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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 17-CV-03079-RBJ

ROBERT R. DUFRESNE, a Trustee of the
Dufresne Family Trust, et al.,

Plaintiffs,

vs.

PDC ENERGY, INC., a Delaware corporation,
et al.,

Defendants.

REPORTER'S TRANSCRIPT
Scheduling Conference

Proceedings before the HONORABLE R. BROOKE JACKSON,
Judge, United States District Court for the District of
Colorado, commencing on the 15th day of March, 2018, in
Courtroom A902, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs:

THOMAS G. FOLEY, JR., Foley Bezek Behle & Curtis, LLP, 15 West
Carrillo St., Santa Barbara, CA 93101

For the Defendants:

CHARLES E. ELDER, Irell & Manella, LLP, 1800 Avenue of the
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Denver, CO 80294, 303-335-2108

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2 (The proceedings commenced at 8:59 a.m.)

3 THE COURT: This is Civil Action No. 17-CV-3079,
4 Robert Dufresne and others versus PDC Energy, Inc. and others.
5 We're in chambers this morning for a scheduling conference.

6 So let me have your appearances, gentlemen, if you
7 would, please.

8 MR. FOLEY: Good morning, Your Honor. Thomas Foley,
9 Foley Bezek Behle & Curtis for plaintiffs.

10 MR. ELDER: Good morning, Your Honor. Charles Elder
11 from Irell & Manella for the defendants.

12 THE COURT: All right. Do you gentlemen know each
13 other?

14 MR. ELDER: Yes. We've gotten to know each other
15 quite well over the years.

16 MR. FOLEY: This is our third case in the last six
17 years where I represented limited partners against PDC, and
18 Mr. Elder has been my esteemed colleague defending each case.

19 THE COURT: I see. Well, then, he and his client
20 have been good for your business.

21 MR. FOLEY: And good for my children and
22 grandchildren's college education, Your Honor.

23 THE COURT: There you go.

24 MR. ELDER: One could say Mr. Foley's been good for
25 my business.

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1 THE COURT: Well, it works both ways, doesn't it?

2 MR. ELDER: It does.

3 THE COURT: In brief, as I understand it, but, of
4 course, you gentlemen know it way better than do I, the
5 plaintiffs are a group of trusts. They invested in limited
6 partnerships. One is called Rockies Region 2006. The other
7 is Rockies Region 2007. The partnerships are managed by PDC
8 Energy, Inc. The individual defendants are officers of PDC
9 Energy, Inc.

10 The claim is that PDC as manager has breached
11 fiduciary duties, broken contracts, basically has run these
12 partnerships in a way that has caused the plaintiffs to lose
13 money, or not make as much money as they otherwise would have.
14 They're filing these claims derivatively on behalf of the
15 partnerships. Right?

16 MR. ELDER: That's correct.

17 MR. FOLEY: Yes, Your Honor.

18 THE COURT: I don't yet really know what PDC Energy's
19 position is because they haven't filed an answer. Mr. Foley
20 undoubtedly knows what their position will be, but generally
21 speaking, one thing that PDC Energy has said is that these
22 plaintiffs are greedy people, because they've already made
23 great returns on their investment, and what this is about is
24 they want even more.

25 MR. FOLEY: You summed it up very accurately, Your

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1 Honor.

2 MR. ELDER: If Your Honor is asking -- I'll let you
3 finish, but --

4 THE COURT: But the other thing that PDC is
5 presumably saying is that -- or will say is that it didn't do
6 these things. It ran these partnerships properly. It did not
7 self-deal, et cetera.

8 MR. ELDER: Correct.

9 THE COURT: That's what they're going to say. Now,
10 there's already been the beginning of what, if not reined in,
11 looks like intensive motion practice. You gentlemen are in
12 the wrong court for that. I don't want that. And among other
13 things, the defendant moved to dismiss. The plaintiff, as I
14 pointed out, contrary to our local rules, filed a motion to
15 amend in its response, which just to get this case going, I
16 granted. So you're going to file an amended complaint.

17 MR. FOLEY: I've had some discussions with my
18 colleague, Your Honor, about the necessity for doing that.
19 He's going to confer with his clients.

20 THE COURT: Well, you asked for permission to do
21 that, and I gave it to you.

22 MR. FOLEY: Then we will do it, Your Honor, but it
23 may not be necessary if we come --

24 THE COURT: You don't have to do it. I mean, if
25 you've decided or if you decide that the original complaint is

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1 good enough, I don't need an amended complaint, I guess. But
2 then he'll have to figure out what he wants to do. Press his
3 motion to dismiss -- well, I've already denied it. File a new
4 one, answer, what he's going to do. So I don't know what you
5 gentlemen will work out.

6 You've submitted a proposed scheduling order, so
7 let's go through it. I have a number of questions about it.
8 I assume you both have it there.

9 MR. ELDER: Yes.

10 MR. FOLEY: Yes, Your Honor.

11 THE COURT: I noted on page 3 -- I granted leave to
12 amend, so some of this might be moot. I made a note -- I
13 think it was Mr. Foley who in his response to the motion to
14 dismiss said that PDC had conveniently omitted to state
15 something. I don't remember what it was. No. I don't like
16 those kinds of words. Please don't do that. To me that's
17 unprofessional. Probably didn't bother your colleague, but it
18 bothered me, so I'm going to ask you don't use fighting words
19 like that in the future.

20 Okay. Still on page 3, defendants have filed a
21 motion to dismiss on two grounds, which I denied, but the
22 first ground is this business about the plaintiff having made
23 a demand on PDC. Really? What's that about?

24 MR. ELDER: So --

25 THE COURT: You think PDC is actually going to say,

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1 okay, I agree. We breached fiduciary duties, so we're going
2 to sue ourselves.

