IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, *et al.*[1]	Case No. 09-12074 (KJC)
	Jointly Administered
Reorganized Debtors.	**Objection Deadline: September 10, 2010 at 4:00 p.m. (ET)** **Hearing Date: September 30, 2010 at 3:00 p.m. (ET)**

REORGANIZED DEBTORS' MOTION FOR ENTRY OF IMPLEMENTATION ORDER WITH RESPECT TO PARAGRAPH 44 OF CONFIRMATION ORDER (RELATING TO ROBERT R. THOMAS AND THE RESTATED THOMAS TRUST)

Building Materials Holding Corporation ("***BMHC***") and its affiliates, as reorganized debtors (collectively, the "***Debtors***" or "***Reorganized Debtors***"), submit this motion (the "***Motion***") for entry of an implementation order, substantially in the form annexed hereto as Exhibit A, which clarifies and determines that, under paragraph 44 of the Confirmation Order, the Cure Claims, if any, of Robert R. Thomas ("***Mr. Thomas***") or The Restated Thomas Trust Dated April 14, 2009 (the "***Thomas Trust***," and collectively with Mr. Thomas, the "***Thomas Parties***") under certain assumed "Acquisition Agreements" do not include the rejection damages claims of Gregg Street, LLC or Ralph Road, LLC arising under separate commercial real estate leases that were rejected pursuant to the Court's order dated July 16, 2009. In support of this Motion, the Reorganized Debtors respectfully submit as follows:

[1] The Reorganized Debtors, along with the last four digits of each Reorganized 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 Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

JURISDICTION AND VENUE

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

GENERAL BACKGROUND

2. On June 16, 2009 (the "***Petition Date***"), each of the now Reorganized Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "***Chapter 11 Cases***"). 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***").

3. The Reorganized Debtors are one of the largest providers of residential building products and construction services in the United States. The Reorganized 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 distribution facilities, manufacturing facilities, and regional construction services facilities.

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

- ***BMC West***. Under the BMC West brand, the Reorganized 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 Reorganized 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 Reorganized 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 Reorganized Debtors currently offer these services in major metropolitan markets in California, Arizona, Nevada and Illinois.

5. On December 17, 2009, the Court entered an Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications) [Docket No. 1182] (the "***Confirmation Order***") confirming the Reorganized Debtors' plan of reorganization (the "***Plan***"). The Effective Date of the Plan occurred on January 4, 2010.

RELIEF REQUESTED

6. Pursuant to paragraph 39 of the Confirmation Order, the Court has "jurisdiction to hear and determine all matters arising from the implementation of th[e] Confirmation Order." To address a limited confirmation objection filed by the Thomas Parties, the Debtors included the following paragraph 44 in the Confirmation Order:

> Robert R. Thomas and The Restated Thomas Trust. Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, the *Cure Claims*, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the *Acquisition Agreement* (as defined in the Objection By Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 to Confirmation of Joint Plan of Reorganization as Amended October 22, 2009 [D.I. 1008]) shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement.

(emphasis added). For the reasons set forth below, the Reorganized Debtors request that the Court enter an order which clarifies and determines that (1) the Thomas Parties' "Cure Claims" under the specifically defined "Acquisition Agreement" that was assumed pursuant to the Confirmation Order cannot possibly include over $800,000 in lease rejection damages asserted

by Gregg Street, LLC and Ralph Road, LLC arising from the rejection of separate commercial real estate leases with those separate entities; and (2) that, instead, the Thomas Parties' "Cure Claims" can at most include only the Thomas Parties' own disputed claim, which they asserted in their proofs of claim and specifically described in their confirmation objection, that they are owed approximately $400,000 related to an alleged lack of cooperation by the Debtors in defending certain construction defect claims.

RELEVANT BACKGROUND

A. Acquisition of HNR Framing Systems, Inc.

7. HNR Framing Systems, Inc., which is one of the now Reorganized Debtors, has been engaged in the construction business in California since 1964. (*See* the contemporaneously filed Declaration of Paul S. Street In Support of Reorganized Debtors' Motion for Entry of an Implementation Order With Respect to Paragraph 44 of the Confirmation Order (Relating to Robert R. Thomas and The Restated Thomas Trust) (the "***Street Decl.***") ¶ 3). BMC Construction, Inc.,[2] which is another one of the now Reorganized Debtors, acquired 100% of the stock of HNR Framing Systems, Inc. pursuant to a Securities Purchase Agreement dated October 17, 2005 (the "***Securities Purchase Agreement***") among BMC Construction, Inc., HNR Framing Systems, Inc., and the Thomas Parties. (Street Decl. ¶ 3 & Exh. A thereto). In addition, FSC Construction, Inc.,[3] also one of the Reorganized Debtors, acquired certain other assets pursuant to an Asset Purchase Agreement dated October 17, 2005 (the "***Asset Purchase Agreement***") among FSC Construction, Inc., HNR Framing Systems, Inc., Home Building Components, Inc. and the Thomas Parties. (Street Decl. ¶ 6 & Exh. B thereto). The Securities

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[2] On or about December 29, 2005, BMC Construction, Inc. changed its name to SelectBuild Construction, Inc. To minimize confusion, this Motion will refer to that entity as BMC Construction, Inc. (Street Decl. ¶ 5).

[3] On or about January 1, 2007, FSC Construction, Inc. was merged into HNR Framing Systems, Inc. To minimize confusion, this Motion will refer to that entity as FSC Construction, Inc. (Street Decl. ¶ 8).

Purchase Agreement and the Asset Purchase Agreement are governed by California law and are sometimes collectively referred to as the "***Acquisition Agreements***." (Street Decl. ¶ 9).

8. The transactions under the Acquisition Agreements closed on or about October 17, 2005, (Street Decl. ¶ 10), at which point the Thomas Trust received the specified purchase price, less reserves that were withheld for a period of one hundred twenty days. (Street Decl. Exh. A, art. 4 & Exh. B, art. 4). Significantly for purposes of the present dispute, the Securities Purchase Agreement contains provisions requiring the Thomas Parties to indemnify BMC Construction, Inc. from, among other things, construction defect liability caused by HNR Framing Systems, Inc. prior to the closing date. (*See* Street Decl. Exh. A, art. 13). Because of the large number of homes for which HNR Framing Systems, Inc. provided services prior to the closing date, and because of the relatively limited insurance protection that the Thomas Parties had purchased with respect to construction defect claims,[4] the Thomas Parties' potential liability under these indemnity provisions is substantial.

