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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 "L"
NEW ORLEANS, LOUISIANA
FRIDAY, APRIL 17, 2015, 10:00 A.M.

08:58:43

THIS DOCUMENT RELATES TO
ALL CASES

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS'
LIAISON COUNSEL:

HERMAN HERMAN KATZ
BY: RUSS M. HERMAN, ESQUIRE
LEONARD A. DAVIS, ESQUIRE
820 O'KEEFE AVENUE
NEW ORLEANS LA 70113

LEVIN, FISHBEIN, SEDRAN & BERMAN
BY: ARNOLD LEVIN, ESQUIRE
SANDRA L. DUGGAN, ESQUIRE
510 WALNUT STREET, SUITE 500
PHILADELPHIA, PA 19106

FOR THE STATE/FEDERAL
COORDINATION COMMITTEE:

BARRIOS, KINGSORF & CASTEIX
BY: DAWN M. BARRIOS, ESQUIRE
701 POYDRAS STREET, SUITE 3650
NEW ORLEANS LA 70139

1 APPEARANCES CONTINUED:

2

3 FOR THE DEFENDANTS'
4 LIAISON COUNSEL:

BAKER DONELSON
BY: KERRY J. MILLER, ESQUIRE
201 ST. CHARLES AVENUE, SUITE 3600
NEW ORLEANS LA 70170

6

7 FOR TAISHAN GYPSUM CO.,
8 LTD:

ALSTON & BIRD
BY: CHRISTINA H. EIKHOFF, ESQUIRE
BERNARD TAYLOR, SR., ESQUIRE
ONE ATLANTIC CENTER
1201 WEST PEACHTREE STREET
ATLANTA, GA 30309

10

11

12 FOR BNBM GROUP AND
13 BNBM PLC:

DENTONS US
RICHARD L. FENTON, ESQUIRE
233 SOUTH WACKER DRIVE, SUITE 7800
CHICAGO IL 60606

14

15

16 ALSO PRESENT:

DANIEL BALHOFF, SPECIAL MASTER
JAMES STENGEL, ESQUIRE
L. CHRISTOPHER VEJNOSKA, ESQUIRE
JODI FERCHAUD

17

18

19 OFFICIAL COURT REPORTER:

CATHY PEPPER, CRR, RMR, CCR
CERTIFIED REALTIME REPORTER
CERTIFIED MERIT REPORTER
500 POYDRAS STREET, ROOM B406
NEW ORLEANS, LA 70130
(504) 589-7779
Cathy_Pepper@laed.uscourts.gov

20

21

22

23

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P-R-O-C-E-E-D-I-N-G-S

FRIDAY, APRIL 17, 2015

M O R N I N G S E S S I O N

(COURT CALLED TO ORDER)

THE DEPUTY CLERK: All rise.

THE COURT: Be seated, please.

The first motion we have is the Motion to Strike the Highly Confidential Matter. Taishan says that the Court has ruled that the privilege is removed, but they feel that there is a distinction between confidential and nonconfidential, and would like to keep some of them not open to the public.

MR. HERMAN: May I approach, Your Honor?

THE COURT: Yes.

MR. HERMAN: I have a copy of this bench book that I'm going to argue from for each of the defense firms, BNBM, Taishan, and CNBM.

May it please the Court, Russ Herman for plaintiffs on this issue.

The issue really is whether or not documents which indicate an exception to privilege under crime fraud should be made public.

Preliminarily, we note that in the past China has

09:47:59 1 brought into the United States defective toys that are lead
09:48:02 2 based, defective built, defective pet supplies, defective
09:48:05 3 drywall and, recently, defective flooring.

09:48:08 4 We believe that there is no reason why these
09:48:12 5 documents should not be made public, so I'm going to address
09:48:15 6 them by number in the bench book.

09:48:18 7 If we turn first to Item 21, Your Honor, we see
09:48:31 8 that BNBm and Taishan, as we look there, knew before they
09:48:46 9 shipped substantial defective drywall to the United States it
09:48:51 10 was defective. They sent it to a lab, and on May 11, 2006, it
09:48:59 11 was reported that USG said the board had a sulfuric smell to
09:49:03 12 it, and the lab said that both types of board had a very
09:49:08 13 distinct sulfur smell to them.

09:49:11 14 This was between an exclusive agent appointed in
09:49:18 15 the United States and BNBm. You'll see the BNBm cards attached
09:49:26 16 to this communication.

09:49:30 17 This is in spite of the fact that Taishan denied
09:49:35 18 in depositions in Hong Kong that they knew in advance that the
09:49:39 19 drywall was defective.

09:49:41 20 Then, if we look at item 22, we look at the
09:49:53 21 states where the drywall was brought into the United States,
09:49:58 22 the Gulf States primarily and North Carolina and Virginia. As
09:50:03 23 we turn the pages, we see that after 2006, substantial
09:50:09 24 shipments were made by Taishan of board which they knew was
09:50:14 25 defective.

09:50:17 1 That brings us to, Your Honor, the Hogan Lovells
09:50:32 2 e-mail. Now, the defendants -- I've put in their bench book
09:50:35 3 these e-mails. I know that they are under seal. I know they
09:50:38 4 are marked highly confidential. But there has already been an
09:50:42 5 ego, alter ego, single enterprise finding, and so these are, in
09:50:49 6 fact, their documents. Therefore, whatever was released to us
09:50:57 7 has been given today to defense counsel for Taishan, BNBM and
09:51:06 8 CNBM.

09:51:08 9 If we look at page 26, we see -- I'm sorry,
09:51:16 10 Item 26, we see several things that CNBM and BNBM were notified
09:51:26 11 about the litigation, and they were determined to withdraw from
09:51:30 12 it. We believe that these some-odd three thousand people who
09:51:37 13 have been victimized since 2006 deserve to know that.

09:51:42 14 The next page says that Chairman Jia of Taishan
09:51:48 15 is not able to make a decision, it's got to be made higher up.
09:51:53 16 And who are the higher-ups, BNBM and CNBM.

09:51:59 17 There are other e-mails. The next one relates to
09:52:05 18 CNBM, BNBM and SASAC.

09:52:12 19 Then it follows that Your Honor's contempt order
09:52:19 20 and the injunction was reported up the line to CNBM and BNBM by
09:52:29 21 Taishan.

