

Lloyd King



Honorable Lloyd King
United States Bankruptcy Judge

Entered on Docket
April 11, 2012

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**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. §§ 361, 362 AND 363 AND FED. R. BANKR. P. 4001(b) AND 4001(d): (I) AUTHORIZING DEBTOR TO USE CASH COLLATERAL AND PROVIDE ADEQUATE PROTECTION PURSUANT TO AGREEMENT WITH PRE-PETITION LENDERS; AND (II) GRANTING RELATED RELIEF

Hearing Date: April 10, 2012

Hearing Time: 9:30 a.m.

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1 The Court, having reviewed and considered the Motion (the “Motion”) filed by American West
2 Development, Inc. [Docket No. 11] (“Debtor”), for entry of an interim order and final order (the “Final
3 Order”) pursuant to sections 361, 362 and 363 of title 11 of the United States Code, §§ 101 *et. seq.* (the
4 “Bankruptcy Code”), Rules 4001(b) and 4001(d) of the Federal Rules of Bankruptcy Procedure (the
5 “Bankruptcy Rules”), and Rules 4001(b) and 4001(c) of the Local Rules for the U.S. Bankruptcy Court,
6 District of Nevada (“Local Rules”): (i) authorizing and approving, among other things, (a) Debtor to use
7 the cash collateral of the Pre-Petition Lenders¹ pursuant to the terms of the Cash Collateral Agreement,
8 (b) Debtor to provide adequate protection to the Pre-Petition Lenders, (c) the form and manner of
9 service of the Motion; and (ii) scheduling interim and final hearings with respect to the relief requested
10 therein; the Court having approved the Motion on a interim basis at the hearing held on March 6, 2012,
11 and subsequently entered the Interim Order Pursuant to 11 U.S.C. §§ 361, 362 and 363 and Fed. R.
12 Bankr. P. 4001(b) and 4001(d): (I) Authorizing Debtor to Use Cash Collateral and Provide Adequate
13 Protection Pursuant to Agreement with Pre-Petition Lenders; (II) Granting Related Relief; and (III)
14 Scheduling Final Hearing [Docket No. 102] (the “Interim Order”), and the Court having conducted a
15 final hearing on the Motion on April 10, 2012 (the “Final Hearing”) to consider the relief requested in
16 the Motion on a final basis and any objections thereto; with no objections to the Motion or the Interim
17 Order having been filed; and upon the record made by Debtor at the Final Hearing; with appearances as
18 noted in the record; it appearing that the relief requested is in the best interests of Debtor’s estate, its
19 creditors and all other parties in interest; and the Court having jurisdiction to consider the Motion and
20 the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and
21 the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being
22 proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having reviewed and
23 considered all other pleadings and evidence submitted by the parties in connection with the Motion; and
24 due and proper notice of the Motion having been provided; and it appearing that no other or further
25 notice need be provided; and the Court having determined that the legal and factual grounds set forth in

26
27 ¹ Capitalized terms used but not defined herein shall have the meaning set forth in the agreement
28 (the “Cash Collateral Agreement”) attached as **Exhibit “B”** to the Omnibus Declaration of Robert M.
Evans filed in support of Debtor’s First Day Motions [Docket Nos. 56 and 57] on March 1, 2012.

1 the Motion establish just cause for the relief granted herein; and the Court having made findings of fact
2 and conclusions of law on the record, which (to the extent not expressly set forth below) are
3 incorporated herein pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable to
4 these proceedings by Bankruptcy Rule 9014(c); and good and sufficient cause appearing therefor,

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

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

7 A. On March 1, 2012 (the "Petition Date"), Debtor commenced its bankruptcy case
8 by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor is continuing
9 to operate its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and
10 1108. No trustee, examiner, or statutory committee has been appointed in this case.

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

14 C. Debtor has complied with the requirements of Bankruptcy Rules 4001(b) and 4011(d),
15 and Local Rules 4001(b), 4001(c) and 9006, requiring, among other things, that the Interim Hearing be
16 held on less than twenty-one (21) days notice by serving the Motion and providing notice of the Interim
17 Hearing by electronic mail, facsimile or overnight mail to: (i) the U.S. Trustee; (ii) all parties listed on
18 the List of Creditors Holding the 20 Largest Unsecured Claims; (iii) the DIP Financing lender; (iv) the
19 Pre-Petition Lenders; and (v) all other parties requesting notice pursuant to Bankruptcy Rule 2002.
20 Given the nature of the relief sought in the Motion, the Court concludes that the foregoing notice was
21 sufficient and adequate under the circumstances and complies with Bankruptcy Rule 4001 in all
22 respects.

23 **II. Findings Regarding the Use of Cash Collateral Based on the Record at the Final Hearing.**

24 D. Debtor has an immediate and critical need to use cash collateral. Debtor's ability to use
25 cash collateral is critical to Debtor's ability to continue as a going concern during the course of this
26 Chapter 11 Case. The Cash Budget provides for Debtor to use cash collateral to fund the costs of
27 administering Debtor's estate, including, without limitation, (i) funding the operations of Debtor's
28 business, (ii) making adequate protection payments to the Pre-Petition Lenders, (iii) paying expenses

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1 incurred for the administration of the Chapter 11 Case, including compensation of professional fees and
2 expenses, (iv) paying contractual obligations consistent with the Final Order, and (v) repaying
3 borrowings under any DIP Financing. Debtor's ability to use cash collateral under the terms of the
4 Cash Collateral Agreement and this Final Order are vital to the preservation and maintenance of the
5 going concern value of Debtor's estate and to Debtor's successful reorganization. Consequently,
6 without the ability to use cash collateral to the extent authorized pursuant to this Final Order, Debtor
7 and its estate would suffer immediate and irreparable harm.

8 E. The Cash Collateral Agreement has been negotiated in good faith and at arms' length,
9 and is fair and reasonable under the circumstances. The Cash Collateral Agreement reflects Debtor's
10 sound exercise of prudent business judgment consistent with its fiduciary duties.

11 F. The adequate protection to be provided pursuant to the Cash Collateral Agreement,
12 including, without limitation, the Replacement Liens and the Pre-Petition Lenders' Superpriority
13 Claim, is consistent and in compliance with the Bankruptcy Code, including sections 361, 362 and 363
14 thereof.

15 G. Good cause has been shown for immediate entry of this Final Order pursuant to
16 Bankruptcy Rules 4001(b)(2) and 4001(d), and, to the extent it applies, Bankruptcy Rule 6003, as the
17 Court finds that entry of this Final Order is necessary to avoid immediate and irreparable harm to
18 Debtor and its estate. Entry of this Final Order is in the best interest of Debtor, its estate and creditors.

19 H. Based on the foregoing, and upon the record made before this Court at the Final Hearing,
20 and good and sufficient cause appearing therefor:

21 **III. Disposition.**

22 1. The Motion is granted on a final basis on the terms and conditions set forth in this Final
23 Order. This Final Order shall become effective immediately upon its entry. To the extent the terms of
24 the Cash Collateral Agreement differ in any material respect from the terms of this Final Order, this
25 Final Order shall control.

26 2. The terms and conditions of the Cash Collateral Agreement, including, without
27 limitation, the Replacement Liens and the Pre-Petition Lenders' Superpriority Claim, are hereby
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1 approved on a final basis. Debtor is hereby authorized to use cash collateral pursuant to the terms of the
2 Cash Collateral Agreement.

3 3. The Replacement Liens and the Pre-Petition Lenders' Superpriority Claims shall be
4 subject to the payment of the Carve-Out.

5 4. The Pre-Petition Lenders shall not be subject to the doctrine of marshalling.

6 5. The provisions of this Final Order shall be binding upon and inure to the benefit of the
7 Pre-Petition Lenders, Debtor, and their respective successors and assigns.

8 6. The automatic stay is vacated and modified to the extent necessary to permit Debtor to
9 make the Adequate Protection Payments and the Pre-Petition Lenders to apply them against the Pre-
10 Petition Lenders' Claims as provided in the Cash Collateral Agreement, the Motion and this Final
11 Order.

12 7. To the extent applicable, this Final Order is not subject to the 14-day stay provision of
13 Bankruptcy Rules 4001(a)(3) or 6003.

14 8. Service of Notice. Debtor shall cause a copy of this Final Order to be served within
15 three (3) business days of its entry, by electronic mail, U.S. Mail or the Court's ECF noticing to: (a)
16 counsel to the DIP Financing lender: Edward C. Lubbers, Esq., Lubbers Law; (b) counsel to the Pre-
17 Petition Lenders: Donald F. Ennis, Esq., Snell & Wilmer LLP, (b) the Office of the United States
18 Trustee for the District of Nevada, Attn: Athanasios Agelakopoulos, Trial Attorney; (c) counsel for any
19 statutory committee appointed in this case, and if no such committee was appointed, then to the parties
20 listed on the List of Creditors Holding the 20 Largest Unsecured Claims; and (d) all other secured
21 creditors, and all other parties requesting notice pursuant to Bankruptcy Rule 2002 (the "Notice
22 Parties").

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1 DATED: April 10, 2012.

2 Prepared and respectfully submitted by:

3 **FOX ROTHSCHILD LLP**

4 By /s/Brett A. Axelrod

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11 *[Proposed] Counsel for Debtor*

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

14 In accordance with Local Rule 9021, counsel submitting this document certifies that the order
15 accurately reflects the court’s ruling and that:

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

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