B. The Gregg Street, LLC Lease

9. Gregg Street, LLC, a separate limited liability company affiliated with the Thomas Trust, entered into a Triple Net Commercial Real Estate Lease (the "***Gregg Street Lease***") with HNR Framing Systems, Inc. as of October 1, 2005. (Street Decl. ¶ 11). Under the Gregg Street Lease, HNR Framing Systems, Inc. leased from Gregg Street, LLC certain real property located at 13465 and 13495 Gregg Street in the City of Poway, California. (Street Decl. ¶ 11 & Exh. C thereto, §1). The Gregg Street Lease's term was to end on September 30, 2010. (Street Decl. Exh. C, §2). Paragraph 19 of the Gregg Street Lease states:

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[4] The Thomas Parties purchased construction defect insurance with large self-insured retentions and deductibles. In addition, there is one coverage year where no insurance is available because the applicable policy was a "claims made" policy.

> No Prior or Other Agreements. This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding other than the Agreement referenced herein shall be effective as of the Effective Date.

10. In the subsequent years, Gregg Street, LLC agreed to several partial terminations of the Gregg Street Lease. (Street Decl. ¶ 13). In 2007, HNR Framing Systems, Inc. and Gregg Street, LLC agreed to terminate the Gregg Street Lease with respect to approximately 28,000 feet of space. Thus Gregg Street, LLC, HNR Framing Systems, Inc. and BMHC entered into a Partial Lease Termination Agreement (the "***First Partial Gregg Street Termination***") effective November 9, 2007. (Street Decl. ¶ 13 & Exh. D thereto). In summary, under the First Partial Gregg Street Termination, Gregg Street, LLC consented to the partial termination with respect to the specified space and entered into a new five year lease of the surrendered space with a new tenant. HNR Framing Systems, Inc. and BMHC agreed, during the remaining term of the Gregg Street Lease, to indemnify Gregg Street, LLC if the new tenant failed to make its lease payments. In addition, HNR Framing Systems, Inc. agreed to pay Gregg Street, LLC the estimated aggregate difference in the base rent payment required of HNR Framing Systems, Inc. in the Gregg Street Lease and the aggregate base rent payment required in the new lease through September 30, 2010.

11. In 2008, HNR Framing Systems, Inc. and Gregg Street, LLC agreed to another partial termination of the Gregg Street Lease, this time with respect to approximately 24,000 feet of space. Thus Gregg Street, LLC, HNR Framing Systems, Inc. and BMHC entered into a Partial Lease Termination Agreement (No. 2) (the "***Second Partial Gregg Street Termination***") effective July 15, 2008. (Street Decl. ¶ 15 & Exh. E thereto). Again, in summary, Gregg Street, LLC consented to the partial termination and entered into a new lease for the surrendered space with another new tenant. HNR Framing Systems, Inc. and BMHC

agreed, during the remaining term of the Gregg Street Lease, to indemnify Gregg Street, LLC if this additional new tenant failed to make its lease payments. In addition, HNR Framing Systems, Inc. agreed to pay Gregg Street, LLC the estimated aggregate difference in the base rent payment required of HNR Framing Systems, Inc. in the Gregg Street Lease and the aggregate base rent payment required in the new tenant's lease through September 30, 2010.

C. The Ralph Road, LLC Lease

12. Effective as of October 1, 2005, another separate limited liability company affiliated with the Thomas Trust, called Ralph Road, LLC, entered into a Triple Net Commercial Real Estate Lease (the "***Ralph Road Lease***") with FSC Construction, Inc. (Street Decl. ¶ 17 & Exh. F thereto). Under the Ralph Road Lease, FSC Construction, Inc. leased from Ralph Road, LLC certain real property located at 340 W. Ralph Road located in the City of Imperial, California. The Ralph Road Lease's term was to end on September 30, 2010. (Street Decl. Exh. F, §2). Just like the Gregg Street Lease, paragraph 19 of the Ralph Road Lease states:

> No Prior or Other Agreements. This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding other than the Agreement referenced herein shall be effective as of the Effective Date.

13. Like the Gregg Street Lease, the Ralph Road Lease was also subject to a subsequent partial termination. (Street Decl. ¶ 19). In 2009, FSC Construction, Inc. and Ralph Road, LLC agreed to terminate the Gregg Street Lease with respect to certain portions of the leased property, known as Sites 1-4, to enable a new tenant to use the surrendered space to operate a storage business. Thus Ralph Road, LLC, FSC Construction, Inc. and BMHC entered into a Partial Lease Termination Agreement (the "***Partial Ralph Road Termination***") effective February 1, 2009. (Street Decl. ¶ 19 & Exh. G). In summary, under the Partial Ralph Road Termination, Ralph Road, LLC paid FSC Construction, Inc. and BMHC $5,000.00, agreed to

indemnify them with respect to certain damage to the asphalt at the site and consented to the partial termination.

D. Bankruptcy Court Proceedings

1. Debtors' Lease Rejection Motion

14. On the Petition Date, the Debtors filed their First Omnibus Motion for an Order Authorizing Rejection of Certain Unexpired Leases and Executory Contracts, *Nunc Pro Tunc* to the Rejection Effective Date [Docket No. 33] (the "***Rejection Motion***"). The Gregg Street Lease and the Ralph Road Lease (collectively, the "***Leases***") were among the leases to be rejected pursuant to the Rejection Motion.

15. On July 10, 2009, Gregg Street, LLC, Ralph Road LLC and the Thomas Trust filed a "Reservation of Rights and Limited Response" to the Rejection Motion [Docket No. 156] (the "***Limited Response***"). The Limited Response did not request any relief in relation to the Rejection Motion; instead, it was filed as a statement of position. In particular, the Limited Response argued that the Leases "were entered into as an integral part" of the 2005 acquisition in which the Thomas Trust sold the stock of HNR Framing Systems, Inc. to BMC Construction, Inc. (Limited Response, ¶ 2). Further, the Limited Response argued that the Leases were "part of the consideration paid in the acquisition" and that they had "above market rent." (Id.) Thus, the Limited Response went on to argue that rejection of the Leases would give the *Thomas Parties* (who were not parties to the Leases) recoupment defenses to continuing liability under the indemnity provisions of the Securities Purchase Agreement. (Limited Response, ¶ 5). The Limited Response also argued that any defenses to liability under the Securities Purchase Agreement and the Asset Purchase Agreement must be adjudicated by arbitration. (Limited Response, ¶ 11).

