



## **RELIEF REQUESTED**

2. By this Motion, the Debtors, pursuant to sections 105, 1107, and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***"), seek entry of an order authorizing and approving the Settlement Agreement (as defined herein).

## **BACKGROUND**

3. 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 June 26, 2009, the Office of the United States Trustee (the "***U.S. Trustee***") appointed the official committee of unsecured creditors (the "***Creditors Committee***").

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. 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 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 \$80 million in debtor-in-possession financing, which the Court approved on a final basis on July 1, 2009.

### **THE ACEVEDO ACTION**

7. On September 22, 2008 Eduardo Acevedo and 13 other current and former employees of the Debtors filed a putative class action and collective action pursuant to Section 16(b) of the Fair Labor Standards Act (the "**FLSA**") on behalf of themselves and all others similarly situated in the United States District Court for the Central District of California [Case

No. CV 08-06227 SJO (CWX)] (the "*Acevedo Action*") which alleges that the Debtors<sup>2</sup> violated various state and federal wage and hour laws. To date, 96 current and former employees of the Debtors have submitted written consent forms to join in the Acevedo Action as named plaintiffs (collectively, the "*Acevedo Plaintiffs*" or the "*Named Plaintiffs*").

8. The Acevedo Plaintiffs make a variety of allegations, all of which suggest that the Debtors failed to pay their employees in accordance with applicable law or to provide their employees with breaks that are required under applicable law. To wit: the Acevedo Plaintiffs allege, *inter alia*, that the Debtors employed the Acevedo Plaintiffs and others "for work weeks in excess of 40 hours and/or in excess of eight hours per day without paying their wages at the required overtime rate for those excess hours" and failed to compensate their employees "for all time worked and activities completed for their employer, including, but not limited to, travel time between job sites, administrative time, time during which work is delayed, and time spent performing preliminary and postliminary activities." Second Amended Complaint ¶¶ 53 and 54.

9. In their Second Amended Complaint, the Acevedo Plaintiffs seek permission to maintain the Acevedo Action as an "opt-in" collective action pursuant to Section 16(b) of the FLSA (the "*Collective Action*") "on behalf of all persons who were, are, or will be employed by Defendants in non-supervisory construction trade job positions in California, Nevada, or Arizona, at any time during the period from September 22, 2005 to the present, who have not been compensated at one and one-half times the regular rate of pay for all work

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<sup>2</sup> Debtors Building Materials Holding Corporation, SelectBuild Construction, Inc., C Construction, Inc., SelectBuild Arizona, LLC, and SelectBuild Nevada, Inc. are named as defendants in the Second Amended Complaint.

performed in excess of forty (40) hours per work week" (collectively, the "***Proposed Collective Action Plaintiffs***"). *Id.* at ¶ 27.

10. The Acevedo Plaintiffs also seek certification of three classes of current and former employees pursuant to Federal Rule of Civil Procedure 23. First, the Acevedo Plaintiffs seek certification of a class consisting of "all persons who were, are or will be employed by Defendants BMHC, SelectBuild and C Construction...within the State of California in non-supervisory construction trade job positions between September 22, 2004 and the present" (the "***Putative California Class***"), alleging that members of the Putative California Class "were subjected to defendants' policies and practices of refusing to compensate employees in non-supervisory construction trade jobs for all time worked and for overtime hours worked, failing to pay employees in non-supervisory construction trade jobs all wages due upon termination of employment, failing to reflect all hours worked on the paycheck stubs of employees in non-supervisory construction trade jobs, and failing to compensate employees in non-supervisory construction trade jobs for missed rest periods." *Id.* at ¶¶ 31 and 35.

