

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

DEBTORS' MOTION FOR ENTRY OF AN ORDER (A) AUTHORIZING THE DEBTORS TO PAY CERTAIN CRITICAL PROVIDER ADMINISTRATIVE CLAIMS; (B) AUTHORIZING THE DEBTORS TO PAY CERTAIN ADDITIONAL CRITICAL PROVIDER CLAIMS; AND (C) AUTHORIZING 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, but not requiring, the Debtors to pay claims for the value of goods received by the Debtors from certain critical providers in the ordinary course of business during the 20-day period immediately preceding the Petition Date (as defined below), (b) authorizing, but not requiring, the Debtors to pay certain critical providers for claims not entitled to administrative priority, and (c) 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

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.

which checks are issued and authorized to be paid in accordance with this Motion. In support thereof, the Debtors respectfully represent:²

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, 364, 503(b)(9), 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 obligating, them to pay the claims of certain critical providers (the "***Critical Providers***") that have delivered goods to the Debtors during the 20-day period prior to the Petition Date, and who are therefore entitled to administrative priority claims pursuant to section 503(b)(9) of the Bankruptcy Code, for the value of such goods (the "***Critical Priority Claims***"), on the terms and conditions set forth herein. The Debtors estimate that the amount of the Critical Priority Claims does not exceed \$12,500,000. This will assist the Debtors in negotiating with these vendors and will thereby increase the likelihood that such vendors will continue to supply the goods and services necessary to operate the Debtors' business.

3. In addition, the Debtors seek entry of an order authorizing the Debtors, in their discretion and business judgment, to pay certain other prepetition fixed, liquidated, and undisputed claims (the "***Critical Provider Claims***" and together with the Critical Priority Claims,

² 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.

the "***Critical Prepetition Claims***") of certain of the Debtors' Critical Providers of products and services on the terms and conditions set forth herein. To satisfy the Critical Provider Claims, the Debtors seek entry of an order authorizing, but not obligating, them to pay, in their sole discretion, up to \$4,600,000 to the Critical Providers in excess of any amounts paid on account of Critical Priority Claims.

4. Finally, the Debtors 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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

CRITICAL PRIORITY CLAIMS

13. Certain of the Debtors' Critical Providers are vendors that have delivered goods to the Debtors in the ordinary course of business during the 20-day period prior to the Petition Date. Pursuant to section 503(b)(9) of the Bankruptcy Code, creditors have an administrative priority claim to the extent of "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." Therefore, the

Critical Providers that have delivered goods to the Debtors in the ordinary course of business during the 20-day period prior to the Petition Date have claims—the Critical Priority Claims—that are entitled to administrative expense priority. Authorizing the Debtors to pay the Critical Priority Claims now instead of at the conclusion of these Chapter 11 Cases will assist the Debtors in negotiating with the Critical Providers and will thereby increase the likelihood that such vendors will continue to supply the goods and services necessary to operate the Debtors' businesses on favorable credit terms.

OBLIGATIONS TO CRITICAL PROVIDERS

14. The Debtors are mindful of their fiduciary obligations to seek to preserve and maximize the value of their estates. They have reviewed their business relationships and identified the Critical Providers that are so essential that the loss of their particular goods or services would cause immediate and irreparable harm to the Debtors' businesses and market share. These Critical Providers fall into two general categories: (i) suppliers of goods, such as the raw materials that the Debtors resell or use to manufacture building components or construct residences; and (ii) suppliers of services that are integral to the daily operation and maintenance of the Debtors' businesses.

15. As suppliers of building materials and construction services, the Debtors require on-time delivery of numerous raw materials on a daily basis. Even a short delay in their delivery could damage the health of the Debtors' operations because the Debtors' customers expect and require uninterrupted access to the Debtors' products and services. Any interruption or even threat of interruption may cause these customers to seek other suppliers, jeopardizing the Debtors' businesses. "***Critical Providers***," as used herein, includes those suppliers of goods or services who are critical because either: (i) the supplier is a sole-source or limited-source supplier of goods or services of the quality and quantity required by the Debtors in a particular

market, without whom the Debtors could not continue to operate without disruption; (ii) the supplier would be prohibitively expensive or time-consuming to replace, such as where the Debtors' existing inventory, equipment, or manufacturing processes are specifically tailored to that supplier's products or services; or (iii) the Debtors are obligated by their customers to use a specific supplier.

BASIS FOR RELIEF REQUESTED

A. The Court Should Authorize Payment of the Critical Prepetition Claims

- (1) Payment of the Critical Priority Claims will aid the Debtors in negotiating with the Critical Providers and will not harm the Debtors' estates**

16. Pursuant to section 503(b)(9) of the Bankruptcy Code, the Critical Priority Claims are entitled to administrative claim status. Because these administrative claims were incurred in the ordinary course of the Debtors' businesses, the Debtors believe that they are authorized to pay the Critical Priority Claims pursuant to section 363(c)(1) of the Bankruptcy Code (even if such payments are made to Critical Providers). However, the Debtors also believe that they are not required to reconcile or pay these claims prior to the conclusion of these cases. Accordingly, for the avoidance of doubt, the Debtors request that the Court enter an order stating that the Debtors are authorized, but not required, to pay the Critical Priority Claims in the ordinary course of the Debtors' businesses, pursuant to the terms outlined below. Authorizing the Debtors to make these required payments now, as opposed to at the conclusion of these cases, will enable the Debtors to leverage this obligation in order to obtain favorable trade terms that will enhance the Debtors' liquidity. Courts in this jurisdiction have authorized the payment of section 503(b)(9) claims during the pendency of chapter 11 cases. *See, e.g., In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Mar. 9, 2009); *In re VeraSun Energy Corp.*, Case No. 08-12606 (BLS) (Bankr. D. Del. Nov. 4, 2008); *In re Buffets Holdings, Inc.*, No. 08-10141

(MFW) (Bankr. D. Del. Feb. 13, 2008); *In re Pope & Talbot, Inc.*, No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); *In re Dura Auto Sys. Inc.*, No. 06-11202 (KJC) Bankr. D. Del. Oct. 31, 2006); *In re Werner Holding Co. (DE), Inc.*, No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); *In re Pliant Corp.*, No. 06-10001 (MFW) (Bankr. D. Del. Feb. 8, 2006).³

**(2) Payment of the Critical Provider Claims
is Essential to the Debtors'
Reorganization**

17. The Debtors have carefully examined whether the payment of the Critical Provider Claims is necessary. Specifically, members of the Debtors' senior management have determined that the products and services provided by the Critical Providers are essential to the continuation of the Debtors' operations on a going-forward basis because: (i) the supplier is a sole-source or limited-source supplier of goods or services of the quality and quantity required by the Debtors in a particular market, without whom the Debtors could not continue to operate without disruption; (ii) the supplier would be prohibitively expensive or time-consuming to replace, such as where the Debtors' existing inventory, equipment, or manufacturing processes are specifically tailored to that supplier's products or services; or (iii) the Debtors are obligated by their customers to use a specific supplier.

