

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- <u>12074</u> ( )
	)	
Debtors.	)	Joint Administration Requested
	)	
	)	

**DEBTORS' MOTION FOR AN ORDER AUTHORIZING (A) THE PAYMENT OF  
PREPETITION SALES, USE AND SIMILAR TAXES; AND (B) FINANCIAL  
INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

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 A**, (a) authorizing the Debtors, in their discretion, to remit and pay sales, use, and franchise taxes, and business license and other similar fees; and (b) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Motion. In support of this Motion, the Debtors respectfully represent:<sup>2</sup>

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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.

<sup>2</sup> A description of the Debtors' business and the reasons for filing these Chapter 11 Cases is set forth in the Declaration of Paul S. Street in Support of Chapter 11 Petitions and First Day Relief (the "**Street Declaration**"), filed contemporaneously with this Motion. This Motion is supported by the Street Declaration.

## **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 105, 363, 541, 1107(a), and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***") and Federal Rules of Bankruptcy Procedure 6003 and 6004, seek entry of an order authorizing, but not directing, the Debtors to pay any Taxes and Fees (as defined herein) that, in the ordinary course of business, accrued and arose before the Petition Date (as defined herein) in an aggregate amount not to exceed \$4,500,000; *provided* that the Debtors will only pay Taxes and Fees if the Debtors determine, in the exercise of their business judgment, that nonpayment of such Taxes and Fees will cause immediate and irreparable harm to the Debtors' estates.

3. The Debtors also seek entry of an order authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Motion.

## **BACKGROUND**

4. On the date hereof (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 these Chapter 11 Cases, and no committees have been appointed or designated.

5. 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.

6. 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.

7. The Debtors operate in metropolitan areas that have historically outpaced U.S. averages for residential building permit activity (largely in the Southern and Western portions of the United States). Based on National Association of Home Builders building permit

activity, the Debtors provide building products and construction services in 9 of the top 25 single-family construction markets.

8. Prior to the Petition Date, the Debtors, with the assistance of their professionals and advisors, pursued several avenues to try to maximize the value of the Debtors' business, including conducting a process to sell the Debtors' business. The Debtors' prepetition sale process did not, however, yield offers that reflected, in the Debtors' business judgment, the true value of the Debtors' business operations.

9. Contemporaneously with this prepetition marketing and sale effort, the Debtors engaged in good faith, arm's-length negotiations with significant holders of the Debtors' prepetition secured indebtedness to develop a way to de-lever the Debtors' business, while at the same time providing the Debtors' unsecured creditor constituency with a substantial recovery. These negotiations culminated in the proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"), filed contemporaneously with this Motion.

10. 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 Debtors seek to have approved by the Court contemporaneously herewith.

11. As of the Petition Date, the Debtors employ approximately 5,500 people. Approximately 300 of the Debtors' employees are represented by seven unions with whom the Debtors have collective bargaining agreements. For the 12 months ended March 31, 2009, the Debtors' total revenue totaled approximately \$1.1 billion. As of March 31, 2009 the book value of the Debtors' assets totaled approximately \$480 million and its liabilities totaled approximately \$481 million.

### **THE DEBTORS' TAX OBLIGATIONS**

12. In the ordinary course of business, the Debtors: (a) incur and/or collect taxes, including sales, use, and franchise taxes in the operation of their businesses (collectively, the "*Taxes*"), (b) incur business license fees and other similar assessments (collectively, the "*Fees*") in connection with obtaining licenses and permits necessary to operate their business, and (c) remit such Taxes and Fees to various taxing, licensing, and other governmental authorities (collectively, the "*Authorities*"). The Taxes and Fees may, from time to time, be the subject of an audit (each an "*Audit*") by the applicable Authority, and the amounts estimated as due or already paid by the Debtors may be subject to upward (each an "*Upward Audit Adjustment*") or downward adjustment based upon the amount that the applicable Authority ultimately claims is due following an Audit.<sup>3</sup> The Debtors pay the Taxes and Fees monthly, quarterly, or annually to the respective Authorities, in each case as required by applicable laws and regulations.

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<sup>3</sup> Nothing contained herein or in the order approving this Motion constitutes or should be construed as an admission of liability by the Debtors with respect to any Audit. The Debtors expressly reserve all rights with respect to any Audit. Furthermore, the Debtors reserve the right to contest the amount, if any, claimed to be due as a result of the Audits.

