

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MATTIE HALLEY, ET AL.

**On Behalf of Themselves
and All Others Similarly Situated,**

Plaintiffs,

v.

**HONEYWELL INTERNATIONAL,
INC., ET AL.,**

Defendants.

Civil Action No. 2:10-cv-3345 (ES) (JAD)

**DECLARATION OF HOWARD A.
JANET**

Document Electronically Filed

1. My name is Howard A. Janet

2. I am an attorney admitted to practice, and am in good standing, in the State of Maryland. I am also admitted to practice, and am in good standing, in the United States District Court for the District of Maryland. I have personal knowledge of each of the facts set forth in this declaration and can and would testify competently thereto.

3. I have been designated as one of the Class Counsel in this case. I represent Plaintiffs Mattie Halley, Shem Onditi, Leticia Malave, and the Temporary Administrator of the Estate of Sergio de la Cruz, on behalf of themselves and all others similarly situated. I make this declaration pursuant to 28 U.S.C. § 1746, in support of Class Counsel's Motion Seeking an Award of Reasonable Costs.

4. Attached as Exhibit 1 and submitted under seal is a true and correct copy of documentation of the reasonable costs incurred by Class Counsel previously submitted to this Court for *in camera* review on October 9, 2015.

5. Attached as Exhibit 2 is a true and correct copy of the transcript of a status conference held before the Honorable Madeline Cox Arleo, dated July 12, 2011.

6. Attached as Exhibit 3 is a true and correct copy of the transcript of a hearing on Plaintiffs' motion for leave to file a Fourth Amended Complaint, dated October 28, 2013.

7. Attached as Exhibit 4 is a true and correct copy of the transcript of oral argument in this matter before the United States Court of Appeals for the Third Circuit, dated January 27, 2017.


8. Attached as Exhibit 5 is a true and correct copy of the term sheet expressing a settlement in principle between Plaintiffs and Defendant Honeywell International, Inc., dated July 14, 2014.

9. Attached as Exhibit 6 is a true and correct copy of captions and counsel appearances for all depositions taken after July 14, 2014.

10. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: _____

9/12/17



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**PLACEHOLDER FOR
EXHIBIT 1
CLASS COUNSEL'S
DOCUMENTATION OF
COSTS**

**SUBMITTED BY MAIL TO
CHAMBERS OF THE
HONORABLE ESTHER
SALAS FOR IN CAMERA
REVIEW**

EXHIBIT 2

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SMITH, et al., .
Plaintiff, . Case No. 10-cv-03345
vs. . Newark, New Jersey
HONEYWELL INTERNATIONAL, . July 12, 2011
INC., et al., .
Defendants. .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MADELINE COX ARLEO
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings at 12:42 p.m.)

2

3 THE COURT: -- seat. We're here in Smith versus
4 Honeywell again. Why don't we start with appearances of
5 counsel?

6 MR. KANNER: Allan Kanner and Lilly Peterson from
7 Kanner & Whitely for class plaintiffs.

8 THE COURT: Okay.

9 MS. BEREZOFSKY: Esther Berezofsky, Williams, Cuker
10 & Berezofsky for the plaintiffs.

11 THE COURT: Okay.

12 MR. GERMAN: Good afternoon, Your Honor, Steven
13 German of German Rubenstein for plaintiffs.

14 THE COURT: Okay.

15 MR. SUGGS: Ken Suggs of Janet Jenner & Suggs for
16 the plaintiff, Your Honor.

17 THE COURT: Okay.

18 MR. RUBENSTEIN: Joel Rubenstein of German
19 Rubenstein for the plaintiffs.

20 THE COURT: Okay.

21 MR. McDONALD: Hello, Your Honor, Michael McDonald
22 from Gibbons for Honeywell International.

23 THE COURT: Okay.

24 MR. KATERBERG: Robert Katerberg from
25 Arnold & Porter for Honeywell.

1 THE COURT: Okay.

2 MR. GERSCH: David Gersch, Your Honor, from Arnold
3 & Porter for Honeywell.

4 THE COURT: Okay.

5 MR. COUGHLIN: Timothy Coughlin from Thompson Hine
6 for PPG Industries.

7 THE COURT: Okay.

8 MR. LAGROTTERIA: Good afternoon, Your Honor, Joe
9 Lagrotteria of LeClairRyan on behalf of PPG.

10 THE COURT: Okay.

11 MS. WALKER: Karol Corbin Walker with LeClairRyan
12 on behalf of PPG.

13 THE COURT: Last but not least.

14 MS. WALKER: Thank you, Your Honor.

15 THE COURT: Okay. Thank you for the joint
16 discovery plan. And I read it thoroughly. And I think a
17 bet- -- the best way to proceed today is sort of to tell you
18 where I'm headed and let everyone respond to some of the
19 bigger, overarching issues until -- and then we can get into
20 the nitty-gritty of dates and times and deadlines.

21 And I think that the real overarching issue is this
22 whole dispute between the plaintiffs and defendants over
23 whether class discovery and class motions should proceed in
24 advance of some bellwether trials. And here's what I'm
25 guided by, and I'd really like to hear responses from

1 | plaintiff on this.

2 | I'm guided by Rule 23 which says that as -- as
3 | early as practicable time after a plaintiff brings a lawsuit
4 | that class issues should be discovered. And in this
5 | District, that is the practice. The practice is to tee up
6 | the class certification issues consistent with the rule,
7 | which means as soon as practicable.

8 | There is always overlap between merits and class
9 | discovery; everybody in this room knows that. But there's a
10 | way to use -- there's no magic formula to say -- to cut -- to
11 | make the demarcation, but most good lawyers can agree that if
12 | I'm taking a plaintiff's disposition, I might as well cover
13 | all topics and spend another three hours or four hours than
14 | call the plain- -- the deponent back at a later phase. And
15 | if both sides have some flexibility, it's been my experience
16 | and practice that they can find ways to put whole chunks of
17 | discovery on hold, but to be flexible and use common sense
18 | and good efficient use of lawyers' time and court time to
19 | maybe overlap and go forward with some limited discovery to
20 | the extent it would advance principles of efficiency. And
21 | you take it on a issue-by-issue basis; there's no magic
22 | formula.

23 | I am not aware in this District of any cases like
24 | this where before in advance of a class certification motion,
25 | that there was bellwether trials. I'm not aware of it. I

1 think it's unprecedented in this District. If there is
2 any -- if plaintiffs would like to shed some light on that
3 for me, I'd be interested in hearing about it. But to -- to
4 take -- to start trials, to have summary judgment, to have
5 trials, summary judgment just on the individual claims,
6 there's property claims, there's medical monitoring claims,
7 and then after all the bellwether trials are done, then to
8 have class certification motions, I think that's what
9 plaintiffs were proposing, I just don't -- I'm not aware of
10 it ever being done here. I'm not aware of it being done
11 anywhere. I'm aware of the federal rule that says you tee up
12 the class motions first, see where that falls out, if there's
13 no class, then what we're left with is -- is named
14 plaintiffs, and then we proceed on those cases.

15 As I'm aware right now, we have only two named
16 plaintiffs; correct?

17 MR. KANNER: Correct, Your Honor.

18 THE COURT: So that's what I'm inclined to do.

19 MR. KANNER: There's three, Your Honor.

20 THE COURT: Ms. -- Ms. Smith, Ms. Halley, and I
21 guess Mr. Wein.

22 So I'm inclined to proceed in accordance with the
23 precedent in this District as well as the Fed. R. Civ. P. 23,
24 tee everything up for class certification, and then see where
25 that takes us, but I'm certainly willing to hear limited

1 arguments from plaintiffs' counsel about why I should proceed
2 otherwise.

3 MR. KANNER: Your Honor, Alan Kanner.

4 First, the "as soon as practicable" language was
5 modified, as you're probably aware, because what more and
6 more judges were doing, they were stretching the time out
7 because they didn't like the old practice, which was class
8 actions on very limited papers. And clearly both the manual
9 of complex litigation and the new language has moved beyond
10 the "as soon as practicable." The language is -- it uses the
11 word "practicable" -- like I can't recall the exact language,
12 but it has been liberalized.

13 THE COURT: Sure.

14 MR. KANNER: In addition, we're in the Third
15 Circuit. We have to deal with Hydrogen Peroxide on any
16 certification matter. And the Hydrogen Peroxide case, what
17 the Third Circuit really said is you're going to look a lot
18 at the merits. You're going to have to talk about with some
19 specificity about how you're going to try the case.

20 THE COURT: I hear you on that. But I have a
21 different question.

22 MR. KANNER: Okay.

23 THE COURT: And that is, where in this District or
24 even within the Circuit have the courts put this
25 classification certification off after the trial? What

1 | you're suggesting here is to have bellwether trials first,
2 | and then after a jury makes conclusions, then decide whether
3 | to certify it as a class. That's what I don't -- I don't --
4 | I'm not aware of ever being done at all in this District.

5 | MR. KANNER: I'm not aware of it being done in this
6 | District.

7 | THE COURT: Has it been done anywhere?

8 | MR. KANNER: I believe --

9 | THE COURT: In federal court?

10 | MR. KANNER: Southern District of Alabama.

11 | THE COURT: Okay.

12 | MR. KANNER: They did some bellwether trials, and
13 | then certify- --

14 | THE COURT: Before class certification?

15 | MR. KANNER: Before class certification, yes.

16 | But -- but actually I'm not using that case as a
17 | precedent. I'm just asking the Court to focus for a
18 | second -- let's get away from the abstraction of just
19 | class -- class action.

20 | What we have here essentially is -- is kind of a
21 | mass tort. I mean there are hundreds, thousands, tens of
22 | thousands of people involved. We represent hundreds of
23 | people already.

24 | At some point in time, we have to decide how to
25 | best manage it. Based on our collective experience on this

1 side of the table, we believe that ultimately it ought to be
2 a class action. We understand that that's a fairly heavy
3 lift on some of these issues. And one of the things that we
4 help -- we think would help the Court in light of Hydrogen
5 Peroxide, where they say look at the merits, rather than
6 having this argued abstractly about what the merits, how we
7 would try our cases, let's have a trial or two. Then I think
8 the Court will be able to say, geez, I see that these are not
9 overwhelmingly individual issues. I see these are mostly
10 common questions about the dangers of chromium, et cetera,
11 the economic impacts on property owners. It could be done by
12 modeling for the most part.

13 So what I'm -- what I'm saying is there's been a
14 growing recognition in federal courts throughout the United
15 States, including the District of New Jersey, that the old
16 "as soon as practicable" was -- was more of -- of a hindrance
17 than a help. The federal rules, the advisory committee
18 liberalized it --

19 THE COURT: I hear you. But there's certain -- it
20 hasn't been so liberalized to say do it after the trial.

21 MR. KANNER: Okay. No, that's --

22 THE COURT: It just doesn't exist. I mean it's --
23 they may have done it, there may be an anomalous case in
24 Alabama, but -- and I'm with you on complex cases. It's not
25 immediately. There are experts. There are issues that need

1 to be explored that are complicated.

2 But this is how it works. You file your motion.
3 There's a class. If it's certified, it changes the dynamic.
4 If it's not certified, then you proceed with individual
5 cases.

6 MR. KANNER: That's fine.

7 It wasn't my intent today or in our submittal to
8 commit the Court to a bellwether trial. If it -- if it says
9 that, I apologize.

10 Our intent was merely to say this may be a tool, a
11 case management tool that Your Honor could go for.

12 Separate and apart from that, on discovery, let's
13 talk about the bifurcation of discovery or not. In my
14 experience -- I don't know about your experience -- in New
15 Jersey and other places, invariably, you end up with a lot of
16 fights about what is class and what is merits. And I think
17 parties waste a lot of time.

18 THE COURT: Well, let me ask you this question.
19 Let me focus you on this question. What do you see --
20 they -- the defendants can see that there is a -- overlap.
21 They're not saying -- you know, they give some lists. They
22 actually in their joint discovery plan and in the proposed
23 schedule Exhibit B, they go through -- and it's hard for me
24 to get a handle on it because I'm not you and I don't know
25 what's out there. But they -- they list a whole bunch of

1 | issues that -- and they know that they're not going to come
2 | and say it's -- it is cut off easily like in an FLSA case.
3 | It's not going to be that simple.

4 | And because you have these overlap -- when you look
5 | at issues like -- common issues of law and fact, numerosity,
6 | typicality, you know, especially when you're looking at
7 | common issues of law and fact, you're going to have to look
8 | to some degree on what happened, liability for the -- for the
9 | medical monitoring -- for the property diminution, is
10 | probably simpler to deal with -- but for the medical
11 | monitoring and the environmental consequences of what
12 | happened.

13 | But -- I guess, what wholesale category of
14 | discovery do you see -- do you sense they would be unwilling
15 | to give you in class discovery?

16 | MR. KANNER: Well, I think -- I think a lot of
17 | things. You have, for example, some of the liability issues.
18 | They're -- they're willing to do a who, what, where, when,
19 | but a lot of the decisions to leave the material, decisions
20 | about how clean is clean, decisions about timing, things of
21 | that sort I think are going to be very fundamental in any
22 | trial, that perhaps the kind of information that reflects
23 | poorly on -- on a particular company. And I understand their
24 | hesitancy, but I think it's going to be --

25 | THE COURT: But how -- how key is that, that level

1 | of detail to a class certification motion? That's really --
2 | I hear you that at the end of the day, if you get past that,
3 | it's going to be relevant. And why can't some of those
4 | issues be put on hold until we decide whether we have a class
5 | sometime next year?

6 | MR. KANNER: I think because the following.
7 | This -- I think every case you have to approach based on --
8 | on the situation you're dealing with. Here, for example, you
9 | have a lot of discovery that has been done over the years; I
10 | think they've been under administrative order since the
11 | 1980s, et cetera. I don't understand why we would start, you
12 | know -- I think it's more efficient to try to get at the
13 | existing body of knowledge that has been put together on
14 | numerous occasions in the past than to artificially sort of
15 | start as if nothing had ever happened, and let's -- let's try
16 | to save certain areas from discovery. I mean a lot of work
17 | has gone into understanding these sites, I'm sure. I -- I'm
18 | not saying -- I don't understand why we would start drawing
19 | lines in it, if that information exists. I think we -- in
20 | some 30(b)(6) depositions, we could find out more about it.
21 | I mean, if it's there and it's not something we're creating
22 | new, I don't see any reason for -- for leaving it -- leaving
23 | it out.

24 | But I will tell you this and, you know, for years
25 | I've had defendants say, let's bifurcate, bifurcate,

1 bifurcate, and then when you get to trial and they've got an
2 expert who's using document -- to the class, got an expert
3 who's using documents, talking about the merits of the case.
4 I mean if the defendants said that they're going to limit
5 their Hydrogen Peroxide arguments --

6 THE COURT: But they'd have -- they'd have to
7 say -- no, they'd have to say that. I mean, I don't know
8 where you have tried cases, but in this courthouse and with
9 Judge Wigenton, experts are not -- at a class certification
10 hearing, are not going to start talking about issues and
11 documents that weren't disclosed in discovery and weren't
12 part of the discovery in a class of this case. They know
13 that. And if they're going to rely on it, they're going to
14 disclose it, and it's going to be part of the discussion.

15 MR. KANNER: But it -- it's -- actually I would go
16 one step further, just taking that example of an expert, they
17 said, for example, well, let's look at all the public
18 information about the health hazards of chromium, and
19 presumably that would be discovered, an expert would get up
20 there and, well, if you look at the public literature, X, Y,
21 and Z.

22 Now, what often happens in these cases is there are
23 internal analyses of what the health hazards are and the
24 company's own understanding about that. One of the things
25 you would want to cross-examine that expert with is what the

1 | company knew, when did they know it, and what did they --
2 | what did they do about it, if anything. I think that's going
3 | to also give some weight, because --

4 | THE COURT: I hear you, but, you know, here's --
5 | here's the problem. Let me just tell you where I'm headed.
6 | I'm not going to say full merits discovery. This case is
7 | overwhelmingly large, and my experience has been when you
8 | open that door, we're in discovery for four years and there's
9 | a million documents. And the more documents you get, the
10 | more depositions you want to take, the more everyone gets
11 | lost in the depositions, and now we're in 2014 and we still
12 | haven't filed class certification motions yet. That's my
13 | impression on that.

14 | MR. KANNER: Well --

15 | THE COURT: I hear you. But there's ways to
16 | address things like that. You're right. There's a lot of
17 | information out there, and you're also right that you're very
18 | experienced in this area, and you know what you're looking
19 | for. And there is a way -- for instance, my answer to a
20 | smart lawyer, like there are in this room, if you get an
21 | expert report from a defense expert and he talks about public
22 | information, it would be completely reasonable to ask in
23 | discovery before you took his deposition, what he relied on,
24 | were there any other studies out there, so you could
25 | cross-examine him at a deposition before you even got to

1 trial.

2 So there's ways to address it, rather than say, I
3 want the entire universe, because the universe will be large.
4 And you may be entitled to the universe, but the minutiae of
5 every detail of the expert report on liability or the expert
6 opinion doesn't need to be addressed at the class
7 certification stage. And my experience is I hear -- I hear
8 that -- you -- the frustration not getting everything,
9 because all lawyers want everything.

10 But my -- my concern is you get bogged down in too
11 much information. And this is a class certification motion.
12 You don't have to prove anything except common commonality,
13 typicality, these people should be in one case.

14 MR. KANNER: Actually I don't want everything.

15 THE COURT: Right.

16 MR. KANNER: Okay? I've been in too many cases --

17 THE COURT: Good. I hope -- that's smart, because
18 you know, everything is bad.

19 MR. KANNER: Well -- well, in fact, you know, one
20 of the things we -- Ms. Berezofsky wrote the defendants
21 asking, hey, maybe there's a way we don't have to reinvent
22 the wheel. Okay? We've been around this barn before.
23 You've -- I think there are 200-some sites we discuss in our
24 complaint.

25 THE COURT: Are all the sites within Jersey City or

1 New Jersey?

2 MR. KANNER: Yes.

3 THE COURT: Okay.

4 MR. KANNER: And I said -- and what we said was,
5 well, maybe there's a way we could work out stipulations,
6 which defendant for which site, what the -- what the average
7 is -- might be of the contamination, which would save us
8 oodles of time, and a lot of the minutiae, we didn't really
9 need. People can work out stipulations, especially in
10 complex cases.

11 And we were told, no, we don't really want to go
12 down that road. Okay?

13 So right now -- I mean if -- if there are
14 solutions, you know, I'm all for -- I'm all for solutions.
15 But we need to be ready to tell the Court at the day of the
16 class certification how this case will try in light of
17 Hydrogen Peroxide. I just want to make sure I get enough
18 discovery that I can do that, and I don't have to listen to
19 defendants say, well, you haven't dealt with this, you
20 haven't dealt with this because I haven't seen it.

21 I also think if you're going to put some
22 limitations on this, Your Honor, there may be a difference
23 between questioning and the actual production. Like, for
24 example, in 30(b)(6) depositions, you often can use those to
25 get the lay of the land, what documents are where. I've had

1 defendants say, oh, no, don't ask about anything else because
2 I think that's merits. Most courts say you can ask about
3 anything; whether you're going to get production right away
4 or not, we may revisit it at a certain point in time. That
5 way we --

6 THE COURT: Let me stop you for a -- let me just --
7 because I don't want to be talking about possibilities all
8 afternoon. But let me give you my view.

9 I'm never going -- in this case, I'm not going to
10 say -- I'm not going to formally bifurcate. I'm going to
11 informally limit it to class -- what's needed for class
12 discovery with the caveat that it should be broadly defined
13 and that if overlap makes sense, overlap is allowed. Number
14 one.

15 Number two, I'm not going to say you can -- you can
16 ask questions and you can't have documents. I'm not going to
17 have those kind of bright line tests; they don't work. I
18 need to have a concrete example.

19 And I approach discovery issues with common sense.
20 So if you're in the middle of a deposition and it seems
21 reasonable to ask some questions, I'm going to let you ask
22 them. I'm always going to have -- unless it is going to
23 substantially increase the burden and require a lot of
24 additional discovery that's not warranted at this time, I'm
25 going to err on the side of allowing it. And I want

1 defendants to be aware of that, because I think that makes
2 sense -- and if I think it's become abusive -- because what I
3 think good-intentioned lawyers can't help themselves and
4 always want more information.

5 So we'll see how it goes is the best way I can
6 explain it to you.

7 There are good lawyers in this room who should try
8 to understand that this is not a simple slip-and-fall case,
9 where we can bifurcate liability and damages. It's very
10 complicated. And there's going to be natural overlap. And
11 to the extent that -- and I want defendants -- and I haven't
12 heard from defendants at all yet, and I'm certainly, you
13 know -- would love to hear from them, but if doc- -- because
14 there's other cases that there's documents there that can
15 easily be transferred to the plaintiffs without -- without
16 burden or expense, that should be accomplished, because
17 there's no reason no to, especially if they're willing to go
18 through them and limit them and use them. If, on the other
19 hand, you know, then you get a 30(b)(6) notice with 200
20 topics, I might say you have to slow down on those 200
21 topics, you don't need 200, you can do it in 10 or 20.

22 So we could talk about possibilities, but I think
23 it's more productive to have concrete examples with that sort
24 of common-sense approach and guidance about there will be
25 overlap, I won't bifurcate it, but, then, again, I'm not

1 | inviting full-blown merits discovery, and I'll put language
2 | like that in the order that I ultimately enter. And I think
3 | that that's what plain- -- defendants are not going to
4 | object -- object to. There's no bright line here that I can
5 | really draw.