18. Applying the criteria set forth above, the Debtors have determined that having the authority to pay the Critical Provider Claims is critical to their efforts to continue their business. Without a seamless continuation of the provision of goods and services by the Critical Providers after the Petition Date, the Debtors would experience an imminent shutdown of their business. The payment of the Critical Provider Claims as requested herein is intended to ensure

³ 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.

there is no disruption in the Debtors' ability to obtain the products and services necessary to the operation of their business and the preservation and protection of their properties.

19. The Debtors seek to pay the Critical Provider Claims only where nonpayment of such claims would lead to the cessation of the delivery of products and/or the provision of services resulting in a shutdown of all or a portion of the Debtors' operations. Thus, the Debtors submit that the relief requested is narrowly tailored to facilitate the Debtors' reorganization process. The Debtors believe the Critical Providers will likely, among other things, refuse to provide products or services, or refuse to provide products or services on reasonable credit terms, absent payment of the Critical Prepetition Claims. Indeed, in recent months certain Critical Providers have demanded that the Debtors pay for their goods on accelerated payment terms, with some requiring cash in advance. Any further expansion of these activities by other Critical Providers would be detrimental to the Debtors, their estates, and their creditors.

20. In addition a significant number of these suppliers may be entitled, pursuant to applicable state law, to assert liens or other possessory rights against the Debtors' property or against the Debtors' customers' property. To the extent these suppliers may have such possessory rights, paying their Critical Provider Claims will result in the reduction of secured claims against the Debtors that ultimately will need to be paid ahead of unsecured claims and, to the extent that customer liens are avoided, ensure receipt of customer receivables. Furthermore, by paying these claims now, the Debtors will maintain access to their Critical Providers and the essential products and services they provide. Paying these claims will also eliminate the fees and expenses the Debtors would otherwise incur in removing the liens and prosecuting and defending motions to lift the automatic stay. Similarly, the payment of the

Critical Provider Claims also may help to avert the institution of numerous reclamation claims, suits and motions. Avoiding the time and expense of evaluating and litigating such claims will provide another incremental benefit for the Debtors, their estates and their creditors.

21. The Debtors estimate that the maximum amount needed to pay the Critical Provider Claims is approximately \$4,600,000 (the "***Provider Claims Cap***").⁴ To arrive at this Provider Claims Cap, the Debtors have carefully reviewed all of their suppliers to determine, among other things: (i) which suppliers are sole-source or limited-source suppliers of goods or services of the quality and quantity required by the Debtors in a particular market, without whom the Debtors could not continue to operate without disruption; (ii) which suppliers would be prohibitively expensive or time-consuming to replace, such as where the Debtors' existing inventory, equipment, or manufacturing processes are specifically tailored to that supplier's products or services; and (iii) which suppliers the Debtors' customers require them to use. After compiling this information, the Debtors estimated the amount they believe they would be required to pay to ensure the continued supply of critical goods and services. The Provider Claims Cap represents this estimated amount.

22. The Provider Claims Cap represents the Debtors' estimate of the amount necessary to satisfy the claims of a mere 3.8% of the Debtors' vendors and represents only about 8% percent of the total amount of the prepetition unsecured claims in these Chapter 11 Cases. The Debtors hope to pay far less than the requested amount. The Debtors' proposed Provider Claims Cap is within the range of amounts awarded by the courts in other cases. *See, e.g., In re*

⁴ The Provider Claims Cap does not include any amounts that may be paid to Critical Providers on account of their Critical Priority Claims or any other amounts the Debtors have authority to pay under other orders entered by the Court in these cases. However, to the extent that any supplier of goods or services receives any payments on account of any prepetition claims pursuant to this motion and any corresponding order of the Court, such payments shall be deemed to apply first to satisfy any claims of those suppliers that are entitled to administrative expense priority, including, without limitation, claims arising under section 503(b)(9).

Smurfit-Stone Container Corp., Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009) (authorizing the debtors to pay up to \$50,000,000 in critical vendor claims); *In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Mar. 9, 2009) (authorizing the debtors to pay up to \$5,600,000 in critical vendor claims); *In re JHT Holdings, Inc.*, Ch. 11 Case No. 08-11267 (BLS) (Bankr. D. Del. June 25, 2008) (authorizing the debtors to pay up to \$5,800,000 in critical vendor claims); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 6, 2006) (authorizing the debtors to pay up to \$10,600,000 in critical vendor claims); *In re Calpine Corp.*, Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005) (granting the debtor authority to pay \$20,000,000 in critical vendor claims); *In re Delphi Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2005) (granting the debtor authority to pay \$90,000,000 in the debtors' vendor rescue program); *In re Meridian Auto. Systems-Composite Operations, Inc.*, Case No. 05-11168 (MFW) (Bankr. D. Del. May 26, 2005) (authorizing the debtors to pay up to \$50,000,000 in critical vendor claims); *In re UAL Corp.*, Case No. 02-48191 (ERW) (Bankr. N.D. Ill. Dec. 11, 2002) (granting the debtor authority to pay \$35,000,000 in critical vendor claims); *In re WorldCom, Inc.*, Case No. 02-13533 (AJG) (Bankr. S.D.N.Y. Jul. 22, 2002) (granting the debtor authority to pay \$70,000,000 in critical vendor claims); *In re Exide Techs.*, Case No. 02-11125 (JCA) (Bankr. D. Del. Apr. 18, 2002) (approving essential trade amount that was 20% of the debtors total trade debt); *In re Enron Corp.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. Dec. 3, 2001) (approving \$48,000,000 in critical vendor claims).

