

IN RE:	)	
	)	<b>Chapter 11</b>
<b>BUILDING MATERIALS HOLDING</b>	)	
<b>CORPORATION, <i>et al.</i>,<sup>1</sup></b>	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Objection Deadline: July 22, 2009 at 4:00 p.m. (ET)</b>
	)	<b>Hearing Date: July 29, 2009 at 10:00 a.m (ET)</b>
	)	

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this motion (the "**Motion**") for entry of an order, substantially in the form annexed hereto as **Exhibit 1**, authorizing the Debtors to (a) reject that certain lease by and between BMC West Corporation and Union Pacific Railroad Company, dated as of September 26, 2007 (the "**Union Pacific Lease**") for the use and occupancy of the premises located in Merced, California that are identified on Exhibit A which is attached to the Union Pacific Lease, and (b) abandon certain related property. In support thereof, the Debtors respectfully represent:

DB02:8379347.1

## **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 365(a), 554, 1107(a), and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***"), Rules 6006 and 6007 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***"), and Rule 2002-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the "***Local Rules***"), seek entry of an order authorizing them to reject the Union Pacific Lease and to abandon any property remaining on the leased premises.

## **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***"). 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.

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***"). As set forth in greater detail in the Plan and Disclosure Statement, the Plan contemplates a restructure of the Debtors' balance sheet and ownership structure, as well as an immediate cash distribution to unsecured creditors and an opportunity for such creditors to receive full payment from the Reorganized Debtors, depending on business performance. The Debtors believe that the restructuring proposal embodied in the Plan provides the Debtors' creditors with the best means of maximizing value of the Debtors and their businesses. To implement this restructuring, the Debtors have obtained a commitment to provide \$80 million in the form of debtor-in-possession financing, which the Court approved on an interim basis on June 17, 2009.

## THE UNION PACIFIC LEASE

7. Prior to the Petition Date, the Debtors entered into the Union Pacific Lease for the use and occupancy of the premises located in Merced, California that are identified on Exhibit A which is attached to the Union Pacific Lease. A true and correct copy of the Union Pacific Lease is attached hereto as ***Exhibit 2***. The Union Pacific Lease granted the Debtors access to a railroad spur upon which rail cars could be delivered to the Debtors' facility in Merced, California. In the ordinary course of business, the Debtors constructed certain lumber storage sheds (the "***Sheds***") at their Merced facility which encroach upon portions of the leased premises. These Sheds have minimal value, if they have any value at all, apart from their current use as storage sheds at the Merced facility. The cost of removal exceeds any perceivable value the Sheds may have.

8. Prior to the Petition Date, the Debtors consolidated their operations such that they no longer needed their Merced, California facility to service customers in the Merced vicinity and vacated their Merced facility. Accordingly, the Debtors no longer needed the Union Pacific Lease associated with their Merced facility. Therefore, the Debtors determined, in the sound exercise of their business judgment, that the Union Pacific Lease was no longer of any value or utility to them.

9. Pursuant to the terms of the Union Pacific Lease, the Debtors are entitled to terminate the Lease upon 30 days' written notice to Union Pacific Railroad Company ("***Union Pacific***"). The Debtors did so on January 21, 2009 and therefore believe that the Union Pacific Lease terminated prior to the Petition Date on or about February 20, 2009. Nonetheless, out of an abundance of caution and because Union Pacific asserts that the Lease remains in force until the Debtors remove the Sheds which encroach upon the leased premises, the Debtors seek authorization to reject the Union Pacific Lease and to abandon the

Sheds located thereon. The Debtors seek to abandon the Sheds rather than to remove them because the Debtors believe that the amount it would cost to remove the Sheds exceeds any value that could be realized from their disposition.

### **BASIS FOR RELIEF REQUESTED**

#### **A. The Court Should Authorize Rejection of the Union Pacific Lease as a Sound Exercise of the Debtors' Business Judgment**

10. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors seek authority to reject the Union Pacific Lease. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). "[T]he purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property.'" *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (quoting 2 COLLIER ON BANKRUPTCY ¶ 365.01[1] (15th ed. 1993)).

11. Courts defer to a debtor's business judgment in rejecting executory contracts or unexpired leases, and upon finding that a debtor has exercised its sound business judgment, approve such rejections under section 365(a) of the Bankruptcy Code. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (recognizing the "business judgment" standard used to authorize rejection of executory contracts), *superseded by statute on other grounds*, 11 U.S.C. § 1113, *as recognized in Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 44 (1st Cir. Mass. 2003); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 39-40 (3d Cir. 1989) (recognizing the "business judgment" standard, which requires only that the rejection will benefit the estate);

*In re Trans World Airlines, Inc.*, 261 B.R. 103, 120 (Bankr. D. Del. 2001) ("A debtor's determination to reject an executory contract is governed by the business judgment standard."). The business judgment standard is "not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate." *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006); *see also In re III Enters., Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) (observing that courts do not "disturb [a debtor's] decision to reject [a lease] unless the decision is so unreasonable that it could not be based on sound business judgment, but only on bad faith or whim") (internal citations and quotations omitted).

