

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

2:15-27769 Crystal Waterfalls LLC

Chapter 11

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#1.00 Hearing
RE: [245] Emergency Motion to Continue Sale Motion and to Modify Bidding Procedures

Docket No: 245

Tentative Ruling:

11/16/2016: **(Amended)** On November 3, 2016, Crystal Waterfalls, LLC, ("Debtor") filed the instant Motion to Modify, requesting an order to modify the Debtor's previously approved bidding procedures. For the reasons stated below, the Court DENIES the Motion to Modify and orders the Debtor's case DISMISSED.

Pleadings Filed and Reviewed

1. Motion to Continue Hearing on Sale Motion and for an Order Modifying Previously Approved Bidding Procedures for Sale of Real Property and Improvements ("Motion to Modify") [Doc. No. 240]
 - a. Application for Order Setting Hearing on Shortened Notice re: Motion to Continue Sale Motion and to Modify Bidding Procedures ("Debtor's Shortened Notice Application") [Doc. No. 241]
 - b. Declaration of Casey Z. Donoyan in Support of Debtor's Shortened Notice Application ("Decl. of Casey Donoyan") [Doc. No. 242]
 - c. Debtor's Notice of Motion and Motion for Entry of an Order Approving Bidding Procedures for Sale of Real property and Improvements and Assumption ("Original Bidding Procedures Motion") [Doc. No. 211]
2. B3 Capital Venture, LLC's Opposition to: (A) "Motion to Continue Hearing on Sale Motion and for an Order Modifying Previously Approved Bidding Procedures for Sale of Real Property and Improvements"; and (B) "Application for Order Setting Hearing on Shortened Notice [LBR 9075(b)]" ("Opposition to Modify Motion") [Doc. No. 243]
3. Debtor's Reply to Opposition of B3 Capital Venture, LLC to Motion to Continue Hearing on sale Motion and for an Order Modifying Previously

**United States Bankruptcy Court
Central District of California
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Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT...

Crystal Waterfalls LLC

Chapter 11

- Approved Bidding Procedures for Sale of Real Property and Improvements ("Reply to Modify Motion") [Doc. No. 247]
4. B3 Capital Venture, LLC's Supplemental Opposition to "Motion to Continue Hearing on Sale Motion and for an Order Modifying Procedures for Sale of Real Property and Improvements;" Declaration of Raymond H. Aver in Support Thereof ("Supplemental Opposition to Modify Motion") [Doc. No. 262]
 5. Notice of Hearing on Debtor's Motion to Modify Bidding Procedures [Doc No. 253]
 - a. Proof of Service re: Notice of Hearing on Debtor's Motion to Modify Bidding Procedures [Doc. No. 254]
 6. Orders:
 - a. Order Granting Relief Pursuant to § 362(d)(2), with the Order's Effect to be Stayed Pending Further Order of the Court ("Stay-Relief Order") [Doc. No. 218]
 - b. Order Granting the Debtor's Shortened Notice Application [Doc. No. 249]
 - c. Order Continuing the Debtor's Hearings on the Sale Motion, Approval of the Disclosure Statement, Cash Collateral, and Motion to Maintain the Existing Cash Management System [Doc. No. 251]
 7. Motion for Sale of Property of the Estate under Section 363(b) [Doc. No. 255]

Facts and Summary of Pleadings

Background Information

The Debtor commenced the instant chapter 11 bankruptcy case on November 19, 2015 ("Petition"). Doc. No. 1. Since commencement, the Debtor has operated as a debtor-in-possession. The Debtor is a California limited liability company that owns and operates a hotel located at 1211 E. Garvey Street, Covina, California, known as Park Inn by Radisson ("Property").

The Property has 258 rooms (fifty of which require certain forms of rehabilitation and are currently not in use) and offers guest accommodations and various amenities such as a fitness center and an on-site steakhouse. The day-to-day

**United States Bankruptcy Court
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Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... Crystal Waterfalls LLC

Chapter 11

operation of the Property is outsourced to a management company. On January 4, 2016, the Court entered an order determining that the Property is a "single asset real estate" within the meaning of § 101(51B) and found that requirements of § 362(d)(3) is applicable in this case. Doc. No. 50. On March 29, 2016, the Debtor filed an application to employ Keller Williams Realty Westside ("Keller") as its real estate broker for the purpose of marketing the Property for sale. Doc. No. 88. The Court entered an order approving the employment application on May 17, 2016. Doc. No. 119.

