

1                    IN THE UNITED STATES DISTRICT COURT  
2                    FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3 JOAQUIN CARCAÑO, et al.,                    ) 1:16CV236

4                    Plaintiffs,                    )

5 v.                    )

6 PATRICK McCRORY, in his                    )  
7 Capacity as Governor of North                    )  
8 Carolina, et al.,                    )

9                    Defendants,                    )

10                    and                    )

11 PHIL BERGER, in his official                    )  
12 Capacity as President Pro                    )  
13 Tempore of the North Carolina                    )  
14 Senate; and TIM MOORE, in his                    )  
15 Official capacity as Speaker of                    )  
16 The North Carolina House of                    )  
17 Representatives.                    )

18                    Intervenor-Defendants. )

19 \_\_\_\_\_ ) 1:16CV425

20 UNITED STATES OF AMERICA,                    )

21                    Plaintiff,                    )

22 v.                    )

23 STATE OF NORTH CAROLINA, et al. )

24                    Defendants,                    )

25                    and                    )

PHIL BERGER, in his official                    )  
Capacity as President Pro                    )  
Tempore of the North Carolina                    )  
Senate; and TIM MOORE, in his                    )  
Official capacity as Speaker of                    )  
The North Carolina House of                    )  
Representatives,                    )

Winston-Salem, North Carolina

September 16, 2016

Intervenor-Defendants. ) 10:05 a.m.

1 TRANSCRIPT OF THE **STATUS CONFERENCE**  
2 BEFORE THE HONORABLE JOI E. PEAKE  
3 UNITED STATES MAGISTRATE JUDGE

4 APPEARANCES:

5 1:16CV236

6 For the Plaintiff: SCOTT B. WILKENS, ESQ.  
7 JENNER & BLOCK, LLC.  
8 1099 New York Avenue, NW Suite 900  
9 Washington, DC 20005

10 CHRISTOPHER BROOK, ESQ.  
11 ACLU of NORTH CAROLINA  
12 P. O. Box 28004  
13 Raleigh, North Carolina 27611

14 1:16CV425

15 For the Plaintiff: LORI KISCH, ESQ.  
16 CHRISTOPHER CARNEY, ESQ.  
17 U. S. DEPARTMENT OF JUSTICE  
18 Civil Rights Division  
19 950 Pennsylvania Avenue, NW  
20 Washington, DC 20530

21 WHITNEY PELLEGRINO, ESQ.  
22 TOREY CUMMINGS, ESQ.  
23 U. S. DEPARTMENT OF JUSTICE  
24 Civil Rights Division  
25 Education Opportunities Section  
601 D Street, NW  
Washington, DC 20579

For the Defendants:

(State of NC,  
Governor McCrory,  
DPS)

KARL S. BOWERS , JR., ESQ.  
BOWERS LAW OFFICE, LLC  
P.O. Box 50549  
Columbia, South Carolina 29250

WILLIAM W. STEWART, JR.  
MILLBERG GORDON & STEWART, P.L.L.C.  
1101 Haynes Street, Suite 104  
Raleigh, North Carolina 27604

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1 APPEARANCES (Continued):

2 (State of NC,  
3 Governor McCrory,  
4 DPS)

ROBERT N. DRISCOLL, ESQ.  
MCGLINCHEY STAFFORD, PLLC.  
1275 Pennsylvania Avenue, NW, Suite 420  
Washington, DC 20004

5  
6 (UNC)

JOHN M. GORE, ESQ.  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, DC 20001

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
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20  
21  
22  
23  
24  
25

CAROLYN C. PRATT, ESQ.  
UNIVERSITY OF NORTH CAROLINA  
P.O. Box 2688  
Chapel Hill, North Carolina 27517

(Intervenors)

STUART K. DUNCAN, ESQ.  
ROBERT POTTER, ESQ.  
SCHAERR DUNCAN, LLP  
1717 K Street, NW, Suite 900  
Washington, DC 20006

Court Reporter:

BRIANA NESBIT, RPR  
Official Court Reporter  
P.O. Box 20991  
Winston-Salem, North Carolina 27120

## P R O C E E D I N G S

09:41:00 1  
10:05:35 2           **THE COURT:** This is Judge Peake. Good morning. What  
10:05:45 3 I want to do -- just for the record, I am going to call the  
10:05:50 4 cases that we are hearing this morning. This is Carcano versus  
10:05:56 5 McCrory, 16CV236, and United States versus State of North  
10:06:01 6 Carolina, 16CV425. We're on for a status conference. I'm in  
10:06:07 7 the courtroom on the telephone call, and the proceeding is  
10:06:09 8 recorded, so we'll have a court reporter and have all of this  
10:06:14 9 for the record on the hearing today.

10:06:17 10           What I want to do is just for my benefit and also for  
10:06:21 11 the benefit of the court reporter, if you could let me know who  
10:06:24 12 all is on the call and who is going to be speaking for each of  
10:06:27 13 the parties first, and we'll start with the 236 case.

10:06:32 14           **MR. WILKENS:** Yes, Your Honor, this is Scott Wilkens  
10:06:33 15 from Jenner & Block on for the Carcano Plaintiffs, and I'll be  
10:06:37 16 speaking for the Plaintiffs, and also on the phone for the  
10:06:41 17 Carcano Plaintiffs is Christopher Brook from the ACLU of North  
10:06:45 18 Carolina.

10:06:47 19           **THE COURT:** Okay. Very good. Is that everyone that  
10:06:48 20 you have on the call then for your client, Mr. Wilkens?

10:06:51 21           **MR. WILKENS:** I believe that's correct. If there is  
10:06:54 22 anyone else on, please speak up or forever hold your peace.

10:06:56 23           **THE COURT:** All right. Thank you.

10:06:58 24           All right. And then for the -- let me go ahead and  
10:07:01 25 go to the Plaintiffs in the 425 case then.

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10:07:05 1           **MS. KISCH:** Yes, hi, Your Honor, good morning. This  
10:07:07 2 is Lori Kisch on behalf of the United States. Whitney  
10:07:10 3 Pellegrino is also on the line and some others from the  
10:07:17 4 Department of Justice listening in. Do you want us to go  
10:07:18 5 through and identify the other individuals listening?

10:07:20 6           **THE COURT:** If you could, identify just everyone on  
10:07:23 7 the call, that would be helpful, and then I'll just note that  
10:07:25 8 it's -- is it Ms. Kisch who's going to be speaking for the  
10:07:29 9 United States?

10:07:29 10           **MS. KISCH:** Yes.

10:07:31 11           **THE COURT:** Yes, ma'am, and then anyone else on for  
10:07:33 12 the United States.

10:07:34 13           **MS. KISCH:** Also on the phone is Torey Cummings,  
10:07:36 14 Whitney Pellegrino, and Christopher Carney.

10:07:42 15           **THE COURT:** All right. For the Defendants in both  
10:07:45 16 cases then?

10:07:51 17           **MR. BOWERS:** Good morning, Your Honor. This is Butch  
10:07:53 18 Bowers. I'm on the phone for the Governor -- what we described  
10:07:57 19 a couple of weeks ago as the State Defendants: The Governor,  
10:08:00 20 the Department of Public Safety, and the State. I'll be  
10:08:04 21 speaking for us today. With me on the line is Bill Stewart and  
10:08:09 22 Bob Driscoll.

10:08:10 23           **THE COURT:** All right. And for the Legislative  
10:08:17 24 Intervenors?

10:08:19 25           **MR. DUNCAN:** Good morning, Your Honor. This is Kyle

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10:08:20 1 Duncan for the Legislative Intervenors, and I have Bob Potter  
10:08:26 2 also on the line. I'll be speaking.

10:08:27 3 **THE COURT:** Thank you. And for UNC?

10:08:31 4 **MR. GORE:** Good morning, Your Honor. This is John  
10:08:32 5 Gore on for the UNC Defendants. I'll be speaking for the UNC  
10:08:37 6 Defendants, and with me on the line is Carolyn Pratt from UNC.

10:08:40 7 **THE COURT:** All right. And then just for the record,  
10:08:43 8 let me ask generally if there is anyone on the call who hasn't  
10:08:49 9 been identified thus far? Thank you.

10:08:52 10 I have three things on the agenda this morning.  
10:08:55 11 First is the joint Rule 26(f) report and scheduling generally,  
10:09:00 12 second is the joint motion for entry of a stipulated  
10:09:04 13 confidentiality order, and then third is to clean up any  
10:09:08 14 pending motions. Right now the only one I show is the motion  
10:09:11 15 for leave to file a second amended complaint, but I'll ask if  
10:09:15 16 there is anything else that the parties know when we get to  
10:09:20 17 that in terms of things that we otherwise need to address or  
10:09:24 18 resolve.

10:09:24 19 What I would intend to do is start with the  
10:09:27 20 scheduling generally, and then what I will try to do is open up  
10:09:32 21 the question or issue. And then it's a little awkward  
10:09:37 22 sometimes to go through all the parties, but I think given the  
10:09:40 23 telephone conference system we've got set up here, that's the  
10:09:45 24 only way really to do it and cover it for the record. So I'll  
10:09:49 25 just go through each of the five of you to make sure that we've

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10:09:54 1 covered everything and see if you have anything you need to add  
10:09:57 2 on any of the issues that I raise.

