

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

IN RE:)	Chapter 11
)	
BUILDING MATERIALS HOLDING CORPORATION,¹)	Case No. 09-12074 (KJC)
)	
Reorganized Debtor.)	Jointly Administered
)	
)	Ref. Docket Nos. 1881 and 1933
)	
)	Hearing Date: Nov. 1, 2011 at 1:00 p.m. (ET)
)	

JOINT PRETRIAL MEMORANDUM CONCERNING (1) MOTION OF CENTEX HOMES, ET AL. FOR ENTRY OF ORDER ENLARGING THE CLAIMS BAR DATE [DOCKET NO. 1933]; AND (2) MOTION OF CENTEX HOMES, ET AL. FOR RELIEF FROM THE DISCHARGE INJUNCTION [DOCKET NO. 1881]

Building Materials Holding Corporation (“*BMHC*”) and its affiliates, as reorganized debtors (collectively, the “*Reorganized Debtors*” or “*Debtors*”), on the one hand, and Centex Homes (“*Centex*”), Centex Real Estate Holding, L.P., Centex Real Estate Corporation and Nomas Corp. (collectively, the “*Centex Parties*”), on the other hand, pursuant to the Chamber Procedures for Honorable Kevin J. Carey (Effective April 1, 2008) and the General Order Re: Pretrial Procedures in Adversary Proceedings Set for Trial Before Judge Kevin J. Carey, respectfully submit this Joint Pretrial Memorandum Concerning the (1) Motion of Centex Homes, et al. for Entry of Order Enlarging the Claims Bar Date [Docket No. 1933] (the “*Bar Date Enlargement Motion*”); and (2) the Motion of Centex Homes, et al. for Relief from the Discharge Injunction [Docket No. 1881] (the “*Discharge Relief Motion*”):

¹ The Reorganized Debtor in this proceeding and the last four digits of its tax identification number are as follows: Building Materials Holding Corporation (4269), with a mailing address of 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

BASIS OF JURISDICTION

1. The Court has jurisdiction over the Bar Date Enlargement Motion and the Discharge Relief Motion pursuant to 28 U.S.C. § 157 and 1334, Rule 9024 of the Federal Rules of Bankruptcy Procedure 9024 and Rule 60(b) of the Federal Rules of Civil Procedure.
2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).
3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

STATEMENT OF UNCONTESTED FACTS²

1. Centex is a party in interest in these chapter 11 cases.
2. From 2006 through 2007, Centex developed a residential development known as “Four Leaf Lane” in Corona, California (the “*Four Leaf Lane Project*”).
3. On or about February 10, 2006, Centex and C Construction, Inc. dba Campbell Concrete of California (“*C Construction*”) entered into a Centex Homes Construction Agreement dated February 10, 2006 (the “*Construction Agreement*”). Under the Construction Agreement, C Construction agreed to provide certain materials and labor at the Four Leaf Lane Project.
4. Pursuant to paragraph 21(A) of the Construction Agreement, C Construction also agreed to obtain commercial general liability insurance with the following limits: “\$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.”

² The Centex Parties and the Reorganized Debtors stipulate to these facts only for purposes of the hearing on the Bar Date Enlargement Motion and the Discharge Relief Motion, and not for any other purpose or litigation in any other court.

5. Pursuant to paragraph 7(A) of the Construction Agreement, C Construction provided Centex with a warranty, in relevant part, as follows: “In addition to any other warranty expressly made by Subcontractor or implied by Law, Subcontractor unconditionally guaranties and warrants for the benefit of Centex Homes and its successors and assigns that the Work shall (1) comply with all Laws, [i]ncluding the Right to Repair Act (as defined in Section 23), 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 strict accordance with the Contract Documents and the prevailing standards of the industry (collectively, the ‘Warranty’).”

6. Pursuant to paragraph 22 of the Construction Agreement, C Construction agreed to indemnify Centex, in relevant part, as follows: “Subcontractor shall Indemnify the Indemnified Parties from and against any and all Claims to the extent such Claim(s) arose out of or relate to Subcontractor’s Work.”

7. Section 2 of the Construction Agreement contains a sentence that states: “A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION.”

