IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: **BUILDING MATERIALS HOLDING CORPORATION,**[1] **Reorganized Debtor.**	)))))))))	**Chapter 11** **Case No. 09-12074 (KJC)** **Jointly Administered** **Ref. Docket Nos. 1881 and 1933**

REORGANIZED DEBTORS' OBJECTION TO (1) MOTION OF CENTEX HOMES, ET AL. FOR ENTRY OF ORDER ENLARGING THE CLAIMS BAR DATE [DOCKET NO. 1933]; AND (2) MOTION OF CENTEX HOMES, ET AL. FOR RELIEF FROM THE DISCHARGE INJUNCTION [DOCKET NO. 1881]

Building Materials Holding Corporation ("***BMHC***") and its affiliates, as reorganized debtors (collectively, the "***Reorganized Debtors***" or "***Debtors***"), respectfully submit this objection (the "***Objection***") to the (1) Motion of Centex Homes, et al. for Entry of Order Enlarging the Claims Bar Date [Docket No. 1933] (the "***Bar Date Enlargement Motion***"); and (2) the Motion of Centex Homes, et al. for Relief from the Discharge Injunction [Docket No. 1881] (the "***Discharge Relief Motion***"). In support of this Objection, the Reorganized Debtors respectfully submit as follows:

INTRODUCTION

1. The Bar Date Enlargement Motion and Discharge Relief Motion filed by Centex Homes ("***Centex***") raise similar issues to those that this Court has already ruled upon in connection with motions filed in these cases by Weis Builders, Inc. ("***Weis Builders***"). More

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1 The Reorganized Debtor in this proceeding and the last four digits of its tax identification number are as follows: Building Materials Holding Corporation (4269), with a mailing address of 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

specifically, after an evidentiary hearing on January 27, 2010, the Court allowed Weis Builders to file a late proof of claim to pursue insurance proceeds with respect to construction defect litigation against the applicable Reorganized Debtors, but only because Weis agreed "to directly satisfy any deductibles and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claims asserted by Weis against any of the Debtors' insurance policies[.]" (*See* Combined Order Granting (I) Motion of Weis Builders, Inc. for Entry of an Order Enlarging the Claims Bar Date and (II) Modifying the Plan Injunction dated May 27, 2010, ¶ J [Docket No. 1592]). Indeed, the Court expressly stated that "[a]bsent Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies, the Court would not have found that Weis has demonstrated excusable neglect." (*Id.*, ¶ K) (emphasis added).

2. As was the case with Weis Builders, Centex had notice of the August 31, 2009 claims bar date in these cases but it did not file a proof of claim. In addition, as was the case with Weis Builders, the insurance policies potentially applicable to Centex's claims have multi-million dollar deductibles secured by a letter of credit issued by the Debtors' prepetition secured lenders in favor of the insurer. Thus, as was the case with Weis Builders, unless Centex agrees to ameliorate the extreme prejudice to the Reorganized Debtors if Centex is allowed to pursue the insurance proceeds (which so far it has refused to do), Centex's neglect in failing to file a timely proof of claim should not be deemed excusable and Centex should not be granted relief from the discharge injunction to pursue its time-barred claim.

BACKGROUND

A. The Debtor's Prepetition Relationship and Contract With Centex

3. Centex is a subsidiary of the Pulte Group, Inc., a large, national, publicly-traded homebuilder with revenues of approximately $4.5 billion last year. Despite the national homebuilding slump, Pulte Group, Inc. had home sales of over 17,000 in 2010. On information and belief, Pulte Group has a large in-house legal department and a significant pool of sophisticated outside counsel throughout the United States.

4. On or about February 10, 2006, Centex and Debtor C Construction, Inc. d/b/a Campbell Concrete of California ("***C Construction***"), entered into a Centex Homes Construction Agreement dated February 10, 2006 (the "***Construction Agreement***"). A true and correct copy of the Construction Agreement is attached as Exhibit "1" to the Declaration of Philip Kopp in Support of the Motion of Centex Homes, et al. for Entry of an Order Enlarging the Claims Bar Date [Docket No. 1934] (the "***Kopp Declaration***"). Under the Construction Agreement, C Construction agreed to perform certain work related to a residential building project called Four Leaf Lane, located in Corona, California (the "***Four Leaf Lane Project***"). In addition, under the Construction Agreement, C Construction provided to Centex a written warranty as well as an indemnity "from and against any and all Claims to the extent such Claim(s) arise out of or relate to Subcontractors' Work." (*See* Construction Agreement, § 22). C Construction finished its work on the Four Leaf Lane Project by no later than December 2007.

B. The Prevalence of Construction Defect Claims

5. "[I]n certain states such as California, Nevada and Arizona, construction litigation is particularly prevalent." "Construction Defect Disputes: Getting to Yes without Going to Court" at p. 2, National Association of Homebuilders Study, April 2005 (hereafter

"***Construction Defect Disputes***"), available at http://www.nera.com/67_5030.htm. In those states, all three of which the Debtor operated in prepetition, sophisticated plaintiffs' lawyers "use websites and mass mailings to target 'virtually every' condominium or townhouse project." *Id.* Further, as reported in 2005, "this successful formula for class action solicitations is now being applied with greater frequency to communities with single-family homes." *Id.*; *see also* "The Liability Insurance Crisis for Builders: Reasons and Responses," prepared for National Association of Home Builders by Jeffrey D. Masters, Sandra C. Stewart, R. Jane Lynch of Cox, Castle & Nicholson LLP, December 2001 ("Only a few years ago, major construction defect litigation was for the most part limited to California, Texas and Florida. In those states, an aggressive plaintiffs' bar and a cottage industry of plaintiff oriented consultants and experts combined to create an environment in which virtually every condominium or townhome project would be hit with a lawsuit. Today, communities of detached single family homes are experiencing an incidence of construction defect litigation nearly as high as attached projects."). As a result, "[i]n 2004, the estimated per unit cost of home builder liability was $2,700, but some home builders reported costs as high as $15,000 per unit." Construction Defect Disputes, *supra*, at p. 3 (citations omitted).

6. The Debtors performed prepetition work at over 7,000 projects in Nevada and California on which construction defect suits could still be filed. Before the June 16, 2009 Petition Date, the Debtors had approximately 104 construction defect claims pending against them. Since the Petition Date, claimants have asserted or threatened to assert 292 discharged construction defect suits and claims against the Debtors, all of which arise out of prepetition construction activities subject to discharge.

7. Based on their own experience, the Reorganized Debtors believe that Pulte/Centex typically has hundreds of construction defect cases pending against it at any given time. Further, in the Reorganized Debtors' experience, construction defect claims can be, and often are, asserted five to ten years after the construction work is completed. Indeed, in section 2 of the Construction Agreement, Centex expressly recognized that construction defect cases related to the Four Leaf Lane Project could be asserted against it years in the future: "A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION." (Construction Agreement, § 2).

C. The Debtors' Bankruptcy Cases

8. On June 16, 2009 (the "***Petition Date***"), each of the now Reorganized Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "***Chapter 11 Cases***") in this Court.

1. The August 31, 2009 Claims Bar Date and Centex's Decision Not to File a Proof of Claim

9. On July 16, 2009, the Court entered an *Order Pursuant to Sections 501, 502, and 1111(a) of the Bankruptcy Code, Bankruptcy Rules 2002 and 3003(c)(3), and Local Rule 2002-1(e), Establishing Bar Dates for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* [Docket No. 248] (the "***Bar Date Order***"). Other than with respect to certain claims inapplicable to the present motions, the Bar Date Order established August 31, 2009 as the bar date (the "***Claims Bar Date***") to file proofs of claim in these Chapter 11 Cases.

10. Centex admits in its Bar Date Enlargement Motion that "[o]n or about July 23, 2009, Centex's regional office in Corona, California received notice of the Claims Bar Date of August 31, 2009." (Bar Date Enlargement Motion, ¶ 17). Centex further acknowledges that its

"San Diego Division received notice of the Debtors' bankruptcy in connection with an arbitration hearing entitled *Burrow v. Centex Homes*, prior to the Claims Bar Date." (Bar Date Enlargement Motion, ¶ 18). Despite the fact that Centex knew that construction defect claims could be asserted against it years in the future related to C Construction's prepetition work on the Four Leaf Lane Project, and despite the fact that the Construction Agreement contained written warranty and indemnification provisions related to the Four Leaf Lane Project, Centex chose not to file <u>any</u> proof of claim, whether contingent or otherwise, by the August 31, 2009 Claims Bar Date.

2. The Confirmation Order

11. On December 17, 2009, the Court entered an *Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications)* [Docket No. 1182] (the "***Confirmation Order***") confirming the *Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications)* [Docket No. 1134] (the "***Plan***"). As described in the *Disclosure Statement With Respect to Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009* [Docket No. 764] (the "***Disclosure Statement***"), "the Plan [sought] to preserve the value of the Debtors for their creditors while recognizing and balancing the fact that the Debtors' secured prepetition lenders have direct claims against the Debtors that would result in the Debtors' other creditors receiving no value for their Claims." (Disclosure Statement, p. 1). In sum, under the Plan, the publicly-traded equity interests in Debtor BMHC were cancelled with Reorganized BMHC emerging from chapter 11 as a private company owned by its pre-petition secured lenders. However, the prepetition secured lenders permitted the Debtors to allocate $5.5 million

for the payment of Allowed General Unsecured Claims in classes 6(a) through 6(l) under the Plan. (*See id.* at pp. 1-3). On January 4, 2010 (the "***Effective Date***"), the Debtors' Plan became effective.

12. Paragraph 17 of the Confirmation Order provides, in relevant part:

> [T]he Confirmation of the Plan shall, as of the Effective Date: (i) discharge the Debtors, the Reorganized Debtors or any of its or their Assets from all Claims, demands, liabilities, other debts and Interests that arose on or before the Effective Date, including all debts of the kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (a) a Proof of Claim based on such debt is filed or deemed filed pursuant to section 501 of the Bankruptcy Code, (b) a Claim based on such debt is Allowed pursuant to section 502 of the Bankruptcy Code or (c) the Holder of a Claim based on such debt has accepted the plan; and (ii) preclude all Persons from asserting against the Debtors, the Reorganized Debtors, or any of its or their Assets, any other or further Claim or Interests based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date, all pursuant to sections 524 and 1141 of the Bankruptcy Code.

13. Paragraph 19 of the Confirmation Order provides, in relevant part:

> The injunctions contained in the Plan, including, but not limited to, those provided in Article XI of the Plan, are hereby authorized, approved, and binding on all Persons and entities described therein. Except as otherwise provided in the Plan or this Confirmation Order, all entities that held, currently hold, or may hold Claims or other debts or liabilities against the Debtors, or an Interest or other right of an Equity Security Holder in any or all of the Debtors, that are discharged pursuant to the terms of the Plan, are permanently enjoined, on and after the Effective Date, from taking any of the following actions on account of any such Claims, debts, liabilities or Interests or rights: (i) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim, debt, liability, Interest or right . . . .

3. Contested Matter Related to Weis Builders' Effort to File Late Claim to Recover Insurance Proceeds for Construction Defect Claims

14. In late 2009, relatively shortly after the passage of the August 31, 2009 Claims Bar Date, Weis Builders filed the *Motion of Weis Builders, Inc. for Entry of an Order Enlarging the Claims Bar Date* [Docket No. 817] and *Weis Builders, Inc.'s Motion for Order Granting Modification of the Automatic Stay* [Docket No. 597] (collectively, the "***Weis Motions***"). The

Reorganized Debtors objected to the Weis Motions on the grounds that, among other things, Weis Builders' neglect in failing to file a proof of claim by August 31, 2009 was not excusable. In particular, the Reorganized Debtors objected that they would be prejudiced if Weis Builders was permitted to pursue insurance proceeds on its time-barred claim because, due to the Reorganized Debtors' continuing obligations under prepetition letters of credit securing their deductible obligations, the Reorganized Debtors would have to pay any triggered insurance deductible in full.

15. The Court conducted a contested evidentiary hearing on the Weis Motions on January 27, 2010. Weis Builders presented two witnesses at the hearing and the Reorganized Debtors presented one, Mr. Leonard Baumann, their Director of Risk Management. As the Debtors had argued, Mr. Baumann testified that the Reorganized Debtors would have to pay, in full, up to $2 million on the deductible if a claim were allowed to proceed against the 2005 to 2006 insurance policy applicable to the claims Weis Builders sought to pursue:

> Q. [By Mr. Graves, counsel for the Reorganized Debtors] Do you believe that the Debtors have an insurance policy that could be called upon to be responsive to the claims made by Weis?
>
> A. [By Mr. Baumann] Yes.
>
> Q. Could you tell me what policy that would be?
>
> A. That would be the ACE policy effective November 11th, 2005 to 2006.
>
> Q. Okay. Would—if you have a copy of the Debtor's exhibit binder in front of you, would you please turn to Exhibit 11 in there. Would you get to Exhibit 11, could you tell me if that is a copy of the Ace policy you've referenced?
>
> A. Yes, it is.
>
> Q. Is it your understanding that this Ace policy Exhibit 11 has a deductible?
>
> A. Yes.

Q. And what is the amount of that deductible?

A. $2 million.

Q. Are the Debtor's obligations to pay that deductible secured by a letter of credit?

A. Yes, they are.

. . .

Q. Would you please turn to Exhibit 14 in the Debtor's exhibit binder? Can you tell me what this document is when you get there?

A. This document consists of amendments to the aforesaid letter of credit increasing the total amount of the letter of credit to $56,870,000.

. . .

Q. Because the Debtor's obligations to pay the deductible amounts under the Ace insurance policy are secured by this letter of credit, under the Debtor's plan of reorganization, who has the obligation to pay those amounts, if there's a claim against the Debtor's insurance?

A. BMHC.

(January 27, 2010 Transcript, attached hereto as ***Exhibit A***, 42:21-44:10).

16. To convince the Court to allow Weis Builders to file a late claim and pursue insurance, Weis Builders' counsel made the following offer on the record during closing arguments at the January 27, 2010 hearing:

> In order to rebut any argument that the Debtors may make concerning prejudice to the Debtors, should the Court grant Weis relief under the excusable neglect theory, Weis agrees as follows: If pursued, if Weis' claim causes the insurance carriers to have a claim against the Debtors on account of any deductible, and/or self-insured retention under the policies, Weis agrees that it shall not seek any payment under the policies unless it satisfies directly with the insurance carrier, any deductible and/or self-insured retention.

(*Id.* at 52:15-24).

17. At the conclusion of the hearing, the Court granted the Weis Motions based on the offer their counsel had made to ameliorate the financial harm to the Debtors: "So for these reasons, I'm going to grant the motion, subject to the condition that I've imposed, as a result of what the movant offered. <u>And I will tell you had the movant not offered that, I would not have granted this relief</u>." (*Id.* at 72:24-73:2) (emphasis added).

18. The Court's January 27, 2010 ruling was memorialized in the *Combined Order Granting (I) Motion of Weis Builders, Inc. for Entry of an Order Enlarging the Claims Bar Date and (II) Modifying the Plan Injunction* [Docket No. 1592], attached as hereto ***Exhibit B***. In that Order the Court found, in particularly relevant part:

> H. Weis' length of delay in filing its claim and its potential impact on judicial proceedings weighs in favor of granting the Motion to Enlarge in light of Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies.
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> . . .
>
> J. Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies supports, in part, a finding that Weis has demonstrated excusable neglect with respect to its failure to file a timely proof of claim because such an agreement ameliorates, in part, certain prejudice to the Debtors from allowance of the late-filed claim.
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> K. Absent Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies, the Court would not have found that Weis demonstrated excusable neglect.

