

Lloyd King



Honorable Lloyd King
United States Bankruptcy Judge

Entered on Docket
April 11, 2012

BRETT A. AXELROD, ESQ.
Nevada Bar No. 5859
MICAELA RUSTIA MOORE, ESQ.
Nevada Bar No. 9676
FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Telephone: (702) 262-6899
Facsimile: (702) 597-5503
Email: baxelrod@foxrothschild.com
mmoore@foxrothschild.com
[Proposed] Counsel for Debtor

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re

AMERICAN WEST DEVELOPMENT, INC.,
a Nevada corporation,

fdba Castlebay 1, Inc.
fdba Development Management, Inc.
fdba Fairmont 1, Inc.
fdba Glen Eagles 3, Inc.
fdba Heritage 1, Inc.
fdba Inverness 5, Inc.
fdba Kensington 1, Inc.
fdba Kingsbridge 1, Inc.
fdba Promontory Estates, LLC
fdba Promontory Point 4, Inc.
fdba Silverado Springs 1, Inc.
fdba Silverado Springs 2, Inc.
fdba Tradition, Inc.
fdba Windsor 1, Inc.,

Debtor.

Case No. BK-S-12-12349-MKN

Chapter 11

**FINAL ORDER PURSUANT TO
11 U.S.C. § 364 AND FED. R. BANKR.
P. RULE 4001(C): (I) AUTHORIZING
DEBTOR TO OBTAIN POSTPETITION
FINANCING; AND (II) GRANTING
RELATED RELIEF**

Hearing Date: April 10, 2012
Hearing Time: 9:30 a.m.

FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 262-6899
(702) 597-5503 (fax)

1 The Court, having reviewed and considered the Motion (the "Motion") filed by American West
 2 Development, Inc. ("Debtor") for entry of a final order (the "Final Order") pursuant to section 364 of
 3 title 11 of the United States Code, §§ 101 *et. seq.* (the "Bankruptcy Code"), Rule 4001(c) of the Federal
 4 Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 4001(b) and (c) of the Local Rules
 5 for the U.S. Bankruptcy Court, District of Nevada ("Local Rules") authorizing and approving, among
 6 other things, Debtor to obtain postpetition financing (the "Postpetition Financing") from AWH
 7 Ventures, Inc. (the "Lender") on a non-priming secured and superpriority basis pursuant to a
 8 Debtor-In-Possession Revolving Credit Agreement (the "DIP Agreement"); and it appearing that the
 9 relief requested is in the best interests of Debtor's estate, its creditors and all other parties in interest;
 10 and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to
 11 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a
 12 core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this Court pursuant to
 13 28 U.S.C. §§ 1408 and 1409; and the Court having reviewed and considered all other pleadings and
 14 evidence submitted by the parties in connection with the Motion; and due and proper notice of the
 15 Motion having been provided; and it appearing that no other or further notice need be provided; and the
 16 Court having determined that the legal and factual bases set forth in the Motion establish just cause for
 17 the relief granted herein; and the Court having considered the oral arguments of counsel at the hearings
 18 held on April 10, 2012 (the "Hearing"); and the Court having made findings of fact and conclusions of
 19 law on the record, which (to the extent not expressly set forth below) are incorporated herein pursuant
 20 to Rule 52 of the Federal Rules of Civil Procedure, made applicable to these proceedings by Bankruptcy
 21 Rule 7052; and good and sufficient cause appearing therefor,

22 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

23 **I. Background, Jurisdiction and Notice.**

24 A. On March 1, 2012 (the "Petition Date"), Debtor commenced its bankruptcy case (the
 25 "Chapter 11 Case") by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.
 26 Debtor is continuing to operate its business as a debtor-in-possession pursuant to Bankruptcy Code
 27 sections 1107(a) and 1108. No trustee, examiner, or statutory committee has been appointed.

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1 B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334.
2 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant
3 to 28 U.S.C. §§ 1408 and 1409.

