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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: CHINESE-MANUFACTURED Docket No. 09-MD-2047  
DRYWALL PRODUCTS LIABILITY New Orleans, Louisiana  
Friday, August 7, 2015

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TRANSCRIPT OF MONTHLY STATUS CONFERENCE AND MOTION PROCEEDINGS  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	HERMAN, HERMAN & KATZ BY: RUSS HERMAN, ESQ. 820 O'Keefe Avenue New Orleans, LA 70130
	LEVIN, FISHBEIN, SEDRAN & BERMAN BY: ARNOLD LEVIN, ESQ. 510 Walnut Street, Suite 500 Philadelphia, PA 19106
	BARRIOS, KINGS DORF & CASTEIX BY: DAWN M. BARRIOS, ESQ. 701 Poydras Street, Suite 3650 One Shell Square New Orleans, LA 70139
FOR THE DEFENDANT:	BAKER DONELSON BY: DANIEL J. DYSART, ESQ. 201 St. Charles Ave., Suite 3600 New Orleans, LA 70170
	PHELPS DUNBAR BY: HARRY ROSENBERG, ESQ. 365 Canal St., Suite 2000 New Orleans, LA 70130-6534

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ORRICK, HERRINGTON & SUTCLIFFE  
BY: JAMES L. STENGEL, ESQ.  
51 West 52nd St.  
New York, NY 10019-6142

DENTONS  
BY: RICHARD L. FENTON, ESQ.  
7800 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606

ALSTON & BIRD  
BY: CHRISTINA H. EIKHOFF, ESQ.  
One Atlantic Center  
1201 W. Peachtree St.  
Atlanta, GA 30309-3424

ACE HOME CENTER:

LUTHER, COLLIER, HODGES & CASH  
BY: DANNY J. COLLIER, JR., ESQ.  
Post Office Box 1002  
Mobile, Alabama 36633

SETTLEMENT ADMINISTRATOR:

BROWNGREER  
BY: JACOB WOODY  
250 Rocketts Way  
Richmond, VA 23231

Official Court Reporter:

Karen A. Ibos, CCR, RPR, CRR  
500 Poydras Street, Room HB-406  
New Orleans, Louisiana 70130  
(504) 589-7776

Proceedings recorded by mechanical stenography, transcript produced by computer.

P R O C E E D I N G S

(MONTHLY STATUS CONFERENCE AND MOTIONS)

(OPEN COURT.)

THE COURT: Be seated, please. Good morning, ladies and gentlemen. Call the case, please.

THE DEPUTY CLERK: MDL No. 2047, *in re: Chinese Manufactured Drywall Products Liability Litigation.*

THE COURT: Liaison counsel make their appearance for the record, please.

MR. ROSENBERG: Good morning, your Honor, Harry Rosenberg as liaison counsel for the Taishan, BNBM, and CNBM entities, your Honor.

MR. HERMAN: May it please the court, good morning, Judge Fallon, Russ Herman for the PSC.

MR. ROSENBERG: Your Honor, in fairness, I understand Mr. Miller had a court conflict.

THE COURT: Yes, he called me and he talked to me about it, so I understand.

MR. DYSART: Yes, your Honor, Danny Dysart on behalf of the Knauf defendants standing in for Kerry Miller.

THE COURT: Thank you very much.

MR. HERMAN: Your Honor, when you recess before the argument after the conference, I will distribute to everybody and the law clerk the PowerPoints that we have.

09:06:40 1 THE COURT: I met with liaison and lead counsel a moment  
09:06:42 2 ago to talk about the agenda that they proposed today.

09:06:46 3 The first item is Pre-trial Orders. Anything on that?

09:06:50 4 MR. HERMAN: No, your Honor.

09:06:51 5 THE COURT: Anything on state court trial settings?

09:06:56 6 MR. HERMAN: Ms. Barrios will address that.

09:06:58 7 MS. BARRIOS: Thank you, Mr. Herman. Good morning, your  
09:07:00 8 Honor, Dawn Barrios for the Federal/State Committee.

09:07:02 9 The one trial that is listed in the joint report, the  
09:07:06 10 parties are trying to work it out, it's an already remediated home.  
09:07:13 11 I was going to ask Mr. Miller today, but since he is running late --

09:07:14 12 THE COURT: Where is it?

09:07:16 13 MS. BARRIOS: It's in Florida.

09:07:17 14 Your Honor, while I am here, if you permit me just to  
09:07:19 15 discuss the Venture settlements in Virginia. The property damage  
09:07:24 16 has been totally distributed, all that money has gone out on the  
09:07:27 17 streets. Now we have the other loss claims. Everything has been  
09:07:32 18 done except there is one appeal to your Honor that the Nguyens are  
09:07:39 19 appealing the Special Master award.

09:07:41 20 I believe that someone spoke with your chambers and talked  
09:07:44 21 about putting that argument to you on September 18th, which I  
09:07:48 22 believe is the next status conference.

09:07:51 23 Garretson Resolution Group notified me that the  
09:07:54 24 determination of that issue is holding up distribution of everyone  
09:07:59 25 else's money, so they asked me if I could get together with your

09:08:02 1 clerk later to maybe get an earlier telephone conference date.

09:08:06 2 THE COURT: Sure. We will do that. That'll be fine.

09:08:10 3 MS. BARRIOS: Thank you, your Honor.

09:08:10 4 MR. LEVIN: Your Honor, in light of what we know about  
09:08:12 5 September 18th, that's advisable.

09:08:14 6 THE COURT: Okay, that's fine.

09:08:15 7 MS. BARRIOS: Thank you, your Honor.

09:08:18 8 THE COURT: Anything on the Omnibus Class Action  
09:08:23 9 complaints?

09:08:23 10 MR. HERMAN: Your Honor, nothing at this time.

09:08:28 11 Nothing, may it please the court, on Roman numeral V.

09:08:31 12 THE COURT: How about Remediation, anything of that sort?

09:08:34 13 MR. HERMAN: We have representatives of the remediation  
09:08:41 14 program present, and I believe that BrownGreer has a report to make,  
09:08:47 15 which can come at this point.

09:08:48 16 THE COURT: Okay.

09:08:49 17 MR. WOODY: Good morning, your Honor. My name is Jake  
09:09:09 18 Woody from BrownGreer here to give the monthly status report.

09:09:13 19 As always we'll start with our payments. To date we've  
09:09:16 20 issued \$79,496,921, which is an increase of just over \$1.4 million  
09:09:25 21 since our last status conference. Most of the payments we've made  
09:09:29 22 since then have been from the other loss fund, and I'll cover that  
09:09:33 23 briefly.

09:09:35 24 Twenty-five percent of our total payments have come from  
09:09:37 25 the other loss fund. We are at \$19,495,738 paid out for other loss

09:09:44 1 claims. And just over 60 million, \$60,001,182 from the Global  
09:09:53 2 Banner INEX repair and relocation claims, which are a pro rata share  
09:09:58 3 of three different settlement funds based on the square footage of  
09:10:04 4 an eligible property.

09:10:05 5 As I mentioned, the GBI payments make up the bulk of our  
09:10:10 6 payments. We have issued, like I said, just over \$60 million; paid  
09:10:16 7 14,925 separate claims.

09:10:19 8 We do have \$16.2 million remaining to distribute for GBI  
09:10:22 9 claims. We have about \$1.8 million allocated to eligible properties  
09:10:28 10 where the claimant has not submitted payment documentation to us to  
09:10:31 11 allow us to release those payments. We need a W-9 and our  
09:10:36 12 verification of claims form in order to make those payments. And  
09:10:40 13 that is a pretty significant portion of the amount remaining.

09:10:43 14 We also, it's a good time I think to touch on how the GBI  
09:10:47 15 process works with the Knauf payments. When Knauf remediates a  
09:10:51 16 property or settles an already remediated property, they oftentimes  
09:10:56 17 receive an assignment of the claimant's Global Banner INEX repair  
09:11:00 18 and relocation claim as part of that remediation settlement process.  
09:11:04 19 When they receive that assignment, we make the GBI payment that  
09:11:08 20 would have been made to the homeowner, we make it to Knauf. And  
09:11:11 21 some of the remaining funds, because Knauf is still remediating  
09:11:16 22 properties and settling already remediated properties, some of the  
09:11:22 23 remaining 16.2 is allocated to future assignments to Knauf.

09:11:25 24 There will be some excess remaining, we are not quite  
09:11:28 25 sure what it will be yet because of the uncertainty around how many

09:11:33 1 assignments there will be and whether or not people will submit  
09:11:35 2 their payment documentation and claim their payments. But we do  
09:11:38 3 believe there will be some left.

09:11:41 4 As we wind down on the remediation program, which I  
09:11:44 5 expect to happen late this year or early first quarter of next year,  
09:11:49 6 we will have a good idea of how much is left and how much needs to  
09:11:53 7 be distributed to Knauf, and can come up with a plan to distribute  
09:11:57 8 the rest.

09:11:57 9 THE COURT: Okay.

09:11:58 10 MR. WOODY: Our other loss payments are, we've made to  
09:12:03 11 five separate claim types: Foreclosure and short sale claims have  
09:12:08 12 received \$4.9 million or 26 percent of the total; lost rent, use and  
09:12:13 13 sales have received \$5.5 million, which is 28 percent of the total;  
09:12:17 14 miscellaneous has received 17 percent of the total, three and a half  
09:12:20 15 million; pre-remediation alternative living expenses, we paid 5.2  
09:12:27 16 million, which is 28 percent; bodily injury we've paid \$110,000,  
09:12:32 17 which is less than one percent of the total. Total payments  
09:12:36 18 \$19,495,738.

09:12:39 19 THE COURT: And those payments, of course, Knauf has no  
09:12:42 20 interest in that?

09:12:44 21 MR. WOODY: Knauf has no interest in these types of  
09:12:47 22 claims, we haven't made any payments to Knauf. For the most part,  
09:12:50 23 these are payments made to non-commercial entities, to real people.  
09:12:54 24 Some of the commercial entities received payments from lost rent,  
09:12:59 25 for instance, and miscellaneous. But for the most part, these

09:13:02 1 payments have been made to homeowners.

09:13:06 2 I did want to touch real quickly on where we are with our  
09:13:11 3 loss claims as a whole. We have 7,908 total other loss claims. We  
09:13:18 4 have issued eligibility notices to 5,064; denied 2,078. To this  
09:13:27 5 point, all of the denials have been because of incompleteness;  
09:13:31 6 people haven't given us the documents they need to prove their  
09:13:35 7 claim.

09:13:35 8 We do have 140 incomplete claims at this point, that  
09:13:38 9 number is down significantly from the last status conference. As  
09:13:41 10 we've talked about throughout this program, whenever we have an  
09:13:42 11 incomplete claim or an open offer, it affects how we can close the  
09:13:46 12 program. And the incompletes have been low for awhile and they  
09:13:51 13 continue to dwindle, and I think we have, to be honest with you,  
09:13:56 14 just about run out of claims at this point. Once we close these  
09:13:59 15 incompletes, either deny them for being incomplete or mark them  
09:14:03 16 eligible because people have submitted them, we should be able to  
09:14:07 17 wind down the other loss program, tell the Special Master how much  
09:14:11 18 money is available to him to distribute to the people who have  
09:14:15 19 requested a Special Master award from another loss eligibility  
09:14:19 20 notice and resolve those claims as well.

09:14:23 21 And again, just touching on what we've done with our  
09:14:27 22 other loss eligibility notices: 5,006 have received notices; we  
09:14:32 23 have 140 that are with offers that are open, meaning that we've  
09:14:35 24 issued them an eligibility notice, they haven't accepted yet. The  
09:14:39 25 time to do that, you have 30 days from the date of the notice. Most



09:14:42 1 of these -- all of these notices predate this conference, obviously,  
09:14:46 2 and will close at most 30 days from yesterday. And they'll close  
09:14:52 3 either because the claimant accepts the offer and we pay them, the  
09:14:55 4 claimant does nothing and we mark them as accepted, or the claimant  
09:14:58 5 requests a Special Master award, as I touched on just a moment ago,  
09:15:03 6 where they feel that the initial offer that we made is not  
09:15:06 7 sufficient and they can ask the Special Master for an increased  
09:15:10 8 offer. 696 people have done that so far. 4,178 have accepted the  
09:15:16 9 offer. And 140 are open.

09:15:19 10 Finally, I just wanted to touch on what we've been doing  
09:15:23 11 since the last status conference. We've made 320 payments totalling  
09:15:28 12 \$1.4 million. We've received 168 accepted offers, which means we  
09:15:32 13 can close those claims and pay them. We've issued 902 notices. Of  
09:15:38 14 those, 644 have been incompleteness denial notices, meaning people  
09:15:42 15 have gone through the incomplete process, we've issued incomplete  
09:15:45 16 notices, a follow-up, and they still haven't responded so we've  
09:15:49 17 denied their claim.

09:15:50 18 This is significant because of what I just mentioned.  
09:15:53 19 Once they are denied, we can close the claim, take them off the  
09:15:56 20 books, and have a better understanding of what claims we have left  
09:16:00 21 to deal with.

09:16:01 22 We've closed 347 claims either because the time to  
09:16:05 23 respond, time to appeal has run out or we've paid them.

09:16:08 24 And I just wanted to touch briefly on the inspection  
09:16:12 25 reimbursement stipend that I mentioned last month. We received

09:16:16 1 responses from many firms, we issued a notice to each firm telling  
09:16:20 2 them what we had on our records for them. We received 175  
09:16:25 3 confirmations, 175 firms confirmed that the spreadsheet entirely.  
09:16:30 4 Forty-six have some revisions, we are looking at those now and  
09:16:33 5 expect to finish that process next week.

09:16:35 6 MR. LEVIN: Your Honor, I just want to assure the  
09:16:38 7 plaintiffs bar that the stipend is being evaluated and worked on,  
09:16:44 8 and Jake has been working diligently on it. It's a very complex  
09:16:49 9 situation and we're going to put it to bed, but it takes time. But  
09:16:54 10 lead liaison counsel have interfaced with Jake and we will solve all  
09:16:58 11 of the problems.

09:16:58 12 THE COURT: Okay.

09:16:59 13 MR. WOODY: Yes, sir.

09:17:01 14 THE COURT: So how many, you have 175 firms confirmed?

09:17:06 15 MR. WOODY: Yes. We sent out just about 220 lists to  
09:17:12 16 firms. We asked for responses, either confirming our information.  
09:17:17 17 The information we asked to confirm was whether an attorney  
09:17:21 18 represented the homeowner and the type of drywall in the property.  
09:17:26 19 As you can see, the majority of people confirmed and a few had some  
09:17:30 20 revisions and we're looking at those now. As Arnie mentioned, we're  
09:17:35 21 working quickly through this.

09:17:36 22 THE COURT: Okay.

09:17:37 23 MR. WOODY: Thank you, your Honor.

09:17:38 24 THE COURT: Thank you. And of course, as I mentioned  
09:17:40 25 several times, this is in addition the remediation of the home by

09:17:44 1 Knauf.

09:17:45 2 All right. Anything from Knauf on the remediation?

09:17:51 3 MR. DYSART: Nothing particularly new, your Honor. There  
09:17:59 4 are currently ten homes under construction, four that are set to  
09:18:02 5 begin. They are on track to try to follow-up and finish by the end  
09:18:06 6 of this year.

09:18:06 7 THE COURT: Okay. Good. Thank you.

09:18:09 8 Anything in the seven INEX, Banner, Knauf settlements,  
09:18:14 9 we've heard that review. Anything else on that?

09:18:16 10 MR. HERMAN: No, your Honor.

09:18:17 11 THE COURT: How about Taishan, BNBM, and CNBM?

09:18:22 12 MR. HERMAN: I'll state for the record, we appreciate  
09:18:25 13 Mr. Egan and Mr. Rosenberg making their offices available for  
09:18:30 14 depositions and their courtesies. And discovery is proceeding in  
09:18:38 15 those matters.

09:18:38 16 MR. ROSENBERG: That's correct, your Honor. I was just  
09:18:40 17 going to echo Mr. Herman's comments, which is that all three  
09:18:44 18 entities have been working with the PSC to productively resolve  
09:18:49 19 discovery issues, both with respect to individuals associated with  
09:18:57 20 these entities as well as third parties, and we're moving together  
09:19:02 21 amicably, your Honor.

09:19:03 22 THE COURT: Okay. Good. Thank you, Harry.

09:19:04 23 MR. ROSENBERG: Your Honor, and of course we will address  
09:19:06 24 the motions but that's part 12.

