IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 09-12074 (KJC)
BUILDING MATERIALS HOLDING CORPORATION, et al. [1]	)	Jointly Administered
Debtors	)	**Re: Docket No. 762**

OBJECTION BY ROBERT R. THOMAS AND THE RESTATED THOMAS TRUST DATED APRIL 14, 2009 TO CONFIRMATION OF JOINT PLAN OF REORGANIZATION AS AMENDED OCTOBER 22, 2009

Robert R. Thomas ("Mr. Thomas") and The Restated Thomas Trust Dated April 14, 2009 (the "Thomas Trust") (collectively, the "Thomas Parties") hereby file this objection (the "Limited Objection") to confirmation of the Joint Plan of Reorganization As Amended October 22, 2009 (the "Plan") [Docket No. 276]. In support of this Limited Objection, the Thomas Parties respectfully represents as follows:

I. INTRODUCTION

1. The Thomas Parties are the counterparties to two executory contracts, each of which includes comprehensive alternative dispute resolution provisions governed by the Federal Arbitration Act. While the Thomas Parties protested the Debtors' breaches of the contracts prior to the bankruptcy, they had not yet proceeded to demand mediation and arbitration under the ADR provisions of the contracts.

[1] 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.

2. The Plan contains a general provision to the effect that all executory contracts of the Debtors are to be assumed, subject to exceptions not applicable here.[2] Following approval of the Disclosure Statement, the Debtors served their Sixth Omnibus (Substantive) Objection to Claims, which objects to all of the various claims of the Thomas Parties. The deadline to respond to the Sixth Omnibus Objection is December 8, 2009. The Thomas Parties intend to oppose the Sixth Omnibus Objection by seeking to compel arbitration.

3. This Limited Objection to plan confirmation relates only to those provisions of the Plan which would require the dispute between the Debtors and the Thomas Parties to be resolved by the Bankruptcy Court via objections to proposed Cure Claims.[3] The Thomas Parties contend that the Federal Arbitration Act and controlling case law require enforcement of the ADR provisions of these contracts.

II. STATEMENT OF THE CASE

4. Prior to October, 2005, the Thomas Trust was the 100% shareholder of HNR Framing Systems, Inc. The Thomas Trust was also the 100% shareholder of Home Building Components, Inc. ("HBC") HNR did business as a framing contractor. As such, it constructed the framing for literally thousands of homes in California. HBC was a manufacturer of roof trusses.

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[2] The Plan provides that all executory contracts of the Debtors will be assumed unless previously rejected or appearing on the "Rejected Executory Contract and Unexpired Lease List." To this point, counsel for the Thomas Parties has been unable to locate the list on the Docket. It therefore appears that the Debtors intend to assume the contracts with the Thomas Parties.

[3] The Plan also provides that no later November 20, the Debtors will notify counterparties to executory contracts of proposed Cure Claims, with counterparties having until December 3 to object to the proposed Cure Claims. As of the date of this brief, the Thomas Parties cannot locate any notice of proposed Cure Claims on the Docket, and they have not been served with proposed Cure Claims by any means other than perhaps by mail not yet received.

5. In about October, 2005, the Thomas Trust entered into a "Securities Purchase Agreement"[4] under which it agreed to sell 100% of the stock of HNR to BMC Construction, Inc. The Thomas parties believe that BMC Construction is now Selectbuild Construction, Inc., one of the Debtors in this chapter 11 case. Concurrently, HBC entered into an "Asset Purchase Agreement"[5] under which it agreed to sell substantially all of its assets to FSC Construction, Inc. The Thomas Parties believe that FSC Construction was later merged into one of the Debtor entities. The Securities Purchase Agreement and Asset Purchase Agreement are referred to collectively herein as the "Acquisition Agreement."

6. The Acquisition Agreement establishes an ongoing contractual relationship between the Debtors on the one hand and the Trust on the other. The parties' mutual contractual duties include among other things the agreement of the Trust to indemnify Selectbuild against construction defect claims. Prior to the bankruptcy, the Thomas Parties protested in writing that Selectbuild was failing to perform its duties under the Securities Purchase Agreement in the handling of those claims and to mitigate the construction defect losses.

7. Both the Securities Purchase Agreement and the Asset Purchase Agreement[6] provide in part:

> (a) With the exception of disputes arising pursuant to Sections 10 and 22.6, any dispute, controversy or claim arising out of or relating to this Agreement or any transaction contemplated hereby, whether based on contract, tort, statute or other legal or equitable theory (including without limitation, any claim of fraud, misrepresentation or fraudulent inducement or any question of validity or effect of this Agreement including this

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[4] Exhibit A to the Declaration Robert R. Thomas filed herewith (the "Thomas Decl.")

[5] Thomas Decl. Exh B.

[6] Thomas Decl. Exh A pp. 47-48; Exh B p. 44

clause) or the breach or termination thereof ("Dispute"), shall be resolved in accordance with this Section . . . .

(b) The parties shall first use their reasonable and good faith efforts to settle any Dispute through non-binding mediation to be held in Orange County, California ("Mediation"), prior to initiating binding arbitration as set forth below. . . . If for any reason the parties are unable to resolve the Dispute within thirty (30) days following the date of the Notice of Dispute, such Dispute shall be resolved by binding arbitration to be conducted before the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration rules and regulations promulgated by AAA as in effect at the time of the arbitration, and as follows . . . .

8. Prior to closing of the acquisition, HNR occupied the property located at 13465 and 13495 Gregg Street, Poway California, under leases from entities which are affiliates of the Trust. HBC occupied the facilities located at 12345 Crossthwaite Circle, Poway, California and 340 West Ralph Road, Imperial California, under leases from entities which are affiliates of the Thomas Trusts.

9. As part of the consideration paid in the acquisition, Selectbuild and FSC agreed to lease the Poway and Imperial properties at above market rent.[7] These new leases were referred to in the Acquisition Agreement as the "New Shareholder Leases." The rent under these New Shareholder Leases was negotiated by the parties as an integral part of the purchase price in the acquisition which affected the cash amount paid at closing. These New Shareholder Leases were later terminated in part, and modified by written agreements which contain simplified versions of the same ADR provisions which are included in the Acquisition Agreement.[8] The Debtors

[7] See, Declaration of Paul S. Street in Support of Debtors' . . . First Day Motions fld 6-16-09 Docket No. 3 p. 40 ¶ 100.

[8] Thomas Decl. p. 3 ¶¶ 8, 9.

vacated the leased premises and filed a first day motion to reject the New Shareholder Leases.[9]

10. The Thomas Parties filed a "Reservation of Rights and Limited Response" to the Debtors' motion to reject,[10] which explained that the New Shareholder Leases were part of a unified acquisition transaction. The Reservation of Rights notified the Debtors that rejection of the New Shareholder Leases would give rise to a defense, based on a right of recoupment, to the Debtors' indemnity claims under the Securities Purchase Agreement. It stated:

> This Reservation of Rights and Limited Response does not ask the Court for any relief in relation to the Debtors' First Omnibus Motion. It is a statement of position, intended to inform the Debtors on the record of what the Thomas Parties believe that the legal consequences of rejection will be. As to all of the claims, rights and defenses which will arise from rejection, the Thomas Parties do not waive their right to arbitrate, and hereby expressly reserve all other such claims, rights and defenses.

11. The Debtors filed a Reply[11] which took issue with the recoupment argument, but which also argued that this Court lacked jurisdiction to consider the issue, because only the motion to reject the New Shareholder Leases was before it at the time. The Court entered an Order approving rejection of the leases which does not address the effect of rejection on the Acquisition Agreement.[12]

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[9] "Debtors' First Omnibus Motion for an Order Authorizing Rejection of Certain Unexpired Leases and Executory Contracts, Nunc Pro Tunc to the Rejection Effective Date" filed 6-16-2009 as Docket No. 33).

[10] "Reservation of Rights and Limited Response to Debtor's First Omnibus Motion For An Order Authorizing Rejection Of Certain Unexpired Leases And Executory Contracts, Nunc Pro Tunc To The Rejection Effective Date" filed 7-10-2009 as Docket Entry No. 156.

[11] "Debtors' Reply to the Reservation of Rights and Limited Response to Debtors' First Omnibus Motion for an Order Authorizing Rejection Of Certain Unexpired Leases And Executory Contracts, Nunc Pro Tunc To The Rejection Effective Date" filed 7-13-09 as Docket Entry No. 173.

[12] "First Order Authorizing the Debtors To Reject Certain Unexpired Leases and Executory Contracts, Nunc Pro Tunc To The Rejection Effective Date" entered 7-16-09 as Docket Entry No. 242.

12. Ralph Road, LLC and Gregg Street, LLC, the landlords under the New Shareholder Leases, timely filed proofs of claim for rejection damages. Because it was uncertain as to which of the Debtor entities was the successor in interest to the original tenants under the New Shareholder Leases, each of these claims was filed against four entities: Building Materials Holding Corp., Selectbuild Construction, Inc., H.N.R Framing Systems, Inc., and BMC West Corporation.

13. Also prior to the general claims bar date, the Thomas Parties filed proofs of claim against Debtor Selectbuild Construction, Inc., based upon pre-petition breaches of the Securities Purchase Agreement. Each proof of claim was submitted in the amount of $400,000, which is an estimate of the amount of damages incurred due to the lack of cooperation by the Debtors in defending construction defect claims.

The Plan provides in relevant part:

> **6.1** ***Assumption and Rejection of Contracts and Unexpired Leases.*** Except as otherwise provided herein or pursuant to the Confirmation Order, all Executory Contracts and Unexpired Leases . . . shall be assumed pursuant to section 365(a) of the Bankruptcy Code as of the Effective Date, except for any such contract or lease (i) that has been assumed or rejected, or renegotiated and either assumed or rejected on renegotiated tenns, pursuant to an order of the Bankruptcy Court entered prior to the Effective Date . . . or (iv) that is identified on the Rejected Executory Contract and Unexpired Lease List.
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> ***6.4 Cure of Defaults.*** Any monetary defaults under each Executory Contract and Unexpired Lease to be assumed pursuant to the Plan shall be satisfied, pursuant to section 365(b)(1) of the Bankruptcy Code, by payment of the Cure Claim in Cash on the Effective Date . . . . In the event of a dispute regarding (i) the Cure Claim . . . or (iii) any other matter pertaining to assumption, the payments required by section 365(b)(1) of the Bankruptcy Code in respect of Cure Claims shall be made following the entry of a Final Order or orders resolving the dispute and approving the assumption. At least 20 days prior to the Confirmation Hearing, the Debtors shall provide for notices of proposed assumption and proposed Cure Claims to be sent to applicable third parties. . . . . Any

> counterparty to an Executory Contract or Unexpired Lease that fails to object timely to the proposed assumption or Cure Claim will be deemed to have assented to such assumption and Cure Claim. If an objection to a proposed Cure Claim is sustained by the Bankruptcy Court, the Reorganized Debtors may elect to reject such Executory Contract or Unexpired Lease in lieu of assuming it.

14. Counsel for the Thomas Parties has not been able to locate in the Docket the "Rejected Executory Contract and Unexpired Lease List" and has not been notified that the Debtors now intend to reject the Acquisition Agreement. It therefore appears that the Debtors intend to assume these agreements on the Effective Date of the Plan. Also, counsel for the Thomas Parties has not received, and cannot locate on the docket, any notice of the proposed Cure Claims. These proposed Cure Claims were required under the Plan to be served on November 20.

15. On November 13, 2009, the Debtors filed their "Sixth Omnibus (Substantive) Objection to Claims . . . ." (Docket No. 929). This Sixth Omnibus Objection objects to the $400,000 claim based on breach of the Securities Purchase Agreement filed by Mr. Thomas, based on the grounds that the Debtor's books and records indicate no liability. In addition, the Sixth Omnibus Objection objects to some, but not all, of the proofs of claim filed by Ralph Road, LLC and Gregg Street, LLC in relation to the rejection of the New Shareholder Leases. The deadline to respond to the Sixth Omnibus Objection is December 8, 2009.

III. ENFORCEMENT OF THE ADR PROVISIONS OF THE ACQUISITION AGREEMENTS IS MANDATED BY THE FEDERAL ARBITRATION ACT

16. 9 U.S.C. § 2 provides in part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . . shall be valid, irrevocable, and

> enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

17. 9 U.S.C. § 1 states that "'commerce,' as herein defined, means commerce among the several States . . . ." The Acquistion Agreement documents a purchase and sale of assets and securities between, on the one hand: (i) Mr. Thomas, a California resident; (ii) the Thomas Trusts, which were established by Mr. Thomas under the laws of California; (iii) HnR Framing Systems, Inc. and Home Building Components, Inc., both of them California corporations with their chief executive offices in California. The acquiring parties, on the other hand, were BMC Construction, Inc., a Delaware corporation with executive offices in both San Francisco, California and Boise, Idaho and operations nationwide; FSC Construction, Inc., a Delaware corporation with its chief executive offices in San Francisco and Boise.

18. Given both the interstate operations of the businesses involved and the fact that the parties to the Acquisition Agreement were residents of different states, the Acquisition Agreement clearly constitutes a contract "evidencing a transaction involving commerce" such that the Federal Arbitration Act applies to the ADR provisions of these contracts. See generally, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 55-56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003).

19. 9 U.S.C. § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

20. The Debtor's Amended Plan does not itself seek to disallow the claims of the Thomas Parties or to adjudicate their defenses to further indemnity claims under the Acquisition

Agreement. It does, however, seek to establish a system for the resolution of Cure Claims which is confined to legal proceedings in the Bankruptcy Court. Specifically, the Debtors are to propose Cure Claims to which the Thomas Parties must object in Court. If the Thomas Parties fail to object, or their objection is overruled by the Bankruptcy Court, then they will be barred from asserting these claims and defenses in the future in relation to the Acquisition Agreement.

