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5 *Ventures/Wedge Parkway, LLC*

6 IN THE UNITED STATES BANKRUPTCY COURT  
7 DISTRICT OF DELAWARE

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9 IN RE

10 BUILDING MATERIALS HOLDING  
11 CORPORATION, et al.,

12 Debtors,

CHAPTER 11

13 CASE NO.: 09-12074 (KJC)

14 **MOTION FOR RELIEF FROM**  
15 **AUTOMATIC STAY**

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18 **MOTION FOR RELIEF FROM AUTOMATIC STAY**

19 Priske-Jones Ventures/Galena LLC; Priske Jones Co. and Priske-Jones Nevada; Priske-Jones  
20 Ventures Parkway, LLC (“Movants”), “Priske-Jones”), in accordance with Rules 4001 and 9014 of  
21 the Federal Rules of Bankruptcy (“the Bankruptcy Rules”), by and through their respective counsel  
22 of record Stephen Castronova, Esq., of CASTRONOVA LAW OFFICES, P.C, move this Court for  
23 an Order under Section 362(d) of the United States Bankruptcy Code, 11 U.S.C. §101-1330 (the  
24 “Bankruptcy Code”), granting Movants relief from all stays and injunctions in the above captioned  
25 case, including the automatic stay of Bankruptcy Code §362(a), for the limited purpose of pursuing  
26 Debtor BMC West (“BMC West”, “Debtor”) as a nominal party in the Washoe County Nevada State  
27 Court Action, case number CV08-03448 for the sole purpose of establishing Debtor’s liability and  
28 pursuing recovery of proceeds from Debtor’s liability insurance.

US BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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1 Bankruptcy Code §§ 541(a)(1) and 362(d) govern the relief requested by Movants in this  
2 motion. Bankruptcy Code § 362(d) reads, in pertinent part:

3 “On request of a party in interest and after notice and a hearing, the court shall grant  
4 relief from the stay provided under subsection (a) of this section, such as by  
5 terminating, annulling, modifying, or conditioning such stay

6 (1) for cause, including the lack of adequate protection of an interest in property of  
7 such party in interest

8 (2) with respect to a stay of an act against property under subsection (a) of this  
9 section, if--

10 (A) the debtor does not have an equity in such property; and

11 (B) such property is not necessary to an effective reorganization.”

12 Movants submit that they are entitled to stay relief in this case because the proceeds of the  
13 liability insurance policies insuring Debtor for construction defects are not the property of the estate  
14 and therefore the scope of the automatic stay does not extend to the insurance proceeds. §524(e)  
15 permits a creditor to bring, and proceed in, an action nominally directed against a discharged debtor  
16 for the sole purpose of proving liability on its part as a prerequisite to recovering from its insurer.  
17 Movants are also entitled to relief from the automatic stay under the provisions of Bankruptcy Code  
18 § 362(d).

19 “Cause” under Bankruptcy Code §362(d)(1) exists to grant stay relief because Debtor would  
20 have no right to keep the proceeds of its liability insurance policies in any event since these proceeds  
21 would be paid to third parties for whose benefit the policies were obtained, namely Movants.  
22 Therefore, these policies would not be included in the “property of the estate” and would not be  
23 protected by the automatic stay. Additionally, Movants are entitled to stay relief under Bankruptcy  
24 Code §362(d)(2) because Debtor has no equity in the insurance proceeds, and the proceeds are not  
25 necessary for any effective reorganization in this case.

26 This Motion presents a “core proceeding” in which the Court is entitled to enter a final order  
27 under 28 U.S.C. §§1334 and 157(b)(2)(G); Bankruptcy Code §362(d); and Bankruptcy Rules 4001

1 and 9014.

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 On June 16, 2009, Building Materials Holding Corporation, and its affiliates, including BMC  
4 West (collectively the “BMHC Companies”) filed voluntary petitions pursuant to Chapter 11 of the  
5 Bankruptcy Code, thereby commencing the above-captioned Chapter 11 case.

6 Priske-Jones Nevada, although no longer in existence, was a corporation in the State of  
7 Nevada who engaged the business of general contracting for construction projects. In the late 1990s,  
8 Priske-Jones was the general contractor on the Galena Meadows subdivision development project  
9 located in Reno, Nevada (“Galena Meadows Project”). Priske-Jones Nevada was the builder and  
10 contractor of record. However, it was a “paper” contractor only and did not perform any items of  
11 construction. Essentially, all items of home construction were completed through subcontractors.

12 Priske Jones entered into a subcontract agreement with BMC West for the Galena Meadows  
13 Project as a materials supplier of: windows; screens; interior doors & hardware; bypass doors &  
14 hardware; MDF baseboards; and Q-Lon Door Seals. BMC West supplied these items per the  
15 contract.

16 On May 15, 2008, Chapter 40 notices were served on Priske-Jones on behalf of 12 home  
17 owners in the Galena Meadows Project, alleging a variety of construction defects with respect to  
18 their single family residences. Included in these alleged construction defects are claims of a variety  
19 of window and door problems including claims of inferior window product and window and door  
20 leaking. BMC West was sent notices of these defects in compliance with Nevada Revised Statutes  
21 (“N.R.S”) §40.646. The homeowner Plaintiffs then filed their complaint in the Nevada Superior  
22 Court, County of Washoe, case number CV08-03448, on October 29, 2009, naming Priske-Jones as  
23 a defendant. Priske-Jones then filed its Answer and Third Party Complaint naming BMC West as  
24 a Third Party Defendant on November 10, 2009. Priske Jones was made aware of the BMHC  
25 Companies’ Chapter 11 filing shortly thereafter.

26 Upon being made aware of BMHC Companies’ voluntary Chapter 11 Filing, counsel for  
27 Priske-Jones contacted counsel for BMHC Companies and requested the parties stipulate that the

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1 automatic stay provisions of 11 U.S.C. §362 be lifted for the limited purpose of allowing Priske-  
2 Jones to pursue the Washoe County Nevada state court action against BMC West for the sole  
3 purpose of ascertaining if BMC West has liability insurance coverage for constructional defects and  
4 if it does allowing Priske Jones to exercise its rights to pursue the case in order to attempt to recover  
5 BMC West' insurance proceeds only. Counsel for BMHC refused.

6 **II. LEGAL ARGUMENTS AND AUTHORITIES**

7 With respect to its request for stay relief, Movants have the burden of proof only on the issues  
8 of the Debtor's equity in the insurance proceeds. The Debtor has the burden of proof with respect  
9 to all other issues raised in this motion. (See 11 U.S.C. §362(e)(2); see *In re Gauvin*, 24 B.R. 578,  
10 580 (Bankr.9th Cir.1982); *In re Schaller*, 27 B.R. 959, 961 (W.D. Wis. 1983). Applying the  
11 foregoing principles to the facts of this case, Movants have the clear right to relief under §524(e);  
12 §362(d)(1) and §362(d)(2).

13 **A. Movants Are Entitled To Relief Under §524(e).**

14 Under Bankruptcy Code §541(a)(1), "property of the estate" includes "all legal or equitable  
15 interest of the debtor in property as of the commencement of the case." Although the law is clear  
16 that an insurance policy issued to the Debtor will generally constitute "property of the estate", See  
17 *Matter of Edgeworth*, 993 F.2d 51,55 (5th Cir.1993), the question of whether the proceeds of an  
18 insurance policy are property of the estate must be analyzed in light of the facts of each case. *In re*  
19 *Sfuzzi, Inc.* 191 B.R. 664, 668 (Bankr. N.D. Tx.1996).

20 In *Edgeworth*, supra, individuals holding a medical malpractice claim against the Chapter  
21 7 debtor sought authority to pursue their lawsuit against the debtor in order to collect any judgment  
22 solely from the proceeds of the debtor's malpractice liability policy. The Court held that the  
23 claimant could do so because 11 U.S.C. §524(e) excludes the liability insurance carrier from the  
24 protection of the bankruptcy discharge and the proceeds of the policy were not property of the  
25 debtor's estate. The court stated, "The overriding question when determining whether insurance  
26 proceeds are property of the estate is whether the debtor would have a right to receive and keep those  
27 proceeds when the insurer paid on the claim. When a payment by an insurer cannot inure to the

1 debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy  
2 estate." *Edgeworth*, supra at 55-56.

3 In applying the Edgeworth test to the facts at hand, the Debtor has no cognizable interest in  
4 the proceeds of any liability policy because the proceeds will be payable only for the benefit of those  
5 harmed by the debtor under the terms of the insurance contract, namely Priske Jones. Where the  
6 debtor assigns the proceeds or designates a third party as a beneficiary, the proceeds have been held  
7 to be outside the scope of property of the estate. *In re Louisiana World Exposition, Inc.* 832 F.2d  
8 1391, 1399-1400 (5th.Cir. 1987); *In re Florian*, 233 B.R. 25 (Bankr.Conn.1999) (Since liability  
9 insurance policy, although purchase by the debtors, was intended to cover damages to non-estate  
10 property, proceeds were not property of the estate). Here, the proceeds would therefore be outside  
11 of the estate and Movants should be permitted to pursue them.

12 **B. Movants Are Entitled To Stay Relief Under Bankruptcy Code §362(d).**

13 1. Under Bankruptcy Code §362(d)(1), relief from stay must be granted "for cause".

14 Under §362(d)(1), stay relief is to be granted "for cause including the lack of adequate  
15 protection of an interest in property of [the party requesting the relief]." 11 U.S.C. §362(d)(1).

16 If a creditor seeking relief from the automatic stay makes a prima facie case of "cause" for  
17 lifting the stay, the burden going forward shifts to the debtor pursuant to Bankruptcy Code § 362(g).  
18 See *In re 234-6 West 22nd St. Corp.*, 214 B.R. 751, 756 (Bankr.S.D.N.Y. 1997). The Bankruptcy  
19 Code does not define "cause." Instead, whether cause exists to lift the automatic stay should be  
20 determined on a case by case basis. See *Izzarelli v. Rexene Prod. Co. (In re Rexene Prod. Co.)*, 141  
21 B.R. 574, 576 (Bankr.D.Del. 1992). See also, *In re Texas State Optical, Inc.*, 188 B.R. 552, 556  
22 (Bankr. E.D.Tex. 1995) (finding that "cause" for modification of the automatic stay is "an  
23 intentionally broad and flexible concept that permits ... [a] [b]ankruptcy [c]ourt, as a court of equity,  
24 to respond to inherently fact-sensitive situations.") Courts determine what constitutes "cause" based  
25 on the totality of the circumstances in each particular case. *Baldino v. Wilson (In re Wilson)*, 116  
26 F.3d 87, 90 (3d Cir. 1997).



1 It is quite a simple matter to determine whether Movants have any equity in the potential  
2 insurance proceeds. Debtor would have no right to keep the proceeds of its construction defect  
3 insurance policies in any event since these proceeds would be paid to third parties for whose benefit  
4 the policies were obtained. Movants, therefore, have determined that there is no equity in the  
5 potential insurance proceeds over and above Movants' security interest.

6 The second prong of the test under the Bankruptcy Code §362(d)(2) requires that the property  
7 must be "necessary to an effective reorganization" of the Debtor. 11 U.S.C. §362 (d)(2)(B). In order  
8 for property to be necessary to an effective reorganization, the Debtor must establish that the  
9 property under consideration is necessary to effect a reorganization, and that there is a likelihood of  
10 a successful reorganization in prospect. *United Savings Association of Texas v. Timbers of Inwood*  
11 *Forest Associates, Ltd.* 484 U.S. 365 (1988). If reorganization of the Debtor is not feasible, then the  
12 stay cannot continue to prevent the creditor from enforcing its interest in the Debtor's property. See  
13 *In Re Century Investment Fund VII Limited Partnership*, 96, B.R. 834 (Bankr. E.D. Wis 1989). In  
14 the present case, the potential insurance proceeds are not necessary to an effective reorganization of  
15 the Debtor since the Debtor has no interest in the proceeds. Because Debtor lacks equity in the  
16 prospective insurance proceeds, the proceeds would have no effect on a prospective reorganization  
17 of the estate. Therefore, Movants' motion for relief from the automatic stay should be granted under  
18 Bankruptcy Code §362(d)(2).

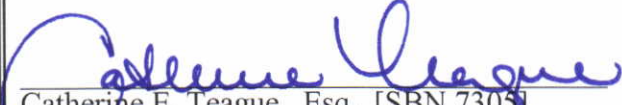
19 **III. CONCLUSION**

20 For all of the foregoing reasons, Movants respectfully request that the Court enter an Order  
21 vacating and terminating all applicable bankruptcy stays and injunctions for the limited purpose of  
22 pursuing the Washoe County Nevada State Court case number CV08- 03448 in order to establish  
23 Debtor's liability and pursue recovery of proceeds from Debtor's construction defect insurance only  
24 and granting Movants all other and further relief as is just and proper under the circumstances of this  
25 case.

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RESPECTFULLY SUBMITTED

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