

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

**IN RE:**

**BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,**

**Debtors.**

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**Chapter 11**

**Case No. 09-12074 (KJC)**

**Jointly Administered**

**Ref. Docket No. 19**

**WITHDRAWAL OF DEMAND BY RAY MCDERMETT THROUGH HIS ATTORNEY  
PHIL TURNER**

TO THE HONORABLE CLERK OF THE COURT:

Recognizing the futility of recovering his claim, Ray McDermett hereby withdraws his demand letter<sup>1</sup> of June 1, 2009, which was forwarded by the Debtor to The Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801. There is no court action pending regarding this demand.

No further notice to Ray McDermett or his attorney Phil Turner is required.

Respectfully submitted,



PHIL TURNER  
State Bar # 24049240  
KUHN DOYLE & KUHN PC  
603 West 8<sup>th</sup> Street  
Austin, TX 78701  
512-472-1422 tel.  
512-472-1422 fax.

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<sup>1</sup> attached

**FILED**  
2009 JUL 13 PM 12:52  
CLERK  
U.S. BANKRUPTCY COURT  
DISTRICT OF DELAWARE

KUHN, DOYLE & KUHN, P.C.

ATTORNEYS-AT-LAW

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HENRY MCCALL  
INVESTIGATOR

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Monday 1 June 2009

BMC WEST BUILDING MATERIALS  
1100 Brushy Creek Road at 1201 BMC Drive  
Cedar Park, TX 78613

Re: Delivery of building materials to 5700 Penick, Austin  
TX 78741

To BMC WEST BUILDING MATERIALS,

Our law firm represents Mr. Ray McDermett in connection with the above-referenced matter. You will recall that Mr. McDermett's driveway was damaged during a delivery of building materials in September of last year. If you will look at the photographs, I think you will agree that the damage was caused by negligent operation of equipment. The waiver Mr. McDermett signed did not relieve you of liability for this.

Enclosed for your reference are the bill of lading, the release, and photographs of the damage.

Texas has adopted the express negligence rule. See *Ethyl Corp. v. Daniel Const.*, 725 SW2d 705. And this rule applies to releases. See *Dresser Indus v. Page Pet Inc.*, 853 SW2d 505. The preamble of your release makes it quite clear what the release covers, while the second paragraph takes a global position. Regardless of this ambiguity, nowhere is there a release from negligence expressed in specific terms as required by the express negligence rule.

Mr. McDermett would like to repair his driveway, the cost for which would be approximately \$2,400.00.

After reviewing this please notify your insurance company and contact me within 60 days to settle this negligence claim.

DTPA

Alternatively, Mr. McDermett may file a DTPA claim against you for breach of implied warranty in that you failed to perform services in a good and workmanlike manner.

Undoubtedly, you are aware of your liability to my client for breaching the express warranties and implied warranties arising from the contract and under principles of common law. Mr. McDermett may take action against you under, among other things, Section 17.50(a)(2) of

the Deceptive Trade Practices--Consumer Protection Act. As applied to the facts of this case, Texas law makes it clear that you are liable to my client.

Accordingly, on behalf of my client, demand is hereby made that within 60 days of your receipt of this letter you pay the following expenses reasonably incurred by my client in asserting this claim:

1. \$2,400.00 in economic damages;
3. \$325.00 for expenses, including attorney's fees.

Please understand that this demand is made in the spirit of compromise. According to our analysis, the demand represents a tremendous savings to you given your potential exposure to Mr. McDermett. We hope you view this demand as a good faith, conservative effort on our part to expeditiously resolve this potential litigation on amicable terms.

My client is anxious to have this payment. Therefore, I suggest that you or your attorney contact me as soon as possible. From this point forward, I am going to be the only contact for you or your attorney about this matter.

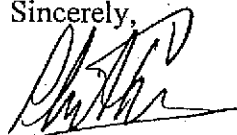
If the payment is not received as requested above, I may advise my client to bring a lawsuit against you for all appropriate remedies under the Texas Deceptive Trade Practices--Consumer Protection Act. We would expect to recover not only our actual damages, but also mental anguish damages, prejudgment interest, attorney's fees, and perhaps additional damages.

Please forward a copy of this letter to your insurance representative for review.

We trust you will immediately respond, in writing, to this formal demand letter and/or schedule a mutually convenient time and date for the requested relief within the time limit specified in this letter. If you have any questions regarding this matter or need additional information, please contact me or have your attorney contact me.

Please do not contact my client either orally or in writing without my prior express written permission.

Sincerely,



PHIL TURNER  
State Bar # 24049240  
KUHN DOYLE & KUHN PC  
603 West 8<sup>th</sup> Street  
Austin, TX 78701  
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512-472-1422 fax.

Cc: Mr. Ray McDermett