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February 11, 2022

VIA ECF AND E-MAIL

Special Master Thomas P. Scrivo, Esq.
O'Toole Scrivo, LLC
14 Village Park Road
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RE: *Occidental Chemical Corp. v. 21st Century Fox America, Inc., et al.*
Docket No. 2:18-cv-11273-MCA-LDW

Dear Special Master Scrivo:

I write on behalf of the Small Parties Group (the "SPG") in advance of the February 16, 2022, Status Conference to provide an important update regarding the status of settlement discussions between Defendants and the United States.

A significant number of Defendants have now reached an agreement in principle with the United States. As OxyChem's agenda letter (topic #1) acknowledges, such an agreement between Defendant parties and the United States will have a significant impact on this litigation. OxyChem's true share of responsibility for the remedial costs at this Site far exceeds its recent offer of \$441 million plus the amount it has spent to date and should be viewed for what it is: another desperate attempt by OxyChem to thwart EPA's allocation and settlement process.

Because entry of a settlement between Defendant parties and the United States should effectively end the litigation for all parties the Court should grant a stay of this litigation and motion for leave to file the same. At this point, the Special Master should pause proceedings as these motions are considered.

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If the Special Master still decides to hold the February 16 conference and discuss the outstanding discovery issues, the SPG provides an update on the following:

- (1) Case Management
 - a. Stay of Litigation
 - b. Timeline for Depositions
- (2) Document Discovery
 - a. OxyChem's Non-Compliance with Privilege and Sampling Data Orders
 - b. Consultant Productions
 - c. Supplemental ESI Productions
 - d. OxyChem's Second Requests for Production of Documents ("RFPs")
- (3) The SPG's Requests for Admission ("RFAs")
- (4) Administrative

1. Case Management

a. Stay of Litigation

Update: On January 14, all defendants and Third-Party Defendants ("Defendants") filed a motion for leave to file a joint request for a stay of this litigation to allow the final stage of the United States' parallel settlement proceedings to conclude.¹ OxyChem filed a letter opposing the SPG's request for leave on January 21,² and Defendants filed a reply on January 31.³

Next Steps: The motion for leave to file the motion for stay is fully briefed and is currently pending before Magistrate Judge Wettre. As further explained in their moving papers, Defendants believe that their request for leave should be granted and their motion for a stay heard. The stay would further the ends of judicial economy and long-standing EPA policies designed to facilitate the cleanup of contaminated sites through settlement as opposed to litigation.

b. Timeline for Depositions

Update: At the last status conference, the Special Master requested that the parties provide submissions on February 4 regarding the timeline for depositions. The parties were ordered to identify "a date on which these depositions can commence realistically, and also baking into that timeline all of the things that have to occur in order for the depositions to commence."⁴ This was a discussion that parties had been directed to hold in December, but OxyChem instead pressed forward with issuing deposition notices on its own preferred schedule—a schedule that is opposed by every other party in the case.

¹ ECF Nos. 1943, 1943-1.

² ECF No. 1953.

³ ECF No. 1962.

⁴ 01/25/22 Status Conf. Tr., at 58:2-6.

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As previously explained, Defendants believe that their motion to stay should be heard and granted and that no depositions should proceed while their request is pending. Nevertheless, as directed, all Defendants have agreed on a realistic, albeit ambitious, schedule based on “the conditions precedent that must occur before deposition take place.”⁵ OxyChem, for its part, simply doubled down on its tactics from December, again refusing to comply with the Special Master’s directive and again demanding that depositions proceed on the dates it purported to schedule them, with no consideration of the “things that have to happen before those depositions can start.”⁶ Under OxyChem’s proposal, depositions would begin on March 8—less than 3 weeks from the status conference—notwithstanding the outstanding tasks and the fact that the Special Master has not yet ruled on the competing submissions.

Next Steps: Defendants request that the Special Master enter an order setting a deposition discovery start date of May 31.⁷ This timeline appropriately accounts for the tasks that must be completed before depositions can begin. It would also give the parties clarity and would avoid the additional waste of resources that OxyChem’s insistence on unilaterally scheduling depositions causes. Finally, it will provide sufficient time for Defendants’ request for leave to be heard.

