

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

<b>In re:</b>	)	
	)	<b>Chapter 11</b>
<b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b>	)	
	)	<b>Case No. 09-12074 (KJC)</b>
<b>Debtors,</b>	)	
	)	<b>Jointly Administered</b>
<b>PARKER DEVELOPMENT N.W. INC.,</b>	)	
	)	
<b>Movant.</b>	)	<b>Ref. Docket No. 813</b>
	)	

**DEBTORS' OPPOSITION TO MOTION OF PARKER DEVELOPMENT N.W. INC.,  
FOR RELIEF FROM THE AUTOMATIC STAY**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), respectfully submit this Opposition to the Motion of Parker Development N.W., Inc. for Relief from the Automatic Stay [Docket No. 813] filed on October 30, 2009 (the "**Motion**") as follows:

**I. Introductory Statement**

1. Parker Development N.W., Inc. ("**Movant**"), through its Motion requests that the Court lift the stay so that it can join Building Materials Holding Corporation ("**BMHC**") as a third party defendant in an Oregon state court construction defect lawsuit that is apparently

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

scheduled for trial *in less than two months*. The resulting prejudice of such a request is apparent on its face. The Debtors respectfully request that the Court deny the Motion:

2. First, Movant has not filed a proof of claim in this bankruptcy proceeding, so it is now barred from asserting a claim against the Debtors. Second, cause does not exist to lift the automatic stay in favor of Movant. The Debtors will be prejudiced significantly if the stay is lifted. As noted, the Movant requests relief from the automatic stay to **join** BMHC to this lawsuit for the first time as a third-party defendant. Further, according to the Movant, the trial in this matter is scheduled to take place on January 11, 2010,<sup>2</sup> less than two months from now. Prior to the Motion being filed, the Debtors were not even aware this lawsuit existed and they obviously have not participated in any way. It is completely unreasonable to expect the Debtors to join a lawsuit at this late date and be ready to participate in a trial in less than two months, particularly in light of the tasks presently occupying the Debtors as they prepare for the confirmation hearing scheduled in this case on December 10, 2009. In addition, the Movant has not demonstrated that it would suffer any prejudice if the stay remains in place. As noted, the Movant has not filed a proof of claim in this case, so it is barred from asserting a claim against the Debtors. Further, it is obvious that the Debtors' participation in the Oregon lawsuit is immaterial because the Movant has waited until the eve of trial to even attempt to join the Debtors as a party. Finally, the Movant cannot demonstrate any probability of prevailing on the merits of a claim against the Debtors; they do not even specify what work the Debtors performed or how it was defective. Accordingly, the Court should deny the Motion.

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<sup>2</sup> The Movant's Motion states: "The trial in this matter is currently scheduled for January 11, 2009." Counsel for the Movant has clarified that this was a typographical error and that the trial is, in fact, in January 2010.

## II. Procedural and Factual Background

3. The Movant alleges that it was a developer and general contractor for the construction of certain homes located on NW Burnside Road, Gresham, Oregon commonly known as Covington Place Row Homes (the "**Project**"), and that the Movant was sued in the Circuit Court of the State of Oregon (the "**State Court Action**") on some unspecified date. Motion, ¶ 3. The Movant further alleges that it has filed a third-party complaint in the State Court Action against various subcontractors, but that it did not name any of the Debtors in the suit. Motion, ¶ 4. It was only "through the discovery process" in the State Court Action that the Movant allegedly learned, on some unspecified date, that Debtor BMC West Corporation purportedly "entered into a subcontract to complete work on the Project." Motion, ¶ 5. The Movant states that a trial in the State Court Action "is currently scheduled for January 11, 20[10]." Motion, ¶ 6.

4. On June 16, 2009, the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* On July 16, 2009, the Court entered an 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] establishing August 31, 2009 as the bar date (the "**Bar Date**") in the bankruptcy proceeding. The Debtors did not send a Bar Date Notice to the Movant they were not aware of the State Court Action until the Movant filed the Motion. However, the Debtors did publish Notice of Commencement and notice of the Bar Date in several different publications, including the *Wall Street Journal*. See Docket Nos. 146, 147, 148, 149, 153, 154, 167, 250, 312, 366, 367, 368,

411, 498, 499, 500, 501, and 524. The Movant has not filed a proof of claim in these cases. *See* Declaration of Gregory B. Guarton ¶ 4, attached hereto as ***Exhibit A***.

5. To the extent any Debtor did work on the Project from 1999 to 2003, the Debtors believe one of three insurance policies issued by Royal Insurance Company of America ("Royal") may be applicable. Each of the Royal policies has a substantial deductible, with the lowest one being \$100,000. Further, the Debtors' obligation to Royal to pay the deductible is secured by a letter of credit issued by Wells Fargo Bank, N.A. *See* Declaration of Maureen Thomas ¶ 4, attached hereto as ***Exhibit B***.

### **III. Argument**

6. The automatic stay provision of 11 U.S.C. § 362(a) is "one of the fundamental debtor protections provided by the bankruptcy laws." *Midatlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 503 (1986). The purpose of the automatic stay is "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor." *Borman v. Raymark Industries, Inc.*, 946 F.2d 1031, 1036 (3rd Cir. 1991); *accord In re DBSI, Inc.*, 407 B.R. 159, 166 (Bankr. D. Del. 2009).

7. Section 362(d) of the Bankruptcy Code permits the Court to grant relief from the stay for cause. The movant bears the initial burden "to produce evidence that cause exists to grant relief from the automatic stay." *In re DBSI, Inc.*, 407 B.R. at 166. "To establish cause, the party seeking relief from the stay must show that 'the balance of hardships from not obtaining relief tips significantly in its favor.'" *In re Am. Classic Voyages, Co.*, 298 B.R. 222, 225 (D. Del. 2003) (emphasis added; alteration marks omitted). The Court uses a "three-prong balancing test"

to determine whether to lift the stay: (1) whether permitting continuation of the civil suit will cause great prejudice to the debtor; (2) whether, if the stay is maintained, the hardship to the creditor outweighs the hardship to the debtor; and (3) whether the creditor is likely to prevail on the merits of the civil suit. *Id.* at 857.

8. The Court should deny the Motion because Movant has not established that cause exists to lift the stay. First, Movant has not shown why it should be allowed to join the Debtors in the State Court Action when, as a result of its failure to file a proof of claim, it would be prevented from presenting any claims based on the outcome of that action in this bankruptcy proceeding. Second, Movant does not meet the standard for lifting the stay because it fails to show that the hardship to it significantly outweighs the prejudice to the Debtors if the Motion is granted.

**A. No Cause Exists to Lift the Stay Because Any Claims Movant Has Against the Debtors Are Time-Barred.**

9. Because "cause" is not defined by the Bankruptcy Code, the Court conducts a "fact intensive case-by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the stay." *In re The SCO Group, Inc.*, 395 B.R. 852, 856 (Bankr. D. Del. 2007); *see also In re Lincoln*, 264 B.R. 370, 372 (Bankr. E.D. Pa. 2001) ("Each request for relief for 'cause' under [section] 362(d)(1) must be considered on its own facts."). In this instance, one critical fact is dispositive of Movant's request to lift the stay: Movant did not file a proof of claim on or before the August 31, 2009 Bar Date. Therefore, even assuming it prevailed after litigation of its claims against the Debtors, Movant is barred from asserting those liquidated claims in this proceeding. Thus, Movant cannot meet its initial burden to show that cause exists to require the Debtors to devote substantial effort and resources litigating time-barred claims in the underlying State Court Action. The Motion does not mention

Movant's failure to file a proof of claim in this proceeding, much less demonstrate that its failure was due to excusable neglect. Movant cannot show cause to lift the stay to litigate claims it no longer has.

