

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

**In re:**

)

) **Chapter 11**

)

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

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

) **(Jointly Administered)**

)

**Debtors.**

) **Objection Deadline: November 25, 2009**

) **Hearing Date: December 10, 2009 at 11:00 a.m.**

) **Related Docket No. 762**

**CALIFORNIA FRANCHISE TAX BOARD'S OBJECTION  
TO DEBTORS' JOINT PLAN OF REORGANIZATION**

California Franchise Tax Board ("FTB"), by and through its undersigned counsel, hereby objects to the Debtors' Joint Plan of Reorganization, dated October 22, 2009 (the "Plan"), and in support thereof states as follows:

**BACKGROUND**

1. FTB is a governmental unit under the Bankruptcy Code. 11 U.S.C. § 101(27); Cal. Gov't Code § 15700. Specifically, FTB is responsible for administering the California Corporation Tax, which includes a tax measured by net income on corporations doing business in California. Cal. Rev. & Tax. Code §§ 19501 and 23151.

2. On November 11, 2009, FTB timely filed priority tax claims against the Debtors for such taxes in the following amounts:

- \$820,482.08 against Building Materials Holding Corporation (Case No. 09-12074);
- \$44,469.55 against BMC West Corp. (Case No. 09-12075);

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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).

- \$323,509.55 against SelectBuild Construction, Inc., aka BMC Framing, Inc. (Case No. 09-12076);
- \$849.55 against SelectBuild Northern California, Inc. (Case No. 09-12077);
- \$85,653.55 against C Construction, Inc. (Case No. 09-12079);
- \$265,281.55 against TWF Construction, Inc. (Case No. 09-12080);
- \$51,302.55 against H.N.R. Framing Systems, Inc. (Case No. 09-12081);
- \$849.55 against SelectBuild Southern California, Inc. (Case No. 09-12082);  
and
- \$849.55 against SelectBuild Nevada, Inc. (Case No. 09-12083).

### **PLAN OBJECTIONS**

3. The Plan cannot be confirmed for the following five reasons.<sup>2</sup>

4. **First**, pursuant to Bankruptcy Code § 503(b)(1)(D), a governmental unit “shall not be required to file a request for payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense.” It is unclear, however, whether paragraph 2.1 of the Plan requires a governmental unit to file a request for payment of an expense described in Bankruptcy Code § 503(b)(1)(B) or (C). If it does, then the Plan violates Bankruptcy Code § 503(b)(1)(D) and cannot be confirmed under Bankruptcy Code § 1129(a)(1). To resolve this issue, FTB proposes that the following language, or some similar language, be added to paragraph 2.1 of the Plan prior to the words “the Holder of such Administrative Expense Claim shall be paid in Cash”:

“or (iii) based on an expense described in Bankruptcy Code § 503(b)(1)(B) or (C),”.

5. **Second**, Bankruptcy Code § 1129(a)(9)(C) provides the confirmation requirement for payment of priority tax claims (*i.e.*, claims of the kind specified in

Bankruptcy Code § 507(a)(8)). Paragraph 2.3 of the Plan, however, states only that “each Holder of such Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.” This provision fails to specify the treatment of priority tax claims, which, in turn, precludes FTB from determining whether the Plan complies with the provisions of section 1129(a)(9)(C) and whether the reorganized debtors are performing in accordance with the Plan. In order for the Plan to comply with section 1129(a)(9)(C), it must be amended to state the specific treatment of priority tax claims. To resolve this issue, FTB proposes that the following language, or some similar language, replace the above-quoted provision from paragraph 2.3 of the Plan: “each Holder of such Allowed Priority Tax Claim shall be paid in full on the Effective Date.”

6. **Third**, paragraph 2.3 of the Plan impermissibly gives the Internal Revenue Service special treatment that is not accorded to other priority tax claimants. This special treatment should not be authorized. *See* 11 U.S.C. § 1123(a)(4) (“a plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest”); *see also In re Combustion Engineering*, 391 F.3d 190, 239 (3d Cir. 2004) (“Equality of distribution among creditors is a central policy of the Bankruptcy Code.”) (*quoting Begier v. IRS*, 496 U.S. 53, 58, 110 L. Ed. 2d 46, 110 S. Ct. 2258 (1990)). If priority tax claimants are not provided the same treatment, the Plan cannot be confirmed under Bankruptcy Code § 1129(a)(1). To resolve this issue, FTB proposes that the

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<sup>2</sup> FTB reserves the right (a) to incorporate by reference and join any additional objections to the Plan filed by other parties in this case; and (b) to amend or supplement this Objection in any way based on information learned prior to the close of the Confirmation Hearing.

following language, or some similar language, be added to paragraph 2.3 of the Plan: “If the Reorganized Debtors substantially default on the payment of a tax due to the California Franchise Tax Board under the Plan, the entire tax debt owed to the California Franchise Tax Board shall become due and payable immediately, and the California Franchise Tax Board may collect these unpaid tax liabilities in accordance with California law.”

7. **Fourth**, paragraph 9.1.2 of the Plan impermissibly attempts to eliminate the setoff and recoupment rights of taxing authorities, including FTB. Such provision violates Bankruptcy Code § 553(a), which preserves the setoff rights of creditors. *See also* Bankruptcy Code § 362(b)(26) (evidencing Congress’s intent to preserve taxing authorities’ setoff rights); Bankruptcy Code § 363(e) (entitling secured creditors to adequate protection of their secured claim). Unless this provision is corrected, the Plan cannot be confirmed under Bankruptcy Code § 1129(a)(1). To resolve this issue, FTB proposes that the following language, or some similar language, be added to paragraph 9.1.2 of the Plan: “Notwithstanding anything to the contrary herein or in Confirmation Order, the setoff and recoupment rights of the California Franchise Tax Board are preserved.”

8. **Fifth**, paragraph 9.1.2 of the Plan appears to impermissibly allow punitive damage recovery against governmental units, including FTB. Bankruptcy Code § 106(a)(3) precludes recovery of punitive damages against governmental units. Unless this provision is corrected, the Plan cannot be confirmed under Bankruptcy Code § 1129(a)(1). To resolve this issue, FTB proposes that the following language, or some similar language, be added to paragraph 9.1.2 of the Plan: “Notwithstanding anything to

the contrary herein or in the Confirmation Order, punitive damages are not authorized against the California Franchise Tax Board.”

### **CONCLUSION**

Based on the foregoing, unless the Plan is modified to address the objections raised herein, FTB respectfully requests that the Court enter an order (i) denying confirmation of the Plan, and (ii) granting such other relief as the Court deems just and proper.

Dated: November 24, 2009  
Wilmington, Delaware

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	)	(Jointly Administered)
	)	
Debtors.	)	
	)	

**CERTIFICATE OF SERVICE**

I, Mark T. Hurford, of Campbell & Levine, LLC, hereby certify that on November 24, 2009, I caused a copy of the *California Franchise Tax Board's Objection to Debtors' Joint Plan of Reorganization* to be served upon the individuals listed on the attached service list via the manner indicated.

Date: November 24, 2009

/s/ Mark T. Hurford

Mark T. Hurford (No. 3299)

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