

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
BUILDING MATERIALS HOLDING	)	Case No. 09-12074 (KJC)
CORPORATION, <i>et al.</i> , <sup>1</sup>	)	
	)	Jointly Administered
Debtors.	)	
	)	
	)	Ref. Docket Nos. 11 and 61

**NOTICE OF ENTRY OF INTERIM ORDER AND FINAL HEARING**

TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (II) THE DEBTORS' FIFTY LARGEST UNSECURED CREDITORS ON A CONSOLIDATED BASIS; (III) COUNSEL TO WELLS FARGO BANK, N.A., AS AGENT FOR BOTH OF THE DEBTORS' PREPETITION AND POSTPETITION LENDERS; (IV) THE UTILITY PROVIDERS; AND (V) ALL PARTIES THAT HAVE REQUESTED NOTICE PURSUANT TO RULE 2002 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE.

**PLEASE TAKE NOTICE** that on June 16, 2009, the debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors") filed the **Debtors' Motion for Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance** [Docket No. 11] (the "Motion"), a copy of which is attached hereto as Exhibit A. On June 17, 2009, the United States Bankruptcy Court for the District of Delaware (the "Court") entered an order [Docket No. 61] (the "Interim Order"), a copy of which is attached hereto as Exhibit B, approving the Motion on an interim basis and, among other things, prohibiting the Utility Providers<sup>2</sup> from discontinuing, altering or refusing service pending a final disposition of the Motion.

**PLEASE TAKE FURTHER NOTICE** that any objections to the entry of a final order approving the Motion must be filed on or before **July 9, 2009 at 4:00 p.m. (ET)** (the "Objection Deadline") with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the response upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

<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 otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

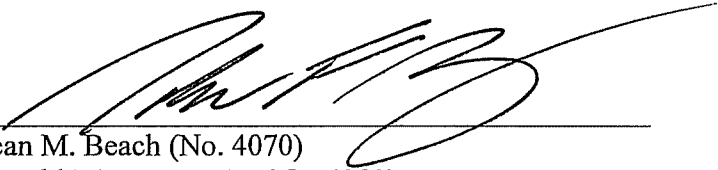
**PLEASE TAKE FURTHER NOTICE** THAT A FINAL HEARING ON THE MOTION WILL BE HELD ON **JULY 16, 2009 AT 4:30 P.M. (ET)** BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

**PLEASE TAKE FURTHER NOTICE** THAT UNTIL SUCH TIME AS A FINAL ORDER ON THE MOTION IS ENTERED BY THE COURT, THE UTILITY PROVIDERS ARE FORBIDDEN TO DISCONTINUE, ALTER OR REFUSE SERVICES TO THE DEBTORS ON ACCOUNT OF ANY UNPAID PREPETITION CHARGES OR TO DISCRIMINATE AGAINST THE DEBTORS, OR TO REQUIRE PAYMENT OF A DEPOSIT OR RECEIPT OR OTHER SECURITY FOR CONTINUED SERVICE AS A RESULT OF THE DEBTORS' BANKRUPTCY FILINGS OR ANY OUTSTANDING PREPETITION INVOICES IN CONNECTION WITH ANY UNPAID CHARGES FOR UTILITY SERVICES FURNISHED TO THE DEBTORS.

**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  
June 18, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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Sean M. Beach (No. 4070)  
Donald J. Bowman, Jr. (No. 4383)  
Robert F. Poppiti, Jr. (No. 5052)  
The Brandywine Building  
1000 West Street, 17th Floor  
P.O. Box 391  
Wilmington, Delaware 19899-0391  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

----and----

GIBSON, DUNN & CRUTCHER LLP  
Michael A. Rosenthal (admitted *pro hac vice*)  
Matthew K. Kelsey (admitted *pro hac vice*)  
Saeed M. Muzumdar (admitted *pro hac vice*)  
200 Park Avenue, 47th Floor  
New York, New York 10166-0193  
Telephone: (212) 351-4000  
Facsimile: (212) 351-4035

Aaron G. York (admitted *pro hac vice*)  
Jeremy L. Graves (admitted *pro hac vice*)  
2100 McKinney Avenue, Suite 1100  
Dallas, Texas 75201-6911  
Telephone: (214) 698-3100  
Facsimile: (214) 571-2900

PROPOSED ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION

**EXHIBIT A**

Motion

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 ( )

Joint Administration Requested

**DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS  
(A) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING OR  
DISCONTINUING SERVICE; (B) APPROVING THE DEBTORS' PROPOSED  
ADEQUATE ASSURANCE; AND (C) ESTABLISHING PROCEDURES  
FOR RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this Motion (the "**Motion**") for the entry of an interim order substantially in the form annexed hereto as **Exhibit A** and a final order substantially in the form annexed hereto as **Exhibit B** (a) prohibiting the Utility Providers (defined below) from altering, refusing or discontinuing service; (b) approving the Debtors' proposed adequate assurance;<sup>2</sup> and (c) approving the Debtors' proposed procedures for resolving

<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> Nothing contained in this Motion is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' right to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order granting this Motion is not intended and should not be construed to be an admission as to the validity of any claim or a waiver of the Debtors' right to subsequently dispute such claim.

Date Filed 6/16/09  
Docket No. 11

additional requests for adequate assurance. In support thereof, the Debtors respectfully represent:<sup>3</sup>

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. sections 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. section 157(b). Venue is proper pursuant to 28 U.S.C. sections 1408 and 1409.

### **RELIEF REQUESTED**

2. Section 366(a) of the Bankruptcy Code prevents utility companies from discontinuing, altering, or refusing service to, or discriminating against, a debtor during the first 20 days of a chapter 11 case. Section 366(c)(2) of the Bankruptcy Code, however, permits a utility company to alter, refuse, or terminate its services if a debtor has not furnished adequate assurance of payment within 30 days after the commencement date.

3. By this Motion, the Debtors, pursuant to sections 105(a), 366, 1107(a), and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***") and Federal Rules of Bankruptcy Procedure 6003 and 6004, seek entry of (A) the Interim Order (i) prohibiting the Utility Providers (as defined herein) from altering, refusing, or discontinuing services to, or discriminating against the Debtors on account of prepetition amounts outstanding or on account of any perceived inadequacy of the Debtors' proposed adequate assurance pending entry of the Final Order, (ii) approving the Debtors' Proposed Adequate Assurance (as defined herein), (iii) approving the Debtors' proposed procedures for resolving any requests for additional adequate

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<sup>3</sup> A description of the Debtors' business and the reasons for filing these Chapter 11 Cases is set forth in the Declaration of Paul S. Street in Support of Chapter 11 Petitions and First Day Relief (the "***Street Declaration***"), filed contemporaneously with this Motion. This Motion is supported by the Street Declaration.

assurance, and (iv) scheduling a hearing (the "*Final Hearing*") on the Motion to consider granting the relief requested herein on a final basis; and (B) the Final Order granting the relief requested herein on a final basis.

### **BACKGROUND**

4. On the date hereof (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 these Chapter 11 Cases, and no committees have been appointed or designated.

5. 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.

6. 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.

7. The Debtors operate in metropolitan areas that have historically outpaced U.S. averages for residential building permit activity (largely in the Southern and Western portions of the United States). Based on National Association of Home Builders building permit activity, the Debtors provide building products and construction services in 9 of the top 25 single-family construction markets.

8. Prior to the Petition Date, the Debtors, with the assistance of their professionals and advisors, pursued several avenues to try to maximize the value of the Debtors' business, including conducting a process to sell the Debtors' business. The Debtors' prepetition sale process did not, however, yield offers that reflected, in the Debtors' business judgment, the true value of the Debtors' business operations.

9. Contemporaneously with this prepetition marketing and sale effort, the Debtors engaged in good faith, arm's-length negotiations with significant holders of the Debtors' prepetition secured indebtedness to develop a way to de-lever the Debtors' business, while at the same time providing the Debtors' unsecured creditor constituency with a substantial recovery. These negotiations culminated in the proposed chapter 11 plan (the "**Plan**") and accompanying disclosure statement (the "**Disclosure Statement**"), filed contemporaneously with this Motion.

10. 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 a commitment to provide \$80 million in the form of debtor-in-possession financing, which the Debtors seek to have approved by the Court contemporaneously herewith.

11. As of the Petition Date, the Debtors employ approximately 5,500 people. Approximately 300 of the Debtors' employees are represented by seven unions with whom the Debtors have collective bargaining agreements. For the 12 months ended March 31, 2009, the Debtors' total revenue totaled approximately \$1.1 billion. As of March 31, 2009 the book value of the Debtors' assets totaled approximately \$480 million and its liabilities totaled approximately \$481 million.

#### **UTILITY PROVIDERS**

12. In the normal course of their business, the Debtors obtain natural gas, electricity, telephone, sewer, sanitation, and other services (the "*Utility Services*") from a number of "utilities," as that term is used in section 366 of the Bankruptcy Code (each a "*Utility Provider*," and collectively, the "*Utility Providers*"). Annexed hereto as *Exhibit C* is a non-exclusive list of the Utility Providers that provide Utility Services to the Debtors as of the Petition Date (the "*Utility Service List*"). The relief requested herein is for all Utility Providers

providing Utility Services to the Debtors and is not limited to those listed on the Utility Service List.<sup>4</sup>

13. In the past 12 months, the Debtors paid an average of approximately \$557,000 per month on account of all Utility Services. The Debtors have an excellent payment history with the Utility Providers. Uninterrupted Utility Services are essential to the Debtors' ongoing operations, and, therefore, to the success of the Chapter 11 Cases. Should any Utility Provider refuse or discontinue service, even for a brief period, the Debtors' business operations could be disrupted. The impact of such disruption on the Debtors' business operations and revenues would be extremely harmful, and would jeopardize the success of the Chapter 11 Cases. Therefore, it is essential that the Utility Services continue uninterrupted.

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

##### **A. Adequate Assurance of Payment of Postpetition Charges**

14. Section 366(a) of the Bankruptcy Code protects a debtor against the immediate termination or alteration of utility services after commencing its case.<sup>5</sup> Under that

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<sup>4</sup> The inclusion of any entity on, as well as the omission of any entity from, the Utility Service List is not an admission by the Debtors that such entity is, or is not, a utility within the meaning of section 366 of the Bankruptcy Code, and the Debtors reserve all rights with respect thereto.

<sup>5</sup> Section 366 states, in pertinent part:

- (a) Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.
- (b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

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(c)(2) subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in

[Footnote continued on next page]

section, a utility company may not, during the first 20 days of a chapter 11 case, alter, refuse, or discontinue services to a debtor solely because of unpaid prepetition amounts. If during the 30 day period following the Petition Date, however, the Debtors do not provide "adequate assurance" of payment for postpetition services in a form "satisfactory" to the utility company, the utility company may exercise its rights. Section 366(c)(1)(A) of the Bankruptcy Code provides that "assurance of payment" of postpetition charges may consist of "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is mutually agreed on between the utility and the debtor or trustee."

15. The Debtors expect to have ample liquidity to timely pay all postpetition obligations owed to their Utility Providers. Nevertheless, to provide additional assurance of payment for future services to the Utility Providers, the Debtors propose to deposit, within 20 days after the Petition Date, into a single segregated account (the "*Utility Deposit Account*") an amount equal to the Debtors' aggregate cost for two weeks of Utility Services, calculated as an historical average of the 12 months between January 1, 2008 and December 31, 2008 (the "*Adequate Assurance Deposit*") for the benefit of any Utility Provider that does not receive payment on account of providing Utility Services, unless a Utility Provider agrees to a lesser amount, and unless such Utility Provider already holds a letter of credit or a security deposit

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[Footnote continued from previous page]

subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility

(c)(3) (A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2) ....

securing the Debtors' performance. The Debtors will maintain the Adequate Assurance Deposit until the earlier of (i) entry of an order of the Court authorizing the return of the Adequate Assurance Deposit to the Debtors and (ii) the effective date of a chapter 11 plan for the Debtors (at which time the Adequate Assurance Deposit will automatically, without further order of the Court, be returned to the reorganized Debtors).

16. The Debtors, however, reserve the right to reduce the Adequate Assurance Deposit to the extent it includes an amount on account of a (i) Utility Provider that the Debtors subsequently determine should be removed from the Utility Service List, (ii) the Debtors discontinue service from a Utility Provider, or (iii) to the extent that an Additional Assurance Request (as defined herein) is properly served by a Utility Provider and any settlement results in such Utility Provider's removal from the Utility Service List or in payment of alternate assurance to the Utility Provider. Based on the foregoing, for those Utility Providers on the Utility Service List, the Debtors estimate that the total amount of the Adequate Assurance Deposit will be \$263,000.<sup>6</sup>

17. The Debtors submit that the Adequate Assurance Deposit, together with the Debtors' ability to pay for future Utility Services in the ordinary course of business with their postpetition financing (collectively, the "*Proposed Adequate Assurance*"), constitutes sufficient adequate assurance to the Utility Providers. If any Utility Provider believes that the Debtors

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<sup>6</sup> The Debtors believe that 13 of their Utility Providers currently hold cash deposits. Accordingly, the Debtors did not include amounts paid to these Providers on a monthly basis when calculating the amount of the Adequate Assurance Deposit. These Utility Providers are: APS, City of Charlotte, City of Cedar Park (Whitestone), City of Cedar Park (Brushy Creek), City of Coppell, City of Frisco, City of Houston, City of Killeen, City of North Las Vegas, City of Terrell, Duke Energy, Harris County Mud 366, Imperial Irrigation District, NW Harris Co. Mud #6, and Piedmont Natural Gas.

should provide additional adequate assurance, it may request such assurance pursuant to the procedures set forth below.

**B. Additional Adequate Assurance Procedures**

18. Because of the severe consequences to the Debtors of any interruption in services by the Utility Providers, but recognizing the right of each Utility Provider to evaluate the Proposed Adequate Assurance on a case-by-case basis, the Debtors propose that the Court approve and adopt the following procedures (the "*Adequate Assurance Procedures*") for any Utility Provider not satisfied with the Proposed Adequate Assurance to request additional adequate assurance (an "*Additional Assurance Request*"):

- a. Within three business days after the date of the Interim Order is docketed, the Debtors will mail a copy of the Interim Order to the Utility Providers on the Utility Service List;
- b. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurance of payment in the form of a deposit, letter of credit, prepayment, or otherwise, it must serve an Additional Assurance Request upon the following parties: (i) Building Materials Holding Corporation, 720 Park Blvd., Ste 200, Boise, ID 83712 (Attn: Paul Street), and (ii) the attorneys for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166 (Attn: Michael A. Rosenthal and Matthew K. Kelsey) and Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, DE 19801 (Attn: Sean M. Beach and Robert F. Poppiti) (collectively, the "*Notice Parties*");
- c. Each Additional Assurance Request must (i) be in writing; (ii) set forth the type of Utility Services and the location for which such Services are provided; (iii) include a summary of the Debtors' payment history relevant to the affected account(s), including any deposits and other security held by the Utility Provider; (iv) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment; and (v) be actually received by the Notice Parties;
- d. Upon the Notice Parties' receipt of an Additional Assurance Request at the addresses set forth in subparagraph (b) above, the Debtors shall have the greater of (i) 14 days from the receipt of such Additional Assurance Request or (ii) 20 days from the Petition Date (collectively, the "*Resolution Period*")

to negotiate with such Utility Provider to resolve such Utility Provider's Additional Assurance Request;

- e. The Debtors may, in their discretion, resolve any Additional Assurance Request by mutual agreement with the requesting Utility Provider without further order of the Court and may, in connection with any such agreement and in their discretion, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, cash deposits, prepayments, and/or other forms of security, without further order of the Court to the extent the Debtors believe such additional assurance is reasonable in the exercise of their business judgment;
- f. If the Debtors determine that a timely received Additional Assurance Request is not reasonable and are unable to reach an alternative resolution with the Utility Provider during the Resolution Period, the Debtors will file a motion with the Court to request a hearing before the Court within a reasonable time after receipt of the Additional Assurance Request to determine the adequacy of assurance of payment with respect to a particular Utility Provider (the "**Determination Motion**") pursuant to section 366(c)(3) of the Bankruptcy Code;
- g. Pending resolution of any such Determination Motion, any such Utility Provider shall be prohibited from altering, refusing, or discontinuing service to the Debtors on account of unpaid charges for prepetition services, the filing of the Chapter 11 Cases, or any objection to the adequacy of the Proposed Adequate Assurance;
- h. The Debtors may, in their discretion, resolve any Determination Motion by mutual agreement with the requesting Utility Provider without further order of the Court and may, in connection with any such agreement and in their discretion, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, a cash deposit, prepayment, letter of credit, and/or other forms of security, without further order of the Court to the extent the Debtors believe that such additional assurance is reasonable in the exercise of their business judgment; and
- i. Absent the timely filing of a Procedures Objection (as defined below), the Proposed Adequate Assurance shall be deemed adequate assurance of payment for any Utility Provider that fails to make a timely Additional Assurance Request.

19. The Debtors respectfully request that, absent compliance with the Adequate Assurance Procedures, the Utility Providers are forbidden to alter, refuse, or discontinue service on account of any prepetition charges, or require additional adequate

assurance of payment other than the Proposed Adequate Assurance, pending entry of the Final Order.

**C. Objections to Adequate Assurance Procedures**

20. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("**BAPCPA**"), a debtor could place the burden on utility providers to argue that whatever form of adequate assurance proposed by the debtor was insufficient. BAPCPA's amendments to section 366 of the Bankruptcy Code arguably shift the burden to the debtor to both provide adequate assurance that the utility providers find satisfactory and to seek court review if a utility provider does not accept the proposed adequate assurance. This interpretation of post-BAPCPA section 366 of the Bankruptcy Code, if taken to its logical limit, could cripple a debtor. For instance, a Utility Provider, on the 29th day following the Petition Date, could announce that the proposed adequate assurance is not acceptable, demand an unreasonably large deposit alleging payment risk from the Debtors, and threaten to terminate Utility Service the next day unless the Debtors complied with the demand. This would leave the Debtors with effectively no ability to seek review.

21. Accordingly, the Debtors believe it is prudent to establish the Adequate Assurance Procedures and to require that Utility Providers raise any objections to the Adequate Assurance Procedures so that any such objections may be heard by the Court prior to the expiration of the 30-day period following the Petition Date. Thus, the Debtors propose that any Utility Provider that objects to the Adequate Assurance Procedures described above must file a written objection (a "**Procedures Objection**") and serve such objection on the Notice Parties, so that it is actually received by the date that is the earlier of (i) 15 days after entry of the Interim Order and (ii) five business days before the Final Hearing. To resolve any Procedures Objection

within 30 days following the Petition Date, the Debtors request that the Court schedule the Final Hearing on any unresolved Procedures Objections approximately 25 days after the Petition Date.

**D. Subsequent Modifications of the Utility Service List**

22. Although the Debtors have made extensive and good faith efforts to identify all Utility Providers, certain companies that currently provide Utility Services to the Debtors may have been omitted inadvertently from the Utility Service List. To the extent that the Debtors identify additional Utility Providers, the Debtors will promptly file amendments to the Utility Service List and will serve copies of the Motion, the Interim Order, and the Final Order (when and if entered) on such newly identified Utility Providers.

23. The Debtors further request that the Court make the Interim Order and Final Order binding on all Utility Providers, regardless of when each Utility Provider was added to the Utility Service List, provided that (i) the Debtors shall increase the amount of the Adequate Assurance Deposit by an amount equal to the average cost of two weeks of Utility Services over the past 12 months for any newly identified Utility Provider that does not currently hold a cash deposit, letter of credit, or other security deposit, and (ii) any such newly identified Utility Provider shall have until 14 days from the date of such service to serve an Additional Assurance Request in compliance with the proposed Adequate Assurance Procedures, which request must actually be received by the Notice Parties within this time period. The Debtors have the periods specified in the proposed Adequate Assurance Procedures to seek to resolve any such request by mutual agreement with the Utility Provider without further order of the Court or to file a Determination Motion with the Court to determine the adequacy of assurance of payment with respect to such Utility Provider in accordance with such Procedures.



**E. Cause Exists to Authorize the Debtors'  
Proposed Treatment of Utility Providers**

24. The relief requested will ensure that the Debtors' operations will not be needlessly disrupted by the commencement of the Chapter 11 Cases. If a disruption to the provision of Utility Services occurs, the Debtors' business operations and revenues would be harmed. The relief requested provides the Utility Providers with a fair and orderly procedure for requesting an Adequate Assurance Deposit and for determining requests for additional adequate assurance. Without these procedures, the Debtors could be forced to address numerous requests by Utility Providers in a haphazard manner at a critical period in the Chapter 11 Cases and during a time when the Debtors' efforts could be more gainfully focused on the continuation of their operations for the benefit of all parties in interest.

25. Pursuant to section 366(c) of the Bankruptcy Code (as amended by BAPCPA), in a chapter 11 case, a utility provider may alter, refuse, or discontinue utility service if within 30 days after the commencement of the chapter 11 case the utility provider does not receive adequate assurance in a form that is "satisfactory" to the utility provider, subject to the Court's ability to modify the amount of adequate assurance. *Cf. Jones v. Boston Gas Co. (In re Jones)*, 369 B.R. 745, 749 (B.A.P. 1st Cir. Jun 08, 2007) ("[B]ased on a debtor's failure to provide adequate assurance of payment, bankruptcy courts have concluded that [section] 365(b) grants utilities the unilateral right to terminate service."); *St. Torrance v. Cincinnati Gas & Elec. Co. (In re St. Torrance)*, No. 06-8090, 2007 Bankr. LEXIS 3180, at \*8 (B.A.P. 6th Cir. Sept. 26, 2007) (same). Furthermore, under section 366(c), in making a determination of whether an assurance of payment is adequate, the Court may not consider (i) the absence of security before the petition date, (ii) the debtor's history of timely payment or (iii) the availability of an administrative expense priority to the utility provider. *See* 11 U.S.C. § 366(c)(3)(B).

26. While the form of adequate assurance of payment may be limited under subsection 366(c) to the types of security enumerated in subsection 366(c)(1)(A), Congress did not, by enacting BAPCPA, divest the Court of its power to determine what amount, if any, is necessary to provide adequate assurance of payment to a utility company. *See id.* at § 366(c)(3)(A) ("On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance payment...."). In addition, BAPCPA did not change the requirement that the assurance of payment only be adequate, and does not require a guarantee of payment. Indeed, Courts construing section 366(b) have consistently held that "adequate" assurance of payment does not require an absolute guarantee of the debtor's ability to pay. *See, e.g., In re Caldor, Inc. – NY*, 199 B.R. 1, 3 (Bankr. S.D.N.Y. 1996) ("Section 366(b) requires the Bankruptcy Court to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require an 'absolute guarantee of payment.'" (citation omitted); *aff'd sub nom Virginia Elec. Power Co. v. Caldor, Inc. – NY*, 117 F.3d 646 (2d Cir. Jun 10, 1997); *In re Adelphia Bus. Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002) (same). Therefore, despite the language in section 366(c)(2) allowing a utility to take action against a debtor should it fail to provide adequate assurance of payment that is "satisfactory" to the utility, section 366 does not require that the assurance provided be "satisfactory" once the Court determines the appropriate amount of adequate assurance.

27. Accordingly, the Debtors believe that the Proposed Adequate Assurance and the Adequate Assurance Procedures are reasonable and satisfy the requirements of section 366 of the Bankruptcy Code. The relief requested in this Motion is similar to the relief granted

in other recent chapter 11 cases filed in this District after BAPCPA became effective.<sup>7</sup> See *In re Key Plastics LLC*, Case No. 08-13324 (MFW) (Bankr. D. Del. Jan. 6, 2009) (approving adequate assurance to utilities in an amount equal to a two week deposit); *In re SemCrude, L.P.*, Case No. 08-11525 (BLS) (Bankr. D. Del. Aug. 18, 2008) (same); *In re LandSource Comtys. Dev. LLC*, Case No. 08-11111 (KJC) (Bankr. D. Del. Jul. 1, 2008) (same); *In re Holley Performance Prods. Inc.*, Case No. 08-10256 (PJW) (Bankr. D. Del. Mar. 5, 2008) (same); *In re Leiner Health Products Inc. (n/k/a Supplements LT, Inc., et al.)*, Case No. 08-10446 (KJC) (Banks. D. Del. Mar. 13, 2008) (approving adequate assurance consisting of escrow of a sum equal to 50% of the estimated costs of monthly utility services); *In re Buffets Holdings, Inc.*, Case No. 08-10141 (MFW) (Bankr. D. Del. Feb. 27, 2008) (approving adequate assurance consisting of escrow of a sum equal to 50% of the estimated costs of monthly utility services); *In re American Home Mortgage Holdings, Inc.*, Case No. 07-11047 (CSS) (Bankr. D. Del. Sept. 4, 2007) (same); *In re Fedders North America, Inc.*, Case No. 07-11176 (BLS) (Bankr. D. Del. Sept. 12, 2007) (same); *In re Global Home Products, LLC*, Case No. 06-10340 (KG) (Bankr. D. Del. Apr. 11, 2006) (same).

28. Further, the Court has the authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code, which provides that the Court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The purpose of section 105(a) is "to assure the bankruptcy courts [sic] power to take whatever action is appropriate or necessary in aid of the exercise of their

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<sup>7</sup> The Debtors have not annexed copies of the unreported orders cited herein because of their size. Copies of these orders, however, are available upon request of the Debtors' counsel, including at the hearing to consider the Motion.

jurisdiction." 2 COLLIER ON BANKRUPTCY 105.01, at 105-5 to 105-6 (15th rev. ed. 2006). The proposed Adequate Assurance Procedures are necessary and appropriate to carry out the provisions of the Bankruptcy Code, and in particular, section 366. Indeed, the proposed Adequate Assurance Procedures will protect the Debtors by ensuring the continued provision of Utility Services without materially prejudicing the Utility Providers. Therefore, the proposed Procedures implement section 366 in a manner fully consistent therewith and are an appropriate exercise of this Court's authority under section 105(a) of the Bankruptcy Code.

29. Based on the foregoing, the Debtors submit that the relief requested herein is necessary and appropriate, is in the best interests of their respective estates and creditors, and should be granted.

**F. Interim Relief is Justified**

30. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within twenty (20) days after the filing of the petition regarding a motion to "use, sell, lease, or otherwise incur an obligation regarding property of the estate" only if such relief is necessary to avoid immediate and irreparable harm. The Debtors submit that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein, Bankruptcy Rule 6003 has been satisfied.

**REQUEST FOR WAIVER OF STAY**

31. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), any "order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." As set forth above, the establishment of the proposed Utility Deposit Account, the deposit therein of the

Adequate Assurance Deposit, and the implementation of Adequate Assurance Procedures are essential to prevent potentially irreparable damage to the Debtors' operations. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay imposed by Bankruptcy Rule 6004(h).

### **NOTICE**

32. No trustee, examiner, or creditors' committee has been appointed in these chapter 11 cases. The Debtors have provided notice of filing of the Motion either by electronic mail or facsimile and/or by overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) the 50 largest unsecured creditors of the Debtors on a consolidated basis as identified in the Debtors' chapter 11 petitions; and (c) counsel to Wells Fargo Bank, as agent for both of the Debtors' prepetition lenders and proposed postpetition lenders. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Local Rule 9013-1(m). Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

### **NO PRIOR REQUEST**

33. 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  
June 16, 2009

YOUNG CONAWAY STARGATT &  
TAYLOR, LLP



Sean M. Beach (No. 4070)  
Donald J. Bowman, Jr. (No. 4383)  
Robert F. Poppiti, Jr. (No. 5052)  
The Brandywine Building  
1000 West St., 17th Floor  
Wilmington, DE 19801  
Telephone: 302.571.6600  
Facsimile: 302.571.1253

---- and ----

GIBSON, DUNN & CRUTCHER LLP  
Michael A. Rosenthal (*pro hac vice* pending)  
Matthew K. Kelsey (*pro hac vice* pending)  
Saeed M. Muzumdar (*pro hac vice* pending)  
200 Park Ave, 47th Floor  
New York, NY 10166-0193  
Telephone: 212.351.4000  
Facsimile: 212.351.4035

Aaron G. York (*pro hac vice* pending)  
Jeremy L. Graves (*pro hac vice* pending)  
2100 McKinney Ave, Suite 1100  
Dallas, TX 75201-6911  
Telephone: 214.698.3100  
Facsimile: 214.571.2900

PROPOSED ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION

# **EXHIBIT A**

**Proposed Interim Order**

IN RE:	)	
	)	Chapter 11
BUILDING MATERIALS HOLDING	)	
CORPORATION, <i>et al.</i> , <sup>1</sup>	)	Case No. 09- <u>12074</u> ( )
	)	
Debtors.	)	Jointly Administered
	)	
	)	Ref. Docket No. _____

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 interim order pursuant to sections 105(a) and 366 of title 11 of the United States Code (the "**Bankruptcy Code**") (a) prohibiting Utility Providers<sup>2</sup> from altering, refusing, or discontinuing service; (b) approving the Debtors' proposed adequate assurance; and (c) establishing procedures for resolving requests for additional adequate assurance, 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

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



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 on an interim basis.
2. Until such time as the Final Order is entered by the Court, all Utility Providers listed on the Utility Service List, annexed to the Motion as ***Exhibit C***, are (a) prohibited from altering, refusing, or discontinuing Utility Services to the Debtors on account of any unpaid prepetition charges, (b) discriminating against the Debtors, or (c) requiring a payment of a deposit or receipt or any other security for continued services as a result of the Chapter 11 Cases or any outstanding prepetition invoices except as provided in the immediately following decretal paragraphs.
3. Except as may be adjusted by a subsequent order of the Court (which may be the Final Order), as adequate assurance for the payment of Utility Services, the Debtors shall deposit cash in an amount equal to the Debtors' approximate aggregate cost of Utility Services for a two week period, calculated as an historical average over the 12 months between January 1, 2008 and December 31, 2008 (the "***Adequate Assurance Deposit***"), but not including the cost of Utility Services for any Utility Provider already holding a letter of credit or security deposit securing the Debtors' performance, into a segregated escrow account (the "***Adequate Assurance Deposit***

*Account*") with an escrow agent (the "*Utility Escrow Agent*") for the benefit of all Utility Providers.

4. Except as the amount may be reduced by application of Orders of the Court, the Adequate Assurance Deposit in the amount of \$263,000 is to be deposited in the Adequate Assurance Deposit Account within 20 days after the Petition Date and is to be held in escrow, pending entry of the Final Order for the purpose of providing each Utility Provider adequate assurance of payment for its postpetition Utility Services to the Debtors.

5. Within three business days after the Debtors establish the Adequate Assurance Deposit Account, the Debtors shall notify each Utility Provider (other than a Utility Provider holding a letter of credit or a security deposit) by first-class mail, postage prepaid, of the notice information (including, without limitation, name, address, contact person, facsimile number, and account number) of the Utility Escrow Agent.

6. If an amount relating to postpetition Utility Services provided by any Utility Provider is unpaid beyond any applicable grace period, such Utility Provider may request a disbursement from the Adequate Assurance Deposit Account by giving notice to the Utility Escrow Agent with a simultaneous copy by facsimile to Paul Street, Building Materials Holding Corporation, facsimile number 208-331-4477 and Michael A. Rosenthal, Gibson, Dunn & Crutcher LLP, facsimile number 212-351-6258, in which case the disbursement shall only be honored on the date that is three business days after the date of such Utility Provider's request.

7. Except as provided herein with respect to the rights of Utility Providers, the creditors of the Debtors shall have no interest in, or lien on, the Adequate Assurance Deposit or the Adequate Assurance Deposit Account.

8. The Adequate Assurance Deposit shall be maintained until the earlier of (a) entry of an order of the Court authorizing the return of the Adequate Assurance Deposit to the Debtors and (b) the effective date of a chapter 11 plan for the Debtors (at which time the Adequate Assurance Deposit shall automatically, without further order of the Court, be returned to the reorganized Debtors).

9. The Debtors shall have the right to reduce the Adequate Assurance Deposit to the extent that it includes an amount on account of (a) a Utility Provider that the Debtors subsequently determine should be removed from the Utility Service List, (b) the Debtors discontinue service from a Utility Provider, or (c) to the extent that an Additional Assurance Request is properly serviced by a Utility Provider and any settlement resulting in such Utility Provider's removal from the Utility Service List or in the payment of alternate assurance to the Utility Provider.

10. The relief granted herein is for all Utility Providers providing Utility Services to the Debtors and is not limited to those listed on the Utility Service List annexed to the Motion as *Exhibit C*.

11. The Debtors are authorized to supplement, as necessary, the Utility Service List and shall serve copies of the Motion, the Interim Order, and the Final Order (when and if entered) on such newly identified Utility Providers.

12. The Interim Order and Final Order (when and if entered) shall be binding on all Utility Providers providing Utility Services, regardless of when each Utility Provider was added to the Utility Service List, provided that (i) the Debtors shall increase the amount of the Adequate Assurance Deposit by an amount equal to the average cost of two weeks of Utility Services provided by such additional Utility Provider over the past 12 months, *provided that*

such Utility Provider that does not currently hold a cash deposit, letter of credit, or other security deposit, and (ii) any such newly identified Utility Provider shall have until 14 days from the date of such service to serve an Additional Assurance Request in compliance with the proposed Adequate Assurance Procedures, which request must actually be received by the Notice Parties within this time period.

13. If a Utility Provider is not satisfied with the Adequate Assurance Deposit provided by the Debtors, the Utility Provider shall serve a request for additional adequate assurance (the "***Additional Assurance Request***") so that it is received by the Debtors at the following addresses on or before the objection deadline: (i) Building Materials Holding Corporation, 720 Park Blvd., Ste 200, Boise, ID 83712 (Attn: Paul Street), and (ii) the attorneys for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166 (Attn: Michael A. Rosenthal and Matthew K. Kelsey) and Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, DE 19801 (Attn: Sean M. Beach and Robert F. Poppiti) (collectively, the "***Notice Parties***"). Any Additional Assurance Request shall (a) be in writing; (b) set forth the type of Utility Services and the location for which such Services are provided; (c) include a summary of the Debtors' payment history relevant to the affected account(s), including any deposits and other security held by the Utility Provider; (d) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment; and (e) be actually received by the Notice Parties. Such objection shall be heard at the Final Hearing.

14. Any Utility Provider that does not seek an Additional Adequate Assurance Request and/or does not timely file a Procedures Objection (as defined herein) shall be deemed

to have adequate assurance that is satisfactory to it, within the meaning of section 366 of the Bankruptcy Code.

15. Nothing in the Motion or this Interim Order shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors, a waiver of the right to dispute any claim, or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code.

16. The Debtors' service of the Motion or this Interim Order upon a company, or a Utility Service's inclusion on the Utility Service List, shall not constitute an admission or concession that any such entity is a utility within the meaning of section 366 of the Bankruptcy Code and the Debtors reserve all rights and defenses with respect thereto.

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

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

19. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6004(a).

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

21. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.

22. Any objections or responses (each a "*Procedures Objection*") to the Motion and the Adequate Assurance Procedures shall be filed and served upon the Notice Parties and on those parties as required by Local Rule 9006-1(c)(ii), so that it is actually received by the date

that is earlier of (i) 15 days after the date this Interim Order is docketed, or (ii) 5 business days prior to the Final Hearing.

23. A Final Hearing, if necessary, to resolve any timely filed Procedures Objection shall be scheduled for \_\_\_\_\_, 2009 at \_\_:\_\_\_\_.m. (prevailing Eastern Time).

24. If no Procedures Objections are timely filed, served, and received in accordance with this Interim Order, the Court may enter a Final Order without further notice or hearing.

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

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

# **EXHIBIT B**

**Proposed Final 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 ( )

)  
) Jointly Administered

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

**FINAL ORDER (A) PROHIBITING UTILITY PROVIDERS FROM ALTERING,  
REFUSING OR DISCONTINUING SERVICE; (B) APPROVING THE DEBTORS'  
PROPOSED ADEQUATE ASSURANCE; AND (C) ESTABLISHING PROCEDURES  
FOR RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE**

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 a final order pursuant to sections 105(a) and 366 of title 11 of the United States Code (the "*Bankruptcy Code*") (a) prohibiting Utility Providers<sup>2</sup> from altering, refusing, or discontinuing service; (b) approving the Debtors' proposed adequate assurance, and (c) establishing procedures for resolving requests for additional adequate assurance, 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

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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.



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 on a final basis.
2. Absent compliance with the procedures contained herein for requesting additional assurance, all Utility Providers listed on the Utility Service List, annexed to the Motions as **Exhibit C**, are (a) prohibited from altering, refusing, or discontinuing Utility Services to the Debtors on account of any unpaid prepetition charges, (b) discriminating against the Debtors, or (c) requiring a payment of a deposit or receipt or any other security for continued services as a result of the Chapter 11 Cases or any outstanding prepetition invoices other than (x) the \$263,000 deposit (the "**Adequate Assurance Deposit**") that the Debtors have made into a segregated escrow account (the "**Adequate Assurance Deposit Account**") with an escrow agent (the "**Utility Escrow Agent**") for the benefit of all Utility Providers or (y) the letters of credit or security deposits that the Debtors have issued or paid for the benefit of certain Utility Providers (each a "**Direct Utility Deposit**" and together with the Adequate Assurance Deposit, the "**Proposed Adequate Assurance**").
3. If an amount relating to postpetition Utility Services provided by any Utility Provider is unpaid beyond any applicable grace period, such Utility Provider may request a disbursement from the Adequate Assurance Deposit Account by giving notice to the Utility

Escrow Agent with a simultaneous copy by facsimile to Paul Street, Building Materials Holding Corporation, facsimile number 208-331-4477 and Michael A. Rosenthal, Gibson, Dunn & Crutcher LLP, facsimile number 212-351-6258, in which case the disbursement shall only be honored on the date that is three business days after the date of such Utility Provider's request.

4. Except as provided herein with respect to the rights of Utility Providers, the creditors of the Debtors shall have no interest in, or lien on, the Adequate Assurance Deposit or the Adequate Assurance Deposit Account.

5. The Adequate Assurance Deposit shall be maintained until the earlier of (a) entry of an order of the Court authorizing the return of the Adequate Assurance Deposit to the Debtors and (b) the effective date of a chapter 11 plan for the Debtors (at which time the Adequate Assurance Deposit shall automatically, without further order of the Court, be returned to the reorganized Debtors).

6. The Debtors shall have the right to reduce the Adequate Assurance Deposit to the extent that it includes an amount on account of (a) a Utility Provider that the Debtors subsequently determine should be removed from the Utility Service List, (b) the Debtors discontinue service from a Utility Provider, or (c) to the extent that an Additional Assurance Request is properly serviced by a Utility Provider and any settlement resulting in such Utility Provider's removal from the Utility Service List or in the payment of alternate assurance to the Utility Provider.

7. The Debtors' Proposed Adequate Assurance satisfies the requirements under section 366 of the Bankruptcy Code.

8. The following additional requirements and procedures (the "*Adequate Assurance Procedures*"), with respect to the submission of requests for additional assurance by any Utility

Provider not satisfied with the Adequate Assurance Deposit (each an "***Additional Assurance Request***"), are approved, and absent compliance with the following Adequate Assurance Procedures, the Utility Providers are forbidden to (i) alter, refuse, or discontinue service to the Debtors, (ii) discriminate against the Debtors on account of any prepetition charges, or (iii) require additional adequate assurance of payment other than the Proposed Adequate Assurance:

- a. Within three business days after the date that the Interim Order is docketed, the Debtors will mail a copy of the Interim Order to the Utility Providers on the Utility Service List;
- b. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurance of payment in the form of a deposit, letter of credit, prepayment, or otherwise, it must file an Additional Assurance Request with the Court and serve such Additional Assurance Request upon the following parties: (i) Building Materials Holding Corporation, 720 Park Blvd., Ste 200, Boise, ID 83712 (Attn: Paul Street), and (ii) the attorneys for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166 (Attn: Michael A. Rosenthal and Matthew K. Kelsey) and Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, DE 19801 (Attn: Sean M. Beach and Robert F. Poppiti) (collectively, the "***Notice Parties***");
- c. Each Additional Assurance Request must (i) be in writing; (ii) set forth the type of Utility Services and the location for which such Services are provided; (iii) include a summary of the Debtors' payment history relevant to the affected account(s), including any deposits and other security held by the Utility Provider; (iv) set forth why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment; and (v) be actually received by the Notice Parties;
- d. Upon the Notice Parties' receipt of an Additional Assurance Request at the addresses set forth in subparagraph (b) above, the Debtors shall have the greater of (i) 14 days from the receipt of such Additional Assurance Request or (ii) 20 days from the Petition Date (collectively, the "***Resolution Period***") to negotiate with such Utility Provider to resolve such Utility Provider's Additional Assurance Request;
- e. The Debtors may, in their discretion, resolve any Additional Assurance Request by mutual agreement with the requesting Utility Provider without further order of the Court and may, in connection with any such agreement and in their discretion, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, cash deposits, prepayments, and/or other forms of security, without further order of the

Court to the extent the Debtors believe such additional assurance is reasonable in the exercise of their business judgment;

- f. If the Debtors determine that a timely received Additional Assurance Request is not reasonable and are unable to reach an alternative resolution with the Utility Provider during the Resolution Period, the Debtors will file a motion with the Court to request a hearing before the Court within a reasonable time after receipt of the Additional Assurance Request to determine the adequacy of assurance of payment with respect to a particular Utility Provider (the "**Determination Motion**") pursuant to section 366(c)(3) of the Bankruptcy Code;
- g. Pending resolution of any such Determination Motion, any such Utility Provider shall be prohibited from altering, refusing, or discontinuing service to the Debtors on account of unpaid charges for prepetition services, the filing of the Chapter 11 Cases, or any objection to the adequacy of the Proposed Adequate Assurance; and
- h. The Debtors may, in their discretion, resolve any Determination Motion by mutual agreement with the requesting Utility Provider without further order of the Court and may, in connection with any such agreement and in their discretion, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, a cash deposit, prepayment, letter of credit, and/or other forms of security, without further order of the Court to the extent the Debtors believe that such additional assurance is reasonable in the exercise of their business judgment.

9. The relief granted herein is for all Utility Providers providing Utility Services to the Debtors and is not limited to those listed on the Utility Service List annexed to the Motions as *Exhibit C*.

10. The Debtors are authorized to supplement, as necessary, the Utility Service List and shall serve copies of the Motion, the Interim Order, and the Final Order on such newly identified Utility Providers.

11. The Interim Order and Final Order shall be binding on all Utility Providers providing Utility Services, regardless of when each Utility Provider was added to the Utility Service List, provided that (a) the Debtors shall increase the amount of the Adequate Assurance Deposit by an amount equal to the average cost of two weeks of Utility Services provided by

such additional Utility Provider over the past 12 months, *provided* that such Utility Provider that does not currently hold a cash deposit, letter of credit, or other security deposit, and (b) any such newly identified Utility Provider shall have until 14 days from the date of such service to serve an Additional Assurance Request in compliance with the proposed Adequate Assurance Procedures, which request must actually be received by the Notice Parties within this time period.

12. The Debtors shall have the periods specified in the proposed Adequate Assurance Procedures set forth herein to seek to resolve any such request by mutual agreement with the Utility Provider without further order of the Court or to file a Determination Motion with the Court to determine the adequacy of assurance of payment with respect to such Utility Provider in accordance with such Procedures.

13. Any Utility Provider that does not seek an Additional Adequate Assurance Request within 30 days after the date of the Interim Order and/or does not timely file a Procedures Objection shall be deemed to have adequate assurance that is satisfactory to it, within the meaning of section 366 of the Bankruptcy Code.

14. Nothing in the Motion or this Final Order shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors, a waiver of the right to dispute any claim, or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code.

15. The Debtors' service of the Motion, the Interim Order, or this Final Order upon a company, or a Utility Service's inclusion on the Utility Service List, shall not constitute an admission or concession that any such entity is a utility within the meaning of section 366 of the Bankruptcy Code and the Debtors reserve all rights and defenses with respect thereto.

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

17. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6004(a).

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

19. 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  
\_\_\_\_\_, 2009

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

# **EXHIBIT C**

## **List of Utilities Providers**

Vendor	Account #	Address	City	State	Zip
ADG Communications	119261	6650 N 47TH AVE STE 4	Glendale	AZ	85301
AHA Macav Power Service	123062	PO Box 6878	Mohave Valley	AZ	86446-6870
Allied Waste Services # 538	77445	PO Box 78829	Phoenix	AZ	85062-8829
AITel	66692	PO BOX 79033	Phoenix	AZ	85062-9033
APS	127513	PO Box 2906	Phoenix	AZ	85062-2906
Arapahoe County	14934	PO Box 172608	Denver	CO	80217-2608
Arkadin Global	134668	PO BOX 684	Buffalo	NY	14240-0684
Atmos Energy	99080	PO Box 78108	Phoenix	AZ	85062-8108
ATT	18114	PO BOX 650502	Dallas	TX	75265-0502
ATT Mobility	135439	PO BOX 6463	Carol Stream	IL	60197-6463
Bermuda Water Company	123131	4544 Highway 95	Bullhead City	AZ	86426-9346
Black Hills Energy	95206	PO BOX 4660	Carol Stream	IL	60197-4660
Board of Water Works	68265	PO Box 755	Pueblo	CO	81002-0755
Bona Vista Water District	117805	2020 West 1300 North	Farr West	UT	84404
Broadwing/L3 Communications	118530	PO BOX 952061	St. Louis	MO	63195-2061
CCI Network Services	134640	155 N 400 W STE 100	Salt Lake City	UT	84103
Cellular One	16042	PO BOX 30336	Billings	MT	59107-0336
CenterPoint Energy	59084	Po Box 2628	Houston	TX	77252
Central Texas Electric	121445	PO Box 473	Fredericksburg	TX	78624-0473
CenturyTel	63298	PO BOX 4300	Carol Stream	IL	60197-4300
City Of Abilene	38881	PO Box 3479	Abilene	TX	79604-3479
City of Austin	37883	PO Box 2267	Austin	TX	78783-2267



Vendor	Account #	Address	City	State	Zip
City of Boise	741	PO Box 2760	Boise	ID	83701
City of Cedar Park	103420	600 North Bell Blvd	Cedar Park	TX	78613-2216
City of Charlotte/Mecklenburg County	81058/87448	600 East 4th Street	Charlotte	NC	28250-0001
City of Coppell	59120	PO Box 9478	Coppell	TX	75019-9478
City of Fort Collins	11506	PO Box 1580	Fort Collins	CO	80522-1580
City of Fresno	10253	PO Box 2069	Fresno	CA	93718-2069
City of Frisco	57348	PO Box 2730	Frisco	TX	75034
City of Helena	63782	316 N Park Ave	Helena	MT	59623
City of Houston	65353	PO Box 1560	Houston	TX	77251
City of Hurst	31168	1505 Precinct Line Rd	Hurst	TX	76054-3302
City of Issaquah	79783	Po Box 1307	Issaquah	WA	98027
City of Kent	35173	PO Box 84665	Seattle	WA	98124-5965
City of Killeen	37886	PO Box 549	Killeen	TX	76540-0549
City of Missoula	64094	PO Box 31236	Billings	MT	59107-1236
City of Modesto	10108	Po Box 767	Modesto	CA	95353-0767
City of North Las Vegas	123516	Po Box 360118	North Las Vegas	NV	89036-0118
City of Orem	765	56 North State	Orem	UT	54057-5597
City of Rexburg	770	PO Box 280	Rexburg	ID	83440-0280
City of Rosenberg	120281	PO Box 631	Rosenberg	TX	77471-0631
City of Shelley	121889	101 S. Emerson	Shelley	ID	83274
City of Terrell	130066	PO Box 310	Terrell	TX	75160
City of West Jordan	20378	8000 S Redwood Rd.	West Jordan	UT	84088
City Waste Paper, Inc	51668	PO Box 1552	Ogden	UT	84402

Vendor	Account #	Address	City	State	Zip
Clark Public Utilities	12426	PO Box 8989	Vancouver	WA	98668
Clark Regional Waste Water	29611	PO Box 8955	Vancouver	WA	98668-8955
Colorado Springs Utilities	58772	PO Box 1103	Colorado Springs	CO	80947-0010
CPS Energy	116367	PO Box 2678	San Antonio	TX	78289-0001
Douglas County	68729	PO Box 3000	Minden	NV	89423
Duke Energy	80288	PO Box 70516	Charlotte	NC	28272-0516
Duncan Disposal	77917	PO Box 9001856	Louisville	KY	40290-1856
EDCO Waste & Recycling Service	133740	PO Box 5488	Buena Park	CA	90622-5488
eFax Corporate	134632	PO BOX 51873	Los Angeles	CA	90051-8173
El Paso Electric Company	17717	PO Box 20982	El Paso	TX	79998-0982
El Paso Water	17858	PO Box 511	El Paso	TX	79961-0001
Embarq	123649	PO BOX 96064	Charlotte	NC	28296-0054
EMBARQ Communication, Inc.	3000158499421455701	PO Box 219008	Kansas City	MO	64121-9008
Evergreen Disposal	664141	PO Box 7158	Kalispell	MT	59904
Evergreen Metro District	42842	PO Box 3819	Evergreen	CO	80437-3819
Excel	82708	PO BOX 650582	Dallas	TX	75265-0582
Flathead County Water	63978	130 Nicholson Dr.	Kalispell	MT	59901
Flathead Electric Cooperative, Inc.	71133	2510 US Highway 2 East	Kalispell	MT	59901-2312
Frontier	36245	PO BOX 20550	Rochester	NY	14602
Gas Company	81065	PO Box C	Mont Pk	CA	91756
Gila River Telecom	29334	BOX 5015	Chandler	AZ	85226
Granite	134256	100 NEWPORT AVE EXT	Quincy	MA	02171
Hargus Disposal	124288	PO Box 5530	Mohave Valley	AZ	86446

Vendor	Account #	Address	City	State	Zip
Harris County Mud 366	68792	PO Box 9	Spring	TX	77383
Idaho Power	1897	PO Box 34966	Seattle	WA	98124-1966
Indio Water Authority	119201	PO Box 512490	Los Angeles	CA	90051-0490
Integra Telecom	126957	PO BOX 94118	Tukwila	WA	98124
InterCall	61301	PO BOX 281866	Atlanta	GA	30384-1866
Intermountain Gas	1939	PO Box 64	Boise	ID	83732
Intermountain Rural Electric Association	56125	PO Drawer A	Sedalia	CO	80135-0220
Lakeview Light & Power	2178	PO Box 98979	Lakewood	WA	98496-8979
Lakewood Refuse Service	83837	PO Box 11630	Tacoma	WA	98411-6630
Las Vegas Valley Water District	123777	1001 S Valley View Blvd	Las Vegas	NV	89153
Matrix Telecom Inc	134107	PO BOX 60091	New Orleans	LA	70160-0091
Mett Span	135245	PO BOX 2269	Carol Stream	IL	60132-2269
Modesto Irrigation District	7836	PO Box 5355	Modesto	CA	95352-5355
Mountain Water Co.	63488	PO Box 4826	Missoula	MT	59806-4826
New Braunfels Utilities	37703	PO Box 660	San Antonio	TX	78293-0660
NorthWestern Energy	95443		Butte	MT	59707-0001
NTS Communications Inc	82197	PO BOX 10730	Lubbock	TX	79408-3730
NW Harris Co. Mud # 6	85591	PO Box 3030	Houston	TX	77253-3030
NW Natural	2710	PO Box 6017	Portland	OR	97228-6017
PAETEC Communications	134078	PO BOX 1317	Buffalo	NY	14240-1314
Pedernales Electric	25814	PO Box 1	Johnson City	TX	78636
PG & E	2903	PO Box 997300	Sacramento	CA	95899-7300
PGE Portland General Electric	2786	PO Box 4438	Portland	OR	97208-4438

Vendor	Account #	Address	City	State	Zip
Piedmont Natural Gas	80290	PO Box 533500	Atlanta	GA	30353-3500
Pierce County	24747	PO Box 11620	Tacoma	WA	98411-6620
Pride Disposal Company	78643	PO Box 820	Sherwood	OR	97140
Puget Sound Energy	56534	PO Box 91269	Bellevue	WA	98009-9269
Questar Gas	60067	PO Box 45841	Salt Lake City	UT	84139-0001
Qwest	3801	PO BOX 11035	Seattle	WA	98111-1135
Riverside Public Utilities	134762	3460 Orange Street	Riverside	CA	92501
Rocky Mountain Power	121631	1033 NE 6th Ave	Portland	OR	97256-0001
Rubantino Refuse Removal Inc	75026	PO Box 1029	Everett	WA	98206-1029
Sammamish Plateau	35618	1510 228th Ave SE	Sammamish	WA	98075
San Diego Gas & Electric	124058	PO Box 25111	Santa Ana	CA	92799-5111
Sierra Pacific Power Co.	20609	Po Box 10100	Reno	NV	89520
Snohomish County	3393	PO Box 1100	Everett	WA	98206-1100
Southern California Edison	91574	PO Box 300	Rosemead	CA	91772-0001
Southwestern Electric Power - American Electric Power	47769	PO Box 24422	Canton	OH	44701-4422
Sprint-Nextel	23053	PO BOX 4181	Carol Stream	IL	60197-4181
Strategic Energy	120015	PO Box 676863	Dallas	TX	75267-6863
TelePacific Comm	123853	PO BOX 526015	Sacramento	CA	95852-6015
Texas Gas Service	102590	PO Box 269042	Oklahoma City	OK	73126-9042
Truckee Meadows Water	98275	PO Box 659565	San Antonio	TX	78265-9565
Tualatin Valley Water District	17675	PO Box 8996	Vancouver	WA	98668-8996
TW Telecom	65636	PO BOX 650734	Dallas	TX	75265-0734
UCN Inc	115555	PO BOX 410468	Salt Lake City	UT	84141

Vendor	Account #	Address	City	State	Zip
United Power	33440	Dept. 535	Denver	CO	80281-0535
United Water	40039	PO Box 371804	Pittsburgh	PA	15250-7804
Utility Services	97286	3101 Cedar St.	Everett	WA	98201
Verizon	36899	PO BOX 660720	Dallas	TX	75266-0720
Waste Connections - Vancouver District 210	133795	Dept. 1433	Los Angeles	CA	90084-1433
Waste Management	2706	PO Box 78251	Phoenix	AZ	85062-8251
West Haven Special District	103372	4150 S. 3900 W.	West Haven	UT	84401
Westel Fiber	135149	1450 S EAGLE FLIGHT WAY, Suite 200	Boise	ID	83709
Western Disposal Services	1407	PO Box 9100	Boulder	CO	80301-9100
WTU Retail Energy	94874	PO Box 21588	Tulsa	OK	74121-1588
Xcel Energy	11112	PO Box 9477	MPLS	MN	55484-9477

**EXHIBIT B**

Order

**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, et al.,<sup>1</sup></b>	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Ref. Docket No. 11</b>

**INTERIM ORDER (A) PROHIBITING UTILITY PROVIDERS FROM ALTERING,  
REFUSING OR DISCONTINUING SERVICE; (B) APPROVING THE DEBTORS'  
PROPOSED ADEQUATE ASSURANCE; AND (C) ESTABLISHING PROCEDURES  
FOR RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE**

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 interim order pursuant to sections 105(a) and 366 of title 11 of the United States Code (the "*Bankruptcy Code*") (a) prohibiting Utility Providers<sup>2</sup> from altering, refusing, or discontinuing service; (b) approving the Debtors' proposed adequate assurance; and (c) establishing procedures for resolving requests for additional adequate assurance, 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

<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.

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 provided herein.
2. Pending further order of this Court, all Utility Providers are prohibited from altering, refusing or discontinuing service on account of any unpaid prepetition charges or the commencement of a case under the Bankruptcy Code.
3. On or before the date that is twenty (20) days after the Petition Date, the Debtors shall deposit the Adequate Assurance Deposit, in the amount of \$263,000.00, into the Utility Deposit Account. Nothing in this paragraph or this Interim Order constitutes a finding that the Adequate Assurance Deposit constitutes "adequate assurance of payment for utility service that is satisfactory to the [Utility Providers]" under section 366(c)(2) of the Bankruptcy Code.
4. The Debtors are authorized, in their sole discretion, to amend the Utility Service List on or before ten (10) days prior to the Final Hearing, a copy of which is attached as Exhibit C to the Motion, to add or delete any Utility Provider, and the Debtors shall add to the Adequate Assurance Deposit an amount equal to two (2) weeks of utility service for each subsequently-added Utility Provider. To the extent that the Debtors add any Utility Provider after such date and add to the Adequate Assurance Deposit an amount equal to two (2) weeks of utility service



for each subsequently-added Utility Provider, such Utility Provider shall have ten (10) days after receipt of notice to object to the applicability of any final order approving this Motion to such Utility Provider.

5. The Final Hearing shall be held on July 16, 2009 at 4:30 p.m. Eastern Time.

6. The Debtors shall serve a copy of the Motion, this Interim Order and notice of the Final Hearing on each of the Utility Providers on the Utility Service List within two (2) business days of entry of this Interim Order.

7. If a Utility Provider is not satisfied with the Adequate Assurance Deposit provided by the Debtors, the Utility Provider shall: (i) serve a request for additional adequate assurance (the "Additional Assurance Request") so that it is received by the Debtors at the following addresses on or before the Objection Deadline (as defined below): (i) Building Materials Holding Corporation, 720 Park Blvd., Ste 200, Boise, ID 83712 (Attn: Paul Street); and (ii) the proposed attorneys for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166 (Attn: Michael A. Rosenthal and Matthew K. Kelsey), and Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, DE 19801 (Attn: Sean M. Beach and Robert F. Poppiti, Jr.) (collectively, the "Notice Parties"). Any Additional Assurance Request shall: (i) be in writing; (ii) set forth the location(s) for which Utility Services are provided; (iii) state the account number(s) for such location(s); (iv) include a summary of the Debtors' payment history relevant to the affected account(s), including any security deposits; and (v) explain why the Utility Provider believes that the Proposed Adequate Assurance is not sufficient assurance of future payment. Such objection shall be heard at the Final Hearing.

8. If a Utility Provider objects to the Motion, the Utility Provider shall file an objection to the Motion no later than 4:00 p.m. Eastern Time on July 9, 2009, unless that deadline is extended by order of this Court or with the Debtors' consent consistent with the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the "Objection Deadline"). If no objections to the Motion are filed prior to the Objection Deadline, the Court may enter the Final Order without further notice or hearing.

9. Upon further order of this Court, all Utility Providers who do not serve an Additional Assurance Request on the Notice Parties may be deemed to consent to the Proposed Adequate Assurance, without prejudice to the rights of any party in interest under section 366(c)(3) of the Bankruptcy Code.

10. Nothing in this Interim Order or the Motion shall be deemed to constitute the postpetition assumption or adoption of any agreement pursuant to section 365 of the Bankruptcy Code.

11. The Debtors' service of the Motion upon the Utility Service List shall not constitute an admission or concession that such entities are a utility within the meaning of section 366 of the Bankruptcy Code, and the Debtors reserve all rights and defenses with respect thereto. Similarly, the rights of Utility Providers to argue that they are not "utilities" for purposes of the Bankruptcy Code are reserved.

12. Nothing in this Interim Order shall affect or otherwise impair the rights of utilities under section 366(c)(4) of the Bankruptcy Code.

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

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

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

16. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order

Dated: Wilmington, Delaware  
June 17, 2009



KEVIN J. CAREY  
CHIEF UNITED STATES BANKRUPTCY JUDGE