09:52:30 22 Now, we looked at the actual relationships among
09:52:38 23 these folks who are defendants before Your Honor. If we look
09:52:44 24 at pages 2 through 11 -- Items 2 through 11 -- and I'm not
09:52:52 25 going to go through all of them, I'll just take the 2010

09:52:55 1 report -- you'll note that it has a BNBМ logo. It shows that
09:53:04 2 March 17, 2011, the 2010 annual report of BNBМ makes reference
09:53:15 3 not only to the lawsuit, but the amount of attorneys' fees that
09:53:21 4 BNBМ and Taishan Gypsum are expending in defense of the case.
09:53:29 5 They total some -- I'll round it off -- \$4,300,000 as of that
09:53:37 6 date.

09:53:39 7 Further on, it says, "This company and our
09:53:43 8 subsidiaries, Taishan Gypsum Company," so it's clear, in all of
09:53:48 9 these reports. We've put the ones we've been able to discover
09:53:53 10 and interpret in this binder through 2014.

09:53:59 11 I'll just turn to 2014. Under material
09:54:05 12 litigation, we find that BNBМ, again, is reporting
09:54:16 13 Taishan Gypsum litigation as of that date.

09:54:20 14 The next set of documents, Your Honor, that I
09:54:25 15 would like to address is the documents numbered 12 through
09:54:33 16 20 -- again, I'm not going to labor the Court with an argument
09:54:38 17 that could last several hours -- that show directly that CNBM
09:54:44 18 and CNBM Group are the puppeteers and masters of BNBМ and
09:54:51 19 Taishan.

09:54:52 20 Indeed, the annual report, tab 13, of CNBM makes
09:55:01 21 certain admissions, including a chart, which I think Your Honor
09:55:07 22 will find interesting, at page 10, because it shows the parent,
09:55:15 23 it shows then the BNBМ and the CNBM, and then the company which
09:55:23 24 controls. If we go down to lightweight building materials, and
09:55:32 25 we see Taihe, Shandong Taihe, as we do for every year.

09:55:39 1 The only thing that's added are more affiliates
09:55:41 2 and controls. We note on the page before that it has, that is,
09:55:48 3 CNBM has the same executive committee virtually for every year
09:55:54 4 from 2007 through 2014. As discovery goes forward on other
09:56:04 5 issues, we intend to pursue that.

09:56:10 6 Under tab 14, Your Honor, the company profile, at
09:56:17 7 page 2, lists the largest gypsum board producer in Asia. When
09:56:23 8 you get to 2014, the statement is that CNBM is the largest in
09:56:32 9 the world.

09:56:35 10 You can follow as they add affiliates year by
09:56:38 11 year, but always Taishan and BNBM appear.

09:56:47 12 It's interesting that there is some admissions
09:56:49 13 against interest in which CNBM admits that it controls Taishan
09:56:55 14 through its subsidiary BNBM.

09:57:01 15 So here is the question, Your Honor. I don't
09:57:04 16 doubt -- I'm often in error, but never in doubt -- but I really
09:57:13 17 do not doubt that we are going to show the affiliates, at some
09:57:16 18 point when we're allowed to, and that at the present time and
09:57:18 19 in 2006, at the time that Taishan and BNBM knew that they had
09:57:26 20 defective drywall and determined that they would export it to
09:57:31 21 the United States, particularly to the Gulf States and Virginia
09:57:34 22 and North Carolina, that CNBM was aware, BNBM was aware, and
09:57:43 23 that CNBM and BNBM were the people upstairs that Taishan had to
09:57:50 24 report to that they weren't going to participate in this case.

09:57:53 25 Now, that brings down to what is equitable. Is

09:57:59 1 the public, and particularly those folks that have been
09:58:03 2 endangered by this drywall, some of them have been foreclosed
09:58:07 3 upon, some of them have lived in deplorable conditions, some of
09:58:12 4 them have had to sell properties for much less than value, are
09:58:17 5 they entitled at least to know that Taishan and their Chinese
09:58:26 6 puppeteers, CNBM and BNBM, knew that they were shipping
09:58:32 7 material to the United States that would cause them substantial
09:58:37 8 damage, and they did it anyway. Why is that not of public
09:58:40 9 interest that outrides any highly confidential documents
09:58:47 10 revealed in the Taishan documents.

09:58:49 11 The last thing I want to say about it is we took
09:58:54 12 depositions in Hong Kong. Had to take them twice, Your Honor
09:58:57 13 will recall. It would have been of some interest to the Court,
09:59:13 14 to the public, and to counsel if this information had come
09:59:17 15 forward in the Taishan depositions in Hong Kong.

09:59:24 16 We note now that, unfortunately, the two chief
09:59:30 17 individuals at Taishan, one doesn't work there anymore, his
09:59:33 18 whereabouts are unknown, and the other is ill and can't
09:59:36 19 testify. At that time, the information, had it come forward in
09:59:44 20 their deposition, would have been public. There would have
09:59:47 21 been no reason to hide it.

09:59:50 22 Most respectfully, Your Honor, in this situation,
09:59:53 23 we don't see how these documents should be highly confidential.
09:59:59 24 There is a straight linkage, they're relevant, and they will
10:00:06 25 give at least some balm to those folks, those 3,000-plus folks

10:00:11 1 who now have updated plaintiff profile forms, as to what really
10:00:16 2 happened here.

10:00:17 3 Thank you, Your Honor, for the opportunity.

10:00:20 4 THE COURT: Thank you very much. Thank you.

10:00:22 5 Since you're just seeing this document, too, I'll
10:00:24 6 give you an opportunity to write a reply, if you need it.

10:00:29 7 MS. EIKHOFF: Thank you, Your Honor. I appreciate
10:00:30 8 that.

10:00:30 9 The bench book that we have just been handed, we
10:00:35 10 haven't had a chance to review it.

10:00:35 11 THE COURT: Right.

10:00:37 12 MS. EIKHOFF: It's the first we're seeing it. It
10:00:38 13 contains a lot of documents that were not produced by Taishan
10:00:42 14 and seem to come from other sources, and we're going to need a
10:00:45 15 chance to digest that and review it.

10:00:46 16 Based on counsel's arguments, however, it seems
10:00:50 17 that this bench book is being used as a platform to make alter
10:00:56 18 ego arguments that the plaintiffs want to make, and otherwise
10:00:59 19 to cast aspersions on Taishan.

10:01:02 20 We understand that's their position. There is
10:01:05 21 going to be a time and a place for those arguments to be made.
10:01:09 22 It does not strike us that -- on a motion to de-designate
10:01:15 23 confidentiality notations on certain documents under the
10:01:21 24 Court's standing protective order does not seem to be the time
10:01:24 25 and the place to be making such broader allegations and

10:01:29 1 arguments.

