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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE-MANUFACTURED )  
DRYWALL PRODUCTS )  
LIABILITY )  
LITIGATION )  
) CIVIL DOCKET NO. 09-MD-2047-EEF-JCW  
) SECTION "L"  
) NEW ORLEANS, LOUISIANA  
) WEDNESDAY, JANUARY 4, 2012  
) 9:00 A.M.  
THIS DOCUMENT RELATES TO: )  
)  
ROBERT C. PATE, AS TRUSTEE )  
FOR THE CHINESE DRYWALL )  
TRUST )  
)  
vs. )  
)  
AMERICAN INTERNATIONAL )  
SPECIALTY LINES INSURANCE )  
COMPANY, FCCI COMMERCIAL )  
INSURANCE COMPANY, FCCI )  
INSURANCE COMPANY, ET AL )  
)  
2:09-CV-07791 (E.D. LA.) )  
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TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

OFFICIAL COURT REPORTER: SUSAN A. ZIELIE, RPR, FCRR  
United States District Court  
Eastern District of Louisiana  
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New Orleans, La 70130  
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Also Present:

MATTHEW CLARK, ESQ.

1 NEW ORLEANS, LOUISIANA; WEDNESDAY, DECEMBER 4, 2012

2 9:00 A.M.

3 (COURT CALLED TO ORDER)

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

6 THE COURT: Counsel make their appearance for the  
7 record.

8 MR. HERMAN: May it please the Court, good morning,  
9 Judge Fallon. Russ Herman for the plaintiffs.

10 MR. MILLER: Good morning, Your Honor. Kerry Miller on  
11 behalf of the Knauf defendants.

12 THE COURT: Today, I have before me a joint motion of  
13 the proposed settlement submitted by class counsel, Plaintiff's  
14 Steering Committee and Knauf defendants, for an order seeking the  
15 preliminary approval of a global Knauf settlement, conditional  
16 certification of the settlement class and issuing of class  
17 notice, a scheduling on the fairness hearing, and also there's a  
18 motion to stay all proceedings.

19 By way of background, the proposed global class  
20 settlement agreement before the Court is intended to resolve  
21 claims made and filed in actions which arose out of the KPT  
22 Chinese drywall installed in properties throughout the United  
23 States. The settlement agreement defines the KPT Chinese drywall  
24 as, quote: Any and all drywall products manufactured, sold,  
25 marketed, distributed and/or supplied by KPT which are alleged to

1 be defective.

2 The settlement agreement class includes all persons or  
3 entities who, as of December the 9th, 2011, filed a lawsuit in  
4 the litigation as a named plaintiff asserting claims arising from  
5 or otherwise related to the KPT Chinese drywall whether or not  
6 the Knauf defendants are named in the suit.

7 The settlement agreement in essence establishes two  
8 funds for the benefit of the class members. First, a remediation  
9 fund; and, second, an other loss fund.

10 The remediation fund is uncapped, with the Knauf  
11 defendants making an initial deposit of \$200 million, and  
12 additional deposits of \$50 million each time the balance of the  
13 fund is reduced to \$25 million. Additional funds may also be  
14 deposited into the remediation fund. For example, 50 percent of  
15 the prospective insurance settlement funds and net amounts  
16 recovered from IN/EX, Banner and prospective L&W class  
17 settlements.

18 In essence, the remediation fund involves the  
19 residential owners and commercial owners, and they have three  
20 available options for remediating benefits.

21 First, they may elect to have their properties  
22 completely remediated, pursuant to the settlement remediation  
23 protocol which has been devised by the Court after hearing a  
24 number of cases that were tried.

25 Second, they may self-remediate their affected

1 properties and be compensated for the cost under this settlement.

2 Third, they may receive a discounted cash opt-out  
3 payment if they choose not to remediate their property.

4 The remediation protocol option is intended to make the  
5 owners whole within a three month period by completely  
6 remediating their affected properties to its former state prior  
7 to the installation of KPT drywall.

8 Residential owners will also receive a lump sum payment  
9 of either \$8.50 or \$10 per square foot, depending on the size of  
10 the property. The purpose of this payment is to compensate for  
11 other covered expenses, which include the following incurred  
12 during remediation, such as alternate living expenses, as many of  
13 the people will have to in effect move out of their homes; their  
14 personal property damage, maintenance cost, utility bills,  
15 insurance, property taxes, landscaping, moving and storage.  
16 That's what that fund is intended for.

17 The second option. Under the second option, which is,  
18 as I said, the self-remediation option, residential owners and  
19 commercial owners may elect to self-remediate their affected  
20 properties and a cash payment will be made to the owner's chosen  
21 contractor. Some of these individuals have contractors that they  
22 have used to build their home in the first place and they want to  
23 go back to that individual. Some of them have their friends or  
24 brothers-in-law who are contractors, and they want to use them.  
25 So that's an option for those folks.

1           For mixed properties, the payment will be discounted by  
2 multiplying the payment by the KPT drywall percentage. There's a  
3 certain percentage in these cases. The cases, particularly in  
4 Florida and to some extent in Louisiana, we've found that some of  
5 them are completely KPT drywall, but some of them are not. Some  
6 of them are different percentages of the KPT drywall, and there's  
7 an effort made to deal with those properties.

