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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO: L-9868-05

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NEW JERSEY DEPARTMENT OF	: HEARING ON ORDERS
ENVIRONMENTAL PROTECTION, THE	: APPROVING SETTLEMENT
COMMISSIONER OF THE NEW	:
JERSEY DEPARTMENT OF	:
ENVIRONMENTAL PROTECTION, and	:
THE ADMINISTRATOR OF THE NEW	:
JERSEY SPILL COMPENSATION	:
FUND,	:
Plaintiffs,	:
v.	:
	:
OCCIDENTAL CHEMICAL	:
CORPORATION, TIERRA	:
SOLUTIONS, INC., MAXUS ENERGY	:
CORPORATION, REPSOL YPF,	:
S.A., YPF, S.A., YPF	:
HOLDINGS, INC., and CLH	:
HOLDINGS, INC.,	:
	:
Defendants.	:
	:
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BEFORE: THE HONORABLE SEBASTIAN P. LOMBARDI

TRANSCRIPT of the above-entitled proceedings
as taken by and before LINDA M. JORRITSMA, a Certified
Shorthand Reporter and Notary Public of the State of
New Jersey, at the Essex County Historic Courthouse,
470 Martin Luther King, Jr. Boulevard, Newark, New
Jersey, on Thursday, December 12, 2013, commencing at
9:47 in the forenoon.

Job No. NJ1781234

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21 ALSO ATTENDING: HON. MARINA CORODEMUS (RET.)

SPECIAL MASTER

1 THE COURT: Good morning.

2 All right. We still will be recording and
3 we have our court reporter here today which I believe I
4 entered an order earlier that it is the official record.
5 But let me -- we'll go on the record.

6 This is the matter of New Jersey Department
7 of Environmental Protection versus Occidental Chemical
8 Corporation, et al., including Third-Party Defendants,
9 Docket No. L-9868-05.

10 Now, because of the number of counsel we
11 have, I may allow them to set forth their positions.
12 When you speak firstly, please put your name on the
13 record so the court reporter doesn't have to ask later.
14 Thank you.

15 All right. Now, I am here today to respond
16 to -- and to enter orders approving a settlement with the
17 Plaintiffs and certain direct Settling Defendants. It's
18 everyone except the Defendant Occidental Chemical
19 Corporation.

20 And also to -- being asked to approve and
21 sign an order of a -- I believe it's a settling agreement
22 and a consent judgment on behalf of Third-Party
23 Defendants.

24 Now, I am going to follow that I will
25 finally make a determination as to the Third-Party

1 Defendant settlement agreement and consent judgment after
2 I decide the direct Settling Defendants' proposed
3 settlement agreement with the DEP.

4 But having said that, I would like to first
5 hear -- and we did have some positions taken in
6 opposition as to how the third-party settlement will be
7 determined, and we had several parties substantively
8 respond. And by that I mean, I would like to hear first
9 from -- there's probably about three, possibly four, that
10 substantively submitted a brief on behalf of approving
11 the Third-Party Defendant settlement vis-a-vis the
12 Settling Defendants' settlement.

13 So I will like to hear from them first, and
14 I think I know who you are. Who would like to speak -- I
15 don't want anyone to speak at this time. I certainly
16 read everything that people who just joined into earlier
17 arguments. I would like to hear if anybody wants to add
18 anything.

19 I know, Mr. Scagnelli, I think you were the
20 first one I received. I don't know if Mr. Scagnelli is
21 here or not.

22 MR. SCAGNELLI: I am, your Honor.

23 THE COURT: I don't know if you want to add
24 anything to your brief about that, but I will hear from
25 you. Anybody who submitted something substantively,

1 before everybody else joined in.

2 MR. SCAGNELLI: All right. I would like to
3 make a few comments about that.

4 THE COURT: All right.

5 MR. SCAGNELLI: John Scagnelli, I am the
6 liaison counsel for the Third-Party Defendant Public
7 Entity Group in this case.

8 Just a few comments, your Honor, to make
9 some bold-faced points.

10 The Third-Party Public Entity Defendants
11 fully support the third-party consent judgment and urge
12 its immediate entry by this Court. That consent judgment
13 is the product of months -- months of extensive
14 negotiations between the DEP and the Third-Party
15 Defendants, and its immediate entry will dismiss
16 approximately 260 Third-Party Defendants from this case.

17 Now, we believe that the immediate entry of
18 the third-party consent judgment is required by this
19 Court's January 24, 2013, approval order, which stated
20 that following the 60-day public comment period for the
21 consent judgment, it was to be brought before the Court
22 for its entry absent comments which the State DEP
23 determined warranted its rejection.

24 The DEP is now moving for entry of the
25 consent judgment. No parties in this case have

1 substantively objected to its terms. And this -- the
2 expectation that the consent judgment will be promptly
3 entered was confirmed to this Court by the DEP and by the
4 Third-Party Defendant liaison counsel at I believe a
5 March 26, 2013, settlement conference that we had here.

6 The public Third-Party Defendants were very
7 surprised to find that paragraph 50 of the
8 State-Repsol-YPF settlement subordinated the entry of the
9 third-party consent judgment of the Court's approval of
10 that. The agreement, the State-Repsol agreement,
11 provided that if their settlement was not approved by the
12 Court and was overturned or modified on appeal, the DEP
13 would come back, reopen the now closed public comment
14 period on the third-party consent judgment, allow the
15 Settling Defendants to object to it, and withdraw the
16 consent judgment from the Court's consideration.

17 We believe that the subordination
18 provisions in paragraph 50 of the State settlement are
19 totally inconsistent with this Court's own January 24,
20 2013, approval order. There's a require -- paragraph 54
21 of the consent judgment, itself, which requires that it
22 be promptly entered, and the discussion at the March 26,
23 2013, case management conference. I would note that this
24 Court's own April 25th, 2013, approval order, process
25 order for the State/Repsol settlement, said nothing at

1 all about subordinating the consent judgment to the
2 State/Repsol settlement agreement.

3 What we have now, the DEP in its motion
4 before the Court to enter these settlements, continues to
5 request that the Court enter the State settlement first
6 before the entry of the third-party consent judgment.

7 THE COURT: "Or simultaneously" it says in
8 the paragraph. But I'm doing it today. I'm choosing the
9 order. If anyone objects to it --

10 MR. SCAGNELLI: No, I understand that. But
11 basically we feel and the Third-Party Defendants feel
12 that that subordination and delay of letting
13 approximately 260 parties out of this case will harm the
14 Third-Party Defendants, require them to continue to pay
15 litigation expenses involved with participation in this
16 case, and will particularly harm the public Third-Party
17 Defendants whose resources have been stretched to the
18 breaking point. There's simply no reason, your Honor,
19 not to immediately enter the third-party consent judgment
20 right now and let the approximately 260 Third-Party
21 Defendants out of this case.

22 You know, I believe Exodus 9:1 -- this is
23 the Christmas season -- is appropriate. As the Lord
24 directed Moses to tell Pharaoh, "Let my people go." Your
25 Honor, I'm asking that you let my people go. Thank you.

1 THE COURT: All right. Now, does anybody
2 want to add anything to the position which I think is
3 consistent that Mr. Scagnelli expressed on behalf of one
4 or more of the Third-Party Defendants?

5 MR. COFFEY: Your Honor, I'm Gregory Coffey
6 with Coffey & Associates.

7 THE COURT: Yes, Mr. Coffey, you did submit
8 your brief.

9 MR. COFFEY: And I will be very brief with
10 my comments and not repeat those that were artfully set
11 forth by Mr. Scagnelli, but we did submit a brief.

12 I think there are just two points that I
13 want to bring out.

14 First is why we're here today. Okay? We
15 have a settlement among the parties. But the Spill Act,
16 in order to convey the contribution protection
17 provisions, requires court approval. And that's why
18 we're here and I think it's very important to bring out
19 the fact, your Honor, that this is a situation where it's
20 on consent of all the parties. As Mr. Scagnelli
21 indicated, there are 260 Third-Party Defendants here.
22 There is not a wholesale group as we have in other cases
23 that are outliers, that are objecting to and not part of
24 the settlement.

25 So like Mr. Scagnelli, I strongly urge the

1 Court to enter the consent judgment for the Third-Party
2 Defendants in this case. But I similarly would urge the
3 Court on behalf of the public entities that I represent
4 that it's strongly in the public interest here to enter
5 both consent judgments, both consent decrees.

6 And I think I read Occidental's comments
7 very carefully and I think they're not objecting to the
8 Maxus settlement, but they have some issues with respect
9 to discovery. From the standpoint of the public interest
10 and the municipalities and public entities that have
11 endured this case for such a long time, our position,
12 your Honor, would be is this case should be completed,
13 should be finished. The settlement should be done. And
14 we think that the State of New Jersey stepped up to the
15 plate here and engaged in discussions both simultaneously
16 but a little ahead with the Third-Party Defendants. That
17 brought about the momentum that we needed to get a
18 settlement here.

19 The most demonstrative thing, Judge, about
20 the settlement that's presented here is it's on the
21 consent of all these parties. And I think that that's
22 very important to bring out. What we're not here to do
23 is to come up with an allocation and to determine that,
24 well, what, you know, Hasbrouck Heights paid was fair.
25 Because I'll argue all day long that, you know, that they

1 probably paid more.

2 But what we're here to determine, your
3 Honor, is that the overall settlement can pass the basic
4 test of fairness, so that if there were ever a
5 third-party that was out there who hadn't been sued in
6 this action, they couldn't come back and shouldn't be
7 permitted to come back and bring an action against any of
8 the municipalities that I represent. And that's what the
9 Spill Act provides for and that's what is most advanced
10 here in the interest of public policy and the interest of
11 the public -- of the municipalities and public entities
12 that were brought in this case.

13 And I thank you for the time.

14 THE COURT: All right. Thank you, sir.

15 MR. ERICKSON: Your Honor, my name is Dave
16 Erickson. I'm common counsel for the Joint Defense
17 Group. We represent over 100 private companies.

18 I will just echo what the others have
19 already said without repeating it just to point out a
20 couple of main points.

21 Nobody has objected to our settlement. Our
22 group worked very hard on the settlement for months and
23 months and months. The reason we did that was that we
24 were involved in very extensive complicated litigation.
25 It was hotly contested and the parties chose to settle

1 the case, and we worked closely with the State for months
2 to do that.

3 The reason our documents were prepared, and
4 they include both the private companies and the public
5 entities that have just spoken, the way they were was
6 because there were so many parties involved and it was a
7 difficult process to negotiate the terms of the State and
8 to get all of the members of the Third-Party Defendant
9 group to agree to everything. We submitted the documents
10 with the provisions keeping them in the same order,
11 because if we start changing things, we have to bring in,
12 you know, 300 parties and start going through things
13 again. We hope to avoid that.

14 I understand the terms of the original
15 Defendant settlements. Notwithstanding that, I think all
16 of the Third-Party Defendants in our group and all of the
17 Third-Party Defendants want our settlement approved
18 immediately regardless of what else happens. Because if
19 that doesn't happen, then we'll have to become embroiled
20 in all of the complex issues that your Honor has to deal
21 with again and we hope to avoid that and stop the
22 expense. Thank you.

23 THE COURT: All right. Let me just -- go
24 ahead.

25 MR. ROTHENBERG: One quick comment, your

1 Honor. Eric Rothenberg.

2 THE COURT: Go ahead. You submitted sort
3 an a "me too" letter. Go ahead. What would you like to
4 add?

5 MR. ROTHENBERG: I'm here to say, "me too,"
6 your Honor. But I did want --

7 THE COURT: I did read everything at least
8 twice.

9 MR. ROTHENBERG: In terms of the order of
10 the argument and matters to be dealt with today, and
11 assuming that the consent judgment can and will be
12 entered today, we'd like a little bit of time at the end
13 to bring certain administrative matters before you. We
14 have been working with Wayne Greenstone on behalf of the
15 Plaintiffs on the form of escrow agreement to make
16 provision for payment.

17 Paragraph 59 of the consent judgment
18 contemplates that all of the third-parties will have paid
19 up their fees and their court costs. And there's, under
20 a January 2011 order that you issued, an account that we
21 have set up for funding the Special Master's services.
22 We think that that order needs to be amended in light of
23 today's proceedings.

24 So those are three items that we'd like a
25 little bit of time to address with you before we

1 conclude.

2 THE COURT: Right. Well, here's what I
3 will tell you and I think it went out in e-mail to
4 everybody. I do want to get to what's most substantive
5 today and hear the main issue concerning the case
6 management and decide that certainly today.

7 If I can get to it today, I certainly will.
8 If not, I did calendar tomorrow morning. So if it's
9 necessary, you can certainly come back tomorrow morning
10 if you don't want to wait until next week. But we'll
11 try. All right? And we'll just deal with that at the
12 end of the day. Okay? And several other things I'd like
13 to say -- unless it's something substantive?

14 MS. PETICOLAS: Yes, your Honor.

15 THE COURT: With this many people, I do
16 want to get done with the main issues today. What would
17 you like?

18 MS. PETICOLAS: Yes, I understand, your
19 Honor. I will be brief. Susanne Peticolas from Gibbons,
20 P.C.

21 THE COURT: I read yours. It's in my list
22 here as Exhibit I.

23 MS. PETICOLAS: Thank you, your Honor. I
24 will not repeat what the other have said. We represent
25 ITT Corporation, Benjamin Moore & Company, Givaudan

1 Fragrances Corporation, Ashland Inc. --

2 THE COURT: I don't think you need to put
3 on the record. I have a list and it's about 25. If
4 everybody wants to just put who they represent --

5 MS. PETICOLAS: No, your Honor. I do have
6 an argument.

7 THE COURT: So I understand and I have it
8 listed right here. I can probably read the list more
9 quickly but the court reporter wouldn't like that. Just
10 proceed. I understand who you represent.

11 MS. PETICOLAS: You know what, if I may
12 give the court reporter these names afterward to put in
13 the record, I would do that.

14 THE COURT: That's fine.

15 MS. PETICOLAS: Yes.

16 Your Honor, of course we adopt the other
17 arguments that were made before. I wanted to point out
18 that the Direct Defendant settlement was entered
19 subsequent to ours. Everybody knows that. Ours was
20 complete and stands on its own merits. It's independent.
21 The addition in the Direct Defendants' settlement that
22 essentially says that the -- the comments should be
23 reopened on our settlement, if theirs is not entered,
24 creates a condition precedent to our settlement that was
25 not negotiated. And obviously, we didn't have any

1 interaction or participation in the negotiation of the
2 Direct Defendant settlement which took place after ours.

3 However, I would like to point out to your
4 Honor that paragraph 69 of the Direct Defendants'
5 settlement makes it null and void if it is not approved
6 as submitted. If it is null and void, then any
7 commitment the State has made to the Direct Defendants to
8 reopen our Third-Party Defendant settlement cannot go
9 into effect because their whole settlement would be null
10 and void if it's not adopted and approved as submitted.

11 Therefore, there should be no question that
12 the State should not reopen any comments on our
13 settlement and our settlement should go forward and be
14 approved as submitted.

15 Thank you, your Honor.

16 THE COURT: All right.

17 At this time let me add two things
18 Mr. Coffey reminded me about the public interest.

19 I have not received any written opposition
20 by members of the public or people who represent the
21 public except as to concerns as to what the State would
22 do regarding the distribution of the settlement funds. I
23 do find as an independent branch of the government, the
24 judiciary, that I don't have jurisdiction and nobody's
25 pointed any jurisdiction that I do have to make a

1 determination as to how the State of New Jersey or the
2 DEP will use these funds. I know there's some language
3 in the order about it, but there's a caveat in the order
4 that the State will have the discretion internally to
5 decide things.

6 So that's the only opposition I received,
7 and that's my only comment to it because it has nothing
8 to do substantively that I believe to be before me in
9 deciding whether to accept these settlement agreements or
10 not.

11 With that, I'll also ask, is anybody here
12 on behalf of the public or somebody representing a group
13 as to the public? I wasn't made aware anybody was going
14 to be here and nobody suggested they would. I just want
15 to make sure that I would allow them to speak if it's
16 appropriate.

17 Now, lastly, before we get to
18 the -- perhaps longer, I don't know if they're greater
19 but longer arguments -- is that -- now I lost -- oh, it
20 has been reported to me officially earlier this week that
21 all of the originally non-settling Third-Party Defendants
22 that weren't part of the negotiations around the 260,
23 they now have all settled and dismissed -- the
24 third-party claims as to them have been dismissed. And
25 so at this point if I do approve the third-party

1 agreement and consent judgment, there will be no more
2 Third-Party Defendants left in this matter. Just to let
3 everybody know that. I don't know if it's good news or
4 bad news, but it does mean that we continue to move on
5 with this case.

6 Now, with that, I will hear from the
7 settling parties, that is, from the DEP and the Settling
8 Defendants, Direct Defendants, and you can certainly put
9 forth, since there's been some change in certain
10 entities, you know -- between, you know, Repsol and YPF
11 and the Argentinian government, you can make
12 representation of who you're representing yourself today.

13 But let me start with that as to why I
14 should approve this settlement agreement and sign the
15 orders that are asked for including a Case Management
16 Order. And I assume, let me first hear from the
17 Plaintiff.

18 Mr. Jackson.

19 MR. JACKSON: Your Honor, Bill Jackson and
20 Mike Gordon here today for the Plaintiffs. And we've
21 conferred with our co-counsel and opposing counsel here
22 today, and what we'd like to do, if it please the Court,
23 is I will go through the motion to enter the settlement,
24 rather briefly summarizing the key terms of both the
25 Repsol/YPF settlement and the third-party consent

1 judgment, how they come together, how they are
2 intertwined; and then we will let those who want to speak
3 in support of the settlement to do so. Then give it to
4 Mr. Howard for Occidental to respond, their cross-motion.

5 THE COURT: Right. I intended to hear
6 those arguments together.

7 MR. JACKSON: And then let Mr. Gordon
8 respond to the scheduling issues, if that's okay with
9 you.

10 THE COURT: Right. But I won't preclude
11 anybody who certainly submitted their briefs or reply
12 briefs if they want to at some point jump in and enter
13 their arguments. So if that's your schedule, that's
14 fine. But you are here; you did submit briefs to alert
15 the Court as to what your argument may be. And if it's
16 appropriate, I will let other people speak as well.

