

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: ZURN PEX PLUMBING PRODUCTS) MDL NO. 08-1958
LIABILITY LITIGATION) (ADM/RLE)
)
) Courtroom 13 West
) Wed., November 19, 2008
) Minneapolis, Minnesota

**HEARING ON PLAINTIFFS' MOTION TO COMPEL 30 (b) (6) DEPOSITION
-and-
IDENTITY OF 30 (b) (1) DEPONENT**

[DOCKET NO. 15]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

TIMOTHY J. WILLETTE, RDR, CRR
Official Court Reporter - United States District Court
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415
612.664.5108

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

For the Plaintiffs:

LARSON KING, LLP

By: SHAWN M. RAITER, ESQUIRE
2800 Wells Fargo Place
30 East Seventh Street
Saint Paul, Minnesota 55101

ZIMMERMAN REED, PLLP

By: J. GORDON RUDD, JR., ESQUIRE
DAVID M. CIALKOWSKI, ESQUIRE
651 Nicollet Mall - Suite 501
Minneapolis, Minnesota 55402

LOCKRIDGE GRINDAL NAUEN, PLLP

By: ROBERT K. SHELQUIST, ESQUIRE
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401-2179

HOLLAND & HART, LLP

By: DAVID L. BLACK, ESQUIRE
555 Seventeenth Street - Suite 3200
Denver, Colorado 80201-8749

STRAUS & BOIES, LLP

By: TIMOTHY D. BATTIN, ESQUIRE
4041 University Drive - Fifth Floor
Fairfax, Virginia 22030

PENDLEY, BAUDIN & COFFIN, LLP

By: CHRISTOPHER L. COFFIN, ESQUIRE
Post Office Drawer 71
Plaquemine, Louisiana 70765

For the Defendants:

FAEGRE & BENSON, LLP

By: JAMES A. O'NEAL, ESQUIRE
DANIEL J. CONNOLLY, ESQUIRE
AMY R. FREESTONE, ESQUIRE
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901

1 (1:30 p.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 afternoon. Please be seated.

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

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

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

11 THE COURT: Mr. Raiter.

12 MR. RUDD: Good afternoon, your Honor. Gordon
13 Rudd from Zimmerman Reed.

14 THE COURT: Mr. Rudd.

15 MR. SHELQUIST: Good afternoon. Rob Shelquist
16 from Lockridge Grindal Nauen.

17 THE COURT: Okay. First table. Back to the
18 second table.

19 MR. BATTIN: Good afternoon, your Honor. Tim
20 Battin, Straus & Boies, for the plaintiffs.

21 MR. BLACK: Dave Black, Holland & Hart, for
22 Plaintiffs.

23 MR. CIALKOWSKI: David Cialkowski, your Honor,
24 from Zimmerman Reed.

25 THE COURT: All right.

1 MR. COFFIN: Good afternoon, your Honor. Chris
2 Coffin of Pendley, Baudin & Coffin out of Louisiana. We have
3 a case that is in the process of being transferred to your
4 Honor's court. It was filed in October and it's with the
5 panel right now and I believe it will be coming here.

6 THE COURT: So you've gotten an invitation to the
7 party, huh?

8 MR. COFFIN: Yes, your Honor.

9 THE COURT: All right. Mr. O'Neal.

10 MR. O'NEAL: I think he issued his own invitation.

11 (Laughter)

12 MR. O'NEAL: Jim O'Neal, Faegre & Benson, for the
13 defendants.

14 MR. CONNOLLY: Dan Connolly, your Honor, as well.

15 MS. FREESTONE: Amy Freestone for the defendants
16 as well.

17 THE COURT: Good afternoon.

18 Well, since we last met I have been to the MDL
19 seminar/school, all hard work. Judges learn best when we can
20 see the ocean and get a little fresh air at the same time,
21 I've been told. You will be proud of me, I think, to know
22 that I'm the only MDL-assigned judge that wore my device to
23 the reception. I strung one of the things on a gold necklace
24 and it was very impressive to the other MDL judges who
25 thought I'd really had an expensive piece of jewelry. So,

1 anyway, had a little fun with that there.

2 MR. O'NEAL: I still remember when you came to an
3 open house at our firm and you walked around with a name tag
4 saying Sandra Day O'Connor.

5 THE COURT: I did that only because Justice
6 Schiefelbein was parading as -- who was he that day? I don't
7 know, Stevens or --

8 MR. O'NEAL: You never know.

9 THE COURT: He wrote my name tag for me. I did
10 scare a few secretaries that day.

11 (Laughter)

12 THE COURT: Anyway, on a more serious note, I
13 think the issues before us today concern the pretrial order,
14 and it's my understanding through my law clerk, Joe Weiner,
15 you may have worked out the final details of that.