12. As set forth above, the Union Pacific Lease relates to a facility that the Debtors no longer need to operate their business. Therefore, the Debtors have determined, in the sound exercise of their business judgment, that the Union Pacific Lease is no longer of any value or utility to their estates.

13. For these reasons, the Debtors' decision to reject the Union Pacific Lease is an exercise of sound business judgment that will tremendously benefit the Debtors' estates.

**B. The Court Should Authorize Rejection of the Union Pacific Lease Effective as of the Rejection Effective Date**

14. The Debtors also respectfully submit that it is appropriate for the Court to order that the effective date of rejection for the Union Pacific Lease be the Petition Date (the "*Rejection Effective Date*").

15. While section 365 of the Bankruptcy Code does not specifically address whether the Court may order rejection to be effective retroactively, many courts have held that bankruptcy courts may, in their discretion, authorize rejection retroactive to a date prior to entry of the order authorizing the rejection where the balance of equities weighs in favor of

retroactive application of rejection. *See, e.g., Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1074 (9th Cir. 2004) (affirming bankruptcy court's approval of retroactive rejection); *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machs., Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995) ("[B]ankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation"); *Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC)*, 297 B.R. 133, 140 (D. Colo. 2003) (holding that "because section 365 does not, as a matter of law, prohibit selection of a retroactive date for rejection, the bankruptcy court has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject."); *Constant Ltd. P'ship v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 37 (S.D.N.Y. 1995) (stating that section 365 does not include "restrictions as to the manner in which the court can approve rejection"); *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (Case, J.) (holding that when principles of equity dictate, a bankruptcy court may approve rejection of a nonresidential lease pursuant to section 365(a) retroactive to the motion filing date); *In re Amber's Stores, Inc.*, 193 B.R. 819, 827 (Bankr. N.D. Tex. 1996) (holding that the lease at issue should be deemed rejected as of the petition date due to the equities of the case where the debtor turned over its keys and vacated the premises prepetition and served the motion to reject the lease as soon as possible).

16. Here, the balance of the equities favors granting the Debtors' request for a retroactive effective date of rejection. The Debtors do not believe that the Union Pacific Lease is currently in force. However, without a retroactive date of rejection, the Debtors may be forced to incur unnecessary administrative charges for this lease that does not provide, and has not provided since the Petition Date, any tangible benefit to the Debtors' estates, should

the Court determine that the Union Pacific Lease remains in effect. Moreover, Union Pacific will not be unduly prejudiced if the rejection is deemed effective as of the Rejection Effective Date because it will receive notice of this Motion and have sufficient opportunity to act accordingly. Indeed, the Debtors provided Union Pacific Railroad Company with a notice of their intention to terminate the Union Pacific Lease prior to the Petition Date on January 21, 2009 and again in a letter dated June 25, 2009 which notified Union Pacific of the Debtors' bankruptcy filings and reiterated their intent to reject the Lease. In these circumstances, the Debtors respectfully submit that it is fair and equitable for the Court to find that the Union Pacific Lease is rejected as of the Rejection Effective Date, as the retroactive rejection of the Union Pacific Lease promotes the purposes of section 365 by potentially relieving the estate of additional and unnecessary administrative expenses.

17. Courts in this jurisdiction have routinely approved relief similar to the relief requested herein.<sup>2</sup> *See, e.g., In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Apr. 23, 2009) (authorizing the rejection of leases and granting retroactive relief requested); *In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Apr. 14, 2009) (same); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009) (authorizing the rejection of certain leases retroactive to the date the motion was filed); *In re Leiner Health Prods., Inc.*, Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 4, 2008) (authorizing the rejection of leases retroactive to the date the motion was filed); *In re Buffets Holdings, Inc.*, Case No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008)

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<sup>2</sup> The Debtors have not annexed copies of the unreported orders cited herein because of their size. Copies of these orders, however, are available upon request of the Debtors' counsel, including at the hearing to consider the Motion.



(authorizing the rejection of leases retroactive to the petition date); *In re Pope & Talbot, Inc.*, Case No. 07-11738 (CSS) (Bankr. D. Del. Dec. 12, 2007) (authorizing the rejection of executory contracts retroactive to the petition date); *In re Am. Home Mortgage Holdings, Inc.*, Case No. 07-11047 (CSS) (Bankr. D. Del. Sept. 20, 2007) (authorizing the rejection of leases and granting retroactive relief requested).

**C. The Court should authorize the Debtors to abandon the Sheds pursuant to section 554 of the Bankruptcy Code**

18. Pursuant to section 554(a) of the Bankruptcy Code, the Debtors "may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Courts routinely permit Debtors to abandon property that is burdensome or of inconsequential value to the estate. *See, e.g., Hanover Ins. Co. v. Tyco Industries, Inc.*, 500 F.2d 654, 657 (3d Cir. 1974) ("[T]he Trustee may abandon his claim to any asset...he deems less valuable than the cost of...administering the property."); *In re Wilson*, 94 B.R. 886, 889 (Bankr. E.D. Va. 1989) ("[T]he only concern of the trustee in determining whether to abandon a claim is whether such action would be in the best interest of the estate.").