4. Other Requests for Discharge Injunction Relief

19. Since the August 31, 2009 Claims Bar Date, the Debtors have received approximately 85 informal requests or formal motions for relief from the automatic stay and/or discharge injunction. Approximately 75 of these requests or motions involved parties that had

not filed proofs of claim by the August 31, 2009 Claims Bar Date. If the requesting claimant had not filed a timely proof of claim, the Debtors only agreed to provide stay or discharge injunction relief, to enable the claimant to pursue insurance proceeds, if the requesting party agreed to ameliorate the financial effects of such relief to the Debtors (or the insurer agreed to waive the deductible).[2] For example, in paragraph 2 of the *Stipulation Resolving the Motion of Greystone Homes, Inc. for Relief from the Automatic Stay*, approved by the Court on September 18, 2009 [Docket No. 636], the requesting party (who had not filed a proof of claim by the August 31, 2009 Claims Bar Date) agreed: "If any action by the Claimant would cause the Insurers to have a claim against the Debtors on account of any deductible and/or self insured retention under the Policies, the Claimant acknowledges and agrees that it shall not seek any payment under the Policies unless it satisfies directly with the Insurers any such deductible and/or self insured retention." Similar language appeared in three other stipulations approved by the Court prior to its determination with respect to the Weis Motions, including with Ryland Homes of California, Inc. on December 16, 2009 [Docket No. 1167] and Greystone Nevada, LLC on January 21, 2010 [Docket No. 1332]. In fact, on January 4, 2010, this Court entered an order [Docket No. 1259] approving a stipulation under which Centex (the present movant) agreed, in order to proceed with arbitration on a project unrelated to the Four Leaf Lane Project in order to recover insurance proceeds that could trigger a deductible, that it too would "not seek any payment under the Policy unless it satisfies directly with the Insurer any such deductible and/or self insured retention."

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2 Based on their understanding of applicable law, discussed below, the Debtors had been taking this position even before the Court's determination with respect to the Weis Motions.

20. Of course, after the Court's ruling on the Weis Motions confirmed their practice and understanding under applicable law, the Reorganized Debtors continued to require parties that had not filed proofs of claim to agree to pay any applicable deductible or self-insured retention in order to obtain relief to pursue insurance proceeds. The Court has approved stipulations the Reorganized Debtors entered into to that effect with: (1) Cristoherson Homes, Inc. and Vintage Meadows Cloverdale, LLC, by order dated February 26, 2010 [Docket No. 1452]; (2) Pacific Bay Properties, by order dated March 18, 2010 [Docket No. 1483]; (3) Richmond American Homes of Arizona, Inc. and Richmond American Construction, Inc., by order dated April 26, 2010 [Docket No. 1546]; (4) Brookfield Homes San Diego, Inc., by order dated May 17, 2010 [Docket No. 1578]; (5) KB Home Phoenix, Inc., by order dated May 17, 2010 [Docket No. 1579]; (6) K. Hovnanian at Bridgeport, Inc., by order dated June 28, 2010 [Docket No. 1620]; (7) S&S Homes of the Central Coast, Inc., by order dated August 30, 2010 [Docket No. 1677]; (8) Torrey Pines Homebuilding Company, LLC, by order dated October 8, 2010 [Docket No. 1715]; (9) Nigro Associates, by order dated December 20, 2010 [Docket No. 1759]; (10) Greystone Homes, Inc. and Lennar Sales Corp., by order dated December 28, 2010 [Docket No. 1769]; and (11) Greystone Nevada, LLC, by order dated June 8, 2011 [Docket No. 1879].

21. In one instance, the self-insured retention on the policy had previously been satisfied. In that case, the Court approved a stipulation lifting the discharge injunction that obviously did not require the claimant to pay the satisfied self-insured retention [*See* Docket No. 1565]. In some other instances, the insurers agreed to waive the deductible, thus the Court approved certain stipulations granting relief from the discharge injunction that did not require the claimant to satisfy the deductible, with each such stipulation stating essentially that the Debtors'

agreement "is based upon the agreement of the insurer to waive the deductible" under the policy with respect to the action. [*See* Docket Nos. 1323, 1475, 1476, 1720, 1797, 1874]. The Court presently has a similar stipulation before it with respect to Arcadia Homes, Inc. [*See* Docket No. 1931].

22. Of course, some parties determined that it was not in their interests to agree to pay significant deductibles or self-insured retentions on certain smaller claims. Thus, upon making such determinations, at least seven parties have agreed to withdraw motions they had filed seeking relief from the discharge injunction. [*See* Docket Nos. 1418, 1441, 1465, 1652, 1756, 1852]. One of these withdrawals was filed by Pulte Home Corporation. [*See* Docket No. 1418]. These withdrawals generally state that they were without prejudice. In addition, numerous parties that had made merely an informal request for discharge relief and reached a similar conclusion simply did not file a motion for relief from the discharge injunction.

23. At present, the Reorganized Debtors are in discussions concerning requests for relief from the discharge injunction on at least 45 pending construction defect suits.

D. Centex's Long-Standing Awareness of the Homeowners' Actual Claims Related to Four Leaf Lane

24. Centex acknowledges that it become aware that homeowners in the Four Leaf Lane Project were actually asserting construction defect claims against Centex, with respect to which Centex could potentially assert warranty or indemnification claims against Debtor C Construction under the Construction Agreement, as early as September 29, 2009. This was just a month after the August 31, 2009 Claims Bar Date and several months before the Court confirmed the Reorganized Debtors' Plan. Specifically, Centex alleges that "[o]n or about September 29, 2009, approximately a month after the Claims Bar Date had passed, the owners of nine homes at the Project served Centex with a Notice of Claim pursuant to California's Right to

Repair Act contending that property damage occurred and exists at their homes due to violations of building standards, and defective development, workmanship, repairs, materials, and construction of the Project." (Bar Date Enlargement Motion, ¶ 19; Exh. 2 to Kopp Decl.).

25. Even though Centex obviously knew that actual claims were being asserted against it, it still did not attempt to file a proof of claim. Instead, by letter dated October 15, 2009, Centex purported to notify Debtor C Construction of the Four Leaf Lane Notice of Claim, stating that "[u]nder California law, this notice has the same force and effect as a notice of commencement of legal proceeding." (Exh. 3 to Kopp Decl.). In the October 15, 2009 letter, Centex demanded that Debtor C Construction "defend and indemnify [Centex] with respect to this matter pursuant to your contract with Centex and California law." (*Id.*). Centex sent a second notice with respect to additional homes in the Four Leaf Lane Project by letter dated October 23, 2009, a third notice by letter dated November 9, 2009, a fourth notice by letter dated November 18, 2009, and a fifth notice by letter dated December 3, 2009. (*Id.*).

26. By letter dated December 9, 2009, the Reorganized Debtors reiterated to Centex "that C Construction filed a petition under Chapter 11 of the [B]ankruptcy [C]ode in the Delaware bankruptcy court on June 16, 2009, Case No. 09-12079, and as a result there is an automatic stay in place." (Exh. 4 to Kopp Decl.). The Debtors further advised: "For additional information of same, please visit our website at www.bmhcrestructuring.com." (*Id.*).

27. Even after receipt of this letter, Centex still did seek to file a proof of claim in the Debtors' cases and thereby confirm its desire to participate in the reorganization. Nor did Centex seek to enter into another Plan injunction stipulation like the one that the Court approved with Centex with respect to a separate project on January 4, 2010. Instead, Centex simply continued

to send various letters advising of additional claims related to the Four Leaf Lane Project. (*See* Exh. 3 to Kopp Decl.).

28. After apparently inspecting the homes listed in the homeowners' Notices of Claims, Centex's counsel sent letters to counsel for the homeowner-plaintiffs stating: "Centex observed very few items that were violations of SB800's residential construction standards." (See Exh. 5 to Kopp Decl). Even so, Centex alleges that it made various repair offers on each of the homes it inspected. (Kopp Decl. ¶ 15; Exh. 5).

29. Centex acknowledges that the claimants with respect to the Four Leaf Lane Project filed suit against it on or about June 1, 2010. (Kopp Decl. ¶ 17; Exh. 6). Even so, Centex again took no immediate action to seek to file a late proof of claim in the Reorganized Debtors' Chapter 11 Cases. Instead, on March 22, 2011, Centex filed a Cross-Complaint against C Construction, and twelve other subcontractors, for (1) breach of written contract, (2) breach of oral contract to indemnify, to obtain insurance and to defend, (3) breach of implied contract to indemnify, obtain insurance and to defend, (4) total equitable indemnity, (5) partial equitable indemnity, (6) contribution and repayment, (7) declaratory relief for duty to indemnify, (8) declaratory relief for duty to obtain insurance, (9) declaratory relief for duty to defend, and (10) declaratory relief for duty to contribute. Indeed, Centex waited another entire year after the Four Leaf Lane Project claimants had sued it before filing its Discharge Relief Motion on June 10, 2011. (Kopp Decl. Exh. 10). Centex finally filed its Bar Date Enlargement Motion on September 2, 2011, more than two years after the August 31, 2009 Claims Bar Date and nearly two years after Centex acknowledges it actually knew it had potential warranty and indemnity claims against Reorganized Debtor C Construction. (*See* Kopp Decl. ¶ 9).

E. Potentially Applicable Insurance and Deductibles Secured by Letter of Credit

30. The Reorganized Debtors have determined that the insurance policies that may be applicable to the claims belatedly asserted against Reorganized Debtor C Construction by Centex are (1) Policy Number G18072889, with a policy period of 11/11/2005 to 11/11/2006, issued by ACE American Insurance Company (the "***2005-2006 Policy***"); and (2) Policy Number XSLG2170250A, with a policy period of 11/11/2006 to 11/11/2007, also issued by ACE American Insurance Company (the "***2006-2007 Policy***"). The 2005-2006 Policy has a $2,000,000 Products/Completed Operations Limit, with a $2,000,000 Deductible Per Occurrence. The 2006-2007 Policy also has a $2,000,000 Products/Completed Operations Limit, with a $100,000 self-insured retention layer and a $1,900,000 Deductible Per Occurrence.

31. The Reorganized Debtors' deductible obligations to ACE American Insurance Company are secured by prepetition letters of credit in the amount of $45,638,000 (down from $56,870,000 in January 2010). Section 4.3.2.4 of the confirmed Plan provides that "Prepetition Letters of Credit shall continue to collateralize all obligations under Insurance Policies and Agreements . . . secured by Prepetition Letters of Credit . . . and such Prepetition Letters of Credit and obligations shall survive the Effective Date unaffected and unaltered by the Plan." Thus, the Reorganized Debtors must pay in full any deductible triggered under an insurance policy secured by a letter of credit, such as the 2005-2006 Policy and the 2006-2007 Policy.

32. In addition, while both insurance policies provide for a Claims Service Organization to investigate, administer, adjust and settle claims and suits, the policies also provide that the insurer "shall not have any duty to defend any such 'suit.'" Further, both policies state that the insurer "shall have no duty to pay any 'allocated loss adjustment expense' within the Deductible amounts with respect to any claim or 'suit.'" Allocated loss adjustment

expenses are essentially expenses and costs associated with investigation, administration, adjustment, settlement or defense of claims and suits. Because the deductible and self-insured retention layers are equal to the insurance limits, and the Reorganized Debtors are obligated to pay the allocated loss adjustment expenses, no insurance proceeds are available for the time-barred claims Centex is now trying to assert. Instead, the Reorganized Debtors will be required to pay in full all defense costs, and up to $2 million in liability, if the Court permits Centex to file its late claim and pursue it in state court.

33. Centex claims that it is an additional insured under the policies issued to C Construction. However, Centex was only an additional insured while operations with respect to the Four Leaf Lane Project were ongoing, and it was no longer an additional insured once operations were completed. More specifically, with respect to the 2005-2006 Policy, C Construction's insurance broker, Marsh Risk & Insurance Services ("***Marsh***"), issued an executed Certificate of Insurance (Certificate Number SEA-000950227-01) to Centex specifying that Centex is an additional insured only as to "ongoing operations" and further specifying that "[t]his insurance does not apply to 'bodily injury' or 'property damage' occurring after: 1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be completed by or on behalf of the additional insured(s) at the location of the covered operations has been completed . . . ." With respect to the 2006-2007 Policy, Marsh issued an executed Certificate of Insurance (Certificate Number SEA-000950227-04) to Centex with identical language specifying that Centex was not an additional insured with respect to completed operations. Because operations were completed on the Four Leaf Lane Project in 2007, Centex was no longer an additional insured thereafter.

F. Adverse Impact If the Reorganized Debtors Must Pay an Unexpected $2,000,000 Deductible Related to Prepetition Construction Work

34. It is no secret that homebuilding is going through an extraordinarily difficult period in the United States. As the Debtors described in their Disclosure Statement, adverse market conditions caused the Debtors' sales revenues to decline from $3.0 billion in 2006 to $1.3 billion in 2008. For the year ending December 31, 2008, the Debtors experienced a loss of $192,456,000 from continuing operations. The company continues to operate in a difficult housing market and although it has achieved a positive adjusted EBITDA year to date as of July 31, 2011 (unaudited), it has yet to achieve a positive net income. Thus, paying an unexpected $ 2 million deductible with respect to the claims now asserted by Centex would constitute an economic hardship.

35. Perhaps more significantly, the Debtors performed work on at least 7,000 different construction projects in California and Nevada from September 1, 2001 to the June 16, 2009 Petition Date. Again, since the Petition Date, 292 construction defect suits and claims have been asserted or threatened against the Debtors. Many of these were resolved pursuant to the stipulations or withdrawals referenced above and, as noted above, the Reorganized Debtors are presently in discussions concerning requests for relief from the discharge injunction on at least 45 pending construction defect suits. If developers on each of those projects were permitted to file late proofs of claim with respect to construction defect claims related to the Debtors' prepetition work (without agreeing to pay the applicable deductible or self-insured retention),

then the Plan discharge injunction would be rendered a nullity, the finality of the Confirmation Order would be impaired and the Debtors' reorganization would be threatened.[3]

ARGUMENT

36. In connection with ruling on similar motions by Weis Builders, this Court noted that "[a]bsent Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies, the Court would not have found that Weis demonstrated excusable neglect." Because Centex is similarly situated to Weis Builders, the Reorganized Debtors urge the Court to reach the same result and not permit Centex to file a late proof of claim or otherwise proceed with its untimely prepetition claim unless Centex also agrees to ameliorate any financial effect on the Reorganized Debtors. So far, based on the Court's determination related to Weis Builders, other claimants that did not file proofs of claim have agreed to pay applicable deductibles or self-insured retention layers in order to obtain discharge injunction relief. Changing course now will encourage claimants to refuse to enter into such stipulations in the future and will open the floodgates to litigation concerning the Plan discharge injunction.

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3 The Debtors have had prepetition letters of credit securing their deductible obligations under commercial general liability insurance policies issued by ACE American Insurance Company since 2003. On the policy in effect from 11/11/2002 to 11/11/2003, the per occurrence deductible is $500,000. On the policies in effect from 11/11/2003 to 11/11/2005, the deductible is $1,000,000. On the policy in effect from 11/11/2005 to 11/11/2006, the deductible is $2,000,000. On the policies in effect from 11/11/2006 to 11/11/2009, the self-insured retention was $100,000 with a $1,900,000 deductible. The treatment of allocated loss adjustment expenses vary depending on the policy.

I. The Court Should Deny the Bar Date Enlargement Motion Because Centex Cannot Demonstrate Excusable Neglect in Failing to File Its Prepetition Claim

37. Like Weis Builders, Centex is asserting a prepetition claim. Like Weis Builders, Centex received more than adequate notice of the Claims Bar Date. Like Weis Builders, Centex did not file a proof of claim. And like the circumstances before the Court with Weis Builders, the substantial deductibles under the applicable insurance policies are secured by a letter of credit, which would require the Reorganized Debtors to pay any such triggered deductible in full. Accordingly, based on the Court's prior determination concerning Weis Builders, Centex cannot show that its failure to file its prepetition warranty and/or indemnity claim was the result of "excusable neglect" unless Centex agrees to pay any such deductible or self-insured retention. Because Centex has refused to agree to do so, the Reorganized Debtors respectfully request the Court to deny the Bar Date Enlargement Motion.

A. Centex's Indemnity and/or Warranty Claim is a Prepetition Claim

38. Centex is well-aware of the Court's determination relative to the similar motions filed by Weis Builders. In a failed effort to distinguish its circumstances, Centex argues that "Centex's claim did not arise until the homeowners' first Notice of Claim to Centex on or about September 29, 2009." (Bar Date Enlargement Motion, ¶ 40). Based on this proposition, Centex argues that it "could not have timely filed its proof of claim" and that "the Debtors' notice of the Claims Bar Date to Centex on or about July 23, 2009 gave Centex no reason to take action in the Debtors' bankruptcy proceeding." (*Id.* ¶¶ 40-41). Centex's suggestion that it did not have a prepetition claim is incorrect under any conceivable test. Thus, to preserve its rights, Centex, as a large and sophisticated entity, should have known that it was required to file a timely proof of claim.

39. The Bankruptcy Code defines a "claim" as "[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secured, or unsecured . . . ." 11 U.S.C. § 101(5). The House and Senate Reports state that '[b]y adopting this broadest possible definition . . . the bill contemplates that all legal obligations of the debtor no matter how remote or contingent, will be able to be dealt with in the bankruptcy case . . . [which] permits the broadest possible relief in the bankruptcy court." H.R. Rep. No. 95-595, at 309. As a result of the broad language, the Supreme Court has itself noted that the term "claim" has "the broadest possible definition . . . ." *FCC v. NextWave Pers. Communs., Inc.*, 537 U.S. 293, 302 (2003) (*quoting Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)); *see also In re Remington Rand Corp.*, 836 F.2d 825, 826 and 829 (3rd Cir. 1988) ("Congress defined 'claim' in the broadest possible terms").

40. Despite the broad definition, Federal courts have articulated somewhat different tests for what constitutes a prepetition "claim." Even so, Centex's warranty and indemnity claim related to Debtor C Construction's prepetition Construction Agreement and prepetition work constitutes a prepetition claim under even the most restrictive test, articulated in the Third Circuit's now-overruled decision in *Avellino & Bienes v. M. Frenville Co, (In re M. Frenville Co.),* 744 F.2d 332 (3rd Cir. 1984).

41. In *Frenville*, the Third Circuit adopted an "accrual" test under which it looked to when a claim accrued under state law in order to determine when a claim arose for purposes of the Bankruptcy Code. 744 F.2d at 335-336. Under the facts of that particular case, the Court found that, because a common law indemnity or contribution claim did not arise under the applicable state law (New York) until after a suit was filed, a New York common law indemnity

or contribution claim did not accrue for purposes of the Bankruptcy Code until such a suit was brought. *Id.* at 336-37. The Court so held even though the conduct on which liability was premised had occurred prepetition. *Id.*

42. In effect, Centex appears to be arguing for the Court to apply such an "accrual test" when Centex states that its "claim did not arise until the homeowners' first Notice of Claim to Centex on or about September 29, 2009." (*See* Bar Date Enlargement Motion, ¶ 40). Of course, applying such an "accrual" test is not appropriate because the Third Circuit overruled *Frenville's* "accrual" test in *JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.),* 607 F.3d 114, 121 (3rd Cir. 2010). Further, Centex cannot rely on the recency of *Frenville's* overruling to excuse its failure to file a proof of claim because Centex's contractual claim for warranty or indemnity <u>was a prepetition claim even under the now-discredited "accrual" analysis in *Frenville*</u>.

43. Specifically, in *Frenville* the Third Circuit noted that <u>contractual</u> indemnity claims arise upon the signing of the agreement:

> The present case is different from one involving an indemnity or surety contract. When parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, there exists a right to payment, albeit contingent, upon the signing of the agreement. Such a surety relationship is the classic case of a contingent right to payment under the Code—the right to payment exists as of the signing of the agreement, but it is dependent on the occurrence of a future event.

744 F.2d at 336-337 (citations omitted). Thus, even under *Frenville's* now-discredited "accrual" test, Centex's contingent warranty or indemnity claims first arose on February 10, 2006 when the Construction Agreement was signed. *See id.; see also JELD-WEN v. Van Brunt (In re Grossman's Inc.),* 400 B.R. 429, 432 (D. Del. 2009) (holding that, under New York law, breach of warranty claim arose prepetition at time of delivery of product and was discharged).

44. Because Centex's claim arose prepetition even under *Frenville*, it is certainly the case that Centex's claims against Debtor C Construction are prepetition claims under the Third Circuit's broader test articulated in *In re Grossman's*. *See* 607 F.3d at 125. In *Grossman's*, the Third Circuit had to determine whether a claimant had a bankruptcy "claim" when she was exposed to a debtor's asbestos prepetition but she did not manifest an injury until years after the debtor's plan of reorganization had been confirmed. After overruling *Frenville's* accrual test, and considering approaches adopted by other courts (including the prepetition "conduct" test, the pre-petition "relationship" test and the "fair contemplation" test), the Third Circuit said: "Irrespective of the title used, there seems to be something approaching a consensus among the courts that a prerequisite for recognizing a 'claim' is that the claimant's exposure to a product giving rise to the 'claim' occurred pre-petition, even though the injury manifested after the reorganization." *Id.* at 125. The Third Circuit specifically agreed with that statement and, accordingly, "h[e]ld that a 'claim' arises when an individual is exposed prepetition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." *Id.*

45. Here, Centex claims that it was "exposed" to allegedly defective work on the part of Debtor C Construction years before the June 16, 2009 petition date because C Construction worked on the Fair Leaf Lane Project from 2006 to 2007. Thus, Centex clearly had a contingent, prepetition claim against Debtor C Construction for indemnity and/or warranty related to the Four Leaf Lane Project. *See id.; see also Hassanally v. Republic Bank (In re Hassanally)*, 208 B.R. 46, 55 (9th Cir. B.A.P. 1997).

46. *Hassanally* is closely on point. In that case, a debtor acted as a general contractor in constructing a condominium complex that the debtor owned and financed through a bank. 208

B.R. at 47. Two years after completing construction, the debtor defaulted on the bank's note and filed for bankruptcy protection. The debtors received a discharge, and the bank obtained post-discharge stay relief to foreclose on the property. After taking possession, the bank alleged that it noticed several instances of the debtors' negligent construction. Two years later, the bank sued the debtors for the construction defects, and the debtors asked the bankruptcy court to sanction the bank for violating the discharge injunction. *Id.* at 48.

47. The bank argued, and the bankruptcy court agreed, that the debtors' liability for negligent construction arose out of the bank's "post-petition ownership or possession of the real property" and was "based on a tort claim which did not arise under state law until after the commencement of the debtors' bankruptcy case." *Id.* As a result, the bankruptcy court determined that the bank had not violated the discharge injunction.

48. The Ninth Circuit Bankruptcy Appellate Panel reversed. After describing the prepetition "conduct" and "relationship" tests for determining when a "claim" arises for discharge purposes, the Bankruptcy Appellate Panel noted that "the determination of when the claim arose under federal law need not be analyzed further than when the alleged negligent conduct occurred, for a contingent claim arose at that time." *Id.* at 54. Because it was "undisputed that Debtors' conduct, which allegedly created a construction defect and damaged the property, occurred prepetition" the court concluded: "As a matter of law, the bank's negligent construction claim was a prepetition contingent claim which was discharged in Debtors' bankruptcy." *Id.* at 55.

49. Regardless whether one utilizes a prepetition "accrual," "conduct" or "relationship" test, it is plain that Centex's contingent indemnity and warranty claim, related to Debtor C Construction's prepetition Construction Agreement and prepetition work on the Four

Leaf Lane Project, was a prepetition claim in these bankruptcy cases. Thus, there was no excuse for a sophisticated entity like Centex to not recognize that fact. Because, as further described below, Centex had adequate notice of the Claims Bar Date and Centex failed to file a proof of claim, Centex's prepetition, contingent claim against Debtor C Construction was discharged by the confirmed Plan.

B. Centex Had More than Adequate Notice of the August 31, 2009 Claims Bar Date

50. A prepetition claim such as that held by Centex is discharged by a plan of reorganization if the fundamental principles of due process are satisfied. *See In re Grossman's*, 607 F.3d at 125-126. Determining whether discharge of a claim comports with due process "involve[s] inquiry into the adequacy of the notice of the claims bar date." *Id.* at 127; *see also Chemetron Corp. v. Jones,* 72 F.3d 341, 346 (3rd Cir. 1995) ("*Chemetron I*") ("Inadequate notice is a defect which precludes discharge of a claim in bankruptcy.").

51. "For notice purposes, bankruptcy law divides claimants into two types, 'known' and 'unknown.'" *Chemetron I*, 72 F.3d at 346. For unknown claimants, "notification by publication will generally suffice." *Id.* However, "known creditors must be provided with actual written notice of a debtor's bankruptcy filing and bar claims date." *Id.*

52. Here there is no need to determine whether Centex was a known or unknown creditor because Centex acknowledges, as it must, that "[o]n or about July 23, 2009, Centex's regional offices in Corona, California received notice of the Claims Bar Date of August 31, 2009." (Bar Date Enlargement Motion, ¶ 17). Actual receipt of the notice of the Claims Bar Date is the best form of notice and plainly satisfies due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

53. Centex seems to suggest that, in addition to "known" and "unknown" creditors, the Court should construct a third category of claimants for notice purposes—known claimants who do not recognize that they hold claims. However, as stated above, the Third Circuit has clearly recognized that "[f]or notice purposes, bankruptcy law divides claimants into two types, known and unknown." *Chemetron I*, 72 F.3d at 346 (emphasis added). Thus, Centex's argument has no application to the adequacy of notice. Further, as described below, the Third Circuit has specifically stated that "[i]gnorance of one's own claim does not constitute excusable neglect." *Jones v. Chemetron Corp.* ("*Chemetron II*"), 212 F.3d 199, 205 (3rd Cir. 2000).

C. Centex Cannot Demonstrate "Excusable" Neglect to File Its Late Claim

54. As explained above, Centex is now attempting to assert prepetition claims for which it did not file a proof of claim after receiving actual notice of the bar date. As the Third Circuit has recognized, the "strict bar date" in bankruptcy proceedings is intended "to facilitate the equitable and orderly intake of . . . claims." *In re Am. Classic Voyages Co.*, 405 F.3d 127, 133 (3rd Cir. 2005). Accordingly, delay in filing a proof of claim that was "entirely avoidable and within [the movant's] control," as is the case here where Centex had clear notice, "strongly disfavors" that movant in seeking permission to file a late claim. *Id.* at 134 (refusing to extend the bar date for a late-filed claim). Indeed, numerous courts have condemned attempts to extend the bar date for creditors who received actual notice because of the prejudice to debtors and the orderly progress of their reorganization efforts, as well as the unfairness and due process concerns related to other creditors who timely filed. As one court in this Circuit has explained,

> Tinkering with an established bar date may raise due process claims of parties who have timely filed claims by originally-established bar dates, since it gives late filers a second bite at an apple which is likely to be less than fully satisfying, and thus effect unfair diminution of the timely filer's share of a distribution.

In re Sacred Heart Hosp., 177 B.R. 16, 23-24 (Bankr. E.D. Pa. 1995); *see also In re Musicland Holding Corp.*, 362 B.R. 644, 655 (Bankr. S.D.N.Y. 2007) (noting "the irony" of "extending the bar date for the benefit of those who sat on their rights . . . at the expense of the vigilant creditors who observed the bar date"; "unfair to permit 'a second bite at the apple for those creditors who received notice of the bankruptcy filing and of the Claims Bar Date, and who chose not to file'"); *In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. 616, 622 (Bankr. S.D.N.Y. 2009) ("[E]xpansion of the Bar Date for notified class members who failed to file individual claims in a timely manner will violate due process and prejudice the rights of timely filers."); *Kahler v. FirstPlus Fin., Inc. (In re FirstPlus Fin., Inc).*, 248 B.R. 60, 73 (Bankr. N.D. Tex. 2000) ("[A] creditor who has received actual notice of the claims bar date, and who does not file a proof of claim, is barred and has no claim."); *Bailey v. Jamesway Corp. (In re Jamesway Corp.)*, 1997 Bankr. LEXIS 825, at *34 (Bankr. S.D.N.Y. June 11, 1997) ("The bar date is akin to a statute of limitations, and must be strictly observed.").

55. Because Centex had more than adequate notice of the August 31, 2009 Claims Bar Date, it has the burden to prove that its failure to file a timely proof of claim was the result of excusable neglect. *Chemetron II*, 212 F.3d at 205 ("The burden of proving excusable neglect lies with the late-claimant."). The United States Supreme Court has indicated that the following four factors are relevant in determining whether a claimant's failure to appear or produce evidence is the result of "excusable neglect": "[T]he danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *See Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 397

(1993). Under these standards, Centex simply cannot meet the burden to show that its delay in attempting to file a proof of claim was the result of excusable neglect.

1. The Danger of Prejudice to the Debtor

56. Centex has agreed "not to proceed against [C Construction's] bankruptcy estate in the event of judgment against [C Construction] in the State Action in excess of [C Construction's] insurance." (Discharge Relief Motion, ¶ 20). Even so, as was the case in the situation involving Weis Builders, there is a clear and present danger to the Reorganized Debtors if the Court permits Centex to pursue its late claim "only" against insurance.

57. Specifically, because the Centex claim is insured under the 2005-2006 Policy and the 2006-2007 Policy that, respectively, have a $2,000,000 deductible and a combined $100,000 self-insured retention/$1,900,000 deductible (each of which matches policy limits and is secured by a prepetition letter of credit), the insurer is not going to be obligated to bear the expense of any portion of Centex's liability claim. Further, under the policies, the insurer is not obligated to pay allocated loss adjustment expenses (*i.e.*, defense costs). Instead, if Centex is allowed to proceed with its untimely claim, the Reorganized Debtors will have to pay the defense and indemnity amounts <u>in full</u> to prevent the insurer from drawing on the $56,870,000 letter of credit securing the Reorganized Debtors' deductible obligations. This is the very danger that caused the Court, in connection with the similar Weis Motions, to state on January 27, 2010 that it would not have found excusable neglect if Weis Builders had not agreed to satisfy any deductible or self-insured retention under the policies it sought to pursue. That danger is no less significant now than it was back in January 2010.

58. Centex attempts to show lack of prejudice to the Debtors by arguing that it is an additional insured under the policies. (*See* Bar Date Enlargement Motion, ¶ 9). Centex is

incorrect. Because operations are no longer ongoing at the Four Leaf Lane Project, but were instead completed in 2007, Centex is not an additional insured under the 2005-2006 Policy or the 2006-2007 Policy. Specifically, with respect to the 2005-2006 Policy, C Construction's insurance broker, Marsh Risk & Insurance Services ("Marsh"), issued an executed Certificate of Insurance (Certificate Number SEA-000950227-01) to Centex specifying that Centex is an additional insured only as to "ongoing operations" and specifying that "[t]his insurance does not apply to 'bodily injury' or 'property damage' occurring after: 1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be completed by or on behalf of the additional insured(s) at the location of the covered operations has been completed . . . ." With respect to the 2006-2007 Policy, Marsh issued an executed Certificate of Insurance (Certificate Number SEA-000950227-04) to Centex with identical language specifying that Centex was not an additional insured with respect to completed operations. Because Centex is not an additional insured, Centex does not have a direct claim against the insurer under the policies. Thus, the only way the multimillion deductible can be triggered is if the Court were to allow Centex to file a late proof of claim and proceed with it in state court.

2. Length of Delay and Potential Impact on Judicial Proceedings

59. The length of Centex's delay here is considerable (much more so than Weis Builders' delay). Indeed, the August 31, 2009 Claims Bar Date passed more than two years ago, and the Reorganized Debtors are approaching the second anniversary of the January 4, 2010 Plan Effective Date. Given that the Plan in this case was confirmed long ago, the potential impact on these proceedings is significant. Specifically, allowing Centex to pursue such untimely claims at

this late juncture threatens to impair the finality of the Confirmation Order. Indeed, permitting such untimely claims could threaten the Reorganized Debtors' reorganization.

60. In *American Classic Voyages*, the Third Circuit applied the *Pioneer* excusable neglect factors in a situation where, as here, a claimant filed both a motion to lift the automatic stay with respect to a late-filed claim, and a motion requesting the Court to allow its late claim. *See* 405 F.3d at 129. Applying the first and second excusable neglect factors, the Court concluded "that Debtors will be prejudiced by exposure to a late claim and that the length of delay would have a substantial impact on the bankruptcy proceedings." *Id.* at 133. As the Court noted, the claimant in that case "moved for relief from the automatic stay two days after Debtors filed their Joint Plan of Liquidation with the Bankruptcy Court" and that a "policy that would allow proof of claims at that late date would have disrupted Debtors' reorganization." *Id.* In particular, the Court explained:

> Thousands of individual claims are outstanding against Debtors; the sheer scale presents a formidable problem of management. The strict bar date provided by the Bankruptcy Court was intended, in part, to facilitate the equitable and orderly intake of those claims. Debtors argue, with some persuasive effect, that, in view of the large number of post-bar date claims filed, allowing appellant to file late might 'render the bar order meaningless.'

