

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 345, 363, 1107(a), and 1108 of title 11 of the United States Code (the "*Bankruptcy Code*"), Federal Rules of Bankruptcy Procedure 6003 and 6004, and Local Rules 2015-2 and 9013-1, seek entry of an order (I) authorizing the Debtors to: (a) continue using their cash management system, bank accounts, and existing business forms, and (b) continue intercompany transactions in the ordinary course of business; and (II) granting extension of time to comply with the requirements of section 345(b) of the Bankruptcy Code relating to the Debtors' continued use of their prepetition investment practices.

3. The Debtors further request that the Court authorize the Banks (as defined herein) to: (a) continue to maintain, service, and administer the Bank Accounts (as defined herein) and honor checks issued by the Debtors subsequent to the Petition Date, *provided* that such Banks shall not be authorized to honor any other checks issued or dated prior to the Petition Date, absent a separate order of the Court specifically related thereto; and (b) in accordance with current practice and the agreements governing the Bank Accounts, charge back the Debtors' accounts amounts incurred by the Banks, solely with the Debtors' permission and solely resulting from returned checks or other returned items, claims that arise from providing the Bank Accounts to the Debtors or performing services for the Debtors in connection with their Cash Management System (as defined herein).

4. As described in more detail below, the Debtors believe that the relief requested herein will help ensure the Debtors' orderly entry into and administration in chapter 11. Approval of the relief requested will avoid many of the possible disruptions and distractions that not only could divert the Debtors' attention from more pressing matters during the initial days of the Chapter 11 Cases (defined below), but also interfere with the operation of the Debtors' business during the course of the Chapter 11 Cases. Such relief will benefit all stakeholders by maintaining the Debtors' going-concern value as they attempt to effect a reorganization of their business.

BACKGROUND

5. 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 business 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

CASH MANAGEMENT SYSTEM

13. The Debtors' business requires the collection, payment, and transfer of funds through numerous bank accounts. In the ordinary course of business and prior to the Petition Date, the Debtors maintained a centralized cash management system (the "**Cash Management System**"). Like other large businesses, the Debtors designed their Cash Management System to efficiently collect, transfer, and disburse funds generated through the

Debtors' operations and to accurately record such collections, transfers, and disbursements as they are made. The Debtors' financial personnel manage the Cash Management System from the Debtors' treasury department in San Francisco, California. The Debtors' Cash Management System is comprised of approximately 70 bank accounts. Each general category of accounts is described below and a diagram of the Cash Management System is annexed hereto as *Exhibit B*.

14. The Cash Management System includes the following bank accounts (together, the "*Bank Accounts*") at various banks (the "*Banks*") which are also described in the flowchart annexed hereto as *Exhibit B* and listed in the schedule annexed hereto as *Exhibit C*, and is operated according to the treasury procedure described herein (the "*Treasury Procedure*"):

a. Bank Accounts

- i. *Depository Accounts*. The Debtors maintain several depository accounts (the "*Depository Accounts*"). These accounts are used to deposit funds into the Debtors' Cash Management System.
- ii. *General Accounts*. Funds are disbursed as needed from the Concentration Account to various Debtors' general accounts (the "*General Accounts*"). Most of the General Accounts are zero balance accounts ("*ZBAs*") used to fund separate ZBAs for payroll, accounts payable and other disbursements (discussed below) and to make payments by wire, for example, to domestic and overseas vendors. Excess funds remaining in these General Accounts at the end of each day are swept back to the Debtors' Concentration Account. Certain of the Debtors' General Accounts are stand-alone accounts whose balances are monitored daily by the Debtors' treasury department in San Francisco.
- iii. *Concentration Account*. Following the Treasury Procedure, funds from the Depository Accounts, General Accounts and various other accounts are swept daily to and from a concentration account (the "*Concentration Account*") maintained at Wells Fargo Bank by Debtor Building Materials Holding Corporation.
- iv. *Payroll and A/P Accounts*. The Debtors maintain various accounts for payroll and accounts payable (the "*Payroll Accounts*" and the

"*A/P Accounts*"). The ZBA Payroll Accounts and A/P Accounts are funded from the relevant General Accounts as checks are presented for payment. Certain of the Debtors' Payroll Accounts are stand-alone accounts whose balances are monitored daily by the Debtors' treasury department in San Francisco.

