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UNITED STATES BANKRUPTCY COURT  
 WESTERN DISTRICT OF NORTH CAROLINA  
 CHARLOTTE DIVISION

IN RE: : Case No. 20-30080-JCW  
 DBMP LLC, : Chapter 11  
 Debtor, : Charlotte, North Carolina  
 : Wednesday, April 17, 2024  
 : 9:30 a.m.

: :

OFFICIAL COMMITTEE OF : AP 21-03023 (JCW)  
 ASBESTOS PERSONAL INJURY :  
 CLAIMANTS and SANDER L. :  
 ESSERMAN, etc., :

Plaintiffs,

v.

DBMP LLC and CERTAINTEED LLC,  
 Defendants,

: :

OFFICIAL COMMITTEE OF : AP 22-03000 (JCW)  
 ASBESTOS PERSONAL INJURY :  
 CLAIMANTS and SANDER L. :  
 ESSERMAN, etc., :

Plaintiffs,

v.

CERTAINTEED LLC, CERTAINTEED  
 HOLDING CORPORATION, and  
 SAINT-GOBAIN CORPORATION,

Defendants,

: :



1 OFFICIAL COMMITTEE OF : AP 22-03001 (JCW)  
2 ASBESTOS PERSONAL INJURY :  
3 CLAIMANTS, on behalf of :  
4 the estate of DBMP LLC, :

5 Plaintiff, :

6 v. :

7 COMPAGNIE DE SAINT-GOBAIN :  
8 S.A., *et al.*, :

9 Defendants, :

10 :

11 ALDRICH PUMP LLC, *et al.*, : Case No. 20-30608 (JCW)

12 Debtors. : Chapter 11

13 :

14 TRANSCRIPT OF PROCEEDINGS  
15 BEFORE THE HONORABLE J. CRAIG WHITLEY,  
16 UNITED STATES BANKRUPTCY JUDGE

17 APPEARANCES:

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1 ALSO PRESENT: JOSEPH GRIER  
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1                                   P R O C E E D I N G S

2                   (Call to Order of the Court)

3                   THE COURT: Have a seat, everyone. Good morning.

4                   (Counsel greet the Court)

5                   THE COURT: Okay. Joint hearings today. We are in  
6 both the DBMP case and adversaries and that of Aldrich and  
7 Murray. So effectively, got a lot of ground to cover. This is  
8 pursuant to a, a printed agenda. I'm just looking at the one  
9 in the DBMP case at 2747, is the docket number.

10                   Let's get our appearances and then we'll see what we  
11 have to talk about. All right.

12                   Starting with the debtors.

13                   MR. ELLMAN: I can go, your Honor. Jeffrey Ellman  
14 from Jones Day on behalf of the debtor. We also have Valerie  
15 Ross here from ArentFox Schiff and my partner, Greg Gordon,  
16 from Jones Day is right behind me.

17                   THE COURT: All right.

18                   Others for the debtors?

19                   MR. CASSADA: Your Honor, Garland Cassada. I'm here  
20 with Kevin Crandall. We also represent the debtor.

21                   THE COURT: Okay, very good.

22                   Anyone else there?

23                   MR. EVERT: Your Honor, Michael Evert from Evert  
24 Weathersby Houff on behalf of debtors, Aldrich and Murray, and  
25 Clare Maisano from my firm and Matt Tomsic from Rayburn Cooper

1 are here for those debtors as well.

2 THE COURT: I should have asked if everyone was  
3 content with us announcing appearances jointly since I assume  
4 you're wanting to have joint hearings here this morning.

5 Is anyone opposed to that or want to talk about it?

6 (No response)

7 THE COURT: Okay.

8 So if you're only in one case, if you want to just let  
9 us know, that's fine, just as Mr. Evert did.

10 Anyone else?

11 Yes.

12 MR. SCHNEIDER: Yes, your Honor. Richard Schneider  
13 from King & Spalding representing Bestwall LLC.

14 THE COURT: All right.

15 Okay. How about for the Committees/Plaintiffs?

16 MS. CONCANNON: Good morning, your Honor. Serafina  
17 Concannon of Caplin & Drysdale on behalf of the Official  
18 Committee of Asbestos Personal Injury Claimants in DBMP and in  
19 Aldrich and Murray. And with me is my colleague, Shah Raafi.  
20 And I'll let my co-counsel introduce themselves.

21 THE COURT: All right, very good.

22 FCR representation?

23 Oh, I'm sorry. Mr. Wright, do you want to go next?

24 MR. WRIGHT: Morning, your Honor. Davis Wright of  
25 Robinson & Cole on behalf of the DBMP and Aldrich Committees,

1 with my partner, Natalie Ramsey.

2 THE COURT: Okay.

3 All right.

4 MS. HARDMAN: Your Honor, Carrie Hardman and David  
5 Neier from Winston & Strawn, special counsel for the Committees  
6 in DBMP and Aldrich, but we are here on Matter 2 on the agenda.  
7 So I think we're really speaking just for the adversaries  
8 today.

9 THE COURT: All right.

10 MS. HARDMAN: And just to round this out, we also have  
11 Rob Cox from Hamilton Stephens Steele & Martin.

12 THE COURT: Okay.

13 FCRs?

14 MR. GUY: Yes. Good morning, your Honor. Jonathan  
15 Guy for Mr. Grier, who's the FCR in the Aldrich and Murray  
16 cases. Mr. Grier is here with me in the courtroom.

17 THE COURT: Okay.

18 MR. GUY: Thank you, your Honor.

19 THE COURT: All right.

20 MR. GREECHER: Good morning, your Honor. Sean  
21 Greecher from Young Conaway on behalf of Mr. Esserman, who is  
22 on the telephone. Here with my partners, Mr. Parrish,  
23 Mr. Brady, and Mr. Herron.

24 THE COURT: Good to see the two of y'all sitting at  
25 the same table. You can imagine how disorienting --



1 MR. GREECHER: Yes. The future is bright, your Honor.

2 THE COURT: -- this is from the Court's perspective.

3 Because we always get something entirely different in the two  
4 cases from the FCR, so.

5 Other announcements? Other parties in the courtroom  
6 needing to announce?

7 Yes.

8 MR. STEEL: Morning, your Honor.

9 THE COURT: Mr. Steel?

10 MR. STEEL: Howard Steel of Goodwin Procter for the  
11 DBMP Non-Debtor Affiliates. I'm here with my partner, Gabby,  
12 Gabrielle Gould, and Jack Miller from Rayburn Cooper.

13 THE COURT: Anyone else in the courtroom needing to  
14 announce?

15 (No response)

16 THE COURT: Any telephonic appearances? Anyone?

17 Okay, very good.

18 MR. MASCITTI: Good morning, your Honor. Greg

19 Mascitti --

20 THE COURT: All right.

21 MR. MASCITTI: -- McCarter & English, on behalf of  
22 Trane Technologies Company LLC and Trane U.S. Inc. And I  
23 believe I'm joined on the phone by Beth Sieg of McGuireWoods  
24 and Stacy Cordes of Cordes Law.

25 THE COURT: Very good.

1 And for anyone else who might be trying to get through  
2 at the moment, I think it's Star 6 that gets you unmuted.

3 Anyone else?

4 (No response)

5 THE COURT: Okay.

6 Have the parties talked at all about how we're going  
7 to approach the two motions that we have pending here today?  
8 What batting order? How to, how to, to structure the argument,  
9 or we're just going to have a battle royal and everyone jump up  
10 and argue at the same time on, on a given matter?

11 MR. ELLMAN: Your Honor, Jeffrey Ellman from Jones  
12 Day.

13 I -- we haven't talked to the other side. We assumed  
14 we'd file the agenda.

15 THE COURT: Uh-huh (indicating an affirmative  
16 response).

17 MR. ELLMAN: That would allow the Aldrich folks to, to  
18 leave for the second matter if they don't want to stick around  
19 for it. But other than that, I mean, it's, it's not our  
20 motion. So we presume that both the, both the motions will be  
21 argued, we would respond, and, and, and the like.

22 MS. CONCANNON: Your Honor, we were planning on  
23 proceeding with the joint motions first and arguing them  
24 together.

25 THE COURT: Okay.

1           Anyone got a different plan?

2           (No response)

3           THE COURT: That's the way we'll do it.

4           We have traditionally in each of these cases offered  
5 the opportunity for case updates before we get into the matters  
6 on our omnibus dates. I don't know if you feel the need for  
7 that or whether that can be preserved until the end.

8           But I'm happy to hear anything you feel like we need  
9 to know.

10           MR. GORDON: Your Honor, Greg Gordon, Jones Day, on  
11 behalf of the debtor.

12           I do have a status report. I'm agnostic as to whether  
13 we do it now or at the end. I'm happy to do it at the end if  
14 that's preferable.

15           THE COURT: Anyone else feel like they need to update  
16 on the cases?

17           MR. EVERT: Your Honor, on behalf of debtors Aldrich  
18 and Murray.

19           We have an omnibus with the Court actually next week  
20 where we have other matters up. So we'll provide a status at  
21 that point.

22           THE COURT: Okay. Well, you just answered one of my  
23 questions, which was whether we were going to have a hearing  
24 next week, so. All right, very good.

25           Well, if it's just DBMP and you're going to be here,

1 Mr. Gordon, why don't you just stick with, with us --

2 MR. GORDON: Will do.

3 THE COURT: -- and we'll do that at the end.

4 We'll follow the printed agenda, then, and call the  
5 first matter, which is Committee's Objection to the Motion to  
6 Strike Subpoenas Issued by the Debtor to Aldrich and Murray,  
7 Bestwall, and, and the like and the objections filed thereto.

8 Are you also wishing to argue the, the motion by the  
9 Committee to quash the sub, the subpoenas sent to the debtors  
10 in DBMP, No. 2? I assume they go together.

11 All right, very good. That's where we'll start.

12 Hear from the movants.

13 MS. CONCANNON: Good morning again, your Honor.

14 Serafina Concannon of Caplin & Drysdale on behalf of the  
15 Committees in Aldrich and Murray and DBMP.

16 We are here today because DBMP has issued more  
17 subpoenas against more entities seeking sensitive and  
18 confidential claimant data from other cases in connection with  
19 estimation. This is not the same issue. This is worse because  
20 DBMP is doing it, again. DBMP is making an estimation theory  
21 soup and it is, it has been salting its soup and it is  
22 continuing to salt its soup, even though it no longer needs to.  
23 The soup is already too salty.

24 DBMP already has information from various trusts. It  
25 has PIQ data. It has information from Paddock. DBMP

1 articulates some reason, some minimum use for this data, but  
2 that minimal use is disproportionate to its needs here at this  
3 time and it is disproportionate to the burden on individual  
4 claimants who risk disclosure of their medical histories and  
5 their confidential information.

6           Where does this end? Is DBMP going to seek this  
7 information from every mass tort debtor, every mass tort  
8 defendant? Who's going to be the next mass tort debtor from  
9 whom DBMP will seek this information? Discovery is not  
10 limitless. At some point it has to be enough.

11           And DBMP's going to say that there's a protective  
12 order in place and that this information has already been  
13 produced pursuant to the various protective orders. But every  
14 time that claimants' data is exchanged, every time it is  
15 floating around between different debtors there is an increased  
16 risk that an inadvertent disclosure is going to happen or a  
17 data breach is going to occur. At some point it has to end.  
18 DBMP's estimation theory soup is already oversalted.

19           And I recognize that your Honor heard some of these  
20 arguments before and some of these points before. So I'm going  
21 to focus on the key issues here.

22           THE COURT: Uh-huh (indicating an affirmative  
23 response).

24           MS. CONCANNON: And those are at this point what are  
25 DBMP's needs for this information as well as the

1 confidentiality and the sensitive claims data at issue. And  
2 these, these are important points and they're intertwined, but  
3 first, I want to touch on issue preclusion.

4           There is no issue preclusion here because we are not  
5 here on the same issue. We're here because DBMP is asking for  
6 more information at the continued risk to claimants that their  
7 medical histories are going to be disclosed, that their  
8 confidential information will be shared. In Bestwall, there  
9 were different facts. Judge Beyer said that the discovery was  
10 largely precipitated by the fact that the debtor was entirely  
11 unsuccessful at getting trust discovery and PIQ discovery. And  
12 that was at the May 18, 2022 hearing. And DBMP, too, when it  
13 sought discovery from the trusts and from Paddock it did not  
14 have the information that it has now. So the circumstances are  
15 different here than in Bestwall and they're different here than  
16 they were in DBMP first time around.

17           So there's no issue preclusion on, under the first  
18 factor of the Microsoft test articulated by the Fourth Circuit  
19 and that first factor, which has to be met, is that the issue  
20 or fact is identical to the one previously litigated. And  
21 there are other factors that it has also not met and those are  
22 in our brief, but I want to focus on this main, on this, on  
23 this key factor. Because these issues are not identical. This  
24 is DBMP asking for more and with, with no need at this point.  
25 And that brings me to my, my next point about need.

1           So DBMP is precluded from obtaining this information  
2 under FRCP 26. We're all familiar with Rule 26(b)(1) about the  
3 scope of discovery, but it's really important to emphasize it  
4 here. This, this Rule is at issue here. The Rule says that  
5 discovery must be "proportional to the needs of the case,  
6 considering the importance of the issues at stake" -- and I'm  
7 going to leave a couple of words out, but I'll -- the important  
8 ones are "and the burden" -- "whether the burden of the  
9 proposed discovery outweighs its likely benefit." DBMP does  
10 not need this cumulative data. For two years, it has been  
11 aggregating a massive amount of settlement claims data from  
12 thousands of asbestos victims nationwide for estimation  
13 purposes. And in fact, DBMP admitted at the October 12, 2023  
14 hearing that it has made good progress in estimation.

15           And as your Honor knows, the vast majority of asbestos  
16 bankruptcies are resolved without estimation. Estimation is  
17 not needed to confirm a 524(g) plan. Estimation's not even  
18 mentioned in 524(g). At this point DBMP either has the  
19 information or it doesn't and any further claims data is not,  
20 any need, any need that it is purporting to state it has for  
21 further claims data is not, it's no longer advancing its case.  
22 It is amounting to an improper fishing expedition. And this is  
23 supported by U. S. v. Brown where the court noted that, "A  
24 subpoena that isn't advancing the case is a proverbial fishing  
25 expedition."

1 Both Judge Beyer and your Honor expressed concern  
2 about expanding the universe of estimation discovery. Judge  
3 Buyer has stated -- and Judge Beyer stated this with respect to  
4 Bestwall when Bestwall didn't even have the information that  
5 DBMP has now. Judge Beyer stated that it was time to "start  
6 contracting the universe of discovery rather than expanding  
7 it."

8 And your Honor also expressed concerns that claims  
9 discovery is "ballooning" and that we need to be mindful of the  
10 costs and the privacy concerns and not getting any more than we  
11 need. Well, we are at the point of ballooning.

12 And what is DBMP's need for this additional data? It  
13 hasn't provided support. It attached the declaration of  
14 Dr. Bates in Bestwall and that declaration states that,  
15 "Bestwall needs PIQ data to fill gaps in its records." Well,  
16 DBMP has the PIQ data.

17 Now DBMP also referenced Dr. Bates' declaration in, in  
18 the DBMP case, but that declaration is from 2020 before it had  
19 the data, the PIQ data, before it had the data from the various  
20 trusts, and from Paddock. DBMP has not articulated why the  
21 vast amounts of information that it has are insufficient for  
22 estimation and why it needs more.

23 And this Court needs to balance DBMP's little need for  
24 the information against the burden on claimants that their  
25 personal and their confidential information will be disclosed.



1 And that leads me to my next point about the confidentiality of  
2 the information. And I know your Honor has heard this before,  
3 but I just want to remind you of the key points. I'll try to  
4 keep it short.

5 THE COURT: It's been a while. Go ahead.

6 MS. CONCANNON: Huh?

7 THE COURT: It's been a while, so.

8 MS. CONCANNON: Okay. Well, happy to remind you of  
9 the key points.

10 The settlement data is confidential. These settlement  
11 agreements are private contracts. They were negotiated between  
12 private parties and often, these contracts require that the  
13 terms and confident, the terms and provisions be kept  
14 confidential. And that can include whether, when the date of  
15 the settlement payment was and that could even include the fact  
16 of the settlement. It depends on what the terms and the  
17 conditions of the contract state. And DBMP knows this.  
18 Because tort defendants have an interest in keeping the terms  
19 and conditions confidential. They have -- it's not, it's not  
20 more of an interest, the same interest. They don't want other  
21 plaintiffs to know with which plaintiffs they settled and for  
22 how much. So -- and they, and they don't want other  
23 tortfeasors to know as well. It is only now that they're in  
24 bankruptcy that they're willing to share information with each  
25 other.

1 But these are confidential terms and claimants are  
2 relying on the confidentiality being maintained.

3 DBMP cites some cases on pages 15 to 16 in the DBMP,  
4 in the opposition in DBMP and 9 to 10 in the opposition in  
5 Aldrich and they don't, but they don't support -- for, for the  
6 proposition that the fact of a settlement is not confidential.  
7 But their cases don't support that. The cases have different  
8 facts and different circumstances. And I'm not going to go  
9 through all of them, but as an example, in Arbour v. Alterra  
10 the settlement contract was filed on the public docket in  
11 redacted form.

12 So when, when something is filed on the public docket  
13 there's a different expectation of privacy. These settlement  
14 agreements were not filed on public dockets. And even there in  
15 that case the court noted that:

16 "Settlements between private parties are, generally,  
17 purely a matter of private contract. Neither the  
18 court nor the public ordinarily has any right to the  
19 disclosure of the terms of a private settlement."

20 There's also a strong public policy argument for  
21 upholding the confidentiality of settlement agreements and, I  
22 mean, this is black letter law. But it -- it-- the, the  
23 purpose of upholding the confidentiality of settlement  
24 agreements is that it encourages parties to settle. This is  
25 well-established. And just as an example, the Hasbrouck v.

1 BankAmerica case that, it granted a protective order relating  
2 to the discovery of settlement information based on a  
3 substantial public interest in maintaining the confidentiality  
4 of settlements and where the relevance was slight, if any. And  
5 Federal Rule of Evidence 408, we know, it prohibits the  
6 admissibility of evidence of settlement negotiations. The  
7 purpose of it is also to encourage settlements. Therefore,  
8 "The secrecy of settlement agreements and contractual rights of  
9 the parties thereunder deserve court protection." And this is  
10 a quote from Kalinauskas v. Wong.

11           And again, we need to look at this in the context of  
12 DBMP having little need for this information at this time.  
13 There must be some outer limit to how much sensitive claims  
14 data can be discoverable for the very narrow purpose of an  
15 estimation proceeding. In other words, now is the time to rein  
16 in this discovery.

17           I want to make a couple of other points. Your Honor  
18 has heard the Barton Doctrine argument. We believe it is  
19 applicable here. We don't think this is a trivial point.  
20 Courts around the country, including in this Circuit, have held  
21 that it applies to subpoenas issued to debtors. In In re  
22 Circuit City in this Circuit has held this. Eagan Avenatti in  
23 California, In re General Growth Properties, these cases are  
24 cited in our briefs. They have held this point.

25           DBMP tries to argue that this only applies when the

1 debtor's estate is affected. And this is at the Aldrich  
2 opposition at pages 15 to 16. Well, that's true here. The  
3 issuance of the subpoenas requires resources to respond to  
4 them. DBMP's going to argue that the subpoena targets didn't  
5 object, that they said, "Well, it's not burdensome to produce  
6 this information," but that leads me to my next point, which is  
7 that they're all represented by the same firms. Of course,  
8 they're not going to object. They have an interest in not  
9 getting -- in -- in -- in getting the subpoenaed information.  
10 And this is demonstrated in Paddock where the debtor was  
11 represented by different counsel and did object to this type of  
12 claimant data being produced.

13           So DBMP's argument about the lack of objections here  
14 should carry no weight.

15           Finally, if this Court does deny the motions, we urge  
16 your Honor to require the data to be produced subject to a  
17 confidentiality order that is tailored to the sensitive claims  
18 data and that has provisions that will give it the best  
19 possible protection. And we believe that is the order in  
20 Aldrich that's dated July 1, 2022. That has to do with the  
21 subpoenas issued on asbestos trust in Paddock. This order was  
22 negotiated among parties to protect this very type of  
23 information and it has provisions that offer the best type of  
24 protection. They, for example, that the information be used  
25 only for estimation purposes and for the negotiation,

1 formation, and confirmation of a plan; that the claims data  
2 when it is produced be produced in anonymized form; that the  
3 data be deleted 30 days after the effective date of a plan; and  
4 that the data be limited to professionals with a clear need for  
5 it.

