

1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE MIDDLE DISTRICT OF TENNESSEE
3 (Nashville)
4 Bankruptcy Petition #: 3:13-bk-02857
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8 Debtor
9 RANDAL PEYTON HAND
10 107 Briarwood Drive
11 Greenbrier, TN 37073-5258
12

13 Joint Debtor
14 LINDA SUE HAND
15 107 Briarwood Drive
16 Greenbrier, TN 37073-5258
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19

20 Transcript of Proceedings
21 September 11, 2013 9:00a
22

23 Before The Honorable Keith M. Lundin, Bankruptcy Judge
24
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26

27 APPEARANCES
28

29 Counsel for the Movant:

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31 HOLLY KNIGHT, ESQ.
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33 Counsel for the Debtors:

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35 RAY WALDRON, ESQ.
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THE COURT: Can we have appearances,
please, in the Hand matter.

MS. KNIGHT: Good Morning, Your Honor,
Holly Knight on behalf of Latif Abdulsayed in this case.

THE COURT: All right.

MR. WALDRON: Ray Waldron for the
Debtors, Your Honor.

THE COURT: All right, I'm ready, or I
can be in a moment, for your stipulations.

MS. KNIGHT: Your Honor, the parties have
agreed to stipulate to the statement of facts that were
incorporated in the Movant's Memorandum of Facts (inaudible)
filed yesterday. Would you like for me to read those into
the record or do you want me to simply reference Paragraph 1
through 28?

THE COURT: Of what document now?

MS. KNIGHT: It's the Memorandum of Facts
and Law in support of the Motion for Order pursuant to
Bankruptcy Rule 9006-B-1 for extension of time for deadline
to file Notice of Exception to Dischargeability of Debt and
Response to Debtor's Memorandum of Law in support of
objection to Creditor's Motion for Extension of time, which

1 was filed at (inaudible) yesterday.

2 It's likely the last pleading that was
3 filed on the record, although I may have returned the Return
4 of Service and the subpoena after that, but the memo is
5 either the last docket entry or I think the next-to-last
6 docket entry.

7 THE COURT: The problem here is you
8 stipulated to the - this is Document No. 62 on the docket
9 sheet, and by agreement of the parties, you said the first
10 how many, 15 paragraphs, is that what you said?

11 MS. KNIGHT: Your Honor, it's the
12 Statement of Facts, which would be Paragraphs 1 through 28.

13 THE COURT: One through 28.

14 MS. KNIGHT: It's Page 1 through 4 of the
15 pleadings.

16 THE COURT: All right, let me just state
17 it for the record, then, that the parties are stipulating to
18 Paragraphs 1 through 28 of Document 62 that was filed in the
19 case; is that correct?

20 MS. KNIGHT: Yes, Your Honor.

21 MR. WALDRON: Correct, Your Honor.

22 THE COURT: All right -

23 MS. KNIGHT: Additionally, Your Honor,
24 the parties have stipulated to the admissibility of the

1 exhibits that have been previously filed and uploaded in
2 electronic evidence, and that would include the Movant's
3 Exhibits 1 through 6.

4 THE COURT: Okay.

5 MS. KNIGHT: And the Debtors' Exhibits A
6 through E.

7 THE COURT: All right, Exhibits 1 through
8 6 and A through E will be admitted. All right, hang on just
9 a second and let me be sure I'm familiar with Paragraphs 1
10 through 28.

11 All right, Ms. Knight, I've looked at the
12 fact stipulations and at Exhibits 1 through 6 and A through
13 E. I'm ready to hear what other stipulations there are.

14 MS. KNIGHT: I don't think there are any
15 other stipulations, Your Honor.

16 THE COURT: All right, then I'm ready for
17 whatever other evidence there may be.

18 MS. KNIGHT: Your Honor, prior to calling
19 witnesses, I'd like to invoke the rule and exclude non-party
20 witnesses, Your Honor.

21 THE COURT: All right. Let me have
22 everybody who is in the room who might be a witness, if
23 there's any possibility, to stand up. If you think you might
24 be a witness, stand up.

1 All right, Ms. Knight, who is your
2 client?

3 MS. KNIGHT: My client is (inaudible) and
4 they are not present, Your Honor.

5 THE COURT: They're not present so you do
6 not have a client present. Mr. Waldron, who is your client?

7 MR. WALDRON: One of my clients is
8 deceased; the other is Linda Sue Hand, and she is not
9 present.

10 THE COURT: So the witnesses who are
11 standing are not your clients; is that right?

12 MR. WALDRON: That's right.

13 THE COURT: All right, there are two of
14 you and Ms. Knight has asked for the rule and you all know
15 what the rule is, but just so everybody is clear, this has
16 nothing to do with whether you're going to tell the truth or
17 not, we know you are, it's simply that you'll be out of the
18 room when everyone else testifies and from this time until
19 you're released as a witness, you can't discuss this case
20 with anyone. You can't talk to the lawyers involved or to
21 each other or to anyone else.

22 So I'm going to ask the two of you to
23 leave the room for a little while. If you'll stay close it
24 won't be long before we get to you.

1 MS. KNIGHT: Your Honor, I'm actually
2 going to call Ms. Fecteau first.

3 THE COURT: Is there any other
4 preliminary matter that I need to address before we start
5 with Ms. Fecteau's evidence?

6 MS. KNIGHT: I'm not aware of any.

7 MR. WALDRON: No, Your Honor.

8 THE COURT: Okay, then come around,
9 please.

10 (Witness sworn)

11 CLERK: State your full name, please.

12 MS. FECTEAU: Kristin Fecteau.

13 THEREUPON came

14 K R I S T I N F E C T E A U

15 who, having been first duly sworn according to law, testified
16 as follows:

17 DIRECT EXAMINATION

18 BY MS. KNIGHT:

19 Q Ms. Fecteau, what is your relationship to
20 the parties in this case?

21 A I'm their attorney.

22 Q You're who's attorney?

23 A I'm the attorney for Latif Abdulsayed and
24 Afaf Hanna.

1 Q And in what capacity were you retained by
2 Mr. Abdulsayed and Ms. Hanna.

3 A I was retained to represent them at the
4 trial court in an action against the Debtors in this case for
5 intentional misrepresentation and breach of contract.

6 Q And this is in Tennessee State Court?

7 A Yes, it was in the Second Circuit Court,
8 Davidson County.

9 Q Ms. Fecteau, you're familiar with the
10 statement of facts that are included in the memorandum that
11 was filed with the Court yesterday, to which the parties have
12 now stipulated; is that right?

13 A Yes.

14 Q Does that appear to be a true and
15 accurate recording of the facts as they have transpired?

16 A It is.

17 Q Ms. Fecteau, are you familiar with the
18 exhibits that were tendered by the Movant's Exhibits 1
19 through 6, which incorporate correspondence between the
20 parties and a copy of the certified judgment that was entered
21 in the state court action; are you familiar with those?

22 A Yes, I am.

23 Q And the parties that stipulated to those
24 exhibits, did they appear to be a true and accurate

1 representation of the correspondence and the certified
2 judgment entered in the underlying action?

3 A Yes, they are.

4 MS. KNIGHT: Your Honor, I would like to
5 move at this time to enter Exhibits 1 through 6.

6 THE COURT: They've already been admitted
7 by stipulation.

8 MS. KNIGHT: Thank you, Your Honor.

9 BY MS. KNIGHT:

10 Q Ms. Fecteau, the parties engaged in
11 several pieces of electronic correspondence and written
12 correspondence as reflected in the exhibits that have been
13 admitted into evidence in this case. Was there any other
14 communication between the parties regarding the underlying
15 indebtedness?

16 A Those are the only written
17 communications. There was one other oral communication.

18 Q And when was that?

19 A It was on May 9th, I think it was, but it
20 was at the meeting of the creditors.

21 Q May 7th?

22 A May 7th. I stand corrected.

23 Q And what occurred at the meeting of
24 creditors?

1 A The Debtors testified about a few things.
2 I appeared on behalf of Latif Abdulsayed and Afaf Hanna. I
3 questioned the Creditors about a few things, including what
4 they did with the \$190,000 that they swindled my clients out
5 of.

6 Q And what was the result of the
7 communication you had at the 341 meeting?

8 A After the Debtors said that they had
9 spent all the money, after the meeting was over, I approached
10 Mr. Rothschild and I asked him again about giving me an
11 agreed order stating that this debt should not be part of the
12 bankruptcy, that it was non-dischargeable, and he said that
13 it was premature because we didn't have the amount yet,
14 because the trial court had not yet ruled on the final
15 judgment amount, and that we would revisit that issue once we
16 had, of him giving me an agreed order, once we had the final
17 amount so that we could put that in the order.

18 Q Was there any other communication between
19 you and Debtors or Debtors' Counsel?

20 A That was all.

21 Q Did you communicate with the Debtors once
22 the final judgment had been entered in state court?

23 A Yes, I did. I wrote a letter and
24 attached a copy of the final judgment and I sent it to Mr.

1 Rothschild.

2 MS. KNIGHT: Your Honor, may I approach?

3 THE COURT: Sure.

4 MS. KNIGHT: (Inaudible)

5 THE COURT: Counsel, I can't hear a word
6 you said. Sorry.

7 MS. KNIGHT: (Inaudible)

8 THE COURT: I don't know what you're
9 talking about or what you have in your hand or why we're
10 doing this. So I'll just be an observer for the time being.

11 MS. KNIGHT: Your Honor, I'd like to
12 refer the witness to previously admitted Exhibits 3 and 4.

13 BY MS. KNIGHT:

14 Q Ms. Fecteau, can you identify what I've
15 handed you?

16 A Yes, Exhibit 3 is the July 1st letter
17 that I wrote to Mr. Rothschild and Exhibit 4 is a copy of the
18 final judgment that was enclosed with the letter. And my
19 letter asks him, again, about voluntarily entering into an
20 agreement, which we had earlier discussed on April 2nd and at
21 the creditors meeting. And this was the final amount so I
22 was making him aware that it had finally been rendered and
23 entered by the trial court.

24 Q And did you receive a response from Mr.

1 Rothschild?

2 A I received an email reply.

3 MS. KNIGHT: May I approach, Your Honor?

4 THE COURT: Yes.

5 MS. KNIGHT: Your Honor, I'd like to
6 refer the witness to what has previously been admitted as
7 Exhibit 5.

8 BY MS. KNIGHT:

9 Q Ms. Fecteau, can you identify the
10 document I've handed you?

11 A That is a copy of the email reply from
12 Mr. Rothschild.

13 Q And, Ms. Fecteau, this was in response to
14 your letter dated July 1; is that correct?

15 A Yes, and that's referenced in the first
16 sentence of Mr. Rothschild's reply.

17 Q How did Mr. Rothschild respond to your
18 correspondence?

19 A I was surprised to learn that Mr. Hand
20 had died. He assumed that I knew that, which I did not. He
21 told me he was going to be meeting with Mrs. Hand later in
22 the week to discuss her options. And he told me it was
23 unlikely she was going to be able to continue running the
24 market, that's Baker's Market that was the subject of the

1 fraud, and that she would be unlikely to continue funding the
2 plan because Mr. Hand had always run the market. And he said
3 he would respond when he had a chance to discuss this with his
4 client.

5 Q Did you receive any further response from
6 Mr. Rothschild?

7 A No, I did not.

8 Q After Mr. Rothschild had a meeting with
9 his client, did he call up and notify you as to what the
10 outcome was of that meeting?

11 A No, he did not.

12 Q Did he ever notify you that the Debtor
13 was going to dispute the indebtedness?

14 A OH, that was never in question. He
15 always stated that it was non-dischargeable.

16 MS. KNIGHT: Your Honor, I'd like to
17 refer to what's previously been admitted as Exhibit A. May I
18 approach?

19 THE COURT: Yes.

20 MS. KNIGHT: Exhibit 1.

21 BY MS. KNIGHT:

22 Q Ms. Fecteau, I'd like to refer you to
23 what's previously been admitted as Exhibit 1. Can you
24 identify that document for me, please?

1 A This was a letter I wrote to Ms.
2 Ausbrooks. Her name was the one I originally received as
3 handling this file from the Rothschild Law firm. And I wrote
4 this letter as soon as I was notified that the bankruptcy was
5 filed by the Hands. And I notified them right away that this
6 debt had been obtained by fraud, had been adjudicated as
7 fraud at the Court of Appeals. Justice Clement wrote the
8 opinion. I included a copy of the opinion with my letter and
9 I asked them to contact me because I was asserting right away
10 that this debt was not to be discharged in bankruptcy.