8. C Construction finished its work on the Four Leaf Lane Project by no later than December 17, 2007.

9. “[I]n certain states such as California, Nevada and Arizona, construction litigation is particularly prevalent.” “Construction Defect Disputes: Getting to Yes without Going to Court” at p. 2, National Association of Homebuilders Study, April 2005 (hereafter “Construction Defect Disputes”), available at http://www.nera.com/67_5030.htm. In those states, all three of

which the Debtor operated in prepetition, sophisticated plaintiffs' lawyers "use websites and mass mailings to target 'virtually every' condominium or townhouse project." *Id.* Further, as reported in 2005, "this successful formula for class action solicitations is now being applied with greater frequency to communities with single-family homes." *Id.*; *see also* "The Liability Insurance Crisis for Builders: Reasons and Responses," prepared for National Association of Home Builders by Jeffrey D. Masters, Sandra C. Stewart, R. Jane Lynch of Cox, Castle & Nicholson LLP, December 2001 ("Only a few years ago, major construction defect litigation was for the most part limited to California, Texas and Florida. In those states, an aggressive plaintiffs' bar and a cottage industry of plaintiff oriented consultants and experts combined to create an environment in which virtually every condominium or townhome project would be hit with a lawsuit. Today, communities of detached single family homes are experiencing an incidence of construction defect litigation nearly as high as attached projects."). As a result, according to the National Association of Homebuilders, "[i]n 2004, the estimated per unit cost of home builder liability was \$2,700, but some home builders reported costs as high as \$15,000 per unit." *Construction Defect Disputes, supra*, at p. 3 (citations omitted).

10. Before the June 16, 2009 Petition Date, the Debtors had approximately 104 construction defect claims pending against them. Since the Petition Date, claimants have asserted or threatened to assert 292 discharged construction defect suits and claims (including right to repair and tenders) against the Debtors, all of which arise out of prepetition construction activities.

11. Pulte/Centex typically has hundreds of construction defect cases pending against it at any given time. Construction defect claims can be, and often are, asserted five to ten years after the construction work is completed.

12. On June 16, 2009 (the "**Petition Date**"), each of the now Reorganized Debtors, including C Construction, filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "**Chapter 11 Cases**") in this Court.

13. On June 26, 2009, the Debtors filed *Debtors' Motion for 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. 106].

14. 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**"). Other than with respect to certain claims inapplicable to the present motions, the Bar Date Order established August 31, 2009 as the bar date (the "**Claims Bar Date**") to file proofs of claim in these Chapter 11 Cases.

15. On July 23, 2009, the Debtors filed a copy of 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))*, in the form approved by the Bar Date Order.

16. On or about July 23, 2009, Centex's regional office in Corona, California received notice of the Claims Bar Date of August 31, 2009.

17. Centex' San Diego Division received notice of the Debtors' bankruptcy in connection with an arbitration hearing entitled *Burrow v. Centex Homes*, prior to the August 31, 2009 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), than the Four Leaf Lane Project.

18. Centex has not filed a proof of claim in these Chapter 11 Cases.

19. 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 *Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications)* [Docket No. 1134] (the "**Plan**").

20. Pursuant to the *Disclosure Statement With Respect to Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009* [Docket No. 764] (the "**Disclosure Statement**"), "the Plan [sought] to preserve the value of the Debtors for their creditors while recognizing and balancing the fact that the Debtors' secured prepetition lenders have direct claims against the Debtors that would result in the Debtors' other creditors receiving no value for their Claims." (Disclosure Statement, p. 1).

21. On January 4, 2010 (the "**Effective Date**"), the Debtors' Plan became effective.

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

Except as otherwise provided in the Plan or this Confirmation Order, the 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, whether or not (a) a Proof of Claim based on such debt is filed or deemed filed pursuant to section 501 of the Bankruptcy Code, (b) a Claim based on such debt is Allowed pursuant to section 502 of the Bankruptcy Code or (c) the Holder of a Claim based on such debt has accepted the plan; 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.

