

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**IN RE: POOL PRODUCTS DISTRIBUTION
MARKET ANTITRUST LITIGATION**

**THIS DOCUMENT RELATES TO: ALL
ACTIONS**

* **MDL NO. 2328**
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* **SECTION R/2**
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* **Judge Vance**
* **Mag. Judge Wilkinson**
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**JOINT REPORT REGARDING ISSUES TO BE DISCUSSED AT THE
JUNE 20, 2013 STATUS CONFERENCE**

The parties respectfully submit the following list of items for discussion at the June 20, 2013 status conference. The Direct Purchaser Plaintiffs' and the Indirect Purchaser Plaintiffs' set forth their report in Section I. The defendants set forth their report in Section II.

I. Plaintiffs' Report on the Status of Discovery and Issues to be Addressed at the June 20, 2013 Court Conference

A. Status of Fact Discovery Since the March 7, 2013 Court Conference

i. Discovery From Defendants to DPPs

a. Transaction Data

In Pretrial Order No. 17, issued March 7, 2013, the Court ordered defendants to respond to plaintiffs' questions about the transactional data that each had produced. Timely responses were received from each defendant. On April 1, 2013, DPPs transmitted additional follow-up questions and requests resulting from each defendant's response. All defendants have since provided their responses to the additional follow-up questions and requests.

On June 3, 2013, DPPs served a third set of questions to PoolCorp concerning PoolCorp's transaction data. PoolCorp contends that these questions are "just requests for

additional transaction data,” citing a question on vendor rebates or discounts as an example. DPPs, however, have sought rebate and discount information from the outset. Subpart (m) of DPPs’ transaction data request to PoolCorp, made in August 2012, sought information on “discounts, credits, debits, rebates, or other adjustments.”

Expert analysis requires information such as this to determine an appropriate net price per transaction. Indeed, defendants in other cases have repeatedly challenged calculations of transaction prices when rebates, discounts, and the like were not included in an expert’s statistical analysis. Defendants themselves requested rebate and discount data in their own transaction discovery requests directed to DPPs. Thus, there is no basis for PoolCorp to object to the DPPs’ questions.

b. Document Production

The defendants are producing documents on a rolling basis. On May 28, 2013, the Court approved the parties’ stipulated extension of the deadline to complete the defendants’ rolling production of documents until June 24, 2013. To date, the defendants have produced collectively over one million pages of documents, the majority of which have been produced to DPPs during the last two months. (This round of production is in addition to the defendants’ earlier productions from the FTC’s PoolCorp Investigation.)

c. Depositions

The depositions of all defendant witnesses taken by DPPs to date are listed in the table in Attachment A. In addition, the parties are in the process of scheduling depositions of defendant witnesses to take place in July, August and beyond. Four such depositions have been scheduled thus far.

d. Supplemental Requests for Production

On May 8, 2013, DPPs served a supplemental document request on the defendants seeking the following categories of documents: 1) monthly inventory data; 2) documents arising from an antitrust litigation between Hayward and Aquastar Pool Products, a manufacturer-competitor of Hayward; and 3) documents relating to PoolCorp's manager meetings. The Manufacturer Defendants served objections and response to the supplemental request on June 5, 2013, and PoolCorp filed objections and responses on June 7, 2013. DPPs held a meet and confer with PoolCorp on June 12, 2013, and with the Manufacturer Defendants on June 17, 2013. Thus far, defendants' objections are unresolved.

Defendants object to these modest additional requests as "not contemplated by the Court" and "not timely" under Pretrial Order No. 15 (PTO 15). But these targeted requests should not be objectionable. The Court, we submit, did not intend the parties' discovery requests from nearly a year ago to afford the entirety of the documentary discovery that could be sought in the case, regardless of what issues might subsequently arise in discovery, or what additional facts may appropriately need to be probed.

DPPs' request for inventory information, while substantively similar to one that DPPs chose not to pursue last fall, should not be unduly burdensome. We seek transactional data and will work with the defendants to minimize the information to be produced. The extent to which PoolCorp may not maintain the inventory data requested is a subject requiring further discussion between counsel, as PoolCorp's document production suggests that significant data is captured electronically.

ii. Discovery From DPPs to Defendants

a. Document Production

DPPs have made several productions, consisting of both hard copy documents and ESI, in the last month, including:

- A Plus Pools Corp. (APLUS_0005484-0007079)
- Liquid Art Enterprises d/b/a/ Carl Boucher, The Pool PhD (LIQART_00000001-0004470)
- Oasis Pool Service, Inc. (OASIS_00000001-0033737)
- Pro Pool Services (PROPOOL_0004947-0005260)
- Thatcher Pools, Inc. (THATCHER_0007675-0012980)
- Aqua Clear Pools & Decks (AQUA_0002558-0003200)

DPPs intend to make subsequent productions in the coming weeks. On May 28, 2013, the Court approved the parties' stipulated extension of the deadline to complete the DPPs' rolling production of documents until June 24, 2013.

