IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	§	**CHAPTER 11**
	§	**CASE NO. 09-12074 (KJC)**
BUILDING MATERIALS HOLDING	§	**Jointly Administered**
CORPORATION, et al.	§	
	§	**Hearing Date: May 19, 2010 @ 11:30 a.m.**
Reorganized Debtors.	§	**Objections Due: May 12, 2010 by 4:00 p.m.**

MOTION TO RECONSIDER CLAIM
OF GSA HOME ENERGY SOLUTIONS

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

NOW COMES GSA HOME ENERGY SOLUTIONS, LLC ("GSA"), and in its Motion to Reconsider Claim would show the Court as follows:

1. GSA's claim arises from the rejection of an executory contract.

JURISDICTION

2. This Court has core jurisdiction under 28 U.S.C. § 157, 28 U.S.C. § 1334, 11 U.S.C. § 502, and Federal Bankruptcy Rule 3008.

PROCEDURAL BACKGROUND

3. On November 19, 2009, this Court entered an Order rejecting the executory contract between GSA and BMC West Corp. ("BMC"). Pursuant to the Order, GSA had thirty (30) days to file a proof of claim for its rejected executory contract.

4. GSA timely filed its proof of claim on December 18, 2009.

5. The Debtor filed an objection to GSA's proof of claim as being filed late. This is because the deadline for filing proofs of claim for regular unsecured creditors was August 31, 2009.

6. GSA prepared a response to the Debtor's objection to its claim but did not file same as Debtor's counsel represented that he would withdraw the objection, which he did.

7. After the Debtor's Plan was confirmed, the Court and the Debtor issued a notice dated January 4, 2010 requiring the re-filing of proofs of claim with the Court Clerk. A true and correct copy of such notice is attached hereto as Exhibit "A". Specifically, such provision stated in relevant part:

> Please take further notice . . . all Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts . . . must be filed with the Bankruptcy Court within thirty (30) days after the January 4, 2010 Effective Date . . .

8. Texas counsel followed the procedure. An identical proof of claim that had already been filed with the claims agent was therefore filed on January 26, 2010 with the bankruptcy clerk.

9. On March 18, 2010, Debtor filed and served the Sixteenth Omnibus Objection to Claims and the Seventeenth Omnibus Objection to Claims. They were both received by GSA's Texas counsel on the same date. GSA's counsel looked at them and given the similar title, date and service, thought they were identical.

10. The Sixteenth Omnibus Objection simply provided that the December 18, 2009 claim was objectionable and that the January 26, 2010 claim should be a "surviving claim." As the claims were duplicative in amount, this was no problem and GSA filed no objection.

11. GSA had no problem with this order because it only wants to be paid for the value of its services and products, nothing more.

12. The problem is that the Sixteenth Omnibus Objection was not identical to the Seventeenth Omnibus Objection and instead of reiterating that GSA had a surviving claim of $1,114,147.60, the Seventeenth Omnibus Objection stated that GSA had no claim and the same should be expunged.

13. This anomaly was compounded on April 19, 2010, when this Court entered an order that stated that the GSA claim had been expunged.

14. However, later on April 19, 2010, the Court entered an order stating that GSA had a surviving unsecured claim of $1,114,147.60. By normal rules of statutory construction, the subsequent order superseded the prior order.

15. The last order of the Court controls and GSA requests that this Court enter an order so stating. As a practical matter, however, the dispute will likely not end here.

BACKGROUND FACTS

16. Prior to the filing of this bankruptcy proceeding, GSA and the Debtor entered into an executory contract for sale of goods, services, and technical know how.

17. On or about September 8, 2009, the Senior Vice President of Building Materials Holding Corporation, Paul S. Street, mailed a letter to Mr. Craig Bushon, President of GSA. A true and correct copy of such letter is attached hereto as Exhibit "B" and is incorporated by reference.

18. Mr. Street took positions that were not authorized under law. Mr. Street stated that under Section 365(a) of the Bankruptcy Code that BMC West Corporation ("BMC") had the right to reject the agreement for services it no longer needed. He further stated that "BMC is hereby rejecting the above-referenced agreement effective September 14, 2009."

19. Mr. Street had no legal authority to make these statements. Mr. Street did not have the power to accept or reject contracts. BMC has the power to petition the Court to accept or reject executory contracts and may do so only after the Court grants permission.

20. Furthermore, BMC cannot unilaterally state when the rejection of the contract becomes effective. It is the Court that has this power.

21. Such letter makes reference to BMC sales personnel having entered into confidentiality agreements with GSA and that upon termination of the contract, such materials will be returned. Specifically, BMC states:

> BMC will advise the sales personnel of their responsibilities under the confidentiality agreement and collect the materials to be returned to HES for delivery to HES on September 14.

22. This is the responsibility of BMC. BMC has failed to do so.

23. BMC delayed in rejecting its contract with GSA. The motion to reject such contract was filed on the 19th day of November, 2009. Because of the nature of the "business judgment test", GSA did not object to the rejection of the contract even though it was a very poor business move. BMC requested that the rejection relate back to September, 2009, GSA had no reason to be unreasonable and did not object.

24. Instead, GSA allowed the motion for rejection of contract to go forward together with the retroactive application date. GSA did so because the Debtor and GSA have another contract that is very lucrative that both parties want to go forward with.

A. THE "CAUSE" STANDARD UNDER § 502(J)

25. Under Federal Rules of Bankruptcy Procedure 3008 and § 502(j) of the Bankruptcy Code, it is clear that once a claim has been allowed or disallowed by the bankruptcy

court, a party in interest may file a motion to reconsider for "cause." These provisions do not provide any guidance, however, as to what constitutes "cause."

26. Therefore, the Courts have developed their own standards as to what constitutes "cause." The first step in applying the proper standard is to determine whether the claim has been litigated. If the claim has been litigated and the motion to reconsider is filed more than 10 days after the date the order allowing or disallowing the claim was entered then the motion will be governed by Federal Rule of Bankruptcy Procedure 9024. Rule 9024 incorporates Federal Rule of Civil Procedure 60, which determines if cause exists to reconsider a claim under Bankruptcy Rule 3008 and 11 U.S.C. § 502(j). See *In re Harbor Financial Group, Inc.*, 303 B.R. 124, 131 (Bank.N.D.Tex. 2003) citing *In re Colley*, 814 F.2d 1008, 1010 (5th Cir. 1987). Because the motion was filed within ten (10) days of the order denying the claim, GSA is subjected to a lesser standard to vacate.

27. If the claim has not been litigated, there is still a lesser standard to vacate. The next section will address the issue of whether or not the claim was litigated.

1. Whether the Claim was Litigated or Whether It Was Obtained by Default

28. The Omnibus Objection to GSA's claim was not "actually litigated." The Debtor, not GSA, initiated a contested proceeding by filing an objection to proof of claim. GSA had already fought off and won a previous objection. Debtor filed two subsequent objections to claims on April 19, 2010. GSA did not file a response. GSA did not conduct discovery. GSA did not appear at the hearing to contest the objection. Under one order, GSA's claim was disallowed in whole without any adjudication on the merits. In point of fact, a default order was entered against GSA under the order. Case authority holds that an uncontested denial of claim

under these circumstances is "in essence" a default judgment. See *In re Washington County Broadcasting, Inc.*, 39 B.R. 77, 79 (Bankr. D. Me. 1984).

