



Kathy D. Patrick
Partner
kpatrick@gibbsbruns.com
713.751.5253

February 11, 2022

Via CM/ECF

Special Master Thomas P. Scrivo, Esq.
O'Toole Scrivo, LLC
14 Village Park Road
Cedar Grove, New Jersey 07009
tscrivo@oslaw.com

**Re: *Occidental Chemical Corp. v. 21st Century Fox Am., Inc., et al.*
Civil Action No. 2:18-cv-11273-MCA-LDW**

Dear Special Master Scrivo:

We write on behalf of OxyChem regarding the agenda for the February 16, 2022 status conference and the actions we request the Special Master to take on these items.

1. Update on OxyChem's Ongoing Cooperation with EPA

On September 30, 2022, the United States Environmental Protection Agency (EPA) issued its Record of Decision (ROD) selecting an interim remedy for the upper nine miles of the Passaic River in Operable Unit 4 of the Diamond Alkali Superfund Site (the OU4 ROD).

On January 13, 2021, as part of its ongoing cooperation with EPA, OxyChem sent EPA a letter offering to perform the entirety of the remedial design and remedial action set out in the OU4 ROD. EPA estimates it will cost \$441 million to design and implement the remedy OxyChem has offered to perform.

OxyChem's \$441 million offer is conditioned on EPA's agreement that it will not try to bar OxyChem's claims against other companies for contribution, cost recovery, and declaratory judgment if, in the future, the United States settles its own claims against those responsible parties, many of whom are Defendants in OxyChem's action in this Court.

If EPA agrees to accept OxyChem's \$441 million offer, work to design the remedy will begin promptly and performance of the interim remedy at OU4 will be accelerated, providing important benefits to Passaic River communities. Consistent with Congressional policy under CERCLA, if the offer is accepted, OxyChem will seek to amend its Complaint here to include contribution claims against other companies to require them to pay their fair shares of the costs to do this work. In doing so, OxyChem will seek only what it has sought from the beginning: a fair,



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equitable, and evidence-based allocation, among all responsible parties, of the response costs required to clean up the Diamond Alkali Superfund Site.¹

OxyChem has continued to engage with EPA regarding this offer. We will apprise the Court and the parties promptly if EPA accepts it.

Action Requested: None.

2. Deposition Schedule and Amendments to Protocol

As directed by the Special Master at the January 25, 2022 conference, OxyChem's February 4 submission (Dkt. 1967) enclosed the schedule of duly noticed Rule 30(b)(6) depositions that are set to proceed, starting with Conopco on March 8, 2022.² OxyChem expects Defendants to comply with those deposition notices.

Predictably, Defendants continue their concerted effort to avoid the prospect that *any* of them will be required to give sworn testimony about their responsibility for hazardous substances in the Diamond Alkali Superfund Site. Their submissions in advance of the conference, *see* Dkt. 1969, Dkt. 1971, Dkt. 1968, make plain that they value avoiding their own depositions *more* than they do their obligations to comply the Federal Rules and this Court's Orders. Their latest tactic is to move the goal posts again. Now, in this three-year-old case, the Defendants' claim no deposition can proceed until *June*—the latest version of the “12th of Never” date when the Defendants contend their depositions can begin.³

The Federal Rules do not make optional Defendants' obligation to give sworn testimony about their liability. The Court established a Deposition Protocol to ensure depositions move forward. OxyChem noticed Defendants' depositions pursuant to that Protocol to require them to

¹ *See, e.g.*, Dkt. 1 (OxyChem Complaint, explaining that OxyChem “files this action for cost recovery and contribution under Sections 107 and 113 ...for contribution and recovery from Defendants of response costs that OxyChem has expended to date and will expend in the future in response to releases and threatened releases of hazardous substances into the Lower Passaic River and elsewhere within the Diamond Alkali Superfund Site); Dkt. 1247 (OxyChem's Amended Complaint, explaining that, “The purpose of this action is to ensure that each and every party responsible for contamination...pays its fair share of the costs of investigation, design, and anticipated implementation of the remedy for such contamination.”).

² Counsel for Conopco and counsel for OxyChem have participated in several meet-and-confer calls regarding the noticed topics for the March 8 deposition. OxyChem believes that any outstanding issues relating to the topics will be resolved during its next scheduled call on Monday, February 14, 2022.

³ *See, e.g.*, Dkt. 1088 (Aug. 10, 2020 letter from SPG claiming depositions can proceed after protocol is entered); Dkt. 1159 (Feb. 8, 2021 letter from SPG claiming entry of protocol must wait until SPG joins third-parties); Dkt. 1471 (Aug. 23, 2021 letter from SPG claiming depositions must wait until after third-party defendants appear, but depositions can proceed in Jan. or Feb. 2022); Dkt. 1894 (Nov. 12, 2021 letter from OxyChem reporting third-party defendants' position that depositions must wait until Feb. 2022); Dkt. 1944 (Jan. 14, 2022 submission from SPG claiming depositions can proceed in “April/May/June timeframe”).

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testify, under oath, about their industrial operations that polluted the Passaic River. Now, under the Protocol and the Federal Rules, those depositions must proceed.

Defendants have used (and abused) every opportunity to provide input on pandemic-related logistics of those depositions. Now they invoke the *lack* of agreement on those issues to try to delay depositions yet again. The ongoing pandemic is *not* a ground on which Defendants should be permitted to delay their obligations to give sworn testimony under oath.

