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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE MANUFACTURED \* Docket 09-MD-2047  
DRYWALL PRODUCTS \*  
LIABILITY LIGATION \* October 15, 2009  
\*  
This Document Relates to All Cases \* 9:00 a.m.  
\* \* \* \* \*

STATUS CONFERENCE BEFORE THE  
HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Also Participating: Dawn M. Barrios, Esq.  
Arnold Levin, Esq.

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**PROCEEDINGS**

**(October 15, 2009)**

**THE DEPUTY CLERK:** Everyone rise.

(WHEREUPON, the Court called into session.)

**THE COURT:** Be seated, please. Good morning, ladies and gentlemen.

Call the case, please.

**THE DEPUTY CLERK:** MDL-2047 in re: Chinese drywall.

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

**MR. HERMAN:** Good morning, Your Honor. Judge Fallon, Russ Herman for the PSC.

**MR. MILLER:** Your Honor, good morning. Kerry Miller on behalf of the defense steering committee.

**THE COURT:** We're here today for our monthly status conference. We have a full house and also several hundred people on the phone. I also have on the phone a number of judges from both Florida and Alabama. I appreciate their attendance and look forward to working with them throughout the course of this proceeding.

I have met with the committees this morning and discussed with them an agenda. I'll take it in the order in which they have proposed.

Pretrial orders is the first item on the agenda.

1                   **MR. HERMAN:** Good morning, Judge.

2                   Your Honor has indicated that you have  
3 coordinated with, I believe, Judge Farina on an economic loss  
4 issue, which ...

5                   **THE COURT:** Right. Let me flesh that out a bit.

6                   Judge Farina is going to hear motions on  
7 economic loss claims under Florida law on November the 13th at  
8 10:00 eastern standard time in Florida. I will participate by  
9 phone and participate actively in those proceedings. We'll  
10 consider the claims in Florida state courts. They'll have a  
11 number of judges present in Florida to deal with those claims;  
12 and also, from my standpoint, the Florida cases that are filed  
13 in the MDL, I'll consider that as the hearing on those  
14 particular cases.

15                   The following week on November the 20th, I will  
16 have a hearing here in New Orleans on the economic loss issues  
17 in the non-Florida cases, and the Florida courts will  
18 participate by phone in that matter.

19                   We'll confer and work out the differences. I  
20 said November the 20th. I think we did November the 19th. We  
21 agreed upon the 19th because the Florida courts, they have some  
22 motion day on the 20th. So I'll move my conference to the  
23 19th, and I'll deal with it at that time.

24                   Hopefully, we'll be able to coordinate and issue  
25 our opinions around the same time. I don't know whether or not

1 they'll be consistent, but we'll at least have an opportunity  
2 to confer and discuss the issues and, hopefully, we'll have  
3 consistency on our rulings.

4 Property inspections. Anything on the property  
5 inspections?

6 **MR. HERMAN:** Yes, Your Honor. Russ Herman. The  
7 inspections are going forward. They've been coordinated  
8 through PSC member Jerry Meunier's firm, Gainsburgh. Floor  
9 plans have been provided to Crawford & Company in advance, as  
10 well as the cosmetic plugs.

11 **THE COURT:** Anything from the defendants on the  
12 property inspections?

13 **MR. MILLER:** Yes, Your Honor.

14 **THE COURT:** We had some difficulty originally with  
15 the protocol for property inspections. I met with counsel, as  
16 well as the inspectors, and discussed it with them. They've  
17 worked out a better protocol, and that protocol now is in  
18 place.

19 Is it working?

20 **MR. MILLER:** Your Honor, yes. As the Court recalls,  
21 we did 10 initial inspections pursuant to Pretrial Order  
22 No. 13. We had a couple of court meetings with respect to that  
23 and found that that particular protocol was too time consuming  
24 and too destructive in some ways to the home.

25 After that, there were a series of meetings in

1 which I participated primarily with Mr. Lambert on behalf of  
2 the PSC. We developed what we believed was a much more  
3 streamlined inspection protocol; but a protocol that was still  
4 objective and aimed at creating the census, detecting the  
5 drywall that was on-site at the property, and not being  
6 destructive.

