UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: :

M.I. WINDOWS AND DOORS, INC. :
PRODUCTS LIABILITY LITIGATION : 2:12 MN 1

Motion Hearing held on Wednesday, January 6, 2016, commencing at 9:12 a.m., before the Hon. David C. Norton, in Courtroom II, United States Courthouse, 81 Meeting St., Charleston, South Carolina, 29401.

APPEARANCES:

CASPER F. MARCINAK, III, ESQ., P.O. Box 87, Greenville, SC, appeared for Abella Owners.

J. GEOFFREY OSBORN, JR., ESQ., 401 N. Main St., Greenville, SC, appeared for Mansion Supply.

RICHARD A. FARRIER, JR., ESQ., 134 Meeting St., Charleston, SC, appeared for MI Windows.

REPORTED BY DEBRA LEE POTOCKI, RMR, RDR, CRR
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THE COURT: Mr. Farrier, who's first?

MR. FARRIER: Your Honor, we originally had four motions to enforce that we filed; we're down to one and a half.

THE COURT: Good.

MR. FARRIER: Docket number 306 has been resolved, docket 320 against Centex has been resolved, and docket number 307, I filed a motion to enforce judgment against both Abella and the Signature defendants. The Abella motion is still alive, and we're ready to argue that in just a moment. The Signature defendants' portion of that has been resolved. We also have docket number 336, which is a motion to enforce judgment against Mansion Supply.

THE COURT: So which one do you want to go first on?

MR. FARRIER: Probably Abella.

THE COURT: Okay.

MR. FARRIER: Your Honor, this involves a lawsuit that has been pending in California since around 2012. It is a case that falls directly within the settlement class. Plaintiffs are within the settlement class. What we're seeking to do is enjoin that action altogether. It's a suit in which the plaintiffs are seeking to bring a products liability action entirely consistent with the class action we just settled.

The Court's order of July 22nd, 2015, which is docket

entry number 292, clearly is going to dictate the result of our motion. The Court approved the settlement, dismissed the release claims. The plaintiffs in this action are within the settlement class, the claims were released, there was no opt out.

As I read the defense to this action, it is that the respondent Abella is seeking to really destroy the entire final order that the Court entered in this matter. And to attack the due process of the notice that was provided to the plaintiffs. The claim is that the lawyer for the Abella plaintiffs was not provided an additional notice outside of that which the Court approved.

We had separate due fairness hearing on the notice, and I'm going to pass up a couple of documents.

Your Honor, just to explain what these are, the parties agreed to and the Court approved, under due process grounds, the manner in which settlement was going to be noticed in this action.

And the first document is a portion of the list of addresses and names of class participants that was provided to Epic. Epic provided the class notice.

And the second is a confirmation of notice having been sent. On the left you see tracking numbers. Those evidence the mailings to all of the plaintiffs in the Abella class action.

So to repeat, all of the Abella plaintiffs have received the same notice every other class member has received, the notice has been deemed effective and the case has been settled. And the case should not be opened up -- this is a real reason why we have class action settlement -- so that we were not exposed to additional litigation over the same matters, by parties who have not opted out of the claims.

Thank you, Your Honor.

THE COURT: Yes, sir?

MR. MARCINAK: Your Honor, good morning. May it please the Court, Fred Marcinak from Smith, Moore, Leatherwood in Greenville for Abella Owners Association.

Your Honor, we disagree with two characterizations that Mr. Farrier made. He claims that our position would destroy the final order and is an attack on due process and the sufficiency of the notice. Nowhere are we claiming that the notice that was sent is insufficient. We're not making a due process argument, we're not claiming that Abella did not receive notice, we're not claiming the notice was not sufficient.

Our arguments, instead, address the power of the Court to order the injunction under the Anti-Injunction Act, and whether MI Windows is equitably estopped from enjoining Abella from proceeding with its action.

Those issues are adequately briefed, and I'll be happy to

answer any questions. We think that the cases that were cited by MI Windows on those issues are distinguishable.