6 | MR. KANNER: Could I ask Your Honor --

7 | THE COURT: Sure.

8 | MR. KANNER: -- for two things?

9 | One, I have found in cases that are complicated
10 | like this where you -- where you potentially have lots of
11 | discovery, if the Court could set like maybe a monthly
12 | conference, because --

13 | THE COURT: Sure. I do that all the time. Welcome
14 | to New Jersey.

15 | (Laughter)

16 | MR. KANNER: I grew up here. I've been here a lot.
17 | I do a lot of work in New Jersey, Your Honor.

18 | So, one, I think that would be helpful, because I
19 | find parties tend to work out most of their disputes before
20 | they have to face the judge.

21 | THE COURT: That's why I have a jury room. Not for
22 | the jury, it's for the lawyers.

23 | (Laughter)

24 | MR. KANNER: Okay. And secondly, I do think there
25 | should be Rule 26 disclosures in this case. That's another

1 point we disagree on.

2 THE COURT: Well, that would be a little bit
3 tricky, wouldn't it? I mean you could do it for class
4 certification purposes, I mean --

5 MR. KANNER: Well --

6 THE COURT: Look, here -- here's my view on
7 Rule 26. The critical thing about Rule 26 for me is the
8 names of folks with knowledge.

9 MR. KANNER: That's all I --

10 THE COURT: Because if you don't have -- and I'm
11 going to -- I'm not -- I will not waive that in any case
12 because invariably, if there's ever a trial, it's shocking at
13 the final pretrial conference how many witnesses pop up that
14 were never disclosed in discovery and then you get this
15 dispute about, well, they were mentioned in deposition.

16 If they're not named specifically as a person with
17 knowledge in an -- in a Rule 26 disclosure, they're not going
18 to be trial witnesses. So -- unless they were fully deposed.
19 But the rule says, it should be the name and the scope of the
20 knowledge.

21 And in this case, scope of the knowledge is
22 important; it's not just the name, because a witness could
23 have a lot of different knowledge, and you could call a
24 witness in a company about X and then they're going to
25 testify -- you could have deposed them on X and not know they

1 had information about Y, and then at trial, there'll be a
2 fight over what were they -- what was the scope of their
3 testimony.

4 So I will not waive that rule. I don't know if I
5 need it with documents. Any documents that are produced in
6 response to document requests will be part of the case. It
7 might be redundant to have your lists and identify the names
8 of all documents, but you'd be hard-pressed to -- in to me
9 not to have the witness rule because it protects everyone at
10 the end of the day in a case like this. You don't want them
11 calling plaintiffs and folks that you never heard of, and
12 then -- now, that I've said it on the record, no one's going
13 to come back to me at a final pretrial -- I cannot tell you
14 how many final pretrials I have where there are more
15 witnesses who were never identified in discovery than were,
16 and it becomes very troublesome to then have to reopen
17 discovery and have last-minute depositions taking place.

18 MR. KANNER: That was my concern.

19 THE COURT: So that's always my concern. So I will
20 not waive that rule. If you want to agree on -- let's look
21 at Rule 26. Do you want to agree as to documents, you can
22 abide by whatever you disclose in discovery, and I know I
23 don't even have to say this in this case, all the documents
24 have to be Bates-stamped, so that we -- there's no documents
25 flying around that no one knows what they are or who -- what

1 | they're -- what they're addressed to. And they have to be --
2 | unless you can agree to some kind of -- you have to have some
3 | kind of logical system, not just -- not just here are a bunch
4 | of documents from another case. I think it would be -- make
5 | more sense to put some kind of numbering system on them.

6 | So what we will do is -- the names, if known, the
7 | addresses and telephone numbers of each individual that have
8 | discoverable information along with the subjects of that
9 | information that the disclosing party may use to support its
10 | claims or defenses. Okay? So I'm not going to -- I'm going
11 | to require everyone to do (a) (1) (A).

12 | There's description and location of all documents,
13 | I think we can coordinate that better with -- with document
14 | re- -- responses to requests for production, provided that
15 | everything is Bates-stamped in an organized way.

16 | The computation of each category of damages, I
17 | don't think that's practical in this case. I think you'll
18 | have experts, and you'll talk about property damage versus
19 | medical monitoring and personal injury.

20 | And, again, insurance agreements, are there any
21 | insurance agreements? Yeah, they probably want to see those.

22 | So why don't we agree that Rule 26 will be limited
23 | to (a) (1) (A) (i), little 1, and little 4. Okay?

24 | MR. KANNER: Thank you.

25 | THE COURT: Okay. Anything defendants want to say?

1 You don't have to say anything, actually. Don't feel
2 compelled.

3 MR. KATERBERG: Well, I'm not compelled,
4 Your Honor.

5 With regard to the disclosure of individuals, can
6 we at least, because this is a mammoth case and undertaking,
7 that we at least be able to get through the paper discovery
8 and then produce --

9 THE COURT: You could always supplement. I mean
10 you can -- you should -- the purpose -- you should do it as
11 soon as practicable. You know right now the people that
12 have -- have relevant knowledge, and you should get those
13 names out. And then you supplement it.

14 MR. KATERBERG: Okay.

15 THE COURT: And here's the rule. You're not going
16 to have any witnesses testify at any kind of hearing for
17 class certification if they weren't identified as whatever
18 day we set before that hearing as someone with relevant
19 knowledge. Neither will they. And before trial, then
20 you'll -- if the case gets certified as a class, we'll go
21 forward, and you'll have more names and more folks, and
22 you'll supplement it. Rule 26 says it should be constantly
23 supplemented. So take your best shot now and give -- and
24 identify those people that you know for sure from the top of
25 your head and then do it on a continuing basis. Make sure

1 | it's always in writing, and the "re" is always "supplement to
2 | Rule 26" and keep those in a binder somewhere so we don't
3 | have to look through a zillion documents at the conference to
4 | find out if anyone was identified. Don't hide it under
5 | something in a letter with other things. Make it a separate
6 | letter, called "re: Rule 26 supplements." Okay?

7 | Any other big-picture issues that we should discuss
8 | before we gets to dates?

9 | MR. GERMAN: Your Honor, Steven German. I just --
10 | I put my hand up to make a point about 10 minutes ago.

11 | THE COURT: You did. I saw you do that before and
12 | then you sat down again. So I thought it was answered.

13 | MR. GERMAN: I hope -- I hope my point is still all
14 | taken.

15 | I just really wanted to take one step back and --
16 | and just remind us all what we're talking here, because we
17 | were talking about, you know, whether information about
18 | defendants' knowledge years ago is relevant at the class
19 | certification stage and those types of details. And I think
20 | it's just worth respectfully reminding the Court -- and I
21 | know you read the proposal in detail, but, you know, the
22 | plaintiffs are alleging that these companies --

23 | THE COURT: Covered up.

24 | MR. GERMAN: -- covered up and manipulated science
25 | as to how much chromium was disposed, how potent that

1 chromium is, how long they left it at these sites for without
2 telling people. There's -- there's a record in Judge
3 Cavanaugh's decision that deals with some of these issues in
4 the Honeywell decision, and those issues will ultimately tie
5 directly into class certification here.

6 THE COURT: In what way?

7 MR. GERMAN: In the sense that how much is there
8 may affect the distance that stuff traveled. How much was
9 left there pursuant to DEP orders which were based on their
10 science and how potent it is, may affect the potency when it
11 travels, how potent it is in that travel. All of those types
12 of issues --

13 THE COURT: Right. But let me stop you for a
14 minute. Everything from merits on some level impacts class
15 and vice ver- -- it -- they're just interconnected.

16 But there's -- there's a reasonable -- and this is
17 what I'm afraid of. We're not having full merits discovery.
18 I hear you, but of course everything is related to everything
19 about what they knew, when they knew it, how detailed, how
20 far the contamination spread. That may affect how -- you
21 know, the claimants when the lung cancer first developed,
22 et cetera.

23 But that's not the showing needed under Rule 23.
24 It's common questions of law and fact. It's typicality.
25 It's adequacy of class representation. I don't know how much

1 | you're going to need that kind of detail that you just said.
2 | A lot of it's publicly available. You got it from Judge
3 | Cavanaugh's cases. You'll get documents.

4 | But I -- I don't think it's practical now to get
5 | into the -- the merits of it. You're going to have an expert
6 | that's going to talk -- your expert will talk about that.
7 | You seem to have the information already. But whether you
8 | need to get every single document from 1982 now to make a
9 | class certification motion, I'm not sure.

10 | MR. GERMAN: I fully agree, Your Honor. I just
11 | didn't want us to go back, start meeting and conferring with
12 | the defendants and there to be some misunderstanding that
13 | we're wholesale not entitled to certain information. But
14 | I -- I just wanted that to be clear before we left today.

15 | THE COURT: Okay. Well, as I said and I'll say it
16 | again, if we have to come back here once a month and talk
17 | about what you're looking for and why you need it -- I'm not
18 | bifurcating. I'm not going to strictly say class is here and
19 | merits is here. That would be silly and unpracticable in a
20 | case like this. I'm going to allow some overlap. And where
21 | that line is drawn will really depend on how the issues are
22 | presented to me by example. Certainly, some guidance is if
23 | the documents have already been produced and are easily
24 | accessible in other cases, they should not be held back
25 | simply because they're not relevant to -- to the class. If

1 | they're all in boxes and they're all stamped and you can just
2 | give them copies, you probably should, unless it's
3 | overwhelming and there's a reason why you can't do it. That
4 | doesn't mean you're going to be able to question every
5 | witness on every document in the box. And you need to meet
6 | and confer and try to -- have a formulation where your
7 | experts are going on common issues of law and fact. And
8 | really the fact issues, I don't know how much detail you
9 | need; we'll take that on a case-by-case basis. I'm not going
10 | to anything beyond that because it would not be fair to say
11 | it unless they had an opportunity to explain why it would be
12 | burdensome and irrelevant and you have an opportunity to say
13 | you need it.

14 | I will err on the side of Rule 26, which is
15 | discovery is broad, even with class certification, as long as
16 | it's moving at a reasonable, common-sense pace. So I think
17 | that's what we need to say as to that.

18 | Any other broad issues that we need to talk about,
19 | because I think with those under way, we sort of have a -- a
20 | general framework of how to set up a Rule 26 [sic] discovery
21 | order.

22 | I have one issue that scared me in the discovery
23 | plan was the amount of interrogatories, because the more
24 | interrogatories there are, there's more problems with
25 | interrogatories, and that affects me.

1 Yes, there were a lot of them.

2 MR. KATERBERG: I can just address.

3 THE COURT: Who's going to write all these
4 questions and answer them?

5 MR. KATERBERG: Well, the questions are already
6 written.

7 THE COURT: The multiple part scares me.

8 MR. KATERBERG: Your Honor, because of the size and
9 scope, we're actually dealing with two different classes
10 here. We have a medical monitoring class and a property
11 damage class, which are --

12 THE COURT: Right. But you want -- you want 50 for
13 each of them. They want -- everyone wants a lot of
14 interrogatories in this class, so -- in this room, so it's
15 not just you. You actually share that maybe little bit
16 different.

17 Let me ask you this question. Fifty multiple-part
18 interrogatories for class -- for the three class reps is a
19 lot.

20 MR. KATERBERG: The definition is only to take into
21 account where there are some that have multiple parts that
22 are all related, such as your -- you know, various medical
23 histories about smoking or about --

24 THE COURT: Let me stop you for one minute.

25 There's three plaintiffs. Right -- many more.

1 Probably. Will there be more? Named plaintiffs? How many?

2 MR. KANNER: It's possible.

3 THE COURT: How many? Another two or three?

4 MR. KANNER: Possibly. I haven't thought about --
5 about it.

6 THE COURT: Okay. And you're going to take all
7 their depositions, right? Before the class certification.
8 You said that in your joint discovery plan. You want to take
9 all the depositions of all the named plaintiffs.

10 MR. KATERBERG: Correct.

11 THE COURT: So that's what I get back to. You're
12 going to take their depositions. You're going to ask them in
13 detail about their smoking history, their diet, all that
14 stuff. Do you -- and you're going to get all their medical
15 records in advance. You're going to have every single doctor
16 they saw. You're going to sit down and take an eight-hour
17 deposition of each plaintiff. Why do you need as to each of
18 those plaintiffs 50 multiple-part? It's going to be hard to
19 convince me. If you -- if you weren't taking their
20 depositions, I would understand it more, but you're taking
21 their depositions.

22 MR. KATERBERG: But many of them are not multiple
23 part. It's only when there are multiple part that are
24 related that --

25 THE COURT: I hear you, but let me tell you

1 something, the federal rules say 25, and you're asking for 50
2 multiple-part of plaintiffs when you're going to take their
3 depositions. That seems like overkill to me.

4 MR. KATERBERG: Your Honor, these are going to be
5 joint sets. So if --

6 THE COURT: But you have the same -- there's really
7 not a lot of difference. In other words, I hear you. But it
8 seems like a huge -- 50 inter- -- so let me stop for you one
9 minute.

10 The three named plaintiffs, how many are property
11 damage and how many have medical damage?

12 ATTORNEY FOR PLAINTIFFS: I believe it's two
13 medical and one property. I believe.

14 THE COURT: And the way you see the case, do most
15 people have both or one or the other? Just -- you know, I'm
16 not going to hold you to it. I'm just trying to get a sense.

17 ATTORNEY FOR PLAINTIFFS: I think one -- I think
18 one has -- I thank two have --

19 THE COURT: Both?

20 ATTORNEY FOR PLAINTIFFS: Two have both, I believe,
21 Your Honor.

22 THE COURT: Okay.

23 ATTORNEY FOR PLAINTIFFS: I need to take a look
24 back at the complaint.

25 MR. KATERBERG: Your Honor, if we played the

1 numbers game in the rule, we could -- we could still do
2 this --

3 THE COURT: But -- it's not -- see, that's what you
4 just did. If we played the numbers game in the rule -- I'm
5 here to make sure there's no numbers game, because this is a
6 perfect example in my judgment of really just weigh- --
7 weighing down discovery, and then you have lawyers spending
8 hours answering interrogatories and they're fighting over
9 sufficiency when you're going to take their depositions
10 anyway. There are cases that I have -- it wouldn't be this
11 one -- where I just -- where I just don't even allow any
12 interrogatories, for instance, with pro ses. I say just go
13 take the deposition. You have Rule 26, you don't need any
14 depositions. I have cases where lawyers say to me, we only
15 need deposition -- we only need 10 interrogatories, we're
16 taking depositions. Fine.

17 I'm not inclined to allow you to have 50, and I'm
18 not inclined to allow multiple parts, because you're taking
19 depositions. And you -- from what I see in your joint
20 discovery plan, you want depositions of every named plaintiff
21 before you file class certification motions. If you're going
22 to take every named plaintiff, you don't need 50
23 multiple-part questions.

24 I'm going to limit you to 35; 35 single-part. You
25 can -- the defendants jointly on -- a joint set on each

1 | plaintiff on medical, and if there is -- if there is -- if
2 | that plaintiff also has property damage, I'm going to limit
3 | you to 25 on property damage. Because the plaintiffs aren't
4 | going to have information about what was causing the
5 | chromium. They're going to have information about what
6 | happened to them. So you don't need to ask all those
7 | detailed questions.

8 | So if you have -- you can do a joint set, 35 for
9 | each medical plaintiff, 25 for each property plaintiff. The
10 | property plaintiff is all going to be, frankly, expert
11 | reports. It's not going to be -- they're going to have no --
12 | I'd love to see how you even come up with 25.

13 | So that's what defendants together can serve on
14 | plaintiffs.

15 | Now, plaintiffs aren't defendants. What does
16 | plaintiff suggest? Yours was a little different. They had
17 | 50, and then they had 50 on you. Could you live with -- how
18 | many different defendants do we have?

19 | MR. KANNER: Two.

20 | THE COURT: Two defendants.

21 | MR. KANNER: Yeah, I would just note that it
22 | covers -- our complaint talks about a hundred years of
23 | operation. I do agree with you on one of the things that you
24 | said which is, you know, I find that you get a lot more
25 | useful information in 30(b)(6) depositions where you get

1 knowledgeable people on certain topics rather than having
2 lawyers, you know, who's got the most artful question, who's
3 got the most artful answer kind of thing.

4 We could live with 35 interrogatories as well.
5 We -- we just would ask --

6 THE COURT: Thirty-five jointly. I'm going to
7 limit you to 20 on each -- on each defendant.

8 MR. KANNER: Okay. And --

9 THE COURT: Single part. Unlimited interrogatory
10 requests [sic], okay? I mean -- I'm sorry, document
11 requests.

12 MR. KANNER: Could we do at least 25 on each?
13 Would that work?

14 MR. GERMAN: Your Honor, we're talking about there
15 are --

16 THE COURT: I'll let you have 25, but you're
17 taking -- guys, this is exact- -- we're talking about -- no.
18 I'm going to limit it to 20. I'll tell you why. This is all
19 about class certification discovery. We're going to have
20 more -- another set of interrogatories if the class is
21 certified. Let's limit it to 20, because this is exactly
22 what -- I told you my theory: Lawyers can't help it. They
23 want -- I -- I understand lawyers. They want as much
24 information as possible. But I'm trying to keep it moving so
25 that you can move this case and get it ready, and you're not

1 going to get it ready if we have 50 multi-point -- we'll be
2 here 16 hours of torturous hearings over the sufficiency of
3 interrogatories. So I don't think that makes sense. So
4 that's how we'll limit. We'll do 20 each. Okay? And that's
5 how we're going to handle it. Everything is single-part.

6 So with that as background and I think those are
7 the big overarching issues, let's talk about the actual --

8 MR. KATERBERG: Your Honor?

9 THE COURT: Yes.

10 MR. KATERBERG: One point of clarification. If new
11 players do come in --

12 THE COURT: Oh absolutely.

13 MR. KATERBERG: -- your order will account for that
14 they'll answer them within 30 days?

15 THE COURT: Or whatever. You know, 30 -- within a
16 reasonable time of -- 30 days after service of the questions.

17 MR. KATERBERG: I just didn't want -- if they
18 seriatim are adding plaintiffs along the way, that we don't
19 have to keep serving them, that they will -- it's going to be
20 the same set.

21 THE COURT: Oh, you're going to have a standard
22 set? Well, of course, you can just write them a letter, and
23 he's not going -- they're not going to say no to new
24 plaintiffs, but there'll be a motion to amend, and we'll know
25 about it and we'll talk about it then, but certainly -- if

1 | they have a standard set, that's great. You can use it for
2 | all the other plaintiffs.

3 | Now, in these very fine discovery -- detailed
4 | discovery -- how many hours did you spend on the discovery
5 | plan? It was very impressive. A long time.

6 | MR. KANNER: Not very effective.

7 | THE COURT: It was good. I enjoyed it.

8 | Okay. So we have Exhibit B is the defendants';
9 | correct? So let's start with theirs. And I'm going to
10 | move -- I'm going to do my own, but I just want to go through
11 | the dates.

12 | He- -- and so I probably -- issues that you've
13 | raised.

14 | I don't think we should file the motions for class
15 | certification -- I don't know what -- go to Exhibit B and go
16 | to paragraph 1. Okay? I don't think any motion should be
17 | filed until they can be fully brief- -- until they can file
18 | briefs and affidavits. I don't know what that means,
19 | October 1.

20 | MR. KATERBERG: Your Honor, if I may.

21 | THE COURT: Sure.

22 | MR. KATERBERG: Since discovery has to come off of
23 | what their class claims are going to with and who are going
24 | to be their class representatives, all we wanted was this
25 | simple statement. The supporting briefs and affidavits --

1 THE COURT: I hear you. But isn't that what an
2 amended complaint is? I mean -- in most class actions, they
3 have the obligation in the pleading to do that, to say who
4 their -- we can have a deadline for amendments to pleadings,
5 and then that amended pleading would set forth the class
6 allegations. I didn't look at the complaint, but I can't
7 imagine there's not class allegations in the complaint. So
8 I'm not going to require anything above and beyond that. The
9 rule doesn't require it. We can set a deadline for
10 amendments to -- to -- we'll talk about that in a minute.
11 But I'm not going to require that.

12 What about expert designations? Usually there's a
13 date for service of the expert reports; the affirmative ones
14 come first. Have you agreed or conferred about having
15 designations about people or experts or type of experts in
16 advance of the motions or in advance of service of reports?

17 MR. KANNER: We haven't discussed that, Your Honor.

18 THE COURT: Is that something that you would like
19 to do?

20 MR. KATERBERG: Have a discussion?

21 THE COURT: Or -- have it. I mean, is that --
22 let's start at the beginning, okay, and let -- the beginning
23 is always Rule 20- -- we know we're going to have Rule 26
24 disclosures. And we know we're going to have interrogatories
25 now. So -- and it's going to be limited to class discovery,

1 | but I'm not bifurcating anything. It's going to be -- and
2 | I -- I'm going to designate it that way so that we know that
3 | if the class gets certified, we'll reopen and revisit what
4 | additional discovery we need. Okay? And that's why I have
5 | everything on the record today.

6 | When can you on both sides -- begin at the
7 | beginning. The beginning is Rule 26 and service of
8 | interrogatories and document requests. When do you think you
9 | can get those out? Can you get them out by August 1?

10 | MR. KATERBERG: Yes, Your Honor.

11 | MR. KANNER: Yes.

12 | THE COURT: Okay. We'll put August 1 down.

13 | Then we have amendments to pleadings. And, again,
14 | amendments for pleadings as to class issues. When do you
15 | think you're going to be adding new plaintiffs? When will
16 | you know by? Because remember, everything's going to turn on
17 | that. If you're going to bring in new plaintiffs, they're
18 | going to want to serve more interrogatories, they're going to
19 | take more depositions.

