

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	
	)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i> , <sup>1</sup>	)	Case No. 09-12074 (KJC)
Debtors.	)	Jointly Administered
	)	
	)	Objection Deadline: January 20, 2010 at 4:00 p.m. E.T.
	)	Hearing Date: January 27, 2010 at 3:00 p.m. E.T.
	)	

**DEBTORS' MOTION FOR AN ORDER AUTHORIZING REJECTION OF CERTAIN EXECUTORY CONTRACTS WITH SALESFORCE.COM, INC., ADT AND CNH CAPITAL AMERICA, LLC, NUNC PRO TUNC TO DECEMBER 31, 2009**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*"), submit this Motion (the "*Motion*"), pursuant to section 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 to reject certain executory contracts as more fully described below. In support thereof, the Debtors respectfully represent:

**JURISDICTION AND VENUE**

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

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

## RELIEF REQUESTED

2. By this Motion, the Debtors, pursuant to sections 365(a), 1107(a), and 1108 of title 11 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 6006, seek entry of an order authorizing them to reject the Contracts (as defined below).

## 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. On June 26, 2009, the Office of the United States Trustee (the "*U.S. Trustee*") appointed the official committee of unsecured creditors (the "*Creditors' Committee*").

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

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

- ***BMC West.*** Under the BMC West brand, the Debtors market and sell building products, manufacture building components, and provide construction services to professional builders and contractors. Products include structural lumber and building materials purchased from manufacturers, as well as manufactured building components such as millwork, trusses, and wall panels. Construction services include installation of various building products and framing. The Debtors currently offer these products

and services in major metropolitan markets in Texas, Washington, Colorado, Idaho, Utah, Montana, North Carolina, California, and Oregon.

- **SelectBuild.** Under the SelectBuild brand, the Debtors offer integrated construction services to production homebuilders, as well as commercial and multi-family builders. Services include wood framing, concrete services, managing labor and construction schedules, and sourcing materials. The Debtors currently offer these services in major metropolitan markets in California, Arizona, Nevada and Illinois.

6. On the Petition Date, the Debtors filed their proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"). 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. The Court entered an order confirming the Plan on December 17, 2009.

7. The Debtors are parties to the following contracts that the Debtors wish to reject (collectively the "**Contracts**"):

Name of Other Party to Lease/Contract	Address	Account Identifier	Description of Lease/Contract
Salesforce.com, Inc ("Salesforce.com")	The Landmark@One Market Suite 300 San Francisco, CA 94105	Account # 4-232449	Software system for customer account information, bidding and task management and coordination between units, status reporting on existing work, project management on all stages of jobs.
ADT ("ADT")	P.O. Box 371956 Pittsburgh, PA 15250-7956	Customer No. 01300-102349276	Security system.

CNH Capital America, LLC <sup>2</sup> ("CNH Capital")	P.O. Box 7247-0030 Philadelphia, PA 19170-0330	Leased Forklift SN: N6C412693	Expired <sup>3</sup> lease for backhoe that was returned to CNH Capital America, LLC
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8. On December 17, 2009, after notice and a hearing, the Court entered an order confirming the Plan (the "**Confirmation Order**"). Section 6.1 of the Plan provides for the following treatment of executory contracts:

***Assumption and Rejection of Contracts and Unexpired Leases.*** Except as otherwise provided herein or pursuant to the Confirmation Order, all Executory Contracts and Unexpired Leases that exist between the Debtors and any person, including, but not limited to, all Intercompany Contracts, shall be assumed pursuant to section 365(a) of the Bankruptcy Code as of the Effective Date, except for any such contract or lease (i) that has been assumed or rejected, or renegotiated and either assumed or rejected on renegotiated terms, pursuant to an order of the Bankruptcy Court entered prior to the Effective Date, (ii) that has been entered into by the Debtors during the pendency of the Chapter 11 Cases in the ordinary course of business or pursuant to an order of the Bankruptcy Court, (iii) that is the subject of a motion to reject, or a motion to approve renegotiated terms and to assume or reject on such renegotiated terms, that has been filed and served prior to the Effective Date, or (iv) that is identified on the Rejected Executory Contract and Unexpired Lease List; provided, however, that the applicable Debtors shall assume the Collective Bargaining Agreements on the Effective Date. Entry of the Confirmation Order shall constitute approval, pursuant to section 365(a) of the Bankruptcy Code, of the assumption of Executory Contracts and Unexpired Leases provided for herein. Each Executory Contract and Unexpired Lease assumed pursuant to this Section 6.1 or by any order of the Bankruptcy Court, which has not been assigned to a third party prior to the Confirmation Date, shall revert in and be fully enforceable by the Reorganized Debtors in accordance with its terms, except as such terms are modified by the provisions of the Plan or any order of the Bankruptcy Court

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<sup>2</sup> The CNH Capital lease ended according to its terms and the Debtors believe their obligations thereunder were fully satisfied, thus the CNH Capital lease may not be an executory or unexpired contract but the Debtors request its rejection out of an abundance of caution.

<sup>3</sup> The Debtors believe the CNH Capital Lease expired by its terms on or about July 27, 2009 and that the leased equipment was returned. The Debtors do not believe the CNH Capital Lease is an executory contract, and simply include it in an abundance of caution.

authorizing and providing for its assumption under applicable federal law. All agreements that are rejected pursuant to the Rejected Executory Contract and Unexpired Lease List shall be rejected effective as of the date specified therein.

