

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE-MANUFACTURED * 09-MD-2047
DRYWALL PRODUCTS *
LIABILITY LITIGATION * Section L
 *
Relates to: All Cases * October 16, 2018
 *
* * * * *

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

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1 PROCEEDINGS

2 (October 16, 2018)

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

5 Call the case.

6 **THE DEPUTY CLERK:** MDL No. 2047, *In re*
7 *Chinese-Manufactured Drywall Products Liability Litigation.*

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

10 **MR. ROSENBERG:** Good morning, Judge Fallon. Harry
11 Rosenberg as liaison counsel for CNBM, BNBM, and Taishan,
12 Your Honor.

13 **MR. DYSON:** Good morning, Your Honor. Danny Dyson on
14 behalf of the Knauf defendants.

15 **MR. HERMAN:** May it please the Court. Good morning,
16 Judge Fallon. Russ Herman for the PSC.

17 **THE COURT:** This is our monthly status conference. I
18 met a moment ago with liaison lead counsel to discuss the
19 agenda. I will take it in the proposed form.

20 First, pretrial orders, anything?

21 **MR. HERMAN:** Your Honor has issued a number of orders
22 and reasons in the past several weeks and they are all
23 recorded. There's no need, I think, to review them.

24 Taishan, Section IV, page 15, a motion to strike
25 the Clarke declaration is pending. As I understand it, it's

09:02

1 not set today. A motion to challenge confidentiality filed is
2 not set for today.

3 We have with us Jake Woody, who is here from
4 BrownGreer.

5 **MR. WOODY:** Good morning, Your Honor. Jake Woody
6 from BrownGreer. I have just a brief update.

7 Our main activity at this point is reissuing
8 payments that have expired, checks that have expired for
9 people, so we are very close to being finished with the
10 settlement portion of the settlement program.

11 I do have a couple of accounts that need to be
12 closed. They were created by Court order, so I will confer
13 with the parties as to whether we need to submit a motion and
14 order to close those.

15 **THE COURT:** We probably do need a motion and order.
16 If they are finished and nothing is in them, let's close them.

17 **MR. WOODY:** Yes, Your Honor. I will prepare that and
18 submit it and close those before the end of the year.

19 **THE COURT:** Great. Thank you.

20 **MR. WOODY:** Thank you, Your Honor.

21 **MR. HERMAN:** May it please the Court. At pages 2 and
22 18, Dan is here for Knauf and has two matters.

23 **MR. DYSON:** Your Honor, on page 2 and 3 there are two
24 items with respect to the settlement claims. The first is the
25 remaining Option 2/Option 3 claims that need to be processed

09:03

1 with BrownGreer. We have filed a motion to extinguish that has
2 been continued a couple times. We have been in contact with
3 Colson Hicks. They filed a motion to continue those claims,
4 Rec. Doc. 21837, to the next status conference in November.
5 That is unopposed. That will not go forward today.

6 The other item is the 16 remaining ARH claims
7 that were sent down to the special master for reports and
8 recommendations. That has been completed and the record is
9 done. Your Honor filed those reports and recommendations into
10 the record this week.

11 Separate from that, a motion to construe the
12 settlement was filed by claimants. There has been an
13 opposition filed by the Knauf defendants, a reply, and then
14 yesterday evening we filed a motion for leave to file a
15 surreply. So those are all now under submission with the Court
16 at this time.

17 The only other matter on page 18 related to
18 Knauf is the *Bennett* action, and we have a separate status
19 conference set specially for that matter on October 26. There
20 is no update at this time.

21 **THE COURT:** Okay.

22 **MR. HERMAN:** May it please the Court. Page 23,
23 Taishan's motion to remand *Mitchell*, Rec. Doc. 21786, is ready
24 for argument by the parties.

25 The only other thing I want to mention is that

09:05

1 www.laed.uscourts.gov lists the status conferences and the
2 materials therein should anyone wish to access them.

3 **THE COURT:** Do we have anything other than the
4 motions?

