

**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

**OBJECTION OF THIRD AVENUE SPECIAL SITUATIONS (MASTER) FUND, L.P.  
AND GRACE BAY HOLDINGS, II, LLC TO (I) CONFIRMATION OF  
THE JOINT PLAN OF REORGANIZATION FOR THE DEBTORS UNDER  
CHAPTER 11 OF THE BANKRUPTCY CODE AMENDED DECEMBER 14, 2009  
(WITH TECHNICAL MODIFICATIONS) AND (II) THE DEBTORS' MOTION  
FOR AN ORDER PURSUANT TO SECTION 363(B) OF THE BANKRUPTCY  
CODE AND BANKRUPTCY RULE 6004 AUTHORIZING THE REIMBURSEMENT  
OF CERTAIN EXPENSES AND CERTAIN INDEMNITY AGREEMENTS**

Third Avenue Special Situations (Master) Fund, L.P. (“**Third Avenue**”) and Grace Bay Holdings, II, LLC, (“**Grace Bay**”) by and through their undersigned counsel, hereby object (the “**Objection**”) to (i) confirmation of the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications) (the “**Amended Plan**”) and (ii) the Debtors’ Motion for an Order Pursuant to Section 365(b) of the Bankruptcy Code and Bankruptcy Rule 6004 Authorizing the Reimbursement of Certain Expenses and Certain Indemnity Agreements [Docket No. 1139] (the “**Motion**”), and in support of this Objection, respectfully state as follows.

**Background**

1. On June 16, 2009 (the “**Petition Date**”), each of the above-captioned Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. 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.

2. Third Avenue is a Class 2 creditor under the Amended Plan and voted to accept the Original Plan (as defined herein). Grace Bay is a Class 2 creditor under the Plan and abstained from voting to accept or reject the Original Plan (as defined herein).

### **The Plan and Disclosure Statement**

3. On the Petition Date, the Debtors filed their proposed chapter 11 plan and accompanying disclosure statement. Both the plan and disclosure statement have been amended several times.

4. On October 22, 2009, this Court entered the Order (I) Approving the Disclosure Statement; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, Including (A) Approving the Form and Manner of Distribution of Solicitation Packages, (B) Approving the Form and Manner of Notice of the Confirmation Hearing, (C) Establishing a Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing the Deadline for Receipt of Ballots, and (F) Approving the Procedures for Vote Tabulations; (III) Establishing the Deadline and Procedures for Filing Objections to (A) Confirmation of the Plan, and (B) Proposed Cure Amounts Related to Contracts and Leases Assumed Under the Plan; and (IV) Granting Related Relief [Docket No. 768] (the “**Disclosure Statement and Solicitation Order**”). The Debtors’ Plan of Reorganization on file with the Bankruptcy Court as of the entry of the Disclosure Statement and Solicitation Order is herein referred to as the “**Original Plan**”).

5. On November 15, 2009, the Debtors filed the Plan Supplement [Docket No. 930]. On December 7, 2009, the Debtors filed the Amended Plan Supplement [Docket No. 1073]. On December 14, 2009, the Debtors filed the Further Amended Plan Supplement [Docket No. 1144].

6. In accordance with the Disclosure Statement and Solicitation Order, voting on the Original Plan concluded on November 25, 2009.

7. On December 14, 2009, after completion of voting on the Original Plan, the Debtors filed the Amended Plan [Docket No. 1134].

8. A hearing to consider both confirmation of the Amended Plan and approval of the Motion is scheduled for December 17, 2009 at 1:00 p.m.

### **The New Proposed Exit Financing**

9. On less than two days' notice, and practically on the eve of the hearing to consider confirmation of the Original Plan, the Debtors filed the Amended Plan which purported to include "technical modifications" to the Original Plan. In fact, the modifications set forth in the Amended Plan go to the very heart of the economic deal which was contained in the Original Plan and on which the Debtors' senior secured lenders, including Third Avenue, relied in casting their ballots. The exit financing proposed in the Original Plan was to be provided by these same senior secured creditors, who would have, subsequent to confirmation of the Original Plan, have converted a substantial portion of their debt to equity. The terms of the exit financing proposed in the Original Plan were one of the critical items in these senior secured lenders agreeing to convert their debt to equity in the first instance.

