

**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
PURCHASE AGREEMENT WITH DAVIS BROTHERS FRAMING, INC., ET AL.**

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 Purchase Agreement (as defined herein) with Davis Brothers Framing, et al. 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 Purchase 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 PURCHASE AGREEMENT

7. On July 31, 2006, Debtors SelectBuild Construction, Inc. ("**SelectBuild**") and C Construction, Inc. ("**C Construction**") entered into that certain Asset Purchase Agreement (the "**Purchase Agreement**") with Davis Brothers Framing, Inc. ("**Davis Brothers Framing**"), Rancho Leasing, Inc. ("**Rancho Leasing**") (an affiliated entity), Mr. Randolph Davis and Mr.

George Davis (the sole shareholders of Davis Brothers Framing). Pursuant to the Purchase Agreement, C Construction (as SelectBuild's subsidiary) acquired Davis Brothers Framing's California-based carpentry and framing business, including contracts in existence at the time, fixed assets, certain intangible assets, and non-cash net working capital.² In addition, as described herein, the Debtors agreed to pay additional annual consideration based on the business unit's success and to employ Randolph and George Davis as the managers of the business unit.

8. The Debtors entered into the Purchase Agreement because Randolph and George Davis and Davis Brothers Framing had established a vibrant business and strong business relationships in Southern California, specializing in high-density residential construction as well as single-family developments. By purchasing the business of Davis Brothers Framing, the Debtors were able to quickly establish a profitable framing business unit and solidify their multi-family strategy in the Southern California region. This business unit (the "***Davis Business Unit***") remains highly profitable for Debtors, accounting for approximately 28% of the Debtors' 2008 California revenues for continuing operations and is projected to represent approximately 22% of 2009 California revenues.

9. The Purchase Agreement requires that, as part of the purchase price, the Debtors make additional payments annually to Randolph and George Davis upon the achievement of certain earnings targets (the "***Contingent Consideration***"). This payment of Contingent Consideration is due each year in which the business unit achieves the required earnings targets and is subject to setoffs for certain liabilities and expenses. After the first

² The Debtors paid a purchase price of approximately \$78.6 million for the Davis Brothers Framing business.

anniversary of the purchase and based on achievement of the earnings targets, the Debtors paid approximately \$3.1 million in Contingent Consideration. The Debtors will most likely owe a Contingent Consideration payment for the twelve month period ending June 30, 2009. However, this payment will not be due until August 2009 and the dollar amount will not be known until the Debtors close the June 2009 monthly financial statements and complete the necessary calculations as stipulated in the Purchase Agreement. The Debtors estimate that, based on the performance of the Davis Business Unit, this payment could be in excess of \$3 million. In addition, the Purchase Agreement provides that the Debtors are responsible for any warranty work up to \$1,000 per dwelling unit, but that Davis Brothers Framing is responsible for warranty work that costs in excess of \$1,000. No payments associated with this warranty work are estimated to be due at this time.

10. A central factor in the success of the Davis Business Unit is the managerial prowess of, and network of relationships among employees and highly loyal customers cultivated and maintained by, Randolph and George Davis. In light of the importance of Randolph and George Davis' management skills and business relationships to the success of this business unit, the Purchase Agreement provides that the Debtors will keep Randolph and George Davis employed in management positions for a period of three years following July 31, 2006, and continuing thereafter for successive one-year periods unless written notice is provided by either party 60 days prior to the end of the preceding term. Along the same lines, the Purchase Agreement contains a covenant by which Randolph and George Davis agree not to compete with the Debtors in the State of California for a period of five years following the July 31, 2006 effective date of the Purchase Agreement.

BASIS FOR RELIEF REQUESTED

11. Ample authority exists to support Debtors' assumption of the Purchase 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 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.").

12. 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)

³ The Debtors believe that the Purchase 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 Purchase Agreement is not an executory contract, the Debtors request that they be authorized to make the payments of Contingent Consideration required by the Purchase Agreement pursuant to section 363(b) of the Bankruptcy Code. As set forth below, the Debtors' decision to make the payments required by the Purchase 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.").

(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).

13. 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).

14. The Debtors have determined, in the sound exercise of their business judgment, that assumption of the Purchase Agreement is in the best interests of their estates. As noted previously, the Purchase Agreement contains Randolph and George Davis' agreement to

remain employed by the Debtors and a non-competition provision whereby Randolph and George Davis are prohibited from competing with the Debtors. If the Debtors did not honor their obligations to make the payments of Contingent Consideration required by the Purchase Agreement—which is only due if the Davis' business unit achieves certain specified levels of profitability—the Debtors would be in material breach of their obligations under the Purchase Agreement and may well be unable to prevent Randolph and George Davis from leaving the Debtors or to enforce the non-competition provision of the Purchase Agreement. In addition, the Debtors' estates would be burdened by substantial breach of contract damages claims.