6           The DBMP protective order that we have is not tailored  
7 to address or protect this type of highly sensitive claims  
8 data. It doesn't have anonymization, for example. It doesn't  
9 have a limit that it be used only for estimation and for plan  
10 purposes. And in Paddock, both DBMP and Bestwall agreed to  
11 apply the protections of this Aldrich order with respect to the  
12 production of identical claims data. And that's at the Paddock  
13 docket, 1679 at page 2.

14           So DBMP agreed to follow the Aldrich order with  
15 respect to claims data, already. There's no reason why it  
16 should not agree to do so now. And again, this is our argument  
17 in the alternative.

18           The Court should grant the motions to strike and quash  
19 and put an end to DBMP's cumulative requests when it has what  
20 it needs for its limited purposes and where there is a great  
21 risk to individual claimants that their confidential  
22 information will be disclosed and their personal medical  
23 history information might be wrongfully obtained.

24           Thank you.

25           THE COURT: All right.

1 I guess we can do this by teams. Is there anyone else  
2 that needs to speak with regard to this motion that is a  
3 proponent?

4 (No response)

5 THE COURT: All right. We'll get the response.

6 MS. ROSS: Thank you, your Honor. I actually do have  
7 a presentation, which I am going to try to put on.

8 MR. ELLMAN: You're skilled.

9 MS. ROSS: I can take direction well.

10 There we go. And I can approach and give you a copy.

11 THE COURT: Okay.

12 (Presentation provided to the Court and counsel)

13 THE COURT: Thank you.

14 MS. ROSS: Thank you.

15 Okay.

16 THE COURT: All right.

17 MS. ROSS: Valerie Ross --

18 THE COURT: Does anyone need --

19 MS. ROSS: Oh.

20 Hang on one second, Ms. Ross.

21 Do we need to pull the screens out so they're more  
22 facing the audience? Can y'all see? They, they will bend  
23 slightly out from the wall. But unfortunately, they hit  
24 whoever stands up on this side, so.

25 (Screens adjusted)

1 THE COURT: Whenever you're ready.

2 MS. ROSS: Thank you, your Honor.

3 So Valerie Ross on behalf of DBMP. And I am going to  
4 address both motions collectively. I know it's a long  
5 presentation. I will try and move through and really just  
6 address the arguments that my opponent made.

7 So I first want to take a step back and just talk  
8 about what the subpoenas actually are requesting, which I  
9 didn't really hear a lot about. So the source of the  
10 information that the subpoenas are directed at are these pre-  
11 petition databases that each of the debtors, DBMP as well as  
12 Aldrich/Murray and Bestwall, use to track basic information  
13 about asbestos-related lawsuits against them. And it was those  
14 databases that were the subject of the 2022 subpoenas that  
15 Bestwall served on Aldrich/Murray, and DBMP. And there were  
16 challenges back in 2022 to, to those subpoenas. You heard two  
17 of the challenges in the DBMP and Aldrich/Murray case. Judge  
18 Beyer heard a challenge made by the Bestwall Committee in the  
19 Bestwall case. Those challenges were all overruled. And in  
20 fact, in 2022 at the time of those challenges DBMP said in the  
21 papers that it filed both in the DBMP case and in the Bestwall  
22 case that it intended to serve the same discovery. We were  
23 waiting because, as I will explain, we were waiting until we  
24 actually had a sample of claimants. Because we wanted to focus  
25 the subpoenas on the claimants whose information was, actually,

1 really going to be the, the subject of the estimation  
2 proceeding.

3           And you know, the arguments that we heard today were  
4 all heard two years ago and there's, there's nothing new that  
5 we've heard. And your Honor and Judge Beyer in the face of  
6 those arguments allowed Bestwall to proceed with their  
7 subpoenas because you both found the subpoenas did not seek any  
8 confidential, sensitive, personal, private information, that  
9 the information that was sought was highly relevant, and that  
10 there was little burden on the targets of the subpoenas to  
11 produce. And, and at that time I stood up in Judge Beyer's  
12 courtroom, my partner, Betsy Geise, stood up here and said on  
13 behalf of DBMP not a lot of burden in producing it. It's a  
14 matter of a few hours of work by our database administrator.  
15 This, this is not a challenging task. And we're asking that  
16 DBMP should now be allowed to pursue the same discovery as  
17 Bestwall.

18           And just taking a step back here. When Bestwall gets  
19 to its estimation proceeding they, Judge Beyer will have the  
20 benefit of this sort of information, some of the evidence that  
21 she will be able to consider when making sort of difficult,  
22 challenging decisions about how much money is necessary to  
23 compensate present and future claimants. Seems that the,  
24 whoever the judge may be -- I know you're looking forward to  
25 your retirement -- but whomever the judge may be that is



1 overseeing the Bestwall estimation hearing and having to make  
2 the same sort of decisions ought to have the benefit of the  
3 same information. There's not really any good grounds that  
4 I've heard today to distinguish the Bestwall case from the DBMP  
5 case.

6 THE COURT: Right. And you're talking about the  
7 estimation hearings in these three cases.

8 MS. ROSS: Exactly.

9 THE COURT: Not Bestwall.

10 MS. ROSS: That is correct, yes.

11 THE COURT: Okay.

12 MS. ROSS: So sort of flashing up, this is the sort of  
13 information that was in the databases. I think you've, you've  
14 heard this before. The information came out of public  
15 documents. It was typically collected by the database  
16 administrator at the time a complaint was filed. They would  
17 create a new entry in the database for that, for the claimant  
18 or claimants who were listed as, or named as plaintiffs in the  
19 complaint and input information, name, biographical  
20 information, filing date, plaintiff's counsel, jurisdiction,  
21 and then the database would track the status of the case as it  
22 moved along. Status would change, you know, not surprising,  
23 when these debtors were facing, you know, tens of thousands of  
24 cases at any given time and, you know, I think as they have all  
25 said, you know, several hundred thousand cases over their

1 history. And those databases or extracts from them have all  
2 been produced to the Claimant Representatives and their  
3 retained professionals in all, in all three cases.

4 And so I can speak specifically to what DBMP produced,  
5 but I have every reason to think and I -- we've -- the other,  
6 other debtors have said this in their filings -- what DBMP  
7 produced was an extract from their pre-petition database that  
8 concerned over 320,000 claimants and had over 125 substantive  
9 non-privileged data fields. And by "substantive," there were  
10 some data fields that were used to track claimants, claimant  
11 identifiers, or track lawsuits, lawsuit identifiers. I'm not  
12 counting those, but things that have jurisdiction of filing,  
13 date of filing, claimant name, those, that sort of substantive  
14 information. And as I said, all the, the other debtors all  
15 produced the same things and those extracts from much larger  
16 sets of information than what we're talking about here were  
17 protected by the agreed protective orders entered in each case.

18 So the, the sort of provisions that were in the agreed  
19 protective orders were good enough for these much larger  
20 extracts than what we are talking about seeking here. And you  
21 know, among other things, the reason for that is there is some  
22 sensitive information in the database, in particular Social  
23 Security numbers for a lot of the claimants. That's not what  
24 we're looking for here, but that was part of the database  
25 extract that was produced to the Claimant Representatives. And

1 the extracts also had settlement notes, which also confidential  
2 and considered by the debtors as confidential information.  
3 Because, you know, taking a step back, not the sort of  
4 information that you necessarily want different plaintiffs'  
5 firms to know --

6 THE COURT: Sure.

7 MS. ROSS: -- what your course of dealings are with  
8 another firm. And so that's the reason for protecting that  
9 information. And if you look at the agreed protective orders,  
10 there's actually some specific language about disclosure of  
11 settlement amounts to claimants and -- and their -- the -- to  
12 the members of the Committee, the claimants' counsel, or the  
13 counsel to the claimants on the Committee, and the extent to  
14 which that information can be turned over because of the  
15 concern about settlement amounts being sort of widely  
16 distributed.

17 But again, these subpoenas, they're not asking for  
18 settlement amounts.

19 So what are they asking for? Well, first of all, it's  
20 very clear that what we're looking for is data that's coming  
21 out of the pre-petition database. And I put up on the screen  
22 the Bestwall subpoena as an example. The subpoenas to Aldrich  
23 and Murray are the same. The, the claims data that we're  
24 asking for comes out of the pre-petition database of Bestwall.

25 And you know, I, you look at that definition. You

1 say, well, all electronic information in here. You're, you're  
2 seeking a lot. Well, the subpoena goes on to list out  
3 specific, the specific items of information that DBMP is  
4 requesting. And I've actually now put on the screen the  
5 Bestwall subpoena to DBMP from two years ago. That's on the  
6 left-hand side. Right-hand side is the DBMP subpoena to  
7 Bestwall from a month-and-a-half ago. And the specific items  
8 of information that are called out are virtually identical.  
9 And I'm going to quickly scroll through.

10 Both ask for the law firms. Both ask for jurisdiction  
11 and state of filing. Both ask for the claimant's status, date  
12 of resolution, date on which settlement or judgment was paid,  
13 if there was a payment, and then exposure-related information  
14 and the specific exposure-related information, the dates of  
15 exposure, manner of exposure, location, occupation, products.

16 Now that location of exposure, that's only in the DBMP  
17 subpoena and I, I signed that subpoena. I can't exactly tell  
18 you why at the time I added that in. I think it's, it's sort  
19 of a distinction without a difference because it's the same  
20 type of information that we're asking for, but did want to sort  
21 of call out that there is one additional bullet point that was  
22 in the, the current subpoenas that was not in the subpoenas two  
23 years ago.

24 What are we not seeking? Well, no biographical  
25 information. We know who these claimants are. It's in our

1 database, already. We know, you know, dates of birth, dates of  
2 death. We have that information. No Social Security numbers.  
3 Again, we have that information for most of these claimants.  
4 We certainly would have it for any claimant with whom DBMP  
5 settled because we would have had to get that information for  
6 reporting purposes to the Federal Government. There's no  
7 medical information that we're asking for. There was a lot of  
8 discussion about, oh, highly confidential medical data. We're  
9 not asking for any medical information. Again, we have that  
10 information about these claimants in our database. And no  
11 settlement amounts.

12           And who, who, who are the claimants about whom we're  
13 asking for this information? Well, it's, it's actually just a  
14 few thousand. So hundreds of thousands of claimants that are  
15 potentially, this information is recorded in the databases of  
16 Bestwall, Aldrich, and Murray. But we're actually only asking  
17 for information about just under 4200 claimants. So it's the  
18 claimants, pending claimants at the time of the petition date,  
19 DBMP claimants with mesothelioma to be clear, who filed and did  
20 not withdraw a proof of claim form.

21           So as you may recall, as of the petition date there  
22 were just over 4,000 pending mesothelioma claimants, but as  
23 part of the proof-of-claim process that really winnowed down  
24 and we're now at around 1100 pending claimants.

25           And then it's the, the resolved claimants that are in

1 the sample that the parties have agreed on for purposes of  
2 estimation. And there's 3,093 of those. But in fact, we're  
3 not going to get information on all 4200 claimants because we  
4 can only get information about these claimants to the extent  
5 they also brought claims against Bestwall, Aldrich, and Murray.  
6 And so it's going to be a subset of that.

7 And Bestwall, in their, the paper that they filed, the  
8 response they filed in the DBMP case, reported, they actually  
9 already gone through the matching process and there are,  
10 roughly, 2600 such claimants.

11 So that's how many claimants about whom we're getting  
12 this information.

13 So you know, it's less than 1 percent of the total  
14 number of claimants that we have in our database.

15 And how does this matching happen? And this -- you  
16 know, just to be clear, the subpoenas, there's a, a Schedule 1  
17 to the subpoenas that doesn't list any claimant names, doesn't  
18 list Social Security numbers. There, there's no personal  
19 identifying information. Instead, it uses these claimant and  
20 lawsuit identifiers that I referenced earlier that the database  
21 manager used to track claimants. And we have the benefit here  
22 of DBMP, Bestwall, Aldrich/Murray all used the same database  
23 administrator prepetition. And so that company, which is PACE,  
24 as you can see up here, the PACE Reference ID, PACE Injured  
25 Party ID, PACE Lawsuit ID, they're able to take these

1 identifiers that are coming out of the CertainTeed database and  
2 use them to match up claimants that were in the Bestwall  
3 database and the Aldrich/Murray database.

4           So the, the subpoenas, the arguments that we've heard  
5 today, they were all raised in 2022. And I've kind of just put  
6 up on the screen the headers from the motions in 2022 and the  
7 motions that you're hearing today. And some of them are word-  
8 for-word the same. Some of them, there's a little bit of  
9 wordsmith, smithing that went on, but it's the same arguments  
10 all made, all made two years ago.

11           And Judge Beyer, she, she went first two years ago and  
12 the hearing was in April of 2022, but she announced her ruling  
13 in May, on May 18th of 2022, and she rejected every single one  
14 of those arguments and sort of put some quotes from what she  
15 had to say at that hearing up on the screen. And then you, you  
16 had your hearing a little over a week later. Same thing, you  
17 rejected every single one and I, I quoted you back to yourself  
18 some of the things that you had to say two years ago.

19           And so after those 2022 rulings DBMP made its  
20 production to, to Bestwall. And I'm showing you the, the data  
21 fields, right? This is -- it -- the production was in the form  
22 of a Microsoft Access database. That's how I, if, if you were  
23 to allow the subpoenas, that's how I think the production would  
24 be made to DBMP. It had three, three data tables, name,  
25 occupational exposure, plaintiff's counsel. And then, which in

1 those data tables, as you can see, there's just 14 substantive  
2 data fields. There's these identifiers that show up in each  
3 data field, or each data table. That's how you know what, who  
4 the claimant is. But then on the main table, state and  
5 jurisdiction. So where was the case filed and in what  
6 jurisdiction? You know, California, was it Los Angeles County,  
7 San Francisco County? The lawsuit status description and then  
8 lawsuit status category.

9           So the description is a little more descriptive.  
10 Summary judgment granted, dismissed with prejudice, dismissed  
11 without prejudice, settled, whereas the category sort of  
12 collates some of those together. So a dismissal with or  
13 without prejudice, summary judgment granted. That's going to  
14 show up as a zero, right? You didn't pay anything. A  
15 settlement would show up as a Set. A plaintiff's verdict would  
16 show up as a Pverd in there. But it's just a, a way of cat,  
17 sort of grouping resolutions together or statuses together.  
18 The date of resolution and then in the event it's a case that  
19 was paid, there was a settlement, there was a judgment, the  
20 date of payment.

21           The counsel table. Well, we identify what the lawsuit  
22 is. That's the, the first field, the, the lawsuit ID. But  
23 then who's the plaintiff's counsel? Are they primary? That's  
24 just a checkbox. And type, that's national counsel, local  
25 counsel.



1           And then the occupational exposure field. Well,  
2 again, we have the, the ID number to identify the claimant, but  
3 all it's tell, all they get is jobsite, occupation, start and  
4 end date, and then is secondary. Again, a checkbox. So is  
5 this a situation where the claimant was actually at that  
6 jobsite and was exposed or is this a situation where the  
7 claimant's household member worked at that jobsite and the  
8 claim is about asbestos that was brought home on their  
9 clothing. So it's a secondary exposure claim.

10           That's it. Again, no settlement amounts, no personal  
11 identifying information.

12           And you know, in terms of that exposure field, just to  
13 be clear, it's coming from the complaint, right? There's not a  
14 lot of magic to this. The complaint would come in, the  
15 database administrator then has someone who would review it,  
16 and they would just pull the information right out of the  
17 complaint, right? The location of exposure, the occupations,  
18 the dates.

19           And because -- largely because we think -- largely  
20 because the companies use the same database administrator, we  
21 anticipate that what we're going to get, if you were to allow  
22 these subpoenas, is identical data fields, an identical-looking  
23 Microsoft Access database. The information'll be different,  
24 but the, the fields of information will be the same. And we  
25 have specifically provided in the subpoena that any information

1 that's produced in response by Bestwall, Aldrich/Murray, we're  
2 going to deem it confidential pursuant to the DBMP agreed  
3 protective order, which, again, is exactly what protects the  
4 information that was produced, much larger sets of information  
5 produced to the Claimant Representatives.

6           Now Aldrich/Murray, they don't object. And I put up  
7 there some quotes from their, their pleading. Bestwall, they  
8 don't object. I heard, "Well, of course, they didn't object  
9 because everyone shares the same counsel. So why would they  
10 come in and say that it was burdensome?" You know, I, I, I  
11 guess I found that a little offensive, I will admit. I think,  
12 you know, lawyers have independent ethical obligations to sort  
13 of not make misrepresentations to the Court about, about things  
14 like, of that nature.

15           But in any event, each of these companies have  
16 sophisticated in-house counsel and have separate counsel who  
17 are fully capable of judging the burdensomeness or lack of  
18 burdensomeness of this production. And in fact, Bestwall  
19 reports in the pleading that they filed in this case that  
20 they're ready to go, right? They already have that Microsoft  
21 Access database and it's, it's ready to produce if the Court  
22 allows this discovery. There, there was not a lot of burden  
23 that was -- and, and I didn't hear anything that sort of, from  
24 the other side explaining exactly where the burden is on the,  
25 these companies in producing this. It's a, it's a matching

1 process because they share the same database administrator.  
2 It's a pretty easy process.

3 So again, no valid legal or factual reason that  
4 they've offered for doing anything different. I'm going to try  
5 and move through this pretty quickly.

6 But first, I want to talk about the, the question of  
7 whether or not the subpoenas seek private information. And  
8 DBMP, we say it does not. Don't think there's any claim by  
9 Bestwall, Aldrich/Murray that what is being sought is at all  
10 confidential, you know.

11 But first, before getting into the merits of that,  
12 issue preclusion. I don't -- and so these are the, the  
13 requirements for issue preclusion. And to be clear, our  
14 argument about issue preclusion is centered on, on just this  
15 issue, right, on the question of whether the information that  
16 the subpoenas seek is private or sensitive information. And  
17 the only arguments that I heard today or I saw in the, in the  
18 reply briefs in response to the claim that, that the Committees  
19 can't relitigate the question of whether or not the subpoenas  
20 seek private or sensitive information is, well, the issues  
21 aren't identical, No. 1.

22 But the arguments about why they're not identical have  
23 nothing to do with the substance of what the subpoenas are  
24 requesting and whether or not it's private or sensitive.  
25 There's no, no contention that, well, DBMP is asking for

1 different information or there's something about the Bestwall  
2 database that makes the information that's in that database  
3 private and sensitive, even though two years ago there was a  
4 finding that there was nothing in the, the DBMP or  
5 Aldrich/Murray database that was private or sensitive. It,  
6 it's all about the parties are in different positions.  
7 Bestwall had difficulties getting certain kind of discovery.  
8 That -- that -- that relates to proportionality, but it doesn't  
9 relate to the question of whether, the, the fact issue of is  
10 private or sensitive information being sought, you know. Is  
11 there any difference between the issues two years ago and the  
12 issues today? And I didn't hear anything on that.

13           And then the only other thing that I heard -- and this  
14 wasn't argued today, but it was in their briefs -- was, well,  
15 it wasn't a final order. And I think they cite a case or two  
16 that relates to the lack of finality of a discovery order that  
17 happens in a case, right? So you know, the DBMP Committee  
18 serves discovery on DBMP. We refuse to turn it over. They  
19 move to compel. You grant the motion. DBMP at that point  
20 can't go and take an interlocutory appeal. That is clear. No  
21 dispute about that.

22           What is DBMP's options? Well, they can produce or  
23 they can refuse to produce, wait to be held in contempt, and  
24 then that contempt order is appealable. And I think Judge  
25 Beyer got to deal with that a little bit in her courtroom.

1 Thankfully, I don't think you've had to deal with that issue  
2 yet here.

3           But that's not what we're talking about. We're  
4 talking about third-party discovery and the rule in third-party  
5 discovery is, is different. And I've put up a quote from the  
6 DC Circuit that I thought sort of nicely encapsulated the  
7 issue. But the main reason is a third party isn't interested  
8 enough in this to, and doesn't have enough of a stake, to risk  
9 being held in contempt, right? So they're not going to wait  
10 for that contempt order and then take the appeal. If there's  
11 an order allowing the discovery, they're going to produce the  
12 information. And for that reason, courts let, have held that  
13 third-party discovery orders are immediately appealable.

14           So the finality issue, there -- there is -- there was  
15 finality two years ago 'cause that was in the context, you  
16 know, what you heard in this courtroom were challenges to  
17 discovery that was issued in the Bestwall case on DBMP, on  
18 Aldrich and Murray. That was third-party discovery. The  
19 Committees could have appealed the orders. At the time they  
20 chose not to.

21           But then, you know, stepping back from issue  
22 preclusion -- and I'll, I'm going to go through this very  
23 quickly -- but there was a lot of rhetoric and there's a lot of  
24 rhetoric in the brief. Sensitive, highly personal, it's  
25 confidential. It's a massive incursion, I think was one of the

1 terms used in the briefs. There's sensitive medical  
2 information here. I went through the subpoenas. None of that  
3 is true. There's nothing sensitive, personal, confidential,  
4 about any of this information. I think you, you said -- and  
5 this was in the context of the trust discovery -- but this idea  
6 that consistency is helpful when the facts and circumstances  
7 are identical. And, and that's really what we're talking about  
8 here.

