said: Absolutely. You can visually look at these and know
3 whether you have a Zurn system or not.

4 And as I said, ascertainability is not an injury
5 concept. Posner's decision is very clear as is even a
6 decision from Judge Schiltz in the district that we've cited,
7 Delsing. You're not looking at whether there is an injury if
8 you're looking at ascertainability. You're just saying can we
9 figure out who's in the class and you just have to have an
10 objective basis for doing so. This is very easy. You have
11 fittings that say "Q Pex" on them and that's easily
12 determined. There are some fittings behind walls, but there
13 are almost always fittings that are exposed under vanities, in
14 utility rooms. People know whether they have these systems if
15 they actually go look.

16 THE COURT: Is there any situations where some of
17 the fittings are used in some locations within the system but
18 another type is used elsewhere? I mean, do we make the
19 assumption because you might find one with a Q Pex stamp on it
20 that the entire system is the same?

21 MR. RAITER: Well, by and large they use the same
22 fittings in most systems. That's been the record evidence
23 that we have. There's a plumber in North Carolina,
24 Mr. Crider, that they've referenced in their brief and I don't
25 think he's relevant to this particular motion. But to answer

1 your question, your Honor, there are going to be some plumbers
2 who use fittings other than --

3 THE COURT: I'll use their big ones, but I'll use
4 somebody else's smaller ones?

5 MR. RAITER: Yeah. It's usually not that clear a
6 practice. If it happens, they grab what's ever on the truck
7 and for some reason they might have some fittings that aren't
8 on the truck. You know, from our perspective, if you've got
9 Zurn fittings in your system that need to be replaced, they
10 need to be replaced. We don't have any evidence that any of
11 the class representatives here have anything other than Zurn
12 fittings, and really there isn't any other record evidence
13 other than this guy saying: You know, I just used whatever
14 the supply house gave me. I don't know that he said, Mr.
15 Crider, that he actually interspersed them or not. But again,
16 we're at the certification stage. That may be something that
17 we need to look at later, but at this point there's no real
18 evidence one way or the other.

19 THE COURT: Okay.

20 MR. RAITER: Standing. They talk about standing.
21 If we're going to talk about standing, we should do it
22 properly.

23 Standing is an Article III concept, requires actual
24 or imminent injury. Typically it involves a question of
25 whether you have the legal right or basis to bring a claim,

1 you're the right party to bring it. That's usually what we're
2 talking about with standing.

3 There is an idea here about whether there's an
4 imminent injury for those people who have not yet had a leak
5 that has been discovered, but as we've said, the evidence we
6 think is very strong that the leaks are in fact imminent, that
7 they do have damage already, meaning they have standing right
8 now.

9 Interesting decision from Judge Rosenbaum in
10 December of '09, Kinetic v. Medtronic. There a third-party
11 payer was trying to be reimbursed for paying for the
12 explantation of defibrillators that were alleged to be
13 defective and prone to premature failure. The nature of the
14 damage in that case is that we had to pay for explantation
15 sooner than we should have. In other words, we didn't get the
16 term of use that we expected, or our plan member didn't get
17 the term of use.

18 Medtronic raised a standing defense. Judge
19 Rosenbaum uses what he called a thought experiment and comes
20 up with a hypothetical about a person who has such a
21 defibrillator that is at risk of failing prematurely, and he
22 in no uncertain terms says that person who has such a device
23 that needs to reasonably be replaced sooner than it should
24 have been has standing to bring a claim.

25 That is our argument here, that we believe that we

1 have standing right now to get these out of everyone's homes
2 right now based on what we just showed you, based on the
3 science, the engineering, the field failures already. They
4 have standing. The question is really can we prevail on the
5 merits and prove damage or injury. That's really a merits
6 question.

7 Briehl and O'Neil. You can't have a class action
8 anymore without talking about those two cases in Minnesota.

9 Here the defects are manifest. The cracking is
10 under way, all of the class representatives have had multiple
11 failures, not just one, but multiple failures that resulted in
12 leaks. Again, our position is that failure is under way,
13 defect has manifested in the form of stress corrosion cracking
14 that is under way in everyone's system. When that actually
15 results in a leak that causes damage to property and to these
16 people's homes is a question to be decided on the merits.
17 Whether these people are entitled to replacement cost right
18 now is a decision on the merits. That is the issue.

19 Briehl and O'Neil, as you know, involved wildly
20 speculative claims. Briehl involved the idea that the way
21 that antilock brakes work might confuse people sufficiently
22 that they might have an accident and they might hurt someone
23 or hurt something. There was no allegation that any of those
24 people had had that happen and the court probably rightly said
25 you don't have an injury here. You don't have -- you're not

1 able to proceed. Too speculative is really what Briehl says.

2 O'Neil is a little different. O'Neil is the
3 drop-sided cribs that had caused some problems and there was
4 no allegation that those plaintiffs in that case had actually
5 had a problem, and in fact they admitted that they had not.

6 And O'Neil involved a manufacturer who provided a remedy, that
7 you could avail yourself to a kit that would prevent this from
8 happening, and those plaintiffs didn't take them up on that.

9 We don't have such a remedy here. We don't have any offer to
10 get the fittings out of our home to prevent any future injury,
11 so we're here in a different setting. But O'Neill again, your
12 Honor, says something might happen in the future, it hasn't
13 happened yet, and it's a Rule 12 motion to dismiss posture.

14 It is nothing like the evidence we have here, not even close,
15 where the engineering literature, where their own testing in
16 2004, where the testing in this case by them and us, the
17 expert opinions, all agree that this can happen, that it does
18 happen. The question is simply when is it going to happen.
19 So the no-injury concept really, in our mind, does not apply
20 here. This is a record that is robust. This is not
21 speculative. In 2004 they cemented it with their own testing.

22 Whether these defects, as I just said, require a
23 proactive replacement is something that will need to be
24 decided. Now, perhaps that's something that's decided on
25 summary judgment, but if you're going to decide it, we should

1 decide it on a classwide basis. We should either do it in
2 front of a jury or we should do it on summary judgment and
3 decide whether more is needed right now, because our evidence
4 is pretty strong that it's there, it's working, they don't
5 have any evidence that says it isn't. They just say it hasn't
6 happened yet.

7 This is an example that is compelling to me and I
8 don't want to use it flippantly, but that bridge over the
9 river was there for 40 years, 35W, and it hadn't failed yet,
10 and under their analysis there would be no reason to replace
11 that bridge or do any work on that bridge because it hasn't
12 failed yet, no one's reported that it's failed, and yet we
13 know what happened to that bridge. It fell. And had anyone
14 done the engineering analysis, they would have known that it
15 was going to fall, that it was a problem, and that's what
16 we're dealing with here. We've got the evidence that says you
17 need to get these out of your house.

18 We've got an argument about consumer protection
19 claims. Their argument really boils down to: Well, we have
20 the right to present evidence that individual issues
21 predominate. They don't actually present any. They don't
22 present any plumber testimony that says: Zurn told me
23 something and I ignored it, or that there were omissions that
24 were not material. They just say: We have a right to do it
25 later. We believe your decision in Mooney v. Allianz sets the

1 standard or tells us what the standard is. We just have to
2 show that this is a cause that had had some effect on the
3 purchase decision.

4 There is no evidence here that any of these plumbers
5 would find these omissions not to be material. The omissions
6 include things like the brass is highly susceptible to stress
7 corrosion cracking. The brass is subject to failure in
8 relatively benign water, which is what Gary Runyan said in an
9 internal memo, that this brass had not been tested for this
10 use, that it was not in fact superior to copper as they
11 claimed, that it should not be used in well water despite
12 their affirmative Internet advertising or Internet
13 representation saying no deterioration in low pH commonly
14 found in well waters. They had no basis to say that and it
15 turns out it's wrong. Their experts disagree in this case.

16 So, they never asked the plumbers those questions.
17 They could have. They could have said: Did you find this
18 material? Would this have changed your purchase decision?
19 They didn't do any of those things that in St. Jude the
20 defense asked. So they're simply saying: Well, we might be
21 able to ask about that later, but they haven't met their
22 burden right now to show that predominance is somehow defeated
23 by individual issues on the consumer protection claims.

24 And again, they go to hypotheticals about, well,
25 what did a plumber know about orthophosphates, what did a

1 plumber know about water softening. They didn't provide any
2 warnings about orthophosphates or water softening. How could
3 that possibly predominate when they didn't do it? They don't
4 claim that they did it. They didn't do it. So hypotheticals,
5 again, can't defeat predominance.

6 We're here under superiority. I'm almost done.

7 This class is manageable. They don't claim that
8 it's anything other than that. Your Honor has obviously
9 managed classes already, tried them to verdict. This is a
10 much more manageable case. It's statewide, one law. It is
11 really not that difficult to try. We should do so to answer
12 these common questions, avoid duplicate expense and effort,
13 and we should do so to avoid inconsistent results.

14 One of the problems we have here is that people are
15 unable to bring a claim if we don't proceed in this forum.
16 It's very clear. They've denied hundreds and hundreds of
17 warranty claims and they don't have hundreds and hundreds of
18 individual lawsuits. In fact, I don't know that they have any
19 lawsuits brought by individuals. They might have one or two.
20 It's either brought by a subrogated insurance carrier or
21 brought by somebody on behalf of a class or a putative class.

22 So, this will be a death knell to many claims that
23 have already been denied and should not have been, and claims
24 that will be denied tomorrow because they continue to get
25 warranty claims, and their position is: We're not paying

1 them, and this is the forum for us to decide whether that's
2 right or wrong, and we're happy to do it on a classwide basis
3 and find out whether they're right or whether they're wrong.

4 Fairness plays into this as well, your Honor. The
5 position that Zurn wants the Court to place people in by way
6 of adopting Zurn's argument on certification is as follows.

7 Right now your claim is premature because you
8 haven't had a leak that caused damage to your property. Now,
9 at the same time in this brief they've argued about statute of
10 repose and statute of limitation. So your claim's premature
11 right now, but by the way, when you bring it later it's going
12 to be time barred too, so you're in a Catch-22.

13 They also want you to wait until the damage has been
14 caused to your home and your property. Then you should come
15 forward and submit a warranty claim which they will deny as
16 they have been denying.

17 Then you're forced perhaps, if you're lucky, to
18 submit it to your homeowners insurance, who may or may not
19 take that claim up. If it does take the claim up, you've now
20 got a rating history problem.

21 And there's actually evidence in the record -- since
22 they brought up North Carolina, we should probably talk about
23 the North Carolina plaintiffs in the case, the Roses, who got
24 dropped by their homeowners insurance because they had two
25 Zurn fittings fail. So if you wait for them to fail, you're

1 going to get dropped perhaps by your insurance company. If
2 you go to Zurn, they're going to say, "Submit it to your
3 insurance company. We're not paying. You've got aggressive
4 water." It places people in an impossible position. The law
5 in this state, by and large, requires people to mitigate their
6 damage. There's been no offer by Zurn to withdraw or waive
7 any mitigation defense in any future claim, that people by
8 sitting around and waiting for this to leak, cause damage to
9 their home and their property, that they haven't somehow
10 mitigated this problem. We're doing exactly what we think we
11 should do, replace fittings, replace these systems before we
12 have a bigger problem that both Zurn and perhaps our insurance
13 companies won't cover for us.

14 Now, you think to yourself: "Well, gee, Mr. Raiter.
15 That seems like a big bite of the apple." Zurn itself has
16 paid for that. Its good customers have asked for proactive
17 replacement of plumbing systems. They've said: Fine, go
18 ahead and do it, because they didn't want future failures.
19 They didn't want future damage.

20 In the Rehau case, Mr. Carlson's client did the same
21 thing, went out and proactively replaced plumbing systems
22 because it was concerned about these pex fittings. Rightly
23 so. It's exactly what we're asking for. That's what they did
24 elsewhere. That's what they should do here.

25 So -- almost to the end. Both sides have a lot of

1 cases, your Honor, as you can imagine, that certify a class
2 and don't certify a class. We've got similar cases that have
3 been certified.

4 The Kitec litigation was certified on a litigation
5 basis in state court in Nevada.

6 The Entran II case is one of those that was called
7 Payne which we cited in our brief. It's a radiant heat
8 system. That's essentially a rubber piping system that was
9 degrading and failing prematurely. That was certified both in
10 federal court in Massachusetts on a litigation basis, it was
11 also certified in state court in New Mexico and one other
12 place, and I've got those orders if you want them.

13 There's a case called Easy Heat that I also have
14 this order in. I happen to be involved in that case. That
15 was a five-state class certified in Minnesota for a radiant
16 heat system, state court again, Judge Pagliacceti in St. Louis
17 County.

18 We've got the Pella windows case which we've cited.
19 That's Saltzman v. Pella Windows. Mr. O'Neal's involved in
20 that case in the Northern District of Illinois. That was
21 certified as a litigation class.

22 There are several Louisiana Pacific trim board
23 cases. One was just certified about two weeks ago. We've
24 cited those as well.

25 And then you've got polybutylene, which is really

1 the only other plumbing class that -- excuse me. I missed
2 one, Anthem. Anthem is a galvanized corrosion issue of copper
3 piping buried under homes, two different classes certified for
4 litigation purposes in state court in I believe Arizona and
5 Nevada. I also have at least one of those decisions if your
6 Honor would like them.

7 Polybutylene was the granddaddy of all plumbing
8 cases. That was certified as a settlement class, actually
9 several settlement classes, a little different, as you know,
10 than a litigation class.

11 But when we get to the end of this, we need to think
12 about what do we do here. Can we try this case, how do we try
13 the case, and what's the best method.

14 So, we think the common liability questions are
15 easily decided in a class setting. We believe that the past
16 damages, so failures that have already occurred, could be
17 fairly adjudicated in some summary process, taking up Zurn's
18 concern about not paying for fittings that weren't theirs,
19 taking up its concern about plumber error or something other
20 than stress corrosion cracking. You have all kinds of
21 mechanisms available to you under the -- well, the Reference
22 for Complex Litigation and various other cases will tell you
23 that you can do this in a way that's fair to everyone and you
24 can do it summarily so that we don't have to run people
25 through full-blown trials to prove that they had a stress

1 corrosion cracking failure if we have a liability decision.

2 And then what are looking for going forward? We're
3 looking for replacement of systems. And we have submitted an
4 expert affidavit or opinion from a plumbing repipe specialist
5 that has done more than 50,000 homes because of various
6 plumbing problems, including Kitec, including polybutylene,
7 including some other pex systems, and the way they do that is
8 on a per fixture basis. A fixture is hot and cold water, so a
9 sink would be one fixture, the toilet would be one half of a
10 fixture, and they just will say, "We will do this work for 'X'
11 number of dollars per fixture." That's pretty easily done.
12 That's how they've done it in all these other cases.

13 Our position is that we can prove on a classwide
14 basis through various means a mathematical calculation to
15 estimate the cost needed to replace all systems in Minnesota.
16 That's how we intend to prove future damages. Zurn doesn't
17 have an opinion that says that you can't do that. They
18 deposed our expert, but they don't have another expert who
19 says that that's not workable. It's been done, it's being
20 done right now. So that's why we think we can get the case
21 tried in a way that is manageable and is fair to everyone.

22 So -- this is my last slide, a little longer than I
23 thought I'd be.

24 The question for you, your Honor, is what do we do
25 with this litigation. You're obviously the MDL transferee

1 court, you have to manage these cases, and we need to resolve
2 the common issues. The question is how do we do that if we
3 don't certify a class. We've got cases backed up behind this,
4 there'll be more cases to come, and then you've got all these
5 people who are out there who have claims who are members of
6 these putative classes, but if the class is not certified,
7 where do we go from here? How do we deal with these common
8 issues? Are we going to construe this warranty over and over
9 and over again? Are we going to decide over and over again
10 whether you need aggressive water for these to fail? Are we
11 going to do more testing in every one of these cases? At some
12 point we need to have a plan and it's your role as the MDL
13 judge to help us formulate that plan. We believe the class
14 mechanism is clearly superior here, clearly workable, and on
15 balance is the way to proceed.

16 Unless you have questions, I will sit down.

17 THE COURT: No, I've tried to suppress my questions
18 and let you get through your material. So we'll take a
19 15-minute break and then I'll hear from Mr. O'Neal on class
20 certification.

21 (Recess taken at 10:00 a.m.)

22 * * * * *

23 (10:18 a.m.)

24 IN OPEN COURT

25 THE COURT: All right. Mr. O'Neal, you've got the

1 floor.

2 MR. O'NEAL: Thank you, your Honor, and good
3 morning. Oh. I think you need to switch the monitor to the
4 defense presentation.

5 THE COURT: Have we got it accomplished? Looks like
6 we're on our way.

7 MR. O'NEAL: Sabotage, Mr. Raiter?

8 (Laughter)

9 MR. O'NEAL: And, your Honor, I hope you're not one
10 of those judges who dislikes PowerPoint. Mr. Raiter --

11 THE COURT: I kind of like them, so --

12 MR. O'NEAL: -- used it and in this case it is I
13 think important, because it is awfully complex and there's a
14 lot of things to look at.

15 As I listened to Mr. Raiter this morning, I thought
16 that his argument showed us why Blades v. Monsanto is so right
17 and so important. And as I know your Honor is familiar, that
18 case from the Eighth Circuit said that it is not correct, as
19 the plaintiffs said in their initial brief, that the judge is
20 to accept as true all of the allegations of the plaintiff on
21 this motion. Rather, the judge must resolve evidentiary
22 disputes to the extent necessary to make a decision on the
23 class certification elements, and in Blades that specifically
24 involved the resolution of disputes about expert testimony, so
25 we are going to talk about the science.

1 Now, I obviously have prepared remarks. Before I
2 get to those, just in response to my listening to Mr. Raiter,
3 I want to just list off a few things in which there is in fact
4 a dispute, although Mr. Raiter often said there was no
5 dispute, and I want to say just something about the science
6 here.