20 | MR. KANNER: I understand that.

21 | THE COURT: You tell me.

22 | MR. KANNER: 90 days.

23 | THE COURT: From today? October 1? October 1?

24 | Does that work for anyone?

25 | UNIDENTIFIED SPEAKERS: Yes, it does, Your Honor.

1 THE COURT: You guys work on Saturdays; right?
2 Well, I would hate to ruin anyone's Halloween. No, that's
3 the end the month.

4 MR. KANNER: How about November -- November 1st?

5 MR. KATERBERG: Or September 30th, since it was
6 October 1.

7 THE COURT: You're the plaintiff, you should be in
8 a hurry. They're happy. They'll -- they'll say November 1,
9 that's fine. That's what you want? That -- they're --
10 they're thrilled. Because that's going to push everything
11 back more now.

12 I'm going to make it October 3rd, because I think
13 you should know by October who your other plaintiffs are,
14 independent of whatever you get in discovery from them. Have
15 a plaintiff, you think it's common, you add them.

16 So we're going to say October 3rd for amendments to
17 pleadings, because what dates have you talked about for class
18 discovery. And that's what we talked about, the documents,
19 the 30(b)(6), the named plaintiffs, all the discovery
20 disputes. You have June -- they have June 1 for discovery on
21 all class issues. What do you have?

22 MR. KANNER: Did you just say October 3rd for
23 adding plaintiffs and amending pleadings?

24 THE COURT: Isn't that the same thing?

25 MR. KANNER: Not necessarily, no. For example, in

1 | the course of discovery, they may say some other dude did it,
2 | and we'd have to take discovery of that alleged dude.

3 | THE COURT: Right. Well, you know -- you know what
4 | that rule is; right? That means it's always -- there's
5 | always amendments of pleading for good cause shown, under
6 | Rule 16. So as, again, in New Jersey we always follow the
7 | rules of civil procedure. 16 governs for good cause shown.
8 | If you learn about a new guy, a new defendant a year from
9 | now, you'd have a good argument that you should be able to
10 | add that -- that person in.

11 | In Rule 26 -- the date for amendment to pleadings
12 | is for -- to bring in those claims you know about. So
13 | anything before then, they can never argue prejudice or delay
14 | or whatever, because that's the date that we all agreed to,
15 | and that's the October 3rd date. And what I was thinking
16 | about was new plaintiffs, if you have additional plaintiffs,
17 | it's July, you should know in three months whether you're
18 | going to bring in new plaintiffs. Doesn't mean you can't
19 | bring in -- you can't try to bring one in after that, but if
20 | you wanted to make October 15th, I will. But that gives you
21 | a good three months to know. So we'll make October 15th --
22 | oh, that's a Saturday again. We'll make it the 17th. Okay?

23 | But of course, if you learn about someone new, you
24 | could always bring them in. That goes without saying.

25 | Okay. Now, hopefully you'll start having documents

1 answered sometime in September and October.

2 You have a lot of depositions to take. The
3 defendants have suggested class discovery or discovery headed
4 towards the class certification, should be June 1. What did
5 you folks -- the plaintiffs, propose for class discovery?

6 Fact --

7 MR. KANNER: Well, we had -- we had a different
8 plan.

9 THE COURT: I know you did. I'm sorry about that.

10 MR. KANNER: No, no, it's fine. It's fine.

11 THE COURT: Okay. So that's why --

12 MR. KANNER: Those things happen.

13 THE COURT: I know it does. That's why you have to
14 kind of go with the flow --

15 MR. KANNER: Even in New Jersey.

16 THE COURT: -- on things with joint discovery
17 plans.

18 Can you live with June 1st?

19 MR. KANNER: How about June 30th? Would that work?

20 THE COURT: They're fine with that.

21 MR. KANNER: Just -- I just want to clarify one --
22 one thing just because of the way --

23 THE COURT: Sure.

24 MR. KANNER: -- you've been saying requests for
25 production and interrogatories. You know, I can live with

1 | the fact that they actually get to ask more questions in
2 | interrogatories of the plaintiffs than we get to ask of them.
3 | I could probably get over that. But I certainly -- I need to
4 | be able to ask 30(b)(6) depositions early on.

5 | THE COURT: I didn't restrict that. I didn't
6 | restrict that.

7 | MR. KANNER: Okay, thank you.

8 | THE COURT: But one thing that I say in every case.
9 | You can take it early on, unlimited topics. But what I don't
10 | want to happen is that you say, I want to take it -- I want
11 | to take a 30(b)(6) on August 5th before you even get any
12 | documents, and then after you get the documents, you want to
13 | go and ask the same exact topics again, before you have the
14 | documents. That doesn't work with me, because then that's --
15 | that's ineffective. If you say I need a threshold quite -- I
16 | don't think you should be taking Rule 26 -- Rule 30(b)(6)
17 | depositions until you get some documents.

18 | MR. KANNER: In -- in my experience, especially in
19 | a case like this that covers many decades, there are going to
20 | be a lot of documents. And I think that that's going to be a
21 | problem getting through that. I think if you talk to the
22 | knowledgeable person who's prepared --

23 | THE COURT: Here's the problem. I'll tell you what
24 | the problem is.

25 | MR. KANNER: You can save a lot of time and effort

1 on both sides.

2 THE COURT: You know, here's what you have --
3 here's what you save. You save -- you -- me, because here's
4 what's going to happen. If a 30(b)(6) witness has to become
5 prepared on a topic, they're necessarily going to have to
6 have doc- -- review documents. Unless they -- they're
7 wizards with photographic minds, they're not going to
8 remember what happened yesterday, never mind from 1985.
9 You're going to have all these topics. It's not a regular
10 fact witness that just testifies about what they remember
11 independent of documents. 30(b)(6) representatives have to
12 become educated, and then you're going to ask them what they
13 reviewed, and they need -- they're going to tell you about
14 all these documents that you haven't had yet in discovery,
15 and you're going to want to review them before you take the
16 30(b)(6) deposition.

17 So I -- if you want to do that, you can do it, but
18 you do it at your own risk, because then they're going to sit
19 down and say, yes, I sat with -- I reviewed a whole bunch of
20 documents, and then they're going to show you the documents
21 then. And then in -- three months later you want to take the
22 same witness on the same topic, I will say no, you had a
23 chance and that's what you're going to live with. Because
24 you are not going to turn this case into taking the same guy
25 two or three times before and after documents. That's all.

1 So you do it at your own risk.

2 MR. KANNER: You know, I un- -- I understand that,
3 Your Honor. And, again, subject to good cause shown.

4 But I think that if you get a witness who's well
5 prepared for their 30(b)(6) early, plus you get their
6 personal files, their custodial files or whatever you call
7 them, I think you can accomplish a lot. And to the extent
8 that there are gaps, you know -- you either let them be. You
9 don't have to get everything.

10 But because --

11 THE COURT: But let me stop you right now. I don't
12 want -- there's no gaps. You took a 30(b)(6). They're to be
13 prepared.

14 MR. KANNER: Right.

15 THE COURT: And you're not going to call that same
16 witness back on a very closely related but separate topic
17 three months later after you get all the documents. That
18 doesn't work with me. That's really protracting litigation.
19 Then you say, I'm okay with what I got, because we remember,
20 this is only to make a class certification motion. I'm okay
21 with that. Maybe I take him at the -- I'll have to revisit
22 this sometime after we have full merits discovery.

23 But what I don't want to invite is I jump in and
24 take that 30(b)(6) deposition August 15th, and then I serve a
25 related notice on almost very similar topics after I get the

1 documents to see if anything changes. That's not what --
2 that's not the purpose of a Rule 30(b)(6). It's to get
3 someone --

4 MR. KANNER: Yeah, and that --

5 THE COURT: -- educated. Get them done and you're
6 not revisiting it again. And I'll be -- I'm telling you this
7 right now on the record. I'm not inviting and I will not
8 hesitate to cut off a 30(b)(6) if one's taken real early on
9 and then you have a second one three months later on more
10 documents. It's not going to work. Do it at your own risk.

11 MR. KANNER: Your Honor, I understand that. I
12 think that's -- that's the rule pretty much everywhere.

13 What -- what -- all I was going to suggest is that
14 in a number of these environmental cases over the years, you
15 know, I've had defendants say, you know, here's two main
16 pages of documents. Then you finally -- and then you fight
17 about those because they're not all there and then there's
18 privilege logs and all that. And then nine months later, you
19 get to the 30(b)(6), and the person says, oh, well, this --
20 the information's right here instead of -- you know, going
21 through the haystack, very often the 30(b)(6) will help you
22 focus your discovery on what set or subset of documents --

23 THE COURT: Sometimes. Sometimes it's a disaster.

24 MR. KANNER: Right. No, I agree. But I'm just
25 saying that's -- that's where I'm coming from on all this.

1 THE COURT: Okay. I didn't limit it. Okay.

2 So I'm going to put June -- for the end of fact
3 discovery for now, I'm going to put -- I'm going to keep it
4 at June 1st. If we have to extend it and there's reasonable
5 basis to extend it, I will, but I don't want this case to be
6 on a three-year discovery track, nor does Judge Wigenton, who
7 asks me all the time to report on her more complex cases, and
8 I think June 1's a reasonable deadline.

9 Now, in connection with that, the date for class
10 experts, what date did plaintiff have that -- plaintiff --
11 the defendants had a -- because your plan didn't work -- the
12 date they had inconsistent with gearing up towards a class
13 certification motion, that they -- that you produced your
14 experts by February 1. That sounds soon.

15 MR. KANNER: I would recommend the experts after
16 the completion of fact discovery, Your Honor. I think that's
17 pretty typical.

18 THE COURT: It is. But then I think their -- their
19 plan had it sooner than that. Can defendants live with
20 experts after that?

21 ATTORNEY FOR DEFENDANTS: Your Honor, if I may, the
22 one thing that I think would be important to us is that the
23 expert discovery precede the filing of the class motions.
24 And that's because when you don't have that, what happens is
25 you get a pro forma class motion from the plaintiffs in our

1 | experience, and then the defendants suppose and for the first
2 | time you found out for the plaintiffs' theory is in their
3 | reply and then we come and we ask for a surreply.

4 | THE COURT: Because of experts.

5 | ATTORNEY FOR DEFENDANTS: Right. So the thing
6 | that's most important to us is that expert discovery be
7 | concluded before they file their class motion brief.

8 | THE COURT: That's fine. That makes sense. Yeah,
9 | it's fine.

10 | All right. So I'll put you -- June 1. And I'll
11 | put July 1 for affirmative expert reports. And --

12 | ATTORNEY FOR DEFENDANTS: July 1's a Sunday,
13 | Your Honor.

14 | THE COURT: Okay. July 2d.

15 | MR. KANNER: Your Honor, I -- it's going to be very
16 | hard to get expert reports on these sorts of matters turned
17 | around that quickly --

18 | THE COURT: You're right. So I'm going to move up
19 | fact discovery to May 1. I can't possibly go to this -- in
20 | this District and say I'm giving them over a year just to do
21 | class certification discovery. It may turn out that way, but
22 | in the first instance, you're right, I'm going to move up
23 | fact discovery to May 1. This is going to have to be a
24 | priority. The case is really old -- I mean the conduct is
25 | old, and the plaintiffs, you know, according to the --

1 | your -- the complaint have been injured many years ago, and
2 | we can't have this case linger in federal court for five
3 | years. So why don't we move it up to May 1, and then we'll
4 | put July 2d for affirmative experts. And then we'll put
5 | September 6th for responsive experts. This is, again, for
6 | class certification, not for merits.

7 | MR. KANNER: On the class certification,
8 | Your Honor, do you expect discovery to be completed on all
9 | 200 sites or just the sites related to the named class
10 | representatives?

11 | THE COURT: Well, that's a good question. I have
12 | no idea.

13 | MR. KATERBERG: That's a class issue, Your Honor.
14 | They have filed on over a hundred various sites. And they
15 | are all different. They're all in different parts of Jersey
16 | City. They all might have had COPR brought to them. If --
17 | if I may --

18 | THE COURT: Right. Well, I guess the answer is you
19 | want this -- this class to be certified on all hundred sites;
20 | right? How many sites are there? A hundred or 200?

21 | MR. KANNER: I think there's like 200.

22 | MR. KATERBERG: There's a little over --

23 | THE COURT: If you want the class to be on 200
24 | sites and all the parties who have been affected by living in
25 | close proximity to those 200 sites, the discovery has to be

1 on all 200 sites.

2 MR. KANNER: Well, that's -- that's -- I think
3 that's the reason --

4 THE COURT: How else could you -- let me ask you
5 this way. There's no other practicable way to do it. You
6 can't limit discovery to the three sites that they're
7 affected by and then say, but I want to make a class
8 certification motion and have it certified on 200 sites.

9 MR. KANNER: You can show that it's illustrative of
10 the class without going through --

11 THE COURT: It's not working that way. It's going
12 to be on 200 sites. And this is about smart lawyering. You
13 have to recognize that this is going to be a class
14 certification motion. And I have to tell you -- and the
15 other New Jersey lawyers will vouch for you -- many of my
16 colleagues would be giving you six or seven months to do
17 this. I'm giving you a year to do class certification
18 discovery. Don't blow it. Work hard to get it done and be
19 smart. And that's when I -- what we were talking about all
20 afternoon, not trying to get every little bit of it. You
21 cannot possibly argue before Judge Wigenton to have a class
22 certified who are damaged at a hundred different --
23 different -- if it's all common -- and that's what the
24 discovery's going to focus on, how common was the dumping or
25 the disposal of the chromium, because that common issue is a

1 fact that you have to talk about.

2 So it clearly is going to be everything related to
3 what you want the Court to certify the class as. It's not
4 going to be limited to be illustrative sites.

5 And I'm going to put for affirmative response- --
6 expert reports July 2d. Responsive reports September 6th.
7 We will -- these dates, you know, I'd -- I would almost bet
8 my pension that all these dates will not be met. That there
9 will be some adjustments. I never bet my pension against
10 anything, though, so I can't say that with certitude. But
11 there's always flexibility, and if you're working hard and
12 there's going to be privilege log issues or discovery
13 disputes, it's going to -- personal problems or issues in --
14 with lawyers and depositions and witnesses, there's always
15 going to be adjustments made. And I certainly understand
16 that going into a case like this.

17 So these will be the dates. I will draft the
18 order.

19 I think monthly status conferences are a good idea.
20 The first one will be in September because you're not going
21 to have the discovery out and answered until sometime in
22 September. And we'll talk at the end of September.

23 If there's more -- here's what I'm going to do in
24 this case, a couple of rules. I want -- in more complex
25 cases, what I do is I ask in advance of every conference a

1 status letter, a joint status letter. I don't need joint
2 filings if there's discovery disputes. You can write your
3 letter, he writes his letter, and then we have a reply and a
4 hearing and do what we have to do. But just as to status, I
5 like to have a joint -- one joint letter by the parties. It
6 forces the parties to meet and confer and let me know whether
7 there's any problems, whether there -- if there's a small
8 discovery problem, you can put it in the letter. Plaintiffs'
9 position, defendants' position. If it's more of a complex
10 problem that needs further briefing, you can let me know and
11 we'll do that too.

12 What I don't like to happen in a case like this is
13 in advance of a monthly status call, the night before get a
14 30-page submission about privilege log and then the other
15 side blows a gasket and we haven't had a chance to respond to
16 it. I won't entertain those at the conference call. I'll
17 give you a date to respond.

18 And I ask you to use common sense and courtesy in
19 raising discovery disputes. In other words, if we have a
20 conference on September 22d, you know, don't give me a huge
21 brief -- if someone gives me brief and someone responds to it
22 on, you know, on the 18th and the hearing's on the 20th, give
23 me a little bit of time or just ask in the letter to adjourn
24 the date of the hearing, make it in person, so we can -- we
25 can have a more reasonable schedule to handle discovery

1 | disputes.

2 | All discovery disputes should be in writing in
3 | advance, other than the most very basic ones like, you know,
4 | where's the deposition taking place; I don't need a brief on
5 | that. I take very seriously your obligation under the local
6 | rules to meet and confer and bring me legitimate questions on
7 | scope and privilege, and I'll rule on them. I'm happy to
8 | rule on them.

9 | Everything that you file that has a discovery
10 | dispute should be efiled with a courtesy copy to me, hard
11 | copy to chambers. If it's something of a more emergent
12 | nature, you can -- you can fax the letter to me.

13 | And we will talk every month. My order -- my first
14 | order will have in to send me that joint letter. And that's
15 | how we'll proceed.

16 | There'll be no dispositive motions until the end of
17 | discovery, and we'll see what happens -- I'm not going to
18 | even put in dates yet for the filing of those motions,
19 | because I know that there'll be -- there'll be modifications
20 | to the schedule. But there'll be motions for cert- -- for
21 | class certification. If -- I don't know if this case it
22 | would be -- it wasn't in the joint discovery plan, but if
23 | defendants wanted to crossmove to dismiss any of the parties
24 | or claims, we'll do that, and we'll coordinate it so Judge
25 | Wigenton has one set of motion papers.

1 Anything else you can think of?

2 MR. KATERBERG: Just one, Your Honor.

3 THE COURT: Sure.

4 MR. KATERBERG: Because of the Court's admonition
5 of wanting the lawyers to work smart and obviously we will
6 try to work together on the defense as much as possible. But
7 at the same time, I've heard plaintiff's counsel making these
8 arguments of conspiracy that they wouldn't mind something in
9 the Court's order that because the Court is encouraging
10 counsel to work together, any communications that were
11 between the defendants is not subject to any discovery.

12 THE COURT: Well, you have a joint defense
13 privilege, I take it; right?

14 ATTORNEY FOR DEFENDANTS: Correct, Your Honor.

15 THE COURT: So put them on notice, if there's a
16 joint defense privilege. Right? I mean I've dealt with
17 joint defense -- the problem is sometimes lawyers will say,
18 there is no joint defense privilege, we're separate
19 defendants, and then they change through the course of the
20 litigation, and then the issue is when did it arise. If you
21 put them on notice now that you have a joint defense here and
22 I'm pretty up on those cases, is a joint defense is a joint
23 defense. And -- and it doesn't seem like that's going to be
24 an issue to me.

25 ATTORNEY FOR DEFENDANTS: Just one -- just one

1 other issue.

2 THE COURT: Oh, one -- I'm sorry, before I forget.
3 Is there going to be a protective order in the case? I would
4 imagine your clients' medical records you would like.

5 MR. KANNER: Yes.

6 THE COURT: So you have a 5.3 is our local rule.
7 Take a look at it. There's a model order. You can designate
8 things attorneys' eyes only or for the purposes of this
9 litigation. I would suggest that you do that for all your
10 clients' medical information. I don't know what other
11 information needs to be so designated. Send it to me as
12 quickly as possible, and I'll sign it.

13 Yes?

14 MR. GERMAN: Your Honor, just in terms of smart
15 working together, after the April conference, which was --
16 which was adjourned, the plaintiffs requested that the
17 defendants provide four very basic categories of information
18 which will help streamline this process. One, which site
19 belongs to which of them? We don't -- we don't know that as
20 plaintiffs. And these are things that could easily go into a
21 four-column chart. What belongs to who. When the site was
22 created. When was the waste dumped there. The alternative
23 is we have to go through 200- --

24 THE COURT: Do we know?

25 MR. KANNER: Presumably they do. They've been

1 working with the DEP on it for 30 years.

2 THE COURT: Here's the problem with that. Which
3 sites belongs to who is easy; right? Is it Honeywell --
4 what's the two defendants? Honey- --

5 ATTORNEY FOR DEFENDANTS: No, that's not correct,
6 Your Honor, that is not correct.

7 THE COURT: It's not easy.

8 ATTORNEY FOR DEFENDANTS: No. There are -- there
9 are some sites we know belong to one or the other. And there
10 are a whole category of so-called "orphan sites." So
11 that's -- it's not correct.

12 THE COURT: Well, then that's easy, though. Then
13 you said you're not sure of what the ownership is; right?

14 ATTORNEY FOR DEFENDANTS: Well, we could certainly
15 say that.

16 THE COURT: Right. The ones that you know for
17 sure, you can identify with certainty. And the ones that you
18 don't know, you can say it's unclear what the ownership. I
19 mean there has to be someone that has title to the property;
20 right? Present? Or no?

21 ATTORNEY FOR DEFENDANTS: No, we have title to none
22 of the property.

23 THE COURT: None of the properties, but at the
24 time? I mean --

25 ATTORNEY FOR DEFENDANTS: No, when you say --

1 Your Honor, just let's clarify this. When he says whose site
2 is --

3 THE COURT: It's not easy.

4 ATTORNEY FOR DEFENDANTS: It's not --

5 THE COURT: It's not -- it's not who -- it's not
6 about ownership. It's about -- who had possess- -- who had
7 possession of it at a -- at a given point in time. Or who
8 had access to it, really.

9 MR. KANNER: Actually who dumped there. And --

10 THE COURT: Who dumped there. Or who had access to
11 it, not who owned it.

12 MR. GERMAN: Well, no, it's whose -- it's whose
13 waste is there. There are -- there were only two producers
14 in the City.

15 THE COURT: That's not what you said.

16 ATTORNEY FOR PLAINTIFFS: I apologize for that.

17 THE COURT: I wrote down what you wrote [sic]. You
18 [sic] wrote which site belongs to them. Who -- that's --
19 that's qualitatively different than who dumped there. That's
20 a different question.