16 MR. RAITER: I think we're close, your Honor, the
17 majority of the language. I told Mr. O'Neal when we got here
18 today that I'd had a chance to speak with our group about the
19 latest draft, which would be the draft that you had received
20 this morning. We have a few additional changes or
21 suggestions. I don't think they're terribly material. I
22 think we'll probably be able to work them through very
23 easily, one of which is providing for a reply to expert
24 disclosures for the plaintiffs. Right now the proposed
25 schedule of events doesn't have a reply or a rebuttal period

1 and really just a minor change or two. But with that, we do
2 still have some issues about inserting dates and when we
3 would actually start to be before your Honor on timing and
4 disclosures and deadlines and that sort of thing.

5 THE COURT: And my understanding, you want more
6 time to continue to talk about that, or do you want me to
7 decide that?

8 MR. RAITER: I think it makes sense, because I'm
9 guessing we could probably agree to a schedule.

10 THE COURT: Okay. Is that your sense, Jim?

11 MR. O'NEAL: We may well be able to agree to a
12 schedule. I do think it might be good for us to talk through
13 some of the issues that Shawn and I have been talking about
14 so you're aware of how we're thinking --

15 THE COURT: Okay.

16 MR. O'NEAL: -- and we make sure you don't have
17 differing views about the how the litigation should be
18 handled.

19 THE COURT: Okay. And I have a couple things I
20 was going to throw out as items that I picked up at the
21 conference that I thought maybe should be included in some
22 order that -- maybe this is a good time to plug them into
23 that order.

24 MR. O'NEAL: How do you want to do this, Judge?
25 Do you want to tell us that now? Do you want us to go over

1 what we've been talking about?

2 THE COURT: Well, let's chat about what you see as
3 the issues of some disagreement, and if you want to direct me
4 to the paragraph, I'll --

5 MR. O'NEAL: Actually, it's really -- I think we
6 have pretty much worked it out. It's not so much the areas
7 of disagreement. It's more making sure you agree with what
8 we're talking about.

9 One of the things that Shawn and I have spent a
10 fair amount of time talking with each other about is when we
11 say class certification is the first thing we're going to
12 resolve and we want to move to it quickly, what is it exactly
13 we're talking about, because we have a dozen or so cases
14 around the country. The complaints are pretty much the same
15 in terms of the class definitions and the theories pled and
16 so forth.

17 Shawn will obviously speak for himself. I
18 understand him to have expressed concerns about are we moving
19 for class certification in one case or in all the cases. If
20 the ruling comes out and somebody in another case wants to
21 make a motion on class cert., you know, how does that work.
22 I initially asked that there be a master complaint required
23 so that we would know in advance what the class
24 certification -- what class definition would be sought and so
25 forth so that we could direct our discovery and our expert

1 work accordingly.

2 And in the course of discussions, we have come, I
3 believe, to what is set forth in this proposed Pretrial Order
4 3, which has language that indicates that as lead counsel,
5 Mr. Raiter would identify -- the wording currently is "cases
6 to be considered in Phase I." It says: "Plaintiffs' lead
7 counsel will identify the cases he proposes to be included in
8 Phase I and the scope of the proposed classes to be included
9 in Phase I," and we've exchanged discussion about what that
10 means, and what I --

11 (Audio feedback)

12 THE COURT: Does somebody have a BlackBerry on?
13 That's usually what happens with the feedback. Even if you
14 have it on vibrate the mike picks it up, so if you'd turn it
15 all the way off.

16 MR. O'NEAL: I'll just turn it off. I apologize.

17 THE COURT: No problem.

18 (Additional feedback)

19 MR. O'NEAL: No, I turned it off.

20 THE COURT: That might have been just the last
21 gasp.

22 MR. O'NEAL: So what this would contemplate, as I
23 understand it, is, within I think it says 30 days the
24 plaintiffs' side would indicate, okay, we are going to move
25 for certification of -- you know, whether it's a national

1 class with an alternative statewide class for Minnesota or
2 whatever it is they're going to end up with by appointing the
3 cases, and then that would be resolved. And once it is
4 resolved and, you know, subject to appeal and so forth, the
5 other cases could bring motions to the extent there were
6 issues unresolved by the first order.

