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IN THE UNITED STATES BANKRUPTCY COURT

2010 FEB -9 AM 10:01

DISTRICT OF DELAWARE

IN RE

CHAPTER 11

BUILDING MATERIALS HOLDING CORPORATION, et al.,

CASE NO.: 09-12074 (KJC)

Debtors.

NOTICE OF MOTION FOR RELIEF FROM STAY UNDER SECTION 362 OF THE BANKRUPTCY CODE

TO:

Brian K. Cuttone
Donald J. Bowman, Jr.
Robert F. Poppiti, Jr.
Sean Matthew Beach
Vicki Lauren Shoemaker

[Debtor/Debtor Counsel]

Bradford J. Sandler
Christopher J. Giaimo

[Creditor Committee Counsel]

United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19899-0035

[United States Trustee]

Priske-Jones Ventures/Galena LLC; Priske Jones Co. and Priske-Jones Nevada; Priske-Jones Ventures Parkway, LLC ("Movants") have filed a Motion for Relief from Stay which seeks the following relief: Movants seek relief for the limited purpose of pursuing Debtor BMC West ("BMC West", "Debtor") as a nominal party in the Washoe County Nevada State Court Action, case number CV08-03448 for the sole purpose of establishing Debtor's liability and pursuing recovery of proceeds from Debtor's liability insurance.

HEARING ON THE MOTION WILL BE HELD ON February 22, 2010, at 1:00 p.m.

1 You are required to file a response (and the supporting documentation required by Local
2 Rule 4001-1(d)) to the attached motion at least five business days before the above hearing date.

3 At the same time, you must also serve a copy of the response upon movant's attorney:

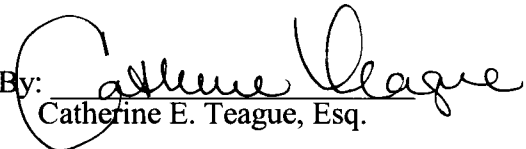
4 CASTRONOVA LAW OFFICES, P.C.
5 Stephen G. Castronova, Esq. [SBN 7305]
6 Catherine E. Teague, Esq. [SBN 11000]
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10 The hearing date specified above may be a preliminary hearing or may be consolidated
11 with the final hearing, as determined by the Court.

12 The attorneys for the parties shall confer with respect to the issues raised by the motion in
13 advance for the purpose of determining whether a consent judgement may be entered and/or for
14 the purpose of stipulating to relevant facts such as value of the property, and the extent and
15 validity of any security instrument.

16 DATED this 3rd of February, 2010.

17 CASTRONOVA LAW OFFICES, P.C.

18 By: 
19 Catherine E. Teague, Esq.

1 **CERTIFICATE OF SERVICE**

2 **CASE NO.: 09-12074 (KJC)**

3 I HEREBY CERTIFY that on February 3, 2010, I served a true and correct copy of
4 the foregoing **NOTICE OF MOTION FOR RELIEF FROM STAY UNDER SECTION 362**
5 **OF THE BANKRUPTCY CODE** to the last known addresses of the following recipients:

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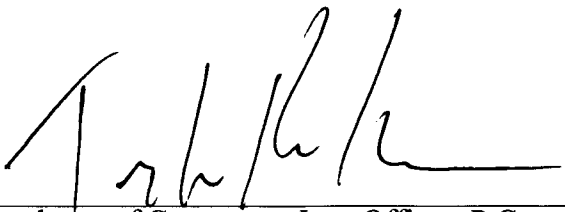
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Employee of Castronova Law Offices, P.C.
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7 Attorneys for *Priske-Jones Ventures/Galena LLC*;
8 *Priske-Jones Nevada*; *Priske-Jones*
9 *Ventures/Wedge Parkway, LLC*

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10 IN RE
11 BUILDING MATERIALS HOLDING
12 CORPORATION, et al.,
13 Debtors,

CHAPTER 11
CASE NO.: 09-12074 (KJC)

**MOTION FOR RELIEF FROM
AUTOMATIC STAY**

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.

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

28

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