UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
Building Materials Holding Corporation, et al.	.	
Reorganized Debtor(s).	.	Bankruptcy #09-12074 (KJC)

....

Wilmington, Delaware
January 27, 2010
3:00 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

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1 THE CLERK: All rise. Please be seated.
2 THE COURT: Good afternoon everyone.
3 ALL: Good afternoon.
4 MR. BEACH: Good afternoon, Your Honor. May it
5 please the Court, Sean Beach from Young, Conaway, Stargatt and
6 Taylor on behalf of the Debtors. Your Honor, the first eight
7 items on the agenda have been adjourned or otherwise resolved.
8 Items 9 through 14 were filed under Certification of No
9 Objection, and Your Honor I believe have signed all of those
10 orders. Which brings us, Your Honor, to item number 15 on the
11 agenda today, which is the debtor's motion for approval of a
12 second implementation order in connection with the plan to
13 essentially provide some level of comfort to certain insurance
14 carriers, who would be charged with the liquidation of the
15 supplemental employee retirement programs, and deferred
16 compensation programs. The objection deadline was on Monday at
17 10:00 a.m. No objections were received, but given that we
18 couldn't file a certificate of no objection until 10:00 a.m.
19 this morning, we determined not to do that in case Your Honor
20 had any questions regarding the motion. But there have been no
21 objections, and unless Your Honor has any questions, we did
22 file a revised form of order, with some slight clarifications,
23 which should've been in Your Honor's binder.
24 THE COURT: It was. I've reviewed it and do not have
25 any questions, but let me ask if anyone else wishes to be heard

1 in connection with this motion. I hear no response.
2 Do you have a form of order for me?
3 MR. BEACH: I do, Your Honor. May I approach?
4 THE COURT: You may. Thank you. The order has been
5 signed.
6 MR. MCMAHON: Your Honor, good afternoon. Joseph
7 McMahon for the acting United States Trustee. With the Court's
8 permission, I'd like to be excused.
9 THE COURT: Well, you just got here. That's fine.
10 MR. MCMAHON: If the first 14 agenda items had taken
11 longer, I would've stayed. Thank you, Your Honor.
12 THE COURT: Thank you, Mr. McMahon. I'm sure I'll
13 see you soon anyway.
14 MR. BEACH: Your Honor, what I would request I think
15 is the most efficient way to proceed with the remainder of the
16 hearing is to take certain matters out of turn. What we'd like
17 to do if it's acceptable is to take out on number 19 which is
18 an omnibus claim objection which I think will be quick. And
19 then after that, Your Honor, item number 18, which is the cure
20 -- which was set up as a cure issue related to the Southwest
21 Management matter, which now is I believe Your Honor has been
22 advised, the Debtors have determined to reject that contract so
23 we won't be going forward as a contested matter, but I know the
24 Debtors, and I suspect Southwest Management may have some
25 remarks for the Court, which I believe will be pretty quick in

1 connection with that matter.

2 THE COURT: Okay. It did get to me just in the nick
3 of time as I was refreshing myself from the earlier hearings,
4 and I appreciate the call.

5 MR. BEACH: Well, I'm glad it got to you before you
6 fully prepared, Your Honor. We did call chambers as quickly as
7 we knew how the matter was going to be handled. And then after
8 that, Your Honor, what we'd like to do is to handle items
9 number 16 and 17. As we've advised Your Honor, item number 16
10 has a resolution in principal which we'll state to the Court on
11 the record, and then item number 17 is the only contested
12 matter, other than perhaps a claim objection matter going
13 forward.

14 THE COURT: Okay.

15 MR. BEACH: Thank you, Your Honor. With that, I'd
16 like to cede the podium to my colleague, Rob Popitti.

17 THE COURT: Very well.

18 MR. POPITTI: Good afternoon, Your Honor. For the
19 record, Rob Popitti from Young, Conaway, Stargett and Taylor on
20 behalf of the Debtors. As Mr. Beach said, we're here on the
21 eighth omnibus claims objection, agenda number 19. Your Honor,
22 if you would like, I can approach with a copy of the proof of
23 claim. I don't know if Your Honor's had an opportunity to --

24 THE COURT: It's in the binder.

25 MR. POPITTI: Okay.

1 THE COURT: I've -- it's actually a proof of
2 interest, I have reviewed it.
3 MR. POPITTI: Great, Your Honor. You've actually
4 made my argument I think. Your Honor, the objection's a little
5 bit incoherent, but I think at bottom, as Your Honor just
6 eluded to, it's really just a proof of interest. The Debtors
7 have objected to it on that grounds. As we've done in the
8 past, Your Honor, we would request that you overrule the
9 objection as a proof of interest that need not be filed in
10 these cases.
11 THE COURT: All right. Let me ask for the record if
12 anyone is present or on the telephone on behalf of Vincent
13 Rhynes.
14 ALL: (No verbal response).
15 THE COURT: I hear no response. As I said, I have
16 reviewed the objection and the response, and this is purely an
17 equity interest. I'm prepared to grant the relief that's been
18 requested.
19 MR. POPITTI: Great, Your Honor, thank you. May I
20 approach with the Form of Order?
21 THE COURT: You may.
22 MR. POPITTI: Thank you.
23 THE COURT: Thank you. That order has been signed.
24 MR. POPITTI: Thank you, Your Honor. With that, I'll
25 turn the podium over to Jeremy Graves from Gibson Dunn. Thank

1 you.

2 THE COURT: All right.

3 MR. GRAVES: Thank you, Your Honor. For the record,
4 Jeremy Graves with Gibson Dunn and Crutcher on behalf of the
5 reorganized debtors. As Mr. Beach indicated, we would just
6 like to make a few brief remarks regarding agenda item 18 which
7 had previously been before Your Honor as a cure claim dispute,
8 with respect to the purchase agreement with Southwest
9 Management. The Debtors and Southwest Management have been
10 engaged in discussions prior to this morning, in an effort to
11 reach an agreement on the matter with respect to the cure
12 amount. And partially as a result of these discussions and
13 partially as a result of the Debtor's renewed restructuring
14 efforts, and discussions with their new owners, the Debtors
15 have engaged in a new cost benefit analysis of the costs and
16 benefits that would be associated whether they are assuming or
17 rejecting the purchase agreement with Southwest Management.

18 And as a result of that analysis that the Debtors
19 have engaged in, the Debtors have determined at this time, that
20 it is in the best interest of the estates and their business
21 judgment to move to reject the purchase agreement, in
22 accordance with Your Honor's prior order which would retain the
23 option for the Debtors to do that.

24 THE COURT: All right. Does anyone else wish to be
25 heard in connection with this matter?

1 MR. KRAKOW: David Krakow, Gibbons for Southwest
2 Management. We take no position on the rejection, just that
3 the form of order will have to be submitted to the Court --
4 THE COURT: Very well.
5 MR. KRAKOW: -- on a later basis.
6 THE COURT: Thank you. I'll wait its submission
7 then.
8 MR. GRAVES: Your Honor, if it's okay with you, we
9 will present the proposed order under certification of counsel
10 regarding the rejection.
11 THE COURT: That's fine.
12 MR. GRAVES: Thank you. The next item on the agenda,
13 I believe the last item on the agenda are our items 16 and 17,
14 which relate to Weis' motion to expand the bar date and the
15 related motion for relief from stay. I'd like to start this
16 afternoon with the good news, which is that we've reached an
17 agreement on the lift stay motion. It's sort of a menu option
18 approach, in that we view the bar date motion as a gating
19 issue, and so we've agreed that if the Debtors are to prevail
20 on the bar date motion, I believe that we've agreed that the
21 stay would remain in place, with respect to the Debtors,
22 subject to two conditions, which Weis would like to have in the
23 order. Which is that, Weis asserts that it is an additional
24 insured, under certain insurance policies, and that it can
25 recover directly against the insurance providers in its

1 capacity as an additional insured. And so Weis has asked that
2 the order clarify that the stay imposed does not impact their
3 rights against those insured -- their direct rights against the
4 insurance providers, and without conceding any defenses or
5 anything of the like, the Debtors agree that if Weis is
6 corrected, it has rights to the additional insured the stay or
7 plan injunction provisions don't, in fact, prevent them from
8 proceeding directly in direct action against the insurance
9 providers.
10 And second, Weis wants to make sure that the order is
11 clear that it does not impede their ability to proceed in the
12 state court action against the other third party, the other
13 defendants or third party defendants, and of course, we would
14 agree to that as well. If Weis prevails on the bar date
15 motion, Weis, of course, would have an unliquidated claim that
16 must be liquidated, and so the Debtors will work with Weis to
17 agree to a proposed form of order lifting the stay, if in fact,
18 Your Honor rules that they have a claim. Which I believe,
19 unless you have any questions, brings us to the bar date or if
20 Weis has any comments.
21 THE COURT: Well, is there still a dispute about
22 whether the insurance policy provides self-insured retention or
23 whether it provides first dollar coverage? It's an issue
24 that's raised in connection with the motion to file lead claim.
25 MR. GRAVES: I'll let Weis respond.

1 MS. RAPORT: Your Honor, Leigh Anne Raport from Ashby
2 and Geddes on behalf of Weis Builders. Your Honor, we don't
3 think that issue's relevant anymore, because the resolution
4 with lift stay. I think Weis Builders wants the opportunity to
5 negotiate with the Debtor's insurance carrier.
6 MR. GRAVES: If I could just bring a little clarity
7 for the Debtors if I could.
8 THE COURT: Go ahead.
9 MR. GRAVES: We will be presenting evidence in our
10 case in chief in the bar date expansion motion regarding the
11 insurance policies that are in place, and Mr. Baumann who is
12 here on behalf of the Debtors will testify regarding the
13 deductible amounts, or the existence of a deductible and the
14 deductible amounts that the Debtors believe would apply.
15 THE COURT: All right. So that's your way of telling
16 me you think it is still relevant?
17 MR. GRAVES: We do believe that the issue is
18 relevant. I'm not sure if it will be disputed.
19 THE COURT: Well, I didn't have the benefit and this
20 is not a criticism, of the terms of the resolution of the
21 motion to lift stay. But it sounds to me as if you're almost
22 really there, in terms of acknowledging the claim, and I guess
23 what I would like to know is, and I have read the papers, but
24 if you're able to do this without compromising your litigation
25 strategy, why are you really opposing this?

