

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

OWENS?ILLINOIS, INC. * Civil Docket No.
* 2:99?CV?117

VS. * Tyler, Texas
* August 8, 2000
T&N, LTD, Et Al * 2:30 p.m.

HEARING ON MOTION TO COMPEL
BEFORE THE HONORABLE T. JOHN WARD
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

APPEARANCES:

FOR THE PLAINTIFF: MR. PAUL SADLER
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Mann, Sadler & Hill
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FOR THE DEFENDANT: MR. MARK LANIER
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903/590?1187

(Proceedings recorded by mechanical stenography,
transcript produced by CAT system.)

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PROCEEDINGS

THE COURT: Please be seated.

We don't have quite the cast of thousands we
had the last time.

MR. LANIER: We're working on it though.

THE COURT: All right. We will call for
hearing on the Defendant T&N's Motion to Compel this case
of Owens?Illinois versus T&N and Federal?Mogul, cause
number 2:99?CV?117.

What says the movant?

MR. LANIER: Movant is here, Mark Lanier, I
will be arguing for the Movant.

THE COURT: Okay. Who is here on behalf of ??

MR. SADLER: Paul Sadler, Your Honor, here on
behalf of Owens?Illinois.

THE COURT: Sort of lonesome over there, Mr.
Sadler.

MR. SADLER: The way I like it, Judge.

MR. LANIER: I told him if it broke out in a
fist?fight, I think we could win.

THE COURT: Well, I don't know, he is pretty
tough, pretty tough.

Well, the Court has read all of the ?? let me

23 Now, the Court has read all of the ?? items
24 give you a few things here before we start.
25 Reading the Motion to Compel and the response,

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1 it appears to me that what O?I has said in response is
2 that most of the items ?? a number of the items which
3 they identify in their response is that they have
4 actually produced. Am I correct in that, Mr. Sadler?

5 MR. SADLER: That is correct, Your Honor,
6 except for those that I ??

7 THE COURT: I think you listed in paragraph 5
8 the items that are in dispute.

9 MR. SADLER: Yes, sir.

10 THE COURT: Okay. And if I can ?? I am trying
11 to whittle this down to something we can deal with.

12 MR. LANIER: Your Honor, I don't want
13 interrupt, but what might assist you, Mr. Sadler and I in
14 an effort to whittle this down and take as little of your
15 time as needed, have come up with a list of seven
16 document areas that are still in fuss. I have marked it
17 as Exhibit 2, a copy to put in front of you, so that it
18 is a ready reference. And I have also marked and
19 attached as Exhibit 1, a letter from Mr. Sadler dated
20 yesterday, where he promises to produce a lot of
21 documents that he tells you in his response are produced,
22 and I understand they are supposed to be waiting for me
23 in boxes when I get back to my office today. And I take
24 him at his word, he has been consistent with his word,
25 and I trust that those documents will, in fact, be

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1 produced as he said in his response. And I will get
2 those when I get back to the office.

3 But Exhibit 2 is the list of six document areas
4 that at least I would like to discuss with the Court if
5 that is helpful.

6 THE COURT: Well, I wanted to ?? just to make
7 it clear that the Court is accepting Mr. Sadler's
8 representation that he has produced these, and having
9 either said that he is producing them or is in the
10 process of producing them, then the Court accepts that,
11 and in absence of a showing that those have not been
12 produced, then I don't see any need to address it, and
13 that appears what y'all have done.

14 Now, you know we have a privilege hearing
15 already set, so to the extent that these documents are
16 not being produced by reason of the claim of privilege,
17 it seems ?? it is going to be difficult for this Court to
18 rule on the claims of privilege without privilege logs
19 and things like that. So, I don't know how we are going
20 to address that. I want to address as much as we can,

21 but on the claims of privilege, I had already told the
22 parties I was going to give you a chance to fully set
23 forth your claim of privilege and the basis for it, and
24 that is the reason that we set a hearing.

25 So, out of this list of seven, Mr. Sadler,

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1 which ones of these deal with ?? do you think that we are
2 talking about that the reason you are not producing them
3 is a claim of privilege?

4 MR. SADLER: Well, Your Honor, if I ?? I will
5 just take them from the beginning.

6 The first is a full index or search program of
7 the CDs or microfilm. There are items contained on the
8 CDs and microfilm that we think do involve privilege, but
9 what I have told Mr. Lanier is that we will produce all
10 of those that we are not claiming for privilege and
11 reproduce those CDs for them.

12 Now, he is asking particularly there for the
13 full index or search program, and I can give him an
14 explanation of how to do that computer search. There is
15 not an index, as such, other than the record description
16 which I have furnished him and attached to my response to
17 the Motion to Compel.

18 THE COURT: Well, then wait, so I understand.
19 So, you are saying that with respect to Item No. 1, you
20 are going to produce all of those except those which will
21 be covered by some claim of privilege?

22 MR. SADLER: Yes, Your Honor. And that has to
23 do with ?? for example, one of the record descriptions
24 are: Medical summaries prepared by counsel, work
25 history summaries prepared by counsel in the evaluation

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1 of the claim.

