

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

**IN RE:**

**BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>**

**Debtors,**

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**Chapter 11**

**Case No. 09-12074 (KJC)**

**Jointly Administered**

**Ref. Docket No.: 365**

**DEBTORS' OBJECTION TO MARIO CRUZ LUNA'S  
MOTION FOR RELIEF FROM STAY**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), respectfully submit this Opposition to Mario Cruz Luna's Motion for Relief From Stay [Docket No. 365] filed on August 4, 2009 (the "***Motion***") as follows:

**I. Factual Background**

1. On June 16, 2009, the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* Pursuant to that certain order entered by the court on June 17, 2009 [Docket No. 52], the chapter 11 cases filed by each of the Debtors are being jointly administered.

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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.

2. On July 18, 2007, Mario Cruz Luna ("**Movant**") filed suit against Debtor BMC West Corporation in the 34<sup>th</sup> Judicial District Court of El Paso County, El Paso, Texas, Cause No. 2007-3332, alleging that BMC West Corporation wrongfully terminated his employment.

3. On August 4, 2009, Movant filed the Motion requesting that this Court, pursuant to 11 U.S.C. § 362, "grant relief from automatic stay to authorize and permit Movant to prosecute their claims against Debtor to final Judgment . . ." Mot. ¶ VIII. Movant asserts that "[i]t is the belief of the Movant that the above debtor is insured by a third party insurance company and its attorney is defending the claim of Movant and to pay [sic] all sums, not exceeding the limits of the policy which the Debtor should become liable to pay as damages imposed on it by law." Mot. ¶ VII. Indeed, Movant states that "if Judgment is in excess of insurance limits, Movant reserves the right to amend it's [sic] Proof of Claim for the excess and will make no claims against debtor beyond the stated policy limits of debtor's insurance policy." Mot. ¶ VIII.

4. The Movant's belief with respect to insurance is incorrect. Although the Debtors have an Employment Practices Liability Insurance Policy, it has a \$1,000,000 per claim retention for judgments, settlements and defense costs.<sup>2</sup> According to paragraph 2 of the "Proof of Claim" attached to the Movant's Motion, the Movant's claim for damages is "\$250,000 plus interest and costs of suit." Thus, the Employment Practices Liability Insurance Policy is not implicated by the Movant's suit and the Movant's only articulated basis for lifting the stay is factually incorrect.

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<sup>2</sup> The Declarations page from the Employment Practices Liability Insurance Policy is attached hereto as Exhibit A.

## II. Argument

5. The court should deny the Motion because Movant has not established that cause exists to lift the stay. Permitting the continuation of the civil suit will prejudice the Debtors and impede their orderly rehabilitation.

6. The automatic stay provision of 11 U.S.C. § 362(a) is "one of the fundamental debtor protections provided by the bankruptcy laws." *Midatlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 503 (1986). The purpose of the automatic stay is "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor." *Borman v. Raymark Industries, Inc.*, 946 F.2d 1031, 1036 (3rd Cir. 1991); *accord In re DBSI, Inc.*, 407 B.R. 159, 166 (Bankr. D. Del. 2009).

7. Section 362(d) of the Bankruptcy Code permits the Court to grant relief from the stay for cause. The movant bears the initial burden "to produce evidence that cause exists to grant relief from the automatic stay." *In re DBSI, Inc.*, 407 B.R. at 166. Because "cause" is not defined by the code, the Court conducts a "fact intensive case-by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the stay." *In re The SCO Group, Inc.*, 395 B.R. 852, 856 (Bankr. D. Del. 2007). The Court uses a "three-prong balancing test" to determine whether to lift the stay: (1) whether permitting continuation of the civil suit will cause great prejudice to the debtor; (2) whether, if the stay is maintained, the hardship to the creditor outweighs the hardship to the debtor; and (3) whether the creditor is likely to prevail on the merits of the civil suit. *Id.* at 857.

8. The Movant is not entitled to relief from the automatic stay because he has not produced any evidence to show that cause exists to lift the stay. Movant has not provided any evidence of whether the hardship to Movant will outweigh the hardship to the Debtors or whether Movant will likely prevail on the merits of his lawsuit. Without evidence, the Court cannot conduct the necessary "fact intensive case-by-case balancing test" to determine whether it should lift the stay. *Id.* at 856.

9. Movant simply asserts that he "is prejudiced if not permitted to proceed . . . [and that t]he continuation of the State Court suit will not hinder, burden, delay or be inconsistent with this case." Mot. ¶¶ IX-X. However, there is no evidence of any kind that Movant needs immediate relief from the stay. Further, the Debtors will be prejudiced by the lifting of the stay and continuation of the civil suit. The only reason Movant offers for lifting of the stay is the statement that the Debtors are "insured by a third party insurance company," presumably implying that lifting the stay will not prejudice the Debtors because the Debtors' insurance policy would satisfy the judgment. Mot. ¶ IX. As noted above, Movant's "Proof of Claim" attached to the Motion asserts claims in the amount of \$250,000 plus interest and costs of the suit, which is presumably the amount requested in the civil suit. The self-insured retention under the Debtors' Employment Practices Liability Insurance Policy is \$1,000,000. Thus, there is no insurance available to pay the costs of defense or any settlement or judgment with respect to the Movant's suit and continuation of the suit would greatly prejudice the Debtors without any benefit to the Movant that will outweigh this hardship.