09:19:08 25 THE COURT: Right. As we all know, that there are two

09:19:13 1 lines of manufacturing in this particular case, those of you  
09:19:20 2 litigants in the office and in the courtroom and also on the phone.  
09:19:27 3 One is the Knauf entities, they are German companies wholly owned  
09:19:34 4 subsidiary, Chinese wholly owned subsidiary by German companies.  
09:19:40 5 We've proceeded along that line for a long time, and we're in the  
09:19:44 6 distribution phase of that particular case.

09:19:46 7 The claims against Knauf were resolved. But another line  
09:19:50 8 of manufacturers is what we've been calling the Taishan entities.  
09:19:56 9 There's been some jurisdictional issues with that group and also  
09:20:03 10 some discovery issues that we're dealing with now. But that group  
09:20:06 11 is not resolved, it's in the discovery phase and in the trial phase  
09:20:14 12 of this particular case.

09:20:14 13 So that's what we're talking about now, we're talking  
09:20:17 14 about the Taishan entities. And that's in the discovery phase and  
09:20:21 15 also the motion phase, which we will be going into shortly.

09:20:25 16 MR. ROSENBERG: And, your Honor, if it please the court,  
09:20:27 17 without belaboring that issue, I understand that term Taishan  
09:20:31 18 entities is just an abbreviation for the moment, but really the  
09:20:34 19 court recognizes the three separate entities.

09:20:37 20 THE COURT: Yes, I think that's fair. What we're dealing  
09:20:41 21 with now is Taishan, TTP, BNBM, CNBM, BNBM Group, CNBM Group, and  
09:20:52 22 the latter groups feel that they are solely, totally indifferent  
09:20:57 23 from Taishan. Simply for purposes, as I mentioned, I've group those  
09:21:04 24 as Taishan entities; but that's not something that is a finding of  
09:21:09 25 fact or a conclusion of law at this time, it is vigorously objected

09:21:14 1 to.

09:21:15 2 MR. ROSENBERG: Thank you, your Honor.

09:21:17 3 THE COURT: Anything from Venture Supply and Porter  
09:21:25 4 Blaine?

09:21:25 5 MR. HERMAN: I think Ms. Barrios reported on that.

09:21:27 6 MS. BARRIOS: Yes, your Honor.

09:21:28 7 THE COURT: Okay. Plaintiff and Defendant Profile Forms.

09:21:32 8 MR. HERMAN: Excuse me, your Honor, because there are so  
09:21:34 9 many people in the courtroom and I understand a number on the phone,  
09:21:39 10 counsel have agreed to have depositions in Hong Kong the week of  
09:21:48 11 September 14th. I am not going to elaborate on that, Monday  
09:21:53 12 afternoon or Tuesday we will be filing notices. And ask that they  
09:21:57 13 be posted on the judge's website, as well as being served by ECF.

09:22:08 14 THE COURT: Okay.

09:22:08 15 MR. HERMAN: Plaintiff and Defendant Profile Forms, your  
09:22:10 16 Honor, there is no issue at this point.

09:22:14 17 Frequently Asked Questions, there's no issue.

09:22:19 18 Matters for hearing following the status conference, as I  
09:22:23 19 understand it, your Honor will hear those after the status  
09:22:29 20 conference is over.

09:22:30 21 MR. ROSENBERG: That's correct, your Honor.

09:22:31 22 THE COURT: That's right.

09:22:32 23 MR. ROSENBERG: As your Honor knows, there are three  
09:22:35 24 motions and we're going to address those after this conference.

09:22:41 25 THE COURT: Yes.

09:22:41 1 MR. HERMAN: Your Honor, there is no new report regarding  
09:22:48 2 Physical Evidence or Preservation Order or any request pursuant to  
09:22:52 3 that order.

09:22:57 4 The Entry of Preliminary Default, there's nothing new at  
09:23:03 5 this time.

09:23:04 6 Already Remediated Homes, there may be an issue, but I am  
09:23:10 7 not directly aware of it. And your Honor may want to inquire about  
09:23:16 8 that.

09:23:17 9 THE COURT: Yes, I will. I know we have someone, a  
09:23:20 10 litigant that had some issues with the remediated home, we will take  
09:23:26 11 that up now if the person who would like to come forward. Yes,  
09:23:41 12 ma'am. Introduce yourself for the record, please.

09:23:44 13 MS. REBECCA HAINEY: Rebecca Hainey.

09:23:45 14 THE COURT: Ms. Hainey.

09:23:48 15 MS. REBECCA HAINEY: Last time I came here, you know, I  
09:23:50 16 was explaining my situation with the house. Of course, we had  
09:23:54 17 health problems after we moved back in and we moved back out. And  
09:23:58 18 just recently Tuesday they came to my house to look at it, and they  
09:24:01 19 didn't find anything wrong with the house. The three gentlemen said  
09:24:06 20 that they didn't notice any smell or notice any corrosion in the  
09:24:10 21 house, which I think everyone but those three gentlemen who have  
09:24:14 22 gone into my house have noticed a smell and had some type of  
09:24:18 23 physical irritation.

09:24:19 24 And they only stayed in there 20 minute s and they said it  
09:24:23 25 would take about an hour and a half.

09:24:24 1 Now, about a year ago I did go into the house and I did  
09:24:28 2 pull the plugs out to try to look at the wiring to see if it was  
09:24:31 3 corroded, and some of it is darker but the air and the power's been  
09:24:35 4 off since then. And honestly, I think that since it's been pulled  
09:24:41 5 away from the wood, the 2x4s, that it might not be corroding as much  
09:24:47 6 because I believe that the wood has absorbed the chemicals and the  
09:24:51 7 sulphur from the Chinese drywall.

09:24:54 8 And I actually had some testing done. I had some testing  
09:25:04 9 done and it shows that my samples were higher with the elemental  
09:25:12 10 sulphur versus new samples. Shows there that, I guess the paper,  
09:25:21 11 mine was 54.9 and new samples are 29.7 as far as the elemental  
09:25:28 12 sulphur goes. So I don't know if the gentlemen took any drywall  
09:25:32 13 with them to test it as well.

09:25:37 14 But like I said, I truly believe that the 2x4s have  
09:25:42 15 absorbed the chemicals from the elevated sulphur levels because  
09:25:49 16 that's what they believe ended up causing a lot of the health  
09:25:53 17 problems, you know, the respiratory problems. And, you know, now I  
09:25:56 18 have asthma and I can't even go back in the house. That's why I  
09:25:59 19 left the wiring and the plugs out is because after I was in there  
09:26:03 20 last year I ended up getting very sick again, so I haven't been able  
09:26:08 21 to go back in the house.

09:26:11 22 And another thing is that my cabinets were not replaced  
09:26:15 23 in the house, they were just stored, and I am not sure -- I've heard  
09:26:21 24 that you made a recommendation that the cabinets were supposed to be  
09:26:25 25 replaced, but I am not sure about that. But I also wanted to bring

09:26:31 1 up the fact that -- the victims in these houses, we have had so many  
09:26:41 2 health problems. And I think just about everyone in one way or  
09:26:47 3 another have experienced some type of health problems. And as far  
09:26:50 4 as the claims go, I believe that they settled with everybody -- not  
09:26:54 5 everybody because it looks like a lot were denied. But for some  
09:26:58 6 people they settled for \$1,000. And when you experience asthma,  
09:27:02 7 nose bleeds, you know, I've got a friend who their daughter gets  
09:27:08 8 seizures. I mean, it's heart breaking as a parent to sit there and  
09:27:12 9 watch your child go through all types of problems.

09:27:14 10           And the confidential settlement agreement released  
09:27:18 11 between Banner and Knauf that was dated on 2006, December of 2006.  
09:27:25 12 This states in here -- well, it states all kind of things. But it  
09:27:33 13 talks about how a breach of this provision could cause irreparable  
09:27:37 14 harm to Knauf and then it talks about how -- it talks about that  
09:27:47 15 they have to keep it confidential right here and they can't make any  
09:27:50 16 statements regarding any perceived or actual smell or health risks  
09:27:55 17 relating to the Knauf plasterboard.

09:27:58 18           And there's a lot of different reports that have come out  
09:28:01 19 where the executives of Knauf, that they knew about this and they  
09:28:05 20 knew about the health problems. Here is something that was from  
09:28:10 21 2010 and it states that Knauf officials tried to resell the suspect  
09:28:16 22 board after taking it from Banner in 2007 but nobody wanted their  
09:28:20 23 board. So they knew that there were health risks, they knew that it  
09:28:24 24 caused air problems, they knew that it corroded different metals and  
09:28:27 25 different construction materials in the house, but they still wanted



09:28:29 1 to get rid of it and they still wanted to sell it and put it in  
09:28:32 2 people's homes.

09:28:34 3 And here is the thing is that if -- and then another  
09:28:39 4 thing it says is the agreement also appears that they wanted to  
09:28:43 5 block Banner from informing any government agency, including health  
09:28:48 6 and consumer authorities. So no media, no press or public media, no  
09:28:52 7 internet web sites, nothing. So they wanted to keep it as  
09:28:55 8 confidential as possible, you know, with it causing health problems  
09:28:59 9 to the consumers.

09:29:00 10 THE COURT: Did you sign it, did you agree with the  
09:29:03 11 settlement?

09:29:04 12 MS. REBECCA HAINEY: I did. I did. But I did not realize  
09:29:08 13 at the time then of what I know now.

09:29:10 14 But the thing is is that I don't understand how they were  
09:29:18 15 allowed to sell that to us and they knew that there were health  
09:29:21 16 problems and it doesn't seem like there's any justice. It seems  
09:29:25 17 like if they knew that they had testing done and they knew that  
09:29:31 18 there was health problems and it can make consumers and people sick,  
09:29:36 19 how they were allowed to sell it, you know, to everyone.

09:29:42 20 And here it is on December 13th, 2006, Knauf executives,  
09:29:47 21 and it lists a lot of executives, that they said that they were  
09:29:52 22 notified that it contains sulphur compounds and the release, you  
09:29:56 23 know, in a gaseous form. They had testing done from CTH, but CTH  
09:30:05 24 wasn't allowed to release the statement until they consulted with  
09:30:11 25 the Knauf attorneys. So they had to, you know, word it just so to

09:30:15 1 where it wouldn't affect them or harm their name in any kind of way.

09:30:19 2           And I just don't understand, it seems like there's no  
09:30:22 3 justice; because honestly I think that, you know, the Department of  
09:30:26 4 Justice and other people need to step in because what they've done  
09:30:29 5 it should be illegal, you know, to sell, you know, toxic chemicals.

09:30:34 6           THE COURT: Well, first of all, I do appreciate you being  
09:30:38 7 here. I always encourage the litigants to come as well as attorneys  
09:30:43 8 and participate in the program. That's why I have it in open court  
09:30:48 9 and I also put it on the telephone so that anybody interested can  
09:30:56 10 listen in and find out what's happening. And I know that you've  
09:31:01 11 come a long way and I appreciate you being here and telling me about  
09:31:04 12 those things.

09:31:05 13           Let me make a couple of observations. Part of the issue  
09:31:10 14 here is you say that they knew or didn't know. I don't know what  
09:31:16 15 they knew or what they didn't know. I heard evidence and one jury  
09:31:20 16 found that they did not, that Knauf did not know, could not have  
09:31:24 17 known because it never happened before, and that's an issue. But it  
09:31:30 18 doesn't mean that Knauf's not liable. Under the law of most states,  
09:31:35 19 and certainly Louisiana and most states, if you manufacture  
09:31:40 20 something that is defective, whether you knew, could have known,  
09:31:45 21 should have known, must have known is of no relevance. You're  
09:31:49 22 liable. You're liable because you manufactured a defective product.  
09:31:54 23 So whether they knew or didn't know doesn't mean that they're not  
09:31:58 24 liable.

09:31:59 25           But the people downstream when they sell it to a

09:32:04 1 distributor or a builder, the builder or distributor's liability is  
09:32:09 2 not based on the manufacturer's what we call strict liability. The  
09:32:14 3 builder must know, a builder must have had some opportunity to know  
09:32:18 4 or could have known or should have known for them to be liable.

09:32:22 5 But when you say that Knauf knew, they take the opposite  
09:32:28 6 view and say they did not know; and at least one jury had agreed  
09:32:33 7 with them that they did not know. So there is a question of fact  
09:32:37 8 here that caused the parties to at least open discussions and  
09:32:42 9 discuss the case and ultimately resolve the case.

09:32:44 10 But part of the settlement, I heard evidence and I  
09:32:50 11 designed a protocol that had to be followed in order to remove the  
09:32:59 12 drywall, remove all of the wires connected to the house; and in  
09:33:07 13 addition to removing the drywall and replacing the drywall and  
09:33:11 14 replacing all of the wires in the house, I required that an  
09:33:16 15 inspector look at the house, take photographs of the house, showing  
09:33:21 16 that it's removed, and then issue a -- and make sure it's clean.  
09:33:29 17 Remove all of the material out of it and clean it and then issue a  
09:33:34 18 certificate.

09:33:34 19 The reason I did that is because individuals who have  
09:33:38 20 drywall in their home and have it removed, when they go to sell  
09:33:44 21 their home they have to disclose that they had drywall, defective  
09:33:48 22 drywall in their home. And if they disclose that, someone may not  
09:33:54 23 want to buy the house and they have to sell the house or they want  
09:33:57 24 to sell the house. So I felt that in order to give those  
09:34:01 25 individuals some comfort, we ought to have someone issue a

09:34:05 1 certificate saying all of the drywall has been removed, the house  
09:34:09 2 has been cleaned, and there is no evidence of any defective chemical  
09:34:14 3 in it. I put that in the program that they had to issue that.

09:34:20 4 So the individual came out to your home, the company who  
09:34:30 5 is the inspector, they inspected the home and they took photographs  
09:34:35 6 of it after the drywall was removed, and they issued a report saying  
09:34:43 7 that there was no -- that the drywall had been removed and there was  
09:34:50 8 no evidence of the contaminants in the house anymore and new drywall  
09:34:55 9 was put in.

09:34:56 10 Now the last time you came you indicated that you felt  
09:34:59 11 that, well, perhaps Chinese drywall was replaced with Chinese  
09:35:06 12 drywall, so I had them go back out and look at the house and they  
09:35:10 13 did. And they indicated that they looked at the drywall and found  
09:35:14 14 that it was American made drywall, not Chinese drywall.

09:35:17 15 MS. REBECCA HAINEY: Right, I didn't think it was Chinese  
09:35:20 16 made before because I knew that it had a plaque of Florida stamped  
09:35:24 17 on it saying made in the U.S.A.

09:35:26 18 THE COURT: In any effect, they issued another report  
09:35:28 19 saying that there's no evidence, they took apart some of the wires  
09:35:31 20 and didn't find any evidence of any problem. They report that  
09:35:37 21 there's no unusual odor was detected, and there's no blackening of  
09:35:43 22 copper or silver.

09:35:46 23 You know, I have before me documents from individuals  
09:35:52 24 saying that your home is safe and your home doesn't have a problem.  
09:35:56 25 But if you're dissatisfied, you need to have a lawyer look at it. I

09:36:02 1 understand you had a lawyer.

09:36:02 2 MS. REBECCA HAINEY: Right. I mean, honestly, it's been  
09:36:05 3 very hard to try to find a lawyer to help me in this case. And I  
09:36:09 4 think that the drywall should be tested, because like I said, I  
09:36:12 5 think that the 2x4s, the wood is pour Russ in the home and I think  
09:36:15 6 they absorbed the sulfides and all of the other chemicals and now  
09:36:20 7 they're being re-released back into the air of the home.

09:36:22 8 THE COURT: I understand your feeling and I understand and  
09:36:28 9 you articulate it very well. But what you need to do at this point,  
09:36:30 10 you need to have a lawyer represent you and proceed to litigation  
09:36:35 11 because it's not before me. You signed a settlement agreement, you  
09:36:41 12 agreed with the terms of the settlement agreement. Now you're  
09:36:44 13 indicating that the terms of the settlement agreement weren't  
09:36:48 14 properly carried out. That's an issue of a breach of contract and  
09:36:54 15 you need somebody to file a suit for you on a breach of contract,  
09:36:59 16 and I'll hear evidence on both sides. That's the best I can do with  
09:37:04 17 it.

09:37:04 18 What I see before me is that you agreed to a settlement,  
09:37:12 19 and the terms of the settlement at least indicate that it was  
09:37:16 20 carried out. Now you feel it wasn't carried out.

09:37:21 21 MS. REBECCA HAINEY: I do believe that they followed --

09:37:23 22 THE COURT: There is nothing else I can do.

09:37:26 23 MS. REBECCA HAINEY: I do believe that they followed  
09:37:27 24 protocol, I do believe -- I mean, I know for a fact, you know, that  
09:37:27 25 they did remove all of the drywall, they did clean it, they did

09:37:30 1 replace the copper and the plumbing and all of that. They didn't  
09:37:34 2 replace the cabinets. But they --

09:37:35 3 THE COURT: You wanted them to knock the house down, is  
09:37:38 4 that what you would do? I mean, you don't -- they removed it  
09:37:42 5 down -- I have pictures showing that it's just down to the studs.

