

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: ZURN PEX PLUMBING PRODUCTS) MDL NO. 08-1958
LIABILITY LITIGATION) (ADM/RLE)
)
) Courtroom 13 West
) Tuesday, April 21, 2009
) Minneapolis, Minnesota

PRETRIAL CONFERENCE
-and-
HEARING ON PLAINTIFFS' MOTION TO COMPEL

[DOCKET NO. 46]

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 (9:00 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 Plumbing Products Liability Litigation.

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

9 MR. RAITER: Shawn Raiter on behalf of the
10 plaintiffs.

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

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

15 MR. CIALKOWSKI: Good morning, your Honor. David
16 Cialkowski for the plaintiffs.

17 MS. SWANSON: Good morning, your Honor. Kelly
18 Swanson on behalf of the plaintiffs.

19 THE COURT: Five attorneys. All right.

20 Mr. O'Neal.

21 MR. O'NEAL: Good morning. Jim O'Neal, Faegre,
22 for the defendants.

23 MS. FREESTONE: Good morning. Amy Freestone on
24 behalf of the defendants.

25 MR. SNIEG: Good morning. David Snieg on behalf

1 of the defendants.

2 THE COURT: Good morning, counsel.

3 Before the Court this morning, I think, is the
4 status conference with regard to this matter as well as a
5 motion to compel. I don't know. Anybody have a preference
6 of what we do first? Let's hear argument on the motion to
7 compel. I just finished reading the briefs and have my head
8 into that, so let's hear the motion to compel first and then
9 we'll --

10 MR. RAITER: Sure, your Honor. Thank you. Shawn
11 Raiter on behalf of the plaintiffs.

12 THE COURT: This is one of those good ideas I had
13 of doing all the discovery motions myself instead of sending
14 them back to Judge Erickson.

15 MR. RAITER: I'm afraid you're going to see others
16 as well, but we can talk about that later.

17 THE COURT: That was a pre-Petters decision.

18 (Laughter)

19 THE COURT: Given the weight of my other case
20 load, I may have to reconsider, but I'll take this one on
21 anyway.

22 MR. RAITER: Well, luckily this one is fairly ripe
23 in that we've gone through some of these issues before.

24 THE COURT: And we're down to 20 documents.

25 MR. RAITER: We're down to 20 documents. We

1 believe they present many of the same issues that Judge
2 Erickson decided. They're obviously unique documents.
3 Plaintiffs are at the disadvantage that they always are in
4 this situation because we've never seen the documents, so we
5 are making this motion based on the meet-and-confer process
6 that Magistrate Judge Erickson uses not only in this case but
7 other cases, which is you meet and confer about a privilege
8 log and you literally sit down with defense counsel and say,
9 "Tell me about this document. What can you tell me about
10 whether there was a claim? What can you tell me about the
11 indicia of potential litigation?" We've done that and here
12 we are with 20 documents.

13 Really, the fundamental issue that runs through
14 this motion is whether any of these documents were generated
15 outside the normal course of business, because such documents
16 are not privileged. Even if Ms. Macia, in-house counsel, or
17 Wayne Aaron, who was another Zurn attorney, were involved in
18 the creation of, in the recipient chain of, or in the
19 distribution of those documents, if this is a regular course
20 of business activity or should be a regular course of
21 business activity, those documents are discoverable.

22 So, really what's at issue here are two different
23 types of regularly conducted business activities that you see
24 a manufacturer of a product like Zurn conducting on a
25 day-to-day basis, which is the handling of warranty claims.

1 And when you're having a problem with a particular product or
2 products, you investigate the causes of those problems and
3 you try to figure out what's happening, either to make
4 changes in the product, to change your warnings, to do
5 something to address the issue. That's what these documents
6 really reflect from what we can tell. And again, we don't
7 know with absolute certainty because we've not seen the
8 documents.

9 But category number one are these Cartwright
10 documents. Magistrate Judge Erickson in his first order
11 issued an order compelling Zurn to produce a document that
12 was produced by a man named Peter Cartwright. He happens to
13 be a water consultant. The document was dated December of
14 2005 and it was addressed to Mr. Runyan at Zurn Pex.
15 Mr. Runyan is the head of engineering. Gary Runyan is his
16 name.

17 Those documents, or the first category of documents
18 here, are four documents that apparently relate to
19 Mr. Cartwright's retention and perhaps communications with
20 him or with another consultant that he conferred with as part
21 of his work. In the prior motion before Magistrate Judge
22 Erickson, Zurn did not claim that the retention of Peter
23 Cartwright was done out of an anticipation of litigation. We
24 now have an affidavit --

25 THE COURT: It doesn't look to me that the

1 Cartwright issue was discussed much.

2 MR. RAITER: It wasn't discussed in the briefing,
3 but it was certainly part of the privilege log and part of
4 the documents submitted to him, obviously, because Magistrate
5 Judge Erickson ruled on that. But, you know, our position on
6 this is, by omission, at that time, if there was some belief
7 that he had been retained in anticipation of litigation, they
8 would have said that at that time and by omission we can
9 infer that he really wasn't retained in anticipation of
10 litigation in the true sense that would make the documents
11 potentially privileged.

12 So, the prior affidavit of Ms. Macia was silent,
13 the plaintiffs' briefing was silent, as was the defendant's
14 briefing, but it was still a document submitted and we
15 believe that if there was some belief that it was privileged
16 in any way and that his retention and communications with
17 him, communications about him were somehow privileged, it
18 should have been addressed then and it wasn't.

19 So we now have the document, the actual report
20 itself, and what appears to be at issue are these four
21 documents, three of which were issued by or drafted by Gary
22 Runyan to unknown recipients. One of them was drafted by
23 Zurn Pex, Inc. We don't know who the actual author was.

24 But these documents don't have any indicia
25 whatsoever that Ms. Macia provided advice, that her advice is

1 reflected in those documents. She was not a copyee of the
2 documents. She was not a recipient of the documents. So
3 what you really have is not a work product/mental impression
4 issue. It is: Is he a litigation consultant retained in
5 anticipation of litigation or was he retained as part of
6 their normal business activities.

7 So if you look at the contemporaneous evidence
8 surrounding these documents, what you really see is that
9 there is no indication that this was related to any
10 particular claim, that it was related to any particularly
11 anticipated litigation, and Magistrate Judge Erickson reached
12 that conclusion by looking at the report itself. Whether
13 these communications have any such indication we don't know
14 for sure, but having met and conferred with defense counsel,
15 we believe that there isn't any.

16 So, we look at the deposition testimony that we
17 provided to your Honor from Mr. Trevor Johnson, who's the
18 president of Zurn Pex, Inc. We asked him about the retention
19 of Mr. Cartwright, or we asked him about the use of
20 Mr. Cartwright's work. Page 60 of his deposition, he
21 indicated that the work was done as part of the consulting
22 and analysis of the cause of the failures in Minnesota and it
23 was done as part of the analysis Zurn used to determine
24 whether it should continue selling these products in
25 Minnesota. Doesn't say anything about we hired him because

1 of litigation or out of anticipation of litigation.

2 We then asked Mr. Runyan a similar question: "What
3 was the purpose of your consulting with Mr. Cartwright?

4 "We had some water test results and we wanted him
5 to review them to see if there were -- he could identify
6 characteristics about the water that might set it apart from
7 other types of water that he might have been aware of in the
8 United States."

9 This was the chance to tell us -- there had just
10 been an objection by counsel, by Mr. O'Neal, right before
11 this question saying: Hey, if Ms. Macia told you to do this
12 out of anticipation of litigation, it's legal advice,
13 et cetera, don't answer. And he tells us: Really, we had
14 some water test results. We wanted them analyzed. Nothing
15 about litigation itself.