- v. *Imprest Accounts.* The Debtors maintain various accounts in which they maintain a certain balance from which certain insurers have the right to make draws in order to satisfy the amounts owed to those insurers (the "*Imprest Accounts*"). The Imprest Account balances are replenished periodically by transfers from other accounts whenever they are drawn down by the Debtors' insurers.
- vi. *Other Accounts.* The Debtors maintain a variety of other ZBA accounts that are used to pay insurance obligations, fund employee benefit plans and make various other disbursements. In addition, the Debtors maintain a stand-alone account to fund short-term money market investments.

b. Treasury Procedure

- i. Each morning beginning at 8:00 a.m., the Debtors run reports detailing the previous day's activity in all bank accounts, as well as current day reports of controlled disbursement account totals, returned items, and both incoming and outgoing wire and ACH transactions.
- ii. For each subsidiary, daily cash worksheets are then prepared to determine the morning starting balance, expected cash inflows and expected cash outflows.
- iii. The net cash position of each subsidiary is estimated by subtracting outflows from total cash available. A negative cash position requires funding from the Concentration Account to the relevant subsidiary account, while a positive cash position is considered available to be swept up to the Concentration Account.
- iv. A consolidated cash worksheet is then prepared by considering the information referenced above as well as (a) outgoing or incoming wire transfers reflecting subsidiary funding or sweeps; (b) interest and bank fees scheduled to be charged to the Debtors' accounts; (c) miscellaneous incoming or outgoing wire transfers requested by other departments; and (d) periodic payroll funding.
- v. The Debtors' net cash position is then estimated by subtracting outflows from total cash available. A negative cash position

requires borrowing from the bank credit line, while a positive cash position is available to pay down outstanding loan balances.

INVESTMENT POLICIES AND PRACTICES

15. Prior to the Petition Date, in the ordinary course of their businesses, the Debtors developed policies and practices for deposits and investments ("*Prepetition Practices*") of excess funds within the Cash Management System. In particular, under the Prepetition Practices, excess funds within the Cash Management System are either (a) maintained in domestic bank accounts below amounts insured by the United States (through FDIC or FSLIC), (b) maintained in domestic banks that have signed Uniform Depository Agreements with the United States Trustee for Region Three,³ (c) used to pay down outstanding loan balances, (d) transferred to a collateral account from which they are invested in money market funds by the Debtors' lenders, or (e) invested overnight by the Debtors in money market funds offered by Wells Fargo Bank.

16. The Debtors have determined, in their business judgment, that it is desirable to maintain their excess cash in income-producing investments to the fullest extent possible. These investments must be primarily short term in nature, however, because of the need for liquidity in the operation of the Debtors' businesses. The Debtors' conservative Prepetition Practices reflect the primary goals of preserving principal, maintaining liquidity, diversifying investment risk and maximizing earnings on such invested funds consistent with the

³ Certain of the Banks at which the Debtors maintain relatively small Bank Accounts have not yet signed Uniform Depository Agreements with the United States Trustee for Region Three. These are First Financial Bank, Union State Bank, and Whitney National Bank. The Debtors will seek to have these banks sign Uniform Depository Agreements in a timely fashion.

other three goals. The Debtors thus believe that it would be in the best interests of their estates to continue to follow these Prepetition Practices.

17. The yield on investments under the Prepetition Practices will be greater than if the Debtors were restricted to direct investments in government securities. If the Debtors were limited to investing directly in government securities, considerations of liquidity would limit their investments to very short-term securities that would produce a lower return on such investments. Although the investment of excess cash in this manner may not strictly comply with the approved guidelines for investing funds under section 345 of the Bankruptcy Code, the Debtors believe that such investment of funds nevertheless would be safe and prudent and will yield the maximum reasonable net return on the funds invested, taking into account the safety of the investment. The Debtors propose, therefore, to continue their Prepetition Practices during these Chapter 11 Cases.

INTERCOMPANY TRANSACTIONS

18. In the ordinary course of their business, the Debtors maintain business relationships among themselves. As a result, there are numerous intercompany transactions and transfers (collectively, the "*Intercompany Transactions*") that give rise to intercompany claims (the "*Intercompany Claims*"), including, without limitation, the following types of transactions:

19. **Intercompany Sales.** In the ordinary course of business, the Debtors sell and purchase goods from various Debtor affiliates. The Debtors' records of Intercompany Transactions reflect the net position of sales, purchases, and cash transfers made between their affiliates.

20. **Central Receipts and Disbursements.** In the ordinary course of business, Debtor Building Materials Holding Corporation pays for inventory and supplies and, in

some cases, collects receivables on behalf of its affiliates. The Debtors' records of Intercompany Transactions reflect the net position of both receipts and disbursements received by or made on behalf of the various Debtors.