1 MR. GRAVES: Well, Your Honor, the Debtors are
2 opposing this for a couple of reasons, and one of them, as
3 you'll see once we get in our arguments, we believe that if the
4 stay is lifted in this instance, it has a potential to
5 prejudice the Debtors on a going forward basis. And there's a
6 couple of reasons for that. One of them is that the Debtors
7 are attempting to reduce the outstanding amount of their
8 letters of credit. And in their negotiations with Ace, the
9 existence of these very types of claims have been a sticking
10 point.
11 THE COURT: But you've made your lift stay deal with
12 this creditor.
13 MR. GRAVES: Your Honor, we -- the --
14 THE COURT: Or purported creditor.
15 MR. GRAVES: Just to be clear, the deal that we've
16 made is that they could proceed against the insurance company,
17 the insurance providers, under their rights as an additional
18 insured.
19 THE COURT: I understand the distinction.
20 MR. GRAVES: And the Debtors believe that any
21 insurance company may be subrogated to any defenses that the
22 Debtors could assert. One of those defenses being the failure
23 to file proof of claim, and so the Debtors feel it's necessary
24 to continue to object to the allowance of the proof of claim.
25 THE COURT: Well, okay that's -- so that I'm clear,

1 is the Debtor's concern a timing concern, or is it a concern
2 that there are other claimants who have not yet filed or who
3 filed late, who you think will be seeking similar relief?
4 MR. GRAVES: It is certainly the second. I'm not
5 sure I understand where Your Honor says this is a timing
6 concern.
7 THE COURT: Well, these are the types of claim which
8 ordinarily wouldn't be liquidated here. The plan's been
9 confirmed, so now would be the time for those things normally
10 to move forward. So I wouldn't usually expect resistence from
11 the Debtor as a result of timing. But you're telling me that's
12 not really the problem here.
13 MR. GRAVES: No, the problem is substance. As Mr.
14 Beach just pointed out to me, to make clear to Your Honor, if
15 in fact, Weis is able to successfully assert a claim either
16 directly against the Debtors or as an additional insured under
17 the insurance coverage, the money will come directly out of the
18 reorganized Debtors' operating expenses, by virtue of the plan
19 which was confirmed, which pays claims that are secured by a
20 letter of credit, as this one would be, in full out of the
21 Debtor's operating expenses, instead of having a trigger on the
22 letter of credit.
23 And the Debtors believe that if Weis is successful in
24 asserting any claim about the Debtor's insurance providers,
25 whether as an additional insured, or a direct claimant, it will

1 result in a direct recovery out of the Debtor's estates. And
2 for that reason, the Debtors believe that it is a matter of
3 substance, not just one of timing.
4 THE COURT: Okay. And -- but I thought I heard you
5 also say there might be others similarly situated, or did I not
6 hear that correct?
7 MR. GRAVES: You did hear me say that, Your Honor.
8 There is a matter that is on your docket, Parker Development
9 Northwest, that is in a virtually identical set of
10 circumstances. It was originally scheduled for today, it has
11 since been adjourned to February 22nd, and the Debtors continue
12 to receive requests to lift the stay on these various types of
13 construction defect claims on an ongoing basis, and many of
14 them would result in class five claims that the Debtors would
15 have to directly satisfy. So what the reason that the Debtors
16 would agree to the lifting -- to an order that clarifies that
17 if -- that Weis can proceed in its capacity as an additional
18 insured is merely because that claim is a direct claim that
19 Weis may have against the insurance provider, that the Debtors
20 feel is vitally necessary that the Debtors preserve any
21 defenses that the Debtors -- that the insurance company may be
22 able to assert one of those as late filed claim.
23 THE COURT: I understand. Okay. Well, it's Weis'
24 motion, let's proceed.
25 MS. RAPORT: May it please the Court, Leigh Anne

1 Raport, from Ashley and Geddes on behalf of Weis Builders, Inc.
2 Your Honor, I appreciate you hearing us today with respect to
3 the motion to enlarge the bar date. Your Honor, I have two
4 witnesses here with me today, Weis lead counsel in the state
5 court action, Tonya MacBeth from Burch and Cracchiolo, which
6 I'll refer to as B and C, who was flown in from Arizona, and
7 Weis' local counsel in the state court action, Bill Salmon,
8 from Rhodes and Salmon, who has flown in from New Mexico.
9 Unless Your Honor has any questions, I would like to call my
10 first witness.
11 THE COURT: Proceed.
12 MS. RAPORT: Mr. Salmon.
13 THE CLERK: Please remain standing.
14 WILLIAM C. SALMON, WEIS' WITNESS, SWORN
15 THE CLERK: Please state your full name for the
16 record and spell it.
17 MR. SALMON: William C. Salmon.
18 THE CLERK: Thank you.
19 DIRECT EXAMINATION
20 BY MS. RAPORT:
21 Q. Good afternoon, Mr. Salmon. Can you tell me where you
22 currently are employed?
23 A. I am employed with Rhodes and Salmon PC. It's a law firm
24 that -- with two lawyers, myself and Mark Rhodes.
25 Q. Can you briefly describe the nature of your practice?

1 A. It’s a general practice firm. I don’t -- I do a lot of
2 real estate law, both transactional and litigation, but it’s a
3 general practice firm.
4 Q. Can you tell me how you first became involved in this case?
5 A. In late -- in December of 2007 and January of 2008, Burch
6 and Cracchiolo contacted me about helping them getting admitted
7 pro hac vice in this state court litigation, and asked me to be
8 -- our firm to be local counsel with them.
9 Q. And what is your role in the state court action?
10 A. Well, Burch and Cracchiolo, Mitch Resnick and Tonya
11 MacBeth, my first contact was Mitch Resnick, he explained to me
12 that -- and we agreed on a division of labor and they were
13 gonna do all the work on the case really, except for matters
14 involving local law, New Mexico law, and all the substantive
15 work would be done by them, all the discovery. It was gonna
16 to be a complex case. It already had been pending for a year,
17 and there would be a lot of very intensive discovery, and they
18 were gonna do all the discovery, handle the expert witnesses.
19 But I would be contacted if there was an issue about local and
20 New Mexico procedure and any local law issues. They would be
21 drafting the pleadings as well.
22 Q. Have you spoken to Debtor’s counsel in the state court
23 action or the bankruptcy proceeding?
24 A. Yes. Marty Diamond became involved in March of 2009. This
25 was after a third amended, a third party complaint had been

1 filed, and I, as a professional courtesy, gave him an extension
2 of time to answer the complaint.
3 And I explained to him that any of his substantive
4 questions about the project and about discovery would have to
5 be covered by Tonya MacBeth because they were -- Burch and
6 Cracchiolo were lead counsel. They were handling the
7 litigation, and I was just local counsel that had assisted
8 them, admitting them pro hac vice and -- because he started out
9 with some questions about -- and I couldn't answer them.
10 I subsequently -- my first conversation with him was in
11 late March. Another conversation in early April, and there
12 were e-mails from Tonya, this is 2009, e-mails from Tonya
13 MacBeth to all counsel, and there's a number of parties,
14 setting up a meeting at the project for April 14th and 15th of
15 2009. And I had a conversation at the site with Marty Diamond
16 again, and Tonya was late arriving at the meeting.
17 And we had a room full of attorneys there and they were
18 all patiently waiting for her arrival, and I explained to them
19 that -- because I was attorney co-counsel for Weis, that I
20 really couldn't proceed on the meeting without her, because I
21 really couldn't explain the details regarding the project. I
22 hadn't been up to the site at that point until that date, and
23 that we'd just have to wait for her to come, and that I was --
24 had called her cell phone, and that I understood she was on her
25 way. And I explained that to Marty Diamond as well, that

1 again, I was just co-counsel, and that she was lead counsel,
2 and the meeting would have to wait until she arrived.
3 Then subsequent to that, there was a bankruptcy notice
4 that Marty Diamond filed for the Debtor indicating that the
5 Debtor filed bankruptcy and that notice was sent, as I would've
6 expected to all counsel, including co-counsel, Tonya MacBeth.
7 Then there was a letter in early July from Jeremy Graves,
8 and it was basically -- it appeared to me to be a cease and
9 desist letter indicating that this entire action was stayed,
10 and that we could be subject to sanctions, that the case
11 couldn't move forward at all until there was a dismissal of the
12 BMC Group, there was three different entities there that were -
13 - different entities from the Debtor, but were apparently
14 related.
15 And I called Marty Diamond and I said -- I explained to
16 him that he would have to -- those issues regarding the stay
17 and regarding the bankruptcy would have to be dealt with with
18 Tonya MacBeth, and he needed to contact her regarding the
19 bankruptcy, and regarding the issues involved in the stay.
20 Q. Did you have any other interactions with Debtor's
21 bankruptcy counsel?
22 A. No. They were -- all their interactions were with the
23 Burch and Cracchiolo firm.
24 MS. RAPORT: Your Honor, may I approach with an
25 exhibit binder?

1 THE COURT: You may.
2 MS. RAPORT: Thank you.
3 (Ms. Raport approches The Bench)
4 THE COURT: Thank you.
5 BY MS. RAPORT:
6 Q. Mr. Salmon, can you please turn to the document marked Weis
7 Exhibit 1 in the exhibit binder? Can you tell me if you're
8 familiar with this document?
9 (Weis's Exhibit-1 previously marked for identification)
10 A. This is a notice of entry of bar date.
11 Q. And did you do anything with that notice when you received
12 it?
13 A. I looked at it. This was received some time in, I believe
14 it was late July. And when I looked at it, I noticed that it
15 was directed to myself, William C. Salmon, and Rhodes and
16 Salmon PC my law firm, and there were Proof of Claim forms that
17 listed myself as a creditor, and Rhodes and Salmon PC as a
18 creditor. And I noticed that it stated, you should not file a
19 Proof of Claim unless you believe you have a claim, and I did
20 not feel myself individually, or my law firm, had a claim
21 against the Debtor. I thought potentially there could've been
22 a possibility of a claim for attorney's fees, if they had -- if
23 the client had prevailed, but I concluded there was clearly no
24 claim that I could file on behalf of myself or my firm. And so
25 I did not act on this, and I put it in the file.