Plaintiffs Oasis Pool Service, Inc. and A Plus Pools Corp. redacted documents in reliance on the Court's rulings precluding discovery of downstream information and other non-defendant advertising materials, and did not redact information from an otherwise responsive document. PTO 15, at 15-23. Defendants' objections to these redactions are inapposite because in the cases cited, the Court had not previously ruled on the relevance of the redacted discovery. Here, the Court has already ruled that defendants are not entitled to downstream documents or to non-defendant advertising materials.

Defendants should not be allowed to secure indirectly discovery that the Court has held they are not entitled to at all. Production in redacted form is clearly preferable to withholding the entire document. *See Spano v. Boeing Co.*, 3:06-CV-00743DRHDGW, 2008 WL 1774460, at

**2-3 (S.D. Ill. Apr. 16, 2008) (“To their credit, the Defendants produced the documents containing irrelevant information with redacted portions instead of not producing the documents at all. Thus, the Court concludes that the redaction of information ... was acceptable because that information is not relevant to the issues in this case and not reasonably calculated to lead to the discovery of admissible evidence.”) (citing *Beauchem v. Rockford Products Corp.*, 2002 WL 1870050 at *2 (N.D. Ill. Aug. 13, 2002) (finding good cause existed to support redaction based on relevance); *Schiller v. City of New York*, 2006 WL 3592547 at *7 (S.D.N.Y. Dec. 7, 2006) (upholding redaction of portions of meeting minutes not relevant to issues in case)).

b. Depositions

DPPs have produced five of the seven named direct purchaser plaintiffs for depositions. The depositions of the two remaining DPP class representatives, Liquid Art and A Plus Pools, have been rescheduled to July 12, 2013 and July 18, 2013.

iii. Third-Party Discovery

On May 9, 2013, the Court granted the Federal Trade Commission’s request for a temporary stay of third-party discovery. Dkt. No. 234. On May 10, 2013, DPPs sent a copy of the Court’s Order to each third party that had been served by the DPPs with a subpoena *duces tecum*, and requested that no further action on the subpoenas be taken until further notice. On June 5, 2013, after briefing from the parties, the Court entered a Protective Order and lifted the stay of third-party discovery. Dkt. No. 269. On June 10, 2013, as required by the Court’s June 5, 2013 Order, DPPs sent a notice to third parties informing them of the Protective Order and attaching a copy of the Court’s June 5, 2013 Order. The parties are now in the process of rescheduling approximately 16 third-party depositions. The parties are also negotiating with the

third parties new return dates for the production of documents requested in the various subpoena *duces tecum*.

iv. Indirect Purchasers' Discovery

a. Document Productions

The Indirect Purchaser Plaintiffs have produced all documents to Defendants. There will be a supplemental search of the California Class Representative's documents in July after the Representative has moved in to her new home and her boxes are out of storage. Counsel for the Indirect Purchaser Plaintiffs are reviewing and analyzing the documents being produced by the Defendants for merits depositions, expert damages report, and for supporting class motion issues.

b. Class Representative Depositions

Class representatives for Arizona, California, and Missouri have had their depositions taken by Defendants. The Florida Class Representative withdrew from the lawsuit before her scheduled deposition for health reasons and an unwillingness to travel to New Orleans to testify at trial if needed. Indirect Purchaser Counsel intend to file a motion for leave to amend their complaint in order to substitute a new class representative for Florida and to conform the new complaint to the Court's Order on the motions to dismiss.

c. Depositions on Merit Issues

Counsel for the Indirect Purchaser Plaintiffs are monitoring by internet video or are attending merits depositions. They are working with Counsel for the Direct Purchasers on documents and questions to make the most efficient use of the time allotted to plaintiffs.

d. Document Discovery of Third Parties

The Indirect Purchaser Plaintiffs notified all parties on June 13th by e-mail of their intention to issue subpoena *duces tecums* to eighteen (18) retailers and pool service providers or

contractors in the States of California, Arizona, Florida, and Missouri. The subpoena consists of one document request that asks for financial information and profit and loss records for the 2005 thru 2012 time period. There will be no depositions in connection with these subpoenas unless absolutely necessary. Following any comments by the parties, these subpoenas will be served and negotiations will begin with the third parties.

