

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	
	)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i> , ¹	)	Case No. 09-12074 (KJC)
)	
Debtors.	)	Jointly Administered
)	
	)	Objection Deadline: December 29, 2009 at 4:00 p.m. (ET)
	)	Hearing Date: January 5, 2010 at 11:00 a.m. (ET)

DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 363(b) AND 365(a) OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS (I) TO AMEND THE LICENSING AGREEMENT WITH MICROSOFT LICENSING, GP AND TO ASSUME THE LICENSING AGREEMENT, AS AMENDED; AND (II) TO REJECT THE FINANCING AGREEMENT WITH CIT TECHNOLOGY FINANCING SERVICES, INC.

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*"), submit this Motion (the "*Motion*"), pursuant to sections 363(b) and 365(a) of title 11 of the United States Code (the "*Bankruptcy Code*") for entry of an order substantially in the form annexed hereto as *Exhibit A* authorizing the Debtors (i) to amend the Licensing Agreement (as defined herein) and to assume the Licensing Agreement, as amended; and (ii) to reject the related Financing Agreement (as defined herein). In support thereof, the Debtors respectfully represent:

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

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.

BACKGROUND

2. 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. 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*").

3. 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.

4. 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.

5. On the Petition Date, the Debtors filed their proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"). The Debtors filed several amended versions of the Plan and Disclosure Statement since that time. The Court approved the Disclosure Statement by order entered on October 22, 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.

THE LICENSING AGREEMENT

6. Prior to the Petition Date, the Debtors entered into that certain Enterprise Agreement (the "**Licensing Agreement**") by and between Microsoft Licensing, GP (together with its affiliates, "**Microsoft**") and Debtor Building Materials Holding Corporation (together with Microsoft, the "**Parties**") with an effective date of October 1, 2007. Pursuant to the Licensing Agreement, the Debtors are licensed to use certain specified Microsoft products (the "**Software**") for a period of three years. The total contract price for the Licensing Agreement is \$1,781,978.61.

7. The Licensing Agreement currently authorizes the Debtors to use the Software on 3,786 computers. As a result of the downturn in the Debtors' business, the Debtors no longer need authorization to use the Software on this many computers. Accordingly, the

Debtors have renegotiated the Licensing Agreement to reduce the number of authorized computers to 2,100. To facilitate this transaction, the Parties have agreed to an amendment of the Licensing Agreement (the "*Amendment*") whereby the total contract price will be reduced to approximately \$1,629,000 and the Debtors' remaining obligations on account of the Licensing Agreement will be reduced from \$600,392.58 to approximately \$448,000. The Debtors will pay this amount directly to Microsoft upon execution of the Amendment.

THE FINANCING AGREEMENT

8. The Debtors' obligations to make payments under the Licensing Agreement were financed through an agreement (the "*Financing Agreement*") with CIT Technology Financing Services, Inc. ("*CIT*"). Pursuant to the Financing Agreement, the Debtors are obligated to make semi-annual payments of \$300,196.29. There are two payments totaling \$600,392.58 remaining to be paid under the Financing Agreement.² It is the Debtors' understanding that CIT has not advanced to Microsoft the final annual installment of \$593,992.87 that is due with respect to the Licensing Agreement. Because CIT has not advanced the remaining amounts owed by the Debtors to Microsoft and because CIT has not agreed to a modification of the Financing Agreement, the Debtors are seeking to reject the Financing Agreement. The Debtors believe that the resulting damages should be limited to the profits that CIT will lose as a result of the rejection.

² One of these payments is overdue because the due date for the payment was November 1, 2009.

BASIS FOR RELIEF REQUESTED

I. The Debtors' Amendment of the Licensing Agreement Should Be Approved Pursuant to Section 363(b) of the Bankruptcy Code

9. Section 363(b)(1) of the Bankruptcy Code permits a debtor-in-possession to use property of the estate "other than in the ordinary course of business" after notice and a hearing. 11 U.S.C. § 363(b)(1). Uses of estate property outside the ordinary course of business may be authorized if the debtor demonstrates a "sound business purpose." *See In re Lionel Corp.*, 722 F. 2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a 363(b) application expressly find from the evidence presented before him...a good business reason to grant such an application."); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtor to show that a sound business purpose justifies such actions.").

