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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE MANUFACTURED * Docket No.: 09-MD-2047
DRYWALL PRODUCTS * Section L
LIABILITY LITIGATION * October 12, 2017
* New Orleans, Louisiana
This Document Relates To All Cases *
* * * * *

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

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9:20AM 1 **MR. STENGEL:** I will try and handle it by myself.
9:20AM 2 We're mindful of the Court's desire that we keep this
9:20AM 3 relatively brief.

9:20AM 4 We've tried to respond in writing obviously to
9:20AM 5 both the initial question of the effect of *Bristol-Myers Squibb*
9:20AM 6 and the questions put to us by the Court, which were helpful in
9:20AM 7 focusing our comments. I will try not to repeat things in the
9:20AM 8 briefs. By my count, we've now filed 11 briefs, some of them
9:20AM 9 quite extensive. I think we collectively owe Jason an apology
9:20AM 10 for the volume of material that we've dropped on him, but I
9:21AM 11 hope we've responded to the Court's questions.

9:21AM 12 But let me proceed. Your Honor may wonder why
9:21AM 13 we can simultaneously, in an opinion where the court itself
9:21AM 14 said, we're merely applying conventional law, describe in one
9:21AM 15 brief *BMS* as a tectonic event in terms of personal
9:21AM 16 jurisdiction. And our view is what *Bristol-Myers Squibb* did
9:21AM 17 was, in fact, clarify emerging existing law. But you have to
9:21AM 18 sort of go back a little in history to understand why it was a
9:21AM 19 game changer. And I think the reaction of federal district
9:21AM 20 courts and, in fact, state courts since confirms the impact
9:21AM 21 it's had on personal jurisdictional matters.

9:21AM 22 And the root of this really probably goes back
9:21AM 23 to *Asahi Metals* in 1987 wherein the court for a long period of
9:21AM 24 time struggled to find a majority position. They issued
9:21AM 25 plurality opinions, Justice O'Connor, in *Asahi*. And

9:21AM 1 Justice Brennan wrote an opinion where he said, I think
9:21AM 2 foreseeability really should be enough. Now, he would have
9:22AM 3 also ruled for *Asahi* on due process grounds. But I think that
9:22AM 4 tiny kernel became a doctrine of law where some courts were
9:22AM 5 going down the path of foreseeability being enough of a
9:22AM 6 relatedness concept to succeed.

9:22AM 7 And over time you saw, first in *Nicastro*, an
9:22AM 8 effort to substantially narrow that, again a plurality. But,
9:22AM 9 in our view, we can take the plurality opinion by Kennedy, and
9:22AM 10 then the Breyer and Alito decision concurring on the judgment,
9:22AM 11 our view is foreseeability without more became a dead letter at
9:22AM 12 that point. And that --

9:22AM 13 **THE COURT:** Yeah. That's always a problem with
9:22AM 14 plurality because it goes both ways. I see it one way; you see
9:22AM 15 it the other way; we don't know what it is. It's a little
9:22AM 16 harder with plurality cases.

9:22AM 17 **MR. STENGEL:** But I think it's what courts and
9:22AM 18 litigants have struggled with since then. I think the court's
9:22AM 19 jurisprudence in this decade with cases like *Daimler*, with
9:22AM 20 cases like *Walden versus Fiore*, with *BMS* most recently, has
9:23AM 21 been an effort to build a consensus in the court. Obviously,
9:23AM 22 there are strident dissents in most of those cases.

9:23AM 23 But I think what *Bristol-Myers Squibb* does is
9:23AM 24 finally get us to a point where there's a clear statement by
9:23AM 25 eight justices of what's required for personal jurisdiction to

9:23AM 1 be exercised as a matter of due process.

9:23AM 2 **THE COURT:** The big issue that you have is whether or
9:23AM 3 not the *Bristol-Myers* case applies in class actions in MDL
9:23AM 4 cases. That's really the big issue as I see it.

9:23AM 5 **MR. STENGEL:** Right.

9:23AM 6 **THE COURT:** Yeah.

9:23AM 7 **MR. STENGEL:** And we've -- I won't belabor the
9:23AM 8 language of the text. I mean, I think we agree that if
9:23AM 9 *Bristol-Myers* does, in fact, apply in these cases, it will have
9:23AM 10 a profound impact on where cases can properly be heard because
9:23AM 11 it will impose a geographical limitation on where cases should
9:23AM 12 be.

9:23AM 13 In our view, the PSC, in responding to our
9:23AM 14 motion, raised four issues, none of which are controlling of
9:23AM 15 this matter. And Your Honor is right, they've raised the
9:24AM 16 inapplicable in federal court. I think this one we can sort of
9:24AM 17 deal with fairly quickly, and this is their notation that *BMS*
9:24AM 18 doesn't apply to federal cases.

9:24AM 19 They refer to a footnote in the *BMS* opinion
9:24AM 20 itself saying, we reserve as to what due process would be
9:24AM 21 required under the Fifth Amendment. That's really an artifact
9:24AM 22 of a dispute during the argument of the case referring to a
9:24AM 23 footnote in *Omni Capital*, which was a case under the
9:24AM 24 Exchange -- the Securities Exchange Act.

9:24AM 25 And the parties there asked the court to find if

9:24AM 1 there was sufficient aggregation of claims in the United
9:24AM 2 States, not a particular state, would that be sufficient to
9:24AM 3 show personal jurisdiction nationwide.

9:24AM 4 **THE COURT:** Well, the big issue, though, is the
9:24AM 5 Fourteenth Amendment deals with the states and the Fifth
9:24AM 6 Amendment deals with the United States. Unfortunately, the
9:24AM 7 jurisprudence on the Fourteenth and the Fifth Amendment
9:24AM 8 regarding jurisdiction is a little different. It's a little
9:24AM 9 nuanced.

9:24AM 10 **MR. STENGEL:** It's a little nuanced because if you
9:25AM 11 have a nationwide service of process in figuration with a
9:25AM 12 federal claim, it's clearly a Fifth Amendment rule. But if you
9:25AM 13 look at cases involving courts sitting in diversity, there is
9:25AM 14 no ambiguity; there's no real dispute, the courts look to due
9:25AM 15 process as determined by the Fourteenth Amendment.

9:25AM 16 **THE COURT:** But that's because the Congress, which
9:25AM 17 has some flexibility with jurisdiction, has created it that
9:25AM 18 way. That's the problem that you're faced with with dealing
9:25AM 19 with jurisdiction. There's no question that Congress can weigh
9:25AM 20 in on jurisdiction. They've done so in expanding the
9:25AM 21 jurisdiction even in the areas that you've mentioned statewide.

9:25AM 22 Statewide jurisdiction is limited to the states,
9:25AM 23 but Congress has said, well, it's 100 miles. They've made that
9:25AM 24 bubble. There's no other bubble in the states. The state law
9:25AM 25 is the state law. But Congress has created a bubble of

9:26AM 1 100 miles outside the state boundaries, which is different from
9:26AM 2 the states.

9:26AM 3 So it's a problem from a District Court judge to
9:26AM 4 figure out what the situation is because there's no question,
9:26AM 5 Congress can deal with jurisdiction. They've done it in CAFA.
9:26AM 6 They've done it with the 100-mile area.

9:26AM 7 That's the big question: Does that mean that
9:26AM 8 *Bristol-Myers* is limited to the state cases? Because
9:26AM 9 *Bristol-Myers* is not an MDL. *Bristol-Myers* is not a class
9:26AM 10 action. *Bristol-Myers* is a group of cases that are filed in a
9:26AM 11 state. That's the big issue that I'm grappling with trying to
9:26AM 12 figure out this issue.

9:27AM 13 **MR. STENGEL:** Your Honor, let me try to be helpful on
9:27AM 14 that.

9:27AM 15 **THE COURT:** Sure.

