

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: VERONICA DANIELS, .a/k/a
VERONICA DANIELS, d/b/a/
THE COMMUNITY FUEL OIL COMPANY
Debtor

Case No. 09-22822(rdd)
Chapter 13

ORDER DENYING WEST VERNON ENERGY CORP'S MOTION FOR AN
ORDER ALLOWING ITS CLAIM OR A DECLARATION THAT ITS CLAIM IS
NOT DISCHARGED

Upon the motion (ECF #'s 50 & 51) (the "Motion") of West Vernon Energy Corp. ("WVE") seeking, *inter alia*, a declaration that its late-filed claim is not stayed or discharged, or alternatively, dismissing this case or converting it to a chapter 7 case; and there being due and sufficient notice of the Motion and the May 16, 2011 hearing thereon; and the debtor herein (the "Debtor") relying, in opposition to the Motion, on her motion to enforce the automatic stay (ECF #35) (the "Stay Violation Motion") and her opposition (ECF #43) to WVE's motion seeking reconsideration (ECF #'s 40 & 41); and upon the record of the evidentiary hearing held by the Court on May 16, 2011; and based upon the Court's assessment of the witnesses' testimony and analysis of the documentary evidence and the arguments of counsel; and for the reasons stated by the Court in its bench ruling at the conclusion of the hearing, it is hereby

ORDERED, that WVP's Motion is denied in all respects; and it is further

ORDERED that the Debtor's Stay Violation Motion is denied as moot.

Dated: White Plains, New York
May 23, 2011

/s/Robert D. Drain
Robert D. Drain,
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:

VERONICA DANIELS d/b/a
COMMUNITY FUEL,

Debtor.

|
|
| Case No. 09-22822
| Chapter 13
| White Plains, NY
| May 16, 2011
|

HEARING ON DISCHARGEABILITY OF CLAIM
BEFORE HON. ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR U.S. TRUSTEE: (No appearance)

FOR CREDITOR: SANFORD YOUNG, ESQ.
(For West Vernon Energy Corp.)
Law Office of Sanford Young, PC
225 Broadway
New York, New York 10007

FOR DEBTOR: STUART IRWIN DAVIS, ESQ.
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22
23
24
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Index to Examinations

Witness:

<u>VINCENT CUONO:</u>	DE	CE	RD	RC	VERONICA DANIELS
By Mr. Young	5	--	62	--	--
By Mr. Davis	--	38,41	--	68	--

<u>ROBERT B. ALMEIDA:</u>	DE	CE	RD	RC	VERONICA DANIELS
By Young	71	--	--	--	--
By Davis	--	--	--	--	--

<u>ANNE PENACHIO:</u>	DE	CE	RD	RC	VERONICA DANIELS
By Mr. Davis	80	--	99	--	--
By Mr. Young	--	84	--	101	--

* * *

Index to Exhibits

(Transcriber's note: *Exhibits were pre-marked off the record for identification)

<u>HEARING EXHIBITS</u>	<u>ID.</u>	<u>EVD.</u>
F - ECF 41, WEST VERNON'S LIMITED OBJECTION TO		
CONFIRMATION OF CHAPTER 13	*	23

<u>MOVANT'S EXHIBITS</u>	<u>ID.</u>	<u>EVD.</u>
1 through 11 - EXHIBITS FROM EXHIBIT BOOK	*	41

* * *

1
2
3
4
5
6
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THE COURT: Okay. Good morning. In Re: Daniels.

MR. YOUNG: Are you asking for our appearances?

THE COURT: You can just state who you're representing when you speak first. But it's your motion, I think, sir.

MR. YOUNG: Should I call my witness, Your Honor?

THE COURT: Yes.

MR. YOUNG: Okay. I'm calling Vincent Cuono.

THE COURT: Okay. Take the stand, please.

MR. YOUNG: Your Honor, I pre-marked the exhibits, if I may?

THE COURT: Okay.

MR. YOUNG: Thank you.

THE COURT: And is there any objection to their admissibility, Mr. Davis?

(Exhibits were pre-marked off the record for identification.

MR. DAVIS: I'm going to object to several of certain of the exhibits as presented, Your Honor.

THE COURT: Okay. Well --

MR. YOUNG: And as a housekeeping matter, Your Honor, if I may. In Your Honor's order of November 22, 2010,

1 you directed the debtor to serve us or file their opposition
2 to this motion seven days before the hearing and we have not
3 received that opposition, any opposition.

4 THE COURT: Right. I haven't seen it either.
5 There's no written opposition, correct?

6 MR. DAVIS: At this point, Your Honor, no, there is
7 no written opposition, effectively --

8 THE COURT: Okay.

9 MR. DAVIS: -- all of the claims, allegations,
10 etcetera, that have been raised in this cross-motion with the
11 exception of the dischargeability, which is the subject of
12 this hearing, have been raised and answered previously.

13 THE COURT: Okay. All right. So, I'll deal with
14 objections to admissibility when the documents come up.

15 MR. YOUNG: Okay. May I proceed?

16 THE COURT: Yes.

17 MR. YOUNG: All right. Mr. Cuono, can you tell us
18 your background, college and --

19 THE COURT: Oh, I'm sorry. Stop.

20 Would you raise your right --

21 MR. YOUNG: He needs to be sworn in.

22 THE COURT: -- would you raise your right hand,
23 please? And could you spell your name for the record?

24 THE WITNESS: It's Vincent Cuono, C-u-o-n-o.

25 THE COURT: Okay.

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VINCENT CUONO,

having been first duly sworn by the court,

was examined and testified as follows:

* * * * *

DIRECT EXAMINATION BY MR. YOUNG:

Q. Mr. Cuono, what is your present position and occupation?

A. I'm the administrative manager and chief financial officer and general counsel for the Almeida Group, a group of closely related companies, owned by the Almeida family.

Q. And does that include West Vernon Energy Corporation?

A. Yes.

Q. And can you give the court some, briefly, your background; college education and law school?

A. Yes. I have a B.S. in accounting from Manhattan College and a J.D. in law from Albany Law School.

Q. And are you admitted to practice?

A. I am.

Q. When were you admitted?

A. In 2000, I believe.

Q. And can you briefly give the court your employment history since law school?

A. Yes. I started out with Arthur Anderson in the Wealth

1 Management Group doing financial planning and tax planning
2 and then from there I took a job in a private bank, U.S.
3 Trust Company, where I did essentially the same kind of
4 work. And then, from there, I took a job in White Plains
5 in a law firm, Fenton and Goldman, which is a boutique real
6 estate law firm, and Mr. Almeida hired me out of that law
7 firm in 2003.

8 Q. And you've been working with the Almeida Group
9 continuously since when?

10 A. Since January of 2003.

11 Q. And how was West Vernon Energy Corporation related to
12 the Almeida Group?

13 A. It's owned by Robert Almeida.

14 Q. And has it been owned by him this entire period of
15 time?

16 A. Since, yes -- since I've been working.

17 Q. Since you've been employed there?

18 A. Yes.

19 Q. And Almeida Oil Company, Incorporated, how is that
20 related to West Vernon Energy Corporation and the Almeida
21 Group?

22 A. Well, it's owned in part by Robert Almeida.

23 Q. What are your duties and responsibilities?

24 A. I handle most of the administrative functions, sort of
25 the back-office work, as the administrative manager and

1 benefits, things of that nature. I'm responsible for the
2 accuracy and filing of the financial statements and the tax
3 returns in my role as chief financial officer. And then I
4 handle the in-house legal work, contracts, and things of
5 that nature.

6 Q. And these duties and responsibilities, has that
7 changed at all, materially, since you began with Almeida?

8 A. Only to the extent that I've gotten more.

9 Q. More what?

10 A. More work.

11 Q. More work. And do you hold a title or an office?

12 A. I'm the chief financial officer for some of the
13 companies.

14 Q. What is the nature of the business of West Vernon
15 Energy Corporation?

16 A. It's a wholesale marketer of petroleum products, so
17 West Vernon Energy would buy heating oil, store it in a
18 facility, and then turn around and sell it to retailers.

19 Q. And what is the business of Almeida Oil Company?

20 A. Almeida Oil Company is a retail distributor of heating
21 oil. Almeida would buy heating oil from a company, such as
22 West Vernon Energy, and would sell it to an end user for
23 use in heating a home, for example.

24 Q. Now, I'm going to ask you a little about the
25 locations. 33 Hubbles Drive, Mount Kisco, is that a

1 location of which West Vernon Energy does business?

2 A. Yes.

3 Q. Okay. What is done at that location?

4 A. 33 Hubbles Drive is the corporate offices for all of
5 the companies in the Almeida Group. So all of the back
6 office legal, administrative, functions happen out of that
7 office. It's also a terminal that West Vernon sells
8 heating oil out of.

9 Q. And since when have those activities that you
10 described taken place at 33 Hubbles Drive?

11 A. Since as long as I've been there and before.

12 Q. And where are the corporate offices of West Vernon
13 Energy Corporation?

14 A. The same address, 33 Hubbles Drive, Mount Kisco.

15 Q. And those are the activities you described before?

16 A. Yes. Yes.

17 Q. And who works at that location?

18 A. All the administrative employees, everyone, other than
19 the drivers or servicemen, who go out on the road to
20 deliver fuel.

21 Q. And has that been true since you began working there?

22 A. Yes.

23 Q. And where is mail received on behalf of the
24 corporations, West Vernon Energy Corporation and the other
25 Almeida corporations?

1 A. 33 Hubbles Drive, Mount Kisco.

2 Q. And since when have they been receiving their mail
3 there?

4 A. Since as long as I've been there and since before
5 that.

6 Q. Now, the other location in Mount Vernon, 701 South
7 Columbus Avenue, what is that location?

8 A. That's the address of a heating oil terminal that West
9 Vernon Energy was marketing heating oil out of for a period
10 of time.

11 Q. And what period of time was West Vernon Energy
12 Corporation using that facility in Mount Vernon?

13 A. Roughly, from May of 2001, until about November 2007.

14 Q. And does West Vernon Energy Corporation, or any of the
15 Almeida corporations, have they owned that property in
16 Mount Vernon?

17 A. No.

18 Q. What was the arrangement in which they were able to
19 use that property?

20 A. Almeida Oil Company had a license agreement with the
21 owner of that facility at 701 South Columbus Avenue.

22 Q. And what's the name of the licensor of that facility?

23 A. The West Vernon Petroleum Corp.

24 Q. Not to be confused with West Vernon Energy Corp.,
25 correct?

1 A. Correct.

2 Q. Can you tell me a little about how --

3 MR. YOUNG: Withdraw that.

4 Q. When did the Almeida Group begin operating West Vernon
5 Energy Corporation?

6 A. The beginning of May 2001.

7 THE COURT: I'm sorry, 2001?

8 THE WITNESS: 2001.

9 Q. Is there a relationship between the beginning use of
10 West Vernon Energy Corporation by the Almeida Group and the
11 use of the Mount Vernon facility?

12 A. Yes. It occurred simultaneously.

13 Q. And can you explain that?

14 A. Well, Mr. Almeida was interested in marketing fuel at
15 the wholesale level and the owner of West Vernon Petroleum
16 Corp. was looking for somebody to take over the operation,
17 and, so, in 2001, they signed a license agreement whereby
18 Mr. Almeida's company would take over operation of the
19 facility and as part of that he took over the entity known
20 as West Vernon Energy Corp., which, I believe, was formed
21 in about the year 2000 by the owner of West Vernon
22 Petroleum Corp. It was a shell corporation.

23 Q. Who is the owner of Mount Vernon -- you said that was
24 Mount -- that was West Vernon Petroleum Corporation?

25 A. Okay, who's the owner of West Vernon Petroleum Corp.?

1 Q. Of the Mount Vernon facility?

2 A. I believe it's West Vernon Petroleum Corp.

3 Q. And what's the name of the principal of that company?

4 A. Harvey Wiles (phonetical).

5 Q. And so you're saying the West Vernon Energy
6 Corporation was a shell, originally?

7 A. It was an entity formed by Harvey Wiles. I don't --
8 I'm not sure, specifically, for this purpose, but it was a
9 dormant corporation that in 2001, when Mr. Almeida
10 negotiated to license the terminal, part of the deal
11 included taking over this entity with the name West Vernon
12 Energy Corp.

13 THE COURT: When you say "taking over," what do
14 you mean by that; did Almeida acquire West Vernon
15 Petroleum?

16 THE WITNESS: Yeah. He acquired the entity --

17 THE COURT: All right.

18 THE WITNESS: -- S corp. --

19 THE COURT: Okay.

20 THE WITNESS: -- as part of the license
21 agreement.

22 Q. And under the license agreement --

23 MR. YOUNG: Withdraw that.

24 Q. Was the license agreement assigned to West Vernon
25 Energy Corporation as part of the transaction?

1 A. Yes. The agreement was between West Vernon Petroleum
2 Corp. and Almeida Oil Co., Inc., or their designee. And,
3 simultaneously, in 2001, Almeida Oil Co. designated West
4 Vernon Energy Corp. to run the facility.

5 MR. DAVIS: Objection, Your Honor. This is all
6 hearsay. Effectively, Mr. Cuono has no direct knowledge of
7 any of this, all these instances apparently occurred before
8 he was employed by West Vernon Energy. I believe he stated
9 he was employed on January 1st, 2003, his testimony's
10 testifying to occurrences that occurred back in 2001, 2002.

11 MR. YOUNG: Your Honor, Mr. Cuono is the general
12 counsel and hold many other offices and he's fully familiar
13 with these transactions.

14 THE COURT: What is the basis for your knowledge
15 of this acquisition and the assignment of the license
16 agreement?

17 THE WITNESS: I've seen all the documents, ad
18 nauseam, where we've been in litigation with West Vernon
19 Petroleum Corp. and the owner of that terminal since 2000
20 and -- since 2003, when I started.

21 THE COURT: And you stated you're responsible for
22 preparing the tax returns and financial statements?

23 THE WITNESS: That's correct.

24 THE COURT: Does that include information for
25 this terminal facility in Mount Vernon?

1 THE WITNESS: Yes. We have, in fact, monthly tax
2 returns.

3 THE COURT: Okay. So you would know the owner of
4 that through preparing the financial statements and the tax
5 returns?

6 THE WITNESS: At least, that way, yes.

7 THE COURT: All right. I'll overrule the
8 objection.

9 MR. YOUNG: Thank you, Your Honor.

10 Q. What were the activities that took place at West
11 Vernon Petroleum Corporation during the period of the
12 license?

13 A. They were merely the landlord, West Vernon Petroleum.

14 Q. I'm sorry. What were the activities that took place
15 in Mount Vernon during the period of the license agreement?

16 A. Do you mean, what were West Vernon's activities? West
17 Vernon Energy Corp.'s activities?

18 Q. Yes?

19 A. West Vernon Energy Corp. would buy, store, and sell
20 fuel oil out of the Mount Vernon terminal.

21 Q. And did West Vernon Energy Corporation have any
22 administrative functions or offices at that location --

23 A. No.

24 Q. -- in Mount Vernon?

25 A. No.

1 Q. Did West Vernon Energy Corporation receive any mail at
2 that facility?

3 A. No.

4 THE COURT: Well, when you say it bought and sold
5 heating oil as well as stored it there, how did it do that
6 if it didn't have any activity?

7 THE WITNESS: Well, the way it works, we would
8 buy oil by barge and we would do the transaction out of
9 Mount Kisco; we'd order the oil, pay for it. The oil would
10 be shipped by barge along the waterway into the terminal.
11 Behind the terminal is a small creek where the barge would
12 come in and it would offload the oil into the facility and
13 then the oil would be stored there, and then when a
14 customer would come in, they drive their truck in under
15 this apparatus called a rack and they would load the oil
16 into their truck.

17 THE COURT: All right. So it was really just a
18 storage facility? You weren't buying and selling out of
19 the facility?

20 THE WITNESS: Well, we were selling in the sense
21 that the physical transfer of oil took place there.

22 THE COURT: Okay.

23 Q. Other than the physical activities, did any other
24 activities take place at Mount Vernon on behalf of West
25 Vernon Energy?

1 A. No.

2 Q. So, as the judge asked you, all of the actual
3 activities of placing orders and invoicing customers and
4 other functions such as that, where did those take place?

5 A. In the Mount Kisco office.

6 Q. Now, did the license agreement, or the --

7 MR. YOUNG: Withdraw that.

8 Q. Did West Vernon Energy Corporation's operation of the
9 Mount Vernon facility end at some point?

10 A. Yes, it ended around November of 2007.

11 Q. After it ended, what became of the terminal?

12 A. It was basically razed to the ground and turned into a
13 bus depot, a parking lot for buses.

14 Q. By whom?

15 A. I believe by the owner of the terminal.

16 Q. So that would be West Vernon Petroleum Corp., or
17 Harvey Wiles?

18 THE COURT: Now, I'm sorry. I thought you
19 testified that Mr. Almeida acquired Mount Vernon Petroleum
20 Corp.?

21 THE WITNESS: No. Mr. Almeida acquired West
22 Vernon Energy Corp. The terminal at 701 South Columbus
23 Avenue was always owned and, as far as I understand, is
24 still owned by an entity called West Vernon Petroleum Corp.
25 In 2001, Mr. Almeida signed a license with West Vernon

1 Petroleum Corp., whereby Mr. Almeida would market heating
2 oil, sell, store and sell, heating oil out of that
3 facility. And as part of the arrangement, he acquired an
4 entity known as West Vernon Energy Corp. from the owner.

5 THE COURT: Okay.

6 Q. So, to be clear, West Vernon Energy Corporation and
7 West Vernon Petroleum Corporation have no relationship with
8 each other?

9 A. None.

10 Q. Okay. Now, the relationship, in a more figurative
11 sense, if I may, between West Vernon Petroleum Corp. and
12 Mr. Almeida and West Vernon Energy Corporation, how would
13 you describe that relationship?

14 A. Highly contentious.

15 Q. And can you explain --

16 MR. YOUNG: Withdraw that.

17 Q. You mentioned before in answer to the judge's
18 questions that there's been litigation; litigation between
19 whom?

20 A. Between West Vernon Petroleum Corp., the owner of the
21 terminal, Almeida Oil Company, West Vernon Energy Corp. and
22 a third party that had an agreement to operate at that
23 terminal in Mount Vernon.

24 Q. And to be clear, is it correct that West Vernon
25 Petroleum Corporation is one party and West Vernon Energy

1 Corporation and other Almeida corporations and individuals
2 are the adversaries of West Vernon Petroleum Corporation?

3 A. Yes.

4 Q. And since when has that litigation taken place?

5 A. Well, there's three separate lawsuits; one with a 2003
6 index number, one with a 2004 index number, and one with, I
7 believe, a 2008 index number.

8 Q. And what is the status of the 2003 and 2004
9 litigations?

10 A. Well, they're still ongoing with respect to West
11 Vernon Petroleum Corp., although a piece of it has been
12 settled vis-a-vis the Almeida companies and this third
13 party.

14 Q. But has the case settled with West Vernon Petroleum
15 Corporation?

16 A. No, that's ongoing.

17 Q. And after West Vernon Energy Corporation left Mount
18 Vernon facility, and I believe you said it was the end of
19 2007, has any mail been forwarded to them?

20 A. Not --

21 THE COURT: From where?

22 Q. -- from Mount Kisco?

23 A. Not that I'm aware of.

24 Q. Now, are you familiar with Veronica Daniels and her
25 d/b/a Community Fuel?

1 A. Yes.

2 Q. Was she a customer of West Vernon Energy Corporation?

3 A. Yes.

4 Q. How did she become a customer of West Vernon Energy
5 Corporation?

6 A. West Vernon Energy acquired all of their customers,
7 initially, by virtue of the fact that they took over the
8 operations of the terminal at 701 South Columbus Avenue in
9 May of '01. It was intended to be a seamless transition
10 from one entity to the other.