On May 16, 2016, the Court held a hearing on the United States Trustee's ("UST") motion to dismiss or convert the Debtor's chapter 11 case. Doc. No. 115. The Court ordered the Debtor to file a plan and disclosure statement by August 8, 2016 and confirm a chapter 11 plan by November 30, 2016. *Id.* Subsequently, the Court entered an order approving a stipulation between the UST and the Debtor on August 11, 2016, extending the deadlines for the Debtor to file a plan and disclosure statement to September 7, 2016 and receive confirmation of a plan to December 30, 2016 ("New Deadline"). Doc. No. 184. The Debtor filed a disclosure statement ("Disclosure Statement") and Plan ("Plan") on September 7, 2016. Doc. Nos. 207-08.

Stay-Relief Motion

On July 11, 2016, B3 Capital Venture, LLC's ("Secured Creditor"), filed a motion for relief from the automatic stay ("Stay-Relief Motion"), seeking stay-relief with respect to the Secured Creditor's first priority deed of trust against the Property. Doc. No. 156. On September 21, 2016, the Court granted the Secured Creditor's Stay-Relief Motion under § 362(d)(2) for reasons set forth in the Court's tentative ruling, incorporated by full reference herein at docket number 210, and for representations made by the Debtor's counsel at the hearing on the Stay-Relief Motion, [FN 1] with the effect of the order to be stayed pending further order of the Court. Doc. No. 218.

Original Bidding Procedures

On September 17, 2016, the Debtor filed the Original Bidding Procedures Motion, requesting the Court to approve PFM Ltd./Hillary Shockley, et al. ("PFM") as a stalking horse bidder for a sale amount of \$25,000,000 with a deposit in the amount of \$750,000. Doc. No. 211. The Debtor also sought approval of a \$150,000 break-up

**United States Bankruptcy Court
Central District of California
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Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... **Crystal Waterfalls LLC**

Chapter 11

fee and various procedures related to the Debtor's proposed bidding process, including a sale auction scheduled for November 15, 2016. *Id.* On September 28, 2016, the Court entered an order approving the Original Bidding Procedures Motion and set the hearing to approve the sale for November 18, 2016 ("Sale Hearing"). Doc. No. 224. As such, the Debtor's motion for the Sale Hearing ("Sale Motion") was due by no later than October 28, 2016, pursuant to Local Bankruptcy Rule ("LBR") 9013-1(d).

Motion to Modify

On November 3, 2016, the Debtor filed the Debtor's Shortened Notice Application and the instant Motion to Modify. Doc. Nos. 240-41. The Debtor states that PFM failed to provide a proof of funds and make the initial deposit of \$750,000 into escrow, rendering the Debtor unable to timely file the motion for the Sale Hearing by the October 28, 2016, deadline. Motion to Modify at 2. The Debtor requests either (1) the Court continue the Sale Hearing or (2) allow the Debtor to file the Sale Motion on shortened notice. *Id.*

Further, the Debtor requests an order to modify the Original Bidding Procedures to include a new stalking horse bidder, L.A. Property Investment ("LA"), at a new purchase price of \$20,500,000. *Id.* The Debtor avers that LA already placed a \$615,000 deposit into escrow to evidence its willingness to perform. *See* Motion, Ex. A and Decl. of Casey Donoyan, ¶ 17. The Debtor proposes the following modifications:

Original Bidding Procedures	Motion to Modify
1.	
Stalking Horse Bidder – PFM	1. New Stalking Horse Bidder
2.	
Purchase Price - \$25,000,000	2. New Purchase Price - \$20,500,000
3.	
Deposit - \$750,000	3. New Deposit - \$615,000
4.	
Overbid - \$25,750,000	4. New Overbid - \$21,000,000
5.	
Bid Deadline – November 11, 2016	5. New Bid Deadline – November 11, 2016

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... Crystal Waterfalls LLC

Chapter 11

6.