B. Status of the Mediation

In accordance with the Court's instructions in Pretrial Order No. 17 (Dkt. No. 200), the parties have contacted mutually agreed upon mediator, Judge Layne Phillips. The parties have agreed to a mediation session on July 22, 2013, in Chicago, Illinois. Although DPPs were prepared to schedule a second mediation session on a date convenient with Judge Phillips in August, the defendants are disinclined to proceed with a second session at this time.

C. Motion for Leave to File Second Consolidated Amended Complaint

DPPs' motion for permission to file their Second Consolidated Amended Class Action Complaint is currently under consideration by the Court. To summarize, DPPs have demonstrated sufficient cause to warrant the opportunity to amend their existing Consolidated Amended Complaint. DPPs have been diligent in reviewing the roughly 1.7 million pages of documents that the defendants produced to the FTC, while also taking and defending the many depositions that began in March of this year. DPPs' proposed amended pleading cures deficiencies that the Court found in their Consolidated Amended Complaint, and permitting this amended pleading will not prejudice defendants, nor delay the current case schedule. On the other hand, absent amendment, DPPs could be prejudiced if leave to amend were denied.

D. Additional Issues to be Addressed at the June 20, 2013 Court Conference

i. Proposed Extension of the Remaining Deadlines Set Forth in Pretrial Order Nos. 16 and 17

As a result of the stay of third-party discovery and the 24-day extension of the deadline for the parties to complete their document productions, the DPPs propose an extension (detailed below) of the remaining deadlines in Pretrial Order No. 16 and Pretrial Order No. 17. DPPs propose a 60-day extension, except for the first three upcoming dates when shorter extensions are used and except where necessary for weekend or holiday end dates.

This proposed extension takes particular account of the fact that the stay associated with the FTC's protective order motion stopped all third-party discovery for a month. In consequence, whereas third-party productions would have begun in early May, now they will have to be rescheduled on a third-party by third-party basis. The delay in receiving the documents further means that both sides' corresponding review and ability to prepare for depositions will be delayed.

The defendants' proposed 30-day extension of the schedule is unduly short, and does not adequately take account of the difficulties inherent in restarting third-party discovery between now and the fall – the height of the “pool season” in many parts of the country. Delays in securing document productions and deposition dates for these non-parties will be unavoidable. Accordingly, DPPs' proposed 60-day extension is more realistic. The two sides have discussed the subject, most recently on May 22, 2013, and have not reached agreement.

More specifically, the DPPs' proposal is as follows:

- June 24, 2013 (from June 1, 2013): Parties must complete their rolling production of documents pursuant to outstanding quests (stipulated extension already approved by the Court).
- July 9, 2013 (from June 14, 2013): Parties must exchange privilege logs.

- The parties shall identify all deponents by September 15, 2013 (from August 1, 2013). No deponent may be added after September 15, 2013, absent agreement or a showing of good cause under Federal Rule of Civil Procedure 16(b)(4).
- March 3, 2014 (from December 31, 2013): Parties must complete all fact and class certification discovery.
- April 29, 2014 (from February 28, 2014): Parties shall simultaneously exchange their expert reports on all issues.
- May 30, 2014 (from March 31, 2014): Parties shall exchange reply expert reports.
- July 1, 2014 (from April 30, 2014): Parties must complete expert depositions.
- August 29, 2014 (from June 30, 2014): All summary judgment, class certification, and *Daubert* motions must be filed.
- October 29, 2014 (from August 30, 2014): Oppositions to all summary judgment, class certification, and *Daubert* motions must be filed.
- December 5, 2014 (from September 30, 2014): Replies to all summary judgment, class certification, and *Daubert* motions must be filed.
- To be determined by the Court (from October 28, 2014): Oral Argument on summary judgment, class certification, and *Daubert* motions.

ii. Proposed Stipulation Concerning IPPs' Questioning of the Named DPPs on Downstream Information Irrelevant to the Direct Case

As set forth in the plaintiffs' June 3, 2013 status report, counsel for IPPs have stated an intention to discover "downstream" information at the two remaining depositions of named Direct Purchaser Plaintiffs. In Pretrial Order No. 15, this Court ruled that such information is non-discoverable in the action brought by the DPPs against the defendants. However, the IPPs maintain that downstream information is relevant and discoverable as to the IPPs' own claims against defendants. IPPs and DPPs are amenable to entering into a stipulation that would allow the IPPs to proceed with their questioning but only in the indirect purchaser litigation. This would be accomplished by the use of a separate transcript with a caption that comports with the procedure contemplated by Pretrial Order No. 6, which specifies that "when a pleading is

intended to apply to fewer than all of the cases, this Court’s docket number for each individual case to which the document number relates shall appear immediately after the words ‘This Document Relates To.’” The DPPs and IPPs proposed a stipulation to this effect to the Defendants (Attachment B), but they declined to enter into such a stipulation.