10:10:00 3           The first issue with respect to the 26(f) report  
10:10:03 4 notes that the cases are consolidated for discovery and trial.  
10:10:08 5 I would say as an administrative matter we've coordinated them.  
10:10:16 6 They are obviously not consolidated for all purposes at this  
10:10:18 7 point, but they are coordinated, so they would still be two  
10:10:21 8 separate case files and two separate file numbers, which means  
10:10:26 9 just an administrative matter I need you to caption everything  
10:10:28 10 in both cases so that we have everything proceeding on parallel  
10:10:33 11 tracks but coordinated together. That's what I would intend to  
10:10:38 12 do just to keep things straight, but otherwise keep them  
10:10:41 13 coordinated as we proceed, and then, of course, any question  
10:10:44 14 for how things get presented at trial would be for the district  
10:10:49 15 judge.

10:10:50 16           Let me just go through the list with all of you to  
10:10:52 17 see if there is anything to add, any questions on that, any  
10:10:57 18 issues with respect to just that general coordination and  
10:11:00 19 consolidation -- or coordination and then keeping the cases  
10:11:02 20 separate as cases and case numbers, but otherwise coordinating  
10:11:07 21 them and captioning in both cases.

10:11:09 22           So, Mr. Wilkens, anything as to that issue?

10:11:13 23           **MR. WILKENS:** No questions, Your Honor.

10:11:15 24           **THE COURT:** And Ms. Kisch?

10:11:17 25           **MS. KISCH:** No questions, Your Honor.

10:11:20 1           **THE COURT:** All right. Mr. Bowers?

10:11:21 2           **MR. BOWERS:** No questions and no issues, Your Honor.

10:11:23 3           **THE COURT:** All right. Mr. Duncan?

10:11:26 4           **MR. DUNCAN:** Nothing here, Your Honor.

10:11:27 5           **THE COURT:** Okay. And Mr. Gore?

10:11:29 6           **MR. GORE:** Nothing, Your Honor.

10:11:30 7           **THE COURT:** Okay. The issue that I show that you all  
10:11:34 8 had left to resolve in the 26(f) report was a cutoff date for  
10:11:39 9 expert depositions in the second deposition period. As I  
10:11:42 10 understand it, the Plaintiffs requested an expert cutoff date  
10:11:48 11 of January 17 or, as a compromise, that the first 8 experts at  
10:11:55 12 least be finished by January 17. Defendants preferred through  
10:12:00 13 February 22 for the experts or at least then proposed a  
10:12:09 14 compromise of February 1.

10:12:10 15           I think before I make a decision on that, I wanted to  
10:12:14 16 look at the numbers that you all had originally presented in  
10:12:19 17 your joint notice in the prior status conference. As I recall,  
10:12:27 18 it looked like at that point you anticipated, I believe it was,  
10:12:31 19 32 fact witnesses and 18 experts; and it might help for me to  
10:12:40 20 know how many of them -- of those 18 experts you anticipate in  
10:12:43 21 the first deposition period, how many are left for the second  
10:12:48 22 deposition period, and how we divide that time up.

10:12:52 23           Based on the number that you are looking at, it seems  
10:12:55 24 like it might work better to just use February 1 as the outside  
10:13:01 25 date to make sure there is enough dates to work with but to get

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10:13:06 1 everybody in as early as possible, which would still be 30 days  
10:13:11 2 before the first *Daubert* motions are due.

10:13:13 3           What I want to do is let each of you tell me where we  
10:13:17 4 are on those numbers of depositions and what your position  
10:13:20 5 might be for how that works out with the deposition periods  
10:13:24 6 that you've got proposed here.

10:13:27 7           So, Mr. Wilkens, let me start with you.

10:13:30 8           **MR. WILKENS:** Thank you, Your Honor. I won't claim  
10:13:32 9 to have full knowledge of the number of depositions. I don't think  
10:13:38 10 it's materially changed since the numbers that you mentioned,  
10:13:41 11 but others can speak to that as well. At the moment, the only  
10:13:47 12 expert depositions that we envision taking in the first period  
10:13:52 13 are the experts that relate to public safety, and I think  
10:13:58 14 that's approximately five --

10:14:03 15           **THE COURT:** Okay.

10:14:03 16           **MR. WILKENS:** -- experts, but others can chime in  
10:14:06 17 with better numbers. So that would leave a substantial number  
10:14:09 18 of experts for the later phase, which is -- you know, which  
10:14:14 19 means that we would need some time to get them in.

10:14:18 20           And there is -- you know, there is -- I think we are  
10:14:22 21 trying to winnow down the total number of fact witnesses, and  
10:14:29 22 that's starting to happen, but it will still be a substantial  
10:14:33 23 number. We will -- those will -- we've each exchanged lists of  
10:14:35 24 those of 8 to 9 on each side that we will depose in the first  
10:14:40 25 phase, but that will then leave approximately 25 or more for

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10:14:48 1 the rest of the deposition period.

10:14:51 2 **THE COURT:** Right. So as far as the schedule for the  
10:14:55 3 second deposition period, we've got sort of 13 experts  
10:15:02 4 potentially for that second deposition period. Does it work to  
10:15:05 5 leave you generally the period from December 6 through  
10:15:10 6 February 1 to try and get all of those 13 in, and then you  
10:15:15 7 would still have the 30 days before your *Daubert* motions were  
10:15:17 8 due, or 30-plus days, it looks like?

10:15:23 9 **MR. WILKENS:** Yeah, I think that would work.

10:15:25 10 I mean, one question I have, Your Honor, is I think  
10:15:29 11 in the hearing we had before you in person the last time, I  
10:15:32 12 think you had noted that we would need to get *Daubert* motions  
10:15:37 13 and any others -- well, for dispositive motions, into the Court  
10:15:43 14 60 days before trial with the hope of getting a ruling. I may  
10:15:49 15 have misremembered that, or I may be misportraying it, but what  
10:15:54 16 is your sense of when we would need to get *Daubert* motions in  
10:15:57 17 in advance of the May trial date to have them ruled upon?

10:16:04 18 **THE COURT:** Well, I have your proposal. That's one  
10:16:08 19 of the things on my list in terms of setting some deadlines for  
10:16:11 20 schedules. Right now, the dispositive motions aren't going to  
10:16:15 21 be fully briefed until May 15, which, if that's the case, then  
10:16:20 22 obviously that's getting rolled into a May 22 trial. They are  
10:16:24 23 not fully briefed until the week before trial.

10:16:27 24 As far as the *Daubert* motions, as I understand the  
10:16:31 25 schedule you all have proposed, those would be fully briefed by

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10:16:35 1 April 17, which would at least give an opportunity for the  
10:16:39 2 Court to look at those in advance of trial and then determine  
10:16:45 3 on what schedule you are going to take care of those pretrial  
10:16:49 4 issues. So I don't know, though, under the schedule that you  
10:16:52 5 have where you -- that you've anticipated having everything  
10:16:56 6 fully briefed 60 days prior to trial, I didn't see that that  
10:17:00 7 was part of your proposal.

10:17:02 8           And I mentioned that at the prior hearing in terms of  
10:17:07 9 whether you wanted to try to do that to get some sort of  
10:17:10 10 rulings earlier or whether things maybe more appropriately got  
10:17:15 11 rolled into trial anyway.

10:17:16 12           **MR. WILKENS:** Yes, Your Honor. I mean, I think we  
10:17:18 13 had started out with trying the 60-day approach, but just given  
10:17:23 14 the number of witnesses to be deposed, that didn't seem to  
10:17:30 15 work, which is why you have the dates before you that you do.  
10:17:35 16 So it sounds like, given those dates, it would be the sort of  
10:17:41 17 typical practice for the Court to roll the dispositive motions  
10:17:45 18 into the trial itself.

10:17:48 19           **THE COURT:** Particularly given this is a bench trial  
10:17:51 20 and sort of the time frame that you've proposed here.

10:17:53 21           **MR. WILKENS:** Right. Okay.

10:17:55 22           **THE COURT:** And that's my understanding, that that's  
10:17:59 23 the dates that you all are proposing and agree to at this  
10:18:03 24 point. If so, then just as to the one issue where you  
10:18:06 25 disagree, it looks like the compromise that the Defendants

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10:18:11 1 offered with February 1 would give you a little more  
10:18:15 2 flexibility in terms of getting all 13 of those experts on a  
10:18:20 3 date that might work for them during that period but still  
10:18:23 4 satisfy Plaintiffs' request to have those depositions taken in  
10:18:29 5 time. So they've got 30 days prior to the due date for their  
10:18:34 6 *Daubert* motions is what it looks like to me, but I want to make  
10:18:39 7 sure I am not missing some other issue that the Plaintiffs were  
10:18:42 8 concerned about.

10:18:44 9 **MR. WILKENS:** I agree with that, Your Honor.

10:18:46 10 **THE COURT:** Let me go to Ms. Kisch and see if there  
10:18:49 11 is anything else from the Department of Justice.

10:18:51 12 **MS. KISCH:** Yeah, hi, thank you, Your Honor. One  
10:18:52 13 additional concern that we have is just being able to schedule  
10:18:56 14 and fit in all the depositions into that second period, and the  
10:19:00 15 February 1 certainly helps versus the February 22; but just in  
10:19:04 16 terms of numbers, I think the number of depositions have  
10:19:10 17 increased slightly from what was previously identified. I  
10:19:16 18 think there's about a total of 58 depositions right now with 20  
10:19:21 19 of them being experts.

