

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
BUILDING MATERIALS HOLDING	)	Case No. 09-12074 (KJC)
CORPORATION, <i>et al.</i>	)	
	)	
Reorganized Debtors.	)	Hearing Date: June 23, 2010 at 2:00 p.m.
	)	Obj. Deadline: June 15, 2010 at 4:00 p.m.

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**MOTION OF ANTHONY E. SCURRIA FOR RECONSIDERATION OF HIS  
DISALLOWED CLAIM AND/OR FOR RELIEF FROM ORDER  
PURSUANT TO FED. R. CIV. P. 60**

Anthony E. Scurria, by and through the undersigned counsel, respectfully submits the following Motion of Anthony E. Scurria For Reconsideration of His Disallowed Claim and/or For Relief From Order Pursuant to Fed. R. Civ. P. 60 (hereinafter "Motion"), seeking an order from the Court allowing Mr. Scurria to resubmit his proof of claim, or, in the alternative, relief from the Order granting Debtors' Omnibus Objection expunging Mr. Scurria's proof of claim pursuant to Fed. R. Civ. P. 60(b) and Fed. R. Bankr. P. 9024(b). In support of the Motion, Mr. Scurria respectfully states as follows:

**Jurisdiction**

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

**Background**

2. On June 16, 2009 (the "Petition Date"), the above-captioned debtors (collectively as the "Debtors") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United

States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware.

3. On or about July 10, 2007, Mr. Scurria was working on a job site known as the Rosemont Place Project located at 8624 19<sup>th</sup> Street, University Place, Pierce County, Washington, working on interior walls of a home in said project. On that same date, John Doe 1 was operating a boom truck owned by the Debtors, to situate trusses at the Rosemont Place Project. While operating said boom truck, and in the scope of his employment for the debtor BMC West Corporation a/k/a Building Materials Holding Corporation (“BMHC”), Mr. Scurria alleges that John Doe 1 negligently swung and hit Mr. Scurria with the trusses.

4. As a result of the alleged negligence of John Doe 1, Mr. Scurria states he sustained bodily injury, pain and suffering, both mental and physical, and loss of enjoyment of life. Certain injuries suffered by Mr. Scurria are permanent. He will continue to experience pain, suffering, and mental anguish, will continue to incur medical expenses, and has been and will continue to be affected in his ability to work and enjoy life.

5. On July 23, 2009, Mr. Scurria filed a lawsuit (the “State Court Action”) in the Superior Court of the State of Washington in and for Pierce County, against BMHC, John Doe 1 and Jane Doe 1, seeking general damages, special damages, and costs and disbursements, relating to the injuries Mr. Scurria sustained in the above-described incident.

6. The complaint was served on BMHC West Corporation on or about July 23, 2009. Upon information and belief, to date, no attorney has entered an appearance on behalf of BMHC. Subsequently, Mr. Scurria learned that BMHC had filed for bankruptcy in this Court. Since learning of the Debtors bankruptcy filing, Mr. Scurria has taken no further action in the

State Court Action. Mr. Scurria seeks a jury trial to assess the liability of and damages against BMHC, its insurance carriers, John Doe 1 and Jane Doe 1.

7. Following Mr. Scurria's injuries, on July 17, 2007, Mr. Ladenburg, on behalf of Mr. Scurria, sent correspondence to BMHC, notifying same of Mr. Scurria's injuries and asking that the matter be forwarded to the appropriate insurance carrier(s). On July 23, 2007, Mr. Ladenburg received a letter from Gallagher Bassett adjuster, Paul Rowson indicating that he would be handling the matter on behalf of BMHC. See Affidavit of Frank B. Ladenburg, Jr., a true and correct copy of which is attached hereto as Exhibit A.

8. Between July 23, 2007 and November 5, 2007, Mr. Scurria and Mr. Ladenburg had various correspondence with Mr. Rowson. On April 15, 2009, Mr. Ladenburg sent a demand letter to Mr. Rowson seeking damages in the amount of \$463,297. On May 6, 2009, Mr. Ladenburg contacted Mr. Rowson to check on the status of the demand letter, and Mr. Rowson indicated that he had received the demand letter, but had not yet had the opportunity to review it. See Ladenburg Aff. at 3.

9. After the Petition Date, on August 6, 2009, Mr. Ladenburg received correspondence from Mr. Rowson indicating that BMHC had filed for protection under chapter 11, and that while they received the complaint and summons filed in the State Court Action, they could not file a response due to the bankruptcy proceedings. Mr. Scurria had no prior knowledge of the bankruptcy proceedings, and did not otherwise receive notice of the bankruptcy proceedings. See Affidavit of Anthony E. Scurria, a true and correct copy of which is attached hereto as Exhibit B.

10. On September 14, 2009, Mr. Scurria sent his proof of claim in the amount of \$463,297.98 to The Garden City Group, Inc., Attn: Building Materials Holding Corp., P.O. Box

393, Dublin, Ohio 43017-4293. As stated in the proof of claim, Mr. Scurria's personal injury attorney, Frank B. Ladenburg, Jr. was listed as the notice agent. See Landenburg Aff. at 3.

11. On or about October 20, 2009, Mr. Scurria, through Mr. Ladenburg, sent a retainer and fee agreement to the law firm of Cross & Simon, LLC to draft a Motion for Relief from the Automatic Stay so that Mr. Scurria could proceed with the State Court Action in Washington. On that same date, however, the Debtors filed their First Omnibus (Non-Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1 (the "Objection") [D.I. No. 757]. See Landenburg Aff. at 4.

