

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.	§	
	§	RE: D.I. No. 1551
Reorganized Debtors.	§	

**NOTICE OF FILING AMENDED EXHIBIT "C" TO
MOTION TO RECONSIDER CLAIM OF GSA HOME ENERGY SOLUTIONS**

GSA Home Energy Solutions, LLC filed, on April 29, 2010 its *Motion to Reconsider Claims of GSA Home Energy Solutions* (the "Motion") (D.I. 1551). Inadvertently attached to the Motion at Exhibit "C" was an incomplete copy of the contract between Debtor and GSA Home Energy Solutions, LLC. Attached hereto as Exhibit "C" is a true and correct copy of the complete contract.

Dated: May 24, 2010

SEITZ, VAN OGTROP & GREEN, P.A.

/s/ Patricia P. McGonigle

By: _____

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Counsel to: GSA Home Energy Solutions

EXHIBIT “C”



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 installations, 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.*



- 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



- 5.2. Shipping Terms. Terms of purchase for the Products shall be FOB HES' place of shipment. In the event any Product is damaged, lost or destroyed during shipment, HES shall cooperate requests for information and assistance in submitting claims to the freight carrier or to any insurer for such damage, loss or destruction. BMC shall pay all freight charges for delivery of all Products. Returns to HES of any defective Products shall be at HES' expense. Returns of rental, loaned or leased Equipment to HES upon termination of this Agreement or of any Contract with a BMC shall be at BMC's expense.
- 5.3. Invoicing. Invoices for Products shall be submitted directly to BMC, which shall pay such invoices within Fifteen (15) days of the invoice date. HES reserves the right to charge 1.5% interest per month (18%/year), or the maximum permitted by law if such maximum is lower than 1.5% per month, on any amounts not paid when due.
6. Additional Products. Additional products, including services or information technology products ("Additional Products") which are not within the scope of this Agreement but may still be purchased by BMC on terms to be mutually agreed with HES.
7. Product Upgrades. In the event HES markets a product that represents the next generation of equipment, solutions or disposables as compared to the Products offered under this Agreement (hereinafter referred to as the "New Technology"), then HES shall make such New Technology available to BMC upon mutually agreeable terms, after the terms of this Agreement and of the Contracts are fulfilled, unless otherwise mutually agreed. Notwithstanding the foregoing, nothing herein is intended to limit HES' responsibility to address Product defects, including where appropriate in HES' discretion, through Product upgrades provided at no charge to customers.
8. Logos and Labeling. BMC at its expense will logo each truck being used at the licensed facilities with the HES official logo on all tailgates of pickup trucks and where reasonably appropriate and visible on all delivery vehicles. HES will provide any graphic files needed for such work. BMC business cards will need to carry the official HES logo to show the affiliation between the two companies for employees of the licensed facilities.
9. Taxes. BMC shall be responsible for the payment of any taxes assessed on the transactions contemplated by this Agreement, including on the possession, storage, use or operation by BMC of the Equipment rented or leased to it, to the extent applicable, whether characterized as sales, use, gross receipts or excise taxes, fees, or assessments, or otherwise or the purchase by BMC of any Product or Service. Prices herein do not include applicable taxes. To the extent Member Centers claim exemption from such taxes; they will provide HES with appropriate documentation of such exemption.
10. Training. HES have staff technical specialists proficient in the technical and marketing aspects of its Products. In addition to HES staff, HES Manufacturers will provide technical and customer service support to HES products when appropriate.
11. No Other Warranties; Limitation of Liability.

THE EXPRESS WARRANTIES MADE BY HES IN THIS AGREEMENT AND ANY ACCOMPANYING CONTRACTS ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, INCLUDING WARRANTIES OF QUALITY WHETHER WRITTEN, ORAL OR IMPLIED, AND ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. EACH PARTY HEREBY WAIVES ALL OTHER REMEDIES, WARRANTIES, GUARANTIES OR LIABILITIES, EXPRESS OR IMPLIED, AND ANY CLAIM FOR SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, HOWEVER OCCASIONED, INCLUDING ANY SUCH LOSSES RESULTING FROM TERMINATION OR THIRD-PARTY CLAIMS.