10:01:29 2 Now, just to be clear, these documents that are
10:01:35 3 actually at issue in the motion to de-designate are the
10:01:39 4 documents that were produced by Hogan Lovells. Those documents
10:01:44 5 are discovery materials that are now available for everyone in
10:01:48 6 the case. All counsel of record get them.

10:01:51 7 So in terms of redaction and, you know, whether
10:01:54 8 other defendants can see them or not, of course, we understand
10:01:58 9 that, under the PTO, this Court's PTO 16, that these are
10:02:03 10 discovery materials that can be used for discovery in this
10:02:06 11 case. There is no argument about that.

10:02:08 12 We also understand, Your Honor, that you have
10:02:13 13 ruled that certain content of those documents are not
10:02:18 14 privileged. The privilege, any privilege that may have
10:02:21 15 protected them has been removed by this Court's ruling, and we
10:02:25 16 absolutely understand that.

10:02:27 17 It does not follow, however, Your Honor, that
10:02:31 18 just because they are no longer privileged for purposes of this
10:02:33 19 litigation, that they no longer have any confidentiality
10:02:37 20 protection under PTO 16 and under Rule 26(c).

10:02:41 21 Rule 26(c) and your protective order, Your Honor,
10:02:47 22 recognize that there is a difference between privilege and
10:02:50 23 confidentiality. Of course, the parties may designate certain
10:02:55 24 documents as confidential that are not privileged documents.

10:02:59 25 When these documents were produced by

10:03:01 1 Hogan Lovells, they were deemed by Hogan to be designated as
10:03:06 2 highly confidential, and they were so designated.

10:03:10 3 The PSC has moved, the plaintiffs have moved to
10:03:14 4 remove that -- have moved to have that highly confidential
10:03:19 5 designation removed, and we object to that because we do
10:03:23 6 believe that these are documents that, although they can be
10:03:27 7 freely used for purposes of this litigation among counsel and
10:03:30 8 among parties, that they are discovery materials that do have
10:03:35 9 confidential and proprietary information, business
10:03:39 10 communications, communications made with attorneys with an
10:03:43 11 expectation of confidentiality, and for those reasons we
10:03:47 12 believe that they were properly designated.

10:03:49 13 Now, I would like to direct the Court's attention
10:03:53 14 to the Supreme Court case *Seattle Times v. Rhinehart*, which is
10:03:59 15 467 US 20. In that case, the Supreme Court has ruled that
10:04:06 16 discovery materials are a horse of a different color from other
10:04:11 17 materials that are subject to open courts and First Amendment
10:04:15 18 issues.

10:04:15 19 Just because a document is produced in discovery
10:04:20 20 does not mean that it becomes automatically a public record,
10:04:23 21 which is what the plaintiffs are arguing.

10:04:27 22 So those are generally our arguments and our
10:04:30 23 position on keeping the designation as it is currently
10:04:33 24 designated, which we think creates no restriction on the use --
10:04:37 25 would create no restriction on use for depositions, but simply

10:04:41 1 just prevents it from becoming a document that is a public
10:04:45 2 document and could be widely disseminated through the press or
10:04:49 3 otherwise.

10:04:49 4 THE COURT: You want these documents kept under seal,
10:04:51 5 is that it?

10:04:53 6 MS. EIKHOFF: Yes, Your Honor, because once they are
10:04:55 7 filed in PACER, it essentially does become a public document.

10:04:55 8 THE COURT: Right.

10:05:00 9 MS. EIKHOFF: So we understand that the documents are
10:05:02 10 being used for purposes of this litigation. We received from
10:05:07 11 the parties, the other side, the unredacted versions, and we
10:05:12 12 can deal with that. The Court receives unredacted.

10:05:12 13 THE COURT: Right.

10:05:16 14 MS. EIKHOFF: But for what gets published on the web,
10:05:18 15 that would be protected from public consumption.

10:05:21 16 THE COURT: Now, what happens if a deposition is taken,
10:05:23 17 and the document is used in a deposition; or, if a trial
10:05:26 18 proceeds, and the document is used in trial? What would you
10:05:32 19 say to that? Keep the trial private, too?

10:05:38 20 MS. EIKHOFF: Well, Your Honor, the PTO does address
10:05:40 21 that, Your Honor, and so we would follow the procedures that
10:05:42 22 are set forth in the PTO.

10:05:44 23 Respectfully, we'll cross that bridge when we
10:05:47 24 come to it. I mean, I understand that that does change the
10:05:50 25 analysis; but, to date, they have not been introduced into any

10:05:57 1 trial.

10:05:57 2 Really, the motion that we're dealing with is a
10:06:01 3 motion to say these documents are not entitled to any
10:06:05 4 confidentiality protection for any purposes. Since they've
10:06:11 5 been produced in discovery, they must become public documents,
10:06:14 6 and we don't believe that's appropriate.

10:06:16 7 THE COURT: Okay, I understand your argument.

10:06:19 8 MR. HERMAN: A short rebuttal.

10:06:20 9 May it please the Court, I don't think a highly
10:06:23 10 confidential designation can cover up a fraud.

10:06:26 11 Secondly, I don't think embarrassment by what
10:06:29 12 you've done is enough to assert something is highly
10:06:35 13 confidential and nonprivileged.

10:06:35 14 Lastly, most of these documents were published in
10:06:41 15 English and circulated by these parties. For example, in 2006,
10:06:53 16 CNBM had a public offering in -- that was published, and,
10:06:58 17 indeed, they attracted shareholders, potential shareholders.

10:07:05 18 This isn't a question of discovery. It's a
10:07:09 19 question of notice. Who knew, when did they know, and how were
10:07:14 20 they related to a decision, number one, to distribute defective
10:07:22 21 drywall that they knew was defective in the United States,
10:07:26 22 which was not previously disclosed, and is not a privileged --
10:07:30 23 or deprivileged document; and, when did -- when did they make a
10:07:40 24 determination that they were going to ignore, on the basis of
10:07:44 25 some legal counsel, that United States law, judgments of this

10:07:53 1 Court would not apply.

10:07:56 2 There is a bigger issue here that extends beyond
10:07:59 3 the case, and that is the fact that a United States
10:08:05 4 manufacturer is held to a defective product balancing the
10:08:14 5 books, but a Chinese manufacturer is not. I think, to keep
10:08:19 6 that document -- or those documents that are Hogan Lovells'
10:08:26 7 deprivileged documents because they may prove embarrassment or
10:08:31 8 because they contradict what Taishan was saying is just not
10:08:37 9 proper, Your Honor. Thank you.