61. The Debtors in these cases have already addressed more than 85 requests for relief from the automatic stay and/or the discharge injunction. Approximately 75 of those were from claimants that had not filed timely proofs of claim. Based on applicable law (further described below), as confirmed by this Court's determination with respect to Weis Builders, the Debtors have thus far been able to (1) enter into approximately six stipulations under which insurers agreed to waive certain smaller deductibles to permit claimants to pursue insurance without impact to the Reorganized Debtors; (2) enter into approximately fifteen stipulations (including one with Centex with respect to another project) pursuant to which the claimant

agreed to pay any deductible or self-insured retention or else not pursue the insurance; and (3) persuade approximately six claimants (including Pulte Homes) to agree to withdraw their filed motions for relief from the discharge injunction. Of course, many other claimants making informal inquiries for discharge injunction relief have simply decided not to pursue their request.

62. The Reorganized Debtors are presently communicating with claimants on requests to lift the discharge injunction on approximately 45 construction defect suits, and they expect many more in the future given the number of past requests. If the Court were to permit the untimely Centex claim to proceed at this late stage without requiring Centex to pay the applicable deductible or self-insured retention, the potential impact on these proceedings is evident: Other parties seeking relief from the discharge injunction will themselves no longer agree to pay applicable deductibles or self-insured retentions or else withdraw their requests. This will cause the Reorganized Debtors to have to litigate all such future requests at considerable expense and effort. Worse, because the Debtors worked on more than 7,000 prepetition construction projects in California and Nevada on which construction defect lawsuits might still be filed, to the extent other parties that did not file proofs of claim are also allowed to proceed with their prepetition, contingent claims without agreeing to pay the deductible or self-insured retention, then the Reorganized Debtors' reorganization may fail under the weight of such claims. Centex's neglect in failing to file a proof of claim simply cannot be "excusable" when it could result in such a consequence.

3. Reasons for Delay, Including Whether It Was Within the Reasonable Control of the Movant

63. Fault in the delay is a primary factor in the *Pioneer* excusable neglect analysis. *See e.g., In re Am. Classic Voyages*, 405 F.3d 127, 134 (3rd Cir. 2005) (relying "primarily" on the fact that the delay was avoidable and was within the movant's control and refusing to extend

bar date for a late-filed claim); *United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004) (noting that "fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable") (internal quotations and citations omitted); *Graphic Commns. Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F3d 1, 5 (1st Cir. 2001) ("We have observed that the four Pioneer factors do not carry equal weight; the excuse given for the late filing must have the greatest import."); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000) (same). Here, the fault lies entirely with Centex.

64. Given its sophistication and construction defect litigation experience, not to mention the language of the Construction Agreement stating on its face that latent construction defect claims could be asserted up to ten years after completion of the Four Leaf Lane Project, Centex knew or should have known that it could very well face construction defect claims allegedly related to C Construction's prepetition work. A result, given the applicable case law defining when a bankruptcy "claim" arises, Centex also should have known that it had prepetition, contingent claims against Debtor C Construction. Centex also should have known that its only chance to assert those claims was by filing a proof of claim by the August 31, 2009 Claims Bar Date. Centex chose not to do so.

65. In addition to being aware of the real possibility that construction defect claims could be asserted against it, Centex became aware that homeowners in the Four Leaf Lane Project were actually asserting such construction defect claims by September 29, 2009. As Centex itself has acknowledged, the notices of claims that the homeowners sent to Centex related to the Four Leaf Lane Project had "the same force and effect as a notice of commencement of legal proceeding." Despite the fact that the August 31, 2009 Claims Bar Date had passed just weeks before, and the Debtor's Plan had not yet been confirmed, Centex still made no effort to

file any type of proof of claim. Instead, it simply sent letters to the Reorganized Debtors advising of the homeowners' claim notices. Centex continued this letter writing campaign even after the Debtors sent their December 9, 2009 letter reiterating that they had filed chapter 11 bankruptcy petitions.

66. Even after the homeowners actually filed suit against Centex on June 1, 2010, Centex still took no action in this Court. Instead, Centex delayed yet <u>another</u> full year before filing its Discharge Relief Motion.

67. Centex tries to justify its long delay by arguing that "it was not aware that it had any claims against [C Construction] with respect to the Project until the Claims Bar Date had passed." (Bar Date Enlargement Motion, ¶ 40). Even if true, the Third Circuit has emphatically declared that "[i]gnorance of one's own claim does not constitute excusable neglect." *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3rd Cir. 2000) (*quoting In re Best Prods. Co.*, 140 B.R. 353, 359 (Bankr. S.D.N.Y. 1992)). Further, there can be no question that this excuse holds no water after September 29, 2009 when the homeowner-plaintiffs actually asserted their claims against Centex.[4]

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68. Centex is entirely at fault for the two year delay in asserting its claims. When one combines that fact with the significant danger of prejudice to the Reorganized Debtors in terms of immediately facing the possibility of having to pay defense costs and a $2,000,000 deductible,

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4 As discussed below, Centex's Cross-Complaint against the other twelve subcontractors has been progressing since March 2011, many dates in the state court's scheduling order have passed, and the case is set for trial on July 18, 2012. Centex's delay in acting in this Court in this circumstance does suggest a certain lack of good faith. Other than that, however, the Debtors have no specific basis on which to contend that Centex acted in bad faith, and thus do not rely on that element of the "excusable neglect" analysis.

plus the potential for a crippling flood of litigation concerning the Plan discharge injunction that could threaten the Reorganized Debtors' reorganization and fresh start, it becomes plain that Centex cannot meet its heavy burden to show excusable neglect. *See id.* ("The prejudice to the 'fresh start' to which Chemetron was entitled as a result of the Chapter 11 reorganization, the delay of four years after the bar date and two years after the confirmation date before the plaintiffs brought their claim, and their failure to specifically investigate the cause of their illnesses, even though the danger from the Bert Avenue dump generally was known in the community, combine to defeat their request that they be permitted to file late claims."). Consequently, the Reorganized Debtors urge the Court to deny the Bar Date Enlargement Motion.

II. Centex is Not Entitled To Relief from the Discharge Injunction

69. Additionally, the Reorganized Debtors urge the Court to deny the Discharge Relief Motion. "Determining whether relief from the permanent [section 524] injunction is warranted under appropriate circumstances should be analyzed pursuant to a cause standard." *See In re Fucilo*, 2002 Bankr. LEXIS 475, 2002 WL 1008935 at *9 (Bankr. S.D.N.Y. Jan. 24, 2002) (*citing In re McGraw*, 18 B.R. 140, 143 (Bankr. W.D. Wisc. 1982)). This analysis is similar to the analysis a court conducts in determining whether to grant relief from the automatic stay under section 362.

70. The movant bears the initial burden "to produce evidence that cause exists to grant relief from the automatic stay." *In re DBSI, Inc.*, 407 B.R.159, 166 (Bankr. D. Del. 2009). Because "cause" is not defined by the Bankruptcy Code, courts conduct a "fact intensive case-by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the stay." *In re SCO Group, Inc.*, 395 B.R. 852, 856 (Bankr. D. Del.

2007); *see also In re Lincoln*, 264 B.R 370, 372 (Bankr. E.D. Pa. 2001) ("Each request for relief for 'cause' under [section] 362(d)(1) must be considered on its own facts.").

71. As Centex acknowledges, this Court utilizes a three-prong balancing test to determine whether causes exists to allow relief from stay to allow litigation to continue, asking whether: "a) Any great prejudice to either the bankrupt estate or the debtor will result from the continuation of the civil suit; b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship to the debtor; and c) the creditor has a probability of prevailing on the merits." *In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) (*quoting Int'l Bus. Machines v. Fernstrom Storage and Van Co. (Matter of Fernstrom Storage and Van Co.),* 938 F.2d 731, 735 (7th Cir. 1991)). Centex cannot meet any of these factors.

1. Centex Cannot Show a Probability of Success on the Merits

72. As explained above, Centex cannot prevail on the merits of its claim against C Construction because its claim is time-barred. Indeed, the Third Circuit has specifically held that there is no cause to lift the stay to litigate barred claims. *In re Am. Classic Voyages, Co.*, 405 F.3d 127, 134 (3rd Cir. 2005).

2. Great Prejudice Will Result to the Reorganized Debtors if the Discharge Injunction is Lifted

73. "The most important factor in determining whether to grant relief from the automatic stay to permit litigation to proceed against a debtor in another forum is the effect of such litigation on the administration of the estate." *In re W.R. Grace & Co.*, 2007 Bankr. LEXIS 1214, at *9 n. 7 (Bankr. D. Del. Apr. 13, 2007) (*quoting In re Curtis*, 40 B.R. 795, 806 (Bankr. D. Utah 1984)). As also explained in great detail above, enormous prejudice will result to the Reorganized Debtors if Centex is allowed to pursue its time-barred claims. In addition to forcing

the Reorganized Debtors to pay the defense costs and up to a $2,000,000 deductible, allowing such a claim to proceed threatens the Reorganized Debtors with a flood of litigation concerning the Plan discharge injunction which could threaten their very reorganization.

74. Although Centex presents its Discharge Relief Motion as a request to sue the Debtor solely to pursue insurance proceeds, courts that have allowed this have only done so when the discharged debtor was truly a nominal defendant in that it had nothing at stake economically in the litigation. For example, in lifting the stay in *In re Jet Florida Systems*, 883 F.2d 970, 974 (11th Cir. 1989), the court noted that the debtor was "not prejudiced by exposure to the liability claim because '[t]he Debtor and his property are not subject to any risk . . . .'" In lifting the stay in *Houston v. Edgeworth (In re Edgeworth)*, 993 F.3d 51, 54 (5th Cir. 1993), the court noted: "[Debtor] has not asserted that he will be required to pay the costs of his defense against appellants' suit or that the insurance company denied coverage . . ." And *In re Beeney*, 142 B.R. 360, 361 (9th Cir. B.A.P. 1992), the Court noted at the outset that "the debtor would have borne no expense to defend the litigation."

75. Perhaps most on point is *In re Catania*, 94 B.R. 250, 253 (Bankr. D. Mass. 1989). In that case, the court held that the movant could maintain the action against the debtor to recover insurance proceeds because "the movant agrees to pay the Debtor's reasonable costs of defense, if no third party has agreed or will agree to fund these costs." Obviously, this is precisely what this Court has required in these very chapter 11 cases in connection with the Weis Motions. To change course now, after the Court has approved approximately twenty-five stipulations on similar terms, and many more requests for relief from the discharge injunction are pending and expected in the future, could be disastrous to the Reorganized Debtors.

76. In addition, C Construction would be seriously prejudiced if Centex were permitted to drag it into a state court lawsuit that was first filed against it (in violation of the Plan discharge injunction) in March 2011 and with respect to which the state court has entered a 51-page Case Management Order that shows that numerous significant dates have already passed and with respect to which a trial is scheduled for July 18, 2012. (Kopp Decl., Exh. 9, p. 50-51). Again, such prejudice is entirely the fault of Centex due to its considerable delay in taking action in this Court, and should not be countenanced.

3. The Hardship to Centex Does Not Outweigh the Hardship to the Debtors

77. "To establish cause, the party seeking relief from the stay must show that 'the balance of hardships from not obtaining relief tips significantly in its favor.'" *In re Am. Classic Voyages, Co.*, 298 B.R. 222, 225 (D. Del. 2003) (emphasis added; alteration marks omitted). This has been described as a "heavy and possibly insurmountable burden[.]" *In re W.R. Grace*, 2007 Bankr. LEXIS 1214, at *11 (*quoting In re Micro Design, Inc.*, 120 B.R. 363, 369 (E.D. Pa. 1990)). Given the potential magnitude of the prejudice to the Reorganized Debtors if Centex is allowed to pursue its claims, Centex simply cannot meet this burden.

78. Indeed, Centex will likely suffer no material prejudice if the discharge injunction remains in place. Centex itself has acknowledged that, in its experience, "a typical contribution of a concrete subcontractor towards settlement of construction defect claims involving single family detached homes is approximately $1,000 to $1,200 a house." (Bar Date Enlargement Motion, ¶ 36). Further, Centex acknowledges that it estimated that, even after its "inspection of the subject homes in the State Action, the settlement exposure for [C Construction's work] would be in the same range." (*Id.*). In fact, after its inspections, Centex evidently sent letters to the homeowners' counsel stating: "Centex observed very few items that were violations of

SB800's residential construction standards." (Kopp Decl. Exh. 5). The mere fact that counsel for the homeowners in the Four Leaf Land Project has apparently asserted some vastly exaggerated damages figure does not change the true extent of Centex's limited exposure.

79. Further, as reflected in the Cross-Complaint that Centex filed in the state court action, Centex has sued twelve other subcontractors for indemnity with respect to the Four Leaf Lane Project, and each of those subcontractors has insurance. (Kopp Decl. Exh. 10, ¶¶ 22-28). In addition, Centex has its own substantial insurance coverage. Thus, while Centex will be without the benefit of the Reorganized Debtors' "insurance" (which the Reorganized Debtors would themselves have to fund if relief were granted), Centex certainly will not be without the means to defend itself. Thus, Centex will suffer little or no prejudice if Debtor C Construction is not dragged belatedly into the state court lawsuit.

***

80. Centex cannot satisfy any of the three prongs that the Court will consider in determining if cause exists to grant relief from the discharge injunction. Accordingly, the Reorganized Debtors respectfully request the Court to deny the Discharge Relief Motion.

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CONCLUSION

For the reasons set forth above, the Reorganized Debtors respectfully request that the Court deny Centex's Bar Date Enlargement Motion and Discharge Relief Motion in their entirety.

Dated: Wilmington, Delaware
September 14, 2011

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ATTORNEYS FOR REORGANIZED DEBTORS

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

. . . .

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

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

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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THE CLERK: All rise. Please be seated.

THE COURT: Good afternoon everyone.

ALL: Good afternoon.

MR. BEACH: Good afternoon, Your Honor. May it please the Court, Sean Beach from Young, Conaway, Stargatt and Taylor on behalf of the Debtors. Your Honor, the first eight items on the agenda have been adjourned or otherwise resolved. Items 9 through 14 were filed under Certification of No Objection, and Your Honor I believe have signed all of those orders. Which brings us, Your Honor, to item number 15 on the agenda today, which is the debtor's motion for approval of a second implementation order in connection with the plan to essentially provide some level of comfort to certain insurance carriers, who would be charged with the liquidation of the supplemental employee retirement programs, and deferred compensation programs. The objection deadline was on Monday at 10:00 a.m. No objections were received, but given that we couldn't file a certificate of no objection until 10:00 a.m. this morning, we determined not to do that in case Your Honor had any questions regarding the motion. But there have been no objections, and unless Your Honor has any questions, we did file a revised form of order, with some slight clarifications, which should've been in Your Honor's binder.

THE COURT: It was. I've reviewed it and do not have any questions, but let me ask if anyone else wishes to be heard in connection with this motion. I hear no response. Do you have a form of order for me?

MR. BEACH: I do, Your Honor. May I approach?

THE COURT: You may. Thank you. The order has been signed.

MR. MCMAHON: Your Honor, good afternoon. Joseph McMahon for the acting United States Trustee. With the Court's permission, I'd like to be excused.

THE COURT: Well, you just got here. That's fine.

MR. MCMAHON: If the first 14 agenda items had taken longer, I would've stayed. Thank you, Your Honor.

THE COURT: Thank you, Mr. McMahon. I'm sure I'll see you soon anyway.

MR. BEACH: Your Honor, what I would request I think is the most efficient way to proceed with the remainder of the hearing is to take certain matters out of turn. What we'd like to do if it's acceptable is to take out on number 19 which is an omnibus claim objection which I think will be quick. And then after that, Your Honor, item number 18, which is the cure -- which was set up as a cure issue related to the Southwest Management matter, which now is I believe Your Honor has been advised, the Debtors have determined to reject that contract so we won't be going forward as a contested matter, but I know the Debtors, and I suspect Southwest Management may have some remarks for the Court, which I believe will be pretty quick in connection with that matter.

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

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

THE COURT: Okay.

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

THE COURT: Very well.

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

THE COURT: It's in the binder.

MR. POPITTI: Okay.

THE COURT: I've -- it's actually a proof of interest, I have reviewed it.

MR. POPITTI: Great, Your Honor. You've actually made my argument I think. Your Honor, the objection's a little bit incoherent, but I think at bottom, as Your Honor just eluded to, it's really just a proof of interest. The Debtors have objected to it on that grounds. As we've done in the past, Your Honor, we would request that you overrule the objection as a proof of interest that need not be filed in these cases.

THE COURT: All right. Let me ask for the record if anyone is present or on the telephone on behalf of Vincent Rhynes.

ALL: (No verbal response).

THE COURT: I hear no response. As I said, I have reviewed the objection and the response, and this is purely an equity interest. I'm prepared to grant the relief that's been requested.

MR. POPITTI: Great, Your Honor, thank you. May I approach with the Form of Order?

THE COURT: You may.

MR. POPITTI: Thank you.

THE COURT: Thank you. That order has been signed.

MR. POPITTI: Thank you, Your Honor. With that, I'll turn the podium over to Jeremy Graves from Gibson Dunn. Thank you.

THE COURT: All right.

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

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

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

MR. KRAKOW: David Krakow, Gibbons for Southwest Management. We take no position on the rejection, just that the form of order will have to be submitted to the Court --

THE COURT: Very well.

MR. KRAKOW: -- on a later basis.

THE COURT: Thank you. I'll wait its submission then.

MR. GRAVES: Your Honor, if it's okay with you, we will present the proposed order under certification of counsel regarding the rejection.

THE COURT: That's fine.

MR. GRAVES: Thank you. The next item on the agenda, I believe the last item on the agenda are our items 16 and 17, which relate to Weis' motion to expand the bar date and the related motion for relief from stay. I'd like to start this afternoon with the good news, which is that we've reached an agreement on the lift stay motion. It's sort of a menu option approach, in that we view the bar date motion as a gating issue, and so we've agreed that if the Debtors are to prevail on the bar date motion, I believe that we've agreed that the stay would remain in place, with respect to the Debtors, subject to two conditions, which Weis would like to have in the order. Which is that, Weis asserts that it is an additional insured, under certain insurance policies, and that it can recover directly against the insurance providers in its capacity as an additional insured. And so Weis has asked that the order clarify that the stay imposed does not impact their rights against those insured -- their direct rights against the insurance providers, and without conceding any defenses or anything of the like, the Debtors agree that if Weis is corrected, it has rights to the additional insured the stay or plan injunction provisions don't, in fact, prevent them from proceeding directly in direct action against the insurance providers.

And second, Weis wants to make sure that the order is clear that it does not impede their ability to proceed in the state court action against the other third party, the other defendants or third party defendants, and of course, we would agree to that as well. If Weis prevails on the bar date motion, Weis, of course, would have an unliquidated claim that must be liquidated, and so the Debtors will work with Weis to agree to a proposed form of order lifting the stay, if in fact, Your Honor rules that they have a claim. Which I believe, unless you have any questions, brings us to the bar date or if Weis has any comments.

THE COURT: Well, is there still a dispute about whether the insurance policy provides self-insured retention or whether it provides first dollar coverage? It's an issue that's raised in connection with the motion to file lead claim.

MR. GRAVES: I'll let Weis respond.

MS. RAPORT: Your Honor, Leigh Anne Raport from Ashby and Geddes on behalf of Weis Builders. Your Honor, we don't think that issue's relevant anymore, because the resolution with lift stay. I think Weis Builders wants the opportunity to negotiate with the Debtor's insurance carrier.

MR. GRAVES: If I could just bring a little clarity for the Debtors if I could.

THE COURT: Go ahead.

MR. GRAVES: We will be presenting evidence in our case in chief in the bar date expansion motion regarding the insurance policies that are in place, and Mr. Baumann who is here on behalf of the Debtors will testify regarding the deductible amounts, or the existence of a deductible and the deductible amounts that the Debtors believe would apply.

THE COURT: All right. So that's your way of telling me you think it is still relevant?

MR. GRAVES: We do believe that the issue is relevant. I'm not sure if it will be disputed.

THE COURT: Well, I didn't have the benefit and this is not a criticism, of the terms of the resolution of the motion to lift stay. But it sounds to me as if you're almost really there, in terms of acknowledging the claim, and I guess what I would like to know is, and I have read the papers, but if you're able to do this without compromising your litigation strategy, why are you really opposing this?

MR. GRAVES: Well, Your Honor, the Debtors are opposing this for a couple of reasons, and one of them, as you'll see once we get in our arguments, we believe that if the stay is lifted in this instance, it has a potential to prejudice the Debtors on a going forward basis. And there's a couple of reasons for that. One of them is that the Debtors are attempting to reduce the outstanding amount of their letters of credit. And in their negotiations with Ace, the existence of these very types of claims have been a sticking point.

THE COURT: But you've made your lift stay deal with this creditor.

MR. GRAVES: Your Honor, we -- the --

THE COURT: Or purported creditor.

MR. GRAVES: Just to be clear, the deal that we've made is that they could proceed against the insurance company, the insurance providers, under their rights as an additional insured.

THE COURT: I understand the distinction.

MR. GRAVES: And the Debtors believe that any insurance company may be subrogated to any defenses that the Debtors could assert. One of those defenses being the failure to file proof of claim, and so the Debtors feel it's necessary to continue to object to the allowance of the proof of claim.

THE COURT: Well, okay that's -- so that I'm clear, is the Debtor's concern a timing concern, or is it a concern that there are other claimants who have not yet filed or who filed late, who you think will be seeking similar relief?

MR. GRAVES: It is certainly the second. I'm not sure I understand where Your Honor says this is a timing concern.

THE COURT: Well, these are the types of claim which ordinarily wouldn't be liquidated here. The plan's been confirmed, so now would be the time for those things normally to move forward. So I wouldn't usually expect resistence from the Debtor as a result of timing. But you're telling me that's not really the problem here.

MR. GRAVES: No, the problem is substance. As Mr. Beach just pointed out to me, to make clear to Your Honor, if in fact, Weis is able to successfully assert a claim either directly against the Debtors or as an additional insured under the insurance coverage, the money will come directly out of the reorganized Debtors' operating expenses, by virtue of the plan which was confirmed, which pays claims that are secured by a letter of credit, as this one would be, in full out of the Debtor's operating expenses, instead of having a trigger on the letter of credit.

And the Debtors believe that if Weis is successful in asserting any claim about the Debtor's insurance providers, whether as an additional insured, or a direct claimant, it will result in a direct recovery out of the Debtor's estates. And for that reason, the Debtors believe that it is a matter of substance, not just one of timing.

THE COURT: Okay. And -- but I thought I heard you also say there might be others similarly situated, or did I not hear that correct?

MR. GRAVES: You did hear me say that, Your Honor. There is a matter that is on your docket, Parker Development Northwest, that is in a virtually identical set of circumstances. It was originally scheduled for today, it has since been adjourned to February 22nd, and the Debtors continue to receive requests to lift the stay on these various types of construction defect claims on an ongoing basis, and many of them would result in class five claims that the Debtors would have to directly satisfy. So what the reason that the Debtors would agree to the lifting -- to an order that clarifies that if -- that Weis can proceed in its capacity as an additional insured is merely because that claim is a direct claim that Weis may have against the insurance provider, that the Debtors feel is vitally necessary that the Debtors preserve any defenses that the Debtors -- that the insurance company may be able to assert one of those as late filed claim.

THE COURT: I understand. Okay. Well, it's Weis' motion, let's proceed.

MS. RAPORT: May it please the Court, Leigh Anne

Raport, from Ashley and Geddes on behalf of Weis Builders, Inc. Your Honor, I appreciate you hearing us today with respect to the motion to enlarge the bar date. Your Honor, I have two witnesses here with me today, Weis lead counsel in the state court action, Tonya MacBeth from Burch and Cracchiolo, which I'll refer to as B and C, who was flown in from Arizona, and Weis' local counsel in the state court action, Bill Salmon, from Rhodes and Salmon, who has flown in from New Mexico. Unless Your Honor has any questions, I would like to call my first witness.

THE COURT: Proceed.

MS. RAPORT: Mr. Salmon.

THE CLERK: Please remain standing.

WILLIAM C. SALMON, WEIS' WITNESS, SWORN

THE CLERK: Please state your full name for the record and spell it.

MR. SALMON: William C. Salmon.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. RAPORT:

Q. Good afternoon, Mr. Salmon. Can you tell me where you currently are employed?

A. I am employed with Rhodes and Salmon PC. It's a law firm that -- with two lawyers, myself and Mark Rhodes.

Q. Can you briefly describe the nature of your practice?

A. It's a general practice firm. I don't -- I do a lot of real estate law, both transactional and litigation, but it's a general practice firm.

Q. Can you tell me how you first became involved in this case?

A. In late -- in December of 2007 and January of 2008, Burch and Cracchiolo contacted me about helping them getting admitted pro hac vice in this state court litigation, and asked me to be -- our firm to be local counsel with them.

Q. And what is your role in the state court action?

A. Well, Burch and Cracchiolo, Mitch Resnick and Tonya MacBeth, my first contact was Mitch Resnick, he explained to me that -- and we agreed on a division of labor and they were gonna do all the work on the case really, except for matters involving local law, New Mexico law, and all the substantive work would be done by them, all the discovery. It was gonna to be a complex case. It already had been pending for a year, and there would be a lot of very intensive discovery, and they were gonna do all the discovery, handle the expert witnesses. But I would be contacted if there was an issue about local and New Mexico procedure and any local law issues. They would be drafting the pleadings as well.

Q. Have you spoken to Debtor's counsel in the state court action or the bankruptcy proceeding?

A. Yes. Marty Diamond became involved in March of 2009. This was after a third amended, a third party complaint had been filed, and I, as a professional courtesy, gave him an extension of time to answer the complaint.

And I explained to him that any of his substantive questions about the project and about discovery would have to be covered by Tonya MacBeth because they were -- Burch and Cracchiolo were lead counsel. They were handling the litigation, and I was just local counsel that had assisted them, admitting them pro hac vice and -- because he started out with some questions about -- and I couldn't answer them.

I subsequently -- my first conversation with him was in late March. Another conversation in early April, and there were e-mails from Tonya, this is 2009, e-mails from Tonya MacBeth to all counsel, and there's a number of parties, setting up a meeting at the project for April 14th and 15th of 2009. And I had a conversation at the site with Marty Diamond again, and Tonya was late arriving at the meeting.

And we had a room full of attorneys there and they were all patiently waiting for her arrival, and I explained to them that -- because I was attorney co-counsel for Weis, that I really couldn't proceed on the meeting without her, because I really couldn't explain the details regarding the project. I hadn't been up to the site at that point until that date, and that we'd just have to wait for her to come, and that I was -- had called her cell phone, and that I understood she was on her way. And I explained that to Marty Diamond as well, that again, I was just co-counsel, and that she was lead counsel, and the meeting would have to wait until she arrived.

Then subsequent to that, there was a bankruptcy notice that Marty Diamond filed for the Debtor indicating that the Debtor filed bankruptcy and that notice was sent, as I would've expected to all counsel, including co-counsel, Tonya MacBeth.

Then there was a letter in early July from Jeremy Graves, and it was basically -- it appeared to me to be a cease and desist letter indicating that this entire action was stayed, and that we could be subject to sanctions, that the case couldn't move forward at all until there was a dismissal of the BMC Group, there was three different entities there that were -- different entities from the Debtor, but were apparently related.

And I called Marty Diamond and I said -- I explained to him that he would have to -- those issues regarding the stay and regarding the bankruptcy would have to be dealt with with Tonya MacBeth, and he needed to contact her regarding the bankruptcy, and regarding the issues involved in the stay.

Q. Did you have any other interactions with Debtor's bankruptcy counsel?

A. No. They were -- all their interactions were with the Burch and Cracchiolo firm.

MS. RAPORT: Your Honor, may I approach with an exhibit binder?

THE COURT: You may.

MS. RAPORT: Thank you.

(Ms. Raport approches The Bench)

THE COURT: Thank you.

BY MS. RAPORT:

Q. Mr. Salmon, can you please turn to the document marked Weis Exhibit 1 in the exhibit binder? Can you tell me if you're familiar with this document?

(Weis's Exhibit-1 previously marked for identification)

A. This is a notice of entry of bar date.

Q. And did you do anything with that notice when you received it?

A. I looked at it. This was received some time in, I believe it was late July. And when I looked at it, I noticed that it was directed to myself, William C. Salmon, and Rhodes and Salmon PC my law firm, and there were Proof of Claim forms that listed myself as a creditor, and Rhodes and Salmon PC as a creditor. And I noticed that it stated, you should not file a Proof of Claim unless you believe you have a claim, and I did not feel myself individually, or my law firm, had a claim against the Debtor. I thought potentially there could've been a possibility of a claim for attorney's fees, if they had -- if the client had prevailed, but I concluded there was clearly no claim that I could file on behalf of myself or my firm. And so I did not act on this, and I put it in the file.

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

Mr. Salmon.

THE COURT: Cross examination?

MR. GRAVES: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. GRAVES:

Q. Mr. Salmon, you're a counsel of record in the underlying state court action where Weis' claim against the Debtors is pending, aren't you?

A. Yes.

Q. And in your practice there in New Mexico, you've had some experience with bankruptcy issues, haven't you?

A. Some experience, yes.

Q. And on or before July 13, 2009, you received the Debtor's Notice of Commencement, which advised you of the fact that the Debtors had filed for bankruptcy, didn't you?

A. Well, I was aware that this entity had filed bankruptcy, yes. There was notice --

Q. The question --

A. There was a notice filed in the state court action that there was a pending bankruptcy.

Q. But you've also received directly from the Debtors, the Notice of Commencement that was approved by the bankruptcy Court, didn't you?

A. Yes, I believe I did.

Q. And on or before July 13th, 2009, you received the Debtor's

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

Q. Okay. So it is true, isn't it, that on or before July 13th, 2009, the date of this fax, you received from the Debtors the Notice of the Disclosure Statement Hearing?
A. Yes.
Q. And on or before July 13th, 2009 you also received a letter from Debtor's counsel which discussed at length the automatic stay, and its impact on the pending state court action, didn't you?
A. Yes. That's what I just discussed. I called Marty Diamond about this letter, this July 10th letter.
Q. And on or before -- around July 26th, 2009, you received the Debtor's notice of the entry of the bar date order, didn't you?
A. Yes.
Q. Okay. And upon receipt of the Notice of Commencement, the disclosure statement hearing notice, and the letter from Debtor's counsel, you promptly faxed each of these documents to your co-counsel in the state court action, Tonya MacBeth and Mitch Resnick at the Burch and Cracchiolo firm, didn't you?
A. Well, no. I did not fax the bar date notice. I did fax this document.
Q. Did you ever send the bar date notice to Burch and Cracchiolo?
A. In -- when this issue came up in late September.

MR. GRAVES: No further questions, Your Honor.

THE COURT: Is there any redirect?

REDIRECT EXAMINATION

BY MS. RAPORT:

Q. Mr. Salmon, I know you mentioned your experience in bankruptcy. Could you go into a little more detail about that? Maybe describe for us the amount of work you've done in bankruptcy in the past ten years and the nature of the work?

A. Well, I generally refer out bankruptcy issues to the attorneys that specialize in bankruptcy. I'm not at all familiar with Chapter 11, in particular. My experience in bankruptcy has been in residential foreclosure cases, where -- and lifting the stay in cases where there's no equity in the property, and the lenders lifting the stay to foreclose on the property.

Q. And about how many --

A. In a handful of cases -- I've had a handful of cases related to bankruptcy in the last ten years.

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

THE COURT: Any recross?

MR. GRAVES: No, Your Honor.

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

MS. RAPORT: Your Honor, can I move the admission of Weis' Exhibit 1?

THE COURT: Is there any objection?

MR. GRAVES: No, Your Honor. We had actually, just to clarify the record in this matter, we've agreed with Weis to the admission of all of the documents, I believe, that are contained in Weis' hearing binder. And we've also agreed to the admission, I believe, of Exhibits 1, 2, 3, 6 and -- I'm sorry, Your Honor, if you're writing this down, 1, 2, 3, 6 and 11 through 17 in the Debtor's hearing binder, to speed the process here.

MS. RAPORT: Your Honor, could I just note that with regards to the admission of the affidavits by the Debtors, Weis agreed to admit those documents, not for the truth of the matter that's asserted in the documents, but that if that witness was here, that was what they would testify to.

THE COURT: And please identify which exhibits those are.

MR. GRAVES: If I could step in there. 1, 2, and 3, Your Honor, the Debtors have submitted them for the truth of the matter, that they testify to. Our agreement is just that they would be admitted, and Your Honor would consider whether or not their testimony is truthful.

THE COURT: It doesn't sound like there's an agreement on the basis for admission or the conditions for admission.

MR. GRAVES: It's just that they can rebut what is said in the declarations. I don't believe there's any objections to the actual admission of the documents themselves.

MS. RAPORT: Correct.

THE COURT: Oh, but they are being offered for the truth?

MR. GRAVES: They are being offered for the truth of the matter testified to.

THE COURT: Is there an objection? I know you're not admitting that they're true, but is there an objection to their 1, 2, and 3 being admitted for the truth?

MS. RAPORT: There is, Your Honor. I believe that they have some facts in there that directly contradict facts in our affidavits, which I believe Ms. MacBeth will testify to, concerning specifically, I believe, when the Debtors first became aware of the state court action, and when the Debtors first received service of the complaint in the state court action.

MR. GRAVES: Your Honor, I don't believe that she's articulating an objection to the admissibility of the documents.

THE COURT: No.

MR. GRAVES: I believe we've agreed to the --

THE COURT: You're offering them for the truth and they're hearsay.

MR. GRAVES: And I --

THE COURT: And they would not otherwise be admissible for that purpose without agreement of --

MR. GRAVES: That's correct. And the understanding that I believe that we had with counsel is that they would not object on hearsay basis, but that they would preserve the right to present rebuttal testimony that may demonstrate a different fact.

MS. RAPORT: Your Honor, we'll agree that if they were here and they were put on the stand that's what they would say.

THE COURT: Okay. D-1, 2, 3, 6, 11 to 17 are admitted as are W-1 through 7, all by agreement.

(Debtor's Exhibit-1 admitted into evidence)
(Debtor's Exhibit-2 admitted into evidence)
(Debtor's Exhibit-3 admitted into evidence)
(Debtor's Exhibit-6 admitted into evidence)
(Debtor's Exhibit-11 admitted into evidence)
(Debtor's Exhibit-12 admitted into evidence)
(Debtor's Exhibit-13 admitted into evidence)
(Debtor's Exhibit-14 admitted into evidence)
(Debtor's Exhibit-15 admitted into evidence)
(Debtor's Exhibit-16 admitted into evidence)
(Debtor's Exhibit-17 admitted into evidence)
(Weis' Exhibit-1 admitted into evidence)
(Weis' Exhibit-2 admitted into evidence)
(Weis' Exhibit-3 admitted into evidence)
(Weis' Exhibit-4 admitted into evidence)

(Weis' Exhibit-5 admitted into evidence)
(Weis' Exhibit-6 admitted into evidence)
(Weis' Exhibit-7 admitted into evidence)
MS. RAPORT: Thank you, Your Honor. Your Honor, may I call my next witness?
THE COURT: You may.
MS. RAPORT: Ms. MacBeth.
THE CLERK: Please remain standing.
TONYA MACBETH, WEIS' WITNESS, SWORN
THE CLERK: Please state your full name for the record and spelling your last name.
THE WITNESS: My full name is Tonya K. MacBeth. My first name is spelled T-O-N-Y-A. My last name is M-A-C-B-E-T-H, usually with no space.

DIRECT EXAMINATION

BY MS. RAPORT:
Q. Good afternoon, Ms. MacBeth. Can you tell me where you're currently employed?
A. I'm employed at Burch and Cracchiolo in Phoenix, Arizona.
Q. Can you briefly describe the nature of your practice?
A. I am -- my practice consists primarily of insurance defense, focusing on construction defect litigation, generally defending general contractors and subcontractors in those actions.
Q. Could you tell me how you and your law firm first became

involved in this case?

A. We were contacted by the insurance company for Weis and they requested that we come in as counsel, taking over for an existing law firm, as the case had developed beyond the initial lien claims, and was moving into construction defect allegations, and we accepted that and became counsel for Weis Builders in that matter.

Q. Could you give me some initial background on the New Mexico state court action?

A. Sure. The New Mexico state court action had -- is captioned Rainbow Vision Santa Fe LLC v Weis Builders and had additional defendants in the caption as well, which were mainly focusing on outstanding lien claims and construction lay claims. As the litigation progressed, it became evident that there were certain conditions at the site that raised issues of sufficiency of the actual construction. But Rainbow Vision and Weis Builders entered into a settlement agreement, and that settlement agreement put Weis in the position that it would need to make certain remediations commonly referred to as repairs to three separate areas, and those remediations were part of that settlement agreement.

Q. How much did the work pursuant to the settlement agreement cost Weis?

A. The remediations up to that point, up to September of 2008 were roughly $700,000 in remediation work. A majority of that expense is related specifically to a reconstruction of the project balconies which involve significant framing issues, as well as other subcontractor's related work.

Q. Can you tell me how the Debtors first became involved in this matter?

A. Well, the Debtors were informed of potential issues at the site by Weis Builders, outside of litigation, in early 2007 by communication between the Weis principals and by letter to the Debtor. Subsequent to that, they were named in the second amended third party complaint, in which Weis Builders alleged specific construction defect actions in its third party complaint against subcontractors. And then they were also named subsequently in the third party complaint.

Q. Can you please turn to the document marked Weis Exhibit 2 in the exhibit binder?

A. Sure. I also want to add that in February of 2008, before being served, there was a tender of defense indemnity made by Weis to BMC so that they could be -- their carrier should be put on notice pursuant to that correspondence.

Q. Do you recognize the document?

A. You said Exhibit 2, right?

Q. Yes.

A. Yes.

Q. Can you tell me what it is?

A. This is the December '08 third amended third party

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

process that claim and identify exactly generally with the notice pleading of the complaint was specifically discussing.

Q. Did you have any further interactions with Ms. Thomas after that initial e-mail?

A. I had conversations with her before and after this e-mail.

Q. And what did the conversations include?

A. Identification as to what the claims were at the project, that the litigation was ongoing, that you know, how we should be contacting the company, who were the responsible parties, whether or not they would attend an upcoming mediation that was being planned pursuant to an existing scheduling order.

Q. Did you communicate with Ms. Thomas over the phone or via e-mail?

A. Both.

Q. Please turn to the document marked Weis Exhibit 4 in the exhibit binder.

A. Sure.

Q. Do you recognize the document?

A. I do. This is a chain of e-mails which predates the prior exhibit, in which we are specifically discussing how they are going to participate in the upcoming mediation and when it's going to occur, it's along those lines.

Q. And was the meeting mentioned in that e-mail ever held?

A. You know, it was not. That meeting was transformed from a mediation to an on site expert identification of the issues.

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

Q. And what is it?
A. This is the certificate of service for -- that a company's discovery request in New Mexico state court. And this is specific to the request for admissions and non-uniform interrogatories to the Debtor.
Q. And when is it dated?
A. It is dated November -- I can't actually see the day of 2008.
Q. Did Mr. Salmon or anyone at his firm have involvement in drafting the discovery?
A. No.
Q. Who drafted the discovery?
A. I did.
Q. I wanted to talk to you a little bit about the division of labor between your firm and Mr. Salmon's firm in the state court action. Can you tell me a little bit about that?
A. Yes. In order to -- at the time that our representation for this case initiated, we did not have any attorneys in the office who were licensed in New Mexico. And in order to take the representation that was requested of us from -- on behalf of Weis Builders, we needed local counsel.

So my senior partner, Mitch Resnick contacted Mr. Salmon and created an arrangement where we would have local counsel who could address us on the subtleties of New Mexico state law, procedural issues, and provide us with the authority to participate in New Mexico.

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

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

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

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

A. Absolutely.

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

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

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

A. Yes. I had multiple in-depth conversations with Marty Diamond, their New Mexico counsel. I also had conversations with their Texas counsel. Marty and I discussed what discovery needed to occur, that discovery was outstanding, and he needed to produce those documents and respond to that prior request.

Q. Did you ever meet Mr. Diamond?

A. I met with Mr. Diamond two or three times, including at on-site at the site inspection, which Mr. Salmon previously referenced in his testimony, in which Marty Diamond and I discussed potential resolution of the claims, how we could take care of the issues without diving into substantial litigation and discovery, as well as specific identification of the issues that were present in the construction itself.

Q. Did you have any discussion with Mr. Diamond concerning the automatic stay?

A. Subsequent to that inspection, there was no automatic stay at that inspection, but I did discuss with Marty Diamond the automatic stay. He and I discussed in great detail my concern regarding the claim that the stay applied to all subcontractors, including those who were not alleged, including those that were not related to the Debtor here in this action, and how this was impacting existing substantive motions which were pending in the state court unrelated aspects of the case. He and I did discuss that the bankruptcy existed.

Q. And what was your response with regards to what Weis was

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

Diamond, their counsel in the state court construction defect action.

Q. Did you have any other interactions with Debtor’s counsel at Gibson Dunn?

A. I did. We played phone tag for a while, and then I had a conversation with, I believe a simultaneous conversation with two attorneys, although my memory regarding that is not too clear.

Q. And did they mention the automatic stay with you?

A. We did discuss the automatic stay specifically. I expressed my concerns regarding their position on it applying to all subcontractors, and my personal feelings regarding the threat of sanctions, so yes, we did discuss it.

Q. And did you tell them what Weis was prepared to do, in regards to the automatic stay in the bankruptcy case?

A. Yes, I did.

Q. And what was that?

A. To file a motion to lift the stay.

Q. Did you make it clear to the attorneys at Gibson Dunn that you were lead counsel to Weis?

A. It was my understanding that they were very clear of that fact, that’s why we were having this conversation.

Q. And did the attorneys at Gibson Dunn ever inform you of the bar date?

A. No.

Q. Did anyone else on behalf of the Debtors ever inform you of the claims bar date?
A. No.
Q. Did you ever receive written notification from Debtor's bankruptcy counsel or anyone else on behalf of the Debtor notifying you of the claims bar date?
A. No.
MS. RAPORT: That's all I have for her, Your Honor.
THE COURT: Cross examination?
MR. GRAVES: Thank you.

CROSS EXAMINATION

BY MR. GRAVES:
Q. You testified that you are counsel of record in the underlying state court action where Weis' claim is pending against the Debtors. That's correct, isn't it?
A. Yes.
Q. And you testified that your firm is listed on the third party -- the admitted third party complaint which is Exhibit 2 --
A. Yes.
Q. -- in the exhibit binder. But that amended third party complaint also lists Rhodes and Salmon as attorneys for Weis, doesn't it?
A. Yes, they were our local counsel.
Q. You also, as is your testimony, engaged in repeated

discussions with the New -- with the Debtor's New Mexico counsel, Marty Diamond, regarding the Debtor's position in the bankruptcy, the Debtor's filing the notice of bankruptcy, and the Debtor's position that the automatic stay applied unless the Debtors were dismissed or severed from the action. That's correct, isn't it?

A. That's a very long list. I did have many conversations with Marty Diamond regarding the substantive issues of the construction defect litigation, as well as separate conversations regarding my impressions of the broad spectrum automatic stay.

Q. Okay. I'll try to make this question a little bit easier for both you and I, it's lengthy as well, but I'm going to quote from your declaration. You testified there that you received letters, direct voice mails, personally left voice mails, and engaged in direct discussions with the Debtor's bankruptcy counsel around the petition date, end quote, regarding the automatic stay in the state court action, that's your testimony, isn't it?

A. Yes.

Q. And on July 13th, 2009 you received a fax from your co-counsel, William Salmon, which contained the July 10, 2009 letter we've been discussing from Gibson Dunn, the Debtor's notice of commencement, and the Debtor's notice of a disclosure statement hearing, didn't you?

A. I believe so.

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

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

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

A. I did become aware of that.

MR. GRAVES: No further questions.

THE COURT: Any redirect?

MS. RAPORT: No, Your Honor.

THE COURT: Thank you. You may step down.

A. I'll leave those there.

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

MS. RAPORT: No, Your Honor.

THE COURT: All right.

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

THE CLERK: Please remain standing.

LENARD C. BAUMANN, DEBTOR'S WITNESS, SWORN

THE CLERK: Please state your full name for the record and spell it.

THE WITNESS: Lenard C. Baumann. Baumann is spelled B-A-U-M-A-N-N.

DIRECT EXAMINATION

BY MR. GRAVES:

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

A. Building Materials Holding Corporation.

Q. And what is your position with BMHC?

A. Director of Risk Management.

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

A. Since September 1st, 2004.

Q. In your capacity as the Director of Risk Management, are you familiar with the company's insurance programs and policies?

A. Yes.

Q. And do you have a basic familiarity with the state court cause of action that has been brought against the company by Weis, in connection with the Rainbow Vision project, which is the basis for Weis' motions in this court?

A. Yes.

Q. Do you believe that the Debtors have an insurance policy that could be called upon to be responsive to claims made by Weis?

A. Yes.

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

A. That would be the Ace policy effective November 11th, 2005 to 2006.

Q. Okay. Would -- if you have a copy of the Debtor's exhibit binder in front of you, would you please turn to Exhibit 11 in there. When you get to Exhibit 11, could you tell me if that is a copy of the Ace policy you've referenced?

A. Yes, it is.

Q. Is it your understanding that this Ace policy Exhibit 11 has a deductible?

A. Yes.

Q. And what is the amount of that deductible?

A. $2 million.

Q. Are the Debtor's obligations to pay that deductible secured by a letter of credit?

A. Yes, they are.

Q. Would you please turn to Exhibit 12 in the Debtor's exhibit binder? Is that a copy of the letter of credit in favor of Ace, which secures the Debtor's obligations to pay the deductible?

A. Yes, it is.

Q. Would you please turn to Exhibit 14 in the Debtor's exhibit binder? Can you tell me what this document is when you get there?

A. This document consists of amendments to the aforesaid letter of credit increasing the total amount of the letter of credit to $56,870,000.

Q. Is it your understanding that this is the current outstanding amount of the letter of credit?

A. Yes, it is.

Q. Because the Debtor's obligations to pay the deductible amounts under the Ace insurance policy are secured by this letter of credit, under the Debtor's plan of reorganization, who has the obligation to pay those amounts, if there's a claim against the Debtor's insurance?

A. BMHC.

Q. So for example, if Weis is successful in obtaining the $700,000 judgment, it asserts that it is entitled to obtain, who would pay that judgment?

A. BMHC.

Q. The entire 700,000?

A. The entire 700,000.

Q. And where would the money come from?

A. From BMHC's current operations.

Q. Would the same be true if Weis were successful in asserting an additional insured claim against the insurance company?

A. Yes.

Q. Switching gears just a little bit. Did you submit a declaration in connection with the Debtor's opposition to Weis' lift stay motion?

A. Yes, I did.

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

credit, in particular, the $56 million letter of credit we discussed earlier?
A. Yes, we are.
Q. And what is that fee?
A. The current cost of the letter of credit fees is five and a quarter percent per annum on the outstanding values of those letters of credit.
Q. So the Debtors have to pay five and a quarter percent per annum on 56 million under this letter of credit?
A. Correct.
Q. Because of this, have the Debtors engaged a -- in an effort to reduce the outstanding amount of the letter of credit?
A. Yes, we have.
Q. And has Ace agreed to reduce the outstanding amount of the letter of credit to an amount that the Debtors believe is reasonable?
A. Not up to this point.
Q. Is one of the reasons cited by Ace to justify a higher letter of credit amount based --

MS. RAPORT: Objection, Your Honor, hearsay.

THE COURT: Any --

MS. RAPORT: Ace isn't here, Your Honor.

THE COURT: Any response?

MR. GRAVES: Your Honor, he is testifying to his personal knowledge of the discussions with Ace.

THE COURT: Sustained.

BY MR. GRAVES:

Q. Do you believe if the Court allows Weis' proof of claim it would hurt the Debtor's ability to reduce the outstanding amount of the LCs with Ace?

A. Yes, I do.

Q. Do you believe that if the Court does not allow Weis' proof of claim, it would help the Debtor's ability to reduce the outstanding amount of the letter of credit?

A. Yes, I do.

MR. GRAVES: Thank you.

THE COURT: Cross examination.

UNIDENTIFIED SPEAKER: Your Honor, if you can just give us two minutes, please.

THE COURT: All right.

(Pause in proceedings)

CROSS EXAMINATION

BY MS. RAPORT:

Q. Good afternoon, Mr. Baumann. The policy that you mentioned in the exhibit binder, that's the general excess policy, not the general liability policy, is that correct?