10. In conjunction with the modifications contained in the Amended Plan, the Debtors seek authority to enter into an entirely new exit financing facility, which is funded by different lenders, on different, and in many instances, more stringent terms and conditions, and which provides substantially less liquidity to the Reorganized Debtors (as defined in the Amended Plan) than the exit financing contained in the Original Plan.

11. The Debtors also seek authority, in their discretion, to reimburse potentially more than \$1 million of expenses to DK Acquisition Partners, L.P. ("DKAP") and Wells Fargo

Foothill, LLC (“WFF” and together with DKAP, the “**New Proposed Exit Lenders**”) that were or will be incurred in connection with the proposed exit financing (the “**New Proposed Exit Financing**”) to be provided by the New Proposed Exit Lenders.

12. The proposed New Proposed Exit Financing is materially different than the Old Exit Financing in a number of respects. Potentially most troubling is that it provides \$13.5 million less liquidity to the Reorganized Debtors (as defined in the Amended Plan) than the Old Exit Financing.

13. In addition, the New Exit Financing contains additional terms, conditions and covenants which are more onerous to the Reorganized Debtors and raise the risk of default, imposes higher fees on the Reorganized Debtors, including a 3.0% closing fee as compared to the 2.5% closing fee under the Old Exit Financing, as well as greater unpaid commitment fees and prepayment fees.

14. The New Proposed Exit Financing<sup>1</sup> is a material component of the proposed means for implementation of the Plan, and is a critical component of the Reorganized Debtors’ expected liquidity after confirmation of the Amended Plan. Specifically, section 7.2 of the Plan provides three sources of consideration for plan distributions: (i) the Exit Credit Facilities; (ii) the Term Loan Credit Agreement; and (iii) the issuance of Reorganized BMHC Equity Interests. See Plan at Section 7.2.

### **Objection**

#### **The Proposed New Exit Financing Constitutes a Material Modification to the Plan**

15. If a modification to a plan is such that a creditor would be apt to reconsider its acceptance of the plan, then such modification is material. In re Sentinel Management Group,

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<sup>1</sup> Capitalized terms in paragraph 9 not otherwise defined in this Objection shall have the meanings ascribed to such terms in the Amended Plan.

Inc., 398 B.R. 281, 302 (Bankr. N. D. Ill. 2008); see also In re American Trailer & Storage, Inc., 2009 WL 3756975, at \*3 (Bankr. W.D. Mo. Nov. 9, 2009) (holding that if a modification materially and adversely affects any of the voting parties' interests who previously voted to accept the plan, they must be afforded an opportunity to change their vote).

16. Despite calling the modifications to the Amended Plan "Technical Modifications," the proposed New Exit Financing constitutes a material modification to the Plan such that a revote is required. As set forth above, the New Exit Financing comprises one of three sources of funding for making distributions under the Plan and provides an important source of liquidity for the Reorganized Debtors' after confirmation of the Amended Plan. The New Exit Financing provides \$13.5 less in liquidity to the Reorganized Debtors (as defined in the Amended Plan) than the Old Exit Financing. This reduction in liquidity alone represents a material impact on the feasibility of the Amended Plan.

17. Furthermore, the additional covenants, more stringent terms and conditions, and higher fees to be charged under the New Exit Financing will serve to increase the risk of default by the Reorganized Debtors post-confirmation of the Amended Plan, thereby placing the feasibility of the Amended in further jeopardy.

18. Moreover, for lenders who are being asked to convert debt to equity, the identity of the lender alone is a material question. Under the Original Plan, there would have been a commonality of interest between the lenders who were also, at least initially, going to be the majority equity owners of the Debtors. Having a lender with separate interests clearly changes the risk on investment for lenders who are converting their debt to equity.

19. Each of these factors demonstrates that the Amended Plan is not simply the result of "technical modifications" to the version of the plan mailed to all creditors upon entry of the

Disclosure Statement and Solicitation Order. Indeed, the modifications contained in the Amended Plan are material, have adversely affected voting parties' interests, including Third Avenue, who previously voted to accept the Original Plan (prior to the filing of the Amended Plan), and such parties must be afforded an opportunity to change their vote.

**Conclusion**

WHEREFORE, Third Avenue and Grace Bay respectfully request that this Court enter an Order (i) denying the Motion; (ii) denying confirmation of the Amended Plan; and (iii) granting such other and further relief as is just and proper.

Dated: December 17, 2009

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