

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

<b>IN RE:</b>	) Chapter 11
	)
<b>BUILDING MATERIALS HOLDING CORPORATION, et al.,</b>	) Case No. 09-12074 (KJC)
	)
<b>Debtors.</b>	) Jointly Administered
	)
	) Dkt. Ref. No. 768 at Exhibit B.
	)
	) Objections Due: 11/25/2009 at 4:00 p.m.
	) Hearing Date: 12/10/2009 at 11:00 a.m.

**OBJECTION OF JUAN M. NAVARRO AND  
LETITIA RAMIREZ TO CONFIRMATION OF THE  
DEBTORS' JOINT PLAN OF REORGANIZATION FOR  
THE DEBTORS UNDER CHAPTER 11 OF THE BANKRUPTCY  
CODE AMENDED OCTOBER 22, 2009**

Juan M. Navarro and Letitia Ramirez (together the "Plaintiffs"), hereby file this limited objection to confirmation of the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009 (D.I. 768 at Exhibit B) (the "Plan"), and state in support hereof as follows:

**Background**

1. On or about July 28, 2007, Mr. Navarro was injured in an automobile accident caused by the Debtor's employee, Floyd Pearson, while Mr. Pearson was driving one of the Debtors' vehicles.
2. On June 3, 2009, prior to the Petition Date, Mr. Navarro and his spouse, Ms. Ramirez, filed suit against Mr. Pearson and the Debtor in the Superior Court of the State of Arizona and served the complaint on Mr. Pearson and the Debtor.
3. The Plaintiffs thereafter filed a proof of claim against the Debtors which has been entered on the claims register for this case as Claim No. 2611.

4. On October 22, 2009, the Debtors filed their Plan as Exhibit B to the Order approving the Debtors' Disclosure Statement.

5. At Section 8.9 of the Plan, the Debtors propose that "If the Debtors or any other party in interest disputes any Claim against the Debtors, such dispute shall be determined, resolved, or adjudicated, as the case may be, under applicable law by the Bankruptcy Court." (the "**Adjudication Provision**").

6. At Section 9.2.3 of the Plan, the Debtors propose that any holder of a Claim "shall be deemed to have released and forever waived and discharged all Claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise that are based in whole or part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date (including prior to the Petition Date) *in any way relating to the Debtors . . . .*" (the "**Release**") (emphasis added).

7. At Section 9.2.5 of the Plan, the Debtors propose that "all Persons that have held, currently hold, or may hold claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities that are released or exculpated pursuant to Section 9.2.1, 9.2.2, 9.2.3, and 9.2.4 are permanently enjoined, on and after the Effective Date, from taking any of the following actions on account of any such claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities: (i) commencing or continuing in any manner any action or other proceeding of any kind against a Released Party or Exculpated Party with respect to any

such each claims, obligations, suits, judgments, damages, demands, debts rights, Causes of Action, and liabilities . . . . (the “**Injunction**”).

8. A “Released Party” is defined as “(i) each of the Debtors’ respective officers, directors, Professionals, agents, *and employees . . . .*” See Plan at Appendix A No. 133 (emphasis added).

9. Likewise, an “Exculpated Party” is defined as “(i) each of the Debtors’ respective officers, directors, *employees . . . .*” See Plan at Appendix A No. 62 (emphasis added).

### **Objections**

10. The Plaintiffs object to the Adjudication Provision, the Release and Injunction as follows:

**The Adjudication Provision improperly attempts to vest jurisdiction over personal injury and tort cases in the Bankruptcy Court.**

11. Resolution of the Plaintiffs’ claims is not a “core matter” within the meaning of 28 U.S.C. § 157(b)(2)(B). Indeed, core matters specifically do not include “the liquidation of estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11.” 157(b)(2)(B).

12. Nonetheless, the Adjudication Provision appears to try to vest the Bankruptcy Court with the jurisdiction to resolve, for purposes of distribution, all disputed claims, regardless of whether such claims are core claims. To the extent that the Adjudication Provision attempts to vest jurisdiction over the Plaintiffs’ tort claim with the Bankruptcy Court, the Plaintiffs object to such jurisdiction. Rather, the Plaintiffs

respectfully request that any such liquidation of the Plaintiffs' claims be adjudicated in the Superior Court of the State of Arizona, where Plaintiffs have commenced such action.