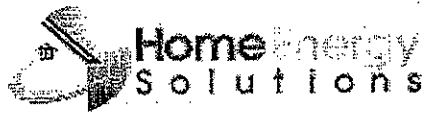


HES shall, in no event, incur any liability or obligation for damages or of any nature whatsoever to BMC or to any other person or entity claiming through them or any of them with respect to any Products improperly stored, subjected to accident, damage, misuse or abnormal, unusual or improper operating conditions or conditions not made known or contemplated by HES at the time of this Agreement or of any use plan or other agreement with BMC, or applied or used for a purpose or installation other than or at variance in any degree from that for which designed, or operated in any manner or degree beyond their proper capacity or contrary to operating instructions.

12. Responsibility For Use Of Products. BMC and HES shall agree not to misuse or abuse the Equipment or any component thereof and shall not permit any of the Disposables, Equipment or any component thereof, or the Ancillary Items, to be used in a manner not conforming to the Operator's Manual and/or instructions provided in its Operator's Manual or by its manufacturers trained personnel. The uses and applications to which the Products may be applied, and the results obtained from the Products, shall be the responsibility of BMC and HES, safe and effective use of the Products requires application of proper techniques of setup and operation and should be undertaken only by trained personnel.
13. Warranty and or Guarantee of products. HES product manufacturers will be notified and when applicable, be held liable for claims of their product(s) defects, or failure to meet their intended purpose by purchaser or user of products including claims for personal injury, property damage, product liability, misrepresentation, warranty, negligence or any other tort, contractual or statutory claim.
14. Term and Termination. The term of this Agreement shall commence on the Effective Date and shall remain in effect until the end of the agreed upon term. (The "Initial Term"). The Initial Term shall be comprised of the period beginning with the Effective Date and the five following calendar years 1 ("Contract Years") beginning on the date this agreement is signed. Any renewal shall be subject to the mutual written agreement of the parties.

This Agreement and the Contracts hereunder may only be terminated for breach by BMC of any of its obligations hereunder, provided that the non-breaching party gives the breaching party written notice of the alleged breach. If the breach remains uncured for one hundred eighty (180) days following the date of written notice, then the non-breaching party may terminate this Agreement effective on the one hundred eighty-fifth (185) day following the date of the written notice. In the event that either HES or BMC defaults on any of their obligations to each other that are subject to this Agreement, then only the terms governing BMC, and not this entire Agreement, may be terminated by the non-breaching party and the same procedure shall be followed as set forth herein.

15. Successors and Assigns. In the event BMC experiences a "change in control," they shall be required to assign this Agreement, or such portion of it as applies to the affected BMC successor subject to the consent of HES which will not be unreasonably withheld, to such successor to the assets or business of BMC, if applicable, and/or take such action and do all things necessary to vest the rights and obligations of BMC in this Agreement in and to its successor. A "change in control" shall be deemed to have occurred (i) whenever BMC becomes the affiliate of a person or entity who was not their affiliate on the effective date of this Agreement, (ii) upon any sale, exchange or other transfer of all or substantially all of BMC's assets to an unaffiliated third party, including by merger, consolidation, or otherwise, or (iii) a sale, exchange or other transfer of all or substantially all of the business activities of BMC involved in this Agreement, including by merger, consolidation, or otherwise. Except as herein provided, neither party shall have the right to assign this Agreement without the advance written consent of the other party, which shall not be unreasonably withheld. This Agreement shall be binding upon and inure to the benefit of the parties thereto and their respective successors and permitted assigns,
16. No Waiver Or Invalidity. None of the terms of this Agreement shall be deemed to be waived by any party unless such waiver is in writing duly executed by the party to be charged with such waiver and such writing recites specifically that it is a waiver of the terms of this Agreement. The waiver by either party of any breach of any agreement, warranty or covenant contained in this Agreement shall not be construed to act as a waiver of any subsequent breach. The failure or delay of either party to exercise any right, power or remedy shall not operate as a waiver thereof, and all rights, powers and remedies shall continue in full force and effect. All



rights, powers and remedies of both parties provided for in this Agreement are cumulative and non-exclusive, except as otherwise expressly provided. Unenforceability or invalidity of any one or more provision hereof shall not render any other provision herein contained unenforceable or invalid.

17. Confidentiality. The parties acknowledge that the terms and provisions hereof, including without limitation, the prices of Products hereunder, are confidential and the parties agree not to disclose this contract or any term or condition thereof to any person not affiliated with them except as required by law or with the other party's written assent. The parties agree to treat this Agreement with confidentiality and to make the contents thereof known only to those employees who, by the nature of their jobs, are required to have such knowledge. This provision shall not be deemed to constitute an agreement by the parties not to seek and obtain review of this Agreement by its legal counsel. In addition, in connection with the negotiation or performance of this Agreement, the parties may obtain proprietary product and business information of the other party and each agrees to maintain as confidential any information of the other party so obtained which is either specifically designated as confidential or which a reasonable person would understand to be confidential.

Neither party will use the trademarks, proprietary names, copyrighted information or other intellectual property of the other party without the other party's advance written permission.

18. Entire Agreement and Amendment. This Agreement constitutes the entire agreement between the parties relating to the subject matter herein and supersedes all prior proposals, understandings, course of conduct and writings by and between the parties and relating to the subject matter herein. However, nothing herein is intended nor shall it be construed to modify any agreements existing between HES and BMC as of the effective date of this Agreement. None of the terms of this Agreement shall be deemed to be amended, including by any future purchase orders, unless such amendment is in writing and duly executed by all parties to this Agreement and such writing specifically states that it is an amendment to this Agreement.
19. Notices. Any notice required to be sent by one party to the other and any request by either party pursuant to the terms of this Agreement shall be in writing, duly delivered to the other party in person or sent by facsimile transmission or by registered or certified mail, as follows:

If to HES, to:

CRAIG BUSHON
PRESIDENT,
GSA Home Energy Solutions, LLC
100 E. Whitestone Blvd. Suite 148-308
Cedar Park, TX 02184

20. Choice Of Law and Dispute Resolution. This Agreement shall be governed as to interpretation, validity, effect, enforceability and all other substantive or procedural matters by the laws of the State of Texas, without regard to conflict of laws principles.

In the event a dispute arises between the parties relating to this Agreement, the parties will attempt to resolve the dispute amicably and, if such efforts are unsuccessful after thirty (30) days following written notice of a dispute or claim, then the matter will be submitted to mediation. Any claim or dispute concerning questions of law or fact arising out of, or relating to, this Agreement or any alleged breach thereof which is not disposed of by agreement of the parties or in mediation, including without limitation any claim concerning the interpretation or validity of this Agreement, upon written demand of one of the parties, shall be determined, solely and exclusively, by a single arbitrator sitting in accordance with the Rules of Commercial Arbitration of the American Arbitration Association then in force. If the parties cannot agree upon a single arbitrator within ten (10) days after demand by either of them for arbitration, then the American Arbitration Association shall select one arbitrator from a list of neutral arbitrators. The decision or award of the arbitrator shall be final and binding unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary or so grossly erroneous as to imply bad faith. Judgment shall be entered in a court of competent jurisdiction. The expense of the arbitration shall be shared equally by the parties.



- 21. **Force Majeure.** Failure of either party to perform its obligations under this Agreement shall not subject such party to any liability to the other party if such failure is caused by any cause beyond the reasonable control of such nonperforming party, including, but not limited to, acts of God, fire, explosion, flood, drought, war, riot, sabotage, terrorism, embargo, strikes or other labor trouble or a national health emergency.
- 22. **Authority.** Each individual signing this Agreement, and any other documents executed in connection with this Agreement, whether signed individually or on behalf of any person or entity, warrants and represents that he or she has full authority to so execute the agreement on behalf of the parties on whose behalf he or she so signs. Each separately acknowledges and represents that he or she has full authority to so execute the Agreement on behalf of the parties on whose behalf he or she so signs, and this expressly includes BMC's authority to agree, on behalf of the BMC Member Centers, to those terms and conditions set forth herein, that shall be accepted and acknowledged by the BMC Member Centers wishing to obtain the benefit of this Agreement. Each separately acknowledges and represents that this representation and warranty is an essential and material provision of this Agreement and shall survive execution of this Agreement.
- 23. **Publicity.** The parties, or either of them, may issue a press release, subject to the review and approval of the other party, concerning the existence, but not the specific terms of, this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and delivered by their respective duly authorized officers on the day and year first above written.

BMC WEST CORPORATION

By [Signature] Date 9-16-08
 Title V.P. Central Tx Region
 By [Signature] Date 9-16-08
 Title TEXAS REGION MANAGER

GSA HOME ENERGY SOLUTIONS LLC

By [Signature] Date 9-16-08
 Title CRAIG BUSHON
 Title President, Home Energy Solutions LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 24, 2010, a copy of the foregoing *Notice of Filing Amended Exhibit "C" Motion to Reconsider Claim of GSA Home Energy Solutions* was served (1) upon the counsel listed below, and (2) via CM/ECF Noticing to all parties appearing thereon

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ATTORNEYS FOR THE REORGANIZED DEBTORS

/s/ Patricia P. McGonigle

Patricia P. McGonigle (DE 3126)