21 MR. GERMAN: That's -- so whose waste was deposited
22 at the site. And they've been working on this for decades
23 with the DEP. So this is certainly something they should
24 have information about that we certainly could not have
25 information about, if they don't.

1 ATTORNEY FOR DEFENDANTS: That is not correct.
2 There are sites where we know that there has been testimony
3 otherwise that materials brought from one of the sites or --
4 and he's incorrect, there were three sites where chrome was
5 produced, and one was the -- site. And their material was
6 also brought into Jersey City, but for some reason they're
7 not in this case.

8 THE COURT: Right.

9 ATTORNEY FOR DEFENDANTS: The -- there are many
10 other sites where chrome just is -- was found. And there was
11 a -- there's an -- there are so-called orphan sites. And
12 we -- we may or may not have dealt with the DEP just to
13 cooperate to get some problems solved or deal with the
14 issues. But that's not an ownership issue. That's not an
15 allocation of responsibility issue. That's a very
16 complicated issue, Judge.

17 THE COURT: I know it is.

18 ATTORNEY FOR DEFENDANTS: So it's not as easy to
19 say, well, let's set four categories, let's work it all out.
20 That's a significant --

21 MR. KANNER: We'll -- discovery --

22 (Simultaneous conversation)

23 MR. KANNER: -- we'll get to the bottom of this.

24 THE COURT: Right. I hear you. But -- but in
25 response to your question, it isn't an easy issue in a case

1 | like this. Who -- whose -- you know, who dumped it and when.
2 | We're talk- -- we're going back to what years? 1960s. And
3 | there's not always good records. And there's not always
4 | clarity of who was dumping what where and when. I've had
5 | cases that the eve of trial where it was still unclear who
6 | was dumping, when, where, and when -- who, what, where, and
7 | when's were unclear at the eve of trial in Superfund cases.
8 | So it's not always that simple.

9 | You can ask in interrogatory, but I don't think
10 | it's the kind of thing that you're going to get here's where
11 | we dumped, here's when we dumped, it's very -- it's black and
12 | white. There's a lot of gray area there. You're certainly
13 | entitled to explore it in discovery because it goes to
14 | commonality of -- of fact, and it's a legitimate question.
15 | But that's why we have interrogatories. That's we have
16 | 30(b)(6) witnesses. And that's why you can request all the
17 | DEP documents and see -- certainly all those documents should
18 | be turned over with ease, if they're -- certainly as I've
19 | said earlier, if they've already been turned over in other
20 | cases and they're relevant here.

21 | MR. GERMAN: Out -- so -- I understand, Your Honor.
22 | There -- there are a couple of other categories. One they
23 | should know is if they put a remedy at that site. If they've
24 | put an interim cover on it or if they've excavated the
25 | chromium or they've simply put a fence around it and they're

1 calling that a remedy, we'd like to know in that chart the
2 date they did it, because each of them did it. It wasn't
3 the --

4 THE COURT: Well, you can ask that in
5 interrogatories. That's why we have discovery.

6 MR. GERMAN: The -- on the Rule 20(b)(6) [sic] --

7 THE COURT: 30(b)(6).

8 MR. GERMAN: Yeah, sorry. The Rule 26 disclosures,
9 to the extent both firms -- both defendants have used
10 third-party vendors, the environmental consultants who often
11 go out there, I think it's important that to the extent they
12 know who worked on what, that would be part of that
13 discovery. Not just the people inside the company, because
14 very often, you just go to the vendor third-party discovery,
15 and you can get the information more efficiently about a
16 particular site. You can also --

17 THE COURT: Guys, this is the kind of thing that
18 you need to talk about first, and you shouldn't be raising it
19 to me at a Rule 26 conference [sic].

20 You're right. That makes sense. If they've been
21 working with vendors for the past 20 years, that should be
22 disclosed. And if there's documents that can be easily
23 turned over to you about what remedies they've done to
24 remediate these sites, that should be turned over. That's
25 simple. That's not that complicated.

1 But you need to talk about it first. And if you
2 can't agree on it, then you come back to me with detailed
3 letters that explain the problem and tell me -- I don't want
4 copies of all the letters you wrote to each other. I don't
5 like ad hominem attacks in letters. I don't read them. My
6 eyes skim over them. I want to get to the nub of the
7 problem. You're all good lawyers in this courtroom. It's a
8 scope issue. We don't think we should have to produce this.
9 We think we should have to produce this. Lay it out for me
10 in a letter. I'll read the other side. If I get the
11 impression that one side is being unreasonable, they'll know
12 how I feel very quickly. But lawyers attacking other lawyers
13 doesn't get -- doesn't get anyone very far here with me.

14 So that's how we're going to handle it.

15 The next conference I'm going to put as an
16 in-person conference on September 22d at 11 a.m., with the
17 caveat that if there's no overarching issues that I need to
18 address in person, I will convert it -- I'll be happy earlier
19 that week when you send me your joint status letter, you can
20 put in that joint status letter that we -- convert it to a
21 phone call, but we'll reserve it as a -- you know what?
22 There may be some Jewish holidays that week. I'm not sure
23 now that I think about it. But I don't have my calendar up.

24 Okay. You're right. September 29th. So we'll
25 keep it on for September 22d at 11 a.m. If you need to

1 | produce -- if you think you can convert it to phone, just in
2 | that joint status letter indicate that it'll be converted by
3 | phone.

4 | And I will do the scheduling order consistent with
5 | everything that I've said today. Okay?

6 | Thank you, guys. Take care.

7 | FEMALE SPEAKER: All rise.

8 | UNIDENTIFIED SPEAKERS: Thank Your Honor.

9 | (Conclusion of proceedings at 1:50 p.m.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 62 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

July 16, 2011

Signature of Approved Transcriber

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EXHIBIT 3

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LATREICA SMITH, MATTIE HALLEY,	:	Case No. 2:10-cv-03345-ES-JAD
On Behalf of Themselves and	:	
All Others Similarly Situated,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Newark, New Jersey
	:	Friday, October 18, 2013
HONEYWELL INTERNATIONAL INC.	:	10:37 a.m.
and PPG INDUSTRIES, INC.	:	
	:	
Defendants.	:	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JOSEPH A. DICKSON
UNITED STATES MAGISTRATE JUDGE

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Colloquy

4

1 (Conference commenced at 10:37 a.m.)

2 THE COURT: Okay. This is Latreica Smith and Mattie
3 Halley against -- versus Honeywell International, Inc. and PPG
4 Industries, Docket Number 10-33451. May I have appearances of
5 counsel, please?

6 MR. GERMAN: Steven German, German Rubenstein, LLP,
7 on behalf of the plaintiffs. Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. RUBENSTEIN: Good morning, Your Honor. Joel
10 Rubenstein, German Rubenstein, on behalf of the plaintiffs.

11 THE COURT: Good morning.

12 MS. BARRON: Good morning, Your Honor. Leah Barron,
13 Janet, Jenner and Suggs, on behalf of plaintiffs.

14 THE COURT: Good morning.

15 MS. DAVIS: Good morning, Your Honor. Anne Davis,
16 Arnold and Porter, on behalf of Honeywell International, Inc.

17 THE COURT: Okay.

18 MR. McDONALD: Good morning, Your Honor. Michael
19 McDonald from Gibbons, PC, on behalf of Honeywell.

20 THE COURT: Good morning.

21 MS. WALKER: Good morning, Your Honor. Karol Corbin
22 Walker with LeClairRyan on behalf of defendant PPG Industries,
23 Inc.

24 THE COURT: Good morning.

25 MS. WALKER: Good morning.

1 MR. COUGHLIN: Tim Coughlin, Thompson Hine out
2 of Cleveland, for PPG Industries, Inc.

3 THE COURT: Good morning.

4 MR. COUGHLIN: Good morning, Your Honor.

5 THE COURT: All right. I wanted to talk this morning
6 about the motion for leave to amend and I also just wanted to
7 talk about status and where we're at, in terms of discovery
8 and things like that.

9 I have a fundamental question on the motion for -- on
10 your motion to amend the complaint. Why are you amending it
11 now to drop plaintiffs, add plaintiffs, and change I guess the
12 potential class? I think that's what the second part is;
13 correct?

14 MR. GERMAN: Sure, Your Honor. If I may, I think
15 there's a map that we submitted as Plaintiffs' Exhibit 5 to
16 our reply brief that really speaks volumes and can answer that
17 question.

18 THE COURT: Well, no. Here's -- I don't think I
19 properly asked the question. This is not your fault for not
20 answering what I asked, because I don't think I asked really
21 what I want to ask. I understand what you're trying to
22 achieve, but why is that coming now?

23 MR. GERMAN: Your Honor, the reason that's coming now
24 is because we learned new information through discovery from
25 the time of in between the time of the last amendment and the

1 time that Judge Mannion offered us to amend the complaint.
2 And that information became critical in the way we, as
3 attorneys, our technical consultants and experts, thought
4 about this case, learned about the areas where there was
5 community concern about the case, the most serious community
6 concern, the most serious impacts of the chromium.

7 We recognized through that also that the case, as it
8 was framed, was a little bit unwieldy -- there were a lot of
9 sites involved, and there was a lot of conflict arising over
10 proving whose waste, when, where, where it went around the
11 city -- and by focusing the complaint the way it's focused
12 now, we could jettison a lot of those issues to focus on the
13 areas that we learned about through discovery, discovery that
14 we had been seeking for two years and that wasn't produced, --

15 THE COURT: What discovery exactly did -- was
16 produced at the time that -- let's -- let me -- let's set a
17 couple more fundamental facts. Technically, you were I think
18 about eight days late in filing the motion; right? Am I
19 wrong? Am I reading the dates wrong as to what Judge Mannion
20 -- Judge Mannion said -- and maybe I'm wrong. Hold on.
21 Where's the -- what day did you file your --

22 MR. GERMAN: I don't -- I believe we were on time,
23 Your Honor. I don't think there's any dispute that the -- we
24 followed the precise protocol and orders articulated by Judge
25 Mannion. We exchanged a draft of the complaint, a redline

1 copy, we discussed it with the defendants, and we timely
2 submitted the brief with the attached proposed amendment.

3 THE COURT: So, you filed this motion before June
4 21st? That's what I'm asking.

5 MR. GERMAN: The ECF stamp has it on June 28th. I
6 don't -- I believe there was an extension on it, if I remember
7 correctly.

8 THE COURT: Well, let me be clear. I'm not going to
9 nail you on being eight days late, but I just want to know
10 whether you were eight days late or not.

11 MR. GERMAN: I don't believe we were.

12 THE COURT: Do you -- anybody remember granting or
13 Judge Mannion granting an extension for the eight days?

14 MR. McDONALD: Your Honor, --

15 MR. GERMAN: Your Honor, we -- Judge Mannion granted
16 an extension, because we were conferring with the defendants --

17 THE COURT: Okay.

18 MR. GERMAN: -- over the complaint. So, we were
19 perfectly within time.

20 THE COURT: Okay. So, that's one thing I don't have
21 to consider, although I understand you're reserving your
22 rights to argue that it was still untimely because of what had
23 happened before that.

24 MS. DAVIS: Yeah, and I would just add, I think it a
25 little bit obscures the record to say that Judge Mannion

1 granted leave. I mean, this was all contingent upon our
2 having the ability to object to it as untimely, because it
3 was, in fact, --

4 THE COURT: No, I --

5 MS. DAVIS: -- two years late.

6 THE COURT: And I got that.

7 MS. DAVIS: Yeah.

8 THE COURT: Where I'm going with this, Mr. German, is
9 I I tend to agree, based on the record in front of me, that
10 it's a Rule 16 standard, not a Rule 15 liberality of the
11 pleadings standard. So, that implicates good cause and, as
12 you -- I think you recognize and the defendants recognize.
13 Then, what is the good cause for changing this? And I'm --
14 it's -- I'm going to sound like I'm being judgmental, if I can
15 use that term -- changing the class again?

16 I'm not so concerned about the plaintiffs. I'm
17 guessing there's probably a real rational explanation for why
18 you need to drop a plaintiff and add a plaintiff. I presume --
19 and you can correct me if I'm wrong. I presume it has to do
20 with property ownership.

21 MR. GERMAN: It doesn't, Your Honor. It has to deal
22 with the presence of the waste, where it is, and the impact on
23 the surrounding community. And this one --

24 THE COURT: You need class -- you need named
25 plaintiffs who at least owned property within the class you

1 seek to certify.

2 MR. GERMAN: That's correct. That's correct. And,
3 Your Honor, I understand where you're headed with respect to
4 the Rule 15(a)/Rule 16(b) dichotomy here. I just want --

5 THE COURT: Because I kind of interrupted myself.
6 What new discovery did you --

7 MR. GERMAN: Sure. So, that new discovery is
8 extensive. What we had at the outset of this case before the
9 amendment was basically technical reports about various sites
10 throughout the city that where waste was. We did indeed have
11 that. But what we didn't have was this extensive and
12 voluminous record about where the community was expressing
13 greatest concern. The fact that the DEP, the New Jersey
14 Department of Environmental Protection, was telling people
15 near these sites keep your windows closed, don't run your air
16 conditioners. We didn't have question --

17 THE COURT: Why didn't you have that DEP inform --
18 what you just said; why didn't you have that information?
19 When did that start?

20 MR. GERMAN: Because it was all in records that were
21 subpoenaed from the independent site administrator for the PPG
22 sites. And PPG moved to block that subpoena. Without
23 standing, PPG moved to block that subpoena and we waited well
24 over a year, maybe close to 14, 15 months to get those
25 documents. We didn't --

1 THE COURT: When did you get the documents? You can
2 give me a rough estimate. Or a good estimate. You know, I
3 don't need --

4 MR. GERMAN: We got them --

5 THE COURT: -- to know the exact date.

6 MR. GERMAN: We got them maybe, on a rolling basis,
7 just a couple of months before the amendment. The proposed
8 amendment.

9 THE COURT: So, sometime --

10 MR. GERMAN: And to be clear, --

11 THE COURT: Sometime in the spring of 2013?

12 MR. GERMAN: That's correct. That's --

13 THE COURT: Does anybody dispute that's when the EPA
14 documents began to be served?

15 MR. GERMAN: Okay. And, Judge, the volume of these
16 materials was extensive. It took an inordinate amount of time
17 for them to be produced. PPG is regularly involved in the
18 process and the plaintiffs aren't. So, there's this built in
19 bias in our ability to wade through these materials in a way
20 PPG couldn't, and we moved expeditiously in getting through
21 those materials, noticing up depositions.

22 There's an extensive history in the record here about
23 our inability to access these materials, confidentiality
24 orders about it, cost-shifting battles about these materials;
25 all which were held up and precluded us from moving forward

1 with this information.

2 And what we discovered through the materials is that
3 -- and let me take a step back, Judge. Just for some
4 perspective on how serious this issue is.

5 There's a residential inspection program that goes on
6 in Jersey City where an independent site administrator goes
7 into people's homes near the PPG sites and looks for chromium.
8 People are having blood drawn to detect if they're being
9 exposed to chromium. There --

10 THE COURT: How long has that been going on? I read
11 that in your papers.

12 MR. GERMAN: Yeah.

13 THE COURT: How long has that been going on?

14 MR. GERMAN: That's -- that program has been going on
15 for a couple years. And we didn't have access to that
16 information. There's a Web -- a public Web site that's put
17 out, which is essentially run by PPG's public relations staff.

18 But the information underlying everything that's put
19 out to the public is all contained in these records. There's
20 extensive studies, ongoing studies, environmental studies that
21 are in these records. There's correspondence back and forth
22 with the Department of Environmental Protection about air
23 monitoring, about how much of this stuff is getting up in the
24 air, about how much is there. We just got it a couple of
25 months before the amendment.

1 And that's only -- that's only non-party subpoenas.
2 We -- we're not even done getting the documents yet from PPG
3 and Honeywell. I mean, there are still -- I mean, we may have
4 recently gotten the final documents, but they've trickled in
5 maybe over the past, what?

6 (Discussion among counsel, off the record.)

7 MR. GERMAN: We're still waiting on documents.

8 So, this is not a simple case. It involves a lot of
9 material. And for plaintiffs to be, you know, to be put to
10 task and to appreciate what's gone on in each of these sites
11 on this map, on Plaintiffs' Exhibit 5, when the defendants
12 themselves have been studying this through the years, and we
13 haven't had access to that information, when we haven't been
14 given a single deposition on it yet, we did our best with the
15 information as it came in. We promptly came to the Court, we
16 proceeded with diligence; which is the standard.

17 If this Court is going to adopt Rule 16, which the
18 plaintiffs respectfully disagree with, the standard in the
19 Third Circuit remains a strong liberality in granting
20 amendments and there's a general presumption. And we believe
21 that, if the Court were to turn to Rule 16, based on the prior
22 amended order, it would have to accept the fact that that
23 order from Judge Arleo from three years ago governs the case
24 and that the amendment somehow causes delays in that order.

25 But it doesn't, because that order had been modified

1 subsequently for reasons totally unrelated to this proposed
2 amendment. We would have had delays in the schedule, whether
3 or not plaintiffs moved to amend that complaint or not. And
4 that's because we haven't gotten the discovery that we've
5 requested. We're still bickering over it. So, --

6 THE COURT: I don't disagree with everything you're
7 saying about what the standard is. And I -- and we all know
8 that there are very few motions to amend that get denied.
9 They do get denied, though.

10 When I first read these papers, my major question is
11 why is this changing again. And I -- and that's why I wanted
12 to have -- I am probably going to reserve today, because I
13 want to consider exactly what's going on here. I think we're
14 very close, if not -- I've kind of said I think we're -- it's
15 a Rule 16 standard, based on what's happened.

16 On the other hand, that's why I'm asking you. What
17 have you found out now that wants -- makes you want to change
18 what the -- I guess the geographical areas are that are under
19 consideration? Because I would have presumed that this type
20 of a issue, which I think everybody kind of knows it's out
21 there in Jersey City, we would have known where the -- where
22 it went.

23 MR. GERMAN: Judge, the -- some of the specific
24 examples of an -- first of all, it is absolutely not true that
25 people would know where it went. I have to respectfully

1 disagree with that.

2 THE COURT: I guess I'm trying to figure out whether
3 you are trying to make the class an appropriate class or
4 whether you are trying to make it the best class.

5 MR. GERMAN: Where -- what --

6 THE COURT: Do you understand that -- all that I'm
7 saying?

8 MR. GERMAN: Sure. Sure. So, let me answer two
9 questions. What are some examples of things we've obtained?
10 We've obtained internal studies that Honeywell did that
11 demonstrate that chromium blowing off of these sites migrates
12 into these class areas.

13 THE COURT: As opposed to the former class areas that
14 you named?

15 MR. GERMAN: Well, that's right.

16 THE COURT: Or in addition.

17 MR. GERMAN: We -- we --

18 THE COURT: Or is it in addition to?

19 MR. GERMAN: It's -- it definitely -- I mean, they
20 talk about the direction that the waste is migrating; towards
21 the south and southeast. If you look at the class areas --

22 THE COURT: And you didn't know that before?

23 MR. GERMAN: That's correct.

24 THE COURT: And when did you learn that?

25 MR. GERMAN: We learned that in recently-produced

1 documents. I could not stand here and tell you which of the
2 14 or 15 productions involving several million documents that
3 that was in.

4 THE COURT: But at least as late as the spring of
5 2013?

6 MR. GERMAN: I -- that --

7 THE COURT: Is that what you're going to --

8 MR. GERMAN: I -- I -- I --

9 THE COURT: I need you to tell me yes or no to that.

10 MR. GERMAN: I -- that's my belief. I mean, Your
11 Honor, there's a practical element here of us getting through
12 the material.

13 THE COURT: And I understand that, too.

14 MR. GERMAN: But that's when we learned of it. It
15 was very recently that we learned of it. It may have been in
16 one of these voluminous productions, --

17 THE COURT: Okay.

18 MR. GERMAN: -- but when we got to it was around this
19 time.

20 We had no access, none whatsoever, to the results of
21 the residential inspection program.

22 THE COURT: Okay.

23 MR. GERMAN: We had no access to the questionnaires
24 that -- the results of the questionnaires that PPG's public
25 relations staff and the independent site administrator had in

1 its files that we subpoenaed and didn't get access to for over
2 a year. There are maps, there's environmental data, there's
3 information about the chemical composition of the waste.
4 There is -- there is so much information that we did not have
5 access to before this that we now have.

6 It is true, Your Honor, it is true that we had a lot
7 of information, but --

8 THE COURT: But the inform -- I'm not -- I don't want
9 to be too dense about this. All I'm make -- what I'm putting
10 you to the task, in your words, is to tell me what information
11 you got recently -- and by recently, I'd say in the spring of
12 2013 -- that persuaded you that you need to change the
13 geographical area again to follow the facts, if you will?

14 MR. GERMAN: It was the -- it was our ability to --

15 THE COURT: Your diligence, in other words.

16 MR. GERMAN: It was what? Our what?

17 THE COURT: Your -- in other words, I'm -- I want you
18 to talk to me about your diligence --

19 MR. GERMAN: I -- I -- and --

20 THE COURT: -- in getting the information.

21 MR. GERMAN: Well, our diligence in getting the
22 information was, A, issuing the re -- in the first instance,
23 was issuing a request, sending out the subpoenas trying to get
24 the information. And that didn't flow immediately. In fact,
25 it took a very long time. We're still waiting on information

1 for over 15, 16 months that would -- that could ultimately
2 affect the final precise boundaries of this class.

3 THE COURT: So, that was actually almost my next
4 question. Is it conceivable that there will be a fifth motion
5 to amend the complaint?

