

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- <u>12074</u> ()
Debtors.)	
)	Joint Administration Requested
)	

DEBTORS' MOTION FOR AN ORDER (A) AUTHORIZING THE DEBTORS TO PAY, IN THE ORDINARY COURSE OF BUSINESS, CLAIMS FOR GOODS ORDERED PREPETITION AND DELIVERED POSTPETITION; (B) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS OF SHIPPERS, WAREHOUSEMEN, MECHANIC'S/MATERIALMAN'S LIEN CLAIMANTS, AND JOINT CHECK BENEFICIARIES; AND (C) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS

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** (a) authorizing, but not requiring, the Debtors to pay, in the ordinary course of business, claims for goods ordered prepetition and delivered postpetition; (b) authorizing, but not requiring, the Debtors to pay, in the ordinary course of business, certain prepetition claims of shippers, warehousemen, mechanic's/materialman's lien claimants, and joint check beneficiaries; and (c) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to

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.

which checks are issued and authorized to be paid in accordance with this Motion. In support thereof, the Debtors respectfully represent:²

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.

RELIEF REQUESTED

2. By this Motion, the Debtors, pursuant to sections 105, 363, 503, 1107(a), and 1108 of title 11 of the United States Code (the "*Bankruptcy Code*") and Federal Rules of Bankruptcy Procedure 6003 and 6004, seek entry of an order authorizing, but not obligating, them to pay, in the ordinary course of business, amounts due in respect of Outstanding Orders (as defined herein) for goods ordered by the Debtors prior to the Petition Date and delivered after the Petition Date. The Debtors estimate that the Outstanding Orders total approximately \$20,000,000.

3. In addition, the Debtors seek entry of an order authorizing, but not obligating, them to pay, in the ordinary course of business, and in their business judgment, certain prepetition Shipping Charges, Warehousing Charges, and Materialman's Lien Claims, (each as defined herein) as provided herein in an aggregate amount not to exceed \$1,133,000. The Debtors also request the authority to continue the Joint Check Procedures and to pay the Joint Check Claims (each as defined herein) in the ordinary course of business.

² A description of the Debtors' business and the reasons for filing these Chapter 11 Cases is set forth in the Declaration of Paul S. Street in Support of Chapter 11 Petitions and First Day Relief (the "*Street Declaration*"), filed contemporaneously with this Motion. This Motion is supported by the Street Declaration.

4. Finally, the Debtors seek entry of an order authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Motion.

BACKGROUND

5. On the date hereof (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 these Chapter 11 Cases, and no committees have been appointed or designated.

6. 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.

7. 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.

8. The Debtors operate in metropolitan areas that have historically outpaced U.S. averages for residential building permit activity (largely in the Southern and Western portions of the United States). Based on National Association of Home Builders building permit activity, the Debtors provide building products and construction services in 9 of the top 25 single-family construction markets.

9. Prior to the Petition Date, the Debtors, with the assistance of their professionals and advisors, pursued several avenues to try to maximize the value of the Debtors' business, including conducting a process to sell the Debtors' business. The Debtors' prepetition sale process did not, however, yield offers that reflected, in the Debtors' business judgment, the true value of the Debtors' business operations.

10. Contemporaneously with this prepetition marketing and sale effort, the Debtors engaged in good faith, arm's-length negotiations with significant holders of the Debtors' prepetition secured indebtedness to develop a way to de-lever the Debtors' business, while at the same time providing the Debtors' unsecured creditor constituency with a substantial recovery. These negotiations culminated in the proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"), filed contemporaneously with this Motion.

11. 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 a commitment to provide \$80 million in the form of debtor-in-possession financing, which the Debtors seek to have approved by the Court contemporaneously herewith.

12. As of the Petition Date, the Debtors employ approximately 5,500 people. Approximately 300 of the Debtors' employees are represented by seven unions with whom the Debtors have collective bargaining agreements. For the 12 months ended March 31, 2009, the Debtors' total revenue totaled approximately \$1.1 billion. As of March 31, 2009 the book value of the Debtors' assets totaled approximately \$480 million and its liabilities totaled approximately \$481 million.

OUTSTANDING ORDERS

13. Prior to the Petition Date, and in the ordinary course of business, the Debtors ordered approximately \$20,000,000 of goods for which delivery will not occur until after the Petition Date (the "***Outstanding Orders***").

