

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
ORLEANS HOMEBUILDERS, INC., <u>et al.</u> ,)	Bankr. Case No. 10-10684 (PJW)
)	
Debtors.)	Joint Administration Requested
)	

**DEBTORS' MOTION FOR ENTRY OF ORDERS AUTHORIZING THEM TO PAY
PRE-PETITION OBLIGATIONS TO CERTAIN CRITICAL VENDORS**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”),¹ by and through their undersigned attorneys, hereby file this motion (the “Motion”) for an interim order (the “Interim Critical Vendor Order”) and final order (the “Final Critical

¹ The other Debtors in these cases are: Brookshire Estates, L.P.; Community Management Services Group, Inc.; Greenwood Financial Inc.; Masterpiece Homes, LLC; OHB Homes, Inc.; OHI Financing, Inc.; OHI PA GP, LLC; OPCNC, LLC; Orleans Arizona Realty, LLC; Orleans Arizona, Inc.; Orleans at Bordentown, LLC; Orleans at Cooks Bridge, LLC; Orleans at Covington Manor, LLC; Orleans at Crofton Chase, LLC; Orleans at East Greenwich, LLC; Orleans at Elk Township, LLC; Orleans at Evesham, LLC; Orleans at Falls, LP; Orleans at Hamilton, LLC; Orleans at Harrison, LLC; Orleans at Hidden Creek, LLC; Orleans at Jennings Mill, LLC; Orleans at Lambertville, LLC; Orleans at Limerick, LP; Orleans at Lower Salford, LP; Orleans at Lyons Gate, LLC; Orleans at Mansfield LLC; Orleans at Maple Glen LLC; Orleans at Meadow Glen, LLC; Orleans at Millstone River Preserve, LLC; Orleans at Millstone, LLC; Orleans at Moorestown, LLC; Orleans at Tabernacle, LLC; Orleans at Thornbury, L.P.; Orleans at Upper Freehold, LLC; Orleans at Upper Saucon, L.P.; Orleans at Upper Uwchlan, LP; Orleans at Wallkill, LLC; Orleans at West Bradford, LP; Orleans at West Vincent, LP; Orleans at Westampton Woods, LLC; Orleans at Windsor Square, LP; Orleans at Woolwich, LLC; Orleans at Wrightstown, LP; Orleans Construction Corp.; Orleans Corporation; Orleans Corporation of New Jersey; Orleans DK, LLC; Orleans RHIL, LP; Parker & Lancaster Corporation; Parker & Orleans Homebuilders, Inc.; Parker Lancaster, Tidewater, L.L.C.; Realen Homes, L.P.; RHGP LLC; Sharp Road Farms Inc.; Stock Grange, LP; and Wheatley Meadows Associates, LLC. Tax identification and individual case numbers are set forth in the Declaration of Benjamin D. Goldman in Support of Debtors’ First-Day Pleadings.

Vendor Order”, and together with the Interim Critical Vendor Order, the “Critical Vendor Orders”), pursuant to Bankruptcy Code §§ 105(a) and 363, authorizing them to pay the pre-petition claims of certain critical vendors (each, a “Critical Vendor Claim” and collectively, the “Critical Vendor Claims”) in accordance with the Critical Vendor Procedures (as defined and described in greater detail below). In support of the relief requested in this Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these cases and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

INTRODUCTION

2. On the date hereof (the “Petition Date”), each of the Debtors filed with this Court separate, voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to manage their properties and operate their business as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. No trustee, examiner, or official committee has been appointed in these cases.

3. Contemporaneously with the filing of this pleading, the Debtors have sought an order of this Court pursuant to Bankruptcy Rule 1015 directing that their Chapter 11 cases be jointly administered. The Debtors have also filed additional motions with the Court (some of which are seeking emergency relief) in the proposed lead case of Orleans Homebuilders, Inc. (“OHB”).

