IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, *et al.*[1]	Case No. 09-12074 (KJC)
	Jointly Administered
Reorganized Debtors.	**Ref. Docket Nos. 1667, 1668 and 1691**

REORGANIZED DEBTORS' REPLY TO OBJECTION BY ROBERT R. THOMAS AND THE RESTATED THOMAS TRUST DATED APRIL 14, 2009 TO DEBTOR'S MOTION FOR ENTRY OF IMPLEMENTATION ORDER WITH RESPECT TO PARAGRAPH 44 OF CONFIRMATION ORDER (RELATING TO ROBERT R. THOMAS AND THE RESTATED THOMAS TRUST) [D.I. 1691]

Building Materials Holding Corporation ("***BMHC***") and its affiliates, as reorganized debtors (collectively, the "***Debtors***" or "***Reorganized Debtors***"), submit this reply (the "***Reply***") to the Objection by Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 [D.I. 1691] (the "***Objection***") to the Reorganized Debtor's Motion for Entry of Implementation Order With Respect to Paragraph 44 of Confirmation Order (Relating to Robert R. Thomas and The Restated Thomas Trust) [D.I. 1667] (the "***Motion***"). For their Reply, the Reorganized Debtors respectfully submit:

INTRODUCTION

1. In their Motion, the Reorganized Debtors have requested the Court to enter an order enforcing the agreement among the Reorganized Debtors and the Thomas Parties,

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

memorialized in paragraph 44 of the Confirmation Order,[2] providing that the parties would resolve by alternative dispute resolution only the Thomas Parties' "Cure Claims" under an assumed "Acquisition Agreement." In their Objection, the Thomas Parties contend that if the Court were to grant the Reorganized Debtors' Motion, "it would be deciding matters expressly reserved to arbitration under the Acquisition Agreement." (Objection ¶ 6). The Thomas Parties' contention is plainly incorrect and simply assumes away the very issue presented.

2. Under well-established principles, "the question whether the parties submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for *judicial determination . . . .*" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis added); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217 (3d Cir. 2007) (noting that whether the parties agreed to arbitrate a particular matter is "presumptively entrusted to the court for resolution."). This is precisely what the Reorganized Debtors have requested this Court to determine—the scope of matters that the parties agreed to arbitrate in paragraph 44 of the Confirmation Order. As stated in the Reorganized Debtors' Motion, the Thomas Parties' "Cure Claims" under the specifically defined "Acquisition Agreement" that the Debtors assumed pursuant to the Confirmation Order cannot possibly include over $800,000 in rejection damages asserted by separate parties arising from the rejection of two separate commercial real estate Leases. As a result, the Thomas Parties are not entitled to arbitrate such claims under the parties' agreement as set forth in paragraph 44 of the Confirmation Order, and the Court is free to determine that issue.

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

ARGUMENT

3. As noted above, "a threshold question of arbitrability is presented for the court to decide." *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 200 (3d Cir. 2010). In determining whether parties must arbitrate a particular dispute, a court must engage in a three-part analysis to determine: "1) whether the dispute is governed by an enforceable arbitration clause, 2) whether the Court has discretion to deny the enforcement of the arbitration clause . . . , and 3) whether the Court should exercise its discretion to deny arbitration." *Jalbert v. Pacific Employers Ins. Co. (In re Olympus Healthcare Group, Inc.),* 352 B.R. 603, 607 (Bankr. D. Del. 2006) (*quoting Shubert v. Wellspring Media (In re Winstar Communications, Inc.)*, 335 B.R. 556, 562 (Bankr. D. Del. 2005)). As shown below, the parties do not have an enforceable agreement to arbitrate disputes concerning damages under the rejected Leases. In addition, even if arbitration were applicable, the Court has the discretion to deny arbitration (and should deny arbitration) given the fact that the dispute implicates purely Bankruptcy Code issues.

