

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 09-12074-KJC

- - - - -x

In the Matter of:

BUILDING MATERIALS HOLDING CORPORATION, ET AL.,

Reorganized Debtors.

- - - - -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

July 8, 2010

10:04 AM

B E F O R E:

HON. KEVIN J. CAREY

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: AL LUGANO

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HEARING re Motion of GSA Home Energy Solutions to reconsider
claim.

Transcribed by: Penina Wolicki

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Attorneys for Reorganized Debtors

The Brandywine Building

1000 West Street, 17th Floor

Wilmington, DE 19899

BY: ROBERT F. POPPITI, JR., ESQ.

SEITZ VAN OGTROP & GREEN, P.A.

Attorneys for GSA Home Energy Solutions

222 Delaware Avenue

Suite 1500

Wilmington, DE 19801

BY: PATRICIA MCGONIGLE, ESQ.

GRAVES DOUGHERTY HEARON & MOODY PC

Attorneys for GSA Home Energy Solutions

401 Congress Avenue

Suite 2200

Austin, TX 78701

BY: JAMES HOFFNER, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning.

MR. POPPITI: Good morning, Your Honor. For the record, Robert Poppiti from Young Conaway Stargatt & Taylor on behalf of the debtors. We'll be working off the agenda for today's hearing. The only item going forward, Your Honor, is agenda item 8. It is the movant's motion, so we if it's okay with Your Honor, I'll turn the podium over to my opposing counsel.

THE COURT: Very well.

MR. POPPITI: Thank you.

MS. MCGONIGLE: Good morning, Your Honor. Patty McGonigle on behalf of GSA Home Energy Solutions. Your Honor, on the -- participating by phone is my co-counsel James Hoeffner, who's in Texas. Mr. Hoeffner will be able to -- he's filed an affidavit in connection with the motion to reconsider claim, and would be available to answer any specific questions Your Honor may have with regard to the background facts giving rise to the motion.

THE COURT: Well, speaking of --

MR. HOEFFNER: Good morning, Your Honor.

THE COURT: Good morning. Speaking of facts, how is it exactly and of what will the record consist today?

MS. MCGONIGLE: Excuse me, Your Honor?

1 THE COURT: What factual record do you intend to make
2 today?

3 MS. MCGONIGLE: Well, Your Honor, what we have
4 submitted, Your Honor, with the motion, is Mr. Hoeffner's
5 affidavit as to -- which we believe substantiates our view of
6 the excusable neglect, which would give rise under Pioneer, to
7 Your Honor essentially voiding the seventeenth omnibus
8 objection -- the order sustaining the seventeenth omnibus
9 objection, which expunged GSA's claim of 1.1 million dollars,
10 and allowing that matter to proceed on the merits.

11 We're not obviously looking for Your Honor to allow
12 the claim, we're simply looking for an opportunity to have it
13 heard on the merits.

14 THE COURT: No, I've read the paper. But I want to
15 deal with the basics. So are you moving the admission of that
16 affidavit?

17 MS. MCGONIGLE: Yes, Your Honor.

18 THE COURT: Okay. Is there any objection?

19 MR. POPPITI: Your Honor, there's no objection. And I
20 think we would obviously move for the admission of our
21 affidavit -- declaration of Paul Street that was attached to
22 the objection that we filed for the motion for reconsideration.

23 THE COURT: Okay. So by agreement, both affidavits
24 and/or declarations are admitted.

25 (Affidavit of James Hoeffner was hereby received in evidence,

1 as of this date.)

2 (Declaration of Paul Street was hereby received in evidence, as
3 of this date.)

4 MS. MCGONIGLE: Thank you, Your Honor.

5 THE COURT: Okay.

6 MS. MCGONIGLE: May I proceed?

7 THE COURT: You may.

8 MS. MCGONIGLE: Thank you, Your Honor. Your Honor,
9 since Your Honor has indicated you've read the papers, I'll try
10 and move forward with this motion, hitting the highlights.