The Debtors and their Business²

4. The Debtors build, develop, market, and sell single-family homes, townhouses, and condominiums to various segments of the homebuyer market. The Debtors also regularly purchase land and finished lots for development, improve land to be ready for home construction, obtain land entitlements, and invest in joint venture projects with other homebuilders.

5. The Debtors pride themselves on building high-quality and affordable homes, using a combination of production-style construction techniques and a design center customization marketing approach. Indeed, they have won various awards, including JD Power and Associates awards for home quality and designs in various divisions, and top rankings for being one of the fastest growing homebuilders from Builder magazine, one of the largest homebuilders from Big Builder magazine, and best homebuilder companies to work for from Professional Builder magazine, as well as various other product design and community of the year awards in various divisions from similar publications and homebuilding trade groups.

6. The Debtors have developments or projects in the following regions: (a) the Northern Region (including southeastern Pennsylvania, central and southern New Jersey, and Orange County, New York); (b) the Southern Region (including Charlotte, Raleigh, and Greensboro, North Carolina, including adjacent counties in South Carolina, and Richmond and Tidewater, Virginia); (c) the Midwestern Region (including Chicago, Illinois); and (d) the

² The description set forth herein is solely a summary of the Debtors, their corporate and capital structure, their operations, and the events leading to these Chapter 11 cases. For more information, please review the Debtors' public filings with the Securities and Exchange Commission, accessible at <http://www.sec.gov> and at <http://www.orleanshomes.com>.

Florida Region (including Orlando, Florida). The Debtors' operations in Pennsylvania and New Jersey date back more than 90 years, and they have operated in Florida on and off since 1970. The Debtors have been in business in Virginia, North Carolina, and South Carolina since approximately 2000. Over the years, the Debtors have acquired other homebuilders, including Masterpiece Homes (Florida), Parker Lancaster Corporation (North Carolina and Virginia), and Realen Homes (Illinois and Pennsylvania).

7. Most of the Debtors' projects are "master-planned" residential communities where the Debtors purchase plots of land, obtain the necessary approvals, build several model homes and "spec" (constructed but unsold) homes, and then build additional "backlog" homes upon entering into sales contracts with homebuyers. The Debtors typically act as a general contractor and employ subcontractors to construct homes and install site improvements. The Debtors' agreements with subcontractors typically provide for a fixed price for work performed and materials supplied. The Debtors do not manufacture any of the materials or other items used in the development of their communities.

8. The Debtors have various non-debtor direct and indirect subsidiaries (the "Non-Debtor Subsidiaries")³ that, among other things, offer supplemental services to

³ These entities have not filed Chapter 11 petitions: Alambry Funding, Inc.; A. P. Orleans & Co.; A. P. Orleans, Incorporated (PA); A. P. Orleans, Incorporated (NJ); A. P. Orleans Real Estate Co., Inc.; Greenwood Orleans, Inc.; Lucy Financial, Inc.; Masterpiece Homes & Properties, Inc.; Meadows at Hyde Park, LLC; Moorefield Title Agency, L.C.; OAH Manager LLC; OHI NJ, LLC; OHI PA, LLC; OHI South Service Corp.; Orleans Abstract Member, LLC; Orleans Affordable Housing LP; Orleans Air LLC; Orleans Arizona Construction, LLC; Orleans at Aston, L.P.; Orleans at Dolington, L.P.; Orleans at Florence, LLC; Orleans at Horsham, LP; Orleans at Illinois, LLC; Orleans at Lower Makefield, LP; Orleans at Monroe, LLC; Orleans at South Brunswick, LLC; Orleans Homebuilders Trust; Orleans Management, LLC; Orleans RHPA, LLC; Orleans-

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homebuyers, including real estate brokerage, title and closing, and mortgage broker services. The Debtors provide administrative support for certain of the Non-Debtor Subsidiaries, including, for example, payroll and accounting services.

9. For the six months ending December 31, 2009, the Debtors delivered 356 homes to homebuyers, generating approximately \$132.7 million in revenue. For the same period, the Debtors recorded net new orders for 369 homes in the amount of approximately \$134.5 million. As of December 31, 2009, the Debtors had approximately 589 homes in inventory, consisting of approximately 345 backlog units, 184 spec homes, and 60 owned model homes.

