

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

In re:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-12074 (KJC)  
Jointly Administered

**Objections due by: June 22, 2011 @ 4:00 p.m.**  
**Hearing Date: June 29, 2011 @ 2:00 p.m.**

**MOTION OF CENTEX HOMES, ET AL.**  
**FOR RELIEF FROM THE DISCHARGE INJUNCTION**

Centex Homes, Centex Real Estate Holding, L.P., Centex Real Estate Corporation, and Nomas Corp. (collectively, "Centex"), by and through their undersigned counsel, hereby move (the "Motion") this Court for an order granting relief from or modification of the discharge injunction so that it may prosecute the State Action and Cross-Complaint (both as defined below) and proceed only against the available insurance proceeds of debtor C Construction, Inc. dba Campbell Concrete of California ("Campbell"), a subsidiary of debtor Building Materials Holdings Corporation. In support of this Motion, Centex relies upon the Declaration of Philip Kopp. ("Kopp Decl.") filed contemporaneously herewith and states as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, Rule 9024 of the Federal Rules of Bankruptcy Procedure, and Rule 60(b)(6) of the Federal Rules of Civil Procedure.

2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).

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<sup>1</sup> The Debtors consist of the following 12 entities: Building Materials Holding Corporation, BMC West Corporation, SelectBuild Construction, Inc., SelectBuild Northern California, Inc., Illinois Framing, Inc., C Construction, Inc., TWF Construction, Inc., H.N.R. Framing Systems, Inc., SelectBuild Southern California, Inc., SelectBuild Nevada, Inc., SelectBuild Arizona, LLC, and SelectBuild Illinois, LLC.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicate for the relief requested herein is Section 105 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

### **BACKGROUND**

5. On or about June 16, 2009, Campbell filed a voluntary petition for relief under chapter 11 the Bankruptcy Code. Kopp Decl., ¶ 2.

6. Centex is a creditor of Campbell and, therefore, qualifies as a party in interest in this case. Kopp Decl., ¶ 3.

7. On or about June 1, 2010, numerous homeowners (“Plaintiffs”) from the residential development known as “Four Leaf Lane” in Corona, California (the “Project”) brought a construction defect action against Centex in the Riverside County Superior Court in the State of California entitled *Guillen, et al. v. Centex Homes*, Case No. RIC 10010749 (the “State Action”), alleging numerous causes of action and seeking damages based upon strict liability, breach of express and implied warranties, negligence and breach of contract (the “Complaint”).<sup>2</sup> A true and correct copy of the Complaint is attached to the Kopp Decl. as Exhibit “1”. Kopp Decl., ¶ 4.

8. On or about March 22, 2011, Centex inadvertently filed a Cross-Complaint for breach of written contract, breach of oral contract to indemnify, to obtain insurance and to defend, breach of implied contract to indemnify, obtain insurance and to defend, total equitable indemnity, partial equitable indemnity, contribution and repayment, and declaratory relief (the “Cross-Complaint”) against Campbell, among others, based upon the alleged construction defects caused by Campbell during Campbell’s performance of work and/or services and/or

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<sup>2</sup> When Plaintiffs first filed their Complaint on June 1, 2010, they consisted of the owners of 31 homes at the Project. On or about June 15, 2010, Plaintiffs filed their operative first amended complaint to add 18 additional homes into the State Action.

providing of materials which were incorporated in the development, construction and/or sale of the Project. A true and correct copy of the Cross-Complaint is attached to the Kopp Decl. as Exhibit "2". Kopp Decl., ¶ 5. Subject to obtaining appropriate relief from this Court, Centex intends to prosecute its cross-claim against Campbell in the State Action.

9. Based on the information produced in discovery in the State Action, it appears that Plaintiffs' claims implicate Campbell. Kopp Decl., ¶ 6.

10. Centex seeks recovery from Campbell for indemnification and payment of the total amount of any judgment rendered against Centex based upon the Complaint, together with Centex' attorneys' fees, expenses and costs of suit incurred in defending the State Action. Additionally, Centex seeks recovery for any and all attorneys' fees, experts' fees, costs and discovery expenses incurred by Centex in its defense of the State Action and in its pursuit of the Cross-Complaint. Kopp Decl., ¶ 7.