7 It was stated to you numerous times that we had no
8 science, that our case was speculative and anecdotal. In
9 fact, we've done more testing than the plaintiffs have done in
10 this case. We've done a detailed finite element analysis.
11 They have not done one. We've done strain gauge testing,
12 we've done coordinate measurement, machine measurements, we've
13 done a raft of slow strain rate tests, and of course we've
14 done water tests and spectography and so forth.

15 We have presented individualized evidence as to the
16 water in the class representatives' homes. We have presented
17 a report from a leading water chemistry and corrosion expert,
18 Dr. Gregory Korshin, which is entitled *Site-Specificity of*
19 *Water Conditions*. We have talked about the fact that in
20 several of the class members' homes, which are right sort of
21 in the epicenter of where this has gone up there by
22 Alexandria, there is no phosphate, untreated well water with a
23 long history of recommendations from the Minnesota Department
24 of Health that there should be phosphate in the water, and we
25 have two different peer-reviewed scientific articles cited in

1 our expert report, discussed in the deposition and cited in
2 our brief, indicating that phosphate will, as Mr. Raiter said,
3 inhibit or prevent stress corrosion cracking in brasses.

4 We have done a raft of slow strain --

5 THE COURT: Is that limited to -- I think his point
6 was that that's limited to city systems as opposed to well
7 water, or does the expert report go to both?

8 MR. O'NEAL: Well, city systems use phosphate in
9 Minnesota, although not all of them. Again, it's an
10 individualized inquiry.

11 The Haugen home was municipal and had phosphate.
12 That's down by Rochester, not in the same area. And the
13 Haugen home, according to our expert, has such a low pH
14 condition that even with the phosphate, the phosphate was not
15 able to inhibit stress corrosion cracking.

16 The Oelfke home, which is up near the Alexandria
17 area, is on a municipal system, but she did not have
18 phosphate, raising the question why didn't that municipality
19 use phosphate if it's a well system. When the Minnesota
20 Department of Health is recommending phosphate or bust, the
21 name of one of their articles, why don't the well companies
22 use phosphate when they install the well?

23 So, right now -- I'm going to get into all this, but
24 right now I just want to say a lot of the statements that were
25 made are not correct.

1 There was a statement about the initial round of
2 slow strain rate testing that was done, what we've taken to
3 call the Phase I testing done by Chuck Morin when he was
4 alive, who was our first expert. There wasn't any Commerce
5 water tested there. Mr. Raiter said in Phase I, if I
6 understood correctly, that the Commerce water was the most
7 aggressive in that test. Actually, there was no Commerce
8 water tested. There was one sample of tap water and that came
9 from Columbus, Ohio.

10 With respect to the Kitec case and a lot of the
11 general discussion about other litigation, it's important your
12 Honor understand that other than a series of cases
13 Mr. Raiter has brought like this one, like the Uponor case
14 before you, those cases for the most part are in Clark County,
15 Nevada. They involve dezincification, not stress corrosion
16 cracking, and the allegation is that site-specific water
17 conditions in Las Vegas relating to the Colorado River are
18 aggressive to the fittings in terms of dezincification. The
19 companies, principally IPEX, that sold in that area should
20 have known that, should have warned about it. They're just
21 different than here.

22 Similarly, the decisions companies have made about
23 moving to plastic, moving to other materials, first of all
24 would be a subsequent remedial measure for the most part and
25 not even admissible. But secondly, there's been a lot of

1 testimony about why that was done, in part because plastic
2 wouldn't have the corrosion issues that Mr. Raiter has sued us
3 about, but also because the plastic is cheaper, it's a good
4 material, we can charge less to our customers while at the
5 same time making more money because it costs us less to
6 manufacture. It's -- our specialty is plastics, really, and
7 so it makes sense. There's a lot of reasons, but none of this
8 is admissible and none of it really relates to the subject at
9 hand.

10 Zooming in. Your Honor asked about magnification.
11 It reminds me when I look at my face in one of those
12 magnifying mirrors. If you zoom in closely enough, you see
13 lots of cracks and fissures on just about everything. But
14 there's a little bit of smoke and mirrors --

15 THE COURT: Well, thankfully I haven't had my first
16 wrinkle yet --

17 (Laughter)

18 THE COURT: -- so I'm not too worried about that,
19 but for others, I'm sure.

20 MR. O'NEAL: So, there is a lot of dispute in this
21 case on the science and Mr. Connolly is going to argue the
22 Daubert motion. We're going to really get into some
23 nitty-gritty with respect to this purported science that the
24 other side has.

25 All right. Now I'll move to my prepared remarks.

1 Your Honor is aware that there has been a
2 significant evolution in class action law with respect to
3 product liability cases in the federal courts in this nation.
4 The evolution is that trial courts cannot ignore or paper over
5 individual issues, issues of causation, reliance, comparative
6 fault, damages. Under modern federal appellate authority,
7 these nearly always defeat class certification in products
8 cases and the appellate courts will scrutinize the decisions
9 of trial courts to be sure that they have done a rigorous
10 analysis of these points and to be sure that there is a
11 specific layout of how the case can fairly be litigated on a
12 classwide basis. That evolution really sprang from a series
13 of Supreme Court cases: Costano, Amchem, Ortiz. It was
14 exemplified in the Bridgestone/Firestone case from the Seventh
15 Circuit, but it has come to the Eighth Circuit as well.

16 I found it remarkable that the plaintiffs' initial
17 brief in this products liability case did not cite the
18 St. Jude case, which is the leading Eighth Circuit law with
19 respect to certification or noncertification of product
20 liability classes. The St. Jude case, followed by the Baycol
21 case where Judge Davis declined to certify a class and
22 enjoined attempts to get other class actions certified -- and
23 that was affirmed by the Eighth Circuit -- are very important
24 harbingers that the modern authority with respect to
25 noncertification of product liability classes is very much the

1 law of the Eighth Circuit.

2 Not only did they not cite St. Jude in their initial
3 brief, they cited Blades, but only for rather trivial
4 propositions, while ignoring the fact that Blades v. Monsanto,
5 the Eighth Circuit made it clear that this court has to
6 evaluate evidence, even if it overlaps the merits, and resolve
7 disputes in the evidence insofar as necessary to resolve the
8 class certification decision. You also need to consider the
9 defenses that will be put forward, as well as the plaintiff's
10 allegations. So, what they said in their brief about
11 accepting the allegations made by the plaintiffs for purposes
12 of this motion is no longer the law in the Eighth Circuit.

13 Mr. Raiter has said several times -- even though he
14 says today that this will be the death knell of these claims,
15 he has said several times in court and in an e-mail which we
16 will be showing you again that whether a class is certified or
17 not, they intend to proceed with these claims and they intend
18 to bring claims on behalf of the people they've been able to
19 locate, whoever they will be. Now, whether it's appropriate
20 to do that here or in state court somewhere or whatever forum
21 obviously needs to be resolved at a later date, but the fact
22 is, that kind of bringing of claims is how product liability
23 claims with their inherently individualized nature need to be
24 brought in the Eighth Circuit.

25 Your Honor obviously knows the elements of Rule 23.

1 I'm going to focus on four requirements. We actually believe
2 that the plaintiffs' motion fails on all the requirements
3 except numerosity, that's all that we concede, but I've argued
4 a number of class cert motions and they generally come down to
5 these issues: commonality, typicality, adequacy. Our brief
6 talks about the arguments there and we do not concede them,
7 but to a significant extent in class action litigation those
8 tend to be subsumed into the predominance and superiority
9 arguments of Rule 23.

10 The first and last of the four elements that I'm
11 going to organize my argument around are not expressly in Rule
12 23, but they've been layered onto Rule 23 by the case law,
13 that is, that there must be a cohesive, ascertainable class
14 definition so that one can tell by objective, easy-to-apply
15 standards who is a member of the class and who is not, and
16 there does not need to be a series of individual inquiries
17 just to figure out who's in the class.

18 And manageability, you can subsume it within
19 predominance and superiority, but the case law has more and
20 more become clear. Judge Tunheim imposed this requirement in
21 St. Jude, that there must be a specific trial plan put
22 forward. The appellate courts do not want to see generalities
23 of how the case might be litigated with summary this or that,
24 whatever it was that Mr. Raiter proposed that sounds to me
25 like it takes away the parties' right to a jury trial.

1 Rather, there must be specific ways in which the case can be
2 litigated. Many of the ways of handling cases in a summary
3 fashion that plaintiffs' counsel in class motions like to talk
4 about are from settled classes, where you settle and then
5 there's an agreement that people are going to go out and
6 replace the fittings -- replace the pipe. That's very
7 different from how you're going to litigate in this courtroom
8 individual issues of causation, reliance, damages.

9 Now, let me talk then about ascertainability, is
10 there a single objective class definition or will the Court
11 need to engage in multiple complex inquiries to figure out who
12 is in the class. Let's take a look at their class definition.

13 And I want to highlight that it includes "All
14 persons and entities that own a structure located within the
15 state of Minnesota that contains a Zurn Pex plumbing system
16 with brass crimp fittings." So everybody who owns a
17 structure: commercial building, home, manufactured home,
18 apartment building, is a member of the class whether or not
19 they've had any noted problem with the fittings. This class
20 definition cannot be certified under very recent Eighth
21 Circuit precedent.

22 The O'Neil v. Simplicity case is the strongest case
23 on the no-injury class that we see here, although Briehl hints
24 at it and the Baycol case, Smith v. Baycol from the Eighth
25 Circuit, which said that people who had the -- who took Baycol

1 and did not suffer the side effect involved had no injury and
2 no claim. Baycol and O'Neil make very clear what the Eighth
3 Circuit law is on people who say they have a product which
4 they're afraid is going to fail, but it hasn't failed yet.

5 This no-injury class, I want to talk about that for
6 a second, because it really is a remarkable achievement by the
7 plaintiffs bar if they've been able to get this into the law.

8 As we've talked about, after Castano and Amchem and
9 similar cases, it became much, much harder to certify a
10 product liability class, at least in federal court, because of
11 individual issues about why any particular failure occurred.
12 So, we started seeing -- and I've defended a number of them --
13 cases where the allegation was: Well, we have a class of
14 everybody who's got the product, so that gets around the
15 individual issues of who's in the class. X percent of these
16 things have failed and we've got this expert that comes in and
17 says they're all going to fail, and therefore we can extend
18 the damages to the entire class. That has two remarkable
19 victories embedded in it for the plaintiffs bar.

20 One is that they avoid the issues of individuality,
21 lack of predominance that Castano and Amchem and Ortiz says
22 prevent certification.

23 The other is, they take a manageable warranty
24 issue -- all products have failures. They take a manageable,
25 small warranty claim rate and blow it up so that the exposure

1 and the threat to the manufacturer is tremendously multiplied,
2 getting that *in terrorem* effect Justice Posner likes to talk
3 about, that how does a manufacturer dare try one of these
4 cases if all of a sudden some jury is going to get to say
5 every product they've got out in the field is defective. So
6 the no-injury class would have been a great victory for the
7 plaintiffs product liability bar, but the Eighth Circuit, as
8 well as the Seventh Circuit and others, have said it's not
9 going to work.

10 Now, justices differ about the exact analytical,
11 intellectual reason it's not going to work, whether it's
12 justiciability, or standing, or a failure to meet a required
13 element, and if Justice Posner and Judge Rosenbaum and Judge
14 Schiltz ever got together, I'm sure they'd have a very lively
15 discussion of that, but it doesn't really matter, because it's
16 clear, particularly from the O'Neil case, no injury, no claim.

17 Let's think about O'Neil. That's what it says right
18 there in the quote, but let's think about that case.

19 This was grandparents who bought a crib and it had a
20 drop side. The CPSC recalled that crib or required a retrofit
21 program because the drop side was defectively designed and a
22 baby could get caught and strangled and babies died. So there
23 wasn't really any question that the grandparents couldn't use
24 the crib as it was, and the manufacturer, as Mr. Raiter
25 alluded to, had a retrofit program where they'd fix it so that

1 the drop side didn't work anymore and it was rigid. But the
2 grandmother, Mrs. O'Neil -- no relation -- said that she
3 couldn't use that retrofit program because she had some
4 problem with her shoulder. I don't remember what it was, but
5 she couldn't use it.

6 THE COURT: Couldn't put the baby over.

7 MR. O'NEAL: So the crib was of no use to them.
8 They had bought it. Now it's of no use to them.

9 Now, that's a heck of a lot better injury claim than
10 somebody who's had fittings for five or ten years -- these
11 fittings have been on the market for a dozen years -- and the
12 water has been flowing through them and they haven't had any
13 problem, but the Eighth Circuit said no claim. No injury, no
14 claim. The defect hadn't manifested.

15 Mr. Raiter made reference to the 35W bridge, and
16 like him I'm reluctant to bring it up, it's a tragedy and a
17 sore wound, but his analogy made no sense to me, because it
18 would be like if someone was driving across the bridge, it
19 hadn't collapsed, it didn't collapse, and they said that
20 because it was defectively designed they were afraid it was
21 going to collapse and that they have a case to bring in court.
22 It doesn't work. And this Court is bound by the requirements
23 of O'Neil and Baycol from the Eighth Circuit.

24 I note, by the way, that in the McGregor case that
25 your Honor issued, you made reference to Briehl -- I don't

1 think you made reference to O'Neil -- and you reserved the
2 issue in footnote 5 of that decision of whether no-injury
3 claims could be brought within the class or might be dismissed
4 at a later date. Now with respect to being in the class that
5 issue is before you and needs to be resolved here.

6 THE COURT: I can't dodge it again.

7 MR. O'NEAL: No.

8 THE COURT: All right.

9 MR. O'NEAL: And O'Neil I think makes absolutely
10 clear that you can't put those people into this class.

11 In fact, the principal case it sounded to me like
12 Mr. Raiter was relying on to say that no injury was not
13 something to be resolved at class certification, he referred
14 to an opinion by Justice Posner, and what he's talking about
15 -- it was in his reply brief -- is Kohen v. Pacific Investment
16 Management, 571 F.3d 672, and he quoted language -- this was
17 when I made the somewhat flippant comment about Judge
18 Rosenbaum and Judge Schiltz having a lively discussion with
19 Justice Posner. He made the comment that: "The defendant
20 argued 'before certifying a class the district judge was
21 required to determine which class member had suffered damages.
22 But putting the cart before the horse in that way would
23 vitiate the economies ...; in effect the trial would precede
24 the certification." That's what Mr. Raiter relied upon and it
25 says that, but if you turn the page --

1 THE COURT: I know this is Posner, but which
2 decision is this in?

3 MR. O'NEAL: This is Kohen, K-O-H-E-N, vs. Pacific
4 Investment, 571 F.3d 672.

5 First of all, obviously, Justice Posner is in the
6 Seventh Circuit and the Eighth Circuit in O'Neil and Baycol
7 are here --

8 THE COURT: I understand.

9 MR. O'NEAL: -- but Justice Posner doesn't disagree
10 with those decisions. He just has a little different
11 rationale. And he says on the next page from that: "A
12 related point is that a class should not be certified if it is
13 apparent that it contains a great many persons who have
14 suffered no injury at the hands of the defendant." It also
15 says that: "If the definition," the class definition, "is so
16 broad that it sweeps within it persons who could not have been
17 injured by the defendant's conduct, it is too broad."

18 So, there has to be an injury, there has to be a
19 manifestation of the alleged defect, and somehow we would have
20 to be able to distinguish those class members who have had a
21 manifestation of the defect from those who have not.

22 Your Honor referenced the Zamora case in your
23 McGregor opinion. That was cited approvingly by the Eighth
24 Circuit in the Briehl case. Zamora is the California case
25 about microcracks and says that microcracks cannot be an

1 injury. They are not sufficient to constitute injury. But we
2 would even have to have individual inquiries about who's got
3 microcracks and whether those microcracks are stress corrosion
4 cracking or some other metallurgical phenomenon and whether
5 those microcracks are the result of bad manufacture for which
6 we should have a contribution claim against suppliers, or what
7 are they. So ascertainability is a tremendous problem in this
8 case.

9 Now -- by the way, one other thing. They also rely
10 besides the Kohen case from Justice Posner on the Medtronic
11 case by Judge Rosenbaum. That case did not cite or discuss
12 O'Neil. What that case was about was a recalled defibrillator
13 and whether as a matter of subrogation law, insurance law, the
14 third-party payers had standing to bring a claim for
15 defibrillators that had actually been replaced, not ones where
16 people were just worried and not doing it. It was there's
17 been an actual replacement for which the third-party payer
18 actually paid and as a matter of subrogation and standing and
19 so forth do they have a claim. Judge Frank in the Guidant
20 case actually said no, they don't. Judge Rosenbaum disagreed,
21 said yes, they do, but neither of them, I don't believe, cited
22 O'Neil or discussed it in the terms we're talking about it,
23 and in neither case were they really no injury, because having
24 to take a defibrillator out of somebody and pay for it was,
25 according to Judge Rosenbaum, a tangible financial injury.

1 So, they can't distinguish O'Neil. In fact, O'Neil
2 is a stronger case than -- O'Neil would be a stronger case for
3 the plaintiffs' side than our case and the Eighth Circuit
4 ruled as they did, and the cases they do cite don't support
5 their position.

6 So what if -- I got to move faster here. I'm going
7 to be all day. What if we limit the definition to people who
8 have failed brass crimp fittings, and this is just our
9 inserting "failed" into their proposed definition. What's
10 wrong with that? Well, what is the definition of a failure,
11 as Mr. Raiter said. Does there have to be a leak? Does there
12 have to be property damage? Who ascertains whether that's the
13 case? What if the leak might have been caused by something
14 other than stress corrosion cracking? We're going to see
15 examples of that.

