UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: FEMA TRAILER FORMALDEHYDE PRODUCTS LIABILITY LITIGATION

Docket No. MDL-1873(N)
New Orleans, Louisiana
Friday, April 18, 2008

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TRANSCRIPT OF MOTION PROCEEDINGS
HEARD BEFORE THE HONORABLE KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(FRIDAY, APRIL 18, 2008)

(MOTION PROCEEDINGS)

THE COURT: The court has before it a motion by the Plaintiff Steering Committee, which is record document No. 119. It is a motion to compel the defendant United States for failure to respond to a subpoena for certain information. The subpoena is attached as Exhibit 1, also with a letter from Mr. Woods transmitting the subpoena. The court has reviewed the memoranda submitted by the parties and has also reviewed the relevant jurisprudence.

So would anybody like to make any opening remarks on this? You need not repeat what's all in the memo, if we can just pick up from there.

MR. MEUNIER: Gerry Meunier for the plaintiffs, your Honor. And there are just a few points I want to emphasize, and then if you don't mind I would like to respond more specifically to some arguments raised in the opposition brief.

I don't think it can be overemphasized that the MDL does present a unique opportunity for global resolution. And it is a truly unique opportunity and it depends upon, in our view, identifying and evaluating claims on a comprehensive basis. And as we've indicated in chambers in discussions and in our motion, if you approach that objective through the process which puts Rule 23

certification at the forefront of the MDL proceedings that carries with it a number of very distinct disadvantages.

Conversely, if you have claims identified through a fact sheet/tolling agreement process pending the certification ruling, I think that approach has much to offer the court and the litigants; and frankly, I think it's supported by history, including the most recent history of the Vioxx MDL in which that very approach was taken and where the outcome I believe was successful for the litigants and for the court.

We believe that a proper pre-certification notice to a list of known putative class members, which we believe is authorized under the discretionary notice provision of Rule 23(d), are essential to that process. And, Judge, the key legal decisions that you have to make in connection with this motion we think are clearly vested in your discretion, that as to Rule 23(d) notice the question is not if you have authority to direct the issuance of a notice to putative class members prior to certification, but whether you feel it's justified in this case given the circumstances and given the case management approach we hope to take.

And as to the Privacy Act which is the chief defense against the motion, again the question is not if a court by order can require the disclosure of that which is otherwise protected under the act, but whether a court in its discretion feels justified in doing so, again in this case as a matter of case management.

So in other words, the exercise of the court order

exemption in the Privacy Act clearly gives you discretionary authority.

Let me turn, if I may, to some of the arguments, key arguments made by the government. I believe that the government makes what amounts to an artificial distinction between the management value and the merits value of this claims information. It's argued that the court order exemption of the Privacy Act applies only if the information at issue is relevant to a claim or a defense, and that here, according to the government, it isn't relevant to a claim or defense, it's merely to serve the convenience of the parties.

Well, we think that information as to the identity and the location of putative class members and potential claimants is not just a matter of convenience, it truly goes to the heart of what claims and defenses are going to be presented in this MDL because this information will define the scope and the nature of the claims and the defenses: What claims are going to be asserted, what damages are going to be alleged, what defenses are going to be made, what manufacturers are going to be ultimately called on to defend claims made in this MDL as a mass tort proceeding. So the relevance of the information makes possible, is that it makes possible a transition from what is pled in the class action to individualized concrete claims and defenses asserted in the case; and I can't imagine anything more relevant to the management and disposition of claims and defenses than knowing what the claims are and I think

that information is critical.

I also think that the government misconstrues the importance of the distinction between mandatory and discretionary notice under Rule 23. There is reference in their brief to the circumstances in which this court would send out a notice after certification. That's laid out in Rule 23(c), that is not the issue. There is a clear, separate provision in Rule 23, 23(d) for discretionary notice, which can be given at any stage, including prior to certification, to address any step in litigation. And, in fact, in 23(e) we see it even linked to Rule 16, which has to do with case management issues, steps that need to be taken in a case. And that's exactly what this notice will be about.

We think the twofold inquiry under Rule 23 is is it protective of class members, will it facilitate a fair conduct of the action, and we believe that this information meets both criteria.

And also there is some reference, I believe it's not intended the way it's written, some reference in their brief at page 15 that the authority you have to do this does not exist where no class has been certified, and therefore, no class is pending. Well, as the court knows, the pendency of a class action triggers the provisions of Rule 23, the pendency and not simply the certification of a pending class.

I think it's also an indication of the fundamental disagreement we have with the government when I read in their brief

at page 7 that the PSC does not currently represent these FEMA trailer residents, past and present. The proposed class definition clearly identifies these individuals as putative class members, and as court appointed plaintiffs counsel we do have an obligation and a responsibility to them. And I didn't cite it in my brief, but if you look at *Newberg on Class Actions*, Section 1348, there is an elaborate discussion there about not just the right but the obligation of counsel to protect the rights and interests of absent putative class members and the corresponding obligation to communicate important matters.

And look, one way we could go in this is we could in total deference to the Privacy Act say forget about giving this list to a notice administrator so that we don't see it and then having the notice issued and having people respond, and just give us the list as plaintiffs' counsel who have an obligation to putative class members and we will confect our own communication using the list directly. We've tried not to go that way because we do see a Privacy Act issue and we are trying to erect this barrier of the notice administrator.

THE COURT: We had talked about a third-party administrator who could with this information send a notice to people on the list, is that still the intent?

MR. MEUNIER: Yes, that's the intent, Judge.

THE COURT: And the notice, so that we're clear, the notice would be what you have attached to your proposal regarding

proceeding on a mass joint basis?

MR. MEUNIER: Exactly, Judge. And I would have to say this on the language of it, that is the language of a trained attorney, namely myself. And there are experts on class notice who are very skilled at using language and words that lay people, some of whom may not have a lot of formal education, can truly understand.

And I would only ask that if we do this I be given a chance to have a notice expert, who I assume would also be the same as the notice administrator, work with the court and with us to, you know, to make sure that what we say in that notice is clear to people. But the content of it, the intent of it is there.

THE COURT: One of the other objections that the government made was that the subpoena was too broad; if that was your intent, then the subpoena was too broad because it related to persons who had applied for housing as opposed to those who actually received it and lived in it. Can we be clear on that?

MR. MEUNIER: We can, Judge, we can fix that. I do agree that the specific scope of the individual list that we're looking for would certainly be intended to be limited to those who actually received and were placed in the FEMA units. Obviously a mere request does not bring them within the scope of the defined class.

Finally, I just want to address -- well, two more things. One is I do think if we're talking about equity factors and balancing, it's important to emphasize that FEMA has had ample

opportunity to communicate with these same people. We've cited in our brief any number of instances in which that's been done both in connection with the CDC testing and otherwise.