11 Q. Are you referring to the license agreement for the
12 Mount Vernon facility?

13 A. Yes.

14 Q. And was Ms. Daniels a customer before the license
15 agreement of someone?

16 A. Yes.

17 Q. And who was she a customer of before the license
18 agreement became effective?

19 A. West Vernon Petroleum Corp.

20 Q. And so, after, as part of the license agreement, is it
21 correct that the customers of the facility became customers
22 of West Vernon Energy Corporation?

23 A. Well, the ones that did, did. I mean, there was no
24 agreement that the customers would come, but --

25 Q. The ones that continued?

1 A. Right.

2 Q. And until when did Ms. Daniels continue being a
3 customer of West Vernon Energy Corp.?

4 A. I believe around March or April of 2002.

5 Q. Are you familiar with West Vernon Energy Corporation's
6 efforts to collect monies that were due from Ms. Daniels?

7 A. Yes.

8 Q. And what was due from her and for what?

9 A. Well, there were a couple of different things. West
10 Vernon was owed for oil that Ms. Daniels' company
11 physically picked up from the terminal and didn't pay for.
12 West Vernon was due fees for storing oil on her behalf that
13 she didn't lift during the period of time when she was
14 supposed to have lifted. There was interest. There was, I
15 think, an additional charge in relation to the fact that
16 she hadn't lifted the fuel. And then pursuant to a
17 personal guaranty, there were legal fees due, as well.

18 Q. And what efforts were made to collect that? How much
19 was due, by the way?

20 A. I would say with the principal was roughly 90, 90,000.
21 Roughly.

22 Q. As of when?

23 A. As of April of -- April or May of 2002 -- or as of
24 August. The litigation commenced in August of '02, so as
25 of August of '02, it was, roughly.

1 Q. You mentioned litigation. Can you tell us where that
2 litigation is and the nature of that litigation?

3 A. It was in the state Supreme Court and it commenced in
4 August of 2002 and we were there for a brief period of time
5 when Ms. Daniels filed for Chapter 13 bankruptcy
6 protection. And then the proceedings were stayed while she
7 went through the Chapter 13 and then she voluntarily
8 withdrew that sometime in 2003, and the Supreme Court
9 action picked up again from, roughly, '03 to some point in
10 '05 or '06. And then, at that point, Ms. Daniels filed for
11 Chapter 13 protection again and we were back in federal
12 court for a period of time. And then, I want to say,
13 around '07, we were back in Supreme Court and it culminated
14 in a three-week trial in roughly March of '09, wherein, we
15 received a jury verdict in favor of West Vernon Energy.

16 Q. You mentioned the second Chapter 13 proceeding. What
17 happened to that proceeding that you went back to state
18 court?

19 A. Ms. Daniels voluntarily withdrew her Chapter 13.

20 Q. And was there some contest regarding that in the
21 continuation of West Vernon Energy Corporation's suit?

22 A. Yes. When we were in -- the second time we were in
23 the federal court --

24 MR. DAVIS: Your Honor, I'm objecting to this
25 entire line of testimony. It's my understanding that this

1 hearing, evidentiary hearing, was ordered in regards to
2 several e-mails back and forth from Ms. Penachio and Mr.
3 Cuono as in regards to what he believed or did not believe
4 was the bar date. What relevance this entire line of
5 testimony has to that, I don't see it.

6 THE COURT: Okay.

7 MR. YOUNG: Your Honor, this proceeding today is
8 about fairness and equity, that's the basis of the doctrine
9 of us asking for this debt to be discharged from this
10 bankruptcy and so this is part of the background. And as
11 Mr. Cuono may have gone in, there was an appeal to the
12 Southern District and Judge McMahon --

13 THE COURT: But I can take judicial notice, I've
14 read that. I've read the ruling.

15 MR. YOUNG: And I'll be another minute, Your
16 Honor, anyway.

17 THE COURT: Okay.

18 MR. YOUNG: I'm going to get right past this.

19 THE COURT: Okay. I'll overrule the objection.
20 But you should, you should cut it short.

21 MR. YOUNG: Okay. I will. Thank you.

22 Q. So, the Chapter 13, the second one, was withdrawn
23 again voluntarily by the debtor?

24 A. Correct.

25 Q. Okay. Now, the state court proceeding continued, you

1 said there was a jury trial?

2 A. Yes.

3 Q. And how long was that jury trial for?

4 A. Roughly, three weeks.

5 Q. And did it result in a verdict?

6 A. Yes.

7 Q. And what was the verdict?

8 A. It was a verdict for the plaintiff, for West Vernon
9 Energy Corp., for the full amount of the claim, which was
10 roughly 178,000 at that point.

11 Q. And at some point in time was another Chapter 13
12 proceeding filed in this, the instant one?

13 A. Yes.

14 Q. Okay. And how soon after the verdict was rendered?

15 A. I believe it was filed in April, right around the time
16 of the verdict, March or April of '09.

17 Q. All told, how much in legal fees did West Vernon
18 Energy Corporation expend on prosecuting the claim in the
19 state court?

20 A. I would say, roughly, 120 to 150,000.

21 Q. Now, after the jury rendered the verdict, did there
22 come a time that you learned of the filing of this Chapter
23 13 proceeding?

24 A. Yes.

25 Q. And how did you learn of it?

1 A. Around the third week of August 2009, I received a
2 phone call from Jeff Green, who was our outside litigator
3 in the Community Fuel case, and he told me that around
4 March or April of '09, Veronica Daniels had filed for
5 Chapter 13 protection and he had just found out about it by
6 way of a letter from Ms. Daniels' then attorney, Anne
7 Penachio.

8 Q. Before I ask you more about that, I just want to refer
9 you, if I may, to exhibit 1, in the binder, in front of
10 you?

11 MR. YOUNG: And for the court's information, this
12 is exhibit E to our cross motion, ECF number 41, and I've
13 labeled it as Hearing Exhibit 1 today.

14 Q. What is this document?

15 A. This is the proof of claim filed by West Vernon Energy
16 Corp., in 2006, during the second Chapter 13.

17 Q. Did you prepare this?

18 A. I did. I did.

19 Q. And can you find the information of the creditor? Do
20 you see that in the upper left-hand corner?

21 A. Yes.

22 Q. And what is the address given for the creditor, West
23 Vernon Energy Corporation?

24 A. It's care of Vincent Cuono, Esquire, 33 Hubbles Drive,
25 Mount Kisco, New York 10549.

1 Q. Thank you. And that's the correct address, right?

2 A. Yes.

3 Q. Okay. And I would ask you to look at exhibit 2,
4 which, for the record, is ECF number 41, exhibit F, hearing
5 exhibit, for today's purposes, number 2. What is this
6 document?

7 A. This is West Vernon's limited objection to the
8 confirmation of the Chapter 13 plan, the second Chapter 13.

9 MR. DAVIS: Objection, Your Honor. Relevance.

10 THE COURT: No. I'll admit it.

11

12 (Hearing Exhibit F - ECF 41, WEST VERNON'S
13 LIMITED OBJECTION TO THE CONFIRMATION OF CHAPTER
14 13 PLAN, received into evidence)

15

16 Q. And which bankruptcy was this?

17 A. I believe it was the second one.

18 Q. Okay. And did you prepare this document?

19 A. Yes.

20 Q. And is the address of the creditor on this document?

21 A. Yes.

22 Q. Okay. And can you read, for the record, what address
23 is given?

24 A. 33 Hubbles Drive, Mount Kisco, New York 10549.

25 Q. And you signed that, correct?

1 A. Yes.

2 Q. Okay. And that's the correct address?

3 A. Yes.

4 Q. Thank you. So, I believe you testified earlier
5 that --

6 MR. YOUNG: I'm going to withdraw that.

7 Q. Please turn to exhibit number 3, please? And, for the
8 record, this is ECF number 41, exhibit 10. Would you turn
9 to the third page, please? Do you see a listing for West
10 Vernon Petroleum?

11 A. Yes.

12 Q. Okay. And West Vernon Petroleum, is that a different
13 corporation, as you testified before, than West Vernon
14 Energy Corporation?

15 A. Yes.

16 Q. Okay. And the address given here, 701 South Columbus
17 Avenue, that's the address of the Mount Vernon facility?

18 A. Yes.

19 Q. Okay. And at this point in time of this schedule, is
20 it fair to say that, the Almeida companies and West Vernon
21 Energy had nothing to do with the Mount Vernon facility?

22 A. That's correct.

23 Q. Thank you. Now, after you received the call from Mr.
24 Greene, did he send something over to you?

25 A. Yes. He e-mailed a copy of the letter from Anne

1 Penachio to him.

2 Q. Would you turn to exhibit 4, please? And, for the
3 record, this is ECF number 41, exhibit N, as in Nancy.

4 Q. Can you identify this document, it's two pages?

5 A. Yes. This was the attachment that I received from
6 Jeff Green regarding the Chapter 13 filing of Veronica
7 Daniels.

8 Q. Now, other than the phone call from Mr. Green and then
9 seeing this letter, was there any other notification that
10 you are aware of that was received by West Vernon Energy
11 Corporation of the filing of the third Chapter 13
12 proceeding?

13 A. No.

14 Q. And if there was such a proceeding --

15 MR. YOUNG: Withdraw that.

16 Q. If notice was sent in any manner to West Vernon Energy
17 Corporation, is it fair to assume that based upon your
18 position with the company that you would have been aware of
19 it?

20 A. Yes.

21 Q. Now, I would ask you to look at the second page of
22 exhibit 4. Was this attached to Mr. Green's letter?

23 A. Yes.

24 Q. And I'm going to ask you what your understanding is of
25 certain entries in this document, notice of Chapter 13

1 bankruptcy case, up in the left-hand corner, roughly, in
2 the middle, it says, "Meeting of creditors, date July 17,
3 2009." What does that entry mean to you, if anything?

4 A. That that's an opportunity for any of the creditors to
5 get together and look at the plan and see if it's viable
6 and, you know, if they want to make objections, etcetera.

7 Q. And the date of July 17 had already passed as of the
8 time you first received this notice, correct?

9 A. That's correct.

10 Q. And was it important to you or Mr. Almeida to be
11 involved in the creditors' meeting?

12 A. Yes. Mr. Almeida specifically instructed me to make
13 sure that we get on the creditors' committee.

14 Q. And why?

15 A. Well, we had tried to get on the creditors' committee
16 for the -- during the prior filing, as well. We believed
17 that -- we wanted to make sure that we were going to get
18 paid in full for our claim and we believed that Ms. Daniels
19 had not properly scheduled the value of her business. We
20 have some specialized knowledge because we're in the same
21 industry and we knew that -- we believe Ms. Daniels' most
22 valuable asset was in fact her business and that was valued
23 at zero dollars and we wanted to be sure that, if something
24 happened and this plan wasn't paying us in full, that we
25 made that objection, because there certainly is value to

1 the business more than enough to cover the debt, certainly,
2 to cover our debt, the debt that she owed West Vernon
3 Energy.

4 Q. And did Mr. Almeida, or anyone for the Almeida Group,
5 or West Vernon Energy, were they able to attend any
6 creditors' meetings?

7 A. No.

8 Q. Now, the second entry I'm going to refer to is to the
9 right of that, "Confirmation Hearing, date August 25,
10 2009." Is that entry of significance to you and what do
11 you understand it to be?

12 A. I understand that to mean that that's the hearing to
13 determine whether or not the plan, the Chapter 13 plan,
14 that was submitted by the debtor was viable and will be
15 approved by the court.

16 Q. And I'm going to move you further down, and just for
17 completeness, "Deadline to file a proof of claim, October
18 15, 2009." What is your understanding of what that means?

19 A. That's the bar date by which creditors need to file
20 their proof of claim to the court.

21 Q. And what is the importance of that date to you?

22 A. The proof of claim must be filed by that date.

23 Q. And below that -- and I'm skipping, "Deadline to
24 object to exemptions" -- below that, it says, "Deadline to
25 file objections to confirmation of the plan, August 17,

1 2009." Does that have meaning to you?

2 A. Yes. That -- that's, I believe, is the date that the
3 creditors need to file their objection, if they're going to
4 object to the plan, to the viability of the plan, or to any
5 aspect of it.

6 Q. And that date of August 17 was the day prior to the
7 date of Ms. Penachio's letter, correct?

8 A. Yes.

9 Q. Did Almeida or West Vernon Energy eventually file
10 objections to the confirmation of the plan?

11 A. I -- we did.

12 Q. And do you know when they were filed?

13 A. I believe it was in December of '09.

14 Q. And were they accepted or objected to for being
15 untimely?

16 A. I don't recall.

17 Q. After the letter was received and you -- I assume you
18 looked over the notice we just went over, okay -- what was
19 the next thing that happened regarding the Chapter 13
20 proceeding on behalf of West Vernon Energy?

21 A. I put in a couple of calls to Ms. Penachio.

22 Q. And was it your duty and responsibility to take care
23 of the Chapter 13 and to call her?

24 A. Yes.

25 Q. Okay. And did you speak with her?

1 A. I think around the third call I got her on the phone.

2 Q. And what did you say? To the best of your
3 recollection, what did you say to her and what did she say
4 to you?

5 A. I introduced myself, I said that I was in-house
6 counsel for West Vernon Energy, and I asked her how we
7 could get on the creditors' committee in this case. And I
8 believe -- I'm not sure whether she said there was no
9 creditors' committee or it was too late to get on the
10 creditors' committee -- but somehow she intimated to me
11 that there was no -- there was no opportunity for us to be
12 on the committee. And I don't know it's because it didn't
13 happen or I don't recall, exactly.

14 Q. What else was said by you and her?

15 A. Then I told her that the name address for West Vernon
16 was incorrect and I also told her that the amount of the
17 claim in the petition was not correct. And then she said
18 to me that the plan would pay West Vernon Energy in full,
19 or Ms. Daniels was intending on paying West Vernon's debt
20 in full, and then she told me that she would be in court on
21 the following day and that she would get a 60-day
22 adjournment of the proceedings. And then the last thing
23 that I recall her saying is, she had asked me to send her
24 an e-mail confirming our conversation.

25 Q. Anything else?

1 A. Not that I can recall.

2 Q. You made a reference to the amount of the claim being
3 incorrect. Would you look at exhibit 7, please? And
4 that's ECF number 41, exhibit R. And I believe the fifth
5 page down. It's a --

6 THE COURT: I'm sorry. I'm sorry. What exhibit
7 number?

8 MR. YOUNG: This is exhibit 7.

9 THE COURT: Okay.

10 MR. YOUNG: And I think I said the fifth page
11 down.

12 THE COURT: Right.

13 MR. YOUNG: Schedule F creditors.

14 Q. Mr. Cuono, do you have that in front of you?

15 A. Yes.

16 Q. Do you see the listing for West Vernon Petroleum?

17 A. Yes.

18 Q. Okay. And, again, that's the other corporation?

19 A. That's correct.

20 Q. That's Mr. Wiles' corporation?

21 A. That's right.

22 Q. Okay. And the address, that's the address of the
23 Mount Vernon facility and not of West Vernon Energy?

24 A. Yes.

25 Q. And the amount of the claim is indicated as 180,000,

1 how is that incorrect?

2 A. The -- our judgement was for 178,000 and change.

3 Q. So, you were correcting her that she overstated the
4 claim or at least the principal amount of the claim?

5 A. Right.

6 Q. Now, I'm going to refer you back now to exhibit 5.
7 This is ECF number 41, exhibit O. What is this document?

8 A. It's an e-mail from me to Ms. Penachio and a reply
9 from her.

10 Q. Okay. The e-mail on the bottom, being your e-mail,
11 that's the earlier e-mail, right?

12 A. That's correct.

13 Q. Okay. Can you, for the record, read your e-mail?

14 A. Yes. (Reading): To Anne Penachio, subject, Veronica
15 Daniels, Monday, August 31, 2009. Anne, this e-mail
16 confirms the 60-day extension Re: Daniels' bankruptcy
17 proceeding. I will e-mail you my draft proof of claim,
18 FYI, and file it this week. The name, address, of the
19 creditor is West Vernon Energy Corp., 33 Hubbles Drive,
20 Mount Kisco, New York 10549. Thanks so much for your
21 courtesies. And I signed it.

22 Q. Now, when you wrote, "confirms the 60-day extension,"
23 what was your understanding of what that meant?

24 A. I thought that she was getting a 60-day extension of
25 all the proceedings in this case and I thought it was

1 because we were not notified properly and she wanted to
2 make sure that we had time to put in our objections,
3 etcetera, if we had any.

4 Q. Did this have any relationship to the proof of claim
5 date, the bar date?

6 A. It was my impression that the bar date was moved, as
7 well. I thought the whole, everything, was being moved.

8 Q. Extended?

9 A. Extended. Right.

10 Q. Now, would you turn to exhibit 9, please? Do you have
11 that in front of you?

12 A. Yes.

13 Q. What is exhibit 9?

14 A. This is a --

15 Q. -- it's two pages, by the way. What is it?

16 A. This is a print screen of my electronic calender.

17 THE COURT: I'm sorry. Your electronic
18 what?

19 THE WITNESS: Calender.

20 Q. Can you describe for the court what you mean by
21 electronic calender? What is the application and how do
22 you use it?

23 A. It's called Lotus Organizer. I've been using this
24 version since I started with the company. It's an
25 electronic calender, every day I would come in and I open

1 my calender and the current date pops up and sort of a to-
2 do list will pop up and it will help me to -- prompt me
3 what I need to get done for the day, etcetera.

4 Q. And you and I had a conversation a few days ago and I
5 asked you about your calender?

6 A. Yes.

7 Q. And I asked you to print it out?

8 A. Yes.

9 Q. Okay. Now, the first page of the calender, what is
10 the date?

11 A. This is November 3rd, 2000 and -- it's 2009, the date
12 is -- the nine is knocked off.

13 Q. And the first two entries in the right-hand column,
14 under the description of tasks, can you read those?

15 A. Yes. (Reading): Community Fuel, proof of claim due
16 next week, Community Fuel proof of claim.

17 Q. Now, what was the purpose for that entry?

18 A. This is sort of a tickler for me to remember.

19 Whenever I enter something in my organizer, I always put it
20 in on the due date and then roughly a week before to prompt
21 me to get to it.

22 Q. When did you make this entry?

23 A. November -- oh, it would have been right when I
24 received the response e-mail from Ms. Penachio, so it would
25 have been August 31st, 2009.

1 Q. Let's go back -- and just keep one hand or finger on
2 this exhibit -- and let's go back to exhibit 5, and that's
3 the e-mail?

4 A. Okay.

5 Q. You referred to an e-mail from Ms. Penachio, she
6 responded to the e-mail that you described earlier?

7 A. Yes.

8 Q. And what did she write? Can you read that for the
9 record?

10 A. Yes. (Reading): From Anne Penachio, to Vincent
11 Cuono, Re: Veronica Daniels, ADJ, adjourned, to Tuesday,
12 November 9th, 2009, at 10 a.m., signed Anne Penachio.

13 Q. What was your understanding what that meant?

14 A. That meant that my understanding was that the bar date
15 was November 9th.

16 Q. Anything else?

17 A. And that there was an appearance on November 9th.

18 Q. Now, to go back to exhibit 9, relative to the receipt
19 of that e-mail, when did you make that entry?

20 A. I would have made it at the same time. I generally
21 calender things right away, try to calender them right
22 away.

23 Q. And what -- is that important to do?

24 A. Yes, because otherwise I'll lose it, I'll forget it.
25 If I don't -- if I don't put it in my calender, there's so

1 many things on my desk, it could get misplaced.

2 Q. Now, the next page of exhibit 9, what is that?

3 A. This is another date in my Lotus Organizer, November
4 9th.

5 Q. And can you read the first entry under "tasks"?

6 A. Yes. (Reading): Community Fuel proof of claim date,
7 10 dash 10 a.m.

8 Q. And when did you make this entry?

9 A. At the same time.

10 Q. Same time as the prior page?

11 A. Right. I would have made it on August 31st, 2009.

12 Q. When you got the e-mail?

13 A. When I got the e-mail.

14 Q. Did you have any further conversations with Ms.
15 Penachio?

16 A. No.

17 Q. Any further e-mails or other correspondence?

18 A. There -- I think she sent this e-mail twice, she said
19 the same thing, adjourned, November 9th.

20 Q. Other than that were there any other communications?

21 A. No.

22 Q. Now, would you turn to exhibit 6, please? And this is
23 ECF number 41, exhibit Q. Can you describe this document?

24 A. Yes. This is the proof of claim that I prepared in
25 the current Chapter 13 bankruptcy.

1 Q. And when was this filed?

2 A. It was filed on November 4th, 2009.

3 Q. Did you make any attempts to speak to Ms. Daniels or
4 her attorney, or did Mr. Almeida make any attempts to speak
5 with her?

