

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

<hr/> <b>In re:</b> <b>BUILDING MATERIALS HOLDING</b> <b>CORPORATION, <i>et al.</i>,</b>  Debtors.	: : : : : : :	Case No. 09-12074 (KJC)  Chapter 11  Hearing Date: January 5, 2010 @11:00 a.m. Objection Date: December 29, 2009 @4:00 p.m.
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**MOTION OF CENTEX HOMES FOR RELIEF FROM THE AUTOMATIC STAY  
UNDER SECTION 362 OF THE BANKRUPTCY CODE**

Centex Homes, a Nevada general partnership ("Centex"), by its undersigned counsel, hereby files this Motion for Relief from the Automatic Stay (the "Motion") pursuant to 11 U.S.C. § 362(d), seeking an order from the Bankruptcy Court modifying the automatic stay to allow Centex to conclude pending arbitration proceedings to enforce a Joint Defense Agreement signed by the debtor, HNR Framing Systems, Inc. ("HNR Framing" or "Debtor"), and to collect on any judgment or award against the Debtor from the proceeds of the applicable insurance policy. In support thereof, Centex states as follows:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Venue is appropriate in this District pursuant to 28 U.S.C. § 1409(a). The statutory predicate for the relief sought herein is § 362(d) of Title 11 of the United States Code (the "Bankruptcy Code").

2. The Debtor commenced this bankruptcy case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on June 16, 2009 (the "Petition Date").

## II. FACTS

3. Centex is in the business of developing and building residential properties. Centex contracts with subcontractors such as HNR Framing to perform work and/or provide materials in the construction of the homes.

4. The underlying claim involves a lawsuit against Centex and various subcontractors by James Burrow, the purchaser of a single family home from Centex in the Clifton Heights Project in Carlsbad, California. Burrow alleges that there were defects in the construction of the home. The alleged defects include deficiencies in the work performed by HNR Framing.

5. Centex and HNR Framing entered into a Construction Agreement on or about April 5, 2004, whereby HNR Framing agreed to perform work and furnish materials to Centex in connection with the construction of homes in the Clifton Heights Project. The Construction Agreement included indemnity provisions by HNR Framing in favor of Centex. A true and correct copy of the Construction Agreement is attached hereto as Exhibit A.

6. Also on or about April 5, 2004, Centex and HNR Framing Systems entered into a Joint Defense Agreement ("JDA") to establish binding procedures for resolving any claim for defense costs by Centex under the indemnity provisions of the Construction Agreement. A true and correct copy of the Joint Defense Agreement is attached hereto as Exhibit B.

7. Centex made demand under the JDA against HNR Framing and other subcontractors for indemnification of its defense costs incurred in connection with the action by Burrow.

8. HNR is a named insured under a policy of insurance issued by Certain Underwriters at Lloyds, London ("Underwriters"), Certificate No. A/504/117 (23 January 2004 to 23 July 2005)( the "Policy"). The Policy contains liability limits of \$1,000,000 Per

Occurrence, \$1,000,000 Products/Completed Operations Aggregate and \$2,000,000 General Aggregate (Other than Products/Completed Operations). The Policy is subject to a \$75,000 Self Insured Retention Per Occurrence.

9. In accordance with HNR Framing's undertaking in the Construction Agreement, Underwriters agreed to defend Centex under the Policy in connection with the claims made by Burrow. Underwriters further advised Centex by letter dated May 27, 2009, that HNR Framing had satisfied the Self Insured Retention amount under the Policy. A true and correct copy of the letter is attached hereto as Exhibit C.

10. Pursuant to the JDA, the parties are required to submit the allocation of defense costs to arbitration. Specifically, the JDA states, "The arbitrator shall determine the percentages of the Owner's defense which is attributable to each Subcontractor and/or Design Professional, based on the percentage that each Party's alleged negligence contributed to the damages alleged against Owner in the Action." JDA ¶ 9. The JDA contemplates at most three proceedings for the determination of the percentage which each Party owes the Owner for defense: an initial preliminary allocation; a secondary interim allocation; and a final allocation. JDA ¶ 8.

11. The Parties completed the initial preliminary allocation proceeding prior to the Petition Date. Briefing on the secondary interim allocation proceeding was completed, but before the proceeding could be concluded, HNR Framing filed for bankruptcy and invoked the automatic stay provision to stop the proceeding.

### **III. RELIEF REQUESTED**

12. Centex seeks relief from the automatic stay pursuant to Sections 362(d)(1) and (2) of the Bankruptcy Code so that it may proceed with the secondary interim allocation proceeding and, if necessary, the final allocation proceeding against HNR Framing and enforce any award in its favor from the available liability insurance proceeds of the Underwriters policy.

#### IV.   ****GROUND**s FOR RELIEF**

13.     Section 362(d)(1) of the Bankruptcy Code provides that upon a request from a party in interest, the Court shall grant relief from the automatic stay “for cause.” The existence of “cause” must be determined on a case-by-case basis. *In the Matter of Rexene Products, Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992).

14.     In *American Airlines, Inc. v. Continental Airlines, Inc.*, 152 B.R. 420, 424 (D. Del. 1993), the Court set forth the criteria to be considered in determining whether “cause” exists to lift the stay to allow parties to litigate their dispute in a non-bankruptcy forum:

There is no rigid test for determining whether sufficient cause exists to modify an automatic stay. Rather, in resolving motions for relief for “cause” from the automatic stay courts generally consider the policies underlining the automatic stay in addition to the competing interest of the Debtor and the Movant. In balancing the competing interest of the Debtor and the Movant, courts consider three factors: (1) the prejudice that would be suffered should the stay be lifted; (2) the balance of the hardships facing the parties; and (3) the probable success on the merits if the stay is lifted.

15.     First, the Debtor will not suffer any prejudice should this stay be lifted. Centex merely seeks to complete the arbitration proceedings under the JDA and to enforce any award against Underwriters, who has already acknowledged the satisfaction of the Debtor’s Self Insured Retention and a duty to pay Centex’s defense costs. To the extent that the Debtor’s liability to Centex is covered by insurance, any recovery by Centex will not affect the Debtor’s estate. Moreover, briefing was already completed in the second interim allocation proceeding when the automatic stay halted the proceeding.

16.     Centex agrees to waive any right to recover directly against the Debtor and will enforce any award solely against Underwriters on the Policy.

17.     Second, the hardship to Centex in denying relief from the stay greatly outweighs the hardship to the Debtor if the stay is lifted. The Debtor will suffer no prejudice should the

Motion be granted as Centex does not seek to enforce any award against the Debtor. On the other hand, Centex will be denied payment of its defense costs and the fruits of the indemnity provisions of the Construction Agreement if it is unable to complete the allocation proceedings under the JDA. Moreover, the Parties have already completed the initial preliminary allocation under the JDA and fully briefed the issues in the secondary interim allocation. The Parties should be allowed to finish that proceeding and any final allocation proceeding if necessary.

18. Lastly, Centex's entitlement to defense costs from HNR Framing pursuant to the indemnity provisions in the Construction Agreement is clear. Underwriters has already acknowledged an obligation to pay the defense costs and the initial preliminary allocation proceeding resulted in an award against HNR Framing. Under *Continental Airlines*, the last element of the analysis is satisfied by "even a slight probability of success on the merits." *Continental Airlines* at 425. That standard is more than met in this case.

19. Based on these facts, there is cause to lift the stay and grant the relief requested by the Movant. *Rexene Products*, 141 B.R. at 576 ("cause" may be established by single factor including to permit action to proceed in another tribunal).

#### **Notice**

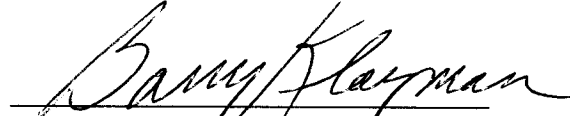
20. Notice of this Motion has been provided to (i) counsel to the Debtors; (ii) counsel to the United States Trustee; and (iii) those parties entitled to receive notice pursuant to Rule 4001 of the Bankruptcy Rules and Rule 4001-1 of the Local Rules. No other or further notice need be provided.

#### **No Prior Request**

21. No prior request for the relief sought herein has been made to this or any other Court.

WHEREFORE, Movant respectfully request that this Honorable Court enter an Order substantially in the form attached hereto, modifying the automatic stay imposed by § 362(a) of the Bankruptcy Code so that it can complete the arbitration proceedings under the Joint Defense Agreement and enforce any award against the Policy issued by Underwriters, and granting such other and further relief as this Court deems just and proper under the circumstances.

DATED: December 18, 2009



Barry M. Klayman (DE #3676)  
COZEN O'CONNOR  
1201 N. Market Street, Suite 1400  
Wilmington, DE 19801  
Tel: (302) 295-2035  
Fax: (201) 701-2209  
E-mail: bklayman@cozen.com  
Attorneys for Movant, Centex Homes

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

<hr/> <div style="display: flex; justify-content: space-between;"><div><p>In re:</p><p><b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,</b></p><p>Debtors.</p></div><div style="text-align: center;">:</div><div><p>Case No. 09-12074 (KJC)</p><p>Chapter 11</p><p>Hearing Date: January 5, 2010 @11:00 a.m.</p><p>Objection Date: December 29, 2009 @4:00 p.m.</p></div></div> <hr/>	
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**NOTICE OF MOTION OF CENTEX HOMES FOR RELIEF  
FROM AUTOMATIC STAY UNDER SECTION 362 OF THE BANKRUPTCY CODE**

TO:

Donald J. Bowman, Jr.  
Young, Conaway, Stargatt & Taylor LLP  
The Brandywine Building  
1000 West Street, 17<sup>th</sup> Floor  
Wilmington, DE 19801  
(Attorneys for Debtor)

Bradford J. Sandler  
Benesch Friedlander Coplan & Aronoff  
222 Delaware Avenue, Suite 801  
Wilmington, DE 19899  
(Attorneys for Official Committee of  
Unsecured Creditors)

United States Trustee  
844 King Street, Room 2207  
Lockbox #35  
Wilmington, DE 19899

The Movant has filed the attached Motion for Relief from Automatic Stay which seeks the following:

Relief from the automatic stay to permit Centex Homes to proceed with arbitration proceedings to enforce a Joint Defense Agreement signed by the debtor, HNR Framing Systems, Inc. ("Debtor"), and to collect on any judgment or claim, contractual or otherwise, obtained against the Debtor in such action from proceeds of any applicable insurance coverage.

A HEARING ON THE MOTION WILL BE HELD ON JANUARY 5, 2010 AT 11:00 A.M.

You are required to file a response (and the supporting documentation required by Local Rule 4001-1(d)) to the attached Motion no later than **December 29, 2009 before 4:00 PM.**

At the same time, you must serve a copy of the response upon Movant's attorney:

Barry M. Klayman, Esquire  
Cozen O'Connor  
1201 N. Market Street, Suite 1400  
Wilmington, DE 19801  
Telephone: (302) 295-2035  
Fax: (215) 701-2209  
E-Mail: [bklayman@cozen.com](mailto:bklayman@cozen.com)

**IF NO OBJECTION OR OTHER RESPONSE TO THE MOTION IS TIMELY  
FILED IN ACCORDANCE WITH THE PROCEDURES SET FORTH ABOVE, THE  
BANKRUPTCY COURT MAY ENTER AN ORDER GRANTING THE RELIEF  
SOUGHT IN THE MOTION WITHOUT FURTHER NOTICE OR A HEARING.**

Dated: December 18, 2009

/s/ Barry Klayman  
Barry M. Klayman (DE #3676)  
Cozen O'Connor  
1201 N. Market Street, Suite 1400  
Wilmington, DE 19801  
Telephone: (302) 295-2035  
Fax: (215) 701-2209  
E-Mail: [bklayman@cozen.com](mailto:bklayman@cozen.com)  
Attorneys for Movant, Centex Homes



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

<hr/> In re: <b>BUILDING MATERIALS HOLDING CORPORATION, et al.,</b>  Debtors. <hr/>	: : : : :	Case No. 09-12074 (KJC)  Chapter 11  Related Doc. No. _____
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**ORDER GRANTING MOTION FOR RELIEF FROM  
THE AUTOMATIC STAY**

Upon consideration of the Motion for an Order for Relief from the Automatic Stay (“Motion”) to allow Centex Homes to prosecute the allocation proceedings under the Joint Defense Agreement with the debtor, HNR Framing Systems, Inc. (“Debtor”), and any responses thereto, and after opportunity for a hearing and due and sufficient cause appearing therefore,

It is hereby ORDERED and DECREED this \_\_\_\_ day of \_\_\_\_\_, 2009,  
that:

1. The Motion is GRANTED.
2. Relief from the Automatic Stay is hereby GRANTED pursuant to § 362(d) of the Bankruptcy Code to permit Centex Homes to proceed with arbitration proceedings under the Joint Defense Agreement with HNR Framing and to collect on any judgment or award against the Debtor from the proceeds of the applicable insurance policy.

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HONORABLE KEVIN J. CAREY  
CHIEF UNITED STATES BANKRUPTCY  
JUDGE

# EXHIBIT A

CENTEX HOMES  
CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT (this "Agreement") is made this 5th day of April, 2004 by and between HnR Framing Systems (Contractor's License No. 617393) trade windows ("Subcontractor") whose address is 13465 Gregg Street, Poway, CA 92064, and CENTEX HOMES, a Nevada general partnership (Contractor's License No. 825943) ("Centex Homes"), whose address is 1815 Aston Avenue, Suite 101, Carlsbad, CA.  
03-09

A. Subcontractor wishes to perform work and/or furnish materials in the construction of the project of Centex Homes Clifton Heights (the "Project") on property that may or may not be owned by Centex Homes Map # 14379, Lots 1 - 91, Neighborhoods 3.12 and 3.13 Site Plan Composite - SD 03-09 in the City of Carlsbad, county of San Diego, State of California (the "Site"), and Centex Homes desires to pay Subcontractor for such work and/or materials subject to and in accordance with the terms and conditions contained in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties hereto agree as follows:

1. **WORK.** In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all materials, labor, equipment, supplies and tools for the work described on Schedule B attached to this Agreement (the "Work"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are or will be on file at the office of Centex Homes (collectively, the "Contract Documents") and incorporated into the Agreement by this reference as if fully set forth. Centex Homes will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event that an amendment or supplement to the Contract Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Centex Homes within 24 hours after Centex Homes delivers such amendment or supplement to Subcontractor.

2. **CONTRACT PRICE.** Centex Homes will pay to Subcontractor for the Work the sum *of* OR /calculated based upon the price schedule (the "Price Schedule") on Schedule C to this Agreement/ (the "Contract Price"), subject to the terms and conditions contained herein. The Contract Price includes all costs of construction, including, without limitation, materials, labor, supervision, freight, permits, sales and other taxes, and any other applicable costs required to provide the Work. If Subcontractor elects to participate in Centex Homes' "Centex Homes Accelerated Payment Service" paperless approval and payment system for vendors and is approved by Centex Homes for such participation, payment of the Contract Price may be made by direct deposit to a designated account at Subcontractor's bank or other financial institution. Participation in such service will not otherwise alter the rights and obligations of the parties under this Agreement.

3. **PAYMENT SCHEDULE.** Payments will be made in accordance with the payment schedule ("Payment Schedule") attached hereto as Schedule D. The making of any payment to Subcontractor will not be construed as acceptance of the Work or waiver of any rights of Centex Homes under this Agreement and will not relieve Subcontractor of any of its obligations hereunder. Notwithstanding any other provisions of this Agreement, Centex Homes will not be obligated to make any payment to Subcontractor if and as long as any one or more of the following conditions exist:

(a) Subcontractor has failed to perform any of its obligations hereunder or otherwise is in default under this Agreement.

(b) Subcontractor has failed to furnish to Centex Homes invoices and signed receipts and vouchers and lien releases or waivers in the form and manner satisfactory to Centex Homes.

(c) Any part of a payment requested is attributable to Work that is defective or not performed in accordance with this Agreement and/or the Contract Documents; provided, however, if severable, payment will be made as to that part of the Work that appears to be properly performed after due allowance for the cost of correcting the defective part of the Work and the part which was not performed in accordance with this Agreement and/or the Contract Documents, as estimated by Centex Homes.

(d) Subcontractor has failed to make payment promptly to any lien claimants.



(e) Centex Homes, determines in its good faith judgment, that the portion of the Contract Price then remaining unpaid will not be sufficient to complete the Work and correct deficiencies in the Work. In such case no additional payments will be due Subcontractor hereunder unless and until Subcontractor, at its sole cost, performs a sufficient portion of the Work so that such portion of the Contract Price then remaining unpaid is determined by Centex Homes to be sufficient to so complete and correct the Work.

(f) Subcontractor has failed to procure, maintain or pay for Required Insurance (as defined in Section 8).