9           Now there was a discussion a little earlier on, well,  
10 you know, settlement information, there's public policy about  
11 keeping settlement agreements confidential. There's this  
12 Northern District of New York case that's cited in the  
13 Committees' briefs about, you know, a plaintiff who was allowed  
14 to get a protective order to shield from discovery a prior  
15 settlement agreement that had a, that actually had a  
16 confidentiality provision that, that had a penalty that was  
17 associated with violating the confidentiality provision.  
18 Couple of things about that.

19           First, I haven't seen a single settlement agreement or  
20 an excerpt from a settlement agreement here. And I, I know  
21 there's been an awful lot of discovery in Bestwall, at least,  
22 with a lot of documents being produced. Presumably, if there  
23 were such an agreement that actually shielded this information  
24 or provided some confidentiality, the Bestwall Committee would  
25 have showed it to us. Instead, it's sort of generalities, you

1 know. I, I think I heard earlier often contracts require that  
2 the terms and conditions be kept confidential. Okay. But what  
3 about the specific contracts that we're talking about, the  
4 specific settlements here? We haven't seen any of that.

5 In, in any event, the Fourth Circuit actually -- this  
6 is a case from the Middle District of North Carolina -- but  
7 made pretty clear, "Confidentiality agreements inserted by  
8 parties into private settlement agreements do not immunize  
9 those agreements from discovery."

10 The other thing is we're not asking for the settlement  
11 agreements, right? We have not asked, we're not asking for any  
12 document at all, right? All we are asking for is the yes or no  
13 on whether or not you settled and if so, what are the dates.  
14 And that information is discoverable. And I, and I've put up  
15 here a quote from one of the cases we cited in our brief, which  
16 is, I, I like a lot because it's actually an asbestos case.  
17 And I will -- in the interest of full disclosure, it's an  
18 asbestos case in which Old CertainTeed was involved, right?

19 So Church v. Dana Kepner. There was a California  
20 action and that's the action that CertainTeed was a party to.  
21 CertainTeed, along with other defendants in the California  
22 action, settled that California case. The plaintiff then filed  
23 a new lawsuit in Colorado against this company called Dana  
24 Kepner. I believe it was a second lawsuit because of personal  
25 jurisdiction issues. Dana Kepner turned around and wanted to

1 get, sought discovery from the plaintiff about the settlements  
2 that had happened in California, right? What happened? You  
3 had this whole lawsuit in California. I want to know. Did you  
4 settle? Who did you settle with? And there was motion  
5 practice on that and what the District of Colorado held is  
6 that, in fact, the plaintiff was required to produce  
7 information about the fact of the settlements in the California  
8 litigation, including the identities of each defendant with  
9 whom the plaintiff settled and the date of each settlement.

10 And that's exactly what we're looking for here. We're  
11 not looking for anything more. As I said, no settlement  
12 amounts, no specific terms that, you know, might somehow be  
13 confidential of the agreement. We're not asking for the  
14 agreements.

15 And as an aside, I will say, you know, as part of the  
16 discovery that's going on in the DBMP case and you know,  
17 relating to the resolved, the 3,093 resolved claimants, some of  
18 the discovery requests that the Committee has served on DBMP do  
19 seek the actual agreements, right? And we've agreed to produce  
20 them. They will be produced pursuant to our protective order,  
21 right, for the reasons that I've talked about. They, when,  
22 when those documents are produced. But there, they are  
23 actually asking for the, the settlement agreements themselves.  
24 We're not asking for that here.

25 And again, no medical information, right? We -- there



1 is some medical information in the databases. We're not  
2 looking for it as part of the subpoena. We -- to the extent  
3 DBMP is interested in that information, it has it already about  
4 these claimants.

5 And finally, no confidentiality issues raised by  
6 Aldrich/Murray, Bestwall. And this is a quote from what  
7 Bestwall had to say in their papers.

8 So proportionality. So you know, we, I have put up  
9 here Rule 26. You know, discovery is broad, but there is this  
10 proportionality requirement.

11 One thing to say about proportionality, just again  
12 taking a bit of a step back. We are in the midst -- and you're  
13 going to hear a little more about this later -- of sort of a,  
14 DBMP, a massive document collection and review process to  
15 respond to discovery requests made by the Claimant  
16 Representatives in DBMP. I think we, we have now collected  
17 close to three million documents. I expect we're going to go  
18 over three million documents that are going to have to be  
19 reviewed. It's -- there's, there's dozens of lawyers who are  
20 working their way through the document review, probably more  
21 than that. It is going to be an effort that is going to take  
22 months to complete and get through. We're talking about a few  
23 hours' worth of work here, right?

24 So when we're talking about proportionality, this is a  
25 drop in the bucket to what is being sought on the other side in

1 terms of the masses of information that we are collecting and  
2 producing and are in the process of producing.

3 I don't, I didn't really hear a whole lot about why it  
4 wasn't relevant. So I mean, this is something you've seen a  
5 bunch of times, the quote from Garlock, as to why, you know,  
6 information about what happened with other defendants matters  
7 and you know, this, that's one of the reasons why you  
8 authorized the trust discovery a few years ago. This is from,  
9 well, the types of information, which is going to look very  
10 familiar, that was sought in the trust discovery. You have  
11 commented -- and this again was in connection with trust  
12 discovery -- that a great deal of data is needed for estimation  
13 and we have to find it where we can. And that's what we're  
14 looking for.

15 And then this idea that, well, you have it, already,  
16 'cause you've gotten all this information. Well, no, we don't.  
17 I don't -- I don't think -- I don't think my client would be  
18 authorizing me to, to sort of argue this if we have this  
19 information already, right? This is different. What we got  
20 from the trust was information about trust claims. What we're  
21 looking for now is information about claims against Bestwall,  
22 Aldrich, and Murray.

23 And we won't always have that information somewhere,  
24 right, for various reasons. Sometimes claimants, they, they  
25 would settle with one defendant administratively outside the

1 tort system and sue another. So there might have been a case  
2 that DBMP was named in a complaint, but the --

3 THE COURT: Uh-huh (indicating an affirmative  
4 response).

5 MS. ROSS: -- the claimants settled with Bestwall  
6 without bringing a lawsuit, before they brought the lawsuit.  
7 We might not have known when there was a resolution of a case,  
8 you know. They -- regularly, when I was part of this  
9 litigation, regularly we served discovery saying tell me about  
10 your settlements and we regularly got objections to that  
11 discovery saying, "We'll tell you when there is a judgment in  
12 the case." And you need to have that information to mold the  
13 verdict, right, for set-off, purposes of setoff. Some, to be  
14 fair, there were some jurisdictions where we regularly got it.  
15 There was sort of some variation in the practices In different  
16 jurisdictions, but lots of places, plaintiffs regularly  
17 objected. And so we wouldn't necessarily have that  
18 information.

19 And we certainly wouldn't have it if we resolve first,  
20 okay, settled first. We're done with the case. We're not  
21 paying attention to what, what's going on with, you know, the  
22 codefendants that are still in the case. And you know, as  
23 exemplified by that, that Church v. Dana Kepner case that I  
24 just referenced, there were sometimes more than one lawsuit.  
25 And if, you know, DBMP, they were in the first lawsuit, they

1 would know nothing about the second lawsuit and what happened  
2 there.

3           And that leads me to the next point, which is, you  
4 know, if there were different lawsuits, if something was  
5 settled administratively, there might have been different  
6 disclosures about exposure and claims information. And that is  
7 certainly a, a lot of interest to DBMP to sort of try and  
8 understand what sort of things are the claimants saying and  
9 what are they saying to different parties from whom they're  
10 trying to recover money.

11           And finally, just as, in a very practical, very  
12 practical point, whatever information we may have, it's not in,  
13 in the database, right? Our database was not used to track  
14 what's going on with codefendants. So is it possible that  
15 there's some e-mail sitting somewhere, you know, "Hey,  
16 Bestwall, Georgia-Pacific, they just settled the Smith case."  
17 Yeah, of course it's possible that there's an e-mail, but sort  
18 of the work that would be required to sort of collect all of  
19 that information about this number of claimants when it's  
20 available in this database form that can be readily put  
21 together, sort of, you know, talk about, you know, the scale  
22 and the proportionality scale there.

23           And so there's -- there was -- there's a lot of  
24 discussion in the brief and we heard some today that, well,  
25 this case is different because Bestwall was having all of these

1 difficulties getting trust discovery. They were having some  
2 problems with PIQ compliance back in 2022 and DBMP hasn't had  
3 any. Well, we did have some issues with our trust discovery,  
4 but by now, we have, actually, worked our way through that.  
5 But I think they sort of put it backwards, right?

6           So Judge Beyer's starting point was this discovery is  
7 out. There's no reason not to allow it. And, but at the same  
8 time when she heard the argument of the Bestwall Committee  
9 trying to, to strike the Bestwall subpoenas and, and it was  
10 Ms. Ramsey who, who made the argument, Ms. Ramsey -- this was  
11 in April of 2022 -- came in and said, "Hey, we have an  
12 estimation hearing right now and it's scheduled for October  
13 2023. It's fast approaching. The time is to start cutting  
14 back on discovery. We shouldn't be sort of expanding the  
15 field, or we're never going to get to that October 2023 date."  
16 And Judge Beyer was somewhat persuaded by that. And I've put  
17 the quote up from her, you know, that:

18           "I was compelled by Ms. Ramsey's argument regarding  
19 proportionality and the need to rein in rather than  
20 broaden the scope of discovery at this point in order  
21 to stick with our estimation hearing date of October  
22 2023."

23           But she, nonetheless, allowed the subpoenas because  
24 she, she recognized that Bestwall was having some issues  
25 obtaining other discovery. She actually also recognized that

1 the Committee had just filed pretty significant discovery  
2 requests on Bestwall. And so she allowed it to go forward.

3 But that's all sort of immaterial here because we  
4 don't have an estimation hearing date. We've actually just  
5 suspended all the deadlines. As I said, we've got a long way  
6 to go in reviewing our three million documents. This is not  
7 going to sort of -- this -- allowing this discovery is not  
8 going to impact the schedule one iota. And so the fact that we  
9 haven't had the same difficulties is beside the point. And you  
10 know, right now, Bestwall actually has gotten all of the  
11 information.

12 So you know, things happened in a slightly different  
13 order in that case, but I don't know that that's a reason why  
14 DBMP and again, who, whomever the Judge is who has to oversee  
15 the estimation proceeding, should have less evidence available  
16 to them.

17 The Barton Doctrine, very quickly. I -- I -- I'm not  
18 going to get into does it apply to subpoenas, does it not apply  
19 to subpoenas. I just want to make a very practical point,  
20 which I think is exactly what you did two years ago. Just what  
21 would happen if you said the Barton Doctrine applied? Well,  
22 that would mean that DBMP would have to file a motion seeking  
23 leave of you in your capacity as the judge overseeing the  
24 Aldrich/Murray case to allow it to serve the subpoena, do the  
25 same thing in Judge Beyer's courtroom with, in connection with

1 the Bestwall subpoena. The Committees in those two cases,  
2 presumably, would serve objections, DBMP would come in and have  
3 their reply, and then we'd all get together at a hearing and it  
4 would all be hashed out.

5 Well, we're all here right now and the arguments are  
6 all in front of you. I don't think there's going to be any  
7 different arguments and we're going to be in front of Judge  
8 Beyer tomorrow on the Bestwall case with the Bestwall  
9 Committee's motion. And so as a practical matter, there's  
10 nothing to be gained and we're just going to delay things more.

11 So I -- and I think that was exactly what you said two  
12 years ago when faced with the Barton Doctrine arguments. But I  
13 don't need to decide this. Good issues on both sides, but  
14 there's no reason to preclude the motion 'cause we're all here  
15 now. There, there's nothing more that's going to be  
16 accomplished by putting things off.

17 I'm not going to -- I'm going to skip over this. The  
18 integrity of the bankruptcy process is, I don't think there was  
19 really much said about that earlier.

20 And notice to claimants. I didn't hear anything about  
21 that.

22 So finally, the protective order, right? So as I've  
23 said, DBMP has made clear in their subpoenas that they will  
24 deem the information that is produced in response to the  
25 subpoena confidential pursuant to the agreed protective order

1 in this case. The claimants' position is that's not good  
2 enough, you know. We, we need to do something more than that.  
3 We need to sort of have the, the protections that are part  
4 of -- and they specifically point to the trust discovery order  
5 in Aldrich/Murray. I think those are, essentially, the same  
6 protections that are in the DBMP trust discovery order.  
7 Bestwall trust discovery order, I think they all sort of  
8 modeled on one another. But I didn't really hear why and was  
9 waiting to hear that.

10           You know, part of the argument is, oh, it's all  
11 sensitive and confidential. Well, we already talked about it.  
12 It's not. There's nothing terribly sensitive or confidential  
13 about this. And I, I really sort of can't understand what  
14 more, what they think these protections are going to accomplish  
15 other than I do know one thing it will accomplish. It'll make  
16 it a lot more difficult and cumbersome for DBMP to actually use  
17 the data, specifically this idea of anonymization, matching  
18 keys. Very cumbersome to, to work your way through. And it  
19 makes no sense because these databases writ large, right,  
20 extracts that are much more massive concerning hundreds of  
21 thousands and more claimants, you know. You know, tens more or  
22 hundred, hundred plus more data fields have been produced to  
23 the Claimant Representatives and their experts without those  
24 protections with no, they never came in and said, "Oh, no. We  
25 need to anonymize the data first. We need to give a matching



1 key. We're concerned about the, the sort of integrity and, and  
2 potential data breaches on this data." Didn't hear any of that  
3 two years ago. And, and they're not encumbered by any of that  
4 and yet, for this much, much smaller set of information, you  
5 know, they, they want to impose these additional restrictions.

6 And to be clear -- and I, I've put up some pages from  
7 the DBMP protective order -- but it specifically provides the  
8 data has to be kept confidential. It specifically provides  
9 that the data can only be used in the bankruptcy case. It  
10 provides that the data has to be destroyed at the end of the  
11 case. And it actually -- I, I think I heard that -- that there  
12 was -- that these protective orders weren't designed to deal  
13 with these databases, but, in fact, they were, you know.  
14 Paragraph (j) of these protective orders specifically talks  
15 about the asbestos claims databases and that's true in the  
16 protective order. It's Paragraph (j) in the DBMP protective  
17 order, the Aldrich/Murray protective order, and the Bestwall  
18 protective order. They were -- there is a specific provision  
19 in all of them dealing specifically with databases.

20 With that, your Honor, unless you have any questions,  
21 I will sit down.

22 THE COURT: All right. Thank you.

23 MS. ROSS: Thank you.

24 THE COURT: Any other parties responding to the  
25 motion?

1 MR. EVERT: I guess, your Honor, it'd probably make  
2 sense for me to go next.

3 THE COURT: All right.

4 MR. EVERT: Mike --

5 THE COURT: Please do.

6 MR. EVERT: Michael Evert on behalf of debtors Aldrich  
7 and Murray.

8 Your Honor, we filed a short paper, which I'm sure the  
9 Court has seen. I, I rise just briefly to highlight a couple  
10 things in there that I wanted to make sure the Court was aware  
11 of.

12 THE COURT: Okay.

13 MR. EVERT: I, I think, a little bit, we tend to lose  
14 sight of the forest for the trees a little bit in these cases.  
15 The, the, the whole idea here is to try to provide the Court  
16 with the best possible information in order that the Court can  
17 come to the most accurate and best possible estimation. And  
18 this data is, is, is there, it's accessible, it's relevant, and  
19 it, it seems to check all those boxes. We -- we were -- in  
20 fact, we were almost done with getting the data together when  
21 the objections came in. We stopped. We've not produced  
22 anything. We, of course, will comply with whatever the Court  
23 rules.

24 But we agree. The data is, like the trust data that  
25 we argued about and I, obviously from that litigation, as you

1 know, reasonable minds can differ. We, we do not see the data  
2 as protected or confidential. And the, the, the great irony in  
3 all this, your Honor, is that in all three cases the ACC has  
4 hired the same estimation actuarial expert as has the debtors  
5 in all three cases. So technically, they already have all this  
6 information. This process is merely to comply with the various  
7 applicable confidentiality orders in order that it can be used  
8 in this fashion.

9           So again, this data will assist them in providing the  
10 Court with the most information possible and the best possible  
11 efforts at estimation. So we do not object. It's an odd  
12 situation to be the target of the subpoena and hear others  
13 objecting, but no -- it's déjà vu all over again. We've been  
14 through this once before.

15           The second point that I do want to be clear about is  
16 that we would intend, that is, Aldrich and Murray, would, would  
17 intend and do intend to seek the same information. So I, I, I  
18 didn't want the Court to say, you know --

19           THE COURT: Uh-huh (indicating an affirmative  
20 response).

21           MR. EVERT: -- a month from now, or whatever, "Hey,  
22 guys. Why didn't you let me know you were going to do this?"  
23 The -- the -- the DBMP case, as you know, was filed a little  
24 earlier than ours. They're, they've been a little bit ahead of  
25 us on those issues. So we hadn't gotten to it yet, but we're

1 pretty much close enough there now.

2 So wanted to make sure the Court was aware of that. I  
3 know that the ACC in their papers has cited that that is  
4 absolute evidence of the floodgates flying open. I, I get  
5 that. It's wonderful advocacy. We don't see this as much of a  
6 flood for the reasons articulated by DBMP, more of, more of a  
7 trickle here. It's a small amount of data that, that, really,  
8 we've already litigated.

9 So from our perspective, your Honor, obviously we will  
10 comply. We don't have much, we don't see much of a burden  
11 here. We think the data's relevant. And again, the most  
12 important point from our perspective is to provide the Court  
13 with the most information possible to get to the best  
14 estimation possible. And that's in the interest, in my view,  
15 of all the parties, not just the debtors, but the ACC and the  
16 FCR as well.

17 So thank you very much, your Honor.

18 THE COURT: Anyone else?

19 Mr. Guy.

20 MR. GUY: I'm not sure when will be an appropriate  
21 time for us to respond. 'Cause we're responding to the Aldrich  
22 and Murray Committee's motion.

23 So I defer to the Court and to the Aldrich and Murray  
24 Committee as to that.

25 THE COURT: Were you planning to argue those

1 separately? I thought we were talking about them together, but  
2 okay.

3 MR. GUY: I thought so, too.

4 THE COURT: Everyone, too?

5 (No response)

6 THE COURT: All right. Go ahead, Mr. Guy. We'll get  
7 you in just a second.

8 MR. SCHNEIDER: Thank you.

9 MR. GUY: Your Honor, I won't be very long as I know  
10 you have our papers.

11 I did a quick count and I think there's maybe up to 30  
12 professionals in the room today. It's not our data. We're not  
13 producing it. So why are we here? Why am I standing up?

14 It, it's mostly, your Honor, because we mourn that the  
15 interests of the class are not being focused on and that's the  
16 class of current claims and it's the class of future claims.  
17 We know what the best result for those classes are. We all  
18 know that.

19 And it's problematic. 'Cause as the Court and the  
20 Fourth Circuit and, in fact, as Committee counsels have  
21 acknowledged, what is going on here is to, the desire to avoid  
22 similar critical determinations that were made in the Garlock  
23 case. And I, I'm not saying that, you know, because it's, it's  
24 what the Committee themselves, Committee counsel, said. I  
25 understand that, but it doesn't serve the interests of the

1 class.

2 Bottom line, your Honor, relitigation is not advancing  
3 the interests of either class. We -- I'd much prefer to see  
4 the 29 professionals working towards a consensual plan that has  
5 funding and optouts that are acceptable to the claimants'  
6 counsel.

7 We've heard this before. The Court's ruled on it. To  
8 the extent the Court is concerned about confidentiality, I know  
9 that we can put an appropriate protective order in place.

10 Thank you, your Honor.

11 THE COURT: Thank you.

12 Yes, Counsel.

13 MR. SCHNEIDER: Your Honor, Richard Schneider, King &  
14 Spalding, for, on behalf of Bestwall LLC.

15 THE COURT: Hang on one moment, Mr. Schneider. I  
16 don't think we can get you.

17 Why don't you come around here to the podium.

18 MR. SCHNEIDER: I'll be glad to come on up, if that'd  
19 be all right.

20 THE COURT: Please do.

21 (Mr. Schneider complies)

22 THE COURT: Want to make sure we have you recorded  
23 accurately, so.

24 Please.

25 MR. SCHNEIDER: It's a pleasure to appear before your

1 Honor. We have monitored many of these hearings. This is the  
2 first time I've spoken. So --

3 THE COURT: Okay.

4 MR. SCHNEIDER: -- glad to have the opportunity.

5 Again, Richard Schneider, King & Spalding, on behalf  
6 of Bestwall LLC.

7 Just simply to state out loud what we said in our  
8 short paper that we filed, that we do not oppose the subpoena,  
9 that we were asked, basically, to check whether or not 4,000  
10 DBMP, DBMP claimants matched any Bestwall claimants. We did  
11 that work. Actually, PACE did that work. Took them about six  
12 hours to make the matches and generate a Microsoft Access  
13 database that contains, or will contain the very same fields  
14 that have been shown to you today by DBMP's counsel.