11. Similarly, the Acevedo Plaintiffs seek certification of a class consisting of "all persons who were, are or will be employed by Defendants BMHC, SelectBuild, and SelectBuild Nevada...within the State of Nevada in non-supervisory construction trade job positions between September 22, 2004 and the present" (the "***Putative Nevada Class***"), alleging that members of the Putative Nevada Class "were subjected to defendants' policies and practices of refusing to compensate employees in non-supervisory construction trade jobs for all regular and overtime hours worked, failing to pay employees in non-supervisory construction trade jobs full wages upon termination of employment in accordance with Nevada Revised Statutes

§§608.020 and 608.030, and failing to provide employees in non-supervisory construction jobs with rest breaks as required by Nevada Revised Statutes §608.019." *Id.* at ¶¶ 38 and 42.

12. Finally, the Acevedo Plaintiffs seek certification of a class consisting of "all persons who were, are or will be employed by Defendants BMHC, SelectBuild, and SelectBuild Arizona...within the State of Arizona in non-supervisory construction trade job positions between September 22, 2007 and the present" (the "***Putative Arizona Class***", and together with the Proposed Collective Action Plaintiffs, the Putative California Class, and the Putative Nevada Class, the "***Putative Class Action Plaintiffs***"), alleging that members of the Putative Arizona Class "were subjected to Arizona Defendants' policies and practices of refusing to compensate employees in non-supervisory construction trade jobs for regular and overtime hours worked." *Id.* at ¶¶ 45 and 49.

13. The Debtors estimate that there may be as many as 32,000 Putative Class Action Plaintiffs. Significantly, however, none of the putative classes has been certified nor has any order for conditional certification been issued and no plaintiffs have joined the Collective Action other than the Named Plaintiffs.

### **THE SETTLEMENT AGREEMENT**

14. The Debtors vigorously dispute the allegations contained in the Second Amended Complaint and do not believe that there is a basis for class certification or that they would be found liable for any damages in the Acevedo Action if such Action were litigated to a final resolution by a trier of fact. Nonetheless, the sheer size of the putative classes is sufficient to transform the otherwise minimal risk of loss associated with the Acevedo Action into a massive potential, though unlikely, liability for the Debtors. The settlement of this potential liability has two important consequences for the Debtors and their estates. First, it removes the

uncertainty surrounding the possible certification of the Acevedo Action and a subsequent favorable ruling in favor of the Putative Class Action Plaintiffs. Although the Debtors dispute that any liability exists, if the Putative Class Action Plaintiffs were to prevail in their action against the Debtors, the allowed unsecured claims of the Putative Class Action Plaintiffs might be very substantial and would substantially dilute the recovery of the other unsecured creditors in these Chapter 11 Cases.

15. Second, and perhaps more important, the uncertainty surrounding the Debtors' liability in the Acevedo Action threatens to disrupt the Debtors' reorganization efforts. This is the case because in order for the Court to confirm the Debtors' Plan, the Court must find that the Plan is feasible. *See* 11 U.S.C. § 1129(a)(11); *see also Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988); *In re Frascella Enters.*, 360 B.R. 435, 453 (Bankr. E.D. Pa. 2007). Because the Debtors' Plan proposes to pay claims entitled to priority pursuant to section 507(a) of the Bankruptcy Code in full on the Effective Date of the Plan or, if such claims are disputed, within 30 days of the date on which such claims are allowed by the Court, the Debtors must demonstrate that they can make these payments in order to demonstrate that the Plan is feasible. The Debtors can only demonstrate an ability to make these payments if they know the extent of the claims entitled to priority pursuant to section 507(a) of the Bankruptcy Code. A portion of the damages sought on behalf of the Putative Class Action Plaintiffs would be entitled to priority pursuant to section 507(a)(4) of the Bankruptcy Code (the "**Priority Claims**") if the Acevedo Plaintiffs were to succeed in certifying the putative classes, and, the Putative Class Action Plaintiffs were to prevail on their claims. Absent the settlement, as of the date of the confirmation hearing this amount would not be known and might not be readily ascertainable, forcing the Debtors either to delay the confirmation hearing or the Court to conduct an expensive

and time consuming estimation hearing. In the event of an estimation hearing, there is a further risk that the Debtors would not be able to make the requisite showing that their Plan is feasible because they might not be able to demonstrate that they will be able to pay the full amount of the Priority Claims within 30 days of the date on which such claims are allowed by the Court if such claims were to be allowed by the Court. In any event, the settlement reduces the uncertainties created by both of these events.

16. In light of the deleterious effects that the very existence of the Acevedo Action has on the Debtors' ability to successfully reorganize, the potentially substantial dilutive effect the Acevedo Action could have on the recovery of the Debtors' unsecured creditors, and the significant costs attendant with continuing to litigate the Acevedo Action, the Debtors have determined, in the sound exercise of their business judgment, that it is in the best interests of the Debtors, their estates, and all interested parties to settle the Acevedo Action. Accordingly, the defendant Debtors entered into that certain Settlement Agreement and Release (the "***Settlement Agreement***") attached hereto as ***Exhibit B***.

17. The Settlement Agreement settles the claims of the Named Plaintiffs and thereby halts the Collective Action and the putative class actions. Pursuant to the Settlement Agreement, the defendant Debtors agreed to pay \$244,343.57 to the Named Plaintiffs in full and final settlement and satisfaction of any claims related to the allegations contained in the Second Amended Complaint (the "***Settlement Consideration***"). The defendant Debtors also agreed to pay \$230,505.48 to the Acevedo Plaintiffs' counsel for attorneys' fees and costs related to the Acevedo Action (the "***Fee Settlement***"). The Settlement Consideration and the Fee Settlement are separate and distinct settlements related to the Acevedo Action. Pursuant to the Settlement Agreement, the Court may approve of the Settlement Consideration and not the Fee Settlement,



in which case the Settlement Agreement will remain in full force and effect in all respects except that the Acevedo Plaintiffs' counsel will retain the right to either (i) accept whatever reduced amount of attorneys' fees and costs is approved by the Court, or (ii) file a separate claim for attorneys' fees and costs in such amount as the Acevedo Plaintiffs' counsel believes appropriate. If the Acevedo Plaintiffs' counsel chooses the latter course of action, the Debtors retain the right to object to the allowance of the proof of claim filed by such counsel to the extent that such claim exceeds the amount of the Fee Settlement. By this Motion, the Debtors respectfully request that the Court approve the entire Settlement Agreement, including both the Settlement Consideration and the Fee Settlement.

#### **BASIS FOR RELIEF REQUESTED**

18. Bankruptcy Rule 9019(a) provides that "on motion by the trustee and after a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). The settlement of time-consuming and burdensome litigation, especially in the bankruptcy context, is encouraged and "generally favored." *In re World Health Alternatives, Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006); *see also In re Penn Cent. Transp. Co.*, 596 F.2d 1102 (3d Cir. 1979) ("[I]n administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims . . .") (quoting *Protective Comm. for Indep. Stockholders of TMT Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

19. In determining the fairness and equity of a compromise in bankruptcy, the United States Court of Appeals for the Third Circuit has stated that it is important that the bankruptcy court "apprise[] itself of all facts necessary to form an intelligent and objective opinion of the probabilities of ultimate success should the claims be litigated, and estimated the complexity, expense and likely duration of such litigation, and other factors relevant to a full and fair assessment of the [claims]." *In re Penn Cent. Transp. Co.*, 596 F.2d 1127, 1146 (3d Cir.

1979); *see also In re Marvel Entm't Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (describing "the ultimate inquiry to be whether 'the compromise is fair, reasonable, and in the interest of the estate'" (quoting *In re Louise's Inc.*, 211 B.R. 798, 801 (D. Del. 1997))).

20. The Third Circuit Court of Appeals has enumerated four factors that should be considered in determining whether a compromise should be approved. The four enumerated factors are: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *accord Will v. Northwestern Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006).