12. On October 23, 2009, Mr. Ladenburg was provided with a draft copy of a Motion for Relief from the Automatic Stay from Cross & Simon, LLC. Id.

13. On October 28, 2009, however, Mr. Ladenburg was informed by Paul Rowson, an adjusted with Gallagher Bassett that the applicable insurance policy had a deductible of either \$1 or \$2 million. Id.

14. On November 4, 2009, Mr. Ladenburg sent a letter to Mr. Rowson confirming the conversation had previously, and asking for confirmation of the deductible amount. In light of the conversations with Mr. Rowson, on November 18, 2009, Mr. Ladenburg sent a letter to the offices of Cross & Simon, LLC advising that no further action be taken on the Motion for Relief from the Automatic Stay until he was able to confirm the applicable deductible amount. Id.

15. On November 19, 2009, Mr. Ladenburg spoke with Mr. Rowson who indicated to Mr. Ladenburg that the deductible amount on the applicable policy was \$1 million or more. Mr. Ladenburg asked if he could acquire a copy of the declarations page of the policy, and Mr. Rowson indicated that he would look into the request. Id.

16. On December 3, 2009, Mr. Ladenburg had not yet heard back from Mr. Rowson, and called him to acquire the information on the applicable deductible amount(s). Mr. Rowson indicated he would send, via facsimile, the documentation on the deductible amount. On December 9, 2009, Mr. Ladenburg sent correspondence to Mr. Rowson again seeking information on the deductible amount. Id.

17. On December 16, 2009, Mr. Rowson called Mr. Ladenburg indicating that he would be sending the declarations page of the applicable insurance policy from ACE American Insurance Company. Mr. Rowson informed Mr. Ladenburg that the deductible amount was \$100,000, not \$1 million or more, and stated that he did not intend to misrepresent the terms of the policy. See Ladenburg Aff. at 5.

18. On December 23, 2009, Mr. Ladenburg called ACE Insurance Company and spoke with Jim Rzepkecki. Mr. Rzepkecki indicated that the deductible amount for the applicable insurance policy was \$100,000 and Mr. Ladenburg sent a confirmation letter to Mr. Rzepkecki to that effect. Id.

19. On January 14, 2010, Mr. Ladenburg contacted the offices of Cross & Simon, LLC, and indicated that he was able to confirm that the deductible amount was \$100,000. Mr. Ladenburg also indicated that he learned the Debtors had come out of bankruptcy, and inquired as to how to now proceed with Mr. Scurria's State Court Action and/or claim. Id.

20. On January 20, 2010, Mr. Ladenburg was informed that the Debtors filed the Objection, and that because no response was received from Mr. Scurria, the order granting the objection was signed. While Mr. Ladenburg did receive the Objection, he did not see Mr. Scurria's name or claim on the Objection as Mr. Scurria's claim is listed under "Anthony E. Scurria" as opposed to "Scurria, Anthony E." Id.

21. On February 25, 2010, Mr. Scurria filed his Motion for Relief from the Plan Injunction [D.I. No. 1445] seeking an order from the Court allowing Mr. Scurria to proceed with the State Court Action as against the applicable insurance proceeds only. See Ladenburg Aff. at 6.

22. On March 10, 2010, Mr. Ladenburg was informed that the Debtors believed that the deductible amount was \$1.9 million, and not \$100,000 as previously represented to Mr. Ladenburg. In that regard, on March 25, 2010, Mr. Ladenburg sent correspondence to Mr. Rzepecki at ACE American Insurance Company attempting to clarify the deductible amount. Mr. Ladenburg sent a similar letter to Mr. Rzepecki on April 5, 2010. Id.

23. On April 8, 2010, Mr. Ladenburg was able to speak with Mr. Rzepecki where Mr. Rzepecki indicated that the deductible amount was \$100,000 and not \$1.9 million. However, on April 27, 2010, Mr. Ladenburg received correspondence from Mr. Rowson indicating that no insurance proceeds would be available to resolve Mr. Scurria's claim as the deductible amount exceeds any reasonable value of the claim. In light of the above, Mr. Scurria files the instant Motion seeking an order from other Court allowing his late filed claim, based on the above-stated facts, or, in the alternative, relief from the November 19, 2009 Order Sustaining, In Part, Debtors' First Omnibus (Non-Substantive) Objection to Claims (the "Order") [D.I. No. 967]. Id.

#### **Relief Requested**

24. Mr. Scurria respectfully requests this Court enter an Order stating that Mr. Scurria's previously submitted claim be allowed pursuant to Fed. R. Bankr. P. 3008 and 11 U.S.C. § 502(j), or, in the alternative, grant Mr. Scurria relief from the Order effectively expunging Mr. Scurria's claim without his knowledge pursuant to Fed. R. Civ. P. 60(b) and Fed. R. Bankr. P. 9024(b).

### **Basis for Requested Relief**

25. Federal Rule of Bankruptcy Procedure 3008 states that a “party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate.” Fed. R. Bankr. P. 3008. Further, 11 U.S.C. § 502(j), in pertinent part, provides a “claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case.” 11 U.S.C. § 502(j). Federal Rule of Civil Procedure 60(b) states, in pertinent part, “on motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for mistake, inadvertence, or excusable neglect.” Fed. R. Civ. P. 60(b); See also Pro-Tec Service, LLC v. Inacom Corp (In re Inacom Corp.), 2004 WL 2283599 at \*2 (D. Del. Oct. 4, 2004).

26. The factors a court must consider when determining whether a party has failed to appear or to produce evidence because of excusable neglect were articulated by the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993), and were adopted and applied by the Third Circuit in In re O’Brien Environmental Energy, Inc., 188 F.3d 116, 125 (3<sup>rd</sup> Cir. 1999). Inacom, 2004 WL, at \*2.