19. As noted above, the Sheds relate to a facility that the Debtors no longer need to operate their business and the cost to remove the Sheds exceeds their value. The Sheds are therefore of inconsequential value and are burdensome to the estate because if the Debtors are not permitted to abandon the Sheds, they will be forced to expend estate assets to remove them from the leased premises. Therefore, the Debtors request that the Court authorize them to abandon the Sheds.

### **REQUEST FOR WAIVER OF STAY**

20. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), any "order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." While the Debtors do not believe that Bankruptcy Rule 6004(h) applies to the relief requested in this motion, ample cause exists to waive any stay of the effectiveness of this order because the Debtors' estates may be liable to pay any postpetition obligations arising under the Union Pacific Lease as administrative expenses. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay possibly imposed by Bankruptcy Rule 6004(h).

### **NOTICE**

21. No trustee or examiner has been appointed in these Chapter 11 Cases. The United States Trustee formed the official committee of unsecured creditors ("the *Creditors' Committee*") on June 26, 2009. The Debtors have provided notice of filing of the 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 Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (c) the Creditors' Committee; (d) Union Pacific; and (e) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested, and in accordance with Local Rule 2002-1, the Debtors respectfully submit that no further notice of this Motion is required.

### **NO PRIOR REQUEST**

22. 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  
June 29, 2009

YOUNG CONAWAY STARGATT &  
TAYLOR, LLP



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---- and ----

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PROPOSED ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION

**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**

)  
) **Objection Deadline: July 22, 2009 at 4:00 p.m. (ET)**

) **Hearing Date: July 29, 2009 at 10:00 a.m. (ET)**

**NOTICE OF MOTION**

TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE; (II) COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS; (III) COUNSEL TO WELLS FARGO BANK, AS AGENT UNDER THE PREPETITION CREDIT FACILITY AND THE DIP FACILITY (AS DEFINED IN THE PLAN); (IV) UNION PACIFIC RAILROAD COMPANY; AND (V) ALL PARTIES ENTITLED TO NOTICE UNDER RULE 2002-1(b) OF THE LOCAL RULES OF BANKRUPTCY PRACTICE AND PROCEDURE FOR THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

**PLEASE TAKE NOTICE** that the above-captioned debtors and debtors in possession (collectively, the “Debtors”) have filed the attached **Debtors’ Motion for an Order Authorizing (A) Rejection of That Certain Lease With Union Pacific Railroad Company and (B) Abandonment of Certain Related Property, *Nunc Pro Tunc* to the Rejection Effective Date** (the “Motion”).

**PLEASE TAKE FURTHER NOTICE** that any objections to the Motion must be filed on or before **July 22, 2009 at 4:00 p.m. (ET)** (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the objection upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

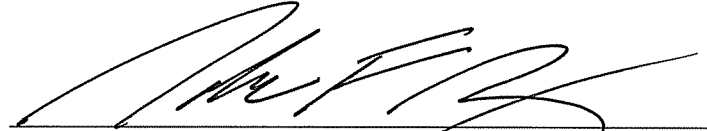
**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON JULY 29, 2009 AT 10:00 A.M. (ET) BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.**

<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.

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

Dated: Wilmington, Delaware  
June 29, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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PROPOSED ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION

# **EXHIBIT 1**

**Proposed Order**

**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

Ref. Docket No.

**ORDER AUTHORIZING THE DEBTORS TO (A) REJECT THAT CERTAIN LEASE WITH UNION PACIFIC RAILROAD COMPANY AND (B) ABANDON CERTAIN RELATED PROPERTY, *NUNC PRO TUNC* TO THE REJECTION EFFECTIVE DATE**

Upon consideration of the motion (the "***Motion***") of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***") for entry of an order authorizing the Debtors to (a) reject that certain lease by and between BMC West Corporation and Union Pacific Railroad Company, dated as of September 26, 2007 (the "***Union Pacific Lease***") for the use and occupancy of the premises identified located in Merced, California that are identified on Exhibit A which is attached to the Union Pacific Lease, and (b) abandon certain related property, as set forth in the Motion; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular

<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.

circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "**Hearing**"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Motion is granted as set forth below.
2. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors are authorized to reject the Union Pacific Lease, to the extent that the Union Pacific Lease may be determined at a later date to have been in effect as of the Petition Date.<sup>2</sup> Effective immediately, the Union Pacific Lease, to the extent that it remains in effect, is deemed rejected (the "**Rejection**"), with the Rejection being effective as of the Petition Date (the "**Rejection Effective Date**").
3. Notwithstanding the foregoing, nothing contained in this Order shall be deemed to be a finding that the Union Pacific Lease remained in effect as of the Petition Date.
4. Pursuant to section 554 of the Bankruptcy Code, the Debtors are authorized to abandon the Sheds.
5. Union Pacific Railroad Company shall have until the date fixed by this Court pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3) to file any claim for damages arising from the rejection of the Union Pacific Lease.
6. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

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



7. The Debtors do not waive any claims they may have against Union Pacific Railroad Company, whether or not such claims arise under, are related to the rejection of, or are independent of the Union Pacific Lease.

