

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE 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>	:	Jointly Administered
	:	
Debtors.	:	<b>Hearing Date: October 7, 2009 at 11:00am (EDT)</b>
	:	<b>Objection Deadline: October 7, 2009 at 11:00am (EDT)</b>
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**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO  
THE DISCLOSURE STATEMENT WITH RESPECT TO JOINT PLAN OF  
REORGANIZATION FOR THE DEBTORS UNDER CHAPTER 11 OF  
THE BANKRUPTCY CODE AMENDED OCTOBER 1, 2009**

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 proposed counsel, hereby submits this objection (the “Objection”)<sup>1</sup> to the Disclosure Statement with Respect to Joint Plan of Reorganization for the Debtors under Chapter 11 of the Bankruptcy Code Amended October 1, 2009 (the “Second Amended Disclosure Statement”). In support of the Objection, the Committee respectfully represents as follows:

**BACKGROUND**

1. The factual background relating to the Debtors’ commencement of these cases is set forth in detail in the Declaration of Paul S. Street, Senior Vice President, Chief Administrative Officer, General Counsel, and Corporate Secretary of Building Materials Holding

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<sup>1</sup> This Objection incorporates the Committee’s objection to the Amended Disclosure Statement filed on September 4, 2009 [D.I. 564] (the “Initial Objection”) to the extent not inconsistent with the terms of this Objection.

Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Motions, filed by the Debtors on June 16, 2009 and for purposes of brevity, will not be restated herein except when necessary.

2. On June 16, 2009, the Debtors initiated these "pre-pack" cases by filing a Chapter 11 Plan of Reorganization [D.E. 18] (the "Plan") and accompanying Disclosure Statement [D.E. 19] (the "Disclosure Statement"). The hearing to approve the Disclosure Statement was first noticed for July 29, 2009 (the "Disclosure Statement Hearing"). The initial Plan and Disclosure Statement professed to provide a one hundred percent (100%) payout to unsecured creditors with a present value exceeding fifty percent (50%).

3. On June 26, 2009, the Office of the United States Trustee for Region 3 appointed the Committee pursuant to Sections 1102(a) and 1102(b) of the Bankruptcy Code. The Committee selected the undersigned as counsel, subject to Court approval.

4. On July 13, 2009, the Debtors filed a Motion for an Order (I) Approving the Disclosure Statement; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, Including (A) Approving the Form and Manner of Solicitation Procedures, (B) Approving the Form and Manner of Notice of the Confirmation Hearing, (C) Establishing a Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing the Deadline for Receipt of Ballots, and (F) Approving the Procedures for Vote Tabulations; (III) Establishing the Deadline and Procedures for Filing Objections to (A) Confirmation of the Plan and (B) Proposed Cure Amounts Related to Contracts and Leases Assumed Under the Plan; and (IV) Granting Related Relief (the "Solicitation Procedures Motion").

5. The Solicitation Procedures Motion seeks, inter alia, the approval of the procedures for solicitation of votes on the Second Amended Plan (defined below) as well as additional relief in connection with the Second Amended Disclosure Statement (defined below). The Solicitation Procedures Motion is also set for consideration at the Disclosure Statement Hearing.

6. On July 27, 2009, two days prior to the Disclosure Statement Hearing, the Debtors filed an Amended Chapter 11 Plan [D.E. 314] (the “Amended Plan”) and an Amended Disclosure Statement [D.E. 316] (the “Amended Disclosure Statement”) and continued the Disclosure Statement Hearing until August 11, 2009.

7. The most substantial difference between the Plan and the Amended Plan and Amended Disclosure Statement was that the latter provided for the further separation of the three (3) plans originally contemplated into twelve (12) subplans for each of the Debtors. The Amended Plan and Disclosure Statement did not materially alter the economics of the case, nor did they change the material terms of treatment of the creditors’ claims.

8. The Amended Plan contemplated a restructuring of the Debtors’ balance sheet and ownership structure, as well as an immediate cash distribution to unsecured creditors and deferred payments from the Reorganized Debtors’ cash flow giving creditors an opportunity to receive “full payment”, depending on future business performance.

9. On August 5, 2009, the Debtors informed the Committee that the Disclosure Statement Hearing would again be continued, this time until the first available date in September. The Debtors cited a new prospective source of funding as a basis for continuing the hearing but offered very little detail to Committee counsel. The undersigned requested information with respect to such funding, but was told it was confidential.

10. Not having a formal agreement in place, the Committee was required to file its Initial Objection. By its Initial Objection, the Committee alleged, inter alia, that the Amended Disclosure Statement failed to provide adequate information as required by 11 U.S.C. § 1125. Despite the Committee's multiple inquiries in the days leading up to the objection deadline, the Debtors only informed the Committee of their intent to again continue the Disclosure Statement Hearing after the objection deadline had passed.

11. In the last thirty days, the Committee's professionals reminded the Debtors of the importance of keeping the Committee's professionals apprised of the status of the case. Specifically, Committee's counsel commented on the Debtors' practice of constantly adjourning the Disclosure Statement Hearing and urged the Debtors and Lenders to disclose information about the circumstances affecting the delay of the Disclosure Statement Hearing.

12. Prior to the filing of the Second Amended Disclosure Statement (as defined below), the Debtors had revealed virtually nothing about the proposed financing, the circumstances of its negotiation, or how it would affect the unsecured creditors, or anyone else for that matter. Instead of including the Committee's professionals, on Sunday, September 27, 2009 (while Committee's lead counsel was on a pre-planned vacation in Italy, a fact known to the Debtors and Lenders) Debtors' lead counsel sent the Committee's professionals an email to inform the Committee that the most material terms of the Amended Disclosure Statement and Amended Plan would be changing.

