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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: CHINESE-MANUFACTURED MDL DOCKET NO. 09-MD-2047
DRYWALL PRODUCTS LIABILITY SECTION L
LITIGATION NEW ORLEANS, LOUISIANA
Tuesday, December 8, 2015
THIS DOCUMENT RELATES TO: 8:00 A.M.

ALL CASES

TRANSCRIPT OF MOTION HEARING 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

December 8, 2015

* * *

THE CASE MANAGER: All rise.

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

Call the case.

08:03AM CASE MANAGER: *MDL No. 2047, In Re:*

08:04AM *Chinese-Manufactured Drywall Products Liability Litigation.*

08:04AM THE COURT: Counsel, make your appearance for the record, please.

08:04AM MR. LEVIN: Arnold Levin and Russ Herman for the plaintiffs.

08:04AM MR. STENGEL: James Stengel for CNBM Group.

08:04AM THE COURT: All right. By way of background, let me mention the following things just to put us in position today.

08:04AM As we all know from 2004, through 2006, a housing boom in Florida and re-building efforts necessitated by Hurricanes Rita and Katrina led to a shortage of construction materials, particularly drywall.

08:04AM The United States is one of the largest manufacturers of drywall in the world, but frankly, the United States ran out.

08:04AM As a result, drywall manufacturing in China was brought into the United States and used in the construction in

08:05AM 1 refurbishing of the homes in the coastal areas, particularly,
08:05AM 2 the gulf coast and the eastern seaboard.

08:05AM 3 Sometime after the insulation of the drywall, the
08:05AM 4 homeowners began noticing smelly gases, corrosion, blackening
08:05AM 5 of metal wiring, surfaces, objects, appliances were breaking,
08:05AM 6 heating and cooling systems were failing, and it was discovered
08:05AM 7 that this was due to Chinese-manufactured drywall.

08:05AM 8 The drywall that was brought into the United States was
08:05AM 9 manufactured basically by two entities. One entity was Knauf
08:05AM 10 entity, which Knauf entity owned a wholly-owned subsidiary
08:05AM 11 Chinese manufacturing facility, and the Taishan entities.

08:06AM 12 Suits were filed throughout the country, primarily in
08:06AM 13 the gulf coast and eastern seaboard, and in the gulf coast as
08:06AM 14 far as Texas.

08:06AM 15 With regard to the Chinese entities, suits were brought
08:06AM 16 against Taishan, and a subsidiary, TTP, and also other entities
08:06AM 17 that the plaintiffs felt were associated, related, and had some
08:06AM 18 connection to Taishan.

08:06AM 19 The CNBM defendants comprised of CNBM Group, CNBM
08:06AM 20 Company, and various other entities.

08:06AM 21 We are here today because of CNBM Group moved to
08:06AM 22 dismiss the suit against them on the basis of FISA, Foreign
08:07AM 23 State and Immunities Act. And under FISA, a foreign state,
08:07AM 24 which is defined in FISA, is immune from lawsuits.

08:07AM 25 The foreign state includes an agency or instrumentality

08:07AM 1 of a foreign state, and an instrumentality also includes any
08:07AM 2 entity that is a separate legal person, corporation, or
08:07AM 3 otherwise, a majority of whose shares or other ownership
08:07AM 4 interests is owned by a foreign state, a political subdivision
08:07AM 5 thereof.

08:07AM 6 And the issues here, as I read the cases cited by the
08:07AM 7 parties as well as their briefs, are first: There is no
08:07AM 8 question that FISA grants a foreign state immunity.

08:08AM 9 The first issue that the plaintiffs raise is, is CNBM
08:08AM 10 Group either an organ or instrumentality of a foreign state, or
08:08AM 11 is a majority of its stock owned by a foreign state. And in
08:08AM 12 this case, China, namely, does CNBM Group qualify under FISA.

08:08AM 13 Now CNBM Group has presented a *prima facie* case that it
08:08AM 14 is a foreign state as FISA defines it.

08:08AM 15 When they do that, the burden shifts then to the
08:08AM 16 plaintiffs to show that an exception to suit is present.

08:08AM 17 So that's the second issue, as I see it, are any
08:08AM 18 exceptions to FISA applicable.

08:08AM 19 The two exceptions that the plaintiffs raise are the
08:09AM 20 commercial activity in the United States exception, and the
08:09AM 21 tort in the United States exception. Those are the two
08:09AM 22 exceptions.

08:09AM 23 Now, the question is, did CNBM -- does CNBM fall into
08:09AM 24 those exceptions, either of those exceptions. That raises
08:09AM 25 another issue. Did CNBM Group engage in any commercial

08:09AM 1 activity in the United States or did any action or inaction
08:09AM 2 result in a tort in the United States.

08:09AM 3 Subsection, did CNBM Group itself do the above, or can
08:09AM 4 actions of others be attributed to CNBM Group so that those
08:09AM 5 actions satisfy the exception, and those actions, can they be
08:10AM 6 attributable to the CNBM Company.

08:10AM 7 So we are here today to discuss these issues.

08:10AM 8 I will hear from the parties, the moving party.

08:10AM 9 MR. STENGEL: Thank you, Your Honor. Jim Stengel from
08:10AM 10 Orrick Herrington for CNBM Group.

08:10AM 11 If I may approach?

08:10AM 12 THE COURT: Yes.

08:10AM 13 MR. STENGEL: I'm providing the documents, and I'm
08:10AM 14 having copies of the slides I will use distributed to other
08:10AM 15 counsel in the courtroom.

08:10AM 16 The other document I provided the Court is a copy of
08:10AM 17 the Federal Judiciary Centers Guide for Judges to the Sovereign
08:10AM 18 Immunity Act.

08:10AM 19 I know that is available online. I found that a very
08:10AM 20 useful document, generally, in this matter. Frankly, I find
08:10AM 21 the Judicial publications, generally, although as a recidivist
08:10AM 22 defense lawyer, they are sometimes a little bit more balanced
08:10AM 23 than I would like, but they are useful.

08:10AM 24 I think in this context, there is learning in there
08:10AM 25 that could be valuable.

08:11AM 1 I'm going to address the issues raised by the Court.
08:11AM 2 In framing these issues, by way of note, Your Honor, the Court
08:11AM 3 is likely aware that last week the Supreme Court delivered its
08:11AM 4 opinion in the *OBB Personenverkehr* case, which is the case
08:11AM 5 involving the Austrian National Railway.

08:11AM 6 They reversed an en banc panel to the Ninth Circuit
08:11AM 7 finding that OBB was in fact immune under this Sovereign
08:11AM 8 Immunity Act.

9 THE COURT: Right.

08:11AM 10 MR. STENGEL: I will touch upon some aspects of that.
08:11AM 11 I will say that OBB had raised the issue of attribution
08:11AM 12 explicitly in the case. I believe it was one of the questions
08:11AM 13 that was presented.

08:11AM 14 For our purposes, perhaps, unfortunately, the Court
08:11AM 15 determined that essentially the nexus of the commercial
08:11AM 16 activity, the interpretation of the *Nelson* case by the Ninth
08:11AM 17 Circuit panel was erroneous, so they didn't need to reach the
08:11AM 18 attribution issue.

08:12AM 19 Obviously, we will talk about that here today.

08:12AM 20 By way of preface, thank you, Your Honor, it is time to
08:12AM 21 hear this motion.

08:12AM 22 As Your Honor mentioned, the Sovereign Immunity Act
08:12AM 23 provides not only immunity from liability, but immunity from
08:12AM 24 litigation. And our peculiar entry point in the litigation has
08:12AM 25 created some issues as to how quickly we could get this motion

08:12AM 1 before the Court, but it is time.

08:12AM 2 We have spent substantial amounts of time and money
08:12AM 3 engaged in extensive discovery in the case, and we are, in my
08:12AM 4 view, at the ragged edge, if not past the ragged edge, of how
08:12AM 5 long decision can be deferred on this matter.

08:12AM 6 CNBM Group is entitled to a determination of its
08:12AM 7 sovereign status.

08:12AM 8 Let me go through what I want to talk about today.

08:12AM 9 First, that CNBM Group is presumptively immune from
08:12AM 10 suit.

08:12AM 11 We will talk about, as Your Honor noted, the two paths
08:12AM 12 to being a sovereign under the terms of the Sovereign Immunity
08:13AM 13 Act, that is to be an organ or ownership.

08:13AM 14 While there has been some apparent confusion on that
08:13AM 15 front, we cite exclusively the ownership leg as it relates to
08:13AM 16 Group.

08:13AM 17 In our view, the commercial activity exception does not
08:13AM 18 apply. This is a well-developed doctrine under the Sovereign
08:13AM 19 Immunity Act. It has specific requirements. It does shift the
08:13AM 20 presumption, and the plaintiffs and the state, for that matter,
08:13AM 21 have failed to demonstrate an adequate recourse to commercial
08:13AM 22 activity exception.

08:13AM 23 The tort exception, I will spend relatively less time
08:13AM 24 with, because of the geographical requirements of that, which
08:13AM 25 is both the tort itself, and the injury occurring in the United

08:13AM 1 States, and CNBM, on this record, CNBM Group has never been in
08:13AM 2 the United States.

08:13AM 3 There is no basis for a finding that it engaged in
08:13AM 4 tortious activity.

08:13AM 5 Finally, we will get to what may be the real issue
08:13AM 6 before the Court on this motion is whether attribution provides
08:14AM 7 any basis for a way around immunity. Because I think fairly
08:14AM 8 read, there is no real dispute, at least from our perspective,
08:14AM 9 as to the sovereign status of the CNBM Group, and there is no
08:14AM 10 real dispute as to whether CNBM Group engaged in any commercial
08:14AM 11 activity with the appropriate nexus with the conduct at issue.

08:14AM 12 Because sometimes, particularly for this first leg of
08:14AM 13 the case, it's been obscured that this case is about the sale
08:14AM 14 of allegedly defective drywall.

08:14AM 15 CNBM Group sold no drywall. It exported no drywall.
08:14AM 16 So the only path to it, the only legal basis to overcoming
08:14AM 17 sovereign immunity would be through attribution.

08:14AM 18 In short, Your Honor, we do not believe they can make
08:14AM 19 that case.

08:14AM 20 Before I get into more detail, I think there are some
08:14AM 21 rules of the road, if you will.

08:15AM 22 This case may be less complex than Knauf was. We don't
08:15AM 23 have a thousand defendants. But we do have a multiple set of
08:15AM 24 defendants, albeit, interrelated by ownership, but we need to
08:15AM 25 be very precise, particularly in this motion, that we identify

08:15AM 1 the companies involved, the companies, and whose personnel are
08:15AM 2 sources of evidence with precision.

08:15AM 3 It's not accurate for these purposes to talk about
08:15AM 4 BNB. There are multiple BNB entities.

08:15AM 5 It is not appropriate to talk about CNB, and the
08:15AM 6 multiple CNB entities. Each of them have employees, and we
08:15AM 7 need to be precise as to their relationship.

08:15AM 8 Because recall, Your Honor, that CNB Group is not here
08:15AM 9 as a manufacturer or seller of drywall. It invested in other
08:15AM 10 companies that invested in other companies that allegedly
08:15AM 11 manufactured defective drywall.

08:16AM 12 In that chain of ownership, there are several
08:16AM 13 intervening layers of public registered share ownership. And
08:16AM 14 in our view, that structure, by definition, breaks the chain
08:16AM 15 that would be necessary for attribution.

08:16AM 16 But again, we and the PSC need to be very precise in
08:16AM 17 what we present to the Court. We need to be precise as to
08:16AM 18 where this came from, which defendant, what it relates to, and
08:16AM 19 most importantly, the two other nexus issues that will arise
08:16AM 20 throughout this case are geographic: Did the conduct touch
08:16AM 21 United States.

08:16AM 22 All of these exceptions to the Sovereign Immunity Act
08:16AM 23 require a geographic nexus.

08:16AM 24 The one which this Court has already identified, which
08:16AM 25 is also important, and this is part of the required precision

08:17AM 1 in demonstrating whether there is an exception or whether
08:17AM 2 attribution is appropriate, relates to time.

08:17AM 3 The plaintiffs have alleged the allegedly defective
08:17AM 4 drywall was sold in a particular time frame.

08:17AM 5 The commercial activity exception only applies, and
08:17AM 6 again, we do not believe that it does, to the extent they can
08:17AM 7 show commercial activity directly or via attribution to CNBM
08:17AM 8 Group relating to those sales in drywall.

08:17AM 9 What may have happened subsequently, their reactions to
08:17AM 10 this litigation, their alleged role in the conduct of this
08:17AM 11 litigation has nothing to do with a determination that there is
08:17AM 12 a commercial exception to the Sovereign Immunity Act that would
08:17AM 13 make them subject to litigation in this Court.

08:17AM 14 THE COURT: Don't they take the position, though, that
08:17AM 15 that is not the issue. The fact that they are able or were
08:17AM 16 able to control the litigation is evidence of the fact that
08:18AM 17 they had the capacity to control the companies in litigation.

08:18AM 18 If they had the capacity, then they say, they also had
08:18AM 19 the capacity to do day-to-day activity. Whether or not they
08:18AM 20 did day-to-day activity is a question of fact, which they have
08:18AM 21 tried to discover, or feel they still need to discover.

08:18AM 22 MR. STENGEL: Well, Your Honor, the problem with that
08:18AM 23 it's a form of factual extrapolation that the Fifth Circuit
08:18AM 24 has rejected in the *Stena* case.

08:18AM 25 In that case, there was a dispute where the plaintiffs

08:18AM 1 attempted to find a basis for application of commercial
08:18AM 2 exception. And, one of the pieces of evidence that they seized
08:18AM 3 upon was after the matters which gave rise, it involved a
08:18AM 4 drilling rig related vessel, and there were settlement
08:18AM 5 discussions in the state of Texas, I believe.

08:18AM 6 And, the Court said quite clearly -- and this gets back
08:18AM 7 to OBB and the general interpretation of how the sovereign
08:19AM 8 immunity statute works -- that you have to show specific nexus
08:19AM 9 with the conduct which gives rise to the cause of action.

08:19AM 10 You can't extrapolate forward and backward, and say
08:19AM 11 well, in 2014, we think we have evidence of control, because
08:19AM 12 2014 conduct may be quite different.

08:19AM 13 In this case, you will have different configurations of
08:19AM 14 ownership, different arrangements of shareholding.

08:19AM 15 But what they need to show, which they have not shown
08:19AM 16 is that in the period 2005, to 2007, where the alleged sales of
08:19AM 17 defective drywall by Taishan took place, there was the level of
08:19AM 18 control necessary.

08:19AM 19 And from our perspective, as Your Honor is well aware,
08:19AM 20 it is our position we think borne out by the case law, that
08:19AM 21 that level of control, even as to that time period, can't be
08:19AM 22 general. It would have to specifically relate to activities
08:20AM 23 relating to the sale of drywall.

08:20AM 24 That's what would need to be shown in this Court, on
08:20AM 25 this record, on this motion, for them to prevail on the

08:20AM 1 application of a commercial activity exception via an
08:20AM 2 attribution theory.

08:20AM 3 That, I submit Your Honor, is nowhere part of this
08:20AM 4 current record.

08:20AM 5 THE COURT: You feel there is a difference of control
08:20AM 6 and there was some change. They didn't have any control in the
08:20AM 7 early times, but they do have control now?

08:20AM 8 MR. STENGEL: Well, Your Honor --

08:20AM 9 THE COURT: There is some change that occurred?

08:20AM 10 MR. STENGEL: I'm not at this point going to concede
08:20AM 11 that CNBM Group controlled the litigation.

08:20AM 12 CNBM Group clearly received information about drywall
08:20AM 13 sales in 2010, clearly in reaction to the fact the cases have
08:20AM 14 been filed.

08:20AM 15 That fact does not show control. That fact, and again
08:20AM 16 Your Honor, the context for much of this, and why I think there
08:21AM 17 is some confusion in the record, is CNBM Group was a
08:21AM 18 shareholder at some level, removed from Taishan.

08:21AM 19 So they did have an ownership interest, and we will go
08:21AM 20 through the exact percentages, 14 to 15 percent. It was not
08:21AM 21 anywhere near majority interest, but it was an asset that they
08:21AM 22 had a financial interest in.

08:21AM 23 So it was not surprising that when the litigation
08:21AM 24 erupted, they, as shareholders, would want some information as
08:21AM 25 to exactly what was happening.

08:21AM 1 That does not suggest control, nor, since it's in
08:21AM 2 reaction to the litigation itself, does it provide a basis to
08:21AM 3 say, whatever you may feel their actions in 2010, upon receipt
08:21AM 4 of data or in asking for data, whatever that means about their
08:21AM 5 engagement with the drywall situation, has no relevance, no
08:21AM 6 probative value as it relates to where they engaged in
08:22AM 7 Taishan's sale of drywall.