And you don't have to look beyond an attachment to Mr. Miller's brief to see another example of what I'm talking about. He attaches a press release that FEMA sent out in which they say FEMA distributed 70,000 formaldehyde and housing fact sheets to the occupants of every FEMA unit. The press release then goes on to talk about the fact that formaldehyde is found in chairs and carpentry and drapes and then emphasizes that to date FEMA's headquarter safety office has not received any employee health complaints related to working in those units.

I am not ascribing bad motive, I am simply saying this. This is an adverse party. The whole issue here is what is safe and unsafe about levels of formaldehyde, and they have had ample chance already and they continue to have that chance to communicate with these people. So for there to be resistance to the idea of what I see as a neutral notice that alerts these people to the right they have to make a claim does not seem to be properly balanced.

Finally, Judge, I just want to mention the Supreme Court case of Department of Defense v. FLRA, which really appears to be the chief case on which the government relies. You know, that was a case where two unions made FOIA requests of various federal agencies that they furnish to union representatives the home addresses of agency employees who were not union members. The information about

where -- the names of these people and where they work was known. The union said, look, we've got a collective bargaining responsibility under the labor laws. We have to do collective bargaining for the units that these people work in, so we have some statutory obligation here and we ought to know how to reach them.

And Justice Thomas when he said that the FOIA exemption of the Privacy Act, which again is not what we're dealing with here, we are dealing with a different exemption, the court order exemption, but the FOIA exemption of the Privacy Act, which was the focus of that case, involved this balance between the need to know and the privacy issues. Justice Thomas said these people have not joined a union and now they're going to be getting mail from a union rep saying, you know, please join the union. And they may have good reason not to be bothered by that, and so I am going to say they have the privacy interest.

I think that's legally and factually distinguishable. First of all, we are not dealing with the FOIA exemption, we're dealing with the court order exemption. Secondly, those union reps are trying to make contact with people who had already decided they were not interested in being union members. That was not a class action. Rule 23 was not part of the analysis. There was not a relationship between counsel and putative class members. And there was not the discretionary notice power for pre-cert notice of Rule 23(d). So for any number of reasons, we don't think that case is legally and factually similar to carry the day for the government.

If there were a Supreme Court case to look at, and I regret that we did not identify it in our brief, it would be Gulf Oil v. Bernard, which was a Supreme Court case that directly dealt with Rule 23(d) and the issue of notice to class members. The court already knows this, perhaps, it's an employment discrimination case, the defendant employer, Gulf Oil, entered into a settlement with the EEOC to pay employees certain backpay benefits. Gulf Oil the defendant started writing to people about the settlement, plaintiffs filed a class action for the same people. Plaintiff's counsel said we want to communicate, we want to tell people what they should know about this while the defendant's out there getting it himself. The defendant filed a motion to stop the plaintiffs from communicating, and the court refused to issue a ban on the communication.

THE COURT: Was that a circumstance where the information was known to plaintiffs already that they were utilizing to communicate? You said the defendants came to court to stop the plaintiff. Obviously they were already doing it, so they must have had the information to disseminate already.

MR. MEUNIER: Well, I think it was more of an issue where the plaintiffs wished to offset information.

THE COURT: Right. But, I mean, that's more of a free speech perhaps issue --

MR. MEUNIER: It was.

THE COURT: -- as opposed to give me the information so that I can now use it to exercise --

MR. MEUNIER: It was, it was. Although, I guess the relevance of the case is this: No. 1, in that case you have recognition of the district court's discretionary authority under Rule 23 in the area of class communication.

THE COURT: Right.

MR. MEUNIER: And in that case I think you have the Supreme Court taking seriously the right of plaintiffs' counsel in class actions, even prior to certification, to communicate with class members. The court did not shut that effort down and said, you know, you're going to have to have a hearing and show me there's abuse before I do a First Amendment ban on communication.

I'm just saying it's a case much more so than the defense case where the Supreme Court tells us, I think what is pertinent here which is when you've got putative class members and you have a need to communicate with them, it's a serious matter, the district judge has the authority in that regard and we are not just going to do things that inhibit the ability of counsel to make contact when it's necessary.

So for all of those reasons, your Honor, we ask the court to grant this motion, following which we will submit a notice protocol. We've proposed already the mass joinder case management protocol we suggest, we've submitted the type of notice we'd send, and it will just get us started in the direction.

And I want to make it clear, the way that I, we conceive this, the letter would merely give people a deadline by which to

declare that they are interested in proceeding with a claim. And if they respond to the notice administrator, yes, I am interested in making a claim, at that point we go forward with the fact sheet. In other words, we are not burdening people right now with a fact sheet, we are not sending it in the mail to them. We simply want to know who is really out there who is going to be participating in making a claim and who isn't.

And then as you see in our layout of a mass joinder, we don't halt, cease and desist the road to a class certification ruling, I think that proceeds as it did in Vioxx. But as we approach that time, we are gathering the comprehensive claims info where we can make appropriate bellwether trial selections, we can get our arms around the fact sheets, we can know what we're dealing with, we acknowledge, and I know this has been important to the defendant manufacturers, at some point you will in our proceedings decide on Rule 23, that's important to the defendants. If your decision is not to certify, the time starts running and at some point people are prescribed on whether they could do it.

THE COURT: Let me ask you this. We give them a date in this notice, you should respond by such and such a date. What of the relevant prescription statute of limitation time periods, both in Louisiana and the other states involved, a claimant who doesn't respond to that notice and then decides three months later, you know, I'm still within that time frame, I would like to assert such a claim, I'm going to go hire my own lawyer, file that lawsuit,

those people would still wind up coming here, wouldn't they, as part of the MDL?

MR. MEUNIER: They would.

THE COURT: So how does this get us any further down the road if we still are operating, as we must be under the state provided tort statute of limitations? Does it just kind of get us a little bit more information?

MR. MEUNIER: It accelerates the process. Your Honor, at the end -- let me just use Vioxx again. At the end of the day in Vioxx we had not necessarily captured each and every claimant in the country who wanted to sue Merck because of Vioxx. I mean, that only happens -- if that's your aim, that only happens when all of the statutes run to the two years under the FTCA, when the American Pipe interruption prescription is done and the four states statutes toll. And when that magic day or series of dates arrive, you then know no more claims.

I am not suggesting to you that this process is going to take those dates and deliver them to the doorstep at an earlier time. What I am suggesting is that if we do this, we will be in a position with the defendants to get our arms around who likely is going to be appearing as litigants, which will in turn help us evaluate the scope of this thing, decide on appropriate bellwethers if we want a representative sample. It'll just enable us sooner rather than later to have serious discussions about how to bring this to a close.

And I end where I began, if the MDL -- there are some MDL judges who don't see that as their role and that's a traditional view. I am just here to do pretrial and then it'll be remanded and it falls out. But if the more current, I would say enlightened view is, let's try to resolve it, but let's not make it a black hole where we're here five years from now waiting to see if FTCA statutes have run, if the Alabama statute has run since you decided certification, and we'll wait around and know and we want to get our arms around it sooner rather than later. This is a tool that works.

