IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
BUILDING MATERIALS HOLDING CORPORATION, *et al.*,	.	Case No. 09-12074(KJC)
	.	
	.	Oct. 7, 2009 (11:01 a.m.)
Debtors.	.	Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEVIN J. CAREY
UNITED STATES BANKRUPTCY COURT JUDGE

Appearances:

For the Debtors:	Sean M. Beach, Esq. Young, Conaway, Stargatt & Taylor Michael A. Rosenthal, Esq. Mitchell Karlan, Esq. Jeremy Graves, Esq. Gibson, Dunn & Crutcher LLP
For the Committee:	Christopher J. Giaimo, Esq. Arent Fox
For Pedro Alvarado:	Kate Buck, Esq. McCarter & English James R. Hawkins, Esq. James Hawkins APLC
For Wells Fargo:	Tomas Kent, Esq. Paul Hastings

Audio Operator:	Al Lugano
Transcriber:	Elaine M. Ryan (302) 683-0221

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THE CLERK: Please rise.

THE COURT: Good morning, all.

All: Good morning, Your Honor.

MR. BEACH: Good morning, Your Honor. May it please the Court, Sean Beach from Young, Conaway on behalf of the debtors. Your Honor, before we begin, I'd like to make just a few introductions. Thank you for executing the *pro hac vice* motions for Mitch Karlan who's in the courtroom today, as well as Richard Falek. I believe you signed those last night. Also from Gibson, Dunn is Mr. Michael Rosenthal and Jeremy Graves.

THE COURT: Good morning.

ALL: Good morning, Your Honor.

MR. BEACH: Your Honor, we also have Paul Street, he's the general counsel for Building Materials in the courtroom and two representatives from Peter J. Solomon, Mr. Brad Deitz and Paul Croci. Your Honor, there's one housekeeping item that I wanted to take care of before we started today, it's with respect to the removal motion which is item number 5 on the agenda. Your Honor entered that order and on the same day Your Honor entered that order we saw that two letters were docketed. If I may approach, I can give you copies of those letters. They're styled as objections, but they're not truly objections.

THE COURT: Okay. Thank you.

MR. BEACH: Your Honor, I pause here simply to bring this to your attention since they were styled as objections. They were filed, or at least docketed, after the order was approved. As you can see it's with respect to a creditor who I believe thought that this was some kind of a claim objection type of motion when it was a simple extension of the removal deadline.

THE COURT: Okay. It's two pieces of paper, but they're identical as far as I can tell; are they not?

MR. BEACH: Yes, Your Honor, they are identical, they are two separate docket numbers which is why I handed both of them to you.

THE COURT: Alright. Do this please, communicate with claimant letting her know the order's been entered, that you brought to the Court's attention her letters today, but the order's been entered and I'm not inclined to do anything unless asked to do so by the movant. You may tell her that she may consider, if she wishes to press it, filing a motion for reconsideration or other relief.

MR. BEACH: We'll so advise her, Your Honor.

THE COURT: Okay. But I tend to agree with the debtors' characterization that it's not really an objection to the substance of the relief that was requested.

MR. BEACH: I think that's right, Your Honor.

THE COURT: Okay.

MR. BEACH: Thank you, Your Honor, which brings us to the agenda. Your Honor, the first 7 items on the agenda have either been adjourned or Your Honor has entered an order on those. Items 8 and 9 are the disclosure statement and the solicitation procedures motion, and I think before we address those items, Your Honor, we would need to turn to item number 11 on the agenda, which is the expedited motion filed by the Committee requesting a continuance of the disclosure statement hearing, and if it's acceptable to Your Honor, I will cede the podium to the Committee to present that motion.

THE COURT: Alright. I have one question before you do that and that is, from the debtors' standpoint, have all the parts stopped moving?

MR. BEACH: Yes, Your Honor. I can cede the podium to Mr. Rosenthal, but we do have some minor changes, as is very typical, obviously, to the disclosure statement, some late requests that we got but again, only minor changes that we were going to present to Your Honor today.

MR. ROSENTHAL: Yes, that's correct, Your Honor. We filed yesterday at about 2:30 an amended plan and disclosure statement, and then since then we added substantially in a couple of places to conform with requests from the IRS. There was one paragraph in the disclosure statement that needed a clarification and conforming to the amount of the claims for employee-related claims. We changed the number

from 1.1 to 1.3 million for deferred compensation, and then someone asked us to change performance bonds to surety bonds, so there are basically 5 or 6 changes.

THE COURT: Okay, but with that, the debtor has come to rest, so to speak -

MR. ROSENTHAL: Yes, Your Honor.

THE COURT: - with the terms of a proposed plan.

MR. ROSENTHAL: Yes, Your Honor.

THE COURT: Alright, thank you. I'll hear from the Committee.

MR. GIAIMO: Good morning, Your Honor. Chris Giaimo from Arent Fox. With me today is Katie Lane, also from Arent Fox, and co-counsel, Brad Sandler from Benesch Friedlander. We also have Robert Garcia, Chairman of the Committee, joining us today. I'd like to start by thanking the Court for hearing us on an expedited basis. The majority of what I have to say, Your Honor, is kind of set forth in our papers, and we think that the facts are pretty much undisputed. What we have here is four months ago we started off with a prepackaged plan, with the plan and disclosure statement filed on the first day. That plan provided for a present value of 56 percent to unsecured creditors, kind of sold as a hundred percent distribution as of the formation meeting. There's a trust for unsecured creditors, $10 million cash payment percentage of cashflow. The professionals for the

debtor and the lender spent nearly $4 million putting that together prior to the petition date, and when we got into the case, we assumed that that was the plan we were dealing with. So, we worked under that assumption for nearly 4 months, day-in and day-out. There was no requirement in the plan or the disclosure statement for third-party investments or a sale. So, we continued to discuss the disclosure statement and the various plan provisions with the debtor. The debtor did indicate several months ago that they were in discussions with third parties for either exit financing, some sort of equity participation, or something that would better the treatment under the plan. Of course, we're all for that, but we weren't provided any details, and we asked for details and we asked to be included. Counsel said that they were confidential. So, okay, we went along with it from that point on. So, we kept operating under the assumption that it was the original plan and disclosure statement for nearly 4 months. We marked up the disclosure statement. We were negotiating the disclosure statement with debtor's counsel. We understood that the disclosure statement was continued for several reasons, one of which was their continuing participation with third parties but at the same time, the only document that we had was for 56 percent, the trust, the $10 million cashflow. In August we went up to New York to have a discussion with lender's counsel about tweaking the

plan, and the plan wasn't that bad to begin with, but we wanted to see if we could tweak it for the benefit of the unsecured creditors. We had very frank and open in what I thought were very productive discussions with lender's counsel and they said that they understood our position, that we weren't being overly greedy, and that they appreciated that, and we weren't threatening any litigation, that they would go back and speak to their clients and get back to us. So we waited patiently. Beginning of September, we had the disclosure statement hearing deadlines coming up. At that time we spent a significant amount of time going through and marking up what was the original disclosure statement and were discussing that with debtor's counsel. They agreed to a majority of our changes, and we were getting to a point where if they agreed to all of that, while we didn't necessarily agree with certain claim provisions that we were alright with the disclosure statement, and we would have conceivably withdrawn our objection, but we proceeded with the objection because no formal agreement was ever entered into, and then we kind of sat for several weeks in complete radio silence. Come mid-September, right before I was scheduled to go on a trip to Italy, I had a discussion with debtor's counsel. They informed us that they were once again considering the disclosure statement to today. I said, that's fine. We understood you're still discussing with third parties.