17 MR. JACKSON: Fine.

18 THE COURT: Go ahead, Mr. Jackson.

19 MR. JACKSON: Thank you, your Honor.

20 Let me start by just noting the
21 significance of the day a little bit. I think that we
22 all have worked in this case for so long that sometimes
23 you need to kind of take a step back. And I do want to
24 at least make an observation that it was over 20 years
25 ago that the Appellate Division held that Diamond

1 Shamrock Chemical Corporation, now OCC, intentionally and
2 knowingly discharged hazardous pollutants with full
3 awareness of their inevitable migration to and
4 devastating impact upon the environment.

5 As a result of that dioxin contamination,
6 going back three-quarters of a century, the State and the
7 communities around the Lister site have suffered
8 substantial economic impacts. And the Passaic River,
9 itself, has been described as a dead zone, an industrial
10 wasteland, a liquid landfill, a degraded and destroyed
11 public resource, and has been declared dead.

12 Today, your Honor, I think that these
13 settlements before you prove that that diagnosis is
14 wrong. The Passaic River is not dead and it's not going
15 to be left for dead. The settlements that you have
16 before you today ensure that it will be revived, it will
17 be remediated, and it will be restored.

18 For three decades, literally 30 years, the
19 State of New Jersey, several amazing folks at the
20 Department of Environmental Protection and Division of
21 Law, my co-counsel, Mike Gordon, various community
22 groups, the EPA, and the federal trustees have worked
23 tirelessly to remediate this river and to restore it to
24 the public for the benefit of the public and to deal with
25 the contamination that came from 80 Lister Avenue.

1 So I do consider myself very fortunate
2 today to stand before you to announce that we are
3 presenting for the Court's approval settlements involving
4 over 265 parties and recovering \$165 million for the
5 State of New Jersey that will bring life back into this
6 effort for the Passaic River and make substantial
7 contributions towards its restoration.

8 The settlements constitute some of the
9 largest environmental settlements in the history of the
10 State, and they are truly significant to the Passaic
11 River and to the people in the communities around them.
12 These settlements as set forth fully in the briefing
13 fully reimburse the State for \$148 million of past
14 cleanup and removal costs, and then secure another
15 \$17 million for the restoration projects along the
16 Passaic River.

17 Though it was the State's goal to have a
18 full and final settlement of this litigation, the
19 settlement does not yet accomplish that. It's our hope
20 that ultimately it will. The State and OCC were not yet
21 able to resolve their differences. We will continue to
22 work with OCC in that regard, but at this point the State
23 must complete its case against Occidental.

24 Thus, as part of the settlement, the State
25 is asking to immediately proceed with its final phase of

1 the case. There are two essential components to what
2 remains of the State's case.

3 First, the State, in order to give teeth to
4 your Honor's summary judgment declaring that Occidental
5 is strictly, jointly, and severally responsible for all
6 of the future cleanup and removal costs associated with
7 the discharges from the Lister site, the State needs to
8 demonstrate the nexus under the Dimant opinion between
9 those costs and the discharges from Lister Avenue, and
10 the State is prepared to move forward with that next
11 year.

12 Likewise, after eight years of litigation,
13 the State is prepared and asking to move forward with
14 their substantial damages claims with respect to the
15 intentional discharges from the Lister site.

16 Additionally, it's important to remember
17 that this litigation is but one piece of a
18 several-pronged approach to deal with what is a hugely
19 significant environmental issue. There are several
20 federal processes that are undergoing -- or that are
21 going forward right now under EPA auspices. Most
22 importantly is the Focused Feasibility Study, which I
23 know the Court is familiar with, the study involving the
24 eight-mile stretch of the river and basically how to
25 remediate it and to control the constant resuspension of

1 dioxin and contamination that came from the Lister site
2 in particular.

3 Likewise, the federal Superfund process
4 that involves all 17 miles of the river in the Newark Bay
5 complex will 80 continue.

6 Finally, the upland site, itself, the
7 Lister site is part of a federal process. There is an
8 interim remedy that is under review every two to five
9 years for that site, and that process will continue as
10 well.

11 I say all that simply to remind the Court
12 and give context that this case was not ever intended to
13 resolve all issues with respect to the Passaic River,
14 it's a piece of a much larger set of processes that are
15 in place right now.

16 So this settlement is designed to take care
17 of huge pieces of the State's litigation and to resolve
18 the State claims as to the settling third-parties and as
19 to the Settling Defendants.

20 We recognize the settlement agreement
21 provides that's there are federal processes that will
22 continue. There is likely to be federal litigation, and
23 all those federal claims as between the settling parties
24 were preserved and set to the side as well.

25 So what I would like to do, your Honor, is

1 given the lack of briefing and comment to most of the
2 settlement issues that are before the Court, if it suits
3 the Court, what I would like to do is briefly run through
4 the key terms, and then turn it over to the other -- the
5 opposing counsel.

6 Let me provide your Honor with -- I think
7 most folks in the courtroom have this. It's a Power
8 Point presentation. I have handed it out to all the
9 opposing counsel.

10 Borrowing from Mr. Howard's playbook the
11 last time we were here together arguing, I thought it was
12 a nice way to do it rather than having big blow-ups and
13 let everybody have just a few points.

14 Obviously, the standards that are
15 here -- that we are here before you are that as the
16 agency actions, they should typically be upheld unless
17 they're shown to be arbitrary, capricious, or
18 unreasonable.

19 The settlement in some set of circumstances
20 because of the public interest involved, the Court is
21 also to consider whether it's fair, reasonable and
22 adequate to the public's interest.

23 Here are the terms of the settlements, as
24 you know, intricately and arduously negotiated over
25 14 months do that and much more.

1 So with the State's goals of the litigation
2 in mind, let me just run through them real quickly.

3 Obviously, the State's first goal was to
4 recover its damages and to recover its costs associated
5 with the cleanup. The State wanted to ensure that the
6 public never had to bear the cost of the cleanup
7 associated were with the Lister site.

8 And so we have accomplished that through
9 the settlements with respect to the past costs. It is
10 the future costs that we have preserved. We also wanted
11 to jump start the remediation and restoration efforts
12 under the NRD.

13 So if you look at page one of the handout
14 that I provided to you, I would like to just run through
15 some of the key terms with respect to the Repsol/YPF
16 settlement agreement first.

17 Repsol and YPF have agreed to collectively
18 pay the State \$130 million, which is being applied to
19 past costs and to natural resource damages.

20 The settlement agreement provides that the
21 State is reserving its claims for future costs as to the
22 Focused Feasibility Study and its damages as to
23 Occidental. As part of that, the State, as I mentioned,
24 pursuant to Dimant opinion, needs to connect the nexus
25 between the discharges pursuant to your Honor's order and

1 the costs that the State faces as a result of that.

2 The State also needs to be able to
3 establish that Occidental's actual conduct occasioned the
4 damages that have been reserved as to it.

5 Essential to all of this, of course, is the
6 flipping of the tracks, and that the State is able to
7 make these demonstrations. And I'll get to why in just
8 one moment.

9 The most difficult part of this was that
10 the Maxus indemnity was to be honored and to remain in
11 place. And so to negotiate the settlement with
12 Repsol/YPF and the Settling Defendants and not Occidental
13 left us with a problem, of course, that anything that the
14 State reserved as to Occidental would go right through
15 the indemnity and go right back to settling parties.

16 And so as a result, Repsol and YPF agreed
17 to total exposure of \$530 million with respect to those
18 reserved claims, an additional \$400 million.

19 In essence, what the State agreed to do is
20 if it establishes in what has been previously known as
21 Track VIII future cleanup and removal costs and economic
22 damages in excess of \$400 million and Occidental then is
23 able to successfully assert and collect those damages
24 from Repsol and YPF and/or YPF, the settling parties, the
25 State is agreeing to remit its own damage award to

1 \$400 million.

2 With respect to the Lister site, itself,
3 it's subject to the existing ACOs with the State and with
4 the federal government. It's not really part of the
5 settlements, it's not subject to the cap. The
6 process -- the agreement is that the process will
7 continue on as it was.

8 With respect to the areas outside of the
9 Focused Feasibility Study, outside of the eight-mile
10 stretch of the river that is immediately expected to be
11 ruled upon by EPA, Occidental is responsible for the
12 first \$35.4 million of any future costs the State may
13 incur, any costs above \$70.4 million. And basically that
14 was a construct around it, the third-party settlement
15 where the third-parties were granted contribution
16 protection.

17 But there are no caps because, frankly,
18 outside of the Focused Feasibility Study there is
19 uncertainty as to what may be out there; and as a result,
20 the State could not cap its future exposure with respect
21 to what may be required in the future out of Newark Bay.

22 Ten million dollars of the settlement funds
23 would be applied to restoration projects. And the
24 settling parties agreed not to contest or comment upon
25 the third-party agreement if this agreement was entered.

1 Let me say on behalf of the State and just
2 about everybody in this room, I think that we all want
3 Mr. Scagnelli and his people and the third-parties to go.
4 Part of this plan was simply to streamline this
5 litigation and to pull this back together. But the
6 fundamental tenet that we were directed to follow by the
7 Attorney General and by the law is that it has to be
8 reasonable and fair to the non-settling parties and to
9 the public. And when we negotiated the third-party
10 settlement and as it was entered in the consent judgment,
11 one of the things that we were required to do is to
12 ensure that it was fair to the non-settling parties. At
13 that point that included Maxus and Tierra, and the other
14 parties who are now Settling Defendants.

15 And we had numerous negotiations with the
16 third-parties about how that fairness would be employed
17 and how it was required of the State. And as a result,
18 when we began negotiations with Maxus, Tierra, and the
19 settling third-parties, they accepted that the
20 third-party consent judgment extinguished their direct
21 claims as against the third-parties, and they said, "All
22 right, we will accept that, because it is, in the context
23 of the broader settlement, fair. We'll accept it. But
24 if our settlement is for whatever reason not approved, we
25 would like the opportunity the comment upon the fact that

1 you're extinguishing our claims as to the third-parties."

2 And the State agreed to that as being fair
3 and reasonable. And that is how those issues became
4 linked together, because Maxus and Tierra's direct claims
5 against the third-parties are being extinguished by the
6 consent judgment; and therefore, in order to be fair to
7 at that time non-settling parties, that was the construct
8 which the State ultimately agreed upon.

9 Likewise, throughout the entire process, we
10 have worked very hard to maintain the fairness as to
11 Occidental, and I'll get to that in one minute.

12 If you flip the page, you will see the
13 third-party consent judgment and the essential terms that
14 are agreed to in that document.

15 As your Honor knows, with 260-some-odd
16 parties, almost 300 at one point, the settlement
17 structure with the third-party arrangement was I want to
18 settle on a per capita basis. And the per capita basis
19 was built around at some level ability to pay, the public
20 interest, the municipalities and the demands that they
21 needed, as well as all of the intricacies of the
22 different parties and the breadth of which they have been
23 sued upon.

24 As a result of that per capita payment
25 structure, in the aggregate, the third-party consent

1 judgment results in \$35.4 million in total recovery to
2 the State; \$28 million plus or minus is being applied to
3 the State's past costs, with \$7 million being applied to
4 restoration projects and an NRD credit against ultimate
5 responsibility.

6 The third-parties are entitled to
7 contribution protection under the State law. And the
8 State, in order to protect its interests and the public
9 insisted upon re-openers as to the third-parties if the
10 State's exposure and the public was ever exposed to
11 certain thresholds of costs.

12 So outside of the Focused Feasibility Study
13 area, if the State ever incurs more than \$35.4 million,
14 the State may reopen the claims as to third-parties.

15 Within the FFS area, that re-opener was set
16 at \$88.5 million, multipliers of the settlement funds in
17 total.

18 As I mentioned, the dismissal of the
19 third-party claims as asserted against Maxus or by Maxus
20 and Tierra would be dismissed. As your Honor knows, the
21 State never asserted claims against the third-parties,
22 and in fact, reserved those claims. And as to those
23 reserved claims, the upland sites where all of the
24 third-party sites were located, those reservations
25 remained in effect, as did the reservation as to NRD

1 subject to the \$7 million credit and the procedures the
2 State agreed to as to re-opening these issues.

3 Collectively, by these settlements, the
4 State retires all past cleanup and removal costs at 100
5 cents on the dollar.

6 Through the motion for summary judgment,
7 Occidental is already held strictly, jointly, and
8 severally liable for all of the cleanup and removal costs
9 associated with the Lister discharges. So after eight
10 years of litigation, the State is asking and should be
11 allowed under the terms of the settlement to conclude its
12 claims against Occidental. With respect to those, the
13 State, as I mentioned, will next year endeavor to produce
14 and administrate the nexus that's required, as well as we
15 would like to proceed to trial to obtain the specific
16 economic and punitive damages.

17 The reservations and re-openers in these
18 two agreements protect the State and the public against
19 any and all future costs associated with the FFS area,
20 with the areas outside of the FFS, and with respect to
21 the Lister site, itself.

22 Because of these settlements, the State
23 avoids substantial risk and litigation costs associated
24 with Track IV. I think at the time that Argentina got
25 YPF, there were 30 or 40 depositions that we were trying

1 to negotiate around the globe. We'd already been to
2 Buenos Aires, to London, to Sydney, everywhere you can
3 imagine. The costs of trying Track IV were enormous and
4 the State obviously took that into account when it made
5 the decision to settle as it did. The difficult and
6 expensive expert evaluation issue as well as the
7 intricacy of the claims, themselves, all justified
8 resolution with Repsol and YPF under the terms as set
9 forth in the settlement agreement of \$130 million.

10 The State also avoids massive litigation
11 costs associated with 300 third-parties.

12 The State avoids the litigation costs with
13 respect to its past costs of \$148 million.

14 Repsol and YPF have also recognized in
15 addition to the \$130 million, the potential exposure of
16 up to 530 million. And as I said, \$17 million of these
17 funds will be applied to restoration projects.

18 To get all of this, what the State gave up
19 was this: If it obtains a judgment against Occidental
20 Chemical Corp. in excess of \$400 million for the claims
21 that are reserved, and Occidental Chemical is successful
22 in its claims against Repsol and YPF and collects on the
23 claims, then the State would agree to remit its claims
24 and its damages recovered from Occidental of
25 \$400 million. That's it.

1 If Oxy is not successful, then the caps
2 don't apply and the State is not required to remit its
3 damages, because the agreement to cap the exposure was to
4 the settling parties and there's an exchange of paying
5 the State \$130 million today that they would cap the
6 ultimate exposure as to them.

7 Again, the way these settlements were put
8 together were incredibly intricate but it was built
9 completely around the indemnity and the fact that it
10 exists.

11 So I would say that and would argue that
12 these settlements are not only rational, reasonable, and
13 fair, they're clearly in the public interest. They're in
14 the best interest of the State. They're consistent with
15 the policies of the Spill Act, and they are ensuring that
16 the remediation of the Passaic River and Lister site and
17 third-party sites can go forward.

18 As I mentioned a moment ago, throughout
19 this process, the thing that the State fought to do and
20 what we were instructed to do by the Attorney General was
21 to ensure that the settlements were not only fair to the
22 public but were fair to the non-settling parties. So as
23 to folks that are not in the settlement agreement, most
24 notably Occidental, but there are others that could be in
25 the future brought in to the federal litigation, not the

1 State, the State worked very hard to accomplish a lot on
2 behalf of Occidental, and all the parties did.

3 And so the next slide that I would like you
4 to look at, your Honor, is the benefits to OCC, the
5 notable non-settling party, the party who is strictly,
6 jointly, and severally liable for the Lister site.

7 Under the terms of the settlement
8 agreement, Occidental received a direct benefit,
9 dollar-for-dollar credit under the Spill Act for
10 \$148 million in retired past cleanup and removal costs.

11 It received the indirect benefit of
12 \$17 million in restoration projects, because those
13 restoration projects ultimately reduced the total value
14 of the impacts to the natural resources. And they
15 actually may spin off positive impacts, as well. As
16 you've seen already with activities like Riverfront Park
17 project and revival of this waterway may have substantial
18 impacts to the community around them.

19 Occidental receives contribution protection
20 for the claims that have been settled and it receives an
21 explicit covenant not to sue for the past cleanup and
22 removal costs and attorney fees that have been retired by
23 these settlements.

24 Part of the Case Management Order requires
25 that the State would amend its Complaint in two months

1 and to proceed against Occidental and to drop out
2 anything that's relevant to the settling parties,
3 including the \$148 million of settled claims. We're
4 agreeing to dismiss those claims and give covenants not
5 to sue to settling parties.

6 Likewise, Occidental benefits by the
7 State's agreement to reduce its economic damage claims
8 and its FFS claims against it if it's successful in its
9 claims against Repsol and YPF.

10 Occidental can pursue Maxus under the
11 indemnity for its independent summary judgment from
12 dollar one. The indemnity we ensured that it was left in
13 place so that nothing about the settlement agreement was
14 intended to impair that indemnity obligation. And the
15 settlement agreement also protected and made sure that
16 all of Occidental's direct claims under the federal law
17 and CERCLA is protected as well, preserved.

18 With all those benefits in mind, I
19 think -- and the briefing lays it out with some
20 particularity, Occidental accepted the majority of those
21 benefits, and the real issues that are left via
22 Occidental's briefing are, one, with respect to the
23 credit mechanisms that retired the State's past costs;
24 and, two, with respect to the scheduling order and CMO.
25 As I said, Mr. Gordon will address the CMO issues.

1 I did want to briefly address the
2 settlement issues. I honestly, the credit issue, I don't
3 know. Occidental raised it in their initial papers, and
4 when we replied and pointed out the fact that the
5 settlement credit mechanisms is part of the fairness
6 analysis, they responded in a footnote. So I don't know
7 how much of an issue this is. We've literally brought
8 part of the administrative record to give the Court a
9 sense of what we are dealing with. I don't intend to go
10 through it unless Occidental wants us to go through it
11 and wants to make it an issue. But the State produced
12 20,000, 30,000 pages of documents in the course of the
13 litigation years ago that substantiated all of these past
14 costs. We put another 13,000 documents into the
15 administrative record to support the DEP's past costs.
16 Another 1,300 documents to support the DOT's past costs.
17 The entirety of the settlement was constructed around
18 this fairness principle, and the fact that Occidental is
19 getting a complete release and a covenant not to sue for
20 these damages. For Occidental to argue that what it
21 would like to do is relitigate the settled claims and
22 argue about whether or not Repsol or YPF overpaid on any
23 particular claims so that they might be able to move that
24 dollar credit and move it to a different category is
25 unconscionable. You can't leave the State in a position

1 where it's dismissing the claims as part of the fairness
2 analysis and then let Occidental essentially relitigate
3 the settlement claims.

4 So as I said, I'm prepared to go through
5 this in great detail, but what I would like to do is
6 perhaps sit down, let the other folks discuss these
7 issues, and let's see if this is really a significant
8 issue or not. Because the State has gone through
9 incredible pains to ensure that the documents are here in
10 response to Occidental's comments that said that the
11 Court had to make this allocation now, and it had to have
12 this information now, we submitted additional
13 declarations. And yet they didn't address it in the
14 briefing at all. They simply said we want to talk about
15 that later in Track VIII as part of an argument to
16 suggest that there's a lot of discovery left for Track
17 VIII, they wanted to tackle the State's past costs as
18 part of that. Obviously, we think that they're retired,
19 they're settled. Occidental benefits from that by the
20 covenant not to sue; and therefore, we don't intend to go
21 through that process again and we're asking the Court to
22 make it clear. And the Case Management Order and the
23 orders before your Honor make it clear that these are
24 settled and resolved claims and that the State would not
25 be pursuing them further as the case went forward.

1 Thank you, your Honor.

2 THE COURT: Okay. Thank you.

3 MR. JACKSON: Any questions?

4 THE COURT: I probably have three
5 questions; and if you want someone else representing your
6 client to answer, they can.

7 The first is I read the examples that are
8 in Appendix A, I think, as to various determinations as
9 to who pays what depending on a verdict against OCC in a
10 Track VIII, talk about generally in the trial. Can you
11 give me an example in which OCC would have to go into its
12 pocket.

13 MR. JACKSON: OCC would have to go into its
14 pocket, A, if it's not successful against Repsol and/or
15 YPF or YPF International.

16 THE COURT: No, no, no. But putting aside
17 the indemnification agreement with Maxus --

18 MR. JACKSON: Okay.

19 THE COURT: -- in Track IV, obviously that
20 may make a difference. But as so far as this settlement,
21 are you saying that the State will agree to return or
22 take less money but only if Occidental is successful in
23 Track IV, or that that -- you'll do that before Track IV
24 if it's tried first or second?

25 MR. JACKSON: So the State's claims that

1 are reserved as against Occidental --

2 THE COURT: Yes.

3 MR. GORDON: -- are two. One is for the
4 future cleanup and removal costs associated with the
5 Focused Feasibility Study, the eight-mile stretch.

6 THE COURT: Right. And the gap.

7 MR. JACKSON: And the economic damages,
8 punitive damages, special damages, and the State owns the
9 river body -- bottom, things of that nature.

10 The State will pursue those claims against
11 Occidental. If the State receives a judgment against
12 Occidental, let's say it's \$500 million --

13 THE COURT: Right.

14 MR. JACKSON: -- then Occidental -- and
15 part of the way the caps work, frankly, is it matters
16 what that judgment is.

17 THE COURT: Because it matters between
18 Repsol and YPF.

19 MR. JACKSON: And it's matters between
20 Occidental and YPF as to how the caps would be applied.

21 THE COURT: Right.

22 MR. JACKSON: If the State gets a dollar,
23 if Occidental beats the State, then there is no indemnity
24 claim, there is no claim against Repsol or YPF and that
25 whole effort is not necessary.

1 THE COURT: And OCC does not have to go
2 into its pocket?

3 MR. JACKSON: Correct. Yes, sorry, I
4 misunderstood your question.

5 THE COURT: All I want to know is an
6 example in which a particular judgment under Track VIII,
7 they would have to pay the State and the caps wouldn't
8 apply and that moneys wouldn't be applied to the judgment
9 you get. Is it -- is it complicated? Because I wasn't
10 certain. I understand what you say that in certain
11 circumstances you would apply the cap and then reduce a
12 judgment over the 400 million.

13 MR. JACKSON: Right. Let me --

14 THE COURT: But are there examples in which
15 that wouldn't occur.

16 MR. JACKSON: Yes.

17 THE COURT: The cap wouldn't come into
18 play, or you wouldn't, you know, use up all the 400
19 million that might be available.

20 MR. JACKSON: Sure. Yes, your Honor,
21 you're right. There are several different ways this
22 could go.

23 Obviously, we think it's important to
24 establish the claims, the size of the claims, et cetera,
25 in Track VIII for precisely that reason. So if

1 Occidental wins at trial --

2 THE COURT: But wins at which trial, Track
3 VIII?

4 MR. JACKSON: Sorry. As against the State.

5 THE COURT: The trial that it will have
6 with the Plaintiff. Okay.

7 MR. JACKSON: Right. So if Occidental
8 wins, beats the State's claims, then there is no
9 indemnity claim and nothing to pursue.

10 THE COURT: Well, that's okay. They won
11 and they walk away and you'll enter an order for no cause
12 of action, and I'm sure that OCC would be happy to draft
13 it.

14 MR. JACKSON: Certainly.

15 THE COURT: We understand.

16 MR. JACKSON: If the State receives an
17 award of less than \$400 million --

18 THE COURT: Yes.

19 MR. JACKSON: -- then Occidental can pursue
20 Maxus, Repsol, YPF for the entirety of it. Period. And
21 the caps may not come into play at all depending on the
22 precise allocation of the funds and how they were --

23 THE COURT: That's what I'm trying to
24 understand. But there would be instances in which the
25 cap would be applied before they would -- you know, it

1 doesn't depend on Maxus not paying under the indemnity
2 contract? A cap would still come into play where they
3 wouldn't owe that money to the State?

4 MR. JACKSON: Well, if Maxus pays
5 Occidental's indemnity claim, I think we're done.

6 THE COURT: Right. But that would still be
7 in dispute and that's part of --

8 MR. JACKSON: Part of their issue.

9 THE COURT: -- part of their issue about
10 trying those issues first before trying Track VIII.

11 But I don't want to get into -- I'll allow
12 the whole thing about Case Management Orders that are
13 certainly in dispute.

14 But I just want to understand that the caps
15 only apply how? Do they only apply once Maxus refuses
16 indemnification, or it can apply where OCC could walk
17 away from your trial saying that, that's it, we don't
18 have to pay a dime.

19 MR. JACKSON: Correct.

20 THE COURT: What's the situation like that?

21 MR. JACKSON: Right. So if Maxus fully
22 indemnifies Occidental, same issue. Not triggered at
23 all. The caps are in place only as to Repsol, YPF, and
24 YPF International, and they were designed for their
25 benefit, the Settling Defendants' benefits because the

1 arrangement was we will pay the State \$130 million now to
2 resolve these claims and in exchange we want our ultimate
3 exposure capped at \$530 million.

4 THE COURT: But their ultimate
5 exposure -- since you've settled with them on claims, the
6 direct claims that you had against YPF and Repsol --

7 MR. JACKSON: Yes, your Honor.

8 THE COURT: -- for, you know, fraudulent
9 transfer, piercing the corporate veil, those issues that
10 were directly against Repsol and YPF --

11 MR. JACKSON: We've resolved it.

12 THE COURT: So you've resolved it.

13 MR. JACKSON: Yes, your Honor.

14 THE COURT: And you received moneys for
15 that?

16 MR. JACKSON: Yes, your Honor.

17 THE COURT: Okay. So why would the caps
18 come into play in any event?

19 MR. JACKSON: Because Occidental's claims
20 still exist.

21 THE COURT: Right. So the caps only come
22 into play if Occidental is successful on their suit that
23 still remains as a cross-claim?

24 MR. JACKSON: Yes, your Honor.

25 THE COURT: Okay. So that's what you mean

1 when you say if OCC is successful. I know in your
2 summary and also in your examples you just said here. So
3 if OCC is successful, then they'll get a credit for your
4 settlement of the 400 with the extra 400 million. Is
5 that how it works?

6 MR. JACKSON: What the State agreed to do
7 is, and it's -- it's set out in some detail in the
8 Repsol/YPF settlement agreement. But if the State
9 obtains and collects a judgment in excess of \$400 million
10 from Occidental, it agrees to put the amounts of money in
11 excess of \$400 million into an escrow account, and those
12 moneys will sit in that escrow account until the issues
13 as between Occidental and the Settling Defendants are
14 resolved. And I think there's a time period by
15 which -- after I think four years for the finality of
16 that judgment, if they weren't resolved then the funds
17 would be disbursed to the State.

18 If Maxus satisfies Occidental's indemnity
19 claim in full, it's done. If Maxus is unable to satisfy
20 fully that claim, or if Occidental otherwise chooses to
21 pursue Repsol and YPF, the caps were put in place for the
22 benefit of the parties who are agreeing to settle with
23 the State today. They said, "Look, we will settle with
24 you today for \$130 million, but we don't want this
25 unlimited exposure because of the indemnity and the

1 pass-through argument."

2 Occidental's claims because of the
3 indemnity and because of the claims that Occidental has
4 against Repsol and YPF exist. That's what made the
5 settlement so difficult was no matter what we tried to
6 accomplish with Repsol and YPF, as we continued to pursue
7 Occidental on the outside, we called it the boomerang
8 problem, it would boomerang back.

9 So what we did was we said basically let's
10 treat this like a high/low agreement. And as to the
11 settling parties, Repsol and YPF and YPF International,
12 those parties that are paying the moneys will never pay
13 more than \$530 million. If everything goes wrong for
14 them, they will never pay more than that. So they were
15 put in place to protect the Settling Defendants.

16 Occidental gets the benefit of that cap if
17 they are successful. You know, Occidental -- and
18 in -- it wasn't part of the settlement discussions in
19 this particular point, obviously. This was later. But
20 the -- the benefit inures to Occidental because there's
21 no other way to do it. If Occidental is successful as to
22 Repsol and YPF, the caps are in place and the State is
23 remitting its judgment, then the moneys in escrow goes
24 back to Oxy.

25 THE COURT: So if they're successful, they

1 don't have to pay anything?

2 MR. JACKSON: That's right.

3 THE COURT: Because you'll give them back
4 the money.

5 MR. JACKSON: Yes. Well, above 400
6 million. That's right. But if they're completely
7 successful, you're right.

8 THE COURT: Okay. They really won't be in
9 the hole or they won't have to go chase around the world
10 to collect on some judgment.

11 MR. JACKSON: Well, no, they have to
12 collect on the judgment in order for us to --

13 THE COURT: Well, no. That 400 million is
14 not in escrow here or it's not touchable? I mean, it's
15 just in the air?

16 MR. JACKSON: So -- I'm sorry. With
17 respect to the amounts under \$400 million, if the State's
18 judgment against Occidental is final and it is collected,
19 we'll owe \$400 million. The State will put that into the
20 treasury of the State. Occidental would sue Repsol/YPF,
21 et al. If it's successful, they would get \$400 million
22 back from Repsol and YPF. Oxy is not out a penny.
23 Game's over.

24 THE COURT: Okay.

25 MR. JACKSON: Above \$400 million, the State

1 is saying we're going to set that aside and put it in an
2 escrow account, and if Occidental is successful against
3 YPF and Repsol -- and there's a lot of details in the
4 agreements, but generally -- successful as against them,
5 and they pay, they have to satisfy the judgment. But if
6 they do, they pay that judgment. So they pay that
7 \$400 million to Occidental, then the moneys that are
8 sitting in escrow above \$400 million also go back to
9 Occidental and Occidental gets off without paying.

10 THE COURT: Okay. I think that's enough.
11 Somebody else might -- I'm trying to digest that because
12 you argue that as a result of your settlement there are
13 advantages to OCC.

14 MR. JACKSON: It's a real benefit.

15 THE COURT: Okay. Now, I had one other
16 earlier question.

17 You've agreed -- and I'm looking for you to
18 respond to whatever was brought up by the third-party
19 Settling Defendants about paragraph 69. And you -- I
20 would like to know why you as the Plaintiff agreed that
21 rather than have the Settling Defendants now put forth
22 what objections they may have to the third-party
23 agreement, and they could say, subject to our agreement,
24 if our agreement isn't done, why they didn't just do it
25 now. I mean, nobody came back to the Court and you just

1 put it in the settlement agreement.

2 I'll probably hear from the Settling
3 Defendants, but why did you agree to that? Because are
4 you telling me that you agree that you'll wait for your
5 money from the Third-Party Defendants? I thought that
6 money, some of that has already been paid, or in some
7 respects it's been put somewhere; that if it gets opened
8 up, I don't have any idea what the objections would be.
9 And if -- as I read the agreement, if the Appellate
10 Division doesn't do things according to what -- if they
11 change any terms of the settlement agreement or the Case
12 Management Order that the Settling Defendants feel are
13 material, they have a right to void their settlement.
14 But are we holding up the third-party moneys? Because it
15 could be years down the road on an Appellate process.

16 MR. JACKSON: The settlement --

17 THE COURT: Well, if they voice their
18 objection, that's fine, but what does that mean? That I
19 then take back because of some unenumerated reasons
20 there's something against the public interest to accept
21 the third-party settlement and nobody has told me at this
22 point?

23 Why would the State agree, or do you
24 interpret the language -- I know it's 66 pages and I
25 would have a comment about settlements that take that

1 many pages, but I digested it.

2 MR. JACKSON: You and me both.

3 THE COURT: Why would the State agree that
4 you will hold in abeyance until after there's no more
5 appealability -- whatever the language is, an
6 unappealable final judgment approving the settlement with
7 the third-parties that you would hold in abeyance the
8 third-party settlement? Why would the State do that?

9 MR. JACKSON: I'll let Mr. Gordon talk
10 about the procedural issues.

11 THE COURT: Okay. That's fine, but I want
12 a response.

13 MR. JACKSON: The two settlement agreements
14 are so interrelated that it is impossible in some
15 respects to pull them apart. The third-party settlement
16 agreement insofar as it was affecting the direct claims
17 of Maxus and the settling parties basically by collapsing
18 them on themselves and presenting them together as one
19 cohesive settlement, the State's intent was to present
20 them together as one.

21 And so, yes, your Honor, as to the State's
22 perspective, this is one large settlement process made up
23 by consent judgment --

24 THE COURT: There seems to be a gap.
25 Unless I'm reading it, there's a gap. I would say even

1 though I'm sure a lot of time was spent, I find some
2 phrases and some paragraphs aren't wholly understood.
3 But I assume the parties understood what they meant. And
4 I don't want to go outside the record today. We're not
5 going to have a hearing and forcing it and do parol
6 evidence as to why it was. But just generally speaking.

7 And again, Mr. Gordon, if you're prepared
8 in answering OCC to respond to that, I'll hear from you.

9 MR. GORDON: I'm going to take on the
10 third-party issue, your Honor, just briefly.

11 THE COURT: I just want to know -- I'm sure
12 I'll hear from the Settling Defendants.

13 MR. GORDON: The reality was, your Honor,
14 that the January 24th, 2013, consent order on the
15 approval process for the proposed consent judgment, which
16 is the process order governing the Third-Party
17 Defendants, was an adversarial proceeding with Maxus.
18 And your Honor put in there a paragraph that directed the
19 parties to the Special Master because Maxus had told the
20 Court and the Special Master they were going to seek
21 discovery potentially. They were going to seek to block
22 the agreement. And as part of the benefit to the
23 third-parties, the Plaintiffs were able to negotiate
24 Maxus backing down from their intent to disrupt and
25 challenge the settlement in voluminous detail was the

1 subject of the discussions at the Special Master's
2 office. So we wouldn't be here today, potentially we
3 wouldn't be here today. We'd still be potentially in
4 some Appellate process that Maxus may have sought to
5 develop. We might have been in some discovery process if
6 your Honor or the Special Master felt that was necessary.
7 And in order to avoid all that, we felt it was reasonable
8 when somebody is potentially paying \$530 million to
9 integrate the two settlements to protect the public
10 interest, to have them layer upon each other, if one
11 piece fails, the entire effort fails. Fourteen months of
12 work would be out the window. But we did it to benefit
13 the third-parties. What they are telling you here is
14 saying, don't look behind the curtain because we know why
15 the Plaintiffs did it but we can't figure out why they
16 did it. Well, they know why we did it. We did it to
17 protect them, to protect us, and to make this a more
18 comprehensive settlement. As Mr. Jackson said, our wish
19 was that OCC would be part of this, and we're intent on
20 making that happen. But right now we have everyone but
21 OCC. We wouldn't have anyone if we didn't have that
22 provision. That's why it's there.

23 THE COURT: But -- but practically
24 speaking, what would it result in?

25 MR. GORDON: Well, we don't know because we

1 avoided it.

2 THE COURT: Right.

3 MR. GORDON: What we do know is you entered
4 this order, and they were saying they may need discovery.
5 They wanted to see the information, what was in the
6 settlement, before they said exactly what they were going
7 to do. But they did mention that there were potential
8 Appellate challenges, there were potential requests for
9 discovery. The third-parties were aware of that and they
10 were not happy about that. They were fighting along with
11 us because we had a mutual interest to get their
12 settlement through.

13 But in order to have Maxus formally
14 withdraw any opposition, the price of linkage is a small
15 price to pay because they will all succeed together.
16 What they're saying is we want our reality of not being
17 able to be challenged. Well, the only reason it wasn't
18 challenged is we negotiated the subsequent agreement.

19 THE COURT: But I assume in reaching an
20 agreement with the Settling Defendants, Direct
21 Defendants, it was taken into consideration how much
22 moneys were coming from the Third-Party Defendants or not
23 coming. Correct?

24 MR. GORDON: Exactly, yes, your Honor.

25 THE COURT: And also it was taken into

1 consideration the cost to all parties if, in fact, the
2 Third-Party Plaintiff, Maxus, particularly challenged the
3 settlement.

4 MR. GORDON: Exactly right, at the time.

5 THE COURT: And so you negotiated it and
6 you came up with this agreement and with the dollar
7 amounts in consideration of that.

8 MR. GORDON: Yes. And also one of the
9 conditions was we felt when somebody is potentially
10 paying \$530 million, they want to make sure that their
11 agreement goes through what your Honor addressed by
12 saying your Honor has decided to hear their agreement
13 first. But also on appeal that all of the agreements
14 move through together.

15 THE COURT: Okay.

16 MR. GORDON: Because with Occidental not
17 participating, the Settling Defendants were aware of the
18 fact that they may be the only ones that have a direct
19 challenge to their agreement. So they are literally
20 layered one upon another.