21. Furthermore, the decision to approve a compromise "is within the sound discretion of the bankruptcy court." *In re World Health Alternatives, Inc.*, 344 B.R. at 296; *see also In re Neshaminy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa. 1986), cited with approval in *In re Martin*, 91 F.3d at 393. In making its decisions, the bankruptcy court should not substitute its judgment for that of the debtor. *See In re Neshaminy Office Bldg. Assocs.*, 62 B.R. at 803. The court is not to decide the numerous questions of law or fact raised by litigation, but rather should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness. *See In re W.T. Grant and Co.*, 699 F.2d 599, 608 (2d Cir. 1983) ("[T]he court does not have to be convinced that the settlement is the best possible compromise. Rather, the court must conclude that the settlement is within the reasonable range of litigation possibilities.") (internal citations and quotations omitted); *see also In re World Health Alternatives, Inc.*, 344 B.R. at 296.

22. Pursuant to the Settlement Agreement, and subject to this Court's approval, the Settlement Agreement will be in full and final satisfaction of any and all claims that the Named Plaintiffs have or may have against the Debtors and their estates with respect to the allegations contained in the Second Amended Complaint. The Debtors believe that entering into the Settlement Agreement will provide a material benefit to these estates for the benefit of all stakeholders by eliminating the uncertainty surrounding the Acevedo Action, by fixing the Debtors' liability with respect to the Acevedo Action, and by allowing the Debtors to avoid potentially time-consuming and costly litigation.

23. As noted previously, the uncertainty surrounding the Acevedo Action threatens to undermine confirmation of the Debtors' Plan and thereby derail the Debtors' reorganization efforts. By settling the Acevedo Action, the Debtors have been able to eliminate this uncertainty and to move forward with their reorganization efforts. At the same time, the Debtors have been able to fix the amount of their potential liability in the Acevedo Action and thereby ensure that the recovery of the Debtors' other unsecured creditors is not substantially diluted by the claims of the Putative Class Action Plaintiffs. In addition, the Settlement Agreement relieves the Debtors' estates of the burden of protracted time-consuming and costly litigation with the Acevedo Plaintiffs. The value of these benefits greatly exceeds the amount that the Debtors are required to pay under the terms of the Settlement Agreement. As such, the Settlement Agreement "is fair, reasonable, and in the interest of the estate." *In re Marvel Entm't Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (quoting *In re Louise's Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). Indeed, because the Debtors' potential exposure in the Acevedo Action greatly exceeds the Debtors' payment of \$474,849.05 under the Settlement Agreement, the amount paid to settle the litigation is well "within the reasonable range of litigation possibilities," *In re World*

*Health Alternatives, Inc.*, 344 B.R. at 296 (internal citations and quotations omitted), and certainly does not "fall[] below the lowest point in the range of reasonableness," *In re W.T. Grant and Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (internal citations and quotations omitted).

24. In light of the foregoing, the Debtors, in their business judgment, believe that the Settlement Agreement represents a compromise between the Debtors and the Named Plaintiffs which is fair and equitable and advances the paramount interests of the creditors of these estates. Accordingly, for the reasons set forth above, the Debtors submit that entering into the Settlement Agreement is an exercise of sound business judgment and that the Court should therefore approve the Settlement Agreement.

#### **NOTICE**

25. No trustee or examiner has been appointed in these Chapter 11 Cases. The Debtors have provided notice of filing of the Motion to: (a) the U.S. Trustee; (b) counsel to Wells Fargo Bank, as agent under the Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (c) counsel to the Creditors' Committee; (d) counsel to the Acevedo Plaintiffs; 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**

26. 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  
August 21, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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ATTORNEYS FOR DEBTORS AND DEBTORS IN  
POSSESSION