21. **Centrally-Billed Expenses.** In the ordinary course of business, the Debtors incur centrally-billed expenses, including insurance premiums, workers' compensation obligations, advertising expenses, shipping and transportation charges, and other expenses necessary to operate the business. Debtor Building Materials Holding Corporation pays these expenses and then allocates them to the appropriate affiliate.

22. The Debtors maintain detailed records of all Intercompany Transactions and, therefore, can ascertain, trace, and account for all Intercompany Claims. The Debtors will continue to maintain records of Intercompany Transactions in the postpetition period. The Debtors propose, therefore, to continue the Intercompany Transactions in the ordinary course of business during the Chapter 11 Cases.

EXISTING BUSINESS FORMS AND CHECKS

23. In the ordinary course of business, the Debtors use a variety of checks and business forms. To minimize expenses to their estates and avoid unnecessarily confusing their employees, customers, and suppliers, the Debtors believe it is appropriate to continue to use all checks, correspondence, and other business forms (including, without limitation, letterhead, purchase orders, and invoices) (collectively, the "***Business Forms***") as such forms were in existence immediately before the Petition Date – without reference to the Debtors' status as debtors in possession – rather than requiring the Debtors to incur the expense and delay of ordering entirely new business forms. The Debtors will replace their existing stock of Business

Forms with new forms identifying their status as debtors in possession as existing forms are depleted.

BASIS FOR RELIEF REQUESTED

A. Continued Use of the Cash Management System Is Essential to the Debtors' Business Operations

24. Bankruptcy courts routinely permit chapter 11 debtors to continue using their existing cash management systems and treat requests for such relief as a relatively "simple matter." *In re Baldwin-United Corp.*, 79 B.R. 321, 327 (Bankr. S.D. Ohio 1987). *See also In re Columbia Gas Sys.*, 997 F.2d 1039, 1061 (3d Cir. 1993) (recognizing that a requirement to maintain all accounts separately "would be a huge administrative burden and economically inefficient."); *Charter Co. v. Prudential Ins. Co. of Am. (In re Charter Co.)*, 778 F.2d 617, 621 (11th Cir. 1985) (holding that allowing the debtors to use their prepetition "routine cash management system" was entirely consistent with applicable provisions of the Bankruptcy Code).

25. The Cash Management System has been used by the Debtors for nine years and is a customary and essential business practice. The widespread use of such systems demonstrates the numerous benefits they provide, including the ability to control and monitor corporate funds, invest idle cash, ensure cash availability and reduce administrative expenses by facilitating the movement of funds. In light of the size and complexity of the Debtors' operations, the value of the Debtors' estates cannot be maximized if the Cash Management System is substantially disrupted. Additionally, preserving a "business as usual" atmosphere and avoiding the unnecessary distractions that inevitably would be associated with any substantial disruption of the Cash Management System will facilitate the stabilization of the Debtors' business operations.

26. Parties in interest will not be harmed by the Debtors' maintenance of the existing Cash Management System, including the Bank Accounts, because the Debtors have implemented appropriate mechanisms to ensure that unauthorized payments will not be made on account of obligations incurred prior to the Petition Date. Specifically, with the assistance of their professionals and consistent with prior practice, the Debtors will continue to maintain detailed records of all transfers of cash and record all transactions on applicable accounts. Therefore, the Debtors should be permitted to continue to manage their cash and transfer monies among the Bank Accounts in accordance with the Cash Management System.

27. In complex chapter 11 cases such as these, courts in this District have granted similar requests for approval of cash management systems.⁴ See, e.g., *In re Sun-Times Media Group, Inc.*, Case No. 09-11092 (CSS) (Bankr. D. Del. Apr. 1, 2009); *In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Mar. 17, 2009); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009); *In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Feb. 13, 2009); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 3, 2006); *In re Meridian Auto. Systems-Composite Operations, Inc.*, Case No. 05-11168 (MFW) (Bankr. D. Del. Apr. 27, 2005).

B. Continued Use of Existing Bank Accounts and Business Forms Should Be Permitted

1. Use of Existing Bank Accounts.

28. The Office of the United States Trustee ("*U.S. Trustee*") has established several operating guidelines for chapter 11 debtors in possession, including a requirement that

⁴ 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.

the debtor in possession open new bank accounts and close all existing accounts. This requirement was designed to provide a clear line of demarcation between pre- and postpetition claims and payments and to help protect against the inadvertent payment of prepetition claims. The U.S. Trustee's guidelines also require opening a separate operating account and a special tax payment account into which all funds (including funds held in trust for employee tax withholdings) that may be collected and or payable during the case will be deposited. This requirement is meant to provide cash collateral for, and ensure payment of, certain priority tax claims such as federal and state payroll taxes and sales taxes.