16 Zurn sells mainly to wholesalers, to plumbers and to
17 some retail outfits like Home Depot. And I'll just mention,
18 because Mr. Raiter mentioned it, the plan was that we'd be all
19 done selling brass fittings at the end of 2009. I'm told
20 we're almost there and there are still some sales going on,
21 but it's kind of working it through the commercial channels --

22 THE COURT: Inventory that's already out there?

23 MR. O'NEAL: -- and we should be done with it this
24 year.

25 So all of these are issues. How do we find who's a

1 class member and who is not if we're talking about only people
2 with failed fittings?

3 Now, I asked this question to Professor Staehle,
4 and -- I'm sorry. I tend to react because I've heard from
5 Mr. Raiter for years now about how Roger Staehle came down
6 from Mt. Olympus to testify in this case. He's a qualified
7 metallurgist who's written about stress corrosion cracking. I
8 believe his opinions in this case are grossly exaggerated.

9 I asked him how can we find these people. That's a
10 critical question this Court needs to answer. It is something
11 for which he should have been prepared to answer. It is not,
12 you know, some off-the-wall question where he's going to
13 answer off top of his head. Your Honor has to be able to
14 answer this. So I asked him this.

15 He starts out by just saying his mantra of all these
16 fittings are going to crack, and then he actually tries to
17 answer the question.

18 (Excerpt from 10/27/09 videotape deposition of
19 Roger Staehle played, 262:3-265:25)

20 MR. O'NEAL: I know no one wants to spend that kind
21 of money. It is impossible under the current standards of the
22 Eighth Circuit to ascertain who would be a member of this
23 class with a viable damage claim and who would not.

24 Now, I don't know how many times during the course
25 of his deposition Dr. Staehle said to me, "They'll all crack,

1 they'll all crack," and that's really what they're resting on,
2 and Mr. Connolly's argument on the Daubert motion is going to
3 address that.

4 I do want to make it clear -- and I think your Honor
5 is familiar with this -- that after Blades v. Monsanto it is
6 clear you do not accept that. You have to listen to this and
7 consider it and consider not resolving whether, you know, the
8 fittings are defective or not, that's the merits, but
9 resolving what evidence is going to be presented and how we
10 can deal with this on a classwide basis, and you can't do it
11 with this class definition or any class definition.

12 Now, I'm going to move to the predominance of the
13 individual issues, which is the main reason for the evolution
14 and product liability class action law, the main reason these
15 cases generally are not certified, and the main reason that
16 the Eighth Circuit reversed Judge Tunheim's certification of
17 the St. Jude class.

18 Plaintiffs at page 29 of their original brief again
19 misstated class action law when they said predominance is
20 satisfied where the defendant's liability is the focus. Well,
21 I've never had a case where the plaintiffs didn't say that
22 defendant's liability is the focus. But in Blades and in
23 St. Jude, it's clear you can't just ignore these individual
24 issues which we're going to now talk about not based on
25 speculation, but on science, and what's in the file.

1 We are not saying no failures occur. We're not
2 saying no stress corrosion cracking failures occur. Failures
3 can occur with all kinds of materials. This is out of our
4 expert report, but it's actually a published paper that's
5 available on the Internet just listing different kinds of
6 failures that occur with different materials, and so anybody
7 who goes into a business like the plumbing business knows
8 there are going to be some number of corrosion failures out
9 there.

10 In fact, water conditions vary all over the country
11 and there are some parts of the country where failures are
12 more prevalent than others. Copper plumbing can't be used in
13 most of Florida because of a pitting problem and they use PVC.
14 Copper also can't be used in the Washington, D.C. area for the
15 same reason.

16 Individual inquiries. Well, so we now are going to
17 certify a failure class, say. What issues arise when
18 individual class members come forward and say they have a
19 case? Well, when we looked at the fittings that both sides
20 dumped into a depository up there in Plymouth, here's a case
21 of erosion corrosion. It's a failure, but not a stress
22 corrosion cracking failure that we found in the depository.

23 Here is an example, a real-world example of a
24 fitting that failed due to mechanical abuse. It's a valve and
25 the plumber tightened it too much and that's a fitting that's

1 in our warranty claims depository up there. Mr. Raiter will
2 say it's true that there's a lot more stress corrosion
3 cracking fittings in that depository than other things, but
4 there are these other failure modes.

5 It's interesting also. Remember that that
6 depository is all fittings that were sent in either to
7 plaintiffs lawyers or to us for warranty claims. It's not a
8 random sample. And Dr. Staehle made a big issue in his report
9 about the high percentage of failures in the fittings at the
10 depository. Well, all those fittings either failed or they
11 came from homes that had a failure and were exposed to the
12 same conditions.

13 I said in the very first court appearance in this
14 case to Judge Erickson -- and I've said it to you before --
15 there is one overwhelming fact in this litigation which claims
16 that all of these fittings are failing. We've sold over
17 200 million of them. I don't know the exact number, but
18 265 million in ten years. So when you deduct for things that
19 were not used or for things that were used in radiant heating,
20 200 million seems a reasonable number.

21 And here we have a claims rate. This is based on
22 the Zurn reports. As Mr. Raiter said, they have some
23 additional reports and we're not sure of the extent of
24 overlap. Two hundred sixty-five million sold in the warranty
25 base, which really doesn't cover the full ten years. We have

1 good solid information from 2002 when Mark Samples started up
2 through around the end of 2008, and that's 1,583 out of 265
3 million. Claim failed fittings per million units sold, 5.96
4 countrywide.

5 Now, they repeatedly say reported warranty claims do
6 not equal failure rate. Well, that's true. There are no
7 doubt some number of claims out there that were not reported.
8 That's true. Nobody knows how many there are. They criticize
9 our data and yet they use our data to attempt to bring this
10 Court to believe there is going to be a massive, catastrophic
11 failure problem. This is going to be a little duplicative of
12 what you're going to hear from Mr. Connolly, but it's directly
13 relevant to class certification.

14 Not all of these fittings fail. This is a
15 photograph from our expert report of an installation in Zurn's
16 manufacturing facility in Texas. The fittings in that
17 installation have been running since 2004 without any problem
18 in an accelerated basis where they're running accelerated
19 water through them.

20 This is a graphic that was prepared by our
21 statistician Bill Wecker, and what he did was take the actual
22 failure data, reported failure data for the years for which we
23 have information -- and those are the blue -- and then
24 superimposed with the red bars what Dr. Blischke's analysis
25 claims will be happening based on this statistical analysis

1 I'm going to talk about briefly and Mr. Connolly will also
2 talk about. Those bars would go on and on off the chart. He
3 wanted me to approve him creating some long thing that would
4 stretch across the courtroom and I didn't think it was
5 necessary.

6 This is Dr. Blischke. So I wanted to understand how
7 he got this facially improbable result. How did he as a
8 statistician, not a metallurgist, not a plumbing expert, how
9 did he conclude that there'd be this huge balloon of failures
10 out there when we don't know about them, and what he did was
11 assume in advance a mean time to failure, the mean time in
12 which these fittings are going to fail. That is normally
13 calculated by the kind of statistical analysis he did, which
14 is called the Weibull analysis. Instead, he assumed it.

15 (Excerpt from 11/11/09 videotape deposition of
16 Dr. Wallace Blischke played, 18:6-20)

17 MR. O'NEAL: Now, what happened was, he took the
18 data that the plaintiffs' counsel provided him, which included
19 our claims data plus their additional data, and he ran this
20 Weibull analysis to try and calculate the mean time to failure
21 in the accepted method, and the result he got was 3500 years
22 being the mean life. And we're not using that to say
23 therefore we've proven the mean time to failure is 3500 years.
24 What we're saying is that under accepted statistical ways of
25 doing this, you can't get a 40-year mean time to failure, and

1 if you don't think the data is enough to support the 3500
2 years, you just don't have enough data to really do this.

3 So then in order to come up with something that
4 would result in this catastrophic failure rate, he gets some
5 documents from Mr. Raiter and they come up with this 40-year
6 figure.

7 (Excerpt from 11/11/09 videotape deposition of
8 Dr. Wallace Blischke played, 152:22-153:21)

9 MR. O'NEAL: So we assumed the result going in and
10 therefore you get the result. Not surprising, the Weibull
11 analysis is wholly useless.

12 Now, in addition, it's interesting, I'm going to
13 talk now about a second overwhelming fact in this litigation,
14 which is that the failures are very low and also clumped, and
15 really, this has been identified as principally a Minnesota
16 problem from the beginning in Zurn's mind and in Zurn's
17 documents. And it's not just Minnesota. It's northern
18 Minnesota principally with the epicenter around Alexandria.

19 As a matter of fact, when you look at the number of
20 reported claims and analyze them by county within Minnesota,
21 152 of them are in Douglas County, in our records. The next
22 highest is in Otter Tail County, which is right next to
23 Douglas County, and that's 27 claims, and the next highest in
24 Pope County, which is also right next to Douglas County. Of
25 course, Douglas is where Alexandria is located. Pope is right

1 next to Douglas and that's 25 claims. No other county in
2 Minnesota has more than ten claims and 24 counties in
3 Minnesota have zero claims.

4 Nevertheless, when you look all over the country,
5 Minnesota is -- and in particular, northern Minnesota around
6 Alexandria is the epicenter here, but that was not considered
7 by Dr. Blischke.

8 (Excerpt from 11/11/09 videotape deposition of
9 Dr. Wallace Blischke played, 47:12-47:21)

10 MR. O'NEAL: And when I suggest to him -- and I have
11 a factual misstatement in this. I say that over 50 percent of
12 the total claims in the country reported in Zurn's database
13 are from Minnesota. It's actually about 42 percent, so I have
14 a misstatement here. But I asked him if he has an opinion as
15 to what that would be.

16 (Excerpt from 11/11/09 videotape deposition of
17 Dr. Wallace Blischke played, 48:10-24)

18 MR. O'NEAL: So, none of the plaintiffs' experts try
19 to explain why we have this significant disparity. Minnesota
20 does not have a high claim rate particularly, but northern
21 Minnesota certainly -- in the area in the west there over by
22 Alexandria certainly has a higher claim rate than the rest of
23 Minnesota or than other parts in the country. Two percent of
24 national sales, but 42 percent of the failed fitting claims,
25 21 times higher than the national average.

1 And here's bar charts giving the same information,
2 two percent of sales, 42 percent. And while it says Minnesota
3 for convenience, it's really a particular part of Minnesota.

4 Here's a national map -- we've got lots of graphics
5 on this point -- a national map showing the number of claims
6 in Minnesota. Montana has a large clump up by Kalispell.
7 North Carolina seems to be high, but actually the sales were
8 very high in North Carolina.

9 So northern Minnesota -- here is one dividing up the
10 state and we see Alexandria is the principal location of the
11 claims. And we believe there has to be explanations for why
12 failures occur in certain homes, why failures are clumped in
13 certain locations, and that those explanations deal in the
14 complex interacting variables among water quality,
15 installation issues and manufacturing defects, by which we
16 mean particular fittings. And there were some -- we say a
17 few, they say a lot -- where you can see rough manufacture,
18 rough surface that you can relate to a failure, and where
19 those occur we should be able to make a claim against one of
20 our five different suppliers.

21 Our experts conclude that this pattern is most
22 closely related "to local environmental effects coupled with
23 individual mechanical factors, including as-installed
24 stresses," so it wasn't clear to me why I kept hearing that
25 our experts didn't dispute this and our experts didn't dispute

1 that when they do.

2 So let's look at the Venn diagram, and anybody who
3 deals with stress corrosion cracking gets to see this Venn
4 diagram. Stress corrosion cracking is said commonly to be the
5 intersection of three different factors: material, that you
6 have to have the material that is potentially subject to
7 stress corrosion cracking, and many, many materials are,
8 including copper under the right circumstances; you have to
9 have tensile stress within the material, not compressive
10 stress that pushes things together, but tensile stress that
11 pulls things apart; and you have to have a corrosive
12 environment. And if you have more than one, you can have less
13 of the other and so forth. And I will tell you, having done
14 this for three years, the science is very complex, very
15 controversial, things change. And you cannot, as we'll see a
16 clip in a minute, say somebody did a slow strain rate test
17 where you actually pulled something apart and it got stress
18 corrosion cracking under those extreme circumstances and say
19 that means it's going to have stress corrosion cracking in the
20 field.

21 In order to litigate any particular class member's
22 case about why stress corrosion cracking occurred, we are
23 entitled to talk about the material, but also about the stress
24 and the corrosive environment.

25 On the material, which is principally in Zurn's

1 control, the choice of the alloy, Dr. Staehle is highly
2 critical, saying whatever the design, whatever the stresses,
3 all these brass alloys, high zinc with alpha beta phases are
4 going to fail in potable water.

5 Well, this is Gary Runyan, who was the chief
6 technical person, is the chief technical person for Zurn and
7 responsible for the design of these, and Mr. Raiter asked him
8 why did they choose these alloys, what tests were done, what
9 did they rely on.

10 (Excerpt from 2/11/09 videotape deposition of
11 Gary Runyan played, 41:4-12)

12 MR. O'NEAL: So the 360 brass, which is one of the
13 two alloys, they're both zinc content of 35 to 40 percent in
14 alpha beta phases, those brasses are extremely common, the
15 most common in potable water applications. They're used in
16 faucets and fittings and a lot of things, have been for years.
17 Those alloys are called out, recognized in the F1807 ANSI
18 standard, which is the ANSI standard governing fittings for
19 pex systems as being appropriate to use, so they were used.

20 And Mr. Raiter made reference to John Beavers.
21 That's John Beavers. He's one of our experts and he's the one
22 that Mr. Raiter pointed out said that these alloys are, quote,
23 highly susceptible to stress corrosion cracking in an article,
24 and he did. And that was an article that was talking about
25 the results of slow strain rate type testing, and that when

1 you compare alloys, high zinc tends to exhibit more stress
2 corrosion cracking than low-zinc alloys, and that's a true
3 fact. But then you ask this same Dr. Beavers: So, was this a
4 bad choice of alloy? And Mr. Raiter points out that you could
5 make this crack in laboratory conditions, so isn't that a bad
6 choice of alloy? And here's Dr. Beavers' response.

7 (Excerpt from 11/24/09 videotape deposition of
8 Dr. Beavers played, 124:20-127:7)

9 MR. O'NEAL: So that's the material circle of the
10 Venn diagram and we have a case there. Now, that sounds more
11 like a classwide case than the other circles, but we are
12 entitled to talk about the other circles too. Let's talk
13 about the water which Mr. Raiter talked about, and that would
14 be the circle about the environment.

15 Water chemistry is highly complex and variable,
16 varies from aquifer to aquifer, municipality to municipality,
17 well to well. A disproportionate number of the Minnesota
18 claims have been on wells which do not typically have the
19 phosphate treatment that many Minnesota municipalities have.

20 Now, Mr. Raiter kind of dismissed the lead/copper
21 rule as being a health standard, and it is, but it is
22 relevant, as he said, to corrosivity, because if you have a
23 lot of violations, you have a lot of copper in your water, it
24 suggests your copper is corrosive to water.

25 And the Minnesota Department of Health has published

1 repeatedly -- and these are in the record -- documents about
2 characteristics of Minnesota groundwater and the fact that we
3 have the highest level of municipalities that violate the
4 lead/copper rule, suggesting that the groundwater in parts of
5 Minnesota is extremely corrosive.

6 Here, for example: "Due to unique characteristics
7 of Minnesota's groundwater with its tendency to absorb copper,
8 exacerbated by the iron-removal treatment process commonly
9 used by groundwater systems, Minnesota experienced the highest
10 rate of copper action level exceedances in the United States.
11 About 200 systems have exceeded the copper action level"

12 Now, Mr. Raiter says, well, that's about general
13 corrosion, but as he acknowledged, we have peer-reviewed
14 literature indicating that phosphate, which is a material
15 recommended by the Minnesota Department of Health to be used
16 to inhibit corrosion and which inhibits general corrosion,
17 that same phosphate, that same corrosion inhibitor, prevents
18 or inhibits stress corrosion cracking in brass.

19 Now, this gets complicated because there is a war,
20 sort of, between -- or a disconnect between metallurgists and
21 water chemists who specialize in corrosion, but the
22 metallurgists who have analyzed stress corrosion cracking
23 typically do so in terms of particular chemicals which they
24 describe as potent cracking agents. So when stress corrosion
25 cracking in brass was first identified, it was because of

1 ammonia getting on the brass and ammonia is well known as a
2 potent cracking agent, sulfates, sulfides, nitrates. These
3 are identified as potent cracking agents. When you test the
4 water from the class reps' homes, you don't really see potent
5 cracking agents and Mr. Raiter would say accordingly there's
6 no case on the water and it's not relevant. But when you look
7 at the reported claims data, when you look at the truly
8 extraordinary disproportionate number of claims in northern
9 Minnesota around Alexandria, that is in and of itself,
10 whatever you want to say about not all claims are reported,
11 basis for saying that that water is aggressive. It is not a
12 coincidence that that disproportionate number of claims
13 involving this copper alloy -- brass is a copper alloy -- is
14 in a location which has the highest number of exceedances of
15 the lead/copper rule.

16 Now, Dr. Korshin, our water expert, wrote a report
17 called Site-Specificity of Water Conditions, and he has one
18 opinion regarding why the homes of Oelfke and Cox and
19 Minnerath, which are up in the general area we're talking
20 about here, exhibit this, and that relates to the lack of
21 phosphate which could form a film. I don't know how much
22 detail you want to get into on this.

23 There is a school of thought among metallurgists
24 that if something is generally corrosive, it won't be causing
25 stress corrosion cracking. It relates to passivating films.