3 MR. ELDER: Well, so I think this goes to -- there's
4 a whole body of law in Delaware on this, and I think that what
5 is likely to happen is not so much that PDC will say, yeah,
6 let's sue ourselves. What tends to happen in these cases --
7 and if Your Honor will indulge me to give you sort of maybe a
8 heads-up about where things may go for purposes of case
9 management.

10 What companies do in these situations often is they
11 will appoint something called a special litigation committee,
12 and so because the demand was directed to the PDC board of
13 directors who manages the managing general partner, PDC, what
14 companies will sometimes do is they'll appoint one or two
15 directors, and say, look, set aside for a moment your
16 fiduciary duties to the stockholders and only look at this
17 from the perspective of the limited partners.

18 And the genesis of that body of law is the overriding
19 principle that, with all due respect to you, Your Honor,
20 neither you nor Mr. Foley nor his clients should be directing
21 the business of the partnerships. It's really up to the
22 management of the partnerships, just as it would be up to the
23 management of the corporation. That is one path that this may
24 go.

25 The other path, and I think that the -- Your Honor,

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1 it was a short order, but I tried to read between the lines a
2 little bit. One question maybe in your mind is, well, they
3 made this demand, why hasn't PDC done anything so far? And
4 part of the reason for that is these partnerships are close to
5 if not already insolvent, and Mr. -- you know, the plaintiffs
6 will argue, well, that's PDC's fault. We'll deny that. But
7 the fact remains that is an issue, that the operating costs
8 are either close to or are already exceeding the money coming
9 in.

10 And so one option -- I think this was even alluded to
11 in the plaintiffs' opposition brief. One option PDC is
12 considering is whether it would need to put these partnerships
13 into bankruptcy. And obviously PDC does not want to spend the
14 time and energy going down the path of a special litigation
15 committee if at the end of that it was just going to go into
16 bankruptcy and then there would be a bankruptcy trustee
17 running these claims.

18 I am not a bankruptcy practitioner. I am not PDC's
19 bankruptcy lawyer, so -- and I know only enough to be a little
20 dangerous, so I don't want to speak unintelligently about what
21 the implications of that may be other than to say it may -- it
22 very likely could, if that is what happens, have significant
23 impact on the procedural impact of this case, including the
24 possibility that the bankruptcy court appoints some party to
25 step into the shoes, not only of PDC, but also the plaintiffs,

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1 and decide whether it wants to pursue these claims on behalf
2 of the estates.

3 So it's not so much a question of PDC deciding to sue
4 itself. It's a question of what's the best process that
5 protects the limited partners and the assets for deciding what
6 to do about the claims that have been included in the demand
7 and in the complaint.

8 MR. FOLEY: May I respond?

9 THE COURT: Of course. Go ahead.

10 MR. FOLEY: Your Honor, the idea of a special
11 committee -- this is the first I've heard of it -- but in the
12 original action, which we've referenced, which was a class
13 action filed in the federal district court for the Central
14 District of California entitled the Schulein action, PDC did
15 appoint a special committee that got special counsel, that had
16 special investment bankers that dragged the litigation on for
17 years.

18 Then they made a motion for summary judgment saying
19 the special committee was totally disinterested and was
20 looking out for the interests of the limited partners, that
21 this was a fair deal. The motion for summary judgment was
22 denied. I think the special committee is just dragging things
23 on, because it takes a lot of time to hire the independent
24 counsel, hire the investment bankers, have their meetings, and
25 that case dragged on for three and a half years when it

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1 shouldn't.

2 Second, with respect to the bankruptcy, this is
3 another tactic that PDC used with some partnerships. They
4 were all West Virginia partnerships. They were all drilling
5 only in Colorado. They opened up a bank account for each of
6 12 partnerships in 2013 in Dallas, Texas. They didn't file a
7 bankruptcy. They got a trustee appointed, who conducted a
8 sale of partnership assets, and there was only one bidder at
9 the sale who bought them for pennies on the dollar, and that
10 was PDC.

11 Now, I didn't get involved going down to Texas and
12 getting in the middle of the bankruptcy, but a bankruptcy
13 judge, as the Court well knows, is not an Article III judge,
14 and we have the right under a breach of contract cause of
15 action for a jury. And we are not going to give up the right
16 to go into a bankruptcy and have a bankruptcy judge litigate
17 it as a court proceeding or anything else. We intend to stay
18 here in the federal district court in Denver and have an
19 Article III judge litigate the claims.

20 THE COURT: Maybe. I don't know. I don't know.
21 Here's what I do know. I have no interest in running your
22 business, but I'm going to run this lawsuit, and PDC isn't
23 going to drag this out for three years or anything like that.
24 So if that's the strategy, they might as well disabuse
25 themselves of that right now.

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1 MR. ELDER: That is not the strategy, Your Honor. I
2 disagree with his mischaracterization.

3 THE COURT: I've granted leave to amend. You
4 probably better amend. You can file your motion to dismiss
5 again. I will almost certainly deny it. And we'll litigate
6 this case, unless a bankruptcy is filed, in which case there
7 will be an automatic stay, and then we'll deal with that when
8 it happens.

9 Now, let's keep going. Defendant wants a stay of
10 discovery it says on page 4. Denied.

11 MR. ELDER: Okay.

12 THE COURT: Now, discovery disputes. I don't want
13 any motions to compel, motions for protective orders, any of
14 that. No responses, no replies. If you have a discovery
15 dispute, you must confer. Local Rule 7.1(a) requires that you
16 confer. That means talk. Not e-mails, not letters, to talk.
17 If you can't resolve the dispute, all you need to do is call
18 chambers, and say you need a conference with the judge.

