

IN RE:)	
)	Chapter 11
)	
BUILDING MATERIALS HOLDING)	Case No. 09-12074 (KJC)
CORPORATION, <i>et al.</i>,¹)	
)	
Debtors.)	Jointly Administered
)	
)	Objection Deadline: July 23, 2009 at 4:00 p.m. (ET) (requested)
)	Hearing Date: July 29, 2009 at 10:00 a.m. (ET) (requested)
)	

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), submit this motion (the "***Motion***") for entry of an order, substantially in the form annexed hereto as ***Exhibit A***, pursuant to section 363 of title 11 of the United States Code (the "***Bankruptcy Code***") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***") authorizing the Debtors, in their discretion, to reimburse a limited amount of due diligence expenses to H.I.G. Capital ("***HIG***") in connection with its evaluation of the possibility of providing exit financing with respect to the Plan (as hereinafter defined). In support of this Motion, the Debtors respectfully represent:

DB02:8442248.1

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.

BACKGROUND

2. On June 16, 2009 (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 the Chapter 11 Cases. On July 26, 2009, the Office of the United States Trustee (the "*U.S. Trustee*") appointed the official committee of unsecured creditors (the "*Creditors' Committee*").

3. 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.

4. 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.

5. On the Petition Date, the Debtors filed their proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"). As set forth in greater detail in the Plan and Disclosure Statement, the Plan contemplates a restructuring 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 \$80 million in debtor-in-possession financing (the "**DIP Financing**"), which the Court approved on a final basis on July 1, 2009.

THE APPRAISAL REIMBURSEMENT

6. HIG is a member of the Debtors' prepetition lender group and is also a participant in the Debtors' debtor in possession financing. HIG has indicated a willingness to provide exit financing in the amount of \$100 million (the "**Exit Financing**") with respect to the Plan, but has advised the Debtors that, prior to committing to such Exit Financing, certain additional diligence is required to be performed by HIG. Specifically, as part of its due diligence,

HIG needs to engage an independent appraiser to conduct an appraisal of certain property of the Debtors (the "**Appraisal**"). As a condition precedent to engaging an appraiser to conduct the Appraisal, HIG has requested the Debtors to agree to reimburse HIG for the expenses of the Appraisal.

7. Exit Financing is integral to the success of the Plan. While the Debtors are in negotiations with Wells Fargo Bank, N.A. and various other parties to provide the Exit Financing, the Debtors believe that it is absolutely critical that they preserve flexibility and competitiveness with respect to such Financing. Accordingly, the Debtors have agreed to reimburse HIG for the costs of such Appraisal, up to a total amount equal to the lesser of (i) the actual, documented, out-of-pocket costs of HIG in respect of the Appraisal and (ii) \$100,000 (the "**Appraisal Reimbursement**"), subject to the following conditions: (a) the Debtors' receipt of Court approval to pay the Appraisal Reimbursement and (b) the Debtors' receipt of a copy of the Appraisal.

8. The Debtors' ability to pay the Appraisal Reimbursement on the conditions set forth herein is an essential inducement and condition of HIG's willingness to commission the Appraisal and perform the diligence necessary for it to make a final decision on providing the necessary Exit Financing. Accordingly, payment of the Appraisal Reimbursement is an actual and necessary cost of preserving the Debtors' estates because, absent such payment, the Debtors may not be able either expeditiously to finalize the required Exit Financing or to maintain the competitive tension necessary to obtain the most favorable terms possible for such Financing.

BASIS FOR RELIEF REQUESTED

9. Based on the facts and circumstances of these cases, the Debtors submit that good and sufficient justification exists to warrant approval of the Appraisal Reimbursement.

10. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate" 11 U.S.C. § 363(b)(1). Although section 363 does not set forth a standard for determining when it is appropriate for a court to authorize transactions outside of the ordinary course, courts in the Second Circuit have required that the proposed transaction be supported by the sound business judgment of the debtor. *See, e.g., In re Chateaugay Corp.*, 973 F.2d 141 (2d Cir. 1992) (holding that a good business reason must exist to authorize a use of property outside of the ordinary course under section 363); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (same). *See also Stephens Indus. v. McClung*, 789 F.3d 386, 390 (6th Cir. 1986) (a "bankruptcy court can authorize a sale of all of a chapter 11 debtor's assets under § 363(b)(1) when a sound business purpose dictates such action"); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval of a section 363 sale requires a showing that the proposed sale is fair and equitable, a good business reason exists for completing the sale and that the transaction is in good faith).

11. In the context of using assets of a bankruptcy estate to provide a proposed investor with a break-up fee, an expense reimbursement, or other similar protections, other bankruptcy courts use the "business judgment" test to measure the appropriateness of such provisions. *See Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992). The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.* (internal quotations and citations omitted).

12. In the Third Circuit, the propriety of payment of the Appraisal Reimbursement as a general administrative expense may also be evaluated, by analogy, under the standards imposed in *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999) ("*In re O'Brien*"). In *In re O'Brien*, a case involving the payment or break-up fees and expenses, the Third Circuit concluded that "the determination whether break-up fees or expenses are allowable under § 503(b) must be made in reference to general administrative expense jurisprudence. In other words, the allowability of [such] fees depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." *In re O'Brien*, 181 F.3d at 535. Here, the Appraisal Reimbursement should be approved because it will preserve and provide a significant benefit to the Debtors' estates.

13. Although a bidding incentives case, the circumstances under which the Third Circuit suggested the payment of reimbursable expenses would be appropriate is instructive in analyzing the Appraisal Reimbursement. The Third Circuit identified at least two instances in which expenses incurred by a third party may benefit the estate. First, expense reimbursement may be necessary to preserve the value of the estate if payment of the expenses "promote[s] more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *Id.* at 537. Second:

if the availability of break-up fees and expenses were to induce a bidder to research the value of the debtor and convert that value to a dollar figure on which other bidders can rely, the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth.

Id. Both of these criteria favor approval of the Appraisal Reimbursement. In this regard, the Debtors' agreement, subject to court approval, to reimburse these expenses will

induce HIG to continue its evaluation with respect to providing the Exit Financing and such Financing, if agreed to be extended by HIG, will not only preserve the value of the Debtors' estates but provide competitive pressure for other parties that are also evaluating providing Exit Financing to the Debtors. In addition, the expenses are specifically being incurred to allow HIG to research the value of the Debtors through the commission of the Appraisal and, if the results of that research are satisfactory, to be in a position to extend the Exit Financing to the Debtors.

14. In *In re O'Brien*, the Third Circuit referred to nine factors that the bankruptcy court viewed as relevant in deciding whether to approve expense reimbursement: (1) the presence of self-dealing or manipulation in negotiating the expense reimbursement; (2) whether the fee harms, rather than encourages, bidding; (3) the reasonableness of the expense reimbursement relative to the purchase price; (4) whether the "unsuccessful bidder place[d] the estate property in a sales configuration mode to attract other bidders to the auction;" (5) the ability of the request for expenses reimbursement "to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders"; (6) the correlation of the fee to a maximization of value of the debtor's estate; (7) the support of the principal secured creditors and creditors committees of expense reimbursement; (8) the benefits of the safeguards to the debtor's estate; and (9) the "substantial adverse impact [of the break-up fee] on unsecured creditors, where such creditors are in opposition to the break-up fee." See *In re O'Brien*, 181 F.3d at 536. Some of these factors are, of course, not applicable to the Appraisal Reimbursement because it does not arise in the context of a competing bid for the Debtors. Those that are applicable, however, clearly support approval of the Expense Reimbursement. The Appraisal Reimbursement involves no self-dealing or manipulating, encourages rather than

harms competitive bidding for exit financing, is reasonable relative to the amount of the proposed Exit Financing (\$100 million), maximizes the value of the Debtors' estates, is necessary to induce HIG to determine whether to propose to provide Exit Financing and, under the circumstances, has no adverse impact on either secured or unsecured creditors.

