

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: HardiePlank Fiber) MDL No. 12-MD-2359
Cement Siding Litigation)
)
) Minneapolis, Minnesota
) September 12, 2012
) 9:40 a.m.
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BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(STATUS CONFERENCE)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 APPEARANCES

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1 MR. WANTA: Good morning, Your Honor. Shawn Wanta
2 from Baillon, Thome on behalf of the plaintiffs.

3 THE COURT: Good morning and welcome.

4 MR. MORIARITY: Scott Moriarity from Lockridge,
5 Grindal, Nauen for the --

6 THE COURT: Good to see you again.

7 MS. WOLCHANSKY: Good morning. Melissa Wolchansky
8 from Halunen & Associates on behalf of the plaintiffs.

9 THE COURT: Good morning.

10 MS. FISHER: Good morning, Your Honor. Heidi
11 Fisher with Oppenheimer, Wolff & Donnelly on behalf of the
12 defense.

13 THE COURT: Good morning.

14 MR. MURPHY: Chris Murphy on behalf of the
15 Defendant James Hardie, of McDermott, Will & Emery.

16 THE COURT: Good morning and welcome from Chicago.

17 All right. Mr. Shelquist, do you wish to take the
18 podium.

19 MR. SHELQUIST: Thank you, Your Honor. Your
20 Honor, we appreciate the opportunity to have this status
21 conference and present what I think has been good progress
22 between the plaintiffs and defendants in putting together
23 recommendations to make sure that this MDL moves forward
24 hopefully quickly -- I say that with some trepidation based
25 upon Baycol experience -- and certainly to present all the

1 issues before the Court in a way that's helpful to the
2 Court. As you're aware, there is a motion to dismiss that's
3 pending with regard to the Picht case.

4 This case involves HardiePlank siding which was
5 sold with a 50-year warranty as being no or low maintenance.
6 It is a wood substitute that's made essentially of fiber and
7 cement.

8 We allege that there are two distinct groups of
9 problems. The first group of problems involves the
10 shrinkage, cracking, delamination of the product itself.
11 The second set of problems involves a fading of the stain or
12 paint where the white board shows from underneath.

13 We believe that we have preliminary investigations
14 by experts that are pinpointing what the problems are and
15 we'll be able to present that to the Court hopefully within
16 about eight months after the Court rules on the various
17 motions to dismiss.

18 One item that I should raise with regard to the
19 Picht case is that it was subject to a separate scheduling
20 order. Prior to the change in the local rules we were able
21 to stipulate that the exchange of expert materials was going
22 to be stayed. We had the change in the local rules and a
23 deadline came up for the filing of class certification in
24 that case. We obviously had no discovery.

25 We filed a motion to stay, which is pending before

1 Judge Brisbois. We have a hearing date if it's necessary,
2 but we would ask the Court to at least take jurisdiction
3 over that case and incorporate it in some way, shape, or
4 form into the scheduling order that comes out from this
5 Court.

6 THE COURT: I'll take control of that case and
7 I'll stay it. I'll tell you right now we'll stay anything
8 on that until we get organized here.

9 MR. SHELQUIST: We're largely in agreement except
10 for scheduling and even there I don't think we are too far
11 off.

12 As you can see from the scheduling order itself,
13 there's agreement that a consolidated complaint is going to
14 be filed mid November and that defendant's response is going
15 to be filed mid December.

16 From that point forward the plaintiffs have
17 attempted to sequence and time all the dates from a date
18 which will occur in the future after this Court rules on the
19 motion to dismiss. And assuming that one or more claims
20 survive, when the answer is filed, that answer would be the
21 trigger date.

22 Defendants have built in hard dates, which we
23 don't think make sense because, in fact, by the time the
24 case is submitted for oral argument, we would be facing
25 deadlines with regard to our experts.

1 So the plaintiffs would ask the Court to maybe
2 stay the dates beyond the motion to dismiss or answer. Let
3 the case progress on the motion practice if, in fact, that's
4 what the defendants decide to do and then at that point in
5 time, when the Court reaches a decision, put in place the
6 scheduling order moving forward so that we don't have a
7 number of ancillary disputes on whether any discovery should
8 be had or, if discovery should be had, whether it relates to
9 claims that may be dismissed or not.

10 We also have presented to the Court a leadership
11 structure. It's unopposed by the defendant. It's
12 relatively flat given the small number of cases. It's our
13 understanding that the Court would like more detail with
14 regard to the firms and lawyers and what they bring. We
15 will make that submission.

16 And it's our understanding that the Court would
17 also like a time and expense order entered. We will present
18 what we deem to be the time and expense order that we would
19 like to see for your consideration and would be willing to
20 discuss any issues or additions that you would like to that
21 order.

22 I think one of the other issues that may catch the
23 Court's attention is that for briefing we've done everything
24 in terms of pages even though the local rules speak in terms
25 of a word count. If you want us to convert to a word count

1 or do something different, please let us know and we can
2 work --

3 THE COURT: Please do word count because the
4 history behind us going to word count, pages and then font
5 size and footnotes, I've gone blind and had to have a number
6 of microscopes to be able to read the footnotes in some of
7 the briefs. So let's make sure that it complies with the
8 local rule.

9 MR. SHELQUIST: We will take care of that, Your
10 Honor.

11 THE COURT: And if the 60 pages that you're
12 talking about in some way exceeds and does exceed the local
13 rule, the Court will grant that. You have agreed to that.
14 So if I have to sign an order dealing with the expansion, I
15 will do that. But let's do it by word count so everyone
16 knows that we're on the same page and we're using the local
17 rules as the guide.

18 MR. SHELQUIST: There are a couple of other areas.
19 On page 11, item C, with interrogatories and depositions
20 where we have suggested exceeding the local rules, we think
21 it's reasonable given the scope of the case as we understand
22 it, especially the number of plaintiffs involved and some of
23 the ancillary depositions that might be taken. So we would
24 ask the Court to also consider the stipulation of the
25 parties and allow us to go beyond the rules in those regards

1 as well.

2 THE COURT: All right.

3 MR. SHELQUIST: The other administrative matter is
4 a protective order. A protective order was entered by Judge
5 Brisbois in the Picht case. Neither party has requested any
6 changes to that order. So we've re-presented it to this
7 Court, only changing the caption so that it is applicable to
8 all MDL cases going forward.

9 THE COURT: The Court will review that and make
10 the appropriate changes. So we're clear on this, I'm taking
11 Brisbois off everything. The way I handle my MDLs is
12 everything comes through me first and then I'll parse it
13 out, because I don't want people to be playing a double game
14 here. I'll control the initial aspects of the case and
15 then -- so everyone understands where I'm coming from and
16 how I want to run the MDL and then we'll go either to a
17 magistrate judge or a special master.

18 MR. SHELQUIST: To give the Court --

19 THE COURT: I'm really talking to Kristine.

20 THE CLERK: Yes.

21 THE COURT: Go ahead.

22 MR. SHELQUIST: To give the Court an idea of where
23 we think the MDL is going as far as size and scope, the
24 group of attorneys who are on file will probably be filing
25 some additional cases in new states. I'm aware Illinois and

1 Texas may be coming online shortly. We have been contacted
2 by lawyers in some other states, a couple of whom are
3 representing condo associations, who may or may not file
4 cases here. But we anticipate that the case filings at the
5 end of the day will be less than 50 and that this case will
6 largely proceed as a commercial class action.

7 THE COURT: Okay.

8 MR. SHELQUIST: The last issue that I wanted to
9 raise, absent any Court questions, is status conferences.
10 We understand that the Court would like to have some
11 semblance of control as to what's happening as we get into
12 this MDL and we will work with the defense counsel to
13 suggest some dates that are agreeable to all so that we can
14 present where we're at and where we're going on a timely
15 basis.

16 THE COURT: Please. We also talked about
17 diversity and making sure that committees are, if possible,
18 diverse and that the work is just not grunt work and that
19 people that are brought in have work that will help them
20 grow as lawyers.

21 The number of MDLs over the last ten years has
22 grown and it's close to 30 to 40 percent of the federal
23 caseload and so it's important that the attorneys that are
24 involved in the MDLs are as diverse as our population.

25 MR. SHELQUIST: We understand that directive, Your

1 Honor, and we will make sure that the committees reflect
2 that.

3 THE COURT: One thing that I did mention to -- the
4 record should reflect that I met with the attorneys in
5 chambers just to get a quick briefing on what we would be
6 doing today. Nothing that was said in chambers has not been
7 summarized here in the courtroom.

8 One thing that I did mention and we have not
9 talked about and I want both sides to vet is that I am
10 interested in appointing a special master dealing with any
11 of the discovery matters and nondispositive matters and that
12 person would be located in Minneapolis and that person could
13 morph into settlement, if that's appropriate, settlement
14 discussions if that's appropriate. I am recommending
15 retired Judge Jon Lebedoff.

16 MR. SHELQUIST: On behalf of the plaintiffs, since
17 we've got more of a Minneapolis presence, we would agree to
18 that, Your Honor, without hesitation.

19 THE COURT: Counsel.

20 MR. MURPHY: Good morning, Your Honor. Chris
21 Murphy again on behalf of the defendant and with me, of
22 course, is Heidi Fisher. I will be brief. I'm not going to
23 address the merits or class certification or anything like
24 that, but just a couple of key points.

25 One, as you know, in the Picht case, which is

1 P-i-c-h-t, which I think I've always referred to as
2 "picked," but is properly, I guess, called "peached," there
3 is a fully briefed and heard motion for summary judgment.
4 That case was ahead by about six months of these other
5 cases. I understand Your Honor wants to stay that case.
6 Fine.

7 But we would like that summary judgment motion, if
8 at all possible, addressed separate and apart from the
9 consolidated complaint that will be filed just because she's
10 either a plaintiff or she's not.

11 She had a unique statute of limitations issue
12 which was factually based, which was the reason it was a
13 summary judgment as opposed to the motion to dismiss that
14 we'll be filing to the consolidated complaint which will be
15 directed at pleading issues.

16 In terms of the schedule, what we've proposed is
17 basically about ten months of discovery for the plaintiffs
18 to get to class certification. I believe that's ample time
19 for them to do whatever they need to do to get a class
20 certification motion on file.

21 And what the plaintiffs are proposing is sort of
22 this ambiguous deadline of 13 months following the
23 defendant's filing of an answer. My concern with that was
24 that we're going to file a motion to dismiss. We have told
25 them that. We are not going to seek a stay of discovery

1 while we file a motion to dismiss because we are not going
2 to be moving to dismiss all the claims as to all plaintiffs.

3 There's a lot of plaintiffs here and a lot of
4 claims. There's no way we're going to be moving to dismiss
5 everything here. We are going to focus on specific legal
6 arguments which we think are dispositive of certain claims
7 of certain plaintiffs.

8 So our position is we should start discovery,
9 start it now because this process does take a long time and
10 I don't want this to stretch into years of litigation. If
11 ultimately we all know the end game is the class
12 certification issue, we want to get there as fast as we can;
13 and that's obviously what the federal rules contemplate as
14 well.

15 So we think ten months of discovery from now is
16 plenty of time. But if Your Honor wants to set a specific
17 schedule with specific dates, what I would suggest is it be
18 triggered based on our responsive pleading date, our motion
19 to dismiss, not an answer date, because then you have the
20 motion to dismiss, then you have briefing, and then Your
21 Honor may need some time to rule, there could be an amended
22 complaint. It just goes on too indefinitely and too long.
23 So we propose at least some very hard dates triggered from
24 our responsive pleading date.

25 And the parties have agreed that the plaintiffs'

1 consolidated complaint -- they want two months. That's
2 fine, November 16th. And we said we would file our
3 responsive pleading in the form of a motion to dismiss by
4 December 21st of 2012, and we think all dates should be
5 triggered from that date.

6 And one final comment would be it is crucial to
7 the defense that the plaintiffs disclose their experts as
8 far in advance of class certification briefing as possible.
9 Because we know what this case is going to look like. It's
10 going to be a theory of a common design defect of some sort,
11 which is how they will try to get their class certified, by
12 saying there's a common issue of a particular design defect
13 across all the siding. We have no idea what that theory is
14 going to be.

15 The complaint has several -- they mentioned two.
16 There's actually multiple theories of what could be wrong
17 with the siding. In order for us to defend ourselves, we're
18 going to have to flush out at some point what that specific
19 theory of the case is as to what's wrong with the siding.

20 So we'll obviously ask interrogatories to that
21 effect, but we know we're going to get back that's the
22 subject of expert testimony. And so we're going to be
23 pushing hard to get those expert deadlines disclosed at
24 least as they pertain to class certification so we know what
25 the theory is so we can focus our discovery in advance of

1 class certification.

2 THE COURT: All right.

3 MR. MURPHY: Thank you.

4 THE COURT: Anything else?

5 MR. SHELQUIST: To briefly respond to that last
6 point, we're concerned that we should at least have an
7 answer and see what's being admitted and denied and
8 direction from this Court as to which claims will or will
9 not survive so that we can tailor our discovery accordingly.

10 We don't fundamentally have a problem with
11 presenting expert testimony, but, again, we want that expert
12 testimony to be informed. And with ESI discovery issues and
13 scheduling of depositions, we want to make sure that we
14 aren't in a position where we have to continuously
15 supplement or update expert opinions based upon what's
16 produced.

17 Thank you, Your Honor.

18 THE COURT: When will you have the information
19 that I need dealing with the people that are going to be on
20 your committee?

21 MR. SHELQUIST: I think we could pull that
22 together and submit it sometime towards the middle or end of
23 next week, if that's soon enough.

24 THE COURT: Why don't you give me a date a week
25 from this Friday.

1 THE CLERK: The 21st, September 21st.

2 THE COURT: The 21st.

3 MR. SHELQUIST: Yes, Your Honor.

4 THE COURT: 12:00 noon.

5 Anything else from any of your colleagues from
6 other parts of this country?

7 MR. SHELQUIST: I don't think so, Your Honor.

8 THE COURT: Anything further?

9 MS. FISHER: No.

10 THE COURT: All right. We'll recess. I'll take
11 everything under advisement and we'll get an order out as
12 quickly as possible. Thank you very much for coming in.

13 (Court adjourned at a.m.)

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17 I, Lori A. Simpson, certify that the foregoing is a
18 correct transcript from the record of proceedings in the
19 above-entitled matter.

20

21 Certified by: s/ Lori A. Simpson

22 Lori A. Simpson, RMR-CRR

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