16. The Debtors filed a reply to the Limited Response [Docket No. 173] (the "***Reply***") on July 13, 2009. In the Reply, the Debtors noted that because the Limited Response was essentially a statement of position, the factual allegations and legal conclusions in the Limited Response did not relate to any case or controversy actually pending in the Court. Nonetheless, the Debtors also pointed out in their reply that they disputed the contentions in the Limited Response. For example, the Debtors stated:

> [I]t is clear that the Leases represent transactions that are separate and distinct from the Securities Purchase Agreement and the Asset Purchase Agreement. The Securities Purchase Agreement and the Asset Purchase Agreement were transactions for the purchase of businesses. The Leases were transactions for the use and occupancy of real property following the effective date of the Securities Purchase Agreement and the Asset Purchase Agreement. In no way were the Leases an integrated part of the Securities Purchase Agreement or the Asset Purchase Agreement. Contrary to the vague averments contained in the [Limited] Response, the Leases were not above-market at the time they were entered into and did not constitute any portion of the consideration paid pursuant to the Securities Purchase Agreement or the Asset Purchase Agreement.

(Reply, ¶ 7).[5]

17. The Court authorized the rejection of the Leases by order dated July 16, 2009 [Docket No. 242].

2. Proofs of Claim Filed By Gregg Street, LLC, Ralph Road, LLC and the Thomas Parties

18. On August 31, 2009, Gregg Street, LLC filed a $407,808.86 proof of claim with respect to the rejection of the Gregg Street Lease and Ralph Road, LLC filed a $418,408.22 proof of claim with respect to the rejection of the Ralph Road Lease.[6] (Street Decl. ¶¶ 24-27). The Reorganized Debtors have allowed Gregg Street, LLC and Ralph Road, LLC

[5] That the Leases were not above-market is evidenced by, among many other things, the fact that the letter of intent executed by the parties, including Robert Thomas, with respect to the acquisition specified that the acquisition company "will enter into new leases with Thomas for any properties owned by Thomas and used by Target <u>at fair market value lease rates</u>." (Street Decl. ¶ 21) (emphasis added). Nothing in the transaction documents suggest that the Leases were entered into at above-market rates.

[6] Gregg Street, LLC and Ralph Road, LLC each filed proofs of claims against four Debtors to ensure that they did not inadvertently miss the correct debtor as a result of subsequent mergers. Duplicate claims were expunged as multiple debtor duplicates pursuant to the Order Sustaining, in Part, Debtors' Sixth Omnibus (Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1 [Docket No. 1168].

general unsecured claims in the amounts asserted and have issued checks to Gregg Street, LLC and Ralph Road, LLC on account of these allowed claims. (Street Decl. ¶ 28).

19. In addition, Mr. Thomas filed a separate proof claim (the "***Thomas Proof of Claim***") for "$400,000.00 according to proof" against SelectBuild Construction, Inc. based on the Securities Purchase Agreement and Asset Purchase Agreement.[7] (Street Decl. ¶ 29 & Exh. K thereto). The attachment to the Thomas Proof of Claim described the Thomas Parties' construction defect indemnity obligations to SelectBuild Construction, Inc. under the Securities Purchase Agreement and alleged that the Thomas Parties had suffered damages due to SelectBuild Construction, Inc.'s alleged failure to perform its duties in handling those claims and mitigating the construction defect losses. Specifically, the attachment to the Thomas Proof of Claim alleged that the Thomas Parties had "suffered damages due to these breaches in the form of increased expenses incurred in defending and indemnifying against these claims in an amount not less than $400,000 according to proof."

20. In addition, the Thomas Proof of Claim stated: "Claimant contends that the Securities Purchase Agreement, Asset Purchase Agreement and New Shareholder Leases [including the Leases] were part of the same transaction such that rejection of the New Shareholder Leases *precludes assumption of the Securities Purchase Agreement and Assets [sic] Purchase Agreement*. Without waiving this position and for the sake of clarity, Gregg Street, LLC and Ralph Road, LLC have filed separate proofs of claim relating to rejection of the New Shareholder Leases." (emphasis added). Although the Thomas Proof of Claim reserved the right to file a cure claim if the Debtors sought to assume the Securities Purchase Agreement or Asset Purchase Agreement, the Thomas Parties did not specifically assert that they would take the

[7] A substantially identical proof of claim filed by the Thomas Trust was disallowed as duplicative of the proof of claim filed by Robert R. Thomas by order dated November 19, 2009 [Docket No. 967].

position that such cure claims would include rejection damages under the Leases; instead, as noted, they simply indicated that the rejection of the Leases would *preclude* assumption of the Securities Purchase Agreement and Asset Purchase Agreement.

3. Plan Confirmation and Assumption of the Acquisition Agreements

21. Article 6.1 of the Plan provided, in short, that all Executory Contracts and Unexpired Leases shall be assumed pursuant to section 365(a) as of the Plan Effective Date unless a particular executory contract was previously rejected or identified on a Rejected Executory Contract and Unexpired Lease List. The Securities Purchase Agreement and Asset Purchase Agreement were not previously rejected and they were not identified on the Rejected Executory Contract and Unexpired Lease List filed on December 16, 2009 [Docket No. 1176]. (Street Decl. ¶ 32). Accordingly, the Securities Purchase Agreement and Asset Purchase Agreement were to be assumed under the Plan.

22. Article 6.4 of the Plan provides, in relevant part: "In the event of a dispute regarding (i) the Cure Claim[8] . . . under the Executory Contract or Unexpired Lease to be assumed . . ., or (iii) any other matter pertaining to assumption, the payments required by section 365(b)(1) of the Bankruptcy Code in respect of Cure Claims shall be made following the entry of a Final Order or orders resolving the dispute and approving the assumption. Any counterparty to an Executory Contract or Unexpired Lease that fails to object timely to the proposed assumption or Cure Claim will be deemed to have assented to such assumption and Cure Claim."

23. On November 25, 2009, the Thomas Parties filed their Objection by Robert R. Thomas and the Restated Thomas Trust dated April 14, 2009 to Confirmation of Joint Plan of Reorganization As Amended October 22, 2009 [Docket No. 1008] (the "***Confirmation***

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[8] The Uniform Glossary of Defined Terms for Plan Documents defines "Cure Claim," in pertinent part, as "a Claim based upon the Debtors' defaults on an Executory Contract or Unexpired Lease at the time such contract or lease is assumed by the Debtors pursuant to section 365 of the Bankruptcy Code . . . ."

Objection"). (Street Decl. ¶ 33 & Exh. L thereto). In the Confirmation Objection, the Thomas Parties stated that they "are counterparties to two executory contracts, each of which includes comprehensive alternative dispute resolution provisions governed by the Federal Arbitration Act." (Street Decl. Exh. L, ¶ 1). The Confirmation Objection referenced the two executory contracts as being the Securities Purchase Agreement and the Asset Purchase Agreement and stated: "The Securities Purchase Agreement and Asset Purchase Agreement are referred to collectively herein as the 'Acquisition Agreement.'" (Street Decl. Exh. L, ¶ 5). The Thomas Parties specifically recognized that "the Debtors intend to assume these agreements on the Effective Date of the Plan." (Street Decl. Exh. L, ¶ 14).

24. The Confirmation Objection stated again the position that the Gregg Street Lease and the Ralph Road Lease were "part of the consideration paid in the acquisition" but it also noted that the Debtors had "filed a first day motion to reject" those Leases. (Street Decl. Exh. L, ¶ 9). The Thomas Parties also noted that Gregg Street, LLC and Ralph Road, LLC had filed proofs of claim for rejection damages under the Leases. (Street Decl. Exh. L, ¶ 12).

25. The Confirmation Objection then described the claim asserted in the Thomas Parties' Proofs of Claim: "Also prior to the general claims bar date, the Thomas Parties filed proofs of claim against Debtor SelectBuild Construction, Inc., based upon pre-petition breaches of the Securities Purchase Agreement. *Each proof of claim was submitted in the amount of $400,000, which is an estimate of the amount of damages incurred due to lack of cooperation by the Debtors in defending construction defect claims.*" (Street Decl. Exh. L, ¶ 13) (emphasis added). The Confirmation Objection did not state that the Thomas Parties' claims under the Securities Purchase Agreement or the Asset Purchase Agreement should be deemed to include the rejection damages claims asserted in the proofs of claim filed by Gregg Street LLC or

Ralph Road, LLC (and, as noted above, the Thomas Parties' Proofs of Claim did not make that assertion either).

26. After this general description, the Thomas Parties then stated the limited nature of their confirmation objection: "The Thomas Parties are making only a limited objection to confirmation of the Amended Plan. The Thomas Parties only object to the Plan's provisions for determining their *Cure Claims*, because the Plan does not require resolution of claims and defenses relating to the *Acquisition Agreement* according to the ADR provisions." (Street Decl. Exh. L, ¶ 21) (emphasis added). Even though the Thomas Parties' Proofs of Claim had argued that rejection of the Leases "precludes assumption of the Securities Purchase Agreement and the Asset Purchase Agreement," the Thomas Parties did <u>not</u> object to the assumption of the Securities Purchase Agreement or Asset Purchase Agreement in the Confirmation Objection; instead, they only objected to the procedures for determining the cure amount owing with respect to such assumption. Finally, in the second to last paragraph of the Confirmation Objection, the Thomas Parties again stated: "The claims filed by the Thomas Parties related to the breach of the Acquisition Agreement *total $400,000*." (Street Decl. Exh. L, ¶ 26) (emphasis added).

27. Paragraph 20 of the Confirmation Order implements articles 6.1 and 6.4 of the Plan relating to "Assumed Contracts and Leases." To address the Thomas Parties' Confirmation Objection, the Reorganized Debtors included the following language in paragraph 44 of the Confirmation Order:

> <u>Robert R. Thomas and The Restated Thomas Trust</u>. Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, the *Cure Claims*, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the *Acquisition Agreement* (as defined in the Objection By Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 to Confirmation of Joint Plan of Reorganization as Amended October 22, 2009 [D.I. 1008]) shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement.

(emphasis added). This resolved the Thomas Parties' Confirmation Objection and the Court entered the Confirmation Order on December 17, 2009.

ARGUMENT

28. The Debtors correctly understood and intended the "Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement"—which the Debtors agreed would be resolved by ADR—to encompass only the disputed claims that the Thomas Parties described in paragraph 13 of their Confirmation Objection as having been "submitted in the amount of $400,000, which is an estimate of the amount of damages incurred due to lack of cooperation by the Debtors in defending construction defect claims." Indeed, the Thomas Parties repeated that description in the second to last paragraph of the Confirmation Objection where they wrote: "The claims filed by the Thomas Parties related to the breach of the Acquisition Agreement *total $400,000*." (Street Decl. Exh. L, ¶ 26) (emphasis added). Counsel for the Thomas Parties, however, recently informed the Reorganized Debtors' counsel that the Thomas Parties contend that, in addition to the purported $400,000 claim related to alleged lack of cooperation in defending construction defect claims, the Thomas Parties can assert the *rejection damages claims* filed by *separate entities* under *separate agreements* as part of the "Cure Claims" under the assumed Acquisition Agreements.

29. Cash is at a premium for the Reorganized Debtors. The Thomas Parties' argument is simply a belated effort to force the Reorganized Debtors to reject the Acquisition Agreement, and thereby free the Thomas Parties from their substantial indemnity obligations, by requiring the Reorganized Debtors to pay the lease rejection damages as part of the Cure Claims. The rejection damages claims under the previously rejected Leases cannot possibly be "Cure Claims" under the assumed "Acquisition Agreement" because (1) the Thomas Parties repeatedly

stated in their Confirmation Objection that the claims of the Thomas Parties under the Acquisition Agreement "total $400,000" and related only to the alleged lack of cooperation by the Debtors in defending construction defect claims; (2) the assumption of the Acquisition Agreements under the Confirmation Order precludes the Thomas Parties from arguing that the previously rejected Leases were an integrated, inseverable part of the Acquisition Agreements; and (3) the assumed Acquisition Agreements and the rejected Leases are in fact separate agreements.

30. Accordingly, the Reorganized Debtors respectfully request the Court to enter an order confirming the Debtors' understanding that the Cure Claims that are subject to alternative dispute resolution under paragraph 44 of the Confirmation Order do not include more than $800,00 in rejection damages claims under the Leases but instead only include the Thomas Parties' claim (which the Reorganized Debtors dispute) that they are owed approximately $400,000 related to the alleged lack of cooperation by the Debtors in defending construction defect claims.

A. The Thomas Parties' Cure Claims Subject to ADR Under Paragraph 44 of the Confirmation Order Only Include the Purported Breach of Contract Claim that the Thomas Parties Described in the Confirmation Objection.

31. In the Confirmation Objection that prompted the Debtors to include paragraph 44 in the Confirmation Order—permitting alternative dispute resolution of "the Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement"—the Thomas Parties specifically described their potential claims under that specifically defined Acquisition Agreement. In paragraph 13 of the Confirmation Objection, the Thomas Parties indicated that such claims were "submitted in the amount of $400,000, which is an estimate of the amount of damages incurred due to lack of cooperation by the Debtors in defending construction defect claims." And just to leave no doubt, in the second to last

paragraph of the Confirmation Objection, the Thomas Parties stated: "The claims filed by the Thomas Parties related to the *breach of the Acquisition Agreement total $400,000.*" (Street Decl. Exh. L, ¶ 26) (emphasis added). As a result of this language, the Debtors understood and intended that those specifically described claims, and no others, would constitute the potential "Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement." Thus, as a matter of simple contract interpretation, the Court should not permit the Thomas Parties to expand the scope of the claims subject to ADR in paragraph 44 of the Confirmation Order beyond the Thomas Parties' own description.

B. The Thomas Parties are Precluded from Arguing that the Cure Claims Under the Assumed Acquisition Agreements Include Damages Under the Rejected Leases.

32. In addition, the Court necessarily adjudicated that the rejected Leases were not part of the assumed Securities Purchase Agreement when the Court entered the Confirmation Order providing for the assumption of the Securities Purchase Agreement. As a result, the Thomas Parties are precluded from re-opening that issue under the doctrines of res judicata and collateral estoppel.

33. Res judicata, or claim preclusion, bars a party from re-litigating claims that were or could have been asserted in an earlier proceeding. *In re ANC Rental Corp.*, 277 B.R. 226, 233 (Bankr. D. Del. 2002). The Third Circuit has held that res judicata "requires (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies; and (3) a subsequent suit based on the same cause of action." *CoreStates Bank v. Huls Am., Inc.*, 176 F.3d 187, 205 (3d Cir. 1999) (citations omitted).

34. In the bankruptcy context, a bankruptcy court order to assume, reject, or assign an executory contract or unexpired lease under section 365 is a final judgment for res judicata purposes. *See, e.g.*, *In re Marlin Hathaway*, 401 B.R. 477, 482 (Bankr. W.D. Wash. 2009). A

subsequent proceeding is based on the same cause of action as the first proceeding when "there is 'an essential similarity of the underlying events giving rise to the various legal claims.'" *CoreStates Bank*, 176 F.3d at 200 (quoting *United States v. Athlone Industries, Inc.*, 746 F.2d 977, 984 (3d Cir. 1984)); *see also In re Kmart Corp.*, 362 B.R. 361, 380 (Bankr. N.D. Ill. 2007), *aff'd Philip Morris Capital Corp. v. Kmart Corp.*, 2007 WL 3171316 (N.D.Ill. Oct. 24, 2007). Moreover, the concept of a "cause of action" includes possible defenses and, in bankruptcy proceedings, objections that implicate a party's rights in the bankruptcy estate. *See, e.g.*, *CoreStates Bank*, 176 F.3d at 200, 205 ("claim" for preclusion purposes includes objections); *In re Kmart Corp.*, 362 B.R. at 378 (claim preclusion "applies to defenses as well as claims").

35. The Thomas Parties were plainly on notice that the Plan and Confirmation Order provided for the assumption of the Securities Purchase Agreement, and they were parties to the assumption proceeding in connection with confirmation, because they filed the Confirmation Objection addressing that very issue. However, in the Confirmation Objection the Thomas Parties did not object to *assumption* of the Securities Purchase Agreement or the Asset Purchase Agreement; instead, they simply objected to the Plan provisions related to the determination of the *cure amount* arising from such assumption. Specifically, the Thomas Parties stated: "The Thomas Parties are making only a limited objection to confirmation of the Amended Plan. The Thomas Parties only object to the Plan's provisions for determining their Cure Claims . . . ." (Street Decl. Exh. L, ¶ 21).

36. The Confirmation Objection and confirmation proceedings related to the assumption of the Acquisition Agreements, on the one hand, and the Thomas Parties' present intention to assert the Lease rejection damages as part of the Cure Claims under the Acquisition Agreements in alternative dispute resolution, on the other hand, involve the same "cause of

action" because "there is an essential similarity of the underlying events giving rise to the various legal claims." *CoreStates Bank*, 176 F.3d at 200 (quotations and citations omitted). Specifically, both involve the existence of and the relationship between the Leases and the Acquisition Agreements and whether they are one agreement that could be separately rejected or assumed by the Debtors pursuant to section 365 of the Bankruptcy Code. Because it is black letter law that debtors must either assume an entire contract, *cum onere*, or reject the entire contract, the Court necessarily adjudicated that the rejected Leases were not part of the Acquisition Agreements when it entered the Confirmation Order providing for the assumption of the Acquisition Agreements. *See, e.g.*, *ANC Rental Corp.*, 277 B.R. at 238-39.

37. Finally, the Thomas Parties' argument that the rejected Leases were part of the assumed Acquisition Agreements is a "claim" that could have been raised in an effort to block the Debtors' assumption of the Acquisition Agreements. Indeed, in the Thomas Proof of Claim they had asserted that rejection of the Leases "precludes assumption of the Securities Purchase Agreement and Assets [sic] Purchase Agreement." (Street Decl. Exh. K). However, the Thomas Parties did not pursue this as an objection to assumption of the Securities Purchase Agreement in the Confirmation Objection; instead, the Thomas Parties simply asserted the limited objection that any cure claim owed as a result of the assumption must be determined pursuant to alternative dispute resolution. Further, as previously emphasized, the Thomas Parties specifically described the parameters of that cure claim in the Confirmation Objection as follows: "Also prior to the general claims bar date, the Thomas Parties filed proofs of claim against Debtor SelectBuild Construction, Inc., based upon pre-petition breaches of the Securities Purchase Agreement. Each proof of claim was submitted in the amount of $400,000, which is an estimate of the amount of damages incurred due to lack of cooperation by the Debtors in defending construction defect

claims." (Street Decl. Exh. L, ¶ 13). Precluding the Thomas Parties' effort to now include the Lease rejection damages as part of the Cure Claim on the assumed Acquisition Agreements supports "the principal underlying the rule of claim preclusion [] that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so." *In re Grossinger's Assocs.*, 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995) (quoting *Restatement (Second) of Law of Judgments* ch. 1 at 6 (1982)).

38. For similar reasons, the Thomas Parties are precluded from raising the issue of whether the Leases are a part of the Acquisition Agreements under the doctrine of collateral estoppel. The doctrine of collateral estoppel, also referred to as issue preclusion, requires that (1) the issue sought to be precluded be the same as the one involved in the previous proceeding; (2) the issue has been fully litigated; (3) the issue has been decided by a final judgment; and (4) the determination be essential to the prior judgment. *Wolstein v. Docteroff (In re Docteroff)*, 133 F.3d 210, 214 (3d Cir. 1997); *In re Access Beyond Tech., Inc.*, 237 B.R. 32, 40 (Bankr. D. Del. 1999). The touchstone of whether an order should be given preclusive effect is whether the parties had a full and fair opportunity to be heard on the issue. *Wolstein*, 133 F.3d at 215; *In re Access Beyond Tech., Inc.*, 237 B.R. at 40; *Manhattan King David Restaurant, Inc. v. Levine*, 154 B.R. 424, 428 (S.D.N.Y. 1993).

