

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
BUILDING MATERIALS HOLDING .
CORPORATION, *et al.*, . Case No. 09-12074 (KJC)
Debtors. . (Joint Admin. Requested)
. June 17, 2009 (10:29 p.m.)
. (Wilmington)

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

Appearances:

For the Debtors: Sean M. Beach, Esq.
Young, Conaway, Stargatt & Taylor
Michael A. Rosenthal, Esq.
Matthew K. Kelsey, Esq.
Gibson, Dunn & Crutcher LLP

For ACE: Richard Riley, Esq.
Duane Morris

For Wells Fargo: Paul Heath, Esq.
Richards, Layton & Finger

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1 THE CLERK: All rise.

2 THE COURT: Good morning.

3 MR. BEACH: Good morning, Your Honor. May it please
4 the Court, Sean Beach from Young, Conaway, Stargatt & Taylor
5 on behalf of the debtors. Your Honor, first of all, I'd like
6 to thank you for giving us some additional time this morning.
7 I think it was fruitful in our ability to get through some
8 remaining issues with the United States Trustee. I'm pleased
9 to say that I think we have resolved in principal everything
10 except for the *de minimis* asset sale motion that is, I think,
11 the last item on the agenda today. Your Honor, I'd like to
12 just make some quick introductions. I know your schedule is
13 tight today.

14 THE COURT: Yeah, let's talk about scheduling.

15 MR. BEACH: Sure.

16 THE COURT: I have a matter scheduled for hearing at
17 11, although I do not think it will take long, so, it's my
18 intention to break then briefly and dispose of that matter
19 and then resume with this hearing. I have a luncheon
20 engagement in town that I intend to make around noon, so I'm
21 going to break shortly before noon to do that. If we're not
22 finished by then, we'll resume probably at around 1:30. So
23 my suggestion is, in terms of how you order the relief today
24 is, if there are employee wage payroll issues, I would
25 suggest we get to those orders earlier so they can be

1 disposed of this morning and docketed in time to do what
2 needs to be done in that respect.

3 MR. BEACH: Thank you, Your Honor, I think that
4 makes sense and that's what we were hoping you'd say.

5 THE COURT: Okay.

6 MR. BEACH: So, we'll move in that regard. Your
7 Honor, if I may, I'd just like to make some very brief
8 introductions. My co-counsel from the law firm, Gibson, Dunn
9 & Crutcher, Mr. Michael Rosenthal and Mr. Matthew Kelsey are
10 here.

11 MR. ROSENTHAL: Good morning, Your Honor.

12 MR. KELSEY: Good morning, Your Honor.

13 MR. BEACH: Your Honor, we filed *pro hac vice*
14 motions. Both Mr. Rosenthal and Mr. Kelsey are admitted in
15 good standing in New York, and we'd ask that you allow them
16 to be heard today.

17 THE COURT: Very well.

18 MR. BEACH: In addition, we have Mr. Paul Street
19 who's the declarant with respect to the first day declaration
20 today in the courtroom.

21 THE COURT: Good morning.

22 MR. BEACH: And as well as Mr. Brad Dietz from
23 Peter J. Solomon & Associates, our investment bankers in the
24 courtroom, and Mr. Steven Garner (phonetical) from Alvarez &
25 Marsal, financial advisors for the company. Your Honor,

1 with that, I'd like to cede the podium to Mr. Rosenthal to
2 give you an introduction to the company and the direction of
3 these cases and start with the relief we're seeking today.

4 THE COURT: Alright.

5 MR. BEACH: Thank you, Your Honor.

6 MR. ROSENTHAL: Good morning, Your Honor. It's nice
7 to appear before you.

8 THE COURT: Nice to have you.

9 MR. ROSENTHAL: Your Honor, this is one of the most
10 if not the most important days in this company's existence,
11 and not coincidentally, it's also one of the most important
12 days in the lives of our customers, in the lives of our 5,500
13 employees, and with respect to our vendors because many of
14 them depend on our survival for their own financial survival.
15 We have filed last night or the night before last, I guess,
16 cases for Building Materials Holding Corporation and its
17 subsidiaries, and when we filed these cases, we filed them
18 pursuant to some intensive negotiations that we've had over
19 the last six months with our pre-petition secured lenders to
20 come to a restructuring deal that we could present to the
21 Court on day one. As a result, we filed our first day
22 motions but we also filed a complete plan, a complete
23 disclosure statement with attachments, and we are prepared,
24 Your Honor, to go forward and effectuate the rapid
25 confirmation of this plan before the Court. The plan, Your

1 Honor - I know that we've hit you with a number of documents,
2 but to summarize the plan, the plan calls for the conversion
3 by our pre-petition secured lenders of their secured debt
4 into a package of debt which would substantially reduce the
5 debt on a company and a hundred percent of the equity of the
6 company, but it also calls, Your Honor, for us to pay our
7 pre-petition unsecured creditors what we believe will amount
8 to a hundred percent on their pre-petition claims. Some of
9 that will be paid in cash up front and some of that will be
10 paid in payments from revenues of the company, and in
11 addition, Your Honor, we obviously have, as many plans do, a
12 small convenience class where creditors will get a hundred
13 percent payment in cash on day one. We think, Your Honor,
14 that the plan is clearly in the best interest of all of the
15 constituencies that I mentioned, the customers, the vendors,
16 the employees, and we think that the conduct of this case in
17 an organized, orchestrated, timely fashion is important to
18 maintain the value of this business to keep our customers
19 happy to keep our vendors happy. Your Honor, we have here
20 today Mr. Paul Street who is the general counsel of the
21 company, senior vice president of the company, and chief
22 administrative officer of the company. We have filed his
23 first day declaration in support of the first day motions,
24 and I would like to offer the Street declaration into
25 evidence.

1 THE COURT: Is there any objection? The declaration
2 will be accepted into evidence without objection. It's
3 Docket No. 4.

4 MR. ROSENTHAL: Your Honor, Building Materials
5 Holding Corporation and its subsidiaries are one of the
6 largest providers of residential business products and
7 construction services in the United States. The debtors
8 distribute building products and materials, they manufacture
9 building components such as trusses and millwork and wall
10 panels and they provide construction services both for
11 professional builders and for production builders. They
12 operate out of 31 distribution facilities, 43 manufacturing
13 and production facilities, and 5 regional construction
14 services facilities. They operate under two principal brand
15 names. One is BMC West and BMC West markets and sells
16 business products, manufactures building components, and
17 provides construction services to professional builders and
18 contractors and markets such as Texas, Washington, Colorado,
19 Idaho, Utah, Montana, California, and Oregon. Their products
20 include structural lumber and building materials that they
21 purchased from manufacturers, as well as components that they
22 manufacture themselves at their facilities, and as I said,
23 they provide construction services. SelectBuild offers
24 integrated construction services to production homebuilders
25 as well as commercial and multi-family builders and their

1 services include framing operations, concrete services,
2 managing labor and construction services, again, in major
3 markets in California, Arizona, Nevada, and Illinois. One of
4 the things that I think is important for the Court to
5 understand about this company is that in virtually all of the
6 major markets in which it competes, it is either number one
7 or number two in those markets. So, this is a very
8 substantial player in significant markets around the country.
9 It operates in markets that outpace other U.S. Markets for
10 residential building permits. So, it operates in very active
11 markets. Its strengths include long-term relationships with
12 suppliers who are able to provide volume rebates, its
13 reputation for superior quality building components and
14 construction services, its ability - and this will come up in
15 some of the motions to provide just-in-time deliveries,
16 meaning that when a project is at the stage where it requires
17 certain millwork components, they don't have to wait for a
18 week or two weeks to have those millwork components delivered
19 just in time for the project's needs. The pre-petition
20 capital structure of the company was relatively simple.
21 There was a pre-petition secured debt which approximated
22 about \$310 million outstanding at the time of the filing. It
23 consists of a term loan on which at the petition date about
24 275, 280 million was outstanding, a revolver which had an
25 outstanding balance of approximately \$20 million at the time

