

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

IN RE:	)	
	)	Chapter 11
BUILDING MATERIALS HOLDING	)	
CORPORATION, <i>et al.</i> , <sup>1</sup>	)	Case No. 09-12074 (KJC)
	)	
Debtors.	)	Jointly Administered
	)	
	)	Objection Deadline: December 8, 2009 at 4:00 p.m. (ET)
	)	Hearing Date: December 15, 2009 at 1:00 p.m. (ET)

**DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 363(b) AND 365(a)  
OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS TO AMEND THE  
DIXON LEASE AND TO ASSUME THE DIXON LEASE, AS AMENDED**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this Motion (the "**Motion**"), pursuant to sections 363(b) and 365(a) 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 amend the Dixon Lease (as defined herein) and to assume the Dixon Lease, as amended. 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.

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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.

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

#### **THE DIXON LEASE**

6. Prior to the Petition Date, the Debtors entered into that certain unexpired lease (the "*Dixon Lease*") by and between B&T, LLC (the "*Landlord*") and KBI Norcal General Partnership<sup>2</sup> (together with the Landlord, the "*Parties*") for the property described therein located at 1100 Business Park Drive, Suites A and B, Dixon, California 95620 (the "*Premises*"), dated as of March 10, 2005.

7. The Dixon Lease currently encompasses approximately 49,854 square feet of warehouse space and approximately 3,440 square feet of office space and runs through May 30, 2010. The Debtors no longer need a substantial portion of this space, though they intend to maintain their Dixon operation on a go-forward basis. Accordingly, the Debtors have renegotiated the Dixon Lease to reduce the square footage encompassed thereby to

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<sup>2</sup> KBI Norcal General Partnership is the named counterparty on the Dixon Lease. KBI Norcal General Partnership subsequently assigned its interests in the Dixon Lease to Debtor SelectBuild Northern California, Inc.

approximately 27,508 square feet of warehouse space and approximately 5,000 square feet of office space and to extend its term until December 31, 2011. To facilitate this transaction, the Parties have agreed to an amendment of the Dixon Lease (the "*Amendment*") whereby the base rent due on account of the Dixon Lease will be reduced from approximately \$21,896 per month to approximately \$10,565 per month—a savings of greater than 50%. Pursuant to the Amendment, the Debtors will move from suite A into suite C, and will retain suite B.

### **BASIS FOR RELIEF REQUESTED**

#### **I. The Debtors' Amendment of the Dixon Lease Should Be Approved Pursuant to Section 363(b) of the Bankruptcy Code**

8. 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 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.").

9. 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)).

10. The Dixon Lease, as amended, is at a market rate and provides the Debtors with warehouse and office space that is sufficient to meet their needs for the foreseeable future without incurring any of the relocation costs that would be associated with moving to a different location. By agreeing to the Amendment, the Debtors have been able to reduce their monthly obligations from approximately \$21,896 per month to approximately \$10,565 per month—a savings of greater than 50%. Moreover, because the Debtors have been able to reach a consensual agreement with the Landlord, the proposed transaction allows the Debtors to rationalize their monthly lease obligations without burdening their estates with rejection damages claims. Because the Amendment will benefit the Debtors' estates by reducing the Debtors' monthly lease payment obligations by more than 50% while providing the Debtors with ample warehouse and office space, and because the Debtors will not suffer any harm from entering into

the transaction, the Debtors' Amendment of the Dixon Lease is accordingly an exercise of sound business judgment.

## **II. The Debtors Should Be Authorized to Assume the Dixon Lease, As Amended**

11. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor-in-possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. §365(a). The purpose of section 365(a) is to allow a trustee to maximize the value of the debtor's estate by assuming executory contracts that benefit the estate and rejecting those that do not. *See, e.g., In re Fleming Companies, Inc.*, 499 F.3d 300, 304 (3d Cir. 2007) (noting that section 365(a) allows "the trustee to maximize the value of the debtor's estate by assuming executory contracts . . . that benefit the estate and rejecting those that do not.") (internal citations and quotations omitted); *Dye v. Sandman Assocs., L.L.C. (In re Sandman Assocs., L.L.C.)*, 251 B.R. 473, 481 (W.D. Va. 2000) ("The authority granted by section 365 allows the trustee or debtor in possession to pick and choose among contracts, assuming those that are favorable, and rejecting those that are not.").