29. To avoid substantial disruption to the normal operation of their businesses and to preserve a "business as usual" atmosphere, the Debtors request that they be permitted to continue to use the existing Bank Accounts without establishing separate accounts for cash collateral or tax payments. Allowing the Debtors to maintain the Bank Accounts will assist them in accomplishing a smooth transition to operations under chapter 11. Moreover, the Debtors can distinguish between pre- and postpetition obligations and payments without closing the Bank Accounts and opening new ones. Additionally, all Banks with which the Debtors maintain the Bank Accounts will be immediately advised not to honor checks, advises, drafts, or other requests for payment issued prior to the Petition Date, except as otherwise expressly permitted by an order of the Court and directed by the Debtors. Therefore, the goals of the United States Trustee guidelines can be satisfied, and the Debtors' creditors can be protected, without closing the Bank Accounts.

30. In addition, the Debtors are current on all of their known priority tax obligations and have strict systems in place to make sure that these claims are satisfied on a timely basis. Altering the Bank Account structure would interrupt these systems, thereby

significantly disrupting the Debtors' business operations and jeopardizing the Debtors' prompt and timely payment of employee taxes and other priority tax obligations. The Debtors' systems provide the protections required by the U.S. Trustee guidelines – ensuring payment of taxes – without requiring the creation of new accounts and payment procedures.

31. Thus, the Debtors respectfully request that the Court authorize and direct the Banks to continue to maintain, service, and administer the Bank Accounts as accounts of the Debtors as debtors in possession, without interruption and in the ordinary course of business. In this regard, the Banks should be authorized and directed to receive, process, honor, and pay any and all checks, automated clearing house payments ("*ACH Payments*") and other instructions, and drafts payable through, drawn, or directed on such Bank Accounts after the Petition Date by holders, makers, or other parties entitled to issue instructions with respect thereto; *provided, however*, that any check, advise, draft, or other notification that the Debtors advised the Banks to have been drawn, issued, or otherwise presented prior to the Petition Date may be honored by the Banks only to the extent authorized by order of the Court.

32. The Debtors further request that the Court authorize and direct the Banks to accept and honor all representations from the Debtors as to which checks, drafts, wires, or ACH Payments should be honored or dishonored consistent with any order of the Court and governing law, whether such checks, drafts, wires, or ACH Payments are dated prior to or subsequent to the Petition Date. The Debtors also request that, to the extent a Bank honors a prepetition check or other item drawn on any account that is the subject of the Motion either (a) at the direction of the Debtors, (b) in a good-faith belief that the Court has authorized such prepetition check or item to be honored, or (c) as the result of an innocent mistake despite the above-described protective measures, such Bank will not be deemed to be liable to the Debtors

or to their estates on account of such prepetition check or other item honored postpetition. The Debtors respectfully submit that such relief is reasonable and appropriate because the Banks are not in a position to independently verify or audit whether a particular item may be paid in accordance with a court order or otherwise.

33. In the ordinary course of business, the Banks charge, and the Debtors pay, honor, or allow the deduction from the appropriate account, certain service charges and other fees, costs, and expenses (collectively, the "**Bank Fees**"). The Debtors respectfully request that the Court authorize the Banks to (a) continue to charge the Debtors the Bank Fees and (b) charge-back returned items to the Bank Accounts, whether such items are dated prior to, on, or subsequent to the Petition Date, in the ordinary course of business. The Debtors further request that the Court order that liens on any of the Bank Accounts granted to creditors will not have priority over the Bank Fees of the respective Bank at which the Bank Account is located.

34. Consistent with the relief courts in this District have granted in other chapter 11 cases, the Debtors' continued use of the Bank Accounts should be authorized. *See, e.g., In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Mar. 17, 2009); *In re Portola Packaging, Inc.*, No. 08-12001 (CSS) (Bankr. D. Del. Aug. 29, 2008); *In re Amp'd Mobile, Inc.*, Case No. 07-10739 (BLS) (Bankr. D. Del. June 29, 2007); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 3, 2006); *In re Meridian Auto. Systems-Composite Operations, Inc.*, Case No. 05-11168 (MFW) (Bankr. D. Del. Apr. 27, 2005).

