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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE MANUFACTURED	*	Docket 09-MD-2047-L
DRYWALL PRODUCTS	*	
LIABILITY LITIGATION	*	
	*	
This Document Relates to:	*	March 16, 2011
	*	
Vickers, et al v. Knauf Gips KG,	*	
et al, 09-4117	*	
	*	9:30 a.m.
Payton, et al v. Knauf Gips KG,	*	
et al, 09-7628	*	
	*	
Silva, et al v. Knauf Gips KG,	*	New Orleans, Louisiana
et al, 09-8034	*	
* * * * *		

ORAL ARGUMENT BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For PSC:	Ervin Gonzalez, Esq Arnold Levin, Esq. Fred Longer, Esq.
For Home Builders:	Neal Sivyer, Esq.
For Banner Supply:	Nick Panayotopoulos, Esq Mike Sexton Esq.
For InEx:	Benjamin Grau, Esq.
For KPT:	Paul Thibodeaux, Esq.
For North River:	Kevin Risley, Esq.

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6 produced by computer.

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PROCEEDINGS

(March 16, 2011)

THE DEPUTY CLERK: Everyone rise.

THE COURT: Be seated, please. Let's call the next case.

THE DEPUTY CLERK: MDL 2047, In Re: Chinese Drywall.

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

MR. LONGER: Good morning, Your Honor. Fred Longer on behalf of the PSC.

MR. GRAU: Good morning, Your Honor. Benjamin Grau on behalf of Interior Exterior.

MR. SEXTON: Good morning, Your Honor. Mike Sexton for Banner Supply.

MR. SIVYER: Good morning, Your Honor. Neal Sivyer representing the intervening home builders.

MR. THIBODEAUX: Good morning, Your Honor. Paul Thibodeaux for KPT.

THE COURT: We have a number of people on the phone. This is really not a motion as much as it is just a discussion on the various issues presenting itself, the question of timing primarily. The plaintiff committee wants to try the case in June and the defendants want to do it sometime in August.

Where are we with that, Fred?

MR. LONGER: Your Honor, if you would like me to

1 speak first, I'm happy to do that. We have an InEx trial now
2 scheduled for July 18, Your Honor. We have had these motions
3 for class certification of record basically since September of
4 last year.

5 **THE COURT:** How do you see them interfacing? Do you
6 need to do one before the other or does it matter?

7 **MR. LONGER:** Well, Rule 23 suggests that -- I don't
8 think it suggests. I think Rule 23 says that class
9 certification is to be done as early as practicable given the
10 Court's schedule.

11 Here you have a trial. It involves class
12 representatives and these are class complaints, so it's our
13 position that the class certification determination must
14 precede the trial. If the Court certifies the class, then we
15 are going to have a class trial, and that has to be determined
16 first and foremost. So our position, Your Honor, is that the
17 class certification hearing has to precede the InEx trial. The
18 parties have agreed to the trial date. In February, the
19 parties agreed to an end of June class certification hearing.

20 We have had some substitutions of plaintiffs. I
21 agree that the defendants have not been -- well, that we have
22 not done a perfect job apprising them of who they are, but
23 certainly they have known of these plaintiffs really since the
24 beginning of the litigation. They have had PPFs on these
25 plaintiffs since the end of February, beginning of March. They

1 have had answers to interrogatories and requests for production
2 of documents. They have had all the information that they need
3 to at least understand the issues on motions that have been
4 pending now for six months.

5 So our thinking is that there's really nothing
6 new under the sun here. There are new plaintiffs. But a home
7 in our estimation, for purposes of this motion, is basically a
8 home. The drywall is there. The impact of that drywall and
9 the legal issues surrounding the impact of that drywall is
10 going to be the same home by home. The product was uniform.
11 The effect is uniform.

12 So our position is that they have known about
13 this. Since we have a trial date and we have had since
14 February -- and actually going back to January 12 when we all
15 submitted to Your Honor an agreed to scheduling order, we have
16 all had June in mind for a class certification hearing. We
17 just think we ought to keep going forward, have that hearing in
18 June, and then have the trial as scheduled.

19 **THE COURT:** Okay. Let me hear from the other side.
20 Anybody? What has changed since we discussed it and everybody
21 agreed on June?

22 **MR. GRAU:** Benjamin Grau, G-R-A-U. There have been
23 no less than eight changes to the class representatives since
24 we last discussed this. Additionally, we have propounded
25 extensive discovery. As late as this morning, we are just

1 receiving responses to the critical liability discovery as to
2 Interior Exterior.

3 Addressing the issue of the trial itself, the
4 trial that's scheduled in July is a bellwether trial. It is
5 not a class trial. It never has been considered a class trial.
6 The plaintiffs handpicked these class representatives and
7 picked the trial plaintiffs. That wasn't our doing. They
8 chose to pick the same plaintiffs. If there's an issue with
9 which goes first, they have created that issue not the
10 defendants. We would submit, Your Honor, that there's simply
11 not enough time to complete the discovery that's necessary for
12 the class certification hearing for a June trial at this point.

13 **THE COURT:** What would you do? What do you need to
14 do from a discovery standpoint?

15 **MR. GRAU:** Well, from a discovery standpoint, we are
16 just completing the inspections of the Florida homes this week.
17 Like I say, Your Honor, we just received written discovery
18 responses this morning and obviously need to evaluate those to
19 determine whether or not they are complete and satisfactory.

20 We still have to take class representative
21 depositions. At this point there are 9 class homes between
22 Florida and Louisiana, 15 individual representatives to be
23 deposed. We then have to depose fact witnesses. There's
24 obviously a dispute between that, but it will be somewhere
25 between 12 and 16 fact witnesses. From our perspective, we

1 need to complete inspections of those fact witness homes first
2 and then depositions of those fact witnesses themselves. The
3 plaintiffs have designated no less than 39 or 49 fact witnesses
4 they may call at trial. We obviously are entitled to take
5 depositions of those witnesses and --

6 **THE COURT:** Has any of this been done?

7 **MR. GRAU:** No, Your Honor. Literally, the only thing
8 that's been completed at this point are inspections of
9 Louisiana homes, partial inspections of Florida homes to be
10 completed at the end of this week, and exchange of written
11 discovery responses that were just received this morning to
12 some of those.

13 **THE COURT:** I thought we had set these a while back
14 and I thought both sides were working towards this.

15 **MR. GRAU:** We are working, Your Honor, but the class
16 representatives keep changing. It does matter because the
17 discovery responses are just now coming in. We can't schedule
18 class representative inspections until we know who those class
19 representatives are, which is the whole reason the Florida
20 inspections couldn't take place until this week.

21 **THE COURT:** Why do you have so many class reps?

22 **MR. LONGER:** If I may, Your Honor. I understand what
23 counsel opposite is saying, but I don't necessarily agree at
24 all with what he is saying. In the InEx trial, there are only
25 four class representative plaintiffs. In the Banner trial,

1 there are only two class representative plaintiffs. In the
2 Knauf class, the same four Louisiana class representative
3 plaintiffs represent the Louisiana class there, and there are
4 four class representative plaintiffs from Florida in the Banner
5 trial.

6 Now, from InEx's perspective, they are saying
7 that there's all these fact witnesses, but the reality is that
8 most of them are listed as Knauf depositions. Those
9 depositions have been taken. They're in the can. They're on
10 videotape. By the way, Your Honor, we are talking about a
11 class certification hearing. Our intention is to put this --

12 **THE COURT:** Let me just interrupt you. What I was
13 thinking about from a class certification hearing, I thought 90
14 if not 100 percent of this would be on paper; maybe not
15 everything, but most of it would be on paper. I thought that
16 all of the paper had already been taken like the depositions.
17 I didn't see them putting on any additional witnesses other
18 than the witnesses that they had taken, and maybe there's some
19 other witnesses, but primarily introducing depositions that had
20 already been taken. Am I missing that?

21 **MR. LONGER:** That's where I was going, Your Honor.
22 We intended to produce all of our record basically on paper.
23 It will be done by then. The only depositions that really need
24 to be taken are the class representative plaintiffs. We have
25 been asking for weeks for the defendants to schedule them.

1 They have been postponing it.

2 We have answered the discovery as late as
3 February, the beginning of March. The InEx counsel here has
4 claimed that there were deficiencies. We provided what they
5 considered to be deficiencies, which were essentially, "Are
6 there any other documents that you have?" and we have told them
7 no. They needed to hear that. So that's what we provided to
8 them as recently as yesterday, and today they're apprised of
9 that. There's nothing new here.

10 As far as the class certification hearing is
11 concerned, our intention was to put in a paper record as
12 Your Honor was alluding to. We have two experts for class
13 certification. If the depositions go well, they will probably
14 come in on a paper record. If we think that it's appropriate
15 to bring them here live, we will do that. But it's going to be
16 a paper record and oral argument.

17 **MR. GRAU:** Your Honor, they have identified, as I
18 said, over 40 fact witnesses, which include the class
19 representatives. Of those, it's my appreciation that there's
20 only been 14 depositions taken. So that leaves 26 witnesses
21 that they have identified whose depositions have never been
22 taken not to mention the fact witnesses that we'll want to
23 identify as well.

24 Addressing the issue of uniformity, just looking
25 at the class representative homes that they have selected,

1 these homes are not uniform. There's varying degrees of
2 corrosion found in the homes. There's varying degrees of
3 reactivity in the drywall being found in the homes. There's a
4 varying amount of imported drywall in the homes.

5 Certainly there will be even more divergence
6 when we start looking at other class member homes. There are
7 homes out there that have one or two sheets of drywall who are
8 part of this putative class. There are homes that have drywall
9 manufactured by Taishan as opposed to Knauf that will be part
10 of the Interior Exterior class. So all of those issues have to
11 be looked at and all of those issues have been presented to the
12 Court for class certification.

13 As Your Honor saw in our briefing, we
14 extensively outlined the case law and sort of legal framework
15 for class certification. As Your Honor is well aware, the
16 issue is not simply looking at the pleadings as they are
17 presented by the plaintiffs but piercing those pleadings and
18 looking at the facts and looking at how the trial will proceed,
19 what evidence will be presented to the Court not just in terms
20 of liability but in terms of damages as well, in terms of how
21 do you look at and determine property damage in these
22 homes: does it vary between homes; does it vary between homes
23 that have 95 percent imported drywall and a home that may only
24 have two sheets of drywall; does it vary between a home that
25 has never been remediated and a home that was remediated over a

1 year ago; does the diminution of value aspect of the claims
2 vary by neighborhood from neighborhood, by state from state.

3 All of those issues need to be presented to the
4 Court, and all of those issues require discovery. Interior
5 Exterior and the other defendants would certainly be severely
6 prejudiced if we are railroad into a 20-day discovery period
7 or a 30-day discovery period at this point to complete all of
8 that necessary discovery which is created by the fact that the
9 class representatives have changed numerous times since we
10 first discussed the issue and the fact that plaintiffs
11 themselves have designated over 40 fact witnesses to be called.

12 **THE COURT:** You take the position that you need 30
13 days to do that?

14 **MR. GRAU:** We take the position that we need more
15 than 30 days to do it. They are giving us 30 days under their
16 proposed schedule to complete --

17 **THE COURT:** Your suggestion is instead of doing it in
18 June, you do it in August, so that's what? 45 days.

19 **MR. GRAU:** Correct. 50, 60 extra days to complete
20 that, yes, Your Honor, which we still think is an ambitious
21 schedule.

22 One last thing I should raise. I know the home
23 builder representative is here. There is a motion to intervene
24 in the case by the home builders, which certainly we'll submit
25 briefing on that. But to the extent that that would be

1 allowed, any schedule we discuss today would be overly
2 ambitious I would think.