**4. PAYMENTS BY SUBCONTRACTOR.** Subcontractor will promptly pay in cash all costs of labor employed and materials and services furnished and used in the performance of the Work. Centex Homes will have the right, whenever it will deem such procedure advisable, to make payments due to Subcontractor directly to any subcontractor, material or equipment supplier, utility or transportation company, insurance company, governmental agency or union trust fund for any work, labor, materials, equipment, utilities, transportation, insurance premiums, taxes or the like, performed, furnished, rendered or payable in connection with the performance of the Work, unless Subcontractor has first delivered written notice to Centex Homes of a dispute with any such person and has furnished security satisfactory to Centex Homes insuring against claims therefrom. Any payment so made will be credited against sums due Subcontractor in the same manner as if such payment had been made directly to Subcontractor. The provisions of this Section 4 are intended solely for the benefit of Centex Homes and will not inure to the benefit of any third persons, or obligate Centex Homes or its sureties in any way to any third party.

**5. PERFORMANCE OF WORK.** Subcontractor will commence the Work immediately upon notice from Centex Homes and will proceed with the Work during Centex Homes' normal business hours (unless other arrangements have been made) and every part thereof until completion in a prompt, diligent and workmanlike manner, in strict accordance with the Contract Documents and Centex Homes' time schedule and in such time so as not to delay the other trades. If in Centex Homes' opinion Subcontractor's ability or willingness to commence and perform the Work in accordance with the Contract Documents and Centex Homes' time schedule will result in delays for other trades, then Centex Homes may terminate this Agreement for that portion of the Work to be performed upon twenty-four (24) hours written notice to Subcontractor. If any persons performing the Work engage in a strike or work stoppage, or cease to work due to picketing or a labor dispute of any kind, Centex Homes may, at its option and without prejudice to any other remedies it may have, after forty-eight (48) hours written notice to Subcontractor, provide through whatever means Centex Homes determines is reasonable any such Work and deduct the cost thereof incurred by Centex Homes from any monies then due or thereafter to become due Subcontractor. Further, Centex Homes may at its option, without prejudice to any other remedies it may have, terminate its relationship with Subcontractor for the Work and will have the right to enter upon the Site and take possession, for the purpose of completing the Work, of Subcontractor's materials, tools and equipment thereon and to finish the Work, either with its own employees or other contractors, and in case of such termination of the relationship by Centex Homes, Subcontractor will not be entitled to receive further payments under the Agreement or otherwise but will nevertheless remain liable for any damages that Centex Homes incurs. If the expenses incurred by Centex Homes in completing the Work exceed the unpaid balance of the Contract Price, Subcontractor will pay the difference to Centex Homes together with any other damages incurred by Centex Homes as the result of Subcontractor's default. Centex Homes will have a lien upon all materials, tools and equipment taken possession of, to secure such payment. If Subcontractor fails to provide sufficient people or equipment for the Work and is thereby unable to timely meet the requirements of Centex Homes, Centex Homes may obtain additional equipment and provide additional people to assist Subcontractor, and all costs thereof, including a fee for expenses of administration and supervision equal to fifteen percent (15%) of such costs, will be promptly paid by Subcontractor to Centex Homes. If Subcontractor delays the progress of the Project, Subcontractor shall indemnify, defend and hold Centex Homes harmless from and against all loss, damage or expense (including attorneys' fees and other costs of defense incurred by Centex Homes in defending against any Claims [as defined in Section 9] or in enforcing this indemnity and defense obligations) arising out of such delay. Any consent of Centex Homes to the delayed finishing of the Work will not be construed as a waiver of any provision of this Agreement.

**6. FAMILIARITY WITH THE SITE.** Subcontractor will be responsible for inspecting the Site, reading all of the Contract Documents and comparing the Site against the Contract Documents. Subcontractor's commencement of the Work is an acknowledgment by Subcontractor that the Site is safe and ready for the Work to commence and proceed in a good and workmanlike manner and in compliance with all Law (as hereinafter defined) bearing on the Work. It is understood by the parties that Subcontractor is best able to evaluate the cost of the Work and that in arriving at the Contract Price, Subcontractor has considered and assumed the risk that unforeseen conditions or events may be encountered causing additional difficulty and expense not anticipated at the time of execution of this Agreement. Subcontractor further represents that it is fully familiar with the requirements of any governmental authority having jurisdiction over the Work and is prepared to and will comply with all such requirements without additional compensation. No estimate or bids of Subcontractor preceding this Agreement and no verbal agreement or conversation with any representative of Centex Homes, either before or after execution of this Agreement, will affect or modify any of the terms or provisions contained in this Agreement or the Contract Documents.

**7. PROTECTION OF WORK.** Subcontractor will supervise, administer and protect the Work against loss or damage from any cause and will be responsible for all parts of the Work, temporary or permanent, finished or not, until the Work is finally completed and inspected and accepted by Centex Homes. Subcontractor will take reasonable precautions and maintain reasonable safeguards to protect against loss or damage to persons or property as a result of weather conditions and arising out of Subcontractor's activities at or about the Site including, without limitation, bracing and reinforcing where

necessary and providing for guards, locks, fences, signs, barricades, lights and such other warning and security devices where appropriate. Subcontractor will bear and be liable for and Centex Homes will not be responsible for any loss or damage to the Work and any material, equipment or other thing used in the Work or placed at the Site including, without limitation, loss or damage due to theft, trespass or vandalism before final completion of the Work and inspection and acceptance of the Work by Centex Homes. The acceptance of the Work by Centex Homes shall not constitute a waiver or release of any rights of Centex Homes against Subcontractor under this Agreement, including, without limitation, liability for defective, deficient or non-conforming Work.

8. **INSURANCE.** The following coverage, terms and limits are minimum requirements (the "Required Insurance") to be provided by Subcontractor:

(a) Commercial General Liability:

i. \$1,000,000 each occurrence limit, \$1,000,000 personal and advertising injury limit, \$2,000,000 general aggregate limit, \$2,000,000 products-completed operations aggregate limit or equivalent approved by Centex Homes, or current limit carried, whichever is greater. If Subcontractor is engaged in mass grading activities and/or trenching activities over five (5) feet in depth, the products-completed operations aggregate limit including any umbrella and excess coverage shall be a minimum of \$10,000,000.00;

ii. ISO or comparable Occurrence Form (Occurrence Form #CG0001-1093 or equivalent) (Modified Occurrence and Claims Made forms are not acceptable);

iii. Bodily injury and property damage coverage including products liability/completed operations coverage (including any product manufactured or assembled), premises operations, blanket contractual liability (for this Agreement), broad form property damage, personal and advertising injury, independent contractor's liability, mobile equipment, elevators, owners and contractors protective liability, damage from explosion, collapse and underground hazards (No "XCU" exclusions are acceptable), and cross-liability and severability of interest clauses;

iv. Additional Insured Endorsement CG2026-1185, or CG2010-1185 or CG2010-1093 (but only if modified to delete the word "ongoing" and insert the sentence "Operations include ongoing and completed operations") or equivalent approved by Centex Homes at no expense to Centex Homes naming Centex Homes, a Nevada general partnership, Centex Real Estate Corporation, a Nevada corporation, and the owner of the Site if other than Centex Homes, their respective officers, directors, partners, members and employees, as additional insureds. General liability coverage will continue to apply to "bodily injury" and to "property damage" occurring after all Work on the Site of the covered operations to be performed by or on behalf of the additional insureds has been completed and will continue after that portion of "your Work" out of which the injury or damage arises has been put to its intended use;

v. A provision that such insurance afforded by the policy for the benefit of the additional insureds will be primary and non-contributory to any insurance or self insurance maintained by the additional insureds;

vi. An endorsement affording thirty (30) days prior notice to Centex Homes by certified mail in the event of cancellation, non-renewal, modification or reduction in coverage. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement must be deleted. To the full extent permitted by law, any provision on the face of any Certificate of Insurance provided by Subcontractor that states anything to the effect that the Certificate of Insurance does not confer rights to insurance upon Centex Homes is hereby deemed deleted from such Certificate of Insurance;

vii. A deductible or self-insured retention of not more than \$25,000 as to Subcontractor (unless approved in writing by Centex Homes) and no deductible or self-insured retention as to any additional insured;

viii. Coverage will not be limited to vicarious liability and will extend to (and there will be no endorsement limiting coverage for) the negligent acts, errors or omissions of Centex Homes in connection with or relating to the Work;

ix. No exclusionary language or limitations relating to soils subsidence or earth movement of any kind regardless of cause;

x. If insurable by law, no exclusionary language or limitations relating to punitive or exemplary damages, fines or penalties;

xi. No exclusionary language or limitations relating to condominiums, multi-family or multi-unit dwellings, if applicable to the Work;

xii. No exclusionary language or limitations that are applicable to any additional insured that are not applicable to the named insured;

xiii. No exclusionary language or limitations relating to the scope of coverage for liability arising from pollution, mold or fungus, or arising from the use of EIFS, DEIFS or similar products; and

xiv. A provision that defense costs are paid in addition to and do not deplete any policy limits.

(b) Automobile Liability:

i. \$1,000,000 combined single limit for bodily injury and property damage or equivalent approved by Centex Homes;

ii. Owned, non-owned and hired vehicles (commercial policies only); and

iii. Thirty (30) days notice of cancellation by certified mail (commercial policies only).

(c) Workers' Compensation/ Employer's Liability:

i. Bodily injury limits as required by statute;

ii. Employer's Liability:

Bodily injury by accident - \$1,000,000 each accident

Bodily injury by disease - \$1,000,000 each employee

Bodily injury by disease - \$1,000,000 policy limit

iii. Waiver of subrogation for Centex Homes and the owner of the Site if other than Centex Homes (in each case to the full extent permitted by law);

iv. If leased employees are used, issuance of an Alternate Employer's Endorsement; and

v. Thirty (30) days notice of cancellation by certified mail.

(d) Insurance carriers must have a "Best's Rating" and a "Financial Size Category" as set forth in the most current edition of Best's Key Rating Guide acceptable to Centex Homes. Insurance carriers must be admitted in the State of California unless Centex Homes otherwise agrees in writing.

(e) The Required Insurance will cover Subcontractor, its authorized representatives, employees, agents and any other person (including its authorized representatives, employees and agents) performing any work under any contract or agreement with Subcontractor.

(f) Subcontractor will cause each subcontractor retained by Subcontractor to purchase, obtain and maintain the Required Insurance prior to commencing any portion of the Work. Upon request of Centex Homes, Subcontractor will provide Centex Homes with copies of certificates of insurance evidencing the Required Insurance for each subcontractor. Subcontractor will also obtain from each such subcontractor a written indemnification in form and substance identical to the indemnity set forth in Section 9 except that such indemnity will be from such subcontractor for the benefit of Centex Homes (and the owner of the Site if other than Centex Homes) and all of the other parties that are indemnified in Section 9.

(g) Subcontractor for itself and on behalf of its insurers, to the full extent permitted by law without voiding the insurance required under this Agreement, hereby waives and releases the additional insureds from liability for loss, damage or loss of property at the Site, which loss or damage is covered by such insurance, irrespective of the additional insureds' negligence which may have contributed to or caused such loss, to the extent such damages are covered by Subcontractor's policies of insurance or are required to be covered by the Required Insurance. This provision is intended to waive fully for the benefit of Centex Homes and the other additional insureds any rights and/or claims which might give rise to a right of subrogation in favor of any insurance carrier issuing the Required Insurance or any other insurance (including any first party coverage) maintained by Subcontractor. Subcontractor will obtain a waiver of any subrogation right that its insurers may acquire against the additional insureds by virtue of payment of any such loss covered by such insurance.

(h) The project/job description and/or description of operations on all certificates, endorsements and other insurance documentation will read "All Work Performed for the Additional Insureds."

(i) Concurrently with the execution of the Agreement, Subcontractor will file with Centex Homes original certificates of insurance and endorsements showing the Required Insurance to be in force. Certificates of insurance such as "ACORD 25S" alone, without the requisite endorsements, are not acceptable to satisfy the provisions of the Required Insurance. Upon the request of Centex Homes, Subcontractor will provide Centex Homes with certified copies of all policies as well as any subsequent policies and endorsements which Subcontractor is required to procure and maintain. Upon the request of Centex Homes, renewal certificates and endorsements for commercial general liability will be provided to Centex Homes, at no expense to Centex Homes, prior to expiration of such insurance, for a period of ten (10) years after completion of all works of improvement on the Project. Such continuing insurance will comply with the requirements set forth in this Section 8. SUBCONTRACTOR WILL NOT COMMENCE OR BE PAID FOR ANY WORK UNLESS AND UNTIL INSURANCE DOCUMENTATION PROPERLY COMPLETED AND EXECUTED HAS BEEN DELIVERED TO AND APPROVED BY CENTEX HOMES.

- (j) All insurance documentation evidencing the Required Insurance will be sent to:

Centex Homes San Diego Division,  
1815 Aston Avenue, Suite 101  
Carlsbad, CA 92008  
Attn: Mickey Olson

(k) If Subcontractor fails to procure, maintain or pay for the Required Insurance, Centex Homes will have the right (but not the obligation) to secure same in the name of and for the account of Subcontractor, in which event Subcontractor will pay the cost thereof and will furnish upon demand, all information that may be required to procure such insurance. Centex Homes will have the right to backcharge Subcontractor for the cost of procuring such insurance. The failure of Centex Homes to demand certificates of insurance and endorsements evidencing the Required Insurance or to identify any deficiency in Subcontractor's coverage based upon the evidence of insurance provided by Subcontractor will not be construed as a waiver by Centex Homes of Subcontractor's obligation to procure, maintain and pay for the Required Insurance. Notwithstanding any provision to the contrary contained herein, any waiver of the Required Insurance, including, without limitation, the amount or extent of coverage, may only be obtained by the prior written consent of Centex Homes.

(l) The insurance requirements set forth herein will in no way limit Subcontractor's liability arising out of the Work performed under this Agreement or related activities (including liability under the indemnification provisions set forth in Section 9 or under any other provisions of the Contract Documents or at law). The inclusions, coverage and limits set forth herein are minimum inclusions, coverage and limits. The required minimum policy limits set forth in this Section 8 will not be construed as a limitation of Centex Homes' rights under any policy with higher limits, and no policy maintained by Subcontractor will be endorsed to include such a limitation. Nothing contained herein will be construed as limiting the type, quality or quantity of insurance coverage that Subcontractor should maintain. Subcontractor will be responsible for determining appropriate inclusions, coverage and limits which may be in excess of the minimum requirements set forth herein.

(m) The failure of Subcontractor to fully and strictly comply at all times with the insurance requirements set forth herein will be deemed a breach of this Agreement.

(n) Subcontractor will immediately notify (or cause its insurers or insurance broker to notify) Centex Homes of receipt by Subcontractor of any notice of cancellation or rescission received from an insurance carrier referring to or relating to a policy which names Subcontractor, its parent, subsidiary or affiliated companies or their officers, directors or employees as additional insureds or which may otherwise impact the ability of Subcontractor to fully perform its obligations hereunder (including, without limitation, the indemnity obligations of Subcontractor set forth in Section 9).

(o) To the full extent permitted by law, if Subcontractor is out of business or otherwise unavailable at the time a claim is presented to Centex Homes, Subcontractor hereby assigns to Centex Homes all of its right, title and interest (but not any liabilities or obligations) under any applicable policies of insurance. The foregoing provision will not apply to those policies where there is an express prohibition against assignment.

(p) The Required Insurance set forth in this Section 8 is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement.

9. **INDEMNITY.** To the fullest extent permitted by law, Subcontractor shall indemnify, defend (at Subcontractor's sole cost and expense and with legal counsel reasonably approved by Centex Homes), protect and hold harmless Centex Homes (and the owner of the Site if other than Centex Homes), all subsidiaries, divisions and affiliated companies of Centex Homes, its partners, Centex Real Estate Corporation, a Nevada corporation, and all of such parties' representatives, partners, members, designees, officers, directors, shareholders, employees, agents, successors and assigns, and any lender of Centex Homes with an interest in the Project (individually, an **"Indemnified Party,"** collectively, the **"Indemnified Parties"**), from and against any and all claims (as more particularly set forth below), demands, obligations, damages, actions, causes of action, suits, losses, judgments, settlements, fines, penalties, liabilities, costs and expenses (including, without limitation, attorneys' fees, disbursements and court costs, and all other professional, expert or consultants' fees, repair or replacement costs, and costs incurred as a result of such claims or in enforcing this indemnity provision) of every kind and nature whatsoever (individually, a **"Claim,"** collectively, **"Claims"**) which may arise from or in any manner relate (directly or indirectly) to any work performed or services provided under this Agreement (including, without limitation, defects in workmanship or materials and/or design defects) or Subcontractor's presence or activities conducted on the Project (including, without limitation, the negligent and/or willful acts, errors and/or omissions of Subcontractor, its principals, officers, agents, employees, vendors, suppliers, consultants, subcontractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable or any or all of them (individually, a **"Subcontractor Party,"** collectively, **"Subcontractor Parties"**)) regardless of any fault, active or passive negligence, breach of warranty or contract, or strict liability of an Indemnified Party, including, without limitation, the following:

- (1) Property damage, including, without limitation, damage to both real and/or personal property whether or not such property was manufactured by Centex Homes (or the owner of the Site if other than Centex Homes), costs to repair defects in property, diminution in property value, loss of use, loss of economic value, consequential losses, and any other damages associated

with damage to, destruction of, defects in, or loss of real or personal property caused or alleged to be caused in whole or in part by any act or omission to act of Subcontractor or any Subcontractor Party.

