Case No. 10-30568
Consolidated with
Case No. 12-31017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: CHINESE-MANUFACTURED DRYWALL PRODUCTS LIABILITY LITIGATION

MICHELLE GERMANO, Individually and on behalf of all others similarly situated; et al.,
Plaintiffs
JERRY BALDWIN; INEZ BALDWIN; STEVEN HEISCHOBER; ELIZABETH HEISCHOBER; JOSEPH LEACH; KATHY LEACH; PRESTON MCKELLAR; RACHAEL MCKELLAR; J. FREDERICK MICHAUX; VANNESSA MICHAUX; WILLIAM MORGAN; DEBORAH MORGAN; ROBERT ORLANDO; LEA ORLANDO,
Intervenors-Appellees
v.
TAISHAN GYPSUM COMPANY LIMITED, formerly known as Shandong Taihe Dongxin Company, Limited,
Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of Louisiana
U.S.D.C. Case No. 2:09-MD-2047; No. 2:09-CV-6687

BRIEF OF UNITED STATES SENATORS AND CONGRESSMEN AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF CONSENT OF ALL PARTIES TO FILING

Pursuant to FRAP 29(a), all parties have consented to the filing of this Amici Curiae Brief.

SUPPLEMENTAL STATEMENT OF INSTERESTED PERSONS

MICHELLE GERMANO, Individually and on behalf of all others similarly situated; et al.,
Plaintiffs
JERRY BALDWIN; INEZ BALDWIN; STEVEN HEISCHOBER; ELIZABETH HEISCHOBER; JOSEPH LEACH; KATHY LEACH; PRESTON MCKELLAR; RACHAEL
MCKELLAR; J. FREDERICK MICHAUX; VANNESSA MICHAUX; WILLIAM MORGAN;
DEBORAH MORGAN; ROBERT ORLANDO; LEA ORLANDO,
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TAISHAN GYPSUM COMPANY LIMITED, formerly known as Shandong Taihe Dongxin
Company, Limited,
Defendant-Appellant

Pursuant to Fifth Circuit Rule 29.2, requiring a supplemental statement of interested parties, all the parties to the In re: Chinese-Manufactured Drywall Products Liability Litigation, MDL No. 2047 (U.S.Dist.Ct., E.D.La.) conceivably have an interest in this brief that supports the position of the PSC. Those parties are listed in the Certificate of Interested Persons in the Brief of Appellees (pages iii-vi). *See* note 3, *infra*, listing the cases in this MDL litigation that have been separately appealed by Appellant TG that raise similar jurisdictional issues.

In addition to these interested persons listed in Brief of Appellees, interested persons in this Amicus Curiae Brief are the United States Senators and Congressmen who have authorized and signed this brief, as follows:

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INTEREST OF AMICI CURIAE

The *amici curiae* are United States Senators and Congressmen whose constituents have been adversely affected by contaminated drywall exported to the United States from China. They and their constituents have a deep concern over the effects of Chinese drywall on the property, health, and well-being of persons in their states and districts, as well as in the United States as a whole. The Chinese drywall introduced into and sold in American communities was defective and of dangerous quality. At the time there was a shortage in the United States of drywall for construction due to severe hurricanes and weather. The defendant in this case, Taishan Gypsum Company, Limited (TG), aggressively marketed and sold its products in the United States through such activities as advertising on the internet, use of agents for distribution and sales, customizing the product for particular markets, and arranging for shipping and freight to American ports. This resulted in large quantities of Chinese drywall being purchased and used in construction of homes and buildings which had to be removed and replaced at great expense.

The injury done to constituents of the *amici curiae*, as well as to other Americans, goes to the basic societal need for a safe and healthy place to live. The United States and individual states have a strong interest in providing a forum in which to assert their legal rights. The importance of that interest is reflected in the Drywall Safety Act of 2012, HR 4212 (112th Congress), Pub.L. 112-266 (Jan. 13,

2013). It expressed "the sense of Congress" that the Chinese government facilitate a meeting with the companies (many of them state-owned) "on remedying homeowners that have problematic drywall in their homes" and "submit to jurisdiction in United States Federal courts." A number of foreign drywall manufacturers have not contested jurisdiction, but TG has resisted jurisdiction in American courts. The district court below found that jurisdiction was properly asserted against TG. This appeal tests whether American citizens can assert the basic right to seek redress in American courts for injury done by a foreign company for sending defective products into this country in large numbers, thereby making large profits and availing itself of its benefits.