2 THE COURT: Okay. Well, I am going to give you
3 some guidance on privilege here in a little bit, but I
4 just wanted to make sure that I understand what we ?? I
5 am trying to define the fight right now.

6 MR. SADLER: There are twenty items described
7 in this system.

8 THE COURT: Yeah, I have got a list of them, it
9 is on Exhibit F.

10 MR. SADLER: Yes, sir. There are only six
11 categories that we believe some of the documents within
12 those fields have privileged information on them. We are
13 going through them one by one and trying to determine
14 which ones we want to claim privilege on, but there are
15 ?? they tell me that there are approximately a million
16 images on this CD/microfilm system, and so it takes a
17 little bit of time.

18 THE COURT: Okay.

18 THE COURT: Okay.

19 MR. SADLER: So, of the twenty categories,
20 fourteen of which are being reproduced, six we have
21 identified to Mr. Lanier as areas that we think have
22 privilege, and those are the ones that we are not
23 offering at this time. We are working through them, we
24 just haven't finished.

25 THE COURT: I am just saying, there is no way

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1 that I am going to reach the privilege issues today
2 because y'all haven't had a chance to prepare logs. But
3 I am trying ?? what you are saying is other than those
4 you are ?? other than those that you have identified as
5 privileged or may contain privileged documents, you are
6 producing those, I guess it must be sixteen. There is
7 twenty?two listed.

8 MR. SADLER: Correct, there are six categories
9 that may have privileged information on them.

10 THE COURT: You got any response to that, Mr.
11 Lanier?

12 MR. LANIER: First a question of clarification,
13 Your Honor, if I understand correctly, there are whole
14 categories that are not going to be produced because
15 within those categories there may be some documents that
16 are that privileged?

17 MR. SADLER: No, that ??

18 MR. LANIER: Or only the privileged documents
19 are not going to be ??

20 THE COURT: If I understood what he said, they
21 are going to produce the sixteen without taking any out,
22 but the other six they say they may have privilege which
23 will require a review of each field to see if there is
24 some information that needs to be redacted.

25 MR. SADLER: That is correct.

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1 THE COURT: And that process is going to take
2 some time since there is approximately a million fields
3 that must be observed.

4 MR. LANIER: Then my main reaction, Your Honor,
5 is to say he has got to protect his privilege, and I
6 won't argue that today. I do gulp because we have sought
7 these since February, and I have got a million documents
8 I am being told now that are new to look at with
9 depositions starting tomorrow and a trial ??

10 THE COURT: Well, the Court is going to address
11 some other issues. Let's ?? right now let's just try to
12 stay focused here today on this issue.

13 MR. LANIER: All right.

14 THE COURT: On the Motion to Compel.
15 All right. Let's take Item No. 2, it sounds

16 like attorneys fee statements.

17 MR. SADLER: Item No. 2, what we have tried to
18 do, Your Honor, is through the legal department, the same
19 computer system and the account journals, is to give an
20 overview of the attorneys fees issue. We have submitted
21 all of the information our experts used to calculate
22 their damages.

23 The next layer is the actual journal entries
24 which are being collected. We are up to 350 boxes so
25 far, and we think we're about halfway through. They are

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1 estimating between six hundred and seven hundred boxes if
2 you do the actual bills themselves.

3 It is the belief that some of those bills, and
4 it may be a very small fraction of them, will have some
5 items on there that describe privileged information, and
6 so those matters have to be gone through.

7 So, what I have furnished to Mr. Lanier in
8 response to his questions to me, and our discussions back
9 and forth are quarterly summaries from the beginning of
10 all the attorneys fees, monthly journal entries that are
11 specific to the law firm and how much they billed per
12 month. The next layer is production of the actual bills
13 themselves, and we are talking about over twenty years of
14 attorneys' bills, and so it is a little bit of a task to
15 go through.

16 It is our position that that level of discovery
17 is not necessary for review of the attorneys fees claim
18 in here unless they are going to challenge the
19 reasonableness of the underlying charges, and I can't
20 imagine that being the case when Turner & Newell had
21 attorneys fees in the same cases. I mean ?? I assume ??
22 if that is what they are planning to do, then that is a
23 different inquiry, and that is why I state to the Court,
24 if that is where we're headed, then clearly attorneys fee
25 bills have to be produced, if you are going to challenge

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1 the reasonableness of individual bills. But I don't
2 think in a claim of three hundred and eighty million
3 dollars in attorneys fees that that's what they are going
4 to be doing.

5 THE COURT: Well, the problem the Court has
6 with that position, Mr. Sadler, is the mere fact that
7 they are claiming ?? that y'all are seeking three hundred
8 and eighty million dollars here, they may want to look at
9 every line. They may not end up challenging the three
10 hundred ?? you know, they may not end up, but in making
11 that decision as to whether they are going to or are not,
12 the Court is inclined to believe, absent a claim of
13 privilege that we will deal with separately, the Court is

13 privilege that we will deal with separately, the Court is
14 inclined to believe that the defendant is entitled to
15 evaluate what they want to challenge and don't want to
16 challenge, and the only way they can do that is look at
17 each line.

18 MR. SADLER: I don't disagree with that
19 statement at all, Your Honor. It is not my position at
20 all that when I ??