23. To minimize the amount of payments required, the Debtors request authority to identify Critical Providers in the ordinary course of business, by considering the criteria outlined above. Identifying the Critical Providers now would likely cause all such

vendors to demand payment in full. Under these circumstances, the Debtors should be able to exercise their discretion and business judgment to pay Critical Provider Claims.⁵

24. The Debtors will maintain a matrix summarizing: (i) the name of each Critical Provider paid on account of Critical Provider Claims; (ii) the amount paid to each Critical Provider on account of its Critical Provider Claim; and (iii) a brief description of the goods or services provided by such Critical Provider. This matrix will periodically be provided to: (a) the United States Trustee for the District of Delaware; and (b) any statutory committee appointed in the Chapter 11 Cases (the "**Committee**"); *provided, however*, that the Committee shall execute a confidentiality agreement in a form acceptable to the Debtor prior to its receipt of the matrix.

**(3) Proposed Terms and Conditions of
Payment of Critical Prepetition Claims**

25. The Debtors propose to condition payment of each Critical Prepetition Claim on the relevant Critical Provider's binding agreement to continue supplying its products or services to the Debtors on "Customary Trade Terms" and on other such terms and conditions as are acceptable to the Debtors. As used herein, "**Customary Trade Terms**" means, with respect to a Critical Provider: (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.

⁵ The Debtors would be willing to submit a proposed list of Critical Providers, *in camera*.

26. For cash management purposes, the Debtors further propose to pay substantially all of the Critical Prepetition Claims in deferred cash payments. Thus, the Debtors propose that any amounts due with respect to a Critical Prepetition Claim be paid in three (3) installments consisting of: (i) a payment of 30% of the Critical Prepetition Claim on the date that is thirty (30) days after the date on which the Debtors execute a binding agreement with the relevant Critical Provider pursuant to which the Critical Provider agrees to continue supplying its products or services to the Debtors on Customary Trade Terms; (ii) a payment of 30% of the Critical Provider Claim on the date that is sixty (60) days after the date on which the Debtors execute a binding agreement with the relevant Critical Provider pursuant to which the Critical Provider agrees to continue supplying its products or services to the Debtors on Customary Trade Terms; and (iii) a payment of 40% of the Critical Provider Claim on the effective date of any plan of reorganization (the "**Deferred Payment Program**"). However, to accommodate those instances in which the Debtors, in the exercise of their business judgment, determine that the Deferred Payment Program is inappropriate because, among other reasons, the suppliers at issue have their own financial or liquidity difficulties, the Debtors are seeking the authority to pay a subset of the Critical Prepetition Claims, up to \$3,400,000 outside of the Deferred Payment Program with the relevant Critical Providers pursuant to which they agree to continue supplying products or services on Customary Trade Terms.

27. To facilitate this arrangement, the Debtors propose to use a letter agreement (a "**Supplier Protection Agreement**"), substantially in the form attached hereto as **Exhibit B**, which will be available at www.bmhc.com for review and execution by those Critical Providers interested in taking part in the critical provider program (the "**Supplier Protection**

Program") and will remain subject to the Debtors' acceptance of that Supplier Protection Agreement.

28. The Debtors propose that each Supplier Protection Agreement executed in connection with the Supplier Protection Program be subject to, without limitation, substantially the following terms:

- (a) Debtors will pay _____ to the Supplier in full and final satisfaction of all amounts owed for pre-Petition Date transactions (the "*Agreed Amount*"). This amount will be paid in three (3) installments consisting of: (i) a payment of 30% of the Agreed Amount on the date that is thirty (30) days after the date on which the Debtors execute this Agreement; (ii) a payment of 30% of the Agreed Amount on the date that is sixty (60) days after the date on which the Debtors execute this Agreement; and (iii) a payment of 40% of the Agreed Amount on the effective date of any plan of reorganization.
- (b) Supplier agrees to waive any general unsecured claim against the Debtors.
- (c) Supplier agrees to provide an open trade balance or credit line to the Debtors for shipment of postpetition goods in the amount of \$ _____ (which shall not be less than the greater of the open trade balance outstanding on: (i) _____; or (ii) normal and customary terms on a historical basis before and up to the Petition Date). The terms of such open trade balance or credit line are as follows (if more space is required, attach continuation pages):

- (d) Supplier agrees, through the earlier of the effective date of a chapter 11 plan, the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code or the dismissal of the Debtors' cases, to be bound by the Customary Trade Terms (as defined below), which shall include, but not be limited to, credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and

programs acceptable to the Debtors, so long as the Debtors are not then in postpetition default.

- (e) "**Customary Trade Terms**" shall be defined, with respect to a Supplier as (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors at any time prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.
- (f) If the Supplier is a beneficiary of a letter of credit as security for the Debtors' payment, the Supplier agrees not to draw on the letter of credit so long as the Debtors remain current on their payment obligations under this Agreement, notwithstanding any provision in the underlying letter of credit that may allow such Supplier to draw on the letter of credit as a result of the Debtors' bankruptcy filings or as a result of the Debtors' payment of less than the full amount of such Supplier's prepetition claim.
- (g) Supplier agrees not to draw on a letter of credit, if applicable, or demand a lump sum payment upon consummation of a plan of reorganization in these chapter 11 cases on account of any administrative expense priority claim that Supplier asserts, but instead agrees that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms, if the plan provides for the ongoing operations of the Debtors.
- (h) Supplier acknowledges that it has reviewed the terms and provisions of the Motion and the Order approving the Motion, and consents to be bound by the terms of the Order.
- (i) Supplier agrees that it will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless Supplier's participation in the Supplier Protection Program authorized by the Order is terminated.
- (j) Supplier agrees that it will not file or otherwise assert against the Debtors, the estates, or any other person or entity, or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to Supplier by the Debtors arising from agreements entered into prior to the Petition Date. Furthermore, Supplier agrees to take (at its own expense) all necessary steps to remove any such lien as soon as possible.