**B. Cause Does Not Exist To Support Lifting The Stay.**

10. Even if Movant had timely filed a proof of claim, lifting the stay would still be unwarranted. As discussed above, courts in this jurisdiction use a "three-part balancing test" to determine whether to lift the stay to allow litigation to continue: (1) whether permitting continuation of the civil suit will cause great prejudice to the debtor; (2) whether, if the stay is maintained, the hardship to the creditor outweighs the hardship to the debtor; and (3) whether the creditor is likely to prevail on the merits of the civil suit. *In re DBSI, Inc.*, 407 B.R. at 166-67. Here, these factors all support leaving the automatic stay in place.

11. Lifting the automatic stay to allow the Movant to join the Debtors as a third-party defendant in the State Court Action would cause substantial prejudice to the Debtors. The Movant itself states that the trial in the State Court Action is scheduled for January 2010. Further, based on the Movant's assertion that it learned of the Debtors' alleged involvement in the Project "through the discovery process," it appears the discovery has already taken place in the State Court Action. Thus, the Movant's request to allow it to join any of the Debtors as third-party defendants in the State Court Action is unreasonable on its face. Further, the Court has scheduled a December 10, 2009 confirmation hearing on the Joint Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code Amended October 22, 2009 (the "*Plan*"). Thus, allowing the Movant to join any of the Debtors to the State Court Action would simply distract the Debtors from their reorganization effort at this critical juncture in the case.

12. The Movant suggests that the Debtors will not be prejudiced by granting it relief from stay because "it is not seeking, and will not seek immediate recovery against the Debtor or the Debtor's estate for any amount owing Parker Development over and above its primary, excess or umbrella insurance . . . ." Motion, ¶ 15. Further, the Movant contends that "any burden for defending this suit may be borne by the Debtor's insurance carrier." Motion, ¶ 13. The Movant's assertions are not well founded. The Royal insurance policies that may be applicable to the Movant's claims have at least a \$100,000 deductible, and the Debtor's obligation to Royal to pay that deductible is secured by a letter of credit issued by Wells Fargo Bank, N.A. If Royal draws upon the letter of credit, Wells Fargo will hold a secured claim where previously only the Movant's unsecured claim existed. To avoid just this result, the Debtors' Plan requires the Debtors to pay any claim that could result in a draw on a letter of credit in full. Thus, if the Debtors are forced to defend the State Court Action, they will be required to pay at least the first \$100,000 of any related defense. Given the dubious validity of these claims, as discussed below, this a substantial prejudice that the Debtors should not be required to bear.

13. The Movant articulates no hardship that significantly outweigh the prejudice to the Debtors. *See In re W.R. Grace & Co.*, 2007 Bankr. LEXIS 1214, at \*11 (Bankr. D. Del. Apr. 13, 2007) (describing the burden as requiring proof "that the balance of hardships tips significantly in favor of granting relief."). Indeed, Movant simply states that it is entitled to a jury trial and that the Oregon state court is "best suited to try all issues" raised in the State Court Action. Motion, ¶ 14. In addition, the Movant complains that failing to lift the stay would harm the Movant "by a delay in liquidating its claims against the Debtor." The fact that the Movant waited until this late date before even attempting to join any of the Debtors in the State Court Action clearly belies the harm of any alleged "delay" and demonstrates how tangential the claims

against the Debtors are to the course of that proceeding. Further, the mere fact that the party may bear a loss by the maintenance of the stay "is not enough to warrant relief from the stay based on the balance of hardships. There must be extraordinary circumstances." *In re Boyertown Auto Body Works*, 1991 U.S. Dist. LEXIS 17372, at \*11 (E.D. Pa. Nov. 27, 1991). Nothing alleged by the Movant raises to the level of such extraordinary circumstances.