8           The third option, as I mentioned, the owners may select  
9 a discounted cash payment, but they have to follow certain  
10 disclosure requirements if they do that.

11           Now, with regard to the other loss fund, a fixed fund,  
12 as I said, the first fund is not capped. The other loss fund is  
13 capped. Knauf defendants have deposited or will deposit \$30  
14 million and 50 percent of the net proceeds from the prospective  
15 insurance settlement in excluded releases. This fund provides  
16 additional benefits to class members for economic loss depending  
17 on the subclass.

18           Residential owners, for example, may be entitled to  
19 reimbursement of alternate living expenses arising from the need  
20 to vacate prior to the remediation.

21           Or, two, to recover an economic loss from foreclosures  
22 and short sales. We have some of those.

23           Commercial owners may be entitled to economic loss for  
24 at most three months for inability to use or to rent the affected  
25 property during remediation.

1           Also reimbursement for carrying costs arising from  
2 inability to sell the affected properties.

3           And, third, loss of equity due to foreclosures and short  
4 sales. Unfortunately, we do have some of those that occurred.

5           The tenants may seek compensation for moving expenses  
6 and for personal property damage.

7           The other loss fund may also provide compensation for  
8 bodily injury to residential owners and tenants, assuming they  
9 can prove the connection there.

10           In addition to these funds, these two funds that I've  
11 just spoken about, the settlement agreement also provides for  
12 attorney fees. The attorney fees do not come out of those funds.  
13 The purpose of the settlement -- at least, the purpose of it, is  
14 to provide full remediation and not take attorneys fees from that  
15 full remediation, because it wouldn't be full remediation at that  
16 point. So the settlement agreement also provides for at least  
17 \$160 million in attorneys fees and costs, separate from the  
18 compensation allotted to the prospective class members.

19           These fees will compensate the PSC, common benefit  
20 counsel, proposed settlement class counsel and individually  
21 retained plaintiff attorneys.

22           Also, the Knauf defendants will make an advanced payment  
23 of \$6 million nonrefundable for the shared costs of counsel.

24           The movants in this case presently ask for preliminary  
25 approval of the settlement agreement on the basis they claim that



1 the agreement is in the best interest of the Knauf settlement  
2 class members. And the requirements of Rule 23, they say, have  
3 been satisfied for at least a conditional certification of the  
4 class.

5 Additionally, they take the position that the proposed  
6 form and method of class notice, which they would intend to send  
7 out, meets the requirements of Rule 23.

8 I have received objections to this preliminary approval.  
9 Some of the objections are not objections as much as they are  
10 opportunities to state their position and also to seek some  
11 clarification.

12 I remind the parties, this is a very complex and  
13 complicated proposal, and it's going to take perhaps some  
14 tweaking. Even if a conditional approval is made, it's going to  
15 take some tweaking probably before any final approval can be  
16 granted.

17 But, in any event, that's the proposal, that's the  
18 motion. I'll hear from the parties at this time.

19 Anything from the proponents?

20 MR. LEVIN: The proponents would rather wait for the  
21 objections and then reply. I think it would be easier.

22 THE COURT: Probably, what would be helpful, if we had  
23 the objection, and then the PSC would respond to each objection,  
24 and then give the objector an opportunity to speak again also.  
25 So let's have the objection first.

1 MS. BASS: Good morning, Your Honor. Hillary Bass on  
2 behalf of the Home Builders' Steering Committee.

3 As noted in the recently-filed PSC response to those  
4 filing objections to the entry of this conditional approval  
5 order, this is one of a number of building blocks that is this  
6 Court's effort to resolve all of the Chinese drywall disputes,  
7 some of which obviously have already been preliminarily approved,  
8 Banner and IN/EX; some of which are before you for the first time  
9 today; and others, like the insurance agreement, are merely a  
10 concept at this point, with much to be worked out.

11 But, because of the bulk of the parties have so many  
12 multiple roles and have so many interrelated claims -- the Home  
13 Builders are a perfect example of that. We stand before you as a  
14 plaintiff, as a defendant, and also as an assignee of the  
15 homeowner claims seeking to recover the costs of remediation.  
16 So, despite the fact that the PSC has objected to whether we have  
17 standing, it is our view that we do fit within one of those  
18 exceptions to class actions where our rights are being directly  
19 affected, both by the nature of the releases and the bar here.

20 We have, as you know, had detailed conversations with  
21 both the PSC and Knauf, trying to resolve some of ambiguities of  
22 this agreement. And we are happy to report, as stated in our  
23 papers, that we do believe that many of the clarifications will  
24 resolve many of the Home Builders' objections.

25 That being said, there are two things that we would ask

1 of Your Honor today.

2 First and foremost is that this insurance agreement,  
3 that this entire Knauf-PSC settlement agreement, is dependant  
4 upon, is at this point purely a concept. We're going to meet  
5 with Mediator Perry, we are going to be meeting with him today,  
6 and we are hopeful that that would be resolved.

7 But it would be our view that any opt-out period or  
8 objection date be triggered by the resolution of that proposed  
9 insurance agreement.

10 To ask any party to make a decision about whether they  
11 object or chose to opt-out of this class before they have a  
12 thorough understanding of the insurance agreement that will help  
13 fund this class action settlement and will provide for various  
14 other issues relating to release and bar orders, we believe,  
15 would be improper.