9:27AM 16 **MR. STENGEL:** And you're right, *Bristol-Myers* came
9:27AM 17 out of a state court determination. But I think what it
9:27AM 18 reflects is a common sense, indeed, and some little pragmatic
9:27AM 19 determination, that states are convenient existing political
9:27AM 20 units for judges to use. And I don't think there's a serious
9:27AM 21 suggestion that in this case, the Louisiana *Amorin* case should
9:27AM 22 include Louisiana property owners, plus all property owners
9:27AM 23 within 100 miles of the state border. I think that would be
9:27AM 24 misapplication of what Your Honor has termed the "bubble."

9:27AM 25 So I think you can use *BMS*. I think you can use

9:27AM 1 consistent reliance on the Fourteenth Amendment as the measure
9:27AM 2 of due process in this context to say, we are going to use
9:27AM 3 state boundaries reflecting the sovereignty of those states.

9:27AM 4 Now, the PSC has said, well, this is different
9:27AM 5 because it really doesn't involve questions of intrastate
9:28AM 6 sovereignty, which *BMS* clearly did. I would argue that's not
9:28AM 7 correct. We have cases in many jurisdictions all asserting
9:28AM 8 common law state based actions.

9:28AM 9 And if you look at *Asahi* in the Supreme Court
9:28AM 10 jurisprudence on due process, the PSC really has flipped the
9:28AM 11 consideration of sovereignty here. Because the court has
9:28AM 12 repeatedly -- and as Your Honor is aware, many of these Supreme
9:28AM 13 Court cases involving personal jurisdiction relate to foreign
9:28AM 14 entities. Sometimes on both sides of the caption. But there
9:28AM 15 the courts have said not only -- this is not a lesser concern
9:28AM 16 with sovereignty. Because here you have a situation where you
9:28AM 17 have foreign nationals, international relations, different
9:28AM 18 legal regimes, so the courts have to be sensitive to that.

9:28AM 19 But all that leads me to, I think, a very
9:28AM 20 practical suggestion, that we look at the fact that the
9:28AM 21 Fourteenth Amendment controls, and the Court not, I won't say
9:28AM 22 burden yourself, but be pragmatic in looking at the boundaries
9:28AM 23 of the state of Louisiana are a preexisting political
9:28AM 24 limitation. Let's use those and apply *BMS* in federal court
9:29AM 25 applying the Fourteenth Amendment.

9:29AM 1 And as we go through this, you'll see how we
9:29AM 2 suggest that we resolve what is, frankly, a very difficult
9:29AM 3 problem for the litigants and the Court, on we have overlapping
9:29AM 4 cases. We have, in our view, a nonclass class action. We've
9:29AM 5 got lots of moving parts here and lots of complication for the
9:29AM 6 Court to deal with.

9:29AM 7 Now, the inapplicability to class actions I
9:29AM 8 think is an interesting question. We raised this in the first
9:29AM 9 instance because we looked at the case and said, this is a
9:29AM 10 strange animal. As Your Honor is aware, the class definition
9:29AM 11 explicitly excludes absent class members, which are typically
9:29AM 12 designated out of no other class action, that there's got to be
9:29AM 13 a representative capacity going on.

9:29AM 14 And we think the post -- and let me just back
9:29AM 15 up. We do have two different animals here. But if you look at
9:29AM 16 the essence of what's a class versus a mass action, this, you
9:29AM 17 know, to use the analogy of, "It walks like a duck; it talks
9:30AM 18 like a duck," this litigation because the plaintiffs are all
9:30AM 19 known, they're all named, we don't have a limitation.

9:30AM 20 And to take a case cited by the PSC, the
9:30AM 21 *Dr. Pepper* case. Their court post-*BMS* said, "I'm not going to
9:30AM 22 apply *BMS* to a class action," citing the fact that this is a
9:30AM 23 representative case. "I, of course, will apply it to the class
9:30AM 24 representatives because they're the only known plaintiffs we
9:30AM 25 have. I can't apply it to people who are unknown."

9:30AM 1 Now, he had a probabilistic understanding there
9:30AM 2 were lots of non-state actors. But here there's no reason for
9:30AM 3 this Court, no legal justification, to apply the fiction of
9:30AM 4 "this has been labeled a class action," and the PSC has so
9:30AM 5 asserted to avoid the inquiry of, we know exactly where these
9:30AM 6 plaintiffs are. They are named plaintiffs in litigation.

9:30AM 7 So we think the better course, the appropriate
9:30AM 8 course, is to ignore the fiction of the class action and treat
9:31AM 9 this as it actually is, a mass action. We think that will help
9:31AM 10 clarify the decisions the Court has to make, the disposition of
9:31AM 11 these cases. In some ways it actually may be to the advantage
9:31AM 12 of the plaintiffs, as we'll talk about in a moment.

9:31AM 13 There have been cases that I think make this
9:31AM 14 fairly clear. I mentioned *Dental Supplies* and *Spratley*. We
9:31AM 15 don't have a lot of jurisprudence yet because the *BMS* decision
9:31AM 16 itself is fairly young. But these cases make it very clear
9:31AM 17 that personal jurisdiction concerns apply and due process
9:31AM 18 applies in the same context in the class action as it would in
9:31AM 19 individual actions. We think that --

9:31AM 20 **THE COURT:** But all of those cases that you cite,
9:31AM 21 none of them are class actions.

9:31AM 22 **MR. STENGEL:** *Dental Supplies Antitrust Litigation* is
9:31AM 23 a class action, Your Honor.

9:31AM 24 Now, *Spratley* is confused, I'll confess, because
9:31AM 25 there were two cases, not consolidated, where one was a class

9:31AM 1 action, *Spratley* was not. But they deferred final disposition
9:32AM 2 of the case observing that they wanted to see where class
9:32AM 3 certification went in *Spratley*. So that's a chapter as of yet
9:32AM 4 not written. But, in our view, the logic of this is powerful.
9:32AM 5 You can't evade the evaluation of due process because it's a
9:32AM 6 class action.

9:32AM 7 Rule 23, there's fair brief discussion.
9:32AM 8 Obviously, the rule's enabling act, as we've learned in *Amchem*
9:32AM 9 and *Ortiz* and elsewhere, doesn't give courts the power to
9:32AM 10 expand substantive rights under Rule 23. It's a procedural
9:32AM 11 device. So due process and personal jurisdiction limitations
9:32AM 12 apply despite the device of a class action.

9:32AM 13 The PSC cites *Phillips*, which is an interesting
9:32AM 14 case, but *Phillips* deals exclusively with the due process
9:32AM 15 rights of absent class members. Raised by *Phillips*, there was
9:32AM 16 some interesting standing discussion, obviously, but the court
9:32AM 17 found standing. But there the court found no more than for
9:33AM 18 absent class members an opportunity of notice and an ability to
9:33AM 19 be heard and ability to opt out were sufficient.

9:33AM 20 It's beyond the strict boundaries of personal
9:33AM 21 jurisdiction at this point. I would say that the *Shutts*
9:33AM 22 decision does raise some questions for this Court going
9:33AM 23 forward. Because the one thing that is clear is it places
9:33AM 24 substantial limitations on the Court's ability to apply foreign
9:33AM 25 state legal regimes without consideration of choice of law.

9:33AM 1 There the court said that's a full faith and credit violation
9:33AM 2 as well as a due process violation.

9:33AM 3 MDLs, and there are many -- the Court asked two
9:33AM 4 specific questions of us in passing. One was how did we think
9:33AM 5 the *DePuy* decision in the Fifth Circuit -- I should say
9:33AM 6 decisions to be more accurate -- impact this Court. There are
9:33AM 7 interesting issues relating to Lexecon and its impact, but
9:33AM 8 that's for another day.