7 But I am concerned -- and I believe Mr. Raiter
8 recognizes the legitimacy of this -- with not wanting to
9 rehash certain issues which once resolved it seems to me
10 ought to be resolved in this context. In other words, there
11 may be instances of a particular state's law or whatever that
12 in fairness would not be resolved by the first order but
13 would then be legitimately brought up later. But it is
14 not -- if we say that -- the plaintiff says: "We're going to
15 move in Cox, Minnerath and Oelfke," which are the three
16 Minnesota cases, that doesn't mean we're at square one and if
17 class is either granted or denied, then in the other cases
18 the same issues can be rehashed, you know, from scratch.

19 So that's one of the things we've had to work out,
20 and I dropped the notion of the master complaint after
21 discussions with Shawn and I think where we're at is kind of
22 clear, but I thought it was helpful for you to understand --

23 THE COURT: That was something that was discussed,
24 the use of the master complaint, and it seems to me that that
25 might solve some of these dilemmas.

1 Mr. Raiter?

2 MR. RAITER: Yeah. The master complaint depends
3 then on how you're going to approach certification. The
4 master complaint doesn't do you all that much good if you're
5 then going to consider motions one by one, because you're
6 getting a big fat complaint and you can keep working off the
7 same complaint, but you're still bringing these motions. And
8 so the issue in our mind, at least, from our side of the case
9 was more focused on how do we get the cases prepared to
10 present them to you for certification while balancing Zurn's
11 interest in doing so quickly and Rule 23's interest in doing
12 so quickly, but yet also making sure that the cases are
13 properly prepared.

14 So, for example, the Breaux case that Mr. Coffin is
15 here about, which just got into the system, so to speak,
16 hasn't had any discovery yet, and if we set a schedule today
17 that would require that we brief that for certification in
18 two months, that might be aggressive for that particular
19 case.

20 So, what our thought is, your Honor, is to come
21 forward with a case or maybe a few cases in Phase I. In that
22 class certification analysis and the review that you're going
23 to do under Rule 23, many of these issues are repetitive in
24 Minnesota. They're as repetitive as they are in North
25 Dakota, North Carolina, Virginia, Louisiana, these other

1 states where we have the cases, and I think the thought
2 between both of us is, if you decide that there are uniform
3 issues or common issues of law and fact that can be pursued
4 on a class basis, we may not need to continue to brief these
5 things over and over again because we know your ruling. Of
6 course, the corollary is true as well. If you deny class
7 certification on some basis that would be applicable to the
8 rest of the cases, we'd have an opportunity to review that,
9 regroup and think about what we do then in Phase II and what
10 we do to get these cases ready to either be remanded or be
11 resolved in this district.

12 So, because we've got this Cox case that was out
13 ahead of everybody else, it makes some sense, of course, to
14 make sure that the Cox case is one of or the case that would
15 be put up first and put up soon, because again, your Rule 23
16 analysis isn't going to vary all that much from circuit to
17 circuit. It may with some real finer points, but by and
18 large your analysis will be the same. And we can get the
19 benefit of your ruling on the Cox case fairly early or
20 another case or two with Cox, and then we can be efficient
21 from there in deciding what else do we need to do to move
22 these cases to conclusion.

23 THE COURT: What is the plaintiffs' thought about
24 the urgency or the need for certification soon? I mean,
25 they're MDLs, they're going to be here. What's the reason

1 that you think you need early certification?

2 MR. RAITER: Well, that's an issue that's being
3 driven much, much more by Zurn than it is by us. We want to
4 move for certification when we feel that we're prepared to do
5 so and that we can present a record to you that allows you to
6 rule obviously favorably for us, but also gives you a record
7 that you're comfortable with, that we've developed it, that
8 we have all the issues in mind. We don't have the same
9 urgency that the defendant does for a lot of reasons.

10 On the other hand, though, your Honor, we're not
11 here to pursue these cases for three years only to find that
12 what we're dealing with is two dozen individual cases for
13 water damage that ranges from, you know, \$2,000 to \$30,000
14 per household, because at the end of the day we will have
15 done a lot of work and we'll be left with two or three dozen
16 individual cases.

17 So, we need to know from your Honor at some point
18 what we're dealing with here, because the scope of the
19 discovery, the scope of the damages analysis, how we try the
20 case or cases, all depends on whether we're doing so on a
21 class basis. It also depends on what is being tried on a
22 class basis. So, we have kind of a balance here where we do
23 want to get this up fairly soon. We may not have quite the
24 aggressive schedule that Zurn proposes.

25 THE COURT: Mr. O'Neal, what's your thought about

1 the need for certification to be argued soon?

2 MR. O'NEAL: Well, the litigation is imposing a
3 lot of costs and difficulties on Zurn Pex and litigation of
4 this sort is extremely difficult, I will say that, for a
5 defendant.