16 So we do not have an objection to this Court  
17 preliminarily approving this settlement for the purpose of  
18 getting the stay in effect for pending cases against Knauf. But,  
19 for the purpose of putting the parties on notice, we would ask  
20 that the Court use the opt-out date and the objection date, and  
21 select one that would be triggered by some timeframe following  
22 resolution of that insurance agreement.

23 Secondly, as noted in our response, there are multiple  
24 ambiguities in this agreement. We certainly understand the  
25 pressure these parties were under to put forth a very detailed

1 and multi-paged agreement. But it does underscore the fact that,  
2 as Your Honor noted, further negotiations are required to clarify  
3 those ambiguities. I'll just give you a few examples.

4 In Section 4.82, for example, it discusses that Knauf  
5 related settlement proceeds of the Banner, IN/EX and L&W  
6 settlement will be used to fund these two Knauf loss funds.

7 We have now obtained clarification that, despite the  
8 fact the language does not indicate this is the case, that it is  
9 the parties' objections to exclude from that monies that Home  
10 Builders, as assignees of homeowners for homes they've prepared,  
11 Home Builders would be entitled to those Banner proceeds. That  
12 money will be excluded. That of course is not in this document.

13 Additionally, there is a provision in 148 and Section  
14 4.8 relating to the use of insurance proceeds. Similarly, there  
15 is no exclusion for the money coming into the Knauf settlement  
16 funds for monies that would go to Home Builders.

17 And a third example is Section 14.3 that describes also  
18 that this agreement over and supercedes any existing Knauf  
19 agreement regarding settlement of attorneys fees. And of course  
20 Knauf does have separate agreements with Home Builders that does  
21 reference those attorney fees. We have been told that, despite  
22 the fact that language is not in there, it is not the intention  
23 to supercede those separate agreements.

24 These are just examples of one of a number of many  
25 clarifications, and what we would ask Your Honor to do in advance

1 of any final approval of this settlement is to have a PSC and  
2 Knauf, if it doesn't require a full amendment of this paragraph  
3 for purposes of this settlement agreement, at least enter into a  
4 side agreement to clarify these ambiguities so the parties will  
5 have certainty as to what this ambiguous language is intended to  
6 cover. And it's specifically relevant in light of all the  
7 different moving parts of these other settlements, and the fact  
8 the language does not make clear what is intended to be affected  
9 in those other settlements and what is not.

10 So, subject to those two clarifications, Your Honor,  
11 one, that we ask for the opt-out and objection date to be  
12 triggered by the conclusion of the insurance agreement; and, two,  
13 that the PSC and Knauf in fact enter into some type of writing  
14 which gives the Home Builders the clarification that they  
15 deserve, that this is not intended to affect other existing  
16 agreements that they have entered with both these parties, we  
17 have no objection to the conditional approval this morning, Your  
18 Honor.

19 THE COURT: Hear from the PSC.

20 MR. LEVIN: Arnold Levin for the proposed class counsel  
21 and the Plaintiff's Steering Committee.

22 There's not much I have to say, Your Honor. It's all  
23 been said in the brief as to conditional certification, et  
24 cetera.

25 We do not believe the Home Builders have standing to

1 object to this settlement. They are not part of it. They're not  
2 taking from the pot. It's Omni plaintiffs only.

3 Nevertheless, everything that Ms. Bass said with regard  
4 to the clarifications we made, we did not think they were  
5 ambiguous. I can assure her that paranoids do not have enemies  
6 when it comes to the Knauf settlement.

7 Specifically, in this settlement, the provision read as  
8 a whole, comport with her now understanding of the settlement.

9 As to the Banner and IN/EX monies and insurance monies  
10 and L&W monies and subsequent settlements, they only become a  
11 ticket for admission to the Knauf settlement. If you're not  
12 taking from the Knauf settlement, those funds belong to whoever  
13 those funds belong to with regard to the allocations in Banner  
14 and IN/EX. And we will be filing an allocation plan shortly with  
15 regard to Banner.

16 We anticipate and hopefully, that, if we can accomplish  
17 the insurance settlement in an expeditious fashion, that the  
18 fairness hearing in this case will include Banner, IN/EX,  
19 insurance, L&W and Knauf, so that all the moving parts will fit  
20 together. It's been a tough situation of getting all the moving  
21 parts moving, and we're 80 percent there right now.

22 As to the opt-out period, I really leave that to Knauf  
23 to address, because everybody in all of these settlements want to  
24 know how many opt-outs they have before they move to the next  
25 stage of the settlement.

1           We as the Plaintiff's Steering Committee would  
2 accommodate all opt-out periods and all dates for opt-out periods  
3 so long as we could hold the fairness hearing for everything at a  
4 time that will be determined in the proposed insurance  
5 settlement. So perhaps Mr. Glickstein will deal with the opt-out  
6 period.

7           Does the Court have any questions?

8           THE COURT: No.

9           The thing that I remind everybody, though, that this is  
10 a complicated program. And it's complicated not only from the  
11 standpoint of putting it down in words, but it's going to also be  
12 complicated from the standpoint of carrying it out. And I think  
13 that, if we get to the point that it's preliminarily approved  
14 before it's even finally approved, I'm going to have to meet with  
15 the parties and get some kind of methodology for carrying out  
16 this program. It's not like the typical release where you get a  
17 check and you sign a release. It's something additional. So  
18 we're going to have to give some thought as to how it's carried  
19 out and who is in charge of the various aspects of the carrying  
20 out of the program. Because, the devil's going to be in the  
21 details of carrying it out, and we ought to have that down pretty  
22 well before we focus on the final approval.