16 So, he certainly indicated that Ms. Macia directed
17 him to retain Mr. Cartwright. There's no dispute about that.
18 We won't dispute that Ms. Macia said go hire a water
19 consultant, but what we know about Ms. Macia's role in the
20 company was that she was acting as the handler of subrogation
21 warranty claims routinely. She was the only person who
22 handled those. And many of the communications that are --

23 THE COURT: They did not have anyone close to
24 being a metallurgist on staff?

25 MR. RAITER: Correct, and we provided you with a

1 few snippets of deposition testimony to that effect. They
2 didn't have a metallurgist and they didn't have a water
3 expert. Now, we'll talk a whole bunch about that when we get
4 to the merits of the case, that you're selling products that
5 are made out of metal used to convey water and you don't have
6 people on staff that have that expertise, but nonetheless,
7 what you have here is a requirement that if they want any
8 further analysis, it has to be sent out.

9 And really, the position they take is, as of 2004
10 when Ms. Macia has averred that she anticipated litigation,
11 any time they retain some other outside consultant it must be
12 privileged. Well, you've got four or five years here of
13 business practices, handling warranty claims, trying to
14 figure out what happened, and you don't have internal
15 expertise to make these determinations. So the Cartwright
16 documents, we believe, were simply generated as part of the
17 retention of an outside consultant to help identify what was
18 going on with these fittings and what the water conditions
19 were. There's no indication otherwise.

20 There's been -- I'll just go through the others as
21 well.

22 There's a category of water testing documents.
23 These were all generated by Gary Runyan. We don't have any
24 indication who the recipients were. We don't have any
25 copyees, we don't have any indication that there's attorney

1 mental impressions, work product advice displayed in those
2 documents. I believe the position is that there is some
3 outside evidence that there may have been a threat of
4 litigation. We heard that in the prior motion, Magistrate
5 Judge Erickson rebutted that for the most part, so there are
6 about four or five documents there as well.

7 And then there are these claims handling
8 communications. Same thing. I don't think we need to beat
9 this horse too terribly.

10 Without seeing the documents, it appears to us that
11 they continue to be communications by or to Ms. Macia
12 involving the handling of routine warranty claims and/or
13 subrogation claims. Again, she clearly handled all the
14 subrogation claims herself. Some of the other warranty
15 claims she was consulting with her staff and that's great,
16 she can do that, but really, there wasn't any indication that
17 any of these claims were going to be litigated.

18 As we sit here today, what is interesting is that
19 none of these reports from Cartwright, none of the water
20 testing documents referenced by Mr. Runyan -- or excuse me --
21 drafted by Mr. Runyan, to my knowledge, have ever been part
22 of any litigation. They've not been used. There's no
23 indication that there ever was a lawsuit or that there was a
24 claim or that somehow these documents were used to further
25 the defense of one of those claims, so it's all internal

1 handling, in our mind.

2 The last point I want to make, your Honor, is,
3 there was an indication in Zurn's brief that there's this
4 dual purpose exception. If you look at what the Marvin
5 Lumber case says and the Diversified case that is cited by
6 the Marvin Lumber case, and then if you also look at *Wright*
7 *and Miller* as well, what that talks about is where a document
8 has legal advice and mental impressions of an attorney so
9 intertwined with a document, so intertwined with normal
10 business activities within a document that you shouldn't
11 produce the document even though part of it was generated out
12 of a normal business activity. That's not what's going on
13 here. We don't have any indication that Ms. Macia's legal
14 advice is intertwined within any of these documents with the
15 exception of perhaps the claim handling documents.

16 THE COURT: Zurn suggests in their brief that it
17 might be helpful for me to review the documents *in camera*
18 rather than feel through the blanket here about what these
19 are. I take it the plaintiff doesn't have any objection to
20 that.

21 MR. RAITER: No, we don't, your Honor. I think
22 you're probably going to have to do that.

23 THE COURT: Okay.

24 MR. RAITER: It appears to be a very limited
25 number of documents, not a lot of pages.

1 THE COURT: Thankfully.

2 MR. RAITER: It should be pretty easy to handle.

3 THE COURT: All right. Thank you.

4 Mr. O'Neal. Or is it Ms. Freestone?

5 MS. FREESTONE: Good morning, your Honor.

6 THE COURT: Good morning.

7 MS. FREESTONE: Well, I think any motion to compel
8 that, you know, you have to look at, especially on issues of
9 privilege like this, are sometimes seen as a burden to the
10 Court and nobody's favorite thing to do. You have the great
11 benefit --

12 THE COURT: Well, I spent a couple years as a
13 magistrate, so it's sort of going back in time, but it's --

14 MS. FREESTONE: Old times?

15 THE COURT: Part of the job. It's okay.

16 MS. FREESTONE: Well, you do have the benefit that
17 Judge Erickson really has been through all of these issues
18 before and we have his order, and that's really where Zurn
19 came at this process when it was going through its
20 supplemental privilege log, is, it wasn't starting from
21 scratch. We weren't -- you know, we had already produced
22 this privilege log and what we were doing now was going back
23 through that log very carefully on a document-by-document
24 basis and applying each document to Judge Erickson's order.
25 And so it's our position that once we went through that

1 process, there were certain documents that Zurn had
2 maintained privilege on, but in light of Judge Erickson's
3 order changed its position in order to stay within the
4 confines of the court's ruling. Our position, however, was,
5 at least with regard to these 20 documents and it remains,
6 that our review of these documents in light of Judge
7 Erickson's order is consistent with keeping them privileged.
8 And I will just -- I do think it's probably critical that the
9 Court looks at these documents and I have them here. It's a
10 very small file. You can get through it very quickly.

11 THE COURT: Oh. It looks much better than I was
12 guessing. I like that.

13 MS. FREESTONE: And what we've done too -- if your
14 Honor wants to see it at the end of this hearing, what we've
15 done is, where a full document was withheld, we give you that
16 document and we list it by the priv log doc number.

17 THE COURT: That would be helpful.

18 MS. FREESTONE: Along with we have a copy -- have
19 exerted the privilege log itself that the plaintiffs got so
20 you can see why we maintained the privilege.

21 THE COURT: That should guide us through it.
22 That's fine.

23 MS. FREESTONE: And then as to documents where we
24 just redacted a portion, we give you both the produced
25 redacted version and the unredacted version so you can take a

1 look.

2 THE COURT: Great.

3 MS. FREESTONE: I will address just very quickly
4 the three areas of documents that you're going to see in this
5 folder, first as to the Cartwright documents.

6 Mr. Raiter is incorrect that at the time that we
7 submitted the report of Mr. Cartwright initially to Judge
8 Erickson, which was the only Cartwright document that Judge
9 Erickson saw -- the other documents came in this supplemental
10 log that he did not review. But as to that report, right on
11 the privilege log itself, in the initial privilege log, we
12 indicated that this was a consultant retained in anticipation
13 of litigation.

14 Now, I should note that that report itself was
15 attached to a privileged e-mail communication between
16 Mr. Runyan, Ms. Macia and outside counsel. Plaintiffs never
17 challenged the e-mail communication, they only challenged the
18 actual final report, and Judge Erickson said that the final
19 report should be produced. When we reviewed that and then
20 reviewed now Mr. Cartwright's -- the underlying consulting
21 documents that are at issue here, we reviewed that in light
22 of Judge Erickson's order and determined that, as we had
23 always believed, the retention of Mr. Cartwright fell in line
24 with the retention of IMR, which Judge Erickson did address.
25 And the metallurgical firm IMR, Ms. Macia said that she had

1 retained them or under her direction Gary Runyan contacted
2 IMR --

3 THE COURT: For litigation.

4 MS. FREESTONE: For anticipation of litigation.

5 Judge Erickson agreed with that, but the final reports that
6 IMR produced -- or that IMR created were produced. It was
7 just the underlying communications about the consultation
8 itself that were withheld. And so we believe we are firmly
9 in line with Judge Erickson's order that, yes, fine, the
10 final report was produced. It had been withheld initially
11 because it was part of a privileged communication. That
12 e-mail communication has still been withheld, the report was
13 produced, but it's our position that those underlying
14 consulting documents still should be withheld under the same
15 reasoning that Judge Erickson gave to the IMR documents.