- (k) If either the Supplier Protection Program or Supplier's participation therein terminates as provided in the Order, or Supplier later refuses to continue to supply goods or services to the Debtors on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments Supplier receives on account of Supplier's participation in the Supplier Protection Program will be deemed voidable postpetition transfers pursuant to 11 U.S.C. § 549(a). Supplier will immediately repay to the Debtors any payments made to it on account of its participation in the Supplier Protection Program to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Supplier's claim shall be reinstated in such an amount as to restore the Debtors and Supplier to the same positions as would have existed if payments under the Supplier Protection Program had not been made.
- (l) To the extent there exist any safe-harbor contracts between the Debtors and the Supplier that contain a right of termination based on the Debtors' bankruptcy, insolvency, or other similar conditions, the Supplier agrees to waive the filing of bankruptcy by or the insolvency or other similar conditions of the Debtors as a termination right under those contracts for the duration of the Supplier Protection Agreement. All other default, suspension, and termination provisions in such contracts shall remain in effect.
- (m) Any dispute with respect to this letter agreement, the Order and/or Supplier's participation in the Supplier Protection Program shall be determined by the United States Bankruptcy Court for the District of Delaware.

29. By this Motion, the Debtors seek an order authorizing, but not directing, them to enter into Supplier Protection Agreements when they determine, in their business judgment, that payment of some or all of such Critical Prepetition Claims is necessary and that such agreements are in the best interests of the Debtors and their estates. The Debtors reserve the right, in their sole discretion, to negotiate new trade terms with any Critical Provider as a condition to payment of any Critical Prepetition Claim and to enter into agreements with Critical Providers for the payment of Critical Prepetitions Claims that contain terms which are more favorable to the Debtors' estates than the terms outlined above. In addition, the Debtors reserve the right to contest any invoice of a Critical Provider on any grounds.

30. The Debtors further propose that if a Critical Provider later refuses to continue to supply goods or services to the Debtors on the Customary Trade Terms, or on such other terms as were individually agreed to between the Debtors and such Critical Provider, then the Debtors may, in their discretion, and without further order of the Court: (i) declare the payment of the applicable Critical Prepetition Claim a voidable postpetition transfer pursuant to Section 549(a) of the Bankruptcy Code that the Debtors may recover from such Critical Provider in cash or in goods; and (ii) demand that the creditor immediately return such payments in respect of the Critical Prepetition Claim to the extent the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or setoffs of any type whatsoever, and the creditor's Critical Prepetition Claim shall be reinstated in such an amount as to restore the Debtors and the Critical Provider to their original positions, as if the agreement had never been entered into and the payment of the Critical Provider Claim had not been made. In sum, the Debtors will return the parties to their positions immediately prior to the entry of the order approving the relief sought herein.

(4) The Court May Authorize Payment of the Critical Prepetition Claims Pursuant to Sections 363 & 364 of the Bankruptcy Code

31. The Court may grant the relief requested herein pursuant to sections 363 & 364 of the Bankruptcy Code. *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, 20 (Bankr. M.D. Fla.

2005) ("Bankruptcy courts recognize that section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks.").

32. The Debtors intend to require postpetition consideration from Critical Providers in exchange for payment of their prepetition claims, such as commitments to continue supplying essential goods or services, the continuation or enhancement of favorable terms, and other business terms and concessions. This provision of "new value" by these Critical Providers in exchange for payment of their prepetition claims warrants approval of the relief sought by this Motion pursuant to section 363(b) of the Bankruptcy Code.

33. The Debtors also propose to pay certain Critical Prepetition Claims on the condition that each Critical Provider agrees to extend postpetition credit or provide other valuable consideration in exchange for payment. Thus, these parties, by providing value to the Debtors, principally in the form of postpetition credit extensions, may be compensated pursuant to section 364 of the Bankruptcy Code.

34. At best, the Debtors' inability to pay the Critical Prepetition Claims would result in a detrimental delay in the Debtors' operations and at worst would result in a total shutdown of the Debtors' operations. The Debtors submit that the amount of the Critical Prepetition Claims is small in relation to the value that would be lost if the Debtors experienced a substantial disruption in their operations, which may occur if the Critical Prepetition Claims are not paid. In addition, in light of the fact that the Critical Providers may have secured claims against the Debtors' estates, payment of the Critical Provider Claims is not likely to provide those Critical Providers with any greater priority than they would otherwise have if the relief requested herein were not granted. Furthermore, certain of the Critical Providers may have the right to assert liens against the Debtors' customers property and under the Debtors' agreements

with those customers, the Debtors may not be paid until they secure lien releases from those Critical Providers. Accordingly, not only will the Debtors' other creditors not be impaired by payment of the Critical Prepetition Claims but such creditors will benefit by this Court's empowering the Debtors to negotiate payment of the Critical Prepetition Claims to facilitate a smooth transition into bankruptcy.

35. Moreover, the bulk of the Critical Prepetition Claims are entitled to administrative priority pursuant to section 503(b)(9) of the Bankruptcy Code. Accordingly, payment of these claims will not harm the Debtors' estates. Authorizing the Debtors to make these required payments now, as opposed to at the conclusion of these cases, will enable the Debtors to leverage this obligation in order to obtain favorable trade terms that will enhance the Debtors' liquidity. Courts in this jurisdiction have authorized the payment of section 503(b)(9) claims during the pendency of chapter 11 cases. *See, e.g., In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Mar. 9, 2009); *In re VeraSun Energy Corp.*, Case No. 08-12606 (BLS) (Bankr. D. Del. Nov. 4, 2008); *In re Buffets Holdings, Inc.*, No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008); *In re Pope & Talbot, Inc.*, No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); *In re Dura Auto Sys. Inc.*, No. 06-11202 (KJC) Bankr. D. Del. Oct. 31, 2006); *In re Werner Holding Co. (DE), Inc.*, No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); *In re Pliant Corp.*, No. 06-10001 (MFW) (Bankr. D. Del. Feb. 8, 2006).

(5) The Court May Also Authorize Payment of the Critical Prepetition Claims Pursuant to its General Equitable Powers Under Section 105(a) of the Bankruptcy Code and the "Necessity of Payment" Doctrine

36. The Debtors proposed payment of the Critical Prepetition Claims should also be authorized pursuant to section 105(a) of the Bankruptcy Code and the "doctrine of necessity."

37. 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 prepetition 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 Fin. 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.").

38. 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, 312 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent "stoppage of [crucial] business relations"); *In re Lehigh Co. & 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) (Second Circuit extends 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, 285-86 (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).

39. 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 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.

40. As stated above, the payment of the Critical Prepetition Claims is essential to the uninterrupted operation of the Debtors' business. In turn, the maintenance of the Debtors' business during these chapter 11 cases is crucial to the Debtors' ability to rehabilitate for the benefit of all stakeholders. Hence, this Court should exercise its equitable powers to grant the relief requested herein.