29. But under the subsequent order issued on April 19, 2010, GSA's claim was allowed. The subsequent order should control.

2. The Lesser Dignity Afforded to Orders and Judgments Obtained by Default

30. Although default judgments are fully enforceable as final judgments, they are not given the same force, dignity, and affect as a litigated judgment when it comes to setting the same aside or in subsequent proceedings where the doctrine of issue preclusion is to be applied. And this is understandable. To do otherwise would elevate form over substance. As has been stated by many a court many a time, the law abhors a forfeiture.

31. As a result, it is much easier to set aside a default judgment than a judgment that has been litigated on the merits. Outside of the realm of reconsideration of claims in bankruptcy, courts have held that when the grant of a default judgment precludes consideration of the merits of the case, even a slight abuse of discretion may justify reversal. See *Johnson v. Dayton Elect. Mfg. Co.*, 140 F.3d 781, 785 (8th Cir. 1998); *Shepard Claims Serv. Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 193 (6th Cir. 1986); *In re Mildred Marie McArthur*, 258 B.R. 741, 746 (Bankr. W.D. Ark. 2001).

32. This is amplified by the fact that a subsequent order on the same day, April 19, 2010, allowed the claim.

33. Furthermore, "[f]ederal courts are very reluctant to accord res judicata or collateral estoppel effect to judgments which have been previously entered by default. . . " *In re*

Bova, 211 B.R. 803, 810 (Bankr. E.D. Penn. 1997). Collateral estoppel is not afforded a prior judgment if the judgment was entered by default. The law provides:

> The threshold question in the instant case is whether the second requirement [that an issue must have been actually litigated] for establishing collateral estoppel has been satisfied. The Court of Appeals for the Second Circuit has specifically endorsed this requirement. The relevant issue (must have been) actually litigated and determined in the prior proceeding. In the case at bar no issues were actually litigated because the prior judgment was procured by default. Consequently, the doctrine of collateral estoppel does not bar relitigation by this court of the issues included in the default judgment. *In re Ianelli*, 12 B.R. 561, 563 (Bankr. S.D.N.Y. 1981).

34. In addition, the following statement has been made that "to invoke the doctrine of collateral estoppel in default causes is not only an oppressive notion of the doctrine, but also misconceives the nature of a default judgment." 3 Moore, James William; Vestal, Allan D.; and Kurland, Philip B., *Moore's Manual Federal Practice & Procedure* § 30.05[5] p. 30-102 (1997).

35. The above referenced authority does not directly address the standard to be applied in reconsidering a bankruptcy claim that has been denied by default. Such authority makes it clear, however, that lesser dignity is afforded to rulings obtained by default, especially when the same are obtained by misleading circumstances, even if the same are innocent.

3. The Lesser Standard for Cause When Reconsidering a Claim Denied by Default

36. Reference is made to the case of *In re Washington County Broadcasting, Inc.*, 39 B.R. 77 (Bankr. Maine 1984). In such case the creditor, like GSA, had timely filed a proof of claim. The creditor's staff attorney, however, took over the file and failed to notify the Court or the debtor that he was the new "point person" who needed to receive notifications. In the Washington County case, an objection was filed by the trustee, a default order was entered

denying the claim, and the creditor moved for reconsideration more than 10 days after the claim was denied.

37. The Maine Court noted the similarities of the order denying the claim to a default judgment. In such regard, the Court stated:

> Moreover, the order disallowing [the creditor's] claim is in essence a default judgment. As this Court has recently stated, default judgments are not favored in the law. (citation omitted), *Id.* at 79.

The Court, interestingly enough, applied Federal Rule 60(b) in determining whether the claim should be reconsidered or not. The focal point for the Court was how to apply the standard of "excusable neglect" to reconsideration of a claim. In that regard, the Court noted that such standard was flexible. The Court further noted that depending upon the interests and circumstances involved, the standard could vary. In that regard, the Court stated:

> With respect to reconsideration of this claim under Bankruptcy Rule 3008, the Court concludes that ***a liberal standard of "excusable neglect" is appropriate***. The Rules themselves make clear that little weight should be accorded to any party's interest in the finality of an order disallowing a claim. See Bankruptcy Rule 3008 (Advisory Committee Note) .... At least where dividends have not been paid, there is no prejudice to the other creditors in allowing reconsideration of the disallowance of a just claim would result in an undeserved windfall to other creditors. 1d at 79. (Emphasis and italics added).

The rule of law from the above case, therefore, holds that a *liberal standard* is to be applied to the case at bar in making a determination under Rule 60(b)'s excusable neglect standard. This means that according to the Maine Court, that it would apply the standards set out in this Court's *Harbor* case, but on an even more liberal basis. As will be later shown, GSA meets both standards of excusable neglect. Furthermore, upon information and belief, litigation is still pending, future distributions need to be made, and the case has not been administered. The

estate is therefore not prejudiced by the timing of the Motion. See *In re Harbor Financial Group Inc.*, 303 B.R. at 137. Such fact simply amplifies the argument that no party will be prejudiced through the reconsideration and allowance of GSA's claim.

38. In other cases where the proof of claim was not actually litigated, but instead was deemed allowed without objection, courts have articulated a similar standard to establish cause for reconsideration under Bankruptcy Code § 502(j) that is again based upon the default nature of the ruling on the claim. See *In re Gomez*, 250 B.R. 397, 401 (Bankr. M.D. Fla. 1999); *In re Lincoln-Gerard USA, Inc.*, 2002 U.S. Dist. LEXIS 26717, *5.

39. In the *Lincoln-Gerard USA* case, a creditor's claim had been allowed through the failure of the debtor and the unsecured creditor's committee to timely file an objection within the bar period to do so. The Court noted that when the claim has been litigated, then the standard of review for reconsideration was the same as under Federal Rule 60(b). But when the claim has not been litigated, the Court noted that there was a different standard. In that regard, the Court stated as follows:

> In the present case, the claim of [the creditor] has not been actually litigated or considered on the merits. Instead the [bar date] order provides for the claim to be deemed allowed. This is an important difference and distinguishes the present case from the foregoing cases. In cases where the proof of claim was not actually litigated, but instead was deemed allowed ... without objection, courts instead have articulated a different standard to establish cause for reconsideration under § 502(j). *In re Gomez*, 250 B.R. 397, 401 (Bankr. M.D. Fla. 1999).
>
> As pointed out in the Gomez case, where a claim was not actually litigated, but was deemed allowed, the factors which should be considered in determining whether sufficient cause for reconsideration exists include (1) the extent and reasonableness of the delay, (2) the prejudice to any party in interest, (3) the effect on

> efficient court administration, and (4) the moving party's good faith. *Id.* at page 3.

40. At this point, GSA will walk the Court through the Gomez factors and show the Court that GSA's claim should be reconsidered.

