IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: **BUILDING MATERIALS HOLDING CORPORATION, *et al.*,**[1] **Debtors.**	)))))))))	**Chapter 11** **Case No. 09-12074 (KJC)** **Jointly Administered**

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF JOINT PLAN OF REORGANIZATION FOR THE DEBTORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE AMENDED DECEMBER 7, 2009 (WITH TECHNICAL MODIFICATIONS)

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ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION

Dated: Wilmington, Delaware
December 7, 2009

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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.

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MEMORANDUM

The above-captioned debtors and debtors-in-possession (the "Debtors") hereby submit this memorandum of law in support of confirmation of the *Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 7, 2009* (With Technical Modifications) [See D.I. 1066] (as may be further amended, supplemented and/or modified, the "Plan") and in response to any objections filed in opposition to the Plan.[2] As provided in detail below, the Plan satisfies the requirements for confirmation set forth in section 1129 of title 11 of the United States Code (the "Bankruptcy Code"). Accordingly, the Debtors submit that the Plan should be confirmed.

I. BACKGROUND

A. General Background of the Chapter 11 Cases

On June 16, 2009 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Each Debtor is continuing to operate its business and manage its property as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Debtors' cases have been consolidated for procedural purposes only and are being jointly administered pursuant to an order of this Court. On June 26, 2009, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an Official Committee of Unsecured Creditors (as such committee may be composed from time to time, the "Creditors Committee"). No trustee or examiner has been appointed.

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2 Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Uniform Glossary of Defined Terms for Plan Documents, Plan Appendix A.

On the June 16, 2009 Petition Date, the Debtors filed the first iteration of the Plan and the disclosure statement concerning the same. The Debtors have since filed amendments to the Plan and its related disclosure statement, including the Disclosure Statement With Respect to Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009 [See D.I. 834, Exhibit 3] (the "Disclosure Statement"). By Order entered October 22, 2009 [D.I. 768] (the "Disclosure Statement Approval Order"), the Court approved the Disclosure Statement and solicitation procedures with respect to voting on the Plan.

B. Solicitation of the Plan

On July 13, 2009, the Debtors filed the Debtors' Motion for Order (I) Approving the Disclosure Statement; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, Including (A) Approving Form and Manner of Distribution of Solicitation Packages, (B) Approving the Form and Manner of Notice of the Confirmation Hearing, (C) Establishing a Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing the Deadline for Receipt of Ballots, and (F) Approving the Procedures for Vote Tabulations; (III) Establishing the Deadline and Procedures for Filing Objections to (A) Confirmation of the Plan and (B) Proposed Cure Amounts Related to Contracts and Leases Assumed Under the Plan; and (IV) Granting Related Relief [D.I. 172] (the "Solicitation Procedures Motion"). By the Disclosure Statement Approval Order, as modified by that certain Order Extending By Two Days the Deadlines for Mailing Solicitation Packages, Confirmation Hearing Notices and Non-Voting Holder Notices dated October 27, 2009 (the "Solicitation Extension Order") [D.I. 780], the Court approved the Solicitation Procedures Motion. As required by the Disclosure Statement Approval Order, as

modified by the Solicitation Extension Order, on or before October 29, 2009, the Debtors, through their noticing and claims agent, The Garden City Group, Inc. ("GCG"), timely mailed to holders of claims entitled to vote on the Plan, a solicitation package containing: (a) written notice of (i) the Court's approval of the Disclosure Statement, (ii) the deadline for voting on the Plan, (iii) the date of the hearing to consider confirmation of the Plan (the "Confirmation Hearing"), and (iv) the deadline and procedures for filing objections to the confirmation of the Plan; (b) the Plan in pdf format on a CD-Rom; (c) the Disclosure Statement in pdf format on a CD-Rom; and (d) the appropriate ballot along with a return envelope. [D.I. 834].

In addition, notice of the Confirmation Hearing was published in the national edition of The Wall Street Journal [D.I. 837], regional English and Spanish language papers in Las Vegas [D.I. 854, 1006], Los Angeles [D.I. 855, 1005], and Phoenix [D.I. 835, 856], and English language publications in Fort Lauderdale and Miami [D.I. 836, 1049] on or before October 31, 2009. Pursuant to the Disclosure Statement Approval Order, ballots were required to be submitted to GCG no later than 4:00 p.m., prevailing Eastern Time, on November 25, 2009 (the "Voting Deadline"), unless extended by the Debtors.

C. Plan Supplement

On November 15, 2009, the Debtors filed their Notice of Filing of Plan Supplement Pursuant to the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009 [D.I. 930] (as amended and restated on December 7, 2009 [D.I. 1073], the "Plan Supplement").

D. Ballot Tabulation

As described more fully in the Declaration of Jeffrey S. Stein of The Garden City Group, Inc. Certifying the Methodology for the Tabulation of Votes on and Results of Voting With Respect to the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009 (the "Voting Certification") [D.I. 1078], the Plan has been accepted by the following impaired Classes entitled to vote on the Plan: Classes 2(a)-(l); Classes 3(a)-(l); Classes 6(a), 6(e),[3] 6(k), and 6(l); Classes 8(a)-(l); and the Plan has been rejected by the following impaired Classes of Claims entitled to vote on the Plan: Class 6(b), 6(c), 6(d), 6(f), 6(g), 6(h), 6(i) and 6(j) (the "Rejecting Classes").

Because the Holders of Interests in Class 9(a) and Claims in Classes 10(a) through 10(l) (the "Deemed Non-Accepting Classes") will not receive or retain any property on account of such Claims or Interests, pursuant to section 1126(g) of the Bankruptcy Code, these Classes are deemed not to have accepted the Plan. The Deemed Non-Accepting Classes and the Rejecting Classes are sometimes, collectively, referred to herein as the "Non-Accepting Classes."

E. Objections to the Plan

The Disclosure Statement Approval Order additionally required that any objections to confirmation of the Plan be in writing, filed with the Court and served upon various interested parties by 4:00 p.m., prevailing Eastern Time, on November 25, 2009. The Debtors received objections to confirmation of the Plan from the County of Comal, Texas, Central Appraisal District of Taylor County, and County of Williamson [D.I. 983], certain other Local Texas Tax Authorities [D.I. 986], the California Franchise Tax Board [D.I. 996], Robert R. Thomas and the

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[3] No valid ballots were cast in Class 6(e).

Restated Thomas Trust [D.I. 1008], Juan M. Navarro and Letitia Ramirez [D.I. 1011], and letter objections from William H. Milligan [D.I. 971], Steven Pearson [D.I. 985], Robert Satterfield [D.I. 1012], Bruce B. Sherlock [D.I. 1014], Leroy D. Custer [D.I. 1026] and Joseph J. Zuendel [D.I. 1046]. A summary of these objections, and the Debtors' responses, is attached hereto as Exhibit A. To the extent not resolved or withdrawn prior to the Confirmation Hearing, the Debtors submit that all objections to the Plan should be overruled for the reasons more fully set forth herein. In connection with entry of the Disclosure Statement Approval Order, the Creditors Committee agreed, pursuant to that certain Stipulation Regarding Plan Support and Challenge Period dated October 26, 2009, and approved by Order entered October 28, 2009 [D.I. 801], "to support the plan" and "to take such reasonable actions as are in furtherance of confirmation of the Plan[;]" provided that the Plan Treatment[4] (as defined in the Stipulation) was not in any way altered to lessen or negatively impact the distribution to general unsecured creditors provided in that certain Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009.

F. Technical Modifications

The Debtors filed the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 7, 2009 (With Technical Modifications) on December 7, 2009. As demonstrated by the redline filed with the Plan on December 7, 2009 showing the few changes made from the version of the Plan amended October 22, 2009 [D.I. 1067], the

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4 The "Plan Treatment" for general unsecured creditors is (a) the establishment and funding of the "Unsecured Cash Fund" (as such term is defined in the Plan) in the amount of $5,500,000 and (b) the agreement to provide aggregate payments to "Holders" of "Allowed Small Unsecured Claims" (as such terms are defined in the Plan) of up to $700,000.

proposed modifications do not materially and adversely impact any claimant's treatment. Instead, the changes are either clarifying in nature or favorably impact claimants' treatment. Such modifications in no way alter, lessen or negatively impact the Plan Treatment of general unsecured creditors, which continues to be (a) the establishment and funding of the "Unsecured Cash Fund" (as such term is defined in the Plan) in the amount of $5,500,000 and (b) the agreement to provide aggregate payments to "Holders" of "Allowed Small Unsecured Claims" (as such terms are defined in the Plan) of up to $700,000.

G. Highlights of the Plan

The Plan constitutes a separate chapter 11 subplan for each of the Debtors. Each Debtor's separate chapter 11 subplan is designated by a letter (from (a) to (l)). The Plan represents a compromise and settlement of various significant Claims against the Debtors. The Plan seeks 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 substantially less with respect to their Claims in a hypothetical liquidation under chapter 7 of the Bankruptcy Code.

Under the Plan, each Holder of an Allowed General Unsecured Claim in Class 6 (whether or not that particular holder itself voted to accept or reject the Plan) will receive its pro rata share (i.e., a percentage share based on the ratio of the holder's claim to the total allowed claims in the class) of distributions from an Unsecured Cash Fund that shall be funded on the Effective Date in the amount of $5.5 million. Based on the most up-to-date Liquidation Analysis, attached as Exhibit A to the Declaration of Bradley I. Dietz in Support of Confirmation of Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December

7, 2009 [D.I. 1080] (the "Dietz Declaration"), funding the Unsecured Cash Fund with $5.5 million provides each Holder of a General Unsecured Claim with more than such Holder would receive in a hypothetical chapter 7 liquidation of the Debtors. The Unsecured Cash Fund will be held in a segregated Unsecured Cash Distribution Account. Initial payments to Holders of Allowed General Unsecured Claims will be made by the Reorganized Debtors from available, unreserved cash in the Unsecured Cash Distribution Account as soon as practicable after the Effective Date of the Plan. The Debtors project that each Holder of an Allowed General Unsecured Claim will receive Distributions with a value of approximately 12.1% of such Holder's Allowed Claim.

The ballots sent to Holders of General Unsecured Claims in Classes 6(a) through 6(l) contained boxes where Holders of such claims could make the "Small Unsecured Claims Class Election." This election was completely voluntary. By making this election, the Holder of a General Unsecured Claim voted to accept the Plan and agreed to reduce the aggregate amount of the Holder's claims against all Debtors to the lesser of $5,000 or the aggregate amount of the Holder's claims. All allowed General Unsecured Claims less than $5,000 are placed in Class 8 (Small Unsecured Claims) for each Debtor. Under the Plan, Holders of Small Unsecured Claims in Class 8 (including those who agreed to reduce the aggregate amount of their claims against all Debtors to less than $5,000 by making the Small Unsecured Claims Election), will receive Cash equal to the lesser of (a) 25% of the Allowed Amount of all Allowed General Unsecured Claims held by such Holder against all Debtors (excluding interest) or (b) $1,250; provided, however, that the aggregate payments to Holders of Allowed Small Unsecured Claims shall not exceed $700,000 and payment to each Holder of an Allowed Small Unsecured Claim shall be reduced

proportionately to the extent aggregate payments would otherwise exceed $700,000. The amounts paid to Small Unsecured Claims will not come from the Unsecured Cash Fund available to Holders of allowed General Unsecured Claims and will not adversely impact distributions to such Holders.

The Holders of the Prepetition Funded Lender Claims in Classes 2(a)-(l), which are claims under the Debtors' secured Prepetition Credit Agreement in the amount of approximately $302 million, will receive a pro rata share of Term Notes under a Term Loan Credit Agreement in the aggregate principal amount of $135 million, less amounts such Holders receive from the sale of certain excess real estate prior to the Effective Date.[5] On the Effective Date, Reorganized BMHC will emerge from chapter 11 as a private company and 100% of the Reorganized BMHC Equity Interests shall be owned by the Holders of Prepetition Funded Lender Claims. This ownership interest is subject to dilution by up to 10% in connection with the Long Term Incentive Plan, which Long Term Incentive Plan shall provide, as an incentive mechanism, for the allocation to management of the Reorganized Debtors of restricted stock units, stock options, and/or stock appreciation rights, and by the Reorganized BMHC Equity

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5 The Debtors own a large portfolio of real estate assets and have identified approximately $50 million of excess real estate that is no longer required to support the business. The Debtors are engaged in efforts to sell such excess real estate. Under the DIP Facility, any proceeds from sales of excess real estate during the Chapter 11 Cases are placed into a "Sale Cash Collateral Excess Proceeds Account" as additional collateral for the Debtors' secured lenders. Amounts in the Sale Cash Collateral Excess Proceeds Account, less amounts required to repay the DIP Facility and to fund $6,000,000 for use by the Debtors as operating cash, shall be paid on the Effective Date to the holders of Prepetition Funded Lender Claims. The Debtors anticipate that, on the Effective Date, no amount will be available in the Sale Cash Collateral Excess Proceeds Account to pay the holders of Prepetition Funded Lender Claims.

Interests, if any, issued to the Holders of liquidated Allowed L/C Lender Claims (i.e., Holders of any Prepetition Letters of Credit that are drawn in the future).

Prior to the Petition Date, the Debtors caused to be issued various Prepetition Letters of Credit in favor of certain of the Debtors' creditors. The Prepetition Letters of Credit were issued primarily with respect to performance bonds for projects undertaken by the Debtors, with respect to obligations owed to certain of the Debtors' key material suppliers, and in favor of the Debtors' insurers for the deductible portion of automobile, general liability, and workers' compensation claims. The Prepetition Letters of Credit were issued by the Prepetition L/C Lenders under the terms of the secured Prepetition Credit Agreement.

Holders of Unsecured Claims that are the beneficiaries of Prepetition Letters of Credit, or that have claims against the Debtors that are covered by insurance or performance bonds that would entitle an insurer or surety to draw under a Prepetition Letter of Credit if the claim were not paid, are classified in Classes 5(a)-(l) under the Plan. These claims are unimpaired and shall be paid in full by the applicable Reorganized Debtors to avoid draws on the Prepetition Letters of Credit.

The Debtors do not expect that there will be any draws on Prepetition Letters of Credit during these Chapter 11 Cases or after the Effective Date. However, in consideration for the continuation of these Prepetition Letters of Credit after the Effective Date, the Reorganized Debtors will have certain obligations related to them after the Effective Date of the Plan. While the Reorganized Debtors will not be liable to reimburse the Prepetition L/C Lenders if any amounts are drawn under the Prepetition Letters of Credit, the Reorganized Debtors will be responsible to pay certain fees associated with the continuation of these Prepetition Letters of

Credit; namely, a standby letter of credit fee equal to 2.5% per annum of the outstanding amount of the Prepetition Letters of Credit. Further, while not expected, if and to the extent that draws are made under any Prepetition Letters of Credit after the Petition Date, the Prepetition L/C Lenders (which are classified in Classes 3(a)-(l) under the Plan) that fund such draws shall, like the Holders of Prepetition Funded Lender Claims, be entitled to receive Reorganized BMHC Equity Interests and notes under the Term Loan Credit Agreement based on the formula set forth in the Plan. This formula is designed to give the Prepetition L/C Lender that funds a draw on a Prepetition Letter of Credit a distribution of the Term Notes and Reorganized BMHC Equity Interests that is equivalent to the distribution that the Holders of Prepetition Funded Lender Claims will receive on account of their claims.

II. ARGUMENT

As the Plan proponents, the Debtors bear the burden of proof on all elements necessary for confirmation of the Plan. In re Richard Buick, Inc., 126 B.R. 840, 851 (Bankr. E.D. Pa. 1991). To satisfy this burden, the Debtors will show by a preponderance of the evidence that the Plan complies with the applicable provisions of the Bankruptcy Code. Heartland Fed. Savs. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II), 994 F.2d 1160, 1165 (5th Cir.) (concluding that "preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown"), cert. denied, 510 U.S. 992 (1993); In re Union Meeting Partners, 165 B.R. 553, 574 n.17 (Bankr. E.D. Pa. 1994) (adopting preponderance standard with respect to requirements of Bankruptcy Code section 1129), aff'd mem., 52 F.3d 317 (3d Cir. 1995).

Section 1129(a) of the Bankruptcy Code provides that a court shall confirm a chapter 11 plan if all of the requirements of sections 1129(a)(1) through (a)(13) of the Bankruptcy Code are satisfied. 11 U.S.C. § 1129(a). Here, the Plan should be confirmed because the Debtors have satisfied (or will satisfy, at the Confirmation Hearing) each of the requirements of section 1129(a) of the Bankruptcy Code.

A. The Plan Complies with Applicable Provisions of the Bankruptcy Code as Required by Section 1129(a)(1)

Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code. In determining whether the Plan complies with section 1129(a)(1), the Court must consider section 1123(a) of the Bankruptcy Code, which sets forth certain elements that a plan must contain, and section 1122 of the Bankruptcy Code, which governs the classification of claims. H.R. Rep. No. 95-595, at 412 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6368 .

1. The Plan Designates Classes of Claims and Interests and Such Classification is Proper (Sections 1122 and 1123(a)(1))

Section 1123(a)(1) of the Bankruptcy Code requires that a plan classify all claims (with the exception of certain administrative and priority claims) and all interests, and that such classification comply with section 1122 of the Bankruptcy Code. 11 U.S.C. § 1123(a)(1). With the exception of Administrative Expense Claims, Professional Compensation Claims, Priority Tax Claims and Claims under the DIP Facility against all applicable Debtors, which are not required to be classified, Article III of the Plan designates Classes of Claims and Interests.[6]

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6 The classes, which include all Claims and Interests that are required to be classified, are summarized in Section 3.2 of the Plan.

A plan proponent has significant flexibility in classifying claims under section 1122 of the Bankruptcy Code. Courts also are afforded broad discretion in approving a plan proponent's classification structure and should consider the specific facts of each case when making such a determination. John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 158 (3d. Cir. 1993) (stating that "the classification of claims of interests must be reasonable"); In re Jersey City Med. Ctr., 817 F.2d 1055, 1060-61 (3d Cir. 1987) (observing that "Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case"); Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.), 800 F.2d 581, 586 (6th Cir. 1986) (noting the "broad discretion" courts are given to determine proper classifications).

Courts have routinely upheld separate classifications of various groups of claims and interests where there is a reasonable basis for such separation. In so doing, they have emphasized that the Bankruptcy Code prohibits only the identical classification of dissimilar claims, and nowhere requires the same classification for claims that may share some attributes. Jersey City Med. Ctr., 817 F.2d at 1060 (noting that "[t]he express language of this statute explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes"); Briscoe Enters., 994 F.2d at 1167 (permitting separate classification of similar claims where there were "good business reasons"); U.S. Truck Co., 800 F.2d at 587 (permitting separate classification of similar claims); In re Ionosphere Clubs, Inc., 98 B.R. 174, 177-78 (Bankr. S.D.N.Y. 1989) (stating "a debtor may place claimants of the same rank in different classes and thereby provide different treatment for each respective class").

Here, the Plan's classification structure meets these standards. The Plan, which constitutes a separate chapter 11 plan for each Debtor, provides for the separation of Claims and Interests into the following ten classes based upon differences in the legal nature and/or priority of such Claims and Interests:

- Classes 1(a)-(l) (Other Priority Claims) provides for the separate classification of claims entitled to priority under section 507(a) of the Bankruptcy Code, other than Administrative Claims and Priority Tax Claims.
- Classes 2(a)-(l) (Funded Lender Claims) provides for the separate classification of all secured Funded Lender Claims.
- Classes 3(a)-(l) (L/C Lender Claims) provides for the separate classification of all L/C Lender Claims.
- Classes 4(a)-(l) (Other Secured Claims) provides for the separate classification of any Secured Claim that is not a Funded Lender Claim or an L/C Lender Claim.
- Classes 5(a)-(l) (L/C General Unsecured Claims) provides for the separate classification of Unsecured Claims for which (a) the Holder is a beneficiary of a Prepetition Letter of Credit; or (b) the nonpayment of such claim by the Debtors would entitle an insurer or surety under an Insurance Policy or Agreement to draw under one or more Prepetition Letters of Credit.
- Classes 6(a)-(l) (General Unsecured Claims) provides for the separate classification of General Unsecured Claims.
- Classes 7(a)-(l) (Intercompany Claims) provides for the separate classification of Intercompany Claims.

- Classes 8(a)-(l) (Small Unsecured Claims) provides for the separate classification of Small Unsecured Claims for administrative convenience.
- Classes 9(a)-(l) (Interests) provides for the separate classification of all Interests in the Debtors.
- Classes 10(a)-(l) (Section 510(b) Claims) provides for the separate classification of all Section 510(b) Claims.

The Plan's classification structure is factually and legally reasonable, necessary to implement the Plan, and in accordance with section 1122(a) of the Bankruptcy Code. Each Class of Claims or Interests contains only Claims or Interests that are substantially similar to the other Claims or Interests within that Class. Accordingly, the Debtors submit that the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

2. Specification of Unimpaired Classes (Section 1123(a)(2))

Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). The classes, which include all Claims and Interests that are required to be classified, are summarized in Section 3.2 of the Plan. More specifically, Article III of the Plan identifies all classes of Claims and Interests that are unimpaired and sets forth the applicable treatment afforded to them under the Plan and consistent with the provisions of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of Bankruptcy Code section 1123(a)(2).

3. Treatment of Impaired Classes (Section 1123(a)(3))

Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C.

§ 1123(a)(3). Article III of the Plan specifies the treatment of Claims and Interests that are impaired. Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

4. Equal Treatment Within Classes (Section 1123(a)(4))

Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Article III of the Plan satisfies this requirement in that all Holders of Claims and Interests within a particular class are receiving identical treatment under the Plan, unless any such Holder has agreed to accept less favorable treatment. Thus, the Plan complies with this section of the Bankruptcy Code.

5. Means for Implementation (Section 1123(a)(5))

Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. 11 U.S.C. § 1123(a)(5). Articles VI, VII, and VIII of the Plan, along with various other provisions, provide adequate means for implementing the Plan, including, among other things: (i) entry into the $103.5 million Exit Credit Facilities consisting of the Exit Revolver in an amount of up to $50 million and the Exit Term Loan in the original principal amount of up to $53.5 million; (ii) entry into the Term Loan Credit Agreement providing for the issuance of Term Notes to Holders of Prepetition Funded Lender Claims (and, if Prepetition L/C Lenders fund draws under a Prepetition Letter of Credit, the Prepetition L/C

Lenders) in the aggregate principal amount of $135 million;[7] (iii) issuance of Reorganized BMHC Equity Interests, less reserves for the L/C Lender Equity Reserve and for options, or other equity awards, if any, to Holders of allowed Funded Lender Claims (and, if Prepetition L/C Lenders fund draws under a Prepetition Letter of Credit, the Prepetition L/C Lenders as specified in the Plan); (iv) the funding the Unsecured Cash Fund with $5.5 million, and up to $700,000 for payments with respect to Allowed Small Unsecured Claims; (v) the assumption and rejection of Executory Contracts and Unexpired Leases; and (vi) provisions with respect to the ongoing management and operations of the Reorganized Debtors. The Debtors will have sufficient Cash to make all payments required to be made pursuant to the terms of the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(5) of the Bankruptcy Code.

6. Charter Provisions (Section 1123(a)(6))

Section 1123(a)(6) of the Bankruptcy Code requires that the Plan provide for the inclusion in a debtor's charter of specific provisions (i) prohibiting the issuance of nonvoting equity securities and (ii) providing for an "appropriate distribution" of voting power among the securities possessing voting power. 11 U.S.C. § 1123(a)(6). Section 7.11 of the Plan provides: "The New Certificates of Incorporation and New Bylaws, among other things, shall prohibit the issuance of nonvoting equity securities to the extent required by section 1123(a) of the Bankruptcy Code," and the operative documents with respect to the Reorganized Debtors, filed in the Plan Supplement, prohibit the issuance of nonvoting equity securities. Accordingly, the Plan satisfies the requirement of section 1123(a)(6) of the Bankruptcy Code.

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7 Less amounts received from the Sale Cash Collateral Excess Proceeds Account established under the DIP Facility, but plus any amounts issued to the Prepetition L/C Lenders that fund draws under a Prepetition Letter of Credit.

7. Selections for Certain Positions (Section 1123(a)(7))

Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any officer, director or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123(a)(7). Section 7.9 of the Plan provides that "the operation, management and control of the Reorganized Debtors shall be the general responsibility of its board of directors or managers and senior officers . . . ." In addition, the Plan Supplement [D.I. 930, D.I. 1067] identifies individuals proposed to serve, after the Effective Date, as a director or officer of the Reorganized Debtors. The persons proposed to serve, after the Effective Date, as a director or officer of the Reorganized Debtors were selected in good faith and are fully qualified effectively to operate, manage and control the Reorganized Debtors after the Effective Date. No party has suggested that the manner of selection of officers and directors and their successors are inconsistent with public policy or the interests of creditors and equity security holders. Therefore, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

B. The Permissive Provisions Contained in the Plan Are Appropriate

Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Among other things, this subsection provides the authority to include in a plan provisions beyond the list of examples of mandatory and permissive provisions set forth in sections 1123(a) and 1123(b). The Plan contains a number of these provisions, each of which is consistent with the applicable provisions of the Bankruptcy Code.

1. The Plan's Treatment of Executory Contracts

Consistent with section 1123(b)(2) of the Bankruptcy Code, Article VI of the Plan provides for the assumption of executory contracts and unexpired leases of the Debtors except for any such contract or lease (i) that has been assumed or rejected, or renegotiated and either assumed or rejected on renegotiated terms, pursuant to an order of the Court entered prior to the Effective Date, (ii) that has been entered into by the Debtors during the pendency of the Chapter 11 Cases in the ordinary course of business or pursuant to an order of the Court, (iii) that is the subject of a motion to reject, or a motion to approve renegotiated terms and to assume or reject on such renegotiated terms, that has been filed and served prior to the Effective Date, or (iv) that is identified on the Rejected Executory Contract and Unexpired Lease List. The Debtors intend to file the Rejected Executory Contract and Unexpired Lease List prior to the Confirmation Hearing. Such treatment of Executory Contracts and Unexpired Leases is typical in chapter 11 cases and is appropriate.

2. The Plan's Provisions Regarding Retention, Enforcement and Settlement of Claims Held by the Debtors and Retention of Jurisdiction

Consistent with section 1123(b)(3) of the Bankruptcy Code, section 9.2.1 of the Plan provides for certain releases of claims by the Debtors, and section 7.16 provides for the preservation of other Causes of Action, including those specified in the Plan Supplement. In addition, pursuant to Article XI of the Plan, the Court will generally retain jurisdiction as to all matters involving the Plan, including, among other things, allowance of Claims, determination of tax liability under section 505 of the Bankruptcy Code, resolution of Plan-related controversies, and approval of matters related to the assumption or rejection of executory contracts or unexpired leases. Significantly, the above matters are matters that the Court would otherwise

have jurisdiction over during the pendency of the Chapter 11 Cases. See 28 U.S.C. §§ 157 and 1334. This retention of jurisdiction by the Court post-confirmation is permitted by the Bankruptcy Code. In re Johns-Manville Corp., 97 B.R. 174, 180 (Bankr. S.D.N.Y. 1989).

3. The Plan's Provisions Regarding Modification of the Rights of Holders of Claims

Consistent with section 1123(b)(1) and (b)(5) of the Bankruptcy Code, Articles III and IV of the Plan modify or leave unaffected, as the case may be, the rights of Holders of Claims and Interests within each class.

4. The Release, Exculpation and Injunctive Provisions

The Plan's release, exculpation and injunctive provisions are necessary and appropriate for the implementation of the Plan and are otherwise consistent with the Bankruptcy Code and Third Circuit precedent. Accordingly, the release, exculpation and injunctive provisions should be approved.

a. The Debtor Release

Section 9.2.1 of the Plan provides that, as of the Effective Date, the Debtors shall release certain claims, rights and causes of action arising prior to the Effective Date that the Debtors may have against the Released Parties, including certain entities that commonly are released in chapter 11 plans – officers, directors, professionals, agents and employees of the Debtors, the agent under the Prepetition Credit Agreement, the Prepetition Lenders and their respective officers, directors, employees, professionals and agents (the "Debtor Release").

The Plan's Debtor Release provisions will eliminate the costs and risks of litigation and allow the principals of the Reorganized Debtors to focus on operations after emergence, as opposed to being distracted by litigation (either as a party to such litigation themselves or the

stakeholders who will bear the burdens of the Debtors' investigation, prosecution or participation in such litigation).

The Debtor Release provisions are the product of arm's-length negotiations, have been critical to obtaining the support of the various constituencies for the Plan, are not objected to by any party in interest and, as part of the Plan, have received overwhelming support from voting creditors. Accordingly, the Debtor Release provisions are necessary and appropriate under the circumstances of the Chapter 11 Cases and should be approved pursuant to section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019.

(1) Bankruptcy Rule 9019

Where a compromise is part of a plan, the court has a duty to determine if the proposed compromise is "fair and equitable." In re Coram Healthcare Corp., 315 B.R. 321, 334 (Bankr. D. Del. 2004). "The standards for approval of a settlement under section 1123 are generally the same as those under Rule 9019" of the Bankruptcy Rules. Id. Under Rule 9019, approval of a proposed settlement is within the "sound discretion" of the bankruptcy court. In re Neshaminy Office Building Assocs., 62 B.R. 798, 803 (E.D. Pa. 1986), cited with approval in Meyers v. Martin (In re Martin), 91 F.3d 389 (3d Cir. 1996). The bankruptcy court should not substitute its judgment for that of the debtor. Neshaminy, 62 B.R. at 803. The court is not to decide the numerous questions of law or fact raised by litigation, but rather should "canvas the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983), cert. denied, 464 U.S. 22 (1983). The Third Circuit Court of Appeals has enumerated the following four-factor test to be used in deciding whether to approve a compromise or settlement: "(1) the probability of success in litigation,

(2) the likely difficulties in collection, (3) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." In re RFE Inds., Inc., 283 F.3d 159, 165 (3d Cir. 2002). Additionally, the court should defer to a debtor's judgment if there is a legitimate business justification for its action. See Meyers, 91 F.3d at 395.

The Debtors are not aware of any viable litigation against the Released Parties, so it is not possible to place any probability of success on such litigation. Further, given that the Debtors are not aware of any viable claims, it certainly seems likely that any litigation brought against the Released Parties "would [have been] expensive, time consuming, complicated, protracted and vigorously defended[.]" In re PWS Holding Corp., 228 F.3d 224, 231 (3d Cir. 2000). Finally, the contemplated releases were a key component of the negotiations with respect to the Plan and the Prepetition Lenders' agreement to provide the $5.5 million Unsecured Cash Fund and the funds for payment of a 25% distribution to Holders of allowed Small Unsecured Claims, without which the distributions to unsecured creditors proposed by the Plan could not have been achieved. Because of the consideration provided under the Plan, which constitutes a substantial contribution to the Debtors' reorganization, Holders of Unsecured Claims will obtain a larger recovery on account of their Allowed Claims than they would have otherwise received.

Under the Plan, the Debtors' pre-petition lenders will become the majority owners of the Reorganized Debtors, receiving the Reorganized BMHC Equity Interests. In the view of the Debtors and the other stakeholders who assisted in developing the Plan, pursuing questionable causes of action against third parties, including the new owners of the Reorganized Debtors, and distracting the officers and directors of the Reorganized Debtors from their primary obligations

of managing and supervising the management of the Reorganized Debtors to attend to such litigation matters will not serve the ultimate goal of maximizing the value of the Reorganized Debtors. Accordingly, the Debtors submit that the "paramount interest of creditors" is best served by the Court's approval of the Plan, including the releases of the Released Parties.

(2) Additional Factors

While some courts have focused solely on the Rule 9019 standard in evaluating debtor releases of third parties in a plan (see In re AAIPharma, Inc., Case No. 05-11341 (PJW), Transcript of Record at 44-45 [Docket No. 893] (Bankr. D. Del. Jan. 18, 2006)), others focus upon "additional factors . . . relevant to determine the fairness of the compromise." Coram Healthcare, 315 B.R. at 335 (citing Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212-214 (3d Cir. 2000); In re Genesis Health Ventures, Inc., 266 B.R. 591, 608 (Bankr. D. Del. 2001); In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999).

In the Zenith case, the court applied the factors identified in In re Master Mortgage, 168 B.R. 930, 934 (Bankr. W.D. Mo. 1994), in connection with examination of debtor releases. The Master Mortgage court approved releases and indicated that the following five factors were important to its decision:

> i. There is an identity of interest between the debtor and the third party . . . such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate[;]
> ii. The non-debtor has contributed substantial assets to the reorganization[;]
> iii. The injunction is essential to the reorganization. Without it, there is little likelihood of success[;]
> iv. A substantial majority of the creditors have agreed to support the injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment[; and]
> v. The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

Master Mortgage, 168 B.R. at 935 (internal citations omitted). However, the principal focus of the release discussion in the Master Mortgage case was not a debtor release, but a plan provision enjoining creditors and equity security holders from asserting claims against the debtor's largest secured creditor. Likewise, in Continental, the Third Circuit was faced with a plan provision authorizing the non-consensual release and permanent injunction of shareholder lawsuits against present and former officers and directors of the debtors. See Continental, 203 F.3d at 211, 214.

To the contrary, the Debtor releases in section 9.2.1 of the Plan are consensual, granted in the context of the global resolution achieved among the Debtors and their Prepetition Lenders. As the Third Circuit held in In re PWS Holding Corp., 228 F.3d at 245 n.21, its holding in Continental should not be extended to serve as a standard by which debtor releases should be measured. "Section 524(e) provides that the bankruptcy discharge of the debtor does not operate to relieve non-debtors of their liabilities, but by its terms it does not govern provisions in a plan by which a debtor releases its own claims against third parties." Id.

Accordingly, the Debtors submit that the Court need not engage in a Master Mortgage inquiry as to whether additional factors exist to support the grant of the Debtors releases of the Released Parties. Nevertheless, the Debtors submit that substantially all of these factors are present in the Chapter 11 Cases.

- *Identity of interest*

The Prepetition Lenders and the Debtors' directors and officers were "instrumental in formulating the Plan." See Zenith Elecs. Corp., 241 B.R. at 110. In addition, these parties are entitled to indemnification from the Debtors.

The Debtors' Prepetition Lenders and Wells Fargo Bank, as agent, enjoy a right to contractual indemnity under the Debtors' Prepetition Credit Agreement. Specifically, section 11.04(b) of the Prepetition Credit Agreement grants WFB and the Prepetition Lenders a broad indemnity for losses, claims or expenses.

With regard to current and former executive officers and directors, section 43 of the Amended and Restated Bylaws of Building Materials Holding Corporation (the "BMHC Bylaws") provides that officers and directors are indemnified to the fullest extent authorized by Delaware law (subject to limitation by individual contract). Delaware General Corporation Law § 145 allows a company to indemnify any person sued as a director, officer, employee or agent of the company "if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."[8]

Because a suit against the Prepetition Lenders, WFB as agent, or current or former directors and officers would likely give rise to indemnification claims against the Debtors' estates, thereby depleting their estates, the Debtor Release provided for in the Plan is appropriate.

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[8] Section 145(a) of the Delaware General Corporation Law, 8 Del. C. § 145(a), provides in pertinent part:

> A corporation shall have the power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of a corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful . . . .

- *Substantial contributions by Released Parties have resulted in a direct benefit to the Estates and holders of Claims*

The Plan provides (among other things) that Allowed Administrative Expense Claims, Professional Compensation Claims, Priority Tax Claims, DIP Facility Claims, and Other Priority Claims will be paid in full, while Holders of Other Secured Claims and L/C General Unsecured Claims will have their claims reinstated or otherwise rendered unimpaired. Holders of General Unsecured Claims and Small Unsecured Claims will receive a cash payment on account of their Claims. These distributions have been made possible because of the Prepetition Lenders' willingness to provide value to other creditors that would not otherwise be available due to the Prepetition Lenders having security interests in substantially all of the Debtors' assets. Further, the efforts of the Debtors' and officers, as well as the Prepetition Lenders, have made it possible for the company to emerge from bankruptcy protection.

As evidenced in the detailed updated Liquidation Analysis attached as Exhibit A to the Dietz Declaration, the result of the collective efforts of the parties who negotiated the terms of the Plan has been the Debtors' ability to propose a Plan that provides for greater recoveries by Holders of Allowed Claims than they would otherwise have received on account of their Claims. The Debtors' officers and directors contributed, among other ways, through the stable maintenance of the Debtors' business operations during a lengthy restructuring process and the negotiation of a feasible financial restructuring at a time of unprecedented upheaval in the U.S. economy and in the credit markets. See Zenith Elecs. Corp., 241 B.R. at 111 (officers and directors made substantial contributions by designing and implementing the operational restructuring and negotiating the financial restructuring with the plan funder). In addition, many Released Parties played a principal role in orchestrating the ultimate resolution set forth in the

Plan, thereby contributing in a substantial way to the Debtors reaching this result, which is in the best interests of all creditors and parties in interest. Id. at 110 (noting that released parties "instrumental in formulating the Plan, . . . share an identity of interest with [the debtor] in seeing that the Plan succeed and the company reorganize").

- *Necessity*

The Debtor Release is an integral element of the Plan. The Plan represents a global agreement among the parties in the Chapter 11 Cases, which is premised on all of its mutually-interdependent elements, including the Debtor Release.

- *Overwhelming support for the Plan and the proposed releases*

No party or person affected by the proposed Debtor Release has presented an objection to this feature of the Plan. Furthermore, in the aggregate, creditors voted $19,302,659.64 in claims in Class 6 and Class 8 to accept the Plan, as opposed to $9,985,483.82 in claims in such classes that voted to reject the Plan.

- *Treatment of claims of classes affected by the injunction*

As previously noted, the Debtor Release set forth in the Plan is entirely consensual on the part of the Debtors, so this factor from the Master Mortgage case is not particularly applicable. The only interested parties arguably affected by the Debtors' release of the Released Parties are those whose rights are impaired under the Plan. Here, the Liquidation Analysis demonstrates that, by virtue of the global resolution of all matters through the Plan as opposed to a chapter 7 liquidation, the distribution that the Holders of Allowed Claims will receive has been meaningfully enhanced by the substantial contributions by Released Parties. Accordingly, the Debtors submit that any collateral rights that claimants might forego as a result of the Debtors'

releases of the Released Parties are overshadowed by the tangible consideration that such claimants are entitled to receive under the Plan. Therefore, the Debtor Release is appropriate.

b. Consensual Third-Party Releases

Section 9.2.3 of the Plan is a consensual third-party release of the Released Parties that, as result of amendments made to the Plan on December 7, 2009, is given only by those Holders of Claims or Interests that voted to accept the Plan (the "Third-Party Release"). Accordingly, the release is appropriate under applicable case law. See Zenith Elecs. Corp., 241 B.R. at 111.

c. Exculpation

Section 9.2.4 of the Plan contains a provision which, in sum, exculpates the Exculpated Parties from liability for acts or omissions occurring during and in connection with the Chapter 11 Cases, except for claims arising from the gross negligence, willful misconduct, fraud, or breach of fiduciary duty or loyalty (the "Exculpation"). The "Exculpated Parties" consist of (i) the Debtors and each of the Debtors' respective officers, directors, employees, Professionals, and agents, (ii) the Creditors Committee, its members, and Professionals, (iii) WFB, in its capacity as Agent under the Prepetition Credit Agreement, and its officers, directors, employees, professionals, and agents, (iii) the Prepetition Lenders and each of their respective officers, directors, employees, professionals, and agents, and (iv) the DIP Lenders and each of their respective officers, directors, employees, professionals, and agents. Because the Exculpation excludes any acts that constitute willful misconduct or gross negligence, it is consistent with the exculpation clause approved in In re PWS Holding Corp., 228 F.3d at 245-46. Accordingly, the exculpation provision of the Plan is appropriate and should be approved.

d. Injunction

Finally, section 9.2.5 of the Plan is an injunction provision relating to the release and exculpation provisions and should be approved. The injunction provision is necessary to preserve and enforce the Debtor Release, the Third-Party Release and the Exculpation. Further, Article XI(B) of the Disclosure Statement, along with section 9.2 of the Plan, comply with the requirements of Bankruptcy Rule 3016(c) that "the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and entities that would be subject to the injunction." The Disclosure Statement states in bold letters all acts to be enjoined and identifies all entities that would be subject to the injunction. The applicable release, exculpation, and injunction provisions are clearly identified in the Plan and Disclosure Statement, are displayed in bold font, and specifically identify all acts to be enjoined and identifies all entities that would be subject to the injunction.

C. The Proponents of the Plan Have Complied with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2))

Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a plan comply with the applicable provisions of title 11. 11 U.S.C. § 1129(a)(2). The principal purpose of this section is to ensure that a plan proponent has complied with the requirements of section 1125 in the solicitation of acceptances of the plan. See In re Resorts Int'l Inc., 145 B.R. 412, 468-69 (Bankr. D.N.J. 1990); see also H.R. Rep. No. 95-595, at 412 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6368.

Here, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of section 1125 of the Bankruptcy Code and the applicable Bankruptcy Rules. The Court entered the Disclosure Statement Approval Order on October 22, 2009 and the

Solicitation Extension Order on October 27, 2009. The Disclosure Statement, the Plan, appropriate ballots, notices, and all other related documents were distributed to all parties in accordance with the Disclosure Statement Approval Order and Solicitation Extension Order. Similarly, the date and time of the Voting Deadline and the Confirmation Hearing were timely published in the national edition of The Wall Street Journal, regional English and Spanish language papers in Las Vegas, Los Angeles, and Phoenix, and English language publications in Fort Lauderdale and Miami on or before October 31, 2009. The Debtors have filed affidavits and certificates of service demonstrating compliance with section 1125 of the Bankruptcy Code, the Bankruptcy Rules, the Disclosure Statement Approval Order and the Solicitation Extension Order with respect to the transmittal of the Disclosure Statement, the Plan, and all related solicitation materials. [See D.I. 834, 835, 836, 837, 854, 855, 856, 1005, 1006, and 1049] Furthermore, the Debtors have complied with all other orders of the Court entered during the pendency of these chapter 11 cases and with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules with respect to postpetition disclosure and solicitation of acceptances of the Plan. Accordingly, the Debtors have fully complied with all the provisions of title 11 and, in particular, with the provisions of section 1125 of the Bankruptcy Code. Consequently, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

D. The Plan was Proposed in Good Faith (Section 1129(a)(3))

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although not defined in the Bankruptcy Code, "good faith" has been interpreted by the courts to include: (i) the debtor's "legitimate and honest purpose" in proposing the plan and "reasonable hope of success," In re

Century Glove, Inc., No. Civ. A. 90-400-SLR, 1993 U.S. Dist. LEXIS 2286, at *15 (D. Del. Feb. 10, 1993); (ii) a showing that the plan was proposed with "honesty and good intentions," Kane v. Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988) (citations omitted); and (iii) the existence of "a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code," In re Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1984) (citations omitted). The Court must also consider the totality of the circumstances surrounding a plan to determine if it has been proposed in good faith. In re New Valley Corp., 168 B.R. 73, 81 (Bankr. D.N.J. 1994).

Prior to the Petition Date, the Debtors engaged in good faith, arm's-length negotiations with their Prepetition Lenders, among many other potential funding sources, to develop a proposed restructuring that would significantly de-lever the Debtors' balance sheets, while at the same time provide a meaningful recovery to the Debtors' unsecured creditors in relation to the amount that they would receive in a liquidation. After months of negotiations and the consideration of multiple funding proposals, the Debtors and certain of their Prepetition Lenders were able to agree to a restructuring proposal. The Debtors filed an initial proposed plan of reorganization with respect to this restructuring proposal on the Petition Date. The Debtors subsequently filed several amended versions of the proposed plan as a result of continued negotiations and developments. At the same time, the Debtors were engaged in discussions with various plan bidders to explore alternative plan proposals. Those discussions did not result in an alternative that the Debtors viewed as more favorable to that in the Plan. After additional negotiations with the Creditors Committee, the Debtors filed the Plan that they are now requesting the Court to confirm (with certain technical modifications).

The Plan was negotiated in good faith and is the result of arm's length negotiations among the Debtors, the Prepetition Lenders, the Creditors Committee, and certain of the Debtors' creditors. The Plan allows Holders of Allowed Claims to realize the highest possible recovery under the circumstances. As such, the Plan was proposed with the legitimate and honest purpose of providing the greatest possible distribution to the Debtors' creditors while facilitating the rehabilitation of the Debtors' business. Additionally, the Plan has been proposed in compliance with all applicable laws, rules and regulations. Clearly, the Plan has been conceived and proposed with the "honest purpose" and "reasonable hopes of success" by which "good faith" under section 1129(a)(3) of the Bankruptcy Code is measured. Brite v. Sun Country Dev., Inc. (In re Sun County Dev., Inc.), 764 F.2d 406, 408 (5th Cir. 1985). Accordingly, the Plan satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

E. Payments for Services or Costs and Expenses (Section 1129(a)(4))

Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case," either be approved by the Court as reasonable or subject to approval of the Court as reasonable. 11 U.S.C. § 1129(a)(4). To date, all such payments have been approved by this Court or are subject to the approval of the Court pursuant to section 2.2 of the Plan. The procedures for the Court's review and ultimate determination of the fees, costs and expenses to be paid by the Debtors satisfy the requirements of section 1129(a)(4) of the Bankruptcy Code. Resorts Int'l, 145 B.R. at 475-76 (stating that as long as fees, costs and expenses are subject to final approval of the court, section 1129(a)(4) of the Bankruptcy Code is satisfied).

F. Service of Certain Individuals (Section 1129(a)(5))

Sections 1129(a)(5)(A)(i) and (ii) of the Bankruptcy Code require that the plan proponent disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or successor to the debtor under the plan," and require a finding that the "appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(i)-(ii).

The Debtors have disclosed in the Plan Supplement and/or will disclose on the record at the Confirmation Hearing the identity and affiliations of the individuals or Entities proposed to serve as a director or officer of the Debtors under the Plan, including the compensation of any insiders, and the appointment to, or continuation in such offices of each such individual is consistent with the interests of Creditors and with public policy. As a result, the Plan satisfies section 1129(a)(5)(A) of the Bankruptcy Code.

G. Rate Changes (Section 1129(a)(6))

Section 1129(a)(6) of the Bankruptcy Code requires any governmental regulatory commission having jurisdiction over the rates charged by the post-confirmation debtor in the operation of its business to approve any rate change provided for in the plan. 11 U.S.C. § 1129(a)(6). Because no governmental regulatory commission will have jurisdiction over the Debtors' rates after confirmation of the Plan, the provisions of section 1129(a)(6) of the Bankruptcy Code are not applicable to the Plan and, consequently, should be deemed satisfied.

H. The Plan Satisfies the "Best Interests" Test (Section 1129(a)(7))

The Bankruptcy Code protects creditors and equity holders who are impaired by the Plan and have not voted to accept the Plan through the "best interests" test of section 1129(a)(7). The "best interests" test requires that holders of impaired claims or interests who do not vote to accept the plan "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7)(A). If the Court finds that each non-consenting member of an impaired class will receive at least as much under the Plan as it would receive in a chapter 7 liquidation, the plan satisfies the best interests test. Century Glove, 1993 U.S. Dist. LEXIS 2286, at *23.

The Debtors submit that, with respect to each impaired Class of Claims or Interests, each Holder of a Claim or Interest in such impaired Class (i) has accepted the Plan; (ii) will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtor entity was liquidated under chapter 7 of the Bankruptcy Code on the Effective Date; or (iii) has agreed to receive less favorable treatment. This is demonstrated by the Liquidation Analysis attached to the Dietz Declaration. Specifically, under the Plan, Holders of General Unsecured Claims will receive their Pro Rata share of the distributions from the Unsecured Cash Fund of $5.5 million, resulting in a projected rate of recovery of 12.1%. As demonstrated in the Liquidation Analysis, this projected recovery to Holders of General Unsecured Claims under the Plan exceeds the following projected recoveries to Holders of General Unsecured Claims in a hypothetical chapter 7 liquidation: BMHC (4.1%), BMC West (0.0%), Illinois Framing (0.5%), SelectBuild

Construction (0.0%), SelectBuild Northern California (0.5%), C Construction (4.4%), TWF Construction (0.0%), H.N.R. Framing Systems (0.0%), SelectBuild Southern California (0.5%), SelectBuild Nevada (0.0%), SelectBuild Arizona (2.3%) and SelectBuild Illinois (0.1%). Holders of Interests in BMHC and Section 510b) Claims, who will receive no distribution under the Plan, would likewise receive no distribution in a hypothetical chapter 7 liquidation. Therefore, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

I. Acceptance of the Plan by Each Impaired Class (Section 1129(a)(8))

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. 11 U.S.C. § 1129(a)(8). Classes 2(a)-(l), Classes 3(a)-(l), Classes 6(a), 6(e), 6(k) and 6(l), and Classes 8(a)-(l) are impaired by the Plan and each Class has accepted the Plan. Because the Holders of Interests in Class 9(a) and Claims in Classes 10(a) through 10(l) will not receive or retain any property on account of such Claims or Interests, pursuant to section 1126(g) of the Bankruptcy Code, these Classes are deemed not to have accepted the Plan. Holders of Claims in Classes 6(b), 6(c), 6(d), 6(f), 6(g), 6(h), 6(i) and 6(j) have rejected the Plan. Notwithstanding the lack of compliance with section 1129(a)(8) of the Bankruptcy Code with respect to the Non-Accepting Classes, the Plan is confirmable because, as described below, the Plan satisfies the "cramdown" requirements of section l129(b) of the Bankruptcy Code with respect to the Non-Accepting Classes.

J. The Plan Satisfies the "Cram Down" Requirements with Respect to the Non-Accepting Classes

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan when the plan is not accepted by all impaired classes of claims or interests. Specifically, section 1129(b) provides, in pertinent part:

> [I]f all of the applicable requirements of subsection (a) of [section 1129] other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b).

This section essentially provides two requirements for "cramdown" of a plan on a dissenting impaired class: (i) that the plan does not discriminate unfairly, and (ii) that it be fair and equitable, with respect to such class. 11 U.S.C. § 1129(b)(1).

1. The Plan Complies with Section 1129(b)(1) Because it Does Not Discriminate Unfairly Against Holders of Claims and Equity Interests in Rejecting Classes.

The section 1129(b)(1) requirement that a plan not discriminate unfairly against impaired, dissenting classes focuses on the treatment of the dissenting class relative to other classes consisting of similar legal rights. See H.R. Rep. No. 95-595, at 416 ("The plan may be confirmed . . . if the class is not unfairly discriminated against with respect to equal classes and if junior classes will receive nothing under the plan. . . ."); see also In re Buttonwood Partners, Ltd., 111 B.R. 57, 62 (Bankr. S.D.N.Y. 1990) (same). Moreover, section 1129(b)(1) does not prohibit discrimination among classes; it only prohibits discrimination that is "unfair" with respect to the class or classes that do not accept the plan. In re 11,111, Inc., 117 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment. In re Kennedy, 158 B.R. 589, 599 (Bankr. D.N.J. 1993); In re Buttonwood Partners, Ltd., 111 B.R. at 63. Thus, with respect

the Non-Accepting Classes, there is no unfair discrimination if (i) the classes comprise dissimilar claims or interests, or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment. In re Johns-Manville Corp., 68 B.R 618, 636 (Bankr. S.D.N.Y. 1986); Buttonwood Partners, 111 B.R. at 63; In re Rivera Echevarria, 129 B.R. 11, 13 (Bankr. D.P.R. 1991).

The Plan does not discriminate unfairly against the Holders of Claims in Class 6 and 10, or the Holders of Interests in Class 10. First, while the Plan places Unsecured Claims of $5,000 or less (including those that have been reduced to $5,000 or less by agreement of the claimant) in separate Class 8 Classes from General Unsecured Claims above $5,000, which are placed in Class 6 Classes, this does not constitute unfair discrimination because section 1122(b) of the Bankruptcy Code specifically authorizes such treatment. See 11 U.S.C. § 1122(b) ("A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience."). In addition, every Holder of a General Unsecured Claim in Class 6 Classes had an equal opportunity to make the Small Unsecured Claims Class Election and thereby reduce the aggregate amount of its General Unsecured Claims against all Debtors to $5,000 or less and have such claim treated as a Small Unsecured Claim. Second, while Intercompany Claims may be reinstated, this is simply to preserve the Debtors' corporate structure and benefits only the new owners of the Reorganized BMHC Equity Interests, the Holders of Funded Lender Claims (and, to the extent Prepetition Letters of Credit are drawn, the Holders of L/C Lender Claims), because all of the Subsidiary Debtors are 100% owned, directly or indirectly, by Reorganized BMHC.

Finally, the "unfair discrimination" requirement does not apply to Classes 9 and 10 because there are no other classes with similar legal rights to those in Classes 9 and 10. Class 9 consists of Holders of Interests in the Debtors. Classes 10 consist of Holders of Claims subordinated pursuant to section 510(b) of the Bankruptcy Code. Accordingly the Plan does not discriminate unfairly with respect to these classes.

2. The Plan Complies with Section 1129(b)(1) Because it is Fair and Equitable with Respect to Holders of Claims and Interests in Non-Accepting Classes.

Under section 1129(b)(2)(C)(ii), a plan is fair and equitable with respect to a dissenting classes of unsecured claims and interests if it follows the "absolute priority" rule. See 11 U.S.C. § 1129(b)(2)(B)(ii) and (C) (ii); see also Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441-442 (1999); In re PPI Enters. (U.S.), Inc., 228 B.R. 339, 352 (Bankr. D. Del. 1998); In re Union Meeting Partners, 165 B.R. at 569. The Plan complies with this rule.

Under the Plan, Intercompany Interests in Classes 9(b) through (l) are rendered unimpaired, but this is done to maintain the Debtors' prepetition organizational structure for the administrative benefit of the Holders of Funded Lender Claims (and, to the extent Prepetition Letters of Credit are drawn, the Holders of L/C Lender Claims). The Intercompany Interests in Classes 9(b) through (l) are not "old equity"—instead, old equity consists of the Interests in BMHC (Class 9(a)) which are being cancelled without further distribution. The recognition and preservation of Intercompany Interests in the Plan is nothing more than a conceptual mechanism to consolidate the equity interests in the Reorganized Debtors for distribution to the Holders of Funded Lender Claims (and, to the extent Prepetition Letters of Credit are drawn, the Holders of

L/C Lender Claims), who are entitled to substantially all of the reorganization consideration available for distribution.

Approximately two weeks ago, Bankruptcy Judge James M. Peck, United States Bankruptcy Judge for the Southern District of New York, confirmed a plan of reorganization which provided for the preservation of intercompany interests over the objection of a junior creditor in In re Ion Media Networks, Inc., No. 09-13125, 2009 Bankr. LEXIS 3710 (Bankr. S.D.N.Y. Nov. 24. 2009). In overruling the junior creditor's objection, Judge Peck wrote:

> This technical preservation of equity is a means to preserve the corporate structure that does not have any economic substance and that does not enable any junior creditor or interest holder to retain or recover any value under the Plan. The Plan's retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure. These intercompany interests are being retained with the consent and support of the First Lien Lenders in recognition of the value to the enterprise that the company's structure represents to the Debtors' estate and creditors.

Id. at *40-41. The same is true here. The preservation of the Intercompany Interests does not enable the Holders of those Interests to retain or recover any value; instead, the preservation of the corporate structure benefits the new holders of the Reorganized BMHC Equity Interests, the Debtors' secured Prepetition Lenders. Accordingly, the Plan complies with the absolute priority rule.

Even if the preservation of the Debtors' corporate structure should be deemed to result in a recovery to Classes 9(b)-(l), the Plan still satisfies the absolute priority rule. Significantly, the absolute priority rule does not prohibit payment to a junior class of claims or interests over the objecting senior class in every instance. Instead, courts have held that "gifting," pursuant to which a senior secured creditor voluntarily offers a portion of its very own collateral to junior

creditors, does not violate the absolute priority rule. See In re World Health Alternatives, Inc., 344 B.R. 291, 298-99 (Bankr. D. Del. 2006) (noting that, under In re Armstrong World Indus., Inc., 432 F.3d 507, 514 (3d Cir. 2005), carve out agreements under which a secured creditor gives up a portion of its collateral for the benefit of junior creditors does not violate the absolute priority rule); see also In re Genesis Health Ventures, Inc., 266 B.R. 591, 617 (Bankr. D. Del. 2001) (holding that allocation of equity and warrants to management who were former equityholders did not violate the absolute priority rule because the allocation was a voluntary transfer of value from senior lenders). Indeed, "gifting" does not even implicate the absolute priority rule because the property being gifted does not belong to the estate; instead, it belongs to the secured creditors who have a lien on the property. See World Health, 344 B.R. at 298 (noting that Armstrong distinguished an appropriate "gifting" case where "the senior creditor had a perfected security interest, meaning that the property was not subject to distribution under the Bankruptcy Code's priority scheme").

To the extent one could deem that preserving the Debtors' corporate structure results in a recovery to Holders of Intercompany Interests, the Plan simply results in a proper gift. Here, the Prepetition Lenders have an undisputed, perfected security interests in the very Intercompany Interests that are being preserved. BMHC, BMC West, and the other Subsidiary Debtors (collectively, the "Prepetition Grantors") are parties to the Third Amended and Restated Security Agreement, dated as of November 10, 2006 (the "Prepetition Security Agreement") along with WFB, as administrative agent (in such capacity, the "Prepetition Administrative Agent"), and the lenders under the Prepetition Credit Agreement (together with the Prepetition Administrative Agent, the "Prepetition Secured Parties"). The Prepetition Security Agreement was executed in

connection with the contemporaneous execution of the Prepetition Credit Agreement. Pursuant to Section 2 of the Prepetition Security Agreement, the Prepetition Grantors granted the Prepetition Administrative Agent a security interest in all of the Prepetition Grantors' Investment Property (as such term is defined in Article 9 of the Uniform Commercial Code in effect in the state of California). Under the California Commercial Code, "Investment property" means "a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account." Cal.Com.Code § 9102(a)(49). A "Security," moreover, is defined, in part, as "an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer . . . ." Cal.Com.Code § 8102(a)(15). Accordingly, pursuant to Section 2 of the Prepetition Security Agreement, each of the Prepetition Grantors granted the Prepetition Administrative Agent, for itself and the other Prepetition Secured Parties, a security interest in all equity issued by other Subsidiary Debtors and held by such Prepetition Grantors. Accordingly, they may gift those Intercompany Interests to the Reorganized Debtors that presently hold them without implicating the absolute priority rule.

Finally, as demonstrated by the Liquidation Analysis, no Holders of Claims or Interests senior to the Non-Accepting Classes are receiving more than full payment on account of such senior Interests. Therefore, the "cramdown" provisions of sections 1129(b)(2)(B) and 1129(b)(2)(C) are satisfied and the Plan is confirmable notwithstanding the Non-Accepting Classes.

K. Treatment of Priority Claims (Section 1129(a)(9))

Under Bankruptcy Code § 1129(a)(9), unless otherwise agreed, a plan must provide that:

A. the holder of a claim entitled to priority under Section 507(a)(2) or (3) will receive cash for the allowed amount of the claims on the effective date of the plan;

B. the holder of a claim entitled to priority under Section 507(a) (1), (4), (5), (6) or (7) will receive either deferred cash payments for the allowed amount, or cash for the allowed amount of the claim on the effective date of the plan; and

C. the holder of a tax claim entitled to priority under Section 507(a) (8) will receive regular installment payments in cash (i) of the total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and, (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b); and

D. the holder of a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, will receive cash payments on account of that claim in the same manner and over the same period as described above in subparagraph (C).

In accordance with section 1129(a)(9), section 2.1 of the Plan provides with respect to Administrative Expense Claims that,

> On the later of (i) the Effective Date or (ii) if the Administrative Expense Claim is not Allowed as of the Effective Date, 30 days after the date on which an Administrative Expense Claim becomes Allowed, the Debtors or Reorganized Debtors shall either (x) pay to each Holder of an Allowed Administrative Expense Claim, in Cash, the full amount of such Allowed Administrative Expense Claim, or (y) satisfy and discharge such Administrative Expense Claim in accordance with such other terms that the Debtors or Reorganized Debtors and such Holder shall have agreed upon; *provided, however*, that such agreed-upon treatment shall not be more favorable than the treatment provided in clause (x). Other than with respect to Professional Compensation Claims and Cure Claims, notwithstanding anything in the Plan to the contrary (including, without limitation, any other provision that purports to be preemptory or supervening or grants an injunction or release), (a) if an Administrative Expense Claim arises (i) based on liabilities incurred in, or to be paid in, the ordinary course of business during the Postpetition Period or (ii) pursuant to an Executory Contract (including, but not limited to, the Debtors' Insurance Policies and Agreements that are treated as Executory

> Contracts under the Plan), or (iii) based on an Administrative Expense described in Bankruptcy Code § 503(b)(1)(B) or (C), the Holder of such Administrative Expense Claim shall be paid in Cash by the applicable Debtor (or after the Effective Date, by the applicable Reorganized Debtor) pursuant to the terms and conditions of the particular transaction and/or agreements giving rise to such Administrative Expense Claim without the need or requirement for the Holder of such Administrative Expense Claim to file a motion, application, claim or request for allowance or payment of an Administrative Expense Claim with the Bankruptcy Court and (b) such Administrative Expense Claims shall be Allowed Claims; *provided, however*, that nothing limits the ability of any applicable Debtor or Reorganized Debtor to dispute (or the Holder of such Administrative Expense Claim to assert and/or defend) the validity or amount of any such Administrative Expense Claim and/or to bring an action in the appropriate forum.

Section 2.2 of the Plan, with respect to Professional Compensation Claims, provides that

> Notwithstanding any other provision of the Plan dealing with Administrative Expense Claims, any Person asserting a Professional Compensation Claim shall, no later than thirty (30) days after the Confirmation Date, file a final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Confirmation Date. To the extent that such an award is granted by the Bankruptcy Court, the requesting Person shall receive: (i) payment of Cash in an amount equal to the amount Allowed by the Bankruptcy Court less all interim compensation paid to such Professional during the Chapter 11 Cases, such payment to be made within the later of (a) the Effective Date or (b) three (3) business days after the Order granting such Person's final fee application becomes a Final Order; (ii) payment on such other terms as may be mutually agreed upon by the Holder of the Professional Compensation Claim and BMHC or Reorganized BMHC, as applicable (but in no event shall the payment exceed the amount Allowed by the Bankruptcy Court); or (iii) payment in accordance with the terms of any applicable administrative procedures orders entered by the Bankruptcy Court, including the Interim Compensation Order, dated July 16, 2009. All Professional Compensation Claims for services rendered after the Confirmation Date shall be paid by Reorganized BMHC (or the Debtors prior to the Effective Date) upon receipt of an invoice therefor, or on such other terms as Reorganized BMHC (or the Debtors prior to the Effective Date) and the Professional may agree, without the requirement of any order of the Bankruptcy Court.

Section 2.4 of the Plan, with respect to DIP Facility Claims, provides that,

> Notwithstanding any other provision of the Plan dealing with Administrative Expense Claims, Administrative Expense Claims arising under the DIP Facility shall be Allowed Administrative Expense Claims on the Effective Date and shall be paid in full in Cash on the Effective Date, and all excess Cash in the Cash Collateral Account shall remain with Reorganized BMHC.

Section 2.3 of the Plan, with respect to Priority Tax Claims, provides that,

> Except to the extent that a Holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in full and final satisfaction, settlement, release, and discharge of and in exchange for each Allowed Priority Tax Claim, each Holder of such Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code, with the Petition Date as the commencement date of the five year period, and any interest required to be paid on Allowed Priority Tax Claims will be paid in accordance with section 511 of the Bankruptcy Code. If the Reorganized Debtors substantially default on the payment of a tax due to the Internal Revenue Service under the Plan, the entire tax debt owed to the Internal Revenue Service shall become due and payable immediately, and the Internal Revenue Service may collect these unpaid tax liabilities through the administrative collection provisions of the Internal Revenue Code. If the Reorganized Debtors substantially default on the payment of a tax due to a state or local taxing authority under the Plan, including the California Franchise Tax Board, the entire tax debt owed to such taxing authority shall become due and payable immediately, and the taxing authority may collect these unpaid tax liabilities in accordance with applicable state law remedies.

And section 4.1.2 of the Plan, with respect to Other Priority Claims, provides that

> On the Distribution Date, each Holder of an Allowed Other Priority Claim shall receive in full satisfaction, release, and discharge of and in exchange for such Claim: (i) payment of Cash in an amount equal to the unpaid portion of such Allowed Other Priority Claim, or (ii) such other treatment that the Debtors and such Holder shall have agreed upon in writing; *provided*, *however*, that such agreed-upon treatment shall not be more favorable than the treatment provided in clause (i).

Therefore, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

L. Acceptance of at Least One Impaired Class (Section 1129(a)(10))

If a plan has one or more impaired classes of claims, section 1129(a)(10) of the Bankruptcy Code requires that at least one such class vote to accept the plan, determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10). At least one of the Classes of Claims for each of the Debtors that is impaired under the Plan has voted to accept the Plan, which acceptance has been determined without including any acceptance of the Plan by any insider of the Debtors. Thus, the Plan meets the requirements of this section.

M. Feasibility (Section 1129(a)(11))

Section 1129(a)(11) of the Bankruptcy Code requires as a condition to confirming a plan of reorganization that confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan." 11 U.S.C. § 1129(a)(11). In interpreting the requirements of section 1129(a)(11), courts have found the language of the statute to be "sufficiently broad so as to have provided a great deal of latitude to Courts interpreting its provisions." In re Eddington Thread Mfg., Co., Inc., 181 B.R. 826, 832-33 (Bankr. E.D. Pa. 1995). The courts have also universally interpreted the statute to mean that a debtor need only demonstrate a reasonable assurance of commercial viability, and the court need not require a guarantee of success in order to find that a plan satisfies the feasibility requirement. See e.g., In re T-H New Orleans Ltd. P'ship, 116 F.3d 790, 801 (5th Cir. 1997); In re Briscoe Enters., Ltd., 994 F.2d 1160, 1165-66 (5th Cir. 1993); Kane, 843 F.2d at 649; In re Prussia Assocs., 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 226 (Bankr. D. N.J. 2000); Corestates Bank, N.A. v. United Chem. Tech., Inc., 202 B.R. 33, 45 (E.D. Pa. 1996).

While the debtor bears the burden of proving plan feasibility, the applicable standard is by a preponderance of the evidence – proof that a given fact is "more likely than not." In re Briscoe Enters., Ltd., 994 F.2d at 1164; see also In re T-H New Orleans Ltd. P'ship, 116 F.3d at 801; Corestates Bank, N.A., 202 B.R. at 45. Further, a number of courts have held that this constitutes "a relatively low threshold of proof." In re Eddington Thread Mfg. Co., 181 B.R. at 833; In re Mayer Pollack Steel Corp., 174 B.R. 414, 423 (Bankr. E.D. Pa. 1994) (stating that the debtors "have established that they meet the requisite low threshold of support for the Plan as a viable undertaking. . ."); see also In re Briscoe Enters. Ltd., 944 F.2d at 1116 (upholding the bankruptcy court's ruling that a reorganization that had only "a marginal prospect of success" was feasible because only "a reasonable assurance of commercial viability" was required). The courts have also made clear that "speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds." In re WorldCom, Inc., No. 02-13533, 2003 Bankr. LEXIS 1401, at *170 (Bankr. S.D.N.Y. 2003).

The courts have fashioned a series of factors to be considered in the determination of whether a debtor's plan is feasible. These factors, while varying from case to case, traditionally include: the adequacy of the debtor's capital structure, the earning power of its business, economic conditions, the ability of the debtor's management, the probability of the continuation of the same management, and other related matters affecting successful performance under the provisions of the plan. See, e.g., In re Prussia Assocs., 322 B.R. at 584; In re Greate Bay Hotel & Casino, Inc., 251 B.R. at 226-27; see also In re T-H New Orleans Ltd. P'ship, 116 F.3d at 801 (discussing the factors that the bankruptcy court examined in its decision that the debtor's plan

was feasible). The Plan satisfies each of the factors courts consider in determining whether a plan of reorganization is feasible.

The $103.5 million Exit Credit Facilities provided for under the Plan will provide the Reorganized Debtors with sufficient cash to permit them to fund the distributions contemplated by the Plan, will provide the Reorganized Debtors with working capital sufficient to support their business operations, and will enable the Debtors, on the Effective Date, to repay the DIP Facility and to pay all other claims, costs and expenses contemplated by the Plan.

As described in the Dietz Declaration, under the Plan, the Reorganized Debtors will emerge from chapter 11 with $188.5 million of total debt and $57.4 million of unrestricted cash, which results in a net debt position of $131.1 million. Over the three year forecast period, the Reorganized Debtors project that they will reduce their total debt position to $111.5 million and increase their unrestricted cash to $96.8 million or approximately $14.7 million of net debt. During the projection period, quarterly total liquidity, defined as balance sheet cash plus revolver availability, is projected to range from approximately $64 million at the end of the third quarter of 2011 to $97 million by the end of 2012.

In Exhibit F to the Disclosure Statement, as updated on Exhibit B to the Dietz Declaration, the Debtors, with the assistance of their financial advisor, Peter J. Solomon Company, prepared financial projections of the Reorganized Debtors' annual performance for fiscal years 2010, 2011 and 2012. These financial projections, which include the impact of the up to $70 million tax refund anticipated as a result of the "Worker, Homeownership, and Business Assistance Act of 2009," support the Reorganized Debtors' ability to meet their

obligations while maintaining sufficient liquidity and capital resources. In sum, the Plan meets the requirements of Section 1129(a)(11).

N. Payment of Certain Fees (Section 1129(a)(12))

Section 1129(a)(12) of the Bankruptcy Code requires that all fees payable under 28 U.S.C. § 1930 be paid or that the plan provide for their payment on the effective date of the plan. 11 U.S.C. § 1129(a)(12). Section 2.5 of the Plan provides that U.S. Trustee Fees incurred by the U.S. Trustee prior to the Effective Date shall be paid on the Effective Date in accordance with the applicable schedule for payment of such fees. Therefore, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

O. Satisfaction of Retiree Benefits (Section 1129(a)(13))

Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation of retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code for the duration of the period that the debtor has obligated itself to provide such benefits. 11 U.S.C. § 1129(a)(13). The Debtors do not provide any "retiree benefits" programs, as such term is defined in section 1114 of the Bankruptcy Code, and therefore section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Plan.

P. Only One Plan (Section 1129(c))

Section 1129(c) of the Bankruptcy Code provides that "the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144" of the Bankruptcy Code. Other than the Plan (including previous versions thereof), no plan has been filed in these Chapter 11 Cases. Accordingly, the requirements of section 1129(c) of the Bankruptcy Code have been satisfied.

Q. Principal Purpose of the Plan (Section 1129(d))

Section 1129(d) of the Bankruptcy Code provides that "[n]otwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." No governmental unit has requested that the Plan not be confirmed on the grounds that the primary purpose of the Plan is the avoidance of taxes or the avoidance of application of Section 5 of the Securities Act of 1933, and the primary purpose of the Plan is not avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act of 1933. Therefore, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

R. Satisfaction of Bankruptcy Rule 3016(a)

Bankruptcy Rule 3016(a) provides that "Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it." The Plan is dated and identifies the Debtors as the entities submitting the Plan, and therefore complies with Bankruptcy Rule 3016(a).

III. RESOLUTIONS OF, OR RESPONSES TO, OBJECTIONS

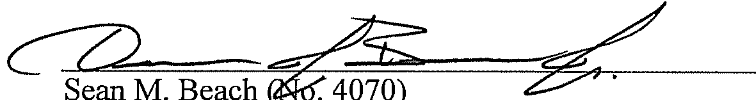
As noted in Section 1.E above, the Debtors have received various objections to confirmation of the Plan, a number of which have been resolved. The status of, and responses to, these objections are set forth in the attached Exhibit A.

IV. CONCLUSION

For all the foregoing reasons, all objections to confirmation should be overruled, and the Plan should be confirmed pursuant to section 1129 of the Bankruptcy Code.

Dated: Wilmington, Delaware
December 7, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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ATTORNEYS FOR THE DEBTORS
AND DEBTORS-IN-POSSESSION

EXHIBIT A

Summary of Confirmation Objections and Responses Thereto

Objection	**Summary**	**Debtors' Response**
11/17 Letter of William H. Milligan [D.I. 971]	Writes to "voice my disagreement with the recovery amount for class 6 C claims . . . ." "And now, with President Obama signing into law 'HR-3458 'Worker, Homeownership, and Business Assistance Act of 2009.' the Company will be able to amend the tax returns for an additional two years that could generate a tax refund of up to an additional $40 Million most of which will likely go towards the Lender Group. Couldn't some of this money go towards improving the recovery rate of unsecured creditors? I think it can and I think it should." "I am requesting, on behalf of myself and all of my fellow unsecured creditors, that the Judge in this case 'balance the scales of justice' and intervene to ensure that the unsecured creditors, and in particular class 6C, is helped in terms of improving our recovery rate, and at the very least, consider the impending tax refund that will be forthcoming to the Debtors."	As described in section 2(H) above, the Plan satisfies the "best interests" test of section 1129(a)(7) of the Bankruptcy Code because each dissenting, impaired class will receive or retain under the Plan on account of such claim property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code. As demonstrated by the Liquidation Analysis attached to the Declaration of Bradley I. Dietz, this is true even if the Debtors receive a $70 million tax refund as a result of the New Legislation. Accordingly, Mr. Milligan's objection should be overruled.

