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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

2010 SEP 24 PM 9:00
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U.S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:)	
)	Chapter 11
BUILDING MATERIALS HOLDING)	Case No. 09-12074
	)	Jointly Administered
CORPORATION, et al.,	)	Objections Due By: October 26, 2010
	)	Hearing Date: November 2, 2010 at 9:00

MOTION OF LUKE GILLIAM FOR RELIEF FROM THE PLAN INJUNCTION OR, IN THE ALTERNATIVE FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 USC 362

COMES NOW LUKE GILLIAM, Movant in the above-captioned matter, by and through his attorneys, KREITLEIN LAW GROUP, LTD., and moves this Court for an Order Relief from the Plan Injunction or in the Alternative for an Order Granting Relief From Automatic Stay. In support thereof, Movant shows the Court as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.
2. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1409.
3. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(G).
4. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105(a), 362(d) and 524(e) and Rule 4001 of the Federal Rules of Bankruptcy Procedure.

Parties

5. Claimant is an individual who at all time relevant herein resided in Washoe County, Nevada.
6. Building Materials Holding Corporation and its affiliates, including BMC West Corporation, are the reorganized debtors in the above-referenced case.

Background

1 7. On June 15, 2009 Creditor LUKE GILLIAM (hereinafter "Mr. Gilliam"), filed a Complaint
2 pursuant to the doctrine of *respondeant superior* against Debtor BMC WEST CORPORATION in the
3 Second Judicial District Court of the State of Nevada, in and for the County of Washoe, Case No.
4 CV09-01852.

5 8. On June 16, 2009, Debtor BMC WEST CORPORATION (hereinafter Debtor) filed a
6 Chapter 11 petition with this Court, Case Number 09-12075, which was then consolidated into the above
7 captioned matter. On June 16, 2009, (the "Petition Date"), each of the debtors filed with the United States
8 Bankruptcy Court for the District of Delaware (the "Court") voluntary petitions for relief under Title 11 of
9 the United States Code (the "Bankruptcy Code"). The debtor's cases are being jointly administered pursuant
10 to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. On December 17, 2009, the Court entered
11 an *Order Confirming Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy*
12 *Code Amended December 14, 2009 (With Technical Amendments)* [Docket 1182] (the "Confirmation Order")
13 confirming the Debtor's joint plan of reorganization (the "Plan"). On January 4, 2010 (the "effective Date"),
14 the Debtor's Plan became effective.

15 9. From the Petition Date until the Effective Date, the automatic stay imposed by 11 U.S.C. §
16 362 prevented persons or entities from bringing or continuing any actions against the debtors on account of
17 pre-petition claims, and from and after the Effective Date the injunction imposed by the Plan and Confirmation
18 Order (the "Plan Injunction") prevents persons or entities from bringing or continuing any actions against the
19 debtors on account of prepetition claims

20 10. Mr. Gilliam's Complaint prayed for general and special damages arising from personal
21 injuries sustained while working on a construction site when BMC WEST CORPORATION's employee
22 carelessly and negligently lifted trusses in such a manner as to strike Plaintiff propelling him from the truck.
23 See, Exhibit "1".

24 11. Prior, on June 19, 2007, Mr. Gilliam was working as a framer on a custom home being
25 constructed by his employer, Dream Creations, Inc. Dream Creations, Inc. had ordered the roof trusses for
26 the project from BMC West. At or about 4:00 P.M., the trusses arrived at the jobsite. At the request of the
27 BMC West driver, Mr. Gilliam climbed aboard the flatbed to aid in the off loading of the trusses. After
28 attaching the cabling to the trusses, Mr. Gilliam stepped to the rear of the truck. Without paying attention

1 to Mr. Gilliam's location, the BMC West driver negligently lifted the trusses in such a manner so as to cause
2 the rear portion of the trusses to swing around thereby striking Mr. Gilliam from behind and propelling him
3 ten (10) to twelve (12) feet from the bed of the truck. Mr. Gilliam landed on his head and face on the concrete
4 and gravel surface below. Mr. Gilliam was knocked unconscious, and suffered serious injuries.

5 12. After regaining consciousness, Mr. Gilliam was transported from the scene via ambulance
6 in full spinal precautions. He was initially diagnosed with bilateral distal radial fractures, facial fractures,
7 closed head injury, multiple facial lacerations, a partially detached lower lip, and multiple contusions.

8 13. Mr. Gilliam received medical treatment from several care providers, and was forced to receive
9 dozens of treatments over the course of several months, including plastic surgery. Follow up evaluations by
10 his physicians and neuropsychologist indicate Mr. Gilliam suffers from reduced function in both of his arms,
11 persistent memory loss, restlessness, reduced spatial awareness, vertigo, and a loss of symbolic cognitive
12 processing. Mr. Gilliam has suffered lost earnings, disfigurement, physical and cognitive impairment, injuries
13 that exceed the minimum jurisdictional requirements in the Court in which it was filed.

14 14. Mr. Gilliam is informed and believes that Debtor, BMC West Corporation, Defendant in the
15 state court action referred to herein, carries a policy or policies of insurance which would provide coverage
16 for its liability, if any, in connection with the damages suffered by Mr. Gilliam. Movant seeks to modify the
17 automatic stay for the limited purpose of continuing suit against Debtor BMC West Corporation to adjudicate
18 its liability in connection with the injuries and damages sustained by Movant.

19 15. Movant, as a condition of the requested modification, agrees to limit the extent of his recovery
20 efforts against BMC West Corporation to the funds available under any and all insurance policies which may
21 provide coverage for Respondent's adjudicated liability, if any.

22 16. Through this Motion, Movant seeks authority from this Court, to the extent it may be
23 necessary under 11 U.S.C § 362, to proceed with the state court litigation to judgment to liquidate Mr.
24 Gilliam's claims against Debtor. Mr. Gilliam also seeks authority, to the extent that it would be necessary,
25 to execute, levy, and collect upon such judgment as may be obtained by him in the state court action from
26 Debtor's insurance carrier or carriers, only.

27 17. Mr. Gilliam alleges that the Court should lift the automatic stay to permit the continuation
28 of the State Court suit since no great prejudice to either the Debtor or the bankruptcy estate will result from

1 the continuation of the civil action. As well, the hardship to Mr. Gilliam caused by a continuation of the stay
2 vastly outweighs the hardship caused to the Debtor as a result of modification of the stay.

3 18. Movant alleges that the imposition of the automatic stay denies him the opportunity to litigate
4 since further time delays will result in the aging of evidence, loss of witnesses and the possible dismissal of
5 the action.

6 19. Movant further alleges that cause exists to lift the automatic stay in order to continue with
7 the State Court litigation, as all issues therein are based entirely on state law.

8 WHEREFORE, PREMISES CONSIDERED, Movant respectfully prays for an order modifying the
9 Automatic Stay to permit Movant to proceed to judgment in the State Court lawsuit styled and numbered *Case*
10 *No. CV09-01852, In the Second Judicial District, State of Nevada, County of Washoe, Luke Gilliam v. BMW*
11 *West Corporation et al.*, now pending in the Second Judicial District, Washoe County, Nevada, and to
12 execute, levy and collect upon such judgment as be obtained by Movant in the State Court action to the extent
13 of available policies of insurance which provide coverage in such matters, and for any and all other such relief
14 as the Court finds Movant is entitled.

15 DATED this 20th day of September, 2010.

16 KREITLEIN LAW GROUP, LTD.

17 

18 Philip L. Kreitlein, Esq. (NV Bar 5394)
19 Bryan J. Carpenter, Esq. (NV Bar 11359)
20 470 E. Plumb Lane, Suite 310
21 Reno, Nevada 89502
22 (775) 786-2222
23 Attorney for Creditor:
24 LUKE GILLIAM
25
26
27
28

ORIGINAL

FILED

09 JUN 15 PM 4:30

HOWARD W. CONYERS

BY 

CV09-01852 DC-950008995-002
LUKE GILLIAM VS BMC WEST COR & P, et al
District Court 06/15/2009 04:30 PM
Washoe County NV 1425

1 S1425
Philip L. Kreitlein, Esq.
2 Nevada State Bar No. 005394
KREITLEIN LAW GROUP, LTD.
3 470 E. Plumb Lane, Suite 310
Reno, Nevada 89502
4 (775) 786-2222
Attorney for Plaintiff:
5 LUKE GILLIAM

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9 ***

10 LUKE GILLIAM,

11 Plaintiff,

Case No.: CV09 01852

12 vs.