10:19:22 20 Again, as Mr. Wilkens mentioned, we are trying to  
10:19:26 21 whittle down some of those fact depositions by working through  
10:19:30 22 some stipulations. So we are hopeful that some of those would  
10:19:33 23 be cut out; but as of right now, the number of fact depositions  
10:19:39 24 for that second period is 27 and 14 expert, and so we really --  
10:19:46 25 we were trying to work through, you know, to have that first

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10:19:50 1 sort of six-week period from December 6 to January 17 to really  
10:19:55 2 focus on the 8 medical experts, which everyone really agrees,  
10:20:01 3 you know, that there is no reason to hold those up, and given  
10:20:07 4 sort of the time frame in which to get all the depositions  
10:20:11 5 done, 8 depositions in a six-week period shouldn't be  
10:20:16 6 burdensome for the parties.

10:20:20 7           Just to give a little bit of context, in that first  
10:20:21 8 deposition period, which is a seven-week period, the parties,  
10:20:24 9 you know, are committed to taking -- putting forth 23 total  
10:20:30 10 depositions, and then sort of the last -- and then if we did  
10:20:35 11 have that six-week period in the middle for 8 medical experts,  
10:20:40 12 and then after that, there would be five weeks left to complete  
10:20:44 13 27 additional depositions, 21 fact and 6 experts.

10:20:49 14           So it's the United States' position that we would  
10:20:53 15 really like to try and keep the 8 medical experts within that  
10:20:57 16 six-week period so we get through them. We make sure that they  
10:21:02 17 are done so that there is enough time after that to finish up  
10:21:07 18 all the other depositions.

10:21:08 19           The difference between January 17 and February 1 is  
10:21:10 20 not a huge of amount of time when we're talking about this many  
10:21:13 21 depositions in this short of period of time. We still think  
10:21:16 22 that it was, you know, a significant enough difference in which  
10:21:21 23 we were hoping to get that six-week period.

10:21:25 24           We also were hopeful to file *Daubert* motions a bit  
10:21:30 25 earlier than what has been proposed in the schedule to give the

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10:21:33 1 Court additional time to consider them, especially given that  
10:21:37 2 there are so many experts, potentially 20 experts. Again, it  
10:21:41 3 may be that we are able to whittle that down before getting to  
10:21:46 4 trial, but those were our reasons why we were hoping for a  
10:21:50 5 February 1 cutoff to just help manage the deposition schedule  
10:21:55 6 and ensure that the *Daubert* briefs could get in as early as  
10:22:01 7 possible; and because there is no reason to hold up on these  
10:22:04 8 expert depositions, they are not relying on e-discovery or on  
10:22:10 9 the issues being briefed, that we should be able to get 8  
10:22:13 10 depositions done in a six-week period.

10:22:19 11 **THE COURT:** All right. And I've got a follow-up for  
10:22:20 12 you on that, Ms. Kisch.

10:22:21 13 I did note that there was a -- someone joined the  
10:22:25 14 call. Do we have someone else on the call now?

10:22:35 15 **MR. BROOK:** This is Chris Brook. I briefly got  
10:22:37 16 kicked off.

10:22:39 17 **THE COURT:** All right. That's fine. I just wanted  
10:22:41 18 to make sure we had everybody covered.

10:22:44 19 Ms. Kisch, I think I understand. It sounds like one  
10:22:49 20 option would be to try and carve out sort of a third deposition  
10:22:54 21 period here in the middle, but I'm afraid that might become  
10:22:58 22 sort of unduly complicated, and the same purpose could be  
10:23:01 23 served by setting a February 1 deadline for experts. It would  
10:23:07 24 still be February 22 for the second deposition period for the  
10:23:11 25 larger, including the fact witnesses, to the extent you could

10:23:16 1 get them all in there, but February 1 for experts and maybe a  
10:23:21 2 notation that the parties will use their best efforts to  
10:23:25 3 attempt to schedule the 8 medical experts as early as possible  
10:23:29 4 in the second deposition period.

10:23:34 5 **MS. KISCH:** That would work.

10:23:36 6 **THE COURT:** All right. So I am going to come over to  
10:23:40 7 the Defendants and see if they have anything to add on that  
10:23:43 8 issue before we get into the other issues that might be in the  
10:23:48 9 scheduling order. Just as to the second deposition period,  
10:23:52 10 Mr. Bowers?

10:23:55 11 **MR. BOWERS:** Your Honor, nothing to add. That sounds  
10:23:58 12 very reasonable to us.

10:23:59 13 **THE COURT:** All right. Mr. Duncan?

10:24:04 14 **MR. DUNCAN:** That sounds reasonable to us, Your  
10:24:05 15 Honor.

10:24:06 16 **THE COURT:** And Mr. Gore?

10:24:08 17 **MR. GORE:** That sounds reasonable to us as well.

10:24:09 18 **THE COURT:** So what I'll do is for the second  
10:24:11 19 deposition period we'll adopt February 1 as the deadline for  
10:24:17 20 completing depositions of expert witnesses, but, in addition,  
10:24:21 21 note that the parties will use their best efforts to schedule  
10:24:24 22 the 8 medical experts early in the second deposition period.

10:24:38 23 All right. And, Mr. Wilkens, coming back around to  
10:24:40 24 you on that, following my colloquy with Ms. Kisch, anything you  
10:24:46 25 needed to add on that?

10:24:49 1           **MR. WILKENS:** No, thank you, Your Honor.

10:24:49 2           **THE COURT:** All right. What I also have then is a  
10:24:57 3 few questions with respect to the 26(f) report and the prior  
10:25:05 4 scheduling order. I will tell you that I intend to come back  
10:25:08 5 around at the end here to set dates for all of the briefing  
10:25:12 6 that we've talked about, and so we can address that further if  
10:25:16 7 we need to; but I had a couple of questions with respect to  
10:25:20 8 some of the matters that were addressed in the prior scheduling  
10:25:23 9 order that I didn't necessarily see explicitly addressed here,  
10:25:27 10 and I wanted to make sure we confirm what the requirement would  
10:25:33 11 be.

10:25:34 12           In the initial scheduling order -- and, actually, I  
10:25:36 13 have three. I am going to go ahead and note all of them, and  
10:25:39 14 then I am going to go through each of you to let you address  
10:25:42 15 all three of these things.

10:25:44 16           First, there was a separate deadline or schedule for  
10:25:47 17 document production requests and then a requirement that  
10:25:53 18 responses and objections be due within 14 days and production  
10:25:58 19 completed within 30 days. My assumption is that some of that  
10:26:04 20 may have changed based on our extension of the discovery period  
10:26:07 21 here and your ongoing e-discovery negotiations and discussions,  
10:26:15 22 but I want to make sure that we address whatever the deadline  
10:26:18 23 or schedule may be for document production requests, or if we  
10:26:23 24 don't set that today, that you include it in your e-discovery  
10:26:26 25 information that you are going to submit.

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10:26:29 1           The second piece would be the deadline for responses  
10:26:34 2 to interrogatories and requests for admission. There was a  
10:26:38 3 deadline of 15 days for responding to interrogatories and  
10:26:43 4 requests for admission, and I want to confirm whether that is  
10:26:47 5 still the case and how that might also fit in with any other  
10:26:50 6 larger deadlines that we've got here.

10:26:52 7           And then, finally, we had left open the issue of the  
10:26:55 8 limit on the number of depositions. We've touched on that  
10:26:58 9 here, and so it would seem appropriate to at least put some  
10:27:03 10 outer limits on that, and I think you all have gotten some  
10:27:09 11 information now about where you are and certainly your intent  
10:27:12 12 to narrow down the numbers that you have right now; but if we  
10:27:17 13 need to use those as the outer limit, at least we can take that  
10:27:22 14 up.

10:27:23 15           So those are the three things that were still open or  
10:27:26 16 that were not addressed yet that we had previously talked  
10:27:29 17 about, and so let me see where each of you are on those three  
10:27:34 18 issues. I will start with you, Mr. Wilkens.

10:27:36 19           **MR. WILKENS:** Thank you, Your Honor. On the issue of  
10:27:39 20 document discovery, I think -- well, it's our position that the  
10:27:43 21 normal deadlines for responding under the federal rules should  
10:27:47 22 apply, although I think we made a note in the report, and I  
10:27:50 23 would have to find it, that we obviously -- we want the rolling  
10:27:56 24 production to continue.

10:27:57 25           **THE COURT:** I did see that, yes.

10:27:58 1           **MR. WILKENS:** Yes. And then I think similarly, with  
10:28:00 2 regard to the interrogatories and the RFAs, we also were under  
10:28:07 3 the impression -- we think it's fine if the normal deadlines in  
10:28:12 4 the federal rules now apply instead of the expedited deadlines  
10:28:17 5 that we had set in the prior order.

10:28:19 6           **THE COURT:** Okay. The limit on the number of  
10:28:22 7 depositions was the focus.

10:28:23 8           **MR. WILKENS:** Well, we are certainly -- I think -- on  
10:28:26 9 that front, I think it might be most efficient for the parties  
10:28:31 10 to have another discussion about that rather than try to do it  
10:28:37 11 on this call, but I am certainly open to it. Just given --  
10:28:41 12 we -- I mean, we've all been, I think, thinking about the  
10:28:45 13 number of fact witnesses and what we can winnow down, and so it  
10:28:50 14 may be that we can come up with a limit and agree on that. It  
10:28:59 15 may be more difficult to do it in the context of this call, but  
10:29:00 16 I am open to it.

10:29:02 17           **THE COURT:** Okay. Ms. Kisch?

10:29:03 18           **MS. KISCH:** Yeah, I would agree with everything that  
10:29:06 19 Mr. Wilkens just said, that the normal rules would apply for  
10:29:10 20 the written discovery. We are doing a rolling production, and  
10:29:13 21 the parties are, you know, engaging and discussing documents  
10:29:21 22 and e-discovery and moving forward with that, and we'll  
10:29:25 23 continue to move forward on that; but with regard to the number  
10:29:27 24 of depositions, I do think -- the parties are also really  
10:29:34 25 moving forward with trying to negotiate stipulations, and that

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10:29:37 1 very much could affect the number of depositions. So I think  
10:29:41 2 it would be useful for the parties to continue to work through  
10:29:43 3 that process because that may just -- you know, easily help  
10:29:49 4 result in eliminating some of the depositions, but in addition  
10:29:53 5 to that, certainly, we could go back and talk, you know,  
10:29:59 6 amongst the parties, you know, if there is a way to further  
10:30:02 7 limit depositions.

10:30:03 8           One proposal, you know, that we haven't finished  
10:30:09 9 discussing is rather than limiting the number, limiting the  
10:30:13 10 time for certain depositions, and I think that would be a  
10:30:16 11 fruitful conversation to continue, particularly for some of the  
10:30:19 12 depositions, that they don't need to be full seven-hour  
10:30:23 13 depositions.

10:30:23 14           **THE COURT:** All right. If you were going to suggest  
10:30:26 15 a time frame for how long you all might need to have those  
10:30:28 16 discussions -- because what I would like to do is impose some  
10:30:32 17 sort of limits so that it's clear at the outset what those  
10:30:36 18 limits are and that we have taken those limits into account in  
10:30:39 19 setting the deposition period here so that all of what you all  
10:30:44 20 agree to can get done in this time period, and whether you do  
10:30:48 21 that by number of depositions or total time I think would be a  
10:30:52 22 good conversation for you to have.

10:30:55 23           How long would you anticipate needing to work that  
10:30:59 24 out and submit an agreement to the Court?

10:31:07 25           **MS. KISCH:** In terms of the total number of

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10:31:08 1 depositions?

10:31:10 2 **THE COURT:** Well, or follow your suggestion on the  
10:31:13 3 limit on time, whatever the limits that you all can agree to,  
10:31:16 4 again with the ultimate purpose or point of putting a limit on  
10:31:21 5 it so that it can all be taken care of in the time period that  
10:31:27 6 we have.

10:31:30 7 So what I am looking at, for example, is I can give  
10:31:35 8 you a week or two weeks, and then if you haven't reached an  
10:31:38 9 agreement or if the agreement is a number or amount of time of  
10:31:44 10 depositions that is not actually feasible to get done in this  
10:31:48 11 discovery period, then I can set another conference call, and  
10:31:53 12 we can take care of that before it becomes a problem.

10:31:56 13 **MS. KISCH:** I think a two-week period would be useful  
10:32:00 14 for us to engage in that, and within that two-week period, we  
10:32:04 15 are also, which will be put forth in a 26(f) report, exchanging  
10:32:08 16 dates of availability with regard to witnesses and trying to  
10:32:11 17 put together, you know, a firm schedule for the various  
10:32:17 18 periods. So two weeks will give us more of an opportunity to  
10:32:19 19 get through that process and make sure that that's all working.

10:32:24 20 **THE COURT:** All right. Mr. Wilkens, anything to add  
10:32:25 21 on that?

10:32:27 22 **MR. WILKENS:** No, Your Honor. I think that time  
10:32:29 23 period would work well, the two weeks.

10:32:32 24 **THE COURT:** All right. And then, Ms. Kisch, before I  
10:32:35 25 go over to the Defendants, was there anything else you needed

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10:32:39 1 to add on those three issues that I had raised?

10:32:42 2 **MS. KISCH:** Nothing else. Thank you.

10:32:43 3 **THE COURT:** Mr. Bowers, as to each of those three  
10:32:47 4 things?

10:32:47 5 **MR. BOWERS:** Thank you, Your Honor. At the outset, I  
10:32:51 6 would like to state that the Defendants have been coordinating  
10:32:59 7 to try to streamline work and activities on our side, and,  
10:33:06 8 largely, the Intervenor Legislators have been running point on  
10:33:16 9 the discovery issues, so I will defer to Mr. Duncan.

10:33:21 10 **THE COURT:** I can take Mr. Duncan first. If that  
10:33:24 11 would be helpful, we can do it that way as we go through these,  
10:33:29 12 and then I will come back to you, Mr. Bowers, if there is  
10:33:33 13 anything you want to add. How about that?

10:33:34 14 **MR. BOWERS:** I think it might be. Kyle, I hate to do  
10:33:36 15 that to you. If that's okay with you, I think that probably  
10:33:37 16 would be more productive.

10:33:38 17 **THE COURT:** Mr. Duncan?

10:33:41 18 **MR. DUNCAN:** Thanks, Butch. I like it when you defer  
10:33:44 19 to me.

10:33:47 20 Sure, Your Honor. You know, I actually find myself  
10:33:53 21 pretty much in agreement with everything the Plaintiffs have  
10:33:55 22 said on that so far. As far as a separate schedule, yes,  
10:33:58 23 normal deadlines for document production I think makes sense  
10:34:04 24 now, as do to the normal deadlines on the interrogatories and  
10:34:08 25 RFAs.

10:34:09 1 I agree with Lori and Scott that we should confer on  
10:34:14 2 the number of depositions and the time limits in trying to  
10:34:17 3 streamline these things. I think we can -- my hope is we can  
10:34:22 4 make some significant progress on that over the next two weeks.

10:34:26 5 As Lori indicated, we also will be talking about,  
10:34:30 6 gosh, a whole lot of additional things. We are in the middle  
10:34:34 7 of talking about the privilege issue, the legislative  
10:34:38 8 privilege, and all those issues right now. I think we are  
10:34:41 9 going to be talking about the medical records issues.

10:34:44 10 So, you know, hopefully -- I think it would be great  
10:34:48 11 if we could talk about all these things and just try to  
10:34:52 12 streamline out some of these issues, including depositions,  
10:34:56 13 over the next couple of weeks. I think we can make progress on  
10:35:00 14 that if we are all diligent about it, and we've certainly tried  
10:35:04 15 to be diligent so far.

10:35:06 16 **THE COURT:** All right. I think that's helpful. Let  
10:35:08 17 me ask Mr. Bowers. Anything you wanted to add to that?

10:35:14 18 **MR. BOWERS:** No, ma'am, my position is consistent  
10:35:16 19 with what Kyle just said.

10:35:18 20 **THE COURT:** All right. Mr. Gore?

10:35:19 21 **MR. GORE:** We're in agreement with what was said by  
10:35:23 22 Kyle and others with respect to the deadlines and deposition  
10:35:26 23 issues.

10:35:27 24 **THE COURT:** All right. I'm going to add one other  
10:35:31 25 possibility or suggestion on this. I think we had previously

10:35:35 1 set this case for a potential status conference on September 30  
10:35:44 2 in order to at that time resolve discovery issues for the  
10:35:47 3 November trial.

10:35:49 4           What I may do and what sounds like might be helpful  
10:35:54 5 here is to have you all file a joint notice say by Wednesday,  
10:35:58 6 September 28. It's not quite two weeks but will give you a  
10:36:03 7 week and a half at least to have those discussions and then  
10:36:10 8 still have a mechanism to report back to the Court; and then if  
10:36:20 9 there are issues that I have, we can have another telephone  
10:36:21 10 conference on September 30. It may be that we don't need  
10:36:22 11 another telephone conference, and I am not going to schedule  
10:36:24 12 one just to do it, but it would at least give us a mechanism  
10:36:29 13 for making sure those things are still moving during that time  
10:36:32 14 period; and then if there is anything or any piece that still  
10:36:35 15 needs to be resolved, then I can go ahead and take care of it  
10:36:39 16 right then.

10:36:40 17           So what I can do is leave this on for a telephone  
10:36:43 18 hearing on September 30. I believe it was set for 10:00.  
10:36:48 19 We'll just leave that on for September 30 at 10:00 just for a  
10:36:52 20 telephone hearing, and by Wednesday, the 28th, if you all can  
10:36:58 21 file a joint notice that addresses, in particular, the issues  
10:37:05 22 with respect to limits on depositions and whether there is any  
10:37:13 23 other disagreement or issue for the Court to take up; and then,  
10:37:17 24 as I've indicated previously in these joint notices, if there's  
10:37:22 25 anything else that you want to put on the agenda that you think

10:37:26 1 would be helpful for the Court to address in order to move  
10:37:29 2 these things forward, you can include that as well so that if  
10:37:34 3 there are issues that can be resolved, we can go ahead and just  
10:37:39 4 take care of them then.

10:37:41 5 I am going to go through and see if anybody has any  
10:37:46 6 issues with that or other suggestions before I go that route.  
10:37:50 7 Mr. Wilkens?

10:37:51 8 **MR. WILKENS:** No issues, Your Honor.

10:37:52 9 **THE COURT:** Ms. Kisch?

10:37:56 10 **MS. KISCH:** That works for us as well. Thank you.

10:37:58 11 **THE COURT:** Mr. Duncan?

10:38:00 12 **MR. DUNCAN:** We are fine with that, Your Honor.

10:38:02 13 **THE COURT:** Mr. Bowers?

10:38:03 14 **MR. BOWERS:** We are fine with that, Your Honor.

10:38:04 15 **THE COURT:** All right. And Mr. Gore?

10:38:06 16 **MR. GORE:** We are fine as well, Your Honor.

