

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

In re:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 09-12074 (KJC)  
Jointly Administered

**Obj. Deadline: Sept. 14, 2011 @ 4:00 p.m.**  
**Hearing Date: Sept. 21, 2011 @ 1:30 p.m.**

**MOTION OF CENTEX HOMES, ET AL.**  
**FOR ENTRY OF AN ORDER ENLARGING THE CLAIMS BAR DATE**

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 to Enlarge") this Court for an order enlarging the claims bar date (the "Claims Bar Date") previously established in the above-captioned case to allow Centex an extension to file its proof of claim (the "Claim") so that it will be deemed timely. In support of the Motion to Enlarge, Centex relies on the Declaration of Phillip Kopp in Support of the Motion of Centex Homes, *et al.* for Entry of an Order Enlarging the Claims Bar Date (the "Kopp Decl."), filed contemporaneously herewith, and respectfully states as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
4. The statutory predicates for the relief requested are 11 U.S.C. § 105 and Rules 3003(c)(3) and 9006(b) of the Federal Rules of Bankruptcy Procedure.

## **II. PRELIMINARY STATEMENT**

5. Centex's claim against C Construction, Inc., dba Campbell Concrete of California, a subsidiary of Building Materials Holding Corporation ("Campbell")<sup>1</sup>, in the underlying state court action did not exist until the homeowners in the underlying state action served Centex with their notice of claim pursuant to California Civil Code section 895, *et seq.* (hereinafter "California's Right to Repair Act") on September 29, 2009, approximately a month after the Claims Bar Date of August 31, 2009.

6. The homeowners' construction defect claims against Centex in the underlying state court action triggered mandatory pre-litigation procedures under California's Right to Repair Act, requiring Centex to engage in a year-long inspection and repair process to determine whether the homeowners' claims could be resolved short of litigation. During this time, it was neither necessary nor appropriate for Centex to seek relief from this Court to pursue its indemnity claim against Campbell, as the homeowners' claims were limited to repairs offered by Centex pursuant to the pre-litigation procedures of California's Right to Repair Act.

7. Even when the homeowners eventually commenced litigation against Centex in the underlying state court action, Centex did not become fully aware of the magnitude of its potential indemnity claim against Campbell until the homeowners made a settlement demand to Centex in excess of forty-six million dollars, consisting of over fifteen million dollars in repair costs arising out of work performed by Campbell. Upon discovery of the homeowners' concrete-related defect claims, Centex acted diligently to seek relief from this Court to pursue its indemnity claim against Campbell.

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<sup>1</sup> Campbell is one of the Debtors in this bankruptcy proceeding that consists of the following twelve 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.

8. Campbell's position with respect to its obligations to pay any deductibles or to maintain security for payment of such deductibles would not change if Centex is allowed to file its proof of claim to pursue Campbell's insurance proceeds in the underlying state court action. Under the Debtors' Plan of Reorganization confirmed by the Court (the 'Plan') and other Orders relating to the Debtors' insurance obligations, Campbell is authorized to continue its prepetition practices with respect to payment of deductibles under applicable insurance policies. Moreover, the Plan authorizes the Debtors' prepetition letters of credit to continue to collateralize Campbell's deductible obligations for claims arising after the effective date of the Plan. Accordingly, Centex's proposed proof of claim, whether filed prior to the Claims Bar Date or after, would not result in any prejudice to Campbell.

9. In addition, because Centex is an additional insured under Campbell's insurance policies issued by ACE American Insurance Company ("ACE American"), Centex's rights under the policies viz-a-viz ACE American are not affected by any arrangement Campbell has with ACE American to pay the deductibles to trigger coverage. As an additional insured, Centex has a direct claim against ACE American for indemnification of the homeowners' claims in the state court action. Allowing Centex to file its claim against Campbell and lifting the plan injunction to allow Centex to pursue Campbell's insurance proceeds would not prejudice the Debtors and would preserve Centex's rights as an insured under the ACE American policies.

### **III. STATEMENT OF FACTS**

#### **A. The Project**

10. From 2006 through 2007, Centex developed a residential development known as "Four Leaf Lane" in Corona, California (the "Project"). Kopp Decl., ¶ 2.

11. Centex states, on information and belief, that on or about February 10, 2006, C Construction, Inc. dba Campbell Concrete of California, a subsidiary of Building Materials Holding Corporation ("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 "1." 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 for each occurrence. Kopp Decl., ¶ 3.

12. Centex states, on information and belief, that Campbell obtained general liability insurance policies through ACE American Insurance Company ("ACE American") for policy periods of 11/11/2005 to 11/11/2006 and 11/11/2006 to 11/11/2007, wherein ACE American agreed to pay all sums not to exceed \$2,000,000 per each policy period, which Campbell became obligated to pay because of property damage and/or personal injury at the Project caused by an occurrence during the effective coverage period of the policy, in any way related to the work of Campbell. Kopp Decl., ¶ 4.

13. Centex states, on information and belief, that the aforementioned ACE American policies provide that insolvency or bankruptcy of Campbell does not release ACE American from its obligations under the policies to pay covered damages on behalf of Campbell. Kopp Decl., ¶ 5.

14. Centex states, on information and belief, that the aforementioned ACE American policies further provide that in the event that Campbell is unable to pay any deductible amount subject to the policies, or any portion thereof, ACE American's obligation to pay covered damages includes the deductible amount. Kopp Decl., ¶ 6.