12. A debtor's decision to assume or reject an unexpired lease or executory contract is subject to court review under the "business judgment" standard, which is satisfied when a debtor shows that assumption would be beneficial to its estate and reflects a reasonable exercise of business judgment. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (describing the business judgment test as the "traditional" test); *Sharon Steel Corp. v. Nat'l Fuel Gas Dist. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (same); *In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) ("The decision to assume or reject an executory contract is within the sound business judgment of the debtor-in-possession...."); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994) ("In determining whether a debtor may be permitted to reject an

executory contract, courts usually apply the business judgment test. Generally, absent a showing of bad faith, or an abuse of business discretion, the debtor's business judgment will not be altered.") (internal citations omitted); *In re III Enters., Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) ("Generally, a court will give great deference to a debtor's decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment—a standard which [the courts] have concluded many times is not difficult to meet."). Accordingly, courts approve the assumption or rejection of an executory contract or unexpired lease unless evidence is presented that the debtor's decision to assume or reject "is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." *In re Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985).

13. For the same reasons articulated herein that the Debtors' decision to amend the Dixon Lease is a sound exercise of their business judgment, the Debtors' decision to assume the Dixon Lease, as amended, is a sound exercise of their business judgment. Assumption of the Dixon Lease, as amended, will allow the Debtors to conduct business in the Dixon, California vicinity under the terms of a market-rate lease which provides the Debtors with an appropriate amount of warehouse and office space to meet their needs for the foreseeable future.

14. In light of the foregoing, the Debtors respectfully submit that their amendment of the Dixon Lease is an appropriate exercise of the Debtors' business judgment; is necessary and in the best interest of the Debtors, their creditors, and their estates; should be approved under section 363(b) of the Bankruptcy Code; and the Debtors should be authorized to assume the Dixon Lease, as amended, under section 365 of the Bankruptcy Code.

### **NOTICE**

15. 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) the Landlord; and (e) any persons who have filed a request for notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested the Debtors respectfully submit that no further notice of this Motion is required.

### **NO PRIOR REQUEST**

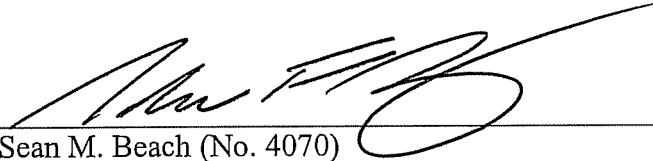
16. No prior request for the relief sought in this Motion has been made to this or any other court.



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  
November 23, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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

----and----

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

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

ATTORNEYS FOR THE DEBTORS  
AND DEBTORS-IN-POSSESSION

**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>Objection Deadline: December 8, 2009 at 4:00 p.m. (ET)</b>
	)	<b>Hearing Date: December 15, 2009 at 1:00 p.m. (ET)</b>

**NOTICE OF MOTION**

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

**PLEASE TAKE NOTICE** that the above-captioned debtors and debtors in possession (collectively, the “Debtors”) have filed the attached **Debtors’ Motion for an Order Pursuant to Sections 363(b) and 365(a) of the Bankruptcy Code Authorizing the Debtors to Amend the Dixon Lease and to Assume the Dixon Lease, as Amended** (the “Motion”).

**PLEASE TAKE FURTHER NOTICE** that any objections to the Motion must be filed on or before **December 8, 2009 at 4:00 p.m. (ET)** (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the objection upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

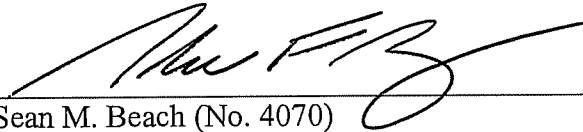
**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE MOTION WILL BE HELD ON DECEMBER 15, 2009 AT 1:00 P.M. (ET) BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.**

<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.