There is no merit to defendants’ argument positing that this Court may admit, in DPPs’ case, “downstream” information that may be elicited in the IPPs’ case. As the Court recognized in Pretrial Order No. 15, the Supreme Court’s decisions in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), make activity below the direct purchaser level irrelevant as a matter of law in a federal antitrust case: “as the Supreme Court explained in *Illinois Brick* and *Hanover Shoe*, a direct purchaser may recover for an antitrust overcharge whether or not the party experienced a net loss or net gain (by passing on the overcharge to downstream parties).” PTO 15, at 18.

For *this* reason – because *Hanover Shoe* and *Illinois Brick* render downstream activity irrelevant as a matter of law – discovery of downstream information in pretrial proceedings in DPPs’ case is similarly precluded. *See, e.g.*, PTO 15, at 20 (“If the Supreme Court found these concerns sufficiently compelling to prevent a defendant from asserting a pass-on defense to the merits of a claim by a direct purchaser, then the Court’s reasons apply *a fortiori* to foreclosing this enormously complicated and burdensome discovery on one element of a multi-factor test for class certification.”). Plainly, the fact that downstream discovery may be elicited in the IPPs’ case cannot make admissible in the DPPs’ case information that the Supreme Court has held inadmissible by operation of law.

iii. Additional Depositions

Defendants have proposed, for the first time only hours before this report was due for filing: (1) a limit of 20 additional party witness depositions for each side, together with 40 additional non-party depositions (20 per side), and (2) a September 1, 2013 cut-off date by which the examination date for each newly-designated deponent would have to be scheduled. There has been no meet and confer process on either proposal, and, while it may be possible to come up with an approach acceptable to both sides, there simply has not been an adequate opportunity to explore these two eleventh-hour matters.

II. Defendants' Report on the Status of Discovery and Issues to be Addressed at the June 20, 2013 Court Conference

A. Fact Discovery Status Reports

i. Direct Purchaser Plaintiffs ("DPPs") Production of Documents

The DPPs have made a number of productions of hard copy documents. Their first production of ESI for any named plaintiff was on May 16, 2013, and they are continuing to produce ESI. Defendants are just beginning to review these documents, and they reserve their right to raise any issues with the DPPs production once they have had an adequate opportunity to review the documents.

ii. Indirect Purchaser Plaintiffs ("IPPs") Production of Documents

The IPPs have produced less than thirty documents in aggregate. The documents have been produced prior to the depositions of the three IPPs deposed to date. Counsel for IPPs canceled Lorraine O'Brien's deposition and indicated Ms. O'Brien cannot continue as a named representative and must be substituted. If such a substitution is permitted by the Court via amendment of the IPP complaint, then provisions will need to be made for the new

representative to produce documents and be identified for deposition potentially outside of the schedule currently contemplated by the Court.

iii. Defendants' Status Reports

a. Hayward

Hayward, in addition to producing over 326,000 pages of documents it previously produced to the FTC, has also made several rolling productions to Plaintiffs totaling over 446,000 pages. Document production and review by Hayward is ongoing pursuant to the Joint Stipulation Regarding the Extension of Document Production Deadlines, ECF No. 243, approved and entered by the Court's May 28, 2013 Order, ECF No. 251, which extended Defendants' discovery deadline to June 24, 2013. Hayward expects to complete its production by the June 24th deadline.

Hayward has produced a complete set of its transactional data for the time period January 1, 1998 through May 31, 2012, in accordance with Pretrial Order No. 15. Hayward has also responded to two extensive sets of questions from Plaintiffs regarding that transactional data.

b. Pentair

Since reaching agreement with DPPs on the search terms to be used in identifying potentially responsive documents, Pentair has produced over 580,000 pages of documents to DPPs, and will continue to produce responsive documents over the course of the week. (These 580,000 pages of documents are in addition to Pentair's FTC production, which consisted of over 152,000 documents. A copy of that FTC production was provided to DPPs during the late summer of 2012.) Two large repositories of electronic documents very recently became available for review and Pentair is working toward completing the processing and review of these documents in order to meet the June 24, 2013 deadline, although it may need a few days

extension depending on the volume of documents identified as responsive. Transactional data also will be produced to the extent that it exists.

c. Pool Corporation

Pool Corporation reached agreement in principle on search terms with plaintiffs in late March. Since that time, Pool Defendants have been regularly making productions of documents and expect to have completed their production by the June 24th deadline. As of June 14, 2013, Pool Defendants have produced over 99,000 documents and approximately 430,000 pages in addition to the FTC production made last summer.