6 A. Yes.

7 Q. And what were those for?

8 A. It was basically to try and settle the --

9 MR. DAVIS: Objection, Your Honor.

10 THE COURT: I'm sorry. Do we have a time frame
11 here?

12 Q. When did those conversations take place?

13 A. Sometime after we were notified of the Chapter 13
14 filing.

15 Q. Was it before you filed the notice of claim?

16 A. Yes.

17 THE COURT: I'm sorry, the proof of claim?

18 THE WITNESS: Proof of claim.

19 Q. -- the proof of claim. Okay. What were those
20 conversations?

21 A. Well, I didn't have any of the conversations. I'm
22 aware of the conversations.

23 Q. What are you aware of?

24 MR. DAVIS: Hearsay. Objection, Your Honor.

25 THE COURT: Do you have a response?

1 MR. YOUNG: I guess I could call Mr. Almeida to
2 the stand and go through that.

3 THE COURT: Okay.

4 A. I did have conversations with our attorney, who spoke
5 -- I can tell you about the conversations I had with our
6 attorney regarding those talks.

7 Q. I'm not going to ask you that, though.

8 MR. YOUNG: No further questions, Your Honor.

9 THE COURT: Okay. Cross?

10 MR. DAVIS: Good morning, Your Honor.

11 THE COURT: Good morning.

12

13 CROSS EXAMINATION BY MR. DAVIS:

14 Q. Good morning, Mr. Cuono.

15 A. Morning.

16 Q. First, you have testified that West Vernon Energy
17 Corp. and West Vernon Petroleum Corp. are two separate and
18 distinct entities with no cross ties, whatsoever?

19 A. That's correct.

20 Q. Unfortunately, I didn't make a copy of it, but in
21 exhibit A to ECF number 41, which is the verified complaint
22 in the 2002 action, (reading): The plaintiffs, West Vernon
23 Energy Corp. successor and assign of West Vernon Petroleum
24 Corp., as in for the first cause of action, at all times
25 herein after mentioned, the plaintiff, West Vernon Energy

1 Corp. Energy, was and still is a corporation incorporated
2 under the laws of the State of New York, with a place of
3 business located at 701 South Columbus Avenue, Mount
4 Vernon, New York, and is the successor and assign of West
5 Vernon Petroleum Corp." How do you reconcile that, Mr.
6 Cuono?

7 A. Well, when we -- when West Vernon -- when Robert
8 Almeida took over West Vernon Energy Corp., he also got the
9 files and records from West Vernon Petroleum Corp.,
10 including the personal guaranties, among other -- among
11 other items, and these were essentially assigned to West
12 Vernon Energy Corp., so that when they started business,
13 roughly, May of 2001, it was a seamless transaction, we
14 didn't need to go back to the customers for anything.

15 Q. So, point in fact West Vernon Energy Corp. is a
16 successor and assign of West Vernon Petroleum Corp.?

17 A. Of certain -- of documents, yes.

18 Q. Well, that's not what your verified complaint says?

19 MR. YOUNG: Objection. I believe that's mis-
20 stating what it says.

21 THE COURT: Well, the complaint speaks for
22 itself, right? So, I mean, I think you should ask the
23 witness clarifying questions, but not just repeat the
24 complaint.

25 MR. DAVIS: Sorry, Your Honor.

1 MR. YOUNG: If it helps, Your Honor, I have a
2 copy of the verified complaint?

3 THE COURT: It's one of the exhibits to the
4 original motion or --

5 MR. YOUNG: Yes.

6 THE COURT: -- the cross motion.

7 MR. YOUNG: Yes.

8 THE COURT: I have it.

9 MR. DAVIS: It's exhibit A, Your Honor.

10 THE COURT: Right. Oh, I'm sorry. We might as
11 well do this now. You actually didn't move for the
12 admission of your exhibits. I've denied the objections,
13 but you didn't actually formally move for the admission of
14 all your exhibits. Are you going to move for 1 through 11?

15 MR. YOUNG: Yes, sir, Your Honor. I do move that
16 our cross motion papers be part of the --

17 THE COURT: That's a separate issue. You want to
18 introduce these exhibits --

19 MR. YOUNG: Yes, Your Honor.

20 THE COURT: -- as evidence, as part of the
21 evidentiary record?

22 MR. YOUNG: Oh, the ones that I was asking about,
23 yes, Your Honor.

24 THE COURT: Yes.

25 MR. YOUNG: I didn't go through that formality.

1 THE COURT: Right.

2 MR. YOUNG: Absolutely, yes, Your Honor.

3 THE COURT: And I've overruled Mr. Davis'
4 objection to the extent he had one to a couple of them. So
5 unless you have a further objection, Mr. Davis, I'll admit
6 the exhibits, that part --

7 MR. DAVIS: No, Your Honor.

8 MR. YOUNG: Thank you, Your Honor.

9 THE COURT: -- of the exhibit book? Okay.

10

11 (Movant's Exhibits 1 through 11 - EXHIBITS FROM
12 EXHIBIT BOOK, received into evidence)

13

14 CROSS EXAMINATION BY MR. DAVIS (Cont'd.):

15 Q. Mr. Cuono, I direct your attention to Movant's Exhibit
16 1, the proof of claim that was filed on January 3rd, 2006.
17 As an attachment to that proof of claim, there are -- I'm
18 not quite sure what they would call these -- but they're
19 some kind of documents that require Community Fuel to
20 purchase a set number of gallons of fuel oil and such, at a
21 future price, and such?

22 A. You mean in exhibit A, to that document?

23 Q. Yes. As exhibit A to your proof of claim?

24 A. Okay.

25 Q. Those agreements are by and between whom?

1 A. West Vernon Petroleum Corp. and Community Fuel, by
2 Veronica Daniels.

3 Q. And item number three calls for delivery of that fuel
4 at what location?

5 A. The Mount Vernon facility.

6 Q. Exhibit B.

7 THE COURT: To the proof of claim?

8 MR. DAVIS: Yes, Your Honor.

9 THE COURT: Okay.

10 Q. That document is between whom and whom?

11 A. West Vernon -- it says at the top, West Vernon
12 Petroleum Corp. and Veronica Daniels, but, in reality, this
13 agreement was between West Vernon Energy Corp. and Veronica
14 Daniels. This is just sloppy paperwork by Guy Pippalow
15 (phonetical), who was working for Petroleum Corp. at the
16 time and who was helping us in the transition. I can tell
17 you that these contracts were supplied and were, in
18 reality, between West Vernon Energy Corporation and
19 Veronica Daniels.

20 Q. I will refer you to exhibit D of that same document?

21 A. The personal guaranty?

22 Q. Yes. And that guaranty is between whom and whom?

23 A. West Vernon Petroleum Corp. and Veronica Daniels, as
24 guarantor, of the Community Fuel Co.

25 Q. The date of that document?

1 A. It looks like January 24th. I don't know if it's
2 1995.

3 Q. So, is it safe to assume that in 1995 Veronica Daniels
4 was dealing with West Vernon Petroleum?

5 A. Yes.

6 Q. And not West Vernon Energy?

7 A. Yes.

8 Q. But your assumption of the guaranty was pursuant to
9 your assumption of the assets, operating license, or
10 whatever, of West Vernon Petroleum?

11 A. No, no, no. There were to asset -- this is not an
12 asset exchange, and West Vernon Petroleum Corp. kept all
13 their licenses, it was just basically assigning over the
14 documentation from the customers, really. Basically, the
15 personal guaranties, until we --

16 THE COURT: Do you have an assignment of the
17 personal guaranty?

18 THE WITNESS: I don't recollect. I don't recall.
19 I have to look.

20 MR. YOUNG: Your Honor, I don't want to interrupt
21 the cross examination, but there's some legal questions
22 being raised and I have some comments to make about that --

23 THE COURT: You can do that later.

24 MR. YOUNG: -- from the state litigations.

25 THE COURT: You can do that later.

1 MR. YOUNG: Okay.

2 Q. I will direct you to exhibit 4 of the exhibits, which
3 is the letter from Anne Penachio to Jeff Green, along with
4 the attachment of the notice of the Chapter 13 bankruptcy
5 case meeting of creditors and fixing of the dates.

6 "Deadline to file the proof of claim," what does it say
7 there?

8 A. (Reading): For all creditors, except a governmental
9 unit, October 15th, 2009.

10 Q. Does it specify a time of day?

11 A. No.

12 Q. I'll direct you to "confirmation hearing," the date?

13 A. Where is that? Okay. I see it. Okay. August 25th,
14 2009.

15 Q. Does it specify a time?

16 A. Yes. 10 a.m.

17 Q. I'll direct you across the page to "meeting of
18 creditors," the date?

19 A. July 17th, 2009.

20 Q. The time?

21 A. 10 a.m.

22 Q. Further down the page, "deadline to file objection to
23 confirmation of the plan," the date?

24 A. August 17th, 2009.

25 Q. Does it specify a time?

1 A. No.

2 Q. Thank you. I'll direct you now to the exhibit 5. The
3 e-mail from Ms. Penachio to you?

4 A. Yes.

5 Q. Could you read it, please?

6 A. (Reading): From Anne Penachio, to Vincent Cuono,
7 subject Re: Veronica Daniels, ADJ, adjourned to Tuesday,
8 November 9th, 2009, at 10 a.m.

9 Q. That did specify a time. I will now direct you
10 further down the page to your e-mail to Ms. Penachio. If
11 you could read the second sentence?

12 A. The one that starts, the name, address?

13 Q. No. "I will..."

14 A. Oh, sorry. (Reading): I will e-mail you my draft
15 proof of claim, FYI, and file it this week.

16 Q. Did you ever e-mail Ms. Penachio a proof of claim?

17 A. I did not.

18 Q. Did you ever file it, I presume would be, the first
19 week in September?

20 A. No.

21 Q. If you will, your exhibit 6. This is the proof of
22 claim that you filed with the bankruptcy court November
23 4th?

24 A. Yes.

25 Q. Okay. This document is dated?

1 A. 10/5/09.

2 Q. And is signed by?

3 A. It was signed by Mr. Almeida, Robert B. Almeida.

4 Q. There is a signature there?

5 A. This is the -- I think this was the return receipt. I
6 think this is the receipt. We have -- we have a signed one
7 somewhere.

8 Q. Well, this --

9 A. It was signed by Robert Almeida.

10 Q. Well, this is the filed stamped copy of the bankruptcy
11 from --

12 A. No. I think this is the --

13 Q. -- the bankruptcy court?

14 A. I have a signed copy. I think this was the receipt.
15 We brought a second copy to get it date stamped.

16 Q. I believe if you would check the docket and the claims
17 register you would find that there is no signature on the
18 proof of claim that was filed with the court?

19 A. Okay. I don't know. I don't --

20 MR. YOUNG: Objection, Your Honor.

21 THE COURT: Was that a question? Have you
22 checked the docket?

23 MR. DAVIS: Yes, I have, Your Honor. Several --

24 THE COURT: Have you checked the docket?

25 MR. DAVIS: -- times.

1 THE WITNESS: I believe it was. I know it
2 definitely was signed. I have a copy of the signed ones.
3 I'm -- you know, I could -- I would testify here that it
4 was signed.

5 THE COURT: No, but you haven't checked the
6 docket, right?

7 THE WITNESS: No.

8 THE COURT: Okay.

9 MR. DAVIS: I have several times.

10 THE COURT: Well, all right, but that's -- you're
11 not testifying.

12 MR. DAVIS: I'm sorry?

13 THE COURT: But you're not the witness.

14 MR. DAVIS: I understand.

15 Q. I direct you to page 7 -- I'm sorry, exhibit 7. First
16 page to exhibit 7 is schedule C, property claimed as
17 exempt. I believe you had testified that Ms. Daniels, in
18 filing the petition, indicated that the value of the
19 business was valued at zero?

20 A. Yeah, I realized it, and I meant valued at unknown.

21 It's not -- it doesn't say "zero," it says "unknown."

22 Q. Has West Vernon Energy, West Vernon Petroleum, ever
23 sent any letter or any other documentation, prior to the
24 filing of the bankruptcy in 2009, indicating that the
25 address is not 701 South Columbus Avenue, rather than 33

1 Hubbles Street?

2 A. Well, I know in our -- in the -- in our notice of
3 claim in the 2006 filing, I know that the address was 33
4 Hubbles Drive.

5 THE COURT: Are you aware of any other notices
6 after that?

7 THE WITNESS: Yes. Any correspondence I had with
8 Ms. Daniels' attorney in the New York State case would have
9 been on our letterhead, which is 33 Hubbles Drive.

10 THE COURT: Was there such correspondence?

11 THE WITNESS: I -- I -- I don't recollect, but I
12 imagine there was correspondence, it was going on for a
13 number of years, and I did speak with -- a few times --
14 with one of the attorneys, not the trial attorney, but the
15 attorney before that. Her name escapes me.

16 I've never -- we've never used -- as long as I've
17 been there, we've always used 33 Hubbles Drive, that's the
18 address on all of our correspondence.

19 MR. DAVIS: I'm sorry, Your Honor, I am looking
20 for a mailing matrix on one of the prior bankruptcy filings
21 that is an exhibit.

22 Q. In the ECF 41 motion in exhibit D, okay, which happens
23 to be the order dismissing the Chapter 13 case from 2003,
24 the certificate --

25 A. I don't have a copy of that. Is it in here? No.

1 THE COURT: Let him ask the question first.

2 THE WITNESS: Oh, sorry.

3 THE COURT: And if you can answer, you can answer
4 it. If you need to have the document to answer, you can
5 say that.

6 Q. Okay. The certificate of service indicates that West
7 Vernon Energy Corp. was served in care of Laurence Solarsh,
8 Esq., 81 Main Street, in White Plains, New York, and also
9 701 South Columbus Avenue, Mount Vernon, New York. During
10 the pendency of that bankruptcy, was there any -- ever any
11 objection made or claim of not being served?

12 A. I don't know.

13 Q. Okay. When you called Ms. Penachio on August 24th,
14 what did Ms. Penachio say to you?

15 Let me rephrase that again. You asked -- you
16 called Ms. Penachio for what purpose?

17 A. Well, first, to see if we could get on the creditors'
18 committee, but then also to correct the name, address and
19 the amount of the claim, which were all incorrect, on the
20 petition.

21 MR. DAVIS: Your Honor, this is a copy of the
22 affirmation in support of West Vernon's motion, the
23 affidavit Vincent Cuono and that's in ECF number 41.

24 THE COURT: Okay. This was submitted in
25 connection with the motion, right?

1 MR. DAVIS: I'm sorry?

2 THE COURT: This is submitted with, in connection
3 to the cross motion?

4 MR. DAVIS: Absolutely.

5 THE COURT: I have this.

6 MR. DAVIS: This is affirmation in support of the
7 motion.

8 MR. YOUNG: What exhibit number is that?

9 MR. DAVIS: It's not an exhibit.

10 THE COURT: It's a separate filing, supplemental
11 -- oh, I'm sorry.

12 MR. DAVIS: This is the -- ECF 41, the motion.

13 THE COURT: Okay. This is different -- this is
14 different than the supplemental declaration.

15 MR. DAVIS: The notice of the motion.

16 THE COURT: All right.

17 MR. YOUNG: This is an -- is this the
18 affirmation?

19 MR. DAVIS: Yes.

20 THE COURT: Yes.

21 MR. YOUNG: Okay.

22 MR. DAVIS: This is the affirmation of Mr. Cuono.

23 Q. Do you recognize that document, sir?

24 A. Yes.

25 Q. And this document was submitted by you for what

1 purpose?

2 A. It was in connection with our -- the application we
3 made to the court.

4 Q. I'll first refer you to page 6, line item 17?

5 A. Okay.

6 Q. I believe you testified that West Vernon Energy had
7 expended 120 to \$150,000 in its state court litigation?

8 A. That's right.

9 Q. Your affidavit states that up to the point of entry of
10 the state court order and judgement, West Vernon had
11 incurred an excess of?

12 A. 90,000.

13 Q. How do you reconcile the difference, sir?

14 A. Well, it's my -- my time. We don't charge my time.
15 My time is effectively valued at a number, but because I'm
16 paid by the company as an employee, it's not -- I don't
17 charge my legal fee, per se.

18 Q. Your legal fee would have then been 30 to \$60,000?

19 A. Yeah. Probably. Something like that. I mean, if I
20 was charging the time.

21 Q. And what would you charge per hour?

22 A. Whatever the -- I don't know what the rate would be,
23 \$200, say. Okay, something like that, yeah.

24 Q. At the bottom of page 16 -- I'm sorry, page 6, number
25 19, can you read the sentence, or starting with the

1 sentence, "as a result of..."?

2 A. (Reading): As a result of the improper listing, West
3 Vernon did not receive the court notices of the instant
4 bankruptcy filing and in turn did not receive the court
5 notices of the 341 meeting and bar date for filing proofs
6 of claim.

7 Q. Continue?

8 A. (Reading): The only notice that West Vernon did
9 receive of the instant proceeding came in the form of an
10 unofficial letter from Anne Penachio, Esquire, the debtor's
11 newly retained bankruptcy counsel, to Jeff Green, Esquire,
12 counsel to West Vernon in the state court action, dated
13 August 18, 2009, exhibit A.

14 Q. Continue, please?

15 A. (Reading): In her two-sentence letter, Ms. Penachio
16 cryptically states that she is "bankruptcy counsel to
17 Veronica Daniels" and "Ms. Daniels filed a petition for
18 bankruptcy relief."

19 Q. The last sentence, please?

20 A. (Reading): Ms. Penachio said nothing about the date
21 of filing and made no reference to a stay.

22 Q. Isn't it the case that Ms. Penachio, when she faxed
23 that letter to Mr. Green, attached a copy of the notice of
24 Chapter 13 filing with all the various dates?

25 A. I believe so.

1 Q. And how do you reconcile your statements here with
2 the fact that you did get a copy of that notice, albeit
3 late?

4 A. Well, this is more relating to notices for creditors
5 hearings, etcetera.

6 Q. Which was in that notice?

7 A. Okay.

8 Q. In number 20, the first sentence, please?

9 A. Do you want me to read it?

10 Q. Yes?

11 A. (Reading): On or about August 24th, 2009, I called
12 Ms. Penachio, who advised me that the hearing on the
13 confirmation of the debtor's Chapter 13 plan was scheduled
14 for August 25th, 2009, and had been adjourned for 60 days
15 and that the debtor, Veronica Daniels, was prepared to pay
16 our claim in full. Keep going?

17 Q. Did you have any conversation with Ms. Penachio in
18 regards to the bar date?

19 A. Well, that -- that's the whole crux of this, you know,
20 it was my understanding that the bar date was moved. That
21 was my impression from our conversations from -- and from
22 the e-mail. As soon as I got that -- I was waiting for Ms.
23 Penachio to give me a date and as soon as I got that date,
24 I calendered.

25 Q. Did Ms. Penachio, in any way, shape, manner or form,

1 indicate to you in those conversations that she was talking
2 about extending a bar date, or was there a discussion in
3 relation to the confirmation hearing?

4 A. Well, I --

5 MR. YOUNG: Your Honor, I object to the question,
6 manner, shape or form. I mean if he's asking --

7 THE COURT: No. You can answer the question.
8 I'll overrule the objection.

9 A. I can't recollect the words, but the impression that I
10 got from the conversation was that the bar date, that all
11 the dates, had been moved. And I was looking for -- the
12 bar date is the date that I was looking to calender,
13 specifically.

14 THE COURT: Did Ms. Penachio or you ever use the
15 phrase "bar date"?

16 THE WITNESS: Maybe. I don't recollect during
17 that phone call. I just don't.

18 Q. In the e-mail you indicated that you will e-mail a
19 draft proof of claim, FYI, and file it this week. Is there
20 any reason that you did not mail the proof of claim and did
21 not file it at the beginning of September?

22 A. Well, I hadn't prepared it by the beginning of
23 September. That was, unfortunately, a gratuitous statement
24 and I got busy with corporate -- corporate tax returns and
25 individual tax returns, and so I didn't actually prepare it

1 until probably late September, which was, you know, well --
2 well more than a week after this, my e-mail, and by that
3 time, Ms. Penachio was no longer the attorney for Ms.
4 Daniels anyway, so there was no point in e-mailing it to
5 her at that -- when I had done it.

6 Q. You said Ms. Penachio no -- Ms. Penachio was no longer
7 attorney for Ms. Daniels?

8 A. Yes, I believe that was in September.

9 Q. And you garner that belief from where?

10 A. We have another attorney, Lou Gasparini, who actually
11 took over handling the file for a period of time, and he's
12 the one, he contacted Ms. Penachio and she told him that
13 she was no longer the attorney on the case. And then he,
14 thereafter, contacted Lauren McGregor (phonetical), and
15 they had some discussions regarding settlement and that was
16 in September/October, I believe, of '09.

17 Q. You prepared -- the date on the preparation of the
18 proof of claim was October 4th?

19 A. That's when it was signed. I'm sure I prepared it at
20 least a week before.

21 Q. If it was prepared or dated October 5th, I believe,
22 and why was it not filed until November 4th?

23 A. Because I was waiting for somebody who's the -- to go
24 the courthouse and then I was going to have them drop it
25 off. I walk to work, I don't have a -- we have one car and

1 my wife uses it and I was just sort of piggy-backing off.
2 And, in fact, the reason November 4th was the date we filed
3 it, is because that's when Mr. Almeida was at the county
4 courthouse for something and so I gave it to him and asked
5 him to bring it in and file it.

6 Q. So it was prepared and purportedly executed on a
7 timely basis --

8 A. I prepared it --

9 Q. -- but not filed timely?

10 MR. YOUNG: Objection, Your Honor. It begs the
11 question of why we're here.

12 THE COURT: Well, let's assume, for the moment
13 that the bar date was, in fact, not moved and was October
14 15th.

15 THE WITNESS: Right. Then it would have been --
16 then I had prepared it before the October 15th bar date,
17 but we didn't file it with the court until November 4th, so
18 -- which was, it would have been after the so called bar
19 date.

20 MR. DAVIS: I believe I am done, Your Honor.

21 THE COURT: Okay. Do you have any -- actually, I
22 have a couple of questions, we should probably wait for
23 redirect until you hear those.

24 Mr. Cuono, in your August 31 e-mail, you say that
25 you -- you say, "I will e-mail you my draft proof of claim,

1 FYI, and file it this week."?

2 THE WITNESS: Right.

3 THE COURT: Why did you say that?

4 THE WITNESS: Well, because at the time -- I'll
5 admit it was gratuitous -- but at the time, I had the
6 intention of doing it at that --

7 THE COURT: But had you --

8 THE WITNESS: -- point, just to get it done.

9 THE COURT: Does that refresh your memory as to
10 whether you discussed filing a proof of claim or the bar
11 date with Ms. Penachio on August 24th phone call?

12 THE WITNESS: Not really. I think that the
13 reason that I would have given the advance copy was more
14 for the amount of the claim than anything.

15 THE COURT: Well, you had already told her that
16 on the phone, right?

17 THE WITNESS: Right.

18 THE COURT: And it was about \$1500 difference?

19 THE WITNESS: Yeah. Right.

20 THE COURT: Now, I want you to think very
21 carefully. Do you recall any discussion by Ms. Penachio of
22 a claims bar date on the August 24th phone call?

23 THE WITNESS: I -- I don't recall the words, no.

24 THE COURT: She says, in paragraph 5, of her
25 affirmation, that I advised -- this is a quote -- "I

1 advised Mr. Cuono that I intended to seek an adjournment of
2 approximately 60 days because the claims bar date was not
3 until mid October. I recall explaining that it, in my
4 opinion, it would best to defer confirmation until after
5 the bar date had passed." Does that refresh your
6 recollection?

7 THE WITNESS: No. I read it, but I didn't, even,
8 at the first time I read it, I didn't recollect that
9 conversation.

10 THE COURT: Okay.

11 THE WITNESS: I mean, that was my impression,
12 when I put that date, November 9th, November 9th, in the
13 calender, it's because my understanding was that was the
14 bar date. I mean, it's as simple as that.

15 THE COURT: And when do you think you put that
16 in?

17 THE WITNESS: Probably, immediately, from
18 receiving that e-mail.

19 THE COURT: But not on August 24th?

20 THE WITNESS: No, no. I would have done it on
21 August 31st, whenever I got that e-mail from her.

22 THE COURT: Why wouldn't you have put it in on
23 the 24th?

24 THE WITNESS: Because I didn't know the date on
25 the 24th.

1 THE COURT: Hadn't she said that she would give
2 you a 60-day extension?

3 THE WITNESS: Yes, she did.

4 THE COURT: And asked you to confirm that in the
5 e-mail?

6 THE WITNESS: Yes.

7 THE COURT: Why did you wait a week to do so?

8 THE WITNESS: I think -- I think because I was
9 waiting for her to give me the exact date.

10 THE COURT: Well, did she?

11 THE WITNESS: She did. She e-mailed on --

12 THE COURT: But that was after your e-mail,
13 right?

14 THE WITNESS: Yes. I e-mailed her, I sent her a
15 confirming e-mail, and then she responded and her response
16 gave me the date of November 9th.

17 THE COURT: Why did -- if November 9th was the
18 date for everything, including objecting to the plan, why
19 did Mount Vernon Energy file its objection in December?

20 THE WITNESS: Because that -- when we went on
21 November 9th and realized what had happened, we had
22 contacted outside counsel and they had done that. The
23 reason we didn't file an objection is because, according to
24 Ms. Penachio, we were going to get paid in full. We
25 believed our claim would be paid. And, in fact, on

1 November 9th, I thought we were meeting in the Trustee's
2 office and we were going to get an opportunity to question
3 Ms. Daniels, because I wanted to find out exactly how the
4 plan was going to pay us in full, because it didn't seem,
5 at that point, that it would.

6 THE COURT: Okay.

7 THE WITNESS: And we had done that once before,
8 during the second Chapter 13 filing, we did have the
9 opportunity to question Ms. Daniels, I don't know, but that
10 was my impression as to where we were going at that point.

11 THE COURT: But that wasn't the confirmation
12 hearing?

13 THE WITNESS: No. Right.

14 THE COURT: Who is Mr. Gasparini?

15 THE WITNESS: He's an attorney, an outside
16 attorney, that we use on certain matters, legal matters.

17 THE COURT: And when did he take over the file?

18 THE WITNESS: I don't know exactly when, but it
19 was sometime between September and -- sometime
20 September/October of '09.

21 THE COURT: What's involved in taking over the
22 file?

23 THE WITNESS: Just Mr. Almeida calling me and
24 telling me that Lou's going to handle it and Mr. Almeida
25 having conversations with Mr. Gasparini and then Mr.

1 Gasparini contacting Veronica Daniels' attorneys.

2 THE COURT: And when did he give up the file, if
3 he has?

4 THE WITNESS: He -- it would have been sometime
5 in, I would say, October. I think he was only on -- he was
6 only involved in it to try to contact Ms. Daniels'
7 attorneys to see if we could settle it, settle it -- settle
8 the claim. We had made -- she had made an offer to sell
9 her business to Mr. Almeida for 1.5 million and --

10 MR. DAVIS: Objection, Your Honor.

11 THE COURT: No, that's okay. You can answer.

12 THE WITNESS: That's when it broke down. There
13 was some talk about buying her business and Lou was
14 handling that. You know, I only know what I spoke to Lou
15 about those conversations. I wasn't in on those
16 conversations, but that essentially broke down, at one
17 point, when her attorney intimated this offer to sell, and
18 that's really when he didn't -- he wasn't handling the case
19 anymore.

20 THE COURT: So, again, when do you think that
21 would have been?

22 THE WITNESS: It would have been, I'm guessing,
23 October.

24 THE COURT: But October, when?

25 THE WITNESS: Early October, probably. Because

1 then I filed -- we filed our -- he -- Mr. Almeida signed
2 the proof of claim on October 4th, or 5th, something like
3 that. So it would have been, probably, around that time,
4 as a guess.

5 THE COURT: What relation does signing the proof
6 of claim have to Mr. Gasparini not working on it?

7 THE WITNESS: Well, if he was handling it, then I
8 would have just sent him the draft and he would have done
9 everything on it, but I believe that he had given me back
10 the file, not a physical transfer, but he had said he did
11 what he could do on it and now he was no longer working on
12 the case and so then I --

13 THE COURT: Did you ever tell him what the bar
14 date was?

15 THE WITNESS: I -- I definitely didn't have any
16 conversations like that with him that I can recall.

17 THE COURT: Okay. Any redirect?

18 MR. YOUNG: Yes, Your Honor. May I do it from
19 here, Your Honor?

20 THE COURT: Yes. That's fine.

21 MR. YOUNG: Thank you.

22
23 REDIRECT EXAMINATION BY MR. YOUNG:

24 Q. Just taking things in order, you were questioned about
25 the assignment from West Vernon Petroleum. Earlier you

1 testified about the litigation and there was a third party,
2 what was the name of that third party?

3 A. Singer Holding Corp.

4 Q. And what was Singer's relationship to the facility in
5 Mount Vernon?

6 A. They had a throughput agreement, which is,
7 essentially, a contract to bring oil in and load oil out of
8 the terminal.

9 Q. And who was that throughput agreement with?

10 A. It was with West Vernon Petroleum Corp.

11 Q. And when West Vernon Energy took over the facility, or
12 under the license agreement, was there a litigation
13 regarding who was entitled or who was -- who became the
14 party entitled to the benefits of the Singer throughput
15 agreement with West Vernon Petroleum?

16 A. Are you asking at the time, in May of '01?

17 Q. No, eventually, did litigation ensue as to who became
18 the party as between West Vernon Petroleum and West Vernon
19 Energy entitled to the benefits of the throughput
20 agreement?

21 A. Yes.

22 Q. And did that go to the Appellate Division, Second
23 Department?

24 A. Yes.

25 Q. In who's favor did they rule?

1 A. West Vernon Energy Corp.

2 Q. Okay. And do you recall what the Appellate Division
3 essentially ruled vis-a-vis assignments?

4 A. That there was no assignment.

5 Q. Okay. Now, regarding your e-mail with Ms. Penachio --

6 THE COURT: I'm sorry?

7 THE WITNESS: That the assignment was void -- was
8 voidable. I don't really recollect.

9 MR. YOUNG: Actually -- okay.

10 THE COURT: Maybe you can just tell me in
11 argument. I'm not sure --

12 MR. YOUNG: Shall I do it now, Your Honor?

13 THE COURT: No.

14 MR. YOUNG: Okay. I'll do it later.

15 THE COURT: Right. I'm not sure the witness
16 really understands.

17 MR. YOUNG: I handled that litigation, but I --

18 THE COURT: Fine. So, you can tell me. I mean,
19 it's a matter of public record --

20 MR. YOUNG: Okay.

21 THE COURT: -- you can tell me that.

22 MR. YOUNG: But just so the court knows, I do
23 report to Mr. Cuono, so we do speak. Okay.

24 Q. You were asked questions about the e-mail in which, in
25 your words, you gratuitously said, FYI, you were going to

1 send her a draft and file it within a week. And I believe
2 Mr. Davis said within a week would have been the beginning
3 of September of '09?

4 A. Right.

5 Q. Okay. But the original bar date was October 15, '09,
6 correct?

7 A. Yes.

8 Q. Okay. You had no -- did you have any reason why you
9 would have had to file it early?

10 A. No.

11 Q. Okay. Did you calender the fact that you were going
12 to send her a draft early, or file it early?

13 A. I don't think so.

14 Q. Okay. And if you look at your calender, if you will,
15 because Mr. Davis questioned you about times, and I'm going
16 to refer you back to exhibit 9, in the second page, which
17 was the November 9 entry?

18 A. Okay.

19 Q. And you wrote, "Community Fuel proof of claim date
20 dash 10 a.m." Can you explain that?

21 A. I think that it was, I was calendering the proof of
22 claim, the bar date, and also the fact that we were
23 appearing at 10 a.m.

24 Q. Was there any difference between these different dates
25 in '09?

1 A. No, not really. No.

2 Q. You considered them all the same date?

3 A. Yes.

4 Q. Mr. Davis also questioned you regarding, I think he
5 said, it was exhibit D, of the motion papers, ECF number
6 41, and that was under the order dismissing the Chapter 13
7 case and there's a certificate of service and it indicated
8 West Vernon Energy Corporation, care of Lawrence Laurence
9 Solarsh, Esquire, 81 Main Street, Suite 205, White Plains,
10 New York 10601. First of all, West Vernon Energy
11 Corporation, that's the correct corporation, correct?

12 A. Yes, West Vernon Energy Corp.

13 Q. And Laurence Solarsh is who?

14 A. He was a bankruptcy attorney that Mr. Almeida had used
15 during the first Chapter 13 filing of Ms. Daniels.

16 Q. And in exhibit B to ECF exhibit 41 --

17 MR. YOUNG: -- Your Honor, may I show this to the
18 witness?

19 THE COURT: I'm sorry. This is what?

20 MR. YOUNG: Exhibit B to the original motion, ECF
21 number 41.

22 THE COURT: Yes, that's fine.

23 Q. I'm going to show you a document. I'm going to show
24 you what appears to be a proof of claim in the prior
25 bankruptcy?

1 THE COURT: This is the first one, right?

2 MR. YOUNG: I'm sorry? First one, yes.

3 THE COURT: This is the first proof of claim?

4 MR. YOUNG: I believe so.

5 THE COURT: The first bankruptcy. Okay.

6 Q. And can you just tell me the name and address you have
7 for the -- that's there for the creditor?

8 A. It says, West Vernon Energy Corp., care of Laurence
9 Solarsh, Esquire, 81 Main Street, Suite 205, White Plains,
10 New York 10601.

11 Q. And that's the correct corporation?

12 A. Yes.

13 Q. Thank you. You were asked some questions about your
14 affirmation and your description of Ms. Penachio's
15 letter --

16 A. Okay.

17 Q. -- correct? And in that affirmation there's a
18 reference to exhibit N, ECF number 41, exhibit N, and is it
19 a fact that exhibit N had a copy of her letter and the
20 proof of claim?

21 A. Yes, I believe so.

22 MR. YOUNG: No more questions, Your Honor.

23 THE COURT: Okay. Anything on recross, just on
24 that series of questions?

25 MR. DAVIS: Just one thing, Your Honor, briefly,

1 Your Honor.

2

3 RECROSS EXAMINATION BY MR. DAVIS:

4 Q. In the -- I guess it's exhibit A to the ECF motion,
5 there is part of an exhibit, actually, it's the first page
6 after the complaint -- a letter to Ms. Veronica Daniels,
7 owner, Community Fuel Oil Company, etcetera, and the letter
8 is from West --

9 THE COURT: Do you want to show the witness?

10 MR. DAVIS: Yes, I want to show this.

11 THE COURT: Do you have this exhibit, sir?

12 THE WITNESS: I have it, yes, sir.

13 THE COURT: Okay. All right.

14 Q. That is a letter from whom?

15 A. From David Rogers.

16 Q. David Rogers was?

17 A. He was the -- really, the chief financial officer for
18 West Vernon Petroleum Corp., and he was also, at that time,
19 working for West Vernon Energy Corp., he was working for
20 both companies.

21 Q. Okay. And the letterhead is from?

22 A. West Vernon Energy Corp.

23 Q. And the address of West Vernon Energy Corp.?

24 A. It says 701 South Columbus Avenue, Mount Vernon, New
25 York 10550. That's because this was -- this was the

1 letterhead that West Vernon Petroleum Corp. had created for
2 this entity. This isn't our -- this isn't the West Vernon
3 Energy Corp. letterhead that we use.

4 Q. So, that letter dated in 2002, after West Vernon
5 Energy Corp., if you will, of Mount Kisco took over the
6 operation of the terminal under the auspice of West Vernon
7 Petroleum, okay, this is West Vernon Energy Corp. of Mount
8 Vernon, a shell corporation, that was acquired back in
9 2001?

10 A. Right. Yeah. This is just a laziness that -- I'm
11 just guessing, I have no idea, but -- that he had the
12 letterhead and he used it.

13 MR. DAVIS: I have no more, Your Honor.

14 THE COURT: Okay. All right. You can step down,
15 sir.

16 THE WITNESS: Thank you, Your Honor.

17

18 (Witness is excused)

19

20 THE COURT: Okay. Did you want to call another
21 witness, or you may not need to? I don't know. I don't
22 know what your -- because of subsequent testimony, but --

23 MR. YOUNG: Well, Your Honor, first, I was going
24 to ask if we could take a five-minute recess and I would
25 like to speak to my client. Also, I was under the

1 impression that Ms. Penachio was going to be called as a
2 witness on behalf of the debtor?

3 THE COURT: Is she?

4 MR. DAVIS: Presumably, yes, Your Honor.

5 THE COURT: All right. Well, I'm happy to take a
6 five-minute recess. But you're not -- this -- Mr. Cuono's
7 done, right?

8 MR. YOUNG: He's done.

9 THE COURT: Okay.

10 MR. DAVIS: Is Mr. Young going to be calling any
11 other witnesses?

12 THE COURT: Well, I think he wants to go through
13 his notes --

14 MR. YOUNG: I'm asking for that recess --

15 THE COURT: -- and see whether he needs to or
16 not.

17 MR. YOUNG: Yes.

18 THE COURT: So I'm happy to give people a five-
19 minute recess for that.

20 MR. YOUNG: Thank you.

21

22 (Break in proceeding)

23

24 THE COURT: Okay. We're back on the record in In
25 Re: Daniels.

1 MR. YOUNG: I'm going to call Robert Almeida to
2 the stand, Your Honor.

3 THE COURT: Okay.

4 MR. DAVIS: Your Honor, I do have an objection to
5 that. Mr. Almeida was present during the entire
6 examination, cross examination.

7 THE COURT: But he's the president of the -- he's
8 allowed to because he's the president of the claimant.

9 MR. DAVIS: But he's an officer, he's not the --
10 he's not the party, he's an officer of the party.

11 THE COURT: But the party's a corporation. It
12 can't -- it appears through its president, so he's...

13 I'll overrule that objection.

14 MR. YOUNG: Thank you, Your Honor.

15 THE COURT: So, you can take the stand, sir.
16 Would you raise your right hand, please? Please sit down.
17 Would you, please, spell your name for the record?

18 THE WITNESS: My name is Robert B. Almeida. B,
19 for boy. Almeida, A-l-m-e-i-d-a.

20 THE COURT: Okay. Go ahead.

21

22 ROBERT B. ALMEIDA,
23 having been first duly sworn by the court,
24 was examined and testified as follows:

25

* * * * *

1 DIRECT EXAMINATION BY MR. YOUNG:

2 Q. Mr. Almeida, what is your background in the fuel oil
3 business?

4 A. I started in the oil business with Exxon in 1954. I
5 worked with them in India for 12 years, and then,
6 subsequently, within the U.S. for another roughly 15 years
7 and I retired from them in 1986.

8 Q. What was your last position with Exxon?

9 A. My last position was strategic planning advisor to the
10 corporate -- in the corporate office.

11 Q. And title?

12 A. My prior experience basically in oil refining and in
13 oil transportation and distribution. My title was
14 strategic planning advisor.

15 Q. Now, the Mount Vernon facility, was this your first
16 private venture in the fuel oil business?

17 A. I had started Almeida Oil Company as a retail
18 operation, but Mount -- West Vernon Energy Corporation was
19 my first venture in the wholesale side of it.

