

**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. 09-12074 (KJC)
Debtors.)	
	)	Jointly Administered
)	
	)	Objection Deadline: July 22, 2009 at 4:00 p.m. (ET)
	)	Hearing Date: July 29, 2009 at 10:00 a.m. (ET)

**DEBTORS' MOTION FOR AN ORDER
AUTHORIZING ASSUMPTION OF THE ASSIGNMENT AGREEMENT
WITH PROFESSIONAL BUILDING SOLUTIONS, LLC AND SCOTT AXELROD**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this Motion (the "**Motion**") for the entry of an order substantially in the form annexed hereto as **Exhibit A** authorizing assumption of the Assignment Agreement (as defined herein) with Professional Building Solutions, LLC and Scott Axelrod. In support thereof, the Debtors respectfully represent:

JURISDICTION AND VENUE

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

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.

RELIEF REQUESTED

2. By this Motion, the Debtors, pursuant to sections 365, 1107(a), and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***") and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***"), seek entry of an order authorizing them to assume the Assignment Agreement (as defined herein).

BACKGROUND

3. On June 16, 2009 (the "***Petition Date***"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "***Chapter 11 Cases***"). The Debtors continue to operate their businesses and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases. On June 26, 2009, the Office of the United States Trustee (the "***U.S. Trustee***") appointed the official committee of unsecured creditors (the "***Creditors Committee***").

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

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

- ***BMC West.*** Under the BMC West brand, the Debtors market and sell building products, manufacture building components, and provide construction services to professional builders and contractors. Products include structural lumber and building

materials purchased from manufacturers, as well as manufactured building components such as millwork, trusses, and wall panels. Construction services include installation of various building products and framing. The Debtors currently offer these products and services in major metropolitan markets in Texas, Washington, Colorado, Idaho, Utah, Montana, North Carolina, California, and Oregon.

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

6. On the Petition Date, the Debtors filed their proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"). 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 \$80 million in debtor-in-possession financing, which the Court approved on a final basis on July 1, 2009.

THE ASSIGNMENT AGREEMENT

7. On October 1, 2007, Debtor BMC West Corporation ("**BMC West**") entered into that certain Assignment Agreement the ("**Assignment Agreement**") by and among BMC West, Professional Building Solutions, LLC d/b/a Trim Solutions ("**Trim Solutions**"), and Mr. Scott Axelrod, the sole member of Trim Solutions. Pursuant to the Assignment Agreement, BMC West acquired Trim Solutions' Denver-based millwork supply and installation business.

8. The business relationships that Scott Axelrod and Trim Solutions had established with many of the largest Denver-based production homebuilders drove the Debtors' decision to enter into the Assignment Agreement. By purchasing the Trim Solutions' business, the Debtors acquired customer relationships with these local builders who previously had not done business with the Debtors. During the current downturn in the housing market, these builders have performed relatively well, and the business generated as a result of the Assignment Agreement contract remains profitable for the Debtors.²

9. Pursuant to the Assignment Agreement, the Debtors took an assignment of Trim Solutions' pre-existing contracts to provide and/or install millwork for houses under construction in the Denver area. These agreements to supply and/or install millwork—and the builders that are counterparty to them—constitute a significant percentage of the Debtors' Colorado-based millwork operation.

10. The Assignment Agreement requires the Debtors to (i) make quarterly payments to Mr. Axelrod until October 2010 and (ii) pay Mr. Axelrod a specified amount for each house for which BMC West supplies and/or installs millwork prior to October 1, 2010 pursuant to a contract assigned to BMC West under the terms of the Assignment Agreement. In addition, the Assignment Agreement requires the Debtors to perform warranty work on all houses that are subject to a contract that was assigned to the Debtors, even if Trim Solutions

² The Debtors regard the amounts payable pursuant to the Assignment Agreement as well as the amount of revenue and level of profitability generated by this business unit as confidential proprietary information. Accordingly, the Debtors have not disclosed this information in this Motion. This information will be provided to the Court for *in camera* review upon request. It will also be made available to the U.S. Trustee and the Creditors' Committee upon those parties' request (subject to such information remaining confidential).

provided the labor or materials prior to the assignment, and requires the Debtors to refrain from requesting price increases under the assigned contracts unless certain preconditions are met.

11. A central factor in the success of this business unit is the network of relationships with key customers that have been cultivated and maintained by Mr. Axelrod. In light of the importance of Mr. Axelrod's customer relationships to the success of the Debtors' Colorado-based millwork supply and installation business unit, the Assignment Agreement contained a covenant by which Mr. Axelrod agreed not to compete with the Debtors for a period of three years following the execution of the Assignment Agreement, which period may be extended for an additional year. The Assignment Agreement also requires Mr. Axelrod to continue to provide services to the Debtors relating to the transition of Trim Solutions' business and business relationships to the Debtors for a period of three years following the execution of the Assignment Agreement, which period may be extended for an additional year.