10:38:09 17 **THE COURT:** All right. So that's then the schedule  
10:38:12 18 we'll leave on as to any sort of remaining discovery issues.

10:38:17 19 What I will do is note in the joint report, to the  
10:38:20 20 extent that there were expedited response times that were  
10:38:24 21 previously adopted for written discovery, that going forward  
10:38:28 22 all the normal deadlines will apply for any pending or future  
10:38:36 23 document requests or responses to interrogatories or requests  
10:38:41 24 for admission; and then with respect to the limits on the  
10:38:43 25 number of depositions or other deposition-related limits, the

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10:38:49 1 parties will file their joint notice by Wednesday,  
10:38:52 2 September 28, and we'll take that up if there is anything to be  
10:38:56 3 resolved at the hearing on September 30, a telephone hearing at  
10:39:00 4 10:00.

10:39:03 5           The next issue I had for scheduling has to do with  
10:39:06 6 the briefing schedule, and what I would like to do is just set  
10:39:11 7 some definitive dates for all of the motions that would be  
10:39:19 8 briefed so that we are clear on what those dates would be; and,  
10:39:23 9 in particular, what I would like to do is set those dates  
10:39:27 10 without including the three-day service period or any other  
10:39:34 11 ambiguity that might push these things out even closer to  
10:39:38 12 trial.

10:39:40 13           My point would be to have definitive deadlines and  
10:39:44 14 deadlines by which the Court knows everything is going to be  
10:39:47 15 fully briefed. Now, if these motions get filed earlier and an  
10:39:54 16 earlier deadline would otherwise apply under the local rules,  
10:39:58 17 then I will hear from you whether you want to use the local  
10:40:00 18 rule deadlines or you want to use just across the board the  
10:40:04 19 deadlines that I am going to set; but what I would like to do  
10:40:09 20 is tell you what those deadlines would be and then ask you to  
10:40:17 21 let me know if those deadlines are consistent with your  
10:40:22 22 understanding or agreement or if there is some modification  
10:40:26 23 I've made, whether you have any objection to that, and then,  
10:40:29 24 second, whether you want to include some provision for earlier  
10:40:35 25 deadlines to apply if a motion is filed earlier than the due

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10:40:39 1 date. If you've got questions about what I mean by that, then  
10:40:42 2 I will let you ask me that as well.

10:40:47 3 But to go through the motions, there are two  
10:40:53 4 preliminary issues that we've been talking about, the  
10:40:54 5 legislative immunity and the medical records, and I show for  
10:40:58 6 those, for the legislative immunity, the due date for the  
10:41:01 7 motions would be September 23, responses due October 7, replies  
10:41:09 8 due October 14. For a protective order for the medical  
10:41:15 9 records, the due date would be October 4, the response would be  
10:41:19 10 October 18, replies due October 25.

10:41:24 11 Both of those then look like they would be briefed by  
10:41:29 12 mid to late October, and I would intend to go ahead and set  
10:41:34 13 this case then for a hearing on Friday, October 28 at 10:00,  
10:41:40 14 and that would be in person here in this courtroom in  
10:41:43 15 Winston-Salem so that everyone has it on their calendar. If  
10:41:49 16 there are any issues then that would be helpful for me to hear  
10:41:51 17 from the parties or to try to resolve some pieces or parts at  
10:41:55 18 the hearing as to either of those motions or issues, the  
10:42:00 19 legislative immunity or the medical records, we can do that on  
10:42:05 20 Friday, October 28, at 10:00. If there's a conflict or issue  
10:42:10 21 with that date, then I'll hear from you on that, and we can see  
10:42:15 22 what we can work out.

10:42:15 23 Then as to the final pretrial motions, I show the  
10:42:20 24 *Daubert* motions being due March 6, 2017. I would then note a  
10:42:29 25 response date of March -- let me make sure I have these as I go

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10:42:36 1 through them. March 27, which is 21 days but without the three  
10:42:40 2 days for service, and then replies due April 10, which is 14  
10:42:45 3 days, and that has then the *Daubert* motions to the Court by  
10:42:51 4 April 10, which helps with having sufficient time for the Court  
10:42:59 5 to review those as they are coming in prior to trial.

10:43:05 6           The dispositive motions would be due March 24.  
10:43:12 7 Responses -- actually, if I shorten that to 28 days instead of  
10:43:16 8 30 days, it keeps all of these on sort of a weekly turnaround.  
10:43:22 9 So all of the dates are either, 7, 14, 21, or 28, and so the  
10:43:28 10 response there would be due April 21, and the replies would be  
10:43:35 11 due 14 days later, which is May 5.

10:43:41 12           For non-*Daubert* motions in limine, the due date you  
10:43:46 13 all had suggested was April 10, with a response of 14 days, so  
10:43:52 14 that would be April 24; and reply 7 days, that would be May 1,  
10:43:58 15 at least as I have tried to roughly or initially calculate it.

10:44:06 16           So what I would like to do is have you all react or  
10:44:11 17 respond to those deadlines, whether those deadlines work, as  
10:44:15 18 well as the hearing October 28, and then also whether we need  
10:44:20 19 to make some separate provision for earlier-filed motions and  
10:44:27 20 what you would suggest on that.

10:44:29 21           Mr. Wilkens?

10:44:31 22           **MR. WILKENS:** Yes, Your Honor. On the legislative  
10:44:36 23 privilege and on the medical records issue, I think those --  
10:44:43 24 the deadlines are fine, and I think also the hearing date, I'm  
10:44:47 25 still checking that, that looks fine.

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10:44:52 1 I would have one caveat there, and, that is, we are  
10:44:57 2 trying quite hard to get these meet-and-confers done so that we  
10:45:01 3 can actually -- so that protective orders can be filed when  
10:45:05 4 they are supposed to be filed. I would just note that it may  
10:45:09 5 be the case that the parties are still trying to, you know,  
10:45:13 6 reach some kind of a deal that would avoid a motions practice  
10:45:17 7 --

10:45:19 8 **THE COURT:** Right.

10:45:19 9 **MR. WILKENS:** -- that might delay the filing of a  
10:45:21 10 protective order.

10:45:23 11 **THE COURT:** Would you all be able to do that in a way  
10:45:27 12 that still has everything briefed by either October 14 or  
10:45:32 13 October 25? If you needed to give yourself more room in there,  
10:45:38 14 that they are still briefed by the 14th and 25th, as far as any  
10:45:42 15 responses or replies that you wanted to file?

10:45:46 16 **MR. WILKENS:** Well, I could imagine, Your Honor, that  
10:45:49 17 at the very -- well, that at least we could -- that they could  
10:45:52 18 both be briefed by the 25th. So, for example -- and I have no  
10:46:00 19 idea, but if the legislative privilege slid by a few days  
10:46:06 20 because of continued efforts to meet and confer and come to  
10:46:09 21 some kind of agreement, I would think we can certainly complete  
10:46:14 22 that briefing by the 25th, the same date that the briefing is  
10:46:19 23 due to be complete on the medical issue, so that that hearing  
10:46:22 24 date of the 28th would still work.

10:46:25 25 **THE COURT:** All right. What I would say then is I am

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10:46:28 1 not going to make those floating dates right now. If you  
10:46:33 2 needed to file a motion to extend the dates, you could do that.  
10:46:36 3 I think my intent would be to try to keep everything on for the  
10:46:41 4 28th, and that means having everything briefed by the 25th,  
10:46:44 5 which means that if you put a proposal in to move the dates,  
10:46:51 6 that you do it in a way that would still have everything fully  
10:46:54 7 briefed by the 25th so that we don't have to move the hearing  
10:46:56 8 on the 28th. Does that make sense?

10:46:58 9 **MR. WILKENS:** Yes, Your Honor, that makes sense, and  
10:46:59 10 then I was going to turn to the other dates.

10:47:04 11 **THE COURT:** Yes.

10:47:06 12 **MR. WILKENS:** So turning to those dates, I have no  
10:47:10 13 issues there on the dates that you specified for the *Daubert*  
10:47:13 14 motions, the dispositive motions, and the non-*Daubert* motions  
10:47:20 15 in limine. That all sounds fine for the Carcano Plaintiffs.

10:47:23 16 **THE COURT:** Okay. All right. Thank you. Ms. Kisch?

10:47:28 17 **MS. KISCH:** The only thing I would add is just on the  
10:47:31 18 medical records issue. We are going to engage in the  
10:47:36 19 meet-and-confer and try to narrow the issues for briefing. I  
10:47:40 20 mean, at this point the United States' witnesses have not been  
10:47:43 21 served with any document requests, and, you know, I think we  
10:47:48 22 anticipate that once the protective order is put in place, that  
10:47:52 23 the parties will exchange the names and contact information and  
10:47:59 24 attorneys involved with representing any individual witnesses,  
10:48:03 25 that that will be exchanged, and then I expect -- the

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10:48:06 1 Defendants have said that they will serve subpoenas.

10:48:09 2           So just in terms of the briefing, you know, I still  
10:48:13 3 think that we can work through issues without that, but, you  
10:48:16 4 know, we are hoping to get an understanding of the scope of the  
10:48:20 5 types of documents and information that the Defendants intend  
10:48:24 6 to seek from the witnesses just because at this point we do not  
10:48:28 7 know that; but we'll certainly engage in a meet-and-confer,  
10:48:32 8 and, hopefully, we'll have a better understanding, and our hope  
10:48:34 9 is to be able to then, you know, file a motion for protective  
10:48:36 10 order.