2. Document Discovery

a. OxyChem’s Non-Compliance with Privilege and Sampling Data Orders

Update: There are still outstanding issues related to OxyChem’s productions and privilege logs. First, OxyChem continues to violate the Special Master’s June 2021 order⁸ addressing documents withheld under OxyChem’s First and Fourth Privilege Logs. The SPG first notified OxyChem of deficiencies related to these logs over two years ago. At the January status conference, OxyChem claimed it needed an additional week to complete its review and subsequent production.⁹ On February 1, 2022, OxyChem sent a letter to the Special Master which blatantly misstated the Special Master’s prior ruling to justify producing only 6 documents.¹⁰ The SPG responded on February 4, explaining that OxyChem was still refusing to produce hundreds of documents for which it was unable to provide the author, sender, or recipient in clear violation of the Special Master’s order.¹¹

Second, the SPG wrote to the Special Master on February 1, 2022, requesting that the Special Master also bring OxyChem into compliance with the October 2019 Order on Sampling Data.¹² In its opposition, OxyChem points for the first time to new production volumes that it now

⁵ *Id.* at 56:11-21. *See also* ECF Nos. 1969, 1969-1, 1969-2.

⁶ 01/25/22 Status Conf. Tr., at 56:11-21. *See also* ECF Nos. 1967, 1967-1.

⁷ This would include an order directing OxyChem to postpone the deposition of Conopco, Inc., currently scheduled for March 8. *See* ECF Nos. 1968, 1973.

⁸ ECF No. 1251.

⁹ 01/25/22 Status Conf. Tr., at 43:12-16.

¹⁰ ECF No. 1963.

¹¹ ECF No. 1970.

¹² ECF No. 1964.

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says contain certain of the missing data. The SPG is still assessing OxyChem's list, which OxyChem had not provided previously. Regardless, however, OxyChem does not appear to dispute that it has not produced "unvalidated" data, as required by the prior order. OxyChem's carefully worded response was that it had produced all the data "*in its possession*," which begs the question of whether it has even asked the consultants who collected the data on its behalf to turn over all of the unvalidated data, required to be produced in this case.¹³

Next Steps: OxyChem should be required to come into compliance with the Special Master's privilege order and produce the documents it is wrongly withholding. The parties should also discuss with the Special Master why OxyChem has not produced unvalidated sampling data.

b. Consultant Productions

Update: The parties are still working through the first phase of the Consultant Subpoena Stipulation—the production of folder indices.¹⁴ But OxyChem has provided an ESI index in compliance with the Joint Stipulation for only one consultant (Arcadis) and still has not even confirmed the participation of others (such as Ramboll and Exponent). The SPG wrote to OxyChem about this on December 12, 2021, asking it to confirm: (1) whether Ramboll and Exponent will be opting into the process; and (2) when OxyChem expects to provide First Responses and Acknowledgment and Agreement forms from Brown and Caldwell, Exponent, Ramboll, and Tetra Tech. After nearly two months, the SPG sent a follow up on February 11, again asking for confirmation.¹⁵ For its part, the SPG has now submitted First Responses and "opt in" forms for eight subpoenas, and it anticipates making an additional production next week.

Next Steps: Subpoenas to OxyChem's consultants have been outstanding since August and September 2020, and the SPG has been waiting since December for updates on the status of the consultants' productions. OxyChem should confirm whether its consultants are opting in and provide their First Responses by February 21.

c. Supplemental ESI Productions

Update: At this time, SPG parties have largely completed their supplemental productions of documents created through June 30, 2021.¹⁶ The next supplemental ESI productions—for documents created between June 30, 2021, and December 31, 2021—are due for all parties, including OxyChem, by March 1, although some parties, including OxyChem, have already requested extensions until a later date in March.

¹³ ECF No. 1966.

¹⁴ ECF No. 1865.

¹⁵ See Letter from Jeffrey D. Talbert to Kathy D Patrick and Jack McDermott (Feb. 11, 2022), attached as **Exhibit A**.

¹⁶ Any outstanding productions are due to technological issues or other complications as a result of COVID-19. A status update regarding these productions is attached as **Exhibit B**.

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Next Steps: SPG parties will continue to make progress on any outstanding productions. The parties are still discussing the deadline extensions for their next supplemental production but expect to be able to reach agreement with all documents produced in March.

d. OxyChem's Second RFPs

Update: After back and forth with OxyChem regarding SPG parties' objections to OxyChem's Second RFPs, OxyChem sent a letter on January 11, 2022, confirming the scope of the requests. Following this confirmation, the SPG filed a motion for a protective order on requests 1, 2, 4, and 6.¹⁷ OxyChem filed an opposition on February 2, 2022.

Next Steps: The SPG requests that the Special Master enter an order to protect SPG parties from being required to produce documents that are clearly privileged, irrelevant, and unduly burdensome to produce.

3. The SPG's RFAs

Update: The SPG filed a motion on January 14, 2022, asking the Court to order OxyChem's evasive, improper responses be deemed admitted or, in the alternative, to compel OxyChem to properly amend the identified responses.¹⁸ At the last status conference, the Special Master granted OxyChem's request to submit a motion for protection and a response to the SPG's motion within 30 days. OxyChem's response to the SPG's motion is due February 24.