21. The Thomas Parties are making only a limited objection to confirmation of the Amended Plan. The Thomas Parties only object to the Plan's provisions for determining their Cure Claims, because the Plan does not require resolution of claims and defenses relating to the Acquisition Agreement according to the ADR provisions.

IV. THE BANKRUPTCY COURT HAS NO DISCRETION TO DENY ARBITRATION IN THIS CASE

22. There is no question that confirmation of a chapter 11 plan, as well as the allowance and disallowance of claims against the bankruptcy estate, are "core matters" as to which this Court has the jurisdiction to make a final determination. 28 U.S.C. § 157(b)(2)(B) & (L). However, whether any matter is or is not within the Bankruptcy Court's core jurisdiction "does not affect whether the Bankruptcy Court [has] the discretion to deny arbitration . . . ." *In re Mintze*, 434 F.3d 222, 229 (3d Cir. 2006).

23. *Mintze* was a chapter 13 case filed by a Debtor who had, prepetition, notified her home mortgage lender of her intent to rescind for alleged violation of the Truth in Lending Act ("TILA" 15 U.S.C. §§ 1601-1667f). The Debtor commenced an adversary proceeding to enforce the rescission, then opposed the lender's motion to compel arbitration. The Bankruptcy Court found that both the confirmation of the chapter 13 plan and the allowance of the lender's claim were core matters, and "decided that the matter was best resolved in the bankruptcy court system because the outcome of Mintze's rescission claim would affect her bankruptcy plan and the

distribution of monies to her other creditors." *In re Mintze*, 434 F.3d 222, 227 (3d Cir. 2006). The District Court affirmed, but the Third Circuit reversed.

24. The Third Circuit held that the abuse of discretion standard of review did not apply to the appeal in *Mintze*, supra., because the above-quoted provisions of the FAA are mandatory in their requirement that courts must stay judicial proceedings in order to allow for contractual arbitration. In determining whether FAA applied, the Third Circuit applied the test articulated in *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) and applied in *Hays & Co. v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156 (3d Cir.1989). As recapitulated in *Mintze*, supra., 434 F.3d at 229, the standard is as follows:

> By itself, the FAA mandates enforcement of applicable arbitration agreements even for federal statutory claims. See *McMahon,* 482 U.S. at 226, 107 S.Ct. 2332.
>
> The FAA's mandate can, however, be overridden. If a party opposing arbitration can demonstrate that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," the FAA will not compel courts to enforce an otherwise applicable arbitration agreement. *McMahon,* 482 U.S. at 227, 107 S.Ct. 2332. To overcome enforcement of arbitration, a party must establish congressional intent to create an exception to the FAA's mandate with respect to the party's statutory claims. Congressional intent can be discerned in one of three ways: (1) the statute's text, (2) the statute's legislative history, or (3) "an inherent conflict between arbitration and the statute's underlying purposes." *McMahon,* 482 U.S. at 227, 107 S.Ct. 2332.

25. The Court in *Mintze*, supra, found nothing in the Bankruptcy Code that evidenced a Congressional intent to make an exception to the FAA's mandate to enforce the arbitration clause contained in the loan documents. The Court concluded that "[i]f arbitration is enforced in this case, we likewise cannot perceive of a sufficiently adverse effect on the underlying purposes

of the Bankruptcy Code." *In re Mintze*, 434 F.3d 222, 232 (3d Cir. 2006).

26. The Debtor in *Mintze* presumably argued that the ability to rescind her home mortgage loan was pivotal to her ability to confirm a chapter 13 plan. In contrast, in this case the rights under the Acquisition Agreement are by no means pivotal to this chapter 11 reorganization. The claims filed by the Thomas Parties relating to the breach of the Acquisition Agreement total $400,000.00 The projected 2009 financial statements of the reorganized Debtors, attached as Exhibit F to the Disclosure Statement, show total assets of $401,200,000, current assets of $234,800,000, and 2009 gross revenue of $693,000,000.

V. CONCLUSION

27. The Thomas Parties therefore object to confirmation of the Amended Plan on the grounds that it provides for the resolution of its claims and defenses under the Acquisition Agreement in a manner which is not consistent with the ADR provisions contained in the Acquisition Agreement. The Thomas Parties request that this Court order that all proceedings relating to the Debtors' proposed assumption of the Acquisition Agreement be stayed pending the resolution of the claims and defenses of the parties by proceedings consistent with the ADR provisions.

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DATE: November 25, 2009

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Attorneys for Robert R. Thomas
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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of November, 2009, a copy of the foregoing *Objection by Robert R. Thomas and the Restated Thomas Trust Dated April 14, 2009 to Confirmation of Joint Plan of Reorganization as Amended October 22, 2009* was caused to be served on the following, in the manner so indicated:

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