11 Q Did you receive a response to that
12 letter?

13 A Yes, I did.

14 MS. KNIGHT: Your Honor, I'd like to
15 refer to what's been previously admitted as Exhibit 2.
16 May I approach?

17 THE COURT: Yes.

18 BY MS. KNIGHT:

19 Q Ms. Fecteau, can you identify the
20 document I just handed you?

21 A Yes, Exhibit 2 is the email response I
22 received from Mr. Rothschild.

23 Q And what was the substance of that
24 response?

1 A He chided me for not being familiar with
2 Bankruptcy Law, which required that the debt be scheduled and
3 provided for. He said that he had read Justice Clement's
4 opinion before the case was ever filed, so he was already
5 familiar with it, and he had discussed it with his clients at
6 length, that the debt was likely not dischargeable under
7 11USC523 and he told me he would discuss with his clients
8 giving me an agreed order granting relief from the automatic
9 stay because we had to go back to the trial court for entry
10 of judgment consistent with the opinion of the Court of
11 Appeals.

12 He also said, "We will also likely enter
13 an agreement that this debt is non-dischargeable, based on
14 the clear language in Justice Clement's opinion." And he
15 said, "There appears to be no reason to litigate this further
16 in Bankruptcy Court."

17 Q Now, did the parties enter into an agreed
18 order granting relief for purposes of continuing the
19 litigation in state court?

20 A Yes, Mr. Rothschild prepared that agreed
21 order.

22 Q At anytime during the pendency of the
23 Bankruptcy Case, prior to the bar date, did Mr. Rothschild
24 indicate to you that the Debtors' position that the debt was

1 non-dischargeable changed?

2 A No. He had always said that it was,
3 based on these communications. He didn't argue with me at
4 the meeting of the creditors. We were just waiting on the
5 final number.

6 Q Did he indicate to you at anytime that it
7 had become necessary to litigate the dischargeability of this
8 debt?

9 A No.

10 Q Did he indicate to you at anytime that
11 their agreement to enter into an agreed order excepting the
12 debt from discharge was conditioned upon the filing of a
13 complaint by the Movants?

14 A Absolutely not.

15 Q Did you and Mr. Rothschild ever discuss
16 entering into a tolling agreement?

17 A No.

18 Q Why not?

19 A Well, I was waiting on Mr. Rothschild to
20 get back to me about whether this 13 was going to stay in
21 place or whether it was going to convert to a 7. If it
22 converted to a 7, all bets were off.

23 Q So why did the Movants not file a
24 complaint?

1 A Because Mr. Rothschild had said no
2 further litigation was necessary. There was no need to spend
3 extra attorney expense on either side. It was going to be an
4 extreme hardship for both parties. I would assume it would
5 be for the people in a bankruptcy and I know it was for my
6 clients. He had already told me no further litigation was
7 necessary.

8 MS. KNIGHT: I'll pass the witness, Your
9 Honor.

10 THE COURT: Cross-examine.

11 CROSS-EXAMINATION

12 BY MR. WALDRON:

13 Q Ms. Fecteau, when did you receive notice
14 of the Hand Bankruptcy filing?

15 A It was a few days prior to the April 2nd
16 letter that I wrote.

17 Q And how did you receive that notice?

18 A I do not recall.

19 Q You stated earlier that you thought Ms.
20 Ausbrooks was Counsel.

21 A That's right.

22 MR. WALDRON: Your Honor, I'd like to
23 direct the witness's attention to Pre-filed Exhibit marked as
24 A.

1 BY MR. WALDRON:

2 Q Ms. Fecteau, do you recognize what's on
3 the screen?

4 A Yes.

5 Q And what is it?

6 A It is a Notice of Chapter 13 Bankruptcy
7 Case.

8 Q And the attorney for Debtor is listed as
9 Mary Beth Ausbrooks; is that right?

10 A That's right.

11 Q Do you believe that's where you got the
12 information from that Ms. Ausbrooks was Counsel?

13 A That had to have been.

14 Q Do you see down two boxes below where
15 she's listed? It starts with Deadlines?

16 A Yes.

17 Q And I'm sorry, it's actually one more box
18 below that, it's "Deadline to object to Debtor's Discharge or
19 to Challenge Dischargeability of Certain Debt."

20 A Yes.

21 Q What date is that?

22 A 7/8/13.

23 Q Do you believe you received this before
24 you responded on April 2nd?

1 A That is not disputed.

2 Q What did you do with that notice?

3 A I put it in my file.

4 Q Do you still have it now?

5 A Yes.

6 Q Have you ever looked at it again?

7 A Ever? Like when are you referring to?

8 Q Before July 8th.

9 A I'm sure I did.

10 Q Approximately how many times have you
11 formally represented creditors in Bankruptcy proceedings?

12 A Creditors?

13 MS. KNIGHT: (Inaudible)

14 THE COURT: I'm sorry, I couldn't hear
15 what you said.

16 MS. KNIGHT: I objected as to relevance.
17 I'm not sure what her representation of a prior creditor has
18 to do with her representation of the Movants in this case.

19 THE COURT: Your response, Counsel.

20 MR. WALDRON: I do believe it's relevant.
21 One of the factors that we'll get to is diligence and I think
22 if she was very experienced in representing creditors that
23 her diligence might be different than her diligence if she
24 was brand new at representing creditors in Bankruptcy

1 proceedings.

2 THE COURT: That's interesting. Is
3 diligence objective or subjective in the Maughan analysis? I
4 never thought about that. For the time being I'll overrule
5 the objection while I think about whether diligence and the
6 Maughan Analysis is an objective or subjective concept. I'll
7 let the record contain the evidence, so go ahead.

8 THE WITNESS: Formally as in what are you
9 referring to?

10 BY MR. WALDRON:

11 Q Where you actually made an appearance in
12 the court.

13 A I don't believe I have.

14 Q This is your first?

15 A Yes, this is my first.

16 Q You sent Ms. Ausbrooks a letter, that was
17 the one you discussed before, dated April 2, 2013, and you
18 received a response from her, right?

19 A That was my testimony.

20 Q Do you remember what that response said,
21 Ms. Ausbrooks' response?

22 A Oh, she said something like Mr.
23 Rothschild is handling this.

24 Q Then you received a detailed response

1 from Mr. Rothschild via email, Exhibit 2?

2 A That is Exhibit 2.

3 Q Can you see Exhibit 2 on your screen?

4 A I can.

5 Q Do you believe you reached an agreement
6 as to non-dischargeability in this exchange with Mr.
7 Rothschild, your letter and his response email?

8 A Yes.

9 Q What do you believe that agreement is?

10 A That this debt is not dischargeable,
11 based on the clear language in Justice Clement's Opinion that
12 it is fraud.

13 Q Do you recall sending this letter that's
14 before you?

15 A That's what I testified.

16 MR. WALDRON: For the record, please let
17 it be clear that Ms. Fecteau is looking at her letter dated
18 July 1st and that is pre-marked as Exhibit 3.

19 BY MR. WALDRON:

20 Q In this letter, Ms. Fecteau, you are
21 soliciting an agreement; is that correct?

22 A No, I'm asking him whether he will now
23 give me the agreed order he already told me he would give me.

24 Q And that's the agreed order he said he

1 would likely give you?

2 A Right, because there was no further need
3 for litigation.

4 Q Did you receive that agreement?

5 A No, he never got back to me.

6 Q So you believe you had an agreement on
7 April 2nd?

8 A That's right.

9 Q But you were perhaps asking for an
10 agreement on July 1st?

11 A No, I'm asking him again about the
12 agreement and I referenced the April 2nd email.

13 Q And you state that if he doesn't enter
14 that agreement we can infer that you were going to do
15 something else?

16 A That's right. I would have filed an
17 adverse action.

18 Q And did you file that?

19 A No, because he told me that the clients
20 likely would not be able to continue with the plan because
21 Mr. Hand died.

22 Q So you felt it was not necessary to
23 dispute anything at that point?

24 A I don't know what you're referring to

1 dispute anything.

2 Q Or you felt it was not necessary to file
3 what you have classified as an adverse action?

4 A It wouldn't be because if it was going to
5 convert to a 7, it would be a whole different case.

6 Q And what made you think it was going to
7 convert to a 7?

8 A Because he told me they wouldn't be able
9 to fund the plan.

10 Q And he did preface that with likely and
11 he was going to meet with his client?

12 A That's right. And we both knew, because
13 I already had experience with these people. I had deposed
14 them and cross-examined them at trial. Mr. Hand was the one
15 that ran the market; she didn't run the market. So when he
16 said that, I knew there was probably no way she could run the
17 market.

18 Q So you just assumed that it would convert
19 to a 7 at that point?

20 A I assumed he would get back to me and let
21 me know either way, like he said in his email.

22 Q Do you have any information that he met
23 with his client before July 8th?

24 A No, I do not.

1 Q You represented the creditors, Mr.
2 Abdulsayed and Ms. Hanna, in Bankruptcy Court as well as
3 state court; is that correct?

4 A I do now.

5 Q And am I correct in assuming that they've
6 paid you for your services?

7 A Which part?

8 Q Either. That they've paid you in the
9 past.

10 MS. KNIGHT: Objection, Your Honor. I'm
11 not sure what her fees have to do with this, whether or not
12 the Movants are entitled to an extension (inaudible).

13 THE COURT: Response to the objection.

14 MR. WALDRON: I'll withdraw my question.

15 THE COURT: I won't rule on the
16 objection.

17 BY MR. WALDRON:

18 Q If a client says to you, I will likely
19 hire you, would you start representation of them?

20 A Sometimes I do. It depends. If we have
21 a statute of limitations or something like that, absolutely.

22 Q Do you bill them at that point?

23 A It depends.

24 Q Would you believe you had an agreement

1 with the client at that point?

2 A It depends.

3 Q What would it depend on?

4 MS. KNIGHT: Your Honor, we're going
5 down a long road of speculation. What we're talking about,
6 what facts transpired in this case, what could happen and
7 potential cause of action in some other potential
8 representation doesn't have anything to do with whether the
9 Movants are entitled to an extension (inaudible).

10 THE COURT: I'm not sure what your
11 objection is.

12 MS. KNIGHT: It's relevance, Your Honor.

13 THE COURT: Your response to the
14 relevance objection.

15 MR. WALDRON: I do think it's relevant to
16 determine what she thinks the presence of the word "likely"
17 is in the context of whether you have an agreement or not.

18 THE COURT: You can ask her what she
19 thought the word "likely" meant. That would be fine. The
20 hypothetical discussion of other cases is not helpful so I
21 think I'll sustain the objection but allow you to question
22 her along the lines you describe.

23 MR. WALDRON: Yes, Your Honor.

24 BY MR. WALDRON:

1 Q After Mr. Rothschild's email response to
2 your letter, when is the next time you communicated with him?

3 A Which email and which letter?

4 Q Your April 2nd letter and his email of
5 the same date.

6 A And what is the question?

7 Q When is the next time you communicated
8 with Mr. Rothschild?

9 A We communicated regarding an agreed order
10 that had to be entered, had to be approved by the Trustee,
11 granting relief from the automatic stay, so that we could go
12 back to the trial court and get entry of the judgment.

13 Q Was there any discussion about an
14 agreement for non-dischargeability at that point?

15 A Not at that point.

16 Q When was your next communication with Mr.
17 Rothschild?

18 A It was at the meeting of the creditors.

19 Q Was there an agreement reached for non-
20 dischargeability at that point?

21 A We'd already reached it. We were just
22 waiting on a number.

23 Q And did you proffer an agreed order to
24 him at that point?

1 A No, we were waiting on a number.

2 Q Did you ever plan on proffering an agreed
3 order to him?

4 A I assumed one of us was going to have to
5 draft it and, based on our course of conduct, when he had
6 drafted the first agreed order, in my mind, it was probably
7 going to come from him. But usually attorneys discuss who's
8 going to draft an order. So we could have discussed it.

9 Q And you didn't prompt that discussion?

10 A I was waiting on him to reply to me
11 whether this was going to be a 13 or a 7.

12 Q And the bar deadline expired during that
13 time?

14 A I couldn't hear your question.

15 Q The bar - did the complete deadline
16 expire during the time you were waiting?

17 A Yes, it did.

18 Q Could you have filed a timely motion
19 before July 8th to extend the Complaint deadline?

20 A I mean that's possible.

21 Q Why did you elect not to?

22 A I was waiting to hear if we were going to
23 have a 13 or a 7.

24 Q And then what was your plan if you heard

1 that it was a 13?