41. This Court and other courts have granted similar relief in other large chapter 11 cases where the payment of critical provider claims was essential to the debtors' continued operation.⁶ See, e.g., *In re Syntax-Brilliant Corp.*, Ch. 11 Case No. 08-11407 (BLS) (Bankr. D. Del. July 9, 2008); *In re JHT Holdings, Inc.*, Ch. 11 Case No. 08-11267 (BLS) (Bankr. D. Del. June 25, 2008); *In re Am. Home Mortgage Holdings, Inc.*, Ch. 11 Case No. 07-11047 (CSS) (Bankr. D. Del. Aug. 7, 2007); *In re Werner Holding Co. (DE) Inc.*, Ch. 11 Case No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); *In re Pliant Corp.*, Ch. 11 Case No. 06-10001 (MFW) (Bankr. D. Del. Jan. 4, 2006); *In re Meridian Auto. Sys.-Composite Operations*, Ch. 11 Case No. 05-11168 (MFW) (Bankr. D. Del. May 26, 2005); *In re Maxide Acquisitions, Inc.*, Ch. 11 Case No. 05-10429 (MFW) (Bankr. D. Del. Feb. 15, 2005); *In re Fleming Cos., Inc.*, Ch. 11 Case No. 03-10945 (MFW) (Bankr. D. Del. May 6, 2003); *In re Maxim Medical Group, Inc.*, Ch. 11 Case No. 03-10438 (PJW) (Bankr. D. Del. Feb. 19, 2003); *In re Worldcom, Inc.*, Ch. 11 Case No. 02-13533 (ALG) (Bankr. S.D.N.Y. July, 22, 2002); *In re Enron Corp.*, Ch. 11 Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. Dec. 3, 2001); *In re AI Realty Mktg. of New York, Inc.*, Ch. 11 Case Nos. 01-40252 through 01-40290 (AJG) (Bankr. S.D.N.Y. Feb. 6, 2001); *In re Payless Cashways, Inc.*, 268 B.R. 543 (Bankr. W.D. Mo. 2001); *In re LTV Steel Co.*, Ch. 11

⁶ 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.

Case No. 00-43866 (RB) (Bankr. N.D. Ohio Dec. 29, 2000); *In re Pillowtex, Inc.*, Ch. 11 Case No. 00-4211 (SLR) (D. Del. Nov. 14, 2000).

(6) The Court May Also Authorize Payment of the Critical Prepetition Claims as a Valid Exercise of the Debtors' Fiduciary Duties

42. The Debtors, operating their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, are fiduciaries operating the business for the benefit of creditors and, if value justifies, equity owners. Implicit in the duties of a debtor in possession is the duty to protect and preserve the estate, including the business's going-concern value.

43. There are instances in which a debtor in possession can fulfill its fiduciary duty only by the preplan satisfaction of prepetition claims. Preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when, for example, the payment is a means of effecting a substantial enhancement of the estate or when the payment was to a sole-source provider.

44. Here, payment of the Critical Prepetition Claims is a valid exercise of the Debtors' business judgment because the Debtors have narrowly tailored their request to pay the Critical Prepetition Claims to encompass only those suppliers and service providers that are absolutely essential to the Debtors' ongoing business operations. Without these Critical Providers, the Debtors' operations would be, at best, disrupted for a significant period of time due to the time and expense that would be involved in transitioning to new providers (if even available) and, at the worst, shut down completely. This disruption or possible shutdown of the Debtors' operations would cost the Debtors' estates substantial amounts in lost revenues and would adversely impact the Debtors' ongoing operations and reorganization efforts.

45. Accordingly, the harm and economic disadvantage that would stem from the failure to pay the Critical Providers is grossly disproportionate to the amount of the Critical Prepetition Claims that would have to be paid to ensure that the Critical Providers continue to conduct business with the Debtors. Therefore, the Debtors request that the Court grant the relief requested herein.

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

46. 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. Interim Relief is Justified

47. 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. Here, the relief requested is necessary to avoid immediate and irreparable harm to the Debtors' estates for the reasons set forth above.

48. As described above, payment of the Critical Prepetition Claims is integral to the Debtors' operations and is necessary to maintain the confidence and goodwill of the Debtors' customer base, which is critical to a successful reorganization. The Debtors' business depends upon its ability to provide on-time delivery and/or installation of building products and manufactured building components. This, in turn, requires the timely provision of the Critical Providers' goods and services to the Debtors. Any disruption in the Debtors' carefully choreographed distribution and delivery system would likely cause the Debtors' customers to turn elsewhere to satisfy their needs for on-time delivery of building products and services – especially in today's market climate where competition for the Debtors' services is at an all-time high.

49. Moreover, failure to pay the Critical Prepetition Claims may result in some Critical Providers exercising various self-help remedies available under applicable state law. Payment of the Critical Prepetition Claims will save the Debtors the considerable time and expense of having to negotiate or litigate for the return of or right to use property of the estate that may be subject to these claims.

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

REQUEST FOR WAIVER OF STAY

51. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the orders 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, proposed payment on account of Critical Prepetition Claims 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

52. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors; a waiver of the Debtors' rights to dispute any claim; or an approval, assumption or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice or claim with respect to Critical Prepetition Claims in accordance with applicable nonbankruptcy 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

53. 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.

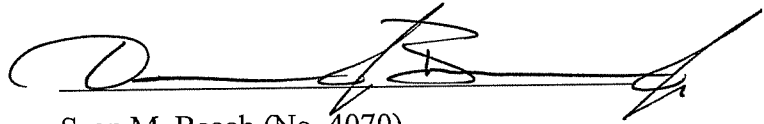
NO PRIOR REQUEST

54. 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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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

EXHIBIT A

Proposed Order

**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-<u>12074</u> ()
Debtors.)	
)	Jointly Administered
)	
)	Ref. Docket No. _____

ORDER (A) AUTHORIZING THE DEBTORS TO PAY CERTAIN CRITICAL PROVIDER ADMINISTRATIVE CLAIMS; (B) AUTHORIZING THE DEBTORS TO PAY CERTAIN ADDITIONAL CRITICAL PROVIDER CLAIMS; AND (C) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS

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, but not requiring, the Debtors to pay claims for the value of goods received by the Debtors from certain critical providers in the ordinary course of business during the 20-day period immediately preceding the Petition Date,² (b) authorizing, but not requiring, the Debtors to pay certain critical providers for claims not entitled to administrative priority, and (c) 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

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 herein but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

accordance with this Order, all as set forth in the Motion; and upon the Street Declaration 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 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, in the reasonable exercise of their business judgment, to pay some or all of the prepetition claims of those Critical Providers who agree to continue to supply goods or services to the Debtors on such Critical Provider's "Customary Trade Terms" and on other such terms and conditions as are acceptable to the Debtors. As used herein, "**Customary Trade Terms**" means, with respect to a Critical Provider: (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors at any time prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.