Dept. No.: 3

13 BMC WEST CORPORATION,
14 a Delaware corporation; JOHN
DOE, individually; ROES 1-10; and
15 A - Z CORPORATIONS, inclusive,

16 Defendants.

17 **COMPLAINT**

18 (Arbitration Exemption Requested: Claim Exceeds \$50,000.00)

19 Plaintiff LUKE GILLIAM, by and through his attorneys, KREITLEIN LAW GROUP, LTD.,
20 hereby alleges as follows:

21 1. Plaintiff LUKE GILLIAM (hereinafter "Plaintiff"), is and was, at all times relevant
22 hereto, a resident of Washoe County, Nevada.

23 2. Plaintiff is informed and believes and thereupon alleges that Defendant BMC WEST
24 CORPORATION (hereinafter "BMC WEST"), is a Delaware corporation which at times relevant to this
25 action operated its business as a supplier of building and construction materials from offices located
26 within Washoe County, Nevada.

27 ...

28 ...

1 3. Plaintiff is informed and believes and thereupon alleges that Defendant sued herein as
2 "JOHN DOE" was at times relevant to this action a resident of Washoe County, Nevada and worked as
3 an employee to BMC WEST. When Defendant JOHN DOE's true identity is made known, Plaintiff
4 prays leave to amend this Complaint to substitute Defendant JOHN DOE's true identity in the proper
5 place.

6 4. The true names, capacities, or involvement, whether individual, corporate, governmental
7 or associate, of the defendants named herein as ROES 1 - 10 and CORPORATIONS A - Z are unknown
8 to Plaintiff who therefore sues said defendants by such fictitious names. Plaintiff prays leave to amend
9 this Complaint to show their true names and capacities when the same have been finally determined.

10 5. Plaintiff is informed and believes, and upon such information and belief alleges that each
11 of the defendants named herein as ROES 1 - 10 and CORPORATIONS A - Z are negligently or
12 otherwise legally responsible in some manner for the events and happenings herein referred to, and
13 negligently or otherwise caused injury and damages proximately thereby to Plaintiff, as is hereinafter
14 alleged. Each of said Defendants is the agent of the other and at all times pertinent hereto was acting
15 within the scope of said agency. Each of said Defendants is a joint venturer with one or more of the
16 other Defendants and was acting in furtherance of the joint venture.

17 6. The claims being asserted by Plaintiff herein have a probable jury verdict which exceeds
18 \$50,000.00 and therefore this action should be exempted from Nevada's Mandatory Arbitration
19 Program.

20 7. On or about June 19, 2007, Plaintiff was working as a construction worker on a custom
21 home being constructed by his employer, Dream Creations, Inc.

22 8. On or about June 19, 2007, Defendant JOHN DOE, an employee of BMC WEST, arrived
23 at the aforementioned construction site to deliver trusses necessary for the construction of the project.

24 9. At the specific request of Defendant JOHN DOE, Plaintiff climbed aboard the BMC
25 WEST flatbed truck to attach the necessary cabling to the trusses required for off loading.

26 10. Once the necessary cabling was attached to the trusses, Plaintiff positioned himself on
27 the rear of the flatbed truck in such a manner so as to avoid potential harm while the trusses were being
28 off loaded.

1 11. While removing the trusses from the BMC WEST flatbed truck, Defendant JOHN DOE
2 carelessly and negligently *lifted* the trusses in such a manner as to strike Plaintiff propelling him from
3 the truck and onto the ground below.

4 12. That at all times pertinent hereto, Defendant JOHN DOE was acting within the course
5 and scope of his employment with BMC WEST and therefore, BMC WEST is liable to Plaintiff for his
6 injuries pursuant to the doctrine of *respondeant superior*.

7 13. That as a direct and proximate result of the carelessness and negligence of Defendants
8 JOHN DOE and BMC WEST as aforesaid, Plaintiff has suffered severe and permanent personal injuries
9 and emotional distress all to his general damage in a just and reasonable amount in excess of TEN
10 THOUSAND and 00/100 (\$10,000.00) DOLLARS.

11 14. That as a further direct and proximate result of the carelessness and negligence of
12 Defendants JOHN DOE and BMC WEST and each of them as aforesaid, Plaintiff has incurred physician
13 and related medical expenses and will continue to incur such expenses into the future in an amount
14 presently not ascertained. Additionally, Plaintiff was unable to attend to his usual occupation and, as
15 a result, has lost income in an amount presently not ascertained. Plaintiff prays leave to prove such
16 amounts at the trial of this matter.

