

**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
)	
)	Objection Deadline: November 12, 2009 at 4:00 p.m. (ET)
)	Hearing Date: November 19, 2009 at 11:00 a.m. (ET)

**DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTION 363(b) OF THE
BANKRUPTCY CODE AUTHORIZING THE DEBTORS TO ENTER INTO THE
SUBCONTRACT FINALIZATION AGREEMENT**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this Motion (the "**Motion**"), pursuant to section 363(b) of title 11 of the United States Code (the "**Bankruptcy Code**") for entry of an order substantially in the form annexed hereto as **Exhibit A** authorizing the Debtors to enter into the Subcontract Finalization Agreement (as defined herein). In support thereof, the Debtors respectfully represent:

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.

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.

BACKGROUND

2. 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 June 26, 2009, the Office of the United States Trustee (the "***U.S. Trustee***") appointed the official committee of unsecured creditors (the "***Creditors' Committee***").

3. 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.

4. 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.

5. On the Petition Date, the Debtors filed a 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 CHANEN CONTRACT

6. Prior to the Petition Date, Chanen Construction Company, Inc. ("**Chanen**") and Debtor SelectBuild Arizona, LLC ("**SelectBuild Arizona**", and together with Chanen, the "**Parties**") entered into a Construction Subcontract Agreement dated May 29, 2007 (as amended from time to time by various change orders and other amendments, the "**Chanen Contract**") to pour cast-in-place concrete in connection with the construction of the Casino Arizona's Talking Stick Resort & Spa (the "**Casino Project**"). The Casino Project is expected to be one of Arizona's largest casino resorts and is owned by Salt River Gaming Enterprises, a division of the Salt River Pima-Maricopa Indian Community (the "**Owner**"). Chanen is the general contractor for the Casino Project.

7. Originally, the Chanen Contract called for SelectBuild Arizona to provide cast-in-place concrete for a three-story parking garage that was to be attached to the casino for a total contract price of \$1,920,230. However, the scope of the Chanen Contract was significantly expanded by Subcontractor Change Order S06A-002 ("**SCO-002**"), dated July 16, 2007, which

called for SelectBuild Arizona to provide nearly all of the cast-in-place concrete for the entire Casino Project, including the concrete for the casino, the conference center, and a 15-story hotel. After the execution of SCO-002 the total contract price for the Chanen Contract was \$14,466,920. SelectBuild Arizona's obligations under the Chanen Contract are secured by a performance bond and a payment bond (together, the "**Bond**") issued by Liberty Mutual Insurance Company ("**Liberty Mutual**") in favor of Chanen and the Owner. Liberty Mutual's obligations under the Bond are secured by, *inter alia*, a security interest in the Debtors' rights under the Chanen Contract and the proceeds thereof.

8. By the summer of 2008, the relationship between the Parties had become strained. Since the commencement of the project, the Parties had agreed to numerous change orders which had not been fully approved and paid. Disputes arose relating to these unapproved change orders, back charges, and other issues. Chanen had concerns about the financial condition of SelectBuild Arizona and its ability to complete its scope of work in a timely fashion. At the same time, the management of SelectBuild Arizona had determined as a part of its restructuring plans to focus its efforts on residential concrete projects. Completion of the project by SelectBuild Arizona would have required an additional significant capital outlay, a portion of which would remain outstanding until completion of the entire project in 2010. These were among the factors which led the Parties to agree in the fall of 2008 that the best course of action was to have another subcontractor finish the work remaining to be completed under the Chanen Contract. SelectBuild Arizona stopped working on the Casino Project in late 2008 and Chanen contracted with Hardrock Concrete Placement Company, Inc. ("**Hardrock**") to provide the remaining cast-in-place concrete needed to complete the Casino Project.

THE SUBCONTRACT FINALIZATION AGREEMENT

9. For the sake of clarity, the Parties desired to memorialize their understanding of the scope of the work that was performed by SelectBuild Arizona pursuant to the Chanen Contract and the amount of compensation that SelectBuild Arizona is entitled to receive as a result of such work. Accordingly, the Parties entered into an Agreement, dated as of October 28, 2009 (the "***Subcontract Finalization Agreement***") which, *inter alia*, clearly delineates (i) the scope of the work performed by SelectBuild Arizona and the warranty obligations related thereto, (ii) the scope of the work that was to be performed by SelectBuild Arizona which has been or will be performed by Hardrock and the warranty obligations related thereto, and (iii) the amount of compensation owed to SelectBuild Arizona on account of the Chanen Contract.