THE COURT: All right. My primary concern at this point -- and I'll tell you this so that you all can tailor your remarks accordingly, my primary concern at this point is to try to get conceptually down the road on mass joinder versus class. And that's one of those things I was referring to earlier this morning that we have sat at this table and discussed, gee, wouldn't it be great if we did it this way, wouldn't it be great if we did it that way, and everybody kind of nods their heads like that would be good, that would be a good thing. And we're still trying to come to grips with that, and I realize that that needed to take sometime to develop, but I am really focused on just getting that decided sooner rather than later.

And I take it your argument is that this mechanism is going to allow you to somehow evaluate the claim and be able to present it as a mass joinder sooner or later. Is there anything that you want to add in that context that would strengthen the

court's desire to try to do it the way you're suggesting?

MR. MEUNIER: It will, without question, encourage and motivate plaintiffs and their counsel to proceed herein with a focus up front on a mass joinder versus a class certification approach.

I should also add, Judge, that if this case were to be certified as a class action, we would have to go through the claims process we're talking about anyway.

THE COURT: Right.

MR. MEUNIER: And I think this plaintiff fact sheet, which has now been agreed upon, serves as a class action claim form, it's just that you do it later, after certification, after the Fifth Circuit, after, after, after. This advances the agenda, and, yes, it clearly will facilitate the conversion ultimately into a mass joinder because plaintiffs do give something up there, they give up the protection of a class action, albeit the people may think the odds are against us on getting certification, Rule 23 certification provides a lot of advantages.

But if plaintiffs know, look, we can take on the burden now, it's not an easy task, we can get all of our people to fill out these claim forms, got to do it anyway, class or no class, we can get tolling agreements so we don't have thousands of suits filed. It takes some work, but if we on the plaintiff's side think that this really will get us in a position where we can sit down with the defendant manufacturers in particular and say, can we look at resolution, can we pick an intelligent bellwether trial plaintiff,

we're all for that.

THE COURT: I guess my concern is we go through all of this and I allow you to get from the government what you want to get and then you get all of this information and you say, you know, this is great, thanks, Judge, but we kind of like the class vehicle anyway. My hope is that we can get -- the desire was to try to proceed as a mass joinder. I am gathering from you that there is no way to know if we hit a certain number of claimants, I don't know what the criteria is, where this tips that decision or makes that procedure more doable or more likely than if we were to proceed as a class.

And you're right, I mean, it has to be done one way or the other, I hear what you're saying. Notification has to be given and the only way it's not given is if I don't certify the class and it's not a mass joinder and we just go ahead and try the common issues and spin it out into the individual trials. I don't think anybody here really wants that, because I would consider this effort to be a failure as an MDL if that's all we did. I can render a decision and have other courts cite it, hopefully, and follow it. If that's the case I think we're here to do much more than that, I think we're here to try to not only get common rulings that would apply to every claimant, but also to try the bellwether cases and try to get some results that would facilitate a settlement of some sort depending on those results.

Andy, you didn't file anything on this. Have you got any

position on this?

MR. WEINSTOCK: I did not file anything, but sitting here I realize I have more of a dog in this fight than I thought. The question is, consistent with your comments, is timing is everything. If a class is not certified, notice must go out at that time telling people class has not been certified, which to me makes this discussion highly relevant but also premature, unless the court's envisioning a pre-certification hearing notice and a post certification hearing notice. It's going to get to the same place.

THE COURT: Well, we would have to, that's what I think is sort of the scenario. If we give this notice and they come back and they say, you know what, class action is where we want to be and I either certify or not certify, there's got to be some notice then again provided stating you need to pursue your own claim because you're not part of the class as it stands now, or here is what you need to do in order to be considered a member of the class that the court has certified. So, yeah, it's got to be.

MR. WEINSTOCK: That's why to me it seems like there should be one notice after certification determination, which I truly believe I'll win, we have 47 different ailments, 60 different manufacturers, I mean every plaintiff would need their own subclass. But regardless, that's an argument for another day.

To me the correct timing of notice is after certification, there is no class, if you want to come in, call this number, get on board, we're going to proceed, your rights are starting to run, do

something. Now we're sending out a notice saying your rights aren't running, do you want to get in on this, and that's really a much different type of notice to me and maybe not one as compelling as needed to say right now you're being protected but we want to know who you are.

MR. MEUNIER: Can I respond to that, Judge?

THE COURT: Go ahead and then we'll hear from the government.

MR. MEUNIER: We are going to urge certification. I think everyone here wants a ruling on the merits that is a contested for the record ruling on the merits. We're going to have to have briefing, we're going to have to either reach stipulations or we're going to have to conduct some discovery relative to class certification.

I don't know how long all of that's going to take, I don't know to what extent that's going to distract us from the important issues like testing evidence before it's destroyed. My worry is that if we wait to get arms around existing claims until there is a response to something sent out after that ruling, we will be talking about doing this next year, or at end of this year, and valuable time will have been lost.

So I don't -- you know, I had never contemplated two notices. My perception of this was that you do a discretionary pre-cert notice now that hopefully informs us as to who is and is not coming forward. True, people can sit out there and do nothing

and still have a case, but the hope of this is that there aren't going to be a lot of those. That's my assumption. But once the court rules, if we do this, we announce what we're announcing now, the court rules and the time runs, I don't think there is any obligation to send out another notice, and I had not seen that being necessary. I am not opposed to it, but if you're saying why not wait because we're going to have to do it anyway, I don't necessarily subscribe to that.

THE COURT: I mean, if that's the case then we ought to have a class cert hearing sooner rather than later. And yet again, the beautiful picture we painted here was let's not get bogged down in that and have to do discovery, let's get the units tested and let's try these cases and start getting some substantive results. And we decided that, no, let's push the class issue to the back end. And the context of that discussion was, hey, why don't we do this as a mass joinder.

So I am still having problems figuring out how this process, if the court were to go down this road, how is this process going to get us away from the class idea, how do we overcome an allegation that's already been made for class certification -- I understand why you made it, you have to protect the record -- how do we as a result of this process get this from being a class certification issue and on to trial as a mass joinder, and that's the disconnect that I have.

We've been kicking this around and I am trying to get down

the road here a ways and I am not quite following.

MR. MEUNIER: Judge, it ends up as a mass joinder only when you deny class cert and the time runs.

THE COURT: I understand that.

MR. MEUNIER: That's immutable, that's the conversion to mass joinder. So let's --

THE COURT: But didn't we say that we were going to do the cert hearing, we were going to pretermit that?

MR. MEUNIER: Right. And the reason for that was that if we focused on class cert now, it would: (A) distract us from merits and other things, case development, we would have delay, and we wouldn't be learning what I always thought was important to know, who is making claims here. We have 17,000 to 18,000 claimants who have hired attorneys. That may be all we see. I mean, there's been publicity about the case, although I submit most of the publicity has been between FEMA and the class members, but that leaves 120 some odd thousand, perhaps, who are by definition in the class who are absent, not yet heard from.