14. As a result of the commencement of the Chapter 11 Cases, suppliers of the Outstanding Orders (the "***Outstanding Order Suppliers***") may be concerned that goods ordered prior to the Petition Date pursuant to the Outstanding Orders, which will be delivered to the Debtors after the Petition Date, will render the suppliers general unsecured creditors of the Debtors' estates with respect to such goods. Suppliers may refuse to ship or transport such goods (or recall such shipments) with respect to such Outstanding Orders unless the Debtors issue

substitute purchase orders postpetition or obtain an order of the Court: (a) granting all undisputed obligations of the Debtors arising from the acceptance of goods subject to Outstanding Orders administrative expense priority under section 503(b) of the Bankruptcy Code and (b) authorizing the Debtors to satisfy such obligations in the ordinary course of business.

**SHIPPING AND WAREHOUSING CHARGES, MATERIALMAN'S LIEN CLAIMS,
AND JOINT CHECK BENEFICIARIES**

A. Shippers and Warehousemen

15. The Debtors operate 31 distribution facilities, 43 manufacturing facilities and five regional construction services facilities which produce and/or deliver construction materials to professional builders and contractors. The Debtors have developed a complex supply chain and distribution network that includes shipping and warehousing raw materials, building products and manufactured building components. The Debtors depend on the services of shippers, truckers, expeditors, customs brokers, and other carriers (collectively, the "*Shippers*") to assure the timely shipping and delivery of (a) raw materials and building products to the Debtors and (b) building products and manufactured building components to customers in the ordinary course of the Debtors' business.

16. **Shipping.** The Debtors' businesses use a substantial amount of raw materials, including wood and wood products, concrete, steel and other building products. Foreign suppliers of raw materials and building products typically provide shipping to a local port as part of the purchase price, but the Debtors frequently are responsible for the cost of shipping the materials from the local port to their facilities and any import duties. In addition, some domestic suppliers of raw materials and building products require the Debtors to pay for the cost of shipping the materials to the Debtors' facilities. The Debtors utilize approximately 115 Shippers to move building products and manufactured building components to and from

their manufacturing and distribution facilities. On average, the Debtors pay approximately \$5,800,000 to the Shippers annually for delivery and/or distribution of raw materials, building products and manufactured building components. The Debtors estimate that, as of the Petition Date, the outstanding prepetition invoices of the Shippers (inbound and outbound) and unpaid import duties are approximately \$175,000 (the "*Shipping Charges*").

17. **Warehousing.** The Debtors' suppliers of raw materials and building products typically warehouse the shipments of raw materials pursuant to the underlying purchase agreement. However, occasionally, the Debtors must use third-party warehousemen (collectively, the "*Warehousemen*") for the storage of raw materials and building products prior to their delivery to the Debtors. In addition, while the Debtors generally store these raw materials and building products, as well as any building components they have manufactured, in one of their 79 warehouses across the United States, occasionally the Debtors rely on Warehousemen to store these items before they are delivered to the Debtors' customers. The Debtors estimate that, as of the Petition Date, the outstanding amounts owed to Warehousemen are approximately \$8,000 (the "*Warehousing Charges*").

18. To avoid undue delay and to facilitate the continued operation of the Debtors' business, the Debtors seek immediate authority to pay, on a case-by-case basis and in their sole discretion, the Shipping Charges and the Warehousing Charges to ensure that the Debtors can continue to send, receive and store raw materials, building products and manufactured building components, including those raw materials, building products and manufactured building components currently in the possession of the Shippers and Warehousemen.

B. Mechanic's/Materialman's Lien Claimants

19. The Debtors do business with a number of third parties who could potentially assert liens against the Debtors and their property or their customers' property for amounts the Debtors owe to those third parties, including mechanic's liens and materialman's liens (the "*Materialman's Lien Claimants*," and together with the Shippers and the Warehousemen, the "*Possessory Claimants*"). For example, the Debtors operate as a contractor on various construction projects and are obligated to pay certain other subcontractors for services performed. If the Debtors have obligations due and owing to any of these subcontractors, the subcontractors may be able to assert a lien on the Debtors' customers' property or the Debtors' tooling and other equipment located on the jobsites. As a result, the Debtors will not be able to receive payment from their customers or retrieve the tooling and other equipment unless they pay the amounts due to the subcontractors.

20. To avoid undue delay and to facilitate the continued operation of the Debtors' business, the Debtors seek immediate authority to pay and discharge, on a case-by-case basis and in their sole discretion, the claims of all Materialman's Lien Claimants that have given or could give rise to a lien against the Debtors or the Debtors' customers regardless of whether such Materialman's Lien Claimants already have perfected their interests. The Debtors estimate that, as of the Petition Date, the outstanding prepetition invoices of the Materialman's Lien Claimants are approximately \$950,000 (the "*Materialman's Lien Claims*," and together with the Shipping Charges and the Warehousing Charges, the "*Possessory Claims*").