10. Pursuant to the Subcontract Finalization Agreement, SelectBuild Arizona is entitled to a total of \$11,632,486 for work performed pursuant to the Chanen Contract. Of this amount, \$8,870,179 has already been paid to SelectBuild Arizona. By entering into the Subcontract Finalization Agreement, SelectBuild Arizona was able to obtain Chanen's agreement to pay \$2,512,307 of the remaining \$2,762,307 that SelectBuild Arizona is owed within two business days of the Court's approval of the Subcontract Finalization Agreement. To induce Chanen to enter into the Subcontract Finalization Agreement, SelectBuild Arizona agreed to remain liable for its warranty obligations arising out of the Chanen Contract. These warranty obligations are secured by the Bond. The Parties also executed mutual releases of liability.

11. Absent this Agreement, SelectBuild Arizona would have had to wait until 30 days after substantial completion of the Casino Project—which is estimated to be in the spring of 2010—to receive its final payment of over \$1.1 million. In addition, SelectBuild

Arizona may have been forced to initiate costly action under the dispute resolution provisions of the Chanen Contract and might not have been able to obtain such a favorable outcome with respect to the amounts it is owed due to the fact that there were numerous undocumented change orders. The remaining \$250,000 that is owed to SelectBuild Arizona will be held by Chanen as security to satisfy any back charges that might be claimed in the future by one of SelectBuild Arizona's subcontractors. SelectBuild Arizona will remain liable for these back charges (to the extent they are valid) and after final completion of the Casino Project, any portion of the \$250,000 that has not been used to satisfy back charges will be remitted to SelectBuild Arizona. If the back charges exceed \$250,000, SelectBuild Arizona will pay Chanen the difference.

12. Because certain of SelectBuild Arizona's subcontractors have not been fully paid, the Debtors have agreed that Chanen may satisfy a portion of its obligations to SelectBuild Arizona by paying these subcontractors directly.² Pursuant to the Chanen Contract, these subcontractors must be paid in full before SelectBuild Arizona can receive final payment and SelectBuild Arizona's obligation to make these payments is secured by the Bond. These payments to subcontractors will total \$289,306.12.

BASIS FOR RELIEF REQUESTED

13. Section 363(b)(1) of the Bankruptcy Code permits a debtor-in-possession to use property of the estate "other than in the ordinary course of business" after notice and a hearing. 11 U.S.C. § 363(b)(1). Uses of estate property outside the ordinary course of business may be authorized if the debtor demonstrates a "sound business purpose." *See In re Lionel Corp.*, 722 F. 2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge

² The amounts owed to these subcontractors are in whole or in part prepetition obligations of the Debtors.

determining a 363(b) application expressly find from the evidence presented before him...a good business reason to grant such an application."); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtor to show that a sound business purpose justifies such actions.").

14. Once the debtor articulates a business justification for a particular form of relief, courts review the debtor's request under the "business judgment rule." *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee's judgment concerning use of property under Bankruptcy Code section 363(b) when there is a legitimate business justification). The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *see also In re Helm*, 335 B.R. 528, 539 (Bankr. S.D.N.Y. 2006) ("The business judgment rule requires the Court to determine whether a reasonable business person would make a similar decision under similar circumstances.") (quoting *In re Vencor, Inc.*, Case No. 99-3199, 2003 Bankr. LEXIS 659, 2003 WL 21026737 at *3 (Bankr. D. Del. Apr. 30, 2003)).

15. The Debtors' entry into the Subcontract Finalization Agreement was an exercise of sound business judgment. By entering into the Subcontract Finalization Agreement, the Debtors were able to secure an immediate cash infusion of \$2,223,000.88 at virtually no cost

to their estates. Absent entry into the Subcontract Finalization Agreement, the Debtors would have been forced to wait, at a minimum, until the Casino Project is completed sometime in 2010 to receive payment for their performance under the Chanen Contract. In addition, if the Debtors had not been able to reach an agreement regarding the amounts they are owed pursuant to the Chanen Contract, they may have been forced to resolve any disputes through costly litigation. Chanen's direct payment of SelectBuild Arizona's subcontractors will not harm the Debtors' estates because the amount the Debtors are entitled to receive pursuant to the Subcontract Finalization Agreement greatly exceeds the amounts owed to these subcontractors and because the Debtors cannot obtain full payment under the Chanen Contract until these subcontractors are paid in any event.³ Moreover, SelectBuild Arizona's obligation to pay its subcontractors is secured by the Liberty Mutual Bond, which is in turn secured by a security interest in the Debtors' rights under the Chanen Contract. Similarly, SelectBuild Arizona's warranty obligations related to the Chanen Contract are secured by the Bond. Thus, the Debtors' unsecured creditors will not be harmed by the Debtors' entry into the Subcontract Finalization Agreement and all of the Debtors' creditors will benefit from this transaction because the benefits derived therefrom greatly exceed the relatively minimal costs thereof.