2 A I'm sorry, what?

3 Q What were you going to do if you heard
4 that it was a 13?

5 A Ask him again, do we need to enter an
6 agreed order or -

7 Q And if he said no?

8 A I'd get an adverse action going.

9 Q After the bar date?

10 A Not after the bar date. I assumed he
11 would get back to me in time. Just like the first time he
12 said he would get back to me with an agreed order granting
13 relief from the limited stay in his April 2nd email, and he
14 did.

15 Q So your assumption was wrong?

16 A I didn't think he was lying to me.

17 Q Well, your assumption turned out to be
18 wrong?

19 A Yeah, it did. I assumed Mr. Rothschild
20 was being truthful when he said he would get back to me. I
21 was wrong.

22 Q So you think he was untruthful?

23 A Yes.

24 Q How so?

1 A Because he didn't get back to me.

2 Q You never contacted with him again?

3 A Yes, the next one is Exhibit 6, I
4 believe.

5 Q Do you recognize Exhibit 6 in front of
6 you?

7 A That is an email response to an email I
8 had sent to Mr. Rothschild.

9 Q Ms. Fecteau, will you read Mr.
10 Rothschild's email, just one line?

11 A He said, "Dear Ms. Fecteau, we met with
12 Ms. Hand last week and she intends to go forward with her
13 case. Your deadline to file a complaint has passed."

14 Q Would you characterize that as getting
15 back with you?

16 A After I contacted him.

17 Q So you prompted him but he got back with
18 you?

19 A After I had to contact him again.

20 Q Did Mr. Rothschild ever provide
21 confirmation to you that he did, in fact, have an agreement?

22 A Our course of conduct.

23 Q So on July 1st when you asked whether he
24 was going to enter an agreement, you never got anything back

1 saying, yes, we're entering an agreement?

2 A I never got anything saying no either.

3 Q Okay, you never got anything. In there
4 you talk about whether this is a good faith filing of a debt
5 and you said you'd filed a motion. Did you ever file that
6 motion ?

7 A No, I didn't want to get the Debtors in
8 trouble if we could simply get an agreed order and get out.

9 Q So you did it out of a courtesy to the
10 Debtors?

11 A That's correct.

12 Q Did you ever file a complaint to
13 determine the dischargeability of your client's debt?

14 A No, I have not. I'm waiting to see if we
15 can have an extension on the deadline.

16 Q Did you ever proffer an agreed order to
17 Mr. Rothschild?

18 A No, I did not.

19 Q Did you ever file for a motion to extend
20 the 4000C deadline before the deadline passed?

21 A No, I did not.

22 Q Was it in your control to do so?

23 A Yes, I guess so.

24 Q Is that consistent with your statement

1 earlier saying that yes, it absolutely was?

2 A I'm sorry, what statement?

3 Q Do you recognize Exhibit C in front of
4 you?

5 A Yes, I do.

6 Q And what is it?

7 A That's the brief I wrote.

8 Q Can you read the last paragraph to us
9 from your brief?

10 A Yes. I don't see the word "absolutely"
11 in there.

12 Q Would you read it to us?

13 A "Was it in the control of the Petitioner
14 Creditor to meet the deadline? There is no other answer but
15 yes. This is where the excusable neglect comes in. However,
16 it did not seem necessary to file anything when the Debtors'
17 attorney had already stated, 'There appears to be no reason
18 to litigate this further.' This omission was not mere
19 neglect though, it was due to trickery involved here. Filing
20 an exception for this debt not to be included in the
21 bankruptcy would have simply caused extra expense and
22 complication to this bankruptcy to file an exception where an
23 agreement had already been reached."

24 Q So you still believe there is trickery

1 involved by Mr. Rothschild?

2 A I do.

3 Q You believe it was his intent to deceive
4 you?

5 A Yes, I do.

6 Q The overlying characterization of your
7 motion is excusable neglect; is that correct? Of your
8 motion?

9 A Not the overlying.

10 Q But that's one -

11 A That's one. It's also equitable estoppel
12 and equitable tolling.

13 Q And whose neglect would it have been?

14 A It was due to the behavior of the
15 Debtors.

16 MS. KNIGHT: Your Honor, I think we're
17 getting into legal argument here instead of listening to
18 factual testimony. We're greatly in excess of Direct
19 Examination, Your Honor.

20 THE COURT: I think there were two
21 objections in there, Counsel. Do you want to respond to both
22 of them?

23 MR. WALDRON: I'll go back on track in
24 the first one. I don't respond to the first one. You can

1 sustain the objection on the first. And in the second, I'm
2 cross-examining. I don't think I have to stay within her
3 Direct Examination.

4 MS. KNIGHT: Actually, Your Honor, I
5 believe you do.

6 THE COURT: Actually, it's a theoretical
7 requirement that no trial court strictly enforces in bench
8 trials. I don't think you're outside of the scope so I'll
9 overrule the second objection. Go ahead.

10 BY MR. WALDRON:

11 Q If the Court doesn't find that these
12 emails and letter exchanges creates an agreement, is there a
13 second one that you've entered into?

14 A No, there is not.

15 Q So you do admit that you had the ability
16 to file a complaint before July 8th?

17 A The ability?

18 MS. KNIGHT: Objection. It's been asked
19 and answered. She's already admitted to that two or three
20 times now.

21 THE COURT: I think we have established
22 that she could have.

23 BY MR. WALDRON:

24 Q Ms. Fecteau, did you have the ability to

1 file a motion to extend before July 8th?

2 A The ability?

3 MS. KNIGHT: Again, Your Honor, it's been
4 asked and answered. He's already asked this question and
5 she's already answered.

6 MR. WALDRON: Your Honor, I think I've
7 only asked whether she had the ability to file a complaint.
8 This is a separate issue of whether she could have filed a
9 motion to extend.

10 THE COURT: I think we've covered both of
11 those now.

12 MR. WALDRON: Nothing further, Your
13 Honor.

14 THE COURT: Redirect, if any?

15 MS. KNIGHT: I will try to be brief, Your
16 Honor.

17 REDIRECT EXAMINATION

18 BY MS. KNIGHT:

19 Q Ms. Fecteau, on cross-examination,
20 Counsel asked you when you had any evidence that Mr.
21 Rothschild met with his clients prior to the bar date of July
22 8, 2012. I'd like to refer you to what's previously been
23 admitted as Exhibit 6.

24 MS. KNIGHT: May I approach, Your Honor?

1 THE COURT: Sure.

2 THE WITNESS: You said 2012, it was 2013.

3 MS. KNIGHT: I said 2012? I'm sorry, I
4 meant 2013.

5 BY MS. KNIGHT:

6 Q I'd like to refer you to the initial
7 email that was sent on July 12th. Who initiated that email?

8 A I did.

9 Q And was this the first piece of
10 communication you received from Mr. Rothschild since his July
11 1 email when he said he would meet with his client and get
12 back with you?

13 A Yes.

14 Q And did you contact him or did he contact
15 you?

16 A I contacted him.

17 Q And what was his response?

18 A Suddenly he let me know that he had met
19 with Ms. Hand.

20 Q And when did he meet with Ms. Hand?

21 A He said last week but there was no
22 specific date given.

23 Q But the previous week to July 12th would
24 be July 1st through July 5th?

1 A That's correct.

2 Q And that would have been prior to the
3 July 8th bar date?

4 A It would have.

5 Q Mr. Waldron asked you why you didn't
6 enter into an agreement back in May of 2013 when the parties
7 met and discussed dischargeability of debt after the meeting
8 of creditors, and you responded you were waiting on a number,
9 what does that mean?

10 A Yes, we were still waiting to get back
11 before the trial court judge for her to make post-trial
12 determinations. She had to hear something about punitive
13 damages, attorneys' fees, prejudgment interest and costs, and
14 then we had to have a final judgment entered. So that was
15 going to change the number.

16 Q So no final judgment had been entered in
17 the state court litigation at that time?

18 A Correct.

19 Q And that's why the parties entered into
20 an agreed order allowing the state court litigation to go
21 forward to liquidate the damages claim?

22 A That is correct.

23 Q And that judgment setting the damages
24 amount and making a specific finding of fraud was entered on

1 June 24, 2013, right?

2 A Right. I believe it was adjudicated as
3 fraud at the Court of Appeals and this was the entry of the
4 judgment.

5 Q So this was a final judgment that was
6 consistent with the Court of Appeals Opinion?

7 A Right.

8 Q So could the parties have entered into an
9 order prior to June 24, 2013?

10 A It wouldn't have had the amount included
11 if it had. There would be no way to know the amount.

12 Q Again, Ms. Fecteau, was there any other
13 reason, other than the Debtors' previous communication that
14 the debt was non-disputed, that no litigation was necessary,
15 that they would likely enter into an agreed order, that we
16 needed to wait till the judgment was final, that the case
17 might be dismissed or converted because Ms. Hand couldn't
18 continue - other than those statements, was there any other
19 reason or any other evidence you relied upon in making the
20 decision not to file a lawsuit?

21 A That pretty much covers it.

22 MS. KNIGHT: Thank you, Your Honor. Pass
23 the witness.

24 THE COURT: Recross?

1 REXCROSS-EXAMINATION

2 BY MR. WALDRON:

3 Q Ms. Fecteau, are you aware of any
4 prohibition against agreements as to non-dischargeability of
5 debts before a claim has been liquidated?

6 A I am not, other than the fact that when I
7 spoke with Mr. Rothschild at the meeting of creditors, he
8 said wait till we got our judgment.

9 MR. WALDRON: Nothing further, Your
10 Honor.

11 THE COURT: You can step down, Ms.
12 Fecteau. Thank you.

13 (Witness stood aside)

14 THE COURT: Call your next witness.

15 MS. KNIGHT: That concludes the Movant's
16 proof, Your Honor.

17 THE COURT: All right, Mr. Waldron, your
18 evidence.

19 MR. WALDRON: Your Honor, I call Edgar
20 Rothschild to the stand.

21 THE COURT: All right.

22 MR. WALDRON: I'd also ask that the Rule
23 be reciprocal and that witnesses remain out of the courtroom.

24 THE COURT: Let me ask Ms. Knight if she

1 expects to use Ms. Fecteau again.

2 MS. KNIGHT: No, Your Honor, I do not.

3 THE COURT: All right. Ms. Fecteau can
4 remain in the room but will not be available as a witness.

5 (Witness sworn)

6 CLERK: State your name.

7 THE WITNESS: Edgar Rothschild.

8 THEREUPON came

9 E D G A R R O T H S C H I L D

10 who, having been first duly sworn according to law, testified
11 as follows:

12 DIRECT EXAMINATION

13 BY MR. WALDRON:

14 Q Good Morning, Mr. Rothschild. What is
15 your relation to Linda Sue Hand and the now deceased Randal
16 Hand?

17 A They're my clients in Chapter 13.

18 Q Do you recognize the names Latif
19 Abdulsayed and Afaf Hanna as creditors in that case?

20 A Yes.

21 Q Do you recall being contacted by an
22 attorney representing the creditors?

23 A Yes.

24 Q Who was that attorney?

1 A That was Kristin Fecteau.

2 Q Mr. Rothschild, do you recognize the
3 email on the screen in front of you?

4 A Yes, that's my initial email to Ms.
5 Fecteau after receiving a voice mail from her.

6 Q Is it in response to her letter?

7 A Yes.

8 MR. WALDON: I'd like the Court to know
9 that he's looking at Exhibit 2.

10 BY MR. WALDON:

11 Q What did you mean when you stated, "We
12 also will likely enter an agreement that this debt is non-
13 dischargeable."

14 A I was stating in the conjunctive. I
15 would discuss that with my clients and if we were presented
16 with an option of either agreeing or face a complaint that we
17 would not litigate that.

18 Q Were you faced with that?

19 A I'm sorry?

20 Q Were you faced with that position? Did
21 you receive a complaint?

22 A No.

23 Q Did you receive an agreed order?

24 A No.

1 Q There is mention of another matter within
2 that same email in front of you, a possible agreed order for
3 limited stay relief.

4 A Correct.

5 Q Did that agreement ever materialize?

6 A Yes.

7 Q How so?

8 A I've forgotten if we prepared or Ms.
9 Fecteau prepared an agreed order that granted limited stay
10 relief to allow her to comply with the ruling by Justice
11 Clement that referred this case back to Circuit Court.

