

ORDERED in the Southern District of Florida on APRIL 20, 2009



*A. Jay Cristol*

A. Jay Cristol, Chief Judge Emeritus  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division  
[www.flsb.uscourts.gov](http://www.flsb.uscourts.gov)

In re:

DB ISLAMORADA, LLC,

Case No. 07-20537-AJC

Debtor.

Chapter 11

**ORDER APPROVING AND CONFIRMING  
DEBTOR'S SALE OF DEBTOR'S PROPERTY, FREE AND CLEAR  
OF LIENS AND ENCUMBRANCES, PURSUANT TO 11 U.S.C. § 363, TO MAMC, INC.**

THIS MATTER came before the Court for hearing on March 19, 2009 at 10:30 a.m. ("**Sale Hearing**") upon the following:

(1) *Motion of Debtor for Order (1) Authorizing Sale Free and Clear of Liens, Claims, and Encumbrances under Section 363 of the Bankruptcy Code and Other Related Relief, Including Approving Break-up Fee; and (2) Approving Procedures for Sale, Including Terms for Submission of Competing Offers and Auction Procedures* (D.E. 104) ("**Initial Sale Motion**");

(2) *Debtor's Motion to Cancel Proposed Sale Hearing on February 13, 2009 and to Set Hearing on Sale for March 19, 2009* (D.E. 163) ("**Second Sale Motion**") (collectively with Initial Sale Motion the "**Sale Motion**"); and

(3) *Order Granting Debtor's Motion to Cancel Proposed Sale Hearing on February 13, 2009 and to Set Hearing on Sale for March 19, 2009 at 10:30 A.M.*, attached to which were the Bidding Procedures for the Sale Hearing (D.E. 165)(“**Final Sale Order**”).

### **Background**

In the Sale Motion, DB Islamorada, LLC, debtor and debtor-in-possession (“**Debtor**”), sought to sell substantially all of its assets, which include: (i) certain real property owned by Debtor commonly known as the Indigo Bay Hotel situated in Islamorada, Monroe County, Florida (“**Real Property**”) and (ii) substantially all of the assets used or employed by Debtor (collectively with the Real Property, “**Property**”). The Property is more fully described on Exhibit A, which is attached hereto.<sup>1/</sup>

On September 16, 2008, following a hearing, the Court entered an Order Granting the Initial Sale Motion (D.E. 107). On February 13, 2009, the Court entered the Final Sale Order (D.E. 165) and set the Sale Hearing for March 19, 2009 at 10:30 a.m. (D.E. 165).

### **Parties Claiming an Interest in the Property**

Pursuant to the Sale Motion, the following parties may claim a lien or other interest in, to, or against the Property:

- a. MAMC, Inc., d/b/a Berman Capital Management as Servicing Agent (“**MAMC**”), which holds:
  - i. a first mortgage commonly referred to as the Mortgage Note Series # 1 Lenders, securing a note with a principal balance of \$23,568,000.00; and
  - ii. a second mortgage commonly referred to as the Mortgage Note Series # 2 Lenders, securing a note with a principal balance of \$1,250,000.00.

---

<sup>1/</sup> The Property does not include (i) any inventory, furniture, fixtures, equipment and other personal property now or hereafter owned by Debtor and not located on the Real Property, (ii) all causes of action under Chapter 5 of the Bankruptcy Code and claims against third parties, including without limitation recovery of the Concord Wilshire deposit, under any applicable law other than with respect to certain Warranties and Guaranties, and (iii) any other rights expressly assigned to purchaser upon consummation of the sale transaction.

- b. Debtor's other secured creditors in respect of the Property consist of: (i) various mechanic's lienholders holding claims totaling approximately \$600,000.00, and (ii) property tax claimants asserting tax liens totaling approximately \$60,000.00.

### **Sale Hearing and Auction**

On March 19, 2009, the Court conducted the Sale Hearing concerning the sale of Debtor's Property to the highest and best Qualified Bidder, as defined in the Bidding Procedures attached to the Final Sale Order. David Finnegan, either personally or on behalf of an assignee ("**Finnegan**"), placed a Five Hundred Thousand and No/100 Dollars (\$500,000.00) deposit with Chicago Title in accordance with the Bidding Procedures, but did not comply with certain other terms of the Bidding Procedures. Thus, Finnegan did not become a Qualified Bidder. Because no bidder qualified before the Bidding Deadline, as that term is defined in the Bidding Procedures attached to the Final Sale Order, pursuant to the Motion and Notice, the Court found that it was in the best interests of creditors of the estate to conduct an auction ("**Auction**") for the sale of Debtor's Property. At the Auction, MAMC credit bid its liens, pursuant to 11 U.S.C. § 363(k), in the amount of Five Million and No 00/100 Dollars (\$5,000,000.00) to purchase Debtor's Property. No other party bid in excess of MAMC's credit bid.

### **Objections**

William R. Kelley filed an objection to the Sale on March 23, 2009 (D.E. 183) ("**Kelly Objection**"), which was denied by the Court on March 23, 2009 (D.E. 184).

### Findings and Conclusions

The Court has carefully considered the Sale Motion, heard evidence as proffered by counsel for Debtor and takes judicial notice of the record and file as of March 19, 2009. For the reasons stated on the record at the Sale Hearing and Auction, which are incorporated by reference herein, and taking into account all relevant facts concerning the current real estate market in South Florida, the Court finds as follows:

A. The Court has jurisdiction over the Auction and Sale of the Property pursuant to 28 U.S.C. §§ 157 and 1334.

B. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

C. The Property, as defined on Exhibit A hereto, constitutes property of Debtor's bankruptcy estate. The sale, assignment, and transfer of the Property to MAMC, or a special purpose entity formed by MAMC to take title to the Property, is or will be a legal, valid, and effective transfer of property of Debtor's estate to MAMC, or its assignee, and vests or will vest MAMC, or its assignee, with all right, title, and interest of Debtor in and to the Property to MAMC, or its assignee, free and clear of all liens, claims, interests and encumbrances under sections 363(b), 363(f), 363(k) and 105 of the Title 11 of the United States Code ("**Bankruptcy Code**").

D. The relief requested in the Sale Motion and at the hearing was necessary to achieve the highest and best offers for the sale of the Property. The Bidding Procedures were reasonable and appropriate and represent the best process for maximizing the return for the Property.

E. Debtor provided sufficient grounds for conducting an Auction and approval of the sale of the Property pursuant to the Auction.

F. Debtor filed the Sale Motion in good faith and with the goal of maximizing the value of the Property.

G. The relief requested is in the best interests of Debtor's estate, its creditors, and other parties in interest.

H. Proper, timely, adequate and sufficient notice of the Sale Motion and Sale Hearing was provided in accordance with the Bankruptcy Code, Federal Rules of Bankruptcy Procedure and the Local Rules of this Court, and a reasonable opportunity to object or to be heard regarding the sale process and manner in which the sale was to be conducted was afforded to all interested persons and entities, (including, but not limited to, all creditors of Debtor and all parties known to assert liens or claims in the assets subject to sale) and no other or further notice need be provided for entry of this Order. Such notice was adequate and sufficient pursuant to Federal Rules of Bankruptcy Procedure 2002 and 6004.

I. Finnegan placed a Five Hundred Thousand and No/100 Dollars (\$500,000.00) deposit with Chicago Title in accordance with the Bidding Procedures. However, Finnegan did not comply with certain other terms of the Bidding Procedures and, thus, was not a Qualified Bidder. Further, Finnegan did not place a bid at the Auction.

J. MAMC is the successful bidder for the sale of the Property with the highest and best bid, in the form of a credit bid under 11 U.S.C. § 363(k), of Five Million and No/100 Dollars (\$5,000,000.00).

K. MAMC is an arm's length purchaser and is purchasing the Property in good faith for fair value within the meaning of 11 U.S.C. § 363(m), and, therefore, is entitled to all of the protections set forth in 11 U.S.C. § 363(m).

L. A reasonable and adequate opportunity to bid, object, and to be heard concerning all aspects of the relief contemplated pursuant to the Initial Sale Motion<sup>2/</sup> and applicable orders and notice was afforded to creditors of Debtor, parties in interest and other entities, including without limitation: (i) all creditors in Debtor's case; (ii) the Office of the United States Trustee for the Southern District of Florida; (iii) all parties who hold or claim to hold interests in or liens, security interests, judgments, or other encumbrances upon or claims against any of the Property that is to be transferred or conveyed to MAMC or its nominees; (iv) all governmental taxing or other authorities who have, or as a result of the sale and transfer of the Property may have claims, contingent or otherwise, against Debtor; (v) all parties that have expressed an interest in purchasing some or all of the Property and other potential bidders for all or any portion of the Property. Any creditor or other party in interest that did not file or assert and serve, on or before the Sale Hearing, a written objection to the Sale Motion is conclusively deemed to have waived any objection that they may have to the Sale Motion or the sale of the Property.

M. Immediately upon issuance of this Order, Debtor shall have full power and authority to execute and deliver the necessary agreement, documents, certificates, instruments, or other writings, and take all actions, necessary to transfer and convey the Property to MAMC, or its assignee, and to consummate any other transactions contemplated by Debtor and MAMC, or its assignee, concerning the sale of the Property.

N. Debtor has demonstrated a sound business reason for the sale of the Property, and the price that has been garnered for the Property is equivalent to the highest and best value attainable in the marketplace at this time.

---

<sup>2/</sup>The Second Sale Motion was served on individuals and/or entities required to receive notice pursuant to the Court's Order Granting Debtor's Motion to Limit Notice (D.E. 20). The Court deems such notice to be adequate.

Therefore, based on the foregoing, the Court finds good cause to approve the Sale Motion and to authorize Debtor to sell the Property as set forth in this Order. Accordingly, it is –

**ORDERED** as follows:

1. **Sale Motion**: The Sale Motion is GRANTED.
2. **Auction**: The Court CONFIRMS that an Auction and the sale of the Property was necessary and is in the best interest of the creditors of the estate. The Court APPROVES the manner in which the Auction was conducted.
3. **Sale of the Property**: Debtor is AUTHORIZED and DIRECTED to sell the Property pursuant to 11 U.S.C. §§ 363(b), (f) and (k), consistent with the terms and provisions of this Order.
4. **Kelly Objection**: The Kelly Objection is overruled in all respects.
5. **Successful Purchaser**: The Court AUTHORIZES and CONFIRMS the sale of the Property to MAMC, who has made the highest and best offer at the Auction to purchase the Property for the credit bid, under 11 U.S.C. § 363(k), of Five Million and No/100 Dollars (\$5,000,000.00). MAMC will take title directly or through a special purpose entity formed by MAMC.
6. **Good Faith Purchaser**: MAMC is an arm's length purchaser and is purchasing the Property in good faith for fair value within the meaning of 11 U.S.C. § 363(m), and, therefore, is entitled to all of the protections set forth in 11 U.S.C. § 363(m).
7. **"As Is"–"Where Is"**: The sale of Debtor's right, title and interest in and to the Property is "AS IS-WHERE IS," without any express or implied representations, warranties, or guaranties of any kind whatsoever.
8. **Free and Clear of Encumbrances**: The sale of the Property shall be made pursuant to 11 U.S.C. §§ 105 and 363(b), (f) and (k), free and clear of all liens, claims (as defined by 11

U.S.C. § 101(5)), and encumbrances of any kind whatsoever, whether known or unknown, (collectively, “**Encumbrances**”), including, but not limited to, all liens and interests listed above and in the Sale Motion, with all valid Encumbrances attaching to the proceeds of the sale, and all holders of Encumbrances are enjoined from asserting such claims against MAMC, or its assignee, or the Property.

9. **Distribution of Proceeds From Sale of Property**: This Order shall not operate to merge, extinguish or in any way affect, and in fact preserves, the priority structure among the claim holders that comprise MAMC concerning the Property and the DIP Lenders’ respective super-priority positions concerning the Property. Such priority structure shall exist as it did prior to MAMC’s credit bid.

10. **Return of Deposit**: Debtor shall (within two (2) business days) return all deposits placed pursuant to the Bidding Procedures, if any.

11. **Debtor’s Business Judgment**: A sound business reason exists for the sale of the Property pursuant to the terms that were confirmed at the Auction and set forth in this Order, as the transaction provides fair and reasonable consideration to Debtor and the transaction was proposed and negotiated in good faith.

12. **Execution of Sale Documents**: Debtor is AUTHORIZED and DIRECTED to execute any and all documents of any nature whatsoever to fully implement the provisions of this Order and to take such other and further actions as are necessary to effect the sale of the Property to MAMC, or its assignee, pursuant to this Order.

13. **Waiver of Stay**: For the reasons stated on the record at the Hearing, and pursuant to the provisions of Fed. R. Bankr. P. 6004(h), the Court waives the ten (10) day stay applicable to



orders approving the sale of assets. Debtor may proceed with the sale of the Property as approved by this Order forthwith.

14. **Notice**: Immediately upon entry of this Order, Debtor shall serve this Order on (i) MAMC; (ii) all parties registered to receive notices electronically in this case; (iii) all creditors as listed on Debtor's Schedules; (iv) all creditors who have filed proofs of claim in this case; (v) the Internal Revenue Service, (vi) all known parties who allegedly claim a lien against the Property, and; (vii) the U.S. Trustee's Office, and such service shall be good, adequate and timely notice pursuant to the Bankruptcy Code, Bankruptcy Rules and Local Rules of this Court.

15. **Binding Effect**: The terms of this Order are binding and supersede any terms in the Sale Motion and the Final Sale Order. To the extent any provision of this Order conflicts with any prior order of the Court, agreement to which Debtor is a party, obligation of Debtor, or operates to cause Debtor to be in default under the terms of any of the foregoing, the terms of this Order shall control and any default on the part of Debtor shall be excused, void, and of no effect.

16. **Impact of Order**: This Order (a) is and shall be effective as a determination that the conveyances described herein have been effected and (b) is and shall be binding upon all entities, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Property. MAMC, or its assignee, may file a copy of this Order with any of the foregoing, and such filing shall constitute public notice of all matters referenced herein.

17. **Retention of Jurisdiction:** The Court retains jurisdiction over this matter for the entry of such further orders as are necessary and appropriate, including to: (i) enforce and interpret the terms of this Order and (ii) resolve any dispute concerning the sale of the Property, or the rights and duties of the parties with respect to the sale of the Property.

###

**Submitted by and Copy furnished to:**

Patricia A. Redmond, Esq.  
[predmond@swmwas.com](mailto:predmond@swmwas.com)  
STEARNS WEAVER MILLER WEISSLER  
ALHADEFF & SITTERSON, P.A.  
Museum Tower  
150 W. Flagler Street  
Suite 2200  
Miami, Florida 33130  
*Counsel to Debtor*

(Attorney Redmond is directed to serve copies of this order as indicated above, and to file a certificate of service.)

G:\W-BANK\37482\0002\Sale of Real Property\Form Order Approving Sale.wpd

**EXHIBIT A**

**(Description of Property)**

As used in the Order Approving and Confirming Debtor's Sale of Debtor's Property, Free and Clear of Liens and Encumbrances, Pursuant to 11 U.S.C. § 363, to MAMC, Inc., a copy of which this Exhibit is attached to, the term "**Property**" shall mean collectively the Real Property, and the Personal Property.

**A. "Real Property"** shall mean the Land and the Improvements.

1. "**Land**" shall mean that certain parcel of real estate (including, without limitation, submerged land) lying and being in Islamorada, Monroe County, Florida, as more particularly described on Exhibit "1" attached hereto, together with all easements, rights, privileges, remainders, reversions and appurtenances thereunto belonging or in any way appertaining, and all of the estate, right, title, interest, claim or demand whatsoever of Seller therein, if any, in the streets and ways adjacent thereto and in the beds thereof.

2. "**Improvements**" shall mean all buildings, improvements, boat slips, docks, swimming pools, fixtures and other items of real estate located on the Land or described in the Plans & Specs.

a. "**Plans & Specs**" shall mean all the architectural, mechanical, structural, electrical and other plans and specifications for the construction of the Improvements that are described in Exhibit "2" attached hereto.

**B. "Personal Property"** shall mean collectively the Tangible Personal Property and the Intangible Personal Property.

1. "**Tangible Personal Property**" shall mean the items of tangible personal property consisting of all fixtures, equipment, machinery and other personal property of every kind and nature owned by Seller and currently located at or on the Real Property.

2. "**Intangible Personal Property**" shall mean all intangible personal property, if any, owned by Seller and currently in its possession and used in connection with the ownership, operation, renovation, leasing, occupancy or maintenance of the Property, to the extent assignable, including, without limitation, (1) Seller's right to use the trade name "Indigo Bay" and all variations thereof, (2) all current licenses, permits and authorizations, and (3) utility and development rights and privileges, general intangibles, business records, and plans and specifications pertaining to the Real Property.

**EXHIBIT 1**

**LAND**

Tract 7, according to the subdivision of Lots 3 and 4, Upper Matecumbe Key, according to the plat thereof, as recorded in Plat Book 2, Page 59, together with baybottom contiguous thereto described Plat Book 2, Page 59, together with baybottom contiguous thereto described as a parcel of submerged land in Florida Bay, Section 32, Township 63 South, Range 37 East, Upper Matecumbe Key, Monroe County, Florida, more particularly described as follows:

From the intersection of the dividing line between Tracts 7 and 8, and the northwesterly right of way line of State Road No. 5, all as shown on plat of subdivision of Lots 3 and 4, Plat Book 1, Page 41, subdivision plat being recorded in Plat Book 2 at Page 59 of the public records of Monroe County, Florida, run North  $42^{\circ}02'30''$  West along said dividing line, a distance of 418 feet more or less to the Mean high tide line on the shore of Florida Bay and the POINT OF BEGINNING of the parcel hereinafter described; thence North  $34^{\circ}02'30''$  West a distance of 200 feet; thence North  $56^{\circ}11'30''$  East a distance of 146.9 feet; thence South  $34^{\circ}51'50''$  East a distance of 182.5 feet more or less to the said Mean high tide line at the dividing line between Tracts 6 and 7, Plat Book 2, Page 59; thence southwesterly meandering said Mean high tide line a distance of 148 feet more or less to the POINT OF BEGINNING.

Also;

A portion of Tract 8, according to the plat thereof as recorded in Plat Book 2, at Page 59 of the public records of Monroe County, Florida, of a subdivision of Lots 3 and 4 on Upper Matecumbe Key, Monroe County, Florida, according to MacDonald's Plat as recorded in Plat Book 1, at Page 41 of the public records of Monroe County, Florida, said portion of Tract 8 being more particularly described as follows: Beginning at a point of the northwesterly right of way line of the Overseas Highway, said point being on the dividing line between Tracts 7 and 8, as per said plat of subdivision of Lots 3 and 4, run South  $44^{\circ}11'30''$  West along said northwesterly right of way line of the Overseas Highway a distance of 69.53 feet; thence North  $39^{\circ}47'$  West to the shore of the Bay of Florida; thence northeasterly meandering said shore of the Bay of Florida a distance of 50 feet more or less to the dividing line between Tracts 7 and 8 according to said plat of subdivision of Lots 3 and 4; thence South  $42^{\circ}26'$  East along said dividing line between Tracts 7 and 8 a distance of 358 feet more or less to the POINT OF BEGINNING.

And

A parcel of submerged land in the Bay of Florida in Section 32, Township 63 South, Range 37 East, Upper Matecumbe, Monroe County, Florida, lying northwesterly of and abutting a portion of Tract 8, according to the plat thereof recorded in Plat Book 2, Page 59 of the public records of Monroe County, Florida, and being more particularly described as follows: from a point on the northwesterly right of way line of Overseas Highway, said point being on the dividing line between Tracts 7 and 8 per said Plat Book 2, Page 59, run South  $44^{\circ}35'00''$  West along said northwesterly right of way line a distance of 69.53 feet; thence North  $39^{\circ}23'30''$  West a distance of 430 feet to the Mean high tide line on the shore of Florida Bay and the most easterly corner of

a parcel conveyed by Trustees I.I.F. Deed No. 22744 and the POINT OF BEGINNING of the parcel hereinafter described: thence North  $34^{\circ}23'00''$  West along the northwesterly side of said parcel conveyed by said Trustees I.I.F. Deed No. 22744 a distance of 207.5 feet; thence North  $64^{\circ}51'00''$  East a distance of 52.0 feet to the most westerly corner of a parcel conveyed by Trustees I.I.F. Deed No. 23077; thence South  $34^{\circ}02'30''$  East along the northwesterly side of said parcel conveyed by Trustees I.I.F. Deed No. 23077 a distance of 200 feet to the said Mean high tide line between Tracts 7 and 8 (said Plat Book 2, Page 59), thence southwesterly, meandering said Mean high tide line a distance of 50 feet more or less, to the POINT OF BEGINNING.

**EXHIBIT 2**

**PLANS & SPECS**

**Plans and Specifications prepared by Perez Engineering and Development, Inc., 1010 Kennedy Drive, Suite 400, Key West, Florida 33040, with a date of January 24, 2005 and a revision date of September 26, 2005.**