



petition litigation against Debtor H.N.R. Framing Systems, Inc. (“*HNR*”) in order to recover against applicable insurance.

2. The Court granted Weis Builders’ request for similar relief based on its counsel’s express agreement to “ameliorate the effect of self-insured retention or deductible.” *See* January 27, 2010 Transcript of Motions Hearing Before the Honorable Kevin J. Carey (“*1/27 Tr.*”) 72:9-14, attached hereto as Exhibit A. Further, the Court noted: “And I will tell you had the movant not offered that, I would not have granted this relief.” *1/27 Tr.* 73:1-2.

3. In the K. Hovnanian Motion and proposed order, the movant has agreed that it “shall not proceed against HNR’s bankruptcy estate in the event of judgment against HNR (or any other resolution, including, but not limited to, settlement) . . . .” Further, the movant has agreed that “to the extent that HNR’s insurance coverage does not satisfy such liability, K. Hovnanian waives its right to satisfaction of its claim and participation in any distribution of assets of HNR’s estate.” Even so, as the Debtors have expressly advised K. Hovnanian to no avail, these agreements do *not* satisfy the additional condition the Court previously imposed requiring the movant to agree to ameliorate the effect of any self-insured retention or deductible. Accordingly, the Debtors respectfully request the Court to deny the K. Hovnanian Motion unless the movant agrees to ameliorate any prejudice to the Debtors by including in the order the language proposed below in paragraph 16.

### **BACKGROUND**

4. According to the K. Hovnanian Motion, “on or about June 9, 2008, Anthony Trolinger and various homeowners (collectively, the ‘Homeowners’) commenced litigation against K. Hovnanian relating to a certain housing development located in San Diego, California (the ‘Project’) . . . .” K. Hovnanian Motion, ¶ 3. The K. Hovnanian Motion further states that “[o]n or about February 17, 2009, K. Hovnanian filed a Cross-Complaint for equitable

indemnity, express indemnity, breach of express and implied warranties, breach of written contract, negligence, contribution, declaratory relief, and total indemnity (the 'Cross-Complaint') against [Debtor H.N.R. Framing Systems, Inc.], among others, based upon the alleged construction defects caused by HNR during HNR's performance of work and/or services and/or providing of materials which were incorporated into the development, construction and/or sale of the Project." K. Hovnanian Motion, ¶ 4. As K. Hovnanian acknowledges, "[t]he matter is known as Case No. 37-2008-00085314-CU-CD-CTL in the Superior Court of the State of California, County of San Diego (the 'Litigation')." K. Hovnaian Motion, ¶ 3.

5. On June 16, 2009 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "**Chapter 11 Cases**"). On July 7, 2010, The Garden City Group, Inc., the claims and noticing agent in these Chapter 11 Cases, mailed, among other things, the Debtors' Notice of Commencement of Chapter 11 Bankruptcy Cases and Meeting of Creditors (the "**Notice of Commencement**") to K. Hovnanian's counsel of record in the Litigation at the following address that specifically referenced the case number of the Litigation:

WOOD, SMITH, HENNING & BERMAN LLP  
ATTN: TAWNYA L. SOUTHERN  
5000 BIRCH ST., SUITE 8500  
RE: CASE#37-2008-00085314-CU-CD-CT  
NEWPORT BEACH, CA 92660

6. On July 16, 2009, the Court entered an Order Pursuant to Sections 501, 502 and 1111(a) of the Bankruptcy Code, Bankruptcy Rules 2002 and 3003(c)(3), and Local Rule 2002-1(e) Establishing Bar Dates for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof [Docket No. 248] (the "**Bar Date Order**") establishing August 31, 2009 as the bar date (the "**Bar Date**") in these Chapter 11 Cases. On July 23, 2009, the claims and noticing agent mailed to K. Hovnanian's counsel in the Litigation, at the same address listed above *that*,

*again, specifically referenced the case number of the Litigation*, the Notice of Entry of Bar Date Order Establishing Deadlines for Filing Proofs of Claim Against the Debtors (Including Claims Pursuant to Bankruptcy Code § 503(b)(9)) (the “**Bar Date Notice**”) along with a Proof of Claim Form. The Debtors also published the Notice of Commencement and the Bar Date Notice in nine different publications. *See* Docket Nos. 146, 147, 148, 149, 153, 167, 250, 312, 366, 367, 368, 411, 498, 499, 500, 501 and 524.