2. Use of Existing Business Forms.

35. The Debtors use numerous Business Forms in the ordinary course of their businesses. The Debtors request authority to continue using their existing prepetition Business Forms without reference to their status as debtors-in-possession or any other alteration. It is

essential that the Debtors be authorized to continue using their existing Business Forms because they routinely deal with a large number of vendors, including foreign vendors, and changing business forms would impose a substantial burden without corresponding benefit. With respect to checks, the Debtors print all non-payroll checks in-house on blank stock and will label postpetition checks with the legend "Debtor-in-Possession" once they deplete their existing stock of checks and it is reasonably practicable for the Debtors to modify their printing process. Payroll checks are printed by a third-party payroll processor, Automatic Data Processing, Inc. ("*ADP*"). ADP can print postpetition payroll checks with the legend "Debtor-in-Possession," and the Debtors will instruct ADP to do so once it depletes its existing stock of checks and it is reasonably practicable for ADP to modify its printing process.

C. Continued use of Intercompany Transactions Should be Permitted

36. As described above, the Debtors enter into certain Intercompany Transactions in the ordinary course of business including, without limitation, intercompany sales, centralized collection of receipts and issuance of disbursements, and centralized billing of certain expenses. The Intercompany Transactions reduce the administrative costs incurred by the Debtors. If the Intercompany Transactions were to be discontinued, the Cash Management System and related administrative controls would be disrupted.

37. The continuation of the Intercompany Transactions will not prejudice the Debtors' estates or their creditors. Furthermore, the Debtors maintain strict records of all transfers of cash and can readily account for all Intercompany Transactions. Accordingly, the Debtors believe that continuation of the Intercompany Transactions is in the best interests of the Debtors' estates and creditors.

38. Because the Debtors engage in Intercompany Transactions on a regular basis and such transactions are common among similar enterprises, the Debtors believe the

Intercompany Transactions are ordinary course transactions within the meaning of section 363(c)(1) of the Bankruptcy Code and, therefore, do not require the Court's approval.

Nonetheless, out of an abundance of caution, the Debtors are seeking express authority to engage in such transactions on a postpetition basis. The continued performance of the ordinary course Intercompany Transactions is necessary to ensure the Debtors' ability to operate their businesses after the Petition Date.

39. This Court previously has authorized debtors to continue intercompany transactions in the ordinary course of business to resolve concerns relating to the repayment of funds moved between a debtor and its subsidiaries in a chapter 11 case. *See, e.g., In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Mar. 17, 2009); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (KJC) (Bankr. D. Del. Oct. 31, 2006); *In re FLYi, Inc.*, Case No 05-20011 (MFW) (Bankr. D. Del. Nov. 8, 2005); *In re Globalstar Capital Corp.*, Case No. 02-10499 (PJW) (Bankr. D. Del. Feb. 21, 2002).

D. The Debtors Should be Given a 60-day Extension of Time to Comply with Section 345(b)

40. Pursuant to section 345(b) of the Bankruptcy Code, any deposit or other investment made by a debtor, except those insured or guaranteed by the United States or by a department, agency or instrumentality of the United States or backed by the full faith and credit of the United States, must be secured by a bond in favor of the United States that is secured by the undertaking of a corporate surety approved by the United States Trustee or by the deposit of securities of the kind specified in 31 U.S.C. § 9303. *See* 11 U.S.C. § 345(b). Section 345(b) provides further, however, that a bankruptcy court may allow the use of alternatives to these approved investment guidelines "for cause." *Id.*; *see also In re Serv. Merch. Co.*, 240 B.R. 894,

896 (Bankr. M.D. Tenn. 1999). Moreover, Local Rule 2015-2 provides that, if a motion for waiver of the section 345 requirements is filed on the first day of a chapter 11 case, the Court may grant an interim waiver of the section 345 requirements until such motion is heard. *See* Local Rule 2015-2.

41. In *Service Merchandise*, the court identified the following factors for determining whether cause exists to waive the requirements of section 345(b) of the Bankruptcy Code:

- (a) the sophistication of the debtor's business;
- (b) the size of the debtor's business operations;
- (c) the amount of investments involved;
- (d) the bank ratings of the financial institutions where the debtor's funds are held;
- (e) the complexity of the case;
- (f) the safeguards in place within the debtor's own business for insuring the safety of the funds;
- (g) the debtor's ability to reorganize in the face of a failure of one or more of the financial institutions;
- (h) the benefit to the debtor of current practices;
- (i) the harm, if any, to the estate; and
- (j) the reasonableness of the debtor's request for relief from the section 345(b) requirements in light of the overall circumstances of the case.

Service Merchandise, 240 B.R. at 896. Examining these factors, the *Service Merchandise* court concluded that "cause" existed in that case because the debtors were "large, sophisticated [companies] with a complex cash management system," with the ability to shift money as needed to insure the safety of their funds. *Id.* Moreover, the benefits to the debtor of waiving the section 345(b) requirements far outweighed any potential harm to the estate, and the failure to

waive the requirements "would needlessly handcuff this debtor's reorganization efforts." *Id.* at 896-97.