Again, we said, the Committee needs to be involved in those discussions. You can't blind side us with some sort of new plan, some sort of sale. We want to know what's going on and quite frankly, we might be helpful in trying to broker a deal on behalf of the entire estate. They said, We agree. We're concerned with confidentiality. They said, this is just September 15th. I said, attorney's eyes only, for professional eyes only, won't even go to the Committee, we'll keep it confidential. Says, that's fine. We'll do that. I said, that's great, because we really need to know what's going on. We've been in the dark for too long. We ended the phone call saying, I'm leaving tomorrow, please don't let anything happen while I'm away, just kind of jokingly. So, I went on vacation, thought, alright, we're still in the realm of the 56 percent plan, the 100 percent distribution, all these great things. I'm literally getting off the plane, I get an email. That plan is scrapped. You're going to get 10 percent, there's no trust, no cashflow, it's a one-time payment, and you're done. You can imagine my reaction. I said, Wait a minute. You just cut our distribution 75 percent and you're expecting me just to say, Okay. I need explanations. This is the exact scenario that I was worried about when I said you need to keep us involved. We just got sandbagged, 75 percent reduction without any notice. I said, well, I need to know what happened. Well, the third-party

investors fell through. Well, the original plan didn't require third-party investors. So, I need something more than that. Well, there is no more than that. There's some lender discord, you know, within the lender group. We understood that from the beginning, from day one, when we had our meeting with the lenders. So now we're faced with what was on Wednesday night, this past Wednesday night, I received emails from the debtor attaching all the revised documents. It was a 9.9 percent distribution. So I took that and began analyzing it as fast as I could. I said, You're not going to go forward with this one on Wednesday; are you? Well, yeah, we are. I said, How can you possibly go forward with this entirely new plan. Well, the facts are still the same, and you know what, the facts are still the same. It's still BMC West and BMC Select and they do provide building materials. Other than that, you know, there's no trust, no 56 percent, no cashflow, nothing. I said, you know, I have to chuckle. It makes me think of the saying, you know, Other than that, Mrs. Lincoln, how did you like the play? I said, this can't go forward. I said, we need time. No. Okay, so I take that 9.9 percent plan, I start to scurry around and try to review it. Well, it turns out on Thursday night, there's another disclosure statement and plan filed. That one was fundamentally different than the one they provided the night before. That's 13.1 and several other provisions have

changed. Unfortunately for me, I only discovered that last night in discussing it with my colleague again. We apparently were reading two different plans. I was never notified that they filed the plan and disclosure statement that was filed. There's no blacklines provided. So, come Thursday, all of a sudden now, everyone wants to negotiate with us. The negotiation was, Here's the deal, take it. The case is administratively insolvent on a liquidated basis. I said, You expect me to go back to my Committee and say we now have 3 business days to cut this entirely new deal to try to get support for the current plan. I said, I'm not doing that. I don't know what transpired. We need more notice, this is an entirely new plan. Having us go forward today violates 3017 and the Local Rule 9006. The plan is not the same. It's entirely different. It's a 75 percent reduction and taking away other provisions that benefitted the unsecured. If the plan is not the same, the disclosure statement can't be the same. Again, I was inundated with, Come on, negotiate, accept the deal. They said, We're available all weekend. Well where was everybody for the first 4 months? What they're trying to do, Your Honor, is put a deadline on us of 3 days so we have nothing to do but accept it. Well, I'm not willing to do that. They said, Well, we're going to liquidate instead. I don't think so. I don't think they're going to throw it away because we're

asking for 30 days. That's all we're asking for. We want 30 days to consider this entirely new plan, have the disclosure statement mid-November with a confirmation in mid-December. I understand that their financing, which we haven't even had the opportunity to analyze, expires December 31st, and I appreciate that deadline, and I don't think that having a confirmation hearing mid-December will jeopardize that. We need time to figure out what the heck just happened and what we can do to either support it or not. We've had 3 business days. It's completely unreasonable. Thank you.

THE COURT: There really are two - at least two dynamics at play here, only one of which may be relevant for purposes of today. Let me start with an issue that I think is clearly relevant today, and that has to do with the debtors' position as it's explained in its objection to the motion to continue that while you complain that the Committee hasn't been properly consulted or has sufficient time to continue to discuss the terms of what might be a consensual plan, it doesn't say the disclosure statement that's been presented for approval today is inaccurate. Do you disagree with that proposition?

MR. GIAIMO: I have no idea whether it's accurate or not, Your Honor. I got one on Wednesday night, one on Thursday, and they filed one last night. I have no idea. I wish I did.

THE COURT: Let's assume, for the moment, that the debtor has the absolute and unfettered right to propose, consistent with confirmation standards, whatever plan it wants to propose, and here, let's assume, it's proposed a plan contrary to all of the Committee's expectations, a distribution far less generous than that which was originally proposed, and let's assume, also, that, you know, it's been changing unilaterally the deal, supposedly. Doesn't it have the right to do that?

MR. GIAIMO: It absolutely does, Your Honor, but we absolutely have the right for proper notice under the rules.

THE COURT: Okay, so let's say, given more time, not for plan negotiations but for vetting the disclosure statement, what would you do?

MR. GIAIMO: I'm not sure I understand Your question.

THE COURT: Well, the relevant exercise for the Court in determining whether a disclosure statement should be approved is not whether the Committee likes the plan, it's whether it contains adequate information.

MR. GIAIMO: Uh-huh.

THE COURT: So, if the Court were to give you more time, what would it do in connection with determining what position it should take on whether the proposed disclosure statement contains adequate information?

MR. GIAIMO: Well, I'm not sure that you can necessarily easily separate those two because having adequate information in a disclosure statement, if we come to a conclusion that it does contain accurate information, then we'll understand the plan better, and that's the purpose of the disclosure statement, but obviously we need time. Things have changed. If this was the first time we were seeing this disclosure statement, it would be whatever it is, and I would completely agree with you, but what we have here is a situation where they presented something for 4 months and then on the eve of this hearing, they're saying everything has now changed. So those are disclosure statement issues. We need to find out what changed, what happened, why is feasibility and the liquidation analysis now fundamentally different. We need to know was accurate then or now or vice versa. These are all issues that we need to figure out before we can say this is their disclosure statement.

THE COURT: I don't disagree with you in principal.

MR. GIAIMO: Uh-huh.

THE COURT: But, for the Court to determine whether you should have more time and if so what amount of time, I need you to tell me what exercise will you be undertaking.

MR. GIAIMO: Well, we need to carefully and methodically review the disclosure statement, the attachments, look behind the documents that were used to

formulate those numbers.

THE COURT: Okay, so that usually means some form of formal or informal discovery.