1 Q. Did you see Weis' name anywhere on that, the document or
2 the Proof of Claim form?
3 A. No. No, there was no reference to Weis anywhere.
4 Q. And you mentioned the potential claim that attorneys have
5 if successful. Is that normal in your industry?
6 A. Well, as an additional insured, an attorney representing a
7 party who's an additional insured could have a claim for
8 attorney's fees if they prevailed. So it's conceivable, you
9 know, our firm could've had a claim, at some point, against the
10 Debtor for attorney's fees.
11 Q. Were there any other reasons you didn't think that the
12 notice was significant and you just filed it away?
13 A. Well, I was under the belief that the communications
14 regarding the -- Weis' claims against the Debtor would've been
15 made to Burch and Cracchiolo and that Burch and Cracchiolo
16 would've gotten notices as attorney of record, and since I had
17 indicated I was not lead counsel, that any communication should
18 be with Burch and Cracchiolo, who are handling the case. I was
19 in a very passive role. Burch and -- from the outset, we
20 didn't want to have two law firms billing on a very large case
21 and doing all the same work, so I wasn't going to repeat and do
22 the same work they were doing on this case. So I was under the
23 belief that they've got all these notices regarding this
24 bankruptcy.
25 MS. RAPORT: Your Honor, I have no more questions for

1 Mr. Salmon.
2 THE COURT: Cross examination?
3 MR. GRAVES: Thank you, Your Honor.
4 CROSS EXAMINATION
5 BY MR. GRAVES:
6 Q. Mr. Salmon, you're a counsel of record in the underlying
7 state court action where Weis' claim against the Debtors is
8 pending, aren't you?
9 A. Yes.
10 Q. And in your practice there in New Mexico, you've had some
11 experience with bankruptcy issues, haven't you?
12 A. Some experience, yes.
13 Q. And on or before July 13, 2009, you received the Debtor's
14 Notice of Commencement, which advised you of the fact that the
15 Debtors had filed for bankruptcy, didn't you?
16 A. Well, I was aware that this entity had filed bankruptcy,
17 yes. There was notice --
18 Q. The question --
19 A. There was a notice filed in the state court action that
20 there was a pending bankruptcy.
21 Q. But you've also received directly from the Debtors, the
22 Notice of Commencement that was approved by the bankruptcy
23 Court, didn't you?
24 A. Yes, I believe I did.
25 Q. And on or before July 13th, 2009, you received the Debtor's

1 Notice of a Disclosure Statement hearing in this bankruptcy
2 case, didn't you?
3 A. You know I'm not sure about that.
4 Q. Okay.
5 A. I think so.
6 MR. GRAVES: Your Honor, may I approach with an
7 exhibit binder for you?
8 THE COURT: You may.
9 (Mr. Graves approaches The Bench)
10 THE COURT: Thank you.
11 BY MR. GRAVES:
12 Q. Would you please turn to Exhibit 6 in the Debtor's exhibit
13 binder?
14 (Debtor's Exhibit-6 previously marked for identification)
15 A. Okay.
16 Q. Does this document look familiar to you?
17 A. Yeah, this is a fax.
18 Q. And who would've sent this fax?
19 A. Well, I signed it. That's my signature at the bottom.
20 Q. Okay. If you flip over to the last page, page six in the
21 Debtor's Exhibit 6, what you see there is the first page of the
22 Debtor's Notice to Consider Approval of a disclosure statement
23 hearing, isn't that true?
24 A. Yes. I would've sent these -- it appears these documents
25 are what I faxed, yes.

1 Q. Okay. So it is true, isn't it, that on or before July
2 13th, 2009, the date of this fax, you received from the Debtors
3 the Notice of the Disclosure Statement Hearing?
4 A. Yes.
5 Q. And on or before July 13th, 2009 you also received a letter
6 from Debtor's counsel which discussed at length the automatic
7 stay, and its impact on the pending state court action, didn't
8 you?
9 A. Yes. That's what I just discussed. I called Marty Diamond
10 about this letter, this July 10th letter.
11 Q. And on or before -- around July 26th, 2009, you received
12 the Debtor's notice of the entry of the bar date order, didn't
13 you?
14 A. Yes.
15 Q. Okay. And upon receipt of the Notice of Commencement, the
16 disclosure statement hearing notice, and the letter from
17 Debtor's counsel, you promptly faxed each of these documents to
18 your co-counsel in the state court action, Tonya MacBeth and
19 Mitch Resnick at the Burch and Cracchiolo firm, didn't you?
20 A. Well, no. I did not fax the bar date notice. I did fax
21 this document.
22 Q. Did you ever send the bar date notice to Burch and
23 Cracchiolo?
24 A. In -- when this issue came up in late September.
25 MR. GRAVES: No further questions, Your Honor.

1 THE COURT: Is there any redirect?

2 REDIRECT EXAMINATION

3 BY MS. RAPORT:

4 Q. Mr. Salmon, I know you mentioned your experience in

5 bankruptcy. Could you go into a little more detail about that?

6 Maybe describe for us the amount of work you've done in

7 bankruptcy in the past ten years and the nature of the work?

8 A. Well, I generally refer out bankruptcy issues to the

9 attorneys that specialize in bankruptcy. I'm not at all

10 familiar with Chapter 11, in particular. My experience in

11 bankruptcy has been in residential foreclosure cases, where --

12 and lifting the stay in cases where there's no equity in the

13 property, and the lenders lifting the stay to foreclose on the

14 property.

15 Q. And about how many --

16 A. In a handful of cases -- I've had a handful of cases

17 related to bankruptcy in the last ten years.

18 MS. RAPORT: That's all I have, Your Honor.

19 THE COURT: Any recross?

20 MR. GRAVES: No, Your Honor.

21 THE COURT: Thank you, sir. You may step down.

22 MS. RAPORT: Your Honor, can I move the admission of

23 Weis' Exhibit 1?

24 THE COURT: Is there any objection?

25 MR. GRAVES: No, Your Honor. We had actually, just

1 to clarify the record in this matter, we've agreed with Weis to
2 the admission of all of the documents, I believe, that are
3 contained in Weis' hearing binder. And we've also agreed to
4 the admission, I believe, of Exhibits 1, 2, 3, 6 and -- I'm
5 sorry, Your Honor, if you're writing this down, 1, 2, 3, 6 and
6 11 through 17 in the Debtor's hearing binder, to speed the
7 process here.
8 MS. RAPORT: Your Honor, could I just note that with
9 regards to the admission of the affidavits by the Debtors, Weis
10 agreed to admit those documents, not for the truth of the
11 matter that's asserted in the documents, but that if that
12 witness was here, that was what they would testify to.
13 THE COURT: And please identify which exhibits those
14 are.
15 MR. GRAVES: If I could step in there. 1, 2, and 3,
16 Your Honor, the Debtors have submitted them for the truth of
17 the matter, that they testify to. Our agreement is just that
18 they would be admitted, and Your Honor would consider whether
19 or not their testimony is truthful.
20 THE COURT: It doesn't sound like there's an
21 agreement on the basis for admission or the conditions for
22 admission.
23 MR. GRAVES: It's just that they can rebut what is
24 said in the declarations. I don't believe there's any
25 objections to the actual admission of the documents themselves.

1 MS. RAPORT: Correct.
2 THE COURT: Oh, but they are being offered for the
3 truth?
4 MR. GRAVES: They are being offered for the truth of
5 the matter testified to.
6 THE COURT: Is there an objection? I know you're not
7 admitting that they're true, but is there an objection to their
8 1, 2, and 3 being admitted for the truth?
9 MS. RAPORT: There is, Your Honor. I believe that
10 they have some facts in there that directly contradict facts in
11 our affidavits, which I believe Ms. MacBeth will testify to,
12 concerning specifically, I believe, when the Debtors first
13 became aware of the state court action, and when the Debtors
14 first received service of the complaint in the state court
15 action.
16 MR. GRAVES: Your Honor, I don't believe that she's
17 articulating an objection to the admissibility of the
18 documents.
19 THE COURT: No.
20 MR. GRAVES: I believe we've agreed to the --
21 THE COURT: You're offering them for the truth and
22 they're hearsay.
23 MR. GRAVES: And I --
24 THE COURT: And they would not otherwise be
25 admissible for that purpose without agreement of --

1 MR. GRAVES: That’s correct. And the understanding
2 that I believe that we had with counsel is that they would not
3 object on hearsay basis, but that they would preserve the right
4 to present rebuttal testimony that may demonstrate a different
5 fact.
6 MS. RAPORT: Your Honor, we’ll agree that if they
7 were here and they were put on the stand that’s what they would
8 say.
9 THE COURT: Okay. D-1, 2, 3, 6, 11 to 17 are
10 admitted as are W-1 through 7, all by agreement.
11 (Debtor’s Exhibit-1 admitted into evidence)
12 (Debtor’s Exhibit-2 admitted into evidence)
13 (Debtor’s Exhibit-3 admitted into evidence)
14 (Debtor’s Exhibit-6 admitted into evidence)
15 (Debtor’s Exhibit-11 admitted into evidence)
16 (Debtor’s Exhibit-12 admitted into evidence)
17 (Debtor’s Exhibit-13 admitted into evidence)
18 (Debtor’s Exhibit-14 admitted into evidence)
19 (Debtor’s Exhibit-15 admitted into evidence)
20 (Debtor’s Exhibit-16 admitted into evidence)
21 (Debtor’s Exhibit-17 admitted into evidence)
22 (Weis’ Exhibit-1 admitted into evidence)
23 (Weis’ Exhibit-2 admitted into evidence)
24 (Weis’ Exhibit-3 admitted into evidence)
25 (Weis’ Exhibit-4 admitted into evidence)

1 (Weis' Exhibit-5 admitted into evidence)
2 (Weis' Exhibit-6 admitted into evidence)
3 (Weis' Exhibit-7 admitted into evidence)
4 MS. RAPORT: Thank you, Your Honor. Your Honor, may
5 I call my next witness?
6 THE COURT: You may.
7 MS. RAPORT: Ms. MacBeth.
8 THE CLERK: Please remain standing.
9 TONYA MACBETH, WEIS' WITNESS, SWORN
10 THE CLERK: Please state your full name for the
11 record and spelling your last name.
12 THE WITNESS: My full name is Tonya K. MacBeth. My
13 first name is spelled T-O-N-Y-A. My last name is M-A-C-B-E-T-
14 H, usually with no space.
15 DIRECT EXAMINATION
16 BY MS. RAPORT:
17 Q. Good afternoon, Ms. MacBeth. Can you tell me where you're
18 currently employed?
19 A. I'm employed at Burch and Cracchiolo in Phoenix, Arizona.
20 Q. Can you briefly describe the nature of your practice?
21 A. I am -- my practice consists primarily of insurance
22 defense, focusing on construction defect litigation, generally
23 defending general contractors and subcontractors in those
24 actions.
25 Q. Could you tell me how you and your law firm first became

1 involved in this case?
2 A. We were contacted by the insurance company for Weis and
3 they requested that we come in as counsel, taking over for an
4 existing law firm, as the case had developed beyond the initial
5 lien claims, and was moving into construction defect
6 allegations, and we accepted that and became counsel for Weis
7 Builders in that matter.
8 Q. Could you give me some initial background on the New Mexico
9 state court action?
10 A. Sure. The New Mexico state court action had -- is
11 captioned Rainbow Vision Santa Fe LLC v Weis Builders and had
12 additional defendants in the caption as well, which were mainly
13 focusing on outstanding lien claims and construction lay
14 claims. As the litigation progressed, it became evident that
15 there were certain conditions at the site that raised issues of
16 sufficiency of the actual construction. But Rainbow Vision and
17 Weis Builders entered into a settlement agreement, and that
18 settlement agreement put Weis in the position that it would
19 need to make certain remediations commonly referred to as
20 repairs to three separate areas, and those remediations were
21 part of that settlement agreement.
22 Q. How much did the work pursuant to the settlement agreement
23 cost Weis?
24 A. The remediations up to that point, up to September of 2008
25 were roughly $700,000 in remediation work. A majority of that