15. Bankruptcy courts have approved the payment of a variety of fees and expenses as beneficial to the estate in creating incentives to bid, to provide financing to, or purchase the assets of, the debtor based on the facts and circumstances of the case. *See In re Chi-Chi's Inc.*, Case No. 03-13063 (Bankr. D. Del. November 4, 2003); *In re Riverstone Networks*, Case No. 06-10110 (Bankr. D. Del. February 24, 2006); *In re Radnor Holdings*, Case No. 06-10894 (Bankr. D. Del. September 22, 2006) (aggregate fee and expense reimbursement of 3% permitted); *Tama Beef Packing, Inc.*, 312 B.R. 192 (Bankr. N.D. Iowa 2004); *In re Great Northern Paper, Inc.*, Case No. 03-10048 (Bankr. D. Me. February 18, 2003) (fee of 5.4% plus reimbursement of expenses upheld); *Integrated Resources*, 147 B.R. 650, 662 (S.D.N.Y. 1992); *In re Montgomery Ward Holding Corp.*, Case No. 97-1409 (PJW) (Bankr. D. Del. February 17, 1998); *In re Hechinger Investment Company Inc.*, Case No. 99-2261 (PJW) (Bankr. D. Del. October 1, 1999); *In re FSC Corp.*, Case No. 00-B-04659 (Bankr. N.D. Ill. February 28, 2000) (break-up fee of 3.4% plus reimbursement of expenses is reasonable).

16. Whether evaluated under the "business judgment rule" applied by many courts or the Third Circuit's "administrative expense" standard, the Appraisal Reimbursement should be approved because it is necessary to preserve the full value of the Debtors' estates. First, all negotiations between the Debtors and HIG have been conducted on a good faith, arm's-length basis and in consultation with counsel and advisors. Second, the Debtors believe that the

Appraisal Reimbursement is necessary to retain HIG as a potential source of Exit Financing and to maintain competitive tension with respect to such Financing.

17. The Debtors' payment of the Appraisal Reimbursement under the circumstances described herein would be (i) an actual and necessary cost and expense of preserving the Debtors' estates, within the meaning of section 503(b) of the Bankruptcy Code; (ii) of substantial benefit to the Debtors' estates; (iii) reasonable and appropriate in light of the efforts and the significant due diligence costs and expenses that have been and will be expended by HIG; and (iv) necessary to ensure that HIG will continue to pursue the Exit Financing.

18. The Debtors have determined, in the exercise of their business judgment, that paying the Appraisal Reimbursement is reasonable and in the best interests of the Debtors, their creditors, and all parties in interest. Exit Financing is critical to the Plan and the Debtors must agree to pay the Appraisal Reimbursement to induce HIG to continue its efforts to provide such Exit Financing. Even if HIG is subsequently unable to commit for Exit Financing or if HIG's exit financing proposal is not ultimately selected by the Debtors, the Debtors will still have benefited from the competitive tension generated by HIG's efforts and will still realize the benefit of the Appraisal that is conducted.

REQUEST FOR WAIVER OF STAY

19. 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), any "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." While the Debtors do not believe that Bankruptcy Rule 6004(h) applies to the relief requested in this motion, to the extent applicable, ample cause exists to waive any stay of the effectiveness of this

order because the Debtors' estates may be liable to pay any postpetition obligations arising under the Personal Property Leases as administrative expenses of their estates. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay under by Bankruptcy Rule 6004(h), to the extent applicable.

NOTICE

20. No trustee or examiner has been appointed in the Chapter 11 Cases. The Debtors have provided notice of filing of the Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the Official Committee of Unsecured Creditors; (c) counsel to Wells Fargo Bank, as agent under the Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (d) counsel to HIG; and (e) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

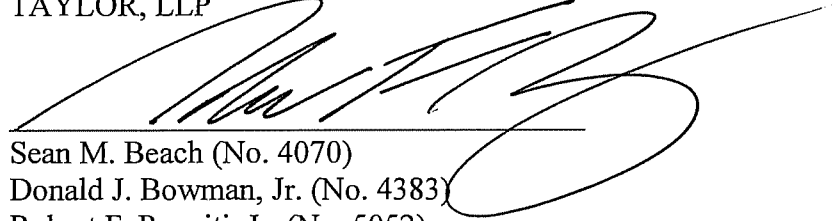
NO PRIOR REQUEST

21. 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
July 13, 2009

YOUNG CONAWAY STARGATT &
TAYLOR, LLP



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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