16. In light of the foregoing, the Debtors respectfully submit that entry into the Subcontract Finalization Agreement is an appropriate exercise of the Debtors' business

³ To the extent that the payments to the subcontractors are deemed to be payments from the Debtors to satisfy prepetition debts, these payments should be authorized pursuant to section 363(b), which empowers the Court to authorize the payment of prepetition claims outside of the ordinary course of business. *See, e.g., Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay the prepetition claims of some suppliers who were potential lien claimants because the payments were necessary to induce general contractors to release funds owed to the debtors); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (Bankr. M.D. Fla. 2005) (recognizing section 363 as a source of authority and allowing payment of the prepetition claims of vendors whose supplies would take four to six weeks to replace).

judgment; is necessary and in the best interest of the Debtors, their creditors, and their estates; and should be approved under section 363(b) of the Bankruptcy Code.

NOTICE

17. No trustee or examiner has been appointed in these 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) Chanen; 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

18. 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
October 30, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Robert F. Poppiti, Jr.

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ATTORNEYS FOR THE DEBTORS
AND DEBTORS-IN-POSSESSION

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

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) Chanen; and (E) All Parties That Have Requested Notice Pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure.

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.

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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 30, 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 PURSUANT TO SECTION 363(b) OF THE BANKRUPTCY CODE
AUTHORIZING THE DEBTORS TO ENTER INTO THE SUBCONTRACT
FINALIZATION AGREEMENT

Upon consideration of the motion (the "***Motion***") of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "***Debtors***") for entry of an order authorizing the Debtors to enter into the Subcontract Finalization Agreement,² all as set forth in the Motion; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "***Hearing***"); and the Court having

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

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 363(b) of title 11 of the United States Code (the "*Bankruptcy Code*"), the Debtors are authorized to enter into the Subcontract Finalization Agreement and are authorized and empowered to take any and all steps and to perform such other and further actions as are necessary to carry out, effectuate, or otherwise enforce the terms, conditions, and provisions of the Subcontract Finalization Agreement.
3. The Debtors are authorized to take any action necessary to effectuate the terms of this Order without further order of the Court.
4. The Court shall retain jurisdiction over any and all matters arising from or related to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware
November __, 2009

Kevin J. Carey
Chief United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

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

Debtors.

Chapter 11

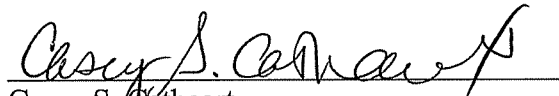
Case No. 09-12074 (KJC)

Jointly Administered

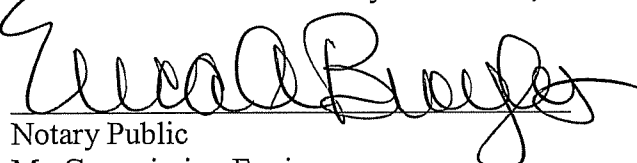
AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS
NEW CASTLE COUNTY)

Casey S. Cathcart, an employee of the law firm of Young Conaway Stargatt & Taylor, LLP, co-counsel to the above-captioned debtors, being duly sworn according to law, deposes and says that on October 30, 2009, she caused a copy of the **Debtors' Motion for an Order Pursuant to Section 363(b) of the Bankruptcy Code Authorizing the Debtors to Enter Into the Subcontract Finalization Agreement** to be served as indicated upon the parties identified on the attached service lists.


Casey S. Cathcart

SWORN TO AND SUBSCRIBED before me this 30th day of October, 2009.


Notary Public
My Commission Expires:

ERICA A. BROYLES
NOTARY PUBLIC
STATE OF DELAWARE
My commission expires Sept. 6, 2013

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.

BUILDING MATERIALS HOLDING CORPORATION
SPECIAL SERVICE LIST RE: SUBCONTRACT FINALIZATION AGREEMENT
10/30/2009

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10/30/2009

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