I want to focus on the excusable neglect argument. Because the other point that Mr. Farrier made was that if Abella is not enjoined from proceeding, it would destroy the final order that this Court entered in the class action. And, Your Honor, that's directly at odds with the result in the Pioneer Services versus Brunswick Associates case decided by the U.S. Supreme Court, and by the In Re Vitamins Antitrust Case decided by the Circuit Court for the District of Columbia.

In both of those cases the Court allowed a party that's a part of the settlement class to file a late opt out under the provisions of Rule 60(b)(1), or of Rule 6, for excusable neglect.

And that's really Abella's primary argument here is that this Court has broad discretion. And both the Supreme Court and the D.C. Circuit describe the District Court as having broad discretion in equity to allow a late opt out to be filed.

Neither of those courts said that this would destroy the final settlement that was present in In Re Vitamins, was a class action case, in the In Re Vitamins case.

Pioneer was a bankruptcy case where you have similar concerns about all the claims being filed. Neither of those

courts believed that it would destroy what was at work in the underlying litigation to allow a late opt out based on excusable neglect.

So there's no question that under those cases, under Rule 6, under Rule 60, this Court has broad equitable discretion to allow a late opt out for excusable neglect.

The facts that constitute excusable neglect here are at least as strong as they were in the Pioneer case, the U.S. Supreme Court, and the Vitamins Antitrust Case, the D.C. Circuit. Both of those cases involved attorney inattention, attorney neglect. Even as the Supreme Court said in Pioneer, attorney negligence. The Supreme Court said the Court has discretion even where there's been negligence under Rule 60(b)(1) to allow a late opt out, or a late filing in that case, based on excusable neglect.

MI Windows argues that to receive relief under Rule 6 or under Rule 60(b)(1), that Abella has to show extraordinary circumstances. But that's not what the Supreme Court said in the Pioneer case. The Supreme Court said the extraordinary circumstances applies to Rule 60(b)(6), which is the catch all provision. But under Rule 60(b)(1), the Court said, "Excusable neglect is understood to encompass situations in which the failure to comply with the filing deadline is attributable to negligence."

So in this case, even if Abella's California attorney was

negligent, it still comes within Rule 60(b)(1) and this Court can still allow an opt out.

Now, in both of those cases the courts articulated factors that are to be considered when considering whether to exercise the Court's discretion. And those factors -- those factors are the prejudice to the other party, the link to the delay, and efficiency concerns, whether the cause was beyond reasonable control of the party in good faith. And we think, as we've said in the briefs in this case, Abella meets all of those factors.

Your Honor, the parties have litigated the California litigation for over two years now. MI Windows fully participated in that litigation, participated in discovery, participated in settlement conferences, fully litigated that, participated in site inspections for two years. There's no prejudice if that litigation is allowed to continue.

There's no showing that Abella acted in bad faith. I don't think that's in dispute.

The length of delay or efficiency. Abella has opposed this motion as soon as it was brought. Abella responded promptly in seeking to avoid being foreclosed from proceeding with its action.

So we think there's no prejudice. If Abella had filed its opt out notice when it was required to do so, the parties would be right where they are now, they would be proceeding.

This litigation, this class action was never mentioned in the course of two years of litigation. And we're not arguing that as a strict legal matter that MI Windows' attorney in California had to mention this action as a strict legal matter, to comply with the notice requirement. But it's certainly a factor to be considered in equity, that in two years of litigation MI Windows' attorney never once mentioned this action to Abella's attorney, even when he knew that a class settlement was proposed. He never disclosed it in mandatory filings with the California court, never disclosed related litigation, which he was required to do under the rules. So there was certainly some reliance by Abella on those representations by MI Windows' attorneys.

Your Honor, when you factor all that in, in equity, all of these plaintiffs should not be barred from pursuing their action that they've litigated for two years, based on the excusable neglect of the attorney, and so we'd ask that this motion be denied.