20 Q. And is that the license, the first time you've had an
21 oil facility pursuant to the license, with West Vernon
22 Petroleum Corp.?

23 A. Yes. I signed the license agreement, West Vernon
24 Petroleum Corporation, and took over the operation of their
25 terminal facility in Mount Vernon.

1 Q. Okay. I would like to clarify some dates that were
2 spoken about and I'm looking for the dates when you started
3 at the Mount Kisco facility. When did that begin?

4 A. We bought the Mount Kisco facility towards the end of
5 2001 and were operating that terminal from then and we
6 moved all our offices to Mount Kisco at the end of 2002.

7 Q. Prior to that time, where were the offices?

8 A. Almeida Oil's office was in Scarsdale and West Vernon
9 Energy's office was at the terminal, because the only
10 administrative employee it had -- well, not the only one,
11 one of the two administrative employee it had -- was
12 located there.

13 THE COURT: I'm sorry, which terminal, the one in
14 Mount Vernon?

15 THE WITNESS: The one in Mount Vernon.

16 Q. Did there come a time when the office functions at the
17 Mount Vernon facility terminated?

18 A. Yes, sir.

19 Q. When was that?

20 A. That was at the end of 2002. Prior to that, it
21 started in May 2001, and the administrative function was
22 managed by a gentleman named David Rogers, who was alluded
23 to earlier in Mr. Cuono's testimony, he worked for West
24 Vernon Petroleum Corporation, as also for West Vernon
25 Energy Corporation, more or less on a 50/50 basis.

1 Q. After you moved to Mount Kisco in the end of 2002, was
2 there any other -- were there any office functions that
3 were performed on your behalf, or on behalf of West Vernon
4 Energy, at the Mount Vernon facility?

5 A. No. The operation continued there, but there was no
6 administrative function. The operating function continued
7 there.

8 Q. When you say "the operating function," are you
9 referring to the physical delivery and storage of oil?

10 A. Right. There's a terminal operator who handles the
11 barges and handles the truck, etcetera. And they continued
12 to be there, but the administrative function was always
13 handled at West Vernon -- of West Vernon always handled at
14 Mount Kisco from the end of 2002 until today.

15 Q. The other area I would like to clarify was Mr.
16 Gasparini's involvement. Who was Mr. Gasparini?

17 A. Mr. Lou Gasparini is an outside attorney whom I use
18 for several of my spot litigations that there may be. And
19 when this bankruptcy came up and Ms. Penachio had informed
20 Mr. Cuono -- Mr. Green and then Mr. Cuono about it and we
21 were in the process of -- she had said, basically, that we
22 were going to be paid off -- and we were in the process of
23 then preparing our application, etcetera, our proof of
24 claim, at that time, we entered into negotiations with her
25 to try and facilitate the provision of some funds to help

1 this process along. In other words, she had offered to pay
2 for this and we wanted to establish the --

3 THE COURT: I'm sorry, when you say "her," who do
4 you mean?

5 THE WITNESS: I'm talking about Veronica Daniels.
6 A. She -- Ms. Penachio had said that she intended to pay
7 us in full and I wanted to make sure that were enough funds
8 on that because that was not clear from the -- from the
9 petition, the bankruptcy petition. So we made an offer to
10 her to buy her operation for between 2 to \$300,000 -- I
11 can't remember the exact figure now, but it was between,
12 certainly between that, between those two numbers -- and
13 this was in part because she had -- she had not placed any
14 value on her operation in the bankruptcy petition, it was
15 shown as zero, so we thought we'd provide some funds, we'd
16 establish the value of the corporation, and at least that
17 because it would obviously go to an auction and it would be
18 some figure above that afterwards. However, she came back
19 with a demand of one-and-a-half million and, obviously,
20 that was too --

21 MR. DAVIS: Your Honor?

22 A. -- too much to consider.

23 MR. DAVIS: Your Honor, this testimony is all to
24 nature of the settlement. It's not appropriate.

25 THE COURT: But it's not being offered for the

1 truth of the value of the company. It's just being offered
2 for discussions that the claimant had with the debtor, so I
3 don't think the settlement privilege applies. It's not --
4 it can't be used for establishing the value of the company.
5 A. That was the only involvement Mr. Gasparini had. He
6 talked with Anne Penachio and then she said she was no
7 longer handling it and then he spoke with another attorney
8 Community Fuel had used earlier, her name was Lauren
9 McGregor, he talked with her and that was where that offer
10 of one-and-a-half million came from. And since we were
11 getting nowhere, his involvement ended and the file
12 reverted to Mr. Cuono, who proceeded to put in the proof of
13 claim.

14 Q. I'm going to show you an exhibit --

15 MR. YOUNG: Your Honor, if I may, (inaudible)
16 exhibit to him.

17 Q. -- the last item I would like to clarify, is the date,
18 to your knowledge, that Ms. Penachio ceased to be the
19 attorney for the debtor? And I'm referring you to exhibit
20 11, which is also ECF number 41, exhibit T. This is a
21 letter from Community Fuel Oil Company to Ms. Penachio,
22 dated September 14, '09, and it's been filed with the
23 bankruptcy court on September 15, '09. Can you just read
24 the first line?

25 A. Yeah. (Reading): Anne Penachio, I am terminating you

1 as my lawyer.

2 Q. Thank you. And that's September 14, '09.

3 MR. YOUNG: I have no further questions.

4 THE COURT: Okay. Any cross?

5 MR. DAVIS: No, Your Honor.

6 THE COURT: Okay. I have just one question, Mr.
7 Almeida. The debt that forms the basis for your claim, in
8 this case -- or from West Vernon Energy's claim, in this
9 case, did that debt, was that originally debt owed to Mount
10 Vernon Petroleum?

11 THE WITNESS: No. It was debt owed to West
12 Vernon Energy Corp. Whatever West Vernon Petroleum had
13 supplied before I took over, they collected that money from
14 the -- from their customers. In other words, the accounts
15 receivable at the time I took over, they collected all the
16 accounts receivable. I only made fresh supplies and billed
17 for those supplies.

18 THE COURT: Okay. And those are the bills set
19 down in the complaint?

20 THE WITNESS: Yes.

21 THE COURT: And in the proof of claim?

22 THE WITNESS: Now, many of her -- there were many
23 more bills before that and many of those were paid.

24 THE COURT: Right.

25 THE WITNESS: This was one that was outstanding.

1 THE COURT: No, I'm just talking about the ones
2 that were not paid, and those are the bills set forth in
3 the proof of claim and the complaint?

4 THE WITNESS: Yes.

5 THE COURT: Okay. You can step down.

6

7

(Witness is excused)

8

9 THE COURT: Okay. Do you have any more evidence
10 that you want to introduce?

11 MR. YOUNG: I have no further evidence, Your
12 Honor.

13 THE COURT: Okay. All right.

14 MR. YOUNG: I just have -- I have an application
15 and then I wanted to clarify a few things.

16 My application, Your Honor, is that I would ask
17 the court to consider ECF number 41, which was the
18 affirmation, and the exhibits that I referred to, but I
19 realize that that is on the other motion, the motion to re-
20 argue, which we implicitly referred -- relied upon in this
21 motion.

22 THE COURT: I'm sorry. When you say, ECF 41,
23 just, can you identify that by title, Mr. Young?

24 MR. YOUNG: That would be our motion to
25 reconsider Mr. Cuono's affirmation.

1 THE COURT: And that's the one with exhibits A
2 through Z?

3 MR. YOUNG: Or beyond, yes.

4 THE COURT: Yeah. That's fine. That's part of
5 the record and I'll consider that it as --

6 MR. YOUNG: Thank you.

7 THE COURT: -- part of this motion.

8 MR. YOUNG: I had several things to clarify?

9 THE COURT: Well, I'm sorry, are these different?
10 Are these additional factual exhibits or is this your
11 comments on them?

12 MR. YOUNG: Just some comments, Your Honor.

13 THE COURT: All right. Well, first, I want to
14 see whether the debtor has any evidence that it wishes to
15 introduce, or if she wishes to introduce?

16 MR. DAVIS: Bear with me a second, Your Honor,
17 I'll get Ms. Penachio in here?

18 THE COURT: Okay.

19 MR. DAVIS: Thank you. The debtor calls Ms. Anne
20 Penachio to the stand.

21 THE COURT: Okay. You can take a seat up there,
22 Ms. Penachio.

23 Just before we begin then, the claimant's direct
24 case is closed?

25 MR. YOUNG: Yes, Your Honor.

1 THE COURT: You, obviously --

2 MR. YOUNG: We rest. We rest.

3 THE COURT: Okay. You can introduce facts on
4 rebuttal, but his direct case is over.

5 Okay. Would you raise your right hand, please?

6 THE WITNESS: Yes.

7 THE COURT: And could you state your name for the
8 record, please?

9 THE WITNESS: Anne Penachio.

10 THE COURT: And spell it?

11 THE WITNESS: A-n-n-e, P-e-n-a-c-h-i-o.

12 THE COURT: Okay. You can go ahead, Mr. Davis?

13 MR. DAVIS: Thank you.

14

15 ANNE PENACHIO,

16 having been first duly sworn by the court,

17 was examined and testified as follows:

18 * * * * *

19

20 DIRECT EXAMINATION BY MR. DAVIS:

21 Q. Good afternoon, Ms. Penachio. Could you give the
22 court a bit of a background and your experience, college,
23 law school?

24 A. Yes. I was graduated from Fordham College in 1988 and
25 Fordham Law School in 1991. After law school, I clerked

1 for a bankruptcy judge and then I worked for a law firm. I
2 clerked for a bankruptcy judge for two years and then I was
3 an associate at Curtis, Mallet, Prevost, Colt and Mosle for
4 about three years and then I opened my own practice in
5 Eastchester for about 12 years. I then joined Lowey,
6 Dannenberg, Cohen and Heart for about two years and then in
7 about 2009 I went back into my own practice.

8 Q. Did there come a point in time in your practice where
9 you were engaged by a (inaudible) or an individual by the
10 Veronica Daniels?

11 A. Yes.

12 Q. And you were engaged to?

13 A. In connection with her bankruptcy case.

14 Q. Okay. During the pendency of the bankruptcy --

15 THE COURT: I'm sorry, this was her third case?

16 THE WITNESS: This was the most recent, the case
17 that is --

18 THE COURT: The most recent one, this present
19 case?

20 THE WITNESS: -- pending right now. Yes.

21 THE COURT: All right.

22 THE WITNESS: Yes.

23 THE COURT: Okay.

24 Q. Okay. One of the creditors in Ms. Daniels' bankruptcy
25 case was West Vernon Energy Corp., is that correct?

1 A. Yes.

2 Q. Do you remember at what address West Vernon Energy
3 Corp. was served --

4 A. Well, I --

5 Q. -- was put on the mailing matrix?

6 A. I believe that it was in Mount Vernon, New York, that
7 was the address that was used.

8 Q. Okay. And where did you obtain that address, if you
9 remember?

10 A. I don't remember. I have -- I know that I Googled it
11 to verify, which I typically do, and that was the result of
12 a Google search. I also have had other cases with West
13 Vernon in the past and it was my understanding that they
14 operated from Mount Vernon. Now, I'm not sure whether I
15 got that information from Ms. Daniels or from one of my
16 other cases or from general knowledge.

17 Q. Okay. Did there come a point in time where you became
18 aware that West Vernon Energy Corp. might not have received
19 notice of the bankruptcy filing?

20 A. Yes.

21 Q. And how did you obtain that notice?

22 A. I believe that I was contacted by an attorney for West
23 Vernon.

24 Q. Okay. I'll show you an exhibit put in by the movant.
25 Could you -- I believe it's exhibit number 5?

1 A. Yes.

2 Q. Okay. Could you indicate what that letter says?

3 A. It looks like a letter to Mr. Green.

4 THE COURT: Actually, it's exhibit number 4.

5 THE WITNESS: 4.

6 MR. DAVIS: Number 4.

7 THE COURT: You can go ahead?

8 A. It's a letter dated August 18th, 2009, to Mr. Green.

9 Q. Okay. And the letter says?

10 A. (Reading): I serve as bankruptcy counsel to Veronica
11 Daniels, a defendant, in the above-referenced case, I am in
12 receipt of the notice of entry and judgement, please note
13 that Ms. Daniels filed a petition for bankruptcy relief.
14 And then there is an attachment.

15 Q. And the attachment?

16 A. Is the official form B 91.

17 Q. And would you have faxed the attachment along with the
18 letter to Mr. Green?

19 A. That's my practice.

20 Q. Thank you. Did there come a time, shortly after this
21 letter was sent to Mr. Green, that you had a conversation
22 with a Vincent Cuono?

23 A. Yes.

24 Q. Do you know who Vincent Cuono is, or was, when you
25 spoke to him?

1 A. I believe that he was a representative of West Vernon.

2 Q. Okay. Can you recount that conversation?

3 A. I believe that he called me and he identified himself
4 as representing West Vernon and he indicated that -- that
5 the address in Mount Vernon was incorrect, or that, I
6 believe, he said, we don't use that address anymore. And I
7 believe we chatted about -- we may have -- oh, no, I
8 believe he asked me about the confirmation hearing, there
9 was a confirmation hearing coming up, and I told him that I
10 had planned on adjourning it because I was waiting for the
11 bar date to pass. And I said that I was going to go to
12 court, I'd get a new confirmation date, and I'd let him
13 know when it was.

14 Q. And did you do so?

15 A. I believe so, yes.

16 Q. Okay. In front of you is exhibit 8, from the movant's
17 exhibits. One of the documents is an affirmation made by
18 yourself, and the other purports to be two e-mails, one
19 from you and one from Mr. Cuono. Do you have a
20 recollection of either of those e-mails?

21 A. Not -- when I look at this, I recall sending, vaguely
22 recall, sending it.

23 Q. Okay. The other document there is an affirmation
24 submitted by you to the court on January 19th, 2010. Is
25 there anything that you want to add or change in regards to

1 the affirmation?

2 A. No.

3 Q. And everything in the affirmation is true and correct,
4 to the best of your remembrance and knowledge?

5 A. Yes, it is.

6 MR. DAVIS: Your Honor, this affirmation has
7 already been entered as evidence.

8 THE COURT: Right. That's correct.

9 MR. DAVIS: I have no further questions.

10 THE COURT: Okay. Cross?

11 MR. YOUNG: Before we begin, (inaudible)?

12 THE WITNESS: I do not. Thank you.

13

14 CROSS EXAMINATION BY MR. YOUNG:

15 Q. Good afternoon, Ms. Penachio. I'm Sanford Young. I'm
16 the attorney for West Vernon Energy Corporation. You
17 stated, and I'm going to, I believe, quote, specifically,
18 the question that Mr. Davis asked you: Quote, "One of the
19 creditors was West Vernon Energy Corporation," end quote,
20 "correct?" And you answered yes to that?

21 A. Yes.

22 Q. Now, would you turn to exhibit 3, please?

23 A. Yes.

24 Q. And this is part of the bankruptcy filing that you
25 prepared?

1 A. It looks that way.

2 Q. And would you turn to the third page?

3 A. Yes.

4 Q. And look at the last line, what does this page
5 indicate? What is this a list of names on this page?

6 A. I'm not sure.

7 Q. Would it be fair to say that these are a list of
8 creditors of Ms. Daniels?

9 A. Yes.

10 Q. And the very last item, you see the last creditor
11 listed?

12 A. Yes.

13 Q. And can you read the name?

14 A. West Vernon Petroleum.

15 Q. So, I am asking you now, which was the creditor, was
16 it West Vernon Petroleum or was it West Vernon Energy?

17 A. Gee, I'm not sure.

18 Q. So, when you answered the question that one of the
19 creditors was West Vernon Energy Corporation and you said
20 yes before, the truth is, you're not sure, is that correct?

21 Yes or no?

22 A. I -- I guess I would refer to them as West Vernon, so
23 I -- I'm not sure, off the top of my head, of the technical
24 name, the legal name, of the entity.

25 Q. Now, but it is important to know the legal name, is it

1 not?

2 A. Not for me, today, sitting here.

3 Q. For purposes of the bankruptcy filing and listing the
4 creditors, was it important to know the legal name of the
5 creditor entities? That's simple yes or no, ma'am --

6 A. Yeah, I mean, I --

7 Q. -- question?

8 A. -- I --

9 Q. -- it's a yes or no question?

10 A. Yeah, I guess so. Sure. Yes.

11 Q. You guess so?

12 A. Yeah.

13 Q. Okay. You concentrate in bankruptcy practice,
14 correct?

15 A. Yes.

16 Q. You were at Curtis, Mallet, you have a very impressive
17 background?

18 A. Yes.

19 Q. -- correct? Okay. Now, during your testimony, when
20 Mr. Davis was questioning you, you used the term West
21 Vernon repeatedly. And you said that you had other cases
22 with West Vernon?

23 A. Yes.

24 Q. Which West Vernon did you have other cases with?

25 A. I believe it was the same West Vernon that was

1 controlled by the Almeidas.

2 Q. And which one is that?

3 A. I don't know whether it's West Vernon Petroleum,
4 sitting here today, or West Vernon Energy, but the company
5 West Vernon was -- I had dealt with in other cases.

6 Q. But you don't -- but you're not sure which West
7 Vernon?

8 A. I'm not sure whether it was West Vernon Petroleum or
9 West Vernon Energy Corp.

10 Q. Okay. Now, how do you determine --

11 MR. YOUNG: Let me withdraw that.

12 Q. What steps did you take to ensure that the list of the
13 creditors and their addresses that were in the filing were
14 correct?

15 MR. DAVIS: Asked and answered.

16 THE COURT: But he can ask it again. He's
17 setting up his next question. So you can answer that.

18 A. I don't remember the specific steps that I took.

19 Q. Did your client give you the information?

20 A. I believe that she gave me the vast bulk of the
21 information.

22 Q. Now, you're aware that this is the third bankruptcy of
23 Ms. Daniels?

24 A. I'm not. I don't recently remember sitting here today
25 that she had previous filings.

1 Q. Would it have been important to know that, that she
2 had filed prior Chapter 13s and voluntarily withdrew them?

3 MR. DAVIS: Objection, Your Honor. Relevance.

4 THE COURT: I mean --

5 MR. YOUNG: I have a follow up to that, Your
6 Honor.

7 THE COURT: Yeah. Why don't you go to the follow
8 up?

9 Q. Did you review the filings in the prior Chapter 13
10 proceedings?

11 A. I would assume I did, but I don't -- I'm not sure,
12 sitting here today, whether I -- I don't have my file with
13 me.

14 Q. Let's see if I can refresh your recollection?

15 A. Um-hmm.

16 Q. Turn to exhibit 1, please. This is a proof of claim
17 that was in a -- on prior Chapter 13 filing of Ms. Daniels.
18 Do you know whether you've seen this before?

19 A. No. I don't recognize it.

20 Q. Okay. Does that mean you didn't review it, or you
21 don't remember?

22 A. I just don't remember.

23 Q. Okay. And just for reference --

24 A. I don't recognize it.

25 Q. -- you'll see that the name is West Vernon Energy

1 Corporation in Mount Kisco, do you see that address?

2 A. I do.

3 Q. Because you testified earlier that, to your knowledge,
4 West Vernon, whichever West Vernon you were referring to,
5 operated in West Vernon [sic]?

6 A. That's my understanding.

7 THE COURT: Do you mean Mount Vernon?

8 MR. YOUNG: Hmm?

9 THE COURT: I think you said West. It's an easy
10 mistake. I think you said, operated in West Vernon, you
11 meant Mount Vernon, right?

12 MR. YOUNG: Mount Vernon, yes. Thank you, Your
13 Honor.

14 THE COURT: Okay.

15 MR. YOUNG: It's become a tongue twister for me.

16 Q. And would you take a look at exhibit 2, please? This
17 is a limited objection to confirmation plan that was filed
18 in a prior Chapter 13. Have you seen this?