21 THE COURT: You know, I am just saying, I
22 don't know if they will end up challenging it, but I
23 don't think that they should be in the position to have
24 to make that decision in the dark.

25 MR. SADLER: Well, that is the reason why I

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1 have given them the journal entries, to break it out by
2 law firms per month, per year, as well as the summaries.
3 Like I said, the next level is simply copying every
4 single attorney's bill for thirty years. And if that is
5 what they want to do and go through line by line, that is
6 what we will have to do. And if the Court tells me that
7 is what I have to do, then that is what I will do.

8 THE COURT: Well, you know, if that is what
9 they want to do, you know, we are not talking about a
10 two?hundred?and?fifty?thousand?dollar claim here, we are
11 talking about three hundred and eighty million.

12 MR. SADLER: That is a big number.

13 THE COURT: I don't know, for this Court, that
14 is big even ?? even in today's market.

15 So, Mr. Lanier, what is it that you really
16 want?

17 MR. LANIER: That is exactly what I want, Your
18 Honor. I want to be able to go through ?? I need to be
19 able to see what was paid, what the bills were. There
20 are some additional subtle things that will be contained
21 within them, I suspect. Mr. Sadler and I have talked
22 about my need, for example, of one particular law firm's
23 bills where we believe that some matters were being paid
24 that are not appropriate for recovery in any case like
25 this. And I have got some questions under McCarter &

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1 English, for example, whether or not the bills that had
2 been tabbed included work on the O?I insurance fight,
3 because McCarter & English represented O?I in the fight
4 against their insurers, as well as in personal injury
5 litigation.

6 And we have got to get these to an expert, and
7 let an expert look at them and make an assessment.

8 A final note that I was just handed was a
9 reminder that we also have an issue as to who paid the
10 bills, and whether they were paid by insurance or paid by

11 O?I.

12 THE COURT: That should show up in the journal
13 entry, shouldn't it?

14 MR. LANIER: It may, I don't know. But I
15 definitely need to get the bills to an expert. There are
16 two services that we have talked to, who go line by line
17 and try and make a determination.

18 THE COURT: Well, I am sitting up here ?? I am
19 having some amusing thoughts or bemusing thoughts by
20 looking down there and seeing Mr. Jones sitting here, and
21 I was thinking, here I have got two plaintiffs lawyers up
22 here ?? two plaintiffs lawyers talking about for the
23 first chance to look at what those defense lawyers charge
24 in defending these cases for twenty years. And I find
25 that there is something about ?? what is it about this

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1 puzzle that doesn't quite fit?

2 MR. JONES: I was told that I couldn't talk.

3 THE COURT: That is good, probably.

4 MR. LANIER: Not by me, not by me.

5 THE COURT: That is probably a good idea, but I
6 couldn't help but be somewhat bemused by the thought that
7 here I have got two plaintiffs lawyers talking about
8 this.

9 Okay. Well, you know, my thought is: You
10 know, they are entitled to look at them line by line, and
11 to the extent you want to stop line by line between now
12 and the time of the date we have got this privilege
13 hearing set, you must ?? you will need to identify those
14 you want to redact.

15 MR. SADLER: I understand. The next item which
16 is the Owens?Illinois/Owens Corning Fiberglas arbitration
17 documents, there are privileged matters, I am sure,
18 within that file. But the more pressing issue with
19 respect to Owens?Illinois is that this is a claim that
20 was made through the arbitration proceeding between OCF
21 or by OCF against Owens?Illinois. At the conclusion of
22 that arbitration there was a protective award ?? a
23 protective award compelling confidentiality that requires
24 notice to Owens Corning Fiberglas upon inquiry into that
25 file. It is protected by the award from being produced.

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1 Owens?Illinois does not feel in good faith to that award
2 that it can violate without the Court ruling telling
3 them, "Yes, you have to produce it." Now, there are
4 compelling reasons ?? and by that statement I don't want
5 you to misunderstand, Owens?Illinois does not think it
6 relates to this lawsuit and does not want to produce it,
7 but that is the big hurdle. I have for the Court a copy
8 of the protective award

of the procedure under.

9 THE COURT: How does ??

10 MR. SADLER: It was not the subject of the
11 Motion to Compel, so I didn't attach it to my response,
12 but it is something that we have talked about for a month
13 or so, and I ??

14 THE COURT: Well, since it is not a part of the
15 Motion to Compel, we are not ??

16 MR. LANIER: It is, Your Honor. It is a part
17 of the Motion to Compel.

18 MR. SADLER: I didn't see it listed in there.
19 Maybe I am mistaken.

20 MR. LANIER: It is one of the exhibits that is
21 attached, and the fourth or fifth paragraph references
22 the multi?faceted exhibits. May I reach over you here?

23 MR. SADLER: Oh, well, it is on that.

24 MR. LANIER: Yeah, and it is referenced here.

25 MR. SADLER: That is okay, I don't mind

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1 considering it today. But that is the reason ??

2 THE COURT: Well, why is it that this is so
3 relevant to this litigation, Mr. Lanier? What is it that
4 this is going to tend prove or not prove there? Tell me
5 exactly what it is.

6 (Defendant's counsel confer.)