23. 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

24. Since the August 31, 2009 Claims Bar Date, the Debtors have received approximately 85 informal requests or formal motions for relief from the automatic stay and/or discharge injunction. Approximately 75 of these requests or motions involved parties that had not filed proofs of claim by the August 31, 2009 Claims Bar Date. If the requesting claimant had not filed a timely proof of claim, the Debtors only agreed to provide stay or discharge injunction relief, to enable the claimant to pursue insurance proceeds, if the requesting party agreed to ameliorate the financial effects of such relief to the Debtors (or the insurer agreed to waive the deductible).

25. On January 4, 2010, this Court entered an order [Docket No. 1259] approving a stipulation under which Centex, in order to proceed with arbitration on a project unrelated to the Four Leaf Lane Project, agreed that it would “not seek payment under the Policy unless it satisfies directly with the Insurer any such deductible and/or self insured retention.”

26. At present, the Reorganized Debtors are in discussions concerning requests for relief from the discharge injunction on at least 45 pending construction defect suits.

27. On or about September 29, 2009, approximately a month after the Claims Bar Date had passed, the owners of nine homes at the Four Leaf Lane 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 Four Leaf Lane Project.

28. Between September 29, 2009 and August 5, 2010, the homeowners at the Four Leaf Lane 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.

29. 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 the homeowner can file a lawsuit. 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 homeowners' 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 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 homeowners' mediation request.

30. Centex's counsel, Mr. Philip Kopp, sent a letter to C Construction dated October 15, 2009 regarding "Notice of Commencement of Legal Proceedings[,] Four Leaf Lane, Corona, California[,] Our Client: Centex Homes." The first paragraph of the letter read: "We represent Centex Homes ('Centex') as personal counsel in the above-referenced matter. On September 29, 2009, Claimants provided Centex with a written Notice of Claim of Violation of Functionality Standards pursuant to Civil Code section 895, et seq. ('Notice'). A copy of the claim notice is enclosed for your reference. Under California law, this notice has the same force and effect as a notice of commencement of legal proceeding." In the October 15, 2009 letter, Centex demanded that Debtor C Construction "defend and indemnify [Centex] with respect to this matter pursuant to your contract with Centex and California law." (*Id.*).

31. Centex sent a second notice to C Construction with respect to additional homes in the Four Leaf Lane Project by letter dated October 23, 2009, a third notice by letter dated November 9, 2009, a fourth notice by letter dated November 18, 2009, and a fifth notice by letter dated December 3, 2009.

32. The Reorganized Debtors sent a letter dated December 9, 2009 to Centex's counsel, Mr. Philip Kopp of the Newmeyer & Dillion firm, stating in the first paragraph: "This letter is written in response to yours dated October 15, 2009 and December 9, 2009 wherein you have requested that C Construction participate in the defense and indemnification of your client, Centex Homes, in the above referenced matter. As we previously advised C Construction's

concrete division is no longer in operations. As such, C Construction can not attend site inspections or offer a repair in this matter.” The second paragraph of the December 9, 2009 letter stated in highlighted text: **“In addition, please note that C Construction filed a petition under Chapter 11 of the bankruptcy code in the Delaware bankruptcy court on June 16, 2009, Case No. 09-12079, and as a result there is an automatic stay in place. For additional information of same, please visit our website at www.bmhcrestructuring.com.”**

33. Centex sent a sixth notice to C Construction with respect to additional homes in the Four Leaf Lane Project by letter dated January 8, 2010, a seventh notice by letter dated February 10, 2010, an eighth notice by letter dated March 23, 2010, a ninth notice by letter dated May 3, 2010, a tenth notice by letter dated June 30, 2010, and an eleventh notice dated August 27, 2010.

34. Between November 10, 2009 and August 31, 2010, Centex conducted several multi-day inspections of sixty-nine homes implicated in the Notices of Claim.

35. Between January 22, 2010 and September 30, 2010, Centex made repair offers on each of the sixty-nine homes inspected during the pre-litigation process. After each inspection, Centex’s counsel sent letters to counsel for the homeowner-plaintiffs, each stating: “Centex observed very few items that were violations of SB800’s residential construction standards.”

36. 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.

37. On or about June 1, 2010, before the repair process under California’s Right to Repair Act was completed, the homeowners in the Four Leaf Lane Project (the “Plaintiffs”)

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.