My concept was when we had these discussions about let's defer class cert and treat it as a mass joinder, that in treating it as a mass joinder, which is let's focus on individual claims, we would do our best to find out who those are.

THE COURT: Right.

MR. MEUNIER: And not just say, well, let's deal with the 17,000 we got. We could do that, but I submit that if we do that

and ignore the rest, the tail may be wagging the dog. Why not find out how big a pool of claims we're talking about and you'll find out eventually anyway. I am not saying this is the only way to find out, but this way gives us an information process now that is useful to resolution, that's all.

Does it make it more likely that there will be a mass joinder than a class action? I believe it does, but I think that likelihood exists regardless of what we do. You're going to decide class cert, the time is going to run for appeal, we're going to have a mass joinder, and that's going to happen in the life of this MDL, either sooner or later.

But to me that reality doesn't change the argument that sooner rather than later we should make an effort to find out about the claims. And I believe because these are putative class members and I believe you have the authority, we can do that. That's all. This is a case management effort and I do believe it facilities the handling of the matter as a mass joinder, and it facilities it because it will allow us to have global resolution discussions and bellwether trials without having to wait for the day when there's a formal ruling on class cert, an appeal or no appeal, et cetera.

THE COURT: Well, you've mentioned bellwether trials a few times. Haven't we claimants now that could be bellwether trial participants that will be just as exemplary than somebody who is out there that hasn't sent in a fact sheet?

MR. MEUNIER: Arguably you could. I mean, look, in the

Vioxx case, Judge Fallon, and I mentioned this in my brief, he tried four of the five bellwether trials before ruling on the class certification. He kept class cert pending and I will submit to you there was a reason. He didn't want to have a situation where he got flooded with umpteen thousand individual lawsuits because the time ran out for people to file suits. He felt the better approach was, let the claimants be identified through a plaintiff profile form and a tolling agreement. No lawsuits needed, claim forms.

We selected the bellwether trial plaintiffs in Vioxx, I will concede, without knowing the full universe of claims. So, yes, the answer is we could take the 17,000 known claimant pool and we could use it as a base for selecting bellwether trials. Do I know now as I sit here that the other hundred and some odd thousand putative class members are typified and the information and nature of those claims is truly captured by those who are signed up with lawyers? No way to tell. But I am not suggesting that 17,000 are so small a number that you couldn't say, you know, let's start picking bellwethers from that group irrespective of what we find out about other claims.

THE COURT: Okay. Well, let me go ahead and let the government weigh in on this now.

MS. BOYLE: Thank you, your Honor. Michelle Boyle for the United States.

Our remarks are fairly well laid out in our pleadings, but what I'll do is just try to respond to the oral argument that was

made today and as to your Honor's questions.

THE COURT: That's fine.

MS. BOYLE: There are two main reasons why this motion should be denied. I'll focus on the second reason first, which is that Rule 23, the interpreting case law and the Advisory Committee notes do not contemplate the procedure that is being proffered by plaintiffs. And if the so-called notice which the United States submits at this point at this time in the litigation because it does not effect the substantive rights of any claimants or putative class members, which is the purpose of notice, is not actually notice in the true sense of that term under Rule 23. And if so, this procedure seems incongruus as to the notice that could be required later after a class certification, that is the reason why.

Rule 23(c) provides that a certification determination should be made at an early practicable time. After that both the mandatory and discretionary notice provisions appear after the certification provisions. The discretionary notice provision the United States would submit is misinterpreted by the Plaintiff Steering Committee. What that is is that it refers to the court's discretion of whether or not to issue notice at all by contrast under the mandatory notice provision with respect to a class certified under 23(b)(3) if the court does find that the class action is superior to the other methods of adjudication because of the common questions of law and fact, then the notice is mandatory.

However, if the court certifies under 23(b)(1) or (2) then

the notice is discretionary and it would be at that point for the court to determine whether or not to issue notice. And the availability of a list such as that which is at issue in this case can at that point be a factor in your Honor's decision whether or not to issue the notice and the manner and timing of notice and so on and so forth.

There is an exception to this rule that notice should only be issued after a certification determination contained in the Advisory Committee notes of Rule 23(e) also establishing the case cited by plaintiff Shelton v. Pargo, which provides that in the event of a settlement offer, even if no class is actually certified, it may be proper, depending on the facts and circumstances, for courts to issue notice at that point.

For example, in Vioxx, which is also cited by the plaintiffs, that case is distinguishable in a number of grounds, but it doesn't support the relief that is at issue today. First there was no Privacy Act objection in that case, there was no government actor. But in any event, in the Supreme Court case not cited in our pleadings but available at 437 U.S. 343, 1978 Oppenheimer Fund provides that a request for a list of persons for class notice that is brought pursuant to discovery rules must be analyzed Rule 23 and not under the discovery rules.

So in keeping with that rule, in Vioxx the plaintiffs concede in their brief no notice of this nature was issued in that case. After settlement offer was made, which took place after the

bellwether trials as well as after the denial of the class certification, then those plaintiffs who had a pending or tolled complaint as of that time were issued notice with respect to how to submit their claims to the settlement program and the deadlines. However, none of those plaintiffs' rights with respect to the settlement were precluded -- rather let me correct myself.

If they failed to participate in the settlement program by the established deadlines, then their right to take advantage of the settlement offer was precluded. However, their right to file a later suit if their claim were to accrue at a later date because of their injuries that they were claiming, that rate was not precluded.

And in this respect, actually, the plaintiffs' notice that they submitted, I believe earlier this week, is actually wrong when it states that only those who fill out this form will be allowed to participate as claimants in the MDL.

Now I'll just try to address some of the points that were made.

With respect to case management, the MDL statute certainly authorizes and requires the court to manage the case that is before it; however, the MDL statute as well as Rule 23(d) which provides under, "this rule, the court may issue orders to protect "class members" and fairly conduct the action." The case management authority and duty that the court is bound to apply really only applies to the case that is before the court, which in this case is a pending class action and that is all that is before the court.

By contrast to issue the list or to compel FEMA to provide the list to the court for a "notice" contravene the text in purpose of Rule 23, and at this stage it doesn't actually accomplish the purpose of what the notice is designed to do under Rule 23, and, therefore, the United States submits that at this point all it is is merely an invitation or in other words an advertisement for absent persons who are already covered by the class action to nevertheless fill out paperwork and join the suit. And in that respect that relief, we submit, is improper because it's not authorized under Rule 23.

With respect to the Gulf Oil case that was cited, I have not read that case, however, it appears from the Plaintiff Steering Committee's description that a settlement offer also was at issue in that case. And so in that respect it's more like Vioxx where there was a settlement offer that would preclude a person's substantive rights where the court determined that in the circumstances notice should be given.

By contrast in this case there hasn't been any, as far as I'm aware, settlement offer made or any type of global procedure undertaken with respect to settlement.