10. The Debtors have approximately 305 employees, including 22 Alambry mortgage services employees. The majority of these employees are full-time employees, and none is a member of any union.

Capital Structure

Background

11. OHB, a Delaware corporation, is a public company listed on the American Stock Exchange under the symbol "OHB."

12. The Debtors' Chairman, President, Chief Executive Officer, and majority shareholder is Jeffrey P. Orleans, the grandson of the Debtors' founder, Alfred P. Orleans.

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Wheatley Meadows, LLC; P & L Realty, Inc.; Quaker Sewer, Inc.; and Radnor Carpentry Corporation.

Senior Secured Credit Agreement

13. On or about September 30, 2008, Greenwood Financial, Inc., and the rest of the Debtors, with OHB as guarantor, entered into a second amended and restated revolving credit loan agreement (as amended and modified on or about January 28, 2009, February 11, 2009, August 3, 2009, August 13, 2009, September 30, 2009, October 30, 2009, December 18, 2009, and January 25, 2010 (the "Senior Secured Credit Agreement")), with various banks as lenders (collectively, the "Senior Lenders") and with Wachovia Bank, National Association, as administrative agent ("Wachovia," or the "Agent"). The obligations under the Senior Secured Credit Agreement were guaranteed by OHB and the maturity date of the Senior Secured Credit Agreement, originally December 20, 2009, was extended through February 12, 2010, under certain terms and conditions. As of that date, the loan matured, and on February 17, 2010, the Agent sent the Debtors a Default and Reservation of Rights Letter.

14. The Senior Secured Credit Agreement provided the Debtors with a revolving facility of up to \$350 million⁴ as of the Petition Date, subject to a defined borrowing base availability.⁵ The Senior Secured Credit Agreement also originally provided for a swingline facility of \$10 million and a letter of credit sublimit of \$30 million.⁶ The Debtors used the funds available under the Senior Secured Credit Agreement to support their operations.

⁴ This amount reflects various agreements to reduce the size of the facility from its original \$650 million.

⁵ The definition of borrowing base was amended to remain until February 12, 2010, at the level reflected on the borrowing base certificate provided to the Agent on December 15, 2009 (as of November 30, 2009).

⁶ Pursuant to agreements with the Senior Lenders, swing line borrowings have been suspended, and no new letters of credit may be issued.

15. The Debtors' obligations under the Senior Secured Credit Agreement are secured by senior, first-priority liens on, among other things, all real estate, income tax refunds, inter-company debt, certain cash deposits, certain equity interests, certain pineland development credits, and life insurance policies under the Debtors' survivor benefit program.

Circumstances Leading to this Filing

16. The homebuilding industry has experienced a significant and sustained downturn characterized by decreased demand for new homes, an oversupply of both new and resale home inventories (including homes under foreclosure), a decline in average selling prices, and aggressive competition among homebuilders. The declining real estate market has negatively impacted homebuilders nationwide.

17. The decreased demand for new homes has been exacerbated by the credit crisis, which has made traditional mortgages more difficult to obtain, and their terms and pricing more onerous, resulting in a challenging lending environment for most prospective home buyers.

18. As a result of these and other external factors, the Debtors' consolidated revenue dropped from \$987 million, for the fiscal year ended June 30, 2006, to \$335 million, for the fiscal year ended June 30, 2009. While the Debtors reacted appropriately to the changing market conditions, including reducing net debt by approximately \$185 million (31%); reducing spec home units by 53%; reducing total lots by 59%, including exiting certain markets in Florida and Arizona and reducing land exposure in Illinois; and reducing staff headcount by 67%, enabling the Debtors to be cash flow positive or neutral in 10 of the last 12 quarters, the Debtors violated certain covenants contained in the Senior Secured Credit Agreement (which has now matured).

19. The recent turmoil in the credit markets has also had an adverse impact on the Debtors' continued access to needed financing. Despite their significant efforts, the Debtors were unable to obtain a heavily-negotiated maturity extension and structural modification to the Senior Secured Credit Agreement.

20. Market conditions have not improved, and the Debtors do not have sufficient liquidity to continue operating normally outside of bankruptcy. Accordingly, the Debtors have concluded in their sound business judgment that commencing these Chapter 11 cases was necessary to provide them with the breathing space necessary to formulate a reorganization strategy that would allow them to continue as a going concern, for the benefit of all parties-in-interest.

FACTUAL BACKGROUND

The Debtors' Critical Vendors

21. In the ordinary course of business, the Debtors rely on certain third parties to supply goods and services, without which the Debtors either could not operate or would operate at significantly reduced efficiency. The Debtors have established relationships with a number of vendors and suppliers in each of their markets and believe that these relationships ensure continued access to consistent labor and material and otherwise provide substantial savings and benefits. These vendors provide the diverse products and services that are necessary at all stages of home construction and development. These products and services include, among other things, plumbing, electrical, lumber, appliances, fixtures, floor coverings, and other high-quality equipment and materials.

22. The vendors give the Debtors a level of certainty that materials of a specified quality will be provided, and services of a consistent quality will be rendered, in

accordance with the various deadlines of the Debtors' projects. Accordingly, any disruption in the services of such vendors would likely have a detrimental impact upon the quality of homes built by the Debtors and impede the timely completion of homes in accordance with customers' specifications. Given the highly competitive markets in which the Debtors operate, such a disadvantage would lead to an immediate erosion in customer confidence and have an adverse affect on the Debtors' reputation, which could be impossible to restore.

23. The Debtors owe certain of these aforementioned vendors (each, a "Critical Vendor" and collectively, the "Critical Vendors") amounts for pre-petition goods and services. Without the continued support of, and the goods and services to be provided by, the Critical Vendors, the Debtors may not be able to continue operating and producing homes without great added cost and likely delay.

24. Despite the need for the receipt of essential goods and services, the Debtors historically have sought to bargain with their vendors to achieve the lowest price, the best service and quality, and the most favorable payment terms possible for each necessary product or service. The Debtors have developed valued relationships with many suppliers that have met the Debtors' standards for price, service, quality, and payment terms, and they hope to maintain and improve upon those vendor relationships on a post-petition basis and to continue to negotiate to ensure such standards going forward.

25. The Debtors believe that certain of the Critical Vendors, despite the protections of administrative priority status, may refuse to provide goods or services post-petition to the Debtors if they do not pay all or part of the Critical Vendor Claims.

RELIEF REQUESTED

26. The Debtors seek authorization to pay, in their discretion, all or part of the Critical Vendor Claims, in an aggregate amount not to exceed \$10 million, subject to certain conditions and procedures described below.

27. On an emergency basis, the Debtors are requesting authority to pay up to \$7.5 million (the "Interim Critical Vendor Cap") on the Critical Vendor Claims that they believe may come due or otherwise require payment within 21 days of the Petition Date.⁷ In addition, the Debtors request that this Court schedule a final hearing (the "Final Hearing") on this Motion to consider any remaining relief. The Debtors would file and serve a proposed form of final order approving payment of any remaining amounts and certain other relief prior to the date of the Final Hearing.

28. Furthermore, the Debtors request that financial institutions be authorized to receive, process, honor, and pay all checks presented for payment and electronic payment requests related to the Critical Vendor Claims described in this Motion, whether such checks were presented or electronic request were submitted prior to or after the Petition Date. The Debtors also request that financial institutions be authorized to rely on the Debtors' designation of any particular check or electronic payment request as appropriate pursuant to this Motion.

⁷ Notwithstanding any statement in this Motion or in the order approving this Motion, the Debtors' ability to make payments is limited to the amount shown in the budget approved by the DIP Lenders (as defined in the debtor-in-possession financing motion) for the period at issue.