5 **MR. ROSENBERG:** No, Your Honor.

6 **THE COURT:** Let me hear the motion, then. Let's tee
7 that up.

8 This is a motion to remand the *Mitchell* case.
9 There's some opposition to it. I will hear from the movant.

10 **MS. EIKHOFF:** May it please the Court. Christy
11 Eikhoff on behalf of Taishan, the movant.

12 Your Honor, the Court has made it clear in its
13 recent orders and statements regarding remand that the MDL is
14 wrapping up and it's time to move these cases back to where
15 they were originally filed. The *Mitchell* case, Your Honor, is
16 a putative class action for home builders. It was filed in the
17 Northern District of Florida in 2009 and transferred to the MDL
18 shortly thereafter.

19 The MDL served the *Mitchell* case well from 2010
20 to 2014. *Mitchell* was part of the personal jurisdiction
21 discovery and decision making and appeal that went up to the
22 Fifth Circuit, and the Fifth Circuit affirmed this Court's
23 rulings on that in 2014. Nothing happened in *Mitchell* between
24 2014 and September 2017. That is two years after Taishan came
25 back into the case when Mitchell renewed its long dormant 2010

09:07

1 motion for class certification.

2 Your Honor, that motion, we have done some
3 discovery, and over the course of several months slowly but
4 surely documents we have been asking for have been trickling
5 in. But in light of the recent remands, it made sense to us
6 that the actual class certification decision, which is case
7 specific, should be decided by the court that Mitchell
8 originally filed in. There is nothing in this MDL at this
9 point that can be helpful to the adjudication of the *Mitchell*
10 case.

11 In Mitchell's response to our motion, they
12 completely ignore that all of the other cases, homeowner cases,
13 are being remanded out of the MDL. Instead they point to two
14 things that they think will be helpful to them. I want to
15 point out to this Court that both of those aspects of the MDL
16 are illusory because they can have no bearing on this home
17 builder class action.

18 First, they say that the June 2015 class damages
19 hearing, which resulted in a formula to estimate homeowner
20 remediation damages, somehow will be helpful to them and to the
21 class certification decision. In Mitchell's own class
22 certification motion, they emphasize that their damages are
23 liquidated damages, that they are definitive sums, and I'm
24 quoting. That's from their own class certification motion at
25 Rec. Doc. 20857-1 on page 13. There's no need for a formula to

09:09

1 determine the actual amounts that home builders expended to
2 either remediate or to settle remediation claims -- and those
3 are the damages that they say that they are seeking -- so the
4 formula doesn't help them.

5 Second of all, they say, well, this Court has
6 made so-called product ID determinations that they think will
7 come into play. That is wrong because this Court has not made
8 any product ID determinations. The only documents in the
9 records that Mitchell cites to are exhibits to the Knauf
10 settlement, which the Court approved, and those exhibits were
11 privately negotiated documents between two parties, neither of
12 which was Taishan. So the fact that this Court approved a very
13 comprehensive settlement that had attachments that referred to
14 product ID is not the same thing as a judicial determination of
15 fact or findings of fact in this case with respect to product
16 ID.

17 Those are the only things that Mitchell points
18 to as to why this case needs to stay in the MDL. We are in the
19 unusual position of, as defendants, advocating for the cases to
20 go back to the court where the plaintiff filed their case, but
21 that's where we are. We think that it does not make sense for
22 these case-specific determinations and adjudications to
23 continue in the MDL at this point in the proceedings.

24 **THE COURT:** Let me hear the other side of it.

25 **MR. NICHOLAS:** Thank you, Your Honor. Steve Nicholas

09:10

1 for Mitchell.

2 Your Honor, the question before the Court isn't
3 will the case get remanded, but when will we get remanded.

4 **THE COURT:** Yes.

5 **MR. NICHOLAS:** Our position is that it is much more
6 efficient and appropriate for Your Honor to rule on class
7 certification prior to the remand, and that's what we are
8 asking the Court to do. The reasons for that, really, our
9 response has been misconstrued by Taishan.