09:37:49 6 MS. REBECCA HAINEY: Well, I mean, not now, now it's back  
09:37:51 7 to normal, you know. Back then they did because that's what they  
09:37:55 8 did with all of the houses is they removed everything and put it  
09:38:00 9 back down to the studs. But like I said, I do believe that the  
09:38:02 10 studs is what absorbed, and I think the wood should be tested in  
09:38:04 11 these houses.

09:38:05 12 THE COURT: Okay. That may be a breach of contract claim  
09:38:09 13 that you need to do.

09:38:11 14 MS. REBECCA HAINEY: Okay.

09:38:12 15 THE COURT: But I would urge you to contact counsel and  
09:38:16 16 deal with it accordingly because you need to file a suit.

09:38:19 17 MS. REBECCA HAINEY: Yeah, okay. All right. Thank you,  
09:38:21 18 your Honor.

09:38:21 19 THE COURT: Okay. Thank you very much, though, for  
09:38:25 20 coming.

09:38:25 21 Okay. Anybody else from the audience that would like to  
09:38:29 22 speak? I always entertain any comments by counsel or litigants or  
09:38:36 23 anything else.

09:38:37 24 All right. I will be back in a moment then to hear oral  
09:38:41 25 argument. The court will stand in recess.

09:38:42 1 THE DEPUTY CLERK: All rise.

09:38:43 2 (WHEREUPON, A RECESS WAS TAKEN.)

09:55:14 3 (OPEN COURT.)

09:55:16 4 THE COURT: Be seated, please.

09:55:16 5 As part of the proceeding today, we have two motions  
09:55:20 6 before the court. One motion is the motion by CNBM and BNBM,  
09:55:28 7 motions to clarify or alter the contempt order. I'll hear from the  
09:55:35 8 parties at this time.

09:55:37 9 MR. ROSENBERG: Your Honor, if it please the court, I  
09:55:42 10 think the court is correct, of course as it always is, that there  
09:55:47 11 are two substantive motions, but one of the motions is a subpart of  
09:55:52 12 the first motion that's going to be presented to the court, which is  
09:55:54 13 the motion to strike an affidavit.

09:55:57 14 THE COURT: Right. Okay. I didn't need any argument on  
09:56:02 15 that, I'll agree with that, I'll grant the motion to strike the  
09:56:07 16 affidavit; it's argument and it may have a place, but not at this  
09:56:10 17 time.

09:56:11 18 MR. ROSENBERG: Well, to Mr. Fenton's chagrin, your Honor,  
09:56:15 19 he's prepared a 30-minute argument, so I'll have to break the news  
09:56:18 20 to him.

09:56:19 21 MR. FENTON: Not quite, your Honor, but I will say no more  
09:56:21 22 on the subject.

09:56:22 23 THE COURT: Okay, fine. When you win, you don't say  
09:56:24 24 anything.

09:56:27 25 MR. STENGEL: Good morning, your Honor, Jim Stengel from

09:56:32 1 Orrick, Herrington for the CNBM movants on this matter.

09:56:35 2 We've made a motion to modify or vacate or seek  
09:56:40 3 clarification in some ways of the court's July 17, 2014, contempt  
09:56:45 4 order. We've had a dispute in chambers as to documents that I  
09:56:52 5 believe Mr. Herman, I believe, intends to use, and I think we've  
09:56:55 6 resolved that to the parties' satisfaction.

09:56:57 7 But there was one point that I did want to clarify, which  
09:56:59 8 was, as we discussed earlier during the status conference, there are  
09:57:04 9 multiple entities on the defense side of this case; and we  
09:57:06 10 understand for convenience and economy of expression, the court  
09:57:10 11 refers to it sometimes collectively. That has from our perspective  
09:57:15 12 a pernicious risk in that we view ourselves, and view the record  
09:57:21 13 will show quite clearly we are separate entities; and that brings to  
09:57:25 14 mind that the documents at issue here, although this is a CNBM  
09:57:30 15 entity motion joined in by BNBM entities, the documents at issue as  
09:57:35 16 to confidentiality are not ours but we will respect the wishes of  
09:57:38 17 other parties in that respect.

09:57:39 18 What I want to do today, and this -- the vibe of the  
09:57:45 19 submission, the fact that the documents I think shows that we and  
09:57:48 20 the PSC are in some way ships passing in the night. We view this as  
09:57:54 21 a strictly legal motion, a modification of an interlocutory order of  
09:57:59 22 this court under Rule 54, we are not seeking partial or full summary  
09:58:02 23 judgment under Rule 56, so the factual material to our view is not  
09:58:07 24 relevant. This is purely a matter of legal issues to be decided by  
09:58:12 25 the court.



09:58:15 1           Now, what are those legal issues? First and most  
09:58:19 2 obviously there is the issue of the scope and the definiteness of  
09:58:25 3 the injunction under Rule 65. But in bringing that matter to the  
09:58:29 4 Court's attention, there are a number of related procedural issues  
09:58:33 5 which we view both purely legal, meaning they're ripe for  
09:58:37 6 determination by the court at this time, but critical to what we are  
09:58:41 7 doing.

09:58:43 8           Which brings me to my concluding point, which is broader  
09:58:47 9 than a motion to clarify, vacate, or modify an existing Rule 65  
09:58:52 10 injunction; and that is I hope the court will take this motion and  
09:58:59 11 our explanation of the governing law and have the chance at this  
09:59:06 12 juncture to rethink what we're doing. And I understand, your Honor,  
09:59:10 13 that we are procedurally in uncharted waters. I have never been  
09:59:14 14 in a case like this before, I suspect none of us have; and looking  
09:59:17 15 around the room, there are very few of us for whom this is our first  
09:59:22 16 rodeo. We've created a situation which is unprecedented I think in  
09:59:26 17 the complication and we appreciate the court's efforts to get this  
09:59:30 18 on an orderly path.

09:59:32 19           And we understand that because of that history we started  
09:59:33 20 with the July order and moved from there, and we came back into the  
09:59:38 21 litigation. And the fact that shouldn't be lost here on the court  
09:59:42 22 or the litigants is we are back. We've been litigating, I think  
09:59:46 23 we've been litigating reasonably successfully in terms of making  
09:59:49 24 progress with the PSC. I think we've demonstrated that we are  
09:59:53 25 litigating.

09:59:54 1 As your Honor will remember, when we first re-entered the  
09:59:57 2 litigation earlier this year, we were under a fairly strict  
10:00:00 3 admonition that the Court was watching our conduct and we were  
10:00:04 4 liable to have our defenses stricken, or the sanctions entered if we  
10:00:09 5 didn't comply with what the court expected in terms of active  
10:00:13 6 litigation.

10:00:13 7 We're here and we've done that. So there's a very  
10:00:17 8 substantial argument, I think the compelling argument that the  
10:00:21 9 injunction has served its coercive purpose, which was to bring the  
10:00:26 10 litigants back to court.

10:00:29 11 Now the court may have concerns about what happens in the  
10:00:31 12 future, but I think there are mechanisms to deal with that. And I  
10:00:35 13 think we need to deal with the hear and now, which I will go into in  
10:00:38 14 greater detail, of the fact that -- now, granted, we're serving  
10:00:41 15 multiple purposes with the discovery that's going on now, but much  
10:00:44 16 of it is focused, if not exclusively, but substantially on the issue  
10:00:50 17 of whether there's any conduct of business in the United States  
10:00:53 18 during the contempt order period.

10:00:56 19 That is consuming literally millions of dollars a month  
10:01:00 20 of attorney time. I think it's slowing down the process of our  
10:01:06 21 being in a position to litigate substantial issues like personal  
10:01:10 22 jurisdiction, or in the case of my client group, subject matter  
10:01:15 23 jurisdiction. And we have been accommodating I think on the PSC's  
10:01:19 24 insistence that certain discovery needs to be completed before they  
10:01:22 25 can proceed with substantive briefing and argument on motions

10:01:26 1 relating to the sovereign immunity of one of my clients.

10:01:30 2 But when in response to our 14 page legal brief we get 40  
10:01:36 3 something pages of briefing, a 40 page Herman affidavit, attaching  
10:01:40 4 96 exhibits, which I unfortunately went through the process of  
10:01:44 5 actually printing them and it occupies about this much space  
10:01:48 6 (DEMONSTRATING), there's something wrong with that. When we say we  
10:01:52 7 have a problem with the ambiguity of the order and the responses  
10:01:58 8 briefing of that level and now we have another 50 pages of purported  
10:02:02 9 factual material, I think it highlights the fact that the court  
10:02:05 10 should pay careful attention to what we're saying here. Because it  
10:02:10 11 does implicate how this proceeding goes, how efficient we are in  
10:02:14 12 resolving the open issues, the issues that matter.

10:02:16 13 And this frankly has become a side show, which is  
10:02:19 14 consuming substantial resources; and a substantial resource which I  
10:02:22 15 know the court is very sensitive to is the consumption of time. And  
10:02:27 16 as you know, we started with what were probably optimistic and  
10:02:31 17 unrealistic deadlines at the start of this process, we were going to  
10:02:35 18 be done with discovery on a very breakneck pace. Everyone, the PSC,  
10:02:40 19 the defendants has worked very hard to do that. And I think we,  
10:02:44 20 frankly, in some ways moved heaven and earth to make this thing  
10:02:46 21 work.

10:02:46 22 But we are a long way from being done, we are now setting  
10:02:49 23 conferences and arguments for early December, this matter will  
10:02:52 24 clearly run deeply into next year. And I don't think that was  
10:02:54 25 anyone's contemplation.

10:02:56 1           So I think that's a framing reference for what I am going  
10:02:58 2 to talk about this morning, which are, and again, the legal  
10:03:01 3 deficiencies of the injunction order under Rule 65 and other  
10:03:06 4 provisions, not the facts of the relationship among the parties, not  
10:03:11 5 whether there is an alter ego basis beyond the findings of fact and  
10:03:16 6 conclusions of law. Those really miss the point.

10:03:18 7           As I said, we are in many ways ships passing in the  
10:03:21 8 night. But I urge the court, as I know you already have, to look  
10:03:24 9 carefully at the briefing. This matter has been extensively briefed  
10:03:26 10 now, and although I will focus initially on Rule 65, there are a  
10:03:30 11 number of procedural issues, which again because of our unique  
10:03:34 12 situation may not be within our normal experience, they may not be  
10:03:38 13 obvious, but some of them raise very critical issues and run afoul  
10:03:43 14 of very clear Fifth Circuit law.

10:03:45 15           With that, let's turn to Rule 65. And we have a dispute  
10:03:51 16 with the PSC because they want to treat the injunction initially as  
10:03:55 17 being a product of Rule 37, a discovery sanction. They are correct  
10:04:01 18 in that an injunction may be issued as a discovery sanction under  
10:04:05 19 Rule 37, but every injunction is governed by Rule 65. And the rule  
10:04:11 20 is quite clear in that respect and every order granting injunction  
10:04:17 21 must state its terms specifically.

10:04:18 22           And, again, contempt is an available sanction, but it  
10:04:22 23 doesn't create a separate body of law governing the clarity of the  
10:04:28 24 injunction, that's all Rule 65 and the cases interpreting Rule 65.

10:04:34 25           Obviously here there are two critical issues with respect

10:04:41 1 to how the injunction works here. The first is whether person --  
10:04:46 2 who the persons bound are. And I wasn't here in July of '14, so I  
10:04:55 3 can't speak of the circumstances at that time, others were. But the  
10:04:59 4 order uses a set of phrases, which we think are inherently  
10:05:05 5 uncertain. And Rule 62(d)(2) lays out who can be bound, and we  
10:05:11 6 submit the CNBM entities are not part of any of that.

10:05:18 7 One of the analytical collapses I think we need to avoid  
10:05:23 8 here is to realize that there are two separate events: There's  
10:05:27 9 Taishan's withdrawal from the litigation. And while Taishan, as I  
10:05:34 10 understand it, was under a clear directive from this court to appear  
10:05:37 11 and participate in a debtor's exam. There was no injunction, there  
10:05:40 12 was no injunction directed at any other party. It was Taishan as a  
10:05:44 13 party in *Germano*, and our clients were not parties in *Germano*, had  
10:05:49 14 not been served in *Germano*, they were not there.

10:05:53 15 Now, I know the PSC thinks they have an argument, but we  
10:05:59 16 weren't there. That's one element.

10:06:03 17 The second event, which is where we consumed all of this  
10:06:07 18 time and effort in discovery, lots of third-party discovery, is the  
10:06:11 19 conducting business during the July to March period. A huge amount  
10:06:17 20 of time and we submit a waste of time. And there's no evidence,  
10:06:25 21 there's no allegation that any of the CNBM entities aided or caused  
10:06:32 22 Taishan to do business during the period.

10:06:37 23 So we start with the July order, and the July order is  
10:06:42 24 simple, it's brief, and it refers to Taishan and any of its  
10:06:50 25 affiliates or subsidiaries is hereby enjoined. Well, subsidiaries

10:06:55 1 is fairly clear in this context, that really means TTP, and I think  
10:07:00 2 the order fairly read is referring to subsidiaries of Taishan, not  
10:07:04 3 subsidiaries of affiliates.

10:07:05 4 But affiliates is the evil that lurks in this order.  
10:07:10 5 Because affiliates, as your Honor knows, is often a defined term in  
10:07:14 6 contracts because parties don't know what it means necessarily.  
10:07:19 7 Blacks gives a very expansive view of affiliates, can mean almost  
10:07:23 8 any relationship. And affiliates, while the court may have had  
10:07:26 9 something firmly in mind, unfortunately the text of the order does  
10:07:30 10 not communicate that clearly to a reader.

10:07:33 11 And ironically some of the materials that I think  
10:07:36 12 Mr. Herman's going to display involves dialogue about what does this  
10:07:41 13 mean. And while Mr. Herman will focus on how that dialogue might  
10:07:46 14 have been resolved, from my perspective the fact that there is that  
10:07:50 15 dialogue, that parties who at least in the PSC's view are subject to  
10:07:56 16 those limitations, are debating. I think you'll find takes this  
10:08:02 17 order out of the context of Rule 65 and makes it inadequate because  
10:08:07 18 there is that ambiguity.

10:08:11 19 But the PSC says, well, we have the findings and  
10:08:14 20 conclusions finding that five of these entities are affiliates, for  
10:08:17 21 purposes alter egos. But those findings, conclusions happened after  
10:08:23 22 the contempt order, and the law is clear you can't nunc pro tunc  
10:08:30 23 clarify an injunction by subsequent rulings in developments. So as  
10:08:34 24 interesting as the findings of facts and conclusions of law may be,  
10:08:38 25 they don't really help clarify or save the contempt order in this

10:08:42 1 respect.

10:08:42 2           And we have an issue that I am sure in many motions we  
10:08:48 3 will be discussing, that is the binding effect of Taishan's  
10:08:53 4 admissions. Now, these were admissions in response to discovery  
10:08:57 5 requests, which I understand were served after Taishan had announced  
10:09:01 6 its intention to leave the litigation, so it's perhaps no surprise  
10:09:04 7 that there was no response and they were deemed admitted against  
10:09:08 8 Taishan. And I think they are binding as to Taishan.

10:09:11 9           But again, recognizing the separate status of these  
10:09:13 10 defendants, the findings of fact and conclusions of law may not be  
10:09:18 11 used as a binding determination of the status as to us. We cite the  
10:09:24 12 controlling Fifth Circuit law which is quite clear on this, but  
10:09:29 13 Wright, Miller, et cetera, make it fairly clear that this is not a  
10:09:33 14 unique Fifth Circuit provision, but that's how the law is generally  
10:09:36 15 applied. The courts take very seriously the provision with which  
10:09:41 16 Rule 65 injunctions must be framed.

10:09:44 17           Now, the PSC has contributed in many ways and I think  
10:09:49 18 affirmed the problem with the affiliates language. These are  
10:09:51 19 successive in time, but first there were five, then there were 39,  
10:09:56 20 then there were 46, and then there were 66. If the party which  
10:10:02 21 wishes to prosecute the injunction from time to time can't state  
10:10:07 22 with certainty who it is they believe is bound by the injunction,  
10:10:11 23 the inherent ambiguity of that phrase becomes manifest, and that's  
10:10:16 24 what we have here.

10:10:17 25           And while in fairness the PSC has not described the other

10:10:21 1 150 SOE's from which they sought discovery as affiliates for these  
10:10:25 2 purposes, the definition they've used is so broad relating to  
10:10:30 3 ownership, given the strict government ownership of Group, one of my  
10:10:35 4 clients, I believe there is an argument under their construction  
10:10:39 5 that most of the state owned enterprises in the People's Republic of  
10:10:44 6 China would be affiliates for these purposes.

