

In The Matter Of:
BENNETT Vs
CENTERLINE ET AL

Hearing Before Judge Kelley
February 12, 2010

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1 IN THE CIRCUIT COURT FOR THE
2 15TH JUDICIAL CIRCUIT IN AND FOR
3 PALM BEACH COUNTY, FLORIDA
4 GENERAL JURISDICTION DIVISION
5 CASE NO.: 50 2009 CA 01-4458 XXXX MB AA

6 MARLENE BENNETT,

7 Plaintiff,

8 vs.

9 CENTERLINE HOMES, INC., a Florida corporation;
10 KNAUF GIPS KG, a German corporation;
11 KNAUF PLASTERBOARD (TIANJIN) CO., LTD.,
12 a Chinese limited liability corporation; KNAUF
13 PLASTERBOARD (WUHU) CO. LTD., a Chinese
14 limited liability corporation; KNAUF
15 PLASTERBOARD (DONGGUAN) CO. LTD.,
16 a Chinese limited liability corporation; BEIJING
17 NEW BUILDING MATERIAL, PLC, a Chinese
18 corporation; TAISHAN GYPSUM CO. LTD.,
19 a Chinese corporation; SHANDONG TAIHE DONGXIN,
20 CO., LTD., a Chinese corporation; USG CORPORATION,
21 a Delaware corporation; L&W SUPPLY CORP.,
22 d/b/a SEACOAST SUPPLY, a Delaware corporation;
23 ALL INTERIOR SUPPLY, INC., a Florida corporation;
24 BANNER SUPPLY CO., a Florida corporation;
25 ROTHCHILT INTERNATIONAL LTD., a foreign
 corporation; LA SUPREMA TRADING, INC., a
 Florida corporation; LA SUPREMA ENTERPRISE,
 INC., a Florida corporation; BLACK BEAR GYPSUM
 SUPPLY, INC., a Florida corporation; I.B.S.A., INC.,
 a North Carolina corporation,

 Defendants.

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 PROCEEDINGS BEFORE THE HONORABLE GLENN KELLEY

 Taken before Barbara Gallo, RMR-CRR, Registered
 Merit Reporter-Certified Realtime Reporter, Notary
 Public in and for the State of Florida at Large.

 Friday, February 12, 2010
 Palm Beach County Courthouse
 West Palm Beach, Florida 33401

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9 ALSO PRESENT:

10 Jason Connors, by Telephone

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13 Elizabeth Schiller, Additional Court Reporter with
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P R O C E E D I N G S

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Be it remembered that the following proceedings were had before the HONORABLE GLENN KELLY in Courtroom 9D in the Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, Florida on Friday, February 12, 2010, beginning at 8:08 a.m. with appearances as hereinabove noted, to wit:

- - -

THE COURT: Please be seated. We're waiting to get some folks on the phone. We're not sure. My judicial assistant is trying to make that connection right now, so we just need to pause for one moment. Do we know who's appearing by phone? Does anyone know?

MR. GELFAND: I know of one attorney, and I don't know beyond that.

THE COURT: Okay. Well, they've requested permission to appear by phone, and I have no problem with that. I just have to wait until we get them on.

Is there anything you need to hand up to me while we're waiting?

MR. BACKMAN: Yes, Judge, I have a copy of the agenda for this morning if I may approach.

1 Judge, I do have just a little issue here.
2 We have two court reporters. Jeff Backman, by
3 the way, for the defense. I've always
4 coordinated the court reporter, so one of mine
5 is here. Apparently another lawyer, I don't
6 think anybody in the room, I think it's somebody
7 else ordered a court reporter. So maybe
8 somebody on the phone did, and we can ask them
9 when they get on.

10 THE COURT: All right. When we get somebody
11 on, we'll find out.

12 MR. BACKMAN: Okay.

13 THE COURT: I'm not sure it makes much
14 difference one way or the other --

15 MR. BACKMAN: Sure.

16 THE COURT: -- except someone is going to be
17 paying.

18 MR. BACKMAN: Just wasting someone's time
19 this morning.

20 THE COURT: Yes. And it's early morning
21 time, too.

22 MR. GELFAND: Your Honor, do you have the
23 agenda that we e-mailed yesterday?

24 THE COURT: Yes, yes.

25 MR. GELFAND: Great.

1 THE COURT: Now the agenda we have now, and
2 I realize we're going to have to repeat a lot of
3 this once we get the folks on the phone, but is
4 this an agreed agenda because there was some
5 dispute as to what we ought to be doing with
6 regard to all the e-mails.

7 MR. GELFAND: Yes. Not to speak for you,
8 Jeff, but I think substantively there isn't much
9 of an issue, I would imagine, scheduling-wise.

10 THE COURT: Okay.

11 MR. GELFAND: The defendants may have an
12 issue with the dates, but beyond I think we all
13 agree on the substance.

14 THE COURT: All right.

15 (Telephone call initiated.)

16 THE COURT: It's Judge Kelley. Good
17 morning.

18 MR. KOCH: This is Kent Koch. I just
19 initiated this telephonic conference.

20 THE COURT: Okay. Is everyone on that needs
21 to be on?

22 MR. MONTOYA: Judge, this is
23 Patrick Montoya on behalf of several plaintiffs
24 out of Miami.

25 MR. QURAIISHI: Good morning, Your Honor.

1 Marsad Quraishi from Bice Cole on behalf of
2 several defendants.

3 MS. FERRY: Elizabeth Ferry on behalf of
4 Black Bear.

5 MR. WEISS: Greg Weiss on behalf of general
6 plaintiffs as well, Your Honor.

7 MR. CONNORS: Jason Connors on behalf of
8 several plaintiffs.

9 THE COURT: Okay. Has everyone identified
10 themselves at this point?

11 MR. KOCH: With regard -- Kent Koch, Your
12 Honor. I represent Northstar Homes, Northstar
13 Holdings, Inc. and Northstar Aving (phonetic),
14 LLC.

15 THE COURT: All right. All right. Well,
16 let's go ahead and get started. I have been
17 provided with a copy of a proposed agenda for
18 this morning, so I have no objection to using
19 this agenda. The first thing I want to do,
20 though, before we get started, I have conformed
21 copies of two orders that I want to hand to
22 someone for distribution. One would be,
23 frankly, a belated order on the status
24 conference back in November that had not been
25 sent out yet. The other has to do with

1 electronic service. So both of those orders
2 have now been entered. So let me hand them --
3 hand them out so you can distribute them.

4 MR. GELFAND: Thank you, Your Honor.

5 THE COURT: We'll -- My judicial assistant
6 is back, so we'll hopefully get a little more
7 organized or better organized going forward, so
8 we should be able to get things out a little
9 quicker in the future.

10 Okay. Let's go ahead and start. I'll just
11 go off the agenda, then. MDL update is the
12 first thing. What do you want to tell me about
13 the MDL?

14 MR. BACKMAN: Sure, Judge. Jeff Backman
15 for the defendants. I'm not sure how up to date
16 you are or all of the attorneys in the courtroom
17 are, but the MDL is moving. The first trial is
18 scheduled to take place beginning on
19 February 19th, next Friday. The scope of that
20 trial is really one of damages and what a proper
21 remediation should be for seven homes in
22 Virginia that contain Taishan Chinese drywall,
23 which is alleged to be defective. It's through
24 a default judgment proceeding against Taishan
25 and Knauf, and other parties were given the

1 opportunity to intervene into that proceeding.
2 And litigation has been going crazy over the
3 past few weeks. They've got experts, expert
4 reports, expert depositions. They had Daubert
5 hearings a couple weeks ago. And the trial
6 commences on Friday and is scheduled to run
7 through the 24th or 25th -- 25th of the
8 following week.

9 After that there's a Bellwether trial which
10 is scheduled to start, I believe, the week of
11 March 15th in New Orleans, another one in April.
12 And I think they have another one scheduled for
13 May.

14 So that's the status. There's been some
15 ruling on the Economic Loss rule motions.

16 THE COURT: I've seen those.

17 MR. BACKMAN: Also, the second agenda item
18 is with respect to other state courts. The only
19 other state court that is organized is really
20 Miami. Palm Beach is right behind Miami.

21 THE COURT: Judge Farina is, it looks like,
22 taking the lead, although it looks -- And I want
23 to talk about this as we move through and see if
24 it makes sense to everyone here. It certainly
25 does to me. It seems like Judge Farina is

1 adopting many of the things that are being done
2 in the MDL. And I think for consistency's sake
3 that makes a lot of sense.

4 MR. BACKMAN: That is correct. A lot of the
5 preliminary orders that were entered in MDL,
6 confidentiality, privilege, things like that.

7 THE COURT: And Judge Farina has been good
8 enough to send me e-mail copies of all that so I
9 have it.

10 MR. BACKMAN: Sure.

11 THE COURT: So that's really the update on
12 the MDL and other state courts; is that right.

13 MR. BACKMAN: Yes. Yes, Judge.

14 THE COURT: Okay. Anything anyone wants to
15 add to that?

16 Okay. MDL omnibus complaint filings.

17 MR. BACKMAN: Judge, this kind of goes in
18 line with what's going on in the MDL. What's
19 happened is with all the cases being
20 consolidated up there in New Orleans, the
21 Plaintiff Steering Committee has decided to file
22 what they're calling omnibus complaints. And
23 what they are, the first one that was filed
24 related solely to homes or supposed to relate
25 solely to homes containing Knauf Plasterboard

1 Tianjin drywall. They named about 600
2 defendants, and there were approximately 2,100
3 named plaintiffs and class representatives.

4 There was another omnibus complaint that
5 they filed against what they title indeterminate
6 defendants, meaning homes where there's such a
7 mixture of drywall that they don't know who the
8 manufacturer is. Perhaps there's no markings on
9 the board, what have you. That names another
10 100 or so defendants, including all of those in
11 the room. We're all parties to those omnibus
12 complaints as well as individual class action
13 complaints that were filed and are now part of
14 the MDL.

15 And the reason why I bring that up, and that
16 goes hand in hand with number four on the list,
17 because many of those plaintiffs that are now a
18 party to these omnibus complaints -- and what's
19 interesting and what you should know is with
20 respect to the Knauf omnibus complaint, that was
21 filed primarily because Knauf agreed to accept
22 service on one day only in the MDL. And so the
23 plaintiffs went out, they gathered up as many
24 homeowners as they could find, and they took
25 advantage of that one-time acceptance of

1 service. And as well as naming Knauf, they
2 named all the other defendants in the stream of
3 commerce. As I said, there were about 600
4 defendants in that.

5 Those same plaintiffs, many of those same
6 plaintiffs have pending individual state court
7 cases before Your Honor as well as other state
8 courts throughout Florida. And so one of the
9 issues that we wanted to discuss and figure out
10 how to bring it best to your attention, whether
11 it's through motion practice or just a
12 discussion here, is what to do with those
13 duplicative cases.

14 I know that Banner Supply of the 80 or so
15 cases up here, about 27 of them are duplicates.
16 I believe between Northstar and Centerline
17 there's about 50 or 60 that are duplicates.
18 And, you know, the defense has a big problem
19 with that. We're litigating the identical case
20 in two separate forums. So that's one of the
21 big issues that the defense would like to bring
22 to Your Honor's attention.

23 THE COURT: All right.

24 MR. DURKEE: Your Honor, David Durkee on
25 behalf of various plaintiffs and within this

1 county on that issue. As far as I know, to date
2 Judge Farina has not ordered any of the state
3 cases as of today to be stayed because of these
4 duplicative actions. Those have been heard on
5 oral argument on motion to stay for that issue.

6 THE COURT: So does Judge Farina have that
7 issue under advisement?

8 MR. DURKEE: He does have the issue under
9 advisement currently, Your Honor.

10 Second of all, there is another issue that
11 will be brought up during those hearings, which
12 I think will be best done by motion practice.
13 And that is, several of the plaintiffs -- I know
14 our office specifically told the Plaintiff
15 Steering Committee in the federal court that
16 they were authorized to bring the action because
17 we were taking part in the multi-district
18 litigation to bring an action on behalf of our
19 plaintiffs against Knauf. And our cover letter
20 and everything else specifically said we're
21 taking advantage of this one-time service rule,
22 and we want to avail ourselves of that on behalf
23 of our clients against the defendant, Knauf,
24 because of all the pay convention formalities
25 amounts and everything of serving that

1 defendant.

2 But we specifically said we did not
3 authorize them to bring the action for any other
4 defendant. Now I do believe that the style of
5 the complaint may bring in those issues. But I
6 think there are going to be other issues as to
7 whether our plaintiffs certainly have been
8 properly brought against any other defendant
9 other than Knauf. So, again, just bringing
10 things that may eventually bring to your
11 attention --

12 THE COURT: Well, how is that issue being
13 teed up in the MDL if at all?

14 MR. DURKEE: Well, I don't think it has been
15 teed up at this point. I don't think it's been
16 teed up in the state court. And as far as I
17 know, the arguments that have been made in the
18 state court in Dade County were really only
19 timing, whether the federal court case was filed
20 first or the state court case was filed first
21 and whether it should be stayed based on that
22 grounds. But the issue of whether the MDL
23 Plaintiff Steering Committee had authorization
24 to bring actions against any defendant other
25 than Knauf I don't think has been addressed in

1 either the MDL or in state court yet.

2 THE COURT: All right. But it just seems
3 to -- I mean, would you agree that at some point
4 it makes sense that you're only litigating or
5 the defendants are only required to litigate in
6 one forum the same claims? I mean, it seems at
7 some point a decision has to be made, either
8 it's properly -- the defendants are properly
9 joined within the MDL, and they're going to
10 defend themselves there, or they're going to
11 defend themselves here. It seems fundamentally
12 that at some point that decision has to be made.

13 MR. DURKEE: I completely agree, Your Honor.
14 I do believe it's going to be based on motion
15 practice and the case law surrounding. You
16 know, there are before Chinese drywall other
17 class actions where they have filed an action in
18 state court and an action in federal court.
19 They were duplicative. One had to be stayed.
20 And those -- there is a body of case law that
21 addresses that. And we are going to address
22 those issues. We are not going to make the
23 defendant defend, I don't believe, in two
24 different courts. I don't think the court would
25 allow that, and I don't think that that's

1 proper.

2 But I do believe the issue as to whether a
3 particular action can be maintained against a
4 particular defendant in state court will be
5 addressed through motion practice and will be
6 teed up before Your Honor in the near future on
7 those issues.

8 THE COURT: Well, I think, I mean, in answer
9 to one question, I think it is going to have to
10 be done by motion practice. It's obviously not
11 something that I can resolve today. But I am
12 concerned that the defendants will be required
13 to defend in two different forums, and I think
14 everyone can see why ultimately that can't
15 happen because we have to decide where these
16 cases are going to be prosecuted.

17 MR. DURKEE: Absolutely, Your Honor.

18 THE COURT: Okay. Well, I'm sure
19 Judge Farina will let me know if he makes a
20 ruling because he's been good about e-mailing me
21 copies of his orders.

22 MR. DURKEE: Okay.

23 THE COURT: Okay. What's the next on the
24 agenda, then?

25 MR. DURKEE: Master Complaint.

1 THE COURT: Master Complaint?

2 MR. GELFAND: Yeah. Your Honor, we're close
3 to being ready to file a Master Complaint on
4 behalf of all the plaintiffs, which is the
5 procedure that's been adopted, as I understand
6 it, in the MDL. It's been adopted in Dade
7 County, and it's already something that's been
8 contemplated in the November order.

9 And, frankly, we've essentially lost three
10 months since November. That's due in part to
11 the fact that we had the holidays, due in part
12 to the fact there was a bit of the changing in
13 the guard in liaison counsel, also due in part
14 to some scheduling conflicts.

15 So our goal here is to -- And that starts
16 the ball rolling with everything. Scott Gelfand
17 on behalf of plaintiffs by the way. That starts
18 the ball rolling in terms of filing the Master
19 Complaint. Then if you look at the schedule
20 that we proposed, we proposed a following
21 schedule from that point forward where there can
22 be responses to the Master Complaint both on an
23 omnibus and individual basis. We can start the
24 discovery process. And we've tried to be
25 sensitive to doing everything on as much of a

1 global basis as possible to minimize party
2 resources where we can.

3 But it's obviously the plaintiffs' burden to
4 follow the Master Complaint. We're about ready
5 to do that, and we really want to get the ball
6 rolling given that we're a little bit behind
7 now. We're several months behind Dade County.
8 They've already had the motion to dismiss heard
9 on the Economic Loss Rule. That was denied in
10 Dade County. It was denied in the MDL. To the
11 extent the defendants want to reserve the right
12 to bring that in here I guess we can't stop them
13 from doing that. But there has being a lot of
14 legwork that has been done in these other forums
15 that we'd like to get caught up on.

16 THE COURT: All right. Let me ask you a
17 question with respect to the Master Complaint.
18 And this harks back to a discussion that we had,
19 I think, at the November status conference.
20 There was some discussion about creating a
21 master file here in Palm Beach County. And I
22 guess at the time, as I recall, I expressed some
23 reservation because of some bad experiences we
24 had in this circuit with that. Is that still
25 the request of the parties? Do we -- is it

1 still the position -- I'm not sure if it was the
2 position then. Let me find out what the
3 position of the parties is. Does it make sense
4 to have a master file opened with the clerk here
5 in Palm Beach County? Right now the Bennett
6 case is acting as the lead case.

7 MR. GELFAND: Right.

8 THE COURT: You can see that the orders that
9 I've entered are all in that case --

10 MR. GELFAND: Right.

11 THE COURT: -- although I've added, for
12 example, to the electronic service order that
13 this order applies to any cases, which comes
14 within the purview of the administrative order
15 assigning all drywall cases to me. But let me
16 just broach that subject again.

17 MR. GELFAND: Yeah, I think it makes sense,
18 and I think the defendants would agree a case
19 caption something in the nature of in re: Palm
20 Beach County Chinese drywall cases which
21 essentially addresses all of these cases, not to
22 speak for you, Jeff, but --

23 MR. BACKMAN: No. And it depends on how you
24 set it up, Judge, because we have one down in
25 Miami. But with respect to the Master Complaint

1 that the plaintiffs prepared, it didn't become
2 the Master Complaint for all the litigation.
3 The 60 cases that were pending are still pending
4 separately.

5 THE COURT: Right.

6 MR. BACKMAN: So the master file doesn't
7 really help because I still have to -- the
8 defense still has to file separate motions in
9 every case. If we're going to set this up with
10 a Master Complaint that then the defense files
11 some sort of master response that could be
12 adopted by other defendants as they come in and
13 we really have one file going forward, then it
14 would seem to make more sense that way. But to
15 open a master file, if there's logistical issues
16 or other reasons why the court doesn't want to,
17 if we're still going to have 80 separate cases
18 pending --

19 THE COURT: Then it doesn't make sense.

20 MR. BACKMAN: -- then it doesn't make any
21 sense.

22 THE COURT: All right. Well, we'll -- I'll
23 have to give that a little thought. In any
24 event, the Master Complaint, you believe, will
25 be ready to be filed by when, February 17th?

1 MR. GELFAND: Yes, Your Honor.

2 THE COURT: Okay. Well, I guess that's
3 brings us to the master response.

4 MR. BACKMAN: And it really comes down to
5 what the plaintiffs are intending by the Master
6 Complaint. Because, as I said, in Miami, they
7 did it more form over substance, if you will,
8 and it took place going forward where they had
9 this short form complaint that could be adopted
10 and filed by new parties coming in and filing
11 new complaints against defendants. But as it
12 relates to any complaints that were on file at
13 the time, the plaintiffs did not want the master
14 Complaint to comprise those cases. And so
15 really in terms of a master response it really
16 depends on how the plaintiffs intend to go
17 forward.

18 THE COURT: Yeah. How are we going to
19 respond? I mean, let's talk a little bit about
20 logistically the issue of do we have -- if we've
21 got a Master Complaint, although there's
22 independent complaints pending in each of these
23 actions that have be to responded to, can you
24 really have a master response? Or how -- Just
25 walk me through this procedurally. How does it

1 work?

2 MR. GELFAND: We intend to do it a little
3 differently. We intend to be a lot more
4 thorough and not do essentially notice
5 duplicative. What we intend to do is we've got
6 an entire delineation of facts that are very
7 thorough that we think apply in all these
8 various cases, and we're going to try to lay out
9 all the possible causes of action on a matter
10 basis and essentially giving the universe of all
11 possible facts and claims within one overall
12 Complaint. I think that's different from how it
13 was done in Miami Dade.

14 MR. JACKMAN: Slightly, but it's still a
15 procedural issue. And there's another issue,
16 which my friend here is going to bring up as it
17 relates to the builder claims, I'm sure.

18 MS. HUNNEFELD: And, Your Honor,
19 Angelica Hunnefeld on behalf of G.L. It seems
20 that when you have a home builder who has a
21 handful of cases pending against it and
22 different defenses and different issues
23 vis-a-vis the plaintiffs and vis-a-vis potential
24 other third parties or co-defendants, it can
25 become a little unmanageable if you try to have

1 a single form that covers everything. And
2 you're ultimately going to be bound by the
3 specific facts in each case, the allegations in
4 each case, each homeowner, each plaintiff, each
5 home and the circumstances in each case. So I
6 just wanted to submit that for the court's
7 consideration.

8 THE COURT: No, I know. It's a logistical
9 problem. Nightmare might be a better
10 description.

11 MR. GELFAND: Yeah. I think there are
12 portions that you can segregate, at least our
13 perspective suggests that, that clearly apply in
14 every case. Clearly, it's the same time of
15 drywall. Clearly, it's installed in the same
16 fashion. Clearly, the consequences of the
17 drywall are the same in terms of the off-gassing
18 and the effect that it's having on collateral
19 property within the house. Those types of
20 things, I think, are universal.

21 Obviously there are going to be individual
22 issues, different developments. There might be
23 subissues within those developments. We
24 understand that. But I think we can all agree
25 to the extent we can come up with a way to

1 centralize it as much as possible, I think
2 that's in everybody's best interest.

3 THE COURT: But isn't there still -- I mean,
4 based on what I'm hearing it seems like there's
5 still going to have to be individual responses
6 in each of the cases to the individual issues
7 that are raised with respect to particular
8 defendants. So that really a master response is
9 a little bit of a misnomer in the sense that
10 there's going to have to be a response to the,
11 quote unquote, Master Complaint, but there still
12 has to be a response to the individual
13 Complaints that are in all of these actions.

14 MR. GELFAND: Right.

15 THE COURT: In fact, I don't even know how
16 many are pending now in my division or have been
17 assigned, At the last count was in the fifties.
18 I don't know whether it's higher than that now.
19 It seems like you're still going to have to have
20 some sort of response filed as to each of the
21 individual issues raised in those cases.

22 MR. DURKEE: Your Honor, David Durkee on
23 behalf --

24 MR. MONTROYA: Judge, this is Patrick Montoya
25 on behalf of several plaintiffs. I drafted the

1 Master Complaint out of Miami. And I think that
2 Your Honor will find over time, and if you
3 discuss with Judge Farina as well, that it's
4 more of a procedural mechanism to help you, you
5 know, help the court get a grip on all the
6 motions that are out there. Individual
7 complaints are correct. I think those will
8 eventually need to be heard individually, but
9 really what you'll find is a commonality of
10 claims across all of them. And I think what
11 we're finding in Miami/Dade County is that
12 several motions to dismiss have been heard. The
13 same arguments are raised. And I'm not going to
14 the merits, but whether they're -- you know, how
15 the court rules have been universal across the
16 board. And I understand there may be some
17 individual issues. But potentially you will see
18 the same arguments are raised time and again.
19 So it sounds unwieldy to begin with, but I
20 think over time it smooths out. And at least
21 with the Master Complaint, and we filed at least
22 a dozen of them, and you can rule on a dozen at
23 a time. You're hearing the same arguments that
24 are going to be raised in the individual cases.
25 So it's going to be the same thing, at least

1 what we found in Dade, over and over again.

2 THE COURT: Let me just ask from the
3 defendant's perspective, preserving your right
4 to file individual responses in the individual
5 cases, is there any reason not to have a Master
6 Complaint and then just individual responses?

7 MR. BACKMAN: It's --

8 THE COURT: -- as needed?

9 MR. BACKMAN: It's a tool that, in my
10 personal opinion, helps the plaintiffs, not the
11 defense, because we still have to file responses
12 in every single case. So now you're adding a
13 Master Complaint, which just creates a new
14 Complaint that the plaintiffs will adopt in a
15 short form, and we'll respond to it
16 appropriately. But there's no help in terms of
17 the logistical nightmare for the defense.

18 What we'd love is a way -- for instance, all
19 the cases are consolidated in the MDL. There's
20 a master MDL case number. We file one motion up
21 there and we deal with our issues.

22 THE COURT: Right.

23 MR. BACKMAN: But because of the 50, 60,
24 70, 80 some odd individual cases, which, quite
25 frankly, the way that they're alleged right now

1 the majority of them are identical type
2 allegations. It seems silly that the defendant
3 has to respond 80 times in the same fashion.
4 But unfortunately that's the way that they've
5 set it up right now with the multiplicity of
6 suits, which brings me back to the stay issue.

7 THE COURT: Well, the only thing I can say
8 is we don't have an MDL, obviously. That is
9 Dade, although I think they've handled it a
10 little differently. They actually have what
11 they call a division that's handling -- I mean,
12 we had them assigned to me for pretrial purposes
13 to preserve the right to send them out to
14 individual judges for trial if necessary. So we
15 don't really have a MDL, so how else can we do
16 it really?

17 MR. BACKMAN: I don't know that there is a
18 way, Judge.

19 THE COURT: Well, it seems like what we're
20 going to end up doing is filing the Master
21 Complaint. You're going to have the individual
22 right to respond to each of those, you know,
23 Complaints in the individual cases that raise
24 the individual or unique issues with respect to
25 each of those, and we're just going to have to

1 deal with it, I guess.

2 MR. GELFAND: And I think to follow up on
3 what Patrick is saying is I think you'll find
4 that we've seen the motions to dismiss and the
5 response to the Complaints are essentially the
6 same. And I think in that context it helps
7 centralize the opportunity to hear the motion to
8 dismiss once as opposed to 70 different times or
9 50 different times.

10 THE COURT: Well, I realize the issues --
11 there's going to be a lot of repetitive issues,
12 and, you know, so, I mean, I can see some
13 benefit to me. But, you know, still we're going
14 to have to preserve each defendant's right in
15 the individual cases to raise unique facts to
16 each defendant. I mean, obviously the cases,
17 although there are a lot of common issues, there
18 are still some individual issues that we have to
19 deal with.

20 MR. DURKEE: And, Your Honor, on that point
21 I think that's exactly how the Master Complaint
22 and the response by the defendant to the Master
23 Complaint is -- makes the court efficient.
24 Because then there is a briefing schedule on
25 the -- first of all, the Master Complaint tees

1 up all of the big issues for the defense to
2 respond to that Master Complaint. The defense
3 then files a master response to that with the
4 big issues, the Economic Loss Rule, et cetera,
5 the big issues that you're going to hear in
6 almost every one of these cases. And then
7 everybody will know how this court is going to
8 rule on the Economic Loss Rule and the other big
9 issues that are going to be duplicated
10 throughout all the motions to dismiss.

11 Then once the individual motion to dismiss
12 is filed in an individual Plaintiff's case, the
13 efficiency becomes at that motion hearing. The
14 court can then deal with that motion to dismiss
15 on an individual case very efficiently. Count
16 one -- or argument one is the Economic Loss
17 Rule. I've ruled on that. You've preserved
18 your right in this individual case. You know
19 how I've ruled. I'm adopting that ruling in
20 this particular case. There's nothing different
21 about this particular complaint than the Master
22 Complaint. And so we know the big issues will
23 be preserved in the individual cases, but
24 they've already been teed up before Your Honor
25 on a general sense in the Master Complaint, and

1 they've already been ruled upon by the
2 defendant's response. Therefore, it does become
3 much more efficient in the motions to dismiss
4 that are filed in the individual cases when they
5 are heard later down the line.

6 THE COURT: All right. Well, I think we're
7 going to just go ahead and proceed with the
8 Master Complaint and, again, preserving the
9 rights to the individual defendants to raise
10 unique issues. Perhaps as we get into this I'll
11 figure out a way to tweak it, but at this point
12 I don't see, you know, really any reason to go
13 differently than, for example, Judge Farina's
14 proceedings.

15 MS. HUNNEFELD: And, Your Honor, just for
16 clarification, we're not talking about a Master
17 Complaint that's going to be attaching every
18 single homeowner contract because, as you can
19 imagine, they will be different. They will have
20 variances.

21 THE COURT: No, I understand.

22 MS. HUNNEFELD: They will have different
23 provisions, and you will still have to look at
24 each individual claim individually.

25 THE COURT: I understand.

1 But in terms of filing it February 17th is
2 the date, the response date.

3 MR. BACKMAN: There won't be any. The way
4 that they want to do it is they just want to
5 file it. And then what they'll do when they get
6 a new homeowner is they have a short form that
7 they'll fill --

8 THE COURT: And motions --

9 MR. BACKMAN: -- out and file with the
10 clerk, and they have to serve it on us. So
11 there's nothing to attack in terms of a Master
12 Complaint at this point. It's just a procedural
13 tool for the plaintiffs is really all it is.

14 THE COURT: Okay. All right.

15 MR. DURKEE: But, Your Honor, that's how it
16 was focused in Dade County. The big issues,
17 like the Economic Loss Rule, were teed up before
18 the court in Dade County. And, therefore, all
19 the defendants had an opportunity to be heard on
20 those big issues, and the court ruled on those
21 big issues.

22 Now we can either as a Plaintiff Steering
23 Committee adopt one Complaint that's already
24 been filed and have all the defendants hear the
25 big issues on that Complaint. But, see, that's

1 where we get into the efficiency, and that's how
2 it became very efficient in Dade County. The
3 court ruled either in one of the cases or in
4 response to the Master Complaint on the big
5 issues. That way subsequent hearings on
6 individual cases are going to be efficient. And
7 they've been efficient, because most of them
8 actually have started to get off the calendar
9 because everyone knows the rulings that are
10 going to be made.

11 So I think the efficiency for this court is
12 to get some sort of procedural way to get all
13 the defendants to be heard on the large
14 substantive issues. Therefore, in the
15 individual cases later on down the line they can
16 be addressed efficiently. The individual issues
17 on each individual complaint will necessarily
18 not be argued, but the big issues like the
19 Economic Loss Rule, et cetera, will pretty much
20 already be ruled on, and, therefore, you don't
21 have to necessarily hear argument on every
22 individual case.

23 MR. GELFAND: What we envision, Judge, is
24 this: This Master Complaint will be a template,
25 and it will have all of the causes of action.

1 And we have down here on our agenda by
2 March 5th, 2010 all global motions to dismiss as
3 to the causes of action.

4 For instance, one cause of action may be a
5 strict liability cause. We've seen individual
6 motions to dismiss where the defendants have
7 taken issue with the strict liability claim.
8 That could be heard globally on what we've
9 called here a global motion to dismiss Master
10 Complaint period of time at the next hearing.

11 There have been the Economic Loss Rule
12 claims. There have been claims as to certain
13 other causes of action. Those the plaintiffs
14 would adopt on a global basis. And it's only
15 ministerial after that. On the individual basis
16 the various complaints -- plaintiffs just simply
17 filed a document saying we adopt this cause of
18 action, this cause of action, this cause of
19 action for our case, and if there are any
20 additional claims, they would add those as well.

21 We might even have a general breach of
22 contract claim as I envision it. Obviously
23 there will be different issues with respect to
24 different contracts with different builders.
25 But on the whole there are things that we can do

1 that can be done. This is exactly what David is
2 talking about that was done in Miami on a global
3 basis to preserve judicial economy, move these
4 cases along.

5 We don't view it as ministerial at all. We
6 view it as starting the clock so that we get
7 these global motions to dismiss heard and
8 addressed. And, as David says, to the extent
9 there are individual ones those duplicative
10 issues will have already been dealt with. And
11 it streamlines anything individually going
12 forward.

13 THE COURT: That seems to make sense to me.
14 I mean --

15 MR. BACKMAN: Yeah, but I think we're
16 talking about two separate things, and I don't
17 mean to stay on this Master Complaint issue, but
18 if they're going to file a Master Complaint, as
19 they're describing it, where they want to
20 somehow encompass all the defendants and all the
21 claims, then they need to prepare that with
22 their respective plaintiffs and they need to
23 serve it on the defendants, and we'll all
24 respond accordingly.

25 But if they're trying to use it as a

1 procedural tool, what they're talking about is
2 general motion practice, which is a little bit
3 down the agenda. There are pending motions in
4 all these case.

5 So what we did in Miami, we didn't do it on
6 the Master Complaint that they filed for their
7 own procedural benefit. What we did is we took
8 the motions and we took the issues, and really
9 we had one argument on the Economic Loss Rule
10 one day where with enough notice everybody
11 wanted to put a brief on, could put a brief on.
12 Anybody who wanted to argue the time was divvied
13 up appropriately, and we argued it.

14 THE COURT: You just divided issues.

15 MR. BACKMAN: And at the hearing --

16 MR. GELFAND: We're saying the same thing.
17 But, Jeff, we're saying the same thing.

18 MR. BACKMAN: Right, but there's two
19 different procedures as to how to go about it.
20 We could deal with pending motions, and they can
21 deal with the Master Complaint in the short form
22 that they want to adopt, which when they get a
23 new homeowner, they'll adopt the short form.
24 They'll serve it on the defendants, and we'll
25 respond.

1 MS. HUNNEFELD: And, Your Honor, if I may,
2 one of the problems is if you have a series of
3 cases where you have motions to stay pending for
4 various reasons, especially for home builders
5 who are repairing homes, you don't want to
6 subsume them in this whole motion practice
7 pretrial discovery when you could potentially be
8 disposing of that case in a totally different
9 way.

10 And my understanding of what happened in
11 Dade County was, as Jeff said, you had the
12 pending motions, and to facilitate the hearing
13 of the argument, you sort of heard one global
14 argument and what was already there as opposed
15 to preempting it before you get to that point in
16 the individual cases, which doesn't seem to make
17 much sense.

18 MR. GELFAND: It seems to me if you have a
19 separate issue for home builders, for instance,
20 a 558, a statutory 558 issue, that's another
21 separate issue that would get addressed at a
22 certain time on a global basis.

23 THE COURT: You know, I want to see this
24 Master Complaint to figure out exactly how to
25 proceed with this. So let's get the Master

1 Complaint filed. I'll take a look at the
2 procedure that Judge Farina did. If you guys
3 want to submit competing orders on how you think
4 that ought to work out, that's fine. But I'm
5 going to take a look at the Master Complaint.
6 Get it filed by February 17th. Send me a
7 courtesy copy, if you would. And we'll figure
8 out how to proceed on that. I don't know
9 whether I can do anything different than what
10 Judge Farina did to make it any cleaner or not
11 or whether we're just going to have to follow
12 the same procedure that was done in Dade.

13 MR. BACKMAN: Where should they file that?

14 THE COURT: The Master Complaint? It needs
15 to be filed in the Bennett case at this point
16 because we really don't have a master file set
17 up. So just go ahead and get it filed in this
18 case. Like I said, it's the lead case at this
19 point, and we'll figure out where to go from
20 there.

21 What about pending motions?

22 MR. BACKMAN: There's -- As far as I know,
23 I could speak on behalf of most of the
24 defendants in the room. There's a pending
25 motion attacking, I think, every complaint

1 that's on file, whether it be a stay issue, a
2 558, abatement issue or a dismissal for failure
3 to state a cause of action.

4 THE COURT: So all of those need to get set
5 for hearing or heard. I think it's going to be
6 a little problematic to do that at these status
7 conferences. We are reserving time -- I realize
8 the order reserved time for motions at status
9 conference. Once we get rolling we can probably
10 do that. But I think what I'm going to have to
11 set aside some additional time to hear those
12 motions to dismiss after the Master Complaint is
13 filed. But I do need to deal with some of the
14 same major issues that have been raised,
15 obviously, in the MDL and in Dade.

16 MR. BACKMAN: And just so you know, Your
17 Honor, over in Lee County Judge McHugh actually
18 granted the motion to dismiss on the economic
19 Loss Rule, so it's not all the judges in all the
20 courtrooms are doing the same thing.

21 THE COURT: We're all independent
22 constitutional officers --

23 MR. BACKMAN: That's right.

24 THE COURT: -- required to look at the
25 matter for ourself. So I'll do that.

1 MR. BACKMAN: If I could suggest, I would
2 think, and maybe the builders would jump in
3 because they have a big interest here, but I
4 would think we would want to do the stay issue
5 first, then the abatement for the builders and
6 those distributors who didn't get any notice
7 under 558 and then the dismissals, because if,
8 obviously, it's stayed, there's no reason to do
9 anything else. And same thing with the
10 abatement.

11 THE COURT: Well, let me hear from the
12 plaintiffs on that.

13 MR. DURKEE: Your Honor, the main issue that
14 is going to be addressed in every Plaintiff's
15 Complaint is going to be the Economic Loss Rule.
16 We know that. We know that coming in to today.
17 It's already been briefed and rebriefed and
18 argued. I think if we accomplish anything
19 today, we should somehow put a procedure in that
20 we can have the Economic Loss Rule heard,
21 briefed and heard a month from now in our March
22 hearing. We know it's going to come up.
23 Everyone has been addressing it for six months
24 now. We might as well put some sort of
25 procedural way to get there by March. That way

1 the first big hurdle this court has addressed
2 and has gotten over.

3 Now as far as motions to stay, motions to
4 abate for 558 notices, those thing become very
5 very individualized. And as your court has
6 started to lead into, we can probably address
7 those on individual cases because those are the
8 case specific type of issues that the court is
9 going to need to be addressed. Has there been a
10 558 notice sent? Has the 558 provisions been
11 complied with? That's going to be case
12 specific. But something as general as the
13 Economic Loss Rule that in every one of the
14 Complaints that we have filed and every one of
15 the ones that Mr. Gelfand has filed and everyone
16 that I have talked to, every single motion to
17 dismiss is really fundamentally based on the
18 Economic Loss Rule.

19 We have a month from now where we know
20 there's gonna be an hour of this court's time.
21 We know that these things can be briefed before
22 that time. The only thing we need is a
23 procedural outline so that we can get there by
24 March. And that's going to be the very biggest
25 hurdle for the plaintiffs to overcome. And once

1 it's addressed, it's going to streamline all
2 these individual motions.

3 THE COURT: Well, let me ask this. I mean,
4 whether it's stay, abatement, 558, Economic Loss
5 Rule, you all have briefed all these issues
6 before, have you not?

7 MR. DURKEE: Exactly, Your Honor.

8 THE COURT: No? You're shaking your head
9 no.

10 MS. KEITH: Your Honor, if I may, with all
11 due respect, I'm Heather Keith. I'm the
12 in-house counsel for G.L. Homes. So unlike most
13 of the people in the room here, I'm actually
14 in-house. I'm the client. I only have eight
15 houses -- eight houses that are in litigation in
16 this court. I just got served in the MDL,
17 haven't been in the MDL at all. We haven't done
18 anything in the MDL. And we're one of the
19 builders out there trying to fix houses.

20 I have a limited amount of money. I have
21 cases pending in this court that are now pending
22 in the MDL. And now we're hiring attorneys that
23 we have to pay to be litigating in two courts
24 with a limited pot of money that I'm trying to
25 fix houses with for homeowners that aren't suing

1 me. When I have to start now paying law firms
2 to brief the Economic Loss Rule before this
3 court and now ask for rehearings in courts
4 before Miami and in New Orleans, which I haven't
5 even been in yet, I'm spending money when I need
6 a decision first as to where am I going to be.
7 I shouldn't have to be spending duplicative
8 money. And I should be able to use the money to
9 fix houses that I want to fix.

10 So sorry for the frustration, but I'm
11 spending a lot of money on lawyers where I would
12 really like to have stays heard first so that
13 there's money left to fix houses.

14 MS. HUNNEFELD: And also the issues of
15 duplicative losses, Your Honor, we believe that
16 it is critical that at some point they make a
17 decision or there is a ruling because you have
18 all these different claims by the same
19 plaintiffs. Before Your Honor you have five
20 individual claims, claims by individual
21 plaintiffs and then a purported class action by
22 the very same plaintiffs in the individual
23 actions.

24 And so all of these multiple forums where
25 the plaintiffs are trying to be at the same time

1 is only wasting judicial resources. And we
2 think there should be a first attempt to
3 streamline that before we do anything else.

4 THE COURT: All right. Here's what I think
5 we're going to do. We're going to do it in
6 quick order, though. We're going to do stay and
7 abatement and then substantive. And that's the
8 way we're going to proceed. I think there are
9 legitimate arguments to be made that -- you
10 know, particularly with respect to duplicative
11 claims. Now I don't know how quick that's going
12 to work itself out in the MDL. But it just
13 seems to me that we need to decide stay and
14 abatement issues quickly, and we need to decide
15 some of the major substantive issues quickly,
16 including Economic Loss and 558.

17 I agree those are the major, you know,
18 substantive issues that really have to be ruled
19 on. But I don't think -- frankly, I don't think
20 they're big mysteries. I think they have been
21 briefed to death in the MDL and briefed in front
22 of Judge Farina. And I deal with Economic Loss
23 Rule every day. So, I mean, it's not -- I don't
24 think it's going to take that much to get that
25 issue, you know, properly briefed, heard and

1 before me. And I think I've got a framework for
2 that.

3 But I do want to hear these stay and
4 abatements quickly, frankly. And I think hasn't
5 Farina already, Judge Farina already heard a few
6 of these?

7 MR. BACKMAN: Yes. Judge, last Friday my
8 client, we filed a couple specific as to three
9 trial selections that the plaintiffs made, and
10 then we have a couple more pending against
11 Mr. Durkee. But that issue was more of timing.
12 There's many aspects of this stay issue, in Palm
13 Beach particularly. The majority of the homes
14 are in Centerline community and in Northstar
15 community in Cobblestone Creek.

16 There's pending -- there's two issues. One,
17 there's pending class actions for those
18 communities and those builders and those
19 distributors in the MDL. And that's one aspect
20 of it. So all those individuals are part of
21 that class until they opt out, I guess.

22 And then the second issue is these identical
23 duplicate cases where these same individuals
24 named in the lawsuits here in Palm Beach are now
25 specific named plaintiffs and class

1 representatives in these omnibus complaints that
2 I've described.

3 THE COURT: Well, let me ask you this. Can
4 we hear stay and abatement at the same time, or
5 are they going to require separate hearings?

6 MR. BACKMAN: I can argue whenever Your
7 Honor is ready.

8 MR. GELFAND: It may require separate
9 hearings. And I have a concern, Your Honor,
10 that if I can raise to the court and to other
11 counsel who are more familiar with the MDL than
12 I am, I'm wondering aloud are there going to be
13 stay motions made in the MDL? And is there
14 going to be any respecting of any motion on a
15 stay that Judge Fallon decides that may bind
16 this court?

17 In other words, are they going to address
18 the issue? Obviously the plaintiffs can't sue
19 in both forums. They're going to have to elect
20 their forum. But the question remains is that
21 something that Judge Fallon will have to decide
22 as to whether he sends the plaintiffs back to
23 the state courts. Or if we're deciding it
24 separately here, is there any conflict?

25 THE COURT: Well, keep in mind a stay or an

1 abatement is not a dismissal. I mean, if
2 something -- if I decide to stay or abate an
3 action and for some reason something occurs in
4 the MDL which would change that, the rationale
5 for that result, I simply lift the stay.

6 So I think there's a legitimate concern
7 raised by the defense that we really do need to
8 figure out where they're going to be spending
9 their resources and their money. I have no
10 problem moving forward quickly with the
11 substantive issues. I, frankly, think -- you
12 know, I respect the fact that, you know, some
13 defendants are just getting into the case, and
14 they're going to have to, you know, gear up to
15 brief this. But my experience is most folks
16 kind of piggyback what some of the other
17 defendants have already done, and they're just
18 going to adopt arguments that are made. There's
19 only so much you can say about the Economic Loss
20 Rule. Okay. It either applies or it doesn't
21 apply. You know, the case -- there's a finite
22 number of cases out there. And so, you know 50
23 individual briefs on Economic Loss Rule, you
24 know, aren't going to say much different, you
25 know.

1 So I think we can move forward quickly with
2 those substantive issues. But I think there is
3 a good faith basis to hear these stay and
4 abatement motions quickly. So I think we need
5 to set up a schedule for that and get it done
6 and also get the substantive motions done. But
7 it may not be on your time frame of 30 days. I
8 think the 30 days is probably the stay and
9 abatement, and within 60 I'll hear the others --

10 MR. GELFAND: Fair enough.

11 THE COURT: -- I think is the way we're
12 going to do it.

13 MR. DURKEE: Your Honor, the only concern I
14 have is we have an hour in March. And most of
15 these motions that are going to be filed, stay
16 and abate motions, are going to be case
17 specific. As a result, you know, we're going to
18 have to have oral argument and brief on every
19 motion to stay and every motion to abate. And,
20 therefore, you know, I believe, number one, I'm
21 positive that an hour next month there's no way
22 this court can hear that extensive types of
23 motions in an hour.