21 And we as a state with our administrative
22 expertise in trying to put together comprehensive
23 settlements in these complex environmental matters, we
24 felt that was in the public interest and we understand
25 the concerns of the third-party. But we made a judgment

1 to avoid the direct and what could have been disastrous
2 challenge by Maxus, and that's why it's structured the
3 way it is, your Honor.

4 THE COURT: Well, I understand how it's
5 structured. I can read that. But I'm trying to
6 understand what does that mean in regard to the
7 Third-Party Defendants? I won't even say at the trial
8 court, but if an Appellate Court -- this agreement goes
9 on appeal and the Appellate Court looks at it and decides
10 to change one or more sentences and one or more
11 paragraphs having nothing to do with the Third-Party
12 Defendants, and therefore, there's an assertion that it's
13 material. I'm not sure who defines -- in the index
14 there's no definition of materiality, but it's raised a
15 number of times. If they think the Appellate Division or
16 the State Supreme Court changes something that they think
17 would make the agreement voidable, what position are the
18 Third-Party Defendants in?

19 MR. GORDON: Well, both the Third-Party
20 Defendants and the direct Settling Defendants are guilty
21 of what a wise man once told me was "Be careful what you
22 wish for." If third-parties insisted any change,
23 material change, they can withdraw. The Settling
24 Defendants, the same provision. They insisted on that.

25 We have told your Honor and we believe the

1 settlements are linked. The orders are linked. They
2 will all go up on appeal together if there is a challenge
3 from the one person who's here. All of those issues will
4 be in the Appellate Court. If they do make a change and
5 the parties who are to the agreement say it's a material
6 change, the entirety of the settlements fail. That's our
7 position.

8 THE COURT: Okay. I understand that. And
9 you're explaining to me administratively that's what you
10 took into consideration.

11 MR. GORDON: Yes.

12 THE COURT: That may make an interesting
13 appeal if there is one.

14 MR. GORDON: And then we would all be back.

15 THE COURT: Okay.

16 MR. GORDON: If the State's view,
17 Plaintiff's view is not accepted by the third-parties --

18 MR. JACKSON: With Moses.

19 MR. GORDON: -- we would all be back. The
20 Red Seas would close again. Everybody is back in Egypt
21 and we go again.

22 THE COURT: All right.

23 I did have a third question, but at this
24 time I'm sure it will come up when we have some other
25 arguments.

1 With that, before I hear from the only
2 written opposition, which is by OCC, and the cross-motion
3 which I think is intertwined, does anyone of the Settling
4 Defendants want to make any additional comments as to
5 what the position today is by the Third-Party Settling
6 Defendants? Or you think you're satisfied with the
7 explanation given by Mr. Gordon?

8 All right. I see nobody jumping up but
9 Mr. Warren is thinking about it.

10 MR. WARREN: We are satisfied with the
11 position taken by Mr. Gordon. I would just point out
12 that while the Third-Party Defendants complained about
13 paragraph 69 in the settlement agreement --

14 THE COURT: They have a similar paragraph.

15 MR. WARREN: Well, what I was going to say,
16 your Honor, is that I didn't hear anybody complain about
17 the paragraph that says the Settling Defendants may not
18 challenge the Third-Party Defendant settlement.

19 THE COURT: And that's part of what you
20 agreed.

21 MR. WARREN: That's right. This was
22 basically, it is my understanding -- although the
23 Third-Party Defendants and the State can speak to
24 this -- that there was an agreement between the State and
25 the Third-Party Defendants that if there's a settlement

1 with the Direct Defendants, there would be a provision
2 that there would not be a challenge to the Third-Party
3 Defendants' settlement. The State honored that. They
4 said that this is absolutely necessary. It's a drop-dead
5 issue. We said fine. But what happens -- what happens
6 if our settlement is not approved? And then, you know,
7 we're up the proverbial creek without a paddle. You
8 know, we haven't objected because you told us not to
9 object --

10 THE COURT: Well, you agreed not to.

11 MR. WARREN: Right. But now the agreement
12 in which we agreed not to object is no longer an
13 agreement. So they said, "Well, yeah. We understand
14 that. You know, that's obviously -- that's a reasonable
15 concern. And in fact, if your agreement is rejected,
16 then you will have the opportunity to reopen because you
17 shouldn't be prejudiced."

18 And that's where we are.

19 THE COURT: All right.

20 Now I will hear the opposition from OCC.

21 And you can include -- because in part your response to
22 the opposition is your cross-motion for a different Case
23 Management Order, so it's combined, and I will let you
24 argue. And then I'll certainly let you respond after we
25 hear any opposition. Go ahead.

1 MR. HOWARD: Thank you, your Honor. Oliver
2 Howard. I will be speaking today on behalf of
3 Occidental.

4 I learned unfortunately at 6:30 this
5 morning from my colleague, Mr. Lehman, who was going to
6 be giving this argument that he had come down with a flu
7 and he was literally unable to participate today. So
8 I'll do my best to be as clear as I can and as organized
9 as I can, again, in some of the circumstances that are
10 here.

11 THE COURT: Okay. Let me just respond to
12 that because I'm appreciative this is a large matter. If
13 at any time you would like to take a break and perhaps
14 communicate with Mr. Lehman, I'll give you that. Rather
15 than Mr. Lehman asking the Court that we adjourn today's
16 hearing, which I think he realized that that would not be
17 so. So you can certainly continue, Mr. Howard. And
18 again, if I give you a question which you would like to
19 ask him what the answer would be, I will give you that.
20 All right?

21 MR. HOWARD: Well, my colleague behind me
22 may grab me and tell me to stop. Hopefully maybe they
23 won't have to do that. I will try to be circumspect
24 enough not to do that.

25 As the Court has noted and is clear, I

1 think, to everybody that's read the papers, Occidental
2 has made a very narrow challenge, and that challenge
3 really goes to the CMO. That's where our challenge is.
4 There are a lot of things that are in these papers that I
5 wish had not been put in these papers because I think
6 they were in violation of mediation practice and they are
7 unfounded, but it's very difficult for me as a party here
8 and with the duties that I have to this Court to do
9 anything to violate the obligations that I have to be
10 confidential with respect to a mediation.

11 So I'm not going to do that. I'm going to
12 resist that and I'm not going to take the bait to try to
13 talk about some of the things that were said about Oxy in
14 these papers other than to say that I disagree with them.

15 Having said all of that, I would like to
16 talk to the Court about why Oxy has truncated its
17 objections the way it has and why we believe that there
18 are ways that this can get resolved in a way that's fair
19 and will fulfill due process to everybody in this room.

20 And so I'll do this briefly but I want to
21 do it very pointedly.

22 This lawsuit was brought in 2005 by the
23 State. Included at some point along the way early on, it
24 was the State, not Oxy, that brought in the parents of
25 Maxus, Repsol and YPF. The Court knows that I

1 personally, my firm on behalf of my client, Occidental,
2 had been involved myself in similar litigation in Ohio
3 and Texas before being engaged by my client to
4 participate in this case along with Mr. Lehman as my
5 partner and co-counsel.

6 I thought when we finished the Dallas case
7 that we understood what the rules were. I thought when
8 the ruling came out of Ohio that we knew what the rulings
9 were, that Maxus owed a full indemnity to Oxy. We had to
10 argue it again before your Honor, and again your Honor
11 saw it the same way because it's the same contract, it's
12 the same language, it's the same conduct.

13 And so again it was found that we had
14 indemnification.

15 These claims that have been brought against
16 YPF and Repsol became claims that we had to join in.
17 Because of the entire controversy doctrine, we had no
18 choice. And so we joined in with the State on those
19 claims.

20 Being very concerned about what the State
21 had alleged in those claims that there had been wholesale
22 taking of moneys out of Maxus, our indemnitor, and put
23 into those companies, presumably beyond attachment by
24 Oxy, and beyond the State through the claims that it had
25 against Maxus, we worked hand in glove with the State for

1 a long time in developing plans that would work, that
2 would create a situation where we wouldn't be here today
3 with a piecemeal settlement.

4 Judge Corodemus, I can remember saying at
5 one of the very first sessions that we had in our case
6 management meetings, that the only way this case gets
7 resolved is that we have the resolution of the people who
8 are ultimately responsible to the claims of the State:
9 Repsol, YPF, and Oxy. It was on the basis of what she
10 said that we had a trial plan that was crafted,
11 participated by everybody, including YPF and Repsol, and
12 approved by the Court.

13 And the reason that it made sense is
14 because of what Judge Corodemus had earlier said is we
15 have to find out who's ultimately responsible, and we
16 still do.

17 And the reason we challenge the CMO is that
18 once again we find ourselves in a situation, not
19 theoretical, but very realistically, that here we are, a
20 party that's now going to have to go out, I presume -- I
21 don't know what's going to happen -- we're going to have
22 to go out and we're going to have to defend ourselves in
23 Track VIII because I have no clue as to whether our
24 indemnitor intends to indemnify us or defend us in Track
25 VIII. We don't know anything about Track VIII.

1 THE COURT: Well, let me ask you this:
2 Isn't that something that no matter when the tracks go
3 forward you should have a response from your indemnitor
4 if they're going to provide you with a defense or not?
5 What I'm trying to understand is why is it that you will
6 not know?

7 MR. HOWARD: Well, we may very well know.
8 Right now we are anticipating that we are going to have
9 to prepare to defend ourselves, but I don't know that
10 that's the case.

11 THE COURT: So there hasn't been a response
12 that we're not telling you. Right?

13 MR. HOWARD: I'm not clear.

14 THE COURT: Okay. Well, that's something
15 you didn't raise in your brief, but it's of some concern.
16 I would think that -- I don't know if maybe by motion or
17 not -- that it should be resolved as to -- you know, I
18 don't have the indemnity agreement in front of me. I
19 know I made some rulings about it in a motion that you
20 are entitled to indemnification. And you know, but I
21 assume you would know or you would exercise whatever
22 legal rights you have whenever we start the trial, the
23 direct claim by Plaintiff against you, whether -- in
24 whatever order.

25 MR. HOWARD: My point really is though

1 beyond that with respect to Track VIII that there has
2 literally been nothing done in Track VIII, nothing. And
3 so the real point that I would make to the Court in terms
4 of this particular session is that what has happened in
5 Track IV, to the contrary, has been that we have, in
6 fact, exchanged over two million pages, documents. All
7 of the paper has been exchanged. All of the privilege
8 logs have been submitted. All of the challenges to the
9 privilege logs have been submitted. A number of the
10 depositions have been taken. And in January of 2013 we
11 submitted this as an exhibit, your Honor. The parties
12 basically agreed that we were within a matter of a few
13 months of being able to finish discovery.

14 So our position in challenging the Case
15 Management Order is simply that we stand here today, Oxy
16 having been in this case since 2006, 2007, we are in a
17 position to know within a matter of a few months who is
18 responsible, who are the ultimate responsible parties for
19 paying whatever has to be paid. And we believe, your
20 Honor, that the way this case should proceed is not that
21 Oxy should be locked out from being able to get that
22 adjudication or years, we have to wait for Track VIII to
23 finish? We have to only at that point in time come in
24 and have an opportunity to do Track IV. And the question
25 of the Court is right: Who is going to be responsible

1 for it?

2 We're putting this off way down the road.
3 And so we came in to challenge not the settlement, but
4 the CMO saying, look, what needs to be done here is that
5 we need to have the opportunity for Track IV to be
6 finalized. Then the Court knows who it is that is
7 responsible and this matter can get ultimate resolution.

8 And I think that we're doing this in such a
9 way and we're trying to think of every way that we can
10 that will be the least intrusive way of doing this.

11 For example, we think working together with
12 the parties that there are ways that this Case Management
13 Order can be dealt with in a way that does not create
14 hardship for anybody nor give anybody a right to walk.
15 For example, let's let VIII begin. We'll figure out with
16 these people whether they're going to defend us or not.
17 If they don't, we'll defend ourselves. But let Track
18 VIII begin.

19 While it's beginning, let's finish the
20 discovery of Track IV. We don't have to set the trial,
21 but let's finish the discovery so that we would be ready
22 to try that case at the most opportune moment. I think
23 looking at it this way it can all be done without
24 violating anything that anybody's agreed to. Because
25 when you look at the Case Management Order, what it

1 really has to do is the fact that there won't be a trial
2 in Track IV until some later --

3 THE COURT: You're correct as to them
4 picking December 2015 as to a projected trial date.
5 That's the earliest or later, and I have a feeling that
6 people didn't want to say January 2016. It's likely no
7 substantive case will begin in December. And if you want
8 to have jurors, it's likely we won't get sufficient
9 jurors just before the holiday season and the new year,
10 so I accept that it could be December 2015.

11 But what it does say -- and let me just
12 make sure I'm on track -- that discovery should not begin
13 until after the completion of the Track VIII file. So
14 that's what you're -- trial. So that's what you're
15 really objecting to.

16 MR. HOWARD: Right.

17 THE COURT: That we don't hold off
18 discovery to be completed on Track IV even though the
19 trial date might be a way off if I accept theirs.
20 And -- but you don't have an objection that there
21 shouldn't be a trial until 2015? You did in the papers.

22 MR. HOWARD: We believed, your Honor, that
23 what should happen is that trial on Track IV should take
24 precedence.

25 THE COURT: Right.

1 MR. HOWARD: We think that that is the
2 proper way of doing what has to be done.

3 However, the Court may not have to make
4 that decision today. If the Court makes the decision,
5 we're going to begin discovery --

6 THE COURT: Well, I do, because they say
7 it's material to their whole settlement. If they don't
8 like my Case Management Order or perhaps the Appellate
9 Division's Case Management Order, then the contract is
10 voidable, and that was the agreement.

11 MR. HOWARD: Could be. But the fact is,
12 your Honor, I think that what we have here and what we've
13 objected to we've objected to because what we have is not
14 reasonable. And we have a right -- we are -- we are
15 here. We have to be here because of the entire
16 controversy doctrine. We have to bring all of our
17 claims. We are in a situation where we are with respect
18 to Track IV well along the road. If you want to look at
19 it in terms of the totality of what has to be done in a
20 track, probably 75 percent of the track is over with, or
21 80 percent. Most of it was all the document production.

22 And so all you've got left is basically a
23 couple of -- less than two dozen depositions, a dozen and
24 a half depositions and you're done.

25 Now, does the Court have to decide today on

1 a trial date? Let us proceed with Track VIII. Let's see
2 where it goes.

3 THE COURT: It's interesting you raise it,
4 because I certainly have the question for the Settling
5 Defendants. Neither side has given me any indication of
6 the length of time needed to complete discovery on Track
7 VIII or whatever issues would be in that trial with the
8 State as the Plaintiff, or the length of the trial, or
9 whether it's going to be a bench trial or a jury trial on
10 one or more of the issues.

11 So I'll agree that you're right, because I
12 had a question for everybody as to that, is that without
13 such a record, I really can't fill in the details today.
14 So I think you both are asking me to fill in the details
15 as to what it would take us to Track VIII.

16 Now, you've suggested as to Track IV that
17 it could be done pretty quickly. Again, is it going to
18 be a jury trial or a bench trial?

19 MR. HOWARD: A bench trial.

20 THE COURT: Okay. Are the parties in
21 agreement at this point? We don't know.

22 MR. HOWARD: Well, I think it's been --

23 THE COURT: Because when they always make
24 allegations of fraud or something, there's some case law
25 about whether a fact-finder, a jury, can answer certain

1 factual questions or not. I don't know.

2 MR. HOWARD: I think under the Case
3 Management Order it's been said it's a bench trial.

4 THE COURT: Okay. I didn't go back and
5 look at that aspect.

6 And how long do you think a Track IV trial
7 would take? Just a ballpark.

8 MR. HOWARD: Probably if we do it as a
9 bench trial, I think two weeks or less.

10 THE COURT: And you have no idea about how
11 long a Track VIII would take.

12 MR. HOWARD: I really don't, because I
13 don't think we've even started Track VIII.

14 THE COURT: Okay.

15 MR. HOWARD: Now, my colleague, if I could
16 ask, given the circumstances because you can hear I'm
17 hoarse, and I found out just a few minutes ago I was
18 going to be giving this argument, Mr. Rowland has been
19 the person who has worked mainly in connection with
20 putting together the briefing as well as the work on
21 these tracks. And if I could have the permission of the
22 Court, I would like to cede just a couple minutes of my
23 time to Mr. Rowland.

24 THE COURT: That's fine.

25 Go ahead, Mr. Rowland.

1 MR. ROWLAND: Thank you, your Honor, and at
2 the risk of being the C team, I will try to be brief.

3 THE COURT: Okay. I don't put such
4 designations. Go ahead.

5 MR. ROWLAND: Well, I appreciate that.

6 The way we look at this, it's fairly
7 simple. Discovery is the primary concern that we have,
8 and part of the argument Mr. Lehman was going to address
9 is that we believe that under the rules that apply in
10 this situation, particularly with the application of the
11 entire controversy doctrine, it is not within discretion
12 to completely stay discovery of Track IV indefinitely. I
13 mean, in effect --

14 THE COURT: Well, it wouldn't be
15 indefinite. That's what I would like to know. Nobody
16 told me how long Track VIII is going to be or anticipated
17 to be, but the Settling Defendants and the Plaintiff are
18 simply asking that we don't start that discovery until
19 we're done with Track VIII if I agree that Track VIII
20 gets tried first.

21 MR. ROWLAND: Right. And I think I can put
22 some color on that. But just in terms of the time frame
23 that we're talking about. The last deposition taken in
24 Track IV was in March of 2012. So we're coming up on a
25 two-year hiatus already, for various reasons that we're

1 all aware of.

2 THE COURT: That I gave too much time to
3 the parties to reach settlement. That's one of them.
4 But I'll criticize myself. Go ahead.

5 MR. ROWLAND: And I'll respond to that
6 because it is important to note that Occidental does not
7 object to the settlement here because we are totally
8 supportive of trying to get this case resolved, and that
9 does some great things.

10 THE COURT: Let me interrupt you. I had
11 this question for Mr. Howard, let me ask you.

12 Do you think that the discovery that you
13 took against Repsol and YPF was a factor in the Plaintiff
14 reaching a settlement with YPF and Repsol? I can assume
15 everybody had that knowledge. Nobody has to disclose
16 that to me. But you're suggesting that we should get
17 Track IV done just because we've taken this discovery,
18 and then if we don't do it, then it's not going to have
19 any value?

20 MR. ROWLAND: Well, no. There's a
21 practical response that's raised by your question. And
22 that is, I was literally on my way to the airport to go
23 take the depositions of the former Maxus CFO and CMO when
24 the term sheet was announced and they requested a stay.
25 I don't think that settlement happens without Track IV

1 having applied the pressure that it did.