IN RE:)	
)	Chapter 11
)	
BUILDING MATERIALS HOLDING)	
CORPORATION, <i>et al.</i> , ¹)	Case No. 09-12074 (KJC)
)	
Debtors.)	Jointly Administered
)	
)	Objection Deadline: July 23, 2009 at 4:00 p.m. (ET) (requested)
)	Hearing Date: July 29, 2009 at 10:00 a.m. (ET) (requested)
)	

TO: (A) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (B) COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS; (C) COUNSEL TO WELLS FARGO BANK, AS AGENT UNDER THE PREPETITION CREDIT FACILITY AND THE DIP FACILITY (AS DEFINED IN THE PLAN); (D) COUNSEL TO HIG; AND (E) ALL PARTIES THAT HAVE REQUESTED NOTICE PURSUANT TO RULE 2002 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE.

PLEASE TAKE FURTHER NOTICE that the Debtors have filed a motion (the “Motion to Shorten”) requesting that any objections to the Reimbursement Motion be filed on or before **July 23, 2009 at 4:00 p.m. (ET)** (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the objection upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

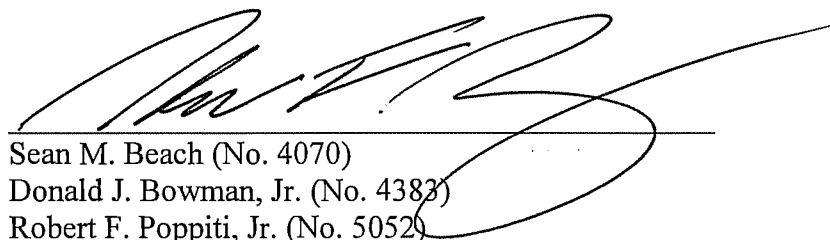
¹ The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C 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.

THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM
NO. 5, WILMINGTON, DELAWARE 19801.

PLEASE TAKE FURTHER NOTICE that if you fail to respond in accordance
with this notice, the Court may grant the relief requested in the Reimbursement Motion without
further notice or hearing.

Dated: Wilmington, Delaware
July 13, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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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. 09-12074 (KJC)
)	
Debtors.)	Jointly Administered
)	
)	Ref. Docket No. _____

**ORDER PURSUANT TO SECTION 363(b) OF THE BANKRUPTCY CODE
AND BANKRUPTCY RULE 6004 AUTHORIZING THE REIMBURSEMENT
OF CERTAIN DUE DILIGENCE EXPENSES**

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 pursuant to section 363 of title 11 of the United States Code (the "***Bankruptcy Code***") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***") authorizing the Debtors, in their discretion, to reimburse a limited amount of due diligence expenses to H.I.G. Capital ("***HIG***") as set forth in the Motion; 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

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.

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 objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.
3. Upon receipt of a copy of the Appraisal, the Debtors are authorized to pay HIG the Appraisal Reimbursement² in an amount equal to the lesser of (i) the actual, documented, out-of-pocket costs incurred by HIG to the provider of the Appraisal and (ii) \$100,000.
4. No recipient of the Appraisal Reimbursement shall be required to file an application to be employed pursuant to any section of the Bankruptcy Code or to file any interim or final fee application with the Court, provided, however, that the Debtors shall file with Court, as soon as practicable after payment of the Appraisal Reimbursement, a notice that reflects the amount of Appraisal Reimbursement paid and the recipient thereof.
5. Any claim of HIG resulting from the Debtors' failure to pay the Appraisal Reimbursement as set forth in the Motion and Order shall be afforded administrative expense priority under sections 503(b) and 507(a) of the Bankruptcy Code. Nothing herein contained

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

shall directly obligate the Debtors for the Appraisal or to the appraiser conducting such Appraisal.

6. The Court retains jurisdiction to enforce and implement the terms and provisions of this Order.

7. To the extent Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. 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).

9. 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
July __, 2009

Kevin J. Carey
Chief United States Bankruptcy Judge