10:10:46 7 And I can't believe that that was the court's intent in  
10:10:49 8 July of last year. I think the court's clear intent was to achieve  
10:10:55 9 exactly the result it did, which was to bring these litigants back  
10:10:59 10 in so there could be a resolution of this case.

10:11:03 11 Now I'll touch briefly on jurisdiction as a legal  
10:11:09 12 prerequisite. I touch briefly on this because we tried to frame  
10:11:13 13 this motion surgically. We have Rule 12 motions pending for our  
10:11:17 14 client, we have a sovereign immunity challenge as part of those  
10:11:20 15 challenges pending. We didn't want to wander into the complex area  
10:11:24 16 of jurisdictional findings. We don't think you need to do that at  
10:11:27 17 this point. But we did think it was fair to make sure that the  
10:11:30 18 court understood how stringently the jurisdictional requirement,  
10:11:34 19 personal jurisdiction, and subject matter jurisdiction is applied in  
10:11:38 20 these cases.

10:11:40 21 The case we cite from the Fifth Circuit does cite the  
10:11:43 22 prevailing Fifth Circuit standard, but that's been the standard in  
10:11:46 23 federal courts since the *Zenith Radio v. Hazeltine Research*  
10:11:51 24 antitrust case I believe in the early '60s. That case was extreme  
10:11:54 25 in many ways. There was a subsidiary as a defendant, there was a



10:11:57 1 stipulation in the record that the subsidiary and its parent could  
10:12:00 2 be treated as one entity for purposes of litigation. The  
10:12:03 3 stipulation was entered into specifically to avoid veil piercing  
10:12:05 4 discovery. Subsequently the court attempted, the district court  
10:12:08 5 entered injunction against both subsidiary and parent, and the  
10:12:13 6 Supreme Court ultimately ruled that as the parent, despite the  
10:12:15 7 stipulation, had not been served with process, was not a party to  
10:12:19 8 the litigation, was not subject to the jurisdiction of the court,  
10:12:22 9 they could not be bound by an injunction.

10:12:24 10 So again, that's a placeholder, a gentle reminder to the  
10:12:28 11 court that that is a substantial issue, and it's a predicate issue  
10:12:32 12 towards any party being held to be bound by an injunction.

10:12:37 13 Now I would like to turn, this is who is bound. Let's  
10:12:40 14 talk about what conduct is prohibited. And this again, plain  
10:12:48 15 meaning. You've got to be able to look at the injunction and say I  
10:12:52 16 understand what I can or cannot do. In the cases involving the idea  
10:12:56 17 of conducting some activities, commercial activity, are very clear.  
10:13:01 18 And just to take an example, again, how the PSC I think proves the  
10:13:06 19 case of ambiguity. And I will say and I don't want to be unfair  
10:13:11 20 because we're in the process of discovery, which is inherently  
10:13:14 21 broader than the PSC may want to go in terms of recoveries, but the  
10:13:20 22 assertions from discovery perspective of the interests that are  
10:13:24 23 necessary to be conducting business include people investing in  
10:13:28 24 securities of my clients that are listed on the Hong Kong exchange,  
10:13:32 25 the Shenzhen exchange, Shanghai exchange. It may very well be that

10:13:36 1 American invest or a bank invest in those.

10:13:39 2 But it's strange credulity to say that someone could have  
10:13:42 3 picked up this order in July of 2014 and said, boy, I better not  
10:13:47 4 invest in a company which is three or four levels of ownership,  
10:13:52 5 including intervening publicly traded companies removed from  
10:13:57 6 Taishan.

10:13:57 7 But here we have a very specific example and the  
10:14:00 8 plaintiffs have been very clear that they consider this doing  
10:14:03 9 business, conducting business to use the phrase of the order; that  
10:14:08 10 is, we know you've done things in Oregon, Texas, and other places.  
10:14:11 11 When you look at the actual governing state law in each case, the  
10:14:14 12 state corporate law exempts from the concept of doing business,  
10:14:18 13 albeit this is for registration purposes, that very conduct.

10:14:23 14 So how the PSC can stand up and say, well, obviously  
10:14:27 15 conducting business, everyone would have known that that included  
10:14:32 16 litigation. I think again, strange credulity. I also would say, to  
10:14:38 17 put it in context, some of the litigation involved here was ongoing  
10:14:41 18 at the time the order was entered, and I can't believe it was the  
10:14:44 19 intention of this court to force parties to do in other cases  
10:14:50 20 exactly what they were doing here that got them in trouble with this  
10:14:53 21 court. I don't think this court would have ever said, "I am going  
10:14:57 22 to enjoin you from conducting litigation in Texas." "That Oregon  
10:15:02 23 case, walk away." That again is so far beyond the bounds of  
10:15:11 24 reasonable I can't believe it was part of the court's thinking at  
10:15:13 25 the time.

10:15:15 1 Now, we've had some debate in the briefing as to whether  
10:15:18 2 the court entered criminal or civil sanctions here, and whether the  
10:15:24 3 injunction was criminal or civil. I will be bound by the wording of  
10:15:32 4 the order, which says explicitly it was criminal. And to the extent  
10:15:35 5 criminal contempt is involved, there are a host of procedural  
10:15:39 6 protections. Due process standards, these are square corners that  
10:15:44 7 have to be honored. And they will have a substantial impact on how  
10:15:48 8 we go forward.

10:15:49 9 I think it's a substantial impact on the existing  
10:15:52 10 adequacy of procedure to support this injunction if it is read with  
10:15:57 11 the breadth that the PSC urges. You can't make that work.

10:16:06 12 Again, I think it's abundantly clear, this is criminal  
10:16:12 13 contempt. The order says the court holds Taishan in contempt of  
10:16:16 14 court both criminally and civilly. In the deprivileging order of  
10:16:20 15 December, the court recites historical facts that it was both a  
10:16:24 16 civil and criminal contempt citation, and notes that the PSC argues  
10:16:29 17 that it was criminal in part to support the application of the crime  
10:16:32 18 fraud exception of the Hogan Lovells documents. So I don't think  
10:16:35 19 there's a serious issue as to whether this was both species of  
10:16:40 20 contempt.

10:16:40 21 Of the reasons that I think the court and litigants need  
10:16:45 22 to think very hard about what we're doing with this path towards I  
10:16:50 23 suppose expected recoveries of profits for conduct of business is,  
10:16:56 24 and there seems to be some confusion here, to the extent this was a  
10:16:59 25 coercive mechanism, and clearly was, there was no relationship

10:17:04 1 between any injury to any user of Taishan drywall and the profits of  
10:17:09 2 sometimes far removed entities. That was a substantial hammer.

10:17:16 3 If that's what it was, and I think it clearly was  
10:17:19 4 coercive, then any recoveries realized here would be paid to the  
10:17:23 5 clerk of the court. That's what you do with those awards. And in  
10:17:28 6 my experience, every time you've had a witness who wouldn't testify  
10:17:31 7 before they were incarcerated they were paid -- they had a fine  
10:17:34 8 imposed of X dollars a day until they purged themselves. And there  
10:17:40 9 was never any question in my mind in those cases that the plaintiff  
10:17:42 10 was going to receive those funds.

10:17:45 11 Now, the court does have in its power and does issue  
10:17:48 12 compensatory contempt awards, but those would have to be clearly  
10:17:53 13 linked with the injury to the plaintiffs and there is no linkage  
10:17:57 14 here. So we have the possibility of spending huge amounts of time  
10:18:01 15 and resources to pursue money, which although I'm sure the clerk of  
10:18:06 16 the Eastern District of Louisiana would love to get an unexpected  
10:18:11 17 check for a very substantial amount of money, I don't think that's  
10:18:12 18 what the court intended us to be doing, and I don't think that's how  
10:18:15 19 we should be spending our time right now.

10:18:17 20 A more serious issue in many respects is the next one.  
10:18:22 21 And this one I am not sure we have a good fix for. This is a quote  
10:18:31 22 from *in re: H. Peter Davidson* in the Fifth Circuit, it cites the  
10:18:36 23 Supreme Court, Scalia I believe in the *Vuitton et Fils* case, but it  
10:18:42 24 stands for what's really I think in most contexts an unexceptional  
10:18:46 25 proposition, that when you are dealing with a contempt situation,

10:18:49 1 particularly in a contempt situation including criminal contempt,  
10:18:54 2 the defendants, and this is not a matter of stepping into the shoes  
10:18:57 3 of the plaintiffs and looking out for that interest, this is a  
10:19:01 4 straight due process issue for we defendants. We deserve and the  
10:19:04 5 law contemplates in criminal contempt if it has to be proceeded, it  
10:19:09 6 would be a special prosecutor assigned, because, as in all  
10:19:13 7 defendants' cases, we're entitled to an objectively minded  
10:19:17 8 prosecutor who can do what prosecutors do. If the evidence is  
10:19:21 9 adequate, I'll walk away.

10:19:24 10 By delegating this process to someone with, in their  
10:19:27 11 view, very direct financial interest because they don't agree with  
10:19:30 12 us as to the ability to have the plaintiff class recover the  
10:19:34 13 proceeds of this exercise, we have interested counsel pursuing  
10:19:40 14 contempt claims. Clearly impermissible.

10:19:45 15 And, your Honor, the *Davidson* case goes on to distinguish  
10:19:48 16 the law in the Fifth Circuit from others on this very point; which  
10:19:53 17 is because of the seriousness of this issue from a defendant due  
10:19:56 18 process perspective, there is no harmless error carved out as to  
10:20:02 19 these cases in the Fifth Circuit. If you touch this third rail,  
10:20:06 20 you're done.

10:20:07 21 And I don't know how we unpack this now because we've  
10:20:10 22 gone some distance with an impermissible prosecutor in these cases.

10:20:16 23 Now, I don't want to be accused of sort of creating a  
10:20:22 24 Christmas tree of issues, but I do want to make sure the court is  
10:20:25 25 aware of some other issues.

10:20:29 1           The complaints allege that Group is a state owned  
10:20:34 2 enterprise owned by the Chinese government, and we have, as your  
10:20:37 3 Honor knows, briefed the issue of sovereign immunity under the  
10:20:43 4 Foreign Sovereign Immunity Act. And that has consequences on  
10:20:46 5 subject matter jurisdiction, personal jurisdiction, jury trial, the  
10:20:50 6 availability of punitive damages, how you would execute and recover  
10:20:54 7 if anything was ever found to be liable.

10:20:56 8           But it also has direct consequences in a situation of  
10:21:01 9 contempt, and the Act and the cases interpreting the Act place  
10:21:05 10 substantial limitations on the court's ability to pursue contempt  
10:21:08 11 remedies against sovereign immunities.

10:21:10 12           So in this collection of issues which we think the court  
10:21:14 13 needs to consider when deciding whether we're going to consider  
10:21:20 14 continue howling down the path of looking for discovery about  
10:21:23 15 conduct of business in the United States, it's something that the  
10:21:25 16 court ought to consider.

10:21:27 17           Now, can I have the last slide, please.

10:21:30 18           Obviously I spent a fair amount of time looking at this  
10:21:34 19 language, and I have shared with the court the defects we see. And  
10:21:38 20 I say that with all respect, your Honor, but we think those are  
10:21:42 21 fatal.

10:21:43 22           But when I looked at it and I thought there was another  
10:21:46 23 source of ambiguity, which is this phrasing here is a little  
10:21:50 24 peculiar. Most of us would say "unless and until," the order  
10:21:57 25 doesn't say that. The order is stated in the disjunctive. Until or

10:22:01 1 unless it participates in this judicial process. I think that "or"  
10:22:09 2 is significant and the "or" allows you to read either until or  
10:22:14 3 unless Taishan and the other defendants having subjected themselves  
10:22:19 4 to this court's tender mercies in some way, although obviously we've  
10:22:24 5 reserved personal jurisdiction and other issues, we're back and I  
10:22:28 6 think a fair reading of this order is unless and since we're here,  
10:22:32 7 the contempt process should stop.

10:22:36 8           And that's broader than the motion we started with, but  
10:22:39 9 it's where we ended up after the analytical process of looking where  
10:22:43 10 we were and frankly looking at the extensive factual matter provided  
10:22:47 11 by the PSC. So we think we are at a juncture in time where the  
10:22:53 12 court should suspend activity, and I say this knowing that one of  
10:22:56 13 the things that PSC said in response to our motion was we were  
10:23:00 14 seeking a stay of discovery, we're not. We think this is a discrete  
10:23:03 15 binary decision on the court's part.

10:23:05 16           If we're going to continue with discovery, we're going to  
10:23:09 17 continue prosecution in this form with a contempt remedies, if we're  
10:23:14 18 going to continue to try and enforce the July 17th injunction as  
10:23:19 19 written, absent a consideration of my suggestion on "or," then I  
10:23:24 20 think we're into that realm.

10:23:27 21           But I do think the order having served its purpose with  
10:23:31 22 the litigants back and with us, I think, still searching for a  
10:23:36 23 viable damage model on the part of the plaintiffs, there are lots of  
10:23:41 24 issues that need to be resolved. Jurisdiction, alter ego, damages,  
10:23:47 25 who is entitled.

10:23:49 1 I don't think it's constructive for this court and these  
10:23:52 2 litigants to engage in extensive fraud and detour to see who was  
10:23:58 3 doing what through an Nth level subsidiary in the United States  
10:24:03 4 between July and March. It's a waste of this court's time, it's a  
10:24:06 5 waste of resources, it is legally, we think, facially impermissible.

10:24:11 6 And with that, thank you, your Honor.

10:24:13 7 THE COURT: Okay. Thank you very much, I appreciate your  
10:24:15 8 comments.

10:24:15 9 MR. FENTON: Your Honor, very briefly. There's little I  
10:24:23 10 can add to Mr. Stengel's very comprehensive and very excellent  
10:24:27 11 presentation. There's a couple of specific points to my clients  
10:24:31 12 BNBM, PLC and BNBM Group that I would like to make.

10:24:36 13 First of all, we had raised very much the same arguments,  
10:24:40 14 with the exception of sovereign immunity, we had raised very much  
10:24:43 15 the same arguments in our May 8 filing, Record Document 18872 in  
10:24:52 16 response to the PSC's request for an expedited hearing and we  
10:24:57 17 incorporated that in our joinder.

10:24:59 18 In particular, your Honor, with respect to BNBM Group,  
10:25:04 19 which is the entity that the plaintiffs are claiming engaged in  
10:25:08 20 transactions that violated the injunction, BNBM Group is an entity  
10:25:15 21 that has and never had any ownership interest in Taishan, either  
10:25:20 22 direct or indirect. It has no ability to control Taishan. There is  
10:25:26 23 no ownership relationship between those companies whatsoever, and  
10:25:33 24 that obviously implicates the ambiguity of the term affiliate. And  
10:25:41 25 so everything that I think Mr. Stengel said about that ambiguity



10:25:46 1 applies with great force with respect to BNBM Group.

10:25:50 2 Obviously BNBM, PLC does have a substantial stake in  
10:25:55 3 Taishan, that's a little different analysis. But I think the point  
10:25:59 4 that was made about the ambiguity of the term affiliate is quite  
10:26:04 5 salient.

10:26:05 6 Also, your Honor, with respect to the individual  
10:26:09 7 transactions that were raised by the PSC, I agree that for purposes  
10:26:13 8 of today's motion, which really go to the face of the order, they  
10:26:18 9 are not particularly relevant. We discussed them in our reply, not  
10:26:23 10 just to set the record straight on some of the facts, but also I  
10:26:28 11 think to illustrate for the court that these transactions, which  
10:26:36 12 largely involve U.S. companies going over to China and doing  
10:26:42 13 business with some of the BNBM entities in one form or another, are  
10:26:48 14 being construed to implicate this language of the court doing  
10:26:54 15 business in the United States, and that I think highlights the vague  
10:27:00 16 nature of that language. And really it's not clear at all what the  
10:27:06 17 companies are allowed to do or not allowed to do.

10:27:09 18 And I think Mr. Stengel is quite right that there has  
10:27:14 19 been a tremendous amount of extensive and expensive discovery spent  
10:27:19 20 on pursuing these transactions that I don't think were fairly  
10:27:23 21 intended by the scope of this order. All because there is vagueness  
10:27:29 22 in the order and the PSC is trying to force fit some of these  
10:27:33 23 transactions. And I do think that addressing that at this juncture  
10:27:39 24 is appropriate.

10:27:44 25 And the only other thing that I will say, your Honor, is

10:27:48 1 I want to reiterate Mr. Stengel's observation that if you need a  
10:27:53 2 50-page brief and a 40 page now stricken affidavit and exhibits from  
10:27:58 3 one end of this courtroom to the other in order to understand what  
10:28:02 4 this two-page order means, there is a problem. And I think the  
10:28:07 5 court should address it.