7 MR. LANIER: Okay. He didn't know I was ready
8 for that one.

9 THE COURT: Okay.

10 MR. LANIER: Owens Corning, OCF, made a claim
11 against O?I that O?I fraudulently sold the Kaylo Division
12 to OCF and that O?I had knowledge of the hazards and the
13 problems with the Kaylo Division, when it sold it in
14 1958. If that is true, then that is a core issue in our
15 case because Owens?Illinois, in our case, claims that up
16 and to the time the unit was sold to OCF, there was no
17 knowledge that asbestos was a hazard or that the Kaylo
18 was a problem. In fact, in this lawsuit Owens?Illinois
19 claims the only reason they sold the Kaylo unit is that
20 it was losing money because of this monopoly that existed
21 between T&N and other fiber producers. That
22 representation was made to Judge Folsom, and it's also
23 contained in the pleadings. Now, one story is true or
24 the other story is true, but I am allowed not only to the
25 relevant evidence, but to anything that might lead to

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1 relevant evidence. And so I would like to see the fight
2 over that issue that was waged between OCF that bought
3 Kaylo and O?I that sold Kaylo. It seems to be it is a
4 core issue.

5 THE COURT: Mr. Sadler, why isn't that ??

6 MR. SADLER: If, in fact, that is the claim
7 that was ?? proceeded to arbitration, you may be correct.
8 But the problem is, Your Honor, that this is a sealed
9 matter, that there is not just simply Owens?Illinois
10 involved in this, Owens Corning Fiberglas is too.
11 And what I have tried to tell the Court and Mr. Lanier
12 is that if you want to proceed with this, then I think
13 you have to give notice to Owens Corning Fiberglas, they
14 have an interest, to appear also and protect their
15 information.
16 THE COURT: Okay. Mr. Lanier ??
17 MR. SADLER: You know, arbitrations are
18 protected by state statute and federal statute.
19 THE COURT: Okay. Give them notice and tell
20 them that it is going to be heard on whatever our next
21 hearing date is.
22 MR. LANIER: Okay. Thank you, Your Honor.
23 MR. SADLER: September 1st?
24 THE COURT: Whatever our next date is, that
25 issue is going to be resolved. But we need ?? I do

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1 believe that you need to give them notice.
2 MR. LANIER: Okay. Thank you, Judge.
3 THE COURT: And with respect to identifying the
4 issue, you can also notify them that anything they
5 designate as being sealed, for the purpose of that
6 hearing will be sealed, and I will make the determination
7 at the hearing as to whether it will remain sealed or
8 not.
9 MR. LANIER: Okay. I will put that in the
10 letter as well, and I will copy the Court on the letter.
11 THE COURT: I don't want to make an order since
12 ?? on that today.
13 MR. SADLER: Well, this order requires
14 Owens?Illinois, as I read it, to give Owens Corning
15 Fiberglas that notice, and so I will see that a formal
16 notice is sent to them, Your Honor, as well.
17 THE COURT: Well, you know, I haven't read
18 this, I just saw it, but I am just saying whatever is
19 required by this document entitled "Protective Award
20 Compelling Confidentiality Non?Waiver of Privileges and
21 Protection," whatever is required in terms of notice, I
22 expect the parties to give that.
23 MR. LANIER: It will be done, thank you, Judge.
24 MR. SADLER: The fourth issue, Your Honor, has
25 to do with litigation involving Owens?Illinois and its

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1 insurers. I will tell you, briefly, this. This is part
2 of public record, Owens?Illinois is a public company and
3 they have disclosed this. In 1984 Owens?Illinois

3 they have discussed this. In 1984 Owens-Illinois
4 initiated the litigation against its insurers, including
5 a captive insurer, Owens Insurance Limited. It was to
6 establish coverage for the years 1977 to 1985, that was
7 the sole issue presented in that litigation. Litigation
8 has been ongoing since 1984. There was a settlement
9 along the way where Owens-Illinois Limited furnished
10 coverage. There is now dispute with some of the
11 re-insurance, most of the re-insurers have paid pursuant
12 to that original settlement. That is fifteen years of
13 insurance litigation over the years 1977 to 1985, that
14 coverage question. We don't think that it is relevant to
15 anything we are doing here, and like I said that is the
16 reason why they don't want to produce it, and don't feel
17 like it should be produced at this time.

18 THE COURT: How is that litigation relevant to
19 the issues in this case?

20 MR. LANIER: Your Honor, in the insurance
21 litigation, the insurers said "We are not going to cover
22 you, OI because you, OI, knew the hazards of asbestos
23 and you defrauded the public when you sold your Kaylo to
24 them without warning. Your work was ?? and the asbestos
25 sale that you were doing was an act of fraud.

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1 Both Dr. Egilman, our expert; and Shep Hoffman,
2 my co-counsel, had been approached by the insurance
3 companies to testify or to work on their behalf against
4 OI. They were specifically told that that was the core
5 issue that was being pursued. Both Dr. Egilman and Shep
6 Hoffman backed away, and refused to work for the
7 insurance carriers, because both of them wanted OI to
8 get as much insurance coverage as possible to cover the
9 injured victims. Because of their request, however, we
10 know that that was a core issue in the case, that was
11 what they were both solicited to work on. Mr. Hoffman,
12 because he had such success at punitive damage findings
13 against OI, and Dr. Egilman because of his testimony in
14 those trials about what OI knew.