6 MR. GERMAN: We don't anticipate that. We do
7 anticipate the possibility after the expert work is completed,
8 as in all -- virtually all environmental class actions, and
9 most class actions, that there may be some honing and
10 recontouring of the class based on the geographic location of
11 the waste. I mean, there's going to be air expert modeling
12 that may be done in this case that tells us the precise
13 boundaries. It -- they may move it a little bit. But based
14 on the information that we learned leading up to this
15 amendment, we think this is the appropriate area.

16 And you asked if we're looking to craft the best
17 class or an appropriate class. And the answer is --

18 THE COURT: Of course, the definition of best is
19 important, but that's --

20 MR. GERMAN: The answer is that we have an obligation
21 to move forward with a class that we believe that we can
22 certify, that meets our Rule 11 obligations to litigate, and
23 that is not a waste of this Court's or the parties' time in
24 litigating. And in that respect, the best class is the
25 appropriate class, because in our belief, based on our

1 analysis of the facts, these are the areas where there is the
2 most serious concern in the city, it -- they are the areas
3 where we're going to have the least fighting with the
4 defendants about whose waste it is.

5 If I may remind Your Honor, as we've set forth in the
6 briefs, we're focused on the areas now where the defendants
7 manufactured their waste and disposed of it on contiguous
8 adjacent parcels of land. All of these other sites on the map
9 are areas where waste was trucked off and the defendants say,
10 we have no idea whose waste it is, how it got there, and we're
11 going to --

12 THE COURT: Do you have a copy of the map with you?

13 MR. GERMAN: Sure, Your Honor. If I may?

14 THE COURT: You have it; right? You have the map?

15 MS. DAVIS: Not the one that he is --

16 MR. GERMAN: It's Plaintiffs' Exhibit 1 of the motion
17 to amend and Plaintiffs' Exhibit 5 of the reply brief.

18 If you look at Plaintiffs' Exhibit 5, Your Honor,
19 we've narrowed this case down from sites all across the city
20 to those areas where we know the defendants' waste was
21 manufactured and the adjacent lands where it was disposed.
22 These are the areas where we have testimony that has recently
23 been developed that people have expressed very serious concern
24 about the presence of this waste in the community. They have
25 expressed concern about the health of their neighbors, their

1 property, their property values, their families. And we could
2 set aside and hone in on the areas of most serious concern in
3 the city.

4 And these are also the areas where the scientific
5 evidence is beginning to develop and will come out in expert
6 testimony that this is physically where the waste is and these
7 are where the dust -- these are where the residential
8 inspection program took place, these are the -- the
9 information we obtained recently, the -- from the site
10 administrator and other resources that were produced, these
11 are the areas where we believe the appropriate and the
12 correct, Your Honor, to use that word, correct classes are.
13 And we see great efficiencies in litigating this class as
14 opposed to the other classes.

15 THE COURT: All right. I have another question, but
16 I think it might -- the defendants may -- is Ms. Davis -- who
17 is going to be arguing; Ms. Davis?

18 MS. DAVIS: I think we may both want a turn, but it
19 may make sense for Mr. Coughlin speak first, because --

20 THE COURT: Okay.

21 MS. DAVIS: -- he can speak to the site administrator
22 and the --

23 MR. COUGHLIN: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. COUGHLIN: As you indicated, this isn't a new

1 problem. As you said, everybody knows about this issue. It's
2 been around in the regulatory realm since the '80s. There was
3 no secret as to the site itself; it's been sitting there --
4 you know, the production stopped in '63, sold in '64 and
5 demolished -- and for more than a decade it's been sitting
6 there with a fence around it. And so, to hear now that it was
7 in the spring of 2013 that these things suddenly sprung to
8 life, it's a little disingenuous.

9 The -- PPG entered into a settlement with the
10 regulatory agencies in 2009; matter of public record, a lot of
11 press about it. That settlement in part defined a large --
12 and I'm speaking to class area B, which is, in part, around
13 the -- and, Your Honor, here is -- there were two maps that we
14 have provided and these, in part, demonstrate why this is not
15 just an issue of timing, but why it's class. Why are they
16 talking about this class now?

17 Because, as we pointed out -- let me finish the
18 history first. In 2009, with the settlement, there's a thing
19 called a Residential Inspection Program that Mr. German talked
20 about. There is a boundary for that settlement in large part
21 in this 2009 settlement. It's maps on -- it's lines on
22 streets. He picked that up as part of the current definition.
23 That's been there since 2009.

24 The results of that Residential Inspection Program
25 are a matter of public record. They are in the newsletters

1 that go out to the thousands of people in this community.
2 They're on the Web site. They're available. There has been
3 public hearing after public hearing by the site administrator.
4 Mr. German attends those, and so he knows everything that's
5 been going on since those started in late 2009.

6 The blood sampling program. Thousands of
7 notifications went out about that program, 40 -- only 42
8 people signed up. But thousands were invited, 42 showed up.
9 The results of that program; again, published on the Web site,
10 published in the newsletter. All a matter of wide
11 dissemination. This isn't about a lightbulb went off in the
12 spring of 2013.

13 We hear this constant refrain now, it's -- Mr. German
14 said it repeatedly, this is the area of most serious concern.
15 Well, to me that sounds like a predominance question actually
16 for Rule 23, but that issue, this concern has been voiced at
17 these public meetings by individuals who rose to speak;
18 meetings that Mr. German and Mr. Rubenstein have been at since
19 the beginning. So, again, this isn't an issue of timing.

20 Yes, there have been a million pages plus produced by
21 my client, and I know the same amount by Honeywell, but they
22 were produced because the plaintiffs insisted we have
23 100-and-some sites, you're going to produce documents on every
24 single site. We went back and forth about that, but that's
25 why there's a million documents.

1 THE COURT: And when were they -- are they -- and,
2 now, is it a rolling production?

3 MR. COUGHLIN: It has been a rolling production. We
4 have produced -- because this has been going on for so long,
5 there was a tremendous amount of historical information.

6 THE COURT: When did you begin production?

7 MR. COUGHLIN: After everything was worked out, I
8 believe it was in the summer of last year, I believe.

9 THE COURT: These were the motions in front of Judge
10 Mannion?

11 MR. COUGHLIN: The motion to compel by plaintiffs is
12 resolved.

13 THE COURT: I know.

14 MR. COUGHLIN: But the --

15 THE COURT: But it -- was that part of the motion?

16 MR. COUGHLIN: That was part of it. This issue about
17 subpoenaing the site administrator's records? The site
18 administrator objected, because there is highly confidential
19 information in there about individuals who participated in a
20 blood study, and so you have HIPAA concerns.

21 THE COURT: These are the 42 people?

22 MR. COUGHLIN: Yes. You also have -- at some point,
23 there was much discussion about the confidentiality of the
24 people that participated in the residential sampling program.
25 And but, yes, those were worked out, --

1 THE COURT: Okay.

2 MR. COUGHLIN: -- documents were produced, but it's
3 not as though the program itself suddenly sprung to life.

4 THE COURT: No, I understand. So, I guess what I'm
5 getting at, a picture of this from both sides, is that there
6 was a lot of public information from which you say they could
7 have ascertained the site that they are now -- or the sites or
8 the geographical locations that they are now seeking to use as
9 a class; correct?

10 MR. COUGHLIN: This boundary, again, --

11 THE COURT: Which map are you holding up?

12 MR. COUGHLIN: This is Exhibit 2 to the PPG's
13 response.

14 THE COURT: Okay. This boundary --

15 MR. COUGHLIN: That is 90-plus percent the boundary
16 of the JCO, the judicial consent order entered in 2009. And
17 so, there's -- they have a bolt-on area over here on the -- I
18 guess that would be northeast of the map in the dark blue.

19 THE COURT: Right.

20 MR. COUGHLIN: And so, our issue is, yes, they've
21 gone from -- they've winnowed the class down, in terms of site
22 numbers, but it's not site numbers that matter; it's the
23 people, it's the plaintiffs -- or putative plaintiffs, the
24 putative class members. That's the issue.

25 And so we've gone from geographic quarter mile

1 definitions, which Mr. German's map represents, where he
2 pretty much covered 80 percent of Jersey City. Then we went
3 down to a 300 foot out of the ATSDR --

4 THE COURT: Right.

5 MR. COUGHLIN: -- and the interesting part about that
6 is that was based upon apparent modeling that the New Jersey
7 DEP or EOHSI did with regards to potential spread.

8 And we have -- we gave you, Your Honor, that Exhibit 2
9 represents 300 feet from the various sites that now find
10 themselves as part of class B. So, the blue represents areas
11 that would be unaffected.

12 You look perplexed.

13 THE COURT: I'm just trying to make sure I understand
14 the distinctions between the various areas.

15 MR. COUGHLIN: If you look at --

16 THE COURT: How is your Exhibit 2 different from what
17 their --

18 MR. GERMAN: Your Honor, could I just --

19 THE COURT: If -- if --

20 MR. GERMAN: Could I just say something about the 300
21 foot boundary? It's simply wrong. That's not what the
22 amended complaint said.

23 MR. COUGHLIN: Well, I --

24 MR. GERMAN: The amended complaint --

25 THE COURT: What -- wait. The old amended complaint?

1 MR. GERMAN: Yeah, the --

2 THE COURT: I don't even want to argue about it.

3 MR. GERMAN: Okay. So, --

4 THE COURT: If you disagree, that's okay.

5 MR. COUGHLIN: But what we're talking about are --
6 we've gone from these circumferential dif -- geographic areas
7 to now lines on streets.

8 THE COURT: I want to make sure everybody understands
9 that -- and I know you understand this. I want to make sure
10 you understand that I understand this. We are not doing a
11 motion for class certification today.

12 MR. COUGHLIN: I -- and I understand, but our -- my
13 point is, why this class? Why this definition? Because --
14 and then, once you read it, --

15 THE COURT: Well, there are two questions I would
16 have. Number one, does it make any sense at all?

17 MR. COUGHLIN: No. Be --

18 THE COURT: Well, why doesn't it make any sense at
19 all?

20 MR. COUGHLIN: Two reasons. The definition as -- or,
21 you know they throw this perimeter out there. It doesn't make
22 sense based upon the factual record that's been developed.
23 It's -- again, it's just lines on streets. It -- and I know
24 Ms. Davis has even more concerns about it. The geographic or
25 lines on streets that plaintiffs have drawn with regard to

1 class B is -- again, is merely a negotiated settlement in the
2 JCO between a governmental organization and PPG that bears no
3 relationship to the conduct of PPG.

4 THE COURT: Well, --

5 MR. COUGHLIN: And then, the actual class definition.
6 If you read the class definitions themselves, I have no idea
7 what they mean. With respect to property owned in 2008, for
8 those people who own property in 2008, I have no idea what
9 that means. Nor do I understand why --

10 THE COURT: What part?

11 MR. COUGHLIN: If you go to what the actual class
12 definition is, and class --

13 THE COURT: What are you reading from?

14 MR. COUGHLIN: Their complaint, which is paragraph 64.

15 THE COURT: Hold on. Let me find the -- the proposed
16 complaint?

17 MR. COUGHLIN: Yes.

18 THE COURT: Okay. Go ahead.

19 MR. COUGHLIN: And, again, I'll stick with Class B.
20 "With respect to property owned as of September 30 2008, all
21 persons who, as of September 30, 2008, owned any real property
22 not zoned for industrial use exclusively." I don't even know
23 what that means. And so, in terms of being problematic, it --
24 this complaint presents any number of them.

25 Why -- as you have said, Your Honor, why this class?

1 Why this area? You -- when you --

2 THE COURT: Well, I say that in the context of what's
3 going to happen six months from now. And in the context of
4 why didn't we have this area before. Plaintiffs' counsel has
5 explained to me why they haven't had this area before. You
6 disagree with that explanation; I understand that and I'll
7 hear that. And then the other part of it is, I don't want to
8 do this again if we could possibly in any way avoid it.

9 MR. COUGHLIN: So, we've had this long history of
10 amendments that have been drug along, --

11 THE COURT: And I understand that. That's what
12 causes me -- that's what gives me some concern.

13 MR. COUGHLIN: And now, under this one, with no
14 explanation whatsoever -- and as Your Honor is looking at a
15 Rule 16 standard -- no explanation whatsoever as to why we go
16 from 2010, the filing date of this litigation, now we're sort
17 of backtracking to 2008. And so it's a totally different
18 definition of property ownership. Forget about the geographic
19 area. So, now there are people that were in the class under
20 the prior definitions that are now out of the class. With no
21 explanation whatsoever in the comments --

22 THE COURT: Well, the explanation was given today.

23 MR. COUGHLIN: That explanation did not even touch on
24 why 2008 versus 2010. Because -- and we raised this in our
25 brief about, you had people that --

1 THE COURT: But here -- you know what? We're going
2 down the road of those that I do want to avoid. Or not avoid,
3 but I want to make sure you -- I think your arguments are
4 better suited when you are going to oppose the motion for
5 class certification.

6 MR. COUGHLIN: I don't --

7 THE COURT: And they may be really very strong and
8 powerful arguments. Okay? Based on what I've read, but I
9 won't be deciding that motion unless something really horrible
10 happens.

11 MR. COUGHLIN: But if --

12 THE COURT: Worse than sequester.

13 MR. COUGHLIN: But if Mr. German is arguing to the
14 Court that this is the best, this is the best definition --

15 THE COURT: Well, all -- well, you're --

16 MR. COUGHLIN: -- they can come up with, --

17 THE COURT: You're taking today as an opportunity to
18 tell him that you're going to really make it hard for motion
19 for class certification.

20 I am more concerned with, has there been a lack of
21 diligence? I've given him an opportunity to talk about that.
22 Has there been newly-discovered evidence? I know that -- I
23 think it's in your brief where you say only two depositions
24 have happened after he drafted the complaint and I'm going to
25 hear from you on that. But those are the issues for his

1 ability to -- and we haven't gotten to one other issue, and
2 that is prejudice and what's going to happen if I grant this
3 motion, in terms of discovery and costs and things like that.

4 Okay?

5 So, certainly -- I get your arguments. I actually --
6 I get it, but I don't think they rule the day on motion to
7 amend.

8 MR. COUGHLIN: Only with regard to the good cause
9 standard, Your Honor. When there's no explanation whatsoever
10 as to why plaintiffs are now kicking people out of the class.
11 Even in this geographic area, Your Honor, under their prior
12 definition there were people in this area that were in the
13 class that sold their property in 2009 and 2010 that he's
14 booted out of the class.

15 THE COURT: And I don't know if you're arguing what I
16 think you may be arguing, but I would understand why you might
17 be concerned that there might be another class sitting out
18 there.

19 MR. COUGHLIN: Yes.

20 THE COURT: Okay. So, I think that actually might be
21 resolved in a different way. And we can talk about that at the
22 end of the day, in terms of maybe -- I don't know if it's
23 possible -- but maybe we can sit down and talk about and maybe
24 negotiate -- not without waiving any rights to -- about
25 certifying the class, but maybe we can negotiate something

1 about we ought to be fighting over in the future.

2 MR. COUGHLIN: And that's -- our concern is, because
3 -- and, again, if there was some rationale for this that we
4 could have addressed in -- and we asked this question --

5 THE COURT: People are either going to meet the Rule
6 23 standards or not, in terms of whether they're injured and
7 how they're injured and whether they have commonality and
8 typicality and all that. I under --

9 MR. COUGHLIN: This -- but --

10 THE COURT: But we need to find out who those people
11 are.

12 MR. COUGHLIN: It -- but as a more fundamental
13 matter, Your Honor, when we had our meet and confer about
14 whether we would accept -- and this isn't even what they had
15 initially put up. But I asked the question why? Why are they
16 going to 2008? What is the basis behind this?

17 THE COURT: All right. Well, I ask him the question.

18 MR. COUGHLIN: Thank you, Your Honor.

19 THE COURT: Okay.

20 MS. DAVIS: Thank you, Your Honor. I just want to
21 add to some of the things that Mr. Coughlin mentioned and talk
22 about a few things that are also relevant to Honeywell,
23 specifically.

24 I agree with you 100 percent that diligence is the
25 standard, Rule 16. In fact, the cases that the plaintiffs

1 themselves admonished us for not citing say that very thing,
2 so I'm not sure where they were going with that. But, in any
3 case, diligence is the standard.

4 They have talked about depositions of site
5 administrator, they've talked about documents that they got
6 from -- voluminous documents that they got from PPG's site
7 administrator relating to community concerns. Mr. Coughlin
8 has already pointed out that they had access to much of that
9 information, if not all of it, in advance of getting those
10 productions. And as we pointed out in our papers, they, in
11 fact, drafted the new complaint before they had the benefit of
12 those depositions. So, I think it's really makeweight to say
13 that that is the basis for all these changes.

14 But setting even that aside, none of those documents
15 relate to Honeywell or any of the Honeywell sites. Or the
16 areas around the Honeywell sites. So, there has been no
17 explanation, other than what I heard today for the very first
18 time, which was not brought up at the meet and confer and it
19 was not brought up in the briefs to my knowledge, some --
20 about some study about the migration of -- a migration study
21 that Honeywell did, which I can't -- therefore, I'm not
22 prepared to give you a date on when it was produced, because I
23 didn't know that was the basis of their change to their
24 complaint, because they've never mentioned it before. So,
25 that appears to me to be a late-found excuse for having made

1 these amendments.

2 The only -- the fact is that the only information
3 that the plaintiff learned in discovery is that the named
4 plaintiffs, the class representatives that they have, have no
5 injury. They testified that their homes weren't tested or
6 either -- either they weren't tested or they were tested and
7 revealed no contamination. Their persons were not tested.
8 They didn't know whether their properties were contaminated.
9 They weren't aware of the supposedly course-changing study
10 that the plaintiffs rely on to avoid the statute of
11 limitations.

12 So, you know, in light of that, it's not surprising
13 that the plaintiffs have gone back to the drawing board, but
14 it is too late. There is nothing new that they learned in
15 discovery that prompted these changes, and all of what you're
16 hearing today I think is just an attempt to talk around the
17 issue.

18 You mentioned in your conversation with Mr. Coughlin
19 this issue of whether there's another class out there. Is
20 this the best or the most -- is the -- actually the
21 appropriate class or is this just their attempt to get some
22 class certified? I feel very strongly that there is -- this
23 is not a certifiable class, even as amended, but that doesn't
24 change the fact that it's an improper amendment, it's
25 untimely, it's improper, and it's not made in -- for good

1 cause.

2 And to your question about, you know, outstanding
3 classes and outstanding plaintiffs, Latreica Smith -- who, by
4 the way, was in the case, out of the case, --

5 THE COURT: I know.

6 MS. DAVIS: -- back in the case, with no knowledge
7 that -- she had no knowledge about any of this. She was not
8 consulted, according to her deposition testimony. In and out,
9 in and out. She's now out again. And after this proposed
10 amended complaint came across, we actually asked the
11 plaintiffs whether they were going to voluntarily dismiss her
12 with prejudice; the answer was no. And we broke on that and
13 we asked what the situation was and what -- all we -- all we
14 were told by the plaintiffs was that they don't represent her,
15 they don't think she has a claim under the current new amended
16 complaint, but that's all they're willing to say. That seems
17 to us highly inappropriate.

18 THE COURT: I'm sorry. Have you deposed her?

19 MS. DAVIS: We did. We did.

20 THE COURT: All right.

21 MS. DAVIS: You know, again, the issue, as you've
22 pointed out and we've discuss a couple of times is diligence
23 and not prejudice. But we did ask about the prejudice and I --

24 THE COURT: Yeah, I'd like to talk about that now.

25 MS. DAVIS: -- I take -- I take the plaintiffs'

1 claims that this will create efficiency. You know, I don't
2 know if they believe that's true, but it's interesting to me,
3 given that they've been unwilling to forego any discovery on
4 the other side. It's essentially -- I mean, even this week,
5 we have been talking about their demands for discovery as to
6 sites that are no longer in the case. So, that is -- it -- we
7 are prejudiced retrospectively by having to produce a ton of
8 material on sites that they now are no longer interested in
9 and that they haven't let go of, even to this day.

10 And, you know, this is, in fact -- drawing the lines
11 as they have, changing the manner in which they are
12 approaching identifying the class and certif -- and attempting
13 to certify the class is a change of theory. I mean, they --
14 it was very clearly based on some form of dispersion from a
15 center point to surrounding areas and now I don't know what it
16 is, and they haven't explained what it is.

17 I mean, they point to the lines drawn on the map for
18 PPG and they point to the fact that it has to do -- that it
19 comports with the Residential Inspection Program or the JCO
20 boundaries. None of that has anything to do with Honeywell,
21 and those lines mean nothing as to Honeywell, and they have
22 not explained to us why the line -- why ohne person on one
23 side of the street is in the class and the person across the
24 street is outside of the class. There has just been no
25 explanation.

1 So that, you know, there's a lot of issues here and
2 we do, you know, really object to this amendment and fear
3 future amendments as well. I mean, I don't know how many
4 times we have to go through this exercise.

5 THE COURT: How much -- let's talk about the
6 discovery, in terms of -- let me go to the plaintiff first.

7 MS. DAVIS: Okay.

8 THE COURT: If I grant this motion, what further
9 document discovery are you going to be seeking?

10 MR. GERMAN: Your Honor, I think that the document
11 discovery has -- the actual flow of paper is very near its
12 end. We have some subpoenas out that we haven't received
13 responses to yet and --

14 THE COURT: But will there be new document demands
15 based on this if I grant the motion?

16 MR. GERMAN: No, not -- not to the parties, no.

17 THE COURT: And will there be a letter to the parties
18 suggesting they supplement their discovery responses based on
19 the amendment?

20 MR. GERMAN: No, Your Honor. This -- this amendment
21 narr --

22 THE COURT: In other words, the same document
23 demands, but now --

24 MR. GERMAN: It's -- this narrows discovery, it
25 doesn't broaden it in any way. Again, the maps --

1 THE COURT: So, you won't be seeking any additional
2 document discovery from any of the parties, and what about for
3 certain -- from third parties?

4 MR. GERMAN: We probably have some subpoenas out --

5 THE COURT: Are they already out?

6 MR. GERMAN: Most of them are out. There may be
7 another one or two, but --

8 THE COURT: Two?

9 (Discussion among counsel, off the record.)

10 MR. GERMAN: There may be some environmental
11 contractors, but --

12 THE COURT: Okay.

13 MR. GERMAN: Your Honor, I understand you're asking a
14 practical question. It doesn't -- you know, it doesn't bear
15 on the definition, but --

16 THE COURT: Well, it bears on the motion.

17 MR. GERMAN: So, we are not asking -- it's
18 inconceivable, standing here right now -- this is our
19 representation to the Court -- that, based on this amendment
20 we would need more information, what we've --

21 THE COURT: What about depositions?

22 MR. GERMAN: That we'd request more information.

23 THE COURT: What about depositions? Would it change
24 -- we started -- obviously, you've taken some depositions.
25 Where are we with depositions?

1 MR. GERMAN: I want to be clear. This amendment will
2 only serve to narrow discovery.

3 THE COURT: I know you make that argument. And I --
4 and now you're making it, representing it to me in court. I
5 got it.

6 MR. GERMAN: I cannot -- I could give you a list of
7 the depositions we anticipate, but --

8 THE COURT: Well, has that list or will it change if
9 I grant the motion?

10 MR. GERMAN: No, the -- my point is that the list
11 would stay the same --

12 THE COURT: Okay. All right.

13 MR. GERMAN: -- no matter what, but I can't promise,
14 standing here today, that there wouldn't be a follow-up
15 document request, a follow-up deposition, but that's not
16 related in any way to the amendment, because this --

17 THE COURT: I understand. You answered that question.

18 MR. GERMAN: Okay.

19 THE COURT: Would you be seeking more discovery based
20 on this amendment if I granted it?

21 MR. COUGHLIN: Your Honor, the prior CMO provides for
22 discovery on new putative class representatives and the -- any
23 remaining class representative based upon the change.

24 THE COURT: So, that would be three or -- two or
25 three people; correct?

1 MR. COUGHLIN: Correct. Along with then the
2 associated third-party document discovery. And we found --
3 you know, with regard to their lenders and the like.

4 THE COURT: Mm-hmm.

5 MR. COUGHLIN: With regards to areas that were never
6 in the class that I think as we've highlighted in blue, there
7 are areas that we have to change now, because they have
8 expanded beyond what was in the -- based upon these sites,
9 what was in the previous definition. So, there is going to be
10 some additional analysis and discovery.

11 THE COURT: Well, what's expanded?

12 MR. COUGHLIN: If you look at Exhibit 1, which has
13 the limited amount of blue --

14 THE COURT: And the blue is the new stuff?

15 MR. COUGHLIN: Yes.

16 THE COURT: Okay.

17 MR. COUGHLIN: And I think one of the plaintiffs is
18 even -- the new putative plaintiffs is in the blue on the
19 north. But now we have totally retool expert analysis also.
20 Which has been going on behind the scenes, if you will.

21 THE COURT: Right.

22 MR. COUGHLIN: And so it does dramatically change the
23 direction of how we're going about defending the case,
24 because, as Anne said, it's a whole new theory of liability.

25 THE COURT: Because?

1 MS. DAVIS: Well, that -- I mean, that -- I --

2 THE COURT: Or just remind me again why it's a new
3 theory.

4 MS. DAVIS: Well, it's a new theory in the sense
5 that --

6 THE COURT: It's still in the air and under the
7 ground.

8 MS. DAVIS: But they have --

9 THE COURT: And where it went --

10 MS. DAVIS: But they have changed the approach with
11 which they are defining the class, and that is very much the
12 subject of what will be expert discovery in this case. And
13 it's one of the ways in which we are prejudiced, in that we
14 have to go back now for the fourth time --

15 THE COURT: Well, they've define -- I want to make
16 sure I understand this. This may be my fault here.

17 MS. DAVIS: Yeah.

18 THE COURT: They're define -- they're changing the
19 definition of where to find the damage. Right? No.

20 MR. COUGHLIN: It's that -- the sites have always
21 been known. Where the COPR waste has been is al -- has always
22 been known.

23 THE COURT: Has always -- I know.

24 MR. COUGHLIN: The question around, around it.

25 THE COURT: How -- I --

1 MR. COUGHLIN: How are they defining around it?

2 THE COURT: I know. In other words -- and that's a
3 scientific investigation. Flowing under the -- in the --
4 under the ground.

5 MR. COUGHLIN: There's no groundwater, but --

6 THE COURT: And in the air. Right? I mean, that's
7 the only two ways to get it. Nobody actually built pipes and
8 piped it right into the house or anything; correct?

9 MR. COUGHLIN: Correct.

10 THE COURT: Okay. I don't mean to -- I didn't mean
11 to be facetious; but, I mean, it's air or ground. Or water.
12 So, it's changing the location, not how -- is it changing how
13 it happened? Or how it may have moved?

14 MS. DAVIS: I don't know the --

15 THE COURT: We don't know?

16 MS. DAVIS: I don't know.

17 MR. COUGHLIN: You -- you certainly --

18 MS. DAVIS: They haven't told us what the basis is
19 for the new lines on the map. We don't understand why they've
20 changed it. It's not -- it doesn't comport with any distance
21 from a site any more, so I don't understand.

22 THE COURT: Mr. German?

23 MR. GERMAN: Your Honor, first of all, it's very
24 clear -- I mean, the complaint hasn't changed all that much.
25 What we've done is, we've changed the class definition. We

1 haven't added claims, we haven't added new causes of action,
2 we haven't changed the theory of how things moved. The
3 Paragraph in the first amended complaint that said, you know,
4 wind --

5 THE COURT: But --

6 MR. GERMAN: -- wind blow and natural processes, this
7 is the same paragraph that's in the current complaint. And I
8 think this only goes to the point that Your Honor was making.
9 Two points. One, this is not a class certification hearing.
10 And the second is, we need -- we all need an opportunity to do
11 our expert work.

12 THE COURT: Well, but Ms. Davis has made this point a
13 few times, and I think it's a fair point in the context of
14 this motion and is -- well, how is Honeywell -- when you use
15 PPG settlement lines and -- or more or less -- how does that --
16 how does Honey -- how is it fair to Honeywell? How do they
17 defend this case?

18 MR. GERMAN: It's the -- it's -- it -- there are two
19 completely different issues. The -- PPG -- let me take a step
20 back again. There is a process; right? There is a scheduling
21 order and a process. They've raised the scheduling order. It
22 provides for discovery and then it provides for us to get that
23 discovery, review it, take the depositions and consult with
24 our experts. Air experts, toxicologists, experts on fate and
25 migration, toxicity of chromium; things like that. We haven't

1 done all that today.

2 We have done a lot of and we've done it diligently.
3 We took the information that we set forth on page 13 of our
4 brief, that we only recently obtained, and we worked with our
5 experts. And our experts -- and I don't think it's
6 appropriate for us to go into all the expert detail right now
7 -- they told us that these are the areas where they anticipate
8 -- based on the information that was produced, these are the
9 areas they anticipate there to be chromium dust in these
10 homes.

11 On top of that, we found studies from P -- from
12 Honeywell -- and you asked about the Honeywell area
13 specifically. We found studies and other information -- and
14 the experts put together, we consulted with them and it says,
15 you know what? The chromium moves in this direction when --

16 THE COURT: Are you --

17 MR. GERMAN: -- when it's blowing in the air.

18 THE COURT: Are you still --

19 MR. GERMAN: And it goes a certain distance.

20 THE COURT: Are you seeking to hold Honeywell
21 responsible for all three classes?

22 MR. GERMAN: No, and it's very clear in the complaint
23 there is a conspiracy claim for their joint efforts. And this
24 is -- I don't want to quote Judge Cavanaugh's lengthy opinion
25 in Interfaith, it's a 100 page opinion, with which I refer

1 Your Honor, that goes through extensively the history of what
2 was done by the chromium industry in Jersey City.

3 So, there is a claim that the defendants worked
4 together to mislead the public and regulatory agencies about
5 the extent of the contamination, its risks and the risk to the
6 surrounding community. And Judge Wigenton already ruled,
7 seeing some of that information, already ruled on statute of
8 limitations with respect to their internal studies and what
9 was represented to the public. So, there is a conspiracy
10 claim, but we are not seeking to hold PPG liable for what
11 Honeywell did in its disposal area, or Honeywell liable for
12 what PPG did in its disposal area.

13 MS. DAVIS: So, can -- can I just speak to that point
14 for one moment? Which is that one of the additions in the new
15 amended complaint is paragraph 62, which reads: "Upon
16 information and belief, COPR beginning -- originating at
17 Honeywell's facility and COPR originating at PPG's facility,
18 became commingled at both disposal areas A and B, defined
19 below, and impacted the respective classes." That is a new
20 allegation. Brand new. No understanding of the basis for it.

21 MR. GERMAN: Your Honor, --

22 MR. COUGHLIN: And contrary to the record and
23 statements that you've made.

24 MS. DAVIS: Yes.

25 MR. GERMAN: Your Honor, we stood in this court in

1 front of Judge Waldor and in front of Judge Mannion for a
2 year, maybe two years, and we tried to get each of these
3 defendants to tell us where did you put your waste, and they
4 stood in front of Judge Mannion and they stood in front of
5 Judge Waldor and they said, we don't know, we -- we think it's
6 all mixed in, it's all commingled. And based on that, we put
7 that allegation in.

8 But recently, after Judge Mannion twisted some arms,
9 sat us down in his courtroom and made us work through -- after
10 -- work through some of that discovery, after this proposed
11 amendment, they finally told us that they didn't have evidence
12 that the waste was commingled. So, for that to be raised here
13 today is pure gamesmanship and it's a semantic change that
14 could be made to the amendment in the complaint.

15 MR. COUGHLIN: You raised it, Your Honor. It's not
16 gamesmanship. You raised it.

17 MS. DAVIS: No, Judge. That's a complete
18 misrepresentation --

19 THE COURT: I'm not taking responsibility.

20 MS. DAVIS: -- of the history of this case.

21 THE COURT: All right. Listen. I have some -- all
22 right. I have an idea about this. Prejudice, in terms of new
23 -- frankly, I think you just answered all my questions. If
24 you don't know the basis for this, you're going to need to
25 take discovery on this allegation. Number 62. Correct?

1 MS. DAVIS: But who is going to answer it; the
2 lawyers?

3 THE COURT: All right. Does anybody have anything
4 else to say? You've got these people behind you waiting.

5 All right. Have you -- are we done? I've heard what
6 I need here.

7 All right. You'll hear from me. Thank you.

8 MR. COUGHLIN: Thank you.

9 MS. DAVIS: Thank you.

10 MR. GERMAN: Thank you, Your Honor.

11 MR. McDONALD: Thank you, Judge.

12 (Conference adjourned at 11:33 a.m.)

13 * * * * *

14

15 C E R T I F I C A T I O N

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

20

21

22 10/21/13

S / Terry L. DeMarco

23 Date

Terry L. DeMarco, AD/T 566

24

KLJ Transcription Service

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EXHIBIT 4

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-2712

MATTIE HALLEY; SHEM ONDITI; LETICIA MALAVE;
TEMPORARY ADMINISTRATOR OF THE ESTATE OF
SERGIO DE LA CRUZ

On Behalf of Themselves and All Others Similarly

Situated

v.

HONEYWELL INTERNATIONAL, INC. ;
PPG INDUSTRIES, INC.

Maureen Chandra,

Appellant

Job No.: WDC-138438
Pages: 1 - 35
Transcribed by: Jackie Scheer

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3, 32	ORAL ARGUMENT By Mr. Paciorkowski
18	By Mr. Roisman

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1 1217 applies in this case. The second is that the
 2 PPG expenses should not be taken out of the
 3 Honeywell settlement. And then the third issue is
 4 that rule 23-H was violated.
 5 With regard to rule 1217, that rule
 6 applies to contingency fee cases involving tortuous
 7 conduct. Here the tortuous conduct is product
 8 nuisance, trespass, strict liability, and
 9 negligence. Clearly it applies in this case.
 10 THE COURT: Is there any conflict between
 11 the New Jersey state laws governing attorneys fees
 12 and rule 23-H of the federal rules? That would
 13 preclude a court from applying New Jersey law. Is
 14 there any conflict there?
 15 MR. PACIORKOWSKI: I don't believe
 16 there's any conflict that would -- that would
 17 restrict New Jersey's rule of making the attorney
 18 fee calculated on the net settlement as opposed to
 19 the gross in conflict with rule 23-H. And that's
 20 really what -- the reason for bringing the statute
 21 to bear is, is for that particular purpose. And
 22 that's the -- that's the primary purpose of that

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1 P R O C E E D I N G S
 2 THE COURT: Number 16-2712, Halley, et
 3 al. versus Honeywell International, et al.
 4 Mr. Petrikowski (phonetic) and Mr. Rosemond
 5 (phonetic). Roismon (phonetic). Probably
 6 butchering both names. Is it Roismon?
 7 MR. ROISMAN: It is Roisman, yes. Thank
 8 you.
 9 THE COURT: Yes. Is it Pejorskowski or?
 10 MR. PACIORKOWSKI: Paciorkowski.
 11 THE COURT: Okay. I'll let you pronounce
 12 it and then I'll try to make sure I follow.
 13 MR. PACIORKOWSKI: Good morning, Your
 14 Honors, Thomas Paciorkowski on behalf of Maureen
 15 Chandra. I'd like to reserve five minutes of
 16 rebuttal time.
 17 THE COURT: That's fine.
 18 MR. PACIORKOWSKI: We've been notified
 19 that oral argument is gonna be limited to the
 20 attorney fee and expense issues, so that's all I'm
 21 gonna touch upon here. With regard to those issues,
 22 there are three main issues. The first is that rule

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1 statute is to compute the fee on the net recovery,
 2 and this court in Nitzel (phonetic) versus Resting
 3 House actually analyzed that statute -- that court
 4 rule in a personal injury case and actually said
 5 that it's -- it's there to protect the client
 6 because of the unequally bargaining power between
 7 the attorney and the client.
 8 THE COURT: That wasn't -- that wasn't a
 9 class action case, was it?
 10 MR. PACIORKOWSKI: No it wasn't. It was
 11 a personal injury case.
 12 THE COURT: Isn't -- isn't that a
 13 substantial difference in the facts, then? That is,
 14 rule 23 applies in class action cases but was not
 15 applied -- was not applicable in Nitzel.
 16 MR. PACIORKOWSKI: Well, I don't -- well,
 17 when you -- when you look at whether or not
 18 something conflicts, you have to see whether or not
 19 you could apply the two of them at the same time,
 20 and if you cannot apply the two, whether it be rule
 21 23-H and the New Jersey court rule at the same time,
 22 then there would be a conflict. And if there is a

<p style="text-align: right;">Page 6</p> <p>1 conflict, then I would say that rule 23-H, which is 2 procedural, would -- would apply. 3 But also in this case, if you think about 4 it, that the local rule actually mandates that the 5 New Jersey court rule applies to the district in New 6 Jersey as well. So the New Jersey Supreme Court has 7 said that the court rule applies to New Jersey 8 admitted attorneys in the state courts and in the 9 federal courts in New Jersey. So I don't think 10 there's any conflict between the court rule and rule 11 23-H. 12 THE COURT: If -- if the -- the district 13 court in this particular case found that even if you 14 computed the fees after reduction for expenses, the 15 amount of the fee was still reasonable, what, 16 28.7 percent or 28.9 percent, something like that. 17 So why does it really matter in this case whether 18 the district court committed an error in the way it 19 went about doing it, when it ultimately concluded, 20 as it was required under rule 23, that the amount of 21 fees were reasonable? 22 MR. PACIORKOWSKI: Well, there's --</p>	<p style="text-align: right;">Page 8</p> <p>1 they -- they go as high as 33 and a third. 2 THE COURT: Or greater sometimes. 3 MR. PACIORKOWSKI: Well, and it's pretty 4 rare to go to the 40 percent range, but there are 5 cases that are cited that do 40 percent. 6 THE COURT: Yeah. 7 MR. PACIORKOWSKI: But when you go to 8 that extreme high end, you have to show 9 justification for that. When -- in this case they 10 asked for 25 percent and then they -- they upped it 11 to 29 percent in a reply brief. And there was no 12 justification given to -- 13 THE COURT: -- no, the dollar amount 14 remained the same. The question is how -- how do 15 you do the -- the numbers? One was 25, one was 16 28.7. But don't the numbers, the actual amount 17 that's requested, stay the same? 18 MR. PACIORKOWSKI: The amount stays the 19 same. 20 THE COURT: Okay. 21 THE COURT: So. 22 MR. PACIORKOWSKI: I can see that the</p>
<p style="text-align: right;">Page 7</p> <p>1 there's three reasons why that's improper. First of 2 all, that enhancement, going from 25 to essentially 3 29 percent, occurred in a reply brief, and you 4 cannot ask for new relief in a reply brief. We all 5 know that. So the district courts should not have 6 -- 7 THE COURT: -- but the amount -- the 8 amount never changed. 9 MR. PACIORKOWSKI: But -- 10 THE COURT: -- the gross -- the dollar 11 amount never changed. 12 MR. PACIORKOWSKI: Yes, but the 13 percentage did. And going back to that particular 14 issue, there's only two ways to get attorney fees in 15 a class action in -- in this circuit, and that's 16 through your load star or a percentage of the 17 recovery. So that dollar amount is actually billed 18 on a 25 percent recovery off the gross. 19 THE COURT: But 30 percent recoveries, 20 even greater than that, are not unusual in common 21 fund cases. 22 MR. PACIORKOWSKI: No, they're not, and</p>	<p style="text-align: right;">Page 9</p> <p>1 amount stays the same. 2 THE COURT: Your position is there should 3 have been a re-notification on that issue? 4 MR. PACIORKOWSKI: Well, I believe it 5 violates rule 23-H that there was not a 6 re-notification, sir. A re-notification was 7 mandated and it could have been on the website. It 8 doesn't mean that you have to send a postcard notice 9 to everybody and incur that expense. But more 10 importantly, what's the reason from going from 11 25 percent to 29 percent? It's to circumvent the 12 New Jersey court rule. And this court acts as a 13 fiduciary to the class and you're supposed to be 14 looking out for the class' interest. This court and 15 the district court are no longer arbitrators or 16 they're no longer referees, but actually stand for 17 the protection of the class. And when you see the 18 class counsel, the only reason from going from 25 to 19 29 percent is to circumvent the role that's meant to 20 protect the class, then you have to step in and do 21 something about that and not allow it. And 22 certainly by -- by raising that fee, that percentage</p>

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1 in a reply brief, certainly that's not allowed.
 2 There's many reasons not to allow that increase.
 3 THE COURT: Other questions? Okay. Hear
 4 from Mr. Roisman. We'll get you back right away.
 5 MR. PACIORKOWSKI: Well, can I address
 6 the other two issues?
 7 THE COURT: Go ahead.
 8 THE COURT: He still has time.
 9 THE COURT: Go ahead.
 10 MR. PACIORKOWSKI: All right. The issue
 11 with regard to PPG's expenses being taken out of the
 12 Honeywell settlement. First of all, PPG operated on
 13 the east side of -- the east side of Jersey City.
 14 What they did on the east side of Jersey City had
 15 absolutely no effect on the west side for classes A
 16 and C. Didn't affect their land, didn't have any
 17 effect on contaminating their property, had no
 18 effect on the property values. And the same thing
 19 as what Honeywell did on the west side. Honeywell's
 20 operation at its facility on the west side had
 21 absolutely no impact on the land on the east side to
 22 the class B land, and it had absolutely no effect on

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1 the class B property values. So these two cases,
 2 classes A and C against Honeywell, and class B
 3 against PPG, are two totally separate cases. They
 4 could have been tried separately. The only thing
 5 that makes them is this conspiracy charge. And it's
 6 very important that what class counsel told Judge
 7 Dixon in 2013, he threw the settlement, they
 8 actually told Judges Dixon that they -- that the
 9 conspiracy charge is only essentially a -- a PR
 10 issue. What Honeywell and -- and PPG did was
 11 conspire to misrepresent the extent of contamination
 12 and the risk. That's all they said about the
 13 conspiracy fee involved, and it did not -- and they
 14 did not seek to hold PPG liable for what Honeywell
 15 did on its property, and they are not seeking to
 16 hold Honeywell liable for what PPG did on its
 17 property. So if you're not gonna hold PPG liable
 18 for what Honeywell did on its property and the only
 19 contamination and the only reason for contamination
 20 on classes A and C's properties is because of
 21 Honeywell, and you're not gonna hold PPG liable for
 22 that, then the recovery that you're gonna seek for

Page 12

1 property contamination and loss property values only
 2 comes from Honeywell. So there's really no reason
 3 for class A and C to litigate against and pay for
 4 litigation costs against PPG 'cuz there's nothing to
 5 be gained from it. And in fact, if you look at the
 6 settlement agreement, class counsel admits that
 7 there's conspiracy claims won't recover anything
 8 above the non-conspiracy claims. So if the -- why
 9 would you spend hundreds of thousands of dollars
 10 litigating against the defendant? There's no --
 11 there's no possibility of you recovering anything
 12 above what the -- the primary defendant's gonna pay
 13 anyway. And nobody's arguing that Honeywell didn't
 14 have the money to pay out here. In fact, they said
 15 that they had plenty of cash to pay out if there was
 16 a judgment against them.
 17 THE COURT: And so the -- the argument, I
 18 take it, was that it was impossible to separate
 19 these -- the work done on both of them in both
 20 matters?
 21 MR. PACIORKOWSKI: Well, I -- I address
 22 that in great detail in the briefs and, quite

Page 13

1 frankly, through experience, everybody knows that
 2 when you hire an expert, the expert gives you an
 3 expert report based on specific things. So if
 4 you're gonna have a loss property value claim on the
 5 west side, it's not gonna take into account anything
 6 happening on the east side. If you're gonna have a
 7 loss property value claim for something that
 8 happened in PPG's area on the east side, how does
 9 that affect the west side? And the same thing with
 10 property contamination. If you -- if you have
 11 property contamination on the west side, how does
 12 that affect anybody on the east side and vice versa?
 13 And more importantly, I was there at that public
 14 hearing, and I asked class counsel about their
 15 experts doing any testing on the class property
 16 related to the damage analysis, and he told me open
 17 mic to everybody our experts did no testing of
 18 anybody's property. So I'm at a loss in how they
 19 spent \$700,000 on experts and then why you can't
 20 separate what those experts did for PPG and what
 21 those experts did for -- for the Honeywell case. I
 22 believe they can and, quite frankly, a lot of the

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1 depositions that took place against -- took place
 2 for Honeywell's employees and for their property,
 3 why isn't that separable from depositions taken
 4 against Honeywell? How about the documents? They
 5 produced a million pages of documents and it's
 6 claimed that there was over a hundred thousand
 7 dollars in expense related to document management.
 8 Well, certainly you could -- you could isolate the
 9 millions of pages of documents for PPG and separate
 10 that expense. There's lots of expenses that you can
 11 separate. It's common sense. But I'll admit that
 12 there's certain owner expenses say the -- the filing
 13 fee of 350. Certainly that's indistinguishable if
 14 you file two cases on that, and anything that is
 15 truly indistinguishable, why not spread it 50/50?
 16 For example, if you're involved in a car accident
 17 and a taxicab and there's another passenger and
 18 you're not -- you're not liable for that taxi cab
 19 'cuz you're a passenger, you hire an attorney 'cuz
 20 you're personally injured, and that same attorney
 21 represents the -- the person next to you. After
 22 several years of litigation, you decide to settle.

