IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	) Chapter 11
	)
BUILDING MATERIALS HOLDING.,[1] CORPORATION, et al.,	) Case No. 09-12074 (KJC)) (Jointly Administered)
	)
Debtors.	) Re: Docket I.D. 543, 591, 593, and 594) Hrg Date: October 7, 2009 @ 11:00am

REPLY IN SUPPORT OF MOTION AUTHORIZING CLASS PROOF OF CLAIM OR, IN THE ALTERNATIVE, TO EXTEND TIME FOR INDIVIDUAL CLASS MEMBERS TO FILE PROOFS OF CLAIM

COMES NOW, Pedro Alvarado ("Movant") on behalf of himself and the proposed class of individuals employed by, or formerly employed by Building Materials Holding Corporation, Selectbuild Construction, Inc., Selectbuild Southern California, Inc., and/or H.N.R. Framing Systems, Inc. (the "Prospective Class" collectively with Movant referred to herein as the "Affected Parties"), and submits this Reply in Support of the Motion Authorizing Class Proof Of Claim Or, In The Alternative, To Extend Time For Individual Class Members To File Proofs Of Claim (the "Motion") and in response to the Debtors' ("Debtors' Objection") to the Motion, as well as the Joinders of Wells Fargo Bank, N.A. and The Official Committee of Unsecured Creditors (Joinders along with Debtors' Objection collectively referred to as the "Objections"). In support thereof Movant represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction to hear this Motion pursuant to Title 28, Sections 157 and 1334 of the United States Code. *See* 28 U.S.C. §§ 157, 1134. This is a core proceeding

[1] The Debtors in these cases, together with the last four digits of the federal tax identification number of each Debtor, are as follows: Building Materials Holdings Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

pursuant to Title 28, Section 157(b) of the United State Code. *See* 28 U.S.C. § 157(b). Venue is appropriate pursuant to Title 28, Sections 1408 and 1409 of the United States Code. *See* 28 U.S.C. § 1408, 1409.

BACKGROUND

2. The Debtors' Objection to the present Motion effectively denies innocent individuals, who have been wronged by the Debtors' employment practices, of their day in Court. Putative class representative Pedro Alvarado respectfully requests that the Court not countenance such a result.

3. The issue presented is one of fundamental due process -- the Debtors seek to disallow and permanently expunge the claims of the Affected Parties, who in all likelihood, have no idea that they have claims stemming from the Debtors' violation of federal and state wage and hour requirements. The Debtors believe this permissible because each claimant was purportedly sent a generic Bar Date Notice and Proof of Claim Form, which contained no indication of the type of claim that the Affected Parties may have. Additionally, the time between the date of service of the bar date notice and the claims bar deadline was only approximately five (5) weeks.

4. Through the motion, Movant, as class representative, seeks to preserve the rights of thousands of current and former employees of the Debtors, by filing a class claim. The Debtors seek to forever bar the class of employees from seeking redress against the Debtors, because it might "gum up the works" in the Debtors' own aspirations for a quick and easy Chapter 11 proceeding. Obj. ¶21 (citation omitted). Perhaps the Debtors should have thought of that before subjecting itself to the jurisdiction of the Bankruptcy Court to avoid liability to the Affected Parties, most of whom remain unaware that their rights were violated. The rights of thousands of present and former employees whose rights under the California Labor Code were

violated should not be abolished in favor of the interests of one of the largest construction companies in the country.

5. At the very least, Movant should be permitted to file a class claim on behalf of all similarly-situated employees, which is provisionally allowed pending a class certification decision from either this Court, or in the underlying class action litigation. Moreover, Movant respectfully requests an opportunity for full legal briefing and an evidentiary hearing on the issue of class certification. As discovery and full briefing on this issue are required, it cannot be accomplished in the context of this Reply, which is why Movant did not seek to burden this Court with deciding class certification issues within the context of this Motion. Alternatively, at the very least, Movant requests that the Debtors be required to put the Affected Parties on notice of their claims, and give them a reasonable opportunity to submit their own individual proof of claim forms.

