

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
. .
BUILDING MATERIALS HOLDING . Case No. 09-12074 (KJC)
CORPORATION, *et al.*, . (Jointly Administered)
. .
. July 16, 2009
. 11:00 a.m.
Debtors. . (Wilmington)
. .

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

APPEARANCES:

For the Debtors: Robert F. Poppiti, Jr., Esq.
Young, Conaway, Stargatt
& Taylor, LLP

Michael A. Rosenthal, Esq.
Gibson, Dunn & Crutcher, LLP

For the US Trustee: Jane Leamy, Esq.
Office of the United States Trustee

For the Committee: Katie Lane, Esq.
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1 THE CLERK: All rise. Be seated, please.

2 THE COURT: Good morning, all.

3 ALL: Good morning, Your Honor.

4 MR. POPPITI: May it please the Court, Your Honor,
5 Rob Poppiti on behalf of the Debtors, Building Materials
6 Holding Corporation. Your Honor, I'm pleased to announce
7 that I'll be working off, well, my co-counsel will be working
8 off today's amended agenda. But we're here on a consensual
9 basis with respect to every item except for one. And if it's
10 acceptable to the Court, my co-counsel will run down the
11 agenda for today's hearing.

12 THE COURT: Certainly.

13 MR. POPPITI: Thank you.

14 THE COURT: Thank you.

15 MR. ROSENTHAL: Good morning, Your Honor. Michael
16 Rosenthal from Gibson, Dunn & Crutcher on behalf of the
17 Debtors. As Mr. Poppiti was telling you, we think we can
18 simplify the agenda, because we have virtually, resolved
19 virtually all matters. Your Honor, the, let's, if we go down
20 the agenda, the first item relates to our omnibus motion for
21 rejection of unexpired leases. The Court has entered an
22 order resolving that matter. The second item is another
23 omnibus motion for rejection of leases and contracts, and
24 there has been an order entered on that. Similarly, on the
25 third item on the agenda, another omnibus rejection motion.

1 The fourth item on the agenda is the same. An order has been
2 entered. The fifth item deals with the interim compensation
3 procedures, and an order has been entered on that. The sixth
4 item relates to the retention of Young Conaway as local
5 counsel, and an order has been entered on that matter. The
6 seventh relates to rejection of a single lease, and an order
7 has been entered on that. And by the way, Your Honor, we
8 appreciate how quickly you've entered the orders on these
9 matters. The seventh, the next matter, Your Honor, relates
10 to settlement procedures for certain causes of action and I
11 believe an order has been entered on that, Rob? Or not.

12 THE COURT: Yes. But the agenda indicates that the
13 parties wish a further revision to that order.

14 MR. ROSENTHAL: Oh, yes. That's right, Your Honor.
15 So Your Honor, what happened here is that the Court entered
16 an order. The Committee contacted us and raised some
17 questions and wanted some language inserted into the order.
18 So we worked with the Committee to, even after the deadline
19 to come up with some language to insert that basically
20 requires us to provide the Committee with notice of these
21 settlements. May I approach?

22 THE COURT: You may. Thank you.

23 MR. ROSENTHAL: So Your Honor, if you turn to the
24 fourth page. The end, the bottom of the fourth page and the
25 top of the fifth page. This is language that does two

1 things. First it provides that this order does not interfere
2 with a prior order the Court entered with respect to critical
3 vendors. And secondly, it provides for us to give notice of
4 settlements under this order, provided that they're not,
5 these are not settlements that would be covered by the
6 critical vendor order, to the Creditors Committee. So with
7 that, Your Honor, I would ask the Court to enter this order,
8 which would supercede the prior order.

9 THE COURT: All right. Let me ask if anyone else
10 wishes to be heard on this matter. I hear no response.

11 MR. ROSENTHAL: May I approach?

12 THE COURT: You may. Thank you. That order has
13 been signed.

14 MR. ROSENTHAL: Thank you, Your Honor. Next matter,
15 Your Honor, is again listed as having some concerns. We have
16 resolved those concerns, and the Court has now entered that
17 order. The tenth matter, Your Honor, we're informed that the
18 Court has entered that order as well.

19 THE COURT: I have.

20 MR. ROSENTHAL: The eleventh matter is our utility
21 motion and the Court has just entered that order as well.
22 The twelfth matter, Your Honor, relates to the employment of
23 Gibson, Dunn & Crutcher, and we have had discussions with the
24 United States Trustee's Office and we have made some
25 revisions requested by the US Trustee's Office. May I

1 approach?