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1 Good settling, I'm gonna take it, but the passenger
 2 who's sitting in the backseat next to you decides
 3 no, I'm not gonna settle, I'm gonna take my case
 4 to -- to trial. And the attorney representing both
 5 of you comes to you and says, well, guess what, I'm
 6 gonna take my -- my expenses completely out of your
 7 settlement and if this person that was seated next
 8 to you happens to win at trial, well, they'll pay
 9 you back. That is completely inappropriate. I
 10 don't think as a fiduciary of the class you could
 11 permit that here. I believe that the circumstances
 12 don't permit.
 13 I had another issue but my time has run
 14 out.
 15 THE COURT: Maria, add -- add two more
 16 minutes, please.
 17 MR. PACIORKOWSKI: You know, the other
 18 thing is, too, is the expert report -- there was no
 19 expert report for -- for damage amounts. It's
 20 what's (inaudible) absolutely no expert reports
 21 produced for the final approval hearing. And in
 22 fact, class counsel said that they were not gonna be

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1 producing a damage expert analysis because that
 2 would injure class B. So if you're gonna withhold a
 3 damage report for the benefit of another class, how
 4 can Honeywell's -- how can that class A and C be
 5 charged for that damage report if it's actually
 6 benefiting another class? They shouldn't be.
 7 The last issue is the rule 23-H. In
 8 addition to raising the attorney fee in the reply
 9 brief which violates rule 23-H, they also violated
 10 23-H because they never -- they never gave any
 11 indication of what the expenses were. When they
 12 filed their -- their fee for attorney's fees and
 13 expenses, the only thing class counsel produced in
 14 that -- in that attorney fee brief was a total
 15 dollar amount. They said what the total dollar
 16 amount was and how much the different law firms
 17 paid, but they never broke -- they never said what
 18 they spent for attorney fees -- I mean, for expert
 19 fees or for anything else. There was nothing that
 20 made that review both by the -- by the class to
 21 determine whether or not those fees were
 22 reasonable -- whether or not those expenses were

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1 reasonable and in the prosecution of this case. And
 2 furthermore, when the district court asked for those
 3 fees, the fee expenses to be produced in camera,
 4 suddenly they dropped \$50,000 off of them. I don't
 5 believe that they -- they would have done that if
 6 the district court didn't ask for an in camera
 7 review, but their in camera view -- review
 8 doesn't -- doesn't satisfy -- doesn't satisfy rule
 9 20-H violation, because as -- as I showed the
 10 district court never -- never brought up any of the
 11 discrepancies between what class counsel said the
 12 expenses were with regard to the claims
 13 administrative. Class counsel in his declaration
 14 said that the claims administrator's expenses were
 15 gonna be between a hundred and \$120,000 based on
 16 negotiations and discussions with the claims
 17 administrator, and ultimately after the -- the
 18 period to object and -- and (inaudible) hearing was
 19 over, suddenly a \$220,000 bill comes in, a hundred
 20 thousand dollars over what was declared in class
 21 counsel's representation to the court, and the
 22 district court said nothing. Didn't even reference

<p style="text-align: right;">Page 18</p> <p>1 it in her opinion. And then if you take a look at 2 that -- at that claims administrator's bill, 3 something like almost \$18,000 for nothing more than 4 quality assurance. Another \$50,000 for a project 5 management, what is that? If I filed a fee 6 application with the court and put quality 7 assurance, would a court grant me \$18,000 in fees 8 for nothing more than quality assurance or \$53,000 9 for project management? It just looks -- it 10 certainly raises the question whether or not the 11 district court adequately looked into the issue of 12 the -- of the expenses in this case. 13 THE COURT: All right. 14 MR. PACIORKOWSKI: Thank you. 15 THE COURT: Thank you very much. Hear 16 from Mr. Roisman. 17 MR. ROISMAN: May it please the court, 18 Anthony Roisman for the class. Let me start with 19 the New Jersey statute. It seems to me that this is 20 actually a nonissue. Both the New Jersey statute 21 and rule 23-H are based upon setting an attorney's 22 fee based upon what is reasonable. The only time</p>	<p style="text-align: right;">Page 20</p> <p>1 which is what the district court applied and what 2 this court has routinely applied in class action 3 cases. You look at the gross recovery. Later when 4 counsel raised the issue, well, that you should have 5 calculated it on the basis of the net, we explained 6 that if you calculated on the basis of the net, you 7 would still have a reasonable fee and it was at a -- 8 at a percentage that was well within the range that 9 this court and other courts have recognized as 10 acceptable in class action cases when the amounts 11 recovered are, say, under a hundred million dollars. 12 THE COURT: Now, the -- just back to the 13 basics, you have the rules of professional conduct 14 which give you, what, roughly eight factors in New 15 Jersey? 16 MR. ROISMAN: Yes. 17 THE COURT: And if you had 23-H you would 18 have (inaudible) and credential factors. Is the 19 authorizing of attorneys fees, is that substantive 20 so you would apply state law or is it procedural, 21 in -- in your view? 22 MR. ROISMAN: In my view?</p>
<p style="text-align: right;">Page 19</p> <p>1 that the provisions of the New Jersey statute could 2 possibly come into play is if the total recovery in 3 the case were \$2 million or less under the version 4 that existed at the time this case was originally 5 filed. It's now \$3 million or less. In New Jersey 6 there's a staggered provision, and in that staggered 7 provision, the way the fee is calculated is it's 8 calculated on the net recovery. And that makes a 9 difference, because you get 33 and a third percent. 10 If it's the gross, you get more fee. If it's the 11 net, we get less fee at the 33 and a third percent 12 level. But that statute provides both in sub 13 section C-5 and in subsection F that if the 14 attorneys feel that the fee is not adequate, they 15 should ask for a reasonable fee and the court will 16 decide whether it's reasonable. That's exactly the 17 same standard as the prize under 23-H. 18 So in the original notice that went to 19 the class regarding what the fee would be, we 20 indicated we wanted a fee of roughly two and a half 21 million dollars. We then explained that it was 22 reasonable because it was 25 percent of the gross,</p>	<p style="text-align: right;">Page 21</p> <p>1 THE COURT: And you're saying it makes no 2 difference, I got it. 3 MR. ROISMAN: Right. No, no, I -- at 4 first I thought it was substantive, okay, because 5 there is a court case in which the court was asked 6 to answer that very question, whether or not fees 7 were substantive or procedural. But in this case, 8 which is covered by CATHRA, the provision that gives 9 this court jurisdiction is a provision that's part 10 of rule of 28 U.S. code 1332 which is diversity. 11 And so we're in -- we have a unique version of 12 diversity here. It's not complete diversity. It's 13 the special CATHRA diversity. In that case we would 14 look to the state law for substance and we'd look to 15 the federal law for procedure. I think candidly 16 that the best interpretation of that -- of those 17 cases is that the attorneys fee provision is a 18 substantive provision. Now, personally, if this 19 were that issue before this court, I would present 20 you a brief as to why I think that earlier decision 21 called it substantive is incorrect. But for the 22 moment, let's assume that it is substantive. Even</p>

Page 22

1 if it's substantive --

2 THE COURT: -- what makes attorneys fees

3 procedural?

4 MR. ROISMAN: What makes them procedural,

5 in -- in my judgment, is that under the federal

6 rule, they come up as a provision that relates to

7 how you calculate the fee of the attorney in a

8 process, 23-H is a process provision. So in that

9 sense I would see it as a procedural rule rather

10 than a substantive. But as I said, and, candidly,

11 had not really prepared to address extensively this

12 question, I don't think it matters if it's

13 substantive or procedural for this case, because

14 both rules take you to the same test, is the fee

15 request reasonable, did we give the class notice of

16 what fee we wanted, we did. And we used the

17 25 percent or later the 28.7 percent and then even

18 the load star, all of which were designed to show

19 why two and a half million was a reasonable number.

20 Counsel for the appellant has presented it as though

21 we calculated the fee by taking a 25 percent, and

22 that's not what actually happened.

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1 THE COURT: But -- but when you look at

2 23-H only, it says in a certified class action, a

3 court may award reasonable attorneys fees and

4 non-taxable cost that are authorized by law or the

5 party's agreement, and here there's no agreement.

6 Then it goes the following procedures apply. So the

7 procedures seem to be separated from that first

8 sentence, which is are authorized by law and it

9 would seem that authorized by law wouldn't be

10 CATHRA. It would be, would -- would it not, the New

11 Jersey law?

12 MR. ROISMAN: The -- it could be. It

13 could also be that that provision is related to

14 those statutes that are fee shifting statutes, which

15 we don't have involved here. There are a whole

16 group of both federal and state laws that include

17 fee -- fee shifting statutes, and that could be what

18 that sentence is applied to, that and -- so in this

19 case there is no statute that specifies what the fee

20 should be beyond this generic statement that the

21 fees are to be reasonable.

22 THE COURT: So if -- if New Jersey were

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1 to pay a statute saying that under no -- under no

2 exception attorney's fees in a class action

3 involving common fund either in federal -- either in

4 a diversity case or a CATHRA case in federal court

5 or a class action in state court, could not be more

6 than five percent of the common fund, what -- what

7 is your answer then? Is that substantive or

8 procedural?

9 MR. ROISMAN: To me as a lawyer it's very

10 substantive, Your Honor, but I think probably as a

11 legal matter it is probably procedural. And as you

12 know, CATHRA has a fee provision in it --

13 THE COURT: -- sure.

14 MR. ROISMAN: -- and it does apply here.

15 It applies to the coupon cases, which this -- which

16 this is not. And -- and I -- I think that that's a

17 procedural rule. But as I -- as I said, it's not an

18 issue that -- that I have carefully examined for

19 purposes of this argument and I apologize for that.

20 THE COURT: Oh, no apology is necessary.

21 MR. ROISMAN: I mean, it's been a long

22 time since I was in law school, but that difference

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1 was always fascinating. I tried to avoid getting

2 fascinated and tried to stay focused for this, so I

3 would go back to the fact I don't think it matters,

4 but my -- my -- my gut tells me I think it's

5 procedural.

6 THE COURT: Could you address the

7 argument of your colleague adversary that the PPG

8 costs should have been separated out or you should

9 have used a finer tooth to separate out those costs?

10 MR. ROISMAN: Sure, yes, yes. I believe

11 that argument is based on a -- a profound

12 misunderstanding of what this case is about. So

13 give me a moment to sort of put it into context.

14 THE COURT: Okay.

15 MR. ROISMAN: This case started because

16 the government identified the area of Jersey City as

17 heavily contaminated with chromium, a known human

18 carcinogen. And the government health agency, the

19 Agency for Toxic Substances Disease Registry,

20 prepared a report that found a coincidence, a

21 correlation between where people live and where dump

22 sites of chrome were located in Jersey City. This

<p style="text-align: right;">Page 26</p> <p>1 was not laying ground work for a case, as I think 2 this court is sometimes looked at when it -- it -- 3 that evaluating a fee. This is basically 4 identifying the area where a case might be built. 5 So when we bring this case, we start based upon what 6 the ATSDR has found, namely that the danger area's a 7 quarter mile from the dump and that there are 145 8 dump sites in New Jersey. All we know about 9 Honeywell and PPG at that point is that they are the 10 major producers of chrome in that area, because they 11 run essentially the same factories. They just -- 12 they're competitors producing the same product. We 13 spend a huge amount of time and expenses trying to 14 figure out what happened to the chrome that was in 15 those dump sites. The ATSDR never did a study of 16 where it went. So we hired experts to do what are 17 called source term investigations, determine how 18 much chrome could have been released from those 19 sites. They looked at aerial photographs, they 20 looked at historical records, and of course we took 21 discovery and tried to get documents from Honeywell 22 and PPG that would tell us how much chrome did you</p>	<p style="text-align: right;">Page 28</p> <p>1 they had been using the sites jointly, that they 2 actually did, and finally they said no, we didn't. 3 We didn't co-mingle them. That didn't come up until 4 the end of 2013. At that point in time, in January 5 of 2014, we prepared a complaint that recognized 6 that it was probably separate damage to the class A 7 and C from Honeywell and class B from PPG as a 8 result of the dump sites and as a result of their 9 production facilities. 10 Now, at that point if you look -- and we 11 indicated this in our filings -- the expert fees 12 which, were by far the largest number. I mean, out 13 of the total amount of money that was spent on the 14 case, \$700,000 was in attorney's fees -- excuse me, 15 was in expert witness fees. We then spent a quarter 16 of a million dollars on expert witnesses to help pin 17 down PPG's contribution to the contamination that 18 was going on in the area where that class was 19 residing. We took that money out of the costs. We 20 did not include that money in the cost. But until 21 we were at that point in discovery and until our 22 experts got -- righted us, we didn't know whether or</p>
<p style="text-align: right;">Page 27</p> <p>1 produce, where did you send the chrome waste after 2 you did the production. They fought us extensively 3 on that. We did a lot of motions practice on that. 4 We did a lot of discovery disputes over that. And 5 that work was based upon trying to find out did 6 Honeywell and PPG use the same sites to dump their 7 waste at. 8 So at that stage of the case, which was 9 for the first couple of years, we believed that 10 these two companies, which refused to tell us where 11 they dump their waste and led us to believe that 12 they were co-mingled, that we were doing research on 13 two companies that were simultaneously dumping toxic 14 waste in these sites that were the source of the 15 contamination that was affecting our clients. As we 16 worked our way through discovery, we eventually came 17 to realize that, one, there were many fewer dump 18 sites that were really at risk. This was thanks to 19 the work of our experts, so we narrowed the number 20 of dump sites down from 145 to, like, 27, I think. 21 And, secondly, that we could not find any direct 22 evidence even though the defendants had told us that</p>	<p style="text-align: right;">Page 29</p> <p>1 not these two companies were jointly causing the 2 problem at these various sites -- 3 THE COURT: -- well, why shouldn't there 4 have been some -- a portion of the -- of the costs 5 so that a percentage would be attributable to PPG? 6 Seems like if you get a recovery against PPG they're 7 skating free on costs. 8 MR. ROISMAN: No, no. No, we've agreed, 9 and -- and I'll say it again in open court, that if 10 and when we are successful in recovering money from 11 PPG, we would then approach the district court at 12 that point to allocate a portion of these costs to 13 the PPG resolution, and we would then have a fund of 14 money that we would be able to effectively 15 distribute back to the A and C class. But, unless 16 and until that happens, all that money that was 17 spent that to some extent was investigating PPG 18 activities, was for the benefit of the A and C class 19 also. It wasn't that it was of no benefit to them 20 and only of benefit to class B. 21 On top of that, the central issue in the 22 case as it's now evolved and as we finally were able</p>

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1 to -- to reach it with the settlement with
 2 Honeywell, is that the primary source of the
 3 contamination is production activity rather than
 4 dumping activity. The production activity means how
 5 much of the chrome ran out of the facilities where
 6 the chrome was being processed. Honeywell and PPG
 7 each engaged in essentially the same activity. But
 8 their records were grossly inconsistent. Honeywell
 9 would tell us how much stuff went up a particular
 10 stack, but not the temperature of it. PPG would
 11 tell us what the temperature was, but not how much
 12 went up. In order to do what's called an air
 13 dispersion model, the air dispersion expert has to
 14 know the details of what actually goes up the stack,
 15 what the size of each particle is, what the
 16 temperature was when it goes up the stack, what the
 17 timing was, was it day or night? What the moisture
 18 content was. We needed to get data from both PPG
 19 and Honeywell to finally put together a combination
 20 of understanding how do you make chrome waste go up
 21 the stack, and there were dozens of stacks at both
 22 facilities, each stack connected to a different

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1 piece of equipment that did something different in
 2 the process. So we're looking at a combination of
 3 things that are impossible to not see the benefit to
 4 everybody, A, B, and C, of having all that data.
 5 Now, could you try to split that up now?
 6 Could you now try to say, okay, a certain amount
 7 goes to PPG and a certain amount goes to Honeywell?
 8 In theory, yes. But I would suggest that that would
 9 be a very dangerous and inappropriate course to
 10 take. If this court or the district court on remand
 11 were to tell us take 30 percent of the costs that
 12 went to this case up until now that you haven't
 13 already charged to PPG and assign them to PPG and
 14 later we get a settlement with PPG and a different
 15 court, not bound by what this court does because the
 16 class B is not party to this -- part of the
 17 litigation, not bound by that, tells us no, no, it's
 18 not 30 percent. It's only 20 percent. Then we're
 19 left having expended that money and not being able
 20 to recover it.
 21 On the alternative, the proposal that we
 22 put forward and the commitment we've made is if and

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1 when that case is resolved, we will provide a system
 2 by which the moneys can be allocated based upon the
 3 whole record with all the evidence available to
 4 decide how it outta be divided up. And that's what
 5 we would propose be done. Thank you.
 6 THE COURT: Thank you, sir.
 7 Paciorkowski.
 8 MR. PACIORKOWSKI: Yes. The problem with
 9 what you just heard was that the Honeywell class
 10 takes the contingent risk of a recovery in the PPG
 11 case. If there's no recovery, who -- who gets stuck
 12 with the entire expense bill? The Honeywell class.
 13 Where as when class counsel takes a case on a
 14 contingency fee -- fee basis, representing the PPG
 15 class, which is class B, and there's no recovery,
 16 shouldn't it be class counsel who -- who suffers the
 17 loss of those expenses if they don't get a recovery?
 18 THE COURT: How -- how much are we
 19 talking about with regard to those particular
 20 expenses that are being contested?
 21 MR. PACIORKOWSKI: Well, the expenses
 22 right now are over a million dollars. So if you

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1 slice them down the middle, if they're truly
 2 indistinguishable and you can't apportion them
 3 equally through some -- some measure of using a fine
 4 comb or whatever, then -- then apportion them
 5 equally. 50/50. And those expenses would be in the
 6 neighborhood of somewhere 500 to \$700,000.
 7 The other issue that was -- it wasn't
 8 asked of me, but it was asked of opposing counsel
 9 here, whether or not the attorney fee issue is
 10 procedural or subsudance -- sub -- substantive. The
 11 attorney fee issue is really a matter of contract
 12 law. Because the New Jersey court rule 1217
 13 mandates that in a -- in a retainer --
 14 THE COURT: -- the contract has to
 15 provide X or Y or Z.
 16 MR. PACIORKOWSKI: It's a contract
 17 action. And this case was brought in state court,
 18 so that that retainer agreement with class counsel
 19 is under New Jersey law. So when it gets removed to
 20 federal court, that contract under the enabling
 21 rule's still valid. That controls. The contract
 22 between counsel and the client controls. The

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1 procedural aspect of whatever the -- the Federal
2 Rules of Civil Procedure cannot overrule a -- a
3 contract between the client and his attorney because
4 of the enabling rule.
5 THE COURT: Okay.
6 MR. PACIORKOWSKI: Thank you, Your Honor.
7 THE COURT: Thank you very much. Thank
8 you both, counsel. Very well presented arguments.
9 And we'll take the matter under --
10 (The recording was concluded.)
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1 CERTIFICATE OF TRANSCRIBER
2 I, Jackie A. Scheer, do hereby certify
3 that the foregoing transcript is a true and correct
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5 proceedings were transcribed to the best of my
6 ability from the audio recording as provided; and
7 that I am neither counsel for, related to, nor
8 employed by any of the parties to this case and have
9 no interest, financial or otherwise in its outcome.
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15 JACKIE A. SCHEER
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EXHIBIT 5

Settlement Confidential
Subject to FRE 408

Halley, et al. v. Honeywell International, Inc.