13. The Debtors estimate that the total amount of prepetition Taxes and Fees owing to the various Authorities is approximately \$4,500,000. The Debtors believe that payment of such Taxes and Fees is appropriate to preserve the value of their estates for the benefit of all stakeholders. In addition, certain amounts owing to the various Authorities are amounts that the Debtors have withheld from third parties on account of those parties' outstanding tax liabilities. As a result, these funds may not constitute property of the Debtors' estates. Moreover, unpaid Taxes and Fees may result in penalties, the accrual of interest, or both.

**A. Sales and Use Taxes**

14. The Debtors' products are sold to retail consumers and, therefore, the Debtors are required to collect and remit retail sales tax. In addition, the Debtors sell materials and supplies used for construction service contracts and installed sales, upon which consumer use taxes must be accrued and remitted. The Debtors generally remit sales Tax monthly or quarterly, as required by the applicable Authorities.

15. Additionally, the Debtors purchase various components and other raw materials used in processing their products from out-of-state vendors who – because they are not located in-state – do not charge the Debtors sales Tax in connection with such purchases. The Debtors are therefore required to remit use Taxes to certain of the Authorities in an amount equal to the sales Tax that they otherwise would have paid.

16. The Debtors collect and remit to the Authorities approximately \$3,000,000 per month in sales and use Taxes. Although the Debtors are current with respect to sales and use Taxes, the Debtors estimate that approximately \$4,500,000 of unpaid sales and use Taxes accrued during the prepetition period.

**B. Franchise Taxes and Other Similar Taxes**

17. The Debtors pay franchise and other similar Taxes to certain of the Authorities to operate their businesses in numerous states throughout the country. The Debtors incur the bulk of such Taxes in Texas, Delaware and the City of San Francisco. In 2008, the Debtors remitted approximately \$464,000 in franchise and other similar Taxes. The Debtors are current with respect to their payment of franchise and other similar Taxes and thus, the Debtors estimate that there are no unpaid franchise and other similar Taxes accrued and outstanding as of the Petition Date.

**C. Business License Fees**

18. State and local laws require the Debtors to pay Fees to obtain a wide range of business licenses and permits from a number of Authorities. The method for calculating amounts due for such licenses and permits, and the deadlines for paying such amounts, varies by jurisdiction. Further, certain states require the Debtors to pay (a) annual reporting fees to state governments to remain in good standing for purposes of conducting business within the state, and (b) various business Taxes based on gross receipts or other bases, as determined by the taxing jurisdiction. As of the Petition Date, the Debtors believe there are no amounts outstanding with respect to Fees relating to the prepetition period.

**BASIS FOR RELIEF REQUESTED**

**A. Payment of the Taxes and Fees is Necessary and Appropriate**

19. The Debtors' payment of Taxes and Fees in the ordinary course of business is necessary and appropriate. In addition to being warranted for business and other reasons, as described herein, such payment is justified because certain of the Taxes and Fees are not property of the estate pursuant to section 541(d) of the Bankruptcy Code. Moreover, the

Debtors' directors and officers may be held personally liable for the non-payment of certain taxes. Certain Authorities may take precipitous action against the Debtors' directors and officers for unpaid Taxes, which would distract the Debtors from their efforts to complete a successful reorganization.

**1. Certain of the Taxes and Fees May Not Be Property of the Debtors' Estates**

20. Section 541(d) of the Bankruptcy Code provides, in relevant part, that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest...becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtors' legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d).

21. Some of the Taxes and Fees constitute "trust fund" taxes, which the Debtors are required to collect and/or hold in trust for payment to the Authorities. Courts have held that such taxes are not part of a debtor's estate. *See, e.g., Begier v. Internal Revenue Serv.*, 496 U.S. 53, 57-60 (1990) (holding that any prepetition payment of trust fund taxes is not a transfer subject to avoidance because such funds are not the debtor's property); *DuCharmes & Co., Inc. v. Mich. (In re DuCharmes & Co.)*, 852 F.2d 194 (6th Cir. 1988) (per curiam) (same); *Shank v. Wash. State Dept. of Revenue (In re Shank)*, 792 F.2d 829, 833 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customers is a "trust fund" tax and not released by bankruptcy discharge); *DeChiaro v. New York State Tax Comm'n*, 760 F.2d 432, 435-36 (2d Cir. 1985) (same); *Rosenow v. Ill. Dept. of Revenue (In re Rosenow)*, 715 F.2d 277, 279-82 (7th Cir. 1983); *Western Surety Co. v. Waite (In re Waite)*, 698 F.2d 1177, 1179 (11th Cir. 1983) (same). To the extent these "trust fund" Taxes are collected, they are not property of the Debtors' estates under section 541(d). *See, e.g., In re Am. Int'l Airways, Inc.*, 70 B.R. 102,



