

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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IN RE: CASE NO. 07-18127-BKC-LMI
DB KEY LARGO, LLC, CHAPTER 11
Debtor.

DEBTOR'S MOTION TO VOLUNTARILY DISMISS CHAPTER 11 PROCEEDING

Debtor in Possession, DB Key Largo, LLC (the "Debtor") by and through its undersigned counsel and pursuant to 11 U.S.C. § 1112(b), files this Motion to Voluntarily Dismiss Chapter 11 Proceeding and in support thereof states as follows:

I. Relevant Procedural and Factual Background

1. On September 28, 2007 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.
2. The Debtor is operating its business as a debtor-in-possession pursuant to Bankruptcy Code Sections 1107 and 1108. To date, no Trustee, examiner or official committee of unsecured creditors has been appointed.
3. On June 16, 2005, prior to the Petition Date, the Debtor executed and delivered a certain Promissory Note and a Mortgage securing payment of the Note to TIB Bank of the Keys in the original principal amount of \$6,234,000.00 (the "Original Note and Original Mortgage"). The Original Mortgage was recorded in Official Records Book 2126, Page 1639 of the Public Records of Monroe County, Florida.
4. The Original Mortgage was subsequently modified through various agreements (collectively the "Mortgage Modifications").

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5. The Original Mortgage and Mortgage Modifications (hereinafter collectively the "Philrich Mortgage Obligation") was assigned to Philrich of Key Largo, LLC ("Philrich") pursuant to a certain Assignment of Mortgage and Loan Documents dated June 22, 2007 and recorded in Official Records 2305, Page 2296 (the "Philrich Assignment").

6. The Philrich Mortgage Obligation matured on April 1, 2007 and the Debtor defaulted under the Philrich Mortgage Obligation by failing to pay the Philrich Mortgage Obligation in full on April 1, 2007.

7. As of November 1, 2007, Philrich was owed \$6,490,653.08 which included accrued interest beginning on April 1, 2007 through November 1, 2007, but excludes attorney's fees and costs (the "Philrich Secured Claim"). The Philrich Secured Claim continues to accrue interest at 18% or a per diem of \$2,895.27.

8. The real property securing the Philrich Mortgage Obligation is located at Mile Marker 104 in Key Largo Florida and was intended to be developed by the Debtor as a Condominium-Hotel Facility (the "Property").

9. The Debtor has no ongoing business operations or any means to fund a Chapter 11 Plan other than from the liquidation of the Property, its only significant asset.

10. Along with the Philrich Mortgage Obligation, the Property is also subject to a certain junior mortgage obligation serviced by BMC and MAMC as attorney in fact (the "Subordinate Mortgage").

11. The holders of the Subordinate Mortgage are the individual lenders listed on the Debtor's Bankruptcy Schedule "D" ("Junior Lenders"). This secured claim of approximately was scheduled in the amount \$7,350,000.00 as undisputed.

12. Subsequent to the Petition Date, Philrich filed its *Motion to Dismiss Case as Bad*

MAMC
Lenders

Faith Filing and Motion for Relief from Stay (the "Philrich Motion to Dismiss") (C.P. #33).

13. The Debtor believed that it could sell the Property for the benefit of Philrich, the Junior Lenders, and the Debtor's estate.

14. As such, shortly after the Petition Date, the Debtor filed its motion for authority to retain Louis B. Fisher, III and Fisher Auction Co., Inc. (the "Auctioneer") to auction the Property (C.P. # 18) for the benefit of the estate (the "*Auctioneer Motion*").

15. While Philrich filed a preliminary objection to the *Auctioneer Motion* (C.P. # 35), the Debtor was able to negotiate the points of contention raised by Philrich and was able to submit an agreed order granting the *Auctioneer Motion* which was entered by the Bankruptcy Court on November 19, 2007 (C.P. # 53).

16. On November 29, 2007, the Bankruptcy Court entered an *Amended Agreed Order Granting the Auctioneer Motion (the "Auctioneer Order")* to clarify some points raised by the Office of the United States Trustee (C.P. # 59).

17. The Debtor also filed its *Plan of Liquidation (the "Plan")* (C.P. # 60) and *Disclosure Statement for the Plan (the "Disclosure Statement")* (C.P. # 61), entirely premised on the sale of the Property by way of an auction, with the distribution of the proceeds from the sale of the Property to creditors after payment of the Philrich Secured Claim in full.

18. In an effort to avoid the costs and uncertainties associated with the *Philrich Motion to Dismiss* and to allow the Debtor to focus its efforts at selling the Property, the Debtor, Philrich, BMC and MAMC agreed to the settlement of the *Philrich Motion to Dismiss* as set forth in the Stipulation to Resolve Philrich of Key Largo, LLC's Motion to Dismiss Bankruptcy Case as Bad Faith Filing and/or for Relief from the Automatic Stay (the "*Stipulation*"), filed on December 5, 2007 (C.P. # 65, Exhibit "A").

19. Pursuant to the Stipulation, Philrich offered and the Debtor accepted an initial bid for the sale of the Property whereby Philrich will credit bid the Philrich Secured Claim pursuant to 11 U.S.C. Section 363(k) plus pay an additional \$100,000.00 in cash to the Estate in exchange for receiving title to the Property free of any liens, claims and/or 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 (the "Philrich Stalking Horse Bid").

20. On December 19, 2007, the Court entered an order approving the Stipulation (C.P. # 75).

21. The Debtor then filed a *Motion to Approve Bidding Procedures in Connection with the Auction (the "Bidding Motion")* (C.P. # 76), scheduling the auction and final hearing to approve the sale of the Property for February 1, 2008.

22. Pursuant to the *Bidding Motion*, the Philrich Stalking Horse Bid was determined to be \$6,977,728.59 based on a closing twenty (20) days after the February 1, 2008, consisting of: (i) principal and accrued interest in the amount of \$6,817,728.59; (ii) a maximum of \$60,000.00 in attorneys' fees and costs (subject to Court approval if disputed by Debtor); and (iii) \$100,000.00 to the estate.

23. The Court entered an order granting the *Bidding Motion* on January 10, 2008 (C.P. # 81).

24. Despite the Auctioneer's marketing, advertising and sales efforts, no bids were submitted by any potential buyers for the Property prior to or at the February 1, 2008 auction.

25. At the February 1, 2008 hearing to approve the sale of the Property to Philrich, the Court determined that there was insufficient notice of all of the assets (such as governmental permits) to be sold to Philrich or any other prospective buyer pursuant to the terms of contract

attached to the *Bidding Motion*.

26. As such, the Court entered an *Amended Bid Procedures Order* (C.P. # 99), which rescheduled the auction and final sale hearing to March 10, 2008, which attached an amended contract for the sale of the Property to Philrich or any potential buyer in accordance with the Court's instructions at the February 1st hearing to include any and all governmental permits as part of the assets to be sold at the auction.

27. Pursuant to the *Amended Bid Procedures Order*, the deadline for any potential buyers to submit bids was March 6, 2008 at 5:00 p.m.

28. Despite the Auctioneer's updated marketing and sales efforts and advertising of the March 10th auction, no bids were submitted by any potential buyers for the Property prior to or at the March 10, 2008 auction.

29. Accordingly, the Court approved the sale of the Property to Philrich on March 10, 2008 as set forth in its *Order Approving Sale of Property Free and Clear of Liens, Claims, Encumbrances and Other Interests (the "Sale Order")* (C.P. # 111) entered on March 13, 2008.

30. As set forth in the *Auctioneer Order*, in the event that the Philrich Stalking Horse Bid turned out to be the successfully bid, the Auctioneer is to receive a flat fee of \$7,000.00 plus reimbursement of up to \$53,000.00 for all out-of-pocket marketing and advertising expenses, including overhead in connection with the auction.

31. The Auctioneer has submitted invoices and supporting documentation to the Debtor for \$50,811.05 in expenses associated with the auction, which shall be filed with the Court.

32. Accordingly, the Auctioneer is seeking an award of **\$57,811.05** in fees and costs (the "Auctioneer Fees").

33. Prior to the Petition Date, the undersigned's law firm received a \$20,000.00 fee retainer of which \$3,405.00 was billed against for fees incurred prior to the filing. As such, \$16,595.00 remains in trust (the "Remaining Retainer").

34. From the Petition Date through March 17, 2008, the undersigned's law firm has incurred a total of \$49,481.50 in fees and \$4,498.83 in expenses, for a total of **\$53,980.33** (the "Outstanding Fee Balance").

35. Deducting the Remaining Retainer from the Outstanding Fee Balance results in the net amount of **\$37,385.33** incurred by the undersigned's law firm through March 17, 2008 (the "Net Attorneys Fees").

36. The Net Attorneys Fees and Auctioneer Fees total **\$95,196.38** (the "Professional Fees").

37. Pursuant to Bankruptcy Code Section 503(b)(2), the Professional Fees are administrative expenses, which in this case have the first priority of payment from estate funds pursuant to Bankruptcy Code Section 507(a)(2).

38. Accordingly, after deducting the Administrative Fees from the \$100,000.00 that is to be paid to the estate by Philrich in connection with the sale, there will only remain **\$4,803.62**, prior to the payment of any outstanding United States Trustee Fees and any additional attorneys' fees and costs incurred by the undersigned's law firm from March 18, 2008 through the conclusion of this case.

39. As set forth in the Debtor's Monthly Operating report for January 2008 (C.P. #107), the current balance in the Debtor's DIP bank account was \$1.97 and no additional funds have been deposited into the account since January 31, 2008.

40. As such, the Debtor is simultaneously filing its Notice of Withdrawal of the Plan

and Disclosure Statement as there will not be any funds to distribute to creditors in this case.

II. Basis for Relief Requested

a. Legal Authority

41. Section 1112(b) of the Bankruptcy Code permits a party in interest, such as the Debtor in this case, to dismiss a Chapter 11 case for cause provided it is in the best interests of creditors. 11 U.S.C. §1112(b)(1).

42. Bankruptcy Code Section 1112(b)(4)(J) identifies "cause" for purposes of dismissal of a Chapter 11 case, as "failure to file a disclosure statement, or to file or confirm a plan, within the time frames fixed by this title or by order of the court." 11 U.S.C. § 1112(b)(4)(J).

b. Application of Law to Facts Warrant Dismissal of this Proceeding

43. The Property is the only asset from which the Debtor could utilize to fund a plan.

44. While the Debtor hoped to generate proceeds from the sale of the Property over and above what was owed to Philrich and to distribute such proceeds to creditors, this unfortunately did not happen.

45. After payment of the Professional Fees and the U.S. Trustee fees, there will most likely be no money remaining in the estate to distribute to creditors.

46. Therefore, there is no reason for this case to remain in Chapter 11 or for the Debtor to go forward with its Plan when there is no money to distribute to any creditors.

47. The Debtor proposes that the dismissal of this case be with prejudice to the Debtor filing a petition under either Chapter 11 or Chapter 7 of the Bankruptcy Code for a period of not less than twelve (12) months from the date of entry of the order granting this motion.

48. The Debtor shall pay the United States Trustee the appropriate sum required

pursuant to 28 U.S.C. Section 1930(a)(6) within ten (10) days from the date of entry of the order granting this motion and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the relevant period since the period reported on the last debtor-in-possession report filed by the Debtor.

49. The Debtor proposes to submit to the United States Trustee all outstanding monthly operating reports, if any (or an affidavit of disbursements), within ten (10) days of the entry of the order granting this motion and s shall pay the Clerk of the Court any outstanding fees, costs and charges in connection with this case within ten (10) days of the entry of the order granting this motion.

50. The Debtor also requests the Court retain jurisdiction to award fees and costs incurred by its undersigned counsel in this case upon the filing of a final fee application within twenty (20) days of the entry of the order granting this motion.

WHEREFORE, the Debtor requests that this Court enter an Order dismissing this case and retaining jurisdiction to award fees and costs incurred by its undersigned counsel in this case and granting such other relief as this Court may deem just and proper.

Dated this 18th day of March, 2008.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

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