10:28:08 6 THE COURT: Okay.

10:28:09 7 MR. FENTON: Thank you, your Honor.

10:28:10 8 THE COURT: Thank you very much, you've been very helpful.  
10:28:13 9 Any response? I'm sorry, Bernard, do you have anything?

10:28:21 10 MR. TAYLOR: Your Honor, just one thing. Bernard Taylor  
10:28:22 11 for Taishan.

10:28:23 12 We filed a motion to lift the contempt order by showing  
10:28:27 13 compliance, which is Document No. 18449, I think we filed it in  
10:28:32 14 March. I believe that Mr. Stengel and Mr. Fenton's arguments  
10:28:37 15 capsulize very clearly the same arguments we made in our motion  
10:28:41 16 briefs.

10:28:42 17 THE COURT: All right. Thank you.

10:28:45 18 Any response?

10:28:46 19 MR. LEVIN: Good morning, your Honor. I will present  
10:29:11 20 argument based on the facts of this case, what we've observed from  
10:29:19 21 an alphabet soup of companies, and Mr. Herman will then delve into  
10:29:27 22 the documents that we've been able to uncover that were in Chinese,  
10:29:33 23 that were machine translated, that were determined by picking up a  
10:29:38 24 word here and there, translated into English, and they are the  
10:29:46 25 subject matter and you will see.

10:29:49 1 I want to assure the court that Mr. Herman filed an  
10:29:53 2 affidavit, much like the affidavits that were filed in the Taishan  
10:29:58 3 motions that went to the Fifth Circuit, to put those documents  
10:30:02 4 before the court for the purposes of this hearing. I want to assure  
10:30:07 5 the court that I've dealt with Mr. Herman, and I would take this  
10:30:11 6 affidavit that the division of labor of plaintiff's counsel in this  
10:30:17 7 case was devised where Mr. Herman took Taishan and CNBM and I took  
10:30:24 8 BNBK depositions. Every document that was used, and more, has been  
10:30:30 9 read by Mr. Herman and it's on his personal information that that  
10:30:35 10 affidavit was created. He not only read the CNBM and Taishan  
10:30:41 11 documents, he read the BNBK. We counselled each other before the  
10:30:47 12 depositions, and he is fully conversant with what was established at  
10:30:51 13 the depositions.

10:30:53 14 Your Honor, contempt is not a side show. Nor is what our  
10:31:00 15 clients have gone through, 4,000 of them, been a side show for the  
10:31:06 16 last five, six years living as they had to live because of the  
10:31:11 17 conduct of these defendants.

10:31:15 18 It's nice to have something to say that's fresh in the  
10:31:20 19 mind of the argument. BNBK stood up and said BNBK Group, one of the  
10:31:28 20 alphabet companies, had absolutely nothing to do with anything here.  
10:31:35 21 CNBM we know, Group, controls everything going down; BNBK Group, the  
10:31:46 22 one that has nothing to do with anything, 70 percent of its stock is  
10:31:52 23 owned by CNBM Group, 30 percent by CNBM Trading, and CNBM Group owns  
10:31:59 24 100 percent of Trading. Now, sure they would like us to stay away  
10:32:05 25 from the facts, but the facts are what this is all about. And we've

10:32:10 1 had to uncover the facts.

10:32:17 2 Your Honor, they've done a marvelous job, CNBM Group,  
10:32:23 3 CNBM, BNBM, BNBM Group, CNBM Trading, CNBM Investing, CNBM this,  
10:32:31 4 CNBM that, BNBM this, BNBM that, and they sat together and they  
10:32:36 5 formed a global offering and they put together a conglomerate. I am  
10:32:44 6 from Philadelphia. The Wharton School would love to teach a course  
10:32:50 7 on this because it's marvelous. It's a money making organization,  
10:32:55 8 and there's nothing wrong in making money, but it wasn't designed to  
10:33:03 9 defend this lawsuit.

10:33:06 10 And as a result of that, they are -- they are not  
10:33:12 11 independent defendants that have been brought into the litigation  
10:33:14 12 and held in contempt because somebody, a codefendant is in contempt.  
10:33:20 13 They are alter egos, they are a single business enterprise, they  
10:33:25 14 take the situation of Taishan and TTP, which your Honor ruled on and  
10:33:32 15 the Fifth Circuit ruled on twice, and take it to its farthest point  
10:33:38 16 north of how they're interrelated with boards of directors that are  
10:33:43 17 the same. Everything is controlled up top.

10:33:48 18 And control is good when you're setting up a money making  
10:33:54 19 corporation that's the biggest wall board company in China and  
10:33:58 20 perhaps the world.

10:34:00 21 So why now are we here? We have a December hearing on  
10:34:08 22 jurisdiction or foreign sovereign immunity. Your Honor has given us  
10:34:12 23 instructions as to how to take this discovery, that's alter ego and  
10:34:17 24 contempt, do it right now, and affiliates. And suddenly four or  
10:34:24 25 five months before the hearing they come in and say the facts are

10:34:28 1 not important. It's completely a legal issue. What did your Honor  
10:34:37 2 tell us to do, what have we been doing and why are we here? Because  
10:34:46 3 they're like, at least some of my 14 grandchildren, they want their  
10:34:51 4 ice cream before their meal.

10:34:55 5 The meal and the meat of this case is in December and  
10:34:59 6 that's what we're involved in. And they do not want discovery and  
10:35:03 7 they want to stop discovery. And as a result, we have asked for  
10:35:09 8 depositions of affiliates: CNBM Import and Export, CNBM Forest,  
10:35:16 9 CNBM U.S.A., United Sun Tech, and we can't get a date.

10:35:25 10 We finally found out this week: Well, we can't give you  
10:35:30 11 a date because we don't know what's going to happen in these  
10:35:34 12 motions. You have to wait until Friday. Well, your Honor, Friday  
10:35:39 13 is here, today is Friday, and we should get on with what we've been  
10:35:47 14 doing.

10:35:48 15 And it's not been easy, your Honor. We've taken 30(b)(6)  
10:35:53 16 depositions where CNBM has produced 1,967 pages before the  
10:36:01 17 deposition; CNBM document production after the 30(b)(6) depositions,  
10:36:10 18 that's like two, three weeks ago, 143,560 pages. That was produced  
10:36:19 19 three days before Mr. Herman had to take a deposition this week of  
10:36:24 20 CNBM. CNBM Group did a little bit better, they produced 13,851  
10:36:31 21 pages before the 30(b)(6) and 202,421 pages after the 30(b)(6).

10:36:42 22 Your Honor, you know, I was born but not yesterday.  
10:36:49 23 Probably the oldest person in this courtroom because I haven't asked  
10:36:53 24 your Honor your age. But this is not mind boggling. We know  
10:37:02 25 exactly what's happening here. They're running the clock, and it's

10:37:10 1 especially difficult because the clock is in Chinese and we're faced  
10:37:15 2 with that. They're not co-defendants in a case. They are  
10:37:23 3 co-conspirators, they are alter egos, they're a single business  
10:37:29 4 enterprise under Florida law, as we found out in the original  
10:37:34 5 Taishan jurisdictional motions, they're agencies. They've traded  
10:37:42 6 lawyers. Sometimes this one represents them, so they hide the pea.  
10:37:49 7 Sometimes this one represents them. BNBM was in China before,  
10:37:54 8 before, before they appeared in this litigation with attorney  
10:38:00 9 sitting with Taishan.

10:38:03 10 I can't comment on everything in the HL, Hogan Lovells  
10:38:07 11 privilege log, but your Honor has seen it and our briefs that are  
10:38:12 12 marked confidential, secret -- which is another thing. We're also  
10:38:19 13 hamstrung. We don't know what the defendants really have, because  
10:38:25 14 in China, they have a Chinese Secrecy Act and you can't find out  
10:38:30 15 what the privilege is, what has been withheld because it's a secret.

10:38:36 16 Despite all of that, with all of those limitations,  
10:38:42 17 Mr. Herman will show you the tip of the iceberg of what's here.

10:38:52 18 Now, they argue whether it's civil or criminal contempt.  
10:38:56 19 They were all aware, BNBM, CNBM of what Taishan was going to do when  
10:39:04 20 they fired their attorneys and went back to China. And then they  
10:39:09 21 came back in. They were aware then. And they all knew what was  
10:39:15 22 happening, they took a gamble; and because of what happened in this  
10:39:19 23 courtroom, they lost that gamble and now they come in like the kid  
10:39:28 24 that kills his parents. And when he appears in court, he pleads for  
10:39:33 25 mercy. And the reason he needs mercy is he is an orphan.

10:39:39 1 Well, they created the situation that puts them here.  
10:39:43 2 And in the middle of discovery when they're being found with their  
10:39:47 3 hands in the cookie jar, what do they do? They file a motion to try  
10:39:52 4 to stop everything. Well, whether it's civil or criminal contempt,  
10:40:01 5 and your Honor will make this decision, the damages can go to the  
10:40:04 6 class. There are cases that say even in criminal contempt they can.  
10:40:07 7 This contempt occurred in the open courtroom, and your Honor had the  
10:40:14 8 ability to do exactly what you did when it did.

10:40:17 9 And they argue that they want to be in criminal contempt.  
10:40:20 10 Can you really believe that these Chinese defendants, who have  
10:40:24 11 ruined the lives of thousands of Louisiana residents, want to be in  
10:40:30 12 front of a jury in Louisiana on a contempt citation? Everything is  
10:40:36 13 done to stop the wheels of justice and stop us from proceeding so  
10:40:41 14 that we can get to December. And there is no reason that we  
10:40:45 15 can't -- that we shouldn't do that.

10:40:48 16 We will be able to prove, your Honor, I could read the  
10:40:51 17 12, 14 statements in the *Jackson* case that your Honor cited, that  
10:40:56 18 the Fifth Circuit cited with regard to alter ego, and your Honor  
10:41:01 19 told us to take discovery on alter ego, and we did. And you'll see  
10:41:05 20 part of it.

10:41:07 21 But most shocking, and I would like to hand out a  
10:41:14 22 document that is not confidential, I'm sure you've both seen it.  
10:41:19 23 May I approach the clerk? Your Honor, this document has been marked  
10:41:37 24 as Exhibit 215 in depositions. It came out in the BNBM deposition.  
10:41:46 25 It's a CNBM Group document. Not so separate that they end up with

10:41:54 1 this document.

10:41:55 2 This is six days before they were to appear in court for  
10:41:59 3 the judgment debtor hearing. Six days before. And from the top  
10:42:06 4 CNBM Group down the line to all of the other alphabet companies,  
10:42:12 5 what do they tell them? Controlling shareholder, they tell them  
10:42:19 6 don't use banks in New York and use private e-mails. It's a lot  
10:42:25 7 more in the document. They already knew what was going to happen  
10:42:30 8 here, that we were going to chase them on the *Germano* judgment and  
10:42:36 9 further with regard to the 4,000 other homes and they set that out.

10:42:41 10 And we didn't know that at the time, and I know your  
10:42:45 11 Honor didn't know that at the time, I just gave you the document.  
10:42:47 12 And we just found the document two weeks ago in Chinese. This was a  
10:42:55 13 plan, not only to commit a fraud on our clients, but a fraud on our  
10:43:02 14 courts; and we know what they've said about our courts, we have  
10:43:05 15 their announcements, don't worry, they tell their shareholders.  
10:43:11 16 They can't get us in China. You can't execute on a judgment in  
10:43:15 17 China. And we don't like what the courts did. We don't like the  
10:43:21 18 American courts. We feel that we've been dealt with unfairly.  
10:43:24 19 Unfairly by the Eastern District of Louisiana, District Court, your  
10:43:28 20 Honor, and two panels of the Fifth Circuit Court of Appeals.

10:43:32 21 And they have the audacity to come in here today when  
10:43:36 22 they have a hearing in December and we're engaged in discovery and  
10:43:39 23 we're recovering something like 215, Exhibit 215, and asked to stop  
10:43:47 24 everything and we want to get out of jail free card.

10:43:50 25 Your Honor, there are a million stories in a naked city,



10:43:58 1 you've heard two today. I think ours is a very valid story. And  
10:44:04 2 Mr. Herman will address the other issues.

10:44:06 3 THE COURT: All right. Thank you.

10:44:17 4 Let's see if we can move along faster, folks. It's been a  
10:44:22 5 long time now.

10:44:24 6 MR. HERMAN: Well, your Honor, my affidavit is out, I  
10:44:27 7 ought to at least be able to argue.

10:44:29 8 THE COURT: You can argue.

10:44:32 9 MR. HERMAN: I feel sort of like the ring dang doo, that's  
10:44:36 10 what they call it in South Carolina; that's a snake that swallows  
10:44:41 11 its tail but keeps on rolling. So I accept, don't agree with your  
10:44:47 12 Honor's ruling, but of course I accept it.

10:44:50 13 I will state this: Everything in that affidavit is on  
10:44:53 14 personal knowledge. If your Honor looks at it closely, you'll see  
10:44:57 15 that the majority of documents were created by and published to the  
10:45:03 16 world by CNBM and BNBM. I had employed four or five interpreters,  
10:45:14 17 we downloaded these documents as soon as we knew there was an issue.  
10:45:20 18 We started reading them, we've taken depositions. I am certain that  
10:45:27 19 they are authentic. I am also certain that they were introduced in  
10:45:31 20 depositions.

10:45:35 21 I supervised the interpreters myself. I have supervised  
10:45:40 22 and directed every lawyer that has reviewed a document on the  
10:45:46 23 plaintiff's side. I supervised the translation of these documents.  
10:45:56 24 And even though I am a ring dang doo, I am not on a New York street  
10:46:00 25 corner with three shells hiding facts.

10:46:05 1 And I understand why they don't want to argue the facts  
10:46:07 2 and I understand why they have miscited the law. And the key thing  
10:46:13 3 that they've miscited is that there is some great misunderstanding  
10:46:17 4 of alter ego and it makes no difference if they are Taishan. And  
10:46:24 5 the judge obviously was wrong when he used the word affiliate.  
10:46:28 6 Nobody knows what that means.

10:46:32 7 Yesterday I had the good fortune to take the deposition  
10:46:36 8 of Chairman Cao, who said under oath he doesn't read e-mails, he  
10:46:44 9 doesn't send e-mails, he doesn't engage in chat talk, and therefore,  
10:46:51 10 he doesn't really respond to notices that are sent him.

10:47:00 11 Having said that, let's talk about what the case is  
10:47:06 12 really about a year after your Honor filed a very ascertainable  
10:47:15 13 order. This matter comes in argument more than a year, your Honor,  
10:47:19 14 after you issued your order.

10:47:21 15 What happened? This document comes from the deposition  
10:47:30 16 of a 30(b)(6) witness of CNBMG: "Isn't it true that in 2014, the  
10:47:39 17 chairman of CNBM Company, Limited; BNBM Group; and CNBM Group was  
10:47:49 18 Song Zhiping? As far as I understand, yes."

10:47:59 19 This comes from the deposition of the same 30(b)(6)  
10:48:04 20 witness: "Is it true that in 2014, Cao was president of CNBM  
10:48:15 21 Company, Limited? Yes. As far as I understand, yes. Isn't it true  
10:48:20 22 that in 2014, Cao was chairman of the supervisory committee of BNBM  
10:48:27 23 Group? Yes. As far as I understand, yes. And isn't it true that  
10:48:34 24 in 2014, Cao was the general manager and a director of CNBM Group?  
10:48:42 25 As far as I know, yes."

10:48:47 1 We have two individuals controlling aspects of two alter  
10:48:53 2 egos from each of the defendants.

10:49:01 3 Now, it's been denied that anybody in BNBM Group received  
10:49:14 4 a letter from Knauf addressed to Wang Bing of BNBM Group, which  
10:49:27 5 indicates that they met, they understood what was happening in  
10:49:33 6 Louisiana, and they talk about Taishan Gypsum Company and that BNBM  
10:49:45 7 has already been named as a defendant in 90 lawsuits. It's  
10:49:51 8 May 15th, 2009. They didn't get it. BNBM Group didn't get it.  
10:49:57 9 BNBM didn't get it.

10:50:00 10 But what it does evidence is that at least Knauf's  
10:50:04 11 understanding was that these companies were related. And it also  
10:50:11 12 indicates that there was activity and attempt to get BNBM involved.

10:50:23 13 The letter also went from Mr. Norris of Knauf, and there  
10:50:43 14 was additional letters to Chairman Song of CNBM Group and the other  
10:50:53 15 interrelated corporations saying: After our letter dated April 21,  
10:50:58 16 2009, more developments. More developments on U.S. plasterboard  
10:51:05 17 'incident'. It wasn't incidental to the people that had that  
10:51:08 18 drywall in their homes.

