

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

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In re:	:	Chapter 11
	:	
BUILDING MATERIAL HOLDING	:	Case No. 09-12074 (KJC)
CORPORATION, <u>et al.</u>	:	Jointly Administered
	:	
Debtors.	:	<b>Proposed Hearing Date: October 7, 2009 at 11:00am</b>
	:	<b>(EDT)</b>
	:	<b>Proposed Objection Deadline: October 7, 2009 at</b>
	:	<b>11:00am (EDT)</b>
	:	
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**EXPEDITED MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS TO CONTINUE THE CURRENTLY SCHEDULED OCTOBER 7, 2009  
HEARING ON THE DISCLOSURE STATEMENT [D.E. 19, 316, 678]  
AND RELATED SOLICITATION PROCEDURES MOTION [D.E. 172]**

TO THE HONORABLE KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE:

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 Expedited Motion to Continue the Currently Scheduled October 7, 2009 Hearing on the Disclosure Statement [D.E. 19, 316, 678] and Related Solicitation Procedures Motion [D.E. 172] (the “Motion”). In support of the Motion, 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 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 10, 2009, the Committee filed its Motion for an Order Fixing and Clarifying the Committee’s Requirement to Provide Access to Information and Solicit and Receive Comments and Setting and Fixing Creditor Information Sharing Procedures and Protocols [D.E. 169] (the “Creditor Information Sharing Motion”). The Creditor Information Sharing Motion was negotiated with the Debtors prior to filing.

5. 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”).

6. 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.

7. On September 9, 2009, the Court entered an order granting the Creditor Information Sharing Motion (the “Creditor Information Sharing Order”). The Creditor Information Sharing Order contains numerous provisions that provide Committee professionals access to confidential, proprietary or privileged information. These provisions, when read in tandem with the Committee Bylaws and confidentiality agreements agreed to by the Committee, are intended to permit the Committee’s professionals to meaningfully participate in the reorganization process.

8. 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.

9. 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.

10. 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.

11. 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.

12. In early September, in the midst of informal discussions with the Debtors regarding the Committee's concerns with the Disclosure Statement and the Amended Disclosure Statement, the Committee and the Debtors worked together to exchange detailed comments and to draft provisions to be included in the Amended Disclosure Statement. The Committee endeavored to assist the Debtors with revisions that would bring the Amended Disclosure Statement into compliance with the requirements of 11 U.S.C. § 1125 and other applicable law.

13. On September 3, 2009, Debtors' counsel provided the Committee with the Amended Disclosure Statement in Microsoft Word format to better enable Committee counsel to mark up and include provisions that the Committee believed were necessary to properly inform the creditors of their treatment. In fact, the Committee and its professionals expended significant time and resources marking up the Amended Disclosure Statement.

14. Not having a formal agreement in place, the Committee was required to file its objection to the Amended Disclosure Statement on September 4, 2009 [D.E. 564] (the

“Objection”). By its 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.

15. On September 15, 2009 the Debtors informed the Committee that the Disclosure Statement Hearing would again be continued, this time until October 7, 2009.

16. 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.

17. 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. Finally, after several demands by Committee counsel, the Debtors informed the Committee in mid-September that they would share information with the Committee’s counsel on an “attorneys eyes only” basis. The Committee’s professionals agreed to this limitation. However, 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.

18. 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.

19. 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.

20. 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. 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.

21. In sum, the Debtors have asked this Court to consider, inter alia, the following at the Disclosure Statement Hearing on October 7, 2009: (i) a brand-new Second Amended Disclosure Statement filed at the last minute instead of the Amended Disclosure Statement, and

(ii) a brand new Solicitation Procedures Motion. For the reasons outlined below, the Committee seeks a continuance of these two (2) matters until November 19, 2009, the next scheduled omnibus hearing date, so that the Committee, and all of its constituents not privy to the settlement negotiations that gave rise to the Second Amended Disclosure Statement and Second Amended Plan, have a meaningful opportunity to review and digest their contents.

### **JURISDICTION AND VENUE**

22. This Court has jurisdiction over this Motion 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.

### **RELIEF REQUESTED**

23. The Committee respectfully requests that this Court continue consideration of the Second Amended Disclosure Statement and the Solicitation Procedures Motion until November 19, 2009, the Court's next scheduled omnibus hearing date. In the alternative, if this Court intends to address these matters in some respect on October 7, 2009, it should recharacterize the Disclosure Statement Hearing as a status and scheduling conference to discuss appropriate briefing and discovery deadlines on the Second Amended Disclosure Statement and the Solicitation Procedures Motion.

### **ARGUMENT**

24. This Court has broad discretion to control its docket and to determine when to grant a continuance in a particular case. Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 390-91 (3d Cir. 2004). A decision to grant or deny a motion for a continuance of the matters identified in this Motion lies within this Court's sound discretion. In re Armstrong World Indus.,

Inc., 320 B.R.523, 530 n.17 (D. Del. 2005). However, when substantial discovery matters and other outstanding issues remain to be addressed, a continuance is mandated. See, e.g., Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3d Cir. 1950) (finding that the lower court's refusal to grant a continuance in light of unresolved discovery issues constituted an abuse of discretion).

**A. The Court Should Continue the October 7, 2009 Hearing on the Second Amended Disclosure Statement.**

25. First, this Court should not consider the Second Amended Disclosure Statement at the Disclosure Statement Hearing on October 7, 2009 because of the recent events in these Bankruptcy Cases. As discussed above, the Debtors have intentionally left the Committee in the dark, permitted the Committee to labor under the misapprehension that the Amended Disclosure Statement is the current working version, and deliberately withheld material information despite the Committee's requests and cooperation with respect to the Committee Bylaws, confidentiality agreement and Creditor Information Sharing Order. The Debtors' stratagem represents nothing less than an end-run around the fundamental requirements of due process, the federal Rules of Bankruptcy Procedure ("FRBP") and the local rules of the Delaware Bankruptcy Court.

26. Even in bankruptcy court, unsecured creditors – especially the ones in this case who are generally employees and trade vendors, rather than sophisticated equity investors or financial players – are entitled to basic due process, the fundamental requisite of which “is the opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). Procedural due process, including the right to a hearing, “embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.” Morgan v. United States, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129 (1914).

27. Similarly, under FRBP 3017, a hearing on a new disclosure statement must be



held on at least twenty-five (25) days' prior notice to creditors and other parties in interest. FED. R. BANKR. P. 3017(a); Delaware Local Rule 9006-1(c)(iii) requires that all motions (such as a motion to consider a disclosure statement) be filed at least fifteen (15) days before the hearing on the motion—unless a motion to expedite on shortened notice is filed. DEL. LOC. R. 9006-1(c)(iii).

28. Any effort to have this Court consider on October 7, 2009 the Second Amended Disclosure Statement and its accompanying Second Amended Plan would contravene these rules and requirements. This “amended” disclosure statement, contrary to the arguments the Debtors are surely going to make, amounts to an entirely new disclosure statement. Though the Committee has not had time to review the Second Amended Disclosure Statement and Second Amended Plan in detail, the Committee can hardly imagine how the Debtors could document a resolution of what have been only generally communicated to the Committee as multilateral disputes among the secured creditor community without making lengthy, fundamental changes to both the Amended Disclosure Statement and Amended Plan. (The Second Amended Disclosure Statement is itself 114 pages long and its exhibits comprise hundreds more pages.) Although the Committee has not had sufficient time to review them, on information and belief, the newly filed exhibits, such as forecasts, feasibility and liquidation analyses, have been materially changed without explanation. Consequently, forcing a decision on this entirely new Second Amended Disclosure Statement on October 7, 2009 violates the Committee’s due process rights as well as federal and local bankruptcy rules. See Morgan, 304 U.S. at 18; FRBP 3017(a); DEL. LOC. R. 9006-1(c)(iii). For these reasons, this Court should grant a continuance of the hearing on the Second Amended Disclosure Statement.

29. As a practical matter, granting the Committee and other parties in interest a continuance so that they may review Second Disclosure Statement and Second Amended Plan is

only fair. As this Court knows, the Debtors have adjourned the Disclosure Statement Hearing multiple times without adequate explanation. Furthermore, the Second Amended Plan and Second Amended Disclosure Statement were filed Thursday night. The Committee's constituents are not privy to CM/ECF and the Committee's professionals cannot confirm whether the unsecured creditors each received the FedEx overnight package that Committee counsel received on Friday afternoon. Many creditors have no Internet access and cannot even review the Second Amended Disclosure Statement and Second Amended Plan online. Nor have the Committee's financial advisors had an opportunity to review the brand new liquidation and feasibility analyses that accompany the Second Amended Disclosure Statement. Under these circumstances and in light of the substantial issues at stake, the Committee and parties in interest surely deserve the normal time period of twenty-five (25) days to review and consider the Second Amended Disclosure Statement and Second Amended Plan—especially since the modifications sought by the Debtors apparently seek to cut off their rights by reducing the unsecured creditor distribution to a mere ten percent (10%). The Court and the parties in interest deserve an explanation as to why these drastic changes are being proposed.

30. Finally, this Court should continue the October 7, 2009 hearing so that the Committee and other parties in interest can conduct discovery related to the Second Amended Disclosure Statement and the Second Amended Plan. As a legal matter, when discovery remains necessary so that parties in interest can prepare for and effectively participate in a hearing, then courts should ordinarily grant a continuance. See Summers v. Missouri Pac. R.R. Sys., 132 F.3d 599, 605-06 (10th Cir. 1997) (stating that “[z]eal to dispose of pending litigation, commendable in itself, [should not result] in deprivation of reasonable opportunity to make adequate preparation for trial” (quoting Sutherland Paper Co.)). The Second Amended Disclosure

Statement and Second Amended Plan raise unanswered questions about what the Debtors are doing, how their agreement with the secured lenders came to be, what other prospective offers of financing were available, negotiations with third parties and the effect on the Committee and its constituents. All these subjects are proper matters for discovery, and the Committee intends to take such discovery as appropriate.

31. For these reasons, this Court should continue the currently scheduled October 7, 2009 hearing on the Second Amended Disclosure Statement

**B. The Court Should Continue the October 7, 2009 Hearing on the Solicitation Procedures Motion.**

32. Second, if this Court is not inclined to deny the Solicitation Procedures Motion outright as the Committee has requested, this Court should instead continue the October 7, 2009 Disclosure Statement Hearing as to the Solicitation Procedures Motion. The Solicitation Procedures Motion was filed in furtherance of a now outdated disclosure statement and plan and the Debtors hope to have the Court and parties hear and approve a wholly new Solicitation Procedures Motion that is itself hundreds of pages long. The Committee therefore needs additional time to review the new Solicitation Procedures Motion in order to assess its viability.

33. Furthermore, the Solicitation Procedures Motion should also be adjourned so that, as explained above, the Committee can conduct discovery on the Second Amended Disclosure Statement and Second Amended Plan, on the negotiations among the Debtors and the secured lenders, and on the other issues raised by the Debtors' filings and statements in connection with these matters. The Solicitation Procedures Motion should not go forward until the Committee has been afforded and completed such discovery.

**C. In the Alternative, the Court Should Convert the October 7, 2009 Hearing into a Status and Scheduling Conference.**

34. In the alternative to continuing its consideration of the Second Amended Disclosure Statement and/or the Solicitation Procedures Motion, the Committee respectfully requests that the Court convert the October 7, 2009 Disclosure Statement Hearing into a status and scheduling conference so that the Court and the parties may discuss appropriate briefing and discovery deadlines on the Second Amended Disclosure Statement and the Solicitation Procedures Motion. As the Committee has noted, it intends to seek discovery in connection with these pending contested matters. The Committee therefore believes that a status and scheduling conference might be useful in coordinating this discovery as well as setting appropriate briefing and other deadlines in advance of any formal consideration of these matters by this Court.

#### **RESERVATION OF RIGHTS**

35. The Committee reserves the right to further amend, modify or supplement this Motion at any time. The Committee reserves all rights in connection with the Second Amended Disclosure Statement (and its accompanying plan) and the Solicitation Procedures Motion, and/or as a creditor and party in interest in these Bankruptcy Cases.

WHEREFORE, The Committee respectfully requests that the Court: (i) continue the Disclosure Statement Hearing on the Second Amended Disclosure Statement currently scheduled for October 9, 2009 until such time as may be appropriate under the circumstances; (ii) continue the hearing on the Solicitation Procedures Motion indefinitely only if this Court chooses not to deny that motion outright; (iii) in the alternative, convert the Disclosure Statement Hearing scheduled for October 7, 2009 into a status and scheduling conference to discuss appropriate briefing and discovery deadlines on the Second Amended Disclosure Statement and the Solicitation Procedures Motion; and (iv) grant the Committee all other and further relief as is just and proper.

Dated: October 5, 2009

BENESCH FRIEDLANDER COPLAN & ARONOFF, LLP

By: /s/ Bradford J. Sandler

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Creditors*

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

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In re:	:	
	:	Chapter 11
BUILDING MATERIAL HOLDING	:	
CORPORATION, <u>et al.</u> <sup>1</sup>	:	Case No. 09-12074 (KJC)
	:	
Debtors.	:	Jointly Administered
	:	
	:	<b>Re: Docket No. _____</b>
	:	
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**ORDER GRANTING EXPEDITED MOTION OF THE OFFICIAL COMMITTEE  
OF UNSECURED CREDITORS TO CONTINUE THE CURRENTLY  
SCHEDULED OCTOBER 7, 2009 HEARING ON THE DISCLOSURE  
STATEMENT AND RELATED SOLICITATION PROCEDURES MOTION**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the Official Committee of Unsecured Creditors (the “Committee”) of the above-captioned debtors and debtors in possession (the “Debtors”), to Continue the Currently Scheduled October 7, 2009 Hearing on the Disclosure Statement and Related Solicitation Procedures Motion (the “Motion to Continue”) [Docket No. \_\_\_\_]; and due and proper notice of the Motion to Continue having been given, it is hereby **ORDERED** that:

1. The Motion is GRANTED.
2. The hearing on the Second Amended Disclosure Statement and related Solicitation Procedures Motion shall be continued to the next scheduled omnibus hearing date of November 19, 2009 at 11:00 a.m., EDT.

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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).

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion to Continue.

3. The Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Order.

Dated: October \_\_, 2009

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HON. KEVIN J. CAREY  
UNITED STATES BANKRUPTCY JUDGE