LEGAL ARGUMENT

A. Representative Litigation Serves Fundamental Judicial Interests.

6. Congress enacted the Bankruptcy Code with the intention of "open[ing] bankruptcy proceedings to the widest possible range of 'players'" *In re Zenith Laboratories, Inc.*, 104 B.R. 659, 663 (D. N.J. 1989); *See also In re The Charter Co., et al.*, 876 F.2d 866, 870 (11th Cir. 1989) (finding the Bankruptcy Code's definition of the term, 'code,' "permits the broadest possible relief in the bankruptcy court").

7. Class proof of claims and class actions serve interests vital to the administration of justice.[2] These mechanisms "increase[] the likelihood that the small claimant will be represented and thereby 'serve[] a deterrent function by ensuring that *wrongdoers bear the costs*

[2] Representative litigation and bankruptcy matters share an extensive history, as "some of the earliest class suits were the creditors' bills that preceded the 1898 Code." *In re American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988).

of their activities.'" *In re Zenith Laboratories, Inc.*, 104 B.R. at 662 (emphasis added). Further, individuals are often ignorant of "the full scope of their rights in bankruptcy," and these class mechanisms serve as "the only practical means of permitting small claims to be brought." *Id.* For many individuals, it is a class action or nothing, and these individual claims "cannot be avoided by a wrongdoer merely because of their individual size." *Id.*

B. Movant is Permitted to File A Class Proof Of Claim.

8. A proof of claim shall be executed by the creditor or the creditor's authorized agent[.]" *See* FED. R. BANKR. P. 3001. The Movant is a putative agent capable of filing a class proof of claim on behalf of the Affected Parties for purposes of "keep[ing] the case alive pending the decision on certification." *In re Kaiser Group Int'l, Inc., et al.*, 278 B.R. 58, 63 (Bankr. D. Del. 2002) (quoting *In re American Reserve Corp.*, 840 F.2d at 493). The Movant's status "as a putative representative is at least minimally sufficient to authorize his agency for class filing purposes, and there is no apparent reason to prohibit him from acting in that capacity." *Id.* (quoting *In re Charter Co.*, 876 F.2d 866, 873 (11th Cir. 1989)). An interpretation to the contrary would improperly limit the use of class actions in bankruptcy proceedings to those instances where a state or federal court had previously appointed a class representative to take action on behalf of the class. *See id.* (citing *In re Zenith Laboratories, Inc.*, 104 B.R. at 663). This conclusion is clearly inapposite to the Bankruptcy Code and the intent underlying the enactment of Bankruptcy Rules 7023 and 9014. *See* FED. R. BANKR. P. 7023, 9014. *See also In re United Companies Financial Corp., et al.*, 276 B.R. 368, 372 (Bankr. D. Del. 2002).

C. The Courts Permit The Filing Of A Class Proof Of Claim.

9. A court may exercise its discretion in favor of allowing a class proof of claim.[3] *See id.* Rule 7023 of the Bankruptcy Rules permits class certification in adversary actions. *See* Fed. R. Bankr. P. 7023. Rule 9014 expands the scope to contested matters, in which "[t]he court may at any stage in a particular matter direct that one or more of the rules in Part VII shall apply." Fed. R. Bankr. P. 9014. The Movant invoked the powers of Rules 9014 and 7023 in seeking authority to file the class proof of claim on behalf of the Affected Parties. *See* Motion, ¶ 13.

10. A putative class representative may file a class claim on behalf of all others similarly-situated notwithstanding the lack of class certification. *See In re Kaiser Group Int'l, Inc.*, 278 B.R. at 63 (citing *In re Zenith Laboratories, Inc.*, 104 B.R. at 663). The courts have widely recognized this principle. *See also In re United Companies Financial Corp., et al.*, 277 B.R. 597, 600-01 (Bankr. D. Del. 2002); *In re Spring Ford Industries, Inc.*, 2004 Bankr. LEXIS 112, at *6 (Bankr. E.D. Pa. Jan. 20, 2004); *In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995); *In re Zenith Laboratories, Inc.*, 104 B.R. at 662. To conclude otherwise, the court "would effectively prohibit the use of class actions in bankruptcy altogether." *In re Kaiser Group Int'l, Inc.*, 278 B.R. at 63.

