UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE
Case No. 09-12074 (KJC)
- -x
In the Matter of:

BUILDING MATERIALS HOLDING
CORPORATION, et al.,

Reorganized Debtors.
- -x

U.S. Bankruptcy Court
824 North Market Street
Wilmington, Delaware

November 2, 2010
10:02 a.m.

B E F O R E:
HON. KEVIN J. CAREY
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: AL LUGANO

MOTION of GSA Home Energy Solutions to Reconsider Claim [D.I. 1551, 4/29/10].

REORGANIZED Debtors' Fifteenth Omnibus (Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1 [D.I. 1432, 2/19/10].

MOTION of Rucker Construction, Inc. for Relief From Stay Under Section 362 of the Bankruptcy Code [D.I. 1447, 2/25/10].

REORGANIZED Debtors' Twentieth 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 [D.I. 1585, 5/20/10].

MOTION of Luke Gilliam for Relief From the Plan Injunction or, in the Alternative, for Relief From the Automatic Stay Pursuant to 11 U.S.C. Section 362 [D.I. 1696, 9/24/10].

REORGANIZED Debtors' Twenty-Fourth 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 [D.I. 1709, 10/1/10].

REORGANIZED Debtors' Motion for Entry of Implementation Order With Respect to Paragraph 44 of Confirmation Order (Relating to Robert R. Thomas and the Restated Thomas Trust) [D.I. 1667, 8/26/10].

Transcribed by: Esther Accardi

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P R O C E E D I N G S

THE CLERK: Be seated please.

THE COURT: Good morning, everyone.

MR. YORK: Good morning, Your Honor.

MR. POPPITI: Good morning, Your Honor. Robert Poppiti, from Young Conaway Stargatt & Taylor on behalf of the debtors.

Your Honor, we'll be working today from the notice of agenda of matters scheduled for November 2nd hearing.

Your Honor, we could skip forward to agenda item 6, which you've already entered the order on; that was the twenty-fourth omnibus claims objection.

So the only matter going forward today, Your Honor, is item 7, which is the debtors' motion for entry of -- implementation order, with respect to paragraph 44 of the confirmation order.

If it's okay with Your Honor, I have my co-counsel, Aaron York, formerly of Gibson Dunn, now with Sacks Tierney at the table, and I'll turn the podium over to him to handle this one.

THE COURT: Thank you.

MR. POPPITI: Thank you, Your Honor.

MR. YORK: Good morning, Your Honor. Aaron York for the reorganized debtors.

We're here on the motion for an order implementing

paragraph 44 of the confirmation order. And I've agreed with opposing counsel that today we're only going to do legal argument. To the extent that the Court finds that it needs to rely on disputed facts to rule on the motion we'll request the Court to set an evidentiary hearing in the future.

THE COURT: Well, let me ask this.

MR. YORK: Sure.

THE COURT: And I did review the submissions, and I'm not yet confident I have as full a grasp of the facts as I would like to. So in a minute I'll tell you where I think my gaps are.

But it didn't strike me, except for the issue of what did the parties intend, that there were disputes about what actually happened.

MR. YORK: I think that's right, Your Honor. And that's why I think we -- we think we can go forward at least on the issue of whether -- you know, what the scope of the agreement is. You know, the language is what it is in the paragraph. And, you know, whether or not the argument they're making is barred by res judicata. All that I think is undisputed.

Where there might be factual issues is if Your Honor determines that you must skip to the question of whether or not these agreements were, in fact, integrated, then that might involve factual issues that we would want to have an

evidentiary hearing on.

THE COURT: Well, to get there I guess the claimant here has to get over your argument that by agreeing to the assumption of the acquisition agreements, that objection has been waived.

MR. YORK: Correct, Your Honor.

THE COURT: Okay.

MR. YORK: Your Honor, I have a binder of some of the documents, you know, that I'll be referring to, do you mind if I approach with that?

THE COURT: No, that would be fine.

MR. YORK: And I've given a copy to opposing counsel.

THE COURT: Thank you.

(Pause)

MR. YORK: Your Honor, paragraph 44 of the confirmation order, which is in tab 6 of the binder, it states that "The cure claims, if any, of Robert R. Thomas, or the restated Thomas Trust dated April 14th, 2009 under a specifically defined acquisition agreement shall be resolved by proceedings consistent with alternative dispute resolution provisions of the acquisition agreement."