12 Q So it's fair to say that two possible
13 agreements were discussed in that email and one materialized?

14 A Correct.

15 Q Which one was that?

16 A The limited stay relief.

17 Q And which agreement did not materialize?

18 A There was no agreement, we've already
19 discharged (inaudible) the debt.

20 MS. KNIGHT: Your Honor, I'm having a
21 hard time hearing Mr. Rothschild's testimony.

22 THE COURT: Mr. Rothschild, if you would,
23 lean into the microphone. We're having microphone problems
24 today.

1 BY MR. WALDRON:

2 Q Do you specifically recall the Hands
3 meeting of creditors on May 7, 2013?

4 A I remember it, yes.

5 Q Do you recall Ms. Fecteau being present?

6 A Yes, she was present.

7 Q Do you recall making any type of
8 agreement with Ms. Fecteau on that date, May 7th?

9 A I don't know that there was a specific
10 agreement. I had a number of cases that day and I was
11 running in and out so we had a brief discussion about it,
12 pretty much along the lines of this email.

13 Q Do you recall receiving any type of
14 follow-up from Ms. Fecteau after that meeting of creditors?

15 A No.

16 Q When did you next hear from Ms. Fecteau?

17 A It was quite sometime later; a couple of
18 months later, I believe.

19 Q Do you recognize what's in front of you
20 right now?

21 A Yes, I recognize that letter.

22 MR. WALDRON: I'd like the Court to note
23 that we're looking at Exhibit 3.

24 BY MR. WALDRON:

1 Q Is this the letter you received from Ms.
2 Fecteau?

3 A Yes.

4 Q How did you interpret this letter?

5 A Well, this was received after Mr. Hand
6 died and I responded to Ms. Fecteau about what had occurred.

7 Q Is that response in front of you?

8 A Yes.

9 MR. WALDRON: I'd like the Court to note
10 we're looking at Exhibit 5.

11 BY MR. WALDRON:

12 Q In Exhibit 5 you state that you'll meet
13 with your client.

14 A That's correct.

15 Q Did you ultimately meet with your client?

16 A Yes.

17 Q Do you remember when?

18 A It was a couple of weeks later, I
19 believe. She had made a couple of appointments and she was
20 busy and in grief and we had trouble getting her to come in.
21 She had made a couple of appointments and canceled out but I
22 don't particularly remember the date that she showed up but a
23 few days after this.

24 Q So you don't specifically remember

1 meeting with her within the time frame of one week?

2 A I don't recall the exact date but it was
3 a few days later.

4 Q At the time you wrote this email was it
5 your belief that it would be unlikely for Ms. Hand to
6 continue?

7 A At that time I really didn't know how she
8 was going to do it because she was telling me she was having
9 a lot of emotional issues with the death of her husband
10 because she was facing running the market and she was having
11 trouble with it.

12 Q Did you intend in any way to be deceiving
13 to Ms. Fecteau?

14 A No, I told her the absolute truth.

15 Q After your July 1st email response to Ms.
16 Fecteau, when was the next time the two of you communicated?

17 A I believe it was a couple weeks later. I
18 don't have the exact date in front of me.

19 Q Do you have the next email in front of
20 you?

21 A Yes.

22 Q Was that the next communication with Ms.
23 Fecteau?

24 A I believe so.

1 Q In this email dated July 12th, you and
2 Ms. Fecteau both recognize that the bar deadline is, in fact,
3 passed?

4 A Correct.

5 Q Other than the limited stay relief
6 agreement, did you ever reach an agreement with Ms. Fecteau
7 in the Hand case?

8 A No, there was no agreement ever reached.

9 MR. WALDRON: No further questions of
10 this witness, Your Honor.

11 THE COURT: Cross-examine.

12 CROSS-EXAMINATION

13 BY MS. KNIGHT:

14 Q Good Morning, Mr. Rothschild.

15 A Good Morning.

16 Q Mr. Rothschild, you were aware when the
17 Debtors filed their Bankruptcy Case that there was an ongoing
18 litigation in state court relating to the debt that was owed
19 to the Movants, in fact, you reference that in your email of
20 April 2nd, that you had read Justice Clement's Opinion.

21 A That's right.

22 Q And it was your opinion at that point, as
23 of April 2, 2013, that the debt was non-dischargeable due to
24 a specific finding of fraud by the Appellate Court?

1 A That's correct.

2 Q And it was also your opinion that because
3 of that the debt was non-dischargeable and there was no need
4 for further litigation in Bankruptcy Court; is that right?

5 A I put it in the subjunctive. If we were
6 presented with that option, we would not litigate that issue
7 because it was clear from Justice Clement's finding that
8 there was fraud.

9 Q Mr. Rothschild, so it's now your
10 testimony that you included language in your email that you
11 would not contest it if it were litigated?

12 A The email speaks for itself. We wouldn't
13 contest litigation, that's correct.

14 Q So, if your email reads -

15 A And we would, in fact, if we were
16 presented with that, we would stipulate that it was non-
17 dischargeable.

18 Q But that's not in your email, is it?
19 Your email reads, "There appears to be no reason to litigate
20 this further in Bankruptcy Court." Is that right?

21 A That's correct.

22 Q Your email does not say if an adversary
23 proceeding is filed, we will not contest it?

24 A The email says what it says, that's

1 right.

2 Q Mr. Rothschild, as you testified a few
3 minutes ago, you recall that Ms. Fecteau was present at the
4 341 Meeting on May 7, 2013.

5 A Right.

6 Q And you recall that you had a
7 conversation with Ms. Fecteau regarding the debt owed to the
8 Movants after the 341 Meeting.

9 A Yes, ma'am, we did.

10 Q And if Ms. Fecteau testified under oath
11 that you stated that you would follow up with her after the
12 judgment was final, because doing so beforehand was
13 premature, would you agree with that?

14 A Yes.

15 Q Mr. Rothschild, you referenced a moment
16 ago your meeting with your client after the July 1
17 correspondence.

18 A Correct.

19 Q And you indicated that you met with her a
20 few days after that.

21 A I don't remember the exact date but that
22 would have been sometime between July 1 and July 12th. I'd
23 have to look on my calendar.

24 Q If your email indicated, as it does, on

1 July 12th, that you met with Ms. Hand the week prior to July
2 12th, that statement would have been accurate at the time you
3 typed the email, would it not?

4 A That's right. I think I met with her on
5 Friday the 5th. That would be my best estimate.

6 Q Which was prior to the bar deadline.

7 A Correct.

8 Q And you were also aware that the bar
9 deadline was July 8, 2013, as Debtor's Counsel?

10 A Correct.

11 Q And you indicated to Ms. Fecteau on July
12 1 that you would follow up with her after you met with Ms.
13 Hand, but you did not do that?

14 A That's right.

15 Q And you never indicated to her that the
16 parties' positions had changed?

17 A I never indicated to her -

18 Q You never communicated to her that the
19 Debtor now would contest the dischargeability of the debt?

20 A I never said that or didn't say that.

21 That never came up. The Debtor, as far as I know, the Debtor
22 never contested whether or not the debt was dischargeable.
23 That wasn't an issue.

24 Q Did you ever notify Ms. Fecteau that your

1 agreement to enter into an order excepting the debt from
2 discharge was conditioned upon the filing of an adversary
3 proceeding?

4 A I don't have to wave a red flag in front
5 of my opposing counsel and tell them what's going on or if
6 their deadline is coming up. I expect them to know that.

7 Q Mr. Rothschild, you indicated to her that
8 there was no need to litigate this matter in Bankruptcy
9 Court. If that position changed, didn't you have an
10 obligation -

11 A That position didn't change.

12 THE COURT: Just a minute. Don't talk
13 over each other, if you would. Finish the question.

14 BY MS. KNIGHT:

15 Q Did you ever notify Ms. Fecteau that it
16 was now necessary to litigate this issue in Bankruptcy Court?

17 A I did not notify Ms. Fecteau that it was
18 now necessary to litigate it in Bankruptcy Court.

19 MS. KNIGHT: I'll pass the witness, Your
20 Honor.

21 THE COURT: Redirect, if any.

22 REDIRECT EXAMINATION

23 BY MR. WALDRON:

24 Q Mr. Rothschild, in your email when you

1 state that it was likely, we would likely also enter into an
2 agreed order as there is no need to litigate this further in
3 Bankruptcy Court, you still expected that she would either
4 have to proffer an agreement -

5 A I had expected that either she was going
6 to proffer an agreement with the follow-up that if we didn't
7 enter into an agreement that she would file the complaint. I
8 had expected to receive one and I had so advised my client
9 that we'd expect to get that.

10 Q And your client was never in a position
11 where they had to dispute the dischargeability of this debt?

12 A No, we never disputed that.

13 Q If there was a complaint or if there was
14 an agreed order proffered, would you have sat down with Ms.
15 Hand to figure out whether or not she had a valid defense to
16 it?

17 A We had agreed that she didn't have a
18 valid defense to it.

19 MR. WALDRON: Nothing further, Your
20 Honor.

21 THE COURT: Recross?

22 MS. KNIGHT: No, Your Honor.

23 THE COURT: You can step down, Mr.

24 Rothschild. Thank you. Mr. Waldron, call your next witness.

1 MR. WALDRON: I have no further evidence,
2 Your Honor.

3 THE COURT: All right, Ms. Knight, back
4 to you. Do you have any rebuttal evidence?

5 MS. KNIGHT: I'm sorry, I didn't hear
6 what Mr. Waldron said because of saw. No, Your Honor, I
7 think that concludes the proof.

8 THE COURT: That will close the proof
9 then. All right, ready for argument.

10 MS. KNIGHT: Your Honor, the Movants are
11 before the Court asking the Court to exercise its equitable
12 powers to extend the filing deadline for a complaint to
13 determine dischargeability of debt.

14 In this case, as the facts have
15 demonstrated, there was cause (inaudible) to do so. The
16 Movants diligently pursued their rights in the bankruptcy
17 case. The Debtors were on notice before the case was even
18 filed -

19 THE COURT: Let me stop you for a second.
20 You are, of course, acutely aware of the complete disconnect
21 between the motion that was filed on the 26th of July and the
22 brief that you filed yesterday. You get the obvious
23 disconnect when the motion for an extension of time was filed
24 by Ms. Fecteau in July. On July 26th she filed a Rule 9006

1 Motion.

2 MS. KNIGHT: Yes, Your Honor.

3 THE COURT: Which I take it you have
4 conceded is not an available avenue of relief in this case,
5 is it?

6 MS. KNIGHT: Well, Your Honor, under the
7 Maughan Opinion, the Court can use their equitable powers,
8 together with 9006 and 4007 to extend the filing deadline.

9 THE COURT: Read with or read in
10 opposition to? It's the fact that 9006 isn't available that
11 gives us Maughan in the first place, isn't it?

12 MS. KNIGHT: Well, Your Honor, what
13 distinguishes it from being a jurisdictional statute and
14 becomes a statute of limitations?

15 THE COURT: All right, the point being
16 that your client, on behalf of the Creditors, you have now
17 changed the legal theory completely. This is not an argument
18 that there is relief available under the Federal Rules of
19 Bankruptcy Procedure, as is argued in the motion. It is,
20 instead, an argument that the Rule is not applicable and
21 equitable tolling is.

22 MS. KNIGHT: Well, Your Honor, I think
23 what the Maughan court said is the Court has to read all
24 those things together, not only 9006 and 4007, but in

1 conjunction with 105. And I think, Your Honor, the proof
2 demonstrates there is entitlement to relief. And I guess I
3 can move to orally amend the pleadings to conform to the
4 proof but the proof demonstrates that there is cause, if the
5 Court reads the statutes in conjunction with the rules to
6 extend the filing deadline.

7 THE COURT: This wasn't an equitable
8 tolling case until someone read Maughan; isn't that what
9 really happened here?

10 MS. KNIGHT: I believe it was the first
11 time maybe that that was raised may have been at the hearing
12 last week. I'm not sure, Your Honor. I was retained on
13 Friday so -

14 THE COURT: Fair enough.

15 MS. KNIGHT: But, Your Honor, I think the
16 proof demonstrates that the Movants have grounds for relief
17 and I think that the briefs demonstrate that there are
18 grounds for relief. And, Your Honor, if I need to orally
19 move to amend the pleadings to conform to the proof, I can
20 certainly do that.

21 THE COURT: It's just - it's the
22 signature of the problem in this case. It's what this case
23 is about, that there is no citation to Maughan in the motion
24 or brief that was filed until yesterday. Isn't that the

1 problem here? This whole hearing is about the fact that
2 either because of inexperience or lack of familiarity with
3 Bankruptcy, the actual issue in this case wasn't even
4 identified in any paper filed by these creditors by Ms.
5 Fecteau; isn't that right?

6 MS. KNIGHT: Well, no, Your Honor, I
7 disagree because in the motion that was filed, the Movants
8 did raise the issue of detrimental reliance upon the
9 statements and representations made by the Debtors. I
10 believe there is a recitation of factually what occurred and
11 maybe she didn't cite to the Maughan opinion but the theories
12 of law are the same, that the Movant should not be barred
13 from filing a dischargeability action when they pursued their
14 rights and relied upon the representation of the Debtors that
15 litigation would not be necessary, so there was no need to
16 file a complaint. And that's the only reason a complaint was
17 not filed. If the Movants had known a complaint needed to be
18 filed or the issue would have been litigated in Bankruptcy
19 Court, they would have filed a complaint.