A. That is the general liability policy.

Q. Are there additional policies?

A. There are umbrella and excess layers above that, yes.

Q. And do you know what the deductibles are available on those

policies?
A. The first umbrella is subject to a $2 million self-insured retention for that policy year.
Q. Do additional policies name Weis as an additional insured?
A. The umbrella policy is a following form umbrella policy.
Q. One last question, if Weis agreed to fund a deductible, would that ameliorate the prejudice to the Debtors should this motion to enlarge be granted?
A. It would seem it would, yes.
MS. RAPORT: No more questions, Your Honor.
THE COURT: Any redirect?
MR. GRAVES: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. GRAVES:
Q. If Weis were to agree to fund the deductible under the insurance policy, is there a chance in your view that there would be an increased demand placed on the insurance provider?
A. Would you restate the question, please?
MS. RAPORT: Objection.
THE COURT: Sustained.
MR. GRAVES: Withdrawn. No questions, Your Honor.
THE COURT: Thank you, sir, you may step down.
MS. RAPORT: Your Honor, I wanted to start with a very brief recitation of the facts. In April 2004, Rainbow and Boyce entered into a contract for construction services for the

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

What does that mean in the context of a claims bar date notice? It means that due process required Debtor's counsel to provide a creditor's attorney notice of the claims bar date that the creditor's counsel had a pre-existing relationship with Debtor's counsel. And it is clear in this case, from the numerous interactions between B and C and Debtor's counsel in both the state court action and the bankruptcy case, that the parties had a pre-existing relationship. As you know, when a creditor received adequate notice of the claims bar date, it depends largely on the facts and circumstances of a given case. That what makes the facts in this case so important.

In this case, Your Honor, it's clear from the testimony you just heard, that B and C handled all substantive matters in the state court action, and that counsel for the Debtors in both the state court action, and the bankruptcy were made very well aware of B and C's representation of Weis. Counsel for the Debtors in the state court action had spoken to B and C regarding this case in the state court action on several occasions, regarding substantive and procedural issues. More importantly, B and C had direct communications with Debtor's bankruptcy counsel. These interactions between B and C and Debtor's counsel in both the state court action and the bankruptcy case included letters, e-mails, voice mails and direct discussions.

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

Just like the Debtor in AFY Holdings, the Debtor in this case were on notice of B and C's intention to prove Weis' claim. That notice should've prompted the Debtors to include B and C on the claims bar date mailing notice list. We contend that because the Debtors did not do this, this Court should hold in a similar fashion, to the Court in AFY Holdings and enlarge the claims bar date with respect to Weis.

Your Honor, that brings me to excusable neglect. Weis contends that it has clearly met its burden to enlarge the claims bar date under the Grand Union standard. However, even if the Court finds for some reason that Weis has not met this burden, Weis also contends that the motion to enlarge should be granted, based on excusable neglect. In order to rebut any argument that the Debtors may make concerning prejudice to the Debtors, should the Court grant Weis relief under the excusable neglect theory, Weis agrees to the following: If pursued, if Weis' claim causes the insurance carrier to have a claim against the Debtors on account of any deductible, and/or self-insured retention under the policies, Weis agrees that it shall not seek any payment under the policies unless it satisfies directly with the insurance carrier, any such deductible and/or self-insured retention.

As I'm sure Your Honor is aware, a bankruptcy court may extend the bar date for cause, to prevent the late filing of a claim if the movant's failure to comply with an earlier deadline was the result of excusable neglect. That standard is clearly met here, Your Honor. The term excusable neglect used in Bankruptcy Rule 9006(b)(1) was clarified by the Supreme Court in Pioneer. In Pioneer, the Court found that by empowering the Court to accept late filings, where the failure to act was the result of excusable neglect, Congress plainly contemplated that the Court would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, carelessness, as well as by intervening circumstances beyond the party's control. The Supreme Court stressed in Pioneer that the determination of whether a party's neglect of a deadline was excusable, was a bottom and equitable one, taking into account all relevant circumstances surrounding the party's admission. The relevant circumstances the Court noted, included analyzing the following factors: The danger of prejudice to the Debtor, the length of delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the Movant, and whether the Movant acted in good faith.

Each of these factors weighs in favor of Weis. The Third Circuit Court of Appeals in O'Brien recognized that the first factor, danger of prejudice, should be a conclusion based on evidence. Under O'Brien the relevant factors for analysis of prejudice include whether the Debtor was surprised or caught unaware of the claim, whether payment of the claim would force the return of amounts already paid out under the confirmed plan, or affect distribution to other creditors, whether payment of the claim would jeopardize the success of the Debtor's reorganization, the size of the claim sought to be considered, as compared to the rest of the estate, whether allowance of the claim would adversely impact the Debtor actually or legally, whether allowance of the claim would open the flood gates to future claims, and finally, whether the plan was filed or confirmed with notice of existence of the claim.

Each of these factors falls in Weis' favor. First, the Debtor cannot claim that they were unaware or surprised by Weis' assertion of its claim. The Debtors had scheduled a contingent on liquidated claim in the bankruptcy case, related to Weis' claim in the state court action. Further, based on the parties interactions, counsel for the Debtor was well aware of the state court litigation and Weis' claim against the Debtors. Accordingly, the Debtors clearly were aware of Weis' claim well in advance of filing and seeking confirmation of their claim. The second and fourth O'Brien factors impact upon reorganization, and whether allowance of the claim would adversely impact the Debtor actually or legally, likewise revealed that no prejudice will result from granting the motion to enlarge. Weis asserts that it has met its burden under

Grand Union, and the Court should grant relief under the due process standard. But as I said, should however, the Court disagree that Grand Union is applicable to this case, and finds in favor of Weis, under the excusable neglect theory, Weis has agreed in an effort to ameliorate any argument about prejudice to the Debtor, that Weis will waive distribution on account of any claim with respect to the Debtors, and seeks to pursue claims solely against available insurance. Weis also agreed that if the insurance carrier seeks to collect on a deductible from the Debtors, Weis will either discontinue its pursuit against developed insurance proceeds, or pay the deductible on behalf of the Debtor. Thus, the impact upon reorganization is non-existent.

The next O'Brien factor, whether payment of the claim would jeopardize the success of the Debtor's reorganization also weighs in favor of Weis. Because the Debtor's plan went effective earlier this month, the Debtor cannot claim that enlarging the bar date for Weis would jeopardize the reorganization.

The final O'Brien factor, where allowed, the claim would open the flood gates to future claims against Weis weighs in favor of Weis. In Inacon (ph), the Delaware District Court disagreed with Judge Walsh regarding whether allowance of a claim would open the flood gates of litigation. In that case, the District Court concluded that the debtors failed to identify any other similarly situated creditor, that it also filed a motion to allow its claim. It's difficult to believe that every single other late filer will claim that its failure to timely file a proof of claim was a result of the following factors: Notice of the claims bar date was sent to local counsel, and not to lead counsel; the notice sent to local counsel incorrectly listed the attorney in his law firm on the proof of claim forms; the creditor's name did not appear anywhere on the proof of claim forms; the underlying state court action was a construction litigation dispute, wherein counsel regularly seek recovery of their fees and expenses, if successful against insurance, unless it was reasonable for local counsel to believe that the proof of claim form related solely to him and his firm; and finally, the creditors lead counsel had a pre-existing involvement, which included numerous exchanges and interactions with Debtor's counsel, in both the bankruptcy case and the state court action. In fact, the Debtors have not identified any similarly situated creditor, who files or plans to file a motion to enlarge the claims bar date. That takes care of the first Pioneer factor. The other ones move a little faster.

That brings me to the second Pioneer factor, length of delay. Approximately seven weeks past from the expiration of the claims bar date in the filing of this motion to enlarge. Courts in this jurisdiction have permitted late filings based upon excusable neglect in cases where the delay at issue was much greater than the delay present here. Weis only became aware of the issue when the Debtor filed their response to the lift stay motion, and promptly filed this motion to enlarge. The third Pioneer factor is the reason for the delay. The reason for the delay in filing the claim clearly falls in favor of Weis. At best, the claims bar date notice was confusing and misleading. The notice that was provided to Mr. Salmon incorrectly listed his name and his law firm as the creditor on the proof of claim form, and Weis' name did not appear anywhere on the documents. Given the tendency of attorneys in construction litigation to regularly seek recovery of their fees and expenses, if successful, it was reasonable for Mr. Salmon to believe that the proof of claim form applied only to him and his firm, and not to Weis.

THE COURT: But it seems to me that receipt of that might have caused a reasonable person, lawyer, to scratch his head and say, you mean if I don't have the claim, I do know somebody who does, because I represent them.

MS. RAPORT: Well, Your Honor, I think that comes down to the fact that Weis was not listed on the form, and also due to the pre-existing involvement of the Debtor's counsel in both the state court action and the bankruptcy case with B and C, and how Mr. Salmon had directed them to --

THE COURT: Well, I heard the explanation.

MS. RAPORT: Moreover, based upon the division of labor between the firms and multiple conversations between B and C and Debtor's counsel, Mr. Salmon reasonably believed anything important would've been sent to B and C particularly because he instructed Debtor's counsel that B and C handled all substantive matters.

The final Pioneer factor is whether Weis acted in good faith. It is clear that Weis did not delay the filing of its claim, as a result of bad faith. Weis has acted in good faith, and has worked expeditiously to file the motion to enlarge as soon as reasonably possible, after learning of the claims bar date.

Your Honor, based on the Pioneer factors, Weis has shown that its failure to file a timely proof of claim is certainly at minimum, a result of excusable neglect, and given the equities in the case, we would ask that the motion to enlarge the claims bar date be granted.

THE COURT: Thank you.

MS. RAPORT: Thank you, Your Honor.

MR. GRAVES: The burden in this case lies with Weis to prove, by competent evidence that its neglect in failing to file a proof of claim was excusable as a matter of law. And under established precedent, including the Third Circuit, Weis has failed to meet this burden, put simply Weis' neglect was inexcusable. The pre-eminent factor courts look to, to determine whether neglect was excusable is the reason for the delay, including whether it was in the reasonable control of the movant. Weis was repeatedly notified of these bankruptcy cases, and received notice of the bar date, well in advance of the bar date, Weis received a notice of the bankruptcy filing that was filed in the state court action, the Debtor's notice of commencement, which apprised Weis of the fact, that a bar date would be set and that quote, creditors whose claims are not scheduled or whose claims are listed as disputed contingent or unliquidated as to amount and who desire to participate in these cases, or share in any distribution must file a proof of claim. The Notice of Commencement further apprised Weis that all documents filed in these cases are available to the public free of charge on the Debtor's restructuring website, www.bmhcrestructing.com, then Weis received the disclosure statement hearing notice, then Weis received the Court approved bar date notice, which approved Weis that each person or entity holding or asserting a claim against one or more of the Debtors that arose prior to the petition date must file a proof of claim, so that it is actually received on or before August 31, 2009 at 5:00 p.m. Then Weis received a letter discussing this bankruptcy at length from the Debtor's counsel. Moreover, the testimony of the witnesses showed that Weis' attorneys received letters and direct voice mails, personally left voice mails, engaged in direct discussions with Debtor's bankruptcy counsel around petition date. Thereafter, they engaged in repeated discussions with Debtor's New Mexico counsel, regarding the Debtor's position in the bankruptcy, the filing of the notice of the bankruptcy, and the Debtor's position that the automatic stay applied to the state court action. In spite of all of this clear and repeated notification of the bankruptcy and notice of the bar date, Weis failed to timely file a proof of claim. And in support of its argument in favor of extending the bar date, Weis relies on two facts, and neither of these facts justify expanding the bar date.

First, Weis makes much of the fact that the preprinted proof of claim form that was included in the packet with the bar date notice listed its attorney in the box where the name of the creditor belongs. According to Weis, this renders the bar date notice itself inaccurate and misleading.

I think of the threshold, this Court should follow the Seventh Circuit, and hold that where a creditor's attorney has actual knowledge of the bar date, in the context of representing other creditors, here, the attorney was concerned that maybe he had a claim against the Debtors. That creditor can't tell in specificity or form of the bar date notice. In K-Mart, the Seventh Circuit assumed arguendo that the creditor received no physical notice of the bar date. Nonetheless, the Court held that because her attorney had obtained actual knowledge of the bar date, in connection with representing other clients, and because this knowledge should be imputed to the creditor there was, quote, no due process concern with respect to the creditor. According to Weis' attorney, he read the bar date notice, but filed it away, after concluding that he had no claim against the Debtors. And it's important to keep in mind the context in which he received the bar date notice. Prior to receiving the Court approved bar date notice, he received notice of these bankruptcy proceedings, notice of a disclosure statement hearing, notice of a fact that a generally applicable bar date would be set, notice of the fact that the Debtors and Weis were engaged in discussions regarding Weis' variability to proceed in the state court action, notice that all creditors seeking to participate in the distribution of the estates must file a proof of claim, and he had actual knowledge that his client was asserting a claim against the Debtors. Then in that context, Weis' counsel received the bar date notice, which had been specifically approved by this Court after notice and a hearing, and significantly, the bar date notice itself does not reference any particular claimants or claims, and there's good reason for that. The bar date notice is intended to be a generic notice to all potential claimants, that they must file a proof of claim in order to protect those interests, whatever their interests may be. But perhaps the most fundamental point here, is that the evidence has shown that when Weis' attorney got a notice relating to these bankruptcy cases, he knew what to do with it. Every other notice that he was sent which referenced the Rainbow Vision action, was promptly forwarded as a quote, bankruptcy court notice, that related to Weis' claim. Then when Weis' attorney got notice of the bar date, he knew or should've known that it related to Weis' claim. Weis' second fact, is that because the Court approved bar date notice was mailed to local counsel, the Rhodes and Salmon firm, and not leads and counsel -- lead counsel, Burch and Cracchiolo, that Weis didn't receive proper notice of the bar date. Listening to Counsel's arguments and reading their papers, one might come away with the impression that Burch and Cracchiolo is the creditor, and that the Debtor's obligation was to provide B and C with notice of the bar date. But B and C is not the creditor, Weis is. And the Debtor's obligation was to provide Weis with notice of the bar date. And under established precedent, the Debtors did so, by mailing notice of a bar date to Weis' lawyer and agent in the underlying action, Rhodes and Salmon. Significantly, Weis does not dispute that its attorney agent, in the state court action, received numerous notices of the bankruptcy, including the notice of the bar date. And the notice of the bar date provided to Weis' attorney agent, was noticed to Weis itself, as a matter of law. But Weis would have this Court ignore Rhodes and Salmon's agency relationship with Weis, and hold that Weis did not receive notice unless every single one of its agents representing it received notice.

This argument has been considered and rejected by every court that's considered it, including the Third Circuit.

In the word of the Third Circuit, regrettably, and it's true, the lack of communication that occurred here is not a unique circumstance. In Alaska Limestone reported at 799 F2d 1412, the Court held that receipt of notice by one of two counsel of record, as here, sufficiently informs the party of the entry of judgment. The argument that relief should be granted, when the parties quote, "principal counsel," did not receive notice was rejected in Gooch (ph). And Weis argues that these cases like this, there are others, are inapposite because they don't arise in the context of a bar date notice. But the precise issue raised in that case, whether quote, receipt of notice by one of two counsel of record sufficiently informs the party, end quote, was raised and decided by the Third Circuit. The Third Circuit based its ruling on the fact that it's the client that is entitled to receive notice and not the lawyer, and that each of the two law firms in that case were entitled to receive notices on behalf of the client. The rationale of those cases applies with equal force here, which is that notice to a party's agent is notice to that party. The law does not speak in terms of best agents or better agents or lead agents, it's only concerned with agency, and Mr. Salmon was Weis' agent, just the same as B and C. But without addressing the fundamental agency issue, Weis pauses its theory as supported by the Grand Union and AFY cases out of this jurisdiction. But just to be clear, Weis is not arguing for a straight-forward application of either Grand Union or AFY. What Weis is arguing for is an extension of those cases, in a way that conflicts with the Third Circuit precedent that I've just quoted. Neither Grand Union nor AFY held or even suggested, as far as I can tell, that in order for a bar date notice to be adequate, the debtors have to send that notice to each and every lawyer representing the potential claimant, or else bear the risk of wrongly guessing which of those attorneys is the quote, lead lawyer.

Instead, Grand Union and AFY stand for an unremarkable proposition, which is that where a creditor is represented by counsel, in connection with a claim against the Debtors, the bar date notice should be mailed directly to the creditor's attorney, instead of being delivered to the creditor, because the lawyer is, in the words of one court, a quote, presumed expert in law, and the creditor is not. As Weis acknowledges, that is precisely what the Debtors have done here. But beyond the fact that the fault lies with Weis for its failure to timely file, if the bar date is expanded in this case where the claimant was provided with notice of the bar date, and was elbow deep in these bankruptcy proceedings, other similarly situated claimants that failed to file a claim may also seek to expand the bar date.

THE COURT: And where in this record does that evidence appear?

MR. GRAVES: In Mr. Baumann's testimony, he testified that there were other -- they had received requests to lift the stay from other claimants who have felt -- they're asking to seek to lift the stay, who had failed to file proofs of claim in the case, and also the -- we referenced earlier in discussion, the Parker Development motion that has been filed, on behalf of a general contractor, it's on the docket. I believe that Your Honor take judicial notice of it, where they are seeking to lift the stay and expand the bar date to file their claim against the Debtors.

And in addition, there may be other claims, Your Honor. We can't prove the negative, because we don't know what's out there. I've got it here in a moment in my outline, but we've got currently outstanding approximately $11 million in late filed claims, that's an updated figure from the evidence that is in the record that I got from Garden City just yesterday. So we've got a substantial number of late filed claims outstanding that have yet to be expunged, and we just simply don't know what kind of position they may take. And many of these claimants like Weis may be class five claimants, and those claims must be satisfied in full directly out of the operating funds of the reorganized debtor's estates. And the Debtor's plan and exit financing that was confirmed, you know, were predicated in part, on the Debtor's ability to discharge claims, for which no proof of claim was filed. And if the Debtors can't -- if the reorganized Debtors cannot rely on the bar date to discharge these claims, there is a danger that it will impair, at least to some extent, the ability -- the Debtor's ability to successfully reorganize.

THE COURT: Well, but the Debtor here knew, at least at the very latest on September 11th when the lift stay motion was filed, that there was a claim to be asserted here. This plan was not confirmed until December. So there was about three months when if the Debtor believed that there was some impact adversely -- adverse impact on the plan to be confirmed, during which time they could've taken steps to address that, but as far as I recall, it did not.

MR. GRAVES: Your Honor, I understand what you're saying, and to be clear, the Debtor's argument is not an unfair surprise argument. We're not saying that necessarily even the Debtors confirmed the plan under the belief that this claim would be discharged, because of the bar date. But to some extent, because I think it's true in any bankruptcy case, the Debtor's plan and exit financing facilities were entered into with the belief that they would be able to discharge late filed claims.

THE COURT: I wonder whether the lender assumed that? But there's no evidence in the record one way or the other.

MR. GRAVES: One harm that there is evidence in the record of, which is substantial, is that the Debtors are seeking to reduce their outstanding letter of credit with Ace.

THE COURT: Well, let's talk about that for a minute, because the movants offered to ameliorate any direct out-of-pocket consequence to the Debtor, with respect to either a deductible or self-insured retention, to the extent that a claim ultimately is liquidated, which would be in excess of that, frankly those are claims which are intended to be covered by the insurance. So it seems to me that that's something that in or out of a bankruptcy would be the same. Tell me why you think I might be wrong about that.

MR. GRAVES: I'm not sure I followed you a hundred percent, but let me do my best to answer your question. Which is that as a result of the bankruptcy, there are -- the Debtors do have an ability to discharge claims that were not filed. And the Debtors are seeking to use what is admittedly a -- it's Debtor-friendly. It's the operation of the Bankruptcy Code, which is the bar date, to expunge late filed claims. And the -- one of the things they're trying to do is to demonstrate to Ace, that these claims that you thought were outstanding, all of these claims that result in your need for a letter of credit, don't exist anymore. They were discharged by virtue of the bankruptcy case. And so you shouldn't require us to keep an enormous letter of credit, because there are no such claims.

And if the Debtors -- if the bar date is expanded for folks that filed late claims, it undermines the Debtor's ability to argue with Ace in this renegotiation, that the amount of the letter of credit should be reduced.

THE COURT: I understand your response.

MR. GRAVES: I think the final point on the prejudice to the Debtors, is I would just ask Your Honor to look carefully at the American Classic Wages' case that was decided by the Third Circuit, and I'll quote it here. It says, applying the first and second Pioneer factors, we conclude that the debtors will be prejudiced by exposure to a late claim, and that the length of the delay would have a substantial impact on the bankruptcy proceedings, have to move for relief from the automatic stay two days after the debtors filed their joint plan of liquidation with the Bankruptcy Court, a policy that would allow proofs of claim at that late date, would've disrupted the debtor's organization. Thousands of individual claims are outstanding against the debtors. The sheer scale presents a formidable problem of management. The strict bar date provided by the Bankruptcy Court was intended, in part, to facilitate the equitable and orderly intake of those claims. The debtors argue with some persuasive effect, that in view of the large number of post-bar date claims filed, allowing appellant to file late, might quote, render the bar date order meaningless. Debtors allege --

THE COURT: Well, let me ask you to pause and tell you --

MR. GRAVES: Sure.

THE COURT: -- I didn't read the case before I took the bench, but I succeeded to the bankruptcy case that's the subject of that opinion, although the Third Circuit's opinion -- the trial court opinion was before my time. But my impression is, and my recollection is, that the claims in that case were largely from customers who placed deposits and were unable or didn't travel to take their reservations, largely as a result of the incidents of 9/11. That's what, at least I found in one reported opinion, that's what basically caused the company's collapse. So if assuming that I'm right about that, I don't see the comparison here to the possible disruption in the administration of the estate.

MR. GRAVES: Well, it -- I guess our position is what I've already articulated. I've given you our position, I think you understand it. It is basically a concern that if the bar date is not enforced, we may see other claims, other efforts. And the efforts themselves, you know, are prejudicial to the Debtors, to the extent that the Debtors have to, or in many cases, may believe they're entitled to defend against those efforts to expand the bar date. And, you know, the -- we've got the evidence in the record regarding the potential prejudice to the Debtor's estates, and I think you understand our argument, so I'll leave it to Your Honor's decision.

THE COURT: All right. You would agree, I'll just ask you one last question, would you not, that no one factor under the Pioneer test is determinative of the outcome, and that a Court can give different weight to different factors, depending upon the circumstances?

MR. GRAVES: I believe that's established law, Your Honor.

THE COURT: Okay. Thank you. Brief rebuttal, very brief.

MS. RAPORT: Sure, Your Honor. Your Honor, I just wanted to say I feel like Debtor's counsel made much of the fact that B and C was on inquiry notice, and I just want to, you know, remind this Court that this is a Grand Union case first and foremost, and that inquiry notice is not enough. You know, you have to send notice of the claims' bar date, not just notice of the bankruptcy. And I'm not asking that, you know, the Debtors are obligated to send notice to each and every attorney, but under Grand Union to send notice to those attorneys that they had a pre-existing relationship with. And I also wanted to say I didn't think that the record in this case supports the fact that there are other similarly situated creditors who are going to file similar motions to Weis.

My final thing was, Debtor's counsel knew they had to give notice, and why didn't they send notice to B and C.

That's all I have, Your Honor.

THE COURT: Thank you. All right. I'm prepared to make my ruling. First, while these situations often present the circumstance under which it could be argued and as it has been here, that different notice or allegedly better notice could be given. The record here overwhelming demonstrates that appropriate notice was given to the claimant in this case. So I then turn to whether under the Pioneer standard, the movant has demonstrated in consideration of the four factors, whether there's excusable neglect, and I conclude that there has been. I will say that -- well, many of the cases, maybe most of the cases in which this issue comes up, there is involved the failure of a lawyer or lawyers to do something that they should have done. And that's the situation here. I recognize that both attorneys who testified here on behalf of the movant, and I will add, testified credibly, are non-bankruptcy practitioners, but as the Debtor here has submitted, certainly at least one of the attorneys was knee deep in the bankruptcy proceeding. And I don't know, and I know some of the cases, and I think mostly older cases, but I confess I didn't do a complete survey of all the excusable neglect cases that are coming out all the time, assume that a non-bankruptcy practitioner should be given a little more leeway in terms of what should be recognized with respect to the bar date. I'm not -- with the Bankruptcy Code having been in effect for so many years, I wonder whether that is a valid proposition anymore. But I will here specifically the evidence here shows that one counsel, who represented this movant was aware that a bar date had been set. So that much is clear. But, you know, not a very long period of time has passed. It's just a matter of a couple of months, and 30 days before the motion was filed after somebody finally woke up and realized there was a bar date that had to be addressed as a result of the Debtor's filing in response to the lift stay motion. But the movant here, in this record, I think demonstrates clearly acted in good faith, has offered, and I would order as a condition of granting this motion, that ameliorate the effect of self-insured retention or deductible along the lines of what the movant's counsel proposed in her closing arguments.

I am often faced, I'll note, with a well, Your Honor, you're opening the flood gates argument, and I'm not saying that it never applies, but I'm not satisfied on this record that this decision will cause flood gates to be opened, but the courts have a way of controlling that if that appears to be developing, and each case is considered specifically on its own merits, and even if there may be arguably other creditors similarly situated, I would bet you that the circumstances will, at least in some material respect, differ.

So for these reasons, I'm going to grant the motion, subject to the condition that I've imposed, as a result of what the movant has offered. And I will tell you had the movant not offered that, I would not have granted this relief.

Are there any questions? I'll ask counsel to confer and submit a form of order, embodying the ruling. All you need to do is refer to the reasons that I've stated on the record. Any questions about what should be in the order?

MR. GRAVES: No, Your Honor, I believe we understand your ruling, and we will work together to submit a consensual form of order which embodies Your Honor's ruling. Unless Weis has anything else, I believe that concludes today's omnibus hearing in the Building Materials Holding Corporation matter.

THE COURT: All right.

MS. RAPORT: Thank you, Your Honor.

THE COURT: All right. Thank you all very much.

MR. GRAVES: Thank you, Your Honor.

THE COURT: That concludes this hearing. Court will stand adjourned.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Lewis Parham 2/3/10

Signature of Transcriber Date

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, *et al.*,[1]	)	Case No. 09-12074 (KJC)
	)	Jointly Administered
Reorganized Debtors.	)	Ref. Docket Nos. 597, 817 and 1591

COMBINED ORDER GRANTING (I) MOTION OF WEIS BUILDERS, INC. FOR ENTRY OF AN ORDER ENLARGING THE CLAIMS BAR DATE AND (II) MODIFYING THE PLAN INJUNCTION

Upon consideration of the (a) *Motion of Weis Builders, Inc. for Entry of an Order Enlarging the Claims Bar Date* [Docket No. 817] (the "***Motion to Enlarge***"),[2] (b) *Debtors' Objection to Weis Builders, Inc.'s Motion for Entry of an Order Enlarging the Claims Bar Date* [Docket No. 917], (c) *Reply to Debtors' Objection to Weis Builders, Inc.'s Motion for Entry of an Order Enlarging the Claims Bar Date* [Docket No. 1352], (d) *Motion of Weis Builders, Inc. for Order Granting Modification of the Automatic Stay* [Docket No. 597] (the "***Lift Say Motion***", and together with the Motion to Enlarge, the "***Motions***"), (e) *Debtors' Objection to Weis Builders, Inc.'s Motion for Order Granting Modification of the Automatic Stay* [Docket No. 664], and (f) *Reply to Debtors' Objection to Weis Builders, Inc.'s Motion for Order Granting Modification of the Automatic Stay* [Docket No. 815]; and based upon the contested hearing held before the Court on January 27, 2010 (the "***Hearing***") and for the reasons stated on the record at

[1] The Reorganized Debtors, along with the last four digits of each Reorganized Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

2 Capitalized terms used but not defined herein shall have the meanings ascribed to those terms in the Motion to Enlarge.

the Hearing; and based upon the agreement of Weis Builders, Inc. ("***Weis***") and the Debtors to the form of this Order; and after due deliberation thereon; and good cause appearing therefore:

IT IS HEREBY FOUND AND DETERMINED THAT:

A. On June 16, 2009 (the "***Petition Date***"), each of the Debtors filed with the Court voluntary petitions for relief under title 11 of the Unites States Code (the "***Bankruptcy Code***"). On December 17, 2009, the Court entered an *Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications)* [Docket No. 1182] (the "***Confirmation Order***") confirming the Debtors' joint plan of reorganization (the "***Plan***"). On January 4, 2010 (the "***Effective Date***"), the Debtors' Plan became effective.

B. From the Petition Date until the Effective Date, the automatic stay imposed by 11 U.S.C. § 362 prevented persons or entities from bringing or continuing any actions against the Debtors on account of prepetition claims, and from and after the Effective Date the injunction imposed by the Plan and Confirmation Order (the "***Plan Injunction***") prevents persons or entities from bringing or continuing any actions against the Debtors on account of prepetition claims.

C. Weis received adequate notice of the Claims Bar Date.

D. At the Hearing, the Court held that Weis' failure to timely file a proof of claim was the result of excusable neglect under Bankruptcy Rule 9006(b)(1).

E. The Debtors were not surprised or caught unaware of Weis' claim.

F. The record does not establish that enlarging the Claims Bar Date for Weis will open the floodgates to future claims.

G. The Plan was confirmed with the Debtors' knowledge of the existence of Weis' claim.

H. Weis' length of delay in filing its claim and its potential impact on judicial proceedings weighs in favor of granting the Motion to Enlarge in light of Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies.

I. Weis acted in good faith.

J. Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies supports, in part, a finding that Weis has demonstrated excusable neglect with respect to its failure to file a timely proof of claim because such an agreement ameliorates, in part, certain prejudice to the Debtors arising from allowance of the late-filed claim.

K. Absent Weis' agreement to directly satisfy any deductible and/or self-insured retention amount that the Debtors might otherwise be obligated to pay on account of any claim asserted by Weis against any of the Debtors' insurance policies, the Court would not have found that Weis has demonstrated excusable neglect.

L. This ruling is limited to the particular facts and circumstances relating to Weis.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Motions are granted as set forth below.
2. The Claims Bar Date with respect to Weis is hereby enlarged and Weis' claim against the Debtors shall be deemed timely filed provided that Weis' claim is filed on or before 14 days after entry of this Order.

3. The automatic stay imposed by section 362 of the Bankruptcy Code and the Plan Injunction (together, the "*Stay*"), as applicable, are modified in order to permit Weis to proceed with liquidating its claims against the Debtors in the State Court Action.

4. Weis may not seek to collect from the Debtors on any judgment rendered against the Debtors in the State Court Action, other than from available insurance.

5. The Stay is not effective against claims by and between Weis and the remaining non-debtor third-party defendants in the State Court Action.

6. The Stay is not effective against claims by Weis related to additional insurance coverage available in the State Court Action.

7. If any action by Weis causes any of the Debtors' insurance carriers to have a claim against the Debtors on account of any deductible and/or self-insured retention under the policies (which may include defense costs under the terms of the policies), Weis is obligated to satisfy, and shall directly satisfy with the insurance carrier, any deductible and/or self-insured retention under the policies (which may include defense costs under the terms of the policies), and, if any action or inaction by Weis causes any of the Debtors' insurance carriers to draw on a letter of credit on account of any deductible and/or self-insured retention under the policies (which may include defense costs under the terms of the policies), then Weis shall be obligated to reimburse the Debtors in the amount drawn on such letter of credit.

8. If any action by Weis causes any of the Debtors' surety holders to have a claim against the Debtors or results in any costs or other prejudice to the Debtors' estates, then Weis shall be obligated to reimburse the Debtors in the same amount sought by the surety holders against the Debtors or incurred by the Debtors as a result of any action or inaction

by Weis. Weis shall be permitted to discontinue its pursuit against said surety holder, but shall remain liable to the Debtors for any claim, cost or other prejudice to the Debtors' estates.

Dated: May 27, 2010
Wilmington, Delaware

Kevin J. Carey
Chief United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BUILDING MATERIALS HOLDING CORPORATION,[1] Reorganized Debtor.	Chapter 11 Case No. 09-12074 (KJC) Jointly Administered

AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS
NEW CASTLE COUNTY)

Casey S. Cathcart, being duly sworn according to law, deposes and says that she is employed by the law firm of Young Conaway Stargatt & Taylor, LLP, co-counsel to the Reorganized Debtor, and that on September 14, 2011, she caused a copy of the **Reorganized Debtors' Objection to (1) Motion of Centex Homes, *et al.* for Entry of Order Enlarging the Claims Bar Date [Docket No. 1933] and (2) Motion of Centex Homes, *et al.* for Relief From the Discharge Injunction [Docket No. 1881]** to be served as indicated upon the parties identified on the attached service list and the following parties:

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Casey S. Cathcart
Casey S. Cathcart

SWORN TO AND SUBSCRIBED before me this 14th day of September, 2011.

Notary Public
My Commission Expires:

KASSANDRA ANN RIDDLE
NOTARY PUBLIC
STATE OF DELAWARE
My commission expires July 10, 2012

[1] The last four digits of the Reorganized Debtor's tax identification number are 4269. The Reorganized Debtor's mailing address is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

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