A. The Parties Agreed to Limit Arbitration to "Cure Claims" Under the "Acquisition Agreement."

4. The Court must first determine whether the dispute is governed by an enforceable arbitration clause. Here, the Thomas Parties acknowledge that they agreed to "withdraw[] their objection to confirmation after the Debtors agreed to include paragraph 44 in the Confirmation Order." (Objection, ¶ 30). Under this paragraph of the Confirmation Order, the parties entered into a superseding, binding agreement limiting the scope of arbitration to "the Cure Claims, if any, of Robert R. Thomas or The Restated Thomas Trust Dated April 14, 2009 under the Acquisition Agreement (as defined in the Objection By Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 to Confirmation of the Joint Plan of Reorganization as Amended October 22, 2009 [D.I. 1008])." Further, in describing these very claims in their

Confirmation Objection that led to the agreement contained in Paragraph 44 of the Confirmation Order, the Thomas Parties stated: "The claims filed by the Thomas Parties related to the breach of the Acquisition Agreement total $400,000." (Confirmation Objection, ¶ 26). Thus, these claims—which the Thomas Parties indicated were incurred due to an alleged "lack of cooperation by the Debtors in defending construction defect claims" and which did not mention any damages resulting from rejection of the Leases—are the only claims that the parties have agreed to arbitrate under their binding agreement contained in paragraph 44 of the Confirmation Order.[3]

5. The agreed arbitration language in paragraph 44 of the Confirmation Order is obviously binding. Indeed, section 1141 of the Bankruptcy Code specifies that "provisions of a confirmed plan bind the debtor . . . and any creditor . . . ." Thus, "[a] confirmed plan of reorganization is in effect a contract between the parties and the terms of the plan describe their rights and obligations." *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 755 (7th Cir. 2002); *see also General Elec. Capital Corp. v. Dial Business Forms, Inc. (In re Dial Business Forms, Inc.),* 341 F.3d 738, 743 (8th Cir. 2003) ("Once confirmed, a Chapter 11 plan 'acts like a contract that binds the parties that participate in the plan.'"); *In re Benjamin Coal*

[3] In paragraph 4 of their present Objection, the Thomas Parties contend that they previously asserted that "they were entitled to recover as part of their cure claim the damages they suffered due to the breach by the Debtors of two related leases . . . ." (Objection, ¶ 4). This is simply not true. The Thomas Parties never indicated they would take the position that rejection damages under the Leases would be part of their own claims. Indeed, even though the Debtors had already rejected the Leases, the Thomas Parties limited their own filed proof of claim to "$400,000.00 according to proof" with respect to damages they claim to have asserted due to an alleged lack of cooperation in defending construction defect claims. With respect to the effect of the rejection of the Leases, the Thomas Parties took the position in their filed proof of claim that the rejection "precludes assumption of the Securities Purchase Agreement and Asset Purchase Agreement." But when the Debtors in fact sought to assume those agreements in connection with Plan confirmation, the Thomas Parties did not object to such assumption. Rather, as the Thomas Parties themselves state in their present Objection, "the Thomas Parties only objected to the Plan's provisions for determining their cure claims," (Objection, ¶ 20), and the Thomas Parties specifically stated in their Confirmation Objection that "[t]he claims filed by the Thomas Parties related to breach of the Acquisition Agreement total $400,000." (Confirmation Objection, ¶ 26).

Co., 978 F.2d 823, 828 (3d Cir. 1992) (holding that confirmed plan created "new contractual claim"). Of course, paragraph 44 is contained in the Confirmation Order, but section 12.8 of the Reorganized Debtors' Plan specifies that "the terms of the Confirmation Order shall control" over contrary terms in the Plan. Thus, the provisions of the Confirmation Order are specifically incorporated into, and control over, the provisions of the Plan. Thus, the new agreement contained in paragraph 44 of the Confirmation Order governs what the parties must arbitrate. *See Ernst & Young*, 304 F.3d at 755-56.

6. *Ernst & Young* is directly on point. In that case, a debtor proposed a plan of reorganization after it had filed an adversary proceeding against its accountants. The accountants filed an objection to the plan because it contained a release proposing to limit the accountants' ability to file a claim against a third-party. After the debtor modified the third-party release to exclude the accountants' claims, the accountants withdrew their confirmation objection and the plan was confirmed.

