

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

<b>IN RE:</b>	)	
	)	<b>Chapter 11</b>
<b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b>	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Ref. Docket No. 649</b>
	)	

**DEBTORS' MOTION FOR LEAVE TO FILE SURREPLY TO ALVARADO'S  
AMENDED 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**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), hereby submit this motion for entry of an order, pursuant to Rule 9006-1(d) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware, granting the Debtors leave and permission to file a Surreply to Pedro Alvarado's Amended 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 (the "***Surreply***"). In support of this motion, the Debtors respectfully represent:

1. On August 31, 2009, Pedro Alvarado filed a Motion Authorizing Class Proof of Claim or, in the Alternative, to Extend Time for Individual Class Members to File

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding 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.

Proofs of Claim (the "**Motion**") [Docket No. 543]. On September 11, 2009, the Debtors filed an Objection (the "**Debtors' Objection**") [Docket No. 591] to Alvarado's Motion. Alvarado filed an Amended Reply (the "**Reply**") to the Debtors' Objection on September 18, 2009 [Docket No. 649].

2. Alvarado's Reply focuses predominately on issues that were not addressed in Alvarado's original Motion. For example, Alvarado in his Reply discusses the Rule 23 requirements for class certification at great length, while his Motion barely mentioned the Rule 23 requirements, addressing them in only the most perfunctory and conclusory manner. *Compare* Reply ¶¶ 14-21 *with* Motion ¶ 15. Similarly, Alvarado's Motion, although it specifically asked the Court to extend the Bar Date for thousands of individuals, never mentioned, much less attempted to meet, the applicable "excusable neglect" standard. *See* Motion ¶¶ 18-21. In contrast, Alvarado's Reply devotes no less than six paragraphs to discussing the excusable neglect standard. *See* Reply ¶¶ 28-33. Alvarado in his Reply also relies heavily on the assertion that the Debtors' notices were inadequate because, even though they plainly notified employees of their right to submit claims in these bankruptcy proceedings and the Bar Date, the notices did not explain the exact nature of the possible claims employees might have. *Id.* ¶¶ 3, 5, 22-34. That is an entirely new argument never mentioned in Alvarado's Motion; indeed, the Motion relied on Alvarado's (incorrect) assertion that the Debtors provided no notice at all. *See* Motion ¶ 18-19.

3. Because Alvarado's Reply focuses predominately on issues not addressed in his original Motion, the Debtors respectfully request that the Court enter an order granting them leave and permission to file a brief Surreply, in the form attached hereto as **Exhibit B**. The Surreply addresses the various factual and legal arguments first asserted by Alvarado in the

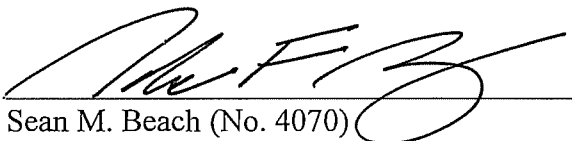
Reply that have not previously been addressed. Accordingly, the Debtors believe that the Surreply will assist the Court in the consideration of Alvarado's Motion.

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WHEREFORE, the Debtors respectfully request the Court to enter an order, substantially in the form attached hereto as **Exhibit A**, allowing the Debtors to file the Surreply in the form attached hereto as **Exhibit B** and granting such other and further relief as the Court deems just and proper.

Dated: Wilmington, Delaware  
September 29, 2009

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ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION

**EXHIBIT A**

Proposed Order

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

<b>IN RE:</b>	)	
	)	<b>Chapter 11</b>
<b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b>	)	
	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Ref. Docket No. _____</b>
	)	

**ORDER GRANTING DEBTORS' MOTION FOR LEAVE TO FILE SURREPLY TO  
ALVARADO'S AMENDED 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**

Upon consideration of the motion (the "***Motion***") of the above-captioned debtors and debtors in possession (collectively, the "***Debtors***") for entry of an order, pursuant to Rule 9006-1(d) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware, granting the Debtors leave and permission to file a Surreply to Pedro Alvarado's Amended 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 (the "***Surreply***"); and it appearing that the Court has jurisdiction to consider the Motion; and it appearing that the relief requested in the Motion is in the best interest of the Debtors, their estates and creditors; and due and adequate notice of the Motion having been given; and it

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding 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.

appearing that no other notice need be given; and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED that the Motion is granted; and it is further

ORDERED that, pursuant to Local Rule 9006-1(d), the Debtors are granted leave and permitted to file the Surreply; and it is further

ORDERED that the Surreply, which is attached as ***Exhibit B*** to the Motion, is deemed filed and a matter of record in these cases; and it is further

ORDERED that this Court shall retain jurisdiction over any and all matters arising from or related to the interpretation of this Order.

Dated: Wilmington, Delaware  
October \_\_, 2009

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Kevin J. Carey  
Chief United States Bankruptcy Judge

**EXHIBIT B**

Surreply

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

<b>IN RE:</b>	)	
	)	<b>Chapter 11</b>
<b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b>	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Ref. Docket No. 649</b>
	)	

**DEBTORS' SURREPLY TO ALVARADO'S AMENDED 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**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), hereby submit this Surreply to Pedro Alvarado's Amended 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. In support thereof, the Debtors respectfully represent:

**ARGUMENT**

1. Alvarado's Reply is most notable both for what it does and does not discuss. Alvarado's Reply does not discuss:

- Why, as a threshold matter, this Court should consider his class proofs of claim when  
(1) no class was certified pre-petition, (2) actual or constructive notice of the

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding 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.

bankruptcy case and Bar Date was provided to all of the putative class members, and (3) class certification would delay or disrupt these bankruptcy proceedings. *See* Debtors' Objection ¶¶ 18-24.

- Why class treatment of Alvarado's claims would be superior. *See* Debtors' Objection ¶¶ 26-27.
- Why common issues predominate over individual issues. *See* Debtors' Objection ¶¶ 28-31.
- Why Alvarado has standing to seek individual extensions of the Bar Date for thousands of individuals that Alvarado's counsel does not represent as individuals. *See* Debtors' Objection ¶ 41.

Alvarado's Reply does discuss:

- The Rule 23 requirements for class certification at length, *see* Reply ¶¶ 14-21, despite the absence of any such discussion in Alvarado's original Motion, and that Motion's insistence that it "does not seek to have this Court decide whether the action is suitable for treatment as a class action," *id.* ¶ 17.
- Alvarado's novel contention that courts in this jurisdiction grant class proofs of claim as of right as a mere procedural formality, Reply ¶¶ 11-13, even though that argument never appears in his Motion.
- The assertion that the Debtors' notices were inadequate because they did not specifically inform employees that they may have wage and hour claims against the Debtors, Reply ¶¶ 3, 5, 22-34, even though this too was never mentioned in Alvarado's Motion.

- Alvarado's new argument that "excusable neglect" exists to permit extension of the Bar Date for thousands of individuals, Reply ¶¶ 27-34, even though his original Motion never mentioned, much less attempted to meet, the excusable neglect standard.

Because Alvarado in his Reply has seen fit to focus on issues not addressed in his original Motion, the Debtors respectfully submit this brief response to Alvarado's new contentions.

2. In his Reply, Alvarado argues at length that class proofs of claim are allowed in bankruptcy courts. *See* Reply ¶¶ 7-11. The Debtors have never suggested that class claims are *per se* barred. Rather, the Debtors have pointed out that class claims are permitted only at the discretion of the court, that there is a consistent standard courts apply when exercising that discretion, and that Alvarado's claims fall far short of that standard. *See* Debtors' Objection ¶ 17. Alvarado now appears to argue that courts in this jurisdiction essentially grant class proofs of claim as of right. *See* Reply ¶ 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.") (emphasis added). No court has so held. In support of his extreme position, Alvarado cites to Judge Walrath's opinion in *In re Kaiser Group Int'l*, 278 B.R. 58 (Bankr. D. Del. 2002). *See* Reply ¶ 11. In *In re Kaiser*, however, Judge Walrath allowed class proofs of claim (and certified the class) only after a comprehensive Rule 23 analysis. *See In re Kaiser*, 278 B.R. at 67 ("We conclude the Claimant has satisfied the requirements of Rule 23(a) and (b)(3) and we will . . . permit the filing of a class proof of claim."). Moreover, Alvarado simply ignores the many courts that have explained that, even before reaching a Rule 23 analysis, a court should consider the threshold question of whether allowing the class proof of claim would be inconsistent with the goals of bankruptcy. *See* Debtors' Objection ¶¶ 18-24.

Alvarado's attempt to reduce the threshold standard for granting class proofs of claim to a mere rubberstamp is wholly without foundation, whether in this or any other jurisdiction.

3. In contrast to his Motion, which addressed Rule 23 in only the most cursory fashion (*see* Mot. ¶ 15) and urged this Court "not . . . to . . . decide whether the action is suitable for treatment as a class action," *id.* ¶ 17 (emphasis in original), Alvarado's Reply discusses Rule 23 at length. *See* Reply ¶¶ 14-21. But Alvarado devotes almost the entirety of that discussion to Rule 23(a), which the Debtors in their Objection never argued could not be met. Instead, the Debtors carefully explained why Alvarado could not meet Rule 23(b)'s superiority and predominance requirements. *See* Debtors' Objection ¶¶ 25-31. Alvarado's Reply devotes one solitary paragraph to Rule 23's predominance requirement, and in that paragraph merely asserts that Alvarado's claims "present[] common issues 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." Reply ¶ 20. Beyond the fact that such naked assertions cannot substitute for evidence or argument, Alvarado's statement does not even address the relevant standard. The relevant question under Rule 23(b) is whether common issues predominate, not simply whether there are common issues. Alvarado's Reply similarly misses the proper standard in arguing that "[c]ontrary to the Debtors' assertions, 'the policies underlying bankruptcy and class actions are not in conflict.'" Reply ¶ 21 (alteration marks omitted). The Debtors never argued that the policies underlying bankruptcy and class action are "in conflict." That is simply a straw man. The proper Rule 23(b) inquiry is whether the class action remains superior to the bankruptcy proceedings, and, as the Debtors have shown, many courts faced with claims indistinguishable from Alvarado's have concluded that class treatment was not superior. *See* Debtors' Objection ¶¶ 26-27.

