

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

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IN RE: * NO. 1:08-bk-10249
*
PROPEX, INC., et al., * CHAPTER 11
*
Debtors. * JOINTLY ADMINISTERED
*

FEBRUARY 13, 2008

BE IT REMEMBERED, that the above-styled
cause came on to be heard on the 13th day of February, 2008,
before the Honorable John C. Cook, Judge of said Court, when
all parties announced ready to proceed, and the following
proceeding was had, to wit:)

* * *

Donna F. Segars, CCR
Freelance Court Reporting Service
6255 Dayton Boulevard
Chattanooga, Tennessee 37343-2710
(423) 843-3114

1 APPEARANCES:

2 FOR THE DEBTORS:

3 HENRY J. KAIM, ESQUIRE

-and-

4 MARK W. WEGE, ESQUIRE

King & Spalding, LLP

5 1100 Louisiana, Suite 4000

Houston, Texas 77002-5213

6

7 SHELLEY D. RUCKER, ESQUIRE

Miller & Martin, PLLC

8 832 Georgia Avenue, Suite 1000

Chattanooga, Tennessee 37402

9

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FOR THE CREDITORS:

11

IRA S. DIZENGOFF, ESQUIRE

12

-and-

JAMES SAVIN, ESQUIRE

13

Akin Gump Strauss Hauer

& Feld, LLP

14

590 Madison Avenue

New York, NY 10022-2524

15

16 RICHARD B. GOSSETT, ESQUIRE

Baker Donelson Bearman

17

& Caldwell, PC

1800 Republic Centre

18

633 Chestnut Street

Chattanooga, Tennessee 37450

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1 APPEARANCES: (Cont'd)

2 FOR THE CREDITORS:

3 ALDOUS D. McCRORY, ESQUIRE
4 Vice-President, Legal Services Division
5 EPB of Chattanooga
6 10 West MLK Boulevard
7 Chattanooga, Tennessee 37402

8 HAROLD L. NORTH, ESQUIRE
9 Chambliss, Bahner & Stophel
10 Two Union Square, Suite 1000
11 Chattanooga, Tennessee 37402

12 RICHARD C. KENNEDY, ESQUIRE
13 Kennedy, Koontz & Farinash
14 320 North Holtzclaw
15 Chattanooga, Tennessee 37404

16 GENE L. HUMPHREYS, ESQUIRE
17 Bass, Berry & Sims, PLC
18 315 Deadrick Street, Suite 270
19 Nashville, Tennessee 37238

20 -and-
21 CHRIS L. DICKERSON, ESQUIRE
22 -and-

23 PETER E. KREBS, ESQUIRE
24 Skadden, Arps, Slate, Meagher
25 & Flom, LLP
333 West Wacker Drive
Chicago, Illinois 60606-1285

FOR THE INTERNAL REVENUE SERVICE:

20 M. KENT ANDERSON, ESQUIRE
21 United States Department of Justice
22 Office Of U.S. Attorney
23 1110 Market Street, Suite 301
24 Chattanooga, Tennessee 37402

25

* * *

1 APPEARANCES: (Cont'd.)

2 FOR THE UNITED STATES TRUSTEE:

3 KIMBERLY C. SWAFFORD, ESQUIRE
4 Historic U.S. Courthouse
5 31 East 11th Street, 4th Floor
6 Chattanooga, Tennessee 37402

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20 (Note: Unless provided by counsel to the court reporter,
21 some names may be rendered as the best phonetic
approximation.)

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1 THE COURT: Clerk, call the case.

2 THE CLERK: In the Chapter 11, jointly
3 administrative cases of Propex, Inc., motions hearing.

4 THE COURT: All right. I believe we have a
5 number of motions set on our agenda this morning. We also
6 have an application to report, the counsel for the
7 administrative creditors' committee which is not on the
8 agenda, and I think we have set that for hearing this
9 morning.

10 MR. GOSSETT: Your Honor, Richard Gossett
11 for the creditors. We will also be filing today an
12 application for the committee to retain as counsel Akin Gump
13 and we have two of their lawyers here today on behalf of the
14 committee, and I will introduce them when it's appropriate,
15 as well.

16 THE COURT: All right. First of all, let's
17 have a record of appearances, just give me a name and who
18 you represent.

19 MR. KAIM: Good morning, Judge. Henry Kaim
20 and Mark Wege of King & Spalding here representing Propex,
21 the debtors.

22 THE COURT: All right.

23 MS. RUCKER: Shelley Rucker with
24 Miller & Martin, Your Honor, as local counsel, also
25 representing Propex.

1 THE COURT: All right.

2 MR. DIZENGOFF: Good morning, Your Honor.

3 Ira Dizengoff and James Savin with Akin Gump here on behalf
4 of the initial creditors today.

5 THE COURT: All right.

6 MR. McCRORY: Good morning, Your Honor.

7 Aldous McCrory representing EPB.

8 MR. NORTH: Your Honor, Hal North for
9 Synthetic Industries.

10 MS. SWAFFORD: Kim Swafford for the
11 U.S. Trustee's office.

12 MR. KENNEDY: Richard Kennedy for Platipus
13 Earth Anchoring Systems.

14 MR. HUMPHREYS: Your Honor, Gene Humphreys,
15 from Bass, Berry & Sims, on behalf of BNP Paribas. I also
16 have with me Chris Dickerson and Peter Krebs from the
17 Skadden firm in Chicago. They've previously been
18 pro hac vice in this case.

19 THE COURT: All right.

20 MR. DICKERSON: Good morning, Your Honor.

21 THE COURT: Okay. Anyone else?

22 MR. KAIM: Your Honor, Henry Kaim on behalf
23 of the debtors. We have some eighteen or so motions to go
24 over today. I am pleased to announce to the Court that the
25 motions, at this point, have been negotiated and

1 uncontested, saving except for one issue with respect to the
2 EPB has an objection that we've not been able to resolve,
3 but I don't think that that will take much time this
4 morning.