Concern for protecting the rights and interests of their constituents and the general public commanded the attention of many American legislators once the harm caused by Chinese drywall had become apparent. Congressmen Theodore E. Deutch (D. Fla.) and Scott Rigell (R. Va.), and the other interested legislators, have large numbers of constituents affected by the defective drywall because their states and district were particularly targeted by TG through promotional and sales activities. Remediation of drywall in homes and buildings has been especially acute in those districts. Congressmen Deutch and Rigell are chairs of the Congressional Contaminated Drywall Caucus which was formed by them and other interested legislators. It has taken special notice of the plight of American

victims who, despite strong product liability cases, are stopped at the door to the courthouse by the defense of lack of personal jurisdiction. They believe that, consistent with the findings of the district court, this is a strong case for finding jurisdiction, and therefore participate in this *amici curiae* brief.[1]

ARGUMENT

I. ADVERSE IMPACT OF DENIAL OF JURISDICTION

1. Ability to Recover for Harm Done

The general welfare of the *amici curiae*'s constituents and of the American public is at stake in the outcome of this appeal. The consequence of foreign companies not being subject to American court jurisdiction is a decreased likelihood that American victims will be able financially to sue them abroad or to obtain equivalent remedies in foreign courts. There would also be an adverse impact on the efficacy of American laws by freeing foreign companies from the

[1] Pursuant to Fed.R.App.P. 29(c)(5), the undersigned counsel for *amici curiae* was retained to represent the Congressional Contaminated Drywall Caucus ("CCDC"). Further, counsel for *amici curiae* states that (A) he authored this brief in its entirety; (B) the Plaintiffs' Steering Committee in MDL 2047 on behalf of the parties they represent (s*ee* Supplemental Statement of Interested Persons), has agreed to compensate me at my ordinary hourly rate for my time spent preparing and submitting this brief in light of the inability of the members of the CCDC to fund such efforts; (C) no other person contributed money that was intended to fund preparing or submitting this brief.

deterrent effect of laws as to product liability, commercial transactions, and consumer rights.

Appellant makes the curious argument that "Plaintiffs' interests are better served through a prompt recovery pursuant to the Venture settlement in this matter, as opposed to prolonged litigation against TG which may not result in an enforceable judgment."[2] TG, of course, was the manufacturer of the defective drywall and therefore primarily responsible for its harmful effects on American purchasers. The problem, as the district court found, was that TG's fingerprints were all over the supposed independent actions of Venture. Venture was undercapitalized, and the settlement the PSC made with it was necessarily for a small amount not nearly enough for the remediation of all the affected homes. Appellant's threat that a judgment against TG may not be enforceable against it continues its cavalier attitude that it can avoid all responsibility for its conduct as the primary perpetrator. Suggesting that having unsuccessfully avoided jurisdiction TG would try to prevent the enforcement of a judgment in China continues to flout the usual standards of responsibility in commercial practice.

2. Competitive Advantage and Market Distortion

If foreign companies are not subject to jurisdiction in the United States for injury done by their defective products sent into the United States, they will have a

[2] Brief of Appellant Taishan Gypsum Co. Ltd, at p. 78.

competitive advantage over their American competitors. According foreign companies immunity from American legal process would not only advantage them as to American competitors, but also as to competitors from foreign countries that do not dispute that their contacts will subject them to American jurisdiction. By being immune from jurisdiction in the U.S., such foreign companies would not need to factor into their marketing and pricing strategies the cost of compensating American customers damaged by their defective products, as would American companies that are subject to jurisdiction here.

Denial of American jurisdiction in this case would contribute to a distortion of the market. Just as anti-competitive conduct by some market players can distort the forces of a free market, so too would according immunity to foreign manufacturers under the circumstances of this case. Those manufacturers would be freed from complying with the rules that are followed by other market players thus preventing the market processes from insuring that there is a level playing field for all competitors.

The distorting effect of denying jurisdiction is exacerbated by the facts of this case. The size of the portion of the American drywall market captured by TG in the aftermath of the 2005 hurricanes (87 million square feet earning more than 8.5 million dollars) was very large. This is not a case of an isolated entry and sale of an imported product, but of a high volume and long-term relationship with the

American market. Sizable quantities of TG's drywall were sold in several Gulf Coast states, including Florida and Louisiana, which are the subject of related appeals with separate briefing schedules.[3] Likewise TG's volume of business in Virginia that resulted from direct targeting efforts (7.3 million square feet, much of which was custom manufactured for its distributor Venture Supply, Inc.) had a significant impact on the drywall market in Virginia and of the well-being of its citizens. The sheer size of the intrusion of TG into both the national and Virginia drywall markets sets this case apart from cases in which the contacts were isolated or limited in size and length of time.