10:48:36 11           It's just that at this point there haven't been any  
10:48:38 12 documents requested, but I certainly expect that the parties  
10:48:42 13 will work through that to meet that October 4 deadline.

10:48:48 14           **THE COURT:** All right. I think I mentioned at the  
10:48:51 15 previous hearing it's important for me to have actual concrete  
10:48:57 16 disputes to resolve rather than sort of more general arguments  
10:49:03 17 or pronouncements that you all might be looking for, and so I  
10:49:08 18 don't want to set this for a hearing if we don't have  
10:49:11 19 particular documents that are at issue for me to consider.

10:49:17 20           So I think that it is important and certainly  
10:49:20 21 assumed, in my view, that all of that is proceeding at a fast  
10:49:23 22 enough pace so that you all have those disputes at issue in  
10:49:30 23 time for the briefs to be filed and the responses and replies  
10:49:36 24 so that we can resolve that at the hearing.

10:49:43 25           I hesitate, though, to push it out further because

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10:49:45 1 you're starting in on your deposition period November 1, and I  
10:49:50 2 think it needs to be resolved early. So what I would like to  
10:49:55 3 do is put that on for the 28th and then go ahead and enter the  
10:50:05 4 protective order and with the understanding and intent that any  
10:50:09 5 requests related to the medical records or that raise the  
10:50:14 6 legislative immunity issues would be provided immediately, if  
10:50:17 7 they haven't been already, so that those issues can be  
10:50:21 8 addressed in the meet-and-confers and then in the requests for  
10:50:26 9 protective order.

10:50:27 10 Does that cover what you are looking for, Ms. Kisch?

10:50:30 11 **MS. KISCH:** Yes. And just to let the Court know, for  
10:50:37 12 the first round of depositions beginning November 1, none of  
10:50:39 13 the witnesses whose medical records were at issue are in that  
10:50:45 14 first round, and we're specifically, you know, trying to  
10:50:47 15 identify individuals where that was not an issue. So I just  
10:50:50 16 wanted to let you know that, but, yes, that all makes sense,  
10:50:55 17 what you said.

10:50:56 18 **THE COURT:** All right. That's helpful to me to know  
10:50:58 19 that. Do you know if there are any legislative immunity issues  
10:51:01 20 that arise in the first deposition period, or if that arises,  
10:51:05 21 is it reserved for the second deposition period?

10:51:09 22 **MS. KISCH:** So those were also all reserved for the  
10:51:13 23 latter period.

10:51:14 24 **THE COURT:** All right. So if we had to push it into  
10:51:17 25 November, we could. I will tell you all I'm on criminal duty

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10:51:20 1 in November. It's going to be harder to work in hearings sort  
10:51:25 2 of quickly around the schedule of the criminal hearings that I  
10:51:31 3 have, but I can certainly do that, but that's part of my  
10:51:35 4 preference for going ahead and taking care of it at the end of  
10:51:39 5 October before we get into November, but if we need to do  
10:51:40 6 that -- certainly, I want you all to try to resolve as much you  
10:51:44 7 can yourself and narrow the issues and have specific documents  
10:51:48 8 at issue before we set it on for another hearing.

10:51:53 9 Let me come around to the Defendants. Mr. Duncan, as  
10:51:58 10 to the dates I've set out and the discussion where I have been  
10:52:02 11 with the Plaintiffs?

10:52:05 12 **MR. DUNCAN:** Yes, Your Honor. So I don't think -- we  
10:52:11 13 don't have any issues with respect to the dates on the  
10:52:13 14 legislative privilege and medical records. I agree completely  
10:52:18 15 with what Mr. Wilkens was saying about if we are in the middle  
10:52:21 16 of negotiations with respect to legislative privilege, and he's  
10:52:24 17 right that we are trying to work through that very hard, we  
10:52:29 18 will -- we would only -- if we had to extend one of those  
10:52:33 19 dates, we would do it as soon as possible so that we wouldn't  
10:52:39 20 upset the larger briefing and hearing schedule. Hopefully,  
10:52:41 21 that won't be necessary anyway, but, no, that's all fine.

10:52:45 22 Yes, we take Your Honor's point completely on sort of  
10:52:49 23 making any disputes about medical records concrete and not  
10:52:52 24 abstract, but that's -- we take that point very well.

10:52:59 25 On the motions for the *Daubert* dispositive,

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10:53:03 1 non-*Daubert*, I don't have any problems with the deadline. I  
10:53:09 2 had just one clarification question.

10:53:11 3 I recall a discussion with the United States on  
10:53:15 4 thinking that they could file a motion to dismiss counterclaims  
10:53:19 5 early. I don't know if they still intend on doing that or not,  
10:53:22 6 but that's the purpose of me asking is if it turns out in the  
10:53:28 7 sort of developing course of this case that we, for example,  
10:53:31 8 wanted to file dispositive motions -- I frankly can't think of  
10:53:38 9 what it would be right now, but it just occurs me that it's  
10:53:42 10 possible. If we elected to file a dispositive motion early,  
10:53:45 11 our Rule 26(f) schedule says they can be filed on or before  
10:53:53 12 March 24. If we decided to do that, and I can't represent that  
10:53:56 13 we are planning on it, but I just want to understand, if we do  
10:53:59 14 that, I understand what you said, Your Honor, that it would  
10:54:05 15 very likely be that the Court would just wait until trial or  
10:54:09 16 roll those over into trial, but we do have the option of filing  
10:54:15 17 something early.

10:54:16 18 **THE COURT:** Right.

10:54:16 19 **MR. DUNCAN:** Then, for instance, if we felt very  
10:54:18 20 strongly that we needed a ruling before, I suppose we could  
10:54:21 21 make the argument, and the Court could agree or not.

10:54:25 22 **THE COURT:** Right.

10:54:25 23 **MR. DUNCAN:** Is that something that's within your  
10:54:28 24 contemplation?

10:54:29 25 **THE COURT:** It is, and that's why I raised the

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10:54:32 1 question about what the response deadlines would be for motions  
10:54:37 2 filed earlier. What I would contemplate generally would be --  
10:54:41 3 as I've said before, I am not going to preclude anyone from  
10:54:44 4 filing any motions. So you are free to file whatever motions  
10:54:47 5 that you might want to file whenever you want to file them, as  
10:54:51 6 long as they are before the deadline or the last date by which  
10:54:57 7 you can file them. Understanding that in all likelihood these  
10:55:01 8 things will get addressed together either immediately before  
10:55:06 9 trial or as part of the trial preparation or at trial,  
10:55:09 10 certainly, you could include in there a request or argument as  
10:55:13 11 to why you would seek to have something resolved earlier, and  
10:55:18 12 that's something the Court can consider and take into account.

10:55:22 13 I think what I had previously indicated would be that  
10:55:25 14 for motions filed earlier, the ordinary rules set out -- or  
10:55:33 15 calculation of deadlines set out in the federal rules and the  
10:55:36 16 local rules would apply, and that's going to include your  
10:55:41 17 ordinary deadlines and your three days for service.

10:55:47 18 What I would intend to do is set these dates that I  
10:55:52 19 gave you as the no-later-than date. So the due date, for  
10:55:59 20 instance, for *Daubert* motions would be March 6. Any responses  
10:56:03 21 to *Daubert* motions would be due no later than March 27. If a  
10:56:08 22 *Daubert* motion was filed earlier than March 6 and the deadline  
10:56:12 23 calculated in the local rules with your time for service and  
10:56:17 24 whatever other considerations you might look at would be  
10:56:22 25 earlier than March 27, then that would be the deadline that

10:56:26 1 would apply, but in no event would it be after March 27 that  
10:56:32 2 the responses would be due.

10:56:34 3 So if a motion is filed --

10:56:39 4 **MR. DUNCAN:** Can I just ask you a question to see if  
10:56:41 5 I understood that?

10:56:42 6 **THE COURT:** Yes. Okay.

10:56:43 7 **MR. DUNCAN:** If the motion was filed earlier, then  
10:56:46 8 the deadline would be earlier?

10:56:47 9 **THE COURT:** Then the deadline would be earlier. Now,  
10:56:49 10 I can contemplate a scenario in which a *Daubert* motion is filed  
10:56:56 11 a day or two before March 6 and the deadline calculated, even  
10:57:00 12 with the three days of service, would be after March 27, and so  
10:57:05 13 my point is that responses are going to have to be filed by  
10:57:10 14 March 27; but if the motion is filed earlier and the deadline  
10:57:15 15 would be earlier, then the earlier deadline applies.

10:57:18 16 Does that make sense, Mr. Duncan?

10:57:21 17 **MR. DUNCAN:** Understood. Yes, it does. Thank you.

10:57:22 18 **THE COURT:** All right. So I think that what my  
10:57:25 19 general intent would be, consistent with what I've previously  
10:57:29 20 indicated, would be if you file a motion, you can file a motion  
10:57:33 21 at any time, but the deadlines that I am setting for these  
10:57:37 22 would be the last date by which the motions could be filed, and  
10:57:42 23 then the response and reply dates would be the latest date by  
10:57:48 24 which the responses and replies would be due. If the response  
10:57:52 25 or reply would be due at an earlier date under the ordinary

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10:57:58 1 calculation of the rules, then that would be the date that  
10:58:01 2 would apply, but in no event would it be later than the dates  
10:58:04 3 that I've set out here, and I will include those in a written  
10:58:06 4 order.

10:58:07 5 I think that covers the second part of my question,  
10:58:11 6 which is what we do with earlier-filed motions, and I think  
10:58:14 7 that answers your question, Mr. Duncan, but let me follow up  
10:58:18 8 and see if that covers it. Mr. Duncan?