19 You won't have to come here from California. You can
20 stay out there, get on the phone, I'll listen to what your
21 dispute is, and I'll give you a ruling. If I can't, then I'll
22 tell you what the next step is. 95 percent of the time,
23 you'll get a quick and dirty ruling right there on the phone.
24 So that's how we'll handle discovery disputes.

25 Page 4, computation of damages. The plaintiffs have

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1 not yet provided defendants with a computation of damages.

2 Why?

3 MR. FOLEY: Your Honor, we need the financial
4 information regarding the partnerships. Here's what I mean by
5 that. In the two prior cases, we go through the requests for
6 production documents, we get the documents, because what PDC
7 has done is drill horizontal wells only for its benefit on the
8 former acreages that the partnerships had the mineral rights.
9 They take the mineral rights for the partnership, and then
10 they drill the horizontal wells, and they make a lot of money.

11 So we need to figure out how many horizontal wells
12 they drilled in each of the partnerships leaseholds, how much
13 money net is generated from each of those wells. That
14 information is not publicly available, so we have to subpoena
15 or do requests for production of documents and say, okay, how
16 many wells have you drilled on this partnership acreage? What
17 did it cost to drill those wells? How much money have you
18 made from selling the oil and the gas?

19 And then this has been the big issue between us in
20 each of these two prior cases, the proper measure of damages.
21 We ask for it two ways. One is what's called fair value under
22 West Virginia law, and the other one is what's called
23 disgorgement, which is also a West Virginia remedy. As I
24 said, these are West Virginia partnerships with basically a
25 West Virginia choice of law provision.

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1 So to do the disgorgement analysis, which is
2 typically higher than the fair value, we need to get the
3 internal data to say how much money did it cost to drill all
4 these horizontal wells, how much money did they make on these
5 horizontal wells, and that's what we would present as our
6 damage theory.

7 THE COURT: One thing that seems odd about that is I
8 thought under Colorado's oil and gas procedures governed by
9 the Colorado Oil and Gas Commission -- and some of these wells
10 are Colorado wells?

11 MR. FOLEY: All of them are.

12 THE COURT: That if you want to drill a horizontal
13 well through property where someone else has mineral rights,
14 you've got to give notice, you've got to give an opportunity
15 to participate. If they say, yes, they participate under a
16 joint operation agreement typically. If they say no, you can
17 force pool. Why didn't that happen?

18 MR. FOLEY: You're exactly right, Your Honor. That
19 is the remedy we're talking about. It didn't happen because
20 the partnerships were not afforded that opportunity.

21 THE COURT: Well, they have to be.

22 MR. FOLEY: But they weren't.

23 THE COURT: Why?

24 MR. ELDER: The -- the fact is the partnerships
25 didn't know -- did not control acreage. They had nothing more

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1 than a wellbore interest in -- basically they just owned the
2 wellbore and the production that came out of that well. PDC's
3 position has been and is that the acreage around them is owned
4 by PDC or someone else. It's not owned by the partnerships.

5 MR. FOLEY: May I respond?

6 THE COURT: I've never heard of that.

7 MR. FOLEY: Well, Your Honor, these were
8 publicly-traded partnerships, so there's a prospectus under
9 each one, and not in one of the partnerships in any of this
10 litigation over the last six years does it say you only get a
11 wellbore. It says you get what's called a spacing unit, which
12 in the prospectus and in the partnership agreement says under
13 Colorado law the minimum spacing unit for a vertical well is
14 40 acres.

15 THE COURT: Spacing units are common in Colorado.

16 MR. FOLEY: Correct. And so what PDC has brought up
17 in the litigation is even though it's not in the prospectuses,
18 even though it's not mentioned in the partnership agreement --

19 THE COURT: All you get is the one wellbore.

20 MR. FOLEY: All you get -- and we recorded it in the
21 county -- after we formed the partnerships, we recorded it,
22 but we didn't tell you about -- in Weld and Garfield County,
23 and we put it in an FCC disclosure. And that's why we had to
24 file this lawsuit when we did, not wait longer, because
25 there's a ten-year statute of limitations on breach of

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1 contract in West Virginia, and we wanted to make sure we
2 didn't lose our breach of contract claim. But this wellbore
3 issue is really the central issue in the case. It was
4 extensively briefed in the first Schulein class action, which
5 had virtually identical prospectuses and partnership
6 agreements.

7 MR. ELDER: That's untrue. The partnerships are --
8 the partnership agreements are different, and consequently --

9 THE COURT: Well, why did you interrupt what he was
10 saying?

11 MR. ELDER: I'm sorry. Because it was untrue.

12 THE COURT: Well, you can tell me that, but we're
13 courteous here in Colorado. Maybe not in California, but we
14 don't interrupt each other usually.

15 Go ahead.

16 MR. FOLEY: After extensive briefing, the federal
17 district court in California denied their motion for summary
18 adjudication and said this is a factual issue, and we'll go to
19 trial. In the case that is currently pending in -- here in
20 Denver for an opt-out person who opted out of that first class
21 action, we filed -- the plaintiff filed a motion for partial
22 summary adjudication saying to the Court this is really just a
23 matter of the Court reading the prospectuses, the partnership
24 agreements, and making a determination, was it a wellbore or
25 was it an assignment of a spacing unit? That motion is still

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1 pending. It's fully briefed.

2 THE COURT: When was it fully briefed?

3 MR. FOLEY: I would say three to four weeks ago, five
4 weeks ago.

5 MR. ELDER: Yes. Although I don't anticipate we
6 would get any decision on that, because in that case we
7 submitted a notice that there's intent to settle. So that may
8 -- that may -- you may not have the benefit of a judge's
9 ruling.