2 THE COURT: Well, I agree with you. I
3 think the fact that I didn't stay it until that point
4 helped get the settlement going.

5 MR. ROWLAND: It absolutely did. And I
6 think the original wisdom of identifying parties who are
7 liable, and Maxus has been identified and we have been
8 identified, and only two parties haven't, has the same
9 value now that had then.

10 But as to on-the-ground practicalities, the
11 orders that were in place then allowed for simultaneous
12 discovery of Track IV and Track VIII. We're not asking
13 that that be changed. The settling parties are asking
14 that to be changed, but the State has no interest in it
15 because under the settlement they're not participating in
16 the discovery on Track IV. So make no mistake, the only
17 reason why we're being put in the back seat on discovery,
18 is because Repsol and YPF don't want that discovery to go
19 forward.

20 And so we don't see any reason, we think
21 that under the rules we're entitled to continue with
22 discovery, but we think it makes sense in case management
23 really trying to get to a total resolution of this case,
24 that's the way to get there. The complicating factor
25 that we have that your Honor raised before on the

1 question of whether we're going to have to defend Track
2 VIII, if you'll recall Exhibit 14 to our opening paper
3 was a letter we received from Maxus in October of this
4 year in which we were told, "Our preliminary legal
5 analysis raises significant questions as to whether or
6 not Maxus has an obligation to defend NJDEP's Track VIII
7 damage claims against OCC."

8 We found that pretty shocking in light of
9 your Honor's order that they have to indemnify us.

10 So what we feel like is happening here is
11 our ability to get the parties that we believe are
12 responsible to pay, the ones who apparently feel some
13 responsibility because they've certainly settled exactly
14 same thing with the State, they're asking us to no longer
15 be able to have access to the Court having to try those
16 claims. They want to accelerate Track VIII. And by the
17 way, you're on your own.

18 That's an untenable position. It won't
19 lead to the most expeditious resolution of the case. We
20 say, yes, we think Track IV should be decided first
21 through trial. But even if you don't end up there, let
22 the parties do discovery on both tracks. Try it when
23 they're ready.

24 At the time that the case was stayed, the
25 parties with these counsel entered a consent order that

1 said Track IV discovery would start, I believe, January
2 of 2013 and be completed at the end of April.

3 In January of 2013 at Judge Corodemus'
4 request we submitted a schedule of the depositions, and
5 she said they will be done on time. And we reported to
6 her, all the parties, we were on a track to be completed
7 in that time frame.

8 The order that we're submitting to your
9 Honor has the same time frame for completion of Track IV.
10 It would work then; it will work now. Same lawyers, same
11 witnesses, same everything.

12 If Track VIII is ready sooner, try Track
13 VIII; but if it's not, Track IV should go first and Track
14 IV has the added benefit of keeping the pressure on to
15 get this case resolved in its entirety.

16 That's basically our position in a
17 nutshell. We had no control over the trapdoor provisions
18 in their agreement that says, guess what, if we can't
19 force the Court to give us the schedule we want, we can
20 walk away. We don't think that's an appropriate
21 provision and we think that they realized that when in
22 paragraph 68 they said, yeah, but if something doesn't go
23 our way in this settlement agreement, if the Judge
24 doesn't agree with parts of it, we can waive it.

25 And if this settlement has all the benefits

1 that it has, and it certainly does, particularly to the
2 State, but it really does because it applies caps and
3 other kinds of certainties for Repsol and YPF, they
4 should be willing to allow us to at least continue with
5 discovery. That doesn't go to the merits of their
6 settlement.

7 And in terms of burden, let's be realistic
8 here. Who is the only party who is going to be in both
9 tracks? It's Oxy. We've got to defend Track VIII
10 against these folks; and we've got to defend Track IV
11 against these folks. They're not going to be in Track
12 VIII, they're not going to be in Track IV, so there
13 really is no undue burden by what we're proposing.

14 So we think that under the rules we're
15 entitled to continue discovery. We've taken a four-year
16 break in our case, which is totally unjustified. That's
17 a pragmatic factor. The only time anything happened in
18 this case is when I was on a plane and getting ready to
19 go down and depose Maxus former employees, when their
20 documents were scathing what they said about Repsol and
21 YPF. That's the way cases get resolved, not by letting
22 people go sit on the bench. And that's why we ask that
23 our CMO be the one that's adopted.

24 THE COURT: You're talking about -- okay.
25 Your differences on challenging perhaps the

1 indemnification agreement with Maxus and your cross-claim
2 against YPF and Repsol, that is what you mean when you're
3 saying that those -- your interests makes it harder to
4 settle because of they're suggesting as to how things
5 should go forward under case management?

6 MR. ROWLAND: Well, I'm suggesting that
7 what they have tried to do is structure a situation where
8 the only party in any jeopardy is Oxy because we're
9 defending Track VIII. And even under their
10 agreement -- remember as Mr. Jackson described it, the
11 State can proceed against us and would have to get a
12 judgment against us and we would have to pay it or bond
13 it before any of these caps or any other business could
14 apply. So even though --

15 THE COURT: Nobody talks about the time
16 period that that would be involved.

17 MR. ROWLAND: Well, and as I said, your
18 Honor has recognized in previous hearings that Maxus has,
19 in fact, been defending that part of the case up to this
20 point. We haven't. They've assembled all the
21 information as our indemnitor as to what may be applied
22 in that case. We don't know how long it's going to take.
23 We have to start at ground zero if they are, in fact --

24 THE COURT: Ah, okay, now I understand
25 that. I asked why -- like you didn't put any response as

1 to what Track VIII will entail time-wise because --

2 MR. ROWLAND: We don't know.

3 THE COURT: But doesn't that counsel have
4 to keep you apprised of such information or that counsel
5 has withdrawn that?

6 MR. ROWLAND: We don't know.

7 THE COURT: Okay.

8 MR. ROWLAND: We've been told there's
9 preliminary legal analysis notwithstanding your order.
10 So that's the position we're in.

11 THE COURT: Since you're perhaps the last
12 one talking on behalf of OCC, let me ask you because you
13 referred to it. I already made note that I'm not sure
14 what "material changes" mean. What do you think
15 "ministerial changes" mean in paragraph 68?

16 MR. ROWLAND: If I could understand their
17 agreement, life would be a lot simpler, but I can't, and
18 I don't know the answer to what they did.

19 I will tell you that they have in the
20 papers made very clear that they consider anything
21 involving Track IV as material because that's the
22 leverage they want to get this signed off.

23 THE COURT: So you think the only thing
24 that's material in the Case Management Order is as to
25 which track is put in an order to be tried first?

1 MR. ROWLAND: I think they would --

2 THE COURT: You think that's the only
3 material thing?

4 MR. ROWLAND: I think they would have to
5 answer that, but I do think it's their position that both
6 the discovery and the trial would be material.

7 THE COURT: Okay. I'm going to take a
8 short break. I would like one. Just five minutes. And
9 then I'll hear opposition or reply to the opposition by
10 OCC.

11 (A recess is taken.)

12 THE COURT: All right. Everybody may be
13 seated. Let's go back on the record and I will hear a
14 reply to the opposition.

15 Mr. Gordon.

16 MR. GORDON: Your Honor, thank you.

17 The argument of Mr. Howard and Mr. Rowland
18 would have been an interesting argument if this was a
19 case management conference. The problem with Occidental
20 is they have always been one chapter too late in this
21 book. Now they're saying, "What about us, where's our
22 fairness?" They know, even though they get up and they
23 argue, "We just want what's fair to us. We want to be
24 able to do our discovery and find out who's paying
25 although we don't know who is defending us," and this and

1 that. By their challenge they are directly challenging
2 both of these settlements.

3 Now, they also say some things, well, the
4 rules of the cases they say we're entitled to our
5 discovery. Not a single rule, not a single case says
6 that. In fact, the rules we cite say it's totally in
7 your discretion, and it's clear.

8 Rule 112(a) says totally in your discretion
9 to seek justice and a fair determination on the issues.

10 The Manual For Complex Litigation which you
11 and the Special Master have been using, says it's your
12 decision whether to postpone or stay any particular claim
13 or track.

14 The case, the only case they cite, State v.
15 Corbin, a Supreme Court case, supports our position. The
16 stay in that case was lifted because the Supreme Court
17 found the Trial Court didn't weigh the public interest
18 versus the particularized burden on the defendants. And
19 the Court, the Supreme Court said very clearly where the
20 public interest is implicated -- as it is in this case on
21 so many levels, the environmental level, the public
22 entity settlement level, the case management of the major
23 complex environmental matter -- the issue is that the
24 public interest is superior to the particular burdens
25 placed on any defendant, and they have the burden to

1 convince the Court that that burden that's being placed
2 on them totally outweighs the public interest. They
3 haven't even attempted that because they can't. They can
4 just say we don't like the Case Management Order. But
5 let's be clear, they know they're attacking the
6 fundamental basis of this settlement.

7 Now, what has this Court done for the last
8 few years in active case management? This Court has a
9 Special Master that you work in tandem with. You're
10 utilizing the most aggressive and innovative case
11 management techniques in a case that I think everyone
12 would recognize is one of the most complex environmental
13 matters ever in the history of the courts of New Jersey.
14 What have you utilized? Liaison counsel. Committees;
15 finance committee, procedures committee, technical
16 committee. Trial tracks. You've stayed tracks. You've
17 stayed proceedings.

18 Contrary to the assertion of OCC, the State
19 on numerous occasions came in and got a ruling under the
20 entire controversy doctrine, we didn't need to bring in
21 certain parties or certain claims. They're not required
22 to do anything in this case under the entire controversy
23 doctrine. They continually argue that and that's just
24 totally incorrect. What they do have an obligation to do
25 is to bring it to your Honor's attention and let your

1 Honor make a judgment whether it should go forward.

2 They want it, which is their choice to
3 bring it, but they didn't have to which they keep saying.

4 So what we have is an active case
5 management. What we also have is each and every party in
6 this courtroom has criticized your Honor and the Special
7 Master, has accused your Honor and the Special Master of
8 not being fair, has accused your Honor and Special Master
9 of abusing their Constitutional rights. But what has
10 happened? Through the techniques you've utilized we're
11 here today, and we're about to put through historic
12 settlements, the largest cost recovery and damage
13 settlement in the history of the State of New Jersey is
14 before your Honor today. That's what we've done.
15 Because your Honor -- it's not stagnant, nor is our Case
16 Management Order stagnant. Your Honor and the Special
17 Master have been flexible enough to revisit the situation
18 as the circumstances develop and proceed and as
19 necessary.

20 So what we're really weighing when we look
21 at it, your Honor, is through the two competing Case
22 Management Orders is a direct attack on the settlement
23 and the public interest waged by Occidental versus
24 Occidental getting its own way.

25 So what we've done is we put a comparison

1 chart together, your Honor. If you adopt our Case
2 Management Order, which is an integral part of the
3 settlement, 261 third-parties are dismissed from the
4 case. Final, out, done.

5 The State receives \$148 million to recover
6 all its past costs.

7 We get \$17 million for natural resource
8 damages and restoration into the affected communities.

9 The State is spared having to spend
10 additional millions of dollars in participating in the
11 Track IV discovery. If your Honor listens to OCC and
12 even considers starting Track IV now, while there is an
13 appeal pending, your Honor would require the State to
14 participate unnecessarily and expend additional millions
15 of dollars. If your Honor enters our order, the State
16 gets to target its damage, the remainder of its damage
17 case, Track VIII, as the primary next step in the case.

18 What does that do when your Honor signs our
19 Case Management Order? History tells us, as Mr. Rowland
20 described, that will create the best opportunity for the
21 State and Occidental to reach a settlement, because by
22 the terms of our order, Track IV discovery is stayed at
23 least until April. And that's not a magical date. That
24 coincides with the redrafting of the pleadings, first
25 60 days for the State to redraft their pleadings, 60 days

1 for Occidental to answer.

2 In that time, the State envisions you
3 direct us to the Special Master for a new trial discovery
4 plan for Track VIII, we put in our papers we anticipate
5 12 months to 16 months for Track VIII to be done
6 completed.

7 THE COURT: That's the first -- nobody has
8 been given me that information.

9 MR. GORDON: It was in our papers, your
10 Honor.

11 THE COURT: All right. But there's been no
12 detail. Obviously you asked for case management with the
13 Special Master.

14 MR. GORDON: Right. The CMO has a pleading
15 time to redraft. It's key. From now until April, OCC
16 and the State should attempt to settle Track VIII.
17 Because while we're redrafting our pleadings and they're
18 answering, if we reach a settlement, what happens in
19 April? By the terms of the order you're entering, OCC is
20 free to pursue its discovery. They hold the key to
21 unleashing what they want.

22 THE COURT: Because -- pursue what
23 discovery?

24 MR. GORDON: Track IV discovery.

25 THE COURT: I thought that Track IV

1 discovery shouldn't start after Track VIII. Is the
2 position of you and the Settling Direct Defendants that
3 if Track VIII is settled, you then can start Track IV
4 discovery?

5 MR. GORDON: Track VIII is settled.

6 THE COURT: It's over.

7 MR. GORDON: If Track VIII is settled with
8 OCC and the State, it satisfies the condition, and after
9 April discovery can start on Track IV.

10 THE COURT: But do I still have to adhere
11 to no trial until December 2015?

12 MR. GORDON: Your Honor, I think --

13 THE COURT: Or -- or perhaps because of
14 those changed circumstances, somebody could request a new
15 Case Management Order.

16 MR. GORDON: We're just getting to the
17 juicy part on my good news list if you sign the CMO.

18 The Court retains the discretion to
19 entertain either an OCC motion to lift the stay or change
20 the trial date.

21 THE COURT: That's exactly what I was
22 asking, because nobody put that in their papers.

23 MR. GORDON: We cannot deny, your Honor.
24 But what we're saying is the public interest really will
25 be served by your Honor signing all of the agreements in

1 front of you and entering the two settlements and the
2 orders as they exist. Then allowing OCC and the State to
3 engage in discussions while we replead and see if we can
4 accomplish before April a settlement. That's consistent
5 with the logic that has gotten us to this point that your
6 Honor has laid out and guided this case by.

7 Now let's go to the bad news column.

8 What if OCC's is entered?

9 Well, we know from Repsol and YPF, and if
10 we have to hear it again today I'm sure they'll reiterate
11 it. If OCC's CMO is entered, they will withdraw from the
12 settlement. Then we must reopen the administrative
13 record for the Third-Party Defendants. Maxus is free to
14 challenge the Third-Party Defendants' settlement
15 agreement. We would have wasted 14 months, millions of
16 dollars in effort in negotiating the two settlements. We
17 won't be any closer to moving any case because there will
18 be no discovery until the new settlement process with the
19 third-parties has been determined whether we're able to
20 go through with that over Maxus' objections.

21 THE COURT: As long as I agree to stay
22 discovery if you go back for settlement discussions.

23 MR. GORDON: Yeah, that's correct. I mean,
24 all of this is within your Honor's discretion.

25 If everything falls apart, we're back where

1 we were 14 months ago with 275 parties trying to
2 participate in ESI and at a cost of between 14 and 35
3 million.

4 We'll have to fully integrate potentially
5 the discovery on the third-parties.

6 Global Track IV would include the State
7 requiring us to pay millions of dollars in effort that's
8 not necessary, and clearly that cannot be in the public
9 interest.

10 So OCC, whether strategically or not, they
11 took the smallest piece, but they knew they might as well
12 come in here with a big sign that says we're against all
13 of these settlements. We don't want orderly process
14 towards the full resolution of this matter. Because
15 that's what they're saying.

16 But they come up and they say, "We just
17 want our day in Court. We just want to be fair."

18 They'll get their day in court but it is
19 not an undue burden on a single defendant to allow the
20 public interest to move forward so accomplish what was
21 unthinkable, undoable for many, many years, and is in
22 front of your Honor with the support of 265
23 Third-Parties, Direct Defendants, and the State of New
24 Jersey. We're going to accomplish truly ground-breaking
25 success if your Honor in your own discretion enters those

1 orders.

2 And I think nothing you've heard from the
3 Defendant cannot be dealt with over time over the next
4 six to 12 months as conditions evolve in this case.

5 And I think as Mr. Rowland said, you want
6 to put pressure on somebody to settle the case? OCC is
7 the last hold-out. They deserve the pressure,
8 appropriate pressure. And by signing the CMO, they have
9 between now and April to come to terms with the State.
10 The State is convinced we could settle with OCC.

11 If OCC gets up and says, Well, you can't
12 force us, we're not trying to force them. We're giving
13 them another opportunity consistent with the way your
14 Honor has managed the case. And that's why we would urge
15 your Honor to enter the settlements.

16 The other issue is both of the settlements,
17 first the third-parties through the order on approval of
18 the process by your Honor, a consent order, allowed for
19 the finding that they be final judgments. The settlement
20 agreement has it in its terms in the order, and the
21 third-party -- third-party consent judgment basically has
22 it in the order on the approval process that your Honor
23 is being asked to determine that these are final
24 judgments pursuant to Rule 4:42-2. And we would propose
25 that we integrate both of these into one order declaring

1 that the certification is final judgment because it
2 satisfies the rule, and really your Honor should have an
3 order that states the rule. Because what we have in
4 front of you is a complete adjudication of separate
5 claims. That would be as to the Settling Defendants, our
6 past costs and NRD for the Defendants is totally -- those
7 claims are totally taken care of.

8 And it also is a complete adjudication of
9 all the rights and liabilities asserted in the
10 litigation. That's as to the Third-Party Defendants.
11 That's why it needs to be certified as final. What that
12 does is if there is an appeal by Occidental, they're the
13 only loan dissenter, then once the Appellate Division
14 affirms it, your Honor no longer can revisit on an
15 interlocutory basis. It's a full and final
16 determination. Otherwise, if it's not a final judgment,
17 it remains in limbo that your Honor can be asked to
18 revisit it.

19 THE COURT: Let me ask you, because you
20 were a party to the language -- or the Third-Party
21 Defendants, I can ask them. What does it mean,
22 "non-appealable order"?

23 MR. GORDON: I think it means the highest
24 Court has rendered its decision.

25 THE COURT: Well, I know there's existing

1 decisions wherein an Appellate Court when they're asked
2 to approve a settlement that's not a full settlement,
3 they may very well say it's not ripe for leave to appeal;
4 but once the total case is settled or tried, then they'll
5 hear it. Now I only know that an Appellate Court has
6 said that in years past. I don't know if that's good law
7 or not, but if that happens, where does that leave us?
8 Or we'll let the Appellate Division tell us where it
9 leaves us.