17 15. That as a further direct and proximate result of the carelessness and negligence of
18 Defendants JOHN DOE and BMC WEST, Plaintiff has been required to retain the services of an
19 attorney to prosecute this action and is entitled to reasonable attorney's fees and costs of suit.

20 **WHEREFORE**, Plaintiff prays judgment against Defendants, and each of them, as follows:

21 1. For general damages in a just and reasonable amount in excess of TEN THOUSAND and
22 00/100 (\$10,000.00) DOLLARS;

23 2. For special damages for medical expenses, health care expenses, and lost income in an
24 amount in excess of TEN THOUSAND and 00/100 (\$10,000.00) DOLLARS;

25 3. For reasonable attorney's fees and costs of suit; and

26 4. For such *other* and further relief as the Court deems just and proper under these
27 circumstances.

28 ...

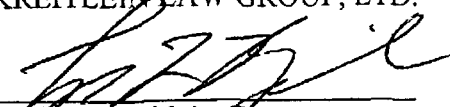
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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 12th Day of June, 2009.

KREITLEIN LAW GROUP, LTD.

By: 

Philip L. Kreitlein, Esq.
Nevada Bar No. 005394
470 E. Plumb Lane, Suite 310
Reno, NV 89502
(775) 786-2222
Attorney for Plaintiff:
LUKE GILLIAM

1 **IN THE UNITED STATES BANKRUPTCY COURT**
2 **FOR THE DISTRICT OF DELAWARE**

3 In re: 4 BUILDING MATERIAL HOLDINGS 5 CORPORATION, et al., 6 Debtors.) Chapter 11) Case No. 09-12074 (KJC)) Jointly Administered
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7
8 **CERTIFICATE OF SERVICE**

9 I, BRYAN J. CARPENTER, ESQ. hereby certifies that on this date a copy of the foregoing
10 *Motion of Luke Gilliam For Relief From The Plan Injunction or, In The Alternative For Relief From The*
11 *Automatic Stay Pursuant to 11 USC 362*, was served, via first class mail on the following:

12 **SEE ATTACHED SERVICE LIST**

13 **KREITLEIN LAW GROUP, LTD.**

14 
15 Philip L. Kreitlein, Esq. (SBN 5394)
16 Bryan J. Carpenter, Esq. (SBN 11359)
17 470 E. Plumb Lane, Suite 310
18 Reno, Nevada 89502
19 (775) 786-2222

**BUILDING MATERIALS HOLDINGS CORPORATION
SERVICE LIST**

1
2
3
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22
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25
26
27
28

David G. Aelvoet, Esq.
Linebarger Goggan Blair & Sampson LLP
Travis Building, 711 Navarro, Suite 300
San Antonio, TX 78205
(Counsel to Bexar County)

Sanjay Bhatnager, Esq.
Cole, Schotz, Meisel, Forman & Leonard, P.A.
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
(Counsel to CNH Capital America, LLC)

Robert McL. Boote, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(Counsel to Westchester Firs Insurance
Company and ACE USA)

Barbara L., Caldwell, Esq.
Aiken Schenk Hawkins & Ricciardi, P.C.
4742 North 24th Street, Suite 100
Phoenix, AZ 85016
(Counsel to Maricopa County)

Craig W. Carlson, Esq.
The Carlson Law Firm, P.C.
P.O. Box 10520
Killeen, TX 76547-0520
(Counsel to Juanita Stace)

Theodore A. Cohen, Esq.
Sheppard, Mullin, Richter & Hampton, LLP
333 South Hope Street, 48th Floor
Los Angeles, CA 90071
(Counsel to Southwest Management, Inc.)

Scott D. Cousins, Esq.
Dennis A. Melero, Esq.
Greenberg Traurig, LLP
1007 North Orange Street, Suite 1200
Wilmington, DE 19801
(Counsel to Grace Bay Holdings, II, LLC)

Raniero D. D'Aversa, Jr., Esq.
Laura D. Metzger, Esq.
Weston T. Eguchi, Esq.
Orrik, Herrington & Sutcliff LLP
666 Fifth Avenue
New York, NY 10103-0001
(Counsel to Rabobank International)

Christopher M. Alston, Esq.
Foster Pepper PLLC
111 Third Avenue, Suite 3400
Seattle, WA 98101
(Counsel to JELD-WEN, inc.)