8. Nothing herein shall prejudice the rights of the Debtors to argue that any claim for damages arising from the rejection of the Union Pacific Lease is limited to the remedies available under any applicable termination provision of the Union Pacific Lease, or that any such claim is an obligation of a third party, and not that of the Debtors or their estates.

9. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rules 6006(c), 6007, and the Local Rules are satisfied by such notice.

10. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

11. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.

Date: Wilmington, Delaware  
July \_\_\_\_, 2009

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Kevin J. Carey  
Chief United States Bankruptcy Judge

# **EXHIBIT 2**

**Union Pacific Lease**

**LEASE OF PROPERTY**  
**(INDUSTRIAL LEASE - UNIMPROVED - YEAR TO YEAR)**

THIS LEASE ("Lease") is entered into on Sept 26<sup>th</sup>, 2007, between UNION PACIFIC RAILROAD COMPANY ("Lessor") and BMC WEST, a Delaware corporation, whose address is P O Box 70006, Boise, Idaho 83707 ("Lessee").

**IT IS AGREED BETWEEN THE PARTIES AS FOLLOWS:**

**Article 1.     PREMISES; USE.**

Lessor leases to Lessee and Lessee leases from Lessor the premises ("Premises") at Merced, California, shown on the print dated November 26, 2001, marked **Exhibit A**, hereto attached and made a part hereof, subject to the provisions of this Lease and of **Exhibit B** attached hereto and made a part hereof. The Premises may be used for lumber yard operations, and purposes incidental thereto, only, and for no other purpose.

**Article 2.     TERM.**

The term of this Lease shall commence December 1, 2007, and, unless sooner terminated as provided in this Lease, shall extend for one year and thereafter shall automatically be extended from year to year.

**Article 3.     FIXED RENT.**

A. Lessee shall pay to Lessor, in advance, fixed rent of Thirty Eight Thousand Three Hundred Dollars (\$38,300.00) annually. The rent shall be automatically increased by Three percent (3%) per annum, cumulative and compounded.

B. Not more than once every three (3) years, Lessor may redetermine the fixed rent. If Lessor redetermines the rent, Lessor shall notify Lessee of such change.

**Article 4.     INSURANCE.**

A. Before commencement of the term of this Lease, Lessee shall provide to Lessor a certificate issued by its insurance carrier evidencing the insurance coverage required under **Exhibit C** hereto attached and made a part hereof.

B. Not more frequently than once every two years, Lessor may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

C. All insurance correspondence, certificates and endorsements shall be directed to: Real Estate Department, 1400 Douglas Street STOP 1690, Omaha, Nebraska 68179-1690, Folder No. 01978-66.

**Article 5. SPECIAL PROVISION – CANCELLATION.**

Effective upon commencement of the term of this Lease, the Lease dated 5/4/2001, identified as Audit No. 220527 (the 'Prior Lease'), together with any and all supplements and amendments, is canceled and superseded by this Lease, except for any rights, obligations or liabilities arising under the Prior Lease before cancellation, including any consent to conditional assignment, chattel agreement, or consent to sublease. The security deposit provision or rental payment, if any, contained in the Prior Lease, will survive the cancellation of the Prior Lease and be made a part of this Lease.

IN WITNESS WHEREOF, the parties have executed this Lease as of the day and year first herein written.


Lessor:  
**UNION PACIFIC RAILROAD COMPANY**

Lessee:  
**BMC WEST**

By: \_\_\_\_\_

  
Director - Real Estate

By: \_\_\_\_\_

  
Title: SUP + GM Canceled

NOTE: Cancels and supersedes Lease dated 5/4/2001, effective 12/1/2000, Audit No. 220527, Folder 1978-66.



**EXHIBIT B**  
**TO**  
**INDUSTRIAL LEASE (UNIMPROVED YEAR TO YEAR)**

**Section 1.     IMPROVEMENTS.**

No improvements placed upon the Premises by Lessee shall become a part of the realty.

**Section 2.     RESERVATIONS, TITLE AND PRIOR RIGHTS.**

A.     Lessor reserves to itself, its agents and contractors, the right to enter the Premises at such times as will not unreasonably interfere with Lessee's use of the Premises.

B.     Lessor reserves (i) the exclusive right to permit third party placement of advertising signs on the Premises, and (ii) the right to construct, maintain and operate new and existing facilities (including, without limitation, trackage, fences, communication facilities, roadways and utilities) upon, over, across or under the Premises, and to grant to others such rights, provided that Lessee's use of the Premises is not interfered with unreasonably.

C.     Lessee acknowledges that Lessor makes no representations or warranties, express or implied, concerning the title to the Premises, and that the rights granted to Lessee under this Lease do not extend beyond such right, title or interest as Lessor may have in and to the Premises. Without limitation of the foregoing, this Lease is made subject to all outstanding rights, whether or not of record. Lessor reserves the right to renew any such outstanding rights granted by Lessor or Lessor's predecessors.