10 MR. GORDON: Your Honor, I think the
11 260-some-odd parties will be arguing that the Court,
12 based upon your certification and finding here, and based
13 upon the issues and what's done, should treat it that
14 way. So our expectation is we won't have a problem. But
15 if the Court does what your Honor says, I think it will
16 be creating, again, one of those areas where if it can be
17 revisited at any time that the Third-Parties could be
18 brought back into the case, they may not deem it as a
19 settlement that meets their terms.

20 So I think that everyone is contemplating
21 that if your Honor signs that order that makes it clear
22 in your opinion these are the types of issues that should
23 be considered final for judgment purposes, and really
24 what the Court says is are they enforceable. We could go
25 collect on these agreements. That's what it's about. So

1 they are enforceable. They are final. That's why your
2 Honor signed the January order for the Third-Parties
3 saying everybody wanted a final determination to know
4 that big issues in this case were fully and finally
5 settled.

6 So we would settle the past costs, the NRD
7 for the Settling Defendants. The Third-Parties, I know
8 they're loving to hear this, would be fully dismissed,
9 never to be seen in this case again. And we would move
10 on.

11 THE COURT: Okay. So leave to appeal.
12 Basically you're right. At this stage, I think -- I
13 assume an opposition for appeal if I do approve this or
14 approve it on certain terms and the parties have a right
15 to seek leave to appeal, that if they granted leave to
16 appeal, it's anyone's guess how long the Appellate
17 Division might take, I assume.

18 MR. GORDON: That's right, your Honor.

19 THE COURT: So they might do it really
20 quickly or they might not.

21 MR. GORDON: We can't predict the Appellate
22 procedure. But if Oxy appeals -- and it looks like they
23 would be the only one if you do execute these that would
24 appeal -- I'm sure that the collective group that was
25 looking to move the settlements would urge the Appellate

1 Division to act on summary disposition to affirm the
2 settlements so we could clearly put that behind us and
3 move forward.

4 THE COURT: I have a question, I guess I
5 wanted to ask the Plaintiffs and the Third-Party
6 Defendants. It was mentioned by, I think Mr. Howard,
7 about at the mediation there may not have been proper
8 procedures. I'm not concerned with what parties said to
9 each other or accusations they're making about what
10 people said during the mediation process. When I first
11 read the order, it concerned me as to why perhaps I
12 didn't receive a call from the mediator saying that
13 there's an issue in dispute concerning the Court making
14 rulings such as changing the Case Management Order, as to
15 why nobody called me. Because it had situations where if
16 it happens, and if I think it's -- it would be
17 productive, I would have had a Case Management Order that
18 if the parties settled, this is how it's going to be
19 going forward; and if they don't settle, this is how it's
20 going to be going forward; so you would have a Court's
21 determination to then continue settlement discussions.
22 And perhaps OCC, if they knew what I would have ruled
23 back then, maybe you would have been longer along in your
24 settlement negotiations.

25 I'm not -- you know, it just didn't happen.

1 But it really came to mind that I get surprised that a
2 major issue in the settlement agreement is what I'm going
3 to do with further case management. I don't hear about
4 it until I read the last few pages of the settlement
5 agreement. And, I don't know -- I think --

6 MR. GORDON: I think your Honor -- I
7 think --

8 THE COURT: -- the Court should be apprised
9 if their decision is going to be determinative of a
10 settlement or not.

11 MR. GORDON: If we had it to do over, I
12 think, your Honor, there is a few turns in the whole
13 process I know from Plaintiffs we might have chosen a
14 different path. But I think what we were really keeping
15 our eye focused on was trying to build the number of
16 parties and claims that we could bring before your Honor
17 at one time so that hopefully from Plaintiff's
18 perspective we wanted none of our case left. We came
19 very close to that, but we couldn't accomplish it.

20 THE COURT: All right.

21 I will hear, because it's a cross-motion,
22 anything that OCC would like to add by any of its
23 counsel, Mr. Howard or anyone else. If you want to add,
24 it's a reply to the opposition to your cross-motion. I
25 want to make sure everybody has a record, particularly if

1 there's an appeal.

2 MR. ROWLAND: Just briefly, your Honor. I
3 think one thing that the briefing on this CMO, and really
4 all the briefing has come down to the case management
5 issues, it isn't about the settlement. The settlement,
6 we haven't objected to it.

7 THE COURT: You don't object that you might
8 have -- potentially have some benefit from that
9 settlement.

10 MR. ROWLAND: That's correct.

11 THE COURT: Okay.

12 MR. ROWLAND: And there's a great benefit
13 to having a settlement, no question. But I think one way
14 to frame this is if there's no settlement to be had and
15 this was just a case management conference and we were
16 just talking about what makes the most sense, their CMO
17 or our proposed order, I don't think there would be any
18 argument.

19 THE COURT: Well, that was the status
20 before settlement.

21 MR. ROWLAND: It was. But I'm going
22 somewhere with this.

23 What they have done is the have said,
24 really -- they're talking about the public interest.
25 What they have said is that the public interest is that

1 we put in place an order that will deprive one party from
2 access on its claim for two, perhaps three more years;
3 and because the settlement is so good to the public, you
4 should overlook whatever discretion you normally would
5 exercise in that situation. They might just as well have
6 said in their settlement, we condition this upon the
7 entry of summary judgment against Occidental, and could
8 you say in the larger sense the public interest would be
9 better served by judgment against Occidental? Sure it
10 would. But you know, that's what the Court is here to
11 protect, the interest of the individual against the
12 so-called public interest. Our rights don't change
13 because they've settled their case and because the two
14 foreign defendants have negotiated in a provision to try
15 to put us in a compromised position going forward in the
16 case.

17 It doesn't benefit the State that we don't
18 have discovery for two years. It only benefits YPF and
19 Repsol. It was on the eve of that discovery that they
20 bolted to the State.

21 So the question for your Honor is very
22 clear. It is a single defendant, but if there was no
23 settlement, would this make any sense. And the fact that
24 they've settled it alone does not, we would submit, make
25 it appropriate to have one party's claims who

1 have -- these aren't new claims, and that's one thing to
2 be clear about. These are exactly the same claims that
3 the State had. To have us have to sit on the sideline
4 for two or three years, at the same time accelerating a
5 claim that our indemnitor has cast doubt about whether
6 we're going to be left to defend. It's pretty apparent
7 what's going on here, and we appeal to your Honor because
8 it's the only opportunity that an individual has is to go
9 before the Court and say the majority doesn't rule where
10 it impinges on another person's rights.

11 That's really what we're here for.

12 THE COURT: And that's based on your
13 wanting to take discovery immediately and have a trial as
14 soon as possible on Track IV issues.

15 MR. ROWLAND: Yes.

16 THE COURT: There may be some other issues
17 that may be raised about the indemnification agreement
18 with Maxus, but that would be included. Or it might not
19 be. I don't know if anybody is talking about -- I don't
20 think anybody has been definitive as to whether or not
21 you might be precluded from engaging, at least in motion
22 practice, concerning anything having to do about with
23 what that particular letter in October suddenly raised.

24 MR. ROWLAND: It's certainly something --

25 THE COURT: I think that's left open. I

1 don't think that's dependent on my approving or not about
2 the issue of your defense being provided by the indemnity
3 agreement or not. I haven't heard any opposition that
4 that has to be absolutely stayed, that issue.

5 MR. GORDON: Your Honor is right, that's
6 not addressed.

7 THE COURT: Right. But now what I'm
8 hearing that I don't think anyone is saying that has
9 anything to do with approval of the settlements being
10 dependent in some respects on the proposed Case
11 Management Order by the Settling Defendants or the
12 Plaintiff and by Occidental.

13 All right.

14 MR. ROWLAND: Thank you, Judge.

15 THE COURT: You're welcome.

16 We're going to take a lunch break. My
17 staff needs a lunch break. And let's -- there's a lot of
18 people around here. Let's reconvene the usual lunchtime
19 at 1:30. And what I'm going to do is spend the time over
20 lunch. I should be prepared to render a decision after
21 lunch. And then I think I can satisfy some Third-Party
22 Defendants --

23 JUDGE CORODEMUS: I think Mr. Rothenberg
24 had a change of mind.

25 THE COURT: Oh, he did. I thought if I did

1 decide it today, he was going to pick the lunch tab for
2 the room.

3 MR. ROTHENBERG: Not a problem.

4 MR. GORDON: Your Honor, before lunch,
5 we're going to pass out, there's an order that --

6 THE COURT: I'm going to fish out the
7 orders that I think I have to sign, but if you have
8 something else.

9 MR. GORDON: We have one that if your Honor
10 is leaning to enter them --

11 THE COURT: I still have to sign an order
12 if I'm not agreeing, so I still need the orders.

13 MR. GORDON: It would incorporate the
14 finality of the final judgment language.

15 THE COURT: Okay.

16 MR. HALL: Your Honor, Thomas Hall on
17 behalf of the YPF Defendants.

18 THE COURT: Yes, go ahead.

19 MR. HALL: Will we have the opportunity to
20 be hear this afternoon?

21 THE COURT: Oh, I thought you were just
22 relying on the Plaintiff, because I kept inviting anybody
23 else to to join in. I think we have a little bit of
24 time. It's not quite five after twelve. I would
25 entertain -- if you wish, I would entertain if YPF wants

1 to assert a position on any of the issues, whatever was
2 raised by the Third-Party Defendants and what's been
3 raised by OCC. Certainly. I thought that was going to
4 be it. Because I think Mr. Jackson didn't include you in
5 his initial representation of how we're going to proceed.

6 Please put your appearance on the record
7 for the court reporter and I'll hear you.

8 MR. HIRD: I'm David Hird representing
9 Repsol.

10 THE COURT: Oh, okay. You were very quiet
11 today, and I guess you were just waiting for your turn.
12 We might even take lunch a little later. Maybe I should
13 hear all the arguments before lunch because I want to
14 spend some time and not have a hiatus. I'm going to try
15 to be prepared after lunch with a decision.

16 So go ahead, sir.

17 MR. HALL: Thank you, your Honor.

18 Thomas Hall from Chadbourne & Parke LLP on
19 behalf of the YPF Defendants.

20 Your Honor, I will be relatively brief, but
21 I wanted to put this CMO issue in some historical context
22 because these negotiations have been going on for some
23 time.

24 As your Honor will recall, back in April of
25 2012 we had the Argentine law expropriating the shares in

1 YPF. In the spring of 2012, new senior management came
2 into YPF. By the summer of 2012, I was appearing as
3 co-counsel for YPF.

4 THE COURT: And original counsel no longer
5 was appearing.

6 MR. HALL: By the fall they were out and I
7 was in.

8 And in my first session with the Special
9 Master, she made it abundantly clear that your Honor and
10 she thought this was a case that should be settled. And
11 we took that to heart and I do want to thank the Special
12 Master for all of her perseverance, because I think
13 without her none of us would be here today.

14 But it took more than that. It took a
15 client on my side who had incentive to settle. And it
16 wasn't on the merits. We don't think there's a viable
17 case here. The thing that got us here were twofold.
18 One, expense. There was enormous expense going on, and
19 suddenly it was doubled because, before Kirkland
20 withdrew, YPF and Repsol were sharing counsel so they
21 were each paying 50 percent. Suddenly YPF was bearing
22 100 percent of its own share, its own counsel.

23 Secondly is senior management time. We
24 have new management coming into this company. Their
25 directive, your Honor, is to really refocus this company

1 on domestic oil and gas exploration and production. The
2 government said that is in our vital national interest --

3 THE COURT: They discovered new oil
4 reserves offshore.

5 MR. HALL: Correct, your Honor, and there
6 was an enormous amount of distraction from this case of
7 senior management. We had all sorts of disputes. There
8 were stay motions, attorney withdrawal motions,
9 electronic discovery, depositions. It was a major, major
10 distraction. So my client at that stage did see -- did
11 see a real benefit at trying to negotiate a settlement.

12 We were hoping for a global. We went into
13 mediation last October with the mediator. We were hoping
14 for a global because that would accomplish our
15 objectives. That fell by the wayside pretty quickly,
16 your Honor. And what we were left was a possible partial
17 settlement, but that wasn't going to satisfy where we had
18 to get, which is cut down the expense, free up management
19 time so they could focus on their vital national interest
20 of developing oil and gas development within the country.

21 But what happened through discussions was
22 the idea percolated up. Maybe we can get you halfway
23 there. Maybe we can get you, YPF, a period of time in
24 this case where you can get that benefit, where your
25 expenses go way down. Your senior management is not

1 distracted. Where they can focus on what the Argentine
2 government wants them to focus on in redeveloping their
3 business.

4 And that idea, your Honor, took root. My
5 general counsel was at the mediation sessions, was an
6 active participant. He expressed interest. We went back
7 to senior management and they expressed interest, and
8 that, your Honor, I think was the first term of the
9 settlement. We hadn't even reached a number yet because
10 the number was going to be driven on whether we can
11 accomplish our objectives of lowering costs and freeing
12 up senior management time.

13 That was the premise of the settlement from
14 the beginning. It was in our term sheet that was agreed
15 to in February of this year. It was in every single
16 draft of the settlement agreement. And it was an
17 important component for senior management, and it
18 certainly was an important component back in June of this
19 year.

20 When I went down to Buenos Aires and
21 presented this to my board of directors, it was a very
22 important component then, as well.

23 My point is, your Honor, this is not a
24 tag-on item at the end of the deal. This is at the core
25 of the benefit of the bargain here. It's the element

1 that enabled us to resurrect a settlement out of burning
2 ashes. The settlement was dead when Oxy walked from the
3 table, but this enabled us to get back in the game and
4 get the parties where we are today.

5 My point quite simply, your Honor, is we
6 are not here, I don't think, today to talk about whose
7 CMO is better, whose CMO is worse. We're here to decide
8 whether Occidental has satisfied it's very, very high
9 burden of showing your Honor why you should approve the
10 settlements.

11 Thank you.

12 THE COURT: Mr. Hird, I'll ask you to come
13 forward. Even though the microphones don't amplify, they
14 have to record what's being said.

15 MR. HIRD: I'm David Hird. I'm
16 representing Repsol.

17 Your Honor, Repsol is in a very unusual
18 position here. We did not discharge into the Passaic.
19 We have never done business in New Jersey. We're only
20 here because in 1999 we purchased YPF which was the
21 indirect parent of Maxus.

22 We believe we would prevail on a trial in
23 Track VIII, and I need to mention that we have demanded a
24 jury trial on Track VIII.

25 THE COURT: Track IV you're talking about.

1 MR. HIRD: I'm sorry, Track IV. I get them
2 confused. Forgive me.

3 We do believe that we would prevail in
4 Track IV and we've demanded a jury trial in Track IV.

5 So why does a company like ours which
6 believes it could prevail in the litigation settle for an
7 amount as large as \$65 million? And the reason why is
8 very similar to the reasons that Mr. Hall said for his
9 client. In the fall of 2012, the Argentine government
10 appropriated YPF, which was a major asset for Repsol.
11 That was a major corporate event that required the
12 attention of key people, including those few Repsol
13 employees who were still in Argentina, and other people
14 in Spain and around the world. That has been a focus of
15 this -- of Repsol for a year. There have been some
16 recent developments that may succeed in a settlement, but
17 it's still the focus.

18 Just for the same reasons that Mr. Hall
19 had, for us to expend the time, the effort, the money,
20 particularly with new counsel, particularly with a
21 situation where we would be questioning witnesses who
22 previously may have worked for us and no longer work for
23 us, and who may have some adversity to us, this was a
24 decision to -- to make this settlement in order to get
25 the breathing space. The breathing space is important to

1 my client and we made this a condition of the settlement.

2 As Mr. Hall said, this was in the term
3 sheet from the beginning. If you take out the CMO, it's
4 like asking us to buy a car without an engine. This is
5 part of the business decision that our client made to pay
6 \$65 million.

7 Now, with respect to the comment that
8 Mr. Howard made -- or Mr. Rowland, I forget
9 which -- that, you know, it's important to decide who is
10 liable first. We're in a different place now. The
11 question is who's liable for what? These settlements are
12 approved. The State's past costs are paid in full. The
13 State has recovered part of its NRD costs. The remaining
14 damages are much more -- even I'm sure Mr. Jackson will
15 say are harder to prove. I'm sure he believes he'll
16 prove it, but he would acknowledge it's harder to prove.

17 Before we do a massive corporate trial that
18 involves depositions all around the world and bring it
19 here, let's see if there's something left, what's left,
20 and decide. It's not back where we were when the Court
21 issued the first Case Management Order, when the State
22 everyone knew was out at least \$150 million. We're now
23 in a different position and it calls logically for a
24 different Case Management Order. Thank you.

25 THE COURT: Mr. Warren, go ahead.

1 MR. WARREN: I will try to be brief.

2 William Warren on behalf of Maxus Energy, Tierra
3 Solutions, Maxus International.

4 Your Honor, I just want to set out what I
5 understand was the decisional framework that we're here
6 on. This is a motion not by Maxus, not by Repsol, not by
7 YPF. It's a motion by the State.

8 And as I understand, the initial objection
9 came from Occidental; and as I understand, the decisional
10 process with respect to this motion, the question is was
11 the State acting in an arbitrary, capricious, or
12 unreasonable manner when it executed this settlement.
13 Not whether there could have been a better settlement.
14 Not whether your Honor could have -- could have
15 negotiated or crafted a ten-page agreement which maybe
16 you could have. Just was it arbitrary, capricious,
17 and -- or unreasonable. And I didn't hear anything about
18 that at oral argument today. And I assume, although
19 Occidental can speak for itself, that Occidental doesn't
20 take the position that the settlement as executed, as the
21 State executing the settlement was acting arbitrary and
22 capricious.

23 And then there's backup argument.

24 Mr. Oliver, I thought -- excuse me -- Mr. Howard put it
25 very well when he came in, he said, "We're looking for

1 due process for everyone in the room."

2 It's a due process argument. It's -- well,
3 maybe it wasn't arbitrary, capricious, or unreasonable,
4 but you know, it violated our due process.

