

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

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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.

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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

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

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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

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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

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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.
11

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14 Briana L. Nesbit, RPR
15 Official Court Reporter
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