9:33AM 9 We think what -- and they did not, in fairness,
9:33AM 10 cite *BMS*, but we think the attitude of that court was quite
9:33AM 11 clear, and it's consistent with prior jurisdiction, is the MDL
9:34AM 12 process has an impact on venue and jurisdiction in a very
9:34AM 13 limited way. The transferor court, even for direct-filed
9:34AM 14 actions where the transferor court is in some sense a fiction,
9:34AM 15 has to have personal jurisdiction, and the venue has to be
9:34AM 16 appropriate in that court.

9:34AM 17 What the MDL statute does is allow for, again,
9:34AM 18 pragmatic reasons, this court can have cases over it which it
9:34AM 19 would not itself have personal jurisdiction or which for itself
9:34AM 20 would not be appropriate in venue. That's all fine under 1407.
9:34AM 21 But you have to look back and find existent personal
9:34AM 22 jurisdiction in the initial court, and that's what's missing in
9:34AM 23 this analysis. We can't just say the MDL statute overrules the
9:34AM 24 requirement for personal jurisdiction.

9:34AM 25 **THE COURT:** Didn't I find that, though, already in

9:34AM 1 the two cases that the Fifth Circuit has ruled on?

9:34AM 2 **MR. STENGEL:** Well, that may be better left to
9:34AM 3 Ms. Eikhoff for Taishan. But, Your Honor, our position for
9:35AM 4 CNBM and BNBK is those decisions didn't touch on jurisdiction
9:35AM 5 as to us. They related only to the issue of Taishan and TTP.

9:35AM 6 **THE COURT:** Yeah. But --

9:35AM 7 **MR. STENGEL:** They were also limited in jurisdiction.

9:35AM 8 **THE COURT:** Yeah. I found, and I held up, given an
9:35AM 9 appeal at this point, but I found that you're stuck with it
9:35AM 10 because of agency, not from the standpoint of your doing
9:35AM 11 business. My view was that you were doing business in the name
9:35AM 12 of Taishan.

9:35AM 13 **MR. STENGEL:** Well, Your Honor --

9:35AM 14 **THE COURT:** That's on appeal, and will be on appeal,
9:35AM 15 I'm sure.

9:35AM 16 **MR. STENGEL:** To be very brief on that, we think that
9:35AM 17 the *BMS* opinion fairly stated should lead the Court to
9:35AM 18 re-examine its findings on both SBE and agency, but I won't
9:35AM 19 belabor the point given the limitation of time.

9:35AM 20 This gets to your point earlier, I mean, the
9:35AM 21 prior decisions on jurisdiction are, frankly, interesting.
9:36AM 22 Because, for example, on *Germano* there was an issue about
9:36AM 23 Virginia residents being the only parties in the case. So in
9:36AM 24 an unintentional preview of where we are, you had a class
9:36AM 25 action that was, in fact, limited. And, you know, the earlier

9:36AM 1 cases before we got to *Amorin* and *Brooke* were more conventional
9:36AM 2 class actions with absent class members.

9:36AM 3 But there the issue, and I think it was an
9:36AM 4 exchange with you and perhaps Mr. Levin, about dismissing
9:36AM 5 non-Virginia residents if there were any in the case. So we
9:36AM 6 don't think the existing cases impact how *BMS* should apply.
9:36AM 7 And, in any event, *BMS* is a subsequent Supreme Court authority
9:36AM 8 which has to be taken into account by this Court.

9:36AM 9 **THE COURT:** Where do you end up? You end up by
9:36AM 10 saying there's no court in the country that's able to handle
9:36AM 11 this case?

9:36AM 12 **MR. STENGEL:** No, Your Honor. We have to divide this
9:36AM 13 by party. Because what *BMS* counsels is you have to look at
9:36AM 14 jurisdiction as to each claim, each jurisdiction, and each
9:36AM 15 defendant.

9:36AM 16 And our view, as I noted, would be there is
9:36AM 17 probably no court in the country that can hear the claims
9:37AM 18 against C- and BNBM, with the possible exception that with BNBM
9:37AM 19 as to the 40 or 50 properties in Florida, a Florida court could
9:37AM 20 hear just those cases. Those 40 properties don't give them
9:37AM 21 general jurisdiction as to the Taishan claims. Again, we think
9:37AM 22 the agency and SBE claims fail for reasons relating to how *BMS*
9:37AM 23 operates.

9:37AM 24 But as to the Taishan claims, what we think
9:37AM 25 needs to happen is, and this is where the, from our

9:37AM 1 perspective, the somewhat inexplicable duplication of *Amorin*
9:37AM 2 cases and *Brooke* cases may actually help the Court in that --
9:37AM 3 and let me break this into two parts because those obviously
9:37AM 4 deal with Virginia, Florida and Louisiana residents.

9:37AM 5 This Court or the transferor courts should
9:37AM 6 dismiss from Louisiana *Amorin*, which makes it easier because
9:37AM 7 it's here, all the non-Louisiana property owners. But those
9:38AM 8 people have existing cases in Florida or Virginia. So those
9:38AM 9 people will all have a place to go.

9:38AM 10 The PSC has, in effect, recognized, and they've
9:38AM 11 styled the protective actions, but I think there's an agreement
9:38AM 12 that there's a problem here when they filed on August 1 the 11
9:38AM 13 or so what they call the protective actions. Those are class
9:38AM 14 actions limited to a particular state, addressing your concern
9:38AM 15 about the appropriate geographic boundaries. They are
9:38AM 16 conventional class actions.

9:38AM 17 And I haven't read all of them, so I have to be
9:38AM 18 careful here. But I believe they're conventional in terms of
9:38AM 19 each of them is styled with representatives and absent class
9:38AM 20 members. But those take care of this problem.

9:38AM 21 So, at the end of the day, if Your Honor were to
9:38AM 22 dismiss the non-Louisiana claimants from Louisiana *Amorin* and
9:38AM 23 *Brooke*, the non-Florida residents from Florida *Amorin*, and the
9:38AM 24 corresponding non-Virginia residents in Virginia *Amorin*, we'd
9:38AM 25 then be -- I mean, that would not resolve all the issues.

9:38AM 1 There would be lots of remaining issues as to
9:38AM 2 what the consequence of that was, but that would give us a
9:39AM 3 geographically and arguably, at least as a first pass, sounder
9:39AM 4 personal jurisdiction configuration than we have right now.
9:39AM 5 Because right now we've got the hopeless problem of an obvious
9:39AM 6 *BMS* problem with having foreign, meaning foreign to Louisiana,
9:39AM 7 claimants and property owners here, and we don't think that can
9:39AM 8 follow *BMS*. And --

9:39AM 9 **THE COURT:** Yeah. But what you're saying, though, is
9:39AM 10 that then you sacrifice Taishan, and before doing so, you
9:39AM 11 extract all of the resources from Taishan. Then Taishan is a
9:39AM 12 target, but they don't have any resources to pay for it; and
9:39AM 13 you, doing business through Taishan, escape to China and say,
9:39AM 14 "You can't get me."

9:39AM 15 That's where we're going with this?

9:39AM 16 **MR. STENGEL:** Well, Your Honor, in fairness, I don't
9:39AM 17 think that's consistent with any of the behavior you've seen
9:39AM 18 since we've re-appeared in the litigation.

9:40AM 19 **THE COURT:** Well, I'm not sure. Because we've been
9:40AM 20 here eight years now, and this time we're focusing on
9:40AM 21 jurisdiction after two courts in the circuit have held
9:40AM 22 jurisdiction, and you are even mentioned in those cases.

9:40AM 23 Now, whether or not those cases held you may be
9:40AM 24 an issue. But to bring up jurisdiction after eight years just
9:40AM 25 seems to me that this is a delay. In this particular case,

9:40AM 1 people have been living outside of their homes for eight years
9:40AM 2 while we're dealing with all of these things involving lack of
9:40AM 3 service and involving contempt. Everything that's happened in
9:40AM 4 this case so far has just retarded the development of it.

