

Emergency Motion for Entry of an Order (A) Authorizing the Debtors to Sell Homes Free and Clear of Liens, Claims, Encumbrances and Other Interests and (B) Establishing Procedures for the Resolution and Payment of Operational Lien Claims, Nunc Pro Tunc to the Petition Date (the “Home Sale Motion”).

By the Home Sale Motion, the Debtors seek entry of an order (i) authorizing them to continue to close on homes already under contract and continue to contract for the construction and completion of new homes; (ii) authorizing the Debtors to continue past business practices, including, where appropriate, refund of deposits and honor other customer incentives; (iii) allowing the Debtors to sell homes free and clear of liens and encumbrances; (iv) establishing procedures to resolve disputed claims in respect of home sales; (v) authorizing, but not directing, the Debtors to pay mechanics liens out of the proceeds of home sales; (vi) authorizing the Debtors to use the proceeds of home sales, subject to the terms of the DIP Financing; (vii) authorizing the Debtors to establish lien procedures; and (viii) requiring financial institutions to honor all related checks and electronic requests for payment relating to the foregoing.

As of the Petition Date, the Debtors were parties to 2,500 outstanding contracts to build and/or sell homes (the “Prepetition Sales Contracts”). In some instances, the terms of the Prepetition Sales Contracts require the Debtors to refund the customer’s deposit under certain circumstances. Additionally, the Debtors run several customer related programs (the “Customer Programs”) designed to incentivize new purchases, sustain goodwill and enhance customer satisfaction. The Debtors assert that the order requested is essential to maintaining consumer confidence in the Debtors’ ability to abide by their Prepetition Sales Contracts. Moreover, the Debtors assert that the sale of homes is essential to ensure continued cash flow during the chapter 11 cases.

In the construction process, the Debtors routinely rely on and contract with third parties (the “Lien Claimants”) who may be able to assert liens against the homes the Debtors sell (the “Mechanics Liens”) in order to secure payment for prepetition goods and services. Notwithstanding the automatic stay imposed by the Bankruptcy Code, some of the Lien Claimants may be entitled to assert and perfect Mechanics Liens on the Debtors’ unsold homes. The Debtors assert that their title insurance underwriters will not proceed with closings unless the Debtors provide assurance that the Mechanics Liens will not impair title to the homes.

The properties are also subject to liens (the “Prepetition Lender Liens” and, together with the Mechanics Liens, the “Liens”) under the Prepetition Secured Credit Facilities. Under those credit facilities, the Prepetition Lender Liens on the property are released when a property is sold. The Debtors seek an order allowing the transfer of the Prepetition Lender Liens to the proceeds of home sales, as necessary.

The Home Sale Motion proposes the following procedures to adequately protect the claims of the Lien Claimants that are backed by valid and enforceable Liens:

- The Debtors will be authorized to sell homes free and clear of Liens and other encumbrances.
- All valid and enforceable Mechanics Liens will transfer to the proceeds of the sale and the Lien Claimants will be deemed secured to the extent of the proceeds. The Debtors may hold and use the proceeds as set forth below. Importantly, no Lien Claimant will have any claims against the Debtors’ title insurance company arising out of the transaction.

- Where the Debtors determine that a valid Mechanics Lien exists, the Debtors will satisfy the Lien Claimants to the extent of the proceeds within five business days of the determination. The Debtors will provide updated lists of the paid Lien Claimants to the agent to the prepetition secured lenders, the agent to the postpetition secured lenders and the Committee.
- Any Lien Claimant that believes it has a valid Mechanics Lien, but has not received payment within three days of the sale, may send written demand for payment (the “Demand”). The Demand must be served on the Debtors, the Debtors’ counsel, and counsel to the DIP Lenders.
- The Debtors must respond to each Demand within ten business days after receipt. If the Debtors determine, in their sole discretion, that a Demand is valid, or that litigating resolution of the dispute will be more costly than paying the Lien Claim, the Debtors, without further order of the Bankruptcy Court, may pay such Lien Claim. Payment will not prevent other parties in interest from challenging the claim and seeking disgorgement.
- If the Debtors dispute the validity or extent of the claim asserted in a Demand, the parties will first negotiate to resolve the dispute. If the dispute is not resolved within thirty days after receipt of a Demand (the “Resolution Period”), the Debtors or the Lien Claimant may file a motion (“Demand Resolution Motion”) seeking a determination from the Bankruptcy Court as to the validity and extent of the Mechanics Lien; *provided, however*, that if the Debtors determine during the Resolution Period that the Demand is not likely to be resolved, the Debtors may file a Demand Resolution Motion before the expiration of the Resolution Period.
- Upon a determination by the Bankruptcy Court that the Debtors are required to satisfy a Mechanics Lien, the Debtors will satisfy such liens within five business days.
- The Debtors will be authorized to use proceeds from the sale of homes for corporate purposes in the ordinary course of business without being required to escrow such proceeds; *provided, however*, that the Debtors maintain cash on hand in an aggregate amount sufficient to satisfy all unresolved Demands that have been received.

An interim order approving the Home Sale Motion was entered on January 31, 2008. A final order approving the Home Sale Motion was entered on February 28, 2008.