23           MR. LEVIN: As to final approval.

24           But, as to preliminary approval, Your Honor, we would  
25 suggest that --

1 THE COURT: We've got to get the notice out first.

2 MR. LEVIN: -- in the old days, we walked into the  
3 judge's chambers and the judge signed the order. I think it's a  
4 good idea to have this hearing that Your Honor has scheduled.  
5 But we have to get the notice out, which is only by mail, to the  
6 class members so we can push the can down the road.

7 THE COURT: Yes. I'm not taking about before the final  
8 approval. I'm talking about before the preliminary approval.

9 MR. LEVIN: There's a lot of work to be done at that  
10 period of time, Your Honor.

11 MR. GLICKSTEIN: Good morning, Your Honor. Steve  
12 Glickstein on behalf of Knauf defendants.

13 I think it's just important to note how little is in  
14 dispute between the Home Builders' Steering Committee and the PSE  
15 and Knauf.

16 Ms. Bass says that she is not opposed to preliminary  
17 approval of the settlement and to the entry of a stay. The  
18 objection would be to setting an opt-out date prior to the  
19 completion of the prospective insurer agreement.

20 I would urge the Court to set an opt-out and objection  
21 date; but, in recognition of the fact that when the prospective  
22 insurer agreement is done, if there are requests at that time for  
23 additional time in light of new information, Your Honor always  
24 has discretion to address it then.

25 I think we need to get the process started of counsel



1 thinking and discussing with their clients this settlement, and I  
2 believe that deferral of the notice will only serve ultimately to  
3 delay things.

4           The Knauf settlement, we hope, will provide very  
5 substantial momentum for the prospective insurer agreement to be  
6 completed. We are hopeful that it will also spur completion of  
7 negotiations with Northriver and the IN/EX settlement, it will  
8 hopefully result in negotiations between Knauf and Banner and  
9 IN/EX concerning their disputes. And I fear that putting things  
10 on hold will only serve to take away the heat and the fire that  
11 will require us ultimately to complete those sooner rather than  
12 later.

13           If the prospective insurer agreement is not completed in  
14 a timely way, and somebody comes to Your Honor and asks for more  
15 time, I think the time to address that request is now. But a  
16 deadline is always a good thing to get the parties moving. And  
17 so I would urge Your Honor to set that deadline, subject always  
18 to Your Honor's right to reconsider.

19           With respect to the ambiguities in the settlement, I  
20 like to think that we had drafted it carefully and clearly. But,  
21 you know, things are always more clear to the folks that are  
22 negotiating and drafting than perhaps those who are reading it  
23 cold for the first time.

24           We have certainly spoken with Ms. Bass, and I believe  
25 that we have satisfied her concerns. We put those -- we've

1 confirmed in writing in our brief to the extent to which her  
2 understandings are correct. And, if at some point we need to  
3 take those confirmations out of the brief and put them in another  
4 piece of paper, it's not going to bother me.

5 So there's very little in dispute here. It's really  
6 only whether Your Honor sets the deadline, and I think Your Honor  
7 ought to set the deadline.

8 THE COURT: I see the wisdom in both sides.

9 I think that the Home Builders are correct, that it's  
10 very difficult for them to evaluate whether or not to opt-out  
11 without some understanding of the insurance agreement. It's a  
12 little bit amorphous now.

13 But I do see the wisdom in having a date.

14 But I'm going to move that date if it's not -- if it  
15 presents a problem, because I do want the parties to understand  
16 what their opportunities are before they decide whether or not to  
17 opt-out.

18 And, with regard to the ambiguities, side agreements are  
19 always helpful in this kind of thing. I don't see any problem in  
20 that.

21 Anyone else, any other objectors wish to speak?

22 MR. HASKINS: Yes, Your Honor.

23 Good morning, Your Honor. Stewart Haskins from King &  
24 Spaulding for Home Depot.

25 THE COURT: Okay.

1 MR. HASKINS: Your Honor, first of all, I'd like to  
2 start by saying that Home Depot would like to congratulate the  
3 parties and the PSC and Knauf in particular for reaching this  
4 settlement. And our objection to the settlement is fairly  
5 narrow. But we just want to make sure that the parties haven't  
6 cut too wide of a swab here in their haste and zeal to reach a  
7 settlement. Which I think everybody, including the Court,  
8 recognizes is a positive development in the case. But we're  
9 afraid that some of those details which the Court referred to  
10 earlier that the devil is in perhaps has a detrimental impact on  
11 Home Depot's rights.

12 First, though, I want to very briefly address the  
13 comments that were made by the setting parties in their reply in  
14 support of the joint motion for preliminary approval which  
15 suggests that parties like Home Depot do not have standing to  
16 object to the preliminary approval of the settlement at this  
17 time. And, principally, their argument was that Home Depot  
18 doesn't have the right to object to this settlement because it's  
19 not a class member.