9:40AM 5 The other claimant has already resolved all of
9:40AM 6 their cases. We're at the point with Taishan and the alphabet
9:41AM 7 that we're dealing with jurisdiction still. It just is --

9:41AM 8 **MR. STENGEL:** Your Honor, I understand the Court is
9:41AM 9 frustrated --

9:41AM 10 **THE COURT:** Yes.

9:41AM 11 **MR. STENGEL:** -- but there's not much I can do about
9:41AM 12 that at this point in time. I think since we've reentered the
9:41AM 13 litigation, it would be hard to point to anything we've done to
9:41AM 14 delay the litigation or interfere with its orderly progress.

9:41AM 15 **THE COURT:** Okay.

9:41AM 16 **MR. STENGEL:** We're, frankly, trying to help the
9:41AM 17 Court by configuring this case in a way that will be legal.
9:41AM 18 Because whether it's satisfactory because it adds further delay
9:41AM 19 because of appeals or that things get undone because they're
9:41AM 20 not legally sufficient, that's unfortunate. But most of us
9:41AM 21 want to live in a rule of law jurisdiction, and that's all
9:41AM 22 we're asking the Court to do: Apply the rules as they exist.

9:41AM 23 BNBK and CNBK were not parties to the prior
9:41AM 24 appeals. There was a discussion of attribution between Taishan
9:42AM 25 and one of its subsidiaries, but that really isn't relevant to

9:42AM 1 how you evaluate the relationship between CNBM, BNBM and
9:42AM 2 Taishan.

9:42AM 3 So what we're trying to do, Your Honor, frankly,
9:42AM 4 is help the Court come to a closer and more rapid resolution.
9:42AM 5 Because we can either fix this situation now, or we'll do it at
9:42AM 6 the end of the case, and that will lead to substantially more
9:42AM 7 delay. And I don't say that by way of threat. I just -- I
9:42AM 8 think it's a statement of accurate fact.

9:42AM 9 Finally, Your Honor, what we would -- and I've
9:42AM 10 given the Court, and I will pass on the relatedness argument.
9:42AM 11 In the last filing made yesterday by the PSC, having taken the
9:42AM 12 position until then that *BMS* didn't apply to this litigation
9:42AM 13 for a variety of the reasons we've discussed, they came up with
9:42AM 14 a new relatedness standard claiming that it survived *BMS*.

9:42AM 15 I think my introductory comments about how
9:42AM 16 *Nicastro* worked on the foreseeability standard puts that to
9:42AM 17 rest. There is no new standard, and the relatedness standard
9:42AM 18 they propose is not legally sufficient.

9:43AM 19 But, finally, Your Honor, as we've talked about,
9:43AM 20 we think the non-resident claims need to be dismissed. We
9:43AM 21 think the BNBM and CNBM claims are out with the possible
9:43AM 22 exception of the small number of BNBM claims in Florida which
9:43AM 23 can proceed only as to those properties.

9:43AM 24 And Your Honor certified this litigation before
9:43AM 25 the *BMS* issue was raised. And we can debate the metes and

9:43AM 1 bounds of the impact of *BMS*; but I think the one thing that's
9:43AM 2 absolutely clear, it certainly doesn't weaken the position of
9:43AM 3 the defendants in this litigation, and it sharpens the issues
9:43AM 4 in dispute.

9:43AM 5 So if the Court is disinclined to give us the
9:43AM 6 relief we seek on personal jurisdiction grounds, we think it is
9:43AM 7 critical that the Court certify the entire personal
9:43AM 8 jurisdiction issue, and we think that certification should
9:43AM 9 include the prior jurisdictional decision as well as whatever
9:43AM 10 Your Honor crafts here in response to *BMS*. Because we don't
9:43AM 11 think it's useful for any of us to have sort of a diffracted
9:44AM 12 issue or part of an issue taken to the circuit.

9:44AM 13 **THE COURT:** All right. Let me ask you, rather than
9:44AM 14 dismiss, why wouldn't I transfer the cases?

9:44AM 15 **MR. STENGEL:** Well, Your Honor, the problem is in
9:44AM 16 part the jurisdictional or the procedural decisions the
9:44AM 17 plaintiffs have made here. I don't know that you can transfer
9:44AM 18 a claim independent of a case. I think there are also -- and
9:44AM 19 this is, again, outside of the scope of where I wanted to go
9:44AM 20 with talking about *DePuy*. I think there are limitations on
9:44AM 21 your ability to do anything other than send cases back as a
9:44AM 22 transferee court.

9:44AM 23 So I think, you know, it's probably a closer
9:44AM 24 call in our mind than just the threshold jurisdictional issue.
9:44AM 25 But I don't think -- I think this is a dismissal given where we

9:44AM 1 are.

9:44AM 2 But, again, at least in terms of the *Amorin* and
9:44AM 3 *Brooke* plaintiffs, they would likely end up, and I can't -- I
9:44AM 4 have to be careful because there may be sort of orphan
9:44AM 5 claimants in there that aren't one of those three states and
9:44AM 6 not protected by the protective actions.

9:45AM 7 But we think, for the most part, that dismissal
9:45AM 8 would not leave stranded claimants. It might have an impact on
9:45AM 9 their rights, but they'd be in a case someplace.

9:45AM 10 **THE COURT:** Okay.

9:45AM 11 **MR. STENGEL:** So I -- sorry to have run over time,
9:45AM 12 Your Honor.

9:45AM 13 **THE COURT:** No, that's okay. Fine. Thank you very
9:45AM 14 much. You've been very helpful.

9:45AM 15 **MR. STENGEL:** Thank you.

9:45AM 16 **MS. EIKHOFF:** Good morning, Judge Fallon. Christy
9:45AM 17 Eikhoff on behalf of Taishan. I am certainly not going to
9:45AM 18 retread the ground that was just so ably covered by
9:45AM 19 Mr. Stengel, but I do want to address with the Court how
9:45AM 20 Taishan is in a different procedural position than CNBM and the
9:45AM 21 BNB entities.

9:46AM 22 Now, as the Court has already noted this
9:46AM 23 morning, it is true, and Taishan certainly recognizes that this
9:46AM 24 Court did extensive jurisdictional discovery and analysis in
9:46AM 25 2010 through 2012 when Taishan was represented by prior

9:46AM 1 counsel. And this Court's analysis culminated in its
9:46AM 2 September 4th, 2012 order in which this Court held that the
9:46AM 3 plaintiffs had met their burden to prove specific jurisdiction
9:46AM 4 for certain Florida plaintiffs in Florida, for certain
9:46AM 5 Louisiana plaintiffs in Louisiana, and certain Virginia
9:46AM 6 plaintiffs in Virginia. And these were the *Wiltz*, *Gross*,
9:46AM 7 *Mitchell* and *Germano* cases.

9:46AM 8 Of course, those were upheld by the Fifth
9:46AM 9 Circuit, and Taishan cannot, and will not, seek to revisit this
9:46AM 10 Court's decisions here. But why we are standing here today,
9:47AM 11 Your Honor, is to take grave issue with the jurisdictional
9:47AM 12 failings that are present in the current class before this
9:47AM 13 Court and the subsequently filed complaints.

9:47AM 14 If I may illustrate that, Your Honor, the only
9:47AM 15 class that's certified in this case is *Amorin*. And as
9:47AM 16 Mr. Stengel just noted, and as the Court is well aware, all of
9:47AM 17 the plaintiffs in *Amorin* are identified. We know who they are.
9:47AM 18 We know their names. We know their addresses. We know what
9:47AM 19 states they live in.