10 THE COURT: That's in front of Judge Brimmer?

11 MR. ELDER: Exactly.

12 MR. FOLEY: That's right, Your Honor.

13 MR. ELDER: Oh, sorry. Go ahead.

14 MR. FOLEY: I didn't mean to interrupt you.

15 THE COURT: Or was somebody going to move to
16 consolidate this case with that case?

17 MR. FOLEY: Well, Your Honor, when we filed it, we
18 filed a notice of related case as set forth in the Federal
19 Rules of Civil Procedure. It didn't get related. I don't
20 know why not, but it didn't. In our scheduling order, I did
21 reference the fact it's the same defendant. It's basically
22 the same issue, which is this wellbore issue. But my
23 colleague is correct.

24 Through the efforts of a retired federal district
25 judge Layn Phillips, it looks like we have a tentative

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1 settlement, so that issue which is fully briefed will not be
2 decided again. We get close to having a decision on an issue,
3 that's when the cases tend to settle. And that's why I'd
4 really like to tee that issue up early. I think it's an issue
5 just for the Court to review the documents and interpret the
6 documents.

7 THE COURT: Well, maybe your colleague doesn't agree
8 with you on that. Maybe he thinks there's a fact dispute. I
9 don't know what Mr. Elder thinks.

10 MR. ELDER: Would you like me to tell you? I think
11 that -- I think -- you know, I think there may be a factual
12 dispute. I will say -- and I apologize for interrupting
13 Mr. Foley, but I do think the partnership agreements are
14 different. The definition of what the partners get is
15 different. They really are written differently and in part
16 largely because of this issue, because of -- you know, some --
17 candidly ambiguities -- and we made this candid statement to
18 Judge Brimmer -- some ambiguities in the earlier partnership
19 agreements.

20 PDC cleaned some of those up to make clear they're
21 really only investing in the wells. They're not investing in
22 lease-holding acreage, they're not investing in mineral rights
23 on lands. They're really investing in these wells. These are
24 -- these partnerships -- I don't know how familiar you are
25 with them, but they are primarily tax vehicles, tax benefits.

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1 So if I were -- if I had made a lot of money in a year, and I
2 wanted to take a tax deduction, what I would do is I would --
3 if I, say, invested \$200,000 in one of these partnerships,
4 under the IDC deduction, which is part of the -- was -- I
5 don't know if it still is with the new tax code -- but at the
6 time was part of the tax code, you could take a deduction of
7 something close to 90 percent of your investment off the --
8 right off the bat.

9 So if you're paying roughly 50 percent in taxes as a
10 high net worth individual, you would -- if you invested
11 200,000, you'd get something close to 90,000 back right away.
12 And then you get -- then the idea is to drill wells, spend all
13 the money, and then just get the income from those wells, and
14 that's it. And then PDC had different partnerships for
15 different time periods, and so these folks were not investing
16 in a drilling plan to participate in PDC's future drilling or
17 other partnerships' future drilling.

18 And so that's sort of a -- it's more complicated than
19 that, but that's as short and as concise as I can put it as to
20 why it makes sense that the partnerships really only had an
21 interest in the oil and gas coming from one well -- or, you
22 know, if a partnership drilled 50 wells for the limited
23 partners, it would get oil and gas from those 50 wells and
24 nothing else.

25 THE COURT: Why are your clients doing this?

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1 MR. FOLEY: My clients, which include literally
2 widows and orphans, invested in these because these types of
3 investments pay out large returns. They are risky because you
4 can get a dry hole, but PDC has a history, particularly in the
5 Wattenberg Field here in Colorado -- they haven't had one dry
6 hole in hundreds and hundreds of vertical wells, and the only
7 failures they've had on horizontal wells are mechanical
8 failures where they just re-drill it and it works.

9 So people invest in these because -- if you invest in
10 U.S. treasury bills for the eight or nine years, you don't
11 make very much money. If you invest in these oil and gas
12 partnerships, you can make significant returns. And so these
13 people --

14 THE COURT: Which he says your clients already have.

15 MR. FOLEY: Well, that's true, Your Honor. But if
16 you invest in a stock -- if you invested in Google, and Google
17 goes up and up and up, after you've gotten your money back
18 doesn't mean you don't get to invest anymore. You've invested
19 in a long-term program.

20 THE COURT: Right.

21 MR. FOLEY: And that's what these were. They said
22 you're getting a spacing unit in one of the best fields in the
23 United States with proven wells. They didn't say once in any
24 of the prospectuses, any of the partnership agreements, oh,
25 you're only getting a wellbore.

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1 THE COURT: Well, Mr. Elder thinks they did.

2 MR. FOLEY: That's why I think the Court needs to
3 review the prospectus and the partnership agreements, and I
4 plan to tee it up since it's fully briefed in the other case.
5 The law is pretty clear. It's a matter of taking these
6 partnership agreements and these prospectuses --

7 THE COURT: Well, if it's fully briefed, why don't
8 you let Judge Brimmer decide it?

9 MR. FOLEY: Because they made a rather significant
10 settlement offer to my client, and my client said, I'll take
11 it.

12 THE COURT: Then why don't you make a significant
13 offer in this case?

14 MR. ELDER: We may do that. I don't know. I think
15 -- I mean, in that particular case, it's an interesting thing.
16 I don't know how deep down this rabbit hole you want to go.
17 The client he's referring to in that other case -- initially
18 this arose out of partnerships that were merged out of
19 existence. So this case, these partnerships are still
20 ongoing.