39. Again, the issue of whether the Leases and the Acquisition Agreements are one integrated agreement was necessarily before this Court in connection with confirmation of the Plan providing for the assumption of the Acquisition Agreements. The Thomas Parties had every opportunity to object, and in fact did file a Limited Objection, to the entry of the Confirmation Order. The Confirmation Order represents a final, non-appealable judgment. The determination that the rejected Leases are not part of the Acquisition Agreement necessarily was

essential to the prior judgment because a debtor cannot partially reject an executory contract as a matter of law. *See, e.g.*, *In re ANC Rental Corp*, 277 B.R. at 238.

40. In conclusion, the Thomas Parties had specifically asserted in the Thomas Parties' Proofs of Claim that rejection of the Leases "precludes assumption of the Securities Purchase Agreement and the Assets [sic] Purchase Agreement." But when the Debtors actually sought to assume those Acquisition Agreements in connection with confirmation of the Plan, the Thomas Parties elected not to press that particular objection. Indeed, they did not object to the assumption at all; instead, they asserted only a "limited objection" to the procedures for determining their Cure Claims under the assumed agreements. Further, they described those potential Cure Claims as being "in the amount of $400,000, which is an estimate of the amount of damages incurred due to lack of cooperation by the Debtors in defending construction defect claims."

41. Thus, the Thomas Parties are now precluded from arguing that the rejected Leases were part of the assumed Acquisition Agreements or that the Cure Claims under the Acquisition Agreements include, in addition to the described $400,000 claim for alleged lack of cooperation in defending construction defect claims, more than $800,000 in rejection damages under the Leases.

C. The Rejected Leases Were Separate From the Assumed Acquisition Agreements.

42. Lastly, the Thomas Parties cannot attempt to include the rejection damages in their Cure Claims because the Leases and the Acquisition Agreements were in fact separate agreements.

43. The question of whether multiple agreements should be read as one contract for purposes of assumption and rejection is determined under state law. *See In re Abitibibowater Inc.*, 418 B.R. 815, 823 (Bankr. D. Del. 2009). As the Ninth Circuit Bankruptcy Appellate Panel

has recognized: "Under California law, this is a question of the parties' intent based upon the substance and language of the agreement at issue." *In re Pollock*, 139 B.R. 938, 940 (9th Cir. B.A.P. 1992) (citing *Keene v. Harling*, 61 Cal. 2d 318, 320 (1964)); *In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837, 845 (Bankr. C.D. Cal. 1999). Significantly, the mere fact that instruments arise out of a single transaction does not mean that they constitute a single contract for purposes of section 365. *See, e.g.*, *In re Pac. Express, Inc.*, 780 F.2d 1482, 1486 (9th Cir. 1986).

44. In *Pollock*, the Bankruptcy Appellate Panel articulated three factors that courts should consider when analyzing the severability of obligations under California law: "(1) whether the nature and purpose of the obligations are different; (2) whether the consideration for the obligations is separate and distinct; and (3) whether obligations of the parties are interrelated." *Id.* at 940-41 (citing *In re Gardinier*, 831 F.2d 974, 976 (11th Cir. 1987)). These three factors were also applied by the bankruptcy court when applying California law in *Plitt Amusement*. *See* 233 B.R. at 843.

45. In *Plitt Amusement*, a debtor had purchased three theaters. In connection with the transaction, the debtor executed one purchase agreement, a promissory note, a security agreement, and three leases. When the debtor sought to reject one of the leases, the seller objected that the three leases, the purchase agreement and the promissory note constituted one indivisible, nonseverable transaction that the debtor must assume or reject in its entirety. *Id.* at 840. Applying the three factors outlined in *Pollock*, the bankruptcy court disagreed.

46. Analyzing the structure of the transaction, the court found that the transaction had two principal features. First, the seller sold the business to the debtor for a cash down payment and a deferred payment over ten years on a note. Second, the seller leased the three theaters to

the debtor for a period of twenty years. Although the three leases, the purchase agreement and the note were all executed on the same day, the court found that the leases functioned independently. In particular, the court noted, "the leases are designed to continue long after the purchase price is fully paid." *Id.* at 844.

47. The court also found very few provisions in the agreements to support an inference that they were intended as a single integrated contract. *Id.* at 844. Although the note stated that any default under the note constituted a default under each lease, the court noted that, in the bankruptcy context, "cross-default provisions do not integrate otherwise separate transactions." *Id.* at 845. The court further stated that although the leases and the purchase agreement contained an integration clause referring to "any instrument executed by the parties concurrently herewith," the purpose of this clause was to prevent the introduction of parol evidence of other agreements not contained in a particular instrument. The court explained that "[t]his is a wholly separate issue from whether the various instruments constitute a single agreement for the purposes of assumption or rejection." *Id.* Finally, the court noted that although the purchase agreement repeatedly referred to the leases, "these provisions do not refer to the substantive provisions of the leases, and thus do not incorporate the leases into the purchase agreement." *Id.*

48. As a result of this analysis, the bankruptcy court concluded that state law fully supported the right of the trustee to reject one of the leases separate from the other documents. The court also found an independent basis in federal bankruptcy law for permitting separate rejection:

> [Bankruptcy law's] chief purpose is to relieve debtors of their improvident agreements. At the same time, it permits a trustee or debtor in possession to take advantage of those agreements that are beneficial, for the benefit of creditors. A trustee or debtor in possession must be permitted to pick and choose, to make this determination authorized by section 365.

Id. As a result of this policy, the court concluded that "artful drafting of the sales documents cannot be permitted to circumvent section 365." Thus, the court held that the lease was "severable from the other leases and the purchase agreement and note." *Id.* at 848; *see also Pollock*, 139 B.R. at 941 (concluding that a note issued as payment for a business and its assets, including a sublease, was a separate contract from the sublease and did not have to be assumed with the sublease). As a result, the court permitted the trustee to reject the single lease.

49. In *Abitibibowater*, this Court recently applied a similar analysis in determining that two contracts were in fact separate agreements that could be assumed or rejected separately. 418 B.R. at 824-828. Nearly every factor that the Court considered in that case, which further refines the analysis applied by the courts in *Plitt Amusement* and *Pollock*, demonstrates that the Gregg Street Lease and the Ralph Road Lease at issue in this case are separate from the Acquisition Agreements.

50. First, the agreements relate to different subject matter. *See Abitibibowater*, 418 B.R. at 824. The Acquisition Agreements' recitals demonstrate that their purpose was to effectuate the sale of the equity interests in HNR Framing Systems, Inc., and certain related assets and liabilities of another entity, to the respective buyers. (See Street Decl. Exh. A, p. 1; Exh. B, p. 1). In contrast, the Leases provided for the use and occupancy of certain real property. (See Street Decl. Exh. C, p. 1; Exh. F, p. 1). Any attempt to integrate them was simply 'artful drafting of the sales documents [that] cannot be permitted to circumvent section 365." *Plitt Amusement*, 233 B.R. at 848.

51. Second, the agreements were all between different parties. *See Abitibibowater,* 418 B.R. at 826. The Gregg Street Lease was between Gregg Street, LLC and HNR Framing Systems, Inc. and the Ralph Road Lease was between Ralph Road, LLC and FSC Construction,

Inc. The lessors under the Leases, Gregg Street, LLC and Ralph Road, LLC, were not even parties to the Acquisition Agreements. Instead, the Securities Purchase Agreement was between BMC Construction, HNR Framing Systems, Inc. and the Thomas Parties and the Asset Purchase Agreement was between FSC Construction, HNR Framing Systems, Inc., Home Building Components, Inc. and the Thomas Parties. As the Court stated in *Abitibibowater*, "[a]lthough the parties are related, they are separate entities, and this weighs in favor of finding separate agreements." 418 B.R. at 826. The fact that the Gregg Street Lease and the Ralph Road Lease are separate is further highlighted by the fact that each of the lessors under those Leases filed separate proofs of claim against HNR Framing Systems, Inc., and the Reorganized Debtors have allowed those claims. (*See* Street Decl. ¶¶ 24-28). The Court clearly cannot allow *both* the lessors and the Thomas Parties to assert claims related to the rejection of the Leases, but that is precisely what the Thomas Parties are attempting to accomplish.

52. Third, the Leases contain an integration clause. *See id.* at 826. Specifically, the Ralph Road Lease and the Gregg Street Lease each state at paragraph 19: "No Prior or Other Agreements. This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding other than the Agreement referenced herein shall be effective as of the Effective Date." (Street Decl. Exh. C, ¶ 19; Exh. F, ¶ 19). As the Court noted, "the presence of [such] an integration clause undermines the argument that two separate agreements are one." *Abitibibowater*, 418 B.R. at 826.

53. Fourth, the Acquisition Agreements continue even after the termination of the Leases. *See id.* at 827. Specifically, the Leases were set to expire September 30, 2010. (Street Decl. Exh. C, ¶ 2; Exh. F, ¶ 2). In contrast, the Thomas Parties' indemnity obligations under the

Acquisition Agreements continue, in some cases, indefinitely. (*See, e.g.,* Street Decl. Exh. A, § 13.1(b); Exh. B § 13.1(b)). This demonstrates that these agreements are separate. *See Plitt Amusement*, 233 B.R. at 844 (holding that leases were separate from the underlying sales transaction because, among other things, "the parties contemplated that the seller would remain the landlord under each of the leases for an indefinite duration, decades after the completion of the payment of the purchase price of the business.").

54. Fifth, the Leases and the Acquisition Agreements were not in consideration for one another. See *Abitibibowater*, 418 B.R. at 827. The "Purchase Price" described by the Securities Purchase Agreement and the Asset Purchase Agreement does not include any mention of the Leases or the execution thereof. (*See, e.g.,* Street Decl. Exh. A, § 3.1; Exh B, § 3.1). This conforms with the June 30, 2005 letter of intent with respect to the transaction which was executed by Mr. Thomas and specified that the acquiring entity would "enter into new leases with Thomas for any properties owned by Thomas and used by Target *at fair market value lease rates*." (See Street Decl. ¶ 21) (emphasis added).[9] Likewise, the amounts due and payable under each Lease were separate from the Securities Purchase Agreement and the Asset Purchase Agreement as evidenced by the fact that the rents were payable to *completely separate entities*.

55. Sixth, subsequent amendments to the Leases demonstrate that they were separate from the Acquisition Agreements. *See Abitibibowater*, 418 B.R. at 827. Specifically, the lessors

[9] Despite the clear language in the June 30, 2005 letter of intent that Mr. Thomas executed, the Thomas Parties now contend that "[a]s part of the consideration paid in the acquisition, Selectbuild and FSC entered into [the Leases] having above market rent." (Limited Response, ¶ 2). To support the contention that the Leases were above-market, the Thomas Parties cite to the Declaration of Paul S. Street filed in support of the first day motions. In the Declaration, Mr. Street simply pointed out that, *as of June 16, 2009*, "many of the Leases are above-market or contain other unfavorable terms . . . ." Mr. Street's Declaration offers no support for the contention that any particular lease was above-market at the time of its execution. In addition, as noted above, the notion that the Leases were part of the consideration paid under the Acquisition Agreements is belied by the fact that the "Purchase Price" described in the Securities Purchase Agreement and the Asset Purchase Agreement does not mention the Leases. Finally, the Debtors highly doubt that the Thomas Parties have accounted for any portion of the rentals under the Leases as capital gains for federal income tax purposes.

under the Leases entered into several partial terminations of the Leases over the last several years, and such terminations did not require the consent of the Thomas Parties and otherwise had no effect on the provisions of the Acquisition Agreements.

56. The applicable factors overwhelmingly demonstrate that the previously rejected Leases were separate from the assumed Acquisition Agreements.[10] To hold otherwise would be to require the Debtors to pay the Thomas Parties the full amount of the rejection damages as purported Cure Claims under the assumed Acquisition Agreements, which would harm the creditors who have become the new owners of the Reorganized Debtors under the Plan. Further, allowing this would encourage "artful drafting" and would encourage other parties to make similar arguments with respect to tangentially related agreements, which would severely limit future debtors' right to assume beneficial agreements while rejecting those that burden the estate.

NOTICE

57. No trustee or examiner has been appointed in the Chapter 11 Cases. The Reorganized Debtors have provided notice of filing of this 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 Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (c) DK Acquisition Partners, L.P.; (d) Wells Fargo Foothill, LLC; (e) the Thomas Parties; and (f) 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 Reorganized Debtors respectfully submit that no further notice of this Motion is required.

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[10] Only two *Abitibibowater* factors support the Thomas Parties. First, the Leases and the Acquisition Agreements were effective on the same day. Second, the agreements are all governed by California law and contain alternative dispute resolution provisions. However, these agreements concerned the acquisition of a business and the use of real property located in California, so the fact that they are governed by California law should not be surprising. Further, at the time the Leases were executed, they did not contain alternative dispute resolutions provisions; instead, those were added in the partial terminations.

NO PRIOR REQUEST

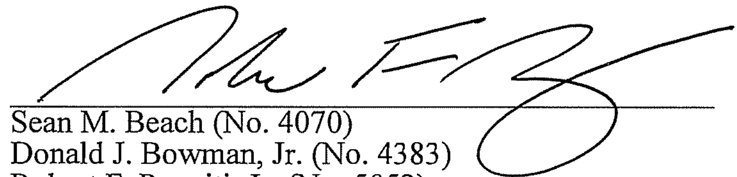
58. No prior request for the relief sought in this Motion has been made to this or any other court.

CONCLUSION

WHEREFORE, the Reorganized Debtors respectfully request the Court to grant the relief requested herein by entering a form of order substantially in the form annexed hereto as Exhibit A, and to grant such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware
August 26, 2010

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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ATTORNEYS FOR REORGANIZED DEBTORS

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)**
	)	**Jointly Administered**
Reorganized Debtors.	)	
	)	**Objection Deadline: September 10, 2010 at 4:00 p.m. (ET)**
	)	**Hearing Date: September 30, 2010 at 3:00 p.m. (ET)**

NOTICE OF MOTION

TO: (I) The U.S. Trustee; (II) Counsel to Wells Fargo Bank, as Agent Under the Reorganized Debtors' Prepetition Credit Agreement and DIP Facility; (III) DK Acquisition Partners, L.P.; (IV) Wells Fargo Foothill, LLC; (V) the Thomas Parties; and (VI) All Parties Entitled to Notice Under Rule 2002-1(b) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware

PLEASE TAKE NOTICE that the above-captioned reorganized debtors (collectively, the "Reorganized Debtors") have filed the attached **Reorganized Debtors' Motion for Entry of Implementation Order With Respect to Paragraph 44 of Confirmation Order (Relating to Robert R. Thomas and the Restated Thomas Trust)** (the "Motion").

PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be filed on or before **September 10, 2010 at 4:00 p.m. (ET)** (the "Objection Deadline") with the United States Bankruptcy Court for the District of Delaware, 824 North 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 Reorganized 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 **SEPTEMBER 30, 2010 AT 3:00 P.M. (ET)** BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

---

[1] The Reorganized Debtors, along with the last four digits of each Reorganized 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 Reorganized 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 A HEARING.

Dated: Wilmington, Delaware
August 26, 2010

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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ATTORNEYS FOR THE REORGANIZED DEBTORS

EXHIBIT A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, *et al.*[1]	Case No. 09-12074(KJC)
	Jointly Administered
Reorganized Debtors.	**Ref. Docket Nos. 1182 and _____**

IMPLEMENTATION ORDER WITH RESPECT TO PARAGRAPH 44 OF THE CONFIRMATION ORDER (RELATING TO ROBERT R. THOMAS AND THE RESTATED THOMAS TRUST)

On December 17, 2009 the Court entered an Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended December 14, 2009 (With Technical Modifications) [Docket No. 1182] (the "Confirmation Order") confirming the Debtors' plan of reorganization. For the avoidance of doubt, the Court hereby enters this Order (the "Implementation Order") to clarify certain provisions and effects of paragraph 44 of the Confirmation Order and finds and concludes as follows:

A. The Court has jurisdiction to hear and determine all matters arising from the implementation of the Confirmation Order pursuant to paragraph 39 of the Confirmation Order.

B. Paragraph 44 of the Confirmation Order states:

> Robert R. Thomas and The Restated Thomas Trust. Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, the Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement (as defined in the Objection By Robert R. Thomas and The

[1] The Reorganized Debtors, along with the last four digits of each Reorganized 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 Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

Restated Thomas Trust Dated April 14, 2009 to Confirmation of Joint Plan of Reorganization as Amended October 22, 2009 [D.I. 1008]) shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement.

C. The Debtors agreed to insert paragraph 44 into the Confirmation Order in response to the Objection by Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 to Confirmation of Joint Plan of Reorganization as Amended October 22, 2009 (the "Confirmation Objection"). In paragraph 13 of the Confirmation Objection, Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 (collectively, the "Thomas Parties") indicated that their potential claims under the "Acquisition Agreement" were "submitted in the amount of $400,000, which is an estimate of the amount of damages incurred due to lack of cooperation by the Debtors in defending construction defect claims." Further, in paragraph 26 of the Confirmation Objection, the Thomas Parties stated: "The claims filed by the Thomas Parties related to breach of the Acquisition Agreement total $400,000."

D. Under paragraph 44 of the Confirmation Order, the "Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement" include only the potential claims, which the Debtors dispute, described above in paragraph C.

E. The Debtors' assumption of the "Acquisition Agreement" referenced in paragraph 44 of the Confirmation Order precludes the Thomas Parties, under the doctrines of res judicata and collateral estoppel, from asserting that the following agreements are one integrated agreement: (i) the "Acquisition Agreement" that was assumed under the Confirmation Order; (ii) the rejected Triple Net Commercial Real Estate Lease made and entered into between Gregg Street, LLC and HNR Framing Systems, Inc. as of October 1, 2005 (as modified), and (iii) the rejected Triple Net Commercial Lease made and entered into between Ralph Road, LLC and

FSC Construction, Inc. as of October 1, 2005 (as modified) (the two rejected leases are collectively referred to herein as the "Leases").

F. The Leases are in fact separate agreements from the "Acquisition Agreement" referenced in paragraph 44 of the Confirmation Order.

G. The "Cure Claims, if any, of Robert R. Thomas or the Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement," as referenced in paragraph 44 of the Confirmation Order, do not include damages related to the rejection of the Leases.

Accordingly, it is hereby **ORDERED, ADJUDGED AND DECREED that**:

1. Under paragraph 44 of the Confirmation Order, the "Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement" that shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement include only the Thomas Parties' claims that they are owed approximately $400,000 related to alleged lack of cooperation by the Debtors in defending construction defect claims (the "Cooperation Claims"); such Cure Claims do not and may not include any damages arising as a result of the rejection of the Leases.

2. Except as specified above, nothing in this Implementation Order is an adjudication of the validity or amount of the Cooperation Claims.

3. All recitals, findings of fact, and conclusions of law set forth in the Confirmation Order are hereby incorporated by reference into this Implementation Order as if set forth fully herein

4. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Implementation Order.

Dated: Wilmington, Delaware
September ___, 2010

____
Kevin J. Carey
Chief United States Bankruptcy Judge