**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  
November 23, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Sean M. Beach (No. 4070)  
Donald J. Bowman, Jr. (No. 4383)  
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The Brandywine Building  
1000 West Street, 17th Floor  
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Michael A. Rosenthal (admitted *pro hac vice*)  
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Saeed M. Muzumdar (admitted *pro hac vice*)  
200 Park Avenue, 47th Floor  
New York, New York 10166-0193  
Telephone: (212) 351-4000  
Facsimile: (212) 351-4035

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

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:

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

**Debtors.**

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**Chapter 11**

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

**Jointly Administered**

**Ref. Docket No.**

**ORDER PURSUANT TO SECTIONS 363(b) AND 365(a) OF THE BANKRUPTCY  
CODE AUTHORIZING THE DEBTORS TO AMEND THE DIXON LEASE AND TO  
ASSUME THE DIXON LEASE, AS AMENDED**

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 amend the Dixon Lease<sup>2</sup> and to assume the Dixon Lease, as amended, 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

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

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

Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Motion is granted as set forth below.
2. Pursuant to section 363(b) of title 11 of the United States Code (the "*Bankruptcy Code*"), the Debtors are authorized to enter into the Amendment to the Dixon Lease 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 Amendment.
3. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors are authorized to assume the Dixon Lease, as amended by the Amendment.
4. The Debtors have no cure obligations in connection with the assumption of the Dixon Lease, as amended by the Amendment, and the Landlord is hereby barred, enjoined, and prohibited from asserting any additional amounts on account of the Debtors' cure obligations under section 365 of the Bankruptcy Code or otherwise from the Debtors or their estates with respect to the Dixon Lease.
5. The Debtors are authorized to take any action necessary to effectuate the terms of this Order without further order of the Court.
6. 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  
December \_\_\_\_, 2009

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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.*,<sup>1</sup>

Debtors.

Chapter 11


Case No. 09-12074 (KJC)

Jointly Administered

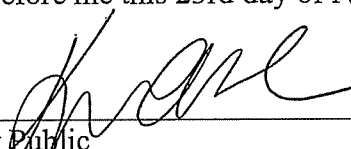
**AFFIDAVIT OF SERVICE**

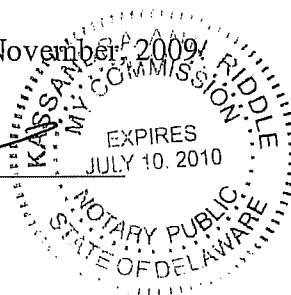
STATE OF DELAWARE     )  
                                      ) SS  
NEW CASTLE COUNTY    )

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 November 23, 2009, she caused a copy of the **Debtors' Motion for an Order Pursuant to Sections 363(b) and 365(a) of the Bankruptcy Code Authorizing the Debtors to Amend the Dixon Lease and to Assume the Dixon Lease, as Amended** to be served as indicated upon the parties identified on the attached service lists.

  
Casey S. Cathcart

SWORN TO AND SUBSCRIBED before me this 23rd day of November, 2009.

  
Notary Public  
My Commission Expires:



<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.

**BUILDING MATERIALS HOLDING CORPORATION**  
**SPECIAL SERVICE LIST RE: MOTION TO AMEND AND ASSUME DIXON LEASE**  
**11/23/2009**

B&T, LLC  
c/o William H. MacLaughlin, III  
MacLaughlin and Company  
1401 Shore Street  
P.O. Box 735  
West Sacramento, CA 95691  
*First Class Mail*



**2002 SERVICE LIST**  
**BUILDING MATERIALS HOLDING CORPORATION**  
**11/23/2009**

David G. Aelvoet, Esq.  
Linebarger Goggan Blair & Sampson LLP  
Travis Building, 711 Navarro, Suite 300  
San Antonio, TX 78205  
(Counsel to Bexar County)  
***First Class Mail***

Christopher M. Alston, Esq.  
Foster Pepper PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101  
(Counsel to JELD-WEN, inc.)  
***First Class Mail***

Sanjay Bhatnagar, Esq.  
Cole, Schotz, Meisel, Forman & Leonard, P.A.  
500 Delaware Avenue, Suite 1410  
Wilmington, DE 19801  
(Counsel to CNH Capital America, LLC)  
***Hand Delivery***

Brian W. Bisignani, Esq.  
Post & Schell, P.C.  
17 North 2nd Street, 12th Floor  
Harrisburg, PA 17101-1601  
(Counsel to Aon Consulting)  
***First Class Mail***

Robert McL. Boote, Esq.  
Ballard Spahr Andrews & Ingersoll, LLP  
1735 Market Street, 51st Floor  
Philadelphia, PA 19103-7599  
(Counsel to Westchester Fire Insurance  
Company and ACE USA)  
***First Class Mail***