Brian W. Bisignani, Esq.
Post & Shell, P.C.
17 North 2nd Street, 12th Floor
Harrisburg, PA 17101-1601
(Counsel to Aon Consulting)

David Boyle
Airgas, Inc.
259 Radnor-Chester Road, Suite 100
P.O. Box 6675
Radnor, PA 19087-8675

Andrew Cardonick, Esq.
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, IL 60601
(Counsel to Grace Bay Holdings, II, LLC)

Scott T. Citek, Esq.
Lamm & Smith, P.C.
3730 Kirby Drive, Suite 650
Houston, TX 77098
(Counsel to Bay Oil Company)

David V. Cooke, Esq.
Asst City Attorney-Municipal Operations
201 West Colfax Avenue, Dept. 1207
Denver, CO 80202-5332
(Counsel to the City and County of Denver)

David N. Crapo, Esq.
Gibbons P.C.
One Gateway Center
Newark, NJ 07102-5310
(Counsel to Southwest Management, Inc.)

Tobey M. Daluz, Esq.
Joshua E. Zugeran, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
919 North Market Street, 12th Floor
Wilmington, DE 19801
(Counsel to Westchester Fire Insurance
Company and ACE USA)

1 Robert J. Dehney, Esq.
Morris Nichols Arsht & Tunnell LLP
2 1201 North Market Street, 18th Floor
P.O. Box 1347
3 Wilmington, DE 19899-1347
(Counsel to D.R. Horton, Inc.)
4
5 Mark W. Eckard, Esq.
Reed Smith LLP
1201 North Market Street, Suite 1500
6 Wilmington, DE 19801
(Counsel to CIT Technology Financing
7 Services, Inc.)
8 Kevin B. Fisher, Esq.
Seth Mennillo, Esq.
9 Paul, Hastings, Janofsky & Walker LLP
55 Second Street, 24th Floor
10 San Francisco, CA 94105
(Counsel to Wells Fargo Bank, N.A.)
11
12 Christopher J. Giaimo, Jr., Esq.
Katie A. Lane, LLP
Arent Fox LLP
13 Washington, DC 20036-5339
(Counsel to the Official Committee of
14 Unsecured Creditors)
15 Paul N. Heath, Esq.
Richards, Layton & Finger, P.A.
16 One Rodney Square
920 North King Street
17 Wilmington, DE 19801
(Counsel to Wells Fargo Bank, N.A.)
18
19 Melody C. Hogston
Royal Mouldings Limited
P.O. Box 610
20 Marion, VA 24354
21
22 James E. Huggett, Esq.
Amy D. Brown, Esq.
Margolis Edelstein
23 750 Shipyard Drive, Suite 102
Wilmington, DE 19801
24 (Counsel to Eduardo Acevedo, et al.)
25 Internal Revenue Service
Attn: Insolvency Section
26 11601 Roosevelt Blvd., Mail Drop N781
P.O. Box 21126
27 Philadelphia, PA 1911
28

John P. Dillman, Esq.
Linebarger Goggan Blair & Sampson LLP
P.O. Box 3064
Houston, TX 77253-3064
(Counsel to Cypress-Fairbanks ISD, Fort
Bend County, and Harris County)

William R. Firth, III, Esq.
Gibbons P.C.
1000 North West Street, Suite 1200
Wilmington, DE 19801
(Counsel to Southwest Management, Inc.)

John M. Flynn, Esq.
Carruthers & Roth, P.A.
235 North Edgeworth Street
P.O. Box 540
Greensboro, NC 27401
(Counsel to Arrowood Indemnity Company)

Adam C. Harris, Esq.
David J. Karp, Esq.
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
(Counsel to DK Acquisition Partners, L.P.)

David G. Hellmuth, Esq.
Hellmuth & Johnson, PLLC
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(Counsel to FCA Construction Company, LLC)

Eric H. Holder, Jr., Esq.
U.S. Attorney General
Department of Justice-Commercial Litigation
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

IKON Financial Services
Attn: Bankruptcy Administration
1738 Bass Road
P.O. Box 13708
Macon, GA 31208-3708

Thomas W. Isaac, Esq.
Dietrich, Glasrud, Mallek & Aune
5250 North Palm Avenue, Suite 402
Fresno, CA 93704
(Counsel to Wison Homes, Inc.)