5 Since our last hearing, the creditors'
6 committee was appointed. They have engaged counsel. The
7 debtors have spent quite a bit of time in working with the
8 creditors' committee and their counsel to explain what we're
9 trying to do in these motions, a substantial amount of
10 financial information has been provided to those
11 professionals and the result has been that they have
12 reviewed all of the motions, they've made comments. We've
13 made changes to several of the orders. We have provided the
14 Court with black lines of those changes.

15 THE COURT: Yes, I did read those this
16 morning.

17 MR. KAIM: The long and the short of it is
18 I think we're going to have largely uncontested hearings,
19 except with respect to the one objection as to the utility
20 motion.

21 THE COURT: All right.

22 MR. KAIM: Having said that, Your Honor, I
23 think we're going to just go through the motions and then
24 we'll handle the one contested motion when we get to that
25 one.

1 THE COURT: Very well.

2 MR. KAIM: Mr. Wege will be handling the
3 first set of our motions.

4 Thank you.

5 MR. WEGE: Good morning, Your Honor. As
6 Mr. Kaim mentioned, we have submitted to the Court modified
7 orders that reflect our agreements with the creditors'
8 committee. Many of the orders have had some modification.
9 Largely, the committee consent rights and the types of
10 rights to review payments that were made, all of that is
11 acceptable, and those black line orders reflect our
12 agreement. Again, as Mr. Kaim alluded, we are -- we have
13 agreements on every motion, except for the utility motion.

14 The matters that I'll be covering this
15 morning are matters 1 through 10 on our agenda. And I can
16 proceed in any way the Court desires. I can go through the
17 motions briefly, or if the Court just simply wants to ask
18 questions on any particular motion, I can just deal with the
19 questions like that.

20 THE COURT: Why don't we just go through
21 the motions briefly then.

22 MR. WEGE: Okay. Your Honor, first on the
23 agenda is the motion to extend time to file statements and
24 schedules. And the debtor, obviously, is a complex entity
25 with operations throughout the world and the debtor is

1 attempting to work on preparing statements and schedules and
2 recently contacted an applicant who'll be -- who'll file an
3 application to be retained in this matter in order to help
4 assist in the preparation with the statements and schedules.

5 We have requested until April 2nd to file
6 the statements and schedules in this case. We've, actually,
7 conferred with the U.S. Trustee about that date, and we have
8 some information in our post-341 notice which references
9 that, and, actually, we may have an initial meeting to
10 determine that, and then accommodate a date for a full
11 341 meeting following the filing of the statements and
12 schedules.

13 We believe this is an adequate time and, in
14 fact, we're going to try to file our statements and
15 schedules before that date. We are confident that we can
16 file them on or before April the 2nd.

17 THE COURT: All right. That motion will be
18 granted.

19 MR. WEGE: Your Honor, the second motion
20 deals with the -- deals with the desire of the debtors to
21 continue to honor its obligations with respect to its
22 insurance programs. Included within that are really, I
23 would say, three things. One is the debtor, just like
24 virtually any other company, enters into an agreement with a
25 premium finance entity to finance the premiums. They retain

1 the security interest in the unearned premiums, paid an
2 initial payment, an initial payment for the insurance cost,
3 however, we have continuing premium and obligations. One
4 payment was not made pre-petition and we seek approval to
5 pay that payment and continue to pay our premium finance
6 obligations which will allow us to continue with our
7 insurance program that we have in place that was attached to
8 the motion.

9 THE COURT: Yes, that motion will be
10 granted, as well.

11 MR. WEGE: And just to make clear on the
12 record, with respect to our workers' comp program, we are
13 assuming our obligations under our insurance programs which
14 includes the 12-01-05 insurance programs, which there's not
15 proof on that, and so we'll be honoring those, as well,
16 Your Honor.

17 THE COURT: All right.

18 MR. WEGE: Your Honor, with respect to the
19 next motion on the docket, that is, No. 3, this is the
20 motion to establish procedures for allowance of reclamation
21 claims. There's no objection to that motion. We have
22 submitted a revised order which incorporates the committee's
23 comments with respect to participation of that.

24 THE COURT: Yes, I have reviewed that and
25 that motion will also be approved.

1 MR. WEGE: Thank you, Your Honor.

2 With respect to Item No. 4 on the agenda,
3 Your Honor, this is a motion to approve payment of outside
4 maintenance providers and contractors in satisfaction of
5 liens. Again, we have submitted a red line order that
6 incorporates the committee's participation in this process,
7 as well.

8 THE COURT: Okay.

9 MR. WEGE: And what this allows is any
10 party that has a lien on our property, that has
11 performed maintenance or performed by outside contractor, we
12 have a right to the receipt to pay any pre-petition amount
13 to satisfy that lien. The committee's introduced some
14 language that provides for making sure that in the debtors'
15 good faith that the value of the property is an excessive
16 amount, and we certainly intend to proceed on that.

17 THE COURT: The motion will be granted.

18 MR. WEGE: Your Honor, with respect to
19 No. 5 on the agenda, there's been no changes in this form of
20 the order. It's a motion to reject fifteen different
21 executory contracts. These are contracts largely where we
22 have either terminated employees that were terminated
23 pre-petition or various leases and contracts at vacated
24 locations where we're no longer doing business, such as the
25 Genesee, Idaho, location, and we do not need those, any of

1 those contracts for the business operations of the debtor.
2 They are burdensome. We do not want to pay administrative
3 claims with respect to any of those units. We did see a
4 letter that was filed with the Court which identified some
5 potential pre-petition claims, but that didn't seem to
6 affect the decision on rejection.

7 THE COURT: The motion will be granted.

8 MR. KENNEDY: Your Honor?

9 THE COURT: Yes.

10 MR. KENNEDY: Does this rejection motion
11 include the Platipus contract?

12 MR. WEGE: It does.

13 MR. KENNEDY: May I address the Court,
14 Your Honor?

15 THE COURT: All right.

16 MR. KENNEDY: As is set forth in the motion
17 in one paragraph, the debtor was a party to the contract
18 Platipus Earth Working Systems, Inc., I guess, LLC, prior to
19 the petition and was terminated prior to the petition, and
20 there are rights that stem from that contract that are not
21 monetary rights. And I want to make sure and I want
22 representation from the debtor that nothing in this, nothing
23 arising from this hearing, including the order resulting
24 therefrom, would adversely affect Platipus's rights to seek
25 contract rights arising from that objection in a further

1 proceeding before this Court, and, if so, I would -- and if
2 not, I would like to question the debtors' representatives
3 about that contract.

4 THE COURT: So you are saying that it was
5 terminated pre-petition --

6 MR. KENNEDY: I'm saying that --

7 THE COURT: -- and there is no sense in
8 rejecting it now?

9 MR. KENNEDY: No, I'm -- well, there may --
10 I just want to make sure that nothing changes as to the
11 status of that contract by the order that's entered as a
12 result of this motion because that was a pre-petition
13 termination.

14 MR. WEGE: Your Honor, may I address that?

15 THE COURT: All right.

16 MR. WEGE: That may be a little bit
17 different variant than what we spoke of before the hearing
18 today. All we are seeking to do is to ensure that the
19 contract is rejected. If it was terminated pre-petition or
20 not, we didn't want any lingering doubt as to whether the
21 contract was no longer enforced, so by our rejection to the
22 contract, we're seeking to cut off and reject and
23 terminate -- not terminate, but reject the contract and then
24 cut off the potential act, that's all we're attempting to do
25 by the motion. We are not attempting to affect any property

1 rights that this may have. And so we have explained that we
2 are more than willing to stipulate that as part of the DIP
3 motion on Mr. Kaim's motion, Your Honor.

4 THE COURT: Is that satisfactory?

5 MR. KENNEDY: Well, as long as Your Honor
6 knows that the term "property rights" may well include a
7 monetary claim post-petition as a result of what the debtor
8 intends to do with the trademark jointly owned or were
9 jointly owned by the parties and the systems that arose
10 under those contracts, because if they intend to continue
11 operating with that system, then there will probably be an
12 adversary proceeding about that.

13 MR. WEGE: Your Honor, obviously, we're not
14 to stipulate as to whether they have or do not have any sort
15 of -- have any claims.

16 THE COURT: That's just not -- it's not
17 being determined today.

18 MR. WEGE: It's not being determined,
19 right.

20 THE COURT: I understand that.

21 All right. The motion will be granted.

22 MR. WEGE: Your Honor, with respect to
23 going down the agenda, with respect to Item 6, this is a
24 motion to authorize our pre-petition customer rebates that
25 we incur in the ordinary course of business. With respect

1 to that order, we do have a revised order again
2 incorporating the concept of providing information to you
3 about this program.

4 This is a program that is a program that
5 the company has had in place. It is a series of contracts
6 in which the company provides rebates to its customers in
7 the -- just in the ordinary course of business. The program
8 is an incentive program, that primarily it is a credit-based
9 program for continued purchases for 2008 purchases, so it's
10 incentive based, and it continues to provide benefit to the
11 debtor going forward and to its customers.

12 As part of this, I would also note that we
13 have typical customer returns and rebates that are contained
14 in these contracts. I think there is a nominal amount of
15 returns that are typical, that the company if there's an
16 error in the product, provide the product, or refund on the
17 product or provide new product, that's about \$75,000, of
18 which we would include in this.

19 THE COURT: All right. No objection?

20 That motion will also be granted.

21 MR. WEGE: Your Honor, Item No. 7, again, a
22 revised order here. This is the debtors' motion to approve
23 payment for goods, materials and services that were ordered
24 pre-petition and delivered post-petition, and that's one
25 aspect of the order, and then payment of any pre-petition

1 claims of common carriers, warehousemen and other possessory
2 lien claims subject to certain dollar amounts that are
3 described in the motion. This relief, at least the first
4 part of this relief really just simply describes the law,
5 which is that if the debtor doesn't have a contract and he
6 has a purchase order and the goods or services were provided
7 post-petition, that we simply affirm by way of order that,
8 that, in fact, if it's provided post-petition, they have an
9 adversary.

10 THE COURT: Yes. Motion will be granted.

11 MR. WEGE: With respect to -- with respect
12 to Item No. 8, this is the -- this is an additional motion,
13 and let me provide just a brief background to the Court.

14 As the Court is aware, on the first day,
15 the Court granted a motion that provided an appointment of,
16 I think, as the notice provider in the case and then also
17 approved a form of 341 meeting. Since the first day order
18 was entered there was an error and accidentally a 341 notice
19 which contained a bar date or, actually, two bar dates was
20 entered and I believe that notice was withdrawn by the
21 clerk's office or will be withdrawn. Unfortunately, that
22 may have created a bit of confusion.

23 Additionally, there was a desire by the
24 debtor to simply provide a single notice that contains the
25 single bar date to its creditors on the majors, that would

1 be the most efficient way to deal with that. We contact the
2 U.S. Trustee's office, discuss any dates that they desire
3 for a 341 meeting, incorporating the timing that they file
4 notices and schedules. And then we also discussed with the
5 committee a singular bar date for not only general
6 creditors, but also government units. And so we just
7 slightly modified the proposed bar date from July 7th to
8 this July 16th, which is precisely 180 days from the
9 additional order, so it incorporates the time frame for
10 governing units so that we have, if this motion is approved,
11 a singular bar date of July 16th in the case and a single
12 notice of a bar date and 341 notice and the form that was
13 attached to the motion, with the only caveat to that, of
14 course, the form incorporated a July 7th date and we
15 modified that to July 16th, and that's the only
16 modification.

17 THE COURT: All right. The motion will be
18 granted.

19 MR. WEGE: Your Honor, Item No. 9, which we
20 can either talk about it now or we can put it off, is the
21 utility motion.

22 THE COURT: You can just put that to the
23 hills and we'll come back to that one.

24 MR. WEGE: Very well. And then, finally,
25 with respect to my presentation, subject to the utility

1 matter, is a motion for authority to retain and compensate
2 professionals used in the ordinary course of business.