20 Certainly, we have no disagreement with that, Home Depot  
21 is not a class member here.

22 But the settlement parties do concede that, if the  
23 settlement impacts Home Depot's rights, and I think the term that  
24 they use and the term that you used in the case, if there's plain  
25 legal prejudice to a nonlegal settling party, and one example of

1 that which was given in the VIOXX litigation is where the  
2 settlement strips a non-settling party of its indemnity rights.  
3 And that is precisely the case that we have here, Your Honor. At  
4 least, the way that we read the settlement agreement.

5 If in fact that is the case, that is clearly plain legal  
6 prejudice to Home Depot and would give us standing to object.

7 Now, the two types of objections that Home Depot has to  
8 this preliminary approval of the joint motions here are really,  
9 one is timing, because the settlement is premature because we  
10 have some agreements, which we've already discussed. And I think  
11 the Court's already addressed that issue. We'd simply echo the  
12 comments that were made by Home Builders' counsel that we can't  
13 really evaluate the fairness of the settlement, can't evaluate --  
14 the parties, the Court or even the non-settling parties, like my  
15 client, can't evaluate the settlement at this time, and we have  
16 agreements that have yet to be reached. And it sounds like Your  
17 Honor is going to address that.

18 Home Depot's other objection, though, and the more  
19 substantive one, is to the scope of the release and the  
20 corresponding bar orders that the parties received here. Because  
21 Home Depot has contractual rights from to indemnity from two of  
22 the parties here, L&W and Interior/Exterior. Home Depot has made  
23 written demands of indemnity from those parties. Yet, certain  
24 sections of the Knauf settlement agreement, at least as I read,  
25 appear to try to release Home Depot's claims for indemnity,

1 including, for example, its right to reimbursement for attorney  
2 fees in this case, and extinguish those claims. And then, even  
3 further, would bar Home Depot from prosecuting those claims later  
4 on.

5 I could give Your Honor some examples of the provision  
6 in the settlement agreement if that would be helpful. But I  
7 think, just from a big picture perspective, that is the basis of  
8 our objection. Because they have defined released parties in the  
9 settlement agreement to include L&W and Interior/Exterior, they  
10 have defined released claims to include claims for contribution  
11 and indemnity. And those claims are defined so broadly that they  
12 would encompass claims that non-parties to the settlement  
13 agreement would have, like my client Home Depot.

14 THE COURT: But, if you get released, what is your  
15 indemnity or what has happened before you were released?

16 MR. HASKINS: As I read the settlement agreement, Your  
17 Honor, the only release that Home Depot would have would be if  
18 Home Depot participated or its insurers participated in the  
19 settlement. So the only way that we can participate and get a  
20 release would be if we actually -- if our insurers contributed  
21 funds. At least, that's my understanding.

22 Of course, our rights to indemnity would flow the other  
23 way. Home Depot at that point should be getting indemnified from  
24 L&W and Interior/Exterior.

25 Like I said, we've already made those demands upon L&W

1 and Interior/Exterior, and they have not been disputed.

2 And I think the settlement agreement then attempts to  
3 take it one step further. And, if you look at Section 12, they  
4 ask this Court to enter a bar order which would enjoin Home Depot  
5 from seeking those indemnity clauses. And I think the exact  
6 language is they ask the Court to enjoin all pending and future  
7 claims against the Knauf defendants and the other releasees  
8 arising from or relating to KPT Chinese drywall.

9 Now, Your Honor, perhaps it wasn't their intention.  
10 And, certainly, from their reply, the reply that they supplied in  
11 support of the joint motion, it appears that that was not their  
12 intention. But, at least, reading that plain language, it  
13 certainly appears that they're asking the Court to bar folks like  
14 Home Depot from prosecuting their claim for indemnity from L&W,  
15 from Interior/Exterior and the other releases.

16 Now, if that wasn't their intent, then I think there's a  
17 simple fix for that, but we simply just have to clarify that in  
18 the agreement. But that needs to be done before preliminary  
19 approval.

20 If that was their intent, then I think that was clearly  
21 the type of plain legal prejudice that would not only give us  
22 standing, but I think it would be improper. Knauf and the PSC  
23 cannot agree contractually to alter the contract rights that Home  
24 Depot has with Interior/Exterior or other vendor, frankly, that's  
25 not a party to the agreement, and the Court should not approve or

1 bless that even on a preliminary basis.

2 THE COURT: Okay. Thank you.

3 I'll hear from the PSC.

4 MR. LEVIN: Your Honor, we got a two-page brief from  
5 Home Depot's counsel, signed by five lawyers from King &  
6 Spalding, and no where in the brief did we hear the presentation  
7 that was made today. That's why there's a fairness hearing.  
8 Could have been made.

9 But the release here and the bar orders are stock  
10 releases and bar orders in class action jurisprudence. Nobody  
11 outside of this settlement that's not a party to this settlement  
12 is being prejudiced by any of the terms of these settlements.  
13 Some are being protected by pro rata, pro tanto and setoffs in  
14 terms of the release which reduces what the plaintiff could  
15 recover against a non-settling defendant.

16 At the time of the fairness hearing, if counsel will  
17 provide a brief with regard to what was stated today, we will  
18 respond to it.