15 Because that is a core issue being fought out
16 between the insurer and OCF (sic) ?? we think we are ?? I
17 mean, between OI and the insurer, we are entitled to it.
18 It is also a core issue in our case. In our case OI is
19 making the claim that they had absolutely no knowledge
20 about the hazards of asbestos to end users during the
21 entire time that they manufactured and sold asbestos
22 products.

23 THE COURT: Well, I know, but how is it that
24 some insurance company's claim is going to be
25 attributable to OI?

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1 MR. LANIER: I think it is different than that,
2 my goal is in the discovery to get all of the relevant
3 information or anything that might lead to relevant
4 information. And I have no doubt that witnesses were
5 designated, I have no doubt that documents were
6 identified, I have no doubt that testimony was offered.
7 A number of the witnesses that I would like to call in my
8 case are dead. That was a case that pended fifteen,
9 twenty years ago where a lot of the witnesses that I
10 would like to call were still alive. And whether through
11 discovery responses or whether through depositions or
12 whether through signed interrogatory answers the
13 testimony was offered. It is either going to be relevant
14 for me or it at least ought to be calculated to lead to
15 relevant evidence.

16 I have agreed to a protective order in this
17 case. The whole case now is under seal, but even absent
18 that, I have got a protective order. I have got every
19 personal reason in the world to make sure O?I keeps all
20 of the insurance they possibly can. I represent too many
21 underlying claimants in claims against O?I. So, I want
22 O?I to keep the insurance. I am not going to try and
23 deep?six anything, there is no down side to me getting it
24 that I see. It just is either relevant itself, or surely
25 will lead me to relevant evidence. And so, I would like

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1 to see what the depositions say, I would like to see what
2 the documents produced say, I would like to see what the
3 interrogatory answers are, what affidavits there may be
4 of witnesses that are dead and gone and beyond my reach,
5 or witnesses that may be alive and may be telling a
6 different story twenty years later.

7 THE COURT: Well, I order you to produce
8 depositions of O?I's representatives, interrogatory
9 answers filed by O?I, requests for admissions filed by
10 O?I.

11 MR. LANIER: Your Honor, could I also request
12 the Court specifically for any documents that may have
13 been produced in that litigation that have not already
14 been produced in ours, produced by O?I?

15 THE COURT: Well, not anything that broad,
16 huh?uh. You know, any documents that is produced in that
17 litigation that relates to what?

18 MR. LANIER: That relates to the issues of
19 fraud and what O?I knew and when O?I knew it.

20 THE COURT: Well, obviously that should have
21 already been produced in this litigation pursuant to
22 voluntary disclosure.

23 MR. LANIER: And if ??

24 THE COURT: Well, and you know, I don't have
25 any reason to believe that they didn't. and until I see

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1 some ?? I am not going to send them on that broad of a
2 trip of searching the documents. If you come back after
3 you see their answers and you think it is inconsistent
4 with what they are now saying, then bring it to my
5 attention and I might reconsider that, but I am going to
6 stop it at that stage today.

7 MR. SADLER: Bring it to my attention first,
8 okay?

9 MR. LANIER: I will be glad to.

10 MR. SADLER: Number 5, documents on the sale of
11 the Kaylo Division. We have had discussions, Mr. Lanier
12 and I have, and I have asked them to give us all
13 documents that relate to Kaylo to produce those; that are
14 not subject to privilege that have been specifically
15 identified to the Court. To my knowledge, every document
16 relating to Kaylo, I have been assured, have been
17 furnished.

18 THE COURT: Except those that you are going to
19 claim on the privilege log?

20 MR. SADLER: Exactly, Your Honor. So,
21 everything they have is done. Now, Mr. Lanier has asked
22 me again this morning ?? or this afternoon before the
23 hearing, and his words were simply this, if I misphrase,
24 please tell me. "But surely within this company there
25 were discussions and memorandums concerning this was a

23

1 division that was losing money, what were the reasons for
2 the sale, and et cetera, things like that, and if so,
3 that is specifically what I am asking for."

4 I have asked for that information before, but I
5 am more than willing to go back and ask one more time to
6 make sure ??

7 THE COURT: Well, it should be produced, you
8 know.

9 MR. SADLER: It should have been produced
10 months ago if it, in fact, exists. I wouldn't argue
11 that.

12 THE COURT: And if we find some evidence at
13 some time that they haven't produced it, I think in the
14 last telephone hearing this Court probably talked
15 sufficiently about its' feelings about failure to
16 produce.

17 MR. SADLER: And I have communicated that to
18 the general counsel of Owens?Illinois and all the legal
19 ??

20 THE COURT: Well, that is what I say: I don't
21 need to go into that again today, I think the parties ??
22 y'all have heard that lecture, so you don't need to hear
23 it again

20 again.