41. **The extent and reasonableness of the delay**: GSA discovered that its claim had been denied on April 22, 2010. This is within three (3) days of the order denying its claims which was entered on April 19, 2010. As this Court is aware, there is a one year period for filing motions under Federal Rule 60(b) and a ten (10) day period under Federal Rule 59[1], therefore, the Motion is considered timely filed under such Rules. Furthermore, Bankruptcy Rule 9024 provides that a motion for reconsideration of an order allowing or disallowing a claim against the estate entered without contest is not subject to the one year limitation prescribed in Rule 60(b). Fed. R. Civ. Proc. 9024. As this Court has stated:

> Bankruptcy Rule 9024 incorporates Federal Rule of Civil Procedure 60 into all matters governed by the Bankruptcy Rules except, inter alia, the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b). *In re Harbor Financial*, 303 B.R. at 136.

This Court was applying a stricter standard, however, as it was applying the standard for claims actually litigated. Under this more difficult standard, however, GSA's Motion to Reconsider is still deemed timely filed especially because it was filed within ten days of the denial of the claim.

42. To determine what constitutes a reasonable time, courts also consider the facts of each individual case. "The courts consider whether the party opposing the motion has been

[1] Bankruptcy Rule 9023 incorporates Federal Rule 59 "except as provided in Rule 3008." Bankruptcy Rule 3008 has no time limitation which emphasizes the liberality of the rule.

prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner." *Id.*

43. In the present case, the administration of the bankruptcy estate has not been completed as there is pending litigation and upon information and belief distribution of the estate assets has yet to begin to some classes. Furthermore, the claims objection procedure is still progressing. Therefore, Debtors and other creditors are not prejudiced by reconsideration of GSA's claim.

44. Under the facts of this case, as well as according to the statutorily mandated deadline in cases involving a stricter standard, the Motion is timely.

45. **The prejudice to any party in interest**: Applying the stricter standard of review in reconsideration of claims cases, this Court has stated that prejudice to the claimant that outweighs prejudice to the rest of the bankruptcy estate may constitute cause under § 502 (j). *In re Harbor Financial Group Inc.*, 303 B.R. at 136. If the Court denies reconsideration of GSA's claim, the prejudice to GSA is apparent: it loses a substantial claim of over $1,000,000.00 for a breach of contract that it did not want terminated. What prejudice is there to the estate that justifies GSA's claim not being reconsidered? Increase in claims is not a legally recognized prejudice.

46. As has been stated by one court, "[p]rejudice is not an imagined or hypothetical harm; a finding or prejudice should be a conclusion based on facts in evidence." In re Inacom Corp., 2004 U.S. Dist. LEXIS 20822 (D. Del. 2004).

47. The Inacom court listed several factors for analysis of prejudice under § 502 (j), including (1) whether the debtor was surprised or caught unaware by the assertion of a claim that it had not anticipated; (2) whether the payment of the claim would force the return of amounts

already paid out under the confirmed plan or affect the distribution to creditors; (3) whether payment of the claim would jeopardize the success of the debtor's reorganization; (4) whether allowance of the claim would adversely impact the debtor actually or legally; and (5) whether allowance of the claim would open the floodgates to other future claims.

48. In applying the facts of the present case to the factors articulated above, there is no prejudice to the Debtors or to the creditors. First, the Debtor was very well aware of the assertion and amount of the claim of GSA as GSA had timely filed a proof of claim. Therefore, no party in interest can claim to be surprised or caught unaware of GSA's claim.

49. Second, upon information and belief, as of the time of filing of this Motion, no distributions have been made to unsecured creditors under the Plan of Reorganization. And because of the size of the estate to be distributed, the granting of the Motion and the allowance of GSA's claim will have a minimum impact upon distribution to other creditors in fact. Moreover,

> [W]here no dividends have been paid, the mere fact that allowance of a claim would dilute dividends which would otherwise be paid is not the type of injury that should result in disallowance of the claim if reconsideration is not allowed other creditors will receive a windfall to which they are not entitled on the merits. If reconsideration is allowed [a creditor] will receive no more than its fair and proper share pari passu with other unsecured creditors. In re Leroux, 216 B.R. 459, 465 (Bankr. D. Mass. 1997).

GSA's claim falls under an unsecured class and is entitled to its proportionate share of monies available to such Classes under the Plan. GSA's claim is $1,114,147.60, it is still entitled to its distribution.

50. Third, there is no evidence that payment of GSA's full claim would jeopardize the success of the debtor's reorganization. The plan has been confirmed. Distribution is to be made on a pro rata basis and is not based upon a creditor receiving a sum certain.

51. Fourth, there is no prejudice to Debtors created by the delay in litigating the disallowed portion of GSA's claim because the inquiry to be performed in reconsidering GSA's claim is straightforward. See, *In re Inacom Corp.*, 2004 U.S. Dist. LEXIS at *16. GSA's claim is based on breach of contract and its projected damages were created prior to entry of the contract. With the filing of the proof of claim, GSA provided the Debtor with copies of all unpaid invoices. The same are well-documented and itemized.

52. As the court asserted in *Inacom*, the value of finality in judicial proceedings is not sufficient for a finding of prejudice. And here, Debtors are still litigating disputed claims. There is no evidence that the payment of GSA's claim would adversely impact Debtors or affect the finality of Debtors' judicial proceedings.

53. Lastly, there is no evidence that other creditors whose claims were eliminated by default have filed motions for reconsideration. Therefore, there is no threat that a granting of GSA's Motion to Reconsider will result in a large number of additional claims.

54. **The effect on further court administration**: There is no negative impact upon further court administration. As stated earlier, there are still other claims that the Debtor is taking care of and the Trustee is holding monies in reserve for claims such as that of GSA's, among other parties.

55. In considering the impact upon court administration, the Court must consider the length of any delay in absolute terms. *In re Inacom Corp.*, 2004 U.S. Dist. LEXIS at *20. In Inacom, a creditor's motion for reconsideration was filed almost two years and ten months after the objection, almost two years and nine months after the order was served and nine months after the plan was confirmed. However, the court found that the length of the delay had no impact on implementation of the plan. The debtor was still litigating claims and creditors had been advised

that distributions under the plan were dependent on the claims resolution process. Failure to respond in and of itself did not weigh in favor of denying a claim.

56. Similar to the present case, the Liquidating Trustee is still litigating for funds to come into the estate. Contrary to the creditor in Inacom, GSA only waited ten days before seeking reconsideration of its claim. GSA's delay is not unreasonable.

57. **The moving party's good faith**: GSA's good faith in this motion is undisputable. Despite the rejection of a lucrative contract by the Debtors, GSA has continued to conduct business with the Debtors. There has never been a complaint in regard to the quality of GSA's work. GSA, upon request of the Debtor, further furnished post-petition services in the ordinary course of business to the Debtors. With the magnitude of the debt owed to GSA for pre-petition services, GSA could have challenged the performance under the other contract, but did not. Therefore, GSA actively facilitated the Debtor's attempt to get creditors paid out of this bankruptcy proceeding.

58. GSA's failure to respond to the Debtor's objection to its claim was certainly not intentional. The Sixteenth Omnibus Objection did not seek to disapprove the claim of GSA. As the Sixteenth and Seventeenth Omnibus objections were received by GSA on the same day and were substantially similar, GSA assumed they were the same instrument.