08:22AM 8 Now the plaintiffs' allegations are imprecise as to
08:22AM 9 exactly when sales efforts took place by Taishan.

08:22AM 10 But if you recall, Your Honor, the acquisition of
08:22AM 11 Taishan by BNBK didn't take place until sometime, I think, in
08:22AM 12 April of 2005, with a subsequent larger acquisition. But there
08:22AM 13 is every reason to suspect on this record that sales or the
08:22AM 14 process of sales may have started before there was any
08:22AM 15 involvement by BNBK, CNBK, or any other related entity.

08:22AM 16 But the other element of this, and we have debated this
08:22AM 17 in other contexts in the contempt situation, Your Honor, we,
08:22AM 18 again, dispute the idea that CNBK Group controlled the
08:22AM 19 litigation.

08:22AM 20 We don't think the record of respecting decisions made
08:22AM 21 by Taishan's Board, and that is the testimony of those that
08:22AM 22 were involved, indicates control.

08:22AM 23 But again, we're now a decade removed in time from when
08:23AM 24 the events would have begun relating to what is relevant for
08:23AM 25 these purposes, which is the sale of drywall.

08:23AM 1 It's not even a slender read from a causal chain
08:23AM 2 perspective.

08:23AM 3 I should say that this nexus notion in the context of
08:23AM 4 the Sovereign Immunity Act is viewed as being a more stringent
08:23AM 5 requirement than proximate cause in the ordinary tort context.
08:23AM 6 So these are real limitations, and I think one of the things we
08:23AM 7 need to guard against is as we go through this issue is we
08:23AM 8 exist in a world where, to a certain extent, legal reality is
08:23AM 9 suspended.

08:23AM 10 As Your Honor knows, veil piercing is extraordinarily
08:23AM 11 rare. It requires stringent levels of proof in some states,
08:23AM 12 and I believe this is true in Louisiana, it requires proof of a
08:23AM 13 clear and convincing nature.

08:24AM 14 Obviously, here we have not even facts. We have
08:24AM 15 assertions, and we will, through hopefully not in too much
08:24AM 16 detail, because I'm respectful of Your Honor's time, but the
08:24AM 17 record simply does not support what the PSC wants to do in this
08:24AM 18 context.

08:24AM 19 But let me hopefully take care fairly quickly of the
08:24AM 20 qualification of Group within the Foreign Sovereign Immunities
21 Act.

08:24AM 22 The Act is now, as Your Honor knows, the only means by
08:24AM 23 which a foreign entity can be subject to jurisdiction. It's a
08:24AM 24 matter of subject matter as well as personal jurisdiction.

08:24AM 25 As I noted earlier, and I think Your Honor understands,

08:24AM 1 it's immunity not only from liability, but litigation itself.

08:24AM 2 The Courts have reflected the fact that it is the sole
08:24AM 3 basis, and there is no basis to proceed unless an exception can
08:24AM 4 be proven. We will talk about where the burdens lie.

08:24AM 5 This has been taken so seriously, that even though the
08:25AM 6 collateral order of doctrine might suggest otherwise, a denial
08:25AM 7 of an application for dismissal on sovereign immunity grounds
08:25AM 8 is, in all Circuits, uniformly viewed as immediately
08:25AM 9 appealable.

08:25AM 10 It is given that level of importance by the Circuits.

08:25AM 11 The evidence is quite clear, and this -- just so there
08:25AM 12 is no confusion -- this is Mr. Cao's Declaration from
08:25AM 13 June 10th, which is submitted with the papers in the first
08:25AM 14 instance. He was subsequently deposed. No issue as to
08:25AM 15 surprise or prejudice as to this, but Mr. Cao says, quite
08:25AM 16 clearly, it is the state I entered in.

08:25AM 17 Now the confusion, and there is some substantial
08:25AM 18 discussion of this in the PSC's papers, they spent a lot of
08:25AM 19 time pursuing the discussion of the organ leg, and that really
08:25AM 20 is different.

08:25AM 21 We have an "or" here, sometimes as we have discussed
08:25AM 22 there is an issue of disjunctives here, but the majority shares
08:26AM 23 of ownership interests is clearly owned by the People's
08:26AM 24 Republic of China.

08:26AM 25 I think this issue is relatively simple for CNBM Group.

08:26AM 1 Now, I suspect, although, I don't know and they don't
08:26AM 2 say this, the extensive discussions of PSC about organ is
08:26AM 3 probably directed more at the diplomatic objections filed on
08:26AM 4 behalf of SASAC, which would implicate the organ discussion.

08:26AM 5 Now, I'm not counsel for SASAC. I may have strong
08:26AM 6 personal views having spent a fair amount of time with this
08:26AM 7 legislation that SASAC doesn't deserve or doesn't belong in
08:26AM 8 this litigation, either, but that is not my fight to have.

08:26AM 9 But if I were cleaning house in this case, they would
08:26AM 10 both be gone.

08:26AM 11 Again, we pursue ownership. We don't need to get into
08:26AM 12 the complexities of organ, and the fact of ownership means that
08:26AM 13 some of the characterizations about the purpose of CNBM Group,
08:26AM 14 the fact that it is, by itself, a commercial enterprise is not
08:27AM 15 relevant to the determination.

08:27AM 16 The important part, here, is the second part. We have
08:27AM 17 established this.

08:27AM 18 Now it's up to the plaintiffs to demonstrate that there
08:27AM 19 is an exception to immunity. And in our view, they fail in
08:27AM 20 that respect.

08:27AM 21 Now, does the commercial activity exception apply? I
08:27AM 22 want to be, again, as I noted, Your Honor, we need to be
08:27AM 23 precise here. So I'm going to take this in two pieces, really.
08:27AM 24 I'm going to talk about CNBM Group itself. Is there any
08:27AM 25 evidence of record that CNBM Group, absent some theory of

08:27AM 1 attribution, engaged in commercial activity? I think, there,
08:27AM 2 the answer is resoundingly, no.

08:27AM 3 Now, here we get to the nexus, and this is where last
08:27AM 4 week's determination in the OBB case was relevant.

08:27AM 5 Just by way of background, OBB was a tragic case. A
08:27AM 6 woman fell off a train platform in Austria, injured her legs
08:28AM 7 very severely, and ended up with double amputation.

08:28AM 8 She sued the Austrian Railroad in the United States.
08:28AM 9 And her reported basis for suit in the United States was that
08:28AM 10 an agent for OBB, again, the Austrian State Railway System,
08:28AM 11 Eurail pass had sold her a Eurail pass in the United States.
08:28AM 12 The plaintiffs in OBB took the position that that commercial
08:28AM 13 act as an agent of OBB was sufficient to bring them in the
08:28AM 14 commercial exception, because in their view, again, the
08:28AM 15 geographic nexus requirement of the Sovereign Immunity Act that
08:28AM 16 there has to be commercial activity by the defendant in the
08:28AM 17 United States.

08:28AM 18 There, they pursued essentially an attribution theory.
08:28AM 19 They lost in the District Court, lost in the Ninth Circuit, an
08:28AM 20 en banc panel of the Ninth Circuit reversed finding and they
08:28AM 21 read *Nelson* as suggesting if you found an element of a cause of
08:28AM 22 action, that would be sufficient, and the sale of the Eurail
08:28AM 23 pass by the agent was sufficient.

08:29AM 24 It went to the Supreme Court on the theories of the
08:29AM 25 scope of the gravamen of the complaint, the nexus, and the

08:29AM 1 attribution theory.

08:29AM 2 The Court said explicitly, and Justice Roberts for a
08:29AM 3 unanimous Court, we're not going to get to attribution because
08:29AM 4 you can't parce the elements of the claim. So the gravamen,
08:29AM 5 the whole claim has to take place in the United States.

08:29AM 6 And in this case, interestingly, a sale of the ticket
08:29AM 7 in the United States was deemed as not sufficiently tied to the
08:29AM 8 core compliment to be a basis for commercial activity in the
08:29AM 9 part of OBB.

08:29AM 10 THE COURT: Yeah. The case is different, as you say.
08:29AM 11 The ticket wasn't defective.

08:29AM 12 If the ticket was defective, and the reason that she
08:29AM 13 fell was because she had a defective ticket, for some reason,
08:29AM 14 that then is a different situation.

08:29AM 15 In the *OBB* case, the ticket wasn't defective. The
08:29AM 16 issue really was whether or not the person selling the ticket
08:30AM 17 was the agent of OBB, and they didn't get to that, but they
08:30AM 18 said, as you say.

08:30AM 19 MR. STENGEL: Well, as Your Honor knows there was a
08:30AM 20 fair amount of confusion about the period which there were
08:30AM 21 representation issues, or other claims which I don't think had
08:30AM 22 been adequately preserved. It's not a model of clarity, and
08:30AM 23 it's hard to imagine a defective ticket.

08:30AM 24 I think clearly, if that would have been the case, they
08:30AM 25 would probably have dealt with the attribution theory.

08:30AM 1 THE COURT: Yes. I don't see any evidence at all that
08:30AM 2 CNBM Group was personally involved in it.

08:30AM 3 Really, we're dealing in this case with attribution,
08:30AM 4 whether or not any of the entities, Taishan, TTP's activity in
08:30AM 5 the United States is attributable to CNBM Group. That is where
08:30AM 6 I think really the issue is.

08:30AM 7 It's really CNBM Group is not just a shareholder. I
08:30AM 8 mean, it's not Warren Buffett who owns a bunch of shares and a
08:31AM 9 lot of stock in a lot of companies, but the issue is really
08:31AM 10 whether or not that's enough.

08:31AM 11 And it's a difficult hurdle for the plaintiffs.

08:31AM 12 CNBM Group owned a minority interest in CNBM Company.
08:31AM 13 CNBM Company owns a minority interest in BNBM PLC. BNBM PLC
08:31AM 14 owns a majority interest in Taishan, so it's very, very
08:31AM 15 layered.

08:31AM 16 MR. STENGEL: Well, Your Honor, it's that sort of
08:31AM 17 tinkers to ever as to chance sequence, which we don't think the
08:31AM 18 plaintiffs can surmount.

08:31AM 19 I would take some issue with the Court's suggestion
08:31AM 20 that there is a difference between Warren Buffett and CNBM
08:31AM 21 Group.

08:31AM 22 Obviously, there is a difference in terms of who they
08:31AM 23 are and what they do.

08:31AM 24 But in terms of legal significance, as Your Honor is no
08:31AM 25 doubt aware, the cases are replete with statements about

08:32AM 1 activities. And this gets back to the exceptional nature of
08:32AM 2 alter ego findings, generally. The fact of mere ownership is
08:32AM 3 not enough. The fact of appointing, even the majority of a
08:32AM 4 board, is not enough.

5 THE COURT: Yes, I agree.

08:32AM 6 MR. STENGEL: Appointing executives, and I should say
08:32AM 7 to be mindful of my own admonition at the start of this, I'm
08:32AM 8 now getting imprecise in ways that aren't borne out by the
9 record.

08:32AM 10 Many of the things the PSC says that Group has done,
11 they are not in fact done.

08:32AM 12 But all of that makes it increasingly remote that you
08:32AM 13 could ever find a basis with them having the burden to impose
08:32AM 14 this on CNBM Group.

08:32AM 15 As we have already discussed the only facts that relate
08:32AM 16 directly to CNBM Group are related to litigation.

08:32AM 17 I invite you to look at their opposition papers. Those
08:32AM 18 are the only explicit factual acts by CNBM Group recognized.

08:32AM 19 This Court has already recognized that fact. So, and I
08:32AM 20 said earlier, we can handle this really quickly.

08:33AM 21 Obviously, no direct conduct by CNBM Group relating to
08:33AM 22 the tort exception -- they didn't do anything in the United
08:33AM 23 States at any point in time. They didn't do anything that
08:33AM 24 relates to the injury allegedly done to the homeowners here.

08:33AM 25 So that gets us to what Your Honor has described as the

08:33AM 1 key issue, which is attribution. And here, we need to be
08:33AM 2 mindful that we are operating, not only where there is a burden
08:33AM 3 on the part of the plaintiffs, but there is a Supreme Court
08:33AM 4 case which creates a presumption of separate status.

08:33AM 5 And while the PSC engaged in substantial efforts to try
08:33AM 6 and suggest -- I will just call it *Bancec* -- I won't try to do
08:33AM 7 the Spanish pronunciation, but this is a clear case. It's been
08:33AM 8 honored repeatedly. It has been honored by the Fifth Circuit
9 in the *Arriba* case.

08:33AM 10 The application of this doctrine, we believe, even if
08:33AM 11 there were greater factual issues than there are, that would be
08:34AM 12 fatal to the PSC's claims for attribution.

13 And *Dole v Patrickson*, which is the U.S. Supreme Court
08:34AM 14 confirming the ownership leg, made it quite clear, and this is
08:34AM 15 worth pausing on: Ignoring corporate separateness is the rare
08:34AM 16 exception, applied in the case of fraud -- not present here --
08:34AM 17 or certain other exceptional other circumstances. Again, not
08:34AM 18 present here.

08:34AM 19 So we haven't gotten, frankly, close to what you would
08:34AM 20 need or what the PSC would need to show to be successful in
08:34AM 21 finding attribution.

08:34AM 22 Now, the pleadings here, admittedly, are fairly old,
08:34AM 23 and they are very summary as they relate to Group.

08:34AM 24 But the cases suggest that what you need to show -- and
08:34AM 25 here you would have under *Iqbal* and *Twombly*, I suppose, you

08:34AM 1 would need to do it every link of that chain. You would have
08:34AM 2 to have a specific allegation of how you could get from Taishan
08:34AM 3 through the BNBM entities, to CNBM companies, to CNBM Group.

08:35AM 4 And that, just as a matter of pleading, is not present
08:35AM 5 in this record because all you have is summary assertions that
08:35AM 6 CNBM Group is responsible for the sales of defective drywall in
08:35AM 7 the United States.

08:35AM 8 Now, there is no preclusive finding of alter-ego agency
08:35AM 9 or attribution. The PSC places substantial reliance on this
08:35AM 10 Court and the Fifth Circuit's determinations on the personal
08:35AM 11 jurisdiction challenges of Taishan.

08:35AM 12 CNBM Group and CNBM Group structure and practice was
08:35AM 13 before no Court at that point in time. And it is obvious, I
08:35AM 14 think, upon a review of the record to date, that TTP and
08:35AM 15 Taishan, and their interrelationships bear no relevance to how
08:35AM 16 Group is -- CNBM Group is related to CNBM Company, and how
08:35AM 17 those entities might downstream be related to Taishan.

08:36AM 18 So we're not in a world where we have issue or claim
08:36AM 19 preclusion on agency or attribution. We're riding on a clean
08:36AM 20 slate.

08:36AM 21 The PSC, I believe, has largely abandoned this early in
08:36AM 22 the case. They took the position, the findings of fact and
08:36AM 23 conclusions of law that this Court entered and supported class
08:36AM 24 certification, determined this issue, which was a matter of
08:36AM 25 fairly complete circularity. We hadn't been there; therefore,

08:36AM 1 the admissions had been put in place. Therefore, we were
08:36AM 2 bound.

08:36AM 3 The Circuit is quite clear that deemed admissions can't
08:36AM 4 be applied as the PSC would urge against non parties only as
08:36AM 5 against Taishan. And as I said, the only prior findings that
08:36AM 6 relate to TTP and Taishan, have no relevance to us.

08:36AM 7 Your Honor already pointed to these statistics.

08:36AM 8 As you noted, and this, as I said, changes slightly
08:36AM 9 over time with CNBM Groups' indirect interest diminishing.

08:37AM 10 We have an organizational chart that we can walk
08:37AM 11 through, but the fact that gets obscured is that these are
08:37AM 12 substantial corporate entities.

08:37AM 13 These aren't, as in one of the Louisiana common
08:37AM 14 enterprise cases, two guys running insurance companies out of a
08:37AM 15 shoebox in a garage.

08:37AM 16 I mean, these are companies with reported financials,
08:37AM 17 they have auditors, they comply with the law. They are on the
08:37AM 18 Shenzhen and Hong Kong Exchange, and you would have to -- there
08:37AM 19 is no record of any illegality or abuse of corporate form at
08:37AM 20 any level.

08:37AM 21 That is what you would need. That is what the PSC
08:37AM 22 would need to show here, substantial commercial enterprises.