3 **MR. SIVYER:** Neal Sivyer, S-I-V-Y-E-R. Your Honor,
4 we do not have any role in the InEx trial whatsoever. We are
5 participating in the Banner intervention. By statute, you may
6 recall that every single home that we fix we have to give
7 notice to Banner. In addition to that, we did profile forms.
8 In addition to that, the two class representatives, Lennar and
9 Taylor, have months ago provided detailed information on every
10 single home that was repaired, square footage, price,
11 inspection reports, photos, answered questions for weeks. Our
12 class representatives are available any time.

13 There are other home builders that have
14 intervened for the limited purpose of settlement negotiations,
15 as I understand it. But as far as the two class reps, we
16 couldn't be farther ahead. As a matter of fact, I think it
17 actually expedites things because we now have a relatively
18 large class of completed homes where the Court can look at the
19 price per square foot and the remediation protocol for a large
20 number and see that they are very similar.

21 **THE COURT:** So you're in favor of keeping the same
22 trials?

23 **MR. SIVYER:** As quickly as possible, Your Honor. I
24 don't think we are going to slow that down.

25 **MR. THIBODEAUX:** Paul Thibodeaux for KPT. We agree

1 with InEx's presentation as far as how the scheduling order
2 needs to go and when the class certification hearing date
3 should be, which is in the August time period. I think a
4 critical issue is what Mr. Longer referred to as this
5 uniformity issue. That's certainly going to be what the
6 plaintiffs are going to claim as far as class certification
7 goes, and that's specifically what the defense will show as to
8 why the plaintiffs are not entitled to certification.

9 This really goes down to the putative class
10 member fact witness inspections, which the plaintiffs in their
11 scheduling order do not provide for and say we are not entitled
12 to. Those are critical to the defendants' defense of the class
13 certification issues.

14 If you look at the scheduling order proposed by
15 plaintiffs, it establishes April 1 as the date for defendants
16 to select fact witnesses, and then discovery of fact witnesses
17 and class reps must be done by April 27. If you back out the
18 weekends, that leaves approximately 20 depositions, I believe, to do
19 in 18 days and does not even account for the inspections that
20 need to be done of those fact witnesses both in Florida and
21 Louisiana. I think that just highlights how unreasonable the
22 scheduling order is and how it's trying to be shoehorned into a
23 time period because of their own juggling act with respect to
24 the class reps.

25 Also, Your Honor, one separate point. We just

1 learned this morning that our co-counsel, Mr. Steve Glickstein
2 with Kaye Scholer, is out of the country from August 5 to
3 August 20, so we would like to raise that and let the Court
4 know that we would appreciate that be considered with respect
5 to class certification hearing dates.

6 **MR. RISLEY:** Your Honor, Kevin Risley for North River
7 Insurance Company, one of the excess carriers for InEx. Maybe
8 I'm missing something, but I was just told early this morning
9 that my client did not need to be involved in the bellwether
10 trial because we weren't going to get to those issues. Now I'm
11 hearing we have to have the class certification hearing in June
12 to make that bellwether trial the class trial. So I think
13 there's some inconsistency going on here.

14 I think we can certainly have the bellwether
15 trial in July without having the class certification hearing.
16 A bellwether trial is not supposed to be a class trial. They
17 should be different things, and they can go on different
18 schedules.

19 **MR. SEXTON:** Again, Your Honor, Mike Sexton for
20 Banner Supply. I, of course, concur with the arguments
21 presented by InEx's and Knauf's counsel. Just a few additional
22 points with respect to Banner.

23 First off, to the extent that the Silva trial
24 needs to go forward in July and the Court concludes that that's
25 a trial on the merits as opposed to a bellwether trial, I note

1 that that doesn't affect the class certification proceedings
2 vis-à-vis Banner. There's no reason that Banner proceedings
3 need to be on precisely the same schedule as InEx or Knauf or
4 anybody else. There may be certainly conveniences associated
5 with doing them three days in a row. But if there are unique
6 procedural hurdles affecting one party, that does not
7 necessarily affect all.

8 Second, Your Honor, I would like to elaborate
9 just for a moment on why it's important that only on March 10,
10 with a substituted motion for class certification against
11 Banner, that they finally settled on who are the class
12 representatives going to be. Why is that important? I think
13 it relates to the fundamental misunderstanding articulated by
14 Mr. Longer which is a home is just a home.