15 We stand prepared to do as your Honor directs. None  
16 of that information is confidential. It's actually the  
17 company's information that they collected and put into a  
18 database. DBMP has agreed that if we produce it to them they  
19 will hold it confidential under the protective order in that  
20 case. And we believe that the subpoena is proper. We stand  
21 ready to comply with it and do as your Honor directs.

22 Thank you very much.

23 THE COURT: Thank you.

24 Before we get rebuttals, anyone who's not weighed in?  
25 I think we've got all the replies and responses.

1 (No response)

2 THE COURT: All right. Back to the ACC.

3 MS. CONCANNON: Serafina Concannon again on behalf of  
4 the Committees.

5 So we, we argued before and we are saying again the  
6 information is confidential. There are confidential settlement  
7 agreements. We cannot attach the confidential settlement  
8 agreements to our papers. If, if your Honor wants to see them,  
9 we can, we can work something out. But we understand that  
10 there are confident, that there are settlement agreements that  
11 state that the terms and conditions of the agreements must be  
12 kept confidential. And those terms and conditions would  
13 include when the settlement payment was made, even the fact of  
14 the settlement it, itself, among other information that DBMP is  
15 requesting.

16 In addition, the exposure -- well, let me make sure I  
17 got everything there.

18 THE COURT: Take a second.

19 MS. CONCANNON: The -- well -- so the, the exposure  
20 information, that, too, is sensitive information. The medical  
21 information that they're asking for, dates exposure began,  
22 dates exposure ended, manner of exposure, location of exposure,  
23 this is private medical information and if, if it is disclosed  
24 somehow inadvertently, it ties individual claimants to their  
25 medical history and that would be a big problem if that were



1 somehow disclosed to the public. And courts have protected the  
2 association of a person's name with their medical condition and  
3 that is supported by In re Motions Seeking Access to 2019  
4 Statements, 585 Bankruptcy Reporter 733, District of Delaware,  
5 2018. We have cited this case in our prior briefs.

6 THE COURT: Uh-huh (indicating an affirmative  
7 response).

8 MS. CONCANNON: If the information were not  
9 confidential, then why did the parties negotiate this order in  
10 Aldrich, the July 1, 2022, I think, or 2023, the order I had  
11 referenced in my argument, why did the parties go through and  
12 negotiate this order for this exact same information to have,  
13 to have high protections of this information?

14 The DBMP protective order is not sufficient here. In  
15 DBMP, Paragraph (j), the databases paragraph, that talks about  
16 claims databases being produced to Committee counsel and to FCR  
17 counsel. Our clients don't even view these databases. They  
18 don't talk about this information being produced to debtors in  
19 other cases. The protective order in DBMP is simply not  
20 sufficient. It doesn't state that the information must be used  
21 only for purposes of estimation, only for purposes of  
22 confirmation and negotiation of the plan. And the, the  
23 Paragraph (j) also, you know, because that information is  
24 produced to the Committee and to, to Committee counsel and the  
25 FCR, it really limits the number of people who are receiving

1 the information. But once we get into this type of claimant  
2 data floating around among different debtors, there, the risk  
3 just increases that something, that something inadvertent is  
4 going to happen and the data is going to be disclosed.  
5 There's, there's no reason why DBMP should not agree to a  
6 protective order that sufficiently protects this information,  
7 an order that DBMP already agreed to for this very same  
8 information in connection with Paddock.

9 Ms. Ross talked about burden and I, I did not mean to  
10 offend anyone when I said about, about the debtors, the  
11 different debtors not objecting+. I, I understand everyone has  
12 ethical obligations. The, the burden that I'm talking about is  
13 not the burden on producing the data, *per se*. It is on the  
14 burden to the claimants of having their confidential  
15 information and their sensitive information exposed,  
16 potentially, yet again and the more and more times these  
17 debtors are seeking this information through the different  
18 subpoenas, the more risk there is to something happening.

19 DBMP, it claims it needs this information for  
20 estimation. It says it doesn't have this particular  
21 information. It, it does, it does have a lot of information  
22 already for its limited purposes. It -- I understand Bestwall  
23 and CertainTeed shared a common parent or one was owned by the  
24 other during a period of time and lot of, there's a lot of  
25 overlap, too, already.

1           So they have a lot of this information in connection  
2 with their joint ownership with Bestwall for that period of  
3 time. So they have a lot of this. And again, it is just at  
4 this point it is not proportionate to their needs for the  
5 limited purpose of this estimation proceeding.

6           And Ms. Ross went through the fact that the  
7 information requested was the same as in Bestwall. She went  
8 through showing how this information is the same as what,  
9 requested before. But again, these, these are different  
10 circumstances. The debtors are in different places and your  
11 Honor has observed that it is not necessary to have full  
12 consistency across these cases all the time.

13           Proportionality. Ms. Ross talked about  
14 proportionality with respect to the burden of producing it.  
15 And again, the proportionality is with respect to the needs of  
16 the case and the burden on claimants in their confidential and  
17 sensitive medical histories being inadvertently disclosed.

18           Ms. Ross also mentioned that Judge Beyer with respect  
19 to the Bestwall subpoenas, she was talking about the estimation  
20 hearing proceeding. And so, I mean, first of all, I, I don't  
21 see how that follows this argument. Because Judge Beyer didn't  
22 state that if there is no hearing approaching, then Bestwall  
23 would have had the right to limitless discovery. Parties are  
24 still bound by the limits of the FRCP. And here, again, DBMP  
25 has a lot of the information already from numerous bankruptcy

1 trusts, PIQs from claimants, and information from Paddock.  
2 This additional information is just plainly cumulative. And  
3 furthermore, the fact that there's an estimation date in DBMP,  
4 it's not irrelevant. It is a delay that is hurting claimants.

5 In short, your Honor, there's little need for this  
6 information at this point. It is for limited purposes. The  
7 continued exchange of sensitive information is increasing the  
8 risk of disclosure of this personal information and it's just  
9 going to continue. Where, when is it going to stop?

10 So we ask that your Honor grant the motions to strike  
11 and quash.

12 Thank you.

13 THE COURT: Okay.

14 That got it for this motion? Anyone else?

15 MS. ROSS: Can I just speak to one point quickly? I  
16 don't want to reiterate --

17 THE COURT: You may.

18 MS. ROSS: -- but I do want to just --

19 THE COURT: You may, Ms. Ross. What I was going to  
20 say is there's no premium paid to being the last speaker, so.

21 MS. ROSS: Yeah, no. But I, I just want to correct  
22 the record on one point.

23 THE COURT: Okay. What, what do --

24 MS. ROSS: Which is --

25 THE COURT: -- you have to say?

1 MS. ROSS: -- Ms. Concannon said, well, DBMP already  
2 has all this information because Bestwall and CertainTeed  
3 shared a common parent. And that got me a little confused. So  
4 I just wanted to be clear on what the history was.

5 CertainTeed had a, up until 1956, they sold joint  
6 compound under the brand name Bestwall. In 1956, they spun off  
7 that company into an independent company called Bestwall  
8 Manufacturing. I can't remember the full name, but Bestwall.  
9 In 1966, ten years later, that, Georgia-Pacific bought that  
10 company and I, I don't know the details of that transaction.

11 But ten years' separation in time. Bestwall was an  
12 independent company in the intervening ten years. They have  
13 never shared a common parent. There's no relation, there's no  
14 corporate relationship between the companies.

15 So just wanted to correct the record on that.

16 But unless you have any questions about anything else,  
17 I will sit down.

18 MS. CONCANNON: I just --

19 THE COURT: That evoke anything else?

20 MS. CONCANNON: Just quickly responding.

21 Ms., Ms. Ross articulated the history much better than  
22 me, but they did, I understand that DBMP's parent, CertainTeed,  
23 owned Bestwall during that period of time.

24 So there was some shared information during that  
25 period of time. And I did not say that because of that that

1 DBMP has all of the information. I'm saying that at this point

2 DBMP has a lot of the information --

3 THE COURT: Right.

4 MS. CONCANNON: -- and for the limited purposes --

5 THE COURT: That's the way I heard you.

6 MS. CONCANNON: -- of this proceeding. It no longer

7 needs more.

8 Thank you.

9 THE COURT: Okay, very good.

10 If there's nothing further on this motion, I would be  
11 tempted just to go ahead and try to make a bench ruling on  
12 this. But I want you to have a fair and, and clean record  
13 tomorrow when you're doing Bestwall in front of Judge Beyer  
14 rather than having someone opportunistically citing something I  
15 may have said. I would suspect that she'd probably disregard  
16 it, but the -- we don't want to be tainting her record as well.

17 What I would propose is we're going to have the  
18 Aldrich hearings next week, next Thursday, I guess it is, the  
19 25th. I would invite the DBMP people to appear telephonically  
20 and then I'll try to give you a ruling as part and parcel of  
21 that before we get going with the Aldrich calendar.

22 Does that make sense? Anyone got a problem with doing  
23 it that way?

24 MS. ROSS: No, your Honor.

25 THE COURT: All right. That's what we'll do. I'll

1 take this under submission until then, all right?

2 With that, I would suggest we take a ten-minute recess  
3 for comfort and then we come back and hear the second matter,  
4 all right?

5 And those of you who are Aldrich only here today,  
6 you're welcome to get up and leave, so.

7 Thank you.

8 MR. EVERT: Thank you, your Honor.

9 MR. GUY: Thank you, your Honor.

10 MR. TOMSIC: Thank you, your Honor.

11 (Recess from 10:48 a.m., until 11:00 a.m.)

12 AFTER RECESS

13 (Call to Order of the Court)

14 THE COURT: Have a seat, all.

15 Years ago, I moonlit in, I guess it was, Eastern  
16 Virginia where they have a tradition of the CSOs coming to get  
17 the judge and making sure everyone's in their seats before you  
18 start. I had a proclivity, as you could see, just to walk into  
19 the courtroom without preamble and that really caused them a  
20 lot of distress. So I'm sorry if I caught you unawares.

21 Ready to move on to the second motion?

22 MR. ELLMAN: I believe we are, your Honor.

23 THE COURT: All right, very good.

24 MR. ELLMAN: That's Agenda Item No. 3 and I'm going to  
25 present that. Jeffrey Ellman for the record from Jones Day on

1 behalf of the debtor in this case, DBMP, which is the case  
2 we're in alone at this point.

3 We are seeking in our motion to suspend the deadlines  
4 of briefing on the discovery referee's Report and  
5 Recommendation, his first report.

6 THE COURT: Uh-huh (indicating an affirmative  
7 response).

8 MR. ELLMAN: We filed that in the main case and we  
9 also filed it in the substantive consolidation case, which is  
10 the only adversary in which the debtor is a party. But I  
11 wanted to point out that this discovery relates to all three of  
12 the adversaries. Because as the Court probably recalls, the  
13 discovery in all three adversaries going forward will be used  
14 for all three and then the PI, the preliminary injunction  
15 discovery, will be used in all three.

16 THE COURT: Uh-huh (indicating an affirmative  
17 response).

18 MR. ELLMAN: So I just wanted to point out to the  
19 Court that in our request for relief, if you were to grant our  
20 motion, we did ask that the order be entered in all three, even  
21 though we're only a party to one of them.

22 As far as the motion itself, it's a pretty  
23 straightforward request that we previewed to the Court at a  
24 prior hearing and we, I think we kind of succinctly stated it  
25 in a very short motion.



1           So there are no slides and not a lot to get into  
2 that's too complicated. I, I did want to say a handful of  
3 things that may not be in the motion and highlight a couple  
4 things. But it, it is, like I said, pretty straightforward.

5           Now the Court is familiar with the discovery referee  
6 process being conducted by Judge Bridges. So I'm not going to  
7 go through that. It's all set forth in the order that you  
8 entered in February of 2023. It's Docket 2290. I'll refer to  
9 it as the Discovery Referee Order, but I think you're familiar  
10 with that process.

11           THE COURT: Right.

12           MR. ELLMAN: And contrary to what the Committee has  
13 said in its papers, or the plaintiffs have said, we're not  
14 seeking to reconsider that order, or have the Court reconsider  
15 that order. Instead, we're really just trying to find a way to  
16 promote judicial economy and efficiency in a situation that, at  
17 least to us, is not one that was contemplated by that order.

18           And why do I say that? Well, the discovery referee  
19 was assigned three issues that relate to privilege and they're  
20 in Paragraph 6 of the Discovery Referee Order. And I'll just  
21 go through them quickly.

22           One is, of course, the privilege log and the  
23 sufficiency of that log.

24           The second issue is the crime-fraud exception. In  
25 particular, whether this exception to attorney-client privilege

1 and work product applies and if so, what documents that were  
2 logged of the 4,000 should be actually produced or unredacted  
3 if they were redacted.

4 And the third issue is at-issue waiver. And again, in  
5 particular there, whether such a waiver of attorney-client  
6 privilege and/or work-product doctrine occurred. If that  
7 waiver did occur, what is its scope? And again, what documents  
8 should be produced as a result if there was a waiver or which  
9 documents should be unredacted.

10 So we do have the discovery referee's first Report and  
11 Recommendation and from our perspective, it addresses none of  
12 those issues in full. It defers completely on the privilege  
13 log and the crime-fraud exception. Judge Bridges mentions  
14 crime fraud at one point, but he doesn't rule on it. It does  
15 address at-issue waiver, but only in part. It focuses, focuses  
16 on the instructions, objections, and cautions that were made at  
17 the depositions. The referee discusses, in some cases finds  
18 that there was an at-issue waiver in connection with those  
19 objections, but he has not completed his evaluation of at-issue  
20 waiver. Notably, he has not defined the full scope of it and  
21 he has not determined which documents would be implicated.  
22 That review is ongoing, as he indicated in the report. And of  
23 course, his review of the documents is one of the main focuses  
24 of what his task was as assigned. And that is ongoing. What  
25 else he will say about at-issue waiver? That is unknown what

1 else he might say. What he will eventually say about crime  
2 fraud, that is unknown.

3 He also ruled on nearly 150 objections in the  
4 depositions under what he called traditional evidentiary  
5 principles, except for the privilege issues. So we have that.  
6 But again, none of that addresses any of the three privilege  
7 issues set forth in the discovery referee [sic] way that makes  
8 them complete and, in our view, ready for adjudication by the  
9 Court.

10 So we are in a situation that, from our perspective,  
11 was not contemplated. And it is true that the Referee Order  
12 does allow the referee discretion to address the three assigned  
13 disputes "simultaneously or serially" as he deems efficient.  
14 And that, that is understandable, but we did not reasonably  
15 contemplate a partial, a partial ruling on one issue, which is  
16 what we have here.

17 So from our perspective, we never contemplated  
18 litigating any of the issues until they were decided in full.  
19 And so the debtor's proposition is pretty simple. Briefing  
20 should be suspended at this juncture given the posture we are  
21 in today where the referee has yet to complete, completely  
22 address any of the issues. And you know, at this point I think  
23 it's become clear to us that all these issues are kind of  
24 related to each other. They're going to affect each other.  
25 They're about the same documents. They're about the same

1 topics. And more than before, we think that at this point  
2 these issues because they inform each other should be  
3 considered together and briefing should be deferred until we  
4 have all the reports. Otherwise, we'll have overlapping and  
5 kind of time-consuming proceedings, possibly multiple related  
6 appeals. We just don't think at this point that makes a lot of  
7 sense. It would not advance, in our view, a final resolution.  
8 It would be wasteful and expensive.

9 And so from where we are today, we propose we wait  
10 until we have all the information from the referee and then we  
11 proceed.

12 THE COURT: Okay.

13 MR. ELLMAN: And again, that's not a reconsideration  
14 of the order. It's just a practical approach that we think  
15 makes sense to manage this process from where we are today  
16 going forward. I would say, in particular, it makes no sense  
17 to brief and litigate at-issue waiver, which is the one thing  
18 that, that Judge Bridges did address based on a review only of  
19 the deposition objections when the documents withheld as  
20 privileged were such a large part of the plaintiffs' motion  
21 that is at issue here and a large reason that we do have Judge  
22 Bridges in place to review those in camera.

23 So we think this partial decision is just not ripe at  
24 this point. So I, I think, basically, at this point until we  
25 see the entirety of the picture it's really going to be

1 difficult for the parties to proceed effectively.

2           And I would say it's potentially unfair because we  
3 don't know how to brief a partial issue. It's not contemplated  
4 and I don't think it would be in the best interest of any party  
5 to do that. The debtor's privilege is at issue here. It is  
6 our privilege and we believe we should be allowed to see and  
7 evaluate the entirety of Judge Bridges' ruling before we have  
8 to litigate that issue.

9           As far as reconvening depositions, this is one of the  
10 reasons that Judge Bridges decided, according to his report, to  
11 issue this limited report at this time. His, his idea that  
12 this smaller ruling would allow the deposition to be reconvened  
13 and that would be useful to the process. But to us, that  
14 justification makes little sense for several reasons.

15           First, it would be inefficient to reconvene  
16 depositions until the privilege protection of the underlying  
17 documents is determined. If some or all those documents, your  
18 Honor, have to be produced eventually after we litigate these  
19 issues based on either at-issue waiver or crime fraud, whatever  
20 the reason is, it is inevitable that the other side will ask to  
21 reconvene the depositions again to ask questions about those  
22 documents. It would be perfectly reasonable. That means that  
23 if we reconvene a deposition now, it's going to be part of a,  
24 potentially, a serial process of reconvening depositions and to  
25 us, that is contrary to any notion of efficiency.

1           Second, the questions that are properly posed at a  
2 deposition, if it were to be reconvened, could be impacted by  
3 what else Judge Bridges rules upon and what your Honor then  
4 decides, or your successor, decides on crime fraud, on at  
5 issue, and all of it, again making reconvening the depositions  
6 prematurely, in our view, very ineffective.

7           And I would say, too, your Honor, you think about a  
8 lawyer who's defending these depositions, I'm not sure how you  
9 defend a deposition properly and protect privilege when you  
10 don't understand all the rulings on privilege. What are you  
11 supposed to do? Because at that point the, the lawyers are  
12 responsible in a deposition to protect the privilege and I  
13 think it'll be very fraught and difficult and unfair to try to  
14 do that with an impartial or a, a partial record of what the  
15 privilege issues have been determined. So we think that's a  
16 problem.

17           Third, even under the plaintiffs' approach, we still  
18 have to go through this process with the Court and have a  
19 determination. There are potential appeals. That's all going  
20 to take time. I don't think these depositions are being  
21 reconvened that quickly and by the time that happens, we expect  
22 that Judge Bridges will have more reports and we're going to be  
23 kind of back at Square 1.

24           So I don't think there's a, an ability to really rush  
25 that fast to get the depositions started, regardless.

1           And I think the fourth thing beyond all that is that  
2 if you look at the adversary proceedings that are going  
3 forward, the substantive consolidation and the fraudulent  
4 transfer, those are the two moving forward, we have no  
5 depositions on the horizon other than the brief depositions  
6 next week that you're aware of on the 30(b)(6) topics about  
7 possession, custody, or control of the French documents. Those  
8 are going forward on a very, kind of narrow basis. But we're  
9 still talking to the other side about search terms. We have  
10 not produced an, we produced some documents, but the bulk of  
11 the documents have not been produced and there are no  
12 depositions on the horizon anytime soon.

13           So this is not delaying anything at this point. So  
14 reconvening depositions now, to us, is just, it's not an urgent  
15 matter.

16           I wanted to cover a couple of points from the  
17 plaintiffs' objection they filed, just a few.

18           One of the things they say in their objection is they  
19 complain that we're asking to defer briefing based on some  
20 speculative potential, you know, quote unquote, potential  
21 overlap. I don't think there's any doubt that these privilege  
22 issues will all overlap. The at-issue and crime-fraud issues  
23 were briefed and argued together to the discovery referee.  
24 They cover the same documents. They cover the same subjects.  
25 The referee acknowledged this in his report.

1           So I don't think there's any doubt that they overlap.  
2 And more directly, the at-issue waiver dispute is not fully  
3 resolved. There's no doubt, there can be no doubt that his  
4 ruling on at-issue waiver about documents will overlap the same  
5 issue with respect to the testimonial issues that he's covered  
6 so far.

7           So I don't think there's any speculation. I think  
8 it's just true. They're, until the issues are resolved,  
9 they're going to all overlap.