THE COURT: You agree that Abella plaintiffs are members of the homeowners settlement class as defined in the settlement agreement, right?

MR. MARCINAK: Yes, Your Honor.

THE COURT: And you agree that the release claims are defined in the settlement agreement, and these would be the release claims, is that right?

MR. MARCINAK: Yes, Your Honor.

THE COURT: And you agree that actual notice was given to each and every one of Abella's homeowners, and to Mr. Williams, Abella's plaintiffs' lawyer in the California action, right?

MR. MARCINAK: I don't know about the individual homeowners. I know there's -- Mr. Farrier has given a sheet showing that those were mailed, I believe. I'm not sure terms of receipt are actual notice.

But I would agree with you and we've made clear that Mr. Williams, the attorney, did receive the notice.

THE COURT: So how would he get the notice, if he didn't get the notice from -- I guess he got -- did he get --

How did he get notice, Mr. Farrier, do you know?

MR. FARRIER: I believe he received it from opposing counsel.

THE COURT: Okay. So the MI California lawyer defending this lawsuit sent Mr. Williams a copy of the notice?

MR. FARRIER: That's correct.

THE COURT: And these that you gave us earlier, each one of the homeowners, it's your understanding, in the Abella complex, I guess I'll call it, also got written notice -- a copy of the notice?

MR. FARRIER: Your Honor, the only caveat that I would put to that is we proposed and negotiated, like we did

everything else, a notice plan. It is possible that a homeowner had died, homeowner had moved. But the process that was approved by the Court was implemented, and every record owner in this complex was sent the same notice.

THE COURT: So I mean some of them may not have -- notice was attempted, I mean, they were sent the notice; whether they moved or whether they passed on or -- but I can't imagine everybody on this list had moved and passed away, unless there's some kind of plague out there I hadn't heard of.

MR. FARRIER: We have no evidence that each and every person did not receive that.

THE COURT: And tell me about -- and Mr. Marcinak talked about the prejudice. What prejudice is it to MI Windows to let them, in other words, have a late opt out under the Pioneer case?

MR. FARRIER: Your Honor, the whole purpose of the mechanism around class actions is to bring finality. And one thing I'd like to point out is this is not a default case. This is not a situation where rights have been terminated, in which case I think the Court would -- maybe should have more empathy about what happens to a plaintiff when a lawyer fails to read his mail. In this case all the Abella plaintiffs got the same relief that was afforded to every other class member, and could have taken advantage of it. I don't know whether

they have or not, I don't know whether any of these folks have sent in claims forms. But they definitely had the ability to.

So the prejudice to us is when we're trying to bring closure to a case, the opt out period has closed, we have spent an enormous amount of money coming to this point. And, Your Honor, I probably don't need to remind the Court, I tried to count up the days. I'm not sure how many days we spend in mediation, but we probably spent 35 full days in mediation. And I remember being in mediation at 5:15 in front of Judge Hendricks on Christmas Eve. So the terms that went into this were heavily thought out, and deserve to be upheld.

Your Honor, and just -- specifically what we're asking for is an injunction against Abella as to the claims against MIWD, but also the claims of Abella against the Signature defendants for any products liability related claims. They're also being sued for installation claims; we're not seeking to disturb those, but this settlement covers those.

And the last thing I'd like to point out, Your Honor, is there's an affidavit of our local counsel, attached to which Exhibits J and K are written notice to Abella of the settlement of the application of this order, and a demand that the claims be dismissed. And a mention of the fact that if they're not dismissed within 30 days, that we're entitled to our attorneys' fees and costs, and we're also seeking that here.

THE COURT: Since we assume that each one of the homeowners got notice individually, how do I know that the homeowners have not participated in the settlement, have not opted out, and, therefore, we'd have what might be a double recovery, if I were to let a late opt out. I mean, I can't imagine that everybody on this list did not return the form and make a claim under the settlement.