10:51:10 19 Media point out in their reports that BNBM and CNBM are  
10:51:15 20 all enterprises owned by Chinese government. Of course that doesn't  
10:51:21 21 bind them, but it does indicate that Knauf put them on notice, as  
10:51:29 22 they deny, but they wish, Knauf wishes that CNBM and BNBM will take  
10:51:35 23 effective measures to respond and that Knauf was willing under the  
10:51:39 24 leadership of CNBM to safeguard their international reputation.  
10:51:46 25 Now, they deny they received it.

10:51:50 1 At any rate, by May 2009, BNBM, CNBM had already been  
10:52:00 2 involved in lawsuits in the United States.

10:52:04 3 Now, there was no response that we've been able to  
10:52:12 4 determine. However, a month later, your Honor, HSBC Global Banking  
10:52:21 5 sends an e-mail to Song Zhiping and Cao, Cao Jianglin, the two  
10:52:30 6 individuals that I first introduced the court to this morning that  
10:52:33 7 control these entities. And it says according to Knauf's request,  
10:52:39 8 the bank wishes to arrange a meeting with your esteemed company,  
10:52:46 9 Knauf's partners and its president suggest to meet with your  
10:52:49 10 esteemed company on November 23rd or 24th, 2010 in China. The  
10:52:56 11 topics are update of gypsum board in U.S. and potential cooperation  
10:53:01 12 with BNBM gypsum board and Knauf.

10:53:05 13 What it does show is that Knauf's understanding was that  
10:53:11 14 BNBM was definitely involved. We'll get to why that was a realistic  
10:53:19 15 fact. And it's interesting because chairman Cao said, well, I don't  
10:53:25 16 read e-mails. Did you respond to this? No. Who takes your  
10:53:29 17 e-mails? My secretary. Is your secretary under orders to summarize  
10:53:34 18 your e-mails? No. Did you reply? I don't think I ever got this.

10:53:46 19 So there were at least three attempts beginning in May  
10:53:55 20 15, 2009 and October 21st, 2010 of Knauf saying, hey, BNBM, CNBM,  
10:54:01 21 you're involved in this.

10:54:08 22 Now, to me, to raise due process and equal protection,  
10:54:15 23 evidently I'm too involved in reading *The Federalist Papers* and  
10:54:23 24 *Common Sense* by Thomas Paine and the other early American framers of  
10:54:29 25 our Constitution, because as I understand it, everybody gets due

10:54:36 1 process and equal protection. And as a matter of fact, in  
10:54:39 2 Louisiana, there's a constitutional provision that says everyone is  
10:54:43 3 allowed access to the court.

10:54:49 4 So I asked -- this is one of the questions: "Let me ask  
10:54:52 5 this question: As the corporate representative of CNBM Group, do  
10:54:56 6 you think it's fair for your subsidiaries to sue American companies  
10:55:00 7 in America, but refuse to accept service from American citizens who  
10:55:04 8 have been damaged by Chinese products in the United States?"

10:55:15 9 My clients or our clients entitled to due process?  
10:55:20 10 What's the answer? The answer under oath on a 30(b)(6) deposition  
10:55:26 11 is: "I think this is the management behavior by individual  
10:55:29 12 companies. What steps or strategies each company will take, it's  
10:55:36 13 according to each company's -- the decision will be made legally by  
10:55:42 14 each individual company."

10:55:44 15 Does that mean that every company that is involved in  
10:55:49 16 this lawsuit has the ability to file suits in America through  
10:55:54 17 subsidiaries and affiliated companies to use our court system to  
10:55:59 18 collect against American citizens, but they are shielded from  
10:56:06 19 responsibility of due process and equal protection according to what  
10:56:11 20 a Chinese individual sitting on a board of directors in China  
10:56:16 21 determines? That's really what this is about.

10:56:22 22 Now let's talk about alter ego, which is at the center of  
10:56:27 23 this issue, as well as the word affiliate.

10:56:36 24 30(b)(6) deposition: "Isn't it true that on July 18th,  
10:56:41 25 2014, BNBM Company, Limited was a 52.4% held subsidiary of CNBM

10:56:50 1 Company, Limited? A: Yes, according to the Chinese version of CNBM  
10:56:59 2 Company, Limited voluntary announcement dated July 18th, 2014, it is  
10:57:05 3 stated that CNBM Company, Limited know from BNBM Company,  
10:57:12 4 Limited ... 52.4 percent of the held -- stock..."

10:57:18 5 And you'll see I put some blanks here in order to make  
10:57:25 6 this easier to deal with and more intelligible.

10:57:30 7 Again, this is the 30(b)(6) deposition of Zhangli Chang  
10:57:42 8 of China National Building Materials Company, Limited. This is  
10:57:47 9 CNBM. "Did the board of directors of CNBM Company, Limited, in the  
10:57:51 10 annual report of 2013 approve of the language that Taishan Gypsum  
10:57:58 11 was a 65 percent held subsidiary of BNBM? A: BNBM holds 65 percent  
10:58:05 12 of Taishan Gypsum. That is a fact. BNBM decided the percentage of  
10:58:11 13 share it holds according to its own procedures."

10:58:18 14 Public document, a public document. That's not Russ  
10:58:21 15 Herman's knowledge. It's a public document filed by CNBM and BNBM  
10:58:38 16 for the world. Why? Well, it's interesting. CNBM says, hey, you  
10:58:44 17 know, Judge, we're entitled to be treated like a sovereign even  
10:58:51 18 though we are a public company with people all over the world owning  
10:58:56 19 our stock. You know, maybe BNBM is a ring dang doo with a circular  
10:59:14 20 argument.

10:59:19 21 Let's be clear. Did Taishan act alone? This is from a  
10:59:31 22 Taishan deposition. "Isn't it true -- isn't it true that you did  
10:59:41 23 not undertake, as the corporate representative of Taishan, to  
10:59:44 24 determine who controlled BNBM?" He is the 30(b)(6) representative.  
10:59:50 25 He said: "I have investigated and I confirmed that CNBMG is the

10:59:54 1 shareholder of CNBM, Inc. and CNBM, Inc. is a shareholder of BNBM  
11:00:02 2 and BNBM is a shareholder of Taishan. And I know that BNBM, Inc.  
11:00:08 3 directly or indirectly owns 65% of Taishan Gypsum, but as for the  
11:00:17 4 specific shares, I don't know."

11:00:24 5 THE COURT: I am understanding your argument now. Let's  
11:00:27 6 see if we can shorten this because you have another 50 or 60 pages.  
11:00:31 7 I've looked at them. Let's see if you can shorten your argument. I  
11:00:35 8 got it, I understand it.

11:00:41 9 MR. HERMAN: Okay. You're the judge and I respect your  
11:00:43 10 Honor, and I am going to shorten it at your Honor's direction.

11:01:05 11 I've eliminated about 50 percent of what I wanted to speak  
11:01:11 12 about, your Honor.

11:01:14 13 This comes from a CNBM document, it's been introduced as  
11:01:19 14 Exhibit 27. "BNBM has been listed as one of the defendants in  
11:01:33 15 various gypsum board litigation cases in the US. Although the  
11:01:39 16 company has neither produced nor exported any gypsum boards."  
11:01:46 17 Reported publicly on July 18, 2014, the date that you issued your  
11:01:52 18 order.

11:01:53 19 Regina, would you play just two or three minutes of  
11:01:58 20 Exhibit 107-1. It's been offered in deposition. This is taken on  
11:02:08 21 the 15th of June, 2015. It's a warehouse in Florida.

11:02:20 22 (WHEREUPON, THE VIDEO CLIP WAS PLAYED AS FOLLOWS:)

11:02:20 23 Q: Tell us your name, please, sir.

11:02:29 24 A: Stefan Davis.

11:02:29 25 Q: What do you do for a living?

11:02:31 1 A: I am a developer and a contractor.

11:02:32 2 Q: Previously in this case we took your deposition related to  
11:02:36 3 Beijing New Building Materials, Chinese Drywall. Do you  
11:02:38 4 remember that?

11:02:38 5 A: Yes.

11:02:39 6 Q: During that deposition you testified that you had some  
11:02:41 7 drywall on hand from BNBM, right?

11:02:44 8 A: Yes, that might be an understatement, but yes.

11:02:47 9 Q: Where are we today?

11:02:48 10 A: We are at the warehouse where the drywall is warehoused.

11:02:51 11 Q: Where is that located?

11:02:53 12 A: 44th Avenue in Ocala.

11:02:55 13 Q: Approximately how many boards of BNBM drywall boards do you  
11:02:59 14 have inside the warehouse?

11:03:00 15 A: About 230,000 sheets.

11:03:02 16 Q: Do you mind if we go inside and take a look at it?

11:03:05 17 A: Sure.

11:03:05 18 Q: Great. Thank you.

11:03:05 19 (WHEREUPON, A BRIEF RECESS WAS TAKEN.)

11:03:05 20 BY MR. MONTOYA:

11:03:06 21 Q: So we've moved inside the warehouse.

11:03:08 22 A: Yes.

11:03:08 23 Q: Can you tell us what's inside the warehouse?

11:03:10 24 A: Basically about 139,000 sheets of 5/8" Type X drywall 4x12.

11:03:18 25 And about 87,000 sheets of 1/2" drywall 4x12.



11:03:23 1 Q: All of this drywall was from your orders from BNBM?

11:03:26 2 A: That's correct.

11:03:27 3 Q: I think when we talked in your deposition they were  
11:03:28 4 shipment one, right?

11:03:29 5 A: Yes.

11:03:29 6 Q: And shipment 1 came into Florida?

11:03:31 7 A: Yes.

11:03:31 8 Q: And shipment 2 also came into Florida?

11:03:33 9 A: That is correct.

11:03:34 10 Q: Let's take a look at some of the markings if we could. If  
11:03:38 11 we could walk right over here.

11:03:40 12 A: Okay.

11:03:41 13 Q: This board that we are looking at here, can you read the  
11:03:44 14 label for us?

11:03:45 15 A: Yes. Beijing New Building Materials Public Limited  
11:03:48 16 Company.

11:03:50 17 Q: Does it say Beijing, China on it?

11:03:53 18 A: Beijing, China. The ASTM numbers and, I guess, the date  
11:03:58 19 of when it was manufactured.

11:03:58 20 Q: In 2006?

11:04:00 21 A: 2006.

11:04:02 22 Q: One of the other things we talked about at length in your  
11:04:05 23 deposition was the UL listing.

11:04:06 24 A: Yes.

11:04:07 25 Q: That UL stamp is also on this board, right?

11:04:10 1 A: That is correct.

11:04:10 2 Q: Can you point that out for us?

11:04:13 3 A: It's right here (INDICATING).

11:04:14 4 Q: Now, the 5/8 board -- or all of the board has end tape on  
11:04:19 5 it, right?

11:04:19 6 A: Yes.

11:04:19 7 Q: Can you show us one of the end tapes from the 5/8 board?

11:04:22 8 A: Sure. This is an intake for the 5/8 Type X.

11:04:30 9 Q: What's the Type X?

11:04:31 10 A: Type X is a fire rating that's required on any  
11:04:35 11 multi-family apartments built in the United States.

11:04:40 12 Q: If we could, I'm going to ask the videographer to back up  
11:04:43 13 a bit and kind of give us an idea of the perspective of how  
11:04:45 14 many --

11:04:45 15 (WHEREUPON, THE VIDEO WAS CONCLUDED.)

11:04:45 16 MR. HERMAN: I think that's enough, Regina. I have  
11:04:54 17 Mr. Montoya in the courtroom, who not only took the deposition but  
11:04:59 18 this statement not less than a month ago.

11:05:01 19 Now, I want to speak about another issue, which I think  
11:05:05 20 is important, and I've cut out an awful lot. I am not going to go  
11:05:10 21 into the Hogan Lovells documents, which I am not allowed to go into.  
11:05:15 22 However, there is someone who reported it at an unsuspecting time on  
11:05:22 23 a document that Taishan couldn't make a decision for itself, it had  
11:05:27 24 to go up to some of these other alter egos.

11:05:35 25 The word affiliates is clearly in your order. Evidently

11:05:38 1 all of the lawyers that have participated for defendants, in the  
11:05:42 2 U.S. and in China, don't understand what the word affiliates mean  
11:05:56 3 and think it's ambiguous. However, the word affiliates in document  
11:06:12 4 Exhibit 28-R, you see the red line that learned counsel for BNB  
11:06:20 5 reading our translation from a machine translation inserted the word  
11:06:27 6 in red "affiliates".

11:06:31 7 But what does affiliates mean? Let's see. *Black's Law*  
11:06:39 8 definition: "A corporation that is related to another corporation  
11:06:43 9 by shareholdings or other means of control; a subsidiary, a parent,  
11:06:51 10 or a sibling corporation..."

11:06:54 11 What does *Black's* online dictionary say at page 63:  
11:07:01 12 "Companies that have a shared resources, interests, or business  
11:07:06 13 dealings. Or a Website that sells products they don't physically  
11:07:10 14 own for commission. Refer to subsidiary."

11:07:16 15 Well, I mean there's another one. Definition of  
11:07:19 16 affiliates from Merriam-Webster online dictionary as to what  
11:07:27 17 affiliate means: "An organization that is a member of a larger  
11:07:30 18 organization."

11:07:37 19 And I have an enlargement of the Exhibit 22-R where you  
11:07:44 20 can say related parties is struck and it says now Taishan and its  
11:07:49 21 affiliates. Now, that's in a BNB annual report in 2014.

11:08:01 22 CNBMIT Company, Limited website lists "Affiliated  
11:08:11 23 Corporations".

11:08:17 24 To come in and say to this court, "we don't understand  
11:08:20 25 what the word affiliates mean, we don't understand what subsidiaries

11:08:25 1 mean, we don't understand what we were supposed to do." Okay, I  
11:08:34 2 don't understand it.

11:08:35 3           The last thing I am going to say from exhibits is that  
11:08:45 4 they blatantly ignored your Honor's order. They're wholly owned  
11:08:51 5 subsidiaries, a number of them, continued to conduct business in the  
11:08:55 6 U.S. and were never notified by BNBM, CNBM, CNBMG or BNBMG that they  
11:09:07 7 were to stop doing business. And they could have sought this motion  
11:09:11 8 and this clarification a year ago when the order was issued, or soon  
11:09:19 9 a reasonable time thereafter, instead of having us spend millions  
11:09:22 10 and millions of dollars, hire translators, and take very expensive  
11:09:29 11 depositions at our cost on something that we were doing in  
11:09:36 12 accordance with an order of the court.

11:09:39 13           Now, I don't know whether there's laches, I don't know  
11:09:43 14 whether this is a reasonable time, this matter's been brought. And  
11:09:48 15 this is my last comment. My affidavit is struck, I understand that.  
11:09:57 16 It's okay. The exhibits in evidence are authentic, and as an  
11:10:02 17 officer of the court, I ask that the exhibits not be struck and  
11:10:08 18 anything that's argumentative in my affidavit I'm certain the court  
11:10:14 19 will not consider.

11:10:15 20           Thank you, your Honor, for giving me the opportunity to  
11:10:18 21 address these matters.

11:10:19 22           THE COURT: Okay. Thank you very much. Do you have a  
11:10:21 23 response?

11:10:24 24           MR. STENGEL: Your Honor, in the interest of time I will  
11:10:26 25 try and be as quick as I can. I apparently need to apologize for a

11:10:29 1 misperception or misstatement. I started my comments with we are  
11:10:33 2 passing like ships in the night. We're not even on adjacent oceans.  
11:10:37 3 I don't know what that was directed to. I never suggested we were  
11:10:40 4 going to shut down discovery. I said we should think about whether  
11:10:44 5 we should be continuing this path of discovery, particularly third  
11:10:48 6 parties on the issues with the business being done during the  
11:10:52 7 contempt period.

11:10:53 8 I think I said fairly clearly we understood there would be  
11:10:55 9 ongoing discovery for jurisdictional purposes, alter ego, etc. So  
11:11:00 10 it is a gross misstatement of our position to suggest that we were  
11:11:04 11 trying to shutdown discovery across the board, and I want that to be  
11:11:09 12 completely clear to the court.

11:11:10 13 The demonstration we've seen, and it tempts to cite *Sound*  
11:11:16 14 *and Fury* or *Signifies Nothing*, obviously these are complex corporate  
11:11:22 15 forms, and much of what was put up before you we cannot and would  
11:11:28 16 not dispute. There is interlocking ownership, there is interlocking  
11:11:30 17 board membership. All of that is fine, that's legal as a matter of  
11:11:33 18 Chinese law. They need to show some abuse of that process.