(ii) Personal injury, including, without limitation, bodily injury, emotional injury, sickness or disease, or death to persons, including, without limitation, loss of use and enjoyment, emotional injury to, sickness or disease or death of persons including, without limitation, agents, guests or invitees of a homeowner, Subcontractor, Centex Homes or any other contractor caused or alleged to be caused in whole or in part by any act or omission to act of Subcontractor or any Subcontractor Party.

(iii) Penalties and/or response costs imposed on account of the violation of any law, order, citation, rule, regulation, standard, ordinance, or statute, caused by the act or omission to act of Subcontractor or any Subcontractor Party. Any violation or infraction by Subcontractor of any law, order, citation, rule, regulation, standard, ordinance, or statute in any way relating to the occupational health or safety of employees, including, without limitation, the use of Centex Homes' or any other party's equipment, as well as Subcontractor's failure to comply with the SWPPP Plan for the Project.

(iv) Infringement of any patent rights which may be brought against Centex Homes arising out of or connected with the Work. Claims and liens for labor performed or materials used or furnished to be used on the Project, including incidental or consequential damages resulting to Centex Homes (or the owner of the Site if other than Centex Homes) from such Claims or liens.

(v) Costs incurred by Centex Homes in the good faith settlement of any lawsuits, Claims under the Calderon Act (California Civil Code §1375 et seq.), the Right to Repair Act (California Civil Code §895 et seq.) or any similar statute, and warranty-related Claims in connection with investigations brought by third parties, including, without limitation, the Department of Real Estate and/or Subcontractor's State License Board of the State of California.

9.1 The indemnification provisions of (i) through (v) above and elsewhere in this Agreement apply regardless of whether this Agreement is executed after Subcontractor begins the Work, and shall extend to Claims arising after this Agreement is terminated, including a dispute as to the termination of Subcontractor. The indemnity obligations of Subcontractor shall continue until such time it is determined by final judgment that the Claim against the Indemnified Parties is fully and finally barred by the statute of limitations, which may be construed to be expressly and/or impliedly tolled as to Subcontractor by Centex Homes or by operation of law. The indemnity provisions apply to any acts or omissions, willful misconduct or negligent acts, whether active or passive on part of Subcontractor or any Subcontractor Party, regardless of fault or negligence. Subcontractor's obligation to indemnify, defend and hold Centex Homes harmless shall apply with full force and effect regardless of any act or omission to act, or active or passive negligence by Centex Homes or any Indemnified Party regardless of any concurrent negligence, whether active or passive, by Centex Homes or any Indemnified Party. Notwithstanding any provision of law that would otherwise limit Subcontractor's liability, Subcontractor shall be strictly liable under this indemnification provision for damage or injury resulting from any defects in the Work regardless of fault. **Subcontractor shall not be obligated under this Agreement to indemnify Centex Homes or any Indemnified Party for Claims arising from the sole negligence or willful misconduct of Centex Homes or an Indemnified Party or otherwise in contravention of California Civil Code Section 2782.** Nothing in California Civil Code Section 2782 limits Subcontractor's obligation to defend, and Subcontractor's obligations to defend and indemnify Centex Homes are in addition to any liability Subcontractor may have to Centex Homes for a breach by Subcontractor of any of the provisions of this Agreement. Nothing in Subcontractor's indemnity obligations shall be construed to negate, abridge or otherwise reduce any of Centex Homes' other rights of indemnity which would otherwise exist.

9.2 Evidence of insurance procured by Subcontractor shall be deemed admissible in any legal proceeding and/or arbitration for any purpose, including evidence that the parties expressly bargained for a commercially reasonable risk allocation. The indemnification obligations of Subcontractor under this Section 9 and elsewhere in this Agreement shall not be limited by the amounts or types of insurance (or the deductibles or self-insured retention amounts of such insurance) which Subcontractor is required to carry under this Agreement. The right to indemnification by Subcontractor under this Section 9 shall be in addition to Centex Homes' separate rights under the insurance to be provided by Subcontractor under this Agreement.

9.3 It is the intention of the parties hereto that Subcontractor provide total indemnity to Centex Homes as provided herein. Subcontractor acknowledges that the indemnification provisions herein, at a minimum, include a "Type I" indemnity provision under California law. In the event of any action or proceeding, including, without limitation, litigation, arising out of Subcontractor's activities in connection with this Agreement, Subcontractor shall not enter into any settlement (total or partial) with respect to such action or proceeding without the express prior written consent of Centex Homes. Any such attempt to enter into a settlement without the required consent shall conclusively establish that the settlement is not in "good faith," within the meaning of California Code of Civil Procedure Section 877 et seq. Any such attempted settlement shall not prohibit Centex Homes from proceeding against Subcontractor for contractual and/or equitable indemnity. Should Subcontractor attempt to settle any action or proceeding in violation of this provision, such attempt shall constitute a breach of this provision and shall provide a separate legal basis for which Centex Homes may seek recovery available at law or in equity.



9.4 Subcontractor's duty to defend the Indemnified Parties is entirely separate from, independent of and free-standing from Subcontractor's duty to indemnify the Indemnified Parties, including, without limitation, the defense of the Indemnified Parties against Claims for which the Indemnified Parties (or any of them) may be strictly liable and applies whether the issue of Subcontractor's liability, breach of this Agreement or other obligation or fault has been determined and whether the Indemnified Parties (or any of them) have paid any sums or incurred any detriment, arising out of or resulting directly or indirectly from Subcontractor's performance of the Work. Such defense obligation shall arise immediately upon written notice of Claim being provided to Subcontractor, and includes, without limitation, the obligation to defend Centex Homes with respect to any alternative dispute resolution proceeding authorized under this Agreement as well as matters related to investigation and resolution of Claims, including, without limitation, Claims pursuant to Section 27, and Claims brought pursuant to statute by homebuyers, successive homebuyers or homeowners associations, or Claims arising out of the Limited Warranty (as defined in Section 11(a)). It is the parties' intention that the Indemnified Parties (or any of them) shall be entitled to obtain summary adjudication of Subcontractor's duty to defend and/or duty to indemnify the Indemnified Parties at any time. Payment by any Indemnified Party is not a condition precedent to enforcing such Indemnified Party's rights to indemnification and/or defense under this Agreement.

9.5 Subcontractor shall procure contractual liability insurance covering its obligations under this Section 9.

#### 10. COMPLIANCE WITH LAWS.

(a) Subcontractor will carefully check the drawings, plans and specifications for conformity with all local, state and federal laws, codes, rules, and regulations governing the Work (collectively, "Law") before commencing the Work. Unless Centex Homes otherwise agrees in writing, before commencement of the Work, Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law governing the Work, including, without limitation, safety and health rules and regulations initiated by Centex Homes and established by or pursuant to the Occupational Safety and Health Act, 29 U.S.C. Section 651 *et seq.* and California Occupational Safety and Health Act, California Labor Code Section 6300 *et seq.* or any other applicable public authority. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Centex Homes in writing. Subcontractor will be responsible for any fines, charges or penalties related to the Work, including, without limitation, fines, charges and/or penalties related to the operation of equipment, Subcontractor's performance of the Work, the handling of materials or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required and all other obligations of Subcontractor with respect to the Work have been completed.

(b) The Occupational Safety and Health Administration ("OSHA") has promulgated regulations ("Regulations") which are entitled OSHA Hazard Communication Standard. Among other things, the Regulations require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project. Subcontractor agrees as follows:

(i) Subcontractor will fully comply with the Regulations and will cooperate with Centex Homes and all subcontractors of Centex Homes in order to assure compliance with the Regulations.

(ii) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Site.

(iii) Subcontractor will indemnify, defend and hold Centex Homes harmless from all Claims which arise from the failure of Subcontractor to comply with the Regulations.

(iv) Subcontractor will assist Centex Homes in complying with the Regulations.

(v) Subcontractor will not use any chemicals in its performance of the Work or incorporate any chemicals into materials or products supplied to Centex Homes or to the Site unless Subcontractor has given Centex Homes prior written notice of the existence and the possible exposure to such chemicals, has delivered an MSDS to Centex Homes and has received a written consent of Centex Homes to use such chemicals.

(c) Subcontractor shall, at its own expense, comply in all respects with all applicable federal, state, local and municipal laws, statutes, ordinances, codes, consent decrees, orders, rules, regulations and requirements of any governmental authority regulating, relating to, or imposing liability or standards of

conduct concerning any Hazardous Materials (as hereinafter defined) or pertaining to occupational health, industrial hygiene, occupational or environmental conditions on, under, from or about the Project, or the regulation or protection of the environment, including ambient air, soil, soil vapor, ground water, surface water and/or land use. For purposes of this Agreement, the term "**Hazardous Materials**" includes: (i) any hazardous or toxic substance, material or waste which is or becomes designated, regulated or classified as hazardous or toxic under any applicable federal, state, local or municipal laws or regulations, (ii) any other substance, material or waste which results in liability to any person or entity from exposure to such substance, material or waste under any statutory or common law theory, (iii) petroleum, oil or gas or any direct or derivative product or by-product thereof, (iv) asbestos, (v) polychlorinated biphenyls, (vi) flammable explosives, and (vii) radioactive materials.

#### 11. RIGHT TO REPAIR ACT.

(a) The Right to Repair Act (California Civil Code Section 895 et seq. contained in Part 2 of Division 2 of the California Civil Code) (as amended from time to time, the "**Right to Repair Act**") governs standards and procedures for the resolution of construction defect matters, and applies to new residential units originally sold on or after January 1, 2003. The legislative intent of the Right to Repair Act is, in part, to "improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects." Pursuant to the terms and conditions of the contract entered into or to be entered into by Centex Homes and homeowners for the purchase and sale of residences in the Project, Centex Homes has (i) agreed that the functionality standards set forth in the Right to Repair Act (See California Civil Code Sections 896 - 897, inclusive) shall govern the rights and obligations of Centex Homes and such homeowners with respect to any construction defect claims regarding such residence, (ii) agreed to comply with the "pre-litigation" and "non-adversarial" procedures set forth in the Right to Repair Act (California Civil Code Sections 910 - 938, inclusive), and (iii) provided to such homeowners a limited warranty, a copy of which is attached hereto as Schedule L.W (the "**Limited Warranty**"). Subcontractor represents to Centex Homes that Subcontractor has received a copy of the Limited Warranty and has read and understands the Limited Warranty. All labor, materials and/or services provided by Subcontractor shall be sufficient to comply with the Limited Warranty. Subcontractor and Centex Homes acknowledge and agree that the Right to Repair Act, including the functionality standards and pre-litigation and non-adversarial procedures described therein, apply to this Agreement and the Work.

(b) Subcontractor shall comply with the Right to Repair Act and cooperate in good faith with Centex Homes in resolving disputes governed by the Right to Repair Act. In addition to complying with any other requirements of this Agreement, the Work shall comply with (i) the functionality standards set forth in the Right to Repair Act (California Civil Code Sections 896 and 897), and (ii) the Limited Warranty.

(c) As part of the Work and prior to completion thereof, Subcontractor shall provide Centex Homes with copies of any and all plans, specifications, grading plans, soils reports, engineering calculations, maintenance and preventative maintenance recommendations, limited warranty or "useful life" information as to any "manufactured products" (as defined in California Civil Code Section 896(g)(3)), guarantees on consumer product (as defined in the Magnuson-Moss Act) and any other documentation relating to the Work which Centex Homes is required to provide to homeowners under the Right to Repair Act (See California Civil Code Section 912).

(d) Any notice of a Claim by a homeowner given by Centex Homes to Subcontractor pursuant to California Civil Code Section 916(e) (or any alternative procedure adopted in place thereof) may be delivered to Subcontractor pursuant to the notice provisions set forth in Section 20. Centex Homes' delivery of such notice to Subcontractor at least two (2) business days prior to a scheduled inspection or other activity specified in such notice shall be deemed to constitute sufficient and reasonable notice under the Right to Repair Act.

(e) Subcontractor shall comply with and satisfy (and shall cooperate reasonably in good faith with Centex Homes so that Centex Homes may comply with and satisfy) any requirements and/or obligations related to the "non-adversarial" and "pre-litigation procedures" under the Right to Repair Act (California Civil Code Sections 910 - 938, inclusive) and the Limited Warranty with respect to any Claim arising out of or relating to the Work. Such cooperation shall include, without limitation, assisting Centex Homes (as determined by Centex Homes in its sole discretion) in complying with deadlines in responding to Claims by homeowners, participating in inspections, participating in mediation, and assisting Centex Homes (as determined by Centex Homes in its sole discretion) in preparing offers to repair and performing such repairs (to the extent requested or permitted under the Right to Repair Act to perform such repair).

(f) Subcontractor understands and acknowledges that a homeowner has the right under the Right to Repair Act to require the repair of any portion of the Work performed by Subcontractor (or of damage or conditions arising out of the Work) that constitutes an Unmet Standard to be performed by a contractor other than Subcontractor (See California Civil Code Sections 917 and 918). Subcontractor shall

be liable for and shall promptly reimburse Centex Homes for all costs and expenses incurred by Centex Homes if (1) Subcontractor fails or refuses to repair at Subcontractor's cost and expense any portion of the Work (or of damage or conditions arising out of the Work) that constitutes an Unmet Standard or (2) a homeowner exercises the right under the Right to Repair Act to require the repair of the portion of the Work (or of damage or conditions arising out of the Work) that constitutes an Unmet Standard to be performed by a contractor other than Subcontractor.

## 12. WARRANTY.

(a) In addition to any other warranty expressly made by Subcontractor or implied by Law, Subcontractor unconditionally guarantees and warrants for the benefit of Centex Homes and its successors and assigns that the Work shall (1) comply with all Law and the Contract Documents, (2) be of good quality, free of defects in materials and workmanship, (3) consist of new materials unless otherwise specified, and (4) be completed in a good and workmanlike manner in accordance with the prevailing standards of the industry (collectively, the "Warranty"). The Warranty specifically inures to the benefit of and shall be enforceable by any purchaser of any residence constructed or to be constructed in the Project with respect to which the Work applies and, to the extent applicable, any municipal corporation, jurisdiction, agency or homeowners' association that will ultimately own and/or govern any portion of the Site (the "Subsequent Owner"). The obligations of Subcontractor under the Warranty are separate and distinct from the obligations of Subcontractor under Section 11. The Warranty shall commence upon commencement of the Work and continue for a period of one (1) year from the later of (i) the date of substantial completion and formal acceptance of the Work by the Subsequent Owner, or (ii) the close of escrow between Centex Homes and the original homeowner for each residence.

(b) Any portion of the Work which Centex Homes reasonably determines to be defective, deficient or non-conforming shall be repaired or replaced by Subcontractor in a manner reasonably satisfactory to Centex Homes and in accordance with procedures set forth in this Section 12. If a demand is made upon Subcontractor to perform work under the Warranty, Subcontractor, at its sole cost and expense, shall use its best efforts to expeditiously repair or replace any and all defective, deficient or non-conforming Work, whether existing because of faulty workmanship, defective equipment, materials or otherwise, and shall repair and/or replace any and all damage to the work of others caused by the defective, deficient or non-conforming Work. Subcontractor shall complete such repair and/or replacement within eight (8) hours in an emergency (as determined by Centex Homes) or forty-eight (48) hours in a non-emergency (Saturdays and Sundays excluded) after oral or written notice from Centex Homes or a Subsequent Owner (as applicable). If such repair and/or replacement cannot be completed within forty-eight (48) hours despite Subcontractor's best efforts, Subcontractor shall diligently and continuously proceed toward completion of such repair and/or replacement. Subcontractors performing HVAC, electrical, roofing or plumbing services shall provide and maintain emergency telephone numbers for night, weekend and holiday calls. If Centex Homes requests, Subcontractor shall contact homeowners directly to make necessary arrangements for punctual appointments and access to the residence in order to complete the repair and/or replacement within such forty-eight (48) hour period. Subcontractor shall obtain the signature of the Subsequent Owner confirming completion of the repair and/or replacement. Signed service requests shall be faxed or mailed to Centex Homes within twenty-four (24) hours after completion of the repair and/or replacement.

(c) If Subcontractor refuses or fails to perform under the Warranty, the party entitled to performance or Centex Homes, as applicable, shall have the right to hire other persons to correct the defective, deficient or non-conforming Work without notice to Subcontractor, and Subcontractor shall be liable for the costs and expenses thereof, including, without limitation, costs, disbursements, and reasonable attorneys' fees incurred in the enforcement of this provision. The cost of any such work shall be charged to Subcontractor and such cost plus a sum equal to fifteen percent (15%) thereof (which additional sum represents an allowance for the administration by Centex Homes of such work) shall be charged against the account of Subcontractor. If the amount owing Subcontractor under this Agreement at the time such work is performed by others is less than the sum charged against its account, Subcontractor will remit the difference to Centex Homes within five (5) days after request therefor.