David Boyle  
Airgas, Inc.  
259 Radnor-Chester Road, Suite 100  
P.O. Box 6675  
Radnor, PA 19087-8675  
***First Class Mail***

Barbara L. Caldwell, Esq.  
Aiken Schenk Hawkins & Ricciardi P.C.  
4742 North 24th Street, Suite 100  
Phoenix, AZ 85016  
(Counsel to Maricopa County)  
***First Class Mail***

Andrew Cardonick, Esq.  
Greenberg Traurig, LLP  
77 West Wacker Drive, Suite 3100  
Chicago, IL 60601  
(Counsel to Grace Bay Holdings, II, LLC)  
***First Class Mail***

Scott T. Citek, Esq.  
Lamm & Smith, P.C.  
3730 Kirby Drive, Suite 650  
Houston, TX 77098  
(Counsel to Bay Oil Company)  
***First Class Mail***

Scott D. Cousins, Esq.  
Dennis A. Melero, Esq.  
Greenberg Traurig, LLP  
1007 North Orange Street, Suite 1200  
Wilmington, DE 19801  
(Counsel to Grace Bay Holdings, II, LLC)  
***Hand Delivery***

**2002 SERVICE LIST**  
**BUILDING MATERIALS HOLDING CORPORATION**  
**11/23/2009**

Raniero D. D'Aversa, Jr., Esq.  
Laura D. Metzger, Esq.  
Weston T. Eguchi, Esq.  
Orrick, Herrington & Sutcliffe LLP  
666 Fifth Avenue  
New York, NY 10103-0001  
(Counsel to Rabobank International)  
***First Class Mail***

Robert J. Dehney, Esq.  
Erin R. Fay, Esq.  
Morris Nichols Arsht & Tunnell LLP  
1201 North Market Street, 18th Floor  
P.O. Box 1347  
Wilmington, DE 19899-1347  
(Counsel to D.R. Horton, Inc.)  
***Hand Delivery***

Mark W. Eckard, Esq.  
Reed Smith LLP  
1201 North Market Street, Suite 1500  
Wilmington, DE 19801  
(Counsel to CIT Technology Financing  
Services, Inc.)  
***Hand Delivery***

John M. Flynn, Esq.  
Carruthers & Roth, P.A.  
235 North Edgeworth Street  
P.O. Box 540  
Greensboro, NC 27401  
(Counsel to Arrowood Indemnity Company)  
***First Class Mail***

Paul N. Heath, Esq.  
Richards, Layton & Finger, P.A.  
One Rodney Square  
920 North King Street  
Wilmington, DE 19801  
(Counsel to Wells Fargo Bank, N.A.)  
***Hand Delivery***

Tobey M. Daluz, Esq.  
Joshua E. Zugerman, Esq.  
Ballard Spahr Andrews & Ingersoll, LLP  
919 North Market Street, 12th Floor  
Wilmington, DE 19801  
(Counsel to Westchester Fire Insurance Company  
and ACE USA)  
***Hand Delivery***

John P. Dillman, Esq.  
Linebarger Goggan Blair & Sampson LLP  
P.O. Box 3064  
Houston, TX 77253-3064  
(Counsel to Cypress-Fairbanks ISD, Fort Bend  
County, and Harris County)  
***First Class Mail***

Kevin B. Fisher, Esq.  
Seth Mennillo, Esq.  
Paul, Hastings, Janofsky & Walker LLP  
55 Second Street, 24th Floor  
San Francisco, CA 94105  
(Counsel to Wells Fargo Bank, N.A.)  
***First Class Mail***

Christopher J. Giaimo, Jr., Esq.  
Katie A. Lane, Esq.  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5339  
(Counsel to the Official Committee of Unsecured  
Creditors)  
***First Class Mail***

David G. Hellmuth, Esq.  
Hellmuth & Johnson, PLLC  
10400 Viking Drive, Suite 500  
Eden Prairie, MN 55344  
(Counsel to FCA Construction Company, LLC)  
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**2002 SERVICE LIST**  
**BUILDING MATERIALS HOLDING CORPORATION**  
**11/23/2009**

Melody C. Hogston  
Royal Mouldings Limited  
P.O. Box 610  
Marion, VA 24354  
***First Class Mail***