7           We sampled -- or we used that protocol last week  
8 in a couple of homes in the Slidell area. We were able to  
9 complete the protocols in about five hours, Your Honor. And so  
10 the plan moving forward is we have 18 -- there were 30 houses  
11 initially that were identified for inspection. We did 10  
12 initially under the old protocol, two under the revised  
13 protocol to see if it worked, did the two, then further tweaked  
14 the revised protocol.

15           By the way, Your Honor, we have a final  
16 document, if the Court wants to enter it, that will supersede  
17 Pretrial Order 13. It is this revised protocol. We could give  
18 it to the Court this afternoon. And next week we're going to  
19 roll it out on the remaining 18 in Louisiana, and Florida, and  
20 Mississippi and North Carolina.

21           We had previously agreed that after we were done  
22 with that shift, we would have another meeting to see if this  
23 particular protocol was working. Hopefully, it is, and it can  
24 be rolled out to more properties. If further modification  
25 needs to be made, then the Court will entertain a hearing or a

1 meeting at that time.

2           **THE COURT:** Yes. I think that to some extent we're  
3 dealing with trial and error, but hopefully we can get it down  
4 to a meaningful and accurate protocol.

5           As I mentioned several times, you can sit with  
6 experts and design a protocol that they feel and you feel is  
7 best. But until you actually do it and put it in place, you  
8 don't know whether it's going to work. So counsel met with the  
9 experts. I met with the experts. And they came up with a  
10 design that looked to be perfect.

11           But then when we started putting it in place, it  
12 didn't work out that way. So the parties had to go back to the  
13 drawing board. This is just the way it's done and the way it  
14 has to be done. But, hopefully, we'll come up with something  
15 very shortly that can be used throughout the country and will  
16 be helpful.

17           I think that's one of the benefits, frankly, of  
18 the MDL is coordination; and with the great help of my  
19 colleagues in state court, we've been able to do that with  
20 motions and also with protocols. Hopefully, we'll be able to  
21 do that with the preservation of evidence protocols, so that  
22 the attorneys know that the method that they preserve evidence  
23 will be useful both in state as well as in federal courts.

24           **MR. MILLER:** Your Honor, I wanted to highlight that  
25 item, actually. It's item 1B on Page 1 of the pretrial order

1 on the Physical Evidence Preservation Protocol. That is a  
2 change from our last hearing. It was actually entered by the  
3 Court earlier this week, submitted by the parties last week.  
4 So now there's something in place. I'm not quite sure if the  
5 state court jurists who are on the phone are aware of that new  
6 development, but that is in place now.

7 **THE COURT:** Right. I did send it to everyone and,  
8 hopefully, it represents their views also and they'll be able  
9 to adopt it in their respective courts.

10 Plaintiff and defendant profile forms. Anything  
11 on that?

12 **MR. MILLER:** Your Honor, one issue that we have, and  
13 that is there is still outstanding a retailer profile form  
14 issue. Apparently, the parties have been in touch, retailers  
15 and PSC, but there has been some hiatus in discussions. So  
16 those should be brought to fruition relatively soon. I think  
17 there are two retailers currently in the case.

18 **THE COURT:** Okay. And I do have some motions on the  
19 profile forms which I'll take up after the hearing.

20 The preservation order. Do we have anything on  
21 that? We have a motion also on the preservation order. We  
22 have a preservation order for the physical evidence. The issue  
23 that is more challenging is the preservation order on  
24 e-discovery and on documents and e-documents.

25 State/Federal Coordination?



1           **MR. HERMAN:** Your Honor, Ms. Barrios has, in  
2 electronic format, her report.

3           **MS. BARRIOS:** Thank you, Mr. Herman.

4                   Good morning, Your Honor. Dawn Barrios for the  
5 Federal/State Committee on the plaintiff's side.

6                   Your Honor, through Pretrial Order 8, there have  
7 been no motions for remand filed. So I think everybody's  
8 enjoying being in your court. We have had an opportunity to  
9 meet and confer with the defense Federal/State Committee one  
10 time this week and both sides have pledged to coordinate and  
11 cooperate as fully as possible in this multiparty case, and we  
12 pledge to do that.

13           **THE COURT:** Yes. I think that what we're trying to  
14 do, both the state and federal court, is to see if we can get  
15 an environment in a forum so that you can just do things one  
16 time. We have 18 states involved in this litigation, and there  
17 may be a couple more coming on board.