Briefly with respect to the Privacy Act and the normal discovery channels, as I've already stated, the Oppenheimer case stands for the proposition that the court needs to decide under Rule 23. But in any event, since it was raised in our objections to discovery, I'd just like to highlight that this also isn't true

discovery in the true sense of the term because it's seeking a list of persons who are not parties and, therefore, those claims or defenses could not be at issue.

The Department of Defense v. FRLA case of 1994, the Supreme Court case did analyze a request for records that were initially made then objected to under the Privacy Act. However, because the Privacy Act contains a FOIA exception, it also contains the court order exception which we have explained in our brief is only relevant with respect to discovery if Rule 26 is satisfied.

But with respect to the FOIA exception, that analysis requires the court to undertake a balancing test, as the Plaintiffs Steering Committee noted, between the privacy right protected and the public's interest in the disclosure of the information because FOIA is a public interest statute.

And in that respect, the FOIA test is actually more lenient than the Privacy Act test which provides that unless an exception applies, the Privacy Act protected information should not be disclosed.

But in any event, the court analyzed whether the FOIA exception would apply and found that it would not because the unions were seeking the contact information to facilitate their own operations, not to expose some type of public interest to the public. And in that respect that case would still support the United States' position that no public interest is being sought here with respect to the list, but rather it's being sought to facilitate

the case preparation efforts of the Plaintiff Steering Committee.

And the other cases cited in our brief, as well as cited in the Plaintiff Steering Committee's brief, the Sun-Sentinel case also support that proposition as well.

Finally, with respect to using the confidential court appointed notice administrator, at this stage in the litigation that should not change the court's analysis with respect to this issue. For one thing as described earlier, there is no balancing test between the degree of the invasion of the privacy and the benefit to be gained by the disclosure.

THE COURT: That wouldn't satisfy the Privacy Act concerns, putting everything else aside, the other issues, I am not trying to minimize those, but if we were to use a third-party administrator such that plaintiffs' counsel would not receive the information, defense counsel would not receive the information, that would not satisfy a Privacy Act concern?

MS. BOYLE: No, your Honor. The Privacy Act provides and this is held in the United States Department of Defense case, that the information is protected unless a statutory exception applies. And in this case the statutory exception that's being alleged is the court order exception which could be applied as was done on the March 4th order to allow FEMA to disclose information that would relate to a claim or defense in this litigation under Rule 26. However, in this case that is not sufficient here because this only pertains to persons who -- to other persons who have not filed suit,

and, therefore, it could not be brought under the court order exception to discovery.

THE COURT: Well, the tricky part of the non-party argument is that, I mean, they're class members, they're potential class members. So we're kind of going round and round on the issue of the argument of whether these are truly non-parties, non-claimants or whether they're, in fact, claimants as we sit here today.

MS. BOYLE: In that case, your Honor, the United States submits that under Rule 23 and the Oppenheimer case which compels the inquiry to be made under Rule 23, that this notice is also improper because it's not noticed under Rule 23.

If you -- if we come to the point of notice being required pursuant to Rule 23 to protect absent putative class members' rights, at that point certainly the court should consider the manner of the notice, such as perhaps the proposal that is being made today, and the manner and timing and the propriety of the method of that notice. And also at the rate of accuracy that the notice could be, could facilitate, and Professor Newberg write s about this and there is also a case in this court, the Educational Testing Service Litigation, where the notice administrator did achieve an accuracy rate of about 96%, and that was found on a challenge that was found to be a high rate of accuracy and it was found to protect the absent class members' rights

THE COURT: Sounds like you're offering as the

government's position that the class cert hearing should be sooner and imminent rather than later.

MS. BOYLE: Your Honor, Rule 23(c) provides that certification should be done at an early practicable time. With respect to -- and that is because of this very issue based on the Advisory Committee notes which is how to inform -- how to protect the absent class members. And the United States supports this method.

The only addition I would make on behalf of the United States is that pursuant to the FTCA, the class action cannot be maintained unless all of the members exhaust their administrative remedies. But in any event, whether the class certification takes place now or whether it takes place later as in the case of Vioxx, that determination is really at its core a relevance determination as to how related all of the claims are to each other. So in Vioxx after the bellwether trials apparently assisted the court in assessing the spectrum of claims and defenses that were at issue.

On the other hand Rule 23(c) does say that the court should make a determination at an early practicable time. I believe the United States hasn't developed a firm position on exactly when certification must be made.

THE COURT: But certainly before any of this type of procedure be employed.

MS. BOYLE: Yes, your Honor.

THE COURT: All right.

MS. BOYLE: And the rules and supporting case law we believe support that.

THE COURT: Okay. Do you want to respond?

MR. MEUNIER: May I respond briefly, your Honor?

THE COURT: Go ahead.

MR. MEUNIER: First, as you point out, contrary to the government's position, the list does pertain to those for whom a suit has been filed. It pertains to putative class members on behalf a class action is pending. They are absent litigants. They are absent parties to this case.

I am happy through Oppenheimer to make our motion rise or fall on Rule 23. I am perfectly happy to have you analyze this question under Rule 23, and Rule 23 could not to me be more clear that you have two types of notice, the mandatory post cert notice under Rule 23(c), the discretionary notice at any step of the way under Rule 23(d); and the test is will it protect the class members, will it fairly conduct the action.

And I think if we analyze it that way, you've got the authority -- again, we get back to the question it's not an if you have the authority, it's a whether you choose to exercise it. So Rule 23 informs us that you have the authority and I think the decision for you is should I exercise it at this time.

And finally, just on Vioxx again. You know, in Vioxx where class certification was deferred, where bellwether trials took place prior to certification, but where pending class certification

we had an enormous amount of effort in getting profile forms filed, we had an enormous amount of effort in getting tolling agreements executed. Why? Why did we go through all of that in Vioxx? Why didn't we just wait until after certification and let the appeals run and then see what suits were filed? That's the other way to do it. The reason we did it in Vioxx is because it enabled us with the defendants to know what we were dealing with sooner rather than later, which is helpful to everyone. It's helpful to everyone.

So when you look at it on what will enable the fair conduct of the action, to us it's rather simple. Know who is making a claim, try to know that sooner rather than later. And I'll say this, the Vioxx settlement was built on an information platform. And you know what? The Vioxx settlement by its definition excludes people who didn't fill out profile forms and signed tolling agreements.

What you ended up with in Vioxx is a settlement, in other words, that by its terms excludes these absent class members who choose to sit on their rights and who don't come forward and who say, you know, what. I am just going to wait for a class cert ruling, I am going to wait for my statute of limitations to run, and then I am going to file an individual lawsuit. You know, that's what I say becomes the tail wagging the dog. If that's the way we choose to find out.

All we're saying here is, look. It's a way we can find something out, it's a way we can determine sooner rather than later.