Now, the debtors included that paragraph to resolve a limited confirmation objection that Robert Thomas and the restate trust had filed back in November of this -- November of 2009.

THE COURT: Yeah. I will tell you that the dispute here brought back a recollection, but only a vague one, that which had been raised and supposedly resolved at that time.

Let me ask this question.

MR. YORK: Yes, sir.

THE COURT: In the papers -- debtors' papers, it reflects that the rejection damaged proofs of claim filed with respect to the Greg Street and the Ralph Road properties were treated as allowed claims and distributions on which have been made. Is that correct?

MR. YORK: That is correct, Your Honor.

THE COURT: Okay. And, yet, there are now two other rejection damage claims which the papers say have been filed. And that -- that I don't understand what the genesis of those are?

MR. YORK: Well, there haven't been anymore rejection damages claims. What happened in the case is they filed Ralph Street -- Ralph Road and Greg Street filed proofs of claim for the rejection damages when we rejected the leases.

THE COURT: Right. Approximately 400,000 each.

MR. YORK: Each, correct. They haven't filed any new claim. The genesis of this dispute is we agreed to arbitrate the claim of the -- the Thomas parties under the assumed acquisition agreement. They have to indemnify us for construction defect claims.

THE COURT: I know. And the debtors says that that could be a very substantial liability.

MR. YORK: Correct. And they said in their, you know, proof of claim that their damages under the acquisition agreement were 400,000 dollars. And so when they filed their confirmation objection they said, you know, we object only to the -- we don't object to the assumption, we object only to the process for determining our cure claims under the acquisition agreement. And they specifically described those claims under that acquisition agreement as the claims related to the failure to cooperate in the construction defect offense. And they said, specifically, that those claims were 400,000 dollars.

They didn't say in their confirmation objection that they were going to assert the rejection damages claims of the separate entities.

And so we resolved that objection by saying we will arbitrate your cure claims under the acquisition agreement. We didn't agree to arbitrate any other claims. And it was our understanding that the claims they were asserting was that 400,000 dollar claim for failure to cooperate. They didn't say anything about the rejection damages claims.

THE COURT: Well, okay. I'm looking at paragraph 20 of the debtors' motion.

MR. YORK: Of the debtors' motion?

THE COURT: That's correct. Here's where my confusion

comes in.

It says "In addition the Thomas proof of claim stated 'claimant contends that the securities purchase agreement, asset purchase agreement and new shareholder leases [including the leases]'" that's in brackets "'were part of the same transaction that's rejection -- such that rejection of the new shareholder leases precludes assumption of the securities purchase agreement and assets purchase agreement.'"

Now, is the reference to the new shareholder leases the --

MR. YORK: Those were the -- those were --

THE COURT: -- Greg Street and Ralph Road leases that were rejected?

MR. YORK: Yes, sir. So in the proof of claim -- again, that's the proof of claim of the Thomas parties.

THE COURT: Understood.

MR. YORK: And so they -- and they filed it for 400,000 dollars. They said that claim relates to your failure to cooperate in defending the indemnity claims under the acquisition agreement.

And then they said you know, and the lessors under the rejected leases have filed separate proofs of claims. and we want to let you know that we argue that because you rejected those leases you're now precluded from assuming this acquisition agreement.

THE COURT: But then as a consequence of what happened in connection with confirmation the agreements were assumed --

MR. YORK: Right. And they didn't object to the assumption. They said we're filing a limited objection to the cure claims.

THE COURT: Right.

MR. YORK: And, again, they described those claims very specifically. We didn't realize that they were still continuing to -- or while they never took the position that the cure claim under that agreement would include the rejection damages. They had taken the position early on that we would be precluded from assuming the agreement, but they never said they would argue that they were part and parcel of the cure.

THE COURT: But in the debtors' view what was left for arbitration under the pre-petition agreements was a determination of liabilities under the acquisition agreements, which consist of the securities purchase agreement and the asset purchase agreement.

MR. YORK: Right. And the only claims under that agreement that they were talking about was the 400,000 dollars for failure to cooperate. They didn't say they were going to include the additional 800,000 dollars in rejection damages claims.

And, Your Honor, those claims -- those rejection damages claims can't possibly be cure claims, it doesn't make

any sense. In order to cure a default under the Bankruptcy Code, you have to, you know, pay the monetary damages, but you also have to fix the default. And so that highlights why if they were going to object -- that highlights why they had to object to the assumption.

THE COURT: Well, let me ask this. Is a default under the -- either of the acquisition agreements -- either the components of what's termed acquisition agreements, is the default under the leases a default under the securities purchase agreement, or under the asset purchase agreement?

MR. YORK: No, it isn't. And so but that's -- they're trying to argue that they're integrated now. But it's too late. Because if they were going to make that argument they needed to make that argument when Your Honor entered the order assuming the agreements, entered the confirmation order. They didn't do that. And so as a result that necessarily is a finding by Your Honor that those agreements were not integrated with the previously rejected agreements.

THE COURT: Well, it seems to me that a party -- just to make it simple, let's say there are four agreements, doesn't oppose the rejection of the first two, doesn't oppose the assumption of the next two, has the right to decide, which it will agree or not agree to, with respect to what should be assumed or rejected now, the party to be harmed, seems to me has the right to make that choice.

But it also seems to me that assuming we're now -- assuming that the universe of agreements between the parties and among the parties, we'll put aside the difference in the party issue for the moment, have been addressed either by assumption or rejection, I'm not sure what else there is to be decided in that respect. I mean -- and I'm saying I think that this was the debtors' position here.

MR. YORK: That is the debtors' position, Your Honor. You know, that the leases were rejected, the acquisition agreement was assumed. It's too late now for anybody to argue that those agreements are part and parcel of the same agreement because the Bankruptcy Code does not allow you to assume and reject in part.

So because --

THE COURT: Well, unless the non-debtor counterparty says it's okay, wouldn't that be true?

MR. YORK: Correct. But that's not what happened here. So -- well, it is actually what happened here in the sense that they didn't object to the assumptions. So once they did that I think they're now too late to try to argue that they can include rejection damages as part of the cure claim, which, again, doesn't make any sense under the Bankruptcy Code.

THE COURT: Well, what if, as a matter of the agreements that were assumed between the parties, an element of damage, arguably, under the agreements, are applicable state

law, is that which was lost as a result of the rejection of the leases. Isn't that something for the arbitrator to decide?

MR. YORK: I don't believe so. Because, again, what we agreed to arbitrate is the cure claim under the acquisition agreement. They specifically described that cure claim as being 400,000 dollars. And so now to allow them to come in and completely sandbag us with an additional 800,000 dollars of claims, I think is completely unfair, number one. But it -- what we defined in the paragraph 44 of the confirmation order was specifically tied to what they said in the confirmation objection.

THE COURT: All right. And stated another way, the cure claim is a claim to cure defaults as a condition of assumption. And the rejection of the leases, at least in the debtors' view, don't constitute defaults under the agreements which are the subject of the arbitration.

MR. YORK: Correct.

THE COURT: All right.

MR. YORK: Your Honor, I think we've hit all the points I was going to make in sort of a roundabout way. If you have any other questions I'd be happy to answer them. Otherwise, I'll cede the table to --

THE COURT: Thank you.

MR. YORK: -- Mr. Kirby.

THE COURT: All right.

MR. KIRBY: Good morning, Your Honor. Dean Kirby, Kirby & McGuinn. It's my first time in your courtroom in your courthouse. I'm from San Diego, California.

THE COURT: Welcome, sir.

MR. KIRBY: Thank you.

THE COURT: I wish I were in San Diego. And not because you're here.

MR. KIRBY: Your Honor, I want to address the issues raised in the reply because I think that they really address what the Court was asking about and was concerned about here.

What the debtors arguing is that this confirmation order, itself, has taken the place of the arbitration provisions in the agreements involved. And that the confirmation order has become the arbitration agreement, and that, therefore, it's res judicata on the point of what's aribitrable and what's not.

THE COURT: And more than that, you agree to it.

MR. KIRBY: We withdrew our objection to confirmation based on that language appearing in the order, yes, we did.

That language doesn't limit the amount of the cure claim. It doesn't limit the legal theories that the arbitrator can consider in arriving at the cure claim.

If there were limits in that regard they should have been expressly stated.

THE COURT: Well, a cure claim is a function of

bankruptcy law as it's used here. And as I said to Mr. York, the -- in our world a cure claim is payment or performance of that which must be done or paid to cure a default under a document or under an agreement which is being assumed.

MR. KIRBY: I understand that.

THE COURT: But you want to -- it sounds to me, and the debtors arguing, I think, you want to read that more broadly, tell me -- tell me what the basis would be for me to say -- to say you should do that?

MR. KIRBY: Well, the basis was stated first during the first thirty days of this case when we opposed the debtors' first day -- or filed a statement of position, rather, on the debtors' first days motions to reject these leases.

And we said in that filing that under California law recoupment and equitable doctrine prevented the debtor from breaching these leases while at the same time claiming the benefits of the acquisition agreements. Not because, Your Honor, there are cross-default provisions in the documents, they're not. But because under all of the circumstances of this case recoupment, which doesn't require mutuality of parties, applies. And the underlying facts, which were put in the papers, include the fact that my client's obligation to indemnify is made easier by being obligated to indemnify an operating business in these conducted -- in these locations. So that the records would be maintained in these locations. So

that personnel familiar with the construction of these improvements were employed on those locations.

The rent on these leases was set above market as part of the purchase price that is part of the acquisition agreement. The leases are referred to in the acquisition agreement.

All of these things are equitable factors which could cause a court under state law to conclude that in order to continue to claim the benefits under the acquisition agreement you have to pay for breaching the leases. And that is based on a theory of recoupment, it was stated that way specifically in the papers that we filed, the statement of position that we filed, when they went to reject these two leases.

And we said in our statement of position you can reject the leases but understand that we will take the position that this is the legal consequence of rejecting the leases that we have --

THE COURT: You see that's -- that determination actually occurs as a matter of bankruptcy law. The Bankruptcy Code says -- not in these words, but the import of it is that a rejection of the lease relieves the debtor from the obligation of further performance under the lease and calls into being a pre-petition general unsecured claim, and the calculation of damages is set forth in the Bankruptcy Code for what the rejection damage claim may be.

I think that's the beginning and the end of it.

MR. KIRBY: Your Honor, which debtor are we talking about there?

THE COURT: Well, that's an interesting question --

MR. KIRBY: Because these debtors were not --

THE COURT: -- because there is -- and I'm not -- that's another gap I think in my -- in my fact pattern.

There was discussion in the papers about the difference in parties here. Tell me from your standpoint how that breaks down and why that weighs in your favor.

MR. KIRBY: Well, it -- it certainly breaks down in that different debtors were tenants under these leases than are parties to this acquisition agreement. True enough.

But we have a legal theory which says that as far as the acquisition agreement is concerned that is not dispositive. Maybe important, maybe a factor, but not dispositive to that defensive recruitment, which we referred to from the beginning.

And -- now, it does make 502(b)(6) a red herring here. Because yes, our claims against those debtors are limited by bankruptcy law; by 502(b)(6). We filed those proofs of claim, they were paid. The fa -- or they were paid in part. And that payment reduces the amount that in the arbitration we can claim resulted from the breaches, no question. But the issue of whether this debtor gets to have affiliates breach these leases and still enforce the acquisition agreement without taking into

account the effect of those breaches, that's an issue that is reserved for arbitration under the acquisition agreement. And we never, never waived that position. We stated it over and over again in our papers.

THE COURT: Well, let's go back again then to the language to which the parties agree.

How does this component of damages that you wish to assert in the arbitration fall within the definition of cure claim? If, in fact, there are no cross-defaults, so there is in theory no default per se to cure, how does it become a cure claim?

MR. KIRBY: Your Honor, by phrasing the question in that way assumes, and I think we all agree, that had there had been cross-default provisions that it would have been part of a cure claim as Your Honor is now narrowly defining it, no question. Right. But --

THE COURT: Well, that's how courts view it under the Bankruptcy Code. I mean, I -- that's the context in which that phrase is used.

MR. KIRBY: But --

THE COURT: And if the parties meant something different it seems to me that would have called for different language in the order that I was asked to sign. And to which you agreed.

MR. KIRBY: So the upshot of this is that even though

we made this argument once and twice, and even though -- I mean, of the recruitment argument. The argument that says you can't accept the benefits under this acquisition agreement without paying for breaching the leases. Even though we made that argument twice and even though we were never called upon to file a cure claim, because the debtor did not follow the procedures called for in their plan, that because of this language, which is ambiguous in its application, at best, I should not be held to have waived my client's right to arbitrate. Because agreements to arbitrate are liberally construed in favor of arbitration because --

THE COURT: Listen, you know who the bankruptcy judge was in Mintz (ph.)? You're looking at him. So the proposition you just stated, and Mintz was reversed by the Circuit, is not a lesson you have to teach me, I agree with it. But that doesn't change, as the debtor correctly points out, whether based on the confirmation order, which contained agreed language, modified the scope of the arbitration agreement which it, by agreement of the parties, perfectly can do.