19 But we had -- you know, the boilerplate two pages didn't  
20 warrant a response to what was said today.

21 But we are certain that our bar order and our releases  
22 comport with the applicable jurisprudence, and these issues can  
23 be taken up at the fairness hearing.

24 THE COURT: You want to respond to that?

25 MR. HASKINS: I guess, in defense of the folks who filed

1 that, I would say that we didn't have very long to draft the more  
2 detailed brief that he would like.

3 But, certainly, we would be happy to file a more lengthy  
4 response to outline not only our contractual rights of  
5 indemnification but how those are impacted by the scope of the  
6 release and the bar order in this case.

7 THE COURT: How do you see Home Depot being affected by  
8 this?

9 MR. GLICKSTEIN: To answer Your Honor's precise  
10 question, I think it is they won't be getting a release.

11 Remember, the settlement has two categories of people in  
12 the supply chain, those who are other releasees and those who are  
13 excluded releasees. You are an other releasee if your insurer  
14 will participate in the prospective insurer agreement. In which  
15 case, if Home Depot's insurers do so, they will be other releasee  
16 and will get the benefit of the settlement and they will get a  
17 full release from all of the plaintiffs. If they elect not to  
18 participate in the agreement, then they are an excluded releasee.  
19 And, if they are excluded releasees, then the plaintiff's full  
20 rights against Home Depot are preserved and Home Depot's rights  
21 against other folks are preserved. So that's the architecture of  
22 the agreement.

23 But I do think that that's really not an objection to  
24 preliminary approval. It's certainly something that can be  
25 raised at the fairness hearing. And I think the wisdom of doing



1 that is that many of these objections are going to become mooted.

2 We do know that there is a period of time where there  
3 are going to be negotiations with the insurers for individuals in  
4 the supply chain, like Home Depot. And the hope and the  
5 expectation and the belief is that we will get participation from  
6 most everyone, and that all of these objections will be moot.

7 If, with respect to a particular entity in the supply  
8 chain, they become not moot, I think the time to address them is  
9 at the fairness hearing, in a concrete context, and we can really  
10 evaluate what real claims are we talking about. I think we'll be  
11 able to satisfy Your Honor that third parties' rights have not  
12 adversely been affected.

13 We do say, though, that in the settlement there's a  
14 judgment reduction provision. So if somebody goes after an  
15 excluded releasee, plaintiff does, then they must reduce their  
16 judgment against the excluded releasee to prove that the Knauf  
17 defendants or another releasee is at fault. So that the way it  
18 works is that, to the extent that there is a release of those  
19 claims, it's because the plaintiffs have to release those claims  
20 even against an excluded releasee.

21 So, again, one can always imagine a lot of horrors at  
22 the beginning of a process. I don't really think there are any  
23 horrors in the settlement. I think the time to address these  
24 things is at the end of the day when we'll deal with real issues  
25 in concrete terms, rather than hypothetical issues as they exist

1 now.

2 MR. HERMAN: May I be heard, Your Honor?

3 THE COURT: Yes.

4 MR. HERMAN: May it please the Court, Russ Herman on  
5 behalf of plaintiffs.

6 Seems to me that King & Spalding has made a Pandora  
7 argument. And it's not my intention to open Pandora's box or a  
8 can of worms. However, to my knowledge, prior to checking,  
9 sitting there, Home Depot never filed a claim in the MDL.

10 Secondly, Your Honor, to my knowledge, Home Depot  
11 originally indicated that they did not sell defective Chinese  
12 drywall, although not in a status conference or in a writing.

13 Thirdly -- and it may be that the PSC's discovery hasn't  
14 been as extensive as it should be -- but we found no billing  
15 records showing that Knauf drywall was delivered to Home Depot.  
16 And it strikes me that Home Depot may be -- may have elevated  
17 itself to a target defendant, albeit by these remarks. And none  
18 of that should be taken into account in terms of a preliminary  
19 approval. But it certainly is a matter which the PSC would be  
20 required to look into.

21 Lastly, if Home Depot is correct, then any exposure  
22 which it might have to some 4,000 to 10,000 claimants would be  
23 foreclosed by this settlement in the event that King & Spalding's  
24 argument has merit. Because the documents of settlement in terms  
25 of releases would enure to Home Depot potentially, and we don't

1 think any of these arguments should militate against a  
2 preliminary approval. And, of course, the PSC now will pursue  
3 with vigor Home Depot's allegations and will meet in a  
4 meet-and-confer.

5 THE COURT: Anyone else? You want to respond?

6 MR. HASKINS: Briefly, Your Honor. Just let me respond  
7 to Mr. Herman's comments, because frankly I agree with everything  
8 that he said. At least, most of it.

9 Home Depot hasn't filed a claim in this case, because we  
10 haven't been required to. We have contractual rights which are  
11 independent of any of the claims that exist in the class action,  
12 the six class actions in which we've been named. We have timely  
13 served our claims for indemnity on those third parties with whom  
14 Home Depot has contractual rights, Interior/Exterior, L&W and any  
15 others.