1 of the filing, a letter of credit facility which is actually
2 built into the revolver to issue letters of credit necessary
3 to support their insurance programs, to support obligations
4 owed to key vendors, but the letters of credit obligations
5 outstanding were about \$113 million, again issued by the same
6 group of banks. There were swap obligations, which while
7 they had not been terminated prior to the filing have
8 subsequently, at least one of them has subsequently been
9 terminated and we expect the others to be terminated, would
10 result, we believe, in termination liability of approximately
11 \$6 million. There is a very, very small amount of other
12 secured debt owed on a seller financed real estate note in
13 Texas for approximately a million dollars. The unsecured
14 creditors consist of our trade vendors, and we believe, Your
15 Honor, that approximately \$31, \$32 million is owed with
16 respect to trade claims, and we will use this case as an
17 opportunity to reject burdensome leases both of real and
18 personal property, so there will be some lease rejection
19 damages claims. There are a minimal amount of employment
20 claims, some will arise from rejection of employment
21 contracts, and there are approximately \$21 million of
22 employees or former employees who have claims under various
23 deferred compensation or supplemental employee retirement
24 programs that the company had, and those claims are in the
25 neighborhood of \$21 or \$22 million. Now, let's talk about

1 how we got here. Your Honor obviously knows that we've had a
2 tremendously difficult economic climate and one of the
3 principal drivers of our difficulties has been the U.S.
4 housing market. As the Court knows, single family housing
5 starts have declined precipitously from 2005 hitting a low in
6 this year of \$400,000, which basically, Your Honor, is the
7 lowest level of single family housing starts since World War
8 II. This downturn has obviously been aggravated by the
9 turmoil in the credit markets, the mortgage markets, the
10 increase in levels of unemployment, the decline in home
11 prices, and the general morass that I think everyone sees as
12 the current economic environment. Obviously, this impacted
13 the debtors' sales performance. The company went from a
14 company with \$3 billion in revenue in 2006 to approximately
15 \$1.3 billion in 2008, and our annual year ending March 31st of
16 this year, we're reporting revenue of about \$1.1 billion, and
17 I think as we go through this case, you will see, and we've
18 attached projections and liquidation analyses to our plan and
19 disclosure statement, you'll see that we believe that the
20 tide has turned and that while it will be a slow recovery
21 during the projection period which extends through about 2012
22 in our projections, we expect those revenues to increase back
23 to about \$1.8 billion. Obviously, with the decline in sales,
24 the company suffered losses from continuing operations. That
25 caused the company to default under some of its financial

1 covenants with respect to its pre-petition secured debt, and
2 it obviously had a cascading effect on our ability to borrow
3 money. We negotiated with our lenders to obtain extensions
4 and waivers, and we tried - and when I mean "we" obviously
5 the company, the company tried for about at least since May
6 of 2008 to effectuate an out-of-court restructuring and/or a
7 rationalization of its business operations. One of the first
8 things that happened is the company engaged Alvarez & Marsal
9 to do an analysis of the company's operations and to try to
10 present a business rationalization program for the company
11 based on the market, based on projections of the market
12 designed to improve cashflow and improve profitability. The
13 company reduced head-count so that what had been a company
14 that had 23,000 employees in June of 2006 was reduced to
15 5,500 as of the petition date. It consolidated headquarters
16 in Boise. It consolidated administrative functions. It did
17 everything that companies try to do to rationalize their
18 business operations in these times including selling or
19 winding down operations at about 78 locations around the
20 country. In addition to that, there was a long process
21 whereby the company sought either a new investment or to sell
22 its assets to third parties. The process was supervised for
23 the company by J.P. Morgan initially and then later by Peter
24 J. Solomon. Mr. Dietz from Peter J. Solomon is here today,
25 with the goal of exploring possible sale opportunities.

1 Obviously, that did not come to fruition. While the company
2 did receive expressions of interest, there were none that the
3 parties believed were of sufficient value to justify actually
4 effectuating a sale. The company tried to refinance, but it
5 was trying to refinance at a time when we have the worst
6 credit markets that I think have been seen since the Great
7 Depression. So, the company was unable to effectuate a
8 refinancing, which led the company to enter into discussions
9 with its pre-petition secured lenders about an internal
10 reorganization, and one of the goals that we all sought to
11 accomplish was to achieve a consensual internal
12 reorganization that provided the company with the ability to
13 be profitable on a go-forward basis with a rationalized
14 capital structure and a rationalized business model. The
15 bank group was led by Wells Fargo, and I think Mr. Fisher
16 from Paul Hastings, who will speak to you later, will tell
17 you that we engaged in extensive negotiations with the
18 assistance of A&M, management of the company, and Peter J.
19 Solomon to negotiate a restructuring that right-sized the
20 company and its balance sheet and at the same time provided a
21 meaningful recovery to the debtors' unsecured creditors, and
22 after months of negotiations and many late nights, we came up
23 with the plan and disclosure statement that was filed on day
24 one of this case. To enable us to bridge from the petition
25 date to the effective date of the plan, we entered into a

1 process to obtain debtor-in-possession financing. Peter J.
2 Solomon engaged in a marketing effort to try to solicit bids
3 for debtor-in-possession financing. We did receive
4 proposals. I have to say, Your Honor, we received the
5 typical proposals that this Court has seen from third parties
6 that called for interest rates of LIBOR plus a thousand,
7 LIBOR plus 1,200, and the like. Wells Fargo, our pre-
8 petition administrative agent, came forward with a debtor-in-
9 possession financing proposal which was acceptable to the
10 pre-petition bank group in terms of a priming facility and
11 which provided for financing on much more favorable terms.
12 We are looking at an interest rate that's more base rate plus
13 4 1/2 percent. I do not think there are too many of those
14 kinds of debtor-in-possession financings available out there,
15 Your Honor, and I think that's a testament, one, to the work
16 that Peter J. Solomon has done and, two, to the view of the
17 pre-petition lenders that this is really a business debt that
18 is worth saving and that they want to help exit from Chapter
19 11. Your Honor, I think that's an overview of where the
20 company is. We'd like to go through some of the first day
21 motions. I'm aware of your time, so, let me say that we have
22 been in discussion with the U.S. Trustee's Office. I think
23 we have resolved all of the issues that the U.S. Trustee's
24 Office has raised. We received a few comments from ACE
25 Insurance which provides our workers' compensation and GNO

1 Insurance, and we've implemented all of those into the
2 documents. So, let me start, Your Honor, by doing just the
3 procedural side of it. The first motion is a motion for
4 joint administration. We have 12 debtors, and we believe
5 that this is a case in which joint administration, procedural
6 consolidation for purposes of the case is appropriate, and we
7 would ask the Court to approve the joint administration. Mr.
8 McMahon had a slight change, I believe, to the joint
9 administration order which we have agreed to make.

10 THE COURT: Okay. Anyone else care to be heard in
11 connection with this motion? I hear no response. Do you
12 have a form of order for me?