Now, this is not -- this is also not the first time that parties have agreed to language and the debtor didn't use the word, but you now have used the A word, come back to me and say the order's ambiguous.

You know I will say it creates a dilemma for the Court usually to decide whether I relieve somebody from what they

mistakenly thought was what they wanted, or whether I look at it and say it's plain enough, nobody can legitimately call it ambiguous. And this presents the same situation.

MR. KIRBY: And in that case not Mintz, itself, but the Federal Arbitration Act, and all the cases construing it, give the Court a guide on how to resolve such an ambiguity. Ambiguities and arbitration agreements are construed in favor of arbitration. Waiver of rights to arbitrate any position or any claim are disfavored. So we start from there. Because the basic claim here is that I, by some litigation conduct, have waived the right to arbitrate that in every single paper I file I maintained. And so --

THE COURT: Here's the -- that argument while may be true, I think really misses two -- at least two key operative events. One is a failure to object to the rejection of the leases. Now, it's hard to oppose a rejection of a -- an unexpired lease or executory contract in this Court, but it does happen occasionally especially, and I guess the most common grounds for objection, is that the agreement proposed to be rejected are tied with others in such a way that they can't be broken apart.

And the way to do that isn't to raise your hand and say, you know, we don't like it because there may be other consequences later on. The way to do it is just to object.

Now, when it came to confirmation you did object. But

resolve the objection by agreeing to language, which refers to cure costs. And there's really I will tell you only one way for a bankruptcy court to read that language, which was included in a bankruptcy court order by agreement of the parties. A cure cost is limited to that reaches a condition of assumption under the Bankruptcy Code. I don't know how else to say it.

MR. KIRBY: When Your Honor makes that conclusion Your Honor is resolving a matter that was reserved for arbitration. And to me it matters not that that it is disposed of of the Bankruptcy Code. I disagree, but suppose that it is. That's for the arbitrator to decide, not this Court.

And that goes to the issue of prejudice, which is, as the Third Circuit says, prejudice is the touchstone to determining whether someone's waived the right to arbitrate.

Now, the way this plan is written these arguments can go to the arbitrator, including arguments based on bankruptcy law. I don't believe that they apply. Your Honor may. But it goes to the arbitrator. The arbitrator makes a decision.

In the meantime, since the minute that this debtor elected to assume the acquisition agreement to today, the debtor has not been tasked with any performance under the acquisition agreement other than its exeuctory obligation to cooperate in the defense of these indemnity matters. So the debtors not suffered any prejudice at all by electing to assume

the contract under what the debtors' counsel says is a false assumption. But --

THE COURT: That reminds me, let me ask you to pause for a moment. I don't know whether the papers reflect this, but is there an arbitration proceeding pending?

MR. KIRBY: Not yet. Because when Mr. York and I discussed commencing it this issue came up. And we certainly didn't want that issue to go cold to arbitration briefs, if, in fact, the Court was going to intercede and decide something that we believed was reserved for the arbitrator.

So the way the plan's written, Your Honor --

THE COURT: So does that mean there are pending claims which need to be the subject of an arbitration?

MR. KIRBY: Yes.

THE COURT: Okay.

MR. KIRBY: Yes.

THE COURT: thank you.

MR. KIRBY: The way the plan is written, if that arbitration comes out the way that Mr. York argues it should, then no problem. If it comes out the way I say it should then they have another opportunity to reject the contract. That assumption or rejection is not final. It can be made -- that decision may be made again under the provisions of the plan based on the outcome of the arbitration.

So there is no prejudice, and there is no reason why

an arbitrator shouldn't be allowed to decide every single issue that the Court's been focusing on here, because they are all part and parcel of the dispute. And I don't think that there's anything in Mintz that reserves pure bankruptcy issues before a bankruptcy court if the dispute is otherwise arbitrable, which it clearly is.

