

**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. 14</b>

**ORDER (A) AUTHORIZING THE DEBTORS TO PAY CERTAIN CRITICAL  
PROVIDER ADMINISTRATIVE CLAIMS; (B) AUTHORIZING THE DEBTORS TO  
PAY CERTAIN ADDITIONAL CRITICAL PROVIDER CLAIMS; AND (C)  
AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED  
CHECKS AND TRANSFERS**

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 (a) authorizing, but not requiring, the Debtors to pay claims for the value of goods received by the Debtors from certain critical providers in the ordinary course of business during the 20-day period immediately preceding the Petition Date,<sup>2</sup> (b) authorizing, but not requiring, the Debtors to pay certain critical providers for claims not entitled to administrative priority, and (c) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in

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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.


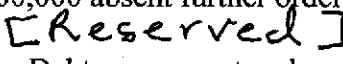
accordance with this Order, all as set forth in the Motion; and upon the Street Declaration in support thereof; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409; and the Court having found that the relief requested 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 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. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay some or all of the prepetition claims of those Critical Providers who agree to continue to supply goods or services to the Debtors on such Critical Provider's "Customary Trade Terms" and on other such terms and conditions as are acceptable to the Debtors. As used herein, "**Customary Trade Terms**" means, with respect to a Critical Provider: (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors at any time prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.

3. The Debtors shall not make any payments on account of Critical Provider Claims in excess of \$6,000,000 absent further order of this Court.

4. The Debtors shall not make any payments on account of Critical Priority Claims in excess of \$9,000,000 absent further order of this Court.

5.   ~~The Debtors may not make any payments to any Critical Provider on account of its Critical Prepetition Claim until 30 days after the date on which the Debtors execute a binding agreement with that Critical Provider pursuant to which the Critical Provider agrees to continue supplying its products or services to the Debtors on Customary Trade Terms. The Debtors shall have the authority to pay up to \$3,400,000 in Critical Prepetition Claims immediately upon the Debtors' execution of a binding agreement with any relevant Critical Providers pursuant to which those Critical Providers agree to continue supplying products or services on Customary Trade Terms.~~

6. After the date hereof, the Debtors shall determine who is a Critical Provider by considering: (i) which suppliers are sole-source or limited-source suppliers of goods or services of the quality and quantity required by the Debtors in a particular market, without whom the Debtors could not continue to operate without disruption; (ii) which suppliers would be prohibitively expensive or time-consuming to replace, such as where the Debtors' existing inventory, equipment, or manufacturing processes are specifically tailored to that supplier's products or services; and (iii) which suppliers the Debtors' customers require them to use.

7. The Debtors shall maintain a matrix summarizing: (i) the name of each Critical Provider paid on account of Critical Prepetition Claims; (ii) the amount paid to each Critical Provider on account of its Critical Prepetition Claim; and (iii) a brief description of the goods or services provided by such Critical Provider. This matrix will periodically and/or upon demand

be provided to: (a) the United States Trustee for the District of Delaware; and (b) any statutory committee appointed in the Chapter 11 Cases (the "**Committee**"); *provided, however*, that the Committee shall execute a confidentiality agreement in a form acceptable to the Debtor prior to its receipt of the matrix.

8. The Debtors shall provide to the United States Trustee for the District of Delaware and counsel for the Committee written reports of all payments made hereunder on an every-other-week basis, and reasonable and timely access to information sufficient to enable it to monitor payments made, obligations satisfied, and other actions taken pursuant to this Order.

9. The Debtors shall undertake all appropriate efforts to cause Critical Providers to enter into an agreement (the "**Supplier Protection Agreement**") including provisions substantially in the form attached to the Motion as **Exhibit B**, which contains terms substantially similar to the following:

- (a) Debtors will pay \_\_\_\_\_ to the Supplier in full and final satisfaction of all amounts owed for pre-Petition Date transactions (the "**Agreed Amount**").
- (b) Supplier agrees to waive any claim against the Debtors and release any lien securing such claim upon both (i) the payment in full of the Agreed Amount and (ii) the earlier of the effective date of a chapter 11 plan, the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code, or the dismissal of the Debtors' cases; provided, however, that the Supplier may file a proof of claim on account of any claim(s) if the Agreed Amount is not paid in full prior to any applicable claims bar date.
- (c) Supplier agrees to provide an open trade balance or credit line to the Debtors for shipment of postpetition goods in the amount of \$ \_\_\_\_\_ (which shall not be less than the greater of the open trade balance outstanding on: (i) \_\_\_\_\_; or (ii) normal and customary terms on a historical basis before and up to the Petition Date). The terms of such open trade balance or credit line are as follows (if more space is required, attach continuation pages:

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- (d) Supplier agrees, through the earlier of the effective date of a chapter 11 plan, the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code or the dismissal of the Debtors' cases, to be bound by the Customary Trade Terms (as defined below), which shall include, but not be limited to, credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs acceptable to the Debtors, so long as the Debtors are not then in postpetition default.
- (e) "**Customary Trade Terms**" shall be defined, with respect to a Supplier as (i) the normal and customary trade terms, practices and programs (including but not limited to credit terms, historical pricing conventions, historical product volumes, cash discounts, payment terms, allowances, rebates, normal product mix, and availability and other applicable terms and programs) that were most favorable to the Debtors at any time prior to the Petition Date; or (ii) such other trade terms as agreed to by the Debtors and such Supplier.
- (f) If the Supplier is a beneficiary of a letter of credit as security for the Debtors' payment, the Supplier agrees not to draw on the letter of credit so long as the Debtors remain current on their payment obligations under this Agreement, notwithstanding any provision in the underlying letter of credit that may allow such Supplier to draw on the letter of credit as a result of the Debtors' bankruptcy filings or as a result of the Debtors' payment of less than the full amount of such Supplier's prepetition claim.
- (g) Supplier agrees not to draw on a letter of credit, if applicable, or demand a lump sum payment upon consummation of a plan of reorganization in these chapter 11 cases on account of any administrative expense priority claim that Supplier asserts, but instead agrees that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms, if the plan provides for the ongoing operations of the Debtors.
- (h) Supplier acknowledges that it has reviewed the terms and provisions of the Motion and the Order approving the Motion, and consents to be bound by the terms of the Order.

- (i) Supplier agrees that it will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless Supplier's participation in the Supplier Protection Program authorized by the Order is terminated.
- (j) Supplier agrees that it will not file or otherwise assert against the Debtors, the estates, or any other person or entity, or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to Supplier by the Debtors arising from agreements entered into prior to the Petition Date. Furthermore, Supplier agrees to take (at its own expense) all necessary steps to remove any such lien as soon as possible.
- (k) If either the Supplier Protection Program or Supplier's participation therein terminates as provided in the Order, or Supplier later refuses to continue to supply goods or services to the Debtors on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments Supplier receives on account of Supplier's participation in the Supplier Protection Program will be deemed voidable postpetition transfers pursuant to 11 U.S.C. § 549(a). Supplier will immediately repay to the Debtors any payments made to it on account of its participation in the Supplier Protection Program to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Supplier's claim shall be reinstated in such an amount as to restore the Debtors and Supplier to the same positions as would have existed if payments under the Supplier Protection Program had not been made.
- (l) To the extent there exist any safe-harbor contracts between the Debtors and the Supplier that contain a right of termination based on the Debtors' bankruptcy, insolvency, or other similar conditions, the Supplier agrees to waive the filing of bankruptcy by or the insolvency or other similar conditions of the Debtors as a termination right under those contracts for the duration of the Supplier Protection Agreement. All other default, suspension, and termination provisions in such contracts shall remain in effect.
- (m) Any dispute with respect to this letter agreement, the Order and/or Supplier's participation in the Supplier Protection Program shall be determined by the United States Bankruptcy Court for the District of Delaware.

10. The Debtors are authorized, but not required, to enter into Supplier Protection Agreements. However, the Debtors inability to enter into a Supplier Protection Agreement shall not preclude them from paying a Critical Prepetition Claim when such payment is necessary to the Debtors operations. In such cases, the Debtors are authorized to condition payment of the Critical Prepetition Claims on appropriate terms and conditions.

11. If the Debtors, in their discretion, determine that a Critical Provider has not complied with the terms and provisions of the Supplier Protection Agreement or has failed to continue to provide Customary Trade Terms following the date of the agreement, or on such terms as were individually agreed to between the Debtors and such Critical Provider, the Debtors may terminate a Supplier Protection Agreement, together with the other benefits to the Critical Provider as contained in this Order, provided, however, that the Supplier Protection Agreement may be reinstated if: (i) such determination is subsequently reversed by the Court after notice and a hearing following a motion from the Critical Provider filed no later than twenty (20) days after the Debtors' written termination notice to the Critical Provider; (ii) the underlying default under the Supplier Protection Agreement is fully cured by the Critical Provider not later than five business days after the date the initial default occurred; or (iii) the Debtors reach a subsequent agreement with the Critical Provider.