Next Steps: There is nothing to address on this issue at the February status conference. After OxyChem files its brief(s) on February 24, the SPG will reach out to the Special Master on a proposed schedule to complete the briefing on OxyChem's RFA responses.

4. Administrative

Update: The parties have exchanged redlines of the Deposition Protocol with amendments to address the addition of Third-Party Defendants, as well as developments with the ongoing COVID-19 pandemic. The parties discussed these issues at a meet and confer on February 2, and appear to have some disputes relating to the revisions, including how the presumptive deposition limits will need to be adjusted to reflect the addition of third parties. OxyChem's proposal was that it would now have 55 total depositions (15 additional ones as a result of the addition of third parties), the primary defendants would get no additional depositions (40 total), and Third-Party Defendants would only get 15 depositions. During the meet and confer, the SPG informed counsel that it required further discussion with its members regarding the proposed revisions to the deposition protocol. The SPG has since circulated proposed revisions to OxyChem and the Third-Party Defendants.

¹⁷ ECF No. 1959.

¹⁸ ECF No. 1945-3.

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Next Steps: At this time, there is no issue requiring the Special Master's attention, but the parties anticipate there could be some dispute concerning the presumptive limit on depositions, as well as a small number of other proposed revisions.

* * *

I look forward to discussing these and other matters with you at the upcoming conference.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Talbert", with a long horizontal flourish extending to the right.

Jeffrey D. Talbert

Attachments: Exhibits A-B

EXHIBIT A

Jeffrey D. Talbert
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February 11, 2022

VIA E-MAIL

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**RE: *Occidental Chemical Corp. v. 21st Century Fox America, Inc., et al.*,
Docket No. 2:18-cv-11273-MCA-LDW
Consultant First Responses**

Dear Kathy and Jack:

I write on behalf of the Small Parties Group (“SPG”) regarding the First Response step of the Joint Stipulation and Order Regarding Production of Documents and Communications with Non-Party Consultants (the “Stipulation”) (ECF No. 1865). The SPG submits First Responses and Acknowledgment and Agreement forms in accordance with ¶ 4 of the Stipulation. These documents are available at the following link¹: <https://bit.ly/3HG9ZnM>. The table attached hereto as **Exhibit A** lists the consultants who have produced these First Responses, the SPG defendants to whom the consultants’ First Responses relate, and an itemized list of the documents in each First Response. Some individual consultants have made specific objections and/or have included other pertinent information with their First Responses. Further, as you are aware, some individual consultants have previously lodged objections to OxyChem’s subpoena and discovery requests therein. A consultant’s submission of a First Response should not be construed as a waiver of any objection previously asserted by a consultant. The SPG will submit additional First Responses and Acknowledgment forms on a rolling basis.

In addition, as you know, the SPG has received only one ESI index in compliance with the Joint Stipulation to date. OxyChem has not provided First Responses—or even “opt in” forms—from any of the other consultants, most of whom were served with SPG subpoenas well over a year ago. The SPG repeats the request it made in my letter of December 12, 2021—still unanswered by OxyChem—that OxyChem confirm: (1) whether Exponent and Ramboll will be opting into the process; and (2) when OxyChem expects to provide First Responses and Acknowledgment and Agreement forms from Brown and Caldwell, Exponent, Ramboll, and Tetra Tech.

¹ This link will expire after 14 days.

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Kathy Patrick and Jack McDermott

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Sincerely,

A handwritten signature in blue ink, appearing to read "J. Talbert", with a long horizontal flourish extending to the right.

Jeffrey D. Talbert

Exhibit A - Table

cc: James W. Beers, Jr.
Benjamin S. Piper
Lee Henig-Elona
Diana Buongiorno
Grant Gilezan
Peter King

EXHIBIT B

**Status of SPG Member Supplemental ESI Productions
(documents pulled through June 30, 2021)**

<u>SPG Member</u>	<u>Progress Made as of January 12 [ECF 1944-15]</u>	<u>Progress Made as of February 11</u>
BASF Corporation (on its own behalf and on behalf of BASF Catalysts LLC)	Anticipates completing production by January 31	Completed January 30
Canning Gumm, LLC	Anticipates completing production by January 14	
Covanta Essex Company	Anticipates completing production the week of February 14	
Givaudan Fragrances Corporation	Anticipates making a small supplemental production in January	Complete
Hoffmann-LaRoche Inc.	Additional production made December 23; will continue making rolling productions in early 2022	Will continue making rolling productions
Pitt-Consol Chemical Company	Production completed November 18; assessing whether a supplemental production will be necessary	Complete
The Okonite Company, Inc.	Anticipates completing production by February 1	