The Court will recall that Defendants insisted relevant COVID and remote protocols *had to be resolved in early February*, so the Special Master Ordered submissions on February 4. OxyChem sent responses to Defendants' proposed amendments to the deposition protocol on January 21, 2022 and to the proposed COVID/Remote Deposition protocol on January 28, 2022. *See Ex. A* (Jan. 28, 2022 letter from OxyChem to Defendants). Then, Defendants changed course, arguing that what once required urgent action by the Special Master *before* the February 16 conference could now wait to be discussed *at* the February 16 conference—just a few weeks before depositions are set to begin. Defendants' motive in delaying finalizing these protocols is obvious, but it should not be rewarded with additional delay.

Because no further delay is warranted. Defendants' failure to respond timely on the COVID and Remote Deposition Protocols should be deemed a non-objection to those orders, which should be entered promptly. *See Ex. B* (Proposed Amended Protocol for Depositions); *Ex. C* (Proposed COVID/Remote Deposition Protocol).

Action Requested:

Enter the Amended Protocol for Depositions and COVID/Remote Deposition Protocol based on the proposed orders attached as Exhibits B and C.

3. OxyChem has complied with the Special Master's Privilege Log Order

OxyChem has complied with its obligations under the Special Master's privilege orders. At last month's conference, the Special Master confirmed that under the June 29, 2021 Final Decision (Dkt. 1251) documents must be produced if the corresponding privilege log entries lack *all* of the author, sender, and recipient—that is, they are "0 for 3."⁴ This is consistent with OxyChem's prior interpretation and confirms OxyChem's August 30, 2021 production of 431 documents complied with the Special Master's ruling. In fact, out of the 1,200 entries the SPG identified prior to that hearing, OxyChem identified only 6 additional documents after the hearing

⁴ *See* 1/25/22 Transcript at 40:21-41:11. ("[M]y ruling means that if you're 0 for 3, we'll call it the 0 for 3 rule, you're 0 for 3, it's to be produced. I'm not going to say something automatically has to be produced if there is an author that is on there who's identified as someone, and that could mean that the author is an attorney. I mean when there's no information about the author, sender or recipient, that was the intention in the ruling. Because we did see documents like that. That's the reason why we came up with that ruling, because we saw that in our own review of the documents.").

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that were “0 for 3.” Consistent with the Special Master’s guidance, on February 1, 2022 OxyChem produced those 6 to the SPG.⁵

Having been overruled repeatedly on its privilege objections, the SPG remains determined to prolong this dispute, perceiving it as a lever it can use to delay the Defendants’ *own* depositions. Frantic to avoid testimony by their own members, the SPG continues to indiscriminately lob every accusation of “non-compliance” it can dream up. Most recently, it seized on a *typo* in OxyChem’s February 1 letter to the Special Master to claim that OxyChem has only produced documents with “no sender, no recipient, and **no date**.” *See* Dkt. 1970 (2-4-22 ltr. from SPG to Special Master). This is false. The SPG also claims falsely that *substantive* entries on OxyChem’s log are empty where—in fact—the log indicates that OxyChem has determined—based on the document’s content—that an unnamed consultant or attorney sent, authored, or received a document.⁶

In a good faith effort to resolve the SPG’s endless stream of “disputes,” OxyChem has endeavored to supply additional or more specific bibliographical information for these entries—e.g., identifying which specific consultant sent, authored, or received a document for which the corresponding log entry states “Consultant” in those fields. OxyChem expects to provide this additional bibliographical information early next week.

Action Requested: None.

4. The Special Master’s Order regarding CPG Documents

On January 11, 2022, the Special Master directed the SPG to address the issue of documents in the possession the CPG, mandating that the SPG “state in writing whether additional response cost documents exist and whether such documents are being withheld based on an applicable privilege” within 30 days. Dkt. 1932 at 12; Dkt. 1933. The deadline for the SPG to provide this response was yesterday, February 10, 2022. OxyChem has not received any additional information or response regarding the CPG’s documents.

Action Requested:

Instruct the SPG to comply with the Special Master’s Order.

⁵ That production (volume OCC-CER021) included (1) MaxPriv012560/OCC-CER000483740; (2) MaxPriv012562/OCC-CER000483742; (3) MaxPriv109036/OCC-CER000483745; (4) MaxPriv109037/OCC-CER000484073; (5) MaxPriv109087/OCC-CER000484528; and (6) MaxPriv109430/OCC-CER000485031.

⁶ The entries the SPG attacks include the 6 documents OxyChem produced on February 1 and another 10 documents the Special Master has already found to be privileged after his *in camera* review. Those 10 documents are (1) OCC-CER-PRIV005721; (2) OCC-CER-PRIV005733; (3) OCC-CER-PRIV005734; (4) OCC-CER-PRIV008693; (5) OCC-CER-PRIV005890; (6) OCC-CER-PRIV010663; (7) OCC-CER-PRIV011325; (8) OCC-CER-PRIV009985; (9) OCC-CER-IM000558546; and (10) OCC-CER-PRIV009206.

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Respectfully submitted,



Kathy D. Patrick

/s/ John J. McDermott

John J. McDermott

cc: All counsel of record

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