20 Under the Debtors' argument, the Debtors
21 are asking the Court to compel creditors to file a
22 dischargeability complaint, despite the fact the parties are
23 in agreement that a debt is non-dischargeable -

24 THE COURT: Ms. Knight, that's exactly

1 what happens. I get 1000 of those complaints a year. That's
2 exactly what happens when you don't get the agreed order and
3 you haven't protected your client. They either file a motion
4 for an extension, an agreed order for an extension, or a
5 complaint to determine dischargeability before July 8th.

6 MS. KNIGHT: Yes, Your Honor, but the
7 Debtors indicated there was no need to do that.

8 THE COURT: Where is the evidence in this
9 record that Ms. Fecteau was even aware of the July 8
10 deadline, other than the notice itself, where is the
11 evidence?

12 MS. KNIGHT: I believe she testified
13 earlier that she was aware of that.

14 THE COURT: There's not even a mention of
15 it on July 12th, four days after it's over, is there?

16 MS. KNIGHT: Well, no, there's no mention
17 specifically of that date but they did refer to their
18 previous correspondence and communications whereby every
19 other communication on behalf of the Debtor had been that it
20 was uncontested and there was no reason to litigate.

21 THE COURT: What explanation is there for
22 Ms. Fecteau's failure to communicate or take some other
23 action on Friday, July 5th?

24 MS. KNIGHT: She relied on Mr.

1 Rothschild's previous representations that there was no
2 reason to litigate the matter, that it was non-dischargeable
3 but they would enter into an agreed order and the case would
4 possibly be dismissed or converted, at which time that would
5 be completely unnecessary as well, and he would follow up
6 with her after he met with his client, which he didn't do.

7 THE COURT: What would have been
8 reasonable diligence during that week before July 8th on
9 behalf of the Creditors?

10 MS. KNIGHT: Well, I suppose, Your Honor,
11 in a perfect world that she could have followed up with him
12 on July 8th. But, Your Honor, she relied upon his previous
13 representations that there was no reason to litigate this
14 matter and that he would follow up with her on whether or not
15 the case was going to be dismissed or converted. Because if
16 the case had been dismissed or converted, any agreed order or
17 complaint that was filed would be moot.

18 THE COURT: If the standard is reasonable
19 diligence expected of Counsel in like or similar
20 circumstances, wouldn't July 8th have been on Ms. Fecteau's
21 calendar with a big red circle around it, as the deadline for
22 filing complaints in the Hand matter?

23 MS. KNIGHT: Yes, Your Honor, and she
24 admits that she was aware of that date but she relied upon

1 the representations made by the Debtor in not filing a
2 complaint. The Movants and Ms. Fecteau did not think it was
3 necessary to initiate litigation and waste the parties'
4 resources and the Court's resources by instituting litigation
5 on a matter that had been agreed that it was non-
6 dischargeable. It was just a matter of getting the pleading
7 filed. All that was left to do was enter into an agreed
8 order. They couldn't do that until the final judgment came
9 down on July 24th. She said that to Mr. Rothschild and he
10 said, "Let me talk to my client. I don't think she's going
11 to be able to keep this case going anyway, and I'll get back
12 to you." He didn't do that before July 8th and she contacted
13 him again and he said, "It's too late." She relied upon his
14 representations in not filing a complaint.

15 Your Honor, I'm sure if the Movants had
16 filed a complaint we would have gotten communication from the
17 Debtor saying why did you file a complaint? We told you we
18 would agree to this. They said it was not necessary, it was
19 undisputed, there was no reason to litigate it. She
20 reasonably relied upon those statements in deciding not to
21 file a complaint against the Debtors.

22 THE COURT: The reason to file the
23 complaint of a motion for extension of time or an agreed
24 order extending the time is to avoid this, where we are right

1 now. It's like a statute of limitations. You file your
2 complaint, even if there's no doubt you're going to win, you
3 file it before the statute runs because you don't want to
4 take a chance on having to claw your way back into court.
5 That's what diligence of counsel is about.

6 It brings me to the very question that we
7 started with, or at least we toyed with it. What is the
8 diligence standard under Maughan? Is it a reasonable
9 attorney standard?

10 MS. KNIGHT: Well, Your Honor, in Maughan
11 the Court extended the deadline because the creditor didn't
12 file a complaint because they were waiting for documents to
13 be produced by the Debtor. And they relied upon the Debtor's
14 statement that the Debtor would produce those documents and
15 that's why they didn't file the complaint.

16 THE COURT: Well, actually, there was a
17 Court Order to file the documents and the Debtor didn't
18 comply with the Court Order. We don't have a Court Order.

19 MS. KNIGHT: No, Your Honor, we do not.
20 We have communication between counsel.

21 THE COURT: Back up to my question. My
22 question is this. The word "diligence" is used in the third
23 standard of the five factors that Maughan requires me to
24 apply. Now, I want you to define the word "diligence" for

1 me.

2 MS. KNIGHT: Diligence would to pursue
3 the client's interests in the potential cause of action,
4 which she did by continuing to communicate with Mr.
5 Rothschild throughout the course of the case, and attempted
6 to enter into an agreement once the final judgment was
7 entered. Until that time they couldn't enter into an agreed
8 order as to dischargeability of the debt because it hadn't
9 been finalized by a state court. And when she tried to do
10 that on July 1, Mr. Rothschild responded that he didn't think
11 the case was going to continue, at which point that agreement
12 would be unnecessary.

13 THE COURT: Is it the diligence of a lay
14 person or the diligence of an attorney?

15 MS. KNIGHT: Well, I think in the Maughan
16 Case it's the diligence of the attorney but, Your Honor, Mr.
17 Waldron referred me to a US Supreme Court Case where the
18 Court refers to the diligence of a party, a pro se party. So
19 I think it depends on the factors. In this case, obviously,
20 an attorney was involved. So I mean the diligence of
21 counsel, Your Honor, pursuing the Movant's rights, and we
22 submit that she was diligent in following up with Mr.
23 Rothschild on finalizing the terms of the agreement to
24 exclude the debt from discharge.

1 THE COURT: What, in your view, was Mr.
2 Rothschild's obligation between July 1st and July 12th?

3 MS. KNIGHT: To respond to Movants and
4 indicate whether his client had decided to dismiss or
5 convert, or whether they could go ahead and enter into an
6 agreed order accepting the debt from discharge, pursuant to
7 their prior conversations. If the Debtor's position changed
8 and they now thought it was necessary to litigate this
9 matter, that should have been communicated to Ms. Fecteau
10 after Mr. Rothschild met with his client. And it was not; it
11 was never communicated to her. The only time they ever
12 indicated that this matter would need to be litigated was
13 after the bar date passed.

14 THE COURT: Circumstances changed, did
15 they not, between April 2nd and July 12th, in a very material
16 way.

17 MS. KNIGHT: Well, Your Honor, two things
18 happened. One, the final judgment was entered by the trial
19 court on remand, and Mr. Hand passed away. But doesn't
20 Counsel have an obligation to notify opposing counsel if they
21 have asserted one position in a case and that position
22 changes?

23 THE COURT: You would impose on Mr.
24 Rothschild an obligation to reveal a change in his litigation

1 strategy to his opposing counsel?

2 MS. KNIGHT: No, Your Honor, but if he
3 had communicated to the opposing counsel that there was no
4 need to file a complaint, there was no need to litigate this,
5 we agree that it's non-dischargeable, and that changed, yes,
6 he should have communicated that to Counsel, that you need to
7 file a complaint. We are no longer going to agree to enter
8 into an order excluding this debt from discharge. Otherwise,
9 they're going to have a complaint filed in every case, even
10 where there's an agreement between the parties.

11 THE COURT: Well, he did communicate that
12 on the 12th. Your position has to be that he had an
13 obligation to inform Ms. Fecteau of the statute of
14 limitations that she was unaware of, apparently.

15 MS. KNIGHT: No, Your Honor, that's not
16 our position. Our position is that he had an obligation to
17 let her know and she needed to file a complaint prior to the
18 discharge deadline, and she did not.

19 THE COURT: And so being aware of the
20 discharge deadline, the bar date, was Mr. Rothschild's
21 obligation but not Ms. Fecteau's?

22 MS. KNIGHT: No, Your Honor, that's not
23 our position. Our position is that he should have notified
24 Ms. Fecteau prior to the bar date that it was now necessary

1 to litigate the dischargeability of this debt, because prior
2 -

3 THE COURT: Well, then what was Ms.
4 Fecteau's obligation prior to July 8th bar date?

5 MS. KNIGHT: Her obligation was to have
6 an agreement with Debtor's Counsel as to dischargeability of
7 the debt, which she reasonably believes she did, or file a
8 complaint. But she thought she had an agreement with Mr.
9 Rothschild and that filing a complaint was not necessary,
10 which is why she didn't do that. Otherwise, she would have.

11 THE COURT: So, Mr. Rothschild's email on
12 July 1, telling Ms. Fecteau that his client had died and that
13 the whole complexion of the case had changed, wasn't material
14 to her belief that she had a deal and didn't need to do
15 something before July 8th?

16 MS. KNIGHT: Your Honor, he didn't
17 indicate that that was going to change the previous
18 discussions regarding dischargeability of the debt. He said
19 that he didn't think that she could continue to run the
20 market and fund the plan. And when he met with her he would
21 get back to Ms. Fecteau.

22 THE COURT: And what would reasonable
23 diligence be on behalf of creditors if everything he said in
24 his July 1 email is true? Mr. Hand died. I'm meeting with

1 Ms. Hand to discuss her options. It's unlikely she can
2 continue funding the plan.

3 MS. KNIGHT: Well, I guess we could have
4 instituted all kinds of litigation based upon those
5 representations.

6 THE COURT: Well, what is diligence?
7 That's my job and I want help. What would diligence mean, in
8 light of that email, with seven days to go before the bar
9 date?

10 MS. KNIGHT: Well, Your Honor, in
11 hindsight, I guess she should have followed up with Mr.
12 Rothschild on the 8th to see what the decision was after
13 their meeting. But she relied upon his statement and his
14 representation that he would follow up with her after he met
15 with the client.

16 THE COURT: Ms. Fecteau said that her
17 focus at that point was whether this was a Chapter 7 or a
18 Chapter 13, and I don't understand why that would be relevant
19 in any way. Can you explain that to me?

20 MS. KNIGHT: I think what she was
21 referring to is whether the 13 was going to be dismissed or
22 converted and how that would impact the necessity for
23 entering into an agreed order excepting the debt from
24 discharge.

1 THE COURT: How would conversion affect
2 that?

3 MS. KNIGHT: Conversion to a Chapter 7,
4 Your Honor, wouldn't all the deadlines revert back to the
5 conversion?

6 THE COURT: Not if the deadline already
7 ran during the 13.

8 MS. KNIGHT: This was prior to the
9 deadline. This was July 1.

10 THE COURT: That's why I'm asking,
11 because that would make July 8th even more important, without
12 what regard to what chapter the case ends up in. I guess
13 you'd have to agree with me that there's no evidence that Ms.
14 Fecteau, on July 1 or even until July 12, had any idea that
15 July 8 was a significant date. I don't see any evidence at
16 all. The issue is whether or not that constitutes diligence.

17 MS. KNIGHT: I think she testified
18 earlier, when Mr. Waldron directed her to the noticing, in
19 the Bankruptcy Court, of filing, I believe he directed her to
20 the discharge deadline and she testified that she was aware
21 of the bar date of July 8, 2013. I believe that's what
22 happened.

23 THE COURT: I heard her say, "Yeah,
24 that's what it says." I'm just making the point that I don't

1 see any evidence. If diligence is appreciating the
2 importance of the July 8 date, I'm asking you to show me
3 where the evidence is of her diligence with respect to the
4 July 8th date.

5 MS. KNIGHT: Your Honor, she continued to
6 pursue the formalization of their agreement between the
7 parties prior to the July 8th -

8 THE COURT: On July 1st and on July 12th.

9 MS. KNIGHT: Yes, Your Honor.

10 THE COURT: What happened in between?

11 MS. KNIGHT: Mr. Rothschild met with his
12 client and they determined that she would continue funding
13 the Chapter 13 plan, and there was no other communication.