3. The Economy and Housing

Amici curiae are particularly aware of the economic impact that the defective drywall has had on their communities as well as regionally and nationally. In an attempt to obtain compensation for their losses when the Chinese manufacturer TG has resisted jurisdiction and defaulted, homeowners have looked to other entities in the chain of distribution, such as suppliers, installers, and homebuilders. This has had an adverse ripple effect throughout affected

[3] Taishan has appealed similar jurisdictional rulings in *The Mitchell Co., Inc. v.Knauf Gips KG*, Case No. 09-4115 (E.D.La.) (involving Florida's long-arm statute), *Gross v. Knauf Gips KG*, Case No. 09-6690 (E.D.La.) (involving Louisiana's long-arm statute), and *Wiltz v. Beijing New Building Materials Public Ltd. Co.*, Case No. 10-361 (E.D.La.) (same), pursuant to 28 U.S.C. § 1292(b). While this appeal involves TG only, the related appeals also involve Taishan's wholly-owned subsidiary Taian Taishan Plasterboard Co., Ltd. ("TTP").

communities with other entities being made defendants and subjected to high litigation costs. Homebuilders have been particularly affected, in some cases being driven out of business because of the potential liability. Insurers have also been looked to, resulting in more litigation costs. However, they have generally been successful in establishing that the defective condition of the drywall is excluded from coverage under pollution exclusion clauses in home owner insurance contracts. *See, e.g., Travco Ins. Co. v. Ward*, 736 S.E.2d 321 (Va. 2012). As a result, homeowners have not generally been able to cover their losses through their insurance policies. Manufacturers are normally in the best position to spread the risk related to their products, but TG has sought to avoid all responsibility for the harm done by its defective products.

Certain subdivisions in which Chinese drywall was used in either new construction or reconstruction following weather disasters have been severely affected. Homeowners have sometimes been unable to keep up their mortgage payments and have lost their homes due to repair costs and reduced value exacerbated by the housing downturn. Areas containing a large number of "Chinese drywall homes" have experienced a stigma, making it difficult to sell, and the presence of a number of Chinese drywall homes can lead to neighborhood blight. Communities in Southern Florida have been plagued by a large number of

empty houses. For example, the Villa Lago Development has experienced severely depressed property values even for those without defective drywall.[4]

A study by a consulting economist in Florida, reported: "Properties known to have experienced certain undesirable circumstances can become stigmatized in a manner which negatively impacts on probable sale or resale values even after the original problem is effectively remediated."[5] He found that remediated homes experienced serious declines in value not all of which was due to the housing downturn. "Without remediation most homes went into foreclosure probably because the home owners could not afford to live elsewhere and pay to remediate and pay to keep the unoccupied home."[6]

The severe decline in home values and depopulation of certain areas adversely affected jobs, storekeepers, service businesses, and local and state

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[4] *See In re: Chinese Manufactured Drywall Products Liability Litigation*, MDL No. 2047 (, Order (1) Preliminarily Approving Settlement Agreement Regarding Claims Against Coastal Construction of South Florida, Inc. Related to Villa Lago at Renaissance Commons in MDL 2047; (2) Conditionally Certifying a Settlement Class; (3) Approving the Form of Notice and Authorizing the Dissemination of the Notice; (4) Scheduling a Fairness Hearing; and (5) Staying the Litigation against Coastal Construction of South Florida, Inc. (E.D.La. April 24, 2013)[ECF Doc. No. 16777].

[5] William F. Landsea, "Price and Value Impact of Toxic Drywall Related Stigma to Residential Real Estate,"at p. 1, presented on March 12, 2011 at the Collegium of Pecuniary Damage Experts Annual Conference.