MR. GIAIMO: Correct, Your Honor.

THE COURT: Okay. And would that involve just document discovery or do you want to depose somebody, and if so, who?

MR. GIAIMO: We've attempted to engage in some informal document discovery, Your Honor. We've had what I would say mild success in that, so, you're right, we would provide for formal discovery and I think depending on the results of the document production, we would have to judge whether we want to exercise engaging oral depositions and discovery. My hope would be that the document production would be sufficient, but I have my doubts on that. So, we would probably be seeking 2004 exams.

THE COURT: Okay. Anything else?

MR. GIAIMO: I think that's it, Your Honor. Again, it depends on the level of cooperation. Obviously, we've heard a lot about these third-party investors. We don't know what was proposed, what was rejected. Again, somewhat out of the blue, we'd like to find out what information we have from those parties as well.

THE COURT: Alright, thank you.

MR. GIAIMO: Thank you.

THE COURT: Let me hear from the debtor.

MR. KARLAN: Good morning, Your Honor. Mitchell Karlan from Gibson, Dunn & Crutcher. Your Honor, the tone of Your Honor's questions suggests to me that you understand that whether you agree with it or not, I don't know, but you seem to understand the argument that the debtors are putting forward, so I'm going to be brief. The chronology that we were given by the Creditors Committee counsel, I would suggest, needs to be supplemented somewhat, and let me just do that quickly. I think it's clear from the Creditor Committee's counsel's presentation that there was a disclosure statement filed on the day the case was filed. There were objections to that disclosure statement, traditional, what I would call normal disclosure statement objections filed by the Committee's counsel and by his silence, I would respectfully suggest, that he has implicitly acknowledged that all of those objections have been addressed in the amended disclosure statement which we would like to have a hearing on today. We've given the Court and all of the parties a blackline version of the disclosure statement which shows the changes that have been made between the initial disclosure statement that was filed on the day the case was filed and the disclosure statement we are proposing the Court approve today. The vast majority of those blacklines have to do with the Committee's original

objections, each of which we have tried out best and I think successfully have dealt with. I do not understand there to be today any, what I would call, traditional, legitimate disclosure statement objections to the disclosure statement from the Committee or from anyone else. The complaint which was delivered with some passion and I think heartfelt passion by counsel is that his constituency is not doing as well as they would like to do under the proposed plan. That's a goal that we share. We wish everybody were getting paid in full, but I have not heard any claim by Committee counsel that there's anything in the disclosure statement that is hard to understand, that inaccurately describes the proposed plan as it is now proposed. Indeed, many of what used to be somewhat complicated - well, somewhat more complicated types of issues that were in the original plan, like for example, there was a liquidating trust and there was going to be a tail of payments that was going to be made, hopefully made to the creditors after confirmation. That's all be eliminated, all that sort of complicated lawyer stuff. It's just a one time cash payment that's going to be made one time. So, we hope that there will be a consensual plan in this case. If it turns out to be a different plan -

THE COURT: Do you think this is the best way to go about that?

MR. KARLAN: I'm sorry, Your Honor.

THE COURT: Do you think this is the best way to go about that?

MR. KARLAN: Here's what we have to do, Judge. We're middle men here to some respect. We wish we had been able to obtain the financing that we hoped to get on the day we filed the plan. As we've described in our objection to today's motion, like many other people in the last year and a half in this country, things haven't turned out as well with our lenders as we had hoped they might.

THE COURT: I hear that a lot.

MR. KARLAN: What we've got is what we've got, and the best we've got is the commitments for which terminate on December 31st. Now, I gather there's been sort of an oral modification to the motion just now. The written motion asks for a much more substantial adjournment of today's hearing than I guess is now being sought. Let me just pause for a moment and say, that, as written in the written motion, I would respectfully suggest that's just a nonstarter because the request in the written motion would require that the Court hold a confirmation hearing after the time when the commitments for our exit financing will have expired. We do have, Your Honor, a date before you of - Oh, I've lost it in my notes here. Where is it? October 22nd. That is the date where we have the application for Your Honor to approve the exit financing commitments. I don't know what Your Honor's

calendar is for the rest of this year, but what we don't want, a) we absolutely -

THE COURT: Full of all kinds of interesting things.

MR. KARLAN: I'm sure. Something told me I was not your only case, and I suspect Your Honor may or may not have some plans for the holidays at the end of the year. So, what we absolutely can't have is a situation where we lose the December 31st date. I suspect even the Committee's counsel would agree with me on that proposition. I don't pretend to know what Your Honor has available in December for confirmation hearings, but I do know that this may be a contested plan. There may need to be a trial. There may need to be live testimony. Your Honor may need to write an opinion. There may need to be a complicated order generated, and I suspect your chambers and staff would like to take some time off at the end of the year, so -

THE COURT: We traditionally give them some time.

MR. KARLAN: I appreciate that. So, of course, we at Gibson, Dunn don't take any time off. So that's not necessary. You need not think of us, but -

THE COURT: Oh, I'm always concerned about the parties' counsel.

MR. KARLAN: Your Honor, I would respectfully suggest that we're hopeful there's going to be a consensual plan. We hope that the exit financing people and the senior

lenders and the unsecured creditors will come to an agreement. We are largely indifferent on that. We just want a plan. If we can get one consensually, that's great, but we can't blow this deadline, and I would respectfully suggest that the reasons for adjourning the disclosure statement hearing that has been proposed and proffered by Committee's counsel today, and I don't mean this to sound provocative, they are not legitimate reasons. I'm not suggesting they're not important to him and his constituency, but they are not reasons that fall under the rubric of what a disclosure statement hearing is supposed to be about.

THE COURT: You know, you're right, you're right, but the problem is, and I know that you recognize it, is the Committee, I think, for some very good reasons feels as if it was sandbagged, in counsel's words, and basically being railroaded, my words. And it's not that a debtor doesn't have the weapons with which perhaps to railroad some class or classes of creditors in connection with a Chapter 11 plan, but it seems to me not an unfair request as a matter of process to give the Committee some brief period of time to collect itself and to address specifically the disclosure statement, and if other issues get addressed in the interim, sobeit, and I'm not suggesting anybody has to do anything. So, actually, I'm looking at my calendar, and I see that the 22nd hearing already shows disclosure statement. I don't know

how that happened, our error, I guess. Maybe it was just one of the possible dates mentioned and we just calendared them all. I don't know what else is scheduled for the 22nd other than the motion to approve payment of a Committee fee? That shows up -

MR. KARLAN: No, I understand - Go ahead, Mike.

MR. ROSENTHAL: That's right, Your Honor. It's the motion to approve payment of the commitment fee -

THE COURT: Commitment fee, okay, because it says - Oh, it does say commitment fee, I misread it. My fault. And I set that specially -

MR. ROSENTHAL: Yes, we did, Your Honor.

THE COURT: - on the day after I get back from NCBJ, but I promise to be alert and ready to go.

MR. ROSENTHAL: I think a number of us are going. Mr. Giaimo mentioned that to me as well.

THE COURT: Alright. Well, I'm inclined, just as a matter of process, to push this hearing over to that date.

MR. KARLAN: October 22nd, Your Honor?