11. Centex states, on information and belief, that Campbell is insured under one or more general and excess liability insurance policies and that Centex' claims can be or have been tendered under those liability insurance policies. Kopp Decl., ¶ 8.

12. Centex states, on information and belief, that on or about February 10, 2006, Campbell and Centex executed a Subcontract Agreement whereby Campbell agreed to provide materials and labor at the Project. A true and correct copy of the Subcontract Agreement is attached to the Kopp Decl. as Exhibit "3". Pursuant to the Subcontract Agreement, Campbell also agreed to obtain general liability insurance with a limit of combined bodily injury and property damage of not less than \$1,000,000. Kopp Decl., ¶ 9.

13. Centex states, on information and belief, that Campbell obtained a general liability insurance policy and excess liability insurance, wherein the insurers agreed to pay all

sums, not to exceed \$1,000,000, which Campbell should become liable to pay as damages imposed upon it by law, for injury sustained in the course of business (including Campbell's work relating to the Project). Kopp Decl., ¶ 10.

14. Centex states, on information and belief, that said insurance policies provide that insolvency or bankruptcy of Campbell shall not release the insurance company from the payment of damages for injuries sustained during the term within the area of coverage of said policies. Kopp Decl., ¶ 11.

15. Centex states, on information and belief, that the insurance policies at issue are not required or otherwise necessary to Campbell for an effective debt liquidation under chapter 11 of the Bankruptcy Code. Kopp Decl., ¶ 12.

16. Centex states, on information and belief, that the State Action against Campbell will be defended at no expense to Campbell. Kopp Decl., ¶ 13.

17. If Movant Centex is not permitted to pursue its interests in the insurance policies and proceeds, then Centex will suffer irreparable injury, loss and damage. Kopp Decl., ¶ 14.

18. No issues of federal or bankruptcy laws are involved in the pending lawsuit against Campbell, only questions of California state law. Kopp Decl., ¶ 15.

#### **RELIEF REQUESTED**

19. Centex seeks a modification of the injunction imposed by Bankruptcy Code section 524 and the Debtors' confirmed plan for the limited purpose of allowing Centex to pursue its claims for indemnification and damages against Campbell's liability insurance policies.

20. Centex agrees not to proceed against Campbell's bankruptcy estate in the event of judgment against Campbell in the State Action in excess of Campbell's insurance coverage.

Should Campbell be found liable for Centex' damages in the State Action, to the extent that Campbell's insurance coverage does not satisfy such liability, Centex agrees to waive its right to satisfaction of its claim and participation in any distribution of assets of Campbell's estate.

21. In addition, to the extent necessary, Centex also retroactive relief from the automatic stay with respect to the State Action retroactive to March 10, 2011.

### **BASIS FOR RELIEF REQUESTED**

22. Even where a debtor's liability to a claimant has been discharged, the bankruptcy court may modify the Section 524 discharge injunction to permit a claimant to pursue a nominal claim against the debtor in order to establish liability upon which to base a claim against the debtor's insurers. *In re Kewanee Boiler Corp.*, 297 B.R. 720, 734-735; *In re Pettibone Corp.*, 156 B.R. 220, 232 (Bankr. N.D. Ill. 1993). See also 11 U.S.C. § 105(a) ("The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.") Courts have generally found that the standard for relief from the discharge injunction is the same as the standards for relief from automatic stay.

23. Section 362(d)(1) of the Bankruptcy Code provides that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . for cause, including the lack of adequate protection of an interest in property of such party in interest;

24. Centex submits that "cause" exists to modify the discharge injunction pursuant to standards established for relief from the automatic stay. 11 U.S.C. § 362(d)(1). "'Cause' is not defined in the [Bankruptcy] Code; it must be 'determined on a case-by-case basis.'" *In re Rexene Products Company*, 141 B.R. 574, 576 (Bankr. D. Del. 1992), citing *Int'l Bus. Machines v. Fernstrom Storage and Van Co.*, 938 F.2d 731, 735 (7th Cir.1991).