59. Finally, the request that its claim be recognized in full and that GSA be paid its pro rata portion of its full claim cannot be considered an act in bad faith. Otherwise, the assertion of any claim to monies rightfully owing would be "bad faith."

4. Standard of Review When Claim is Actually Litigated

60. GSA asserts that it is entitled to a more liberal standard of review in determining cause for reconsideration than if its claim was actually litigated. Nevertheless, GSA believes that

it is helpful to examine the standards of review for reconsideration of actually litigated claims because (a) any standard so applied would necessarily be applied with liberality to GSA, and (b) GSA meets the stricter standard even if a more liberal standard was not applied.

61. One Court has recently addressed the issue of the standard of review in motions for reconsideration where the claim has been litigated and the 10 day period for review has expired. See *In re Harbor Financial Group, Inc.*, 303 B.R. 124 (Bankr. N.D. Tex. 2003). In such regard, this Court has stated:

> When determining whether "cause" exists to reconsider a claim, courts generally apply the standards set forth in Federal Rule of Civil Procedure 60(b), incorporated by Bankruptcy Rule 9024.

This Court further stated that,

> In the Fifth Circuit: when a proof of claim ***has in fact been litigated*** between parties to a bankruptcy proceeding, the litigants must seek reconsideration of the bankruptcy court's determination pursuant to the usual Rule 60 standards if they elect not to pursue a timely appeal of the original order allowing or disallowing the claim.

Id. at 131 citing *In re Colley*, 814 F. 2d 1008, 1010 (5th Cir. 1987) (quoting 3 Collier on Bankruptcy 15th ed. P 502.10 at 502-107) (italics and bold added). It is therefore necessary to analyze the Motion under Rule 60.

B. TIMELINESS OF MOTION UNDER RULE 60(b)

62. A prerequisite of granting a motion under Rule 60(b) is that it be timely. As noted earlier, if a motion is filed within a year of the "judgment", the same is considered timely as a matter of law. The Motion was therefore filed timely as a matter of law.

C. EXCUSABLE NEGLECT STANDARD UNDER RULE 60(b)(1)

1. GSA's Inaction As Neglect

63. One of the grounds for setting aside a judgment under Rule 60(b) is if the entry of the judgment was a result of excusable neglect. Under the excusable neglect standard of Rule 60(b)(1), the court must first find that the party's actions constitute neglect. If so, the Court must then determine whether the neglect is excusable. *In re Dartmoor Homes, Inc.*, 175 B.R. 659, 664 (Bankr. N.D. Ill. 1994).

64. According to the Supreme Court, to act with neglect is "to give little attention or respect to a matter ... or to leave undone or unattended especially through carelessness." *Pioneer Investment Services Co. v. Brunswick Associates Ltd Partnership*, 507 U.S. 380, 388, 113 S.Ct. 1489, 1494 (1993). GSA did not willfully fail to respond to the Debtor's Omnibus Objection. Rather, GSA's attorney's assumption that it was being served the same document twice is more than excusable.

65. In *Pioneer*, the creditor's attorney had failed to timely file a proof of claim despite the actual receipt of the notice of the document entitled "Notice for Meeting of Creditors." which contained the bar date for filing proofs of claim. The Supreme Court stated that "such a designation would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of the notice was intended to be the final date for filing proofs of claim." *Id.* at 386.

66. In the omnibus objections, the name of the creditor to whose claim is referenced is not on the cover page. It is buried in the document and difficult to locate. Furthermore, the other omnibus objection stated the claim was "a surviving claim".

67. Similarly, in *Pioneer*, the creditor's attorney had failed to timely file a proof of claim despite the actual receipt of the notice of the document entitled "Notice for Meeting of Creditors." which contained the bar date for filing proofs of claim. The Supreme Court stated that "such a designation would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of the notice was intended to be the final date for filing proofs of claim." *Id.* at 386.

68. In Pioneer, the notice of the bar date for filing claims was buried at the end of a general notice to creditors dealing with a variety of matters. The creditor's attorney overlooked the bar date notice when reading the general notice and consequently filed the creditor's claim several weeks late. The Supreme Court thought the bar date notice was unusual and inconspicuous and found that the trial court acted within its discretion when it held that the attorney's failure to observe the bar date and to file a timely claim was the result of excusable neglect.

69. The Pioneer court noted that the determination of what constitutes "excusable neglect" is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. *Id.*

70. The Pioneer decision made it clear that attorney negligence or carelessness can constitute excusable neglect. The Supreme Court expressly rejected the narrow approach formerly taken by some Circuits, which had held that attorney negligence was per se inexcusable neglect, or that neglect would be excusable only if caused by circumstances beyond the movant's control.

71. Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty or overlook a

required deadline date in the performance of some responsibility. In applying the Pioneer factors to the case at hand, it is clear that excusable neglect exists under Rule 60(b) and, therefore, under *Gomez* as well.

2. Other Factors Considered in the Excusable Neglect Analysis

72. Pioneer sets forth other factors a court should consider when determining whether an order should be set aside because of excusable neglect. These factors consist of the following:

(a) predjudice to the debtor,

(b) the length of the delay and its potential impact on judicial proceedings,

(c) the reason for the delay, including whether it was within the reasonable control of the movant, and

(d) whether the movant acted in good faith.

73. These issues were generally addressed in considering the standard to be applied in the analysis where the claim to be reconsidered has not been actually litigated. Nevertheless, GSA will further address issues regarding the reason for the delay in bringing this motion although it is timely under Rule 60(b) as a matter of law.

74. The concept of excusable neglect clearly anticipates neglect on the part of the party seeking to be excused. *Pioneer*, 507 U.S. at 388. "Accordingly, a court can find excusable neglect not only in situations beyond the party's control, but also in situations when the party's actions or failure to act was the result of carelessness or mistake." *In re Dartmoor Homes, Inc.*, 175 B.R. 659, 664 (N.D. Ill. 1994).

75. GSA's delay in responding to the Omnibus Objection and Default Order was due in large part to inadequate notices in fact (not in law) by the Debtor and the receipt of multiple, similar omnibus objections on the same day. The Sixteenth Omnibus Objection was innocuous, stated that the claim "survived", and no objection nor response was needed.

76. Nevertheless, GSA files this motion for reconsideration within ten days of entry of the order which is timely.

D. INADVERTENCE STANDARD UNDER RULE 60(b)(1)

77. Rule 60(b)(1) also provides that an order may be set aside if caused by inadvertence. Courts have applied the following factors in determining what constitutes inadvertence in decisions involving excusable neglect:

> (1) whether inadvertence reflects professional incompetence such as ignorance of the rules of procedure;
>
> (2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court;
>
> (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence;
>
> (4) whether the inadvertence reflects a complete lack of diligence; or
>
> (5) whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

In re Lambeth Corp., 227 B.R. 1 (B.A.P. 1st Cir. 1998); In re Wells, 87 B.R. 862, 865-866 (Bankr. E.D. Penn. 1988).

78. In evaluating the above factors, only factors two through five are possibly applicable. GSA's excuse is not "incapable of verification by the court."

The resulting delay was not caused by GSA's failure to provide for a "readily foreseeable consequence." "The type of human error here involved although certainly unavoidable, is neither readily foreseeable nor capable of anticipation .... Counsel may have been less than perfectly diligent, but he did not exhibit a complete lack of diligence." Id. at 866.

Moreover, there is no indication that GSA missed other deadlines or failed to appear. GSA acted promptly and in good faith by promptly notifying Debtor's counsel and requested that

Debtor voluntarily vacate the rejection order, but Debtor's counsel refused to do so without first requesting that GSA prove its case on the merits. That is well and good, but it is not the standard for reconsideration of a claim under these circumstances. The merits are reserved for trial.

79. The term "inadvertent" is defined as an unintentional omission resulting from failure to notice something, i.e., an accidental oversight. In the case at bar, counsel for GSA was under the impression that he had received identical documents on the same day. This is an accidental oversight. See *National Mortgage Co. v. Brengettcy*, 223 B.R. 684, 695 (D. W.D. Tenn. 1998); *Wells* 87 B.R. at 864.

80. GSA has a meritorious defense and Debtor will suffer no undue prejudice from the Court granting GSA's Motion to Reconsider and subsequent evaluation of GSA's claim on the merits. GSA is entitled to its day in Court.

E. MISTAKE STANDARD UNDER RULE 60(b)(1)

81. As a general proposition, the "mistake" provision in Rule 60(b)(1) provides for the reconsideration of judgments only where (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996).

82. Litigation mistakes will not be excused under Rule 60(b)(1) when the mistake is the result of a deliberate and counseled decision by the party, when a party simply misunderstands the legal consequences of his deliberate acts, or when mistakes made in the negotiation of a contract or a stipulation. *Id.* at 577-78.

83. Rather, the kinds of mistakes remediable under a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against, such as counsel acting without

authority. Also, an attorney's failure to timely respond to Motion has been construed as a "litigation mistake." See *Pueblo of Santo Domingo v. Rael*, 209 F.R.D. 470, 472 (D. N.M. 2002).

84. In the present case, counsel for GSA's failure to discover that it had received two different objections to GSA's claim on the same day was an excusable litigation mistake. Both Omnibus Objections had a lengthy title, i.e. "Reorganized Debtors' Omnibus Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1" which failed to put counsel for GSA on notice that the Omnibus Objection related to GSA's claim. There were numerous claims to which the Debtor had objected.

F. ANY OTHER REASON JUSTIFYING RELIEF UNDER RULE 60(b)(6)

85. Rule 60(b)(6) is the catch-all provision. It allows a court to grant relief because of "any other reason justifying relief from the operation of the judgment." Case law has interpreted the provision as granting courts a "grand equitable power to do justice in a particular case." *Bank United v. Hamlett*, 286 B.R. 839, 843 (D. W.D. Va. 2002).

86. Although in deciding whether a party has satisfied the Rule 60(b)(6) standard the court may not consider any of the reasons under clauses (b)(1), (2), or (3), the court can grant relief upon a finding of extraordinary circumstances.

87. Extraordinary circumstances were found in the *Bank United* case in which a bank appealed an order from the bankruptcy court denying its motion to set aside a default judgment. The bank proffered a meritorious defense, established a lack of prejudice to the debtor and established no basis in fact or in law for the default judgment.

88. The bank's liens had been disallowed upon failure to meet the claims deadline. Debtor filed a Motion to Avoid Lien which was styled incorrectly with United Bank of Texas as the adverse party. Debtor amended the Motion to correct the style of the case. Both motions were served on Bank United's corporate secretary in Texas. The bank neither answered the complaint nor appeared in any way. Only after receiving a copy of the default judgment did the bank appear. The *Bank United* court noted that if the matter had come to a hearing on the merits, the debtor's Motion to Avoid liens would not have survived summary judgment. The Court went on to find that "default judgments based on claims that are so unfounded are extraordinary, and are eligible for Rule 60(b)(6) relief." *Id.* at 845.

89. While the extraordinary circumstance in *Bank United* centered around a legally baseless reason to void a lien when the party only failed to file a proof of claim, here the Court should use its equitable power to order reconsideration of a $1,114,147.60 claim that has been summarily reduced without evaluation of the underlying merits of the claim. If reconsideration is not allowed, other creditors will receive a windfall to which they are not entitled on the merits. *In re Washington County Broadcasting*, 39 B.R. at 79.

THE MERITS OF THE CLAIM OF GSA

90. Counsel for the reorganized Debtor was kind enough to confer with counsel for GSA to attempt to resolve this matter. Debtor's counsel's focus was on the merits of GSA's claim. As evidenced by the law above, this is not a factor to consider in reconsidering a claim under these circumstances. Nevertheless, the non-exclusive merits of the claim shall be addressed to better facilitate an understanding.

91. BMC West Corporation and GSA entered into a contract dated September 15, 2008. A true and correct copy of such contract is attached hereto as Exhibit "C" ("the Contract").

The Contract speaks for itself, but will be expanded upon. Under the Contract, BMC was given exclusive rights for the sale of HES products in the State of Texas.

92. Such products include but are not limited to the following:

a) SOLEX Solar Attic Fan – This product is made by Solar Dynamics and is presently being sold to the Debtor by Solar Dynamics;

b) HES Windows and Doors – Upon information and belief, the Debtor is selling this product;

c) HES Solar Domestic Hot Water – This product is being sold by the Debtor by the same manufacturer;

d) 3M Residential & Commercial window film – Upon information and belief, the Debtor is selling this product;

e) Aquatherm Solar pool heating – Upon information and belief, the Debtor is selling this product;

f) Velux Skylights and Sun Tunnels and tradeshow(s) support - Upon information and belief, the Debtor is selling this product

93. HES provided assistance and contract negotiations and corporate strategies to help solidify BMC a position of power in the technology (green) market. More products have been added from time to time since the initial contract which BMC is using.

94. Paragraph 5.1 of the Exhibit "C" contract also provides as follows:

> BMC will order its Products directly from HES. In each year of this Agreement, BMC will provide HES with an individual annual

> forecast for its annual requirement for the HES Program Products. In the event any purchase order is outside normal ordering patters, e.g., orders in excess of fifteen percent (15%) of the previous three (3) months' order volume, HES will have sixty (60) days to adjust to such purchase orders.

This constitutes further damages that is owed by BMC to GSA.

In addition, paragraph 17 has a confidentiality provision. This provision has been breached and libels the Debtor to damages for the same.

95. Furthermore, GSA is entitled to attorneys' fees on all of these damages. Other damages are owing.

96. Discovery will have to be conducted to further to determine the scope of damages. GSA, however, is entitled to its day in Court.

CONCLUSION

97. At the heart of this case is a $1,114,147.60 claim which was never reviewed on the merits. It is well established that a hearing on the merits is favored by the courts as well as the policies underlying the Federal Rules of Civil Procedure.

98. Most importantly, there is no prejudice to the Debtors if the claim of GSA is reconsidered. GSA has a meritorious defense; there is little impact on efficient judicial administration; and GSA has exhibited good faith. Moreover, the prejudice to GSA of forfeiting over $1,114,147.60 substantially outweighs any potential prejudice to the Debtor, the estate, or its creditors.

99. After considering the totality of the circumstances, it is clear that the facts, law and equities favor reconsideration.