6 As is often the case, the plaintiffs' counsel,
7 multiple plaintiffs' counsel, have filled the Internet with
8 comments about our product. There are discussions in the
9 field about this. It is disturbing to the company's
10 business, it is expensive, and the more -- the longer
11 litigation goes on, the more expensive it is. You can talk
12 about trying to cram the work would also increase expenses
13 per month, but the fact is the expenses are there every month
14 that litigation is out there.

15 The case has been defended -- while we're now in an
16 MDL, we now have multiple cases, the fact is that ever since
17 the Cox case was started in June of 2007 we've been in a
18 major class action litigation mode, spending lots of money,
19 lots of publicity, lots of concern among the customers, and
20 so I get a lot of pressure from my client to move this along.

21 THE COURT: Okay.

22 MR. O'NEAL: And as Mr. Raiter says, Rule 23
23 contemplates quick resolution of class certification so that
24 both sides can know is this a relatively, you know, small,
25 manageable piece of litigation --

1 THE COURT: How broad is the class, yeah.

2 MR. O'NEAL: -- or is this World War III?

3 THE COURT: All right. Any other issues there?

4 MR. O'NEAL: Mr. Raiter mentioned the scheduling.
5 The more we talk and sort of get down to exactly what it is
6 that needs to be done on our side, we are now thinking that
7 class certification could be put up sometime in the late
8 summer. In talking with Shawn out in the hall -- well, you
9 can say what your reaction to that is, but I think late
10 summer, very early fall is a reasonable schedule and we can
11 work backward from there with respect to dates.

12 MR. RAITER: As I said, your Honor, we're not
13 terribly far off on schedule. I think we need to have in
14 mind what we want to put up for certification, start to work
15 backward and make sure we leave lots of time for us, lots of
16 time for you to get it done properly. I would believe that
17 within a week or two -- we've got Thanksgiving next week,
18 obviously -- we should have Pretrial Order 3 back to you with
19 some agreement, I hope, or at least competing submissions
20 with very, very limited differences about perhaps schedule
21 and then let your Honor decide and issue --

22 THE COURT: Pick and choose. Okay.

23 MR. RAITER: Exactly.

24 THE COURT: That sounds fine.

25 The items that I have are really fairly small, but

1 having made a little note of things that seemed like good
2 ideas to me, at least at first blush, I thought I'd ask you
3 what your thoughts about those are.

4 One of those would relate to the status conferences
5 as they're addressed on page 6 and whether or not it might
6 not be helpful for us to have a standing date and time for
7 those conferences so that you're on the schedule and we keep
8 this moving with the thought that if there are no issues or
9 nothing that needs to be discussed, they can easily be
10 cancelled, but that you wouldn't have to worry about getting
11 on the calendar quickly and then you'd know when I'm out of
12 town, which is going to be some pretty -- I am going to be on
13 the road a fair amount of the early part of next year at some
14 other commitments I have. So, that's something I throw out
15 there. It may be that we don't need to start the schedule
16 this soon, but I'm certainly open to that as an idea of just
17 saying that it will be -- or giving you a date of each month
18 for a year or so.

19 MR. RAITER: I think that's a great idea, your
20 Honor. I think you're right that there may be months it's
21 not worth bringing people in or even your time to be here
22 live and perhaps we could do it by telephone.

23 THE COURT: Well, okay, and realizing that you're
24 both local and not there, but I would take it for purposes of
25 people that are out of town.

1 When you get the order close to being in final
2 condition, then why don't you send it over and just note that
3 we've injected a date of each month that would work for a --
4 we'd probably try to make it like the first Friday of the
5 month or something and we'll have sort of a standing target
6 date for appearances.

7 The other suggestion that I wrote that seemed to me
8 to make sense -- maybe not -- I'm probably the only one it
9 makes sense to, but it was suggested to me to get a control
10 of expenses early on and fees, to insert in an early pretrial
11 order the fact that ultimately airfares will only be
12 reimbursed at coach rate rather than first class rate, and
13 that seems to me to make sense to preserve that, so I'd like
14 to have that included somewhere where you think it fits.

15 MR. RAITER: Your Honor -- and we can insert that.
16 There's a paragraph in there about charging plaintiffs' lead
17 counsel with establishing time and expense guidelines. I
18 actually have a draft --

19 THE COURT: Okay.

20 MR. RAITER: -- and the draft does include coach
21 air fare and also some other things in order to keep expenses
22 reasonable.