10           As far as ripeness, they, they talk about there, there  
11 is an issue they say we completely ignore, which is the other  
12 matters ripe for decision. And that has to do with the, the,  
13 the objection rulings that didn't involve privilege. These  
14 were what, what I said before that were called the traditional  
15 evidentiary type of, of, of objections that, that Judge Bridges  
16 addressed. They quote the referee's report which says, "The  
17 deposition objection designations can, in many instances, be  
18 resolved without consideration of whether the debtor has waived  
19 attorney-client privilege." And he did rule on a bunch of  
20 things that were separate and apart from privilege, but that  
21 doesn't change the fact that the privilege issues that were  
22 assigned to him, none of them have been addressed in, in total.  
23 They're still open.

24           As we read the, the Referee Order, the deposition  
25 transcripts or designated parts of the, excerpts from the



1 trans, transcripts of the depositions -- I apologize -- were  
2 given to the referee to evaluate really after he made a  
3 determination on the privilege issues. Because what it says in  
4 Paragraph 9 of the Discovery Referee Order is that:

5 "At such time as the discovery referee directs, the  
6 plaintiffs shall provide to the discovery referee the  
7 list of deposition instructions previously identified  
8 to the Court that the plaintiffs assert should be  
9 overruled if they were to prevail on the crime-  
10 fraud/waiver motion."

11 So it was contemplated he would review these  
12 deposition designations, but in the context of knowing the  
13 outcome of the privilege disputes, which we don't fully know at  
14 this point. The motion that was filed by the plaintiffs was  
15 about privilege and there is no complete decision on privilege.

16 So we, we don't believe, really, these issues are ripe  
17 at this point to go forward.

18 The last thing I'll mention, they make a big deal in  
19 their objection, they say the debtor's insisted in their  
20 proposal, our proposal, that the issues be decided separately  
21 and somehow that supports moving forward separately. And of  
22 course, the debtor never insisted. We made a, did make a  
23 proposal. We don't, we don't think we have the ability to  
24 insist. We had made a proposal on the protocol at the time we  
25 thought made sense to kind of have them set up an, an order.

1 We do the privilege log and then we do crime fraud and we had  
2 it all set up. That was a very different process where the  
3 Court would instruct the referee on the exact law to apply and  
4 what the standards were and we thought it made sense at the  
5 time. Maybe it did, but it really is kind of irrelevant now  
6 because that's not the process that was put in place.  
7 Everything's been heard together and even under that proposal  
8 there's nothing in the proposal the debtor made that suggests  
9 that we'd hear part of an issue, you know. What we have now is  
10 not within the proposal what we would have contemplated going  
11 forward, a part of at-issue waiver.

12 So with that, I'll just conclude, your Honor, with the  
13 final point, which is a reminder to the Court, which I'm sure  
14 you know, that you have the authority to manage your docket. I  
15 don't think that's very controversial, but I can cite a couple  
16 of Supreme Court cases for your Honor that say that. And you  
17 know, maybe you don't need the cites. I see --

18 THE COURT: No thanks.

19 MR. ELLMAN: So -- which I think --

20 THE COURT: I think --

21 MR. ELLMAN: -- is fair. Because I think it's well  
22 known. And we, we would just ask the Court under those  
23 principles to use your discretion and your judgment to defer  
24 briefing until the interrelated privilege issues are all  
25 decided so we can evaluate them together. We think it's more

1 fair to the parties, more fair to this Court, and more fair to  
2 the appellate courts. And again, at the very least briefing  
3 should be deferred until at least one issue is fully decided as  
4 opposed to having a partial issue.

5 So with that, we would ask for our motion to be  
6 granted. I'm happy to answer any questions you might have.  
7 But again, I think it's fairly straightforward.

8 THE COURT: Okay, very good.

9 MR. ELLMAN: Thank you, your Honor.

10 THE COURT: Ms. Hardman.

11 MS. HARDMAN: Your Honor, if you'll bear with me just  
12 a moment. We need to set up our --

13 THE COURT: Take a moment.

14 MS. HARDMAN: -- tech support, hopefully.

15 (Pause)

16 MS. HARDMAN: Your Honor, Carrie Hardman from Winston  
17 & Strawn on behalf of the plaintiffs here, again unless  
18 Mr. Greecher informs you otherwise.

19 THE COURT: Okay.

20 MS. HARDMAN: So before I begin, I did want to, with  
21 your approval, circulate the slides that will be up on the  
22 screen here, your Honor.

23 THE COURT: Please.

24 MS. HARDMAN: And I do want to note while we're, while  
25 Mr. Neier is kind of waiting for me, that there are slides in

1 this declar, in this deck here, your Honor, today in this  
2 presentation, particularly for the debtor's sake Slides 10  
3 through 13, that we just want to confirm with the defendants  
4 that they have no issue.

5 Your Honor, may we approach?

6 THE COURT: You may.

7 (Presentation provided to the Court and counsel)

8 THE COURT: Thank you, Mr. Neier.

9 MS. HARDMAN: With public reference to the slides, I  
10 won't reach them till the end of my presentation, anyway. So  
11 the debtor and defendants should have time to review them. And  
12 I will take a pause before we get to those slides so that if  
13 there is concern, we can address it. These excerpts contain no  
14 information about the debtor or defendants from a substantive  
15 basis. It's only the objections and instructions not to  
16 answer.

17 THE COURT: Hang on one moment.

18 MS. HARDMAN: So there shouldn't be any issue.

19 THE COURT: Mr. Ellman, does that work for you? Can  
20 y'all review --

21 MR. ELLMAN: I --

22 THE COURT: -- those while she's talking or do you  
23 need to stop now?

24 MR. ELLMAN: Well, I, I don't want to review them  
25 while she's talking 'cause I'd like to pay attention to what

1 she's saying. But if they are simply the, the instructions or  
2 -- excuse me -- the deposition excerpts that were referenced by  
3 the discovery referee, we have confirmed that those are not  
4 problematic.

5 MS. HARDMAN: That is correct.

6 MR. ELLMAN: And so --

7 THE COURT: Okay.

8 MR. ELLMAN: -- we don't have an issue, if that's what  
9 they are.

10 MS. HARDMAN: That's correct.

11 THE COURT: All right.

12 MS. HARDMAN: Yeah. So you will see on the top of  
13 them the reference from the discovery referee with the page and  
14 line and they coincide with the page and line --

15 THE COURT: All right, very good.

16 MS. HARDMAN: -- below them.

17 THE COURT: Please proceed.

18 MS. HARDMAN: More so that we could all have it on one  
19 page at a time, your Honor. All right.

20 So in short here, your Honor, plaintiffs believe that  
21 this motion should be denied and before I walk through the  
22 details to get there, just a few quick points as to why we  
23 think it should be denied. So a shortened sort of executive  
24 summary here.

25 I will say this, your Honor. I was talking to

1 Mr. Neier before this hearing today and I said, "Remember those  
2 decoder rings we used to get either in a Cracker Jack box or in  
3 a cereal box that you used to apply to something and a secret  
4 code would show up?" I think we need a decoder ring for this  
5 motion here, your Honor, today. There's a few aspects to it  
6 that I understand the debtor and defendants believe is, is, you  
7 know, pretty simple, not a big deal, not, you know, nothing to  
8 see here. But your Honor, I think there's more to it  
9 underneath the words of the text here that need to be  
10 addressed.

11 So you know, from our perspective, the defendants  
12 received a report and, and I think this goes to my point about  
13 the decoder. What really is happening here is the defendants  
14 received an initial report that appears, in part at least,  
15 unfavorable from their perspective and now claim that we should  
16 find ways to delay or avoid adjudication of some of the issues  
17 in that report hyperfocusing on one issue raised in the whole  
18 report as opposed to the rest of it. They've chosen to recast  
19 the report as, as an issue related to just at-issue waiver.  
20 That's just not the case. And as Mr. Ellman quoted, Judge  
21 Bridges has determined that the designations, "Deposition  
22 Objection Designations here can, in many instances, be resolved  
23 without consideration of whether the Debtor has waived the  
24 attorney-client privilege at all." That's his report at page  
25 8. In fact, Judge Bridges did us a favor and bifurcated his

1 analysis so that the Court could easily consider the bulk of  
2 his initial analysis here, which is primarily listed and  
3 articulated in Appendix A and then Appendix B addresses those  
4 at-issue waiver matters.

5           The debtor and defendants have not offered an  
6 explanation, that I'm aware of, as to why we should defer the  
7 overwhelming majority of the substance of this first report on  
8 this, what I'll call the impropriety issues in a moment, which  
9 have nothing to do with the at-issue waiver issues. In fact,  
10 your Honor, from our perspective, I hear what the debtor and  
11 defendants are saying relative to at issue and crime fraud and  
12 the privilege issues. I, I understand that concept, but we're  
13 simply talking about the impropriety here. So I'd like to  
14 focus on that as well.

15           Instead, pointing to the small version of the report  
16 on at-issue waiver, the defendants have tried to kick the  
17 entire can down the road here, leading to more delay and  
18 ignoring issues that we and Judge Bridges have mentioned is  
19 very timely. I'm going to call them the Improper Objections  
20 just to short circuit it here, your Honor, but the issues  
21 include instruction not to answer that Judge Bridges may have  
22 deemed improper, speaking objections that Judge Bridges found  
23 amount to coaching of witnesses, and other, other Improper  
24 Objections.

25           To that end, there is substantial prejudice to the

1 plaintiffs in deferring any ruling on these Improper  
2 Objections. We are about to have 30(b)(6) depositions in this  
3 case, which I know Mr. Gordon will reference in his status  
4 report. The Court has noted and provided a temporary  
5 resolution of that very issue that Judge Bridges has raised to  
6 address those relative to the 30(b)(6) depositions that are  
7 coming up. But we do face the imminent prospect of additional  
8 depositions coming up in these cases where these Improper  
9 Objections will play a huge role.

10           It's clear to the plaintiffs that this behavior is not  
11 going to stop without adjudication of the relevant issues in  
12 the first report. In fact, we can't help but see a pattern  
13 here of continued obstruction of the plaintiffs' attempts to  
14 simply conduct a thorough investigation of the corporate  
15 restructuring and the resulting DBMP bankruptcy. We've had to  
16 file motions to compel in the PI. We had to renew them again  
17 in the adversaries, as the defendants have been using the  
18 privilege as both a sword and a shield against the plaintiffs'  
19 attempt to investigate these transactions.

20           After months and months of meet and confers, we had to  
21 file a motion for a status conference to resolve the  
22 defendants' continued stonewalling of the proper custodians and  
23 these routine questions about possession, custody, and control.  
24 The only reason the 30(b)(6) depositions are taking place is  
25 because the debtor and defendants continuously refused to



1 answer our routine questions about possession, custody, and  
2 control.

3           The plaintiffs intend to take significant additional  
4 discovery in these cases, including depositions of some of the  
5 very same witnesses, and that is because the plaintiffs were  
6 stonewalled in the first place in the PI from getting those  
7 answers as to why the corporate restructuring happened and the  
8 resulting DBMP bankruptcy.

9           And respectfully, it would be a significant burden on  
10 this Court if we are to apply your generous offer in the  
11 30(b)(6) context to provide a conference at the end of every  
12 deposition that's coming down the pike, particularly if there's  
13 more than one on the same day. I'm not sure your Honor's  
14 capable of being in two places at once. I also don't think we  
15 should test it. Thus, we have an issue raised in the first  
16 report, from our perspective, that truly requires timely  
17 adjudication.

18           I referenced our motions to compel and as you, as your  
19 Honor well knows, the plaintiffs accepted a level of prejudice  
20 in the PI proceeding to ensure that the PI would expeditiously  
21 proceed. So we withdrew that without prejudice to address  
22 issues that related to the stonewalling of information to our  
23 clients. But we are in new adversary proceedings now. We are  
24 not facing that same emergent process here. And so we don't  
25 want to permit the continued prejudice here by allowing that

1 improper behavior to continue in the upcoming depositions in  
2 this matter. It's why we filed the renewed motion to compel.  
3 We fought for many months about the substance of that motion  
4 and we argued before your Honor on the substance of that motion  
5 and then we argued on the method to get those issues  
6 adjudicated in the first place, ultimately landing on the  
7 Referee Order that we're addressing today.

8           And here we are, yet again, facing a reconsideration  
9 motion that's packaged as a motion to suspend deadlines, all to  
10 further delay and obstruct the plaintiffs from their goal  
11 which, again, in our capacity as individual entities as well as  
12 estate representatives is simply to get at the heart of what  
13 happened here, what happened in the corporate restructuring and  
14 the resulting bankruptcy and why.

15           So whether you want to call it a motion to suspend, a  
16 motion to clarify, or whatever new term will come next, the  
17 result is the same. The defendants would like to rewrite the  
18 terms of the established Referee Order. I raise the title of  
19 the motion to clarify because whether it's a motion to clarify  
20 our standing or it's the motion to suspend here, your Honor, we  
21 see a pattern emerging of revisiting the Court's orders  
22 whenever the plaintiff inch, plaintiffs' path inches closer to  
23 a proper investigation of the corporate restructuring and the  
24 resulting DBMP bankruptcy.

25           I will pause because before I get ahead of myself too

1 much we do think it's important to understand some of the  
2 context and history as to how we got here in the first place.  
3 I've previewed some of it, your Honor. So forgive me for  
4 taking a giant step back.

5 THE COURT: Uh-huh (indicating an affirmative  
6 response).

7 MS. HARDMAN: All right. As I mentioned before, the  
8 terms of the Referee Order are the product of months of  
9 negotiation after oral argument on the issues in the motion to  
10 compel. These are terms the defendants themselves negotiated  
11 and agreed to. Mr. Ellman has said that they contemplated  
12 singular briefing here, or the concept of singular briefing  
13 here, but, as we mentioned in our briefing, it was the  
14 defendants who put into the draft Referee Order provisions to  
15 prepare separate reports through which the parties would file  
16 individual objections and responses.

17 The Referee Order, as written, provides that Judge  
18 Bridges is entitled to address these disputes simultaneously or  
19 serially as he, not another party, deems most efficient. The  
20 entire concept of permitting Judge Bridges to issue one or more  
21 reports as and when he sees fit was intended to reflect Judge  
22 Bridges' role here. He's an extension of this Court, of your  
23 Honor. And the parties were certainly not attempting to tell  
24 this Court or Judge Bridges how and when to rule.

25 So by extension, the parties all supported Judge

1 Bridges having the discretion to issues his rulings in the  
2 manner and order he see, he sees fit. And yet, having reviewed  
3 the first report, defendants are now effectively asking for a  
4 pocket veto of Judge Bridges' chosen process here. Said  
5 simply, the discovery referee's deference should be maintained.

6 I suggest to the Court here, whether we call it  
7 suspension or clarification, defendants are effectively  
8 retrading on the original agreement struck with the plaintiffs  
9 and proposed to your Honor. Defendants claim that they seek to  
10 suspend only one deadline in their brief and that's the initial  
11 opposition brief. Again, going back to my decoder-ring process  
12 here, your Honor, to decode that, that's a bit of a misnomer.  
13 The suspension of the first briefing deadline will effectively  
14 halt the entire procedure here. Of course, the purported  
15 suspension is proposed to be lifted only when Judge Bridges  
16 issues Reports and Recommendations as to all other issues under  
17 his purview. Therefore, the defendants' proposal is, in fact,  
18 intended to completely upend the entire premise and terms of  
19 the Referee Order as currently stated.

20 As we note in our papers, there is a mechanism to seek  
21 relief from the orders in this Court or seek to revisit them.  
22 Suspension or clarification are not it, nor are the principles  
23 of judicial economy and efficiency, as cited by the defendants,  
24 the basis upon which such relief can be granted. It's a motion  
25 for reconsideration, your Honor. That's what this is, a *de*

1 *facto* motion to request reconsideration of the Referee Order.  
2 Yet, because defendants could not establish the new evidence or  
3 a clear error of law or manifest injustice in adhering to the  
4 briefing schedule that the defendants originally proposed and  
5 the parties agreed to, defendants opted to base their request  
6 on the principles of judicial economy and efficiency, citing  
7 one aspect of the multi-faceted first report to justify halting  
8 the entire process.

9           Query what would have happened if the defendants  
10 received a Report and Recommendation from Judge Bridges that  
11 they didn't anticipate opposing. What if it said all of their  
12 instructions not to answer were completely proper? Where would  
13 we be? Probably not before your Honor today. Even if economy  
14 and efficiency were considerations that weighed in favor of  
15 reconsideration of this Referee Order, these factors weigh in  
16 favor of preventing and repeating the same process that  
17 occurred in the PI where we take depositions, we're limited in  
18 our responses and the information we receive, we field  
19 unstrict, unrestricted and improper objections, and then have  
20 to retake these depositions all over again when we finally  
21 address the impropriety issues. Permitting reconsideration  
22 under whatever nomenclature the defendants use today sets a  
23 disturbing precedent for this case.

24           We, therefore, submit that the defendants fail to  
25 properly carry their burden for the relief they truly request

1 and for that reason alone the motion should be denied.

2 But that all said, setting aside the impropriety of  
3 the motion practice, plaintiffs do readily acknowledge that  
4 your Honor has the power to review and consider your own orders  
5 at any time. To that end, as noted in our objection, we  
6 recognize there's a middle ground to be had here.

7 As noted in Judge Bridges' first report, the  
8 overwhelming majority addresses Improper Objections and as  
9 noted in this slide, the first report addresses three issues,  
10 whether the objection was facially valid, whether the  
11 information sought actually falls within the scope and  
12 protection of attorney-client privilege, and where applicable,  
13 whether the waiver or exception to attorney-client privilege  
14 applies.

15 With respect to (a) and (b) on this list, your Honor,  
16 that information is contained in the Appendix A from Judge  
17 Bridges and then he separately addressed the, I will agree,  
18 partial acknowledgment or analysis of the at-issue waiver  
19 matter in Appendix B. The defendants focus solely on Appendix  
20 B here, your Honor, to suggest that the entire report should be  
21 put on ice. Yet, defendants fail to acknowledge a point that  
22 Judge Bridges himself made, that some of these deposition  
23 designations and the issues there about whether or not the  
24 debtor has, can be resolved without consideration about whether  
25 or not the debtor has waived attorney-client privilege.

1           So those findings are ripe for resolution today, your  
2 Honor. In short, we believe there's a way to bifurcate the  
3 analysis of this first report. If your Honor was so inclined  
4 to suspend briefing of the at-issue waiver, crime-fraud  
5 exception analysis for now, the Court could separately address  
6 what I've called the Improper Objections. The importance of  
7 addressing these issues now can't be understated, from our  
8 perspective. This is not just one deposition, but the  
9 defendants improperly instructed witnesses not to answer ten,  
10 answer in 10 out of 18 of the depositions taken in the PI.  
11 Judge Bridges reviewed nearly every deposition to address the  
12 waiver exception, or exception to privilege and found that the  
13 propriety of the objections in the first place must be examined  
14 in 10 out of those 18 depositions.

15           More than that, as noted here, your Honor, of the 79  
16 findings of Judge Bridges about Improper Objections, coaching,  
17 or the like, 48 of them have absolutely no recommendation  
18 whatsoever that overlaps or contains a finding of, of a  
19 potential waiver issue there as well, which can, again, serve  
20 as a secondary analysis later if your Court, if the Court is so  
21 inclined.

22           It's clear that the resolution of the Improper  
23 Objections can stand alone. These Improper Objections are an  
24 issue that permeated the entire discovery process in the PI and  
25 will continue to do so in these adversaries if not resolved.

1 We should be entitled to address this issue fully and in  
2 advance of upcoming discovery and depositions that will take  
3 place in these proceedings.

4 THE COURT: You mean next week's depositions?

5 MS. HARDMAN: Your Honor, while that sounds lovely, I,  
6 I don't know that my family would particularly enjoy me  
7 briefing this between now and next Thursday, your Honor, but we  
8 do believe that your temporary resolution relative to the  
9 30(b)(6) depositions suffices to carry us to the next set of  
10 depositions.

11 All of that said, what I will say is that, as your  
12 Honor knows, the evidence from the prior depositions has been  
13 made ripe here in these proceedings. We rely on the  
14 information received there thus far in determining how to  
15 proceed in these adversaries. Knowing and understanding what  
16 the rule or adjudication would be with respect to the Improper  
17 Objections, your Honor, will inform how we are able to  
18 negotiate depositions on a go-forward basis. If we understand  
19 that there are issues that reopen parts of prior depositions,  
20 for instance, I would want to have a conversation about how  
21 long a deposition is going to be --

22 THE COURT: Hmm.

23 MS. HARDMAN: -- with a particular witness. If I have  
24 no idea whether or not those issues have been adjudicated in  
25 advance, we're, we're effectively negotiating in the blind a



1 smidge. And it could open that up for further depositions down  
2 the line if permitted to continue --

3 THE COURT: Uh-huh (indicating an affirmative  
4 response).

5 MS. HARDMAN: -- to exercise the same Improper  
6 Objections that were done in the PI. Okay.

7 Your Honor, I, I pause a moment to just indicate that  
8 Judge Bridges acknowledged how important it is to address this  
9 on a timely basis as well. There are quotes here, your Honor,  
10 about the dynamic process and ensuring that we avoid witnesses'  
11 memories fading over time and unavailability later on.