24 So, you know, I don't know whether we should
25 start putting these on motion calendar so that

1 these individual -- and we will only address
2 motions to stay and abate, but if it's possible,
3 we might be able to have some sort of scheduling
4 and motion calendar or every week to start
5 knocking out these individual motions to stay
6 and abate because there's no way on these
7 individual cases we're going to have them all
8 heard in March.

9 THE COURT: All right. Let me ask this.
10 How many different separate -- and you don't
11 need to give me a precise answer. How many
12 separate and distinct motions to stay and/or
13 abatement are we talking about?

14 MR. BACKMAN: Judge, I have 26 separate stay
15 issues. Actually, you know what, Judge? In
16 every case it's a stay issue.

17 MR. GELFAND: But isn't it the same
18 underlying basis?

19 MR. BACKMAN: It is for the most part.
20 There's two components as I described before.
21 But, Judge, I disagree with Mr. Durkee. This
22 could be resolved, I truly believe, in one hour
23 on a global basis. There's two fundamental
24 bases to the stay, in my opinion, and there is
25 one issue with respect to the interpretation of

1 Chapter 558. You made your ruling as to whether
2 it applies.

3 THE COURT: Right.

4 MR. BACKMAN: And we go through and we'll
5 get notice --

6 THE COURT: I'm cognizant of the issue
7 you've raised. If there's a problem, I will try
8 to figure out in a very timely fashion how to
9 reserve additional time to give you an
10 opportunity to argue these individual things.
11 If you find when these motions are coming in
12 that, in fact, there are more than a couple of
13 global issues, then I will try to figure out a
14 way from a time perspective to accommodate that.

15 MR. GELFAND: Yeah. And I think there may
16 even be a way to globalize even the things that
17 have individual issues like the 558 motions. I
18 assume one of the arguments is that no notice at
19 all was given. So you have a group of cases
20 where you're in the no notice column.

21 I assume there are other cases where there
22 wasn't sufficient notice given and that sort of
23 thing.

24 THE COURT: What I'm saying is if there are
25 things we can consolidate these things, we can

1 move forward.

2 MR. GELFAND: Yeah, I think that there's a
3 way, if we're creative about it, where we can
4 globalize almost everything.

5 THE COURT: Well, get creative.

6 MR. DURKEE: And, Your Honor, I think what's
7 going to be required, then, is to have some sort
8 of briefing schedule where the defendants file a
9 global big broad issue --

10 MR. GELFAND: Right.

11 THE COURT: Right.

12 MR. DURKEE: -- motion.

13 THE COURT: When can you get these motions
14 filed?

15 MR. BACKMAN: Judge, mine are all find.

16 MS. HUNNEFELD: Ours are all filed.

17 MR. GELFAND: Well, can they be
18 consolidated? That's what we would like to do.

19 MR. DURKEE: Right. And we can do --

20 MR. GELFAND: We would do a consolidated
21 motion, and we would do a consolidated response.

22 MR. DURKEE: So on the one hand they're
23 saying they can be done globally and in broad
24 brush strokes, and on the other hand, they're
25 saying we got 60 of them.

1 THE COURT: Yeah, but the legal ruling I'm
2 going to make on whatever one is brought to me,
3 if they raise the same issue, is to going to
4 carry over as to each of the motions, is it not?

5 MR. DURKEE: I agree, Your Honor. We're
6 just going to need to know which case are --
7 where is the template that we are arguing off
8 of.

9 MR. GELFAND: Right, because we're only in
10 couple cases. He's only in a couple cases. I
11 don't have all of the various motions.

12 MR. BACKMAN: The way we did it in Miami is
13 we used one case, and that motion is what set --
14 or those motions is what set the basis for the
15 others, and then others could file memos in
16 support.

17 THE COURT: Well, if Bennett's the one who
18 wants to get the thing --

19 MR. GELFAND: We can start serving papers.

20 MR. BACKMAN: Why don't we -- We can use
21 Bennett.

22 MR. DURKEE: So pick one, and let them know
23 what it is.

24 MR. BACKMAN: Bennett is the lead case.

25 MR. GELFAND: Whichever one what he wants,

1 just let us know what it is.

2 MR. BACKMAN: All right. We can use the
3 Bennett as the lead case. It's got several
4 pending motions by several defendants. If
5 there's a unique stay issue that's maybe not
6 Bennett that's in another case, we'll let them
7 know.

8 MS. HUNNEFELD: We'll raise it and advise
9 them accordingly, so they'll have an
10 opportunity.

11 THE COURT: All right. So you'll have a
12 template --

13 MR. GELFAND: We don't have it. Can you
14 serve it on us by five days from now?

15 MR. BACKMAN: Sure.

16 MR. DURKEE: Or just go to --

17 MR. BACKMAN: It's Andre's case,
18 so --

19 MR. DURKEE: Okay. We'll get with Andre
20 and, I'm sure, get a copy.

21 THE COURT: The Bennett case is the
22 template. And we'll get that heard at the next
23 case management conference.

24 MR. DURKEE: And, Your Honor, is there any
25 briefing schedule on that as to when the

1 defendant --

2 THE COURT: Well, in terms of briefing
3 schedule you're talking about when materials
4 need to get to me or when you guys want to
5 exchange them?

6 MR. BACKMAN: I think some defendants who
7 aren't parties to Bennett may want to look at
8 those briefs and maybe file supplements in
9 support, whatever their issues may be. That's
10 also an old case so there may be updates that
11 are necessary. But if we can have -- When are
12 we looking to have this heard?

13 THE COURT: March 26.

14 MR. GELFAND: It's March 26.

15 MR. DURKEE: March 26.

16 MR. GELFAND: So how about by 3-5 which is
17 the date we had it for filing? That gives you
18 two and a half weeks.

19 THE COURT: 3-5. Is March 5 okay with
20 everyone?

21 MR. GELFAND: And then we'll get our
22 responses to Your Honor a week before the
23 hearing. That gives us a couple weeks.

24 THE COURT: All right.

25 MR. DURKEE: Very good, Honor. Thank you.

1 THE COURT: All right. Discovery.

2 MS. HUNNEFELD: Your Honor, respectfully on
3 behalf of G.L. we would submit that it is
4 premature to be discussing discovery when we
5 don't even know where we're going to be
6 defending, when we don't even know which cases
7 are going forward. And you know how these
8 things go. Sometimes you go beyond some
9 deadlines, and then you're in the middle of
10 discovery deposing people, gathering documents,
11 and you don't even know if this is going to be
12 the case you're going try, if this is going to
13 be the one where you're going to be trying your
14 case. So could we just defer this issue until
15 we reserve the preliminaries of are we -- do we
16 have an active case? Do we not have an active
17 case? Do they have to choose which case they're
18 going to pursue and which --

19 THE COURT: What are the discovery issues
20 that are pending right at the moment from the
21 plaintiff's perspective?

22 MR. GELFAND: There really aren't any. But
23 I have a solution to this issue. I'm sensitive
24 to it. I understand in the unlikely event they
25 get a stay they don't want to be doing discovery

1 beforehand. What I'd like to suggest, Your
2 Honor, is we have on the schedule for us to
3 serve our master discovery. We'll get it out to
4 them sufficiently in advance, three, maybe four
5 weeks before the hearing on March 26 so that if
6 we are going forward, we haven't lost that
7 six-week period, and they can then respond to
8 the discovery which we've already propounded.

9 THE COURT: Well, but what you're pro -- let
10 me ask this. You filing it is fine. That's one
11 thing.

12 MR. GELFAND: And serving it, yeah.

13 THE COURT: And serving it. But are you
14 suggesting they have to respond to it before
15 I --

16 MR. GELFAND: No, I'm suggesting that they
17 don't have to respond until you've heard the
18 motions for stay. But assuming the stay motions
19 are not granted, their response would be since
20 they've already had it for at least four weeks
21 before that, their response should come very
22 quickly, and then we can move the discovery
23 forward, rather than wait until we first even
24 serve it until after you've ruled, and then
25 we've lost another six weeks.

1 THE COURT: Here's what I'm going to do.

2 I'm --

3 MS. SERRANO: No. There's no such thing as
4 responding quickly. I represent Centerline
5 Homes. We have a ton of homes.

6 THE COURT: I'm not going to set a deadline
7 at this point.

8 MS. SERRANO: Okay.

9 THE COURT: If you want to serve the
10 discovery, that's fine. Responses are stayed
11 until I rule on the motions for stay and
12 abatement, and then I'll set a reasonable period
13 of time to respond at that point and I'll hear
14 argument about how long it's going to take. I
15 don't know what a reasonable period of time is.
16 I haven't seen the discovery. They haven't seen
17 the discovery. I don't know how extensive it
18 is. There's no reason why you can't serve it.

19 MR. GELFAND: Right.

20 THE COURT: But responses are stayed until
21 further order of the court. And then I'll set a
22 reasonable time once I see it, once you've seen
23 it. We'll decide how long. And you can argue
24 about what you think is a reasonable period of
25 time, and I'll make a ruling on it if you don't

1 agree. But there's no reason why you can't
2 serve it. You just don't have to respond to it
3 today.