25. “Cause[, as defined in Section 362(d)(1)], is a flexible concept and courts often conduct a fact intensive, case-by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the [automatic] stay.” Except for lack of adequate protection, “cause” is not defined by § 362(d)(1). *In re SCO Group, Inc.*, 395 B.R. 852, 856 (Bankr. D. Del. 2007)

26. This Court utilizes the following “three-prong balancing test to determine whether to cause exists for relief from stay: (1) whether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit; (2) whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and (3) the probability of the creditor prevailing on the merits.” *In re Rexene Products Company*, 141 B.R. at 576. In particular, this Court confirmed that the legislative intent of Section 362(d)(1) was to emphasize the “importance of allowing a case to continue in the original tribunal so long as there is not prejudice to the estate.” *In re SCO Group, Inc.*, 395 B.R. at 857.

27. The *Rexene Products* test has been repeatedly applied by this Court. *See e.g., In re Continental Airlines, Inc.*, 152 B.R. 420, 424 (D. Del. 1993); *In re SCD Group, Inc.*, 395 B.R. 852, 857 (Bankr. D. Del. 2007); *In re Levitz Furniture Inc.*, 267 B.R. 516, 523 (Bankr. D. Del. 2000); *In re Pursuit Athletic Footwear, Inc.*, 193 B.R. 713, 718 (Bankr. D. Del. 1996). In each of these cases, relief from the stay was granted.

28. Here, application of the Court’s balancing test favors granting Centex relief from or modification of the discharge injunction for three reasons. First, there will be no great prejudice to Campbell because Centex agrees not to proceed against either Campbell in excess of Campbell’s insurance coverage. In addition, to the extent that Campbell’s insurance coverage does not satisfy such liability of Campbell, if any, Centex agrees to waive its right to satisfaction

of its claim and participation in any distribution of assets of Campbell's estate. Second, Centex will suffer considerable hardship if the stay is not lifted because it will not be able to continue prosecution of its Cross-Complaint and will be left to defend itself without the benefit of its additional insured status under Campbell's insurance policies. Third, the likelihood of Centex prevailing on the merits is extremely high because Campbell's obligations to defend, indemnify and name Centex as an additional insured were agreed to and formalized by written contract, to which Campbell has never objected. Therefore, relief from the automatic stay should be granted.

### CONCLUSION

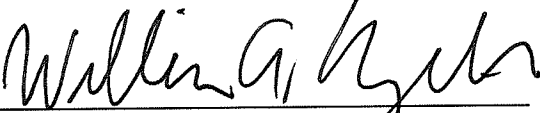
WHEREFORE, Centex respectfully requests the entry of an order, substantially in the form attached hereto, which grants the following relief:

1. That the discharge injunction imposed pursuant to 11 U.S.C. § 524 be modified forthwith to permit Centex to proceed with prosecution of its Cross-Complaint against Campbell and others, and, to the extent necessary, this relief be given retroactively as of March 11, 2011;
2. That Centex be allowed to assert its claims against the liability insurance policies of Campbell;
3. That in the event Centex obtains a judgment against Campbell or otherwise resolves the State Action, Centex may receive Campbell's insurance policy proceeds without any further approval by this Court; and

4. For such other and further relief as the Court may deem proper, just and equitable.

Dated: June 10, 2011  
Wilmington, Delaware

SULLIVAN • HAZELTINE • ALLINSON LLC

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FOR THE DISTRICT OF DELAWARE**

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Debtors.

Chapter 11

Case No. 09-12074 (KJC)  
Jointly Administered

**Objections due by: June 22, 2011 @ 4:00 p.m.**  
**Hearing Date: June 29, 2011 @ 2:00 p.m.**

**NOTICE OF MOTION OF CENTEX HOMES, ET AL.**  
**FOR RELIEF FROM THE DISCHARGE INJUNCTION**

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Unsecured Creditors

Centex Homes, Centex Real Estate Holding, L.P., Centex Real Estate Corporation, and Nomas Corp. (collectively, "Centex") have filed a Motion for Relief from the Discharge Injunction which seeks the following relief: a modification to the discharge injunction imposed pursuant to 11 U.S.C. § 524, allowing Centex to proceed in its State Action and Cross-Complaint against C Construction, Inc. dba Campbell Concrete of California ("Campbell"), limited to recovery of insurance proceeds under the insurance policy of Campbell.