3 We have uploaded a revised order which has
4 got a revised Exhibit A attached to it of the professionals
5 that the company has typically used in the past on an
6 ongoing basis. We have certain caps in the motion. In
7 addition to negotiating with the committee, they requested
8 an aggregate cap for all of the professionals so that the
9 ordinary course of professionals would not be required to
10 file the application in the case.

11 We have no problems with that form of
12 order, and the motion in order contemplates that any lawyer
13 or accountant will need to file a 2014 affidavit with the
14 Court that identifies any connections, as well.

15 THE COURT: All right. I might point out,
16 and I've noticed that several of the declarations that have
17 been filed by attorneys, including several that are filed
18 with these motions for a pro hac vice status, use our
19 electronic signature, and, actually, our administrative
20 procedures say that any declaration or affidavit should,
21 actually, be signed by the declarant and scanned in, that's
22 our administrative procedure. I will waive that requirement
23 with respect to attorneys on the motions for pro hac vice
24 because those can also be made in open court. I would ask
25 that any future declarations or affidavits comply with the

1 administrative procedures and have the professional actually
2 sign those.

3 MR. WEGE: Your Honor, we will make sure
4 that that happens.

5 THE COURT: All right.

6 MR. WEGE: And, with that, we offer the
7 ordinary course of professionals motion.

8 THE COURT: That will be granted.

9 MR. WEGE: I'm going to now -- on Item
10 No. 11, I'm going to turn the podium over to co-counsel with
11 respect to the retention issue.

12 MS. RUCKER: Your Honor, Shelley Rucker
13 here for Miller & Martin. At the time the agenda was
14 prepared there had been no objections or no response of the
15 pleadings to our application. As of last night, there was a
16 document filed that was referred to as a "Notice of Adverse
17 Interest" that we'll need to address today. I didn't know
18 if the Court wanted to put that to the hills since it
19 appears to be contested, or if you would like for --

20 THE COURT: Let's do that. Let's put that
21 to the hills and come back to it.

22 MR. KAIM: Your Honor, Henry Kaim on behalf
23 of King & Spalding. The next item is the application to
24 approve the retention of King & Spalding as debtors'
25 counsel. We have filed the application, we have filed the

1 disclosures, and as that's came up, we've filed some
2 supplements to disclosures. For instance, Akin Gump was
3 retained by the creditors' committee. It so happened that a
4 few years ago I had the privilege of being a partner at
5 Akin Gump and I wanted to make that disclosure. No
6 objections have been filed. We've had discussions with the
7 U.S. Trustee on a number of matters. No objection has been
8 filed by the U.S. Trustee.

9 THE COURT: Your firm holds a pre-petition
10 claim that that's to be canceled; is that right?

11 MR. KAIM: That's exactly right,
12 Your Honor.

13 THE COURT: So you will not be a creditor.

14 MR. KAIM: We will not be a creditor.

15 THE COURT: I assume the U.S. Trustee has
16 no problem with --

17 MS. SWAFFORD: I don't, and I justed wanted
18 the Court to note that they did agree to a cap.

19 THE COURT: Yes, I saw that.

20 The application will be granted.

21 MR. KAIM: Thank you, Your Honor.

22 The next item is the application to approve
23 the retention of Houlihan Lokey. Houlihan Lokey is the
24 debtors' financial adviser. They're a well-known financial
25 adviser and, particularly, well known in distressed

1 situations and in Chapter 11 proceedings. The retention of
2 Houlihan Lokey is on terms that are set forth in letter
3 agreement that is attached.

4 At this point in time where we are is,
5 basically, \$125,000 flat fee per month. There is a
6 transaction fee upon the effective date of the plan of
7 reorganization. The transaction fee is set forth in the
8 agreement. The monthly fee that we pay after four months
9 gets a 50 percent credit against the transaction fee, so
10 we'll get some credit off of the monthly fee that we pay off
11 the transaction fee. The transaction fee is payable on the
12 effective date of a plan of reorganization. There are no
13 objections to the application. It's been discussed with the
14 creditors' committee. And we would request that be granted.

15 THE COURT: It will be granted.

16 MR. KAIM: Thank you, Your Honor.

17 The next item is the debtors' motion for an
18 order establishing procedures for payment of interim
19 compensation and reimbursement of expenses.

20 This is a procedure order, Your Honor. It
21 is an order that would allow for a monthly payment of fees
22 and expenses to its estate professionals. We can't claim
23 authorship of this order. This type of order is filed and
24 entered in, virtually, every Chapter 11 case that's been
25 decided. It, basically, says, Your Honor, that on a monthly

1 basis the estate professionals will be submitting their
2 invoices to the debtors and to the each other. The
3 committee and the debtor will have a time period of 30 days
4 to review the fees and expenses.

5 If we have an objection, any estate party
6 has an objection, they would lodge the objection to the
7 specific disputed items. Those items would not be -- would
8 then not be paid. However, after that, the debtor would
9 make the payment, but it would be subject to a holdback, and
10 the holdbacks that we propose are 80 percent with respect to
11 fees and 90 percent with respect to expenses.

12 THE COURT: I think there's some papers on
13 that issue.

14 MR. KAIM: That's what would be paid. The
15 whole -- I'm glad I've got my creditors here to protect me.
16 It would be paid on an 80 percent basis as to fees and 90
17 percent as to expenses. We thought that was reasonable.
18 Many of these orders have 100 percent of the expenses paid,
19 but we went with the 80/90 rule. And then, every four
20 months an interim fee application would be required to be
21 filed and submitted to the Court.

22 We've discussed this with the U.S. Trustee.
23 We've encouraged her to discuss it with various
24 U.S. Trustees throughout the country, because it is, again,
25 there's no probable authorship here. We didn't make this

1 one up. It's a type of order that's used around the
2 country.

3 THE COURT: All right. The motion will be
4 granted.

5 MR. KAIM: Thank you, Your Honor.

6 The next one is the debtors' motion for an
7 order authorizing payment of pre-petition, non-employee
8 sales commissions incurred in the ordinary course of
9 business.

10 Your Honor, the debtor has, basically,
11 sales personnel throughout the country and, importantly, in
12 foreign countries and these people work on a commission
13 basis. This motion seeks to pay commissions that are
14 pre-petition commissions that were earned in 2007 that would
15 normally be payable during this time frame in 2008. We put
16 a cap on the amount that would be payable on these
17 commissions at \$700,000.

18 These commissions are critically important
19 to us for obvious reasons. We've got to keep these people
20 selling our product. And we felt that we needed a motion.
21 Arguably, it could have been in ordinary course, but because
22 it is a pre-petition, we wanted to make sure that we got the
23 order authorizing such a payment. We have vetted this
24 thoroughly with the creditors' committee, they see what it
25 is, and they are in agreement with us.

1 There is one slight modification that I
2 have to make or a clarification. We have the No. 9, as far
3 as these sales agents in there, there is a tenth person
4 involved. It would not increase our \$700,000 cap. It does
5 not increase the cap. But, there is a tenth person
6 involved, and with respect to that tenth person, that person
7 is in Chattanooga and he is categorized as an employee.
8 He's not an executive, but he is a sales employee. The
9 others are non-employee people. But, he did have and this
10 is his commission for the entirety of 2007 that he has
11 earned and is payable. Other employees receive their
12 commissions.

13 This particular employee was -- the facts
14 are he was living in the Midwest, he moved to Chattanooga,
15 he now lives in Chattanooga. He is categorized as an
16 employee, but he does have this 2007 commission due and
17 owing to him, and I wanted to make that clear that we would
18 like to pay him pursuant to this order. It does not
19 increase the cap. The cap is still at \$700,000.

20 THE COURT: All right. With respect to
21 these motions that are seeking to pay pre-petition claims,
22 you, of course, are relying on the affidavit that's been
23 filed in support of these motions and which I have read and
24 which I consider a part of the record in supporting the
25 motions that you're seeking to have approved.

1 MR. KAIM: Yes, Your Honor.

2 THE COURT: That motion will be granted.

3 MR. KAIM: Thank you, Your Honor.

4 The next item is our motion for an order
5 authorizing debtors to pay pre-petition claims of certain
6 critical trade vendors. I won't go over the facts set out
7 in the motion but try to be very specific as to our reasons
8 for seeking that. We also are relying on Mr. McCarter's
9 first day affidavit with respect to that motion.

10 In general, we're seeking authority to pay
11 up to eight million dollars with respect to critical
12 vendors. We have vetted this in great detail to both our
13 DIP lenders and our creditors' committee. They've
14 recognized the absolute need to pay these vendors, to be
15 able to continue on an uninterrupted service, and we feel
16 it's imperative that we get this type of relief. We tried
17 to curtail it, the eight million dollars. We hit the cap,
18 that's what happened, and only saw 2 percent of our
19 aggregate liabilities, and we did try to curtail the amount
20 of money that we would be paying to critical vendors to only
21 those vendors that are absolutely essential to our business.

22 THE COURT: The motion will be granted.

23 MR. KAIM: Thank you, Your Honor.

24 The next motion is the DIP motion. Since
25 the interim order that the Court entered on the DIP, we have

1 had significant negotiations between the DIP lenders, the
2 debtors, and the newly formed committee. The committee
3 jumped right in. They got into the details of the credit
4 agreement, got into the details of the interim order.

5 We had several negotiations. The debtor
6 pretty much refereed those negotiations. I am pleased to
7 announce that there is an agreement with respect to that DIP
8 order.

9 We did get two objections. One from the
10 U.S. Attorney's office on behalf of the IRS and one on
11 behalf of Shaw Industries. We've resolved those two
12 objections by language that we're going to include in the
13 order. The Assistant U.S.A. wanted language with respect to
14 responsible parties and the internal revenue code,
15 basically, saying it's not applicable to them. I'll put
16 that language in there.

17 Shaw Industries wanted language that made
18 it clear that the liens granted were not granted on any
19 property other than the debtors' property. We're going to
20 put their language in there. The committee negotiated
21 changes to the order. They're changes that are beneficial
22 to the debtors.

23 Basically, we gave more time with respect
24 to an event of default. As the Court recalls, it was five
25 business days and now it's ten days. The committee is

1 included in all notices that are to be granted and the
2 committee is included on all reporting requirements and they
3 are to be granted.

4 So I believe it's a fair order and I
5 believe it's one that will allow the debtor to continue in
6 operations, continue to make payments to its vendors, and we
7 request that agreeable amount.

8 THE COURT: Very well. Submit a final
9 order.

10 MR. DIZENGOFF: Your Honor, if I could just
11 make two comments.

12 THE COURT: Yes.

13 MR. DIZENGOFF: Your Honor, Ira Dizengoff
14 with Akin Gump. We're the proposed counsel for the
15 creditors' committee, together with Mr. Gossett.

16 Your Honor, we are happy to report that on
17 the first day applications, as Mr. Kaim referenced, we've
18 worked through a number of issues and worked very closely
19 with the company. We've gotten off to a very good start.
20 We've gotten a good flow of information and we're getting a
21 lot of, you know, what I would call "good karma," a good
22 working relationship, so I want to report that to you and
23 let you know that's off on a good footing.

24 On the DIP financing, Your Honor, we
25 consent to the DIP financing. We think the company needs

1 the money and we did negotiate some changes to it. I want
2 to highlight one change, which is the standing of the
3 creditors' committee to bring an action in the event that we
4 find infirmities in the liens or claims of the DIP lenders.
5 That's somewhat out of the ordinary, but sometimes you have
6 to come first and ask for relief from the Court. But, in
7 terms of expanding the time frame, we asked for a much
8 longer period, they asked for a much shorter period, and
9 we've compromised that 90 days with a right to have the
10 committee have standing in that regard.

11 Your Honor, our concern on the DIP
12 financing is that it sets forth a timetable, a very
13 aggressive and short timetable, and the committee's concern
14 here is we don't want to dress this up for a valuation fight
15 in a very challenging business environment for the company,
16 so what we had told the DIP lenders is, look, we can live
17 with this and we understand the need for the financing and
18 we're not going to get in the way of that because the
19 company, obviously, needs the money. But, if these don't go
20 according to plan, you know, we might come back before,
21 Your Honor, and ask to refinance out the DIP lenders. These
22 are DIP lenders who are consenting to priming themselves.
23 If we could find someone else who might give us a longer
24 runway, and it might be needed, we'll come back before you
25 and just kind of bookmark that issue for you.

1 It's our fervent hope, Your Honor, that we
2 can work with the banks to get to some kind of consensual
3 resolution of the Chapter 11 case. That, obviously, has to
4 do with valuation. It, obviously, has to do with the
5 business environment. I just wanted to let you know that
6 we're going to try and work with the banks as consensually
7 as possible.

8 If that doesn't happen, we might come back
9 to you with a refinancing alternative just to get us some
10 more runway, because this is a difficult time for this
11 business, the housing market in particular. So I just
12 wanted to kind of bookmark those issues for you.

13 THE COURT: I understand.

14 Thank you.

15 MR. DIZENGOFF: Thank you, Your Honor.

16 THE COURT: All right.

17 MR. KAIM: I believe an uncontested matter
18 is the committee's motion to retain Baker Donelson.

19 MR. GOSSETT: Your Honor, we can have that
20 today, or we're going to submit Akin Gump's today and we can
21 have it at the next hearing. Who wants to handle that?

22 THE COURT: I can grant that ex parte so
23 you can just go ahead and submit that.

24 MR. GOSSETT: All right. Thank you. I'll
25 put the order in.

1 THE COURT: All right. I'll grant that.

2 MR. GOSSETT: Thank you.

3 MR. KAIM: At this point, Your Honor, I
4 think we're down to the two, I suppose, contested matters,
5 and I don't think they're heavily contested. It will be the
6 utility's motion which is a procedural motion on our part
7 and the retention of Miller & Martin.

8 THE COURT: All right. I saw something on
9 the docket. I think the IRS had filed an objection to an
10 order that had to do with pre-petition wages. Is that
11 correct? I don't know that that's -- have you worked that
12 out?

13 MR. ANDERSON: Your Honor, we've worked
14 that out. I think we will be able to resolve that in the
15 next day or two. There is a pre-petition employment tax
16 return that will not post for some reason. It's going to
17 have to be refiled. We can resolve that mechanically. The
18 debtors agreed to furnish one of my administrative people
19 those tax deposits which is what we asked for in that
20 objection.

21 THE COURT: All right.

22 MR. ANDERSON: They've agreed to do that,
23 so I think we can resolve all of those matters. We,
24 probably, won't be able to resolve it today. It may take
25 another day or two. There was a very large employment tax

1 deposit that was misapplied and refunded and then it was
2 sent back to the IRS, and we're trying to run all that down.
3 These are fairly large numbers.

4 THE COURT: What do we do with those
5 pending objections then? Is there going to be an order or
6 do we just ignore them?

7 MR. ANDERSON: Your Honor, if you would
8 like to strike those objections without prejudice to my
9 refiling, in that they were --

10 THE COURT: Just withdraw those. I'll just
11 indicate that those have been withdrawn then.

12 MR. ANDERSON: And then, just as long as
13 they're withdrawn, and then with the understanding we think
14 we've got it all resolved. It's going to take a day or two
15 to get with counsel.

16 MR. KAIM: That's fine. The objection was
17 to the wage order which was already entered.

18 THE COURT: Right, yes.

19 MR. KAIM: So that's fine.

20 THE COURT: Yes.

21 Okay. So we will return now to the
22 utility's matter.

23 MR. KAIM: All right.

24 MR. WEGE: Your Honor, as Mr. Kaim
25 mentioned, we have only one party that appears to have any

1 objection today, which is disappointing apparently, but, we
2 did reach out to that party. We didn't -- we were not able
3 to make any headway at all unfortunately.

4 Your Honor, the utility's motion is a
5 procedural motion, as Mr. Kaim mentioned. It's a means for
6 dealing with a broad group of utilities that the company
7 uses. The company has, approximately, 25 utility suppliers
8 throughout the United States.

9 And with respect to how we are going to
10 best deal with all of those utilities, we have suggested a
11 very streamlined procedure to deal with our proposed
12 adequate assurance, which is, actually, we believe a very
13 good offer with respect to adequate assurance, and that's
14 not what we're here to talk about today necessarily because
15 there is within the procedure there's the deal of whether
16 that's the right amount of adequate assurance.

17 But, what we have proposed is set up a
18 procedure in which if somebody objects to our offer of
19 adequate assurance, which our offer is that we pay all
20 pre-petition bills and then we make a half-month deposit,
21 that's our offer, if somebody objects to that, and let's say
22 the EPB would be a party that might object to that, that
23 offer, what we are proposing to do is we will, if the order
24 is entered, reserve that money, all of our utilities, and
25 then they will have an opportunity, literally, the next day,

1 if they wish, to file the request for some different form of
2 adequate assurance.

3 Once that request is filed, we have a
4 20-day period to negotiate with that utility on the
5 appropriate amount of adequate assurance. If we can't reach
6 a resolution, then we will file a motion within 20 days
7 to -- on the next -- on or of this hearing date that the
8 Court has set to, actually, determine the amount of adequate
9 assurance. If a utility is satisfied with our adequate
10 assurance offer, then there will be no request and that
11 would simply be the form of adequate assurance.

12 It's a means to wrestle with the marshal
13 with 25 different utilities that we have, and, so far, we
14 appear to only have one, a smaller provider to the debtor
15 that has, in any way, objected to the procedures we've
16 suggested.

17 We believe it's a good way and we believe
18 it is supported by the code in that, at any time, the code
19 allows a partying interest to make a determination as to
20 adequate assurance. What we see this as is an interim means
21 or an interim determination as to adequate assurance,
22 subject to any party filing a notice with us and then having
23 a determination on that.

24 We believe it's fully supported by the
25 code. We don't believe it's, in any way, erroneous, and, in

1 fact, it's supported by everybody that we have contacted,
2 including the various committee, including our DIP lenders.

3 We've got agreement, aside from one party.
4 Unfortunately, that one party wants us to accede to their
5 wishes, has demanded that we accede to their wishes, and
6 that they've threatened us, that if we don't accede to their
7 wishes, they're going to attack local counsel. It's very
8 disappointing, very disheartening that that was the approach
9 that they took, but that is the approach that they took.

10 What we have done and we have suggested is
11 that we will handle any matters with respect to the EPB, our
12 firm, King & Spalding. There's no need for local counsel to
13 be involved in any discussions with EPB, and we will deal
14 with any requests that they file through our procedure.

15 We are not attempting to determine today
16 what their adequate assurance is. We do believe it's a good
17 offer of adequate assurance, but if they have some other
18 idea, they can send us a notice, too, on that issue.

19 We think that the Court should enter this
20 procedure. It's a streamlined way to deal with the issues
21 and, apparently, that's -- which the utilities have, in
22 fact, looked at the procedure that have been filed. So we
23 would propose the procedures.

24 THE COURT: All right.

25 MR. McCrory: Thank you, Your Honor.

1 May it please the Court, I want to address
2 the issue that was just raised regarding a perceived threat
3 related to this discussion. There's only been one
4 conversation that's taken place between the parties and that
5 occurred after the first day hearing on the 22nd, in which
6 I attempted to communicate with debtors' counsel what the
7 issues were that we needed to address.

8 There were three issues. And at the end of
9 the conversation, the third issue was raised, in which I
10 attempted to make debtors' counsel aware of the
11 conversations that I had had in court with local counsel
12 relating to this issue of representation, at which point it
13 was characterized at that time that we were trying to some
14 how leverage the question about a potential conflict to some
15 how improve our position, that has never been the intent of
16 EPB or me personally, and I am personally offended by the
17 fact that not only was it raised by conversations, but that
18 it was brought before the Court, because the presentation
19 that was made was simply these are the issues that we need
20 to be aware of, that we need to address. We never, in any
21 way, attempted to use leverage of that type to somehow
22 improve my client's position. So I want to make clear, for
23 the record, that that was not the intent of raising that
24 issue.

25 Dealing, specifically, with the question of

1 adequate assurance in this matter, the objection that was
2 filed simply asked the Court to direct the debtor to follow
3 procedure as provided in 366. We understand that the debtor
4 is proposing a somewhat unique proposition, that they would
5 fully pay a pre-petition debt.

6 Your Honor, I think our situation
7 underscores why it's important to follow 366 in this case,
8 and that is each creditor or each utility is not similarly
9 situated. In our case, the pre-petition to that has no
10 leverage, that EPB was fully secured prior to the filing of
11 this petition by a third party and sought recovery from the
12 third party, and so offering to pay that would not, in any
13 way, advance or improve our position related to offering
14 post-petition service.

15 And so 366 provides for the debtor to
16 provide adequate assurance satisfactory to the utility
17 within 20 days of filing, and we think that that procedure
18 is adequate. If they've worked out an agreement with 24 to
19 25, they've proven that the process works and that there is
20 no need to deviate from that.

21 While in the grand scheme, the numbers that
22 have been thrown around this morning, we would agree that
23 this utility is a small debtor, but in light of the exhibit
24 that was filed, we are the second largest utility.

25 THE COURT: Let me stop you and ask you

1 this question. None of the other utilities have objected to
2 the procedures that the debtor has proposed, except EPB.
3 Why can't this simply be resolved by me approving the other
4 procedures with respect to all of the other utilities, but
5 that a request be filed under 366(c)3(A) to determine
6 adequate assurance of payment with respect to EPB and we'll
7 put it on the next hearing date?

8 Wouldn't that take care of it? Because the
9 way 366 works, as I understand it, if this were just a
10 simple case, one utility, the parties would get together
11 during the first 30-day period and if the utility did not
12 agree to the debtors' proposal, the parties could not get
13 together to come up with adequate assurance that was
14 satisfactory to the utility, then a motion is made for the
15 Court to determine that issue and it would come before the
16 Court and I would decide it.

17 Why can't I do that with respect to EPB in
18 this instance?

19 MR. McCRORY: I don't have any objection to
20 that. The only reason this objection was filed was because
21 we followed the procedure the Court just described by
22 attempting to communicate with debtors' counsel after the
23 hearing on the 22nd, not being able to have any meaningful
24 dialogue regarding that resolution.

25 THE COURT: Right.

1 MR. McCrory: This objection was filed
2 promptly thereafter.

3 THE COURT: Yeah. And as I understand the
4 issue, they are proposing one-half month's utility payment
5 as adequate assurance of payment. You want two. That's the
6 issue.

7 MR. McCrory: Yes, sir.

8 THE COURT: We can have a hearing on that
9 next time.

10 MR. McCrory: And we are prepared to have a
11 hearing on that.

12 THE COURT: I can go ahead and approve the
13 motion with respect to all of the other utilities because
14 they didn't object, then you can file a motion under 366,
15 what is it, 3(a), yeah, 3(a), and we will set that the next
16 hearing date, and then we will determine this matter on the
17 merits.

18 MR. Wege: Your Honor, we believe that's
19 appropriate.

20 THE COURT: And then Miller & Martin would
21 have absolutely no contact or have nothing to do with that
22 matter. They would not be local counsel for that particular
23 issue.

24 MR. Wege: No.

25 THE COURT: And does that resolve the

1 conflict problem? Because that's really the only issue that
2 the utility has with respect to the debtor, is it not?

3 MR. McCRORY: Well, the purpose of filing
4 the notice in relation to the employment of Miller & Martin
5 is to make the Court aware of the special relationship that
6 exists. I'm not asking for disqualification, I'm just
7 making all of the parties aware that if the Court is
8 satisfied with that, then we have no objection. It was not
9 an objection, it was simply a notice.