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

|   |   |  |
|---|---|--|
| <b>In re:</b>   | ) |  |
|   | ) | <b>Chapter 11</b>  |
|   | ) |  |
| <b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b> | ) | <b>Case No. 09-12074 (KJC)</b>                                 |
|   | ) |  |
| <b>Debtors.</b>   | ) | <b>Jointly Administered</b>                                    |
|   | ) |  |
|   | ) | <b>Objection Deadline: September 3, 2009 at 4:00 p.m. (ET)</b> |
|   | ) | <b>Hearing Date: September 10, 2009 at 3:00 p.m. (ET)</b>      |

**NOTICE OF MOTION**

TO: (A) The Office of the United States Trustee for the District of Delaware; (B) Counsel to Wells Fargo Bank, as Agent Under the Prepetition Credit Facility and the DIP Facility (as Defined in the Plan); (C) Counsel to the Official Committee of Unsecured Creditors; (D) All Parties That Have Requested Notice Pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure; and (E) Counsel to the Acevedo Plaintiffs.

**PLEASE TAKE NOTICE** that the above-captioned debtors and debtors in possession (collectively, the “Debtors”) have filed the attached **Debtors’ Motion for an Order Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing and Approving the Settlement with the Acevedo Plaintiffs** (the “Motion”).

**PLEASE TAKE FURTHER NOTICE** that any objections to the Motion must be filed on or before **September 3, 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.

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON SEPTEMBER 10, 2009 AT 3:00 P.M. (ET) BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.**

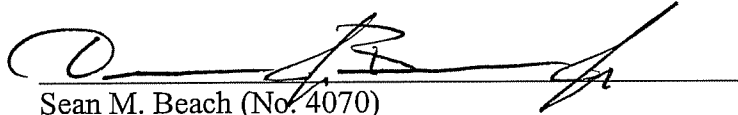
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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern 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.

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

Dated: Wilmington, Delaware  
August 21, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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ATTORNEYS FOR THE DEBTORS  
AND DEBTORS-IN-POSSESSION

# **EXHIBIT A**

## **Proposed Order**



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

**IN RE:**

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

**Debtors.**

)  
) **Chapter 11**

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

)  
) **Jointly Administered**

)  
) **Ref. Docket No. \_\_\_\_\_**

**ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND  
BANKRUPTCY RULE 9019, AUTHORIZING AND APPROVING THE SETTLEMENT  
WITH THE ACEVEDO PLAINTIFFS**

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 authorizing and approving the Settlement Agreement<sup>2</sup> with the Acevedo Plaintiffs, all 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 the statements in support of the relief requested therein at a hearing before the Court (the "***Hearing***"); and the Court having determined

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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 but not defined herein shall have the meanings ascribed to them in the Motion.

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 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, the Settlement Agreement is approved, and the terms, conditions, and provisions of the Settlement Agreement are incorporated in this Order by reference as if fully set forth herein.
3. The Debtors are authorized and empowered to take any and all steps and to perform such other and further actions as are necessary to carry out, effectuate or otherwise enforce the terms, conditions and provisions of the Settlement Agreement.
4. The Court shall retain jurisdiction over any and all matters arising from or related to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware  
September \_\_, 2009

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Kevin J. Carey  
Chief United States Bankruptcy Judge

# **EXHIBIT B**

## **Settlement Agreement**

## **SETTLEMENT AGREEMENT AND RELEASE**

### **RECITALS**

A. On September 22, 2008, a lawsuit entitled *Eduardo Acevedo, et al. v. Building Materials Holding Corporation*, Case No. CV 08-06227 SJO (CWx), was filed in the United States District Court for the Central District of California (the "Action"). The Action, which is styled both as a putative class action under Federal Rule of Civil Procedure 23 and a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., alleges that Building Materials Holding Corporation ("BMHC") and subsidiary corporations violated state and federal wage and hour laws.

B. A total of 96 current and former employees of Defendants have submitted written consent forms to become party plaintiffs with respect to the FLSA claims in the Action. Those individuals are listed on Attachment A hereto. The individuals listed on Attachment A and who sign this Agreement are referred to herein as "Plaintiffs".

C. On June 16, 2009, Building Materials Holding Corporation, SelectBuild Construction, Inc., C Construction, Inc., SelectBuild Arizona, LLC, and SelectBuild Nevada, Inc. (collectively referred to herein as "Defendants") filed voluntary petitions (the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), Case No. 09-12074. As a result of this filing, the Action was automatically stayed pursuant to 11 U.S.C. § 362.

D. At no time has the Action been certified to proceed as a class action, nor has any order for conditional certification been issued.

E. Plaintiffs and Defendants are entering into this Settlement Agreement ("Agreement") in order to resolve any and all claims that Plaintiffs may have against

Defendants and all related entities that arise from or are based on the facts, allegations and legal theories set forth in the Action (including all amended complaints).

F. Defendants' execution and performance of this Agreement are subject to approval of the Agreement by the Bankruptcy Court.

### **AGREEMENT**

1. Defendants are entering into this Agreement for the sole purpose of avoiding the time and expense involved in the litigation of this matter. This Agreement shall not in any way be construed as an admission by Defendants that they have acted wrongfully with respect to Plaintiffs or any other person, or that Plaintiffs or any other persons have any rights whatsoever against Defendants, their current and former predecessors, successors, affiliates, divisions, related corporate entities, assigns, owners, stockholders, partners, directors, officers, employees, agents, representatives, attorneys and all persons acting by, through, under or in concert with any of them (collectively "Defendant Releasees"), and Defendants specifically deny any liability to or wrongful acts against Plaintiffs or any other person, on the part of themselves, or any of their current or former employees or agents.

2. This Agreement, and Defendants' execution and performance of it, are expressly subject to approval of the Bankruptcy Court. Defendants agree that when their counsel of record receives the original of this Agreement executed by Plaintiffs' Counsel (as defined in paragraph 3 below), then Defendants will file a motion in the Bankruptcy Court seeking approval of the Agreement and performance by Defendants of their obligations hereunder, in sufficient time to be heard at the September 4, 2009 hearing. This Agreement will not be effective or enforceable against the Defendants until the Agreement is approved by the Bankruptcy Court.

3. Contemporaneously with the execution of this Agreement, Plaintiffs, through their counsel, Rothner, Segall & Greenstone and Altshuler Berzon LLP (collectively "Plaintiffs' Counsel"), and Defendants, through their counsel, Gibson, Dunn & Crutcher, LLP ("Defendants' Counsel") have executed a Stipulation of Dismissal With Prejudice in substantially the form of Attachment B hereto and made a part hereof. Upon payment of the Settlement Consideration described in Paragraph 4 below, Plaintiffs' Counsel and Defendants' Counsel shall file the Stipulation of Dismissal With Prejudice in the Action, and shall diligently and in good faith cooperate and otherwise take the steps necessary to obtain entry of the Stipulation of Dismissal With Prejudice and dismissal of the Action.

4. (a) In full and final settlement and satisfaction of any Claims (as defined below in paragraph 9), Defendants will pay to the Plaintiffs on or before the Payment Date an aggregate amount of \$244,343.57 (less all required deductions and withholdings) (the "Settlement Consideration"), which amount (less all required deductions and withholdings) shall be allocated among the individual Plaintiffs (less all required deductions and withholdings) as set forth on the individual signature pages attached hereto. In the event that individual Plaintiffs do not sign this Agreement by August 31, 2009, then they will not receive the amounts allocated to them, and the total Settlement Consideration shall be reduced by the amounts of their allocated payments. On or about September 1, 2009, Defendants will file with the Bankruptcy Court a statement setting forth the total Settlement Consideration and the amounts allocated to each individual Plaintiff. Defendants will be responsible for paying the employer's share of all applicable payroll taxes in connection with the settlement payments. Except for the payment of the Settlement Consideration, Plaintiffs shall have no allowed claim against, or right to payment from, whether as an administrative claim or otherwise, the Defendants in the Chapter 11 Cases with respect to the Claims (as defined in paragraph 9 below), and Plaintiffs will withdraw with prejudice within 5 days after

Bankruptcy Court approval of the Settlement Consideration becomes a final, non-appealable order, any proofs of claims filed by them with respect to the Claims (as defined in paragraph 9 below) and, to the extent that they fail to do so, will not object to the disallowance of their claims in the Chapter 11 Cases.