Auction – November 15, 2016	6. New Auction – November
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7.

Sale Hearing – November 18, 2016	7. New Sale Hearing – Decen
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("New Bidding Procedures"). *Id.* at 5.

The Debtor submits that each passing day without the requested modifications decreases the chance of receiving more offers on the Property and further jeopardizes the ability of the Debtor to maximize the sale. *Id.* at 3. As a result, the Debtor requests the need for relief on an emergency basis. *Id.*

Opposition to Modify Motion

On November 7, 2016, the Secured Creditor filed the Opposition to Modify Motion. Doc. No. 243. The Secured Creditor argues that despite the Debtor's knowledge as to the significant deficiencies contained in the Disclosure Statement, the Debtor has yet to file an amended disclosure statement and plan, making it apparent that the Debtor will not be able to confirm a plan by the New Deadline. Opposition to Modify Motion at 6. As to the Debtor's proposal to continue the Sale Hearing, the Secured Creditor asserts that it is unorthodox for the Debtor to proceed to sale based on a sale procedures order, without first having sought and obtained a sale order. *Id.* at 9.

As to the Debtor's alternative request to hear the Sale Motion on shortened notice, the Secured Creditor argues that the Debtor failed to file the Sale Motion concurrently with the Debtor's Shortened Notice Application, as required by LBR 9075-1(b)(3). *Id.* To the extent that the Debtor intended to file an emergency motion under LBR 9075-1(a), the Secured Creditor contends that the Debtor failed to follow procedure, including adhering to the appropriate service requirements. *Id.* at 9-10.

As to the Debtor's proposed modifications of the Original Bidding Procedures, the Secured Creditor states that the Motion to Modify lacked any information as to whether there are other qualified individuals or entities expressing interest in purchasing the Property and how the Original Bidding Procedures will affect these individuals' or entities' decision to participate in the auction sale of the Property. *Id.*

**United States Bankruptcy Court
Central District of California
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Courtroom 1568 Calendar**

Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... Crystal Waterfalls LLC

Chapter 11

at 10. Additionally, the Secured Creditor disputes the Debtor's basis for emergency relief because the Debtor was aware of the bid deadline, the auction date, and the Sale Hearing as of September 23, 2016, but waited two weeks before the scheduled Sale Hearing to file the Motion to Modify. *Id.* at 11. Finally, the Secured Creditor challenges the proof of the \$615,000 deposit by LA and evidence of LA's proof of funds to purchase the Property. *Id.*

Reply to Modify Motion

On November 7, 2016, the Debtor filed the Reply to Modify Motion. Doc. No. 247. First, the Debtor contends that the Motion to Modify will not impact a pending agreement between the Debtor and the Secured Creditor, which allowed the Secured Creditor's claim to be paid from escrow in exchange for the Debtor's waiver of "certain rights" regarding B3's claim. Reply to Modify Motion at 3. Next, the Debtor states that because the Motion to Modify seeks to approve a sale for \$20,500,000, rather than the approved amount of \$25,000,000, the Debtor must first obtain authority to modify the Original Bidding Procedures, before filing the Sale Motion. *Id.* Additionally, the Debtor states that the Secured Creditor will receive payment in full, even if its entire claim is allowed. *Id.* Moreover, the Decl. of Casey Donoyan specifically states that LA already placed the requisite \$615,000 deposit into escrow and provided sufficient proof of funds to the Debtor. *Id.* Further, the Debtor represents to receiving another offer of \$21,000,000 for the Property from an unidentified third-party. *Id.* Finally, the Debtor disputes the information supporting the Secured Creditor's filed proof of claim. *Id.*

On November 8, 2016, the Court entered an order granting the Debtor's Shortened Notice Application and set a hearing on the Debtor's request to modify the Original Bidding Procedures only for November 17, 2016. Doc. No. 249. On the same day, the Court concurrently ordered the Sale Hearing and the hearing on the Disclosure Statement continued to November 30, 2016. Doc. No. 251.

Supplemental Opposition to Modify Motion

On November 14, 2016, the Secured Creditor filed the Supplemental Opposition to Modify Motion. Doc. No. 262. The Secured Creditor states that the Secured Creditor has been unable to obtain LA's proof of funds because the Debtor

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... **Crystal Waterfalls LLC**

Chapter 11

claims that the documents contain confidential information. Supplemental Opposition to Modify Motion at 2. In light of the Debtor's first aborted sale attempt, the Secured Creditor contends that the Court should require the Debtor to explain the basis for the confidential nature and to make any documents available *in camera* to the Court. *Id.* Further, the Secured Creditor highlights paragraph 26.1[FN 2] in the "Addendum to Standard Offer, Agreement and Escrow Instructions for Purchase of Real Property," attached as exhibit A to the Decl. of Casey Donoyan, which provides that the proposed buyer should "remove all contingencies on or before November 14, 2016." *Id.* at 2. The Secured Creditor submits that the Debtor should advise the Court whether LA has removed all contingencies pursuant to the Addendum. *Id.*

Findings of Fact and Conclusions of Law

As a preliminary matter, the Court notes that the notice [Doc. No. 253], proof of service [Doc. No. 254] and the Declaration of Casey Donoyan regarding Notice and Service [Doc. No. 263], show compliance with the Court's order granting the Debtor's Shortened Notice of Application. *See* Doc. No. 249.

Motion to Modify

Pursuant to the Court's previous approval of the Original Bidding Procedures, the Court is unclear why the Debtor filed the instant Motion to Modify. The Court previously approved the Original Bidding Procedures that contained approval for qualified bidders showing interest in purchasing the Property to adhere to and follow. There is no reason why the Original Bidding Procedures could not have anticipated the possibility that the stalking horse bidder might drop out, triggering possible contingencies so as to avoid future delays. For instance, a clause that allowed for a new stalking horse bidder, at a purchase price within the Debtor's reasonable discretion, and with overbids based on the new purchase price seems sufficiently appropriate. Additionally, although the stalking horse bidder PFM failed to submit a deposit and proof of sufficient funds, this did not bar the Debtor from accepting other bids. At the Original Bidding Procedures' hearing on September 23, 2016, at 1:30 p.m. in courtroom 1568, the Court, in response to the Debtor's inquiry as to whether the sale auction would take place in courtroom 1568, the Court specifically stated, "No, I don't want the auction here. I want you to come in and tell me who won and then I want you to come in and tell me who almost won. Okay, that is all I want."

**United States Bankruptcy Court
Central District of California
Los Angeles
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Courtroom 1568 Calendar**

Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... **Crystal Waterfalls LLC**

Chapter 11

In the Court's view the Motion to Modify typifies a pattern of continual delays by the Debtor because of the Debtor's inability to sell the Property, e.g. filing the case approximately one year ago and employing Keller more than seven months ago to broker a sale on March 29, 2016. Another concern of the Court is the Debtor's modified purchase price, which is \$4,500,000 less than what the Debtor previously stated under the Original Bidding Procedures, specifically that the \$25,000,000 would "help the Debtor obtain the highest and best possible price..." Original Bidding Procedures at 13, line 28. Finally, given the Debtor's case history in failing to consummate a sale, the Court is wary of the new stalking horse bidder LA and finds there is a deficient lack of information surrounding the buyer. Thus, the Court denies the Debtor's requested modifications.

Further, the Court finds cause exists under 11 U.S.C. § 1112(b) to either dismiss or convert the case. Courts may, *sua sponte*, convert or dismiss a Debtor's case pursuant to 11 U.S.C. § 105(a). *See* 11 U.S.C. 105(a); *see also In re Labankoff*, No. 2010 WL 6259969 (B.A.P. 9th Cir. June 14, 2010) (holding that the Bankruptcy Court did not abuse its discretion by converting the Debtor's chapter 11 case to a chapter 7 under section 105(a)); *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008) ("Although the statute provides for conversion 'on request of a party...or the...trustee, 11 U.S.C. § 1307, there is no doubt that the bankruptcy court may also convert on its own motion. *See id.* § 105(a).").