42. As in *Service Merchandise*, the Debtors operate a sophisticated enterprise with a complex cash management system that provides the Debtors with the ability to transfer funds rapidly to ensure their safety. In light of these factors and the safety of the institutions and investment vehicles that the Debtors propose to utilize as a continuation of their Prepetition Practices, the Debtors believe that sufficient cause exists to allow deviation from the investment guidelines set forth in section 345(b) of the Bankruptcy Code.

43. Furthermore, investment of cash in strict compliance with the requirements of section 345(b) of the Bankruptcy Code would be inconsistent with section 345(a) of the Bankruptcy Code, which permits a debtor to make such investments of money of the estate "as will yield the maximum reasonable net return on such money." 11 U.S.C. § 345(a). By investing excess funds overnight in money market funds, the Debtors are able to maintain a conservative investment portfolio, while at the same time enjoying a higher yield than would result if their investments were limited to direct investments in government securities. Thus, the Debtors believe that their prepetition investment practices are calculated to achieve the "maximum reasonable net return" in accordance with section 345 of the Bankruptcy Code.

44. The Debtors hereby request that this Court grant them a 60-day extension of the time to comply with the investment requirements of section 345 and authorize the Debtors to continue investing their excess funds in accordance with the Prepetition Practices. During the extension period, the Debtors propose to discuss with the Office of the United States Trustee

what modifications to their Prepetition Practices, if any, would be appropriate under the circumstances.

45. Courts in this district have granted relief similar to that requested herein. *See, e.g., In re Sun-Times Media Group, Inc.*, Case No. 09-11092 (CSS) (Bankr. D. Del. Apr. 1, 2009); *In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Mar. 17, 2009); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC) (Bankr. D. Del. Apr. 3, 2007); *In re Riverstone Networks, Inc.*, Case No. 06-10110 (Bankr. D. Del. Feb. 8, 2006).

E. Immediate Relief is Justified

46. 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

47. 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." The Debtors submit that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay imposed by Bankruptcy Rule 6004(h).

NOTICE

48. 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

49. 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

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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

EXHIBIT A
Proposed Order

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.
2. The Debtors are authorized to maintain and use the Cash Management System as described in the Motion.
3. The Debtors are authorized to: (a) continue to use, with the same account numbers, the Bank Accounts in existence on the Petition Date, including, without limitation, those accounts identified on *Exhibit C*, which was attached to the Motion; (b) treat the Bank Accounts for all purposes as accounts of the Debtors as debtors in possession; and (c) use, in their present form, all Business Forms without reference to their status as debtors in possession; *provided* that the Debtors will (i) print the legend "Debtor-in-Possession" on all of the checks they print in-house once they deplete their existing stock of checks and it is reasonably practicable for the Debtors to modify their printing process, (ii) instruct ADP to print the legend "Debtor-in-Possession" on all of the payroll checks it distributes once ADP depletes its existing stock of checks and it is reasonably practicable for ADP to modify its printing process, and (iii) replace their existing stock of other Business Forms with new forms identifying their status

as debtors in possession as existing forms are depleted, unless such requirement is waived by further order of the Court.

4. Except as otherwise provided in this Order, the Banks are authorized to continue to service and administer the Bank Accounts as accounts of the Debtors as debtors in possession, without interruption and in the ordinary course, and to receive, process, honor, and pay any and all checks, drafts, wires, and automated clearing house transfers issued and drawn on the Bank Accounts after the Petition Date by the holders or makers thereof, as the case may be.

5. Each of the Debtors' Banks is authorized to debit the Debtors' accounts in the ordinary course of business without the need for further order of this Court for: (a) all checks drawn on the Debtors' accounts which are cashed at such Bank's counters or exchanged for cashier's checks by the payees thereof prior to the Petition Date; (b) all checks or other items deposited in one of Debtors' accounts with such Bank prior to the Petition Date which have been dishonored or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtors were responsible for such items prior to the Petition Date; and (c) all undisputed prepetition amounts outstanding as of the date hereof, if any, owed to any Bank as service charges for the maintenance of the Cash Management System.

6. Any of the Debtors' Banks may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this or any other order of this Court, and such Bank shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

7. The Banks are authorized to charge, and the Debtors are authorized to pay, honor, or allow the Bank Fees, and charge back returned items to the Bank Accounts in the ordinary course of business.

8. No liens on any of the Bank Accounts granted to any creditors shall take priority over the Bank Fees of the respective Bank at which the account is located.