C. Joint Check Beneficiaries

21. Certain of the Materialman's Lien Claimants and other of the Debtors' suppliers (the "*Joint Check Beneficiaries*") are paid directly by the Debtors' customers on joint

checks that list both the Debtors and the applicable supplier as the payee. The Debtors' prepetition practice was to endorse these joint checks and to then hand them over to the applicable supplier who would cash them and immediately issue a check to the Debtors for the amount that the joint check exceeded the amount the Debtors owed to the supplier (the "***Joint Check Procedures***"). The Debtors request the authorization to continue the Joint Check Procedures after the Petition Date so that the Debtors will be able to receive payment from their customers who utilize the Joint Check Procedures. In addition, because the Debtors may receive joint checks after the Petition Date that relate to goods provided by a supplier prior to the Petition Date, the Debtors request the authority to pay the prepetition claims of any Joint Check Beneficiaries to the extent that the amount of those claims are included on a joint check issued to both the Debtors and such Joint Check Beneficiary (the "***Joint Check Claims***").

BASIS FOR RELIEF REQUESTED

A. The Court Should Confirm that the Outstanding Orders are Administrative Expense Priority Claims

22. Pursuant to section 503(b) of the Bankruptcy Code, most obligations that arise in connection with the postpetition delivery of goods and services, including goods ordered prepetition, are administrative expense priority claims because they benefit the estate postpetition. Accordingly, granting the relief sought herein with respect to the Outstanding Orders will not provide the suppliers with any greater priority than they would otherwise have if the relief requested herein were not granted, and will not prejudice any other party in interest. Absent such relief, however, the Debtors may be required to expend substantial time and effort reissuing the Outstanding Orders to provide the suppliers with assurance of such administrative

priority.³ The attendant disruption to the continuous and timely flow of raw materials and building products to the Debtors could result in substantial delays in the Debtors' operations, which could lead to dissatisfied customers, potentially harming customer confidence in the Debtors' ability to conduct business at this critical juncture. Therefore, the Debtors submit that the Court should confirm the administrative expense priority status of the Outstanding Orders and should authorize the Debtors to pay the Outstanding Orders in the ordinary course of business. In addition, even if the Court were not sure that the Outstanding Orders would be entitled to administrative expense priority, ample authority (discussed below) exists to support payment of the Outstanding Orders in the ordinary course of the Debtors' business because the Debtors' receipt of the Outstanding Orders is critical to the Debtors' ability to continue their operations without substantial disruption.

B. The Court Should Authorize Payment of the Possessory Claims and the Joint Check Claims

(1) The Court May Authorize Payment of the Possessory Claims and the Joint Check Claims Pursuant to Section 363 of the Bankruptcy Code

23. The Court may grant the relief requested herein pursuant to section 363 of the Bankruptcy Code. Section 363(b) allows the court to authorize the payment of prepetition claims outside of the ordinary course of business. *See, e.g., Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay the prepetition claims of some suppliers who were potential lien claimants because the payments were necessary to induce general contractors to release funds owed to the debtors); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (Bankr.

³ The Debtors have the authority to reissue the Outstanding Orders in the ordinary course of business without an order of the Court pursuant to 11 U.S.C. section 363(c).

M.D. Fla. 2005) (recognizing section 363 as a source of authority and allowing payment of the prepetition claims of vendors whose supplies would take four to six weeks to replace). In addition, section 363(c) allows a debtor-in-possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips*, 29 B.R. at 395 n.2 ("Insofar as transactions are actually in the ordinary course, they are authorized automatically by § 363(c)(1) and § 1107(a), and do not require Bankruptcy Court approval.").

24. Each of the Possessory Claimants possesses goods the Debtors need to continue their ongoing business operations. Absent payment of the Possessory Claims, the Possessory Claimants may refuse to deliver these necessary goods to the Debtors and/or may prevent the Debtors from recovering these goods. The Shippers, Warehousemen and Materialman's Lien Claimants may refuse to deliver goods in their possession to the Debtors because under state law, these Possessory Claimants may have a lien on the goods in their possession that secures the Debtors' obligations to pay for their services.⁴ Thus, the Shippers, Warehousemen and Materialman's Lien Claimants may be unwilling to release the goods in their possession to which they may be entitled to liens, because releasing possession of the goods may convert their claims against the Debtors from secured to unsecured.