12 All of that said, more than that, we just truly want  
13 to understand what happened here and the defendants even  
14 acknowledged Judge Bridges in argument that the objections were  
15 overzealous, which Judge Bridges indicated believes border on  
16 frivolous and obstructive.

17 Are we okay? We're okay, right, with respect to the  
18 10 through 13? I only pause to make sure that we were --

19 THE COURT: 10 through --

20 MS. HARDMAN: We were okay with that, right?

21 MR. ELLMAN: Again, as long as they are what you say  
22 they are, we're fine with them.

23 MS. HARDMAN: Okay.

24 MR. ELLMAN: We, we have looked at all those and we --

25 THE COURT: We start touching --

1 MR. ELLMAN: -- in fact, informed Judge Bridges  
2 that -- we, we gave him a list of the things that were still  
3 designated confidential and he confirmed that none of what he  
4 used was within those categories. And we have confirmed that  
5 since. So we're fine with it.

6 MS. HARDMAN: Okay. Thank you.

7 I just want to show you a few examples of where Judge  
8 Bridges indicated that defendants clearly articulated improper  
9 instructions or objections that, if permitted to continue,  
10 would no doubt hinder the plaintiffs' attempt to get at the  
11 truth here.

12 As noted, you'll see here, your Honor, the question  
13 itself intentionally steered away from privilege and was still  
14 subject to coaching by counsel to their witness. It's as if  
15 the questioner could have asked any non-privileged question,  
16 like about the weather, and the response would have been, "I  
17 will instruct you not to disclose privileged communications  
18 about the weather."

19 On to the next.

20 Similar here, the discovery referee noted a flagrant  
21 example of witness coaching. Again, the questions are purely  
22 nonlegal in nature and yet the instructions turn into clear  
23 coaching as to an answer that should not be provided here.

24 Next slide.

25 And again, we have a whole colloquy here about -- the

1 questioner here happens to be myself truly attempts to limit  
2 the question to non-privileged communications and even despite  
3 those efforts, counsel directs the witness as to how they can  
4 answer the question.

5           And finally, I will not go into detail on this very  
6 long slide, but the point is here, is that the questions  
7 regarding a witness' understanding about why Goodwin-Procter  
8 attended business meetings and counsel applied an improper  
9 standard again here that anything learned from counsel at all  
10 is automatically privileged.

11           I will tell you, your Honor, I fancy myself  
12 knowledgeable about some legal issues and many non-legal  
13 issues. I like to believe I'm helpful in some trivia  
14 situations, but just because an answer comes out of my mouth  
15 does not *de facto* make it privileged. For example, my sadly  
16 vast knowledge of pop culture is not privileged by any stretch.  
17 It's got to be legal advice.

18           I show these examples not to get at the substance of  
19 the issues here, but as demonstratives to explain the gravity  
20 of the issues the plaintiffs have been facing in upcoming  
21 discovery. We should be entitled to seek relief for what is a  
22 timely issue of improper instructions not to answer. We cannot  
23 rely on the defendants who conducted themselves in such a way  
24 in prior discovery to simply self-correct. Plaintiffs should  
25 be entitled to brief the issue of Improper Objections, propose

1 resolutions to the effect, to that effect for the Court's  
2 consideration, and advance further substantive depositions in  
3 the adversary proceedings.

4 So plaintiffs submit at least, your Honor, here the  
5 improper deposition obstruct, instructions and objections  
6 should be briefed and adjudicated in accordance with the terms  
7 of the Referee Order.

8 THE COURT: Okay.

9 MS. HARDMAN: Thank you.

10 THE COURT: Thank you.

11 All right. Mr. Greecher, you want to weigh in?

12 MR. GREECHER: Yes. Thank you, your Honor.

13 We, we join in the request for the motion to be  
14 denied. As Ms. Hardman said, you know, the nomenclature of  
15 this is a motion to suspend really seems to be a  
16 mischaracterization. It really is a motion to disregard the  
17 terms of the discovery order, you know. The, the debtor now  
18 seeks to take away discretion that was granted to the discovery  
19 referee and asks your Honor not to consider the merits of  
20 Judge's, of Judge Bridges' first Report and Recommendation. We  
21 don't believe that that request is well-founded. We don't  
22 believe it's fair to the plaintiffs who have an interest in  
23 seeing these adversary proceedings move forward apace with the,  
24 the rest of this case, not see them sitting idle.

25 As Ms. Hardman noted, the, the motion, nor the reply

1 addressed the applicable standard. The motion simply points to  
2 these concepts of judicial economy or, or practical efficiency  
3 and, and we don't believe that the time for, for, for those  
4 arguments, you know, is now. And, and we certainly don't think  
5 that those, those, those arguments of potential, you know,  
6 inefficiency, you know, you know, meet the standard of a  
7 manifestly unjust result to, to the debtor.

8 But I do want to break down the two arguments of  
9 inefficiency and unfairness. You know, first, the defendants  
10 argue that, that they have to argue the waiver-related issues  
11 for deposition testimony, that they may need to later argue  
12 similar issues for the documentary evidence.

13 THE COURT: Uh-huh (indicating an affirmative  
14 response).

15 MR. GREECHER: This purported inefficiency really  
16 seems slight to me, if there's any at all. In fact, I'll argue  
17 that it will be more efficient for the Court to hear and rule  
18 on this first report now before Judge Bridges spends more time,  
19 spends more estate money preparing subsequent reports that are  
20 going to be premised on his findings and, and conclusions  
21 ultimately, if your Honor is not going to accept Judge Bridges'  
22 determinations that you find in the, in the initial first,  
23 first Report and Recommendation. I don't know how, how closely  
24 your Honor's looked at that first report, but it, it, it does  
25 propose an overall legal framework and makes fundamental

1 conclusions that, under which Judge Bridges believes his work  
2 should proceed for the, each of the 4,000 plus withheld  
3 documents and a subsequent proceeding before Judge Bridges and  
4 likely your Honor that would result from any future reports as  
5 to those 4,000 specific withheld, withheld document, withheld  
6 document rulings would be guided by and, and focused by the  
7 legal framework and determination that your Honor approves or  
8 doesn't approve, you know, in connection with this first  
9 report.

10           How did we get here, your Honor? Recall that this  
11 discovery referee process was put in place after your Honor  
12 reviewed a small subset of documents back at the end of 2022.  
13 At the November 16, 2022 hearing you said that the 50 or so  
14 documents that you saw, you said:

15           "Y'all have managed to come up with as challenging of  
16 attorney-client privilege debates as I've ever been  
17 able to read and I've looked at quite a bit and most  
18 of the cases are much, much simpler.

19           "... Having looked at the 50 plus excerpts, one of the  
20 things that struck me is it's going to be hard to  
21 tell, to just, unless you can lump these into  
22 categories and have 6 or 8 categories. It's going to  
23 be very difficult in an opinion. You could spend two  
24 pages of writing on each and every one of those  
25 because the context and the various issues that come

1 up that are attended to each one of them."

2 And your Honor, I think we all breathed a sigh of  
3 relief when, when we heard that because we had not seen those  
4 documents. We had, we'd discussed a number of potential ways  
5 to tee up these disputes. One suggestion we had was to, you  
6 know, for the parties to agree to some quick peek under Rule  
7 502 to allow us to, to brief and argue a subset of documents.  
8 Debtor didn't agree to that.

9 So we, we simply did our best to divine from the  
10 privilege log, you know, potentially helpful examples of  
11 documents that would likely touch on these controversial points  
12 and, you know, your Honor's comments that we needed to figure  
13 out an effective way to eat this proverbial elephant, if you  
14 will, you know, was, was precisely why the parties negotiated  
15 and, and the Court built, you know, some flexibility and  
16 discretion into the Referee Order, understanding that, you  
17 know, you know, the issues are thorny, they're challenging, and  
18 it was going to be difficult to have to deal with all of those  
19 various challenges and potential arguments and bases for a  
20 particular deposition instruction or a specific relevant  
21 document, you know, to be ruled upon without, you know,  
22 breaking the issues down and bundling them into conceptual  
23 categories.

24 And your Honor, I'd suggest that's exactly what Judge  
25 Bridges has done in this first report. As he notes, he took

1 this limited universe of discovery items, these deposition  
2 instructions, and he examined them sequentially to facilitate  
3 what he calls a "decision-tree" approach. He applied what he  
4 believes is the appropriate legal analysis as to each of the  
5 relevant objections and what he believes are the various topics  
6 for which the defendants placed certain assertions at issue so  
7 that if the Court agrees with or doesn't agree with, you know,  
8 one or more of his, the, the assertions. And if you look at,  
9 you know, Appendix B, he, he sets out sort of his, his  
10 conclusions. A ruling on, you know, any of those categories  
11 will, presumably, trim that "decision tree" for him as, as he  
12 shapes and focuses the analysis as to the 4,000-plus documents  
13 that are still ahead of him, you know.

14 Our view is that this motion really would seek to  
15 undercut all that thoughtful groundwork and that attempt to  
16 categorize and, and, and really sort of focus the, you know,  
17 the proposed rulings on, on the concepts and really would  
18 subject your, you know, your Honor or, depending on when Judge  
19 Bridges is done, your Honor's successor with the very  
20 unenviable task of considering every single potential issue all  
21 at once, 143 deposition instructions and the over 4,000  
22 documents where privileges were claimed, and rule, rule on all  
23 of those things in sort of a morass of, you know, multiple  
24 issues and multiple disputes and going line-by-line without  
25 sort of that conceptual through line that I think your Honor



1 suggested was the right approach here and that clearly, in our  
2 view, Judge Bridges agreed with.

3           So simply stopping and waiting so that we have that  
4 free-for-all down the line, you know, certainly would not be  
5 efficient for Judge Bridges, in our view, as he continues his  
6 work and it certainly wouldn't make for an efficient proceeding  
7 before your Honor or your Honor's successor to go through each  
8 of those items one by one. Again, go back to your Honor's  
9 comment, "You could spend two pages of writing on ... every one  
10 of these ... issues." 2, you know, 4,143 times 2 pages is a  
11 lot of pages, your Honor. We just don't believe that's  
12 efficient.

13           Secondly, want to go to unfairness. Debtor really  
14 doesn't explain, explain how abiding by the terms of the order  
15 that your Honor entered would be unfair. If there's any  
16 unfairness, your Honor, we think it would be unfair to the  
17 plaintiffs for the Court to modify these procedures now. Your  
18 Honor's been crystal clear. Both the estimation process and  
19 the creditor adversary process need to proceed in tandem and  
20 our view is that this is just another attempt by the debtor to  
21 throw sand in the gears of the creditor adversary discovery  
22 process.

23           So your Honor, Judge Bridges said and Ms. Hardman  
24 noted in, on page 6 and 7 of his report depositions are a  
25 dynamic part of the discovery here. The documents that the

1 defendants preserved in accordance with their obligations are  
2 fixed and static, but witnesses' recollections can fade.  
3 They're not fixed and static. They could be altered, as Judge  
4 Bridges said, "altered by intervening events, other discovery,  
5 or the helpful suggestions of lawyers." And presumably, Judge  
6 Bridges' tongue was firmly in cheek as he wrote that.

7           Delaying a report, a ruling on this first report, your  
8 Honor, is denying the relief that Judge Bridges believes that  
9 the plaintiffs are entitled to here, which is full, candid, and  
10 uncoached deposition testimony from key witnesses who were  
11 involved in the corporate restructuring and to have that  
12 testimony locked in in the same way that the documents were  
13 preserved, to get that testimony locked in as soon as possible  
14 before the key witnesses' memories become more hazy or the  
15 witnesses themselves become unavailable. I believe at least  
16 one of the witnesses is no longer employed by the debtor, you  
17 know. Presumably, there are other witnesses who, you know, may  
18 become even more un, unavailable as time goes on. Denying the  
19 plaintiffs that right would be a true unfairness resulting from  
20 granting this motion. We don't believe that the debtor has  
21 really engaged on that issue, but we believe it's an important  
22 one and we would ask that the motion be denied.

23           Thank you.

24           THE COURT: Okay. Thank you.

25           All right. Ready to hear responses.

1 MR. ELLMAN: Jeffrey Ellman from Jones Day on behalf  
2 of the debtor again.

3 Just a few things. It all seems a little bit  
4 backward, some of the argument to me.

5 First of all, what we've filed is very  
6 straightforward. You don't need a decoder ring to understand  
7 it. We're asking your Honor under the authority you say you  
8 know to manage your docket. We're not asking to modify the  
9 procedures. We're not asking Judge Bridges to issue more or  
10 fewer reports. We simply think, given where we are today, this  
11 is the most appropriate and efficient and fair way to proceed.

12 We heard a lot about why, why defer the issues that  
13 are unrelated to privilege because Judge Bridges did issue 140  
14 something rulings that had nothing to do with privilege. Well,  
15 the task in front of him, that was assigned to him had to do  
16 with privilege. We're not trying to change the procedures.  
17 This wasn't something contemplated. We didn't brief these  
18 issues. He, he makes clear on page 8 that, you know, one of  
19 the matters not addressed in the briefing was "the simple  
20 application of traditional evidentiary principles ... without  
21 necessarily requiring resolution under the at-issue waiver  
22 analysis." This wasn't contemplated. We don't have, we just  
23 have something we didn't expect. We didn't expect to have part  
24 of an issue. We expected, at least I did and I think the  
25 debtor did, when the discretion was given to Judge Bridges to

1 issue one or multiple reports we thought he would address  
2 issues, one of the, one or more of the three issues assigned to  
3 him. We do think it's very unfair to have to brief an issue  
4 about at-issue waiver until we see the entirety of it.

5           The primary basis, if you go back and look at the  
6 crime-fraud motion and you look at what, I think your Honor  
7 said -- I haven't gone back to the transcripts -- from memory,  
8 anyway, the, one of the driving forces, probably the main  
9 driving force was to allow Judge Bridges to have the documents  
10 in camera. You had said we should not have privilege issues,  
11 you know, calls made without someone being able to look at the  
12 documents.

13           THE COURT: Uh-huh (indicating an affirmative  
14 response).

15           MR. ELLMAN: But he's, he's still looking at them.  
16 He's not done and he hasn't made a ruling. And there's no  
17 circumstance, in my mind, where what he says about the  
18 documents won't be instructive to the at-issue waiver.

19           So for us to go forward on something that's obviously  
20 important to the debtor on our privilege and to the Non-Debtor  
21 Affiliates -- I'm sure they would agree -- without the full  
22 scope of his ruling, this is unfair. I don't think I have to  
23 explain it more than that. I think it's just true.

24           Would we say the same thing? There's a suggestion  
25 that because we feel like we didn't like all the rulings, that

1 we, that's why we want to delay. Has nothing to do with it.  
2 We're, we're prepared. If we have to brief it, we'll brief it.  
3 These, these are something -- it, it doesn't change the fact  
4 that he hasn't ruled on one complete issue that was assigned to  
5 him and we think that he should do that before we respond.  
6 That's really the fundamental point.

7           These other issues, they were never briefed. We can  
8 brief them for your Honor. It's, it's a little complicated  
9 because there was no motion filed. It wasn't expected, but  
10 we're, we're working on it because it's due next Monday, if we  
11 have to do it, and we'll go through each of the 150, or  
12 whatever it is, and we'll deal with it.

13           But it has nothing to do with we won or lost or liked  
14 it or didn't. We won on some of them. We lost on some of  
15 them. I don't think showing these examples and having a debate  
16 today is appropriate. It's, that's the substance of it and we  
17 have responses to it. I, I won't, won't try to get into it  
18 today.

19           But it's really -- to me, what they're suggesting from  
20 the plaintiffs' side is more of a reconsideration than what  
21 we're suggesting. Going forward with a, a new issue that Judge  
22 Bridges identified separately, we can do that. That's not in  
23 the order. If you want to do that, you'll, you'll tell us and  
24 we'll do that.

25           But we are not trying to modify anything. We are

1 simply asking the Court to use your discretion under  
2 circumstances that are presented to us to have a more efficient  
3 and fair process. We suggested waiting for all of the issues  
4 to be decided at this point. I do have some concern that we're  
5 going to have one issues or part of an issue. We're going to  
6 litigate it, adjudicate it. It's going to go up on appeal.  
7 We'll have another thing coming. It's going to be related.  
8 It's, now we have two appeals. This is not what we -- I agree.  
9 We proposed originally to have one issue at a time, but we're  
10 not there.

11 THE COURT: Uh-huh (indicating an affirmative  
12 response).

13 MR. ELLMAN: And we don't even have one issue.

14 So to me, this just, we're just reacting to where we  
15 are at this point.

16 THE COURT: But at the time the order was entered, the  
17 Referee Order, and that discretion was given to him, wasn't it  
18 knowable to everyone that we might have multiple appeals,  
19 then --

20 MR. ELLMAN: Yes, but --

21 THE COURT: -- that he might use --

22 MR. ELLMAN: -- but, but my expectation would have  
23 been it would have covered an entire issue.

24 THE COURT: Right.

25 MR. ELLMAN: In other words, not at issue about --

1 THE COURT: Is, isn't --

2 MR. ELLMAN: -- depositions and not at issue about  
3 documents.

4 And I, I think the other thing that's happened, your  
5 Honor, since we've had that discussion because everything's now  
6 been argued together, it's harder to pull them apart.

7 THE COURT: Sure.

8 MR. ELLMAN: It just is. We had proposed in our, I  
9 think December 2022 protocol, it was just different. Because  
10 we said let's do this issue. We'll do crime fraud. The, the,  
11 the referee will follow this standard --

12 THE COURT: Uh-huh (indicating an affirmative  
13 response).

14 MR. ELLMAN: -- and we'll do it this way. We didn't  
15 do any of that. We said just take it and do it as you, as you  
16 please. And it just --

17 THE COURT: Right.

18 MR. ELLMAN: -- turned out -- this is not what we  
19 expected, either -- but it just turned out that everything kind  
20 of got mushed together and it's a big --

21 THE COURT: So all three of the topics we gave to the  
22 referee all presuppose that there is a privilege. If there's  
23 no privilege, we don't have a discussion at all --

24 MR. ELLMAN: Yeah.

25 THE COURT: -- the sufficiency or your log, etc.

1           So this strikes me as being a preamble issue before we  
2 get into those other issues. Does it make any sense, though,  
3 to mush them all together in that sense? I, I can see this  
4 going several different ways, but bottom line is this was  
5 something that -- I guess what I'm asking you, Mr. Ellman, is  
6 is this something that we agreed to an order and didn't, didn't  
7 realize of how it would all play out a year later?

8           MR. ELLMAN: Well, to, to some extent because I think  
9 we, we did not anticipate that we would have an order that  
10 didn't address fully an issue.

11           THE COURT: Right.

12           MR. ELLMAN: We're not -- I mean, this is just my  
13 small brain thinking about it, but when I see that provision --

14           THE COURT: Well, you're talking to another small  
15 brain.

16           MR. ELLMAN: Well, so --

17           THE COURT: So go ahead.

18           MR. ELLMAN: So this is how I think about it. You can  
19 -- you have three issues. These are the three issues --

20           THE COURT: Right.

21           MR. ELLMAN: -- and they're defined pretty clearly and  
22 they all talk about, well, the privilege log talks about the  
23 log. The other two talk about the documents --

24           THE COURT: Right.

25           MR. ELLMAN: -- and the scope and all that. And you



1 can decide those three issues together or, or individually.

2 THE COURT: Yeah.

3 MR. ELLMAN: But to me, I never, at least from the  
4 debtor's perspective, we never expected we'd have to deal with  
5 40 percent of an issue and then have the other 40 percent come  
6 and another 20 percent come and deal with them separately. It  
7 doesn't seem very fair to us.

8 And like I said before, I don't know how you reconvene  
9 a deposition anyway and expect a lawyer to protect the  
10 privilege until these issues. How do you do it?

11 THE COURT: Yeah.

12 MR. ELLMAN: I mean, I wouldn't know how to do it.  
13 Luckily, I wouldn't be the one doing it. I was talking to our  
14 litigators trying to figure out, well, how would you, how would  
15 you do it and no one really knows.

16 So it just seems a little unfair to us. And we're not  
17 trying to delay anything. We're waiting for Judge Bridges. As  
18 soon as he's done with an issue, we're ready to go. We'd like  
19 to get them resolved. And he's working on it. I know he  
20 hasn't stopped. He's not waiting -- as I understand it, he's  
21 not waiting for you to rule so he can decide what to do next.

