IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION., <u>et</u> <u>al</u> ., ^l)	Case No. 09-12074 (KJC) (Jointly Administered)
Debtors.)	Related to Docket Nos. 597 & 664

REPLY TO DEBTORS' OBJECTION TO WEIS BUILDERS, INC.'S MOTION FOR ORDER GRANTING MODIFICATION OF THE AUTOMATIC STAY

Weis Builders, Inc. ("Weis"), by and through its undersigned counsel, respectfully submits this Reply (the "Reply") to the Debtors' Objection [D. I. 664] (the "Objection") to Weis Builders, Inc.'s Motion for Order Granting Modification of the Automatic Stay (the "Motion")² [D.I. 597]. In support of this Reply, Weis respectfully states as follows:

REPLY

1. The Objection incorrectly asserts that Weis is attempting to circumvent the deadline for filing proofs of claim (the "Claims Bar Date")³. This argument is a red herring. Rather, Weis seeks to modify the automatic stay to permit the State Court Action to proceed and to allow Weis to satisfy any judgment it may obtain against the Debtors from the proceeds of insurance polices under which Weis is named as an Additional Insured, or in the alternative, for an order affirming that the automatic stay applies exclusively to claims against the Debtors and is not effective against claims by and between Weis and the remaining non-debtor third-party defendants.

The Debtors consist of the following 12 entities: Building Materials Holding Corporation, BMC West Corporation, SelectBuild Construction, Inc., SelectBuild Northern California, Inc., Illinois Framing, Inc., C Construction, Inc., TWF Construction, Inc., H.N.R. Framing Systems, Inc., SelectBuild Southern California, Inc., SelectBuild Nevada, Inc., SelectBuild Arizona, LLC, and SelectBuild Illinois, LLC.

All capitalized terms used and not defined herein shall have the meaning ascribed to them in the Motion.

Weis has filed a Motion to Enlarge the Claims Bar Date which is being filed concurrently herewith to address this issue separately.

- 2. Debtors' counsel in both the State Court Action and this Bankruptcy Court case have informed Weis's counsel that Weis may not proceed in the State Court Action against any defendants without violating the automatic stay and facing the threat of sanctions. Furthermore, the court in the State Court Action has suspended litigation until this Court addresses Weis's Motion. As stated in the Motion, this hold places a substantial hardship on Weis's ability to investigate and prosecute its third-party claims against the Debtors and the other non-debtor third-party defendants.
- 3. The Debtors contend that lifting the stay would seriously prejudice the Debtors and the successful progression of the bankruptcy proceedings. Obj. at ¶ 2. This assertion is incorrect because, as previously stated in the Motion, Weis seeks to recover on any judgment it obtains against the Debtors solely from available insurance coverage, which case law clearly holds is not property of the bankruptcy estate. *See Motion at* ¶ 30.
- 4. Upon information and belief, the Debtors provided proof of insurance coverage to Weis before and during construction of the Project. As is standard in the industry, Weis required insurance coverage to be in place for its protection. Proof of coverage contained in three insurance certificates provide for insurance coverage beyond the claim for damages filed in the State Court Action by Weis, as alleged in the Second and Third Amended Third-Party

 Complaints. The November 6, 2006 Marsh Risk and Insurance Services Certificate of Insurance indentifies the general liability policy (XSL62170250A), Deductible, \$1.9 Million per occ[occurrence] xs of \$100,000 sir [Self Insured Retention] aggregate limit per project, and a general aggregate subject to a policy maximum of \$25,000,000. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 6, 2006 Marsh Risk and Insurance Services Certificate of Insurance is attached hereto as Exhibit A. Additionally, there is also a

policy for excess liability in the amount of \$25 Million, with a \$1 Million self insured retention. The November 30, 2005 Marsh Risk and Insurance Services Certificate of Insurance indentifies a general liability policy (HDOGN8072889), Deductible, \$2 Million per occur [occurrence]. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 30, 2005 Marsh Risk and Insurance Services Certificate of Insurance is attached hereto as **Exhibit B**. Additionally, there is also a policy for excess liability in the amount of \$10 Million, with a \$2 Million self insured retention. The November 22, 2004 Marsh Risk and Insurance Services Certificate of Insurance indentifies the general liability policy (GL5346010), Deductible, \$1 Million per occur [occurrence], with \$1 Million in coverage. Weis is identified as an Additional Insured, providing coverage to Weis for property damage caused by the Debtors' acts or omissions. A true and correct copy of the November 22, 2004 Marsh Risk and Insurance Services Certificate of Insurance is attached hereto as Exhibit C. Additionally, there is also a policy for excess liability in the amount of \$25 Million, with a \$1 Million dollar self insured retention. Weis should be permitted to pursue its claim in the State Court Action and collect payment from the insurance coverage provided to it in the event of the Debtors' acts or omissions.