16 I'd also direct your Honor's attention -- in the
17 voluminous briefing that's been going on basically for a year
18 now almost continually on these privilege issues, there's
19 reference to the **Bituminous Casualty** case that Judge Noel
20 heard, and that was a specific case where the final report of
21 a consultant was produced, but all of the drafts and
22 underlying data and the communications necessary to
23 facilitate the investigation were privileged and the judge
24 ruled that they should stay privileged. And so I think it's
25 a very similar situation and it's similar to the ruling of

1 Judge Erickson on the IMR documents.

2 So it's true that Ms. Macia's affidavit comes now
3 as opposed to a year ago, but I would submit to the Court
4 that it's purely the nature of what was being addressed in
5 the initial briefing. The staging of all this was a little
6 bit strange in that there was briefing in January, there was
7 additional meet-and-confer, and then we submitted things for
8 *in camera* review, and that particular report was never fully
9 briefed or the issue wasn't briefed, but we think our
10 position on it has always been clear.

11 With regard to these water analyses documents, I
12 don't think there's a whole lot to say. Our position is that
13 Judge Erickson indicated that where documents were prepared
14 where it's clear that there was a threat of litigation or
15 that there's some evidence that there was a threat of
16 litigation or that there were attorneys involved for the
17 claimant on the other side, that such documents, even if they
18 were claims handling documents involving Ms. Macia, could
19 remain privileged and he ordered that certain of those
20 documents that he reviewed remain privileged. And that's our
21 position, is that these water analyses documents relate
22 directly back to communications that you'll see here too
23 where there's a reference that the parties are threatening
24 litigation, and so our position is that that actually falls
25 right in line with Judge Erickson's order and that's why we

1 withheld them on that basis.

2 And then finally as to these claims handling -- or
3 how Plaintiffs call them claims handling documents, we submit
4 that -- and you're going to need to take a look and make a
5 decision for yourself, but it's Zurn's position that these
6 are not typical claims handling documents, that these are
7 documents that do address the legal advice and legal
8 consultation of in-house counsel or of Ms. Macia and that
9 they are not just your standard, routine claims handling
10 documents.

11 While we disagree still that Ms. Macia ever acts
12 outside of her capacity as an attorney when she's providing
13 legal counsel on claims issues, Judge Erickson made his
14 ruling and he indicated that where she is, it doesn't mean
15 that every claims document that Ms. Macia is on somehow loses
16 its privilege. She is their in-house counsel and where she's
17 providing counsel outside of or in a nontypical claims
18 fashion, it's our position that her privilege advice or her
19 privilege consults should be maintained.

20 And so it's our position again that all of these
21 documents -- and also Wayne Aaron, who was in-house counsel
22 before Ms. Macia, there's one document in there that
23 references him and it's clearly not related to -- when you
24 take a look at it, we would submit that this is something --
25 this was legal advice between a client and in-house counsel

1 and didn't relate to processing claims.

2 So, we would be happy to give this to you at the
3 end of the hearing today and have you make your decision on
4 that basis.

5 THE COURT: Okay. I think that's what we'll do,
6 we'll turn that over.

7 Did you want a moment or two in rebuttal,
8 Mr. Raiter?

9 MR. RAITER: Very briefly, your Honor.

10 The only -- the issue on the Cartwright documents
11 about IMR in particular, the reports were produced, the kind
12 of ancillary communications were not, but that was because
13 Magistrate Judge Erickson concluded that there was an
14 identifiable risk of litigation and that is why IMR was
15 retained. AADFW and MES are two other metallurgical
16 consulting firms that Zurn retained, and when Magistrate
17 Judge Erickson concluded that they were not retained out of
18 anticipation of litigation, all of the ancillary
19 communications and all of the retention information was
20 produced. So essentially what you have is, they're saying
21 Cartwright is like IMR, we're saying Cartwright's like AADFW
22 and MES.