1 expense is related specifically to a reconstruction of the
2 project balconies which involve significant framing issues, as
3 well as other subcontractor's related work.
4 Q. Can you tell me how the Debtors first became involved in
5 this matter?
6 A. Well, the Debtors were informed of potential issues at the
7 site by Weis Builders, outside of litigation, in early 2007 by
8 communication between the Weis principals and by letter to the
9 Debtor. Subsequent to that, they were named in the second
10 amended third party complaint, in which Weis Builders alleged
11 specific construction defect actions in its third party
12 complaint against subcontractors. And then they were also
13 named subsequently in the third party complaint.
14 Q. Can you please turn to the document marked Weis Exhibit 2
15 in the exhibit binder?
16 A. Sure. I also want to add that in February of 2008, before
17 being served, there was a tender of defense indemnity made by
18 Weis to BMC so that they could be -- their carrier should be
19 put on notice pursuant to that correspondence.
20 Q. Do you recognize the document?
21 A. You said Exhibit 2, right?
22 Q. Yes.
23 A. Yes.
24 Q. Can you tell me what it is?
25 A. This is the December '08 third amended third party

1 complaint.
2 Q. And you said the Debtors are included on there?
3 A. Yes.
4 Q. And is your firm listed on the complaint?
5 A. Yes, it is.
6 Q. Can you tell me briefly what the third amended complaint
7 alleges?
8 A. The third amended complaint really gives significant detail
9 regarding all of the parties involved as third party
10 defendants, as well as specific indemnity and breach of
11 contract, negligence, and essentially subrogation claims.
12 Q. Can you please turn to the document marked Weis Exhibit 3
13 in the exhibit binder?
14 A. Certainly.
15 Q. Do you recognize the document?
16 A. I do.
17 Q. Can you tell me what it is?
18 A. It is an e-mail from Maureen Thomas to me and carbon copied
19 to Len Baumann.
20 Q. Who is Ms. Thomas?
21 A. I was told that Ms. Thomas is counsel for BMHC.
22 Q. And can you tell me generally what the letter says?
23 A. The e-mail letter says that she has been served with the
24 third party complaint in September of 2008, and they were
25 seeking additional information to understand how they should

1 process that claim and identify exactly generally with the
2 notice pleading of the complaint was specifically discussing.
3 Q. Did you have any further interactions with Ms. Thomas after
4 that initial e-mail?
5 A. I had conversations with her before and after this e-mail.
6 Q. And what did the conversations include?
7 A. Identification as to what the claims were at the project,
8 that the litigation was ongoing, that you know, how we should
9 be contacting the company, who were the responsible parties,
10 whether or not they would attend an upcoming mediation that was
11 being planned pursuant to an existing scheduling order.
12 Q. Did you communicate with Ms. Thomas over the phone or via
13 e-mail?
14 A. Both.
15 Q. Please turn to the document marked Weis Exhibit 4 in the
16 exhibit binder.
17 A. Sure.
18 Q. Do you recognize the document?
19 A. I do. This is a chain of e-mails which predates the prior
20 exhibit, in which we are specifically discussing how they are
21 going to participate in the upcoming mediation and when it’s
22 going to occur, it’s along those lines.
23 Q. And was the meeting mentioned in that e-mail ever held?
24 A. You know, it was not. That meeting was transformed from a
25 mediation to an on site expert identification of the issues.

1 We felt that it would be more successful to get the parties on
2 site to be able to specifically identify with the hands-on
3 demonstration by the experts, as to what the issues were. So
4 it was converted. A meeting was held September, just a few
5 months after September of 2008.
6 Q. Can you please turn to the document marked Weis Exhibit 5
7 in the exhibit binder?
8 A. Certainly.
9 Q. Do you recognize the document?
10 A. I do.
11 Q. And what is it?
12 A. This is an e-mail from Lee Gardner to Maureen Thomas,
13 myself and my paralegal, Katie.
14 Q. And what was the e-mail regarding?
15 A. This e-mail chain is regarding the participation of BMHC
16 via Gallagher and Bassett who I guess was their claims agent at
17 the time, in those meetings and what information they needed to
18 make their presence successful in their own evaluation of
19 coverage.
20 Q. Ms. MacBeth, was Mr. Salmon included in any of those
21 correspondences?
22 A. No.
23 Q. Can you please turn to Weis Exhibit 6 in the exhibit
24 binder? Do you recognize the document?
25 A. Yes, I do.

1 Q. And what is it?
2 A. This is the certificate of service for -- that a company's
3 discovery request in New Mexico state court. And this is
4 specific to the request for admissions and non-uniform
5 interrogatories to the Debtor.
6 Q. And when is it dated?
7 A. It is dated November -- I can't actually see the day of
8 2008.
9 Q. Did Mr. Salmon or anyone at his firm have involvement in
10 drafting the discovery?
11 A. No.
12 Q. Who drafted the discovery?
13 A. I did.
14 Q. I wanted to talk to you a little bit about the division of
15 labor between your firm and Mr. Salmon's firm in the state
16 court action. Can you tell me a little bit about that?
17 A. Yes. In order to -- at the time that our representation
18 for this case initiated, we did not have any attorneys in the
19 office who were licensed in New Mexico. And in order to take
20 the representation that was requested of us from -- on behalf
21 of Weis Builders, we needed local counsel.
22 So my senior partner, Mitch Resnick contacted Mr. Salmon
23 and created an arrangement where we would have local counsel
24 who could address us on the subtleties of New Mexico state law,
25 procedural issues, and provide us with the authority to

1 participate in New Mexico.

2 Subsequent to that, I gained admission to the New Mexico
3 Bar and we no longer required local counsel for pro hoc status,
4 but we kept Mr. Salmon involved, because it's helpful to have
5 someone who can, you know, print out a pleading, sign it, and
6 have it delivered to the court that moment.

7 Q. And what did you tell Mr. Salmon to do if he was contacted
8 by anyone in the state court matter?

9 A. Mr. Salmon was directed, and we had a general understanding
10 that all substantive issues should be addressed by myself or
11 Burch and Cracchiolo directly. It was -- it's too complex of
12 an action to have two people, let alone two separate firms
13 making a strategic or factual determinations. So we were using
14 Bill Salmon to handle the local counsel rule requirements.

15 Q. And so you handled all substantive matters in the state
16 court action?

17 A. Absolutely.

18 Q. And could you just give me a brief idea of what that
19 included?

20 A. Everything, all discovery, a majority of the pleading
21 drafting, mediation scheduling, formation of demands,
22 production of documents, everything that would be associated
23 with moving forward a multi-party litigation.

24 Q. Did you have any further interactions with the Debtors
25 after the service of discovery in November of 2008?

1 A. Yes. I had multiple in-depth conversations with Marty
2 Diamond, their New Mexico counsel. I also had conversations
3 with their Texas counsel. Marty and I discussed what discovery
4 needed to occur, that discovery was outstanding, and he needed
5 to produce those documents and respond to that prior request.
6 Q. Did you ever meet Mr. Diamond?
7 A. I met with Mr. Diamond two or three times, including at on-
8 site at the site inspection, which Mr. Salmon previously
9 referenced in his testimony, in which Marty Diamond and I
10 discussed potential resolution of the claims, how we could take
11 care of the issues without diving into substantial litigation
12 and discovery, as well as specific identification of the issues
13 that were present in the construction itself.
14 Q. Did you have any discussion with Mr. Diamond concerning the
15 automatic stay?
16 A. Subsequent to that inspection, there was no automatic stay
17 at that inspection, but I did discuss with Marty Diamond the
18 automatic stay. He and I discussed in great detail my concern
19 regarding the claim that the stay applied to all
20 subcontractors, including those who were not alleged, including
21 those that were not related to the Debtor here in this action,
22 and how this was impacting existing substantive motions which
23 were pending in the state court unrelated aspects of the case.
24 He and I did discuss that the bankruptcy existed.
25 Q. And what was your response with regards to what Weis was

1 prepared to do, concerning the automatic stay?
2 A. I informed him that it was our intent to have the stay
3 lifted, and that we were particularly concerned with the threat
4 of sanctions for items that we did not feel were impacted by
5 the existing bankruptcy at all.
6 Q. Did you make it clear to Mr. Diamond that you were lead
7 counsel to Weis?
8 A. He was well aware of that fact. I'm sure I discussed it
9 with him on more than one occasion.
10 Q. And did Mr. Diamond ever inform you of the claims bar date?
11 A. No, he did not.
12 Q. Did he ever send you anything regarding the claims bar
13 date?
14 A. No, he did not.
15 Q. Can you please turn to the document marked Weis Exhibit 7
16 in the exhibit binder?
17 A. Certainly.
18 Q. Do you recognize the document?
19 A. I do.
20 Q. What is it?
21 A. It is a July 2009 letter from Gibson, Dunn and Crutch to me
22 personally, as well as my senior partner, Mitch Resnick.
23 Q. Was anyone else cc'd on the letter?
24 A. The letter was cc'd to Len Baumann. It's my understanding
25 that that was also a in-house counsel for the Debtor and Marty

1 Diamond, their counsel in the state court construction defect
2 action.
3 Q. Did you have any other interactions with Debtor’s counsel
4 at Gibson Dunn?
5 A. I did. We played phone tag for a while, and then I had a
6 conversation with, I believe a simultaneous conversation with
7 two attorneys, although my memory regarding that is not too
8 clear.
9 Q. And did they mention the automatic stay with you?
10 A. We did discuss the automatic stay specifically. I
11 expressed my concerns regarding their position on it applying
12 to all subcontractors, and my personal feelings regarding the
13 threat of sanctions, so yes, we did discuss it.
14 Q. And did you tell them what Weis was prepared to do, in
15 regards to the automatic stay in the bankruptcy case?
16 A. Yes, I did.
17 Q. And what was that?
18 A. To file a motion to lift the stay.
19 Q. Did you make it clear to the attorneys at Gibson Dunn that
20 you were lead counsel to Weis?
21 A. It was my understanding that they were very clear of that
22 fact, that’s why we were having this conversation.
23 Q. And did the attorneys at Gibson Dunn ever inform you of the
24 bar date?
25 A. No.