3. The Debtors may not make any payments to any Critical Provider on account of its Critical Prepetition Claim until 30 days after the date on which the Debtors execute a binding agreement with that Critical Provider pursuant to which the Critical Provider agrees to continue supplying its products or services to the Debtors on Customary Trade Terms. Payments made pursuant to this Order on account of Critical Prepetition Claims shall be made according to the following schedule: (i) a payment of 30% of the Critical Prepetition Claim on the date that is thirty (30) days after the date on which the Debtors execute a binding agreement with the relevant Critical Provider pursuant to which the Critical Provider agrees to continue supplying its products or services to the Debtors on Customary Trade Terms; (ii) a payment of 30% of the Critical Prepetition Claim on the date that is sixty (60) days after the date on which the Debtors execute a binding agreement with the relevant Critical Provider pursuant to which the Critical Provider agrees to continue supplying its products or services to the Debtors on Customary Trade Terms; and (iii) a payment of 40% of the Critical Prepetition Claim on the effective date of any plan of reorganization (the "***Deferred Payment Program***"); *provided, however*, that the Debtors shall have the authority to pay up to \$3,400,000 in Critical Prepetition Claims immediately upon the Debtors' execution of a binding agreement with any relevant Critical Providers pursuant to which those Critical Providers agree to continue supplying products or services on Customary Trade Terms.

4. After the date hereof, the Debtors shall determine, in the ordinary course of business, who is a Critical Provider by considering, among other things: (i) which suppliers are sole-source or limited-source suppliers of goods or services of the quality and quantity required by the Debtors in a particular market, without whom the Debtors could not continue to operate without disruption; (ii) which suppliers would be prohibitively expensive or time-consuming to

replace, such as where the Debtors' existing inventory, equipment, or manufacturing processes are specifically tailored to that supplier's products or services; and (iii) which suppliers the Debtors' customers require them to use.

5. The Debtors shall maintain a matrix summarizing: (i) the name of each Critical Provider paid on account of Critical Prepetition Claims; (ii) the amount paid to each Critical Provider on account of its Critical Prepetition Claim; and (iii) a brief description of the goods or services provided by such Critical Provider. This matrix will periodically be provided to: (a) the United States Trustee for the District of Delaware; and (b) any statutory committee appointed in the Chapter 11 Cases (the "**Committee**"); *provided, however*, that the Committee shall execute a confidentiality agreement in a form acceptable to the Debtor prior to its receipt of the matrix.

6. The Debtors shall provide to counsel for the Committee written reports of all payments made hereunder on an every-other-week basis, and reasonable and timely access to information sufficient to enable it to monitor payments made, obligations satisfied, and other actions taken pursuant to this Order.

7. The Debtors shall undertake all appropriate efforts to cause Critical Providers to enter into an agreement (the "**Supplier Protection Agreement**") including provisions substantially in the form attached to the Motion as **Exhibit B**, which contains terms substantially similar to the following:

- (a) Debtors will pay _____ to the Supplier in full and final satisfaction of all amounts owed for pre-Petition Date transactions (the "**Agreed Amount**"). This amount will be paid in three (3) installments consisting of: (i) a payment of 30% of the Agreed Amount on the date that is thirty (30) days after the date on which the Debtors execute this Agreement; (ii) a payment of 30% of the Agreed Amount on the date that is sixty (60) days after the date on which the Debtors execute this Agreement; and (iii) a payment of 40% of the Agreed Amount on the effective date of any plan of reorganization.
- (b) Supplier agrees to waive any general unsecured claim against the Debtors.

- (c) Supplier agrees to provide an open trade balance or credit line to the Debtors for shipment of postpetition goods in the amount of \$_____ (which shall not be less than the greater of the open trade balance outstanding on: (i) _____; or (ii) normal and customary terms on a historical basis before and up to the Petition Date). The terms of such open trade balance or credit line are as follows (if more space is required, attach continuation pages:

- (d) Supplier agrees, through the earlier of the effective date of a chapter 11 plan, the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code or the dismissal of the Debtors' cases, to be bound by the Customary Trade Terms (as defined below), which shall include, but not be limited to, credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs acceptable to the Debtors, so long as the Debtors are not then in postpetition default.
- (e) "**Customary Trade Terms**" shall be defined, with respect to a Supplier as (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors at any time prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.
- (f) If the Supplier is a beneficiary of a letter of credit as security for the Debtors' payment, the Supplier agrees not to draw on the letter of credit so long as the Debtors remain current on their payment obligations under this Agreement, notwithstanding any provision in the underlying letter of credit that may allow such Supplier to draw on the letter of credit as a result of the Debtors' bankruptcy filings or as a result of the Debtors' payment of less than the full amount of such Supplier's prepetition claim.
- (g) Supplier agrees not to draw on a letter of credit, if applicable, or demand a lump sum payment upon consummation of a plan of reorganization in these chapter 11 cases on account of any administrative expense priority

claim that Supplier asserts, but instead agrees that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms, if the plan provides for the ongoing operations of the Debtors.

