

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
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BUILDING MATERIAL HOLDING	:	Case No. 09-12074 (KJC)
CORPORATION, <u>et al.</u> <sup>1</sup>	:	
	:	Jointly Administered
	:	
Debtors.	:	Hearing Date: September 10, 2009 at 3:00pm
	:	Obj. Deadline: September 8, 2009 at 12:00pm
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**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO  
THE 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 Official Committee of Unsecured Creditors (the "Committee") of Building Materials Holding Corporation and its affiliates, as debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this objection (the "Objection") to 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 "Settlement Motion"). In support of the Objection, the Committee respectfully represents as follows:

**BACKGROUND**

1. On September 22, 2008, Eduardo Acevedo and 13 other current and former employees of the Debtors (the "Acevedo Plaintiffs") filed a putative class action and collective action pursuant to the Fair Labor Standards Act (the "FLSA") alleging labor claims against the

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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).

Debtors in the United States District Court for the Central District of California. *Acevedo v. Building Materials Holding Corporation*, case No. CV 08-06227 SJO (Cwx) (the “Acevedo Action”). The Acevedo Plaintiffs filed the case on behalf of themselves and a similarly situated class, which the Debtors estimate could be comprised of approximately 32,000 current and former employees who were employed by the Debtors in California, Nevada, and Arizona (the “Acevedo Putative Class”).

2. The Acevedo Action was automatically stayed by the filing of the Debtors’ bankruptcy petition on June 16, 2009, after which the Acevedo Plaintiffs and the Debtors engaged in settlement negotiations. The United States District Court never certified the Acevedo Putative Class.

3. On May 16, 2008, Pedro Alvarado (“Alvarado”) filed a second putative class action alleging labor claims against the Debtors in California state court. *Alvarado v. Building Materials Holding Corp.*, No. BC391029 (the “Alvarado Action”). Alvarado filed the case on behalf of himself and a similarly situated class of approximately 5,000 current and former employees who were employed by the Debtors in California (the “Alvarado Putative Class”). The California state court never certified the Alvarado Putative Class.

4. The Alvarado Action overlaps with the Acevedo Action in that both assert claims under California state law and both putative classes include current and former employees of the Debtors that work in the state of California

5. It appears that Alvarado may be a member of the Acevedo Putative Class, and that the Alvarado Putative Class may be a subset of the Acevedo Putative Class.

6. In August 2009, the Debtors agreed to a settlement with the Acevedo Plaintiffs totaling nearly \$500,000 (\$243,193.57 to settle claims and \$230,505.48 for attorneys' fees and costs) (the "Acevedo Settlement").

7. The Acevedo Settlement settles the claims of only 85 members of the Acevedo Putative Class on an individual basis; it does not resolve the claims of the entire Acevedo Putative Class, nor does it address the claims of the Alvarado Putative Class.

8. The Debtors filed their Settlement Motion for approval of the Acevedo Settlement on August 21, 2009.

9. On August 31, 2009 (the "Bar Date"), Alvarado filed a Motion Authorizing Class Proof of Claim or, in the Alternative, to Extend Time for Individual Class Members to File Proofs of Claim (the "Alvarado Motion"). The Alvarado Motion seeks, *inter alia*, authority to file one Proof of Claim for all members of the Alvarado Putative Class.

### **OBJECTION**

10. The Settlement Motion states that the Acevedo Settlement should be approved because it avoids the massive potential liability to the estates based on the size of the Acevedo Putative Class, which would dilute the recovery for other unsecured creditors. *See* Settlement Motion at 6 and 7. The Settlement Motion also states that the Acevedo Settlement avoids the uncertainty of the priority claims potentially associated with the Acevedo Putative Class. *Id.* at 7. In short, the Debtors submit that the Acevedo Settlement is fair and reasonable because it significantly reduces the size and number of claims asserted against the Debtors' estates. Therefore, the reasonableness of the Acevedo Settlement turns on the number and amount of claims being resolved.

11. The Committee supports the Debtors' efforts to resolve the Acevedo Action. However, approval of the Acevedo Settlement is premature because it is unclear how many actual claims are actually being resolved, other than the 85 members named in the Acevedo Settlement. This is due, in large part, to the filing of the Alvarado Motion and the overlap of claims between the Acevedo Putative Class and the Alvarado Putative Class.

12. Presumably, in entering into the Acevedo Settlement, the Debtors were assuming they could rely on a combination of the Settlement and the preclusive effect of the Bar Date to avoid claims of the remaining members of the Acevedo Putative Class. However, the Debtors entered into the Acevedo Settlement prior to the Bar Date. Accordingly, it was impossible for them to know the extent to which the remaining members of the Acevedo Putative Class would file individual Proofs of Claim and/or be covered by the Alvarado Motion and potential class Proof of Claim requested by that motion.

13. Because the California state court had not certified the Alvarado Putative Class prior to the petition date, the extent of the claims of the Alvarado Putative Class remains unclear. The Committee therefore submits that the outcome of the Alvarado Motion is critical to analysis of the reasonableness of the Settlement Motion because, as stated, there appears to be overlap between the claims of the Acevedo Putative Class and the Alvarado Putative Class. Yet, the outcome of the Alvarado Motion will not be known at the time of the hearing on the Settlement Motion because it is not set for hearing until September 18, 2009.

14. The uncertainty as to the number and amount of individual Proofs of Claim filed by members of the Acevedo Putative Class and the uncertainty of the number and amount of the Proofs of Claims to which the Alvarado Putative Class may be entitled begs the question of whether the Acevedo Settlement is reasonable. Although the Acevedo Settlement purports to

settle 32,000 claims, without knowledge of how many individuals in the Acevedo Putative Class filed timely proofs of claim or may be covered by the relief sought in the Alvarado Motion, the precise number cannot be determined. Indeed, there may be several thousand additional claims of persons who may be in the same putative class that are left unresolved and remain potential liabilities against the estates even after approval of the Acevedo Settlement.

15. Until these two outstanding issues are resolved, the Committee submits that it is impossible to evaluate the reasonableness of the proposed Acevedo Settlement. Certainly the reasonableness of a \$500,000 settlement for 85 individual claims may be called into question if in fact there are thousands more claims in the same putative class yet to be resolved. However, for the reasons stated above, it is entirely uncertain how many claims are being settled at this time.

16. Accordingly, the Committee requests that the Settlement Motion be continued until a date after the Alvarado Motion is resolved and the reasonableness of the settlement can be evaluated in light of all relevant facts.

#### **RESERVATION OF RIGHTS**

17. The Committee reserves the right to further address the Motion and/or supplement this Objection at any time to respond to any reply of the Debtors, or any party, either by further submission to this Court, at oral argument, or by testimony to be presented at any hearing.

## **CONCLUSION**

WHEREFORE, for all the foregoing reasons, the Committee respectfully requests that this Court enter an order continuing the Motion until such time as it is determined what other labor claims of similarly situated current and former employees will be allowed, and granting such further relief as is appropriate.

Dated: September 8, 2009

BENESCH FRIEDLANDER COPLAN & ARONOFF, LLP

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