25. At best, the Debtors' inability to pay the Possessory Claims would result in a detrimental delay in the Debtors' operations and at worst would result in a total shutdown of the Debtors' operations. Because the Debtors' business depends upon the timely delivery and

⁴ For example, section 7-307 of the Uniform Commercial Code provides, in pertinent part, that a "carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." *See* U.C.C. section 7-307(a) (2008).

distribution of raw materials, building products and manufactured building components, avoiding such a scenario is vital to the Debtors' continuing business operations and the success of these cases. The Debtors submit that the amount of the Possessory Claims is small in relation to the value lost if the Debtors experienced a substantial disruption in their operations, which may occur if the Possessory Claimants are not paid. In addition, in light of the fact that the Possessory Claimants may have secured claims against the Debtors' estates, payment of the Possessory Claims is not likely to provide the Possessory Claimants with any greater priority than they would otherwise have if the relief requested herein were not granted. Accordingly, not only will the Debtors' other creditors not be impaired by payment of the Possessory Claims but such creditors will benefit by this Court's empowering the Debtors to negotiate payment of the Possessory Claims to facilitate a smooth transition into bankruptcy.

26. The Debtors' ability to pay the Joint Check Claims is necessary for the Debtors to obtain the amounts owed to the Debtors that are paid using the Joint Check Procedures. Accordingly, payment of the Joint Check Claims will greatly benefit the Debtors' estates by allowing the Debtors to collect these outstanding receivables.

27. The Debtors' payment of the Possessory Claims to obtain needed raw materials and building products and/or to ensure delivery of goods belonging to the Debtors (the value of which in all likelihood greatly exceeds the amounts the Debtors will need to pay to recover those goods), and the Debtors' payment of the Joint Check Claims are arguably actions within the ordinary course of the Debtors' business. As such, the Debtors submit that Court approval of the Debtors' payments is not necessary because of the authority granted to them by section 363(c). Nonetheless, for the avoidance of doubt, the Debtors request that the Court grant

the relief requested herein and enter an order authorizing, but not directing, them to pay the Possessory Claims and the Joint Check Claims in the ordinary course of the Debtors' business.

(2) The Court May Also Authorize Payment of the Possessory Claims and the Joint Check Claims Pursuant to Section 105(a) of the Bankruptcy Code and the "Necessity of Payment" Doctrine

28. The Debtors' proposed payment of the Possessory Claims and the Joint Check Claims should also be authorized pursuant to section 105(a) of the Bankruptcy Code and the "doctrine of necessity."

29. Section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). "Under [section] 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177); *accord In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999) ("To invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is 'critical to the debtor's reorganization.'") (quoting *In re Financial News Network, Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991)); *see also In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) ("[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.").

30. In a long line of well-established cases, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance

the value of a debtor's estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport Ry.*, 106 U.S. 286, 311-12 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent "stoppage of [crucial] business relations"); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that "if payment of a claim which arose prior to reorganization is essential to the continued operation of the...[business] during reorganization, payment may be authorized even if it is made out of [the] corpus"); *Dudley v. Mealey*, 147 F.2d 268 (2d Cir. 1945), *cert. denied* 325 U.S. 873 (1945) (extending doctrine for payment of prepetition claims beyond railroad reorganization cases); *Michigan Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279 (S.D.N.Y. 1987), *appeal dismissed*, 838 F.2d 59 (2d Cir. 1988) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits).

31. The "doctrine of necessity" functions in a chapter 11 reorganization as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors' continued operation); *In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) ("[C]ourts have used their equitable power under section 105(a) of the Code to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization."). The doctrine is frequently invoked early in a reorganization, particularly in connection with those chapter 11 sections that relate to payment of prepetition claims. The court in *In re Structurelite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988), observed the decisional authority which supports "the principle that a bankruptcy

court may exercise its equity powers under section 105(a) to authorize payment of prepetition claims where such payment is necessary to 'permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.'" (quoting *In re Chateaugay Corp.*, 80 B.R. at 287). The court stated that "a per se rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code." *Id.* at 932. The rationale for the doctrine of necessity rule is consistent with the paramount goal of chapter 11 – "facilitating the continued operation and rehabilitation of the debtor...." *Ionosphere Clubs*, 98 B.R. at 176.