- (h) Supplier acknowledges that it has reviewed the terms and provisions of the Motion and the Order approving the Motion, and consents to be bound by the terms of the Order.
- (i) Supplier agrees that it will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless Supplier's participation in the Supplier Protection Program authorized by the Order is terminated.
- (j) Supplier agrees that it will not file or otherwise assert against the Debtors, the estates, or any other person or entity, or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to Supplier by the Debtors arising from agreements entered into prior to the Petition Date. Furthermore, Supplier agrees to take (at its own expense) all necessary steps to remove any such lien as soon as possible.
- (k) If either the Supplier Protection Program or Supplier's participation therein terminates as provided in the Order, or Supplier later refuses to continue to supply goods or services to the Debtors on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments Supplier receives on account of Supplier's participation in the Supplier Protection Program will be deemed voidable postpetition transfers pursuant to 11 U.S.C. § 549(a). Supplier will immediately repay to the Debtors any payments made to it on account of its participation in the Supplier Protection Program to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Supplier's claim shall be reinstated in such an amount as to restore the Debtors and Supplier to the same positions as would have existed if payments under the Supplier Protection Program had not been made.
- (l) To the extent there exist any safe-harbor contracts between the Debtors and the Supplier that contain a right of termination based on the Debtors' bankruptcy, insolvency, or other similar conditions, the Supplier agrees to waive the filing of bankruptcy by or the insolvency or other similar conditions of the Debtors as a termination right under those contracts for the duration of the Supplier Protection Agreement. All other default, suspension, and termination provisions in such contracts shall remain in effect.

- (m) Any dispute with respect to this letter agreement, the Order and/or Supplier's participation in the Supplier Protection Program shall be determined by the United States Bankruptcy Court for the District of Delaware.

8. The Debtors are authorized, but not required, to enter into Supplier Protection Agreements when the Debtors determine, in the exercise of their reasonable business judgment, that it is appropriate to do so. However, the Debtors inability to enter into a Supplier Protection Agreement shall not preclude them from paying a Critical Prepetition Claim when, in the exercise of their reasonable business judgment, such payment is necessary to the Debtors operations. In such cases, the Debtors are authorized to condition payment of the Critical Prepetition Claims on such terms and conditions as the Debtors deem appropriate in the valid exercise of their business judgment.

9. If the Critical Provider is a beneficiary of a letter of credit as security for the Debtors' payment, the Debtors may condition payment of the Critical Prepetition Claim on the Critical Provider's agreement not to draw on the letter of credit so long as the Debtors remain current on their payment obligations, notwithstanding any provision in the underlying letter of credit that may allow such Critical Provider to draw on the letter of credit as a result of the Debtors' bankruptcy filings.

10. If the Debtors, in their discretion, determine that a Critical Provider has not complied with the terms and provisions of the Supplier Protection Agreement or has failed to continue to provide Customary Trade Terms following the date of the agreement, or on such terms as were individually agreed to between the Debtors and such Critical Provider, the Debtors may terminate a Supplier Protection Agreement, together with the other benefits to the Critical Provider as contained in this Order, provided, however, that the Supplier Protection Agreement

may be reinstated if: (i) such determination is subsequently reversed by the Court for good cause after it is shown that the determination was materially incorrect after notice and a hearing following a motion from the Critical Provider; (ii) the underlying default under the Supplier Protection Agreement is fully cured by the Critical Provider not later than five business days after the date the initial default occurred; or (iii) the Debtors, in their sole and absolute discretion, reach a subsequent agreement with the Critical Provider.

11. No payment of Critical Prepetition Claims is avoidable under section 547 or 549(a) of the Bankruptcy Code to the extent that the payee thereof complies with the provisions of any agreement it enters into with the Debtors in respect of such payment. However, if a Supplier Protection Agreement is terminated as set forth above, or if a Critical Provider that has received payment of a prepetition claim later refuses to continue to supply goods or services for the applicable period in compliance with the Supplier Protection Agreement or this Order, then (i) the Debtors may, in their discretion, declare the payment of the creditor's Critical Prepetition Claim a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from such Critical Provider; (ii) the creditor shall immediately return such payments in respect of a Critical Prepetition Claim to the extent the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever; and (iii) the applicable Critical Prepetition Claim shall be reinstated in such an amount so as to restore the Debtors and the Critical Provider to their original positions as if the Supplier Protection Agreement had never been entered into and no payment of a Critical Prepetition Claim had been made.

12. Nothing contained in this Order shall constitute a waiver of the Debtors' right to seek damages or other appropriate remedies against any Critical Provider that breaches the Supplier Protection Agreement, including, without limitation, the Debtor's right to seek injunctive relief from the Court on an expedited basis to compel performance pursuant to the Customary Trade Terms.

13. All Supplier Protection Agreements shall be deemed to have terminated, together with the other benefits to Critical Providers as contained in this Order, upon entry of an order converting the Debtors' chapter 11 cases to cases under chapter 7 of the Bankruptcy Code.

14. The Debtors' payment of the Critical Provider Claims shall not exceed the Provider Claims Cap unless otherwise ordered by the Court after notice and a hearing.

15. 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.

16. 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 payments on account of Critical Prepetition Claims that are dishonored or rejected.

17. Nothing herein shall change the nature or priority of the underlying Critical Prepetition Claims.

18. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

19. Nothing contained in this Order shall be deemed to constitute an assumption or adoption of any executory contract or prepetition or postpetition agreement between the Debtors and the holder of a Critical Prepetition Claim, or to require the Debtors to make any of the payments authorized herein.

20. The authorization granted hereby to pay Critical Prepetition Claims shall not create any obligation on the part of the Debtors or their officers, directors, attorneys, or agents to pay the Critical Prepetition Claims. None of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay a Critical Prepetition Claim, and nothing contained in this Order shall be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect the Critical Prepetition Claims to the extent they are not paid.

21. The amount of such Critical Prepetition Claim set forth in connection with a Supplier Protection Agreement shall be used only for purposes of determining the relevant Critical Provider's claim under this Order and shall not be deemed a claim allowed by the Court, and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Court. Further, signing a Supplier Protection Agreement containing a claim amount for purposes of this Order shall not excuse such Critical Provider from filing a proof of claim in these cases.

22. No claimant who receives payment on account of a Critical Prepetition Claim is permitted to file or perfect a lien, reclamation claim, or a claim under section 503(b)(9) of the Bankruptcy Code on account of such Critical Prepetition Claim, and any such claimant shall take

at the claimant's expense all necessary action to remove any existing lien or withdraw such reclamation claim or 503(b)(9) claim relating to such Critical Prepetition Claim, even if the lien, reclamation claim, or 503(b)(9) claim is against property of a non-debtor.

23. Nothing in this Order shall be deemed either a grant of administrative priority expense status to, or authority to pay, any amounts that are disputed by the Debtors.

24. Nothing contained in this Order shall be construed as a waiver by the Debtors of their rights to contest any claim or invoice of a holder of a Critical Prepetition Claim under applicable law.

