

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

| | | |
|----------------------------|---|---|
| In re: |) | Chapter 11 |
| |) | |
| BUILDING MATERIALS HOLDING |) | Case No. 09-12074 (KJC) |
| CORPORATION, |) | |
| |) | |
| Debtor. |) | Hearing Date: Nov. 19, 2009 at 11:00 a.m. |
| _____ |) | Obj. Deadline: Nov. 12, 2009 at 4:00 p.m. |

**MOTION OF PARKER DEVELOPMENT N.W., INC.
FOR RELIEF FROM THE AUTOMATIC STAY**

Parker Development N.W., Inc. ("Parker Development"), by and through the undersigned counsel, respectfully submits the following Motion For Relief from Stay (hereinafter the "Motion") pursuant to 11 U.S.C. § 362(d), seeking an order from the Court modifying the automatic stay to allow Parker Development to pursue causes of action in the Circuit Court of the State of Oregon, for the County of Multnomah, against BMC West Corporation, a/k/a Building Materials Holding Corporation, the above-captioned Debtor. In support of the Motion, Parker Development respectfully states as follows:

Jurisdiction

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

2. On June 16, 2009 (the "Petition Date"), the Debtor filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware.

3. Parker Development was the developer and general contractor for the construction of row homes located on NW Burnside Road, Gresham, Oregon, and commonly known as Covington Place Row Homes (the “Project”). Parker Development has been named as a defendant by Covington Place Row Homes Association, Inc., and the individual Unit Owners, Carol D. Sadle, Vera Eileen Williams, Sheree L. Bogardus, Marcie M. Murray, Kira L. Updike, Thomas Anderson, Julie D. Muramatsu, Cara Lynn, Elizabeth M. Williams, Joann M. Leutwyler, Amanda and Erik Kowalker, Alicia A. Smith, Sara A. Garland, Jarom Marvin Sweazey, Lisa Severin, Mark and Sharon Ulrich, Peter M. and Lisa A. Emerson, Rodney M. Lewis, Marquitta M. Farrell-Lewis and Smith Wang. The suit was brought in the Circuit Court of the State of Oregon, for the County of Multnomah, Case No. 0809-12623 (the “Action”). Plaintiffs allege that Parker Development breached various duties it owed the Plaintiffs in connection with the construction of the Project.

4. Parker Development filed its Third Party Complaint against Joe’s Siding Corp., Westurn Cedar, Inc., James Robert Warner d/b/a Rocks Roll Concrete, Fadey Cherimnov d/b/a Inway Construction Company, Pinkerton Painting & Restoration, LLC, Jacobs Heating & Air Conditioning, Inc., Kiril Ivanov d/b/a I&E Construction (collectively as the “Third Party Defendants”). All of the Third Party Defendants entered into subcontract agreements to complete certain work on the Project.

5. Through the discovery process, Parker Development learned that BMC West Corporation a/k/a Building Materials Holding Corporation had also entered into a subcontract to complete work on the Project, which work is also subject to the claims now pending against Parker Development.

6. The trial in this matter is currently scheduled for January 11, 2009.

7. Parker Development has not settled its claims against the Third Party Defendants

and wishes to join Building Materials Holding Corporation in this action as a third party defendant.

Relief Requested

8. Parker Development respectfully requests that this Court enter an Order pursuant to § 362(d)(1) of the Bankruptcy Code modifying the automatic stay provisions of 11 U.S.C. § 362 to allow Parker Development to join Building Materials Holding Corporation as a third party defendant, and to liquidate its claims in the Action (or in any such other forum as is proper and to proceed to final judgment, including any alternative dispute resolution), to collect any proceeds from the Debtor's insurance carrier and to receive its *pro rata* share of the unsecured claim dividend.