13 MR. ROSENTHAL: We do. May I approach, Your Honor?

14 THE COURT: You may. Thank you. That order has
15 been signed.

16 MR. ROSENTHAL: Thank you. The next matter, Your
17 Honor, to get out of the way quickly, is the retention of
18 Garden City Group as our noticing claims and solicitation
19 agent. We believe Garden City has the requisite experience
20 and capability to provide services as a claims, noticing, and
21 solicitation agent, and to ease the burden upon the Clerk's
22 Office as required by the Local Rules.

23 THE COURT: Does anyone else care to be heard in
24 connection with this application? I hear no response. I
25 don't have any questions.

1 MR. ROSENTHAL: Here again, Your Honor, we have been
2 responsive to the request of the U.S. Trustee's Office and
3 we'll hand to you a clean copy and a blackline as well.

4 THE COURT: Alright.

5 MR. ROSENTHAL: May I approach?

6 THE COURT: Thank you.

7 MR. ROSENTHAL: Your Honor, I'd like to handle some
8 additional motions. The DIP was next on the agenda, but I'd
9 like to skip that. I think it will take a little longer than
10 what we have and handle it in the break before you go to
11 lunch, if that's okay with the Court?

12 THE COURT: Alright.

13 MR. ROSENTHAL: The next one, Your Honor, is the
14 cash management order. As with many large companies, we
15 utilized and integrated a cash management system which moves
16 funds between linked bank accounts, and we believe, Your
17 Honor, that it is appropriate to continue the cash management
18 system that was in effect. We do have the ability to track
19 the cash and have intricate financial systems to do so.
20 We've also requested authority to use our current business
21 forms and believe it would be burdensome to order new forms
22 now. This is a fairly plain vanilla motion, Your Honor, and
23 we would request the Court to enter the order approving our
24 cash management system. Again, we have received several
25 comments, I think, from the U.S. Trustee's Office, and we

1 have made those comments and reflected them in a blackline.

2 THE COURT: Alright, I'd like to see the blackline,
3 if I may.

4 MR. ROSENTHAL: Thank you.

5 THE COURT: Thank you. Alright, I've reviewed the
6 blackline and don't have any questions but let me ask for the
7 record if anyone else wishes to be heard in connection with
8 this motion? I hear no response. That order has been
9 signed.

10 MR. ROSENTHAL: The next one, Your Honor, I would
11 like to go to is the employee wage motion. Obviously, there
12 are a number of employees waiting on pins and needles to
13 figure out if they're going to be able to receive their
14 checks this week. The debtors employ 5,500 employees. A
15 very few of them, approximately 300, are represented by
16 unions. In the ordinary course of business we pay regular
17 wages and salaries to the employees as well as commissions
18 for certain employees, and we reimburse them for their
19 business-related expenses. As with all large companies, we
20 maintain various employee benefit programs including medical
21 benefits, dental, vision, vacation time, retirement savings
22 plans, relocation plans, short and long-term disability
23 benefits, and the like, all detailed in the motion. We had
24 extensive discussion with the U.S. Trustee's Office about
25 this motion, and we have agreed that the order would be

1 entered on a final basis as presented except that the request
2 for approval of retention and severance would be deferred for
3 now until the second day hearing. I think it's important,
4 Your Honor, to understand two things. One, is that the
5 payment of these obligations is absolutely critical to the
6 success of the debtors in the case, and two, that we do not
7 believe that the pre-petition wage obligations of any one
8 employee that we seek to pay here exceeds the priority cap of
9 \$10,950. Your Honor, I'll hand you a blackline. We have
10 made some changes that the U.S. Trustee requested with
11 respect to not only the deferral of the severance and
12 retention until final, but with respect to amounts that can
13 be paid in cash on account of pre-petition vacation time. So
14 we've taken those comments as well.

15 MR. KELSEY: Your Honor, Matt Kelsey, Gibson, Dunn &
16 Crutcher on behalf of the debtors. For the benefit of the
17 U.S. Trustee, we'd like to confirm on the record that none of
18 the independent contractors or temporary employees employed
19 by the debtors are professionals subject to professional
20 retention application requirements under the bankruptcy.

21 THE COURT: Alright, thank you. Does anyone else
22 care to be heard in connection with this motion? I hear no
23 response.

24 MR. ROSENTHAL: May I approach, Your Honor?

25 THE COURT: You may.

1 MR. BEACH: Your Honor, for the record, Sean Beach.

2 I think that order has a date that would need to be inserted,
3 so that might be one that we need to hold until we figure out
4 the second day hearing.

5 THE COURT: Well, I do want to break now, but before
6 we do, let's talk about at least that one date. I understand
7 that the debtor has a request for second days for the week of
8 July 6th.

9 MR. ROSENTHAL: We do, Your Honor, but we understand
10 that you're on vacation that week.

11 THE COURT: I am. I have every intention of being,
12 anyway.

13 MR. ROSENTHAL: We have no intention of disrupting
14 your vacation. An unhappy judge is not one we would like to
15 appear before.

16 THE COURT: That's a good thought. So, let's talk
17 about Plan B then for that date. My preference would be to
18 have the second days on July 16th, which is about - Well, I
19 think exactly 30 days from today. I would have the hearing
20 earlier in the week, but the three prior days are set aside
21 for what at least at this point is a contested confirmation
22 hearing. How much heartburn does that create for the debtor?

23 MR. ROSENTHAL: Your Honor, that does not create
24 heartburn for us other than with respect to the final hearing
25 on the DIP. We believe that it's important that we show our

1 customer and vendor and employee base that we have the full
2 availability of the \$80 million DIP, and we also have some
3 key projects in the southern California area that may require
4 additional letters of credit to be issued that would require
5 access to more than the \$40 million. So we would propose
6 that if the Court has time that we hold the second day
7 hearings on everything but the DIP on the 16th, in the
8 afternoon, I believe, 4:30 is what the Court suggested, but
9 that we have the final hearing on the DIP on the 3rd.

10 THE COURT: I will not be here from - the 3rd of
11 July?

12 MR. ROSENTHAL: Third of July.

13 THE COURT: That's a federal holiday, first of all.

14 MR. ROSENTHAL: Oh, okay, 2nd then.

15 THE COURT: The 2nd I will not be here, that will be
16 the start of my vacation.

17 MR. ROSENTHAL: Okay.

18 THE COURT: I would add you, you know, to the end of
19 the day on the 1st. I don't know whether in terms of days
20 that gives you sufficient time for a final order, but if it
21 doesn't what I would do is give you another interim order
22 with increased availability against the 80 million based upon
23 need and at that point you will presumably have a committee
24 to work with, but that really is the best I can do.

25 MR. ROSENTHAL: That's fine, Your Honor. That would

1 be fine, at the end of the day on the 1st. Hopefully we will
2 be able to take very, very little of your time and I think -
3 Is that 15 days? I think that is the 15th day.

4 THE COURT: Alright, well, July 1st at 4:30.

5 MR. BEACH: And just so Your Honor knows, we have -
6 Mr. McMahon can speak to this as well, but we have had
7 discussions with the Office of the United States Trustee
8 about moving forward as quickly as possible in terms of
9 setting up a committee so that they will be in place and we
10 can have discussions with them prior to that date.

11 THE COURT: Okay. Is there a tentative date for a
12 formation meeting, Mr. McMahon?

13 MR. McMAHON: Your Honor, good morning. Joseph
14 McMahon for the Acting United States Trustee. Right now
15 there isn't. I think by next Friday would be a safe bet.

16 THE COURT: Okay. Alright. Well, for purposes of
17 the wage order, that will be July 16th.

18 MR. ROSENTHAL: That's fine, Your Honor.

19 THE COURT: Okay. At 4:30.

20 MR. ROSENTHAL: We'll have to make sure the Court
21 has the keg forming on July 1st in the afternoon.

22 THE COURT: Well, maybe we'll even sing, I don't
23 know. And objections by July 9th. Okay, I've filled in those
24 blanks, and with that I've signed the wage order. Now, what
25 I will do is take the orders I've signed already and have

1 them docketed now, if the parties wish.

2 MR. ROSENTHAL: Yes, please, Your Honor.

3 THE COURT: Alright, and then, hopefully this break
4 will be a short one and we'll resume right after.

5 MR. ROSENTHAL: Thank you, Your Honor.

6 THE COURT: Alright, we'll recess.

7 (Whereupon at 11:02 a.m., a recess was taken in the
8 hearing in this matter.)

9 (Whereupon at 11:23 a.m., the hearing in this
10 matter reconvened and the following proceedings were had:)

11 THE CLERK: All rise. Be seated, please.

12 MR. ROSENTHAL: Your Honor, may we now return to the
13 debtor-in-possession financing motion.

14 THE COURT: Yes.

15 MR. ROSENTHAL: Your Honor, I don't want to repeat
16 everything that I said in my introduction. I'd like to point
17 out, this is an \$80 million senior secured revolving credit
18 facility with a \$20 million letter of credit sub-facility and
19 we're requesting on an interim basis \$40 million. We believe
20 that this is urgently needed to continue to operate the
21 business to provide the customers and the vendors with the
22 confidence that they need in the debtors' business and
23 business plan and financial wherewithal so that they will
24 continue to do business with us, and it will provide the
25 employees with the comfort they need that they are going to

1 be paid. I went briefly over the efforts that Peter J.
2 Solomon went to, to try to solicit alternative DIPs and
3 reached the conclusion that the DIP being offered by Wells
4 Fargo was in fact the most advantageous from the company's
5 perspective. There are a couple of things I would like to
6 point out to the Court. We have tried, Your Honor, to take
7 into consideration the things that we know that courts in
8 this jurisdiction and frankly in most jurisdictions are
9 sensitive to. We have clearly identified the terms of the
10 debtor-in-possession financing in our motion. We've excluded
11 from the collateral package avoidance actions. We believe we
12 have established the case for the adequate protection of the
13 pre-petition lenders whose interests are being primed, both
14 in that they're being provided with adequate protection both
15 in terms of the replacement liens, the administrative
16 priority claims we're giving them, the acknowledgment of the
17 validity and amount of their obligations, but also with
18 respect to the small amount of the pre-petition revolver that
19 is being paid in connection with this interim order, and that
20 is \$4 million of the \$20 million revolver will be paid in
21 effect in a roll-up of that amount. The basis of that, Your
22 Honor, is that that is just a reasonable estimation of the
23 amount of the restructuring costs that were incurred in
24 getting ready to prepare for this case, and so, since the
25 pre-petition lenders had funded that and we wanted to - as

1 part of the overall arrangement, the concept was to repay
2 that with the debtor-in-possession funds. In any event, Your
3 Honor, we have received comments from the United States
4 Trustee's Office. We made all of the comments - after
5 negotiation, we made all of the changes that the U.S.
6 Trustee's Office wanted. In addition, we had a comment from
7 ACE Insurance to make sure that one of the schedules to the
8 DIP agreement included all of the accounts that ACE held
9 which were funded with monies for our self-insured retention
10 portion of certain of the payments under these workers' comp
11 policies, and frankly, Your Honor, ACE at this point, because
12 this is recent for them, ACE could not confirm precisely what
13 accounts they have. We think it's two. They think it's two
14 as well, but they're not absolutely certain, and they have to
15 do some further investigation. So what we agreed to do for
16 ACE is add some language into the interim order which
17 provides that that schedule is augmented by any other
18 accounts loss - What did we call them? Loss -

19 MR. RILEY: Good morning, Your Honor. Richard Riley
20 from Duane, Morris for ACE, and debtors' counsel is going to
21 probably jump and punch me or it's the reason you shouldn't
22 allow BlackBerrys in the courtroom. Margie Reed, who's
23 primary counsel for ACE in this matter, I told her what we
24 interlineated. All we're trying to catch is any funds - any
25 other paid loss deposit funds that ACE American Insurance and

1 its affiliates are holding. It's probably the two accounts
2 that are on the debtors' schedule, but we're just now sure.
3 I worked out language in the hallway that provides that it's
4 anything on that schedule and any other paid loss deposit
5 accounts held by ACE or its affiliates. Ms. Reed emailed me
6 to make sure I changed that to be any paid loss deposit funds
7 instead of accounts, and her point is, and I think the
8 debtors basically will know this, they're not separate
9 accounts. ACE holds these as commingled funds. So, she want
10 to make sure it's not just - it's actually any paid loss
11 deposit funds rather than accounts. That's the only point
12 and I know - it's my fault out in the hallway for the wrong
13 language.

14 MR. ROSENTHAL: We don't have any problem with
15 making that change, Your Honor.

16 THE COURT: Alright.

17 MR. ROSENTHAL: Based on that, Your Honor, we
18 request that the Court approve the interim order and set a
19 hearing on the final order for July 1st at 4:30.

20 THE COURT: Alright. Let me see the blackline, walk
21 me through that and then I will ask if any others wish to be
22 heard in connection with that matter.

23 MR. ROSENTHAL: I will do that. May I approach?

24 THE COURT: You may. Thank you.

25 MR. ROSENTHAL: The first change, Your Honor, is on

1 page 6, and the addition of the language as requested by the
2 U.S. Trustee, this is the reservation, paragraph (6) is the
3 paragraph of the order that reserves to the committee the
4 right to challenge the pre-petition liens, so, the effect of
5 this language is just to say that while this may be what the
6 debtor is stipulating to that it doesn't give away the rights
7 of other parties in paragraph (6). And if Your Honor wants
8 to turn to page 18 because that's related to it, you'll see
9 that the challenge period afforded to anyone other than the
10 debtor, including any creditors committee, is 90 days which I
11 believe is a very - which is a long period given what other
12 orders may have done, and at the request of the U.S. Trustee
13 there's been the addition or such later date as the pre-
14 petition administrative agent agrees and the Court orders.
15 Turning back to page 7, Your Honor, the U.S. Trustee wanted
16 to make clear that there was no intent in the document to
17 limit the debtors' ability to pay off in full the DIP
18 obligations through alternative financing. So, we added that
19 to that paragraph on page 7. Page 11, we wanted to make sure
20 that the 506(c) and 552(b) waivers are effective upon entry
21 of the final order. Page 13, the language deleted this
22 language that had the Court expressly approving the terms of
23 the agreements, and the comment was that the Court
24 undoubtedly has not reviewed the terms of a couple hundred
25 pages of documents that were submitted, and so -

1 THE COURT: That would be true. I did read the
2 motion. I did read the first day affidavit in connection
3 with this as well.

4 MR. ROSENTHAL: And so that's the change that was
5 made there. Page 14, again, the insertion of the language
6 that the 506(c) waiver's effective upon entry of the final
7 DIP order, and under 726 that it's to the extent permitted by
8 applicable law. Page 18 is the change we just talked about
9 with respect to the challenge period. Page 22 is the same
10 change about the 506(c) waiver being effective on entry of
11 the final order. Page 27, again, the language that nothing
12 limits the ability to pay off the financing through
13 alternative financing. Page 29, again, the 552(b) waiver
14 being upon entry of the final DIP order and same thing with
15 506(c). Page 30, in the reimbursement of costs section, the
16 U.S. Trustee requested that the reimbursement be subject to
17 the procedures set forth below and that was acceptable.
18 There was an agreement that the fees and expenses in
19 connection with the actual closing of the facility though
20 were approved. Page 31 in the release section where the
21 release just relates to the debtors, again the reservation
22 with respect to challenges by non-debtor persons, and on page
23 35, Mr. McMahon added his address and there was one other
24 change, Your Honor, which I'm trying to find here, which is -
25 Okay. Alright, so that change, Your Honor - those are the

1 changes with the exception of the language that was requested
2 by ACE Insurance which is not in the blackline that you have
3 but will be in the clean version that we hand up to you,
4 although I have handwritten it in.