### **III. Requested Relief**

10. The Debtors respectfully request that the Court deny Movant's Motion for Relief from Stay. Movant has not provided any evidence that cause exists to lift the stay, nor has

Movant shown that he will be prejudiced if the court does not lift the stay. However, the Debtors will be prejudiced if the Court lifts the stay and permits the civil suit to continue. The continuance of the civil suit will require the Debtors to expend costs to defend the suit and will distract from their efforts to reorganize. For these reasons, the balancing test clearly weighs in favor of continuing the stay.

Dated: Wilmington, Delaware  
August 21, 2009

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---- and ----

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ATTORNEYS FOR DEBTORS AND DEBTORS IN  
POSSESSION

EXHIBIT A

[Declarations Pages]

## Exhibit A



### EMPLOYMENT PRACTICES LIABILITY INSURANCE POLICY

- |   |  |
|---|--|
| <input type="checkbox"/> AIG Insurance Company                          | <input type="checkbox"/> Granite State Insurance Company   |
| <input type="checkbox"/> American Home Assurance Company                | <input type="checkbox"/> Illinois National Insurance Company   |
| <input type="checkbox"/> American International South Insurance Company | <input checked="" type="checkbox"/> National Union Fire Insurance Company of Pitts., PA <sup>®</sup> |
| <input type="checkbox"/> AIG Casualty Company                           | <input type="checkbox"/> New Hampshire Insurance Company   |

(each of the above being a capital stock company)

NOTICE: EXCEPT TO SUCH EXTENT AS MAY OTHERWISE BE PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS GENERALLY LIMITED TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED IN WRITING TO THE INSURER PURSUANT TO THE TERMS HEREIN. PLEASE READ THE POLICY CAREFULLY AND DISCUSS THE COVERAGE THEREUNDER WITH YOUR INSURANCE AGENT OR BROKER.

NOTICE: THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR LEGAL DEFENSE. AMOUNTS INCURRED FOR LEGAL DEFENSE SHALL BE APPLIED AGAINST THE RETENTION AMOUNT.

NOTICE: THE INSURER DOES NOT ASSUME ANY DUTY TO DEFEND. HOWEVER THE INSURED MAY UNDER CERTAIN CONDITIONS TENDER THE DEFENSE OF A CLAIM. IN ALL EVENTS, THE INSURER MUST ADVANCE DEFENSE COSTS PAYMENTS PURSUANT TO THE TERMS HEREIN PRIOR TO THE FINAL DISPOSITION OF A CLAIM.

POLICY NUMBER: 744-63-65

REPLACEMENT OF POLICY NUMBER: 626-10-09

#### DECLARATIONS

ITEM 1. NAMED ENTITY: *BUILDING MATERIALS HOLDING CORPORATION*

MAILING ADDRESS: *FOUR EMBARCADERO CENTER  
SUITE 3250  
SAN FRANCISCO, CA 94111*

STATE OF INCORPORATION OR STATE OF FORMATION OF THE NAMED ENTITY:  
*Delaware*

ITEM 2. SUBSIDIARY COVERAGE: any past, present or future Subsidiary of the Named Entity

ITEM 3. POLICY PERIOD: From: *June 4, 2007* To: *June 4, 2008*  
(12:01 A.M. standard time at the address stated in Item 1.)

ITEM 4. LIMIT OF LIABILITY: *\$15,000,000* aggregate for all Loss combined (Including Defense Costs)

ITEM 5. RETENTION:  
Judgments, Settlements and  
Defense Costs (non-Indemnifiable Loss) *None*

7138480

Judgements, Settlements and Defense Costs  
(Company and Indemnifiable Loss)

\$1,000,000

for Loss arising from Claims alleging the same  
Employment Practices Violation or related  
Employment Practices Violation (waivable under  
Clause 6 in certain circumstances)

ITEM 6. CONTINUITY DATES:

- A. All coverages (other than Outside Entity Coverage): February 1, 2000  
B. Outside Entity Coverage: Per Outside Entity: February 1, 2000

ITEM 7. PREMIUM: \$255,000

*Premium for Certified Acts of Terrorism Coverage under Terrorism Risk Insurance Act 2002: Not applicable, coverage rejected by insured. Any coverage provided for losses caused by an act of terrorism as defined by TRIA (TRIA Losses) may be partially reimbursed by the United States under a formula established by TRIA as follows: 90% of TRIA Losses in excess of the insurer deductible mandated by TRIA, the deductible to be based on a percentage of the insurer's direct earned premiums for the year preceding the act of terrorism.*

*A copy of the TRIA disclosure sent with the original quote is attached hereto.*

ITEM 8. NAME AND ADDRESS OF INSURER (hereinafter "Insurer"):  
(This policy is issued only by the insurance company indicated below.)

National Union Fire Insurance Company of Pittsburgh, Pa.

175 Water Street

New York, NY 10038

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