7. Under the plan and confirmation order in *Ernst & Young*, the bankruptcy court retained jurisdiction to adjudicate "any pending adversary proceeding." Nonetheless, citing arbitration provisions in its engagement letters, the accountants moved to stay the debtor's adversary proceeding pending arbitration. The bankruptcy court denied the accountants' motion, finding that the language in the plan and confirmation order constituted an agreement superseding the engagement letter's arbitration provisions. The United States Court of Appeals for the Seventh Circuit ultimately affirmed, agreeing that the plan constituted a new superseding agreement:

> A confirmed plan of reorganization is in effect a contract between the parties and the terms of the plan describe their rights and obligations. . . . The plaintiffs' plan expressly provides for the bankruptcy court to retain jurisdiction to adjudicate pending adversary proceedings . . . . We believe that in this instance, Ernst &

Young's right to arbitrate is superseded by the terms of the confirmed plan. *Ernst & Young*, 304 F.3d at 755-56.

8. The Reorganized Debtors respectfully submit that the Court should reach the same result in this case. Indeed, the agreed language in paragraph 44 of the Confirmation Order is much more specific on the issue of arbitration than the language found to be superseding in *Ernst & Young*. Further, paragraph 44 of the Confirmation Order plainly limits the scope of arbitration; if the parties had intended to submit any and all disputes to alternative dispute resolution, paragraph 44 would have said that using much broader language. For example, the Thomas Parties could have tried to negotiate for language stating that "all disputes between the parties related to the Acquisition Agreement or any transaction related thereto shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement." Such language would have had the effect that the Thomas Parties now urge. *See SFC New Holdings, Inc. v. The Earthgrains Co. (In re GWI, Inc.)*, 269 B.R. 114, 118 (Bankr. D. Del. 2001) (rejecting contention that jurisdictional provision in plan superseded arbitration provision with respect to escrow agreement when plan used broad language providing that disbursing agent would "perform the obligations of the Debtors related to the [Escrow Agreement] under the [Purchase Agreement], in accordance with the terms and conditions thereof . . . ."). But the parties did not use broad language; instead, the language specifically limited Alternative Dispute Resolution to "the Cure Claims, if any . . . under the Acquisition Agreement."

9. Thus, *this* language in paragraph 44 of the Confirmation Order constitutes the parties' agreement to arbitrate and the Court has the power to determine what is arbitrable under that language. As explained at length in the Reorganized Debtors' Motion, there is no sense in

which $800,000 in damages under separately rejected Leases can possibly constitute "Cure Claims" under the assumed "Acquisition Agreement."[4] Besides being clear on its face that "rejection" damages cannot constitute part of a "cure" claim (and being supported by how the Thomas Parties themselves described their claims under the Acquisition Agreement in their Confirmation Objection), the Court necessarily adjudicated that the Acquisition Agreement was separate from the rejected Leases when it allowed the Debtors to assume the Acquisition Agreement, without any objection from the Thomas Parties, pursuant to the Confirmation Order. Thus, the parties do not have an enforceable agreement to arbitrate the Thomas Parties' rejection damages contentions and the Court can and should rule that is has already necessarily decided that issue.

B. The Court Has Discretion to Deny Arbitration Even if It Applies.

10. Even if the parties had not specifically limited the scope of arbitration in paragraph 44 of the Confirmation Order, the Court would still have the discretion to refuse to allow the Thomas Parties to interject the Lease rejection damages into an arbitration about the Thomas Parties' unfounded allegation that the Debtors have breached a cooperation obligation under the assumed Acquisition Agreement. As explained by the U.S. Supreme Court, "[l]ike any