16 Second, Mr. Herman is exactly right; that, in the  
17 profile form that Home Depot submitted in this case, Home Depot  
18 doesn't have any knowledge of selling any Chinese drywall. In  
19 fact, if any ever made it into the Home Depot, any isolated  
20 incidents of any customer, it only could have come through L&W or  
21 Interior/Exterior. That is the basis for our claims of indemnity  
22 from those companies. But, to our knowledge, none ever did.  
23 And, as Mr. Herman pointed out, neither Interior/Exterior nor L&W  
24 have come forward with any records which show that they ever  
25 delivered any Chinese drywall to Home Depot, and the PSC hasn't

1 come forward with any evidence that any Knauf drywall was ever  
2 sold to Home Depot or sold by Home Depot.

3 So I would submit, Your Honor, that Home Depot should  
4 simply be dismissed from this case, and that would eliminate any  
5 of these concerns. We don't think this we should have been in  
6 the case in the first place. But that would certainly eliminate  
7 any objection that Home Depot would have.

8 Finally, with respect to the comments that were made by  
9 Knauf's counsel, if that is correct, if what he said is Home  
10 Depot is going to be an excluded releasee under the settlement  
11 agreement if Home Depot's insurer doesn't participate -- which,  
12 there's no need for Home Depot's insurer to participate because  
13 there are no valid claim against Home Depot -- but, if that's the  
14 case, what he said after that is very important. Which is, that  
15 Home Depot's rights vis-a-vis any third party will not be  
16 affected.

17 And, if that is true, then we have no objection to the  
18 settlement agreement. But that needs to be clear. Because the  
19 scope of the Section 12 bar order seems to be broad enough to  
20 prejudice Home Depot's rights against the other releasees, which  
21 include the companies against Home Depot has indemnity rights.

22 THE COURT: From the Court's standpoint, it seems that  
23 your position is that you have no liability. And so, if you have  
24 no liability, it's hard to understand the significance of  
25 indemnity rights.

1           But, assuming there's a potential of that, of preserving  
2 your rights in the event something happens, it seems, as Knauf  
3 counsel said, if you're not a part of the agreement, you're not  
4 affected by the agreement, other than the fact that you might be  
5 benefited by the agreement because in effect it knocks out any  
6 claimant's claims, because they have no claims because they've  
7 been totally remediated. So their claims for remediation go  
8 away. So that's a benefit.

9           But, as I understand it, if you're not part of the  
10 settlement, then you're an excluded -- you're excluded from it  
11 and you're not affected by it. At least, that was my  
12 understanding of the settlement.

13           I'll look at it in view of some of your comments.

14           MR. HASKINS: Thank you, Your Honor.

15           THE COURT: Okay. Any other objectors?

16           MR. GARCIA:: Your Honor --

17           THE COURT: Yes.

18           MR. GARCIA: Good morning, Your Honor. Diego Garcia  
19 here on behalf of the Northriver Insurance Company.

20           I won't belabor the points because some of them have  
21 been raised previously.

22           Northriver's principal objection to the settlement  
23 agreement, also is concerned about the scope of the bar order and  
24 the release as to the Knauf defendants. Northriver has asserted  
25 a claim for indemnity and contribution against the Knauf

1 defendants. We perfected service last week through the Hague  
2 Convention seeking to recover damages, mostly attorney fees, that  
3 Northriver has incurred defending itself in various direct action  
4 lawsuits in the MDL proceeding and in various Louisiana state  
5 court proceedings. And, when we read the agreement, we were also  
6 concerned, like Home Depot and the Home Builders, about the bar  
7 release and whether or not that could affect our third-party  
8 claims against the Knauf defendants.

9 THE COURT: Okay.

10 MR. LEVIN: Northriver has finally spoken.

11 Northriver is the tail in the IN/EX settlement. If the  
12 Court grants final approval to the IN/EX settlement, then the PSC  
13 class counsel on behalf of the class has the ability to pursue  
14 Northriver to the tune of \$72 million.

15 At this point, with everybody speaking to us, Northriver  
16 is the cheese that stands alone. And I believe that Northriver's  
17 situation and whatever they have to say will be resolved and  
18 dealt with at the IN/EX fairness hearing.

19 THE COURT: Any comments?

20 MR. GLICKSTEIN: I have nothing further, Your Honor.

21 THE COURT: Anybody else from the objectors?

22 MR. PANAYOTOPOULOS: Good morning, Your Honor. Nick  
23 Panayotopoulos on behalf certain Banner entities.

24 We filed certain objections, more like concerns, Your  
25 Honor, and we'll stand on the brief on most of those.

1           The parties, the settling parties, have attempted to  
2 address our concerns, and we're on the road of resolving, and I  
3 believe we are pretty confident that we're going to resolve all  
4 those.

5           The one issue that's a little different is the stay  
6 order as it relates to Banner entities's claims against Knauf.  
7 We've reached an agreement, I believe it was even before the  
8 settlement was announced, with Knauf where, on our own, Banner  
9 will reframe from proceeding with those claims. And, therefore,  
10 we believe that it's a moot point. The stay order should not  
11 address Banner's claims at this time, and the parties will  
12 hopefully resolve this on their own on the long haul. But, for  
13 the time being, it's not an issue.

14           THE COURT: Okay. I'm happy to hear that, because it's  
15 easier for the parties to agree to a stand-by provision. And, if  
16 something happens, I can always get involved in it. So I won't  
17 focus on the stay with regard to those claims.