9. The Debtors are authorized to open any new Bank Accounts or close any existing Bank Accounts as they may deem necessary and appropriate in their sole discretion; *provided, however,* that the Debtors give prompt notice to the Office of the United States Trustee for Region Three and any statutory committees appointed in the Chapter 11 Cases; *provided, further,* that the Debtors shall comply with paragraphs 10 and 11 of this Order, with their obligations under such paragraphs running from the date new accounts are opened (not the date this Order was entered).

10. For each of the Banks at which the Debtors have accounts holding Debtor funds that are party to a Uniform Depository Agreement with the U.S. Trustee, the Debtors shall, within 15 days after the date of entry of this Order, (a) contact each Bank, (b) provide each of the Debtors' employer identification numbers, and (c) identify each such account as being held by a debtor in possession in a bankruptcy case.

11. For each of the Banks at which the Debtors have accounts holding Debtor funds that are not party to a Uniform Depository Agreement with the U.S. Trustee, the Debtors shall use their good faith efforts to cause the Bank to execute a Uniform Depository Agreement in a form prescribed by the U.S. Trustee within 30 days of the date of this Order. The U.S. Trustee's rights to seek further relief from this Court on notice in the event that the aforementioned Banks

are unwilling to execute a Uniform Depository Agreement in a form prescribed by the U.S. Trustee are fully reserved.

12. The Debtors' time to come into compliance with section 345(b) of the Bankruptcy Code is hereby extended for a period of 60 days from the Petition Date; *provided, however*, that such extension is without prejudice to the Debtors' right to request a further extension or the waiver of the requirements of section 345(b) in these cases.

13. The Debtors are authorized to continue performing Intercompany Transactions in the ordinary course of business and to honor and pay obligations in connection with the Intercompany Transactions; *provided, however*, that the Debtors shall maintain records in the ordinary course of business reflecting transfers of cash, if any, including Intercompany Transactions, so as to permit all such transactions to be ascertained.

14. The Banks are authorized to pay obligations in accordance with this or any separate order of the Court.

15. Except as otherwise provided in this Order or in a separate order of the Court, the Banks shall not honor or pay any bank payments drawn on the listed Bank Accounts or otherwise issued prior to the Petition Date.

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

18. 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).

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

20. 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
June ____, 2009

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

EXHIBIT C

Debtors' Bank Accounts

	Bank	Account Number	Description	ZBA Link
1	Wells Fargo Bank	****417	BMHC - Short-term Money Market Investments	Stand Alone
2	Wells Fargo Bank	****669	BMHC - Building Materials Holding Corporation (Collateral Acct)	Stand Alone
3	Wells Fargo Bank	****824	BMHC - Concentration	Stand Alone
4	Wells Fargo Bank	****182	BMCW - Corporation (Co. 10) - General	****824
5	Wells Fargo Bank	****712	BMCW - Corporation (Co. 10) - ACH	****182
6	Wells Fargo Bank	****268	BMCW - Corporation (Co. 10) - Payroll	****182
7	Wells Fargo Bank	****276	BMCW - Corporation (Co. 10) - A/P	****182
8	Wells Fargo Bank	****523	BMCW - Corporation - Returns	****182
9	Wells Fargo Bank	****781	BMCW - Depository	****182
10	Wells Fargo Bank	****286	BMCW - Corporation - DTC	****182
11	Wells Fargo Bank	****185	BMCW - Electronic Receipts	****182
12	Wells Fargo Bank	****749	BMCW - Corporation (Co. 10) - A/P	****182
13	Wells Fargo Bank	****908	BMCW - LP SouthCentral (Co. 32) - A/P	****182
14	Wells Fargo Bank	****940	BMCW - LP SouthCentral (Co. 32) - Payroll	****182
15	Wells Fargo Bank	****698	SB - SelectBuild - Corporation (Co. 90) - General	****824
16	Wells Fargo Bank	****635	SB - SelectBuild - Corporation (Co. 90) - Payroll	****698
17	Wells Fargo Bank	****654	SB - SelectBuild - Corporation (Co. 90) - A/P	****698
18	Wells Fargo Bank	****706	SB - SelectBuild - Corporation (Co. 90) - ACH	****698
19	Wells Fargo Bank	****584	BMHC - Corporation (Co. 99) - General	****824
20	Wells Fargo Bank	****592	BMHC - Corporation (Co. 99) - ACH	****824
21	Wells Fargo Bank	****313	BMHC - Corporation (Co. 99) - A/P	****824
22	Wells Fargo Bank	****328	BMHC - Corporation (Co. 99) - Payroll	****824
23	Wells Fargo Bank	****152	BMHC - San Francisco Disbursements	****824
24	Wells Fargo Bank	****916	BMHC - BMC Insurance	****824
25	Wells Fargo Bank	****062	BMHC - Flexible Spending	****824
26	Wells Fargo Bank	****250	BMHC - Corporation - Benefits	****824
27	Wells Fargo Bank	****357	BMHC - California Employee Benefit Plan	****824