4 C. Debtor has complied with applicable Bankruptcy Rules and Local Rules by serving the
5 Motion and providing notice of the Hearing to: (i) the Office of the United States Trustee; (ii) Debtor's
6 twenty (20) largest unsecured creditors; (iii) counsel to Lender; (iv) counsel to the Pre-Petition Lenders;
7 and (v) all other parties requesting notice pursuant to Bankruptcy Rule 2002. Given the nature of the
8 relief sought in the Motion, the Court concludes that the foregoing notice was sufficient and adequate
9 under the circumstances and complies with Bankruptcy Rule 4001 in all respects.

10 **II. Findings Regarding the Postpetition Financing Based on the Record at the Hearing.**

11 D. Debtor has an immediate and critical need to obtain the Postpetition Financing.
12 Debtor's ability to obtain the Postpetition Financing is critical to its ability to continue as a going
13 concern during the course of this Chapter 11 Case. The proceeds of the Postpetition Financing will be
14 used to fund the costs of administering Debtor's estate, including, without limitation, (i) funding the
15 operations of Debtor's business and properties, (ii) making adequate protection payments to the
16 Pre-Petition Lenders, (iii) paying expenses incurred for the administration of the Chapter 11 Case,
17 including paying reasonable compensation of professional fees and expenses, (iv) paying any
18 contractual obligations, and (v) repaying Revolving Loans. Debtor's access to sufficient liquidity
19 through the incurrence of the Postpetition Financing under the terms of this Final Order is vital to the
20 preservation and maintenance of the going concern value of Debtor's estate and to Debtor's successful
21 reorganization.

22 E. The use of cash collateral alone would be insufficient to meet Debtor's postpetition
23 liquidity needs. Debtor is unable to obtain adequate unsecured credit allowable under Bankruptcy Code
24 sections 364(b) and 503(b)(1). The Postpetition Financing reflects the most favorable terms available to
25 Debtor. Debtor requires the Postpetition Financing, in addition to the use of cash collateral, to satisfy
26 its postpetition liquidity needs.

27 F. Lender has indicated a willingness to provide Debtor with the Postpetition Financing, but
28 solely on the terms and conditions set forth in this Final Order and in the Loan Documents (as defined

FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
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(702) 262-6899
(702) 597-5503 (fax)

1 in the DIP Agreement). After considering all of its alternatives, Debtor has concluded, in an exercise of
2 its sound business judgment, that the financing to be provided by Lender pursuant to the terms of this
3 Final Order and the Loan Documents represents the best financing presently available to Debtor.

4 G. The security interests and liens granted pursuant to this Final Order to Lender are
5 appropriate under Bankruptcy Code sections 364(c)(2) and (c)(3) because, among other things, such
6 security interests and liens do not impair the interests of any holder of a valid, binding, continuing,
7 enforceable and fully-perfected prepetition security interest or lien in the property of Debtor's estate.

8 H. Entry of this Final Order is in the best interest of Debtor, its estate and creditors. The
9 terms of the Loan Documents are fair and reasonable under the circumstances, reflect Debtor's exercise
10 of prudent business judgment consistent with its fiduciary duties, and are supported by reasonably
11 equivalent value and fair consideration.

12 I. Debtor and Lender have negotiated the terms and conditions of the Loan Documents and
13 this Final Order in good faith and at arm's-length, and any credit extended and loans made to Debtor
14 pursuant to this Final Order shall be, and hereby are, deemed to have been extended, issued or made, as
15 the case may be, in "good faith" within the meaning of Bankruptcy Code section 364(e).

16 J. Based on the foregoing, and upon the record made before this Court at the Hearing, and
17 good and sufficient cause appearing therefor;

18 **III. Disposition.**

19 1. The Motion is granted on a final basis on the terms and conditions set forth in this Final
20 Order. This Final Order shall become effective immediately upon its entry. To the extent the terms of
21 the Loan Documents differ in any material respect from the terms of this Final Order, this Final Order
22 shall control.