11. Where the Movant has filed a class proof of claim on behalf of the Prospective Class, the Motion must be granted to permit the Movant to seek certification of the Affected Parties. Most enlightening on this very issue is Judge Walrath's opinion in *In Re Kaiser Group Int'l, Inc.* In *Kaiser*, Judge Walrath granted a putative class representative's motion for class certification, but did so only after first addressing the right of a putative class representative to

[3] The Bankruptcy Code does not prohibit or place limitations on the filing of a class proof of claim. *See In re Charter Co.*, 876 F.2d at 872.

file a claim on behalf of the class pending the outcome on a class certification motion -- a provisional class claim. *See generally Kaise*r, 278 B.R. at 62-63. Judge Walrath made clear that a putative class representative is permitted under the Bankruptcy Rules to file a class claim on behalf of all others similarly situated notwithstanding the lack of class certification. *See id.* at 63 (citation omitted).

12. Under a plain reading of the *Kaiser* decision, it is evident that a class claim is appropriate in this instance where (1) the Movant had commenced and was actively litigating[4] the California class action prior to the bankruptcy filing; (2) the Debtors had notice of the claim prior to the bar date as evidenced by their scheduling a class claim -- *not the individual claims of all of the class members, but a single class claim* -- on their Schedule F; and (3) perhaps most importantly, the Prospective Class is likely unaware of its claims at present, and have not been provided with proper notice of its claims or the bar date. Thus, precedent from Judge Walrath is instructive on this issue. One could even argue that the Motion itself is a "belt and suspenders" approach, because the *Kaiser* court simply ratified the filing of a class claim after the fact and did not require the advance approval of the Court. *See also In re Charter Co.,* 876 F.2d at 873 (finding "the filing claimant's status as a putative representative is at least minimally sufficient to authorize his agency for class filing purposes"); *In re American Reserve Corp.,* 840 F.2d at 493 (finding that "[p]utative agents keep the case alive pending the decision on certification").

13. The United States Circuit Court of Appeals for the Third Circuit has not addressed the present issue in great detail. *See In re Zenith Laboratories, Inc.,* 104 B.R. at 662. While the district courts have engaged in a limited analysis, including, but not limited to, this Court's ruling in *Kaiser,* the Debtors seek to exploit the perceived ambiguity in their opposition

[4]As noted herein *infra*, after commencement of the California Action, the parties agreed to a delay so that informal discovery could take place for purposes of mediation. Movant and the Debtors attended one mediation and were in the process of scheduling another when the automatic stay went into effect

to the Motion. The Debtors, however, misunderstand and/or misstate the analysis to be applied at this initial stage in that the Debtors' exclusive focus upon the class certification requirements, as interpreted by foreign jurisdictions, is premature. This preoccupation 'trips up' the Debtors' argument and only serves to support the Movant's request for full briefing on the issue. The Movant intends to and will seek certification of the class of wronged employees. *See In re Kaiser Group, Int'l, Inc.*, 278 B.R. at 63 (finding that "the timing of bankruptcy filing should be determinative of whether a class proof of claim should be permitted"). This temporary omission does not impact the present question concerning the validity of the class claim, as the Bankruptcy Rules do not require the Movant to file a certification petition at the time of the class claim, nor does the Movant have to conclusively establish the merits of its claim at the outset. *See In re United Companies Financial Corp.*, 276 B.R. at 372. *See, e.g., In re Kaiser Group, Int'l, Inc.*, 278 B.R. at 63.

14. To the extent that the Court finds the nonbinding *In re Bally* decision to carry weight, *see In re Bally Total Fitness of Greater New York, Inc., et al.*, 402 B.R. 616, 620 (Bankr. S.D.N.Y. 2009), the Movant has made a sufficient proffer as to warrant the exercise of discretion in favor of permitting the class proof of claim. First, the Movant has invoked the powers of the Court under Rules 9014 and 7023 in seeking authority to file the class proof of claim on behalf of the Affected Parties. *See* FED. R. BANKR. P. 7023, 9014. Second, the benefits related to the use of the class claim device promote the fundamental interests underlying the administration of the Bankruptcy Code.[5] Third, the Debtors' employment practices and circumstances giving rise