**B. The Voluntary Petition and the Claims Bar Date Notice**

15. On or about June 16, 2009, Campbell filed a Voluntary Petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware, Case No. 09-12079 (which has since been consolidated with all related debtors into Case 09-12074).

16. On June 26, 2009, the debtors filed the Motion to Establish the Claims Bar Date (D.I. 106). On July 16, 2009, the Court entered the Order Approving the Claims Bar Date Motion (D.I. 248). On July 23, 2009, the debtors filed the Notice of the Claims Bar Date for August 31, 2009 bar date (D.I. 296).

17. On or about July 23, 2009, Centex's regional office in Corona, California received notice of the Claims Bar Date of August 31, 2009. However, the homeowners' claims giving rise to Centex's claim against Campbell in the underlying state court action did not exist at the time of the notice, or on the Claims Bar Date. Therefore, Centex had no reason to act upon the Claims Bar Date notice. Kopp Decl., ¶ 7.

18. Centex states, on information and belief, that Centex's San Diego Division received notice of the Debtors' bankruptcy in connection with an arbitration hearing entitled *Burrow v. Centex Homes*, prior to the Claims Bar Date. The *Burrow* matter involved a single home construction defect claim in a housing development located in San Diego County, California, that was built by a different business unit of Centex, and involved a different SelectBuild trade (*i.e.*, HNR Framing). Because the homeowners' claims giving rise to Centex's claim against Campbell in the underlying state court action did not exist, and because *Burrow* involved an entirely different project and claim, Centex had no reason to file a proof of claim for the Campbell claim at that time. Kopp Decl., ¶ 8.

**C.     The Homeowners' Claims Under California's Right to Repair Act and The**  
**Pre-Litigation Repair Process**

19.     On or about September 29, 2009, approximately a month after the Claims Bar Date had passed, the owners of nine homes at the Project served Centex with a Notice of Claim pursuant to California's Right to Repair Act contending that property damage occurred and exists at their homes due to violations of building standards, and defective development, workmanship, repairs, materials, and construction of the Project. Kopp Decl., ¶ 9.

20.     Between September 29, 2009 and August 5, 2010, the homeowners at the Project served Centex with a total of eleven separate Notices of Claim pursuant to California's Right to Repair Act, bringing the total number of claimant homes to seventy-one (collectively, the "Statutory Claims"). True and correct copies of the eleven Notices of Claim that comprise the Statutory Claims, dated September 29, 2009, October 7, 2009, October 26, 2009, November 12, 2009, November 30, 2009, December 24, 2009, January 28, 2010, March 3, 2010, April 14, 2010, June 10, 2010, and August 5, 2010 are collectively attached to the Kopp Decl. as Exhibit "2." Kopp Decl., ¶ 10.

21.     California's Right to Repair Act was enacted in 2002, and applies to all new residential homes sold in California on or after January 1, 2003. The Right to Repair Act was enacted to reduce the impact of construction defect litigation by diverting defect claims away from the courts and into non-adversarial dispute resolution process. The California legislature designed the statute to allow the builder an opportunity to learn the allegations against it and work directly with the homeowner to try to resolve them in advance of litigation. Thus, the cornerstone of California's Right to Repair Act is the requirement for a non-adversarial pre-litigation process which is commenced when a homeowner provides the builder with a written

notice and detailed claim information. The builder is then entitled to inspect and repair the alleged defects before a lawsuit can be filed. The pre-litigation procedures also require the builder to notify the implicated subcontractors of the claims, and involve the trades in the inspection and repair process. California's Right to Repair Act prescribes a strict and specific timeline for the parties to carry out the pre-litigation procedures. For instance, a builder has fourteen days from receipt of the homeowner's notice of claim to acknowledge the claim and request inspections, and fourteen days thereafter to complete initial inspections. The builder then has thirty days to make a repair offer to the homeowner, and the homeowner has thirty days to respond to the offer. The homeowner and the builder are also required to engage in mediation to resolve any disputes concerning the repair offer, and such mediation must occur within fifteen days of the homeowner's mediation request. Kopp Decl., ¶ 11.

22. Upon receipt of each Notice of Claim, Centex notified Campbell of the Statutory Claims, and provided a copy of each Notice of Claim. When applicable, Centex also notified Campbell of upcoming site inspections and repairs. True and correct copies of Centex's notification letters to Campbell, *sans* enclosures, are collectively attached to the Kopp Decl. as Exhibit "3." Kopp Decl., ¶ 12.

23. On December 9, 2009, Campbell advised Centex's counsel that Campbell filed a voluntary petition under Chapter 11 of the Bankruptcy Code. A true and correct copy of correspondence from SelectBuild's Risk Management Specialist dated December 9, 2009 is attached to the Kopp Decl. as Exhibit "4." However, because the homeowners' Statutory Claims were proceeding under the pre-litigation procedures, it was neither necessary nor appropriate for Centex to pursue its indemnity claim against Campbell at that time. It would have been premature for Centex to seek relief from this Court to file a proof of claim or to lift the stay

injunction before completing the repair process to determine whether the homeowners' Statutory Claims could be resolved under California's Right to Repair Act. Kopp Decl., ¶ 13.

24. Between November 10, 2009 and August 31, 2010, Centex conducted several multi-day inspections of sixty-nine homes implicated in the Statutory Claims. Kopp Decl., ¶ 14.