2 THE COURT: You may.

3 MR. ROSENTHAL: So Your Honor, if you look at the
4 ordering paragraphs on pages 2 and 3, there are a number of
5 revisions the point of which is, are to suggest that to the
6 extent there's an inconsistency between our engagement letter
7 and the provisions of the Code, or the applicable rules in
8 this District that these, the rules here would apply. And
9 paragraph 4 has been revised to provide that we will apply a
10 portion of our security retainer, but then be allowed to hold
11 a portion of that retainer. And in 5 we've just outlined
12 some provisions that are in effect carve outs from what our
13 normal engagement letter would be. And these were, these
14 have all been negotiated with the US Trustee's Office.

15 THE COURT: Anyone else care to be heard on this
16 matter? I hear no response. Well I'm happy to see that the
17 changes were made. I'm assuming that you understand that
18 with those provisions you would expect the US Trustee to have
19 taken the positions that she did. And I'm in complete
20 agreement with those changes. Keep that in mind for the
21 future.

22 MR. ROSENTHAL: Thank you, Your Honor. We will.

23 THE COURT: Do you have a form of order for me?

24 MR. ROSENTHAL: Yes. May I approach?

25 THE COURT: Yes. Thank you. That order has been

1 signed.

2 MR. ROSENTHAL: Thank you, Your Honor. The next
3 matter, Your Honor, relates to the employment of
4 PricewaterhouseCoopers as tax advisor. And again, there were
5 some discussions with the US Trustee's Office. The change
6 here relates to allowing the, PricewaterhouseCoopers to keep
7 their time in half hour increments. May I approach?

8 THE COURT: You may. Ah, thank you. All right.

9 MR. ROSENTHAL: So the change, Your Honor, is at the
10 bottom of page 2 and the top of page 3.

11 THE COURT: I see that.

12 MR. ROSENTHAL: And then there is also a change on
13 page 4, Your Honor. Where the question of the reimbursement
14 of expenses for legal counsel, if Pricewaterhouse chose to
15 engage that is, in effect, reserved for a further date.

16 THE COURT: All right. Anyone else care to be
17 heard? I hear no response. That order has been signed.

18 MR. ROSENTHAL: The next order, Your Honor, is the
19 Debtors' motion for employment and payment of ordinary course
20 professionals. Again, there were discussions with the United
21 States Trustee's Office and we have reached an agreement with
22 the United States Trustee's Office. May I approach and I can
23 describe the changes.

24 THE COURT: You may. Thank you.

25 MR. ROSENTHAL: As we walk through these, Your

1 Honor, on page 2 we've, these are, we've obviously added the
2 Committee as a notice party. But the effect of the change on
3 sub-paragraph (a), which also flows through to a paragraph on
4 page 5, is that the Debtor has filed an original OCP list,
5 ordinary course professional list. The Debtor will file, be
6 able to file subsequent ordinary course professionals lists.
7 To the extent that someone is listed on the original list,
8 they'll have to file a declaration. The required OCP
9 declaration within 30 days. To the extent that they're first
10 listed on a subsequent list, they'll have to file an OCP
11 declaration within 30 days after being subsequently listed.
12 If you turn to page 3, you'll see that we've agreed, Your
13 Honor, to in effect a two tier system for the ordinary course
14 professionals. Some of the ordinary course professionals
15 are, do more work than others for the Debtor. So we have
16 divided it into what we've called the \$40 thousand
17 professionals and the \$20 thousand professionals. So we have
18 a list. Our OCP list divides it into those professionals who
19 have a \$20 thousand a month maximum cap and the professionals
20 who have a \$40 thousand a month maximum cap. And that's the,
21 that's the point of the change to (d). The US Trustee had a
22 change to paragraph (e) that suggests that to the extent that
23 an ordinary course professional exceeds the cap for any month
24 that all of their fees would be subject to approval under 330
25 or 331. If you look to paragraph (h) on page 4, Your Honor,

1 this change is one, again, responsive to a comment from the
2 US Trustee's Office that to the extent that an ordinary
3 course professional is not a law firm, or has not represented
4 the Debtor before the petition date, then - - I'm sorry. To
5 the extent it's not a law firm or it's a law firm that didn't
6 represent the Debtor before the petition date, they're
7 employed and they wouldn't have to waive any pre-petition
8 claims. If you are a - - let me start that over again. If
9 you are a law firm who represented the Debtor before the
10 filing of the case, you do not have to waive your pre-
11 petition claims, but you do have to set them out in the
12 declaration. If you are not a law firm, and you have amounts
13 owed pre-petition, to be an ordinary course professional you
14 have to waive your claims. This was a change requested by
15 the US Trustee's Office. Sorry for that confusion.