08:37AM 23 We start getting to issues which arise in some of the
08:37AM 24 cases, but it's important to be accurate. Beijing, where CNBM
08:38AM 25 Group is located, is not in Shandong, where Taishan is located.

08:38AM 1 Nothing that can be said about that is going to change that
08:38AM 2 fact.

08:38AM 3 They don't, in fact, share logos or names. Taishan is
08:38AM 4 distinctive. I don't think there is any record or evidence nor
08:38AM 5 could there be that Taishan ever held itself out to a customer
08:38AM 6 as part of CNBM. It simply wasn't relevant to people dealing
08:38AM 7 with them.

08:38AM 8 I talked about the organization chart, Your Honor.
08:38AM 9 This, again, I think is useful context. This is from 2006.
08:38AM 10 The Parent here is CNBM Group.

08:38AM 11 You can see the complexity of the structure below it,
08:38AM 12 but obviously the company, and this is from a CNBM Company
08:38AM 13 annual report, is publically owned.

08:38AM 14 It's created on a register on a share exchange. It
08:38AM 15 has, again, auditors, accountants, lawyers file annual reports,
08:38AM 16 which I commend to the Court's review.

08:38AM 17 For one thing, one of the other distortions here, is a
08:39AM 18 suggestion that CNBM Group in 2005, or 2006, would have been
08:39AM 19 preoccupied with the sales of drywall in the United States by
08:39AM 20 Taishan.

08:39AM 21 These are the various businesses that Company was
08:39AM 22 involved in, that Group was indirectly involved in as an
08:39AM 23 investor. And cement, like with building materials,
08:39AM 24 fiberglass, composites, and services roles were all part of
08:39AM 25 this very large enterprise.

08:39AM 1 So one of the reasons it's unrealistic to expect that
08:39AM 2 Group would have involved itself in the issue of whether CNBM
08:39AM 3 was going to sell drywall -- I'm sorry, Taishan was going to
08:39AM 4 sell drywall in the United States, is the fact that that takes
08:39AM 5 you several levels down the organization and several levels
08:39AM 6 beyond what would be relevant.

08:39AM 7 THE COURT: Is it your position that they have to be
08:39AM 8 involved in day-to-day activities?

08:39AM 9 MR. STENGEL: Yes, Your Honor. That is the case. You
08:40AM 10 are absolutely clear that the sovereign entity needs to be
08:40AM 11 day-to-day, and day-to-day is the shorthand for domination, for
08:40AM 12 alter ego, the other eye, that they are indistinguishable.

08:40AM 13 We think these presentations help demonstrate why there
08:40AM 14 is no way the plaintiffs can overcome that hurdle. And we can
08:40AM 15 go through the requirements.

08:40AM 16 And again, *Bancec* says it's the plaintiff's burden.

08:40AM 17 I didn't mention *Arriba* had said *Bancec* applies.

18 One of the issues the PSC raised was they said, well,
08:40AM 19 *Bancec* really doesn't apply here. *Bancec* related to whether
08:40AM 20 you could attribute conduct of a Cuban entity to the government
08:40AM 21 of Cuba, and then back to another financial institution.

08:40AM 22 But in the Fifth Circuit, and frankly, every Circuit
08:40AM 23 that has considered this, the *Bancec* presumption has been
08:40AM 24 applied to state on enterprises as well as the state itself.

08:40AM 25 And the confusion, I think, this was more raised by the

08:41AM 1 AG than the PSC. They said, well you tried to apply Chinese
08:41AM 2 law. That's unfortunately a confusion which arose out of our
08:41AM 3 making one motion which attacked both personal jurisdiction and
08:41AM 4 sovereign immunity.

08:41AM 5 Yes, we think for purposes of personal jurisdiction
08:41AM 6 analysis that you would look at the forum state for its
08:41AM 7 corporate law to look at corporate separateness which would
08:41AM 8 implicate Chinese law.

08:41AM 9 We submitted an affidavit by Professor Clark on that
08:41AM 10 point, but we accept the idea that *Bancec* makes this
08:41AM 11 essentially a matter of federal common law, which is informed
08:41AM 12 by general trends towards corporate separateness.

08:41AM 13 As you said, Your Honor, in this circuit and elsewhere,
08:41AM 14 the plaintiff must prove defendant exercised extensive control
08:41AM 15 over the subsidiary's day-to-day management. That means you
08:41AM 16 have got to follow the chain down to Taishan.

08:41AM 17 You have to start it through and get all the way down
08:41AM 18 to Taishan, and say that group and its executives were
08:41AM 19 dominating Taishan's activities.

08:42AM 20 That is what the plaintiffs need to show to overcome
08:42AM 21 the presumption, and there is nothing in the record that does
08:42AM 22 that.

08:42AM 23 THE COURT: They take the position that there is
08:42AM 24 something with the advertising that the Group advertised
08:42AM 25 themselves as a group, as a conglomerate, as a wholly-organized

08:42AM 1 group. Is that sufficient?

08:42AM 2 MR. STENGEL: No, Your Honor, it isn't. It arises in a
08:42AM 3 different context.

08:42AM 4 I believe they base most of their argument on the
08:42AM 5 initial public offering of Company in 2006.

08:42AM 6 And as a matter of accounting and legal requirements
08:42AM 7 over certain levels of shareholding financial statements, as
08:42AM 8 Your Honor knows are consolidated, so the entity that was
08:42AM 9 offering shares to the public in 2006, by financial reality,
08:42AM 10 and not by matter of control or dominance.

08:42AM 11 But if you were going to buy a share on the Hong Kong
08:43AM 12 Exchange of CNBM Company, remember we're talking about Company
08:43AM 13 here, and not Group.

14 THE COURT: Right.

08:43AM 15 MR. STENGEL: It would be relevant to you that one of
08:43AM 16 the assets that was ultimately contained within the CNBM
08:43AM 17 Company balance sheets and income statements, would be Taishan.

08:43AM 18 But that does no more than suggest that they were doing
08:43AM 19 what you would expect them to do as essentially a holding
08:43AM 20 company with a variety of operating companies underneath them.

08:43AM 21 That has nothing to do -- there is no indication, no
08:43AM 22 evidence that any purchaser of Taishan drywall saw the
08:43AM 23 disclosure statement for the 2006 initial public offering, and
08:43AM 24 said, "Ah hah, I wasn't actually interested in dealing with
08:43AM 25 Taishan, but now that I understand that they are part of CNBM

08:43AM 1 Company or soon to be, I think I will make the purchase."

08:43AM 2 There is no such relationship there and nothing about,
08:43AM 3 again, as we raised in our papers, there is an effort on the
08:44AM 4 part of the plaintiffs to take accounting realities, labels
08:44AM 5 that apply as a matter of Chinese company law or accounting
08:44AM 6 standards imposed by the exchanges and suggest that terms like
08:44AM 7 "ultimate shareholder" and "controlling shareholder," which
08:44AM 8 reflect no more than the ownership interest as shareholders,
08:44AM 9 have some relevance for this issue of control.

08:44AM 10 I think the evidence you need to see, and *Hester* is a
08:44AM 11 good case out of the Fifth Circuit. They cite the *Kalamazoo*
08:44AM 12 *Spices* case, and in those cases the dominance is absolutely
08:44AM 13 clear.

08:44AM 14 As a matter of fact, you know, all of the case law
08:44AM 15 everyone cited, I think the only case where sovereign immunity
08:44AM 16 was ignored on an attribution theory was cited, not by the PSC,
08:44AM 17 but by the AG, which is the *S & Davis International versus*
18 *Yemen*.

08:44AM 19 And in that case, it's a breach of contract case, and
08:44AM 20 the order to breach the contract came straight from the
08:45AM 21 government of Yemen. So there was no dispute as to the nexus
08:45AM 22 of the behavior of the sovereign in that case.

08:45AM 23 And again, I mean, going back to the recognition out of
08:45AM 24 the *Dole v Patrickson* case, that alter ego findings, veil
08:45AM 25 piercing, whatever theory of attribution you follow, are

08:45AM 1 extraordinarily rare, and there are reasons for that.

08:45AM 2 This is a very substantial hurdle for plaintiffs to get
08:45AM 3 over. And again, the atmosphericics that come from what the
08:45AM 4 accounting rules require, what was done by way of promoting the
08:45AM 5 initial public offering of, again, Company, not Group in 2006,
08:45AM 6 don't go to the question of day-to-day involvement and control,
08:45AM 7 which is really the issue this Court has to resolve for these
08:45AM 8 purposes.

08:45AM 9 Now, we have tried to summarize what comes from a
08:45AM 10 number of cases. As Your Honor knows, there is a substantial
08:45AM 11 amount of case law relating to the Foreign Sovereign Immunity
08:46AM 12 Act. We have catalogued the things that have been found not to
08:46AM 13 be adequate as a matter of demonstration of an alter ego
08:46AM 14 relationship or control.

08:46AM 15 And admittedly, these don't occur all in one case at
08:46AM 16 any point in time, and you could make the argument, and I'm
08:46AM 17 sure the PSC will, that maybe accumulated, they would, though,
08:46AM 18 they don't accumulate here because they are not present. And I
08:46AM 19 think what these all show is the necessary incidents of being
08:46AM 20 an investor or shareholder.

08:46AM 21 This is, I don't believe any of the cases involve --
08:46AM 22 perhaps one, remote shareholders, and they are all the direct
08:46AM 23 owner of the entity.

08:46AM 24 But the things that have been rejected, 100 percent
08:46AM 25 ownership, that won't do it.

08:46AM 1 Appointment of control of board of directors, that
2 doesn't do it.

08:46AM 3 In fact you have overlapping directors or officers that
4 exercise a significant amount of supervisory control.

08:47AM 5 You monitor your subsidiary's performance. That seems
6 like a prudent thing to do.

08:47AM 7 Articulation of policies and procedures, again, what
08:47AM 8 you would expect; supervising budgetary and capital finance
08:47AM 9 decisions.

08:47AM 10 Your Honor, these are exactly the things that General
08:47AM 11 Electric probably does with GE Jet Engines.

08:47AM 12 To my knowledge that veil has never been pierced. No
08:47AM 13 one has suggested that is inappropriate. These are the things
08:47AM 14 that parents do in a corporate environment.

08:47AM 15 The record here, in terms of direct evidence, is clear
08:47AM 16 and unchallenged that what the companies did was to exercise
08:47AM 17 their rights as shareholders. There is no dispute that they
08:47AM 18 did that.

08:47AM 19 The Group was a shareholder, and in the companies where
08:47AM 20 it held shares, it operated appropriately, and it was out of
08:47AM 21 the same extent, only ordinary shareholder rights.

08:47AM 22 We also get into some of the interpretations of
08:47AM 23 documents.

08:48AM 24 This is what the PSC said this document showed, and it
08:48AM 25 was sort of a policy document suggesting they should do this as

08:48AM 1 part of an overall risk management plan.

08:48AM 2 It doesn't stand for the proposition of day-to-day
08:48AM 3 control or domination.

08:48AM 4 CNBM Group appoints high ranking officers and
08:48AM 5 executives, as its subsidiaries.

08:48AM 6 We can go through these.

08:48AM 7 In response to what the PSC has objected to, I have
08:48AM 8 gone out and actually looked at their exhibits. What it shows
08:48AM 9 is what you would expect.

08:48AM 10 The board of directors are selected by the shareholders
08:48AM 11 in each case. Shareholders may have a right to nominate, but
08:48AM 12 they don't get to appoint anybody.

08:48AM 13 Again, we have talked about this in the context of
08:48AM 14 initial public offering. We take credit for the volume of
08:48AM 15 gypsum board.

08:48AM 16 And here, this is a 2014 report on corporate
08:48AM 17 responsibility, they do describe the various sectors they
08:48AM 18 operate in. But in each case, as you will see, they clearly
08:48AM 19 identify the subsidiary that is involved.

08:49AM 20 There is no suggestion that this is CNBM Group engaged
08:49AM 21 in production of lightweight building materials.

08:49AM 22 To make it more clear, each of the subsidiaries is
08:49AM 23 disputed.

08:49AM 24 As I said, controlling shareholder or actual
08:49AM 25 controller, those are accounting terms from the Shenzhen Stock

08:49AM 1 Exchange, and again, a matter of corporate law and accounting
08:49AM 2 rules in China in Hong Kong.

08:49AM 3 There has been testimony about this: Uncontroverted
08:49AM 4 controlling shareholder regarding the shares.

08:49AM 5 Interesting, it sounds good, I guess, as a sound bite,
08:49AM 6 but it is not relevant to the determination of day-to-day
08:49AM 7 dominance of the company.

08:49AM 8 Ultimate controller, same way. Shareholders' rights,
08:49AM 9 we don't get to this.

08:49AM 10 And first investors, which came out of the Eastern
08:50AM 11 District of Louisiana, then went to the Fifth Circuit is
08:50AM 12 interesting in this regard, because one of the things that
08:50AM 13 *Bancec* requires is not only that you overcome the separateness
08:50AM 14 issue, but there has to be some abuse of the form or fraud, as
08:50AM 15 confirmed by *Patrickson*.

08:50AM 16 That, frankly, is completely absent here. That is a
08:50AM 17 telling omission, because it sort of makes you sit back and
08:50AM 18 say, well, why are we even having this battle right now? Why
08:50AM 19 is this relevant?

08:50AM 20 There is no allegation of prejudice or injury and there
08:50AM 21 is a good reason for that. Each of the subsidiaries were
08:50AM 22 adequately capitalized. There has been no proof of anyone
08:50AM 23 taking debts from Taishan.

08:50AM 24 As a matter of fact, the evidence here is to the
08:50AM 25 contrary. What you would see in the ordinary veil-piercing

08:50AM 1 case is the target defendants' assets being looted by
08:50AM 2 affiliated corporations, assets being taken out of the reach of
08:51AM 3 plaintiffs.

08:51AM 4 Here, it's anything but true. And I borrowed this from
08:51AM 5 BNBK's submission under Rule 12, but this is the net assets of
08:51AM 6 Taishan.

08:51AM 7 This, by itself, demonstrates that there is no
08:51AM 8 prejudice flowing from any of the interrelationships among the
08:51AM 9 companies.

08:51AM 10 The PSC makes a great deal about intercompany lending,
08:51AM 11 that the lending tends to go downstream. It's documented. It
08:51AM 12 appears in the annual reports and financial disclosures, which
08:51AM 13 is exactly what companies are supposed to do under that
08:51AM 14 circumstance.

08:51AM 15 So again, no prejudice, no fraud. Taishan has
08:51AM 16 sufficient profits and assets, which leads you to the broader
08:51AM 17 question of why we are here.

08:51AM 18 I mean, I remember on June 9th, Mr. Kenny from Alston
08:51AM 19 stood in front of Your Honor, and said, this case is about what
08:51AM 20 Taishan owes and who it owes to, and that is what I thought the
08:51AM 21 case was about.

08:51AM 22 Here, we are months later and ten of millions dollars
08:51AM 23 spent on lawyers later. Not only are we not any closer to an
08:52AM 24 answer to that question, but we spent substantial resources
08:52AM 25 litigating the issue of what CNBM Group did, and at what point

08:52AM 1 in time, and we still end up with the record which doesn't
08:52AM 2 advance the ball.

08:52AM 3 Plaintiffs say at the end of their opposition, they
08:52AM 4 need more discovery. And Your Honor, we have had disputes
08:52AM 5 about discovery. We will freely admit that.

08:52AM 6 But as the cases show, the aperture for discovery on
08:52AM 7 sovereign immunity is very narrow. It is unusual and typically
08:52AM 8 what Courts have allowed is only discovery to verify specific
08:52AM 9 allegations.

08:52AM 10 We don't have specific allegations here, so we have
08:52AM 11 gone a fair degree, and it would seem self-evident that if the
08:52AM 12 plaintiffs can put together 115-page opposition with an 85-page
08:52AM 13 factual recital claiming what they have to date, obliterates
08:52AM 14 our claim of sovereign immunity, and it's hard to imagine what
08:53AM 15 else they need.

08:53AM 16 But further, the cases are clear, when a plaintiff
08:53AM 17 seeks discovery on the subject, they have to be very specific
08:53AM 18 as to what exactly they need.

08:53AM 19 We're not writing from a clean slate, here. We have
08:53AM 20 had substantial discoveries, substantial depositions have been
08:53AM 21 taken. We made available our senior executives, 30(b)(6)
08:53AM 22 witnesses for Group, all that has happened.

08:53AM 23 If you look at the opposition, they are looking for
08:53AM 24 blunder busts continuing broad discovery. That simply is not
08:53AM 25 allowable at this point in time.

08:53AM 1 Now, I will go through this quickly because Your Honor
08:53AM 2 is probably painfully aware that we have had these disputes.

08:53AM 3 But again, as I started with, the Court should
08:53AM 4 determine this.

08:53AM 5 Now, what I can do, and I don't want to overstay my
08:53AM 6 welcome, which I may have done already, but the plaintiffs took
08:54AM 7 issue with our filing some supplemental materials. And I
08:54AM 8 understand that, but I think it's fair to just bring to the
08:54AM 9 Court's attention the fact that what they object to -- first of
08:54AM 10 all, they objected to our submission of affidavit about the
08:54AM 11 lack of overlap in executives between Taishan and CNBM Group.

08:54AM 12 We did that with supplemental submission from Mr. Cao,
08:54AM 13 but we don't need to do that. Exhibit 23.1, which is a PSC
08:54AM 14 exhibit, and has a chart of all of the executives and is
08:54AM 15 consistent with what Mr. Cao said. It shows that the only
08:54AM 16 arguable overlap was Mr. Cao's service on the Supervisory
08:54AM 17 Committee of Taishan in 2005.

08:54AM 18 Again, as the annual reports will illuminate, the
08:54AM 19 Supervisory Committee -- I think Your Honor has probably heard
08:55AM 20 something about this -- is a creature of Chinese law and very
08:55AM 21 limited in its purpose.

08:55AM 22 There was also an issue about appointment of directors
08:55AM 23 and officers. I have touched on that briefly.

08:55AM 24 To that extent, I would cite, Your Honor, to the PSC's
08:55AM 25 FISA Exhibit 2. And I would commend that document, which is a

08:55AM 1 CNBM Company annual report, to your reading just because I
08:55AM 2 think it underscores much of what I have said so far about the
08:55AM 3 fact that these are real and substantial companies.

08:55AM 4 They have known auditors.

08:55AM 5 They have known law firms, and it belies the notion
08:55AM 6 that this is some kind of fly-by-night intermediary
08:55AM 7 organization.

08:55AM 8 Again, this is Company, and not Group. But at page 29
08:55AM 9 of Exhibit 2, there is a clear statement about corporate
08:55AM 10 governance, their adherence to the corporate governance
08:55AM 11 regulations of China, and the fact that the board is elected by
08:56AM 12 the shareholders of the company.

08:56AM 13 Continuing on to page 30, there is a reference to the
08:56AM 14 compliance officer retained by the company.

08:56AM 15 On this one, I will rely on a sample rather than a
08:56AM 16 census, Your Honor, so I won't go on excessively.

08:56AM 17 But turning to FISA Exhibit 7 of the PSC, again, an
08:56AM 18 annual report. This time in 2006, at page 37, there is the
08:56AM 19 operation of board which underscores how exactly the board is
08:56AM 20 elected.

08:56AM 21 At 39, there is a reference that nomination of
08:56AM 22 directors, which again, makes it clear, no appointment by
08:56AM 23 Group. They are nominated by and elected by the shareholders.

08:56AM 24 Finally, FSIA Exhibit 9 of the PSC, and again, at pages
08:56AM 25 37, and 39, there is reference to the corporate governance

08:56AM 1 issues that we have discussed here.

08:57AM 2 Again, all of these go to underscore the fact that
08:57AM 3 these are real and substantial companies, and again, talking
08:57AM 4 about CNBM Company document, which is one level removed from my
08:57AM 5 client group.

08:57AM 6 If you look at many exhibits, it is tagged on this one,
08:57AM 7 but it seems to be FSIA Exhibit 32 of the PSC, for purposes of
08:57AM 8 this hearing, that is a Taishan exhibit.

08:57AM 9 There are actually articles of association, which
08:57AM 10 again, outlines how directors and officers of Taishan, which
08:57AM 11 are selected, which belies the idea that there is any
08:57AM 12 involvement of CNBM Group to that.

08:57AM 13 Similarly, FSIA Exhibit 121 of the PSC, and 122 are
08:57AM 14 reflective of that same fact.

08:57AM 15 So, Your Honor, I will reserve a brief -- what I hope
08:57AM 16 to be a very brief period of time to respond, when
08:57AM 17 Messrs. Levin and Herman are finished.

08:58AM 18 But I thank Your Honor for your time.

08:58AM 19 Again, we think the record is abundantly clear that
08:58AM 20 CNBM Group is a sovereign entity. No exception to its immunity
08:58AM 21 applies. It should exit the case now, rather than later, and
08:58AM 22 that there is no basis for attribution of any conduct with the
08:58AM 23 requisite nexus to the sale or export of allegedly defective
08:58AM 24 drywall that would allow an attribution theory to undercut its
08:58AM 25 sovereignty.

08:58AM 1 With that, Your Honor, thank you very much.

08:58AM 2 THE COURT: Okay. Thank you very much. I appreciate
08:58AM 3 your argument.

08:58AM 4 Do you have a response?

08:58AM 5 MR. LEVIN: Good morning, Your Honor.

6 THE COURT: Good morning. Wait until we distribute
7 these materials.

08:59AM 8 MR. LEVIN: Of all that was said, there is absolutely
08:59AM 9 one thing I agree with: CNBMG is no shoebox enterprise.

08:59AM 10 Let's see what we're dealing with here.

08:59AM 11 This Document 2014, Social Responsibility Report,
09:00AM 12 appears on CNBMG's website. That report will show us who we're
09:00AM 13 dealing with, and what we're dealing with.

09:00AM 14 Next. This is CNBMG's own words: "As the leader in
09:00AM 15 China's building materials industry, CNBM is the largest
09:00AM 16 comprehensive building materials industry group in China."

09:00AM 17 That does not sound like Warren Buffett. That does not
09:00AM 18 sound like an investor. That sounds like a business
09:00AM 19 enterprise.

09:00AM 20 Next. It has been ranked first among the top 500
09:00AM 21 enterprises in the building materials industry for many years,
09:00AM 22 41st among the top 500 enterprises in China, and 270 among the
09:01AM 23 Fortune Global 500.

09:01AM 24 Next. Up to the end of 2014, the total assets of the
09:01AM 25 group amounted to RMB 406.9 billion. And I'm told if you

09:01AM 1 divide by 16, you get American dollars. And the total number
09:01AM 2 of employees reached 176,854. So 176,000 employees involved in
09:01AM 3 building materials. That does not sound like an investor.

09:01AM 4 In 2014, CNBM achieved revenue of RMB 250.4 with total
09:01AM 5 profit of RMB 13.0 billion, taxes paid amounted to RMB 14.6.

09:01AM 6 Next. With the objective to maximize corporate value
09:02AM 7 and improve core competence, CNBM has -- when they say CNBM
09:02AM 8 here, they are talking about CNBM Group, not CNBM PLC.

09:02AM 9 CNBM has developed into a comprehensive building
09:02AM 10 materials industry group with integration of -- oh there it is,
09:02AM 11 manufacturing, scientific research and development, set of
09:02AM 12 equipment, logistics, and trading through asset restructuring,
09:02AM 13 business integration, and management improvement.

09:02AM 14 Next. Headquartered in Beijing, CNBM has over 1100
09:02AM 15 member companies, dominates -- that is their word "dominates"
09:02AM 16 -- six listed companies, including two overseas listed
09:02AM 17 companies.

09:02AM 18 Member companies of CNBM are located in 30 Chinese
09:02AM 19 provinces, municipalities, and autonomous regions, whose
09:03AM 20 businesses cover over 120 countries.

09:03AM 21 We're not one of them, Your Honor, the United States,
09:03AM 22 and regions in the world.

09:03AM 23 And we found that out, and we found out a lot because
09:03AM 24 of the contempt proceedings in determining where their
09:03AM 25 affiliates worked and their subsidiaries worked in this

09:03AM 1 country.

09:03AM 2 We found out that this investment company is taking
09:03AM 3 timber out of the northwest, is suing our American corporations
09:03AM 4 in Texas, and is providing solar panels for Wal-Mart.

09:03AM 5 Next. It's the largest gypsum board producer.

09:03AM 6 And, the next map. This is not my map, this is their
09:03AM 7 map: USA, that's us, and that's why we're here, because they
09:04AM 8 took advantage of a situation in the United States where we had
09:04AM 9 a hurricane, and we had a shortage of drywall to bring their
09:04AM 10 product to the United States.

09:04AM 11 What did CNBM Group do? They promoted the distribution
09:04AM 12 of the property. They facilitated the distribution of the
09:04AM 13 property. They weren't the shoemaker that was nailing shoes.
09:04AM 14 They were back there selling the shoes and making sure that
09:04AM 15 they could sell shoes.

09:04AM 16 What did they call themselves? The Big Group
09:04AM 17 Corporation. That was true.

09:04AM 18 Now, we have a Foreign Sovereign Immunity Act to
09:04AM 19 protect foreign sovereigns, not to protect their underlings
09:04AM 20 that do commercial business in the United States.

09:04AM 21 We've always had sovereign immunity. Prior to the Act,
09:05AM 22 the State Department was involved. They had a Tate letter, a
09:05AM 23 State Department Official, Jack Tate would file and serve and
09:05AM 24 the litigation would stop because the United States had an
09:05AM 25 interest in not doing it.

09:05AM 1 Now, they have since codified that, and it's the role
09:05AM 2 of the Courts, more than the State Department, to protect the
09:05AM 3 delicate situation between foreign corporations that are said
09:05AM 4 to be owned by foreign states doing business in the United
09:05AM 5 States.

09:05AM 6 Well, this CNBM Group is owned by SASAC, an
09:05AM 7 intermediate group that we have served just recently in a
09:06AM 8 lawsuit. It is not -- strike that.

09:06AM 9 It is not owned by the People's Republic of China.

09:06AM 10 The *Dole* case that was cited is very, very important,
09:06AM 11 Your Honor.

09:06AM 12 If the PRC does not own the Company, and SASAC owns the
09:06AM 13 Company, then under the *Dole* case there is no sovereign
09:06AM 14 immunity, and the defendant cannot escape that. They can't
09:06AM 15 escape it by their own words, of their own subsidiaries.

09:06AM 16 That is about the most important thing that I could say
09:06AM 17 today: We can never have to reach commercial activities.

09:06AM 18 We will, if we have to.

09:06AM 19 We don't have to reach alter ego.

09:07AM 20 We will, but we don't have to.

09:07AM 21 They are not entitled to sovereign immunity.

09:07AM 22 Next. As you can see here on the recent service,
09:07AM 23 state-owned assets supervision and administration counsel of
09:07AM 24 the state determined that it's an agency, not an organ, but an
09:07AM 25 agency.

09:07AM 1 Next. Now this is very interesting, because this is
09:07AM 2 decisions of this Court, the *Germano* findings. SASAC owns
09:07AM 3 100 percent of the CNBM Group. Class certification findings:
09:07AM 4 SASAC owns 100 percent of the CNBM Group.

09:07AM 5 Well, Mr. Stengel says, "We weren't here. We were in
09:07AM 6 China at that time. We couldn't defend ourselves and somehow
09:08AM 7 correct that, if it's wrong."

09:08AM 8 Shame on CNBMG. They could have been here. They chose
09:08AM 9 not to be here. They chose to sit back behind the Great Wall
09:08AM 10 of China and hide from this Court.

09:08AM 11 They chose to stick Taishan up front as a stalking
09:08AM 12 horse to take the salvos that we would direct in their
09:08AM 13 direction, and we would be unable to get their documents, speak
09:08AM 14 to their officers, take the depositions, do anything -- and
09:08AM 15 they were content to be where they are.

09:08AM 16 Well, actions have consequences. And if it wasn't for
09:09AM 17 the contempt citation, Your Honor, they would still be in
09:09AM 18 China. But because of the contempt citation, and because of
09:09AM 19 the fact that Your Honor found that the subsidiaries and
09:09AM 20 affiliates had a relationship as a result of your contempt
09:09AM 21 citation, and we began to take discovery and find they came
09:09AM 22 here to protect themselves late.

09:09AM 23 Well, they have a default judgment. They chose the
09:09AM 24 default judgment and they are stuck with what they caused them
09:09AM 25 themselves.

09:09AM 1 But we don't have to look just at the default judgment,
09:09AM 2 Your Honor. We don't have to look at what Your Honor has said
09:09AM 3 and found in decisions.

09:09AM 4 Next. Oh, Beijing New Building Materials Public
09:09AM 5 Limited Company, BNBM PLC, one of the alphabet soup of CNBM,
6 BNBM and Taishan.

09:10AM 7 It says 100 percent ownership -- just what I'm saying.
09:10AM 8 Not what Mr. Cao says, who we will depose hopefully because you
09:10AM 9 may have given us -- I will say "may," Your Honor -- 45 days to
09:10AM 10 work on that yesterday.

09:10AM 11 This is their own documents. This document is filed in
09:10AM 12 a Chinese stock exchange, and it's filed each and every year.

09:10AM 13 Next. On the annual reports, "each and every year."

09:10AM 14 Next. The Board of Directors, the Supervisory
09:10AM 15 Committee, and all directors, supervisors, and senior
09:10AM 16 executives of the Company confirm that there are no
09:10AM 17 misrepresentations or misleading statements contained in or
09:10AM 18 material omissions from this report, and accept joint and
09:11AM 19 several responsibilities for the truthfulness, accuracy and
09:11AM 20 completeness of the contents of this report.

09:11AM 21 Mr. Cao, Chairman of the company, under oath. Cao has
09:11AM 22 been director of CNBM Group since April 2014. He is General
09:11AM 23 Manager of CNBM Group.

09:11AM 24 March 2005, to present, Cao has been President and
09:11AM 25 Executive Director of CNBM.

09:11AM 1 2005 to present, Cao held a range of positions at BNB
09:11AM 2 Group. Currently, Cao is Chairman of the Supervisory Committee
09:11AM 3 at BNB Group.

09:11AM 4 Your Honor, this is a case that is very important to
09:11AM 5 our jurisprudence, because China is still a communist nation.

09:12AM 6 Since about 2006, at least, according to Hank Paulson,
09:12AM 7 they transitioned and they are trying to enter our world. And
09:12AM 8 they are welcome in our world, and we welcome them in our
09:12AM 9 world. But when they say it's no small thing that he was on
09:12AM 10 the Supervisory Committee, that's the Communist Party Committee
09:12AM 11 in the corporation.

09:12AM 12 When I asked the question at the deposition, the answer
09:12AM 13 was more like it was a social club.

09:12AM 14 Well, we could take judicial notice that that was not a
09:12AM 15 social club.

09:12AM 16 Next. Now there is a big difference between what is
09:12AM 17 said in the courtroom, what is said in depositions, and what is
09:13AM 18 said in documents that are filed, and what the truth is.

09:13AM 19 We all sat in Hong Kong, Your Honor, in a dungeon, and
09:13AM 20 couldn't believe the deposition of Fu Tinghuan -- I have
09:13AM 21 difficulty with Chinese names.

09:13AM 22 When he said, "In China, we exaggerate a little bit."
09:13AM 23 Exaggerate a little bit. That's allowed.

09:13AM 24 Everybody in that room, and Your Honor will speak for
09:13AM 25 yourself, I'm excluding you, because I don't know your opinion,

09:13AM 1 knew what he was saying. In China, we can lie.

09:13AM 2 Next. Finally, May 11th, 2009, report to Chiefs Song
09:14AM 3 and Cao. In this conglomerate as we heard them depict this as,
4 they are the two heads: Cao and Song.

09:14AM 5 Song, I read once someplace that he is the sixth most
09:14AM 6 influential businessman in China.

09:14AM 7 What does it say? After analysis, Taishan Company
09:14AM 8 believes that this lawsuit is relatively complicated and it
09:14AM 9 plans not to respond, but when necessary it will provide
09:14AM 10 documents that are beneficial to Taishan Company to the Court
09:14AM 11 that accepted this case. Beneficial.

09:14AM 12 That means they will triage their documents and give us
09:14AM 13 what they want to give us and not give us, which is harmful,
09:14AM 14 and Taishan will come in here if they have to, but CNBM Group
09:14AM 15 will stay home in China and CNBM Group is directing them to do
09:15AM 16 that.

09:15AM 17 I'm not the only one that feels this way about those
09:15AM 18 companies.

09:15AM 19 Morgan Stanley offering memorandum. This is their
09:15AM 20 investment advisor, the one that put this whole thing together,
21 this global prospectus.

09:15AM 22 What did they say about their client? We cannot
09:15AM 23 guarantee the accuracy of facts and statistics derived from
09:15AM 24 official sources and industry publications with respect to the
09:15AM 25 PRC, the People's Republic of China, the PRC economy, and the

09:15AM 1 PRC building materials industry contained in this prospectus
09:15AM 2 and the investors should not place undue reliance on them.

09:15AM 3 I wouldn't buy something with that cautionary language
09:15AM 4 in it. And I don't think Morgan Stanley is in business to hurt
09:16AM 5 the clients that they are representing. But they felt that
09:16AM 6 they had to do this to prevent plaintiffs from suing Morgan
09:16AM 7 Stanley, because after all, the operatives of CNBM were all
09:16AM 8 over the United States in road shows selling their stock.

09:16AM 9 Now, what did Mr. Cao produce on ownership? He
09:16AM 10 produced a business license from 1981 -- long before 2006.

09:16AM 11 And unfortunately, we have BNBM's word, year in and
09:16AM 12 year out, CNBM Group, CNBM, BNBM, Taishan. BNBM has told us
09:16AM 13 who owns the company, and they are not entitled to it.

09:17AM 14 They have been playing hide the pea for a long time,
09:17AM 15 Your Honor.

09:17AM 16 Next. We took depositions in this case, Russ and I,
09:17AM 17 Mr. Herman and I, of their 30(b)(6) witnesses. And my God,
09:17AM 18 they were producing documents -- machine documents that you
09:17AM 19 couldn't read. We were having them produced from Chinese to
09:17AM 20 English and working with them.

09:17AM 21 And they produced the bulk of the documents after the
09:17AM 22 depositions. That is not fair. But that is what we were
09:17AM 23 blessed with.

09:17AM 24 And they still continue to dump documents on us at
09:17AM 25 4:30 in the morning. This has been an organized effort to see

09:18AM 1 to it that not all of the facts would be revealed in this
09:18AM 2 courtroom.

09:18AM 3 Now, if I fail, and I shouldn't fail with this first
09:18AM 4 part of the argument, and I will be very brief because
09:18AM 5 Mr. Herman has a presentation on the facts.

09:18AM 6 They are certainly, certainly a recipient of the
09:18AM 7 commercial exception, which will bring them into this
09:18AM 8 courtroom.

09:18AM 9 The *Sachs* case, as Your Honor questioned them, is
09:18AM 10 really not significant as to the facts in this case.

09:18AM 11 We have 4,000 homes in the United States that are
09:18AM 12 destroyed, and *Sachs* had her injury abroad on one railroad
09:18AM 13 ticket.

09:18AM 14 I invite you, because time is short, to look at the
09:19AM 15 Footnote 1. *Sachs* didn't reach all three prongs but,
09:19AM 16 specifically, the third prong, activity of a foreign state
09:19AM 17 elsewhere and the act causes a direct effect in the United
09:19AM 18 States. That certainly is our case here.

09:19AM 19 Next. What is the particular conduct that constitutes
09:19AM 20 the gravamen of the suit? That is what *Sachs* says is
09:19AM 21 important.

09:19AM 22 Next. This is our complaint in the *Gross* case. As
09:19AM 23 Your Honor knows, we have 20 omni complaints outstanding now.
09:19AM 24 *Gross* was the first complaint that we filed. It was an
09:20AM 25 indeterminate defending complaint, because we were faced with

09:20AM 1 the situation where we didn't even know at that time who
09:20AM 2 manufactured what.

09:20AM 3 Chinese companies had invaded the United States, the
09:20AM 4 market for drywall, and fortunately, we had a little help from
09:20AM 5 Knauf in determining, if Your Honor remembers, I think it was
09:20AM 6 Pretrial Order No. 10, in determining the different logos on
09:20AM 7 the documents, so that we could put together at least the
09:20AM 8 Taishan, CNBM, BNBM amendments.

09:20AM 9 But what did we say? Defendant Taishan is a foreign
09:20AM 10 corporation involved in manufacturing and the sale of gypsum
09:20AM 11 drywall. Taishan manufactured, sold, distributed, marketed,
12 and placed with the stream of commerce gypsum drywall with the
09:20AM 13 expectation that the drywall would be purchased by thousands of
09:20AM 14 consumers, if not more, within various states, including but
09:21AM 15 not limited to Louisiana, Alabama, Florida, Mississippi, Texas,
16 North Carolina, and Virginia.

09:21AM 17 Taishan has continuously and systematically distributed
09:21AM 18 and sold drywall to numerous purchasers in the United States,
09:21AM 19 and their drywall is installed in numerous structures in the
09:21AM 20 United States.

09:21AM 21 Taishan was their arm. Under Florida law, Taishan was
09:21AM 22 their agent.

09:21AM 23 Under Louisiana law, Taishan was the alter ego.

09:21AM 24 Under Louisiana law, the whole conglomerate, as it was
09:21AM 25 described, was a single business entity.

09:21AM 1 And under Virginia law, the same occurred. Virginia
09:21AM 2 law was not dealt with by the Fifth Circuit because *Germano*
09:21AM 3 didn't have that.

09:21AM 4 What do we say about CNBM Group? Paragraph 45:
09:21AM 5 Defendant CNBM Group caused the drywall at issue in the case to
09:21AM 6 be imported, distributed, delivered, supplied, inspected,
09:21AM 7 marketed, and/or sold.

09:22AM 8 They weren't on the assembly line, if that's what
09:22AM 9 day-to-day operation is, but they were in the control of moving
09:22AM 10 that defective product into the United States and right here
09:22AM 11 into Louisiana.

09:22AM 12 Next. Defendants, plural, CNBM Group is one of them,
09:22AM 13 tortiously manufactured, exported, imported, distributed,
09:22AM 14 delivered, supplied, inspected, marketed and/or sold the
09:22AM 15 defective drywall, which was unfit for its intended purpose and
09:22AM 16 unreasonably dangerous in its normal use in that the drywall
09:22AM 17 caused corrosion and damage to personal property in plaintiffs'
09:22AM 18 and class members' homes.

09:22AM 19 It sounds like a lawyer wrote that. They did.

09:22AM 20 Now we have heard much about an alter ego. I think if
09:23AM 21 you look at the *Hester* case, Your Honor, and the Cuba case,
09:23AM 22 that when they talked about day-to-day operations they are
09:23AM 23 talking about the People's Republic of China being held under
09:23AM 24 an alter ego theory.

09:23AM 25 But when we're talking about, as between CNBM Group and

09:23AM 1 Taishan, we have our own jurisprudence. We have the *Green* case
09:23AM 2 in Louisiana. We have the *Agency* cases in Florida. In
09:23AM 3 Virginia, we have Fifth Circuit opinion two times. We have
09:23AM 4 Your Honor's opinion.

09:23AM 5 It's not on a clean slate. We don't have to have
09:23AM 6 day-to-day operations. But we certainly have the ability when
09:24AM 7 looking at CNBM Group to know that they have controlled it.

09:24AM 8 Now, counsel said that CNBM Group is just like any
09:24AM 9 other Parent. It's like GE, and probably Kodak, and they
09:24AM 10 listed about 60 for depositions as to BNBM did, and CNBM
09:24AM 11 incorporated the BNBM expert on this.

09:24AM 12 Those depositions will be taken in January. I'm sure
09:24AM 13 that those companies weren't sued as these companies are on an
09:24AM 14 alter ego theory, and I think we will be able to make that
09:24AM 15 determination and prove that fact when we take their
09:24AM 16 deposition.

09:24AM 17 But that is a red herring, Your Honor. What we're
09:24AM 18 dealing with here is not General Electric, but CNBM Group.

09:25AM 19 Now I invite Your Honor to read very carefully, and I
09:25AM 20 know you will, because you read everything, the *Day* case, and
09:25AM 21 especially the *Hester* case, which I believe negates another red
09:25AM 22 herring of day-to-day control.

09:25AM 23 Sure, when you are going against the People's Republic
09:25AM 24 of China, they hold them to day-to-day control. But when you
09:25AM 25 are going behind one commercial entity and another commercial

09:25AM 1 entity, then traditional theories of alter ego, agency, single
09:25AM 2 business enterprise apply.

09:25AM 3 And if you read *Hester*, along with the Cuba case, *First*
09:25AM 4 *National City Bank*, you will find that the Court there said
09:26AM 5 that Chinese law doesn't apply. I think it was Nigeria at the
09:26AM 6 time, that it is domestic law that applies.

09:26AM 7 Now, lastly, counsel for the defendant wants us to be
09:26AM 8 very myopic and just look at 2005 or 2006, or perhaps a week or
09:26AM 9 a month in each of those particular years. That is not the
09:26AM 10 real world.

09:26AM 11 If you look at the totality of what CNBM Group has done
09:26AM 12 here, and what they have controlled here over a span of years
09:26AM 13 where in each year they had the ability to do the same thing,
09:26AM 14 and it's not the actual control, but it's the ability to
09:26AM 15 control, and also the actual control, and how they manage this
09:27AM 16 litigation to prevent my plaintiffs, 4,000 of them, from
09:27AM 17 getting redress in this Court, they were in control, Your
09:27AM 18 Honor.

09:27AM 19 They are the alter ego. They are the agent. This is a
09:27AM 20 single business enterprise with hundreds of companies spread
09:27AM 21 out all over the world. We see what they characterize
09:27AM 22 themselves as.

09:27AM 23 Your Honor, it's been a long time since I read a kiddie
09:27AM 24 book, but I believe Kann said it best. "If you make a mess,
09:27AM 25 clean it up." And it's time for them to clean this mess up.

09:27AM 1 Thank you, Your Honor.

09:27AM 2 THE COURT: Thank you.

09:27AM 3 MR. HERMAN: May it please the Court, good morning,
09:28AM 4 Your Honor. Russ Herman, of Herman, Herman & Katz, New
09:28AM 5 Orleans, for the PSC. I'm pleased to address the Court.

09:28AM 6 Mark Twain said, "There is a world of difference in
09:28AM 7 words." And he used the example between the lightening and a
09:28AM 8 lightening bug. And domination -- I don't know whether
09:28AM 9 domination, means ultimate controller, actual controller, but
09:28AM 10 the words they used throughout the reports to the public,
09:28AM 11 published in English, used the words "actual controller,"
09:28AM 12 "ultimate controller" and "controller" to give notice to the
09:29AM 13 world. And the deposition testimony that we cited to Your
09:29AM 14 Honor in brief, shows that none of those words, none of them,
09:29AM 15 were ever changed.

09:29AM 16 Would you put up that first slide, please.

09:29AM 17 Alter ego, learned counsel is right, 100 percent
09:29AM 18 ownership is not enough -- is not enough to show alter ego.

09:29AM 19 And those cases only point to a single item referenced
09:29AM 20 in facts; however, we have a pattern of conduct here by CNBMG
09:29AM 21 of 17 different indicia of alter ego: Ownership -- substantial
09:29AM 22 identity, subsidiaries doing business, use/ownership of common
09:29AM 23 facilities, ability to control even though not exercised,
09:29AM 24 causing the incorporation of a subsidiary, using the property
09:30AM 25 of another corporation, transfers for no consideration,

09:30AM 1 control, common officers and directors, common employees,
09:30AM 2 uncompensated directors, financial control, intertwined
09:30AM 3 business, administrative control, centralized accounting,
09:30AM 4 excessive fragmentation, and patents and trade marks.

09:30AM 5 And having been served at 4:30 a.m. the night before
09:30AM 6 Thanksgiving, and receiving a call around 5:30 in the morning,
09:30AM 7 and then having to assign translators, who were out of town at
09:30AM 8 the time, we have learned and we will submit supplementary
09:30AM 9 information as to how CNBMG audited the various corporations
09:30AM 10 and the irregularities that they found.

09:30AM 11 Now, Your Honor, I am going, even though we do not
09:31AM 12 agree, and we do not accept counsel's -- learned counsel's
09:31AM 13 statement that we have to concentrate on 2005 to 2008, I am
09:31AM 14 going to deal with the evidence primarily of those years
09:31AM 15 because the false levy that the defendants CNBMG has tried to
09:31AM 16 erect is undermined by the falsity of their statements
09:31AM 17 regarding 2005 and 2008.

09:31AM 18 And I want to make clear that I'm not indicating that
09:31AM 19 counsel has misrepresented anything, the entire strategy
09:31AM 20 directed by CNBMG is a falsehood.

09:31AM 21 Could I have the first statement?

09:31AM 22 Well, Your Honor, Your Honor made a statement, well
09:31AM 23 they don't have majority. Actually, they have majority, direct
09:32AM 24 and indirect control.

09:32AM 25 This is 2005. We see that CNBMG controls CNBM; CNBM

09:32AM 1 controls BNBM; and BNBM controls Taihe, and not only that, the
09:32AM 2 two companies that were doing business in the United States
09:32AM 3 violating your order, Jushi and China Triumph.

09:32AM 4 I'm going to save that for another day.

09:32AM 5 Next line, please. It shows that JP Morgan Chase had
09:32AM 6 about eight percent in total share capital in 2005 of these
09:32AM 7 various interlocking corporations.

09:32AM 8 This deals with CNBM and it talks about the Parent
09:33AM 9 Group, which is CNBMG, but how are they not doing business in
09:33AM 10 the United States if they controlled, through JP Morgan, eight
09:33AM 11 percent of the capital? That is an extraordinary amount of
09:33AM 12 capital to be controlled.

09:33AM 13 Next. Now in 2006, they embarked on making CNBM, after
09:33AM 14 passing a resolution in 2005, a public company. And in the
09:33AM 15 prospectus of CNBM Company, published by Morgan Stanley at
09:33AM 16 their request, it shows that Taihe became a subsidiary,
09:33AM 17 consolidated with BNBM, long-term control of Taihe's board of
09:33AM 18 directors. Of course, there were five directors. They got to
09:33AM 19 elect three. Then who elected BNBM? Why CNBM?

09:33AM 20 Who elected CNBM? CNBMG.

09:34AM 21 Still in 2006, you give me the next slide, please, who
09:34AM 22 is the Parent? In all of these documents who is the Parent
09:34AM 23 CNBM Group Corporation.

09:34AM 24 Who are the controllers? Collectively, Parent, BNBMG,
09:34AM 25 Building Materials Academy, which incidentally they owned

09:34AM 1 100 percent of, and CNBM Trading.

09:34AM 2 Next slide, please. You know, this is a very
09:34AM 3 interesting case on the facts.

09:34AM 4 Just Brandeis once remarked that sunlight is the best
09:34AM 5 disinfectant. And what we're faced with here is and
09:34AM 6 disinfecting a Chinese corporate enterprise that permeates our
09:34AM 7 culture in which they use our Courts, but deny our Courts the
09:35AM 8 opportunity to judge their torts, their commercial activity.

09:35AM 9 And they recognize that if their products fail to
09:35AM 10 perform as expected, they not only would get negative publicity
09:35AM 11 from defects and failures, but they would have claims from
09:35AM 12 purchasers.

09:35AM 13 Now that is a public representation, not a private
09:35AM 14 representation.

09:35AM 15 And it says: A Parent at CNBMG, the company that
09:35AM 16 CNBM's controlling shareholder may differ from those of the
09:35AM 17 company's other shareholders, and the parent could make
09:35AM 18 decisions that were not in the best interests of shareholders.

09:35AM 19 That is an important statement.

09:35AM 20 Also, it says, look you may not be able to serve the
09:36AM 21 company or its directors. Well, we know that is true.

09:36AM 22 It says, PRC judgments obtained from non-PRC Courts,
09:36AM 23 does that explain motive?

09:36AM 24 Where in any enterprise, in any individual, if you want
09:36AM 25 to be treated like a person in our Courts, and our law is that

09:36AM 1 you are a person, then you have to subject yourself to the same
09:36AM 2 laws that a person would.

09:36AM 3 You can't hide. That is what piercing the corporate
09:36AM 4 veil means. That is what Chairman Song of CNBMG, CNBM, and
09:36AM 5 BNBMG said, that you have got to watch out, the U.S. is passing
09:36AM 6 the corporate veil.

09:37AM 7 Next. The directors of Mr. Song -- we're in 2006 now,
09:37AM 8 one of those critical years. And by the way, learned counsel
09:37AM 9 opposite tried the limit, as he can, he's an advocate. The
09:37AM 10 shipments from 2005 to 2007, we're going to show you the
09:37AM 11 evidence, Your Honor, that we're really dealing with 2005,
09:37AM 12 2006, 2007, and 2008, but Mr. Song Zhiping and Mr. Cao Jianglin
09:37AM 13 continue to be directors of the Parent.

09:37AM 14 The directors of the Parent, and why is this key?
09:37AM 15 Because this is commercial enterprise. The directors of the
09:37AM 16 Parent are only involved in the high level decision-making of
09:37AM 17 strategic and policy matters, formulation of business plans,
09:37AM 18 investment strategies, changes in business focus, market, and
09:37AM 19 customer groups.

09:38AM 20 What about our 4,000 people here? What about all of
09:38AM 21 the companies in these various states that they either ran or
09:38AM 22 sold this material to, which was inherently defective?