12. No payment of Critical Prepetition Claims is avoidable under section 547 or 549(a) of the Bankruptcy Code to the extent that the payee thereof complies with the provisions of any agreement it enters into with the Debtors in respect of such payment. However, if a Supplier Protection Agreement is terminated as set forth above, or if a Critical Provider that has received payment of a prepetition claim later refuses to continue to supply goods or services for the applicable period in compliance with the Supplier Protection Agreement or this Order, then

(i) the Debtors may, in their discretion, declare the payment of the creditor's Critical Prepetition Claim a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code that the Debtors may recover in cash or in goods from such Critical Provider; (ii) subject to its challenge right detailed in the preceding paragraph, the creditor shall immediately return such payments in respect of a Critical Prepetition Claim to the extent the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever; and (iii) the applicable Critical Prepetition Claim shall be reinstated in such an amount so as to restore the Debtors and the Critical Provider to their original positions as if the Supplier Protection Agreement had never been entered into and no payment of a Critical Prepetition Claim had been made.

13. Nothing contained in this Order shall constitute a waiver of the Debtors' right to seek damages or other appropriate remedies against any Critical Provider that breaches the Supplier Protection Agreement, including, without limitation, the Debtor's right to seek injunctive relief from the Court on an expedited basis to compel performance pursuant to the Customary Trade Terms.

14. All Supplier Protection Agreements shall be deemed to have terminated, together with the other benefits to Critical Providers as contained in this Order, upon entry of an order converting the Debtors' chapter 11 cases to cases under chapter 7 of the Bankruptcy Code.

15. The Debtors' payment of the Critical Provider Claims shall not exceed the Provider Claims Cap unless otherwise ordered by the Court after notice and a hearing.

16. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or



after the Petition Date. Such banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this order, and such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

17. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of payments on account of Critical Prepetition Claims that are dishonored or rejected.

18. Absent a Supplier Protection Agreement, any similar agreement between the Debtors and a Critical Provider, and/or the payment of claims pursuant to this Order, nothing herein shall change the nature or priority of the underlying Critical Prepetition Claims.

19. Notwithstanding the relief granted herein and any actions taken hereunder, Absent a Supplier Protection Agreement, any similar agreement between the Debtors and a Critical Provider, and/or the payment of claims pursuant to this Order, nothing contained herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

20. Nothing contained in this Order shall be deemed to constitute an assumption or adoption of any executory contract or prepetition or postpetition agreement between the Debtors and the holder of a Critical Prepetition Claim, or to require the Debtors to make any of the payments authorized herein.

21. The authorization granted hereby to pay Critical Prepetition Claims shall not create any obligation on the part of the Debtors or their officers, directors, attorneys, or agents to pay the Critical Prepetition Claims. None of the foregoing persons shall have any liability on

account of any decision by the Debtors not to pay a Critical Prepetition Claim, and nothing contained in this Order shall be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect the Critical Prepetition Claims to the extent they are not paid.

22. The amount of such Critical Prepetition Claim set forth in connection with a Supplier Protection Agreement shall be used only for purposes of determining the relevant Critical Provider's claim under this Order and shall not be deemed a claim allowed by the Court, and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Court. Further, signing a Supplier Protection Agreement containing a claim amount for purposes of this Order shall not excuse such Critical Provider from filing a proof of claim in these cases.

23. No claimant who receives payment on account of a Critical Prepetition Claim is permitted to file or perfect a lien, reclamation claim, or a claim under section 503(b)(9) of the Bankruptcy Code on account of such Critical Prepetition Claim, and any such claimant shall take at the claimant's expense all necessary action to remove any existing lien or withdraw such reclamation claim or 503(b)(9) claim relating to such Critical Prepetition Claim, even if the lien, reclamation claim, or 503(b)(9) claim is against property of a non-debtor.

24. Nothing in this Order shall be deemed either a grant of administrative priority expense status to, or authority to pay, any amounts that are disputed by the Debtors.

25. Nothing contained in this Order shall be construed as a waiver by the Debtors of their rights to contest any claim or invoice of a holder of a Critical Prepetition Claim under applicable law.

26. Nothing in this Order shall prohibit the Debtors from seeking Court authority to increase the prepetition amounts authorized to be paid hereunder.

27. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

28. Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") has been satisfied.

29. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of applicable rules.

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

31. 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  
June 17, 2009



Kevin J. Carey  
Chief United States Bankruptcy Judge