THE COURT: And here's what I view as a potential problem with Mintz in terms of future application. And that is that decision could be read to say there's virtually no bankruptcy issue; core or otherwise, that shouldn't go to arbitration. I haven't -- you know, it's not that I haven't had Mintz-like disputes since then, but there've been a couple and they haven't been very complicated, so I haven't really been faced with that -- with that issue.

MR. KIRBY: Well, I understand exactly what the Court is saying, because it occurred to me when I was reading that well, what if it's central to confirmation of a plan, or --

THE COURT: Well, of the way I found in that case.

MR. KIRBY: Yes.

THE COURT: And the court said it doesn't matter.

MR. KIRBY: But here I mean obviously this is no way essential to confirmation of this plan, the numbers are dwarfed by the size of the reorganization and the, you know, amounts of money at issue. And the debtor doesn't have to pay if it doesn't want to, because if the arbitration result is

unsatisfactory to the debtor it can say well, then we reject. So I don't see that there's any prejudice operating from letting this matter go to arbitration as I thought had been agreed. And I did think that it had been agreed.

And, you know, we've, I think to our credit, have not filed declarations saying I talked to Mr. York and he said thus and such about this language, and I assumed this or I thought that, there are no e-mails attached, mainly because there aren't any. I mean, we both thought we were getting what we're now arguing for. And I thought that I was getting enforcement of this arbitration provision, and I never waived it.

And the only thing really, Your Honor, that could have made this more clear to me, would have been if the debtor had served my office with a notice to file cure claims prior to this confirmation hearing, as they were supposed to do. And if I'd filed a cure claim, and that cure claim had said it's our position that in order to cure you have to pay the damage that resulted from the breach of these leases. But that never happened.

Now, I think that's a critical fact. And like most critical unfavorable facts that gets dealt with in a footnote, you know, by the opposition which is on -- I think it's on page 11 of their brief. And they say, well, no, we did, we did serve you with a notice to file your cure claim. And they refer to docket entry number 1,000. And if you look at docket

entry number 1,000, it is a proof service by mail of a document that is not otherwise docketed, hasn't been filed with the Court, a document which they say says that the cure claim was zero, and which was not sent to my office.

So I never received the notice to file a cure claim. I didn't have -- wasn't called upon to do that. And had I had done so this hearing would have -- you know, would be in a different situation. Because then it would have been clear what was meant -- what I meant by cure claim. But, Your Honor, when I file papers with the Court that say we have a right to recoupment that is independent of the parties doesn't require mutuality, what else could I mean.

Now, you can say well, it's a label, a cure claim, and you had to say cure claim, and that's what we all mean as bankruptcy lawyers. But I know what I meant; I meant that there's a recoupment right under California law and an arbitrator is supposed to, under these agreements, resolve questions of California law, and that's all that we're asking for here.

THE COURT: Thank you. Mr. York, let me ask you to address something first.

Well, I'll make two comments.

One is it's natural and frequently happens that the debtor, reorganized debtor, or whoever the post-confirmation entity when a dispute of this nature arises loves to run home

to mama in the hopes that the bankruptcy court will be favorably inclined to protect its own jurisdiction and integrity and court orders.

The second thing I'll say is I am of the view and always have been in my time on the bench that it's a very rare and extraordinary circumstance in which some other fair and impartial forum isn't equally as capable of interpreting orders and contracts as this Court would be, and sometimes better able to do so.

Which leads be to my question, which is why wouldn't an arbitrator, assuming I would find that this dispute is covered arguably by the scope of the arbitration provision, be equally as capable as this Court in making the determination that you ask me to make here?

MR. YORK: Well, Your Honor, first of all, you do make the key point, which is that the scope of arbitration is for the court to decide. And the Supreme Court has said that, the Third Circuit has said that. So that's what we're asking Your Honor to decide here; what did we agree to arbitrate. And what we agreed to arbitrate were the cure claims.

These are not cure claims, number one. But, number two, Your Honor's clearly better equipped to handle this because it -- this involves Bankruptcy Code questions of what is the effect of the rejection of the previous leases, and the assumption of this agreement on the argument that those are

integrated. And under the Bankruptcy Code it's clear that you cannot reject and assume one agreement in part.

It also involves the question of priorities of claims. As Your Honor pointed out, the rejection damages claim is a pre-petition claim, and they're attempting to elevate that into a claim that has an administrative expense priority, essentially.

So those issues are for Your Honor to decide.

THE COURT: Well, as would be any claim necessary to be paid in connection with the assumption of an agreement. That's the effect of it anyway.