9:47AM 20 And what the PSC did when they filed the first
9:47AM 21 *Amorin* class complaint is that they filed it for all plaintiffs
9:47AM 22 in all states in Florida first as Omni 15. And then
9:47AM 23 immediately they filed the exact same complaint, same
9:47AM 24 plaintiffs, same states, in Louisiana as Omni 16. And then
9:48AM 25 they triplicated their efforts by doing the exact same thing

9:48AM 1 for the same plaintiffs in all the same states in Virginia as
9:48AM 2 Omni 17.

9:48AM 3 Now, we have already recognized that this Court
9:48AM 4 found jurisdiction over Taishan in Louisiana, Florida and
9:48AM 5 Virginia for specific activities that it analyzed with respect
9:48AM 6 to specific claims. But what the PSC has not done, and what
9:48AM 7 has not yet been analyzed in this case, is how all of the
9:48AM 8 claimants in all of the states that are blue on this map tie to
9:48AM 9 those specific findings of jurisdiction. It's the PSC's burden
9:48AM 10 to show that under *BMS*, and they have not even attempted to
9:48AM 11 meet that burden.

9:48AM 12 And quickly I'll show you that the PSC did the
9:48AM 13 exact same thing in November of 2015 when they filed *Brooke*.
9:49AM 14 They filed it as Omni 20 in Florida, same thing. They called
9:49AM 15 it Omni 20 again in Louisiana. And the third Omni 20 was filed
9:49AM 16 for all of the same plaintiffs in all of these cases in
9:49AM 17 Virginia.

9:49AM 18 And, once again, we are in a situation where
9:49AM 19 there are more than 100 claimants that aren't in those three
9:49AM 20 states and for which no connection or tie has been shown to
9:49AM 21 establish jurisdiction in those three states.

9:49AM 22 Now, very recently, as Mr. Stengel just
9:49AM 23 referenced, the PSC has seemed to have stepped away a bit from
9:49AM 24 their argument that *BMS* doesn't apply at all and come up with a
9:49AM 25 new theory that they've satisfied *BMS* because they say -- and

9:49AM 1 this was in a footnote of a brief that they filed just late
9:49AM 2 last week. They say, well, obviously there's jurisdiction in
9:49AM 3 all of the states because states are contiguous and we don't
9:50AM 4 have walls between states. And, Your Honor, there are a lot of
9:50AM 5 problems with that argument.

9:50AM 6 First of all, this is nothing but speculation.
9:50AM 7 It's not evidence. It doesn't meet their burden. It's mere
9:50AM 8 geographic observations, and that does not meet the burden of
9:50AM 9 proof.

9:50AM 10 And, interestingly, the PSC's own observations
9:50AM 11 about geography have been internally inconsistent. In the
9:50AM 12 *DePuy* brief that they filed late in September when they first
9:50AM 13 started unspooling this theory, they -- in one paragraph they
9:50AM 14 say, well, the products would have made their way to Alabama
9:50AM 15 coming in through Florida. And in the very next sentence they
9:50AM 16 say, well, and the products would have made their way to
9:50AM 17 Alabama coming from Louisiana. Well, which is it? We need to
9:50AM 18 know. It's not enough just to speculate of where it could have
9:50AM 19 come from.

9:51AM 20 And, in fact, if you look at the actual evidence
9:51AM 21 by the PSC's own analysis what they've submitted on their
9:51AM 22 spreadsheets to this Court, there are approximately one dozen
9:51AM 23 different types of product markings found for the claims in
9:51AM 24 Alabama.

9:51AM 25 **THE COURT:** But aren't all of those arguments

9:51AM 1 finalized by the circuit's decision? The circuit on two
9:51AM 2 occasions validated my ruling. Doesn't that end the matter?
9:51AM 3 You didn't go to the Supreme Court at that point.

9:51AM 4 **MS. EIKHOFF:** Your Honor, that did end the matter for
9:51AM 5 *Wiltz, Germano, Mitchell, and Gross*. Yes, for those
9:51AM 6 plaintiffs, they showed a tie, and this Court found it, and it
9:51AM 7 was upheld by the Fifth Circuit.

9:51AM 8 But getting back to the demonstrative, we have
9:51AM 9 claimants in all of these other states. And *BMS* -- the crux of
9:51AM 10 *BMS* is that you cannot assume jurisdiction in another state on
9:51AM 11 the basis of having previously found it in one state. If it
9:52AM 12 exists in one state, it does not follow that it must exist
9:52AM 13 somewhere else based on assumptions.

9:52AM 14 So this Court -- so in stark contrast, the PSC's
9:52AM 15 observation that we don't have walls between our states, I
9:52AM 16 would offer to this Court that, in fact, *BMS* erects
9:52AM 17 constitutional walls -- or they didn't even erect it. It
9:52AM 18 recognizes that there are jurisdictional territorial
9:52AM 19 limitations between the states. And in that case, Your Honor,
9:52AM 20 they put a wall around California and said the other ones don't
9:52AM 21 get in whether they share a border or not.

9:52AM 22 And Your Honor had spoken previously about the
9:52AM 23 100-mile bubble and, you know, this idea that maybe the state
9:52AM 24 borders are porous, but *BMS* holds the opposite. *BMS* talks
9:52AM 25 specifically that there are territorial limitations on power,

9:53AM 1 and that arises from this court sitting in diversity acting as
9:53AM 2 a sovereign to enforce that state's laws.

9:53AM 3 So the borders are not porous and, therefore, in
9:53AM 4 light of these territorial limitations, these jurisdictional
9:53AM 5 walls that were recognized and enforced in *BMS* --

9:53AM 6 **THE COURT:** Yes. But you're assuming *BMS* applies to
9:53AM 7 class actions, and that's really a seminal issue. That's what
9:53AM 8 we have to deal with. Because in your argument there would be
9:53AM 9 no such thing as a national class action.

9:53AM 10 **MS. EIKHOFF:** Your Honor, and you have -- when you
9:53AM 11 can identify with this level of precision with names and
9:53AM 12 addresses where all of the claimants are whether they are in a
9:53AM 13 class or not, we think that they absolutely are subject to a
9:53AM 14 *BMS* analysis.

9:53AM 15 That's it.

9:54AM 16 **THE COURT:** Is that it?

9:54AM 17 Okay. From the plaintiffs' standpoint, the
9:54AM 18 defendants raise a point that this is really a mass action
9:54AM 19 styled as a class action, and it's really not a class action
9:54AM 20 and, therefore, *BMS* is applicable because it's the same animal.
9:54AM 21 You've just called a duck a chicken and it's still a duck.

9:54AM 22 **MR. LEVIN:** Well, this duck, Your Honor, is a class
9:54AM 23 action. Due process has been afforded to the class under
9:54AM 24 Rule 23. There is nowhere any rule that says if you know the
9:54AM 25 names and you can identify the class and there's no absent

9:54AM 1 class member, that you cannot certify the class. The
9:55AM 2 defendants are attempting to deconstruct nine years of
9:55AM 3 litigation here and go back to square one. Charles Dickens
9:55AM 4 would have a field day with them in Bleak House for what
9:55AM 5 they've put the plaintiffs through here.

9:55AM 6 Your Honor, if you couldn't have named class
9:55AM 7 members in a class, our clients would not have gotten
9:55AM 8 \$1.1 million from the Knauf settlement because the Knauf
9:55AM 9 settlement by definition only included the names of those on
9:55AM 10 the Omni complaints as to Knauf. As to -- same complaint as to
9:55AM 11 L&W, Banner, InEx. There were absent class members. Even the
9:56AM 12 builders got it.

9:56AM 13 The only difference between Knauf and the
9:56AM 14 present *Amorin* class is whether Your Honor, in handling the
9:56AM 15 litigation, could see yourself handling the manageability
9:56AM 16 issues of Rule 23. It's not a jurisdictional issue; it's a
9:56AM 17 manageability issue that a settlement class doesn't have.