21 The cases that he's talking about, the one in front
22 of Judge Guilford in California, as well as the one in front
23 of Judge Brimmer here, involved mergers where PDC basically
24 bought out the partnerships. The limited partners voted to
25 sell their interests back to PDC, and that led to some

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1 litigation.

2 His client in the Brimmer case, Mr. Rodenfels is his
3 name, initially brought an appraisal proceeding in West
4 Virginia, which was the thing he should have done if he felt
5 like he didn't get enough money. Realized either because he
6 was advised or otherwise that he wouldn't get as much money
7 based on that as if he's just sued in a class action, so he
8 did that. Ended up getting very little in the class action.
9 Opted -- after years he didn't do very well, so he opted out
10 of that, brought this case, and he's essentially been kind of
11 a vexatious nuisance litigant for -- and I'm not casting
12 aspersion on Mr. Foley, but his client's been difficult.

13 THE COURT: A pain in your backside.

14 MR. ELDER: Yeah. And it was worth it to pay some
15 money to make him go away. Here, I think that the -- you
16 know, this may be a case where PDC feels it makes more sense
17 to litigate it. And, again, as I said, there's the bankruptcy
18 aspect of it, which could throw a wrench into a lot of things.

19 MR. FOLEY: May I respond, Your Honor, very briefly?

20 THE COURT: Yes.

21 MR. FOLEY: In the original Schulein case, which
22 settled in a Court-approved class action settlement for
23 \$37 million, my client did not get -- what he would have
24 gotten was approximately \$400,000 if he had stayed in. By
25 doing this opt-out case, he's getting -- and it's a mediated

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1 settlement, so I can't say much, but considerably more.

2 THE COURT: Okay. Well, good for Mr. Rodenfels. He
3 threw the dice, and they came up 7s or whatever. Okay.

4 MR. ELDER: He does live in Las Vegas.

5 THE COURT: Perfect. All right. Back to my
6 question, computation of damages, Rule 26(a)(1)(A)(iii) says
7 in the initial disclosures you provide a computation of your
8 damages. On the next page you say it's agreed that the
9 initial disclosures will be made 30 days after an answer.
10 That's when your computation is due. There's no answer yet,
11 so I guess they're not due yet by your agreement. By the
12 rules they may be due, but by your agreement they're not due.

13 MR. FOLEY: Well, Your Honor, we have already
14 retained the same expert witnesses we used in the Schulein
15 case, the same expert witnesses we used in Mr. Rodenfels'
16 opt-out case, and they're busily working now as we speak based
17 on what publicly-available information we can get off the
18 Colorado oil and gas website, which is really easy to use. It
19 identifies who owns the well, where the well is, how much gas,
20 how much oil comes out.

21 So that's helpful, but we have to then figure out the
22 expenses to net it out. So we're doing the best we can with
23 the publicly-available information, and we will meet the Court
24 -- or the rules deadline on having an analysis of damages. It
25 may have to be refined when we actually get the documents from

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1 PDC.

2 THE COURT: Ballpark, what do you think we're looking
3 at?

4 MR. FOLEY: In the case of the 2004/2005
5 partnerships, which were smaller, \$137 million.

6 THE COURT: Is there any issue here as to whether
7 your issues or any of them should be presented to the Colorado
8 Oil and Gas Commission rather than to a Court?

9 MR. FOLEY: I'll speak to that. It really gets down
10 to an interpretation of, first, the prospectuses, what were
11 these people told when they invested; and, second, the
12 partnership agreements. It's just a matter of reading the
13 contracts. And we don't think there's any ambiguity in the
14 contracts, because it says you are going to get a spacing
15 unit. That's a term. It defines a spacing unit in the
16 Wattenberg Field under Colorado regulations as 40 acres per
17 vertical well.

18 So what has happened is in this particular case
19 that's pending before you -- this is the breach of contract --
20 they promised in the prospectus, they said we will refract
21 those wells in the fifth or sixth year. In the partnership
22 agreement, it says we shall refract those wells in the fifth
23 or sixth year. They took money out of the current revenues to
24 set up the reserve to refract the vertical wells.

25 Once the horizontal wells became very prominent in

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1 the Wattenberg Field, they gave back the reserve to the
2 limited partners, said, Oh, here's your money back. They sold
3 the other assets the partnership had in another basin called
4 -- I'm going to mispronounce it -- Piceance Basin, and said,
5 Oh, we don't need that money. We're going to give it back to
6 you.

7 Then they said we have no money to drill the
8 horizontal wells for you, and we don't have the money to
9 refract your wells, so we're going to abandon them, we're
10 going to pour concrete down them, and you get nothing. And
11 now the clients that did get the intangible drilling credit,
12 the IDC that my colleague referred to, have a huge recapture
13 problem.

14 THE COURT: Well, I guess I can take judicial notice
15 that Mr. Elder would disagree with at least parts of what you
16 just said.

17 MR. ELDER: Yes. I mean, I don't want to litigate
18 the whole case here in chambers, but, yes, that's a fair
19 statement. And he is correct -- I forgot to mention -- I
20 mean, a lot of the stuff in terms of the historical production
21 of the wells is available publicly.

22 THE COURT: Page 6, gentlemen, at the top, plaintiffs
23 have requested an early mediation. Defendants are considering
24 this request. Where are you on that? I don't want to invest
25 a lot of my time in this case if you're going to have an early

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1 mediation and resolve it.

2 MR. FOLEY: These issues -- after six years of
3 litigation and all the senior officers of the company have
4 been deposed, it really gets down to the wellbore issue and
5 the discount rate that's used in figuring out damages. So we
6 think we can go back to one of the prior mediators that really
7 knows this case, one was a magistrate retired judge in the
8 Northern District of California.