Pool Corporation has produced all of the transactional data requested in the Fall of 2012 that was decided and agreed upon at the October 2012 discovery conference. Pool Defendants have responded to two extensive sets of questions regarding that transaction data. Pool Defendants received additional “questions” from DPP’s about its produced transaction data on June 3, 2013. Many of these “questions” are actually informal requests for additional transaction data. See Section II.B.i.e., *infra.*, for a further discussion of these issues.

d. Zodiac

Zodiac likewise reached agreement in principle with plaintiffs regarding search terms in late March and has since made multiple rolling productions of documents. As of June 17, Zodiac has produced nearly 190,000 pages of documents in addition to the FTC production that was provided to plaintiffs last summer. Zodiac’s document review and production is ongoing and Zodiac anticipates meeting the June 24, 2013 deadline, barring any unforeseen circumstances. Zodiac has also produced additional transactional data for the period up through May 31, 2012 and has responded to two rounds of follow-up questions regarding that data.

B. Submission Regarding Items to be Discussed at June 20, 2013 Status Conference

i. Defendants' Statement

a. Amendments of the Consolidated Amended Complaints

1. Indirect Purchaser Plaintiffs

The Indirect Purchaser Plaintiffs have not yet asked this Court for leave to amend their complaint again since the Court on May 24, 2013 dismissed some of the claims in the IPP Second Amended Complaint. As stated above, Counsel for the IPPs cancelled Ms. O'Brien's deposition and indicated they would be locating a substitute Florida class representative. Defendants do not object to an amendment by IPPs solely to substitute a named representative, but would like a deadline imposed for that amendment so that proper discovery can be concluded before expert reports and motions must be filed. Defendants would object to any substantive effort to amend the IPP Second Amended Complaint in light of the Court's Order and Reasons on the Motions to Dismiss on May 24, 2013.

2. Direct Purchaser Plaintiffs

The DPPs filed a proposed amended complaint on May 20, 2013. The Defendants filed a timely opposition to the amendment, and the DPPs filed a motion for leave for a reply, which this Court allowed. Defendants submit that the Motion to Amend fails to identify the requisite "good cause" for amendment at this late date and that DPPs proposed Second Amended Complaint fails to cure any deficiencies identified by the Court in ruling on the Motions to Dismiss.

b. Plaintiffs' Proposed Extension of the Schedule

During the stay of non-party discovery, the parties discussed potentially extending the schedule to accommodate the delay created by the stay. The stay ended up being quite brief, however, with the parties and the Court resolving the issues expeditiously. Defendants believe

that only a brief extension to the schedule is necessary in light of the short delay and, thus, they are now in favor of extending all deadlines beyond the production of documents (now June 24, 2013) by thirty-days (or to the next weekday past the thirtieth day, if the thirtieth day falls on a weekend).

c. Mediation

After several communications with Judge Phillips, the parties have agreed upon July 22, 2013 for a mediation session. Each party may provide a submission up to 15 pages, to be exchanged among the parties and sent to Judge Phillips by July 8, 2013. To reserve a second mediation session on his calendar, Judge Phillips required a substantial deposit, that would become non-refundable twenty-four hours after the July 22, 2013 session. Thus, Defendants declined to reserve a second date in advance of July 22, 2013. If the parties feel an extra day would be beneficial after the session on July 22nd, a second date can be scheduled with Judge Phillips.

d. Depositions

As the Court is aware, the FTC motion to intervene stayed non-party discovery, including depositions, until the Court issued its June 5, 2013 Order (Dkt. 269). The parties presently are working on re-scheduling many of those depositions for July and August, and the deadline for designating deponents is August 1, 2013. Defendants request that any newly-designated deponents be scheduled for deposition no earlier than September 15, 2013, which will allow the postponed non-party depositions (and any previously delayed party depositions) to move forward on a reasonable schedule in July and August.

During the “first wave” of depositions, while non-party discovery was stayed, plaintiffs cancelled several depositions of witnesses, stating that once they were able to review the documents produced, they concluded that those depositions were no longer necessary. In all

cases, notice of the cancellation was given with a few weeks (at most) notice prior to the agreed-upon deposition date. Defendants incurred costs preparing witnesses and arranging for travel to prepare for depositions that were later cancelled.