10 While I'm somewhat at a disadvantage trying to
11 anticipate what Taishan is going to say when they file
12 something finally in opposition to class certification, we
13 believe there are at least two things that it's very important
14 that this Court, having dealt with this issue for all these
15 years, is the best one to reach the issue.

16 One will be identification and ascertainability
17 and how all that interrelates. We do not argue and did not
18 argue that Your Honor made ID decisions in your April 2015
19 order. What Your Honor clearly talked about in that order is
20 the familiarity this Court has with how product ID would work
21 and, because of the markings on the board, how we are going to
22 be able to show at the class certification stage that it's
23 capable of ID'ing Taishan's product. Whereas if you send the
24 matter back to a new judge who has no experience over all that,
25 we are going to have to replot all that ground. It gives

09:12

1 Taishan lots of opportunities to make arguments that I think
2 this Court would know at the front end don't have any merit.

3 We are not suggesting that Your Honor would
4 implement the class action once you made a decision about
5 certification, if you were to certify it. All those ultimate
6 ID decisions could still be maintained or decided by the
7 Florida court, but Your Honor knows this issue and knows how it
8 all works.

9 Secondly, on scope of remediation, we are not
10 arguing and did not argue that the formula that was set forth
11 in Your Honor's order would apply to this case. It doesn't.
12 But, again, I'm anticipating that Taishan is going to talk
13 about, at the class certification stage, scope of remediation
14 because a lot of the builders actually went in and followed
15 this Court's directives as far as how to remediate. So I think
16 the commonality of the remediation following the Court's order
17 is an important issue.

18 And, again, I'm having to anticipate arguments
19 that have not yet been made by Taishan, but Your Honor is
20 certainly intimately familiar with all of that. So we believe
21 it makes much more sense for Your Honor to be the one to decide
22 certification as opposed to a judge who is going to be getting
23 this cold.

24 **THE COURT:** Do you see any reason for any discovery
25 on either one of those issues?

09:13

1 **MR. NICHOLAS:** There may be discovery on an
2 individual determination, but not as far as class
3 certification, other than what we have already done. Taishan
4 asked us to produce lots and lots and lots of documents
5 regarding the remediation that was done, and we have done that.

6 Frankly, I could have come to Your Honor and
7 said all that goes to merits and doesn't really matter; but
8 because I was trying to get this done in time before Your Honor
9 did want to send it back, we didn't make those arguments. It
10 took us a while to get those documents. It's a lot of them.

11 They say they want to take a deposition, a
12 30(b)(6). We could do that tomorrow and be ready as far as any
13 of that goes. I don't know what they are going to argue about
14 that, but we have produced the documents as it relates to those
15 issues.

16 If I can, Judge, just responding to the issues
17 they raised in their reply, Taishan says that it's permissible
18 for the transferor court to determine certification, and
19 certainly the transferor court is capable of determining
20 certification, but I would like to bring Your Honor way back to
21 the order centralizing this case here. What the JPML said was
22 centralization under Section 1407 will eliminate duplicative
23 discovery, including any discovery on international parties;
24 prevent inconsistent pretrial rulings, particularly those with
25 respect to class certification issues.

09:15

1 That's what we are asking for. Certainly,
2 Your Honor, we are not suggesting you are going to have to come
3 out the same way as you did on the homeowner class, but most of
4 those issues are going to be the same. In order to prevent
5 those inconsistent rulings, we think Your Honor should be the
6 one to make that decision.

7 Secondly, they say that you should be guided by
8 the *Amorin* decisions, the cases that you have remanded. We
9 don't disagree with that, Your Honor, but this Court decided
10 certification in those decisions prior to remand. We think the
11 same thing is appropriate here.

12 Third, they accuse us of forum shopping, which I
13 think is the height of irony. We are before this Court. We
14 are happy to be before this Court. It's Taishan that's trying
15 to get some new bites at the apple by going to a new judge who
16 is not familiar with the issues and trying to get things
17 treated differently.