9 The other one was a gentleman by the name of Layn
10 Phillips who was a district court judge in Oklahoma who really
11 drilled into this case quickly, and he actually -- as this
12 Court seems to know something about oil and gas law, which I
13 guess if you're in Oklahoma or Colorado, you know about it.
14 And he got the case settled, so he's a natural to settle this
15 case.

16 MR. ELDER: I think that the prospect of early
17 mediation would make sense but for the bankruptcy overlay. I
18 think as Your Honor points out, you don't want to spend a lot
19 of time in this case litigating this case if it's just going
20 to be mediated. By the same token, I don't know that it makes
21 a lot of sense to engage Judge Phillips, who's also one of the
22 most expensive mediators in the country, if at the end of the
23 day we're going to be essentially handing these partnerships
24 over.

25 THE COURT: When are you going to make this

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1 bankruptcy decision, Mr. Elder?

2 MR. ELDER: I think -- well, it's primarily a
3 financial-driven decision. They're working on, I believe, a
4 10K for the partnerships and working with the auditors and the
5 accountants to sort of make sure they've got it right. They
6 don't want to go in bankruptcy and be wrong about the
7 insolvency question. But I would say as early as a couple of
8 weeks this could happen, but I don't want to promise you that
9 it will happen in a couple weeks, because I don't know.

10 THE COURT: Well, if it does happen, there will be a
11 notice of bankruptcy.

12 MR. ELDER: Right.

13 MR. FOLEY: And, Your Honor, what would likely happen
14 then is -- because I've been litigating these cases for years,
15 and basically the same investors are in these same cases, so I
16 have dialogue with over 500 individual clients that I have
17 retained, so if he files a bankruptcy for the partnerships,
18 the 500 clients will simply do individual mass tort claims
19 against PDC, which will probably end up here in Denver either
20 with Judge Brimmer or yourself. So bankruptcy is --

21 THE COURT: Well, if I'm lucky, it will be some other
22 judge that will draw this.

23 MR. FOLEY: But you already know so much about the
24 case.

25 THE COURT: Yeah, right. Well, we'll see what

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1 happens. Why would it matter whether it's individuals or not
2 as plaintiffs if they're in bankruptcy? There's an automatic
3 stay.

4 MR. FOLEY: Well, the automatic stay would be against
5 the partnerships.

6 THE COURT: It would be against whomever declares
7 bankruptcy.

8 MR. FOLEY: That would be the partnerships, but we're
9 making a case against PDC as the general partner. PDC is not
10 filing a bankruptcy, so we could do that as a class action or
11 500 individual cases. So the filing of the bankruptcy may
12 stop the derivative case which is being brought on behalf of
13 the partnerships, but it will not stop the litigation. It
14 will become a class action or mass tort.

15 THE COURT: All right. Let's get down to the nut
16 cutting now. Discovery limitations. Parties agree that the
17 number of depositions and interrogatories be governed by rules
18 of procedure. No. I don't set it up that way. We're going
19 to agree on a number of depositions, a number of
20 interrogatories, and then if they need to be modified later,
21 that can be set.

22 How many depositions realistically do you need in
23 this case? You've agreed to ten to a side. Do you need ten
24 to a side?

25 MR. FOLEY: I would say at this point we do, Your

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1 Honor.

2 THE COURT: Mr. Elder?

3 MR. ELDER: I don't -- well, if I had to predict, I
4 would guess we probably won't take ten depositions, but I
5 don't want to hamstring -- it's possible. As he says, if the
6 case is in the hundreds of millions of dollars, it's a complex
7 case. There are the four -- I believe four named plaintiffs.
8 We may also want to take depositions of individual financial
9 advisors to confirm what it is they thought they were buying
10 when they invested in this, and then there may be other third
11 parties who need to be deposed, so I think ten --

12 THE COURT: Ten to a side.

13 MR. ELDER: -- should be realistic.

14 THE COURT: Interrogatories, requests for production.
15 The standard is 25.

16 MR. ELDER: That sounds right to me.

17 THE COURT: Mr. Foley?

18 MR. FOLEY: We will abide by the Court's guidance on
19 that. If I could go back to depositions, Your Honor. If they
20 do, in fact, have a special committee again, that resulted in
21 at least 15 depositions just on the special committee's work.
22 We don't know whether they're going to have a special
23 committee yet. So I'd reserve on depositions, but we can live
24 with the 25 interrogatories. For the requests for productions
25 to PDC, there will be an initial request for production.

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1 There will be a third party, which --

2 THE COURT: I don't need to know.

3 MR. FOLEY: Okay.

4 THE COURT: 25 paper discovery, ten to a side
5 depositions. If it turns out you need more, confer. If you
6 agree on more, fine. If you don't agree on more, call me.
7 Length of depositions, again, you're just saying federal
8 rules.

9 MR. ELDER: Seven hours, I think, works.

10 THE COURT: You really want seven hours for
11 depositions? What do you do for seven hours?

12 MR. FOLEY: Well, Your Honor, we just had a
13 deposition of Mr. Rodenfels which went six hours in a case
14 that is in the process of settling. I didn't think it needed
15 six hours, but it did. It went six hours, so --

16 MR. ELDER: Yeah, I mean, sometimes particularly with
17 respect to expert depositions, maybe you want to set that
18 aside for something later, but --

19 THE COURT: Why do you even take an expert's
20 deposition? What's the point?

21 MR. ELDER: Honestly, to pin them down. To try to --

22 THE COURT: Their report pins them down.

23 MR. ELDER: Okay. Good. I mean, not all judges --

24 THE COURT: I'll guarantee. They won't -- they'll be
25 limited to the report. Not a penny more. And if the case

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1 ever went to trial, I would expect you two guys as officers of
2 the court not to ask the expert questions that would cause him
3 to go outside his report. But if you do and somebody objects,
4 I'll look at the report, and I'll say yes or no. That's why I
5 always wonder why take a deposition. You're just giving the
6 expert a practice. But that's up to you.