24 MR. LANIER: I think it got me the CDs, so it
25 was a good lecture.

24

1 MR. SADLER: Actually, the CDs were identified
2 to you in February, 2000. I didn't know that, but before
3 I got involved in this lawsuit in answer to a notice,
4 Richard Josephson told you that the CDs and microfilm
5 existed.

6 THE COURT: Come on, let's stay with what's
7 before the Court, Mr. Sadler.

8 MR. SADLER: No. 6, the ACF legal documents,
9 that has to do with Asbestos Claims Facility legal
10 documents. Again, I did not recognize that to be part of
11 the Motion to Compel, but I am more than willing to
12 discuss it and get it off the table and get it done.

13 ACF is Asbestos Claims Facility, as you know
14 and the Court's aware is the forerunner to CCR. It is my
15 understanding ??

16 THE COURT: You know, the Court was involved
17 in asbestos litigation, but fortunately for me, I got out
18 of it in the early '80s, my client went bankrupt early,
19 and I was out of it. So, really don't ever assume that I
20 know what all of these initials stand for. Tell me
21 because ??

22 MR. SADLER: Asbestos Claims Facility, you had
23 the Wellington group, Asbestos Claims Facility, and now
24 Center for Claims Resolutions, CCR.

25 THE COURT: Okay.

25

1 MR. SADLER: It is my impression based on my
2 discussions with Owens?Illinois that ACF legal documents
3 are still under the control of CCR. I am more than happy
4 to go and see if they have any ACF documents, and if so,
5 I will produce them because I think it comes within the
6 broad guise of production that we have been talking
7 about.

8 THE COURT: Well, I don't even know what the
9 term ?? when you say "legal documents," what are you
10 talking about?

11 MR. SADLER: I assume he means the contract
12 between the ??

13 MR. LANIER: Your Honor, well ?? it ?? Judge,
14 Asbestos Claims Facility at one time consisted of both
15 Owens?Illinois and Turner & Newell.

16 THE COURT: I understand that because I
17 understand that part of Turner & Newell's claim is that
18 people that were on the board of directors and lawyers
19 convinced them that they really shouldn't comply fully
20 with discovery requests.

21 MR. LANIER: Your Honor, within the framework
22 of ACF then, I am rather confident from discussions with
23 folks that there are some releases that were signed
24 between the parties. Now, T&N did not sign one, but I
25 understand O?I signed a release as to other ACF members,

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1 and I would like to see the release because it may have
2 an affect upon this lawsuit. I understand also that
3 within the ACF structure documents were exchanged about
4 what lawyers would be representing what clients, what
5 they were allowed to tell about one client to another
6 client, and what they weren't. These kinds of documents
7 are going to be core on the issue of whether or not
8 Owens?Illinois had actual or constructive knowledge of
9 T&N's role in the history of asbestos.

10 And I am being told ?? and I don't throw this
11 at the feet of Mr. Sadler because he is one among many,
12 and he has been nothing but straight with me, but I am
13 being told that O?I doesn't have any such documents. And
14 I would just ask him to make absolutely certain because I
15 have since done some discovery ?? or have visited with
16 some people who have told me that there may exist such
17 documents, and that is what I am looking for.

18 THE COURT: Well, to the extent that ??

19 MR. SADLER: Your Honor, I ??

20 THE COURT: What did you say, Mr. Sadler?

21 MR. SADLER: I am sorry, Your Honor, but I
22 think it is public record that there were agreements
23 between the Wellington defendants and the later
24 defendants about their relationships within ACF because
25 there certainly is still now with CCR, Turner & Newell is

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1 a member now. I am sure those documents exists, it is a
2 question of whether or not we have them or the Asbestos
3 Claims Facility has them or CCR.

4 THE COURT: Well, it is not a question, you
5 know, of whether you have actual possession of them, it
6 is whether if you are a party to them, whether you have a
7 right to have a copy of it, I believe is the real
8 question that needs to be answered. And if you have a
9 right to obtain a copy of them, which most people that
10 are parties to an agreements have that right, then I
11 expect them to be produced unless you are claiming a
12 privilege to them somehow, that hasn't been waived. Or
13 it may be subject to some joint defense privilege that we
14 have to take up, I don't know.

15 MR. SADLER: Maybe I need a definition of what
16 "legal documents" means.

17 THE COURT: Well, I didn't understand, that is
18 why I asked the question. It sounds to ?? what I heard

18 why I asked the question. It sounds to ?? what I heard
19 him talking about were documents that O?I was actually a
20 party to, that is in terms of signing a release or in
21 terms of making an agreement with this ACF or the
22 Wellington group or CCR as to who was going to represent
23 whom, and who was going to ?? what the respective parties
24 ?? member of those groups were is what I heard. Now, I
25 didn't understand what "legal documents" meant either,

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1 that is awful broad. That is why I wanted him to define
2 it further. And so, that is what I hear him saying, now
3 if he has got some further definition, he is going to
4 have to further define it to you, but that is what I
5 heard, the actual agreements that your client was a party
6 to that controlled how these different companies
7 interacted among themselves, whether it was Asbestos
8 Claims Facility, CCR or the Wellington group. Now, that
9 is what I heard.

10 MR. SADLER: Well, what I would anticipate is
11 providing whatever documents are within their control.
12 If we have them, we have them. But with ACF ??