15. If the Debtors are unable to enforce the non-competition provision, the Debtors' estates and business operations will be harmed. Specifically, the Debtors believe that if they are not permitted to honor their commitment to pay the Contingent Consideration to Randolph and George Davis that is required by the Purchase Agreement, Randolph and George Davis will either reopen their own business to compete with the Debtors or will leave the Debtors in order to work for one of the Debtors' competitors. The Debtors have determined, in the sound exercise of their business judgment, that their Southern California framing business unit would be detrimentally harmed by the loss of the Davis' leadership. As described above, the Debtors' acquisition of Davis Brothers Framing was structured specifically to retain Randolph and George Davis as managers of the business unit, as well as to provide incentives for continued business success in the form of Contingent Consideration.

16. In addition, the Debtors believe that if Randolph and George Davis were to leave, many of the Debtors' customers would cease to do business with the Debtors and would continue to do business with Randolph and George Davis, irrespective of whether they reopened their own business or went to work for one of the Debtors' competitors. The Debtors have

determined, in their sound business judgment, that the amount of revenue and corresponding profits that they would lose if Randolph and George Davis were to compete against the Debtors greatly exceeds the amounts of Contingent Consideration that may now or in the future be due to Randolph and George Davis pursuant to the Purchase Agreement. In these circumstances, the Debtors have determined that assumption of the Purchase Agreement is in the best interests of their estates.

17. The Debtors are not currently in default on the Purchase Agreement, but could be required to make a Contingent Consideration payment in excess of \$3 million in August. The Debtors have the ability to meet this obligation and their other obligations under the Purchase Agreement by 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.

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) Randolph Davis; (e) George Davis; 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 Debtors respectfully submit that no further notice of this Motion is required.

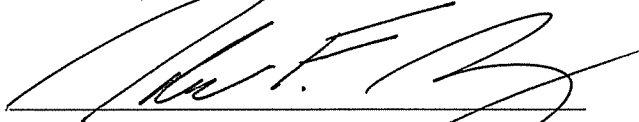
NO PRIOR REQUEST

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

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



Sean M. Beach (No. 4070)
Donald J. Bowman, Jr. (No. 4383)
Robert F. Poppiti, Jr. (No. 5052)
The Brandywine Building
1000 West St., 17th Floor
Wilmington, DE 19801
Telephone: 302.571.6600
Facsimile: 302.571.1253

---- and ----

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (admitted *pro hac vice*)
Matthew K. Kelsey (admitted *pro hac vice*)
Sae M. Muzumdar (admitted *pro hac vice*)
200 Park Ave, 47th Floor
New York, NY 10166-0193
Telephone: 212.351.4000
Facsimile: 212.351.4035

Aaron G. York (admitted *pro hac vice*)
Jeremy L. Graves (admitted *pro hac vice*)
2100 McKinney Ave, Suite 1100
Dallas, TX 75201-6911
Telephone: 214.698.3100
Facsimile: 214.571.2900

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) RANDOLPH DAVIS; (E) GEORGE DAVIS; AND (F) 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 Purchase Agreement with Davis Brothers Framing, Inc., et al.** (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

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Sean M. Beach (No. 4070)
Donald J. Bowman, Jr. (No. 4383)
Robert F. Poppiti, Jr. (No. 5052)
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, Delaware 19899-0391
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

----and----

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (admitted *pro hac vice*)
Matthew K. Kelsey (admitted *pro hac vice*)
Saeed M. Muzumdar (admitted *pro hac vice*)
200 Park Avenue, 47th Floor
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Aaron G. York (admitted *pro hac vice*)
Jeremy L. Graves (admitted *pro hac vice*)
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6911
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

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 ASSET PURCHASE AGREEMENT
WITH DAVIS BROTHERS FRAMING, INC., ET AL.**

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 Purchase Agreement² with Davis Brothers Framing, et al., 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

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

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

determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED:

1. The Motion is granted as set forth below.
2. The Debtors are authorized to assume the Purchase Agreement pursuant to section 365(a) of title 11 of the United States Code (the "*Bankruptcy Code*").
3. The Debtors' have no cure obligations in connection with the assumption of the Purchase Agreement and Davis Brothers Framing, Inc., Rancho Leasing, Inc., George Davis, and Randolph Davis 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 Purchase Agreement.
4. The Debtors have provided adequate assurance of future performance of the Purchase 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