22 THE COURT: Right.

23 MR. ELLMAN: He's had some delays for personal  
24 reasons, but he's moving forward and he's looking at the  
25 documents. I imagine -- and I don't know 'cause he hasn't told

1 us -- but I imagine if you have a proceeding on part of an  
2 issue and these other issues he's added into the mix that  
3 weren't in the order, by the time you get to that and we maybe  
4 have an appeal, we're going to have another thing --

5 THE COURT: Uh-huh (indicating an affirmative  
6 response).

7 MR. ELLMAN: -- and another thing. If these were  
8 separated out, if we had the complete at-issue waiver decision  
9 and he told us exactly everything, we would probably not be  
10 here. I mean, it's not a matter of winning or losing. We just  
11 want to see the scope of what we're arguing about. It's  
12 important to us. We, we don't want to start making argument  
13 and find out he's going a different direction in another  
14 report. Now we've said -- it's just -- it's hard to adjudicate  
15 something, to litigate it, to make a position until we see, you  
16 know --

17 THE COURT: Uh-huh (indicating an affirmative  
18 response).

19 MR. ELLMAN: -- you know, the entirety of it. We see  
20 the whole soup of it, or whatever. We're using "soup" as a, as  
21 a metaphor today.

22 So I mean, it's just hard for us to do and --

23 THE COURT: Sure.

24 MR. ELLMAN: -- you know, from, from our perspective,  
25 we're not trying to rewrite the order. We're not trying to

1 stop Judge Bridges from doing it the way he wants. He's doing  
2 something different than what, from our perspective, is in the  
3 order. If he wants to do it that way, it's what he's going to  
4 do, but we do think that means the Court needs to think about  
5 does the briefing schedule still work if he's going off and  
6 doing something a little different because he thinks it's more,  
7 more appropriate.

8           You know, the -- I'm just looking at my notes of  
9 things that people have said.

10           THE COURT: The briefing schedule work with regard to  
11 the current dispute of whether to go with the initial report,  
12 is that what you were saying?

13           MR. ELLMAN: Well, no. I don't think we should be  
14 briefing the initial report right now.

15           THE COURT: All right.

16           MR. ELLMAN: I think we need to see the entirety of  
17 it. Obviously, if, if you deny --

18           THE COURT: I was just asking what you were meaning by  
19 your last statement, that the Court should consider whether the  
20 briefing schedule still works, is what you effectively --

21           MR. ELLMAN: Well, what I'm saying is that I think  
22 it's within the Court's -- we're not seeking to change the  
23 order, but --

24           THE COURT: Uh-huh (indicating an affirmative  
25 response).

1 MR. ELLMAN: -- the Court does have the inherent  
2 authority --

3 THE COURT: Uh-huh (indicating an affirmative  
4 response).

5 MR. ELLMAN: -- to manage the docket --

6 THE COURT: Got that.

7 MR. ELLMAN: -- and say, "Based on what Judge Bridges  
8 has done so far" --

9 THE COURT: That's one of the few things I'm  
10 absolutely sure about --

11 MR. ELLMAN: Yeah.

12 THE COURT: -- so.

13 MR. ELLMAN: -- And so, I mean, I have the cases to  
14 cite. I know you didn't need them.

15 But based on where we are today, your Honor has the  
16 ability to say, "Look, I know the order" --

17 THE COURT: Right.

18 MR. ELLMAN: -- "says we're going to brief it, but  
19 we're going to defer things for now" --

20 THE COURT: Right.

21 MR. ELLMAN: -- "and see what the next report says and  
22 see if it makes sense to proceed." I would not suggest we  
23 proceed on individual issues that I know the -- there's kind of  
24 a, a statement by the other side that they think we're acting  
25 inappropriately. Those issues can be adjudicated at some

1 point, but they weren't really what was assigned to the  
2 referee. So to me, we would, if you want to hear them or your  
3 successor wants to hear them, we can do them in connection with  
4 this other material.

5 But the privilege issues are what we're waiting for  
6 and as soon as they're ready to go, we're ready to go. We're  
7 not, you know, we're, we're happy to have them finalized so we  
8 can talk to your Honor, talk to your successor, talk to an  
9 appellate court, get them resolved and move on. But obviously,  
10 they're very important to us.

11 So privilege is not something we take lightly, it's  
12 not something our clients take lightly, and we're charged with  
13 preserving it. And so as long as the privilege at this point  
14 has not been determined to have been waived or there's an  
15 exception, we're going to continue to, to do that.

16 So as far as other statements that were made, I think  
17 I've already covered the notion of your taking away Judge  
18 Bridges' discretion. I don't think you are. It's just a  
19 matter of you have your own discretion. They kind of go  
20 together.

21 I've dealt with the fact that he's not waiting for  
22 this report. I don't think he needs you to rule on anything  
23 for him to continue.

24 I mean, the only other thing maybe worth mentioning --  
25 and it's not really relevant to the motion directly -- but

1 there were a number of statements about how we haven't been  
2 cooperative or answered questions. They have to do a 30(b)(6)  
3 deposition. I mean, we have a different point of view. We  
4 have told them, for example, on the possession, custody, and  
5 control of the French documents from the beginning what our  
6 position is and what we think the answer is. They don't think  
7 it's, they don't like the answer. They don't think it's  
8 sufficient. They're, they're going to take the deposition.  
9 They'll find out from a witness.

10 But to say that we haven't been cooperative, it's just  
11 really not fair. I'm not going to get into it more than that.  
12 We've obviously had a lot of meet and confers and we've, we've  
13 been doing our best to answer their questions. And so I think  
14 we found that once we had some of these issues brought to your  
15 Honor, we did get them mostly resolved. There's, you know, a  
16 couple that are left.

17 So with that, I would, unless the Court has questions,  
18 I think I've covered everything. We would ask for the motion  
19 to be, to be, to be granted.

20 THE COURT: Okay.

21 MR. ELLMAN: I, I do know that the Affiliates are  
22 here. I think we kind of skipped them the first round. I  
23 don't know if they intended to speak or not, but I wanted to at  
24 least give them the opportunity.

25 THE COURT: Yes. Ms. Gould.

1 MS. GOULD: Thank you.

2 Your Honor, may I approach?

3 THE COURT: You may. My apologies for overlooking

4 you.

5 MS. GOULD: No, no, your Honor.

6 Good morning, your Honor. Gabrielle Gould from  
7 Goodwin Procter for the Non-Debtor Affiliates. And we had not  
8 intended to speak prior to seeing Ms. Hardman's presentation.  
9 We had filed a joinder in the motion by debtors. We fully  
10 support everything Mr. Ellman said. We will not repeat any of  
11 it. I'm speaking solely to address a couple points made in the  
12 presentation by the counsel for plaintiffs.

13 So plaintiffs in their slides have an entire page  
14 labeled Deference Granted to the Discovery Referee Should Not  
15 Be Circumvented. And it just quotes from the order about what  
16 the discovery referee is going to address. There's actually no  
17 discussion there about deference.

18 And on the next page there's a slide that states  
19 Factors for Reconsideration of Court Orders. And it states,  
20 "Defendants fail to carry their burden to make a showing  
21 sufficient for the Court to disturb its ruling in a Referee  
22 Order." And it seems that in, plaintiffs in their presentation  
23 are intending to prejudge that defendants have failed, failed  
24 to meet a burden, there is some deference and that, therefore,  
25 this Court can move this issue along quicky and we can go

1 straight to depositions. I think that's the impression that  
2 plaintiffs are giving the Court. In fact, it states here that,  
3 "There's no showing of a clear error of law or manifest  
4 injustice." But actually, your Honor, the order appointing  
5 Judge Bridges at Paragraph 15 states very clearly that this  
6 Court is going to conduct a *de novo* review, not a, it's not a  
7 review on a clearly erroneous standard.

8 THE COURT: Right.

9 MS. GOULD: And as the Court is well aware, *de novo*  
10 review "entails consideration of an issue as if it had not  
11 previously been decided." And that's the Fourth Circuit case  
12 in Stone v. Instrumentation Laboratory.

13 So therefore, this standard permits a fresh and  
14 independent determination of the dispute. Because as the  
15 Fourth Circuit said in Stone, "*De novo* process is a new  
16 adjudication."

17 So with respect to any decisions made by Judge  
18 Bridges, the parties are entitled to *de novo* review and with  
19 respect to addressing the first Report and Recommendation, will  
20 raise any and all arguments which were raised before Judge  
21 Bridges.

22 Therefore, given the review to be undertaken by this  
23 Court in response to this first report by Judge Bridges, as  
24 noted by counsel for DBMB, DBMP in connection with all of its  
25 arguments, it would be contrary to efficiency and judicial



1 economy for the Court to undertake a *de novo* review at this  
2 time with respect to this partial ruling by Judge Bridges with  
3 respect to one limited issue, one piece of one privilege issue,  
4 again which didn't even concern the underlying documents.  
5 Because the Court will have to look at this issue fresh and in  
6 total under the standard.

7 Thank you, your Honor.

8 THE COURT: Thank you.

9 Anything else?

10 Ms. Hardman?

11 MS. HARDMAN: Your Honor, if you're entertain me a  
12 moment?

13 THE COURT: You may.

14 MS. HARDMAN: So just a couple of points that were  
15 raised by Ms. Gould and Mr. Ellman.

16 Your Honor, what I heard Mr. Ellman say is that his  
17 clients don't take their assertions of privilege or the  
18 privilege lightly. And I think we all agree on that. In fact,  
19 we believe we'd probably characterize it as heavy handed from  
20 this perspective and Mr. Ellman did indicate that they plan to  
21 continue taking the position that they've taken with respect to  
22 privilege and that is the concern we have.

23 With depositions coming up, not just the one next  
24 Thursday, or the two next Thursday, as it were, I'm talking  
25 about depositions of either witnesses we've already deposed or

1 third-party witnesses where we need the information that was  
2 previously withheld from us in order to effectively ask  
3 questions and, and get to the heart of the matter here, your  
4 Honor. To indicate that they're going to continue with the  
5 *status quo* tells me that we're going to be before this Court,  
6 whether it be your Honor or someone else in the future, going  
7 over this again seeking to reopen depositions again because the  
8 set we go through next will have, will have been stonewalled  
9 again.

10 And your Honor, I just, we do need this issue  
11 addressed about whether or not the privilege itself is even  
12 there. To your point, your Honor, it's a gating issue and I, I  
13 didn't hear the -- I think once you did ask the question.  
14 Mr. Ellman confirmed to your Honor that, in fact, they do  
15 believe even the gating issue should not be addressed now and  
16 should be kicked down the road. Our, our perspective is at the  
17 least that gating issue should be addressed now because it  
18 affects the depositions that will be coming up. And yes,  
19 they're not tomorrow. We do have some on Thursday. You have  
20 addressed that issue for us --

21 THE COURT: Uh-huh (indicating an affirmative  
22 response).

23 MS. HARDMAN: -- by offering your time. But we need a  
24 solution longer term and we need to be able to properly  
25 adjudicate those issues in advance.

1 Ms. Gould issued, or addressed the issue about *de novo*  
2 review by the referee here. Your Honor, we're talking about  
3 the Referee Order and the procedure here, not the substantive  
4 review by Judge Bridges. That's not what we're talking about  
5 today. This is about whether or not we should change the terms  
6 of the Referee Order here, whether it's by reconsideration or  
7 judicial efficiency, she suggests it. Your Honor, I would  
8 submit that it is your authority to decide whether or not to  
9 make those adjustments.

10 THE COURT: Uh-huh (indicating an affirmative  
11 response).

12 MS. HARDMAN: It is -- but if a, if a party wants to  
13 seek reconsideration, that is a mechanism by which to do it and  
14 they didn't make those showings. That's what the focus was  
15 with respect to the technical aspect there. But putting aside  
16 the technical aspects, Ms. Gould is suggesting that we suspend  
17 that *de novo* review by Judge Bridges, anyway.

18 So to the point that she's making, you know, I don't  
19 think that's up for today, but the, but the point is a  
20 procedural one that they're trying to suspend the *de novo*  
21 review.

22 And I will defer to Mr. Greecher if he has anything  
23 else to add.

24 MR. GREECHER: Thanks.

25 Your Honor, very briefly. And your Honor, I agree

1 with Ms. Hardman.

2 To the extent that your Honor is inclined to, you  
3 know, tweak or suspend or, or modify, you know, the, you know,  
4 the, you know, what, what we gave Judge Bridges as far as his,  
5 his authority and purview, I suggest that you do so, you know,  
6 after having the benefit of the full briefing and not to do so  
7 either in a vacuum or based upon sort of partial, you know,  
8 merits arguments. I think, you know, we've tried not to, you  
9 know, bring sort of the merits arguments to, you know, to, to  
10 the fore today, but, but obviously, you know, your Honor, we'd  
11 suggest that all of that be considered at least after you've  
12 had an opportunity to see the full briefing. And there's --  
13 there's -- there's no doubt your Honor has the ability to sort  
14 of suggest how we move forward after you've seen the briefing  
15 and you know, to the extent that there are specific, you know,  
16 portions of the briefing that you think would benefit from  
17 further analysis or development by Judge Bridges, you can  
18 certainly do that. We'd suggest that, at a minimum, today is  
19 not the day to do that and you know, to the extent that there  
20 is a, a suspension, that that happen only after you've had an  
21 opportunity to see the full substantive briefing.

22 THE COURT: When are -- what time are the 30(b)(6)  
23 depositions next Thursday?

24 MS. HARDMAN: That's an excellent question, your  
25 Honor, excellent question.

1 THE COURT: It's not decided yet?

2 MS. HARDMAN: We are working through that with the  
3 parties. We've asked to understand which of the two witnesses  
4 are going to be handling which topics. For instance, if one  
5 only has one topic --

6 THE COURT: Right.

7 MS. HARDMAN: -- and it's a short one, that could be  
8 done very quickly or, perhaps, we adjust the order in which the  
9 depositions are taken.

10 We don't have an answer to that yet, your Honor. So  
11 we're simply --

12 THE COURT: Okay.

13 MS. HARDMAN: -- not sure what time it's starting.

14 THE COURT: All right.

15 We got all the arguments now?

16 MR. ELLMAN: Well, I, if you, if you would permit me  
17 one last --

18 THE COURT: You are the movant.

19 MR. ELLMAN: -- comment. I know there's no premium --

20 THE COURT: So please.

21 MR. ELLMAN: -- for the final word.

22 But I just want to point out all these comments we're  
23 getting back here at the end, to us, to me, anyway, sound like,  
24 those sound like changes the order. We -- they're talking  
25 about us filing a brief. We don't want to file a brief

1 because, not because we can't file a brief, but because we want  
2 to see the entire issue before we brief it as opposed to trying  
3 to brief a partial issue. To say we're going to brief it,  
4 you're going to read it, and decide which issues to hear,  
5 that's all new. Bifurcating this into adding, you know, non-  
6 privileged issues, this is all new stuff.

7           So I just want to be clear. We're not asking to  
8 modify the procedure. We're asking for very simple relief that  
9 we don't need a decoder ring. It's to suspend briefing using  
10 your inherent authority to manage your docket -- that's it --  
11 until we see how this plays out a little bit.

12           That's it, your Honor. Thank you.

13           THE COURT: Does anyone have a feel at all for what  
14 Judge Bridges' time frame looks like for doing the rest of  
15 this?

16           MR. ELLMAN: We -- we -- at least as far as I'm aware,  
17 he hasn't told us. I think --

18           THE COURT: I know he's working hard at it, but --

19           MR. ELLMAN: Yeah. I think -- I think -- he did share  
20 with us a, an e-mail that he sent to you about his current  
21 status and he's indicated only that he's continuing to work.  
22 But as far as a timeline, he hasn't, we haven't asked, at least  
23 I haven't asked, and he hasn't shared with us what his timeline  
24 is. So I don't know the answer.

25           THE COURT: All right.

1 MS. HARDMAN: Our response is the same, yeah.

2 THE COURT: How about one last one? Sometimes in  
3 these circumstances the first request can be a, a "tell me how  
4 I'm doing" request or report. Judge Bridges has been a, a  
5 lawyer longer than I and a, a judge about the same amount of  
6 time. I don't think he has any lack-of-confidence issues.

7 But y'all don't get the impression that he is looking  
8 for some guidance on "how am I doing" at this point, do you?

9 MR. ELLMAN: Your Honor, I -- I -- I can't really  
10 speak for Judge Bridges. I, I take him on his, at his word in  
11 the, in the report that he thought this was an appropriate  
12 thing he could --

13 THE COURT: Right.

14 MR. ELLMAN: -- slice off and do separately because it  
15 was kind of the smaller piece.

16 THE COURT: Right.

17 MR. ELLMAN: We, we don't feel like that's an  
18 appropriate thing for us to brief at this point, but I think  
19 he, he said in the report why he did it and I --

20 THE COURT: Yeah.

21 MR. ELLMAN: -- assume that's the reason.

22 THE COURT: Right.

23 Same?

24 MS. HARDMAN: Your Honor, the same answer.

25 I agree with everything you said, your Honor, and if,

1 if and to the extent that, that this report is part of that  
2 call for an understanding from you, we can't speak to it.

3 But --

4 THE COURT: Okay.

5 MS. HARDMAN: -- you know, we certainly welcome him  
6 communicating if need be --

7 THE COURT: Right.

8 MS. HARDMAN: -- with your Honor.

9 THE COURT: Well, no. We, we had an agreement that I  
10 wouldn't talk to him about all these things.

11 MS. HARDMAN: I know.

12 THE COURT: So I, I think we are safer staying there.  
13 I did hear, of course, about the, the accident and all, but  
14 that might actually mean he gets more time to work on your  
15 matters, not less, so.

16 MR. ELLMAN: Yeah.

17 THE COURT: Y'all have been kind not to directly  
18 address it. One of my concerns in all of this is, is, from the  
19 judicial side of it, if I were going to be here for the next  
20 two years, then I might be more inclined to go forward, but I  
21 also have to factor in what happens if we get this teed up and  
22 we do our briefing and we have our hearing end of May, then  
23 I've got, basically, less than a month to try to get all the  
24 158 issues resolved and written up. That creates a problem all  
25 its own. There's the alternative of what happens if we brief



1 all this, you argue all this, and my successor comes in,  
2 whoever that person may be, and just picks it up and listens to  
3 the hearings and then tries to, to decide the issue.

4 I will tell you one of the things there is that I'm  
5 dealing with some uncertainty because I don't know who that  
6 person is. We understand that, from courthouse scuttlebutt,  
7 that the interviews have occurred. We don't know when the  
8 decision will be made of who that successor is and then they're  
9 looking at a FBI background check that'll probably take a  
10 period of a couple months, at the very least. You may end up  
11 with some visiting judges in the course of this. I don't know.  
12 I would hope not, but that may be just a necessity. There's  
13 even the prospect, I guess, that they might ask me to defer  
14 going for a month or two until the successor could come in.  
15 But I do know -- I don't know whether that's in the cards or  
16 not. No one's spoken to me about that, either.

17 I do know that my successor, though, if any of y'all  
18 have ever tried to wind up a, a law practice and go somewhere  
19 else, of what it's like in the last month and I'm facing that  
20 part of it, which is that in all of my cases everyone's very  
21 eager to get things wrapped up and I'm very concerned about  
22 whether, if I undertake to do this at this point in time and  
23 deny the motion, whether I'll be able to give you a, a written  
24 opinion satisfactory for all purposes before June 26th. And  
25 that is another thing that I'm looking at.

1 I ask about the time periods because I would like to  
2 think about this a little bit more.

3 The other part is me putting my fingerprints on an  
4 issue and then my successor being stuck with what we've done  
5 and that's never a good thing, either. I picked up a case in,  
6 when I was up in Maryland one time for the judge who had  
7 retired there and they had dealt with whether or not you needed  
8 to means test a chapter 11 plan and the judge's answer to that  
9 was to let both the debtor and the, the principal creditor who  
10 opposed the debtor to file chapter 11 plans and have competing  
11 confirmation hearings. And that ended up being one of the  
12 biggest messes I've ever seen because the creditors voted in  
13 favor of both plans and we then spent a week with the two sides  
14 in their dueling confirmation hearings tweaking their plans and  
15 offering slightly better treatment for the creditors and hoping  
16 that I would pick the beauty contest winner through that. But  
17 the point being, it -- when -- it's hard enough that we've  
18 asked Judge Bridges to weigh in on this and having done so, I  
19 really hate to disturb his batting order about how to do this,  
20 but I've got these other issues to think about.

21 It will disturb your timing, but I'm giving a ruling  
22 on the other matter in this case next Thursday at Aldrich, but  
23 I would like to think about all this and try to sort out what's  
24 the best way to handle it from my perspective, recognizing that  
25 that will even further truncate our time periods here.

1 But my inclination would be to take this under  
2 advisement, give you a ruling next Thursday for whoever's not  
3 taking the depositions at the same time as the Aldrich  
4 hearings, and then we'll try to come up with something. And  
5 again, you're invited to do this telephonically, so.