4 MS. SERRANO: And the issue of duplicate
5 cases will, again, come in because we've already
6 responded to some discovery in the MDL on some
7 of these topics.

8 THE COURT: Well, you may not have to
9 respond depending on what I rule on the motions
10 to stay and abate. But there's no reason why
11 the plaintiff, you know, needs to hold back in
12 getting it filed. I think it's probably
13 productive to get it filed. You'll know what
14 you're facing. You know, it may even flush out
15 some of the issues. So, you know, it will just,
16 the response will be stayed until further order
17 of the court.

18 And what I'll try to do is when we get to
19 the stay and abatement and I get a ruling on
20 that, we can start figuring how long it's going
21 to take to respond to discovery.

22 MR. GELFAND: I agree. And to the extent
23 they've already served responses in the MDL, I
24 have no problem having them adopt those
25 responses and providing them to us.

1 THE COURT: We'll figure that out when we
2 get there. I'm just saying they're not going to
3 be required at this point to respond to
4 discovery until I make a ruling on the stay and
5 abatement. And then we'll figure out whether
6 it's quick time or reasonable time or something
7 in between. But we'll figure that out when we
8 get there.

9 MS. HUNNEFELD: Your Honor, if I may, on the
10 issue of master discovery, it is very important
11 that they be very specific as to the type of
12 defendants that they are addressing in the
13 discovery, too, because what could end up
14 happening is you have this master set of
15 requests that are overly broad, extremely
16 general because they're trying to target
17 everybody down the supply chain. And I would
18 suggest to the court that it would save a lot of
19 time, make it more efficient when you have to
20 consider the substantive issues and potential
21 objections to have it addressed to specific type
22 of defendants.

23 MR. GELFAND: We already have that. We have
24 it broken down by defendant.

25 THE COURT: You know, I haven't seen it yet.

1 I don't know what they're going to do. I can't
2 really --

3 MS. HUNNEFELD: I just, I get concerned when
4 I hear "master," and I know that it's created
5 problems.

6 THE COURT: Well, I haven't seen any of
7 these master pleadings yet. So we'll see what
8 they look like. And then I'm sensitive to the
9 issue you're raising. But until I see what
10 they've actually proposed, it's hard to --
11 basically you're raising sort of an objection to
12 a form I haven't even seen. So let's just wait
13 and see what they come up with. All right.

14 MR. GELFAND: And we have broken it out that
15 way. We are sensitive that, too, Your Honor.

16 MR. BACKMAN: And I really -- it was really
17 put on the agenda, Judge, to discuss not whether
18 it's going to be served and when it's going to
19 be responded to, but more along the lines of how
20 we're going to deal with discovery in these
21 cases on a global basis so that we're not
22 responding in 82 cases to the same sets of
23 discovery, things likes that.

24 THE COURT: Okay. Well, those things are
25 going to have to be ironed out. But, I mean, we

1 need to keep -- I think the stay and abatement
2 really needs to be resolved so that we don't, I
3 don't keep hearing stay and abatement at every
4 one of these case management conferences because
5 that's what I'm going to hear. The same
6 objections are going to be raised, Judge, why do
7 we have to respond in two places? My resources
8 are here. They should be there. So, I mean, I
9 don't -- even from the Plaintiff's perspective I
10 think we need to get those issues resolved.

11 MR. GELFAND: And I just want to clarify
12 that point. That's what the briefing is for,
13 only the stay and abatement at this point.

14 THE COURT: Stay and abatement, that's
15 right. And we'll set up a time where we can get
16 the Economic Loss Rule heard with respect to if
17 all of the defendants are still in, they're all
18 in. If some are not, they won't have to
19 respond. But I do think stay and abatement
20 needs to be heard first.

21 MR. BACKMAN: Okay.

22 THE COURT: Scheduling order. Beyond what
23 we're doing right now that may be a little bit
24 premature.

25 MR. BACKMAN: The defense agrees.

1 THE COURT: I think I really need to get to
2 the stay and abatement and then do a scheduling
3 order. Although, again, I see no reason why the
4 Master Complaint shouldn't be filed. I see no
5 reason why you can't get your -- whether you
6 want to call it master discovery or whatever you
7 want to call it, get your discovery out, and
8 then we'll see where we're going. So I think
9 the scheduling order we'll hold off.

10 LexisNexis Service, I think you should have
11 the order now, so you guys are going to have to
12 set that up.

13 MR. BACKMAN: We do. And there's a
14 representative here who can assist after the
15 hearing in talking to anybody about training or
16 whatever issues may arise.

17 THE COURT: Yeah, I may need training. I
18 don't know.

19 MR. STAFFORD: We'll take care of that.

20 THE COURT: I'm assuming you're available to
21 for the court as well as the parties.

22 MR. STAFFORD: Yes.

23 MR. BACKMAN: And if everybody could leave a
24 card with Milton or with the court reporter
25 and/or both so that we can have all that

1 information...

2 MR. STAFFORD: Thank you.

3 THE COURT: We also have liaison counsel.
4 What do we have going on here?

5 MR. BACKMAN: Yeah, the only issues, Judge,
6 the way that it's being handled in other places
7 is that liaison counsel pretty much sets up
8 these case management conferences, takes care of
9 the court reporter, takes care of the agenda,
10 gets orders to you, things of that nature. And
11 in terms of noticing hearings you see there's a
12 little note there five business days prior.
13 Really what they've been doing is if the hearing
14 falls on a Friday, the Thursday before everybody
15 has to have their motions in and their notices
16 in, and they need to e-mail them to, it would be
17 Mr. Gelfand and my office so that we can prepare
18 the agenda. If you miss the Thursday deadline
19 you're going to have to wait for the next.

20 THE COURT: Yeah, that sounds like a
21 reasonable point.

22 In terms of let's just talk about
23 scheduling, though, in terms of case management
24 conferences. They're going to be on Fridays.
25 They're not always going to be this early in the

1 morning. I just couldn't get you in any other
2 time in February. I didn't want to wait and not
3 have a case management conference in February.
4 That's why I called you in at 8:00. But they
5 will be on Fridays. The only thing I don't want
6 to do is conflict with one of Judge Farina's,
7 and I know he's doing them twice a month.

8 MR. BACKMAN: The first and third Friday of
9 each month.

10 THE COURT: Fridays first and third. So it
11 just can't be the first and third.

12 MR. GELFAND: We've actually conferred. And
13 to be consistent with that, we're looking at the
14 second and fourth, and I think my office is
15 actually coordinating with your JA as we speak
16 for the future.

17 THE COURT: Okay. Well, that was my
18 question. Are you going guys going to
19 coordinate with us?

20 MR. GELFAND: Yes.

21 JUDGE'S JA: You want to go ahead and do
22 that now?

23 THE COURT: Well, I don't know if they're
24 going to be prepared to do them all now. But
25 going out, so we're looking at the second,

1 either the second or the fourth. Right now I
2 was only scheduling one a month. Are you
3 requesting two now or just one?

4 MR. GELFAND: We don't get two, then?

5 MR. DURKEE: Your Honor, David Durkee,
6 again, on behalf of the defendants. I think two
7 is necessary. We -- you know, Your Honor,
8 there's a rationale --

9 THE COURT: I don't know whether I've got
10 two for you to be honest.

11 MR. DURKEE: Well, I know. And that's
12 why -- we'll take as much time as the court can
13 give us because, you know, we've got -- I've got
14 several clients that are elderly that are
15 displaced, that are 70 something years old and
16 living, trying to live and survive. And the
17 efficiency of this court really is going to be
18 based on how much time we can get and how many
19 things we can do and how quickly we can do them.
20 And that's really just a function of time.

21 THE COURT: Well, I mean, here's my problem.
22 What you just told me I have 100 lawyers a week
23 tell me.

24 MR. DURKEE: I know. I know. I know.

25 THE COURT: I'm just being honest with you.

1 I've got cases where medical devices have
2 allegedly caused injury to folks that are 70 or
3 80-years-old. And so, I mean, I -- and that's
4 not to make light of your situation. It's just
5 to tell you the reality is --

6 MR. DURKEE: I know, Your Honor.

7 THE COURT: -- that while the Chinese
8 drywall cases are getting a lot of press,
9 there's a whole lot of other cases in this
10 courthouse that, you know, are equally
11 significant.

12 Now going out, we're going to have time.

13 JUDGE'S JA: Well, right now we're up to May
14 because they have their one day up until May,
15 and I don't have any other time before that.

16 THE COURT: So starting in May we can start
17 going --

18 JUDGE'S JA: We can two.

19 THE COURT: -- we could two a month.

20 MR. DURKEE: Which is fine because we have
21 February, March and April scheduled, obviously
22 February today. We have March scheduled. We
23 have April scheduled. And if we could start in
24 May with two a month, I think one as much
25 time -- if you can give us an hour on the second

1 Friday, if you can give us another hour on the
2 fourth Friday, I think that would be smart going
3 forward. And I think that would help address
4 the issues that David raised as well.

5 THE COURT: Mr. Backman, what is it -- I
6 mean, other than you have to come up here, what
7 does it hurt?

8 MR. BACKMAN: Well, I mean, if you want the
9 other side of the coin from the defense
10 perspective, I mean, those of us who are parties
11 in every state because of multiplicity of
12 lawsuits, I'm in New Orleans; I'm in Lee County;
13 I'm in Palm Beach; I'm in Miami; I'm in Broward.
14 I'm all over the place. And so now with a
15 schedule like that, I mean, that's just...