1 It's all described in Dr. Korshin's report. Basically,
2 Dr. Korshin's view is that a phosphate creates a film that
3 goes over the bare metal which can inhibit localized as well
4 as general corrosion. And when Mr. Raiter says that is
5 entirely unsupported by literature, it is not correct, because
6 the literature about phosphate and stress corrosion cracking
7 is supportive of that very proposition.

8 Now, that's up there. Then he looks at the Haugen
9 home, which is on a municipal system and has phosphate, and he
10 says there the pH is such, that particular water, that the
11 phosphate isn't able to do what it would otherwise do. His
12 report analyzes each of the waters in the class
13 representatives' homes and talks about different things.

14 Now, why is all of that relevant? The plaintiffs
15 say, well, you made this for use in potable water, so why is
16 that all relevant? Here are a number of reasons it's relevant
17 and would have to be determined and has to be determined on a
18 water-sample-by-water-sample basis,
19 water-system-by-water-system basis, rather than on a classwide
20 basis. One would be comparative fault. We do have plumbers
21 who have heard of these issues and continue to use the product
22 in places where the water has been demonstrated to cause these
23 problems. This is not hypothetical.

24 Tom Hills was deposed in this case. He's at
25 Ellingson Plumbing, which had the highest number of claims of

1 anybody, right there in Alexandria, and he says that in
2 mid-2003 he was engaged in discussions with Zurn about this.
3 Carl Nicolia, the president of Zurn, in I think it was
4 September, told him to use the plastic fittings rather than
5 the brass fittings because of water quality issues in his
6 area. Hills says he didn't believe him. Hills says that he
7 didn't believe plastic was approved in Minnesota, but bronze
8 clearly was and there were other systems he could have gone
9 to. But he says he kept using it and he says:

10 "To your recollection, you did not instruct any of
11 your customers or inform any of your customers that you have
12 been having a problem ... with the brass fittings ..., right?"

13 "No.

14 "Okay. You never did?

15 "No."

16 So that's one example, nonspeculative example, of a
17 plumber who could have contribution liability as a result of
18 knowledge of his water conditions.

19 We also, as your Honor is aware right now, have a
20 warranty exclusion in our 25-year warranty for corrosive water
21 conditions. Now, it is true that Zurn believes that not all
22 waters cause stress corrosion cracking in brass, and corrosive
23 water conditions is something different than all water, and if
24 our fittings had stress corrosion cracking in water, it
25 suggests that that water was corrosive, but the plaintiff

1 could come forward and say no, it's not corrosive water, it's
2 just noncorrosive water, and then we'd have Dr. Korshin
3 talking about whether there was orthophosphate and whether the
4 pH was correct and so forth in order to determine whether the
5 warranty exclusion applies, and we are entitled to present
6 that evidence. We cannot present it on a classwide basis even
7 among this small number of class representatives. The issues
8 about the water in the Haugen home is different than the
9 issues about the water in the Minnerath, Cox, and Oelfke homes
10 and we can't do it.

11 These are very difficult issues. In fact, I think
12 we're making new science in this case to some degree about
13 stress corrosion cracking, but we don't need to make new law.
14 The law is what the Eighth Circuit says it is. We have
15 individual issues that cannot be swept under the rug. They
16 must be dealt with. The water issues are very relevant and
17 variable and individual.

18 Going back to the Venn diagram, the last circle is
19 stress, where the stress in the material came from. And it's
20 critical here to remember the stresses are additive, so there
21 is a certain amount of the material -- or excuse me -- a
22 certain amount of stress present in the fittings as a result
23 of the manufacturing process, there's a certain amount of
24 stress present in the fittings as a result of the crimp, and
25 we have a significant scientific dispute with Dr. Staehle

1 about how much strain is actually caused in the fitting by the
2 crimp, and that's the subject of part of the Daubert motion
3 that Dan Connolly will be talking about.

4 But other stresses, what may be called applied
5 stresses, are all additive to those things. When Mr. Raiter
6 says we have no expert opinion or evidence that installation
7 stresses can be relevant, what he's basing that on is that
8 among this limited universe of class representatives, we have
9 not been able to show that a particular failure was caused or
10 contributed to by a particular installation error, but we have
11 found numerous installation errors in our investigations and
12 we have expert testimony that they can cause or contribute to
13 stress corrosion cracking.

14 Our manual gives detailed instructions about
15 installation. That one talks about in the lower left-hand
16 corner do not put the crimp ring -- or put the crimp ring
17 one-eighth to a quarter inch from the end of the tube. "An
18 improperly positioned ring may produce a weak connection."
19 Mr. Raiter will say that doesn't add to the stress if you move
20 the crimp ring, and 51 percent of the fittings we looked at in
21 the warranty data, the ring was too close to the shoulder of
22 the fitting. And while it is true that our tests show that
23 doesn't increase the stress, it moves the area of stress to be
24 right in the corner where we've had a number of failures, so
25 that moving the area of maximum stress, moving the stress

1 riser, can contribute to a failure.

2 Furthermore, our instructions talk about limiting
3 the bend radius and always strapping down the pipes every 32
4 inches, so if you have a long run of pipe hanging in the air,
5 you need straps to support it every 32 inches. There's the
6 language.

7 We found numerous instances -- Mr. Raiter's right.
8 That fitting didn't fail, but it's a violation of instructions
9 as to the bend radius that our experts say could add to the
10 stress available for stress corrosion cracking.

11 These are class representative homes with extremely
12 questionable practices in terms of the set-up, the unsupported
13 bends and so forth.

14 Mr. Raiter asked Dr. Stevenson, one of our
15 metallurgists, at great length about how he couldn't link a
16 particular installation error to a particular failed fitting,
17 so I was compelled on redirect to ask him if that meant
18 installation errors are irrelevant and he explains that
19 they're not.

20 (Excerpt from 12/04/09 videotape deposition of

21 Dr. Michael Stevenson played, 309:6-311:8)

22 MR. O'NEAL: So if in particular cases we believe
23 and have expert support for the proposition that the improper
24 placement of the crimp ring, which happened in 51 percent of
25 the cases that we looked at, added to the stress available, if

1 we have evidence that a failure to support the piping added to
2 stress on the fitting making more stress available for stress
3 corrosion cracking, we should be able to defend ourselves and
4 to make a contribution claim against the individual plumber,
5 which is not feasible to be done in the context of a class
6 action.

7 Our installation manual indicates that we disclaim
8 liability for failures to comply with installation
9 instructions, and we have denied a number of claims -- all
10 these letters are in the record -- on the ground of
11 installation errors, so these are real issues, tangible
12 issues, not something made up for class certification
13 purposes.

14 St. Jude is the leading case on individual issues
15 right now in the Eighth Circuit, although there were certainly
16 U.S. Supreme Court cases, as I said, addressing these
17 individual issues.

18 St. Jude, there was a lot of discussion about how
19 there would be differences in the evidence under the consumer
20 protection acts regarding causation and reliance. Your Honor
21 is familiar with the Group Health case and the fact that as
22 the Eighth Circuit says, Group Health did not remove the
23 elements of causation or reliance to the extent it's necessary
24 to show causation from the consumer fraud statute in
25 Minnesota.

1 This is, among other things, a consumer fraud case
2 and the plaintiffs' amended complaint is replete with all
3 kinds of quotes from Zurn product literature which they say
4 constitute consumer fraud.

5 Typically, even though this is in their complaint
6 and they want to prove it and it's obvious that then we have
7 individual issues, just as Group Health said about who saw the
8 literature or who relied on the literature and so forth, even
9 though they make these allegations, their typical answer is,
10 well, it's an omissions case and you can deal with an
11 omissions case on a classwide basis, but an omissions case
12 just doesn't just hang in the air. Judge Magnuson actually
13 dismissed the Group Health case because there had to be a
14 showing that there was some sort of reliance and the failure
15 to disclose the health aspects of smoking. You had to have
16 individual inquiries of whether someone would have kept
17 smoking, or in the Tuttle case whether they would have kept
18 using tobacco. Here, individual inquiries about would you
19 have used these systems if you knew that a thousandth of one
20 percent was the reported failure rate, would you have used
21 these systems if you knew that copper systems were more
22 expensive and would cost you more money, those are individual
23 issues like in St. Jude.

24 The homeowners vary with respect to what they
25 received or what they thought about it. Over on the left we

1 have testimony from the Tom Hills fellow, the plumber, and
2 also from Mr. Hvezda, who was both a plumber and a class
3 representative because he installed the fittings in his own
4 home, and badly, by the way. But he said that he didn't give
5 the homeowners the warranty. Tom Hills didn't. The
6 homeowners typically did not know what was going into their
7 homes, making it difficult to know who will be there and also
8 making it difficult to know whether they would have changed
9 any behavior if their plumber said, "Well, here's the
10 literature and there's a certain amount of stress corrosion
11 cracking, but it's cheaper."

12 Your Honor distinguished St. Jude in the Allianz
13 case and these are quotes from your opinion. The basis for
14 your distinction from St. Jude was that in Allianz, which was
15 a very simple statement about up-front bonuses in a prospectus
16 for this plan, "almost every class member received the
17 misrepresentation," the "vast majority ... relied on a
18 standard set of alleged misrepresentations," the
19 "misrepresentation involv[ed] a relatively straightforward
20 statement," and "The remedial phase of the litigation," the
21 damages phase, "is not so individualized."

22 Those things are not true here. This is more like
23 St. Jude, which said that "the need for detailed and
24 individual factual inquiries concerning ... remedy ... weighs
25 strongly against class certification."

1 So, they are making claim not just for replacing
2 pipe, but for damages, damages for failures, and those are
3 subject to all the usual issues about what depreciation
4 formula is appropriate and how much use did they get out of
5 the fitting for the years of use and what value is that. All
6 of those issues that people litigate all the time in
7 individual property damage cases are in here.

8 Plaintiffs like to say damages are irrelevant, but
9 the St. Jude case makes it clear that that's not correct.
10 What if homeowners don't want their house torn apart and these
11 fittings replaced? How do we try and litigate a damage
12 finding in this case? There's a reference which I didn't
13 really understand to the Multi-District Litigation Manual,
14 which I'm familiar with, and talking about summary methods,
15 but when you don't have a settlement, when you're litigating,
16 we have a jury trial right under the Constitution to talk
17 about these damages issues.

18 Moving to superiority, does this mean the death
19 knell of claims? Is there some huge problem out there that
20 justice requires us to kind of overlook all these problems and
21 certify a class anyway?

22 Well, first of all, the U.S. Supreme Court and the
23 Eighth Circuit have made clear you can't do that. You can't
24 ignore these problems.

25 But secondly, Mr. Raiter has repeatedly said he will

1 bring these claims as individuals. We do have individual
2 claims in lawsuits.

3 Plaintiffs -- this is just an example. Eventually
4 Mr. Raiter sent me an e-mail. He wanted to resume merits
5 discovery. I said why do we have to talk about that, we
6 haven't gotten the certification decision. He replied: "We
7 intend to obtain rulings and findings on liability
8 irrespective of whether a class is certified."

9 So, one way or the other we will have litigation,
10 but the superior way to do that is with real people, real
11 claims, who've had real failures, not the no-injury class, not
12 this speculation by people like Dr. Blischke with statistics
13 and running up huge numbers, hundreds of millions in exposure,
14 conceivably, based on hypotheses. So the superior way to do
15 this is to litigate these cases.

16 Manageability I've already talked about. There's
17 been no trial plan submitted. Other than this offhand
18 reference to summary proceedings, there's been no description
19 of how we'd really try all these issues, and basically what
20 they've said is, well, to the extent there are manageability
21 issues, we can deal with those by issue classes or subclasses
22 without really defining what that's talking about. But again,
23 **St. Jude** is the nemesis for the plaintiffs. "Even courts that
24 have approved 'issue certification' have declined to certify
25 such classes where the predominance of individual issues is

1 such that limited class certification would do little to
2 increase the efficiency of the litigation."

3 They do not meet the Rule 23 elements. The
4 substantive -- the Enabling Act, the Rules Enabling Act says
5 you cannot use a procedural mechanism like Rule 23 to take
6 away substantive rights to a jury trial and to try individual
7 issues and no specific issue class has been suggested that
8 would resolve these problems.

9 Mr. Raiter has referred a couple times to this
10 **Saltzman** case that I'm in down in the Northern District of
11 Illinois about Pella windows. That's an interesting case,
12 because it's about whether the windows leak. Judge Zagel in
13 the Northern District of Illinois has certified an issue
14 class. He found that the individual issues of causation,
15 damages, that we were raising and arguing about -- I made the
16 argument -- were individual and predominated, so he did not
17 certify the whole case as a class. He certified an issue
18 class basically about whether the product is defective and I
19 have no idea how we're going to litigate the case once there's
20 a resolution. And if there's a finding of a defect, what does
21 that mean and what happens? Nobody's explained it. Our
22 petition for an interlocutory appeal of that ruling has been
23 pending before the Seventh Circuit since I think July.

24 I say this knowing it could be quoted to Judge
25 Zagel, whom I greatly respect, but the fact is that case is a

1 mess right now after that class certification ruling, and if
2 the Seventh Circuit doesn't do something about it, nobody has
3 any idea how we're going to litigate that case. This same
4 mess cannot be, should not be created in this case.

5 Your Honor, I'm sorry to have gone on so long, but
6 there are a lot of problems here and the Eighth Circuit law
7 has made clear you cannot obfuscate them, you cannot overlook
8 them. You have to deal with them, wrestle with them, and a
9 denial of class certification is what's called for here as in
10 so many other product liability cases.

11 Thank you.

12 THE COURT: All right. Mr. Raiter, I'll give you a
13 moment or two in rebuttal.

14 MR. RAITER: Absolutely, your Honor. I don't think
15 I'll take that long.

16 THE COURT: I want to take our break right at noon.

17 MR. RAITER: Much of what Mr. O'Neal just said is
18 exactly what I thought he would say and which is exactly what
19 the record is. It's hypothetical, it's not related to any
20 science, it's based on the warranty claims that have been
21 submitted and the location of those claims, and it isn't based
22 on expert opinion, and I'm going to click through some of
23 these statements that are just flat out unsupported by the
24 record, by their own experts. I'm going to start with
25 installation.

1 I asked Dr. Stevenson very clearly: Do you have an
2 opinion that you can say that anything related to installation
3 causes SCC that would not have otherwise occurred or would not
4 have been otherwise present? He says: I do not offer that
5 opinion. But yet they're still here talking about moving the
6 crimp ring and that might affect the stress. Bending it might
7 affect the stress on the tube or the fitting. They don't have
8 such an opinion. That is out the door. They had a chance to
9 do so, they tested it, and they failed. And to sit here and
10 then point to us and say, well, it's speculation about all
11 these failures and yet to stand up and say that installation
12 variances caused this is really remarkable. Read the
13 testimony. It's very clear. The fact that he had to redirect
14 his expert tells you that he knows that the prior testimony
15 was bad. They don't have the opinion. It's not in their
16 report, and Dr. Beavers, who actually knows something about
17 stress corrosion cracking, won't offer that opinion. He did
18 not offer that opinion.

19 So, I'm going to go back and talk about the water,
20 the phosphates. Dr. Korshin said that is a hypothesis under
21 oath at deposition. He has a hypothesis that he's not tested,
22 that's not supported. Again, stress corrosion cracking, lead
23 and copper rule, the Ryzner, the Langelier, none of that is
24 connected by expert opinion or expert testimony or
25 peer-reviewed literature. They're grasping for something

1 because they don't have it. Fittings are failing. There's no
2 response to the cracking that we showed you, nothing other
3 than argument, well, it might be; well, we can't explain it,
4 it's hypothetical. That's what they've got. So, it isn't a
5 question of did the plaintiffs meet their burden to move
6 forward. It's simply does the defense have anything to show
7 that we shouldn't proceed on a classwide basis and get to the
8 resolution once and for all. So, I'm going to click through
9 some of these issues.

10 Orthophosphates. As I said, the Haugen home had
11 them. They had failures. And I'll show -- I'll give you some
12 pictures here from the Haugen home that come from the ESI
13 report that show a fitting dripping during our inspection.
14 While ESI was out there looking at the Haugen home, it's
15 dripping and it's connected to copper that's doing just fine
16 when exposed to the same water. I'll deliver these to your
17 clerk before we leave.

18 Zamora, the case that Mr. O'Neal talked about,
19 involved tort claims only. Very different than our consumer
20 protection claim, very different than our warranty claims, and
21 we get back to this kind of what do you need to show for a
22 tort claim versus a warranty claim. That's what Zamora says.
23 You can read it. You already have before.

24 The failure rate data, Mr. O'Neal conceded, was not
25 kept well before 2002, yet the number of fittings sold that

1 they want to include in their big number includes fittings all
2 the way up to 2002. So they admit that they don't have good
3 claim data up to 2002, but they'll throw all of those fittings
4 sold into there and ignore whether there have been claims that
5 in fact have been submitted to Zurn but for which they did not
6 maintain the claims.

7 The warranty database is not good data, and
8 Dr. Blischke, who normally gets good data from automobile
9 manufacturers, from manufacturers of products who actually
10 maintain the information, typically does have information upon
11 which a mean time to failure can be either calculated or has
12 been provided to him. And again, read the deposition, because
13 he makes it clear that he normally is given that information.
14 So he assumes 40 years here based on some information we give
15 him and that's in the record, and then he runs not only 40
16 years. He runs 50 years and 60 years as a mean time to
17 failure and those results are in his report. This isn't
18 something that just mysteriously appeared or that he used in
19 order to reach a preordained conclusion. The preordained
20 conclusion is the result of the claims that have already been
21 submitted. That's the problem. It isn't the methodology.
22 It's that the input in terms of claims and other information
23 when applied to a normal statistical methodology, i.e., the
24 Weibull analysis, results in a terrible prediction for their
25 systems. And again, they offer no response. They have zero.