18                   It doesn't seem satisfactory to have to do these  
19 things 18 or 19 times, taking depositions 18 or 19 times, the  
20 same deposition, filing interrogatories and so forth and so on.  
21 So we're trying to construct it as well as we can so that you  
22 can do this work one time and use the material throughout the  
23 country, both in state and federal court.

24                   So I've appointed a committee to coordinate  
25 that, and I appreciate all their efforts. I know my colleagues

1 in state court also appreciate it.

2 **MS. BARRIOS:** Your Honor, I have a presentation to  
3 the Court, and defense liaison counsel, and homeowners'  
4 counsel, as well as the PSC, a CD that will replace the CD that  
5 we provided last month. We have a substantial list of cases  
6 broken down by states with the contact information for each  
7 jurist. So I hope Your Honor finds it very convenient to use  
8 when you reach out to your state court colleagues, and we'll  
9 continue to update this every month.

10 Thank you, Your Honor.

11 **THE COURT:** Thank you very much.

12 **MR. HERMAN:** Your Honor, if I might. Kerry Miller  
13 addressed the issue concerning retailer forms, and if Mays'  
14 counsel is present, I'd like to meet with Mays immediately  
15 following the arguments.

16 **THE COURT:** Any trial settings for state court?

17 **MR. HERMAN:** None reported, Your Honor.

18 **THE COURT:** Okay. Motions in the MDL? I've got  
19 several motions, three to be exact, that will follow this  
20 hearing.

21 Discovery issues. Anything we need to talk  
22 about there?

23 **MR. HERMAN:** Yes, Your Honor. In conference this  
24 morning, Your Honor discussed the issue of a rolling document  
25 production. There will be a meeting in Mr. Wittmann's office

1 at 8:30 central standard time on Tuesday with call-in for the  
2 various parties. At that point, the parties will swap lists of  
3 who they want to depose and the priority.

4 And plaintiffs yesterday received the  
5 defendant's first request for production, and we're going to be  
6 responding with objections and production as quickly as we can,  
7 but certainly within the 15-day limit. Hopefully, next week.  
8 Basically, those are the discovery issues that were discussed  
9 this morning.

10 **THE COURT:** Okay. I need everybody's cooperation on  
11 that, both plaintiffs and defendants. The material that you  
12 have no problem with, give it up immediately or on a rolling  
13 basis. The material that you have problems with, meet and  
14 confer, discuss the objections. If you can't resolve them  
15 yourself, then bring them to me, I'll hear them immediately,  
16 and we'll get over the objections.

17 I understand that the parties are going to meet  
18 Tuesday, as was said, and begin setting depositions on some  
19 basis that everybody's comfortable with.

20 **MR. HERMAN:** I would like to request that Mr. Davis  
21 and Mr. Levin be served by defense counsel with all motions, et  
22 cetera, while I'm absent. I'll be absent for about 10 days.

23 **MR. MILLER:** Your Honor, on the issue of discovery.  
24 I am hopeful that the meeting on Tuesday will produce some  
25 progress and some setting of depositions.

1                   As mentioned in chambers to the Court this  
2 morning, I took a survey of the defendants last night, and I  
3 know that documents from various defendants are starting to  
4 roll in. Some rolled in on Tuesday, others yesterday, and I  
5 know more today and tomorrow, and then again early next week.  
6 And then we're going to have a meeting on Tuesday morning. In  
7 connection with the production of documents, also our piece  
8 that has been served on the plaintiffs, to try and minimize the  
9 chaos, I would suggest the following:

10                   When a party produces documents, they file a  
11 notice of production with LexisNexis. The LexisNexis service  
12 has been working very well. In the notice of production, the  
13 parties identify who to contact to get a copy of the documents.  
14 If it's a vendor, if it's a paralegal, if it's someone of that  
15 nature, so that's set forth in the LexisNexis notice of  
16 production. Those parties who want to get a copy can order it  
17 and get it. Those parties who don't want a copy, they don't  
18 need to do it.