23 THE COURT: Okay. Well, I'll be interested in
24 looking at that. I hadn't seen one of those provisions in
25 any other order before, so --

1 MR. RAITER: Typically, your Honor, what we would
2 not do is show defense counsel what our internal time and
3 expense reporting memo or guidelines would be but would be
4 happy to show it to you *in camera*, which would be the way
5 that the plaintiffs' side of the case want to
6 contemporaneously document their time, document their
7 expenses, account for --

8 THE COURT: I know a lot of judges are getting
9 *in camera* monthly reports of expenses as they go along so
10 that they can kind of monitor things, and I don't know that I
11 think that that's important yet. Maybe down the road it
12 would be, but I don't have any problem. If you want to file
13 them, I'll stick them in a folder and have them, but -- I
14 don't know if that makes extra work early for you or not, but
15 I think it is important for me to ride herd on those costs
16 right from the beginning.

17 MR. RAITER: Sure, your Honor. And what I would
18 propose then is that the memo that I intend to send to the
19 steering committee and the members of -- the people who are
20 going to do common benefit work be presented to you *in*
21 *camera*. With that you'll see that it also comes with, like,
22 time sheets and forms where we want people to follow our
23 guidelines about documenting and describing time. Basically,
24 everybody in this room has been through this issue in other
25 cases and it's never fun if you have time and expenses that

1 are not properly documented and accounted for.

2 THE COURT: All right. You're steps ahead of me
3 as usual. All right. That's fine.

4 All right. I think we're down to the motion to
5 compel then. Were there other issues?

6 MR. O'NEAL: I'm sorry, your Honor?

7 THE COURT: We're to the motion to compel then?

8 MR. O'NEAL: I think so.

9 THE COURT: That's the other item on my agenda.

10 MR. RAITER: Your Honor, we have a single motion
11 that deals with two particular issues. I'm sure your Honor
12 has had a chance to read the papers. We've got the 30(b)(6)
13 issue on preservation.

14 What we have here is not a dispute about whether
15 there was a duty to preserve, when that duty to preserve
16 arose. We know that in 2004 Ms. Macia anticipates
17 litigation. She had litigation in 2002, but we now know that
18 she was expecting more in 2004. At that point in time, Zurn
19 had a duty and an obligation to preserve evidence.

20 And we all know that the case law -- we know
21 **Zubulake**, which was first decided in 2003, a year before
22 Macia anticipated litigation. And what we did given what we
23 learned in the course of the discovery really in the Cox case
24 before the MDL was formed was -- really concluded that there
25 was a potential here that evidence was not preserved. And I

1 believe as the record shows at this point in time, the only
2 thing that we can ascertain that Zurn did was make an oral
3 direction to some unknown people at this point in time to
4 preserve claims-related files. That's what their brief says
5 at page 4, relevant individuals at Zurn did keep
6 claims-related materials. That's troubling to us because of
7 product development, product testing, all the other things
8 that go on in a company like Zurn, that if the only thing
9 they really did have a preservation hold out there for was
10 claims-related materials, we're very concerned that evidence
11 has been spoliated. We're not suggesting at this point that
12 it was intentional, we're not suggesting that it is
13 sanctionable. We're not asking for any relief other than to
14 go forward and take a deposition and figure out what
15 happened, what was preserved, what directive was made, when,
16 were there reminders, who received it, how do we know they
17 followed those directives.

18 The 30(b)(6) that we've served, if you read the
19 topics, really says whether you preserved evidence, what you
20 did to preserve evidence, whether evidence was spoliated or
21 destroyed and what evidence might have been spoliated or
22 destroyed. We've not asked yet for some listing of what
23 isn't there or what is there, but what we have before us is a
24 concerning situation, and it's equally concerning or even
25 more so for us given the position that Zurn has been taking

1 in the litigation, which is you don't get any e-discovery.
2 Now, Judge Erickson didn't -- Magistrate Judge Erickson
3 didn't say that, but they've been very resistant --

4 THE COURT: Well, isn't what he said is that we're
5 not going to do that yet, let's start with the paper
6 discovery?

7 MR. RAITER: Start with the paper discovery, and
8 what we're still trying to do here by way of this 30(b)(6) is
9 the paper discovery and understand what is there in paper
10 format, what's there in tangible evidence format, have they
11 destroyed -- done destructive testing. We know they have,
12 but to what extent. And then also e-discovery, what was
13 preserved and what wasn't. So we've not asked yet for a
14 search, we've not asked yet for a production. We've simply
15 asked for a deposition to tell us what is there, because
16 clearly they had the duty. They don't argue that they
17 didn't. They don't argue that in 2004 she didn't know that
18 she should have been retaining --

19 THE COURT: What they do argue, though, is that
20 this is an end run around Judge Erickson's Cox order. Why is
21 it not?

22 MR. RAITER: Well, it's not because again, Judge
23 Erickson didn't say you don't get e-discovery and I don't
24 think the case law would support that.