100. WHEREFORE, GSA respectfully requests that its Motion for Reconsideration be granted and that GSA recover such other relief as may be just and equitable.

Respectfully submitted,

GRAVES DOUGHERTY HEARON & MOODY
a Professional Corporation

/s/ James V. Hoeffner
By:_____

JAMES V. HOEFFNER
Texas State Bar No. 09772700
jhoeffner@gdhm.com
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480.5707
(512) 480.5886 (fax)

SEITZ, VAN OGTROP & GREEN, P.A.

/s/ Patricia P. McGonigle
By:_____

PATRICIA P. MCGONIGLE (ID No. 3126)
pmcgonigle@svglaw.com
222 Delaware Avenue, Suite 1500
P. O. Box 68
Wilmington, DE 19899
(302) 888-0600
(302) 888-0606 (fax)

Attorneys for GSA Home Energy Solutions, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	§	**CHAPTER 11**
	§	**CASE NO. 09-12074 (KJC)**
BUILDING MATERIALS HOLDING CORPORATION, et al.	§	**Jointly Administered**
	§	**Hearing Date: May 19, 2010 @ 11:30 a.m.**
Reorganized Debtors.	§	**Objections Due: May 12, 2010 by 4:00 p.m.**

NOTICE OF MOTION TO RECONSIDER CLAIM OF GSA HOME ENERGY SOLUTIONS

To: Persons Identified on Attached Service List

GSA Home Energy Solutions, LLC filed, on April 29, 2010 a *Motion to Reconsider Claims of GSA Hone Energy Solutions* (the "Motion"), which sought the following relief: reconsideration of its claim.

You are required to file a response/objection to the Motion by: **May 12, 2010 by 4:00 p.m.**

At the same time, you must also serve a copy of the response upon movant's attorneys:

Patricia P. McGonigle
Seitz Van Ogtrop & Green PA
222 Delaware Ave., Suite 1500
Wilmington, DE 19801
Fax: 302-888-0606

James V. Hoeffner
Graves Dougherty Hearon & Moody
401 Congress Ave., Suite 2200
Austin, TX 78701
Fax: 512-480-5886

HEARING ON THE MOTION WILL BE HELD: **May 19, 2010 at 11:30 a.m.**

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: April 29, 2010

Respectfully submitted,

GRAVES DOUGHERTY HEARON & MOODY
a Professional Corporation

/s/ James V. Hoeffner
By:_____
JAMES V. HOEFFNER
Texas State Bar No. 09772700
jhoeffner@gdhm.com
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480.5707
(512) 480.5886 (fax)

SEITZ, VAN OGTROP & GREEN, P.A.

/s/ Patricia P. McGonigle
By:_____
PATRICIA P. MCGONIGLE
Delaware Bar. No. 3126
pmcgonigle@svglaw.com
222 Delaware Avenue, Suite 1500
P. O. Box 68
Wilmington, DE 19899
(302) 888-0600
(302) 888-0606 (fax)

Counsel to: GSA Home Energy Solutions

GSA Home Energy Sol.
RECEIVED JAN 11 2010

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	**Chapter 11**
BUILDING MATERIALS HOLDING CORPORATION, *et al.*,[1]	)	**Case No. 09-12074 (KJC)**
Debtors.	)	**Jointly Administered**

NOTICE OF (A) EFFECTIVE DATE OF ORDER CONFIRMING THE JOINT PLAN OF REORGANIZATION FOR THE DEBTORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE AMENDED DECEMBER 14, 2009 (WITH TECHNICAL MODIFICATIONS) AND (B) DEADLINES FOR FILING CERTAIN CLAIMS

TO ALL CREDITORS, INTEREST HOLDERS, AND OTHER PARTIES-IN-INTEREST:

Confirmation of Plan of Reorganization and Occurrence of Effective Date

PLEASE TAKE NOTICE that on June 16, 2009 (the "***Petition Date***"), the above captioned debtors and debtors-in-possession (the "***Debtors***") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "***Chapter 11 Cases***") with the United States Bankruptcy Court for the District of Delaware (the "***Bankruptcy Court***").

PLEASE TAKE FURTHER NOTICE that the Bankruptcy Court entered an order (the "***Confirmation Order***") confirming the Joint Plan of Reorganization for the Debtors under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications) (the "***Plan***") on December 17, 2009 (the "***Confirmation Date***"). Unless otherwise defined in this notice, capitalized terms used herein shall have the meanings ascribed to them in the Plan and the Confirmation Order.

PLEASE TAKE FURTHER NOTICE that a copy of the Plan and the Confirmation Order may be obtained by contacting the Debtors' Balloting and Claims Agent, in writing, at The Garden City Group, Inc. ("***GCG***"), Attn: Building Materials Holding Corporation, P.O. Box 9393, Dublin, OH 43017-4293. The Plan and Confirmation Order are also available free of charge on the Debtors' restructuring website located at http://bmhcrestructuring.com. The Plan and the Confirmation Order can also be viewed on the Court's website at www.deb.uscourts.gov. You may also contact the Debtors' claims agent, GCG, at 1-866-364-4266.

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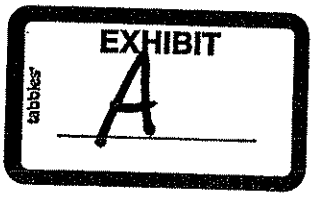
[1] The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451),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



PLEASE TAKE FURTHER NOTICE that the Plan became effective on January 4, 2010 (the "***Effective Date***"). Each of the conditions to the Effective Date have been satisfied or waived in accordance with section 10.1.2 of the Plan.

PLEASE TAKE FURTHER NOTICE that the Plan and the Confirmation Order, and their respective terms and provisions, are binding on the Debtors, the Reorganized Debtors, any entity acquiring or receiving property or a distribution under the Plan, and any present or former holder of a Claim against or Interest in the Debtors and their respective successors, assigns, and parties-in-interest, including all Governmental Units, whether or not the applicable Claim or Interest of such holder is impaired under the Plan and whether or not such holder or entity voted to accept or reject the Plan (or abstained from voting on the Plan).

Deadline for Filing Claims Arising from Rejection of Executory Contracts and Unexpired Leases Pursuant to the Plan

PLEASE TAKE FURTHER NOTICE that, pursuant to section 6.1 of the Plan, the Debtors filed a Rejected Executory Contract and Unexpired Lease List on December 16, 2009, and all agreements listed therein shall be rejected effective as of the date specified therein.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Confirmation Order and section 6.2 of the Plan, all agreements or policies relating to vacation or personal time off, including agreements, plans or policies of Subsidiary Debtors that have been in effect from time to time and any contractual commitments or accepted offers of employment that contain more favorable vacation or personal time off terms than the BMC West Vacation Policy 2009 that was in effect as of the June 16, 2009 Petition Date shall be rejected effective as of the Confirmation Date.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Confirmation Order and section 6.3 of the Plan, all Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases pursuant to the Plan or the Confirmation Order, including with respect to rejected vacation and/or paid time off programs or agreements and all Executory Contracts or Unexpired Leases identified on the Rejected Executory Contract and Unexpired Lease List, must be filed with the Bankruptcy Court within thirty (30) days after the January 4, 2010 Effective Date and served upon GCG, the Balloting and Claims Agent, as follows: (i) if by first class mail: The Garden City Group, Inc., Attn: Building Materials Holding Corporation, P.O. Box 9393, Dublin, OH 43017-4293; or (ii) if by messenger or overnight courier: The Garden City Group, Inc., Attn: Building Materials Holding Corporation, 5151 Blazer Parkway, Suite A, Dublin, OH 43017. Any Claims arising from the rejection of an Executory Contract or Unexpired Lease not filed and served as specified within such time will be automatically disallowed, forever barred from assertion, and shall not be enforceable against the Debtors or the Reorganized Debtors, the Estates, or their property without the need for any objection by the Reorganized Debtors or further notice to, or action, order, or approval of the Bankruptcy Court. All Allowed Claims arising from the rejection of the Debtors' Executory Contracts or Unexpired Leases shall be classified as General Unsecured Claims and shall be treated in accordance with section 4.6 or 4.8 of the Plan, whichever may be applicable.

Deadline for Filing Professional Compensation Claims

PLEASE TAKE FURTHER NOTICE that, notwithstanding any other provision of the Plan dealing with Administrative Expense Claims, any Person asserting a Professional Compensation Claim shall, no later than thirty (30) days after the December 17, 2009 Confirmation Date (the "***Professional Compensation Claims Bar Date***"), file a final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Confirmation Date.

PLEASE TAKE FURTHER NOTICE that all final fee applications of Professionals shall be filed with the Bankruptcy Court and actually served on or prior to the Professional Compensation Claims Bar Date upon the following parties: (i) Building Materials Holding Corporation, 720 Park Boulevard, Suite 200, Boise, Idaho 83712, Attn: Paul S. Street; (ii) Gibson, Dunn & Crutcher LLP, 200 Park Ave., New York, New York 10166, Attn: Michael A. Rosenthal and Matthew K. Kelsey; (iii) Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, Delaware 19801, Attn: Sean M. Beach and Robert F. Poppiti, Jr.; (iv) the Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Joseph McMahon; (v) Arent Fox, LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036-5339, Attn: Christopher J. Giaimo and Katie A. Lane; (vi) Benesch, Friedlander, Coplan & Aronoff LLP, 222 Delaware Avenue, Suite 801, Wilmington, Delaware 19801, Attn: Bradford J. Sandler; (vii) Paul, Hastings, Janofsky & Walker LLP, 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105, Attn: Kevin B. Fisher; and (viii) Paul, Hastings, Janofsky & Walker LLP, 75 E. 55th Street, First Floor, New York, NY 10022, Attn: Thomas L. Kent (collectively, the "***Notice Parties***").

PLEASE TAKE FURTHER NOTICE that any objection to any final fee application shall be filed with the Bankruptcy Court, together with proof of service thereof, and served upon the applicable Professional and the other Notice Parties, so as to be actually received not later than 4:00 p.m. (prevailing Eastern Time) on the date that is twenty (20) days after such final fee application is filed with the Bankruptcy Court and served upon the Notice Parties (the "***Professional Fees Objection Deadline***"). Only those objections made in writing and timely filed and received by the Professional Fees Objection Deadline will be considered by the Bankruptcy Court. If no objection to a final fee application is timely filed and served in accordance with the procedures set forth herein, then the Bankruptcy Court may enter a final order approving such uncontested final fee application without further notice and the Reorganized Debtors may pay the amounts described in such uncontested final fee application (or if any final fee application is the subject of an objection, the Reorganized Debtors may pay the undisputed amounts described in such final fee application). The hearing to consider approval of the final fee applications, if necessary, will be held as soon as reasonably practicable after the expiration of the Professional Fees Objection Deadline and the date of such hearing will be promptly provided to the applicable Professional and Notice Parties and posted on the Debtors' restructuring website at http://bmhcrestructuring.com.

ALL PLEADINGS FILED WITH, AND ORDERS GRANTED BY, THE BANKRUPTCY COURT ARE AVAILABLE FOR INSPECTION ON THE BANKRUPTCY COURT'S INTERNET SITE AT WWW.DEB.USCOURTS.GOV AND AT NO COST FROM THE REORGANIZED DEBTORS' RESTRUCTURING WEBSITE: HTTP://BMHCRESTRUCTURING.COM.

Dated: January 4, 2010
Wilmington, Delaware

BY THE ORDER OF THE COURT
THE HONORABLE KEVIN J. CAREY

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Robert F. Poppiti, Jr.
Sean M. Beach, Esq.
Donald J. Bowman, Jr., Esq.
Robert F. Poppiti, Jr., Esq.
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, Delaware 19801

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal, Esq.
Matthew K. Kelsey, Esq.
Aaron G. York, Esq.
200 Park Avenue
New York, New York 10166-0193

Attorneys For Debtors And Debtors-In-Possession

BMHC
720 Park Boulevard, Suite 200
P.O. Box 70006
Boise, Idaho 83707-0006
Telephone: (208) 331-4300 • Fax: (208) 331-4477
LEGAL DEPARTMENT

September 8, 2009

Mr. Craig Bushon
President
GSA Home Energy Solutions, LLC
100 E. Whitestone Blvd., Suite 148-308
Cedar Park, TX 02184

Re: Agreement effective as of September 15, 2008 by and between GSA Home Energy Solutions, LLC ("HES") and BMC West Corporation ("BMC") ["Agreement"]

Dear Mr. Bushon:

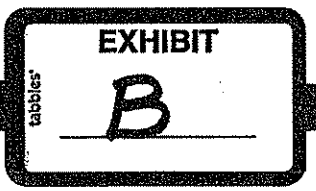
Building Materials Holding Corporation and its subsidiaries including BMC filed voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code (the "***Bankruptcy Case***") on June 16, 2009 (the "***Petition Date***") in the United States Bankruptcy Court for the District of Delaware (the "***Bankruptcy Court***").

Pursuant to section 365(a) of Chapter 11 of Title 11 of the United States Code (the "***Bankruptcy Code***"), BMC has the right to reject agreements or contracts for services that we no longer need. Regrettably, the purpose of this letter is to inform you that BMC is hereby rejecting the above-referenced Agreement effective September 14, 2009. Until the effective date of our the rejection, BMC will continue to process customer orders and pay for any products purchased from HES and will pay, on a pro-rata basis, the monthly fee paid under the Agreement. After the effective date of this notice, BMC will discontinue all activities in connection with the promotion of HES. Final rejection of the Agreement in the bankruptcy will occur as part of the plan submitted for approval.

We understand that some of the BMC sales personnel entered into Confidentiality Agreements with HES which require, upon termination of the contract, return of marketing and training materials upon termination of the underlying contract. BMC will advise the sales personnel of their responsibilities under the Confidentiality Agreement and collect the materials to be returned to HES for delivery to HES on September 14.

BMC and HES have successfully provided products to Highland Homes. To the extent Highland Homes continues to order products for installation in its homes after the effective date of termination of the Agreement, BMC will continue to pay to HES the amounts under the Amendment to Home Energy Solution Agreement of $.75 per square foot for film installation.