13. Following this remarkable revelation, on Thursday, October 1, 2009, the Debtors filed a disclosure statement as amended October 1, 2009 (the "Second Amended Disclosure Statement") [D.E. 678] and an accompanying plan [D.E. 677] (the "Second Amended Plan"). The Debtors also filed several revised exhibits, including revised liquidation and feasibility

analyses and bank commitment letters.

14. Although the Committee has not (obviously) had time to review the Second Amended Disclosure Statement and Second Amended Plan in detail, the Committee suspects that they incorporate the terms of the deal between the Debtors and the secured lenders and make other “amendments” to the Amended Disclosure Statement and Amended Plan. The Committee notes that these filings occurred on Thursday, October 1, 2009, even though the parties to the negotiations had likely known the general outline of their agreement well prior to such date.

15. Despite the Committee’s request for a continuance, the Debtors have confirmed that they intend to seek approval of the Second Amended Disclosure Statement in lieu of the Amended Disclosure Statement and also expect to go forward with the Solicitation Procedures Motion on the October 7, 2009 hearing date.<sup>2</sup> As set forth in its supplemented Disclosure Statement Objection (to be filed contemporaneously with this Motion), the Committee opposes the Debtors’ efforts to ram through this “amended” (i.e., completely new and different) disclosure statement and revised Solicitation Procedures Motion. The Debtors’ decision to file the Second Amended Disclosure Statement and Second Amended Plan three business days before the Disclosure Statement Hearing does not comport with notions of fair play and justice.

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 157 and 1334(b). Venue of these proceedings is proper in this Judicial District pursuant to 28 U.S.C. §§ 1408 and 1409.

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<sup>2</sup> Substantially contemporaneously with the filing of this Objection, the Committee shall file its Motion to Continue the October 7, 2009 hearing on the Second Amended Disclosure Statement and related Solicitation Procedures Motion (the “Motion to Continue”). The Committee shall also file a Motion to Shorten Time with respect to its Motion to Continue.

## **OBJECTION**

2. The Second Amended Disclosure Statement, filed only three business days before the proposed hearing for its approval, should not be heard or approved on October 7, 2009 because the Committee and the unsecured creditor body have not been provided with ample time to review the materially different Second Amended Disclosure Statement and Plan and the myriad exhibits that accompany them. The Committee is simply unable to make a determination as to whether the Second Amended Disclosure Statement contains the information necessary to enable a hypothetical reasonable investor to make an informed judgment about the Second Amended Plan.

3. A disclosure statement represents the primary source of information for creditors to determine whether to vote to accept or reject a proposed plan and it is commonly recognized as “a pivotal concept of Chapter 11 reorganization.” *Kunica v. St. Jean Financial Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999). Without providing the Committee’s professionals with the time necessary to review and analyze the Second Amended Disclosure Statement, a real concern exists that unrepresented unsecured creditors will not have the requisite information to make an educated decision to vote for or against the Second Amended Plan.

4. Due to the nature of the Debtors’ business, their creditor body is not comprised of sophisticated, financially savvy investors capable of understanding the complex financial transactions contained in the Second Amended Disclosure Statement. Rather, a large percentage of the unsecured claims are held by individual creditors, many of them retirees, or small businesses. This fact heightens the normal importance of the Second Disclosure Statement as a vehicle to explain, in plain English, the terms of the proposed Second Amended Plan, and

emphasizes the necessity for clear, unambiguous, and straightforward language laying out the details and risks of the Second Amended Plan.<sup>3</sup>

5. The Disclosure Statement should not be approved because it fails to meet the standards and, more importantly, the purpose, of section 1125 of the Bankruptcy Code. For the reasons described fully below, the Court should enter an order denying approval of the Second Amended Disclosure Statement, or in the alternative, require the Debtors to amend the Disclosure Statement to provide adequate, comprehensible and clear information sufficient to allow creditors to cast an informed vote for or against the Plan.

### **ARGUMENT**

#### **A. Statutory Requirement of Adequate Information.**

6. Section 1125(b) of the Bankruptcy Code provides that an acceptance or rejection of a plan of reorganization may not be solicited until after a disclosure statement approved by the Bankruptcy Court as containing “adequate information” has been prepared and distributed to creditors. Section 1125 of the Bankruptcy Code defines the term “adequate information” as:

[I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holder of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

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<sup>3</sup> The Committee raises its concerns as to the Second Amended Disclosure Statement only and does not seek to raise objections that are more appropriate for the hearing on approval of the Plan. Nothing herein shall be construed as the Committee’s approval of the Plan as proposed. The Committee has serious concerns about the Plan’s feasibility and shall voice those concerns at the appropriate time.

11 U.S.C. § 1125(a)(1).

7. “A party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing adequate information to enable a creditor to make an informed judgment about the Plan.” *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 321 (3rd Cir. 2003) (explaining that “the importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the . . . obligation to provide sufficient data to satisfy the Code standard of adequate information”).

#### **RESERVATION OF RIGHTS**

8. The Committee reserves the right to further address the Second Amended Disclosure Statement and other ancillary issues and 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. The Committee expressly reserves the right to supplement this Objection at any time prior to or during the hearings on the Debtors’ Second Amended Disclosure Statement.



## **CONCLUSION**

WHEREFORE, for all the foregoing reasons, the Committee respectfully requests that this Court enter an order denying approval of the Second Amended Disclosure Statement, or in the alternative, require the Debtors to provide the Committee with the requisite time to review and analyze the Second Amended Disclosure Statement to determine whether it provides additional and adequate information, and granting such further relief as is appropriate.

Dated: October 5, 2009

BENESCH FRIEDLANDER COPLAN & ARONOFF, LLP

By: /s/ Bradford J. Sandler

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