25 And just frankly speaking, your Honor, the posture

1 of the case is much different now than when it was just Cox,
2 and the scope of e-discovery, I think, now that we've got an
3 MDL with 12 cases and more to come, is perhaps different than
4 what Magistrate Judge Erickson was faced with. But certainly
5 we respect his decision and we're not trying to end run his
6 decision. We're not by way of this deposition saying produce
7 these things or go out and produce them. We're just saying
8 did you preserve, and if you didn't, what didn't you preserve
9 so we now have an understanding about whether we should
10 follow up, whether it might be relevant information, whether
11 we might have been prejudiced.

12 There's a defense there about, well, you can't show
13 that you've been prejudiced and you also haven't shown that
14 it's relevant. Well, it's pretty difficult to show that it's
15 relevant when we don't know what may or may not have been
16 spoliated.

17 But hypothetically speaking, your Honor, if there's
18 some memo, there's an e-mail from one of their key people who
19 says this is a defect problem, this is a materials problem,
20 it's a uniform failure problem, that would be substantial
21 evidence that we would present to you on class certification.
22 If they say this whole water defense is crazy, that's not
23 what's happening, it's a materials problem, it's a product
24 design problem, that would be very relevant to proving a
25 uniform defect that could be tried in a Rule 23 setting. We

1 don't know whether those documents existed and we don't know
2 whether they've been maintained at this point.

3 So, the 30(b)(6), in our mind, was the most
4 efficient way to go at this and figure out whether there was
5 something more that we needed to do. The response has been,
6 well, you can ask each of these people at their depositions,
7 entirely inefficient for a whole bunch of reasons, including
8 if you ask someone: "Did you maintain your electronic
9 discovery or did you back up your e-mail," most of us would
10 stand there and say, "I don't know. You'd have to talk to
11 somebody else who knows." And I don't want to be constantly
12 wasting time from deposition to deposition asking about these
13 same type of preservation questions when we can take care of
14 it in a 30(b)(6), and so that's the basis of that part of the
15 motion.

16 Does it make sense, your Honor, to do this issue by
17 issue, have Mr. O'Neal speak to this issue now and then I can
18 speak to the second part of the motion after he's done?

19 THE COURT: The other issue is just the identity
20 of the person who wrote the e-mail.

21 MR. RAITER: Correct.

22 THE COURT: Let's take that up at the same time.

23 MR. RAITER: Okay. That, your Honor, you've got
24 that in mind. Zurn took the position initially that they had
25 properly redacted the name -- they didn't tell us the person

1 was a potential claimant. They told us that --

2 THE COURT: Now they say it's a warranty person.

3 MR. RAITER: They say the person has made a
4 warranty claim, which is interesting. The person clearly is
5 selling their product, so it's either a plumber or
6 distributor of some sort who has also made a warranty claim,
7 apparently.

8 Our position here is that we're not again trying to
9 end run Judge Erickson's order, but again, his order says
10 that we are not entitled to all -- and he puts "all" in bold
11 -- of the names and addresses of the potential class members
12 or the property owners, and he really is focused on this
13 notion that we needed those names and addresses to go look at
14 their water and sample their water and that he says to us,
15 really, you've got access to plenty of other people. You can
16 sample water, you can do enough discovery, and then under the
17 Oppenheimer case I'm not going to give you the list,
18 essentially, of class members at this point in time.

19 But what he doesn't address and what is before you
20 is really a witness who apparently might be a warranty
21 claimant, but he clearly has, or she clearly has very
22 relevant information about what the people who were in the
23 field, who were selling these fittings knew, what --

24 THE COURT: You're saying that based on the
25 content of the e-mail itself?

1 MR. RAITER: Exactly.

2 THE COURT: Anything else?

3 MR. RAITER: No, because I don't have anything
4 else because I don't know, but the content of the e-mail
5 suggests that this person is in the business of selling Zurn
6 fittings. This person is very concerned about the lack of
7 information that he or she has received about the conditions
8 in which these fittings were performed properly. He's
9 concerned about failures that they've had, failures he
10 mentions or she mentions, failures of others, and I don't
11 know who that is, if that means other Zurn fittings or
12 competitors. We don't know anything. We don't even know the
13 geographic area of this person.

14 But you can clearly also see this person poking
15 holes in the water defense, as I call it, that you've got
16 aggressive water. That's why the fittings are failing. This
17 person doesn't agree with that and is having a discourse with
18 Mr. Sauer, who's the vice president of sales at Zurn. Zurn
19 counters and says, well, we had Mr. Sauer talk to this person
20 and the person doesn't want to be identified. Well, I don't
21 think that's a basis for not allowing a deposition to go
22 forward, but concerning to us is the fact that this person --
23 that this is a potential member of putative class. There's
24 all kinds of case law that talks about a defendant
25 communicating with members of a putative class with absent

1 class members, and there are concerns about such
2 communications.

