

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	
	)	Chapter 11
BUILDING MATERIALS HOLDING	)	
CORPORATION, <i>et al.</i> , <sup>1</sup>	)	Case No. 09-12074 (KJC)
	)	
Debtors.	)	Jointly Administered
	)	
	)	Objection Deadline: TBD
	)	Hearing Date: TBD

**DEBTORS' THIRD OMNIBUS MOTION FOR AN ORDER AUTHORIZING  
REJECTION OF CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS,  
NUNC PRO TUNC TO THE REJECTION EFFECTIVE DATE**

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**, authorizing the Debtors to reject certain executory contracts. In support thereof, the Debtors respectfully represent:<sup>2</sup>

**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.

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<sup>1</sup> 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.

<sup>2</sup> 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.

## **RELIEF REQUESTED**

2. By this Motion, the Debtors, pursuant to sections 365(a), 1107(a), and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***") and Federal Rule of Bankruptcy Procedure 6006, seek entry of an order authorizing them to reject certain executory contracts in the form of severance agreements, a form of which is annexed hereto on ***Exhibit B*** (the "***Severance Agreements***" or the "***Agreements***"), which is attached to this Motion. Parties receiving this Motion should consult Exhibit B to locate the Agreements sought to be rejected and the names of the counterparties to such Severance Agreements (the "***Counterparties***").

## **BACKGROUND**

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

#### **SEVERANCE AGREEMENTS**

11. Prior to the Petition Date, the Debtors entered into various Severance Agreements with former employees. The Severance Agreements require the Debtors to pay the former employees and require that the former employees refrain from competing with the Debtors. The Debtors have determined, in the sound exercise of their business judgment, that these Severance Agreements are no longer of any value or utility to the Debtors because the

value derived from the non-compete clauses does not exceed the amounts the Debtors are required to pay pursuant to the Severance Agreements. Accordingly, the Debtors desire to reject the Severance Agreements.

### **BASIS FOR RELIEF REQUESTED**

#### **A. The Court Should Authorize Rejection of the Severance Agreements as a Sound Exercise of the Debtors' Business Judgment**

12. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors seek authority to reject the Severance Agreements. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). "The purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to renounce title to and abandon burdensome property." *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (quoting 2 Collier on Bankruptcy ¶ 365.01[1] (15th ed. 1993)).

13. Courts have found that severance agreements containing non-compete clauses are executory contracts. *See, e.g., In re Teligent, Inc.*, 268 B.R. 723, 729-32 (Bankr. S.D.N.Y. 2001) (holding that non-compete or non-disclosure agreements are executory contracts); *Hutchins v. Fordyce Bank & Trust Co. (In re Hutchins)*, 211 B.R. 325, 327 (Bankr. E.D. Ark. 1997) ("An employment contract is an example of an executory contract. Indeed, even an employment contract which terminated prepetition, but which contained a covenant not to compete, has been held to be an executory contract because the non-compete clause

created a continuing obligation on the part of the debtor.") (citing *In re Constant Care Cmty. Health Center, Inc.*, 99 B.R. 697 (Bankr. D. Md. 1989)).<sup>3</sup>

14. Courts defer to a debtor's business judgment in rejecting executory contracts or unexpired leases, and upon finding that a debtor has exercised its sound business judgment, approve such rejections under section 365(a) of the Bankruptcy Code. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (recognizing the "business judgment" standard used to authorize rejection of executory contracts), *superseded by statute on other grounds*, 11 U.S.C. § 1113, *as recognized in Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 44 (1st Cir. Mass. 2003); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 39-40 (3d Cir. 1989) (recognizing the "business judgment" standard, which requires only that the rejection will benefit the estate); *In re Trans World Airlines, Inc.*, 261 B.R. 103, 120 (Bankr. D. Del. 2001) ("A debtor's determination to reject an executory contract is governed by the business judgment standard."). The business judgment standard is "not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate." *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006).

15. The Debtors have determined, in the sound exercise of their business judgment, that these Severance Agreements are no longer of any value or utility to the Debtors because the value derived from the non-compete clauses does not exceed the amounts

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<sup>3</sup> There is contrary authority holding that severance agreements which contain non-compete clauses are not executory contracts. *See, e.g., In re Drake*, 136 B.R. 325 (Bankr. D. Mass. 1992); *In re Bluman*, 125 B.R. 359 (Bankr. E.D.N.Y. 1991). Nonetheless, the Debtors believe that the Severance Agreements at issue are executory contracts. However, if the Severance Agreements are deemed not to be executory contracts, then the Debtors do not need Court authority to reject the Agreements and may simply cease paying the amounts owed, with any unpaid amounts giving rise to general unsecured claims.

the Debtors are required to pay pursuant to the Severance Agreements. Accordingly, the Debtors' decision to reject the Severance Agreements is an exercise of sound business judgment that will benefit the Debtors' estates.

**B.     The Court Should Authorize Rejection of the Severance Agreements Effective as of the Date Hereof**

16.     The Debtors also respectfully submit that it is appropriate for the Court to order that the effective date of rejection for each Severance Agreement be the date hereof (the "***Rejection Effective Date***").