27. The four (4) Pioneer factors to consider in making the excusable neglect determination are: (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Pioneer, 507 U.S. at 395.

**A. There Is No Prejudice To The Debtor In Allowing Mr. Scurria's Claim**

28. Under Third Circuit case law, Pioneer requires a detailed analysis of more than whether the Plan set aside money to pay the claim at issue. O'Brien, 188 F.3d at 127. The relevant factors for analysis of prejudice under O'Brien include: (a) whether the debtor was surprised or caught unaware by the assertion of a claim that it had not anticipated; (b) whether the payment of the claim would force the return of amounts already paid out under the confirmed plan or affect the distribution to creditors; (c) whether allowance of the claim would adversely impact the debtor actually or legally; and (d) whether allowance of the claim would open the floodgates to other future claims. Inacom, 2004 WL at 4; citing O'Brien, 188 F.3d at 126-28.

29. It is clear that the Debtors could not have been caught unaware by the assertion of the claim that it had not anticipated. Debtors were made aware of Mr. Scurria's claim as early as July of 2007 when Mr. Ladenburg notified Debtors via letter of Mr. Scurria's claims and asking that the claims be referred to the appropriate insurance carrier. Further, while Mr. Scurria never received notice of the bankruptcy proceedings, there is a "Tony Scurria" listed on the Debtors list of creditors,<sup>1</sup> indicating that Debtors were aware of Mr. Scurria's claim. It is also clear that the Debtors were aware of Mr. Scurria's claim as they objected to it in the Objection. Therefore, the Debtors cannot be said to be caught unaware of Mr. Scurria's claim.

30. With regard to the second O'Brien factor, the payment of Mr. Scurria's claim would not force the return of amounts already paid out under the confirmed plan or affect the distribution to creditors. The Debtors are still litigation over certain claims filed in this case,<sup>2</sup>

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<sup>1</sup> While "Tony Scurria" is listed on the Debtors' list of creditors, no address is listed for Mr. Scurria other than him being associated with "Advantage Framing, Inc." located in Tacoma, Washington.

<sup>2</sup> On May 20, 2010, the Debtors filed the Omnibus Objection To Claims (*Twentieth*) (*Non-Substantive*) [D.I. No. 1585], which is scheduled to be heard on June 23, 2010.



and, according to the Seventh Notice of Claims And Scheduled Amounts Previously Satisfied [D.I. No. 1586], “the Reorganized Debtors ... intend to designate the Satisfied Claims and the Satisfied Scheduled Amounts on their claims and distribution registers as having been previously been satisfied ... so that their records are accurate for purposes of making distributions under the Plan.” See Seventh Notice of Claims And Scheduled Amounts Previously Satisfied [D.I. No. 1586]. (Emphasis added.) As the Debtors have not made distributions under the Plan, the payment of Mr. Scurria’s claim would not force the return of amounts already paid out or affect the distribution to creditors.

31. Regarding the third O’Brien factor, Mr. Scurria is unaware of any facts that would support the contention that the payment of his claim would jeopardize the success of the Debtors’ reorganization.

32. The fourth O’Brien factor to consider when determining prejudice to the Debtor is whether allowance of the claim would adversely impact the debtor actually or legally. The Debtors will not be adversely affected if Mr. Scurria’s claim is allowed. The inquiry to be performed in a reconsideration of the claim is fairly straightforward, and, as previously stated, the Debtors continue to object to and litigate disputed claims. Further, the Debtors have been aware of Mr. Scurria’s claim even well before the Petition Date.

33. The final O’Brien factor is whether allowance of the claim would open the floodgates to other future claimants. There is no indication that the allowance of Mr. Scurria’s claim would open the floodgates of other claims. The circumstances that give rise to Mr. Scurria’s claim, as stated above, are certainly unique. Despite the fact that the Debtors were aware of Mr. Scurria’s claims since July 2007, neither Mr. Scurria nor his attorney Mr. Ladenburg received notice of the chapter 11 proceedings, nor were they aware that the Debtors

filed for protection under chapter 11 until after filing the State Court Action. Further, while Mr. Ladenburg did receive the Objection and the Order, the fact that Mr. Scurria's claim was listed under "Anthony" as opposed to "Scurria" caused Mr. Ladenburg not to see Mr. Scurria's name among the list of 131 claims listed on Exhibit A to the Objection, purportedly in alphabetical order. For the reasons stated above, the Debtors will suffer no prejudice should the Court decide to allow Mr. Scurria's claim.

**B. The Minimal Length of Delay and Impact on Judicial Proceedings Support a Finding of Excusable Neglect**

34. As previously stated above, Mr. Scurria was unaware that his claim had been objected to, and expunged pursuant to the Objection and Order until the end of January 2010. Since that time, Mr. Scurria has filed a Motion for Relief from the Plan Injunction [D.I. No. 1445] proceeding under the assumptions that (1) Mr. Scurria is still entitled to proceed against in the State Court Action against the Debtors' applicable insurance carriers; and (2) that the applicable insurance policy has a deductible of \$100,000. Since that time, and through communications with Debtors' counsel, the correct deductible amount has become unclear, and now, in an abundance of caution, Mr. Scurria files the instant Motion only less than (5) months after learning of the Order.<sup>3</sup>

35. In Inacom, the United States District Court for the District of Delaware was called to address a case factually similar to that presented here. In that case, however, the claimant Pro-Tec Services, LLC ("Pro-Tec") filed its motion almost two years and ten months after the objection, almost two years and nine months after the order was served, and nine months after