38. On August 6, 2010, Centex filed a motion to stay the State Action on the basis that the Plaintiffs failed to fully comply with the pre-litigation procedures under California’s Right to Repair Act.

39. 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.

40. On October 25, 2010, Centex filed its Answer to Plaintiffs’ operative complaint in the State Action.

41. On or about November 22, 2010, Centex completed repairs at the last of the Plaintiffs’ homes implicated in the State Action.

42. Following 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.

43. 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 C Construction, among others, based upon the alleged construction defects caused by C Construction during C Construction's performance of work and/or services and/or providing of materials which were incorporated into the development, construction and/or sale of the Four Leaf Lane Project.

44. 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 the amount of \$46,524,000. Plaintiffs contend that the repair cost for concrete hardscape defects and structural defects alone (both within C Construction's scope of work on the Four Leaf Lane Project) exceed \$15,000,000.

45. Prior to Mr. Kopp's current private practice at Newmeyer & Dillion, Mr. Kopp was Centex's in-house counsel overseeing Centex's construction defect litigation in 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 per house. Based on Mr. Kopp's inspection of the subject homes in the State Action, he estimates the settlement exposure for C Construction to be in the same range.

46. Counsel for Centex, Mr. Kopp, sent a letter dated July 18, 2011 to in-house counsel for the Reorganized Debtors, Maureen Thomas, to request that the Reorganized Debtors stipulate to allow Centex to pursue C Construction's insurance for indemnity in the State Action. Centex would not agree to pay the deductible or self-insured retention on the applicable insurance policies. C Construction refused to stipulate.

47. The Reorganized Debtors have determined that the commercial general liability insurance policies that may be applicable to the claims asserted against Reorganized Debtor C

Construction by Centex are (1) Policy Number G18072889, with a policy period of 11/11/2005 to 11/11/2006, issued by ACE American Insurance Company (the “**2005-2006 Policy**”); and (2) Policy Number XSLG2170250A, with a policy period of 11/11/2006 to 11/11/2007, also issued by ACE American Insurance Company (the “**2006-2007 Policy**”). The 2005-2006 Policy has a \$2,000,000 Products/Completed Operations Limit, with a \$2,000,000 Deductible Per Occurrence. The 2006-2007 Policy also has a \$2,000,000 Products/Completed Operations Limit, with a \$100,000 self-insured retention layer and a \$1,900,000 Deductible Per Occurrence.

48. Section IV(1) of the 2005-2006 Policy states: “Bankruptcy or insolvency of the insured or of the insured’s estate will not relieve us of our obligations under this Coverage Part.”

49. Section IV(1) of the 2006-2007 Policy states: “Bankruptcy or insolvency of the insured or the insured’s estate will not relieve us of our obligations under this policy.”

50. In addition, while both insurance policies provide for a Claims Service Organization to investigate, administer, adjust and settle claims and suits, the policies also provide that the insurer “shall not have any duty to defend any such ‘suit.’” Further, both policies state that the insurer “shall have no duty to pay any ‘allocated loss adjustment expense’ within the Deductible amounts with respect to any claim or ‘suit.’” Allocated loss adjustment expenses are essentially expenses and costs associated with investigation, administration, adjustment, settlement or defense of claims and suits.

51. Marsh issued executed Certificate of Insurance (Certificate Number SEA-000950227-01) to Centex Homes, a Nevada Partnership, Centex Real Estate Corp., and Centex Homes—San Diego (collectively, the Centex Parties”) related to the 2005-2006 Policy. Marsh issued executed Certificate of Insurance (Certificate Number SEA-000950227-04) to the Centex Parties related to the 2006-2007 Policy. Marsh was authorized by ACE to issue the documents

referenced in this paragraph to the Centex Parties, as builder of a project under written contract with one or more of the Reorganized Debtors, to indicate additional insured coverage. Marsh's records do not reflect any communication from the Centex Parties questioning or objecting to the form or content of Certificate Number SEA-000950227-01 or Certificate Number SEA-000950227-04.

52. The Reorganized Debtors' deductible obligations to ACE American Insurance Company are secured by prepetition letters of credit in the amount of \$45,638,000 (down from \$56,870,000 in January 2010).