1 Q. Did anyone else on behalf of the Debtors ever inform you of
2 the claims bar date?
3 A. No.
4 Q. Did you ever receive written notification from Debtor's
5 bankruptcy counsel or anyone else on behalf of the Debtor
6 notifying you of the claims bar date?
7 A. No.
8 MS. RAPORT: That's all I have for her, Your Honor.
9 THE COURT: Cross examination?
10 MR. GRAVES: Thank you.
11 CROSS EXAMINATION
12 BY MR. GRAVES:
13 Q. You testified that you are counsel of record in the
14 underlying state court action where Weis' claim is pending
15 against the Debtors. That's correct, isn't it?
16 A. Yes.
17 Q. And you testified that your firm is listed on the third
18 party -- the admitted third party complaint which is Exhibit 2
19 --
20 A. Yes.
21 Q. -- in the exhibit binder. But that amended third party
22 complaint also lists Rhodes and Salmon as attorneys for Weis,
23 doesn't it?
24 A. Yes, they were our local counsel.
25 Q. You also, as is your testimony, engaged in repeated

1 discussions with the New -- with the Debtor's New Mexico
2 counsel, Marty Diamond, regarding the Debtor's position in the
3 bankruptcy, the Debtor's filing the notice of bankruptcy, and
4 the Debtor's position that the automatic stay applied unless
5 the Debtors were dismissed or severed from the action. That's
6 correct, isn't it?
7 A. That's a very long list. I did have many conversations
8 with Marty Diamond regarding the substantive issues of the
9 construction defect litigation, as well as separate
10 conversations regarding my impressions of the broad spectrum
11 automatic stay.
12 Q. Okay. I'll try to make this question a little bit easier
13 for both you and I, it's lengthy as well, but I'm going to
14 quote from your declaration. You testified there that you
15 received letters, direct voice mails, personally left voice
16 mails, and engaged in direct discussions with the Debtor's
17 bankruptcy counsel around the petition date, end quote,
18 regarding the automatic stay in the state court action, that's
19 your testimony, isn't it?
20 A. Yes.
21 Q. And on July 13th, 2009 you received a fax from your co-
22 counsel, William Salmon, which contained the July 10, 2009
23 letter we've been discussing from Gibson Dunn, the Debtor's
24 notice of commencement, and the Debtor's notice of a disclosure
25 statement hearing, didn't you?

1 A. I believe so.

2 Q. But your testimony is that you never directly received the
3 Debtor's notice of commencement, or the notice of the
4 disclosure statement hearing that was attached to that fax,
5 isn't it?

6 A. I don't believe I received those items directly from the
7 Debtor.

8 Q. So you were aware that bankruptcy notices were being mailed
9 to the Rhodes and Salmon firm, which were not being sent to
10 your firm, weren't you?

11 A. I did become aware of that.

12 MR. GRAVES: No further questions.

13 THE COURT: Any redirect?

14 MS. RAPORT: No, Your Honor.

15 THE COURT: Thank you. You may step down.

16 A. I'll leave those there.

17 THE COURT: Does Weis have anything furtherance in
18 the way of evidence in support of its motion?

19 MS. RAPORT: No, Your Honor.

20 THE COURT: All right.

21 MR. GRAVES: Thank you, Your Honor. The Debtors
22 would call Len Baumann to the stand.

23 THE CLERK: Please remain standing.

24 LENARD C. BAUMANN, DEBTOR'S WITNESS, SWORN

25 THE CLERK: Please state your full name for the

1 record and spell it.

2 THE WITNESS: Lenard C. Baumann. Baumann is spelled

3 B-A-U-M-A-N-N.

4 DIRECT EXAMINATION

5 BY MR. GRAVES:

6 Q. Mr. Baumann, who is your current employer?

7 A. Building Materials Holding Corporation.

8 Q. And what is your position with BMHC?

9 A. Director of Risk Management.

10 Q. And how long have you been in that position?

11 A. Since September 1st, 2004.

12 Q. In your capacity as the Director of Risk Management, are

13 you familiar with the company's insurance programs and

14 policies?

15 A. Yes.

16 Q. And do you have a basic familiarity with the state court

17 cause of action that has been brought against the company by

18 Weis, in connection with the Rainbow Vision project, which is

19 the basis for Weis' motions in this court?

20 A. Yes.

21 Q. Do you believe that the Debtors have an insurance policy

22 that could be called upon to be responsive to claims made by

23 Weis?

24 A. Yes.

25 Q. Could you tell me what policy that would be?

1 A. That would be the Ace policy effective November 11th, 2005
2 to 2006.
3 Q. Okay. Would -- if you have a copy of the Debtor's exhibit
4 binder in front of you, would you please turn to Exhibit 11 in
5 there. When you get to Exhibit 11, could you tell me if that
6 is a copy of the Ace policy you've referenced?
7 A. Yes, it is.
8 Q. Is it your understanding that this Ace policy Exhibit 11
9 has a deductible?
10 A. Yes.
11 Q. And what is the amount of that deductible?
12 A. $2 million.
13 Q. Are the Debtor's obligations to pay that deductible secured
14 by a letter of credit?
15 A. Yes, they are.
16 Q. Would you please turn to Exhibit 12 in the Debtor's exhibit
17 binder? Is that a copy of the letter of credit in favor of
18 Ace, which secures the Debtor's obligations to pay the
19 deductible?
20 A. Yes, it is.
21 Q. Would you please turn to Exhibit 14 in the Debtor's exhibit
22 binder? Can you tell me what this document is when you get
23 there?
24 A. This document consists of amendments to the aforesaid
25 letter of credit increasing the total amount of the letter of

1 credit to $56,870,000.
2 Q. Is it your understanding that this is the current
3 outstanding amount of the letter of credit?
4 A. Yes, it is.
5 Q. Because the Debtor's obligations to pay the deductible
6 amounts under the Ace insurance policy are secured by this
7 letter of credit, under the Debtor's plan of reorganization,
8 who has the obligation to pay those amounts, if there's a claim
9 against the Debtor's insurance?
10 A. BMHC.
11 Q. So for example, if Weis is successful in obtaining the
12 $700,000 judgment, it asserts that it is entitled to obtain,
13 who would pay that judgment?
14 A. BMHC.
15 Q. The entire 700,000?
16 A. The entire 700,000.
17 Q. And where would the money come from?
18 A. From BMHC's current operations.
19 Q. Would the same be true if Weis were successful in asserting
20 an additional insured claim against the insurance company?
21 A. Yes.
22 Q. Switching gears just a little bit. Did you submit a
23 declaration in connection with the Debtor's opposition to Weis'
24 lift stay motion?
25 A. Yes, I did.

1 Q. And in that declaration, did you declare that to the best
2 of your knowledge, the Debtors were not served with process in
3 the Rainbow Vision action until March 4, 2009 when you were
4 personally served with the process?
5 A. Yes.
6 Q. And have you seen the e-mails from Maureen Thomas, that
7 Weis has attached to its papers, and have been discussed here,
8 which suggests that possibly the Debtors received service of an
9 earlier date?
10 A. Yes, I have.
11 Q. Do you continue to believe that your declaration is
12 accurate?
13 A. Yes, I do. The papers that are referenced in those e-mails
14 -- e-mail train with Maureen Thomas were served by a Federal
15 Express, which is not a valid service of process.
16 Q. Switching gears just a bit again, to your knowledge, have
17 the Debtors received requests to lift the stay from other
18 general contractors since the August 31 bar date?
19 A. Yes.
20 Q. And to your knowledge, were some of those requests made by
21 general contractors who failed to file proofs of claim in this
22 case?
23 A. Yes.
24 Q. Switching gears just a bit again. Are the Debtors required
25 to pay a fee on the amount of all outstanding letters of

1 credit, in particular, the $56 million letter of credit we
2 discussed earlier?
3 A. Yes, we are.
4 Q. And what is that fee?
5 A. The current cost of the letter of credit fees is five and a
6 quarter percent per annum on the outstanding values of those
7 letters of credit.
8 Q. So the Debtors have to pay five and a quarter percent per
9 annum on 56 million under this letter of credit?
10 A. Correct.
11 Q. Because of this, have the Debtors engaged a -- in an effort
12 to reduce the outstanding amount of the letter of credit?
13 A. Yes, we have.
14 Q. And has Ace agreed to reduce the outstanding amount of the
15 letter of credit to an amount that the Debtors believe is
16 reasonable?
17 A. Not up to this point.
18 Q. Is one of the reasons cited by Ace to justify a higher
19 letter of credit amount based --
20 MS. RAPORT: Objection, Your Honor, hearsay.
21 THE COURT: Any --
22 MS. RAPORT: Ace isn't here, Your Honor.
23 THE COURT: Any response?
24 MR. GRAVES: Your Honor, he is testifying to his
25 personal knowledge of the discussions with Ace.

1 THE COURT: Sustained.
2 BY MR. GRAVES:
3 Q. Do you believe if the Court allows Weis' proof of claim it
4 would hurt the Debtor's ability to reduce the outstanding
5 amount of the LCs with Ace?
6 A. Yes, I do.
7 Q. Do you believe that if the Court does not allow Weis' proof
8 of claim, it would help the Debtor's ability to reduce the
9 outstanding amount of the letter of credit?
10 A. Yes, I do.
11 MR. GRAVES: Thank you.
12 THE COURT: Cross examination.
13 UNIDENTIFIED SPEAKER: Your Honor, if you can just
14 give us two minutes, please.
15 THE COURT: All right.
16 (Pause in proceedings)
17 CROSS EXAMINATION
18 BY MS. RAPORT:
19 Q. Good afternoon, Mr. Baumann. The policy that you mentioned
20 in the exhibit binder, that's the general excess policy, not
21 the general liability policy, is that correct?
22 A. That is the general liability policy.
23 Q. Are there additional policies?
24 A. There are umbrella and excess layers above that, yes.
25 Q. And do you know what the deductibles are available on those

1 policies?
2 A. The first umbrella is subject to a $2 million self-insured
3 retention for that policy year.
4 Q. Do additional policies name Weis as an additional insured?
5 A. The umbrella policy is a following form umbrella policy.
6 Q. One last question, if Weis agreed to fund a deductible,
7 would that ameliorate the prejudice to the Debtors should this
8 motion to enlarge be granted?
9 A. It would seem it would, yes.
10 MS. RAPORT: No more questions, Your Honor.
11 THE COURT: Any redirect?
12 MR. GRAVES: Yes, Your Honor.
13 REDIRECT EXAMINATION
14 BY MR. GRAVES:
15 Q. If Weis were to agree to fund the deductible under the
16 insurance policy, is there a chance in your view that there
17 would be an increased demand placed on the insurance provider?
18 A. Would you restate the question, please?
19 MS. RAPORT: Objection.
20 THE COURT: Sustained.
21 MR. GRAVES: Withdrawn. No questions, Your Honor.
22 THE COURT: Thank you, sir, you may step down.
23 MS. RAPORT: Your Honor, I wanted to start with a
24 very brief recitation of the facts. In April 2004, Rainbow and
25 Boyce entered into a contract for construction services for the

1 purpose of development of a retirement community in Santa Fe,
2 New Mexico. In February 2007, Rainbow filed a state court
3 action for breach of contract against my client, Weis Builders.
4 The original action focused primarily on construction delay and
5 lien claims. Rainbow generally alleged that the project was
6 not completed in a workmanlike manner, which resulted in
7 property damage. That matter later settled and Weis was
8 required to perform substantial work to the project. As of
9 September 2008, Weis spent approximately $700,000 to complete
10 the work pursuant to the settlement agreement. Weis filed a
11 third party complaint and several amendments thereto, which
12 resulted in a construction defect dispute with specific claims
13 against various subcontractors including the Debtors. The
14 state court action is currently pending, and a third amended
15 scheduling order was entered on July 29th, 2009, providing that
16 initial mediation was to be completed by August 31st, 2009.
17 Due to the Debtors filing of this bankruptcy case in 2009, the
18 entire state court action with respect to all parties,
19 including non-parties has been stayed. To put it simply, Your
20 Honor, Weis did not receive adequate notice of the claims bar
21 date under Grand Union. As the Court in Grand Union stated,
22 due process requires notice that is reasonably calculated under
23 all circumstances to apprise interested parties of the pendency
24 of the action and afford them an opportunity to present their
25 objections.