THE COURT: Yeah, and it seems to me that assuming the Court would approve the disclosure statement on that date, and I'll say what I say to parties who object to disclosure statements, there's going to be one that's approved. I mean, except in the extraordinary circumstance, and I think in the almost 9 years on the bench, I've only

done it once, found that a plan was patently un-confirmable, a disclosure statement will be approved. So to the extent the Committee disagrees with the debtors' view that it's satisfied all the previously filed objections, try to work out some language if that's appropriate. If not, I'll make whatever resolution of any remaining dispute there is on that date, but it seems to me that's a date that still would work within the debtors' time frame in connection with its exit financing. Now, I'll say just one other thing, this is not the first case I've had in which the debtor has been pressed to conclude a confirmation and get a decision from a court on a contested confirmation prior to the expiration of a financing deadline. If that scenario should develop, I will give you what I think my resources will allow or not, and the parties will just have to find a way, as they usually do, to do a workaround, but we're not there yet, and I'm hopeful we won't get there yet.

MR. KARLAN: Your Honor, may we know what you have in mind for a confirmation hearing?

THE COURT: Well, let's take a look.

MR. KARLAN: I know I don't get to necessarily vote on this, Judge, but it's been whispered in my ear that the 3rd, 4th, 7th, or 8th would be good for us.

THE COURT: Of December.

MR. KARLAN: Of December, yes, Judge.

THE COURT: Okay, let's take a look.

MR. GIAIMO: Your Honor, the Committee would like a little bit more time than that, preferably the week of the 14th or the 18th. That gives 2 weeks before the financing expires.

THE COURT: Well, I'm not inclined to make that decision at this point. I tentatively -

MR. GIAIMO: I do note that there's a hearing on the 15th already scheduled at 1 o'clock.

THE COURT: I know that. I tentatively have a 3-day trial set for the 2nd, 3rd, and 4th of December. I think, however, that may come off, but I'm not yet in a position to tell you that it will for sure. For reasons which I don't understand, Wednesday, December 9th is completely open, but I'm thinking what I'd like to do is just between now and the 22nd see how things develop and maybe I can be a little more flexible with my timing.

MR. KAPLAN: Very good, Your Honor.

THE COURT: And maybe the parties could come to some agreement on when it should be. That's always a possibility. Alright, anything further on the disclosure statement.

MR. KARLAN: Not on the motion to adjourn the hearing, Your Honor.

MR. GIAIMO: Actually, Your Honor, since we have the October 22nd date and as you discussed, discovery will be

necessary, I think it might be appropriate to enter a discovery schedule so we don't have to worry about bumping up against that date and not having the opportunity to get responses.

THE COURT: I don't disagree with that, and what I will do is before you leave here today, give counsel the opportunity to confer and see if they can make an agreement about that and I'll see that that's done before you go and before I go, I'll be here all day, and to the extent the parties can't agree, I'll resolve any issues you have.

MR. GIAIMO: Thank you, Your Honor.

MR. ROSENTHAL: Yes, Your Honor, I'm sure we'll be able to agree, and we had intended to raise a related point as well about providing the information on the third-party bidders but in a way that - because there's some confidentiality agreements and business-related reasons why the names of those bidders need to be protected, so -

THE COURT: Understood.

MR. ROSENTHAL: I'm hopeful we can work out an agreement.

THE COURT: Okay, thank you. Okay, so, I guess - Was a form of order submitted with the Committee's motion?

MR. GIAIMO: It should have been, Your Honor.

THE COURT: Do you have an extra copy for me?

MR. GIAIMO: One moment, Your Honor. I have one,

it's . . . (microphone not recording).

THE COURT: That's alright. Thank you.

MR. ROSENTHAL: Your Honor, we think the hearing on the 22nd is at 2, I believe.

THE COURT: Two o'clock.

MR. ROSENTHAL: Yes.

THE COURT: That's correct. Alright, that order has been signed.

MR. ROSENTHAL: Your Honor, based on that, I would propose to adjourn the next matter as well, which is the solicitation procedures motion, matter number 9 on the agenda to the same date.

THE COURT: I think that would be appropriate.

MR. ROSENTHAL: And that leaves, Your Honor, I think the only unresolved matter is matter number 10 on the agenda, the motion of Pedro Alvarado. Mr. Graves is going to handle that for the debtors.

THE COURT: Alright.

MR. ROSENTHAL: Actually, Your Honor, this is not our motion. So, I think counsel is on the phone.

MS. BUCK: Your Honor, I apologize for the delay getting to the podium. Your Honor, Kate Buck here from McCarter & English representing Pedro Alvarado. Debtors are in fact right, that my co-counsel, James Hawkins and Ed Hays are appearing via telephone, however, I will be presenting

the motion to the Court today regarding authorization of the provisional class claim or in the alternative to extend the bar date. We are not currently at this time requesting class certification, that's not pending before the Court today so I'll contain my remarks only to the issue before the Court, however, if Your Honor wishes to delve a little deeper into the specific issues related to that class action, I ask that my co-counsel, Mr. Hawkins be permitted to address the Court.

THE COURT: Well, let's talk about the method of proceeding. I have reviewed a number of the cases that the parties have cited and it seems to me that under the Bankruptcy Rules in order for me to permit what would in effect be a class filing, I have to determine that the person making the filing is authorized to do so, and it seems to me no present authorization exists, which then leads to the question of do I not have to make, and I don't believe one actually has been requested in the papers, you know, a Rule 23 decision. First, I have to decide that it's applicable to this contested matter and then don't I have to consider whether the Rule 23 standards have been met in order to permit a class filing.

MS. BUCK: I certainly understand your concerns, Your Honor. We would contend that the movant is a putative agent for the purposes of keeping this claim alive as Judge Walrath noted in her Kaiser decision in 2002. It was noted

that if there's no apparent reason up front to prohibit him from acting in that capacity, a provisional class claim may be filed on behalf of other similar situated pending a class certification.

THE COURT: Of course in Kaiser a class had actually been certified as to parties other than the debtor because the automatic stay had precluded such a determination in the state court as to the debtor. So, there the Judge had a certification of sort already in front of her with a Court of competent jurisdiction having decided that a class should be certified. I think that makes it a little different from the circumstances that we have here.

MS. BUCK: That is correct, Your Honor. I understand that that is a difference, but nonetheless, one of the points made and in the Judge's opinion, recognizing that she agreed with certain 7th Circuit and 11th Circuit reasoning, it was noted that the time of the bankruptcy should not serve to disallow a class claim. So while we had an underlying or related class action pending since May of 2008, unfortunately, in that case - it's turned out to be unfortunate, we actually agreed to stay formal discovery while we attempted mediation in that matter, and in fact, a mediation session did take place and others were being scheduled at the time that this bankruptcy was then filed. So, unfortunately, Mr. Alvarado had not had a chance to

either discover the necessary information nor in fact effectuate service to the proposed class members or potential class members that might have rightful claims in this matter. So while the situation was different in Kaiser we would contend that as an equitable court, the reasoning is relevant here to note that the timing should not be the factor to essentially extinguish the claims of potentially rightful claimants. Additionally, five other Circuit Courts have recognized the allowance of class claims certainly in the bankruptcy proceedings and there's nothing to suggest there that a provisional claim could not be accepted to the extent that then class would also need to be certified. We do understand, Your Honor, your point that we did not seek in our original motion to actually have this Court determine the certification, nonetheless, certainly we would not disagree that this Court would be an appropriate venue for that determination or as well that the state court in California could make that determination. If Your Honor does have specific questions, as I mentioned, Mr. Hawkins would be happy to address the class certification requirement. Nonetheless, our motion here before the Court today contended to make just a *prima facie* showing by addressing the Rule 23 certification saying that this would be a certifiable claim. We did not attempt, Your Honor, to fully discuss the merits of such certification, but certainly just laid out the

process recognizing that factors can at least on the surface appear to be met for that. The movant here did timely file on behalf of the proposed class, and again, as I noticed reasoning that Judge Walrath recognized in the Kaiser case recognized the Charter case in the 11th Circuit which noted that the claim was *prima facie* valid until it was later proved otherwise. Here, a contrary finding would be against bankruptcy equitable principles and in effect would improperly limit class actions in bankruptcy proceedings based solely on the timing of the events that occurred below. I hesitate to believe, Your Honor, that the Code was enacted with that intent in mind. I believe that it is more for the equitable distribution to all rightful creditors.

THE COURT: Well, let's talk about the bankruptcy considerations, and I'm referring, at least in this instance, to the decision by the Bankruptcy Court recently in the Bally case, Judge Lifland, and while the standard that he articulates differs from, at least in part, from the approach taken by Judge Walrath, and I'll mention something I've said many times before, Judge Walrath finished higher than me in our law school class, so I like to defer to her whenever possible, but in Bally Judge Lifland said, The filing of a class proof of claim is consistent with the Bankruptcy Code generally in two principal situations. One, where a class has been certified pre-petition by a non-bankruptcy court.

You've explained why that hasn't happened here, well, at least in terms of process, and I understand that Judge Walrath didn't rely on that as a standard, and two, where there has been no actual or constructive notice to the class members of the bankruptcy case and the bar date. Here the debtor in its pleadings and through affidavits, indicates that notices were sent of the commencement of the case, of the bar date, and of this disclosure hearing, and specifically, with respect to the bar date instructions in how to get to a Spanish version of what needed to be done, and that these notices went to - I don't know the number offhand, it's about 65,000 former employees. Now, your class, purported class is around 5,000, you say, of former employees, but I don't - on, again, the second prong of what Judge Lifland described, it seems to me that the debtor couldn't really have done anything more than that which it already has to advise perspective claimants of what it they should do in a language in which they would understand it. Tell me why that's not sufficient.

MS. BUCK: Well, Your Honor, first of all, as Your Honor expressed, this is a slightly different standard from another jurisdiction, but nonetheless, even following that standard, we can look also to another case in the Southern District of New York, which the debtors in fact cited, Afedra case which noted that even if such notice was provided, the

typical bankruptcy notice, that perhaps in a situation where class notice, specifically to the effect that would be issued in a class action and would provide a little bit more information about the exact claims, could be provided on a supplemental basis. The Afedra Court noted that would be a very simple solution to provide a limited extension of time to the particular proposed claimants by providing a supplemental notice. This is something that the counsel for Alvarado would be willing to undertake if perhaps we were given enough information so that we could identify the proposed class members. While the debtors did purport to serve approximately 65,000 current and former employees, the information we've been privy to doesn't indicate in any way which of these individuals might be the proposed class members, doesn't indicate which entities they worked for, the periods of employment, and various things like that, information that would be necessary in order to provide the proper notice. We would contend that I understand Your Honor's concern about if they did receive actual notice, which again, movant has not been able to officially confirm, but nonetheless, if the debtors purport to have done that, we will take that at their word. We have not been able to officially confirm, but nonetheless, think that equity principles would lend to at least a small extension to provide the proper notice. If Your Honor's concerned about

that extension of time, provisional certification of the class could take place and then as proceedings are moving forward in the rest of the case, steps could be undertaken again with appropriate discovery to notify the appropriate claimants and estimate and liquidate the claims.

THE COURT: Yeah, and looking to Afedra, the Afedra decision, the Court also said, Since class litigation is inherently more time-consuming than the expedited bankruptcy proceeding for resolving contested matters, class litigation would have to be commenced at the earliest possible time to have a chance of being completed in the same time frame as the other matters that must be resolved. Before distributing the estate here, as you've heard, we're on the verge of approval of a disclosure statement, solicitation of a plan, and confirmation - hoped for confirmation sometime early in December. While I understand that the case was, at least initially, filed as a pre-negotiated arrangement or prepackaged bankruptcy, and it hasn't quite gone exactly that way, it's still moving on a relatively quick track here, and it seems to me that as the debtor has made in citing the gum-up-the-works language that a couple of cases now talked about -

MS. BUCK: Right.

THE COURT: - made the point that all this is going to do is slow us down for the benefit of possible claimants

who've already received actual notice. In addition to the sending of the notices, there's also been, according again to the debtors' submissions, publication notices given both in English newspapers geographically around the country, and I think in at least one Spanish-speaking newspaper. So, how do you respond to that?

MS. BUCK: I understand that point, Your Honor, very clearly, however, I think that in a situation like this, and I understand that certainly there are class actions involving wages and very similar factual situations, but nonetheless, it is not the typical situation that you have in most bankruptcy matters where creditors for the majority at least in my experience, however limited it may be, are generally - the HIPPA creditors that are aware right off the bat that they have accounts receivable or ongoing contracts, leases, rental agreements, things like that, and it's pretty obvious to the extent that they have claims here they actually have very serious allegations even including potential fraudulent allegations in the underlying class action having to do with altered documentation as such the potential claimants in that case really in some cases would have no possible way of having known they would have a potential claim. So, the receipt of a bankruptcy notice, whether the actual receipt or publication or in any other form, would not have indicated to them that there was any significance of the bankruptcy

proceeding to them.

THE COURT: Well, what specifically are the claims?

MS. BUCK: The claims in the underlying action have to do with unpaid wages and other compensation having to do with break times that weren't offered at the appropriate times, employees were required to work through breaks; in terms of not being provided the appropriate compensation for overtime hours; failure to provide required payment upon an employee's departure from the company; in terms of failure to indemnify necessary employee expenditures, things to that effect. However, the overriding claims of fraudulent alteration of documents, documents in terms of tracking things like employee hours, like their required breaks, things like that that would have if the employees were aware of the right documents, the correct version of the documents, would have potentially indicated to them that they were being wronged in some way. These were just some employees that aren't sophisticated businessmen in the sense of being part of bankruptcy proceedings, court proceedings often, being part of knowing the inner-workings of a company which as a conglomerate with the collective debtors is one of the largest residential construction companies in the United States.

THE COURT: Well, we do have experience with that type of potential claimant not just - I have it, not just in

this Court but in the one in which I sat before I came here, where 99 percent of my docket was consumer cases. So I've a pretty good feel, I think, for - well, it's called the working person.

MS. BUCK: Right.

THE COURT: One thing that strikes me is that despite the fact that these former employees might not be terribly sophisticated and might not know of some of the claims that they might potentially have, it also strikes me that in any workplace in which people feel they are being unfairly treated, I mean, break-time, for example, that's something they talk about, and it's pretty widely discussed. I mean, those types of things tend not to be secrets. So, I would need to be convinced that these are the types of things about which nobody would have any idea even an unsophisticated person and that when they got a notice that said they had a right to file a claim that they would have thrown it away thinking, Ah, there's really nothing I have to claim against the company.

MS. BUCK: Your Honor, I understand that, you know, that's potentially a consideration, and I understand that line of thinking, and perhaps even agree to some extent that you would think workers talk in a workplace and may be aware of such claims, however, at this point we're not aware and we're not certain, again, we haven't been able to have all of

the identifying information, but we're not aware that in fact any employee has filed this type of claim against the estate, and presumably, if these actions were taking place, these wrongful actions, and at this point, you know, assuming they did place, presumably, at least one or more and presumably a handful of the potentially 5,000 or more individuals who were wronged would have filed a claim to that extent, and I understand Your Honor's concern with, again, gumming up the works and debtors' concern as well, and I know that that's an overriding concern in bankruptcy matters in general and especially one that seems to be moving on an incredibly fast pace. Nonetheless, I would say that just because of those concerns, this case should not be able to move at such a fast pace that it steam rolls over the rights of creditors who are just as equally entitled to their appropriate distribution as any other creditors. I think that there could be a solution here, in fact, if Your Honor noticed, there was not in fact a proposed order submitted with our motion because there are so many possible permutations, I believe, of what the solution could be here, but there are, in fact, several solutions which could allow this proceeding to still take place within reasonable time constraints or if necessary if it had to be December 31st, but nonetheless, I think that we believe there are solutions that would allow both the rights of our creditors and the potential class members to be recognized as

well as this case to continue proceeding as rapidly as possible.

THE COURT: So, let me ask you this, Why didn't you weigh in at the time the debtor moved for the fixing of a bar date?

MS. BUCK: Your Honor, when the bar date notice was served on July 23rd, it was actually only given 5 weeks at that point. There was only 5 weeks until the bar date - the deadline for barring claims, and I personally was not involved in this case at the time, but what I believe was the case was the counsel for Alvarado was still attempting to try to figure out what the potential claims were, who the potential claimants were. They were still making attempts to figure out how to address these issues. I know that 5 weeks may seem like a long time, but when it's somewhat complicated -

THE COURT: Oh, in this business it's a lifetime.

MS. BUCK: I understand that, Your Honor. Nonetheless, the bottom line is that by the claims bar date counsel for Alvarado did in fact file a motion to preserve the right and did in fact file 5 proof of claims for Alvarado individually and on behalf of the proposed class. So, before the expiration of the bar date, notice was given to the debtors. Furthermore, the debtors were in fact aware of the class claim having scheduled it on their schedules or amended

schedules, financial statements, and other documentation. So, although we did not object at the time, it's not as though the debtors weren't aware of this claim as a class claim being a matter in this case.

THE COURT: Well, but when the debtor moves the Court to fix a bar date, normally what happens is, if there are comments from others, they give those comments and they're incorporated or not, depending on what the Court's ruling might be, into a bar date notice. But that didn't happen here. So the filing of a motion like this one on the bar date literally isn't the most efficient way to handle it. The way to handle it is before a bar date is set and a form of notice is approved, for someone who wants to say something else to come forward, you know, especially before 65,000 notices go out.

MS. BUCK: I understand, Your Honor, and I actually believe that in addition to whatever other considerations may have been going on during that 5 weeks, I do recall that counsel in the state action, Mr. Hawkins, who is on the phone and he could confirm this if Your Honor feels necessary, but I believe his notice, he was listed as the address for notice for those class claims. His notice was sent to a previous address which was contained on the complaint in California action. However, he had since moved to a new address and notice was delayed to him. So, there were a couple of

different issues going on there, but, you know, as it might not be ideal, I understand that, but nonetheless, steps were taken prior to the expiration of the bar date to address this matter.

THE COURT: Alright, thank you. Anything further in support of the motion?

MR. HAWKINS (TELEPHONIC): Your Honor, this is James Hawkins and I represent the class. Just, if the Court feels necessary, I could give more reasonings why the motion was actually filed on the bar date and not prior.

THE COURT: Go ahead.

MR. HAWKINS (TELEPHONIC): Once I received notice, I tried to hire bankruptcy counsel. I am by no means a bankruptcy attorney. Once I did find a bankruptcy attorney here in California willing to represent me, we made plans on what we were going to proceed with. He then became medically ill. At that point he advised me that he could not longer represent my class in this action, and he referred me to another attorney here in California, who’s now on the phone. In the meantime, I was calling Delaware counsel, and I guess Delaware, at this time, is swamped and because of this issue being complex no one wanted to touch it. So once we found McCarter & English who would take on such an action and the complex matter, we filed immediately.

THE COURT: Alright, thank you.

MS. BUCK: Okay, thank you, Your Honor, that's all.

MR. GRAVES: For the record, this is Jeremy Graves on behalf of the debtors. Your Honor, I'm going to try to keep my presentation brief, and focus initially on the threshold question, which Your Honor has hit on and is an important consideration, which is whether the Court should exercise its discretion to extend the application of Rule 23 to Mr. Alvarado's class proof of claim, and as you've recognized, Courts have developed sort of three factors to consider in determining whether or not discretion should be exercised, and obviously, the first one of these, whether the class was certified prior to the petition date, the debtors meet because the class in fact was not certified prior to the petition date. The second factor, whether the class members received notice of the bankruptcy proceedings is more than satisfied. The debtors, as you've noted, gave all possible notice that could be given under the circumstances. They provided the mailed notice to everyone they could possibly identify and as well as the publication notice in all the newspapers you've identified and in the Spanish newspapers not only in California but also in Arizona and Nevada. And as to the question of, Did this notice land on the putative class? The answer is, Absolutely, yes. Of the 63,000 plus former non-supervisory construction employees that were notified, almost 10,000 of them were employed by some of the

entities which were alleged to hold claims. We don't concede that they're all members of the putative class, but we gave more broad notice than we really thought was necessary, and this notice was legally sufficient as we've noted from our quotes from the Third Circuit in the Penn Central case, and as you've observed, it was a notice that was approved by Your Honor after notice and a hearing, and I don't know that I heard an explanation for why the notice wasn't challenged at the time the bar date motion was before Your Honor. One final point on the notice issue, counsel cites a kind of a throw-away quote from the Afedra case. To the extent that the Court should provide some sort of special notice because this is a class action, but really that quote in the Afedra case, if you read it carefully, the Judge is addressing a situation where in the normal context of bankruptcy, the class of claimants may not have received notice of the bar date or the bankruptcy proceedings because the debtors may not have scheduled them, and so the Court observed that it may be appropriate in that circumstance to give actual notice to the putative class members. The Court did not say that they should send a special notice which identifies specifically, You may have a claim for failure to reimburse payment of a rent, you may have a claim for failure to pay wages. What the Court said is, Maybe you should send a notice with the bar date to these individuals as well. The

debtors have done that. But finally, in addition to the points we discussed earlier, courts such as Musicland have considered a third factor in determining whether the Court should at the threshold exercise its discretion to extend the application of Rule 23, which is whether allowing the class proof of claim would have an adverse impact on the administration of the debtors' cases, and here, for the reasons we've been discussing in the context of the disclosure statement hearing, obviously there would be an impact by having a long drawn-out class certification hearing. One of the points that we would like to make in connection with that is the fact that an unknown portion of the alleged claims against the debtors is assertedly a valid due priority pursuant to § 507(a)(4) of the Bankruptcy Code. And, as Your Honor is aware, the debtors' plan, as it must, provides that these priority claims will be satisfied in full either on the effective date of the plan or within 30 days after any objections to those claims are resolved. If the amount of these claims is not known as of the confirmation hearing, in order to demonstrate feasibility under 1129(a)(11), the debtors might have to either delay the confirmation hearing, which as you're well aware is not a good idea here, or engage in an expensive and time-consuming estimation hearing to estimate which portion of these alleged claims are entitled to priority. There's a host of other

reasons that the allowance of the class proof of claim would result in an undue burden on these administrations of these cases from distracting the debtors' management at this critical juncture away to class certification motions and discovery, the expense to the estate of hiring counsel to defend these actions, and also the expense, if the class is certified, of re-noticing the class members and the expenses of a long trial, and finally, because there may be protracted litigations for years to come, the class action proceeding would threaten to delay the distribution to all of the debtors' other unsecured creditors to their detriment. We haven't discussed at length this morning the Rule 23 requirements because after you get to the threshold question of whether or not to extend Rule 23 to the class proof of claim, the next question is whether the class proof of claim could actually meet Rule 23's requirements, and I'm just going to highlight briefly, this is more fully set out in our briefs, but whether we hear it today or at some later date, there's no way Alvarado can satisfy the requirements of Rule 23, specifically Rule 23's predominance requirement and Rule 23's superiority requirement. Alvarado's allegations raise inherently individualized questions of both fact and law which predominate over any class issues that may exist. For example, one of his allegations is that the debtors failed to properly reimburse employees for the purchase of a wrench.

Well, that's going to require an individual inquiry into whether the individual actually purchased any equipment, that the equipment was purchased or work and not because of personal preference, that the purchase was required by a supervisor pursuant to company policy, and that reimbursement was sought but denied. It's a mini-trial on individualized issues within that particular consideration. Similarly, the allegations that the debtors failed to compensate people for off the clock work, it's a question of whether Tom worked off the clock, whether Harry worked off the clock, and the same kind of allegations run through each of the debtors' claims. They're simply individualized questions for which class treatment is not appropriate and when Judge Lifland in the Bally case considered these practically indistinguishable California state law which in our claims, the Court concluded on the issue of predominance the Court would have to engage in a series of highly disputed mini-trials for each class member to resolve the issues, making class treatment untenable and impossible. The same is true here. And similarly, the class action proceeding is not superior to these bankruptcy proceedings for adjudicating the claims of the class members. The class action would require a substantial cost to the debtors' estates, extensive discovery and briefing on the class certification issue. If a class is certified, protracted merits discovery. Duplicative notice

would have to be mailed to the class members if the class is certified and a lengthy trial. By contrast, these bankruptcy proceeding allow each of the putative class members to participate in the distribution of the debtors' estates for the price of a stamp. If you read -

THE COURT: How many of those claims by employees or former employees have been filed?

MR. GRAVES: Of this particular class, Your Honor?

THE COURT: Well, let's say of any kind.

MR. GRAVES: Of any kind, we've received - of the 63,000 employees that were noticed, approximately 180 claims have been filed. In the interest of full disclosure, about 97 of those were involved in the other class action, the Asovito action, which Your Honor has entered a 9019 motion on. So, many of these individuals who thought they had claims have filed those claims. Interestingly, we have not received any claims filed on behalf of the putative class. I think the conclusion you can draw from that, Your Honor, is they don't have claims, and indeed, that was the circumstance in the Bally case where only the three main plaintiffs filed claims on behalf of the class. The final issue, which I don't know if Your Honor's inclined to hear, is the request for an extension of the bar date. I still haven't heard an explanation for how Alvarado and his counsel have standing to seek this extension of the bar date on behalf of thousands of

individuals who they don't represent, and as Your Honor has acutely recognized, there are agency problems, both in the Rule 23 analysis but particularly here because the courts that have allowed putative class representatives to file a class proof of claim on behalf of an uncertified class, have engaged in the legal fiction that once the class is certified, the class representative obtains agency status retroactive back to the date the class proof of claim was filed. Not all courts have accepted that, but the majority admittedly have, but in the circumstance of the bar date extension, he would never obtain agency status because no class would ever be certified, but aside from the standing issue, Alvarado fails to demonstrate excusable neglect on behalf of these thousands of individuals. This is the same argument that the bar date notice was defective because the debtors failed to identify specifically what kinds of claims these individuals may have against the debtors. But as we've noted, this argument has been raised in other courts and has been rejected including the Third Circuit which said, "The purpose of the notice requirement is to advise individuals who will be affected by the outcome of any proceeding of the impending hearing so that they can take steps to safeguard their interests. The notice requirement is not necessarily intended to advise them of the nature of those interests." So, the Court concluded, "The notice that a creditor is

required to receive is of the Court's hearings and other actions in the reorganization proceedings." Similarly, here, Your Honor, the debtors provided constitutionally adequate notice to these individuals and there has been no demonstration that they have excusable neglect.

THE COURT: Alright, thank you. Do either the Committee or Wells Fargo care to be heard? Both of whom joined in the debtors' objection.

MR. GIAIMO: The Committee's comments have been addressed by the debtor, Your Honor.

THE COURT: Alright.

MR. KENT: Good morning, Your Honor. Tom Kent on behalf of the Wells Fargo bank agent. I think the points we would have made today, I think have been made by the debtor especially how we would point out the notice, the number of notices that have been sent out and the cost to the estate of doing so. I think the debtors, from our perspective, have attempted to, in fact, give actual notice, so we just point that out, Your Honor.

THE COURT: Thank you. Alright, I'll give the movant the last word.

MS. BUCK: Thank you, Your Honor. Just a couple of quick points. A lot has been made of the fact that notice was provided to these 63,000 or 65,000 or so individuals, however, we heard the debtors say that well under a hundred

claims apparently have been filed on the bases alleged in the underlying class action. I find it hard to believe that if in fact the claims, and assuming the claims in a class action are meritorious, that only that many people would want to pursue their options through the Bankruptcy Court for their rightful entitlement. To me, that indicates that they weren't in fact aware of the significance of the bankruptcy proceedings, and if it turns out to be that in fact their claims are not meritorious, well then that isn't a further prejudice to the distribution of the estate. However, I believe that those creditors are entitled to the right to participate in these bankruptcy proceedings notwithstanding the concerns about this case moving very quickly and certain deadlines that are imposed because of financing concerns and the like, these creditors' rights should not be steam rolled through the fast process of the bankruptcy proceeding. Additionally, it was noted that there was an apparent distinction with the Afedra case where it addressed that claims had not been scheduled. Here, I want to point out again, that the only claim that was scheduled was the class claim listed on debtors' schedules. If they -

THE COURT: Well, the debtor's required to list all pre-petition pending litigation, so, you know, okay, it was listed but I don't - if what you're arguing is that's some endorsement by the debtor that there's a meritorious claim

out there, that's not what I take it to mean.