1 They don't have anybody who says that that is not going to
2 happen.

3 Clumping. He talks again about this anecdotal
4 evidence in Minnesota, there's clumping, and he --
5 Mr. O'Neal -- I actually quoted this -- there has to be
6 explanations for that. Okay. Where is it? What is it? The
7 metallurgists won't say that it's the water. Dr. Beavers
8 wouldn't say that. Dr. Stevenson wouldn't say it.
9 Dr. Korshin has some hypotheses that he hasn't tested that he
10 finds intellectually interesting. There are other
11 explanations and when we get to merits we can probably explain
12 those.

13 For example, Mr. Hills, who we've heard from and
14 heard about, was one of the largest --

15 THE COURT: He's the plumber?

16 MR. RAITER: He's the plumber, yes, Ellingson's
17 Plumbing. He's one of the large users of Zurn Pex in the
18 state of Minnesota. Wouldn't be surprising, then, that he's
19 going to have more problems than anyone else.

20 There are potential reasons why certain plumbers
21 might become aware of this problem and become aware of the
22 warranty process and make more claims than others. There are
23 reasons that can explain this phenomenon.

24 We don't have any information about where they sold
25 the fittings in Minnesota. Talk about Minneapolis and

1 St. Paul. Do they have any evidence in the record that they
2 even sold any of those fittings here? There's not a piece of
3 record evidence before you that they sold one fitting in the
4 Twin Cities. So how can you sit here and say, well, gee, the
5 fact that we don't have many claims down here tells us that
6 the water must be fine. They had failures, big failure
7 problems where they did retrofit replumbing efforts in
8 Woodbury, Lakeville, Farmington, Rochester, Elk River, all
9 city systems, all problems that they paid for to fully repipe
10 or replumb homes. Again, it's anecdotal evidence.

11 The long soliloquy that Dr. Beavers gave me at the
12 end of that question was really interesting. He talks about
13 alternatives that were available. Bronze was available under
14 the same F1807 standard. Copper was available. Plastic was
15 available. Other manufacturers were selling plastic. Zurn
16 wasn't. And he talks about a risk assessment that you do when
17 you choose a material. Zurn didn't do one. Unfortunately,
18 when it finally did do one in the course of this litigation,
19 it got rid of the brass and went to the plastic.

20 THE COURT: Let me back you away from the
21 specifics here and look a little more broadly for a minute in
22 the last couple seconds of your argument.

23 MR. RAITER: Sure.

24 THE COURT: You know, we're probably never going to
25 hear from the Eighth Circuit as to whether I appropriately

1 certified Mooney or not because of the procedural posture of
2 the case, but why is this case more like Mooney than St. Jude?
3 I do think there isn't much in your brief devoted to St. Jude,
4 which clearly is the status of the Eighth Circuit law on
5 certification.

6 MR. RAITER: Sure. St. Jude involved a medical
7 monitoring claim, involved personal injury, very different
8 from the get-go. It involved good proof from the defense of
9 very different reasons for the decision to use that product.
10 The physicians for different reasons decided to use the
11 product differently. They had proof. Zurn didn't ask those
12 questions. They could have. The plumbers were the people who
13 make this purchasing decision by and large. In Minnesota
14 there's privity, so those decisions are imputed to our
15 consumers under warranty and other -- under our warranty
16 statutes, number one, and then also under the consumer
17 protection statutes. Even Group Health --

18 THE COURT: Doesn't that launch us, though, right
19 into the issue of comparative negligence and fault?

20 MR. RAITER: Negligence for the fact that --

21 THE COURT: Plumber's decision, why he made that
22 choice? Isn't that ultimately going to be an issue?

23 MR. RAITER: No, because we're talking about
24 material omissions that they admittedly never made. They
25 never provided this information to these plumbers. How could

1 they have known that these hadn't been tested? How could they
2 have known that this was highly susceptible to stress
3 corrosion cracking? How could they have known --

4 THE COURT: But there are cases where the plumber
5 did know and chose to go ahead.

6 MR. RAITER: No.

7 THE COURT: There aren't?

8 MR. RAITER: Absolutely not. No way.

9 THE COURT: All right.

10 MR. RAITER: They quote Mr. Hills and they say,
11 well, he continued to use them. I then in our reply brief --
12 it's in a footnote -- talk about when they went and actually
13 told him about the problem and told him to stop using it, and
14 the only reason they told him to stop using the plastic was --
15 or excuse me -- the brass was that they finally had plastic
16 available. One of their sales managers -- and this testimony
17 is in the record -- said that: We didn't tell anybody to stop
18 using brass until we had a plastic alternative.

19 THE COURT: Okay. I'll find that where, in which
20 depo?

21 MR. RAITER: I'll find it. If I didn't cite that
22 specifically, I will refer your Honor to that. I believe that
23 is from Mr. Rick Whitaker's deposition. But they did not tell
24 people to stop using these brass fittings until they had an
25 alternative available because they didn't want to lose market

1 share. That is in the record. And Mr. Hills in that -- that
2 testimony we have cited on reply. It's in a footnote in the
3 brief. So, no. These are material omissions. Materiality is
4 based on an objective standard and we get to put in evidence
5 that no reasonable plumber would have purchased these fittings
6 with this system had this information been conveyed to that
7 plumber. There will not be a comparative fault analysis on
8 that basis.

9 So, why isn't it like St. Jude. Medical monitoring
10 case, actually some proof in the record, not, well, gee, we
11 get to put some proof in. They never asked Mr. Hills, "If you
12 would have known that this brass was highly susceptible to
13 this problem, would you have used the fittings? If we would
14 have told you that we didn't test these fittings, would you
15 have used them?" You got to step back here and look at the
16 backdrop of this.

17 Flexible pipe plumbing systems started in this
18 country primarily with polybutylene, which was a disaster.
19 Zurn's predecessor company goes bankrupt because of those
20 systems. Plumbers -- and by the way, the fittings that failed
21 there were plastic fittings that they also hadn't tested and
22 those particular fittings failed when exposed to very low
23 levels of chlorine. Plumbers were gun-shy about plastic
24 fittings.

25 So these companies -- and there's actually record

1 evidence in this case. These companies didn't want to sell
2 plastic fittings again, so they just went to brass. They
3 figured, oh, brass is fine, but they didn't test it in this
4 application. They didn't say, "Gee, if we stress this brass,
5 how will it react?" So, if you step back, these plumbers were
6 very reluctant to go back to another flexible plumbing system,
7 and the testimony from the plumbers is it took some persuasion
8 for them to actually do so. Mr. Hills testified about that
9 and he had to become comfortable that this was going to be all
10 right and unfortunately it wasn't. By the way, when he
11 switched to bronze fittings, he's had no problems in the same
12 water in the same area that all of these Zurn fittings failed.
13 That too is in Mr. Hills' deposition. So if it's the water,
14 explain why the bronze does fine.

15 So, St. Jude. Again, I want to get back to this.
16 The record evidence was very good that there were variances in
17 what was conveyed -- what misrepresentations were provided,
18 not provided, what was relied upon, what was not relied upon.
19 You then have on top of it a very highly individualized damage
20 problem, because it's a personal injury case.

21 When you look at this case and you say what is it
22 that we need to prove, we need to prove that they omitted
23 certain things and that those things were a cause of the
24 decision to purchase. They still can have a contribution
25 claim. They can bring it elsewhere. They can ask for a

1 comparative fault finding on the verdict form if they want,
2 even with absent parties. That happens all the time. They
3 can present their defense, but the question becomes can we do
4 it in a uniform common way and we certainly can, because the
5 standard is objective. It's a reasonable consumer, a
6 reasonable plumber in this case.

7 THE COURT: All right.

8 MR. RAITER: Thank you.

9 THE COURT: We will break for lunch at this
10 juncture.

11 Mr. Connolly, can you estimate for me how long it
12 will take you to make your Daubert presentation?

13 MR. CONNOLLY: Just a bit over an hour, your Honor.

14 MR. O'NEAL: May I have one response on St. Jude?

15 THE COURT: Okay.

16 MR. O'NEAL: And that is, what is it that is said to
17 be omitted here? He said that they're highly susceptible.
18 Well, is it that or is it that it's a thousandth of one
19 percent, or is it that -- how would you characterize what
20 information is being omitted? It would vary from case to
21 case. And I do hope you read the Tom Hills deposition,
22 because he was told in September of 2003 by Carl Nicolia:
23 Looks like you've got a water issue. Don't use the brass.
24 Use the plastic. He says in his deposition that he installed
25 knowing he'd been having problems and he didn't tell people

1 about it.

2 THE COURT: All right.

3 What did you say, an hour?

4 MR. CONNOLLY: I said just over an hour, your Honor.

5 THE COURT: Just over an hour.

6 And, Mr. Raiter, am I going to hear from you on
7 those issues, or --

8 MR. RAITER: Yeah, you'll hear from me, but it
9 certainly won't be an hour.

10 THE COURT: All right. So I don't think we have to
11 economize too much on our lunch hour and still finish at 3, so
12 let's begin again at 1:30. Everybody agree we can do it then?

13 All right. We'll be in recess till 1:30.

14 (Lunch recess taken at 12:00 p.m.)

15 * * * * *

16 (1:28 p.m.)

17 IN OPEN COURT

18 THE COURT: I didn't realize I was jumping the gun
19 here, but we might as well get started a few minutes early.
20 Please be seated.

21 Are you set, or did you need --

22 MR. CONNOLLY: I am. I was just going to talk to
23 Mr. O'Neal about something, but it had no particular huge
24 significance. He would have disregarded it in any event,
25 so --

1 THE COURT: There you go.

2 MR. CONNOLLY: Ready to proceed, your Honor?

3 THE COURT: I am.

4 MR. CONNOLLY: Your Honor, my name is Dan Connolly.
5 I'm here to argue the motion to exclude the portions of the
6 testimony related to Drs. Blischke and Staehle. We're moving
7 to exclude that information essentially on a Daubert analysis.

8 And in the plaintiffs' briefs they argue that
9 Daubert doesn't apply at the certification phase. I think
10 they're basically wrong on this proposition, and I go back --
11 and I don't want to reiterate exactly what Mr. O'Neal talked
12 about today, but I go back to the Blades case, and in front of
13 you here is the particular language from Blades that we're
14 focusing on:

15 "We have stated that in ruling on class
16 certification, a court may be required to resolve disputes
17 concerning the factual setting of the case. This extends to
18 the resolution of expert disputes concerning the import of
19 evidence concerning the factual setting."

20 Your Honor is well familiar with that. That
21 particular inquiry requires not only a weighing of the
22 evidence, but a decision about whether or not the evidence
23 ought to come in fundamentally.

24 Further, the other case law that the plaintiffs
25 refer to is In re Visa Check, and your Honor is also familiar

1 with that. That's the former Second Circuit standard which
2 basically was all in, everything in, but that's the prior
3 dispensation, the prior way that things had proceeded. And in
4 fact, the Second Circuit in In re Initial Public Offering
5 specifically noted that: "[W]e also disavow the suggestion in
6 Visa Check that an expert's testimony may establish a
7 component of a Rule 23 requirement simply by being not fatally
8 flawed." That's exactly the language that the plaintiffs cite
9 to say that this Daubert hearing is not appropriate at this
10 particular time.

11 The Second Circuit in this decision In re IPO --
12 it's a lot easier than saying initial public offering -- also
13 commented that this was a general shift away, a major shift
14 away by the circuit courts, away from the all-in,
15 all-inclusive Visa Check standard, and then the Second Circuit
16 itself in that decision, In re IPO, cited the language from
17 Blades that I read at the opening of these remarks. All of
18 the other cases that the plaintiffs cite in opposing the
19 proposition that this kind of an expert evidentiary inquiry by
20 the Court is inappropriate either rely on In re Visa Check or
21 predate Blades. So, turning from that very -- that threshold
22 inquiry to this threshold inquiry, I'd like to talk about the
23 certification relevance.

24 This is really a motion focused on two numbers that
25 their experts cannot support.

1 The first is the 40 years as a mean time to failure.
2 Dr. Blischke used that in his initial report, later he said 50
3 or 60. It doesn't matter. I'll focus on it as a 40-year mean
4 time to failure, but it pervades the analysis that he
5 performed.

6 The second number is the 20 percent to use in
7 testing these fittings. That was used by Dr. Staehle. I'll
8 address them *seriatim*.

9 It's these two numbers that Plaintiffs claim
10 demonstrate that there's really a catastrophe in the field
11 despite the very low claim rate for these fittings that
12 Mr. O'Neal talked about this morning. This catastrophe is
13 critical to Plaintiffs in their contention that you should
14 certify a class of all Minnesota structures, that common
15 issues predominate and that a class action is the superior way
16 to litigate these claims. We believe your Honor should
17 disregard these numbers and the calculations and testimony
18 that are based upon them.

19 Okay. I'll turn to Dr. Blischke. I had a little
20 bit more, but we can proceed here. I'll try to honor my
21 little-over-an-hour time period.

22 Your Honor, although the plaintiffs spend a lot of
23 time in their briefing talking and pumping up Dr. Blischke's
24 qualifications, this motion doesn't really focus on those
25 qualifications. In essence, Dr. Blischke is a statistician.

1 Like all statisticians, he's subject to the problem of garbage
2 in, garbage out.

3 Dr. Blischke essentially testifies and in his report
4 he details that he used the Weibull analysis to model the
5 claims data in this case. Now, it's not important to know all
6 the specifics of the Weibull analysis, but essentially the
7 Weibull --

8 THE COURT: You're not going to make me do the math,
9 are you?

10 MR. CONNOLLY: No, I'm not going to make you do the
11 math. I couldn't do the math myself. But in essence, the
12 Weibull analysis depends on three factors that are put into
13 it: the number of units sold, the dates of installation, and
14 the dates of failure.

15 Now, when Dr. Blischke did his analysis, initial,
16 the first time, as Mr. O'Neal talked about this morning, using
17 the Weibull analysis that he is purporting to advance in this
18 case, he came up with a mean time to failure of 3500 years.
19 So here's Dr. Blischke on that topic.

20 (Excerpt from 11/11/09 videotape deposition of
21 Dr. Wallace Blischke played, 80:3-7)

22 MR. CONNOLLY: Now, here's a rough depiction.

23 If you take the Weibull analysis -- we'll see a
24 couple more graphs -- it results in a bell curve. And if you
25 have -- obviously, if you have the mean time to failure over

1 3500 years, the mean time, of course, is in the middle and
2 you'd have a rough distribution in front or behind them. As
3 we will hear and talk about in a few more minutes,
4 Dr. Blischke just assumes that this mean time is in 40 years,
5 so what you do is you dramatically increase the number of
6 failures that occur in the very short time period. It's
7 pretty straightforward, but it helps to see it graphically
8 depicted to get a concept here of what we're talking about.

9 Now, as Mr. O'Neal talked about this morning,
10 Dr. Blischke also concedes that typically mean time to failure
11 is a result of the Weibull analysis and not an input, and this
12 is the slide of Mr. Blischke on this topic. I know we heard
13 it this morning, but --

14 (Excerpt from 11/11/09 videotape deposition of
15 Dr. Wallace Blischke played, 77:13-78:5)

16 MR. CONNOLLY: And again, as Mr. O'Neal alluded to
17 earlier today, Dr. Blischke can't recall ever having assumed a
18 mean time to failure before performing the Weibull analysis.

19 (Excerpt from 11/11/09 videotape deposition of
20 Dr. Wallace Blischke played, 18:6-18:20)

21 MR. CONNOLLY: So, where did the 40-year mean time
22 to failure come from? Well, as Mr. Raiter alluded to earlier
23 today, it came from a couple of documents that he provided to
24 Dr. Blischke.

25 The first of these documents here is the 1999 PPI,

1 or Plastic Pipe Institute testing document, and here's the
2 particular passage that Dr. Blischke focused on. The
3 objective of the test was to test these particular fittings in
4 a reasonable lifetime to see whether they would fail. None of
5 them failed.

6 The other document is the 2002 Plastic Pipe
7 Institute testing document, again provided to Dr. Blischke by
8 Mr. Raiter, and again it tests these fittings over a 40-year
9 life service, and again none of them failed.

10 But as we will see, even though none of the fittings
11 failed in this 40-year time period that was tested,
12 Dr. Blischke assumed as a statistician that statistically,
13 one-half of all fittings would fail in about 40 years.

14 Now, here's Dr. Blischke admitting that he got these
15 particular documents from Mr. Raiter.

16 (Excerpt from 11/11/09 videotape deposition of
17 Dr. Wallace Blischke played, 124:25-126:19)

18 MR. CONNOLLY: But also, after reviewing these
19 documents, Dr. Blischke admits that neither one of them
20 anywhere refers to mean time to failure. Here he is on that
21 topic.

22 (Excerpt from 11/11/09 videotape deposition of
23 Dr. Wallace Blischke played, 120:18-121:21)

24 MR. CONNOLLY: Now, the only other source that
25 Dr. Blischke identified for his 40-year mean time to failure

1 assumption were some discussions he had with his own plumber.

2 (Excerpt from 11/11/09 videotape deposition of

3 Dr. Wallace Blischke played, 126:5-127:9)

4 MR. CONNOLLY: So, in short, Dr. Blischke also had
5 some discussions with his plumber about the expected life of
6 his -- of non-pex plumbing systems and thinks that might
7 support his 40-year mean time to failure for brass pex
8 fittings. And even though he based his mean time to failure
9 on those prior two documents that refer to reasonable life
10 testing and documents that were given to him by counsel, he
11 conceded in his deposition that reasonable life does not mean
12 the same as mean time to failure.