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<sup>3</sup> While this Motion is being filed less than five (5) months after learning of the Order, counsel for Mr. Scurria has been in contact with Debtors' counsel since learning of the Order in late January 2010 in an attempt to resolve this matter and Mr. Scurria's underlying claim.

the plan was confirmed. Inacom, 2004 WL at \*6. In addressing this Pioneer factor, Pro-Tec argued that (a) Inacom was still litigating its claims; (b) the length of delay had no impact on the plan; and (c) distributions to unsecured creditors had not yet commenced and would be adjusted depending on Inacom's progress in resolving the claims. Id. In response, Inacom argued that (a) Pro-Tec's counsel's failure to respond, in and of itself, weighed in favor of denying the appeal; (b) Pro-Tec's failure to respond after the order warrants denying the appeal and that Pro-Tec should have contacted Inacom; and (c) the fact that Inacom was still litigating and negotiating claims indicated that reconsidering Pro-Tec's claim would delay closure of the case. Id. at \*7.

36. In response to the above arguments, the Court stated that it agreed with Pro-Tec and found that Inacom's arguments were unpersuasive. Id. The Court in Inacom went on to state that "[n]owhere in Pioneer or O'Brien, do the Supreme Court or the Third Circuit find that failure to respond, in and of itself, weighs in favor of denying the claim. Additionally, there is no finding that the creditor must attempt to make contact with the debtor." Id. Additionally, the Court stated that this Pioneer factor weighs in favor of Pro-Tec because Inacom is still litigating disputed claims and distribution to creditors are based on Inacom's progress in resolving the claims. Id.

37. Similarly here, the Debtors are still litigating disputed claims and, upon information and belief, distribution to creditors will be based on the Debtors' progress in resolving those claims. In addition, Mr. Scurria's delay of under five (5) months cannot compare to that of Pro-Tec which filed its motion almost three (3) years after the objection. This Pioneer factor favors Mr. Scurria and a finding of excusable neglect.

**C. The Reason for the Delay**

38. The third Pioneer factor, reason for the delay, weighs in favor of Mr. Scurria as well. The notice his counsel received with respect to the Objection was deceiving because it purported to be in alphabetical order. One reviewing the Objection could be excused from checking all the names and instead, skipping to the ones starting with “S.” However, even if the Court does not agree, this factor is dispositive. The court in Inacom stated that the third Pioneer factor weighed in favor of Inacom. Id. at \*8.<sup>4</sup> Despite the fact that this factor weighed in favor of Inacom, the Court did, however, find in favor of Pro-Tec and reversed the Bankruptcy Court’s ruling denying Pro-Tec reconsideration of its claim.

**D. Mr. Scurria has Acted in Good Faith**

39. There is no indication that Mr. Scurria has acted in any manner that would support a finding of bad faith. Mr. Scurria’s claim was filed in good faith, and without knowledge of the bar date. Further, once Mr. Scurria became aware that his claim had been expunged, counsel for Mr. Scurria acted promptly, and has been in contact with Debtors’ counsel regarding the issues presented herein. Mr. Scurria and his counsel have acted in good faith, and this factor weighs in favor of a finding of excusable neglect.

**CONCLUSION**

40. As the Court noted in Inacom, “the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with ... good faith ... weigh strongly in favor of permitting the tardy claim. Id., quoting Pioneer, 507 U.S. at 398. The Court went on to hold that “Pro-Tec has shown that there will be no prejudice to Inacom if its claim is

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<sup>4</sup> This case can be distinguished from Inacom because, in Inacom, the list of claimants was not in alphabetical order. One reviewing that list would have been on notice that he or she needed to check everyone. Here, in contrast, the list of claimants was in alphabetical order, except Debtors made a mistake with respect to Mr. Scurria’s name.

reconsidered, the delay's effect on judicial proceedings in absolute terms will not prejudice Inacom, and Pro-Tec has acted in good faith. The only Pioneer factor that weighs against Pro-Tec is the reason for the delay, for which Pro-Tec was fully responsible. Id. The Court went on to reverse the Bankruptcy Court's ruling and remanded the case for proceedings consist with its opinion.

41. Mr. Scurria seeks the same ruling as in Inacom as factually, his case is quite similar, the majority of the Pioneer factors weigh in favor of excusable neglect and allowing Mr. Scurria's claim.

WHEREFORE, Anthony E. Scurria respectfully requests that this Court enter an Order allowing Mr. Scurria to resubmit his proof of claim, or, in the alternative, grant Mr. Scurria relief from the Order and treat his original claim as being filed timely.

Dated: June 4, 2010  
Wilmington, Delaware

CROSS & SIMON, LLC

By: 

Christopher P. Simon (No. 3697)  
Patrick M. Brannigan (No. 4778)  
913 North Market Street, 11th Floor  
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*Attorneys for Anthony E. Scurria*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>	)	Case No. 09-12074 (KJC)
	)	
Reorganized Debtors.	)	Hearing Date: June 23, 2010 at 2:00 p.m.
<hr style="width:50%; margin-left:0"/>	)	Obj. Deadline: June 15, 2010 at 4:00 p.m.

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that Anthony E. Scurria ("Movant") has filed his Motion for Reconsideration of His Disallowed Claim and/or Relief from Order Pursuant to Fed. R. Civ. P. 60 (the "Motion").

A HEARING ON THE MOTION WILL BE HELD ON JUNE 23, 2010 AT 2:00 P.M. AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 5<sup>TH</sup> FLOOR, COURTROOM 5 BEFORE THE HONORABLE KEVIN J. CAREY.