1 What does that mean in the context of a claims bar date
2 notice? It means that due process required Debtor's counsel to
3 provide a creditor's attorney notice of the claims bar date
4 that the creditor's counsel had a pre-existing relationship
5 with Debtor's counsel. And it is clear in this case, from the
6 numerous interactions between B and C and Debtor's counsel in
7 both the state court action and the bankruptcy case, that the
8 parties had a pre-existing relationship. As you know, when a
9 creditor received adequate notice of the claims bar date, it
10 depends largely on the facts and circumstances of a given case.
11 That what makes the facts in this case so important.
12 In this case, Your Honor, it's clear from the
13 testimony you just heard, that B and C handled all substantive
14 matters in the state court action, and that counsel for the
15 Debtors in both the state court action, and the bankruptcy were
16 made very well aware of B and C's representation of Weis.
17 Counsel for the Debtors in the state court action had spoken to
18 B and C regarding this case in the state court action on
19 several occasions, regarding substantive and procedural issues.
20 More importantly, B and C had direct communications with
21 Debtor's bankruptcy counsel. These interactions between B and
22 C and Debtor's counsel in both the state court action and the
23 bankruptcy case included letters, e-mails, voice mails and
24 direct discussions.
25 Counsel for the Debtors in the state court action,

1 even met counsel with B and C. And this meeting is
2 particularly telling because local counsel for Weis, Mr.
3 Salmon, made it clear to Debtor's counsel that Tonya MacBeth
4 from B and C was running things for Weis. Furthermore, Mr.
5 Salmon instructed counsel for the Debtors in the state court
6 action and the bankruptcy that all substantive matters should
7 be directed to B and C. Clearly, the claims bar date falls
8 into that category. Yet, Debtor's counsel never sent the
9 notice to B and C. The Court in Grand Union also noted that
10 the Debtors in that case could've easily avoided any
11 difficulties regarding service of the bar date notice by
12 sending the notice to the parties who Debtor's counsel had a
13 pre-existing relationship with. In this case, counsel for the
14 Debtors could've easily contacted their claims agent and
15 informed them to add B and C to the mailing matrix. I believe
16 that's standard practice, at least it has been in my
17 experience. More towards that point, this Court has held in
18 AFY Holdings that when counsel for a Debtor is put on notice by
19 counsel for a creditor, that it intends to pursue its claim
20 against the Debtors, the Debtors should include that counsel in
21 the bar date notice mailing list. In this case, B and C
22 indicated to Debtor's counsel in both the state court action
23 and the bankruptcy case, that Weis would seek to lift the
24 automatic stay. Any reasonable bankruptcy attorney would
25 conclude that a creditor seeking to lift the automatic stay, to

1 proceed with its claim against the Debtor, would likely also
2 file a proof of claim.
3 Just like the Debtor in AFY Holdings, the Debtor in
4 this case were on notice of B and C's intention to prove Weis'
5 claim. That notice should've prompted the Debtors to include B
6 and C on the claims bar date mailing notice list. We contend
7 that because the Debtors did not do this, this Court should
8 hold in a similar fashion, to the Court in AFY Holdings and
9 enlarge the claims bar date with respect to Weis.
10 Your Honor, that brings me to excusable neglect.
11 Weis contends that it has clearly met its burden to enlarge the
12 claims bar date under the Grand Union standard. However, even
13 if the Court finds for some reason that Weis has not met this
14 burden, Weis also contends that the motion to enlarge should be
15 granted, based on excusable neglect. In order to rebut any
16 argument that the Debtors may make concerning prejudice to the
17 Debtors, should the Court grant Weis relief under the excusable
18 neglect theory, Weis agrees to the following: If pursued, if
19 Weis' claim causes the insurance carrier to have a claim
20 against the Debtors on account of any deductible, and/or self-
21 insured retention under the policies, Weis agrees that it shall
22 not seek any payment under the policies unless it satisfies
23 directly with the insurance carrier, any such deductible and/or
24 self-insured retention.
25 As I'm sure Your Honor is aware, a bankruptcy court

1 may extend the bar date for cause, to prevent the late filing
2 of a claim if the movant's failure to comply with an earlier
3 deadline was the result of excusable neglect. That standard is
4 clearly met here, Your Honor. The term excusable neglect used
5 in Bankruptcy Rule 9006(b)(1) was clarified by the Supreme
6 Court in Pioneer. In Pioneer, the Court found that by
7 empowering the Court to accept late filings, where the failure
8 to act was the result of excusable neglect, Congress plainly
9 contemplated that the Court would be permitted, where
10 appropriate, to accept late filings caused by inadvertence,
11 mistake, carelessness, as well as by intervening circumstances
12 beyond the party's control. The Supreme Court stressed in
13 Pioneer that the determination of whether a party's neglect of
14 a deadline was excusable, was a bottom and equitable one,
15 taking into account all relevant circumstances surrounding the
16 party's admission. The relevant circumstances the Court noted,
17 included analyzing the following factors: The danger of
18 prejudice to the Debtor, the length of delay and its potential
19 impact on the judicial proceedings, the reason for the delay,
20 including whether it was in the reasonable control of the
21 Movant, and whether the Movant acted in good faith.
22 Each of these factors weighs in favor of Weis. The
23 Third Circuit Court of Appeals in O'Brien recognized that the
24 first factor, danger of prejudice, should be a conclusion based
25 on evidence. Under O'Brien the relevant factors for analysis

1 of prejudice include whether the Debtor was surprised or caught
2 unaware of the claim, whether payment of the claim would force
3 the return of amounts already paid out under the confirmed
4 plan, or affect distribution to other creditors, whether
5 payment of the claim would jeopardize the success of the
6 Debtor's reorganization, the size of the claim sought to be
7 considered, as compared to the rest of the estate, whether
8 allowance of the claim would adversely impact the Debtor
9 actually or legally, whether allowance of the claim would open
10 the flood gates to future claims, and finally, whether the plan
11 was filed or confirmed with notice of existence of the claim.
12 Each of these factors falls in Weis' favor. First,
13 the Debtor cannot claim that they were unaware or surprised by
14 Weis' assertion of its claim. The Debtors had scheduled a
15 contingent on liquidated claim in the bankruptcy case, related
16 to Weis' claim in the state court action. Further, based on
17 the parties interactions, counsel for the Debtor was well aware
18 of the state court litigation and Weis' claim against the
19 Debtors. Accordingly, the Debtors clearly were aware of Weis'
20 claim well in advance of filing and seeking confirmation of
21 their claim. The second and fourth O'Brien factors impact upon
22 reorganization, and whether allowance of the claim would
23 adversely impact the Debtor actually or legally, likewise
24 revealed that no prejudice will result from granting the motion
25 to enlarge. Weis asserts that it has met its burden under

1 Grand Union, and the Court should grant relief under the due
2 process standard. But as I said, should however, the Court
3 disagree that Grand Union is applicable to this case, and finds
4 in favor of Weis, under the excusable neglect theory, Weis has
5 agreed in an effort to ameliorate any argument about prejudice
6 to the Debtor, that Weis will waive distribution on account of
7 any claim with respect to the Debtors, and seeks to pursue
8 claims solely against available insurance. Weis also agreed
9 that if the insurance carrier seeks to collect on a deductible
10 from the Debtors, Weis will either discontinue its pursuit
11 against developed insurance proceeds, or pay the deductible on
12 behalf of the Debtor. Thus, the impact upon reorganization is
13 non-existent.
14 The next O'Brien factor, whether payment of the claim
15 would jeopardize the success of the Debtor's reorganization
16 also weighs in favor of Weis. Because the Debtor's plan went
17 effective earlier this month, the Debtor cannot claim that
18 enlarging the bar date for Weis would jeopardize the
19 reorganization.
20 The final O'Brien factor, where allowed, the claim
21 would open the flood gates to future claims against Weis weighs
22 in favor of Weis. In Inacon (ph), the Delaware District Court
23 disagreed with Judge Walsh regarding whether allowance of a
24 claim would open the flood gates of litigation. In that case,
25 the District Court concluded that the debtors failed to

1 identify any other similarly situated creditor, that it also
2 filed a motion to allow its claim. It's difficult to believe
3 that every single other late filer will claim that its failure
4 to timely file a proof of claim was a result of the following
5 factors: Notice of the claims bar date was sent to local
6 counsel, and not to lead counsel; the notice sent to local
7 counsel incorrectly listed the attorney in his law firm on the
8 proof of claim forms; the creditor's name did not appear
9 anywhere on the proof of claim forms; the underlying state
10 court action was a construction litigation dispute, wherein
11 counsel regularly seek recovery of their fees and expenses, if
12 successful against insurance, unless it was reasonable for
13 local counsel to believe that the proof of claim form related
14 solely to him and his firm; and finally, the creditors lead
15 counsel had a pre-existing involvement, which included numerous
16 exchanges and interactions with Debtor's counsel, in both the
17 bankruptcy case and the state court action. In fact, the
18 Debtors have not identified any similarly situated creditor,
19 who files or plans to file a motion to enlarge the claims bar
20 date. That takes care of the first Pioneer factor. The other
21 ones move a little faster.

22 That brings me to the second Pioneer factor, length of
23 delay. Approximately seven weeks past from the expiration of
24 the claims bar date in the filing of this motion to enlarge.
25 Courts in this jurisdiction have permitted late filings based

1 upon excusable neglect in cases where the delay at issue was
2 much greater than the delay present here. Weis only became
3 aware of the issue when the Debtor filed their response to the
4 lift stay motion, and promptly filed this motion to enlarge.
5 The third Pioneer factor is the reason for the delay. The
6 reason for the delay in filing the claim clearly falls in favor
7 of Weis. At best, the claims bar date notice was confusing and
8 misleading. The notice that was provided to Mr. Salmon
9 incorrectly listed his name and his law firm as the creditor on
10 the proof of claim form, and Weis' name did not appear anywhere
11 on the documents. Given the tendency of attorneys in
12 construction litigation to regularly seek recovery of their
13 fees and expenses, if successful, it was reasonable for Mr.
14 Salmon to believe that the proof of claim form applied only to
15 him and his firm, and not to Weis.
16 THE COURT: But it seems to me that receipt of that
17 might have caused a reasonable person, lawyer, to scratch his
18 head and say, you mean if I don't have the claim, I do know
19 somebody who does, because I represent them.
20 MS. RAPORT: Well, Your Honor, I think that comes
21 down to the fact that Weis was not listed on the form, and also
22 due to the pre-existing involvement of the Debtor's counsel in
23 both the state court action and the bankruptcy case with B and
24 C, and how Mr. Salmon had directed them to --
25 THE COURT: Well, I heard the explanation.