Objection	Summary	Debtors' Response
11/20 Letter of Steven Pearson [D.I. 985]	"I believe that the recent passing of HR-3458 will provide the lenders with a substantial tax refund windfall that was unanticipated when they approved the proposed payments to the unsecured creditors in the final disclosure statement. . . . Increasing the amount available to unsecured creditors would be fair and appropriate given the new money available. In closing I would like to strongly urge the Judge to request that the lenders in this case substantially increase the funds available to unsecured creditors in light of the major positive change to the debt structure as a result of the pending large tax refund."	See the Debtors' Response to Letter of William H. Milligan above.

Objection	Summary	Debtors' Response
Objection to Confirmation of Joint Plan of Reorganization, filed by County of Comal, Texas, Central Appraisal [D.I. 983]	Claimants state that their claims are "Other Secured Claims (Secured Tax Claims)." Claimants argue Plan is not fair and equitable because "secured claims are entitled to express retention of all property tax liens, at the priority they now hold, until all taxes, penalties and interest protected by those liens have been paid, and they object to any priming of their statutory lein [sic] position by, or subordination to, any Exit Financing." Claimants argue they are "entitled to interest from the petition date through the Effective Date under 11 USC Section 506(b), as well as from the Effective Date until paid in full, both at the statutory rate of 1% per month as required by 11 USC § 511, and Texas Property Tax Code § 33.01(c)."	The Debtors have amended section 4.4.2 of the Plan (related to Other Secured Claims) to clarify that all Liens related to Other Secured Claims, "including property tax liens," shall be reinstated or otherwise rendered unimpaired. In addition, the Debtors have included the following language in the proposed Confirmation Order: "Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, solely with respect to the claims of the objecting Texas Ad Valorem Tax Claimants [See D.I. 983] and the Local Texas Tax Authorities [See D.I. 986], the Texas Ad Valorem Tax Claimants and the Local Texas Tax Authorities, to the extent they hold Allowed claims, (i) shall retain any property tax liens they may hold, at the priority they now hold, until all taxes, penalties and interest protected by those liens have been paid; and (ii) to the extent they are oversecured pursuant to section 506(b), are entitled to interest from the Petition Date through the Effective Date, as well as from the Effective Date until paid in full, both at the statutory rate of 1% per month pursuant to section 511 of the Bankruptcy Code and Texas Property Tax Code § 33.01(c)."

Objection	Summary	Debtors' Response
		Accordingly, the Debtors respectfully submit that such amendments and Confirmation Order language should be deemed to resolve the objection.
[Texas] Local Tax Authorities' Objection to Confirmation of Joint Plan of Reorganization [D.I. 986]	Claimants make same arguments made in Objection to Confirmation of Joint Plan of Reorganization, filed by County of Comal, Texas, Central Appraisal. In addition, "[t]he Tax Authorities object to Plan section 4.4.2 Treatment of Other Secured Claims which provides that the tax claims will be paid over five years from the Effective Date. Pursuant to 11 U.S.C. § 1129(a)(9)(C)(ii), the Tax Authorities are entitled to payment over a period ending not later than five years from the Petition Date."	See the Debtors' Response to the Objection to Confirmation of Joint Plan of Reorganization, filed by County of Comal, Texas, Central Appraisal above. In addition, the Debtors have amended section 4.4.2 of the Plan (related to Other Secured Claims) to delete reference to treating Allowed Secured Tax Claims in accordance with section 1129(a)(9)(D); instead, such all Other Secured Claims, including secured tax claims, shall be reinstated or otherwise rendered unimpaired as of the Effective Date and the Debtors shall not invoke section 1129(a)(9)(D) to pay secured tax claims over a five year period. Accordingly, the Debtors respectfully submit that the amendments and Confirmation Order language should be deemed to resolve the objection.
California Franchise Tax Board's Objection to Debtors' Joint Plan of Reorganization [D.I. 996]	"It is unclear . . . whether paragraph 2.1 of the Plan requires a governmental unit to file a request for payment of an expense described in Bankruptcy Code § 503(B)(1)(B) or (C). FTB proposes that the following language be added to paragraph	The Debtors have amended section 2.1 of the Plan to add the requested clarifying language (with a slight modification) as follows: "or (iii) based on an Administrative Expense described in Bankruptcy Code § 503(b)(1)(B) or (C)[.]"

Objection	Summary	Debtors' Response
	2.1 of the Plan prior to the words 'the Holder of such Administrative Expense Claim shall be paid in Cash': 'or (iii) based on an expense described in Bankruptcy Code § 503(b)(1)(B) or (C).'" "In order for the Plan to comply with section 1129(a)(9)(C), [section 2.3] must be amended to state the specific treatment of priority tax claims." "FTB proposes that the following language, or some similar language, be added to paragraph 2.3 of the Plan: 'If the Reorganized Debtors substantially default on the payment of a tax due to the California Franchise Tax Board under the Plan, the entire tax debt owed to the California Franchise Tax Board shall become due and payable immediately, and the California Franchise Tax Board may collect these unpaid tax liabilities in accordance with California law.'" "FTB proposes that the following language, or some similar language, be added to paragraph 9.1.2 of the Plan: 'Notwithstanding anything to the contrary herein or in Confirmation Order, the setoff and recoupment rights of the California Franchise Tax Board are preserved.'" "FTB proposes that the following language, or some similar language, be added to paragraph	The Debtors have amended section 2.3 of the Plan as follows (with the additions underlined and in bold): Except to the extent that a Holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in full and final satisfaction, settlement, release, and discharge of and in exchange for each Allowed Priority Tax Claim, each Holder of such Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code, **with the Petition Date as the commencement date of the five year period, and any interest required to be paid on Allowed Priority Tax Claims will be paid in accordance with section 511 of the Bankruptcy Code**. If the Reorganized Debtors substantially default on the payment of a tax due to the Internal Revenue Service under the Plan, the entire tax debt owed to the Internal Revenue Service shall become due and payable immediately, and the Internal Revenue Service may collect these unpaid tax liabilities through the administrative collection provisions of the Internal Revenue Code. **If the Reorganized Debtors substantially default on the payment of a tax due to a state or local taxing authority under the Plan, including the California Franchise Tax**

Objection	Summary	Debtors' Response
	9.1.2 of the Plan: 'Notwithstanding anything to the contrary herein or in the Confirmation Order, punitive damages are not authorized against the California Franchise Tax Board.'"	**Board, the entire tax debt owed to such taxing authority shall become due and payable immediately, and the taxing authority may collect these unpaid tax liabilities in accordance with applicable state law remedies.** In addition, the Debtors have included the following language in the proposed Confirmation Order: "Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, (i) the setoff and recoupment rights of the California Franchise Tax Board, if any, are preserved and may be exercised to the extent authorized by §§ 362(b)(26), 363(e) and 553 of the Bankruptcy Code or order of this Court; and (ii) pursuant to § 106(a)(3) of the Bankruptcy Code, punitive damages may not be awarded against the California Franchise Tax Board by this Court." Accordingly, the Debtors respectfully submit that such amendments and Confirmation Order language should be deemed to resolve the objection.

Objection	Summary	Debtors' Response
Objection of Robert R. Thomas and the Restated Thomas Trust Dated April 14, 2009 to Confirmation of Joint Plan of Reorganization as Amended October 22, 2009 [D.I. 1008]	"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 [under the Acquisition Agreement] to be resolved by the Bankruptcy Court via objections to proposed Cure Claims. The Thomas Parties contend that the Federal Arbitration Act and controlling case law require enforcement of the ADR provisions of these contracts."	To address this objection, the Debtors have included the following language in the proposed Confirmation Order: "Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, the Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement (as defined in the 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 [D.I. 1008]) shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement." Accordingly, the Debtors respectfully submit that such amendments and Confirmation Order language should be deemed to resolve the objection.

Objection	Summary	Debtors' Response
Objection of Juan M. Navarro and Letitia Ramirez to Confirmation of the Debtors' Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009 [D.I. 1011]	"To the extent that the Adjudication Provision [section 8.9 of the Plan] attempts to vest jurisdiction over the Plaintiffs' [personal injury] tort claim with the Bankruptcy Court, the Plaintiffs object to such jurisdiction." "The Release and Injunction Provisions [sections 9.2.3 and 9.2.5] contained in the Plan seek improperly to compel the Plaintiffs to release claims against third parties—specifically the Debtors' employees—who are jointly and severally liable for Plaintiffs' injuries. . . . [I]n this Circuit, release of direct claims against a non-debtor third party, such as those of the Plaintiffs here, 'cannot be accomplished without the affirmative agreement of the creditor[s] affected.'"	To address this objection, the Debtors have included the following language in the proposed Confirmation Order: "Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, pursuant to 28 U.S.C. § 157(b)(5), no personal injury claim of Juan M. Navarro or Letitia Ramirez shall be tried in the Bankruptcy Court." In addition, the Debtors have amended section 9.2.3 of the Plan to provide that the release therein shall be granted by those holders of claims or Interests "that voted in favor of the Plan." Accordingly, the Debtors respectfully submit that such amendments and Confirmation Order language should be deemed to resolve the objection.
11/20 Letter of Robert Satterfield [D.I. 1012]	Encourages review of, and agrees with, William Milligan letter.	See the Debtors' Response to Letter of William H. Milligan above.
11/20 Letter of Bruce B. Sherlock [D.I. 1014]	Encourages review of William Milligan letter. Agrees with Steven Pearson letter.	See the Debtors' Response to Letter of William H. Milligan above.

Objection	Summary	Debtors' Response
11/21 Letter of Leroy D. Custer [D.I. 1026]	Agrees with William Milligan letter. Complains of "lack of action on board's part" and "substantial consulting fees from multiple groups that became part of the bankruptcy proceedings that appear on the verge of excessive."	See the Debtors' Response to Letter of William H. Milligan above. In accordance with section 1129(a)(4) of the Bankruptcy Code, all payments to professionals either have been approved by this Court or are subject to approval of the Court pursuant to section 2.2 of the Plan.
11/30 Letter of Joseph J. Zuendel [D.I. 1046]	Agrees with William H. Milligan and Steven H. Pearson letters.	See the Debtors' Response to Letter of William H. Milligan above.
12/2 Letter of Jack LaRock [D.I. 1076]	Supports William H. Milligan and Steven H. Pearson letters.	See the Debtors' Response to Letter of William H. Milligan above.