And the court can decide how it wants to do this, the court can decide that it's not so important to find out now and the court can decide, tell you what, let's do class cert first; all I am saying is we're going to end up, no matter what, in a position where we've got, let's say, a mass joinder and at that moment we're either going to know more or less about who is making a claim. More or less. And this is a legitimate way to find out sooner rather than later.

So you've got the authority, it's a pre-cert notice authority that's clearly in the rule, the only question is do you choose to exercise it.

I failed to see in anything I've heard here a downside. I thought I was going to hear today, well, the downside is you're going to stir up a lot of litigation, you're going to inspire people to come forward who otherwise wouldn't come forward. I haven't even heard that argument. So what's the downside of this? What's the downside of an invitation to a known group?

We have something here we didn't have in Vioxx. There was no way to mail the known universe of claims in Vioxx. We have that here. I don't think that you're likely to find more than a handful of cases that are class action cases where the information is in the hands of an adverse party right now as to who the claimants are. So if the argument isn't you're going to inspire claims, if the argument isn't shame on you for wanting to know something private about these people, I mean the information is going to a notice administrator.

If those aren't the arguments, if the argument I am hearing is instead you shouldn't do it this way, Judge, because if we really go strictly by the book, we should do class cert. And that's a case management call, and if you don't see the benefits in case managing, then I can't convince you to exercise your authority but the authority is there.

MR. WEINSTOCK: May I respond?

THE COURT: To you and then go back to the government.

MR. WEINSTOCK: I'll try to be brief. You're right in that once upon a time we were painting a rosy picture of all of the things that we could do. But part of that rosy picture that we discussed and envisioned did not include filing a master amended complaint as a class action. Initially the thought was a superseding complaint as a mass joinder.

It wasn't filed that way, that's fine. But now I have to deal with the fact that we have a class action and we have to get -- from our perspective that determination needs to be made sooner rather than later. And I don't want --

THE COURT: You're saying we should have a class cert hearing sooner?

MR. WEINSTOCK: Sure, absolutely. I mean, we need ultimately a merits determination of class. Win or lose we need that. And sooner rather than later is the only way to go in my mind and I think in my entire group's mind.

The issue of notice I think, it keeps going back and

forth, I am trying to follow these arguments on what's mandatory and what's discretionary, it was my impression that you needed to send out notice after certification was denied to tell people you have rights that are going to be dismissed, you need to take action on them; and that's where I came up with the discussion about a second notice, and maybe that's something we need to brief to determine that because I have not heard before that, hey, class can be denied and you don't have to tell anybody it's been denied and their rights are gone.

It's my understanding that they come back in and file a suit and say, hey, I didn't know there was a class denied, nobody told me. I thought I was protected by this class cert that was going on. Now it's gone and nobody told me I had to come to court, so here I am five years later with my lawsuit without a denial of certification and adequate notice that that has taken place I have no protection to anybody's statute of limitations are starting to run which means we will be here in ten years and that's not anybody's fault.

So, yes, I absolutely think that certification needs to go forward. It needs to go forward sooner rather than later. I don't envision it as a long, drawn out process. We've learned a ton about certification already, we've learned that the plaintiff experts believe there is 47 different medical conditions, which in combination 47 squared is 3,619 different medical conditions you have; we learned they believe there is 60 defendants, not ten; so

you multiply that number you have 217,000 different types of plaintiffs. Like I said before, and I wasn't kidding, each plaintiff needs their own subclass at this level.

If you have two models per defendant, you're up to 434,000 different subclasses of plaintiffs. We've learned quite a bit that we can go forward on and get a merits determination of class certification, but that's got to come quickly. And I don't think it needs to be next year or some long drawn out process, but it's got to be done. And if and when it's done, and preferably sooner rather than later, there is a need to send out a notice to everybody on that list and you determine that's a good way to do it, that's the time to do it.

That's why I said earlier I think it's not -- it's premature more than anything. Notice is going to have to be given, whether it's given through the media or through this specific list, that's a determination for whatever the court determines is best. And if it's that specific list and you want to order that, that's the time to do it to me; but that's the part where I don't have a dog in this fight because it's not my list.

MS. BOYLE: Your Honor, the United States does agree that it sounds like based on the facts and circumstances that are happening that class certification proceedings sooner are preferable to later.

But just with respect to the response from Mr. Meunier, with respect to the plaintiff fact sheets, the Plaintiff Steering

Committee already is doing exactly what they say they would like this notice to facilitate. As well in Vioxx that process was underway so that by the time the settlement offer came to the table, certainly the Plaintiff Steering Committee had enough information to ascertain whether or not they would like to accept the offer. And certainly nothing is preventing them from doing that in this case.

And finally, besides the legal issue under Rule 23 which the United States submits clearly precludes the cert class, there is a strong policy argument to be made that the request is because it's not notice authorized under 23, all it is is an advertisement. The Privacy Act legislative history clearly was designed, shows the Privacy Act was designed to protect mailing lists such as this list; and the MDL statute and Rule 23 case management provision provide that the court must ensure fairness for all parties, which is to manage the case that is before the court and not to improperly advertise so that new cases could be brought into the case.

And for the foregoing reasons the United States submits the motion should be denied.

MR. MEUNIER: Judge, the only mandatory notice under Rule 23 is a post certification notice that there has been a class certified. Period. There is no other mandatory notice under Rule 23, there is no mandate that you send out a notice that there's been no class certification. There is only a mandate that you send out a notice that there has been. So it is the case that if you don't send out a notice after Rule 23 certification people are exposed and

the time runs.

You know, Rule 23 gives you such a thing called issues certification. If we are now going to focus on that foremost, first and foremost, we have the concern on our side -- now, there are certain common issues that we should take up in lieu of individual bellwether trials that can be disposed of on a class basis. We may have to ask you to cert the case under Rule 23(c)(4) as an issues class, we may have to do that.

Now, meanwhile we'll be filling out our claim forms, meanwhile there's over 100,000 absent class members who are not hearing from us. One of the defendants knows exactly who they are and will continue to communicate with them. I don't think this is an ideal set up to front-end load class certification. I understand why the defendants want it, I don't think it's the way to get us where we want to get; because if we do that -- and we are going to lose some time because we are going to have to make a proper record, we are obliged here, we are obliged to urge certification at least of an issues class, we are going to have to ask for some discovery, we are going to have to ask for some stipulations, we are going to have to pay some attention to this if that's where we're headed. It's the long road.

What will happen if you choose not to certify a class, whether or not a notice goes out, is you're going to get a lot of lawsuits filed once people realize that they no longer have the protection of American Pipe. Not just lawsuits filed by the people

we're trying to contact, lawsuits filed by the 17,000 people we represent; because once there is no American Pipe protection we'll have 17,000 people filing individual lawsuits, and they will be filed in Alabama and they'll be filed in Texas and they'll be filed in Louisiana. So we can do it that way. I think it is a cumbersome way to proceed.