Bank	Account Number	Description	ZBA Link
Wells Fargo Bank	****102	BMHC - SelectBuild Florida	****824
Wells Fargo Bank	****110	BMHC - SelectBuild California	****824
Wells Fargo Bank	****213	BMHC - CoreSource Benefits	****824
Wells Fargo Bank	****228	BMHC - CoreSource Flexible Spending	****824
Wells Fargo Bank	****429	BMHC - BMHC Cigna Benefit Plan	****824
Wells Fargo Bank	****678	SB - Riggs Plumbing LLC - A/P	****698
Wells Fargo Bank	****682	SB - TWf Construction, Inc. - A/P	****698
Wells Fargo Bank	****697	SB - SelectBuild Northern California, Inc. - A/P	****698
Wells Fargo Bank	****703	SB - SelectBuild Nevada, Inc. - A/P	****698
Wells Fargo Bank	****741	SB - SelectBuild Arizona, LLC - A/P	****698
Wells Fargo Bank	****794	SB - C Construction Inc. - A/P	****698
Wells Fargo Bank	****991	SB - Riggs Plumbing LLC - Payroll	****698
Wells Fargo Bank	****987	SB - TWf Construction, Inc. - Payroll	****698
Wells Fargo Bank	****628	SB - SelectBuild Northern California, Inc. - Payroll	****698
Wells Fargo Bank	****972	SB - SelectBuild Nevada, Inc. - Payroll	****698
Wells Fargo Bank	****949	SB - SelectBuild Arizona, LLC - Payroll	****698
Wells Fargo Bank	****934	SB - C Construction Inc. - Payroll	****698
Wells Fargo Bank	****474	SB - HNR Framing Systems, Inc. - Payroll	****698
Wells Fargo Bank	****586	SB - SelectBuild Nevada - Las Vegas - General	****698
Wells Fargo Bank	****134	SB - SelectBuild Nevada - Las Vegas Payroll	****586
Wells Fargo Bank	****335	SB - SelectBuild Northern California - Concentration	****698
Wells Fargo Bank	****759	SB - SelectBuild Northern California - A/P	****335
Wells Fargo Bank	****763	SB - SelectBuild Northern California - Payroll	****335
Wells Fargo Bank	****798	SB - C - Campbell Companies - Concentration	****698
Wells Fargo Bank	****336	SB - SelectBuild - Southern California Framing - Concentration	****698
Wells Fargo Bank	****448	SB - SelectBuild Arizona - Knipp Brothers Depository	****698
Wells Fargo Bank	****686	SB - SelectBuild Arizona - Flexible Spending Account	****448
Wells Fargo Bank	****440	SB - SelectBuild Arizona - Companies Concentration	****698
Wells Fargo Bank	****457	SB - SelectBuild Arizona - Concrete Depository	****440

Bank		Account Number	Description	ZBA Link
57	Wells Fargo Bank	****228	SB - SelectBuild Arizona - Concrete Health	****440
58	Wells Fargo Bank	****502	SB - SelectBuild Arizona - Plumbing Concentration	****698
59	Wells Fargo Bank	****510	SB - SelectBuild Arizona - Plumbing Merchant	****502
60	Wells Fargo Bank	****528	SB - SelectBuild Arizona - Plumbing Depository	****502
61	Wells Fargo Bank	****353	SB - TWF Construction, Inc. - Concentration	****698
62	JP Morgan Chase	****409	BMHC SelectBuild Florida	Imprest
63	JP Morgan Chase	****417	BMHC SelectBuild California	Imprest
64	JP Morgan Chase	****318	Building Materials Holding Corp.	Imprest
65	Wachovia Bank	****715	SB - SelectBuild Illinois, LLC - Payroll	Stand Alone
66	Wachovia Bank	****606	SB - Illinois Framing, Inc. - Payroll	Stand Alone
67	First National Bank	****401	BMC West Depository - Abilene Lumber	Stand Alone
68	Union State Bank	****603	BMC West Depository - Killeen	Stand Alone
69	Whitney National Bank	****014	BMC West Depository - Houston	Stand Alone
70	US Bank-Idaho	****598	BMC West Depository - Shelley 1408	Stand Alone