9:56AM 18 But Your Honor certified the class.
9:56AM 19 Independently, you wrote an opinion with findings of fact and
9:56AM 20 conclusions of law, and you certified the class. It's not my
9:56AM 21 problem that they were hiding out in China at that time by
9:56AM 22 design with instructions from American and Chinese lawyers
9:56AM 23 because they thought that was the way to get away from the
9:56AM 24 situation that they created here.

9:56AM 25 They came back in. They always come back in.

9:57AM 1 Like you do with a bully, you have to make a threat, and there
9:57AM 2 has to be a contempt. It has to be something that hurts. They
9:57AM 3 come back in, and they argued for decertification, sir. And
9:57AM 4 when they argued for decertification, they went through
9:57AM 5 everything in Rule 23. They never raised those issues.
9:57AM 6 They're raising them now, but they never raised those issues,
9:57AM 7 sir.

9:57AM 8 And Your Honor asked them in open Court, "What
9:57AM 9 are you doing? You want to try 4,000 cases? Rule 23 solves
9:57AM 10 that problem logistically." And they said, "Oh, yeah. We want
9:57AM 11 to try 4,000 cases all over." Your Honor ruled. They then
9:57AM 12 went to certify for appeal under 1292(b). That was rejected.
9:57AM 13 Now here they are again, another bite at the apple.

9:58AM 14 Your Honor, there are two types of cases here
9:58AM 15 that we see. We see the *Amorin* class that has been certified,
9:58AM 16 and we see the *Brooke* claims that have been brought as class
9:58AM 17 claims. We have agreed in our end game that *Brooke* should be
9:58AM 18 treated differently than *Amorin*, and there should be a remand
9:58AM 19 of those *Brooke* plaintiffs.

9:58AM 20 And that could easily be done, Your Honor,
9:58AM 21 because on August 31st, 1917, (verbatim) because we had been
9:58AM 22 discussing this, we've given you charts to show how *Brooke*
9:58AM 23 could be remanded through various states.

9:58AM 24 May I hand them up, sir?

9:58AM 25 **THE COURT:** Yes.

9:58AM 1 MR. LEVIN: May I approach?

9:58AM 2 THE COURT: Yes.

9:59AM 3 MR. LEVIN: Now, why are there three -- Your Honor,
9:59AM 4 I'm going to pass over the Fifth Circuit opinions and Your
9:59AM 5 Honor's opinion that is trying to be undone now. But why did
9:59AM 6 we bring three different cases with everybody in them in
9:59AM 7 Florida, Virginia and Louisiana? That's 90 percent of the
9:59AM 8 plaintiffs here. We did it in *Brooke* too, although *Brooke* is
9:59AM 9 not defaulted and has not been certified. The reason being is
9:59AM 10 the law said that in order to establish personal jurisdiction,
9:59AM 11 you have to target the state.

9:59AM 12 Well, those states were targeted, and I said I
9:59AM 13 wouldn't say it, but the Fifth Circuit and Your Honor certainly
9:59AM 14 agreed with that, and that's to protect everybody. We brought
9:59AM 15 all those claims in those states. Now, they could be unbundled
10:00AM 16 as to *Brooke*. *Amorin* is a class; it's cohesive.

10:00AM 17 What the defendants want to do is dismiss cases
10:00AM 18 to run away from statute of limitations -- to defeat statute of
10:00AM 19 limitations and the default judgment that Your Honor ordered.
10:00AM 20 That shouldn't be done. There are 11 other states that make up
10:00AM 21 the ten percent. Your Honor mentioned the fact that there were
10:00AM 22 other states in your opinion.

10:00AM 23 When *Bristol-Myers* came out, we didn't agree
10:00AM 24 with it, but we tried to cover the proverbial part of the
10:00AM 25 anatomy by bringing cases in those jurisdictions and bringing

10:00AM 1 them over to the MDL where they could be remanded back.

10:00AM 2 They're Alabama. They're Mississippi. We know that InEx
10:00AM 3 submits its product to contiguous states.

10:00AM 4 In Virginia, Venture Supply products ended up in
10:00AM 5 Georgia and North Carolina. We don't -- they showed it -- that
10:01AM 6 was a good line that I put in there -- there's no walls between
10:01AM 7 the states, and the court does recognize that.

10:01AM 8 The *Bristol-Myers* opinion does not change the
10:01AM 9 terrain. It does not change established law. In fact, when
10:01AM 10 argued, the party that did not support the *Bristol-Myers*
10:01AM 11 opinion's dictates said, "There's going to be a parade of
10:01AM 12 horribles here." And Justice Alito said, there's no parade. I
10:01AM 13 mean, this is the law as we've always had it. This is
10:01AM 14 different.

10:01AM 15 Well, the parade of horribles that Justice Alito
10:02AM 16 said shouldn't occur, and wouldn't occur, are attempting to
10:02AM 17 occur in this courtroom today.

10:02AM 18 **THE COURT:** If this were a mass tort, if your claim
10:02AM 19 was a mass tort instead of a class action, would *Bristol-Myers*
10:02AM 20 be applicable?

10:02AM 21 **MR. LEVIN:** Not the way this was captioned, Your
10:02AM 22 Honor. Because in the end game, we've likened it to sort of a
10:02AM 23 mass tort because we've given up tactically the fact that all
10:02AM 24 these claims were brought pursuant to CAFA, and CAFA expanded
10:02AM 25 the jurisdiction and diversity of CAFA class actions. And

10:02AM 1 there's no question that if on the federal side, not the
10:03AM 2 Fourteenth Amendment, on the Fifth Amendment, under *Shady*
10:03AM 3 *Grove*, Justice Scalia said, yeah, I know this is going to
10:03AM 4 expand class actions, but a federal -- but in the federal side
10:03AM 5 of the bar, you can do that. And that's exactly what CAFA --

10:03AM 6 So we don't have a mass tort here. We have two
10:03AM 7 CAFA complaints. Everybody is -- we did that purposely,
10:03AM 8 alleged everything under CAFA. We had a reason for doing it
10:03AM 9 because we wanted to bring in 2,000 defendants rather than run
10:03AM 10 around to the states after those particular defendants as they
10:03AM 11 would like us to do with regard to Taishan, CNBM and BNBM.

10:03AM 12 So these are class actions. But the *Brooke* case
10:03AM 13 is not certified. Under the circumstances, we voluntarily said
10:03AM 14 and stated on the record in our end game that we would agree --
10:04AM 15 we would agree -- if Your Honor were to transfer them, they
10:04AM 16 could be transferred to the home jurisdictions where the
10:04AM 17 properties exist. But it still was styled as a CAFA case to
10:04AM 18 establish that jurisdiction.

10:04AM 19 **THE COURT:** Well, of course, CAFA includes both mass
10:04AM 20 tort and class actions.

10:04AM 21 **MR. LEVIN:** Absolutely. Absolutely, it includes
10:04AM 22 both. We included it as a class action. But even as a mass
10:04AM 23 tort, CAFA was designed to have national classes, multistate
10:04AM 24 national classes. They're walking away from CAFA at this
10:04AM 25 point.

10:04AM 1 **THE COURT:** So you see the *Brooke* case as not being
10:04AM 2 affected by CAFA mass actions?

10:04AM 3 **MR. LEVIN:** Yes, I do. Yes, I do, Your Honor.
10:05AM 4 Although, from a practical standpoint, we've agreed to remands
10:05AM 5 of the *Brooke* cases and just leave the Louisiana binary
10:05AM 6 litigation in front of Your Honor and the *Amorin* class in front
10:05AM 7 of Your Honor and let that go.

10:05AM 8 Your Honor recognized the many different
10:05AM 9 plaintiffs' jurisdictions in your initial jurisdictional order
10:05AM 10 when you said -- when you stated that at some point in time --
10:05AM 11 and that's before certification -- cases could be transferred,
10:05AM 12 I believe at that time we said pursuant to 1404(a) to its home
10:05AM 13 jurisdiction, and that posed no problem.