19 MR. DAVIS: Objection, Your Honor. Relevance.

20 THE COURT: No, overruled.

21 MR. DAVIS: It's going beyond direct.

22 THE COURT: Overruled.

23 A. I -- I --

24 THE COURT: No, you asked about her preparation
25 of the schedules, so you can answer.

1 A. I don't have any independent recollection.

2 Q. Now, would you please turn to exhibit 11? I assume
3 you've seen this letter before?

4 A. Yes.

5 Q. And Ms. Daniels begins this letter of September 14,
6 '09, saying, "I am terminating you as my lawyer." Do you
7 see that?

8 A. Yes.

9 Q. Was this the first indication that you had that she
10 was terminating you?

11 MR. DAVIS: Objection, Your Honor, again,
12 relevance.

13 THE COURT: I'll let -- no, you can pursue this,
14 although, you know, keep it focused --

15 MR. YOUNG: I'm trying, Your Honor.

16 THE COURT: -- on the direct.

17 A. I honestly don't remember.

18 Q. When you were relieved as attorney, is there some
19 formal process that you -- or formal paper that you need to
20 file?

21 A. Well, generally, you need court approval to be
22 replaced.

23 Q. Do you know if that occurred here?

24 A. I believe that when the debtor indicated that she was
25 going to terminate me, I told her when she chose successor

1 counsel to have that attorney contact me and that I would
2 sign a substitution.

3 Q. And do you know when that occurred?

4 A. I believe it was significantly after September 15th,
5 but I'm not sure when it did occur.

6 Q. Now, I'm going to refer you to item number 10, at the
7 bottom of page one of this letter. "You told me I gave you
8 the wrong information on West Vernon Energy." And you can
9 read that entire paragraph to your own -- to yourself?

10 A. Okay.

11 Q. Is that correct that you told Ms. Daniels that she
12 gave you the wrong information on West Vernon Energy?

13 A. I don't remember.

14 Q. And on page 11 -- I'm sorry, page two, item 11?

15 MR. DAVIS: Objection, Your Honor. Relevance.
16 It has nothing to do with this hearing, Your Honor. It was
17 not brought up in any way, shape, manner, or form on
18 direct.

19 MR. YOUNG: I think it's establishing, Your
20 Honor, certain manner of operating in preparing these
21 papers. May I ask the one question, or two questions?

22 THE COURT: You can go ahead.

23 Q. It says, "I do not think you listed Hess correctly in
24 my filing." Do you see that?

25 A. Yes, I do.

1 Q. Do you recall what that is about?

2 A. I vaguely recall that there was an issue a post-
3 petition claim, but I don't know -- I can't swear on a
4 Bible what it -- that I recall exactly what that was all
5 about.

6 Q. Did you tell her that she gave you incorrect
7 information?

8 MR. DAVIS: Attorney/client privilege.

9 MR. YOUNG: I withdraw. I withdraw that.

10 THE WITNESS: Yeah.

11 Q. Did she give you incorrect information?

12 THE COURT: On what?

13 Q. On Hess? Regarding Hess?

14 MR. DAVIS: Same objection, Your Honor,
15 attorney/client privilege.

16 A. I don't believe --

17 THE COURT: No. Overruled.

18 A. I'm not sure. I just -- I'm really not sure.

19 Q. Okay. Now, I'm going to ask you about the
20 conversation with Mr. Cuono. Mr. Cuono testified that he
21 made several attempts to call you and got you on the phone
22 maybe in the third conversation. Is it correct that Mr.
23 Cuono had to make several calls to get you on the phone?

24 A. It's possible. I have -- I'm out of court a lot of
25 the time. I don't like speaking on my cell phone, so it's

1 possible that we played telephone tag.

2 Q. Well, did you return his call?

3 A. I generally return calls if someone from my office
4 returns calls, so I -- I don't specifically remember, you
5 know, dialing him up, but I try to make a habit out of
6 calling people back.

7 Q. Do you have a specific recollection of the phone call
8 you had with Mr. Cuono?

9 A. Limited. I have a sketch -- I do remember speaking
10 with him.

11 Q. Other than remembering speaking with him, do you have
12 a specific recollection of what he said to you and you said
13 to him?

14 A. We spoke about confirmation, we spoke about the bar
15 date, we spoke about the case, in general, and I explained
16 that I was waiting for the bar date and it was a pleasant
17 and cordial conversation.

18 Q. Now, when you say you were waiting for the bar date,
19 what does that mean?

20 A. It means that it -- generally, in a Chapter 13 case, I
21 like, I prefer to wait until the bar date pass -- passes to
22 determine -- to confirm the plan.

23 Q. Now, when you had the conversation with Mr. Cuono, did
24 you agree with the fact that the notice of the bankruptcy
25 was not properly addressed and not properly named for the

1 creditor?

2 A. I don't specifically remember that.

3 Q. Do you remember that was a concern of Mr. Cuono when
4 he called you?

5 A. I think his main concern was getting -- adjourning the
6 confirmation hearing, I don't remember, if it was a
7 concern, it may have been a tangential concern.

8 Q. Do you remember that he was concerned about the fact
9 that the date for the creditors' meeting had passed?

10 A. I do not specifically remember that.

11 Q. But you're denying that, one way or the other, are
12 you?

13 A. I just don't remember.

14 Q. Do you recall any specific conversation about the bar
15 date?

16 A. Other than as I have recounted that --

17 Q. Yes?

18 A. -- I was waiting for the bar date and I would be
19 adjourning, seeking an adjournment of confirmation, until
20 after the bar date.

21 Q. Now, would you take a look at exhibit 5, please? Now,
22 by the way, did you ask Mr. Cuono in the phone conversation
23 to send you the correct name and address of the creditor?

24 A. I may have.

25 Q. And for what purpose would you have done that?

1 A. I don't know, but it would probably be to update my
2 records.

3 Q. Did you do so?

4 A. I -- I would imagine so, but I don't know. I mean, I
5 usually hand it to --

6 Q. Before testifying today, did you review your file at
7 all?

8 A. I did not.

9 Q. Before you prepared or signed that affirmation that
10 you were asked questions of, did you review your file in
11 preparation for that?

12 A. I believe so.

13 Q. Did you notify the court, or file anything with the
14 court, to indicate the correct date of the creditor -- the
15 correct name of the creditor, or the correct address of the
16 creditor?

17 A. I don't believe that I did.

18 Q. Would that have been an appropriate thing to do?

19 A. Not necessarily.

20 Q. Now, if you take a look at the e-mail in exhibit 5,
21 Mr. Cuono writes, "This e-mail confirms the 60-day
22 extension." Do you see he uses the word "extension"?

23 A. Yes, I do.

24 Q. It's Mr. Cuono's testimony that it was his -- he
25 understood the conversation and his intent in this letter

1 was that the bar date was also extended by roughly 60 days?

2 A. Well, I --

3 MR. DAVIS: Is that a question?

4 A. -- didn't extend it.

5 Q. I'm sorry, I didn't hear what you said?

6 A. I -- I certainly did not extend the bar date.

7 Q. What did you extend?

8 A. I only indicated that I was seeking an adjournment of
9 confirmation.

10 Q. But the words that he used was "extension" and not
11 "adjournment," would you agree?

12 A. That looks like the word that he used.

13 Q. Okay. Would you agree that an extension is different
14 than an adjournment?

15 A. Yes.

16 MR. YOUNG: I have no further questions. Thank
17 you.

18 THE COURT: Okay. Before redirect.

19 Ms. Penachio, if you can recall the conversation
20 that you had with Mr. Cuono, was this the only conversation
21 you had with him?

22 THE WITNESS: Your Honor, I'm not sure, because
23 there was another Vincent that called me from --

24 THE COURT: Okay.

25 THE WITNESS: -- West Vernon.

1 THE COURT: Before or after this?

2 THE WITNESS: Around the same time. So I'm not
3 sure. I believe it was my only conversation with Mr.
4 Cuono, but --

5 THE COURT: Okay. Did he specifically ask for an
6 extension of anything?

7 THE WITNESS: I don't recall that he did.

8 THE COURT: Well, I guess this is a subset of
9 that, did he specifically ask for an extension of the bar
10 date?

11 THE WITNESS: No. No. In fact, it was my
12 understanding he was going to file a proof of claim.

13 THE COURT: What's that understanding based on?

14 THE WITNESS: Based upon my suggestion that I
15 couldn't really confirm the case, unless I knew what the
16 claims were and the bar date passed. And it is my
17 recollection that he said, I'll file my proof of claim.

18 THE COURT: Have you dealt -- you mentioned that
19 you've dealt with West Vernon in other cases?

20 THE WITNESS: Yes.

21 THE COURT: And I think you said that was the
22 West Vernon owned or controlled by Mr. Almeida?

23 THE WITNESS: I believe, yes.

24 THE COURT: Had you dealt with Mr. Cuono before?

25 THE WITNESS: I don't remember dealing with Mr.

1 Cuono before. I did deal with Vincent Gasparini, the other
2 Vincent, from Almeida -- from West Vernon.

3 THE COURT: In other cases?

4 THE WITNESS: Yes. In connection with other
5 cases.

6 THE COURT: Okay. Do you remember discussing the
7 bar date with him?

8 THE WITNESS: No, I do not.

9 THE COURT: By "him," I mean Vincent Gasparini?

10 THE WITNESS: No. Yes, I did not -- I do not
11 recall discussing a bar date with him at all.

12 THE COURT: Okay. You can go ahead, Mr. Davis?

13

14 REDIRECT EXAMINATION BY MR. DAVIS:

15 Q. Ms. Penachio, your e-mail back to Mr. Cuono says,
16 adjourned -- I'm sorry -- could you read it, please?

17 A. It's my notation for adjourned, so it's A-D-J, period,
18 to Tuesday, November 9th, 2009, at 10 a.m.

19 Q. So you understood that this was an adjournment?

20 A. Yes.

21 Q. Okay. If the debtor's attorney -- I guess a debtor's
22 attorney can't --

23 MR. DAVIS: Strike that.

24 Q. In your normal practice, do you look to adjourn the
25 confirmation hearing beyond the bar date?

1 A. Yes, in many cases, particularly, where there are tax
2 claims.

3 Q. In your prior dealings with West Vernon, would you
4 recollect whether it was West Vernon Petroleum or West
5 Vernon Energy?

6 A. I don't recollect the full name.

7 MR. DAVIS: Okay. I have nothing further, Your
8 Honor.

9 THE COURT: Okay. Any redirect [sic]?

10 MR. YOUNG: I have a question or two. Can I do
11 it from here, Your Honor?

12 THE COURT: That's fine.

13

14 RECROSS EXAMINATION BY MR. YOUNG:

15 Q. Mr. Cuono testified that, in his conversation with
16 you, you said to him that West Vernon Energy Corporation's
17 claim would be paid in full, do you recall that?

18 A. I -- I don't recall that, no.

19 Q. You deny saying that?

20 A. I don't deny it. I frequently confirm Chapter 13
21 cases that are hundred percent plans, depending on when the
22 claims come in, so it wouldn't be out of the question if,
23 you know, for a creditor with a claim to receive a hundred
24 cents on the dollar.

25 Q. Now, in exhibit 7, schedule F, for West Vernon, albeit

1 West Vernon Petroleum, the amount of claim is indicated at
2 \$180,000, where does that number come from?

3 A. I don't -- could you please --

4 Q. Exhibit 7?

5 A. Yes?

6 Q. Schedule F? It's the last page of that exhibit?

7 A. The claim that the box for unliquidated and disputed
8 is checked off, so the 180 must have just been an estimate.

9 Q. Where did that come from?

10 A. I'm not sure.

11 Q. Are you aware that West Vernon Energy had obtained a
12 jury verdict shortly before your filing of roughly
13 \$178,000?

14 A. I -- I -- I don't recall that, but that may be where I
15 got the 180 from, I just don't remember.

16 Q. Would you agree that it was that verdict that prompted
17 the filing of this Chapter 13?

18 A. I -- I -- it may have been, I am not sure, because she
19 had -- Ms. Daniels had some tax issues as well. I just
20 don't recall. I'm sure it was one of the -- I would have
21 to imagine that a creditor is, you know, a trade debt is
22 one reason to file.

23 Q. Thank you.

24 A. There was some tax issues.

25 MR. YOUNG: I'm done, Your Honor. Thank you.

1 THE COURT: Okay. All right. You can step down,
2 Ms. Penachio.

3 THE WITNESS: Thank you.

4

5 (Witness is excused)

6

7 THE COURT: Does the debtor have any more
8 evidence?

9 MR. DAVIS: No, Your Honor.

10 THE COURT: Okay. All right. And do you have
11 any more on rebuttal?

12 MR. YOUNG: No, Your Honor. We rest.

13 THE COURT: So, I'll hear a brief argument, or if
14 you want to have lunch and have argument after lunch, I'll
15 leave it up to you all?

16 MR. DAVIS: I prefer the brief argument, Your
17 Honor.

18 THE COURT: Okay. Unless you're fading, we'll go
19 ahead?

20 MR. YOUNG: That's fine, Your Honor.

21 THE COURT: Okay. Fine.

22 MR. YOUNG: Your Honor, I'm going to refer the
23 court to my memorandum of law in support, which we had
24 filed in roughly October 2010, and I'm not going to, unless
25 Your Honor asks, to argue the legal points, what I would

1 like argue is based upon the evidence, Your Honor?

2 THE COURT: That's fine. I read that memorandum.

3 MR. YOUNG: It seems to me that the reason we're
4 here, Your Honor, is to establish some equitable remedy and
5 to balance out what's probably some mistakes that have been
6 made or sloppiness on both sides.

7 I would submit, Your Honor, that the burden is
8 with the debtor to make a proper filing and to ensure that
9 the creditors are properly notified and not to misuse the
10 bankruptcy system. Now, we do know that this is her third
11 filing, and I know, Your Honor, you and I have discussed
12 this in October, the import of that, but I would like to
13 make reference to Judge McMahon's talking about the use of
14 these serial filings and the import of it, also, where it
15 underscores the fact that the debtor knew the correct of
16 the entity and knew the correct address of the entity
17 because it was filings previously with the correct name and
18 yet they cavalierly -- and it seems from Ms. Penachio that
19 they -- that it was very sloppy, she doesn't know the
20 difference between one West Vernon and another and she, of
21 her own mind, thinks they're in Mount Vernon, and she did
22 nothing due diligence to ensure the proper notice was
23 received.

24 THE COURT: Can I interrupt you for a second?

25 You know, if you've changed your mind, you've changed your

1 mind, but during an examination of Mr. Cuono you asked him
2 some questions about state court litigation involving a
3 third party and it seemed like he didn't really know the
4 answers to them and you were involved in litigation, the
5 assignments, I don't know if that's relevant here or not?

6 MR. YOUNG: It's not relevant to this particular
7 point, Your Honor.

8 THE COURT: All right.

9 MR. YOUNG: I'm not sure why Your Honor may think
10 so.

11 THE COURT: No, I just --

12 MR. YOUNG: I will get to that.

13 THE COURT: -- I don't. It just came to me.

14 MR. YOUNG: Okay. I will get to that. I'm just
15 trying to discuss the balance of --

16 THE COURT: Okay.

17 MR. YOUNG: -- factors and the fairness here.

18 Now, so, Mr. Cuono --

19 THE COURT: Well, can I, let me stop you on that
20 too. What is the source for the notion that this is simply
21 a matter of my doing equity, as opposed to evaluating
22 whether West Vernon got due process? I think those are two
23 different things. If it were just a matter of doing
24 equity, I would have a lot more discretion, I think.

25 MR. YOUNG: I'm not sure it's a question of due

1 process, Your Honor. I would -- and we've argued this in
2 the prior motion as to whether or not there was due process
3 and whether or not what relief the court could give. I do
4 cite Hairopoulos and Masa (phonetical) and North California
5 Glaziers for the proposition that the burden is of
6 establishing that a creditor receive appropriate notice
7 rests with the debtor.

8 THE COURT: Right. I understand that. But that
9 all goes to due process issues, I think, right, as opposed
10 to equity?

11 MR. YOUNG: Well, but it also, the Stacey
12 (phonetical) case, I'm referring to my memo now, speaks
13 about, "This protection is broad and will even extend to
14 creditors who, although having knowledge of a debtor's
15 pending bankruptcy, have not received particular notice
16 that their claim may be placed in jeopardy." The
17 bankruptcy rules and the system provides for a specific
18 type of notice and a timely notice that is given to the
19 creditor. The rules require that they give accurate
20 information to the court, so that way accurate notices can
21 be given.

22 In this case, there is no question that the
23 debtor did not give proper notice and they did not take any
24 steps to ensure that there was proper notice, and I would
25 go to the next step, that they had every reason to know

1 that they didn't give proper notice.

2 So, now, Mr. Cuono now, on behalf of the
3 creditor, encounters an improper notice naming the wrong
4 company, sent to the wrong address, the creditors' meeting
5 date has already passed, and there are all these dates, Mr.
6 Cuono is not a bankruptcy attorney, in his mind, whether it
7 was correct or not correct, in his mind, all of these dates
8 melded together, the confirmation date, what was going to
9 take place November 9, the bar date, and all of those
10 things. What took place in his mind is reflected in the
11 calender, he put down the fact that in his mind there was
12 an extension of the bar date and he put down the time next
13 to that and it all melded together. He knew there was
14 something in court, but he also believed that that was the
15 bar date.

16 The e-mails undoubtedly are sloppy. They're
17 sloppy on both sides. Mr. Cuono is writing an extension,
18 Ms. Penachio admitted an extension is different than an
19 adjournment. As a practicing attorney of 34 years, I know
20 an extension is different than an adjournment. An
21 adjournment is something that takes place in court, where
22 the parties are going to physically appear for a
23 deposition. Extension is a deadline for filing papers or
24 some other act of that. He writes "extension," she writes
25 ADJ. She's not clear, he's not clear, and, unfortunately,

1 West Vernon now appears -- or at least for the prior motion
2 -- is left holding the bag in a situation that really is
3 unfair and in a situation where they should not be the
4 party who suffers. They have filed notices of claim in two
5 prior proceedings, even if Ms. Penachio, in her mind,
6 wanted to have the -- noted to the proof of claims -- I'm
7 sorry if I didn't say "notices of claim" -- even if in her
8 mind she wanted proof of claims before the confirmation
9 date, there was no secret as to what this claim was, there
10 were two prior filings in court, my client filed timely
11 proof of claims, filed timely objections, and even had
12 litigation going up to the Southern District in pursuit of
13 the very same claim that we're here for the third time.
14 Ms. Penachio wrote down \$180,000 in the schedule, the
15 verdict was, in fact, 178,000, the bankruptcy having been
16 filed within a few weeks of the verdict, undoubtedly, was
17 filed because of that. I would hazard to guess, Your
18 Honor, that if the debtor filed 50 proceedings, or 10
19 proceedings, or three proceedings, sooner or later, she's
20 going to have a got you, where a mistake is going to be
21 made on behalf of the creditor. How many times do they
22 have to go through this process?

23 And that, Your Honor, is what I submit. And
24 based upon the cases, and I could recite them, that speak
25 about what this court, the remedy, should do, I think it

1 would be extremely unfair, Your Honor, for this, because of
2 a got you, to have their -- their debt that no one could
3 dispute, to have it discharged.

4 Now, just two additional comments, which are
5 really related regarding the assignment. I was involved,
6 and this litigation is ongoing, Your Honor, although this
7 issue has been established by the Second Department, Singer
8 Corporation, who had a throughput agreement with West
9 Vernon Petroleum, when West Vernon Energy took over the
10 license agreement, there was a dispute between West Vernon
11 Petroleum and West Vernon Energy as to which party had the
12 rights to the proceeds of that throughput agreement. And
13 even though the throughput agreement had a specific
14 provision saying that -- and I don't remember the language
15 -- that it can't be assigned, the Supreme Court,
16 Westchester County, Justice Kalab Dala, and the Appellate
17 Division affirm Kalab Dala and held that notwithstanding
18 that clause that the throughput agreement went with the
19 license and therefore all of the proceeds of the Singer
20 throughput agreement belonged to West Vernon Energy, so
21 effectively, as the licensee, and because the license
22 agreement says, they're taking over the business, they're
23 operating the facility and so forth, that they're the ones
24 entitled to that. Exactly in the same manner, the
25 transactions that took place here, and these deliveries

1 took place, I believe, Mr. Almeida testified, after the
2 license, they all went with the license agreement and enure
3 to the benefit of West Vernon Energy. Overlapping that, or
4 overlaying that, I would say that the Supreme Court action
5 and the verdict has established and it is the I believe it
6 would be *res judicata* in this court, that the debt is a
7 valid debt.