10:58:21 9 **MR. DUNCAN:** Yes, I think so, Your Honor. What I  
10:58:23 10 understand is that the parties have the option of filing  
10:58:26 11 motions early, even dispositive motions, with no promise, of  
10:58:30 12 course, that the Court will resolve those early.

10:58:33 13 **THE COURT:** Right.

10:58:33 14 **MR. DUNCAN:** But the parties have the option of doing  
10:58:37 15 it, and it would move any briefing schedule forward according  
10:58:40 16 to those local rules?

10:58:43 17 **THE COURT:** Right. All right. Let me go to -- well,  
10:58:44 18 actually, let me ask, Mr. Duncan, anything else that you wanted  
10:58:46 19 to add or address as far as the briefing schedule that we've  
10:58:50 20 talked about or the October 28 hearing on the legislative  
10:58:54 21 immunity and medical records issue?

10:58:58 22 **MR. DUNCAN:** No, Your Honor, thank you.

10:58:59 23 **THE COURT:** Mr. Bowers?

10:59:06 24 **MR. BOWERS:** Nothing further, Your Honor.

10:59:07 25 **THE COURT:** Mr. Gore?

10:59:08 1           **MR. GORE:** Your Honor, we have nothing further and no  
10:59:11 2 objection to the briefing schedules, as you have laid them out.

10:59:14 3           **THE COURT:** All right. Let me come back around to  
10:59:17 4 the Plaintiffs on the second point in particular with respect  
10:59:19 5 to earlier-filed motions and the deadlines for those.

10:59:22 6           Mr. Wilkens, do you follow all of what I've tried to  
10:59:26 7 set out, and do you have any concerns with any of those things?

10:59:30 8           **MR. WILKENS:** Your Honor, that all makes sense to me,  
10:59:32 9 and I understand the point of having the kind of hard deadlines  
10:59:38 10 as the last possible date so that there can't be any gaming of  
10:59:41 11 the system, given that under the hard deadlines specified,  
10:59:45 12 there is no three days for service; but, as you mentioned, one  
10:59:52 13 could file a motion a little bit earlier and try to get around  
10:59:58 14 that deadline. So, yeah, I understand what the Court is  
11:00:01 15 proposing.

11:00:02 16           **THE COURT:** All right. So that we have hard  
11:00:05 17 deadlines -- those hard deadlines are for the Court's benefit  
11:00:09 18 to make sure everything is briefed and to me.

11:00:12 19           I will add this piece. If you all believe you need  
11:00:16 20 to file a request to extend any of those dates, I would at the  
11:00:20 21 very least anticipate that you are still going to have the  
11:00:24 22 whole thing fully briefed by the outside date that's already  
11:00:29 23 set so these things aren't creeping closer to trial, that being  
11:00:35 24 sort of the Court's interest in getting everything briefed in  
11:00:38 25 time to have it presented and considered prior to trial.

11:00:44 1 So those would then, as to due dates, response dates,  
11:00:48 2 and reply dates, be the outside deadlines, and then only if an  
11:00:52 3 earlier date would apply would the local rules or the federal  
11:00:58 4 rules provide the deadline.

11:01:00 5 Ms. Kisch, let me ask, anything you needed me to  
11:01:05 6 clarify or any objections or questions you had on that?

11:01:09 7 **MS. KISCH:** No, we understand and no concerns or  
11:01:12 8 questions.

11:01:13 9 **THE COURT:** All right. I think that takes care of  
11:01:16 10 everything that I had with respect to the joint report, and so  
11:01:19 11 I would intend to adopt the Rule 26(f) report with the  
11:01:25 12 modifications and clarifications that we've gone over here,  
11:01:28 13 leaving open only that question of the number of depositions to  
11:01:34 14 visit on September 30, as well as if there is anything else  
11:01:38 15 that you all need me to further consider on the 30th, we can do  
11:01:44 16 that. So I will enter a written order, but that would be then  
11:01:49 17 adopting the joint Rule 26(f) report with those modifications.

11:01:53 18 Before I move on, let me just ask generally, does  
11:01:57 19 anyone have anything they needed to add or ask with respect to  
11:02:01 20 the Rule 26(f) report?

11:02:06 21 All right. The other issues I had were, I think,  
11:02:10 22 relatively quick. There's just the joint motion for entry of a  
11:02:14 23 stipulated protective order, and I would intend to grant that  
11:02:18 24 and enter the proposed order. I will still include my  
11:02:25 25 supplemental order that reiterates the local rules for sealing

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11:02:31 1 as well as the, I think, obvious point that any requests for  
11:02:39 2 confidential treatment of information at a hearing before a  
11:02:42 3 Court would need to be addressed separately with whoever is  
11:02:48 4 presiding at the hearing. I will include that supplemental  
11:02:52 5 order with the stipulated protective order.

11:02:55 6 Just to be clear, I know that the stipulated order  
11:03:00 7 had anticipated the separate issue with medical information,  
11:03:04 8 but, certainly, if it's part of your agreement or attempt to  
11:03:08 9 narrow that issue, you can agree that some medical information  
11:03:12 10 can be produced and treated in accordance with the provisions  
11:03:18 11 of the stipulated confidentiality order. Then that's something  
11:03:21 12 I would anticipate you all could do and agree to, but it  
11:03:26 13 wouldn't have to be resolved separately, or part of your  
11:03:30 14 separate resolution could be to allow it to be treated under  
11:03:33 15 the stipulated protective order, at least that's my  
11:03:40 16 understanding of how you all intend that to govern.

11:03:44 17 Let me ask as to any of those things, or as to the  
11:03:46 18 stipulated protective order generally, whether there is  
11:03:50 19 anything else, Mr. Wilkens?

11:03:52 20 **MR. WILKENS:** Not from the Carcano Plaintiffs, Your  
11:03:54 21 Honor.

11:03:54 22 **THE COURT:** All right. And is that your  
11:03:54 23 understanding as well, if there is medical information that you  
11:03:58 24 all could agree to release under the terms of the stipulated  
11:04:01 25 order, then that's certainly something you could do?

11:04:04 1 **MR. WILKENS:** Yes, that's my understanding.

11:04:06 2 **THE COURT:** Ms. Kisch?

11:04:09 3 **MS. KISCH:** Yes, that's our understanding as well.

11:04:11 4 **THE COURT:** All right. For the Defendants,

11:04:12 5 Mr. Duncan, anything else on that?

11:04:16 6 **MR. DUNCAN:** No, Your Honor, that's our  
11:04:17 7 understanding.

11:04:18 8 **THE COURT:** Thank you. And Mr. Bowers?

11:04:21 9 **MR. BOWERS:** Nothing further.

11:04:25 10 **THE COURT:** All right. And Mr. Gore?

11:04:26 11 **MR. GORE:** Nothing further, Your Honor.

11:04:26 12 **THE COURT:** All right. Well, I will try to go ahead  
11:04:29 13 and get that order entered today, or if it doesn't get filed  
11:04:34 14 today, at least by Monday then.

11:04:37 15 And then the last piece is the motion for leave to  
11:04:42 16 file a seconded amend complaint, which is just in the 236 case,  
11:04:47 17 and I understand that the Defendants have withdrawn their  
11:04:53 18 opposition to that, at least that's my understanding, and I  
11:04:56 19 will confirm that; but if that is the case, then the piece I  
11:05:02 20 want to address is specifically to clarify what responses are  
11:05:08 21 anticipated and whether the Defendants want the Court to deem  
11:05:15 22 the answers or motions to dismiss that were previously filed as  
11:05:22 23 operative, or whether the Defendants want to file a new answer  
11:05:27 24 in response to the motion for leave to file a second amended  
11:05:34 25 complaint, if the motion is granted.

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11:05:36 1 So I am going start, Mr. Wilkens, with you since it's  
11:05:41 2 your motion to amend, although I think a lot of the question  
11:05:44 3 that I have is going to be for the Defendants; but as far as  
11:05:47 4 where we are on that, what's your understanding, Mr. Wilkens?

11:05:50 5 **MR. WILKENS:** Well, Your Honor, when we originally  
11:05:53 6 proposed it and tried to have it -- with the agreement of all  
11:06:00 7 the parties, we certainly had indicated there would be no need  
11:06:05 8 to answer the amended complaint. We would certainly, you know,  
11:06:13 9 be willing to stick with that approach.

11:06:15 10 **THE COURT:** All right. And, Ms. Kisch, this doesn't  
11:06:18 11 affect you since it's just in the 236 case, but just to make  
11:06:23 12 sure, is there anything else you needed to add on that?

11:06:26 13 **MS. KISCH:** No, thank you, Your Honor.

11:06:27 14 **THE COURT:** So, Mr. Duncan, for the Legislative  
11:06:32 15 Intervenors, what's your position on the motion for leave to  
11:06:37 16 file a seconded amended complaint, and what's your position on  
11:06:40 17 what your response -- what you would want your response to look  
11:06:45 18 like?

11:06:46 19 **MR. DUNCAN:** Well, Your Honor, I believe we have  
11:06:48 20 withdrawn our objection to the seconded amended complaint and  
11:06:53 21 the joint filing that we made with the Governor --

11:06:56 22 **THE COURT:** Okay.

11:06:57 23 **MR. DUNCAN:** -- State Defendants' counsel. Butch, I  
11:07:00 24 believe I'm correct on that; right?

