

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: . Chapter 11
BUILDING MATERIALS HOLDING .
CORPORATION, *et al.*, . Case No. 09-12074 (KJC)
 . (Jointly Administered)
 .
Debtors. . Dec. 30, 2009 (1 p.m.)
 . (Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEVIN J. CAREY
UNITED STATES BANKRUPTCY COURT JUDGE

Appearances:

For the Debtors: Robert F. Poppiti, Jr., Esq.
Young Conaway Stargatt & Taylor, LLP
Josh Weisser, Esq.
Gibson, Dunn & Crutcher LLP
For RBS Investments: Leigh-Anne M. Raport, Esq.
Ashby & Geddes

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 THE CLERK: All rise. You may be seated.

2 THE COURT: Good afternoon, everyone.

3 MR. POPPITI: Good afternoon, Your Honor. For the
4 record, Robert Poppiti from Young, Conaway, Stargatt & Taylor
5 on behalf of the debtors. Along with me at the table today
6 is Joshua Weisser from Gibson, Dunn & Crutcher, and I believe
7 he's been *pro hac*-ed into this Court, Your Honor.

8 THE COURT: Very well.

9 MR. POPPITI: Your Honor, first and foremost, we
10 appreciate your time right around the holiday and end of the
11 New Year. It is much appreciated.

12 THE COURT: Well, I haven't started partying yet.

13 MR. POPPITI: It seems that when the rest of the
14 world is slowing down, bankruptcy is just as busy.

15 THE COURT: It seems that way.

16 MR. POPPITI: Your Honor, I'll be working from the
17 amended agenda that we filed for today's hearing.

18 THE COURT: Alright.

19 MR. POPPITI: As we've noted, Your Honor, item 1 has
20 been adjourned to January 27th, 2010 as it pertains to
21 Southwest Management, and we also submitted, Your Honor,
22 under certification of counsel, an order yesterday, I think,
23 which is consistent with this Court's ruling at the
24 confirmation hearing, as it pertains to - I guess what I'll
25 refer to as the rest of the universe on cure issues, and then

1 with respect to Southwest as it pertained to this Court's
2 ruling on adequate assurance of future performance, but then
3 some language, obviously, in there to reflect that January
4 27th or such other day as the parties may agree is when we'll
5 deal with the actual cure claim amounts.

6 THE COURT: I signed that order this morning.

7 MR. POPPITI: Okay, perfect, Your Honor. With that
8 said, Your Honor, we move to agenda item 2 which is the
9 private sale motion. Your Honor, pursuant to the sale
10 motion, the debtors are seeking an order from this Court
11 approving the private sale of 777 North 70th Avenue in
12 Glendale, Arizona on an as is, where is basis, free and clear
13 of any and all liens, claims, and encumbrances pursuant to
14 § 363 of the Bankruptcy Code. The purchaser, which is not an
15 insider of or otherwise affiliated with the debtors is RBS
16 Investments, LLC. RBS Investments, LLC, is represented by
17 counsel, which is present in the courtroom today, Your Honor.
18 The proposed sale is pursuant to the terms and conditions of
19 that certain real estate purchase and sale agreement dated as
20 of December 14th, 2009, and as thereafter amended. A copy of
21 the agreement, Your Honor, was included with the sale motion.
22 Some of the salient terms of the agreement, Your Honor, are
23 as follows: The purchase price for the sale is \$2.9 million.
24 The sale is subject to the more fuller terms and conditions
25 of the purchase agreement but generally is on an as is, where

1 is basis. All real estate taxes and assessments attributable
2 to the property will be prorated at closing and the seller
3 will pay all such taxes attributable to any period prior to
4 the closing date. The closing of the sale is anticipated to
5 take place tomorrow, and obviously, that's for the reasons
6 set forth in our sale motion with respect to the anticipated
7 tax benefits. Finally, the sale's, of course, subject to
8 this Court's approval. Attached to the sale motion, Your
9 Honor, was the declaration of Paul S. Street, which the
10 debtors rely on today in support of the sale, and with this
11 Court's permission, want to incorporate in today's record by
12 reference.

13 THE COURT: Is there any objection to the admission
14 of the Street affidavit? It's admitted without objection. I
15 will make one comment. The affidavit does not indicate that
16 part of the motion, as the motion says, that there's no
17 relationship between the seller and the buyer here. Can you
18 confirm for me that that's the case?

19 MR. POPPITI: Your Honor, I can confirm the same,
20 and we do apologize for omitting that from the affidavit, and
21 if need be, as I previously noted, not to throw them under
22 the bus, counsel for RBS Investments is in the courtroom
23 today, and I'm sure they would be willing to confirm the
24 same, Your Honor.

25 THE COURT: Alright.

1 MR. STREET (TELEPHONIC): Your Honor, this is Paul
2 Street, and I can confirm that there is no relationship also.

3 THE COURT: Alright, thank you, sir. Does the
4 debtor have anything further in support of its motion?

5 MR. POPPITI: Very briefly, Your Honor. As noted in
6 Mr. Street's declaration, the debtors believe that not only
7 does the consideration to be received from the debtors on
8 account of the sale represent the highest and best offer for
9 the property, but the sale will provide significant tax
10 benefits to the debtors' estate as a result of the recently
11 enacted federal tax legislation which this Court heard about
12 at length at the confirmation hearing. For those reasons,
13 Your Honor, we would request that the Court approve the sale
14 as the debtors believe in their informed business judgment
15 that it's in the best interest of these estates. However,
16 Your Honor, as noted on our original agenda, we received no
17 objections prior to the objection deadline. However, as
18 noted on our amended agenda, we did receive an objection late
19 last evening from Maricopa County. As a result of that
20 objection, a couple of things happened. One, Your Honor, we
21 would rely on the fact that in the proposed form of order,
22 any and all liens are to attach to the proceeds of the sale,
23 so, we believe that alone is sufficed to approve the sale.
24 That language, Your Honor, is in paragraph (9) of the
25 proposed form of order, and if it's easiest, Your Honor, I

1 can approach now with that proposed form of order so that you
2 have it in front of you.

3 THE COURT: Alright. And while you're doing that,
4 I'll simply note that the Maricopa County filing did not
5 object to the sale, it simply said, We have a lien, please
6 don't forget us - my words, not Maricopa County's.

7 MR. POPPITI: Your Honor, I think that's the most
8 accurate representation of their response, and we certainly
9 appreciate that. Your Honor, if the Court can indulge me and
10 flip to page 10 of the redline that I've handed you, which is
11 the second document under the clean order. As a result of
12 that Maricopa County response the debtors have had some
13 negotiations or discussions, frankly, with RBS Investments,
14 and we've agreed to this additional paragraph in the proposed
15 form of order.

16 THE COURT: Okay. I see that. Any other changes?

17 MR. POPPITI: No, Your Honor, and unless counsel for
18 RBS has anything for the Court today, and again, we would
19 request the Court to enter the proposed form of order.

20 THE COURT: Okay. I'll give others a chance to be
21 heard, but I have a couple of things I'd like to run through
22 with you first.

23 MR. POPPITI: Sure.

24 THE COURT: I take it the effective date has not yet
25 occurred.

1 MR. POPPITI: It has not yet occurred, Your Honor.
2 We're hoping that it would be in early January at this point.
3 I believe, and we certainly represented this in some of our
4 pleadings, so I feel as though I'd be comfortable making this
5 representation, that we're hoping it will be January 4th,
6 2010.