23 THE COURT: I get it. I'll take a look at the
24 documents and get you an order soon, probably shorter in
25 length than if you'd heard from Judge Erickson, but hopefully

1 faster than you'd hear from Magistrate Judge Erickson. I
2 think we can turn it around pretty quickly. So we'll get
3 those documents.

4 All right. Other matters we should address today
5 are as listed in Mr. Raiter's letter of April 20th citing an
6 agenda for today.

7 Report of work completed since last conference.

8 MR. RAITER: Your Honor, I think in summary
9 fashion it will be coming from both of us here.

10 We've been taking depositions, both the plaintiffs
11 and defendants have, since we were here last. Defendants
12 have done some water inspection -- excuse me -- inspections
13 and water sampling at some of the class representative
14 properties.

15 I'll also cover work remaining before discovery
16 closes since I'm standing here and then Mr. O'Neal can do the
17 same.

18 THE COURT: Now, you didn't file anything written
19 on this, right?

20 MR. RAITER: Correct. Just the letter.

21 THE COURT: And I take it you agree with
22 Mr. O'Neal's status report.

23 MR. RAITER: Yeah. Those are things that he has
24 requested and work that they're going to be doing and he can
25 address that as well, but we didn't submit anything

1 differently. But I'll cover both since I'm here and he can
2 do the same.

3 THE COURT: Okay.

4 MR. RAITER: There is a New Mexico case that is --
5 either is or has been filed within the next day or two and we
6 do anticipate that there will be several other cases before
7 the next status conference.

8 THE COURT: And they're coming here?

9 MR. RAITER: I would assume that they will.

10 THE COURT: Okay.

11 MR. RAITER: The New Mexico case will be part of
12 the pleadings, so I'll know when it's actually filed, but it
13 may be being uploaded even today, as far as I know, but if
14 not by the end of the week, no doubt.

15 And we do anticipate, as I indicated, a few more
16 cases will be coming in before the next status conference and
17 I'm assuming that Zurn will request that they be transferred.

18 Work remaining before discovery closes. We still
19 have depositions requested of some Zurn representatives.
20 There are going to be some third-party depositions that the
21 plaintiffs intend to take. Zurn has the work that it wishes
22 to do as well. Basically, we're getting most of the fact
23 discovery done as we need to do --

24 THE COURT: That deadline is June 15th.

25 MR. RAITER: June 15, correct, and that's

1 progressing fairly well. We have scheduling issues because
2 of the number of lawyers involved and parties and some of it
3 is geographically dispersed, but we're well under way.

4 There is an issue I wanted to raise. It has to do
5 with electronic discovery. You're going to be seeing a
6 motion from us. To date Zurn has refused to even search its
7 electronic discovery, including e-mails, so the only thing
8 they've given us is any hard copy e-mail or electronic data.
9 We've met and conferred, we're going to get a hearing date
10 from your Honor at some point, and we probably will get a
11 hearing date even before the next status conference so we can
12 tee this up.

13 THE COURT: When is the next status conference?

14 MR. RAITER: I don't believe we have a date for
15 one yet.

16 THE COURT: Probably should be in August?

17 MR. RAITER: Yeah. I mean, we probably will get
18 this before you -- hopefully, given your calendar, within the
19 next month so we'll have this issue up before you, but
20 basically we don't have anything -- part of this is based on
21 one of Magistrate Judge Erickson's earlier rulings about
22 focusing on hard-copy discovery first and then turning to ESI
23 if necessary. We've requested it, Zurn has not produced any,
24 has said that our requests are overly broad and we're going
25 to have an issue that we're going to bring before you very

1 shortly.