And again, for the life of me, I don't understand the resistance to the approach that was proven to work in Vioxx, I don't hear it as a problem in terms of you're going to bother people, I don't hear of it as a problem in terms of you're going to have a lot of people stirred and do something, all I'm hearing is now why don't we do it another way, why don't we do class cert first. Why? The defendants want the time ticking on prescription, that's obviously what they want.

MR. WEINSTOCK: That's clearly why we want it.

MR. MEUNIER: And we'll deal with that, but I am just telling the court and opposing counsel what that's going to mean is when that time starts running sooner rather than later, we're headed to thousands of lawsuits being filed by known claimants.

MR. WEINSTOCK: That's the only place that you've lost me, because never have I rejected the idea of tolling agreements for your 17,000 or any other 17,000 you sign up. I don't know where they have to file an individual lawsuit if we have an agreement on a tolling arrangement.

You want your cake and you want to eat it, too. You want

to say we're going to proceed mass joinder but you want the class hanging out there, the procedure hanging out there so my case is never prescribed, the statute of limitations is always interrupted, and so there is no arm around it, no known universe because the universe could always get bigger.

MR. MEUNIER: It's fine that I represent the absent class members, too.

MR. WEINSTOCK: As long as there's certification pending.

THE COURT: My concern is what of the class allegations at some point the court will have to dispose of those, questionnaire or no questionnaire, notice or no notice, at some point the court will have to dispose of that, and you've made that point and I think clearly everybody agrees.

With this information if we were to proceed in this fashion, and I understand the Vioxx argument and all of the complications of it, at what juncture would we encounter these class allegations? If we all agree that that's something that the court must do, at what juncture would we encounter these allegations and how will that not put us crosswise later on?

MR. MEUNIER: I submitted the calendar and organization of events in the proposal of the mass joinder.

THE COURT: Yes, I have it here.

MR. MEUNIER: And in direct response, your Honor, under this calendar proposal, August 15 would be the date by which there would be a required response to the notice. So our hope and

expectation is that on August 15 we now know the critical missing piece of information, which is who is and who is not coming forward in this MDL.

Now, we have a certification hearing under this schedule taking place November 19. So by the end of the year, by the end of the year if the decision of the court is not to certify a class, that becomes arguably final by the end of the calendar year. But meanwhile on August 15 we'll know something that is to us terribly important, which is who is and who is not going to get on a tolling agreement and a fact sheet that removes the obligation to file an individual suit and that tells us what claims we're dealing with.

Then the time is running from the end of the year on when people's statutes of limitations will preclude them from any legal remedy because there's no more American Pipe protection. And this is again more pertinent to the manufacturers than to the government.

So in answer to your question, it's a variable answer, but if the trigger date is the end of the year and you take each state's statute of limitations out and you know there is no more claim from that state. You know, this case may be remanded before the final bell tolls. My hope is the case may be settled before the final bell tolls. I hope that the case may be settled before, so we'll get there, we'll get there.

What I'm hearing today is why don't we get there now? Why don't we just go ahead and do class cert ASAP and start the trigger date? Well, you're still going to have that outer deadline out in

the future, which I think will outlast the MDL. I don't pretend -- I don't believe that you're going to keep this MDL long enough to await the final outer possible deadline for every possible claim to be made based on a trigger date of no class. I just don't think --

And if your intention is to hold the MDL for that long, I assume you would be holding it for that long to know, okay. Who is in, who is out? Why, let's see if we can't settle. We get there that way, too, it's just a longer, more complicated way. Yeah, we have to do it.

The defendants have to know that people are not going to hide in the bushes forever and I understand that. I actually think this helps the defendants because it brings people forward sooner rather than later and that was always my understanding that we had, you want people coming forward sooner.

So, Judge, that's the calendar proposal we have is that notice allows us to know in mid August and the court reaches a class certification ruling in mid November.

THE COURT: Why don't we do this. Why don't we just take a few minute break here and we'll come back. This might be something I might want to take the weekend to ponder and get you all back on the telephone on Monday at some point, and it's got to be ruled on soon, by Monday, that would be my intent. I could do so with the court reporter here and get you all on the phone rather than reconvene here.

Let me give that some thought for a few minutes. If you

want to go ahead and use the restroom or whatever in the meantime, it will only be a few minutes, but why don't we meet back here.

(WHEREUPON, A RECESS WAS TAKEN.)

THE COURT: Why don't you all have a seat. I think that it would be beneficial to take some more time to look at this over the weekend. Let me say generally that this has gone -- it's not an issue as simple as do we get the list of names to a third-party administrator to send out notices. It seems as though we have a change in position on the part of the defendants with regard to this class cert issue, which I was hoping and thinking that we had come beyond that.

But be that as it may, I am going to say what I said earlier is we've got to stop having conferences where we kind of bounce off-the-walls with all of these ideas; and the case is no longer in the germination stage, it's here, and I am going to have to just start giving some deadlines and we're going to have to follow them. Now, if we're going to go the class cert route, we're going to have some deadlines and we're going to follow them and we're going to do them and get that issue off.

If we're not going to go that route -- and in suggesting that I'm not saying that that's how I'm ruling on this particular issue -- but we can't keep having the sort of stream of consciousness procedure, and I guess I'm talking to you mainly, Andy, not as a criticism of you but as your committee, you all are not being specific enough and it goes to this issue of these

affirmative defenses that go -- we've got to get a plan, a game plan here that everybody is on the same page. If there's something that needs to be treated in an adversarial fashion, let's tee it up and let's decide it.

But every time we get seemingly close to getting something done, I am sensing that there is some wriggling off the hook. Some of your clients are giving you, or I should say your cocounsel, are giving you some flack about it. We had this with the idea of this defense of we need to test every unit, and if the claimant's unit hasn't been tested, the claimant can prove his case. I've said that already and if that's an issue that needs to be put on the record, then we need to put it on the record.

But I guess it's counterproductive to have a conference where seemingly we're in agreement as to a game plan and then there is some dichotomy that leaves here where we are not all on the same page. So the biggest aspect of that that's a problem today is this issue of class certification, because I thought we had all agreed that a mass joinder procedure, regardless of how we got to it, would be preferable. That was before the government was in the case, I understand that and I've held to something that was discussed or agreed to when you weren't in the case. Nonetheless, we're now -- it's kind of brought to a head by this issue of notification in the context that that notification is going to be given, as well as the timing of the notification.

So that's the problem. And I really want to take the

weekend to think about it and work on it. I would like to get you all on the phone Monday, I am thinking around 11 central time. That, of course, is all subject to me being allowed in this building on Monday with all of the Code Pink and whoever else shows up out here on Poydras Street.

MR. MEUNIER: What's happening?

THE COURT: The Western Hemisphere or something rather, the president of Mexico and Canada and every place else is coming to Gallier Hall. Which I'm sure is going to be a great event, but we've already been put on notice that access to our building is subject to whatever security measures they decide. I'm told Tuesday is going to be the worst of the two days in terms of us being able to get here and work.