13 (Excerpt from 11/11/09 videotape deposition of

14 Dr. Wallace Blischke played, 128:1-22)

15 MR. CONNOLLY: That's a fairly straightforward
16 proposition, obviously. You can use reasonable life as a test
17 criteria and you can test for 40 years and have no failures as
18 happened here, and it's just wrong to say that because you
19 test for 40 years, that means that a statistician can assume
20 that one-half of all of the failures in the marketplace are
21 going to fail in 40 years. It doesn't make sense.

22 But beyond the theoretical, beyond the definitional
23 here, your Honor, we know that Dr. Blischke's 40-year mean
24 time to failure assumption is just wrong for several reasons.

25 First, it's not supported by the actual data. As I

1 said earlier, we're going to show you one more of these bell
2 curves. This is the bell curve that our expert drew to
3 reflect what Minnesota claims would look like under
4 Dr. Blischke's assumption, using his formula how it would
5 look. This was -- and then that little area, the blue area
6 there is the area that I'm now going to expand.

7 THE COURT: That's 40 years; is that what that is?

8 MR. CONNOLLY: No, this is the current time
9 period --

10 THE COURT: All right.

11 MR. CONNOLLY: -- okay? And you see -- there's the
12 blue data that Mr. O'Neal referred to earlier. And as you can
13 see, your Honor, the red lines, the red projections by
14 Dr. Blischke, don't anywhere match up. If you look at the
15 2007 data, it's about a seventh of the height. If you look at
16 the 2008, it's about a twentieth. By 2009 he is projecting
17 that you'd have as many failures in Minnesota as we have had
18 in the entire country.

19 Now, Mr. O'Neal said earlier that our expert said
20 that he would have a big long map which would show the red
21 data. If you took this data as reflected on an eight and a
22 half by 11 as we have here on this chart and you expanded the
23 red lines to be Dr. Blischke's assumptions, it would be longer
24 than 20 feet. So it gives you the sense of the magnitude of
25 the problem that Dr. Blischke's assumptions don't take into

1 account for.

2 Now, the plaintiffs say that this is all explained
3 or all addressed by underreporting. And as detailed in our
4 class certification brief and as you heard Mr. Raiter say this
5 morning, they have done everything they could to try to locate
6 and identify claims --

7 THE COURT: Beat the bushes, yes.

8 MR. CONNOLLY: They beat the bushes. That was in
9 fact my word that I used and in fact your Honor ordered them
10 to produce them. And even if you incorporate those, it
11 doesn't anywhere come close to Dr. Blischke's projections. In
12 fact, if you multiply them by a factor of ten, it doesn't come
13 anywhere close. It's just wildly speculative, not consistent
14 with the data.

15 And there's a second reason why Dr. Blischke's model
16 is undermined, his hypothetical mean time to failure, and that
17 is, Dr. Blischke's model assumes that claims and failures
18 would be randomly distributed.

19 (Excerpt from 11/11/09 videotape deposition of
20 Dr. Wallace Blischke played, 50:6-50:18)

21 MR. CONNOLLY: But we know, your Honor, that the
22 distribution is not uniform, not random around the country.

23 Without belaboring this map, this is the same map
24 that Dr. -- that Mr. O'Neal presented to you earlier today,
25 and as you can see, there's a large number of claims in

1 Minnesota --

2 THE COURT: The epicenter, as Mr. O'Neal told me.

3 MR. CONNOLLY: The epicenter, your Honor, yes,
4 indeed. And in fact, the red areas reflect the sales volume.
5 As you can see, there are a great many more claims in
6 Minnesota and in areas of Minnesota than there are in the
7 country proportioned to the sales.

8 And the next slide here, of course, is Minnesota,
9 and this reflects -- the shading here reflects reports, claim
10 numbers by zip code, and that data was shared with Plaintiffs'
11 counsel. They could have provided it to Dr. Blischke. As you
12 heard, they didn't, and so what you have here are nonrandom
13 distributions of these claims that undermine Dr. Blischke's
14 analysis.

15 Third and finally, your Honor, remember, one of the
16 bases of Dr. Blischke's 40-year mean time to failure analysis
17 was that he talked to his plumber about his non-pex system.
18 If that's a basis for a 40-year mean time to failure, then
19 every system, not just pex, not just Zurn, it means every
20 other system has a 40-year mean time to failure, every system
21 has this catastrophe out there in the marketplace. This is
22 just nonsense.

23 So, under Daubert we believe, your Honor, that
24 Dr. Blischke's analysis should be excluded relative to the
25 Weibull and mean time to failure. It's an assumption based on

1 suggested information and anecdotal evidence that demonstrates
2 nothing. He arrived at a means, at a number, and then he
3 acted surprised that he got there.

4 The other issue that is raised in our briefing is,
5 we don't believe that Dr. Blischke's testimony at all supports
6 his claims relative to the deficiencies of Zurn's warranty and
7 claims rate information and warranty exclusion rates. I won't
8 go over that. That is in our briefing. I'd like now to turn
9 -- and so we ask your Honor to exclude from consideration both
10 of those areas. Now I'd like to turn to Dr. Staehle.

11 Dr. Staehle, as you've heard this morning a little
12 bit, has done a lot of work in the area of stress corrosion
13 cracking and for purposes of this motion we don't challenge
14 his credentials. What we are challenging here is his use of
15 the 20 percent strain calculations. The problem is really
16 much the same as what happened with Dr. Blischke's testimony.

17 First of all -- and this is highlighted in the first
18 two boxes here -- he did two types of testing.

19 The first type of testing that Dr. Staehle did was
20 what's called bent beam testing. We'll get into this a little
21 bit. I'm just trying to let you know where I'm going with
22 this. The other type of testing he did was U-bend. His bent
23 beam testing assumed a one to two percent strain. You'll hear
24 him testify it was based upon his long experience in the area
25 of stress corrosion cracking and it produced no stress

1 corrosion cracking. His U-bend test, the second one that he
2 did, multiplies the assumed strain by ten to 20 times and
3 leads to stress corrosion cracking.

4 Now, we asked Dr. Staehle what was the U-bend test
5 supposed to do, what was the bent beam test supposed to do,
6 and you'll hear him testify to this. It's intended to
7 replicate the crimp stress. And in the deposition, because we
8 had difficulty figuring out how he came to the 20 percent
9 calculations, we asked him what the calculations were, and he
10 said this is the methodology that he used to get to the 20
11 percent strain, but as you'll see, it doesn't work. He can't
12 duplicate the means by which he supports the 20 percent strain
13 number. And then you'll see in his testimony that he never
14 measured that strain valuation, never objectively measured it.
15 And finally, when confronted with evidence, the real
16 measurements, he just said they're wrong, concluded, because
17 they didn't show what he thought it should show.

18 So, let's go through this. This is the Venn
19 diagram. You've seen it. All I want to point out relative to
20 this particular slide is that the focus of this issue is the
21 strain, the stress or strain part. For stress corrosion
22 cracking, as you've heard earlier today, you need stress, but
23 of the pulling apart variety, the tensile stress.

24 Now, this is Dr. Staehle on the first test, on the
25 bent beam test and how he came up with the one to two percent

1 calculation used in that test.

2 (Excerpt from 10/27/09 videotape deposition of

3 Roger Staehle played, 108:5-109:3)

4 MR. CONNOLLY: They did this testing, and as
5 Dr. Staehle confirmed in his deposition, there was no stress
6 corrosion cracking.

7 (Excerpt from 10/27/09 videotape deposition of

8 Roger Staehle played, 110:5-110:19)

9 MR. CONNOLLY: And this fact is confirmed in his
10 report where it says they did the initial studies with the one
11 to two percent stress and they didn't have any SCC.

12 Now, this diagram here, this shows the actual bent
13 beam -- the apparatus, and on the left is a diagram to try to
14 show you what's happening. They have a center point that
15 allows you to provide a small amount of deflection to the
16 fitting. And actually, as we'll talk about a little bit later
17 on, the samples that Dr. Staehle used were actual pieces of
18 fitting because he thought that was the proper way of
19 performing this test, and this is Dr. Staehle's testimony
20 regarding the U-bend test.

21 (Excerpt from 10/27/09 videotape deposition of

22 Roger Staehle played, 155:3-157:7)

23 MR. CONNOLLY: So as you heard him explain there,
24 they bent it backwards and he says that this --

25 THE COURT: I don't think he agreed with the

1 backwards, but they bent into a U, yeah.

2 MR. CONNOLLY: Bent it into a U. You're right, he
3 didn't agree with backwards, but we'll get to that point too.
4 And he agrees that you can calculate this strain that he based
5 it on and that it's intended to replicate the crimping
6 process.

7 Now, this is trying to depict side by side the
8 difference in the processes here. On the left you see the
9 bent beam apparatus with the small amount of strain. On the
10 right what you see there is his drawing that you just saw him
11 make, Staehle Deposition Exhibit 9, and then there is a
12 photograph that we just got in there, supplemental affidavit,
13 and that's a photograph of an actual test specimen.

14 And as your Honor can see, they bent this specimen
15 against the barrel, against the way that the barrel of the
16 fitting is normally located. The water goes through the
17 indentation there. So a crimp would typically press down on
18 the fitting in the direction of the barrel. They bent this
19 backwards against the barrel.

20 Okay. Whether he agreed with me or not, that's what
21 they provided to us, whether they agreed with Mr. O'Neal or
22 not.

23 So the question then becomes where did this 20
24 percent strain number come from. Now, we believe -- we
25 couldn't get these numbers to work. We looked through the

1 data, we asked him about it at his deposition, but here is an
2 e-mail that he drafted to the people who did the testing for
3 him on April 17 of 2008.

4 You'll see there he says he wants to direct -- he
5 says here that the objective is to replicate the effective
6 strain, not the one to two percent as you see in the first
7 part, "but, rather, the effective strain is related to half
8 the difference between the diameters divided by the distance
9 over which the strain take place."

10 That's the formula that he describes on April 17,
11 2008. So then he just plugs in the dimensions of the fitting,
12 and then you see bottom here he says based upon those
13 dimensions, "a local plastic strain on the inside surface of
14 the tube wall of the fitting between five and 20 percent is
15 reasonable," and so he tests it for 20 percent.

16 Now, we couldn't understand where this 20 percent
17 figure came from and we couldn't understand his formula. So
18 during the deposition, Mr. O'Neal asked him what was the
19 method he used to come up with his 20 percent calculation, and
20 this is the drawing that Dr. Staehle provided and we discussed
21 that to some degree in the briefing. He didn't use -- we
22 don't need to know a lot about the formula in the April 17,
23 2008 e-mail because he describes a different method of getting
24 there. He describes a method using the Pythagorean theorem.

25 Okay. And the important bit of information here is,

1 no matter if you put the actual fitting dimensions into this
2 Pythagorean theorem that he described, you don't get the 20
3 percent.

4 Now, during the deposition, Mr. O'Neal asked him:
5 Okay. Assuming this is the formula, tell me how you got to 20
6 percent, and here's Dr. Staehle.

7 (Excerpt from 10/27/09 videotape deposition of
8 Roger Staehle played, 169:8-170:11)

9 MR. CONNOLLY: As you saw there, your Honor,
10 Dr. Staehle attempted to run the calculations, they don't
11 work, and then he wouldn't let them be marked into evidence.
12 He said they're wrong and he tossed them away. In fact, he
13 said it's not evidence, but he promises to give us the
14 calculations after the deposition is over.

15 Nonetheless, a few minutes later in the same
16 deposition he tried again. This time he's unable to get
17 there. He's only able to get to five percent.

18 (Excerpt from 10/27/09 videotape deposition of
19 Roger Staehle played, 171:12-172:3)

20 MR. CONNOLLY: So again you heard that he couldn't
21 get beyond five percent and he wants to go to his original
22 calculations and get them, and Mr. O'Neal pressed and pressed
23 to try to get these calculations provided to us and it took
24 more than three months, and finally on February 1 of this year
25 we were provided with a supplemental disclosure.

1 When it arrived, it didn't contain any new
2 information. It was about a five-page document. It's
3 attached to our materials. It did, however, confirm that the
4 20 percent U-bend test was supposed to replicate the strain in
5 the crimp and it also confirmed the method in another page
6 where he confirms the Pythagorean theorem. As you see here,
7 the effort was to estimate the range of plastic strain caused
8 by the application of the crimp, and number 6, utilize these
9 results for U-bend SCC testing.

10 But instead of providing the calculations that he
11 repeatedly promised to provide us, he provided us with a chart
12 or graph, and on this graph what is reflected are the fitting
13 dimensions as compared to the strain, but nowhere on that
14 graph does he actually provide the fitting dimensions or the
15 deflection that he's measuring. In fact, what you have to do
16 is, you have to extend the graph by a factor of three or four
17 to get the information, the actual measured information on the
18 graph.

19 And as your Honor can see on the far left-hand side
20 of this particular graph is a reflection of the information
21 contained in the graph that Dr. Staehle provided to us. The
22 blue line across approximately the midway point is the failure
23 of the material in air. The 20 percent strain is right there
24 just below it, the dot that's pointing.

25 Now, the actual measurements that are confirmed when

1 you look at these fittings is all the way over there on the
2 right where it says: "2 wall thickness transition (per
3 Staehle deposition)." You heard him talk about two wall
4 thickness. And on the very far right, you see that is the
5 strain that's predicted by the FEA. That's the computer
6 modeling that I'll get to in a moment, but that's where the
7 actual strain numbers really are.

8 So, the other problem that Dr. Staehle has relative
9 to his 20 percent strain calculation that he used in the
10 U-bend testing is, he testified, he admitted he never tried to
11 measure it.

12 One of the means that you can measure this strain is
13 by using what's called the coordinate measuring machine. You
14 use the measurements and you precisely plot these
15 measurements. Our experts did that. You'll see a little bit
16 more information about that in a moment. Dr. Staehle here
17 confirms that he didn't.

18 (Excerpt from 10/27/09 videotape deposition of
19 Roger Staehle played, 134:24-135:9)

20 MR. CONNOLLY: So here you heard him say that he
21 didn't do that.

22 Now, here is a depiction of the fitting. On the
23 left is a fitting and on the right are the measurements. And
24 I don't want to get into a lot of detail about this, but what
25 I want to point out here is -- it's really fairly simple.

1 On the left-hand side you see the green mark. The
2 green line reflects the deflection that occurs in the crimping
3 process. That's the measurement that you get if you do the
4 CMM that Dr. Staehle says he didn't do.

5 THE COURT: Is the bigger graph the same as the
6 smaller one? Is that just --

7 MR. CONNOLLY: Yes, your Honor. It's just a blowup
8 there of the side.

9 THE COURT: I just want to make sure.

10 MR. CONNOLLY: Oh. Thank you. So the green is the
11 trace from the measurement that you get with the CMM. The
12 blue is the trace or the lines that you get for the same
13 deflection with the computer model, the FEA.

14 The red is the trace, the line, the deflection that
15 you would need to have to get the 20 percent strain number
16 that Dr. Staehle testifies occurs and which he used in his
17 U-bend testing. You would not only need that amount of
18 deflection, it would not only have to be that far down, it
19 would have to be that steep. In other words, it has to be
20 really that boxy to get the 20 percent number that he
21 testified to.

22 Now, the next -- this is -- the next form of
23 measurement that we employed that Dr. Staehle seems not to
24 have done is what's called finite element analysis. This is
25 computer modeling.

1 Now, this is a first computer simulation taking all
2 of the detailed measurement points and showing what the
3 crimping process looks like. And the outside, the
4 reddish-hued thing, is the crimp, in between it, the gray, is
5 the plastic piping, and the brassy-colored thing is not
6 surprisingly the brass fitting. So this is the computer
7 modeling of what occurs as you press down on it. This
8 particular modeling doesn't show the applicable stresses,
9 okay? That's the first one.

10 This is the same document, but this time -- or the
11 same information, and this time it's calibrated to show the
12 stresses.

13 On the right-hand side of this particular diagram
14 you'll see the stresses reflected in PSI, or pounds per square
15 inch, and it goes from a negative, which reflects a
16 compression, to the red area, which reflects a tensile stress,
17 which is the tensile stress we're looking for.

18 And on the left-hand side you'll see those same
19 strains reflected in percent for brass. And as you'll see, to
20 get 20 percent strain that Dr. Staehle is talking about, you'd
21 have to be well beyond the green, a factor of many times above
22 this diagram, but when you run this computer simulation, you
23 get nowhere in the range, even into the red area.

24 Now, I'll play this. And this particular type of
25 FEA modeling was done both by our people and in fact by Zurn a

1 long time ago. And you see as it plays through here, the blue
2 area is the compression area and the green is the tensile
3 stress area. As you press the piping in between the barbs,
4 it'll have some effect to push the barbs apart, but it nowhere
5 gets close to the red area, which is by itself a factor of
6 many, many times below what you'd need to satisfy or support
7 these 20 percent strain numbers that Dr. Staehle employs.

8 Now, we asked Dr. Staehle about the FEA analysis,
9 the finite element analysis, and you'll hear him and he
10 essentially doesn't contest the information. He just contests
11 the result. Oh, sorry. I skipped one slide.

12 This is Mr. Stevenson's affidavit in which he
13 describes -- he verifies the numbers that I just showed you,
14 and he says that the .04 strain reflected in the fitting is a
15 factor of 200 times less than the 20 percent strain that
16 Dr. Staehle is using in his U-bend tests, and that's attached
17 to our motion paper. In trying to move fast I skipped another
18 slide.

19 Here's Dr. Staehle saying that he didn't have any
20 problem with the FEA input. He just didn't like their result.

21 (Excerpt from 10/27/09 videotape deposition of

22 Roger Staehle played, 179:23-180:23)

23 MR. CONNOLLY: Again we have a problem with the
24 result-oriented analysis here, your Honor.

25 Now, in their papers for the very first time in

1 opposition to our motion to exclude this information,
2 Plaintiffs contend that, oh, this U-bend testing wasn't
3 intended to replicate the crimp. It was really accelerated
4 testing. In essence they do a U-turn on the purpose of the
5 U-bend tests. But this new claim is really nothing more than
6 a last-ditch, desperate effort to try to salvage the 20
7 percent strain testing that they've done, but it's not
8 accurate. As I'll show you here in a moment, it's not
9 contained in Dr. Staehle's reports, it's not described in his
10 reports.