7 THE COURT: Okay. I want to - Well, let me just say
8 it this way: Some of you may have heard me say this in other
9 contexts before and that is, I'm usually reluctant to raise
10 issues that the parties have not, but because the order here
11 calls for 1146(c) relief, I thought it important because I'm
12 sure what I do here, if I approve it, will be - I'll be
13 reminded of it in future proceedings. But I want to approach
14 carefully that issue in light of the Third Circuit's decision
15 in Hechinger in 2003, and the Supreme Court's decision in
16 Piccadilly in 2008. Let me just walk through those for a
17 moment. In Hechinger the Third Circuit held that a real
18 estate transaction is made, quote, "under a plan confirmed
19 under § 1129", close quote, only where the sale is authorized
20 by the terms of a previously confirmed Chapter 11 plan. The
21 Supreme Court in Piccadilly said it this way: "Section
22 1146(a) affords a stamp tax exemption only to transfers made
23 pursuant to a Chapter 11 plan that has been confirmed."
24 There's a nice decision by Judge Bernstein in the Southern
25 District, In Re: New 118th, Inc. That's reported at 398

1 Bankruptcy Reporter 791. He says it this way: "Piccadilly
2 did not address whether the exemption could apply to a pre-
3 confirmation sale that closed post-confirmation.
4 Nevertheless, the post-confirmation delivery of the deed and
5 hence the transfer satisfies Piccadilly's simple bright line
6 rule. Furthermore, the Supreme Court's adoption of the NBR
7 standard" a reference to another case, "and by extension the
8 reasoning of Jacoby-Bender", yet another one, "suggests that
9 the 1146(a) exemption applies to a post-confirmation transfer
10 that follows a pre-confirmation sale if the transfer
11 facilitates the implementation of a plan or in the words of
12 Jacoby-Bender is necessary to the consummation of a plan."
13 So you have pursuant to, authorized by, necessary for. Here
14 we have a - well, post-confirmation approval of the sale, and
15 it would be a post-confirmation closing. So, I did go to
16 the plan which of course - Well, which provides, among other
17 things, that in the revesting provision, which is Article
18 7.5, that upon the effective date, the reorganized debtor can
19 do as it will with its property. Well, we're now pre-
20 effective date. So what's the authority in the plan for
21 transfer of real estate which would entitle it to the 1146(a)
22 exemption? I found no expressed provision, but I went back
23 to the disclosure statement where in the overview section,
24 the debtor does specifically say that, "The debtors own a
25 large portfolio of real estate assets and have identified

1 approximately \$50 million of excess real estate that is no
2 longer required to support the business. The debtors are
3 engaged in efforts to sell such excess real estate." So, I
4 will take the statement in the disclosure statement and the
5 absence of objection to constitute sufficient reason under
6 the standards that were announced in Piccadilly and Hechinger
7 to warrant granting the 1146(a) relief. Now, I know I took
8 you through a little trail there, but I think it's important
9 even in the absence of objection for me to satisfy myself
10 that I'm operating within the boundaries of controlling law.
11 Let me ask one other question, and then I'll give the
12 opportunity for the debtor to rejoin with anything or to hear
13 from others in connection with the sale, and that is, Has the
14 affected taxing authority received notice of this proposed
15 sale?

16 MR. POPPITI: Has Maricopa County, Your Honor, sir?
17 We believe they have, Your Honor, and we believe that's in
18 fact obviously why they did respond. As we noted, not only
19 in our motion, but in our motion to shorten, we served all
20 affected taxing authorities. The Attorney General for the
21 State of Arizona, we believe was also served, and any other
22 creditors we believed that were affected by this.

23 THE COURT: Okay.

24 MR. POPPITI: As well as obviously we had
25 represented people that had previously had interest in the

1 property.

2 THE COURT: I have no further questions. If you
3 wish to follow up with a comment to what I've said, you're
4 welcome to, otherwise I'll hear from others.

5 MR. POPPITI: No, Your Honor, we certainly
6 appreciate you walking through that thought process and
7 certainly appreciate the ruling, Your Honor, and unless
8 counsel for RBS Investments has anything, in light of Your
9 Honor's comments on the insider portion of the sale, the
10 debtors would request that Your Honor enter the sale order.

11 THE COURT: Alright. Does anyone else wish to be
12 heard in connection with the proposed sale?

13 MS. RAPORT: Good afternoon, Your Honor. Leigh-Anne
14 Raport from Ashby & Geddes on behalf of RBS Investments, LLC.
15 Your Honor, I have on the phone Mr. Robert Schwab from RBS
16 Investments, and he can confirm for Your Honor that there is
17 no affiliation between RBS Investments and the debtor.

18 THE COURT: Mr. Schwab?

19 MR. SCHWAB (TELEPHONIC): Yeah, this is Robert
20 Schwab, and I have no affiliation nor knowledge of anybody
21 with the debtor.

22 THE COURT: Thank you.

23 MS. RAPORT: Further, Your Honor, with the insertion
24 of paragraph (10) into the sale order, RBS Investments is
25 satisfied and requests that Your Honor enter the order.

1 THE COURT: Thank you. Does anyone else wish to be
2 heard in connection with the proposed sale? I hear no
3 further response. Based upon the record that's been made,
4 I'm prepared to grant the relief that's been requested. That
5 order has been signed.

6 MR. POPPITI: Thank you, Your Honor. With that I
7 would turn the podium over to Josh Weisser from Gibson, Dunn
8 to handle the third item on today's agenda, Your Honor, which
9 is the assignment motion.

10 THE COURT: Very well.

11 MR. POPPITI: Thank you.

12 MR. WEISSER: Good afternoon, Your Honor. Josh
13 Weisser from Gibson, Dunn & Crutcher on behalf of the
14 debtors, and thank you very much for scheduling the hearing
15 for us today. As noted by Rob, I'm here on behalf of the
16 debtors in support of their motion for an order with respect
17 to the assignment agreements for SelectBuild Illinois, LLC,
18 and Illinois Framing, Inc. We have a small presentation if
19 you would indulge us.

20 THE COURT: Certainly.

21 MR. WEISSER: By this motion, the debtors seek
22 authority to enter into two assignment agreements, *nunc pro*
23 *tunc*, to December 18, 2009 and assign certain construction
24 contracts to the counterparties to such assignment
25 agreements. The motion itself is very related to the order

1 signed by this Court on December 17th, 2009 with respect to
2 the portion of that order that dealt with the wind-down of
3 the operations of the debtors in the State of Illinois. Just
4 as a quick reminder, the business rationale for that wind-
5 down dealt with, I guess, avoiding future losses with respect
6 to the Illinois business and also taking approximately a \$7
7 million tax loss in the Illinois business and generating an
8 approximately \$2.5 million tax refund. The relationship
9 between that order and this motion at bar concerns the
10 assumption and assignment of construction agreements
11 maintained by the Illinois business entities for the
12 completion of performance, Your Honor. The status of the
13 construction contracts is as follows: I think each and every
14 one of the construction contracts are substantively complete.
15 You'll note on Exhibit 1 to each one of the assignment
16 agreements, most -

17 THE COURT: I'm sorry, let me ask you to pause.
18 This is Judge Carey. Let me remind the phone participants,
19 please to put their phones on mute unless it is their turn to
20 speak. Thank you.

21 MR. WEISSER: Thank you, Your Honor. You'll note
22 from Exhibit 1 to the assignment agreements that primarily
23 most of the responsibilities that are left over deal with
24 trim work. Essentially, this motion seeks to fill a gap with
25 respect to the Illinois business wind-down and address the

1 concern that counterparties might be unwilling to reimburse
2 the Illinois business entities for work completed to date or
3 to the effective date, I should say, if projects are not
4 finished on account of the wind-down. The debtors submit
5 that there are multiple business reasons for completing or, I
6 guess, executing the assignment agreements. First and
7 foremost is the contractual consideration. As consideration,
8 the debtors will retain their current rights to payment
9 arising out of existing construction contracts for work
10 performed to date. In addition, upon completion of projects,
11 the debtors shall receive any amounts owed by the assignees
12 to the assignors for work that's to be performed under the
13 construction agreement, less any amounts owed by the
14 assignors to the assignees. Essentially, the effect here is
15 on accounts receivable. Because of fears regarding the
16 debtors meeting future service obligations, certain
17 receivables have been or may be put on hold. So, contract
18 assignment, we hope, will insure that all projects are
19 completed and completed on time and that the debtors will
20 receive payment for amounts due and payable. There are also
21 benefits for other stakeholders. Illinois Framing has 10
22 employees who, pursuant to the wind-down, would lose their
23 jobs. The Illinois Framing assignee will employ all 10
24 employees. The costs here, we believe, are fairly minor.
25 Admittedly, the debtors will pay all cure costs, however, the

1 debtors believe there are no cure costs and it is of note,
2 Your Honor, that no party has objected to the motion on the
3 grounds that the cure amounts listed in the cure schedules
4 are incorrect. Moreover, there may be amounts payable as
5 outlined in Exhibit 1 to each one of the assignment
6 agreements, that from the debtors or the assignors to the
7 assignees, however those amounts are minor when compared to
8 the receivables at stake. One thing we wanted to address
9 dealt with the timing of this motion. As I've noted multiple
10 times in this presentation, this motion at bar is very
11 related to the order of this Court dated December 17, 2009,
12 however, it was not actually included in that motion or
13 incorporated into that motion, and there are multiple reasons
14 for that. First, as outlined at length at the confirmation
15 hearing there were tax reasons for moving in an expedited
16 fashion to obtain the approximately \$23 million in tax
17 benefits under the Worker, Homeownership, and Business Act of
18 2009. The debtors need to complete the Illinois business
19 wind-down and the Ontario Framing business sale by year end.
20 Second, at the time of the submission of the motion, we note
21 that substantive negotiation regarding the assignment
22 agreements were still ongoing, and therefore, we felt - I
23 guess, we felt uncomfortable with submitting something that
24 wasn't final, Your Honor. I do note that I believe Mr. Beach
25 advised the Court that we would be seeking approval of the

1 assignment agreements by year end. The same time constraints
2 are related to our seeking relief, *nunc pro tunc*. Because of
3 time constraints imposed by the Worker, Homeownership, and
4 Business Act of 2009, the debtors must complete the wind-down
5 in full by December 31. Accordingly, the assignors and the
6 assignees executed the assignment agreements on December 18th,
7 2009, and have been treating the agreements as effective
8 since such date. The debtors submit that its sound business
9 judgment to seek *nunc pro tunc* relief. Finally, Your Honor,
10 the debtors submit that all requirements necessary for
11 assumption and assignment are present. With respect to cure,
12 the debtors will pay any cure amounts and have sufficient
13 resources to do so. Currently the debtors believe there are
14 no cure costs and no party has suggested that there are.
15 Furthermore, the debtors have provided notice to all
16 counterparties and interested parties. Each of the assignees
17 are contractors who are fully capable of performing the
18 obligations under the assigned contracts and agreed to do so
19 in the assignment agreements themselves, and finally, Your
20 Honor, the debtors note that no party has objected to the
21 assumption and assignment to date. With that, we would ask
22 if Your Honor has any questions for us regarding the
23 agreements?

24 THE COURT: I do not.

25 MR. WEISSER: We have a proposed form of order. May

1 I approach?

2 THE COURT: You may.

3 MR. WEISSER: Thank you very much, Your Honor.

4 THE COURT: Thank you. Alright, let me ask if
5 anyone else wishes to be heard in connection with this
6 motion? I hear no response. That order has been signed. Is
7 there anything further for today?

8 MR. WEISSER: No, sir. Thank you very much, Your
9 Honor.

10 THE COURT: Alright. Thank you all very much. That
11 concludes this hearing. Court will stand adjourned. Let me
12 wish everyone a safe and happy and healthy New Year.

13 (Whereupon at 1:20 p.m., the hearing in this matter
14 was concluded for this date.)

15

16

17

18 I, Elaine M. Ryan, approved transcriber for the
19 United States Courts, certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter.

22

23 /s/ Elaine M. Ryan January 7, 2010
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UNITED STATES BANKRUPTCY COURT
District of Delaware

In Re:

Building Materials Holding Corporation
720 Park Boulevard, Suite 200
Boise, ID 83712
EIN: 91-1834269

Chapter: 11

Case No.: 09-12074-KJC

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REDACTION***


A transcript of the proceeding held on 12/30/2009 was filed on 1/8/2010 . The following deadlines apply:

The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 1/29/2010 .

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Date: 1/8/10

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