104-105 (Bankr. E.D. Pa. 1987); *In re Dameron*, 155 F.3d 718, 721-22 (4th Cir. 1998) (funds from various lenders held by closing agent in trust for designated third parties not property of debtor's estate). The Debtors, therefore, generally do not have an equitable interest in such funds, and the Debtors should be permitted to pay those funds to the Authorities as they become due.

**2. Payment of the Taxes and Fees Will Avoid Unnecessary Distractions In the Chapter 11 Cases**

22. Any regulatory dispute or delinquency that impacts the Debtors' ability to conduct business in a particular jurisdiction could have a wide-ranging and adverse effect on the Debtors' operations as a whole. Specifically, the Debtors' failure to pay the Taxes and Fees could affect adversely the Debtors' business operations because, among other things: (a) the Authorities could initiate audits of the Debtors or prevent the Debtors from continuing their businesses, which, even if unsuccessful, would unnecessarily divert the Debtors' attention away from the reorganization process; (b) the Authorities could attempt to suspend the Debtors' operations, file liens, seek to lift the automatic stay, and pursue other remedies that will harm the estates; and (c) certain directors and officers might be subject to personal liability – even if such a failure to pay such Taxes and Fees was not a result of malfeasance on their part – which would undoubtedly distract those key employees from their duties related to the Debtors' restructuring. Accordingly, the Debtors must continue to pay the Taxes and Fees as they become due to ensure that their officers and directors remain focused during the chapter 11 cases on operating the business and implementing a successful restructuring.

**3. Certain of the Taxes and Fees May Constitute Secured or Priority Claims Entitled to Special Treatment Under the Bankruptcy Code**

23. Payment of certain of the Taxes and Fees likely will give the Authorities no more than that to which they otherwise would be entitled under a chapter 11 plan and will save the Debtors the potential interest expense, legal expense, and penalties that otherwise might accrue on the Taxes and Fees during the chapter 11 cases.

24. Claims for some of the Taxes and Fees are or may be priority claims entitled to payment prior to general unsecured creditors. *See* 11 U.S.C. § 507(a)(8). Moreover, to the extent that the Taxes and Fees are entitled to priority treatment under section 507(a)(8)(b) of the Bankruptcy Code, the governmental units also may attempt to assess interest and penalties. *See* 11 U.S.C. § 507(a)(8)(G) (granting eighth priority status to "a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss"). Thus, the payment of the Taxes and Fees at this time only affects the timing of the payment for the vast majority of the amounts at issue and, therefore, should not unduly prejudice the rights of other creditors.

**4. Payment of the Taxes and Fees is Appropriate Under the Bankruptcy Code**

25. The Court may authorize the Debtors to pay any prepetition amounts related to Taxes and Fees pursuant to section 363 of the Bankruptcy Code. Section 363(b) allows the court to authorize the payment of prepetition claims outside of the ordinary course of business. *See, e.g., Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay the prepetition claims of some suppliers who were potential lien claimants because the payments were necessary to induce general contractors to release funds owed to the debtors); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (Bankr. M.D. Fla. 2005)

(recognizing section 363 as a source of authority and allowing payment of the prepetition claims of vendors whose supplies would take four to six weeks to replace). In addition, section 363(c) allows a debtor-in-possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips*, 29 B.R. at 395 n.2 ("Insofar as transactions are actually in the ordinary course, they are authorized automatically by § 363(c)(1) and § 1107(a), and do not require Bankruptcy Court approval.").

26. Here, the Debtors' payment of the Taxes and Fees is an exercise of sound business judgment and is necessary to permit a successful reorganization. As discussed above, the Debtors must continue to pay the Taxes and Fees to continue operating in certain jurisdictions and to avoid costly distractions during the Chapter 11 Cases. Indeed, it is possible that Authorities would seek to interfere with the Debtors' businesses if the Taxes and Fees are not paid on a timely basis. Additionally, the relief requested herein merely expedites the treatment and distribution to the taxing Authorities that would otherwise be made at a later date under a plan of reorganization.