15 Obviously, Banner believes that they are all
16 snowflakes, each being unique. How do we prove that? We have
17 class representatives. We see now that the class
18 representatives that they have finally settled upon are a home
19 in Boynton Beach and a home in Cutler Bay, Florida. We would
20 like the opportunity to say, okay, there are approximately 350
21 other named class representatives -- named class
22 representatives -- in Payton. These are not passive. These
23 are not putative class members. These are named class
24 representatives. We believe we have the right to depose and
25 fully explore at least six of them to show how each of those

1 homes is different.

2 One of the problems preventing us from moving
3 forward in a meaningful way is that the plaintiffs' steering
4 committee has failed to provide complete responses to over
5 hundreds -- hundreds -- of plaintiff profile forms, which is a
6 way by which we could select what other class representatives
7 we want to prove our snowflake idea.

8 Further, the plaintiffs' steering committee has
9 refused in its entirety to respond to discovery related to the
10 nonmoving class representatives. While it is certainly
11 convenient to the PSC to cherrypick one or two or five or nine
12 moving class representatives, the fact is that there are
13 hundreds. Under the Rules of Civil Procedure, we believe we
14 have every right to depose every one of them, but we don't want
15 to burden them. We think six will do.

16 Where that goes from there is after we look at
17 the class representative, we say we have a comparative fault
18 defense. Under Florida law, Section 758.81, we get to compare
19 our fault to the others. We believe that that individualized
20 analysis will also preclude class certification.

21 So we would want to know who the home builder
22 is, the installer, the realtor. These are all things that we
23 need to know and all of which are impossible until the PSC
24 gives us information relating to these other people.

25 And then further, the home builder stood up on a

1 motion for intervention. To the extent it was related to the
2 briefing schedule, I'm not sure how it added a lot. To the
3 extent it's on the issue of a motion for intervention, it's
4 premature to discuss. It was just filed in recent days. We
5 would like an opportunity to consult with clients and brief on
6 the issue before it's heard substantively, Your Honor.

7 **MR. GRAU:** Your Honor, I would point out on the
8 intervention that the Mitchell Company has intervened in the
9 Silva action itself, so there are claims as it relates to
10 Interior Exterior.

11 **MR. LONGER:** Your Honor, I have been outranked.

12 **THE COURT:** Okay. A substitute.

13 **MR. LEVIN:** It's not a class representative this time
14 because they are not in the pilot program. We all know why the
15 class representatives change.

16 Judge, I'm old enough to remember *Eisen v.*
17 *Carlisle* where you did class certification on pleadings. I
18 know we have come some way since then. If the snowflake theory
19 works, I would be out of business. Because not every box is a
20 box, that was the argument in *Corrugated*. Not every home is
21 the same home, that's the argument here. We are not dealing
22 with snowflakes.

23 They talk about every plaintiff being a class
24 representative. Everybody knows why that was done in our
25 pleadings. That was to instill CAFA jurisdiction on this Court

1 so this MDL could deal with the entire program.

2 They talk about taking all these depositions.
3 They agreed to take up to 10 class members' depositions,
4 including class representatives, in a stipulation before this
5 Court.

6 I have a suggestion because I have heard these
7 arguments before. Why don't they tell us what the arguments
8 are with regard to class and their position that the class
9 should not be certified, and we'll say we can handle that one.
10 We can handle that one. Some homes have eight rooms. Some
11 homes have six rooms. I can handle that. Some rooms have KPT
12 in the bedrooms. Some have KPT in the kitchen. I can handle
13 that.

14 Let them give us a list rather than taking
15 depositions, InEx running to Florida to inspect Banner homes.
16 It's a feeding frenzy, Your Honor. The only way it is going to
17 stop is to hold this hearing and hold us to the fire and let us
18 do the discovery. They are big firms. They have a lot of
19 lawyers. We will man the discovery, and let's get it over
20 with.