As you know, BMC submitted a proposal which HES helped to prepare to the State of Texas for installation of window film in state office buildings. To date, no award of the contract has been made. If BMC is awarded the contract, it intends to continue to cooperatively work with HES in fulfilling the terms of the contract. Again, BMC will compensate HES for its services pursuant to the Amendment referenced above. In return, HES will have the obligation to assist in marketing the program to the state agencies. If HES is not amenable to proceeding under the terms it negotiated with BMC and which are part of the proposal to Texas, BMC will advise Texas of the change in the



relationship with HES. This state contract is important to both BMC and HES and we would expect that we can cooperatively honor the contract even though the ongoing contractual relationship with HES in the residential sector has been terminated.

Any inquiries regarding BMC's rejection of the Agreement should be directed me at the following address:

Building Materials Holding Corporation
Attn: Paul S. Street, Senior Vice President and General Counsel
720 Park Blvd., Suite 200
Boise, ID 83712
Telephone: 208-331-4381
Facsimile: 208-331-4477

Yours truly,

Paul S. Street
Senior Vice President, Chief Administrative
Officer, General Counsel & Corporate Secretary

[redacted]

Home Energy Solutions

HOME ENERGY SOLUTIONS AGREEMENT

This Agreement is effective as of this 15th day of September 2008 (the "Effective Date") by and between GSA Home Energy Solutions, LLC ("HES") a Texas corporation with a place of business at 100E Whitestone Blvd, Suite 148-308, Cedar Park, TX 78613, and BMC West Corporation ("BMC"), with a usual place of business at 1100 Brushy Creek Road at 1201 BMC Drive, Cedar Park, TX 78613. This agreement allows for expansion of the exclusivity to BMC for all facilities in the State of Texas.

The Term of the Contract will grant BMC exclusive distribution rights for all HES Residential products and HES Commercial window film and Commercial Solar Hot Water (CSHW), to help solidify a short ramp up period along with a long term success strategy for future technology product additions to the HES program. HES will sell its entire current product line outlined in this agreement along with any future technology products negotiated on HES/BMC behalf for the actual cost it has been negotiated for. (*Window film will be priced at $2.00 per square foot above raw cost of material to cover cost incurred by HES for installation. Some additional cost may be charged for difficult instillations, charges will always be at a fair market value as to not jeopardize marketability)* HES will be have the authority and will be the chief negotiator for future technology (Green) products. HES will work with the BMC appointed employee in all negotiations. These product additions will fall under the HES program and will be implemented as deemed necessary by BMC and HES. This alliance should solidify BMC and HES a strong competitive edge over its competition.

In consideration for the exclusive right to distribute HES products, BMC will pay the following on HES products purchased.

a) The rebate will be calculated on annual gross purchases with the following formula:
- 10% on purchases between $1 - $5,000,000
- 7% on all purchases between $5,000,000 - $10,000,000
- 5% on all purchases over $10,000,000 with no cap

b) Rebate will be calculated at the end of each month and paid within ten days following the last calendar day of the month.

c) A rebate of $30,000 or 10% of HES products purchased whichever is greater will be guaranteed for each of the first twelve months of this agreement.

d) If ~~at any point~~ in this agreement following the first year, BMC has not purchased a total of $500,000 in HES products over any six month period of the following four calendar years, this contract may be terminated by either party.

1. The contract will be pro-rated to the date of September 8, 2008.

2. *This contract provides exclusive license(s) to BMC for specific HES products, trademarks and associated marketing activities designed by Home Energy Solutions. HES will provide proprietary sales and management training to assist in their implementation. Do to the complexity of some of the product and system being introduced. HES would ask that Steve Rosenbaum be the BMC employee who is appointed to assist HES in its execution.*

EXHIBIT C tabbies

- Leads generated by HES will be referred to BMC
- BMC logos will be added to HES merchandising projects, including Television program.
- Product warranties will be provided in written form.

A plan for execution will be provided. This will be a joint effort between BMC and HES.

3. Products Defined. SOLEX Solar Attic Fan, HES windows and doors, HES Solar Domestic Hot Water ("SDHW") & HES Solar Commercial Hot Water (SCHW), 3M residential & Commercial window film, Aquatherm Solar pool heating, Great Lakes Windows and Doors, Velux Skylights and Sun Tunnels and tradeshow(s) support. HES will provide assistance in contract negotiations and corporate strategies to help solidify BMC a position of power in the Technology (Green) market. More products will be added from time to time to meet market changes.

4. Home Energy Solutions Centers. BMC will showcase a Home Energy Solutions section within existing BMC locations where products are represented allowing the general public, contractors, architects and remodelers to view and purchase HES program products. From time to time demonstration products may need to be purchased from HES.

   4.1. Removal of Equipment. If BMC obtains loan or demonstration equipment for the purpose of sales and marketing activities that individual BMC are in compliance with this Agreement, HES will not remove Equipment rented, loaned or leased to BMC during the term of this Agreement, provided that HES will have the right to remove the Equipment upon a BMC breach or default under this Agreement or under a relevant Member Contract, including if the BMC staff misuses or abuses the Equipment. When Equipment is removed from any Center location for any reason whatsoever, BMC shall provide to HES access to such location during usual business hours and shall provide such cooperation and assistance as may be required by HES. Any alleged default that may give rise to a right to remove Equipment shall be subject to the default notice and cure provisions set forth in this Agreement.

   4.2. Ownership and Location of Equipment. For all Equipment rented, loaned or leased to any BMC, HES will retain at all times absolute and exclusive ownership of, and, except as set forth herein, all right, title and interest to, the Equipment and every component thereof. Except in the case of leased equipment and only as set forth herein, BMC will have or obtain an ownership or other right, title or interest in or to the Equipment, nor will they have a right to purchase or otherwise acquire title to or an ownership interest in the Equipment or any component thereof, except as the HES and BMC may later agree in writing. BMC will cooperate with HES in providing notice and acknowledgement of HES' absolute ownership of the Equipment, including allowing HES to affix labels to the Equipment or any part, as may be practicable; providing written notice of HES' ownership of the Equipment to any party claiming a security interest in any assets owned by BMC; and filing or allowing HES to file one or more Uniform Commercial Code financing statements giving notice of HES' ownership of the Equipment, and BMC will execute any such financing statements.

5. Ordering, Shipping, and Payment Terms

   5.1. Ordering and Forecasting. BMC will order its Products directly from HES. In each year of this Agreement, BMC will provide HES with an individual annual forecast for its annual requirement for the HES Program Products. In the event any purchase order is outside normal ordering patterns, e.g., orders in excess of fifteen percent (15%) of the previous three (3) months' order volume, HES will have sixty (60) days to adjust to such purchase orders

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 29, 2010, a copy of the foregoing *Motion to Reconsider Claims of GSA Home Energy Solutions* was served (1) upon the counsel listed below, (2) via CM/ECF Noticing to all parties appearing thereon, and (3) further upon those parties appearing on the attached Service List via United States First Class Mail, postage paid:

Sean M. Beach
Donald J. Bowman, Jr.
Robert F. Poppiti, Jr.
Young, Conaway, Stargatt & Taylor
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391

Michael A. Rosenthal
Matthew K. Kelsey
Saee M. Muzumdar
Gibson, Dunn & Crutcher LLP
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