2 THE COURT: Okay.

3 MR. RAITER: So that's on the agenda as well. And
4 I don't have anything else in terms of work we've done or
5 work we intend to do right now.

6 THE COURT: Okay. Mr. O'Neal.

7 MR. O'NEAL: Thanks, Judge. Mr. Raiter is
8 correct. We've been working away and things are going to get
9 more intense as the fact discovery deadline approaches, which
10 is not unusual. I decided to just have as a hand-up a report
11 on what we the defendants believe we want by way of
12 discovery. I did not attempt to cover the things that the
13 plaintiffs have requested.

14 I think that with a lot of work between now and
15 June 15th we are in line to abide by the schedule and keep
16 things on track. The e-discovery point that Mr. Raiter
17 raises is the one potential clinker in that scenario, it
18 seems to me, in that this actually was briefed and discussed
19 with Judge Erickson way back when the case first started in
20 the fall of 2007, and the ruling was, at least in the
21 beginning, Judge Erickson endorsed our suggestions of what we
22 would produce --

23 THE COURT: Start with the paper --

24 MR. O'NEAL: -- in order to get to class
25 certification with the idea that full merits discovery to the

1 extent necessary could proceed after we determined whether we
2 have class action or not. And it seems to me that it is late
3 in the day now to attempt a broad sweep of e-mails for 20
4 people and there's no way we'd be done by June 15th. But
5 those are the issues we're going to be addressing when we're
6 here.

7 There's been some meet-and-conferring. I think
8 we're still willing to talk about one or two custodians or
9 getting it better identified, but if we have to be here,
10 we'll be happy to be here.

11 The destructive testing and water testing I
12 indicate is under way, and the expert report deadlines I
13 would think from our standpoint we'll be ready to make
14 September 1 as scheduled.

15 Thank you.

16 THE COURT: Okay. Good.

17 Well, it sounds like you are basically on course on
18 the e-discovery issue. Obviously you've done, in my
19 estimation, a commendable job of streamlining things for me.
20 I don't think I've been forced to rule on a lot of things
21 unnecessarily. So we'll take a look at these 20 documents,
22 and obviously if you can make some headway on e-discovery,
23 that's fine; otherwise, I'll address the motion when it comes
24 up with the anticipation that if the June 15th deadline has
25 to be bumped back a bit, it would be only for the e-discovery

1 purposes and not for anything else.

2 MR. RAITER: I don't want to argue the motion, but
3 as part of the 30(b)(6) on spoliation and electronic evidence
4 preservation, we learned that there was no change to their
5 policy of retaining only 30 days of backup tapes. And so
6 what we did hear from some people was, "Well, I had my own
7 special e-mail folder for brass fittings problems." So we
8 say, "Great. It's identified. It must be sitting right
9 there. It's still live. Please produce those documents,"
10 and they've said no. So, I mean, that's just one of the
11 issues. We're trying to hammer it out and it's still
12 evolving and I'm not sure that we'll make any headway, but we
13 need to get it in front of you quickly because we would like
14 to try to stay at least as close to the schedule as possible.

15 The next agenda item, your Honor, is Phase I
16 designation. We designated the Minnesota cases as being the
17 cases that we will present to you in Phase I certification.
18 We let Mr. O'Neal know that, the Minnesota cases being the
19 Cox case, the Minnerath case, and the Oelfke case.
20 Mr. O'Neal and I conferred about how to best present that to
21 the Court. We're talking about a Minnesota statewide class
22 only. We are not talking about multi-state classes. We're
23 going to go with a single state to see what you think about
24 that and then we can decide what to do from there once we
25 have a ruling.

1 The procedural issue that we need to address -- and
2 Mr. O'Neal and I talked about it this morning, we've at least
3 talked about it in the past a bit as well -- is how to
4 present that to you. Do we consolidate all those cases into
5 a single case, work from then a consolidated complaint? Do
6 we file a master complaint from which we will seek
7 certification? Do we file one brief on behalf of the
8 plaintiffs and have the other two cases join? We're trying
9 to work that out and we wanted to at least raise that with
10 you, I think, to try to get some input. If you have a strong
11 feeling how you'd like to see this presented, we would do it
12 that way.