21 **MS. GONZALEZ:** Thank you, Your Honor. Ervin
22 Gonzalez. I'm going to be addressing some of the specific
23 issue about Florida and the class runner.

24 Comparative fault was discussed. Comparative
25 fault is the doctrine that came about as a result of *Fabre v.*

1 *Marin*, which allows nonparties as well as parties to be
2 considered by the fact finder in determining percentages of
3 fault. It's been codified under 768.81, Florida statutes, and
4 there are exceptions to it involving pollution concerns to when
5 several liability does apply notwithstanding pure comparative
6 fault.

7 All these issues are really trial issues. It
8 has nothing to do with whether the case should be certified.
9 Class action certification deals with very simple issues,
10 common issues of fact, that's it; do the common issues of fact
11 predominate over any individual issue, and that's all we are
12 going to be looking at.

13 So the common issues of fact that we have in
14 Florida, Louisiana, and anywhere else that's affected by
15 Chinese drywall is this:

16 Did the defendants provide a product that was
17 defective? Yes or no. We can answer that on a common basis,
18 on a class-wide basis without much work whatsoever.

19 Did it cause harm to the homes? The answer to
20 that is yes. We can do that on a class-wide basis. It either
21 did or it didn't. Typicality is the legal process that's going
22 to be used to determine these common questions of fact.

23 Do the same causes of action apply across the
24 board for all states involved? The answer is yes. Numerosity
25 has been met. We have thousands of homes that are impacted.

1 We have adequate counsel. We have adequate representatives
2 without any conflicts of interest in these issues.

3 The core issue here that predominates is the
4 issue of the defect that's involved. That's what the Court is
5 going to be looking at, and the Court can also decide issues of
6 preclusion. We are going to have mini trials on damages.
7 Comparative fault issues will be handled in the trial, not
8 class certification, but the Court can enter issues of
9 preclusion under 23(d) that allows specific factual findings to
10 then be used on a res judicata or collateral estoppel basis to
11 other matters that may flow in the trial. So we can certify
12 particular fault issues clearly on the class certification
13 issue. We can have specific issues by issue preclusion that
14 will apply to the remaining matters.

15 Class certification in this case is relatively
16 simple. Defendants are trying to make it sound like it would
17 be easier to land on Mars. That's not the case. We are simply
18 trying to certify those common questions, as allowed by the
19 rules, that will allow all the parties to move forward.
20 Delaying this further will hurt the plaintiffs, will actually
21 hurt the defendants -- contrary to what they are saying -- and
22 moving forward is in everyone's best interest. Thank you,
23 Your Honor.

24 **THE COURT:** Thank you.

25 **MR. SEXTON:** Mike Sexton for Banner Supply. First,

1 Your Honor, it was correctly pointed out by PSC counsel that
2 Rule 23 requires the Court to determine class certification as
3 soon as practicable. Here these actions were filed in 2009.
4 The PSC waited until September 21, 2010, to file a motion.
5 That was not as soon as practicable. Then the PSC waited six
6 months to decide who the class representatives would be. That
7 is not as soon as practicable.

8 To convey a sense of an emergency that was
9 created by the PSC is a false sense. Your Honor, multiple PSC
10 counsel have now said that this is a simple issue. It's not
11 rocket science. It's not putting a man on the moon. This
12 initial idea was conveyed on page 6 of their brief when they
13 said it is a mere procedural motion, which is much like saying
14 that the Saints winning the Super Bowl is a mere sporting
15 event. Class certification is the end of the analysis in this
16 case.

17 Given the three defendants and the damage
18 calculations offered in plaintiffs' motion for class
19 certification, we are talking about hundreds of millions of
20 dollars and requires the most careful, thoughtful analysis that
21 can be given to it, not a 30-day rush job offered here in the
22 hopes that something will be overlooked.

23 Further, Your Honor, with regard to *Fabre*, I
24 argued the issue against Mr. Gonzalez down in Florida, and
25 Judge Farina ruled that comparative fault principles do apply

1 notwithstanding the pollution exclusion.