**ANY RESPONSE MUST BE FILED AND SERVED TOGETHER WITH A CERTIFICATE OF SERVICE ON OR BEFORE JUNE 15, 2010 AT 4.00 P.M. FAILURE TO TIMELY FILE AND SERVE A RESPONSE WILL RESULT IN AN ORDER GRANTING THE RELIEF REQUESTED IN THE MOTION.**


At the same time you must also serve a copy of the response upon Movant's attorneys:

Christopher P. Simon, Esq.  
Patrick M. Brannigan, Esq.  
CROSS & SIMON, LLC  
913 North Market Street, 11<sup>th</sup> Floor  
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Wilmington, Delaware 19899-1380  
Telephone: (302) 777-4200  
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[csimon@crosslaw.com](mailto:csimon@crosslaw.com)  
[pbrannigan@crosslaw.com](mailto:pbrannigan@crosslaw.com)

The attorneys for the parties shall confer with respect to the issues raised by the Motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as value of the property, and the extent and validity of any security instrument.

Dated: June 4, 2010  
Wilmington, Delaware

CROSS & SIMON, LLC

By:   
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*Counsel for Anthony E. Scurria*

# Exhibit A



**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

IN RE:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 09-12074 (KJC)

Jointly Administered

Ref. Docket No. 757

**AFFIDAVIT OF FRANK B. LADENBURG, JR.**

STATE OF WASHINGTON            )  
  )ss.  
County of Pierce                 )

FRANK B. LADENBURG, JR., being first duly sworn upon oath, deposes and says as follows:

1.       The undersigned attorney is 62 years of age and has been practicing law in the State of Washington with a license continuously since 1974. My practice is limited to representing injured people on tort claims. In the past, I have been President of the local Tacoma-Pierce County Bar Association and elected President of the Washington State Trial Lawyers Association, now known as the Washington State Association for Justice.

**BACKGROUND**

2.       Anthony Scurria is 50 years of age. He was injured on a job site on July 10, 2007 when an operator employed by BMHC (the Debtor in Chapter 11 proceedings herein) negligently operated a crane while placing trusses, knocking Mr. Scurria from the building

wherein he suffered injuries. Mr. Scurria's medical bills totals \$49,362.18 and his wage loss totals \$13,935.80.

3. I have spent my time with my assistant reviewing my file, including correspondence, e-mails, and notes to establish a time line to show the Court the series of events that has transpired in this case. The following timeline shows how this claim has progressed to date and how the plaintiff has been in touch with the agents of BMHC since 13 days after the accident, processing the claim. I believe this time line will exhibit to the Court how the plaintiff came to the point where his claim was expunged. The plaintiff is now left in the position of trying to set it aside so he can proceed with his claim against BMHC for the injuries he sustained.

The legend for the timeline is as follows:

Anthony Scurria	Plaintiff in tort action
Frank B. Ladenburg, Jr.	Attorney hired by Mr. Scurria to pursue personal injury claim.
BMHC	Building Materials Holding Corporation, debtors in bankruptcy and defendants in Mr. Scurria's tort action
Christopher Giamo	Counsel for committee of unsecured creditors
Cross & Simon	Law firm hired by Attorney Ladenburg to pursue bankruptcy motion to set aside stay.
Patrick Brannigan	Attorney with Cross & Simon hired by Attorney Ladenburg to pursue a bankruptcy motion to set aside the stay.
Paul Rowson	Adjuster at Gallagher Bassett handling Mr. Scurria's claim on behalf of BMHC.
Garden City Group	Noted as where to mail Claim for Damages form in Instructions for Claim Form on BMHC's website.
Jim Rzepecki	Adjuster with ACE American Insurance Company, Insuring BMHC.

7/10/07	Scurria is injured on job site. Defendant is BMHC and crane operator for BMHC.
7/17/07	Letter from Attorney Ladenburg to BMHC asking to refer matter to insurance carrier.
7/23/07	Letter from Gallagher Bassett adjuster, Paul Adjuster Rowson, stating he is handling claim on behalf of BMHC.