[5] The class action mechanism is "consistent with the broader goals of bankruptcy in facilitating creditor compensation and ensuring equitable distribution of the debtor's assets." *In re Zenith Laboratories, Inc.*, 104 B.R. at 664. The collection of thousands of claims, involving common questions of fact and law, into a single class action also reduces the expense to be incurred by the bankruptcy estate in that the Debtor will not have to file thousands of objections to the individual claims or get bogged down in the litigation of thousands of mini-trials. *See In re American Reserve Corp.*, 840 F.2d at 489 (finding that "[c]lass actions have procedural and substantive advantages" in that a class action "permits the aggregation and litigation of many small claims that otherwise would

to the underlying state court litigation satisfy the requirements of Rule 23. *See In re United Companies Financial Corp.*, 276 B.R. at 372 (finding that the moving party need only make a showing, beyond bare allegations or conclusory statements, that the requirements for a class certification may be met).

15. The Movant may satisfy the class certification requirements. The Federal Rules of Civil Procedure permit one or more members to sue as a representative of all parties if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. These procedural elements have been simplified to require numerosity; commonality; typicality; and adequacy of representation. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613 (1997).

16. Numerosity "dictates that joinder of all the parties is impracticable when the procedure would be 'inefficient, costly, time-consuming, and probably confusing.'" *See In re United Companies Financial Corp.*, 276 B.R. at 372. Joinder need not be impossible; rather, the joining of all interested parties must be shown to be impractical, in which the court may form "common sense assumptions" as to the practicality of the matter. *See id.* at 372-73. In this case, the numerosity cannot reasonably be disputed. During the relevant time period, the Debtors employed approximately 63,000 non-exempt hourly construction employees in California. Movant asserts that approximately 5,000 of those employees may hold valid claims. Thus, the

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lie dormant"). Moreover, the elimination or withholding of the class action would leave small claimants, like the Affected Parties, in bankruptcy proceedings without a remedy. *See In re Zenith Laboratories, Inc.,* 104 B.R. at 664. Finally, other creditors are not entitled to "the higher share of the debtor's assets they can achieve by excluding rival creditors at the threshold." *In re American Reserve Corp.,* 840 F.2d at 490. *See In re Charter Co.,* 876 F.2d at 871 (finding that because some claims may be of uncertain value, potential claimants may not understand that they can recover damages absent the investigative efforts of a class representative).

sheer number of Affected Parties will far exceed the class member threshold requirements, such that joining the thousands of current and/or former employees would exceed mere difficulty or inconvenience.

17. Commonality requires a showing of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement may be satisfied where "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re United Companies Financial Corp.*, 276 B.R. at 373 (finding the "threshold of commonality is not high"). The allegations in the class action pending before the California state court provide sufficient common questions of law and fact to support class certification. The pleadings raise numerous common questions of fact and law, including:

(1) whether Debtors paid their non exempt hourly construction employees overtime;
(2) whether Debtors allowed their employees to take appropriate off-premises meal breaks;
(3) whether Debtors permitted their employees to take at least two (2) rest breaks during and eight-hour shift;
(4) whether Debtors provided a second meal period for shifts longer than ten hours;
(5) whether Debtors provided its departing employees with requisite and lawful compensation; and
(6) whether Debtors' failure to compensate their current and/or former employees for uncompensated overtime wages, missed meal and rest periods and their failure to provide departing employees all wages due and payable constitutes unfair, unlawful and/or fraudulent business practices under Cal. Bus. & Prof. Code § 17200, *et seq.*

Each of these questions constitutes an issue common to the Affected Parties, i.e., the Debtor has engaged in a standard course of conduct in failing to provide the requisite overtime wages, and meal and rest periods.

18. The typicality requirement inquires whether "the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Id.* (finding that "all class members [need not] share identical claims"). Here, the Movant worked as

a non-exempt construction employee for the Debtors. The Complaint alleges that the Debtors mistreated the Movant and Prospective Class by denying their rights to overtime premiums, proper meal and rest breaks and payment of all wages due and owing upon separation from Debtors. As a result, while in Debtors' employ, the Affected Parties were deprived of lawful overtime wages, and duty free meal and rest breaks. Also, upon leaving Debtors' employ, the Affected Parties did not receive appropriate termination pay. In sum, the Affected Parties have experienced the same systematic pattern of unfair and illegal employment practices.

19. The representative party must "fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). Representation is deemed adequate where legal counsel is qualified and the class representative's interests are not "antagonistic" to those of the unnamed members of the class. *See In re United Companies Financials Corp.,* 276 B.R. at 374 (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 310 (3d Cir. 1998)). As to the issue of conflicts, because adequacy is closely related to typicality, where (as here) the claims of the Movant and Affected Parties are co-extensive, there is no conflict. See generally *General Tel. Co. v. Falcon*, 457 U.S. 147, 157- 158 n. 13 (1982). In this case, Movant, a former non-exempt construction employee of the Debtors, is an adequate representative of the Prospective Class. The Movant's claims are coextensive with the claims of the Prospective Class, as he was damaged by the Debtors' uniform employment practices relating to the failure to pay overtime, and meal and rest breaks. Additionally, the Debtors did not compensate the Movant or the Prospective Class with all wages due and payable to them when they left Defendants' employ. As to any question of vigorous prosecution, both the Movant and his counsel have been and will be zealous advocates for the Prospective Class.[6]

[6] The Movant's attorneys possess extensive experience in successfully prosecuting class actions against national companies.

20. Having satisfied Rule 23(a), the Movant must still meet one of the requirements enumerated under Rule 23(b). "An action may be maintained as a class action if ... (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b). The Movant's argument, as explained above, presents common questions of law and fact. Any differences that may exist among the Affected Parties is minimal, and the presence of individual issues should not defeat the importance of a common question. Further, class certification will prove imperative where a common inquiry offers the most efficient means of resolving the relevant questions. *See In re Zenith Laboratories, Inc.,* 104 B.R. at 663 (finding "[t]he class action provides a champion to investigate similar claims, diminishes uncertainty regarding the legal status of the claim, and, by aggregating the claims, effectively distributes the costs of investigation that would otherwise be borne on an individual basis over the class membership").

21. Contrary to the Debtors' assertions, "the policies underlying bankruptcy and class actions [are not] in conflict." *Id.* at 664. The Debtors' practices and the expansive class of injured parties are tailor-made for class certification. For the reasons explained above, the Movant must be permitted to file a class proof of claim on behalf of the Affected Parties. Notwithstanding the Debtors' eagerness to attack issues not presently before the Court, the Movant has satisfied the evidentiary threshold concerning the filing of a class proof of claim. Collateral attacks upon the Movant's authority to serve as a representative of the Affected Parties should be disregarded as the pivotal issue is allowance of a class proof of claim in these bankruptcy proceedings at the present time.

D. Debtors Failed To Provide the Affected Parties With Adequate Notice.

22. While Debtors assert that they sent "notice" to the Affected Parties via direct mail[7], Debtors violated the due process rights of the Affected Parties in failing to provide adequate notice in violation of these individuals' rights under the Due Process Clause of the United States Constitution. *See In re W.R. Grace & Co., et al.,* 2009 U.S. App. LEXIS 5281, at *6-7 (3d Cir. Mar. 11, 2009). "Due process requires notice that is 'reasonably calculated to reach all interested parties, *reasonably conveys all the required information*, and permits a reasonable time for a response.'" *See In re Chemetron Corp.*, 72 F.3d 341, 346 (3d Cir. 1995) (emphasis added). The content of the print notice fell woefully short of this standard in failing to inform Affected Parties of their claims and rights under the law. Absent adequate notice, an individual's claim may not be discharged through bankruptcy. *See id.*

23. The Affected Parties lack the requisite knowledge of Debtors' improper conduct and their right to pursue monetary relief through the court system. Quite simply, the Affected Parties are likely ignorant of their claims against Debtors. Debtors' efforts to provide notice to the Affected Parties failed to fill this information gap, thereby reducing the individual mailings to 'legal mumbo-jumbo' unworthy of further consideration. *See generally id.* Notably, Debtors cite case law for the proposition that "the Bar date is akin to a statute of limitation, and must be strictly observed." Obj. ¶44. Debtors wholly ignore the fact that even outside the bankruptcy context, Debtors would not be able to extinguish these claims where the individuals' excusable ignorance of the Debtors' conduct effectively tolled the statute of limitations. *See e.g. In re Kaiser Group Int'l, Inc.*, 278 B.R. at 64. As such, notice which fails to inform individuals of all relevant, material information, may not suffice.