11:11:36 19 And I want to thank Mr. Herman because his panoply of  
11:11:40 20 definitions of affiliate made up for a deficiency in my presentation  
11:11:45 21 because I didn't have those with me. And I think by looking at the  
11:11:48 22 variability of those it explains, particularly when you're talking  
11:11:52 23 about people who don't normally function in the United States, in  
11:11:56 24 English, in the United States legal system, how ambiguous the term  
11:12:00 25 "affiliate" would be from the perspective of these defendants.

11:12:03 1 Now, I don't want to get into the factual presentation,  
11:12:07 2 because I, again as I said, I don't think that's at all relevant to  
11:12:10 3 what we were doing. But I do take issue with what I believe was the  
11:12:14 4 predicate, the display of Exhibit 27 by Mr. Herman where he took a  
11:12:26 5 single page and said, aha, this says that BNBM is denying being a  
11:12:34 6 manufacturer of drywall. What this actually shows is -- and this is  
11:12:40 7 the rest of that document in the original form -- the company  
11:12:43 8 referred to in the slide Mr. Herman showed you was not BNBM, the  
11:12:49 9 manufacturer of the drywall and the nice video of the warehouse, but  
11:12:53 10 the company here is China National Building Material Company,  
11:12:56 11 Limited, and there is no evidence in this record, there cannot be  
11:13:01 12 evidence in this record that a Chinese holding company ever  
11:13:04 13 manufactured or sold anything. They invest in other companies.

11:13:08 14 So this was a hugely misleading presentation about what  
11:13:12 15 the evidence shows. And I suggest we're going to need to devote  
11:13:16 16 some substantial time for the hearing on personal jurisdiction and  
11:13:23 17 sovereign immunity, because to sort of sort out this record is  
11:13:26 18 frankly at this point terrifying.

11:13:29 19 I just want to remind your honor, Mr. Herman raised the  
11:13:37 20 issue of, well, is this timely, it is within your rights. You'll  
11:13:43 21 remember, your Honor, and we're reasonably careful lawyers, when we  
11:13:45 22 first appeared we raised the issue we didn't want to accuse of  
11:13:48 23 waiver of delay by participating in the discovery process that your  
11:13:51 24 Honor had entered, and your Honor was considerate enough to give us  
11:13:54 25 the order we had requested. And you'll see at the last line through

11:14:00 1 procedural filings related to the July 17th order.

11:14:02 2 So as always, your Honor, as a practicing attorney I wish  
11:14:06 3 I could have done things sooner, but we've been somewhat busy.

11:14:11 4 So at the end of the day, your Honor, we didn't really  
11:14:15 5 join issue in this argument, I apologize for that because I was  
11:14:19 6 hopeful we would be useful for the court. I do think we've raised  
11:14:23 7 very substantial issues for the court to consider about the whole  
11:14:27 8 contempt path we are on. I would request that the court because of  
11:14:33 9 the importance of the issues and their importance here and  
11:14:37 10 elsewhere, accommodate us that the court is going to rule against  
11:14:41 11 us, I think the court needs to rule specifically on all of the legal  
11:14:45 12 issues we've raised, including the classes' entitlement to damages  
11:14:48 13 and the ability of the PSC to prosecute this contempt.

11:14:50 14 And with that your Honor, thank you very much.

11:14:52 15 THE COURT: Let's take just a ten-minute break and I'll  
11:14:55 16 come back and let you know how I feel about it. The court will  
11:14:58 17 stand in recess for ten minutes.

11:14:58 18 THE DEPUTY CLERK: All rise.

11:14:59 19 (WHEREUPON, A RECESS WAS TAKEN.)

11:20:15 20 (OPEN COURT.)

11:20:16 21 THE COURT: Be seated, please. I've heard arguments from  
11:20:19 22 both sides dealing with the injunction. I make the following  
11:20:23 23 comments:

11:20:23 24 The injunction in addition to finding Taishan in contempt  
11:20:29 25 and requiring Taishan to pay damages as well as attorney's fees for

11:20:41 1 its inaction or action, the injunction went on to say that I  
11:20:50 2 enjoined Taishan and any of its affiliates or subsidiaries from  
11:20:55 3 doing business in the United States until and unless Taishan  
11:21:00 4 participated in this judicial proceeding.

11:21:03 5 Now, I was concerned at that time that if I simply held  
11:21:08 6 them in contempt and required them to pay damages -- they left the  
11:21:19 7 United States, they left the Court. They fired their attorneys and  
11:21:22 8 said we don't like what the Fifth Circuit has said, we don't like  
11:21:25 9 what this court has said, so we're going home. If I held them in  
11:21:32 10 contempt only and said you have to pay "X" amount of money and they  
11:21:37 11 didn't pay it, what was the court to do at that time?

11:21:43 12 They had turned their back and left. So it would be a  
11:21:46 13 meaningless order if they did not pay. If they did not pay the  
11:21:54 14 judgment, if they did not pay the damages, if they did not pay  
11:21:58 15 attorney's fees and walked away, what was I to do?

11:22:05 16 So I provided in addition to the damages, in addition to  
11:22:12 17 the award of attorney's fees, I told them that they, their  
11:22:18 18 affiliates, alter egos were not able to do business in the United  
11:22:25 19 States until they paid up. I said that if they did do business in  
11:22:31 20 the United States, they should know that they would have to forfeit  
11:22:35 21 25 percent of their earnings. They or their affiliates or  
11:22:42 22 subsidiaries would have to do that.

11:22:43 23 Now, they took awhile to think about what I said, from  
11:22:50 24 July to March apparently they were thinking about it, and then  
11:22:55 25 decided in March that they would come back, and Taishan did, and



11:23:00 1 they would pay the judgment of several million dollars and the  
11:23:07 2 attorney's fees and the damages.

11:23:12 3 But that left us at that point -- they were no longer in  
11:23:17 4 contempt of court, but they had been in contempt of court from July  
11:23:21 5 till March, and the rest of my order provided that they should not  
11:23:27 6 do business until they purged themselves of the contempt. So that  
11:23:33 7 left that period from July to March as to whether or not they had  
11:23:37 8 done business in the United States or whether they did it through  
11:23:42 9 their affiliates or subsidiaries, or whether they did it in some  
11:23:51 10 alter ego status, or whether there was any single business  
11:23:57 11 enterprise among and between all of these entities.

11:24:00 12 So I directed the PSC to conduct discovery to see whether  
11:24:05 13 or not they did any business. Taishan hired new attorneys, very  
11:24:11 14 capable attorneys, who advised the court that in his view they  
11:24:17 15 hadn't done business in the United States. I don't dispute that he  
11:24:21 16 believes that; but I had some difficult experiences with his client,  
11:24:29 17 so I felt that I needed more than simply well-respected learned  
11:24:36 18 counsel's comment. I know that Taishan had fired their previous  
11:24:41 19 attorneys for some reason. So I let the parties conduct discovery.

11:24:49 20 The issue, as I felt, was No. 1, who were affiliates?  
11:24:57 21 Who were subsidiaries? No. 2, whether Taishan was acting through an  
11:25:04 22 alter ego status, whether there were other companies involved that  
11:25:14 23 had some single -- that created some single business enterprise  
11:25:17 24 which allowed Tashan to do business during that period of time when  
11:25:24 25 I said they shouldn't do business or couldn't do business.

11:25:28 1 I really feel that those issues are generally factually  
11:25:34 2 determinative, so I asked the parties to conduct discovery. I think  
11:25:42 3 that it's appropriate to look at that discovery, look at that  
11:25:47 4 factual record, and also perhaps hold an evidentiary hearing on the  
11:25:58 5 issue. I don't think it's only law. There are certain aspects of  
11:26:03 6 it that are legal, but who is an affiliate is going to depend upon  
11:26:09 7 what they did, what their relationship is, what their power is.  
11:26:16 8 What's an associate or a subsidiary also depends more on fact than  
11:26:22 9 in law. I can make legal judgments but I have to base them on  
11:26:28 10 facts. Whether or not they did business in a joint enterprise or  
11:26:37 11 one enterprise, I don't know the answer to that.

11:26:40 12 The complication is caused oftentimes in this type of  
11:26:44 13 case by the number of entities and the relationship between and  
11:26:48 14 among those entities. I don't know what it is at this point.  
11:26:52 15 There's some evidence that some of the entities have absolutely  
11:26:57 16 nothing to do with Taishan, other than to own stock. There's other  
11:27:03 17 evidence that questions whether or not that's their only role in  
11:27:11 18 this situation.

11:27:17 19 So with regard to the affiliates or subsidiaries, it's  
11:27:22 20 not their precipitous act which led to the contempt. That was the  
11:27:26 21 action or inaction of Taishan, that's clear to me. It was Taishan's  
11:27:30 22 action or inaction because Taishan was the only person, only  
11:27:35 23 defendant involved in *Germano* where I issued the order. But if any  
11:27:40 24 affiliates or subsidiaries or alter egos, entities did business  
11:27:47 25 during the contempt period, they would be in violation of the

11:27:51 1 contempt because that was the aspect of the contempt which causes  
11:27:56 2 them to at least have some interest in this contempt order.

11:28:02 3 At this point I have not had a hearing. It seems to me  
11:28:07 4 that it's appropriate to allow some discovery on these issues,  
11:28:11 5 particularly as I say because the same witnesses are giving  
11:28:15 6 testimony regarding the jurisdictional issues. That seemed to me to  
11:28:21 7 be an opportunity to handle both of these matters expeditiously.  
11:28:29 8 Many of the people, through counsel's cooperation, came to the  
11:28:34 9 United States to give evidence, give testimony. While they were  
11:28:36 10 here talking about jurisdiction, I felt it was also helpful so that  
11:28:42 11 they didn't have to come back, so that the expense would not be  
11:28:46 12 required to get them back, that they also testify as to whether or  
11:28:49 13 not there's any relationship between the entities that are  
11:28:54 14 represented here today, that may or may not be involved because of  
11:29:00 15 their status.

11:29:05 16 So in summary, while the precipitous action or inaction  
11:29:09 17 which caused the injunction to be issued was that of Taishan. If  
11:29:15 18 any of the affiliates or subsidiaries of Taishan did business in the  
11:29:19 19 United States during the contempt period, they would have violated  
11:29:26 20 the injunction and will be required to remit 25 percent of their  
11:29:30 21 earnings during that time.

11:29:31 22 Also, if Taishan did business in the United States during  
11:29:35 23 that time, as an alter ego or by means of some common business  
11:29:42 24 enterprise, then Taishan will be in violation of the injunction and  
11:29:48 25 will be required to remit 25 percent.

11:29:51 1 As I said previously, the presence or absence of such  
11:29:56 2 subsidiary, affiliate, alter ego, or common business enterprise  
11:30:00 3 status or relationship with Taishan is enshrouded in facts. This  
11:30:09 4 justifies, or requires, some discovery and will, likely, require an  
11:30:19 5 evidentiary hearing in court with live testimony or depositions;  
11:30:27 6 certainly documents would be introduced. Following the hearing, the  
11:30:30 7 court will make findings of fact and conclusions of law as to  
11:30:34 8 whether or not they are affiliates, whether or not they are alter  
11:30:40 9 egos, whether or not they are subsidiaries, whether or not there is  
11:30:45 10 a common business enterprise. And then the issue is whether or not  
11:30:53 11 they did business during the period in question; and if so, how  
11:30:55 12 much. And if so, how much do they owe.

11:31:04 13 I think that hearing should probably be scheduled after  
11:31:06 14 the jurisdictional ruling because the jurisdictional ruling may well  
11:31:11 15 affect some aspect of this ruling.

11:31:16 16 So I do agree that the precipitous act is that of  
11:31:23 17 Taishan, but the aspect of the injunction doesn't simply say to  
11:31:37 18 Taishan you're in contempt, pay attorney's fees, pay the judgment,  
11:31:42 19 and pay the damages; but it also says don't do business in the  
11:31:52 20 United States in any form. And if you do, this is the consequence.

11:31:59 21 So we're at that second phase now. Taishan, to their  
11:32:05 22 credit, has paid up, paid the judgment, paid the attorney's fees,  
11:32:10 23 paid the damages. But from July to March they were thinking about  
11:32:16 24 it and, therefore, were in contempt; and it's that period where I  
11:32:25 25 think the focus should be and that's where BNBM, CNBM, BNBM Group,

11:32:35 1 CNBM Group may have some involvement in this aspect of this case.

11:32:45 2 So that's my ruling. I will do a better job in writing  
11:32:51 3 than I did in speaking, but that's basically what my ruling will  
11:32:55 4 entail. So I do appreciate counsel, they were very effective in  
11:33:02 5 their presentation. And of course as usual, their writing was very  
11:33:07 6 well done.

11:33:09 7 I'll go to the next motion.

11:33:11 8 MR. TAYLOR: Your Honor, before we go to the next motion,  
11:33:14 9 I have one point of clarification.

11:33:16 10 THE COURT: Sure.

11:33:17 11 MR. TAYLOR: Bernard Taylor for Taishan. Our client  
11:33:21 12 Taishan has asked us on numerous occasions are we still in contempt  
11:33:25 13 or not. And it looks like based upon what the court has said today  
11:33:28 14 that we have purged ourselves of contempt.

11:33:32 15 THE COURT: Yes.

11:33:33 16 MR. TAYLOR: We are in agreement on that?

11:33:35 17 THE COURT: Well, I am in agreement that you purged  
11:33:37 18 yourself from the precipitous act. At this point you still have an  
11:33:44 19 interest in the litigation in the contempt proceeding because I  
11:33:46 20 provided that during that time that you were in contempt. I don't  
11:33:50 21 think you're in contempt anymore in the sense of you paid the  
11:33:55 22 amount, and I appreciate your help in getting your client purged of  
11:34:00 23 that. But now I'm focused on during that period of time that you  
11:34:04 24 were in contempt what has happened.

11:34:07 25 MR. TAYLOR: All right. That's very helpful. One other

11:34:10 1 point, your Honor.

11:34:12 2 THE COURT: Sure.

11:34:13 3 MR. TAYLOR: In chambers or the back room we had some  
11:34:15 4 discussions about the Hogan Lovells documents that were to remain  
11:34:21 5 confidential.

11:34:21 6 THE COURT: Yes, thanks for bringing that up. There are  
11:34:24 7 certain documents in the presentation of counsel that I know he  
11:34:30 8 distributed, as he was required to do, to his co-counsel and other  
11:34:34 9 individuals. But those, many of those documents, or at least some  
11:34:39 10 of those documents are under seal because there are certain  
11:34:46 11 privileges, privilege objections made to them. They're attorney  
11:34:51 12 documents involving their clients, and so there is good reason for  
11:34:56 13 at least putting them under seal.

11:34:59 14 So if anybody has those documents, I direct them not to  
11:35:04 15 disclose it. It's under seal and part of this litigation.

11:35:09 16 MR. TAYLOR: Thank you, your Honor.

11:35:10 17 THE COURT: Thank you. I'll go to the next motion. And  
11:35:13 18 we have someone on the line. Call the next motion, Dean.

11:35:16 19 THE DEPUTY CLERK: Motion Document No. 19296, motion of  
11:35:21 20 Taishan Gypsum to dismiss Ace Home Center, Inc.'s first amended  
11:35:26 21 third-party complaints.

11:35:28 22 THE COURT: Make your appearance for the record, please.  
11:35:30 23 The moving party.

11:35:31 24 MS. EIKHOFF: Hello, your Honor, Christy Eikhoff of Alston  
11:35:37 25 Bird on behalf of Taishan, the movant.

11:35:38 1 THE COURT: Okay. We have someone on the phone that's  
11:35:40 2 going to respond?

11:35:42 3 MR. COLLIER: Yes, your Honor. Danny Collier for Ace Home  
11:35:46 4 Center, Inc.

11:35:46 5 MS. EIKHOFF: And, your Honor, we're going to have a very  
11:35:49 6 brief demonstrative. We have e-mailed Mr. Collier a copy of that so  
11:35:52 7 he has it available to him as well.

11:35:54 8 THE COURT: All right.

11:35:58 9 MS. EIKHOFF: Your Honor, Ace Home Center filed the  
11:36:01 10 complaint at issue pursuant to Federal Rule Of Civil Procedure 14.  
11:36:05 11 And as this court knows, Rule 14 allows for third party process and  
11:36:11 12 it permits, but does not require, the court to allow a defendant to  
11:36:16 13 bring a claim against a non-party to drag the non-party into the  
11:36:21 14 lawsuit.

11:36:24 15 And the purpose of the rule, as many authorities including  
11:36:26 16 in the Fifth Circuit and Wright and Miller have noted, is to avoid  
11:36:33 17 circuitry of action and to eliminate duplication of suits. But what  
11:36:37 18 we submit to this court, your Honor, is that the complaint that Ace  
11:36:41 19 Home Center has filed against Taishan in this circumstance does the  
11:36:44 20 exact opposite of the purpose of Rule 14. It turns Rule 14 on its  
11:36:49 21 head.