- | | |
|--|---|
| <p>1 Neal Jacobson, Esq.
Senior Trial Counsel
2 Securities and Exchange Commission
3 World Financial Center, Suite 400
3 New York, NY 10281</p> <p>4 Thomas L. King, Esq.
Paul, Hastings, Janofsky & Walker LLP
5 75 East 55th Street, 1st Floor
New York, NY 10022
6 (Counsel to Wells Fargo Bank)</p> <p>7 Louisiana-Pacific Corporation
Attn: Bruce J. Iddings
8 P.O. Box 4000-98
Hayden Lake, ID 83835-4000
9 (Top 50)</p> <p>10 Dan McAllister
San Diego County Treasurer-Tax Collector,
11 Bankruptcy Desk
1600 Pacific Highway, Room 162
12 Sand Diego, CA 92101</p> <p>13 Frank F. McGinn, Esq.
14 Bartlett Hackett Feinberg, P.C.
155 Federal Street, 9th Floor
15 Boston, MA 02110
(Counsel to Iron Mountain Information
16 Management, Inc.)</p> <p>17 Joseph McMillen
Midlands Claim Administrators, Inc.
18 3503 N.W. 63rd Street, Suite 204
P.O. Box 23198
19 Oklahoma, OK 73123</p> <p>20 Sheryl L. Moreau, Esq.
21 Missouri Department of Revenue-Bankruptcy Unit
P.O. Box 475
22 Jefferson City, MO 65105-0475</p> <p>23 Margery N. Reed, Esq.
24 Wendy M. Simkulak, Esq.
Duane Morris LLP
25 30 South 17th Street
Philadelphia, PA 19103-4196</p> <p>26
27
28</p> | <p>Michael J. Joyce, Esq.
Cross & Simon, LLC
913 North Market Street, 11th Floor
Wilmington, DE 19801
(Counsel to Arrowood Indemnity Company)</p> <p>Gary H. Leibowitz, Esq.
Cole, Schotz, Meisel, Forman & Leonard
300 East Lombard Street, Suite 2600
Baltimore, MD 21202
(Counsel to CNH Capital America, LLC)</p> <p>Cliff W. Marcek, Esq.
Cliff W. Marcek, P.C.
700 South Third Street
Las Vegas, NV 89101
(Counsel to Edward and Gladys Weisgerber)</p> <p>David B. McCall, Esq.
Gay, McCall, Issacks, Gordon & Roberts
777 East 15th Street
Plano, TX 75074
(Counsel to the Collin County Tax
Assessor/Collector)</p> <p>Joseph J. McMahan, Jr., Esq.
Office of The United States Trustee
844 King Street, Suite 2207
Lock Box 35
Wilmington, DE 19801</p> <p>Kathleen M. Miller, Esq.
Smith, Katzenstein & Furlow LLP
800 Delaware Avenue, 7th Floor
P.O. Box 410
Wilmington, DE 19801
(Counsel to Airgas, Inc.)</p> <p>Charles J. Pignuolo, Esq.
Devlin & Pignulol, P.C.
1800 Bering Drive, Suite 310
Houston, TX 77057
(Counsel to Partners in Building, L.P.)</p> <p>Michael Reed, Esq.
McCreary, Veselka, Bragg & Allen, P.C.
P.O. Box 1269
Round Rock, TX 78680
(Counsel to Local Texas Taxing Authorities)</p> |
|--|---|

1 Jonathan Lee Riches
Federal Medical Center
2 P.O. Box 14500
Lexington, KY 40512
3 Lexington, KY 40512

Debra A. Riley, Esq.
Allen Matkins Leck Gamble Mallory
Natsis LLP
501 West Broadway, 15th Floor
San Diego, CA 92101
(Counsel to D.R. Horton, Inc.)

4
5
6 Randell A. Rios, Esq.
Timothy A. Million, Esq.
Munsch Hardt Kopf & Harr, PC
7 700 Louisiana, 46th Floor
Houston, TX 77002
8 (Counsel to Cedar Creek Lumber, Inc.)