27. The Debtors' payment of the Taxes and Fees, which the Debtors are obligated to pay by statute in many instances, is arguably within the ordinary course of the Debtors' business. As such, the Debtors submit that Court approval of the Debtors' payments is not necessary because of the authority granted to them by section 363(c). Nonetheless, for the avoidance of doubt, the Debtors request that the Court grant the relief requested herein and enter an order authorizing, but not directing, them to pay the Taxes and Fees in the ordinary course of the Debtors' business.

28. In addition, the Court may authorize payment of prepetition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code and the "doctrine of

necessity." Section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). "Under [section] 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177); accord *In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999) ("To invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is 'critical to the debtor's reorganization.'") (quoting *In re Financial News Network, Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991)); see also *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) ("[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.").

29. In a long line of well-established cases, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors. See, e.g., *Miltenberger v. Logansport Ry.*, 106 U.S. 286, 311-12 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent "stoppage of [crucial] business relations"); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that "if payment of a claim which arose prior to reorganization is essential to the continued operation of the...[business] during reorganization, payment may be authorized even if it is made out of [the] corpus"); *Dudley v. Mealey*, 147 F.2d 268 (2d Cir. 1945), cert. denied 325 U.S. 873 (1945) (extending doctrine for payment of

prepetition claims beyond railroad reorganization cases); *Michigan Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279 (S.D.N.Y. 1987), *appeal dismissed*, 838 F.2d 59 (2d Cir. 1988) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits).

30. The "doctrine of necessity" functions in a chapter 11 reorganization as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors' continued operation); *In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) ("[C]ourts have used their equitable power under section 105(a) of the Code to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization."). The doctrine is frequently invoked early in a reorganization, particularly in connection with those chapter 11 sections that relate to payment of prepetition claims. The court in *In re Structurlite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988), observed the decisional authority which supports "the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of prepetition claims where such payment is necessary to 'permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.'" (quoting *In re Chateaugay Corp.*, 80 B.R. at 287). The court stated that "a per se rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code." *Id.* at 932. The rationale for the doctrine of necessity rule is consistent

with the paramount goal of chapter 11 – "facilitating the continued operation and rehabilitation of the debtor...." *Ionosphere Clubs*, 98 B.R. at 176.

31. As noted previously, the Debtors' payment of the Taxes and Fees is an exercise of sound business judgment and is necessary to permit a successful reorganization. Moreover, in numerous recent chapter 11 cases, bankruptcy courts in this district, as well as other districts, have exercised their powers to authorize chapter 11 debtors to pay prepetition tax obligations.<sup>4</sup> See, e.g., *In re Portola Packaging, Inc.*, No. 08-12001 (CSS) (Bankr. D. Del. Aug. 29, 2008); *In re ACG Holdings, Inc.*, No. 08-11467(CSS) (Bankr. D. Del. July 16, 2008); *In re Pierre Foods, Inc.*, No. 08-11480 (KG) (Bankr. D. Del. August 13, 2008); *In re Tropicana Entm't, LLC*, No. 08-10856 (KJC) (Bankr. D. Del. May 6, 2008); *In re Leiner Health Prods. Inc.*, (n/k/a *Supplements LT, Inc.*, et al.) No. 08-10446 (KJC) (Bankr. D. Del. April 4, 2008); *In re Wickes Holdings, LLC*, No. 08-10212 (KJC) (Bankr. D. Del. Feb. 5, 2008); *In re Pope & Talbot, Inc.*, No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); *In re American Home Mortgage Holdings, Inc.*, No. 07-11047 (CSS) (Bankr. D. Del. Aug. 7, 2007); *In re Tweeter Home Entm't Group, Inc.*, No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); see also *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 27, 2005); *In re Delta Air Lines, Inc.*, No. 05-17923 (PCB) (Bankr. S.D.N.Y. Sept. 16, 2005); *In re Tower Auto., Inc.*, No. 05-10578 (ALG) (Bankr. S.D.N.Y. Feb. 3, 2005). The Debtors submit that similar relief is warranted in the Chapter 11 Cases.

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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.