11 The Court entered the seventeenth omnibus order
12 approving the seventeenth omnibus objection to claims,
13 expunging GSA's claim. That claim stemmed from a rejection of
14 what is called a Home Energy Solutions agreement, under which
15 the debtor was granted exclusive distribution rights to certain
16 GSA residential and commercial products.

17 THE COURT: Okay. Let me -- forgive me, Ms.
18 McGonigle. I'm going to ask you to step aside for a moment.
19 I'd like to talk to Mr. Poppiti at this point.

20 MS. MCGONIGLE: Certainly, Your Honor.

21 THE COURT: But you will have the opportunity to tell
22 me whatever it is you'd like me to hear --

23 MS. MCGONIGLE: Thank you, Your Honor.

24 THE COURT: -- before you leave here today. Okay.

25 MR. POPPITI: Good morning, Your Honor.

1 THE COURT: Good morning. The papers don't tell me in
2 any detail exactly where the debtor stands with the
3 administration of the Chapter 11 --

4 MR. POPPITI: Sure.

5 THE COURT: -- estate. Let's put it this way. It
6 pushes back but doesn't detail on the allegation in the motion
7 that this isn't going to upset the distribution scheme;
8 nobody's going to have to pay anything back.

9 MR. POPPITI: Sure. And I can certainly appreciate
10 that, Your Honor. And I did have some stuff in my notes for
11 today that I'll step through.

12 THE COURT: All right.

13 MR. POPPITI: Well, hitting the highlights, Your
14 Honor. As you know, we confirmed the plan in December 2009.
15 The plan went effective January 4th -- on or around January
16 4th, 2010, Your Honor. As Your Honor knows, since before and
17 after the effective date, the debtors have spent a lot of time,
18 energy and resources prosecuting claims objections. I believe,
19 as of the last omnibus hearing, which was just a few weeks ago,
20 we had successfully prosecuted twenty claims objections. So in
21 terms of the claims process, we're indeed, Your Honor, pretty
22 far along the way, if not complete. At this point, I think
23 we're tackling the late filed claims that kind of trickle in.

24 In terms of the distributions, the distributions to
25 Class 6 and Class 8 are well underway, Class 6 being the

1 general unsecureds, Class 8 being the convenience class claims.
2 I checked with my client on this yesterday, Your Honor, and
3 what I have been told is that the distributions on the
4 convenience class claims are all but complete, and more than
5 fifty percent in dollar amount -- if Your Honor recalls, the
6 general unsecured fund here was almost like a pot plan, it was
7 5.5 million dollars. We're well past the fifty-percent mark in
8 terms of money that has gone out. The client's anticipating at
9 least two distributions.

10 I think at this point, what we've calculated is about
11 a ten percent return. Depending on how litigation goes in
12 matters such as today, we could see a second distribution with
13 some additional funds. So all in all, I believe the number's
14 3.2 million dollars, Your Honor, of the 5.5, has gone out. So
15 distributions are well under way.

16 Things have obviously changed since when the movant
17 first filed the motion back on April 29th, I believe. Right
18 around then we were beginning to commence distributions on the
19 Class 6. The Class 8 were probably where they are today, maybe
20 give or take a few dollars. But Class 6 has obviously
21 progressed.

22 To the extent Your Honor -- it matters to Your Honor,
23 I think one of the points I would have hit today is, obviously,
24 we have been willing to work with the movant on trying to
25 resolve this matter consensually. So while we were where were

1 on April 29th, it's not necessarily, if there is any blame, why
2 we're not resolving this until today, we've been working with
3 them. We've been amenable to adjournment. So to the extent
4 that that matters to Your Honor, I would point that out that
5 we've made progress since this motion was obviously first
6 filed.

7 THE COURT: Well, I mean, I'll tell you, just from,
8 again, submission of the papers, my overall impression is,
9 as -- put it this way. I don't have a live witness here. So I
10 can't judge Mr. Hoeffner's credibility. But my assumption is,
11 that if the debtor felt that he was being untruthful, he
12 wouldn't have agreed to the admission of his affidavit. So
13 assuming that what he says in his affidavit is true, and that I
14 believe it, frankly, which I'm inclined to do, it doesn't seem
15 to me that -- well, it seems to me that it's not a very
16 difficult decision for the Court to make, that this claim
17 should be determined on its merits.

18 MR. POPPITI: Right.

19 THE COURT: Now, it may be that the debtor has an
20 absolute winner on the merits claim for the reasons that it's
21 discussed in the papers. But, you know, while distributions
22 have begun, it does seem to me, based on what you tell me,
23 nobody would have to give money back if I awarded the full
24 amount to the claimant.

25 MR. POPPITI: No, I think that's fair, Your Honor.

1 THE COURT: The action that the movant here took was
2 timely. I mean, nothing sat here. You know, I get so many of
3 these things that are either months or months or years old.
4 This is not that case. This movant was diligent. Once it
5 realized the error that it made, it acted. Now, again, that's
6 without any comment or ruling on the merits of the claim.

7 And the standard that the Court needs to apply here,
8 and of course, it's the cost standard. But then what does that
9 mean?

10 MR. POPPITI: Right.

11 THE COURT: So parties look to 60(b) and they look to
12 Pioneer. And if you look at the Pioneer standards, it just --
13 it doesn't look like a close call to me. So I thought that's
14 why I wanted to speak with you first and have you give me
15 whatever pushback you had for me.

16 MR. POPPITI: Yeah, no, and I appreciate that, Your
17 Honor. And I did anticipate that. Certainly in our
18 conversations with counsel we've discussed that the standard is
19 Pioneer. We make no accusations to the contrary. You know, it
20 is Pioneer, it's not the merits. And certainly in my notes for
21 today, we're not challenging good faith, Your Honor. We're not
22 here saying that they did not act expeditiously.

23 Certainly, as I sort of alluded to earlier, the motion
24 was filed on April 29th. We would, I think, fairly say, that
25 we're here today and not previously, because we tried to work

1 with counsel to resolve this. And as we've said in our papers
2 and we say today, it's -- we tried to work with them to
3 understand what the claim really is. And it wasn't a leverage
4 pulley or that we're in sort of a different position, whereas
5 if the claim is truly open, right, it'd be a contested matter,
6 not that it's not now. But it wasn't as if we were trying to
7 take advantage of that two-step and that we have to come here
8 today, they have to reopen it up and then we have to relitigate
9 it on the merits, as Your Honor said. You know, we're just
10 trying to understand where that claim goes, if we reopen it up.
11 Obviously, we're seeing a statement in the motion now and in
12 our conversation with counsel that some discovery's going to be
13 necessary.

14 And frankly, the debtors are just at a loss when you
15 look at the agreement as to where are the merits of that claim.
16 It's a very short and basic agreement. I trust Your Honor has
17 read it. And that I can really not characterized it any other
18 way than a one-way street, and that they obligated themselves
19 to sell to us, and that's the freedom of contract. I mean,
20 that's what they bargained for. We didn't have to purchase
21 exclusively from them. We could go elsewhere if we wanted to.
22 And we had a guaranteed payment. We've satisfied that
23 guaranteed payment. There's been nothing to the contrary.

24 So we were trying to work with them to figure that
25 out. Where does this claim ultimately go? I would agree with

1 you, Your Honor. At first blush, you look at Pioneer and you
2 say geez, this is a slam dunk. And I think it's unique. And
3 that was going to be sort of, if you would, my argument to the
4 Court today, that we agree that under the typical excusable
5 neglect standard and the good faith and all that, yeah, I mean,
6 at first blush they win.

7 But I think what we're looking at is the overall
8 equities of this thing. Does it really make sense to open this
9 thing up? And where are we going to go when we do? What is
10 discovery going to accomplish?

11 THE COURT: I mean, we'll go to the merits, is the
12 simple answer.

13 MR. POPPITI: Understood.

14 THE COURT: And it may be, as the debtor asserts,
15 there is no merit to the claim.

16 MR. POPPITI: Right.

17 THE COURT: And frankly, if there is no merit to the
18 claim, at the end of the day, I'll consider a motion for
19 revision of costs and fees, if it really is as meritless as
20 the debtor says it is here. But that's for the end of the day,
21 and after -- if the parties don't resolve it, after some
22 decision on the merits.

23 MR. POPPITI: Understood, Your Honor. And I think the
24 one thing that we were going to offer up as debtors, obviously,
25 is what we think may be appropriate, as understood if Your

1 Honor finds their excusable neglect today and we open it back
2 up, is you know, the sums are at almost 12(b)(6), you know,
3 hear this thing on the papers as opposed to having the parties
4 get into discovery and all those things.

5 I mean, obviously the debtors are prepared to go
6 through that. But the way we almost see it is the claim --

7 THE COURT: Well, on a claim objection in a contested
8 matter, I don't think there's a 12(b)(6) right now. I guess I
9 could order under the rules that that apply. You can have a
10 summary judgment right. But I have another thought. Have the
11 parties talked about mediation?

12 MR. HOEFFNER: We're certainly open to mediation, Your
13 Honor.

14 MR. POPPITI: I will say, Your Honor, it's not been
15 discussed. But I do note that it is in the agreement. I mean,
16 certainly, we all know what the case law is on whether
17 mediation provisions are enforceable and things of that nature.

18 THE COURT: Well, I think I have the authority under
19 the Local Rule --

20 MR. POPPITI: Right, I --

21 THE COURT: -- to order mediation. So, and I guess
22 the way we could set it up is to maybe have some limited formal
23 or informal discovery before a mediation, but in a relatively
24 short time frame, and then get to a mediator, and if that
25 doesn't work out, come back to me for a scheduling order.

1 And if the parties -- I don't know whether, Mr.
2 Poppiti, whether you can make that decision now, but I'll give
3 you a couple minutes to talk about it, if you like, outside of
4 my presence.

5 MR. POPPITI: Right. No, Your Honor, I'm not in a
6 position to make that decision right now, unfortunately.

7 THE COURT: Do you have somebody you can reach by
8 phone?

9 MR. POPPITI: It may be, Your Honor. But frankly, we
10 just didn't contemplate that. I guess Ms. McGonigle and I can
11 always confer afterwards and submit something to Your Honor
12 under certification or -- I just -- I don't have the authority
13 to make that -- I mean, it's obviously not without a question
14 that the parties will get back together for the discussions we
15 had before we were here today and figure out where we go.

16 THE COURT: All right. Anything further from the
17 debtor?

18 MR. POPPITI: No, Your Honor.

19 THE COURT: All right. I did promise an opportunity
20 for you tell me whatever you wanted to --

21 MR. POPPITI: Although, I just want to clarify one
22 thing, and perhaps it's easy right now. So the motion for
23 reconsideration is obviously the 16th and the 17th. Could we
24 agree that I don't think the 16th needs to be reconsidered
25 because that was just the amended and superseded, something we

1 would like to obviously clear that up, if for no other reason,
2 Your Honor, that if this becomes a disputed claim, again, we
3 have reserve issues and --

4 THE COURT: Yes, I don't gather there's a dispute
5 about that.

6 MR. POPPITI: Okay.

7 MS. MCGONIGLE: No, Your Honor. It only pertains to
8 the seventeenth -- the order approving the seventeenth --

9 MR. POPPITI: Okay.

10 MS. MCGONIGLE: -- omnibus objection.

11 THE COURT: Okay. But while we're on the subject of
12 limiting issues, is there an agreement that BMC West is the
13 only liable entity here or not?

14 MS. MCGONIGLE: Your Honor, I'll have to defer to Mr.
15 Hoeffner, because he is the client's substantive lawyer and
16 knows the agreement far better than I.

17 THE COURT: All right. Mr. Hoeffner?

18 MR. HOEFFNER: We have one claim against the one
19 debtor, so we do believe that what the Court has stated is
20 correct.

21 THE COURT: Okay. So it's BMC West only? Okay.

22 MR. HOEFFNER: That's correct.

23 THE COURT: Okay. Here's what my inclina -- oh, I'm
24 sorry. Ms. McGonigle?

25 MS. MCGONIGLE: No, Your Honor. Given Your Honor's

1 comments, I think I would be best just not to go any further.

2 THE COURT: I think that would be wise.

3 Well, here's my inclination. And that's pending the
4 parties' opportunity to have a discussion in light of our
5 colloquy today, to make no ruling at the moment; and then to
6 have you come back to me with what it is you've agreed to or
7 what you can't agree to, and then I'll decide where to go from
8 there. But I don't know what your timing is.

9 I won't be in the office Friday, Monday or Tuesday.
10 If you're able to reach out to me by conference telephone,
11 either later today or tomorrow or Wednesday would be -- it's
12 either later today or next Wednesday, we'll get to the next
13 step. Any questions?

14 MS. MCGONIGLE: No. Mr. Poppiti and I have worked
15 together on other matters in this case as well, Your Honor.
16 I'm sure we can -- given what Your Honor has solicited, I'm
17 sure we can come to something to submit to Your Honor that's
18 consensual.

19 THE COURT: All right. Is there another hearing date.
20 I mean, I would just carry this for calendar purposes. August
21 25th is the next omnibus. How about we just carry it there for
22 calendar purposes, but subject to whatever alterations are made
23 by agreement of counsel or what I might order as a result of a
24 telephone conference. Okay?

25 MS. MCGONIGLE: Thank you, Your Honor.

1 THE COURT: All right. Thank you both very much.

2 MR. POPPITI: Thank you.

3 MR. HOEFFNER: Thank you, Your Honor.

4 THE COURT: You're welcome. That concludes this
5 hearing. Court will stand in recess.

6 (Proceedings concluded at 10:19 a.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

E X H I B I T S

DEBTOR'S	DESCRIPTION	PAGE
	Declaration of Paul Street	6
MOVANT'S		
	Affidavit of James Hoeffner	5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: July 9, 2010

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 7/8/2010 was filed on 7/20/2010 . 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 8/10/2010 .

If a request for redaction is filed, the redacted transcript is due 8/20/2010 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 10/18/2010 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: 7/20/10

(ntc)

Notice Recipients

District/Off: 0311-1
Case: 09-12074-KJC

User: AI
Form ID: ntcBK

Date Created: 7/20/2010
Total: 10

Recipients of Notice of Electronic Filing:

ust	United States Trustee	USTPREGION03.WL.ECF@USDOJ.GOV
aty	Allison N. Cooper	acooper@mgflp.com, hrunge@mgflp.com
aty	Brian K. Cuttone	cheryl@realmediation.net
aty	Michael S. Neiburg	bankfilings@ycst.com

TOTAL: 4

Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	Building Materials Holding Corporation	720 Park Boulevard, Suite 200	Boise, ID 83712
aty	Donald J. Bowman, Jr.	Young, Conaway, Stargatt & Taylor	1000 West Street 17th Floor Wilmington, DE 19801
aty	Robert F. Poppiti, Jr.	Young, Conaway, Stargatt & Taylor, LLP	The Brandywine Building 1000 West Street 17th Floor Wilmington, DE 19801
aty	Scott K. Brown	Lewis and Roca LLP	40 Norht Central Avenue Suite 1900 Phoenix, AZ 85004
aty	Sean Matthew Beach	Young, Conaway, Stargatt & Taylor	The Brandywine Building, 17th Floor 1000 West Street PO Box 391 Wilmington, DE 19899
aty	Vicki Lauren Shoemaker	Marshall Dennehey Warner Coleman & Goggi	1220 N. Market Street 5th Floor PO Box 8888 Wilmington, DE 19899

TOTAL: 6