29. The Debtors propose to make full or partial payment to a Critical Vendor pursuant to this Motion only to the extent they deem necessary, in the exercise of their business judgment, to ensure that the applicable Critical Vendor would provide essential goods and services to the Debtors on a post-petition basis. To further assure that the Debtors' business operations would be minimally impacted during these Chapter 11 cases, the Debtors seek to condition such payments upon an express agreement by the Critical Vendors (i) to provide reasonable and customary price, service, quality, and payment terms ("Customary Trade Terms") or upon other favorable terms to the Debtors on a post-petition basis and (ii) to pay all amounts due to their suppliers and sub-contractors on account of services or materials solicited by the Critical Vendors for the Debtors' projects and to waive the right to assert and to take any action necessary to remove any construction liens, materialman's liens, mechanics' liens, and other liens or encumbrances against assets owned or previously owned by the Debtors, including any such liens or encumbrances that have been or may be asserted by suppliers or sub-contractors on account of services or materials solicited by the Critical Vendors for the Debtors' projects (the "Release").⁸

⁸ Nothing in this Motion should be construed as (a) an admission as to the validity of any claim against the Debtors, (b) a waiver of the Debtors' or any party-in-interest's right to dispute any such claim, or (c) an approval or assumption of any agreement, contract, program, policy, or lease under Bankruptcy Code § 365 or otherwise. Furthermore, any payment made pursuant to the authority requested herein is not intended and should not be construed as an admission of the validity of any claim or waiver of the Debtors' right to dispute such claim subsequently, and the Debtors reserve all related rights.

Proposed Critical Vendor Procedures

30. In light of the severe consequences the Debtors may suffer if the Critical Vendors refuse to provide post-petition goods and/or services, the Debtors propose that the Court approve and adopt the following procedures (the “Critical Vendor Procedures”):

- (a) The payment of the Critical Vendor Claims would be conditioned on the express agreement of each of the Critical Vendors to continue supplying goods and services to the Debtors on Customary Trade Terms and to provide the Release or upon other favorable terms. A letter substantially in the form attached hereto as Exhibit A (or as may be modified pursuant to the Final Critical Vendor Order), along with a copy of the Interim Critical Vendor Order and/or the Final Critical Vendor Order, as applicable, granting the relief requested in this Motion would be sent to the Critical Vendors. The letter would include, without limitation, the following information and terms:
 - i. The amount of a Critical Vendor’s estimated pre-petition claim, accounting for any setoffs, other credits, and/or discounts thereto, which would be mutually determined in good faith by a Critical Vendor and the Debtors (but such amount would be used only for the purposes of determining the Critical Vendor Claim under the Interim Critical Vendor Order and/or the Final Critical Vendor Order, as applicable, and would not be deemed a claim allowed by the Court for any other purpose in these cases, and the rights of all interested persons to object to such claims would be fully preserved until further order of the Court);
 - ii. A Critical Vendor’s agreement to provide goods and services to the Debtors based upon Customary Trade Terms or upon such other favorable terms as the Debtors and the Critical Vendor may agree;
 - iii. A Critical Vendor’s agreement to provide the Release or upon such other favorable terms as the Debtors and the Critical Vendor may agree;
 - iv. A Critical Vendor’s acknowledgement that it has reviewed the terms and provisions of the Interim Critical Vendor Order and/or the Final Critical Vendor Order, as applicable, and consents to be bound thereby;
 - v. A Critical Vendor’s agreement that it will not separately seek payment for any reclamation claims or claims under Bankruptcy Code § 503(b)(9) outside the terms of the Critical Vendor Orders unless a Critical Vendor’s participation in the program to pay

Critical Vendor Claims pursuant to the Critical Vendor Orders is terminated; provided, however, that such claims would, if thereafter raised by a Critical Vendor as permitted by the Critical Vendor Orders, be treated as though raised on the date of the Final Critical Vendor Order; and

- vi. A Critical Vendor's agreement that any payments received by such Critical Vendor under the Critical Vendor Orders would be applied first to claims for the value of goods received by the Debtors within 21 days of the Petition Date that were sold to the Debtors in the ordinary course of business, and then to any other claims.
- (b) Such a letter, once agreed and accepted by a Critical Vendor, would be the agreement (the "Vendor Agreement") between the parties that governs their relationship during these cases. To the extent the Debtors and a Critical Vendor have not, despite diligent efforts, agreed upon and entered into a Vendor Agreement, the Debtors would nonetheless have the right to pay such Critical Vendor if they determine that failure to pay the Critical Vendor Claim would be likely to result in irreparable harm to the Debtors' business operations. The Debtors further would retain the right, on a case-by-case basis, to obtain other written acknowledgement from the Critical Vendors of the terms to which the parties have agreed.
 - (c) If a Critical Vendor refuses to supply goods and/or services to the Debtors on Customary Trade Terms and/or fails to provide the Release (or fails to comply with other terms to which the parties have agreed), following its receipt of payment on the Critical Vendor Claim, or fails to comply with the applicable Vendor Agreement in any way, the Debtors may, in their discretion and without further order of this Court, declare that a Critical Vendor is in breach of its Vendor Agreement with the Debtors. To the extent the Critical Vendor fails to cure such default or reach an alternative agreement with the Debtors, the Debtors may seek appropriate relief from the Court, including, without limitation, injunctive relief to compel performance pursuant to the Vendor Agreement. In addition, if a Critical Vendor refuses to comply with the Customary Trade Terms and/or fails to provide the Release (or fails to comply with other terms to which the parties have agreed), any payment made to a Critical Vendor on account of a Critical Vendor's pre-petition claim would be deemed to have been in payment of any then outstanding post-petition obligations owed to a Critical Vendor, and a Critical Vendor would be required to repay immediately to the Debtors any payment previously made to it on account of its pre-petition claim pursuant to this Motion, to the extent the aggregate amount of such payments exceeds the post-petition obligations then outstanding, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or otherwise.
 - (d) The Debtors would maintain a summary list of all payments made to the Critical Vendors, and would provide updated copies of such list to the United States

Trustee, the Agent and counsel to the Agent, and any official committees appointed in these cases on a monthly basis.

BASIS FOR RELIEF

31. There are several justifications for the relief requested in this Motion. First, Bankruptcy Code § 105(a) empowers a court to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the Bankruptcy Code. The purpose of Bankruptcy Code § 105(a) is to ensure a bankruptcy court’s power to take whatever action “is appropriate or necessary in aid of the exercise of [its] jurisdiction.” 2 Collier on Bankruptcy, ¶ 105.01 (15th rev. ed. 1997); see also In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 843 (S.D.N.Y. 1991).

32. In addition, under the “necessity of payment rule” or the “doctrine of necessity,”⁹ courts often allow the immediate payment of pre-petition claims where such payment is essential to a debtor’s continued operations or to preserve the going-concern value of a debtor’s business. See, e.g., In re Just for Feet, Inc., 242 B.R. 821, 824 (Bankr. D. Del. 1999) (bankruptcy court may exercise equity powers to authorize payment of pre-petition debt where such payment is necessary to preserve the going-concern value of a debtor’s business); In re Columbia Gas Sys., Inc., 136 B.R. 930, 939 (Bankr D. Del. 1992) (recognizing that “[i]f payment of a pre-petition claim ‘is essential to the continued operation of [the debtor], payment may be authorized’”) (citation omitted).

33. Furthermore, pursuant to Bankruptcy Code §§ 1107(a) and 1108, the Debtors are fiduciaries “holding the bankruptcy estate[s] and operating the business for the

⁹ This doctrine, first articulated by the United States Supreme Court in Miltenberger v. Logansport, C&S W. R. Co., 106 U.S. 286, 311-312 (1882), recognizes the existence of judicial power to authorize a debtor to pay pre-petition claims in certain situations.

benefit of [their] creditors and (if the value justifies) equity owners.” In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the fiduciary duties of any debtor-in-possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” Id. Some courts have noted that there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” Id.