[7] It is unclear whether notice was sent to any or all of the Affected Parties. Movant is continuing to look into this matter and reserves the right to argue accordingly.

24. Here, where the Affected Parties presumably do not know that they have been harmed by the Debtors' actions, they are excusably ignorant of any significance attached to these bankruptcy proceedings which might impact their individual rights. This is especially true where class certification in the underlying action was delayed, in part, by a mediation between the parties. Without receiving detailed notices about class certification and their rights in the pending class action case, the Affected Parties presumably do not understand and appreciate how their rights may have been affected and how that may form the basis of a claim against the Debtor. Debtors' failure to adequately notify the Affected Parties of such significance, runs afoul of the due process protections guaranteed under the United States Constitution.

25. Furthermore, even if any of the Affected Parties had a suspicion that they could have a claim, Debtors' notice might very well have actually deterred the filing of a claim. The first sentence of the second paragraph contained within the notice reads as follows: "You should not file a proof of claim if you do not have a claim against the Debtors." See Bar Date Notice. To a lay person, such a sentence could easily be interpreted to mean that filing a claim that turns out to be meritless could lead to legal ramifications. Moreover, it is highly likely that many of the Affected Parties might not be able to afford legal counsel even if they felt they needed guidance and the notice clearly states that the Garden City Group staff is not permitted to give legal advice. In its current form, the Notice leaves too many uncertainties such that it can not be deemed adequate.

26. Debtors' efforts will effectively terminate the rights belonging to the Affected Parties. Debtors, nevertheless, seek to achieve this result in quoting language from the decisions of other jurisdictions advocating the preservation of assets and expedient administration of a bankruptcy proceeding. Surely, the Bankruptcy Code was not created, nor has the Bankruptcy

Code been interpreted, with the intention or purpose of violating individuals' rights. Debtors remain zealous advocates of this approach, notwithstanding their past course of behavior which constituted violations of federal and state employment laws and resulted in a considerable group of individuals incurring damages. The Complaint asserts that Debtors violated federal and state employment laws. If the Affected Parties are not permitted to pursue their claims, then Debtors will further succeed in depriving them of their due process rights guaranteed under the United States Constitution. As a court of equity, the Court has the authority to allow the class proof of claim to survive to avoid the extinguishment of the lawful claims of unsuspecting individuals.

E. The Due Process Violation Warrants An Extension Of The Bar Date So That The Affected Parties May File Individual Claims

27. The violation of due process rights supports an extension of the bar date through an enlargement of the time for filing proofs of claim. *See* Fed. R. Bankr. P. 9006(b). The Federal Rules of Bankruptcy Procedure provide, in pertinent part that:

> *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Id. While Movant's request was in fact made just prior to the expiration of the bar date, even if the Court were inclined to find otherwise, the Affected Parties' failure to file proofs of claim was due to excusable neglect. Debtors' shortcomings warrant an extension where the inadequate notice denied the Affected Parties the opportunity to protect their legal interests. The Affected Parties' omissions stem from this shortfall, and principles of equity support an extension of the

bar date so as to prevent Debtors, with their unclean hands, from unjustly enriching themselves at the expense of an unsuspecting class.

28. As Debtors correctly note, the Third Circuit has instructed Courts to consider the following four factors to determine the existence of excusable neglect: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including weather it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. See *In Re Am. Classic Voyages Co.*, 405 F.3d 127, 133 (3d Cir. 2005); Obj. ¶42. As discussed below, all of the above considerations weigh in favor of extending the bar date for the Affected Parties.