32. As stated above, the payment of the Possessory Claims and the Joint Check Claims is essential to the uninterrupted operation of the Debtors' business. In turn, the maintenance of the Debtors' business during these chapter 11 cases is crucial to the Debtors' ability to rehabilitate for the benefit of all stakeholders. Hence, this Court should exercise its equitable powers to grant the relief requested herein.

33. Courts in this district have granted similar relief in other chapter 11 cases.⁵ *See, e.g., In re Sharper Image Corp.*, Case No. 08-10322 (KG) (Bankr. D. Del. Feb. 20, 2008); *In re Global Motorsport Group, Inc.*, Case No. 08-10192 (KJC) (Bankr. D. Del. Feb. 1, 2008); *In re Pope & Talbot, Inc.*, No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); *In re Hancock Fabrics, Inc.*, No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007); *In re Ultimate Elecs.*, Case No. 05-10104 (PJW) (Bankr. D. Del. Jan. 13, 2005). The Debtors submit that similar authorization is appropriate in these chapter 11 cases.

⁵ The Debtors have not annexed copies of the unreported orders cited herein because of their size. Copies of these orders, however, are available upon request of the Debtors' counsel, including at the hearing to consider the Motion.

C. The Court Should Authorize the Debtors' Banks to Pay the Claims Described Herein

34. In connection with the foregoing, the Debtors respectfully request that the Court enter an order that (a) authorizes all applicable banks and financial institutions to receive, process, honor, and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to, the claims the Debtors request authority to pay in this Motion, regardless of whether the checks were presented, or fund transfer requests were submitted, before or after the Petition Date and (b) provides that all banks and other financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this application, and such banks and other financial institutions shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

D. Immediate Relief is Justified

35. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within twenty (20) days after the filing of the petition regarding a motion to "use, sell, lease, or otherwise incur an obligation regarding property of the estate" only if such relief is necessary to avoid immediate and irreparable harm. Here, the relief requested is necessary to avoid immediate and irreparable harm to the Debtors' estates for the reasons set forth above.

36. As described above, payment of the Outstanding Orders, the Possessory Claims, and the Joint Check Claims is integral to the Debtors' operations and is necessary to maintain the confidence and goodwill of the Debtors' customer base, which is critical to a successful reorganization. The sale of building products and manufactured building components as well as the installation of those building products and manufactured components is the lifeblood of the Debtors' operations. This, in turn, requires the timely delivery of raw materials

and building products to the Debtors as well as the timely delivery of building products and manufactured building components to the Debtors' customers. Any disruption in this carefully choreographed distribution system would likely cause the Debtors' customers to turn elsewhere to satisfy their needs for on-time delivery of building products and services – especially in today's market climate where competition for the Debtors' services is at an all-time high.

37. Moreover, failure to pay the Possessory Claims may result in Possessory Claimants exercising various self-help remedies available under applicable state law. Payment of the Possessory Claims will save the Debtors the considerable time and expense of having to negotiate or litigate for the return of or right to use property of the estate that may be subject to these claims. Payment of the Joint Check Claims will allow the Debtors to receive payment on account of goods provided and services performed.

38. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

REQUEST FOR WAIVER OF STAY

39. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." As set forth above, the immediate payment of the Outstanding Orders, Possessory Claims, and Joint Check Claims is essential to prevent potentially irreparable damages to the Debtors' operations, value and ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay imposed by Bankruptcy Rule 6004(h).

DEBTORS' RESERVATION OF RIGHTS

40. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors; a waiver of the Debtors' rights to dispute any claim; or an approval, assumption or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice or claim with respect to Possessory Claims in accordance with applicable nonbankruptcy law. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

NOTICE

41. No trustee, examiner, or creditors' committee has been appointed in these chapter 11 cases. The Debtors have provided notice of filing of the Motion either by electronic mail or facsimile and/or by overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) the 50 largest unsecured creditors of the Debtors on a consolidated basis as identified in the Debtors' chapter 11 petitions; and (c) counsel to Wells Fargo Bank, as agent for both of the Debtors' prepetition lenders and proposed postpetition lenders. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Local Rule 9013-1(m). Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

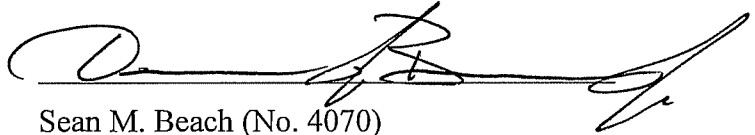
NO PRIOR REQUEST

42. 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
June 16, 2009

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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

