

ORDERED in the Southern District of Florida on

March 13, 2008



Laurel Myerson Isicoff, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

IN RE:

DB KEY LARGO, LLC,

Debtor.

CASE NO. 07-18127-BKC-LMI

CHAPTER 11

**ORDER APPROVING SALE OF PROPERTY FREE AND CLEAR
OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS
TO PHILRICH OF KEY LARGO, LLC**

THIS MATTER came before the Court on March 10, 2008 at 2:30 p.m. upon the scheduled final hearing on DB Key Largo, LLC's (the "Debtor") *Motion for Order (I) Establishing Bidding Procedures; (II) Approving Form of Purchase Agreement; (III) Approving Form and Manner of Notices; (IV) Scheduling Auction and Final Approval of Sale; and (V) Authorizing Sale of Real Property Pursuant to 11 U.S.C. §§ 363, 365 and 1146(a)* (the "Bid Procedures Motion") (C.P. # 76), the *Amended Order (I) Establishing Bidding Procedures; (II) Approving Form of Purchase Agreement; (III) Approving Form and Manner of*

Notices; and Scheduling Auction Hearing for 03/10/08 Commencing as 2:30 p.m., Room 1409, Miami and Scheduling Final Approval of Sale (the "Amended Bid Procedures Order") (C.P. #99); the Order Granting Ore Tenus Motion to Amend Sales Contract To Include Permits and Approval From Monroe County, Florida (the "Order Approving Amended Sales Contract") (C.P. #100); the Order Granting Ore Tenus Motion For Authorization To Execute Documents Necessary To Maintain Permits and Approvals From Monroe County Florida in Current Status (the "Preservation of Permit Order") (C.P. #101); and the Amended Order Continuing Final Sale Hearing to 03/10/2008 (the "Continued Sale Hearing Order") (C.P. #102).

The Amended Bid Procedures Order provided for the Debtor's interest in certain real property located at Mile Marker 104 in Key Largo, Florida (the "Property"), a legal description of which is attached as Exhibit "A" hereto, to be sold pursuant to the terms of the Purchase Contract (the "Amended Contract") attached to the Amended Bid Procedures Order, free and clear of liens, claims and encumbrances (with the exception of the real estate taxes owed to Monroe County, Florida (the "Monroe County Taxes") in the event Philrich of Key Largo, LLC ("Philrich" or the "Buyer") was the highest bidder), with any such liens, claims or encumbrances to attach to the proceeds, at an auction sale (the "Auction") to be conducted in open court on March 10, 2008 at 2:30 p.m., pursuant to sections 363, 365 and 1146(a) of Title 11 of the United States Code §§ 101, et seq. (the "Bankruptcy Code"), and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

The Florida Department of Revenue filed a limited motion for reconsideration of the Bid Procedures Order (the "FDOR Motion") (C.P. # 87), which was denied in part and granted in part by order of the Court on January 28, 2008 (the "FDOR Order") (C.P. #92). Additionally,

Robert J. Rothbard filed an objection to the Bid Procedures Order (the "Rothbard Objection") (C.P. #93) which sought similar relief as the FDOR Motion. The FDOR Order directed the Debtor to escrow the appropriate amount of documentary stamp taxes that paragraph 7 of the Bid Procedures Order sought to exempt pending a final order of the Court that the parties shall request to be set for hearing after the United States Supreme Court issues its ruling in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, Docket No. 07-312.

In addition, on February 22, 2008, TIB Bank filed a *Limited Objection to Sale of Debtor's Real Property* (the "TIB Objection") (C.P. #106) which objects to Philrich's right under the Amended Contract to assign the Amended Contract to a potential third party. Philrich and TIB Bank have resolved the TIB Objection by including language in the instant Order that restricts Philrich's right to assign the Amended Contract to any third party.

At the Auction, the Court was advised by counsel for the Debtor that, other than the Stalking Horse Bid by Philrich, which bid had previously been accepted by the Debtor as the initial bid for the Property, there were no Qualified Competing Bids for the Property.

The Court, having reviewed the Bid Procedures Motion, the Amended Bid Procedures Order, the Amended Contract and all other papers filed with the Court relating thereto, having heard and considered the statements of counsel with respect to the relief sought in the Bid Procedures Motion, having considered the proffered testimony presented by Philrich and the Debtor and the entire record of the hearing conducted before the Court on February 1, 2008, the date of the previous Sale Hearing (the "First Sale Hearing"), and March 10, 2008, hereby

FINDS AND CONCLUDES as follows:

A. The findings and conclusions set forth herein constitute the Court's findings and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding

pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Court has jurisdiction over the Bid Procedures Motion and the transactions contemplated by the Amended Contract pursuant to 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding pursuant to 28 U.S.C. §§157(b) (2) (A). Venue of the case and the Bid Procedure Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

C. The statutory predicates for the relief sought in the Bid Procedures Motion are Sections 363 and 1146(a) of the Bankruptcy Code, as supplemented by Bankruptcy Rules 2002 and 6004.

D. As evidenced by the certificates of service filed with the Court and based on the representations of the Debtor's and Philrich's counsel at the Final Sale Hearing, (1) proper, timely, adequate and sufficient notice of the Motion, the Amended Bid Procedures Order, the Final Sale Hearing and the proposed sale of the Property to Philrich has been timely and properly provided in compliance with the Amended Bid Procedures Order and in accordance with Bankruptcy Rules 2002 and 6004; (2) such notice was good and sufficient, and appropriate under the circumstances, and reasonably calculated to reach and apprise all interested parties about the sale of the Property, the Amended Bidding Procedures, the Auction, the Final Sale Hearing and the other relief granted herein and satisfied all requirements for due process; and (3) no other or further notice of the Bid Procedures Motion, the Amended Bid Procedures Order, the Final Sale Hearing, the sale of the Property, or any other form of relief granted herein is, or shall be, required.

E. As demonstrated by the proffer adduced at the First Sale Hearing and Final Sale Hearing and the representations of counsel on the record at such hearings, (1) Fisher appropriately marketed the Property and the sale was conducted in compliance with the Amended Bid Procedures Order; (2) the Bidding Procedures and the Auction were duly noticed and conducted in a non-collusive, fair and good-faith manner; (3) a reasonable opportunity has been given to any interested party to make a higher and better offer for the Property; and (4) the Stalking Horse Bid submitted by Philrich represented the highest and best offer for the Property and Philrich is the Successful Bidder as such term is defined in the Bid Procedures Motion and Amended Bid Procedures Order.

F. The Debtor (1) has full corporate power and authority to execute the Amended Contract and all other documents contemplated thereby, and the sale of the Property by the Debtor has been duly and validly authorized by all necessary corporate action by the Debtor; (2) has all of the corporate power and authority necessary to consummate the transactions contemplated by the Amended Contract; (3) has taken all corporate action necessary to authorize and approve the Amended Contract and the consummation by the Debtor of the transactions contemplated thereby; and (4) no consents or approvals, other than those expressly provided for in the Amended Contract, are required for the Debtor to consummate such transactions.

G. Approval of the Amended Contract and consummation of the transactions contemplated thereby at this time is in the best interests of the Debtor, its creditors, its estate and other parties in interest and provides the best opportunity under the circumstances to maximize value for all constituencies.

H. The Debtor has advanced sound and sufficient business reasons and it is a reasonable exercise of the Debtor's business judgment, to sell all right, title and interest in and to

the Property on the terms set forth in the Amended Contract and to consummate the sale of the Property. The Debtor has demonstrated compelling circumstances and a good, sufficient and sound business purpose and justification for completing the sale consistent with *In re: Lionel Corp.*, 772 F.2d 1063 (2d Cir. 1983), and other applicable law.

I. The Amended Contract, the Stalking Horse Bid and the sale were negotiated, proposed and entered into by the Debtor and the Buyer without collusion, in good faith and from arm's-length bargaining positions. Neither the Debtor nor the Buyer have engaged in any conduct that would cause or permit the Amended Contract, the Stalking Horse Bid or the sale of the Property to the Buyer to be avoided under Section 363 (n) of the Bankruptcy Code, and the Amended Contract and the sale of the Property therefore are not avoidable.

J. Philrich is a good faith purchaser under Section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby.

K. Philrich is not an "insider" of the Debtor, as that term is defined in section 101(31) of the Bankruptcy Code.

L. The consideration provided by Philrich in the form of the Stalking Horse Bid and other consideration provided in accordance with the Amended Contract: (1) is fair and reasonable under the circumstances; (2) is the highest and best offer for the Property; (3) will provide ~~a greater~~ ^{no less} recovery to the Debtor's estate than would be provided in a liquidation, which, in the reasonable business judgment of the Debtor, would be the only available alternative; and (4) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession or the District of Columbia.

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M. The transfer of the Property to the Buyer will be a legal, valid and effective transfer of the Property and will vest the Buyer with all right, title and interest of the Debtor in and to the Property, free and clear of all claims (including, as defined under Section 101(5) of the Bankruptcy Code, liens, interests and encumbrances (collectively, the "Interests"), including, but not limited to, (1) all deeds of trust and security interests in favor of or for the benefit of a third party, (2) those that purport to give any party a right or option to effect any forfeiture, modification, right of first refusal or termination of the Debtor's or Buyer's interest in the Property, or any similar rights, including rights under Section 365(h) of the Bankruptcy Code; and (3) (a) those arising under all mortgages, deeds of trust, security interests, conditional sale or other title retention agreements, pledges, liens (including any equitable or statutory liens), judgments, demands, encumbrances, rights of first refusal or charges of any kind or nature, if any, including, but not limited to, any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership and (b) all debts arising in any way in connection with any agreements, acts or failures to act of any of the Debtor's or any of the Debtor's predecessors or affiliates, claims (as that term is defined in Section 101(5) of the Bankruptcy Code), obligations, liabilities, demands, guarantees, options, rights, contractual or other commitments, restrictions, interests and matters of any kind and nature, whether known or unknown, contingent or otherwise, whether arising prior to or subsequent to the commencement of this bankruptcy case, and whether imposed by agreement, understanding, law, equity or otherwise including, but not limited to, claims otherwise arising under doctrines of successor liability to the greatest extent permitted by applicable law.

N. Except as expressly set forth herein, Philrich shall have no liability for any liability, claim or other obligation of or against the Debtor related to the Property by reason of

the transfer of the Property to the Buyer. The Buyer shall not be deemed, as a result of any action taken in connection with the purchase of the Property, to (1) be a successor to the Debtor; or (2) have, de facto or otherwise, merged with or into the Debtor. Philrich is not acquiring or assuming any liability, warranty, or other obligation of the Debtor, except as expressly set forth in the Amended Contract.

O. The Debtor may sell the Property free and clear of all Interests of any kind or nature whatsoever as contemplated by the Amended Contract because, in each case, one or more of the standards of Section 363(f) (1) through 363(f) (5) of the Bankruptcy Code have been satisfied. Those holders of Interests that did not object are deemed to have consented pursuant to Section 363(f) (2) of the Bankruptcy Code.

P. No party submitted a Qualified Competing Bid for the Property by the March 6, 2008 at 5:00 pm deadline.

Q. The Stalking Horse Bid submitted by Philrich was the highest, best and only offer for the Property.

R. The Debtor is authorized and directed to execute the Amended Contract, together with such additional documents and instruments as may be reasonably necessary or desirable to implement the Amended Contract and to take such other and further actions as may reasonably be necessary and requested by Philrich for the purpose of assigning, transferring, granting, conveying and conferring the Property to Philrich and the effectuate the terms and provisions of this Order.

Accordingly, it is hereby,

ORDERED AND ADJUDGED, as follows:

1. The Bid Procedures Motion, as it may have been modified by this Order, is
GRANTED.

2. All terms, conditions, transactions contemplated by the Amended Contract are approved in all respects excepting only that the Amended Contract may not be assigned by the Buyer to any third party whatsoever.

3. The sale of the Property is authorized under Sections 105 and 363 of the Bankruptcy Code and the Debtor and Philrich are authorized and directed to perform their respective obligations under the Amended Contract and any related documents.

4. The Amended Contract, the Stalking Horse Bid and the sale of the Property were undertaken by the Debtor and Philrich at arm's length, without collusion and in good faith within the meaning of Section 363(m) of the Bankruptcy Code.

5. The Transfer of the Property shall be made solely to the Buyer. The transfer of the Property to the Buyer pursuant to the Amended Contract constitutes a valid, legal and effective transfer of the Property and shall vest the Buyer with all rights, title and interest of the Debtor in and to the Property.

6. In compliance with Section 363(f) of the Bankruptcy Code, the sale of the Property to Philrich shall be free and clear of liens, claims, interests and encumbrances, with the exception that Philrich shall take title to the Property subject to any and all outstanding real estate taxes due to Monroe County, Florida as of Closing, and all such other liens, claims, interests and encumbrances shall attach to the proceeds from the sale.

7. The sale of the Property to Philrich is "AS-IS, WHERE-IS, WITHOUT REPRESENTATIONS OR WARRANTIES", unless otherwise provided in the Amended Contract.

8. Pursuant to the terms of the Bid Procedures Order, Philrich and the Debtor shall close the transaction within twenty (20) days after entry of this Order (the "Closing Deadline").

9. Closing on the transaction described herein shall take place at the office of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., 150 W. Flagler Street, Suite 2200, Miami, Florida, counsel to the Buyer's lender, TIB Bank ("Mortgagor"). The deed ("Deed") or other instrument of conveyance to the Property shall be issued solely in the name of the Buyer and delivered, unrecorded, to Frank Menendez, Esq. of Stearns Weaver, to be recorded along with a mortgage currently held in escrow granted by the Buyer to Mortgagor. The Buyer shall advance to Stearns Weaver all costs and charges that may be imposed by the Clerk of Monroe County, Florida that are necessary to record the Deed and Mortgage.