09:38AM 23 I remember from Planiol and Pothier -- maybe this only
09:38AM 24 applies in a code state -- that, you know, if you buy a vase,
09:38AM 25 and you think it's porcelain, you can't tell that it's not

09:38AM 1 porcelain, but it's clay. That is a commercial venture that is
09:38AM 2 fraudulent. That is a commercial venture, even if it's not
09:38AM 3 fraudulent, that gives rise to obligation, to duty, and to
4 reparation.

09:38AM 5 Next line, please.

09:38AM 6 Now 2006, again, supply of minerals by the Parent, that
09:39AM 7 is CNBMG, the Parent Group, to the Group meaning CNBM and all
09:39AM 8 of its lower owners and subsidiaries, including Taishan,
09:39AM 9 provision of production supplies and support services by the
09:39AM 10 Parent Group to the Group. The Group, again, is CNBM, BNBM,
09:39AM 11 Taishan, provision -- supply of equipment under No. 3, by the
09:39AM 12 Parent, CNBMG to the Group, CNBM, BNBM, Taishan.

09:39AM 13 A licensing of patents by BNBMG -- Song is Chairman of
09:39AM 14 BNBMG. BNBMG is controlled by CNBMG.

09:39AM 15 Licensing of trademarks by CNBMG, the Parent to the
09:40AM 16 Company, which is CNBM.

09:40AM 17 Next line, please. Again, in 2006, Parent has -- that
09:40AM 18 is Parent, at CNBMG has a direct equity interest of
09:40AM 19 26.54 percent, and an indirect equity interest of
09:40AM 20 68.22 percent, prior to the global offering.

09:40AM 21 Now, that is 2006. That's not a minority interest.
09:40AM 22 That is a controlling interest.

09:40AM 23 Now let's see what happens after.

09:40AM 24 Next slide. Parent, CNBMG, has issued share capital of
09:41AM 25 63.49 percent. But its subsidiary, BNBMG, has 39.60 percent.

09:41AM 1 Now, that is, if our option is not exercised; however,
09:41AM 2 if the option is exercised after this global offering, which
09:41AM 3 incidentally, was published in English -- they sent people to
09:41AM 4 the United States to sell it. It was sold in New York, Boston,
09:41AM 5 and San Francisco -- all over the United States, 97 percent is
09:41AM 6 their effective control of the share capital.

09:41AM 7 Now let's look at what happened to gypsum. Here is
09:41AM 8 2006. Gypsum board increased 150, from 150 in RMB millions to
09:42AM 9 247 millions. Wasn't some of that increase due to the sale of
09:42AM 10 products in the United States?

09:42AM 11 Look at Taihe or Taishan at the bottom dealing with
09:42AM 12 their sales volume, 3.94 -- I'm sorry, the first was volumes of
09:42AM 13 merchandise. This is the average sales, 3.94 increases to
14 4.05.

09:42AM 15 So what we have here is you will see the growth.

09:42AM 16 Next slide. In 2006, the largest gypsum board producer
09:42AM 17 in the PRC, in terms of production in 2006. We get to 2007,
09:42AM 18 and 2008, we will see how that changed.

09:42AM 19 Now let's look at the 2006 CNBM report.

09:43AM 20 Again, still CNBMG owns CNBM. CNBM owns BNBM. BNBM
09:43AM 21 owns Taihe. And CNBM has controlling interest in Jushi and
09:43AM 22 also controlling interest in China Triumph.

09:43AM 23 Next, please. I don't know. I mean, you got a
09:43AM 24 professor from China, and I don't know how much work he does
09:43AM 25 over there. I can't wait to depose him about his use of the

09:43AM 1 word "control" because the public statement, the company's
09:43AM 2 ultimate holding company is China National Building Material
09:43AM 3 Group Corporation.

09:43AM 4 So how is CNBMG not controlled, not the dominator of
09:43AM 5 these other companies?

09:43AM 6 Let's look at 2007. Again, this is their critical
09:43AM 7 period, so-called, by our worthy opponents.

09:44AM 8 Again, here is CNBMG's owning BNBM and controlling BNBM
09:44AM 9 and Shandong Taihe, and Jushi, and China Triumph.

09:44AM 10 I might add for each of these years, Song Zhiping is
09:44AM 11 Chairman and Cao Jianglin is President of CNBM. They are also
09:44AM 12 the officers, directors, and prime movers of CNBMG, and it
09:44AM 13 doesn't change for four years.

09:44AM 14 I will get to that in a minute.

09:44AM 15 Let's go to the next slide. At 2006, compared to 2007:
09:44AM 16 Sales volume, 247 RMB in millions.

09:44AM 17 In 2007, increases to 303 millions in RMB in 2007.

09:45AM 18 How did that increase get there?

09:45AM 19 One of the ways it got there is they targeted the
09:45AM 20 United States of America, taking advantage of people who had
09:45AM 21 lost their homes in Katrina, and there is no question we were
09:45AM 22 targeted. We only have to look at Your Honor's findings of
09:45AM 23 fact, conclusions and the two jurisdictional determinations by
09:45AM 24 the Fifth Circuit, echoing the targeted states that we're
09:45AM 25 dealing with here.

09:45AM 1 In Taihe, it's selling price increased from 2006, to
09:45AM 2 2007. It wasn't bad enough to ship defective drywall to United
09:45AM 3 States, they had to turn the screws by increasing the price --
09:45AM 4 the cost.

09:45AM 5 Next line. In 2007, they are still the largest gypsum
09:46AM 6 producer in the PRC.

09:46AM 7 Next slide. What happens in 2008? Again, in terms of
09:46AM 8 sales volume, they have increased from 303 RMB in millions to
09:46AM 9 323 in millions.

09:46AM 10 Did they increase the price again? Oh, yes. Why not?
09:46AM 11 We got people in the United States. They are suffering; they
09:46AM 12 are out of their homes. We don't care, we are just here doing
09:46AM 13 the bidding of CNBMG. And we're CNBM making this annual report
09:46AM 14 about Taishan and BNBM.

09:46AM 15 Now what about the next slide? My goodness, from 2005
09:46AM 16 to 2008, when they are shipping defective drywall to the United
09:46AM 17 States of America, they become no longer the largest gypsum
09:47AM 18 producer in Asia, I mean, in the PRC, they are now the largest
09:47AM 19 in Asia. Well thank you for shipping your product and working
09:47AM 20 your magic on the people in Louisiana, Texas, Alabama, Georgia,
09:47AM 21 Florida, and Virginia by shipping your drywall during those
09:47AM 22 years, increasing the price and increasing the production.

09:47AM 23 Now, you can talk about, well, USA is a small amount.
09:47AM 24 Well, it may be small to you, but it's not small to me.
09:47AM 25 Because you see, we represent Catholic charities; we represent

09:47AM 1 Habitat for the Humanity, and other folks, 4,000 of them that
09:47AM 2 used that defective drywall.

09:47AM 3 Let's look now at the 2008 annual report again.

09:48AM 4 CNBMG, controls CNBM, controls BNBK, controls Taishan
09:48AM 5 Gypsum now, which has changed its name, at least in their
09:48AM 6 reports, Jushi and China Triumph. Who are the executive
09:48AM 7 directors? The same executive directors, Song Zhiping, Cao
8 Jiangling, Li Yimin and Peng Shou.

09:48AM 9 Now let's look at what JP Morgan Chase did. Now we saw
09:48AM 10 early on, here, they own, again, in 2008, almost 14 percent in
09:48AM 11 total share capital -- total share capital.

09:48AM 12 I always thought JP Morgan's office was in New York,
09:48AM 13 New York. I don't know, this is a public document. We didn't
09:49AM 14 invent this document.

09:49AM 15 Let's look at FSIA Exhibit 42. Well, let's look at a
09:49AM 16 clear picture. Song is Chairman of CNBM Company, LTD., from
09:49AM 17 March 2005 to present.

09:49AM 18 He is Chairman of BNBK Group January '96 to present.

09:49AM 19 He is Chairman of CNBM Group, 2005 to present.

09:49AM 20 He is Executive Director of CNBM, 2005 to present.

09:49AM 21 He was Deputy Director of BNBK until 2002.

09:49AM 22 He is, from 2002 to 2005, the general manager of CNBM
09:50AM 23 Group.

09:50AM 24 So Song, by the time we get to these critical years
09:50AM 25 learned counsel was talking about, 2005 to 2008, Chairman Song,

09:50AM 1 reputed to be the sixth most important person in China, has an
09:50AM 2 iron fist around the building trades. That is commercial
09:50AM 3 enterprise.

09:50AM 4 But what about Cao? First of all, Cao has been
09:50AM 5 impeached, actually, by his own testimony, and by his own
09:50AM 6 reports. And what is he? Well let's see, he was actually at
09:50AM 7 Taishan as a Supervisor and Chairman of the Supervisory Group
09:50AM 8 during this critical period counsel points to, 2005 to 2008.

09:51AM 9 Today, he is Chairman of the Supervisory Committee of
09:51AM 10 BNBM PLC and has been chairman -- Chairman of BNBM during the
09:51AM 11 critical period from 2004 to 2008.

09:51AM 12 He is president of CNBM Company from March 2005 to
09:51AM 13 date, and its Executive Director.

09:51AM 14 Chairman of BNBM Group Supervisory Committee 2005 to
09:51AM 15 date. He is of CNBM Group, General Manager beginning
09:51AM 16 April 2014.

09:51AM 17 But that is not the critical part. The critical part
09:51AM 18 is a Director, and actually an Executive Director of CNBM Group
09:51AM 19 from October 2005, to date.

09:51AM 20 So this business about linkage with 2005 to 2008 is
09:52AM 21 really -- doesn't hold water and even if it did, it's sort of
09:52AM 22 an absurd argument based upon their own facts.

09:52AM 23 Next, please. Now I'm a great believer in facts. FSIA
09:52AM 24 Exhibit 151 goes to Chief Song and Chief Cao. It reports about
09:52AM 25 individuals in Florida, Mississippi, Louisiana, Alabama,

09:52AM 1 Georgia, and Texas, a written report on the facts of the case
09:52AM 2 and relevant information are hereby submitted to each leader so
09:52AM 3 that the leaders can understand the facts of the case and give
09:52AM 4 relevant instructions.

09:52AM 5 And who does it go to? The leaders of CNBMG, Chief
09:53AM 6 Song and Chief Cao.

09:53AM 7 Now, on May 11th of 2009. Can I see the next slide?

09:53AM 8 You know that learned counsel and the argument they
09:53AM 9 have given us is factually incorrect, because this shows in
09:53AM 10 their own documents that defective drywall was exported to the
09:53AM 11 U.S. in 2005, 2006, 2007, and 2008. And 2008 is important
09:53AM 12 because in 2008, they began, even before there were reports of
09:53AM 13 lawsuits being filed, investigating what was happening in the
09:54AM 14 U.S. in terms of their drywall.

09:54AM 15 I will get to that exhibit in a minute.

09:54AM 16 Now on May 11th, 2009 -- now remember, Your Honor, this
09:54AM 17 is only six months after 2008, the humidity, the heat has not
09:54AM 18 yet really been exposed in terms of this defective drywall.

09:54AM 19 And if you would give me the next slide. Now what is
09:54AM 20 the motive? Why did they do that? Because of Katrina.

09:54AM 21 And then they have witnesses at 30(b)(6) depositions
09:54AM 22 that lie, and I use the word "lie."

09:54AM 23 To have to -- in this courtroom -- to depose a witness
09:55AM 24 in two or three days who says he doesn't know how much drywall
09:55AM 25 was shipped to the U.S. or landed in the U.S. when they were

09:55AM 1 writing reports in 2008, and 2009, about how much drywall was
09:55AM 2 shipped here.

09:55AM 3 This isn't a question of exaggeration, it's a question
09:55AM 4 of outright prevarication.

09:55AM 5 We go to, again, May 11th, 2009. Would you go to the
09:55AM 6 next slide?

09:55AM 7 Why won't Taishan respond to the lawsuit? What is the
09:55AM 8 motive?

09:55AM 9 Well, we will just mail evidence to the U.S., that is
09:55AM 10 good for us. And we're going to have our court and
09:55AM 11 governmental departments interfere to eliminate and reduce
09:56AM 12 negative impact.

09:56AM 13 Let's go to the next slide. Again, according to export
09:56AM 14 records from 2005, to 2007, and this just reports 2005, to
09:56AM 15 2007. Your Honor will have to look at where this report went.
09:56AM 16 It went up the line to CNBMG.

09:56AM 17 Oh yeah, I guess so. I would like to have the U.S.
09:56AM 18 government interfere with all citizens' rights. The difference
09:56AM 19 is, we have a constitution, we have due process, we have equal
09:56AM 20 protection. But if you can ride those out, then, of course,
09:56AM 21 you know, you can have interference with government by
09:56AM 22 government departments and courts.

09:56AM 23 Let's go to the next slide. Now this slide
09:57AM 24 conveniently, and I like to look at the date of this slide.
09:57AM 25 It's Exhibit 157.

09:57AM 1 This is a report, I believe, in 2009, that shows that
09:57AM 2 the U.S. customers, Venture Supply, Wood Nation, Young Fen
09:57AM 3 Investment, Tov Trading, and Stone Pride were all receiving
09:57AM 4 defective drywall, and they give the dates. Everything is
09:57AM 5 fairly well set out at an early point before any 30(b)(6)
09:57AM 6 depositions. But they continue: While we don't know it was
09:57AM 7 FOB, I haven't seen it, I don't understand why you are asking
09:58AM 8 those questions.

09:58AM 9 Well, Exhibit 157 is produced or complete. Let's go to
09:58AM 10 the next slide.

09:58AM 11 Well, November 3rd, 2008. This is at the same time
09:58AM 12 that they have just shipped drywall to the U.S. We have got
09:58AM 13 BNBM to Taishan Gypsum, CNBMG and BNBM, and if you could go to
09:58AM 14 the next slide, all in the same document in 2008, this critical
09:58AM 15 period.

09:58AM 16 Please give us the information on import and export
09:58AM 17 business operation, and count the measures of the enterprises
09:58AM 18 during the financial crisis.

09:58AM 19 Well, they sure did report on November 6, exactly what
09:59AM 20 was asked them to investigate, including what drywall went to
09:59AM 21 the U.S.

09:59AM 22 Let's look at the next slide. Again, November 5th,
09:59AM 23 2008. See the attached report of export information, ask the
09:59AM 24 supply department about it.

09:59AM 25 Again, a string of e-mails dealing with the imports and

09:59AM 1 exports, which include the U.S.

09:59AM 2 Let's go to the next one. Interesting document,
09:59AM 3 Exhibit FSIA 150.

09:59AM 4 The main products involved in the export business of
09:59AM 5 Taishan Gypsum are plaster boards, decorative gypsum boards,
10:00AM 6 from 2006, 2007, and 2008, on the main countries and regions
10:00AM 7 for export, which are the U.S.

10:00AM 8 Denied in the 30(b)(6) depositions.

10:00AM 9 Now let's go to another alter ego issue. To facilitate
10:00AM 10 CNBM subsidiary -- subsidiary of who? CNBMG. Transfer by CNBM
10:00AM 11 Group for no consideration.

10:00AM 12 BNBM Group transfers equity to CNBM Equipment for nil
10:00AM 13 consideration.

10:00AM 14 CNBM Group approves the transfer of equity interests to
10:00AM 15 the Parent Group.

10:00AM 16 Let's go to the next line. BNBM Group transfers more
10:00AM 17 than 60 percent of its equity to CNBM Group without
10:01AM 18 compensation.

10:01AM 19 CNBM Group transfers 91 percent interest in China
10:01AM 20 Triumph to CNBM Equipment for no consideration.

10:01AM 21 CNBM Equipment transfers all its assets and liabilities
10:01AM 22 to CNBM import and export, commonly referred to as CNBM Trading
10:01AM 23 for no compensation, and that is the established trading arm of
10:01AM 24 CNBM Group.

10:01AM 25 It's no wonder, Your Honor, that we are still very,

10:01AM 1 very concerned about something that we had to discover
10:01AM 2 ourselves.

10:01AM 3 It was never divulged to the Court, never divulged to
10:01AM 4 us, that BNBM is going to buy all of Taishan. It can't do it
10:01AM 5 without CNBMG's approval.

10:01AM 6 I wonder how that is going to happen before or after
10:02AM 7 BNBM presents its lack of jurisdiction motion.