10:08:38 10 THE COURT: I understand your argument, both sides.

10:08:42 11 MR. FENTON: May I say something?

10:08:43 12 THE COURT: I'll give you an opportunity, too, as I
10:08:46 13 said, to supplement your brief because you've just seen these
10:08:50 14 documents.

10:08:50 15 MR. FENTON: Rick Fenton, Your Honor, on behalf of
10:08:53 16 BNBM.

10:08:53 17 I had not planned on addressing this motion this
10:08:56 18 morning, but Mr. Herman did make a couple of remarks in his
10:08:59 19 opening statements that I think I do need to address.

10:09:02 20 I would like to direct the Court's attention to
10:09:04 21 tab 21, which is the document that Mr. Herman said evidences
10:09:10 22 some core knowledge of BNBM -- I'm not sure which BNBM entity
10:09:18 23 he's talking about because they are very different entities --
10:09:20 24 about the problems with the drywall.

10:09:22 25 As I was looking at the document, Your Honor, it

10:09:26 1 was produced by Guardian Building Products. There is a mention
10:09:31 2 of ASTM testing, but neither of the substantive e-mails are
10:09:38 3 shown, unless I'm missing something, as having gone to BNBK or
10:09:43 4 any of the other Chinese companies.

10:09:45 5 The other thing that caught my eye is that at the
10:09:50 6 very end -- and Mr. Herman referred to the business card of a
10:09:54 7 person at BNBK Company, Ltd, but I noticed that on the Bates
10:10:02 8 numbering, that business card is entirely out of sequence with
10:10:07 9 the other documents, the e-mails that were referenced.

10:10:11 10 Specifically, the first two e-mails, which did
10:10:15 11 not go to anybody at BNBK, they are Bates number of GBT 925 and
10:10:22 12 924, respectively, the Bates number on the business card is
10:10:29 13 GBT 7912.

10:10:30 14 Now, I don't know how these documents got
10:10:35 15 arranged in this order, but I think it is -- and the next
10:10:37 16 business card is 7914 -- but I think it's fair to say that it
10:10:43 17 raises some questions about the statement that this is somehow
10:10:47 18 evidence of prior knowledge by BNBK.

10:10:50 19 I wanted to make that very clear. This is the
10:10:53 20 first time I've seen these documents, Your Honor.

10:10:54 21 THE COURT: No, I appreciate it.

10:10:55 22 Well, in your argument, then, you wouldn't have
10:10:56 23 any objection to 924 and 925 being removed as confidential,
10:11:02 24 since they don't apply to you?

10:11:04 25 MR. FENTON: Your Honor, these are not the Hogan

10:11:08 1 documents, I don't believe. These are -- were, I believe, in
10:11:11 2 the notebook.

10:11:12 3 I think the point that Mr. Herman was trying to
10:11:14 4 make is that, based on what he said was the foreknowledge of
10:11:20 5 these companies, the public has a right to know. I'm saying
10:11:22 6 I'm taking some issue, at least based on these documents, with
10:11:26 7 that assertion.

10:11:26 8 THE COURT: No, I understand. Yes.

10:11:27 9 So these may not be -- no one may mind these
10:11:35 10 being removed from confidential since they don't apply to --

10:11:43 11 MR. FENTON: Your Honor, I really don't know what these
10:11:46 12 documents are, and I don't know whether they are still
10:11:47 13 confidential. I just don't know.

10:11:49 14 THE COURT: I understand. All right. Okay.

10:11:49 15 MR. FENTON: Thank you, Your Honor.

10:11:52 16 THE COURT: I got it.

10:11:53 17 I will take this under advisement. I'll give you
10:11:57 18 five days to do that, and two days for response, if plaintiffs
10:12:00 19 need it.

10:12:03 20 Another argument that I have, too, is the
10:12:10 21 alternate service that's being made.

10:12:18 22 MS. DUGGAN: Good morning, Your Honor. Sandra Duggan
10:12:21 23 for the Plaintiffs' Steering Committee.

10:12:23 24 Nine months ago, the Plaintiffs' Steering
10:12:25 25 Committee filed its Complaint Omnibus 19, and the defendant in

10:12:29 1 that complaint, the principal defendant is the State-Owned
10:12:32 2 Assets Supervision and Administration Commission for the
10:12:35 3 People's Republic of China, which we refer to as SASAC.

10:12:41 4 We proceeded to serve SASAC under the
10:12:43 5 Hague Convention. The steps that we took are set forth in the
10:12:48 6 affidavit of our agent, APS International. It took us about
10:12:51 7 six months, until February 3rd of 2015, for the Ministry of
10:12:58 8 Justice over in China to reject service. The Ministry invoked
10:13:02 9 Article 13 of the Hague, said it would infringe on the
10:13:06 10 sovereignty of China, and also told us that SASAC is an agent
10:13:09 11 of the government.

10:13:10 12 So based on that statement, we sought the Court's
10:13:14 13 intervention to use the service provisions of the Foreign
10:13:18 14 Sovereign Immunities Act at Section 1608, 28 USC Section
10:13:18 15 1608 (b) .

10:13:24 16 Now, we understand that CNBM has objected and
10:13:29 17 said we should have proceeded under 1608 (a) .

10:13:33 18 Whether SASAC is a foreign state or an agent of a
10:13:35 19 foreign state really doesn't matter at this point because the
10:13:38 20 statute sets forth a hierarchy of steps that must be followed.

10:13:42 21 Step one is, if there's a special arrangement
10:13:44 22 between a plaintiff and the defendant, we follow that. We
10:13:46 23 don't have any special arrangement.

10:13:46 24 THE COURT: Right.

10:13:48 25 MS. DUGGAN: Step two is you proceed under the

10:13:49 1 Hague Convention. We've done that.

10:13:51 2 We're interested in strictly complying with the
10:13:53 3 statute. So now we're at Step 3. Step 3, if they are a
10:13:57 4 foreign state, would suggest that the Clerk of the Court can
10:14:02 5 dispatch notice of the suit, which the Fifth Circuit has said
10:14:05 6 is a brief paragraph explaining what the suit is about, by any
10:14:09 7 form of mail that requires a signed receipt upon the Ministry
10:14:13 8 of Foreign Affairs.

10:14:14 9 We don't think that's the subsection that we
10:14:17 10 should be proceeding under, but, at this point, we're willing
10:14:20 11 to do both.

10:14:21 12 If SASAC is an agent, which they've told us they
10:14:25 13 are, then we need to proceed under any forum that is designed
10:14:31 14 to give them actual notice. That could be the Clerk of the
10:14:34 15 Court dispatching the summons and the complaint by any form of
10:14:38 16 mail that would give us a signed receipt.