MS. BUCK: I understand that, Your Honor, I merely just wanted to make the point that that was a similarity to the Afedra reasoning where here the individual claimants were not in fact scheduled accordingly and would not have had notice through that matter. Also, as to the adverse affect on the case, it need not be a long drawn-out process. I understand that that is certainly a valid concern, but I believe with Your Honor's administration, we could set reachable goals and deadlines that would allow the claims to either, if the class claim is allowed, allow the claims to be estimated within short order or if the class claim is not allowed, then to just provide to the extent possible some additional notice. Again, I believe I heard mention of the cost to the estate for this, however, counsel for Alvarado has said that we will undertake this process to notify the appropriate class claimants within a reasonable time set by this Court. We had requested in our motion something to the extent of 90 days. That seems like an appropriate time frame, however, if Your Honor feels that because of the other time constraints that that is not an appropriate time frame within to get it done, we will do the best we can within a given time frame. The bottom line here though is that we believe there were systematic employee practices that were violations of our potential claimants' due rights. They

should have their right to be heard in the bankruptcy case and have their equitable distribution. As this is a court of equity, we believe Your Honor is situated to provide that relief in whatever form you see fit. Thank you.

THE COURT: Thank you.

MR. HAWKINS (TELEPHONIC): Your Honor, James Hawkins for the class, if I may have one final word.

THE COURT: Briefly.

MR. HAWKINS (TELEPHONIC): Thank you, Your Honor, and as a judge that sat as a consumer judge for consumer class actions which I also litigate, the whole reasoning behind a class action is for the small claims to be brought to litigation. If they were only intended to be brought as an individual claim, no one would ever file these claims, and maybe a hundred out of 65,000 would file claims, but here, an individual or a creditor who holds a small claim, that may not be large enough to bring on an individual basis, would be a part of a creditor in a class action, and even though they're in a class action, these individuals are no less a creditor under the Code. So, I think that's what why the legislature intended to create a class action procedure for exactly what we brought in this action.

THE COURT: Alright, thank you.

MR. HAWKINS (TELEPHONIC): With that, I rest.

THE COURT: Thank you. Alright, let me return to

Judge Lifland's decision in Bally's. He goes on to say, "Bankruptcy significantly changes the balance of factors to be considered in determining whether to allow class action and thus class certification is often less desirable in bankruptcy than in ordinary civil litigation." Quoting Musicland, he says, "Bankruptcy provides the same procedural advantages as a class action, in fact it provides more advantages. Creditors, even corporate creditors, don't have to hire a lawyer and can participate in the distribution for the price of a stamp. They need only fill out and return the proof of claim sent with the bar date notice." Again, quoting Woodward but from the Bally case, Judge Lifland talks about something that I think applies here, and that is, "Class certification would adversely affect the administration of these cases adding layers of procedural and factual complexity that accompany class based claims, siphoning the debtors' resources and interfering with the orderly progression of the reorganization." I'd also like to return to the United Company's decision or mention the United Company's decision which was decided almost at the same time, also by Judge Walrath, when she decided the Kaiser matter. In there she dealt with approximately 1,500 - facing a class of 1,500 members who had ECOA claims, Equal Credit Opportunity Act claims. There she declined to certify a class because it had so many individualized issues that would

make it inefficient and unmanageable. As debtors' counsel pointed out with respect to this particular situation, it seems to me likely that there would be the countless mini-trials that Judge Walrath mentions in United Companies, so see, I've come back to her anyway. There are just too many problems with this one, and in addition to that which I've already mentioned, there was a failure to participate at the time of fixing the bar date which was, I think, always the best opportunity in terms of the progress of the 11 to address such issues, but even assuming that that's not the absolute end date that such issues could be raised, this is a circumstance in which actual notice, I'm satisfied, has been received by the appropriate putative class members and others based upon the submissions that have been made and which are uncontradicted. So, for all these reasons, I'm going to deny the motion, and I'll ask counsel to confer and submit one for my signature. Is there anything further for today?

MR. HAWKINS (TELEPHONIC): Just for the record, Your Honor, James Hawkins on behalf of the class. In regards to the Rule 23 and the Judge not having any type of evidence for them cites Judge Walrath's opinion regarding denying certification, just for the record I'd like to point out that plaintiff for the class would like to file a Rule 23 motion for certification, and it could be done within the next 30 days. Also in regards to predominance and superiority in

regards to the factors of a class action being certified, the defendants argued about a wrench, which is not compensable here in California, so that has no bearing in terms of whether or not there's any type of predominance here. The main claim in this case, and I want the Court to understand this, is that the defendant paid their employees straight time for all -

THE COURT: Mr. Hawkins, Mr. Hawkins -

MR. HAWKINS (TELEPHONIC): - they did not pay overtime.

THE COURT: Mr. Hawkins, forgive me for interrupting, but normally after I make a ruling, the only subsequent discussion I entertain is, are questions from anyone who maybe didn't understand the ruling, but I see that you understand it from your comments. My ruling stands.

MR. HAWKINS (TELEPHONIC): And I apologize, Your Honor, I just wanted to make the record. Thank you.

THE COURT: That concludes this hearing -

UNIDENTIFIED SPEAKER: (Microphone not recording.)

(The remainder of this page is intentionally left blank.)

THE COURT: Thank you. Court will stand in recess, and then, let me put it this way, if there is no agreement, I'll be around, contact chambers, and I'll come back out again on the record. Thank you.

ALL: Thank you, Your Honor.

(Whereupon at 12:27 p.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Elaine M. Ryan October 13, 2009

Elaine M. Ryan
2801 Faulkland Road
Wilmington, DE 19808
(302) 683-0221

UNITED STATES BANKRUPTCY COURT
District of Delaware

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

Chapter: 11

Case No.: 09−12074−KJC

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

A transcript of the proceeding held on 10/7/2009 was filed on 10/15/2009 . The following deadlines apply:

The parties have seven days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 11/5/2009 .

If a request for redaction is filed, the redacted transcript is due 11/16/2009 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 1/13/2010 unless extended by court order.

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

Clerk of Court

Date: 10/15/09

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aty	Allison N. Cooper	acooper@mgfllp.com, hrunge@mgfllp.com
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aty	Robert F. Poppiti, Jr.	Young, Conaway, Stargatt &Taylor, LLP The Brandywine Building 1000 West Street 17th Floor Wilmington, DE 19801
aty	Scott K. Brown	Lewis and Roca LLP 40 Norht Central Avenue Suite 1900 Phoenix, AZ 85004
aty	Sean Matthew Beach	Young, Conaway, Stargatt &Taylor The Brandywine Building, 17th Floor 1000 West Street PO Box 391 Wilmington, DE 19899

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