HEARING ON THE MOTION WILL BE HELD ON JUNE 29, 2011, at 2:00 P.M.

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<sup>1</sup> The Debtors consist of the following 12 entities: Building Materials Holding Corporation, BMC West Corporation, SelectBuild Construction, Inc., SelectBuild Northern California, Inc., Illinois Framing, Inc., C Construction, Inc., TWF Construction, Inc., H.N.R. Framing Systems, Inc., SelectBuild Southern California, Inc., SelectBuild Nevada, Inc., SelectBuild Arizona, LLC, and SelectBuild Illinois, LLC.

You are required to file a response (and the supporting documentation required by Local Rule 4001-1(d)) to the attached motion at least five business days before the above hearing date.

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

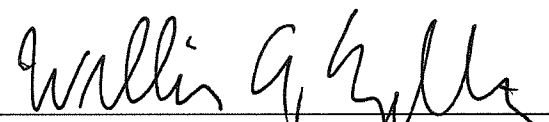
William A. Hazeltine, Esquire  
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The hearing date specified above may be a preliminary hearing or may be consolidated with the final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts.

Dated: June 10, 2011  
Wilmington, Delaware

**SULLIVAN • HAZELTINE • ALLINSON LLC**

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Chapter 11

Case No. 09-12074 (KJC)  
Jointly Administered

**Related Docket No.** \_\_\_\_\_

**ORDER GRANTING MOTION OF CENTEX HOMES, ET AL.  
FOR RELIEF FROM THE DISCHARGE INJUNCTION**

Upon consideration of the Motion of Centex Homes, Centex Real Estate Holding, L.P., Centex Real Estate Corporation, and Nomas Corp. (collectively, "Centex") for Relief From the Discharge Injunction and any objections or responses thereto; and finding good and sufficient cause for granting the relief requested in the Motion; it is hereby ordered and adjudged as follows:

1. The Motion for Relief from the Discharge Injunction on behalf of Centex is granted retroactive to March 10, 2011 for the limited purpose of allowing Centex to pursue its claims for indemnification and damages against the liability insurance policies of debtor C Construction, Inc. dba Campbell Concrete of California ("Campbell").
2. In the event that Centex obtains a judgment against Campbell or otherwise resolves the litigation, Centex may receive Campbell's insurance policy proceeds without any further approval by this Court.
3. Centex shall not proceed against Campbell's bankruptcy estate in the event of judgment against Campbell (or any other resolution, including, but not limited to, settlement) in

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the pending California litigation entitled *Guillen, et al. v. Centex Homes, et al.* Case No. RIC 10010749 in the Riverside County Superior Court (the "State Action").

4. Should Campbell be found liable for Centex' damages in the State Action (or should Campbell settle the claims asserted against it in the State Action), to the extent that Campbell's insurance coverage does not satisfy such liability, Centex waives its right to satisfaction of its claim and participation in any distribution of assets of the Campbell estate.

5. Campbell and its insurers shall retain all defenses they may have with respect to the State Action.

6. This Court shall retain jurisdiction with respect to the interpretation, implementation and enforcement of this Order.

Dated: June \_\_\_\_\_, 2011

By: \_\_\_\_\_  
The Honorable Kevin J. Carey, Chief Judge  
United States Bankruptcy Court

**CERTIFICATE OF SERVICE**

I, William A. Hazeltine, do hereby certify that I am not less than 18 years of age and that on this 10th day of June 2010, I caused a copy of the written *Motion of Centex Homes et al. for Relief from Discharge Injunction* to be served upon the parties on the attached service list via U.S. Mail, First Class, postage pre-paid.

Under penalty of perjury, I declare the foregoing to be true and correct.

June 10, 2011  
Date

/s/ William A. Hazeltine  
William A. Hazeltine

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