D.     Without limitation of Subparagraphs B. and C. above, Lessee shall not interfere in any manner with the use or operation of any signboards now or hereafter placed on the Premises or with any property uses in connection with such signboards (such as, by way of example and not in limitation, roadways providing access to such signboards). In no event may Lessee construct on the Premises any improvements that interfere in any manner with the visibility or operation of any signboards now or hereafter on the Premises or on property in proximity to the Premises.

**Section 3.     PAYMENT OF RENT.**

Rent (which includes the fixed advance rent and all other amounts to be paid by Lessee under this Lease) shall be paid in lawful money of the United States of America, at such place as shall be designated by the Lessor, and without offset or deduction.

**Section 4.     TAXES AND ASSESSMENTS.**

A.     Lessee shall pay, prior to delinquency, all taxes levied during the life of this Lease on all personal property and improvements on the Premises not belonging to Lessor. If such taxes are paid by Lessor, either separately or as a part of the levy on Lessor's real property, Lessee shall reimburse Lessor in full within thirty (30) days after rendition of Lessor's bill.

B.     If the Premises are specially assessed for public improvements, the annual rent will be automatically increased by 12% of the full assessment amount.

**Section 5.     WATER RIGHTS.**

This Lease does not include any right to the use of water under any water right of Lessor, or to establish any water rights except in the name of Lessor.

**Section 6.     CARE AND USE OF PREMISES.**

A.     Lessee shall use reasonable care and caution against damage or destruction to the Premises. Lessee shall not use or permit the use of the Premises for any unlawful purpose, maintain any nuisance, permit any waste, or use the Premises in any way that creates a hazard to persons or property. Lessee shall keep the sidewalks and public ways on the Premises, and the walkways appurtenant to any railroad spur track(s) on or serving the Premises, free and clear from any substance which might create a hazard.

B.     Lessee shall not permit any sign on the Premises, except signs relating to Lessee's business.

C.     If any improvement on the Premises other than the Lessor Improvements is damaged or destroyed by fire or other casualty, Lessee shall, within thirty (30) days after such casualty, remove all debris resulting therefrom. If Lessee fails to do so, Lessor may remove such debris, and Lessee agrees to reimburse Lessor for all expenses incurred within thirty (30) days after rendition of Lessor's bill.

D.     Lessee shall comply with all governmental laws, ordinances, rules, regulations and orders relating to Lessee's use of the Premises and this Lease, including, without limitation, any requirements for subdividing or platting the Premises.

**Section 7.     HAZARDOUS MATERIALS, SUBSTANCES AND WASTES.**

A.     Without the prior written consent of Lessor, Lessee shall not use or permit the use of the Premises for the generation, use, treatment, manufacture, production, storage or recycling of any Hazardous Substances, except that Lessee may use, if lawful, small quantities of common chemicals such as adhesives, lubricants and cleaning fluids in order to conduct business at the Premises. The consent of Lessor may be withheld by Lessor for any reason whatsoever, and may be subject to conditions in addition to those set forth below. It shall be the sole responsibility of Lessee to determine whether or not a contemplated use of the Premises is a Hazardous Substance use.

B.     In no event shall Lessee (i) release, discharge or dispose of any Hazardous Substances, (ii) bring any hazardous wastes as defined in RCRA onto the Premises, (iii) install or use on the Premises any underground storage tanks, or (iv) store any Hazardous Substances within one hundred feet (100') of the center line of any main track.

C.     If Lessee uses or permits the use of the Premises for a Hazardous Substance use, with or without Lessor's consent, Lessee shall furnish to Lessor copies of all permits, identification numbers and notices issued by governmental agencies in connection with such Hazardous Substance use, together with such other information on the Hazardous Substance use as may be requested by Lessor. If requested by Lessor, Lessee shall cause to be performed an environmental assessment of the Premises upon termination of the Lease and shall furnish Lessor a copy of such report, at Lessee's sole cost and expense.

D.     Without limitation of the provisions of Section 12 of this Exhibit B, Lessee shall be responsible for all damages, losses, costs, expenses, claims, fines and penalties related in any manner to any Hazardous Substance use of the Premises (or any property in proximity to the Premises) during the

term of this Lease or, if longer, during Lessee's occupancy of the Premises, regardless of Lessor's consent to such use or any negligence, misconduct or strict liability of any Indemnified Party (as defined in Section 12), and including, without limitation, (i) any diminution in the value of the Premises and/or any adjacent property of any of the Indemnified Parties, and (ii) the cost and expense of clean-up, restoration, containment, remediation, decontamination, removal, investigation, monitoring, closure or post-closure. Notwithstanding the foregoing, Lessee shall not be responsible for Hazardous Substances (i) existing on, in or under the Premises prior to the earlier to occur of the commencement of the term of the Lease or Lessee's taking occupancy of the Premises, or (ii) migrating from adjacent property not controlled by Lessee, or (iii) placed on, in or under the Premises by any of the Indemnified Parties; except where the Hazardous Substance is discovered by, or the contamination is exacerbated by, any excavation or investigation undertaken by or at the behest of Lessee. Lessee shall have the burden of proving by a preponderance of the evidence that any of the foregoing exceptions to Lessee's responsibility for Hazardous Substances applies.

E. In addition to the other rights and remedies of Lessor under this Lease or as may be provided by law, if Lessor reasonably determines that the Premises may have been used during the term of this Lease or any prior lease with Lessee for all or any portion of the Premises, or are being used for any Hazardous Substance use, with or without Lessor's consent thereto, and that a release or other contamination may have occurred, Lessor may, at its election and at any time during the life of this Lease or thereafter (i) cause the Premises and/or any adjacent premises of Lessor to be tested, investigated, or monitored for the presence of any Hazardous Substance, (ii) cause any Hazardous Substance to be removed from the Premises and any adjacent lands of Lessor, (iii) cause to be performed any restoration of the Premises and any adjacent lands of Lessor, and (iv) cause to be performed any remediation of, or response to, the environmental condition of the Premises and the adjacent lands of Lessor, as Lessor reasonably may deem necessary or desirable, and the cost and expense thereof shall be reimbursed by Lessee to Lessor within thirty (30) days after rendition of Lessor's bill. In addition, Lessor may, at its election, require Lessee, at Lessee's sole cost and expense, to perform such work, in which event, Lessee shall promptly commence to perform and thereafter diligently prosecute to completion such work, using one or more contractors and a supervising consulting engineer approved in advance by Lessor.

F. For purposes of this Section 7, the term "Hazardous Substance" shall mean (i) those substances included within the definitions of "hazardous substance", "pollutant", "contaminant", or "hazardous waste", in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601, et seq., as amended or in RCRA, the regulations promulgated pursuant to either such Act, or state laws and regulations similar to or promulgated pursuant to either such Act, (ii) any material, waste or substance which is (A) petroleum, (B) asbestos, (C) flammable or explosive, or (D) radioactive; and (iii) such other substances, materials and wastes which are or become regulated or classified as hazardous or toxic under any existing or future federal, state or local law.

#### **Section 8. UTILITIES.**

A. Lessee will arrange and pay for all utilities and services supplied to the Premises or to Lessee.

B. All utilities and services will be separately metered to Lessee. If not separately metered, Lessee shall pay its proportionate share as reasonably determined by Lessor.

#### **Section 9. LIENS.**

Lessee shall not allow any liens to attach to the Premises for any services, labor or materials furnished to the Premises or otherwise arising from Lessee's use of the Premises. Lessor shall have the right to discharge any such liens at Lessee's expense.



**Section 10. ALTERATIONS AND IMPROVEMENTS; CLEARANCES.**

A. No alterations, improvements or installations may be made on the Premises without the prior consent of Lessor. Such consent, if given, shall be subject to the needs and requirements of the Lessor in the operation of its Railroad and to such other conditions as Lessor determines to impose. In all events such consent shall be conditioned upon strict conformance with all applicable governmental requirements and Lessor's then-current clearance standards.

B. All alterations, improvements or installations shall be at Lessee's sole cost and expense.

C. Lessee shall comply with Lessor's then-current clearance standards, except (i) where to do so would cause Lessee to violate an applicable governmental requirement, or (ii) for any improvement or device in place prior to Lessee taking possession of the Premises if such improvement or device complied with Lessor's clearance standards at the time of its installation.

D. Any actual or implied knowledge of Lessor of a violation of the clearance requirements of this Lease or of any governmental requirements shall not relieve Lessee of the obligation to comply with such requirements, nor shall any consent of Lessor be deemed to be a representation of such compliance.

**Section 11. AS-IS.**

Lessee accepts the Premises in its present condition with all faults, whether patent or latent, and without warranties or covenants, express or implied. Lessee acknowledges that Lessor shall have no duty to maintain, repair or improve the Premises.

**Section 12. RELEASE AND INDEMNITY.**

A. As a material part of the consideration for this Lease, Lessee, to the extent it may lawfully do so, waives and releases any and all claims against Lessor for, and agrees to indemnify, defend and hold harmless Lessor, its affiliates, and its and their officers, agents and employees ("Indemnified Parties") from and against, any loss, damage (including, without limitation, punitive or consequential damages), injury, liability, claim, demand, cost or expense (including, without limitation, attorneys' fees and court costs), fine or penalty (collectively, "Loss") incurred by any person (including, without limitation, Lessor, Lessee, or any employee of Lessor or Lessee) (i) for personal injury or property damage caused to any person while on or about the Premises, or (ii) arising from or related to any use of the Premises by Lessee or any invitee or licensee of Lessee, any act or omission of Lessee, its officers, agents, employees, licensees or invitees, or any breach of this Lease by Lessee.

B. The foregoing release and indemnity shall apply regardless of any negligence, misconduct or strict liability of any Indemnified Party, except that the indemnity, only, shall not apply to any Loss determined by final order of a court of competent jurisdiction to have been caused by the sole active direct negligence of any Indemnified Party.