16 THE COURT: That's okay.

17 MR. ROSENTHAL: On page 5, paragraph 5, this is sort
18 of the paragraph that deals with the time period within which
19 the ordinary course professional must file their declaration.
20 And there's one other caveat that was added here, which is
21 that to the extent that the Debtor, post-filing of the OCP
22 list, employs a new professional, then that new professional
23 needs to be the subject of an ordinary course professional
24 list amendment within 10 days after the employment.

25 THE COURT: All right. Let me ask you this

1 question. With respect to, and I'm looking at the black line
2 - -

3 MR. ROSENTHAL: Um-hum.

4 THE COURT: - - that which is now numbered paragraph
5 9, do we still need that provision? Because we're beyond the
6 20 days. Or is - -

7 MR. ROSENTHAL: Yup.

8 THE COURT: - - is there *nunc pro tunc* relief here
9 so that we do need it?

10 MR. ROSENTHAL: There is *nunc pro tunc* relief, Your
11 Honor.

12 THE COURT: Okay. Then the only thing I would do is
13 put a period after the word motion, and strike out the
14 balance. I don't know that those requirements are waivable.
15 In any event, I never have.

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

17 THE COURT: All right.

18 MR. ROSENTHAL: Thank you.

19 THE COURT: Anyone else care to be heard in
20 connection with this matter? I hear no response. All right.
21 Well with that one change, I am signing the order.

22 MR. ROSENTHAL: The next matter, Your Honor, number
23 15 on the agenda, is the motion for an order to increase the
24 cap on the payments that can be made, pre-petition payments.
25 The payments that can be made to pre-petition shippers,

1 warehousemen, and with respect to mechanic's and
2 materialman's lien claims. The, I don't believe an order has
3 been entered on this.

4 THE COURT: It has not been.

5 MR. ROSENTHAL: There were no objections to this
6 Your Honor, and this is a new order, so I don't have a red
7 line.

8 THE COURT: All right.

9 MR. ROSENTHAL: May I approach?

10 THE COURT: You may. Thank you.

11 MR. ROSENTHAL: This was necessitated, Your Honor,
12 because the Debtors found that their vendors and
13 subcontractors with lien rights exceeded the amount that was
14 originally anticipated. And it increases the cap from \$1.13
15 million to \$2.25 million.

16 THE COURT: All right. Does anyone else care to be
17 heard in connection with this motion? I hear no response. I
18 have no questions.

19 MR. ROSENTHAL: Thank you, Your Honor.

20 THE COURT: That order has been signed.

21 MR. ROSENTHAL: Your Honor, the next matter is the
22 *de minimis* asset sale motion. That's the only contested
23 motion that will go forward. Can we put that at the end?

24 THE COURT: Yes.

25 MR. ROSENTHAL: So if we move to number 17, Your

1 Honor. This is the Debtors' first omnibus motion for an
2 order authorizing rejection. There was, there was no
3 objection filed to this, Your Honor. There was a reservation
4 of rights. Which we replied to. But we don't believe that
5 the pleading that was filed actually objected to the
6 rejection itself. And the issues raised in the reservation
7 of rights we think will be dealt with down the road with
8 respect to this party.

9 THE COURT: Yes. I read the papers. It was a shot
10 across the bow, I guess you might say.

11 MR. ROSENTHAL: It was.

12 THE COURT: Does anyone else care to be heard in
13 connection with this motion? I hear no response. I don't
14 have any questions.

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

16 THE COURT: You may. Thank you. That order has
17 been signed.

18 MR. ROSENTHAL: Thank you, Your Honor. The next
19 matter, Your Honor, relates to the engagement of Alvarez &
20 Marsal as restructuring advisors. Again, we were negotiating
21 with the United States Trustee's Office and an agreement has
22 been negotiated with them which we've embodied in a revised
23 order.

24 THE COURT: Thank you.

25 MR. ROSENTHAL: If the Court looks at, the operative

1 changes are on paragraph 4 on page 2. Where the retainer
2 held by Alvarez & Marsal will be drawn down until it reaches
3 the \$300 thousand level. And on page 4, paragraph 8, where
4 the question of the reimbursement of legal expenses for
5 counsel that might be engaged by A&M is again reserved by the
6 US Trustee, by the parties.

7 THE COURT: All right. Does anyone else care to be
8 heard in connection with this application? I hear no
9 response. I don't have any questions. The revisions are
10 appropriate.

11 MR. ROSENTHAL: The next matter, Your Honor, matter
12 19, is the application to employ Peter J. Solomon as the
13 investment banker and financial advisor. Again, we were in
14 discussions with the United States Trustee's Office and have
15 reached an agreement that's embodied in the revised order.
16 May I approach?