5 THE COURT: That's fine. Let me ask if anyone else
6 wishes to be heard in connection with the financing motion?

7 MR. McMAHON: Your Honor, good morning. Joseph
8 McMahon. The debtors confirmed for me prior to this hearing
9 and I'll ask them to confirm that with respect to the \$4
10 million rolled-up portion that it is, I'd say, fair game with
11 respect to the investigation period, meaning that there's
12 nothing in this order that limits the ability of this Court
13 to order an appropriate remedy in the event that there is a
14 successful challenge.

15 MR. HEATH: Good morning, Your Honor. Paul Heath of
16 Richards, Layton & Finger on behalf of Wells Fargo. Your
17 Honor, I will confirm that on the record, and I'd also like
18 to introduce Your Honor to my co-counsel, Kevin Fisher, Seth
19 Mennillo, and Thomas Kent from the Paul, Hastings firm.

20 THE COURT: Very well, thank you. Welcome.

21 MR. RILEY: Your Honor, Richard Riley from Duane,
22 Morris on behalf of ACE again. Your Honor, just to point
23 out, we did discuss with debtors' counsel last night and I
24 had a discussion with bank's counsel this afternoon that in
25 paragraph (5), the reference to letter of credit rights as

1 being part of the collateral, we just clarified with everyone
2 that by that they mean letters of credit where the debtor is
3 the beneficiary, and they're not talking about the letters of
4 credit posted to ACE or any of the other insurance carriers.
5 And just one other clarification, paragraph (5), "collateral"
6 is defined as all of the assets and other things in paragraph
7 (5) and then they carve out the various things from the
8 collateral. They then use the term "collateral" in paragraph
9 (7) for the cash collateral liens, the adequate protection
10 liens. I am assuming later on in the order when they use
11 capital "C", Collateral, it means the collateral with all the
12 carve-outs, with all the excluded assets in paragraph (5). I
13 think that's how it works.

14 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

15 THE COURT: Alright. Does anyone else care to be
16 heard in connection with the financing motion? Debtor have
17 anything further in support of the motion?

18 MR. ROSENTHAL: No, Your Honor, we request its
19 entry.

20 THE COURT: Alright, based upon the record made and
21 the alterations made to the form of order, I'm prepared to
22 grant the relief that's been requested. Do you have a clean
23 copy?

24 MR. ROSENTHAL: I do, Your Honor, may I approach?

25 THE COURT: Yes. Thank you. Now, just point out to

1 me where the handwritten change is. Alright, thank you.

2 Alright, we need to fill in the -

3 MR. ROSENTHAL: The objection deadline, Your Honor.

4 THE COURT: Yes.

5 MR. ROSENTHAL: We're perfectly happy, Your Honor,
6 with a relatively short objection deadline given that the
7 Court is accommodating us on the early hearing date. We
8 would like a little more than the night, but it doesn't have
9 to be too many more.

10 THE COURT: Well, the hearing's going to be on July
11 1st, that's a Wednesday. I'm thinking maybe June 26th at 4 for
12 everyone except the Committee, and it seems to me that if
13 we're talking about a formation meeting by the end of next
14 week, it really - the committee really ought to be free to
15 come in at the time of hearing and raise any objection. Any
16 response to that schedule?

17 MR. ROSENTHAL: Come in at the time of the hearing?

18 THE COURT: Yeah.

19 MR. ROSENTHAL: And give us their objection at the
20 time of the hearing?

21 THE COURT: Well, let's put it this way, the way it
22 usually works, they'll tell you ahead of time what it is. I
23 may be the one who doesn't know until the time of the
24 hearing. I doubt you'll come without knowing what it is, any
25 problems it may have.

1 MR. ROSENTHAL: Your Honor, the only thing I would -
2 I mean could we set it say noon of that day?

3 THE COURT: On the 1st?

4 MR. ROSENTHAL: Yes.

5 THE COURT: Okay.

6 MR. ROSENTHAL: Thank you, Your Honor.

7 THE COURT: Alright, well let's to it - Okay, I'll
8 handwrite the change in. I'll say it's June 26th at 4 p.m.
9 for all parties except any official committee which shall
10 have until noon Eastern Time on July 1, 2009, and I've
11 inserted that right after the parenthetical which follows the
12 June 26th 4 o'clock prevailing Eastern Time deadline. And
13 with that change, I'll sign the order.

14 MR. ROSENTHAL: Thank you very much, Your Honor.
15 Alright, now, in the couple of minutes we have left before we
16 break, and I'm sorry we've had to interrupt the hearing a
17 couple of times today.

18 MR. ROSENTHAL: I would like to address critical
19 vendors, Your Honor, unless you have another order.

20 THE COURT: Well, here's my thought on that, you
21 mentioned that all had been resolved except for the *de*
22 *minimis* asset motion.

23 MR. ROSENTHAL: Correct, Your Honor.

24 THE COURT: I did have some thoughts about that. I
25 wanted to hear what the U.S. Trustee had to say and maybe

1 during the break, the parties could talk about that based
2 upon that discussion and see whether we can't resolve it, but
3 Mr. McMahon, the U.S. Trustee had objection to that?

4 MR. McMAHON: Your Honor, may I say, good morning.
5 I'll be very brief. Basically the core of the objection is
6 the Rule 6003 standard, immediate and irreparable harm. I
7 don't think that I have to point to any particular case in
8 this district to demonstrate that. This type of relief is
9 not typical on the first day of a bankruptcy proceeding, and
10 the core concern that we have, Your Honor, is that the
11 statutory - the rule-based standard, I should say, is not
12 satisfied by the motion. There's no textual reference to the
13 rule. We just don't believe they've met their burden and
14 this is the type of issue that a committee typically does get
15 the chance to weigh in on before the Court even were to put
16 pen to paper on an order. I think it's fair for the
17 committee to have a chance at this and from speaking with the
18 debtors, my understanding is that there's really some only *de*
19 *minimis* pieces of equipment and machinery that are really at
20 issue or in play over the interim period, and in light of
21 that I think that the fact that we talk about non-core assets
22 tells us something about whether this is an immediate and
23 irreparable harm type issue. So, in light of our
24 understanding communicated from the debtors, we just don't
25 believe that this is necessary today. It could be put out on

1 full notice.

2 THE COURT: Alright, thank you. Anyone else have a
3 comment on this motion? Alright.

4 MR. ROSENTHAL: Your Honor, would you like to hear
5 from the debtor?

6 THE COURT: Briefly, yes.

7 MR. ROSENTHAL: Yes. Your Honor, the debtor has
8 been in the process of winding up its operations. It has
9 numerous equipment, vehicles and equipment of relatively
10 insignificant value that it takes to auctions regularly.
11 While some might say it's even ordinary course of business,
12 we think that auctioneers, for example, may want an order of
13 the Court that says they can go forward. This is
14 deteriorating in value. It's not a lot of money, but we can
15 see no reason why during this intervening three or four week
16 period that this equipment shouldn't be taken to these
17 auction houses and disposed of as it has been in the past.

18 MR. McMAHON: Your Honor, just one footnote here.
19 There is authority sought in the motion to employ 327(a) type
20 people, auctioneers, the like, apparently without the
21 formalities associated with 2014 and applicable rules, so,
22 that's a second concern that we have.

23 THE COURT: Alright. Any response to that issue?

24 MR. ROSENTHAL: Your Honor, we are not requesting
25 authority to employ auctioneers under 327. We do not think

1 that they need to be employed under 327. These auctioneers
2 get paid from the proceeds of the sale. We do not think
3 they're professional persons. We don't think that they would
4 be - you're going to find an auctioneer in some of these
5 jurisdictions that would consent to sell our property if they
6 have to come make an application here. This is - I mean, I
7 think this is truly, Your Honor, a situation where we don't
8 believe that the code section should apply.

9 MR. McMAHON: And in response, Your Honor, we looked
10 at the text of 327(a). The word "auctioneers" is present and
11 it doesn't qualify which types of auctioneers should be
12 subject to the applicable statutory standard.

13 THE COURT: And no one's ever raised that issue
14 before, but the statute does plainly contain reference to
15 auctioneers. Without resolving the matter now, let me give
16 you my reaction. I haven't focused on that issue, and I
17 thank the U.S. Trustee for raising it, but with respect to
18 the continued ability of the debtor even before the
19 appointment of a committee and in the 20-day period which
20 follows, it seems to me that given what the submissions
21 reflect or - I don't want to hyperbolize, but really, massive
22 contraction efforts that have gone forward over the course of
23 the last year, it seems to me all to the better but ought to
24 continue, but subject to two things. I'd be willing to
25 approve disposition of assets of under a hundred thousand in

1 this interim period and then anything over that would require
2 a motion, and if you want to schedule that for the second
3 days, I'd hear it then for final relief, but at least at that
4 point the committee will have had a chance to take a look at
5 what the debtor has suggested. Secondly, I guess at least in
6 the interim period, I don't know, you might consider them
7 ordinary course professionals, but it seems to me, you need
8 to think about the U.S. Trustee's issue with whether an
9 auctioneer is a 327(a) party and then secondly, there's got
10 to be a compliance with Rule 6004(f)(1) which requires the
11 filing of a statement containing certain information about
12 any sales that have taken place. So those are my thoughts.
13 Why don't you talk about them during the break, and we'll
14 come back to that. My inclination would be to break now
15 unless you're telling me there's another order that
16 absolutely has to be entered before the break. Okay. I'm
17 expecting to be back by 1:30. There is another hearing
18 scheduled for 1:30 - actually for one o'clock, but my
19 intention would be to finish these hearings and then move to
20 the other scheduled for this afternoon, but why don't you
21 plan to be back like around 1:15 and we'll resume if not
22 then, then shortly thereafter. Alright, Court will stand in
23 recess.

24 (Whereupon at 11:49 a.m., a recess was taken in the
25 hearing in this matter.)

1 (Whereupon at 1:18 p.m., the hearing in this matter
2 reconvened and the following proceedings were had:)

3 THE CLERK: All rise. Please be seated.

4 THE COURT: Good afternoon.

5 MR. ROSENTHAL: Good afternoon, Your Honor. Michael
6 Rosenthal from Gibson, Dunn & Crutcher for the debtors,
7 Building Materials Holding Corporation and its subsidiaries.
8 Your Honor, if we can continue with these motions, I think we
9 can do them relatively quickly because I think we have
10 agreement on everything with the exception, again, of the *de*
11 *minimis* assets.

12 THE COURT: Alright.

13 MR. ROSENTHAL: Let's, if we can go through, on the
14 insurance motion, we took comments from the U.S. Trustee's
15 Office and we took comments from ACE Insurance Company.
16 We've input all of those comments, Your Honor. This motion
17 is about enabling the debtors to pay self-insured retention
18 portions of workers' compensation claims and to pay for a
19 premium financing and the like, fairly typical of first day
20 relief. There were some changes requested by both the United
21 States Trustee's Office and ACE which have been made, and I
22 can hand up to the Court a blackline and a clean copy of this
23 order and request -

24 THE COURT: If you would. Thank you.

25 MR. ROSENTHAL: Your Honor, the next motion is the

1 utilities motion -

2 THE COURT: Well, let me first ask -

3 MR. ROSENTHAL: Sorry.

4 THE COURT: - if anyone else wishes to be heard in
5 connection with the insurance motion? I hear no response. I
6 have reviewed the blackline and do not have any questions, so
7 I will sign that order. You may proceed.

8 MR. ROSENTHAL: Your Honor, the next one is the
9 utility motion, and we received comments from the U.S.
10 Trustee's Office and we've made changes. Basically, Your
11 Honor, until the second day hearing, we intend to fund the
12 escrow to - which is essentially a two-week escrow based on
13 our average utility payments, which could be accessible by
14 utility providers in the event that we default in the payment
15 of amounts owed to them. We are not deducting from the
16 escrow amounts that utility providers already hold. The
17 principal change we made in the order is that we have instead
18 of asking the Court to approve the procedures for changing
19 the deposit amounts at this hearing, we've moved that to
20 final hearing and that required some rather significant
21 changes to the order, but it is now, as I reflected, on an
22 interim basis we're approving the utility deposit with
23 procedures later.

24 THE COURT: Alright, do you have a blackline for me?

25 MR. ROSENTHAL: Yes, Your Honor, may I approach?

1 THE COURT: Yes, and while you're doing that, I'll
2 ask if anyone else wishes to be heard in connection with the
3 utility motion? I hear no response. Give me a moment just
4 to take a look at the blackline. That order has been signed.

5 MR. ROSENTHAL: Thank you, Your Honor. Your Honor,
6 the next motion is the motion to approve the payment of pre-
7 petition sales and use taxes and this again is a fairly
8 typical first day motion. We are not in arrears on any
9 payments owed to taxing authorities. We're requesting
10 permission to pay these amounts even if they arose pre-
11 petition in the ordinary course, and we have one provision
12 that raised a slight objection from the U.S. Trustee to the
13 extent that there is an audit related to prior period taxes.
14 We requested permission to make the payment required by the
15 additional payment required by that audit, and in fact, the
16 amount of those audit changes over the last three years has
17 been no more than somewhere around \$120,000. So we're not
18 talking significant dollars, but we did agree with the U.S.
19 Trustee to amend the order to reflect that before we pay any
20 amounts on account of upward audit adjustments, we'll provide
21 certain notices to the U.S. Trustee. May I approach, Your
22 Honor?

23 THE COURT: You may. Does anyone else care to be
24 heard in connection with this motion? I hear no response.
25 Alright, I see the addition of the 10-day notice period. I

1 don't have any questions and will sign the order that's been
2 presented.

3 MR. ROSENTHAL: The next motion, Your Honor, relates
4 to something that's extremely important to the debtors which
5 is approval of its customer programs which include programs
6 related to rebates and warranties, all of these designed to
7 build customer loyalty, encourage sales. We believe these
8 are particularly important in this environment and necessary
9 for a company in our industry if we're going to maintain our
10 credibility not only that we can do work in the future but
11 that we stand behind the work that we do. Your Honor, we - I
12 don't believe - we had some minor changes requested by the
13 U.S. Trustee's Office and we've made those, and I have a
14 blackline of that.

15 THE COURT: Alright. Does anyone else wish to be
16 heard in connection with the customer motion? I hear no
17 response. Alright, I've noted the changes in the blackline.
18 They are minimal.

19 MR. ROSENTHAL: Thank you, Your Honor.

20 THE COURT: I will sign the order.

21 MR. ROSENTHAL: The next one, Your Honor, is our
22 critical vendor motion. As I've told the Court, vendor
23 support is essential to our business. We are a just-in-time
24 provider of building materials, and it's important that we be
25 able to continue the supply of needed products. We've

1 identified critical vendors based on a couple of criteria.
2 One, are they a sole source or limited source supplier for
3 us, and we've made this decision in different geographic
4 areas as well because it's not efficient to transport, for
5 example, doors that are manufactured in Texas to a location
6 in Illinois. So, that's one way we've done it. A second is,
7 would it be prohibitively expensive or time consuming to
8 replace the vendor because, given the just-in-time nature of
9 our deliveries, the customers are waiting for us to deliver
10 supplies. We have supplies that are waiting to be shipped to
11 us; can we deliver those supplies? And the third, which I'm
12 sure Your Honor has heard, if you've dealt with these kinds
13 of companies, is that a lot of our business comes from
14 builders who specify certain items to be manufactured by
15 certain providers, so they will say, we specify Marvin
16 windows. We can't deliver them Pello windows or some other
17 windows. So that in effect becomes a critical supplier for
18 those jobs for those builders and enables us to get payment
19 on those jobs. Our critical vendor list includes \$15 million
20 of critical vendor amounts. Now, that breaks down into two
21 categories. One is a category of critical vendor that also
22 has delivered goods to us within the 20 days before the
23 filing. So, not only are these vendors critical, but they
24 also have 503(b)(9) claims. That's about \$9 million, and
25 then the second category are those vendors who are critical

1 but have claims that arise outside of the 20-day period.
2 Here again we have been in discussions with the U.S.
3 Trustee's Office. Mr. McMahon wanted us to separately
4 identify the \$6 million and the \$9 million buckets, which
5 we've done. He also had raised an issue about a provision
6 that we had in the motion, and the provision in the motion
7 said that we could only pay, with certain limited exceptions,
8 we could only agree to pay vendors if they, 1) extended
9 customary terms to us, and 2) would agree that we could pay
10 them their pre-petition amount in 30-, 60-, and 90-day
11 increments. The portion of that request dealing with 30-,
12 60-, and 90-day payments raised an objection for Mr. McMahon.
13 He wanted us to take that out, which we have done. So, as
14 currently drafted, the order says that we do have to get a
15 commitment from our critical vendor to extend customary trade
16 terms to us, but we can pay them - we can either pay them
17 immediately their pre-petition amounts or we can negotiate
18 extended payments with them, it's entirely within our
19 discretion. I would urge the Court to approve this motion
20 immediately.

21 THE COURT: Does anyone else wish to be heard in
22 connection with the critical vendor motion? Alright, based
23 upon the record, primarily the discreet declaration, I'm
24 prepared to grant the relief that's been requested.

25 MR. ROSENTHAL: May I approach?

1 THE COURT: Alright, I've reviewed the blackline. I
2 don't have any questions. That order's been signed.

3 MR. ROSENTHAL: Thank you, Your Honor. The next
4 motion is related and it relates to foreign vendors. Of
5 course, there's always a concern that foreign vendors that do
6 not have jurisdictional ties to the United States will be -
7 require some comfort or payments in order to continue
8 shipping goods into the United States based on the bankruptcy
9 of their customer. So we believe, Your Honor, that it is
10 appropriate to pay those vendors and prevent them from
11 stopping shipments that at any one time we do have containers
12 on ships and things which are coming into the United States.
13 So we would urge the Court to approve our foreign vendor
14 motion. There have been some minor comments from the U.S.
15 Trustee's Office which we've made.

16 THE COURT: Alright, let me see a blackline. Does
17 anyone else care to be heard in connection with this motion?
18 I hear no response. I have no questions. I'm prepared to
19 grant the relief that's been requested. That order has been
20 signed.

21 MR. ROSENTHAL: The final motion, Your Honor,
22 related to vendors relates to goods in transit. At any point
23 in time we have goods in transit to us which haven't arrived,
24 goods that are in the hands of warehousemen who have liens
25 with respect to those goods, parties who have a right to

1 assert mechanics' or materialmen's liens, and in some
2 instances, we get paid pursuant to joint checks, and we have
3 a procedure that we have followed for endorsing those checks,
4 having a joint check paid, received the funds, or remit funds
5 back to us. This is all part of insuring that our customers
6 continue to pay us to avoid liens on their property which
7 would hold up the payments. So we would urge the Court to
8 approve this motion related to payment of shippers',
9 warehousemen's, mechanics', and materialmen's claims and
10 joint checks.

11 THE COURT: Does anyone else wish to be heard in
12 connection with this motion? I hear no response. Do you
13 have a form of order for me?

14 MR. ROSENTHAL: Yes.

15 THE COURT: Thank you. I've reviewed the blackline.
16 I don't have any questions. I'm prepared to grant the relief
17 that's been requested. That order has been signed.

18 MR. ROSENTHAL: Your Honor, that only leaves our *de*
19 *minimis* assets sale motion, and I would again, I want to urge
20 the Court to approve this motion, and I have some responses
21 to the Court's concerns and questions.

22 THE COURT: Go ahead.

23 MR. ROSENTHAL: First, Your Honor, we would be
24 prepared on an interim basis to limit the authorization that
25 we are requesting. We do not even believe we need - I think

1 the Court was suggesting 100,000 per asset. We think that
2 50,000 per asset would be sufficient on an interim basis, and
3 we would agree to file the accounting, the statement required
4 by 6004(f)(1). With respect to the issue that was raised
5 about the auctioneer, I have two points, Your Honor. The
6 first is that while not dispositive, certainly courts in this
7 jurisdiction and in other jurisdictions including the Second
8 Circuit have routinely approved these sorts of motions and
9 authorized the payment of auctioneers, brokers, without
10 requiring those entities to be approved pursuant to 327 of
11 the Bankruptcy Code, and I'd urge the Court to look at the
12 Flying J case which was a case decided last year by Judge
13 Walrath. Lyondell in the Second Circuit in the Southern
14 District of New York which was just decided allowing that.
15 But more than that, Your Honor, we have taken a look at 327
16 and the case law, and here's where we come out on this: You
17 know, 327 is designed for particular types of professionals
18 who should be required to be employed and file applications.
19 When you look at the list, it is true that auctioneers appear
20 in the list. We do not believe though that it's enough just
21 to be in the enumerated list. When you look at the case law
22 and you look at the language of 327(a) you have to be a
23 professional that's in the enumerated list but you also have
24 to be representing or assisting the Trustee in carrying out
25 its duties under this title. Cases that interpret that last

1 phrase define someone who assists the Trustee in carrying out
2 its duties as someone who plays a central role in the
3 administration of the debtor's case, and I would cite the
4 Court to the C Train case. These auctioneers that we are
5 seeking to pay are not in any way, shape, or form playing
6 anything remotely related to a central role in our
7 proceeding. In fact, what they do is they sell piecemeal,
8 pieces of equipment that we send to them and that many, many
9 other sellers send to them in an auction not designed
10 specifically for us but designed to sell whatever comes into
11 them. They are at best, Your Honor, tangentially related to
12 the administration of the case. We have a provision in 327
13 that deals with professionals who are tangentially related to
14 the case. 327(e) deals with professionals who are
15 tangentially related but notably, Your Honor, 327(e) only
16 talks about attorneys. So, it's our view, Your Honor, that
17 327 does not deal with this situation. Auctioneers are not
18 central to the administration of the case so they're not
19 covered by 327(a) and under -

20 THE COURT: Well, let me put it this way, I guess
21 they could be but what you're arguing is under these
22 circumstances they're not.

23 MR. ROSENTHAL: Absolutely. Were they - absolutely.
24 Were they charged with liquidating all of our assets in one
25 proceeding just for our benefit, I think they would then be

1 central, and they would be covered by 327(a) but that is far
2 from what these parties are doing.

3 THE COURT: Alright. Does the U.S. Trustee wish to
4 be heard further on this issue?

5 MR. McMAHON: Your Honor, good afternoon. Joseph
6 McMahon for the Acting United States Trustee. I go back to
7 the § 327 language, Your Honor, and I think it's fairly
8 clear, at least from our perspective that the language which
9 was cited by debtors' counsel is almost prefatory. It's, in
10 fact, merely descriptive of what the listed professionals do
11 as opposed to being a limitation upon the persons that have
12 to be employed pursuant to that subsection. For example,
13 with respect to the role and responsibilities of attorneys,
14 appraisers, other professional persons, Your Honor is well
15 aware that with respect to attorneys we often see attorneys
16 appear in cases and they're responsible for discreet matters
17 for a subset of a particular situation. Maybe they decide to
18 serve as Delaware counsel in a case. That is not to say that
19 they are not representing or assisting the Trustee in
20 carrying out the Trustee's duties under Chapter 11, and if we
21 take a look at what the Trustee's duties are, I think they're
22 fairly well-defined in § 1106 of the Bankruptcy Code.
23 1106(a) refers us to 704. In 704 there outlines the
24 obligations of the Trustee, and what I will say, Your Honor,
25 is that in a liquidating case such as this, to establish a

1 rule that debtors' counsel is suggesting that unless a
2 professional is assisting the liquidation of substantially
3 all of the assets of the estate that we don't have to employ
4 that person. That is - it's interesting as a proposal, but
5 as a general matter it has to fail. The reality is, is that
6 in a liquidating situation any auctioneer of the caliber
7 that's proposed here is effectively assisting the debtor in
8 possession in reducing property to cash and assisting the
9 debtors in closing out their estates. There is no
10 requirement that attorneys, accountants, or specifically in
11 our situation, auctioneers, Your Honor, have to have a
12 central role in the bankruptcy proceeding pro se under the
13 plain language of the § 327(a). They're helping the trustee
14 do the trustee's work or otherwise they wouldn't be employed
15 for the purpose for which they are. I further note, Your
16 Honor, that to the extent that counsel is suggesting that
17 debtors in possession typically in our Chapter 11 cases make
18 a relative judgment as to how central or not an attorney, an
19 accountant, an appraiser, or an auctioneer is to the process
20 and decides not to forego completely 327(a) employment,
21 that's not an experience that I'm typically familiar with in
22 Delaware. What we discussed during our break and the point I
23 would bring up to the Court, Your Honor, is that we have seen
24 the ordinary course professional vehicle used. It does
25 provide for a Rule 2014 affidavit that is in all respects

1 identical to what a typical professional does. I asked
2 debtors to indicate to me how many auctioneers it is we're
3 dealing with here. I heard there's a couple of national
4 firms. There were some independents. Well, are we talking
5 about 6 or 200? And irrespective of that, Your Honor, when
6 Congress comes in and says, You've got to hire these people,
7 the burden is what it is. With respect to the Rule 6000
8 report, the 6004(f)(1) report, I've seen situations where
9 you'd have the employment application or reference to
10 employment of a professional in a separate application or a
11 sale motion, and the 6004(f)(1) report serves effectively as
12 the fee application. Frankly, I'd be happy with either the
13 OCP procedure or something akin to that here, Your Honor.
14 There's a 2014 requirement for these persons. It has to be
15 met, and while I understand that there's a difference between
16 an auctioneer, Your Honor, in northern New Jersey and a law
17 firm like Gibson, Dunn that regularly traffics in this
18 business, the requirements are the same under the plain
19 language. Thank you.

20 THE COURT: Thank you.

21 MR. ROSENTHAL: Your Honor, I don't want to prolong
22 this. I do want to say one thing. To the extent that there
23 was any suggestion that the debtors are liquidating their
24 estate, they are not. So, this is a reorganization. These
25 sales are part of wind-down of businesses that have been

1 closed because of cost rationalization.

2 THE COURT: Alright, well, let me make a couple of
3 comments. First, I'm loathed to set any kind of a precedent
4 on the first day of the case, although my rule from the bench
5 I always caution that it's not a precedent to be relied on by
6 anybody, doesn't seem to stop people from reminding me of
7 such rulings. I look to the motion itself and it says, "In
8 the ordinary course of business, the debtors frequently
9 donated or sold either directly or indirectly or at third-
10 party auctions on predetermined dates assets no longer useful
11 including without limitation various types of vehicles,
12 warehouse equipment, computers, excess, broken,
13 decommissioned and obsolete fixtures and equipment and other
14 personal property and interest in property", and it seems to
15 me that these are things which are of, as the debtor alleges,
16 little value to the estate and part of paring itself down to
17 that which it needs. On the other hand, I will say with
18 respect to the part of the Trustee's objection that deals
19 with meeting the Rule 6003 standard, as I think must be met
20 under these circumstances, there's nothing in the first day
21 declaration which addresses this relief and so, therefore, as
22 yet there's no evidentiary underpinning for my making a
23 finding that this relief is necessary in the first 20 days of
24 the case to avoid immediate and irreparable injury. Now, I
25 have two thoughts about that. If the debtor wishes the

1 opportunity to put on an evidentiary record on that issue
2 today, I'll give you some time to do that. It seems to me,
3 however, it might be just as simple for me to put this off to
4 another day to allow the debtor to consider its strategy and
5 maybe find one that works with the U.S. Trustee. I would be
6 willing to put it down for July 1st, although that still falls
7 within the first 20 days, so you're still going to have that
8 evidentiary burden to meet. If you wish to push it to July
9 16th, you will fall outside of the 6003 requirements. That
10 doesn't mean there might not be other issues. I leave the
11 choice to the debtor.

12 MR. ROSENTHAL: Your Honor, may we confer first?

13 THE COURT: You may.

14 MR. ROSENTHAL: Your Honor, if we could schedule it
15 for the 1st at 4:30 and if we're able to reach a resolution in
16 the meantime, we'll let chambers know as soon as we know.

17 THE COURT: Alright, we'll put it down for July 1st
18 at 4:30 with the same objection deadlines as we put in the
19 financing motion. So, you may notice it on that basis, and
20 if you'd like me to sign an order to that effect you can just
21 present one under certification and I'll act upon that.

22 MR. ROSENTHAL: Thank you, Your Honor. Your Honor,
23 we appreciate your time today. I don't think we have
24 anything else, but we certainly appreciate that you worked us
25 into your calendar, and we look forward to appearing before

1 you and confirming this case.

2 THE COURT: As do I.

3 MR. ROSENTHAL: Thank you.

4 THE COURT: Alright, that concludes this hearing.

5 Court will stand in recess.

6 (Whereupon at 1:51 p.m., the hearing in this matter
7 was concluded for this date.)

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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 June 22, 2009
Elaine M. Ryan
2801 Faulkland Road
Wilmington, DE 19808
(302) 683-0221

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

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND
REDACTION***

A transcript of the proceeding held on 6/17/2009 was filed on 6/23/2009 . 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 7/14/2009 .

If a request for redaction is filed, the redacted transcript is due 7/24/2009 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 9/21/2009 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (name, address/contact information) or you may view the document at the clerk's office public terminal.



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