(d) Subcontractor warrants that it has and shall maintain sufficient materials, equipment and labor to perform Subcontractor's obligations under the Warranty.

(e) Neither final payment nor the partial use or occupancy of a residence by Centex Homes or a Subsequent Owner shall be construed as an acknowledgement by Centex Homes that the Work has been completed in accordance with the terms of the Contract Documents or relieve Subcontractor of liability or responsibility for defective materials or workmanship or any breach of the Contract Documents.

(f) The Warranty is independent from all other obligations of Subcontractor under this Agreement and shall not affect or otherwise limit the indemnity or other obligations of Subcontractor under this Agreement. The Warranty shall survive termination of this Agreement.

13. **TERMINATION OF AGREEMENT BY CENTEX HOMES.** If conditions arise which in the opinion of Centex Homes make it inadvisable for Subcontractor to continue the Work, Centex Homes may

terminate this Agreement by forty-eight (48) hours prior written notice to Subcontractor. Upon receipt of such notice, unless directed otherwise, Subcontractor will immediately discontinue prosecution of the Work and the placing of orders for materials, equipment, machinery and supplies in connection therewith and will, if requested, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Centex Homes. Then, unless otherwise instructed by Centex Homes, Subcontractor will do only such Work as may be necessary to preserve and protect that portion of the Work which has been incorporated into the Project and to protect materials, supplies and equipment at or about the Site or in transit thereto. On the date set for termination, the obligations of the parties to continue performance under this Agreement will cease and Subcontractor will be entitled to receive: (a) compensation for the portion of the Work already performed with the Contract Price being prorated accordingly; (b) payment for materials for which it has made firm contracts, provided that materials are delivered to Centex Homes; and (c) payment for any other bona fide obligations assumed by Subcontractor prior to receipt of notice of termination which obligations cannot with all reasonable effort be canceled, provided any benefits accruing from such obligations are assigned to Centex Homes. Payment to Subcontractor will be made in accordance with Section 3, with final payment being made only after expiration of the period allowed by Law for the filing of any claims to enforce mechanic's liens arising out of the Work. Notwithstanding any other provision to the contrary, termination of this Agreement will not (i) prejudice any claim of either party arising prior to termination, (ii) relieve either party from any liability arising prior to termination, (iii) affect Subcontractor's guarantee of the portion of the Work performed, or (iv) relieve Subcontractor of its duty to correct any defective Work performed or to indemnify, defend and hold Centex Homes harmless in those instances required by this Agreement.

**14. ASSIGNMENT; SUCCESSORS AND ASSIGNS.** Subcontractor shall not assign or subcontract this Agreement or any portion thereof or of any money due or which may become due hereunder without the prior written consent of Centex Homes. In addition to constituting a default under this Agreement, any assignment or attempted assignment made in violation of this Section 14 will be null and void and the assignee will acquire no rights thereunder. If Centex Homes consents to an assignment of or subcontract under this Agreement, the assignee or subcontractor will be bound to the terms of this Agreement, including, without limitation, the Required Insurance. If an assignment or subcontract is made in breach of this Agreement, Subcontractor will be liable to Centex Homes for all damages resulting therefrom. Notwithstanding anything to the contrary contained herein, Centex Homes may assign this Agreement without the consent of Subcontractor. Subject to the foregoing provisions of this Section 14 relating to assignment, this Agreement will be binding upon and inure to the benefit of the parties and their heirs, successors and permitted assigns.

**15. DEFAULT.** In addition to any other remedies available under Law or in equity: (a) if Subcontractor fails or refuses, except in cases where extension of time is provided, to supply enough properly skilled workmen or proper materials for the Work; or (b) if Subcontractor fails to make payment to subcontractors or suppliers for material or labor; or (c) if Subcontractor fails to keep and comply with any of the terms and provisions of this Agreement or the Contract Documents; or (d) if Subcontractor is adjudged bankrupt or files or suffers to be filed a petition for relief under the Bankruptcy Act, or makes a general assignment for the benefit of creditors; or (e) if a receiver is appointed on account of Subcontractor's insolvency; then, in any such event, Centex Homes may, without prejudice to any other right or remedy and after giving Subcontractor and its surety, if any, three (3) days' written notice, terminate its obligation to Subcontractor under this Agreement and take possession of the Site and all materials, tools and equipment thereon to the extent practicable and complete (or cause to be completed) the Work by whatever method Centex Homes may deem expedient. In such event, Subcontractor will not be entitled to receive any further payment until the Work is finally completed and inspected and accepted by Centex Homes and approved by all applicable governmental agencies. Upon completion of the Work, Centex Homes will pay to Subcontractor an amount equal to (x) the unpaid portion of the Contract Price attributable to the Work performed up to the termination less (y) the amount by which (i) the costs incurred by Centex Homes to complete the Work, including, without limitation, costs for architectural, managerial and administrative services and reasonable attorneys' fees (if legal counsel is employed) exceed (ii) the portion of the Contract Price attributable to the balance of the Work yet to be performed at the time of termination. If the amount calculated under part (y) in the preceding sentence exceeds the amount owing under part (x), Subcontractor will pay the difference to Centex Homes. If the amount in part (x) exceeds the amount in part (y), Centex Homes will pay the difference to Subcontractor; however, Centex Homes will have the right at its option to withhold such amount from Subcontractor until the expiration of one year from the date of the termination of this Agreement. Notwithstanding any provision to the contrary contained herein, the failure of Contractor to obtain and maintain the commercial general liability insurance required under Section 8(a) shall not constitute a default or breach under this Agreement provided (i) Contractor has exercised good faith, reasonable diligence and commercially reasonable efforts to obtain such coverage, (ii) such continued coverage is not available or is available only at a cost which is so high as to render the maintenance of such coverage economically and commercially infeasible in the common view of contractors and subcontractors in Southern California of the same size and quality of Contractor, and (iii) if Contractor at any time determines that it is unable to maintain and continue such coverage for the foregoing reasons, Contractor has given Owner written notice of such determination explaining in detail the basis for such determination promptly (but in no event more than five [5] business days) after such determination.

**16. CLEAN UP.** Subcontractor will at all times keep the Site safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove from the Site or place as directed by Centex Homes all rubbish and waste produced by its operations or the Work as well as all of its tools, equipment, machinery and surplus materials no longer needed and leave the Site in a clean ("broom clean" or equivalent condition if the Work is in or around a residence) and safe for Subcontractor's employees and subsequent contractors to perform their work unless otherwise specified in writing. If Subcontractor fails to clean up, Centex Homes may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

17. **AUTHORIZED PERSONS.** The president, any vice president, division president, division vice president, division manager, division land development manager, division purchasing manager, division purchasing and estimating manager of Centex Real Estate Corporation, the managing general partner of Centex Homes, have the authority under this Agreement to: (i) execute change orders; (ii) allow Subcontractor additional time for performance of the Work; (iii) amend, modify, supplement or terminate this Agreement; and (iv) do any other act which waives any right or privilege of Centex Homes under this Agreement or the Contract Documents. Any of the foregoing acts not properly authorized will not be binding upon Centex Homes.

18. **ENTIRE AGREEMENT.** This Agreement, together with the Contract Documents which are incorporated herein by reference, constitute the entire Agreement between the parties. Neither this Agreement nor the Contract Documents may be amended or supplemented except by written instrument duly executed by both parties hereto. No estimates or bids of Subcontractor preceding this Agreement and no verbal Agreement or conversation with any representative of Centex Homes, either before or after execution of this Agreement, will affect or modify any of the terms or provisions contained in this Agreement or the Contract Documents.

19. **WAIVER.** No consent or waiver, express or implied, by either party to this Agreement relating to any breach or default by the other in the performance of any obligation hereunder will be deemed or construed to be a consent to or waiver of any other breach or default by such party. Failure on the part of either party to complain of any act or failure to act of the other party or to declare the other party in default irrespective of how long such failure continues will not constitute a waiver of the rights of such party.

20. **NOTICE.** Unless otherwise provided herein, any notice provided for herein will be in writing and deemed delivered to the other party when delivered to the address shown for such party in the first paragraph of this Agreement, or to such other address as may be designated by either party by written notice in accordance with this Agreement, (a) in person, (b) by facsimile transmission (with the original and a copy of the facsimile confirmation following in the United States mail), (c) by overnight delivery service, or (d) by certified mail, return receipt requested. If such notice is given in person or via facsimile transmission, such notice will be deemed to have been given when delivered or transmitted. If such notice is given by overnight delivery service, such notice is deemed received the day after delivery to the overnight delivery service. If such notice is given by certified mail, such notice will be deemed received three days after a certified letter containing such notice, properly addressed with postage prepaid, is deposited in the United States mail.

21. **TIME.** Time is of the essence of this Agreement and each provision herein contained.

22. **WORDS AND MEANINGS; SECTION HEADINGS.** Words used herein will include the plural as well as the singular. Words used in the masculine gender include the feminine and neuter. The section headings used herein are for convenience only and will have no effect upon the construction or interpretation of any part of this document.

23. **BONDS.** Centex Homes will have the right to require Subcontractor to provide a performance bond or completion bond as a condition precedent to payment.

24. **TAXES.** Subcontractor will bear sole and exclusive responsibility for the payment of all taxes imposed by local, state or federal law applicable to the Work, materials supplied by Subcontractor, payments received by Subcontractor and payments made by Subcontractor. Subcontractor will be solely responsible for the payment of all local, state and federal income taxes, withholding requirements, self-employment taxes, social security taxes and other taxes on the payments made to Subcontractor and payments made by Subcontractor to its employees and suppliers.

25. **DRUGS AND ALCOHOL.** No illegal drugs or alcohol will be permitted on the Site. Subcontractor's employees, agents, subcontractors or suppliers in possession of illegal drugs or alcohol on the Site will be subject to immediate termination. Individuals on the Site whose performance, coordination or ability to Work is impaired, in the opinion of Centex Homes' representatives, will be subject to immediate removal from the Site.

26. **LIENS.** Subcontractor will at all times keep the Site and each part thereof free from any attachment, lien, claim of lien or other encumbrance arising out of the Work and Subcontractor will indemnify, defend and hold Centex Homes harmless from and against all Claims arising by reason of any such lien, claim of lien, attachment or encumbrance. If any claim is filed to enforce any laborers, materialmen, mechanics, or other similar lien arising out of or relating to the Work, Subcontractor will immediately cause such lien to be released and discharged and if Subcontractor fails to do so, then Centex Homes will have the right to pay all sums, including attorney fees and any other costs and expenses incurred, necessary to obtain such release and discharge and will hold Subcontractor liable for the amount thereof, with the right to deduct all or a portion of such sum from amounts that may be due Subcontractor.

27. **DISPUTE RESOLUTION.** Centex Homes and Subcontractor shall resolve any dispute between them arising out of this Contract and/or the performance of the Work in accordance with the following process:

(a) All claims, disputes and other matters in question between the parties to this Contract arising out of or relating to this Contract, the Work or the improvements constructed based upon the Work, shall be decided by the process described in Section 28 and subject to the terms and conditions of the Joint Defense Agreement Multi-Party Construction Defect attached hereto as Schedule JDA to be entered into by Owner and Contractor concurrently with the execution and delivery of this Agreement. Any such

proceeding may include, by consolidation, joinder or any other manner, any additional person not a party to this Contract who is claimed to be liable for or who asserts any Claims arising out of the Work and who has agreed to be so bound.

(b) In the event a Claim is made against Centex Homes by any person or entity arising out of or relating to the Work or the improvements constructed pursuant to the Work which is subject to an alternative dispute resolution process ("ADR") other than the process set forth in Section 27(a) or is not subject to any ADR process at all, any Claim by Centex Homes against Subcontractor arising out of such Claim shall be submitted to the same ADR, and Centex Homes and Subcontractor shall be bound by the resolution under such ADR to the same extent that all other parties are bound.

**28. NEUTRAL, BINDING ARBITRATION.** From and after the date this Agreement is entered into, any action, claim or dispute by, between or among Subcontractor and Centex Homes, including its partners and its and their officers, agents, employees, affiliated parent and subsidiary companies and each of them, or any contractor, subcontractor, design professional, engineer or supplier who provided labor, services or materials to the Project and/or any purchaser of an interest in the Project, including, without limitation, a purchaser of a home and who is bound or has agreed to be bound to the following dispute notification and resolution procedure (a "Purchaser") (collectively, the "Parties"), relating to or arising out of the Project, the Declaration of Covenants, Conditions and Restrictions or other governing documents for the homeowners association governing the Project (if any), this Agreement or any other agreements between any of the Parties, the sale of a residence or unit constructed in the Project, the use or condition of any improvement constructed in the Project (including, without limitation, a residence or unit) or the design or construction of or any condition on or affecting the Project, including, without limitation, construction defects, surveys, soils conditions, grading, specifications, installation of improvements or disputes which allege breach of implied or express warranties as to the condition of any improvement constructed in the Project (including, without limitation, a residence or unit) or the Project where the amount in controversy is greater than \$5,000 (collectively, "Dispute(s)"), shall be subject to the provisions set forth below.

(a) **Disputes Governed By Right To Repair Act.** Resolution of a Dispute governed by the Right to Repair Act shall only be subject to binding arbitration under this Section 28 after the nonadversarial procedure under the Right to Repair Act is completed and such nonadversarial procedure fails to resolve the Dispute.

(b) **Notice.** Any person with a Dispute shall give written notice of the Dispute to the party to whom the dispute is directed describing the nature of the Dispute and any proposed remedy by (1) personal delivery (by hand delivery or professional messenger service), (2) registered or certified mail, with postage prepaid, return receipt requested, or (3) Express Mail of the U.S. Postal Service or Federal Express or any other courier service guaranteeing overnight delivery, charges prepaid.

(c) **AAA Rules.** The arbitration will be conducted by the American Arbitration Association (the "AAA") in accordance with the rules contained in the *Construction Industry Dispute Resolution Procedures* and the rules contained in the *Supplementary Procedures for Consumer-Related Disputes* (collectively, the "Rules") to the extent the *Supplementary Procedures* apply to the Dispute. If the Rules have changed or been renamed by the time a Dispute arises, the successor rules identified by the AAA will apply. Despite the choice of the Rules (or any successor rules identified by the AAA) to govern the arbitration of any Dispute between the parties, if the AAA later identifies different rules that would specifically apply to the Dispute, those rules will apply instead of the Rules.

(d) **Conflict Between Rules And Right To Repair Act.** If there is a conflict or discrepancy between the Rules and the terms and conditions of the Right to Repair Act, the provisions of the Right to Repair Act shall control to the extent of the conflict or discrepancy.

(e) **Participation By Other Parties.** The parties to the Dispute shall cooperate in good faith to ensure that all necessary and appropriate parties are included in the arbitration.

(f) **Small Claims.** If the entire Dispute between the parties does not exceed Five Thousand Dollars (\$5,000.00) (or such other amount established by law for purposes of small claims), any party may elect to have the Dispute resolved in Small Claims Court in accordance with the Small Claims Act (California Code of Civil Procedure Section 116.110 *et seq.*).

(g) **Federal Arbitration Act.** This Agreement evidences a transaction involving interstate commerce. The Federal Arbitration Act (9 U.S.C. Sections 1 - 16) now in effect and as it may be amended will govern the interpretation and enforcement of this provision to the exclusion of any different or inconsistent state or local law, ordinance, regulation or judicial rule.

(h) **Arbitrator.** The arbitrator shall be a neutral, impartial individual who is either a retired judge or an attorney licensed to practice law in California and having at least fifteen (15) years of

experience with substantial experience in the type of matter in dispute and with a strong emphasis on the laws governing real estate matters, especially those dealing with residential real estate development and construction. The arbitrator shall not have any relationship to the parties to the Dispute or any interest in the subject property or the Project in which the subject property is located. The arbitrator shall be selected from a panel in accordance with the Rules, but in no event more than sixty (60) days after written submission to arbitrate.

(i) **Commencement and Timing of Arbitration.** The arbitrator shall promptly commence the arbitration at the earliest convenient date in light of all of the facts and circumstances and shall conduct the arbitration without undue delay.

(j) **Place.** The arbitration shall be conducted in the county in which the subject property is located unless the parties agree in writing to another location.

(k) **Record.** To preserve the rights of Centex Homes and a Purchaser to limited appeal under Section 28(o), the oral evidence received by the arbitrator shall be preserved in a manner that can be converted into a written transcript, and the arbitrator shall preserve all tangible evidence.

(l) **Remedies.** The arbitrator shall have the power to grant all legal and equitable remedies and award damages in the arbitration to the full extent permitted by law.

(m) **Award.** The arbitrator's decision shall be based upon applicable law. The arbitrator shall issue a written award whether or not the Rules require and shall include findings of fact and conclusions of law to the extent required by law. If requested by a party, the arbitrator shall provide a written explanation of the award. The award shall be binding.

(n) **Judgment on the Award.** After expiration of the time to serve a notice of limited appeal has expired under Section 28(o)(2), judgment on the award made by the arbitrator may be entered in any court having jurisdiction over the dispute.