18           MR. PANAYOTOPOULOS: Thank you, Your Honor.

19           MR. CLARK: Good morning, Your Honor, Matthew Clark on  
20 behalf of Southern Homes.

21           We filed an objection basically adopting the objections  
22 that we had previously filed with respect to the bar and stay  
23 orders issued in connection with the IN/EX settlement agreement.

24           We have those same basic objections. We'd like to adopt  
25 the arguments and objections of Home Depot, Northriver and to the

1 extent applicable also Banner.

2 Southern Homes, I'd also like to point out that Southern  
3 Homes may be different from a lot of the other entities the PSC  
4 and Knauf has said lacks standing to object at this time because  
5 there's a very high likelihood that Southern Homes still owns  
6 homes that contains KPT board. To that extent, I believe that  
7 they would fall within the class defined as commercial, for lack  
8 of a better term. The commercial owner subclass.

9 THE COURT: Isn't that good for you? I mean, isn't the  
10 settlement good for you if you own the homes and the settlement  
11 makes you whole?

12 MR. CLARK: For those homes.

13 For the balance of the homes where Southern Homes has  
14 been sued, which is largely all the homes that Southern Homes  
15 built with Chinese drywall manufactured by KPT, it's not so good  
16 because Southern Homes has its redhibition rights. We've briefed  
17 those to the Court, very much appreciate this opportunity to  
18 again bring those up to the Court, but we won't belabor that.  
19 It's already been briefed.

20 It's an issue of Southern Homes having those redhibition  
21 rights, just like plaintiff homeowners have redhibition rights  
22 against the Knauf entities. And, while the settlement agreements  
23 allows a certain amount of claimants within the redhibition  
24 rights to proceed to prosecute their rights against Knauf, it  
25 doesn't allow either, via stay and eventually bar orders.



1           THE COURT: You feel comfortable representing both sides  
2 of that nickel? You are in favor of it for some portions of your  
3 clients' interests and against it for other portions of your  
4 clients' interests?

5           MR. CLARK: Well, when I say we represent Southern  
6 Homes, we represent a collection of builders. Southern Homes is  
7 like the moniker by which a lot of these other entities are  
8 known, but we've got Telecreek, we've got Spring Hill and various  
9 other entities that have filed their own individual claims  
10 against Knauf entities and Louisiana state court, as Your Honor  
11 knows.

12           So that would not be the case for each one of these  
13 entities. It may be the case for one, but certainly would not be  
14 the case for all.

15           So, to that extent, there is a difference there, a  
16 significant difference.

17           Aside from that standing issue, we'd also like to just  
18 note that there's well documented case law, in fact, also  
19 documented by the PSC and Knauf in their omnibus reply, saying  
20 that non-settling parties may object to settlement terms that  
21 affect their own rights. That's the legal prejudice standard  
22 that's been set out by several courts. I believe it is addressed  
23 in the VIOXX matter.

24           In addition to the cases that were cited in the omnibus  
25 reply brief, Southern Homes had also cited some additional cases

1 when it began to object to the IN/EX settlement agreement and  
2 preliminary approval of that, which we reference in our  
3 memorandum of objection to this settlement agreement. I believe  
4 those are still in the Court record. If not, we've got 564  
5 F.Supp 1379 that's *In Re: Mid-Atlantic Toyota; VIOXX*, as I  
6 mentioned; *Agretti vs. A&R Freight System*, that's 982 F.2d 242.

7           Once again, thank you for the time. It's always greatly  
8 appreciated.

9           THE COURT: Thank you.

10           Any response?

11           MR. LEVIN: I'm at a loss. I don't know what to say,  
12 Your Honor, so maybe I should say nothing.

13           But they've filed an objection, they incorporated the  
14 IN/EX objection that they made, the motion for security that they  
15 made, and their response to the Home Builders' agreement. That's  
16 it. That's what they've objected to.

17           The IN/EX materials are on appeal to the Fifth Circuit.  
18 They've been fully briefed. That's for the Fifth Circuit.

19           And I believe that -- I'm trying to understand the  
20 objection and their standing argument. They're not part of the  
21 class. Because, unlike IN/EX and Banner, and unlike the  
22 prospective L&W and insurance settlement, there are no absent  
23 class members in the Knauf settlement.

24           The Knauf settlement is composed of plaintiff's  
25 litigation in the Omni complaints and in the states against

1 Knauf. Plaintiffs, homeowners.

2 To my knowledge, Southern never authorized us to sue on  
3 their behalf in the Omni complaints. Rather, we were authorized  
4 by plaintiffs in the Omni complaints to sue Southern. So they  
5 really have no standing.

6 And, more than that, I don't have anything to say.  
7 Other than, if Your Honor has any questions, I'll attempt to  
8 answer them.

9 THE COURT: Anything from Knauf?

10 MR. GLICKSTEIN: I have nothing to add, Your Honor.

11 THE COURT: All right.

12 Any other objectors? Any other objectors?

13 (No response.)

14 THE COURT: Hearing none, I'll take the matter into  
15 consideration, and I'll be writing my opinion on it very shortly.

16 Thank you very much. Court stands in recess.

17 (9:57 a.m., Proceedings recessed.)

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CERTIFICATE

I, Susan A. Zielie, Official Court Reporter, do hereby  
certify that the foregoing transcript is correct.

/S/ SUSAN A. ZIELIE, FCRR

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Susan A. Zielie, FCRR