(b) In full and final settlement and satisfaction of all claims for attorney's fees and costs against the Defendants related to the Action Defendants will pay Plaintiffs' Counsel on the Payment Date an aggregate amount of \$230,505.48 for attorneys' fees and costs (the "Fee Settlement"). The Settlement Consideration and the Fee Settlement are separate and distinct settlements related to the Action. In the event that the Bankruptcy Court approves the Settlement Consideration but not the Fee Settlement, then the Bankruptcy Court may approve this Agreement and authorize Defendants to pay a lesser amount of attorneys' fees and costs, in which case Plaintiffs' Counsel may either (i) accept whatever reduced amount of attorneys' fees and costs is approved by the Bankruptcy Court, in which case the Fee Settlement shall, automatically and without the need for further amendment or modification of this Agreement, be deemed to be in the amount of such reduced attorneys' fees and costs, or (ii) file a separate claim for attorneys' fees and costs with the Bankruptcy Court in such amount as Plaintiffs' Counsel believes appropriate; provided, however, that nothing contained herein shall limit, restrict or otherwise preclude Defendants from objecting to the allowance of such claim to the extent it exceeds the amount agreed to herein, and all rights and remedies with respect thereto are hereby reserved. If the Bankruptcy Court approves the Fee Settlement and/or if Plaintiffs' Counsel accepts a reduced amount of attorneys' fees and costs approved by the Bankruptcy Court as described above, then Plaintiffs and Plaintiffs' Counsel will withdraw with prejudice within 5 days after Bankruptcy Court approval becomes a final non-appealable order and/or such Plaintiffs' Counsel acceptance any proofs of claims filed by them for attorneys' fees and costs, and will not object to the disallowance of these claims in the

Chapter 11 Cases. In no event will the Bankruptcy Court's approval or disapproval of the Fee Settlement in any way affect or impact any other term or condition of this Agreement. Defendants will issue an IRS Form 1099 with respect to the attorneys' fees and costs payment, and Plaintiffs' Counsel agrees to assume full responsibility for, and indemnify Defendants against, any taxes associated with such payment.

5. No payment shall be required to be made under this Agreement until the Payment Date. The Payment Date shall be 15 business days following the date that the Bankruptcy Court order approving this Agreement becomes a final, non-appealable order. Defendants will send all individual settlement checks (less required withholding) made out to each individual Plaintiff to Plaintiffs' Counsel who will be responsible for distributing the checks to the Plaintiffs. Defendants shall be responsible for remitting withheld amounts to the appropriate federal and state taxing authorities.

6. Plaintiffs represent that they have not filed any complaints, claims, charges or lawsuits asserting any of the claims set forth in the Action against the Defendant Releasees with any governmental agency or any court, other than Case No. CV 08-06227 SJO (CWx); that they will not file any complaint, charge or lawsuit against any of these entities or persons at any time for any events or acts alleged in the Action which occurred prior to the date on which they sign this Agreement; and that if any agency or court assumes jurisdiction of any complaint, charge or lawsuit against any of these entities or persons on behalf of Plaintiffs with respect to any events or acts alleged in the Action which occurred prior to the date on which they sign this Agreement, they will request that the matter be dismissed with prejudice. Plaintiffs' Counsel represent that they have not filed any complaints, charges, claims or lawsuits against the Defendant Releasees other than Case No. 08-06227 SJO (CWx) with respect to any events or acts alleged in the Action.