Under § 1112(b), the Court shall dismiss or convert a case to one under chapter 7 upon a showing of "cause." Section 1112(b)(4) provides a nonexclusive list of factors that constitute "cause," including, the "(J) failure to file a disclosure statement, or to file a plan or confirm a plan, within the time fixed by this title or by order of the court" and "(M) inability to effectuate substantial consummation of a confirmed plan." 11 U.S.C. § 1112(b).

Here, the Court finds that cause exists because the Debtor will be unable to generate value from the sale to effectively and substantially consummate the Plan. The Court finds this especially true in light of the Debtor's previously approved "maximum value" of the Property at \$25,000,000 and the Debtor's inability to consummate the sale at that requested value. Moreover, the Debtor has failed to file an amended disclosure statement that addresses significant deficiencies highlighted by this Court at the October 19, 2016, hearing on the Disclosure Statement, including (1)

**United States Bankruptcy Court
Central District of California
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Courtroom 1568 Calendar**

Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... **Crystal Waterfalls LLC**

Chapter 11

the lack of discussion regarding the concurrent litigation involved in the Property between the Debtor, Huesing Holdings, LLC, and Liberty Asset Management Corporation; (2) the overly broad guarantees contained in the Disclosure Statement; and (3) the insufficient discussion of risk factors with respect to the implementation of the Debtor's Plan altogether. *See* Case Nos. 2:16-ap-01145-ER and 2:16-ap-01343-ER ("Adversary Proceedings").

If cause does exist, the Court must next determine whether dismissal or conversion serves the best interests of creditors of the estate. *See In re Products Int'l Co.*, 395 B.R. 101, 107 (Bankr. D. Ariz. 2008) (citing *In re Nelson*, 343 B.R. 671 (9th Cir. 2006)). "[W]hen deciding between dismissal and conversion under 11 U.S.C. § 1112(b), the court must consider the interests of all of the creditors." *Shulkin Hutton, Inc. v. Treiger (In re Owens)*, 552 F.3d 958, 961 (9th Cir. 2009)(emphasis in original) (quoting *Rollex Corp. v. Associated Materials, Inc. (In re Superior Siding & Window, Inc.)*, 14 F.3d 240, 243 (4th Cir. 1994)). Here, the Court finds dismissal appropriate. The Court previously granted the Secured Creditor's stay-relief under § 362(d)(2) because there was no equity in the Property and the Property was not necessary for an effective reorganization. Further, the contested liens in the Adversary Proceedings cast doubt on whether the Debtor's ability to liquidate the Property. As such, the Court finds dismissal more appropriate.

Therefore, for the reasons stated above, the Court HEREBY DENIES the Motion to Modify as to the Debtor's requested modifications of the Original Bidding Procedures and orders the Debtor's case DISMISSED.

The Court shall prepare and enter the order.

Note 1: The Debtor's counsel represented to receiving a signed purchase agreement the night before the hearing for the Property in the amount of \$25,000,000. Stay-Relief Hearing, September 14, 2016. The Debtor's Bidding Procedure's Motion subsequently verified the representation by stating that on September 12, 2016, PFM Ltd./Hillary Shockley, et al. signed a commercial purchase agreement with the Debtor for the sale of substantially all of the Debtor's assets, including the Property, the Debtor's furniture, fixtures, equipment, an inventory of personal property, and all permits, licenses, authorizations, registrations, consents and approvals relating to the Debtor's business. Doc. No. 211.

**United States Bankruptcy Court
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Thursday, November 17, 2016

Hearing Room 1568

10:00 AM

CONT... Crystal Waterfalls LLC

Chapter 11

Note 2: The Secured Creditor states "paragraph 26.1" which refers to the close of escrow and not the removal of contingencies. The Court notes that the Secured Creditor likely means paragraph 26.2, which contains the contingency removal provision. *See* Decl. of Casey Donoyan, Ex. A.

Party Information

Debtor(s):

Crystal Waterfalls LLC

Represented By
Ian Landsberg