8 THE COURT: How does -- well, let me back up.
9 No, that's fine. You go ahead.

10 MR. YOUNG: So, just to repeat that --

11 THE COURT: I mean, that doesn't go to notice,
12 that just goes to the validity of the underlying claim.

13 MR. YOUNG: Right. I think that -- I truly think
14 that's a total red herring in this proceeding, Your Honor,
15 but I didn't want to address that.

16 THE COURT: And it's undisputed, right, that even
17 though Ms. Daniels signed a guaranty, the Community Fuel
18 Oil Company is just a d/b/a, it's not a separate company?

19 MR. YOUNG: That's my understanding, yes.

20 THE COURT: Right.

21 MR. YOUNG: So I don't think it really matters.
22 So, Your Honor --

23 THE COURT: So, I mean, I asked -- I asked Mr.
24 Cuono, at one point, you know, do you have an assignment of
25 the guaranty, he said no, but I'm not sure the guaranty is

1 relevant because it's a d/b/a.

2 MR. YOUNG: I don't think it matters. See, Your
3 Honor, I think, just to complete this, I really think the
4 question comes down to is that two parties -- and there are
5 mistakes made in both sides -- and which is the party
6 that's going to pay for it.

7 THE COURT: Well, let me ask you about that,
8 because it really isn't two parties, right? If, in fact,
9 this does not have to be a hundred percent plan, then the
10 other creditors are going to be diluted by having this
11 claim ride through the bankruptcy.

12 MR. YOUNG: Well, this was filed as a hundred
13 percent plan and with the -- as the schedule shows, with
14 the belief, correctly, that it's \$180,000 claim, it
15 correctly with it -- it overstates it by a few, you know, a
16 few dollars and cents.

17 THE COURT: My point is, as between the debtor
18 and West Vernon, West Vernon will recover before the debtor
19 even if its claim is not treated as timely; and if the
20 discharge is upheld, it will still have to get paid through
21 the plan before the debtor can recover based on the
22 debtor's, the property of the estate, as opposed to some
23 future property that Ms. Daniels may have.

24 MR. YOUNG: And that's a product, Your Honor, of
25 Your Honor holding -- and I'm not arguing the point -- but

1 Your Honor holding it in connection with the late notice of
2 claim that the court's hands are tied and there's nothing
3 it could do about it.

4 THE COURT: But I guess my question is, it's easy
5 to see the equities as between the debtor and West Vernon;
6 it's harder for me to see the equities as between the other
7 creditors and West Vernon.

8 MR. YOUNG: Well, may. Okay, but in addition to
9 the fact that this happens to be a result of the, what I
10 would say, is the unfairness of the -- an inability of the
11 court and its holding to remedy the late filing and notice
12 of claim to allow the late -- proof of claim -- to allow
13 the late proof of claim would be a better remedy and it was
14 the first remedy that my clients pursued. Having that
15 denied, it has taken up Your Honor's suggestion, and based
16 upon the Collier in other cases, to seek the alternative
17 remedy. I would also point out that, by far, this debtor
18 -- this creditor is the largest creditor of all the other
19 creditors, and I believe, without looking at it, the second
20 largest creditor may be Hess, for which there is questions
21 as to the timeliness and the validity of Hess.

22 Now, Your Honor, I believe has earlier told my
23 predecessor that we did not have standing to complain about
24 the Hess proceeding --

25 THE COURT: No, I didn't say that. I said that

1 he couldn't just complain, he had to give me evidence.

2 MR. YOUNG: Well, I believe -- well, we would be
3 -- we would pursue that, if given the opportunity. But I
4 believe there are questions regarding Hess. And if it's a
5 question in Your Honor's mind that we're going to move
6 ahead of other creditors, one of the other principal
7 creditors would be Hess, which I would suggest, and if we
8 were given an opportunity to explore and prove it before
9 the court --

10 THE COURT: But you could do that anyway. If I
11 rule against you, you still have the ability, given your
12 view, which has not been contradicted, but it hasn't been
13 established either, that the value of the debtor's estate,
14 the value of what, you know, the d/b/a is, you know, 300,
15 400,000 to a million five, you have the ability to get paid
16 in full even as a late claim, and the more you object to
17 other claims, the more likely that occurs -- the more, you
18 know, successfully object to other claims, the more likely
19 that recovery is. So, but, again, as far as the equities
20 of the case are concerned, I don't, first, see, in the case
21 law, a general, general, equitable remedy; I see a
22 balancing of what is due process based on the particular
23 facts and circumstances. But the case law seems to me to
24 be driven by, solely, questions of due process.

25 MR. YOUNG: I would still suggest -- I suggest

1 that due process did not occur here, that they were not
2 properly notified, even when notified, that it was
3 improper.

4 THE COURT: But all the cases say, if you have
5 actual knowledge, and you're not confused, legitimately
6 confused, like in the Massachusetts case -- let me make
7 sure I have the name right -- Collier, where the debtor got
8 -- the creditor's got three inaccurate notices, so it
9 couldn't have possibly filed a -- if they had actually
10 followed the notices, they would have filed the claim
11 incorrectly. But the case law is pretty clear, if you have
12 actual notice and the debtor or the court haven't done
13 something to confuse you, you're out of luck.

14 MR. YOUNG: Well, the confusion occurred after,
15 in the course of this conversation, in which they're
16 discussing --

17 THE COURT: Right. Now, I think that's the only
18 issue. I mean, I agree with you. That issue is the only
19 issue, and that's why I didn't -- that's why I scheduled
20 this hearing.

21 MR. YOUNG: May I suggest one other remedy, Your
22 Honor?

23 THE COURT: Okay.

24 MR. YOUNG: If the court's concern is that to
25 exclude this from discharge allows us to immediately pursue

1 this claim, as compared to other creditors who are
2 participating --

3 THE COURT: Right.

4 MR. YOUNG: -- then the other alternative that
5 might be the fairest of all would be to not allow a Chapter
6 13 and if she needs to pursue a Chapter 7 to allow her to
7 liquidate because, after all, it's the debtor that's
8 benefitting, or the primary party, who will benefit from a
9 Chapter 13 -- then there should be a Chapter 7 and then
10 allow these claims to fall where they may.

11 THE COURT: Well, is there any authority for that
12 to convert a case based on that?

13 MR. YOUNG: No, Your Honor, this is kind of a new
14 -- there aren't many cases on this that I'm aware.

15 THE COURT: Well, there are actually a lot --
16 there are lots of cases. I mean, there must be 35 cases
17 cited in Judge Cox's opinion in Wright. But, again, I
18 guess I -- like a lot of the courts that have dealt with
19 these issues -- I am concerned with the issue that there is
20 no excusable neglect remedy in Chapter 13. But I'm less
21 concerned about it because of the consistent theme from
22 your client, which is that this debtor has sufficient
23 assets to pay her creditors in full, including late filed
24 claims.

25 MR. YOUNG: But that would equally show that if

1 we were to have --

2 THE COURT: It's just a question of --

3 MR. YOUNG: -- this not discharged, that we --

4 THE COURT: -- it's just a question of burden.

5 If you -- I mean, I think that would place the burden on
6 you all to show that, in fact, the debtor is solvent and
7 can pay all the claims and shouldn't get a recovery
8 before a --

9 MR. YOUNG: May I suggest, Your Honor, that if
10 this is a significant factor, that we should be allowed to
11 explore the value of the assets and to resume the hearing?

12 THE COURT: But you can do that anyway. I mean
13 you could -- you could do that. Even if I rule against
14 you, you could do that.

15 MR. YOUNG: If it's a determining factor of what
16 you're going to do as a result of today's hearing.

17 THE COURT: Okay. All right.

18 MR. YOUNG: Thank you.

19 THE COURT: Okay.

20 MR. DAVIS: Firstly, Your Honor, to address Mr.
21 Young's last point, and your point, that there were, seems
22 to be a theme running through all of this that the debtor's
23 assets are very significant, Mr. Almeida, or his
24 representatives, on several occasions have offered to
25 purchase the assets for \$300,000, effectively less his

1 outstanding claim.

2 THE COURT: What? His claim's 178?

3 MR. DAVIS: 178, but he's going to purchase all
4 of the assets of Community for 300 and get paid the 178.

5 THE COURT: What are the other claims, though?

6 MR. DAVIS: Well, the other claims within the
7 bankruptcy currently total approximately \$100,000. For all
8 intents and purposes, prior legal fees, the legal fees for
9 the state court action, various other legal fees, my legal
10 fee yet to be added and --

11 THE COURT: Right.

12 MR. DAVIS: -- an excess of \$50,000 of tax
13 claims.

14 THE COURT: So he's willing to --

15 MR. DAVIS: Zero it out, effectively, Your Honor.

16 THE COURT: Right. Okay.

17 MR. DAVIS: Okay.

18 THE COURT: Is that a bad thing?

19 MR. DAVIS: Well, effectively, he's taking away
20 her livelihood and zeroing, paying all the creditors, and
21 paying himself.

22 THE COURT: But if -- I understand. But if, on
23 the other hand, I ruled in your favor, on this motion, she
24 still would not be able to confirm the plan, right, unless
25 -- well, let me back up. If they were able to show that

1 the value was such that she could pay creditors, including
2 them, on their late claim, a lot more, how can the plan be
3 confirmed?

4 MR. DAVIS: Well, Your Honor, Ms. Daniels, upon
5 the court's suggestion, granted, gratuitously offered to
6 pay 68,000 --

7 THE COURT: That wasn't my question.

8 MR. DAVIS: No, no. I understand, Your Honor.

9 THE COURT: That wasn't my question.

10 MR. DAVIS: But she did offer to pay and they
11 rejected, effectively.

12 THE COURT: But she didn't offer to pay them in
13 full. She offered to pay them the amount that she thought
14 was the excess.

15 MR. DAVIS: That's correct, Your Honor.

16 THE COURT: Above the unsecured claims.

17 MR. DAVIS: That's correct.

18 THE COURT: But you all -- I mean, I guess my
19 point is that, they may disagree with that excess and --
20 just as you disagree with the valuation of \$300,000 -- and
21 doesn't that get fought out at confirmation anyway?

22 MR. DAVIS: Well, okay, currently, this is a
23 hundred percent plan, Your Honor. Your Honor has ruled
24 that that claim is untimely and is not to be considered
25 under the plan, this hearing is effectively to determine

1 whether or not the debt is going to be dischargeable under
2 presumably the Wright standards, and your prior thoughts on
3 the matter resolved around the e-mails and the
4 conversations between Ms. Penachio and Mr. Cuono.

5 THE COURT: I understand that. I understand
6 that. I guess I'm looking ahead, and maybe I should just
7 keep my focus on the issues in front of me today, but it
8 does seem to me that if, in fact, the debtor is worth
9 enough not only to pay the timely filed claims in full, but
10 also to pay West Vernon either in part or in full, how
11 could the plan be proposed in good faith without doing
12 that?

13 MR. DAVIS: The question of the valuation of this
14 type of business, Your Honor, is very difficult. I've had
15 discussions --

16 THE COURT: No, I understand all that.

17 MR. DAVIS: What it really comes down, Your
18 Honor, is that the value of this business is its client
19 list.

20 THE COURT: Right. Well, I mean, it brings in --

21 MR. DAVIS: Absent its client list --

22 THE COURT: -- it brings in --

23 MR. DAVIS: -- it has no value.

24 THE COURT: -- but it brings in money, right?
25 Doesn't it bring in income on a monthly basis and an annual

1 basis?

2 MR. DAVIS: Yes, it brings in income. The income
3 is based pretty much on --

4 THE COURT: So can't you present --

5 MR. DAVIS: -- the debtor herself.

6 THE COURT: Can't you -- you could present value
7 that over five years and see what it's worth?

8 MR. DAVIS: If the debtor determined tomorrow to
9 go out of -- to just go out of business --

10 THE COURT: No, that's a different -- that's a
11 different issue. But right -- but she's --

12 MR. DAVIS: But it goes to the value also, Your
13 Honor.

14 THE COURT: No, but, I mean, there's a present
15 value based on five years of income from this business. Is
16 it more than, you know, \$300,000?

17 MR. DAVIS: Unknown, Your Honor. You know, not
18 to be factious, but we're dealing with the price of West
19 Texas Crude and we're dealing with the price of oil in and
20 of itself and to a certain extent, the higher the price of
21 oil, the less people can afford to heat their homes. But,
22 again, that's I don't think necessarily relevant to what's
23 going on here, Your Honor.

24 THE COURT: Okay. I mean the other issue is the
25 Best Interest Test, and of course, late claims would

1 recover before the debtor under the Best Interest Test
2 under 726.

3 MR. DAVIS: But that's a vis-a-vis Chapter 7,
4 Your Honor.

5 THE COURT: I understand. But the Chapter 13
6 plan has to satisfy the Best Interest Test.

7 MR. DAVIS: Okay.

8 THE COURT: Anyway, these are just things for you
9 all to think about.

10 MR. DAVIS: Yes, Your Honor. All right. But,
11 okay, if I can continue?

12 THE COURT: All right.

13 MR. DAVIS: Firstly, or secondly, or whatever,
14 there's apparently a big issue being made, it's almost the
15 Abbot and Costello routine of Who's on First, is it West
16 Vernon Energy, is it West Vernon Petroleum? Ms. Penachio
17 testified she Googled it and it came up with, I believe,
18 it's 701 South Columbus Avenue in Mount Vernon.
19 Gratuitously, I myself Googled it and it still shows up at
20 that address, albeit there is not an operating terminal
21 there. The debtor's own -- I'm sorry -- the movant's own
22 paperwork in the action underlying all of this basically
23 says that West Vernon Energy and West Vernon Petroleum are
24 one and the same entity and they operate out of the Mount
25 Vernon address.

1 THE COURT: You're referring to --

2 MR. DAVIS: There's letterheads to this effect.

3 THE COURT: I'm sorry. You're referring to the
4 exhibits to the complaint in the state court action?

5 MR. DAVIS: Yeah. I'm referring to ECF number
6 41, exhibit A, which is a summons and complaint in the
7 state court action.

8 THE COURT: Right. Okay.

9 MR. DAVIS: Okay. We're starting -- you know,
10 we're reaching an issue here where the debtor would not
11 necessarily have the ability to distinguish between West
12 Vernon Energy and West Vernon Petroleum and is their
13 address 701 South Columbus Avenue in Mount Vernon or is it
14 33 Hubbles Street in Mount Kisco? The debtor has an
15 obligation to correctly list it, but it becomes difficult
16 at least in this instance to really who and where. In the
17 past she has listed, I believe in the -- I'm not sure if
18 it's the first -- I think it was in the first bankruptcy
19 filing, 701 South Columbus Avenue, in the second bankruptcy
20 filing there was a service notice to West Vernon Energy at
21 the South Columbus address, but all of that being said,
22 they had timely notice that they received on or about
23 August 18th of 2009 which gave them more than adequate time
24 to file a proof of claim, if necessary, to do a 2004
25 examination. They had the ability to do all of this, they

1 so declined. All right. And I don't know when they
2 engaged with Ratett and Pasternack (phonetical), but
3 they're generally well thought of bankruptcy counsel, who,
4 I'm presuming, would have described to them their various
5 remedies and what they could and could not do.

6 I think it all, in general, comes down to what
7 Mr. Cuono reasonably believed and what Ms. Penachio implied
8 to Mr. Cuono. Did she imply that she is extending the bar
9 date? As a knowledgeable bankruptcy attorney, Ms. Penachio
10 would know that she does not have the ability to extend the
11 bar date, that the only person with the ability to extend
12 said bar date is Your Honor on proper motion, etcetera,
13 etcetera, before a bar date has passed.

14 She testified --

15 THE COURT: Well, although, it's not unknown for
16 counsel to a debtor to say, I will agree to an extension of
17 the bar date subject to any necessary court approval.

18 MR. DAVIS: Well, yeah. But that's --

19 THE COURT: And usually that's enough to justify
20 a late filing, if the creditor relies on that.

21 MR. DAVIS: But there has been no testimony to
22 the effect here, Your Honor, to that anybody -- that Mr.
23 Cuono requested an extension to the bar date and indicated
24 -- as I indicated, they had knowledge of this on or about
25 August 18th of 2009, which I believe the original bar date

1 was October 15th, 2009, and if there's supposedly a 60-day
2 extension, well, wouldn't that put it out to December, not
3 November 9th? I guess it all comes back to, again, is to
4 whether or not Mr. Cuono's belief was reasonable and
5 whether or not Ms. Penachio effectively gave him any reason
6 to reasonably believe that she was granting an extension of
7 the bar date.

8 THE COURT: Okay. Let me ask you, Mr. Davis, why
9 shouldn't I give you my preliminary ruling now and then see
10 how the confirmation hearing shakes out, as far as, if this
11 is just an issue between the debtor and West Vernon, as
12 opposed to the debtor, her creditors and West Vernon, her
13 other creditors?

14 MR. DAVIS: When you suggest how the confirmation
15 hearing shakes out --

16 THE COURT: Well, it's if -- if -- it may be one
17 thing if this is truly a hundred percent plan and there's a
18 substantial -- it may be totally moot, for example, if
19 there's a surplus sufficient to pay West Vernon anyway even
20 if its claim is just deemed as a late claim.

21 MR. DAVIS: It currently envisioned, Your Honor,
22 there would be approximately a \$40,000 excess.

23 THE COURT: I know, but if they're able to show
24 that there's more than that, then it becomes moot, right?

25 MR. DAVIS: Well, Your Honor, now, okay, to value

1 this type of business --

2 THE COURT: No, I -- that's their -- I mean
3 they've spent a lot of money on this already, they may be
4 perfectly willing to do that.

5 MR. DAVIS: Yeah, but, at that point in time, my
6 client then has to be able to counter what they're willing
7 to do, all right, and that becomes --

8 THE COURT: I understand, but isn't that --

9 MR. DAVIS: -- inordinately expensive.

10 THE COURT: But isn't that a -- wouldn't she have
11 to do that anyway?

12 MR. DAVIS: Not necessarily, Your Honor, unless
13 it was not a hundred percent plan.

14 THE COURT: But it is.

15 MR. DAVIS: Well, correct, Your Honor. Okay, she
16 has agreed to put in \$150,000, 2500 a month, for the next
17 -- for a total of five years.

18 THE COURT: Right.

19 MR. DAVIS: Okay. It could costs tens of
20 thousands of dollars, I'm assuming, to value this type of
21 business. The creditor has, A, the financial wherewithal
22 and, B, the expertise. The debtor does not have either the
23 expertise or the financial wherewithal to get involved in
24 that type of argument.

25 THE COURT: They're still spending the money.

1 But they're still spending the money. I mean they're still
2 spending money to do that. Okay.

3 All right. Well, I am always reluctant to issue
4 an opinion and a ruling in a case where it all may be moot,
5 but I -- while I think it may well become moot, the motion
6 by West Vernon Energy is not necessarily one that will
7 become moot -- so I believe I should rule on it today.

