

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

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| In re: | : | Chapter 11 |
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| BUILDING MATERIALS HOLDING CORPORATION, et al.,¹ | : | Case No. 09-12074 (KJC) |
| | : | |
| Reorganized Debtors. | : | |

MEMORANDUM ORDER²

Before the Court is the 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) (Docket No. 1667) (the “Motion”), to which Robert R. Thomas and The Restated Thomas Trust Dated April 14, 2009 (the “Thomas Parties”) have objected (Docket No. 1691). The Motion calls for interpretation of Paragraph 44 of this Court’s December 17, 2009 Order (Docket No. 1182) (the “Confirmation Order”), confirming the Debtors’ Joint Plan (Docket No. 1182) (“Plan”), which paragraph provides:

Robert R. Thomas and The Restated Thomas Trust. Notwithstanding anything that may be construed to the contrary in the Plan or this Confirmation Order, 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 Joint Plan of Reorganization as Amended October 22, 2009 [D.I. 1008]) shall be resolved by proceedings consistent with the Alternative Dispute Resolution provisions of the Acquisition Agreement. (Emphasis added)

¹ The Reorganized Debtors are as follows: Building Materials Holding Corporation, BMC West Corporation, SelectBuild Construction, Inc., SelectBuild Northern California, Inc., Illinois Framing, Inc., C Construction, Inc., TWF Construction, Inc., H.N.R. Framing Systems, Inc., SelectBuild Southern California, Inc., SelectBuild Nevada, Inc., SelectBuild Arizona, LLC, and SelectBuild Illinois, LLC.

² This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Paragraph 44 was added to the Confirmation Order to resolve a limited confirmation objection lodged by the Thomas Parties (Docket No. 1008) (the “Confirmation Objection”). In short, because two agreements (a Securities Asset Purchase Agreement and an Asset Purchase Agreement, each dated October 17, 2005, together, the “Acquisition Agreement”) were to be assumed under the Plan, the Thomas Parties sought, by the Confirmation Objection, to preserve their arbitration rights under these agreements.

The Debtors request, by their Motion, the following relief:

. . . that the Court enter an order which clarifies and determines that (1) the Thomas Parties’ “Cure Claims” under the specifically defined “Acquisition Agreement” that was assumed pursuant to the Confirmation Order cannot possibly include over \$800,000 in lease rejection damages asserted by Gregg Street, LLC and Ralph Road, LLC arising from the rejection of separate commercial real estate leases with those separate entities; and (2) that, instead, the Thomas Parties’ “Cure Claims” can at most include only the Thomas Parties’ own disputed claim, which they asserted in their proofs of claim and specifically described in their confirmation objection, that they are owed approximately \$400,000 related to an alleged lack of cooperation by the Debtors in defending certain construction defect claims

The applicable provision in the Acquisition Agreement (Section 22.8/22.9) states, in pertinent part:

(a) With the exception of disputes arising pursuant to Sections 10 and 22.6, any dispute, controversy or claim arising out of or relating to this Agreement or any transaction contemplated hereby, whether based on contract, tort, statute or other legal or equitable theory (including without limitation, any claim of fraud, misrepresentation or fraudulent inducement or any question of validity or effect of this Agreement including this clause) or the breach or termination thereof (“Dispute”), shall be resolved in accordance with this Section

(b) The parties shall first use their reasonable and good faith efforts to settle any Dispute through non-binding mediation to be held in Orange County, California (“Mediation”), prior to initiating binding arbitration as set forth below If for any reason the parties are unable to resolve the Dispute within thirty (30) days following the date of the Notice of Dispute, such Dispute shall be resolved by binding arbitration to be conducted before the American Arbitration Association (“AAA”) in accordance with the Commercial Arbitration rules and regulations promulgated by AAA as in effect at the time of the arbitration, and as follows

Contrary to the reference in the Reorganized Debtors’ Motion, the Thomas Parties’ Confirmation Objection does not expressly define “Cure Claim.” However, the confirmed Plan defines “Cure Claim,” in pertinent part, as follows:

Cure Claim means a Claim based upon the Debtors’ defaults on an Executory Contract or Unexpired Lease at the time such contract or lease is assumed by the Debtors pursuant to section 365 of the Bankruptcy Code. . . .

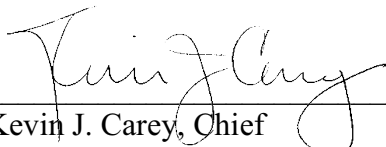
Plan Appendix A.

The Court is guided by the Plan definition of “Cure Claims,” which does not support, on this record, the interpretation of Paragraph 44 of the Confirmation Order urged by the Reorganized Debtors. Whether the Thomas Parties are entitled, as a matter of applicable non-bankruptcy law, to assert alleged damages in connection with assumption of the Acquisition Agreement pursuant to the Plan, but arising, in part, out of agreements with separate parties, is (i) not foreclosed by the agreed language in Paragraph 44 of the Confirmation Order, (ii) not outside the scope of the

applicable arbitration provision(s) and, therefore, (iii) a matter to be left to the Alternate Dispute Resolution provisions of the Acquisition Agreement.

It is therefore ORDERED and DECREED that the Motion is DENIED.³

BY THE COURT:



Kevin J. Carey, Chief
United States Bankruptcy Judge

Dated: November 19, 2010

³ Reorganized Debtors' counsel shall serve a copy of this Order and the accompanying Memorandum upon all interested parties and file a Certificate of Service with the Court.