**The Release and Injunction improperly release claims against third-parties who are jointly and severally liable for Plaintiffs' injuries**

13. The Release and Injunction provisions contained in the Plan seek improperly to compel the Plaintiffs' to release claims against third parties – specifically the Debtors' employees – who are jointly and severally liable for Plaintiffs' injuries.

14. Under Arizona law, a tortfeasor and one vicariously liable for the acts of the tortfeasor, are jointly and severally liable. See ARS 12-2506. Thus, regardless of whether the Debtors are vicariously liable for the torts of their employees, the employees are nonetheless independently liable for any injuries caused to third parties.

15. In this case, Mr. Navarro and Ms. Ramirez have alleged injuries caused by Mr. Pearson's negligent operation of his vehicle while in the Debtors' employ. As such, the Plaintiffs have independent causes of action against Mr. Pearson for which they can recover, and Plaintiffs may seek recovery directly against Mr. Pearson for such injuries. That Mr. Pearson may also have been an employee of the Debtors at the time of his negligent acts – thereby imposing vicarious liability upon the Debtors – does not insulate Mr. Pearson from his joint and several liability to the Plaintiffs.

16. Nonetheless, the Release and Injunction provisions attempt to do exactly that. The Release provision attempts to insulate employees of the Debtors from any claims asserted that “in any way relat[e] to the Debtors. The Injunction attempts to permanently enjoin actions against both the Debtors and employees. Such third-party releases are not permissible, especially where such third-parties are expressly liable under applicable non-bankruptcy law. Further, Section 524(e) of the Bankruptcy Code states

that even a discharge of a debtor “does not affect the liability of any other entity on, or the property of any other entity for, such debt.” Moreover, in this Circuit, release of direct claims against a non-debtor third-party, such as those of the Plaintiffs here, “cannot be accomplished without the affirmative agreement of the creditor[s] affected.” In re Zenith Electronics Corp., 241 B.R. 92, 111 (Bankr. D.Del. 1999); In re Continental Airlines, 203 F.3d 203, 214 (3d Cir. 2000). To the extent, however, that the Debtors propose to extend such relief to non-debtor third parties, the Plaintiffs specifically reserve all rights to challenge such third-party releases at the confirmation hearing.

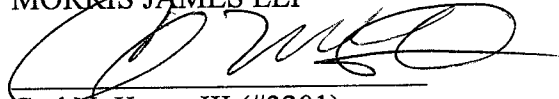
17. Moreover, to the extent required, the Plaintiffs hereby reserve their right to seek stay relief and/or relief from the proposed confirmation injunction, to pursue their rights to liquidate their claims in the Superior Court for the State of Arizona, and seek recovery in accordance with the Plan, including against any applicable insurance proceeds.

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WHEREFORE, the Plaintiffs object to confirmation of the Debtors' Plan, and request all other and further relief that is just and proper under the circumstances.

Date: November 25, 2009

MORRIS JAMES LLP



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FOR THE DISTRICT OF DELAWARE**

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BUILDING MATERIALS HOLDING ) Case No. 09-12074 (KJC)  
CORPORATION, *et al.*, )  
) Jointly Administered  
Debtors. )  
-----X

**AFFIDAVIT OF JAMIE DAWSON, PARALEGAL**

STATE OF DELAWARE :  
: SS:  
NEW CASTLE COUNTY :

I, Jamie Dawson, certify that I am, and at all times during the service, have been, an employee of Morris James LLP, not less than 18 years of age and not a party to the matter concerning which service was made. I certify further that on November 25, 2009, I caused service of the following:

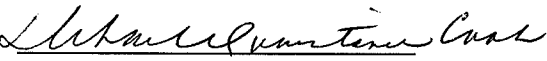
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Service was completed upon the following parties on the attached service as indicated thereon.

Date: November 25, 2009

  
\_\_\_\_\_  
Jamie Dawson

SWORN TO AND SUBSCRIBED before me this 25th of November, 2009.

  
\_\_\_\_\_  
NOTARY  
My commission expires: \_\_\_\_\_

**DEBORAH QUAINANCE COOK**  
Notary Public - State of Delaware  
My Comm. Expires May 11, 2011

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