11 The second reason is, it's not contained in the
12 instructions that he provided to the testing laboratory. It's
13 not what he said in his deposition. You've heard him a number
14 of times here allude to the fact that the stress that was
15 replicated in the U-bend testing was the crimp stress.

16 And last -- and this is a subtle point -- if it's
17 true, it would undermine some of the very purposes that he had
18 for this testing. I say here it would double-count the stress
19 in the test specimens.

20 The point here is -- and we'll get to it
21 momentarily, but I just want to highlight what I'm talking
22 about here -- Dr. Staehle made a big deal out of using actual
23 pieces of fitting in his testing so that he could directly
24 replicate the surface stress and the residual stress that are
25 in actual fittings, but if you now are performing accelerated

1 testing in which you're trying to replicate those same
2 stresses, you're double-counting them. He was critical of our
3 people for doing testing not on the fittings but on bar stock,
4 but that's exactly why you do it. You don't want to
5 double-count. We'll get to that point, but I just want to
6 highlight those are the four points that I'm going to get to.

7 So, first, here are Dr. Staehle's instructions. We
8 first highlighted a different part of that to show how he came
9 up with the calculations. Here he is saying to his own
10 people, clearly, that this 20 percent U-turn -- sorry --
11 U-bend testing is not intended to be accelerated testing, but
12 "The 20 percent plastic strain should ... closely
13 approximate[] the condition of stressing in the fitting due to
14 the crimp."

15 Now, the second thing is -- this is their
16 supplemental disclosure. As I pointed out before, again, he
17 understood the instruction. Mr. O'Neal wanted the
18 calculations for the 20 percent. He said he has to estimate
19 the range of strain caused by application of crimp, utilize
20 the results for the SCC testing. He doesn't talk about
21 accelerated testing here.

22 And finally here that you've heard him talk about a
23 number of times, that he wanted -- the whole point of this
24 testing was to replicate the crimp stress, to reproduce the
25 crimp stress, and here's the last bit of Dr. Staehle's

1 testimony that I'll offer. Here again you'll hear him say
2 that the point of this process was to reproduce what was
3 happening and replicate the stress.

4 (Excerpt from 10/27/09 videotape deposition of
5 Roger Staehle played, 135:10-136:7)

6 MR. CONNOLLY: So as he said, he wanted to reproduce
7 what's happening and have some correctness to it.

8 And I misspoke. I've got one last video of him.
9 All right.

10 Here's Dr. Staehle's affidavit in which he now for
11 the first time claims that this U-bend testing is really
12 considered accelerated testing. As you see, he says it's "an
13 'accelerated test' since the material is highly stressed at
14 the apex of the 'U.' The high stresses can account for a
15 variety of contributions to stress, such as applied stress" --
16 that's the crimp -- "surface abuse, surface defects, and
17 residual stresses."

18 As I talked about earlier today, those particular
19 aspects of the stress, the surface abuse, the surface defects
20 and the residual stresses, were already factored into this
21 testing because he's using actual pieces of fitting. And you
22 don't have to believe me for that proposition. Just listen to
23 Dr. Staehle.

24 (Excerpt from 10/27/09 videotape deposition of
25 Roger Staehle played, 209:13- 210:8)

1 MR. CONNOLLY: So you heard him say there it's a
2 superior method because it's the real case method, and you
3 defeat this purpose, this real case purpose, if you
4 double-counted these. And in fact, he himself in his own
5 affidavit -- I mean, in his rebuttal report -- was critical of
6 ESI for using accelerated tests, because he said -- Staehle's
7 critical of accelerated testing because he said: "It is well
8 known that accelerated tests are often not applicable for
9 identifying residual stress." So one of the very factors that
10 he says he now is trying to identify with these U-bend tests
11 he says is well known that it's not particularly applicable.
12 And you'd think if he was taking others to task for misreading
13 accelerated testing, he would explain why it was properly
14 used, why it was applicable to the testing he was performing
15 if that's really what he intended. It's not as if Dr. Staehle
16 was exactly concise. That binder there is his report. You
17 have a copy. It's hundreds of pages long. His
18 supplemental -- his rebuttal report was 20-plus pages long,
19 his supplemental disclosure was another five pages long, and
20 his recent affidavit was another -- they're all single-spaced.
21 So had he wanted to make this point before this affidavit, he
22 could have done so and he never did.

23 So, in concluding, we believe, your Honor, that the
24 20 percent strain calculations should be excluded. As noted,
25 the 20 percent was intended to replicate crimping. He can't

1 duplicate it. He hasn't been able to duplicate the 20 percent
2 strain calculations he used in his U-bend test. He never
3 measured that stress. And finally when confronted with
4 evidence that contradicts the 20 percent he used in his
5 analysis, he just rejects it as being wrong without any
6 explanation.

7 So as I said at the outset, your Honor, this motion
8 is really focused on two numbers that their experts can't
9 support, the 40-year mean time to failure from Dr. Blischke
10 and the 20 percent crimp strain from Dr. Staehle. Despite the
11 very low claim rates of these fittings, Plaintiffs argue that
12 these two experts on these two particular numbers support the
13 fact that there's a catastrophe out there waiting to explode
14 upon this Court and the world. They argue that is critical to
15 their showing that common issues predominate, that a class
16 action is a superior way of litigating this case. We believe
17 your Honor should disregard them. We agree with Dr. Staehle
18 in crumpling up those calculations and throwing them away and
19 commenting this is not evidence. It's not evidence, your
20 Honor. It's speculation.

21 Thank you.

22 THE COURT: All right. Thank you, Mr. Connolly.
23 You did a good job of beating your time estimate.

24 Let's see. How long are you guessing you're going
25 to go, Mr. Raiter?

1 MR. RAITER: Just 30 minutes.

2 THE COURT: Okay. Let's take a five-minute break
3 then.

4 (Recess taken at 2:22 p.m.)

5 * * * * *

6 (2:30 p.m.)

7 IN OPEN COURT

8 THE COURT: All right. Please be seated.

9 Mr. Raiter, we'll hear from you with regard to the
10 Daubert issues.

11 MR. RAITER: Thank you, your Honor. I am going to
12 take these in reverse order. We'll start with Dr. Staehle.

13 THE COURT: Staehle first. Okay.

14 MR. RAITER: The case law that we've cited we
15 believe still shows that the standard that you apply here at
16 this stage when you're not talking about whether you admit
17 this in front of a jury or not is different. That is
18 magnified, of course, where we're not even to the merits stage
19 of the case yet and we are here talking about class
20 certification and what weight you should accord these
21 opinions. You, of course, are able to understand and walk
22 through the analysis of what weight should be accorded to
23 expert testimony perhaps much better than a jury and that's
24 why the standard is different.

25 So whatever the case law says in this district,

1 including the Mehl case that we cited up from the Northern
2 District of -- excuse me -- from the North Dakota District
3 Court, we believe that you're going to apply a standard that
4 is different than the trial standard. But putting that aside,
5 I want to talk about Dr. Staehle.

6 Much of what Mr. Connolly just put in front of us,
7 these graphics and depictions, are things that have never been
8 produced to us before, number one, and they appear to be
9 driven by expert analysis, but there's no affidavit linking
10 anything up. The affidavit that they've submitted for this
11 motion is an affidavit of Dr. Stevenson. It doesn't say these
12 things, it doesn't do what his visuals do, but that's fine.
13 We'll still talk about the motion, because it's actually
14 flawed for a number of reasons and unfortunately, it's really
15 evidence of Zurn's continued misunderstanding of stress
16 corrosion cracking and how you study it.

17 All of this testing that we're talking about here
18 today is testing that Zurn should have done in product
19 development. It's testing Zurn should have done when it
20 decided to use this brass. It's testing Zurn should have done
21 when it decided to put a 25-year warranty on this product that
22 assumed responsibility for consequential damages. What is
23 interesting about this, of course, is that this is testing
24 that it could have done. For whatever reason it chose not to
25 and that's why we're here. So, we in fact have done much more

1 testing that Zurn ever even dreamt of when it decided to put
2 this product onto the market and sell 260 million of them and
3 only after the fact come back and decide whether it should do
4 some testing to investigate whether they might be susceptible
5 to this process. So, let's talk about what they challenge.

6 They do not challenge Dr. Staehle's methodology.
7 Dr. Stevenson's affidavit is very clear. He challenges an
8 input. The case law we have cited is even more clear. An
9 input in an expert's calculations or assumptions made or
10 values chosen by an expert are the subject of
11 cross-examination. They are not the subject of exclusion.
12 Mr. Connolly does not even mention that case law, he doesn't
13 recognize it. That's because it is fatal to their motion in
14 and of itself.

15 They don't argue that U-bend testing for stress
16 corrosion cracking is an inaccepted or unaccepted methodology,
17 because they can't. It's an ASTM standard.

18 They don't argue that Dr. Staehle's calculation that
19 we did provide in the supplemental submission to them is an
20 inappropriate methodology for estimating strain.

21 Dr. Stevenson doesn't say that. What he says is that in order
22 to get to 20 percent, you have to assume certain things about
23 the geometry of the displacement of the diameter of the
24 fitting, and he says: I just think that those assumptions are
25 without basis. So we have two experts who disagree about

1 whether this assumption used to make an estimate used for ASTM
2 standard testing, which is in and of itself right on the face
3 of the document an accelerated test, is simply a matter of
4 weight. It's not a matter of exclusion. Can't be any more
5 clearer than that. But let's back up and let's look at what
6 Dr. Staehle was doing.

7 Dr. Staehle clearly in the testimony that he gave,
8 in the documents that they quote, which are all in the record,
9 says: I am estimating strain. I'm estimating the amount of
10 strain caused by the crimp. Now, this April 2008 e-mail that
11 Mr. Connolly highlights part of, he doesn't highlight the
12 other part that said five to 20 percent strain. He ignores
13 that part. He ignores the testimony of Dr. Staehle where he
14 says: I estimated ten to 20 percent strain at page 125 of his
15 October 27, 2009 deposition.

16 Now --

17 THE COURT: Tell me again. That was -- he said ten
18 to 20 at that time?

19 MR. RAITER: Ten to 20 was his estimate. You can
20 use the calculation that we provided after his deposition to
21 run this from zero percent to 20-plus percent depending on the
22 geometry of your inputs. It's a strain estimate calculation
23 that again Dr. Stevenson and Zurn don't contend is wrong,
24 doesn't -- they don't contend that it's inappropriate to use
25 it. They just say, well, in order to get to 20 percent you

1 have to use an input that we don't agree with. But he says:
2 I was looking at ten to 20 percent. He says five to 20
3 percent in the e-mail that they reference. This is not
4 precise science. We're not trying to exactly tell you or tell
5 anyone what the exact amount of stress is caused by the crimp
6 process. He was trying to actually compare the water
7 environments in which these fittings were placed and that is
8 important. Why? Because we know these fittings crack in
9 water. It happens in the field. We know that. We know that
10 the crimp stress alone, whatever it is, one percent, zero
11 percent, 20 percent, causes stress corrosion cracking in these
12 fittings. How do we know that? We talked about it earlier
13 today, the 2004 testing that they did. So whatever the stress
14 is, however you want to calculate it, it cracks the brass.

15 Okay. We know that. We know what the literature
16 says. So what's Dr. Staehle doing? He's saying, well, let's
17 look at different water chemistries to see whether they have
18 an impact on the nature of the cracking. That's what the
19 U-bend testing was intended to do.

20 As you see from his report, this is not the front
21 centerpiece of his report. It's at the very back of his
22 report. And in fact, his results aren't even reported, but
23 they're so afraid of this result -- and they should be --
24 they're so afraid of the result, because what it shows when we
25 actually get to merits and we present what results were here

1 is that this stuff cracks all across the board in different
2 kinds of water. So, he wasn't trying to figure out what is
3 the precise stress needed to cause the cracking. That's never
4 been his intention here. The intention has been to analyze
5 the effects of water chemistry in a reasonable amount of time.

6 The bent beam testing that he started did not
7 produce appreciable or even -- did not produce cracking,
8 stress corrosion cracking, in 30 days. Not surprising given
9 the phenomenon, given what we talked about earlier before.
10 There's an incubation period, then it starts, and it starts
11 very slowly and then it propogates.

12 So, in the time frame set by the Court for this case
13 and for this phase of discovery, we needed to study some
14 things, so we used accelerated testing. That's what the
15 standard says. And they're in here talking about, well, you
16 used too much strain. You used an accelerated test and, boy,
17 those results are wrong. You should not consider them one
18 bit. Let's see what Dr. Stevenson said about the testing that
19 they performed.

20 Dr. Stevenson, page 53 of his report. It's the ESI
21 report. "As stated previously, this is a highly aggressive
22 test in which the stresses imparted on the sample are
23 continuously increasing and will continue to increase until
24 failure. That was their slow strain rate testing that pulls
25 it all the way to ductile failure, pulls it well past

1 Dr. Staehle's 20 percent.

2 So, it's mind boggling to me, quite frankly, that
3 we're sitting here having a dispute about too much stress used
4 in stress corrosion cracking testing when the very test
5 methodology they employed imparted more stress on the brass
6 than the test methodology we employed. And if ours are bad,
7 then theirs are bad, and we don't claim theirs are bad,
8 because it's an accepted methodology. It's an ASTM standard.
9 Even the slow strain rate testing is an accepted methodology
10 for doing certain things, just as the U-bend test methodology
11 is.

12 I asked Dr. Beavers at deposition whether U-bend
13 testing was accepted and he said yes. It's in some of his
14 papers. And we quoted that in our reply brief, that U-bend
15 testing is of course used in stress corrosion cracking
16 testing.

17 Now, the idea that somehow these test results are
18 unreliable because they are aggressive, because they are
19 accelerated, that they can't be applied to what's actually
20 happening in the field, is expressly rejected by Dr. Beavers
21 again. At his deposition, page 158, I asked Dr. Beavers about
22 a paper that he had written about slow strain rate testing,
23 and the paper was talking about slow strain rate test results
24 that indicated cracking where you had not yet seen failures in
25 the field. So you do an analysis of the material and you see

1 some cracking in the lab with an accelerated test, but you
2 don't yet see it in the field for some reason. So I ask him
3 and I actually quote from his paper: "The fact that only the
4 SSR test results indicated cracking suggest that the field
5 conditions may be somewhat less aggressive than those used in
6 the laboratory." Not surprising. Here's what he says. This
7 is his quote: "Nevertheless, these results suggest that a
8 problem may exist in the field."

9 So you use the accelerated testing to look down the
10 path and try to figure out what's going to happen in the
11 field. It's their own guy talking about it. It's exactly
12 what Dr. Staehle did.

13 Now, it turns out the actual strain used in the
14 specimens -- and we can get there at some point because we
15 have not yet -- we've not yet provided this information
16 because we hadn't actually calculated it or needed to
17 calculate it, but it turns out the actual strain used in
18 specimens was 13 to about 17 percent in most of the fittings.
19 So they're not even using 20 percent, but they'd be here
20 arguing this anyway if it was 13 percent, so I'm going to put
21 that aside.

22 But the point is, the U-bend test in the standard
23 itself says it has a range between zero and the maximum amount
24 of stress imparted at the apex of the bend, so the fitting or
25 the specimen that you're using has zero strain in it. That's

1 what the ASTM standard says on its face. You have a wide
2 range of stress within the specimen. So how is it that by
3 using an upper bound of 20 percent that Dr. Staehle is able to
4 calculate using methodology that they don't challenge, how is
5 using that as an upper bound in a naturally accelerated test
6 somehow unreliable and subject to exclusion? There's no basis
7 for it whatsoever.

8 Now, this video of the deposition where Mr. O'Neal
9 asked him to actually perform a calculation that he had done
10 18 months earlier that was not laid out in his report, that
11 was not in an appendix to his report, is a great gotcha
12 moment, that he couldn't do it. I knew they were going to
13 come here and actually play this. It's funny that they did to
14 me. But it turns out, of course, when he gives them the basis
15 and the analysis they don't dispute it. They just say: Well,
16 gotcha. And our guy, who's written two papers on stress
17 corrosion cracking, graduates from high school in 1994, has
18 never even spoken on the topic of stress corrosion cracking,
19 disagrees with Dr. Staehle's input, that is not a matter of
20 exclusion. It is a matter of weight. You can give it
21 whatever weight you wish. When you look at Dr. Staehle's
22 report, you will see that this U-bend testing is not the
23 linchpin of his opinions, not even close.

24 Now, since we were talking about strain, we should
25 talk about it and we should talk about the FEA analysis which

1 in and of itself is probably subject to exclusion based on the
2 Coffey case that we've cited, but that's fine. We can talk
3 about that for a minute. This is --

4 THE COURT: Let's see. We don't have the right
5 camera on here.

6 MR. RAITER: This is one of those same diagrams that
7 was part of the earlier PowerPoint that's part of
8 Dr. Staehle's report, Figure 7.13. This is a 1994 study,
9 talks about the range of zinc in alpha beta brass, and on the
10 left-hand side you'll see stress as percent of yield strength
11 and then breaking time and hours underneath; in other words,
12 what stress do you need in order to cause or initiate stress
13 corrosion cracking in these brasses. Okay. And we see that
14 this pink range runs from just above 40 percent down to
15 somewhere around ten percent, okay?

16 Now, the FEA testing that they did -- and this is
17 also in our papers, in our reply in particular -- and some of
18 the yield strength testing that Zurn did here said that the
19 yield strength of this material was around 44,000 PSI, all
20 right?