2 Further, Mr. Gonzalez suggested that damages
3 will be spun off in mini trials. I appreciate that argument,
4 but it's inconsistent with their briefing. On page 21 of their
5 motion for class certification, they offer a formulaic damages
6 analysis inconsistent with our snowflake analysis.

7 The PSC wanted some sort of a preview of what
8 our argument is going to be. I think I provided it. We say
9 each of these homes requires individualized analysis. They are
10 not negative value suits. We are not hiding the ball. There
11 is no reason to rush through this after the PSC waited a year
12 and a half to get this thing going.

13 **THE COURT:** When is the trial before Judge Farina?
14 He and I have talked about it, but I don't remember the date.
15 I think his was in October or --

16 **MR. SEXTON:** The trial last year, Your Honor?

17 **THE COURT:** No, coming up.

18 **MR. SEXTON:** The next trial, I believe, is
19 November 2, 2011.

20 **THE COURT:** Okay.

21 **MR. SEXTON:** I apologize, Your Honor. My colleague
22 pointed out just in any order entered, we need some sort of a
23 time certain for the plaintiffs' steering committee to complete
24 the profile forms and complete the responses to class member
25 discovery. Otherwise, August 15, even that becomes unworkable.

1 **THE COURT:** I thought that was already done, the
2 profile forms.

3 **MR. LONGER:** It has already been done, Your Honor. I
4 don't know what they are talking about.

5 **THE COURT:** I thought the profile forms were done a
6 long time ago. I understand that the reason the substitution
7 came about is that some of the people, their homes were
8 remedied and so they had no claim, and they had to be
9 substituted for people who had claims.

10 **MR. SEXTON:** Your Honor, our recent analysis of the
11 profile forms, which is set forth in the briefing that we
12 supplied on Friday, was that many -- hundreds, in fact, of the
13 profile forms are still deficient by way of not identifying the
14 manufacturer, installer, home builder, and so forth. That
15 precludes our ability to look at other named class
16 representatives to show the differences among the class.

17 **MR. LONGER:** Your Honor, that's a separate motion,
18 and my appreciation is they are talking about deficiencies for
19 persons that are on the newest omni complaint that still have
20 the 40-day time period to even respond and put in their PPFs.
21 They are saying that because they are not in already, they are
22 deficient.

23 There are some issues that we have asked counsel
24 opposite to tell us who the names of all the counsel are --
25 because they have just given the list of clients -- so that we

1 can actually inform the specific counsel who they are. Counsel
2 has been reticent to provide that information. They just
3 haven't done that. We have been taking under our own powers to
4 figure it all out and we are getting the information.

5 My appreciation is that all of the PPFs for the
6 class representative plaintiffs they do have. All of the
7 interrogatories for the class representatives they do have. So
8 that's where there's a disconnect here. A lot of what they are
9 doing is subject to a motion which will be heard next week,
10 Your Honor. We intend to respond on Friday on this.

11 **THE COURT:** One thing that's obvious to me is I'm
12 going to have to have probably weekly meetings with you-all. I
13 can do it on the phone, but we are going to have to move this
14 case a little faster than we are doing. Maybe weekly meetings
15 would be an answer.

16 **MR. SEXTON:** Your Honor, my colleague,
17 Mr. Panayotopoulos -- I'll let him spell his last name -- will
18 address the profile forms, but Mr. Gonzalez asked me to
19 clarify. He has come up with a new argument since we argued it
20 last fall on comparative fault that has not been addressed.
21 Whatever arguments were presented to Judge Farina last fall he
22 and then Mr. Diaz, in a separate case, lost on.

23 **MR. PANAYOTOPOULOS:** Nick Panayotopoulos also for
24 Banner Supply. I just wanted to address the point about the
25 profile forms and the missing discovery responses from the

1 named plaintiff representatives in these cases.

2 Discovery was served in 2009 to the named
3 plaintiffs in this case. None of that has been responded to,
4 as relates to Banner, except as to the movant class reps. Only
5 two people related to Banner have responded to that. I'm
6 sorry. A total of five people have responded. There are
7 hundreds and hundreds that have not given any substantive
8 response.