5 And that's a heavy burden to present to the
6 Court and I never heard anything in support really of
7 that argument, what I heard was sort of slipping over to,
8 well, it's not fair. Not fair is not due process. The
9 question is is this so unfair, is it so unconscionable,
10 is it so outrageous looking at the settlement as a whole.
11 Because, again, I heard, "We're not objecting to the
12 settlement, we're objecting to the Case Management
13 Order."

14 The Case Management Order is integral to
15 the settlement. It is part of the settlement. It is
16 like saying, well, we're not really objecting to the full
17 settlement, we just want paragraph 51 out.

18 And so I haven't -- you know, if there is
19 an argument that can be presented that this settlement
20 prevents Occidental from ever having its issue tried,
21 then there may be a due process argument. But that's not
22 what it provides.

23 And your Honor, if we're getting into case
24 management, we're saying, well, they're due process
25 violations based on case management, was it a due process

1 violation when your Honor issued Case Management Order 17
2 and you said, "Maxus, you may not proceed against the
3 Third-Party Defendants, you have to go to Tracks IV and
4 Tracks VIII first"?

5 And I didn't hear anybody say, well, that's
6 a violation of due process.

7 And by the same token, when your Honor
8 said, "Maxus, we're going to try Track IV" -- totally
9 different case because of everything that's going to
10 happen as part of the settlement agreement. But, "Maxus,
11 we're going to try Track IV first, not Track VIII," was
12 that a violation of Maxus' due process?

13 If your Honor had said, as Maxus asked you
14 to say, we're going to try Track VIII first and not Track
15 IV, would that have been a violation of Occidental's due
16 process?

17 The answer is apparent, it would not have.
18 Moving these tracks around is not a violation of due
19 process.

20 The issue before the Court is not what best
21 practices is, whether I can come up with a better Case
22 Management Order, it's whether this settlement as a whole
23 violates Occidental's due process. It doesn't.

24 I mean, focusing on the Case Management
25 Order, this is not the only Case Management Order before

1 your Honor. There's a Case Management Order that's
2 associated with the third-party consent judgment, a Case
3 Management Order that provides process and procedure and
4 standards, dictates how that's going to move forward on
5 various issues.

6 I mean, if that Case Management Order were
7 disapproved with the Third-Party Defendants or how many
8 of the Third-Party Defendants would say, well, wait a
9 minute, we're not signing up for this consent judgment
10 anymore, it's changed, it's different. We're in the same
11 position.

12 We're not obviously attacking the
13 Third-Party Defendants' consent judgment, but there are
14 parallels even. The fact is in a case with this many
15 parties as complicated as this case is, when parties
16 settle, they need some certainty as to how the case is
17 going to continue. The Third-Party Defendants need that,
18 Plaintiffs needs that, the Settling Defendants need that.
19 That's why there are Case Management Orders.

20 And so if the Court agrees that the State's
21 execution of this settlement agreement is not arbitrary,
22 capricious, or unreasonable, and the Court agrees that
23 Occidental did not demonstrate that this settlement
24 agreement violates its Constitutional right to due
25 process, then I suggest, your Honor, respectfully, that

1 this settlement agreement out to be signed and we ought
2 to move forward. Thank you.

3 THE COURT: Again, I'll ask if OCC wishes
4 to have a response to add something new now that they
5 heard the additional opposition.

6 MR. HOWARD: Yes, your Honor, we would like
7 to.

8 I want to, first of all, say one thing that
9 is just simply not true. Occidental never walked away
10 from this mediation. We never walked away from the
11 mediation. I got a bill from the mediator for several
12 thousand dollars in January, and I called the mediator
13 and I said, "Was there a session?"

14 "Oh, I forgot, you didn't attend."

15 We never refused to attend. We never were
16 invited to that session.

17 Now, to go to the more important point and
18 the point that Mr. Warren just raised, and that is the
19 point of due process. This case was brought by the State
20 in 2005. We brought our claims against these parties in
21 2007. Now, you know, it is a fact that over time big
22 corporations merge, they dissolve, they splinter, they
23 break. They always would much rather be spending time
24 making money than being in a courtroom. And I'm sure
25 that what these gentleman said here today on behalf of

1 YPF or Repsol is right, they don't want to be in this
2 courtroom. They want to be out making money. But we
3 have claims with very solid evidence to show that
4 \$2.5 billion was taken out of Maxus, \$2.5 billion. The
5 Mosconi report done by YPF, itself.

6 And the point is I took a year ago a
7 deposition in Buenos Aires, Mr. Leone, who was one of the
8 principal players in this who called YPF the
9 arm -- excuse me, who called Maxus the arm of YPF. He
10 was in his 80s.

11 You talk to me about due process? How many
12 years do we have to wait, how many people will be dead by
13 the time we get around to having a chance to depose them?
14 I can't say who is going to die between now and a year
15 from now or two years from now, and nobody can. But one
16 of the things that we do believe I think in our system is
17 that justice delayed is justice denied. We have been
18 delayed and delayed and delayed, and we have been
19 unfairly attacked by the positions that we've taken with
20 respect to this mediation. I feel defenseless because we
21 have our own obligations as lawyers to the fact that we
22 will keep confidential things that happen in mediations.
23 And it puts me in a very bad shape and place to be. I
24 don't even like telling you the story I just did.

25 But your Honor, the reality of it is is

1 that time moves ahead. You've read in these papers about
2 the CERCLA issues that are out there. How long does Oxy
3 have to wait to get a judgment against people, if we
4 prove it, that took billions of dollars of money that
5 should have been available for the State of New Jersey
6 and for Occidental? Is it going to be going to get
7 another company in two years?

8 I cannot tell you for sure that Oxy will
9 have due process denied in a week or two or ten, but time
10 itself is a denial of due process.

11 We believe, your Honor, that everything
12 about this settlement agreement can be approved except
13 for the Case Management Order. That we can proceed a
14 pace with discovery, a very small amount of discovery.
15 If you believe that 12 or 14 depositions are going to
16 somehow grind to a halt two of the biggest corporations
17 in the world is crazy. It's nonsense.

18 So what we're asking this Court to do is to
19 give justice, to have due process, to give us our day in
20 court. We've waited long enough. We'll do it quickly.
21 We'll do it fairly. And we'll do it in every way that we
22 can to still reach accommodations wherever we can.

23 And so, your Honor, we stand here not
24 lightly challenging what we've challenged, and we made a
25 deliberate decision not to challenge the settlement,

1 because we wanted to be as unobtrusive as we possibly
2 could be with the State. We have worked long and hard
3 with these people and have great admiration for the
4 State's lawyers. But at the end of the day, I must say,
5 your Honor, that in fairness and due process, Oxy needs
6 to have a right to go forward with this case before even
7 worse things happen and more companies splinter and more
8 assets are lost to God knows whom, so that we can protect
9 the rights of our shareholders and our corporation.

10 And I would say to you that fundamentally
11 that's a matter of due process.

12 Thank you.

13 MR. GORDON: Your Honor, I feel compelled
14 to say two things in response to Mr. Howard.

15 First, Paragraph 5 of our proposed CMO. As
16 I said in my presentation, we cannot deprive your Honor
17 or the Special Master as your entity-fulfilling discovery
18 from the ability to respond to circumstances. There is
19 no basis for him to stand up and say evidence may be
20 lost. Paragraph 5 says an application to the Court can
21 be made if there's a situation they're aware of that they
22 may lose testimony. So that should be totally discounted
23 from your Honor.

24 Second, how many times are we going to hear
25 OCC get up and say they're not challenging the

1 settlement? Once I'd like them to get up and say they're
2 challenging the whole settlement.

3 What they're really saying is go in another
4 room and let's reformat the CMO because it's an integral
5 part of the settlement. How disingenuous can you
6 continue to be? I don't get it. It's really an affront
7 to the Court and to the State. We have been partners.
8 But don't continue to come up and say we're not
9 challenging the settlement. We've called it out in our
10 papers, at argument, and I would like someone from their
11 side to say, we don't like the settlement because an
12 integral part does not favor us. That's really being up
13 front with the Court.

14 THE COURT: All right. I think with that
15 I've given everybody an opportunity to create a record,
16 and we will now take our lunchtime, and I anticipate
17 hopefully we'll reconvene by 1:30 or so.

18 (A lunch recess is taken.)

19 A F T E R N O O N S E S S I O N

20 THE COURT: All right. Everybody may be
21 seated.

22 All right. We're back on the record.

23 All right. As we've discussed, and most
24 parties agree, that the only opposition to approval of
25 these two settlement agreements, that is, the agreement

1 with the approximately 260 Third-Party Defendants, the
2 agreement that the State has settled with them; and also
3 the agreement by the Direct Settling Defendants except
4 Occidental, is two things: One is that the -- the
5 Settling Direct Defendants have a paragraph that if their
6 agreement is void or the Appellate Courts decide it is
7 void, they then would have an opportunity to contest the
8 settlement by the Plaintiff, the DEP, with these
9 participating Third-Party Defendants.

10 That's one opposition I've heard today.

11 Secondly, the opposition has focused on
12 that by the non-settling Defendant, Occidental Chemical
13 Corporation, that the proposed Case Management Order by
14 the settling parties -- that is, by the Plaintiff and the
15 other Direct Defendants, should not be entered into
16 because it's affects their rights as the non-settling
17 Defendant. And they have cross moved for a different
18 order.

19 So I've heard argument as to those two
20 issues.

21 Other than the procedural argument or the
22 administrative, you know, argument made about the
23 Third-Party Defendants shouldn't be subject to this
24 matter being opened up perhaps many years down the line
25 and depending upon Appellate practice, but the main issue

1 before the Court is that the Case Management Order that
2 is, in essence, proposed by the settling parties, the
3 Plaintiff and by the other Direct Defendants, that
4 provides essentially that at this time, if I do approve
5 these two settlements, there should be now a Case
6 Management Order that to proceed with the rest of the
7 litigation as concerning Owens-Corning -- Owens-Corning?
8 Occidental Chemical Corporation -- Owens-Corning is long
9 gone, I've had a case with them -- that the sequence as
10 to the two trials or the two tracks remaining there's a
11 disagreement.

12 The settling parties, the Plaintiff puts
13 forth in asking this Court to approve the settlement,
14 that I order that their remaining claim which is that
15 against Occidental go forward first at this time, and
16 that it results -- if there's no resolve, it should
17 result in a trial that could be no sooner than April. I
18 don't think at this time since it's taken this long
19 perhaps for the Court to hear these motions for the
20 Court's approval of these two settlements, to this time
21 that I don't think the timing is at issue. It's just
22 that the tracking claim or the remaining claims that the
23 Plaintiff may have against Occidental Chemical
24 Corporation be tried before any cross-claim be tried as
25 to what remains with Occidental Chemical Corporation's

1 claims as against the Settling Defendants who settled
2 with the Plaintiff, but against the YPF and Repsol
3 entities, which is based on the fact that there is an
4 indemnification agreement with Maxus, and I've already
5 interpreted that there's -- and I don't recall exactly
6 which terms I was asked to decide -- but there is
7 indemnification owed by Maxus as to damages to be
8 incurred by Occidental Chemical Corporation in this
9 particular litigation. And the causes of action as
10 against YPF and Repsol is that Maxus may not have the
11 assets to satisfy the indemnification obligation they
12 contracted to with Occidental Chemical. And if they
13 don't, then there's a basis that the parent corporation
14 of Maxus, which now has been divided, but basically the
15 parent corporation of Maxus, which was YPF with Repsol as
16 the managing partner, be responsible because of
17 fraudulent transfers and basically being able to pierce
18 the corporate veil because of the way the parent treated
19 the assets and treated its wholly-owned subsidiary,
20 Maxus.

21 So that's -- that's the major claims.
22 There may be some other claims or even some cross-claims
23 or counterclaims by YPF or Maxus. But it's basically
24 litigation that Occidental would have in asserting
25 cross-claims it has against these other Defendants who

1 have settled with the State.

2 Now, generally nobody disagrees that the
3 standard and the reason that these settlements come
4 before the Court for approval is because we do have a
5 public agency, the DEP, as a part of our State government
6 wherein the Court does have to determine whether the
7 actions of the public agency settling this case is not
8 arbitrary, capricious, or unreasonable considering the
9 public interest.

10 Now, that's overall determination, but also
11 the parties do raise as to what is the standards that a
12 Court does have in conducting case management,
13 particularly of cases of some magnitude like this.

14 There's basic Court rules and directives,
15 including there's a Manual For Complex Litigation which
16 people have referred that this is that type of a case.
17 Let me just go over the existing law discussing the
18 discretion of a Court to determine case management.

19 I'll start with our Court Rules, 4:38-2.
20 It talks about that a trial judge does have the
21 discretion to sever claims and hold separate trials to,
22 you know, meet its duty. Severance of Claims, (a), "The
23 Court, for the convenience of the parties or to avoid
24 prejudice, may order a separate trial of any claim,
25 cross-claim, counterclaim, third-party claim, or separate

1 issue, or of any number of claims, cross-claims,
2 counterclaims, third-party claims or issues."

3 And then Section B deals with Separation of
4 Liability and Damage Claims. "Multiple parties, issues
5 or claims are presented in individual or consolidated
6 cases and the nature of the action or actions is such
7 that a trial of all issues as to liability and damages
8 may be complex and confusing, or whenever the Court finds
9 a substantial savings of time will result from trial of
10 an issue of liability in the first instance, the Court
11 may on a party's or its own motion direct that issues of
12 liability and damages be separately tried." And you
13 know, the issues of liability generally should be tried
14 first but there may be reasons to do it on reverse
15 bifurcation.

16 There's a Supreme Court Directive, 3-77,
17 which encourages bifurcation of liability and damage
18 trials in appropriate cases. And basically it's within
19 the sound discretion of the Trial Court and will only be
20 overturned if a judge abuses his or her discretion.

21 It's a standard from Diodato v. Rogers, 321
22 N.J. Super. 326, 1998.

23 There's also Wojcik v. Pollock, 97 N.J.
24 Super. 319, 323 (App. Div. 1967).

25 And the Court is allowed to analyze a

1 number of factors. And it's for calendar control and
2 avoidance of prejudice and resolution of complexity and
3 reduction of confusion. Controlling trial costs is
4 another consideration. And generally, the rationale
5 behind the use of the procedural device of having
6 separate trials or bifurcation of certain issues, you
7 balance the advantages and disadvantages determining
8 whether there would be a greater benefit to the Court as
9 to the manner in which they choose to -- to have issues
10 tried.

11 Now, language for the multiple -- The
12 Manual For Complex Litigation provides that the Court
13 should balance the advantages of separate trials,
14 however, against potential for increased cost, delay,
15 including delay in reaching settlement, and
16 inconvenience. The judge should take care when deciding
17 which issues may and should be severed for separate trial
18 and the order in which to try them.

19 Now, also, the Perretti decision, which
20 it's Perretti v. Ran-Dav's Cnty. Kosher, Incorporated,
21 289 N.J. Super, 618 (App. Div. 1996), where they're
22 discussing the Court's discretionary case management
23 role, it says concerning the entire controversy doctrine,
24 which is raised here that the entire controversy does
25 allow Occidental Chemical Corporation to certainly

1 continue their cross-claims as against Repsol and YPF.

2 "Where litigants have discharged their entire controversy
3 obligations by raising all related causes of action in a
4 single proceeding" -- again, related causes of
5 action -- "the Trial Court is obliged to assume a
6 proactive management role in such matters by, for
7 example, severing or joining claims, staying or
8 accelerating their consideration, and retaining or, in
9 fact, transferring jurisdiction."

10 That's basically citing what the basic law
11 in -- in the entire controversy doctrine as applied in
12 New Jersey that if you bring it to the Court's attention
13 and the Court decides to take jurisdiction and keep
14 jurisdiction and try the case, obviously you have that
15 right, and it's -- it's tried by the Court. But the
16 Court always has discretion really at the beginning or at
17 the end that if an entire controversy doctrine is brought
18 before the Court, the Court may determine not to
19 consider, for whatever reasons, to have it as part of the
20 particular lawsuit. And if the Court makes that
21 decision, nobody's lost any rights under the entire
22 controversy doctrine. It's only if you never bring it to
23 the Court to decide whether it's appropriate to be in
24 another piece of litigation that you also have with other
25 parties would that be any prejudice to a litigant. As

1 long as the Court considers it and decides what the Court
2 thinks is appropriate to do, then if the Court decides
3 not to hear the matter or to transfer it, then in
4 subsequent litigation no one could raise that under the
5 single controversy doctrine, you've lost the right to
6 bring a case.

7 And I think if you read Perretti in the
8 concept there, that's where that comes from.

9 Now, again, The Manual For Complex
10 Litigation which is considering federal cases, but I
11 think it's applicable generally here, too, is that courts
12 can "Consider whether holding separate trials on
13 liability, damages, and allocation of response
14 cost" -- and we're talking about CERCLA claims in federal
15 courts -- "they can consider bifurcating or trifurcating
16 the trial into phases - liability, damages, remediation
17 plans and allocation. The order of trial and the
18 corresponding settlement discussions can be varied to
19 address certain dispositive issues."

20 So to me, all of those basic principles,
21 which nobody heartily disagrees that that's the standard,
22 that regarding courts' decisions on case management is
23 highly discretionary, in fact, specific. And that's the
24 standard that I come in deciding this matter.

25 Now, as to the issue as to what should be

1 the order, if I approve the settlement or if I don't
2 decide on the right order we may have an -- one or more
3 of the settlements void as of today. So I don't know if
4 it's the cart before the horse, but I do have to decide
5 what Case Management Order I would be willing to enter
6 today going forward.

7 As to the State's position, the Plaintiff's
8 position that at this point in time, they would want to
9 have the remaining damage claims, liability and damage
10 claims, they have -- although I've decided liability
11 as -- as a legal successor to the Diamond Shamrock
12 entities, does lie with Occidental -- they want to have
13 the final trial that they would be involved in go forward
14 first. And that's basically what we've called Track
15 VIII.

16 Occidental's position is we did have the
17 last case management in -- in play before I did
18 have -- agreed to stay discovery and now it's been
19 approximately 21 months, was that we were going to
20 continue to complete discovery and have the Track IV
21 allegations tried involving Repsol and YPF.

22 Now, I'll point out that at that time it
23 was certainly clear that I did order that to go forward
24 not simply because of only the interests of Occidental
25 Chemical Corporation, but also because Plaintiffs had a

1 direct claim against YPF and Repsol in which they have
2 now settled that difference, and in which they're going
3 to receive -- and I'll mention in a moment -- some
4 significant dollars. And so that was to go forward. And
5 along with the certainly related and -- you know, I don't
6 have the language before me -- but the cross-claims
7 against Repsol and YPF were certainly in line or in step
8 with the claims by the State. So the State had the claim
9 and there was also a cross-claim that Occidental had. So
10 at that point in time, for whatever reasons I gave, it
11 was appropriate to proceed.