[6] *Id*. at p. 4.

governments. Reduction in property values for purpose of property taxes resulted in reduced government revenues, and social services provided by governments and private agencies have been stretched. Governments have been induced to seek to recover for losses to their interests, and as *parens patriae* on behalf of their citizens. A suit filed by the State of Louisiana alleged that "[o]ne of the doors opened by the hurricanes was to a Louisiana market for international drywall" and that "Taishan pursued a global online marketing strategy that successfully attracted Louisiana customers."[7]

The interest of the *amici curiae* in this brief is to bring to the forefront the lingering serious impact of TG's exporting defective drywall to the United States, and the inevitable consequences of not finding that TG's concerted and targeted sales campaign satisfies the requirements for federal court jurisdiction. As public officials, *amici curiae* urge attention to the importance of the ruling in this case on the safety and economic welfare of their constituents and American citizens.

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II.THE MDL DISTRICT COURT WAS CORRECT IN APPLYING THELAW OF ITS OWN CIRCUIT AS TO THE PROPER STANDARDS FOR PERSONAL JURISCITION

[7] *In re: Chinese-Manufactured Drywall Products Liability Litigation*, MDL No. 2047, The State of Louisiana's Motion and Incorporated Memorandum to Join the Plaintiff Steering Committee's Response to Taishan's Motions Pursuant to Rule 12(b)(2) to Dismiss the Complaint, at pp. 4, 10 (E.D.La. May 18, 2012)[ECF Doc.No. 14366].

Amici curiae recognize that the proper functioning of the Multidistrict process is critical to insuring that plaintiffs in the individual cases transferred under the MDL Act can be properly compensated for the harm done them. The rule governing what circuit law an MDL transferee court should apply raises issues of fairness and efficiency in the MDL process. Judge Eldon Fallon, one of the most experienced district court judges in MDL practice, concluded that as the MDL transferee court he was "obliged to apply, consistent with the parties own positions, the substantive state law of the transferor court, Virginia law and the federal law of its own circuit, the Fifth Circuit."[8] He found that conclusion "overwhelmingly supported by both the jurisprudence and legal scholarship.

In *Van Dusen v. Barrack*,[9] the Supreme Court held that a transferee court to whom a case is transferred under 28 U.S.C. § 1404(a)("for the convenience of parties and witnesses, in the interest of justice") must apply the state law that would have been applied in the transferor court. The court reasoned that applying the law of the transferee state in diversity cases would frustrate the remedial purpose of § 1404(a) because courts would then be reluctant to transfer to a more convenient forum for fear of prejudicing the plaintiff's legitimate right to choice of

[8] Order and Reasons, p. 18.

[9] 376 U.S. 612 (1964).

venue.[10] However, most courts have now rejected application of *Van Dusen* as to federal issues when the transfer was made under the Multidistrict statute (§ 1407(a)). Thus the D.C. Circuit determined, in an opinion by now Justice Ruth Bader Ginsberg, *In re Korean Air Lines Disaster of Sept. 1, 1983*:

> Recognizing that the question is perplexing, particularly in the context of 28 U.S.C. § 1407(a), a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that 'the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit."[11]

The policy reason for applying the law of the circuit of the transferee court to federal issues is quite different from the policy underlying the *Van Dusen* contrary rule that was fashioned to discourage forum shopping by defendants through motions to transfer to a more convenient forum. Uniformity of interpretation of federal law is the central policy of the *Korean Air* approach, recognizing that it is desirable for the transferee court in an MDL transfer to be able to decide federal law issues correctly and consistently.[12] The need for

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[10] *Id*. 629-30

[11] *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1174 (D.C. Cir. 1987), *citing* Marcus, Conflict Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677 (1984); Steinman, Law of the Case, A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U.Pa.L.Rev. 595 (1987). *See also* Marcus, Sherman & Erichson, Complex Litigation: Cases and Materials on Advanced Civil Procedure 159-60 (5th ed.2010).

[12] "The federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote

correctness and uniformity is heightened in an MDL transfer where the transferee judge seeks to apply a uniform interpretation of federal issues.

The instant case provides a good example of the chaos that would ensue if Judge Fallon were required to adopt the circuit law of each individual case transferred to him. In just the four cases consolidated for this appeal, he would have to apply the 4th Circuit interpretation of the federal constitutional due process issues as to personal jurisdiction in *Germano*, the 11th Circuit interpretation in *Mitchell*, and the 5th Circuit interpretation in *Gross* and *Wiltz*. Then he would have to apply other circuit's interpretations in cases transferred from other jurisdictions. Appellant argues that the reasoning of *Korean Air* was undermined by the Supreme Court decision in *Lexecon*[13] that MDL transferred cases must be returned to their original districts after pretrial is completed. Of course, that does not mean that the transferee MDL court does not seek uniformity in interpreting federal law issues during the pretrial MDL proceedings. It has the authority to decide dispositive motions that could determine the merits.[14] Also, even after *Lexecon*, the transferee

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acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job." Marcus, *supra*, 93 Yale L.J. at 679, quoted in In re Korean Air Lines, *supra*, 829 F.2d at 1175.

