

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE-MANUFACTURED
DRYWALL PRODUCTS LIABILITY

Docket No. 09-MD-2047
New Orleans, Louisiana
Thursday, December 14, 2017

TRANSCRIPT OF MONTHLY STATUS CONFERENCE AND MOTION PROCEEDINGS
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(THURSDAY, DECEMBER 14, 2017)

(STATUS CONFERENCE AND MOTION PROCEEDINGS)

14:00:56 5 (OPEN COURT.)

14:00:56 6 THE COURT: Be seated, please. Good afternoon, ladies
14:00:57 7 and gentlemen. We have a monthly status conference. Call the case
14:01:00 8 first.

14:01:00 9 THE DEPUTY CLERK: MDL-2047, *in re: Chinese Manufactured*
14:01:05 10 *Drywall Products Liability Litigation.*

14:01:08 11 THE COURT: Counsel, make their appearance for the
14:01:09 12 record, please, liaison.

14:01:12 13 MR. ROSENBERG: Good afternoon, Judge Fallon. Harry
14:01:16 14 Rosenberg as liaison counsel for CNBM, BNBM, and Taishan, your
14:01:20 15 Honor.

14:01:20 16 MR. MILLER: Good afternoon, Judge Fallon. Kerry Miller
14:01:24 17 as liaison counsel for Knauf.

14:01:26 18 MR. HERMAN: May it please the Court, your Honor, Judge
14:01:32 19 Fallon. Good afternoon, it's Russ Herman for plaintiffs.

14:01:34 20 THE COURT: This is our monthly status conference. We
14:01:36 21 don't have very much to talk about in the status conference, but we
14:01:39 22 have a couple of motions thereafter. Let's do the status
14:01:42 23 conference first.

14:01:45 24 I met with the parties a moment ago, I did talk to them
14:01:49 25 about their proposed agenda. We'll take it in the order given.

14:01:54 1 MR. HERMAN: May it please the Court, on Items 3, 6, 7,
14:02:07 2 10 there really are no new issues, and folks can refer to Status
14:02:17 3 Report No. 94, the previous status report to take a look at what
14:02:23 4 the issues are in those sections because none of them have changed.

14:02:29 5 Your Honor has two scheduled arguments, one appears noted
14:02:36 6 at page 24, Section VII, it's a motion to vacate the preliminary
14:02:46 7 defaults set for hearing today, and Ms. Sandy Duggan will be
14:02:54 8 honoring -- we do honor her, and she will be arguing on behalf of
14:02:59 9 plaintiffs.

14:03:01 10 Another matter is set for hearing, or two matters, at
14:03:04 11 page 30, Section XI. And as I understand it Kerry Miller, Patrick
14:03:16 12 Montoya, and perhaps others will be involved in that argument. I
14:03:24 13 know that Mr. Miller's requested that he, if your Honor permits, be
14:03:29 14 allowed to argue first his issue. The other parties, as I
14:03:35 15 understand it, have no objection to that if your Honor permits.

14:03:40 16 THE COURT: That's fine.

14:03:41 17 MR. HERMAN: One last thing, and that is BrownGreer has
14:03:46 18 already made a report, which I do not need to repeat, but I have
14:03:50 19 provided your Honor's law clerk with also an e-mail that gives that
14:03:56 20 report. That's it, your Honor.

14:04:00 21 THE COURT: Anything from the defendants?

14:04:04 22 MR. ROSENBERG: None from us, your Honor.

14:04:08 23 THE COURT: Can you summarize, Russ, the report of
14:04:14 24 BrownGreer? What's the situation there? We spoke at our
14:04:20 25 conference a moment ago.

14:04:29 1 MR. HERMAN: Yes, your Honor, they have -- excuse me one
14:04:29 2 moment.

14:04:30 3 His oral report is that, "The only thing to report is
14:04:34 4 that BrownGreer is close to finishing the final calculations for
14:04:41 5 the GBI holdback and plans to disburse the holdback amounts to
14:04:48 6 eligible claimants once they determine the pro rata percentage."
14:04:56 7 And I believe your Honor inquired as to how much that might be, and
14:05:02 8 that BrownGreer, through Jake, responded it was in the neighborhood
14:05:06 9 of about \$8 million.

14:05:09 10 THE COURT: And that would be part paid out in accordance
14:05:13 11 with the prior payments and would be proportional to those
14:05:19 12 payments, so he will be doing that shortly and that should be just
14:05:22 13 about resolving the Knauf aspect of the case.

14:05:25 14 MR. HERMAN: Yes, your Honor.

14:05:27 15 THE COURT: Okay. All right. Let's go into the motions
14:05:29 16 then. The first motion which I have before me is filed by BNBM,
14:05:40 17 PLC, BNBM Group, CNBM, and they seek -- they want me to vacate the
14:05:50 18 default judgment, which I rendered a number of years ago in this
14:05:56 19 particular case. You'll recall that this had to do with Taishan
14:06:03 20 also, that suit was filed, it was served on Taishan and others.
14:06:13 21 It's an issue of service insofar as others.

14:06:17 22 But there was a proceeding -- there were some attorneys
14:06:25 23 who either represented them or at least was visiting during our
14:06:32 24 procedures, and I tried to convince the defendants to answer, gave
14:06:42 25 them as much time as I possibly could. Eventually I had to come to

14:06:47 1 the conclusion that we had to move the case forward and that
14:06:51 2 default judgments needed to be issued.

14:06:55 3 I issued default judgments finding jurisdiction, and it's
14:06:59 4 a long story. But in any event, the motion now is by BNBM, BNBM
14:07:07 5 Group, and CNBM insofar as it's applicable to them, that they wish
14:07:13 6 to vacate these judgments against them.

14:07:16 7 I'll hear from the parties, the movants.

14:07:19 8 MR. ROSENBERG: Your Honor, if it please the Court. As
14:07:23 9 Mr. Herman mentioned a moment ago, we've spoken to Mr. Miller and
14:07:27 10 he asked if he could present his motion first.

14:07:30 11 THE COURT: Sure. Okay. That's fine.

14:07:31 12 MR. ROSENBERG: And we've agreed to that procedure,
14:07:34 13 subject to your Honor's approval.

14:07:36 14 THE COURT: No, that's fine. I thought he wanted to
14:07:38 15 speak on that motion first. But we'll take that, that's fine.

14:07:42 16 MR. MONTOYA: Your Honor, good afternoon. Patrick
14:07:45 17 Montoya on behalf of the Villas at Oak Hammock, and the motion at
14:07:48 18 issue is claimants motion Villas at Oak Hammock at Document
14:07:54 19 No. 20277, and it's a motion to vacate your Honor's order
14:07:59 20 extinguishing the Villas at Oak Hammock's claim which was an
14:08:01 21 already remediated homes claim.

14:08:04 22 And the argument really has two parts. The first part is
14:08:07 23 to the untimeliness of the Villas' objection to the extinguishment
14:08:12 24 of the claim and asking to vacate the order; and the second portion
14:08:14 25 of the motion is to allow the evidence that we do have to be

14:08:18 1 presented to Special Master Balhoff.

14:08:21 2 My understanding is, and I see from Mr. Miller, from
14:08:25 3 Mr. Dysart is that as to the first prong as to the untimeliness
14:08:28 4 aspect, that part is not being raised here. I think the only issue
14:08:32 5 we're discussing is the merits or the strength of the evidence as
14:08:35 6 to the claim; is that correct, gentlemen?

14:08:37 7 MR. DYSART: Yes, your Honor. Obviously it was late, but
14:08:40 8 to the extent that good cause is presented to the Court, we would
14:08:43 9 have no objection to the Court hearing their arguments at this
14:08:48 10 time.

14:08:48 11 THE COURT: Go ahead, Pat.

14:08:49 12 MR. MONTOYA: Your Honor, it's an issue that your Honor's
14:08:52 13 faced before in this case, it's Section 3A1 of the settlement
14:08:55 14 agreement that discusses what evidence is available, affected
14:08:59 15 property during remediation. And the settlement agreement reads:
14:09:01 16 "For those owners with claims pending," and the case style, "where
14:09:05 17 available, such submissions shall be in the form required by MDL
14:09:10 18 Pretrial Order 1(B).

14:09:12 19 This is a multi-townhome claim.

14:09:14 20 THE COURT: Right, I remember. Yes.

14:09:15 21 MR. MONTOYA: All of the other units were found to have
14:09:18 22 Knauf 100 percent and were either in the settlement program or had
14:09:22 23 already remediated claims. This claim was done at the same time
14:09:26 24 and evidence preservation was done as to product ID. Proper
14:09:29 25 evidence preservation was not done at the time of demolition.

14:09:32 1 THE COURT: This is one of the claims, Pat?

14:09:34 2 MR. MONTROYA: This is just one. All of the rest have
14:09:37 3 been adjudicated. So we're here with one.

14:09:39 4 So we have indicia from the aspect that all of these
14:09:40 5 homes were built at the same time, some of them have adjoining
14:09:44 6 walls, and they all had Knauf drywall.

14:09:46 7 The second portion of the indicia is the report that is
14:09:48 8 contained at Exhibit A to Document 20277, which is an engineering
14:09:53 9 report from the product -- from the inspectors that went into the
14:09:56 10 product ID. And they tried to be as compliant as possible with
14:10:00 11 your Honor's order, and you will find that they investigated ten
14:10:03 12 different spots in the unit, drilled in and opened up the holes in
14:10:08 13 the wall and the pictures are contained in the report.

14:10:10 14 Knauf's point about the report is that it only seems to
14:10:13 15 have either one or two pictures of an actual piece of Knauf
14:10:17 16 drywall, the same piece of drywall photographed over and over
14:10:19 17 again. What they've glossed over in the report is the chart that
14:10:22 18 the engineer has signed off on that they went to ten different
14:10:25 19 spots throughout the unit, found Knauf Tianjin, and actually shot
14:10:30 20 it with the XRF gun as well and have those readings. I know how
14:10:33 21 your Honor feels about the XRF gun, but the work was done and the
14:10:37 22 product has been identified.

14:10:38 23 So we're in a spot where we've got substantial compliance
14:10:41 24 with your Honor's pretrial order but not full compliance. And what
14:10:45 25 I am asking for is for all of this information on product ID, the

14:10:49 1 contracts, the costs, everything else that is at play here that's
14:10:52 2 been provided to Knauf to let Special Master Balhoff look at it,
14:10:57 3 remediate the claim, and see if we can't come to a resolution. In
14:11:01 4 either event, he reports back to your Honor with a finding of fact.

14:11:03 5 Like I say, either hopefully we can get it resolved or at
14:11:07 6 least then that way your Honor has had the chance and the claimants
14:11:10 7 have had a chance to have their claim see the light of day and be
14:11:13 8 judged properly. That's our request for relief, your Honor.

14:11:15 9 THE COURT: All right. Let me hear from the opponent.

14:11:21 10 MR. DYSART: Good afternoon, Judge Fallon. Danny Dysart
14:11:26 11 on behalf of Knauf defendants. First, I just want to start out
14:11:30 12 that it's undisputed in this case that this is an ARH claim that is
14:11:33 13 subject to the ARH protocol, the Knauf class settlement agreement,
14:11:37 14 and PTO 1(B). It's also undisputed that PTO 1(B) was not complied
14:11:40 15 with. Now, your Honor has recently ruled in other proceedings with
14:11:44 16 ARH claims that when PTO 1(B) is not complied with and in
14:11:51 17 particular where they do not have sufficient photographic evidence
14:11:52 18 to demonstrate how much, if any, KPT drywall was in their home,
14:11:56 19 that it does not comply with the settlement agreement and that
14:11:59 20 claim cannot be compensated.

14:12:00 21 And on this case -- let me just back up and just give a
14:12:03 22 brief time line of this claim. The Knauf class settlement was in
14:12:07 23 January of -- December of 2011. This remediation --

14:12:13 24 Let me back up even further. October of 2009 PTO 1(B)
14:12:18 25 was entered. The remediation of this property was in December of

14:12:21 1 2010 and continuing until May of 2011. So the claimants were on
14:12:26 2 notice of PTO 1(B) at that time. The Knauf class settlement
14:12:30 3 agreement was in December of 2011, which then adopted PTO 1(B).
14:12:35 4 These claimants did not opt out, they knew the requirements and
14:12:37 5 they knew that they needed to provide evidence sufficient with
14:12:40 6 PTO 1(B).

14:12:43 7 Fast forward four years. Knauf had no notice that this
14:12:45 8 was even an ARH claim until January of 2016. It was at that point
14:12:49 9 that we asked for the information for the ARH claim to be
14:12:55 10 submitted. At that point there were multiple deficiencies,
14:12:58 11 including the lack of evidence for KPT evidence for PTO 1(B).
14:13:04 12 Correspondences with counsel and then the motion to extinguish came
14:13:09 13 and that's where we are today.

14:13:10 14 At the end of the day, they can't satisfy the PTO, and
14:13:13 15 the only evidence that's been submitted is one board, a single
14:13:16 16 board.

14:13:16 17 Now I understand that the inspection report has certain
14:13:19 18 information in terms of other areas they say Knauf was found, but
14:13:21 19 this is the exact reason why we have PTO 1(B) and why Knauf put it
14:13:26 20 in the settlement agreement because they need to identify where it
14:13:29 21 is in the property and need to identify the photographic evidence.

14:13:34 22 In this case, it's really just an issue of can it go back
14:13:39 23 to Dan Balhoff? Your Honor can do that. But at this point, it's
14:13:41 24 undisputed that they cannot satisfy the requirements of the
14:13:44 25 settlement agreement and that the claim shouldn't be compensated.

14:13:47 1 THE COURT: I understand that. I got the whole picture.
14:13:51 2 The issue really is at this point as I see it is just a question of
14:13:55 3 due process. I make no judgment on the final amount. The final
14:14:01 4 claim may go the way that you say it's going to go, but I do think
14:14:06 5 that there's enough there to at least let Balhoff take a look at
14:14:11 6 it.

14:14:11 7 So I'll let you file that with Balhoff, let him recommend
14:14:15 8 whatever he recommends to me, and then I'm going to have to deal
14:14:17 9 with it the way that I see it. But I'll give your people an
14:14:21 10 opportunity at least to go through the process.

14:14:23 11 MR. MONTOYA: Thank you, your Honor.

14:14:24 12 MR. DYSART: Thank you, Judge.

14:14:25 13 THE COURT: Thank you.

14:14:28 14 Okay. Are we dealing with you now, Harry?

14:14:30 15 MR. ROSENBERG: Yes, your Honor. Mr. Vejnaska is going
14:14:35 16 to handle the argument for us.

14:14:37 17 THE COURT: Okay.

14:14:49 18 MR. VEJNOSKA: Good afternoon, your Honor. Chris
14:14:51 19 Vejnaska, Orrick, Herrington & Sutcliffe appearing on behalf of
14:14:54 20 CNBM Company, BNBM Group, and BNBM, PLC.

14:14:58 21 Your Honor, we're here today because the Court has
14:15:00 22 entered four defaults against the three movants. These are all
14:15:05 23 preliminary defaults. To illustrate the complexity and the
14:15:11 24 confusion, I'd submit, surrounding those orders to point out that
14:15:17 25 in only one of those cases were all three of the movants defaulted.

14:15:22 1 In other words, in the other three cases only -- there's at least
14:15:27 2 one of the movants who is not defaulted. And, of course, as I've
14:15:33 3 said, none of these defaults have yet been finalized. The PSC has
14:15:37 4 not even requested that they be treated as final.

14:15:41 5 Now, your Honor, in the briefing the PSC did not engage
14:15:44 6 on the law other than citing a few of this Court's rulings and one
14:15:50 7 oblique reference to a New York state case on banking law, its main
14:15:57 8 authority it quoted to your Honor was Mr. David Bowie. Further, in
14:16:03 9 its briefing, your Honor, the PSC focused almost entirely on the
14:16:08 10 wrong defendant. It talked about Taishan Gypsum, which is not one
14:16:13 11 of the moving parties.

14:16:14 12 And finally, your Honor, the PSC did not assist the Court
14:16:18 13 in addressing the application and the meaning of the Court's
14:16:24 14 pretrial orders, specifically Pretrial Orders 1(G) and 1(H).
14:16:29 15 Rather they contented themselves with referring to them as a red
14:16:34 16 herring, which they said would, in quotes, "detract from their
14:16:37 17 ability to collect damages." Which of course, your Honor, is
14:16:40 18 absolutely correct. It would.

14:16:45 19 To be direct, your Honor, we believe that the disposition
14:16:48 20 of this motion begins and ends with the Court's analysis of its
14:16:53 21 pretrial orders and particularly Pretrial Order 1(H).

14:16:59 22 Now, your Honor, I know the Court is well aware of the
14:17:02 23 standards to apply and the three factors to look at. I would only
14:17:08 24 emphasize that the *Upjohn* case made very clear that the requirement
14:17:12 25 of good cause has been interpreted very liberally, and the one

14:17:17 1 parcel of real property case emphasized that, as do many of the
14:17:23 2 cases we cited to the Court, the very clear preference of the
14:17:28 3 judicial system to resolve claims by trials on the merits. In
14:17:34 4 finding the Fifth Circuit wrote that an abuse of discretion need
14:17:38 5 not be glaring to justify reversal.

14:17:42 6 So, your Honor, turning to the application of those three
14:17:47 7 factors here, I would say on the willfulness issue, the pretrial
14:17:52 8 orders alone dictate that the Court's defaults need to be vacated
14:17:58 9 as not willful.

14:18:00 10 Second, no prejudice will ensue by doing so, particularly
14:18:04 11 given the Court's preservation of evidence orders, which ironically
14:18:09 12 are not -- we just heard some discussion of in the prior motion.

14:18:15 13 And finally, the meritorious standard. It's liberally
14:18:18 14 construed, it is not a very high bar, but here the movants don't
14:18:24 15 even need the benefit of that liberal instruction because it had --
14:18:29 16 we have multiple defenses on the merits.

14:18:34 17 Now, your Honor, the Supreme Court has described Congress
14:18:41 18 as not having provided any hard and fast rules, and so this needs
14:18:46 19 to be an equitable analysis and the motion must "take account of
14:18:51 20 all of the circumstances." The *Republic of Iraq* case that we cited
14:18:57 21 makes clear that this is a factual review by the Court. It
14:19:01 22 certainly constrained -- committed to your discretion, your Honor.
14:19:02 23 But that you must balance those factors against one another.

14:19:08 24 And turning to willfulness, your Honor. What is willful
14:19:12 25 is perhaps surprisingly, perhaps not, not really defined in most of

14:19:19 1 these cases. It clearly must be viewed given the cases I've just
14:19:24 2 cited to your Honor in its full context and with a liberal view
14:19:29 3 approaching it. For example, in the *Ortega Dominguez* case, the
14:19:44 4 court excused a deliberate failure to appear where it just found
14:19:48 5 that the defendants were justified in believing at the time that
14:19:52 6 they were not properly served.

14:19:54 7 Perhaps more to the point, the bar to find willfulness is
14:20:02 8 high. Willfulness literally if you look in the dictionary just
14:20:05 9 means essentially any conscious action, any deliberate action.
14:20:09 10 That clearly can't be willfulness here and the courts have said
14:20:13 11 that it is not.

14:20:14 12 Not all conscious decisions are culpable. Culpability is
14:20:17 13 the phrase that is used in Rule 60(b). And indeed some courts,
14:20:22 14 such as the *Artec* case, require something far in excess of that.
14:20:30 15 They require something in the nature of bad faith.

14:20:33 16 And, your Honor, believe me, I've stood here with my
14:20:39 17 colleagues, we've heard the various ad hominem attacks on our
14:20:44 18 clients, but we do not believe that they have acted in bad faith in
14:20:50 19 their decision-making process here.

14:20:55 20 Now, your Honor, this time line is a little complicated.
14:20:59 21 I only want to make one point here. No defaults were entered
14:21:03 22 against the three moving parties until 2011. I know your Honor
14:21:08 23 knows where I am going with this. The significance is that every
14:21:12 24 default was entered after your Honor entered Pretrial Orders 1(G)
14:21:18 25 and 1(H). 1(G), your Honor, says it's necessary because the

14:21:26 1 plaintiffs have now filed amended omnibus complaints in, and you
14:21:31 2 list four cases; two of which, *Gross* and *Wiltz*, are the ones that
14:21:36 3 later on were the first two that, as you look at the time line
14:21:39 4 here, you'll see those are the first two defaults entered against
14:21:42 5 the three parties.

14:21:47 6 It further said that in order to conserve judicial,
14:21:53 7 attorney, and client resources and to avoid filing responses to
14:21:56 8 complaints that will be amended because the PSC stood here month
14:22:01 9 after month and said we're still amending, that nothing needed to
14:22:06 10 be filed in response to those complaints until the PSC filed a
14:22:11 11 notice of completion.

14:22:13 12 You further noted in the same order, your Honor, that as
14:22:17 13 to the six omnibus complaints that were presently before the court,
14:22:21 14 "efforts to complete service have only just commenced." Now, this
14:22:26 15 is in May of 2010.

14:22:31 16 I would also note, your Honor, that the PSC was
14:22:35 17 reported -- I'm sorry, in 1(H) the Court said that it was now aware
14:22:40 18 that there had been inquiries and questions about this notification
14:22:46 19 requirement. 1(H) was entered roughly five months, almost exactly
14:22:51 20 five months after 1(G), and the order makes it clear that it was
14:22:57 21 entered to clarify some of the confusion that had sprung up, just
14:23:01 22 as 1(G) was entered to clarify the confusion that had sprung up
14:23:05 23 from some of the prior orders.

14:23:07 24 And in that you say, as I said, this is where you say
14:23:10 25 that complete service has only just commenced. And so you at that

14:23:15 1 point required that a master complaint be filed. And you said no
14:23:20 2 defendant needs file any response to any complaint now or to come
14:23:27 3 until that master complaint process has been completed.

14:23:31 4 You also directed the PSC to report monthly to you, your
14:23:35 5 Honor, on those master complaints, and, in fact, it did. And for
14:23:39 6 several months afterwards it stated that it was in the process of
14:23:43 7 drafting that.

14:23:48 8 So, your Honor, the simple point here is the obvious one.
14:23:53 9 A party can't be defaulted for failing to respond to a complaint
14:23:59 10 when the date for responding to the complaint has not yet occurred.
14:24:04 11 And by definition, your Honor, that date still has not occurred.

14:24:13 12 The PSC raises some questions in the past about whether
14:24:17 13 this is an effective order, whether it should still be an effective
14:24:20 14 order. This is a screen grab, your Honor, from the Court's web
14:24:24 15 site taken this week. 1(G) and 1(H) remain on the Website.

14:24:31 16 Nor, your Honor, was your embracing and imposing of a
14:24:37 17 master complaint process and requirement unique. It has been done
14:24:43 18 before, as your Honor well knows, in prior MDL's. And as the
14:24:51 19 *Refrigerant Compressors Antitrust Litigation* case pointed out, the
14:24:55 20 master complaint is frequently used to generate deadlines. This is
14:24:59 21 how you calculate the deadline for when your answer is due.

14:25:04 22 Now, your Honor, you know what happened next, or more
14:25:08 23 precisely you know what didn't happen next. The PSC did not file a
14:25:13 24 notice of completion for seven years. We stand here, we talk about
14:25:19 25 delay. For seven years it did not file a notice of completion. It

14:25:23 1 filed it on April 6th. Just several months after that, your Honor,
14:25:27 2 they filed more than a dozen complaints. They filed complaints in
14:25:31 3 intervention. There have been at least two of those, I think, that
14:25:35 4 I am aware of.

14:25:36 5 So clearly the notice of completion is just not
14:25:39 6 effective, the PSC has never filed a master complaint, and in the
14:25:43 7 last few months the PSC even has written that it thinks that these
14:25:47 8 orders should be vacated. You don't vacate something that doesn't
14:25:50 9 exist and that still isn't in force.

14:25:57 10 So to sum up, your Honor, the preliminary defaults by the
14:26:01 11 movants simply could not have been willful. As I've said, I think
14:26:06 12 that Pretrial Order 1(H) is the beginning and the ending of the
14:26:12 13 Court's analysis here when the defendants were told they did not
14:26:16 14 need to respond to the complaint, which is the first thing that you
14:26:19 15 do in litigation, that should end the analysis.

14:26:23 16 We talked about the high equitable standard that's been
14:26:27 17 set by the Supreme Court and other cases here. The pretrial
14:26:32 18 orders, your Honor, not only were entered to try to resolve
14:26:38 19 confusion, and we submit you did, but they recognized that
14:26:43 20 confusion had because of all of the parties, hundreds of parties,
14:26:48 21 thousands of claimants, I think your Honor has said there are
14:26:52 22 certainly thousands of lawyers -- seems like every lawyer in the
14:26:57 23 United States has appeared in this court in this case -- there has
14:27:02 24 been confusion. 1(H) clarified that. The PSC has not abided by
14:27:06 25 those orders, has not triggered an obligation by any of the

14:27:12 1 movants.

14:27:16 2 The failure to answer is simply not willful where proper
14:27:22 3 service is not made. A couple of citations there. And everything
14:27:26 4 that the movants have done in this litigation since appearing has
14:27:32 5 been reflective of their approach and their positions as to this
14:27:41 6 litigation until that time. When we appeared in 2015, the first
14:27:45 7 thing we did, one of the first things we did was to file a request,
14:27:50 8 and your Honor issued an order, preserving all of our defenses.
14:27:55 9 All of our defenses. The reason that they did that has been made
14:27:59 10 clear, then, in the motions to dismiss that were filed in April,
14:28:03 11 May, and June within just a couple of months of appearing here.
14:28:08 12 Those motions to dismiss challenged service, they challenged
14:28:13 13 jurisdiction.

14:28:14 14 And why did they challenge jurisdiction? In other words,
14:28:18 15 when you look at this and you're looking at willfulness and intent,
14:28:21 16 what did the movants know or believe they knew? CNBM Company knew
14:28:28 17 it never made a single sheet of Chinese drywall. BNBM Group knew
14:28:34 18 it never made a single sheet of Chinese drywall. They never
14:28:39 19 shipped them. BNBM Group knew that it had never manufactured
14:28:46 20 any -- I'm sorry I said BNBM, PLC. BNBM Group never made it, BNBM,
14:28:53 21 PLC knew and it's in the motion to dismiss that was filed here in I
14:28:58 22 can't remember if it was April or May of 2015 that its product had
14:29:00 23 been tested and was not defective. So all of these reflect what
14:29:09 24 the parties had, the approaches that they had taken, and I think
14:29:14 25 they directly bear on any question of willfulness.

14:29:20 1 Now, your Honor, there are two other factors you're
14:29:24 2 supposed to consider here, and I want to run through them very
14:29:29 3 quickly; because I think that while it took a little time to make
14:29:35 4 sure and explain the chronology of the pretrial orders, these
14:29:40 5 latter two factors are pretty easily satisfied here.

14:29:43 6 As to prejudice. That same *One Parcel of Property* case
14:29:51 7 is a good example. It says that setting aside the default -- that
14:29:55 8 the fact that setting aside the default would delay recovery or
14:29:59 9 would require the claimant to litigate the action is insufficient
14:30:04 10 prejudice to merit not vacating defaults. One of the cases we
14:30:09 11 cited, your Honor, says, quite frankly, every case has some delay
14:30:12 12 and some delays at some point. But you need much more. And the
14:30:16 13 *Lacy* case makes clear what that is, you need actual prejudice, you
14:30:20 14 need actual loss of evidence, inability to conduct discovery, that
14:30:26 15 sort of thing.

14:30:26 16 Your Honor, Pretrial Order 1 required the parties to
14:30:32 17 preserve evidence. Pretrial Order 1(L) required the claimants to
14:30:38 18 preserve evidence; samples, photographs, et cetera. If evidence
14:30:45 19 has been lost, if there is that kind of prejudice here, it's not
14:30:49 20 because of the defaults or any delay in appearing.

14:30:56 21 The PSC also in its brief has claimed that granting our
14:31:03 22 motion will just obviously they think cause delay. Now, again, as
14:31:12 23 the *Lacy* case says, mere delay is not prejudice. But if you look
14:31:18 24 at what your Honor has done to shepherd this case along, many of
14:31:23 25 the substantive issues have already been resolved at this level.

14:31:27 1 The PSC has taken at least a year's worth of extensive discovery
14:31:33 2 from the movants on all sorts of issues, including ones that we
14:31:37 3 quite frankly thought and still think were irrelevant, but
14:31:40 4 nonetheless, they were given that right.

14:31:42 5 The PSC, as we talked about just earlier this afternoon
14:31:46 6 with your Honor, we've already agreed to claimant discovery. That
14:31:52 7 is going to happen. And your Honor knows that before you can
14:31:58 8 transfer -- remand these cases, that discovery must be completed.
14:32:05 9 I'd submit to you that we are far closer to the end than the
14:32:08 10 beginning, and we're talking now about, you know, discovery that's
14:32:14 11 going to happen over the next several months anyway.

14:32:18 12 Beyond that, even without the relief, your Honor, this
14:32:24 13 goes to one of the points I made at the beginning, each movant is a
14:32:28 14 non-defaulted defendant in one or more actions, including in three
14:32:32 15 of the four cases where defaults have been entered. And even
14:32:38 16 without any relief, your Honor, the movants have the right to take
14:32:43 17 discovery and otherwise defend themselves on the merits and all of
14:32:47 18 the merits in all of these new protective actions.

14:32:51 19 And in the *Brooke* case, the movants, all, regardless of
14:32:59 20 defaults, have the right which cannot be waived to challenge
14:33:04 21 standing. Standing means proving that you actually have a claim,
14:33:08 22 which means you actually have the movant's product.

14:33:17 23 And finally, your Honor, meritorious defenses. As I
14:33:21 24 said, this is not a stringent test. The test is not whether the
14:33:25 25 defense would carry the day, the defense is -- the bar is set far

14:33:29 1 lower than that. It is whether there is some possibility, is the
14:33:33 2 wording, some possibility that the defense could change the outcome
14:33:39 3 in any way from the defaults.

14:33:43 4 And here, your Honor, you're familiar with it, I've
14:33:48 5 already touched on this, but among other things, the PSC, most of
14:33:54 6 its product identification evidence, there is none against CNBM
14:33:58 7 Company, there is none against BNBM Group, there are 60 homes, plus
14:34:02 8 or minus, against BNBM, PLC in Florida. And as to those, BNBM will
14:34:10 9 establish, we believe, that there is no defect as to those. Most
14:34:14 10 of the claims are just as to generic drywall, which the PSC
14:34:19 11 understandably is claiming is Taishan's responsibility, but that
14:34:24 12 has yet to be proven. And as I said, two of the three movants
14:34:27 13 never made, never shipped, never exported any drywall period here.

14:34:34 14 Thank you, your Honor.

14:34:35 15 THE COURT: Okay. Let me hear a response, particularly
14:34:39 16 on the first issue. I understand -- I really don't need a lot on
14:34:46 17 prejudice or defenses, but talk to me about the first issue.

14:34:50 18 MS. DUGGAN: Good afternoon. Sandra Duggan for the
14:34:52 19 plaintiffs.

14:34:54 20 Your Honor, there is no good cause to vacate the default
14:34:57 21 judgments against CNBM, BNBM Group, and BNBM. Just as there was no
14:35:01 22 good cause to vacate the defaults against Taishan.

14:35:04 23 Defendants' motion should be denied for three reasons.
14:35:07 24 One: Defendants' failure to respond to the complaints in this case
14:35:10 25 was indeed willful. They were not only aware of the claims against

14:35:14 1 them but they deliberately refused to accept service. And when
14:35:18 2 they were served under the Hague, they intentionally refused to
14:35:22 3 respond. And on this basis alone, the motion should be denied.

14:35:25 4 Two: If the defaults were vacated, the plaintiffs would
14:35:29 5 be severely prejudiced. At this point any delay whatsoever is
14:35:34 6 unacceptable. Especially given the defendants' attempts throughout
14:35:37 7 the past nine years to engage in gamesmanship and delay the
14:35:43 8 resolution of plaintiffs' claims.

14:35:45 9 And three: Defendants did not act expeditiously after
14:35:48 10 entering the litigation. On the contrary. They waited almost
14:35:52 11 three years after finally appearing in the MDL in February 2015
14:35:56 12 before filing this motion. Long before PTO's 1(G) and 1(H) were
14:36:02 13 entered. Long before the defendants appeared in the litigation
14:36:06 14 they made a deliberate, strategic decision not to answer any
14:36:11 15 Chinese Drywall complaints against them and they knowingly allowed
14:36:14 16 defaults to be entered. These companies in many instances refused
14:36:18 17 service of process under the Hague, and when service was made on
14:36:22 18 them, they intentionally did not respond. These were willful
14:36:27 19 actions on their parts that had absolutely nothing to do with PTO
14:36:30 20 1(G) or 1(H).

14:36:33 21 THE COURT: What about his position that you didn't
14:36:35 22 default -- that you only defaulted three out of the four?

14:36:38 23 MS. DUGGAN: Well, your Honor has actually already ruled
14:36:41 24 on that argument that was previously made in connection with their
14:36:43 25 motions to dismiss for lack of jurisdiction, and our position is

14:36:46 1 that your Honor's ruling was correct. It's irrelevant. They are
14:36:52 2 defaulted parties here. And that was their intention all along.

14:36:54 3 And it's no secret why they didn't answer the complaints.
14:36:58 4 They've made it very clear. The reason they didn't answer the
14:37:01 5 complaints is there was no U.S.-China treaty on the mutual
14:37:06 6 enforcement and recognition of judgments. So because their assets
14:37:09 7 are not in the United States, the chances of your Honor being able
14:37:14 8 to execute on their assets in China was very low. And they made
14:37:18 9 this clear in many announcements they issued publicly to their
14:37:22 10 investors.

14:37:24 11 So we know that when Taishan was served in the *Mitchell*
14:37:30 12 case on May 8th, 2009, Taishan Gypsum wrote to the top ranking
14:37:35 13 officials at CNBM and BNBM in order to give Chief Song and Chief
14:37:40 14 Cao an understanding of the facts of the case and give relevant
14:37:43 15 instructions to Taishan. And again, they laid out their plan in
14:37:48 16 that memorandum not to respond to the *Mitchell* lawsuit.

14:37:53 17 We also know at the same time before the formation of the
14:37:56 18 MDL that their chief competitor in the marketplace, Knauf, wrote to
14:38:01 19 Chief Song, the head of the CNBM operation, and encouraged Taishan
14:38:05 20 and CNBM and BNBM to respond to the lawsuits. Mr. Song and the
14:38:11 21 leader of Knauf had a relationship that went back for years. And
14:38:16 22 as we know, Knauf came into the case and ultimately settled
14:38:20 23 plaintiffs' claims for over a billion dollars. But the defendants
14:38:23 24 did not come into the case.

14:38:25 25 We also know from the Hogan Lovells privilege log that

14:38:29 1 going back to the beginning of the MDL in August of 2009, the
14:38:35 2 attorneys at Hogans Lovells was in regular communications with the
14:38:38 3 leaders of CNBM and BNBM, as well as current counsel for CNBM,
14:38:43 4 Mr. Vejnoska and Mr. Stengel, and they were discussing the status
14:38:48 5 of the litigation, possible retention for counsel for CNBM and
14:38:52 6 BNBM.

14:38:52 7 After the *Germano* default judgment was entered, the
14:38:57 8 defendants held two important meetings on June 3rd, 2010. And
14:39:02 9 during those meetings it was determined that Mr. Song would
14:39:07 10 organize the response to the litigation. The defendants' course of
14:39:10 11 events memo confirms the company's strategy of continuing to reject
14:39:15 12 the service of legal process. And they also discussed hiring Hogan
14:39:20 13 Lovells to represent Taishan as a limited response to the
14:39:24 14 litigation in order to challenge jurisdiction and delay enforcement
14:39:27 15 of the judgment. And sure enough, on the last day to appeal the
14:39:31 16 *Germano* judgment, Hogan Lovells appeared for Taishan solely to
14:39:36 17 challenge jurisdiction and seek to vacate the default judgments.

14:39:41 18 For two years we litigated those jurisdictional motions
14:39:45 19 and we litigated the motions to vacate. And eventually in 2012
14:39:51 20 your Honor denied the motions, and in 2014 two separate panels of
14:39:55 21 the Fifth Circuit affirmed your Honor's rulings.

14:39:59 22 Now, the defendants' response to this is, "Well, this has
14:40:01 23 nothing to do with us. These are Taishan facts. Taishan is a
14:40:05 24 separate company." But we know that behind the scenes after
14:40:09 25 Taishan was ordered to appear for a judgment debtor examination,

14:40:13 1 CNBM Group summoned Mr. Jia, the chairman of Taishan, to its board
14:40:19 2 meeting. And six days before Taishan was supposed to appear before
14:40:23 3 your Honor, CNBM Group's board of directors voted unanimously to
14:40:27 4 respect Taishan's decision not to appear. On that same day, CNBM
14:40:32 5 Group issued a directive to BNBM Group and its subsidiaries not to
14:40:36 6 deposit any funds in New York banks and not to use company e-mails
14:40:40 7 when dealing overseas.

14:40:42 8 And again, the defendants admit in public announcements
14:40:45 9 that the failure to respond to the Chinese Drywall lawsuits was
14:40:48 10 based on the absence of a treaty to enforce American legal
14:40:53 11 judgments in China. Defendants' actions were not based on PTO 1(G)
14:40:58 12 or 1(H). Now all of a sudden at the end of 2017, for the first
14:41:03 13 time defendants come forward and they assert reliance on those
14:41:07 14 pretrial orders as a basis for their good cause argument that they
14:41:10 15 were not required to respond to the lawsuits.

14:41:12 16 They hang their hat on the fact that no master complaint
14:41:15 17 was ever filed. However, if defendants are going to rely on those
14:41:20 18 orders, they must address certain facts. PTO 1(G) required that
14:41:25 19 counsel shall enter their appearance on behalf of their clients
14:41:30 20 within 20 days after service of a complaint on a defendant. These
14:41:33 21 defendants did not timely enter their appearance in any action
14:41:37 22 where service was made on them pursuant to 1(G), and they offered
14:41:41 23 no explanation for this failure to comply.

14:41:44 24 PTO 1(G) also required the defendant shall respond to the
14:41:47 25 appropriate profile form within 40 days after service of a

14:41:51 1 complaint on a defendant. Again, they did not timely submit any
14:41:56 2 profile forms and they offered no explanation for this failure.

14:42:00 3 Meanwhile, even in the absence of a master complaint in
14:42:05 4 PTO 1(H), Taishan was expressly required to file manufacturer
14:42:10 5 profile forms that would form the basis of information to formulate
14:42:15 6 jurisdictional discovery on the issuance of 30(b)(6) notices.

14:42:19 7 Defendants do not explain and cannot explain why CNBM and BNBM
14:42:24 8 could not also have been required to file manufacturer profile
14:42:28 9 forms had they entered their appearance as required.

14:42:30 10 Importantly, PTO 1(H) referred to a motions committee.
14:42:35 11 This motions committee was comprised of representatives from the
14:42:37 12 PSC, from the home builders, and from Knauf. PTO 1(H) contemplated
14:42:43 13 that the motions committee would organize and prioritize any
14:42:47 14 motions filed in response to the master complaint. It's
14:42:50 15 inconceivable that the motions committee would somehow be
14:42:54 16 reconstituted at this juncture to address CNBM and BNBM's motions.
14:42:58 17 This makes no sense.

14:42:59 18 And the truth is there was no need for a master complaint
14:43:02 19 because the omnibus complaints served as a master complaint in this
14:43:10 20 case at the time the Court -- at the time these orders were entered
14:43:15 21 the Court was dealing with 1,600 plus defendants and many insurance
14:43:18 22 companies, and tellingly all non-defaulted defendants responded to
14:43:23 23 the complaints in this case. More than 700 builders, installers,
14:43:28 24 suppliers, and insurers settled the plaintiffs claims. And these
14:43:32 25 settlements will enure to the defendants' benefit, as they'll be

14:43:37 1 entitled to credits for settlement payments made to plaintiffs.

14:43:39 2 It is significant that no other defendants in this
14:43:42 3 litigation have engaged in the legal gymnastics that the CNBM and
14:43:46 4 BNBM companies have used to avoid these lawsuits. Presumably the
14:43:50 5 Court was well aware of its orders when it denied Taishan's motions
14:43:54 6 to vacate in *Germano* and *Mitchell* in 2012, and the Fifth Circuit
14:43:59 7 had no issues in this regard when it affirmed your Honor's rulings
14:44:03 8 in 2014.

14:44:04 9 So it's incredible to us that the defendants are able to
14:44:08 10 contend that their failure to respond to the complaints against
14:44:11 11 them were not willful in light of all of the evidence that we have
14:44:15 12 uncovered to the contrary. And based on this factor alone, that is
14:44:19 13 the defendants' willful refusal to accept service and their willful
14:44:24 14 refusal to respond to complaints, the motion to vacate should be
14:44:29 15 denied.

14:44:29 16 The Fifth Circuit in *Jenkins & Gilchrist v. Groia* held:
14:44:33 17 If a district court finds a defendants' default to be willful, then
14:44:38 18 the district court need not make any other findings. That's at a
14:44:42 19 542 F.3d, page 120. In *in re: Dierschke*, the Fifth Circuit
14:44:48 20 affirmed a lower court's finding of willfulness where the lower
14:44:51 21 court determined that the defendant simply chose to play games with
14:44:57 22 the court and chose to make a decision that he hadn't been served
14:45:01 23 when in fact he had. That's at 975 F.2d, page 184.

14:45:07 24 As the Fifth Circuit concluded in *Jenkins*, perfection of
14:45:10 25 service is not determinative. The defendant's knowledge of the

14:45:14 1 perfected service and the defendant's actions post service also
14:45:18 2 play a role in measuring the willfulness of a defendant's default.

14:45:23 3 In this case BNBM acknowledged on May 28th, 2010, it had
14:45:28 4 been served in this litigation. But rather than respond to the
14:45:32 5 lawsuits, the company would continue to keep an eye on the progress
14:45:37 6 of the litigation. And on June 3rd, 2010, Chairman Song determined
14:45:44 7 the CNBM Group would organize only a limited response to the
14:45:49 8 litigation that involved an appearance by Taishan solely to contest
14:45:52 9 jurisdiction and they would continue their plan of rejecting
14:45:56 10 service of process.

14:45:56 11 Now, the defendants argued that their due process rights
14:46:00 12 have been violated by the entry of defaults against them in
14:46:03 13 contradiction of the requirements of PTO 1(G) and 1(H). However,
14:46:08 14 the measure of due process is not whether there has been a
14:46:12 15 violation of procedural rules, rather due process as it pertains to
14:46:17 16 defendants' obligations to respond to complaints served upon them
14:46:21 17 only requires notice reasonably calculated under all of the
14:46:25 18 circumstances to apprise interested parties of the pendency of the
14:46:30 19 action and afford them an opportunity to present their objections.
14:46:34 20 That's from *United Student Aid Funds v. Espinosa*, 559 U.S. at page
14:46:42 21 272. In this case the defendants have been afforded due process.

14:46:49 22 But what about the plaintiffs' rights? We are nine years
14:46:53 23 into this MDL and any further delay whatsoever would severely
14:46:57 24 prejudice them. There are 2,975 plaintiffs listed on our updated
14:47:03 25 class spreadsheet. These plaintiffs have claims against the

14:47:06 1 defendants. They've been waiting a very long time. The Court
14:47:10 2 certified the *Amorin* class on September 26 and 2014. That was
14:47:16 3 three years ago.

14:47:17 4 On April 21st of this year the Court denied defendants'
14:47:22 5 motions to decertify the class, and the Court ruled the plaintiffs
14:47:26 6 are entitled to class wide remediation damages using an acceptable
14:47:30 7 formula to calculate these damages, which takes into consideration
14:47:33 8 the location of the properties and the costs to remediate per
14:47:37 9 square foot.

14:47:38 10 The PSC has provided to the defendants and to the Court
14:47:44 11 verified square footage information, product ID information,
14:47:49 12 listing the specific markings that plaintiffs consider to be
14:47:53 13 Taishan and BNBM markings for the boards that defendants
14:47:56 14 manufactured. We've provided ownership information based on public
14:48:00 15 records and we've provided prior payments received in other
14:48:03 16 settlements. The PSC's expert Mr. Ron Wright has calculated the
14:48:09 17 class remediation damages based on 2017 remediation costs. We are
14:48:15 18 waiting for the defendants to submit contests to our submissions,
14:48:19 19 and we have asked this Court to give them a deadline to do so.

14:48:24 20 Our end game proposal suggests and lays out a plan for
14:48:28 21 the Court to rule on defendants' responsibility for the product ID
14:48:34 22 buckets that we have identified as Taishan and BNBM product brands.
14:48:38 23 And this Court has ruled given that the defectiveness and corrosive
14:48:43 24 effect of Chinese drywall is well established, defendants are in
14:48:48 25 default, there is no contributory negligence, and this Court

14:48:52 1 already entered a liability judgment. The only issue currently
14:48:56 2 pending before the Court is the amount of damages which should be
14:49:00 3 awarded to the plaintiffs in order to accomplish the necessary
14:49:05 4 remediation.

14:49:06 5 The defendants say the PSC's motivation is eventually
14:49:10 6 laid bare. The PSC intends to achieve a class judgment for
14:49:15 7 plaintiffs' remediation damages. We are guilty as charged. Yes,
14:49:19 8 we intend to achieve a class judgment for the *Amorin* plaintiffs,
14:49:23 9 and there is no good cause to delay that process. There is no good
14:49:27 10 cause to vacate judgments in this case based on the deliberate,
14:49:31 11 intentional plan of the defendants that spanned years to refuse
14:49:35 12 service of process and not respond to the complaints.

14:49:38 13 In closing, your Honor, it's important to add to this
14:49:41 14 discussion some human perspective. The delays caused by the
14:49:44 15 defendants' conduct have taken a significant toll on the
14:49:48 16 plaintiffs' lives. Michelle Germano, who has been here since the
14:49:52 17 beginning, she is the named representative in the *Germano* action,
14:49:55 18 lost her home in Norfolk, Virginia which was damaged by Taishan's
14:50:01 19 Chinese drywall, because she couldn't afford to pay her mortgage
14:50:04 20 and at the same time pay for alternative housing. She had to
14:50:07 21 declare bankruptcy after her homeowner's association sued her for
14:50:10 22 failure to pay her dues, and she had to move into a rental
14:50:14 23 property. And most recently, Ms. Germano was forced to move once
14:50:19 24 again from her rental property to another rental property due to
14:50:22 25 circumstances outside of her control. The PSC has produced

14:50:27 1 photographic evidence showing that Ms. Germano's home contained
14:50:30 2 drywall that was marked Venture Supply, Inc. MFG, Taihe, China, and
14:50:37 3 we well know that that drywall was custom manufactured by Taishan
14:50:42 4 and shipped to Virginia.

14:50:44 5 To date Ms. Germano has not received any compensation in
14:50:49 6 this case for her remediation damages or other losses. Ms. Germano
14:50:54 7 is one of 2,975 *Amorin* class plaintiffs waiting for relief. We ask
14:51:02 8 again, what about the plaintiffs' rights to have their claims
14:51:05 9 adjudicated? We agree with the defendants that this is an
14:51:09 10 equitable analysis and on balance the answer is clear. When
14:51:14 11 weighing the equities, defendants' motion to vacate judgments
14:51:17 12 should be denied.

14:51:19 13 This Court found that CNBM, BNBM Group, BNBM, and Taishan
14:51:27 14 operate as a single business enterprise under Louisiana law. So it
14:51:32 15 is all related, contrary to their argument.

14:51:33 16 And thank you, your Honor, for your patience.

14:51:35 17 THE COURT: Okay. Thank you. Any response?

14:51:43 18 MR. VEJNOSKA: Yes, your Honor. It's a fair amount to
14:51:46 19 unpack there, but I won't try to do it all. Let me see if I can
14:51:50 20 start by focussing on the question that you asked Ms. Duggan, and I
14:51:54 21 didn't hear her ever respond why 1(G) and 1(H) should not be
14:51:59 22 applied.

14:52:00 23 When she talked about willfulness, she was using it as I
14:52:06 24 pointed out in a nonlegal sense. She's using it as she is saying
14:52:11 25 they calculated, they knew, they decided. The legal standard is

14:52:18 1 much higher than that: It's culpability. It's acting essentially
14:52:24 2 in bad faith.

14:52:29 3 As I said, what the defendants -- beyond their
14:52:33 4 entitlement to rely on 1(G) and 1(H) now, this is what we're
14:52:40 5 talking about, we're talking about what the order is now, we're
14:52:43 6 talking about whether these defaults can stand now. The order has
14:52:47 7 been in place for more than seven years, maybe close to eight years
14:52:53 8 now. If we don't abide by the Court's orders, there's where your
14:53:02 9 due process violation occurs. Your Honor made certain
14:53:06 10 representations and made certain orders, and we should be entitled
14:53:12 11 to rely upon them.

14:53:16 12 In terms, though, of what the companies did, talking to
14:53:24 13 one another has become a crime. Ms. Duggan said it correctly when
14:53:35 14 she said that CNBM, the board of directors heard from Taishan and
14:53:39 15 voted to respect their decision. Your Honor's already rejected
14:53:44 16 that argument, I believe, that they made that decision for them.

14:53:48 17 So what I heard was a lot of Taishan, and I predicted
14:53:52 18 that we would hear a lot of Taishan. But these defendants were
14:53:57 19 sued individually. These defendants when they appeared, as I said,
14:54:04 20 they acted consistently with and we have acted consistently for the
14:54:09 21 three years we've been litigating this case now with the conviction
14:54:12 22 that CNBM Group was immune, we're correct, that service was not
14:54:22 23 properly effectuated, which is the very beginning of this process.
14:54:27 24 And I know what your Honor ruled on April 21st, but still a good
14:54:34 25 faith conviction doesn't take a good faith conviction to say this

14:54:38 1 particular summons is addressed to a company that does not exist.
14:54:44 2 That's what some of these summons were that they're complaining now
14:54:48 3 were rejected.

14:54:50 4 In terms of whether there will be delay, you know, I
14:54:56 5 appreciate it, you know, some of the stories, your Honor, but I
14:55:00 6 didn't hear any evidence of how it is that vacating these defaults
14:55:04 7 will delay things. And this is wrapped up with the complaint that
14:55:11 8 the movants did not move, Ms. Duggan's word was expeditiously to
14:55:17 9 vacate the defaults. Well, that is a factor under 60(b) and she
14:55:22 10 referred to constantly vacating the judgments. These are not
14:55:25 11 judgments, not one of them is a judgments; these are entries of
14:55:30 12 default, these are administrative entries.

14:55:32 13 But under Rule 55(c), we look at those three factors.
14:55:38 14 Under Rule 60(b), a judgment, you may look at additional factors,
14:55:43 15 one of which includes doing it expeditiously.

14:55:46 16 But let's take that on. What happened here? Well, when
14:55:50 17 we appeared, your Honor, the first thing we were aware of is that
14:55:53 18 when Taishan had appeared and had filed a motion to vacate the
14:55:59 19 defaults, your Honor ruled that they should first undertake the
14:56:03 20 jurisdictional analysis, do the discovery on that, bring that
14:56:06 21 motion, that's the right ordering of things. That's what happened
14:56:11 22 here. We spent the first year in 2015 undergoing the discovery
14:56:20 23 from the PSC. We began the litigation instructed to file nothing,
14:56:26 24 no affirmative actions, and then we were told to submit to the
14:56:30 25 discovery and we did. The only thing that we did was we asked for

14:56:33 1 and we got the right to move to contest jurisdiction.

14:56:39 2 2016 we devoted to mediation. The PSC's brief talks
14:56:45 3 about it being a waste of time or something like that. That's
14:56:48 4 their phraseology, that was not ours. 2016 was devoted to the
14:56:51 5 mediation. 2017 we went through the process. At the end of April
14:56:56 6 your Honor issued your ruling on jurisdiction.

14:57:00 7 Shortly after that we engaged in the BMS briefing. But
14:57:05 8 as part of -- Ms. Duggan referred to their trial plan, et cetera --
14:57:08 9 we referred in the summertime, we said we're going to be bringing
14:57:11 10 this motion. But at the same time we were proceeding in the blocks
14:57:16 11 that make this, we would submit, your Honor, the right and orderly
14:57:20 12 way to address this litigation. If you look at jurisdictional
14:57:23 13 questions, you look at the FSIA first, you look at personal
14:57:31 14 jurisdiction, and you undertake the discovery. The PSC has had
14:57:35 15 their chance, now we're getting our chance.

14:57:37 16 But I have not heard anything about how this will delay.
14:57:40 17 This is the way the case is going to go regardless. So, your
14:57:46 18 Honor, again, I just think that there's no real citation to any
14:57:53 19 case. The *Jenkins* case by the way, the *Jenkins* case vacated the
14:57:58 20 default that was present there.

14:57:59 21 So, your Honor, we continue and repeat that here the
14:58:10 22 beginning and the ending point is the analysis of what 1(H) said.
14:58:15 23 1(H) is still a valid order. 1(H) still holds that we do not have
14:58:20 24 to respond to a complaint that's filed tomorrow. So how is it that
14:58:24 25 by not responding, and that's what Ms. Duggan kept talking about,

14:58:28 1 by not responding to a complaint that 1(H) specifically said,
14:58:34 2 coming after 1(F), you do not have to appear or you do not have to
14:58:40 3 defend, it's a mystery to us as to how that is that we -- that
14:58:47 4 these defaults should not be vacated.

14:58:48 5 THE COURT: Okay. Thank you very much. I understand the
14:58:51 6 issue. I'll be coming out with my opinion shortly. I appreciate
14:58:55 7 it.

14:58:55 8 THE DEPUTY CLERK: All rise.

14:58:56 9 THE COURT: The court will stand in recess.

14:58:58 10 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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14 REPORTER'S CERTIFICATE

15
16 I, Karen A. Ibos, CCR, Official Court Reporter, United
17 States District Court, Eastern District of Louisiana, do hereby
18 certify that the foregoing is a true and correct transcript, to the
19 best of my ability and understanding, from the record of the
20 proceedings in the above-entitled and numbered matter.

21
22
23 _____
/s/ Karen A. Ibos

24 Karen A. Ibos, CCR, RPR, CRR, RMR

25 Official Court Reporter