[4] In order to assume an executory contract under which there has been a default, section 365(b)(1)(A) requires the debtor to both (1) "cure such default;" and (2) compensate the non-debtor party for "any actual pecuniary loss to such party resulting from such default." Thus, properly understood, the obligation to "cure" includes both a performance component and a pecuniary obligation. This is why it is obvious from the face of section 365 of the Bankruptcy Code that payment of damages resulting from the rejection of one agreement cannot possibly be required to "cure" a default under a separately assumed agreement—in addition to making the monetary payment, the debtor would have to assume the previously rejected agreement to fully "cure" the default, which is obviously impossible. This highlights why the Thomas Parties were required to object to assumption of the Acquisition Agreement if they wanted to preserve the arguments they are now trying to make. Having failed to object to the assumption of the Acquisition Agreement, the Thomas Parties' arguments that these agreements were integrated are now barred by *res judicata* and collateral estoppel.

statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/American Exp. v. McMahon*, 482 U.S. 220, 227 (1987). Specifically,

> [t]o overcome enforcement of arbitration, a party must establish congressional intent to create an exception to the FAA's mandate with respect to the party's statutory claims. Congressional intent can be discerned in one of three ways: (1) the statute's text; (2) the statute's legislative history, or (3) "an inherent conflict between arbitration and the statute's underlying purposes."

Mintze v. American General Fin. Servs., Inc. (In re Mintze), 434 F.3d 222, 229 (3d Cir. 2006) (citations omitted).

11. The United States District Court for the District of Delaware has noted that courts have discretion to refuse arbitration with respect to "statutory claims created by the Bankruptcy Code." *In re Fleming Companies, Inc.*, 2007 WL 788921, at *4 (D. Del. March 16, 2007). Other courts agree. For example, the United States Court of Appeals for the Fifth Circuit has said: "A bankruptcy court does possess discretion, however, to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of a proceeding derives exclusively from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicts with the purpose of the Code." *In the Matter of Gandy*, 299 F.3d 489, 495 (5th Cir. 2002).[5]

12. The matters at issue here are plainly bankruptcy issues and they derive from the Bankruptcy Code. The parties do not dispute the amount of the rejection damages under the Leases; indeed, the distributions on account of the rejection damages claims asserted in the proofs of claim filed by Gregg Street, LLC and Ralph Road, LLC *have already been paid* to those entities and they have cashed their distribution checks. As a result, the only matter at issue is whether the Thomas Parties can now roll those separate parties' rejection damages into their own "cure" claim under the assumed Acquisition Agreement. Of course, whether the Thomas

[5] The Third Circuit also expressed its support for this principle in *Mintze* when it also noted that, absent a "bankruptcy issue to be decided by the Bankruptcy Court," it could not find a conflict between arbitration and the Bankruptcy Code. *See Mintze*, 434 F.3d at 231-32.

Parties should be paid a cure claim at all derives *exclusively* from section 365(b)(1)(A) of the Bankruptcy Code.

13. The Reorganized Debtors' defenses to this purported "cure claim" also derive from the Bankruptcy Code. In particular, requiring the Debtors to pay in full damages resulting from rejection of the Leases would contravene multiple provisions of the Bankruptcy Code. For example, it would violate sections 365(g) and 502(g) of the Bankruptcy Code, which provide that rejection of an executory contract constitutes a breach of such contract immediately before the filing of the petition, thereby rendering "any claim that the contract or lease counterparty may have a prepetition claim not entitled to priority as an expense of administration of the estate." 3 *Collier on Bankruptcy* ¶ 365.10[1] (16th ed. 2010). The Thomas Parties' theory would also violate the limit on lessors' claims for lease rejection damages under section 502(b)(6).[6] In addition, the Thomas Parties' contention violates the priorities established in section 507 of the Bankruptcy Code.