10:02AM 8 You see, because since Taishan has no assets here, and
10:02AM 9 BNBM has no jurisdiction, and CNBM -- BNBM has all of the
10:02AM 10 assets of Taishan, then even if Your Honor were to render a
10:02AM 11 decision in favor of 4,000 homeowners, how indeed would we
10:02AM 12 proceed to recover for them in China, when the defendants, all
10:02AM 13 of them, acknowledge in their documents that China and its
10:02AM 14 courts are not going to enforce a judgment.

10:02AM 15 At the same time CNBMG and its subsidiaries and
10:02AM 16 controlled entities are suing in our Courts for relief.

10:02AM 17 Let's go to the next. What about guarantees? I will
10:03AM 18 just go to 2008.

10:03AM 19 BNBM guarantees Taishan's debt twice. CNBMG guarantees
10:03AM 20 BNBMG's debt. CNBMG guarantees BNBMG's debt twice.

10:03AM 21 2007, BNBM guarantees Taishan; CNBM guarantees BNBM.
10:03AM 22 BNBM guarantees CNBM, and BNBM guarantees Taihe in
10:03AM 23 2006.

10:03AM 24 In 2005 BNBMG has an equity interest -- it gives an
10:03AM 25 equity interest to CNBMG and CNBM/BNBM guarantees Taihe's debt.

10:03AM 1 Under Texas law, it's called a Ring Dang Do. It's a
10:03AM 2 Texas hoop snake that swallows its tail and just goes
10:03AM 3 circularly through a chronological movement. That is all this
10:04AM 4 is. It is definitely an alter ego issue.

10:04AM 5 I'm going to wind up, Your Honor. My time is about up,
10:04AM 6 but I would like you to look at the deposition of Song Zhiping,
10:04AM 7 and I'm going to turn to \$1 million that Song Zhiping
10:04AM 8 authorized to be paid Morgan Stanley.

10:04AM 9 And finally, at page 93, he says, well, we heard from
10:04AM 10 Taishan, and CNBM Group approved -- I don't think they used
10:04AM 11 "approved," I think they used the word "respected" and when
10:04AM 12 they were asked, why they respected the decision after they
10:05AM 13 reported, they said because we believe that Taishan's absence
10:05AM 14 of the Court is a substantial matter. That is why Taishan had
10:05AM 15 to report to CNBMG. That's why CNBMG's folks gave a unanimous
10:05AM 16 approval.

10:05AM 17 Now I'm going to end with this: This is the puzzle
10:05AM 18 that you can't see, Your Honor. And I think that our Courts
10:05AM 19 and our clients who are burdened and wondering every day what
10:05AM 20 is going on in the case, and we can't say, because everything
10:05AM 21 is highly confidential and sealed, want to know what we're
10:06AM 22 doing.

10:06AM 23 I think they deserve the truth. This is what happened
10:06AM 24 with this Chinese puzzle.

10:06AM 25 This is Taishan's production before 30(b)(6).

10:06AM 1 This is BNBMG's production.

10:06AM 2 This is CNBM's production before -- I'm sorry, after
10:06AM 3 30(b) (6) depositions. All of this is after 30(b) (6)
10:06AM 4 depositions.

10:06AM 5 This is CNBMG's production after 30(b) (6) depositions.

10:06AM 6 This is 830,000 documents coming out of Peng's
10:06AM 7 computer, many of them, CNBMG- and CNBM- and BNBMG-related
10:06AM 8 documents.

10:06AM 9 Now they can talk all they want about producing a
10:07AM 10 fellow who had a heart problem in Hong Kong, I understand that.
10:07AM 11 And they couldn't find Mr. Peng, who knew more about this than
10:07AM 12 anybody else, and how cooperative they have been.

10:07AM 13 Remember all of this has happened since March, 2015.

10:07AM 14 We're entitled to the rest of this discovery. And to
10:07AM 15 quote Planiol and Pothier, and Sam Gainsburg and Harry Herman,
10:07AM 16 when all you produce, this dog won't hunt. You can't tell what
10:07AM 17 they are doing in China.

10:07AM 18 We have done the best we can with the facts and with
10:07AM 19 the law. And Your Honor, there is no question that their
10:07AM 20 expert in China needs to go through Daubert, who wants to cut
10:07AM 21 hairs about what is controlling and ultimate controlling. And
10:08AM 22 we appreciate that opportunity.

10:08AM 23 Your Honor, last week we got more production out of
10:08AM 24 CNBM and CNBMG. We have nine translators, students that can
10:08AM 25 only work 16 hours a week, going through hundreds of thousands

10:08AM 1 of documents even now that were machined, corrupted, and trying
10:08AM 2 to make sense out of them.

10:08AM 3 Your Honor, thank you for the opportunity to appear
10:08AM 4 before you.

10:08AM 5 THE COURT: All right. Let's take a ten-minute break
10:08AM 6 at this time, and then we will come back. I think the state
10:08AM 7 has something, and then rebuttal.

8 MR. ALLELY: Your Honor, I just have a two-minute
9 presentation.

10:09AM 10 THE COURT: That's fine. I will be back in 10 minutes.

10:09AM 11 CASE MANAGER: All rise.

12 (Recess.)

13 CASE MANAGER: All rise.

10:17AM 14 THE COURT: Be seated, please. We will hear from the
10:17AM 15 state, and then rebuttal.

10:18AM 16 MR. ALLELY: Good morning, Your Honor. I'm Craig
10:18AM 17 Allely of the firm, Perkins Coie, appearing here on behalf of
10:18AM 18 the state of Louisiana.

10:18AM 19 Thank you for hearing us this morning.

10:18AM 20 I have just a few brief remarks to add to the very fine
10:18AM 21 arguments of learned counsel, and in response to some of the
22 arguments of CNBM Group lawyers.

10:18AM 23 We heard this morning from Mr. Stengel, that what
10:18AM 24 plaintiffs need to show in this case was control in the
10:18AM 25 relevant time period, 2005, '06, '07. And I think Mr. Herman

10:18AM 1 has very clearly shown that.

10:18AM 2 But what I want to call your attention to is maybe
10:18AM 3 another presentation here of the time line. What was happening
10:18AM 4 in these years.

10:18AM 5 So CNBM Group retains Morgan Stanley in or about
10:18AM 6 sometime in 2004, for the express purpose of taking CNBM
10:18AM 7 Company to the public. And so they work on that. They
10:18AM 8 continue to work on that, and in March of 2005, and I think
10:18AM 9 these dates are important, CNBM Group -- well, CNBM Companies,
10:19AM 10 Incorporated, in March of 2005, and they prepare -- they are
10:19AM 11 working on their IPO. As we all know in late August of 2005,
10:19AM 12 and then in September of 2005, we have hurricanes here in
10:19AM 13 Louisiana, devastating thousands of people.

10:19AM 14 That is when CNBM Group saw the opportunity here.
10:19AM 15 Chairman Song -- Chairman Song testified, and it's at the
10:19AM 16 PSC's FSIA Exhibit 25, is his deposition, he testified that
10:19AM 17 what CNBM Group wanted to do was to build up a good image in
10:19AM 18 the capital markets by increasing the market share and branding
10:19AM 19 influence of the gypsum board of BNBM and Taihe. And we cite
10:19AM 20 that testimony on page 24 of our response brief.

10:20AM 21 To my mind, in terms, like, capital markets, building
10:20AM 22 market share, branding influence -- these are all terms
10:20AM 23 relating to commercial activities.

10:20AM 24 Clearly, it seems to me CNBM Group is targeting the
10:20AM 25 commercial opportunity to target sales, increase sales.

10:20AM 1 Increase sales means a better share price, a better offering
10:20AM 2 memorandum, better numbers that they can report to their
10:20AM 3 potential investigators. That is the "why."

10:20AM 4 The "how" is increasing sales. They increase sales by
10:20AM 5 pushing their subsidiaries, their controlled subsidiaries, BNBM
10:20AM 6 and Taihe, Taishan to increase sales in the United States.

10:20AM 7 Mr. Herman referenced their exhibit, PSC Exhibit 157.
10:20AM 8 I urge Your Honor to take a look at that.

10:20AM 9 It's a collection of direct and indirect sales made of
10:20AM 10 drywall to the United States. It's quite a formidable
10:21AM 11 document. It shows very clearly what was going on in this time
10:21AM 12 period.

10:21AM 13 Now CNBM lawyers say that plaintiffs haven't alleged
10:21AM 14 any conduct and actually harmed plaintiffs.

10:21AM 15 I think, to the contrary, as Mr. Levin pointed out,
10:21AM 16 there is an allegation that CNBM Group caused the export of the
10:21AM 17 drywall to the United States, the state of Louisiana, and in
10:21AM 18 its second amended complaint at paragraph 33, makes the same
10:21AM 19 allegation. That CNBM Group's own activities, as I mentioned
10:21AM 20 for the purpose of increasing sales, improving their IPO and
10:21AM 21 their share price, caused the drywall that we're complaining
10:21AM 22 about, to be imported, distributed, delivered, supplied, and
10:21AM 23 inspected, marketed, and sold in the state of Louisiana.

10:21AM 24 That -- when the drywall comes into the state, that is
10:21AM 25 a completed violation, we allege, of the Louisiana Unfair Trade

10:22AM 1 Practices Act of importing defective drywall into Louisiana.

10:22AM 2 The last point, and I promised I would be brief, the
10:22AM 3 last point I wanted to make, Your Honor, and I just want to
10:22AM 4 before I leave this, I want to draw on here. Here, March 23,
10:22AM 5 2006, is the time that the IPO becomes effective.

10:22AM 6 Prior to that time, CNBM Group can hardly be said to
10:22AM 7 be a mere investor. And there is a lot of shipment going on
10:22AM 8 prior to that time.

10:22AM 9 Even after that time, they retain more than 60-some
10:22AM 10 percent of the shares, and certainly they are more than a mere
10:22AM 11 investor, even more than JP Morgan, who happened to buy some
10:22AM 12 shares.

10:22AM 13 The last point I wanted to make, and then I will move
10:22AM 14 and sit down, is the new case, the *Sachs* case, the *OBB* case and
10:22AM 15 Your Honor has clearly already read it, but here, we're not
10:23AM 16 talking about the sale of a Eurail pass, there was certainly
10:23AM 17 nothing defective about the Eurail pass. Here, we're talking
10:23AM 18 about drywall.

10:23AM 19 It was installed in people's homes. As the Court has
10:23AM 20 already found, the drywall, itself, was defective.

10:23AM 21 That is a completely different case than Supreme and
10:23AM 22 Chief Justice Roberts recently had in the last week in the case
10:23AM 23 from Austria.

10:23AM 24 Here, in that case, Chief Justice Roberts cited a
10:23AM 25 letter that Justice Holmes had written to Justice Frankfurter,

10:23AM 1 and you have probably already read that passage.

10:23AM 2 Justice Holmes said that to really learn the gravamen
10:23AM 3 -- I can't get that word right -- gravamen of the complaint,
10:23AM 4 you look to see where the boy's fingers were pinched.

10:23AM 5 In this case, the pinching happened here in the United
10:23AM 6 States. It happened to the Louisiana citizens. And of course,
10:23AM 7 Florida citizens, Texas citizens, Virginia citizens, and so on,
10:23AM 8 but the boy's fingers were pinched here in the United States,
10:24AM 9 and as a result of the commercial activity of CNBM Group,
10:24AM 10 pushing -- causing the sale of that drywall here.

10:24AM 11 The state also joins in the PSC's arguments about alter
10:24AM 12 ego, and their other arguments.

10:24AM 13 If you have no questions, Your Honor, that is -- I'm
10:24AM 14 finished.

10:24AM 15 Thank you very much.

10:25AM 16 THE COURT: No. All right. Thank you very much.

10:25AM 17 Rebuttal?

18 THE COURT REPORTER: Could you just wait a moment?

10:25AM 19 MR. STENGEL: Your Honor, I'm always differential to
10:25AM 20 the court reporters because I speak very quickly. So if I
10:25AM 21 can't trust them, I'm in trouble.

10:25AM 22 A couple observations, and I will try and be brief.

10:25AM 23 The arguments here were -- to a certain extent, we are
10:25AM 24 like ships passing in the night.

10:25AM 25 I'm not sure we really joined issue on what the law is

10:25AM 1 or what the facts are that are relevant to the law.

10:25AM 2 I could be less favorable, and refer to sound and fury.

10:25AM 3 You heard lots of assertions, but the core issues that
10:25AM 4 we discussed when I was up here for the first time about the
10:25AM 5 need to close the link to every step of the chain, and to link
10:25AM 6 that, have the nexus with the sale of drywall, defective
10:25AM 7 drywall, in the United States, and I think that remains
10:25AM 8 unchallenged on what you saw.

10:25AM 9 A lot of information about the corporate structure. A
10:25AM 10 lot of information about, well JP Morgan may have had shares --
10:26AM 11 all of that is interesting. All of that is irrelevant.

10:26AM 12 It's commercial activity relating to the gravamen of
10:26AM 13 the case. That is, the importation of allegedly defective
10:26AM 14 drywall.

10:26AM 15 That issue was not addressed.

10:26AM 16 Mr. Levin helpfully put up the allegations in the case.
10:26AM 17 I did not have them with me, and I apologize for that, but they
10:26AM 18 confirmed, I believe, what I told Your Honor. They were very
10:26AM 19 general in nature, and we have never said there are no
10:26AM 20 allegations of injury as to these claimants.

10:26AM 21 We're saying, you can't link those allegations of
10:26AM 22 injury to Group in a way that overcomes foreign sovereign
10:26AM 23 immunity. That is the essence of what we argued.

10:26AM 24 It's largely un rebutted. It didn't meet.

10:26AM 25 Less happily, Your Honor, and I will say, you know, I

10:26AM 1 think we made it pretty clear what the presumption of *Bancec*
10:26AM 2 required. I think that stands. We proved the ownership of
10:27AM 3 Group by the People's Republic of China. Yes, SASAC has a
4 role.

10:27AM 5 People's Republic can't administrate its assets without
10:27AM 6 help. That is what SASAC does. It exercises the rates of the
10:27AM 7 shareholders for the People's Republic of China.

10:27AM 8 THE COURT: Tell me a little bit more about SASAC. Do
10:27AM 9 they say that SASAC owns 100 percent CNBM Group?

10:27AM 10 MR. STENGEL: There is one document that I think in
10:27AM 11 translation here is an issue, although admittedly, it was a
10:27AM 12 document published by BNBM Group, I believe, in English.

10:27AM 13 But I think what that really refers to is the fact that
10:27AM 14 they operate as they were the shareholder of CNBM Group.

10:27AM 15 The People's Republic obviously doesn't have
10:27AM 16 independently a means to manage its investments. But I don't
10:27AM 17 think under the corporate statement of Mr. Cao's testimony,
10:27AM 18 there is any legitimate dispute. I think even if you looked at
10:27AM 19 the SASAC filing before this Court objecting to its
10:27AM 20 jurisdiction, you would see that as a matter of fact and law,
10:27AM 21 domestic law of China, that CNBM Group is owned 100 percent by
10:28AM 22 the People's Republic of China.

10:28AM 23 Now interestingly, we don't need to have this debate
10:28AM 24 because it's not actually a viable argument. But *Patrickson v*
10:28AM 25 *Dole* did say you couldn't have subsidiaries protected by the

10:28AM 1 Foreign Sovereign Immunities Act.

10:28AM 2 What they didn't address, but is in *OBB*, OBB was in
10:28AM 3 fact owned by something called OBB Holdings. It was an
4 intermediate entity.

10:28AM 5 And in the first investment corporation of *Marshall*
10:28AM 6 *versus Fugian*, there was an intermediate entity. If that
10:28AM 7 intermediate entity qualifies an organ of the state, or
10:28AM 8 sub-unit of the state, it's viewed as the state for ownership
10:28AM 9 purposes.

10:28AM 10 So while it's factually not relevant because SASAC
10:28AM 11 doesn't own CNBM Group, given that I think indisputably SASAC
10:28AM 12 would be treated as an instrumentality or organ of the People's
10:28AM 13 Republic of China, it's a difference without a distinction.

10:28AM 14 Although, I think the record is actually fairly clear
10:29AM 15 and unchallenged as to actual ownership.

10:29AM 16 I would also note that the plaintiffs didn't deal with
10:29AM 17 the prevailing law of this circuit in terms of what *Bancec*
10:29AM 18 requires, in terms of *Kelly versus Syria Oil*, or the other
10:29AM 19 cases, even *Hester*, which Mr. Levin cited repeatedly.

10:29AM 20 I was much taken aback by Mr. Levin's suggestion that
10:29AM 21 it may not have day-to-day control. If they don't have
10:29AM 22 day-to-day control, Your Honor, we have just unfortunately
10:29AM 23 wasted a couple of hours of your life, because that's what they
10:29AM 24 need to show to overcome sovereign immunity.