MR. MARCINAK: Your Honor, I think, in equity, we can craft an injunction, Your Honor could craft any relief to allow for that. But our informal review of the owners indicates that there were a large number who will claim they have not received notice, there are some that will claim that they have received notice. I think we probably have some more work to do to filter through what they have done with that, if any have filed claims. I think that can all be encompassed within the Court's order. Equity allows relief to be shaped to encompass those things.

So that's the best answer I can give to the Court is we certainly would not want double recovery. I think by their continued participation in the California action, these plaintiffs have shown that it's not their intent to file a claim, it's their intent to proceed outside of the class settlement. And I think that should be the assumption at this point, unless we know that those claims have been filed.

Your Honor, if I could just make one brief point.

THE COURT: Sure.

MR. MARCINAK: The facts in this case of actual notice being received by the class member, by the attorney, these are the same facts that were present in the Vitamin Antitrust Case. Similar facts that was in bankruptcy in the Pioneer case. So I don't think that categorically prohibits the exercise of equity by the Court.

The cases that were cited by MI Windows where excusable neglect was denied, or refused as a ground for relief, primarily the Dowell case, those were cases where the -- and also the Silvercreek case as well -- those were cases where the class members had actively participated in the class litigation. So unlike the Abella owners, they were actively involved in the litigation, which of course is not the case here. So I think that is a distinction from those cases.

THE COURT: Of course, in the Vitamins Antitrust Case, the order was signed, the person who made the motion found that he was -- he or she was not included in the settlement, and then two days later filed a motion to get out, to opt -- have a late opt out. In this case we've got what, four months?

MR. MARCINAK: Yes, Your Honor. And, you know, I think that the briefs indicate that Abella found out about the finalization of the class settlement in August. This motion was filed in October. So it was a little closer in time than

where we are now, but that's correct.

THE COURT: I mean, it wasn't closer in time when they discovered the problem, and they certainly did act with a lot more haste than we did in this case, right?

MR. MARCINAK: Yes, Your Honor. And I'm not sure about the back and forth, aside from the actual motions practice in this court, so I'm not sure what back and forth there was between counsel earlier, after the August deadline. There obviously was a demand letter sent that's been referenced.

As far as the attorneys' fees, I don't see that that was a part of the motion for relief that was filed by MI Windows that Mr. Farrier mentioned. He asked for those against Signature Homes; I don't think he requested those against Abella.

THE COURT: All right.

Anything else, Mr. Farrier, Mr. Marcinak?

MR. MARCINAK: No, Your Honor.

MR. FARRIER: No, Your Honor.

THE COURT: Okay. Thank you. I will switch coats. We'll go from California to New Jersey, right?

MR. FARRIER: Yes, Your Honor.

THE COURT: Okay.

MR. FARRIER: This is a much narrower issue; this issue has to do with a discovery request in a lawsuit that's

pending in New Jersey.

As part of the discovery, MI was served with a request asking for documents that were exchanged during the mediation process. And our motion relates solely to the protection of documents that were intended to be privileged and confidential through the mediation process. The documents were not exchanged otherwise. I would refer to the affidavit of my partner, Pat Perrone, which is docket number 306-2, an attachment.

And, Your Honor, there were a number of reasons why these documents should not be produced. They were only produced through mediation. During the mediation process, the parties exchanged a number of documents that were intended to never be seen by any party outside of the mediation process. The mediation rules, the local rule, your standing order on mediation and the final order, all would protect those documents from disclosure, and they should not be forced to be produced.

THE COURT: Yes, sir.

MR. OSBORN: Good morning, Geoff Osborne on behalf of Mansion Supply.

Your Honor, as we briefed, simply, the movant is seeking to apply privilege that simply does not exist. These documents that exchanged, I learned on Monday, included photographs taken by the plaintiffs' experts, a number of

Excel spread sheets that were generated by the plaintiffs' experts, and communications from plaintiffs' counsel themselves.

The movant has cited several rules asserting this privilege, and they've also cited Your Honor's final order.