7/31/07	Conference w/Adjuster Rowson about claim.
8/1/07	Letter to Gallagher Bassett asking for pictures, itemization of payments made, etc.
11/5/07	Adjuster Paul Adjuster Rowson takes informal unrecorded statement from Scurria about claim, injuries, medical treatment, wage loss.
5/01/08	Client treats for injuries and gathers wage loss information.
4/15/09	Demand letter sent to Adjuster Rowson totaling \$463,297 (\$400,000 in general, \$49,362 of medical specials and wages of \$13,935).
5/6/09	Phone call to Adjuster Rowson to check on status of demand letter. Adjuster Rowson states he received demand, but hadn't reviewed it and would get back in a week.
7/23/09	Summons and Complaint filed in Pierce County Superior Court under Cause No. 09-2-11518-0.
8/6/09	<b>Letter received by Attorney Ladenburg dated 8/3/09 from Adjuster Rowson indicating that BMHC is in Chapter 11 bankruptcy and that all actions are stayed pursuant to bankruptcy proceedings. Directed Attorney Ladenburg to Chapter 11 bankruptcy information on BMHC's website at <a href="http://www.BMHC.com">www.BMHC.com</a>. Indicated BMHC received suit and are unable to file response because of Chapter 11.</b>
8/31/09	Date by which Claims had to be filed by. Mr. Scurria was not aware of this date until later because Mr. Scurria did not receive notice of the original bankruptcy claim filing date because he was listed on the original list of creditors as " <b>Scurria, Tony, Advantage Framing, Inc., Tacoma, Washington, 98466.</b> " It is unknown if any notice was ever mailed as there is no address. It was not received by Mr. Scurria.
9/3/09	Attorney Ladenburg called Christopher Giamo (counsel for committee of unsecured creditors) stated Attorney Ladenburg represents Scurria on a serious personal injury claim against BMHC. Discussion about lifting stay so Attorney Ladenburg could proceed with the tort action in Pierce County Superior Court. Sent Attorney Giamo an e-mail.
9/14/09	Letter from Attorney Ladenburg's legal assistant to The Garden City Group enclosing Claim Form for \$463,297.98 signed by client. Obtained from website referenced by Adjuster Rowson.
9/15/09	Ladenburg's assistant wrote to Attorney Giamo via e-mail asking what information he needed to get stay lifted against BMHC. Attorney Giamo asked for Complaint. CMB replied with Declaration of Service, Claim Form, and Complaint to Mr. Giamo.
9/17/09	<b>Date claim form received/filed by The Garden City Group. Note that Claim Form was not filed by 8/31/09 because Mr. Scurria had not received original notice of bankruptcy and was unaware of said deadline. Note address for Advantage Framing, Inc. was easily available to BMHC by typing in "Advantage Framing, Inc., Tacoma, WA" in Google. The first thing that appears is Advantage Framing, Inc. with the address and phone number in Tacoma. If "Anthony Scurria, Tacoma, WA" is typed into <a href="http://www.qwestdex.com">www.qwestdex.com</a>, the same address and phone number appears.</b>

10/15/09	Attorney Ladenburg contacted Cross & Simon discussing hiring attorneys to attempt to lift stay as to insurance proceeds only.
10/15/09	Attorney Ladenburg asked assistant to send copy of S&C to Cross & Simon (Patrick Brannigan's firm), Claim Form. CMB sent req'd info.
10/20/09	<b>Attorney Ladenburg sent fee agreement, and engagement letter to Cross &amp; Simon to handle bankruptcy motion to lift stay.</b>
10/23/09	Rec'd draft copy of Motion for Relief of Automatic Stay from Attorney Attorney Brannigan.
10/28/09	Attorney Ladenburg spoke to BMHC adjuster Paul Rowson, followed up with letter on 11/4/10, indicating BMHC had a deductible of \$1 or \$2 million and Ladenburg and Adjuster Rowson agreed there would be no point in having lawyers lift stay since the value of our claim didn't exceed that amount. Asked for copy of dec sheet.
11/4/09	Attorney Ladenburg spoke to Adjuster Rowson, asked about documentation concerning policy limits, copy of insurance policy, was advised it was either a \$1 or \$2 million deductible. Adjuster Rowson was going to check back.
11/9/09	Adjuster Rowson wrote that he wouldn't be able to provide copy of dec sheet, but stated no insurance proceeds would be available to settle the claim as the deductible exceeded any reasonable value of the claim.
11/18/09	Attorney Ladenburg wrote to attorneys Cross & Simon indicating that until we could confirm amount of deductible, to take no further action on file.
11/19/09	Attorney Ladenburg spoke to Adjuster Rowson, who indicated he couldn't send dec sheet because it would be part of discovery, but Adjuster Rowson did indicate deductible was \$1 million or more. Attorney Ladenburg requested a copy of said dec sheet to confirm; Adjuster Rowson said he would check with lawyers and see if he could provide a copy.
12/3/09	Attorney Ladenburg called Adjuster Rowson and asked him to fax documentation on deductible; he said he would do so.
12/9/09	Attorney Ladenburg wrote to Adjuster Rowson stating Attorney Ladenburg looked forward to receiving info on deductible.
12/16/09	Adjuster Rowson of Gallagher Bassett telephones and states he will send the declaration page of policy through ACE American Insurance Company (insurer for BMHC) showing a \$100,000 deductible, not a \$1 million deductible. On that day, Adjuster Rowson advises Attorney Ladenburg he did not intend to misrepresent the terms of the policy.
12/23/09	Called ACE Insurance Company because they are the company that insures BMHC. Spoke to Jim Rzepecki. He said there was a \$100k deductible, not \$1 million. Follow-up confirmation letter.
1/14/10	Attorney Ladenburg called Adjuster Rzepecki and he indicated that Attorney Ladenburg was indeed reading policy correctly and that it was a \$100k deductible. Indicated that BMHC had come out of bankruptcy and that Attorney Ladenburg should call Paul Adjuster Rowson of Gallagher Basset. Spoke to Adjuster Rowson, who confirmed the \$100k deductible and that all actions need to be filed in Delaware bankruptcy court.
1/14/10	Attorney Ladenburg spoke to attorneys Cross & Simon by phone, sent

	follow-up fax indicating that he could proceed to get stay lifted now that deductible was \$100k.
1/15/10	Attorney Ladenburg's assistant sent declaration page to attorneys Cross & Simon, asking how to proceed.
1/18/10	E-mail rec'd from Attorney Attorney Brannigan attaching a copy of Confirmation Plan and Debtor's Plan of Reorganization and stating he would contact debtor's counsel and see how Scurria's claim was being handled.
1/20/10	<b>Phone conf. w/Attorney Patrick Brannigan regarding Debtors' First Omnibus Objection to Claims. Attorney Brannigan points out that Scurria's claim has been expunged because he didn't respond to the notice by 11/12/09. Attorney Ladenburg looks in the file and sees the Objection in the file dated 10/20/09 and assumes it was received in Ladenburg's office within a few days thereafter. Attorney Ladenburg tells Attorney Brannigan that Scurria's name is not on it. Attorney Brannigan advises Attorney Ladenburg to look under "A" rather than "S" and indeed finds Mr. Scurria's name is listed under his first name of "A" for Anthony and not under his last name of "S" for Scurria. Note that the list does appear to be in alphabetical order and contains 15 pages and 131 names and addresses of entities listed. Note that 10/20/09 is the date that Attorney Ladenburg sent the signed fee agreement to bankruptcy attorneys, Cross &amp; Simon and, by coincidence, is apparently the same date that the Court was mailing out the first Omnibus Objection to the Claims with Mr. Scurria's name under "A", not "S".</b>
1/21/10	Attorney Ladenburg's letter to Attorney Brannigan providing documentation to regarding case.
2/7/10	Received draft motion from Attorney Brannigan for relief.
2/25/10	Received Motion for Relief from Plan Injunction filed by Attorney Brannigan.
3/10/10	Received e-mail from Attorney Brannigan forwarding debtor's counsel e-mail claiming deductible is \$1.9 million, not \$100,000.
3/16/10	E-mail from Attorney Brannigan extending regarding adjournment of hearing date.
3/25/10	Letter to Adjuster Rzepecki at ACE trying to confirm amount of deductible.
4/5/10	Letter to Adjuster Rzepecki trying to confirm amount of deductible.
4/8/10	Letter to Adjuster Rzepecki concerning deductible and possible settlement. Also, phone conference with Adjuster Rzepecki wherein he confirms that the deductible is \$100,000 and not \$1.9 million.
4/27/10	Letter from Adjuster Rowson stating that no insurance proceeds will be available to resolve the claim as the deductible exceeds any reasonable value of the plaintiff's claim.
4/30/10	E-mail from Attorney Brannigan proposing extending hearing date to June, 2010.
5/14/10	Letter to Attorney Brannigan advising we should proceed with motion to

	set aside expungement of Mr. Scurria's claim.
--	---

4. The Court will note that BMHC and its representatives and agents have been in touch with the plaintiff's attorney about this injury claim since 13 days after the accident. Yet no notice was received by Mr. Scurria, or his attorney, of the original claim filing deadline. Instead, Mr. Scurria's name and business was listed with only an address of Tacoma, Washington and a zip code on the original list of creditors. It is unknown if any mailing was ever directed to said business at the address of Tacoma, Washington, but Mr. Scurria states that nothing was ever received. *See Anthony Scurria's Affidavit filed herein.* The plaintiff's attorney has received conflicting information as to the amount of the deductible, i.e., \$100,000 or \$1.9 million from Adjuster Rowson at Gallagher Bassett, Adjuster Rzepecki at ACE American Insurance Company, and from debtor's counsel through contact with Attorney Brannigan. It is still unclear what the deductible may be.

5. The Court will also note that Mr. Scurria learned of the bankruptcy filing by BMHC fortuitously only through Attorney Ladenburg, who was advised via letter received on or about August 6, 2009 from Adjuster Rowson handling the claim for BMHC. Attorney Ladenburg's assistant obtained a BMHC Claim Form online at the BMHC website and mailed it in to the bankruptcy court. Unaware of the deadline set by the Court for filing claims as no notice was ever received.

6. Attorney Ladenburg hired the Law Firm of Cross & Simon and mailed a retainer fee and signed agreement on October 20, 2009 to pursue the attempt to lift the stay relative to Mr. Scurria's claim. By coincidence, this turned out to be the same day the Court was apparently mailing a document entitled "Debtor's First Omnibus Objections to Claims" that listed Mr.

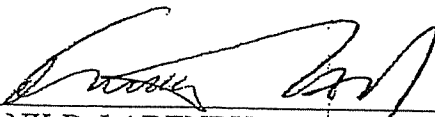
Scurria on the notice, but not listed by last name in alphabetical order, but rather listed under "A"  
for Anthony.

Attorney Ladenburg looked at the document, but did not see the plaintiff's name under "Scurria" and did not notice that the plaintiff was listed under "A" "Anthony Scurria" versus "S" "Scurria, Anthony." Because of this, Mr. Scurria failed to object to having his claim expunged by November 12, 2009 and attorneys at Cross & Simon, received no notice of the First Omnibus Objections to Claims because it had been sent out to Attorney Ladenburg and neither Attorney Ladenburg nor Cross & Simon realized there was a problem until after November 12, 2009, the deadline for objecting to expungement of the claim.

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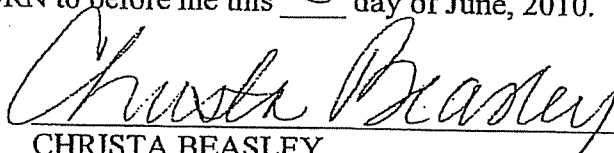
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DATED this 3<sup>rd</sup> day of June, 2010.

  
FRANK B. LADENBURG, JR. WSBA #5704  
Of Attorneys for Plaintiff Scurria

SUBSCRIBED AND SWORN to before me this 3 day of June, 2010.



  
CHRISTA BEASLEY  
NOTARY PUBLIC in and for the State of  
Washington, residing at Puyallup.  
My commission expires 11/25/11.