14. With respect to its likelihood of success on the merits in the State Court Action, the Movant simply alleges that "BMC West Corporation a/k/a Building Materials Holding Corporation did complete a portion of the work now complained of, and for which Parker Development is being sued." Motion, ¶ 17. The Movant offers no suggestion about what specific work the Debtors allegedly performed or how it was defective. Such empty allegations are simply not sufficient to meet even the relatively light burden a movant has with respect to showing success on the merits. In these circumstances, the Movant should not be permitted to saddle the Debtors with the significant costs that would be associated with joining the State Court Action at such a late date and preparing for a trial scheduled to take place in less than two months.

WHEREFORE, the Debtors respectfully request that the Court enter an order denying the Motion in its entirety, and grant such other and further relief as the Court may deem just and proper.

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Dated: Wilmington, Delaware  
November 16, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Robert F. Poppiti, Jr.

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ATTORNEYS FOR THE DEBTORS  
AND DEBTORS-IN-POSSESSION

**EXHIBIT A**  
**(Declaration of Gregory B. Guarton)**

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

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

**DECLARATION OF GREGORY B. GUARTON**

I, Gregory B. Guarton, declare and state as follows:

1. I am a Senior Consultant with The Garden City Group, Inc. ("**GCG**"), the claims and noticing agent in the above-captioned Chapter 11 Cases ("**Chapter 11 Cases**").

2. Pursuant to that certain Order Establishing Bar Dates for Filing Proofs of Claim [Docket No. 248] dated July 16, 2009, the Court set August 31, 2009 at 5:00 p.m. (prevailing Eastern time) as the general bar date and time by which any person and entity (excluding any governmental unit) asserting a claim against the Debtors in the Chapter 11 Cases shall file a proof of claim so that it is received by GCG.

3. As proofs of claim were received by GCG, GCG scanned each claim into a secure proprietary database maintained exclusively for these Chapter 11 Cases (the "**Database**"). All proofs of claim were fully reviewed and the details asserted thereon

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

(including claimant's name, address and other contact information provided on the claim form) were entered into the Database.

4. I have reviewed the Database, and verified that, as of the date hereof, no proof of claim was received by GCG in the Chapter 11 Cases on behalf of Parker Development N.W., Inc.

5. Pursuant to 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on November 16, 2009.

/s/ Gregory B. Guarton  
Gregory B. Guarton

**EXHIBIT B**  
**(Declaration of Maureen Thomas)**

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

**IN RE:**

**BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>**

**Debtors,**

**PARKER DEVELOPMENT N.W. INC.,**

**Movant.**

**Chapter 11**

**Case No. 09-12074 (KJC)**

**Jointly Administered**

**Ref. Docket No. 813**

**DECLARATION OF MAUREEN THOMAS**

I, Maureen Thomas, declare and state as follows:

1. I am an in-house attorney for Building Materials Holding Corporation and its affiliated Debtors in the above-captioned chapter 11 cases (the "***Chapter 11 Cases***"). I have been so engaged by the Debtors since 2004.

2. I am over 18 years of age and am competent to make this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct.

3. BMC West Corporation submitted bids with respect to the construction of certain homes located on NW Burnside Road, Gresham, Oregon, commonly known as Covington Place Row Homes (the "***Project***").

4. To the extent any Debtor did work on the Project from 1999 to 2003, I believe one of three insurance policies issued by Royal Insurance Company of America

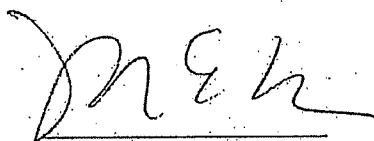
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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

("Royal") is applicable. Each of the Royal policies has a substantial deductible, with the lowest deductible being \$100,000. Further, the Debtor's obligation to pay the deductible is secured by a letter of credit issued by Wells Fargo Bank, N.A.

5. Pursuant to 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on November 16, 2009.



Maureen Thomas