16 THE COURT: Here's where I'm going to start.
17 We're going to start with one because I really
18 don't want to give more time than is needed.
19 But I am going to be sensitive to the fact if I
20 can't get things heard in an hour, I'm going to
21 have to find additional time.

22 MR. BACKMAN: That's fine. And some small
23 items --

24 THE COURT: We'll start on an hour schedule
25 going forward. It will be on the second or the

1 fourth Friday to not conflict with Judge Farina.
2 And so you might as well just someone, one of
3 the liaison counsel call Jan later and just --
4 and we'll do a scheduling order where we go
5 ahead and set them up for the balance, really
6 the balance of the year probably.

7 MR. GELFAND: Yeah, my office will do that.
8 We've been working on that.

9 THE COURT: And the only other issue is, of
10 course, I'm going to be out a little bit in
11 June. But other than that, we should be all
12 right.

13 JUDGE'S JA: I'll try to stick to the fourth
14 Friday. Except June we'll have to do the 2nd
15 Friday.

16 THE COURT: Yeah, I'm going to be out of
17 town in June, so it will have to be a different
18 date in June.

19 Okay. Good enough. We'll set that up.

20 MS. HUNNEFELD: And, Your Honor, if I may
21 propose between now and May perhaps we can try
22 to tee up the issue of duplicative lawsuits so
23 that perhaps we'll find a way to figure out
24 where each of these plaintiffs is going to be so
25 that we don't have to be in multiple court

1 forums.

2 THE COURT: Well, I'm assuming some of this
3 is going to fall out so --

4 MR. BACKMAN: I'm going to make that part of
5 the stay.

6 THE COURT: I think many some of this is
7 going to fall out. And once it done, then
8 everyone knows where they're going to be
9 spending their time and resources, so I think
10 that's the ultimate goal.

11 Let me get to, because I've only got a few
12 minutes before my 9:00 o'clock, one thing that
13 is important to me, because I've already had to
14 deal with one emergency motion, and that's the
15 preservation order. I do think we need to get a
16 preservation order in place. I see no reason
17 why I should reinvent the wheel. I think I
18 should adopt the preservation order in the MDL.
19 But I'll hear argument on that. But I think we
20 need to get that in place because I've already
21 had one situation where a builder or developer
22 has -- wants to go in and do work. I've also
23 had situations where individual plaintiffs, I
24 think, have wanted to go in and do work. And
25 there has to be something in place to preserve

1 evidence. So what do the parties think about a
2 preservation order?

3 MS. HUNNEFELD: Your Honor, on behalf of
4 G.L. I would have to say that we would like the
5 opportunity to revisit the issue only because
6 the existing preservation order is turning out
7 to be very costly, cost prohibitive, very
8 onerous. And when you have a builder who's
9 trying to be out there fixing homes, perhaps you
10 could give us the opportunity to meet and confer
11 to find ways to tailor it a little bit better
12 and try to resolve as much as we can and bring
13 it to the court at the next hearing.

14 THE COURT: All right. Do you agree?

15 MR. GELFAND: I don't have a problem with
16 that. I think it's smart to get it in place as
17 soon as possible. So if you want to give us a
18 proposed order going off of the MDL one but
19 making one that you say is less onerous and not
20 causing the issues that you've had to deal with,
21 submit that -- I mean, get that to us as soon as
22 possible. And we can --

23 THE COURT: That's fine. I don't want to be
24 dealing with emergency motions.

25 MR. GELFAND: Agreed.

1 MR. BACKMAN: There's going to be many sides
2 to this coin because we're not going to be in
3 agreement on that.

4 THE COURT: Well, then I'm going to have to
5 rule.

6 MR. BACKMAN: Fine.

7 THE COURT: But I'm going to give you an
8 opportunity to meet with her and see if you can
9 clear up the issues.

10 MS. SERRANO: Your Honor, and I would just
11 note that Judge Fallon made it clear at
12 yesterday's MDL conference that he intends for
13 everybody, whether you're part of the MDL or
14 not, to be abiding by his order. So I would
15 just caution if your case ends up over there for
16 one reason or another and there was a less
17 onerous one here and now Judge Fallon expected
18 you to comply, there --

19 THE COURT: -- could be a problem. I
20 understand.

21 So keep that in mind when you're discussing
22 tweaking the preservation order. I just believe
23 something needs to be in place. I don't want to
24 be dealing with emergency motions when good
25 faith efforts are being made to remediate the

1 situation. So that's my concern. So work on
2 that.

3 Have any of these issues been brought to
4 Judge Fallon's attention about it being too
5 onerous or it's --

6 MR. BACKMAN: Well, that's part of the
7 issue, Judge, in pretrial order 1B, which is the
8 preservation order up there, the amount of time
9 and effort that went into getting that thing
10 finally approved by Judge Fallon as well as his
11 own thoughts into it was just insane. And to do
12 it all over again just doesn't make sense to us.
13 But I know you adopted it already in one of the
14 cases.

15 THE COURT: In one of the cases, but the
16 parties stipulated at that point.

17 MS. KEITH: Your Honor, again, Heather Keith
18 for G.L. We've actually repaired and moved back
19 in 40 families into their homes that are not in
20 litigation. But because of Fallon's orders in
21 the MDL, which existed before I was ever in a
22 case; we didn't even have any litigation, so we
23 weren't there to negotiate that, and, as I
24 understand it, that order was entered before any
25 builders were actually doing the evidence

1 collection, I now have evidence on 40 houses in
2 a warehouse that aren't in litigation because
3 that order says I have to have that evidence in
4 case there ever is a claim. So I'm paying
5 storage costs to store evidence, and it's just,
6 that's money, again, that could go to fix
7 houses. And the amount of it is --

8 THE COURT: Well, on the other hand, you may
9 end up in the MDL and you're going to have to be
10 complying with Judge Fallon's order.

11 MS. KEITH: And I'm not saying you don't
12 need to collect some evidence. It's just the
13 amount of evidence and the amount of what I'm
14 having to collect and the size of the evidence
15 is becoming an issue. So I just -- I agree -- I
16 need to be able to prove there was Chinese
17 drywall in the house. The plaintiffs need to be
18 able to prove it. I need to video and
19 photograph it. It's just the amount of physical
20 evidence. I would like to agree to revisit, if
21 we could, and it would be to everyone's
22 advantage, including the homeowner. A homeowner
23 that doesn't have a builder that wants to do
24 collection, it's burdensome and costly right
25 now.

1 THE COURT: All right. See what you can do,
2 but keep in mind the warning disclosure about
3 what Judge Fallon apparently said at the MDL
4 status conference yesterday.

5 Okay. That's probably about all I have time
6 for. Appreciate you coming in. As I said, I
7 won't call you in at 8:00 o'clock in the morning
8 from here on out. I normally won't start it at
9 8:00 or 8:30. Going forward out, you'll have an
10 opportunity to have afternoon hearings or
11 something that's a little easier to get to.

12 Keep in mind you can participate by phone as
13 long as you guys set up the conference call. It
14 doesn't make any difference to me.

15 MR. BACKMAN: Thank you, Judge.

16 THE COURT: All right.

17 MR. GELFAND: Thank you, Your Honor.

18 THE COURT: Okay. We're going to sign off
19 for those folks that are on the phone.

20 MR. GELFAND: We'll do the draft order, Your
21 Honor, of what transpired today.

22 THE COURT: Yes.

23 MR. GELFAND: Would you mind taking care of
24 that?

25 (The foregoing proceedings were concluded at

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9:08 a.m.)

1 CERTIFICATE

2 STATE OF FLORIDA
3 COUNTY OF PALM BEACH4 I, BARBARA GALLO, RMR-CRR, Notary Public in
5 and for the State of Florida at Large, hereby certify
6 that the foregoing pages are a true and correct
7 transcription of my stenographic notes of the
8 proceedings had and testimony taken in the foregoing
9 case, at the time and place hereinabove set forth.

10 DATED this 12th day of February 2010.

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15 Barbara Gallo, RMR-CRR
16 Notary Public
17 State of Florida at Large
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		12:25 accommodate (1) 50:14	53:8 advisement (2) 14:7,9	Andre's (1) 53:17
1	6	accomplish (1) 40:18	afternoon (1) 74:10	Angelica (1) 23:19
100 (2) 12:10;65:22	60 (5) 13:17;21:3;27:23;	accordingly (2) 35:24;53:9	again (11) 15:9;20:16;26:18; 27:1;31:8;58:5;62:3; 65:6;72:12,17;73:6	Apparently (2) 6:5;74:3
12 (1) 5:7	600 (2) 12:1;13:3	across (2) 26:10,15	against (10) 9:24;12:5;14:19, 23;15:8,24;17:3; 22:11;23:21;45:10	appear (1) 5:19
15th (1) 10:11	7	acting (1) 20:6	agenda (14) 5:25;6:23;7:1,4; 8:17,19;9:11;10:17; 17:24;34:1;36:3; 60:17;63:9,18	appearances (1) 5:8
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