18 The fourth thing that they argue is that there
19 are all these case-specific issues in *Mitchell* that have
20 nothing to do with the homeowner class. They don't identify
21 what any of those are. We think the certification issues are
22 going to be largely identical to the certification issues in
23 the homeowner class.

24 As far as timing, we could be ready to go as
25 soon as Your Honor asks us to be. We certainly could be ready

09:16

1 to go and Your Honor could have this presented and decided long
2 before the first trial in *Amorin* that Your Honor is still going
3 to be dealing with it. So we don't think we are extending the
4 MDL by asking this Court to hear and decide the certification
5 issues, which is what we would ask Your Honor to do.

6 **THE COURT:** What, in your view, needs to be done
7 before certification?

8 **MR. NICHOLAS:** They have indicated they want to take
9 a 30(b)(6).

10 **THE COURT:** Do you have any depositions that --

11 **MR. NICHOLAS:** No, sir.

12 **THE COURT:** Let me hear a response.

13 The whole issue is really whether or not this
14 Court determines class cert or a transferee court determines
15 class cert, transferor or transferee.

16 **MS. EIKHOFF:** That's exactly right, Your Honor, and
17 we cited to two JPML decisions in our reply where the JPML has
18 said that it's appropriate for the class certification decision
19 to be made back in the original transferor court.

20 Your Honor, under Mitchell's rationale, because
21 you have been working on this case for so many years, then you
22 should do everything in all of the cases because you're, quote,
23 familiar with it. Your Honor, the same product ID decisions
24 that he is referencing that the Court has familiarity with in
25 the homeowner cases, the Southern District of Florida and the

09:17

1 Eastern District of Virginia, they are going to need to be
2 making those decisions too. So the argument can just be taken
3 to a point where you never get rid of these cases because you
4 have a long history with these cases.

5 We think that based on where we are -- which is
6 we have to close up our class certification discovery and then
7 it needs to be briefed. It hasn't been briefed at all in this
8 Court -- that the briefing based on the discovery and the
9 case-specific decisions that need to be made should be made by
10 the court where they filed this case in the first place.

11 **THE COURT:** Do you need any further discovery on
12 this?

13 **MS. EIKHOFF:** We do, Your Honor. First of all, I
14 will say we did not get all of the documents that we asked for,
15 but I think that we have gotten all the documents we are going
16 to get. That's the impression I get. So the record is what
17 the record is. We do need to take depositions, and then we
18 will be ready to brief it.

19 **THE COURT:** What depositions do you need?

20 **MS. EIKHOFF:** We need to take a 30(b)(6). They have
21 a class rep, which is Mitchell, and then they have proposed a
22 second class rep, which is Beazer Homes. We have asked for
23 discovery on both of those parties so that we can understand
24 what the damages are that they are seeking and if they would be
25 representative and satisfy Rule 23. We would want to take a

09:19

1 30(b)(6) of Mitchell and of Beazer.

2 THE COURT: Let's do this. Let's take the
3 depositions first.

4 MS. EIKHOFF: Okay.

5 THE COURT: Maybe I can help the parties in that way.
6 I'm not saying I'm going to keep the case or not keep the case,
7 but let's take the depositions. If I send them back without
8 depositions, it's going to take you another year to take
9 depositions. That's just the way it is.

10 MS. EIKHOFF: Okay.

11 THE COURT: Let's do that. How long do you need?
12 30 days? 60 days?

13 MS. EIKHOFF: Yes. We would have to look now that we
14 are getting closer to Thanksgiving, but I think that we could
15 probably do 30, 45 days.

16 THE COURT: Are you okay with that?

17 MR. NICHOLAS: That would be fine.

18 THE COURT: Let's do 45 days.

19 MS. EIKHOFF: Thank you.

20 THE COURT: Anything else, folks? Harry?

21 MR. ROSENBERG: No, Your Honor.

22 THE COURT: Court will stand in recess.

23 THE DEPUTY CLERK: All rise.

24 (Proceedings adjourned.)

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CERTIFICATE

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

/s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter