

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

In re:) Chapter 11
)
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i> ,) Case No. 09-12074 (KJC)
)
Debtors.) Jointly Administered
)
) Cure Objection Deadline:
) December 3, 2009, 4:00 p.m. (ET)
) Adjourned Hearing Date:
) December 17, 2009, 11:00 a.m. (ET)
)

**SUPPLEMENTAL OBJECTION OF CONTRACTING PARTY
SOUTHWEST MANAGEMENT, INC. TO CURE AMOUNTS
SUBMITTED BY DEBTORS WITH RESPECT TO ASSUMPTION
OF PURCHASE AND SALE AGREEMENT BETWEEN CERTAIN DEBTORS
AS BUYERS AND SOUTHWEST MANAGEMENT, INC. ET AL., AS SELLERS**

Contracting Party Southwest Management, Inc. ("Southwest"), by and through undersigned counsel, submits this supplemental objection ("Supplemental Objection") to the assumption of, and the cure amounts proposed by, the Debtors with respect to that certain purchase and sale agreement between certain Debtors as buyers and Southwest, *et al.*, as sellers, and, in support thereof, represents the following:

1. On December 2, 2009, Southwest Management, Inc. ("Southwest") filed its Objection of Contracting Party Southwest Management, Inc., to Cure Amounts Submitted by Debtors with Respect to Assumption of Purchase and Sale Agreement Between Certain Debtors as Buyers and Southwest Management, Inc., *et al.*, as Sellers ("Objection"). [Docket No. 1052]

2. In the Objection, Southwest asserted that the Purchase and Sale Agreement ("APA") between Debtors C Construction, Inc. ("C Construction") and Selectbuild Construction, Inc., formerly known as BMC Construction, Inc. ("Selectbuild), (C Construction and Selectbuild

are collectively, the "Debtor Parties") and, *inter alia*, Southwest that was identified in paragraph 1 of the Objection could not be assumed without paying (i) \$300,000 due and owing pursuant to the indemnification provisions of § 13(a) of the APA, plus pre-petition interest as allowed by law, and (ii) \$631,085.95 in damages due with respect to four leases that were rejected by the Debtors, but were integral parts of the APA. [Docket No. 1052 at ¶¶ 6, 8-16].

3. On December 8, 2009, the above-captioned Debtors filed their Omnibus Response to Cure Claim Objections and Proposed Order Resolving Cure Claim Objections ("Response"). [Docket No. 1090]

4. In the Response, the Debtors contend, *inter alia*, that (i) pursuant to the terms of the APA, they have no obligation to pay \$300,000 to Southwest; and (ii) the aforesaid leases were independent agreements and not parts of the APA. [Docket No. 1090, ¶ 8] While Southwest disagrees with Debtors' arguments, the Court can resolve Debtors' opposition to the Objection through a consideration and analysis of the terms of the APA.

5. On December 8, 2009, the Debtors also filed their motion to approve (i) the sale of the so-called Ontario Framing Business of debtor C Construction, Inc. to Davis Development Company, Inc. or a wholly owned affiliate ("Davis") and (ii) the wind-down of the Debtors' business in Illinois ("Sale and Wind-Down Motion"). [Docket No. ___]. The Sale and Wind-Down Motion is currently scheduled for December 17, 2009.

6. At the time Southwest filed its Objection, the Debtors had not filed the Sale and Wind-Down Motion. As a result, Southwest had not objected to the proposed assumption of the APA on the basis that the Debtors had failed to provide adequate assurance of performance

under the APA. Under 11 U.S.C. § 365(b)(1)(C), a debtor cannot assume an executory contract without providing adequate assurance of future performance of the executory contract.

7. The Debtor Parties to the APA have several ongoing obligations to Southwest under the APA, including, without limitation, an obligation to manage, in a commercially reasonable manner, and to provide reports on certain litigation and insurance and other claims, an obligation to satisfy and discharge assumed liabilities, an obligation to provide certain indemnification to Southwest, an obligation for a period of ten (10) years to retain books and records regarding the business sold and to provide Southwest with access to same, the obligation to manage any tax audits or other administrative or judicial proceedings involving the business sold, and an obligation to provide administrative support. [Docket No. 1052, Ex.B, §§ 3.3, 7.2, 12.2, 13.3, 13.4, 13.5, 13.7, 15.2, 15.5, and 22.8.]

8. The Sale and Wind-Down Motion raises several concerns about the Debtor Parties' ability to perform their obligations under the APA in the future. The first concern relates to the purchase price being paid to C Construction for the "Purchased Assets." According to the Sale and Wind-Down Motion, the purchase price is the net book value of the "Purchased Assets," which is set forth in Exhibit 6 to the asset and purchase agreement ("Ontario APA") attached to the Sale and Wind-Down Motion. [Docket No. 1097, Exh. B, p.37-38]. The referenced Exhibit 6 indicates that the "Purchased Assets" have a net book value of only \$250,816.39. [Docket No. 1097, Exh. B., p. 37-38] The Sale and Wind-Down Motion also reflects that even that amount may be reduced or even eliminated by credits due Davis, the calculation of which is not set forth in either the Sale and Wind-Down Motion or the Ontario APA. In that regard, it bears noting that the provisions concerning the price being paid for the "Purchased Assets," which are apparently contained on pp. 10-11 of the Ontario APA, are

excluded from the Ontario APA as it was filed with the Court on December 8, 2009 since pp. 10-11 are missing. The fact that the purchase price for the “Purchased Assets” cannot be determined from the Ontario APA raises the question of what, if any, value C Construction is receiving in exchange for the Purchased Assets.

9. The Debtors’ likely answer to that question is that they will receive a sizeable tax refund. However, because the sale of the Ontario Framing business is largely driven by anticipated tax refunds, Selectbuild and C Construction, who are the parties to the APA cannot demonstrate adequate assurance of future performance under the APA. Nothing in the Sale and Wind-Down Motion indicates how the anticipated refunds will be used or if the which of the Debtors will receive them. Specifically, nothing in the Sale and Wind-Down motion indicates whether either Selectbuild or C Construction will receive any of the refunds. In other words, nothing in the Sale and Wind-Down Motion demonstrates that either C Construction or Selectbuild will have the funds available to satisfy the obligations described or to hire the employees required to perform their obligations under the APA.

10. Moreover, the motivation for the sale of the Ontario Framing Business suggests that the Debtor Parties now intend an orderly liquidation of their assets and not continuing their operations, even under a significantly reduced basis. Assuming the Court approves the Ontario APA and the parties thereto consummate the transactions contemplated therein, C Construction effectively will have no remaining assets or business. Specifically, Section 8.2 of the Ontario APA requires that C Construction terminate all affected employees. Without assets or a business or capable employees, at the very least, C Construction cannot provide adequate assurance of future performance under the APA. There is nothing in the Sale and Wind-Down motion indicating that either Selectbuild or another Debtor will be willing or able to take over C

Construction's obligations under the APA. Indeed, if the Debtors' goal is an orderly liquidation of the Debtor Parties, it is hard to see any incentive on the part of any of the Debtors for future performance under the APA.

11. The Debtors also fail to demonstrate in the Sale and Wind-Down Motion that the anticipated revenues to the Debtor Parties from their remaining businesses, if any, will be sufficient for them to perform their obligations under the APA, even if they had any incentive to do so.

12. Because a resolution of the concerns raised by Southwest in this Supplemental Objection must and will occur at the December 17, 2009 hearing on the Sale and Wind-Down Motion, the adjournment to January 27, 2010 of the Objection that has been requested by the Debtors is not necessary.

Conclusion

13. Southwest requests that this Court hear and decide the Objection at the December 17, 2009 hearing on confirmation and deny the adjournment of the hearing on Southwest's objection the Debtors request. Southwest further requests that the Court condition Debtor Parties' assumption of the APA on (i) paying cure costs of \$931,081.95, plus pre-petition interest as allowed by law, and (ii) providing adequate assurance of future performance.

Dated: December 14, 2009
Wilmington, Delaware

GIBBONS PC

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