8 I have before me a motion by West Vernon Energy
9 Corporation, or W.V.E., that was originally brought as a
10 cross motion, which doesn't really exist as a separate
11 proceeding under the Bankruptcy Rules, or as a contested
12 matter, to seek a ruling that the debt set forth in its
13 admittedly untimely proof of claim, dated October 5th,
14 2009, and filed on November 4th, 2009, should not be
15 subject to a discharge in the debtor's Chapter 13 case.
16 Because the motion was not properly noticed or set up for
17 an evidentiary hearing; when it was originally put on the
18 calender in October of 2010, it was rescheduled for today
19 as an evidentiary hearing and I've heard the testimony of
20 W.V.E.'s two witnesses, as well as the debtor's witness.
21 The background to this present motion is largely addressed
22 in the Court's modified and corrected bench ruling on West
23 Vernon Energy's late claim, dated July 9th, 2010, in which
24 I concluded that certain facts are undisputed; first and
25 foremost that W.V.E. did not file its proof of claim by the

1 bar date established in this case of October 15, 2009, but
2 rather did so on November 4th, 2009, but also that the
3 debtor, having filed this Chapter 13 case on May 17th,
4 2009, inaccurately scheduled W.V.E. in her schedules in two
5 ways, first as -- not as West Vernon Energy Corp., but as
6 West Vernon Petroleum, or W.V.P., and, secondly, by listing
7 the address for the creditor as 701 South Columbus Avenue,
8 Mount Vernon, New York 10550, when the correct address for
9 W.V.E. was 33 Hubbles Drive, Mount Kisco, New York 10549.

10 It's also acknowledged by the parties, and
11 confirmed by the testimony today, that W.V.E. was not aware
12 of the debtor's Chapter 13 case until its state court
13 counsel, Mr. Green, received a letter dated August 18th,
14 2009, from the debtor's then counsel, Anne Penachio, which
15 informed him of the Chapter 13 petition, as well as
16 attached the formal notice of that Chapter 13 filing,
17 official form 9I. That notice sets forth various deadlines
18 in the Chapter 13 case, including, as relevant here,
19 October 15th, 2009 as the deadline to file a proof of
20 claim, and the deadline to file objections to confirmation
21 of the plan which was August 17th, 2009, and deadlines also
22 for -- I'm sorry -- the time and date for the meeting of
23 creditors, July 17th, 2009, at 10 a.m., and for the
24 confirmation hearing, which was August 25th, 2009, at 10
25 a.m.

1 It's also undisputed that, upon receiving that
2 letter with the attached notice, Mr. Green contacted his
3 client through its general counsel and CFO, Mr. Vincent
4 Cuono, C-u-o-n-o, who promptly thereafter attempted to
5 contact Ms. Penachio. He did so on August 24th, 2009 and
6 had telephone conversation with her that that, to my mind,
7 raises the only factual issue that I need to decide today,
8 I believe all the other facts being undisputed, or to an
9 extent disputed, irrelevant.

10 I'll return to that conversation in a moment, but
11 I'll note that having filed an untimely proof of claim,
12 W.V.E. then sought to have it be allowed. In my ruling of
13 January 9th, 2010, I concluded, with the vast majority of
14 courts that have considered the issue, that Section
15 502(b)(9) of the Bankruptcy Code and Bankruptcy Rule
16 3002(c) preclude my consideration of deeming a late file
17 claim timely filed in a Chapter 13 case, which, of course
18 this is. On a motion to reconsider that ruling, I ruled
19 against W.V.E. for the same grounds as set forth in the
20 ruling and further noting, as I had previously, that
21 although this was, in fact, the debtor's third Chapter 13
22 filing, the prior two having been voluntarily dismissed by
23 the debtor, I concluded that the circumstances of the
24 present filing, particularly, (a) the existence of a
25 substantial tax claim, and, (b) a now jury verdict on

1 W.V.E.'s claim, took this case out of the ambit of arguably
2 abusive filings, as described by Judge McMahon in her
3 ruling in 2007; that is, at this point, the debtor was
4 facing, from two sources, the very likely imminent prospect
5 of having to pay a full cash judgement to both W.V.E. and
6 the taxing authorities, and, if she didn't, the imposition
7 of liens on her property.

8 As I noted in the July 9th, 2010 bench ruling,
9 this was not the likely end of the road for West Vernon
10 Energy. To the contrary, a number of courts have struggled
11 with the issue of -- and the apparent unfairness of --
12 deeming a claim not timely filed and precluding a late
13 filing of a proof of claim in a Chapter 13 case, in
14 particular, where it's asserted, as it was here, that the
15 claimant had defective notice of the time to file a proof
16 of claim. See, generally, In Re: Wright, W-r-i-g-h-t, 300
17 BR 453 (Bankr. ND, Illinois 2003), which contains a very
18 scholarly and thorough discussion of this issue.

19 The hearing before me, then, today is properly --
20 or was properly focused on the issue of notice to the
21 claimant, W.V.E., and whether the notice was so deficient
22 that I could properly rule that W.V.E. would not be -- or
23 its debt would not be such that it would be "provided for
24 by the debtor's plan" and therefore dischargeable under 11
25 U.S.C. Section 1328(a).

1 It's W.V.E.'s contention that because of the
2 failings in the original schedules and the matrix, and
3 because of the -- what it argues is -- a subsequent
4 confusion in Mr. Cuono's mind and, therefore, on behalf of
5 W.V.E., as to the actual date for filing a timely proof of
6 claim, it should not be subject to the discharge under
7 Section 1328(a) of the Bankruptcy Code. The case law is
8 clear that the determination of whether a creditor received
9 sufficient notice of the bar date, including in a Chapter
10 13 case, is one that depends on the totality of the
11 circumstances both before and after the original notice was
12 sent as well as the degree of prejudice to the claimant.
13 See, for example, In Re: Collier, 370 BR 20, 25 (Bankr. D
14 Mass. 2004) -- I'm sorry -- 25 through 26 (Bankr. D Mass.
15 2004), and the cases cited therein.

16 In light of that case-specific directive, I've
17 considered the facts here to see whether, in fact, the
18 debtor may take advantage of the shelter provided by the
19 bar date at the expense of the creditor or whether the
20 creditor's due process rights were violated, which would
21 mean the debtor could not take advantage of the bar date
22 and receive a discharge under Section 1328(a).

23 I believe that the law is clear that the result
24 will depend upon whether the creditor here had actual
25 knowledge of the pendency of the Chapter 13 case in time to

1 participate in a meaningful way. That is because I accept
2 the fact that the debtor [sic] did not receive actual
3 notice and that the debtor -- I'm sorry -- that the
4 creditor did not receive actual notice and that the debtor
5 is at least partly responsible for that fact by setting
6 forth the address as it did, or as she did, on the matrix
7 to be used for creditor notice. The case law is clear,
8 however, that if the creditor, in fact, has actual notice
9 in time to participate meaningfully, including time to
10 prepare a proof of claim, the failure to provide notice
11 through the matrix on the schedules does not matter. See
12 In Re: Medaglia (phonetical) 52 F.3d 451, 457 (2d Cir.
13 1995), as well as In Re: Wright 300 BR 453 at 467 through
14 68, and In Re: Bourgoin, B-o-u-r-g-o-i-n, 306 BR 442, 443
15 -- I'm sorry -- 444 through 445 (Bankr. D Conn. 2004).

16 Here, while there is dispute between Mr. Cuono
17 and the debtor's witness, Ms. Penachio, as to what occurred
18 in their telephone conversation on August 24th, 2009, it's
19 indisputable that the debtor had given the creditor
20 sufficient notice of the filing of the Chapter 13 case and
21 the October 15th, 2009 bar date with more than sufficient
22 time for the creditor to file proof of claim. The claim
23 had since been confirmed by a judgement, which was entered
24 post-petition and, at that time, unbeknownst to the
25 creditor, that the case had been filed, and, in fact, the

1 proof of claim that was ultimately filed simply attached
2 the judgement. Mr. Cuono is experienced in filing proofs
3 of claim, including twice on this case -- I'm sorry -- in
4 predecessor cases done by this debtor, and I believe that,
5 given notice of the bar date and the filing of this case at
6 least by August 24th, if not a few days before, depending
7 on when Ms. Penachio's August 18th letter was received, the
8 creditor had sufficient time to file a proof of claim by
9 the October 15th bar date.

10 So, the question is whether there is a reason,
11 based upon the content of the August 24th telephone
12 conversation or the e-mail that followed it on August 31st,
13 to conclude that the creditor and the person -- that Mr.
14 Cuono, was reasonably or legitimately confused about the
15 date to file a claim in this case. I conclude that he was
16 not objectively or reasonably confused, although I accept,
17 based on my consideration of his testimony that he may not
18 have understood fully the implications of what Ms. Penachio
19 told him -- that is, I don't believe he consciously filed
20 the claim late or willfully filed it late. However, I
21 believe that the inquiry is one of due process, not of the
22 creditor's own subjective understanding, and based on
23 notions of fundamental due process, I don't believe that
24 Mr. Cuono, or W.V.E., were misled into filing the claim
25 late.

1 While there is a dispute between Ms. Penachio's
2 testimony, which I also accepted as credible, and Mr.
3 Cuono's, as to whether Ms. Penachio ever said that she
4 wanted to -- she was going to adjourn the confirmation
5 hearing because she wanted the bar date to pass,
6 beforehand, which Mr. Cuono does not recall her saying, it
7 is, I believe, undisputed by Mr. Cuono's testimony and
8 confirmed by Ms. Penachio that there was no other
9 discussion of the bar date and no request by Mr. Cuono to
10 obtain an extension of the time to file a proof of claim
11 and certainly no agreement by Ms. Penachio to grant such a
12 request, since it appears that none was made. Rather, I
13 accept Ms. Penachio's testimony, which I find consistent
14 with Mr. Cuono's, that the focus of the conversation was
15 upon two things -- actually, three things -- first, Mr.
16 Cuono's concern that he have the ability to examine the
17 debtor, which could occur at a confirmation hearing and Ms.
18 Penachio's assurance that she was going to obtain an
19 adjournment of the hearing for roughly 60 days. Secondly,
20 I accept that Mr. Cuono pointed out to Ms. Penachio that
21 the current address of West Vernon Energy was incorrectly
22 listed in the schedules. And, thirdly, I accept that he
23 pointed out to her that the amount of the debt listed in
24 the schedules was not accurate, although the difference was
25 under \$2,000. Their testimony is all consistent with the

1 foregoing.

2 I believe it is also supported by the two e-mails
3 that were sent thereafter on August 31, 2009. Mr. Cuono
4 testified that he agreed to -- that he would confirm the
5 foregoing in an e-mail to Ms. Penachio; that is, he agreed
6 on August 24th that he would do that, and he sent such an
7 e-mail on August 31st.

8 The e-mail states, (reading): "This e-mail
9 confirms the 60-day extension re: Daniels' bankruptcy
10 proceeding. I will e-mail you my draft proof of claim, FYI,
11 and file it this week. The name, address of the creditor
12 is West Vernon Energy Corp., 33 Hubbles Drive, Mount Kisco,
13 New York 10549. Thanks so much for your consideration." I
14 believe that that e-mail is entirely consistent with Ms.
15 Penachio's testimony. It clearly does not confirm an
16 extension of the time to file a proof of claim, which is,
17 obviously, a very serious event for a creditor in any
18 bankruptcy case and should be recognized as such by the
19 general counsel of the company, such as Mr. Cuono.
20 Secondly, he confirms that he will e-mail Ms. Penachio his
21 draft proof of claim and file it this week -- that, is the
22 week of the 31st of August. This also is consistent with
23 Ms. Penachio's testimony in which she said that, consistent
24 with her general practice, she wanted to adjourn the
25 confirmation hearing until she could review the claims, and

1 clearly West Vernon Energy Corporation's claim would have
2 an impact on confirmation.

3 Mr. Cuono testified that he simply volunteered to
4 file the draft proof of claim then, but without having
5 gotten a firm extension of the bar date itself, I believe
6 he was operating at W.V.E.'s risk in waiting to file the
7 claim beyond the week that he committed that he would in
8 his e-mail -- and waiting until after the bar date.

9 It's contended that the first sentence of Mr.
10 Cuono's e-mail, which says, (reading): "This e-mail
11 confirms the 60-day extension, re: Daniels' bankruptcy
12 proceeding," should have indicated to a reasonable lawyer,
13 such as Ms. Penachio, that W.V.E. was operating under the
14 impression that it was getting a 60-day extension of
15 everything in the bankruptcy case, including the bar date.
16 Given the testimony about the August 24 telephone
17 conversation, in which, at best, the bar date was discussed
18 only in terms of wanting the confirmation hearing to be
19 after the bar date, and where there was no request to
20 extend the bar date, I believe that Ms. Penachio could not
21 have been reasonably charged with inferring from the first
22 sentence of Mr. Cuono's e-mail that, in fact, he was under
23 the impression that the bar date had been extended. I
24 believe this is confirmed in her response where she refers
25 to adjourned, as abbreviated, "ADJ", to Tuesday, November

1 9, 2009, at 10 a.m. I believe she was clearly under the
2 impression that what Mr. Cuono was referring to was a
3 hearing that would be adjourned, i.e. the confirmation
4 hearing, and that Mr. Cuono should have understood that, or
5 if he had any doubts about it, he should have made clear to
6 Ms. Penachio that it was more than an adjournment of a
7 hearing that he had referred to in his e-mail from earlier
8 that morning.

9 I should note further that Mr. Cuono, although
10 experienced at least in the prior bankruptcy cases of this
11 debtor, and a lawyer, was not the only lawyer functioning
12 on this matter. He testified, as well as Mr. Almeida --
13 the principal of the claimant -- that in September, again,
14 well before the bar date, W.V.E. retained and, quote,
15 "turned the file over to" an outside counsel who had
16 represented Mount Vernon in other matters, including,
17 according to Ms. Penachio's testimony -- other bankruptcy
18 matters, Mr. Vincent Gasparini. Apparently, there was no
19 discussion with Mr. Gasparini about the bar date or the
20 time to file a proof of claim and no one shared with him
21 the August 31st, 2009 e-mail exchange; but this was an
22 extra layer of legal involvement that W.V.E. had and that,
23 I believe, if it had diligently pursued, would have led to
24 filing the claim on timely basis, or getting, before the
25 expiration of the bar date, an extension from the debtor or

1 from the Court, since such an extension was available
2 before the bar date had run.

3 Consistent with the case law discussed in In Re:
4 Wright, I believe that these facts establish that W.V.E.,
5 in fact, was given sufficient actual notice to file a proof
6 of claim and object to plan confirmation and that,
7 therefore, in the words of Judge Cox from that case,
8 "having obtained actual knowledge of the pendency of the
9 bankruptcy case and time to file a proof of claim and
10 object to plan confirmation, such a creditor cannot bypass
11 the Chapter 13 process and then choose to collect the debt
12 when the case is closed." 300 BR at 467 through 68.

13 The cases relied upon by W.V.E. are all
14 distinguishable on their facts. They all stand for the
15 proposition that where a creditor does not have actual
16 notice of the case before the bar date, or has actual
17 notice but has been misled by clearly confusing or
18 inaccurate notices, the creditor should have the right to
19 proceed against the debtor as if it would not be covered by
20 the Chapter 13 plan. This was the case in In Re:
21 Hairopoulos, H-a-i-r-o-p-o-u-l-o-s, 118 F.3d 1240 (8th
22 Circuit 1997), where the bankruptcy court found and the
23 Second Circuit -- I'm sorry -- the Eighth Circuit agreed
24 that more than a year passed after the claims deadline
25 before the creditor had notice of the conversion of the

1 Chapter 7 filing to a Chapter 13 case, and that distinction
2 was important because the conversion triggered a whole
3 different series of rights.

4 Similarly, the court in In Re: Stacey, 405 BR 872
5 (*Bankr. ND Ohio 2009*), found that, while the debtors listed
6 the creditor's agent in the matrix, the creditor, itself,
7 did not receive notice of either the bar date or the case
8 prior to the expiration of the bar date. It cited several
9 cases which stand for the position -- proposition that,
10 "Due process and equitable concerns require that when a
11 creditor does not have notice or actual knowledge of a
12 bankruptcy, the creditor movant must be permitted to file a
13 claim tardily." See -- that's a quote from Stacey quoting
14 itself or -- and quoting United States v. Cardinal Mine
15 Supply, Inc., 915 F.2d 1087, at 1089 (6th Cir 1990) Here,
16 in addition, in contrast to the Stacey case, or dicta on
17 the Stacey case, the creditor did, in fact, receive
18 particular notice, in the form 9I that was attached to Ms.
19 Penachio's August 18th letter, that W.V.E.'s claim may be
20 placed in jeopardy of the bar date if the claim was not
21 filed by the October 15th bar date.

22 Similarly, or in a different vein, in In Re:
23 Collier, relied upon by W.V.E., 307 BR 20, the court found
24 that the claimant had received two incorrect notices from
25 the bankruptcy court, as well as a clearly misleading

1 notice from the debtor, as to when the bar date would run,
2 and consequently was objectively misled from filing its
3 claim on a timely basis. Again, the facts here are to the
4 contrary, as I've already described and, therefore, they
5 fall within the cases cited by In Re: Wright for the
6 proposition that awareness of the bankruptcy case and the
7 time to file a proof of claim means that the creditor would
8 be covered by the Chapter 13 plan and the discharge as a
9 matter of due process. See also, In Re: Aboody
10 (phonetical), 223 BR 36, (1st Cir BAP 1998) and 8 Collier
11 on Bankruptcy, paragraph 1328.02[3][a], (16th Ed. 2010), in
12 which the editors of Collier state, "Courts have held that
13 a creditor that is not scheduled and does not have notice
14 of the Chapter 13 case in time to file the claim or to
15 participate in the confirmation process has not be provided
16 for by the plan," for purposes of Section 1328(a). Here,
17 again, such actual notice was provided and was not
18 misleading.

19 So, I find that and conclude that the motion
20 should be denied. My doing so, however, as I noted during
21 oral argument again, does not close the gate for W.V.E..
22 Although it does have the effect of putting W.V.E. behind
23 the debtor's creditors who timely filed proofs of claim, it
24 doesn't close the gate because W.V.E. contends, and the
25 debtor's plan confirms this, that the debtor has sufficient

1 wherewithal to fund a hundred percent distribution, plus
2 another roughly \$40,000 to holders of untimely claims, i.e.
3 W.V.E. W.V.E. contends that, in fact, the debtor is worth
4 considerably more than that amount, and that, therefore, it
5 should get more than the \$40,000 provided for it in the
6 plan. That issue, I believe, is still an open one and that
7 W.V.E. has the ability, including the standing, to litigate
8 it given its right under Section 1325(a)(4), Chapter 13's
9 "best interest test," as well as Section 1325(a)(3), which
10 requires that the plan had been proposed in good faith.

11 As I noted during oral argument, I don't believe
12 that this is simply a matter of my weighing the equities.
13 I believe that, in particular, because this is not just a
14 matter as between W.V.E. and the debtor, Ms. Daniels, but,
15 rather, my allowance of, or my granting of, W.V.E.'s motion
16 could severely and adversely impact the creditors who filed
17 timely claims. I also believe that the case law does not
18 give the court a free ranging equitable power to do
19 justice, but rather focuses on the fundamental due process,
20 which is what I've done. On the other hand, after the
21 creditors are paid in full, if the debtor is, in fact, able
22 to pay those who have late-filed claims, it seems to me
23 that the debtor may face a serious issue under 1325 as to
24 the confirmability of her plan.

25 So, I strongly encourage, as I have been since

1 the beginning of this case, that the parties think about
2 that and try to resolve it in a way tied to the debtor's
3 reasonable ability to pay over a five-year term.

4 So, Mr. Davis, you can submit an order consistent
5 with my ruling that denies the motion.

6 You don't have to settle that order, but you
7 should e-mail it to counsel for W.V.E. before you submit it
8 to chambers, so they can make sure it's consistent with my
9 ruling, but you don't need to go through all my
10 conclusions, just say "for the reasons stated on the
11 record."

12 MR. DAVIS: Okay.

13 THE COURT: Okay. Thank you.

14 MR. YOUNG: Thank you, Your Honor.

15 MR. DAVIS: Thank you, Your Honor.

16 THE COURT: Thank you.

17

18 (Proceeding adjourned)

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CERTIFICATION

I, Debra S. Nieves, certify that the foregoing transcript is a true and accurate record of the proceedings.



Debra S. Nieves

AMERICAN LEGAL TRANSCRIPTION

11 Market Street

Poughkeepsie, New York 12601

Dated: May 31, 2011

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