14. Most significantly, this particular dispute involves the effect of the assumption of the Acquisition Agreement on the Thomas Parties' contention that the previously rejected Leases were part of the Acquisition Agreement. That is also *solely* a Bankruptcy Code issue related to the scope of a debtor's power to assume or reject executory contracts and unexpired leases under section 365(a) of the Bankruptcy Code. *See In re Plitt Amusement Co.*, 233 B.R. 837, 840 (Bankr. C.D. Cal. 1999) ("The assumption or rejection of an executory contract or unexpired

[6] Section 502(b)(6) of the Bankruptcy Code specifically limits a lessor's claim for damages resulting from the rejection of a lease of real property to the rent reserved by the lease for the greater of one year or 15 percent (not to exceed three years) of the remaining term of the lease. Because the remaining terms of the rejected Leases were only 15 months, the proofs of claim filed by Gregg Street, LLC and Ralph Road, LLC limited their lease termination claims to 12 months of unpaid rent. (See Street Decl. Exh. I and J). Indeed, the Thomas Parties themselves acknowledge that the Gregg Street, LLC and Ralph Road, LLC rejection damages "were limited under Bankruptcy Code section 502(b)(6)." (Objection, ¶ 26).

lease is governed solely by federal bankruptcy law. Nothing in state contract law or property law corresponds to such assumption or rejection.") (citation omitted). And of course, it is a basic Bankruptcy Code principle that a debtor cannot assume only part of a contract; instead, it must either assume the entire contract or reject the entire contract.[7] *In re Exide Tech.*, 340 B.R. 222, 228 (Bankr. D. Del. 2006), *aff'd* 2008 WL 522516 (D. Del. Feb. 27, 2008); *In re ANC Rental Corp.*, 277 B.R. 226, 238-39 (Bankr. D. Del. 2002). Thus, the claims and defenses at issue here derive from the Bankruptcy Code.[8]

15. In addition to involving purely Bankruptcy Code issues, arbitrating the disputes concerning the impact of the rejection of the Leases and the assumption of the Acquisition Agreement would conflict with several of the primary purposes of the Bankruptcy Code. As this Court has explained, "the purpose of the Bankruptcy Code includes the 'goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own

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[7] In their present Objection, the Thomas Parties contend that *res judicata* and collateral estoppel do not apply because the "issue of the cure claim was not before the Bankruptcy Court under the Plan procedures, and was deferred to arbitration as it was required to be." (Objection, ¶ 42). The Thomas Parties have missed the point. While the Thomas Parties' overall "Cure Claim" itself was not before the Court, a fundamental building block of the Thomas Parties' new effort to argue that the Lease rejection damages are part of that "Cure Claim" *was* before the Court at confirmation. Specifically, assuming that they can overcome other hurdles, the Thomas Parties' argument to roll rejection damages under the Leases into their "Cure Claim" under the "Acquisition Agreement" requires that they show that the Leases were integrated with the Acquisition Agreement. The Thomas Parties must make the same showing in order to assert a recoupment defense to the Reorganized Debtors' claims under the assumed Acquisition Agreement, because recoupment requires that "both debts must arise out of a *single integrated transaction* so that it would be inequitable for the debtor to enjoy the benefits of that transaction without meeting its obligations." *University Med. Ctr. v. Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065, 1081 (3d Cir. 1992) (emphasis added). The Thomas Parties' arguments on this point are now foreclosed because the Court necessarily decided that the Leases were not integrated with the Acquisition Agreement when the Confirmation Order permitted the Debtors to assume the Acquisition Agreement even though they had previously rejected the Leases.

[8] If the Court does not apply *res judicata* or collateral estoppel to resolve this dispute, the Court's determination of whether the agreements were or were not integrated may involve reference to state law. However, the fundamental determination itself—whether the Thomas Parties' "Cure Claim" under section 365 of the Bankruptcy Code can possibly include damages under the previously rejected Leases—still derives from the Bankruptcy Code.

orders.'" *In re New Century TRS Holdings, Inc.*, 407 B.R. 558, 571 (Bankr. D. Del. 2009) (*quoting In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1069 (5th Cir. 1997)). This particular proceeding implicates *all three* of these concerns.