BASIS FOR RELIEF REQUESTED

12. Ample authority exists to support the Debtors' assumption of the Assignment Agreement.³ Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor-in-possession, "subject to the court's approval, may assume or reject any executory

³ The Debtors believe that the Assignment Agreement is an executory contract, given the numerous obligations remaining to be performed by all of the parties. *See, e.g., In re Teligent, Inc.*, 268 B.R. 723, 729-32 (Bankr. S.D.N.Y. 2001) (holding that where the only remaining obligations in a merger agreement were the debtor's obligation to pay money and the counterparty's obligation not to compete or disclose confidential information, the contract was executory). *But cf., e.g., In re Bluman*, 125 B.R. 359, 361-65 (Bankr. E.D.N.Y. 1990). Should the court determine that the Assignment Agreement is not an executory contract, the Debtors request that they be authorized to make the payments required by the Assignment Agreement pursuant to section 363(b) of the Bankruptcy Code. As set forth below, the Debtors' decision to make the payments required by the Assignment Agreement is supported by their sound business judgment. Accordingly, the Debtors may be authorized to make this payment pursuant to section 363(b). *See, e.g., Dai-ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtor to show that a sound business purpose justifies such actions.").

contract or unexpired lease of the debtor.” 11 U.S.C. §365(a). The purpose of section 365(a) is to allow a trustee to maximize the value of the debtor's estate by assuming executory contracts that benefit the estate and rejecting those that do not. *See, e.g., In re Felming Companies, Inc.*, 499 F.3d 300, 304 (3d Cir. 2007) (noting that section 365(a) allows “the trustee to maximize the value of the debtor's estate by assuming executory contracts . . . that benefit the estate and rejecting those that do not.”); *In re Sandman Assocs.*, 251 B.R. 473, 480 (W.D. Va. 2000) (“The authority granted by section 365 allows the trustee or debtor in possession to pick and choose among contracts, assuming those that are favorable, and rejecting those that are not.”).

13. A debtor's decision to assume or reject an unexpired lease or executory contract is subject to court review under the “business judgment” standard, which is satisfied when a debtor shows that assumption would be beneficial to its estate and reflects a reasonable exercise of business judgment. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing the business judgment test as the “traditional” test); *Sharon Steel Corp. v. Nat’l Fuel Gas Dist. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (same); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994) (“In determining whether a debtor may be permitted to reject an executory contract, courts usually apply the business judgment test. Generally, absent a showing of bad faith, or an abuse of business discretion, the debtor’s business judgment will not be altered.”) (internal citations omitted); *In re III Enters., Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) (“Generally, a court will give great deference to a debtor's decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment—a standard which [the courts] have concluded many times is not difficult to meet.”). Accordingly, courts approve the assumption or rejection of an executory contract or unexpired lease unless evidence is presented that the debtor’s decision to

assume or reject “is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.” *In re Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985).

14. Section 365(b)(1) of the Bankruptcy Code provides that the trustee or debtor-in-possession may only assume an executory contract after demonstrating that the estate is able to meet the debtor’s obligations—by promptly curing any existing defaults and providing adequate assurance of future performance under such contract. *See, e.g., Metropolitan Airports Comm’n v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.)*, 6 F.3d 492, 496 (7th Cir. 1993).

15. The Debtors have determined, in the sound exercise of their business judgment, that assumption of the Assignment Agreement is in the best interests of their estates. As noted previously, the Assignment Agreement both obligates Scott Axelrod to provide services to the Debtors and, pursuant to the non-compete provisions, prohibits Scott Axelrod from competing with the Debtors in the Denver vicinity. If the Debtors do not honor their obligations to make the payments required by the Assignment Agreement, the Debtors will be in material breach of their obligations under the Assignment Agreement. Not only are the Debtors concerned that, in this circumstance, they will be unable to enforce the non-compete and other applicable provisions of the Assignment Agreement, but the Debtors also believe that significant value will be preserved by assuming the Assignment Agreement.

16. Assumption of the Assignment Agreement will enable the Debtors to realize the full benefit of the Assignment Agreement, including the benefit afforded by the provisions of that Agreement that require Scott Axelrod to perform services to the Debtors and not to compete with them. On the other hand, if the Debtors are not permitted to assume their

commitments in the Assignment Agreement, the Debtors believe their business operations will be harmed because Mr. Axelrod potentially will either reopen his own business to compete with the Debtors or leave the Debtors in order to work for one of the Debtors' competitors. The Debtors believe that if Mr. Axelrod were to do so, several significant customers of the Debtors in the Colorado area would cease to do business with the Debtors and would continue to do business with Mr. Axelrod, irrespective of whether he reopened his own business or went to work for one of the Debtors' competitors. The Debtors have determined, in the sound exercise of their business judgment, that the amount of revenue that they would lose if Mr. Axelrod were to compete against the Debtors greatly exceeds the amounts that are owed to Mr. Axelrod pursuant to the Assignment Agreement. In these circumstances, the Debtors have determined that assumption of the Assignment Agreement is in the best interests of their estates.

17. In connection with assumption of the Assignment Agreements, the Debtors will, pursuant to the provisions of section 365(b) of the Bankruptcy Code, promptly cure any defaults existing under the Assignment Agreement.⁴ Adequate assurance of the Debtors' ability to perform their future obligations under the Assignment Agreement is provided through the Debtors' ongoing cash flow from operations, supplemented as necessary by access to the Debtors' \$80 million debtor-in-possession financing facility. As a result, the Debtors submit that they have satisfied the requirements of section 365 of the Bankruptcy Code, and the Court should therefore authorize them to assume the Assignment Agreement.

⁴ The Debtors believe that they owe Mr. Axelrod \$37,909 in connection with the Assignment Agreement. Otherwise, the Debtors do not believe that any defaults exist under the Assignment Agreement.

NOTICE

18. No trustee or examiner has been appointed in these Chapter 11 Cases. The Debtors have provided notice of filing of the Motion to: (a) the U.S. Trustee; (b) counsel to Wells Fargo Bank, as agent under the Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (c) counsel to the Creditors' Committee; (d) Scott Axelrod; and (e) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested the Debtors respectfully submit that no further notice of this Motion is required.

NO PRIOR REQUEST

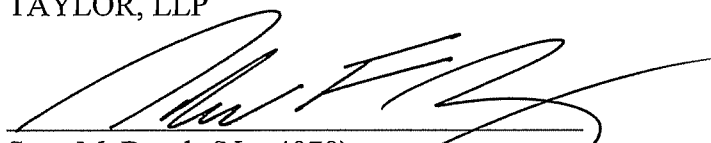
19. No prior request for the relief sought in this Motion has been made to this or any other court.

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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
July 10, 2009

YOUNG CONAWAY STARGATT &
TAYLOR, LLP



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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

**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. 09-12074 (KJC)
)	
Debtors.	)	Jointly Administered
)	
	)	Objection Deadline: July 22, 2009 at 4:00 p.m. (ET)
	)	Hearing Date: July 29, 2009 at 10:00 a.m. (ET)

NOTICE OF MOTION

TO: (A) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (B) COUNSEL TO WELLS FARGO BANK, AS AGENT UNDER THE PREPETITION CREDIT FACILITY AND THE DIP FACILITY (AS DEFINED IN THE PLAN); (C) COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS; (D) SCOTT AXELROD; AND (E) ALL PARTIES THAT HAVE REQUESTED NOTICE PURSUANT TO RULE 2002 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE.

PLEASE TAKE NOTICE that the above-captioned debtors and debtors in possession (collectively, the “Debtors”) have filed the attached **Debtors’ Motion for an Order Authorizing Assumption of the Assignment Agreement with Professional Building Solutions, LLC and Scott Axelrod** (the “Motion”).

PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be filed on or before **July 22, 2009 at 4:00 p.m. (ET)** (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the objection upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

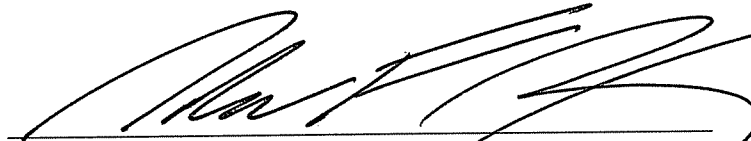
PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON JULY 29, 2009 AT 10:00 A.M. (ET) BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

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 if you fail to respond in accordance with this notice, the Court may grant the relief requested in the Motion without further notice or hearing.

Dated: Wilmington, Delaware
July 10, 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. 09-12074 (KJC)
)	
Debtors.	)	Jointly Administered
)	
	)	Ref. Docket No. _____

**ORDER AUTHORIZING ASSUMPTION OF THE ASSIGNMENT AGREEMENT WITH
PROFESSIONAL BUILDING SOLUTIONS, LLC AND SCOTT AXELROD**

Upon consideration of the motion (the "***Motion***") of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***") for entry of an order authorizing assumption of the Assignment Agreement (as defined herein) with Professional Building Solutions, LLC and Scott Axelrod, all as set forth in the Motion; 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

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.

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 to assume the Assignment Agreement² pursuant to section 365(a) of title 11 of the United States Code (the "*Bankruptcy Code*").
3. The Debtors' cure obligations in connection with the assumption of the Assignment Agreement shall be fixed at \$37,909, and Trim Solutions and Scott Axelrod are hereby barred, enjoined, and prohibited from asserting any additional amounts on account of the Debtors' cure obligations under section 365 of the Bankruptcy Code or otherwise from the Debtors or their estates with respect to the Assignment Agreement.
4. The Debtors have provided adequate assurance of future performance of the Assignment Agreement.
5. The Debtors are authorized to take any action necessary to effectuate the terms of this Order without further order of the Court.
6. This Court shall retain jurisdiction over any and all matters arising from or related to the implementation or interpretation of this Order.

Dated: Wilmington, Delaware
July __, 2009

Kevin J. Carey
Chief United States Bankruptcy Judge

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