C. Where applicable to the Loss, the liability provisions of any contract between Lessor and Lessee covering the carriage of shipments or trackage serving the Premises shall govern the Loss and shall supersede the provisions of this Section 12.

D. No provision of this Lease with respect to insurance shall limit the extent of the release and indemnity provisions of this Section 12.

**Section 13. TERMINATION.**

A. Lessor may terminate this Lease for Lessee's default by giving Lessee notice of termination, if Lessee (i) defaults under any obligation of Lessee under this Lease and, after written notice is given by Lessor to Lessee specifying the default, Lessee fails either to immediately commence to cure the default, or to complete the cure expeditiously but in all events within thirty (30) days after the default notice is given, or (ii) Lessee abandons the Premises for a period of one hundred twenty (120) consecutive days.

B. Notwithstanding the terms of this Lease set forth in Article II, Lessor or Lessee may terminate this Lease without cause upon thirty (30) days' notice to the other party; provided, however, that at Lessor's election, no such termination by Lessee shall be effective unless and until Lessee has vacated and restored the Premises as required in Section 15A, at which time Lessor shall refund to Lessee, on a pro rata basis, any unearned rental paid in advance.

**Section 14. LESSOR'S REMEDIES.**

Lessor's remedies for Lessee's default are to (a) enter and take possession of the Premises, without terminating this Lease, and relet the Premises on behalf of Lessee, collect and receive the rent from reletting, and charge Lessee for the cost of reletting, and/or (b) terminate this Lease as provided in Section 13 above and sue Lessee for damages, and/or (c) exercise such other remedies as Lessor may have at law or in equity. Lessor may enter and take possession of the Premises by self-help, by changing locks, if necessary, and may lock out Lessee, all without being liable for damages.

**Section 15. VACATION OF PREMISES; REMOVAL OF LESSEE'S PROPERTY.**

A. Upon termination howsoever of this Lease, Lessee (i) shall have peaceably and quietly vacated and surrendered possession of the Premises to Lessor, without Lessor giving any notice to quit or demand for possession, and (ii) shall have removed from the Premises all structures, property and other materials not belonging to Lessor, and restored the surface to as good a condition as the same was in before such structures were erected, including, without limitation, the removal of foundations, the filling in of excavations and pits, and the removal of debris and rubbish.

B. If Lessee has not completed such removal and restoration within thirty (30) days after termination of this Lease, Lessor may, at its election, and at any time or times, (i) perform the work and Lessee shall reimburse Lessor for the cost thereof within thirty (30) days after bill is rendered, (ii) take title to all or any portion of such structures or property by giving notice of such election to Lessee, and/or (iii) treat Lessee as a holdover tenant at will until such removal and restoration is completed.

**Section 16. FIBER OPTICS.**

Lessee shall telephone Lessor during normal business hours (7:00 a.m. to 9:00 p.m., Central Time, Monday through Fridays, except for holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried on the Premises. Lessor may change the telephone number and hours of operation by giving Lessee notice of the change. If cable is buried on the Premises, Lessee will telephone the telecommunications company(ies), arrange for a cable locator, and make arrangements for relocation or other protection of the cable. Notwithstanding compliance by Lessee with this Section 16, the release and indemnity provisions of Section 12 above shall apply fully to any damage or destruction of any telecommunications system.

**Section 17. NOTICES.**

Any notice, consent or approval to be given under this Lease shall be in writing, and personally served, sent by reputable courier service, or sent by certified mail, postage prepaid, return receipt requested, to Lessor at: Union Pacific Railroad Company, Attn: General Manager - Real Estate, Real Estate Department, 1400 Douglas Street, Stop 1690, Omaha, Nebraska 68179; and to Lessee at the above address, or such other address as a party may designate in notice given to the other party. Mailed notices shall be deemed served five (5) days after deposit in the U.S. Mail. Notices which are personally served or sent by courier service shall be deemed served upon receipt.

**Section 18. ASSIGNMENT.**

A. Lessee may sublease the Premises or assign this Lease, by operation of law or otherwise, only if Lessee provides Lessor with advance notice of the assignment or sublease and the subtenant's or assignee's written agreement for the benefit of Lessor to be bound by the terms of this Lease. No subletting or assignment shall relieve Lessee of its obligations under this Lease. Any assignment or sublease by Lessee in violation of this Paragraph A shall be void and ineffective and shall, at the option of Lessor, result in an immediate termination of this Lease.

B. Subject to this Section 18, this Lease shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

**Section 19. CONDEMNATION.**

If, as reasonably determined by Lessor, the Premises cannot be used by Lessee because of a condemnation or sale in lieu of condemnation, then this Lease shall automatically terminate. Lessor shall be entitled to the entire award or proceeds for any total or partial condemnation or sale in lieu thereof, including, without limitation, any award or proceeds for the value of the leasehold estate created by this Lease. Notwithstanding the foregoing, Lessee shall have the right to pursue recovery from the condemning authority of such compensation as may be separately awarded to Lessee for Lessee's relocation expenses, the taking of Lessee's personal property and fixtures, and the interruption of or damage to Lessee's business.