Martha E. Romero, Esq.
Romero Law Firm
6516 Bright Avenue
Whittier, CA 90601
(Counsel to Yuba County and San
Bernardino County)

9 George Rosenberg, Esq,
Assistant Arapahoe County Attorney
10 5334 South Prince Street
Littleton, CO 80166
11 (Counsel to Arapahoe County Treasurer)

Howard C. Rubin, Esq.
Kessler & Collins, P.C.
2100 Ross Avenue, Suite 750
Dallas, TX 75201
(Counsel to CRP Holdings B, L.P.)

12 Bradford J. Sandler, Esq.
Jennifer R. Hoover, Esq,
13 Jennifer E. Smith, Esq.
Benesch, Friedlander, Coplan & Aronoff LLP
14 222 Delaware Avenue, Suite 8801
Wilmington, DE 19801
15 (Counsel to the Official Committee of
Unsecured Creditors)

Secretary of State
Franchise Tax
Division of Corporations
P.O. Box 7040
Dover, DE 19903

16 Secretary of Treasury
17 Attn: Officer, Managing Agent or General Agent
P.O. Box 7040
18 Dover, DE 19903

Securities & Exchange Commission
Attn: Christopher Cox
100 F Street, NE
Washington, DC 20549

19 Securities & Exchange Commission
Bankruptcy Unit
20 Attn: Michael A. Berman, Esq.
450 Fifth Street NW
21 Washington, DC 20549

Ellen W. Slights, Esq.
Assistant United States Attorney
U.S. Attorney's Office
1007 Orange Street, Suite 700
P.O. Box 2046
Wilmington, DE 19899

22 Tennessee Department of Revenue
23 c/o Tennessee Attorney General's Office,
Bankruptcy Division
24 P.O. Box 20207
Nashville, TN 37202-0207
25

Kimberly Walsh, Esq.
Assistant Attorney General
Texas Comptroller of Public Accounts,
Bankruptcy & Collection Division
P.O. Box 12548
Austin, TX 78711-2548

26 Christopher A. Ward, Esq.
Shanti M. Katona, Esq.
27 Polsinelli Shughart PC
222 Delaware Avenue, Suite 1101
28 Wilmington, DE 19801
(Counsel to Sun Trust Bank)

Paul M. Weiser, Esq.
Buchalter Nemer
16435 North Scottsdale Road, Suite 440
Scottsdale, AZ 85254-1754
(Counsel to Elwood HA, LLC)

1 Elizabeth Weller, Esq.
Linebarger Goggan Blair & Sampson LLP
2 2323 Bryan Street, Suite 1600
Dallas, TX 75201
3 (Counsel to Dallas County and Tarrant County)

Duane D. Werb, Esq.
Julia B. Klein, Esq.
300 Delaware Avenue, Suite 1300
Wilmington, DE 19801
(Counsel to CRP Holdings B, L.P.)

4
5
6 Joanne B. Wills, Esq.
Sally E. Veghte, Esq.
7 Klehr, Harrison, Harvey, Branzburg & Ellers LLP
919 Market Street, Suite 1000
8 Wilmington, DE 19801
(Counsel to Rabobank International)

Jennifer St. John Yount, Esq.
Jennifer B. Hildebrandt, Esq.
Paul, Hastings, Janofsky & Walker, LLP
515 South Flower Street, Twenty-Fifth Floor
Los Angeles, CA 90071
(Counsel to Wells Fargo Foothill, LLC)

9 Sean M. Beach, Esq.
10 Donald J. Bowman, Esq.
Robert F. Poppiti, Esq.
11 Young Conaway Stargett & Taylor, LLP
The Brandywine Building
12 1000 West Street, 17th Floor
P.O. Box 391
13 Wilmington, DE 19899-0391
(Counsel to the Reorganized Debtors)

Michael A. Rosenthal, Esq.
Matthew K. Kelsey, Esq.
Sae M. Muzumdar, Esq.
Gibson, Dunn & Crutcher LLP
200 Park Avenue, 47th Floor
New York, NY 10166-0193
(Counsel to the Reorganized Debtors)

14 Aaron G. York, Esq.
15 Jeremy L. Graves, Esq.
Gibson, Dunn & Crutcher LLP
16 2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6911
17 Counsel to the Reorganized Debtors

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	
)	Chapter 11
BUILDING MATERIALS HOLDING	)	Case No. 09-12074
	)	Jointly Administered
CORPORATION, et al.,	)	Objections Due By: October 26, 2010
	)	Hearing Date: November 2, 2010 at 9:00