19                   What I'm trying to avoid, Your Honor, in a case  
20 that now has 50 parties, maybe more, maybe going up to  
21 hundreds, hundreds of phone calls, how can I get a copy of the  
22 documents, who do I need to call, calls to the Court. I had a  
23 full-time job a couple of weeks ago when we posted the pictures  
24 of the different drywall markings, that we've talked with the  
25 Court about that and were able to get that information on the

1 Web site.

2 We're not to the point, Your Honor, I think  
3 where we can have a central document depository. I think  
4 that's too ambitious for this particular group. But I think if  
5 we can do a notice of production on LexisNexis, that will  
6 streamline a lot of aggravation and frustration.

7 **THE COURT:** Is there any way you can upload those  
8 documents and anybody who wants them can pull them down? At  
9 least you can discuss it with them.

10 **MR. MILLER:** Yes. That's another thing that we're  
11 exploring doing, and that's a different issue. We may do that,  
12 Your Honor, upload them through FTP sites.

13 **THE COURT:** Right.

14 **MR. MILLER:** But that would be on the LexisNexis  
15 notice.

16 **THE COURT:** Right.

17 **MR. MILLER:** That we've uploaded documents to X, Y  
18 and Z Web site, here's a pass code, this is how you access  
19 them.

20 **THE COURT:** You need to flesh that out or talk about  
21 it, because that's the beginning of the document depository.  
22 So you then just simply import that to some other place and  
23 that becomes your document depository. So it's one document  
24 depository in process. Give that some thought.

25 **MR. MILLER:** I think what we're going to see, Your

1 Honor, is a range, depending on the level of sophistication of  
2 the defendant. I think some will do exactly that, send the  
3 notice, you can access these on the Internet through the X, Y  
4 and Z Web site at A, B, and C pass code, all the way to the mom  
5 and pop builders whose got a box and file cabinets and a  
6 storage shed. But there ought to be one way in which that  
7 notice goes out.

8 **THE COURT:** And the reason for that is that, although  
9 now when it comes in piecemeal, you'll be able to keep a handle  
10 on it. But if we get to millions and millions of documents,  
11 you're going to need some searchable way of getting those  
12 documents. So think about that when you're beginning to  
13 coordinate these documents and you need to have them in some  
14 kind of searchable form eventually.

15 **MR. HERMAN:** Your Honor, I want to reserve comment on  
16 that suggestion. I had not heard it before. We do have a  
17 motion scheduled with regard to ESI and format following this  
18 conference.

19 **THE COURT:** The Freedom of Information Act. Anything  
20 on that?

21 **MR. HERMAN:** We have listed in Your Honor's status  
22 conference report the materials that have been received -- or  
23 the departments of government from which materials have been  
24 received. They're incomplete. We're providing -- will be  
25 providing those on a rolling basis to defense liaison counsel.

1           **THE COURT:** Okay. And then trial court settings?

2           **MR. MILLER:** Your Honor, before we go on to that, I  
3 think we made an agreement if we're going to evolve into  
4 depositions next week, we want to go ahead and get whatever  
5 FOIA information plaintiffs have so we have that to review.

6           **THE COURT:** Sure.

7           **MR. MILLER:** So I'll hook up and, hopefully, get that  
8 information.

9           **MR. HERMAN:** You'll receive ours probably by this  
10 afternoon or tomorrow morning.

11           **MR. MILLER:** Great. Great.

12           **MR. HERMAN:** And we hope to receive whatever the  
13 defendants have received.

14           **THE COURT:** All right. The next is the trial court  
15 settings. I mentioned before that what I had anticipated doing  
16 is having each side pick ten cases, do some quick discovery on  
17 the ten, come down with five, and then each side have two  
18 strikes and we'll come down with six, and then deal with it and  
19 try five of them.

20                   Time is moving up on me, so I'm going to have to  
21 alter that. I've given the plaintiff first choice to pick that  
22 case. I've given them a week to pick that case. A week  
23 thereafter the defendants will pick the second case. We'll  
24 start those cases January and February.

25                   Filings in the MDL. Anything on that?

1           **MR. HERMAN:** Nothing new, Your Honor, on the  
2 particular issues of direct filing and acceptance of service.

3           **THE COURT:** Okay. Notice of appearance, default  
4 judgments. Anything?

5           **MR. HERMAN:** No, Your Honor, nothing new.