10:05AM 14 And we do have the targeting in the three states
10:05AM 15 that make up 90 percent of the class because both the Fifth
10:05AM 16 Circuit and Your Honor evaluated those cases under Fourth
10:06AM 17 Circuit, Fifth Circuit and the Eleventh Circuit law. So there
10:06AM 18 certainly was jurisdiction in Florida, Virginia and Louisiana.

10:06AM 19 **THE COURT:** How about the other states?

10:06AM 20 **MR. LEVIN:** Well, the other states are contiguous or
10:06AM 21 a spillover from the distributors, Banner and InEx and L&W.
10:06AM 22 Because to target the United States -- and the courts do say
10:06AM 23 that the Chinese defendants here targeted the United States.

10:06AM 24 They didn't have to have a distributor in
10:06AM 25 Alabama for the Alabama plaintiffs to obtain relief if they got

10:06AM 1 it from InEx that was right next door. The situation becomes
10:06AM 2 bizarre if you don't do that. And those issues on remand can
10:07AM 3 be dealt with by the judge -- we'll call him the transferor
10:07AM 4 judge -- at that time.

10:07AM 5 Now, there are some 80 cases or more that have
10:07AM 6 applied *Bristol-Myers* as this -- in connection with dismissals.
10:07AM 7 There's maybe 15 that have not. For the most part, those
10:07AM 8 cases, if you look at them, they're plaintiffs that didn't want
10:07AM 9 to be in federal court in the first place, so they said
10:07AM 10 nothing. They stayed away from MDLs because they called MDLs a
10:07AM 11 black hole, which we found in the Eastern District of Louisiana
10:07AM 12 it's not unless the defendants contribute to the black hole as
10:07AM 13 they've done here.

10:07AM 14 In many of the cases there was other reasons and
10:08AM 15 the *Bristol-Myers* issue was a throw-away. In the last brief,
10:08AM 16 *Dr. Pepper*, or Sergeant Pepper's band, came in and they -- the
10:08AM 17 whole brief was just one sentence in it that said *Bristol-Myers*
10:08AM 18 doesn't apply to a class action.

10:08AM 19 There's something fundamentally wrong about the
10:08AM 20 defendants harping on this *Bristol-Myers* decision as the end
10:08AM 21 all in their quest to pay nothing to the plaintiffs in this
10:08AM 22 litigation, to keep this litigation going so that at the end
10:08AM 23 either our clients will have sold their homes, lost their
10:08AM 24 homes, or be dead. It's nine and a half years. They've
10:08AM 25 accomplished that much in nine and a half years. If you give

10:08AM 1 them nine and a half years, Your Honor, I hope you, myself and
10:08AM 2 Russ Herman are still here. I know they will be.

10:09AM 3 But there's two cases that mean a lot to me.
10:09AM 4 The case in *Illinois* and the *Azteca* case in Texas.
10:09AM 5 *Bristol-Myers* was argued in the Supreme Court petitions for
10:09AM 6 certiorari in those cases, and it was denied; denied by a court
10:09AM 7 that just entered an opinion that's the end all to everything
10:09AM 8 called *Bristol-Myers*, and they denied it. Now, we know that
10:09AM 9 that's not controlling law, but it basically says something
10:09AM 10 about whether *Bristol-Myers* applied.

10:09AM 11 Your Honor may remember when *Mascuilli versus*
10:09AM 12 *United States* went to the Supreme Court. We were both young
10:09AM 13 lawyers at that time. And the District Court in the Eastern
10:09AM 14 District, Judge Body, found there was -- the operational
10:10AM 15 negligence of the stevedore did not render the vessel
10:10AM 16 unseaworthy. The Third Circuit said, in an abbreviated opinion
10:10AM 17 of one page, that's right.

10:10AM 18 A petition for certiorari was taken to the
10:10AM 19 Supreme Court. The Supreme Court knew exactly what to do, as
10:10AM 20 the Supreme Court would have done with *Bristol-Myers* here, they
10:10AM 21 reversed, vacated and remanded, and said, "See *Mahnich*; see
10:10AM 22 *Crumady*." They were two maritime cases that supported that
10:10AM 23 position. The Supreme Court didn't do that here.

10:10AM 24 It didn't do that in spite of the fact that
10:10AM 25 Justice Gorsuch, who was a Court of Appeals judge in the Tenth

10:10AM 1 Circuit, analyzed personal jurisdiction in a *Palsgraf*-ian
10:10AM 2 analysis that didn't include -- include three things, but
10:10AM 3 didn't include the sliding scale of the state court in
10:11AM 4 California in *Bristol-Myers*.

10:11AM 5 The defendants have not addressed that case in
10:11AM 6 their recent papers. And we've all seen and heard the hearings
10:11AM 7 involving Justice Gorsuch's appointment to the Supreme Court.
10:11AM 8 Like most Supreme Court judges -- or all Supreme Court judges,
10:11AM 9 he wasn't bashful. He was no potted plant. He was no
10:11AM 10 shrinking violet. He would have said something when those
10:11AM 11 petitions were up if that was applicable, but it's not
10:11AM 12 applicable.

10:11AM 13 And, quite frankly, if you look at the law, we
10:11AM 14 haven't come a long way from *Worldwide*. We haven't come a long
10:11AM 15 way from *Worldwide* at all. It's really the same thing. It's a
10:11AM 16 question of foreseeability. And it certainly was
10:12AM 17 foreseeability that their product would end up everywhere.

10:12AM 18 **THE COURT:** Okay. I understand your argument.

10:12AM 19 **MR. LEVIN:** I think I've said enough because
10:12AM 20 Mr. Herman has to say what he has to say, and it should be
10:12AM 21 enlightening because I know what he's going to say.

10:12AM 22 **THE COURT:** All right. Let's take five minutes,
10:12AM 23 Mr. Herman.

10:12AM 24 **MR. HERMAN:** I'll try to take five minutes, and if I
10:12AM 25 take more than that, Your Honor, stop me, and I'll sit down,

10:12AM 1 and I'll do it very quickly.

10:12AM 2 **THE COURT:** Okay.

10:12AM 3 **MR. HERMAN:** Most of us live under the rule of law
10:12AM 4 says learned counsel. That's true except for the Chinese.
10:12AM 5 They can target defective products in the United States and
10:12AM 6 then escape liability through a series of nine years of delay,
10:12AM 7 contempt, retreat from the Court, and misstatement.

10:12AM 8 Your Honor asked a question, well, what about
10:13AM 9 the other cases? If Your Honor please, in the record, Record
10:13AM 10 No. 2012, very important, Exhibit 1 to the Herman affidavit
10:13AM 11 shows that California, Florida, Louisiana, New York, North
10:13AM 12 Carolina, and Virginia were targeted, that invoices and product
10:13AM 13 were delivered in those states. That takes care of that
10:13AM 14 question.

10:13AM 15 Now, for 3,000 -- we've said all along, we've
10:13AM 16 got 3,000 folks that we represent who haven't been paid a dime
10:13AM 17 while this case has gone on despite the fact that there have
10:13AM 18 been depositions three times in China, once in New York, once
10:13AM 19 in Norfolk, and for a week of depositions here, which clearly
10:13AM 20 show targeting, stream of commerce, and intention, and
10:13AM 21 foreseeability on the part of these defendants.

10:14AM 22 Now, I guess I'm just simple, and I know I am
10:14AM 23 because I look at this as client representation. And I look at
10:14AM 24 it within the construct that you couldn't deprive 3,000 people
10:14AM 25 of due process but give 100 percent of due process to the

10:14AM 1 opponents.