10. At closing, Philrich shall pay the Estate the sum of \$100,000 in accordance with the Amended Contract. Such funds shall be wired to counsel for the Debtor and held by counsel for the Debtor pending further Order of the Court.

11. Upon the closing of the sale of the Property to the Buyer (the "Closing"), any holder of an Interest (other than the Monroe County Taxes) is ~~authorized and directed~~ to execute such documents and take such actions as may be necessary to release its Interest in the Property, if any, as such Interests may have been recorded or may otherwise exist, *but the failure to do so will not affect the fact that the sale to Buyer is free and clear of such Interest.*

12. If any person or entity that has filed financing statements, mortgages, mechanic's liens, *lis pendens*, or other documents or agreements evidencing Interests in the Debtor or the Property shall not have delivered to the Debtor prior to the Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction or releases of all Interests (except the Monroe County Taxes) that the person or entity has with respect to the Property, then Philrich or its designee is hereby authorized to file, register or

(initials)
*the Buyer
may
request*

otherwise record a certified copy of this Order, which shall constitute conclusive evidence of the release of all Interests (except the Monroe County Taxes) in the Debtor or the Property of any kind or nature whatsoever.

13. This Order and the Amended Contract: (a) shall be binding in all respects upon all creditors and holders of equity interests in the Debtor (whether known or unknown), any holders of Interests, all successors and assigns of the Buyer, the Debtor, and any subsequent trustees that may be appointed in the Debtor's Chapter 11 case or upon a conversion of the case to Chapter 7 under the Bankruptcy Code; and (b) shall not be subject to rejection. Nothing contained in any Chapter 11 plan or reorganization or liquidation confirmed in this bankruptcy case or any related confirmation order shall conflict with or derogate from the provisions of this Order and the Amended Contract.

14. Each and every federal, state and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by this Order and the Amended Contract.

15. The Buyer shall have no liability or responsibility for any liability or other obligation of the Debtor arising under or related to the Property. Except as otherwise specifically provided herein or in the Amended Contract, the Buyer shall not be liable for any claims against the Debtor or any of its predecessors or affiliates and the Buyer shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environment, successor or transferee liability, labor law, de facto merger, or substantial continuity, whether known or unknown as of the Closing, now existing or hereafter arising with respect to the Debtor or any obligations of the Debtor arising prior to the Closing including, but not limited to, liabilities on account of any taxes (except the Monroe County Taxes). The Buyer

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~~has given substantial consideration under the Amended Contract for the benefit of holders of Interests. The consideration given by the Buyer shall constitute valid and valuable consideration for the releases of any potential claims of successor liability of the Buyer, which releases shall be deemed to be given in favor of the Buyer by all holders of Interests against the Debtor.~~

16. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order, the Amended Contract, any waivers and consents thereunder, any agreements executed in connection therewith in all respects, including, but not limited to, retaining jurisdiction to (a) compel delivery of the Property to the Buyer; (b) compel performance of other obligations owed by or to the Debtor; (c) resolve any disputes arising from or relating to the Amended Contract, except as otherwise provided therein; (d) interpret, implement and enforce the provisions of this Order; (e) protect the Buyer against any claims existing or which could be against the Debtor, or the assertion of any Interests against the sale assets, of any kind or nature whatsoever.

17. The transactions contemplated by the Amended Contract are undertaken by Philrich without collusion and in "good faith" as that term is used in Section 363(m) of the Bankruptcy Code and, accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the sale of the Property shall not effect the validity of the sale, unless such authorization is duly stayed pending appeal.

18. The terms and provisions of the Amended Contract and this Order shall be binding in all respects upon, and shall inure to, the benefit of, the Debtor, its estate and its creditors, Philrich and their successors and assigns, and any affected third parties, including, but not limited to, all persons asserting an Interest in the assets of the sale of the Property,

notwithstanding any subsequent appointment of any trustee(s) under any chapter of the Bankruptcy Code, as to which trustee(s) such terms shall be binding.

19. The Amended Contact and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto and in accordance with the terms thereof, without further order of this Court, provided, however, that any such modification, amendment or supplement does not have a material adverse effect on the Debtor's estate.

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SUBMITTED BY:

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Copy to:

D. Brett Marks, Esquire
Mark S. Roher, Esquire [Attorney Roher is directed to serve a conformed copy of this order upon all interested parties upon receipt and file a certificate of service.]