25. Between January 22, 2010 and September 30, 2010, Centex made repair offers on each of the sixty-nine homes inspected during the pre-litigation repair process. True and correct copies of two exemplar repair offers, one made on January 22, 2010, and another made on September 30, 2010, are collectively attached to the Kopp Decl. as Exhibit "5." Kopp Decl., ¶ 15.

26. In addition, between February 23, 2010 and October 18, 2010, Centex and the homeowners engaged in seven mediation sessions pursuant to the pre-litigation procedures in California's Right to Repair Act in an effort to resolve disputes concerning the scope of Centex's repair offers. Kopp Decl., ¶ 16.

#### **D. The State Action**

27. On or about June 1, 2010, before the repair process under California's Right to Repair Act was completed, the homeowners in the Statutory Claim ("Plaintiffs") prematurely commenced a construction defect lawsuit against Centex in the Riverside County Superior Court of 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. A true and correct copy of Plaintiffs' Complaint filed in the State Action is attached to the Kopp Decl. as Exhibit "6." Kopp Decl., ¶ 17.



28. On August 6, 2010, Centex filed a motion to stay the State Action on the basis that Plaintiffs failed to fully comply with the pre-litigation procedures under California's Right to Repair Act. A true and correct copy of Centex's Motion to Stay All Proceedings Pending Compliance with Civil Code Section 895 et seq. in Lieu of an Answer is attached to the Kopp Decl. as Exhibit "7." Kopp Decl., ¶ 18.

29. On September 20, 2010, the court in the State Action denied Centex's motion to stay, and ordered Centex to respond to Plaintiffs' operative complaint. Kopp Decl., ¶ 19.

30. On October 25, 2010, Centex filed its Answer to Plaintiffs' operative complaint in the State Action. A true and correct copy of Centex's Answer is attached to the Kopp Decl. as Exhibit "8." Kopp Decl., ¶ 20.

31. On or about November 22, 2010, Centex completed repairs at the last of the Plaintiffs' homes implicated in the Statutory Claim. Kopp Decl., ¶ 21.

32. Following the completion of the repairs, Centex negotiated the terms of a case management order mandated by the court in the State Action. On February 25, 2011, the court in the State Action entered a Case Management Order, wherein the court deemed the State Action to be a "complex litigation" that requires specialized management to avoid placing undue burden on the court system. Accordingly, the Case Management Order set forth a detailed guideline governing each facet of pleading, discovery, pretrial and settlement matters in the State Action. A true and correct copy of the Case Management Order entered in the State Action is attached to the Kopp Decl. as Exhibit "9." Kopp Decl., ¶ 22.

33. On March 22, 2011, pursuant to the Case Management Order timeline in effect in the State Action, Centex 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 against Campbell, among others, based upon the alleged construction defects caused by Campbell during Campbell's performance of work and/or services and/or providing of materials which were incorporated in the development, construction and/or sale of the Project. A true and correct copy of Centex's Cross-Complaint filed in the State Action is attached to the Kopp Decl. as Exhibit "10." Kopp Decl., ¶ 23.

**E. Centex's Discovery of Multi-Million Dollar Indemnity Claim**

**Against Campbell and Motion for Relief**

34. On or about April 21, 2011, pursuant to the Case Management Order timeline in effect in the State Action, Plaintiffs made their settlement demand to Centex. Plaintiffs' settlement demand consists of repair and investigation costs for seventy-one homes in excess of forty-six million five hundred thousand dollars (\$46,500,000). Plaintiffs contend that the repair cost for concrete hardscape defects and structural defects alone (both within Campbell's scope of work at the Project) exceed fifteen million dollars (\$15,000,000). A true and correct copy of Plaintiffs' settlement demand and preliminary cost of repair summary is attached to the Kopp Decl. as Exhibit "11." Kopp Decl., ¶ 24.

35. Based on Plaintiffs' settlement demand and cost of repair produced in the State Action, Campbell's indemnity exposure in the State Action could easily exceed fifteen million dollars (\$15,000,000). Kopp Decl., ¶ 25.

36. Centex acted promptly and diligently to prosecute its indemnity claim against Campbell upon learning of Plaintiffs' settlement demand and repair costs in late April, 2011. Prior to Mr. Kopp's current private practice at Newmeyer & Dillion, Mr. Koop was Centex's in-house counsel overseeing Centex's construction defect litigation in Southern California. In Mr.

Kopp's experience, a typical contribution of a concrete subcontractor towards settlement of construction defect claims involving single family detached homes is approximately \$1,000 to \$1,200 a house. Based on Mr. Kopp's inspection of the subject homes in the State Action, the settlement exposure for Campbell would be in the same range. Until Centex received Plaintiffs' settlement demand and cost of repair estimate, Centex had no reason to anticipate that Plaintiffs would be making a claim of such magnitude for concrete subcontractor. Kopp Decl., ¶ 26.

37. On July 18, 2011, counsel for Centex wrote to the Debtors' in-house risk manager to request that the Debtors stipulate to allow Centex to pursue Campbell's insurance for indemnity of the State Action. Centex explained that Campbell's insurance requires the insurance company to pay the deductible amount to pay damages or effect a settlement on behalf of Campbell, and that Centex does not have an obligation to pay the deductible amount to trigger coverage. A true and correct copy of Philip Kopp's July 18, 2011 letter to Maureen Thomas is attached to the Kopp Decl. as Exhibit "12." Campbell refused to stipulate. Kopp Decl., ¶ 27.

38. Centex has already filed a motion for relief from the automatic stay to pursue its claims against Campbell's insurance and otherwise liquidate its claims in Campbell's bankruptcy proceeding.

#### **IV. RELIEF REQUESTED**

39. Centex seeks to enlarge the Claims Bar Date in order to allow Centex fourteen (14) days from the entry of the proposed form of order (the "Order") on the instant Motion to Enlarge to file the its claim which will be deemed timely filed.

## **V. ARGUMENTS**

### **A. Centex Should Be Allowed to File Its Proof of Claim Against Campbell Because Centex Was Not Aware of The Claim Until The Claims Bar Date Had Passed**

40. Centex's claim against Campbell did not arise until the homeowners' first Notice of Claim to Centex on or about September 29, 2009. Therefore, Centex could not have timely filed its proof of claim against Campbell because it was not aware that it had any claims against Campbell with respect to the Project until the Claims Bar Date had already passed.

41. Because Centex's claim against Campbell did not exist, the Debtors' notice of the Claims Bar Date to Centex on or about July 23, 2009 gave Centex no reason to take action in the Debtors' bankruptcy proceeding.

### **B. Centex's Proof of Claim Should be Considered Timely Filed Because the Failure to Timely File was Due to "Excusable Neglect"**

42. A Bankruptcy Court may extend the bar date for cause to permit the late filing of a proof of claim "if the movant's failure to comply with an earlier deadline 'was a result of excusable neglect.'" *Pioneer Inv. Services Co. v. Brunswick Associates*, 507 U.S. 380, 382 (1993) (*quoting* Federal Rules of Bankruptcy Procedure Rule 9006(b)(1)). The Court should review a creditor's reasons for filing a late claim with some flexibility because the analysis is rooted in equity. *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995).

43. Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure, which sets forth the time for filing proofs of claim, provides, in relevant part, that "the court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Here, August 31, 2009 was the Claims Bar Date for filing proofs of claim in this case. However, Bankruptcy Rule 9006(b)(1) empowers this Court to extend the time for filing a claim if the

movant's failure to comply with the bar date "was a result of excusable neglect." In determining whether to extend the Claims Bar Date, Rule 3003(c)(3) and Rule 9006(b)(1) must be read together.

44. The term "excusable neglect," as used in Bankruptcy Rule 9006(b)(1) was clarified by the Supreme Court in *Pioneer, supra*. The Court found that, "by empowering the courts to accept late filings 'where the failure to act was a result of excusable neglect' . . . Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filing caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer*, 507 U.S. at 388. The Supreme Court stressed that the determination of whether a party's neglect of a deadline was excusable was "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. The relevant circumstances, the Court noted, included analyzing:

- (1) the danger of prejudice to the debtor;
- (2) the length of delay and its potential impact on judicial proceedings;
- (3) the reason for the delay, including whether it was within the reasonable control of the movant; and
- (4) whether the movant acted in good faith.

*Id.* Each of these factors weighs in favor of Centex.

#### **1. Danger of Prejudice to the Debtor**

45. The Third Circuit Court of Appeals has recognized that the first factor, danger of prejudice, "is not an imagined or hypothetical harm; a finding of prejudice should be a conclusion based on facts in evidence." *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 127 (3d Cir. 1999). Under *O'Brien*, the relevant factors for analysis of prejudice include: whether the

debtor was surprised or caught unaware of a claim that it had not anticipated; whether the payment of the claim would force the return of amounts already paid out under the confirmed plan or affect the distribution to creditors; whether payment of the claim would jeopardize the success of the debtor's reorganization; the size of the claim sought to be considered as compared to the rest of the estate; whether allowance of the claim would adversely impact the debtor actually or legally; whether allowance of the claim would open the floodgates to future claims; and whether the plan was filed or confirmed with knowledge of the existence of the claim. *Id.* at 125-26.

46. First, Campbell cannot argue that Centex's claim was unexpected because it identified Centex as a creditor on its Consolidated List of Creditors and provided Centex with notice of the Claims Bar Date. In addition, during the course of the pre-litigation repair process under California's Right to Repair Act, Centex duly notified Campbell of each and every Notice of Claim served by the homeowners and gave Campbell an opportunity to participate in the inspection and repair of the homes. Campbell knew that Centex was engaged in performing repairs of the homes, and should have known that Plaintiffs are entitled to file suit for damages arising out of Campbell's work at the Project after the completion of the repairs.

47. Second, Centex's claim would not affect any payment plans or reorganization plans that have already been confirmed, nor would it otherwise adversely impact the debtor because Centex is only seeking to recover from the debtors' insurance proceeds and not directly from the bankruptcy estate.

48. Third, even though the debtors' insurance contains a \$2,000,000 deductible, the insurance policies provide that if the debtors are unable to pay the deductible amount or any

portion thereof, the insurers have an obligation to pay damages to satisfy a judgment or pay a settlement on behalf of the debtors, including the deductible amount or any portion thereof.

49. Further, the maximum exposure of the debtors is approximately \$2,000,000 per policy, an amount that will have little effect on the bankruptcy estate which, according to the Debtors' schedules, are comprised of \$261 million in assets and \$431 million in liabilities.

## **2. Length of Delay**

50. Approximately twenty-four months have passed from the expiration of the Claims Bar Date and the filing of this Motion to Enlarge. This is not a significant lapse of time that could impact or delay the administration of the Debtors' pre-confirmation estates, especially because Centex is only seeking to recover the applicable insurance proceeds from the Debtors' insurers and not directly from the bankruptcy estate. Courts in this jurisdiction have permitted late filings based upon excusable neglect in cases where the delay at issue was much greater than in the present case. See *Chemetron Corp. v. Jones*, 72 F.3d 341, 350 (3d Cir. 1995) (fact that claim was filed four years after bar date and two years after plan was confirmed did not mandate a conclusion that there was no excusable neglect).

## **3. Reason for the Delay**

51. Centex never delayed in its effort to prosecute its indemnity claims against Campbell, which was brought in response to the State Action filed nearly nine months after the August 31, 2009 Claims Bar Date. Upon receipt of Plaintiffs' Statutory Claim, Centex diligently proceeded to inspect and repair the implicated homes pursuant to California's Right to Repair Act. During the course of the repair process that spanned over a year, Centex inspected and repaired defect claims at sixty-nine homes, and participated in seven mediation sessions with the homeowners to resolve repair offer disputes. It was neither necessary nor appropriate for Centex

to pursue its indemnity claim against Campbell during the repair process, as Plaintiffs had not commenced legal action for damages and Centex could not determine whether the homeowners' claims would result in litigation. When Plaintiffs eventually filed the State Action on or about June 1, 2010, and clarified their damages claim in their settlement demand in late April 2011, the Claims Bar date had already passed, and the Debtors' reorganization plan confirmed by the Court.

52. Upon filing of the Complaint by Plaintiffs in the State Action, Centex was bound by the State Action's complex litigation protocol to proceed under a Case Management Order setting forth detailed guidelines governing each facet of pleading, discovery, pretrial and settlement matters in the State Action, including a timeline for Centex to file its indemnity cross-complaint against the implicated subcontractors. Centex moved diligently to seek relief from this Court to prosecute its cross-complaint against Campbell. As such, there was no delay on the part of Centex.

#### **4. Good Faith Analysis**

53. Centex has acted in good faith at all times. When the statutory repair process was completed and Plaintiffs' damages claim became clear in the State Action, Centex moved quickly to seek relief from the Court.

54. Therefore, the totality of the circumstances support a conclusion that any "delay" on the part of Centex was excusable, and the Motion to Enlarge should be granted.

#### **D. The Court Should Exercise Its Equitable Powers to Enlarge the Claims Bar Date**

55. In the alternative, Centex submits that this Court should exercise its equitable powers to enlarge the Claims Bar Date and allow Centex to file its proof of claim. The Bankruptcy Court is a court of equity, and may use its equitable powers in the administration of a



bankruptcy estate as long as the Court adheres to the confines of the Bankruptcy Code. *Pioneer*, 507 U.S. at 389; See also *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1982).

Bankruptcy Rule 9006(b)(1) grants the Bankruptcy Court discretionary power to enlarge the Claims Bar Date and to allow a claimant to file a late claim. Moreover, section 105(a) of the Bankruptcy Code authorizes the Court to “issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

56. Centex has acted in good faith and its “failure” to file a timely proof of claim was not the result of any inadvertence, neglect, or mistake caused by Centex. Centex's indemnity claims against Campbell did not arise until the Claims Bar Date had passed, and after Plaintiffs' filing of the State Action in June, 2010. In fact, it was not until Plaintiffs' forty-six million dollar settlement demand in late April, 2011 that the magnitude of Campbell's indemnity liability to Centex became clear. Once Centex discovered the full extent of Plaintiffs' claims, Centex diligently took steps to enlarge the Claims Bar Date to file a proof of claim in this case.

57. In the event that the Claims Bar Date is not expanded and Centex's claim is thereby deemed late filed, Centex will be unfairly prejudiced because it will suffer irreparable injury, loss, and damages. Thus, Centex respectfully requests that this Court exercise its equitable powers to consider the Proof of Claim timely filed.

## VI. CONCLUSION

WHEREFORE, based on the foregoing, Centex respectfully requests this Court (a) grant the Motion, (b) grant Centex fourteen (14) days from the entry of the Order approving the Motion to Enlarge to file its Claim which will be deemed as timely filed; and (c) for such other and further relief as this Court deems just and proper.

Dated: September \_\_, 2011  
Wilmington, Delaware

SULLIVAN • HAZELTINE • ALLINSON LLC

By: 

William A. Hazeltine (Del. I.D. No. 3294)  
901 North Market Street, Suite 1300  
Wilmington, DE 19801  
Telephone: (302) 428-8191

*Attorneys for Centex Homes, Centex Real  
Estate Holding, L.P., Centex Real Estate  
Corporation, and Nomas Corp.*

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

In re:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 09-12074 (KJC)  
Jointly Administered

**Obj. Deadline: Sept. 14, 2011 @ 4:00 p.m.**  
**Hearing Date: Sept. 21, 2011 @ 1:30 p.m.**

**NOTICE OF MOTION**

PLEASE TAKE NOTICE THAT on September 2, 2011, Centex Homes, *et al.* filed their attached *Motion for Entry of an Order Enlarging the Claims Bar Date* (the "Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

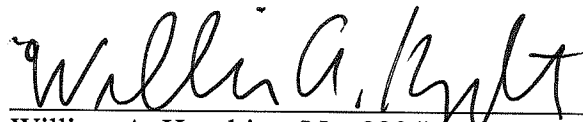
PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be made in writing, filed with the Bankruptcy Court, 824 Market Street, Wilmington, Delaware 19801 and served so as to actually be received by the undersigned counsel for the Debtors on or before **September 14, 2011 at 4:00 p.m. prevailing Eastern time.**

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held before the Honorable Kevin J. Carey at the Bankruptcy Court, 5<sup>th</sup> Floor, Courtroom 5, on **September 21, 2011 at 1:30 p.m. prevailing Eastern time.**

**PLEASE TAKE FURTHER NOTICE THAT 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: September 2, 2011  
Wilmington, Delaware

**SULLIVAN • HAZELTINE • ALLINSON LLC**

A handwritten signature in black ink, appearing to read "William A. Hazeltine", written over a horizontal line.

