

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>

Debtors.

)  
) Chapter 11

)  
) Case No. 09-12074 (KJC)

)  
) Jointly Administered

)  
) Requested Objection Deadline: December 16, 2009 at 12:00 p.m.  
(ET)

) Requested Hearing Date: December 17, 2009 at 10:00 a.m. (ET)

DEBTORS' MOTION FOR AN ORDER, PURSUANT TO SECTIONS 105,  
363, AND 365 OF THE BANKRUPTCY CODE AND BANKRUPTCY  
RULES 2002, 9004, 9006, 9014, AND 9019, (I) AUTHORIZING THE PRIVATE  
SALE BY C CONSTRUCTION, INC. OF THE PURCHASED ASSETS  
FREE AND CLEAR OF LIENS, ENCUMBRANCES AND OTHER  
INTERESTS, (II) AUTHORIZING THE ASSUMPTION AND  
ASSIGNMENT OF CERTAIN ASSUMED CONTRACTS, (III)  
APPROVING THE ASSET PURCHASE AGREEMENT AND  
THE TRANSITION SERVICES AGREEMENT, (IV) AUTHORIZING THE DEBTORS  
TO PAY SEVERANCE, (V) AUTHORIZING THE WIND DOWN OF BUSINESS  
OPERATIONS IN ILLINOIS AND (VI) GRANTING RELATED RELIEF

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this Motion (the "**Motion**") for the entry of an order substantially in the form annexed hereto as **Exhibit A** authorizing (a) the private sale (the "**Sale**") of certain property (as described in greater detail below) free and clear of liens, claims, encumbrances, and interests to Davis Development Company, Inc. or its wholly owned affiliate (the "**Purchaser**") pursuant to the terms and conditions of the Asset Purchase Agreement

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

in the form annexed hereto as *Exhibit B* (the "*Current APA*"),<sup>2</sup> by and between C Construction, Inc. (the "*Seller*") and the Purchaser, including that certain Transition Services Agreement (as defined herein) incorporated therein and (b) the wind down of business operations of the Debtors in the State of Illinois (the "*Illinois Business Wind Down*"). In support thereof, the Debtors respectfully represent:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. sections 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. section 157(b). Venue is proper pursuant to 28 U.S.C. sections 1408 and 1409.

### **RELIEF REQUESTED**

2. By this Motion, the Debtors, pursuant to sections 105(a), 363, and 365 of title 11 of the United States Code (the "*Bankruptcy Code*"), and Rules 2002, 6004, 6006, 9014, and 9019 of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*"), seek entry of an order authorizing and approving (a) the Sale pursuant to the terms of the Current APA and (b) the Illinois Business Wind Down. As a result of the Debtors' need to consummate both the Sale and the Illinois Business Wind Down prior to end of 2009, the Debtors are concurrently requesting a shortened notice period with respect to this Motion.

### **BACKGROUND**

3. On June 16, 2009 (the "*Petition Date*"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "*Chapter 11 Cases*").

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<sup>2</sup> Capitalized terms used herein but not defined herein shall have the meanings ascribed to them in the Current APA.

The Debtors continue to operate their businesses and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases. On June 26, 2009, the Office of the United States Trustee (the "*U.S. Trustee*") appointed the official committee of unsecured creditors (the "*Creditors' Committee*").

4. The Debtors are one of the largest providers of residential building products and construction services in the United States. The Debtors distribute building materials, manufacture building components (e.g., millwork, floor and roof trusses, and wall panels), and provide construction services to professional builders and contractors through a network of 31 distribution facilities, 43 manufacturing facilities, and five regional construction services facilities.

5. The Debtors operate under two brand names: BMC West® and SelectBuild®.

- ***BMC West.*** Under the BMC West brand, the Debtors market and sell building products, manufacture building components, and provide construction services to professional builders and contractors. Products include structural lumber and building materials purchased from manufacturers, as well as manufactured building components such as millwork, trusses, and wall panels. Construction services include installation of various building products and framing. The Debtors currently offer these products and services in major metropolitan markets in Texas, Washington, Colorado, Idaho, Utah, Montana, North Carolina, California, and Oregon.
- ***SelectBuild.*** Under the SelectBuild brand, the Debtors offer integrated construction services to production homebuilders, as well as commercial and multi-family builders. Services include wood framing, concrete services, managing labor and construction schedules, and sourcing materials. The Debtors currently offer these services in major metropolitan markets in California, Arizona, Nevada and Illinois.

6. On the Petition Date, the Debtors filed their proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"). Since the Petition Date, the Debtors filed several amended versions of the Plan and Disclosure Statement. The Court approved the Disclosure Statement by order entered on October 22, 2009 (Docket No 768), and the hearing to confirm the Plan is currently scheduled for December 10, 2009, with an anticipated effective date (the "**Effective Date**") prior to the end of 2009. To implement this restructuring, the Debtors have obtained \$80 million in debtor-in-possession financing, which the Court approved on a final basis on July 1, 2009 (Docket No. 132).

#### **RECENT AMENDMENT TO THE TAX CODE**

7. On November 6, 2009, Congress enacted the Worker, Homeownership, and Business Assistance Act of 2009 (the "**2009 Act**"). Among other things, the 2009 Act extends the net operating loss ("**NOL**") carryback period from two years to as much as five years for tax years beginning in or ending in 2008 or 2009. The Act sets no limit on carrybacks for the first four years of the carryback period, but for year five, the carryback is limited to 50% of the taxpayer's taxable income in that year. The following chart calculates how much cash the Debtors could receive in the form of a tax refund under the 2009 Act:

<i><b>Tax Year</b></i>	<i><b>Cash Available</b></i>	<i><b>Recovery Rate</b></i>	<i><b>Cash Potential</b></i>	<i><b>Tax Rate</b></i>	<i><b>Implied Loss</b></i>
2004	\$29,774,769	50%	\$14,887,385	35%	\$42,535,384
2005	\$67,337,036	100%	\$67,337,036	35%	\$192,391,531
2006		100%		35%	
2007		100%		35%	
	<u>\$97,111,805</u>		<u>\$82,224,421</u>		<u>\$234,926,916</u>

Thus, under the 2009 Act, the Debtors can receive as much as \$82.2 million in cash relating to taxes paid in 2004 and 2005. In this regard, the Debtors contemplate that solely as a result of net operating losses sustained from continuing operations in 2009, they will be able to realize approximately \$50 million of tax refunds by virtue of the 2009

Act. However, if the Court approves the Sale and the Illinois Business Wind Down, and such transactions are consummated before the Effective Date of the Plan and before the end of 2009, the Debtors believe that they can realize an additional approximately \$23 million in tax refunds. The consummation of these transactions provides a substantial benefit to the Debtors' estates as the Debtors have calculated that the benefit represented by the incremental tax refunds exceeds the value of continued operation of the assets related to the Sale and the Illinois Business Wind Down.

### **BASIS FOR RELIEF REQUESTED**

8. By this Motion, the Seller seeks entry of an order, pursuant to sections 105(a), 363(b), and 365 of the Bankruptcy Code and the Bankruptcy Rules 2002, 6004, 6006, 9014, and 9019, (a) authorizing the Sale pursuant to the Current APA, (b) authorizing and approving the Current APA, including the Transition Services Agreement, (c) approving the assumption and assignment of the Contracts (as defined below) and approving procedures in connection therewith, (d) authorizing the Illinois Business Wind Down, and (e) granting related relief.

### **THE ONTARIO FRAMING BUSINESS SALE**

#### **I. Events Leading up to the Current APA**

9. On July 31, 2006, SelectBuild Construction, Inc. ("***SelectBuild Construction***") and the Seller, each a Debtor in the Chapter 11 Cases, entered into that certain Asset Purchase Agreement (the "***2006 Purchase Agreement***") with Davis Brothers Framing, Inc. ("***Davis Brothers Framing***"), Rancho Leasing, Inc. ("***Rancho Leasing***") (an entity affiliated with Davis Brothers Framing), and Messrs. Randolph and George Davis (the sole shareholders of Davis Brothers Framing). Pursuant to the 2006 Purchase Agreement, the Seller (a subsidiary of

SelectBuild Construction) acquired Davis Brothers Framing's California-based carpentry and framing business (the "*Ontario Framing Business*").

10. In addition to the sale of the Ontario Framing Business to the Seller, the 2006 Purchase Agreement required that, as part of the purchase price, the Debtors make annual payments to Messrs. Davis if the Ontario Framing Business achieved certain annual earnings targets (the "*Contingent Consideration*").<sup>3</sup> The 2006 Purchase Agreement obligates the Debtors to pay the Contingent Consideration each year in which the Ontario Framing Business achieved the required earnings targets, subject to setoffs for certain liabilities and expenses. After the first anniversary of the purchase of the Ontario Framing Business, and based on achievement of the earnings targets, the Debtors paid approximately \$3.1 million in Contingent Consideration to Messrs. Davis.

11. During the Chapter 11 Cases, the Debtors filed two motions concerning the Ontario Framing Business and the employment of Messrs. Davis. On July 10, 2009, the Debtors sought to assume the 2006 Purchase Agreement (including the employment agreements of Messrs. Davis) (Docket No. 168), which was approved by the Court on August 11, 2009 (Docket No. 425). Moreover, on October 26, 2009, the Debtors sought authority to make certain incentive payments (the "*Incentive Payments*") to Randolph Davis, and to extend his employment contract with the Seller through July 31, 2010 (Docket No. 776), which the Court approved on November 19, 2009 (Docket No. 962).

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<sup>3</sup> The Debtors estimate that, as of December 21, 2009, they will owe Messrs. Davis approximately \$206,668.84 of Contingent Consideration. The 2006 Purchase Agreement also required the Debtors to employ Messrs. Davis as the managers of the Ontario Framing Business.

12. The current economic downturn and resulting harm to the housing industry have negatively impacted the Debtors' business, including the Ontario Framing Business. In 2008, the Ontario Framing Business recorded revenues of approximately \$62.5 million, a 21.4% drop from 2007. In addition, the Ontario Framing Business's 2009 year-to-date revenues are \$44.4 million. Nevertheless, at the time of commencement of these Chapter 11 Cases, the Ontario Framing Business was one of the Debtors' most profitable business segments.

13. Unfortunately, however, revenues from the Ontario Framing Business have recently deteriorated on account of the unexpected delays in the Chapter 11 Cases. In April 2009, the Debtors forecasted approximately \$7.9 million in revenue for the Ontario Framing Business in the third quarter of 2009. Actual revenues were less than \$5.1 million. In October 2009, moreover, the Ontario Framing Business recorded only approximately \$738,000 in revenue.

14. The Debtors believe that the delays in the Chapter 11 Cases resulting from the difficulty to obtain committed exit financing are directly responsible for the recent deterioration in the Ontario Framing Business. The success of the Ontario Framing Business depends in part on the willingness of contractors to award subcontracts that require construction services over 12-18 month periods of time while the Ontario Framing Business is being operated under chapter 11. The Debtors have noticed that many contractors have been unwilling to award subcontracts to Ontario Framing Business for such extended periods while the Debtors remain in bankruptcy. As a result, prospective opportunities for the Ontario Framing Business have dwindled, thereby reducing backlog significantly. This significant reduction in backlog, coupled with limitations in bonding capacity available to the Reorganized Debtors, leads the Debtors to

believe that there is uncertainty that the Ontario Framing Business will be a source of significant revenue for the Debtors until late in 2010.

## **II. Summary of Proposed Terms of the Sale**

15. Pursuant to the terms of the Sale, the Seller proposes to sell to the Purchaser substantially all of the Seller's assets, including, but not limited to, certain equipment and intangible personal property. The material terms of the Current APA are as follows:

16. Purchased Assets: Upon the terms and subject to the conditions of the Current APA, the Seller agrees to sell, transfer, convey, assign, and deliver to the Purchaser,<sup>4</sup> free and clear of all liens (other than liens created by the Buyer and the Permitted Encumbrances) all of the Seller's rights, titles, and interests in and to the following assets (collectively, the "***Purchased Assets***"), and specifically excluding the Excluded Assets (as defined below):

- a. the contracts, agreements, commitments, purchase orders, and other instruments listed or described on Exhibit 1 to the Current APA (collectively, the "***Contracts***");
- b. all tools, equipment, rolling stock, office furniture, computers, and equipment and other pieces of tangible personal property and fixed assets, including spare parts, supplies, office equipment and products used by the Seller in the Ontario Framing Business listed or described on Exhibit 2;
- c. the intangible personal property listed on Exhibit 3 to the Current APA;
- d. all federal, state, and local licenses, permits and other governmental authorizations relating to the Ontario Framing Business listed on Exhibit 4 to the Current APA;
- e. personal property leases listed on Exhibit 5 to the Current APA;

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<sup>4</sup> On or after the Closing Date, the Purchaser may assign the Purchased Assets to an affiliate, as such term is defined in Bankruptcy Code section 101(2).



- f. the real property lease listed on Exhibit 5 to the Current APA (the "***Real Property Lease***");
- g. prepaid expenses and deposits listed on Exhibit 6 to the Current APA;
- h. all good will of the Ontario Framing Business; and
- i. all rights, claims, credits, causes of action, or rights of set-off against third parties relating to the foregoing and the Assumed Liabilities (as defined below).

17. Excluded Assets: All assets, properties, and rights of the Seller, other than the Purchased Assets (collectively, the "***Excluded Assets***"), including, but not limited to:

- a. all cash, cash equivalents, investments, and securities;
- b. all Trade Accounts Receivable, notes, drafts, intercompany receivables, and other accounts and other obligations for the payment of money, including all rights to access or draw upon funds through credit lines or working capital arrangements, if any;
- c. all assets that are not primarily used by Seller in the Ontario Framing Business;
- d. all bank and other depository accounts, corporate records, and safe deposit boxes;
- e. all rights under the Current APA and the Purchase Price (as defined below);
- f. all employee benefit plans;
- g. all computer software;
- h. all causes of action, claims, demands, set-offs, rights, and privileges against third parties that relate to any Excluded Assets or Excluded Liabilities (as defined below);
- i. any and all tax returns, tax refunds, tax loss carryforwards, tax identification numbers, or other identification numbers of Seller assigned by any Governmental Authority, and records related to the foregoing of Seller relating to the Ontario Framing Business or the Purchased Assets for any period or portion thereof ending on or prior to the date on which the Purchased Assets are transferred

pursuant to the Current APA (the "*Closing Date*");

- j. all assets used primarily in connection with the corporate functions of Seller;
- k. all cash, cash equivalents, and letters of credit of Seller held by Seller's insurers as collateral for workers compensation claims, if any;
- l. other receivables, including volume allowances and employee advances;
- m. prepaid expenses, including prepayments for fuel and for rent under the Real Property Lease, and a deposit for utilities; and
- n. subject to certain adjustments (as outlined in Current APA Section 11.1), all estimated earnings in excess of billings.

18. Assumption of Liabilities: On the terms and subject to the conditions set forth in the Current APA, and specifically excluding the Excluded Liabilities (as defined in below), from and after the Closing Date, the Purchaser will assume and satisfy or perform when due the following liabilities:

- a. any executory liabilities and obligations of Seller as of the Closing Date under any Contract assumed by Buyer; and
- b. any obligations of Seller to perform ordinary course warranty-related services on contracting projects performed as part of the Ontario Framing Business prior to the Closing Date, but only to the extent, and subject to the terms and conditions, set forth in the Current APA.

19. Excluded Liabilities: The following are all Excluded Liabilities under the Current APA:

- a. Liabilities for taxes of Seller or its Related Parties, including, without limitation, those arising as a result of the transactions contemplated by the Current APA;
- b. Liabilities of Seller or its Related Parties in respect of expenses payable by them relating to the Sale;
- c. Liabilities of Seller or its Related Parties not arising out of or relating to the Ontario Framing Business or the Purchased Assets;

- d. Trade accounts payable, accrued expenses, and intercompany accounts;
- e. any accrued or other liability of Seller for vacation pay earned by employees of the Ontario Framing Business through the Closing Date, any accrued or other liability of Seller pertaining to the Ontario Framing Business under any employee pension benefit plan, employee welfare benefit plan, multiemployer plan, collective bargaining agreement, or any other plan or agreement with respect to any employees of the Ontario Framing Business, past or present;
- f. any liabilities of the Ontario Framing Business with respect to or arising out of occurrences on or prior to the Closing Date or actions by Seller or its Related Parties on or prior to the Closing Date (except as set forth in the Current APA);
- g. Liabilities of Seller or its Related Parties relating to the termination of employees;
- h. Liabilities of Seller or its Related Parties arising out of any writ, injunction, lawsuit, claim arbitration, proceeding, citation or notice letter threatened or pending as of the Closing Date, whether or not disclosed to Purchaser;
- i. Liabilities of Seller or its Related Parties related to insurance;
- j. any Construction Defect Liabilities caused by or asserted against Seller or its Related Parties relating to periods prior to the Closing; and
- k. any Liabilities of Seller or its Related Parties that are not expressly Assumed Liabilities.

20. Purchase Price: The "Purchase Price" is the net book value of the Purchased Assets that are specifically set forth on Exhibit 6 to the Current APA and shall be paid, at least in part, by crediting against the Purchase Price all amounts due and payable at any time, before or after the Closing Date from Seller as Contingent Consideration under the 2006 Purchase Agreement and the Incentive Payments.

21. Transition Services Agreement: It is a condition precedent to the Purchaser's duty to close the Sale that the Purchaser and Seller shall have executed the transition services agreement (the "*Transition Services Agreement*").

### **III. The Sale Should be Approved**

22. For the reasons explained below, the Seller believes that the approval of a private sale of the Purchased Assets to the Purchaser pursuant to the terms of the Current APA is not only appropriate but in the best interest of the Debtors, their creditors, and these estates.

23. Section 363(b)(1) of the Bankruptcy Code provides: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code provides: "The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In pertinent part, Bankruptcy Rule 6004 states that, "all sales not in the ordinary course of business may be by private sale or by public auction." Fed. R. Bankr. P. 6004(f)(1). With respect to the notice required in connection with a private sale, Bankruptcy Rule 2002(c)(1) states, in pertinent part, that,

... the notice of a proposed use, sale or lease of property ... shall include ... the terms and conditions of any private sale and the deadline for filing objections. The notice of a proposed use, sale or lease of property, including real estate, is sufficient if it generally describes the property.

Fed. R. Bankr. P. 2002(c)(1).

24. To approve the use, sale, or lease of property out of the ordinary course of business, this Court must find some articulated business justification for the proposed action. *See In re Abbotts Dairies of Pa. Inc.*, 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification and good faith tests of *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983)); *see also In re Delaware*

*& Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (concluding that the Third Circuit had adopted a "sound business purpose" test in *Abbotts Dairies*).

25. Generally, courts have applied four (4) factors in determining whether a sale of a debtor's assets should be approved: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction has been proposed and negotiated in good faith; and (d) whether adequate and reasonable notice is provided. *See Lionel*, 722 F.2d at 1071 (setting forth the "sound business purpose" test); *Abbotts Dairies*, 788 F.2d at 145-57 (implicitly adopting the articulated business justification test and adding the "good faith" requirement); *Delaware & Hudson Ry.*, 124 B.R. at 176 ("Once a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the purchaser is proceeding in good faith.").

26. This fundamental analysis does not change if the proposed sale is private, rather than public. *See, e.g., In re Ancor Exploration Co.*, 30 B.R. 802, 808 (Bankr. N.D. Okla. 1983) ("[T]he bankruptcy court should have wide latitude in approving even a private sale of all or substantially all of the estate assets not in the ordinary course of business under § 363(b)"). The bankruptcy court "has ample discretion to administer the estate, including authority to conduct public or private sales of estate property." *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (D.P.R. 1991), vacated on other grounds, 165 B.R. 1 (D.P.R. 1992); *accord, In re Canyon P'ship*, 55 B.R. 520, 524 (Bankr. S.D. Cal. 1985). Here, the proposed private sale of the Purchased Assets to the Purchaser meets all of these requirements and should be approved.

*A. Proceeding by Private Sale Reflects an Exercise of the Debtors' Business Judgment*

27. There is a sound business justification for the Seller's preference to proceed by private sale, rather than conducting a public sale of the Purchased Assets. The Purchaser is the most logical purchaser of the Seller's assets. The Purchaser's shareholders are members of the Ontario Framing Business's management team and, prior to the execution of the 2006 Purchase Agreement, owners of the Ontario Framing Business. Messrs. Davis' management of the Ontario Framing Business is required for its future success and, therefore, its value to any outside buyer. The Debtors believe that no outside buyer would be willing to assume succession risks relating to Randolph Davis's potential departure from the Ontario Framing Business in July 2010.

28. The Debtors believe, in their business judgment, that selling the Ontario Framing Business offers greater rewards than continuing to operate it. Even though the Ontario Framing Business has been the Debtors' most successful business, its financial performance has suffered lately because of the harsh economic climate and housing downturn. The Debtors' prolonged stay in bankruptcy as a result of difficulties obtaining committed exit financing have further impacted the Ontario Framing Business, causing a large drop in revenues during the third quarter of 2009. The success of the Ontario Framing Business depends, in part, on the principals' ability to attract customers; that ability, in turn, has been impaired by the chapter 11 process.

29. In addition to these factors, the Ontario Framing Business is dependent upon its ability to post surety bonds in connection with its construction projects to ensure performance. The Debtors' current exit financing commitment, however, will make the posting of such bonds post-emergence from chapter 11 very difficult and expensive. Thus, even when the Debtors do emerge from bankruptcy, their proposed financing arrangement would strain the

Ontario Framing Business's ability to remain profitable by limiting its ability to post necessary surety bonds.

30. Further, there is no guarantee that the Ontario Framing Business' revenue stream will return to pre-filing levels after the Debtors' emergence from bankruptcy. The Ontario Framing Business' success is directly linked to the management prowess of Messrs. Davis. During their original ownership of the business, Messrs. Davis formed the network of customers, employees, and suppliers which drive the corporate entity and helped it become the Debtors' most profitable business unit. Mr. Randolph Davis's employment agreement is set to expire on July 31, 2010. If Mr. Davis leaves the business, the entity may struggle to maintain its relationships with key stakeholders.

31. Sale of the Ontario Framing Business will not impair the Debtors' remaining businesses. The business has had limited business integration and customer cross-over with the remainder of the Debtors' businesses. The Debtors' primary business is in the single residence housing market, while the Ontario Framing Business is near-exclusively in the construction of apartments, condominiums, and dormitories. In fact, sale of the Ontario Framing Business may have the smallest impact of any potential disposition on the Debtors' post-emergence strategic and operational footprint, in part, because the Seller only purchased the Ontario Framing Business in 2006. Thus, while profitable, the Ontario Framing Business is not a large part of the Debtors' historical and core business.

32. In light of the foregoing, the tax benefits that the Debtors could derive by operation of the 2009 Act as a result of selling the Ontario Framing Business appears to offer the Debtors' greater recovery than continued operation of the Ontario Framing Business. The original purchase price under the 2006 Purchase Agreement was approximately \$78.6 million.

Three and a half years later, the current tax basis of the Ontario Framing Business (under the 2006 Purchase Agreement) is \$58,765,666. Under the 2009 Act, if this Court were to grant the Motion and approve the Seller's entry into the Current APA before the end of 2009, the Debtors could take a net loss for this entire amount and apply that net loss against profits made in 2004 and 2005. The result is that the Debtors could receive a tax refund of \$20,567,983 in cash on account of the Sale of the Ontario Framing Business. By contrast, the Debtors believe that the Sale will cause them to assume liabilities of only approximately \$62,250 related to the employee vacation and sick pay. The Debtors doubt whether continued operation of the Ontario Framing Business could provide this amount of income in the near term.

33. Moreover, sale of the Ontario Framing Business will not affect the remainder of the Debtors' operations because such business is fundamentally different from, and has little to no connection with, the Debtors' remaining businesses in that the Debtors' primary business is in the single residence housing market, while the Ontario Framing Business is near-exclusively in the construction of apartments, condominiums, and dormitories.

34. While the tax benefits of the 2009 Act as a result of the Sale may be considerable, the window of opportunity to apply for such benefits is short. The 2009 Act will not be available to the Debtors unless they consummate the Sale before the end of 2009. Accordingly, there is no time for a lengthy auction process which is unlikely to garner much interest from outside buyers (who, to the extent they exist at all, will require extensive diligence regarding the Ontario Framing Business). A private sale to the Purchaser under an expedited process may be the only way for the Debtors to extract immediate value out of the Ontario Framing Business.



*B. The Purchase Price is Fair and Reasonable*

35. The Debtors believe that the Purchase Price is a fair and reasonable price for the Purchased Assets. The Purchase Price under the Current APA was the result of extensive and arm's length negotiations. The Debtors will be relieved of significant liabilities in the form of the Contingent Consideration and the Incentive Payments. Moreover, as discussed above, on account of the 2009 Act, the expedited Sale of the Ontario Framing Business will result in a great tax advantage to the Debtors.

36. The Debtors have carefully considered and analyzed the Purchaser's offer as set forth in the Current APA and have concluded that a sale of the Purchased Assets pursuant to the Current APA will result in obtaining maximum value for the Purchased Assets and is in the best interest of the estates. In consideration of the foregoing, the Seller believes that the Purchase Price provides fair and reasonable value for the Purchased Assets.

*C. The Sale is Proposed in Good Faith*

37. The Sale has been proposed in good faith. The Current APA (including the Transition Services Agreement) was the product of good faith, arm's length negotiations between the Seller, on the one hand, and the Purchaser, on the other, and was negotiated with the active involvement of the Seller's officers and professionals. The Seller believes and submits that the sale of the Purchased Assets to the Purchaser pursuant to the terms and conditions of the Current APA is not the product of collusion or bad faith. No evidence suggests that the Current APA is anything but the product of arm's length negotiations between the Seller, the Purchaser, and their respective professional advisors.

*D. The Sale Is Not a Sub Rosa Plan*

38. Under the circumstances of these Chapter 11 Cases, the Sale does not amount to a *sub rosa* plan. To constitute a *sub rosa* or *de facto* plan, creditors must have been denied the procedural and due process protections afforded under the Bankruptcy Code. However, in these cases, creditors have had more than adequate notice of the terms of the Sale and the Current APA, along with the Plan and the Disclosure Statement. Moreover, the focus of any sub-rosa sale analysis is the Debtors' proposal to sell "all" or "substantially all" of its assets – which is not the case here. *In re Tower Automotive Inc.*, 241 F.R.D. 162, 169 (S.D.N.Y. 2006) (noting that "[i]n extreme circumstances, courts have refused to approve settlements or other transactions by a debtor, such as the sale of *all or substantially all assets* . . .") (emphasis added). The assets sought to be sold or wound down herein are non-core assets. It is of note that most if not all of the Debtors' major creditor constituencies support the relief sought herein. In fact, the Plan, which is being presented for confirmation concurrently (or even in advance of) the Motion contemplates the distribution of the Sale proceeds to the Debtors' creditors.

*E. Adequate and Reasonable Notice of Sale Has Been Provided*

39. The Sellers intend to provide adequate notice of the proposed Sale to all parties-in-interest, as required by the applicable procedural rules. *See* Fed. R. Bankr. P. 2002(c)(1) (notice must contain "the terms and conditions of any private sale and the time fixed for filing objections."); *see also, Delaware & Hudson Ry.*, 124 B.R. at 180 (the disclosures necessary in such a sale notice need only include the terms of the sale and the reasons why such a sale is in the best interests of the estate and do not need to include the functional equivalent of a disclosure statement). Shortly after the filing of this Motion, the Seller intends to send copies of this Motion and the Current APA to all parties that have expressed any interest, or the Seller

believes may have an interest, in purchasing the Purchased Assets. The notified parties will have the opportunity to submit other offers during the period prior to the objection deadline set forth herein. Consistent with their fiduciary duties to their estates, the Debtors will consider all such offers.

*F. The Sale Should be Free and Clear of Liens, Claims, and Interests*

40. In accordance with section 363(f) of the Bankruptcy Code, a debtor in possession may sell property under section 363(b) "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (a) such a sale is permitted under applicable non-bankruptcy law; (b) the party asserting such a lien, claim, or interest consents to such sale; (c) the interest is a lien and the purchase price for the property is greater than the aggregate amount of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the party asserting the lien, claim, or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f).

41. The Seller believes that the Debtors' prepetition and postpetition lenders will consent to the Sale pursuant to the terms set forth in the Current APA and as set forth herein. Furthermore, bankruptcy courts have held that they have the equitable power to authorize sales free and clear of interests that are not specifically covered by section 363(f). *See, e.g., In re Trans World Airlines, Inc.*, 2001 WL 1820325, at \*3, 6 (Bankr. D. Del. Mar. 27, 2001); *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987). Considering that any remaining objections to this Motion must be resolved by consent of the objecting party or by the Court, the Sellers expect that they can satisfy at least the second and fifth subsections of section 363(f) of the Bankruptcy Code.

*G. Assumption and Assignment of the Contracts Should be Approved*

42. To facilitate and effectuate the sale of the Purchased Assets, the Seller seeks authority to assume and assign the Contracts to the Purchaser. Section 365 of the Bankruptcy Code authorizes a debtor to assume and/or assign its executory contracts and unexpired leases, subject to the approval of the Bankruptcy Court, provided that the defaults under such contracts and leases are cured and adequate assurance of future performance is provided. A debtor's decision to assume or reject an executory contract or unexpired lease must only satisfy the "business judgment rule" and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046-47 (4th Cir. 1985). If the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989). The business judgment test "requires only that the trustee [or debtor-in-possession] demonstrate that [assumption or] rejection of the contract will benefit the estate." Any more exacting scrutiny would slow the administration of a debtor's estate and increase costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, pursuant to section 365(b)(1) of the Bankruptcy Code, for a debtor to assume an executory contract, it must "cure, or provide adequate assurance that the debtor will promptly cure," any default, including compensation for any "actual pecuniary loss" relating to such default. 11 U.S.C. § 365(b)(1).

43. Once an executory contract is assumed, the trustee or debtor in possession may elect to assign such contract. *See L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (In re Rickel*

*Home Ctrs., Inc.*), 209 F.3d 291, 299 (3d Cir. 2000) ("[t]he Code generally favors free assignability as a means to maximize the value of the debtor's estate"). Section 365(f) of the Bankruptcy Code provides that the "trustee may assign an executory contract . . . only if the trustee assumes such contract and adequate assurance of future performance is provided." 11 U.S.C. § 365(f)(2). The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." See *Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); see also *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. Accord *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease from debtors has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding).

44. The Seller submits that the assumption and assignment of the Contracts is necessary to the consummation of the Sale and is well within its sound business judgment. As required by the Current APA, the Purchaser (or its affiliate) will provide adequate assurance of future performance. Additionally, pursuant to the Current APA, the Debtors have agreed to satisfy any Cure Costs.<sup>5</sup> Accordingly, the Seller submits that the Purchaser will be able to

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<sup>5</sup> "Cure Costs" means amounts that must be paid and obligations that otherwise must be satisfied, including pursuant to sections 365(b)(1)(A) and (B) of the Bankruptcy Code, in connection with the assumption and/or assignment of the Contracts and the Real Property Lease.

demonstrate adequate assurance of future performance under the Contracts at or before the hearing on the Sale. As a result of the foregoing, the Debtors submit that no Counterparty (as defined below) has a right to object to the assumption and assignment of the Contracts to the Purchaser or an affiliate of the Purchaser.

45. The counterparties to the Contracts designated on Exhibit 5 of the Current APA (the "**Counterparties**") will receive a copy of this Motion, including the Current APA, and a notice, substantially in the form annexed hereto as **Exhibit C** (the "**Notice**"). If the Debtors identify additional executory contracts or unexpired leases that might be assumed by the Debtors and assigned to Purchaser not set forth in the original Notice, the Debtors will promptly send a supplemental notice (a "**Supplemental Notice of Assumption and Assignment**") to the applicable counterparties to such contracts. The Notice and the Supplemental Notice of Assumption and Assignment will direct the Counterparties to the Cure Schedule annexed hereto as **Exhibit D**. Pursuant to the terms of the Plan, such Cure Schedule includes a calculation of the undisputed Cure Costs that the Debtors believe must be paid to cure all defaults under the Contracts (the "**Cure Amounts**"). If no amount is listed on the Cure Schedule, the Debtors believe that there is no Cure Amount. The Debtors request that, unless the non-debtor party to a Contract files an objection (a "**Cure Objection**") to (a) its scheduled Cure Amount and/or (b) to the proposed assumption, assignment and/or transfer of such Contracts by 12:00 p.m. (prevailing Eastern time) December 16, 2009 (the "**Cure Objection Deadline**") and serves a copy of the Cure Objection so as to be received no later than the Cure Objection Deadline to: (a) Gibson, Dunn & Crutcher LLP, 200 Park Ave., 47th Floor, New York, New York 10166-0193 (Attn: Michael A. Rosenthal, Esq. and Matthew K. Kelsey, Esq. (Tel. (212) 351-4000 and Facsimile (212) 351-4035), counsel to Debtors; (b) Young, Conaway, Stargatt & Taylor, LLP, The

Brandywine Building, 1000 West St., 17th Floor, Wilmington, Delaware, DE 19801 (Attn: Sean M. Beach, Esq. and Robert F. Poppiti, Jr., Esq. (Tel. (302) 571-6600; Facsimile (302) 571-1253), counsel to Debtors; (c) Office of the United States Trustee for the District of Delaware, 844 King street, Suite 2207, Lockbox 35, Wilmington, DE 19801 (Attn: Joseph J. McMahon, Jr. (Tel. (302) 573-6491, Facsimile (302) 573-6497); (d) Paul, Hastings, Janofsky & Walker, LLP, 55 Second Street, San Francisco, CA 94105-3441 (Attn: Kevin B. Fisher, Esq. (Tel. (415) 856-7219, Facsimile ((415) 856-7200) and 75 East 55th Street, New York, New York 10022 (Attn: Thomas L. Kent, Esq. (Tel. (212) 318-6060 and Facsimile (212) 230-7899), counsel to the agent under the Debtors' postpetition debtor in possession credit facility; (e) Richards, Layton & Finger, P.A., One Rodney Square, 920 King Street, Wilmington, DE 19801 (Attn: Paul N. Heath, Esq. (Tel. (302) 651-7590, Facsimile (302) 498-7590)), counsel to the agent under the Debtors' postpetition debtor in possession credit facility; and (f) George and Randolph Davis, 8780 Prestige Court, Rancho Cucamonga, CA 91730, (Facsimile (909) 944-7952); such non-debtor party shall (i) be forever barred from objecting to the Cure Amount and from asserting any additional cure or other amounts with respect to such Contract and the Debtors should be entitled to rely solely upon the Cure Amount, and (ii) if the Contract was identified as a Purchased Asset, be deemed to have consented to the assumption, assignment, and/or transfer of such Contract and be forever barred and estopped from asserting or claiming against the Debtors, the Purchaser, or any other assignee of the relevant Contract that any additional amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied, under such Contract.

46. The Debtors also request that if an objection challenges a Cure Amount, the objection be required to set forth the cure amount being claimed by the objecting party (the "*Claimed Cure Amount*") with appropriate documentation in support thereof. Upon receipt

of an objection to a Cure Amount, the Purchaser or the Seller may, in its sole discretion, (a) remove such Contract from Current APA Exhibit 5, and such Contract shall be designated as an Excluded Asset, or hold an amount equal to the Claimed Cure Amount in reserve pending further order of the Court or agreement between the Debtors and the objecting party. So long as the Purchaser or the Seller holds the Claimed Cure Amount in reserve, the Debtors seek authority to assume, assign, and/or transfer the Contract that is the subject of an objection without further delay.

47. The Debtors and the Purchaser may determine to exclude any Contract from the list of Purchased Assets prior to the consummation of the Sale. The non-debtor party or parties to any such excluded contract or lease will be notified of such determination.

48. The Sellers assert that the procedures set forth above are reasonable and, that they ensure proper notice of the assumption and assignment of the Contracts, and sufficient opportunity to resolve any issues arising as to disputed Cure Amounts or other objections to the assumption and assignment of the Contracts. Thus, the Sellers submit that the assumption and assignment of the Contracts to the Purchaser, subject to the procedures set forth above, should be approved.

*H. Sale of Purchased Assets and Assignment of Contracts are Proposed in Good Faith*

49. The Debtors additionally request that the Court find that the Purchaser be entitled to the protections provided by section 363(m) of the Bankruptcy Code in connection with the Sale of the Purchased Assets. Section 363(m) of the Bankruptcy Code provides, in pertinent part:

The reversal or modification on appeal of an authorization under subsection (b) . . . of this section of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good



faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m).

50. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal. By its terms, section 363(m) of the Bankruptcy Code applies to sales of interests in tangible assets. The Third Circuit has indicated that section 363(m) of the Bankruptcy Code also protects the assignee of a debtor's interest in executory contracts under section 365 of the Bankruptcy Code. *See Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 497-98 (3rd. Cir. 1998).

51. Although the Bankruptcy Code does not define "good faith purchaser," the Third Circuit, construing section 363(m) of the Bankruptcy Code, has stated that "the phrase encompasses one who purchases in 'good faith' and for 'value'." *Abbotts Dairies*, 788 F.2d at 147. To constitute lack of good faith, a party's conduct in connection with the sale must usually amount to "fraud, collusion between the purchaser and other bidders or the trustee or an attempt to take grossly unfair advantage of other bidders." *Id.* (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)). See also *In re Bedford Springs Hotel, Inc.*, 99 B.R. 302, 305 (Bankr. W.D. Pa. 1989); *In re Perona Bros., Inc.*, 186 B.R. 833, 839 (D.N.J. 1995). Due to the absence of a bright line test for good faith, the determination is based on the facts of each case, concentrating on the "integrity of [an actor's] conduct during the sale proceedings." *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *Rock Indus. Machinery Corp.*, 572 F.2d at 1198 (7th Cir. 1978)).

52. As required by section 363(m) of the Bankruptcy Code, both the Debtors and the Purchaser have acted in good faith in negotiating the sale of the Purchased Assets and the

assignment of the Contracts. There is no evidence of fraud or collusion in the terms of the Current APA and the assignment of the Contracts. To the contrary, as discussed throughout this Motion, the sale of the Purchased Assets will be the culmination of a lengthy negotiation process in which all parties are represented by sophisticated advisors. The Purchaser is not an insider of the Debtors as that term is defined in section 101(31) of the Bankruptcy Code, and all negotiations will be conducted on an arm's length, good faith basis.

53. All parties with an interest in the Purchased Assets, and as required by Bankruptcy Rule 2002, will receive notice of the Sale and will be provided an opportunity to be heard. Additionally, all Counterparties to the Contracts will be provided with notice of the assumption and assignment and an opportunity to be heard. The Debtors submit that such notice is adequate for entry of the Order and satisfies the requisite notice provisions required under section 363(b) and 365 of the Bankruptcy Code. Under the circumstances, the Purchaser should be afforded the benefits and protections that section 363(m) of the Bankruptcy Code provides to a good faith purchaser.

*I. Authorizing the Exemption of the Sale Transaction from Stamp and Similar Taxes Is Appropriate*

54. Under section 1146(a) of the Bankruptcy Code, the “transfer . . . or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp or similar tax.” 11 U.S.C. § 1146(a).<sup>6</sup> Courts have broadly construed this provision to include sales and transfers that occur outside the corners of an actual chapter 11 plan of reorganization and before or after confirmation of that

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<sup>6</sup> Prior to the enactment of the Bankruptcy Abuse Prevention Consumer Protection Act (“BAPCPA”) in 2005, section 1146(a) of the Bankruptcy Code was section 1146(c).

chapter 11 plan so long as the sales relate to a debtor's reorganization. See *CCA P'ship v. Dir. of Revenue*, State of Del. (*In re CCA P'ship*), 70 B.R. 696 (Bankr. D. Del. 1987), *aff'd* 72 B.R. 765 (D. Del. 1987), *aff'd*, *Dir. of Revenue. State of Del. v. CCA P'Ship*, 833 F.2d 304 (3d Cir. 1987); See also *City of New York v. Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.)*, 758 F.2d 840, 842 (2d Cir. 1985) (holding that section 1146(c) of the Bankruptcy Code applied when the “transfer, is necessary to the consummation of a plan”); *In re United Press Int'l, Inc.*, Case No. 91-B-13955 (FSC), 1992 Bankr. LEXIS 842, at \*4 (Bankr. S.D.N.Y. May 18, 1992) (section 1146(c) exemption applied to section 363 sale where “value of debtor's assets . . . likely to deteriorate [during] time necessary to . . . confirm a plan”); But see *Baltimore County, Md. v. Hechinger Liquidation Trust (In re Hechinger Inv. Co. of Del., Inc.)*, 335 F.3d 243, 257 (3d Cir. 2003) (holding “that a real estate transaction is made 'under a plan confirmed under section 1129' [of the Bankruptcy Code] only where the sale is authorized by the terms of a previously confirmed Chapter 11 plan”). Notwithstanding the Third Circuits' decision in *Hechinger*, the Third Circuit's approach in *Hechinger*, is generally viewed as too “restrictive [an] interpretation of transfers 'under a plan confirmed.'” *In re Webster Classic Auctions, Inc.*, 318 B.R. 216, 218 (Bankr. M.D. Fla. 2004) (adopting an alternative to the holdings in the Second Circuit on the one hand, and the Third and Fourth Circuits on the other, that the only requirements to receive the safe harbors of § 1146(a) should be (1) a “plan of reorganization specifically contemplating a sale of property, and [(2)] the plan must ultimately be confirmed in order for a debtor to take advantage of § 1146(c)'s safe harbor.” *Id.* at 219.). The court in *Webster Classic Auctions*, found that while the *Hechinger* bright-line interpretation is “appealing in its alleged simplicity, this temporal interpretation largely ignores the practical reality of chapter 11 reorganization cases.” *Id.* at 218.

The seeds of a better reasoned approach are found in the Supreme Court's holding in *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (2008).

55. Notwithstanding the Supreme Court's holding that the Bankruptcy Code's stamp-tax exemption does not apply to transfers made before a plan is confirmed under chapter 11, “[t]he Supreme Court did not, however, adopt *Hechinger's* interpretation that ‘under a plan confirmed’ necessarily meant *authorized* by the plan. Instead, [citing *NVR Homes, Inc. v. Clerks of the Circuit Courts of Anne Arundel County (In re NVR, LP)*, 189 F.3d 442 (4th Cir. 1999)]:... Congress struck a most reasonable balance. If a debtor is able to develop a chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference.” *In re New 118th, Inc.*, 398 B.R. 791, 797 (Bankr. S.D.N.Y. 2009) (internal citations omitted). Further, the court in *New 118th, Inc.*, went on to find that the Supreme Court “did not address whether the exemption could apply to a pre-confirmation sale that closed post-confirmation.” *Id.* (finding that “the post-confirmation delivery of the deed, and hence, the transfer, satisfies *Piccadilly's* ‘simple, bright-line rule’). “Furthermore, the Supreme Court's adoption of the *NVR* standard, and by extension, the reasoning of *Jacoby-Bender*, suggests that the § 1146(a) exemption applies to a post-confirmation *transfer* that follows a pre-confirmation sale if the transfer facilitates the implementation of the plan, or in the words of *Jacoby-Bender*, is necessary to the consummation of the plan.”. *New 118th, Inc.*, 398 B.R. at 797 (2009).

56. Here, the Debtors' sale of the Purchased Assets is an essential element of the Debtors' reorganization efforts. Moreover, it is anticipated that the Debtors will confirm the Plan in short order and prior to consummation of the Sale contemplated by the Current APA.

Therefore, the Sale of the Purchased Assets should be deemed to be “under a plan” for purposes of section 1146(a) of the Bankruptcy Code.

### **THE ILLINOIS BUSINESS WIND DOWN**

57. The Debtors currently maintain operations in Illinois through two entities, SelectBuild Illinois, LLC and Illinois Framing, Inc. (together the "*Illinois Business*"), both of which are Debtors in these Chapter 11 Cases. Historically, the Illinois Business has not generated significant profits, and recently has generated losses. In 2007, the Illinois Business had revenues of approximately \$44.7 million and Earnings Before Interest Taxes and Amortization ("*EBITDA*") of approximately \$1.7 million. During the economic downturn, the Illinois Business' financial performance worsened. In 2008, the Illinois Business had revenues of approximately \$21.6 million, a decrease of 51.7% from 2007, and an EBITDA of approximately negative \$641,000. Moreover, in 2009, the Illinois Business has continued to struggle. Year to date, revenues for the Illinois Business equal approximately \$6.9 million and EBITDA equals approximately negative \$775,000. In October 2009, the Illinois Business continued to generate poor financial results, only registering \$346,000 in total revenue.

58. In addition, evidence suggests that when the housing market rebounds, the Illinois Business may be poorly situated to take advantage of improving economic conditions. SelectBuild Illinois, LLC, in particular, is subject to fixed labor costs which has impaired and likely, will continue to impair its ability to bid for future work.<sup>7</sup>

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<sup>7</sup> Notably, although all employees of SelectBuild Illinois, LLC are unionized, such employees are not subject to a collective bargaining agreement which would require modification to accomplish the Illinois Business Wind Down. Accordingly, the Debtors submit that the Illinois Business Wind Down and relief sought herein does not implicate section 1113 of the Bankruptcy Code.

59. Under the 2009 Act, the Illinois Business Wind Down represents an opportunity for the Debtors to avoid potential future losses and concurrently receive a tax refund for doing so. The current tax basis for the Illinois Business is \$7,052,411. Under the 2009 Act, if this Court were to grant the Motion and approve the Illinois Business Wind Down, the Debtors could take a net loss for this entire amount and receive a tax refund of \$2,468,344. By comparison, the Debtors estimate that near term liabilities relating to the termination of certain Illinois Business employees will equal approximately \$46,600.<sup>8</sup> Accordingly, the Illinois Business Wind Down is an act of good business judgment and should be approved.

60. The Illinois Business Wind Down likely will not affect the remainder of the Debtors' operations. Geographically, the Illinois Business is cut off from the rest of the Debtors' operations. The Illinois Business has little to no connection with the Debtors' remaining businesses.

61. The Debtors believe that section 363(c) permits them to perform the Illinois Business Wind Down in the ordinary course of their businesses; however, out of an abundance of caution, the Debtors, by this Motion, pursuant to sections 105(a) and 363(b), seek authority to perform the actions described herein. Based on the foregoing, the Debtors believe that the Illinois Business Wind Down is a result of the sound exercise of the Debtors' business judgment, will maximize the value of the estates, and should be approved.

#### **WAIVER**

62. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 10 days after entry of the order, unless

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<sup>8</sup> There may be additional severance obligations payable in 2010 of approximately \$25,000.

the court orders otherwise." Bankruptcy Rule 6006(d) provides a similar ten-day stay of effectiveness for any order authorizing the assignment of an executory contract or lease.

63. To be eligible to receive the tax benefits available under the 2009 Act, the Sale and the Illinois Business Wind Down must be consummated before the Effective Date of the Plan and before the end of 2009. Since consummation of the Sale and the Illinois Business Wind Down are of critical importance to the Purchaser and the Sellers' efforts to preserve and maximize the value of the estates, the Sellers hereby request that the Court waive the ten-day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

#### **NOTICE**

64. No trustee or examiner has been appointed in these Chapter 11 Cases. The Debtors have provided notice of filing of the Motion to: (a) the U.S. Trustee; (b) counsel to Wells Fargo Bank, as agent under the Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (c) counsel to the Creditors' Committee; (d) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002; (e) all parties known to the Debtors who have an interest in or rights to the Purchased Assets; (f) all non-Debtor parties to the Contracts; (g) all taxing authorities having jurisdiction over any of the Purchased Assets, including the Internal Revenue Service; (h) the Attorney(s) General in the State(s) where the Purchased Assets are located and (i) all known creditors of the Ontario Framing Business and the Illinois Business entities. The Debtors also intend to serve the Notice on all parties known to the Debtors that have expressed interest in the possible purchase of any of the Purchased Assets. Due to the nature of the relief requested the Debtors respectfully submit that no further notice of this Motion is required.

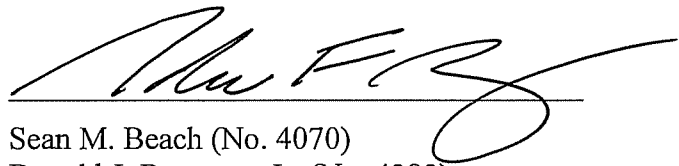
**NO PRIOR REQUEST**

65. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware  
December 8, 2009

YOUNG CONAWAY STARGATT &  
TAYLOR, LLP



Sean M. Beach (No. 4070)  
Donald J. Bowman, Jr. (No. 4383)  
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---- and ----

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ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION



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

**In re:**

) **Chapter 11**

**BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>**

) **Case No. 09-12074 (KJC)**

**Debtors.**

) **Jointly Administered**

) **Requested Objection Deadline: December 16, 2009 at 12:00 p.m. (ET)**

) **Requested Hearing Date: December 17, 2009 at 10:00 a.m. (ET)**

**NOTICE OF MOTION**

TO: (A) The Office of the United States Trustee for the District of Delaware; (B) Counsel to Wells Fargo Bank, as Agent Under the Prepetition Credit Facility and the DIP Facility (as Defined in the Plan); (C) Counsel to the Official Committee of Unsecured Creditors; (D) All Parties Known to the Debtors Who Have an Interest In or Rights To the Purchased Assets; (E) All Non-Debtor Parties to the Contracts; (F) All Taxing Authorities Having Jurisdiction Over Any of the Purchased Assets, Including the Internal Revenue Service; (G) the Attorney(s) General in the State(s) Where the Purchased Assets Are Located; (H) All Known Creditors of the Ontario Framing Business and the Illinois Business Entities; and (I) All Parties That Have Requested Notice Pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure.

**PLEASE TAKE NOTICE** that the above-captioned debtors and debtors in possession (collectively, the “Debtors”) have filed the attached **Debtors’ Motion for an Order, Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 9004, 9006, 9014, and 9019, (I) Authorizing the Private Sale by C Construction, Inc. of the Purchased Assets Free and Clear of Liens, Encumbrances and Other Interests, (II) Authorizing the Assumption and Assignment of Certain Assumed Contracts, (III) Approving the Asset Purchase Agreement and the Transition Services Agreement, (IV) Authorizing the Debtors to Pay Severance, (V) Authorizing the Wind Down of Business Operations in Illinois and (VI) Granting Related Relief (the “Sale Motion”).**

**PLEASE TAKE FURTHER NOTICE** that the Debtors have filed a motion (the “Motion to Shorten”) requesting that any objections to the relief requested in the Sale Motion, including, without limitation, the assumption and assignment of the Contracts and the corresponding Cure Amounts (each as defined in the Sale Motion), be filed with the United

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

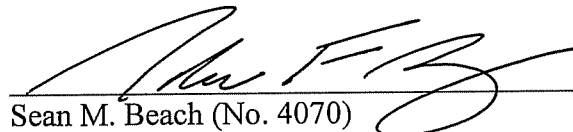
States Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801 on or before **December 16, 2009 at 12:00 p.m. (ET)** (the "**Objection Deadline**"). You must also serve a copy of any objection upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

**PLEASE TAKE FURTHER NOTICE** THAT PURSUANT TO THE MOTION TO SHORTEN, THE DEBTORS HAVE FURTHER REQUESTED THAT A HEARING TO CONSIDER THE SALE MOTION BE HELD ON **DECEMBER 17, 2009 AT 10:00 A.M. (ET)** BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

**PLEASE TAKE FURTHER NOTICE** that if you fail to respond in accordance with this notice, the Court may grant the relief requested in the Sale Motion without further notice or a hearing.

Dated: Wilmington, Delaware  
December 8, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Sean M. Beach (No. 4070)  
Donald J. Bowman, Jr. (No. 4383)  
Robert F. Poppiti, Jr. (No. 5052)  
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----and----

GIBSON, DUNN & CRUTCHER LLP  
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ATTORNEYS FOR THE DEBTORS  
AND DEBTORS-IN-POSSESSION

# **EXHIBIT A**

## **Proposed Order**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

**ORDER, PURSUANT TO SECTIONS 105, 363, AND 365 OF THE  
BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 9004,  
9006, 9014, AND 9019, (I) AUTHORIZING THE PRIVATE SALE  
BY C CONSTRUCTION, INC. OF THE PURCHASED ASSETS  
FREE AND CLEAR OF LIENS, ENCUMBRANCES AND OTHER  
INTERESTS, (II) AUTHORIZING THE ASSUMPTION AND  
ASSIGNMENT OF CERTAIN ASSUMED CONTRACTS, AND  
(III) APPROVING THE ASSET PURCHASE AGREEMENT THE  
TRANSITION SERVICES AGREEMENT, (IV) AUTHORIZING THE DEBTORS  
TO PAY SEVERANCE, (V) AUTHORIZING THE WIND DOWN OF BUSINESS  
OPERATIONS IN ILLINOIS AND (VI) GRANTING RELATED RELIEF**

Upon the motion, dated December 8, 2009 (the "**Motion**"),<sup>2</sup> of the above captioned debtors and debtors in possession (collectively, the "**Debtors**"), for, among other things, entry of an order (the "**Order**") under sections 105(a), 363, and 365 of title 11 of the United States Code (the "**Bankruptcy Code**"), Rules 2002, 6004, 6006, 9014, and 9019 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and Rules 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of

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

<sup>2</sup> All capitalized terms used herein, unless otherwise defined herein, shall have the respective meanings assigned to such terms in the Sale Motion or the Asset Purchase Agreement (the "**Current APA**"), as the case may be.

Delaware (the "**Local Rules**") (a) authorizing and approving (i) the private sale (the "**Sale**") by C Construction, Inc. (the "**Seller**") of certain property (as described in the Sale Motion) free and clear of all liens, claims, encumbrances, and interests (except for Assumed Liabilities and Permitted Encumbrances as provided in this Order) to Davis Development Company, Inc. (the "**Purchaser**"), pursuant to the terms and conditions of the Current APA, and (ii) the transition services agreement between Purchaser and Seller (the "**Transition Services Agreement**"), copies of which are annexed hereto as **Exhibit A**; (b) authorizing and approving the assumption and assignment of certain contracts (the "**Contracts**") to the Purchaser; (c) authorizing and approving the terms of the Current APA and the Transition Services Agreement; (d) authorizing the Debtors to make severance payments pursuant to the terms described in the Motion to the transitioning employees; (e) authorizing the Illinois Business Wind Down and (f) granting relief relating to each of the foregoing; and a hearing on the Sale and Illinois Business Wind Down (the "**Hearing**") having been held before the Court on December 17, 2009; and it appearing from the affidavit of service filed with the Court and from the record that due and sufficient notice of the Motion, the Hearing, and the relief sought in connection therewith having been provided to all parties in interest; and it further appearing that no other or further notice hereof is required; and this Court having reviewed and considered the Motion and objections thereto; and this Court having heard statements of counsel and the evidence presented at the Hearing in support of the relief requested in the Motion; and it appearing that the relief requested in the Motion is in the best interest of the Debtors' estates, their creditors, and other parties in interest; and it further appearing that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause therefore:

**THE COURT HEREBY FINDS THAT:<sup>3</sup>**

**Jurisdiction, Final Order and Statutory Predicates**

A. This Court has jurisdiction to hear and determine the Motion and to grant the relief requested in the Motion pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O). Venue is proper in this District and in this Court pursuant to 28 U.S.C. §§ 1409 and 1409. The statutory predicates for the relief sought in the Motion are sections 105(a), 363, and 365 of the Bankruptcy Code; Bankruptcy Rules 2002, 6004, 6006, 9014, and 9019; and Rule 6004-1 of the Local Rules.

B. This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), and 7062, this Court expressly finds that there is no just reason for delay in the implementation of this Order, and expressly directs entry of judgment as set forth herein.

C. The Purchased Assets constitute property of the Debtors' estates and title thereto is vested in the Debtors' estates within the meaning of section 541(a) of the Bankruptcy Code.

**Corporate Authority**

D. The Seller and any other Debtor party to the APA, the Transition Services Agreement, or any other document executed in connection therewith have full corporate power and authority to execute and deliver each such agreement to which it is a party and all other documents contemplated thereby and to consummate the Sale. The Sale has been duly and validly authorized by all necessary corporate actions of the Seller and any applicable affiliate. No consents or approvals other than the authorization and approval of this Court or those that

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<sup>3</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate pursuant to Rule 7052 of the Bankruptcy Rules.

have previously been obtained are required for the Seller or the other Debtors party to any of the documents executed in connection with the Current APA to consummate the Sale.

### **Notice of Hearing**

E. As evidenced by the affidavits of service previously filed with this Court and the record herein and based on the representations of counsel at the Hearing, due, proper, timely, adequate, and sufficient notice of the Motion, the Sale, and the Hearing, including, without limitation, the assumption and assignment of the Contracts and the Assumed Liabilities have been provided as set forth in the Motion. Such notice constitutes good and sufficient notice of the Motion, the Sale, the Illinois Business Wind Down, and the Hearing and no other or further notice of the Motion, the Sale, the Illinois Business Wind Down, and the Hearing is or shall be required.

F. Notice has been provided to, and a reasonable opportunity to object or to be heard regarding the Motion, the Sale, the Illinois Business Wind Down, and the Hearing has been afforded to, all interested persons and entities, including, among others: (i) all parties known to the Debtors that have expressed interest in the possible purchase of any of the Purchased Assets; (ii) the Office of the United States Trustee for the District of Delaware; (iii) counsel to the agent for the prepetition first lien secured lenders; (iv) counsel to the agent under the Debtors' postpetition debtor in possession financing; (v) all parties that have requested or are entitled to receive notice as of the date of service pursuant to Bankruptcy Rule 2002; (vi) all parties known to the Debtors who have an interest in or rights to the Purchased Assets; (vii) all non-Debtor parties to the Contracts; (viii) all taxing authorities having jurisdiction over any of the Purchased Assets, including the Internal Revenue Service; and (ix) the Attorney(s) General in the State(s) where the Purchased Assets and the Illinois Business are located.



### **Sound Business Judgment**

G. The Debtors have articulated good and sufficient reasons for this Court to grant the relief requested in the Motion regarding the Sale, the approval of the Current APA, the Transition Services Agreement, the Illinois Business Wind Down, and all other matters related to the Sale the Illinois Business Wind Down, and/or the Motion. The relief requested in the Motion is within the reasonable business judgment of the Debtors, and is in the best interests of the Debtors, their estates, their creditors, and other parties in interest. The disclosures made by the Debtors concerning the Illinois Business Wind Down, the Current APA, the Transition Services Agreement, the Motion, the Sale, the Hearing and the assumption and assignment of the Assigned Contracts were good, complete and adequate.

H. The Debtors have demonstrated good, sufficient, and sound business purpose and justification and compelling circumstances for entry into the Current APA and the Transition Services Agreement, the consummation of the Sale and the Illinois Business Wind Down pursuant to section 363(b) of the Bankruptcy Code prior to confirmation of a plan of reorganization, in that, the immediate consummation of the Sale to the Purchaser and the Illinois Business Wind Down are necessary and appropriate to maximize the value to the Debtors' estates and thereby are in the best interests of the Debtors, their creditors, and other parties in interest, and the payment of all costs related to the foregoing.

### **Good Faith of Purchaser**

I. The Purchaser is not an "insider" of any of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code. The Current APA and the Transition Services Agreement were negotiated, proposed, and entered into by the Seller and the Purchaser without collusion, in good faith, from arm's length bargaining positions and is substantively and

procedurally fair to all parties. The Seller and the Purchaser thoroughly negotiated the terms and conditions of the Current APA in good faith and the Purchaser has entered into the Current APA in good faith and is a good faith Purchaser within the meaning of section 363(m) of the Bankruptcy Code and, therefore, is entitled to the protections and immunities afforded thereby. Neither the Debtors nor the Purchaser have engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or cause the application of, or implicate, section 363(n) of the Bankruptcy Code to the Current APA or the Transition Services Agreement, or to otherwise prevent the consummation of the Sale. In the absence of a stay pending appeal, the Purchaser will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the transactions set forth in the Current APA at any time after entry of this Order.

#### **Highest and Best Offer**

J. In part because of certain tax benefits which the Debtors shall receive on account of an expedited Sale, the offer of the Purchaser, upon the terms and conditions set forth in the Current APA, including without limitation, the form and total consideration to be realized by the Debtors (i) is the highest or otherwise best offer received by the Debtors with respect to the Purchased Assets to be purchased thereunder; (ii) is fair and reasonable; (iii) is in the best interest of the Debtors, their creditors, and the Debtors' estates; and (iv) constitutes full, fair, and adequate consideration and reasonably equivalent value for the Purchased Assets to be purchased under the Bankruptcy Code and under the laws of the United States, any state, territory, or possession.

### **No Fraudulent Transfer**

K. The consideration for the Purchased Assets constitutes (i) reasonably equivalent value under the Bankruptcy Code and the Uniform Fraudulent Transfer Act; (ii) fair consideration under the Uniform Fraudulent Conveyance Act; and (iii) reasonably equivalent value, fair consideration, and fair value under any other applicable laws of the United States, any state, territory, or possession.

L. Except as expressly set forth in the Current APA, the Purchaser shall not have any liability or obligations for any lien, claim, encumbrance, or interest, or other obligation of or against the Debtors, related to the Purchased Assets by reason of the transfer of the Purchased Assets to the Purchaser. The Purchaser shall not be deemed, as a result of any action taken in connection with the purchase of the Purchased Assets to: (i) be a successor (or other such similarly situated party) to the Debtors (other than with respect to Assumed Liabilities and any obligations arising under the Contracts from and after the Closing Date as expressly stated in the Current APA); or (ii) have, *de facto* or otherwise, merged with or into the Debtors. The Purchaser is not acquiring or assuming any liability, warranty, or other obligation of the Debtors, except as expressly set forth in the Current APA with respect to the Permitted Encumbrances and Assumed Liabilities.

### **Validity and Free and Clear Nature of Transfers**

M. The transfer of each of the Purchased Assets to the Purchaser pursuant to the Current APA will be, as of the Closing Date, a legal, valid, and effective transfer of good and marketable title of such property and assets and vests, or will vest, the Purchaser with all right, title, and interest of the Seller to the Purchased Assets, free and clear of all liens, claims, encumbrances, and interests of any kind or nature, as set forth in the Current APA, arising or

relating thereto at any time prior to the Closing Date, except for any Permitted Encumbrances and Assumed Liabilities under the Current APA, because one or more of the standards set forth in section 363(f) of the Bankruptcy Code have been satisfied.

N. The Purchaser would not have entered into the Current APA and would not consummate the transactions contemplated thereby if the Sale of the Purchased Assets to the Purchaser, and the assumption, assignment, and sale of the Contracts to Purchaser, were not free and clear of all liens, claims, encumbrances, and interests of any kind or nature whatsoever (except for Permitted Encumbrances and Assumed Liabilities), or if the Purchaser would, or in the future could, be liable for any of such liens, claims, encumbrances, and interests.

O. The Seller may sell the Purchased Assets free and clear of all liens, claims, encumbrances, and interests (except for Permitted Encumbrances and Assumed Liabilities), because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those non-Debtor parties with interests in the Purchased Assets who did not object, or who withdrew their objections, to the Sale or the Motion are deemed to have consented to the Sale pursuant to sections 363(f)(2) and 365 of the Bankruptcy Code. Those non-Debtor parties with interests in the Purchased Assets who did object fall within one or more of the other subsections of sections 363(f) and 365 of the Bankruptcy Code, and such objections are expressly overruled. Accordingly, all persons having such liens, claims, encumbrances, and interests of any kind or nature whatsoever against or in any of the Purchased Assets (except for Permitted Encumbrances and Assumed Liabilities) shall be forever barred, estopped, and permanently enjoined from pursuing or asserting such liens, claims, encumbrances, and interests against the Purchaser or any of its respective assets, property, successors, or assigns.

P. Except for the Permitted Encumbrances and Assumed Liabilities, the transfer of the Purchased Assets to the Purchaser and the assumption and assignment of the Contracts to the Purchaser will not subject the Purchaser to any liability for claims against the Debtors by reason of such transfers under the laws of the United States, any state, territory, or possession thereof, including, without limitation, claims relating to the operation of the Debtors' business before the Closing Date, including: (i) employee pension benefit plan, employee welfare benefit plan, multiemployer plan, collective bargaining agreement, or any other plan or agreement with respect to any employees of the Ontario Framing Business; (ii) the dismissal of employees, or termination of employment; (iv) trade accounts payable, accrued expenses, and intercompany accounts; (v) any writ, injunction, lawsuit, claim arbitration, proceeding, citation or notice letter threatened or pending as of the Closing Date, whether or not disclosed to Purchaser; (vi) insurance; (vii) Construction Defect Liabilities; and (viii) any Liabilities of Seller or its Related Parties that are not expressly Assumed Liabilities.

#### **Assumed Liabilities**

Q. The Debtors may transfer and assign all Assumed Liabilities, Contracts, and other Purchased Assets to the Purchaser notwithstanding any anti-assignment clause or other similar provision or any legal restriction applicable thereto to the extent provided in the Bankruptcy Code, including, without limitation, sections 105, 363, and 365 of the Bankruptcy Code.

R. The Debtors have provided sufficient notice to the non-Debtor parties to the Contracts of the proposed assumption and assignment and the related amounts required to cure any defaults thereunder (the "*Cure Amount*"). Such notice was sufficient to provide all such parties an opportunity to object. All parties that have not objected to the Sale, including, without limitation, the transfer and assignment of the Purchased Assets, Assumed Liabilities, and the

Contracts to Purchaser, are deemed to consent to such transfer and assignment and to the corresponding Cure Amounts specified in *Exhibit B*, of which notice of the Cure Amounts was provided to the non-Debtor counterparties.

S. The assumption and assignment of the Contracts pursuant to the terms of this Order is an integral part of the Current APA and is in the best interest of the Debtors and their respective estates, creditors, and other parties in interest and represents the reasonable exercise of sound and prudent business judgment by the Debtors.

T. Pursuant to section 365 of the Bankruptcy Code, upon the Debtors' payment of the Cure Amounts in the amounts specified in *Exhibit B*, the Debtors shall have (i) cured any monetary defaults existing prior to the Closing Date under any of the Contracts; and (ii) provided compensation to any party for actual pecuniary loss to such party resulting from a default prior to the Petition Date under any of the Contracts. On or before the Closing Date, the Debtors shall pay in full, to the extent owed, all Cure Costs, that are undisputed or have been determined by the Court pursuant to a Final Order.

U. Subject to the terms of the Current APA, the Debtors shall be authorized to consummate the Sale notwithstanding any objection related to disputed Cure Amounts.

V. The Purchaser has provided adequate assurance of future performance (by it or an assignee) under the relevant Contracts within the meaning of the Bankruptcy Code.

W. The Purchaser is assuming only the Assumed Liabilities, as defined and set forth in the Current APA, and the Purchaser is not assuming any other obligations or liabilities.

X. The Sale, this Order and the Current APA are being implemented and authorized under the Plan, and the Debtors have demonstrated (i) good, sufficient, and sound business purposes and justifications and (ii) compelling circumstances for the Sale pursuant to

section 363(b) of the Bankruptcy Code in that, among other things, absent the Sale the value of the Debtors' estates will be harmed.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

**General Provisions**

1. The Motion is granted and approved, and (a) the Sale contemplated thereby and by the Current APA and (b) the Illinois Business Wind Down are approved.

2. Any and all objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are hereby overruled on the merits.

**Approval of the Current APA**

3. The Current APA, the Transition Services Agreement, and all other ancillary documents and all of the terms and conditions thereof are hereby approved.

4. The consideration provided by the Purchaser for the Purchased Assets under the Current APA is fair and reasonable and shall be deemed for all purposes to constitute value under the Bankruptcy Code or any other applicable law, and the Sale may not be avoided, or costs or damages imposed or awarded, under section 363(n) of the Bankruptcy Code, or any other provision of the Bankruptcy Code.

5. Pursuant to sections 363(b) and (f) of the Bankruptcy Code, the Sellers are authorized and empowered to take any and all actions necessary or appropriate to (a) consummate the Sale of the Purchased Assets to the Purchaser pursuant to and in accordance with the terms and conditions of the Current APA; (b) close the Sale as contemplated in the Current APA and this Order (and pay all costs relating to the Sale); and (c) execute and deliver,

perform under, consummate, implement, and close fully the Current APA and the Transition Services Agreement, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Current APA and the Sale, all without further order of this Court.

6. The terms and provisions of this Order shall be binding in all respects upon the Debtors, their estates, all creditors, officers, directors, advisors, members, managers, and all holders of equity in the Debtors, all holders of any claim(s) (whether known or unknown) against the Debtors, any holders of liens, claims, encumbrances, or interest against or on all or any portion of the Purchased Assets, all parties to Contracts, the Purchaser, and all successors and assigns of the Purchaser, and any trustees, if any, subsequently appointed in the Debtors' Bankruptcy Cases or upon a conversion to chapter 7 under the Bankruptcy Code.

#### **Transfer of Purchased Assets**

7. Pursuant to sections 105(a), 363(b), and 363(f) of the Bankruptcy Code, the Debtors are authorized to transfer the Purchased Assets to Purchaser in accordance with the terms of the Current APA and, upon consummation of the transaction contemplated by the Current APA, the Purchased Assets shall be transferred to Purchaser free and clear of any liens, claims, encumbrances, and interests, other than Permitted Encumbrances and Assumed Liabilities. The transfer of the Purchased Assets to the Purchaser pursuant to the Current APA constitutes a legal, valid, and effective transfer of good and marketable title of the Purchased Assets, and vests or will vest the Purchaser with all right, title, and interest to the Purchased Assets, free and clear of all liens, claims, encumbrances, and interests, other than Permitted Encumbrances and Assumed Liabilities, whether arising prior to or subsequent to the Petition Date and whether imposed by agreement, law, equity, or otherwise.



8. Except as expressly permitted or otherwise specifically provided in the Current APA or this Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade and other creditors holding liens, claims, encumbrances, or interest (other than Permitted Encumbrances and Assumed Liabilities) against or in the Debtors or the Purchased Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or noncontingent, senior or subordinated) arising under or out of, in connection with, or in any way relating to, the Purchased Assets, the operation of the Seller's business prior to the Closing Date or the sale of the Purchased Assets to the Purchaser hereby are forever barred, estopped, and permanently enjoined from asserting against the Purchaser or its respective successors or assigns, its property or the Purchased Assets, such respective liens, claims, encumbrances, or interests.

9. Upon consummation of the transactions set forth in the Current APA, the Purchaser shall be authorized to file termination statements or lien terminations in any required jurisdiction to remove any record, notice filing, or financing statement recorded to attach, perfect, or otherwise notice any lien or encumbrance that is extinguished or otherwise released pursuant to this Order under section 363 of the Bankruptcy Code and any other related provision of the Bankruptcy Code. This Order shall be effective as a determination that, except for Permitted Encumbrances and Assumed Liabilities, at the Closing Date, all liens, claims, encumbrances, and interests of any kind or nature whatsoever existing as to the Purchased Assets prior to the Closing Date have been unconditionally released, discharged, and terminated, and the conveyances described herein have been effected, with such liens, claims, encumbrances, and interests attaching to the proceeds of the Sale, and shall be binding upon and shall govern the acts of all entities, including without limitation, all filing agents, filing officers, title agents, title

companies, recorders of mortgages, recorders of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to insure any title or state of title in or to any of the Purchased Assets. Each and every federal, state, and local governmental agency or department is hereby authorized to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Current APA.

10. If any person or entity that has filed financing statements or other documents or agreements evidencing liens, claims, encumbrances, and interests in all or any portion of the Purchased Assets shall not have delivered to the Debtors prior to the Closing Date, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, or releases of all liens, claims, encumbrances, and interests which the person or entity has or may assert with respect to all or any portion of the Purchased Assets, the Purchaser is hereby authorized to execute and file such statements, releases, and other documents on behalf of such person or entity or otherwise record a certified copy of this Order, which shall constitute conclusive evidence of the release of all liens, claims, encumbrances, and interests against or in the Purchased Assets.

11. Upon this Order becoming final, all persons and entities are hereby forever prohibited and enjoined from taking any actions that would adversely affect or interfere with the ability of the Seller to sell and transfer the Purchased Assets to the Purchaser in accordance with the terms of the Current APA and this Order.

## Contracts

12. The Debtors are hereby authorized and empowered, pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, to (a) assume and assign to the Purchaser, effective upon the Closing Date, the Contracts, and/or transfer, sell, and deliver to the Purchaser all of the Seller's rights, title, and interests in and to the Contracts, free and clear of all liens, claims, encumbrances, and interests, as set forth in the Current APA; and (b) execute and deliver to Purchaser such documents or other instruments as may be necessary to transfer and assign to Purchaser, and cause Purchaser to assume, all of the Contracts.

13. The payment of the applicable Cure Amounts (if any) for the Contracts in the amounts specified in *Exhibit B* hereof shall (a) effect a cure of all defaults existing thereunder; and (b) compensate for any actual pecuniary loss to such party resulting from such default. The Seller shall then have assumed the Contracts and, pursuant to section 365(f) of the Bankruptcy Code, the assignment of the Contracts from the Seller to the Purchaser shall not be a default thereunder. Pursuant to sections 105 and 365 of the Bankruptcy Code, as to the assignment to, and the assumption by, the Purchaser of the Contracts, the requirements of sections 365(b)(1) and 365(f) of the Bankruptcy Code with respect thereto are hereby deemed satisfied. After the payment of the relevant Cure Amounts in the amount specified in *Exhibit B* hereof, neither the Debtors nor the Purchaser shall have any further liabilities to the non-Debtor parties to the Contracts other than the Purchaser's obligations under the Contracts that accrue and become due and payable on or after the Closing Date. Notwithstanding anything herein to the contrary, the Purchaser shall have the right, subject to the terms of the Current APA, to elect not to assume any of the Contracts in *Exhibit B* at any time prior to the Closing Date. The Purchaser shall also have the right, subject to the terms of the Current APA, to add additional executory contracts

under certain circumstances as a Contract after the date hereof. In the event Purchaser elects to add any executory contract as a Contract, Debtors and Purchaser shall submit to the Court an agreed upon order setting forth such Contract(s) and the corresponding Cure Amounts thereof. In the event the parties to the additional Contracts are unable to agree on the appropriate Cure Amounts, the Debtors and the Purchaser reserve the right to seek a hearing before this Court to determine the appropriate Cure Amounts.

14. Nothing in this Order shall prevent the Debtors from rejecting any contract not taken by the Purchaser pursuant to the terms of the Current APA.

15. Any provisions in any Contract that restrict, prohibit, or condition the assignment of such Contract or allow the party to such Contract to terminate, recapture, impose any penalty, condition on renewal or extension, or modify any term or condition upon the assignment of such Contract (including, without limitation, provisions of the type described in sections 365(b)(2), (e)(1), (f)(1), and (f)(3) of the Bankruptcy Code) constitute unenforceable anti-assignment provisions that are void and of no force and effect and the Contracts shall be transferred to, and remain in full force and effect for the benefit of, the Purchaser notwithstanding any such provisions. The non-Debtor party to each of the Contracts shall be and hereby is deemed to have consented to such assignment (including, without limitation, under sections 365(c)(1)(B) and 365(e)(2)(A)(ii) of the Bankruptcy Code) or this Court has determined that no such consent is required, and the Purchaser shall enjoy all of the rights and benefits under such Contracts without the necessity of obtaining such non-Debtor party's written consent to the assumption and assignment thereof.

16. Upon the Closing, the Purchaser shall be deemed to be substituted for the Seller as a party to the applicable Contracts and the Seller shall be relieved, pursuant to section 365(k) of the Bankruptcy Code, from any further liability under the Contracts.

17. Upon payment of the applicable Cure Amounts in the amount specified in *Exhibit B* hereof, the Contracts will remain in full force and effect, and all defaults or other obligations of the Debtors under the Contracts arising or accruing prior to the Closing Date shall be deemed cured. No default, whether monetary or non-monetary, shall exist under the Contracts nor shall there exist an event or condition which, with the passage of time or giving of notice, or both, would constitute a default, whether prepetition or postpetition in nature, on the part of any of the Debtors which otherwise would allow the non-Debtor counterparties to terminate, suspend performance, or modify the Contracts and the Purchaser shall not have any further liability or obligation with respect to any default or obligation arising or accruing under any of the Contracts prior to the Closing Date.

18. The Purchaser (and all assignees of the Purchaser) have provided adequate assurance of future performance under the relevant Contracts within the meaning of section 365 of the Bankruptcy Code.

19. Upon assignment of the Contracts to the Purchaser on the Closing Date and the payment of the Cure Costs, no default shall exist under any of the Contracts and no non-Debtor party to any of the Contracts shall be permitted to declare a default by the Purchaser thereunder or otherwise take action against the Purchaser as a result of the Debtors' (or any of the Debtors') financial condition, bankruptcy, or failure to perform any of its obligations thereunder, including, without limitation, any failure to pay any amounts necessary to cure the default of any of the Debtors thereunder. Upon entry of this Order and the assumption and assignment of the

Contracts, the Purchaser shall be deemed in full compliance with all terms and provisions of the Contracts.

20. There shall be no rent accelerations, assignment fees, increases, or any other fees charged to the Purchaser as a result of the assumption, assignment, and/or transfer of the Contracts. The failure of the Seller or the Purchaser to enforce at any time one or more terms or conditions of any Contract shall not be a waiver of such terms or conditions, or of the Purchaser's right to enforce every term and condition of the Contracts.

21. Pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, all parties to the Contracts are forever barred, estopped, and permanently enjoined from asserting against the Purchaser or its property or affiliates, any breach or default under any of the Contracts, any claims of lack of consent relating to the assignment thereof, or any counterclaim, defense, defense, setoff, right or recoupment or any other matter arising prior to the Closing Date, including, but not limited to, any assignment fee, default breach, or claim or pecuniary loss, or condition to assignment, arising under or related to the Contracts existing as of the Closing Date or arising by reason of the Closing.

#### **Additional Provisions**

22. Effective upon the Closing Date, all persons and entities are forever prohibited and permanently enjoined from commencing or continuing any action or other proceeding, whether in law or equity, in any judicial, administrative, arbitral, or other proceeding against the Purchaser, its successors and assigns, or the Purchased Assets, with respect to any (a) lien, claim, encumbrance, or interest (other than Assumed Liabilities and Permitted Encumbrances) arising under, out of, in connection with or in any way relating to the Debtors, the Purchaser, the Purchased Assets, or the operation of the Purchased Assets prior to the Closing Date, or

(b) successor liability with respect to the Purchased Assets, including, without limitation:

- (i) commencing or continuing in any manner any action or other proceeding against the Purchaser or its respective affiliates, successors or assigns, assets or properties; (ii) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order against the Purchaser; (iii) creating, perfecting, or enforcing any liens, claims, encumbrances, or interests against the Purchaser; (iv) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Purchaser; and (v) revoking, terminating, or failing or refusing to issue or renew any license, permit, or authorization to operate any of the Purchased Assets or conduct any of the businesses operated with the Purchased Assets.

23. Except for Assumed Liabilities and Permitted Encumbrances, the Purchaser shall not have any liability or other obligation of the Debtors arising under or related to any of the Purchased Assets arising prior to the Closing Date. Without limiting the generality of the foregoing, except as set forth in the Current APA, the Purchaser and its respective employees, officers, directors, advisors, lenders, affiliates, owners, successors, and assigns shall not be liable for any claims against the Debtors or any of their respective predecessors or affiliates, and the Purchaser and its respective employees, officers, directors, advisors, lenders, affiliates, owners, successors, and assigns shall have no successor or vicarious liabilities of any kind or character, including but not limited to, any theory of antitrust, environmental, successor or transfer liability, labor law, de facto merger or substantial continuity, whether known or unknown as of the Closing Date, now existing or hereafter arising, whether asserted or unasserted, fixed or contingent, liquidated or unliquidated with respect to the Debtors or any obligations of the Debtors arising prior to the Closing Date, including, but not limited to, liabilities on account of

any taxes arising, accruing or payable under, out of, in connection with, or in any way relating to the operation of any of the Purchased Assets or the Debtors prior to the Closing Date.

24. For the avoidance of doubt, the Sale shall not be free and clear of Permitted Encumbrances or Assumed Liabilities.

25. The automatic stay provisions of section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to implement the terms of the Current APA and the Transition Services Agreement. All persons or entities that are presently, or on the Closing Date may be, in possession of some or all of the Purchased Assets are hereby directed to surrender possession of the Purchased Assets to the Purchaser on the Closing Date. Purchaser is hereby authorized, in connection with the consummation of the Current APA, and as permitted by the Current APA, to allocate the Purchased Assets and Contracts (subject to the terms thereof) among its affiliates (including, without limitation, Davis Brothers Framing, Inc.), designees, assignees, and/or successors in a manner as it in its discretion deems appropriate and to assign, sublease, sublicense, transfer or otherwise dispose of any of the Purchased Assets or the rights under any Contract to its affiliates (including, without limitation, Davis Brothers Framing, Inc.), designees, assignees, and/or successors with all of the rights and protections accorded under this Order, the Current APA, and the Transition Services Agreement.

26. The transactions contemplated by the Current APA are undertaken by the Purchaser without collusion and in good faith, as that term is defined in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorization provided herein to consummation the Sale shall not affect the validity of the Sale (including the assumption, assignment, and/or transfer of the Contracts) to the Purchaser, unless such authorization and consummation of such Sale are duly stayed pending such appeal. The



Purchaser is a good faith purchaser of the Purchased Assets within the meaning of section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

27. The consideration provided by the Purchaser for the Purchased Assets under the Current APA and the Transition Services Agreement is fair and reasonable and may not be avoided under section 363(n) of the Bankruptcy Code. Each and every person or entity is hereby barred, estopped, and permanently enjoined from commencing or continuing an action seeking relief under section 363(n) of the Bankruptcy Code.

28. Other than with respect to the Plan, nothing contained in any plan or reorganization or liquidation, or order of any type or kind entered in this Bankruptcy Case, any subsequent chapter 7 case into which any such Bankruptcy Case may be converted, or any related proceeding subsequent to entry of this Order shall conflict with or derogate from the provisions of the Current APA, the Transition Services Agreement, or the terms of this Order.

29. The failure specifically to include any particular provision of the Current APA or the Transition Services Agreement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of this Court that the Current APA and the Transition Services Agreement be authorized and approved in their entirety.

30. The Current APA, the Transition Services Agreement, and any related agreements, documents, or other instruments may be modified, amended, or supplemented by the parties thereto, in a writing signed by such parties, and in accordance with the terms thereof, without further order of the Court, provided that such modification, amendment, or supplement does not have a material adverse effect on the Seller's estate.

31. The Debtors are authorized to make and/or obtain such modifications, amendments, or waivers of the Debtors' postpetition debtor in possession financing facility as the Debtors' deem appropriate in order to effectuate the Sale and the transactions contemplated by the Current APA and the Transition Services Agreement.

32. Pursuant to Rules 6004(h), 6006(d), and 7062, to the extent applicable, the Court finds that there is no reason for delay in the implementation of this Order and this, this Order shall be effective immediately upon entry and the Sellers and the Purchaser are authorized to close the Sale immediately upon entry of this Order.

33. This Court shall retain jurisdiction to, among other things, interpret, implement, and enforce the terms and provisions of this Order, the Current APA, the Transition Services Agreement, and all amendments thereto, and any waivers and consents thereunder, and of each of the documents or agreements executed in connection therewith in all respects, including, but not limited to retaining jurisdiction to (a) compel delivery of the Purchased Assets to Purchaser; (b) resolve any disputes arising under or related to the Current APA and the Transition Services Agreement; and (c) adjudicate all issues concerning any liens, claims, encumbrances, or interests alleged in and to the Purchased Assets.

34. The making or delivery of an instrument of transfer pursuant to the Sale, this Order and the Current APA are being implemented and authorized under the confirmed Plan and, pursuant to 1146(a) of the Bankruptcy Code, may not be taxed under any law imposing a stamp tax or similar tax.

35. The provisions of this Order are non-severable and mutually dependent.

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

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Honorable Kevin J. Carey  
Chief United States Bankruptcy Judge

# **EXHIBIT B**

## **Asset Purchase Agreement**

**ASSET PURCHASE AGREEMENT**  
**among**  
**C CONSTRUCTION, INC.**  
**and**  
**DAVIS DEVELOPMENT COMPANY, INC.**

**Dated as of December 7, 2009**

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## **Exhibits**

<b>Exhibit A</b>	<b>Transition Services Agreement</b>
<b>Exhibit 1</b>	<b>Contracts</b>
<b>Exhibit 2</b>	<b>Equipment</b>
<b>Exhibit 3</b>	<b>Intangible Personal Property</b>
<b>Exhibit 4</b>	<b>Permits</b>
<b>Exhibit 5</b>	<b>Personal Property and Real Property Leases</b>
<b>Exhibit 6</b>	<b>Prepaid Expenses and Deposits</b>
<b>Exhibit 6</b>	<b>NBV of Purchased Assets</b>
<b>Exhibit 7</b>	<b>Purchase Price Allocation</b>
<b>Exhibit 8</b>	<b>Percentage Completion of Building Contracts</b>

## ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this "Agreement"), dated as of December 7, 2009, is made and entered into by and among **Davis Development Company, Inc.**, a California corporation ("Buyer"), **C Construction, Inc.**, a Delaware corporation ("Seller"), with reference to the following.

### RECITALS

A. Buyer has negotiated an agreement with Seller to acquire certain of the assets of Seller related to the Business (as defined below), including certain existing contracts, certain intangible assets, and fixed assets;

B. Seller is a debtor in possession under title 11 of the United States Code, 11 U.S.C. §§ 101 - 1532 (as amended, the "Bankruptcy Code") and filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on June 16, 2009, in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") (Case No. 09-12074) (the "Bankruptcy Case");

C. Consummation of the transaction is subject to entry of the Sale Order (defined below) and is subject to applicable provisions of the Bankruptcy Code;

D. Buyer and Seller will enter into a Transition Services Agreement (the "Transition Services Agreement"), a copy of which is attached hereto as Exhibit A, under which Seller shall provide certain support services to Buyer, for a limited period following the Closing.

E. Pursuant to the terms, and subject to the conditions contained herein, at Closing Seller will sell certain of Seller's assets to Buyer,

F. Buyer and Seller wish to document the terms and conditions of the transaction.

### AGREEMENT

NOW, THEREFORE, IT IS AGREED among the parties as follows:

#### 1. DEFINITIONS

All capitalized terms defined in the introductory paragraph, recitals or elsewhere in this Agreement shall have the meanings ascribed thereto. For purposes of this Agreement, the capitalized terms identified in this Section shall have the following meanings:

"2006 Purchase Agreement" means that certain Asset Purchase Agreement, dated as of July 31, 2006, as amended to date, among Davis Brothers, Seller and certain other parties relating to the sale of Davis Brothers' framing services business to Seller.

"Business" means the Ontario Framing business of Seller, which is its business of providing integrated framing services to general contractors for high density projects, as presently conducted by the Seller in the Southern California area.

"Business Day" means any day, not a Saturday or Sunday, on which banks in the State of California are required to be open.

"Buyer Related Party" means any Person who, directly or indirectly, controls or is controlled by, or is under common control with Buyer.

"Closing" means the exchange of closing documents, the transfer of the Purchased Assets to the Buyer by Seller, and the payment of the Purchase Price to Seller by Buyer.

"Closing Date" means 11:59 p.m. on the date on which the Closing occurs.

"COBRA" means the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended.

"Code" means the Internal Revenue Code of 1986, as amended.

"Construction Defect" means any of the following: (i) performance of services which are not of workmanlike quality in conformance with the requirements of the underlying Contract documents or of applicable building codes, industry and professional standards, and/or manufacturers' recommendations, (ii) violation of any standards set forth in California Civil Code sections 895 et seq. and 1375 et seq. or Nevada Revised Statutes section 40.615, or (iii) construction which is based on design documents containing errors, omissions, or otherwise falling below the applicable standard of care.

"Construction Defect Liabilities" means Liabilities or obligations relating to or arising out of a Construction Defect with respect to products sold or services performed by the Company on or prior to the Closing Date, including but not limited to liabilities or obligations set forth in California Civil Code Sections 895 et seq. and 1375 et seq. or Nevada Revised Statutes Sections 40.645 et. seq. and 40.668 et. seq.

"Contingent Consideration" means any Contingent Consideration or Final Contingent Consideration, as those terms are defined in the 2006 Purchase Agreement and the Contingent Consideration Agreement.

"Contingent Consideration Agreement" means that certain Contingent Consideration Payment Agreement, dated September 18, 2009, among Davis Brothers, Seller and certain other parties.

"Contracts" means each contract, agreement, commitment, purchase order, or other instrument related to the operation of the Business listed on *Exhibit 1* attached hereto, which Exhibit will be updated as of the Closing Date to reflect any new Building Contracts entered into between the date of this Agreement and the Closing Date.

"Davis Brothers" means Davis Brothers Framing, Inc., a California corporation.

"Equipment" means all tools, equipment, rolling stock, office furniture, computers and equipment and other pieces of tangible personal property and fixed assets (and interests in any of the foregoing), including spare parts, supplies, office equipment and products used by the Company in the Business. All Equipment used by Seller in the Business is listed or described on *Exhibit 2* attached hereto.

"Excluded Assets" means the following assets of Seller which assets are expressly excluded from the purchase and sale of assets contemplated by this Agreement and as such are not Purchased Assets:

- (i) all cash, cash equivalents, investments and securities,
- (ii) all Trade Accounts Receivable, notes, drafts, intercompany receivables and other accounts and other obligations for the payment of money, including all rights to access or draw upon funds through credit lines or working capital arrangements, if any,
- (iii) all assets that are not primarily used by Seller in the Business,
- (iv) all bank and other depository accounts, corporate records and safe deposit boxes,
- (v) all rights under this Agreement and the Purchase Price,
- (vi) all employee benefit plans,
- (vii) all computer software,
- (viii) all causes of action, claims, demands, set-offs, rights and privileges against third parties that relate to any Excluded Assets or Excluded Liabilities (as defined in Section 3.3(c)),
- (ix) any and all Tax returns, Tax refunds, Tax loss carryforwards, Tax identification numbers or other identification numbers of Seller assigned by any Governmental Authority, and records related to the foregoing of Seller relating to the Business or the Purchased Assets for any period or portion thereof ending on or prior to the Closing Date (and any such refunds received by Buyer shall be promptly paid over by Buyer to Seller),
- (x) all assets used primarily in connection with the corporate functions of Seller (including but not limited to corporate charters, taxpayer and other identification numbers, records, seals, minute books and stock transfer books),
- (xi) all cash, cash equivalents, letters of credit of Seller held by Seller's insurers as collateral for workers compensation claims, if any,
- (xii) other receivables, including volume allowances and employee advances,

(xiii) prepaid expenses, including prepayments for fuel and for rent under the Real Property Lease, and a deposit for utilities, and

(xii) subject to the provisions of Section 11.1, all estimated earnings in excess of billings.

"Governmental Authority" means any foreign, domestic, federal, territorial, state, regional or local governmental authority, quasi-governmental authority, court, commission, board, bureau, agency or instrumentality, or any regulatory, administrative or other department, agency, or any political or other subdivision, department or branch of any of the foregoing.

"Intangible Personal Property" means and any processes, trade secrets, and know how pertaining to framing of multifamily and high-density projects, and customer lists, customer contacts and relationships and other intangible personal property used, licensed or owned by Seller and used primarily in the Business, and all right, title and interest therein and thereto. All Intangible Personal Property is listed on *Exhibit 3* attached hereto.

"Knowledge of Seller" means, as to a particular matter, the actual knowledge of the Seller.

"Law" means any law, statute, treaty, rule, regulation, ordinance, order, decree, consent decree or similar instrument or determination or award of an arbitrator or a court or any other Governmental Authority.

"Leases" shall mean the Real Property Lease and the Personal Property Leases.

"Liabilities" means all indebtedness, obligations, penalties and other liabilities (or contingencies that have not yet become liabilities), whether absolute, accrued, matured, contingent (or based upon any contingency), known or unknown, fixed or otherwise, or whether due or to become due, including without limitation, any fines, penalties, judgments, awards or settlements respecting any judicial, administrative, arbitration or other proceedings or any damages, losses, claims or demands with respect to any Law or otherwise.

"Permits" means all federal, state and local licenses, permits and other governmental authorizations relating to the Business. All Permits are listed on *Exhibit 4* attached hereto.

"Permitted Encumbrances" means (a) liens for Taxes and other governmental charges and assessments which are not yet due and payable, (b) statutory liens of landlords and statutory liens of carriers, warehousemen, mechanics and materialmen and other like statutory liens arising in the ordinary course of business for sums not yet due and payable, (c) other liens or imperfections on property which are not material in amount or do not materially detract from the value of or materially impair the existing use of the property affected by such lien or imperfections, (d) liens relating to deposits made in the ordinary course of business in connection with workers' compensation, unemployment insurance and other types of social security or to secure the performance of leases, trade contracts or other similar agreements, (e) purchase money liens on personal property acquired in the ordinary course of business, (f) liens securing executory obligations under any lease that constitutes a "capital lease", (g) any and all requirements of Law including those affecting the real property assets relating to zoning and land

use, (h) any customary utility company rights, easements and franchises which do not materially detract from the value of or materially impair the existing use of the property affected by such lien or imperfections, and (i) the other liens, if any, set forth in the Disclosure Schedule.

"Person" means an individual, partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity of whatever nature.

"Personal Property Leases" means those leases of personal property, involving the Business. All Personal Property Leases are listed under "Personal Property Leases" on *Exhibit 5* attached hereto.

"Purchase Price" means the net book value of the Purchased Assets that are specifically set forth on *Exhibit 6*.

"Purchased Assets" means the Contracts, Equipment, Intangible Personal Property, Permits, Personal Property Leases, Real Property Lease, Prepaid Expenses and Deposits, all goodwill of the Business and all rights, claims, credits, causes of action or rights of set-off against third parties relating to the foregoing and the Assumed Liabilities, other than Excluded Assets.

"Real Property Lease" means the lease of real property involving the Business set forth under "Real Property Lease" on *Exhibit 5* attached hereto.

"Sale Order" means a final, non-appealable order (or orders) of the Bankruptcy Court, which is not subject to a stay pending appeals, in form and substance reasonably acceptable to Buyer and Seller approving this Agreement and all of the terms and conditions hereof, and approving and authorizing Seller to consummate the transaction contemplated by this Agreement. Without limiting the generality of the foregoing, such order shall find and provide, among other things, that (i) the Purchased Assets sold to Buyer pursuant to this Agreement shall be transferred to Buyer free and clear of all Liens (other than Liens created by Buyer and Permitted Encumbrances) and claims, such Liens and claims to attach to the Purchase Price; (ii) Buyer has acted in "good faith" within the meaning of section 363(m) of the Bankruptcy Code; (iii) this Agreement was negotiated, proposed and entered into by the Parties without collusion, in good faith and from arm's length bargaining positions; (iv) the Bankruptcy Court shall retain jurisdiction to resolve any controversy or claim arising out of or relating to this Agreement, or any breach hereof; and (v) this Agreement may be specifically enforced and binding upon Seller and any Chapter 7 or Chapter 11 trustee of Seller.

"Seller Financial Statements" means the unaudited balance sheets, profit and loss statements of the Business, which are dated as of December 31, 2008 and October 31, 2009, copies of which have been delivered to Buyer.

"Seller Related Party" means any Person who, prior to the Closing, directly or indirectly, controls or is controlled by, or is under common control with Seller.

"Tax" (and, with correlative meaning, "Taxes") means any federal, state, local or foreign income, gross receipts, property, sales, use, license, excise, franchise, employment, payroll,

(d) Except as expressly set forth in this Agreement with respect to the waiver of Contingent Consideration and non-competition and non-solicitation obligations of Davis Brothers, George Davis and Randolph Davis, the provisions of this Agreement shall not affect any obligations that the parties may have under the 2006 Purchase Agreement.

### 3.4 Certain Expenses.

(a) Buyer shall not pay or be liable for any of the following fees, expenses, Taxes or liabilities incurred by Seller or any of its Related Parties, all of which shall be borne and timely paid, or provided for, or caused to be paid by Seller:

(i) the fees and expenses of any person retained by Seller or any of its respective Related Parties for brokerage, financial advisory or investment banking services or services as a finder rendered to Seller or any of its respective Related Parties in connection with the proposed sale of the Purchased Assets, including without limitation, the transactions contemplated by this Agreement;

(ii) the fees and expenses of legal counsel, auditors and accountants retained or employed by the Seller or any of its respective Related Parties for services rendered to the Seller or any of its respective Related Parties solely in connection with the proposed sale of the Purchased Assets, including without limitation, the transactions contemplated by this Agreement;

(iii) any income, capital gains, or other Tax incurred by the Seller or any of its Related Parties as a result of the consummation of the transactions contemplated by this Agreement.

(b) If Buyer shall be required to pay any fee, expense, Tax or liability described in Section 3.4(a), the sum of all such payments shall be deducted from the Purchase Price. If any such payment is not deducted from the Purchase Price as provided in the preceding sentence, the amount of such payments not so deducted shall be paid promptly by Seller to Buyer upon demand.

(c) Seller shall pay all documentary stamp or transfer Taxes or other similar charges, Taxes or expenses arising in connection with the sale of the Purchased Assets from the Seller to the Buyer ("Sales Tax"). To the extent permitted by law, Buyer and Seller shall cooperate fully in minimizing any such Sales Tax. Seller shall prepare and file any and all documents required to pay the Sales Tax. To the extent a Taxing authority provides notice to a party of an audit of any Sales Tax, such party shall immediately notify the other parties, and Seller shall assume responsibility for such audit and shall have complete authority to control, settle or defend any proposed adjustment to the Sales Tax, and Buyer shall fully cooperate with Seller in such settlement or defense.

(d) All state, county and local ad valorem taxes on real or personal property shall be apportioned between Buyer and Seller as of the Closing Date, computed on the basis of the fiscal year for which the same are levied and all utility charges, gas charges, electric charges, water charges, water rents and sewer rents, if any, shall be apportioned between Buyer and Seller

as of the Closing Date, computed on the basis of the most recent meter charges or, in the case of annual charges, on the basis of the established fiscal year. All prepaid expenses (including any rent) any Seller paid prior to the Closing Date in respect of the Business shall be apportioned between Buyer and Seller as of the Closing Date computed on the basis of the benefit received by Seller prior to the Closing Date and the benefit to be received by Buyer subsequent to the Closing Date with respect to any contract or other matter to which the prepaid expense relates. All prorations shall be made and the Purchase Price shall be adjusted insofar as feasible on the Closing Date. In the event Buyer or Seller shall receive bills after the Closing Date for expenses incurred prior to the Closing Date that were not prorated in accordance with this Section 3.4(d) then Buyer or Seller, as the case may be, shall promptly notify the other party as to the amount of the expense subject to proration and the responsible party shall promptly pay its portion of such expense (or, in the event such expense has been paid on behalf of the responsible party, reimburse the other party for its portion of such expenses).

(e) Seller shall not pay or be liable for any of the following fees, expenses or liabilities incurred by the Buyer, all of which shall be borne by Buyer:

(i) the fees and expenses of any person retained by Buyer for brokerage, financial advisory or investment banking services as a finder in connection with the proposed sale of the Purchased Assets, including, without limitation, the transactions contemplated by this Agreement; and

(ii) the fees and expenses of legal counsel, auditors and accountants retained or employed by the Buyer for services rendered to the Buyer solely in connection with the proposed sale of the Purchased Assets, including, without limitation, the transactions contemplated by this Agreement.

3.5 Ordinary Course Warranty Work. Buyer will be responsible for any Warranty Work; provided that Buyer shall only be responsible for up to \$1000 of Warranty Work per dwelling unit (i.e. detached residence, condominium, townhome or apartment unit) and shall perform such Warranty Work up to such amount without charge to Seller ("Ordinary Course Warranty Work"). In the event that Warranty Work is in excess of \$1000 for any house or other building, Seller may retain Buyer to perform such Warranty Work upon mutually agreeable terms and Buyer will charge Seller for the cost of such Warranty Work in excess of \$1000 per house or other building ("Non-Ordinary Course Warranty Work"). Seller may request that Buyer perform such Non-Ordinary Course Warranty Work, which Buyer may choose to accept or refuse in its sole discretion. In the event Buyer agrees to be hired by Seller to perform Non-Ordinary Course Warranty Work, Buyer will be hired as a subcontractor pursuant to terms mutually agreeable to Seller and Buyer, provided that in no event shall Buyer assume any warranty liability to any third party for Non-Ordinary Course Warranty Work performed by it.

#### 4. TERMS OF PAYMENT

4.1 Payment Due at Closing. At Closing, Buyer shall pay to Seller the Purchase Price for the Purchased Assets as set forth in Section 3. Such payment shall be made as follows: (a) by crediting against the Purchase Price all amounts due and payable at any time, before or after Closing, to Davis Brothers, Randolph Davis and/or George Davis from Seller as Contingent



Consideration under the under the 2006 Purchase Agreement and the Contingent Consideration Agreement that have not previously been paid, and (b) Buyer shall pay to Seller an amount equal to the difference between the Purchase Price and the amount of the credit in clause (a) above, which payment shall be in immediately available funds delivered by wire transfer in accordance with payment instructions provided by Seller to Buyer at least two days prior to the Closing. In order to effect the credit in clause (a) above, Buyer shall cause Davis Brothers, Randolph Davis and George Davis to waive and release, effective as of the Closing Date and in a form acceptable to Seller, the right to receive any and all amounts due and payable at any time, before or after Closing, to any of them as Contingent Consideration.

## 5. CONTRACTS AND LEASES

5.1 Contracts. Seller has delivered to Buyer, as *Exhibit 9*, a schedule setting forth all Contracts, which shall include, as applicable: the name of parties, contact person and information, location of project, amount of work completed and paid under the Contract, amount of work to be completed under the Contract and the total Contract price.

5.2 Real Property Lease and Personal Property Leases. Seller shall assume and assign to Buyer, and Buyer shall perform, the Real Property Lease and Personal Property Leases specified on *Exhibit 5* as of the Closing Date, to the extent that such Leases can be assigned to Buyer pursuant to the Sale Order. Seller agrees to make lease payments through the Closing Date. Buyer and Seller agree to cooperate in obtaining consent to the assignment of the Leases to Buyer to the extent consents are required after entry of the Sale Order. To the extent that any of the Leases cannot be assigned, Buyer agrees to sublease from Seller the real property, equipment or other property covered by such Leases for an amount equal to Seller's total remaining cost under such Leases to the extent permissible.

## 6. REPRESENTATIONS AND WARRANTIES OF SELLER

Seller hereby represents to Buyer, except as specifically disclosed in the disclosure schedules delivered to Buyer herewith (the "Disclosure Schedule"), as follows, and the representations contained in this Section or elsewhere in this Agreement shall be deemed to be made on the date hereof and as of the Closing Date:

6.1 Good Standing; Authorization. Seller is duly organized, validly existing and in good standing under the laws of the state of Delaware, with full corporate power to carry on its business as it is now and has since its organization been conducted and to own, lease or operate the Purchased Assets owned, leased or operated by it, subject to the limitations imposed on Seller as a result of the Bankruptcy Case, and is qualified to do business in the State of California and in every other jurisdiction in which the conduct of the Business requires it to qualify. Subject to entry of the Sale Order and such other authorizations as is required by the Bankruptcy Court, Seller has all requisite power and authority to enter into this Agreement and to carry out the transactions contemplated hereby. This Agreement has been duly executed and delivered by Seller, and, assuming the due authorization and execution of this Agreement by Buyer and subject to entry of the Sale Order, is the valid, binding obligation of Seller enforceable against it in accordance with its terms, except that (i) such enforcement may be subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws now or hereafter in effect relating

to creditors' rights, and (ii) the remedies of specific performance and injunctive and other equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceedings may be brought. This Agreement and the transactions contemplated hereby have been approved all necessary corporate action on the part of Seller. There are no agreements or understandings in effect with respect to voting of any of the capital stock of Seller except as reflected on the Disclosure Schedule.

6.2 Ownership of Purchased Assets. Seller is the lawful owner of each of the Business and the Purchased Assets.. At the Closing, Seller will transfer to Buyer all of its right, title and interest in the Purchased Assets, subject to entry of the Sale Order, free and clear of any liens, mortgages, pledges, security interests, restrictions, prior assignments, encumbrances, options or claims of any kind or nature whatsoever except for Permitted Encumbrances, which Permitted Encumbrances are set forth on the Disclosure Schedule (collectively, "Liens"), other than Permitted Encumbrances, and Buyer will be vested with good title to such Purchased Assets, free and clear of all Liens, other than Permitted Encumbrances to the fullest extent permissible under section 363(f) of the Bankruptcy Code.

6.3 Tax Matters. Seller has timely filed all Tax returns heretofore required to be filed with respect to Taxes imposed on the Business, all such returns were true, complete and correct and Seller has paid or will have paid all Taxes shown to be due on such returns. There are no liens for Taxes upon the Purchased Assets, except liens for current Taxes not yet due or delinquent. Seller has made provision for payment of all Taxes, including without limitation, all federal, state and local Taxes, that have been incurred but are not currently due as of the date of this Agreement. No extension of a statute of limitations relating to Taxes with respect to the Business is in effect. Seller has not received notice that it is or may be subject to Tax in a jurisdiction in which it has not filed, or does not currently file, Tax returns. Seller has withheld for its employees who are employees of the Business any and all applicable Taxes for all pertinent periods in compliance with the Tax withholding provisions of all applicable Laws.

6.4 Compliance with Laws, Licenses and Permits. Seller is not in violation of (i) any applicable order, judgment, injunction, award or decree, or (ii) any Law, statute, ordinance, regulation or other requirement of any Governmental Authority, relating to the Business.

6.5 Financial Statements. Seller has delivered to Buyer true and correct copies of the Seller Financial Statements. The Seller Financial Statements: (i) have been prepared in accordance with the books and records of Seller, (ii) have been prepared in accordance with Seller's normal practices for the Business consistently applied, and (iii) present fairly, in all material respects, the financial position and the results of operations of the Business, at and for the fiscal periods then indicated.

6.6 Absence of Certain Changes. Since October 31, 2009, Seller has conducted the Business in the ordinary course consistent with past practice in all material respects, subject to the limitations of the Bankruptcy Case.

6.7 Legal Proceedings. Except for the Bankruptcy Case and as reflected on the Disclosure Schedule, there are no lawsuits, assertion of claims, charges, hearings, or arbitrations pending or, to the Knowledge of Seller, threatened against or involving the Business or the

Purchased Assets, or that seek to prevent or enjoin, alter or delay the transactions contemplated by this Agreement.

6.8 Accounts Receivable. All Trade Accounts Receivable of Seller as of the Closing Date, including those shown on the Seller Financial Statements, represent bona fide transactions made in the ordinary course of the Business.

6.9 Equipment. A complete and accurate list of the Equipment utilized in the operation of the Business is attached as *Exhibit 2*. Except as reflected on the Disclosure Schedules, the Equipment is in good operating condition and repair and is adequate for the uses to which it is put, and none of such Equipment is in need of replacement, maintenance or repair except for routine replacement, maintenance or repair.

6.10 Brokers and Finders. Neither Seller nor any Related Party has agreed to pay, or have taken any action that will result in any third party becoming obligated to pay or be entitled to receive, any investment banking, brokerage, finder's or similar fee or commission in connection with this Agreement or the transactions contemplated hereby.

6.11 Intangible Personal Property. Each item of Intangible Personal Property is set forth on *Exhibit 3*. Seller owns all Intangible Personal Property and has taken commercially reasonable steps to protect its rights therein. Except as reflected on the Disclosure Schedule, Seller has not (i) received written notice of any infringement by it of the rights of any person with respect to such Person's intellectual property, or (ii) infringed, misappropriated or otherwise violated (and the operation of the Business as currently conducted does not infringe, misappropriate or otherwise violate) any intellectual property rights of any person. To the Knowledge of Seller, no Person has infringed, misappropriated or otherwise violated any of the Intangible Personal Property.

6.12 No Other Representations or Warranties. Except for the representations and warranties contained in this Article VI, neither Seller nor any other person makes any other express or implied representation or warranty with respect to Seller, the Purchased Assets or the transactions contemplated hereby, and Seller disclaims any other representations or warranties, whether made by Seller, its affiliates or any of their respective representatives. Except for the representations and warranties contained in this Article VI (as modified by the Schedules hereto), Seller (i) expressly disclaims and negates any representation or warranty, expressed or implied, at common law, by statute, or otherwise, relating to the condition of the Purchased Assets (including any implied or expressed warranty of merchantability or fitness for a particular purpose, or of conformity to models or samples of materials) and (ii) disclaims all liability and responsibility for any representation, warranty, projection, forecast, statement, or information made, communicated, or furnished (orally or in writing) to Buyer or any of its affiliates or representatives (including any opinion, information, projection, or advice that may have been or may be provided to Buyer by any director, officer, employee, agent, consultant, or representative of Seller or any of its affiliates).

## 7. REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer hereby represents and warrants to Seller as follows, and the warranties and representations contained in this Section or elsewhere in this Agreement shall be deemed to be made as of the date hereof and as of the Closing Date:

7.1 Corporate Status. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the state of California.

7.2 Authority. Buyer has full power and authority to execute and perform this Agreement and each other agreement contemplated hereby. Upon execution hereof, this Agreement shall be a valid and legally binding obligation of Buyer, enforceable against Buyer in accordance with its terms, except that (i) such enforcement may be subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws now or hereafter in effect relating to creditors' rights, and (ii) the remedies of specific performance and injunctive and other equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceedings may be brought. Neither the execution nor the performance of this Agreement or each agreement contemplated hereby will violate the terms or any provision of Buyer's Articles of Incorporation or Bylaws or any material note, loan agreement, lease or other material contract or agreement to which Buyer is a party.

7.3 Brokers and Finders. Other than The Merjant Group, whose fees and commissions will be paid by Buyer, Buyer has not agreed to pay, nor has taken any action that will result in any third party becoming obligated to pay or be entitled to receive, any investment banking, brokerage, finder's or similar fee or commission in connection with this Agreement or the transactions contemplated hereby.

7.4 No Violation of Law. The execution and delivery by Buyer of this Agreement and each agreement contemplated by this Agreement, and the performance by Buyer of its obligations hereunder or thereunder, do not and will not (i) violate any provision of applicable Law relating to Buyer; (ii) violate any provision of any order, arbitration award, judgment or decree to which Buyer is subject; or (iii) require a registration, filing, application, notice, consent, approval, order, qualification or waiver with, to or from any Government Authority.

### 7.5 No Litigation or Regulatory Action

(a) There are no lawsuits, assertion of claims, charges, hearings, arbitrations or proceedings pending or, to the knowledge of Buyer, threatened against Buyer or its affiliates which would reasonably be expected to prevent, hinder or delay the consummation of any of the transactions contemplated by this Agreement or any agreement contemplated by this Agreement; and

(b) There are no lawsuits, assertion of claims, charges, hearings, arbitrations pending or, to the knowledge of Buyer, threatened, that question the legality or propriety of the transactions contemplated by this Agreement or any agreement contemplated by this Agreement.

## 8. EMPLOYEES

8.1 Definition. Seller has furnished to Buyer a list as of the date hereof of all persons regularly employed on either a part-time or full-time basis by Seller in connection with the Business, including their current wages and salary rates. The term "Employees" shall mean all persons included on such list, including employees on leave of absence, as well as those persons who become regularly employed by Seller between the date hereof and the Closing Date.

8.2 Termination. On the Closing Date, Seller shall terminate all Employees then employed by the Business. With respect to terminated Employees and any persons who terminated employment, including by notice of termination prior to Closing, Seller shall be solely responsible for payment, when and if due, of all salaries, wages, bonuses, vacation (subject to Section 8.4), COBRA liabilities and other obligations, if any, owed to Employees or past employees of the Business as of the Closing Date.

8.3 Buyer's Offer of Employment. Subject to the provisions of this Section 8.3, Buyer may offer employment to such terminated Employees as Buyer, in Buyer's sole discretion, may choose, to be effective on the Closing Date, at wages and salary rates of compensation reasonably comparable to those presently offered by Seller. All offers of employment shall be "at will" and Buyer shall be under no obligation to continue the employment for any set term. The number of terminated Employees not offered employment by Buyer shall not exceed 20. Buyer shall include the Employees who accept offers of employment from Buyer in Buyer's employment benefit plans, as such plans may exist, in accordance with the terms of such plans following the Closing Date, giving each Employee credit for his/her time of employment with Seller.

8.4 Nonassumption of Certain Obligations Owed Employees. Buyer assumes no responsibility whatsoever for obligations and/or benefits owed before, or with respect to the period before, the Closing Date, by Seller or the Business to its employees pursuant to Section 3.3(c)(vii), Section 8.2 or otherwise.

8.5 Workers' Compensation. Seller assumes all responsibility for liability arising from workers' compensation claims by Employees, both medical and disability, which have been filed on or prior to the Closing Date or which arose out of incidents that occurred on or prior to the Closing Date. Buyer shall be responsible for all claims for Employees which arise out of, or are based upon, incidents which occur subsequent to the Closing Date.

## 9. FURTHER ASSURANCES; BANKRUPTCY MATTERS

### 9.1 Further Assurances of Seller.

(a) From time to time after the Closing (as hereinafter defined), Seller and its Related Parties will execute and deliver to Buyer or any Buyer Related Party such instruments of sale, transfer, conveyance, assignment and delivery, consents, assurances, powers of attorney and other instruments as may be reasonably requested by Buyer or any Buyer Related Party in order to vest in Buyer all right, title and interest of Seller in and to the Purchased Assets and otherwise in order to carry out the purpose and intent of this Agreement.

(b) Seller will pay all Trade Accounts Payable and accrued expenses for the Business as of the Closing Date in a timely manner and in accordance with payment terms, subject to the requirements of the Bankruptcy Court.

9.2 Further Assurances of Buyer. From time to time after the Closing (as hereinafter defined), Buyer will execute and deliver to Seller or any Related Party such instruments of sale, transfer, conveyance, assignment and assumption, consents, assurances, novation, releases, powers of attorney and other instruments as may be reasonably requested by Seller in order to vest in Buyer all right, title and interest of Buyer, in and to the Assumed Liabilities and release Seller therefrom, and otherwise in order to carry out the purpose and intent of this Agreement.

9.3 Bankruptcy Matters.

(a) Seller shall, at Seller's sole expense, promptly undertake all actions as are reasonably necessary to obtain entry of the Sale Order from the Bankruptcy Court. Seller shall, at the reasonable request of Buyer or Buyer's representative, provide such non-privileged information and documents reasonably necessary to keep Buyer informed as to the progress of the proceeding.

(b) Buyer agrees that it will promptly take such actions as are reasonably requested by Seller to assist in obtaining entry of the Sale Order, and a finding of adequate assurance of future performance by Buyer, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of providing necessary assurances of performance by Buyer under this Agreement and demonstrating that Buyer is a "good faith" purchaser under Section 363(m) of the Bankruptcy Code. Buyer shall not, without the prior written consent of Seller, file, join in, or otherwise support in any manner whatsoever any motion or other pleading relating to the sale of the Purchased Assets hereunder. Buyer shall not be obligated to pay any out-of-pocket costs or expenses in connection with its obligations under this Section 9.3 relating to the Bankruptcy Court proceedings, other than the salaries and miscellaneous expenses of Buyer's employees and the cost of counsel and any other advisors retained by Buyer.

(c) In the event the entry of the Sale Order shall be appealed, Seller and Buyer shall promptly defend such appeal with reasonable diligence.

**10. CONDUCT OF OPERATIONS PRIOR TO CLOSING**

10.1 Interim Operating Covenant. From the date hereof until Closing, Seller shall conduct its operation of the Business in the ordinary course and substantially consistent with its prior practices, subject to the limitations imposed on Seller as a result of the Bankruptcy Case.

10.2 Access to Information. Between the date hereof and the Closing, Seller agrees to provide to Buyer and Buyer's authorized agents (including attorneys, accountants and auditors) reasonable access to the offices and properties of the Business and the books and records of Seller related to the Business upon reasonable prior notice, in order to conduct a review of the Purchased Assets, the Assumed Liabilities and the Business. Seller shall, and shall cause the

employees, agents and representatives of the Business to, reasonably cooperate with such examination. Each of the parties will hold, and will cause each of such party's consultants and advisers to hold, in confidence all documents and information furnished to such consultants and advisers by or on behalf of another party to this Agreement in connection with the transactions contemplated by this Agreement pursuant to the terms of Section 18.6 of this Agreement.

10.3 Employee Information and Access. Prior to the Closing Date, Seller shall provide to Buyer certain general information concerning Seller's compensation and benefit programs and specific information relating to individual Business employees, subject to any such employee's proper consent, solely for the purpose of Buyer formulating offers to such employees; provided, however, that Seller will not make personnel records available for inspection or copying. Seller shall provide Buyer with reasonable access to the Business employees during normal working hours following the date hereof on mutually agreeable dates, to deliver offers of employment from Buyer and to provide information to such employees about Buyer.

10.4 Seller Contractual Consents.

(a) Seller shall use commercially reasonable efforts to obtain all contractual consents to the assignment of the Contracts, except such consents as are not required under the provisions of the Bankruptcy Code. By undertaking this obligation, Seller does not represent, warrant or guarantee that any such contract can be freely assigned or that any such contractual consent shall be obtained.

(b) Buyer shall use commercially reasonable efforts to assist Seller in obtaining all contractual consent to the assignment of the Contracts, except such consents as are not required under the provisions of the Bankruptcy Code.

(c) In the event that any necessary contractual consents or assignments of any of the Contracts, or any right or benefit arising thereunder or resulting therefrom, are not obtained prior to the Closing Date, or in the event that a third party to a Contract objects to the proposed cure costs in the Bankruptcy Case with respect to a Contract, then, unless otherwise mutually agreed by Buyer and Seller, Seller, at its discretion, may terminate, or at Buyer's request, will terminate, such Contract and/or delete it from the list of Contracts being assigned to Buyer, prior to the Closing.

(d) Except as otherwise specifically provided in this Agreement, the obligations of the parties under this Section 10.4 shall not include any requirement of Seller or Buyer to expend money or incur any financial or other obligation (other than normal legal and professional fees, transaction costs or filing fees not otherwise required to be incurred by the other party), commence or participate in any litigation or offer or grant any accommodation (financial or otherwise) to any third party.

10.5 Transition. Between the date hereof and the Closing Date, Seller shall provide, without cost to Buyer, subject to availability and upon reasonable notice, assistance to Buyer in connection with all reasonably requested transition matters arising under the transactions contemplated by this Agreement, including arrangement of personal introductions to vendors and customers of the Business.

## 11. CONDUCT OF BUSINESS FOLLOWING CLOSING

### 11.1 Billings, Collections and WIP for Assigned Contracts.

(a) Seller shall retain, and not transfer to Buyer, the Trade Accounts Receivable that are outstanding as of the Closing Date with respect to the Building Contracts. Subject to the provisions of this Section 11.1, Seller shall have the right to retain any and all amounts collected with respect to such Trade Accounts Receivable that relate to actual work completed as of the Closing Date, which is reflected on *Exhibit 8*. Buyer and Seller shall mutually agree upon the content of *Exhibit 8* as promptly as practicable following the date of this Agreement.

(b) Seller shall be entitled to receive and retain any gross profit earned on the Building Contracts with respect to the period on or prior to the Closing Date, and Buyer shall be entitled to receive and retain any gross profit earned on the Building Contracts with respect to the period following the Closing Date. Accordingly, (i) any Receivable Overage (as defined below) and Cost Shortfall (as defined below) for a particular Building Contract shall be paid by Seller to Buyer, and (ii) any Receivable Shortfall (as defined below) and Cost Overage (as defined below) for a particular Building Contract shall be paid by Buyer to Seller. Payments will be determined and remitted no later than 15 days after each month end that Buyer or Seller collect Trade Accounts Receivables related to Receivable Overages, Receivable Shortfalls, Cost Overages, or Cost Shortfalls.

(c) For purposes of this Section 11.1, (i) "gross profits" shall be calculated in a manner consistent with Sellers past practice, (ii) "Receivable Overage" is any amount collected from a Trade Account Receivable with respect to a Building Contract that is in excess of the amount to be paid under such Building Contract attributable to work completed by Seller as of the Closing Date, (iii) "Receivable Shortfall" is the amount by which a Trade Account Receivable with respect to a Building Contract is less than the amount to be paid under such Building Contract attributable to work completed by Seller as of the Closing Date, (iv) "Cost Overage" is any amount with respect to a Building Contract that Seller has paid for materials attributable to work that is beyond the actual work completed by Seller as of the Closing Date, (v) "Cost Shortfall" with respect to a Building Contract is the amount by which the material costs paid by Seller with respect to such Building Contract is less than the cost of materials attributable to the actual work completed by Seller as of the Closing Date, and (v) "Building Contracts" means those Contracts listed under "Building Contracts" on *Exhibit 1*.

(d) For purposes of illustration only, examples of calculations of the amounts described in this Section 11.1 are attached to *Exhibit 8*.

(e) In the event of a conflict between the provisions of this Section 11.1 and any other provision in this Agreement, the provisions of this Section 11.1 shall prevail.

11.2 Use of Names Related to the Business. Buyer agrees that following the Closing it will not utilize any of the following trade names or corporate names or other name that is confusingly similar to such names: Building Materials Holding Corporation, BMC West and SelectBuild.



## 12. CLOSING

12.1 Closing. Closing shall occur as promptly as practicable following entry of the Sale Order, at 8780 Prestige Court, Rancho Cucamonga, California 91730, or at such other time or place as the parties may agree upon.

12.2 Time is of the Essence. Time is of the essence for the Closing of this transaction.

## 13. CONDITIONS PRECEDENT TO BUYER'S DUTY TO CLOSE

Buyer shall have no duty to close unless and until each and every one of the following conditions precedent has been fully and completely satisfied or waived by Buyer, which waiver shall be deemed to have irrevocably occurred upon the Closing:

13.1 No Misrepresentation or Breach of Covenants and Warranties. The representations and warranties of Seller made in this Agreement (i) that are qualified by materiality or material adverse effect shall be true and correct as of the date hereof and on and as of the Closing Date, as though made on the relevant date, (ii) that are not qualified by materiality or material adverse effect shall be true and correct in all material respects as of the date hereof and on and as of the Closing Date, as though made on the relevant date; except, in each case, for those representations and warranties which refer to facts existing at a specific date.

13.2 Performance of Obligations. Seller shall have substantially performed or tendered performance of each and every one of its obligations hereunder which by their terms are capable of being performed before Closing.

13.3 Delivery of Closing Documents. Seller shall have tendered delivery to Buyer of all the documents required to be delivered to Buyer by Seller prior to or at Closing pursuant to this Agreement.

13.4 Litigation. No lawsuit, administrative proceedings or other legal action shall have been filed which seeks to restrain or enjoin the acquisition of the Purchased Assets or the operation of the Business in any material respect.

13.5 Transition Services Agreement. Buyer and Seller shall have executed the Transition Services Agreement.

13.6 Certificate. The Seller shall have delivered a certificate to Buyer, dated as of the Closing, certifying that the conditions set forth in Sections 13.1, 13.2 and 13.4 have been satisfied.

13.7 Sale Order. The Bankruptcy Court shall have issued the Sale Order.

13.8 Approval of Percentage Completion Schedule. Buyer shall have approved *Exhibit 8*.

13.9 Termination of Non-Competition and Related Obligations. Each of Seller, George Davis and Randolph Davis shall have executed agreements in form reasonably

acceptable to Buyer terminating any confidentiality, non-competition and non-solicitation obligation with Seller and Building Materials Holding Corporation, of Davis Brothers Framing, Inc., George Davis and/or Randolph Davis under their respective Employment, Confidentiality, Non-Competition and Non-Solicitation Agreements with Seller and Building Materials Holding Corporation and/or the 2006 Purchase Agreement.

#### **14. CONDITIONS PRECEDENT TO SELLER'S DUTY TO CLOSE**

Seller shall have no duty to close this transaction unless and until each and every one of the following conditions precedent has been fully and completely satisfied:

14.1 No Misrepresentation or Breach of Covenants and Warranties. The representations and warranties of Buyer made in this Agreement (i) that are qualified by materiality or material adverse effect shall be true and correct as of the date hereof and on and as of the Closing Date, as though made on the relevant date, (ii) that are not qualified by materiality or material adverse effect shall be true and correct in all material respects as of the date hereof and on and as of the Closing Date, as though made on the relevant date; except, in each case, for those representations and warranties which refer to facts existing at a specific date.

14.2 Performance of Obligations. Buyer shall have substantially performed or tendered performance of each and every one of its obligations hereunder which by their terms are capable of being performed before Closing.

14.3 Payment of Purchase Price and Delivery of Closing Documents. Buyer shall have paid the Purchase Price to Seller and Buyer shall have tendered delivery to Seller all the documents required to be delivered to Seller by Buyer at Closing pursuant to this Agreement.

14.4 Litigation. No lawsuit, administrative proceedings or other legal action shall be pending or threatened against Seller which seeks to restrain or enjoin Seller's sale, or Buyer's acquisition of, the Purchased Assets.

14.5 Certificate. The Seller shall have delivered a certificate to Buyer, dated as of the Closing, certifying that the conditions set forth in Sections 14.1, 14.2 and 14.4 have been satisfied.

14.6 Sale Order. The Bankruptcy Court shall have issued the Sale Order.

14.7 Waiver of Severance, Etc. Each of George Davis and Randolph Davis shall have executed agreements in form reasonably acceptable to Seller (i) waiving their respective rights to receive severance or other payments pursuant to their respective Employment, Confidentiality, Non-Competition and Non-Solicitation Agreements with Seller and Building Materials Holding Corporation, upon termination of their employment in accordance with Section 8.2, other than accrued but unpaid salary and expenses as of the date of termination of their employment, and (ii) terminating such agreements.

14.8 Approval of Percentage Completion Schedule. Seller shall have approved *Exhibit 8*.

14.9 Waiver and Release of Contingent Consideration. Davis Brothers, Randolph Davis and George Davis shall have executed and delivered to Seller a waiver and release, in a form acceptable to Seller (the "Contingent Consideration Waiver"), that waives and releases the right to receive any and all amounts due and payable at any time, before or after Closing, to Davis Brothers, Randolph Davis and/or George Davis from Seller as Contingent Consideration under the under the 2006 Purchase Agreement and the Contingent Consideration Agreement that have not previously been paid.

## 15. ITEMS TO BE DELIVERED AT CLOSING BY THE SELLER

At Closing, the Seller shall, unless waived by Buyer, deliver the following items to Buyer:

15.1 Bill of Sale. A duly executed warranty bill of sale (in a form reasonably acceptable to Buyer) conveying the Purchased Assets to Buyer;

15.2 Automobile Titles. Duly executed titles to the vehicles and other rolling stock included in the Equipment; and

15.3 Sale Order. A certified copy of the Sale Order and Notice of Entry.

## 16. ITEMS TO BE DELIVERED AT CLOSING BY BUYER

At Closing, Buyer shall, unless waived by Seller, deliver the following items to Seller:

16.1 Purchase Price. The Purchase Price to be paid at Closing in accordance with Sections 3.1 and 4.1.

16.2 Contingent Consideration Waiver. Buyer shall have delivered, or caused Davis Brothers, Randolph Davis and George Davis to have delivered, to Seller the duly executed Contingent Consideration Waiver.

## 17. TERMINATION

17.1 Grounds for Termination This Agreement may be terminated:

(a) by mutual written agreement of all of the parties;

(b) by Buyer or Seller if the Closing has not been effected on or prior to the close of business on December 31, 2009; provided, however, that the right to terminate this Agreement pursuant to this Section 17.1(b) shall not be available to any party whose willful failure to fulfill any of such party's obligations contained in this Agreement has been the cause of, or resulted in, the failure of the Closing to have occurred on or prior to the aforesaid date; and/or

(c) by Seller or Buyer if any applicable law shall be enacted or become applicable that makes the transactions contemplated hereby or the consummation of the Closing illegal or otherwise prohibited, or if any judgment, injunction, order or decree enjoining any

party from consummating the transactions contemplated hereby is entered, and such judgment, injunction, order or decree shall become final and non-appealable.

17.2 Effect of Termination. If this Agreement is terminated pursuant to Section 17.1(a)-(c), all obligations of the parties hereunder shall terminate without liability of any Party to any other Party, except as provided in Section 18.6. The representations and warranties made herein shall not survive beyond a termination of this Agreement and no party shall have any liability for breach of any representation or warranty upon a termination of this Agreement prior to the Closing.

## 18. MISCELLANEOUS

18.1 No Other Agreements. This Agreement and all schedules and Exhibits hereto and the Transition Services Agreement constitute the entire agreement between the parties with respect to its subject matter. All prior and contemporaneous negotiations, proposals and agreements between the parties are included in, and superseded by, this Agreement. Any changes to this Agreement must be agreed to in writing signed by an authorized representative of each of Buyer and Seller.

18.2 Waiver. Either Buyer or Seller may waive the performance of any obligation owed to it by another party hereunder for the satisfaction of any condition precedent to the waiving party's duty to perform any of its covenants, including its obligations to close. Any such waiver shall be valid only if contained in writing signed by an authorized representative of each of Buyer and Seller.

18.3 Public Announcements. No public announcements of this Agreement shall be made unless Buyer and Seller have mutually agreed on the timing, distribution and contents of such announcements, except as may be required by applicable securities laws or regulations or the requirements of any securities exchange or market.

18.4 Notices. All notices, requests, demands and other communications called for or contemplated hereunder shall be in writing and shall be deemed to have been duly given when delivered to the party to whom addressed or when received by a party if sent by telecopy (or 3 days after mailing if sent by registered or certified mail, return receipt requested, prepaid and addressed) at the following addresses, or at such other addresses as the parties may designate by written notice in the manner aforesaid:

To Buyer: c/o George and Randolph Davis  
8780 Prestige Court  
Rancho Cucamonga, CA 91730  
Facsimile: (909) 944-7952

In each case, with copies to: Kevin Welch  
Patten, Faith & Sandford  
635 West Foothill Blvd.  
Monrovia, CA 91016  
Facsimile: (626) 303-2391

To Seller:

c/o Building Materials Holding Corporation  
720 Park Boulevard, Suite 200  
Boise, ID 83712-7714  
Attn: Paul Street  
Facsimile: (208) 331-4477

Copies to:

Gregory T. Davidson  
Gibson, Dunn & Crutcher LLP  
1881 Page Mill Road  
Palo Alto, CA 94304  
Facsimile: (650) 849-5333

18.5 Third Party Beneficiary. Nothing contained herein shall create or give rise to any third-party beneficiary rights for any individual as a result of the terms and provisions of this Agreement, except as expressly provided herein.

18.6 Confidential Information.

(a) Except as may be deemed necessary or advisable by the Buyer in relation to the Bankruptcy Case, the parties agree that all information acquired from the other in connection with the negotiation, execution and consummation of this Agreement is confidential and shall not be disclosed to any other party (other than attorneys, accountants and agents of the party) without the written consent of the other; provided that following the Closing Buyer may disclose information relating to the Business as it may deem necessary or advisable. Notwithstanding anything herein to the contrary, any party to this Agreement (and their employees, representatives, or other agents) may disclose to any and all persons, without limitation of any kind, the Tax treatment and Tax structure of the transactions contemplated by this Agreement (the "Transactions") and all materials of any kind (including opinions or other Tax analyses) that are provided to it relating to such Tax treatment and Tax structure; provided, however, that this sentence shall not permit any disclosure that otherwise is prohibited by this Agreement (i) until the earlier of (x) the date of the public announcement of discussion relating to the Transactions, and (v) the date of the public announcement of the Transactions; or (ii) if such disclosure would result in a violation of federal or state securities laws; or (iii) to the extent not related to the Tax aspects of the transaction. Moreover, nothing in this Agreement shall be construed to limit in any way any party's ability to consult any Tax advisor regarding the Tax treatment or Tax structure of the Transactions.

(b) Buyer agrees to hold in the strictest secrecy and confidence any confidential or proprietary information or materials belonging to Seller or Seller's affiliates that are not generally known to the public ("Seller Confidential Information"), including information regarding Seller's or Seller's affiliates' operations, proposed business, financial information, customer information, processes and intellectual property. Buyer agrees not to reveal, publish or disclose, directly or indirectly, in whole or in part, any Seller Confidential Information to any third party, nor make use of any Confidential Information for Buyer's own benefit or for the benefit of any third party without the prior written consent of Seller. All Seller Confidential Information, including all copies thereof, will be destroyed or returned immediately at such time as Seller requests. Notwithstanding the return or destruction of the Confidential Information or

the termination of any transactions between Buyer and Seller, Buyer will continue to be bound by the obligations under this Agreement. Buyer agrees to immediately notify Seller when any information comes to Buyer's attention which might indicate that there has been a loss of confidentiality with respect to the Confidential Information. In such event, Buyer agrees to take all reasonable steps to limit the scope of such loss. In the event that Buyer is requested in any proceeding to disclose any Confidential Information, Buyer will provide Seller with prompt written notice of that fact so that Seller may seek (with Buyer's cooperation, if so requested) an appropriate protective order or confidential treatment. If Buyer is nonetheless compelled to disclose any Confidential Information, Buyer will furnish only that portion of the Confidential Information which is legally required and will exercise Buyer's best efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information. Notwithstanding the foregoing provisions, following the Closing, Buyer may disclose Confidential Information relating to the Business as it may deem necessary or advisable. In addition, the term "Seller Confidential Information" does not include information which Buyer can show by competent proof (i) is or becomes generally available to the public other than as a result of a disclosure by Buyer or Buyer's representatives, (ii) becomes available to Buyer on a non-confidential basis from a source other than Seller or one of Seller's representatives which has represented to Buyer that it is not bound by a confidentiality agreement with, or other contractual, legal or fiduciary obligation of confidentiality to Seller or any other party with respect to any portion of the Confidential Information, or (iii) was known to Buyer on a non-confidential basis prior to its disclosure to Buyer by Seller or one of Seller's representatives or affiliates.

(c) The parties shall be entitled to injunctive or other equitable relief as a remedy for any breach of the provisions of this Section 18.6. Any failure or delay by a party in exercising any right, power or privilege in this Section 18.6 shall not operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise of any right, power or privilege hereunder.

(d) Buyer and Seller shall not, and shall use their reasonable efforts to cause their respective affiliates to not, in any communications with customers, clients or suppliers of Buyer or Seller, with the press or other media, or otherwise in statements to third parties, not criticize, ridicule or make any statement which disparages or is derogatory of Buyer, Seller or The Merjant Group or any of their respective directors or officers.

18.7 Assignment. The parties shall not assign this Agreement without the prior written consent of the other parties. Any attempt to assign this Agreement without prior written consent shall be void *ab initio*. Notwithstanding the foregoing, Buyer, at its discretion, may assign this Agreement, and all of its rights and obligations hereunder to Davis Brothers Framing, Inc. without the prior written consent of Seller, provided that Buyer provide Seller with prior written notice of such assignment.

18.8 Nonsurvival of Representations and Warranties. All representations, warranties, covenants and agreements of Buyer and Seller made herein or in any other agreement delivered pursuant to this Agreement shall not survive beyond the Closing and there shall be no liability or obligation in respect thereof, whether such liability or obligation has accrued prior to or after the Closing, on the part of any party or any of its officers, directors, employees, agents or affiliates;

provided, however, that all covenants and agreements, including without limitation, any covenants and agreements in Sections 3.4, 6.2, 6.3 9.1, 9.2 11.1 and 11.2, which, by their terms, contemplate performance after the Closing, shall survive in accordance with their terms.

18.9 Choice of Law; Jurisdiction. This Agreement shall be governed by, and any disputes or controversies related hereto, shall be interpreted in accordance with the laws of the State of California without regard to the conflicts of laws provisions that would apply the laws of any other jurisdiction, except as may be governed by the Bankruptcy Code. Without limiting any party's right to appeal any order of the Bankruptcy Court, (i) the Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Agreement and to decide any claims or disputes which may arise or result from, or be connected with, this Agreement, any breach or default hereunder, or the transactions contemplated hereby, and (ii) any and all proceedings related to the foregoing shall be filed and maintained only in the Bankruptcy Court, and Buyer and Seller hereby consent to and submit to the jurisdiction and venue of the Bankruptcy Court and shall receive notices at such locations as indicated in Section 18.4. Buyer and Seller hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the laying of venue of any such dispute brought in such court or any defense of inconvenient forum for the maintenance of such dispute. Each of the Parties agrees that a judgment in any such dispute may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Each of Buyer and Seller hereby consents to process being served by any party to this Agreement in any suit, action or proceeding by delivery of a copy thereof in accordance with the provisions of Section 18.4.

18.10 Waiver of Jury Trial. EACH OF THE PARTIES TO THIS AGREEMENT HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREBY.

18.11 Paragraph Headings. The Section and Section paragraph headings contained herein are for convenience only and shall have no substantive bearing on the interpretation of this Agreement.

18.12 Rules of Interpretation. The following rules of interpretation shall apply to this Agreement, the Exhibits hereto, and any certificates, reports or other documents or instruments made or delivered pursuant to or in connection with this Agreement, unless otherwise expressly provided herein or therein, and unless the context hereof or thereof clearly requires otherwise:

(a) A reference to any document or agreement shall include such document or agreement as amended, modified or supplemented from time to time in accordance with its terms, and if a term is said to have the meaning assigned to such term in another document or agreement and the meaning of such terms therein is amended, modified or supplemented, then the meaning of such term herein shall be deemed automatically amended, modified or supplemented in a like manner.

(b) References to the plural include the singular, the singular the plural and the part the whole.

(c) The words "include," "includes," and "including" are not limiting.

(d) A reference to any law includes any amendment or modification to such law which is in effect on the relevant date.

(e) A reference to any person or entity includes its successors, heirs and permitted assigns.

(f) Where the character or amount of any asset or liability or item of income or expense is required to be determined or any consolidation or other accounting computation is required to be made for purposes of this Agreement or any Exhibit hereto or certificate, report or other document or instrument made or delivered pursuant to or in connection with this Agreement, such determination or computation shall be done in accordance with generally accepted accounting principles at the time in effect, to the extent applicable, except where such principles are inconsistent with the express requirements hereof or of such exhibit, certificate, report, document or instrument.

(g) The words "hereof," "herein," "hereunder" and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement.

(h) All Schedules, including the Disclosure Schedule, and Exhibits to this Agreement constitute material terms of this Agreement and are incorporated fully into the terms of this Agreement.

18.13 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be an original, but which shall together constitute but one agreement.

18.14 Attorney's Fees. In any legal action, proceeding or arbitration arising out of this Agreement, regardless of which party hereto initiated such action, the prevailing party shall be entitled to recover reasonable attorney's fees and costs.

18.15 Approval of Bankruptcy Court. Notwithstanding anything herein to the contrary, all of Seller's obligations under this Agreement are subject to approval of the Bankruptcy Court.

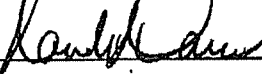




The parties have executed this Asset Purchase Agreement on the day and year first written above.

**BUYER:**

DAVIS DEVELOPMENT COMPANY, INC.


By: 

Name:

Title:

**SELLER:**

C CONSTRUCTION, INC.

By: 

Name:

Title:

**PAUL S. STREET**  
Vice President & Secretary

## EXHIBIT 1

### Contracts

#### Building Contracts

Job #	Job Description	Current Contract
06-01877-067	Traditions II - 17	82,869.00
06-01878-067	Reflections II - 6	91,195.00
06-01879-067	Sycamore - 15/16	282,281.00
06-01880-006	Los Arboles - 6B	177,459.00
06-01881-061	Chu Commercial Building	75,000.00
no # assigned	Buenaterra - 8B (Founders Walk)	148,387.00
no # assigned	Market Street - 6B	228,786.00
no # assigned	Reflections II - 7	93,076.00
no # assigned	Sycamore - 17	137,412.00
no # assigned	Traditions II - 18	82,827.00
06-00103-000	Archstone Gateway Apts.	19,483,754.50
06-00519-050	Four Quartets - 5	249,660.00
06-00581-001	Main Street Village Apts.	9,473,221.66
06-01353-001	College Park Apartments	5,798,559.20
06-01453-010	Cole Street	132,956.00
06-01703-010	The Park - 1 (Spectrum Bldg A)	13,130,450.00
06-01835-033	Force Residence	438,912.25
06-01837-005	WNG Warner Center 195, LLC	3,194,021.00
06-01838-072	Pointe Brea Apartments	4,773,592.00
06-01839-005	Rancho Workforce Apts.	2,751,212.50
06-01840-067	Reflections II - M	97,279.50
06-01842-006	Market Street - 4B	210,491.10
06-01843-005	The Courtyard at Old Town	2,711,725.43
06-01844-033	Romero & Luo Residences	58,627.00
06-01846-066	Medallion - 8B	136,034.00
06-01847-012	Willow Walk - 5	325,796.00
06-01848-052	The Cottages - 2B	1,134,354.75
06-01849-001	University Hills - Comm. Bldg.	347,590.00
06-01850-067	Sycamore - 11	123,652.00
06-01851-067	Traditions II - 13	73,794.00
06-01852-006	Buenaterra - 6 (Founders Wlk)	178,890.10
06-01853-067	Reflections II - 1	88,314.00
06-01854-006	Market Street - 4C	207,529.55
06-01855-067	Sycamore - 12	135,145.00
06-01856-012	Willow Walk - 6	450,733.00
06-01857-023	Connor's Residence Remodel	37,150.00

BS M

**EXHIBIT 1**

**Contracts**

<b>Job #</b>	<b>Job Description</b>	<b>Current Contract</b>
06-01858-067	Traditions II - 14	66,431.00
06-01859-006	Buenaterra - 7A/7B (Fders Wlk)	366,814.00
06-01860-006	Market Street - 5A	225,410.00
06-01861-006	Los Arboles - 5	304,683.00
06-01862-067	Reflections II - 2	91,083.00
06-01863-067	Sycamore - 13	125,707.00
06-01864-006	Market Street - 5B	228,786.00
06-01865-006	Los Arboles - 6A	182,922.00
06-01866-067	Sycamore - 14	136,614.00
06-01867-067	Reflections II - 3	120,076.00
06-01868-067	Traditions II - 15	79,720.00
06-01869-067	Reflections II - 4	92,500.00
06-01870-067	Traditions II - 16	78,004.00
06-01871-005	Terra Vista IV Apts. - M	68,361.00
06-01872-033	Greer Residence	69,141.00
06-01873-006	Market Street - 6A	228,786.00
06-01874-006	Buenaterra -8A (Founders Walk)	178,383.00
06-01875-067	Reflections II - 5	91,342.00
06-01876-033	Parks Residence	162,400.00

*PD 11*

## **EXHIBIT 2**

### **Equipment**

- See Equipment listed in Exhibit 6
- Miscellaneous hand tools and supplies

Handwritten signature and initials, possibly "DJ" followed by a vertical line.

**EXHIBIT 3**

**Intangible Personal Property**

All of the following used, licensed or owned by Seller and used primarily in the Business:

- Customer contacts and relationships
- Vendor contacts and relationships
- The names "Davis Brothers Framing," "Rancho Leasing" and derivations thereof
- Know-how primarily used in the business

**EXHIBIT 4**

**Permits**

- None

*Re M*

**EXHIBIT 5**

**Personal Property and Real Property Leases**

**Personal Property Lease**

**Lessor:** Neopost, Inc.  
**Lessee:** Building Materials Holding Corporation  
**Terms:** 11/1/2009 - 10/31/2012  
**Base Rent:** 27.95/Month  
**Description:** IJ25 w/4lb scale (Postage Meter)

**Real Property Lease**

**Lessor:** Randolph Davis, Sandra Davis, George Davis & Jody Davis  
**Lessee:** C Construction, Inc.  
**Terms:** 7/31/2006 - 7/31/2010  
**Base Rent:** 10,609/Month  
**Description:** Real property located at 8780 Prestige Court in the city of Rancho Cucamonga, County of San Bernardino, State of California

*DS* *N*

**EXHIBIT 6**

**NBV of Purchased Assets**

Asset Number	Serial Number	Description	Date in Service	Life Yr. Mo	Model Number	Legacy Asset Number	Cost	Depreciation	Year to Date Depreciation	Depreciation Reserve	MBV
4633A	1F8PUI6N33LB50680	2003 FORD	1-SEP-05	2.08		TRF FROM CO 55	0	0	0	0	0
4636A	1F8PUI6L94LAL09029	2004 EXPEDITION XLT	1-SEP-05	3.04		TRF FROM CO 55-	2132.88	0	0	2132.88	0
48033A	1F8PUI6S86LA36713	2006 FORD	17-NOV-05	5.00		TRF FROM 55 8762	24545.52	409.09	3681.81	19227.23	5318.19
50366	26CEC19R0M1143368	1998 CHEVY PU S/N	1-JUL-06	.06			7350	0	0	2500	0
50367	26CEC19T6K1253449	1999 CHEVY PU S/N	1-JUL-06	1.00			8000	0	0	8000	0
50368	26CEC19T6K1266703	1999 CHEVY PU S/N	1-JUL-06	1.00			8000	0	0	8000	0
50370	1GCGS19M028109227	2002 CHEVY S10 S/N	1-JUL-06	2.00			7155	0	0	7155	0
50372	26CEC19T321988350	2002 CHEVY C1500	1-JUL-06	2.00			13165	0	0	13165	0
50373	26CEC19T121396043	2002 CHEVY C1500	1-JUL-06	2.00			13165	0	0	13165	0
50374	26CEC19T021442930	2002 CHEVY C1500	1-JUL-06	2.00			13165	0	0	13165	0
50375	26CEC19T21139517	2002 CHEVY C1500	1-JUL-06	2.00			13165	0	0	13165	0
50376	26CEC19T821338494	2002 CHEVY C1500	1-JUL-06	2.00			13165	0	0	13165	0
50377	26CEC19T92139105	2002 CHEVY C1500	1-JUL-06	2.00			0	0	0	0	0
50378	1F8PUI6S5GNA37432	2004 FORD F150 S/N	1-JUL-06	2.02			14500	0	0	14500	0
50379	1GCEC19T74E399451	2004 CHEVY	1-JUL-06	2.04			15500	0	0	15500	0
50380	26CEC19T141166473	2004 CHEVY	1-JUL-06	3.04			15500	0	3875	15500	0
50381	1GCEC19T552115549	2005 CHEVY	1-JUL-06	3.04			18500	0	4625	18500	0
50383	26CEC19T831273442	2005 CHEVY	1-JUL-06	3.09			18500	411.11	4322.21	16855.53	1644.47
50384	1GCEC19T862112811	2006 CHEVY SIL1500	1-JUL-06	4.05			20400	384.91	4234.01	15781.19	4618.81
50385	26CEC19T061110737	2006 CHEVY SIL1500	1-JUL-06	4.05			20400	384.91	4234.01	15781.19	4618.81
51854	1GCR192372204174	2007 SILVERADO 1500	12-DEC-06	5.00			34496.55	574.94	6324.54	26627.87	13796.68
50397	SCAFOLDING	SCAFOLDING	1-JUL-06	5.10			350	55	55	205	145
50402	2 - 20" RADIAL ARM	2 - 20" RADIAL ARM	1-JUL-06	7.07			10000	109.89	1208.79	4503.49	5494.51
50403	2 - 20" RADIAL ARM	2 - 20" RADIAL ARM	1-JUL-06	7.09			10000	107.53	1182.83	4408.65	5591.35
50405	20" RADIAL ARM SAW	20" RADIAL ARM SAW	1-JUL-06	8.00			0	0	52.08	0	0
50408	RADIAL ARM SAW	RADIAL ARM SAW	1-JUL-06	8.09			5000	47.62	523.82	1957.38	3047.62
50409	20" CIRCULAR CUTOFF	20" CIRCULAR CUTOFF	1-JUL-06	9.02			5000	45.45	499.55	1652.55	3136.45
50386	(13) SAWS	(13) SAWS	1-JUL-06	5.00			75000	1250	13750	51250	23750
50387	3 - 1988 GRADALL	1-JUL-06	3.00	3.00			35000	0	5833.36	35000	0
50388	2 - 1997 GRADALL	1-JUL-06	3.00	3.00			80000	0	13333.36	80000	0
50389	2 - 534 D-9 GRADALL	1-JUL-06	3.00	3.00			80000	0	13333.36	80000	0
50390	2 - 534 D-9 GRADALL	1-JUL-06	3.01	554 D-10			120000	0	22200.74	120000	0
50392	FORKLIFT	FORKLIFT	1-JUL-06	4.05			3400	64.15	705.63	2630.17	769.03
50396	2006 GRADALL	2006 GRADALL	1-JUL-06	5.08	544D10		55000	888.82	8897.02	33161.7	21938.3
50398	4X16 MANBAKET	4X16 MANBAKET	1-JUL-06	6.00			575	7.99	87.89	327.51	559.68
50399	180 DEGREE SWING	1-JUL-06	6.00	6.00			1300	18.06	198.66	740.32	34367.77
50400	2003 544 D10	2003 544 D10	1-JUL-06	7.03			65000	247.13	8218.43	30632.23	396.48
50401	2003 GRADALL BASKET	1-JUL-06	7.03				750	3.62	94.87	333.42	396.48
50406	2 - 544-D10 GRADALL	1-JUL-06	8.05	8.05			140000	1386.14	13747.54	58831.7	83168.3
50407	2- TRUSS BOOMS AND	1-JUL-06	8.07	8.07			1500	14.56	160.16	597.02	902.98
50410	4X16 MANBAKET	1-JUL-06	6.11	6.11			750	9.04	99.44	370.54	379.46
50391	7819S9094	MOBILE OFFICE 20X8	1-JUL-06	.06	Dennis		1500	0	0	1500	0
50393	N8123S9572	MOBILE OFFICE 21X8	1-JUL-06	.08	Larry's		1500	0	0	1500	0
50394	7919S99337	MOBILE OFFICE 20X8	1-JUL-06	.08	Richard's		1500	0	0	1500	0
50395	UT8219S30812	MOBILE OFFICE 20X8	1-JUL-06	3.10	Bill's		1500	0	0	1500	0
51594		OFFICE EXPANSION	1-NOV-06	3.10			110789.27	2408.33	26491.63	89108.25	21673.02
16221A		KYOCERA MICA	1-SEP-05	3.05		TRF from Co 55	24068.38	0	594.84	24068.38	0
8670		TELEPHONE SYSTEM	1-JUL-06	7.00		0	0	0	0	0	0
8670		Fire proof file	1-JUL-06	10.00		0	0	0	0	0	0
8670		MINOLTA DI 2510	1-JUL-06	7.00		0	0	0	0	0	0
8670		MURATEK F-360	1-JUL-06	7.00		0	0	0	0	0	0
8670		OFFICE CABINETS	1-JUL-06	4.03		4121.52	80.81	80.81	888.91	3113.31	868.21
8670		CARPET	1-JUL-06	4.04		1204.24	23.16	23.16	254.76	949.51	126.5
8670		GRANITE	1-JUL-06	4.05		588.61	10.53	10.53	115.94	432.11	126.5
8670		OFFICE CABINETS	1-JUL-06	10.00		0	0	0	0	0	0
8670		OFFICE CABINETS	1-JUL-06	10.00		0	0	0	0	0	0



# EXHIBIT 6

## NBV of Purchased Assets

Expense Account	Reserve Account	Asset Number	Serial Number	Description	Date in Service	Life Tr. Mo	Model Number	Legacy Asset Number	Cost	Depreciation	Year to Date Depreciation	Depreciation Reserve	NBV
8670	2575	50363		2 FIRE CABINETS	1-Jul-06	10.00			0	0	0	0	0
8670	2575	50364		DESK & HUTCH	1-Jul-06	5.08			291.77	4.29	47.19	175.89	115.83
8670	2575	50365		SECURITY CAMERA	1-Jul-06	9.08			3268	28.17	309.87	1155.02	2172.98
8670	2575	54698	L3270200071	RICH WIDE FORMAT	1-May-07	7.00			18806	275.07	2475.77	6977.18	11928.82
9015	2630	50333		LASER PRINTER ORI-	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50335		Printer-Origipage 20	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50336		Plotter Printer	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50337		HP 8150N PRINTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50339		(2) P4 2.0 (1) P4	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50340		P4 2.8 DESKTOP	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50341		8CG 17" MONITOR	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50342		SOL SERVER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50343		MS EXCHANGE 2000	1-Jul-06	3.00			0	0	0	0	0
9015	2630	50344		MS SQL ENTERPRISE	1-Jul-06	3.00			0	0	0	0	0
9015	2630	50345		COMPUTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50347		HP2400 LARGE FORMAT	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50348		HP4200 DTF PRINTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50349		COLOR LASER PRINTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50352		P-4 COMPUTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50353		P-4 COMPUTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50354		P-4 3.0 COMPUTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50355		P-4 3.0 COMPUTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	50356		P-4 3.8 COMPUTER	1-Jul-06	5.00			0	0	0	0	0
9015	2630	51395		(7) BELLS/CISCO	1-Nov-06	3.00			14433.24	0	5154.78	14433.24	0
										9,575.33	174,014.97	919,003.44	250,816.39
										1,169,821.83			

*Handwritten initials: P, B*

**EXHIBIT 7**

**Purchase Price Allocation**

- Entire Purchase Price will be allocated as Class V Assets for purposes of IRS Form 8594



**EXHIBIT 8**

**Percentage Completion of Building Contracts**

**To come**

Handwritten signature and initials.

# Attachment A to Exhibit B

## Examples of Calculations

Job Description	Original Contract	Change Orders	Current Contract	Adjusted Current Labor Budget	Under Order To Date	Over/Under Billed	Billed	Earned	% Complete	Material Included in Revenue	Material Cost To VCP	Projected Cost to Revenue	Expenses Not Recognized	Cost & Earnings	Cost & Earnings	Budgeted Gross Profit	Budgeted GP %	JTD Actual Gross Profit	JTD Actual GP %	Net Earnings	Balance to Earn
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Completion Market Street - 6A	228,786.00	-	228,786.00	48,922.81	100.00%	-	228,786.00	228,786.00	100.00%	125,000.00	125,000.00	125,000.00	-	-	-	71,786.00	28.66%	71,786.00	28.66%	-	-

DMHC  
43,762  
30,854  
129,146  
28.66%

Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Following Month Market Street - 6A	228,786.00	-	228,786.00	48,922.81	19.51%	(44,641.90)	44,641.90	44,641.90	19.51%	21,912.94	14,634.40	-	-	(44,641.90)	(44,641.90)	67,561.19	29.53%	13,182.09	29.53%	124,144	228,786
Completion Market Street - 6A	228,786.00	-	228,786.00	48,922.81	100.00%	-	228,786.00	228,786.00	100.00%	125,000.00	125,000.00	125,000.00	-	-	-	71,786.00	28.66%	71,786.00	28.66%	-	-

DMHC  
43,762  
30,854  
129,146  
28.66%

RE

# **EXHIBIT C**

## **Cure Notice**

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

**IN RE:**

**BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,**

**Debtors.**

)  
) **Chapter 11**  
)

) **Case No. 09-12074 (KJC)**  
)

) **Jointly Administered**  
)

) **Requested Cure Objection Deadline: December 16, 2009 at 12:00  
p.m. (ET)**

) **Requested Sale Objection Deadline: December 16, 2009 at 12:00  
p.m. (ET)**

) **Requested Hearing Date: December 17, 2009 at 10 a.m. (ET)**

**PLEASE TAKE NOTICE THAT** on the date hereof, the above-captioned debtors and debtors in possession (collectively, the "***Debtors***") filed the Debtors' Motion for an Order, Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 9004, 9006, 9014, and 9019, (I) Authorizing the Private Sale by C Construction, Inc. of the Purchased Assets Free and Clear of Liens, Encumbrances and Other Interests, (II) Authorizing the Assumption and Assignment of Certain Assumed Contracts, (III) Approving the Asset Purchase Agreement and the Transition Services Agreement, (IV) Authorizing the Debtors to Pay Severance, (V) Authorizing the Wind Down of Business Operations in Illinois and (VI) Granting Related Relief (the "***Sale Motion***"). By the Sale Motion, the Debtors seek, among other things, to assume and assign the Contracts<sup>1</sup> to Davis Development Company, Inc. (the "***Purchaser***") pursuant to the terms and conditions of the current Asset Purchase Agreement (the "***Current APA***") by and between the Seller and the Purchaser.<sup>2</sup>

**PLEASE TAKE FURTHER NOTICE THAT** you have been identified as a Counterparty to a Contract that the Debtors may potentially assume and assign to the Purchaser and the Purchaser may further assign, sublease, sublicense, transfer or otherwise dispose of to its affiliates (including, without limitation, Davis Brothers Framing, Inc.), designees, assignees, and/or successors pursuant to the terms of the Current APA and the Sale Motion. You should identify your contract on ***Exhibit A*** annexed hereto.

**PLEASE TAKE FURTHER NOTICE THAT** the undisputed Cure Costs that the Debtors intend to pay and believe must be paid to cure all defaults under the Contracts (the "***Cure Amounts***") are set forth in the Cure Schedule attached as ***Exhibit A***. You should

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Sale Motion and Current APA (as defined herein), as the case may be.

<sup>2</sup> Copies of the Motion and all exhibits to the same are available by request to Co-Counsel for the Debtors and Debtors in Possession.

locate your Contract on the Cure Schedule to determine the Cure Amount that the Debtors believe is undisputed.

**PLEASE TAKE FURTHER NOTICE THAT** the Debtors have requested in the Motion that unless a non-debtor party to a Contract files an objection (a "**Cure Objection**") to (a) its scheduled Cure Amount and/or (b) to the proposed assumption, assignment, and/or transfer of such Contract by 12:00 PM (prevailing Eastern time) December 16, 2009 (the "**Cure Objection Deadline**") and serves a copy of the Cure Objection so as to be received no later than the Cure Objection Deadline to: (a) Gibson, Dunn & Crutcher LLP, 200 Park Ave., 47<sup>th</sup> Floor, New York, New York 10166-0193 (Attn: Michael A. Rosenthal, Esq. and Matthew K. Kelsey, Esq. (Tel. (212) 351-4000 and Facsimile (212) 351-4035), counsel to Debtors; (b) Young, Conaway, Stargatt & Taylor, LLP, The Brandywine Building, 1000 West St., 17<sup>th</sup> Floor, Wilmington, Delaware, DE 19801 (Attn: Sean M. Beach, Esq. and Robert F. Poppiti, Jr., Esq. (Tel. (302) 571-6600; Facsimile (302) 571-1253), counsel to Debtors; (c) Office of the United States Trustee for the District of Delaware, 844 King street, Suite 2207, Lockbox 35, Wilmington, DE 19801 (Attn: Joseph J. McMahon, Jr. (Tel. (302) 573-6491, Facsimile (302) 573-6497); (d) Paul, Hastings, Janofsky & Walker, LLP, 55 Second Street, San Francisco, CA 94105-3441 (Attn: Kevin B. Fisher, Esq. (Tel. (415) 856-7219, Facsimile ((415) 856-7200) and 75 East 55<sup>th</sup> Street, New York, New York 10022 (Attn: Thomas L. Kent, Esq. (Tel. (212) 318-6060 and Facsimile (212) 230-7899), counsel to the agent under the Debtors' postpetition debtor in possession credit facility; (e) Richards, Layton & Finger, P.A., One Rodney Square, 920 King Street, Wilmington, DE 19801 (Attn: Paul N. Heath, Esq. (Tel. (302) 651-7590, Facsimile (302) 498-7590)), counsel to the agent under the Debtors' postpetition debtor in possession credit facility; and (f) George and Randolph Davis, 8780 Prestige Court, Rancho Cucamonga, CA 91730, (Facsimile (909) 944-7952); such non-debtor party shall (i) be forever barred from objecting to the Cure Amount and from asserting any additional cure or other amounts with respect to such Contract and the Debtors should be entitled to rely solely upon the Cure Amount, and (ii) if the Contract was identified as an Purchased Asset, be deemed to have consented to the assumption, assignment, and/or transfer of such Contract and be forever barred and estopped from asserting or claiming against the Debtors, the Purchaser, or any other assignee of the relevant Contract that any additional amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied, under such Contract.

**PLEASE TAKE FURTHER NOTICE THAT** a hearing to consider the relief requested in the Sale Motion and the assumption and assignment of the Contracts shall be held on December 17, 2009 at 10:00 a.m. (prevailing Eastern Time) before the honorable Kevin J. Carey, in the United States Bankruptcy Court for the District of Delaware, 3<sup>rd</sup> Floor, 824 Market Street, Wilmington Delaware 19801 (the "**Sale Hearing**"). Any Cure Objection that is not

resolved prior to the Sale Hearing will be disposed of at the Sale Hearing, unless otherwise agreed to by the parties.

Dated: Wilmington Delaware  
December 8, 2009

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP Sean M. Beach (No. 4070) Donald J. Bowman, Jr. (No. 4383) Robert F. Poppiti, Jr. (No. 5052) The Brandywine Building 1000 West Street, 17 <sup>th</sup> Floor Wilmington, Delaware 19801 Telephone: (302)571-6600 Facsimile: (302) 571-1253	GIBSON, DUNN, & CRUTCHER LLP Matthew Kelsey Michael A. Rosenthal 200 Park Avenue New York, New York 10166-0193 Telephone: (212) 728-8000 Facsimile: (212) 728-8111
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Co-Counsel for the Debtors and Debtors in Possession



**EXHIBIT A**

# **EXHIBIT D**

## **Cure Schedule**

Job	Description	Cure Amount	Customer	Name	Address 1	Address 2	City	State	Code
06-01703-010	The Park - 1 (Spectrum Bldg A)	0.00	8830-WESTE5	Western National Contractors	8 Executive Circle		Irvine	CA	92614
06-01353-001	College Park Apartments	0.00	8830-GREYS5	Grayston Mkt-Family Bldrs, Inc.	341 Bayside Dr. # 7		Newport Beach	CA	92660
06-01838-072	Pointe Brea Apartments	0.00	8830-SANDE5	Sanders Constructn Svcs, Inc.	20331 Lake Forest Dr #C2		Lake Forest	CA	92630
06-01837-005	WNG Warner Center 195, LLC	0.00	8830-WESTE5	Western National Contractors	8 Executive Circle		Irvine	CA	92614
06-01839-005	Rancho Workforce Apts.	0.00	8830-WESTE5	Western National Contractors	8 Executive Circle		Irvine	CA	92614
06-01843-005	The Courtyard at Old Town	0.00	8830-WESTE5	Western National Contractors	8 Executive Circle		Irvine	CA	92614
06-01848-052	The Cottages - 2B	0.00	8830-FIRST5	First Pacific Bldrs, Inc (Nvs)	650 W. Huntington Dr. #201		Arcadia	CA	91007
06-01856-012	Willow Walk - 6	0.00	8830-OLSON5	The Olson Company	3010 Old Ranch Pkwy. #100		Seal Beach	CA	90740
06-01835-033	Force Residence	0.00	8830-MUSKO5	Muskoka Development	204 Evening Star Ln		Newport Beach	CA	92660
06-01859-006	Buenaterra - 7A/7B (Fders Wlk)	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01849-001	University Hills - Comm. Bldg.	0.00	8830-CALIF5	California Pacific Homes, Inc.	9828 Research Dr.		Irvine	CA	92618
06-01847-012	Willow Walk - 5	0.00	8830-OLSON5	The Olson Company	3010 Old Ranch Pkwy. #100		Seal Beach	CA	90740
06-01861-006	Los Arboles - 5	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-00519-050	Four Quartets - 5	0.00	8830-JOHNLS	John Laing Homes	19520 Jamboree Rd. #500		Irvine	CA	92612
06-01864-006	Market Street - 5B	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01873-006	Market Street - 6A	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01860-006	Market Street - 5A	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01832-006	Los Arboles - 4A	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01854-006	Market Street - 4C	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01833-006	Buenaterra - 4 (Founders Walk)	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01865-006	Los Arboles - 6A	0.00	8830-TAYLO5	Taylor Morrison Services, Inc.	15 Cushing		Irvine	CA	92618
06-01874-006	Buenaterra -8A (Founders Walk)	0.00	8830-ELITE5	Elite Homes Incorporated	23670 Hawthorne Blvd.	Suite 200	Torrance	CA	90505
06-01876-033	Parks Residence	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01866-067	Sycamore - 14	0.00	8830-WOODS5	Woodside Homes California, Inc.	175 Technology Dr., 2nd Floor		Irvine	CA	92618
06-01846-066	Medallion - 8B	0.00	8830-MBKBU5	MBK Builders, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01855-067	Sycamore - 12	0.00	8830-WOODS5	West Coast Design Group, Inc.	41055 Chaco Canyon Rd.		Murrieta	CA	92562
06-01453-010	Cole Street	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01863-067	Sycamore - 13	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01850-067	Sycamore - 11	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01867-067	Reflections II - 3	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01840-067	Reflections II - M	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01869-067	Reflections II - 4	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01875-067	Reflections II - 5	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01878-067	Reflections II - 6	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01862-067	Reflections II - 2	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01877-067	Traditions II - 17	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01868-067	Traditions II - 15	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01870-067	Traditions II - 16	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01851-067	Traditions II - 13	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01872-033	Greer Residence	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01871-005	Terra Vista IV Apts. - M	0.00	8830-WDCRP5	Weeda Contracting Devlpmnt Crp.	26071 Merit Circle, Suite 107		Laguna Hills	CA	92653
06-01858-067	Traditions II - 14	0.00	8830-WESTE5	Western National Contractors	8 Executive Circle		Irvine	CA	92614
06-01844-033	Romero & Luo Residences	0.00	8830-WOODS5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505
06-01857-023	Connor's Residence Remodel	0.00	8830-EMBEE5	Embee & Associates, Inc.	1258 W. Mission Blvd.		Ontario	CA	91762
06-09016-022	Smith Residence	0.00	8830-RANK15	Rankin Constructn Company, Inc.	2976 Garona Drive		Hacienda Hghts	CA	91745
06-01879-067	Sycamore - 15/16	0.00	8830-WOODS5	Lloyd Smith/LDI Mechanical	1587 Bently Dr.		Corona	CA	92879
06-01880-006	Los Arboles - 6B	0.00	8830-TAYLO5	Woodside Homes California, Inc.	11870 Pierce St. #250		Riverside	CA	92505

06-01881-061	Chu Commercial Building	0.00	8830-MURSO5	Mur-Sol Construction, Inc.	119 E. St. Joseph St.	Arcadia	CA	91006
06-01882-067	Traditions II - 18	0.00	8830-WOODS5	Woodside Homes Californ, Inc.	11870 Pierce St. #250	Riverside	CA	92505
No # Assigned	Buenaterra-8B (Founders Walk)	0.00		Taylor Morrison Services, Inc.	15 Cushing	Irvine	CA	92618
No # Assigned	Market Street - 6B	0.00		Taylor Morrison Services, Inc.	15 Cushing	Irvine	CA	92618
No # Assigned	Reflections II - 7	0.00		Woodside Homes Californ, Inc.	11870 Pierce St. #250	Riverside	CA	92505
No # Assigned	Sycamore -17	0.00		Woodside Homes Californ, Inc.	11870 Pierce St. #250	Riverside	CA	92505
No # Assigned	Traditions II - 18	0.00		Woodside Homes Californ, Inc.	11870 Pierce St. #250	Riverside	CA	92505
No # Assigned	Archstone Gateway Apts	0.00		ArchStone Builders	2124 E. Oranewood	Anaheim	CA	92806
06-00581-001	Main Street Village Apts	0.00		White Residential	18200 Von Karman Ave #825	Irvine	CA	92612
06-01842-006	Market Street - 4B	0.00		Taylor Morrison Services, Inc.	15 Cushing	Irvine	CA	92618
06-01853-067	Reflection II -1	0.00		Woodside Homes Californ, Inc.	11870 Pierce St. #250	Riverside	CA	92505
06-01852-006	Buenaterra-6 (Founders Walk)	0.00		Taylor Morrison Services, Inc.	15 Cushing	Irvine	CA	92618