

ORIGINAL

FILED

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:

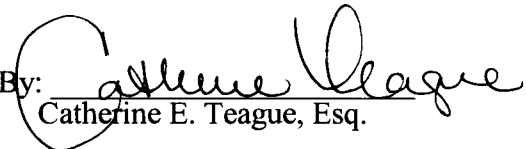
4 CASTRONOVA LAW OFFICES, P.C.
5 Stephen G. Castronova, Esq. [SBN 7305]
6 Catherine E. Teague, Esq. [SBN 11000]
7 605 Forest Street
8 Reno, Nevada 89509
9 Tel: (775) 323-2646 | Fax: (775) 323-3181

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:

6 **Attorney**

Counsel for

Debtor

7 **Brian K. Cuttone**

8 Brian K. Cuttone, Attorney at Law
9 1233 W. Shaw Avenue
10 Suite 100
11 Fresno, CA 93711
12 559-225-2510
13 Fax : 559-225-2389
14 Email: cheryl@realmediation.net

12 **Donald J. Bowman, Jr.**

13 Young, Conaway, Stargatt & Taylor
14 1000 West Street
15 17th Floor
16 Wilmington, DE 19801
17 302-571-6600
18 Email: bankfilings@ycst.com

Debtor

16 **Robert F. Poppiti, Jr.**

17 Young, Conaway, Stargatt & Taylor,
18 LLP
19 The Brandywine Building
20 1000 West Street
21 17th Floor
22 Wilmington, DE 19801
23 302-571-6600
24 Email: bankfilings@ycst.com

Debtor

21 **Scott K. Brown**

22 Lewis and Roca LLP
23 40 Norht Central Avenue
24 Suite 1900
25 Phoenix, AZ 85004
26 602-262-5321
27 Fax : 602-734-3866
28 Email: sbrown@lrlaw.com

Debtor

Sean Matthew Beach

26 Young, Conaway, Stargatt & Taylor
27 The Brandywine Building, 17th Floor
28 1000 West Street

Debtor

1 Wilmington, DE 19899
302-571-6600
2 Fax : 302-576-3281
Email: bankfilings@ycst.com
3

Vicki Lauren Shoemaker
4 Marshall Dennehey Warner Coleman & Goggi
1220 N. Market Street
5 5th Floor
PO Box 8888
6 Wilmington, DE 19899
302-552-4348
7 Fax : 302-651-7905
Email: vlshoemaker@mdwgc.com
8

Debtor

United States Trustee
9 844 King Street, Room 2207
Lockbox #35
10 Wilmington, DE 19899-0035
302-573-6491
11

U.S. Trustee

Bradford J. Sandler
12 Benesch Friedlander Coplan & Aronoff
222 Delaware Avenue
13 Suite 801
Wilmington, DE 19801
14 302-442-7007
Fax : 302-442-7007
15 Email: bsandler@beneschlaw.com

Creditor Committee
**Official Committee of Unsecured
Creditors**

Christopher J. Giaimo
16 Arent Fox, PLLC
17 1050 Connecticut Avenue, NW
Washington, DC 20036-5339
18 202-857-6000
Fax : 202-857-6395
19 Email: giaimo.christopher@arentfox.com

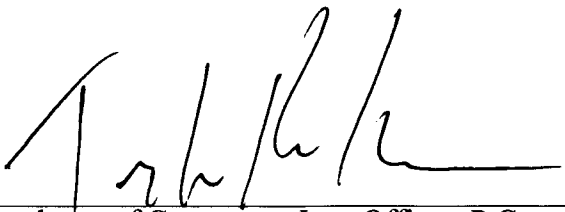
Creditor Committee
**Official Committee of Unsecured
Creditors**

20 Maureen E. Thomas
BMHC Legal Department
21 720 Park Boulevard, Suite 200
Boise, ID 83712-7764
22

**BMHC Legal and Risk Management
Counsel**

23 Stacy Giron
BMC West
Risk Management Specialist
24 6840 W. Frier Drive
Glendale, AZ 85303
25

BMC West Risk Management Specialist


Employee of Castronova Law Offices, P.C.
26
27

1 CASTRONOVA LAW OFFICES, P.C.
2 Stephen G. Castronova, Esq. [SBN 7305]
3 Catherine E. Teague, Esq. [SBN 11000]
4 605 Forest Street
5 Reno, Nevada 89509
6 (775) 323-2646/Fax: (775) 323-3181
7 Attorneys for *Priske-Jones Ventures/Galena LLC*;
8 *Priske-Jones Nevada*; *Priske-Jones*
9 *Ventures/Wedge Parkway, LLC*

RECEIVED
JAN 26 2010
BY:

6 IN THE UNITED STATES BANKRUPTCY COURT
7 DISTRICT OF DELAWARE

FILED
2010 JAN 26 PM 3:27
U.S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

9 IN RE
10
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

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

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

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).

27

28

1 *In re Rexene* provides a “balancing test” to determine whether cause exists to lift the
2 automatic stay. 141 B.R. at 576. The Rexene balancing test looks at three factors to decide whether
3 to lift the automatic stay, including: (a.) whether prejudice will be caused to the estate or the debtor;
4 (b.) whether hardship to the movant from continuing the stay outweighs any hardship to the debtor;
5 and (c.) whether the movant has a reasonable probability of prevailing on the merits of the suit. *Id.*

6 Applying the facts at hand to the Rexene balancing test, cause exists to grant stay relief under
7 all three prongs. Neither the debtor nor the estate will suffer prejudice because Debtor has no right
8 to keep the proceeds of its liability insurance policies in any event since these proceeds would be
9 paid to third parties for whose benefit the policies were obtained. Movants, on the other hand, would
10 suffer hardship in that if Debtor is found culpable in the state court proceeding, Movants would be
11 barred from pursuing any liability insurance that would otherwise available and leave Movants with
12 no means of recoupment. Finally, Movants have a reasonable probability of prevailing on the merits
13 of the suit given as discussed above that the Plaintiffs in the state court proceeding directly name as
14 defects issues with Debtor’s products and Movants subcontracted all labor and materials to other
15 parties including Debtor. Further, Debtor’s subcontract agreement with Movants contained an
16 indemnification provision. Therefore, Cause is present and stay relief should be granted under
17 §362(d)(1).

18 2. Under Bankruptcy Code 362(d)(2), relief from stay must be granted where the Debtor
19 does not have equity in the property.

20 Bankruptcy Code §362(d)(2) provides a separate and independent basis for relief from the
21 automatic stay. Under Bankruptcy Code §362(d)(2), stay relief is to be granted where (A) the Debtor
22 does not have any equity in such property; and (B) the property is not necessary to an effective
23 reorganization. 11 U.S.C. §362(d)(2).

24 While supported by many of the same factors, the standard for relief under Bankruptcy Code
25 §362(d)(2) is independent from the “cause” analysis under Bankruptcy Code §362(d)(1). In
26 accordance with Bankruptcy Code §362(d)(2), relief from the stay must be granted where there is
27 no equity in the subject property and the property is not necessary for an effective reorganization.

28

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.

26

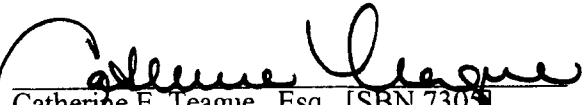
27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

RESPECTFULLY SUBMITTED

CASTRONOVA LAW OFFICES, P.C.



Catherine E. Teague, Esq. [SBN 7305]
605 Forest Street
Reno, Nevada 89509
Tel: (775) 323-2646 | Fax: (775) 323-3181
Attorneys for Defendant *Priske-Jones Ventures/Galena LLC*;
Priske-Jones Nevada; *Priske-Jones*
Ventures/Wedge Parkway, LLC