53. Section 4.3.2.4 of the confirmed Plan provides, in relevant part, that "Prepetition Letters of Credit shall continue to collateralize all obligations under Insurance Policies and Agreements . . . secured by Prepetition Letters of Credit . . . and such Prepetition Letters of Credit and obligations shall survive the Effective Date unaffected and unaltered by the Plan."

54. The Debtors' sales revenues have declined from approximately \$3.2 billion in 2006 to approximately \$1.3 billion in 2008. For the year ending December 31, 2008, the Debtors experienced a loss of \$192,456,000 from continuing operations. While the Reorganized Debtors achieved a positive adjusted EBITDA year to date as of July 31, 2011 (unaudited), they have yet to achieve a positive net income.

55. Centex is now a subsidiary of Pulte Group, Inc., a publicly-traded, national homebuilder. Prior to the companies' merger, during its 2006 fiscal year ending March 31st, Centex generated revenue of \$12.3 billion and pre-tax earnings of \$1.9 billion from more than 39,000 closings. During its 2006 fiscal year ending December 31st, Pulte generated revenue of \$14.1 billion and pre-tax earnings of just over \$1 billion from more than 41,000 closings. By 2010, combined closings had fallen more than 80% to just over 17,000. Similarly, combined

revenues had declined to \$4.5 billion, resulting in an operating loss of \$1.1 billion. Since at least 2007, there has been only one in-house attorney responsible for all Centex claims and litigation nationwide. Centex engages outside counsel, including Mr. Kopp, as it determines necessary.

56. The Debtors performed work on at least 7,000 different construction projects in California and Nevada from September 1, 2001 to the June 16, 2009 Petition Date. Since the Petition Date, 292 construction defect suits and claims have been asserted or threatened against the Debtors. Many of these were resolved pursuant to the stipulations or withdrawals referenced above and, as noted above, the Reorganized Debtors are presently in discussions concerning requests for relief from the discharge injunction on at least 45 pending construction defect suits.

57. The Debtors have had prepetition letters of credit securing their deductible obligations under commercial general liability insurance policies issued since 2002. On the policy in effect from 11/11/2002 to 11/11/2003, the per occurrence deductible is \$500,000. On the policies in effect from 11/11/2003 to 11/11/2005, the deductible is \$1,000,000. On the policy in effect from 11/11/2005 to 11/11/2006, the deductible is \$2,000,000. On the policies in effect from 11/11/2006 to 11/11/2009, the self-insured retention was \$100,000 with a \$1,900,000 deductible. The treatment of allocated loss adjustment expenses vary depending on the policy.

STATEMENT OF MATERIAL FACTS WHICH ARE IN DISPUTE

None.

DAMAGES OR OTHER RELIEF SOUGHT

Pursuant to the Bar Date Enlargement Motion, 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 Bar Date Enlargement Motion to file its proof of claim which will be deemed timely filed.

Pursuant to the Discharge Relief Motion, Centex seeks a modification of the injunction imposed by section 524 and the Debtors' confirmed plan for the limited purpose of allowing Centex to pursue its claims for indemnification and damages against C Construction's liability insurance policies.

Centex agrees not to proceed against C Construction's bankruptcy estate in the event of judgment against C Construction in the State Action in excess of C Construction's insurance coverage. Should C Construction be found liable for Centex's damages in the State Action, to the extent that C Construction'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 C Construction's estate.

In addition, to the extent necessary, Centex also seeks relief from the discharge injunction with respect to the State Action retroactive to March 10, 2011.

LEGAL ISSUES PRESENTED

1. Can Centex demonstrate excusable neglect for not filing a proof of claim by the August 31, 2009 Claims Bar Date? Centex has the burden to prove that its failure to file a timely proof of claim was the result of excusable neglect.³ See *Jones v. Chemetron*, 212 F.3d 199, 205 (3rd Cir. 2000) ("The burden of proving excusable neglect lies with the late-claimant.").

2. Is Centex entitled to relief from the discharge injunction under section 524 and the Debtors' confirmed Plan? Centex bears the burden "to produce evidence that cause exists to grant relief" from the discharge injunction. See *In re DBSI, Inc.*, 407 B.R. 159, 166 (Bankr. D. Del. 2009).

³ Centex acknowledges that its claims for indemnification, defense and damages against C Construction constitute pre-petition claims.

WITNESSES

None.

LIST OF EXHIBITS TO BE ADMITTED WITHOUT OBJECTION

Centex Parties' Exhibits:

1. Centex Homes Construction Agreement (Exh. 1 to Declaration of Philip Kopp in Support of the Motion of Centex Homes, et al. for Entry of an Order Enlarging the Claims Bar Date) ("Kopp Decl.")
2. Letters from Law Offices of Jerry La Cues 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 (Exh. 2 to Kopp Decl.)
3. Letters from Law Offices of Newmeyer & Dillion LLP dated October 15, 2009, October 23, 2009, October 7, 2009, November 9, 2009, November 18, 2009, November 12, 2009, December 3, 2009, January 8, 2010, February 10, 2010, March 23, 2010, May 3, 2010, June 30, 2010, and August 27, 2010 (Exh. 3 to Kopp Decl.)
4. Letter from Lia Stivaletta to Philip Kopp dated December 9, 2009 (Exh. 4 to Kopp Decl.)
5. Exemplar Letters from Newmeyer & Dillion to Law Offices of Jerry La Cues dated January 22, 2010 and September 30, 2010 (Exh. 5 to Kopp Decl.)
6. Complaint in Superior Court of the State of California, County of Riverside, Case No. RIC 10010749, filed on June 1, 2010 (Exh. 6 to Kopp Decl.)
7. Notice of Motion and Motion to Stay All Proceedings Pending Compliance With Civil Code Section 895 et seq. in Lieu of an Answer; Declaration of Jennifer C. Lyons filed August 6, 2010 (Exh. 7 to Kopp Decl.)
8. Answer of Defendants Centex Homes, Centex Real Estate Holding, LP, Centex Real Estate Corporation and Nomas Corp. to First Amended Complaint filed October 25, 2010 (Exh. 8 to Kopp Decl.)
9. Stipulated Case Management Order filed February 25, 2011 (Exh. 9 to Kopp Decl.)
10. Centex Homes' Cross Complaint filed March 22, 2011 (Exh. 10 to Kopp Decl.)
11. Settlement Demand dated April 21, 2011 (Exh. 11 to Kopp Decl.)

12. Letter from Newmeyer & Dillion to Maureen Thomas dated July 18, 2011 (Exh. 12 to Kopp Decl.)

Reorganized Debtors' Exhibits:

1. "Construction Defect Disputes: Getting to Yes without Going to Court," National Association of Homebuilders Study, April 2005
2. "The Liability Insurance Crisis for Builders: Reasons and Responses," prepared for National Association of Home Builders by Jeffrey D. Masters, Sandra C. Stewart, R. Jane Lynch of Cox, Castle & Nicholson LLP, December 2001
3. *Debtors' Motion for 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*, dated June 26, 2009 [Docket No. 106]
4. *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*, dated July 16, 2009 [Docket No. 248]
5. *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))*, dated July 23, 2009 [Docket No. 296]
6. *Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications)*, dated December 17, 2009 [Docket No. 1182]
7. *Motion of Weis Builders, Inc. for Order Granting Modification of the Automatic Stay*, filed September 11, 2009 [Docket No. 597] (without exhibits)
8. *Motion of Weis Builders, Inc. for Entry of an Order Enlarging the Claims Bar Date*, dated October 30, 2009 [Docket No. 817] (without exhibits)
9. Transcript of Motions Hearing Before the Honorable Kevin J. Carey, January 27, 2010, 3:00 p.m.; *In re Building Materials Holding Corporation, et al.*; Case No. 09-12074(KJC)
10. *Combined Order Granting (I) Motion of Weis Builders, Inc. for Entry of an Order Enlarging the Claims Bar Date and (II) Modifying the Plan Injunction*, dated May 27, 2010 [Docket No. 1592]
11. Certified copy of General Liability Policy G18072889 from 11/11/2005 to 11/11/2006 (premium information redacted)