9. The Debtors filed their Notice of Filing of Rejected Executory Contract and Unexpired Lease List on December 16, 2009, but the Contracts were not listed on the Rejected Executory Contract and Unexpired Lease List filed with the Court. The Debtors now wish to reject the Contracts identified above. Therefore, to prevent the automatic assumption of the Contracts under section 6.1 of the Plan, the Debtors request that the Court enter an order approving the rejection of the Contracts.

### **BASIS FOR RELIEF REQUESTED**

#### **A. The Court Should Authorize Rejection of the Contracts 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 Contracts. 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 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).

12. The Debtors have determined, in the sound exercise of their business judgment, that the Contracts are no longer of value or utility to the Debtors. The decision to reject the Contracts is an exercise of sound business judgment that will benefit the Debtors' estates. In light of the foregoing, the Debtors respectfully submit that they should be authorized to reject the Contracts under section 365 of the Bankruptcy Code.

**B. The Court Should Authorize Rejection of the Contracts Effective as of the Date Hereof**

13. The Debtors also respectfully submit that it is appropriate for the Court to order that the effective date of rejection of Contracts be the date hereof (the "*Effective Date*").

14. 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").

15. Here, the balance of the equities favors granting the Debtors' request for a retroactive effective date of rejection. Without a retroactive date of rejection, the Debtors may be forced to incur unnecessary administrative charges for the Contracts that do not provide a benefit to the estate that is equal to or greater than the cost to the estate. Moreover, the other parties to the Contracts will not be unduly prejudiced if the rejection is deemed effective as of the Effective Date because they will receive notice of this Motion and have sufficient opportunity to act accordingly. Further, the Debtors have already informed the other parties to the Contracts that they no longer intend to perform under the Contracts. The Debtors respectfully submit that it is fair and equitable for the Court to find that the Contracts are rejected as of the Effective Date, as the retroactive rejection of the Contracts promotes the purposes of section 365 by relieving the estate of additional and unnecessary administrative expenses.

16. Courts in this jurisdiction have routinely approved relief similar to the relief requested herein.<sup>4</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) (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).

#### **NOTICE**

17. No trustee or examiner has been appointed in the 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) Salesforce.com, ADT and CNH Capital; and (e) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to

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<sup>4</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.



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.

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 31, 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**

<b>In re:</b>	)	
	)	<b>Chapter 11</b>
	)	
<b>BUILDING MATERIALS HOLDING CORPORATION, et al.,<sup>1</sup></b>	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Objection Deadline: January 20, 2010 at 4:00 p.m. (ET)</b>
	)	<b>Hearing Date: January 27, 2010 at 3:00 p.m. (ET)</b>

**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) Salesforce.com, ADT and CNH Capital; and (E) 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 Authorizing Rejection of Certain Executory Contracts With Salesforce.com, Inc., ADT and CNH Capital America, LLC, Nunc Pro Tunc to December 31, 2009** (the “Motion”).

**PLEASE TAKE FURTHER NOTICE** that any objections to the Motion must be filed on or before **January 20, 2010 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 27, 2010 AT 3:00 P.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.**

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

**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 31, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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ATTORNEYS FOR THE DEBTORS  
AND DEBTORS-IN-POSSESSION

**EXHIBIT A**  
**Proposed Order**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

<b>IN RE:</b>  <b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b>  <p style="text-align: center;"><b>Debtors.</b></p>	) ) ) ) ) ) ) ) ) )	<b>Chapter 11</b>  <b>Case No. 09-12074 (KJC)</b>  <b>Jointly Administered</b>  Ref. Docket No. _____
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**ORDER AUTHORIZING REJECTION OF CERTAIN EXECUTORY CONTRACTS  
WITH SALESFORCE.COM, INC., ADT AND CNH CAPITAL AMERICA, LLC,  
NUNC PRO TUNC TO DECEMBER 31, 2009**

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 reject certain executory contracts as described more fully below; 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 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

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

relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefore,

**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 following leases and contracts (collectively, the "**Contracts**"):

Name of Other Party to Lease/Contract	Address	Account Identifier	Description of Lease/Contract
Salesforce.com, Inc (" <b>Salesforce.com</b> ")	The Landmark@One Market Suite 300 San Francisco, CA 94105	Account # 4-232449	Software system for customer account information, bidding and task management and coordination between units, status reporting on existing work, project management on all stages of jobs.
ADT (" <b>ADT</b> ")	P.O. Box 371956 Pittsburgh, PA 15250-7956	Customer No. 01300-102349276	Security system.
CNH Capital America, LLC (" <b>CNH Capital</b> ")	P.O. Box 7247-0030 Philadelphia, PA 19170-0330	Leased Forklift SN: N6C412693	Expired lease for backhoe that was returned to CNH Capital America, LLC.

3. Effective immediately, such Contracts are deemed rejected (the "**Rejection**"), with the Rejection being effective as of December 31, 2009 (the "**Effective Date**").

4. Salesforce.com, ADT and CNH Capital shall have thirty (30) days after entry of this Order to file any claim for damages arising from rejection of the Contracts.

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

6. The Debtors do not waive any claims they may have against Salesforce.com, ADT and CNH Capital whether or not such claims arise under, are related to the rejection of, or are independent of the Contracts.

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

8. 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.

9. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Date: Wilmington, Delaware  
January \_\_\_\_\_, 2010

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Kevin J. Carey  
Chief United States Bankruptcy Judge