(o) **Limited Appeal.**

(1) **Limited Appeal.** The award of the arbitrator shall be subject to limited appeal in accordance with the procedures set forth in this Section 28(o). Although the Rules provide that there will be no appeal or other review of the arbitrator's award, this Section 28(o) completely replaces such portion of the Rules and provides instead a right for either Centex Homes or a Purchaser to have a panel of three (3) arbitrators conduct a limited appeal of the arbitrator's award. Subcontractor acknowledges and agrees that (i) only Centex Homes and/or a Purchaser have the right to a limited appeal under this Section 28, (ii) Subcontractor has no right to a limited appeal of the award of the arbitrator and no right to participate in such appellate process other than as set forth in Section 28(o)(5), (iii) Subcontractor shall be bound by the determination of the appellate panel under this Section 28(o).

(2) **Notice.** To appeal, Centex Homes or a Purchaser must file with the AAA and serve on all other parties a notice stating the general nature of the change it seeks in the award. The notice must be filed no later than thirty (30) days after the date of the award. If Centex Homes or a Purchaser appeals, the other party (*i.e.*, Centex Homes or a Purchaser) for whom or against whom the arbitrator awarded money or other relief may appeal by filing and serving on all other parties a notice stating the general nature of the change it seeks in the award. Such notice must be filed no later than sixty (60) days after the date of the award.

(3) **Appellate Panel.** The panel of appeal arbitrators shall satisfy the standards set forth in Section 28(h) and be appointed by the AAA under the portion of the rules governing the appointment of arbitrators.

(4) **Issues on Limited Appeal.** The only issues that can be considered in a limited appeal are: (1) the award of money was excessive; (2) the award of money was insufficient; (3) the arbitrator awarded nonmonetary relief that was inappropriate; (4) a party who received monetary or nonmonetary relief should have received other or additional monetary or nonmonetary relief; or (5) the award of the arbitrator is not based upon applicable law. The appeal arbitrators may affirm the arbitrator's award or may make any alternative award they find to be just and equitable, but shall not reject any of the arbitrator's decisions (1) that a particular party is entitled to relief of some nature or amount or (2) that a particular party is responsible to provide relief of some nature or amount.

(5) **Evidence; Decision on Appeal.** The appeal arbitrators shall make their decision based upon the evidence received by the arbitrator and applicable law, except that they may also



visit any site (including the subject property) involved in the Dispute. The appeal arbitrators may receive written briefs from all parties (including Subcontractor) involved in the Dispute and may hear arguments but shall not receive new evidence other than any site visit. The appeal arbitrators shall issue a written decision deciding the issues raised by Centex Homes and/or a Purchaser. A majority of the appeal arbitrators is sufficient to decide an issue. The decision shall be final and binding, and judgment may be entered in any court having jurisdiction over the dispute.

(6) **Fees and Costs on Appeal.** The appeal arbitrators shall award costs in accordance with Section 28(p).

(p) **Fees And Costs.** Except as otherwise agreed by the Parties or as required by applicable law, the fees and costs of the arbitration shall be borne by all parties to the arbitration pro rata to the number of parties in the proceeding. The fees and costs of the arbitration shall be borne ultimately as determined by the arbitrator as set forth in the arbitrator's award. The expenses of witnesses shall be paid by the party producing such witnesses.

(q) **Attorneys' Fees.** Each party to the arbitration and any limited appeal shall bear its own attorneys' fees and costs (including expert costs) in connection with such proceeding or appeal. Notwithstanding the foregoing or any provision to the contrary contained in this Agreement, nothing herein is intended or shall be construed to modify or abrogate Subcontractor's obligations under Section 9, including, without limitation, the obligation to defend (including payment of attorneys' fees and costs) and indemnify Centex Homes.

(r) **Restriction Upon Award Of Costs And Fees.** Notwithstanding any provision to the contrary contained in this Agreement, under no circumstances shall a Purchaser be required to pay Centex Homes' share of fees and costs (including, without limitation, fees and costs of the arbitrator, provider organization, attorney or witnesses) if Purchaser does not prevail in the arbitration or limited appeal.

(s) **Survival.** The provisions of this Section 28 shall survive the termination of this Agreement and/or the default of either Centex Homes or Subcontractor.

29. **OTHER AGREEMENTS.** Should there now or hereafter exist one or more other agreements between the parties or with any affiliated corporation or company of either concerning this or any other construction project, then a breach by Subcontractor under the terms of any such agreement, at the option of Centex Homes, will be considered a breach of this Agreement and all such other agreements. In such event, Centex Homes or its affiliates may declare a default under any or all agreements so breached in accordance with their terms and may withhold money due or to become due under any such agreement and apply the same toward payment of any damages suffered.

30. **INDEPENDENT CONTRACTOR.** Subcontractor will be an independent contractor with respect to the Work, and neither Subcontractor nor anyone employed by Subcontractor will be deemed for any purpose to be the agent, employee, servant or representative of Centex Homes in the performance of the Work. Subcontractor acknowledges and agrees that Centex Homes will have no direction or control over the means, methods, procedures or manner of the Work performed by Subcontractor or any of its subcontractors, or any of their employees, vendors or suppliers.

31. **SEVERABILITY.** If any paragraph, section, sentence, clause or phrase contained in this Agreement shall become illegal, null or void, against public policy or otherwise unenforceable for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void, against public policy, or otherwise unenforceable, the remaining paragraphs, sections, sentences, clauses or phrases contained in this Agreement shall not be affected thereby.

32. **LABOR PEACE.** Subcontractor shall be responsible for labor peace on the Site and shall at all times use its efforts and judgment as an experienced subcontractor to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes or strikes where reasonably possible and practical under the circumstances and shall at all times maintain project-wide labor harmony. Except as specifically provided herein, Subcontractor shall be liable to Centex Homes for all damages incurred by Centex Homes as a result of work stoppages, slowdowns, disputes or strikes.

### 33. **EMPLOYEES - UNION AND LABOR MATTERS.**

(a) **Satisfactory to Centex Homes.** All persons employed on the Site by Subcontractor shall be employed under conditions satisfactory to Centex Homes. Subcontractor shall remove, or cause to be removed, from the Site any employee considered by Centex Homes, in its sole discretion, to be unsatisfactory.

(b) **Union Labor Agreements.** In the event that Subcontractor is bound by any collective bargaining agreement applicable to the Site and/or the Work, Subcontractor agrees to the following:

(i) **Compliance.** Subcontractor will comply with the terms and conditions of any such agreements, including, without limitation, hourly rates of pay and payments to trust funds and other





fringe benefits as required by the terms of any such agreements. Subcontractor shall require any sub-subcontractor employed by it to agree in writing to comply with the terms of any such agreements. Subcontractor further agrees that it will bind, by contract, all of its sub-subcontractors to such collective bargaining agreements or agreements for settlement of jurisdictional disputes in the same manner and to the same effect as herein provided with respect to Subcontractor. Any breach by Subcontractor or any sub-subcontractors employed by it of any collective bargaining agreements shall constitute a material breach of this Agreement.

(ii) **Dispute Settlement.** Subcontractor accepts and agrees to be bound by the procedural rules and regulations and decisions of the National Joint Board for the settlement of jurisdictional disputes and will comply with any decisions of the National Joint Board which affect the performance of the Work.

(iii) **Indemnification Regarding Benefit Payments.** Subcontractor shall indemnify, defend (at Subcontractor's sole cost and expense and with legal counsel reasonably approved by Centex Homes), protect and hold harmless the Indemnified Parties from and against any and all Claims for union welfare, pension, unemployment insurance, vacation, apprenticeship, owner-operated, health and welfare, and related type payment obligations connected with the Project and/or the Work which arise from or relate to employment by Subcontractor or any sub-subcontractors employed by Subcontractor. If Subcontractor or any sub-subcontractors employed by Subcontractor are listed by the administrative office of the appropriate health and welfare pension, vacation, or apprenticeship fund as being delinquent in payment, Centex Homes may assume that the listing is correct and Subcontractor has breached this Agreement. In such event, Centex Homes may exercise any and all of the rights and remedies available under this Agreement. Centex Homes may pay any amounts which it believes are due directly to such funds and, at its sole option, (i) withhold and keep the amounts so paid from the payments to Subcontractor due hereunder or (ii) demand immediate reimbursement by Subcontractor.

(c) **Work Entrances.** In the event of labor unrest, Centex Homes may implement a gate system. In such event, Subcontractor may be assigned a gate on the Project that is reserved for the sole and exclusive use of certain designated subcontractors, their employees and suppliers. In the event such a system is established, Subcontractor shall strictly comply with all aspects and procedures related to such system. All costs associated with labor unrest, work stoppages, or any other costs associated with Subcontractor's failure to strictly comply with such system or procedures or the invalidation of such system due to such failure to comply shall be the sole cost and responsibility of Subcontractor, and Subcontractor agrees to indemnify, defend protect and hold harmless the Indemnified Parties from and against such costs and expenses.

#### 34. **BACK CHARGES.**

(a) **Definitions.** For purposes of this Agreement, the term "**Back Charges**" shall mean the amounts due from Subcontractor to Centex Homes as a result of Subcontractor's failure to fulfill its obligations under this Agreement and/or the Contract Documents, and a "**Back Charge Notice**" is a writing submitted by Centex Homes to Subcontractor to notify Subcontractor that Back Charges are being charged to the account of Subcontractor.

(b) **Withholding Payments.** In addition to the reasons set forth in Section 3, Centex Homes may withhold any and all payments due Subcontractor pursuant to this Agreement as a result of:

(i) Third party Claims filed or reasonable evidence indicating the probable filing of such Claims;

(ii) Failure of Subcontractor to make prompt payment to its sub-subcontractors, or for labor, materials, supplies or equipment, or to any other persons entitled to file a mechanic's lien claim or stop notice;

(iii) Any injury to another subcontractor performing work on the Site or damage to such subcontractor's work which injury or damage is allegedly caused by Subcontractor;

(iv) Reasonable evidence that the Work cannot be completed in accordance with the time schedule in the Contract Documents;

(v) Any dispute or controversy between Subcontractor and Centex Homes under this Agreement or any dispute or controversy between Subcontractor and Centex Homes or any affiliated entity with respect to any other agreement;

(vi) Any dispute or controversy between Subcontractor and any other subcontractor or sub-subcontractor on the Site;

(vii) Any failure or purported failure of Subcontractor to make any required payment to any union (if applicable), other agency benefit plan, or to any local, state, or federal governmental agency;

(viii) Reasonable evidence that Subcontractor has sold, assigned or conveyed its business during the performance of Work without prior written approval from Centex Homes;

(ix) Reasonable evidence of Subcontractor's financial indebtedness which in Centex Homes' opinion may affect the Work; or

(x) Any other matter as to which this Agreement specifically authorizes the withholding by Centex Homes of such payment.

Whenever the grounds giving rise to such withholding have been removed, Centex Homes shall pay to Subcontractor the amount withheld because of such grounds less any expenses incurred by Centex Homes or damages sustained by Centex Homes as a result of the withholding, the cause of the withholding or the removal of the cause of the withholding. Any payment made by Centex Homes directly to any laborer, subcontractor or materialman shall be deemed payment to Subcontractor and credited against the Contract Price.

(c) **Notice of Intent to Back Charge.** In the event any of the conditions set forth in Section 3 or Sections 34(b)(i) - (x), inclusive, exist and Centex Homes intends to Back Charge Subcontractor as set forth in this Section 34, Centex Homes shall first provide Subcontractor with notice of the condition and intent to Back Charge. Subcontractor shall notify Centex Homes within forty-eight (48) hours after notice of the condition and intent to Back Charge of Subcontractor's proposed method of remedying such condition(s) (the "Subcontractor Response").

(d) **Right to Back Charge Subcontractor.** In the event Subcontractor fails to provide Centex Homes with the Subcontractor Response in accordance with the provisions of this Section 34 or if, in the sole opinion of Centex Homes, the Subcontractor Response is unsatisfactory, Centex Homes shall have the right to Back Charge Subcontractor for any and all sums expended by Centex Homes (including, without limitation, Centex Homes' overhead in an amount not to exceed fifteen percent [15%] of direct costs) with respect to any matters set forth in Section 3 or Sections 34(b)(i) - (x), inclusive. Centex Homes shall provide a Back Charge Notice to Subcontractor of any Back Charges charged to the account of Subcontractor.

(e) **Method for Collection of Back Charges.** In the event no payments remain outstanding to Subcontractor under this Agreement, or in the event the total amount of the remaining outstanding payments to Subcontractor under this Agreement is less than the amount of outstanding Back Charges, Subcontractor shall immediately pay to Centex Homes the outstanding Back Charges. In all other events, the following shall apply to the collection of Back Charges:

(i) Centex Homes shall have the right to deduct the amount of all outstanding Back Charges from payments due to Subcontractor pursuant to this Agreement. In such event, prior to any payment by Centex Homes, Subcontractor may be required to submit a revised Progress Payment Release or Final Payment Release as required pursuant to Section 3 indicating the amount owed to Subcontractor after deduction of the Back Charge.

(ii) Subcontractor may notify Centex Homes within five (5) days after receipt of a Back Charge Notice that Subcontractor will issue a check or money order to Centex Homes in payment of the Back Charge. Upon payment of such check by the bank upon which it is drawn, and upon satisfaction of all payment procedures under Section 3, payments which have been withheld as a result of such Back Charge shall be paid.

**35. LICENSE. CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CALIFORNIA CONTRACTOR'S STATE LICENSE BOARD. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR, CONTRACTOR'S STATE LICENSE BOARD, 835 GOETHE ROAD, SACRAMENTO, CALIFORNIA; MAILING ADDRESS IS P.O. BOX 26000, SACRAMENTO, CALIFORNIA 95826.**

**36. LIST OF SCHEDULES.** Attached hereto and made a part hereof are the following schedules (check all that apply):

\_\_\_\_\_ Schedule A – General Notes

\_\_\_\_\_ Schedule B – The Work

\_\_\_\_\_ Schedule C – Price Schedule

N/A Schedule D - Payment Schedule (Information listed in Schedule C Price Schedule)

\_\_\_\_\_ Schedule LW - Limited Warranty

\_\_\_\_\_ Schedule JDA - Joint Defense Agreement

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

"CENTEX HOMES"

CENTEX HOMES, a Nevada general partnership

By: CENTEX REAL ESTATE CORPORATION,  
a Nevada corporation, managing general partner

Title:

**GREG MARCON  
PURCHASING**

By:

Name:

*[Signature]* 8/17/04

"SUBCONTRACTOR"

a

Title:

*[Signature]* President

By:

Name:

*Robert R. Thomas*

SCHEDULE LW

COPY OF LIMITED WARRANTY PROVIDED BY CENTEX HOMES TO ORIGINAL  
PURCHASERS PURSUANT TO SECTION 12 OF THE PURCHASE AGREEMENT  
AND ESCROW INSTRUCTIONS

12. LIMITED WARRANTY. TO THE FULLEST EXTENT PERMITTED BY LAW:

12.1 LIMITED WARRANTY INCLUDING FIT & FINISH. SELLER WARRANTS THE RESIDENCE FOR A PERIOD OF ONE (1) YEAR FROM THE CLOSE OF ESCROW (THE "WARRANTY PERIOD") AGAINST DEFECTS IN THE ORIGINAL MATERIALS AND WORKMANSHIP INCLUDING DEFICIENCIES IN THE FIT AND FINISH OF THE COMPONENTS (COLLECTIVELY, THE "LIMITED WARRANTY"). THIS LIMITED WARRANTY IS INTENDED TO SATISFY THE REQUIREMENT OF "THE RIGHT TO REPAIR ACT" (AS DEFINED IN SECTION 14) THAT A BUILDER PROVIDE A ONE (1) YEAR EXPRESS WRITTEN LIMITED WARRANTY COVERING THE FIT AND FINISH OF CABINETS, MIRRORS, FLOORING, INTERIOR AND EXTERIOR WALLS, COUNTERTOPS, PAINT FINISHES AND TRIM (COLLECTIVELY, THE "COMPONENTS") (SEE CALIFORNIA CIVIL CODE SECTION 900). THIS LIMITED WARRANTY DOES NOT AND SHALL NOT BE DEEMED TO CONSTITUTE AN "ENHANCED PROTECTION AGREEMENT" UNDER THE RIGHT TO REPAIR ACT. FOR PURPOSES OF THIS LIMITED WARRANTY, "FIT AND FINISH" SHALL MEAN THE NON-STRUCTURAL, COSMETIC APPEARANCE OR ALIGNMENT OF THE COMPONENTS, AND "DEFICIENCIES" SHALL MEAN THE FIT AND FINISH OF A COMPONENT FAILS TO MEET THE STANDARDS OF QUALITY AS MEASURED BY ACCEPTABLE TRADE PRACTICES OR APPLICABLE INDUSTRY STANDARDS.