Basis for Relief

9. Section 362(d) of the Bankruptcy Code provides that:

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

(1) For cause, including the lack of adequate protection of an interest in property of such party in interest; or

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

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

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

10. "Cause" is not defined in the Bankruptcy Code, it must be determined on a case-by-case basis. Int'l Bus. Machines v. Fernstrom Storage and Van Co., 938 F.2d 731, 735 (7th Cir. 1991). Such cause has been found to exist to permit litigation in another forum to liquidate a personal injury claim. See, In re Rexene Products Co., 141 B.R. 574, 576 (Bankr. D. Del. 1992) (noting that the legislative history of § 362(d) indicates that cause may be established by a single

factor such as “a desire to permit an action to proceed ... in another tribunal.”); In re Drexel Burnham Lambert Group, Inc., 113 B.R. 830, 838 n.8 (Bankr. S.D.N.Y. 1990) (citing liquidation of a personal injury claim as “cause” for relief); In re Holtkamp, 669 F.2d 505 (7th Cir. 1982) (affirming lift of stay by Bankruptcy Court to allow personal injury suit against debtor to proceed to judgment).

11. Most courts employ an equitable balancing test to determine cause. In re Rexene Products, Co. 141 B.R. at 576. In In re Rexene Products Co., the balancing test formula is as follows: Whether

- a. any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,
- b. the hardship to the movant by maintenance of the stay considerably outweighs the hardship to the debtor, and
- c. the movant has a probability of prevailing on the merits. Id. at 576.

12. In the cases where a movant seeks to liquidate the claim, courts have used a two-prong balancing test. See, In re Peterson, 116 B.R. 247, 249 (D. Colo. 1990).¹ Employing a two-pronged balancing test, relief from stay is warranted here. The Debtors will not be prejudiced by the prosecution of Parker Development’s claims, claims which the BMC West Corporation a/k/a Building Materials Holding Corporation must defend. Bankruptcy Courts have consistently found that litigation expenses do not constitute prejudice to justify a continuation of the stay. See In re

¹ In In re Peterson, 116 B.R. 247, 249 (D.Colo. 1990), the Court refused to consider the probability of success on the merits of the underlying claim. Id. The Peterson Court reasoned that a merits analysis was more appropriate in a case seeking some extraordinary relief, but not in a claims liquidation case, where the question is simply the forum in which the action should be brought against the debtor. Id. at 250. Should the Court conclude that the three-prong test applies here, however, all that is required is a vague initial showing that a *prima facie* case can be established. See In re Reice, 88 B.R. 676, 681 (Bankr.E.D.Pa 1988); In re Morysville Body Works, 86 B.R. 51, 55 (Bankr.E.D.Pa 1988).

Peterson, supra, 116 B.R. at 250; In re Nkongho, 59 B.R. 85, 86 (Bankr.D.N.J. 1986) (rejecting debtor's claim that litigation expenses precluded modification of stay); In re Nicholas, Inc., 55 B.R. 212, 217-18 (Bankr.D.N.J. 1985) (same).

13. Parker Development seeks relief from the automatic stay so that it can proceed with the Action and liquidate its claims for, *inter alia*, indemnity, contribution, breach of contract and negligence against the estate and the Debtor's applicable insurance policies. Further, because the Debtor has insurance coverage for Parker Development's claims, any burden for defending this suit may be borne by the Debtor's insurance carrier.

14. Parker Development is entitled to a jury trial for its injuries and damages which are not available in this Court. A jury trial in the Circuit Court of the State of Oregon for the County of Multnomah is best suited to try all issues raised in the Action, and Parker Development's injuries and damages.

15. Parker Development stipulates and agrees that it is not seeking, and will not seek immediate recovery against the Debtor or the Debtor's estate for any amount owing Parker Development over and above its primary, excess or umbrella insurance as a result of any settlement or judgment of the claims in the Circuit Court of the State of Oregon, for the County of Multnomah, so relief would permit the enforcement of any judgment against the Debtor's applicable insurance and a *pro rata* share of the unsecured claim dividend.

16. If this Motion is not granted, Parker Development would be prejudiced and harmed by a delay in liquidating its claims against the Debtor, as Parker Development is being sued for alleged faulty work that was completed by the Debtor and/or the Debtor's employees. The pending Action in Oregon, with a jury, is the best forum to assess both special and general damages incurred by Parker Development in the pending Action.

17. Parker Development's injuries are real, and it has a substantial likelihood of success on the merits. The work on the Project now complained of was completed by the Third Party Defendants. While BMC West Corporation a/k/a Building Materials Holding Corporation has not yet been named as a Third Party Defendant, BMC West Corporation a/k/a Building Materials Holding Corporation did complete a portion of the work now complained of, and for which Parker Development is being sued. Parker Development is confident it will prevail in its claims against BMC West Corporation, a/k/a Building Materials Holding Corporation, and the Third Party Defendants.

18. Notably, the defense or outcome of Parker Development's case would not have a substantive effect on issues involving the Debtor's ability or entitlement to reorganization under the Bankruptcy Code. "[W]here, as here, the pending action is neither connected with nor interfering with the bankruptcy proceeding, the automatic stay in no way fosters Code policy." In re Holtkamp, supra, 669 F.2d at 508 (citations omitted). Further, the liquidation of Parker Development's claims would be more conveniently and speedily determined in the state forum, as the matter involves issues of state substantive law. See In re UNR Industries, supra, 54 B.R. at 269. Moreover here the Action involves a number of different parties to a construction dispute on the other side of the country. The various issues in play can best be resolved in Oregon, where all the parties are present.

19. Allowing Parker Development to join BMC West Corporation a/k/a Building Materials Holding Corporation and proceed on its claims would not grant it a superior position over other creditors. Normally in a claims liquidation case, there is a stipulation that, to the extent that liability insurance is not implicated, judgment will not be executed as to the debtor, so that the action does not fundamentally affect the debtor or its assets. In re Peterson, supra, 116 B.R. at 250.

This Court could require that any liquidated claim (in excess of any amounts where liability coverage is available) be presented in order to receive distribution. See UNR Industries, supra, 54 B.R. at 270 (permitting product disparagement suit to proceed to judgment against debtor, but barring enforcement of any judgment apart from insurance proceeds available to the debtor). This would provide an efficient way to determine the Debtor's liability to Parker Development while maintaining Parker Development's status in relation to other creditors.

20. For the above stated reasons, Parker Development asserts that cause exists to waive the requirements of Bankruptcy Rule 4001(a)(3), and to allow a lift of the stay order to be effective upon entry.

Notice

21. Notice of this Motion has been provided to (i) counsel to the Debtors; (ii) counsel to the United States Trustee; and (iii) those parties entitled to receive notice pursuant to Rule 4001 of the Bankruptcy Rules and Rule 4001-1 of the Local Rules. Parker Development submits that no other or further notice of this Motion need be provided.

No Prior Request

22. No prior request for the relief sought herein has been made to this or any other Court.

[the remainder of this page is intentionally left blank]

WHEREFORE, Parker Development respectfully requests that this Court enter an Order modifying the automatic stay to allow it to join BMC West Corporation, a/k/a Building Materials Holding Corporation as a third party defendant, and to proceed with the Action to judgment, and to enforce any judgment against the Debtor and their insurance carriers.

Dated: October 30, 2009
Wilmington, Delaware

CROSS & SIMON, LLC

By: 

Joseph Grey (No. 2358)

Patrick M. Brannigan (No. 4778)

913 North Market Street, 11th Floor

P.O. Box 1380

Wilmington, Delaware 19899-1380

(302) 777-4200

(302) 777-4224 (facsimile)

csimon@crosslaw.com

pbrannigan@crosslaw.com

Attorneys for Parker Development N.W., Inc.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

| | | |
|----------------------------|---|---|
| In re: |) | Chapter 11 |
| |) | |
| BUILDING MATERIALS HOLDING |) | Case No. 09-12074 (KJC) |
| CORPORATION, |) | |
| |) | |
| Debtor. |) | Hearing Date: November 19, 2009 at 11:00 a.m. |
| _____ |) | Obj. Deadline: November 12, 2009 at 4:00 p.m. |

**NOTICE OF MOTION OF PARKER DEVELOPMENT N.W., INC.
FOR RELIEF FROM THE AUTOMATIC STAY**

PLEASE TAKE NOTICE that on October 30, 2009, the undersigned attorneys filed on behalf of Parker Development N.W., Inc., the Motion of Parker Development N.W., Inc for Relief from the Automatic Stay (the "Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any objections to the Motion must be made in writing, filed with the Bankruptcy Court, 824 Market Street, 5th Floor, Wilmington, DE 19801 and served upon, so as to actually be received by the undersigned counsel, on or before **November 12, 2009 at 4:00 p.m.**

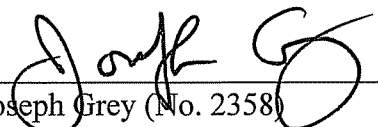
PLEASE TAKE FURTHER NOTICE that if an objection is properly filed in accordance with the above procedure, a hearing on the Motion will be held before the Honorable Kevin J. Carey on November 19, 2009 at 11:00 a.m. Only those objections made in response to the Motion will be heard.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT
MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER
NOTICE OR HEARING.

Dated: October 30, 2009
Wilmington, Delaware

CROSS & SIMON, LLC

By: _____


Joseph Grey (No. 2358)
Patrick M. Brannigan (No. 4778)
913 N. Market Street, 11th Floor
P.O. Box 1380
Wilmington, DE 19899-1380
302-777-4200
302-777-4224 (facsimile)
jgrey@crosslaw.com
pbrannigan@crosslaw.com

Counsel to Parker Development N.W., Inc.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

| | | |
|----------------------------|---|-------------------------|
| In re: |) | Chapter 11 |
| |) | |
| BUILDING MATERIALS HOLDING |) | Case No. 09-12074 (KJC) |
| CORPORATION, |) | |
| |) | |
| Debtor. |) | |
| _____ |) | |

**ORDER GRANTING MOTION OF PARKER DEVELOPMENT N.W., INC.
FOR RELIEF FROM THE AUTOMATIC STAY**

UPON CONSIDERATION of Parker Development N.W., Inc.'s (the "Movant's") Motion for Relief From the Automatic Stay (the "Motion") and due and proper notice of the Motion having been given, and no other or further notice being necessary or required; and after due deliberation and sufficient cause appearing therefore

IT IS HEREBY ORDERED that:

1. The Motion is GRANTED;
2. Movant is granted relief from the automatic stay to liquidate its claim in the pending Action (as that term is defined in the Motion) or in any other forum as is proper and to proceed to final judgment, including any alternative dispute resolution, and to collect any proceeds from any judgment against Debtors' applicable insurance carrier(s), and a pro rata share of the unsecured claim dividend.

Dated: _____, 2009

The Honorable Kevin J. Carey
United States Bankruptcy Court Judge

CERTIFICATE OF SERVICE

I, Joseph Grey, hereby certify that on this 30th day of October, 2009, I caused copies of the foregoing *Motion of Parker Development N.W., Inc. for Relief from the Automatic Stay* to be served on the parties listed below as indicated.

VIA FIRST CLASS MAIL

Allison N. Cooper, Esq.
Marks Colia & Finch LLP
8620 Spectrum Center Blvd., Suite 900
San Diego, CA 92123

VIA FIRST CLASS MAIL

Brian K. Cuttone, Attorney at Law
1233 W. Shaw Avenue, Suite 100
Fresno, CA 93711

VIA FIRST CLASS MAIL

Donald J. Bowman, Jr., Esq.
Robert F. Poppiti, Jr., Esq.
Sean Matthew Beach, Esq.
Young, Conaway, Stargatt & Taylor
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

VIA FIRST CLASS MAIL

Scott K. Brown, Esq.
Lewis and Roca LLP
40 North Central Avenue, Suite 1900
Phoenix, AZ 85004

VIA FIRST CLASS MAIL

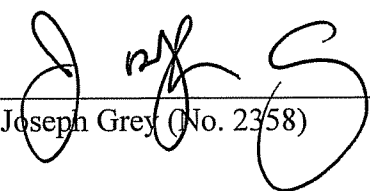
Office of the United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19899-0035

VIA FIRST CLASS MAIL

Bradford J. Sandler, Esq.
Benesch Friedlander Coplan & Aronoff
222 Delaware Avenue, Suite 801
Wilmington, DE 19801

VIA FIRST CLASS MAIL

Christopher J. Giaimo, Esq.
Arent Fox, PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036-5339



Joseph Grey (No. 2358)