

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION	CIVIL ACTION MDL No. 13-2437 15-cv-1712
THIS DOCUMENT RELATES TO: Ashton Woods Holdings LLC, et al., Plaintiffs, v. USG Corp., et al., Defendants.	

**MEMORANDUM RE: USE OF CONTENTION STATEMENTS
TO AVOID DISCOVERY DISPUTES AND MOVE THE LITIGATION FORWARD**

Baylson, J.

November 6, 2017

In the Domestic Drywall MDL litigation, numerous discovery problems erupted during the course of the case on both liability and damages issues. The MDL has gathered together basically three different types of cases.

1. Direct Purchaser action in which the Court recently certified a class action of Direct Purchasers (ECF 631). __ F. Supp. 3d __.
2. Putative class of Indirect Purchasers, as to which the Court recently denied a class certification (ECF 633). __ F. Supp. 3d __.
3. A direct action by twelve of the largest homebuilders in the United States, who combined forces in a single Complaint originally filed in the Central District of California and transferred to this Court by the MDL panel.

The first use of contention statements in this litigation arose during discovery in the Direct Purchaser pretrial proceedings. In various motions and pretrial hearings, it became

obvious that the Plaintiffs had been very successful in gathering information through creative use of electronic discovery, search engines, strategies, and programming. The Court commented on this, and in order to expedite the case, as a result of Plaintiffs' success in finding so many detailed facts, much more than could probably have been accomplished in the pre-digital discovery days, the Plaintiffs should have the obligation of setting forth their contentions as to liability of each defendant.

Discovery had been limited to the issue and agreement among two or more of the defendants. A significant reason for the contention statements was the success of the Plaintiffs in the use of digital discovery opportunities, to uncover detailed facts relevant to the issue of whether an agreement among two or more of the defendants. The Court also required that each defendant would have to respond to those contentions. This was described in a memorandum filed on May 12, 2014, 300 F.R.D. 228. This process led to an early summary judgment motion by the Defendants that the Plaintiffs were unable to prove an agreement.

As a result of this process, of the original seven defendants, three settled, one was granted summary judgment, and three remain in the litigation. This Court's decision on summary judgment is reported at 163 F. Supp. 3d 175.

In this litigation, brought by the 12 homebuilders, there are some issues of whether the Plaintiffs are Direct or Indirect Purchasers under the Illinois Brick doctrine. This is a crucial issue on proving the fact of damage as detailed in the Court's recent decisions referenced above, granting class certification for Direct Purchasers, but denying class certification for Indirect Purchasers. Although the 12 homebuilders are not representing a class, one of the important

issues is whether they were Indirect Purchasers, and if so, whether they can prove through the Illinois Brick doctrine that they were injured by the alleged conspiracy.

As a result of the class action discovery, and the Court's ruling, no further discovery has been necessary as to the issue of an agreement relating to the Plaintiffs – the principal discovery issues have related to their purchases of drywall, the fact of injury, and the amount of damages.

For these reasons, a second round of contention statements is now being utilized in the Ashton Woods case, where constant discovery battles were being fought over document requests and depositions. These disputes need not be detailed. However, the Court realized, on the eve of a hearing on one of many motions to compel, that in the interest of fairness and conservation of resources by both the Court and counsel, service of contention statements should precede any further depositions. The Court further determined there should be a “time out” of the many depositions that had been scheduled by the then-existing December 31, 2017 discovery deadline, pending service of contention statements as to the fact of damage and the amount of damage.

A hearing was held with counsel where the Court explored this concept as superior to any other form of discovery. Without requiring counsel to make any agreements until they could talk to their clients, and each other, the Court allowed the opportunity to either come to an agreement on the contents and dates for the service of these statements, and responses. Although there were some agreements, the Court has distilled the remaining disputes into the order being entered below.

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AMENDED PRE-TRIAL SCHEDULING ORDER
RE: CONTENTION STATEMENTS

Following submissions on behalf of Plaintiffs and Defendants concerning the Contention Statements discussed at a hearing on October 19, 2017, the following will constitute the Court's decision on content and scheduling Contention Statements and further proceedings. This schedule is designed to assure exchange of relevant information among the parties in a manner that is fair to all parties and to keep this complex litigation moving at a reasonable pace, but allowing for sufficient time for the parties to assemble and receive information and proceed towards conclusion of pre-trial proceedings, hopefully within one year.