In the interests of efficiency of resources and to prevent the parties from incurring the costs of preparing witnesses and travel, the defendants request that the Court impose an overall limit of twenty additional party witnesses that each side may notice for depositions (thereby resulting in five times the number of depositions from the presumptive limit of ten depositions per side under Federal Rule of Civil Procedure 30) and forty additional non-party depositions, with twenty to be allocated to plaintiffs and twenty to defendants. Such limitations will incentivize parties to only notice those depositions that they believe they are likely to need and will keep the deposition calendar more manageable.

e. Plaintiffs' Additional Requests for Production

On May 8, 2013, DPPs served all defendants with a set of formal document requests. On June 5, 2013 and June 7, 2013 respectively, the Manufacturer Defendants and Pool Defendants served responses and objections to those requests as required under the Federal Rules of Civil Procedure. These formal document requests were not contemplated by the Court and are not timely pursuant to Pretrial Order No. 5, which had parties providing their "wish lists" of discovery topics last fall, prior to the discovery conference. In one case, one of the Requests (No. 1) concerning inventory levels is substantively identical to a request on DPPs "wish list" to which defendants objected to as burdensome and of marginal relevance. At the discovery conference on October 25, 2012, when this request was argued in open court, the DPPs withdrew it. Pool Defendants and DPPs had a meet and confer on June 13, 2013, where DPP's stated that they had "reconsidered" their position. The Manufacturer Defendants and the DPPs held a meet and confer session on June 17, 2013, during which no resolution was reached.

In a related vein, the DPPs have also posed some additional “questions” to the Pool Defendants about their transaction data on June 3, 2013. These follow-up questions are really just requests for additional transaction data. For example, one question asks, “Does PoolCorp maintain records of vendor rebates or discounts at the vendor level? If so, please produce this information.” There are a number of similar questions, all requesting additional transaction data beyond what any of the plaintiffs put on their “wish lists” and the cumulative transactional data produced, which is cumulatively hundreds of gigabytes. Contrary to DPPs assertions, these are not the same requests – the original requests asked for data at the individual sales level. Once informed that this information was not maintained in the form requested, DPPs began interposing requests for hard copy documents and for similar, but different data. It is unjust to make the request for data never-ending, particularly when the initial productions of data have been so extensive (hundreds of Gigabytes from Pool Corporation alone).

Many of the other requests in this set of Requests for Production are largely cumulative with discovery that DPPs are receiving from the agreed-upon custodians based upon their “wish lists.” Defendants have been subjected to extensive document discovery in this case and ask that these document requests (formal and informal) on parties and any future document requests be disallowed.

f. Plaintiffs’ Redaction of “Downstream” Information From Documents

In recent document productions for Oasis Pool Services and A Plus Pools, plaintiffs redacted materials from otherwise responsive documents on the basis that the information contained in them was “downstream” information and, therefore, not relevant consistent with the Court’s decision in PTO No. 15. Defendants object to this practice as it is improper to redact information from an otherwise responsive document absent a recognized evidentiary privilege.

Cases in this district and elsewhere have found the same conduct to be prohibited, and have ordered the producing party to produce the documents in un-redacted form. (See June 14, 2013 letter from M. Levitt to DPP's Counsel, Attachment C).

Defendants ask the Court to Order the DPPs to stop this practice and re-produce documents previously redacted due to "irrelevant" information.

g. Proposed Stipulation for IPP Discovery of "Downstream Information"

DPPs and IPPs attach a proposed stipulation to this Joint Report that attempts to prevent "downstream" information discovered by the IPPs from the DPPs to "be discoverable in the DPP litigation," setting up a farcical construct whereby there would be a separate transcript and caption at depositions for questions that are deemed to concern "downstream" information (by the DPPs, who are, of course, self-interested).

DPPs and IPPs proposed stipulation conflates discoverability with admissibility of particular evidence. Regardless of when and where information is discovered, putting it on a separate transcript does nothing to change the facts elicited in deposition testimony; rather, the artificial construct is an attempt by DPPs to prevent any facts discovered by the IPPs from coming into evidence to the detriment of the DPPs claims against defendants. Setting up such a construct is unnecessary and decisions on admissibility can be made at such time any party seeks to use a particular fact obtained during discovery as evidence.