Eric H. Holder, Jr., Esq.  
U. S. Attorney General  
Department of Justice - Commercial Litigation  
Branch  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001  
***First Class Mail***

James E. Huggett, Esq.  
Amy D. Brown, Esq.  
Margolis Edelstein  
750 Shipyard Drive, Suite 102  
Wilmington, DE 19801  
(Counsel to Eduardo Acevedo, et al.)  
***First Class Mail***

IKON Financial Services  
Attn: Bankruptcy Administration  
1738 Bass Road  
P.O. Box 13708  
Macon, GA 31208-3708  
***First Class Mail***

Internal Revenue Service  
Attn: Insolvency Section  
11601 Roosevelt Blvd., Mail Drop N781  
P.O. Box 21126  
Philadelphia, PA 19114  
***First Class Mail***

Thomas W. Isaac, Esq.  
Dietrich, Glasrud, Mallek & Aune  
5250 North Palm Avenue, Suite 402  
Fresno, CA 93704  
(Counsel to Wilson Homes, Inc.)  
***First Class Mail***

Neal Jacobson, Esq.  
Senior Trial Counsel  
Securities and Exchange Commission  
3 World Financial Center, Suite 400  
New York, NY 10281  
***First Class Mail***

Michael J. Joyce, Esq.  
Cross & Simon, LLC  
913 North Market Street, 11th Floor  
Wilmington, DE 19801  
(Counsel to Arrowood Indemnity Company)  
***Hand Delivery***

Thomas L. Kent, Esq.  
Paul, Hastings, Janofsky & Walker LLP  
75 East 55th Street, 1st Floor  
New York, NY 10022  
(Counsel to Wells Fargo Bank)  
***First Class Mail***

Gary H. Leibowitz, Esq.  
Cole, Schotz, Meisel, Forman & Leonard, P.A.  
300 East Lombard Street, Suite 2600  
Baltimore, MD 21202  
(Counsel to CNH Capital America, LLC)  
***First Class Mail***

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**11/23/2009**

Louisiana-Pacific Corporation  
Attn: Bruce J. Iddings  
P.O. Box 4000-98  
Hayden Lake, ID 83835-4000  
(Top 50)  
***First Class Mail***

Cliff W. Marcek, Esq.  
Cliff W. Marcek, P.C.  
700 South Third Street  
Las Vegas, NV 89101  
(Counsel to Edward and Gladys Weisgerber)  
***First Class Mail***

Dan McAllister  
San Diego County Treasurer-Tax Collector,  
Bankruptcy Desk  
1600 Pacific Highway, Room 162  
San Diego, CA 92101  
***First Class Mail***

Frank F. McGinn, Esq.  
Bartlett Hackett Feinberg, P.C.  
155 Federal Street, 9th Floor  
Boston, MA 02110  
(Counsel to Iron Mountain Information  
Management, Inc.)  
***First Class Mail***

Joseph J. McMahon, Jr., Esq.  
Office of the United States Trustee  
844 King Street, Suite 2207  
Lock Box 35  
Wilmington, DE 19801  
***Hand Delivery***

Joseph McMillen  
Midlands Claim Administrators, Inc.  
3503 N.W. 63rd Street, Suite 204  
P.O. Box 23198  
Oklahoma, OK 73123  
***First Class Mail***

Kathleen M. Miller, Esq.  
Smith, Katzenstein & Furlow LLP  
800 Delaware Avenue, 7th Floor  
P.O. Box 410  
Wilmington, DE 19801  
(Counsel to Airgas, Inc.)  
***Hand Delivery***

Sheryl L. Moreau, Esq.  
Missouri Department of Revenue - Bankruptcy Unit  
P.O. Box 475  
Jefferson City, MO 65105-0475  
***First Class Mail***

Charles J. Pignuolo, Esq.  
Devlin & Pignuolo, P.C.  
1800 Bering Drive, Suite 310  
Houston, TX 77057  
(Counsel to Partners in Building, L.P.)  
***First Class Mail***

Michael Reed, Esq.  
McCreary, Veselka, Bragg & Allen, P.C.  
P.O. Box 1269  
Round Rock, TX 78680  
(Counsel to Local Texas Taxing Authorities)  
***First Class Mail***

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**11/23/2009**

Jonathan Lee Riches  
Federal Medical Center  
P.O. Box 14500  
Lexington, KY 40512  
***First Class Mail***

Debra A. Riley, Esq.  
Allen Matkins Leck Gamble Mallory & Natsis LLP  
501 West Broadway, 15th Floor  
San Diego, CA 92101  
(Counsel to D.R. Horton, Inc.)  
***First Class Mail***

Randall A. Rios, Esq.  
Timothy A. Million, Esq.  
Munsch Hardt Kopf & Harr, PC  
700 Louisiana, 46th Floor  
Houston, TX 77002  
(Counsel to Cedar Creek Lumber, Inc.)  
***First Class Mail***

Martha E. Romero, Esq.  
Romero Law Firm  
6516 Bright Avenue  
Whittier, CA 90601  
(Counsel to Yuba County and San Bernardino  
County)  
***First Class Mail***

George Rosenberg, Esq.  
Assistant Arapahoe County Attorney  
5334 South Prince Street  
Littleton, CO 80166  
(Counsel to Arapahoe County Treasurer)  
***First Class Mail***

Howard C. Rubin, Esq.  
Kessler & Collins, P.C.  
2100 Ross Avenue, Suite 750  
Dallas, TX 75201  
(Counsel to CRP Holdings B, L.P.)  
***First Class Mail***

Bradford J. Sandler, Esq.  
Jennifer R. Hoover, Esq.  
Jennifer E. Smith, Esq.  
Benesch, Friedlander, Coplan & Aronoff LLP  
222 Delaware Avenue, Suite 801  
Wilmington, DE 19801  
(Counsel to the Official Committee of  
Unsecured Creditors)  
***Hand Delivery***

Secretary of State  
Franchise Tax  
Division of Corporations  
P.O. Box 7040  
Dover, DE 19903  
***First Class Mail***

Secretary of Treasury  
Attn: Officer, Managing Agent or General Agent  
P.O. Box 7040  
Dover, DE 19903  
***First Class Mail***

Securities & Exchange Commission  
Attn: Christopher Cox  
100 F Street, NE  
Washington, DC 20549  
***First Class Mail***

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**11/23/2009**

Securities & Exchange Commission  
Bankruptcy Unit  
Attn: Michael A. Berman, Esq.  
450 Fifth Street NW  
Washington, DC 20549  
***First Class Mail***

Ellen W. Slight, Esq.  
Assistant United States Attorney  
U.S. Attorney's Office  
1007 Orange Street, Suite 700  
P.O. Box 2046  
Wilmington, DE 19899  
***Hand Delivery***

Tennessee Department of Revenue  
c/o Tennessee Attorney General's Office,  
Bankruptcy Division  
P.O. Box 20207  
Nashville, TN 37202-0207  
***First Class Mail***

Kimberly Walsh, Esq.  
Assistant Attorney General  
Texas Comptroller of Public Accounts, Bankruptcy  
& Collections Division  
P.O. Box 12548  
Austin, TX 78711-2548  
***First Class Mail***

Christopher A. Ward, Esq.  
Shanti M. Katona, Esq.  
Polsinelli Shughart PC  
222 Delaware Avenue, Suite 1101  
Wilmington, DE 19801  
(Counsel to SunTrust Bank)  
***Hand Delivery***

Paul M. Weiser, Esq.  
Buchalter Nemer  
16435 North Scottsdale Road, Suite 440  
Scottsdale, AZ 85254-1754  
(Counsel to Elwood HA, L.L.C.)  
***First Class Mail***

Elizabeth Weller, Esq.  
Linebarger Goggan Blair & Sampson LLP  
2323 Bryan Street, Suite 1600  
Dallas, TX 75201  
(Counsel to Dallas County and Tarrant County)  
***First Class Mail***

Duane D. Werb, Esq.  
Julia B. Klein, Esq.  
Werb & Sullivan  
300 Delaware Avenue, Suite 1300  
Wilmington, DE 19801  
(Counsel to CRP Holdings B, L.P.)  
***Hand Delivery***

Joanne B. Wills, Esq.  
Sally E. Veghte, Esq.  
Klehr, Harrison, Harvey, Branzburg & Ellers LLP  
919 Market Street, Suite 1000  
Wilmington, DE 19801  
(Counsel to Rabobank International)  
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