7 MR. FOLEY: Your Honor, for practitioners such as
8 Mr. Elder and myself there are cases which find that not
9 taking the deposition of the other person's designated expert
10 witness is below the standard of care. And so if you don't
11 take the depositions of the expert and you lose, you're kind
12 of setting yourself up to get sued by your own client for
13 malpractice. It's unfortunate, but it's business today.

14 THE COURT: I think that's complete poppycock, and
15 I'll bet you haven't lost any of those malpractice cases
16 either.

17 MR. FOLEY: Your Honor, I have won them representing
18 people suing their lawyers in front of juries.

19 THE COURT: So you sue lawyers, you sue everybody you
20 can find, right?

21 MR. FOLEY: Your Honor, I'm proud to be a lawyer. I
22 represent plaintiffs and defendants. I've never been
23 sanctioned by any Court, and I've been practicing 44 years. I
24 think I've helped a few people, including people whose lawyers
25 failed to depose expert witnesses, and the expert witnesses

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1 were out of control at trial, and they lost their cases,
2 including women who had terrible results of pregnancies.

3 THE COURT: Okay. Well, I would think after 44 years
4 you'd read the local rules. In the future you will.

5 MR. FOLEY: I have lectured my partners that do this
6 type of work for me. But I'm lead counsel. I take
7 responsibility. I've got big shoulders. I apologize for not
8 knowing the local rules, Your Honor.

9 THE COURT: All right. Deadline for joinder of
10 parties and amendment of pleadings. I'm not going to do any
11 of these 45 days or any kind of a number of days after some
12 event. We're going to do specific time. So let's work
13 backwards starting now. Let's start with the trial and work
14 back. I'll give you a trial date. You want two to
15 three weeks. I doubt if it will take two to three weeks, but
16 we'll give you a trial date. July 22nd, July 29th, or
17 August 5th, next year. Gentlemen, what's your --

18 MR. FOLEY: July 22nd, July 28th, or August 5th?

19 THE COURT: 22nd, 29th, or August 5th.

20 MR. ELDER: Those are the start dates or is that the
21 --

22 THE COURT: Start dates.

23 MR. ELDER: Okay.

24 MR. FOLEY: The plaintiff would use July 22nd, Your
25 Honor.

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1 THE COURT: Mr. Elder, do you care?

2 MR. ELDER: I don't think I care. It's two weeks,
3 three weeks. It's not a big deal. Of next year, 2019?

4 THE COURT: Right. I assume you wouldn't feel ready
5 to go in July of 2018.

6 MR. ELDER: Right.

7 MR. FOLEY: Well, Your Honor, I think once we get our
8 motion for summary judgment teed up in front of you on the
9 critical issues on both sides, I think there could be
10 cross-motions. So you've got all the facts, all the law you
11 need. I don't think we'll be here next July. We can get this
12 done this year.

13 THE COURT: Could be. All right. The scheduling
14 order calls it a final pretrial conference. I tend to call it
15 a trial prep conference. I can give you June 27th at 1:30 or
16 July 11th at nine.

17 MR. FOLEY: Your Honor, the plaintiff would like the
18 earlier one, June 27th at 1:30 p.m.

19 MR. ELDER: On this one, I think I might prefer the
20 later just to give us more time to get ready for that. I
21 don't know -- since we're coming back --

22 THE COURT: They're two weeks apart we're talking.

23 MR. ELDER: When you're preparing for trial --

24 THE COURT: You're talking about July of next year.

25 MR. ELDER: When you're preparing for trial, a lot of

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1 stuff happens in that last month before the trial.

2 THE COURT: Well, I'll give you July 11th at nine if
3 that's what you really want.

4 MR. FOLEY: That's fine, Your Honor.

5 THE COURT: Let's talk about what happens, and this
6 will be -- you have to do certain things before that. One is
7 jury instructions. I'll want you to file your jury
8 instructions after conferring a week ahead by e-mail to
9 chambers. So by July 4th. Since that's a holiday, you'll
10 probably want to file them a little before that. I need that
11 time to go over them and be prepared for your conference.
12 Also at the trial preparation conference, I'll want you to
13 have your final list for trial exhibits and witnesses, and
14 we'll talk about any disputes and resolve those. Any in
15 limine issues --

16 MR. ELDER: I'm sorry. So you want the witness list
17 by the week before --

18 THE COURT: I don't want it. I want you to give each
19 other the witness lists and the exhibit lists, the final ones,
20 the ones you're going to go to trial with so if there are any
21 disputes or problems with witnesses or exhibits, we can talk
22 about them or resolve them at that trial prep conference.
23 Same with any in limine issues, other than *Daubert*. If you
24 have a *Daubert* issue that's legitimate, set it for a separate
25 hearing.

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1 MR. FOLEY: Your Honor, I just -- so then one week
2 before we have our final status conference or trial prep
3 conference we're to exchange exhibit lists, witness lists.

4 THE COURT: You can exchange exhibits and witnesses
5 any time you want, but I want you to have that done before the
6 conference. The only thing you have to do with me is a week
7 before submit your jury instructions.

8 MR. ELDER: I'm sorry. What did you say about
9 *Daubert* motions again? I apologize.

10 THE COURT: I don't like them, but if you have a
11 legitimate one that's serious, meaningful, there's something
12 you can in good faith say the expert is not qualified or the
13 expert is whatever, set that for a separate hearing. That
14 would consume the whole trial prep conference. I typically
15 instruct the jury preliminarily right before opening
16 statements. That's why I want to get the instructions done
17 before trial. I don't care about a final pretrial order. Our
18 trial prep conference takes the place of that.