3 So, when we see that Mr. Sauer is calling this
4 person who is a putative client of ours and having
5 discussions about this case and testimony in this case, it's
6 quite concerning. That's not before your Honor, we're not
7 asking your Honor to do anything with that, but the fact of
8 the matter is, I think Magistrate Judge Erickson's order
9 about redacting names and identifying information never
10 contemplated this kind of a situation where we have somebody
11 who really is in the business of selling these fittings and
12 who is saying, "Hey, I don't even know what I'm doing out
13 here. I'm playing Russian Roulette selling your fittings."
14 We think there's discoverable evidence there that might very
15 well be relevant to class certification about what was not
16 conveyed to the field, what omissions were made or withheld
17 from the field, and then also what he heard back from
18 Mr. Sauer.

19 Now, the proposal is that we can take Mr. Sauer's
20 deposition and he can give me his version of what he told
21 this person, but I think we're entitled to explore that. So
22 all we've asked for is the name and identity of this person
23 and we'll go ahead and get him under subpoena and issue a
24 deposition notice and take the person's deposition, ask them
25 questions about what there is in this actual e-mail. There's

1 no reason really not to other than Magistrate Judge
2 Erickson's prior order. That's the only thing, I think,
3 standing in between us and this deposition.

4 Thank you, your Honor.

5 THE COURT: All right. Thank you.

6 Mr. O'Neal?

7 MR. O'NEAL: Mr. Connolly is going to address --

8 THE COURT: Mr. Connolly.

9 MR. CONNOLLY: Thank you, your Honor. I'll
10 address the first motion first.

11 We've done a lot of discovery in this case. We've
12 produced lots of documents. We've been engaged in the
13 process in the Cox case for about 16 months. We've produced
14 thousands of pages of documents from Zurn, also from third
15 parties, and in their motion, on the 30(b)(6) motion, the
16 plaintiffs haven't come forward with any evidence that they
17 suggest has been destroyed or that they even infer has been
18 destroyed. This is really a collateral issue about -- a side
19 show about claims that were in the process of being discussed
20 that have been resolved between Zurn and the claimants, and
21 so we don't think that that discovery is relevant here.

22 THE COURT: Now, as long as you've said that, I
23 guess then what's the prejudice?

24 MR. CONNOLLY: The prejudice is the scope of the
25 notice. If you looked at the scope of the notice here -- and

1 Mr. Raiter downplayed it a little bit, but let me just sort
2 of highlight a couple of the items.

3 Item number 4, whether any electronic information:
4 e-mails, computer hard drives, computer backup tapes or disks
5 have been destroyed or deleted at Zurn Pex since she
6 realized," Ms. Macia, the general counsel, "realized that
7 there was the possibility of other litigation. They don't
8 even tie it down to subject matter. So, that is, if you got
9 -- potentially, this would require somebody to be able to
10 know or respond to the question about whether or not they got
11 an e-mail from their husband or wife that they may have
12 deleted.

13 The next item, number 5, broadens that question
14 even further and says when and at whose direction was this
15 e-mail from anybody about anything destroyed, and then 6 and
16 7 relate to the same topic about hard copy documents. They
17 don't tie it even to the relevance to this case. They don't
18 tie it to the relevance of this case in its whole or do they
19 tie it to issue of class certification, which is what we're
20 all here about after all.

21 So, it's an extremely broad inquiry that would
22 require us to do what your Honor has already suggested by the
23 questioning, which is, Magistrate Judge Erickson said we
24 don't need to go into electronic evidence at this point in
25 time. We don't need to go through that exercise. We don't

1 need to go through all that stuff. In order to answer any of
2 these questions, to offer up a witness who can respond to
3 that, we would have to do exactly what Judge Erickson said we
4 don't need to do at this particular point in time, and all of
5 that is based upon no suggestion by Mr. Raiter or the other
6 plaintiffs that there's been anything untoward done here nor
7 do they tie it in any way to the cases that they have before
8 your Honor.

9 In fact, they say on page 7 of their brief all that
10 is known is that Zurn did not issue a preservation notice.
11 We acknowledge we didn't send out a hard copy of that, but we
12 did inform Mr. Raiter that the people who were involved in
13 this kept the relevant claims-related material.