1 MS. RAPORT: Moreover, based upon the division of
2 labor between the firms and multiple conversations between B
3 and C and Debtor's counsel, Mr. Salmon reasonably believed
4 anything important would've been sent to B and C particularly
5 because he instructed Debtor's counsel that B and C handled all
6 substantive matters.
7 The final Pioneer factor is whether Weis acted in
8 good faith. It is clear that Weis did not delay the filing of
9 its claim, as a result of bad faith. Weis has acted in good
10 faith, and has worked expeditiously to file the motion to
11 enlarge as soon as reasonably possible, after learning of the
12 claims bar date.
13 Your Honor, based on the Pioneer factors, Weis has
14 shown that its failure to file a timely proof of claim is
15 certainly at minimum, a result of excusable neglect, and given
16 the equities in the case, we would ask that the motion to
17 enlarge the claims bar date be granted.
18 THE COURT: Thank you.
19 MS. RAPORT: Thank you, Your Honor.
20 MR. GRAVES: The burden in this case lies with Weis
21 to prove, by competent evidence that its neglect in failing to
22 file a proof of claim was excusable as a matter of law. And
23 under established precedent, including the Third Circuit, Weis
24 has failed to meet this burden, put simply Weis' neglect was
25 inexcusable. The pre-eminent factor courts look to, to

1 determine whether neglect was excusable is the reason for the
2 delay, including whether it was in the reasonable control of
3 the movant. Weis was repeatedly notified of these bankruptcy
4 cases, and received notice of the bar date, well in advance of
5 the bar date, Weis received a notice of the bankruptcy filing
6 that was filed in the state court action, the Debtor's notice
7 of commencement, which apprised Weis of the fact, that a bar
8 date would be set and that quote, creditors whose claims are
9 not scheduled or whose claims are listed as disputed contingent
10 or unliquidated as to amount and who desire to participate in
11 these cases, or share in any distribution must file a proof of
12 claim. The Notice of Commencement further apprised Weis that
13 all documents filed in these cases are available to the public
14 free of charge on the Debtor's restructuring website,
15 www.bmhcrestructing.com, then Weis received the disclosure
16 statement hearing notice, then Weis received the Court approved
17 bar date notice, which approved Weis that each person or entity
18 holding or asserting a claim against one or more of the Debtors
19 that arose prior to the petition date must file a proof of
20 claim, so that it is actually received on or before August 31,
21 2009 at 5:00 p.m. Then Weis received a letter discussing this
22 bankruptcy at length from the Debtor's counsel. Moreover, the
23 testimony of the witnesses showed that Weis' attorneys received
24 letters and direct voice mails, personally left voice mails,
25 engaged in direct discussions with Debtor's bankruptcy counsel

1 around petition date. Thereafter, they engaged in repeated
2 discussions with Debtor's New Mexico counsel, regarding the
3 Debtor's position in the bankruptcy, the filing of the notice
4 of the bankruptcy, and the Debtor's position that the automatic
5 stay applied to the state court action. In spite of all of
6 this clear and repeated notification of the bankruptcy and
7 notice of the bar date, Weis failed to timely file a proof of
8 claim. And in support of its argument in favor of extending
9 the bar date, Weis relies on two facts, and neither of these
10 facts justify expanding the bar date.
11 First, Weis makes much of the fact that the preprinted
12 proof of claim form that was included in the packet with the
13 bar date notice listed its attorney in the box where the name
14 of the creditor belongs. According to Weis, this renders the
15 bar date notice itself inaccurate and misleading.
16 I think of the threshold, this Court should follow the Seventh
17 Circuit, and hold that where a creditor's attorney has actual
18 knowledge of the bar date, in the context of representing other
19 creditors, here, the attorney was concerned that maybe he had a
20 claim against the Debtors. That creditor can't tell in
21 specificity or form of the bar date notice. In K-Mart, the
22 Seventh Circuit assumed arguendo that the creditor received no
23 physical notice of the bar date. Nonetheless, the Court held
24 that because her attorney had obtained actual knowledge of the
25 bar date, in connection with representing other clients, and

1 because this knowledge should be imputed to the creditor there
2 was, quote, no due process concern with respect to the
3 creditor. According to Weis' attorney, he read the bar date
4 notice, but filed it away, after concluding that he had no
5 claim against the Debtors. And it's important to keep in mind
6 the context in which he received the bar date notice. Prior to
7 receiving the Court approved bar date notice, he received
8 notice of these bankruptcy proceedings, notice of a disclosure
9 statement hearing, notice of a fact that a generally applicable
10 bar date would be set, notice of the fact that the Debtors and
11 Weis were engaged in discussions regarding Weis' variability to
12 proceed in the state court action, notice that all creditors
13 seeking to participate in the distribution of the estates must
14 file a proof of claim, and he had actual knowledge that his
15 client was asserting a claim against the Debtors. Then in that
16 context, Weis' counsel received the bar date notice, which had
17 been specifically approved by this Court after notice and a
18 hearing, and significantly, the bar date notice itself does not
19 reference any particular claimants or claims, and there's good
20 reason for that. The bar date notice is intended to be a
21 generic notice to all potential claimants, that they must file
22 a proof of claim in order to protect those interests, whatever
23 their interests may be. But perhaps the most fundamental point
24 here, is that the evidence has shown that when Weis' attorney
25 got a notice relating to these bankruptcy cases, he knew what

1 to do with it. Every other notice that he was sent which
2 referenced the Rainbow Vision action, was promptly forwarded as
3 a quote, bankruptcy court notice, that related to Weis' claim.
4 Then when Weis' attorney got notice of the bar date, he knew or
5 should've known that it related to Weis' claim. Weis' second
6 fact, is that because the Court approved bar date notice was
7 mailed to local counsel, the Rhodes and Salmon firm, and not
8 leads and counsel -- lead counsel, Burch and Cracchiolo, that
9 Weis didn't receive proper notice of the bar date. Listening
10 to Counsel's arguments and reading their papers, one might come
11 away with the impression that Burch and Cracchiolo is the
12 creditor, and that the Debtor's obligation was to provide B and
13 C with notice of the bar date. But B and C is not the
14 creditor, Weis is. And the Debtor's obligation was to provide
15 Weis with notice of the bar date. And under established
16 precedent, the Debtors did so, by mailing notice of a bar date
17 to Weis' lawyer and agent in the underlying action, Rhodes and
18 Salmon. Significantly, Weis does not dispute that its attorney
19 agent, in the state court action, received numerous notices of
20 the bankruptcy, including the notice of the bar date. And the
21 notice of the bar date provided to Weis' attorney agent, was
22 noticed to Weis itself, as a matter of law. But Weis would
23 have this Court ignore Rhodes and Salmon's agency relationship
24 with Weis, and hold that Weis did not receive notice unless
25 every single one of its agents representing it received notice.

1 This argument has been considered and rejected by every court
2 that's considered it, including the Third Circuit.
3 In the word of the Third Circuit, regrettably, and
4 it's true, the lack of communication that occurred here is not
5 a unique circumstance. In Alaska Limestone reported at 799 F2d
6 1412, the Court held that receipt of notice by one of two
7 counsel of record, as here, sufficiently informs the party of
8 the entry of judgment. The argument that relief should be
9 granted, when the parties quote, "principal counsel," did not
10 receive notice was rejected in Gooch (ph). And Weis argues
11 that these cases like this, there are others, are inapposite
12 because they don't arise in the context of a bar date notice.
13 But the precise issue raised in that case, whether quote,
14 receipt of notice by one of two counsel of record sufficiently
15 informs the party, end quote, was raised and decided by the
16 Third Circuit. The Third Circuit based its ruling on the fact
17 that it's the client that is entitled to receive notice and not
18 the lawyer, and that each of the two law firms in that case
19 were entitled to receive notices on behalf of the client. The
20 rationale of those cases applies with equal force here, which
21 is that notice to a party's agent is notice to that party. The
22 law does not speak in terms of best agents or better agents or
23 lead agents, it's only concerned with agency, and Mr. Salmon
24 was Weis' agent, just the same as B and C. But without
25 addressing the fundamental agency issue, Weis pauses its theory

1 as supported by the Grand Union and AFY cases out of this
2 jurisdiction. But just to be clear, Weis is not arguing for a
3 straight-forward application of either Grand Union or AFY.
4 What Weis is arguing for is an extension of those cases, in a
5 way that conflicts with the Third Circuit precedent that I've
6 just quoted. Neither Grand Union nor AFY held or even
7 suggested, as far as I can tell, that in order for a bar date
8 notice to be adequate, the debtors have to send that notice to
9 each and every lawyer representing the potential claimant, or
10 else bear the risk of wrongly guessing which of those attorneys
11 is the quote, lead lawyer.
12 Instead, Grand Union and AFY stand for an
13 unremarkable proposition, which is that where a creditor is
14 represented by counsel, in connection with a claim against the
15 Debtors, the bar date notice should be mailed directly to the
16 creditor's attorney, instead of being delivered to the
17 creditor, because the lawyer is, in the words of one court, a
18 quote, presumed expert in law, and the creditor is not. As
19 Weis acknowledges, that is precisely what the Debtors have done
20 here. But beyond the fact that the fault lies with Weis for
21 its failure to timely file, if the bar date is expanded in this
22 case where the claimant was provided with notice of the bar
23 date, and was elbow deep in these bankruptcy proceedings, other
24 similarly situated claimants that failed to file a claim may
25 also seek to expand the bar date.