10:14AM 2 Lastly, I want to say this, Your Honor, Taishan
10:14AM 3 withdrew twice. There are two Fifth Circuit decisions Your
10:14AM 4 Honor is very familiar with. There are contempt order
10:14AM 5 violations by CNBM and Taishan's other affiliates which show
10:14AM 6 that in this court there's jurisdiction because that contempt
10:14AM 7 order was issued here and those violations occurred even though
10:14AM 8 in other states there were violations of Your Honor's orders
10:14AM 9 here. And where are they? In New York, Illinois, Washington,
10:15AM 10 Oregon and Texas.

10:15AM 11 Now, we know just as in *Through the Looking*
10:15AM 12 *Glass* -- and I mean no disparagement of lawyers or their
10:15AM 13 clients. These are top-notch lawyers and professionals --
10:15AM 14 Tweedledum and Tweedledee, they're supposed to be different,
10:15AM 15 but Alice can tell they're not. They attempt to look like
10:15AM 16 they're different by staging a fight where nobody hits anybody
10:15AM 17 and they roll off arm in arm.

10:15AM 18 Taishan, CNBM, BNBM are arm in arm. The
10:15AM 19 evidence shows that. They've been arm in arm from the
10:15AM 20 beginning. It's not just agency. In many cases, it's alter
10:15AM 21 ego or single business purpose. They have reaped the benefits
10:15AM 22 because money flows up and loans flow down.

10:15AM 23 Lastly, Your Honor, in addition to the chain of
10:16AM 24 commerce, in addition to all the other rulings that have been
10:16AM 25 made in this court, with briefing and briefing and briefing --

10:16AM 1 and I want to thank the excellent briefs that Arnold Levin's
10:16AM 2 firm worked so hard on in this case. Even though some of us
10:16AM 3 are listed as contributing in the brief, it's really their
10:16AM 4 work.

10:16AM 5 There's one more thing in *Through the Looking*
10:16AM 6 *Glass*: "Twas brillig with slithy toves and gyre." Now, I
10:16AM 7 never knew what that meant. I had to go back and read it.
10:16AM 8 What it is is a circular argument, and this syllogism: "If it
10:16AM 9 was so, it might be so; and if it was so, it should be; but as
10:16AM 10 it isn't, it ain't. That's just logic." Chapter 4, *Through*
10:17AM 11 *the Looking Glass*.

10:17AM 12 Because what's happened here is an attempt to
10:17AM 13 link *Bristol-Myers'* case to disarm, defuse, and tear down all
10:17AM 14 the work that's been done in this court in nine years, and not
10:17AM 15 just in this court, but also in the Fifth Circuit. Their
10:17AM 16 arguments are not logical and they're circular.

10:17AM 17 Thank you, Your Honor.

10:17AM 18 **THE COURT:** All right. Thank you.

10:17AM 19 Let me hear your response. Not a response to
10:17AM 20 Alice.

10:17AM 21 **MR. STENGEL:** Your Honor, I was going to apologize up
10:17AM 22 front because my knowledge of *Alice in Wonderland* probably
10:17AM 23 doesn't really equip me to deal fully with Mr. Herman's
10:17AM 24 argument.

10:17AM 25 But I will deal with the arguments made here.

10:17AM 1 Part of this, the structure that we find ourselves in, the
10:17AM 2 class definition and the class certification, is a set of
10:17AM 3 decisions made by the PSC itself. We had nothing to do with
10:17AM 4 their decision to omit absent class members. We had nothing to
10:17AM 5 do with their decision to make only named class members members
10:18AM 6 of the *Amorin* and *Brooke* classes. But those decisions have
10:18AM 7 consequences, and you can't make *Bristol-Myers Squibb* and the
10:18AM 8 body of personal jurisdiction law go away by declaration or by
10:18AM 9 statements of will or intent.

10:18AM 10 The passage of time is unfortunate; no one
10:18AM 11 disputes that, but the law must be applied. Our clients have
10:18AM 12 due process rights that must be respected by this Court. And
10:18AM 13 what we have tried to do through the briefing here and prior
10:18AM 14 briefing is provide the Court with guidance on how we can get
10:18AM 15 to a final resolution of this litigation consistent with the
10:18AM 16 law.

10:18AM 17 I heard nothing in this presentation that
10:18AM 18 contradicted our notion that the MDL statute doesn't give this
10:18AM 19 Court an elevated or a different set of jurisdictional rights.
10:18AM 20 I heard nothing that said, gee, if you start remanding the
10:18AM 21 *Amorin* cases as they are now, you're going to create an unholy
10:19AM 22 mess because you're going to have overlapping classes with the
10:19AM 23 *Amorins* in six different cases. How do you remand that?

10:19AM 24 We're suggesting there's a way to conduct some
10:19AM 25 surgery on this where the clients may survive. Now, we're not

10:19AM 1 conceding any rights. If *Amorin* is sent or stays in Louisiana,
10:19AM 2 there are issues as to the validity of claims we intend to
10:19AM 3 raise. So no one should be under any misapprehension that my
10:19AM 4 suggestion on how we can re-configure this class geographically
10:19AM 5 means we'll walk away from our rights. We won't. We then
10:19AM 6 think we'll be on a platform where we can do a meaningful job
10:19AM 7 of ascertaining what each parties' rights are and move from
10:19AM 8 there.

10:19AM 9 We keep getting into a repetition of arguments.
10:19AM 10 We hear about time. We hear about the bad Chinese, which I
10:19AM 11 find offensive, frankly, but I'm used to it at this point. But
10:19AM 12 we don't get towards a useful position. It doesn't help to
10:19AM 13 talk about contempt. It doesn't help to talk about when people
10:19AM 14 decided, whether they did in fact, not to show up here.

10:19AM 15 What *Bristol-Myers Squibb* and all of the other
10:19AM 16 specific jurisdiction decisions require is that this Court look
10:20AM 17 at what the contacts were of each defendant at the time the
10:20AM 18 transactions occurred which gave rise to cause of action and
10:20AM 19 where the plaintiff was injured. That's a fairly
10:20AM 20 straightforward inquiry. And *Bristol-Myers* dictates that that
10:20AM 21 inquiry take place here and that there's no evasion of that
10:20AM 22 obligation.

10:20AM 23 And we've heard nothing here that suggests that
10:20AM 24 our explanations for why this isn't a class action, Rule 23
10:20AM 25 doesn't control, CAFA, which creates subject matter not

10:20AM 1 personal jurisdiction, is, frankly, irrelevant here. And I'm
 10:20AM 2 actually confused because the suggestions of what could be done
 10:20AM 3 with *Brooke* seem to suggest, along with the filing the
 10:20AM 4 protective actions, that there's some recognition of merit in
 10:20AM 5 the position we're taking with *Bristol-Myers Squibb*.

10:20AM 6 Thank you, Your Honor.

10:20AM 7 **THE COURT:** Okay. Thank you very much both of you.
 10:20AM 8 I've enjoyed your briefs. They're very thorough. I appreciate
 10:21AM 9 the arguments. They've been very helpful.

10:21AM 10 Court will stand in recess.

10:21AM 11 **THE DEPUTY CLERK:** All rise.

10:21AM 12 (WHEREUPON, the proceedings were concluded.)

10:21AM 13 *****

10:21AM 14 **CERTIFICATE**

10:21AM 15 I, Jodi Simcox, RMR, FCRR, Official Court Reporter
 10:21AM 16 for the United States District Court, Eastern District of
 10:21AM 17 Louisiana, do hereby certify that the foregoing is a true and
 10:21AM 18 correct transcript, to the best of my ability and
 10:21AM 19 understanding, from the record of the proceedings in the
 10:21AM 20 above-entitled and numbered matter.

10:21AM 21
 10:21AM 22
 10:21AM 23 s/Jodi Simcox, RMR, FCRR
 10:21AM 24 Jodi Simcox, RMR, FCRR
 10:21AM 25 Official Court Reporter