19 So now, we've got the trial date, let's work
20 backwards. I want your dispositive motions at least three
21 months before trial. So we're talking about April 27th, let's
22 say, for dispositive motions. April 27th of '19. Discovery
23 cutoff typically will be a month earlier than that.

24 THE COURTROOM DEPUTY: Your Honor, April 27th is a
25 Saturday.

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1 THE COURT: April 27th is a Saturday. Then
2 April 26th. Thanks. So you want your expert discovery
3 30 days before that; is that correct?

4 MR. ELDER: Well, I think we had envisioned, yes,
5 staging fact then expert discovery.

6 THE COURT: So how about March 29th?

7 MR. FOLEY: Deadline to complete it, Your Honor?

8 THE COURT: Uh-huh.

9 MR. FOLEY: Thank you.

10 THE COURT: You tell me when you want your nonexpert
11 discovery deadline. I don't care.

12 MR. FOLEY: By the end of the year, December 31st.

13 MR. ELDER: That's fine.

14 THE COURT: When?

15 MR. ELDER: End of the year is fine. Actually,
16 March 29th -- why don't we make it the end of January?

17 THE COURT: All right. January 31st.

18 MR. ELDER: I would propose, Your Honor, that we
19 exchange initial expert reports on or about that date, and
20 that way we can have rebuttal reports end of February, and
21 then we've got time to do the depositions by the end of March.

22 THE COURT: All right. Say that again, please.

23 MR. ELDER: I would propose that we -- if there's a
24 fact discovery cutoff of January 31, 2019, that we exchange
25 initial expert disclosures, reports, et cetera, on or about

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1 that date. It can be a little after, if Mr. Foley prefers,
2 but --

3 THE COURT: Let's just say 1/31.

4 MR. ELDER: Okay.

5 THE COURT: And then rebuttal experts, did you say
6 something?

7 MR. ELDER: I did not yet, but we could do it, again,
8 say, by end of -- beginning of March. I don't know if that's
9 -- what day of the week that is.

10 THE COURT: March 1st. And that takes us back to
11 amendment of pleadings and joinder of parties. Is there some
12 possibility -- well, there is -- I suppose there could be
13 joinder of parties maybe. The bankruptcy trustee or -- or --
14 who knows. Pick a date for joinder of parties. I don't care
15 what you want.

16 MR. ELDER: From my perspective, I'd rather it be
17 sooner than later so we have the pleadings done, so I would
18 say by June 1st.

19 MR. FOLEY: The only complication I have on this
20 particular one, Your Honor, is if they do do the bankruptcy
21 route, I've already telegraphed what I would do, which is
22 bring a new action or just bring into this action 500 people,
23 and that I would want to join them.

24 THE COURT: I like the new action better. It sounds
25 better to me. It increases the odds of avoiding you guys.

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1 MR. FOLEY: Your Honor, this case for six years has
2 taken the time of various federal courts. If we had just one
3 judge that had been on top of all three cases, that knew all
4 the issues, it would happen earlier. The quickest thing to
5 bring cases to resolution is a trial date. I think we all
6 know that.

7 THE COURT: That's why I'm giving you a trial date.

8 MR. FOLEY: Thank you, Your Honor. But the joinder,
9 that means I have to go file yet another action for 500
10 people, another judge --

11 THE COURT: June 29th, subject to modification for
12 good cause shown. Now, does that make you feel happier?

13 MR. FOLEY: Yes, Your Honor.

14 THE COURT: And amendment of pleadings, how about if
15 we say the end of the year?

16 MR. FOLEY: 12/31, Your Honor, is fine.

17 THE COURT: 12/31.

18 MR. FOLEY: Modify pleadings.

19 THE COURT: Even then, if there's good cause for
20 later, I'd consider it at least under Rule 15. But that gives
21 you a deadline. And I think that's all I have on my agenda
22 for today. Do you have anything else on yours?

23 MR. ELDER: I do not, Your Honor.

24 MR. FOLEY: I don't. I just had one question.

25 THE COURT: Go ahead.

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1 MR. FOLEY: If the lady at the head of the table is a
2 court reporter, can we order a transcript so we make sure we
3 get all of our dates right?

4 THE COURT: You can certainly order a transcript.

5 MR. FOLEY: Thank you.

6 THE COURT: And the lady at the head of the table is
7 Sarah Mitchell. But I can give you a copy of this with all my
8 notes, and it's probably a good idea because the schedule
9 doesn't even make sense anymore with the motions having been
10 decided and all of that. Who's the scheduling order drafter
11 between you?

12 MR. FOLEY: One of my associates and Mr. Elder did
13 it.

14 THE COURT: Well, how about if I give you guys a copy
15 of this and expect that you submit an amended scheduling order
16 with all these dates in there and clear it up as to the motion
17 to dismiss and stay of discovery, all that.

18 MR. ELDER: Okay.

19 THE COURT: We'll do that before you leave. If you
20 want to order a transcript of this, you can do that also.
21 That's up to you. Sarah is the one that you deal with.

22 Anything else?

23 MR. FOLEY: No, Your Honor. Thank you for your time.

24 MR. ELDER: No, Your Honor.

25 (The proceedings were concluded at 9:54 a.m.)

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REPORTER'S CERTIFICATE

I, SARAH K. MITCHELL, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 23rd day of March, 2018.

/s/ Sarah K. Mitchell

SARAH K. MITCHELL
Official Court Reporter
Registered Professional Reporter
Certified Realtime Reporter

Sarah K. Mitchell, RPR, CRR