14 THE COURT: Okay, thank you. Mr.
15 Waldron.

16 MR. WALDRON: Your Honor, this is an
17 excusable neglect case. They've argued excusable neglect the
18 whole time and it might have a compelling argument to meet
19 the excusable neglect standard. The problem they have on the
20 other side is that Taylor, the Supreme Court in Taylor
21 foreclosed excusable neglect in the rules, simply saying that
22 9006 B 3 was -

23 THE COURT: Mr. Waldron, don't be
24 confused. This is not an excusable neglect case.

1 MR. WALDRON: But they're basically
2 trying to fit excusable neglect into equitable tolling and
3 equitable estoppel and it just doesn't fit. There's the
4 Maughan factors and there is a Supreme Court case in three
5 separate cases since then, two Bankruptcy level and one
6 District level, that has said that the Supreme Court's
7 equitable tolling test has superseded the Maughan test. So I
8 was going to address both because I'm not sure what the Court
9 would apply here.

10 But under the Maughan or the Andrews
11 test, the first two factors -

12 THE COURT: Actually, let me make one
13 thing clear so you won't get lost in it. I do not believe it
14 is a correct statement that the excusable neglect standard
15 has replaced the equitable tolling discussion in Maughan. I
16 do not believe that's true. I know of no Supreme Court case
17 that has said that.

18 MR. WALDRON: That's not what I mean,
19 Your Honor.

20 THE COURT: Okay, that's what I thought
21 you said.

22 MR. WALDRON: I'm sorry. I misspoke if I
23 said excusable neglect. There's an equitable tolling case
24 from the Supreme Court. It's the United States versus - I'm

1 sorry, it is the Pace versus the Guglielmo (phonetic) 544 US
2 408. And it's completely unrelated to Bankruptcy but very
3 related to equitable tolling statutes of limitations. And it
4 came in, it's a 2005 case, after Maughan. And I know of
5 three, there's the Eastern District of Pennsylvania, there's
6 the Western District of Kentucky, Pennsylvania's Bankruptcy
7 level, Western District of Kentucky District Court, and the
8 Eastern District of Michigan Bankruptcy Court have all said
9 that this equitable tolling test supersedes the Maughan test.
10 So I want to address them both.

11 And that test under the Supreme Court was
12 generally a litigant seeking equitable tolling bears the
13 burden of establishing two elements, that he has been
14 pursuing his rights diligently, and that some extraordinary
15 circumstances stood in his way. If the Court employed that
16 test, I don't believe they'd pass. And I still don't believe
17 they would pass under the Maughan test of equitable tolling.

18 It comes down to diligence. And it
19 doesn't appear that Ms. Fecteau was cognizant of the July 8th
20 deadline and was diligent in doing so. I believe she has a
21 duty to her clients to know of that date and to act
22 accordingly, either secure an agreement that is unambiguous
23 or file a complaint. She was aware that circumstances had
24 changed. Perhaps she should have filed a complaint. But

1 even if she didn't do either of those, 4007 D in the last two
2 sentences says - talks about filing a motion for cause. She
3 certainly might have had cause to extend the bar deadline and
4 that would have been diligence. She didn't do that. She
5 didn't do any of the things that would have been diligent,
6 proffer an agreed order, file a complaint, secure an
7 agreement or file a motion to extend the bar deadline.

8 And I don't think equitable tolling -
9 equitable estoppel requires in there, the supplemental
10 memorandum, equitable estoppel requires misrepresentation by
11 the party who estoppel is asserted. Reasonable reliance on
12 the misrepresentation by the party asserting estoppel and
13 detriment to the party asserting estoppel. In this case, her
14 reliance, in her own testimony, could be classified as an
15 assumption that they couldn't, based on Mr. Rothschild's
16 statement, she assumed that they would file Chapter 7 or
17 assumed that the case would be dismissed.

18 Apparently she wasn't aware of the July 8
19 deadline or abandoned it. Neither of those are diligent.

20 THE COURT: Mr. Rothschild has testified
21 honestly that there never was a dispute about the
22 dischargeability of debt in this case. It was purely about
23 whether something would happen then before July 8th?

24 MR. WALDRON: I think the client has a

1 duty, or the creditor has a duty, established by the rules,
2 to file the complaint or their fraud debt would be
3 discharged. 523 almost states so much. If you don't timely
4 file a proof of claim or you don't timely file a complaint
5 for 523 A 2, A 4 or A 6 debt, then it's discharged.

6 So I just think they have missed the
7 chance here. And excusable neglect isn't enough. It doesn't
8 meet the factors of equitable tolling. There was no
9 complaint filed. I think the best they can do is hope that
10 Ms. Hand is unsuccessful in her endeavors in Chapter 13.
11 Ms. Hand, based on the rules, is entitled to a discharge of
12 that debt, should she complete her plan.

13 THE COURT: On your theory of this case,
14 is there anything to stop Ms. Hand from converting to Chapter
15 13 and discharging this debt without paying anything?

16 MR. WALDRON: I haven't researched it,
17 Your Honor, but I would if she elected to convert. Right now
18 she wants to save her things in Chapter 13. She would lose
19 some things in Chapter 7 so we haven't discussed that.

20 THE COURT: Mr. Waldron, I think I've
21 heard enough from you. Thank you.

22 I want to go back to you, Ms. Knight,
23 with a question. If Mr. Waldron is right that, in addition
24 to the diligence consideration that we've already discussed

1 there is also a requirement that I find extraordinary
2 circumstance, what is the extraordinary circumstance that
3 would justify the failure to file a complaint of a motion to
4 extend before July 8th?

5 MS. KNIGHT: First of all, I think he's
6 relying on the Pace versus DiGuglielmo Opinion that he cited
7 earlier, which is a US Supreme Court case relating to a
8 federal petition for habeas corpus, where the prisoner
9 waited, I think five years, after the statute of limitations
10 to file his petition. So the Court found that he did not
11 diligently pursue his rights and was not entitled to
12 equitable relief. I don't believe that that case overrules
13 Maughan, Your Honor, and it's not applicable to the case at
14 bar. And the cases from other Bankruptcy Courts do not
15 overrule Maughan either, Your Honor. Maughan requires that
16 there's diligence and if there was reasonable reliance upon
17 actions of the Debtor in delaying the filing of the
18 complaint, then equitable tolling was available. And that's
19 what there was here.

20 Mr. Waldron said that she assumed there
21 would be an agreed order, she assumed that litigation was not
22 necessary, and she assumed that there was no reason to file a
23 complaint and the case would be dismissed. But she didn't
24 assume that. She relied upon the Debtor's representations

1 that that was what was going to happen and that's the reason
2 she decided not to file a complaint. It wasn't an
3 assumption; she relied upon their statements that there was
4 no reason to file a complaint.

5 And under Maughan, Your Honor, tolling is
6 available under those circumstances. And the Debtor has
7 every right in every defense that she had to this
8 dischargeability complaint. Perhaps they discovered new
9 defenses in the remaining week. We don't know that. But she
10 still has all of those defenses available that she had on
11 July 8th to dischargeability action. The only issue is the
12 filing date.

13 THE COURT: Thank you. All right, that
14 closes the evidence and the argument. I need to read, again,
15 a couple of the cases that are relevant to the standard here.
16 It's going to take me, I would say it's going to probably
17 take me 30 or 40 minutes to go do that, and I want to do that
18 before I decide this case. And so it's 20 minutes of 1:00
19 right now and I'm going to be back at 1:15 to decide this
20 case.

21 You're welcome to be here if you want to
22 but you don't need to be here. Under Bankruptcy Rule 7052 I
23 can do this over the telephone or in an empty room. And
24 that's simply to say if you want to come back, you can, and

1 if you don't want to be here, that's fine. I draw no
2 conclusions from it. Any questions from Counsel about what
3 I'm going to do? I'll be back here at 1:15.

4 Madam Clerk, have I disposed of
5 everything on the Motion Docket this morning, other than
6 Hand?

7 CLERK: Yes, Your Honor.

8 THE COURT: All right, we'll be in recess
9 until 1:15. Thank you.

10 (Court in recess from 12:40 until 1:15)

11 THE COURT: Okay, I'm here to make
12 findings and conclusions in the Hand matter. With respect to
13 the Motion for an Extension of Time, under Bankruptcy Rule
14 9006, to extend the deadline to file Notice of an Exception
15 to Dischargeability of Debt, I read that directly off of the
16 motion that was actually filed. That's Document No. 55 in
17 this case.

18 I'm going to make the following findings
19 and conclusions:

20 It has been stipulated that the first 28
21 paragraphs of Document No. 62 are accepted as facts. And I'm
22 going to go back through those in just a minute and indicate
23 where I agree that they've been proven and that they should
24 be admitted as facts.

1 I think to put all of this and take
2 mystery out of this and give context for the whole thing, I
3 believe the Supreme Court and the Sixth Circuit have pretty
4 carefully defined when there is equitable tolling of a
5 statute of limitation that appears in a federal rule or in a
6 statute. And that's exactly what we have here. We have a
7 Bankruptcy Rule that sets a deadline for the filing of
8 complaints objecting to the dischargeability of debt in a
9 Chapter 13 case. And when that statute or rule is not
10 respected and the limitation period passes, the Sixth Circuit
11 and the Supreme Court have very carefully laid out when you
12 can timely file after the deadline passes. And it is not
13 claimed or proven that there was a timely filing of anything
14 that could constitute an objection to the dischargeability of
15 debt in this Chapter 13 case.

16 Instead, the argument is made that there
17 should be an exception to the limitation period that's in the
18 Bankruptcy Rules with respect to the filing of objections to
19 dischargeability in Chapter 13 cases based upon equitable
20 tolling. And the Sixth Circuit and the Supreme Court have
21 laid out when equitable tolling is appropriate. And I am
22 going to apply the equitable tolling standards to this case
23 because I am satisfied that this is not a 9006 case where we
24 have an extension of time requested out of time but instead

1 we are asking for an exception to the normal operation of the
2 extension of time provisions in 9006.

3 And I find that the facts of this case do
4 not support equitable tolling. This is instead what the
5 Supreme Court has described as a garden variety litigation
6 context. And in a garden variety litigation context, when
7 the statute of limitations passes and something that had to
8 happen doesn't happen, equity doesn't step in and re-write
9 the statute of the rules to give more time because, when it
10 does that under garden variety circumstances, the rules and
11 the law don't mean anything. And in the next 10 million or
12 10,000 cases, we have to then face the fact that the statute
13 or rule sets a deadline and it wasn't met.

14 And what are the exceptions to that? We
15 get really bad behaviors and bad outcomes when we do that.
16 So, backing up, it's easier to make conclusions of law in
17 this case first.

18 I believe that this case is controlled by
19 Maughan from the Sixth Circuit at 340F 3d 337 and by a series
20 of Supreme Court cases that come after Maughan that deal with
21 the concept of equitable tolling, including the Pace case at
22 544 US 408, the Glus versus Brooklyn Eastern District
23 Terminal 359 US 231 and the Irwin versus Department of
24 Veterans Affairs case at 498 US 89.

1 We went through Isaacman in the Sixth
2 Circuit at 26F 3d 629 in 1994 and got to Maughan in 2003 to
3 get the basic principles here that the deadlines in 4007(c)
4 are not jurisdictional, they are statutes of limitation. And
5 statutes of limitation have to be respected. And when a
6 statute of limitation is missed then sometimes the rules
7 themselves or a statute itself gives you a way around that
8 limitation, and here we do have specific ways for getting
9 extensions of time in 4007(c) and 9006. And it is that you
10 have to request an extension of time before the deadline
11 expires.

12 It is undisputed in this case that the
13 deadline for filing complaints objecting to dischargeability
14 in this Chapter 13 case was July 8 and that no complaint was
15 filed before July 8, neither was a request made for an
16 extension of time before July 8th. Instead the Motion for an
17 Extension of Time was untimely filed on July 26, 2013. And
18 that falls directly into the Isaacman and Maughan line of
19 cases with respect to equitable tolling.

20 The Maughan case tells us that we should
21 have five considerations and the five factors that should be
22 considered with respect to equitable tolling are: (1) lack
23 of actual notice of a filing requirement; (2) lack of
24 constructive knowledge of a filing requirement; (3) diligence

1 in pursuing one's rights; (4) the absence of prejudice to the
2 Defendant; and (5) Plaintiff's reasonableness in remaining
3 ignorant of the notice requirement.

4 It is arguable that those five factors
5 are limited by the Supreme Court's subsequent decision in
6 Pace. Pace formulates the equitable tolling of a statute of
7 limitation differently. The Supreme Court in Pace says,
8 generally, a litigant seeking equitable tolling bears the
9 burden to establish two elements, not five, and the two
10 elements are that he has been pursuing his rights diligently,
11 and number two, that some extraordinary circumstance stood in
12 his way.