13 THE COURT: Or if you have a right to get them.

14 MR. SADLER: Well, that is the reason why I
15 asked because the next step to that or how you would do
16 that, Your honor, is to send a letter to somebody at ACF
17 and say, "I need what ?? all legal documents relating to
18 O?I and ACF?" They are going to fire back a letter that
19 says, "Well, tell us exactly what it is you are looking
20 for." Right?

21 THE COURT: I just have a hard time accepting
22 the fact that O?I didn't keep a copy of what it signed in
23 something that important. When it ?? either they or
24 their lawyers that represented them with the Wellington
25 group would not have kept a copy of what their client was

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1 entering into.

2 MR. SADLER: Well, I will tell you, Your Honor,
3 when this whole notion of the third?party complaint came
4 up, I asked them specifically, "Didn't you give your
5 releases to Mr. McWeeny as executive director or whatever
6 your position was with ACF? Didn't you get a release?"
7 And his answer was "I don't have it, if I did." So, I
8 mean, I made that inquiry, Your Honor, and was told that
9 "No, they didn't have the documents." Now, I can't tell
10 you that since that time, and particularly since the
11 filing of the third?party complaint that they haven't
12 made an effort to go find some of them. And to the
13 extent they have found them, I will produce them. But it
14 is where they are being kept that is going to be ??

15 THE COURT: Well, you know, if you don't have

16 them, and you make inquiry, and they say they are not
17 going to produce them or you got ?? then we will have to
18 deal with that with that facility. As a deposition or ??
19 I can see where we are headed in this thing.

20 MR. SADLER: I will do everything I can to make
21 sure that we have legal documents relating to ??

22 THE COURT: But, I mean, you know, the term
23 "legal documents" as I appreciate what has been said to
24 me today is something that your client, O?I, was a party
25 to that relates to their involvement with the Asbestos

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1 Claims Facility, the Wellington group or the CCR. That
2 is the best definition I have heard so far. Did I
3 misstate what you said to me, Mr. Lanier?

4 MR. LANIER: Your Honor, that is very accurate.

5 THE COURT: Well, don't ?? I wouldn't want to
6 say anything is very accurate, when I am just sitting
7 here flying by the seat of my pants. But anyway ??

8 All right. What about No. 7?

9 MR. SADLER: This is ?? let me ?? from what I
10 have been told this is the way this occurred. There is a
11 listing of an index which I have provided to them of some
12 documents or articles that were kept back in the
13 timeframe involved in asking questions of the '30s, '40s
14 and '50s. There is not a medical library that exists in
15 Owens?Illinois today, and those documents that are on
16 that list do not exist within Owens?Illinois today.
17 It is my understanding that where those documents were
18 kept at one point in time was part of what is called the
19 Tech Center in Toledo which was ultimately destroyed.
20 And that is the whole story that has been told to me.

21 THE COURT: Well, if they destroyed them and
22 they don't exist, I don't know of any way that this Court
23 can make them reappear.

24 MR. LANIER: I don't either, if that is,
25 indeed, what happened. And the way that Mr. Sadler and I

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1 left this with each other this morning, is that when Mr.
2 McWeeny gives a deposition, he will be prepared to answer
3 that. It is our understanding from talking to the people
4 who destroyed the Center, that there weren't any
5 materials in it, and that they were given to some of the
6 lawyers that represented O?I. But I will ask Mr. McWeeny
7 that stuff, we don't need to take your time today.

8 THE COURT: Well, if they are articles that
9 appeared in journals, is that right?

10 MR. SADLER: And they have got a listing.

11 THE COURT: And they have got a listing, it
12 seems like to me we are sort of ?? if they have got a
13 listing of documents that were in the public domain, and

13 reading of documents that were in the public domain, and
14 you got a listing of them, it seems to me like that they
15 are pretty readily available to you through other means.

16 Now, then have we covered the matters?

17 MR. LANIER: Yes, Your Honor, and I thank you
18 for your time today.

19 THE COURT: Well, I am not quite through with
20 you, Mr. Lanier.

21 What does IHF stand for, somebody tell me.

22 MR. LANIER: The Industrial Hygiene Foundation.

23 THE COURT: Good, thank you. We were way off,
24 weren't we, Mr. Everingham?

25 All right. I just saw that.

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1 I want you in preparation for the privilege
2 fight that is on its way to be aware of a couple of cases
3 that the Court thinks is pretty ?? they are very
4 important in these issues of attorney/client privilege in
5 a case such as this involving attorneys and their work
6 product. One of them is Conkling, C?O?N?K?L?I?N?G,
7 versus Turner. It is found at 883 Fed. 2d, 431. And a
8 more recent ?? I think this is an unpublished opinion out
9 of the Eastern District of Louisiana that discusses that
10 case, and it might provide some guidance as to what this
11 Court believes it is probably bound by under Fifth
12 Circuit law. That is the case of American Medical
13 Systems, Inc. versus National Union Fire Insurance
14 Company. And has a Westlaw number of 1138484. Now, it
15 is an unpublished opinion, and I am not trying to violate
16 any rules about citing unpublished opinion, but I am
17 trying to give that to the parties as some guidance as we
18 approach this privilege hearing, which I assume is going
19 to be considerable, unless y'all get it all resolved
20 before the privilege hearing.