Your Honor, if you look at section nine of your final order, that it includes the terms of detailing who is bound by this order. And it states specifically the terms of the settlement and this final order and judgment shall forever -- shall be forever binding on named plaintiffs and other class members. Mansion Supply opted out. There's no dispute as to that; that's admitted within MI's briefs. And so Mansion Supply does not find itself either as a named plaintiff or as a class member; and, therefore, is not bound by the terms of this order.

And even further than that, the order itself does not prohibit the disclosure of this evidence. In their moving papers, MI cites the nonadmission portion of the order. And I'll quote here. "Neither the settlement agreement nor any negotiations, actions or proceedings related to them shall be offered or received in evidence in any action or proceeding against MI Windows."

So it's not a prohibition or limitation on the exchange of discovery; rather, it's a limitation on the admission of certain evidence in a proceeding against MI Windows. So the

order itself, under its express terms, doesn't bar this exchange of discovery.

MI Windows also cites Rule 408. However, Rule 408 is not a privilege rule, and it does not protect against disclosure during discovery. Instead, it merely limits the admission of evidence of settlement negotiation discussions under certain circumstances. I cited two cases to you from the Federal Circuit and also from the District Court in Washington D.C. that go to illustrate this point further. MI Windows cited a number of cases for their proposition that Rule 408 may limit discovery. But every one of those cases deals with the admission of evidence, not the exchange of discovery here.

Additionally, this alleged limitation on materials exchanged during mediation doesn't even extend to materials that are otherwise discoverable. As you know, the 2006 amendment to Rule 408 actually removed a specific provision that dealt with the language of being otherwise -- of information being admissible because it was otherwise discoverable. And the annotations and notes from the advisory committee state that the omission of that going forward after that was based on that language being just simply superfluous.

So, you know, so substantively neither the final order nor Rule 408 limit the exchange, in discovery, of the information that's being sought by Mansion Supply. The only limitations are on the admission of that into evidence at a later time.

From a more procedural standpoint, Your Honor, the Anti-Injunction Act certainly would limit the Court's ability to grant the relief that's been requested here. The two exceptions that have been cited by MI Windows do not apply in this case. This injunction is not necessary in this Court's jurisdiction. This is a case filed in New Jersey, this is not a matter that's directly before this Court, and the information that would be exchanged here would not be in violation of the final orders I've already illustrated to Your Honor, and the relitigation exception does not apply, again, because the final order does not restrict the production or exchange of documents in discovery in any way.

Finally, Your Honor, I argued another procedural aspect in my papers, which was this really appears to be an end around kind of maneuver of -- and kind of a type of relief sought in a 26(c)(1) motion, and they certainly could have sought this in the appropriate District Court up in New Jersey that way. But they are -- even if they filed under that it would be defective, by failing to file it in the court where the action is pending, failing to attach and file the required certification of good faith. And additionally, by failing to show good cause, and provide the specificity as to each document that they're seeking to protect from disclosure.

So, Your Honor, based on what I've said and what we briefed in our papers, it's our position that the information

that Mansion seeks, which was exchanged -- produced by either the party opponent or their expert, are freely discoverable, and should not be subject to an injunction from this Court.

THE COURT: Let me ask, discovery is for the discovery of admissible evidence, right?

MR. OSBORN: Not necessarily, Your Honor. This case is pending in New Jersey. And under New Jersey Rule 410-2, which in part -- which outlines the scope of discovery, states it is not grounds for objection that the information sought will be inadmissible at the trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, nor is it grounds for objection that the examining party has knowledge of the matters as to which discovery is sought.

THE COURT: But you agree that under my order, anything that you've asked for is not admissible in a court, in either Federal Court or State Court in New Jersey, right?

MR. OSBORN: I would argue that, unless it was otherwise discoverable, yes, sir.

THE COURT: Okay. But discoverable or admissible, you agree that whatever it is, like you say, that is exchanged during settlement, is not admissible in any court based on the injunction.

MR. OSBORN: I would agree that the final order states that, Your Honor.

THE COURT: All right.

Mr. Farrier, tell me about the difference between the order, the final order, you know, really goes to admissible rather than discoverability, so what about that?

MR. FARRIER: Well, I think it goes beyond that, and I think that both the mediation rules, Rule 16.08 of the local rules, and your standing order all provide the parties with an expectation of privacy and privilege as to documents which are exchanged in a mediation.

And I guess what I should have done is talk about the practicalities of this. You go into a mediation, and the reason that there are very strong rules about the disclosure of information that is used in the mediation, is that the parties, if they're going to get anywhere, have to be confident that if they make concessions during a mediation, or if they try to show the mediator or the other side their strongest points out of a pile of information, that that process is not going to get in the hands of another party.

I know why the plaintiffs in the New Jersey action would like the mediation documents; because likely those are the most important documents that the parties felt went to the heart of their case. And, therefore, they can piggy-back off of the analysis and the work of another lawyer in trying to persuade the mediator and the opposition of their points in the mediation. That's the precise reason why the parties

should have confidence that these documents, these information -- In fact, under the theory being espoused by Mansion Supply, there's no reason why Judge Hendricks and the other mediators' notes could not be discovered. There's no reason why the parties couldn't be deposed on their statements that were exchanged in mediation. There's no reason why documents that were prepared by the mediator and given to both sides, could not be discovered under this same theory. All of these documents were exchanged with an expectation that they would never see the light of day. The orders, the local rule, I think your final order, all support the idea that these documents should not be discovered.

It is possible that the plaintiffs could obtain these documents through other processes of discovery from other parties. But we reach a real tipping point when you're allowed to force someone who participates in a mediation, that received documents solely through that mediation, not through any other discovery -- and I want to make that point emphatically. Those are not documents that were exchanged in mediation that we otherwise had through the discovery process. The only reason that we have these documents today are that they were exchanged in mediation. They should be protected, they're privileged and they should not be disclosed.

MR. OSBORN: Your Honor, if I may briefly.

THE COURT: Sure.

MR. OSBORN: Specifically as to the photographs prepared -- that were taken by experts, Excel spread sheets that were generated by experts, that is pure evidence.

THE COURT: But he can get that from somebody, just depose the expert, right?

MR. OSBORN: Well, although he would object to it under this, because if that information was only submitted during this mediation, and wasn't submitted outside of that, then he would object saying, I'm sorry, that information was submitted within the context of mediation; therefore, under this extended privilege rule, this broad privilege rule, you don't have access to even that, if you take his argument that far. But this is --

MR. FARRIER: That's not our position.

THE COURT: Not your position?

MR. FARRIER: No.

MR. OSBORN: Well, you know, it's extending the Rule 408 past what it's designed for.

THE COURT: We're not talking about Rule 408, we're talking about the local rules and the local order with regard to mediation, which is -- I'm sure you're familiar with.

MR. OSBORN: Yes, Your Honor. And the intent of those rules is really meant to protect the negotiations and the communications that take place during the mediation that point towards a settlement. Those rules are not designed to

really limit the discovery of evidence that was otherwise generated for the purpose of the litigation itself, such as photographs of projects taken by experts and Excel spread sheets showing damages and whatever other information is contained therein, and that the rule's not designed so that just because that set of evidence was presented within the context of mediation, that it's barred from discovery as a whole. That it's no longer discoverable. That's not the intent or purpose of either of those rules. Because again, they would be otherwise discoverable in the course of the litigation itself.

THE COURT: Of course, as a practical matter, once the thing is mediated and once the mediation is over and the case is settled, there's no -- and nobody else that wants to go after them, because the case is over, right?

MR. OSBORN: It is. And to give Your Honor a little bit of context, similar to the motion that went before this, as I cited in the original MI opposition to the original brief that was filed to enforce the final order against Centex, New Jersey has a rule that requires disclosures of ongoing litigation. MI Window failed to disclose it for at least a year, maybe two years. And Mansion's counsel did not even find out about the class action until he was preparing to depose an MI witness, and doing the Google searches that we all do these days, that's where he discovered it.

This happened subsequent to Mansion Supply actually dismissing, without prejudice, some product liability claims in New Jersey. And it was after this realization that, oh, this whole time with this litigation has been going on, there's this other class action that hasn't been -- we haven't been informed of. And it was at that point in time that they then submitted the interrogatories and request for production that we're here before today.

And so it wasn't given opportunity to engage in this process as the discovery was being conducted here, it wasn't put on notice of it. So -- and, you know, these -- successfully opted out. So it still has all of its claims viable against MI Windows, and it needs to -- it's entitled to obtain the discovery in order to prosecute its claims.

Thank you.

THE COURT: Mr. Farrier?

MR. FARRIER: Your Honor, I just want to make clear the point. I'm sorry for interrupting opposing counsel. But what we're seeking to protect is really a bright line set of documents, and that is the documents that were exchanged by the parties solely through mediation, not otherwise produced in discovery, not otherwise exchanged, not otherwise available to us. The only way we got any of these documents was that they were provided to us during the confidential process of mediation.

And to repeat what I said just a moment ago, to the extent that these documents could be discovered from experts, from opposing counsel, from third parties, consultants, we would not raise that same objection. This Court clearly has the jurisdiction to enforce the confidential and privileged nature of the mediation process, and we ask that it do so.

THE COURT: See if I understand. You talk about pictures and spread sheets which were produced at the mediation. Were some of those pictures also produced outside the mediation, or were they prepared specifically -- were they dual-purpose or single-purpose pictures?

MR. FARRIER: I don't know why they were prepared, but I can say they were not produced outside of mediation.

THE COURT: So what we're looking at is a set of documents that was exchanged and given to the mediators, the various mediators, for over this 35 days, solely there, and doesn't exist anywhere else, it wasn't exchanged prior to that? As far as you know. Because there's a lot of stuff produced, I understand.

MR. FARRIER: Right. It was not exchanged. These were documents that were solely exchanged through the mediation process.

THE COURT: So when you say exchanged, does that mean they were given to the other side, or both sides gave them to the mediator who did not share them with either side?

MR. FARRIER: Both. I mean, certain documents we gave to the mediator, and I couldn't discern now, particularly with the different mediators we used, which fall in which categories. But they were documents that were solely exchanged in the mediation. And these are documents, I can say this -- these are documents in our possession. So it would not include documents that Justin and Dan may have given to one of the mediators and not given to us. These are only the documents that we received through the mediation.

THE COURT: Anything else? Yes, sir.

MR. OSBORN: Your Honor, I would just say that these were clearly documents that were exchanged to a party opponent here. And, you know, plaintiffs' counsel has been served with these papers and haven't posted any objection to Your Honor ordering the production of them or denying this request for relief.

And then finally, Your Honor, Mr. Farrier invited Your Honor to do an in camera review of the documents. If you would like it, we would ask -- we would invite you to do that, too. And just look at the context of the documents and see, you know, if you're inclined to see that these things would be otherwise discoverable. Because if they're in the possession of the documents that are otherwise discoverable, then it shouldn't be a burden on my client to find out who the experts were, who took what photos, and do this whole fishing

expedition, when they would be otherwise discoverable, they're in MI Windows' possession and could be easily produced by them.

THE COURT: Is there anything left pending in the Mansion controversy? There were several things that were in the briefing that we haven't addressed. All we've addressed is the documents; everything else has been taken care of?

MR. FARRIER: Well, Centex, there was a Centex motion as well. That's been resolved. So it's solely the documents in the mediation.

THE COURT: So that's all that's left of that one, all right. We'll get something out promptly, okay? Thanks.

(Court adjourned at 10:42 a.m.)

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR