

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

BESTWALL LLC,¹

Debtor.

Chapter 11

Case No. 17-31795

**MOTION OF THE DEBTOR FOR AN ORDER AUTHORIZING
THE RETENTION AND COMPENSATION OF PROFESSIONALS
UTILIZED BY THE DEBTOR IN THE ORDINARY COURSE OF BUSINESS**

Bestwall LLC, as debtor and debtor in possession (the "Debtor"), respectfully represents as follows:

Background

1. On the date hereof (the "Petition Date"), the Debtor commenced this reorganization case by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

2. The Debtor is a North Carolina limited liability company. It owns real property in Mt. Holly, North Carolina and is the parent company of certain non-debtor subsidiaries that manufacture and distribute industrial plaster products. As of the Petition Date, the Debtor was a defendant in tens of thousands of asbestos-related lawsuits pending in the courts of nearly every state and certain territories of the United States.

3. The Debtor is authorized to continue to manage its property and operate its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

¹ The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303.

4. A comprehensive description of the Debtor, its history, its assets and liabilities and the events leading to the commencement of this chapter 11 case can be found in the declaration of Tyler L. Woolson (the "First Day Declaration"), which was filed contemporaneously herewith and is incorporated herein by reference. In addition to the First Day Declaration, the Debtor has filed an Informational Brief to provide additional information about its asbestos litigation, related costs and plans to address these matters in this chapter 11 case (the "Chapter 11 Case").

Jurisdiction

5. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

6. Pursuant to sections 105(a), 327 and 330 of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtor hereby seeks the entry of an order, substantially in the form attached hereto as Exhibit C: (a) authorizing it to retain, employ and pay certain professionals (each, an "Ordinary Course Professional") in the ordinary course of the Debtor's business on the terms and conditions set forth herein, without the submission of separate retention applications and the issuance of separate retention orders for each Ordinary Course Professional and (b) approving such retention and employment as of the Petition Date or the date the Ordinary Course Professional commences work (each, the "Retention Date").

Argument

Cause Exists for Authorization to Retain, Employ and Pay Ordinary Course Professionals

7. The Debtor's members and management, in the performance of their duties, call upon certain Ordinary Course Professionals – including, in particular, attorneys – to provide professional services to assist them in carrying out their assigned duties and responsibilities in the ordinary course of the Debtor's business.² These Ordinary Course Professionals provide valuable assistance in addressing issues of importance to the Debtor and its business, particularly in connection with the management of the Debtor's asbestos litigation. Exhibit A attached hereto and incorporated herein by reference is a nonexclusive list of the Ordinary Course Professionals identified by the Debtor as of the date hereof (the "OCP List").³

8. The Debtor desires to employ the Ordinary Course Professionals, as and when requested by the Debtor, to render professional and other services to its estate in the same

² Trial experts are excluded from the definition of Ordinary Course Professionals for the purposes of this Motion because courts have recognized that retention of trial experts as professionals is not required and would subject a debtor's litigation strategy to unwarranted disclosure and scrutiny. See In re Napoleon, 233 B.R. 910, 913-14 (Bankr. D.N.J. 1999) (holding that an expert witness is not a "professional person" within the meaning of section 327 of the Bankruptcy Code where the witness does not "play an integral role in the administration of the bankruptcy case"); see also Surrey Inv. Servs., Inc. v. Smith, 418 B.R. 140, 154 (M.D.N.C. 2009) (holding that an expert witness that was hired for litigation purposes, including to provide trial testimony, was not a "professional" under section 327); Elstead v. Nolden (In re That's Entm't Mktg. Grp., Inc.), 168 B.R. 226, 230 (N.D. Cal. 1994) (holding that an "accountant who is retained solely to testify as an expert witness in collateral litigation does not assume a 'central role in the administration of the bankruptcy'" and, therefore, is not subject to the requirements of section 327 of the Bankruptcy Code and Bankruptcy Rule 2014); In re Cyrus II P'ship, No. 05-39857, 2008 WL 3003824, at *6 (Bankr. S.D. Tex. July 31, 2008) (holding that expert witnesses testifying to matters that are "non-central" to the administration of the estate are not "professionals" that must be retained under section 327 of the Bankruptcy Code); In re First Am. Health Care of Ga., Inc., 208 B.R. 996, 998 (Bankr. S.D. Ga. 1996) (holding that an accountant retained solely as an expert witness in collateral litigation need not be retained pursuant to section 327 of the Bankruptcy Code).

³ The Debtor has prepared the OCP List based on a review of the professionals it has employed regularly in the past. The Debtor has not determined which of the parties identified on the OCP List in fact will continue to provide services to the Debtor on a postpetition basis. As such, the OCP List is not intended to constitute a representation that each party listed thereon will be retained, employed and paid by the Debtor during the course of this chapter 11 case. Likewise, the Debtor believes that there may be additional professionals that will provide services as Ordinary Course Professionals in this chapter 11 case, but that were not identified by the Debtor's preliminary review and thus are not included on the attached OCP List.

manner and for the same general purposes as such services were provided prior to the Petition Date. To avoid potential disruptions, it is important that the Debtor continues to have the ability to employ the Ordinary Course Professionals (e.g., for defense counsel, to provide services related to the cases they have been defending), many of whom are familiar with the Debtor's business and affairs, including the thousands of pending litigation matters.

9. Although most of the Ordinary Course Professionals are counsel in asbestos litigation expected to remain stayed under section 362 of the Bankruptcy Code, the Debtor believes that services from these professionals may be needed from time to time. For example, the Debtor may require services in asbestos litigation relating to filing stay notices, addressing potential stay violations, monitoring dockets and providing information about these cases that is not available from any other source.

10. It would be costly, time-consuming and administratively cumbersome for the Debtor and this Court to require each Ordinary Course Professional to apply separately for approval of its employment and compensation through the filing of multiple pleadings in this case. Requiring separate applications also is simply unnecessary under applicable law and would be burdensome to the estate, particularly for professionals providing minimal or sporadic services. Moreover, without assurance that the Debtor is authorized to use and pay these parties, many Ordinary Course Professionals may be reluctant to assist the Debtor when needed.

11. Accordingly, the Debtor requests the authority to retain, employ and pay the Ordinary Course Professionals on the terms set forth herein without further order of the Court. The relief requested will save the Debtor's estate the substantial expense associated with applying separately for the retention of each professional, as well as the incurrence of additional fees related to the preparation and prosecution of interim fee applications. The procedures

outlined below also will relieve the Court and other parties—including the United States Bankruptcy Administrator for the Western District of North Carolina (the "Bankruptcy Administrator"), any official committee appointed in the Chapter 11 Case (a "Committee") and any representative of future asbestos claimants appointed in the Chapter 11 Case (the "FCR")—of the burden of reviewing numerous applications involving relatively small amounts of fees and expenses.

The Ordinary Course Professionals Are Not Professionals Under Section 327(a) of the Bankruptcy Code

12. Where a person is not considered a "professional" under section 327(a) of the Bankruptcy Code,⁴ a debtor may hire that person in the ordinary course of business pursuant to section 1108 of the Bankruptcy Code⁵ without prior court approval. In re Sieling Assocs. Ltd. P'ship, 128 B.R. 721, 723 (Bankr. E.D. Va. 1991). To determine whether an entity to be employed in a bankruptcy case is a "professional" within the meaning of section 327(a) of the Bankruptcy Code, many courts have applied either a "quantitative" or a "qualitative" test. See In re Seven Counties Servs., Inc., 496 B.R. 852, 855 (Bankr. W.D. Ky. 2013) (citing In re First Merchants Acceptance Corp., No. 97-1500, 1997 WL 873551, at *2 (D. Del. Dec. 15, 1997)).

13. Under the quantitative test, courts have required that an entity providing professional services must play a "central role" in the administration of the estate before it is considered a professional under section 327 of the Bankruptcy Code. First Merchants, 1997 WL 873551, at *2; accord In re Action Video, Inc., No. 02 52402, 2003 WL 21350081,

⁴ Section 327(a) of the Bankruptcy Code provides that, with certain exceptions, "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under [the Bankruptcy Code]." 11 U.S.C. § 327(a).

⁵ Section 1108 of the Bankruptcy Code provides, in relevant part, that, "[u]nless the court ... orders otherwise, the trustee may operate the debtor's business." 11 U.S.C. § 1108.

at *4 (Bankr. M.D.N.C. June 9, 2003) (finding that a hired party was a professional under section 327(a) because, among other things, his services "directly related to the administration and operation of the [d]ebtor"); Sieling Assocs., 128 B.R. at 723 (defining "professional person" under section 327 of the Bankruptcy Code as a person whose role is "central to the administration of the estate," rather than someone who serves mechanical functions necessary for a debtor's operations).⁶

14. By contrast, under the qualitative test, an entity is considered a professional if it is permitted to exercise discretion and autonomy in addressing the administration of the estate. First Merchants, 1997 WL 873551, at *2.⁷ Thus, "[w]hile the quantitative test focuses on the significance of the individual's role to the debtor proceeding and the qualitative test focuses on the amount of discretion the individual has in accomplishing that role, the bottom line of both tests involves an examination of the types of duties to be undertaken by the individual." Id.; accord Sieling Assocs., 128 B.R. at 723 (determining whether a professional is central to the administration of the estate by examining its responsibilities).

⁶ See also U.S. Tr. v. Bloom (In re Palm Coast, Matanza Shores L.P.), 101 F.3d 253, 257 (2d Cir. 1996) (stating that "professional persons" are "limited to persons in those occupations which play a central role in the administration of the debtor proceeding"); That's Entm't Mktg. Grp., 168 B.R. at 230 (defining "professional person" under section 327 of the Bankruptcy Code as a person whose role is "central to the administration of the estate") (internal citation omitted); In re Fortune Natural Res. Corp., 366 B.R. 558, 563 (Bankr. E.D. La. 2007) (same); Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 619 (Bankr. S.D.N.Y. 1989) (finding that "the phrase 'professional persons' ... is a term of art reserved for those persons who play an intimate role in the reorganization of a debtor's estate").

⁷ See also In re Smith, 524 B.R. 689, 694 (Bankr. S.D. Tex. 2015) (discussing both qualitative and quantitative factors, but stating that "[g]enerally, to qualify as a 'professional person' under § 327(a), a person must be a professional in the ordinary sense of the word – that is, a person must perform high-level, specialized services requiring 'discretion or autonomy'" (internal citation omitted); In re Neidig Corp., 117 B.R. 625, 629 (Bankr. D. Colo. 1990) (most common factor in determining whether person is a professional is the amount of autonomy or discretion person is given by the debtor or trustee in performing its services); In re Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989) (applying a qualitative test and stating that "it must be determined whether an employee is to be given discretion or autonomy in some part of the administration of the debtor's estate").

15. Seeking to synthesize the two approaches, the First Merchants court developed a nonexclusive list of factors to be considered when determining whether an entity to be employed by a debtor is a professional within the meaning of section 327(a) of the Bankruptcy Code. These factors include:

- (a) whether the entity controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization;
- (b) whether the entity is involved in negotiating the terms of a plan of reorganization;
- (c) whether the entity's employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations;
- (d) whether the entity is given discretion or autonomy to exercise its own professional judgment in some part of the administration of the debtor's estate;
- (e) the extent of the entity's involvement in the administration of the debtor's estate; and
- (f) whether the entity's services involve some degree of special knowledge or skill, such that the entity can be considered a professional within the ordinary meaning of the term.

First Merchants, 1997 WL 873551, at *3.

16. Similarly, in Sieling Associates, the bankruptcy court identified certain tasks as central to the administration of the estate, including "assisting in the negotiation of the debtor's plan, assisting in the adjustment of the debtor/creditor relationship, disposing of assets of the estate and acquiring assets on behalf of the estate." Sieling Assocs., 128 B.R. at 723. These factors must be considered in their totality; no single factor is dispositive. First Merchants, 1997 WL 873551, at *3. Nevertheless, professionals assisting in the routine operation of a debtor's business and affairs, rather than the administration of its bankruptcy estate, are not professionals that must be retained under section 327 of the Bankruptcy Code. Id. at *4.

17. Considering all of the First Merchants and Sieling Associates factors, the Debtor believes that the Ordinary Course Professionals are not "professionals" within the meaning of section 327(a) of the Bankruptcy Code. In particular, the Ordinary Course Professionals generally will not be involved in the administration of the Chapter 11 Case and will not be involved in counseling and advising the Debtor in respect thereof. Instead, the Ordinary Course Professionals will provide services in connection with the ongoing management of the Debtor's day-to-day affairs, including ordinary course advice and assistance relating to asbestos litigation. To the extent that services provided by the Ordinary Course Professionals involve some element of administration of the Debtor's estate, that involvement will be minimal or tangential.

18. As a result, the Debtor does not believe that the retention and compensation of the Ordinary Course Professionals must be approved by the Court. Out of an abundance of caution, however, the Debtor seeks the relief requested in this Motion to avoid any subsequent controversy regarding the Debtor's employment and payment of the Ordinary Course Professionals during the pendency of the Chapter 11 Case.

Proposed Procedures

Ordinary Course Professional Fee Limit

19. The Debtor does not believe that any Ordinary Course Professional generally will have monthly fees of more than \$50,000 or total fees of more than \$500,000 during the pendency of the Chapter 11 Case (such amounts, collectively, and subject to increase by agreement of the Notice Parties, as defined below, or order of the Court, the "OCP Fee

Limits").⁸ As described below, however, if the monthly fees of any Ordinary Course Professional exceed the monthly OCP Fee Limit, or if the total postpetition fees of any Ordinary Course Professional exceed the OCP Fee Limit for the pendency of the Chapter 11 Case, such fees will be subject to a further review and approval process, as set forth below.⁹ Moreover, as also described below, any Ordinary Course Professional that becomes materially involved in the administration of the Chapter 11 Case such that it is a "professional" under section 327 of the Bankruptcy Code – even if its fees are below the OCP Fee Limits – will be retained by separate application to and order of the Court.

OCP Payment Procedures

20. The Debtor proposes that it be permitted to pay each Ordinary Course Professional, without prior application to the Court, subject to the following procedures

(the "OCP Payment Procedures"):

- (a) Each Ordinary Course Professional shall provide the Debtor with a declaration (an "OCP Declaration") substantially in the form attached hereto as Exhibit B, at the following addresses: (i) Bestwall LLC, 100 Peachtree Street, N.W., Atlanta, Georgia 30303 (Attn: J. Joel Mercer, Jr., bestwall@gapac.com); (ii) Jones Day, 2727 North Harwood Street, Suite 500, Dallas, Texas 75201 (Attn: Gregory M. Gordon, Esq., gmngordon@jonesday.com, and Daniel B. Prieto, Esq., dbprieto@jonesday.com); (iii) Jones Day, 1420 Peachtree Street, N.E., Suite 800, Atlanta, Georgia 30309 (Attn: Jeffrey B. Ellman, Esq., jbellman@jonesday.com); and (iv) Robinson, Bradshaw & Hinson, P.A., 101 North Tryon Street, Suite 1900, Charlotte, North Carolina 28246 (Attn: Garland S. Cassada, Esq., gcassada@robinsonbradshaw.com).
- (b) Each OCP Declaration shall certify that the relevant Ordinary Course Professional does not represent or hold an interest adverse to the Debtor or

⁸ The Debtor reserves the right to seek modifications to the OCP Fee Limits in the future as it deems necessary or appropriate.

⁹ The OCP Fee Limits are intended only to limit the amount of *fees* paid to Ordinary Course Professionals without further Court review and not to limit the reimbursement of expenses incurred by Ordinary Course Professionals, to which such professionals may be entitled pursuant to the terms of their engagement.

its estate with respect to the matter on which the professional is to be employed. Each such Ordinary Course Professional shall periodically update its OCP Declaration to the extent necessary to reflect new facts or circumstances relevant to its retention.

- (c) Counsel to the Debtor shall promptly file any OCP Declaration that they receive with the Court and shall serve such declaration on (i) counsel to any Committee appointed in this case; (ii) counsel to any FCR appointed in this case; and (iii) the Bankruptcy Administrator, 402 West Trade Street, Suite 200, Charlotte, North Carolina 28202 (Attn: Shelley K. Abel, Esq.) (each, a "Notice Party" and, collectively with the Debtor and its counsel, the "Notice Parties").
- (d) The Notice Parties shall have 14 days after the filing and service of an OCP Declaration to object to the retention, employment or payment of the Ordinary Course Professional filing such declaration on the terms, and pursuant to the procedures, described herein (the "Objection Deadline"). Any objecting party shall serve its objection upon the Notice Parties and the relevant Ordinary Course Professional on or before the Objection Deadline. If an objection cannot be resolved within 10 days after the Objection Deadline, then the retention, employment or payment of the Ordinary Course Professional that is the subject of the objection shall be scheduled for hearing by the Debtor at the next regularly scheduled omnibus hearing date that is no less than 20 days from that date or on a date otherwise agreed to by the parties. The Debtor shall not be authorized to retain, employ or pay such Ordinary Course Professional until all outstanding objections have been withdrawn, resolved or overruled by order of the Court.
- (e) If no objection is received from any of the Notice Parties by the Objection Deadline with respect to an Ordinary Course Professional, the Debtor shall be authorized to retain, employ and pay that Ordinary Course Professional in accordance with the OCP Payment Procedures effective as of the Retention Date.
- (f) The Debtor may pay 100% of the fees and disbursements incurred by an Ordinary Course Professional upon the submission to, and approval by, the Debtor of an appropriate monthly invoice setting forth in reasonable detail the nature of the services rendered and disbursements actually incurred during the month; provided, however, that all payments of fees to Ordinary Course Professionals shall be subject to the OCP Fee Limits.
- (g) To the extent that the fees sought by any Ordinary Course Professional for a month exceed the monthly OCP Fee Limit, then such Ordinary Course Professional shall, on or before the 20th day of the month following the month for which such fees are sought, serve a "Monthly Statement" on the Notice Parties for the full amount of fees sought in such month.

- (h) If any Notice Party has an objection to the fees sought in a particular Monthly Statement, such party shall, no later than the 15th day following the service of such Monthly Statement (the "Monthly Statement Objection Deadline"), serve upon the relevant Ordinary Course Professional and the other Notice Parties a written objection setting forth the nature of the objection.
- (i) If the Debtor does not receive an objection to a given Monthly Statement on or prior to the Monthly Statement Objection Deadline, the Debtor shall promptly pay all fees identified therein.
- (j) If the Debtor receives a timely objection to a Monthly Statement, the Debtor shall withhold payment of that portion of the Monthly Statement to which the objection is directed (the "Withheld Fees") and promptly pay the remainder of the fees sought unless the Court, upon notice and a hearing, directs payment of some or all of the Withheld Fees to be made.
- (k) If (i) the parties to an objection are able to resolve their dispute and (ii) the relevant Ordinary Course Professional serves upon the Notice Parties a statement describing such resolution, then the Debtor shall promptly pay the Withheld Fees (or such lesser agreed amount) to such Ordinary Course Professional.
- (l) If an Ordinary Course Professional seeks payment of fees in excess of the aggregate OCP Fee Limit, such Ordinary Course Professional shall, unless the Bankruptcy Administrator agrees, or the Court orders, otherwise, file a fee application with the Court for any such excess amount in accordance with sections 330 and 331 of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules of the United States Bankruptcy Court for the Western District of North Carolina, the Guidelines for Compensation and Expense Reimbursement of Professionals promulgated by the Court and any and all applicable orders of the Court.
- (m) At three-month intervals during the pendency of the Chapter 11 Case (each such interval, a "Quarter"), beginning with the partial Quarter ending on December 31, 2017, the Debtor shall file with the Court and serve on the Notice Parties, no later than 40 days after the end of such Quarter, a statement including the following information for each Ordinary Course Professional: (i) the name of the Ordinary Course Professional, (ii) the aggregate amounts of fees and expenses incurred by such Ordinary Course Professional during the reported Quarter and (iii) all postpetition payments made to the Ordinary Course Professional through the end of the reported Quarter.

- (n) The Debtor reserves the right to retain additional Ordinary Course Professionals from time to time during the Chapter 11 Case by having each such Ordinary Course Professional comply with these procedures.

21. Relief similar to that requested herein routinely has been granted by courts in this District and other districts. See, e.g., In re Northampton Generating Co., Inc., L.P., No. 11-33095 (Bankr. W.D.N.C. Jan. 11, 2012) (approving the retention of professionals in the ordinary course and imposing a \$25,000 monthly cap on fees and \$120,000 cap on fees over a rolling 12-month period); Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. July 16, 2010) (approving procedures for the retention of professionals in the ordinary course and imposing a \$50,000 monthly cap on fees and \$500,000 cap on fees over the course of the case); see also Gymboree Corp., No. 17-32986 (Bankr. E.D. Va. July 11, 2017) (authorizing \$75,000 per month per ordinary course professional on average over a rolling three month period); In re Alpha Natural Resources, Inc., No. 15-33896 (Bankr. E.D. Va. Sept. 3, 2015) (authorizing \$75,000 per month per ordinary course professional or \$775,000 in aggregate per ordinary course professional over the course of the chapter 11 cases); In re Xinergy LTD., No. 15-70444 (Bankr. W.D. Va. May 8, 2015) (authorizing \$50,000 per month per ordinary course professional or \$500,000 in aggregate per ordinary course professional over the course of the chapter 11 case); In re Specialty Prods. Holding Corp., No. 10-11780 (JKF) (Bankr. D. Del. July 14, 2010) (approving procedures for the retention of professionals in the ordinary course and imposing up to a \$50,000 monthly cap on fees and \$400,000 cap on fees over the course of the case).¹⁰

¹⁰ See also, e.g., In re Health Diagnostic Lab., Inc., No. 15-32919 (Bankr. E.D. Va. July 1, 2015) (authorizing \$50,000 per month per ordinary course professional or \$500,000 in aggregate per ordinary course professional over the course of the chapter 11 cases); In re Patriot Coal Corp., No. 15-32450 (Bankr. E.D. Va. June 10, 2015) (authorizing \$60,000 per month per ordinary course professional or \$500,000 in aggregate per ordinary course professional over the course of the chapter 11 cases); In re Sbarro LLC, No. 14-10557 (MG) (Bankr. S.D.N.Y. Apr. 7, 2014) (authorizing \$50,000 per month per ordinary course

Waiver of Bankruptcy Rule 6004(h)

22. The Debtor seeks a waiver of any stay of the effectiveness of an Order approving this Motion under Bankruptcy Rule 6004(h), to the extent it applies. Bankruptcy Rule 6004(h) provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Any delay in granting the relief requested herein likely would be disruptive to the Debtor and any pending asbestos-related litigation involving it, thereby causing harm to the Debtor's estate. Accordingly, the Debtor submits that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

Notice

23. Notice of this Motion has been provided to: (a) the Bankruptcy Administrator; (b) the top law firms representing asbestos claimants against the Debtor, as identified in the Debtor's chapter 11 petition; (c) counsel to the Debtor's non-debtor affiliate, Georgia-Pacific LLC, a Delaware limited liability company; and (d) the Ordinary Course Professionals listed on Exhibit A attached hereto. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be provided.

No Prior Request

24. No prior request for the relief sought in this Motion has been made to this or any other Court in connection with this chapter 11 case.

(continued...)

professional or \$500,000 in aggregate per ordinary course professional over the course of the chapter 11 cases). The unreported orders cited herein are not attached to this Motion. Copies of these orders will be made available to the Court or other parties upon request made to the Debtor's counsel.

WHEREFORE, the Debtor respectfully requests that the Court: (a) enter an order, substantially in the form attached hereto as Exhibit C, granting the relief requested herein; and (b) grant such other and further relief to the Debtor as the Court may deem just and proper.

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Dated: November 2, 2017
Charlotte, North Carolina

Respectfully submitted,

/s/ Garland S. Cassada

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(Admissions *pro hac vice* pending)

PROPOSED ATTORNEYS FOR DEBTOR
AND DEBTOR IN POSSESSION

Exhibit A

Nonexclusive List of Ordinary Course Professionals

ALSTON HUNT FLOYD & ING
BAILEY, CROWE & KUGLER
BARCLAY DAMON, LLP
BARNES & THORNBURG
BATY, HOLM, NUMRICH & OTTO, P.C.
BELIN MCCORMICK, PC
BURR & FORMAN LLP
CONROY, SIMBERG, GANON,
KREVINS & ABEL, PA
DOWNS RACHLIN MARTIN PLLC
FORMAN WATKINS & KRUTZ LLP
(JACKSON, MS)
GLASCOCK STREET WAXLER LLP
GNOCCHI-FRANCO LAW OFFICES,
PSC
GOEHRING, RUTTER & BOEHM
HEPLER BROOM LLC
HODGSON RUSS, LLP
KEAN MILLER HAWTHORNE
D'ARMOND MCCOWAN &
JARMAN
LAMSON, DUGAN & MURRAY
LEVIN SITCOFF
LEWIS & ROCA, LLP
LYNCH DASKAL EMERY LLP
MANION GAYNOR & MANNING LLP
MARKS, ONEILL, OBRIEN &
COURTNEY
MARON MARVEL BRADLEY &
ANDERSON LLC
MATTINGLY BURKE COHEN &
BIEDERMAN LLP
MCAFFEE & TAFT
MEAGHER & GEER
MILES & STOCKBRIDGE (MD)
MILES & STOCKBRIDGE (VA)
NAPIER GAULT SCHUPBACH &
MOORE, PLC
NELSON, MULLINS, RILEY &
SCARBOROUGH (GA)

NELSON, MULLINS, RILEY &
SCARBOROUGH (SC)
ORR & RENO
PAINE BICKERS, LLP
PARSONS BEHLE & LATIMER PC
PERKINS COIE, LLP
PINTO COATES KYRE & BOWERS,
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RILEY CARLOCK & APPLEWHITE
SEDGWICK LLP (TX)
SEDGWICK LLP (WA)
SHAPIRO, BLASI, WASSERMAN &
HERMANN, PA
SHULTS LAW FIRM
SWANSON, MARTIN & BELL
TUCKER ELLIS LLP (CA)
ULMER & BERNE, LLP
WARD, GREENBERG, HELLER &
REIDY LLP
WHEELER TRIGG O'DONNELL, LLP
WILLCOX & SAVAGE
WILSON RODE, PLLC
WRIGHT & ASSOCIATES

Exhibit B

OCP Declaration

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re

BESTWALL LLC,¹

Debtor.

Chapter 11

Case No. 17-31795

DECLARATION OF ORDINARY COURSE PROFESSIONAL

[Firm Name]

The undersigned hereby declares, under penalty of perjury, as follows:

1. I am a member, partner or similar representative of the following firm (the "Firm"), which maintains offices at the address and phone number listed below:

Firm:

Address and Telephone Number:

2. This Declaration is submitted in connection with an order of the United States Bankruptcy Court for the Western District of North Carolina authorizing Bestwall LLC (the "Debtor") to retain certain professionals in the ordinary course of business during the pendency of the Debtor's chapter 11 case (Docket No. __) (the "Order"). Following the date that the Debtor's chapter 11 case was commenced (the "Petition Date"), the Debtor has requested

¹ The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303.

that the Firm provide professional services (or continue to provide such services) to the Debtor, and the Firm has agreed to provide such services. Accordingly, the Firm is filing this Declaration pursuant to the Order.

3. The Firm, through me, and other members, partners, associates or employees of the Firm, has provided, or plans to provide, the following services to the Debtor from and after the Petition Date: _____.

4. To the best of my knowledge, information and belief, formed after due inquiry, the Firm does not represent or hold an interest adverse to the Debtor or its estate with respect to the matter(s) on which the Firm is to be retained and employed.

5. The Firm believes that it is [not owed any amount] / [owed approximately \$ _____] on account of services rendered and expenses incurred prior to the Petition Date in connection with the Firm's employment by the Debtor.

6. The Firm further states that it has not shared, has not agreed to share, nor will it agree to share, any compensation received in connection with this chapter 11 case with any party or person, although such compensation may be shared with any member or partner of, or any person employed by, the Firm.

7. If, at any time during its employment by the Debtor, the Firm discovers any facts bearing on the matters described herein, the Firm will supplement the information contained in this Declaration.

Dated: _____

By: _____
[Name]

Sworn to and subscribed before me
this _____ day of _____, 201__

Exhibit C

Proposed Order

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In re

BESTWALL LLC,¹

Debtor.

Chapter 11

Case No. 17-31795

**ORDER AUTHORIZING THE RETENTION
AND COMPENSATION OF PROFESSIONALS UTILIZED
BY THE DEBTOR IN THE ORDINARY COURSE OF BUSINESS**

This matter coming before the Court on the *Motion of the Debtor for an Order Authorizing the Retention and Compensation of Professionals Utilized by the Debtor in the Ordinary Course of Business* (the "Motion"),² filed by the debtor and debtor in possession in the above-captioned case (the "Debtor"); the Court having reviewed the Motion and having

¹ The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 100 Peachtree Street, N.W., Atlanta, Georgia 30303.

² Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

considered the statements of counsel with respect to the Motion at a hearing before the Court (the "Hearing"); the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (d) notice of the Motion and the Hearing was sufficient under the circumstances, (e) the Ordinary Course Professionals are not "professionals" within the meaning of section 327(a) of the Bankruptcy Code, (f) the OCP Payment Procedures provide all parties with sufficient notice and opportunity to object to all OCP Declarations and Monthly Statements (as such terms are defined herein) and (g) there is good cause to waive the 14-day stay imposed by Bankruptcy Rule 6004(h) to the extent it is applicable; 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;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Debtor is authorized to retain, employ and pay the Ordinary Course Professionals in the ordinary course of business, effective as of the applicable Retention Date, on the terms set forth herein.
3. The Debtor is hereby permitted to pay each Ordinary Course Professional, including those identified on the OCP List attached to the Motion as Exhibit A, without prior application to the Court, subject to the following OCP Payment Procedures:
 - (a) Each Ordinary Course Professional shall provide the Debtor with a declaration (an "OCP Declaration") substantially in the form attached to the Motion as Exhibit B, at the following addresses: (i) Bestwall LLC, 100 Peachtree Street, N.W., Atlanta, Georgia 30303 (Attn: J. Joel Mercer, Jr., bestwall@gapac.com); (ii) Jones Day, 2727 North Harwood Street, Suite 500, Dallas, Texas 75201 (Attn: Gregory M. Gordon, Esq., gmkgordon@jonesday.com, and Daniel B. Prieto, Esq., dbprieto@jonesday.com); (iii) Jones Day, 1420 Peachtree Street, N.E.,

Suite 800, Atlanta, Georgia 30309 (Attn: Jeffrey B. Ellman, Esq., jbellman@jonesday.com); and (iv) Robinson, Bradshaw & Hinson, P.A., 101 North Tryon Street, Suite 1900, Charlotte, North Carolina 28246 (Attn: Garland S. Cassada, Esq., gcassada@robinsonbradshaw.com).

- (b) Each OCP Declaration shall certify that the relevant Ordinary Course Professional does not represent or hold an interest adverse to the Debtor or its estate with respect to the matter on which the professional is to be employed. Each such Ordinary Course Professional shall periodically update its OCP Declaration to the extent necessary to reflect new facts or circumstances relevant to its retention.
- (c) Counsel to the Debtor shall promptly file any OCP Declaration that they receive with the Court and shall serve such declaration on (i) counsel to any Committee appointed in this case; (ii) counsel to any FCR appointed in this case; and (iii) the Bankruptcy Administrator, 402 West Trade Street, Suite 200, Charlotte, North Carolina 28202 (Attn: Shelley K. Abel, Esq.) (each, a "Notice Party" and, collectively with the Debtor and its counsel, the "Notice Parties").
- (d) The Notice Parties shall have 14 days after the filing and service of an OCP Declaration to object to the retention, employment or payment of the Ordinary Course Professional filing such declaration on the terms, and pursuant to the procedures, described herein (the "Objection Deadline"). Any objecting party shall serve its objection upon the Notice Parties and the relevant Ordinary Course Professional on or before the Objection Deadline. If an objection cannot be resolved within 10 days after the Objection Deadline, then the retention, employment or payment of the Ordinary Course Professional that is the subject of the objection shall be scheduled for hearing by the Debtor at the next regularly scheduled omnibus hearing date that is no less than 20 days from that date or on a date otherwise agreed to by the parties. The Debtor shall not be authorized to retain, employ or pay such Ordinary Course Professional until all outstanding objections have been withdrawn, resolved or overruled by order of the Court.
- (e) If no objection is received from any of the Notice Parties by the Objection Deadline with respect to an Ordinary Course Professional, the Debtor shall be authorized to retain, employ and pay that Ordinary Course Professional in accordance with the OCP Payment Procedures effective as of the Retention Date.
- (f) The Debtor may pay 100% of the fees and disbursements incurred by an Ordinary Course Professional upon the submission to, and approval by, the Debtor of an appropriate monthly invoice setting forth in reasonable detail the nature of the services rendered and disbursements actually

incurred during the month; provided, however, that all payments of fees to Ordinary Course Professionals shall be subject to the OCP Fee Limits.

- (g) To the extent that the fees sought by any Ordinary Course Professional for a month exceed the monthly OCP Fee Limit, then such Ordinary Course Professional shall, on or before the 20th day of the month following the month for which such fees are sought, serve a "Monthly Statement" on the Notice Parties for the full amount of fees sought in such month.
- (h) If any Notice Party has an objection to the fees sought in a particular Monthly Statement, such party shall, no later than the 15th day following the service of such Monthly Statement (the "Monthly Statement Objection Deadline"), serve upon the relevant Ordinary Course Professional and the other Notice Parties a written objection setting forth the nature of the objection.
- (i) If the Debtor does not receive an objection to a given Monthly Statement on or prior to the Monthly Statement Objection Deadline, the Debtor shall promptly pay all fees identified therein.
- (j) If the Debtor receives a timely objection to a Monthly Statement, the Debtor shall withhold payment of that portion of the Monthly Statement to which the objection is directed (the "Withheld Fees") and promptly pay the remainder of the fees sought unless the Court, upon notice and a hearing, directs payment of some or all of the Withheld Fees to be made.
- (k) If (i) the parties to an objection are able to resolve their dispute and (ii) the relevant Ordinary Course Professional serves upon the Notice Parties a statement describing such resolution, then the Debtor shall promptly pay the Withheld Fees (or such lesser agreed amount) to such Ordinary Course Professional.
- (l) If an Ordinary Course Professional seeks payment of fees in excess of the aggregate OCP Fee Limit, such Ordinary Course Professional shall, unless the Bankruptcy Administrator agrees, or the Court orders, otherwise, file a fee application with the Court for any such excess amount in accordance with sections 330 and 331 of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules of the United States Bankruptcy Court for the Western District of North Carolina, the Guidelines for Compensation and Expense Reimbursement of Professionals promulgated by the Court and any and all applicable orders of the Court.
- (m) At three-month intervals during the pendency of the Chapter 11 Case (each such interval, a "Quarter"), beginning with the partial Quarter ending on December 31, 2017, the Debtor shall file with the Court and

serve on the Notice Parties, no later than 40 days after the end of such Quarter, a statement including the following information for each Ordinary Course Professional: (i) the name of the Ordinary Course Professional, (ii) the aggregate amounts of fees and expenses incurred by such Ordinary Course Professional during the reported Quarter and (iii) all postpetition payments made to the Ordinary Course Professional through the end of the reported Quarter.

(n) The Debtor reserves the right to retain additional Ordinary Course Professionals from time to time during the Chapter 11 Case by having each such Ordinary Course Professional comply with these procedures.

4. The monthly OCP Limit is \$50,000, and the aggregate OCP Limit is \$500,000 during the pendency of the Chapter 11 Case, subject to increase by agreement of the Notice Parties or order of the Court.

5. The entry of this Order is without prejudice to the Debtor's right to request modification of the OCP Fee Limits.

6. Notwithstanding any of the foregoing, the Debtor shall separately retain any Ordinary Course Professional that becomes materially involved in the administration of this case, on application to and order of the Court, pursuant to section 327 of the Bankruptcy Code.

7. Trial experts not materially involved the administration of the Chapter 11 Case: (a) are not included within the definition of Ordinary Course Professionals used herein and in the Motion; and (b) are not subject to the OCP Fee Limits, the OCP Payment Procedures or any other restrictions on Ordinary Course Professionals described herein.

8. Pursuant to Bankruptcy Rule 6004(h), to the extent applicable, this Order shall be immediately effective and enforceable upon its entry.

9. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

10. This Court shall retain exclusive jurisdiction over any and all matters arising from or related to the implementation, interpretation or enforcement of this Order.

This Order has been signed electronically.
The Judge's signature and Court's seal appear
at the top of the Order.

United States Bankruptcy Court