William A. Hazeltine (No. 3294)  
901 North Market Street, Suite 1300  
Wilmington, DE 19801  
Tel: (302) 428-8191  
Fax: (302) 428-8195

*Attorneys for Centex Homes, Centex Real  
Estate Holding, L.P., Centex Real Estate  
Corporation, and Nomas Corp.*

**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

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 Entry of an Order Enlarging the Claims Bar Date; and it appearing that the Court has jurisdiction in this matter; and it appearing that notice of the Motion as set forth therein is sufficient, and that no other or further notice need be provided; and after consideration of any responses, objections, answers, and replies to the Motion; and after due deliberation and sufficient cause appearing therefore, it is hereby:

ORDERED that the Motion is Granted in all respects; and it is further

ORDERED that Centex shall have fourteen (14) days from the entry of date of the entry of this Order to file its Claim, which Claim will be deemed as timely filed

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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.

ORDERED that this Court shall retain jurisdiction with respect to all matters arising from  
or in relation to the implementation of this Order.

Dated: September \_\_\_\_, 2011

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

**CERTIFICATE OF SERVICE**

I, William A. Hazeltine, hereby certify that on the 2<sup>nd</sup> day of September 2011, I caused a copy of the foregoing *Motion of Centex Homes, et al. for Entry of an Order Enlarging the Claims Bar Date* 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.

September 2, 2011  
Date

/s/ William A. Hazeltine  
William A. Hazeltine

David G. Aelvoet, Esq.  
Linebarger Goggan Blair & Sampson LLP  
Travis Building, 711 Navarro, Suite 300  
San Antonio, TX 78205  
(Counsel to Bexar County)

Christopher M. Alston, Esq.  
Foster Pepper PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101  
(Counsel to JELD-WEN, inc.)

Sanjay Bhatnagar, Esq.  
Cole, Schotz, Meisel, Forman & Leonard, P.A.  
500 Delaware Avenue, Suite 1410  
Wilmington, DE 19801  
(Counsel to CNH Capital America, LLC)

Brian W. Bisignani, Esq.  
Post & Schell, P.C.  
17 North 2nd Street, 12th Floor  
Harrisburg, PA 17101-1601  
(Counsel to Aon Consulting)

Robert McL. Boote, Esq.  
Ballard Spahr Andrews & Ingersoll, LLP  
1735 Market Street, 51st Floor  
Philadelphia, PA 19103-7599  
(Counsel to Westchester Fire Insurance Company  
and ACE USA)

David Boyle  
Airgas, Inc.  
259 Radnor-Chester Road, Suite 100  
P.O. Box 6675  
Radnor, PA 19087-8675

Andrew Cardonick, Esq.  
Greenberg Traurig, LLP  
77 West Wacker Drive, Suite 3100  
Chicago, IL 60601  
(Counsel to Grace Bay Holdings, II, LLC)

Craig W. Carlson, Esq.  
The Carlson Law Firm, P.C.  
P.O. Box 10520  
Killeen, TX 76547-0520  
(Counsel to Juanita Stace)

Scott T. Citek, Esq.  
Lamm & Smith, P.C.  
3730 Kirby Drive, Suite 650  
Houston, TX 77098  
(Counsel to Bay Oil Company)

Theodore A. Cohen, Esq.  
Sheppard, Mullin, Richter & Hampton, LLP  
333 South Hope Street, 48th Floor  
Los Angeles, CA 90071  
(Counsel to Southwest Management, Inc.)



David V. Cooke, Esq.  
Assistant City Attorney - Municipal Operations  
201 West Colfax Avenue, Dept. 1207  
Denver, CO 80202-5332  
(Counsel to the City and County of Denver)

Scott D. Cousins, Esq.  
Dennis A. Melero, Esq.  
Greenberg Traurig, LLP  
1007 North Orange Street, Suite 1200  
Wilmington, DE 19801  
(Counsel to Grace Bay Holdings, II, LLC)

David N. Crapo, Esq.  
Gibbons P.C.  
One Gateway Center  
Newark, NJ 07102-5310  
(Counsel to Southwest Management, Inc.)

Raniero D. D'Aversa, Jr., Esq.  
Laura D. Metzger, Esq.  
Weston T. Eguchi, Esq.  
Orrick, Herrington & Sutcliffe LLP  
666 Fifth Avenue  
New York, NY 10103-0001  
(Counsel to Rabobank International)

Tobey M. Daluz, Esq.  
Joshua E. Zuger, Esq.  
Ballard Spahr Andrews & Ingersoll, LLP  
919 North Market Street, 12th Floor  
Wilmington, DE 19801  
(Counsel to Westchester Fire Insurance Company  
and ACE USA)

Robert J. Dehney, Esq.  
Morris Nichols Arsht & Tunnell LLP  
1201 North Market Street, 18th Floor  
P.O. Box 1347  
Wilmington, DE 19899-1347  
(Counsel to D.R. Horton, Inc.)

John P. Dillman, Esq.  
Linebarger Goggan Blair & Sampson LLP  
P.O. Box 3064  
Houston, TX 77253-3064  
(Counsel to Cypress-Fairbanks ISD,  
Fort Bend County, and Harris County)

Mark W. Eckard, Esq.  
Reed Smith LLP  
1201 North Market Street, Suite 1500  
Wilmington, DE 19801  
(Counsel to CIT Technology  
Financing Services, Inc.)

William R. Firth, III, Esq.  
Gibbons P.C.  
1000 North West Street, Suite 1200  
Wilmington, DE 19801  
(Counsel to Southwest Management, Inc.)

Kevin B. Fisher, Esq.  
Seth Mennillo, Esq.  
Paul, Hastings, Janofsky & Walker LLP  
55 Second Street, 24th Floor  
San Francisco, CA 94105  
(Counsel to Wells Fargo Bank, N.A.)

John M. Flynn, Esq.  
Carruthers & Roth, P.A.  
235 North Edgeworth Street  
P.O. Box 540  
Greensboro, NC 27401  
(Counsel to Arrowood Indemnity Company)

Christopher J. Giaimo, Jr., Esq.  
Katie A. Lane, Esq.  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5339  
(Counsel to the Official Committee  
of Unsecured Creditors)

Adam C. Harris, Esq.  
David J. Karp, Esq.  
Schulte Roth & Zabel LLP  
919 Third Avenue  
New York, NY 10022  
(Counsel to DK Acquisition Partners, L.P.)

Paul N. Heath, Esq.  
Richards, Layton & Finger, P.A.  
One Rodney Square  
920 North King Street  
Wilmington, DE 19801  
(Counsel to Wells Fargo Bank, N.A.)

David G. Hellmuth, Esq.  
Hellmuth & Johnson, PLLC  
10400 Viking Drive, Suite 500  
Eden Prairie, MN 55344  
(Counsel to FCA Construction Company, LLC)

Melody C. Hogston  
Royal Mouldings Limited  
P.O. Box 610  
Marion, VA 24354

Eric H. Holder, Jr., Esq.  
U. S. Attorney General  
Department of Justice –  
Commercial Litigation Branch  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

James E. Huggett, Esq.  
Amy D. Brown, Esq.  
Margolis Edelstein  
750 Shipyard Drive, Suite 102  
Wilmington, DE 19801  
(Counsel to Eduardo Acevedo, et al.)

IKON Financial Services  
Attn: Bankruptcy Administration  
1738 Bass Road  
P.O. Box 13708  
Macon, GA 31208-3708

Internal Revenue Service  
Attn: Insolvency Section  
2970 Market Street, Mail Stop 5-Q30.133  
P.O. Box 7346  
Philadelphia, PA 19101-7346

Thomas W. Isaac, Esq.  
Dietrich, Glasrud, Mallek & Aune  
5250 North Palm Avenue, Suite 402  
Fresno, CA 93704  
(Counsel to Wilson Homes, Inc.)

Neal Jacobson, Esq.  
Senior Trial Counsel  
Securities and Exchange Commission  
3 World Financial Center, Suite 400  
New York, NY 10281

Michael J. Joyce, Esq.  
Cross & Simon, LLC  
913 North Market Street, 11th Floor  
Wilmington, DE 19801  
(Counsel to Arrowood Indemnity Company)

Thomas L. Kent, Esq.  
Paul, Hastings, Janofsky & Walker LLP  
75 East 55th Street, 1st Floor  
New York, NY 10022  
(Counsel to Wells Fargo Bank)

Gary H. Leibowitz, Esq.  
Cole, Schotz, Meisel, Forman & Leonard, P.A.  
300 East Lombard Street, Suite 2600  
Baltimore, MD 21202  
(Counsel to CNH Capital America, LLC)

Louisiana-Pacific Corporation  
Attn: Bruce J. Iddings  
P.O. Box 4000-98  
Hayden Lake, ID 83835-4000  
(Top 50)

Cliff W. Marcek, Esq.  
Cliff W. Marcek, P.C.  
700 South Third Street  
Las Vegas, NV 89101  
(Counsel to Edward and Gladys Weisgerber)

Dan McAllister  
San Diego County Treasurer-Tax Collector,  
Bankruptcy Desk  
1600 Pacific Highway, Room 162  
San Diego, CA 92101

David B. McCall, Esq.  
Gay, McCall, Issacks, Gordon & Roberts, P.C.  
777 East 15th Street  
Plano, TX 75074  
(Counsel to the Collin County Tax  
Assessor/Collector)

Frank F. McGinn, Esq.  
Bartlett Hackett Feinberg, P.C.  
155 Federal Street, 9th Floor  
Boston, MA 02110  
(Counsel to Iron Mountain  
Information Management, Inc.)

Joseph J. McMahon, Jr., Esq.  
Office of the United States Trustee  
844 King Street, Suite 2207  
Lock Box 35  
Wilmington, DE 19801

Joseph McMillen  
Midlands Claim Administrators, Inc.  
3503 N.W. 63rd Street, Suite 204  
P.O. Box 23198  
Oklahoma, OK 73123

Kathleen M. Miller, Esq.  
Smith, Katzenstein & Furlow LLP  
800 Delaware Avenue, 7th Floor  
P.O. Box 410  
Wilmington, DE 19801  
(Counsel to Airgas, Inc.)