17 THE COURT: You may. Thank you.

18 MR. ROSENTHAL: Your Honor, the changes here relate
19 to paragraph 4, principle changes - - well, before we get to
20 4. Paragraph 3 is again a waiver of the requirement to keep
21 time in tenths of an hour increments. And they're going to
22 keep time in half hour increments. The change to 4 is an
23 agreement to provide that the, in effect that the monthly fee
24 payable to Peter J. Solomon will be viewed and evaluated
25 under the §328 standards and the transaction fees, if any,

1 that are related to Peter J. Solomon will be viewed and
2 evaluated under the standards of §330. Paragraph 7, Your
3 Honor, is a further limitation or exclusion from the
4 provisions of the engagement letter of Peter J. Solomon. It
5 excludes their limitation of liability provision. Paragraph
6 9 relates to a paragraph in the engagement letter that
7 related to whether Peter J. Solomon could provide a fairness
8 opinion to the board of directors of the Debtors. And for
9 the moment that, the, that section, which was §1(m) of the
10 engagement letter is not being approved pursuant to this
11 order. It's unclear whether the Debtors will ever require
12 such an opinion. But if they do we would have have to come
13 back to the Court to authorize Peter J. Solomon to provide
14 it. Paragraph 10 is the same reservation with respect to the
15 reimbursement of legal fees.

16 THE COURT: Does anyone else care to be heard in
17 connection with this application? I hear no response. The
18 revisions are appropriate. I don't have any questions. I am
19 going to sign the order.

20 MR. ROSENTHAL: Thank you. The next matter, Your
21 Honor, matter 20, which relates to the engagement of KPMG, as
22 the agenda reflects, has been adjourned until the July 29th
23 hearing. And finally Your Honor, on the resolved matters we
24 have the Debtors' motion to approve a bar date. We again
25 have been in discussions with the United States Trustee's

1 Office and we have reached an agreement with the United
2 States Trustee's Office. One of the things that I'd like the
3 Court to understand, we did file our schedules, about 2,000
4 pages of schedules, yesterday. So the schedules are on file.
5 The bar date sought, the general bar date is August 31st,
6 which is slightly before our scheduled confirmation hearing,
7 but you know, approximately 40 days from today. May I
8 approach with this order?

9 THE COURT: You may. Thank you.

10 MR. ROSENTHAL: Your Honor, if you look to paragraph
11 13, which is on page 5. We have eliminated the language that
12 talks about claims not evidenced by timely proof of claims
13 being forever barred, estopped, or enjoined, and replaced it
14 with the language from the Code that if you don't file a
15 timely proof of claim you shall not be treated as a creditor
16 for voting, distribution, or other purposes. In paragraph
17 14, we have added a section that deals with claimants that
18 file requests for 503(b)(9) relief. And deeming a request to
19 be a proof of claim. Paragraph 15, the revision there in
20 paragraph 15 and paragraph 17, just gives the Debtors
21 authority to revise the proof of claim form and the notice
22 form to fill in missing information and to conform them to
23 the changes that are being approved in this order.

24 THE COURT: All right. Thank you. Does anyone else
25 care to be heard in connection with this motion? I hear no

1 response. I have no questions. That order has been signed.

2 MR. ROSENTHAL: So Your Honor that just leaves, once
3 again, our *de minimis* sale motion, which is matter 16. And
4 Your Honor, the sole issue here, I wanted, I could take the
5 Court back to the first day motions, but I think maybe a
6 little background. The sole issue here is that the US
7 Trustee's Office has objected to the provisions of this
8 motion that seek to allow the sales to go forward and the
9 payment of market rate broker's commissions and auctioneer's
10 commissions to be made without those parties filing
11 applications, being employed under 327, or filing appropriate
12 applications for their fees to be paid. Your Honor, the
13 Debtors, before the filing of the case, similar to every
14 other major company in the country, were involved in, and
15 liquidated excess inventory, excess vehicles, excess
16 equipment. And for that purpose, they engaged auctioneers
17 around the country. Their principle auctioneer was Ritchie
18 Brothers, which is a national auction house, which auctions
19 for, frankly for every customer probably of the Debtor.
20 Probably for every creditor of the Debtors that has any
21 equipment. And these are not auctions that take place solely
22 for one debtor's property. They take place for everybody.
23 You know, a truck is a truck. A Ford F150 truck is the same
24 in Texas as it is in New York, except it might bring more in
25 one state depending on the weather. They have continued that