12 We now have, there's a complete settlement
13 of the State's claim, albeit not the cross-claim, for the
14 same issues. And we already have that settlement in
15 which it was explained on the record, and I asked a
16 number of times as to how I can interpret the application
17 of the caps or -- or the non-caps. And essentially they
18 are receiving \$130 million from Repsol and YPF, and
19 they're also receiving some moneys for resource damages,
20 and they also have reached an agreement that depending
21 upon the success of Occidental Chemical Corporation,
22 which it's remained in cross-claim against Repsol and
23 YPF, that may be a benefit and admitted today on the
24 record that they may have achieved some benefit.
25 Certainly, the fact that they've settled these past costs

1 for what's been represented to be the full past costs to
2 date, which would be the -- is it the 135 -- it adds up
3 to 148 million, that they've gotten that money and that
4 is a credit as to Occidental Chemical having to pay those
5 moneys.

6 There was a lot of other explanations as to
7 different categories, but it's clear to the Court that
8 OCC has gained some benefit by the State settling the
9 same issues with these Direct Defendants, YPF and Repsol.
10 So the case going forward that Occidental has is to
11 defend the case of the Plaintiff suing them for damages,
12 and also to seek the Court's determination about any
13 liability for YPF and Repsol if, in fact, Maxus defaults
14 on its indemnification agreement which it would not
15 become ripe if -- if -- not ripe in that sense, but in
16 which that OCC would not have any monetary harm if, in
17 fact, in this case Maxus did pay on their indemnification
18 agreement whether they had the money or perhaps they had
19 it from somebody else, perhaps the other Direct
20 Defendants, or maybe they borrowed the money.

21 So that's the situation we're in.

22 Now, Occidental's position is this: What
23 the Plaintiff is asking, the State is asking that an
24 agreement with the Settling Defendants in which they
25 received the moneys I said, and which there's also an

1 agreement in place in which they may receive \$400 million
2 which would be a benefit to Occidental and which under
3 certain circumstances if Occidental was successful in
4 their claim against Repsol and YPF, that the Plaintiff
5 would actually forgive any amount over the amount that
6 Repsol and YPF would pay. Again, that may be
7 complicated, but that remains perhaps a possibility.

8 Occidental says that it's a denial of their
9 due process or it's simply unfair. They don't use the
10 term that it would be considered arbitrary, capricious,
11 and unreasonable taking into consideration the public's
12 interest that for the interest of the public in having
13 the Department of Environmental Protection clean up this
14 particular site and have that money reimbursed so they
15 could use that money to clean up future sites, that
16 they're not saying that that's not in the public
17 interest. What they're saying is their interest without
18 any harm to the public interest should be taken into
19 consideration and we should try Track IV first. Or if we
20 don't try Track IV first, at least discovery should go
21 forward and be completed as to Track IV before -- perhaps
22 before Track VIII is over, or before Track VIII is tried
23 if I will not agree that Track VIII will be tried at a
24 later date.

25 It's this Court's determination that

1 considering that the previous tracks were in place for a
2 number of reasons, one reason to certainly satisfy the
3 Plaintiff's claims and not necessarily to satisfy
4 cross-claims, and to force the settlement, admittedly
5 which was discussed, and I'm sure as somebody mentioned
6 it was discussed, in fact, with the Court's Special
7 Master. And to try and put an end, you know, to this
8 case in an orderly fashion and one that perhaps would
9 lead for a resolution without having to try each and
10 every tracks or each and every issue that was raised
11 including all those by -- against and by the Third-Party
12 Defendants, their cross-claims against each other,
13 et cetera.

14 So we're at a different point in time now.

15 I will determine that what's fair and
16 what's reasonable and in the public interest is to have
17 the Plaintiff, whether -- in fact, whether it's a public
18 entity or not, now I specifically have to approve it
19 because they're a public entity. But in any case
20 generally, unless there's good reasons not to, a
21 Plaintiff's damages or a Plaintiff's trial should be
22 tried first. There are instances where I would have a
23 different bifurcation or a reverse bifurcation. But in
24 this case I still think that the primary importance is to
25 have the Plaintiff made whole. The Plaintiff has settled

1 with 260 Third-Party Defendants, the other Third-Party
2 Defendants as a result, I'm sure in good part because of
3 that settlement, they have now individually settled their
4 third-party claims. They've settled with all the Direct
5 Defendants. And to make the State whole and for the
6 State to have moneys to be reimbursed for their past
7 costs and to have money to go forward to continue to act
8 in the public good to clean up sites, there's no question
9 that -- I will take judicial notice that there's a number
10 of identified polluted sites that at this point in time
11 are not proceeding to be cleaned up because of lack of
12 sufficient funds by the DEP, by the Spill Act Fund, and
13 also because other third-parties that may be responsible
14 have not been found or they're without assets.

15 So it is in the public interest to have the
16 Plaintiffs made whole, albeit in a law -- in an orderly
17 and logical fashion.

18 So I do believe that it's appropriate to
19 try Track VIII. It's in the interest of the public and
20 just in the interest of somebody being a plaintiff. The
21 fact that there were other claims that they've resolved
22 if cross-claims remain, it's just as among Defendants and
23 not having to do with direct loss such as the Plaintiffs
24 claim that they've lost moneys or they've lost, you know,
25 the ability to use their moneys more wisely because, you

1 know, they've spent it on cleanup of other pollution,
2 et cetera.

3 So I just think, you know, in the exercise
4 of my discretion -- and I'll speak a moment about being
5 concerned with the interests of Occidental. So I think
6 it's appropriate to resolve all the claims against the
7 Plaintiff so the Plaintiff can be made whole insofar as
8 the counts in this case have been pled so I can have this
9 whole case dismissed.

10 Now, Occidental -- and also Occidental's
11 claim is this: It is derivative of the Plaintiff's
12 claims in this suit that there's no question that
13 initially nobody challenged Occidental filing a
14 cross-claim because it's based on the fact that there may
15 be a judgment in this case in which their indemnitor -- I
16 think I'm using the right term -- Maxus may default on
17 its contractual obligations and therefore it would
18 have -- it would need to have the case decided against
19 Repsol and YPF. So Occidental would have an avenue that
20 they legally contracted for or that they have a judgment
21 for to pay for the damages to the State. So it's really
22 derivative of the Plaintiff's claim.

23 And for that reason, it certainly seems
24 appropriate that the Plaintiff's claim as against
25 Occidental be decided before a claim that's really

1 derivative. Because they're being sued in this case,
2 they may have to have a suit as against the parent of
3 Maxus if Maxus decides that they will not -- or proffers
4 that they cannot pay any judgment under the
5 indemnification agreement at this time.

6 Now, I'm not depriving Occidental of any of
7 their rights to litigate in this case and to have their
8 cross-claim decided. It is a question of simply the
9 order it will go in.

10 Now, there was a proffer by way of
11 opposition that it's been a lot of years, they were on a
12 track to complete it before the Court determined only
13 when I thought the parties were close to having a
14 settlement that I stayed discovery, and I should just
15 continue on that because something might happen. I think
16 as pointed out by Plaintiff's counsel, and I had a note
17 about that early on, is that if -- there's a paragraph in
18 the order submitted by the Plaintiff, the settling
19 parties, wherein the parties can certainly ask, as you
20 can with any Case Management Order because of certain
21 circumstances, a change in the existing order. I will
22 tell you now, whatever Case Management Order I sign
23 today, I think it's number 19. So we've had a lot of
24 changes for a lot of reasons as things change.

25 So I just will point out that insofar as

1 there may be prejudice -- right now I expect that there
2 may be prejudice that witnesses may die or assets may be
3 squandered so that judgments will be uncollectible.
4 There's a lot of law and rules about it. There's a basic
5 rule about if anybody in in extremis, even if people
6 haven't started litigation, they can come to Court for an
7 order that if a witness is in extremis, that you get to
8 take a discovery deposition and an immediate de bene esse
9 deposition.

10 So whatever order I sign today doesn't
11 preclude parties, if there's a change in circumstances,
12 to come to the Court for some kind of relief, and perhaps
13 for relief under the present case management order. So
14 that stands.

15 And so unless, you know -- so it's not a
16 basis for the Court to consider that. People around the
17 world may -- may lose all their money or may die, there's
18 law in place and there are rules in place that you can
19 certainly come to the Court and the Court will hear you.
20 So that's not something that I have to decide today, that
21 my order today is going to wholly preclude there ever be
22 an in extremis deposition even if people know about it a
23 month from now. So that's open.

24 Also, the fact that there is -- I think
25 there's a basis that discovery should not go forward on

1 the remaining cross-claim that Occidental has until Track
2 VIII is completed. I think at this point in time it
3 makes sense. I have no idea -- although there's some
4 broad proffer, and we all know there's going to need to
5 be more close case management conference as we go forward
6 with either of these tracks, or when we go forward with
7 each of these tracks, and we're going to go forward on
8 Track VIII first, as to changing. But at this point in
9 time, I am convinced that there may be a bases in which
10 Track VIII will be decided either by settlement or
11 judgment which may obviate the need, and particularly
12 obviate the need for an immediate trial of Track IV.

13 Now, it's been proffered and it's in the
14 Case Management Order, nobody has to respond now whether
15 they think it's material or not. But it's been a
16 proposed trial date for Track IV, not for Track VIII,
17 that's to be immediately and certainly not before April,
18 which I don't think is a problem at all. Even if
19 somebody finds a claim for leave to appeal, it probably
20 won't get a result till April.

21 But anyhow, the point being is that the
22 Track IV, the proposed trial date is that it should be no
23 sooner than December 2015. I really don't have a good
24 idea whether that is wholly appropriate for that
25 particular time because I don't have enough information

1 and the parties have told me, first of all, we're going
2 to have amended cross-claims. I don't know if that will
3 result in additional discovery. I don't know what the
4 response is going to be to additional cross-claims.

5 Also, nobody succinctly stated, if we had a
6 case management conference, as to what specific discovery
7 needs to be done and how long it's anticipated that would
8 take.

9 And also as to the trial, there's a lot of
10 ways that I could try Track VIII. If it's going to be a
11 bench trial, I could maybe start even receiving existing
12 documents to digest at this point in time, so when then I
13 might have to hear testimony, I would be prepared. So if
14 it's a bench trial, I could do it more quickly than if
15 it's a -- and so there's a lot of ways we can handle
16 going forward with Track VIII, and it may take some
17 length of time or it may not.

18 Now, as to Track IV, again, at this time I
19 know parties are thinking that it may only, you know,
20 take -- be another dozen deps or not, but I would like to
21 see a resolve of Track VIII before setting any particular
22 schedule for discovery for Track IV. And I will tell the
23 settling parties, the Plaintiff and the Settling Direct
24 Defendants, that I'll put in the order that it is -- that
25 there won't be a trial until December 2015. But I'm not

1 putting in the order, I'm not being asked to put in the
2 order that that date is inviolate. Meaning that if
3 circumstances change, parties are not precluded from
4 asking for additional case management orders. That's the
5 nature of case management orders.

6 So although I'll accept that as a projected
7 date, and I will sign the order that says that it won't
8 be until then, but I leave it open that if anybody wants
9 to ask for new case management -- and I won't even
10 suggest what the changed circumstances will satisfy
11 because it's just being speculative, like any Case
12 Management Order, it's subject to change. And if it
13 happens that I change it or if it happens on appeal and
14 the Appellate Division changes, then it is up to the
15 parties to decide whether these are ministerial changes
16 or material so as to invoke their right to void the
17 settlement.

18 I can't be any more definitive today to
19 that, other than I'll accept that for now that sounds
20 plausible. But I don't like to say anything advisory so
21 I don't give any bad examples that if certain things
22 happen between now and before December 2015 there may be
23 a basis. Certainly, there may be a basis for me to have
24 a later date, but there may be circumstances in which it
25 may be changed.

1 So if that's a basis, I wasn't asked to be
2 definitive, I'll use the language in the order. But I'm
3 not being asked to say that there can never be a Case
4 Management Order to change that. And if that's a reason
5 to avoid the settlement -- or void the settlement, then
6 whatever legal rights people think they have, they can
7 certainly engage in that.

8 But I accept as presented to me that I'll
9 sign it on that basis. And I'll make a decision whenever
10 I think it's appropriate, it's brought to the Court's
11 attention as to when discovery, if it starts at all, as
12 to Track IV to be completed. And I don't find that
13 there's a lack of due process. The name, you know, that
14 keeps -- that was used a number of times by counsel for
15 Occidental. I have -- at this time I have an intention
16 of trying it and I don't know what the circumstances will
17 be going on. But I'm not precluding them from having a
18 trial in this case. The circumstances are such that I
19 think we are going to proceed with it and their
20 cross-claims remain. It doesn't preclude if they want to
21 file a cross-claim similarly in another case that may be
22 relevant, and if that judge takes jurisdiction and they
23 want to try the case first, I'm not precluding them.
24 They have all the legal rights they have in all the other
25 jurisdictions to pursue this claim which may be

1 reoccurring. Apparently there's -- nobody's proffered a
2 case to me in which a Court has refused such a
3 cross-claim. So if they have, they have. But I
4 certainly can't have a crystal ball to say that this is
5 the last chance, and if I don't try the case immediately
6 in this case, all the other jurisdictions are going to
7 shoot down Occidental and not allow them to adjourn it in
8 any other lawsuits for damages against them for the
9 pollution of the Passaic River or pollution in some other
10 sites in which they might have the same indemnification
11 agreement.

12 So that's really not before this Court now.
13 It's not -- I'm not being asked to -- why don't you
14 decide the issues so other jurisdictions around the
15 country, or around the world, for all I know, won't have
16 to decide it. And certainly Occidental doesn't ask me
17 that I do that.

18 But as far as my considering that, I did
19 accept it on this because I think it's germane to the
20 issues raised here where OCC is being sued by the State
21 for significant damages, that they have a right to
22 litigate in this forum, and I still intend to, but now
23 for the reasons I stated and for the interests, the
24 public interest and the interest of the Plaintiff simply
25 being a Plaintiff, that who have now resolved, I

1 guess -- at one time I thought it was 307, and basically
2 306 of the parties have resolved their differences except
3 for the cross-claims and the parties being sued on the
4 cross-claims for Occidental.

5 So we made a lot of progress, and I think
6 the Plaintiff should be able to proceed. And it's not
7 arbitrary, unreasonable for the Plaintiff to ask that now
8 the final phase of the damages against all the parties,
9 meaning against the last party, Owens-Corning -- I keep
10 saying that -- Occidental Chemical. It's
11 OC -- Occidental Chemical Corporation go forward next
12 because we're at this stage in the litigation.

13 So for all those reasons I am going to sign
14 all the orders submitted. I'm simply going to sign them
15 and then I'll have them electronically published
16 tomorrow. There's no reason for people to wait around
17 for copies or me to stamp copies. What I'm going to sign
18 is the two settlement agreements, both as to the
19 Third-Party and the Direct Defendants where
20 it's -- there's a tag line as to -- it says,
21 "Court-approved settlement agreement." And the last page
22 is that the Court so approves. So I'm going to sign
23 those two orders.

24 I'm going to sign the two orders of
25 dismissal, and the two Case Management Orders, that is,

1 for both of the settlements.

2 The only other thing to perhaps mention is
3 how this Court feels about the Third-Party Defendants
4 perhaps being subject to some type of future opening up
5 of the settlement or future claims because of paragraph
6 69 in the settlement agreement with the Direct
7 Defendants. I've decided to sign these orders. As far
8 as I'm concerned, they are final, and there will be no
9 need to revisit paragraph 69.

10 So -- and I accept the reasoning by the
11 State that administratively it certainly makes sense to
12 have finality to both settlements, and then both
13 settlements if they're appealed will go together to the
14 Appellate Division. To me that makes sense. So if I've
15 kicked the can down the road, I've agreed that these
16 settlements are final as far as the Trial Court is
17 concerned.

18 If on appeal, the Appellate Division, you
19 know, issues are raised, then I think it does become an
20 issue that if the Appellate Division makes certain
21 decisions that may create a situation for a voidable
22 settlement such as the one with the Direct Defendants, I
23 would say you should make your arguments to them as to
24 whether what's the force and import of paragraph 69. I
25 think at this point because for the reasons I've stated I

1 believe that these settlement agreements are appropriate
2 and the Case Management Order for now is certainly
3 appropriate on behalf -- being submitted on behalf of the
4 Plaintiff who wants to have Track VIII tried now. So my
5 having done that, I don't think I have to speculate or
6 advise what I think would happen if the Appellate
7 Division does something. I think that's really for the
8 Appellate Division.

9 So with that, I am going -- I think it's a
10 total -- there's also the certification order that I was
11 given today, Mr. Gordon, and I see you're about to stand
12 up, I forgot. That's the seventh order that I will sign,
13 and that combines as a final order -- it certifies a
14 final order as to both the consent judgment with the
15 Third-Party Defendants as well as to the Settling Direct
16 Defendants. So that I'll accept that you only need the
17 one order. So I'm going to sign that.

18 So if you think there's more than seven
19 orders, I would ask anybody to let me know. Because I'm
20 prepared when I get off the bench now I'll sign them and
21 then they will be posted -- I don't know today but
22 certainly by tomorrow morning so everybody will have a
23 copy of all the orders, and you can proceed with your
24 legal rights with those orders being stamped.

25 I think I'll stamp them today because I'm

1 going to do that now, so you'll get stamped orders that
2 will be online, if not by the end of today by tomorrow
3 morning.

4 All right? I thank everybody and I thank
5 you for being civil in a crowded courtroom. That's
6 always helpful.

7 MR. JACKSON: Thank you, your Honor.

8 MR. GORDON: Thank you, your Honor.

9 MR. HOWARD: Thank you, your Honor.

10 (The proceedings concluded at 2:23 p.m.)
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CERTIFICATION

I, LINDA M. JORRITSMA, a Certified Court
Reporter of the State of New Jersey, do hereby certify
that the foregoing is a true and accurate transcript of
the within proceeding as reported by me stenographically
at the place and on the date hereinbefore set forth.

LINDA M. JORRITSMA, C.C.R.

License No. XI00995

Dated: December 18, 2013

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