10:29AM 25 Now, in closing, and there is much more I can say, but

10:29AM 1 I don't think it is necessary or useful for the Court, but
10:29AM 2 there is one thing I say, and I say this with some hesitation,
10:29AM 3 but the level of rhetoric in this courtroom has begun to
10:29AM 4 trouble me as someone who happily serves clients who are
10:29AM 5 located in China.

10:29AM 6 It's become all too easy in this Court to suggest that
10:29AM 7 an unidentified "they" lie -- manipulate the system. I don't
10:30AM 8 think we would stand by attack on any group. If we said those
10:30AM 9 things about Warren Buffett, you would probably admonish us
10 10 about the rules of civility in this Court.

10:30AM 11 I would ask, Your Honor, merely to remind counsel that
10:30AM 12 we shouldn't be free and easy about accusations about parties,
10:30AM 13 by implication, counsel, or nations and peoples. We have gone
10:30AM 14 too far down that road.

10:30AM 15 As a good example of that, there were many references
10:30AM 16 to things that were said by Taishan witnesses. I don't
10:30AM 17 represent Taishan. I wasn't there. I don't know what
10:30AM 18 happened. But the "they" goes directly against the admonition
10:30AM 19 I made to start, which I think Your Honor accepts, that this is
10:30AM 20 a game of precision. We need to close the loop in each
10:30AM 21 juncture in the chain of causation, if one exists.

10:30AM 22 We submit that it does not.

10:30AM 23 But to say "they did this," or "they did that," without
10:30AM 24 saying who the "they" is and when "they" did it, makes that
10:30AM 25 meaningless for these purposes.

10:31AM 1 Finally, Your Honor, in terms of timing and schedule,
10:31AM 2 having heard the record now, having read it, obviously, we
10:31AM 3 tried to be helpful to the Court with the supplemental Cao
10:31AM 4 Declaration and of that of Professor Fong.

10:31AM 5 We don't think there is any reason for further delay
10:31AM 6 here. And if that is the price of getting an immediate
10:31AM 7 decision, we would invite Your Honor to strike them. We think
10:31AM 8 they were helpful. We think they were relevant. We think the
10:31AM 9 PSC suffered no prejudice by their submission. And we think as
10:31AM 10 I detailed and cited in the record, we have other sources for
10:31AM 11 all of the information contained therein. None of it should be
10:31AM 12 a surprise.

10:31AM 13 But my clients deserve a decision now. We need to know
10:31AM 14 their status as sovereign entities and there is no need for
10:31AM 15 30 days or 45 days. There is no need for additional discovery,
10:31AM 16 because as I mentioned in the opening, the PSC has failed to
10:31AM 17 demonstrate the basis for further discovery as to this matter.

10:31AM 18 We have a record. They were able to talk to Your Honor
10:32AM 19 for over an hour with multiple exhibits, to take their
10:32AM 20 position. And they claim, based on what the record they have
10:32AM 21 in front of them, they have an adequate basis to rebut
10:32AM 22 sovereign immunity.

10:32AM 23 I think clearly, they do not. But nothing that they
10:32AM 24 have identified as additional information will change that
10:32AM 25 fact, Your Honor. So I would invite, request on behalf of my

10:32AM 1 clients that the motion be granted today.

10:32AM 2 Thank you.

10:32AM 3 MR. HERMAN: May it please the Court?

10:32AM 4 THE COURT: Wait, wait, wait. Just a moment. You are
10:32AM 5 the one that attached the documents to your brief.

10:32AM 6 MR. STENGEL: That's correct, Your Honor.

10:32AM 7 THE COURT: You are the one that suggested that those
10:32AM 8 two documents be attached.

10:32AM 9 One is from a professor, and the other one is from a
10:32AM 10 witness.

10:32AM 11 The witness has already been deposed. I don't know
10:32AM 12 whether that is necessarily helpful to re-depose him.

10:32AM 13 But the professor is a totally new person.

10:33AM 14 In reading it, as I told you yesterday, I found it
10:33AM 15 helpful, and it was relevant. But I also found that by
10:33AM 16 admitting it, I would be depriving the plaintiffs of an
10:33AM 17 opportunity to rebut.

10:33AM 18 I thought we had an agreement that by and between
10:33AM 19 counsel of all parties, that they would have an opportunity to
10:33AM 20 either depose or rebut that new witness. That is what I came
10:33AM 21 away with in our conversation.

10:33AM 22 MR. STENGEL: That was our conversation yesterday, Your
10:33AM 23 Honor. In fairness, I will take full responsibility, and I
10:33AM 24 have reconsidered where we were.

10:33AM 25 I don't think holding the record open is worth it. I

10:33AM 1 think that is a disadvantage to my client that ought not be
10:33AM 2 borne.

10:33AM 3 I don't think we need that affidavit, by the way. It
10:33AM 4 was offered in good faith. I think it was helpful and
10:33AM 5 relevant, but if the cost of keeping that affidavit is further
10:33AM 6 delay, we would ask you to disregard it.

10:33AM 7 THE COURT: Okay.

10:34AM 8 MR. LEVIN: Your Honor, we would like to reconsider
10:34AM 9 that, and get back to you very shortly on it.

10:34AM 10 We just don't think you can drop into this courtroom
10:34AM 11 like Mary Poppins and then just remove yourself having tainted
10:34AM 12 the record.

10:34AM 13 THE COURT: All right. We have another -- I will let
10:34AM 14 you all think about it, and give me the benefit of your view.
10:34AM 15 I will rule on it one way or the other.

10:34AM 16 MR. HERMAN: The problem is, you have read it, and you
10:34AM 17 thought it was helpful.

18 THE COURT: Yeah.

10:34AM 19 MR. HERMAN: Now if it's taken out, we have got a
10:34AM 20 problem.

10:34AM 21 I do want to thank counsel opposite, and particularly
10:34AM 22 the Court, for agreeing to begin at eight o'clock this morning.

10:34AM 23 Whoever the "they" is I referred to, I'm sure I was
10:34AM 24 accurate, and I did not include opposing counsel.

10:34AM 25 I have a great deal of disdain for Taishan and BNBM.

10:34AM 1 THE COURT: All right. With regard -- counsel makes a
10:34AM 2 point. I wouldn't allow you to cast aspersions on opposing
10:35AM 3 counsel because both of you all are officers of the Court.

10:35AM 4 But henceforth, let's talk about the issues rather than
10:35AM 5 whether or not somebody lied or didn't lie. That is not
10:35AM 6 helpful to me one way or the other.

10:35AM 7 Harry, you have something?

10:35AM 8 MR. ROSENBERG: Yes, Your Honor. If it please the
10:35AM 9 Court, good morning, Your Honor.

10:35AM 10 We would like to just raise with the Court a separate
10:35AM 11 issue, Your Honor, which relates to a pleading filed by the PSC
10:35AM 12 yesterday evening.

10:35AM 13 And if the Court please, Ms. Eikhoff, who represents
10:35AM 14 Taishan, would like to address the Court initially on that
10:35AM 15 matter.

16 THE COURT: Okay.

17 MR. ROSENBERG: Thank you, Judge.

18 MS. EIKHOFF: Thank you, Your Honor. I'm Christy
10:35AM 19 Eikhoff here on behalf of Taishan.

10:35AM 20 Your Honor, yesterday in a conference that we had in
10:35AM 21 chambers prior to the Court's regularly scheduled status
10:35AM 22 conference, we talked about the parties filing motions and the
10:35AM 23 timing of responses to those motions.

10:36AM 24 In that conference, the Court directed counsel that if
10:36AM 25 they are going to file a motion, they should call the other

10:36AM 1 side and let them know so the parties can work out a time table
10:36AM 2 for both a response and a hearing.

10:36AM 3 Just a few hours later, we received by e-mail a filing
10:36AM 4 notice that the PSC had filed a motion for sanctions, that we
10:36AM 5 had no idea it was coming.

10:36AM 6 It came in the context of filings related to the Peng
10:36AM 7 discovery hearing, which this Court is well familiar with.
10:36AM 8 It's background is on September 17th in a conference we had
10:36AM 9 with the Court, and this Court had questions about Mr. Peng and
10:36AM 10 his documents and his whereabouts, and set an evidentiary
10:36AM 11 hearing on that issue.

10:36AM 12 Importantly, that hearing was not set on the PSC's
10:36AM 13 motions, but rather at the Court's directive.

10:36AM 14 Also, importantly, since September 17th, the PSC has
10:36AM 15 made several attempts to expand the scope of those proceedings
10:36AM 16 well beyond what the Court directed. They have wanted it to be
10:37AM 17 about other discovery issues, about alter ego, about the other
10:37AM 18 defendants in this case, and this Court has rejected that
10:37AM 19 numerous times, both from the bench, and in written orders.

10:37AM 20 The hearing is about Mr. Peng and his discovery in 2015
10:37AM 21 in the contempt tract of these proceedings.

10:37AM 22 We had opening statements on November 17th. After that
10:37AM 23 we had another conference with the Court to talk about whether
10:37AM 24 more briefing on the issue would be necessary. And the
10:37AM 25 agreement that was made with the Court's endorsement was that

10:37AM 1 the parties would merely exchange -- sorry, merely submit to
10:37AM 2 this Court competing findings of facts and conclusions of law.

10:37AM 3 That was included in the order that set the pretrial
10:37AM 4 schedule.

10:37AM 5 Now, last night the motion for sanctions that we
10:37AM 6 received a week prior to the closing arguments that we have set
10:38AM 7 for next Tuesday, the PSC filed a motion for sanctions that
10:38AM 8 amounts to seeking a virtual death penalty in this case.

10:38AM 9 They have asked for the striking of all of the defenses
10:38AM 10 that Taishan presented on damages at the June 9th hearing.

10:38AM 11 They have requested an adverse finding of alter ego
10:38AM 12 that affects all of the other defendants in this case, and all
10:38AM 13 of the issues, including all those that were addressed today in
10:38AM 14 Court.

10:38AM 15 And in addition to that, a virtual waiver of all
10:38AM 16 privilege, and a claim for a year's worth of attorneys fees and
10:38AM 17 costs.

10:38AM 18 Now speaking for Taishan only, Your Honor, we can
10:38AM 19 respond to this. We were sandbagged by it. We were surprised
10:38AM 20 by it, but we can plan on responding to it orally next week on
10:38AM 21 Tuesday at the hearing that's already been set for closing
10:38AM 22 argument.

10:38AM 23 We can file a written response to the motion for
10:38AM 24 sanctions on Monday or in about a week as the Court directs.

10:39AM 25 But, by doing this, and particularly by seeking

10:39AM 1 sanctions that have an effect on the other defendants, it has
10:39AM 2 thrown a monkey wrench into the proceedings that we thought
10:39AM 3 were very clear and defined.

10:39AM 4 And I defer to the co-defendants as to how they propose
10:39AM 5 to respond to it to the extent that this motion now affects
10:39AM 6 them as well.

10:39AM 7 THE COURT: Let me hear from plaintiffs. What is the
10:39AM 8 answer to that?

10:39AM 9 MR. LEVIN: Your Honor, we didn't mean to upset her
10:39AM 10 that much.

10:39AM 11 There was findings of fact and conclusions of law
10:39AM 12 pursuant to it, and towards what end?

10:39AM 13 So we requested relief from the Court. And the way you
10:39AM 14 get relief from the Court is you file a motion. You have an
10:39AM 15 order attached to it. They respond.

10:39AM 16 I would be happy to work out any schedule for
10:39AM 17 opposition to the motion. But we looked at the findings of
10:39AM 18 fact and conclusions of law, and we said to ourselves, "What do
10:40AM 19 we want and what do they give us?" And that was the nature of
10:40AM 20 the motion.

10:40AM 21 We're asking the Court now --

22 THE COURT: Okay. When I --

10:40AM 23 MR. LEVIN: Most of the times when I do things like
10:40AM 24 that, and the defendant doesn't agree, they deny it.

10:40AM 25 THE COURT: I understand. I'm going to strike the

10:40AM 1 motion.

10:40AM 2 If you want to file something, talk first before you
10:40AM 3 file it.

10:40AM 4 I want you all to meet and confer before any motion is
10:40AM 5 filed.

10:40AM 6 I'm going to strike the motion.

10:40AM 7 MR. FENTON: Your Honor, may I just be heard on a
8 related issue?

9 THE COURT: Yeah.

10:40AM 10 MR. FENTON: On behalf of BNBM?

11 Rick Fenton on behalf of BNBM, Your Honor.

10:40AM 12 In addition to the motion, and Your Honor has already
10:40AM 13 ruled on that, in the findings of fact and conclusions of law
10:40AM 14 that were submitted by the PSC in connection with the
10:40AM 15 spoliation motion, they asked for a finding of a -- I will
10:40AM 16 quote the motion, or I will quote the findings: "A rebuttable
10:40AM 17 presumption that Taishan is the alter ego of the BNBM and CNBM
10:41AM 18 entities, and the rebuttable presumption is now established,
10:41AM 19 which shall want to hold for the enforcement of any final
10:41AM 20 judgement entered in relation to the June damages hearing, and
10:41AM 21 otherwise on behalf of the Taishan homeowners; and two, apply
10:41AM 22 to the upscreen BNBM and CNBM in their pending motions for
23 dismissal.

10:41AM 24 Now nowhere in this spoliation hearing until late last
10:41AM 25 night when we got these proposed findings of fact or

10:41AM 1 conclusions of law, were we on notice that any relief was being
10:41AM 2 sought against BNBM or CNBM.

10:41AM 3 And to slide this in after an evidentiary hearing in
10:41AM 4 which we did not participate, and after the 11th hour, raises,
10:41AM 5 I think, concerns about propriety, but more importantly, about
10:41AM 6 due process.

10:42AM 7 We can respond to this on paper, Your Honor, but I know
10:42AM 8 that this is set for final argument next week.

10:42AM 9 If this is part of the relief that is being requested,
10:42AM 10 certainly BNBM and CNBM have a right to be heard.

10:42AM 11 I know that Mr. Barr and I both have commitments next
10:42AM 12 week, both in this and other matters. We cannot be at that
10:42AM 13 hearing.

10:42AM 14 But I think it's improper, and I think that the
10:42AM 15 requested findings should be stricken, just as Your Honor
10:42AM 16 struck the motion.

10:42AM 17 THE COURT: Yeah. I looked at the spoliation issue as
10:42AM 18 being between the Taishan Group. I really didn't look upon it
10:42AM 19 as being broad.

10:42AM 20 I'm not saying that that is not a possibility, but from
10:42AM 21 the standpoint of findings, I'm really looking for findings,
10:42AM 22 vis a vis Taishan, as opposed to anybody else.

10:42AM 23 Now, it may -- it depends upon whether or not Taishan
10:43AM 24 is a subsidiary or an alter ego or something of that sort, but
10:43AM 25 that is not really the issue before me from the standpoint of

10:43AM 1 spoliation. I really looked upon spoliation as here is a
10:43AM 2 person who is employed, either a paid employer or employee or a
10:43AM 3 non-paid employee, but it looked to me like, at least some of
10:43AM 4 the facts indicated, that he had some economic or job-related
10:43AM 5 responsibility during the time that Taishan said: "He's not
10:43AM 6 working for us. He has nothing to do with us. We don't know
10:43AM 7 where he is." That was the issue that I was focusing on,
10:43AM 8 really.

10:43AM 9 MR. FENTON: I just want to confirm, Your Honor, that
10:43AM 10 no relief will be sought against BNBM, or CNBM on that motion.
10:43AM 11 The alter ego issues will be dealt with in February.

10:44AM 12 THE COURT: Yeah. I'm looking upon the issue of
10:44AM 13 whether or not spoliation vis a vis Taishan. The significance
10:44AM 14 of that, you know, I haven't focused on that yet. I may or may
10:44AM 15 not have, but if they seek a significance of that, then you
10:44AM 16 will have an opportunity to respond.

10:44AM 17 MR. FENTON: Thank you very much, Your Honor.

10:44AM 18 THE COURT: Okay.

10:44AM 19 I think I have a meeting with somebody after this. Do
10:44AM 20 you have a meeting with Taishan or somebody?

21 Thank you very much.

10:44AM 22 Court is in recess.

10:44AM 23 CASE MANAGER: All rise.

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REPORTER'S CERTIFICATE

I, Terri A. Hourigan, Certified Realtime Reporter,
Official Court Reporter for the United States District Court,
Eastern District of Louisiana, do hereby certify that the
foregoing is a true and correct transcript to the best of my
ability and understanding from the record of the proceedings in
the above-entitled and numbered matter.

s/Terri A. Hourigan

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