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

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

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

28. 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).

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

30. 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

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Form of Supplier Protection Agreement

[INSERT BMHC LOGO]

Supplier Protection Agreement

_____, 2009

Valued Supplier:

Building Materials Holding Corporation and its affiliates ("**BMHC**" or the "**Debtors**") filed voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code (the "**Bankruptcy Case**") on June 16, 2009 (the "**Petition Date**"). As part of its Chapter 11 filing, BMHC has created a special Supplier Protection Program for its critical providers of goods and services, which was approved by the Bankruptcy Court. Under the Program, certain suppliers who contractually commit to continue doing business with us may be eligible to receive immediate and full payment, as due, for goods and services that were provided before the filing, but for which the supplier has not yet been paid.

The Supplier Protection Program is described in greater detail in the motion filed with the Bankruptcy Court on June 16, 2009 (the "**Motion**"), and the order approving it (the "**Order**"), which can be located at www._____.com. BMHC encourages you to read and understand the additional terms and conditions reflected in the motion and order, which are incorporated by reference in this agreement. You can call _____ with questions or to discuss this opportunity.

To receive payment on your pre-bankruptcy claim, you must agree to continue to provide goods and services to BMHC based on "**Customary Trade Terms**." Customary Trade Terms are the normal and customary trade terms, practices and programs (including, but not be limited to, credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs), that were most favorable to BMHC and in effect between you and BMHC prior to BMHC's bankruptcy filing, or such other terms as you and BMHC agree. You must continue providing those goods or services until the earlier of the effective date of a Chapter 11 plan, the conversion of BMHC's Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or the dismissal of the Bankruptcy Case. In addition, you must provide supporting documents to substantiate the amount of your pre-bankruptcy claim. In exchange, if your Supplier Protection Agreement is accepted by BMHC, you will receive payment, in full of your pre-bankruptcy claim.

Qualification to participate will be determined by BMHC based on applications signed and returned to the company by _____. In order to participate, please download a copy of this contract, print it out, fill in the information below, sign it, and return it by fax, with the appropriate supporting documentation for the amount of your pre-bankruptcy claim, to BMHC at _____.

Supplier Commitment: The undersigned agrees to the following terms and conditions:

- (a) Debtors will pay _____ to the Supplier in full and final satisfaction of all amounts owed for pre-Petition Date transactions (the "**Agreed Amount**"). This amount will be paid in three (3) installments consisting of: (i) a payment of 30% of the Agreed Amount on the date that is thirty (30) days after the date on which the Debtors execute this Agreement; (ii) a payment of 30% of the Agreed Amount on the date that is sixty (60) days after the date on which the Debtors execute this Agreement; and (iii) a payment of 40% of the Agreed Amount on the effective date of any plan of reorganization.

- (b) Supplier agrees to waive any general unsecured claim against the Debtors.
- (c) Supplier agrees to provide an open trade balance or credit line to the Debtors for shipment of postpetition goods in the amount of \$_____ (which shall not be less than the greater of the open trade balance outstanding on: (i) _____; or (ii) normal and customary terms on a historical basis before and up to the Petition Date). The terms of such open trade balance or credit line are as follows (if more space is required, attach continuation pages):
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- (d) Supplier agrees, through the earlier of the effective date of a chapter 11 plan, the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code or the dismissal of the Debtors' cases, to be bound by the Customary Trade Terms (as defined below), which shall include, but not be limited to, credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs acceptable to the Debtors, so long as the Debtors are not then in postpetition default.
- (e) "**Customary Trade Terms**" shall be defined, with respect to a Supplier as (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors at any time prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.
- (f) If the Supplier is a beneficiary of a letter of credit as security for the Debtors' payment, the Supplier agrees not to draw on the letter of credit so long as the Debtors remain current on their payment obligations under this Agreement, notwithstanding any provision in the underlying letter of credit that may allow such Supplier to draw on the letter of credit as a result of the Debtors' bankruptcy filings or as a result of the Debtors' payment of less than the full amount of such Supplier's prepetition claim.

- (g) Supplier agrees not to draw on a letter of credit, if applicable, or demand a lump sum payment upon consummation of a plan of reorganization in these chapter 11 cases on account of any administrative expense priority claim that Supplier asserts, but instead agrees that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms, if the plan provides for the ongoing operations of the Debtors.
- (h) Supplier acknowledges that it has reviewed the terms and provisions of the Motion and the Order approving the Motion, and consents to be bound by the terms of the Order.
- (i) Supplier agrees that it will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless Supplier's participation in the Supplier Protection Program authorized by the Order is terminated.
- (j) Supplier agrees that it will not file or otherwise assert against the Debtors, the estates, or any other person or entity, or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to Supplier by the Debtors arising from agreements entered into prior to the Petition Date. Furthermore, Supplier agrees to take (at its own expense) all necessary steps to remove any such lien as soon as possible.
- (k) If either the Supplier Protection Program or Supplier's participation therein terminates as provided in the Order, or Supplier later refuses to continue to supply goods or services to the Debtors on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments Supplier receives on account of Supplier's participation in the Supplier Protection Program will be deemed voidable postpetition transfers pursuant to 11 U.S.C. § 549(a). Supplier will immediately repay to the Debtors any payments made to it on account of its participation in the Supplier Protection Program to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Supplier's claim shall be reinstated in such an amount as to restore the Debtors and Supplier to the same positions as would have existed if payments under the Supplier Protection Program had not been made.
- (l) To the extent there exist any safe-harbor contracts between the Debtors and the Supplier that contain a right of termination based on the Debtors' bankruptcy, insolvency, or other similar conditions, the Supplier agrees to waive the filing of bankruptcy by or the insolvency or other similar conditions of the Debtors as a termination right under those contracts for

the duration of the Supplier Protection Agreement. All other default, suspension, and termination provisions in such contracts shall remain in effect.

- (m) Any dispute with respect to this letter agreement, the Order and/or Supplier's participation in the Supplier Protection Program shall be determined by the United States Bankruptcy Court for the District of Delaware.

Supplier's Name Date

Date

\$ _____
Amount Supplier Asserts is Owed
Supporting Documents Must Be Included

Supplier's Address

ACCEPTED BY:*

Debtor

Date

*Amount remains subject to review and true up.