11:07:02 25 **MR. BOWERS:** That's correct.

11:07:04 1           **MR. DUNCAN:** Honestly, maybe I'll bounce the ball  
11:07:08 2 over to Mr. Bowers real quick. I would like to actually confer  
11:07:11 3 with our sort of co-defense counsel before I give an answer on  
11:07:15 4 whether we want to incorporate our previous answer or file a  
11:07:20 5 new answer. Forgive me, I am not prepared to answer that  
11:07:27 6 question right now without talking with the Governor's counsel.

11:07:28 7           **THE COURT:** All right. Mr. Bowers, do you have a  
11:07:30 8 position on that?

11:07:35 9           **MR. BOWERS:** Similar to what Mr. Duncan just said,  
11:07:36 10 Your Honor, I would like an opportunity to confer with the  
11:07:42 11 Co-Defendants. I can tell the Court that my inclination at  
11:07:49 12 this time is we would probably like an opportunity to respond  
11:07:55 13 to a second amended complaint. I echo what Kyle just said a  
11:08:00 14 minute ago. We have withdrawn our objection to it. So if it  
11:08:05 15 pleases the Court, we would like an opportunity to confer  
11:08:09 16 amongst ourselves before we make a final determination on a  
11:08:13 17 responsive pleading.

11:08:14 18           **THE COURT:** All right. What I could do would be to  
11:08:21 19 allow the motion to amend, direct the Plaintiff to file the  
11:08:25 20 amended complaint, and then note that the Defendants have the  
11:08:31 21 option of either filing a short statement incorporating their  
11:08:39 22 prior answer as -- providing their answer with a general denial  
11:08:43 23 for any additional allegations, which I would then accept, if  
11:08:47 24 you want to rely on your prior answer, or to file a new answer  
11:08:56 25 to the seconded amended complaint at your election by the

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11:09:01 1 deadline that would otherwise apply.

11:09:04 2 I'll ask -- Mr. Bowers, I'll ask you first. Would  
11:09:07 3 that give you the option you needed?

11:09:10 4 **MR. BOWERS:** Yes, Your Honor, I would agree and  
11:09:20 5 accept that proposal.

11:09:22 6 **THE COURT:** Mr. Duncan, does that satisfy your  
11:09:24 7 request as well?

11:09:25 8 **MR. DUNCAN:** It does, Your Honor. That would be  
11:09:27 9 fine.

11:09:27 10 **THE COURT:** And, Mr. Gore, I'll come around to you.  
11:09:30 11 I think you had otherwise reached some sort of agreement or  
11:09:34 12 stipulation on that, but what I would intend to do is rather  
11:09:38 13 than incorporate that as part of granting the motion to amend,  
11:09:39 14 I could give you the -- or all of the Defendants the same  
11:09:43 15 option, which is to either file a short statement as to  
11:09:49 16 incorporation of your prior motion or file a new motion in  
11:09:56 17 response, if you elected to do that.

11:09:59 18 Any issues with handling it that way?

11:10:04 19 **MR. GORE:** I don't believe so, Your Honor. It was  
11:10:07 20 stipulated in I believe paragraph 9 of the motion to amend  
11:10:11 21 between Carcano Plaintiffs and the UNC Defendants that the  
11:10:13 22 current motion to dismiss already filed by the UNC Defendants  
11:10:17 23 would be treated as operating on the seconded amended  
11:10:20 24 complaint. That's how we would intend to proceed, and at Your  
11:10:25 25 Honor's preference, we can file a short statement to that

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11:10:28 1 effect.

11:10:28 2           **THE COURT:** It might be helpful to do that just so  
11:10:31 3 that the docket is clear, that once the second amended  
11:10:32 4 complaint is there, at least there will be something filed  
11:10:35 5 afterwards that makes clear exactly what the UNC Defendants'  
11:10:41 6 response is; and if it's the prior motions to dismiss, then  
11:10:46 7 that's something that I will let you do and set out  
11:10:51 8 specifically based on the terms of the stipulation that you had  
11:10:54 9 reached with the Plaintiffs.

11:10:55 10           And I will just note for the clerk's office that the  
11:10:58 11 filing of the seconded amended complaint will not automatically  
11:11:02 12 terminate the prior motion to dismiss, and I'll let then the  
11:11:07 13 UNC Defendants respond so they can clarify. If that's still  
11:11:12 14 what they intend to do, they can make that incorporation and  
11:11:15 15 set out the specific terms of the stipulation as part of the  
11:11:18 16 response to the seconded amended complaint.

11:11:23 17           Does that cover it for you, Mr. Gore?

11:11:27 18           **MR. GORE:** Yes, it does, Your Honor.

11:11:29 19           **THE COURT:** Mr. Wilkens, any objection to handling it  
11:11:31 20 that way?

11:11:33 21           **MR. WILKENS:** None, Your Honor.

11:11:33 22           **THE COURT:** All right. So what I will do then is go  
11:11:35 23 ahead and note that I am going to grant the motion for leave to  
11:11:40 24 file the seconded amended complaint. And, Mr. Wilkens, I'll  
11:11:44 25 direct you to go ahead and file the seconded amended complaint,

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11:11:46 1 and I can give you an opportunity to do that say by Tuesday,  
11:11:53 2 unless you need more time for that, Mr. Wilkens?

11:11:57 3 **MR. WILKENS:** No, that's fine, Your Honor. We can  
11:11:59 4 certainly do it by then.

11:12:01 5 **THE COURT:** Okay. And then as part of my written  
11:12:04 6 order, I'll set this out again, but I will note for the  
11:12:07 7 Defendants here, it's my intent then within the time otherwise  
11:12:12 8 required to respond to the second amended complaint that the  
11:12:16 9 Defendants would file a statement either incorporating their  
11:12:23 10 prior answer or motion to dismiss in the case of UNC and the  
11:12:28 11 terms of that pursuant to the stipulation, or file their answer  
11:12:35 12 to the second amended complaint or other responsive pleading as  
11:12:43 13 the case may be.

11:12:44 14 Regardless of the filing, obviously, discovery is  
11:12:48 15 proceeding as set out here, so we'll stay on this schedule.  
11:12:52 16 None of that will change the discovery schedule we are on, and  
11:12:56 17 I would assume that any filing with respect to the Legislative  
11:13:04 18 Intervenors in that case would not change the prior voluntary  
11:13:09 19 dismissal of the counterclaims that had already been addressed  
11:13:12 20 or wouldn't affect the resolution of that issue.

11:13:16 21 Does that make sense, Mr. Duncan?

11:13:18 22 **MR. DUNCAN:** Yes, Your Honor, that does.

11:13:19 23 **THE COURT:** All right. So I think that covers  
11:13:23 24 everything either as to that issue specifically or anything  
11:13:27 25 else larger. I am just going to go through and see if there is

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11:13:32 1 anything else anyone needs to address.

11:13:33 2 Mr. Wilkens, anything else?

11:13:35 3 **MR. WILKENS:** Nothing else, Your Honor, thank you.

11:13:36 4 **THE COURT:** Ms. Kisch, anything else?

11:13:39 5 **MS. KISCH:** Nothing, Your Honor, thank you.

11:13:39 6 **THE COURT:** Mr. Duncan, anything else?

11:13:42 7 **MR. DUNCAN:** No, Your Honor, thank you.

11:13:43 8 **THE COURT:** All right. Mr. Bowers, anything?

11:13:46 9 **MR. BOWERS:** Yes, Your Honor. Just for your

11:13:49 10 situational awareness and everyone else on the call, we intend

11:13:53 11 and on behalf of the Governor to file a notice of dismissal of

11:13:57 12 the Eastern District case sometime later this afternoon.

11:14:03 13 **THE COURT:** Okay.

11:14:06 14 **MR. BOWERS:** So I figured since you brought it up a

11:14:08 15 couple of weeks ago when we were all together that you might

11:14:13 16 appreciate a status update.

11:14:14 17 **THE COURT:** I do appreciate that. I wasn't going to

11:14:16 18 push you on that today, but I appreciate knowing that.

11:14:19 19 Anything else to add on that or anything else,

11:14:21 20 Mr. Bowers?

11:14:23 21 **MR. BOWERS:** No, Your Honor, thank you for your time.

11:14:25 22 **THE COURT:** Thank you. Mr. Gore, anything for you?

11:14:27 23 **MR. GORE:** No, Your Honor, thank you.

11:14:29 24 **THE COURT:** All right. In light of the information

11:14:31 25 Mr. Bowers added, does anyone else have anything else they

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11:14:35 1 needed to add on anything?

11:14:39 2 Well, as I indicated, I will try and put all of this  
11:14:43 3 together in a written order that memorializes at least those  
11:14:47 4 dates and deadlines that I have gone through; but, otherwise,  
11:14:50 5 you can proceed as we've set out here, and I will be back with  
11:14:56 6 you on the 30th unless everything is sufficiently resolved and  
11:14:59 7 we can cancel that telephone conference, if we need to do that.

11:15:25 8 Anything else from anybody then? Thanks very much.

11:15:29 9 (END OF PROCEEDINGS AT 11:15 A.M.)

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11:15:29 1 UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF NORTH CAROLINA  
3 CERTIFICATE OF REPORTER  
4  
5

6 I, Briana L. Nesbit, Official Court Reporter,  
7 certify that the foregoing transcript is a true and correct  
8 transcript of the proceedings in the above-entitled matter.  
9

10 Dated this 7th day of October 2016.  
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14 Briana L. Nesbit, RPR  
15 Official Court Reporter  
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