9 The PSC just filed an objection. They refused
10 to name who the manufacturer is. The profile forms, there's
11 hundreds of profile forms that are missing. There are, I
12 suspect, thousands of profile forms that are deficient. We
13 can't select the homes that we want to address before the Court
14 at the class certification hearing without having the most
15 basic of information before we can proceed.

16 I believe I heard counsel opposite that they
17 were willing to comply with that discovery. If we just set a
18 deadline they are going to supply that discovery, that's fine
19 with us, Your Honor. We will do our best to meet a very quick
20 schedule, which is suggested in August, as long as they comply
21 with that discovery first.

22 **MR. LEVIN:** One last word, Your Honor. There are
23 10,000 plaintiffs in this case. There should be 10,000 profile
24 forms. They haven't got 150. We have said we'll help you get
25 them like we did in Vioxx, like we did in Propulsid. Suddenly

1 they can't prepare for a class certification hearing that's
2 supposed to streamline the case without having discovery of
3 absent class members who happen to be named in omni complaints.
4 Judge, they're trying to hold us back. Please don't let them
5 do that.

6 **THE COURT:** Anybody else?

7 **MR. THIBODEAUX:** Paul Thibodeaux for KPT, Your Honor.
8 All we are asking for is for a five to six-month discovery
9 schedule and certification hearing date that is consistent with
10 the scheduling order that was entered and agreed to by the
11 parties before all these class rep changes came about.

12 **THE COURT:** Well, you're not asking for four or five
13 months. You're asking for four or five weeks as I understand
14 it, six weeks, something of that sort. You're looking at
15 August instead of June.

16 **MR. THIBODEAUX:** Correct, correct, correct.

17 **THE COURT:** Let me check my calendar on it. I don't
18 see any relationship or linkage between the trial in July and
19 the trial in either June or August. I don't see any linkage
20 there. I think they are different focuses.

21 I think the class certification is a significant
22 issue. It's going to be a key issue in this particular case.
23 Ordinarily in this circuit, class certification is a real
24 difficult issue for the plaintiffs, but it hasn't been that way
25 with property damage. While there's differences in personal

1 injury, the differences are not as blatant as in a property
2 damage case. I think this is a significant one. It's easy in
3 personal injury cases, frankly, because the circuit is very
4 down on personal injury certifications. Property damage is a
5 different ballgame. I do think everybody ought to recognize
6 that this is a significant issue.

7 Let me look at my calendar and I'll make the
8 decision, but I also want to start weekly meetings with
9 you-all. I'll set up a meeting on the telephone. I don't need
10 you coming in here. I don't want to take up your time, but I
11 do want to know what's been done since the last conference,
12 what needs to be done, what issues are present.

13 We need to cut through some of the motion
14 practice. Be prepared, if you have a problem, to talk to each
15 other before you talk to me. Every week, you give me the
16 problem, whether it's a motion or whatever, and I will rule on
17 it immediately so we can get through with this.

18 If I need some information beforehand, give me
19 an e-mail or drop me a letter as to what the issue is so that I
20 can be ready for it. I want to be able to work with you on
21 this so that we are not wasting a lot of time on motions and
22 interrogatories and back and forth. We just don't have the
23 time to do that.

24 I'll listen to you. I will hear everything you
25 have to say. I will take it seriously. If you need me to look

1 at cases, I will look at the cases. We need to cut through
2 this and move a little faster than we are doing. Thank you
3 very much. Court will stand in recess.

4 **THE DEPUTY CLERK:** Everyone rise.

5 (WHEREUPON the Court was in recess.)

6 * * *

7 **CERTIFICATE**

8 I, Toni Doyle Tusa, CCR, FCRR, Official Court
9 Reporter for the United States District Court, Eastern District
10 of Louisiana, do hereby certify that the foregoing is a true
11 and correct transcript, to the best of my ability and
12 understanding, from the record of the proceedings in the
13 above-entitled and numbered matter.

14
15
16 s/ Toni Doyle Tusa
17 Toni Doyle Tusa, CCR, FCRR
18 Official Court Reporter
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