29. As to the first factor, there is no prejudice to the Debtors "since the Debtors had notice of the existence of the class claim before the bar date." *See In re Kaiser Group Int'l, Inc.*, 278 B.R. at 64 (explaining its rationale by noting that in analogous situations "the filing of a class action tolls the statute of limitations otherwise applicable to all class members in their individual capacities."). As stated earlier, the Debtors actually scheduled the class claim in its schedules of assets and liabilities. Even if there is any arguable prejudice, it is outweighed by the otherwise certain violation of the rights of the Affected Parties. This is especially so in light of the basis of these claims.

30. Concerning factor two, Movant's request for an extension was filed before the expiration of the bar date. Moving forward, any delay resulting from efforts to properly apprise the Affected Parties of their rights need not be significant. Debtors are in possession of all the necessary contact information and could easily send or facilitate the sending of a supplemental notice which would adequately convey the necessary information. To be sure, Debtors previously agreed to delay the California Action so that informal discovery could take place for

purposes of mediation. In fact, although Movant and the Debtors attended one mediation and were in the process of scheduling another when the automatic stay went into effect, and despite discovery efforts, Debtors did not timely provide appropriate contact information that could have obviated the need for the present Motion. Debtors can not now use delay as their sword after previously using it as their shield.

31. As considered under the third factor, the reason for the delay -- the Affected Parties' total lack of knowledge of Debtors' wrongful activities -- was most certainly not within the reasonable control of the Movant. Indeed, as noted, Movant tried, through informal discovery in the California Action, to obtain the necessary information which would have allowed him to notify the other Affected Parties of their rights. Thus, while Debtors cite to legal language noting an unfairness in "penalizing vigilant employees to the benefit of those who *ignored their known rights* . . .[,]" such a statement is irrelevant since the Affected Parties were not aware of any "known" rights and therefore, by definition, could not have "ignored" any such rights. See Obj. ¶26 (*citing In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16 (Bankr. E.D.Pa. 1995)).

32. Finally, the Movant at all times acted in good faith to protect the rights of himself and the similarly-situated Affected Parties as known creditors in the above captioned matter.

33. In addition to the foregoing factors, the United States Supreme Court has noted that the determination is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S.Ct. 1489, 1498 (1993); see also *Chemetron*, 72 F.3d at 349 (*quoting Pioneer*). As such, the fifth circuit has cited the Supreme Court's finding that excusable neglect existed specifically because the notice was "misleading and inconspicuous . . . [thereby

creating] . . . a 'dramatic ambiguity' which caused the failure to file a timely claim." *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 737 (5th Cir. 1995) (*quoting Pioneer*, 113 S.Ct. at 1500). Furthermore, in the context of class notice in a bankruptcy matter, the United States District Court for the Southern District of New York espoused a simple solution to ensure the fairness of proceedings; noting that where the standard bankruptcy notice is inadequate, "this shortcoming is easily remedied by a bankruptcy notice directed specifically at class members, either at the time of the original notice or thereafter by order extending the bar date for class members." *In re Ephedra Products Liability Litigation*, 329 B.R. 1, 9 (Bankr. S.D.N.Y. 2005) (specifically comparing Rule 23 class member notice to bankruptcy notice by publication).

34. For the reasons stated above and in the interest of equity, the bar date should be extended for the Affected Parties so that their rights are preserved rather than extinguished by the Debtors' subsequent failure to provide adequate notice.

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WHEREFORE, Movant respectfully requests that this Honorable Court authorize the filing of a class proof of claim; or, alternatively, enter an Order requiring Debtors to amend its schedule to reflect the Affected Parties, provide the Affected Parties with actual notice of the bankruptcy filing, wherein such notice describes the claims raised in the Class Action to put the Affected Parties on notice of their potential claims, and extend the bar date for all members of the Affected Parties ninety (90) days from the date of the Order; and granting such other and further relief as deemed just and proper.

Dated: September 18, 2009
Wilmington, DE

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CERTIFICATE OF SERVICE

I, Katharine L. Mayer, hereby certify that on the 18th day of September, 2009, I caused a true and correct copy of the foregoing *Reply in Support of Motion Authorizing Class Proof of Claim or, in the Alternative, to Extend Time for Individual Class Members to File Proofs of Claim* to be served upon the attached service list by U.S. Mail, postage pre-paid, or in the manner so indicated.

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