5. Furthermore, the Debtors contend that they were not a party to the State Court Action until March 4, 2009. Obj. at ¶ 20. Both the Baumann and Diamond Declarations submitted in opposition to the Motion incorrectly assert that the Debtors were not joined as a party in the State Court Action until only a few months before the Petition Date. However, lead counsel to Weis in the State Court Action, Burch & Cracchiolo, P.A. ("B&C"), received an email on September 12, 2008 from Maureen E. Thomas, Esq., an attorney employed by the Debtors, with an email address of mthomas@bmhc.com, copying Len Baumann, with an email address of

<u>Ibaumann@bmhc.com</u>, stating, "We have been served with the 3rd party complaint in this matter and are trying to confirm which carrier to tender to. I have attached the matrix you sent me before. We only framed the balconies on the 2 story buildings. Can you tell me which of the building on the attached matrix are the 2 story ones? Thanks." (the "Thomas Email"). A true and correct copy of the Thomas Email is attached hereto as **Exhibit D**.

- 6. The Debtors argue that Weis is attempting to start a complex litigation "from scratch." Obj. at ¶ 26. The Thomas Email, however, clearly indicates that the Debtors were served in September 2008, approximately ten months before the Debtors filed for bankruptcy.
- 7. Finally, case law has made it clear that the automatic stay only provides protection to the debtor and not to non-debtor third-party defendants. *See Motion at* ¶ 44. If the Court does not lift the automatic stay, the Court should enter an order determining that Weis is not precluded from proceeding against the non-debtor third party defendants in the State Court Action.
- 8. For the reasons set forth herein and in the Motion, the Court should grant the proposed Order attached to the Motion: (i) modifying the automatic stay to allow the State Court Action to proceed to judgment and to enable Weis to satisfy its claims, in the State Court Action solely from the Debtors' existing insurance coverage; or, in the alternative, (ii) ordering that the automatic stay applies exclusively to claims against the Debtors and is not effective against claims by and between Weis and the remaining non-debtor third-party defendants; and (iii) granting Weis such other and further relief as the Court deems just and appropriate.

Dated: October 30, 2009

ASHABY & GEDDES, P.A.

Don A. Reskrone (#4380)

Leigh-Anne M. Raport (#5055)

500 Delaware Avenue, 8th Floor

P.O. Box 1150

Wilmington, Delaware 19899

Tel: (302) 654-1888

Attorneys for Weis Builders, Inc.

EXHIBIT A

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POLICY NUMBER: XLS62170250A

Named Insured: Building Materials Holding Corporation, BMC West Corporation,

SelectBuild Construction, Inc., et.al.

EXCESS COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART

Location(s) Of Covered Operations
Re: Rainbow Vision Santa Fe-500 Rodeo Road, Santa
FE, NM 55707; Contract #D45602
Liability arising out of Named Insured's operations
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EXHIBIT B

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Commercial General Liability Forms 07/01/04

POLICY NUMBER: HDQGI8072889

Narified Insured: Building Materials Holding Corp., BMC West Corp., et al

COMMERCIAL GENERAL LIABILITY

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR **ORGANIZATION**

his endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations
Wais Builders Inc. (Contractor) and Rainbow Vision Santa Pe, LLC (Owner) 7415 Lyndale Avenue South	Project: Rainbow Vision Samh Fe-500 Rodeo Road, Santa Fe, NM 55707; Contract No. D45602
Minnespolis, MN 55423 felimation required to complete this Schedule, if not shown abo	Liability arising out of Named Instited's operations (labor, materials and trusces).

- Section ii Who is An insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
 - 1. Your acts or omissions: or
 - 2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not soply to "bodily injury" or "property damage" occurring after:

- All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintanance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
- That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG #0 10 07 04

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Commercial General Liability Forms 07/01/04 POLICY NUMBER: HDOGI8072889

Named Insured: Building Materials Holding Corp., BMC West Corp., et al

COMMERCIAL GENERAL **LIABILITY**

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location And Description Of Completed Operations
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Section II - Who is An insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

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EXHIBIT C

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Commercial General Liability Forms 07/01/04

POLICY NUMBER: GL8948010

Named Insured: Building Meterials Holding Corp., SMC Construction, et al.

COMMERCIAL GENERAL LIABILITY

CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR **ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMITCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Neme Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations
Weis Builders, Inc. (Contractor) 7645 Lyndele Avenue South Minneepolis, MN 55423	RE: RainbowVision Same Fe - Same Fe, NM
Rainbow Vision Santa Fe, LLC (Owner)	
Information regulared to complete this Schedule, if not shown	above, will be shown in the Declarations.

- A. Section II Who is An insured is amended to include as an additional insured the person(s) or arganization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property demage" or "persons and savertising injury" caused, in whole or in part, by:
 - 1. Your acts or omissions: or
 - 2. The acts or omissions of those acting on your liebalf;

in the performance of your angoing operations for this additional insurat(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insurade, the following additional exclusions apply:

This insurance does not apply to "podily injury" or "property damage" occurring after:

- All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be purformed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
- That portion of "your work" out of which the injury or damage arises; has been put to its intended use by any person or arganization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 07 04

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TO: 16122435010

P.5

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Commercial General Liability Forms 07/01/04

POLICY NUMBER: GL6946010

Named Insured: Building Materials Holding Corp., BMC Construction, et al.

COMMERCIAL GENERAL LIABILITY

CG 20 37 97 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - OWNERS, LESSES OR CONTRACTORS - COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(a) Or Organization(s):	Location And Description Of Completed Operations
Wels Builders, Inc. (Contractor) 7645 Lyndels Avenus Bouth Minnespolis, MN 55423	RE: ReinbowVision Santa Fe — Santa Fe, NM
Rainbow Vision Senta Pa, LLC (Owner)	
Information regulard to complete this Schedule, If not a	houn above, will be shown in the Decisrations.

Section ii — Wits is An insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "biddly injury" or "properly demand" caused, in whole or in part, by "your work" at the leastlen designated and described in the endouse of this endousement performed for that additional insured and included in the "products-completed operations hazard".

CG 20 37 07 04

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EXHIBIT D

LRaport

From:

Maureen Thomas [mthomas@bmhc.com]

Sent:

Friday, September 12, 2008 9:13 PM

To:

Tonya MacBeth

Cc:

Len Baumann

Subject:

FW: Rainbow Vision - BBD Construction

Attachments: Rainbow Vision Summons.pdf; Weiss Certificates of Occupancy.pdf

Hi: We have been served with the 3rd party complaint in this matter and are trying to confirm which carrier to tender to. I have attached the matrix you sent me before. We only framed the balconies on the 2 story buildings. Can you tell me which of the building on the attached matrix are the 2 story ones? Thanks.

Maureen E. Thomas, Esq. mthomas@bmhc.com
248 698-0965 direct
248 505-2962 cell
832 550-4383 efax

CERTIFICATE OF SERVICE

I, Leigh-Anne M. Raport, hereby certify that on October 30, 2009, I caused one copy of the foregoing document to be served upon the parties on the attached service list in the manner indicated.

Leigh-Anne M. Raport (#5055)

BMHC 2002 Service List Case No. 09-12074 Avery Labels 5162

David G. Aelvoet, Esq.
Linebarger Goggan Blair & Sampson LLP
Travis Building, 711 Navarro, Suite 300
San Antonio, TX 78205
(Counsel to Bexar County)
First Class Mail

Brian W. Bisignani, Esq.
Post & Schell, P.C.
17 North 2nd Street, 12th Floor
Harrisburg, PA 17101-1601
(Counsel to Aon Consulting)
First Class Mail

David Boyle
Airgas, Inc.
259 Radnor-Chester Road, Suite 100
P.O. Box 6675
Radnor, PA 19087-8675
First Class Mail

Scott T. Citek, Esq.
Lamm & Smith, P.C.
3730 Kirby Drive, Suite 650
Houston, TX 77098
(Counsel to Bay Oil Company)
First Class Mail

Raniero D. D'Aversa, Jr., Esq.
Laura D. Metzger, Esq.
Weston T. Eguchi, Esq.
Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York, NY 10103-0001
(Counsel to Rabobank International)
First Class Mail

Robert J. Dehney, Esq.
Erin R. Fay, Esq.
Morris Nichols Arsht & Tunnell LLP
1201 North Market Street, 18th Floor
P.O. Box 1347
Wilmington, DE 19899-1347
(Counsel to D.R. Horton, Inc.)

Hand Delivery

Christopher M. Alston, Esq.
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
(Counsel to JELD-WEN, inc.)
First Class Mail

Robert McL. Boote, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(Counsel to Westchester Fire Insurance Company and ACE USA)
First Class Mail

Andrew Cardonick, Esq Greenberg Traurig, LLP 77 West Wacker Drive, Suite 3100 Chicago, IL 60601 (Counsel to Grace Bay Holdings, II, LLC) First Class Mail

Scott D. Cousins, Esq.
Dennis A. Melero, Esq.
Greenberg Traurig, LLP
1007 North Orange Street, Suite 1200
Wilmington, DE 19801
(Counsel to Grace Bay Holdings, II, LLC)

Hand Delivery

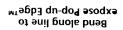
Tobey M. Daluz, Esq.
Joshua E. Zugerman, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
919 North Market Street, 12th Floor
Wilmington, DE 19801
(Counsel to Westchester Fire Insurance Company and ACE USA)

Hand Delivery

John P. Dillman, Esq.
Linebarger Goggan Blair & Sampson LLP
P.O. Box 3064
Houston, TX 77253-3064
(Counsel to Cypress-Fairbanks ISD, Fort Bend County, and Harris County)

First Class Mail

Kevin B. Fisher, Esq.
Seth Mennillo, Esq.
Paul, Hastings, Janofsky & Walker LLP
55 Second Street, 24th Floor
San Francisco, CA 94105
(Counsel to Wells Fargo Bank, N.A.)
First Class Mail





Mark W. Eckard, Esq.
Reed Smith LLP
1201 North Market Street, Suite 1500
Wilmington, DE 19801
(Counsel to CIT Technology Financing Services, Inc.)

Hand Delivery

John M. Flynn, Esq.
Carruthers & Roth, P.A.
235 North Edgeworth Street
P.O. Box 540
Greensboro, NC 27401
(Counsel to Arrowood Indemnity Company)
First Class Mail

Paul N. Heath, Esq.
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(Counsel to Wells Fargo Bank, N.A.)
Hand Delivery

Eric H. Holder, Jr., Esq.
U. S. Attorney General
Department of Justice - Commercial Litigation Branch
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
First Class Mail

Internal Revenue Service
Attn: Insolvency Section
11601 Roosevelt Blvd., Mail Drop N781
P.O. Box 21126
Philadelphia, PA 19114
First Class Mail

Neal Jacobson, Esq.
Senior Trial Counsel
Securities and Exchange Commission
3 World Financial Center, Suite 400
New York, NY 10281
First Class Mail

Thomas L. Kent, Esq.
Paul, Hastings, Janofsky & Walker LLP
75 East 55th Street, 1st Floor
New York, NY 10022
(Counsel to Wells Fargo Bank)
First Class Mail

Christopher J. Giaimo, Jr., Esq.
Katie A. Lane, Esq.
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
(Counsel to the Official Committee of Unsecured Creditors)
First Class Mail

Melody C. Hogston Royal Mouldings Limited P.O. Box 610 Marion, VA 24354 First Class Mail

IKON Financial Services
Attn: Bankruptcy Administration
1738 Bass Road
P.O. Box 13708
Macon, GA 31208-3708
First Class Mail

Thomas W. Isaac, Esq.
Dietrich, Glasrud, Mallek & Aune
5250 North Palm Avenue, Suite 402
Fresno, CA 93704
(Counsel to Wilson Homes, Inc.)
First Class Mail

Michael J. Joyce, Esq.
Cross & Simon, LLC
913 North Market Street, 11th Floor
Wilmington, DE 19801
(Counsel to Arrowood Indemnity Company)

Hand Delivery

Louisiana-Pacific Corporation Attn: Bruce J. Iddings P.O. Box 4000-98 Hayden Lake, ID 83835-4000 (Top 50) First Class Mail

Dan McAllister
San Diego County Treasurer-Tax Collector, Bankruptcy Desk
1600 Pacific Highway, Room 162
San Diego, CA 92101
First Class Mail

Cliff W. Marcek, Esq.
Cliff W. Marcek, P.C.
700 South Third Street
Las Vegas, NV 89101
(Counsel to Edward and Gladys Weisgerber)
First Class Mail

Frank F. McGinn, Esq.
Bartlett Hackett Feinberg, P.C.
155 Federal Street, 9th Floor
Boston, MA 02110
(Counsel to Iron Mountain Information Management, Inc.)
First Class Mail

Kathleen M. Miller, Esq.
Smith, Katzenstein & Furlow LLP
800 Delaware Avenue, 7th Floor
P.O. Box 410
Wilmington, DE 19801
(Counsel to Airgas, Inc.)
Hand Delivery