12. Marsh Certificate of Insurance No. SEA-000950227-01 to Certificate Holder Centex Homes, a Nevada Partnership, Centex Real Estate Corp, Centex Homes-San Diego
13. Certified copy of Excess Commercial General Liability Policy XSL G2170250A from 11/11/2006 to 11/11/2007 (premium information redacted)
14. Marsh Certificate of Insurance No. SEA-000950227-04 to Certificate Holder Centex Homes, a Nevada Partnership, Centex Real Estate Corp, Centex Homes-San Diego
15. Irrevocable Letter of Credit Nos. NZS559165 and NZS631209
16. *Order Approving Stipulation By and Between the Debtors and Greystone Homes, Inc. Resolving the Motion of Greystone Homes, Inc. for Relief From the Automatic Stay*, dated September 18, 2009 [Docket No. 636]
17. *Order Approving Stipulation By and Between the Debtors and Ryland Homes of California, Inc., et al., Resolving the Motions of Ryland Homes of California, Inc., Et Al., for Relief From the Automatic Stay*, dated December 16, 2009 [Docket No. 1167]
18. *Order Approving Stipulation Resolving the Request of Greystone Nevada, LLC, Et. Al., for Relief From the Automatic Stay*, dated January 21, 2010 [Docket No. 1332]
19. *Order Approving Stipulation By and Between the Debtors and Centex Homes for Relief From the Automatic Stay*, dated January 4, 2010 [Docket No. 1259]
20. *Order Approving Stipulation Resolving the Request of Christoherson Homes, Inc. and Vintage Meadows Cloverdale, LLC for Relief From the Automatic Stay and the Plan Injunction*, dated February 26, 2010 [Docket No. 1452]
21. *Order Approving Stipulation Resolving the Motion of Pacific Bay Properties for Relief From the Plan Injunction or, in the Alternative, for Relief From the Automatic Stay to Permit Continuation of State Court Litigation*, dated May 19, 2010 [Docket No. 1483]
22. *Order Approving Stipulation Resolving Request of Richmond American for Relief From the Automatic Stay and Plan Injunction*, dated April 26, 2010 [Docket No. 1546]
23. *Order Approving Stipulation Resolving the Motion of Brookfield Homes San Diego Inc. for Relief From the Automatic Stay*, dated May 17, 2010 [Docket No. 1578]

24. *Order Approving Stipulation Resolving the Motion of KB Home Phoenix, Inc. for Relief From the Automatic Stay*, dated May 17, 2010 [Docket No. 1579]
25. *Order Approving Stipulation By and Between the Reorganized Debtors and K. Hovnanian at Bridgeport, Inc. Resolving the Motion of K. Hovnanian at Bridgeport, Inc. for Relief From Automatic Stay*, dated June 28, 2010 [Docket No. 1620]
26. *Order Approving Stipulation Resolving the Request of S&S Homes of the Central Coast, Inc. and Granite Pointe Estates, LLC for Relief From the Automatic Stay and Plan Injunction*, dated August 30, 2010 [Docket No. 1677]
27. *Order Approving Stipulation Resolving the Motion of Torrey Pines Homebuilding Company, LLC and Colrich Communities, LLC for Relief From the Automatic Stay and Plan Injunction*, dated October 8, 2010 [Docket No. 1715]
28. *Order Approving Stipulation Resolving the Request of Nigro Associates et al. for Relief from the Automatic Stay and Plan Injunction*, dated December 20, 2010 [Docket No. 1759]
29. *Order Approving Stipulation Resolving the Request of Greystone Homes, Inc. and Lennar Sales Corp. for Relief From the Automatic Stay and the Plan Injunction*, dated December 28, 2010 [Docket No. 1769]
30. *Order Approving Stipulation Resolving the Request of Greystone Nevada, LLC et al. for Relief From the Plan Injunction*, dated June 9, 2011 [Docket No. 1879]
31. *Order Approving Stipulation Resolving Request of Davidson Communities LLC, et al. for Relief From the Automatic Stay and Plan Injunction*, dated May 12, 2010 [Docket No. 1565]
32. *Order Approving Stipulation Resolving Request of Richmond American et al. for Relief From the Automatic Stay*, dated January 19, 2010 [Docket No. 1323]
33. *Order Approving Stipulation Resolving the Request of Richmond American, et al. for Relief From the Automatic Stay (with Respect to Webb v. Richmond American)*, dated March 16, 2010 [Docket No. 1475]
34. *Order Approving Stipulation Resolving the Request of Richmond American, et al. for Relief From the Automatic Stay (with Respect to Porter v. Richmond American)*, dated March 16, 2010 [Docket No. 1476]
35. *Order Approving Stipulation Resolving the Request of KB Home Nevada, Inc. et al., for Relief From the Automatic Stay*, dated October 13, 2010 [Docket No. 1720]

