



SO ORDERED.

SIGNED this 16 day of May, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
BEMIS CONSTRUCTION, INC.)	Case No. 02-14893
a Kansas corporation)	Chapter 11
)	
Debtor In Possession.)	
_____)	
WARREN POWER & MACHINERY, INC.,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-5132
)	
BEMIS CONSTRUCTION, INC.,)	
MID-CONTINENT CASUALTY COMPANY,)	
)	
Defendants.)	
_____)	

AMENDMENT TO MEMORANDUM OPINION
DATED MAY 13, 2005

Please substitute the attached Exhibit "A" for page 10 in the original opinion in the above captioned case.

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EXHIBIT “A”

that this issue remained for determination by the Court.⁴⁰

D. Communications Concerning the Offers and Acceptance.

At the evidentiary hearing, many letters and e-mails between and among counsel for the parties were admitted into evidence. Richard Ogden testified about his understanding of the offers and his acceptance of them on behalf of his client, Warren. Susan Saidian testified about Bemis’s offer. Larry Lerner testified about Mid Continent’s offer.

With respect to the MC Offer, it appears that all communication between Lerner and Ogden had broken down by the middle of 2004. The documents admitted into evidence contain a number of Lerner’s file notes indicating that Ogden was, at best, unreliable in returning Lerner’s calls about settlement and scheduling, beginning in March of 2004 and extending throughout the case.⁴¹ In one of Lerner’s letters to Ogden, he notes that Ogden had failed to contact him to follow up on settlement discussions for over *seven months*.⁴² Ogden essentially admitted this under cross examination. When the Court asked Ogden why he did not simply pick up the phone and confer with Lerner about the offer and acceptance, he stated that he “should have called [Lerner]” but that doing so had not occurred to him. The Court finds that Warren unambiguously accepted MC’s Offer of \$40,000 and concludes that Warren’s right to recover costs and fees is a legal issue that will be discussed below.

⁴⁰ Dkt. 86 (Bemis) and Dkt. 88 (Mid Continent).

⁴¹ *See* Ex. CC (File note, March 23, 2004, no callback from Ogden after initial settlement discussions; further notation of no callback April 14, 2004); Ex. OO (September 30, 2004 letter from Martin Bauer, Mid Continent’s local counsel, to Russell Wantland, Ogden’s partner, stating *inter alia* their agreement that Ogden will return “Larry Lerner’s calls which have been made weekly to discuss the status of your review of the records . . .”).

⁴² *See* Ex. UU.