10:14:40 17 THE COURT: How about if they are the government?

10:14:44 18 MS. DUGGAN: If they are the government, then 28 USC
10:14:47 19 1608(a) would apply.

10:14:48 20 THE COURT: Would they have immunity if they are the
10:14:51 21 government?

10:14:51 22 MS. DUGGAN: Well, we're going to argue that they don't
10:14:54 23 because, under the exception to the Foreign Sovereign
10:14:56 24 Immunities Act, our argument is that a foreign state shall not
10:14:59 25 be immune from the jurisdiction of the Courts of the

10:15:01 1 United States or of the states in any case in which the action
10:15:05 2 is based upon an act outside the territory of the United States
10:15:08 3 in connection with a commercial activity of the foreign state
10:15:12 4 elsewhere that causes a direct effect in the United States.
10:15:16 5 That's at 28 USC 1605(a) (2) .

10:15:19 6 The statute defines commercial activity as either
10:15:22 7 a regular course of commercial conduct or a particular
10:15:26 8 commercial transaction or act, and that's at 1603(d) .

10:15:30 9 The allegations in our complaint suggest that
10:15:35 10 this is a commercial activity that has had a direct impact on
10:15:41 11 4,000 plaintiffs with Taishan drywall on their property.

10:15:44 12 THE COURT: Let me hear from the respondent. Any
10:15:49 13 argument on the other side?

10:15:54 14 MR. TAYLOR: Not from us.

10:15:58 15 MR. STENGEL: No, Your Honor. As the motion was
10:15:58 16 originally styled, they were seeking to serve SASAC through us,
10:16:01 17 counsel for CNBM. As I understand where the PSC is now, they
10:16:07 18 have abandoned or withdrawn that aspect, so we have no interest
10:16:09 19 in the resolution of this issue.

10:16:11 20 MS. DUGGAN: I just want to point out, Your Honor, in
10:16:13 21 our surreply that the Court granted us permission to file, at
10:16:17 22 Rec Doc 18679-3, we submitted a revised proposed order that
10:16:22 23 would use both prongs of the statute, (a) and (b), as a means
10:16:26 24 to achieve service at this point.

10:16:29 25 THE COURT: Yes. We're talking about service, we're

10:16:31 1 not really talking about the substance of it. It seems that
10:16:35 2 the two -- the fact that they are served doesn't mean that they
10:16:41 3 are engaged in a commercial activity or not engaged in a
10:16:45 4 commercial activity, but it seems to me that the service, we've
10:16:50 5 got to allow service to get them here. That was my thinking
10:16:53 6 originally. So I deny any opposition to it. Go with the
10:17:00 7 service.

10:17:01 8 MS. DUGGAN: Thank you so much, Your Honor. We will
10:17:03 9 provide all the proper documents to the Clerk of Court.

10:17:05 10 THE COURT: As a courtesy to counsel, give counsel --
10:17:08 11 not that it means anything, but at least a courtesy copy of
10:17:11 12 whatever you're going to do.

10:17:13 13 MS. DUGGAN: We will do that.

10:17:15 14 THE COURT: You can give it to Taishan, so they can do
10:17:17 15 it, so that there is no issue of accepting something and
10:17:22 16 violating any responsibility to your client.

10:17:31 17 MR. HERMAN: May it please the Court.

10:17:31 18 THE COURT: Yes.

10:17:32 19 MR. HERMAN: I was advised after the first part of the
10:17:34 20 status conference that a Garretson representative was here to
10:17:39 21 report on the Virginia settlements. If Your Honor would
10:17:47 22 entertain that, I don't think it will take much time.

10:17:49 23 THE COURT: Sure. Okay.

10:17:52 24 MS. BARRIOS: Good morning, again, Your Honor.

10:17:56 25 Dawn Barrios, on behalf of Garretson Resolution Group.

10:18:00 1 Mr. Bower was here. He had to leave to catch his
10:18:03 2 plane. He asked me just to give you a brief summary of his
10:18:06 3 report.

10:18:06 4 The real property damage portion of their
10:18:10 5 settlements, out, paid, everything done.

10:18:13 6 The other loss determinations have gone out in
10:18:16 7 the mail, and they expect to have everything wrapped up within
10:18:20 8 90, 120 days, depending on if there is any appeals.

10:18:23 9 THE COURT: How many residences are we talking about?

10:18:27 10 MS. BARRIOS: Between three and four hundred.

10:18:29 11 THE COURT: Thank you.

10:18:32 12 Okay. Those are the cases that we tried. They
10:18:37 13 were very helpful to us in the whole litigation. I'm glad that
10:18:44 14 the Virginia matters, at least at this level, were taken care
10:18:46 15 of. I know they have some other issues that are still
10:18:48 16 outstanding, but we'll have to deal with those.

10:18:51 17 I also understand that we have a claimant in the
10:18:56 18 audience. Do you wish to say something, ma'am? Come forward.

10:19:02 19 One of the things I do, in having these open
10:19:08 20 court matters, is that I put all of this on my website, so that
10:19:14 21 all of the litigants, as well as their lawyers, know that they
10:19:17 22 have access to the Court.

10:19:19 23 So this is --

10:19:20 24 MS. FERCHAUD: Yes, Your Honor. My name is
10:19:21 25 Jodi Ferchaud. I spoke with you last month.

10:19:21 1 THE COURT: Right.

10:19:25 2 MS. FERCHAUD: Since that last meeting, I have met with
10:19:29 3 Phil Adams and also Tim Harris of Moss Construction, and we
10:19:34 4 have made progress, serious progress in remedying the problems.

10:19:40 5 We're not completely finished. Nothing is in
10:19:42 6 writing and signed off on, but we're continuing to work out the
10:19:46 7 details.

10:19:46 8 What I'm here for today is I'm here to plead with
10:19:49 9 the Court for lost rents or some sort of form of financial
10:19:54 10 relief. I've been here since December 15th. I haven't
10:19:59 11 received rents on the right side of the property since January
10:20:03 12 of 2014; and, the left side, the tenant -- one tenant moved
10:20:09 13 out, like right before the kickoff party.

10:20:12 14 I thought that I qualified for lost rents. I
10:20:16 15 filled out everything that I was supposed to fill out. Then, I
10:20:20 16 was told that I signed a release. I'm not exactly sure or I
10:20:25 17 wasn't familiar with the nuances of that settlement agreement,
10:20:29 18 but if I signed a release to negate what I thought I was
10:20:37 19 actually qualified for, it was my mistake.