23 **IV. Authorization of the Postpetition Financing and Entry Into the Loan Documents.**

24 2. The terms and conditions of the DIP Agreement are hereby approved. Debtor is hereby
25 authorized to enter into the Loan Documents, including the DIP Agreement and such additional
26 documents, instruments and agreements as may be reasonably required by Lender to implement the
27 terms or effectuate the purposes of this Final Order. Immediately upon entry of this Final Order, Debtor
28

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3800 Howard Hughes Parkway, Suite 500
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1 is hereby authorized to borrow under the Revolving Loan up to ten million dollars (\$10,000,000), in
2 accordance with this Final Order, the DIP Agreement, and the other Loan Documents.

3 3. Debtor hereby is authorized to incur the Obligations solely in accordance with the terms
4 and conditions set forth in the DIP Agreement and this Final Order.

5 **V. Loan Obligations.**

6 4. Upon execution and delivery of the Loan Documents, the Loan Documents shall
7 constitute valid, binding and continuing obligations of Debtor, enforceable against Debtor in accordance
8 with the terms thereof. No obligation, payment, transfer or grant of security under the Loan Documents
9 or this Final Order shall be stayed, restrained, voided, voidable or recoverable under the Bankruptcy
10 Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff,
11 recoupment or counterclaim.

12 5. The Loans: (i) shall bear interest payable at the rates set forth in the DIP Agreement;
13 (ii) shall be secured in the manner specified in Paragraph 7 below; (iii) shall be payable in accordance
14 with the terms of the Loan Documents; and (iv) shall otherwise be governed by the terms set forth
15 herein and in the Loan Documents.

16 **VI. Use of Loan Proceeds.**

17 6. Debtor may use the Loans pursuant to the terms and conditions set forth in this Final
18 Order and in the Loan Documents.

19 **VII. Grant of Superpriority Claims and Liens.**

20 7. As security for the full and timely payment of the Obligations, Lender is hereby granted,
21 subject to the Carve-Out:

22 (a) pursuant to Bankruptcy Code sections 364(c)(1), an allowed administrative expense
23 claim in the Chapter 11 Case having priority over all claims against Debtor now existing or
24 hereafter arising, of any kind whatsoever, including, without limitation, the Pre-Petition
25 Lenders' Superpriority Claims and all other administrative expenses of the kinds and over any
26 and all administrative expenses or other claims arising under Bankruptcy Code sections 105,
27 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114, which DIP Superpriority
28 Claim shall be (i) subject to the Carve-Out (as defined in Paragraph 9 below), (ii) subject to the

FOX ROTHSCHILD LLP
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1 Subordination Agreement (as defined in Paragraph 14 below), and (iii) applicable to any
2 Avoidance Actions; and

3 (b) pursuant to Bankruptcy Code sections 364(c)(2) and (c)(3), (i) a valid and duly
4 perfected first priority Lien on Avoidance Actions, and any other previously unencumbered
5 assets of Debtor, and (ii) a valid and duly perfected junior Lien on the Pre-Petition Lenders'
6 Collateral and any other assets of Debtor that are subject to a valid and perfected lien as of the
7 Petition Date (collectively, the liens to be granted to Lender are referred to herein as the "DIP
8 Lien" and the collateral subject to such DIP Lien is referred to herein as the "DIP Collateral");
9 provided that the DIP Lien shall be subject and subordinate to the lien and security interest of
10 the Pre-Petition Lenders in and to the Pre-Petition Lenders' Collateral and Lender agrees to
11 execute and deliver such additional subordination agreements as the Pre-Petition Lenders may
12 require to evidence such subordination. In no event will the DIP Lien attach to any property
13 constituting collateral pursuant to the Pre-Petition Credit Agreement other than the Pre-Petition
14 Lenders' Collateral.

15 8. The DIP Liens shall not be subject to challenge and shall attach and become valid,
16 binding, continuing, enforceable, fully-perfected and non-avoidable by operation of law as of the
17 Petition Date without any further action by Debtor, Lender, or any other person, and without the
18 necessity of execution by Debtor, or the filing or recordation, of any financing statements, security
19 agreements, vehicle lien applications, mortgages, deeds of trust, assignment of rents, filings with the
20 U.S. Patent and Trademark Office, or other documents. Debtor, upon the request of Lender (i) shall
21 authorize Lender to file and record such financing statements and fixture filings with respect to any DIP
22 Collateral identified by Lender, and (ii) shall take any such other action as required by Lender with
23 respect to DIP Collateral identified by Lender in order to perfect the DIP Liens granted herein. Lender
24 is authorized to file or record such documents in its discretion, in which event all such documents shall
25 be deemed to have been filed or recorded at the time and on the date of entry of this Final Order.