13 MR. O'NEAL: I have a thought on that, your Honor.

14 THE COURT: Okay.

15 MR. O'NEAL: And I mentioned this to Mr. Raiter
16 this morning.

17 We'd been talking about master complaints and there
18 are some fairly complex procedural issues associated with
19 those and other ways of doing it, and it occurred to me that
20 it seems simpler to simply take the Cox, Oelfke, and
21 Minnerath cases, which are all Minnesota cases, I believe all
22 plead identical classes and subclasses --

23 THE COURT: And they've been in existence for
24 quite awhile.

25 MR. O'NEAL: -- but I understand from Mr. Raiter

1 -- and he just said it -- that they're only going to seek a
2 Minnesota class in this motion, not the other classes that
3 are in the complaint. Procedurally, it seems to me simplest
4 to consolidate -- and of course, none of these cases are
5 consolidated on an MDL docket right now -- but to consolidate
6 the three Minnesota cases into one case for all purposes and
7 get an amended complaint that sort of encompasses that case,
8 and then I think it's pretty clear what we're dealing with
9 when the certification motion comes and you don't have some
10 of the more complex issues attendant upon a master complaint.
11 That was my thought. And I just mentioned it to Mr. Raiter
12 this morning, so he hasn't really had time to think about it.

13 THE COURT: What's your first reaction to that?

14 MR. RAITER: My first reaction is that it is not a
15 bad idea and that it may make sense. I obviously need to
16 consult with counsel in the Minnerath and Oelfke cases, both
17 of whom happen to be sitting here today, but we haven't had a
18 chance to discuss it.

19 THE COURT: Well, they haven't fallen on the floor
20 and aren't kicking too much.

21 MR. RAITER: So we have not yet had a chance to
22 analyze that and make a final decision. If that sounds
23 acceptable to your Honor, I think certainly we will go back,
24 meet and confer and get back to you on short notice about our
25 position. It seems reasonable to me to get those things done

1 in a single case, but we'd obviously have issues about trying
2 the case and I think we just as Plaintiffs' counsel here need
3 to talk about it a bit.

4 But that being said, the complaints are relatively
5 similar. I think that they could be fairly well
6 consolidated. The discovery thus far has focused on the
7 Minnesota class representatives already. Ms. Oelfke's been
8 deposed. Her plumber happens to be the Coxes' plumber, who
9 will be deposed next week, I believe. The Minneraths and
10 Ms. Oelfke have had their water sampled. So I think pretty
11 quickly we could get the majority of the fact discovery
12 needed for those cases ready to go and get them up and before
13 you in the fall.

14 So if that's acceptable to you, we'll get back to
15 you shortly.

16 THE COURT: I guess in terms of master complaint,
17 consolidation, single complaint, uniting several, I don't
18 have a strong feeling. If you can agree to a procedure
19 that's satisfactory to everybody, I'm fine with that. You've
20 shown an effort to streamline things and keep things fairly
21 straightforward here and if that continues, that's fine.

22 I do think keeping it to a Minnesota class and it
23 seems to me if there are three or four plaintiffs involved,
24 that's a manageable number, so I think you're on the right
25 track. I don't have a strong feeling about the mechanics and

1 procedural way of doing that.

2 MR. RAITER: Okay.

3 THE COURT: All right. Anything else I need to
4 address today?

5 MR. RAITER: Nothing from the plaintiffs, your
6 Honor.

7 MR. O'NEAL: No, your Honor.

8 THE COURT: All right. We will get a copy of the
9 documents for the *in camera* review and try to get you an
10 order fairly soon on that given the press of other business,
11 but I think we can get it turned around pretty quickly.

12 Thank you.

13 (Proceedings concluded at 9:35 a.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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