4. In his original Motion, Alvarado sought to extend the Bar Date on behalf of the individual employees on the erroneous assumption that that they received no notice. *See* Mot. ¶¶ 18-19. Faced with the fact that the Debtors did provide actual or constructive notice to the employees, Alvarado now claims the notice was inadequate because the Debtors did not specifically inform their employees that they may have wage and hour claims against the Debtors. Reply ¶¶ 3, 5, 22-34. First, the Debtors strenuously disagree that their employees have such claims. But more importantly, numerous courts—including the Third Circuit—have rejected the argument that debtors must provide notice not only of the right to file claims, but also of what possible claims employees might have. *See In re Penn. Central Transp. Co.*, 771 F.2d 762, 768 (3d Cir. 1985) ("the purpose of the notice requirement is to advise individuals who will be affected by the outcome of any proceeding of the impending hearing so that they can take steps to safeguard their interests . . . [not] to advise them of the nature of those interests"); *see also In re Amdura Corp.*, 170 B.R. 445, 452-53 (D. Colo. 1994) (same); *In re Jamesway Corp.*, 1997 Bankr. LEXIS 825, at \*32-33 (Bankr. S.D.N.Y. June 11, 1997) (same). Alvarado cites no authority to the contrary. In any event, this Court specifically approved the notice that was provided to potential creditors, after notice and motion. If Alvarado disagreed with the substance and form of the notice, he should have raised that at the proper time instead of waiting until now to collaterally attack it. The actual or constructive notice provided to the Debtors' employees was more than adequate and fully comported with due process. *See* Debtors' Objection ¶ 44.

5. Finally, again in contrast to his Motion—where Alvarado made no attempt to demonstrate "excusable neglect" sufficient to support extending the Bar Date on behalf of thousands of individuals—Alvarado in his Reply addresses the excusable neglect standard at some length. Reply ¶¶ 27-34. Tellingly, however, Alvarado never explains how he has standing

to seek individual Bar Date extensions on behalf of perhaps 5000 individuals that neither Alvarado nor his counsel represent as individuals. See Debtors' Objection ¶ 41. Moreover, Alvarado's argument that the failure to timely file claims was "excusable" is premised on his new assertion that the Debtors' notice was inadequate. See Reply ¶¶ 31-33. As explained above, that assertion has no basis in law or fact.

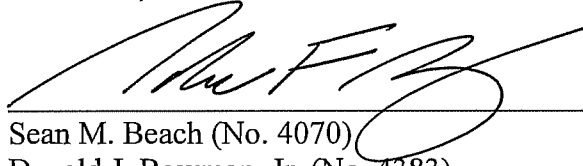
6. For the reasons set forth above, and in their Objection to Alvarado's Motion, the Debtors submit that the Motion should be denied. The Debtors therefore respectfully request that the Court enter an order denying the Motion in its entirety, and disallowing the proofs of claim that were filed on behalf of the putative class.

*Remainder of page intentionally left blank*

WHEREFORE, the Debtors respectfully request that the Court deny the Motion in its entirety, disallow the proofs of claim that were filed on behalf of the putative class, and grant such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware  
September 29, 2009

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ATTORNEYS FOR DEBTORS  
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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

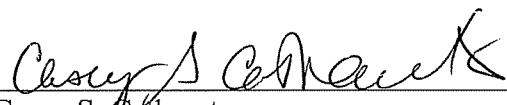
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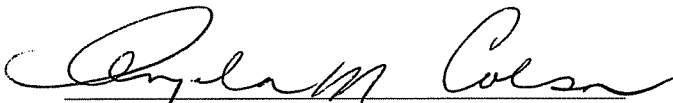
AFFIDAVIT OF SERVICE

STATE OF DELAWARE     )  
                                      ) SS  
NEW CASTLE COUNTY    )

Casey S. Cathcart, an employee of the law firm of Young Conaway Stargatt & Taylor, LLP, co-counsel to the above-captioned debtors, being duly sworn according to law, deposes and says that on September 29, 2009, she caused a copy of the **Debtors' Motion for Leave to File Surreply to Alvarado's Amended 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 as indicated upon the parties identified on the attached service lists.

  
Casey S. Cathcart

SWORN TO AND SUBSCRIBED before me this 29th day of September, 2009.

  
Notary Public  
My Commission Expires:

ANGELA M. COLSON  
NOTARY PUBLIC  
STATE OF DELAWARE  
My commission expires Aug. 31, 2011

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding 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.

**BUILDING MATERIALS HOLDING CORPORATION**  
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**9/29/2009**

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