

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

IN RE:)	
)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,¹)	
)	Case No. 09-12074 (KJC)
Debtors.)	
)	Jointly Administered
)	
)	Ref. Docket Nos. 33 and 156

**DEBTORS' REPLY TO THE RESERVATION OF RIGHTS AND LIMITED RESPONSE
TO DEBTORS' FIRST OMNIBUS MOTION FOR AN ORDER AUTHORIZING
REJECTION OF CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS,
NUNC PRO TUNC TO THE REJECTION EFFECTIVE DATE**

On June 16, 2009 (the "*Petition Date*") the Debtors filed their First Omnibus Motion for an Order Authorizing Rejection of Certain Unexpired Leases and Executory Contracts, Nunc Pro Tunc to the Rejection Effective Date (the "*Motion*"). On July 10, 2009, Gregg Street, LLC ("*Gregg Street*"), Ralph Road, LLC ("*Ralph Road*"), and the Restated Robert R. Thomas Trust Dated April 14, 1999 (the "*Trust*", and together with Gregg Street and Ralph Road, the "*Thomas Parties*"), filed a Reservation of Rights and Limited Response to the Motion (the "*Response*"). The Debtors hereby submit their Reply to the Response (the "*Reply*") and in support thereof represent as follows:

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.

INTRODUCTION

1. The Response is not, and does not purport to be, an objection to the Motion. As set forth in the Response, the Response "does not ask the Court for any relief in relation to the [Motion]." Response at ¶ 4. Indeed, the Thomas Parties state that they "will not attempt to carry the burden of challenging the Debtors' business judgment" to reject the leases that the Debtors seek to reject by way of the Motion. *Id.* at ¶ 12. Instead, the Response is simply "a statement of position, intended to inform the Debtors on the record of what the Thomas Parties believe that the legal consequences of rejection will be." *Id.* at ¶ 4. Because the Response is not an objection to the Motion and because no other objections to the Motion were filed, the Motion is unopposed. Accordingly, the Debtors respectfully request that the Court grant the relief requested in the Motion for the reasons set forth therein.

THE THOMAS PARTIES' RESPONSE

2. In their Response, the Thomas Parties make a series of factual allegations which allegedly support certain legal conclusions relating to the effect of the Debtors' decision to reject the following leases that were set forth on Exhibit B that was attached to the Motion: (i) the Debtors' lease of the premises located at 13465 and 13495 Gregg Street, Poway, California, and (ii) the Debtors' lease of the premises located at 340 W. Ralph Road, Imperial, California (collectively, the "***Leases***"). The Response alleges, in essence, that the Leases are an integral part of a larger transaction whereby the Debtors purchased H.N.R. Framing Systems, Inc. and Home Building Components, Inc., companies then owned by the Restated Robert R. Thomas Trust Dated April 14, 1999 and Robert R. Thomas. The Response alleges that the Leases, which are separate transactions executed (i) by and between H.N.R. Framing Systems, Inc. and Gregg Street, LLC and (ii) by and between FSC Construction, Inc. and Ralph Road, LLC, respectively,

are somehow so connected to the Debtors' acquisitions of H.N.R. Framing Systems, Inc. and FSC Construction, Inc. that a breach of the Leases would give rise to a recoupment defense to the Trust's obligations arising under the relevant acquisition documents, the Securities Purchase Agreement and the Asset Purchase Agreement.

DEBTORS' REPLY TO THE ALLEGATIONS CONTAINED IN THE RESPONSE

3. While the Response is not an objection to the relief requested in the Motion, the Response makes certain factual allegations and draws certain legal conclusions which are disputed by the Debtors. Accordingly, the Debtors believe that it is appropriate to file this Reply.

A. The Court Does Not Have Jurisdiction to Make Any Determinations Relating to the Factual Allegations and Legal Conclusions Set Forth in the Response

4. The Response contains a number of factual allegations and legal conclusions, none of which relates to a case or controversy actually pending before the Court. The only issue presented to the Court in the Motion is whether the Debtors should be authorized to reject the leases that were set forth on Exhibit B that was attached to the Motion. The Response does not challenge the Debtors' decision to reject these leases. Instead, the Response outlines a series of factual allegations which allegedly support certain legal conclusions relating to the effect of the Debtors' decision to reject the Leases. The legal effect of the Debtors' decision to reject the Leases is not a case or controversy pending before the Court. Accordingly, the Court does not have jurisdiction to make any determinations whatsoever with respect to the allegations and conclusions set forth in the Response. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) ("Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'"); *Ex parte McCordle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868) ("Without jurisdiction the court cannot proceed at all in any cause.

Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

B. The Doctrine of Recoupment is Limited

5. The essence of the Response is that the Debtors' breach of the Leases by way of rejecting them will give rise to the Trust's ability to assert a recoupment defense to its obligations to perform pursuant to the Securities Purchase Agreement and the Asset Purchase Agreement. The doctrine of recoupment is an equitable remedy that permits the offset of mutual debts between parties where the debts arise under the same transaction. *See, e.g., In re HQ Global Holdings, Inc.*, 290 B.R. 78, 80 (Bankr. D. Del. 2003). "Mutuality requires that the debts and credits must be in same right, and between the same parties, standing in the same capacity." *In re Windsor Comms. Group, Inc.*, 79 B.R. 210, 217 (E.D. Pa. 1987) (internal citations omitted). In addition, for debts to arise out of the "same transaction" for purposes of the doctrine of recoupment, they must arise from a "single integrated transaction." *See, e.g., In re Univ. Med. Ctr.*, 973 F.2d 1065, 1081 (3d Cir. 1992) ("[T]he fact that the same two parties are involved, and that a similar subject matter gave rise to both claims, does not mean that the two arose from the 'same transaction.' ... Rather, 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 also meeting its obligations."). The standard for determining the bounds of a "single integrated transaction" is a strict one. *See, e.g., id.* ("Use of [a strict] standard for delineating the bounds of a transaction in the context of recoupment is in accord with the principle that this doctrine, as a non-statutory, equitable exception to the automatic stay, should be narrowly construed.").

C. The Trust's Claims to a Recoupment Defense are Dubious

6. It is highly doubtful that the Trust would be able to successfully demonstrate that it is entitled to eschew its obligations under the Securities Purchase Agreement

and the Asset Purchase Agreement pursuant to the limited doctrine of recoupment. First, it is clear that there is no mutuality between the parties to the Leases on the one hand and the Securities Purchase Agreement or the Asset Purchase Agreement on the other. *See, e.g., In re Windsor Comms. Group, Inc.*, 79 B.R. 210, 217 (E.D. Pa. 1987) ("Mutuality requires that the debts and credits must be in same right, and between the same parties, standing in the same capacity.") (internal citations omitted). As noted previously, the Leases were entered into (i) by and between H.N.R. Framing Systems, Inc. and Gregg Street, LLC and (ii) by and between FSC Construction, Inc. and Ralph Road, LLC. The Securities Purchase Agreement was entered into by and among H.N.R. Framing Systems, Inc., the Restated Robert R. Thomas Trust Dated April 14, 1999, Robert R. Thomas, and BMC Construction, Inc. The Asset Purchase Agreement was entered into by and among Home Building Components, Inc., the Restated Robert R. Thomas Trust Dated April 14, 1999, Robert R. Thomas, FSC Construction, Inc., and H.N.R. Framing Systems, Inc. Because these various documents involve different rights between different parties standing in distinct capacities, there can be no mutuality between the debts arising under the Leases and those arising under the Securities Purchase Agreement or the Asset Purchase Agreement.

7. Second, it is clear that the Leases represent transactions that are separate and distinct from the Securities Purchase Agreement and the Asset Purchase Agreement. The Securities Purchase Agreement and the Asset Purchase Agreement were transactions for the purchase of businesses. The Leases were transactions for the use and occupancy of real property following the effective date of the Securities Purchase Agreement and the Asset Purchase Agreement. In no way were the Leases an integrated part of the Securities Purchase Agreement or the Asset Purchase Agreement. Contrary to the vague averments contained in the Response,

the Leases were not above-market at the time they were entered into and did not constitute any portion of the consideration paid pursuant to the Securities Purchase Agreement or the Asset Purchase Agreement.

D. Debtors' Reservation of Rights

8. While the Debtors are filing this limited Reply to the Response, the Debtors reserve all rights to dispute, in the proper forum, any allegation that the rejection of the Leases gives rise to a recoupment defense or constitutes the breach of any agreement other than the Leases being rejected, and to dispute all other factual allegations and conclusions of law asserted in the Response. Nothing contained herein should be construed as an admission of any kind or any limitation on the Debtors' rights to make the arguments set forth herein or any other arguments with respect to any claims, defenses, or other rights now or hereafter asserted by the Thomas Parties or any other parties in interest.

CONCLUSION

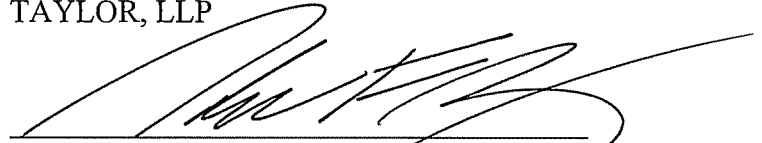
9. The Thomas Parties' Response is not, and does not purport to be, an objection to the relief requested in the Debtors' Motion. Accordingly, the Debtors respectfully request that the Court grant the relief requested in the Motion for the reasons set forth therein.

Remainder of page intentionally left blank

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested in the Motion and such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware
July 13, 2009

YOUNG CONAWAY STARGATT &
TAYLOR, LLP



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

---- and ----

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

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

PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION