

IN RE:)	
)	Chapter 11
)	
BUILDING MATERIALS HOLDING)	
CORPORATION, <i>et al.</i>,¹)	Case No. 09-12074 (KJC)
)	
Debtors.)	Jointly Administered
)	
)	Objection Deadline: November 12, 2009 at 4:00 p.m. (ET)
)	Hearing Date: November 19, 2009 at 11:00 a.m. (ET)
)	

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), submit this motion (the "***Motion***") for entry of an order, substantially in the form annexed hereto as ***Exhibit A***, authorizing the Debtors to reject, *nunc pro tunc* to the Rejection Effective Date (as defined below) that certain executory contract by and between GSA Home Energy Solutions, LLC ("***HES***") and BMC West Corporation, dated as of September 15, 2008 (the "***HES Agreement***"). In support thereof, the Debtors respectfully represent:

DB02:8866141.1

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. By this Motion, the Debtors, pursuant to sections 365(a), 1107(a), and 1108 of title 11 of the United States Code (the "***Bankruptcy Code***") and Federal Rule of Bankruptcy Procedure 6006, seek entry of an order authorizing them to reject the HES Agreement, *nunc pro tunc* to the Rejection Effective Date.

BACKGROUND

3. On June 16, 2009 (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 the Chapter 11 Cases. On July 26, 2009, the Office of the United States Trustee (the "U.S. Trustee") appointed the official committee of unsecured creditors (the "Creditors' Committee").

4. 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.

5. 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.

6. On the Petition Date, the Debtors filed their proposed chapter 11 plan (the "***Plan***") and accompanying disclosure statement (the "***Disclosure Statement***"). The Debtors filed several amended versions of the Plan and Disclosure Statement since that time. The Court approved the Disclosure Statement by order entered on October 22, 2009. To implement their restructuring, the Debtors have obtained \$80 million in debtor-in-possession financing (the "***DIP Financing***"), which the Court approved on a final basis on July 1, 2009.

THE HES AGREEMENT

6. Prior to the Petition Date, the Debtors entered into the HES Agreement in order to obtain exclusive rights to distribute certain HES products. The HES Agreement requires the Debtors to pay HES certain consideration for the exclusive distribution right. The Debtors have determined, in the sound exercise of their business judgment, that the HES

Agreement is no longer of value or utility to the Debtors because the value derived from the exclusive distribution right does not exceed the amounts the Debtors are required to pay pursuant to the HES Agreement. Accordingly, the Debtors desire to reject the HES Agreement.

BASIS FOR RELIEF REQUESTED

A. The Court Should Authorize Rejection of the HES Agreement as a Sound Exercise of the Debtors' Business Judgment

7. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors seek authority to reject the HES Agreement. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). "The purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to renounce title to and abandon burdensome property." *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (quoting 2 Collier on Bankruptcy ¶ 365.01[1] (15th ed. 1993)).

8. Courts defer to a debtor's business judgment in rejecting executory contracts or unexpired leases, and upon finding that a debtor has exercised its sound business judgment, approve such rejections under section 365(a) of the Bankruptcy Code. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (recognizing the "business judgment" standard used to authorize rejection of executory contracts), *superseded by statute on other grounds*, 11 U.S.C. § 1113, *as recognized in Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 44 (1st Cir. Mass. 2003); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 39-40 (3d Cir. 1989) (recognizing the

"business judgment" standard, which requires only that the rejection will benefit the estate); *In re Trans World Airlines, Inc.*, 261 B.R. 103, 120 (Bankr. D. Del. 2001) ("A debtor's determination to reject an executory contract is governed by the business judgment standard."). The business judgment standard is "not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate." *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006).

9. The Debtors have determined, in the sound exercise of their business judgment, that the HES Agreement is no longer of value or utility to the Debtors because the value derived from the exclusive distribution right does not exceed the amounts the Debtors are required to pay pursuant to the HES Agreement. Accordingly, the Debtors' decision to reject the HES Agreement is an exercise of sound business judgment that will benefit the Debtors' estates.

B. The Court Should Authorize Rejection of the HES Agreement Effective as of the Date Hereof

10. The Debtors also respectfully submit that it is appropriate for the Court to order that the effective date of rejection of the HES Agreement be the date hereof (the "*Rejection Effective Date*").

11. While section 365 of the Bankruptcy Code does not specifically address whether the Court may order rejection to be effective retroactively, many courts have held that bankruptcy courts may, in their discretion, authorize rejection retroactive to a date prior to entry of the order authorizing the rejection where the balance of equities weighs in favor of retroactive application of rejection. *See, e.g., Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1074 (9th Cir. 2004) (affirming bankruptcy court's approval of retroactive rejection); *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (In re*

Thinking Machs., Corp.), 67 F.3d 1021, 1028 (1st Cir. 1995) ("[B]ankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation"); *Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC)*, 297 B.R. 133, 140 (D. Colo. 2003) (holding that "because section 365 does not, as a matter of law, prohibit selection of a retroactive date for rejection, the bankruptcy court has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject."); *Constant Ltd. P'ship v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 37 (S.D.N.Y. 1995) (stating that section 365 does not include "restrictions as to the manner in which the court can approve rejection").

12. Here, the balance of the equities favors granting the Debtors' request for a retroactive effective date of rejection. Without a retroactive date of rejection, the Debtors will be forced to incur unnecessary administrative charges for the HES Agreement that do not provide a benefit to the estate that is equal to or greater than the cost to the estate. Moreover, HES will not be unduly prejudiced if the rejection is deemed effective as of the Rejection Effective Date because it will receive notice of this Motion and have sufficient opportunity to act accordingly. Further, the Debtors have already informed HES that they no longer intend to perform under the HES Agreement. The Debtors respectfully submit that it is fair and equitable for the Court to find that the HES Agreement is rejected as of the Rejection Effective Date, as the retroactive rejection of the HES Agreement promotes the purposes of section 365 of the Bankruptcy Code by relieving the estate of additional and unnecessary administrative expenses.

13. Courts in this jurisdiction have routinely approved relief similar to the relief requested herein.² See, e.g., *In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Apr. 23, 2009) (authorizing the rejection of leases and granting retroactive relief requested); *In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Apr. 14, 2009) (same); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009) (authorizing the rejection of certain leases retroactive to the date the motion was filed); *In re Leiner Health Prods., Inc.*, Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 4, 2008) (authorizing the rejection of leases retroactive to the date the motion was filed); *In re Buffets Holdings, Inc.*, Case No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008) (authorizing the rejection of leases retroactive to the petition date); *In re Pope & Talbot, Inc.*, Case No. 07-11738 (CSS) (Bankr. D. Del. Dec. 12, 2007) (authorizing the rejection of executory contracts retroactive to the petition date); *In re Am. Home Mortgage Holdings, Inc.*, Case No. 07-11047 (CSS) (Bankr. D. Del. Sept. 20, 2007) (authorizing the rejection of leases and granting retroactive relief requested).

REQUEST FOR WAIVER OF STAY

14. 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." While the Debtors do not believe that Bankruptcy Rule 6004(h) applies to the relief requested

² 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.

in this Motion, ample cause exists to waive any stay of the effectiveness of the order approving this Motion because the Debtors' estates may be liable to pay any postpetition obligations arising under the HES Agreement as administrative expenses. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay possibly imposed by Bankruptcy Rule 6004(h).

NOTICE

15. No trustee or examiner has been appointed in the Chapter 11 Cases. The Debtors have provided notice of filing of the Motion to: (a) the U.S. Trustee; (b) counsel to Wells Fargo Bank, as agent under the Debtors' Prepetition Credit Agreement and DIP Facility (as defined in the Plan); (c) counsel to the Creditors' Committee; (d) HES; and (e) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

NO PRIOR REQUEST

16. No prior request for the relief sought in this Motion has been made to this or any other court.

CONCLUSION

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
October 26, 2009

YOUNG CONAWAY STARGATT &
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ATTORNEYS FOR DEBTORS
AND DEBTORS IN POSSESSION

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

In re:

Chapter 11

**BUILDING MATERIALS HOLDING
CORPORATION, *et al.*,¹**

Case No. 09-12074 (KJC)

Debtors.

Jointly Administered

Objection Deadline: November 12, 2009 at 4:00 p.m. (ET)

Hearing Date: November 19, 2009 at 11:00 a.m. (ET)

NOTICE OF MOTION

TO: (A) The Office of the United States Trustee for the District of Delaware; (B) Counsel to Wells Fargo Bank, as Agent Under the Prepetition Credit Facility and the DIP Facility (as Defined in the Plan); (C) Counsel to the Official Committee of Unsecured Creditors; (D) HES; and (E) All Parties That Have Requested Notice Pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure.

PLEASE TAKE NOTICE that the above-captioned debtors and debtors in possession (collectively, the “Debtors”) have filed the attached **Debtors’ Motion for an Order Authorizing Rejection of That Certain Executory Contract With GSA Home Energy Solutions** (the “Motion”).

PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be filed on or before **November 12, 2009 at 4:00 p.m. (ET)** (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the objection upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

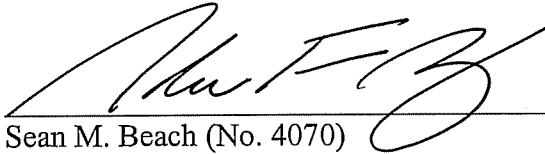
PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON NOVEMBER 19, 2009 AT 11:00 A.M. (ET) BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

¹ 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.

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 a hearing.

Dated: Wilmington, Delaware
October 26, 2009

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ATTORNEYS FOR THE DEBTORS
AND DEBTORS-IN-POSSESSION

EXHIBIT A

Proposed Order

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

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

**ORDER AUTHORIZING REJECTION OF THAT CERTAIN
EXECUTORY CONTRACT WITH GSA HOME ENERGY SOLUTIONS,
NUNC PRO TUNC TO THE REJECTION EFFECTIVE DATE**

Upon consideration of the motion (the "***Motion***")² of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***") for entry of an order authorizing the Debtors to reject, *nunc pro tunc* to the Rejection Effective Date, that certain executory contract by and between GSA Home Energy Solutions, LLC ("***HES***") and BMC West Corporation, dated as of September 15, 2008 (the "***HES Agreement***"); and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was

¹ 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.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "**Hearing**"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED:

1. The Motion is granted as set forth below.
2. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors are authorized to reject the HES Agreement. Effective immediately, such HES Agreement is deemed rejected (the "**Rejection**"), with the Rejection being effective as of October 26, 2009 (the "**Rejection Effective Date**").
3. In accordance with that certain Order Pursuant to Sections 501, 502, and 1111(a) of the Bankruptcy Code, Bankruptcy Rules 2002 and 3003(c)(3), and Local Rule 2002-1(e) Establishing Bar Dates for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof [Docket No. 248], any claim for damages allegedly arising from the rejection of the HES Agreement (a "**Rejection Damages Claim**") must be filed on or before the date which is thirty (30) days from the entry of this Order (the "**Rejection Bar Date**"). Any holder of a Rejection Damages Claim which fails to timely file a proof of such claim on or before the Rejection Bar Date shall not be treated as a creditor for purposes of receiving any distributions under the Plan.
4. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

5. The Debtors do not waive any claims they may have against HES, whether or not such claims arise under, are related to the rejection of, or are independent of the HES Agreement.

6. Nothing herein shall prejudice the rights of the Debtors to argue that any Rejection Damages Claim is limited to the remedies available under any applicable termination provision of the HES Agreement, or that any such claim is an obligation of a third party, and not that of the Debtors or their estates.

7. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6006(c) and the Local Bankruptcy Rules are satisfied by such notice.

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

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

Date: Wilmington, Delaware
November ____, 2009

Kevin J. Carey
Chief United States Bankruptcy Judge