1 THE COURT: And where in this record does that
2 evidence appear?
3 MR. GRAVES: In Mr. Baumann's testimony, he testified
4 that there were other -- they had received requests to lift the
5 stay from other claimants who have felt -- they're asking to
6 seek to lift the stay, who had failed to file proofs of claim
7 in the case, and also the -- we referenced earlier in
8 discussion, the Parker Development motion that has been filed,
9 on behalf of a general contractor, it's on the docket. I
10 believe that Your Honor take judicial notice of it, where they
11 are seeking to lift the stay and expand the bar date to file
12 their claim against the Debtors.
13 And in addition, there may be other claims, Your
14 Honor. We can't prove the negative, because we don't know
15 what's out there. I've got it here in a moment in my outline,
16 but we've got currently outstanding approximately $11 million
17 in late filed claims, that's an updated figure from the
18 evidence that is in the record that I got from Garden City just
19 yesterday. So we've got a substantial number of late filed
20 claims outstanding that have yet to be expunged, and we just
21 simply don't know what kind of position they may take. And
22 many of these claimants like Weis may be class five claimants,
23 and those claims must be satisfied in full directly out of the
24 operating funds of the reorganized debtor's estates. And the
25 Debtor's plan and exit financing that was confirmed, you know,

1 were predicated in part, on the Debtor's ability to discharge
2 claims, for which no proof of claim was filed. And if the
3 Debtors can't -- if the reorganized Debtors cannot rely on the
4 bar date to discharge these claims, there is a danger that it
5 will impair, at least to some extent, the ability -- the
6 Debtor's ability to successfully reorganize.
7 THE COURT: Well, but the Debtor here knew, at least
8 at the very latest on September 11th when the lift stay motion
9 was filed, that there was a claim to be asserted here. This
10 plan was not confirmed until December. So there was about
11 three months when if the Debtor believed that there was some
12 impact adversely -- adverse impact on the plan to be confirmed,
13 during which time they could've taken steps to address that,
14 but as far as I recall, it did not.
15 MR. GRAVES: Your Honor, I understand what you're
16 saying, and to be clear, the Debtor's argument is not an unfair
17 surprise argument. We're not saying that necessarily even the
18 Debtors confirmed the plan under the belief that this claim
19 would be discharged, because of the bar date. But to some
20 extent, because I think it's true in any bankruptcy case, the
21 Debtor's plan and exit financing facilities were entered into
22 with the belief that they would be able to discharge late filed
23 claims.
24 THE COURT: I wonder whether the lender assumed that?
25 But there's no evidence in the record one way or the other.

1 MR. GRAVES: One harm that there is evidence in the
2 record of, which is substantial, is that the Debtors are
3 seeking to reduce their outstanding letter of credit with Ace.
4 THE COURT: Well, let's talk about that for a minute,
5 because the movants offered to ameliorate any direct out-of-
6 pocket consequence to the Debtor, with respect to either a
7 deductible or self-insured retention, to the extent that a
8 claim ultimately is liquidated, which would be in excess of
9 that, frankly those are claims which are intended to be covered
10 by the insurance. So it seems to me that that's something that
11 in or out of a bankruptcy would be the same. Tell me why you
12 think I might be wrong about that.
13 MR. GRAVES: I'm not sure I followed you a hundred
14 percent, but let me do my best to answer your question. Which
15 is that as a result of the bankruptcy, there are -- the Debtors
16 do have an ability to discharge claims that were not filed.
17 And the Debtors are seeking to use what is admittedly a -- it's
18 Debtor-friendly. It's the operation of the Bankruptcy Code,
19 which is the bar date, to expunge late filed claims. And the -
20 - one of the things they're trying to do is to demonstrate to
21 Ace, that these claims that you thought were outstanding, all
22 of these claims that result in your need for a letter of
23 credit, don't exist anymore. They were discharged by virtue of
24 the bankruptcy case. And so you shouldn't require us to keep
25 an enormous letter of credit, because there are no such claims.

1 And if the Debtors -- if the bar date is expanded for folks
2 that filed late claims, it undermines the Debtor's ability to
3 argue with Ace in this renegotiation, that the amount of the
4 letter of credit should be reduced.
5 THE COURT: I understand your response.
6 MR. GRAVES: I think the final point on the prejudice
7 to the Debtors, is I would just ask Your Honor to look
8 carefully at the American Classic Wages' case that was decided
9 by the Third Circuit, and I'll quote it here. It says,
10 applying the first and second Pioneer factors, we conclude that
11 the debtors will be prejudiced by exposure to a late claim, and
12 that the length of the delay would have a substantial impact on
13 the bankruptcy proceedings, have to move for relief from the
14 automatic stay two days after the debtors filed their joint
15 plan of liquidation with the Bankruptcy Court, a policy that
16 would allow proofs of claim at that late date, would've
17 disrupted the debtor's organization. Thousands of individual
18 claims are outstanding against the debtors. The sheer scale
19 presents a formidable problem of management. The strict bar
20 date provided by the Bankruptcy Court was intended, in part, to
21 facilitate the equitable and orderly intake of those claims.
22 The debtors argue with some persuasive effect, that in view of
23 the large number of post-bar date claims filed, allowing
24 appellant to file late, might quote, render the bar date order
25 meaningless. Debtors allege --

1 THE COURT: Well, let me ask you to pause and tell
2 you --
3 MR. GRAVES: Sure.
4 THE COURT: -- I didn't read the case before I took
5 the bench, but I succeeded to the bankruptcy case that's the
6 subject of that opinion, although the Third Circuit's opinion -
7 - the trial court opinion was before my time. But my
8 impression is, and my recollection is, that the claims in that
9 case were largely from customers who placed deposits and were
10 unable or didn't travel to take their reservations, largely as
11 a result of the incidents of 9/11. That's what, at least I
12 found in one reported opinion, that's what basically caused the
13 company's collapse. So if assuming that I'm right about that,
14 I don't see the comparison here to the possible disruption in
15 the administration of the estate.
16 MR. GRAVES: Well, it -- I guess our position is what
17 I've already articulated. I've given you our position, I think
18 you understand it. It is basically a concern that if the bar
19 date is not enforced, we may see other claims, other efforts.
20 And the efforts themselves, you know, are prejudicial to the
21 Debtors, to the extent that the Debtors have to, or in many
22 cases, may believe they're entitled to defend against those
23 efforts to expand the bar date. And, you know, the -- we've
24 got the evidence in the record regarding the potential
25 prejudice to the Debtor's estates, and I think you understand

1 our argument, so I'll leave it to Your Honor's decision.
2 THE COURT: All right. You would agree, I'll just
3 ask you one last question, would you not, that no one factor
4 under the Pioneer test is determinative of the outcome, and
5 that a Court can give different weight to different factors,
6 depending upon the circumstances?
7 MR. GRAVES: I believe that's established law, Your
8 Honor.
9 THE COURT: Okay. Thank you. Brief rebuttal, very
10 brief.
11 MS. RAPORT: Sure, Your Honor. Your Honor, I just
12 wanted to say I feel like Debtor's counsel made much of the
13 fact that B and C was on inquiry notice, and I just want to,
14 you know, remind this Court that this is a Grand Union case
15 first and foremost, and that inquiry notice is not enough. You
16 know, you have to send notice of the claims' bar date, not just
17 notice of the bankruptcy. And I'm not asking that, you know,
18 the Debtors are obligated to send notice to each and every
19 attorney, but under Grand Union to send notice to those
20 attorneys that they had a pre-existing relationship with. And
21 I also wanted to say I didn't think that the record in this
22 case supports the fact that there are other similarly situated
23 creditors who are going to file similar motions to Weis.
24 My final thing was, Debtor's counsel knew they had to
25 give notice, and why didn't they send notice to B and C.

1 That's all I have, Your Honor.
2 THE COURT: Thank you. All right. I'm prepared to
3 make my ruling. First, while these situations often present
4 the circumstance under which it could be argued and as it has
5 been here, that different notice or allegedly better notice
6 could be given. The record here overwhelming demonstrates that
7 appropriate notice was given to the claimant in this case. So
8 I then turn to whether under the Pioneer standard, the movant
9 has demonstrated in consideration of the four factors, whether
10 there's excusable neglect, and I conclude that there has been.
11 I will say that -- well, many of the cases, maybe most of the
12 cases in which this issue comes up, there is involved the
13 failure of a lawyer or lawyers to do something that they should
14 have done. And that's the situation here. I recognize that
15 both attorneys who testified here on behalf of the movant, and
16 I will add, testified credibly, are non-bankruptcy
17 practitioners, but as the Debtor here has submitted, certainly
18 at least one of the attorneys was knee deep in the bankruptcy
19 proceeding. And I don't know, and I know some of the cases,
20 and I think mostly older cases, but I confess I didn't do a
21 complete survey of all the excusable neglect cases that are
22 coming out all the time, assume that a non-bankruptcy
23 practitioner should be given a little more leeway in terms of
24 what should be recognized with respect to the bar date. I'm
25 not -- with the Bankruptcy Code having been in effect for so

1 many years, I wonder whether that is a valid proposition
2 anymore. But I will here specifically the evidence here shows
3 that one counsel, who represented this movant was aware that a
4 bar date had been set. So that much is clear. But, you know,
5 not a very long period of time has passed. It's just a matter
6 of a couple of months, and 30 days before the motion was filed
7 after somebody finally woke up and realized there was a bar
8 date that had to be addressed as a result of the Debtor's
9 filing in response to the lift stay motion. But the movant
10 here, in this record, I think demonstrates clearly acted in
11 good faith, has offered, and I would order as a condition of
12 granting this motion, that ameliorate the effect of self-
13 insured retention or deductible along the lines of what the
14 movant's counsel proposed in her closing arguments.
15 I am often faced, I'll note, with a well, Your Honor,
16 you're opening the flood gates argument, and I'm not saying
17 that it never applies, but I'm not satisfied on this record
18 that this decision will cause flood gates to be opened, but the
19 courts have a way of controlling that if that appears to be
20 developing, and each case is considered specifically on its own
21 merits, and even if there may be arguably other creditors
22 similarly situated, I would bet you that the circumstances
23 will, at least in some material respect, differ.
24 So for these reasons, I'm going to grant the motion,
25 subject to the condition that I've imposed, as a result of what

1 the movant has offered. And I will tell you had the movant not
2 offered that, I would not have granted this relief.
3 Are there any questions? I'll ask counsel to confer
4 and submit a form of order, embodying the ruling. All you need
5 to do is refer to the reasons that I've stated on the record.
6 Any questions about what should be in the order?
7 MR. GRAVES: No, Your Honor, I believe we understand
8 your ruling, and we will work together to submit a consensual
9 form of order which embodies Your Honor's ruling. Unless Weis
10 has anything else, I believe that concludes today's omnibus
11 hearing in the Building Materials Holding Corporation matter.
12 THE COURT: All right.
13 MS. RAPORT: Thank you, Your Honor.
14 THE COURT: All right. Thank you all very much.
15 MR. GRAVES: Thank you, Your Honor.
16 THE COURT: That concludes this hearing. Court will
17 stand adjourned.
18 (Court adjourned)
19
20 CERTIFICATION
21 I certify that the foregoing is a correct transcript from the
22 electronic sound recording of the proceedings in the above-
23 entitled matter.
24
25 Lewis Parham 2/3/10
26 ______________________________ ___________
27 Signature of Transcriber Date

UNITED STATES BANKRUPTCY COURT
District of Delaware

In Re:
Building Materials Holding Corporation
720 Park Boulevard, Suite 200
Boise, ID 83712
EIN: 91−1834269

Chapter: 11

Case No.: 09−12074−KJC

NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION

A transcript of the proceeding held on 1/27/10 was filed on 2/8/10 . The following deadlines apply:

The parties have seven days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 3/1/10 .

If a request for redaction is filed, the redacted transcript is due 3/11/10 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 5/10/10 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.

Clerk of Court

Date: 2/8/10

(ntc)

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