16. First, as described above, whether the Thomas Parties can include the Lease rejection damages of separate entities into their own cure claim under the Acquisition Agreement involves purely bankruptcy issues. Thus, arbitrating those issues in California contravenes the Bankruptcy Code's purpose of centralizing resolution of those issues in this Court. Further, arbitrating those issues in California exposes the Reorganized Debtors (and the secured creditors that now own their equity interests) to the very type of piecemeal litigation that the Bankruptcy Code should prevent. Specifically, this Court has already necessarily ruled that the assumed Acquisition Agreement is separate from the rejected Leases because a debtor cannot assume only part of an agreement. To allow the Thomas Parties to re-open that issue in arbitration creates the possibility of an inconsistent result. Finally, by declining to permit the Thomas Parties to raise the Lease rejection damages in arbitration, the Court enforces its own Confirmation Order. Specifically, it enforces the limits on arbitration expressed in paragraph 44 of the Confirmation Order and it enforces the Court's ruling in paragraph 20 of the Confirmation Order permitting the Debtors to assume all contracts not previously rejected nor listed on the Rejected Executory Contract and Unexpired Lease list.[9]

[9] Incidentally, the Thomas Parties contend several times in their Objection that "the Debtors failed to file or serve any notice of a proposed cure claim relating to the Acquisition Agreement . . . ." (*See, e.g.*, Objection, ¶ 14). The Thomas Parties are mistaken. As reflected on the Affidavit of Service [D.I. 1000] filed on November 24, 2009 by The Garden City Group, Inc., the Debtors did cause a Notice of (I) Possible Assumption of Executory Contracts and Unexpired Leases, (II) Fixing of Cure Amounts in Connection Therewith, and (III) Deadline to Object Thereto (the "***Cure Notice***"), including a customized Exhibit 1 to the Cure Notice, to be mailed to Robert Thomas in Alpine, California with respect to both the Securities Purchase Agreement and the Asset Purchase Agreement. The Exhibit 1 to both Cure Notices indicated that the "Cure Amount" on the agreements was "$0.00."

17. In addition to contravening the purposes identified by this Court in *New Century*, arbitration of the Thomas Parties' contention that rejection damages can constitute part of their "Cure Claim" would contravene another important purpose of the Bankruptcy Code. Specifically, a fundamental purpose is to allow a reorganizing debtor to take advantage of favorable agreements while shedding those that are detrimental:

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

In re Plitt Amusement Co., 233 B.R. 837, 845 (Bankr. C.D. Cal. 1999). Here, the Thomas Parties' efforts have the very purpose of trying to force the Reorganized Debtors to pay them a cure payment with respect to Leases that the Debtors rejected because they found them to be burdensome. The Thomas Parties' purpose is at war with a chief purpose of the Bankruptcy Code. As a result, the Thomas Parties should not be allowed to interject the rejection damages under the Leases into the issue of whether the Reorganized Debtors owe any cure claim under the assumed Acquisition Agreement. Instead, this Court should rule that the Thomas Parties are foreclosed, under principles of *res judicata* and collateral estoppel, from asserting that the rejected Leases are part of the assumed Acquisition Agreement. Alternatively, if the Court reaches the merits (a second time), the Reorganized Debtors respectfully submit that the agreements were in fact separate and that the Court should so find.

Dated: Wilmington, Delaware
October 15, 2010

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, *et al.*,[1]	Case No. 09-12074 (KJC)
	Jointly Administered
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AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS
NEW CASTLE COUNTY)

Casey S. Cathcart, an employee of the law firm of Young Conaway Stargatt & Taylor, LLP, co-counsel to the Reorganized Debtors, being duly sworn according to law, deposes and says that on October 15, 2010, she caused a copy of the **Reorganized Debtors' Reply to Objection by Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 to Reorganized Debtors' Motion for Entry of Implementation Order With Respect to Paragraph 44 of Confirmation Order (Relating to Robert R. Thomas and The Restated Thomas Trust)** to be served as indicated upon the parties identified on the attached service list and the following parties:

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SWORN TO AND SUBSCRIBED before me this 15th day of October, 2010.

ERICA A. BROWN
NOTARY PUBLIC
STATE OF DELAWARE
My commission expires SEPT. 6, 2013

Notary Public
My Commission Expires: 9/6/2013

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

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