26 **VIII. Carve-Out.**

27 9. The DIP Lien and the DIP Superpriority Claims shall be subject to the payment of the
28 Carve-Out. For purposes of this Final Order, the "Carve-Out" shall mean (i) all fees required to be

1 paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee pursuant to
2 28 § U.S.C. 1930, and (ii) an amount not exceeding three million dollars (\$3,000,000) in the aggregate,
3 which amount may be used after the occurrence and during the continuation of an Event of Default, to
4 pay the fees and expenses of professionals retained by Debtor and any Committee and allowed (or
5 allowable) by the Bankruptcy Court (as to which allowed or allowable fees and expenses Lender
6 waives any right to seek disgorgement); provided, however, that Debtor shall be permitted to pay
7 compensation and reimbursement of expenses allowed, allowable or otherwise authorized by the
8 Bankruptcy Court and payable under Bankruptcy Code sections 330 and 331 in accordance with the
9 Cash Budget, the Carve-Out shall not be reduced by the amount of any compensation and
10 reimbursement of expenses paid or incurred (to the extent ultimately allowed or allowable by the
11 Bankruptcy Court) prior to the occurrence of an Event of Default in respect of which the Carve-Out is
12 invoked, and the Lender waives any right to seek disgorgement thereof; and provided, further, that
13 nothing herein shall be construed to impair the ability of Lender to object to the reasonableness of any
14 of the fees, expenses, reimbursement or compensation sought by the professionals retained by Debtor or
15 any Committee.

16 **IX. 11 U.S.C. § 364(e) Protections.**

17 10. If any or all of the provisions of this Final Order are hereafter reversed, modified,
18 vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity of any
19 Obligations incurred pursuant to this Final Order or the Loan Documents, or (ii) the validity or
20 enforceability of any claim, lien, security interest or priority authorized or created hereby or pursuant to
21 the Loan Documents with respect to any Obligations. Notwithstanding any such reversal, modification,
22 vacation or stay, any incurrence of Obligations by Debtor shall be governed in all respects by the
23 provisions of this Final Order and the Loan Documents, and Lender shall be entitled to all of the rights,
24 remedies, protections and benefits granted under Bankruptcy Code section 364(e), this Final Order, and
25 the Loan Documents with respect to incurrence of the Obligations by Debtor.

26 **X. Vacation of the Automatic Stay.**

27 11. Notwithstanding Bankruptcy Code section 362, the automatic stay is hereby vacated and
28 modified to the extent necessary to permit Lender, upon the occurrence and during the continuance of

1 an Event of Default and following three (3) business days' prior notice thereof to Debtor (with a copy to
2 counsel for any Committee, and to the United States Trustee for the District of Nevada), and without
3 further order of or application to the Bankruptcy Court to: (i) terminate the Revolving Loan
4 Commitments, (ii) immediately cease any obligation to provide funding of Revolving Loans,
5 (iii) declare the Obligations immediately due and payable, (iv) declare the Loans or any portion thereof
6 then outstanding to be forthwith due and payable, whereupon the principal of such Loans together with
7 accrued interest thereon and any unpaid accrued fees and all other liabilities of Debtor accrued
8 hereunder and under any other Loan Document, shall become forthwith due and payable, without
9 presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived
10 by Debtor, anything contained herein or in any other Loan Document to the contrary notwithstanding,
11 and (v) after three (3) business days' prior notice (the "Stay Notice Period") to Debtor and any
12 Committee, and absent order of the Bankruptcy Court to the contrary, exercise any and all remedial
13 rights with respect to the DIP Collateral; provided that Lender consents to a hearing before the
14 Bankruptcy Court with respect to the foregoing on such shortened time as may be available according to
15 the Bankruptcy Court's calendar and the stay shall remain in effect pending such a hearing if requested
16 by Debtor prior to the expiration of the Stay Notice Period.