13 It is the extraordinary circumstance
14 element in Pace that gave me pause with respect to the
15 Maughan five factor standard because I don't see anything in
16 Maughan about extraordinary circumstances. And one could
17 argue that Pace is inconsistent with Maughan and there are
18 subsequent decisions, decisions subsequent to Maughan and
19 Pace, that seem to say that. Such as the Bajas decision at
20 443 br 768 from Tommy Tucker up in Michigan where he says, in
21 so many words, that Pace decided after Maughan sets forth a
22 test for equitable tolling that has only two elements in it,
23 instead of five, and Judge Tucker goes ahead and suggests in
24 his citations that Pace may have changed the Maughan rule and

1 added an extraordinary circumstances consideration.

2 The problem I have with that analysis is
3 the case is cited by the Supreme Court in Pace, Irwin versus
4 Department of Veteran Affairs, and when you read Irwin you
5 see a whole series of footnotes citing cases including Glus
6 versus Brooklyn Eastern District Terminal.

7 One of those cases is characterized by
8 the Supreme Court as a garden variety problem of missing a
9 statute of limitations, and that's Irwin versus the
10 Department of Veterans Affairs. In Irwin there was a time
11 period for something to happen after a letter was sent, and
12 the letter went to a lawyer's office who is on vacation. And
13 Justice Rehnquist had no trouble in Irwin characterizing that
14 as a "garden variety claim of excusable neglect that didn't
15 rise to the level necessary for equitable tolling." In other
16 words, an attorney who is out of town and didn't get the
17 piece of paper and realize that it was a statute of
18 limitations cannot or did not in Irwin satisfy the equitable
19 tolling standard that the Supreme Court subsequently in Pace
20 describes as a two-step process of diligence and
21 extraordinary circumstances.

22 You have to contrast that with the 1959
23 decision in Glus in which Justice Black has a situation where
24 an employer or a company says that there are seven years to

1 do something and, in fact, it was not seven years, it was
2 less than seven years, but in reliance on what the company
3 said, somebody waited until seven years to do something. And
4 he says, Justice Black says where one party has, by his
5 representations of conduct, induced the other party to give
6 an advantage, which it would be against equity and good
7 conscience to assert, a Court of Justice won't permit that to
8 happen. And so equitable tolling applies. And he describes
9 it as a technical advantage as opposed to a garden variety.

10 In other words, we have a garden variety
11 case where equitable tolling doesn't work and then we have a
12 technical advantage case where equitable tolling does work,
13 where there is actually a misrepresentation.

14 Where I am today and the hard choice here
15 is am I looking at a garden variety case or am I looking at
16 the Justice Black formulation, and I think I'm looking at the
17 garden variety case. I think that's what we have here. And
18 the reason I get there is I've looked at every piece of paper
19 and listened to every communication that passed here, and in
20 my opinion, this was a garden variety discussion in a
21 bankruptcy case about a debt that might be, probably was, in
22 fact, might be dischargeable in the bankruptcy case. And
23 there was a negotiation of some other things that had to
24 happen in order to figure out how much the debt was and what

1 was going to happen to it in the Chapter 13 case. And what
2 didn't happen was there was no respect given to the July 8
3 deadline for either getting an Order of Nondischargeability,
4 filing a Motion for an Extension of Time, or submitting an
5 Agreed Order for an Extension of Time to file the complaint,
6 or an Agreed Order of Non-dischargeability. I see that fact
7 pattern dozens, if not hundreds of times a year, in student
8 loan cases, in AFDC cases, in state law fraud cases. It is
9 that the non-dischargeability issue is part of the
10 negotiation of what the Chapter 13 Plan looks like, about how
11 much debt gets paid, about everything else that's going on in
12 the bankruptcy case. But the creditor who has a fraud claim
13 or a drunk driving claim or a student loan claim or whatever
14 it is, has their eye on that bar date every moment of the
15 case, because it is the statute of limitations.

16 There has to be something more going on
17 as was the case in Justice Black's situation where somebody
18 makes an affirmative misrepresentation of some kind. There
19 has to be something more than just the ordinary run up to the
20 dischargeability deadline to take it out of the garden
21 variety case that Justice Rehnquist has and put it into the
22 world of extraordinary circumstances where somebody is lying,
23 cheating and stealing, or doing something similar. And I
24 just don't see it here.

1 The only argument that the Creditors here
2 make, and I'll hang a bunch of facts from it in just a
3 minute, but really the only argument is that from the very
4 beginning in this case something was going on that justified
5 the creditor in ignoring the statute of limitations. And the
6 only thing that I've been cited that has any relevance to
7 that argument is this sentence. It is the sentence in Mr.
8 Rothchild's April 2nd email to Ms. Fecteau, and I apologize
9 if I'm mispronouncing that name. And it is this sentence:
10 "We also will likely enter an agreement that this debt is
11 non-dischargeable, based on the clear language in Justice
12 Clement's Opinion, as there appears to be no reason to
13 litigate this further in Bankruptcy Court."

14 You know, the issue with respect to
15 diligence, the diligence standard under Maughan, or the
16 diligence standard under Pace, and extraordinary
17 circumstances argument that might be based on Pace, the
18 garden variety argument under Irwin and not so garden variety
19 misrepresentation in Glus, it has to be that word likely in
20 that sentence. And whether I read that sentence as a lawyer,
21 a judge or another party, I don't read this as an unequivocal
22 statement. It's not an unequivocal statement. It's a
23 discussion among lawyers, an exchange. It says we will also
24 likely enter an agreement that the debt is non-dischargeable.

1 It isn't a promise to enter into an agreement; it isn't a
2 statement that it's a done deal. And the subsequent course
3 of conduct among the parties is consistent with that view
4 that this is not the kind of misrepresentation or, as Ms.
5 Fecteau put it, trickery or deceit, as she sees it. It's not
6 trickery or deceit. It's one of the ironies in this case. I
7 want to reward that kind of behavior from lawyers. I want
8 lawyers to be able to say, well, look, it's likely that we'll
9 agree to non-dischargeability in this case because the fraud
10 finding by the state court is difficult, it's difficult for
11 us to deal with. And then everybody has to do due diligence
12 after that. And everyone started to do due diligence in this
13 case. By started, they agreed to relief from the state.
14 They went back to state court, following the instructions by
15 the Court of Appeals, to get a final judgment amount. Relief
16 from the stay was granted by agreement. Mr. Rothschild
17 drafted the order. They went back to state court. They got
18 the final judgment around June 24th or so. And then there's
19 an email exchange on July 1st of 2013, well, okay, we have
20 our judgment, now what happens next? And at that point Mr.
21 Rothschild has got a different case on his hands. His Debtor
22 is dead, and it was hugely significant in the context of this
23 case. And he writes back in his email, look, I'm sure you
24 know this, but Mr. Hand has died. I'm not sure we can go

1 forward in the 13. We're not sure what's going to happen
2 here.

3 What is reasonable diligence at that
4 point on July 1st of 2013? Well, reasonable diligence is
5 that somebody's calendar would say July 8th is the deadline
6 for complaints to determine discharge or dischargeability or
7 to seek an extension of time. An extension of time of that
8 sort is easily achieved by filing a motion or an agreed order
9 that extends the time. And I get dozens of those agreed
10 orders, week in and week out, that extend the deadline while
11 the parties continue to negotiate what's going on in the
12 bankruptcy case that includes a claim that may be or is non-
13 dischargeable in the bankruptcy case, especially true in
14 Chapter 13 where it matters, where the finances of the case
15 may determine how much can be paid, where adding the non-
16 dischargeable debt might or might not be separately
17 classified. There's all kinds of other issues going on
18 there.

19 My impression of the facts in this case
20 is that I do not believe that Ms. Fecteau had an appreciation
21 on July 1 or on July 8 of what that statute of limitations
22 meant. I don't think she was misled by anything Mr.
23 Rothschild did, I just think she very honestly said so today.
24 It was her first bankruptcy case and she didn't know. She

1 didn't know what it meant. She didn't get the significance
2 of the July 8 deadline. And that may be excusable neglect; I
3 don't know. I don't have to answer that question but it's
4 not the kind of mistake that triggers equitable tolling in
5 those Supreme Court Decisions.

6 It's like the lawyer who went out of town
7 and he didn't set up a procedure in his office to deal with
8 the incoming 30-day letter in an EEOC Case, which was the
9 Supreme Court's Opinion that Justice Rehnquist had to write.

10 What should happen here? What is the
11 ordinary diligence? The ordinary diligence is you've got to
12 do something by July 8. You just do. And it makes this a
13 garden variety case or a case where a different standard
14 might give a different outcome.

15 But I think the standard is higher than
16 excusable neglect. I think that's what equitable tolling is
17 about. It's the last resort. And if I find this is
18 equitable tolling then I've created a hugely troublesome
19 dynamic for debtors' lawyers and for creditors' lawyers in
20 bankruptcy cases. Nobody knows how to act and when to act if
21 I do that. And any missing of the statute of limitations
22 becomes an invitation to this kind of litigation.

23 I'm cognizant of the fact that from the
24 beginning in this case Mr. Rothschild has honestly stated, he

1 stated so in his April 2nd letter and he stated so today on
2 the bench that he doesn't see a defense to the substantive
3 elements of the 523 8 2 fraud action that's underlying here.
4 And I guess that might be true in all of these cases that
5 deal with equitable tolling because equitable tolling always
6 deals with something else. It deals with the statute of
7 limitations. You never get there unless you've missed it.
8 That's what all of these cases are about. That's what Glus
9 is about, Irwin, Pace, Maughan, Isaacman, they're all about
10 the statute of limitation itself. And so it has to be that
11 our diligence focus has to be there.

12 I see some evidence of diligence by
13 Counsel for the Creditors in this case in that there were
14 letters, there was followup, there was a return to state
15 court, there was another order. All of that was predicate to
16 getting this case done by July 8th, when there needed to be
17 an order or an extension of time. And it just didn't happen.
18 It didn't happen in this case. And creditors have to be
19 responsible for protecting themselves. It can't be that Mr.
20 Rothschild, the Debtor's lawyer, on July 1st when he realized
21 that he had a new case on his hand with a dead Debtor and a
22 new state of affairs and uncertainty whether he could even go
23 forward, whether his client could even go forward with a
24 Chapter 13 case, that he had some kind of an obligation to

1 protect the Creditors in this case from the July 8 statute of
2 limitations with respect to discharge and dischargeability.

3 He had an obligation not to lie about it,
4 and he didn't lie. He said from the very beginning that it
5 was likely there would be a resolution of the non-
6 dischargeability matter. That's not a statement that he's
7 going to do it or that he has to protect the Creditors in all
8 of their rights and obligations, including statute of
9 limitations. It's one of the parts of a garden variety
10 responsibility that the creditor has is to protect
11 themselves. And so what happened after July 1st is the
12 diligence failed and I can't find the diligence prong of
13 Maughan in favor of the Creditors here or the diligence prong
14 of Pace in favor of the creditors here.

15 If there is an extraordinary circumstance
16 element also, that's even more difficult on these facts.
17 What is the extraordinary circumstance? It is, according to
18 the creditors here, it is the April 2nd representation that
19 it was likely that there would be an agreement that the debt
20 was non-dischargeable. And that is a very ambiguous and
21 equivocal statement on which to rest extraordinary
22 circumstances. I am certain that that kind of conversation
23 goes on every time non-dischargeability is an issue. There's
24 going to be a discussion in a bankruptcy case with the

1 creditor and it will be used for whatever leverage it can to
2 get concessions with respect to the terms of a plan, with
3 respect to what chapter the case is in, with respect to all
4 the things that happen. And if a representation that it's
5 likely that we'll agree that this is non-dischargeable
6 absolves all opposing counsel of the obligation to file a
7 complaint or to get a motion or an extension of time then
8 we've created a new world, a world that is unknown to me in
9 bankruptcy. And I don't see facts that would support a
10 finding of extraordinary circumstances in this record.

11 The background now, to do some
12 backfilling, cases filed in March, on March 29th, and the
13 creditors involved are named Abdulsayed and Hanna, and they
14 had a fraud action pending since March of 2011 involving a
15 real estate transaction. And there's no dispute that the
16 Debtors won that litigation in the trial court. The
17 Tennessee Court of Appeals reversed it and made a finding
18 that there was a fraudulent misrepresentation with respect to
19 encumbrances on a piece of real property that was sold as
20 part of a transaction, and that that was a misrepresentation
21 for purposes of state law and the state trial court's
22 contrary findings were erroneous and the Court of Appeals
23 said that was a fraudulent misrepresentation. There's no
24 question that there was a Petition for Certiorari in the

1 Tennessee Supreme Court and it was denied and that a mandate
2 went back to the Circuit Court and on March 28, 2013 the
3 parties agreed to set a hearing on post-judgment relief, and
4 the next day on the 29th of March, the Debtors filed their
5 Petition in Bankruptcy.