12.2 NOTICE OF CLAIM; REMEDY. THE LIMITED WARRANTY SHALL APPLY TO ANY COVERED DEFECT OR DEFICIENCY PROVIDED SELLER RECEIVES WRITTEN NOTICE FROM BUYER AS SOON AS REASONABLY POSSIBLE AFTER BUYER'S DISCOVERY OF SUCH DEFECT OR DEFICIENCY AND PRIOR TO EXPIRATION OF THE WARRANTY PERIOD (A "WARRANTY CLAIM"). UPON RECEIPT OF WRITTEN NOTICE OF A WARRANTY CLAIM, SELLER SHALL, IN SELLER'S SOLE DISCRETION AS TO MEANS, METHODS AND MATERIALS AND AT NO COST OR EXPENSE TO BUYER, EITHER (I) PERFORM OR CAUSE TO BE PERFORMED WITHIN A REASONABLE PERIOD OF TIME (SUBJECT TO MATTERS SUCH AS WORK SCHEDULES, WEATHER CONDITIONS, AVAILABILITY OF LABOR AND MATERIALS, AND SIMILAR MATTERS) SUCH WORK AS IS REASONABLE AND NECESSARY TO RESPOND TO THE WARRANTY CLAIM, OR (II) PAY BUYER THE REASONABLE COST OF REPAIRING OR REPLACING THE DEFECTIVE CONDITION OR ITEM IDENTIFIED IN THE WARRANTY CLAIM. BUYER SHALL PROVIDE SELLER AND SELLER'S EMPLOYEES, CONSULTANTS, CONTRACTORS AND SUBCONTRACTORS (COLLECTIVELY, "SELLER'S PARTIES") WITH REASONABLE OPPORTUNITY AND ACCESS TO THE RESIDENCE DURING NORMAL BUSINESS HOURS TO TAKE SUCH ACTION AS SELLER DEEMS APPROPRIATE TO RESPOND TO THE WARRANTY CLAIM. NOTWITHSTANDING THE FOREGOING, DEFECTS OF AN EMERGENCY NATURE MAY BE REPORTED BY CALLING THE APPLICABLE EMERGENCY NUMBERS PROVIDED BY SELLER TO BUYER.

12.3 EXPRESS LIMITED WARRANTY. THE LIMITED WARRANTY IS AN EXPRESS LIMITED WARRANTY AND IS THE SOLE AND EXCLUSIVE WARRANTY, EXPRESSED, IMPLIED OR STATUTORY, WRITTEN OR ORAL, PROVIDED BY SELLER TO BUYER AND IS THE SOLE AND EXCLUSIVE OBLIGATION AND LIABILITY OF SELLER IN CONNECTION THEREWITH. THE LIMITED WARRANTY GIVES BUYER SPECIFIC LEGAL RIGHTS AND BUYER MAY HAVE OTHER LEGAL RIGHTS UNDER THE LAWS OF CALIFORNIA. SELLER EXPRESSLY DISCLAIMS, AND THE LIMITED WARRANTY SUPERCEDES AND IS IN LIEU OF, ALL OTHER WARRANTIES, EXPRESSED, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR USE OR A PARTICULAR PURPOSE. THE LIMITED WARRANTY MAY NOT BE MODIFIED, REVISED, EXTENDED OR SUPPLEMENTED EXCEPT IN WRITING SIGNED BY BUYER AND AN AUTHORIZED OFFICER OF SELLER.

12.4 LIABILITY. SELLER SHALL NOT BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL OR SECONDARY DAMAGES, DIMINUTION IN VALUE OR DAMAGES FOR BODILY OR PERSONAL INJURY ARISING OUT OF ANY DELAY IN PERFORMING SELLER'S OBLIGATIONS UNDER THE LIMITED WARRANTY AS A RESULT OF BUYER'S FAILURE TO NOTIFY SELLER OF A DEFECT OR CAUSES BEYOND THE REASONABLE CONTROL OF SELLER. ANY ACTION TAKEN BY SELLER OR SELLER'S PARTIES SHALL NOT (I) CREATE OR CONSTITUTE A NEW WARRANTY, (II) EXTEND THE WARRANTY PERIOD, OR (III) EXTEND ANY STATUTE OF LIMITATIONS OR REPOSE FOR BRINGING A CLAIM OR ACTION AGAINST SELLER.

**12.5 EXCLUSIONS.** THE FOLLOWING ITEMS ARE EXCLUDED FROM THE COVERAGE OF THE LIMITED WARRANTY:

1. ANY CLAIMS FOR DEFECTS, DEFICIENCIES, LOSS OR DAMAGE GOVERNED BY CALIFORNIA CIVIL CODE SECTIONS 895 THROUGH 897, INCLUSIVE, AND SECTIONS 910 THROUGH 938, INCLUSIVE.
2. DEFICIENCIES OR DEFECTS IN APPLIANCES, EQUIPMENT AND OTHER ITEMS THAT ARE CONSUMER PRODUCTS OR GOODS UNDER THE MAGNUSON-MOSS WARRANTY ACT (U.S.C. SECTIONS 2301-2312 OR ANY SUCCESSOR STATUTE THERETO) AND MANUFACTURED ITEMS COVERED BY SEPARATE MANUFACTURERS' WARRANTIES, AND DAMAGE OR LOSS ARISING OUT OF THE FAILURE TO COMPLY WITH MANUFACTURERS' WARRANTIES.
3. DAMAGE OR LOSS ARISING OUT OF ANY ACT OR OMISSION (INCLUDING, WITHOUT LIMITATION, FAILURE TO MAINTAIN IN A PROPER OR TIMELY MANNER OR TAKE CORRECTIVE OR MITIGATING ACTION) OF BUYER OR ANY THIRD PARTY OTHER THAN SELLER OR SELLER'S PARTIES.
4. DAMAGE OR LOSS ARISING OUT OF ORDINARY WEAR AND TEAR OR UNREASONABLE OR ABUSIVE USE.
5. DEFICIENCIES OR DEFECTS IN ITEMS OR MATERIALS INSTALLED BY BUYER OR ANY THIRD PARTY OTHER THAN SELLER OR SELLER'S PARTIES AND ANY DAMAGE OR LOSS RESULTING THEREFROM.
6. DAMAGE OR LOSS ARISING OUT OF ANY MODIFICATIONS, ALTERATIONS OR ADDITIONS TO THE RESIDENCE BY BUYER OR ANY THIRD PARTY OTHER THAN SELLER OR SELLER'S PARTIES.
7. DAMAGE OR LOSS ARISING OUT OF ACTS, ELEMENTS OR NATURAL OCCURRENCES (INCLUDING, WITHOUT LIMITATION, "ACTS OF GOD") BEYOND THE REASONABLE CONTROL OF SELLER.
8. ANY DAMAGES OR REMEDIES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR SECONDARY DAMAGES; DIMINUTION IN VALUE; OR DAMAGES FOR BODILY OR PERSONAL INJURY [INCLUDING, WITHOUT LIMITATION, PHYSICAL OR MENTAL PAIN AND SUFFERING AND EMOTIONAL DISTRESS]) OTHER THAN THE OBLIGATIONS SET FORTH IN SECTION 12.2.
9. DAMAGE OR LOSS THAT ARISES OUT OF ANY PERIL, OCCURRENCE OR EVENT FOR WHICH COMPENSATION IS PROVIDED UNDER FEDERAL, STATE OR LOCAL LAW OR BY PUBLIC OR CHARITABLE FUNDS.

**12.6 DISPUTE RESOLUTION.** ANY DISPUTE BETWEEN BUYER AND SELLER ARISING UNDER THIS LIMITED WARRANTY WILL BE RESOLVED IN ACCORDANCE WITH THE SAME PROCEDURES FOR DISPUTE NOTIFICATION AND RESOLUTION AS SET FORTH IN SECTION 13.3. ANY CLAIMS THAT ARE NOT COVERED BY THIS LIMITED WARRANTY AND GOVERNED BY THE RIGHT TO REPAIR ACT SHALL BE RESOLVED IN ACCORDANCE WITH THE "NON-ADVERSARIAL" AND "PRELITIGATION" PROCEDURES DESCRIBED IN SECTION 14.4.

**12.7 SURVIVAL.** THE PROVISIONS OF THIS SECTION 12 SHALL SURVIVE THE CLOSE OF ESCROW AND SHALL NOT BE MERGED WITH THE GRANT DEED.



## SCHEDULE JDA

### JOINT DEFENSE AGREEMENT MULTI-PARTY CONSTRUCTION DEFECT

#### I. Parties

This Agreement ("Agreement") is entered into as of the date of that certain Construction Agreement (the "Construction Agreement") by and between CENTEX HOMES, a Nevada general partnership ("Owner"), and HnR Framing Systems, a windows ("Contractor"), to which this Agreement is attached.

Each contractor, subcontractor and/or design professional which executes a contract and/or subcontract containing a copy of this Agreement with respect to the Project (as defined in the Construction Agreement), agrees that by executing such contract they are in privity of contract relative to the terms of this Agreement with any/all other contractors, subcontractors and/or design professionals which execute a subcontract and/or contract relative to the Project to which a copy of this Agreement is attached. Such parties shall collectively be referred to with Owner as the "Parties", and separately as "Subcontractors" and/or "Design Professionals".

#### II. Recitals

The Parties to this Agreement wish to establish the binding procedures for resolving any claim for defense costs by Owner under the indemnity provisions of Section 9 of the Construction Agreement (the "Indemnity Provisions"). This Agreement applies only to the cost of Owner's defense relative to third party claims against Owner for allegations of physical injury to tangible property, loss of use of such property, or defective construction arising out of the performance of work or the rendering or failure to render services with respect to the construction of the Project.

This Agreement relates only to the cost of defense to which Owner is or may be entitled to recover pursuant to the Indemnity Provisions (the "Defense"). It is not intended to address any obligation to pay damages on behalf of Owner under the Indemnity Provisions except as expressly set forth herein. All other rights to such claims and any defenses thereto are expressly reserved.

It is the purpose of this Agreement to ensure the Owner receives funding of an equitable share of its defense for any action hereunder, without first being required to fully litigate the extent to which a duty to indemnify exists pursuant to the Indemnity Provisions. It is the further purpose of this Agreement to allocate the defense obligation of all Subcontractors and/or Design Professionals to those defense costs which arise from the alleged negligence of that Subcontractor and/or Design Professional.

#### III. Terms

The Parties hereto agree that mutuality and adequacy of consideration exist by all Parties in support of the obligations arising under this Agreement. Therefore, the Parties hereto agree as follows:

1. Owner shall attach this Agreement to and refer to this Agreement in any subcontract and/or contract executed by all Subcontractors and/or Design Professionals which provide work and/or services on the Project. In the event that a Subcontractor and/or Design Professional performs work or services on the Project without agreeing to be bound by the terms of this Agreement, such Subcontractor or Design Professional shall have no privity to enforce the provisions of this Agreement.

2. In the event of a formal demand against Owner pursuant to Civil Code Section 1375 et seq., or an action in any court of competent jurisdiction seeking damages as described in the recitals above (the "Actions"), Owner may make a demand for a defense from one or more Subcontractors and/or Design Professionals based upon the Indemnity Provisions. Owner shall attempt to provide by certified mail to last known addresses the demand to the Subcontractor and/or Design Professional contemporaneous to the date Owner provides notice to any insurer of said Subcontractor and/or Design Professional.

Should a Subcontractor and/or Design Professional at any time determine that Owner has failed to make a defense demand under the Indemnity Provisions and the terms of this Agreement upon another Subcontractor and/or Design Professional, and that said Subcontractor and/or Design Professional should be an active participant in Owner's defense under this Agreement, Subcontractor and/or Design Professional may issue a demand in writing to the Parties requesting the involvement of any other Subcontractor and/or Design Professional in the defense.

Any Subcontractor and/or Design Professional which opts out of this Agreement shall be subject to the enforcement of the Indemnity Provisions for purposes of the determination of the extent of its defense and indemnity obligations owed to Owner, if any, and agrees that it and its insurers shall not be entitled to enforce any allocation of the defense pursuant to this Agreement.

Owner shall have the sole right to assert that compliance with its insurance requirements serves as a condition precedent to their participation in this Agreement.

5. All disputes under the terms of this Agreement are to be resolved fully by binding arbitration. All arbitration expenses shall be paid by the Parties in the same proportions as their obligations to pay Owner's defense costs. Owner may be relieved of its obligation to pay a share of such costs, effective the date of notifying all other participating Parties that it elects to pay its maximum 20% as set forth in Paragraph III (9). If any Party fails or refuses to participate in arbitration under the terms of this Agreement, except by the opt out provision pursuant to Section III (4) above, a default award may be entered against that Party by the arbitrator based upon the same criteria set forth herein for determining the percentage obligations of participating Parties. Any such default award by the arbitrator may be filed as a judgment against Subcontractor and/or Design Professional in California Superior Court, and shall be considered costs taxed against the defaulted Party under the Indemnity Provisions.

6. If any Party demands arbitration as a consequence of the meet and confer referred to in Section 2 above, the Parties shall attempt to agree on a mutually acceptable arbitrator. If no agreement can be reached within ten (10) days of the meet and confer, the arbitrator shall be selected using the following method. Each Subcontractor and/or Design Professional shall provide the name of one proposed arbitrator to Owner. If any of those proposed arbitrators are acceptable to Owner, Owner may select one individual as arbitrator. If none of the arbitrators proposed by the Subcontractors and/or Design Professionals is acceptable to Owner, or if more than fifty (50) percent of the Subcontractors and/or Design Professionals object to the arbitrator Owner selects from the proposals submitted by other Subcontractors and/or Design Professionals, then Owner shall petition for appointment of an arbitrator pursuant to California Code of Civil Procedure Section 1281.6.

7. The arbitrator shall appoint an experienced accountant to process defense expenses for purposes of sending billings to the Subcontractors and/or Design Professionals for their respective percentages of the defense, as determined by the arbitrator. The fees of the accountant shall be paid by the Parties in the same proportions as their obligations to pay Owner's defense costs. Owner may be relieved of its obligation to pay a share of such costs, effective the date of notifying all other participating Parties that it elects to pay its maximum 20% as set forth in Paragraph III (9). The accountant shall be independent and not affiliated with any participant under this Agreement or their counsel. The accountant shall send statements at regular intervals every thirty (30) days. If the accountant fails to timely perform its obligations under this Agreement, any Party hereto may request that the arbitrator designate a substitute accountant.

8. There shall be at most three proceedings permitted under this Agreement for determination of the percentage, if any, which each Party owes Owner for the defense. These proceedings shall consist of one initial preliminary allocation; a secondary interim allocation; and a final reallocation.

a. **Preliminary Allocation:** The arbitrator shall make the determination of preliminary percentages within sixty (60) days of appointment. All Parties may be represented by counsel. No expert testimony shall be permitted. Each Subcontractor and/or Design Professional shall be entitled to file a brief not to exceed five (5) pages. Owner shall be entitled to file a brief not to exceed fifteen (15) pages. All briefs shall be filed five (5) calendar days before the hearing date set by the arbitrator. The arbitrator may request argument and/or additional evidence, or at his/her discretion may rule on the briefs. The arbitrator shall in consideration of the arbitration standards set forth in paragraph III (9) rule on the following: whether there is a prima facie showing of the potential for indemnity arising out of the plaintiff's claims; and set interim percentages for the defense obligation owed by the Subcontractors and/or Design Professionals. In the event that a portion of the defense is allocated to Parties which have refused and/or failed to participate under this Agreement, the share of the defense attributable to that Party shall be borne by the participating Parties to this Agreement in the same proportions as their obligations to pay Owner's defense costs, except that Owner's share of the total allocation shall not exceed 20%. To the extent that an allocated share of defense is recovered and/or received from any non-participating Subcontractor/Design Professional, those Parties who have paid their share of the defense allocable to the non-participating Subcontractor/Design Professional, shall be reimbursed in the same proportions which they paid.

b. **Second Allocation:** Any participating Party may make a demand for the reallocation of defense percentages set within the preliminary allocation upon receipt of additional, specific information generated in the Action relative to the claims against Owner therein. Such information may include plaintiff's preliminary cost of repair; plaintiff's preliminary defect list; plaintiff's final cost of



Date: APRIL 5, 2004  
Project: CLIFTON HEIGHTS  
Contract #: CH-28220WJ-00  
Subcontractor: HNR FRAMING SYSTEMS

SCHEDULE "A"  
GENERAL NOTES

THIS SCHEDULE IS HEREBY MADE A PART OF THE CONTRACT DATED April 12, 2004 REFERENCE THEREIN. The Contractor shall supply all materials, equipment, tools, supplies and labor for the full and complete performance of all windows in connection with the construction of Clifton Heights, in the City of Carlsbad County of SAN DIEGO, State of CALIFORNIA.

All of the material, equipment and supplies to be furnished, and all of the labor to be performed by the Contractor shall be in accordance with the plans and specifications (heretofore fully examined and as listed below) and shall be completely satisfactory to the Builder, and the institution making the permanent loan mortgage, and all other Governmental Agencies or Authorities having jurisdiction over the work and the project. This is to be a complete performance of the job any items omitted, normally a part of the contract for the trade under this contract shall be considered to be part of this contract.

Without limitations to any of the foregoing, or any of the other conditions or agreements herein contained, it is understood that this contract shall include the following work, labor and materials.

All work must be completed in a manner which is acceptable to Builder, Carlsbad, City Building and Zoning Department, VA/FHA, and other governmental agencies having jurisdiction over this work and this project, and shall include, but not necessarily be limited to, the following:

1. Plans, Specifications and Schedule Interpretations. The Builder's authorized representative shall decide all questions which may arise as to the quality or acceptability of materials used and work performed, the manner of performance and rate of progress of the work, the interpretations of the plans and specifications, and the acceptability and fulfillment of the contract on the part of the contractor. The Builder's decision shall be final and he shall have the authority to enforce such decisions. It shall be the Contractor's responsibility to review all plans and specifications, to learn the general policies of the Builder, the scheduled pace of work and general methods of procedure. The Contractor shall plan his material and equipment deliveries and the volume of his manpower in order to coordinate all of this work with the Builder's policies, methods and schedule. Structural plans when included as part of the plans and specifications shall supersede architectural details. When applicable codes and FHA minimum property standards are more severe than the plans and specifications they shall govern.
2. Supervision and Quality Control. The Contractor or his agent must remain on the jobsite, during normal working hours, for the period his forces are involved in their work. The Contractor is responsible to schedule his own inspections of his work in cooperation with the Builder's Representative. Should the Contractor fail to staff the job with the personnel and equipment necessary to perform his work on schedule or provide a method of quality control for his work, the Builder reserves the right to exercise the following options:
  - a) Termination of Contract with a FIFTEEN (15) day notice.
  - b) Backcharging the Contractor for the full amount for any additional employees Centex Homes must hire to establish a quality control system for your operation. Centex Homes reserves the right to request transfer of any Contractor employee without cause 24 hours after written notification to the Contractor.
3. Contractor's Equipment. All of the Contractor's equipment and/or rented equipment used to complete the work defined in this contract shall be maintained in a good state of repair. Expenses incurred by the Builder due to breakdowns of the Contractor's equipment causing excessive delay on the construction and or damage to improvements schedule shall be backcharged to the Contractor. All equipment used shall conform to the requirements of paragraph 8-C of this section.
4. Clean-Up. The Contractor shall maintain a clean job at all times. Equipment and materials used for future work for this project shall be stockpiled in a neat manner at an onsite location designated by the Builder's representative. It is agreed that if the Contractor fails to abide by the Schedule B requirements for his trade, the Builder reserves the right to remove any such accumulated debris and to backcharge the Contractor.
5. Damage. The Contractor shall be responsible for repair and notification to the Builder of any damage caused by him in the performance of his work, including but not limited to, damage to utilities, buildings, walks, driveways and curbs.
6. Guarantee and Service Work. All work performed by this Contractor shall be unconditionally guaranteed for a period of one (1) year from the date following customer acceptance of each unit, or eighteen (18) months from date of installation, whichever occurs first. The Contractor shall make good at his own expense all defects which may appear during said period, together with any



- b) Contractor agrees as follows:
- i) Contractor will fully comply with the Regulations and will cooperate with Builder and all subcontractors of Builder in order to assure compliance with Regulations.
  - ii) Contractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the jobsite.
  - iii) Contractor will indemnify, defend and hold Builder harmless of and from all claims, damages, liabilities and causes and actions which arise from the failure of Contractor to comply with the Regulations.
  - iv) Contractor will assist Builder in complying with the Regulations.
  - v) Contractor will not use any chemicals in its performance of the work for Builder or incorporate any chemicals into materials or products applied to Builder or to the property unless Contractor has given Builder prior written notice of the existence and the possible exposure to such chemicals, has delivered an MSDS to Builder had has received a written consent of Builder to use such chemicals.
- c) A citation of non-compliance of OSHA Regulations shall be issued to any individual failing to wear a hard-hat on any Centex jobsite. An amount of \$25.00 for each occurrence will be deducted from payment due Contractor.

18. SHOP DRAWINGS AND SAMPLES

Contractor shall, when requested by the Builder:

Submit one (1) reproducible transparency and four (4) prints of each shop drawing, including fabrication, erection, layout and setting drawings and such other drawings as required by the Builder, and; Submit six (6) copies of manufacturers' descriptive data, including catalog sheets for materials, equipment and fixtures, showing dimensions performance characteristics and capacities, wiring diagrams and controls, schedules and other pertinent information required. When printed materials describe more than one product or model, clearly identify which is to be furnished, and; Submit six (6) samples of sufficient size to indicate general visual effect showing range of color, texture, finish, graining or other similar property illustrating the full scope of this range.

19. CRITERIA FOR SUBSTITUTIONS

After the contract has been executed, the Builder will consider a formal request for the substitution of products in place of those specified, under the following conditions:

The request is accompanied by complete data on the proposed substitution substantiating compliance with the contract documents including product identification and description, performance and test data, references and samples where applicable, and an itemized comparison of the proposed substitution with the products specified or named by addenda, with data relating to contract time schedule, design and artistic effect where applicable, and its relationship to separate contracts. The request is accompanied by accurate cost data on the proposed substitution in comparison with the product specified, whether or not modification of the contract sum is to be a consideration.

Requests for substitution of specified materials or products, when forwarded by the Contractor to the Builder, are understood to mean that the Contractor:


Represents that he has personally investigated the proposed substitute product and determined that it is equal or superior in all respects to that specified;

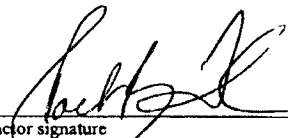
- Will provide the same guarantee for the substitution for that specified; Certified that the cost data presented are completed and include all related costs under the contract, but exclude costs under separate contracts and the architect's redesign costs, and that he waives all claim for additional costs related to the substitution which subsequently became apparent; and
- Will coordinate the installation of the accepted substitute, at no cost to the Builder, making such changes as may be required for the work to be complete.
- Substitutions will not be considered if:  
They are indicated or implied on shop drawing submissions without the formal request provided for herein; or
- For their implementation they require a substantial revisions of the contract documents in order to accommodate their use.
- Contractor shall not substitute material or deviate from the plans and specifications without the Builder's written authorization.

PROPOSITION 65

CENTEX HOMES - SAN DIEGO DIVISION

Contractor shall comply with California Proposition, the Safe Drinking Water and Toxic Enforcement Act. Builder shall provide Contractor with written instructions detailing the jobsite requirement for enforcement of the Act. Those instructions, when received by Contractor, shall become an enforceable part of the contract.

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Contractor signature \_\_\_\_\_ date \_\_\_\_\_

CENTEX HOMES - SAN LEANITO DIVISION

DATE: APRIL 5, 2004  
 PROJECT: CLIFTON HEIGHTS  
 CONTRACT #: CH-28220W1-00  
 CONTRACTOR: HNR FRAMING SYSTEMS, INC.

**SCHEDULE "B"**  
**SCOPE OF WORK**  
**WINDOWS**

Standard Requirements:

1. The Contractor shall comply with the latest requirements of: All Federal Agencies (i.e. HUD, VA, OSHA/CAL OSHA); State of California; County of San Diego; City of Carlsbad; California State Senate Bill 198 (Illness and Injury Prevention Program); Title 24 (California Energy Conservation Law); and any and all other agencies having jurisdiction thereof.
2. The window work shall include but not necessarily be limited in the specific conditions, as per the Models and as per all plans/drawings most current date issue as prepared by:
 

Architectural Drawings:	Bassenian/Lagoni Architects
Structural Engineering Drawings:	Performance Plus Engineering Inc.
Civil Engineering Drawings:	Rick Engineering
Soils Engineering Reports:	Leighton & Associates
California Title 24 Report:	California Living & Energy
Post Tension Slab Design:	Davidson Reinforcing Inc.
3. Drinking of alcoholic beverages or use of any controlled substance on the job site is prohibited. Trade Contractor agrees that after drywall texture there shall be no eating, drinking or smoking inside the units throughout the completion of the units. Empty containers and excessive debris will be kept clear of the job site. Animals of any species will not be allowed on the job site. No loud music/radios, etc. will be tolerated. Contractor shall comply with all applicable noise abatement ordinances.
4. Contractor is aware that this work is being completed on a public through street and will maintain such access as required.
5. Contractor is to be familiar with and abide by the neighborhood Storm Water Pollution Protection Plan (SWPPP) located at the field construction office. If contractor removes any erosion control or storm water control materials, contractor is responsible to replace and/or repair the control measures daily or after completing their work. Additional materials to be supplied by Builder. Any damage to the erosion and storm water control measures shall be immediately reported to the field manager. Contractor is responsible for SWPPP requirements as it relates to their scope of work. Contractor is also responsible for SWPPP fines and fees due to their negligence. Builder is responsible for all SWPPP requirements related to silt transferred off the lot during normal business operations. Contractor shall clean equipment to minimize silt transfer and immediately notify field manager if silt is removed off the lot. Builder to coordinate cleaning location.
6. Trade contractor will be subject to a repair charge if any of their employees damage the job site erosion control devices such as sand bags, erosion netting, etc.
7. Contractor agrees to maintain a clean, safe job during its work. Scrap material generated by this scope of work shall be piled outside the house where designated by Builder's Field Manager on a daily basis.
8. No extensive repair work (such as coring or jack-hammering) shall be done to any foundation without prior written authorization.
9. Contractor shall not contact Builder's architect, structural engineer, civil engineer, soils engineer, Title 24 consultant or any other consultants unless prior approval is received from Builder. Contractor shall direct to the Builder requests for information and all other correspondence intended for Builder's consultants.
10. ~~Contractor shall submit for Builder's approval a complete material schedule for each house showing model number, quantity, species, size and finish, and unit price.~~
11. Contractor agrees that all windows shall be as per models for this project unless otherwise approved by Builder. Builder shall receive a credit in production for any changes made in or from the models that reduces Contractor's cost.
12. Options as outlined on Addendum C - Price Schedule.

CENTEX HOMES - SAN DIEGO DIVISION

13. At the end of each option cut-off period, the Centex Design Center (CDC) will forward an "Ordered Options by Subcontractor" report to this Contractor. This report identifies all option work orders per lot for an applicable phase. The Contractor shall review, sign and return a copy of this report to the CDC within 48 hours of receipt.
14. Option costs shall remain firm for a period of one year from the execution date of this contract.
15. Contractor shall meet production schedule as established by Builder's Field Manager. Typical production work to be scheduled 2 weeks prior to installation/construction. Special circumstances may require a shorter lead-time. Contractor shall do all unloading and spreading to units.
16. Contractor agrees to abide by Builder's model home production schedule of six working days per week. There shall be no extra cost to the Builder to meet this schedule.
17. Both parties in writing prior to the work being done shall agree upon any changes, modifications, or deviations from scope and contract. No additional charges or back charges outside of contract will be accepted without written confirmation from Centex Homes Senior Field Manager. Any charges above the amount of \$250 will require the Senior Field manager's confirmation AND a purchase order number (obtainable through senior field manager).
18. Included in the Contract price is a normal and reasonable amount to cover repairs that are required to provide a complete and operable window system.
19. The amount of this Contract represents a 100% complete job per plans, scope and supporting documentation - No extras.
20. Contractor agrees that all work must be to code and pass inspection or it will be removed and replaced at no cost to Builder. Any re-inspection fees or other costs associated with Contractor's deficiencies or delays shall be borne solely by this Contractor.

Trade Contractor Specifications:

21. All manufactured windows shall comply with the standards as set forth in Table 2-53V of the Energy code. No energy information found on the plans shall be changed nor altered without approval from the State Department of Housing. Contractor shall carefully study and compare all drawings, data, dimensions, specifications and conditions before proceeding with any work and shall immediately report any error or inconsistency discovered to Builder. Should a conflict arise between drawings, government agencies, energy requirements, etc., the most stringent criteria shall take precedence.
22. Contractor is responsible for verifying code compliance concerning egress.
23. Contractor shall verify all framing rough-ins for proper installation and shall immediately notify Builder should openings not accommodate a proper finished installation.
24. Contractor agrees to a two-trip installation:
  - a) Windows frames and panels and sliding glass door frames and panels.
  - b) Screens and adjustments.
25. Contractor shall be responsible for normal and reasonable paint touch-up of windows inside and out as caused during the course of construction and shall complete said touch-up prior to homebuyer pre-occupancy orientation. Contractor shall supply to Builder touch-up paint for frames for use after homeowner move-in.
26. All windows shall be dual glazed. In any window/door location subject to human impact, glazing immediately adjacent to such windows/ doors shall comply with U.B.C. Standard No. 54-1 and 54-2.
27. All windows shall be flashed with 9" Fortifiber Moistop. Windows shall receive a continuous bead of polyurethane sealant under window flange AND over top of window flange (back-caulked), including all nail holes. Any incidental holes in Moistop shall be sealed with caulking.
28. Any and all shortages at the time of installation shall be communicated immediately (within 24 hours) in writing to the Builder's Field Manager.
29. Patio Doors are to include any jamb extensions necessary due to 2 x 6 walls or shear panel.
30. No staples permitted for window installation. Windows to be nailed off or screwed with 8 d galvanized nails. Windows shall be shimmed and nailed as per manufacturer's specifications. Windows shall be set true and plumb and at a minimum of 1/4" up off of the windowsill and centered in the rough opening.

CENTEX HOMES - SAN ANTONIO DIVISION

31. Contractor shall be responsible for any breakage of glass during its installation and shall re-install it at no charge to Builder.
32. Contractor shall install all windows and sliding glass doors per the home construction schedule as established by Builder's Field Manager.
33. Contractor shall submit a Title 24, Form CF-6R to Builder Field Manager prior to Final Inspection.
34. Contractor shall cleanup all window wrappings (i.e. cardboard, plastic, etc.) the same day of window installation.

Neighborhood Specifications:

35. Contractor shall furnish and install finished white vinyl windows and patio doors. Windows shall be dual glazed per plans and shall meet or exceed Title 24 and inspection requirements.
36. Windows shall be manufactured by Jeld Wen



CENTEX HOMES - SAN DIEGO DIVISION

Date: APRIL 5, 2004  
Project: CLIFTON HEIGHTS  
Contract #: CH-28220W1-00  
Subcontractor: HNR FRAMING SYSTEMS

SCHEDULE "C"  
UNIT PRICE CONTRACT

INVOICING & TIME OF PAYMENT:

Contractor may invoice only after completion of work. Work completion must be certified by builder's on-site supervision. Invoices received by the 5<sup>th</sup> of the month will be paid on or about the 31<sup>st</sup> of the same month; invoices received by the 23<sup>rd</sup> of the month will be paid on or about the 15<sup>th</sup> of the following month. Builder reserves the right to hold a ten percent (10%) retention final payment to guarantee work. Retention may be invoiced after completion of work and paid within 45 days per above payment schedule and will be paid if Builder, at his sole discretion, deems the work complete. Contractor understands that the retention is to ensure completion of the entire scope of work and that retention from one house may be used by Builder to complete any other house within the scope of work. Prices shall be firm for all units started by N/A for completion and shall include all taxes and freight. No payment shall be made until Contractor has furnished evidence of insurance and appropriate waivers of lien and lien releases. Insurance shall name Centex Real Estate Corporation as additionally insured. Final payment shall not be made until a final release of lien is received. The Contractor shall provide to the Builder the name, address and phone number (business and emergency) of agents capable of acting on behalf of the Contractor. The list must be maintained currently and shall also include supplier and subcontractor agent information.

All requisitions for payment will be accompanied by the Contractor's affidavit declaring all subcontractors, suppliers, material men and laborers with which the Contractor will be working.

The Contractor's second requisition and all subsequent requisitions shall include:

- a) Affidavit listing all subcontractors, suppliers, material men and laborers and amounts included in the requisition for each individual firm or person.
- b) Centex Homes' Waiver and Release of Lien form for all amounts requisitioned.
- c) An Unconditional Waiver and Release of Lien from each of the subcontractors, suppliers and material men for the amounts drawn in the prior billing period requisition may be required at Builder's option.

Prior to the final retention payment, the Contractor will provide concurrently therewith the following:

- a) An affidavit that declares that all subcontractors, suppliers, material men and laborers employed by the subcontractor have been paid in full.
- b) A final and full Centex Homes Release of Lien form in the full amount of the Contract executed by the Contractor.
- c) Final and full Releases of Lien from all subcontractors, suppliers and material men executed by them.

TAXES: Taxes are included in a vendor's pricing. Otherwise, taxes must be split out on vendor's invoices.

Contractor shall bear sole and exclusive responsibility for the payment of all taxes imposed by local, state or federal law applicable to the Work, materials supplied by the Contractor, payments received by Contractor and payments made by Contractor. Contractor shall be solely responsible for the payment of all local, state and federal income taxes, withholding requirements, self-employment taxes, social security taxes and other taxes on payments made to Contractor and payments made by Contractor its employees and suppliers.

JOINT CHECKS: It shall be the Contractor's responsibility to provide an itemized account of JOINT CHECK AMOUNTS with each invoice. Joint check payments are mandatory when required by preliminary notice or a conditional labor or material release.

BILLINGS IN EXCESS OF CONTRACT: In no case shall the Contractor invoice for contract work where the unit prices or quantities are in excess of the contract amounts. Quantity or price changes will be verified by the Builder's representative and the Contractor will be furnished a Change Order and a revised Builder's Invoice form for this billing. Price and quantities shall be approved by the Builder's Purchasing Department. It is the Contractor's responsibility to obtain approval of: Price changes prior to performing work and quantity changes, so as not to delay his invoicing.

EXTRA WORK: By his signature below, the Contractor agrees that he will perform no extra work and, additionally will not be paid for extra work without first obtaining a PURCHASE ORDER # from authorized Builder representative (Construction Manager or Project Manager.) A field initiated Extra



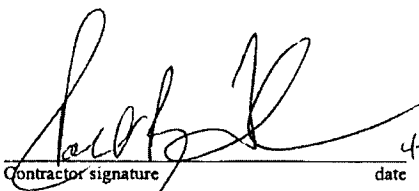
Work Order shall be completed as to cost and signed by the Builder's and Contractor's representative. The Builder shall issue a confirming Purchase Order and remit payment in accordance with the contract. Unit prices for extra work, shall be as shown in Schedule "C" of these Schedules, when the cost of extra work is based on hourly work, the daily time tickets, approved by the Builder's field representative shall be submitted with the Contractor's Invoice. In all cases, all additional Extra Work Orders must conform to this Contract.

FIELD MEASUREMENTS: IN ALL CASES WHERE PAYMENT IS BASED ON AN EXTENSION OF UNIT PRICES MULTIPLIED BY A QUANTITY., A field measurement shall be performed The field measurement shall be performed by a representative of both the Builder and the Contractor. At the completion of the measurement, the Builder's representative shall retain a copy of the notes, which will be attached to the Contractor's invoice when approved by him for payment. IN NO CASE shall a Contractor invoice for work which has not been field measured. In the event of a dispute over the quantities, the Builder's consultant's quantities will be final.

OLD INVOICES: Invoices submitted for payment more than 60 days after the final inspection will be invalidated upon receipt. Invoices which are improper regarding the code, job number, tract number, unit prices, LACK OF PURCHASE ORDER NUMBER and/or EXTRA WORK ORDER NUMBER for extra work, quantities, retention or any of the requirements of this section, shall be RETURNED TO THE CONTRACTOR UNPAID.

ASSIGNMENT: Anything herein to the contrary notwithstanding, The Builder may assign this agreement and all rights and interests under it and delegate all duties and obligations under it without the consent of any other party to this agreement so long as such assignment and delegation is made to a corporation which is wholly owned by either Centex Real Estate Corporation or Centex Corporation.

The balance of this page left intentionally blank.

  
Contractor signature

4-27-04  
date

# EXHIBIT B



## SCHEDULE JDA

### **JOINT DEFENSE AGREEMENT MULTI-PARTY CONSTRUCTION DEFECT**

#### **I. Parties**

This Agreement ("Agreement") is entered into as of the date of that certain Construction Agreement (the "Construction Agreement") by and between CENTEX HOMES, a Nevada general partnership ("Owner"), and HnR Framing Systems, a windows ("Contractor"), to which this Agreement is attached.

Each contractor, subcontractor and/or design professional which executes a contract and/or subcontract containing a copy of this Agreement with respect to the Project (as defined in the Construction Agreement), agrees that by executing such contract they are in privity of contract relative to the terms of this Agreement with any/all other contractors, subcontractors and/or design professionals which execute a subcontract and/or contract relative to the Project to which a copy of this Agreement is attached. Such parties shall collectively be referred to with Owner as the "Parties", and separately as "Subcontractors" and/or "Design Professionals".

#### **II. Recitals**

The Parties to this Agreement wish to establish the binding procedures for resolving any claim for defense costs by Owner under the indemnity provisions of Section 9 of the Construction Agreement (the "Indemnity Provisions"). This Agreement applies only to the cost of Owner's defense relative to third party claims against Owner for allegations of physical injury to tangible property, loss of use of such property, or defective construction arising out of the performance of work or the rendering or failure to render services with respect to the construction of the Project.

This Agreement relates only to the cost of defense to which Owner is or may be entitled to recover pursuant to the Indemnity Provisions (the "Defense"). It is not intended to address any obligation to pay damages on behalf of Owner under the Indemnity Provisions except as expressly set forth herein. All other rights to such claims and any defenses thereto are expressly reserved.

It is the purpose of this Agreement to ensure the Owner receives funding of an equitable share of its defense for any action hereunder, without first being required to fully litigate the extent to which a duty to indemnify exists pursuant to the Indemnity Provisions. It is the further purpose of this Agreement to allocate the defense obligation of all Subcontractors and/or Design Professionals to those defense costs which arise from the alleged negligence of that Subcontractor and/or Design Professional.

#### **III. Terms**

The Parties hereto agree that mutuality and adequacy of consideration exist by all Parties in support of the obligations arising under this Agreement. Therefore, the Parties hereto agree as follows:

1. Owner shall attach this Agreement to and refer to this Agreement in any subcontract and/or contract executed by all Subcontractors and/or Design Professionals which provide work and/or services on the Project. In the event that a Subcontractor and/or Design Professional performs work or services on the Project without agreeing to be bound by the terms of this Agreement, such Subcontractor or Design Professional shall have no privity to enforce the provisions of this Agreement.

2. In the event of a formal demand against Owner pursuant to Civil Code Section 1375 et seq., or an action in any court of competent jurisdiction seeking damages as described in the recitals above (the "Actions"), Owner may make a demand for a defense from one or more Subcontractors and/or Design Professionals based upon the Indemnity Provisions. Owner shall attempt to provide by certified mail to last known addresses the demand to the Subcontractor and/or Design Professional contemporaneous to the date Owner provides notice to any insurer of said Subcontractor and/or Design Professional.

Should a Subcontractor and/or Design Professional at any time determine that Owner has failed to make a defense demand under the Indemnity Provisions and the terms of this Agreement upon another Subcontractor and/or Design Professional, and that said Subcontractor and/or Design Professional should be an active participant in Owner's defense under this Agreement, Subcontractor and/or Design Professional may issue a demand in writing to the Parties requesting the involvement of any other Subcontractor and/or Design Professional in the defense.



Any Subcontractor and/or Design Professional which opts out of this Agreement shall be subject to the enforcement of the Indemnity Provisions for purposes of the determination of the extent of its defense and indemnity obligations owed to Owner, if any, and agrees that it and its insurers shall not be entitled to enforce any allocation of the defense pursuant to this Agreement.

Owner shall have the sole right to assert that compliance with its insurance requirements serves as a condition precedent to their participation in this Agreement.

5. All disputes under the terms of this Agreement are to be resolved fully by binding arbitration. All arbitration expenses shall be paid by the Parties in the same proportions as their obligations to pay Owner's defense costs. Owner may be relieved of its obligation to pay a share of such costs, effective the date of notifying all other participating Parties that it elects to pay its maximum 20% as set forth in Paragraph III (9). If any Party fails or refuses to participate in arbitration under the terms of this Agreement, except by the opt out provision pursuant to Section III (4) above, a default award may be entered against that Party by the arbitrator based upon the same criteria set forth herein for determining the percentage obligations of participating Parties. Any such default award by the arbitrator may be filed as a judgment against Subcontractor and/or Design Professional in California Superior Court, and shall be considered costs taxed against the defaulted Party under the Indemnity Provisions.

6. If any Party demands arbitration as a consequence of the meet and confer referred to in Section 2 above, the Parties shall attempt to agree on a mutually acceptable arbitrator. If no agreement can be reached within ten (10) days of the meet and confer, the arbitrator shall be selected using the following method. Each Subcontractor and/or Design Professional shall provide the name of one proposed arbitrator to Owner. If any of those proposed arbitrators are acceptable to Owner, Owner may select one individual as arbitrator. If none of the arbitrators proposed by the Subcontractors and/or Design Professionals is acceptable to Owner, or if more than fifty (50) percent of the Subcontractors and/or Design Professionals object to the arbitrator Owner selects from the proposals submitted by other Subcontractors and/or Design Professionals, then Owner shall petition for appointment of an arbitrator pursuant to California Code of Civil Procedure Section 1281.6.

7. The arbitrator shall appoint an experienced accountant to process defense expenses for purposes of sending billings to the Subcontractors and/or Design Professionals for their respective percentages of the defense, as determined by the arbitrator. The fees of the accountant shall be paid by the Parties in the same proportions as their obligations to pay Owner's defense costs. Owner may be relieved of its obligation to pay a share of such costs, effective the date of notifying all other participating Parties that it elects to pay its maximum 20% as set forth in Paragraph III (9). The accountant shall be independent and not affiliated with any participant under this Agreement or their counsel. The accountant shall send statements at regular intervals every thirty (30) days. If the accountant fails to timely perform its obligations under this Agreement, any Party hereto may request that the arbitrator designate a substitute accountant.

8. There shall be at most three proceedings permitted under this Agreement for determination of the percentage, if any, which each Party owes Owner for the defense. These proceedings shall consist of one initial preliminary allocation; a secondary interim allocation; and a final reallocation.

a. **Preliminary Allocation:** The arbitrator shall make the determination of preliminary percentages within sixty (60) days of appointment. All Parties may be represented by counsel. No expert testimony shall be permitted. Each Subcontractor and/or Design Professional shall be entitled to file a brief not to exceed five (5) pages. Owner shall be entitled to file a brief not to exceed fifteen (15) pages. All briefs shall be filed five (5) calendar days before the hearing date set by the arbitrator. The arbitrator may request argument and/or additional evidence, or at his/her discretion may rule on the briefs. The arbitrator shall in consideration of the arbitration standards set forth in paragraph III (9) rule on the following: whether there is a prima facie showing of the potential for indemnity arising out of the plaintiff's claims; and set interim percentages for the defense obligation owed by the Subcontractors and/or Design Professionals. In the event that a portion of the defense is allocated to Parties which have refused and/or failed to participate under this Agreement, the share of the defense attributable to that Party shall be borne by the participating Parties to this Agreement in the same proportions as their obligations to pay Owner's defense costs, except that Owner's share of the total allocation shall not exceed 20%. To the extent that an allocated share of defense is recovered and/or received from any non-participating Subcontractor/Design Professional, those Parties who have paid their share of the defense allocable to the non-participating Subcontractor/Design Professional, shall be reimbursed in the same proportions which they paid.

b. **Second Allocation:** Any participating Party may make a demand for the reallocation of defense percentages set within the preliminary allocation upon receipt of additional, specific information generated in the Action relative to the claims against Owner therein. Such information may include plaintiff's preliminary cost of repair; plaintiff's preliminary defect list; plaintiff's final cost of



repair; plaintiff's final defect list; and/or any other information which upon application to the arbitrator, establishes by a preponderance of evidence that a modification to the preliminary allocation is justified. The same procedural rules applicable to the preliminary allocation govern with respect to the secondary allocation. Should such a modification be made by the arbitrator, the effective date of reallocation will commence on the first of the month following the decision by the arbitrator.

c. **Final Reallocation:** Any participant with a zero balance owing in payment of the defense obligation may demand within thirty (30) days following the settlement of the Action or final judgment a reallocation. The arbitrator may allow any testimony or evidence he/she believes may be relevant, and may set briefing at his/her discretion. The arbitrator may not order reallocation of amounts not yet paid, but may order that some or all of the sums previously paid by any Subcontractor and/or Design Professional be repaid in whole or in part by those participating Subcontractors and/or Design Professionals to this Agreement.

d. **Settlement Reallocation:** Should the claims in the action which give rise to a demand under the Indemnity Provisions be resolved such that the Owner agrees the Subcontractor and/or Design Professional is no longer obligated to participate in the defense, Owner and/or that Subcontractor and/or Design Professional shall notify the arbitrator. The arbitrator shall reallocate the Subcontractor's percentages of the remaining participating Parties to this Agreement accordingly, and shall notify the accountant to adjust the billing statements to reflect that adjustment. The adjustment shall take place the first of the month following the ruling of the arbitrator. Should the Owner challenge a Subcontractor and/or Design Professional's request to be relieved from participating in the defense, the Subcontractor and/or Design Professional shall continue to participate, subject to relief at the discretion of the arbitrator in the final reallocation.

9. **Arbitration standards:** The arbitrator shall determine the percentages of Owner's defense which is attributable to each Subcontractor and/or Design Professional, based upon the percentage that each such Party's alleged negligence contributed to the damages alleged against Owner in the Action. Owner's percentage share of the defense shall not exceed twenty (20) percent at any time. In the event information is available which is relevant to the value of defects upon which the claims in the Action are based and to the determination of which Party is allegedly responsible for such defects, the arbitrator shall determine the percentages by reference to that information. In the event such information is not available, the arbitrator shall have authority to set the percentages under this Agreement using equitable standards, including but not limited to pro-rata allocation.

10. This Agreement and the Indemnity Provisions constitute the entire Agreement between the Parties relating to the determination of the existence and extent of any obligation to provide a defense for Owner as set forth herein. Nothing contained in this Agreement shall be deemed to be an admission by any Party of any wrongdoing or liability whatsoever. Nothing contained in this Agreement affects the existence or percentage of the indemnity obligation, if any, owed by any Party hereto, except to the extent set forth in Section III (4) above.

IN WITNESS WHEREOF, Owner and Contractor have executed this Agreement as of the date of the Construction Agreement.

OWNER:

CONTRACTOR:

CENTEX HOMES, a Nevada general partnership

HnR Framing Systems

By: Centex Real Estate Corporation, a Nevada corporation, its managing general partner

Title:

Signature:

Name:

Date:

GREG MARCON  
PURCHASING

8/18/04

Title:

Signature:

Name:

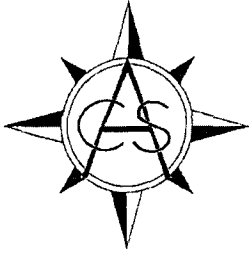
Date:

President  
Robert R. Thomas  
4-27-04

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*[Handwritten signature]*

# EXHIBIT C



American Claims Services, Inc.  
P.O. Box 19450  
Houston, Texas 77224-9450  
Phone: 281-504-0317  
Fax: 281-597-1488

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27 May 2009

Mr. John K Schlichting  
Attorney at Law  
Richard R Sooy & Associates  
255 Broadway, Suite 1500  
San Diego, CA 92101

Case Style:	Burrow vs. Centex Homes
Insured:	HNR Framing, Inc.
Additional Insured:	Centex Homes
Policy:	A4/ 504/ 117 (23 January 2004 to 23 July 2005)
Claim No.:	H-13175 AI

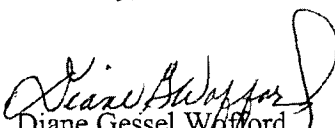
Dear Mr. Schlichting:

American Claims Service Inc. is the authorized representative of Certain Underwriters at Lloyds, London (hereinafter "Underwriters") who provided general liability coverage to the captioned Named Insured.

This follows my letter dated 11 March 2009 concerning the AI legal expenses. As the Self Insured Retention was satisfied on or about 16 March 2009, kindly forward all additional insured billings from 16 March 2009 forward.

If you have any questions, please call.

Sincerely,

  
Diane Gessel Wolford  
Team Leader, AI Unit  
P.O. Box 19450  
Houston, TX 77224-9450  
281-504-0317

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

In re:	:	Case No. 09-12074 (KJC)
	:	
<b>BUILDING MATERIALS HOLDING</b>	:	Chapter 11
<b>CORPORATION, <i>et al.</i>,</b>	:	
	:	
Debtors.	:	
	:	

**CERTIFICATE OF SERVICE OF MOTION OF CENTEX HOMES FOR RELIEF  
FROM AUTOMATIC STAY UNDER SECTION 362 OF THE BANKRUPTCY CODE**

The undersigned certifies that on this date, he caused true and correct copies of the Motion of Centex Homes for Relief from Automatic Stay to be served on the following counsel by first class mail, U.S. postage prepaid, addressed as follows:

Donald J. Bowman, Jr.  
Young, Conaway, Stargatt & Taylor LLP  
The Brandywine Building  
1000 West Street  
17<sup>th</sup> Floor  
Wilmington, DE 19801  
(Attorneys for Debtors)

Bradford J. Sandler  
Benesch Friedlander Coplan & Aronoff  
222 Delaware Avenue  
Suite 801  
Wilmington, DE 19899  
(Attorneys for Official Committee of  
Unsecured Creditors)

United States Trustee  
844 King Street, Room 2207  
Lockbox #35  
Wilmington, DE 19899

Dated: December 18, 2009

/s/ Barry Klayman  
Barry M. Klayman (DE #3676)  
Cozen O'Connor  
1201 N. Market Street, Suite 1400  
Wilmington, DE 19801  
Telephone: (302) 295-2035  
Fax: (215) 701-2209  
E-Mail: [bklayman@cozen.com](mailto:bklayman@cozen.com)  
Attorneys for Movant, Centex Homes