EXHIBIT A

Proposed Order

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

IN RE:)	
)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,¹)	
)	Case No. 09-<u>12074</u> ()
Debtors.)	
)	Jointly Administered
)	
)	Ref. Docket No. _____

ORDER (A) AUTHORIZING THE DEBTORS TO PAY, IN THE ORDINARY COURSE OF BUSINESS, CLAIMS FOR GOODS ORDERED PREPETITION AND DELIVERED POSTPETITION; (B) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS OF SHIPPERS, WAREHOUSEMEN, MECHANIC'S/MATERIALMAN'S LIEN CLAIMANTS, AND JOINT CHECK BENEFICIARIES; AND (C) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS

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 (a) authorizing, but not requiring, the Debtors to pay, in the ordinary course of business, claims for goods ordered prepetition and delivered postpetition; (b) authorizing, but not requiring, the Debtors to pay, in the ordinary course of business, certain prepetition claims of shippers, warehousemen, mechanic's/materialman's lien claimants, and joint check beneficiaries; and (c) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in

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.

accordance with this Order, all as set forth in the Motion; and upon the Street Declaration² in support thereof; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "**Hearing**"); and the Court having determined that the legal and factual bases set forth 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. All undisputed obligations relating to the Outstanding Orders are granted administrative expense priority status pursuant to section 503(b)(9) of the Bankruptcy Code.
3. The Debtors are authorized, but not directed, to pay all undisputed amounts relating to Outstanding Orders in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date.
4. The Debtors are authorized, but not directed, in their sole discretion and business judgment, to pay the prepetition amounts owed on account of Shipping Charges, Warehousing Charges, and Materialman's Lien Claims in an aggregate amount not to exceed \$1,133,000;

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

provided, however, that the Debtors are not authorized to pay Materialman's Lien Claims unless the applicable Materialman's Lien Claimant has perfected its claim or, in the Debtors' business judgment, is capable of perfecting or may be capable of perfecting in the future, one or more liens in respect of such claim; *provided further, however*, that such payment shall not be deemed (i) an admission by the Debtors of the extent, validity, perfection, or possible avoidability of the related liens, claims or payments, and (ii) a waiver of the Debtors' rights regarding the extent, validity, perfection, or avoidability of the related liens, claims, or payments. The Debtors' right to challenge the extent, validity, perfection, or avoidability of such liens, claims, or payments is hereby expressly reserved.

5. In exchange for any payment made by any of the Debtors to any of the Possessory Claimants pursuant to this Order, such Possessory Claimant receiving such payment must release and waive any claims and/or liens against any of the Debtors and their respective estates.

6. The Debtors are authorized, but not directed, to continue to utilize the Joint Check Procedures in the ordinary course of business and to satisfy any outstanding Joint Check Claims by way of such Joint Check Procedures.

7. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date. Such banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this order, and such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

8. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of payments made in accordance with this Order that are dishonored or rejected.

9. Nothing herein shall change the nature or priority of the underlying claims.

10. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

11. The Debtors' satisfaction of any liens pursuant to this order shall not be deemed to be an admission that such liens are valid liens and the Debtors retain the right to contest the extent, validity, or perfection of such liens or to seek the avoidance of such liens.

12. Nothing contained in this Order shall be deemed to constitute an assumption or adoption of any executory contract or prepetition or postpetition agreement between the Debtors and the holder of a Outstanding Order, Possessory Claim, or Joint Check Claim, or to require the Debtors to make any of the payments authorized herein.

13. The authorization granted hereby to pay the Outstanding Orders, Possessory Claims, and Joint Check Claims shall not create any obligation on the part of the Debtors or their officers, directors, attorneys, or agents to pay the Outstanding Orders, Possessory Claims or Joint Check Claims, and none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay an Outstanding Order, Possessory Claim, or Joint Check Claim, and nothing contained in this Order shall be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect the Outstanding Orders, Possessory Claims, or Joint Check Claims to the extent they are not paid.

14. Nothing in this Order shall be deemed either a grant of administrative priority expense status to, or authority to pay, any amounts that are disputed by the Debtors.

15. Nothing contained in this Order shall be construed as a waiver by the Debtors of their rights to contest any claim or invoice of an Outstanding Order Supplier, Joint Check Beneficiary, or the holder of a Possessory Claim under applicable law.

16. Nothing in this Order shall prohibit the Debtors from seeking Court authority to increase the prepetition amounts authorized to be paid hereunder.

17. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

18. Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") has been satisfied.

19. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6004(a).

20. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

21. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware
June ____, 2009

UNITED STATES BANKRUPTCY JUDGE