Agreement in Principle

July 15, 2014

Subject to Court approval, Class Counsel, on behalf of the putative Classes A and C, and Honeywell International Inc. ("Honeywell"), agree in principle to settle the above matter on the following terms and conditions:

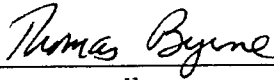
1. Payment by Honeywell to the Settlement Classes in the total amount of \$10,000,000, inclusive of all class compensation, attorneys fees and costs, incentive fees to named plaintiffs, and costs of notice and administration. Class Counsel may distribute payments pursuant to an allocation formula which may be determined at a future date, which shall be incorporated into the settlement agreement and subject to Court approval. To the extent any A or C class member does not make a claim for his/her/its share of settlement proceeds, up to \$100,000 of any such unclaimed proceeds may be used as a donation for community purposes, with plaintiffs, their counsel and Honeywell to be involved in the process and to receive appropriate acknowledgement, details to be determined at a future date and subject to Court approval. Thereafter, any remaining unclaimed proceeds shall be distributed to the members of Classes A and C in a manner consistent with the allocation formula. Under no circumstances shall there be a reversion of settlement proceeds to Honeywell.
2. Settlement Classes for Classes A and C to be limited to 1-4 family residential properties in those Class areas.
3. Dismissal with Prejudice of all claims against Honeywell and PPG for Classes A and C for all 1-4 family residential properties in those Class areas.
4. Class Counsel and Plaintiffs recognize, and shall state in the settlement agreement, that pursuit of the Civil Conspiracy claim by any putative Class member is not anticipated to recover any damages or relief in addition to that otherwise available under putative plaintiffs' other claims. Plaintiffs will dismiss without prejudice their claim for Civil Conspiracy against Honeywell and PPG on behalf of Class areas A, B and C. Plaintiffs shall also state in the settlement agreement that Plaintiffs have not asserted any other claims against Honeywell with respect to Class B.
5. Execution of a Settlement Agreement, releases, and approval documents in a form mutually satisfactory to counsel.
6. Honeywell will not oppose incentive awards to the named plaintiffs in Classes A and C or compensation to the individual named plaintiffs in Class B in an amount not to exceed \$10,000 each.
7. The Parties agree to report to the Court that they have met and conferred on the discovery issues and related issues raised during the April 29, 2014 status conference and in subsequent court filings concerning Mr. de la Cruz

Settlement Confidential
Subject to FRE 408

and Mr. Onditi and that the Parties have agreed on a resolution of such issues that is satisfactory to Honeywell.

8. In the event that this settlement does not materialize, Honeywell shall not be prejudiced from seeking to re-open discovery of Mr. de la Cruz and Mr. Onditi, consistent with the letter agreement between Honeywell and Plaintiffs dated July 15, 2014.
9. This term sheet and the subsequent settlement agreement shall not constitute an admission of liability by Honeywell. In the event that this settlement is not finally approved, for any reason whatsoever, by the Court, the Plaintiffs reserve all claims brought in the *Halley* litigation against Honeywell and Honeywell reserves all defenses thereto.
10. The terms of this Agreement in Principle shall remain confidential until the Parties submit to the Court a motion seeking preliminary approval of the settlement.

For Class Counsel



For Honeywell

EXHIBIT 6

John J. Morris, PE

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- - -

MATTIE HALLEY, SHEM ONDITI, :
LETICIA MALAVÉ, AND SERGIO de la :
CRUZ, on Behalf of themselves and :
all others similarly situated, :
Plaintiffs, :

v. :

HONEYWELL INTERNATIONAL, INC. and :
PPG INDUSTRIES, INC., :
Defendants. :

: CIVIL ACTION
: NO.
: 2:10-cv-3345
: (ES) (JAD)

- - -

June 19, 2014

- - -

Videotaped deposition of JOHN J. MORRIS, PE taken pursuant to notice, was held at the law offices of Gibbons P.C., One Gateway Center, Newark, New Jersey, beginning at 9:38 a.m., on the above date, before Ann Marie Mitchell, a Federally Approved Certified Realtime Reporter, Registered Diplomate Reporter, Certified Court Reporter and Notary Public for the State of New Jersey.

- - -

GOLKOW TECHNOLOGIES, INC.
877.370.3377 ph|917.591.5672 fax
deps@golkow.com

Page 2		Page 4	
1	APPEARANCES:	1	544 Administrative Consent Order, 171
2		2	Bates stamped
3	GERMAN RUBENSTEIN LLP	2	HON-SMITH-01110398 through
4	BY: STEVEN J. GERMAN, ESQUIRE	3	HON-SMITH-01110423
5	19 West 44th Street	3	545 Supplemental Administrative 173
6	Suite 1500	4	Consent Order, Bates stamped
7	New York, New York 10036	4	HON-SMITH-00138662 through
8	(212) 704-2020	5	HON-SMITH-00138666
9	sgerman@germanrubenstein.com	5	546 Letter dated February 1, 1983, 175
10	Representing Plaintiffs	6	Bates stamped
11		7	HON-SMITH-00352130 through
12	ARNOLD & PORTER LLP	7	HON-SMITH-00352148
13	BY: MICHAEL D. DANEKER, ESQUIRE	8	547 Analysis of the Route 440 Site 182
14	555 Twelfth Street, NW	9	from Historical Air Photographs
15	Washington, DC 20004	9	for the Period April 6, 1940
16	(202) 942-5000	10	through February 23, 1966,
17	michael.daneker@aporter.com	10	Bates stamped
18	Representing Honeywell International, Inc.	11	HON-SMITH-01048075 through
19		11	HON-SMITH-01048110
20	THOMPSON HINE LLP	12	548 Packet of Aerial Photographs, 185
21	BY: WILLIAM J. HUBBARD, ESQUIRE	13	Bates stamped
22	3900 Key Center	13	HON-SMITH-00527250 through
23	127 Public Square	14	HON-SMITH-00527267
24	Cleveland, Ohio 44114	15	549 Proposal, Environmental Impact 199
25	(216) 566-5500	15	Assessment and Geotechnical
	bill.hubbard@thompsonhine.com	16	Study, Bates stamped
	Representing PPG Industries, Inc.	16	HON-SMITH-00352169 through
	(Via telephone)	17	HON-SMITH-00352214
		18	550 Health and Environmental 206
	GIBBONS P.C.	19	Assessment of Chromium Residues
	BY: MICHAEL R. McDONALD, ESQUIRE	19	on the Daylin/Grace Site in
	One Gateway Center	20	Jersey City, New Jersey,
	Newark, New Jersey 07102	20	Document Number D072-108, March
	(973) 596-4500	21	1984, Bates stamped
	mmcdonald@gibbonslaw.com	21	HON-SMITH-00333907 through
	Representing Honeywell International, Inc.	21	HON-SMITH-00333994
		22	551 Printout of a website page, 233
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1	- - -	1	552 PowerPoint, "Honeywell & NJDEP 238
2	I N D E X	2	Meeting, SA-7 Remediation Update,
3	- - -	2	SA-6 & SA-7 Redevelopment Program,
4		3	SA-7 Site Meeting, November 8,
5	Testimony of: JOHN J. MORRIS, PE	3	2007," Bates stamped
6	By Mr. German 7	4	HON-SMITH-00544067 through
7		4	HON-SMITH-00544115
8	- - -	5	553 E-mail chain, top one dated 245
9		5	03/30/2009, Bates stamped
10	E X H I B I T S	6	HON-SMITH-01016974 through
11	- - -	6	HON-SMITH-01016976
12		7	554 Website Printout, Jersey City & 249
13		8	Kellogg Street Properties Remedies
14		8	Progress as of May 1, 2014, 1 page
15	NO. DESCRIPTION PAGE	9	
16	539 Plaintiffs' Notice of F.R.C.P. 13	9	555 Website Printout, "Remediation 259
17	30(b)(6) Deposition Duces Tecum	10	Details (Jersey City/Kellogg Street
18	of Defendant Honeywell	10	Properties along Route 440)," 2
19	International, Inc. And	11	pages
20	Individual Deposition Duces	12	556 Website Printout, "Remediation/Site 260
21	Tecum of John Morris	12	Restoration," 2 pages
22	Defendant Honeywell	13	
23	International Inc.'s Response	13	557 Website Printout, "Cleanups of 263
24	to Plaintiffs' Corrected First	14	Chromium Residue in Hudson County,"
25	Set of Interrogatories, 48	14	3 pages
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	541 Map, 1 page 84	15	558 Remedial Action Report dated 268
	542 Defendant Honeywell	16	December 24, 1997, Bates stamped
	International Inc.'s Objections	16	HON-SMITH-00014870 through
	and Responses to Plaintiffs'	17	HON-SMITH-00015175
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	543 Administrative Consent Order, 168	19	Site, Jersey City, New Jersey, March
	Bates stamped	19	1998, Bates stamped
	HON-SMITH-00138549 through	20	HON-SMITH-00132845 through
	HON-SMITH-00138592	20	HON-SMITH-00133119
		21	
		21	560 E-mail dated June 18, 2003, Bates 283
		22	stamped HON-SMITH-00151055 through
		22	HON-SMITH-00151096
		23	
		23	561 Deed Notice, Bates stamped 292
		24	DeLaCruz000079 through
		24	DeLaCruz000163
		25	

John J. Morris, PE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- - -

LATREICIA SMITH and MATTIE	:	CASE NO.
HALLEY, on Behalf of	:	
Themselves and all Others	:	
Similarly Situated	:	2:10-cv-3345
	:	(ES) (SCM)
v.	:	
	:	
	:	
HONEYWELL INTERNATIONAL,	:	
INC., and PPG INDUSTRIES,	:	
INC.	:	
	:	
	:	

- - -

June 20, 2014

- - -

Continued videotaped deposition
of JOHN J. MORRIS, PE, taken pursuant to notice,
was held at the offices of GIBBONS, P.C., One
Gateway Center, Newark, New Jersey, New Jersey,
beginning at 9:17 a.m., on the above date, before
Kimberly A. Cahill, a Federally Approved Registered
Merit Reporter and Notary Public for the State of
New Jersey.

- - -

GOLKOW TECHNOLOGIES, INC.
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John J. Morris, PE

Page 303

1 APPEARANCES:
 2
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 9 Washington, D.C. 20004
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 11 Inc.
 12
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 16 Inc.
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 20 Cleveland, Ohio 44114-1291
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 21 tim.coughlin@thompsonhine.com
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 22
 23 VIDEOTAPE TECHNICIAN:
 Catherine Smalfus
 24
 25 - - -

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1 Efforts to Date,"
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 2 HON-SMITH-00150872
 3 566 10/3/05 Letter from Fahy to 361
 McGown, HON-SMITH-00642843
 4 through HON-SMITH-00642845
 5 567 3/12/08 Memo from Groves to 376
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 7 568 9/18/13 Letter from Groves to 379
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 8 Report: Baseline Air
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 9 EMILCOTT-HON-SMITH-0006921
 through
 10 EMILCOTT-HON-SMITH-0006983
 11 569 Printout from 387
 njcusiteremediation.com/
 healthandsafety
 12
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 6 By Mr. German 307
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 7 By Mr. Coughlin 523
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 10 E X H I B I T S
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 13 NO. DESCRIPTION PAGE
 14 562 6/88 Remedial Plan for 311
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 15 Inc., HON-SMITH-01203871
 through HON-SMITH-01203894
 16 563 10/16/87 Draft Risk 318
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 17 Alternatives for the Droyers
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 18 Jersey, by Clement
 Associates, Inc.,
 19 HON-SMITH-01191693 through
 HON-SMITH-01191772
 20
 21 564 Remedial Action Work Plan, 320
 Droyers Point, Northern
 22 Parcel, Jersey City, New
 Jersey, by Dresdner Robin,
 23 HON-SMITH-00086226 through
 24 HON-SMITH-00086692
 25 565 Document Entitled "Remedial 360

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 2 D E P O S I T I O N S U P P O R T I N D E X
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 5 Direction to Witness Not to Answer
 6 Page Line Page Line Page Line
 7
 8 Request for Production of Documents
 9 Page Line Page Line Page Line
 10 405 13
 407 5
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 12 Stipulations
 13 Page Line Page Line Page Line
 14
 15 Question Marked
 16 Page Line Page Line Page Line
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Deposition of Robert Hazen, taken August 15, 2014

Page 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 2:10-cv-3345 (ES)(JAD)

MATTIE HALLEY, SHEM ONDITI,
LETICIA MALAVE, AND SERGIO
de la CRUZ, On Behalf of
Themselves and all Others
Similarly Situated,

Plaintiffs,

vs.

HONEYWELL INTERNATIONAL, INC.
and PPG INDUSTRIES, INC.,

Defendants.

FRIDAY, AUGUST 15, 2014

DEPOSITION OF:
ROBERT HAZEN

Page 2

1 TRANSCRIPT of the stenographic
2 notes of the proceedings in the above-entitled
3 matter, as taken by and before NANCY J. SANTORELLA,
4 a Certified Court Reporter of the State of New
5 Jersey, held at the OFFICE OF THE ATTORNEY GENERAL,
6 DIVISION OF LAW, RICHARD J. HUGHES JUSTICE COMPLEX,
7 25 MARKET STREET, TRENTON, NEW JERSEY, on Friday,
8 August 15, 2014, commencing at 1:42 in the afternoon.
9

10 A P P E A R A N C E S:
11 GERMAN RUBENSTEIN, LLP
12 BY: STEVEN J. GERMAN, ESQUIRE
13 - and -
14 JOEL M. RUBENSTEIN, ESQUIRE
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16 New York, NY 10036
17 (212) 704-2020
18 jrubenstein@germanrubenstein.com
19 Attorneys for Plaintiffs

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32 bill.hubbard@thompsonhine.com
33 Attorneys for Defendant PPG Industries, Inc.

Page 3

1 OFFICE OF THE ATTORNEY GENERAL
2 BY: RICHARD F. ENGEL, DEPUTY ATTORNEY GENERAL
3 Division of Law
4 Richard J. Hughes Justice Complex
5 25 Market Street
6 Trenton, NJ 08625
7 (609) 984-4863
8 Attorney for Robert Hazen
9
10 ALSO PRESENT:
11
12 SCOTT LINDENBAUM, Videographer
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4 Mr. German 38, 96
5 Ms. Himelfarb 94
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9 578 Letter dated 01/12/90 82
10 to Dr. Robert Hazen
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13 EXHIBITS PREVIOUSLY MARKED AND REFERENCED DURING
14 DEPOSITION:
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16 EXHIBIT PAGE
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19 251 19
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27 259 33

Deposition of Gregory John, taken August 15, 2014

Page 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 2:10-cv-3345 (ES)(JAD)

MATTIE HALLEY, SHEM ONDITI,
LETICIA MALAVE, AND SERGIO
de la CRUZ, On Behalf of
Themselves and all Others
Similarly Situated,

Plaintiffs,
vs.

HONEYWELL INTERNATIONAL, INC.
and PPG INDUSTRIES, INC.,

Defendants.

FRIDAY, AUGUST 15, 2014

DEPOSITION OF:
GREGORY JOHN

Page 3

1 OFFICE OF THE ATTORNEY GENERAL
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Richard J. Hughes Justice Complex
3 25 Market Street
Trenton, NJ 08625
4 (609) 984-4863
Attorney for Gregory John
5
6 ALSO PRESENT:
7 SCOTT LINDENBAUM, Videographer
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Page 2

1 TRANSCRIPT of the stenographic
2 notes of the proceedings in the above-entitled
3 matter, as taken by and before NANCY J. SANTORELLA,
4 a Certified Court Reporter of the State of New
5 Jersey, held at the OFFICE OF THE ATTORNEY GENERAL,
6 DIVISION OF LAW, RICHARD J. HUGHES JUSTICE COMPLEX,
7 25 MARKET STREET, TRENTON, NEW JERSEY, on Friday,
8 August 15, 2014, commencing at 9:43 in the morning.
9

10 APPEARANCES:
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jrubenstein@germanrubenstein.com
15 Attorneys for Plaintiffs
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25 Attorneys for Defendant PPG Industries, Inc.

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2

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	Mr. German	84, 115

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574	Data summary from LST files that were produced	56
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576	Data summary from LST files that were produced	59
577	Collection of contour maps	69

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25

Frank Faranca

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

- - -

MATTIE HALLEY, SHEM ONDITI,	:	
LETICIA MALAVÉ, AND SERGIO de la	:	
CRUZ, on Behalf of themselves and	:	
all others similarly situated,	:	
Plaintiffs,	:	
	:	CIVIL ACTION
v.	:	NO.
	:	2:10-cv-3345
	:	(ES) (JAD)
HONEYWELL INTERNATIONAL, INC. and	:	
PPG INDUSTRIES, INC.,	:	
Defendants.	:	

- - -

August 25, 2014

- - -

Rule 30(b)(6) videotape deposition of
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
taken through its representative FRANK FARANCA,
pursuant to subpoena and notice, was held at the
offices of STATE OF NEW JERSEY, OFFICE OF THE
ATTORNEY GENERAL, 25 Market Street, Trenton, New
Jersey, beginning at 9:35 a.m., on the above date,
before Kimberly A. Cahill, a Federally Approved
Registered Merit Reporter and Notary Public for the
State of New Jersey.

- - -

GOLKOW TECHNOLOGIES, INC.
877.370.3377 ph|917.591.5672 fax
deps@golkow.com

Frank Faranca

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1	APPEARANCES:	1	583 Directive In the Matter of 76
2	GERMAN RUBENSTEIN LLP	2	The Hudson County Chromate
3	BY: STEVEN J. GERMAN, ESQUIRE	3	Chemical Production Waste
4	19 West 44th Street	4	Sites: Human Exposure
5	Suite 1500	5	Assessment, with Attachment
6	New York, New York 10036	6	One, HON-SMITH-01047723
7	(212) 704-2020	7	through HON-SMITH-01047744
8	sgerman@GermanRubenstein.com	8	ACO in the Matter of The 78
9	Representing the Plaintiffs	9	Hudson County Chromate
10	ARNOLD & PORTER LLP	10	Chemical Production Waste
11	BY: REBECCA L.D. GORDON, ESQUIRE	11	Sites and PPG Industries,
12	(via telephone)	12	PPG-SMITH-606353 through
13	555 Twelfth Street, NW	13	PPG-SMITH-606403
14	Washington, D.C. 20004-1206	14	585 Document Entitled 81
15	(202) 942-5000	15	"Compilation of NJDEP
16	Rebecca.Gordon@aporter.com	16	Directives, Orders, and
17	Representing the Defendant, Honeywell International, Inc.	17	Correspondence to PPG
18	THOMPSON HINE LLP	18	Regarding Hudson County
19	BY: TIMOTHY J. COUGHLIN, ESQUIRE	19	Chromium Sites (July 1986
20	3900 Key Center	20	Through March 1990),"
21	127 Public Square	21	PPG-SMITH-691372 through
22	Cleveland, Ohio 44114	22	PPG-SMITH-691579
23	(216) 566-5500	23	586 8/3/95 Letter from Coreory to 83
24	tim.coughlin@thompsonhine.com	24	Hirl, Bossidy, Dempsey,
25	Representing the Defendant, PPG Industries, Inc.	25	Blackburn, HON-SMITH-00195232
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	OFFICE OF THE ATTORNEY GENERAL		587 12/4/90 Letter from Bryant to 86
	BY: RICHARD F. ENGEL, ESQUIRE		Faranca, PPG-SMITH-058607
	Richard J. Hughes Justice Complex		through PPG-SMITH-058612
	8th Floor, West Wing		588 NJDEP SRP - Chrome Update 33 93
	25 Market Street		(December 2007) Memorandum
	Trenton, New Jersey 08625		589 Witness-Prepared Document 110
	(609) 984-4863		Entitled "Hudson County
	Representing the Deponent		Chromium - Documents
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	Catherine Smalfus		590 Aerial Photographs, JW_022850 113
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	- - -		Jersey lifts limit for toxin
	- - -		- Work of scientist paid by
	- - -		- - -
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6	By Mr. German 7	6	
7	By Mr. Coughlin 121	7	
8	By Ms. Gordon 202	8	
9	By Mr. German 206	9	
10	By Mr. Coughlin 240	10	
11	By Mr. German 249	11	
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16		16	
17	NO. DESCRIPTION PAGE	17	
18	579 Subpoena to Testify at a 10	18	
19	Deposition in a Civil Action	19	
20	with Attachment A,	20	
21	Plaintiffs' F.R.C.P. 30(b)(6)	21	
22	Notice of Deposition of the	22	
23	New Jersey Department of	23	
24	Environmental Protection	24	
25	Two-Page Document with 22	25	
	Columns Prepared by the		
	Witness		
	581 12/29/87 Interdepartmental 29		
	Memorandum from Aldredge		
	Titled "Chromium, its Wastes		
	and Chromium Waste Sites in		
	Jersey City, New Jersey"		
	582 11/17/09 Document Titled 31		
	"Hudson County Chromium Sites		
	Status Report"		