34. Consistent with a debtor’s fiduciary duties, courts have authorized payment of pre-petition obligations under Bankruptcy Code § 363(b), where a sound business purpose exists for doing so. See, e.g., In re Tropical Sportswear Int’l Corp., 320 B.R. 15 at 17-18 (Bankr. M.D. Fla. 2005) (authorizing payment to critical vendors for pre-petition amounts when a sound business justification existed because the vendors would not do business with the debtors absent the critical vendor status, and the disfavored creditors were not any worse off due to the critical vendor order); In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (holding that sound business justification existed to justify payment of pre-petition wages).

35. Further, many of the Critical Vendors are contractors, sub-contractors, materialmen, laborers, engineers, or similar suppliers. Under applicable law, these claimants may be able to assert construction liens, materialman’s liens, mechanics’ liens, or other statutory liens against the Debtors’ real property arising from the delivery of pre-petition goods and services. Such liens may attach simply by virtue of the commencement of work in some jurisdictions, whereas in others notice and perfection requirements may apply. In any event, pursuant to Bankruptcy Code § 362(b)(3), the act of perfecting a lien post-petition does not violate the automatic stay to the extent such a lien is unavoidable pursuant to Bankruptcy Code §

546(b),¹⁰ as may be the case with construction liens, materialman's liens, mechanics' liens, or other statutory liens. As a consequence, certain claimants may be entitled to assert and perfect liens against the Debtors' real property post-petition on account of their pre-petition claims. See Great S. Supply Co. of Tex. v. Ernest & Assocs. (In re Ernest & Assocs., Inc.), 59 B.R. 495, 498 n.1 (Bankr. W.D. Tex. 1985) (recognizing that "[u]nder sec. 546(b) and 362(b)(3) of the Bankruptcy Code, post-petition filings [of a materialman's lien] would be permitted if the grace period created by state statute continued to run post-petition . . ."). Courts have accordingly permitted the payment of pre-petition claims of suppliers that were potential lien claimants. See Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.), 29 B.R. 391, 397-98 (Bankr. S.D.N.Y. 1983) (allowing a contractor to pay pre-petition claims of suppliers who were potential lien claimants because the payments were necessary for general contractors to release funds owed to debtors).

36. Further, the Critical Vendors are either "sole source" providers or are sellers of goods and services that cannot easily be replaced. The Debtors believe that the uninterrupted supply of goods and services from the Critical Vendors on customary and beneficial trade terms is imperative to the ongoing operations and viability of their business. Pursuant to the Critical Vendor Procedures, the Debtors only seek to pay the claims of the Critical Vendors where non-payment would, in the Debtors' view, likely lead to the interruption of the delivery of goods and services, seriously disrupting the Debtors' operations. To that end, the Critical Vendor Procedures proposed herein are crafted to minimize the number and amount

¹⁰ Generally, Bankruptcy Code § 546(b) provides that a debtor's lien avoidance powers are "subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . ." 11 U.S.C. § 546(b)(1)(A).

of pre-petition claims that would be paid and to maximize the value that the Debtors gain from such payments.

37. Any refusal by the Critical Vendors to work with the Debtors post-petition would likely impair the Debtors' value as a going concern. The Debtors' construction and home sale operations could be severely disrupted if a Critical Vendor refused to provide goods or services on a timely basis and on acceptable terms. The Debtors' failure to receive any such goods or services could cause the shutdown of development projects until an agreement could be reached with the Critical Vendor in question or an alternate source could be identified. Such a situation would delay the completion of homes built and could precipitate a significant decline in sales.

38. Beyond the impact on future home sales if the construction of homes is delayed or the Debtors fail to deliver homes to their customers' specifications, the Debtors risk delayed closings or home sale contract terminations. Even a temporary disruption of this sort in the Debtors' operations could result in a failure to meet their commitments to customers and may cause severe damage to the Debtors' reputation and customer relationships. Finally, a breakdown in supply relationships with one Critical Vendor may erode the confidences of others in the Debtors' ability to continue operations, thus resulting in a follow-on tightening of vendor liquidity and support at a time when the Debtors' relationships with their Critical Vendors already may be stressed by these Chapter 11 filings.