11:36:50 22 And just to illustrate just the procedural circuitry that's  
11:36:56 23 going on here, this really starts with homeowners, the Collins and  
11:37:00 24 the Herringtons, who are claimants who claim to have been harmed by  
11:37:04 25 Chinese drywall in their homes.

11:37:06 1 They asserted claims against Taishan in the *Wiltz* case in  
11:37:14 2 this court in 2010. And pursuant to the July 9th hearing that we  
11:37:18 3 had on damages between the two of them, they are asking this court  
11:37:21 4 to award them and make Taishan pay them more than \$400,000 worth of  
11:37:28 5 damages for remediation alone. And we know that the PSC has said  
11:37:32 6 that's just the beginning, that they want to seek more.

11:37:35 7 We have -- just by the way, that amount is at least the  
11:37:42 8 full fair market value of their properties already. So that is  
11:37:46 9 pending before this court against Taishan seeking damages for  
11:37:50 10 Taishan directly.

11:37:53 11 But then the Collins and Herringtons also filed a  
11:37:57 12 complaint, which we are calling Complaint No. 2, in the Southern  
11:38:00 13 District of Mississippi, not naming Taishan but seeking relief and  
11:38:05 14 damages for the exact same harm from a whole host of other  
11:38:09 15 defendants, including fictitious Defendants 5 through 150.

11:38:15 16 THE COURT: Is that in state court?

11:38:17 17 MS. EIKHOFF: It was originally filed in state court, your  
11:38:19 18 Honor, then it was removed to the Southern District of Mississippi.  
11:38:22 19 And as you know, it's now been transferred here.

11:38:24 20 THE COURT: Yes.

11:38:29 21 MS. EIKHOFF: So now then the next step of this procedural  
11:38:32 22 triangle is that Ace Home Center, a defendant in that action, is  
11:38:36 23 seeking to bring Taishan in to that action asserting a complaint in  
11:38:41 24 this court in 2014 against Taishan for indemnification for damages  
11:38:45 25 that they owe to the Collins and Herringtons.



11:38:49 1 And just to make it even more complicated, at the same  
11:38:51 2 time they filed a complaint against DEVON, and the Cincinnati  
11:38:58 3 Insurance Company has recently moved to intervene in that case and  
11:39:01 4 open up the default in that case.

11:39:03 5 THE COURT: Right.

11:39:05 6 MS. EIKHOFF: Now, I would like to say that allowing Ace  
11:39:11 7 Home Center to prosecute its claims against Taishan now would be  
11:39:14 8 putting the cart before the horse. But in this case there are so  
11:39:17 9 many horses and so many carts, we can't even keep up with them all;  
11:39:22 10 and that is the exact opposite of the purpose of Rule 14, which is  
11:39:26 11 to allow these types of claims when it will make the adjudication  
11:39:31 12 more efficient and more streamlined. And so what we have is that a  
11:39:37 13 rule that is seeking to avoid circuitry is being used to create a  
11:39:41 14 triangle of duplicative liability, at least as far as Taishan is  
11:39:46 15 concerned.

11:39:47 16 THE COURT: What would your suggestion be, wait until Ace  
11:39:50 17 gets found liable from Collins and Herringtons and then allow Ace to  
11:39:57 18 sue Taishan?

11:40:00 19 MS. EIKHOFF: Yes, your Honor. What we have proposed in  
11:40:02 20 our papers, we moved to dismiss and we provided substantive  
11:40:05 21 Mississippi law why we think dismissal is proper. But in the  
11:40:08 22 alternative, and we put this in our motion, we would ask at a  
11:40:11 23 minimum that Complaint No. 3 be stayed until resolution of Complaint  
11:40:16 24 No. 1, because resolution of Complaint No. 1, we believe, could very  
11:40:21 25 easily moot Complaints No. 2, 3 and 4. They're going to get more

11:40:26 1 than the value, you know, if they get what they're seeking, they'll  
11:40:28 2 get more than the value of their properties.

11:40:30 3 THE COURT: You would agree, though, that they have proper  
11:40:36 4 service on you now?

11:40:38 5 MS. EIKHOFF: Yes, your Honor, we accepted service.

11:40:40 6 THE COURT: Would you require them to do a service under  
11:40:43 7 the Haig on you later on?

11:40:46 8 MS. EIKHOFF: No, we accepted service, your Honor. So  
11:40:49 9 that's what was the predicate for us being able to file the motion  
11:40:54 10 to dismiss.

11:40:55 11 THE COURT: Okay.

11:40:56 12 MS. EIKHOFF: And so, your Honor, in our court conference  
11:40:57 13 that we had earlier this week, your Honor raised the question of  
11:41:01 14 whether it would be prudent to send the case back to the Southern  
11:41:06 15 District of Mississippi for adjudication and trial. And, your  
11:41:11 16 Honor, as far as Taishan is concerned, you know, the issues  
11:41:15 17 between -- that are raised between the Collins and Herringtons and  
11:41:18 18 all of these other defendants, I know some of those defendants have  
11:41:21 19 raised motions to dismiss that are pending; and if that needs to go  
11:41:25 20 back to Mississippi, so be it.

11:41:27 21 But we ask this court not to drag Taishan down with them.  
11:41:31 22 Because if Taishan gets sent away and then -- that'll exacerbate the  
11:41:38 23 inefficiencies of this situation because then we're having to fight  
11:41:41 24 the battle on not only on two different fronts but in two different  
11:41:45 25 courts.

11:41:46 1 THE COURT: I see.

11:41:47 2 MS. EIKHOFF: So in closing, we ask that the court  
11:41:51 3 exercise its authority and its discretion under Rule 14 to either  
11:41:57 4 dismiss the complaint that has been filed against us by Ace or to at  
11:42:02 5 least to stay it until there's been resolution.

11:42:05 6 And I'll just add one more point, which is Ace Home  
11:42:09 7 Center in their response papers seems to acknowledge that there has  
11:42:12 8 to be some phasing of these procedures. When we argued to the court  
11:42:18 9 that we're being faced with potential duplicate liability here,  
11:42:22 10 their response was, well, don't worry about that because whatever  
11:42:26 11 the Collins and Herringtons recover from Taishan will be an offset  
11:42:30 12 against what we will be seeking from them. But that presumes that  
11:42:35 13 there's anything left to be sought from them, and also presumes that  
11:42:40 14 one has happened before the other.

11:42:42 15 THE COURT: I got it. Let me hear any response. What's  
11:42:46 16 the harm with staying the matter if you don't have to worry about  
11:42:53 17 the Haig service, you've got them here, it would have to be staged  
11:42:59 18 anyway, what's the harm of doing that? Danny, let me hear from you.

11:43:02 19 MR. COLLIER: Your Honor, thank you. Again, Danny Collier  
11:43:04 20 for Ace Home Center.

11:43:06 21 And, your Honor, the harm is the very rule for -- reason  
11:43:11 22 for Rule 14, and that is to handle everything at one time. And the  
11:43:18 23 relief Taishan asks for is not found in the rule, not found in the  
11:43:24 24 law. And I would like to respond to a number of points we just  
11:43:28 25 heard.

11:43:29 1 THE COURT: Okay.

11:43:30 2 MR. COLLIER: A couple of opening comments and then I'll  
11:43:33 3 get right to my comments.

11:43:38 4 We just heard several iterations that Ace Home Center is  
11:43:46 5 dragging Taishan here, Ace is dragging Taishan there. That's false.  
11:43:52 6 Your Honor, Taishan's actions in putting this board in the market  
11:43:58 7 that wound up in our store that we sold to Bass, that Bass used to  
11:44:03 8 build the Collins and Herringtons' homes, that drug us into court in  
11:44:09 9 Mississippi and Taishan has thereby drug us into the present forum.

11:44:14 10 So they're the ones dragging folks around, not us.

11:44:18 11 Next point: I listened for an hour and a half this  
11:44:25 12 morning to very good lawyers, but what it showed was a very tangled  
11:44:31 13 web that Taishan has woven, and I say that to contrast and compare  
11:44:39 14 this slide that perhaps is on the screen at this time. Those four  
11:44:47 15 red arrows show how simple our matter is compared to what we just  
11:44:52 16 heard for an hour and a half.

11:44:55 17 One more comment before I get to my prepared remarks.  
11:44:59 18 Taishan has shown itself to have an endless capacity to litigate  
11:45:04 19 with seemingly a bottomless pit from which to pay lawyers, yet  
11:45:09 20 somehow unable to compensate these poor plaintiffs.

11:45:12 21 Now, on the merits: Fundamental fairness requires the  
11:45:21 22 denial of Taishan's request. Let me explain. They want to point to  
11:45:28 23 Collins and Herringtons somehow being part of the class action  
11:45:32 24 against Taishan yet Collins and Herringtons are suing us in a  
11:45:40 25 separate forum, and they would point to the exclusive remedy

11:45:43 1 language of the class members. Well, your Honor, that exclusive  
11:45:49 2 remedy language is for Collins and Herringtons, not for Ace Home  
11:45:55 3 Center. That is to say, it is not our remedy. Our remedy has not  
11:46:02 4 been abrogated by anything the Collins or Herringtons did or failed  
11:46:07 5 to do, our remedy is found in the rules of Civil Procedure Rule 14.

11:46:12 6 It's as if Taishan is trying to say, well, since Taishan  
11:46:14 7 might -- I'm sorry, it's as if Taishan is trying to say, well, since  
11:46:20 8 Collins and Herringtons might get two bites at an apple, Ace should  
11:46:25 9 get no bites at the apple. And that's not fair.

11:46:27 10 In truth Taishan did not only damage Collins and  
11:46:35 11 Herringtons. Taishan's conduct in putting this defective board into  
11:46:42 12 the stream of commerce that landed in our store exposed Ace to  
11:46:47 13 liability to these plaintiffs. As well as the expense of  
11:46:52 14 litigation. And so Taishan must answer in damages to Ace as well as  
11:46:57 15 to Collins and Herringtons.

11:47:00 16 And, your Honor, if there is a true double recovery  
11:47:04 17 problem here, it can be addressed at the appropriate time. For  
11:47:10 18 example, let's assume one day in the future Collins and Herringtons  
11:47:13 19 recover from Taishan in the MDL. Remediation costs, alternative  
11:47:20 20 living expenses, loss of use, whatever. Well, then at that time the  
11:47:25 21 trial judge can consider whether the Collins and Herringtons have  
11:47:31 22 their exclusive remedy, thus cutting off the Collins and Herringtons  
11:47:35 23 claims against Ace, but it's too early to do that now.

11:47:40 24 Taishan has only recently, your Honor, come out of hiding  
11:47:43 25 from that Chinese bunker; and though we can see the whites of their

11:47:47 1 eyes now, they're still fighting tooth and nail. These poor  
11:47:50 2 plaintiffs haven't received a red penny from Taishan yet and yet  
11:47:55 3 Taishan wants to argue and complain about double recovery. We  
11:47:58 4 haven't seen a single recovery yet.

11:48:06 5 Your Honor, this forum -- when I say this forum, let me  
11:48:10 6 back up. The forum where Ace finds itself in a state court action,  
11:48:19 7 removed to federal court, funneled into the MDL forum, that forum is  
11:48:24 8 where Ace finds itself and that forum affords Ace a Rule 14  
11:48:32 9 third-party complaint vehicle. That's the only way and only place  
11:48:36 10 and only way Ace to protect itself. In other words, Ace can't be in  
11:48:43 11 the MDL protecting itself.

11:48:49 12 On the flip side, Taishan can be in my forum and protect  
11:48:54 13 itself just fine, but the reverse is not true. In other words, we  
11:49:01 14 have no standing over there to protect ourselves, yet Taishan does  
11:49:05 15 have standing in our state court/federal court action to protect  
11:49:09 16 itself. And if in the end Taishan ultimately cannot protect itself,  
11:49:15 17 it's only because it's guilt and its culpability proximately damaged  
11:49:20 18 Ace Home Center and we've got a Rule 14 remedy.

11:49:23 19 So that covers the duplicatus argument. Let me raise,  
11:49:34 20 comment one more time on something not raised just a moment ago, but  
11:49:38 21 raised in the papers; and that is Taishan says, well, Danny's client  
11:49:43 22 can't sue us under Rule 14 because Mississippi law does not  
11:49:47 23 recognize contribution among joint tortfeasors. Very simply, your  
11:49:54 24 Honor, there's not a word of contribution in our third-party  
11:49:58 25 complaint. It explicitly alleges common law, equitable indemnity

11:50:05 1 under active passive negligence. So we seek indemnity, not  
11:50:09 2 contribution.

11:50:09 3 And finally, and I'll be quiet, I would ask your Honor  
11:50:14 4 from my writings to ignore the bit of argument about "if credit were  
11:50:20 5 set off" issue because my mind was still in Alabama where we had  
11:50:28 6 joint and several liability. This will be Mississippi law, we're a  
11:50:34 7 pure comparative state. That's just to correct an error on my part  
11:50:37 8 and I appreciate the court's indulgence.

11:50:40 9 THE COURT: Okay. Thank you very much. Any response?

11:50:42 10 MS. EIKHOFF: Just to make one point, your Honor, and that  
11:50:46 11 is, as Mr. Collier just clarified, their complaint against Taishan  
11:50:53 12 is seeking pure indemnification. The damages that they seek is only  
11:50:58 13 recovery of what they are forced to pay to the Collins and  
11:51:01 14 Herringtons or what they settled for, which may be disputed.

11:51:05 15 But in any event, it's purely contingent on them first  
11:51:09 16 being held liable. And so we think that is all the more reason,  
11:51:13 17 especially when the same plaintiffs are coming after us directly for  
11:51:16 18 the same harm at the same time, then it makes sense to put one  
11:51:21 19 before the other; and the direct claim against Taishan should go  
11:51:26 20 first, the other one should be stayed.

11:51:29 21 THE COURT: I see the issue and I understand the issue. I  
11:51:31 22 am going to this under advisement because I understand that the  
11:51:35 23 claimants are in the throws of negotiation at this time and their  
11:51:42 24 decisions may make this matter moot. I think that by taking it  
11:51:47 25 under advisement I may be encouraging a successful resolution of the

11:51:52 1 case, and I do that for that purpose.

11:51:54 2 But I am not going to keep it under advisement long, I  
11:51:57 3 will do that for a couple of weeks, but I am going to come out with  
11:52:01 4 a motion and ruling.

11:52:02 5 Harry, do you have something?

11:52:04 6 MR. ROSENBERG: Yes, your Honor. Please the court, I know  
11:52:06 7 that we discussed this chambers the scheduling of the next status  
11:52:11 8 conference. I may have just not heard it, because my hearing is  
11:52:15 9 fading, your Honor, but whether it was actually announced in open  
11:52:19 10 court that we rescheduled.

11:52:21 11 THE COURT: Thanks for bringing it to my attention, I  
11:52:24 12 didn't so let me do that again.

11:52:24 13 As I understand the parties feel that because of the  
11:52:28 14 depositions that are in Hong Kong, the schedule of September the  
11:52:33 15 19th, that's when they're going to be in Hong Kong; so as I  
11:52:38 16 understand it, we're going to dispense with the September meeting  
11:52:42 17 and have the meeting for September and October on October the 7th.

11:52:48 18 MR. ROSENBERG: That's correct, your Honor.

11:52:49 19 THE COURT: Is that right?

11:52:50 20 MR. ROSENBERG: I think the September 18th conference was  
11:52:53 21 canceled, as I understand the court's decision, and it was going to  
11:52:57 22 be rescheduled to October 7th with a possible telephone conference  
11:53:01 23 on October the 22nd.

11:53:03 24 THE COURT: On October the 22nd. The parties will let me  
11:53:06 25 know if you need a telephone call, because we may have some issues



11:53:09 1 that we can deal with in discovery of that aspect of the case.

11:53:15 2 MR. ROSENBERG: Thank you, your Honor.

11:53:16 3 THE COURT: Thank you. Anything else anybody?

11:53:17 4 Thank you. The court will stand in recess.

11:53:19 5 THE DEPUTY CLERK: All rise.

11:53:20 6 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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10 REPORTER'S CERTIFICATE

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12 I, Karen A. Ibos, CCR, Official Court Reporter, United  
13 States District Court, Eastern District of Louisiana, do hereby  
14 certify that the foregoing is a true and correct transcript, to the  
15 best of my ability and understanding, from the record of the  
16 proceedings in the above-entitled and numbered matter.

17

18

19 /s/ Karen A. Ibos

20 Karen A. Ibos, CCR, RPR, CRR, RMR

21 Official Court Reporter

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