14 And, you know, the discovery here hasn't been from
15 2007 forward. They've asked for and gotten claims-related
16 materials. They're all of the claims-related materials that
17 we have. They haven't tied together any of the dots or
18 linked them together in any way to suggest that there's
19 anything missing here.

20 So, with all due respect, we think there's a
21 fishing expedition where there's been a net cast extremely
22 broadly without any suggestion that there are any fish there
23 at all.

24 Second issue.

25 THE COURT: Identity of the e-mail author.

1 MR. CONNOLLY: Identity of the e-mail person.

2 As Mr. Raiter sort of acknowledged there and as
3 your Honor observed, there's a court order by Magistrate
4 Judge Erickson relative to the redaction that your Honor
5 affirmed that allowed us to redact the witness names, and we
6 inquired of this particular witness to see whether or not
7 this person wanted to participate.

8 I ought to make clear that this person is a
9 warranty claimant. It's a distributor, but they were
10 submitting claims. And we asked this person whether they
11 wanted to be inquired of, they indicated they did not, and
12 because Mr. Raiter never suggested how this was at all tied
13 to the class certification issue, we honored that request. I
14 mean, one could make the same request relative to every
15 single person whose name we redacted and the same arguments
16 could be proffered by Mr. Raiter.

17 THE COURT: Well, but without the support of an
18 e-mail.

19 MR. CONNOLLY: Well, without the support of the
20 e-mail, but there hasn't been a suggestion that the text of
21 the e-mail isn't -- he can inquire of this of Mr. Sauer, who
22 has been noticed for deposition already, and he can say,
23 "What did you do about X, Y and Z that are referenced in that
24 e-mail?"

25 So, they've never shown any basis to suggest that

1 any of this is tied to class certification. The guy is
2 complaining about the issues in his particular locality and
3 addressing his concern and all that's out there for inquiry
4 of the Zurn people.

5 THE COURT: Okay. I'll give you a two-minute
6 rebuttal, Mr. Raiter, if you'd like.

7 MR. RAITER: Certainly if the issue is that the
8 topics are not tied to brass fittings, we can work that out.
9 That's not difficult to do.

10 THE COURT: The bigger issue is I think whether
11 it's tied to class certification.

12 MR. RAITER: Yeah. And at this point, if there
13 are documents that talk about the uniform nature of the
14 failure, if there are documents that talk about why they
15 won't sell brass into the state of Minnesota anymore on a
16 uniform basis, if there are documents that talk about why
17 they are transitioning all of their brass fittings to plastic
18 nationwide because of a uniform design defect or choice of
19 alloy problem or anything like that, that goes right to class
20 certification, and what we've asked for is simply whether and
21 what. We've not asked them to do anything more than that.
22 You can look at the topics very clearly. So, if the answer
23 is yes, we've preserved it, it's an easy deposition.

24 One last point, your Honor, on the 30(b)(1). If
25 this person was a simple property owner who sent an e-mail

1 like that and some did, we wouldn't be here asking for their
2 deposition. This person is selling the fittings and has
3 knowledge about what was being told to the field. That's
4 what makes it relevant. That's what makes it relevant to
5 class certification.

6 MR. CONNOLLY: Your Honor, can I have just a
7 one-sentence response to Mr. Raiter?

8 THE COURT: You may.

9 MR. CONNOLLY: Mr. Raiter identified two issues
10 that might be relevant relative to the 30(b)(6), the
11 transitioning -- the no longer selling in Minnesota and the
12 offering of plastic. What he omitted to tell you is that
13 they've already taken a 30(b)(6) deposition on precisely this
14 topic and they inquired at length about -- the president of
15 the company about exactly those issues, so they've had the
16 discovery that he says would be necessary to address.

17 THE COURT: All right. Well, I haven't heard or
18 ruled on a motion to compel since my magistrate days ended in
19 1996, so I'm going to take a quick review of the law, but
20 I'll get you an order on this in the next couple of days. It
21 won't take me long.

22 Anything further today?

23 (No response)

24 THE COURT: Do we have any more sense since we
25 last met about how many cases might be in the pipeline?

1 MR. RAITER: I'm aware of at least a couple more,
2 some coming from our group and at least one that may not be
3 coming from our group. But yes, I expect we shall see some
4 additional cases.

5 THE COURT: All right. Thank you very much.
6 We'll get you an order fairly soon.

7 (Proceedings concluded at 2:12 p.m.)

8 * * * * *

9

10

11

C E R T I F I C A T E

12

13

14

15

16

17

18

19

20

21

/s/ Timothy J. Willette

22

23

24

25

TIMOTHY J. WILLETTE, RDR, CRR
Official Court Reporter - U.S. District Court
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415-2247
612.664.5108