7. K. Hovnanian, through counsel, was repeatedly notified, in advance of the Bar Date, of these Chapter 11 Cases and the approaching Bar Date. Even so, K. Hovnanian has never filed a proof of claim in these Chapter 11 Cases.

8. On December 17, 2009, the Court entered an Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications) [Docket No. 1182] (the “**Confirmation Order**”) confirming the Debtors’ joint plan of reorganization (the “**Plan**”). On January 4, 2010 (the “**Effective Date**”), the Debtors’ Plan became effective. On January 6, 2010, the claims and noticing agent mailed to K. Hovnanian’s counsel of record, at the same address listed above, a Notice of (A) Effective Date of Order Confirming the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications) and (B) Deadlines for Filing Certain Claims.

9. Paragraph 17 of the Confirmation Order provides, in relevant part:

[T]he Confirmation of the Plan shall, as of the Effective Date: (i) discharge the Debtors, the Reorganized Debtors or any of its or their Assets from all Claims, demands, liabilities, other debts and Interests that arose on or before the Effective Date, including all debts of the kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code . . . and (ii) preclude all Persons from asserting against the Debtors, the Reorganized Debtors, or any of its or their Assets, any other or further Claim or Interests based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date, all

pursuant to sections 524 and 1141 of the Bankruptcy Code.

10. Paragraph 19 of the Confirmation Order provides, in relevant part:

The injunctions contained in the Plan, including, but not limited to, those provided in Article XI of the Plan, are hereby authorized, approved, and binding on all Persons and entities described therein. Except as otherwise provided in the Plan or this Confirmation Order, all entities that held, currently hold, or may hold Claims or other debts or liabilities against the Debtors, or an Interest or other right of an Equity Security Holder in any or all of the Debtors, that are discharged pursuant to the terms of the Plan, are permanently enjoined, on and after the Effective Date, from taking any of the following actions on account of any such Claims, debts, liabilities or Interests or rights: (i) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim, debt, liability, Interest or right . . . .

11. On April 8, 2010, K. Hovnanian filed with the Court the Motion of K. Hovnanian at Bridgeport, Inc. for Relief From Automatic Stay, seeking “a modification of the automatic stay imposed by Bankruptcy Code section 362 for the limited purpose of allowing K. Hovnanian to pursue its claims for indemnification and damages against HNR’s liability insurance policies while waiving any deductibles.” K. Hovnanian Motion, ¶ 15. K. Hovnanian stated in its motion that it “agrees not to proceed against HNR’s bankruptcy estate in the event of judgment against HNR in the Litigation in excess of HNR’s insurance coverage.” K. Hovnanian Motion, ¶ 16. Finally, K. Hovnanian stated: “Should HNR be found liable for K. Hovnanian’s damages in the Litigation, to the extent that HNR’s insurance coverage does not satisfy such liability, K. Hovnanian agrees to waive its right to satisfaction of its claim and participation in any distribution of assets of HNR’s estate.” K. Hovnanian Motion, ¶ 17.

12. The Debtors have determined that they may be insured with respect to the claims alleged against HNR in the Litigation under the following insurance policies: Clarendon America Insurance Company and Lloyd’s of London (the “*Insurers*”); Policy Numbers WCE0623990015 and 618A01635001015; Policy Terms June 1, 1999 to August 7, 2000 and August 7, 2000 to

February 7, 2002, respectively (the "*Policies*"). To the best of the Debtors' knowledge, the Policies each have a per-occurrence deductible of \$5,000.

### **LIMITED OBJECTION**

13. "Determining whether relief from the permanent [section 524] injunction is warranted under appropriate circumstances should be analyzed pursuant to a cause standard." See *In re Fucilo*, 2002 WL 1008935 at \*9 (Bankr. S.D.N.Y. Jan. 24, 2002) (citing *In re McGraw*, 18 B.R. 140, 143 (Bankr. W.D. Wisc. 1982)). This analysis is similar to the analysis a court conducts in determining whether to grant relief from the automatic stay under section 362.

14. Section 362 permits the Court to grant relief from the automatic stay only "for cause." 11 U.S.C. § 362(d)(1). The movant bears the initial burden "to produce evidence that cause exists to grant relief from the automatic stay." *In re DBSI, Inc.*, 407 B.R.159, 166 (Bankr. D. Del. 2009). "To establish cause, the party seeking relief from the stay must show that 'the balance of hardships from not obtaining relief tips significantly in its favor.'" *In re Am. Classic Voyages, Co.*, 298 B.R. 222, 225 (D. Del. 2003) (emphasis added; alteration marks omitted).

15. Here, the Court could deny the K. Hovnanian Motion because K. Hovnanian has not established that cause exists to lift the Plan Injunction. Specifically, K. Hovnanian has not shown—indeed, it makes no attempt to show—why it should be allowed to proceed with any Litigation against HNR when, as a result of its failure to timely file a timely proof of claim any claims it may have against HNR are barred.

16. Nonetheless, as a result of the agreements that K. Hovnanian has made in the K. Hovnanian Motion, the Debtors do not object to the Court entering an order granting relief from the Plan Injunction, on the terms of the proposed order attached to the K. Hovnanian Motion, *if the following new paragraphs 4 and 5 are added to the order:*

4. If any action by K. Hovnanian in prosecuting and/or settling the Litigation causes any insurer to have a claim against any of the Debtors on account of any deductible and/or self-insured retention under any insurance policy (including, but not limited to, with respect to defense costs), K. Hovnanian shall, at the Debtors' option, (i) pay such deductible and/or self-insured retention directly to the applicable insurer, or (ii) reimburse the applicable Debtor with respect to such claim within 30 days of receipt of an invoice from the Debtor with respect thereto.

5. The Debtors and their insurers shall retain all defenses they may have with respect to the Litigation.


17. Although K. Hovnanian has purportedly agreed to "waiv[e] any deductibles" in its motion, such an agreement does not bind the Insurers. As a result, the addition of the proposed paragraphs to the order would ameliorate the effect of the existing deductibles under the Policies and reduce the prejudice to the Debtors from the requested relief. The Court conditioned a prior ruling allowing a late proof of claim filed as part of an effort to lift the automatic stay in these Chapter 11 Cases (filed by Weis Builders Inc.) on a similar agreement by the movant to ameliorate the prejudice to the Debtors. *See* January 27, 2010 Transcript of Motions Hearing Before the Honorable Kevin J. Carey 72:9-73:2 (granting relief on basis that "the movant here, in this record . . . has offered, and I would order as a condition of granting this motion, that ameliorate the effect of self-insured retention or deductible along the lines of what the movant's counsel proposed in her closing arguments. . . . And I will tell you had the movant not offered that, I would not have granted his relief."). The Debtors respectfully request the Court to impose the same condition here.

(Remainder of page intentionally left blank.)

WHEREFORE, the Debtors therefore respectfully request that the Court (i) condition entry of an order granting the K. Hovnanian Motion on inclusion of the language proposed in paragraph 16 above, and (ii) grant such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware  
May 5, 2010

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Sean M. Beach (No. 4070)  
Donald J. Bowman, Jr. (No. 4383)  
Robert F. Poppiti, Jr. (No. 5052)  
The Brandywine Building  
1000 West Street, 17th Floor  
P.O. Box 391  
Wilmington, Delaware 19899-0391  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

----and----

GIBSON, DUNN & CRUTCHER LLP  
Michael A. Rosenthal (admitted *pro hac vice*)  
200 Park Avenue, 47th Floor  
New York, New York 10166-0193  
Telephone: (212) 351-4000  
Facsimile: (212) 351-4035

Aaron G. York (admitted *pro hac vice*)  
2100 McKinney Avenue, Suite 1100  
Dallas, Texas 75201-6911  
Telephone: (214) 698-3100  
Facsimile: (214) 571-2900

ATTORNEYS FOR THE REORGANIZED DEBTORS