6 It's been suggested in some of the papers
7 that this was somehow improper and just the contrary is true.
8 That was exactly the right thing to do because then the
9 Debtors can, through the use of relief from the stay, etc.,
10 control their further litigation costs. And so that's a
11 smart thing to do, not some sort of trickery or deceit, is to
12 file the bankruptcy before you've got to go back to the state
13 court and do the liquidation part of this. And then they did
14 the right thing, they meaning the Debtors, did the right
15 thing and agreed to relief from the stay to go back to state
16 court to liquidate the debt and get the actual amount of the
17 debt because they needed to know that for purposes of the
18 Chapter 13 case, to figure out how much to pay on the Chapter
19 13 case. And on April 15, 2013 the Agreed Order was entered
20 and there was a meeting of creditors on May 7. It's
21 undisputed that Counsel for these creditors was there for the
22 meeting of creditors and that there was a discussion about
23 the idea of an agreed order but there was no agreement that
24 an agreed order of non-dischargeability was entered.

1 There was a statement that we need, first
2 of all, to go back to state court and get it liquidated. And
3 that's what happened. They went back to state court.

4 A plan gets confirmed on June 7; on July
5 24 the Circuit Court comes back with a final judgment; and
6 then on July 1, Counsel for the Creditors sends a letter, an
7 email, to Mr. Rothschild again, saying, all right, what do we
8 do now?

9 I think it's odd that the letter and the
10 conversation that happened on July 1, and the response,
11 there's no mention of the statute of limitations, which is
12 going to run in the next week. Not a word about it. That's
13 part of what leads me to believe that even though Ms. Fecteau
14 concedes that she got the piece of paper that set the July 8,
15 2013 bar date for complaints to determine dischargeability, I
16 see no evidence that there was a clear appreciation of what
17 it meant. And in the garden variety circumstance, I think
18 diligence included understanding what that deadline was about
19 and protecting the Creditors from it. And that didn't happen
20 after July 1st.

21 In fact, nothing happened until July
22 12th. And on July 1st, Mr. Rothschild sent back the missive
23 that we have a dead debtor, we may not be able to continue in
24 Chapter 13, and there's trouble here, which at least from one

1 standpoint is kind of a red flag about this case that
2 something is going - this case is getting ready to change and
3 not for the better.

4 And then the limitation period passes and
5 I think it's a Friday, July 8, 2013, and the weekend passes,
6 the 9th and the 10th, and then it's the 12th before the
7 Creditor's Counsel contacts the Debtor again about what's
8 going to happen next.

9 At that point, I know it is characterized
10 as deceit and trickery. The Debtor's Counsel then said, wait
11 a minute, July 8th passed and you didn't move to extend time,
12 you didn't ask me to extend the time, you didn't file a
13 complaint, you didn't do the things that the Bankruptcy Rules
14 or Code require and I'm obligated on behalf of my client to
15 raise that issue. And I think that's exactly right. Mr.
16 Rothschild, in the garden variety circumstances here, was
17 obligated at that point to raise it, and he did. That's not
18 trickery and deceit, in my opinion; that's representation.
19 That's what Debtors Counsel get paid to do. And that's how
20 we get here.

21 What else can be said? This is worrisome
22 to me in this sense. I know within the bankruptcy universe
23 that what happened here was in the garden variety, as the
24 Supreme Court puts it. I also appreciate that Counsel with a

1 state court practice, who doesn't practice in Bankruptcy
2 Court, might not see this as garden variety. She might
3 believe that there's been deceit and trickery here. And all
4 I can say is that when it comes to statutes of limitation, in
5 or out of Bankruptcy Court, no one can expect opposing
6 counsel to be the party responsible for respecting the
7 statute of limitations. And when it gets missed under
8 circumstances like these, where there's not a
9 misrepresentation made, there's no lying or cheating, there's
10 simply the usual course of events, including relief from stay
11 and liquidation and confirmation and other things, the burden
12 is on the party that wants the equitable tolling principle to
13 apply, to show something more than just a neglect that should
14 be excused. Instead, there has to be some unusual or special
15 or additional circumstances. I wouldn't use the word
16 extraordinary, necessarily, even though the Supreme Court has
17 used that word. But I'm pretty clear that this is on the
18 garden variety side and not on the other side, on the side of
19 where equitable tolling should apply.

20 Let me cite a few more cases that I've
21 considered and then a couple more facts. I've read the Bajas
22 Case that I may have mentioned earlier at 443 BR 768. I
23 looked at Isaacman from the Sixth Circuit at 26 F 3d 629 and
24 I looked at Bob Jacovitz's case called Martinez at 2012

1 Westlaw 30 28 511.

2 MS. KNIGHT: I'm sorry, I missed part of
3 that. What was the citation on Bajas?

4 THE COURT: 443 BR 768. Bajas is the
5 case in which Tommy Tucker up in Michigan works through the
6 Maughan and Pace legal discussion and adds the extraordinary
7 circumstances factor to the equitable toll.

8 I believe those are the cases that I
9 needed to cite.

10 I've also considered the other Maughan
11 factors and I should say something about each of those.
12 There was actual notice in this case, there's no question
13 that Counsel, sometime very soon after the March 29 filing of
14 this case, was aware of the July 8, 2013 deadline for the
15 filing of complaints or motions with respect to the
16 dischargeability of this debt. This is not a construction
17 knowledge case; it's an actual knowledge case. No denial of
18 that.

19 On the prejudice side, I'm deciding this
20 case on the diligence factor because I think diligence is
21 hugely important here. And on the prejudice side, if that is
22 a factor here, I'm not certain which way the prejudice factor
23 cuts. Clearly, there is huge prejudice to the Debtor facing
24 non-dischargeability but that was there all along in this

1 case, from the very beginning. In fact, probably before the
2 case was filed, based on the exchanges of email and Mr.
3 Rothschild's testimony, they were pretty much aware of the
4 possibility of non-dischargeability in this case from the
5 very beginning. So I don't think the prejudice factor bears
6 strongly in one direction or another.

7 And the fifth factor, the reasonableness
8 of remaining ignorant of the notice requirement is not a
9 factor here because the notice requirement that they clearly
10 were on notice but the first part of the sentence could be
11 interpreted to be was it reasonable for the creditor involved
12 in this case to not respect the July 8 deadline, as seems to
13 have happened in the case. And if reasonableness leads us
14 back to diligence, which is probably where it leads back,
15 then I believe that there was a responsibility on the
16 creditor to be diligent with respect to that July 8 deadline,
17 and that they were not excused from that diligence by
18 anything that happened in the rest of this case. And so the
19 diligence factor itself was not satisfied, that factor was
20 not satisfied in this case by the creditor.

21 Let me take a moment here to be sure I
22 covered everything I wanted to say.

23 There seems to be no dispute that Mr.
24 Hand was the person running the market involved that

1 underlies both the real estate transaction and business sale
2 in the state court, and the underlying financials of the
3 Chapter 13 case. And I add that fact because Mr. Hand's
4 death was significant in this case, significant for lots of
5 reasons. And it's certainly a reason why on July 1 that Mr.
6 Rothschild was not in a position to do anything except
7 investigate his own case and figure out what was going on
8 after the death of his client. And it's also further a
9 signal to opposing counsel that the complexion of this whole
10 relationship had changed, with the death of Mr. Hand.

11 No other obstacle has been raised in this
12 case. No factual argument has been made that there was any
13 other obstacle or reason why either a motion for extension of
14 time, an agreed order for extension of time or a complaint
15 wasn't filed by July 8. It's purely in the April 2nd
16 communication and the course of conduct thereafter, which, as
17 I've already addressed in my opinion, does not constitute
18 circumstances sufficient to excuse diligence in respecting
19 the July 8 deadline for complaints to determine
20 dischargeability.

21 It's been claimed that Mr. Rothschild was
22 untruthful, and I've not seen any untruthfulness in this case
23 by Mr. Rothschild. And I wouldn't normally make a finding
24 like that except that misrepresentation is one of the

1 footnoted triggers for equitable tolling in the Supreme
2 Court's Pace, Irwin and Glus decisions. There's a whole
3 discussion of cases like that where there's been
4 misrepresentations. It was not a misrepresentation that the
5 Debtor was likely to agree to non-dischargeability. It was
6 not a misrepresentation that Mr. Rothschild was going to get
7 back to Creditors' Counsel in this case after meeting with
8 his client. That did happen on July 12th, 12 days after the
9 statement was made that he needed to consult with his client.

10 Now, I recognize that that happened on
11 the 12th, after an email from Ms Fecteau on that same day,
12 but it also appears to have been the case that Mr. Rothschild
13 met with the surviving Debtor probably during the week that
14 ended on July 5th, and there's no evidence of
15 misrepresentation on those facts with respect to him getting
16 back to Ms. Fecteau.

17 There's been no claim of
18 misrepresentation or misconduct by the Debtors themselves. I
19 need to make that finding as well.

20 I am looking now at Exhibit 3, and I'm
21 reminded that at least as early as July 1st Ms. Fecteau was
22 aware that there might be a need for her to file something
23 else in this bankruptcy case because she says that she needs
24 to know if they will voluntarily enter an agreement or

1 whether she's going to need to file a motion regarding
2 whether this is a good faith filing of the debt.

3 That doesn't sound like here's the
4 agreement, sign it, we have an agreement and this is done.
5 It's whether they will voluntarily enter into an agreement or
6 whether she'll need to do something else. That does sound
7 like the kind of negotiation that I'm describing goes on in a
8 garden variety bankruptcy case. It's put up or shut up.
9 It's July 1, give me the agreed order that this is non-
10 dischargeable or I'm going to do something.

11 I have to point out, though, what's
12 missing from this is any acknowledgement that on July 1
13 there's only seven days left before that has to happen, and
14 that what has to happen is not a motion regarding a good
15 faith filing of a debt, I have no idea what a motion
16 regarding a good faith filing of a debt it. I don't know
17 what that is. That's certainly not a bankruptcy concept.
18 I'm not sure what concept that is.

19 And I say that only because it's
20 consistent with my point that this more like the lawyer who
21 is out of town fact pattern than it is someone who is being
22 taken advantage of by trickery, deceit or misrepresentation.

23 The July 12th email from Ms. Fecteau to
24 Mr. Rothschild is another piece of why I think that something

1 more like the lawyer being out of town was going on here. It
2 says it's now been over a week, yeah, it's past the July 8
3 deadline, "would you kindly update me whether this judgment
4 based on fraud will be voluntarily dismissed from the
5 bankruptcy." Being charitable, I guess that's both evidence
6 that there was no agreement that it would be declared non-
7 dischargeable. There was still a likelihood but it was still
8 in the negotiation of some kind. But it's also true that it
9 wouldn't be voluntarily dismissed from a bankruptcy. You
10 don't dismiss a debt from a bankruptcy; it's either going to
11 be dischargeable or non-dischargeable. And the second part,
12 I think, is significant, "whether I will need to seek
13 remedies available in having this dismissed." Well, I don't
14 know exactly what that means after July 8th. Dismissal of
15 the bankruptcy? Dismissal of the debt, which is a sort of
16 nonsense? Filing an out of time complaint or motion at that
17 point?

18 My point, again, is what's going on here
19 is misconception and misunderstanding by Ms. Fecteau, in my
20 opinion. That's what this looks like. I don't see
21 misrepresentation, deceit, trickery or misconduct by the
22 Debtor or the Debtors' Counsel. That's why these little bits
23 and pieces and sentences are important.

24 Okay, I think I've made all the findings

1 and conclusions that I intended. Are there any questions
2 from Counsel about anything I've said?

3 MS. KNIGHT: No, Your Honor.

4 MR. WALDRON: No, Your Honor.

5 THE COURT: Thank you both for your
6 excellent preparation and presentation here today. There
7 were a lot of moving parts here and everybody did a good job.
8 I need an Order from you, Mr. Waldron, that denies the Motion
9 to Extend the time. And please include in there that for the
10 reasons stated orally by the Court, equitable tolling is not
11 available to the Claimants in this case.

12 All right, thank you very much. We'll be
13 in recess.

14 (End of proceeding)

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TRANSCRIPTIONIST'S CERTIFICATE

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I, Ann Woofter, Court-approved transcriber,

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

4

5

6

7 Signature of Approved Transcriber

Date