10:20:41 20 So I'm asking the Court to consider that, you
10:20:44 21 know, I haven't received the rents.

10:20:47 22 I haven't been home -- I live in Hawaii. I
10:20:50 23 haven't been home, I haven't seen my daughter in four months.
10:20:53 24 I'm hoping that we can resolve all of the issues, but --

10:20:57 25 THE COURT: You're still in the discussion phase.

10:21:01 1 Mr. Balhoff, if you want to say anything about
10:21:05 2 this one. Are you all talking and working toward some
10:21:07 3 resolution?

10:21:07 4 I know he has his mediator hat on at this time.

10:21:09 5 MR. BALHOFF: Yes, Your Honor.

10:21:15 6 My name is Dan Balhoff. I'm the Court-appointed
10:21:22 7 mediator and also the Special Master. As Your Honor said, for
10:21:25 8 the time being I have my mediator hat on.

10:21:29 9 I've explained to Ms. Ferchaud that I'm trying to
10:21:32 10 mediate this matter for the time being. If it doesn't succeed,
10:21:35 11 I will put my Special Master hat on and make any decisions that
10:21:40 12 are called upon -- that I'm called upon to make.

10:21:43 13 The parties have been working together. I've
10:21:46 14 been speaking with the parties. I spoke to them, as a matter
10:21:50 15 of fact, outside the courtroom just now.

10:21:53 16 As I understand it, Ms. Ferchaud is asking for
10:21:56 17 something beyond what she is discussing with Moss. She's
10:22:00 18 asking for a remedy from the Court of some monetary figure. I
10:22:06 19 told her that, until called upon as Special Master, I'm in no
10:22:13 20 position to award her any money.

10:22:14 21 THE COURT: Yes. We have a process, ma'am, of doing
10:22:19 22 this. You make a claim, and the Special Master looks at it and
10:22:24 23 discusses it and then rules on it, and then it comes to me, but
10:22:27 24 we've got to go through the process.

10:22:29 25 But I'm glad that you're able, at least, to work

10:22:31 1 out some -- I understand, it's been reported to me that you all
10:22:36 2 have made progress with Moss.

10:22:36 3 MS. FERCHAUD: Yes, sir.

10:22:38 4 THE COURT: I appreciate Moss' work, and I appreciate
10:22:41 5 yours, too.

10:22:41 6 MS. FERCHAUD: Thank you.

10:22:41 7 THE COURT: Thank you very much for bringing it to my
10:22:54 8 attention.

10:22:54 9 Anything else from anyone?

10:23:01 10 MS. EIKHOFF: Yes, Your Honor.

10:23:03 11 THE COURT: Yes.

10:23:04 12 MS. EIKHOFF: Your Honor, on behalf of Taishan, I
10:23:12 13 wanted to seek clarification from the Court on a minute entry
10:23:18 14 that was entered for the April 7th discovery telephonic
10:23:25 15 conference that we had.

10:23:26 16 For about two weeks now, Your Honor, we have been
10:23:29 17 asking for -- for purposes of the damages discovery and getting
10:23:34 18 ready for the damages hearing, we have been asking for raw data
10:23:40 19 and information from BrownGreer and the Garretson Group, which
10:23:45 20 we believe are highly relevant to damages, that includes actual
10:23:49 21 remediation information from Moss & Associates, results of
10:23:56 22 inspections, including identification of which claimants had
10:23:59 23 Taishan drywall, supporting claim information for claimants
10:24:02 24 that are currently identified as being part of the class, and
10:24:05 25 amounts of compensation already received.

10:24:08 1 To be clear, we are not seeking any thoughts,
10:24:11 2 mental impressions, analysis, from any attorneys or from these
10:24:17 3 groups. We're really just seeking raw data.

10:24:20 4 We filed a Motion to Compel. We had a hearing on
10:24:22 5 that Motion to Compel. Your Honor held that that information
10:24:26 6 was discoverable for purposes of damages, but made a notation
10:24:32 7 to say that at this time that Knauf's proprietary information
10:24:38 8 was not discoverable.

10:24:40 9 We've reached out to Mr. Miller. Knauf did file
10:24:47 10 a paper after we had that conference, and we reviewed it. The
10:24:50 11 essence of the paper was that it's all proprietary, and
10:24:53 12 therefore Taishan should not be able to get any of it.

10:24:57 13 We have been trying to work this out with
10:25:00 14 Mr. Miller for the last several days. We have been in pretty
10:25:04 15 frequent communication. As it stands now, Your Honor, we're
10:25:11 16 almost there, but we have one hurdle that we haven't been able
10:25:14 17 to overcome, and that is a condition that Knauf has placed on
10:25:18 18 their consent to us getting that information.

10:25:22 19 We have already agreed that we will pay
10:25:24 20 BrownGreer's and Garretson Group's time and expense associated
10:25:30 21 with gathering this information and sending it to us. That is
10:25:32 22 not an issue.

10:25:33 23 Knauf has also said that they will refuse to
10:25:35 24 allow us to have any access to this raw data unless Taishan
10:25:40 25 agrees to pay BrownGreer's travel expenses, starting today,

10:25:46 1 related to them coming to the Court to give their presentation
10:25:50 2 to the Court about the status of the Knauf settlement.

10:25:56 3 That strikes us as completely unrelated and not
10:26:00 4 an issue that should be raised as an obstacle to us getting
10:26:05 5 data that every other party in this case has. From our
10:26:09 6 discussions with the PSC, we have been told that they are
10:26:12 7 working actively with BrownGreer to get these updated plaintiff
10:26:18 8 profile forms, to have that information aggregated and
10:26:21 9 presented to them. We're the only ones that are locked out of
10:26:25 10 getting this raw data that we need in order to analyze the
10:26:30 11 damages and to prepare our defenses on damages.

10:26:34 12 THE COURT: Okay. Just to put this matter in
10:26:39 13 perspective, there was a motion made. As I try to do, as soon
10:26:44 14 as a motion is made, I try to deal with it immediately. So I
10:26:46 15 got counsel on the line for the parties that seemed to be
10:26:51 16 involved in this case.

10:26:52 17 Now, oftentimes, in cases of this sort, I just
10:26:55 18 have two sides, the plaintiff and one defendant. In this case,
10:27:00 19 the difficulty is I have 1,000 defendants in this case, in
10:27:05 20 addition to the regular plaintiffs.