7. Plaintiffs agree that they will not commence, institute, solicit or participate in any lawsuit, action, investigation or other proceeding against the Defendant Releasees, either as a named or unnamed party, whether brought by Plaintiffs or by others based on any of the facts or allegations set forth in the Action with respect to any events or acts which occurred prior to the date on which they sign this Agreement.

8. Plaintiffs represent and agree that they fully understand their right to discuss all aspects of this Agreement with their private attorneys, that they have availed themselves of this right if they chose to do so, that they have carefully read and fully understand all of the provisions of this Agreement, and that they are voluntarily entering into this Agreement.

9. As a material inducement to Defendants to enter into this Agreement, Plaintiffs hereby irrevocably and unconditionally release, acquit and forever discharge the Defendant Releasees from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs) of any nature whatsoever, known or unknown, suspected or unsuspected Plaintiffs may have relating to any event, act, omission or allegation set forth in the Action ("Claim" or "Claims") with respect to any events or acts which occurred prior to the date on which they sign this Agreement.

10. Plaintiffs expressly waive and relinquish all rights and benefits afforded by Section 1542 of the Civil Code of the State of California, as well as any comparable provisions of other states and federal law, and do so understanding and acknowledging the significance and consequence of such specific waiver of Section 1542. Section 1542 of the Civil Code of the State of California states as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

Thus, notwithstanding the provisions of Section 1542, and for the purpose of implementing a full and complete release and discharge of the Defendant Releasees with respect to the Claims, Plaintiffs expressly acknowledge that this Agreement is intended to include in its effect, without limitation, all Claims which they do not know or suspect to exist in their favor at the time of execution hereof, and that this Agreement contemplates the extinguishment of any such Claim or Claims.

11. Plaintiffs represent that they have not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity, any Claim or any portion thereof, or interest therein, and agree to indemnify, defend and hold the Defendant Releasees harmless from and against any and all Claims, based on or arising out of any such assignment or transfer, or purported assignment or transfer of any Claims or any portion thereof or interest therein.

12. Except as provided herein, Defendants and Plaintiffs waive any and all claims they may have for attorneys' fees, costs or damages stemming from Plaintiffs' litigation of Case No. CV 08-06227 SJO (CWx) and Case No. 09-12074.

13. Plaintiffs represent and acknowledge that in executing this Agreement they may not rely upon any representation or statement not set forth herein, including any representation or statement made by Defendants or by any of Defendants' agents, representatives, or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

14. This Agreement shall be binding upon Plaintiffs and upon their heirs, administrators, representatives, executors, successors and assigns, and shall inure to the benefit of the Defendant Releasees and each of them, and to their heirs, administrators, representatives, executors, successors and assigns.

15. This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced and governed under the laws of said State. Notwithstanding the foregoing, the Bankruptcy Court shall have exclusive jurisdiction to interpret and enforce the provisions of the Agreement. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. It is agreed that this Agreement shall be construed with the understanding that both parties were responsible for drafting it.

16. Should any of the provisions of this Agreement be declared or be determined to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

17. This Agreement sets forth the entire Agreement between the parties hereto and fully supersedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof. This Agreement may be amended only by virtue of a writing signed by the parties affected by the proposed amendment.

18. Except as expressly provided herein, the parties agree to be solely responsible for their respective attorneys' fees and costs incurred in the litigation of this matter. However, in the event it becomes necessary for any party to file a legal action to interpret or enforce this Agreement, then the prevailing party shall be entitled to reasonable legal fees, reasonable expert fees and costs.

19. This Agreement may be executed in multiple counterparts, each of which will be deemed an original and all of which will constitute one and the same agreement.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND RELEASE INCLUDES A RELEASE OF ALL KNOWN OR UNKNOWN CLAIMS RELATING TO THE ACEVEDO V. SELECTBUILD LAWSUIT.

*[Signature Pages Omitted]*

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