1 practice, or would like to continue that practice post-
2 filing. Similarly, the Debtors have a number of pieces of
3 real estate, all across the country, that before the filing
4 they were selling that, they were selling the real estate.
5 It wasn't necessary to the business, because they have
6 consolidated to some extent. So they were selling this
7 business, and they engaged brokers in big towns and small
8 towns, but primarily small towns. So we filed this motion,
9 Your Honor, to simplify the procedure for these kinds of
10 sales. The dispute here is whether the word auctioneer, that
11 appears in 327(a) of the Bankruptcy Code means that
12 auctioneers who perform these kinds of services for the
13 Debtors and, and real estate brokers, must in fact be
14 retained under 328 or 330 of the Bankruptcy Code. We
15 believe, Your Honor, that the US Trustee's Office's,
16 objection is misplaced in that it mis-characterizes the
17 statutory requirements for retention. It disregards the
18 precedent in this District, and in other districts, and it
19 impracticably complicates the process that we sought to
20 simplify by filing this motion. Let's talk about the
21 statutory argument. 327(a) provides that the Trustee may
22 engage professional persons to represent or assist the
23 Trustee in the conduct of the Trustee's duties. It's our
24 contention, Your Honor, that these brokers and auctioneers
25 don't fall within 327(a). As noted by the Court in the

1 Eastern District of Pennsylvania in a case, MG Aviation, not
2 every professional falls under 327(a). Only professionals
3 who represent or assist the Trustee in carrying out the
4 Trustee's duties. And then Courts have interpreted this last
5 phrase to limit the application of 327(a) to only those
6 professionals that are central to the Chapter 11 cases. And
7 I cite this Court to the C Tranes (phonetic) case where the
8 Southern District of New York said that a professional
9 person, for purposes of §327, is limited to those persons who
10 have occupations which play a central role in the
11 administration of the proceeding. And it only applies,
12 327(a) only applies to professionals that are intimately
13 involved in the administration of the Debtors' estate. Your
14 Honor, the Trustee's Office doesn't make any argument that
15 the role of these brokers or auctioneers is central to the
16 administration of the cases. In fact, the Debtors are laser
17 focused on their business, which is not really selling these
18 trucks. Their business is selling construction services, and
19 selling building materials. The sale of these, this excess
20 inventory, this excess real estate, this excess equipment, is
21 only incidental to what's happening in the cases. And more
22 than anything else, these sales are taking place because the
23 Debtor is sitting with carrying costs, and storage costs, and
24 maintenance costs for vehicles that it's no longer using, or
25 for property that it's no longer using. We don't think that

1 §328 applies to these kinds of auctioneers and professionals.
2 They're not playing a central role. We think that 327 has a
3 provision that deals with professionals who play an
4 incidental role. And interestingly, that provision, which is
5 327(a), only applies to attorneys. So in our view, Your
6 Honor, the statutory scheme, and congress knew how to say
7 what happened when a party, a professional only played an
8 incidental role. And what was said was that if you're an
9 attorney and you play an incidental role, 327(e) applies. By
10 the, by failing to mention these other parties, we believe
11 that there is nothing in 327 that requires that these
12 professionals be engaged pursuant to §328 or 330. If 327 is
13 not applicable, we think §363 is the correct statutory
14 predicate. These are ordinary course sales that are being
15 done in effect in the ordinary course of the Debtors'
16 business. Why did the Debtors file this motion, then? I
17 think Your Honor, out of an abundance of caution. Because as
18 I said, the Debtors business isn't selling these little
19 assets, it's really selling building materials and
20 construction services. And we wanted to know that we could,
21 we had a procedure that was approved by the Court for selling
22 nominal assets and making the normal payments that would be
23 made to people who used their efforts to sell these assets.
24 I think it's important to note that since the Committee has
25 been formed it's reviewed this application. The banks have

1 reviewed this application. None of those parties have
2 objected to the procedures, including the procedures for the
3 payment of the brokers and auctioneers. If you look at the
4 precedent, Your Honor, we would direct you to the Flying J
5 case, which is here in Delaware, where Judge Walrath approved
6 a motion very similar to this which sought authority without
7 complying with §327 to pay commissions for the sale of assets
8 of \$5 million or less.

9 THE COURT: Was there any objection in the Flying J
10 case?

11 MR. ROSENTHAL: I don't believe it was objected to.
12 In Lyondell, in the Southern District of New York, Judge
13 Gerber entered a similar order. And I do not know whether
14 there was an objection there. And finally Your Honor, I
15 think that we, what we, I think that there's a practical
16 issue here. We filed this motion to set out a
17 straightforward and simple approach to the sale of these,
18 this *de minimis* assets, which appropriately balance the
19 interests of all of the parties. And the practical impact,
20 and the cost that it would take to go around the country and
21 have these brokers who, and auctioneers who are un, in some,
22 in many instances unfamiliar with sort of the bankruptcy
23 process, and to bring them to Delaware to approve these
24 payments we think would be not cost effective and not
25 practical. One other thing to mention here, Your Honor.

1 This is, in all of these instances, this is not really a case
2 where we go make a payment. I mean, we send a truck to an
3 auction, they sell it, they have whatever their commission
4 is, they take it out, they send us net proceeds. In some
5 instances of which I'm aware, I know that the auction houses
6 actually fix up equipment so they can maximize the value.
7 And they take the expenses related to sprucing it up out of
8 the proceeds they realize. What we have offered to the US
9 Trustee's Office is that we would provide them with a list of
10 the auctioneers, and of the brokers, and of the commissions
11 that, their commission rates and what they intend to charge,
12 and that we would provide them with notice and a summary of
13 the sales that have occurred, the commissions and fees that
14 were paid, and the net amount that was realized by the estate
15 from those sales. We would urge the Court to approve the
16 motion as it's presented.

17 THE COURT: Thank you.

18 MS. LEAMY: Good morning, Your Honor. Jane Leamy
19 for the United States Trustee. The US Trustee has objected
20 to the employment of the brokers and auctioneers pursuant to
21 this motion without compliance with §327(a), which would
22 normally require a full blown retention application. We
23 disagree with the Debtors' counsel that §327(a) should be
24 read so narrowly to not require these particular activities
25 to require an employment application, because the word

1 auctioneer is specified. Other professionals persons is
2 normally read to include brokers. It says to represent or
3 assist the Trustee in carrying out the duties under this
4 title. The Debtor has filed this motion, seeks to dispose of
5 assets. It's not in the ordinary course. And that's
6 normally, you know, disposition of assets in a bankruptcy
7 case is a Trustee or Debtor-in-Possession duty. We do
8 understand, however, that this is a procedures order. The
9 Debtors are trying to simplify matters and be efficient.
10 We're not trying to create unnecessary work. We have
11 proposed to the Debtors something similar to the ordinary
12 course professional motion whereby the brokers and
13 auctioneers would file an affidavit disclosing their
14 compensation. The order right now just specifies that
15 they're to be paid at market rate commissions, so there's not
16 necessarily a procedure to disclose what these professionals
17 would be paid. The motion talks about Ritchie Brothers
18 Auctioneers, I believe. I'm not sure how many others there
19 are. I understand there may be several real estate brokers,
20 but the procedures are only up to a million. So I don't know
21 that this is really, if we're really talking about dozens and
22 dozens of professionals, or really just a handful. So in
23 terms of, you know, actual extra work and paperwork,
24 hopefully that's really not going to be an extra burden for
25 the Debtors. So the list that they proposed got us part way

1 there, but I think the preferred procedure would be an
2 affidavit which has been done in other cases where there's
3 private sales or real estate sales. The brokers agree to
4 file an affidavit disclosing their commission. And then
5 after filing that affidavit then they would be authorized to
6 be paid. Thank you, Your Honor.

7 THE COURT: Thank you. Anyone else care to be
8 heard? All right. You know, this is one of those
9 circumstances in which the Bankruptcy Code provisions that
10 are designed, at least in this case, to have the Court serve
11 as a gatekeeper of estate funds, don't match precisely the
12 business needs of the Debtor. But I think the US Trustee is
13 correct in her reading of the Bankruptcy Code. But I think,
14 at least based on what I'm hearing from the parties, that
15 you're almost there. But let me tell you how I approach this
16 from a statutory interpretation and principled basis. The
17 statute, 327(a), clearly includes auctioneers. Bankruptcy
18 Rule 6005 requires the Court, in any order approving the
19 employment of an appraiser/auctioneer, to fix the amount or
20 rate of compensation. And I'm not sure market rate does it.
21 If you look at the cases that talk about who ought to be
22 included in 327(a), if you decide that the language in 327(a)
23 should mean something other than what it plainly says - - and
24 the language, I think, is plain enough - - there's a
25 distinction that's grown up around those professionals who