10:27:06 21 So when I get people on the line, it's hard for
10:27:09 22 me to get 1,000 defendants. Many of them have absolutely
10:27:13 23 nothing to do with this issue. They are installers, they are
10:27:17 24 mom and pop outfits, things of that sort. They are not even
10:27:20 25 available to talk to the Court. So -- and many of them don't

10:27:24 1 have attorneys even.

10:27:25 2 So I have to make a judgment and call the
10:27:29 3 people -- I always get two sides to it. One makes a motion,
10:27:32 4 the other responds to it. Whoever responds in writing or moves
10:27:37 5 in writing, those are the individuals that I generally get in
10:27:41 6 front of me or on the phone, they talk to me, and I hear from
10:27:45 7 each of them, I have a court reporter there, and I rule
10:27:48 8 immediately. That's what I did in this situation.

10:27:50 9 But during the argument, it was mentioned to me
10:27:54 10 that Knauf may have some interest in this. Knauf wasn't on the
10:27:57 11 phone. So I said, if Knauf has an interest in this, I'm not
10:28:02 12 going to make any decision until I hear from Knauf, to hear
10:28:06 13 what their side of the story is. So anything that deals with
10:28:12 14 Knauf, I'm going to except from the order. That's what we're
10:28:17 15 here today for.

10:28:20 16 MR. MILLER: Thank you, Judge. Kerry Miller for Knauf.

10:28:22 17 As you pointed out, we actually put in an
10:28:23 18 opposition, I think, as the phone conference was occurring that
10:28:26 19 afternoon. I think it was last week on Monday, maybe.

10:28:29 20 Your Honor, to clarify Knauf's position, first of
10:28:32 21 all, we don't have any problem at all with Garretson providing
10:28:38 22 Taishan and BNBM and CNBM data for Virginia.

10:28:44 23 The reason for that, Your Honor, is because Knauf
10:28:45 24 wasn't involved in Virginia. We didn't pay for Garretson, we
10:28:50 25 didn't have any homes. So if Taishan and the plaintiffs can

10:28:53 1 work out an arrangement with Garretson, I don't have any issue
10:28:56 2 with that at all.

10:28:57 3 Secondly, Your Honor, with respect to raw data,
10:29:02 4 which, in my mind, is Taishan plaintiff profile forms that were
10:29:07 5 collected in this MDL, BrownGreer became the central
10:29:12 6 clearinghouse for that collection. I don't have any problem,
10:29:14 7 as long as Taishan pays for it, with BrownGreer sending Taishan
10:29:20 8 all of the profile forms, the actual pieces of paper. I think
10:29:23 9 we covered that last time. No problem with that.

10:29:24 10 Third, I heard Mr. Herman in chambers mention
10:29:28 11 that total square foot data of Taishan claimants had been
10:29:33 12 provided to Taishan. Again, no problem with that at all.

10:29:38 13 Here are my issues, Your Honor, is when it comes
10:29:42 14 down to BrownGreer, as the administrator of the Knauf
10:29:47 15 settlement and of the settlements that are related to Knauf,
10:29:50 16 the Banner, the InEx and the Global builder and installer
10:29:56 17 settlement -- Your Honor is very familiar as to how they all
10:29:58 18 work together -- the agreement was, with respect to all those
10:30:01 19 settlements -- and I think you asked a question when Jake Woody
10:30:05 20 was giving his presentation as to the relationship -- because
10:30:08 21 Knauf receives assignments from homeowners, we have rights to
10:30:11 22 certain of the GBI -- Global, Banner and InEx claims.

10:30:16 23 As part of the negotiation of all those
10:30:18 24 settlements, with all the lawyers who were involved in all the
10:30:21 25 settlements with the PSC, Knauf agreed to pay all the

10:30:26 1 administrative costs of all of those settlements,
10:30:29 2 administrative costs being BrownGreer in this particular
10:30:32 3 instance.

10:30:33 4 So we paid for BrownGreer not only to administer
10:30:36 5 the remediation program, which is more specific to Knauf, but
10:30:42 6 all of the payouts from Banner, from InEx, and from the
10:30:46 7 builders and installers that participated in the settlements.
10:30:51 8 We paid for everything, including the payments to homeowners
10:30:53 9 who made Banner claims and InEx claims and Globals claims who
10:30:58 10 have no Knauf, who have Taishan. We paid for BrownGreer to cut
10:31:00 11 those checks and process those claims, even though we have no
10:31:04 12 role in those claims at all. These are participants in GBI who
10:31:08 13 have Taishan.

10:31:09 14 Certainly Knauf is reviewing and analyzing its
10:31:12 15 own claim against Taishan and BNBK and CNBK. One portion of
10:31:18 16 that claim would be reimbursement of what we've spent, what
10:31:21 17 we've incurred in connection with the administration of
10:31:23 18 Taishan-related claims and damages.

10:31:26 19 It would have been terrific if Taishan joined us
10:31:29 20 back in 2010. We could have worked this out. We'd pay for the
10:31:33 21 Knauf share, they'd pay for Taishan share. It would have been
10:31:36 22 easy, but it didn't happen that way.

10:31:39 23 So where I have a problem is when Taishan talks
10:31:41 24 about raw data that BrownGreer possesses, and they spoke
10:31:48 25 specifically about remediation data, they spoke specifically

10:31:50 1 about inspections, the remediation data starts with Moss doing
10:31:54 2 an estimate. We pay for Moss to do the estimate. Nobody else
10:31:57 3 pays for Moss to do the estimate.

10:32:00 4 The inspections, there are separate inspection
10:32:02 5 companies that go out and inspect the homes to see what kind of
10:32:05 6 drywall they have in it after they provide qualifying material
10:32:09 7 to Mr. Levin. We pay the independent inspectors. We pay the
10:32:14 8 independent inspectors regardless of whether or not it's a
10:32:16 9 Taishan home or a Knauf home or a mixed home. We pay for that.

10:32:21 10 Opposing counsel made a reference to the other
10:32:23 11 side has the information. Well, there is a reason why the
10:32:26 12 other side has the information. We have a contract with the
10:32:28 13 other side to share that information with them.

10:32:32 14 Taishan doesn't have a contract with me. The
10:32:35 15 only reason the plaintiffs have it is because of the settlement
10:32:38 16 agreement, the contractual relationship. The negotiations that
10:32:42 17 Knauf had with them is part of a very complicated negotiation,
10:32:47 18 where there was give and take on both sides.

10:32:49 19 The proprietary argument that I have, Your Honor,
10:32:53 20 is when you get into -- let me say what else that I'm --
10:32:59 21 BrownGreer can run summary reports on averages, even on the
10:33:04 22 Knauf side. What's the average size of a Knauf home that's
10:33:08 23 been remediated, what's the average cost, what are the averages
10:33:12 24 in Florida, what are the averages in Mississippi, what are the
10:33:15 25 averages in Louisiana?