17.     While section 365 of the Bankruptcy Code does not specifically address whether the Court may order rejection to be effective retroactively, many courts have held that bankruptcy courts may, in their discretion, authorize rejection retroactive to a date prior to entry of the order authorizing the rejection where the balance of equities weighs in favor of retroactive application of rejection. *See, e.g., Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1074 (9th Cir. 2004) (affirming bankruptcy court's approval of retroactive rejection); *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machs., Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995) ("[B]ankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation"); *Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC)*, 297 B.R. 133, 140 (D. Colo. 2003) (holding that "because section 365 does not, as a matter of law, prohibit selection of a retroactive date for rejection, the bankruptcy court has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject."); *Constant Ltd. P'ship v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 37 (S.D.N.Y. 1995) (stating that section 365 does not include "restrictions as to the manner in which the court can approve rejection").

18. Here, the balance of the equities favors granting the Debtors' request for a retroactive effective date of rejection. Without a retroactive date of rejection, the Debtors will be forced to incur unnecessary administrative charges for Severance Agreements that do not provide a benefit to the estate that is equal to or greater than the cost to the estate. Moreover, the Counterparties to the Severance Agreements will not be unduly prejudiced if the rejection is deemed effective as of the Rejection Effective Date because they will receive notice of this Motion and have sufficient opportunity to act accordingly. The Debtors respectfully submit that it is fair and equitable for the Court to find that the Severance Agreements are rejected as of the Rejection Effective Date, as the retroactive rejection of the Severance Agreements promotes the purposes of section 365 by relieving the estate of additional and unnecessary administrative expenses.

19. Courts in this jurisdiction have routinely approved relief similar to the relief requested herein.<sup>4</sup> *See, e.g., In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Apr. 23, 2009) (authorizing the rejection of leases and granting retroactive relief requested); *In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Apr. 14, 2009) (same); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009) (authorizing the rejection of certain leases retroactive to the date the motion was filed); *In re Leiner Health Prods., Inc.*, Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 4, 2008) (authorizing the rejection of leases retroactive to the date the motion was filed); *In re Buffets Holdings, Inc.*, Case No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008)

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<sup>4</sup> 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.



(authorizing the rejection of leases retroactive to the petition date); *In re Pope & Talbot, Inc.*, Case No. 07-11738 (CSS) (Bankr. D. Del. Dec. 12, 2007) (authorizing the rejection of executory contracts retroactive to the petition date); *In re Am. Home Mortgage Holdings, Inc.*, Case No. 07-11047 (CSS) (Bankr. D. Del. Sept. 20, 2007) (authorizing the rejection of leases and granting retroactive relief requested).

### **REQUEST FOR WAIVER OF STAY**

20. 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, 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 Severance Leases as administrative expenses. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay possibly imposed by Bankruptcy Rule 6004(h).

### **NOTICE**

21. 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; (c) counsel to Wells Fargo Bank, as agent for both of the Debtors' prepetition lenders and proposed postpetition

lenders; and (4) the Counterparties listed on Exhibit B. Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

**NO PRIOR REQUEST**

22. 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**

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

**THIRD ORDER AUTHORIZING THE DEBTORS TO  
REJECT CERTAIN UNEXPIRED LEASES AND EXECUTORY CONTRACTS,  
NUNC PRO TUNC TO THE REJECTION EFFECTIVE DATE**

Upon consideration of the third omnibus 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 authorizing the Debtors to reject certain executory contracts, as set forth in the Motion; and upon the Street Declaration<sup>2</sup> 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

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<sup>1</sup> 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.

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

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. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors are authorized to reject the Severance Agreements listed in **Exhibit B** that was annexed to the Motion. Effective immediately, such Severance Agreements are deemed rejected (the "**Rejections**"), with the Rejections being effective as of June 16, 2009 (the "**Rejection Effective Date**").
3. The Counterparties to the Severance Agreements shall have until the date fixed by this Court pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3) to file any claim for damages arising from rejection of a Severance Agreement.
4. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.
5. The Debtors do not waive any claims they may have against the Counterparties to the Severance Agreements, whether or not such claims arise under, are related to the rejection of, or are independent of the Severance Agreements.
6. Nothing herein shall prejudice the rights of the Debtors to argue that any claim for damages arising from the rejection of the Severance Agreements is limited to the remedies available under any applicable termination provision of such Severance Agreement, or that any such claim is an obligation of a third party, and not that of the Debtors or their estates.

7. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6006(c) and the Local Bankruptcy Rules are satisfied by such notice.

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

9. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Date: Wilmington, Delaware  
\_\_\_\_\_, 2009

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KEVIN J. CAREY  
CHIEF UNITED STATES BANKRUPTCY JUDGE

# **EXHIBIT B**

## **Severance Agreements to be Rejected**



Schedule of Agreements to be Rejected

Former Employee	Debtor Counterparty(ies)	Monthly Rate	Annual Total	Severance Term	
				Start	End
Barrette, Robert	SelectBuild Arizona, LLC	\$5,209	\$62,502	4/1/2009	9/1/2009
Garcia, Robert	SelectBuild Construction, Inc., Building Materials Holding Corporation	\$8,333	\$100,000	7/1/2008	7/1/2010
Knipp, Lawrence	Building Materials Holding Corporation; SelectBuild Southern California, Inc.	\$8,333	\$100,000	9/1/2007	12/31/2009
Milligan, William	Building Materials Holding Corporation; BMC West Corporation; SelectBuild Construction, Inc.	\$6,765	\$81,181	2/27/2009	8/14/2009
Volkman, John	Building Materials Holding Corporation	\$8,333	\$100,000	7/1/2008	7/1/2010