Sheryl L. Moreau, Esq.  
Missouri Department of Revenue,  
Bankruptcy Unit  
P.O. Box 475  
Jefferson City, MO 65105-0475

Charles J. Pignuolo, Esq.  
Devlin & Pignuolo, P.C.  
1800 Bering Drive, Suite 310  
Houston, TX 77057  
(Counsel to Partners in Building, L.P.)

Michael Reed, Esq.  
McCreary, Veselka, Bragg & Allen, P.C.  
P.O. Box 1269  
Round Rock, TX 78680  
(Counsel to Local Texas Taxing Authorities)

Jonathan Lee Riches  
Federal Medical Center  
P.O. Box 14500  
Lexington, KY 40512

Debra A. Riley, Esq.  
Allen Matkins Leck Gamble Mallory & Natsis LLP  
501 West Broadway, 15th Floor  
San Diego, CA 92101  
(Counsel to D.R. Horton, Inc.)

Randall A. Rios, Esq.  
Timothy A. Million, Esq.  
Munsch Hardt Kopf & Harr, PC  
700 Louisiana, 46th Floor  
Houston, TX 77002  
(Counsel to Cedar Creek Lumber, Inc.)

Saverio M. Rocca, Esq.  
Assistant General Counsel  
ACE USA  
436 Walnut Street, 4th Floor - WA04K  
Philadelphia, PA 19106

George Rosenberg, Esq.  
Assistant Arapahoe County Attorney  
5334 South Prince Street  
Littleton, CO 80166  
(Counsel to Arapahoe County Treasurer)

Howard C. Rubin, Esq.  
Kessler & Collins, P.C.  
2100 Ross Avenue, Suite 750  
Dallas, TX 75201  
(Counsel to CRP Holdings B, L.P.)

Bradford J. Sandler, Esq.  
Jennifer R. Hoover, Esq.  
Jennifer E. Smith, Esq.  
Benesch, Friedlander, Coplan & Aronoff LLP  
222 Delaware Avenue, Suite 801  
Wilmington, DE 19801  
(Counsel to the Official Committee  
of Unsecured Creditors)

Secretary of State  
Franchise Tax  
Division of Corporations  
P.O. Box 7040  
Dover, DE 19903

Secretary of Treasury  
Attn: Officer, Managing Agent or General Agent  
P.O. Box 7040  
Dover, DE 19903

Securities & Exchange Commission  
Attn: Christopher Cox  
100 F Street, NE  
Washington, DC 20549

Securities & Exchange Commission  
Bankruptcy Unit  
Attn: Michael A. Berman, Esq.  
450 Fifth Street NW  
Washington, DC 20549

Ellen W. Slights, Esq.  
Assistant United States Attorney  
U.S. Attorney's Office  
1007 Orange Street, Suite 700  
P.O. Box 2046  
Wilmington, DE 19899

Tennessee Department of Revenue  
c/o Tennessee Attorney General's Office,  
Bankruptcy Division  
P.O. Box 20207  
Nashville, TN 37202-0207

Kimberly Walsh, Esq.  
Assistant Attorney General  
Texas Comptroller of Public Accounts,  
Bankruptcy & Collections Division  
P.O. Box 12548  
Austin, TX 78711-2548

Christopher A. Ward, Esq.  
Shanti M. Katona, Esq.  
Polsinelli Shughart PC  
222 Delaware Avenue, Suite 1101  
Wilmington, DE 19801  
(Counsel to SunTrust Bank)

Paul M. Weiser, Esq.  
Buchalter Nemer  
16435 North Scottsdale Road, Suite 440  
Scottsdale, AZ 85254-1754  
(Counsel to Elwood HA, L.L.C.)

Elizabeth Weller, Esq.  
Linebarger Goggan Blair & Sampson LLP  
2323 Bryan Street, Suite 1600  
Dallas, TX 75201  
(Counsel to Dallas County and Tarrant County)

Duane D. Werb, Esq.  
Julia B. Klein, Esq.  
Werb & Sullivan  
300 Delaware Avenue, Suite 1300  
Wilmington, DE 19801  
(Counsel to CRP Holdings B, L.P.)

Joanne B. Wills, Esq.  
Sally E. Veghte, Esq.  
Klehr, Harrison, Harvey, Branzburg & Ellers LLP  
919 Market Street, Suite 1000  
Wilmington, DE 19801  
(Counsel to Rabobank International)

Jennifer St. John Yount, Esq.  
Jennifer B. Hildebrandt, Esq.  
Paul, Hastings, Janofsky & Walker, LLP  
515 South Flower Street, Twenty-Fifth Floor  
Los Angeles, CA 90071  
(Counsel to Wells Fargo Foothill, LLC)

Sean M. Beach, Esq.  
Donald J. Bowman, Jr., Esq.  
Robert F. Poppiti, Jr., Esq.  
Young Conaway Stargatt & Taylor, LLP  
The Brandywine Building  
1000 West Street, 17th Floor  
P.O. Box 391  
Wilmington, DE 19899-0391  
(Counsel to the Reorganized Debtors)

Aaron G. York, Esq.  
Sacks Tierney P.A.  
4250 North Drinkwater Blvd., Fourth Floor  
Scottsdale, AZ 85251  
(Counsel to the Reorganized Debtors)