Charles J. Pignuolo, Esq.
Devlin & Pignuolo, P.C.
1800 Bering Drive, Suite 310
Houston, TX 77057
(Counsel to Partners in Building, L.P.)
First Class Mail

Jonathan Lee Riches Federal Medical Center P.O. Box 14500 Lexington, KY 40512 First Class Mail

Randall A. Rios, Esq.
Timothy A. Million, Esq.
Munsch Hardt Kopf & Harr, PC
700 Louisiana, 46th Floor
Houston, TX 77002
(Counsel to Cedar Creek Lumber, Inc.)
First Class Mail

George Rosenberg, Esq.
Assistant Arapahoe County Attorney
5334 South Prince Street
Littleton, CO 80166
(Counsel to Arapahoe County Treasurer)
First Class Mail

Joseph J. McMahon, Jr., Esq.
Office of the United States Trustee
844 King Street, Suite 2207
Lock Box 35
Wilmington, DE 19801
Hand Delivery

Sheryl L. Moreau, Esq.

Missouri Department of Revenue - Bankruptcy Unit
P.O. Box 475

Jefferson City, MO 65105-0475

First Class Mail

Michael Reed, Esq.
McCreary, Veselka, Bragg & Allen, P.C.
P.O. Box 1269
Round Rock, TX 78680
(Counsel to Local Texas Taxing Authorities)
First Class Mail

Debra A. Riley, Esq.

Allen Matkins Leck Gamble Mallory & Natsis LLP

501 West Broadway, 15th Floor
San Diego, CA 92101
(Counsel to D.R. Horton, Inc.)

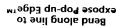
First Class Mail

Martha E. Romero, Esq. Romero Law Firm 6516 Bright Avenue Whittier, CA 90601 (Counsel to Yuba County) First Class Mail

Bradford J. Sandler, Esq.
Jennifer R. Hoover, Esq.
Jennifer E. Smith, Esq.
Benesch, Friedlander, Coplan & Aronoff LLP
222 Delaware Avenue, Suite 801
Wilmington, DE 19801
(Counsel to the Official Committee of Unsecured Creditors)

Hand Delivery

Secretary of Treasury
Attn: Officer, Managing Agent or General Agent
P.O. Box 7040
Dover, DE 19903
First Class Mail





Secretary of State Franchise Tax Division of Corporations P.O. Box 7040 Dover, DE 19903 First Class Mail

Securities & Exchange Commission Attn: Christopher Cox 100 F Street, NE Washington, DC 20549 First Class Mail

Ellen W. Slights, Esq.
Assistant United States Attorney
U.S. Attorney's Office
1007 Orange Street, Suite 700
P.O. Box 2046
Wilmington, DE 19899
Hand Delivery

Christopher A. Ward, Esq.
Shanti M. Katona, Esq.
Polsinelli Shughart PC
222 Delaware Avenue, Suite 1101
Wilmington, DE 19801
(Counsel to SunTrust Bank)
Hand Delivery

Joanne B. Wills, Esq.
Sally E. Veghte, Esq.
Klehr, Harrison, Harvey, Branzburg & Ellers LLP
919 Market Street, Suite 1000
Wilmington, DE 19801
(Counsel to Rabobank International)
Hand Delivery

Michael A. Rosenthal, Esq.
Matthew K. Kelsey, Esq.
Saee M. Muzumdar, Esq.
Gibson, Dunn & Crutcher LLP
200 Park Avenue, 47th Floor
New York, NY 10166-0193
(Counsel to the Debtors)
First Class Mail

Securities & Exchange Commission
Bankruptcy Unit
Attn: Michael A. Berman, Esq.
450 Fifth Street NW
Washington, DC 20549
First Class Mail

Kimberly Walsh, Esq.
Assistant Attorney General
Texas Comptroller of Public Accounts, Bankruptcy & Collections Division
P.O. Box 12548
Austin, TX 78711-2548
First Class Mail

Elizabeth Weller, Esq.
Linebarger Goggan Blair & Sampson LLP
2323 Bryan Street, Suite 1600
Dallas, TX 75201
(Counsel to Dallas County and Tarrant County)
First Class Mail

Sean M. Beach, Esq.
Donald J. Bowman, Jr., Esq.
Robert F. Poppiti, Jr., Esq.
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391

Aaron G. York, Esq.
Jeremy L. Graves, Esq.
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6911
(Counsel to the Debtors)
First Class Mail