21 So, the other FEA testing that they did, again,
22 computer simulation, was that the crimp application alone was
23 in the neighborhood of 12,000 PSI, well above 20 percent of
24 yield, actually 27 percent of yield in particular. So before
25 you factor in residual stress which all of the experts agree

1 can itself approach yield -- so if your yield is 44,000 PSI,
2 all the experts agree that residual stress alone caused by the
3 machining process, caused by the cold work process -- we've
4 dealt with this in our reply memo -- can approach yield all by
5 itself. And as counsel has already indicated today, it's
6 additive to the applied stress which they calculate in their
7 computer simulations at 12,000.

8 So, 12,000 puts us at 27 percent of yield,
9 approximately, and then when we add residual stress on there
10 -- and quite frankly, no one has calculated that, neither side
11 has at this point -- you're in the range from just putting the
12 crimp on, you're in there.

13 So, again, whether Dr. Staehle says 20 percent, one
14 percent, whatever it is, if he far exceeds the yield stress
15 needed or the stress needed to initiate stress corrosion
16 cracking, it doesn't matter. What matters is that you just
17 see it more progressed, you see more propagation sooner. It's
18 not the question of are we trying to estimate at which -- are
19 we trying to estimate the level at which, the strain at which
20 stress corrosion cracking will initiate. That's never been
21 the purpose of that test that Dr. Staehle performed, the
22 U-bend testing.

23 So we back up and we say does any of this matter?
24 Does it matter that he used 20 percent? No, it doesn't.
25 Could he have used one percent? Apparently he could have,

1 because they calculate it at one percent or less than one
2 percent, but we also know we have the failures in the field
3 and we also know we have the failures in their own testing.
4 So we know that even if their number is right, that one
5 percent is right, we're going to see stress corrosion cracking
6 in these fittings. It's a question of when and a question of
7 degree.

8 So, we get back to this and we look at it and we say
9 have you challenged his methodology, because that's what you
10 have to challenge, not his inputs, and they don't challenge
11 his methodology. They just simply say: We don't like your
12 inputs. Stevenson actually says you can calculate 20 percent
13 strain using his calculations. He says it in his affidavit
14 and he gives you an estimate of the length over which this
15 strain has to occur.

16 The idea or the suggestion that we didn't test this
17 or we didn't measure this is simply wrong. And just so you
18 know, your Honor, we tested the deformation of the interior
19 part of the fitting once you put a crimp on it. The interior
20 part of the fitting is reduced in diameter by about one
21 percent because of the strain from the crimp application, so
22 you get about one percent smaller.

23 What Dr. Staehle posits is that at the transition
24 from this crimp indentation in this transition phase here, you
25 have a high degree of local plastic strain and that's what

1 he's trying to calculate. Right in that little transition
2 where the thing has dipped down, whether it's Pythagorean or
3 however you're going to calculate it, he comes up with what he
4 believes is a proper strain calculation to try to estimate the
5 local strain.

6 Now, we also showed in our testing that the
7 deformation of that fitting is in fact plastic, which means
8 that once you remove the crimp it remains deformed. The one
9 percent decrease is there even after you take the crimp off,
10 and that shows that you have plastic strain.

11 FEA analysis did not -- excuse me -- ESI's FEA
12 analysis did not do it after removal of the crimp. They did
13 not measure an actual fitting with the crimp removed after it
14 had been placed. In other words, they don't know whether
15 there is in fact plastic deformation.

16 Again, I don't know that any of this really matters,
17 because when we get down to it we're talking about did he use
18 a number that was within the estimate of reasonable numbers
19 that he could use based on the calculations that he made, and
20 then he applied them to a well-accepted methodology and the
21 results are the results. So, that's Dr. Staehle.

22 Now, let's talk about Dr. Blischke for a second.
23 Dr. Blischke uses one assumption in his calculations and
24 Mr. Connolly makes a point to reiterate that I gave him those
25 documents. Those were Zurn documents produced in this

1 litigation, just so we're clear about this. These weren't
2 documents that I dreamt up or I got somewhere. They were Zurn
3 documents.

4 And the 40-year mean time to failure, again, is an
5 input and a methodology that they do not challenge. They
6 don't challenge his Weibull application. They don't challenge
7 the approach. They have no expert affidavit in support of
8 this motion. You can deny the motion on that basis alone.
9 They don't have a warranty expert who actually knows how to do
10 this nor do they have an affidavit that says that this was
11 done incorrectly. This is all counsel arguing to you about
12 this, point one.

13 Point two is, the use of an estimate in statistics
14 and warranty analysis is common methodology. Again,
15 Dr. Blischke testified to that effect. They have no rebuttal
16 opinion that you can use estimates, you can use numbers that
17 make sense for the approach that you're taking.

18 The reason we had to have an estimate here, as he
19 indicated, was that his first use of the actual data to try to
20 come up with a mean time to failure number resulted in a
21 3500-year mean time to failure. That means that some of these
22 fittings will last 7,000 years, in other words, about the time
23 of the last Ice Age. He, I think rightly, said: That doesn't
24 seem reasonable and that tells me there's something wrong with
25 the data, that the data I have is insufficient to use, the

1 data to calculate mean time to failure.

2 Now, let's back up again. Why does he have to
3 either calculate it here or make an assumption? Because Zurn
4 never did it. A reasonable company who puts a product on the
5 market with a 25-year warranty does warranty analysis. They
6 do an analysis of the expected life, the mean time to failure
7 of their product. They didn't do it. So when he's asked
8 about the several hundred times that he had used mean time to
9 failures in the past, he's working with companies who actually
10 have data, who actually take the time to understand their
11 product before they put a 25-year warranty on the product.

12 What he needed to use to calculate mean time to
13 failure was fitting information on date of installation and
14 date of failure, so he needed to know when was a fitting put
15 in and when did it fail. If you had enough data to have a
16 good data set, you could calculate mean time to failure, but
17 the Zurn warranty documents and the way they keep their
18 warranty claims to the extent they don't throw them away or
19 destroy them doesn't allow for a good analysis. And even more
20 problematic is that some of the forms that come in come in
21 from plumbers, homeowners. They simply don't have the
22 information. In other words, there's lots of missing data.

23 The nature of the analysis means then that over the
24 population of data that he is trying to apply this mean time
25 to failure calculation on assumes that all of these other data

1 points or failures or leaks don't have any input and that
2 those fittings are still performing, so you have big gaps in
3 the analysis and that's what led to the problem. His entire
4 deposition is in the record. You can read it. He explains
5 why this is problematic.

6 So, they say, well, you assumed mean time to
7 failure. Great. We had a motion about this, if you remember,
8 that I was allowed to take Mr. Runyan's deposition. Mr.
9 Runyan, what is the mean time to failure of the fittings? I
10 don't know. That answer from Zurn tells us Dr. Blischke might
11 be right. They can't say he's not. Their own engineer can't
12 say mean time to failure is not 40 years. He might be right.
13 And absent any evidence that he's wrong, we certainly
14 shouldn't exclude his opinion based on something that he just
15 might be right about.

16 The documents that he relied upon included
17 deposition testimony, by the way. Mr. Connolly neglected
18 that. Dr. Blischke actually was testifying to that effect and
19 got cut off on one of these. I asked their people many times
20 what's the useful life of the system, how long will these
21 last. They talk about decades, they talk about a long time.
22 They wouldn't ever commit to a number. They would never give
23 us a number. So the two documents that he used were testing
24 documents.

25 Now, Mr. Connolly makes a big point about the fact

1 that there were no failures over this 40-year testing. The
2 testing was intended to look at erosion of the fitting. From
3 the water flowing through it, did it erode sufficiently,
4 because that's a problem with copper sometimes.

5 I asked Mr. Runyan about this testing, because they
6 say there were no failures. Well, that's kind of not the
7 whole story. I asked Mr. Runyan at deposition: What about
8 those test results? Did you look at the fitting? Did you
9 have a metallurgical analysis done of the fittings? No, we
10 didn't. Did you save the fittings? No, we didn't. Did you
11 take pictures of the fittings? No. What happened to them?
12 We threw them out.

13 So, our position is there very well may have been
14 stress corrosion cracking under way in this highly accelerated
15 test, but they just discarded the fittings. We have no idea.
16 They never had a metallurgist look at them. He testified to
17 that fact. So to suggest that this was some kind of a stress
18 corrosion cracking test or that there was no stress corrosion
19 cracking under way is a little bit unsupported by the record.

20 So, the idea that a statistician who is experienced
21 with warranty cannot make an assumption is simply not
22 supported. We don't have any expert testimony here that says
23 that you can't do that. He used a number. He also -- as he
24 indicated and as we indicated, he calculated a 40-year mean
25 time to failure, a 50-year mean time to failure and a 60-year

1 mean time to failure, giving your Honor numbers to pick from
2 if you wish. They're not as critical of those numbers,
3 apparently. They too, though, result in a pretty dismal
4 prediction of the service of these fittings.

5 Now, they suggest that it's result oriented. We
6 suggest that it's the result of the actual facts and the
7 record. To the extent that it can be used we've tried to use
8 it and this is the result. The Weibull analysis itself is a
9 widely used, widely accepted approach. There's no question
10 about that.

11 And when we look at this graph that Mr. Connolly had
12 up, boy, those first few years Dr. Blischke is spot on. He's
13 spot on right until about 2006. What happens in 2006 and
14 2005? They start telling people don't submit warranty claims.
15 Submit them to your insurance company. By the way, they
16 stopped paying claims in about that time frame.

17 So when you look at our brief where we talk about
18 them discouraging claims and we cite to the record, you can
19 look and you can put it right in that range and you wonder why
20 this number falls off a bit. Not surprising. 2008, by the
21 way, is a year in which we don't have complete information on
22 claims, and these are also Dr. Wecker's claim numbers, not
23 ours. So what we actually have here is also a 30 percent
24 warranty execution rate; in other words, not all claims are
25 being made, only three out of ten, and for the first few years

1 Dr. Blischke appears to be right on it. Now, we think that
2 their conduct and the conduct of their representatives in the
3 field is going to explain some of this trail-off.

4 Now, this again is not exact science. When this is
5 going to happen and how it's going to happen may slide a bit.
6 This scale may go left or right because this is not precise.
7 It's not intended to be precise. It's intended to be
8 instructive and indicative of what's happening, and that
9 something that a company like Zurn would have done itself,
10 they would know that they've got a big problem on their hands.

11 So, again, Dr. Blischke, highly experienced,
12 literally wrote the book on warranty analysis and statistics
13 relating to warranty analysis and uses reasonable assumptions.
14 The fact that they don't like the assumptions is simply a
15 matter of cross-examination. We can deal with that when we
16 need to at trial. But at the end of the day his approach is
17 reasonable, there's no expert who says otherwise, and it
18 cannot be excluded under the case law because the case law is
19 very clear. Quibbles with assumptions or calculations, even
20 if the calculations are wrong, it still goes to weight and not
21 admissibility.

22 Thank you, your Honor.

23 THE COURT: All right. Thank you, Mr. Raiter.

24 Mr. Connolly, I'm a little tight on time, but I can
25 give you a few minutes of rebuttal if you'd like.

1 MR. CONNOLLY: Few quick minutes, your Honor. Thank
2 you.

3 This issue here, your Honor, is not about weight.
4 It's about whether or not these two experts using these two
5 numbers were entitled to make the speculation that they did.
6 Speculation is all that this is.

7 Now, Mr. Raiter says that Dr. Blischke's entitled to
8 make assumptions. He's entitled to make assumptions, but
9 they're not to be considered. In fact, when we were doing our
10 research on whether Daubert applies at the discovery phase --
11 I mean, at the class certification phase -- this is Mahaney
12 from the Northern District of Ohio here and they're quoting
13 Coffey. "[I]f [the expert] assumed certain parameters for his
14 computerized finite element analysis, and those parameters
15 were later proven to be incorrect, then the conclusion reached
16 by the computer model would also be incorrect. This would be
17 true if any of the parameters assumed by [the expert] were
18 incorrect." It doesn't make any sense that they can make
19 assumptions that they can't back up and that they're allowed
20 to present it as evidence that all of these fittings are going
21 to fail. And I tied that down very clearly when we were
22 talking about Dr. Blischke. Of course his charts here, his
23 numbers, reflect closely to what the actual sales data is
24 early on because he made it match that, but later on the
25 actual data doesn't support it.

1 As to the 20 percent number, the question is, is 20
2 percent a reasonable -- does it replicate the crimping process
3 as Dr. Staehle said numerous times. Now, Mr. Raiter says it
4 can be one or 20 percent. I submit to the Court there's a big
5 difference between one and 20 percent. One percent leads to
6 no failures, 20 percent leads to everything failing, and the
7 question that they need to try to present to this Court is 20
8 percent means everything fails; therefore, we've got a
9 catastrophe on our hands. It doesn't work that way. Twenty
10 percent is not supported by the evidence.

11 When Mr. Raiter says that the methodology, we don't
12 dispute the methodology, he's just wrong. He didn't hear me
13 or I didn't explain it well enough. In the April 17, 2008
14 e-mail that Dr. Staehle sent to his testing lab, he explained
15 how he came up with the range five to 20 percent, what he did.
16 Then in his deposition he comes up with a new way of
17 calculating the strain, okay, but those later calculations
18 don't ever get you to 20 percent, only the first calculations
19 that he himself disregards.

20 Now, Mr. Raiter can go along and say all he wants,
21 that, you know, Mike Stevenson was, you know, 20 years old
22 when Dr. Staehle was 50 years old. Okay, I'll assume that,
23 that's fine, okay, but the problem is Stevenson is right on
24 this point and all you have to do is ask Staehle himself.
25 Staehle himself rejects the first method that he used to

1 calculate the 20 percent strain, so it's Staehle vs. Staehle.
2 And I submit to you, when he can't replicate those stresses
3 with the actual measurements of the actual fittings despite
4 being asked twice in his deposition, crumpling up the papers
5 and then submitting it later on, a document that doesn't show
6 the actual dimensions until you go four lengths of the graph
7 beyond it, I submit to you that he can't get from his one
8 percent diameter deformation to the 20 percent plastic strain,
9 and he knows it.

10 Now, two other quick points. They talk repeatedly
11 about the 2004 testing that we performed, the 2004 and 2005
12 testing. Those were in extremely aggressive environments.
13 One is mercurous nitrate, the other is ammonium sulfate.

14 And, you know, this legend in the SCC community that
15 ammonia, which they discovered in the stable in India, led to
16 the corrosion of bullets and that's how stress corrosion
17 cracking came about -- they figured out that the urine was
18 leading the bullets that had been brass casings. So it's well
19 known that stress corrosion cracking results when you put
20 brass into ammonia.

21 What Dr. Staehle is trying to do with his 20 percent
22 crimp analysis is something different. He is trying to say
23 stress corrosion cracking happens in real water. Now, when
24 you bring it to 20 percent strain, as I showed you, the yield
25 stress is just above that, you practically break the thing in

1 your hand at 20 percent. When he does it to one percent,
2 though, he can't get it and he stops it short. So the fact --
3 the argument that he's trying to make is that, oh, it doesn't
4 matter, one percent, 20 percent. Well, sure it matters,
5 because he abandoned the one percent and he only is using the
6 20 percent now because he has to convince your Honor that all
7 of these fittings are going to fail. Same problem with
8 Dr. Blischke, same problem. He assumed his answer.

9 And I can see that you're tapping, so I'm done.

10 THE COURT: All right.

11 Thank you, counsel. I'll take both of these matters
12 under advisement. Unfortunately, you're not going to be
13 getting an order real soon. I'm going to be gone. I'm going
14 to Africa to teach some judges at the Rwanda Tribunal, where
15 I'll be happy just to have plumbing and I won't care about the
16 nature --

17 (Laughter)

18 THE COURT: -- of the fittings in the plumbing, but
19 I will when I arrive back try to get you an order as soon as I
20 can thereafter.

21 MR. RAITER: Your Honor, on that note, when are you
22 leaving?

23 THE COURT: I'm leaving March 13th and coming back
24 the first week in April.

25 MR. RAITER: The reason I ask is obviously our

1 schedule takes us to this point in time and --

2 THE COURT: To what point, right now?

3 MR. RAITER: Right now.

4 THE COURT: Okay.

5 MR. RAITER: We don't have anything else going on.
6 We don't have whatever Phase II is, we don't have merits under
7 way. So recognizing your schedule, we may be sitting here
8 treading water, and I use that unintendedly.

9 THE COURT: Well, I think the break may be okay and
10 I think a little pause while I go over these and can give you
11 some more direction is going to probably be helpful in the
12 long run. What I will try to do when I get back and get an
13 order out is, if that means I need to relax further scheduling
14 and we figure out where we go from here, then -- I'm trying to
15 think. Do we have a schedule that projects beyond that?
16 We're just at the end of our timetable --

17 MR. RAITER: We're at the end of our time frame, so
18 we don't have anything else agreed upon that we would be doing
19 in the next number of months, and that's my -- rather than
20 just sitting here doing nothing while you're gone doing --

21 THE COURT: Well, you can meet and confer about a
22 new schedule. I sure wouldn't want to stop that, but if you
23 want to await the results of this, that's fine too.

24 MR. O'NEAL: As you can imagine, your Honor, it's
25 very difficult to figure out what kind of new schedule you

1 should be talking about unless you know if we're in a class
2 action or --

3 THE COURT: I understand. That's why I think maybe
4 a little hesitation. And the good news is I'm going to
5 virtually clear my docket of everything under advisement
6 before I go so that when I get back this would be close to
7 being up first, so we'll be in good shape.

8 All right. Thank you.

9 (Proceedings concluded at 3:07 p.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

/s/ Timothy J. Willette

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