[13] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[14] "It is generally accepted that a transferee judge has authority to decide all pretrial motions, including motions that may be dispositive, such as motions for judgment

court possesses many ways to retain control of the transferred cases, and only a small percentage of MDL cases are ever returned to their original courts.[15]

Uniformity in interpreting federal law issues is thus still the central policy justifying a transferee court's applying its own circuit's interpretation of federal issues. This is even more so in the instant case where the federal law issue is the second prong of the jurisdictional analysis, clearly a matter of interpreting and applying federal due process standards. The parties agree that the first prong is whether the long-arm statute of the forum state (Virginia) confers personal jurisdiction. Judge Fallon found that various provisions of the Virginia long-arm statute did confer jurisdiction (although this might not have been necessary since the statute has been found to be co-extensive with the United States Constitution). He then analyzed the second prong - whether the exercise of jurisdiction by the federal court in Virginia is consistent with due process under the U.S. Constitution. He correctly applied the law of the circuit for the transferee court (the 5th Circuit) in interpreting the federal due process standards for asserting personal jurisdiction.

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approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment, for involuntary dismissal under Rule 41(b), for striking an affirmative defense, for voluntary dismissal under Rule 41(a), and to quash service of process." Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 582 (1978).

[15] Heyburn, A View from the Panel: Part of the Solution, 82 Tulane L. Rev. 2225, 2234 n.47 (2008).

This approach insures uniformity in the MDL process so the jurisdictional issue will be interpreted uniformly among all cases transferred.

The interest of the *amici curiae* in the proper functioning of the MDL process in order to insure recovery by harmed plaintiffs would be served by the approach and analysis taken by the district court.

III. THE MDL DISTRICT COURT CORRECTLY APPLIED THE FIFTH CIRCUIIT PRECEDENTS ON PURPOSEFUL AVVAILMENT IN LIGHT OF SUPREME COURT PRECEDENTS

The Fifth Circuit precedents, in light of Supreme Court decisions, have been thoroughly and fully examined in Judge Fallon's order and Appellee's brief. *Amici curiae* believe that TG, though its marketing and sales activities, have satisfied both the stream of commerce test and the targeting requirements of *Asahi Metal Industry Co., Ltd. V. Superior Court of California*, 480 U.S. 102 (1987) and *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011) plurality opinions. Having found that Judge Fallon correctly applied the Fifth Circuit precedents that continue to provide the appropriate due process standards after *McIntyre*, it is clear that, even under Fourth Circuit law, or the plurality decisions of *Asahi* or *McIntyre*, there are sufficient grounds and evidence of additional conduct, as set forth in the district court's opinion, to exercise jurisdiction in this case.

One feature of the instant case that warrants special attention is the fact that TG advertised itself through the internet as being capable of exporting drywall

throughout the world. It did this both on its own website and on the Alibaba website. TG viewed the internet as an effective way to get business. Little consideration has been given in past precedents to the power of the internet to reach potential buyers and create a demand for products. As found by Judge Fallon, there were a number of activities by TG that directly targeted the state of Florida. But TG's presence on the internet, which defies geographical and jurisdictional boundaries, was also effective in making sales in Virginia and elsewhere in the United States.

Amici curiae note that the use of the internet by foreign companies has increased in recent years and has many of the qualities of purposeful availment that is the touchstone of the minimum contacts requirement. Business can be successfully solicited and obtained through the internet directed at the United States as a whole. Protecting American businesses and consumers from internet assaults by foreign companies that, like TG, then disavow all responsibility for their defective products, is a genuine concern to the Senators and Congressmen who have joined this *amici curiae* brief.

CONCLUSION

The order of the district court denying Appellant's motion to dismiss for lack of personal jurisdiction should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B)(i) because this brief contains 4,841 words, 614 lines, and 16 pages, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii) and 5th Cir. Local Rule 32.2.

2. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-pointTimes New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to F.R.A.P. 25(d), I hereby certify that the Appellees' Brief has been filed with the Clerk of Court by filing with the Clerk of Court electronically and served on the counsel of record by the Court's electronic Notice of Docket Activity or regular mail, this 7th day of May, 2013.

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