10:33:16 1 I don't have a problem with BrownGreer running
10:33:20 2 that report and giving it to Taishan, if Taishan pays for it,
10:33:24 3 which would give them the useful data I think they are looking
10:33:27 4 for.

10:33:27 5 Where I have a problem, Your Honor, is, is when
10:33:29 6 you look at the 4,000 or so Knauf homes that have been settled
10:33:33 7 in the BrownGreer database, what they told me they wanted when
10:33:37 8 they explained what raw or empirical data meant, they want
10:33:42 9 every piece of information, line by line, homeowner by
10:33:46 10 homeowner, on all those claims.

10:33:48 11 Your Honor, it's inaccurate to say that even the
10:33:52 12 plaintiffs have that information, because the way the
10:33:54 13 BrownGreer portal is set up is one plaintiff lawyer can only
10:33:58 14 look at his clients' claims. So, Mr. Davis can't look at
10:34:02 15 Mr. Seeger's clients, and Mr. Seeger can't look at Mr. Davis'
10:34:06 16 clients, at that level of detail, because -- Your Honor has
10:34:11 17 worked on these cases for a long time -- what BrownGreer has is
10:34:16 18 it has every piece of information about that homeowner's claim,
10:34:20 19 how much was paid to do this, were there any change orders, how
10:34:24 20 much did they get for rent and relocation, how long did it
10:34:28 21 take, you know, so on and so forth.

10:34:30 22 So what we didn't want to have happen is we have
10:34:32 23 one guy on the street, hey, so how much did your house cost?
10:34:36 24 Well, mine cost \$132,000. The guy down the street, well, it
10:34:41 25 was \$104,000. So that's why only the plaintiff lawyer himself,

10:34:46 1 the way BrownGreer has it set up, can look at the portal of
10:34:48 2 information.

10:34:49 3 What Taishan has specified it wants is it wants
10:34:52 4 the keys to everything. It wants a line item with 20 or 30
10:34:57 5 fields of data, by address and by home. That's all been paid
10:35:01 6 for by Knauf, and it's all been handled as proprietary
10:35:04 7 information between the parties to that contract, that
10:35:06 8 individual release, Knauf and that homeowner, and Knauf and
10:35:10 9 that homeowner's counsel.

10:35:12 10 So, like I say, if they want summary information,
10:35:16 11 that's fine, if they pay for it; but, to get the information,
10:35:18 12 line by line, and make that part of the public record, part of
10:35:22 13 what they are doing -- the PSC has made some relevancy
10:35:26 14 objections, I don't think it's relevant either because it's a
10:35:29 15 different set of circumstances -- that's what my -- that's what
10:35:30 16 I mean by proprietary, not my mental impressions, but the
10:35:34 17 consultants that we've paid for, pursuant to a contract with
10:35:37 18 the PSC, that built this machine on a line-by-line basis,
10:35:41 19 that's my objection.

10:35:42 20 THE COURT: I understand. I understand the issues.

10:35:46 21 With regard to the Taishan homes, let's provide
10:35:53 22 the Taishan-only homes information. That's relevant to them.

10:35:56 23 With regard to the -- and they'll pay for it.

10:36:02 24 With regard to the mixed homes or the -- I'm
10:36:07 25 mainly concerned about the Knauf homes -- give them the summary

10:36:12 1 information. Let them pay for that. Let's get that
10:36:16 2 information first, and see where you are with it.

10:36:19 3 I'll listen to you. We're talking about amounts,
10:36:21 4 we're talking about money, and I can deal with money.

10:36:26 5 Also, let's get together -- do you know the total
10:36:32 6 cost of all of that?

10:36:34 7 MR. MILLER: Yeah, I think that BrownGreer can tally up
10:36:36 8 what that total cost is.

10:36:37 9 THE COURT: All right. Well, we'll get together that,
10:36:38 10 and I'll decide who pays it. You may well have to pay it. If
10:36:42 11 you want it, you may have to pay it. You probably ought to
10:36:46 12 know whether it's \$10 or \$10 million before you make that
10:36:48 13 decision.

10:36:48 14 MR. MILLER: The total cost of what Knauf has paid
10:36:49 15 BrownGreer and the others, Your Honor?

10:36:49 16 THE COURT: Yes.

10:36:51 17 MR. MILLER: Yes. I mean, that's what the issue is,
10:36:52 18 and that's why, at one point, I made the request, really before
10:36:54 19 I understood what the data request was, was for these services,
10:36:59 20 Knauf and BrownGreer entered into a fixed rate contract for
10:37:03 21 fees. So it's set. BrownGreer has reached that amount of
10:37:08 22 work. It's \$2.5 million, Your Honor, is what we've paid just
10:37:12 23 for BrownGreer, but then they are talking about Moss, then they
10:37:15 24 are talking about the inspection companies, so that's on top of
10:37:18 25 that.

10:37:20 1 The ombudsman, the *pro se* cure, I mean, you know,
10:37:22 2 the list goes on and on and on and on and on. All that data is
10:37:26 3 captured by BrownGreer because they are the central
10:37:29 4 clearinghouse. So there's more than that --

10:37:29 5 THE COURT: Well, some of it may not be necessary. I
10:37:32 6 mean, it doesn't seem to me to be necessary. If you've got the
10:37:35 7 square footage, if you've got the general average, if you've
10:37:39 8 got all of the Taishan homes -- you know, if you need any
10:37:45 9 additional information after you get all of that, I'll talk
10:37:51 10 with you about it, and I'll see who bears the cost for that.

10:37:57 11 MR. MILLER: Thank you, Judge.

10:37:58 12 THE COURT: All right. Thank you both.

10:37:58 13 Anything else?

10:37:59 14 All right. Folks, thank you very much. I'll see
10:38:01 15 you next time.

10:38:03 16 THE DEPUTY CLERK: All rise.

17 (WHEREUPON, at 1:27 p.m., the hearing was concluded.)

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REPORTER'S CERTIFICATE

I, Cathy Pepper, Certified Realtime Reporter, Registered Merit Reporter, Certified Court Reporter in and for the State of Louisiana, Official Court Reporter for the 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/Cathy Pepper

Cathy Pepper, CRR, RMR, CCR
Certified Realtime Reporter
Registered Merit Reporter
Official Court Reporter
United States District Court
Cathy_Pepper@laed.uscourts.gov

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