39. Indeed, for reasons similar to those set forth herein, courts in this District have authorized the payment of pre-petition trade claims where the payment of such claims is essential to a debtor's continued operations. See, e.g., In re Pliant Corp., Case No. 09-10443 (BLS) (Bankr. D. Del. Feb. 12, 2009); In re Fluid Routing Solutions Intermediate Holding Corp.,

Case No. 09-10384 (CSS) (Bankr. D. Del. Feb. 6, 2009); In re Smurfit-Stone Container Corp., Case No. 09-10235 (BLS) (Bankr. D. Del. Jan. 27, 2009); In re Flying J, Inc., Case No. 08-13384 (Bankr. D. Del. Jan 16, 2009); In re Tribune Co., Case No. 08-13141 (KJC) (Bankr. D. Del. Dec. 10, 2008); In re Buffets Holding, Inc., Case No. 08-10141 (MFW) (Bankr. D. Del. Dec. 8, 2008); In re Tweeter Home Entm't Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 12, 2007).

40. Accordingly, the Debtors submit that the relief requested in this Motion is in their best interests and the best interests of their estates, their creditors, and other parties-in-interest, and that paying the Critical Vendors according to the Critical Vendor Procedures is a sound and prudent exercise of their business judgment and within their fiduciary duties.

SATISFACTION OF BANKRUPTCY RULE 6003

41. Pursuant to Bankruptcy Rule 6003, the Court may grant a debtor's request to pay all or part of a pre-petition claim in the first 21 days of a case only if that relief is necessary to avoid immediate and irreparable harm. Immediate payment of the Critical Vendors Claims, subject to the Interim Critical Vendor Cap, that become due within the first 21 days of the Petition Date is essential to prevent immediate and irreparable harm to the Debtors' value as a going concern. The Debtors rely on the Critical Vendors to provide critical goods and services, and without those goods and services, the Debtors' operations may be severely disrupted. Indeed, if the Critical Vendors refuse to provide goods and services post-petition on account of unpaid pre-petition claims, the Debtors may be unable to carry on their business, and will

therefore be harmed irreparably.¹¹ For the reasons discussed above, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003.

REQUEST FOR WAIVER OF STAY

42. Any delay in paying the obligations and fees addressed herein would be detrimental to the Debtors, their creditors, and their estates. Accordingly and to successfully implement the foregoing, to the extent applicable, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of any order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NOTICE

43. Notice of this Motion has been served upon the Office of the United States Trustee for the District of Delaware, the 50 largest unsecured non-insider creditors of the Debtors on a consolidated basis, the Agent and counsel to the Agent, and the transfer agent for the stock of OHB. As this Motion is seeking first-day relief, notice hereof and of any order entered hereon will be served in accordance with Local Bankruptcy Rule 9013-1(m). Due to the urgency of the circumstances, the Debtors submit that no other or further notice of this Motion is required.

NO PRIOR APPLICATION

44. No previous request for the relief sought in this Motion has been made to this or to any other Court.

¹¹ See In re New World Pasta Co., 2004 WL 5651052, at *5 (Bankr. M.D. Pa. July 9, 2004) (“[Where] the continued operation of the Debtors’ businesses would not be possible . . . serious, immediate and irreparable harm to the Debtors and their estates would occur.”); Northwest Airlines Corp. v. Assoc. of Flight Attendants-CWA (In re Northwest Airlines Corp.), 349 B.R. 338, (S.D.N.Y. 2006) (holding that the loss of ongoing business can constitute irreparable harm).

CONCLUSION

WHEREFORE, the Debtors respectfully request entry of interim and final orders, substantially in the form filed herewith or to be filed, granting the relief requested herein and such other and further relief that may be just and proper under the circumstances.

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Respectfully submitted,


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