**Section 20. ATTORNEY'S FEES.**

If either party retains an attorney to enforce this Lease (including, without limitation, the indemnity provisions of this Lease), the prevailing party is entitled to recover reasonable attorney's fees.

**Section 21. RIGHTS AND OBLIGATIONS OF LESSOR.**

If any of the rights and obligations of Lessor under this Lease are substantially and negatively affected by any changes in the laws applicable to this Lease, whether statutory, regulatory or under federal or state judicial precedent, then Lessor may require Lessee to enter into an amendment to this Lease to eliminate the negative effect on Lessor's rights and obligations to the extent reasonably possible.

**Section 22. ENTIRE AGREEMENT.**

This Lease is the entire agreement between the parties, and supersedes all other oral or written agreements between the parties pertaining to this transaction, including, without limitation, Lease Audit No. 220527 dated May 4, 2001, and any other lease under which all or any portion of the Premises was leased to Lessee. Notwithstanding the prior sentence, Lessee shall retain any and all obligations and

liabilities which may have accrued under any other such agreements prior to the commencement of the term of this Lease. This Lease may be amended only by a written instrument signed by Lessor and Lessee.

**EXHIBIT C**  
**Union Pacific Railroad**  
**Contract Insurance Requirements**

Lease of Land

Lessee shall, at its sole cost and expense, procure and maintain during the life of this Lease (except as otherwise provided in this Lease) the following insurance coverage:

A. **Commercial General Liability** insurance. Commercial general liability (CGL) with a limit of not less than \$2,000,000 each occurrence and an aggregate limit of not less than \$4,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage). The policy must also contain the following endorsement, which must be stated on the certificate of insurance: Contractual Liability Railroads ISO form CG 24 17 10 01 (or a substitute form providing equivalent coverage) showing "Premises" as the Designated Job Site.

B. **Business Automobile Coverage** insurance. Business auto coverage written on ISO form CA 00 01 10 01 (or a substitute form providing equivalent liability coverage) with a combined single limit of not less \$2,000,000 for each accident, and coverage must include liability arising out of any auto (including owned, hired, and non-owned autos).

The policy must contain the following endorsements, which must be stated on the certificate of insurance:

- Coverage For Certain Operations In Connection With Railroads ISO form CA 20 70 10 01 (or a substitute form providing equivalent coverage) showing "Premises" as the Designated Job Site.
- Motor Carrier Act Endorsement - Hazardous materials clean up (MCS-90) if required by law.

C. **Workers Compensation and Employers Liability** insurance. Coverage must include but not be limited to:

- Contractor's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement.
- Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 disease policy limit \$500,000 each employee.

If Lessee is self-insured, evidence of state approval and excess workers compensation coverage must be provided. Coverage must include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

In any and all Claims against Lessor by any employee of Lessee, Lessee's indemnification obligation under this section shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable under any workers compensation acts, disability benefits acts or other employee benefits acts.

D. **Pollution Liability** insurance. If permitted use as defined in this Lease includes any generation, handling, enrichment, storage, manufacture, or production of hazardous materials pollution liability insurance is required. Pollution liability coverage must be written on ISO form Pollution Liability Coverage Form Designated Sites CG 00 39 12 04 (or a substitute form providing equivalent liability coverage), with limits of at least \$5,000,000 per occurrence and an aggregate limit of \$10,000,000.

If hazardous materials are disposed of from the Premises, Lessee must furnish to Lessor evidence of pollution legal liability insurance maintained by the disposal site operator for losses arising from the insured facility accepting the materials, with coverage in minimum amounts of \$1,000,000 per loss, and an annual aggregate of \$2,000,000.

E. Umbrella or Excess insurance. If Lessee utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.

#### **Other Requirements**

F. All policy(ies) required above must include Lessor as "Additional Insured" using ISO Additional Insured Endorsement CG 20 11 (or a substitute form providing equivalent coverage). The coverage provided to Lessor as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 11, provide coverage for Lessor's negligence whether sole or partial, active or passive, and shall not be limited by Lessee's liability under the indemnity provisions of this Lease.

G. Lessee waives all rights against Lessor and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the workers compensation and employers' liability or commercial umbrella or excess liability insurance obtained by Lessee required by this agreement.

H. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless (a) insurance coverage may not lawfully be obtained for any punitive damages that may arise under this Lease, or (b) all punitive damages are prohibited by all states in which the Premises are located.

I. Prior to execution of this Lease, Lessee shall furnish Lessor with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Lease.

J. All insurance policies must be written by a reputable insurance company acceptable to Lessor or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state where the Premises are located.

K. The fact that insurance is obtained by Lessee, or by Lessor on behalf of Lessee, will not be deemed to release or diminish the liability of Lessee, including, without limitation, liability under the indemnity provisions of this Lease. Damages recoverable by Lessor from Lessee or any third party will not be limited by the amount of the required insurance coverage.