MR. YORK: Correct.

THE COURT: Okay.

MR. YORK: The other thing I did want to point out that they have made this statement that we didn't serve the notice of proposed assumption. We did do that, he pointed that out. The address to which Garden City mailed the notice was, you know, Robert R. Thomas in his Alpine, California address.

If this issue is disputed I can get an affidavit from Garden City, I have the documents that show that they -- exactly what they mailed to the Thomas parties.

Each proposed party to an assumed agreement got an individualized cure notice. And so that's why, you know, we don't have a fifty thousand, or whatever, ten thousand page document here.

But they did get that. And in any event, they clearly knew that we were going to assume the agreement, because they objected to the determination of the cure amount.

The final point I really want to exercise is, they -- he indicates -- Mr. Kirby indicated that had he got the proposed cure notice he would have filed something different, but he filed a confirmation objection addressing the cure, and he specifically said in that objection that the claims filed by the Thomas parties related to the breach of the acquisition agreement, total 400,000 dollars. And then so we agreed to arbitrate that issue about the validity of that particular claim, which is related to the alleged failure to defend the construction defect cases. And we said in the language of the confirmation order, which is a superseding binding arbitration agreement, that we will arbitrate the cure claims under the acquisition agreement as defined in their confirmation objection.

So we, essentially, incorporated that confirmation objection into that language. And that language says that that cure claim is asserted in the amount of 400,000 dollars. So that's why they can't now come in an say no, it's not 400,000 dollars, it's really 1.2 million dollars. So that's just the point that I wanted to make again, Your Honor.

THE COURT: Point out to me, again, where in the submissions here I can look at the language in the objection

which defines cure claims.

(Pause)

MR. YORK: In our motion, Your Honor, we describe at page --

THE COURT: I see paragraph 35, page 17, where it quotes it.

MR. YORK: But also, in sort of a factual background section, in -- let's see, it begins on page 11 of our motion, which is at tab 1. It describes the plan and it describes on paragraph 23 their objection to confirmation and then it talks about what they -- how they describe their claims. They said we're parties to two executory contracts, which were the securities purchase agreement and the asset purchase agreement. And they define those as the acquisition agreement. So they say the securities purchase agreement and the asset purchase agreement are referred to collectively herein as the acquisition agreement.

THE COURT: Right.

MR. YORK: They don't say in their -- the securities purchase agreement and the asset purchase agreement and the Greg Street lease and the Ralph Road lease are defined as the acquisition agreement, they describe them as these two.

And then they noti -- they indicate there that the debtors intend to assume these agreements on the effective date of the plan, which we did. And then it says -- you know, they

do point out that they had argued earlier that the Greg Street lease and the Ralph Road lease were part of the consideration.

But then when it came time to actually -- and then I point out that in their proofs of claim they had argued that the rejection of those leases precluded us from assuming the agreements. But then when the time came for us to really assume those agreements they didn't object. They filed -- they said the Thomas parties are making only a limited objection to confirmation of the plan. The Thomas parties only object to the plan's provisions for determining their cure claims. Because the plan does not require resolution of those claims and defenses relating to the acquisition agreement according to the ADR provisions.

THE COURT: Well, let's -- let me ask the question another way. If the rejection of the two leases can, under applicable non-bankruptcy law, be considered as an element -- just for lack of a better term, I'll say an element of damage, or payment of which must be made in order to satisfy obligations under the acquisition agreements, why shouldn't the arbit -- why shouldn't the Thomas group be free to assert it. And why shouldn't the arbitrator be free to consider it?

MR. YORK: Well, there's two reasons. Number one, recoupment. Mr. Kirby indicated that recoupment doesn't require mutuality of parties. There's no case that says that. Recoupment does require that it be the same parties. It

doesn't -- it's not subject, for example --

THE COURT: It doesn't require that it's the same contract or transaction, I understand.

MR. YORK: Right.

THE COURT: Actually, it does. But let me -- okay, so?

MR. YORK: But, again, what we agreed to arbitrate was the cure claims, and they specifically said that those claims were the 400,000 dollars related to alleged failure to cooperate. They never said that the cure claim would include the rejection damages under the leases. If they had said that we wouldn't have agreed to that language. We would have come to Your Honor and said we don't have to arbitrate that for the various reasons that we described in our reply.

So, again, it's -- the question is what is the -- what if the parties agreed to arbitrate. And what they've agreed to arbitrate is the cure claims under that agreement, and then they specifically describe what those were, and that's what we intend --

THE COURT: All right. Let me ask you each the following question. It touches on a subject that we -- that was briefly addressed at the outset of the hearing, and that's this. And I'll ask now. Is either party making the claim that the language in the confirmation order is ambiguous?

MR. YORK: No, sir. I think it's crystal clear and it

incorporates their description in their confirmation objection.

THE COURT: Okay. Mr. Kirby, same question to you.

MR. KIRBY: We do claim that it is ambiguous. And, as Your Honor knows, there are two types of ambiguity. There's ambiguity on its face and ambiguity as applied. And I think it's clear based on the arguments that were raised about what would be necessary under California law to claim the benefits of the acquisition agreement, which I think is a cure claim, it's the equivalent of a cure claim. And, therefore, because of that ambiguity the ambiguity isn't resolved in favor of arbitration and waivers of the right to argue about that before an arbitrator is favored.

THE COURT: Aren't you skipping a step there? If a party is arguing that language in this case and order, which is, in effect, a blessing of a contract in part, is ambiguous, don't I then first look to state law, which I'm assuming is California law in this case, to determine how the exercise of resolving the ambiguity should be undertaken? Some states say the court can just decide whether it is or isn't ambiguous. And if the court decides it's ambiguous then it takes extrinsic evidence. Some states say the court can take extrinsic evidence at the outset before determining whether as a matter of law it's ambiguous. What does Cal -- is California the applicable state law, and if so, what does it provide about how the exercise is to be conducted?

MR. KIRBY: My belief, Your Honor, is that California state law would not be the only law, because the Federal Arbitration Act applies to this discussion. And as counsel has argued again this agreement, and Your Honor characterizes it, as an agreement rather than something which it also is, which is a paragraph in an order that this Court entered. But if it's an agreement, it's an agreement to arbitrate that has to be liberally construed in favor of arbitration. And waivers are not favored. So --

THE COURT: Are you saying that I skipped the state law exercise?

MR. KIRBY: I'm saying that your state law exercise is governed, in large part, by that rule. But if -- and since neither side -- I'm sorry. Since neither side has seen fit to come forward and say here are the e-mails, here are discussions about this language and there aren't any that inform this issue, then what the Court has to look at are the filings made in the Court to determine whether waiver was intended in my part, or the preclusion was intended on his.

Starting from the proposition that it could have been made clear. I mean, clearly we know how to write longer paragraphs, he could have written this to preclude these arguments that we had raised. We could have tried to insist on more specific language. What we have is what we have. But if it's ambiguous then Rule 1 is that the ambiguity is resolved in

favor of arbitration as a matter of law.

THE COURT: Thank you. Well, it's not a matter I'm going to decide from the bench today. Which I will tell you pains me. Because when I walk out of here without having made a decision the exercise of reaching one becomes much more laborious. But the important thing from the Court's standpoint is for me to satisfy that whatever decision I make is the correct one.

So I will take the matter under advisement and make a decision in due course. And I'll either do it either in written form or reconvene by telephone and read a decision into the record.

I have a large under advisement list, and I cannot predict when a decision will be made. And I don't -- I don't say that in any way to punish the parties for not resolving it, but to indicate that you may have a little time to resolve it if you wish to continue any discussions.

MR. KIRBY: Your Honor, I just want to say that I, you know, have never been in this Court before. I expected an airplane hanger full of lawyers with very limited time to talk about this, and I thank you for the care that you took with this today.

THE COURT: You're very welcome. Even with an airplane hanger full of lawyers you'd get the same consideration. In fact, if you want to stick around and listen

to the next case there's an argument then which bears on just what you said, interestingly enough.

Anything further for today?

MR. YORK: No, sir, thank you.

THE COURT: Thank you all very much. That concludes this hearing. Court will stand in recess.

MR. KIRBY: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 10:49 a.m.)

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

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

_____

ESTHER ACCARDI (CET**D-485)

AAERT Certified Electronic Transcriber

Veritext

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Date: November 8, 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 11/2/2010 was filed on 11/10/2010 . The following deadlines apply:

The parties have 12/1/2010 to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 12/13/2010 .

If a request for redaction is filed, the redacted transcript is due 2/8/2011 .

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Date: 11/10/10

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