But assuming that we're here on Monday, I would like to do it at 11 central time. I plan to be here and I don't think Monday is going to be a problem. That'll give me a chance to go through the materials again and really give some thought to what you all have told me today. These are all valid considerations, I don't think anything that you've told me, it's all grist for the mill, and it's going to be a decision that is going to be a significant one with regard to the course of litigation certainly between now and the end of the year and possibly further.

My goal has always been to try to move the ball down the field on this thing and try to get, I just told the clerks, to get from Point A to Point B in the most direct, quickest, efficient,

cost efficient and time efficient fashion, and that's my overriding goal here, too. So I need to figure out what's the best way of doing it, whether it's what Gerry and Justin have suggested or whether it's going the other way and teeing up the certification and getting that out of the way. I had hoped we were beyond that, but we never did agree to do one or the other, so to your credit.

MR. WEINSTOCK: I just briefly want to address it. I don't know that we changed positions but the game has changed. But from day one and today I still believe mass joinder is the superior way to approach the resolution of this case. The problem is I am handed a class action, I've got to deal with it.

THE COURT: Right.

MR. WEINSTOCK: And I think the first conversation we had, to use your analogy, was I want to take the wheels off the bus, Gerry just wanted to take the air out of tires. From day one I said class certification has to go away, whether it's by pleading or by hearing, I understand that's changed.

THE COURT: You have. And I am not being critical, I am not suggesting that you represented one thing and now are telling me something else. That was the discussion that we had and you're accurately stating your position then. I didn't find it unexpected that he's pled class certification because that is in several of the complaints that had already been filed. I interpreted that more as sort of a place marker to be dealt with in our efforts to go the mass joinder route.

And my question now is how do I get -- what is that route and how do we get on that road sooner rather than later. If we can do this as a mass joinder case it's going to be a lot easier to settle, ultimately we want to have that conversation here before we start spinning these cases out back to where they came from. My goal would be to get it all resolved here and not have to send anything back anywhere, to go ahead and get it all resolved here. But to do that we're going to have to have bellwether trials, to do that we're going to have to get rid of somehow this class certification issue by either having a class or not having one.

And so we've got to figure out a way and I've got to figure out a way to get from here to there. I don't think we anticipated, I'll speak for myself, I guess I don't think that I appreciated the gravity of this notice issue raising that decision at this point forcing -- I don't want to say forcing, but certainly implicating that decision now. And maybe that was naive on may part to think that there could be a notice provision outside of a decision with regard to how we're going to proceed as a class or as mass joinder. But I think it does implicate that bigger picture, it does implicate it.

I understand your argument that it is not necessarily, and ultimately I may agree with you, but certainly that is on the heap of things that go into this decision is how it's going to impact getting from class to mass joinder.

MR. MEUNIER: And, your Honor, for us again, it's all

about identification of claims. We cannot resolve this case in this MDL unless we identify the claims while we're here, not later, while we're here.

THE COURT: I understand.

MR. MEUNIER: And to me identifying the claims is a priority, and that's the whole point of our request for a list when we know a list exists telling us each and everyone who is a potential claimant. I realize it's an issue of timing and I appreciate the concerns that have been expressed.

But again, from day one I hope we've been consistent, yes, let's approach this as a mass joinder; but if we're going to approach it successfully as a mass joinder and try to do something to resolve it, we have to know as much about the claims as we can possibly know as soon as we can possibly know it. And that's why I don't think waiting for a class cert and statutes to run and all of that, that's a slow boat, I am trying to front-end load claims identification, that's the whole point of it.

THE COURT: I am a cut-to-the-chase type of person. I mean, as far as I'm concerned, send out the notices, get everybody in here, let's talk turkey, let's try a few, and get those skins on the wall whichever way they fall and then close it down. But we cannot ignore -- the procedure maybe inconvenient but it's there and it's got to be employed.

Go ahead, Michelle, you were about to say something.

MS. BOYLE: Thank you. Just to respond as a factual

matter. That point that Mr. Meunier made assumes a lot. It assumes that all of the people in trailers have claims, and, in fact, the facts show that out of the over 100,000 people there have been approximately 4,500 or so, which is noted in our exhibits, that have called FEMA with respect to concerns.

And so this factual basis underscores the government's position that the purpose of this "notice" at this stage is not notice in the true sense of the term, with respect to substantive rights under Rule 23, it's just an early way of informing people about the litigation, and in that respect resembles more of an advertisement.

THE COURT: Well, the other thing that troubles me about this whole consideration, it's really kind of unique, is the fact that I think Gerry is right that one of the parties to the case, at least a party for right now, has this information and has been communicating with the very people that are at issue in this case. And I think that, if for no other reason, that distinguishes this circumstance -- it's not an insignificant fact, it distinguishes this circumstance from the other cases that we've been talking about, the cases that you and I have been looking at. So that's another concern.

MS. BOYLE: Your Honor, if I may address that very briefly?

THE COURT: Very briefly.

MS. BOYLE: The United States isn't aware of any

allegation of improper communication regarding this litigation per se, only actions taken pursuant to the Stafford Act to distribute the assistance. If the Plaintiff Steering Committee believes there's been some type of interference with respect to the litigation rights of persons, the proper vehicle for redress for that would not be a motion to compel the list to sign everyone up for litigation, but rather some type of petition for injunctive relief or some type of method for the court to have received FEMA's distribution of the aid.

THE COURT: I understand that.

MR. MEUNIER: All we're saying is you're communicating about a key fact in the litigation, which is formaldehyde levels and the safety thereof. It goes to the heart of the case. And pretermiting your right to do it or whether you have the right to be doing it, you're doing it and it's happening, and I think these same people who have potential claims ought to know that there is a way to assert a claim in the MDL and a time to do it in. Period. It doesn't seem fair to me that they're being filled with information from the government about what these levels mean but hearing nothing at all about the opportunity to address and exposure of claims if they choose to make them.

We went out of our way with this notice to include bold print language. Look, we are not telling you you have a claim, we are not telling you you have a valid basis for a claim, we're not making any assertions on that. We're just alerting you to this

forum. Anyway.

THE COURT: Let's do this. Why don't we plan on -- can we reach you at the numbers we already have at 11 --

MR. MILLER: Certainly, yes.

THE COURT: -- on Monday? If for some reason you're at a different number, call my chambers and let us know where we can find all of you all. For instance, if you three are not together, we will get you on the line separately wherever you are. And likewise you all.

Let me try to work through it a little bit, and we'll also have the court reporter on Monday to take down whatever we discuss while on the phone Monday. Okay?

MR. MEUNIER: Thank you, Judge.

MR. MILLER: Thank you, Judge.

THE COURT: All right, thank you all.

MR. WEINSTOCK: Thank you, your Honor.

MS. BOYLE: Thank you, your Honor.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

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

/s/ Karen A. Ibos

Karen A. Ibos, CCR, RPR, CRR

Official Court Reporter