10. Once the debtor articulates a business justification for a particular form of relief, courts review the debtor's request under the "business judgment rule." *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee's judgment concerning use of property under Bankruptcy Code section 363(b) when there is a legitimate business justification). The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van*

Gorkom, 488 A.2d 858, 872 (Del. 1985)); *see also In re Helm*, 335 B.R. 528, 539 (Bankr. S.D.N.Y. 2006) ("The business judgment rule requires the Court to determine whether a reasonable business person would make a similar decision under similar circumstances.") (quoting *In re Vencor, Inc.*, Case No. 99-3199, 2003 Bankr. LEXIS 659, 2003 WL 21026737 at *3 (Bankr. D. Del. Apr. 30, 2003)).

11. The Licensing Agreement, as amended, is at a market rate and provides the Debtors with access to an appropriate amount of Software to operate their business. By agreeing to the Amendment, the Debtors have been able to reduce their obligations under the Licensing Agreement by approximately \$153,000. Because the Amendment will benefit the Debtors' estates by reducing the Debtors' obligations while providing the Debtors with ample Software to operate their business, and because the Debtors will not suffer any harm from entering into the transaction, the Debtors' Amendment of the Licensing Agreement is accordingly an exercise of sound business judgment.

II. The Debtors Should Be Authorized to Assume the Licensing Agreement, As Amended, and to Reject the Financing Agreement

12. 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). The purpose of section 365(a) is to allow a trustee to maximize the value of the debtor's estate by assuming executory contracts that benefit the estate and rejecting those that do not. *See, e.g., In re Fleming Companies, Inc.*, 499 F.3d 300, 304 (3d Cir. 2007) (noting that section 365(a) allows "the trustee to maximize the value of the debtor's estate by assuming executory contracts . . . that benefit the estate and rejecting those that do not.") (internal citations and quotations omitted); *Dye v. Sandman Assocs.*,

L.L.C. (In re Sandman Assocs., L.L.C.), 251 B.R. 473, 481 (W.D. Va. 2000) ("The authority granted by section 365 allows the trustee or debtor in possession to pick and choose among contracts, assuming those that are favorable, and rejecting those that are not.").

13. A debtor's decision to assume or reject an unexpired lease or executory contract is subject to court review under the "business judgment" standard, which is satisfied when a debtor shows that assumption would be beneficial to its estate and reflects a reasonable exercise of business judgment. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing the business judgment test as the "traditional" test); *Sharon Steel Corp. v. Nat'l Fuel Gas Dist. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (same); *In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) ("The decision to assume or reject an executory contract is within the sound business judgment of the debtor-in-possession...."); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994) ("In determining whether a debtor may be permitted to reject an executory contract, courts usually apply the business judgment test. Generally, absent a showing of bad faith, or an abuse of business discretion, the debtor's business judgment will not be altered.") (internal citations omitted); *In re III Enters., Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) ("Generally, a court will give great deference to a debtor's decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment—a standard which [the courts] have concluded many times is not difficult to meet."). Accordingly, courts approve the assumption or rejection of an executory contract or unexpired lease unless evidence is presented that the debtor's decision to assume or reject "is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." *In re Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985).

14. For the same reasons articulated herein that the Debtors' decision to amend the Licensing Agreement is a sound exercise of their business judgment, the Debtors' decision to assume the Licensing Agreement, as amended, is a sound exercise of their business judgment. Assumption of the Licensing Agreement, as amended, will allow the Debtors to continue using the Software on the computers they are currently operating and will reduce the amount the Debtors are required to pay on account of this usage.

15. Similarly, the Debtors' decision to reject the Financing Agreement is a sound exercise of their business judgment. By rejecting the Financing Agreement in conjunction with assuming the Licensing Agreement, the Debtors will be able to reduce the total outlay required to continue using the Software. Absent the Debtors' rejection of the Financing Agreement and amendment of the Licensing Agreement, CIT would have been obligated to advance \$593,992.87 to Microsoft on the Debtors' behalf. Because CIT will be relieved of its obligations to pay Microsoft as a result of the rejection, the Debtors believe that CIT's damages should be limited to its lost profits of \$6,399.71 (i.e., the difference in the amount CIT would have been entitled to receive from the Debtors and the amount it would have been required to advance to Microsoft on the Debtors' behalf).

16. In light of the foregoing, the Debtors respectfully submit that their amendment of the Licensing Agreement is an appropriate exercise of the Debtors' business judgment; is necessary and in the best interest of the Debtors, their creditors, and their estates; should be approved under section 363(b) of the Bankruptcy Code; and the Debtors should be authorized to assume the Licensing Agreement, as amended, and to reject the Financing Agreement, under section 365 of the Bankruptcy Code.

NOTICE

17. 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) Microsoft; (e) CIT; and (f) 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 the Debtors respectfully submit that no further notice of this Motion is required.

NO PRIOR REQUEST

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

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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 16, 2009

YOUNG CONAWAY STARGATT &
TAYLOR, LLP



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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.,¹	)	Case No. 09-12074 (KJC)
)	
Debtors.	)	Jointly Administered
)	
	)	Objection Deadline: December 29, 2009 at 4:00 p.m. (ET)
	)	Hearing Date: January 5, 2010 at 11:00 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) Microsoft; (E) CIT; and (F) 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 363(b) and 365(a) of the Bankruptcy Code Authorizing the Debtors (I) to Amend the Licensing Agreement With Microsoft Licensing, GP and to Assume the Licensing Agreement, as Amended; and (II) to Reject the Financing Agreement With CIT Technology Financing Services, Inc. (the “Motion”).**

PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be filed on or before **December 29, 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.

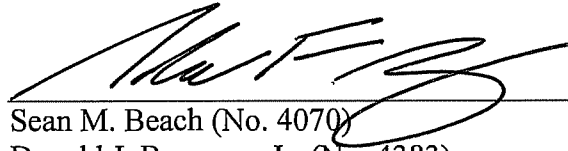
PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON JANUARY 5, 2010 AT 11:00 A.M. (ET) BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

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

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 a hearing.

Dated: Wilmington, Delaware
December 16, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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ATTORNEYS FOR DEBTORS
AND DEBTORS IN POSSESSION

EXHIBIT A
Proposed Order

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

IN RE: BUILDING MATERIALS HOLDING CORPORATION, et al.,¹ <p style="text-align: center;">Debtors.</p>))))))))))	Chapter 11 Case No. 09-12074 (KJC) Jointly Administered Ref. Docket No. _____
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ORDER PURSUANT TO SECTIONS 363(b) AND 365(a) OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS (I) TO AMEND THE LICENSING AGREEMENT WITH MICROSOFT LICENSING, GP AND TO ASSUME THE LICENSING AGREEMENT, AS AMENDED; AND (II) TO REJECT THE FINANCING AGREEMENT WITH CIT TECHNOLOGY FINANCING SERVICES

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 (i) to amend the Licensing Agreement² and to assume the Licensing Agreement, as amended; and (ii) to reject the related Financing Agreement, all 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

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

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

opportunity for a hearing on the Motion was appropriate under the particular 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 363(b) of title 11 of the United States Code (the "*Bankruptcy Code*"), the Debtors are authorized to enter into the Amendment to the Licensing Agreement and are authorized and empowered to take any and all steps and to perform such other and further actions as are necessary to carry out, effectuate, or otherwise enforce the terms, conditions, and provisions of the Amendment.
3. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors are authorized to assume the Licensing Agreement, as amended by the Amendment.
4. The Debtors have no cure obligations in connection with the assumption of the Licensing Agreement, as amended by the Amendment, and Microsoft is hereby barred, enjoined, and prohibited from asserting any additional amounts on account of the Debtors' cure obligations under section 365 of the Bankruptcy Code or otherwise from the Debtors or their estates with respect to the Licensing Agreement.
5. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors are authorized to reject the Financing Agreement, and the Financing Agreement is deemed rejected effective as of the date of entry of this Order.

6. In accordance with that certain *Order Pursuant to Sections 501, 502, and 1111(a) of the Bankruptcy Code, Bankruptcy Rules 2002 and 3003(c)(3), and Local Rule 2002-1(e) Establishing Bar Dates for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* [Docket No. 248], any claim for damages allegedly arising from the rejection of the Financing Agreement (a "**Rejection Damages Claim**") must be filed on or before the date which is thirty (30) days from the entry of this Order (the "**Rejection Bar Date**"). Any holder of a Rejection Damages Claim which fails to timely file a proof of such claim on or before the Rejection Bar Date shall not be treated as a creditor for purposes of receiving any distributions under the Plan.

7. The Debtors do not waive any claims they may have against CIT, whether or not such claims arise under, are related to the rejection of, or are independent of the Financing Agreement.

8. Nothing herein shall prejudice the rights of the Debtors to argue that any Rejection Damages Claim is limited by applicable nonbankruptcy law or to the remedies available under any applicable termination provision of such Financing Agreement, or that any such claim is an obligation of a third party, and not that of the Debtors or their estates.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

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

11. To the extent Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

12. The Court shall retain jurisdiction over any and all matters arising from or related to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware
January __, 2009

Kevin J. Carey
Chief United States Bankruptcy Judge