In finalizing this schedule, in antitrust cases, there is a distinction between the "fact of injury" and the "amount of injury," although there may be some overlapping facts as to both concepts. This Order is intended to require completion of pre-trial discovery on both issues by a fair, orderly schedule.

1. Plaintiffs shall serve Contention Statements as to the fact of injury in consecutively numbered paragraphs – December 22, 2017.

2. Each Plaintiff shall serve a Contention Statement as to the amount of its damages, by January 15, 2018, and showing the basis for all calculations.

3. Not later than January 15, 2018, Defendants shall serve counter Contention Statements as to the “fact of injury,” and by February 15, 2018, as to the amount of damages, as to each plaintiff. The Court will not require Defendants to make any calculation of damages.

4. General.

- a. If a contention does not apply to all Plaintiffs, or all Defendants, it shall be specific as to its applicability.
- b. The Contention Statements shall be stated in separately numbered paragraphs, in chronological order, if feasible, and shall include reasonable details, a citation to the documents, sworn declarations or deposition testimony (or other source(s)) relied upon by each party, but not requiring every possible citation to the record.
- c. If any party desires to rely on an expert for these Statements, the expert reports must be served with the Contention Statements and with the information required by Rule 26(a)(2). As to any Contention Statement prepared by a party’s own employees, or existing professional (such as an accounting firm), and the party does not serve an expert report, that party will be precluded from presenting expert testimony on these topics at any future time.
- d. Each party shall accompany its Contention Statement with identification of at least one, but not more than three, officers, employees, third parties or experts, who are knowledgeable about the Statement, and who will appear for a deposition if requested.

- e. If a party relies on the same witness for both the fact of injury and the amount of damages, that individual may be deposed for a total of eight hours. Otherwise, these depositions will be limited to five hours each.
5. The Plaintiffs' statements as to the amount of damages shall contain at least the following information:
- a. How much gypsum wall board did each Plaintiff purchase (preferably stated in square feet) for which it is claiming damages;
 - b. How much did the Plaintiff pay for that wallboard;
 - c. Which manufacturer(s)' wallboard did the Plaintiff purchase and how much from each?
 - d. Which entities purchased gypsum wallboard for each Plaintiff and how much did each entity purchase?
 - e. If a Plaintiff does not know these numbers, it may estimate the amount by providing a calculation for the estimate.
 - f. The date or date range for purchases and damages.
 - g. How much does Plaintiff allege it was overcharged.
 - h. State the basis of each element for damages (e.g., lost profits, lost going concern value), and the total amount of damages you are claiming.
6. As to the fact of injury, and assuming Plaintiffs are asserting any overcharge was "passed on" or "passed thru" to your customers, or by higher home sale prices, Plaintiffs must state the facts supporting the contention.

7. Defendants' Contention Statements shall have the same level of detail as the Plaintiffs'.

8. Counsel shall confer promptly about any asserted deficiencies in these statements, and attempt to resolve disputes. The Court will allow modifications or clarifications to avoid further disputes, provided this is accomplished within thirty (30) days of service.

9. Depositions shall be stayed, except for perpetuation of testimony, if necessary, until 14 days after Plaintiff has served its Contention Statements on fact of injury. Depositions of the individuals identified by each party may be taken by the opposing party, starting 14 days after the service of that party's Contention Statement. All depositions shall be completed by May 30, 2018.

10. The deadline for any dispositive motions or *Daubert* motions will be June 30, 2017. Responses will be due July 30, 2018; reply briefs by August 24, 2018.

11. The Court ascertains from the parties' submissions that there still may be some lingering disputes about production of documents and/or electronically-stored information by a party, whether Plaintiffs or Defendants. The Court will require that these issues be resolved promptly. Counsel shall confer with specifics, within the next 14 days. If the issue cannot be resolved, within seven (7) days thereafter, a party shall notice depositions of one or two witnesses of an opposing party, either named individually or by topic, under Rule 30(b)(6), and that deposition take place within 14 days thereafter. Any motion relating to this issue must be filed within 14 days after the deposition(s) of a party. In other words, the Court will not consider any future complaints about document discovery or ESI, unless presented for decision as required.

12. The Contention Statements will have a preclusionary effect in this case, but for an Act of God, or a substantial change in governing legal principles.

BY THE COURT:

/s/ Michael M. Baylson

Date: 11/6/2017

MICHAEL M. BAYLSON
United States District Court Judge