6 MR. ELLMAN: Your Honor, one, one point I'd like to  
7 raise on behalf of the debtor. Well, I guess, really, on  
8 behalf of both parties.

9 Right now, our deadline to file these briefs is  
10 Monday.

11 THE COURT: Right. Right. I'm, I'm talking about --

12 MR. ELLMAN: And so --

13 THE COURT: -- a week-long suspension of all the  
14 deadlines --

15 MR. ELLMAN: Okay.

16 THE COURT: -- to go with that.

17 MR. ELLMAN: Okay.

18 THE COURT: Yeah. I -- I -- I was aware of that.

19 MR. ELLMAN: Yeah.

20 THE COURT: But the bottom line is I, I would like to  
21 think about this and try to pick out the best path forward.  
22 And I apologize for complicating it with things that are  
23 extraneous to the case, but the reality is a brand-new judge  
24 coming in here or a, worse, a visiting judge coming in to  
25 something this complex on the fly and having to make rulings,

1 well, that, that's going to be pretty daunting as well. I  
2 think I went nine years before I got my first case of a size of  
3 this one and I needed all nine years to adjust to, to doing the  
4 job.

5 So I'm not real eager to, to tag somebody with that.  
6 And then the question becomes, well, is it better to give it to  
7 them in pieces where I might actually give them a little bit of  
8 a hint of which way to go in, in, by my ruling or is it better  
9 just to dump the whole thing, as the debtor proposes, at the  
10 end. And either one's not going to be delightful for, for a  
11 new person, but we'll see how it goes.

12 Anybody got any insurmountable problems if I just take  
13 this under submission for, for the week and give you a verbal  
14 ruling next week?

15 MR. ELLMAN: That's, that's fine from the debtor's  
16 perspective as long as the briefing is suspended in the  
17 meantime. I think we'll take it.-

18 THE COURT: Well, if y'all need to put that in  
19 writing, that's fine, but that's what I'm telling you now, is  
20 that we will suspend all the deadlines and try to figure it  
21 out, again, at the --

22 MR. ELLMAN: Okay.

23 THE COURT: -- next hearing.

24 MR. ELLMAN: That's fine with us, your Honor.

25 THE COURT: I don't know whether it makes sense

1 because we're going to rule on this one to, for us to start at  
2 9:00 instead of 9:30 and let me announce this decision, then  
3 stop, and then pick up at 9:30 with Aldrich and make the  
4 announcement of the joint motion, motions. That probably would  
5 make more sense, but --

6 MS. HARDMAN: Your Honor, if, if you would indulge  
7 that, that would be great, from our perspective. 'Cause I  
8 think a few of us in the room are going to be participating in  
9 that --

10 THE COURT: In the --

11 MS. HARDMAN: -- deposition.

12 THE COURT: All right, very good.

13 Well, let's make it 9:00 next Thursday. That would be  
14 the 25th. And I'll try to have something for you then. Okay.

15 Any other -- Mr. Gordon, you were going to give us a  
16 status, I believe.

17 MR. GORDON: I was, your Honor. Greg Gordon, Jones  
18 Day, on behalf of the debtor. So just a few topics to go  
19 through, starting with estimation.

20 The discovery process is continuing to proceed. You  
21 may remember that back in October we had presented an agreement  
22 to your Honor on the estimation document collection.

23 THE COURT: Uh-huh (indicating an affirmative  
24 response).

25 MR. GORDON: And with that, we also submitted an

1 agreed form of 502(d) --

2 THE COURT: Right.

3 MR. GORDON: -- order with respect to privileged  
4 documents and that order was entered back in October as well.  
5 And since then, I think, we've been reporting periodically on,  
6 on our efforts pursuant to those orders to collect and review  
7 the documents. And by way of just kind of a reminder, that,  
8 that collection process involves not only collecting documents  
9 from the debtor, but also the debtor's national coordinating  
10 counsel and then the various jurisdictional counsel across --

11 THE COURT: Uh-huh (indicating an affirmative  
12 response).

13 MR. GORDON: -- the country who were involved in the  
14 litigation in the years leading up to the bankruptcy case and  
15 you can imagine the scope of that. Ms. Ross did comment on  
16 that earlier. Because it not only requires the firms to  
17 collect documents, but it also requires them to review the  
18 documents in advance to make sure that the documents they've  
19 collected relate solely to DMP, DBMP and not some other --

20 THE COURT: Right.

21 MR. GORDON: -- client.

22 But having said all that, substantial progress has  
23 been made and Ms. Ross alluded to the fact that it looks like  
24 we're going to be somewhere over the collection of three  
25 million documents.

1 THE COURT: Hmm.

2 MR. GORDON: We're at about 2.9 million dollars -- 2,  
3 2.9 million documents today, which gives you an idea, I think,  
4 of how far along we are in that collection effort.

5 And of course, in connection with that we have,  
6 literally, a team of lawyers reviewing those documents for  
7 responsiveness, for privilege, and then for the further  
8 consideration of whether those privileged documents would be  
9 produced under the parameters of the agreed 502(d) order.

10 I'd previously noted to your Honor that we've been  
11 making productions of documents in waves or increments, doing  
12 that on a rolling basis.

13 THE COURT: Uh-huh (indicating an affirmative  
14 response).

15 MR. GORDON: And since the last time we spoke at the  
16 March hearing we did make an additional production. That  
17 occurred on March 15th and that was related to materials that  
18 were in the debtor's pre-bankruptcy litigation document  
19 repository. So to just give you a, an idea. At this point  
20 we've produced about 72,000 documents comprising about 1.7  
21 million pages to date.

22 You may also remember, your Honor, that by agreement  
23 the parties, and with your approval, we agreed to suspend the  
24 future deadlines in the Case Management Order until such time  
25 that we were farther along in the discovery process so we

1 could --

2 THE COURT: Uh-huh (indicating an affirmative  
3 response).

4 MR. GORDON: -- literally start to assess what would  
5 make sense in terms of a, a discovery completion date and then  
6 the dates that would follow from that. And we think we're at  
7 that point now where we can have discussions with the other  
8 side about resetting the dates in the Case Management Order.  
9 And in fact, there was a meet and confer that occurred last  
10 Friday, the first one where the parties took up this issue.

11 So those discussions will continue and we're hopeful  
12 that in the relatively, in the relative near term we'll be able  
13 to come to an agreement on a new set of deadlines and present  
14 those to your Honor.

15 THE COURT: All right.

16 MR. GORDON: And then at the same time we're  
17 continuing to pursue additional discovery. "We," the debtor,  
18 that is. You obviously heard about the, the subpoenas that  
19 were the subject of the hearing --

20 THE COURT: Sure.

21 MR. GORDON: -- earlier today.

22 We also issued subpoenas to certain trusts. You're  
23 probably aware of that based on a notice that we filed. And  
24 just to be clear about those, those are subpoenas to collect  
25 information that the claimants authorized us to collect from



1 the trusts per their responses to the PIQ --

2 THE COURT: Uh-huh (indicating an affirmative  
3 response).

4 MR. GORDON: -- process. And those trusts to which  
5 subpoenas have been issued are the J. T. Thorpe Settlement  
6 Trust, the Thorpe Insulation Company Asbestos Settlement Trust,  
7 the Plant Insulation Company Asbestos Settlement Trust, and the  
8 Western Asbestos Settlement Trust.

9 In terms of the adversary proceedings, your Honor's  
10 aware that we've had multiple meet and confers as well as  
11 status conferences on various discovery issue concerns that  
12 have been raised by the plaintiffs. And I think your Honor is  
13 aware of the fact that most of those disputes have been  
14 resolved. We're pretty much down to the one that we talked  
15 about today already on the possession, custody, or control of  
16 documents of the French parent company.

17 And of course, the depositions are scheduled. We  
18 talked about that as well of two witnesses. The deps,  
19 depositions of two witnesses will be taken in New York on April  
20 25 and the times for those are set as well.

21 Also, with respect to that, I should say we've  
22 prepared a form of order that memorializes that. It's been  
23 circulated to the other side and I think either just before or  
24 during the hearing today we have signoff from the other side on  
25 the form of order. So we have to make a couple of minor

1 revisions to that and then we'll submit it to your Honor for  
2 your consideration.

3 THE COURT: Okay.

4 MR. GORDON: We're also collecting materials from a  
5 group of custodians. This is eDiscovery related to, to  
6 custodians that have been agreed by the parties. I think there  
7 are 26 of those custodians. We're to the point where we have  
8 proposed search terms provided by counsel for the other side.  
9 And the next step is to basically test those search terms  
10 against the documents collected to see whether those are going  
11 to be kind of reasonable terms that will generate the in,  
12 responsive information. Sometimes, you can get lots of false  
13 hits and we won't know that for sure until we see. And  
14 obviously, that's a process that we'll work through  
15 collaboratively with the other side so that we come up with a  
16 finalized list of search terms that's satisfactory to everyone.

17 And then the last thing, this may be the most minor to  
18 everything. There is a requirement in the CMO that we have a  
19 certification regarding use of mobile devices. And the  
20 purposes of that is to help us identify custodians where  
21 documents should be collected from their mobile devices. And  
22 we've been working on a form of certification which has been  
23 shared with the other side. My understanding is it's gone  
24 through some rounds of edits. I think it's back with the other  
25 side.

1 So hopefully, in relatively short order we'll be able  
2 to --

3 THE COURT: Okay.

4 MR. GORDON: -- have an agreed form of certification  
5 for mobile devices that we can submit to your Honor.

6 THE COURT: All right.

7 MR. GORDON: With that --

8 THE COURT: That it?

9 MR. GORDON: -- that's it.

10 THE COURT: Anyone else want to weigh in?

11 MS. HARDMAN: Your Honor, I'll defer to Ms. Ramsey  
12 relative to the estimation piece --

13 THE COURT: Okay.

14 MS. HARDMAN: -- but I'll speak to the last issues  
15 that Mr. Gordon raised.

16 THE COURT: Ms. Ramsey.

17 MS. RAMSEY: Thank you, your Honor. Natalie Ramsey  
18 for the Asbestos Committee.

19 Your Honor, just one modification or --

20 THE COURT: Uh-huh (indicating an affirmative  
21 response).

22 MS. RAMSEY: -- maybe adjustment to the report on the  
23 estimation process.

24 We are, we are still awaiting a fairly substantial  
25 number of documents that the debtor has been compiling and

1 reviewing and while we are at a point where we might be able to  
2 start talking about the process that will ultimately enable us  
3 to set a deadline for fact discovery, which then is the trigger  
4 for all of the other dates in the estimation order, we're,  
5 we're not yet, from our perspective, at a point where we're  
6 able to identify a fact discovery date. Because we believe  
7 that there's still a volume of information we're going to need  
8 to review to assess what our fact discovery needs are going to  
9 be.

10 So I just wanted to --

11 THE COURT: Right.

12 MS. RAMSEY: -- not be overly optimistic that the  
13 Court was going to see an estimation order that was fully baked  
14 in the immediate future.

15 THE COURT: I understand.

16 MS. RAMSEY: Thank you.

17 THE COURT: All right, Mr. --

18 MS. HARDMAN: And your Honor, Carrie Hardman on behalf  
19 of the Committee, with respect to some of the issues related to  
20 the adversary proceedings.

21 Mr. Gordon indicated that, that there is a set start  
22 time for the depositions next Thursday. I would be curious to  
23 know what that is since we are not aware of it and perhaps, the  
24 names and the identities of those witnesses and who's taking  
25 what topics would be helpful.

1           So it would be infor, information we'd like to know so  
2 we can prepare as well.

3           The mention of search terms that we have provided  
4 them, that is true. I understand from some of our back and  
5 forth with your Honor on our status conferences for the motion  
6 for a status conference that there has been a collection of the  
7 custodians that we all agreed to were business custodians.

8           THE COURT: Right.

9           MS. HARDMAN: I presumed based on the insinuations  
10 that we were holding up that process, but those -- all of that  
11 doc -- that documentation's been collected. Therefore, the  
12 search terms could, in theory, be run against those custodians  
13 now. But we'll talk to the parties about that and see if  
14 that's something that we can move along in some manner.

15           Finally, Mr. Gordon is correct with respect to mobile  
16 devices. We've been going back and forth on the terms and I  
17 think at this point there are a couple of terms that we both  
18 keep removing and reinserting our respective positions. So  
19 we're going to have to see where we go with that.

20           And finally, I think, to the extent that there was an  
21 insinuation that all other outstanding discovery issues are  
22 resolved, I just want to be clear on the record that there are  
23 others. We just elevated a few before your Honor --

24           THE COURT: Very good.

25           MS. HARDMAN: -- so that no one believes that I am

1 stating for the record that we're all resolved.

2 THE COURT: Right.

3 MS. HARDMAN: Just so --

4 THE COURT: I understand.

5 MS. HARDMAN: -- that I don't, you know, lose my job.

6 So thank you, your Honor.

7 THE COURT: Mr. Gordon, is there anything you can pass  
8 on with regard to those depositions? Is that something --

9 MR. ELLMAN: I can probably --

10 THE COURT: -- y'all can talk about afterwards?

11 MR. ELLMAN: Well, Ms. Gould can answer that directly.

12 THE COURT: Okay.

13 MR. ELLMAN: I, I can just say I think the issue on  
14 the time for the deposition, it wasn't about the time, the  
15 start time for the deposition. It was about the time frame --

16 THE COURT: Ah.

17 MR. ELLMAN: -- which your Honor ruled upon. And so  
18 what Mr. Gordon was saying is that we have an order now that  
19 reflects that ruling, which we will be submitting.

20 So the time, I'll let Ms. Gould deal with the  
21 logistics of the deposition.

22 MS. GOULD: Right.

23 So your Honor, we have already let plaintiffs' counsel  
24 know that there will be two witnesses. We had suggested that  
25 they start, I can't remember if the start time was 10:00 or

1 10:30, but we had proposed that and then we said that the  
2 second witness would start at 2:30, or as soon as the first  
3 deposition was concluded.

4 So I'm sure that we'll be able to work it out amongst  
5 ourselves. But that was the proposal.

6 We also are awaiting revised Notices of Deposition  
7 based upon the agreed-upon topics. So hopefully, we'll receive  
8 those from plaintiffs sometime this week.

9 Thank you.

10 MS. HARDMAN: Your Honor, that's news to me that  
11 they've been waiting for our Notices of Deposition when we  
12 haven't discussed a start time. The start time, as we've  
13 mentioned to the parties here, depends on the --

14 THE COURT: Right.

15 MS. HARDMAN: -- breakdown of the topics here and we  
16 have not gotten an answer to that question.

17 So I think we're at an unexpected impasse, I think is  
18 what I would say, your Honor. I didn't realize that they were  
19 waiting on us. Of course, my opinion is that we'd like to  
20 start a smidge earlier than 10:30 in the morning. Of course, I  
21 would like to hear from your Honor at 9:00 and then, perhaps,  
22 shortly thereafter commence our deposition.

23 But all that said, I, if we have one topic and it  
24 starts at 10:30 and then the next starts at 2:30, or as soon  
25 thereafter, that's great. But maybe it makes sense to have the

1 bulk happen in the morning. I just, I don't know and I don't  
2 know which topics are going first or, or whom.

3 So be helpful --

4 THE COURT: Would it --

5 MS. HARDMAN: -- to understand.

6 THE COURT: Would it be useful to you to take a recess  
7 at this point in time for lunch and then let, or just for 10-  
8 or-15 minutes and see if y'all could get this framed up and  
9 satisfied as to what we are doing next and when?

10 MS. GOULD: Your Honor, so we have the date set.

11 We're -- we've agreed upon --

12 THE COURT: Right.

13 MS. GOULD: -- that there will be two deponents and  
14 they will both be that day. I'm confident that we can work out  
15 the start time and the time for the second deposition without  
16 the need to trouble the Court further on this matter. I'm  
17 fairly confident we can work that out. We proposed a start  
18 time of -- again I forgot -- it was 10:00 or 10:30 because the  
19 witnesses were coming in from outside of New York City. We  
20 decided to hold the depositions in person and we felt one day,  
21 then everyone convened on one day would make it easier and,  
22 and, in terms of convenience and cost and everything else.

23 So we're happy to work with counsel to make a start  
24 time that allows everyone to hear your Honor's ruling, gets the  
25 depositions done. We're convinced we can make that happen.



1 THE COURT: Okay.

2 MS. HARDMAN: Your Honor, happy to take a 10-15 minute  
3 break here to get this squared. If we can get this squared  
4 today, that'd be very helpful. It's been a couple of weeks at  
5 this point that we haven't figured that out.

6 THE COURT: I would suggest y'all do take the --  
7 the -- a few moments to see if you can get this framed up.

8 I'm going to be out of the office for the next two  
9 days. So I won't be available to deal with any last-second  
10 disputes on that until next week and that's probably later than  
11 you would.

12 Why don't we -- for those who are not interested in  
13 the discovery matters, you're welcome to leave -- but why don't  
14 we just take ten and you, you can tell me if you're able to  
15 make any progress during that time period.

16 MS. GOULD: Well, your Honor, my, my suggestion -- is  
17 there an issue with starting at 10:30? Or if, if 10:00 makes a  
18 difference, we can agree to a 10:00 start time. I don't know  
19 that we need to have a big recess to talk about that. We're  
20 happy to -- if 10:00 allows everyone to hear your Honor's  
21 rulings and then take a ten-minute comfort break and start at,  
22 at 10:00, that seems fine.

23 THE COURT: Well, weren't you also interested in  
24 who --

25 MS. HARDMAN: Yes.

1 THE COURT: -- and --

2 MS. HARDMAN: Yes, who.

3 THE COURT: -- that?

4 MS. HARDMAN: And, and, and to that end, I'm happy to  
5 disclose this. Part of the proposal was if it's a deponent  
6 that we've already deposed, I'd like to skip some of the  
7 questions about their background that we've already asked.

8 THE COURT: Uh-huh (indicating an affirmative  
9 response).

10 MS. HARDMAN: There's things here that we can make  
11 this more efficient -- and I don't know the answers to the  
12 questions -- in order to be able to have a more productive  
13 discussion which, if we know the identity and the breakdown of  
14 the topics, that will help us inform what our start time is.

15 And, and to be honest, I don't know everybody else's  
16 schedule. So I have to confer on our side to say if 10:00  
17 works, if 9:30 is necessary because we have an, you know, an  
18 unavailability in the afternoon. I don't, I don't know, so.

19 THE COURT: What about this. Instead of us rushing  
20 around now, what if I gave you until Monday or Tuesday? I  
21 could pick up on a call with just those affected by this, if  
22 you still have issues to address. That'll put a little bit of  
23 pressure on everyone to get it ironed out as to what we're  
24 doing and who we're talking to and when we're doing it and that  
25 sort of thing. And if not, then you can get online with me and

1 I'll try to decide for you.

2 MS. GOULD: That works, your Honor. Thank you.

3 MS. HARDMAN: Your Honor, if, if Monday's possible  
4 simply because we have to prepare for the Thursday depositions.

5 THE COURT: Right.

6 MS. HARDMAN: That would be much appreciated.

7 THE COURT: I have a chapter 7 calendar then. I don't  
8 think I have a 9:00 matter. We can do it then.

9 MR. GREECHER: Your Honor, Sean Greecher.

10 Just to suggest, I mean, I think there are sort of the  
11 basic questions, though, the who, the, the when, and what  
12 topics. If, if we could ask your Honor to, you know, give us  
13 some sort of guidance on whether we can get that information in  
14 advance of, or Monday's, for the call, I think that would be  
15 helpful.

16 THE COURT: Is that a problem?

17 MS. GOULD: It's not a problem, your Honor.

18 THE COURT: Okay. Well, give them that information.

19 I'm available to you at 9:00. Just dial in. We won't  
20 try to put it on Zoom or anything of that, or Teams. And this  
21 should be short and relatively simple, I would hope. And let  
22 us know if, on the other hand, you get this ironed out and we  
23 don't need to talk, okay?

24 MS. HARDMAN: Thank you, your Honor. Will do.

25 THE COURT: Other --

1 MS. GOULD: Thank you. We hopefully will.

2 THE COURT: All right.

3 For everyone else, if there are no other matters, any  
4 other issues of the case to talk about, we will recess.

5 Thank you, all. I'll try to give you my best take on  
6 those two motions next week.

7 MR. ELLMAN: Thank you, your Honor.

8 MR. GREECHER: Thank you, your Honor.

9 MS. HARDMAN: Thank you, your Honor.

10 MR. ELLMAN: I appreciate it.

11 (Proceedings concluded at 12:35 p.m.)

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CERTIFICATE

15 I, court-approved transcriber, certify that the  
16 foregoing is a correct transcript from the official electronic  
17 sound recording of the proceedings in the above-entitled  
18 matter.

19 /s/ Janice Russell

April 23, 2024

20 Janice Russell, Transcriber

Date

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