6           **THE COURT:** I gave a preliminary default against a  
7 company. I'm waiting for a motion to confirm the default so  
8 that I can enter a monetary judgment against that defendant. I  
9 don't know whether that defendant has any resources in the  
10 United States, be they cash, or vessels, or anything of that  
11 sort.

12                       But if a judgment is entered, I do sit, as an  
13 MDL judge, as a district judge in every district in the  
14 country, so I can issue orders seizing either vessels, or bank  
15 accounts, or transfers, or anything of that sort that's brought  
16 to my attention.

17           **MR. HERMAN:** Your Honor, if I might look again at the  
18 bellwether trials. I believe Your Honor has indicated that  
19 first trial would be property damage only. The plaintiffs  
20 would select it. And you require that plaintiffs and  
21 defendants meet and accelerate a jury questionnaire.

22           **THE COURT:** Right. I think that in a case of this  
23 sort, it would be helpful to have a jury questionnaire so that  
24 we don't have to have people come to the court the morning of  
25 the jury selection and find that they should be excluded



1 because they have drywall in their house and they have  
2 difficulty with it.

3 So I've asked the parties to get together and  
4 come up with a jury questionnaire which I'll send out. I'll  
5 notify 100, 150 jurors that they're going to be selected for  
6 this particular jury. I'll send the questionnaire out to them,  
7 and I'll tell them to come to court to fill out a  
8 questionnaire.

9 They'll fill out the questionnaire in court.  
10 I'll immediately make it available to the parties. I'll give  
11 them a week to look it over. Then I'll confer with the parties  
12 and make some strikes for cause, and hopefully the  
13 questionnaire will be of help to the lawyers in their voir dire  
14 examination.

15 **MR. MILLER:** Your Honor, a couple of follow-up  
16 comments or questions to what was discussed in chambers  
17 regarding the bellwether trial selection and the altered way in  
18 which we're going to proceed in that manner.

19 As I understand it, the eligible plaintiffs for  
20 the initial selections would be those who either have profile  
21 forms in as of now or will have profile forms in as of a week  
22 of today.

23 And then secondly, Your Honor, you mentioned  
24 that the selections, either the first selection or the first  
25 couple, should involve, I think you used the term "one

1 defendant follow-up question" on that. Since most cases  
2 involve a claim by a plaintiff against a builder, maybe an  
3 intermediary and a manufacturer, are you suggesting that the  
4 initial selections involve one brand of drywall, albeit you may  
5 have a supplier and builder in the mix, or are you suggesting  
6 just one defendant?

7           Because if it's just one defendant, albeit a  
8 builder, a supplier or a manufacturer, you're going to have a  
9 comparative fault analysis going on, even in a property damage  
10 case.

11           **THE COURT:** Not so much with the manufacturer. With  
12 the builder, I can imagine some issue there. From the  
13 standpoint of a manufacturer, I think that that probably is not  
14 as prevalent. A builder or a distributor or an installer, I  
15 can understand that there probably would be some issues of that  
16 sort. But I don't know if I see that particular issue from a  
17 manufacturer's standpoint.

18           So the first cases I would think, certainly the  
19 first case, ought to be focused on the manufacturer of the  
20 drywall, at least that's the way I see it presently.

21           Also, when we get down the line apiece with some  
22 of these cases and learn from them, we need to focus on whether  
23 or not we should have some summary trials. We need to focus on  
24 whether or not we should have some issue trials, and see  
25 whether or not we can get some jury information from those

1 areas.

2 I'm not really wedded to any particular method.  
3 I just think the lawyers function better when they get some  
4 input from juries.

5 Okay. Tolling  
6 agreements/suspension/prescription. Anything on that?

7 **MR. HERMAN:** No, Your Honor. There is no new  
8 insurance issue before Your Honor.

9 **THE COURT:** Okay. Anything on service of pleadings,  
10 electronically? We've now instituted electronic service of the  
11 initial pleading. We have over the period of time gone from  
12 electronic service of filing of everything but the initial  
13 pleading. Now we have electronic filing of the initial  
14 pleadings, so keep that in mind too.

15 Master complaint. Anything?

16 **MR. HERMAN:** Your Honor, there's nothing with regard  
17 to the master complaint. There are some alternatives. I'll  
18 ask Mr. Levin to address the class action indeterminate  
19 defendant complaint and the omnibus complaint.