**B.     The Court Should Authorize the Debtors' Banks to Pay the Claims Described Herein**

32.     In connection with the foregoing, the Debtors respectfully request that the Court enter an order that (a) authorizes all applicable banks and financial institutions to receive, process, honor, and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to, the claims the Debtors request authority to pay in this Motion, regardless of whether the checks were presented, or fund transfer requests were submitted, before or after the Petition Date and (b) provides that all banks and other financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this application, and such banks and other financial institutions shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

**C.     Immediate Relief is Justified**

33.     Pursuant to Bankruptcy Rule 6003, the Court may grant relief within twenty (20) days after the filing of the petition regarding a motion to "use, sell, lease, or otherwise incur an obligation regarding property of the estate" only if such relief is necessary to avoid immediate and irreparable harm.

34.     As discussed above, the Authorities may assert that the Debtors' directors and officers are personally liable if the Debtors fail to meet the obligations imposed upon them to remit Taxes and Fees. Thus, if the relief is not granted, the Debtors' directors and officers may be subject to personal tax-related lawsuits that would cause the Debtors' estates immediate and irreparable harm by detracting from the reorganization efforts. Moreover, pending entry of a final order, the Debtors only intend to pay Taxes and Fees to the extent that they determine that nonpayment of such Taxes and Fees will cause immediate and irreparable harm to the Debtors.

35. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

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

36. 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), "[a]n 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." As set forth above, the immediate payment of the Taxes and Fees is essential to prevent potentially irreparable damages to the Debtors' operations, value and ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay imposed by Bankruptcy Rule 6004(h).

### **DEBTORS' RESERVATION OF RIGHTS**

37. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice of an Authority under applicable non-bankruptcy law. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

### **NOTICE**

38. No trustee, examiner, or creditors' committee has been appointed in these chapter 11 cases. The Debtors have provided notice of filing of the Motion either by electronic



mail or facsimile and/or by overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) the 50 largest unsecured creditors of the Debtors on a consolidated basis as identified in the Debtors' chapter 11 petitions; and (c) counsel to Wells Fargo Bank, as agent for both of the Debtors' prepetition lenders and proposed postpetition lenders. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Local Rule 9013-1(m). Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

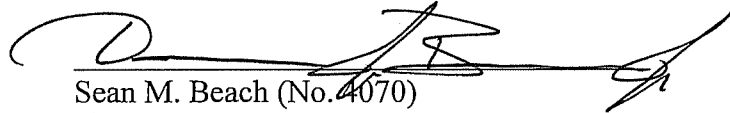
**NO PRIOR REQUEST**

39. 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 16, 2009

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TAYLOR, LLP



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PROPOSED ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION

# **EXHIBIT A**

## **Proposed Order**

IN RE:	)	
	)	Chapter 11
	)	
BUILDING MATERIALS HOLDING	)	
CORPORATION, <i>et al.</i> , <sup>1</sup>	)	Case No. 09- <u>12074</u> ( )
	)	
Debtors.	)	Jointly Administered
	)	
	)	
	)	Ref. Docket No. _____

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 (a) authorizing the Debtors, in their discretion, to remit and pay sales, use, and franchise taxes and business license and other similar fees; and (b) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Order, all as set forth in the Motion; and upon the Street Declaration<sup>2</sup> in support thereof; 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

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

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 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. The Debtors are authorized, but not directed, to pay and remit to the Authorities Taxes and Fees in the ordinary course of business, without regard to whether the Taxes or Fees accrued or arose before or after the Petition Date, in an aggregate amount not to exceed (i) \$4,500,000, plus (ii) all Upward Audit Adjustments necessitated by any subsequent Audits; *provided, however* that, the Debtors only will pay Taxes and Fees if the Debtors determine that nonpayment of such Taxes and Fees will cause immediate and irreparable harm to the Debtors' estates.
3. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date. Such banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this order, and such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

4. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of Taxes and Fees that are dishonored or rejected.

5. Nothing in the Motion or this Order, nor as a result of the Debtors' payment of any Taxes and Fees pursuant to this Order, shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors, a waiver of the right to dispute any claim, or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code.

6. Nothing in this Order shall prohibit the Debtors from seeking Court authority to increase the prepetition amounts authorized to be paid hereunder.

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

8. Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") has been satisfied.

9. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6004(a).

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.

Dated: Wilmington, Delaware  
June \_\_\_\_, 2009

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UNITED STATES BANKRUPTCY JUDGE