TROUP, CHRISTNACHT, LADENBURG,  
McKASY & DURKIN, INC., P.S.  
ATTORNEYS AT LAW  
3602 19TH STREET WEST • TACOMA, WASHINGTON 98466-6183  
PHONE 253/564-2111 • FAX 253/566-9343

# Exhibit B



1                                   **IN THE UNITED STATES BANKRUPTCY COURT**  
2                                   **FOR THE DISTRICT OF DELAWARE**

3       IN RE:

Chapter 11

4       BUILDING MATERIALS HOLDING  
5       CORPORATION, *et al.*,

Case No. 09-12074 (KJC)

6                                   Debtors.

Jointly Administered

Ref. Docket No. 757

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8  
9       **AFFIDAVIT OF ANTHONY SCURRIA IN SUPPORT OF MOTION TO ALLOW**  
10       **ANTHONY SCURRIA TO PROCEED WITH TORT CLAIM AGAINST**  
11       **DEBTORS**

11       STATE OF WASHINGTON       )

)ss.

12       County of Pierce       )

13                   ANTHONY SCURRIA, being first duly sworn upon oath, deposes and says as  
14       follows:

15               1.       I am the plaintiff in Pierce County Superior Court Cause No. 09-2-11518-  
16       0, which was filed on July 23, 2009 and relates to an accident in which I was injured in a  
17       construction site accident on July 10, 2007. I incurred medical bills of almost \$50,000  
18       and lost wages of almost \$14,000 as a result of my personal injuries. At the time of the  
19       accident, I was a co-owner of Advantage Framing, Inc. in Tacoma, Washington.

20               2.       I hired Attorney Frank B. Ladenburg, Jr. to pursue a personal injury claim  
21       for me. We were in touch with an adjuster from an adjustment company handling the  
22       claim less than two weeks after the accident.  
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25  
26       AFFIDAVIT OF ANTHONY SCURRIA - 1  
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**TROUP, CHRISTNACHT, LADENBURG,**  
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ATTORNEYS AT LAW  
6602 19<sup>TH</sup> STREET WEST • TACOMA, WASHINGTON 98466-6183  
PHONE 253/564-2111 • FAX 253/566-9343

3. I never received notice of a bankruptcy filed on behalf of BMHC until my lawyer advised me on August 6, 2009 or shortly thereafter after he received notice from the adjuster handling the claim for BMHC that BMHC was in fact in Chapter 11 bankruptcy.

4. I was just advised by my attorney that the original list of creditors that was filed by BMHC in this matter contained my name as "Scurria, Tony, Advantage Framing, Inc., Tacoma, Washington 98466." Apparently, no address was listed for the business that I co-own. I never received notice of the original bankruptcy filing by BMHC and did not realize until Attorney Ladenburg advised me that such a bankruptcy had been filed shortly after August 6, 2009. If I had received such a notice, I would have brought it directly to my attorney, Mr. Ladenburg. I know that I did not receive any such notice because I would definitely remember that and would definitely have brought it directly to my attorney.

5. I also know that if BMHC had simply typed "Advantage Framing, Inc., Tacoma, Washington" into the Google search engine, my address of 8624 - 19<sup>th</sup> ST. W., Tacoma, WA 98466 would have come up as the first entry. If "Anthony Scurria,

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AFFIDAVIT OF ANTHONY SCURRIA - 2

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**TROUP, CHRISTNACHT, LADENBURG,  
McKASY & DURKIN, INC., P.S.**

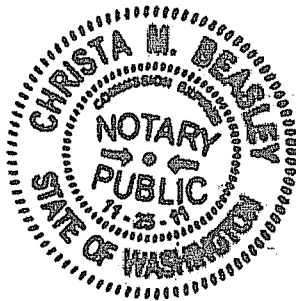
ATTORNEYS AT LAW  
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PHONE 253/564-2111 • FAX 253/566-9343

1 Tacoma, WA" was typed into www.qwestdex.com, the same address would have come  
2 up.

3 DATED this 3<sup>RD</sup> day of June, 2010.

4 Anthony Scurria  
5 ANTHONY SCURRIA

6 SUBSCRIBED AND SWORN to before me this 3<sup>RD</sup> day of June, 2010.



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Christa Beasley  
CHRISTA BEASLEY  
NOTARY PUBLIC in and for the State of  
Washington, residing at Puyallup.  
My commission expires 11/25/11.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
BUILDING MATERIALS HOLDING	)	Case No. 09-12074 (KJC)
CORPORATION, <i>et al.</i>	)	
	)	
Debtors.	)	
_____	)	Re: D.I. No. _____

**ORDER GRANTING MOTION OF ANTHONY E. SCURRIA FOR  
RECONSIDERATION OF HIS DISALLOWED CLAIM AND/OR FOR RELIEF  
FROM ORDER PURSUANT TO FED. R. CIV. P. 60**

Upon consideration of the Motion of Anthony E. Scurria ("Movant") for  
Reconsideration of His Disallowed Claim and/or Relief from Order Pursuant to Fed. R.  
Civ. P. 60 (the "Motion"), it is hereby ORDERED that:

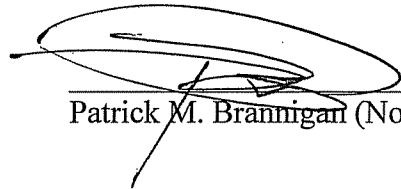
1. The Motion is Granted.

DATED: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Kevin J. Carey  
Chief United States Bankruptcy Court Judge

**CERTIFICATE OF SERVICE**

I, Patrick M. Brannigan, Esquire, hereby certify that on this 4<sup>th</sup> day of June, 2010, I caused a copy of the foregoing *Motion of Anthony E. Scurria for Reconsideration of His Disallowed Claim and/or for Relief from Order Pursuant to Fed. R. Civ. P. 60* to be served on the parties on the attached service list as indicated.

  
\_\_\_\_\_  
Patrick M. Brannigan (No. 4778)

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