21 Now, the Court has reviewed on its own in the
22 last day or so the track which we are on in this case.
23 And the Court has come to the conclusion that it is not
24 realistic for litigation of this size to be forced ?? it
25 is like trying to force something square in a round hole

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1 ?? and this Court got this case in some form in May, and
2 so I sent you a new scheduling order yesterday, so that
3 nobody's deadlines for experts would pass with anybody
4 having a heart attack. You know, Mr. Sadler was
5 palpating according to my law clerk.

6 I think we have got to look at moving this case
7 about six months or seven months, and give Mr. Sadler
8 time to get through with the legislative session.

9 Y'all will have to excuse me, I will be back in
10 just a second.

11 (Short pause in the proceedings.)
12 THE COURT: All right. Please be seated.
13 Excuse me, gentlemen. Sometimes good news can cause
14 emotional outbursts as well as bad news, and that was
15 good news.
16 Back on the record. What I was saying was, I
17 think the Court has come to the conclusion that we are
18 trying to force a square peg in a round hole, and I would
19 like the parties to take the scheduling order that was
20 sent out yesterday or the day before, and let's see ??
21 when is it we are going to be in Marshall in the
22 mid?summer?
23 Are you going to be out of session by July?
24 MR. SADLER: June 1st.
25 THE COURT: June 1st, assuming not a special

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1 session. All right. We are going to set this case for
2 jury selection on July 9th ?? no, wait, no we are not.
3 We are going to set jury selection on July 6th, Friday,
4 July 6th. We will get the panel in and then start
5 evidence in the case on July 9th and go. Now, then whose
6 vacation did I just hit?
7 MR. LANIER: It does not matter. You just ??
8 MR. HOFFMAN: What do you mean it doesn't
9 matter? To you it doesn't.
10 MR. LANIER: It doesn't matter, we ?? we can do
11 this, thank you, Your Honor.
12 THE COURT: Well, it is just a matter that is
13 too much involved in trying to move it this fast. Under
14 the circumstances it is just not appropriate, and who
15 knows, maybe the MDL is going to take this away from me
16 next month anyway.
17 What is the status on the MDL?
18 MR. LANIER: Your Honor, it is my understanding
19 that it is in front of the clerks at this point, and I
20 think there is a good indication especially ?? I will
21 tell the Court that I am going to sit down with
22 Federal?Mogul, if we are set next July, and I am going to
23 urge them to try to withdraw the MDL.
24 THE COURT: Oh, I am not asking them to do
25 that.

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1 MR. LANIER: No, I know you are not, but July
2 9th ?? well, I don't want to influence the Court to take
3 away my July 9th setting.
4 THE COURT: We will set it then, and we will
5 ?? I think that is when ?? it just doesn't seem realistic
6 to me, but I do want to keep this privilege fight on the
7 front burner because it's always been my experience as a
8 lawyer and as a judge that these privilege fights come up

5 lawyer and as a judge and these privilege rights gum up

9 the trial settings about as much as anything. So, I

10 would like to keep the setting.

11 Now then, is there some confusion as to when we

12 are set on this ?? we set it for September the 1st and I

13 thought I bumped it back until August 31st, is the way I

14 have got it on my calendar.

15 What do you got, Mr. Sadler, on your calendar?

16 MR. SADLER: I haven't seen the scheduling

17 order.

18 MR. LANIER: I have got August 31st on my

19 calendar.

20 THE COURT: No, it wasn't on the scheduling

21 order.

22 MR. SADLER: Well, the original one was on

23 September 1st is what I am talking about. That is okay,

24 August 31st.

25 THE COURT: Well, I had originally anticipated

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1 because of the number of documents that we weren't going

2 to be able to get through it in one day.

3 MR. SADLER: We won't be able to. How many

4 documents do y'all have?

5 MR. LANIER: About eighteen billion, I can't

6 count them. I am trying to get through mine to whittle

7 them down.

8 THE COURT: Well, we may have some additional

9 help to help us with those issues, either a magistrate or

10 a special master. But to the extent you can agree, I

11 would hope that those cases would give you some insight

12 as to how the Court sees some of these privilege issues.

13 Is there anything further that I could discuss

14 with the parties at this time?

15 MR. SADLER: What did you do with the expert

16 ?? do you mind me sitting? I apologize.

17 THE COURT: No, that is all right.

18 MR. SADLER: With the expert witnesses and all

19 of that kind of stuff? I haven't seen the order.

20 THE COURT: Why don't you go get everybody

21 copies and ??

22 MR. SADLER: Have you seen the order?

23 MR. LANIER: No, I have not.

24 MR. SADLER: I thought it was going to be

25 handed out here.

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1 THE COURT: It was faxed out yesterday I

2 thought. I signed one yesterday afternoon before I left,

3 so ?? let's be at ease. Don't worry about standing or

4 not standing.

5 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a
correct transcript from the stenographic notes of the
proceedings in the above?entitled matter to the best of
my ability.

SUSAN SIMMONS, CSR _____ Date _____
Official Court Reporter
State of Texas No.: 267