17 **XI. No Marshalling/506(c) Waiver.**

18 12. Lender shall not be subject to the doctrine of marshalling. Debtor has waived any right
19 to seek a surcharge against Lender under Bankruptcy Code section 506(c), and such waiver hereby is
20 approved.

21 **XII. Miscellaneous Provisions.**

22 13. The provisions of this Final Order shall be binding upon and inure to the benefit of
23 Lender, Debtor, and their respective successors and assigns. The provisions of this Final Order and any
24 actions taken pursuant thereto (a) shall survive the entry of any order: (i) confirming any plan of
25 reorganization in the Chapter 11 Case unless otherwise provided therein; (ii) converting the Chapter 11
26 Case to one under chapter 7 of the Bankruptcy Code; or (iii) dismissing the Chapter 11 Case; and
27 (b) shall continue in full force and effect notwithstanding the entry of any such order, and the claims,
28 liens, and security interests granted pursuant to this Final Order shall maintain their priority as provided

1 by this Final Order until all of the Obligations are indefeasibly paid in full and discharged in accordance
2 with the terms of this Final Order and the DIP Agreement.

3 14. Lender’s rights and Borrower’s obligations under this Final Order and the Loan
4 Documents are subject to the Subordination and Intercreditor Agreement executed by Lender and the
5 administrative agent on behalf of the Pre-Petition Lenders (the “Subordination Agreement”) providing
6 for, among other things, confirmation of lien and payment priorities. All provisions, rights, remedies
7 and terms under the DIP Agreement are subject to the Subordination Agreement. In the event of any
8 conflict between the DIP Agreement, the other Loan Documents, and the Subordination Agreement, the
9 Subordination Agreement shall control and each Revolving Note (as defined in the DIP Agreement)
10 shall include a legend (the contents of which to be agreed upon by Lender and the Pre-Petition Lenders
11 pursuant to the Subordination Agreement) that the Revolving Note is subject to the Subordination
12 Agreement.

13 15. The rights of Lender and the obligations of Debtor under the DIP Agreement and the
14 other Loan Documents are subordinate to the claims and obligations incurred by U.S. Bank from
15 ordinary course transactions under Borrower’s cash management system and/or bank accounts with
16 U.S. Bank (collectively, the “Cash Management Claims”).

17 16. Debtor hereby is authorized, without further order of this Court, to enter into agreements
18 with Lender providing for (a) non-material modifications to the DIP Agreement, or (b) any other
19 modifications to the DIP Agreement necessary to conform the DIP Agreement to this Final Order.

20 17. To the extent applicable, this Final Order is not subject to the 14-day stay provision of
21 Bankruptcy Rule 4001(a)(3).

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FOX ROTHSCHILD LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 262-6899
(702) 597-5503 (fax)

1 DATED: April 10, 2012.

2 Prepared and respectfully submitted by:

3 **FOX ROTHSCHILD LLP**

4 By /s/ Brett A. Axelrod

BRETT A. AXELROD, ESQ.

Nevada Bar No. 5859

MICAELA RUSTIA MOORE, ESQ.

Nevada Bar No. 9676

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

8 *[Proposed] Counsel for Debtor*

11 **CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021**

12 In accordance with Local Rule 9021, counsel submitting this document certifies that the order
13 accurately reflects the court's ruling and that:

- 14 The Court has waived the requirement set forth in LR 9021(b)(1).
- 15 No party appeared at the hearing or filed an objection to the motion.
- 16 I have delivered a copy of this proposed order to all counsel who appeared at
17 the hearing, and any unrepresented parties who appeared at the hearing, and
18 each has approved or disapproved the order, or failed to respond, as indicated
below:
- 19 I certify that this is a case under Chapter 7 or 13, that I have served a copy of
20 this order with the motion, pursuant to LR 9014(g), and that no party has
21 objected to the form or content of the order.

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FOX ROTHSCHILD LLP
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(702) 262-6899
(702) 597-5503 (fax)