20 **THE COURT:** Okay.

21 **MR. LEVIN:** Your Honor, as you know from the  
22 inspections, a lot of the Chinese drywall is unmarked,  
23 indicates "made in China," and there are a number of claimants  
24 that have that type of drywall in their homes.

25 The PSC has filed what we would call a class

1 action indeterminate defendant complaint against a host of  
2 manufacturers. It's filing an amended complaint against  
3 several others that we believe are involved in bringing that  
4 product into this country. That's where we stand. We will  
5 make service through the Hague. It will be translated into  
6 German and Chinese and, hopefully, we won't be ignored abroad.

7 **THE COURT:** Okay.

8 **MR. LEVIN:** Just briefly, the PSC will be filing an  
9 omnibus complaint. We anticipate filing several of them on a  
10 rolling basis, where all of the existing plaintiffs that have  
11 product I.D. will be suing everybody in the chain of commerce,  
12 builders, importers, brokers and manufacturers.

13 The first one should be filed within the next  
14 ten days.

15 **THE COURT:** Okay.

16 **MR. LEVIN:** It will be about 300 or 400 plaintiffs;  
17 and it will be followed very quickly by a second one.

18 **THE COURT:** Generally, in cases the challenge is to  
19 figure out whether or not there's any fault and, if so, the  
20 nature and extent of the fault. In this case, and probably in  
21 addition to that, but maybe even dwarfing that is the location  
22 and identification of the parties, the manufacturers, the  
23 product, the distributors.

24 And with regard to distributors, and installers,  
25 and suppliers, when they knew, if they knew, and, if so, when

1 did they know and what-did-they-do-about-it kind of thing. But  
2 the big challenge in this particular case for everybody, and  
3 certainly for the installers and the builders, and the  
4 plaintiffs in general, is to find out the location and  
5 participation of the manufacturers, who manufactured it and  
6 where are they located.

7 So we're going to have some pleadings that throw  
8 out a net to get everybody, and that's probably the process  
9 that we're looking at. But eventually we're going to be  
10 culling down, because we're going to find that some people who  
11 are caught in that initial net don't belong in the net.

12 And I want to make sure that if they do not  
13 belong in the net, they don't have to spend a lot of resources  
14 to get out of the net. We've got to identify them as quickly  
15 as we can and get those folks out. I think it's to everybody's  
16 benefit. But that's going to be a challenge, culling them  
17 down.

18 The next status conference. Anything further  
19 other than the motions?

20 **MR. HERMAN:** Just one other matter on the omnibus  
21 complaint. It's the PSC's intention by filing that complaint  
22 that where manufacturers and other defendants have been  
23 identified, that we'll only have to spend one amount to get  
24 service through the Hague rather than having a thousand cases  
25 served through the Hague. With respect to that issue, that's

1 the only comment that I have, Your Honor.

2 Your Honor, the next status conference ...

3 **THE COURT:** The next status conference is November  
4 the 19th. I'm told that we've got some construction going on  
5 in the courtrooms, so please watch the Web. I'm going to be  
6 moving it to another courtroom, but I'll also have directions  
7 here. We're going to have some updated electronic equipment  
8 and so forth that we're going to be installing in this  
9 courtroom, and it will take me about a month to get that done.

10 Okay. Anything further from anyone in the  
11 audience or on the phone?

12 **MR. HERMAN:** If counsel for Mays is here, I would  
13 like to talk to them.

14 **THE COURT:** All right. We'll take a ten-minute break  
15 at this time and then I'll come back and discuss the motions  
16 with you. Court will stand in recess.

17 **THE DEPUTY CLERK:** All rise.

18 (WHEREUPON, the Court took a recess.)

19 **CERTIFICATE**

20 I, Jodi Simcox, RMR, FCRR, Official Court Reporter  
21 for the United States District Court, Eastern District of  
22 Louisiana, do hereby certify that the foregoing is a true and  
23 correct transcript, to the best of my ability and  
24 understanding, from the record of the proceedings in the  
25 above-entitled and numbered matter.

S/ Jodi Simcox, RMR, FCRR  
Jodi Simcox, RMR, FCRR  
Official Court Reporter