10 THE COURT: Well, and I should have been
11 aware of that.

12 MR. McCRORY: Okay.

13 THE COURT: And they did amend their
14 disclosure statement, which they should have done, because
15 there is a conflict there with respect to this issue, no
16 doubt about it.

17 MR. McCRORY: That was the sole purpose of
18 the notice that was filed, Your Honor. Nothing --

19 THE COURT: All right.

20 MR. McCRORY: -- nothing beyond that. So
21 we, upon the Court's order, we'll --

22 THE COURT: All right. Will that take care
23 of the matter then?

24 MR. WEGE: Yes, Your Honor.

25 THE COURT: Go ahead and file the motion

1 promptly under 366(c)3(A), and at the next motion hearing,
2 we will hear this matter on the merits.

3 In the meantime, if the parties can
4 negotiate or arrive at a settlement, that will be fine, too.
5 But, if not, we will be prepared to hear that on the merits
6 the next hearing date.

7 MR. McCRORY: For clarification, you said
8 that we should file that or the debtors should file that?

9 THE COURT: No, the debtors will file that.
10 Okay?

11 MR. McCRORY: Yes, sir.

12 THE COURT: All right.

13 MR. McCRORY: Thank you.

14 THE COURT: So the motion will be granted,
15 except that I will just -- you have already uploaded the
16 order on that?

17 MR. WEGE: Yes, Your Honor, we have.

18 THE COURT: I guess I can type up the
19 first -- or the space above the order, the procedure would
20 not apply to EPB.

21 MR. WEGE: Your Honor, we would simply say
22 that if the Court would note that the debtor will file the
23 motion for determination on adequate assurance.

24 THE COURT: All right.

25 MR. WEGE: Because the order, itself, does

1 incorporate a stay on terminating power until that
2 determination is made.

3 THE COURT: I will do that.

4 MR. McCRORY: It was my understanding,
5 Your Honor, that what you said originally that that
6 procedure will not apply to EPB.

7 THE COURT: Yes, but the stay will. You
8 cannot terminate utility service until the Court determines
9 the matter because the statute provides in 366(c)(2),
10 subject to Paragraphs 3 and 4.

11 MR. McCRORY: All right.

12 THE COURT: Well, they are going to file a
13 request under Paragraph 3, so you cannot terminate utility
14 service until this matter is decided.

15 MR. McCRORY: We cannot terminate the
16 utility service. The stay provides security as provided in
17 366 --

18 THE COURT: Right, but that paragraph is
19 subject to Paragraph 3.

20 MR. McCRORY: But, in the normal course, if
21 they fail to follow procedures and we follow due process,
22 the Court is not staying EPB's ability to follow a similar
23 procedure, if they don't pay a post-petition bill during the
24 pendency of this action, disrespectful of the issue of
25 deposit, we would be able to proceed on the --

1 THE COURT: Oh. Well, you are going to be
2 paying your post-petition bills?

3 MR. WEGE: Yes, Your Honor, with respect to
4 bills that would -- with the service that's provided on
5 January 18th forward, we intend to pay this --

6 MR. McCRORY: All right. And, now, I just
7 want to clarify. We're not saying that we're being stayed
8 from any discontinuation of service, just as it relates to
9 the 366 issue. Your Honor, is that what we've said?

10 THE COURT: Well, I'm not sure I understand
11 the question.

12 MR. WEGE: Your Honor, I mean, I don't
13 think we are agreeing to allow the service to be turned off
14 on this. I mean once they can demonstrate that we're --
15 we're not restraining in the ordinary course of the
16 post-petition, this post-petition, pursuant to the
17 procedures.

18 MR. McCRORY: And all I'm saying is, if, in
19 the ordinary course, a bill was not paid and we followed due
20 process, giving notice, normal procedures after notice,
21 nonpayment, we would disconnect. That's not staying that
22 process?

23 THE COURT: Well, I will tell you, I am
24 hearing the matter in two weeks, so if there is any problem
25 in the next two weeks, I am sure you can bring that to my

1 attention.

2 MR. WEGE: Your Honor, we can determine in
3 two weeks if there's any issues that they have.

4 THE COURT: But, you will be paying your
5 post-petition utility bills?

6 MR. WEGE: We do intend to pay those
7 post-petition bills.

8 MR. McCRORY: If the post-petition utility
9 bill is paid, we wouldn't have a problem with that.

10 THE COURT: All right. Okay.

11 MR. McCRORY: All right. Thank you,
12 Your Honor.

13 THE COURT: All right. So I will sign the
14 order but note up at the top of the order that the debtors
15 will be filing a 366(c)(3) motion with respect to EPB
16 immediately.

17 MR. WEGE: Yes, Your Honor.

18 THE COURT: And that will be heard the next
19 hearing date.

20 All right. And with respect to the
21 application for employment then, with the assurance that you
22 will have no connection or will have no association with
23 this particular issue, the application will be --

24 MS. RUCKER: Your Honor, I am happy to
25 represent to the Court, we were not involved in pre-petition

1 negotiations. We did assist in filing the first day order
2 simply with the logistics of getting them to the Court.
3 Since that time, we have not been involved in negotiations,
4 haven't had any involvement and don't intend to and we've
5 communicated that to Mr. McCrory on January --

6 THE COURT: No involvement with this
7 matter. Is that satisfactory to EPB then?

8 MS. RUCKER: -- with respect to utilities?

9 MR. McCRORY: Yes, sir.

10 THE COURT: All right.

11 MS. RUCKER: Okay. Your Honor, would you
12 like a clarification in our order stating that?

13 THE COURT: Yes, put that in the order.

14 MS. RUCKER: Put that in?

15 Thank you, Your Honor.

16 We'll make that amendment and upload new
17 order.

18 THE COURT: Another order. Okay.

19 All right. Does that conclude the matters
20 for this morning?

21 MR. KAIM: That does, Your Honor. We will
22 be uploading a stip order. We haven't done that yet, but we
23 will do it today within a few hours.

24 THE COURT: All right.

25 MR. KAIM: And thank you for your time.

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THE COURT: Anything further?
I'll ask the Clerk to adjourn court then.
(Proceedings adjourned.)