1 are involved in the Chapter 11 bankruptcy related type of
2 work and those who are not. And this, as I understand it, is
3 the distinction based upon which ordinary course orders are
4 entered. These are professionals who typically do not have a
5 role in the bankruptcy process itself, but in specified
6 discrete areas of law, or other endeavor which don't, as I
7 say, involve bankruptcy work. With respect to an appraiser,
8 an auctioneer, those are functions that involve disposition
9 of assets. Those are things which clearly fall within what a
10 Debtor or Trustee would do in connection with a bankruptcy.
11 So I don't think you can neatly take them outside of 327(a).
12 But I do think that the US Trustee, in suggesting that a
13 procedures order look more like an ordinary course order, I
14 think is entirely appropriate. With the filing of the
15 affidavit, you've satisfied the disinterestedness issue. I
16 think it would be fair, since this is something that the
17 Debtor has done, I am told, on a regular basis. And there
18 appears to be no dispute about that. That you ought to know
19 within a percentage point what the compensation of the
20 auctioneers are. So I'd be willing to sign an order that
21 showed a range of, I don't know, whatever. I don't know what
22 the going rate is now. But say, 10% to 12% or 8% to 15%,
23 plus expenses. Reasonable expenses. That they ordinarily
24 charge in connection with these things. I think the notice,
25 the prior notice provisions of the ordinary course, prior

1 notice provisions that you would have in *de minimis* sale
2 issues are appropriate. And I do think that there will need
3 to be compliance with Bankruptcy Rule 6004(f)(1), which is
4 similar, Mr. Rosenthal, to what you had suggested you would
5 provide in connection with the sales. So I think with those
6 modifications, I think you've satisfied the US Trustee's
7 objection, I think you've brought yourself into compliance
8 with the Code provisions and Rule provisions, and at the same
9 time left yourself an expedited process that may be a little
10 more cumbersome than that which the Debtor wished to have,
11 but I think that these Code and Rule provisions get in the
12 way a little bit of what you've asked for. Now you have
13 other alternatives, which I'm sure you've considered. One is
14 to withdraw the motion, and simply take the position that
15 it's ordinary course. And Court approval isn't necessary.
16 And I'm not suggesting you do that, but that's a possibility.
17 The other one is with confirmation so close, I suppose you
18 could wait until that, and then do as you would. Assuming a
19 plan gets confirmed. But I would also understand that this
20 is the time of year when it might be best to dispose of such
21 assets. Especially when you're talking about the
22 construction industry. So that's where I end up based on the
23 submissions and arguments of the parties.

24 MR. ROSENTHAL: Your Honor, if I could ask to
25 clarify. The, I, how would you see an entity like Ritchie,

1 which sells nationally for virtually anybody that will give
2 them equipment to sell, and the disinterestedness requirement
3 working? I mean, I think that if they gave, they would
4 probably disclose, would you see them giving a list of
5 everybody that they sell for? I mean, they don't, they
6 wouldn't have a client base, I don't think, like a law firm
7 would have.

8 THE COURT: Well, they probably have something they
9 would consider a client base.

10 MR. ROSENTHAL: Yeah.

11 THE COURT: Let me put it this way. I would, I'd
12 leave that, initially, to discussion between you and the US
13 Trustee. I'm sensitive to the fact that these are folks that
14 aren't necessarily routinely involved with Bankruptcy
15 proceedings, and would not necessarily look favorably on the
16 amount of diligence required to deal with the typical
17 affidavit. Maybe there's, there are things which could be
18 disclosed that wouldn't involve having them give up their
19 customer list, which I'm sure would give them some pause.

20 MR. ROSENTHAL: Right.

21 THE COURT: In fact, I'll take a break now if you
22 want to talk to the US Trustee about it a little bit.

23 MR. ROSENTHAL: We'll do that, Your Honor, so we can
24 - - we'll talk about it, but I suspect that we're going to
25 want to submit something to you and try to have you enter

1 that order as soon as we can.

2 THE COURT: I understand. I just would want there,
3 if after discussion there are unresolved issues, I'd resolve
4 them now.

5 MR. ROSENTHAL: Great.

6 THE COURT: Okay. Anything before we break? Any
7 other questions? Comments?

8 MS. LANE: Katie Lane on behalf of the US, the
9 Committee of Unsecured Creditors. I was just going to
10 support the Debtors' position, from a practical standpoint,
11 and wondered whether the affidavit, the form affidavit could
12 be perhaps submitted before the process so that you're not
13 submitting things on a piecemeal basis. It doesn't seem very
14 effective and efficient to be doing this with respect to, the
15 Debtors' representations to the Committee have been that one
16 truck here, two trucks there. It doesn't seem like it's so
17 central to the case, although I do respect Your Honor's
18 position with respect to 327(a). We just support the Debtors
19 in the attempt to dispose of burdensome assets. That's all I
20 wanted to add.

21 THE COURT: All right. Thank you. Anyone else?
22 All right. We'll take a short break. Court will stand in
23 recess.

24 (Whereupon at 11:47 a.m. a recess was taken in the
25 hearing in this matter.)

1 (Whereupon at 11:57 a.m. the hearing in this matter
2 reconvened and the following proceedings were had:)

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

4 MR. ROSENTHAL: Your Honor, we've had discussions.
5 We're a little bit stymied because Mr. McMahon could not be
6 here because of a funeral, we understand. So what we'd like
7 to do is adjourn this hearing. We're going to go back and
8 spend the afternoon talking about what, which one of the
9 options the Court presented we feel most comfortable with.
10 And hope to be able to talk to Mr. McMahon and submit an
11 order under certification of counsel. We're going to be here
12 this afternoon, we're going to be here tomorrow morning for
13 the 341 hearing as well. So if I could ask the Court is
14 there any time that the Court would have available tomorrow
15 if we needed to appear?

16 THE COURT: Yes. I have hearings at 10, 11, and 2.
17 So what time is your 341?

18 MR. ROSENTHAL: It's at 10. 10 a.m.

19 THE COURT: I'd fit you in, you know, either late
20 morning or early afternoon. If you need to come back to see
21 me.

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

23 THE COURT: Okay. Just let Ms. Hunt know.

24 MR. ROSENTHAL: We will keep her involved.

25 THE COURT: All right.

1 MR. ROSENTHAL: And informed. Thank you, Your
2 Honor.

3 THE COURT: Anything more for today?

4 MS. LANE: Your Honor, if I may for a moment?

5 THE COURT: Yes.

6 MS. LANE: Katie Lane on behalf of the Committee
7 again. Your Honor, I just wanted to give you a status
8 update. The Committee has been getting up to speed on all of
9 the papers that have been filed in the proceedings. We
10 noticed that voluminous schedules were filed last night. We
11 are in the process of finalizing our retention papers. We're
12 just waiting on a signature from the Committee member before
13 we file that with Your Honor. We've run all of our conflict
14 searches and everything has come out clear. As has the
15 Executive Sounding Board's conflicts check. Furthermore, we
16 have begun our investigation pursuant to the final DIP order
17 and the Debtors and the lenders have been cooperating with us
18 and we've been making efforts to move the case forward as
19 quickly as possible.

20 THE COURT: Very well.

21 MS. LANE: That's it, Your Honor. Thank you.

22 THE COURT: Thank you. Anything else?

23 MR. ROSENTHAL: Thank you, Your Honor.

24 THE COURT: All right. Thank you all very much.
25 That concludes this hearing. Court will stand in recess.

1 Oh, I'm sorry. Back on the record for just one second. This
2 case is of the magnitude that I would like to appoint a fee
3 auditor. Put it this way, I would consider appointing a fee
4 auditor. Now you're coming up on a pretty quick
5 confirmation. How many professionals do we now have in this
6 case? Or will there be by the time I get through all the
7 applications?

8 MR. ROSENTHAL: I think we've been, we've got KPMG,
9 Pricewaterhouse, Gibson Dunn, Young Conaway, Alvarez, and
10 Peter J. Solomon. Six. And then the Committee will have
11 Arent Fox and Executive Sounding Board?

12 MS. LANE: Yes. And our local counsel.

13 MS. HOOVER: And Benesch Friedlander.

14 MR. ROSENTHAL: And local counsel. So that's, so
15 that's three there. Six plus three. Nine. Although it is a
16 very quick case. So.

17 THE COURT: Is it anticipated that we'll be one and
18 done in terms of fee applications? Or have the parties
19 talked about that at all?

20 MR. ROSENTHAL: I'm sorry.

21 THE COURT: How many fee hearings do you anticipate
22 having?

23 MR. ROSENTHAL: Your Honor, I, if we go to our
24 confirmation in September, we're going to have basically one
25 hearing, which will be the final - -

1 THE COURT: First and final.

2 MR. ROSENTHAL: First and final.

3 THE COURT: Okay. Then I'll hold off on doing that
4 as that dose of pain will only come one time, maybe we'll
5 take it all in chambers. Okay. Thank you.

6 MR. ROSENTHAL: Thank you, Your Honor.

7 THE COURT: That does conclude this hearing. Court
8 will stand in recess.

9 (Whereupon at 12:01 p.m. the hearing in this matter was
10 concluded for this date.)

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18 I, Jennifer Ryan Enslin, approved transcriber for
19 the United States Courts, certify that the foregoing is a
20 correct transcript from the electronic sound recording of the
21 proceedings in the above entitled matter.

22

23 /s/Jennifer Ryan Enslin
24 Jennifer Ryan Enslin
25 43 Bay Boulevard
Newark, DE 19702
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July 18, 2009

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 7/16/2009 was filed on 7/20/2009 . 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 8/10/2009 .

If a request for redaction is filed, the redacted transcript is due 8/20/2009 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 10/19/2009 unless extended by court order.

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



Clerk of Court

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