Dated: June 17, 2013

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Attachment A

Depositions of Defendant Witnesses Taken by DPPs			
<u>Date</u>	<u>Deponent Name</u>	<u>Company Affiliation</u>	<u>Deposition Location</u>
March 19, 2013	Jon Damaska	Zodiac	Chicago, IL
March 20, 2013	Scott Bushey	Zodiac	Chicago, IL
April 3, 2013	Pentair 30(b)(6) on Code of Conduct	Pentair	Raleigh, NC
April 4, 2013	Pentair 30(b)(6) on Corporate Structure & HR	Pentair	Raleigh, NC
April 16, 2013	Enrique Gomez	Zodiac	Miami, FL
April 17, 2013	David Albee	Hayward	Newark, NJ
April 18, 2013	Doug Bragg	Hayward	Newark, NJ
April 18, 2013	Pentair 30(b)(6) on IT	Pentair	Raleigh, NC
April 19, 2013	Stephen Markowitz	Zodiac	Philadelphia, PA
April 23, 2013	Craig Goodson	Zodiac	Atlanta, GA
May 2, 2013	Pool Corp. 30(b)(6) on Pricing & Acquisitions	PoolCorp	New Orleans, LA
May 3, 2013	Melanie Housey	PoolCorp	New Orleans, LA
May 7, 2013	Robert Nichols	Hayward	Newark, NJ
May 8, 2013	Bill Cook	PoolCorp	New Orleans, LA
May 8, 2013	Paul Walter	Pentair	Las Vegas, NV
May 9, 2013	Darren Coleman	Pentair	Las Vegas, NV
May 10, 2013	Fred Manno	Hayward	Newark, NJ
May 15, 2013	John Oster	Pentair	Indianapolis, IN
May 15, 2013	Paul Snopek	Pentair	Indianapolis, IN
May 16, 2013	Scott Cummings	Pentair	Indianapolis, IN
May 22, 2013	John Hulme	PoolCorp	Boston, MA
May 23, 2013	Dan Porter	Pentair	Houston, TX
May 23, 2013	Jon Cannon	Pentair	Houston, TX
May 29, 2013	Greg Kahle	Pentair	Atlanta, GA
May 30, 2013	Mike Echols	Pentair	Atlanta, GA
June 4, 2013	William Witmarsh	Hayward	Newark, NJ

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION	*	MDL NO. 2328
	*	
	*	SECTION R/2
	*	
THIS DOCUMENT RELATES TO:	*	JUDGE VANCE
	*	MAG. JUDGE
	*	WILKINSON
All Actions	*	

PRETRIAL ORDER NO. _____

WHEREAS, Pretrial Order No. 1 consolidates all cases pending before the Court thereby making discovery taken in the consolidated cases applicable to all cases and

WHEREAS, Pretrial No. 1 establishes in ¶6 a Master Docket File which is the above caption and provides that “when a pleading is intended to apply to fewer than all of the cases, this Court’s docket number for each individual case to which the document number relates shall appear immediately after the words ‘This Document Relates To’”.

WHEREAS, the Parties are commencing depositions and

WHEREAS, the Indirect Purchaser Plaintiffs may ask questions, which may be relevant to the Indirect Purchaser cases but not relevant to the Direct Purchaser Plaintiffs’ cases, and

WHEREAS, the Indirect Purchaser Plaintiffs may seek to otherwise obtain discovery.

NOW THEREFORE:

1. During a deposition when the Indirect Purchaser Plaintiffs ask any questions, the transcript of the questioning shall end and a new transcript shall be begin with the caption

**IN RE: POOL PRODUCTS DISTRIBUTION
MARKET ANTITRUST LITIGATION**

THIS DOCUMENT RELATES ONLY TO:

**Kistler, Et al. v. Pool Corporation, Et al,
Case No. 2:12-md-01284**

* **MDL NO. 2328**
*
* **SECTION R/2**
*
* **JUDGE VANCE**
* **MAG. JUDGE**
* **WILKINSON**
*

2. Any testimony adduced in response to questions in the Indirect Purchaser cases shall be deemed only taken in that case.

3. Any other discovery taken by the Indirect Purchaser Plaintiffs or otherwise taken in the Indirect Purchaser case shall be issued with the caption set forth in paragraph 1 and shall be deemed to be taken only in the Indirect Purchaser case.

New Orleans, Louisiana this ____day of April, 2013.

Sarah S. Vance
United States District Judge



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June 14, 2013

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VIA E-MAIL

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Re: In re: Pool Products Distribution Market Litigation – Document Production Issues

Dear Counsel:

On behalf of all defendants, we are writing to you in your capacity as liaison counsel for direct and indirect plaintiffs about certain document production issues that have arisen in recent weeks.

Specifically, we are referring to the productions that were made, respectively, on behalf of named plaintiffs Oasis Pool Services, Inc. on May 16, 2013 and A Plus Pools Corp. on May 31, 2013. In the transmittal letters accompanying each production, we were informed that documents had been redacted on the basis that certain information falls “outside the scope of the material granted by PTO 15.” (*See* letters of May 16, 2013 and May 31, 2013). We believe that such redactions, made on the grounds of relevance, are improper and inconsistent with numerous decisions on this issue made by courts throughout the country.

By way of example only, we refer you to *SCB Diversified Municipal Portfolio v. Crews & Assoc.*, No: 09-7351, 2012 U.S. Dist. LEXIS 4577, at * 13 (E.D. La. Jan. 12, 2012) (“party may not redact information from a document solely based on the party’s view that the information is irrelevant.”). *See also David v. Signal International, LLC*, No. 08-1220, 2010 U.S. Dist. LEXIS 78171, at * 20 (E.D. La. July 6, 2010) (permitting redactions only on the basis of personally identifiable information and ordering the parties to negotiate a protective order that would protect business confidential information such that redactions are not necessary).

The issue of redactions made on relevance grounds was examined in depth in the recent case of *Burris v. Versa Products, Inc.*, No. 07-3938, 2013 U.S. Dist. LEXIS 21851 (D. Minn. Feb. 19, 2013). There, the court explained that redacting for nonresponsiveness or irrelevance finds no support in the Federal Rules, which limit redactions to portions of documents protected by the attorney-client privilege or work-product immunity. *Id.* at *9. Moreover, “[p]arties making such redactions unilaterally decide that information within a discoverable document need not be

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FOLEY & LARDNER LLP

June 14, 2013

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disclosed, thereby depriving their opponents of the opportunity to see information in its full context . . .” *Id.* Allowing such a practice “would improperly incentivize parties to hide as much as they dare,” a result that is “at odds with the liberal discovery policies, the adversary process, and the Court’s obligations [under Rule 1].” *Id.* Numerous other courts are in agreement with this analysis. See *Melchior v. Hilite Int’l, Inc.*, No. 13-50177, 2013 U.S. Dist. LEXIS 71393, at * 6 (E.D. Mich. May 21, 2013) (unilateral redactions on relevancy grounds improper); *Bartholomew v. Avalon Capital Group, Inc.*, 278 F.R.D. 441, 451-52 (D. Minn. 2011) (redaction for “irrelevant” information improper; courts view documents as relevant or irrelevant as a whole and if one portion is relevant, then the entire document is relevant); *Arcelormittal Cleveland Inc. v. Jewel Coke Co.*, No. 1:10-CV-00362, 2010 U.S. Dist. LEXIS 133263, at * 8-9 (N.D. Ohio Dec. 16, 2010) (Rule 34 refers to the production of “documents” and not merely paragraphs or sentences within documents; defendant may not redact solely on the grounds that it thinks the non-disclosed materials are not relevant or responsive where the information appears in documents that otherwise contain relevant or responsive information.); *David v. Alphin*, No. 3:07cv11, 2010 U.S. Dist. LEXIS 144275, at * 21-24 (W.D.N.C. Mar. 30, 2010) (ordering that documents redacted on relevance grounds be reproduced in unredacted form).

In light of these decisions, we request that you promptly reproduce in unredacted form the documents that you have redacted (other than those portions redacted to protect personally identifiable information).

We also wish to point out that we wrote you last March about a problem with documents that were produced on behalf of named plaintiff SPS Services, Ltd. (“SPS”). As we explained, we learned during the deposition of SPS’s representative that copies of emails were produced in hard-copy format rather than as electronic images as required by PTO No. 7. We asked that you produce those documents in the correct format; however, we have received neither an acknowledgment of our letter nor replacement images. We would appreciate receiving the replacement images forthwith or an explanation as to why you will not comply with this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Melinda F. Levitt".
Melinda F. Levitt

cc: Wayne J. Lee, Esq.
Samantha P. Griffin, Esq.
Richard Hernandez, Esq.
Brent J. Justus, Esq.
Howard Feller, Esq.

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**IN RE: POOL PRODUCTS DISTRIBUTION
MARKET ANTITRUST LITIGATION**

**THIS DOCUMENT RELATES TO: ALL
ACTIONS**

* **MDL NO. 2328**
*
* **SECTION R/2**
*
*
* **Judge Vance**
* **Mag. Judge Wilkinson**
*
*

CERTIFICATE OF SERVICE

I hereby certify that the Joint Report Regarding Issues to Be Discussed at the June 20, 2013 Status Conference [Rec. Doc. 278] has been served on Direct Purchaser Plaintiffs' Co-Liaison Counsel, Russ Herman and Camilo Salas, III, Indirect Purchaser Plaintiffs' Liaison Counsel, Thomas H. Brill, Defendants' Liaison Counsel, William Gaudet, and Manufacturer Defendants' Liaison Counsel, Wayne Lee, by e-mail and upon all parties by electronically uploading the same to LexisNexis File & Serve in accordance with Pretrial Order No. 8, and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF System, which will send a notice of electronic filing in accordance with the procedures established in MDL 2328, on this 17th day of June, 2013.

/s/ Leonard A. Davis

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