NOTICE OF MOTION OF LUKE GILLIAM FOR RELIEF FROM STAY UNDER SECTION 362 OF THE BANKRUPTCY CODE

TO:

Bradford J. Sandler Pachulski Stang Ziehl & Jones LLP 919 N. Market Street, 17th Floor Wilmington, DE 19801	United States Trustee 844 King Street, Room 2207 Lockbox #35 Wilmington, DE 19899-0035
Christopher J. Giaimo Arent Fox, PLLC 1050 Connecticut Avenue, NW Washington, DC 20036-5339	Allison N. Cooper Marks Colia & Finch LLP 8620 Spectrum Center Blvd., Suite 900 San diego, CA 92123
Brian K. Cuttone Brian K. Cuttone, Attorney at Law 1233 W. Shaw Avenue, Suite 100 Fresno, CA 93711	Donald J. Bowman, Jr. Young, Conaway, Stargatt & Taylor 1000 West Street, 17th Floor Wilmington, DE 19801

LUKE GILLIAM has filed a Motion for Relief from the Plan Injunction/Motion for Relief from Stay which seeks the following relief: Movant wishes to proceed with state court litigation with respect to personal injuries.

...

1 **HEARING ON THE MOTION WILL BE HELD ON NOVEMBER 2, 2010, AT 10:00**
2 **A.M.**

3 You are required to file a response (and the supporting documentation required by Local Rule 4001-
4 1(d)) to the attached motion at least five business days before the above hearing date.

5 At the same time, you must also serve a copy of the response upon Movant's attorney:


6 Bryan J. Carpenter, Esq.
7 KREITLEIN LAW GROUP, LTD.
8 470 E. Plumb Lane, Suite 310
 Reno, NV 89502
 Ph.: (775) 786-2222

9 The hearing date specified above may be a preliminary hearing or may be consolidated with
10 the final hearing, as determined by the Court.

11 The attorneys for the parties shall confer with respect to the issues raised by the Motion in
12 advance for the purpose of determining whether a consent judgment may be entered and/or for the
13 purpose of stipulating to relevant facts such as the value of the property, and the extent and validity
14 of any security instrument.

15 DATED this 20th day of September, 2010.

KREITLEIN LAW GROUP, LTD.

18 By: 
19 Philip L Kreitlein, Esq. (SBN 5394)
20 Bryan J. Carpenter, Esq. (SBN 11359)
21 470 E. Plumb Lane, Ste. 310
22 Reno, Nevada 89502
23 Ph. (775) 786-2222
24 Fax (775) 786-2478
25 Attorneys for:
26 LUKE GILLIAM

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	
BUILDING MATERIALS HOLDING)	Chapter 11
	)	Case No. 09-12074
	)	Jointly Administered
CORPORATION, et al.,	)	Objections Due By: October 26, 2010
	)	Hearing Date: November 2, 2010 at 9:00 a.m

ORDER GRANTING MOTION OF LUKE GILLIAM FOR RELIEF FROM THE AUTOMATIC STAY AND/OR RELIEF FROM THE CONFIRMATION INJUNCTION

AND NOW, this _____ day of _____, 2010, upon consideration of *Motion of Luke Gilliam for Relief from the Plan Injunction or, in the Alternative for Relief from the Automatic Stay Pursuant to 11 USC 362*, and any response thereto, and after notice and a hearing, it is hereby ORDERED:

1. The Motion is GRANTED.
2. The automatic stay of 11 U.S.C. § 362(a) and the confirmation injunction is hereby terminated to allow Movant to continue to litigate his action against BMC West Corporation (the “Debtor”) in the District Court of the County of Washoe, State of Nevada, in the case captioned *Luke Gilliam v. BMC West Corporation et al.*, (Case No. CV09-01852)(the “Personal Injury Action”). The automatic stay and/or confirmation injunction is hereby terminated to the fullest extent necessary to allow the Movant to proceed with the Personal Injury Action to final judgment or settlement.
3. Any verdict and judgment award or settlement obtained in favor of Movant and against

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...

1 Debtor(s) may be executed upon insurance proceeds from the Debtor's applicable insurance policies and
2 other available insurance, if any, without further proceedings before this Court, and shall be otherwise
3 treated as provided for in the confirmed Plan.

4 DATED this _____ day of _____, 2010.

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8 _____
9 The Honorable Kevin J. Carey
10 United States Bankruptcy Judge
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