36. *Order Approving Stipulation Resolving the Request of Richmond American, et al. for Relief From the Plan Injunction*, dated January 31, 2011 [Docket No. 1797]
37. *Order Approving Stipulation Resolving the Request of KB Home Nevada, Inc. et al. for Relief From the Plan Injunction (Re: Leverett v. KB Home Nevada, Inc. -- Paradise Hills)*, dated June 2, 2011 [Docket No. 1874]
38. *Order Approving Stipulation Resolving the Request of Arcadia Homes, Inc. et al. for Relief From the Plan Injunction*, dated September 20, 2011 [Docket No. 1944]
39. *Notice of Withdrawal of Motion of Pulte Home Corporation for Relief From Automatic Stay*, dated February 17, 2010 [Docket No. 1418]
40. *Withdrawal of Motion for Relief From Automatic Stay*, dated February 23, 2010 [Docket No. 1441]
41. *Notice of Withdrawal of Motion to Lift Automatic Stay of Proceedings*, dated March 10, 2010 [Docket No. 1465]
42. *Notice of Withdrawal of Docket Nos. 813 and 1020*, dated August 9, 2010 [Docket No. 1652]
43. *Withdrawal of Motion of Rucker Construction, Inc. for Relief From Stay Under Section 11 USC 362 of the Bankruptcy Code*, dated December 10, 2010 [Docket No. 1756]
44. *Notice of Withdrawal of Docket No. 1837*, dated April 26, 2011 [Docket No. 1852]
45. *October 25, 2011 Letter to Steven S. Wang, Newmeyer & Dillion, LLP, from Scott Cady, ACE American Insurance Company (admitted only for the purpose of showing statements were made and not for the truth of the matters asserted)*

INTERROGATORIES/DEPOSITIONS

None.

ESTIMATE OF TRIAL LENGTH

Given that no facts are in dispute, the parties estimate a hearing of one hour to one hour and thirty minutes.

Dated: Wilmington, Delaware
October 27, 2011

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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---- and ----

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SULLIVAN HAZELTINE & ALLINSON LLC

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ATTORNEYS FOR THE CENTEX PARTIES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

BUILDING MATERIALS
HOLDING CORPORATION,¹

Reorganized Debtor.

Chapter 11

Case No. 09-12074 (KJC)


AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS
NEW CASTLE COUNTY)

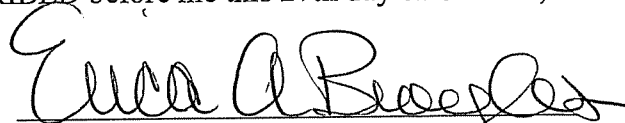
Casey S. Cathcart, being duly sworn according to law, deposes and says that she is employed by the law firm of Young Conaway Stargatt & Taylor, LLP, co-counsel to the Reorganized Debtor, and that on October 27, 2011, she caused a copy of the *Joint Pretrial Memorandum Concerning (1) Motion of Centex Homes, et al. for Entry of Order Enlarging the Claims Bar Date and (2) Motion of Centex Homes, et al. for Relief From the Discharge Injunction* to be served as indicated upon the following parties:

William A. Hazeltine, Esq.
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(Counsel to Centex Homes, et al.)
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(Counsel to Centex Homes, et al.)
First Class Mail and Electronic Mail


Casey S. Cathcart

SWORN TO AND SUBSCRIBED before me this 27th day of October, 2011.


Notary Public
My Commission Expires: 9/6/2013

**ERICA A. BROYLES
NOTARY PUBLIC
STATE OF DELAWARE**

My commission expires Sept 6, 2013.

¹ The last four digits of the Reorganized Debtor's tax identification number are 4269. The Reorganized Debtor's mailing address is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.