

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Hearing Date:
February 15, 2017 at 3:00 p.m.

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In re:

Chapter 11

MADDD WEST 38 LLC,

Case No. 16-45836 (CEC)

Debtor.

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**NOTICE OF HEARING TO CONSIDER THE DEBTOR’S MOTION FOR
AUTHORIZATION TO ASSUME CONTRACT TO PURCHASE REAL PROPERTY
AND APPROVAL OF RELATED MORTGAGE FINANCING**

PLEASE TAKE NOTICE that a hearing will be held before the Honorable Carla E. Craig in the United States Bankruptcy Court for the Eastern District of New York, located at 271-C Cadman Plaza East, Brooklyn, New York in Courtroom 3529 on February 15, 2017 at 3:00 p.m. or as soon thereafter as counsel can be heard, to consider the motion of MADDD West 38, LLC (the “Debtor”) to authorize the Debtor to assume its executory contract to purchase certain real property located at 402 West 38th Street, New York, NY, and to approve related mortgage financing

PLEASE TAKE FURTHER NOTICE that opposition, if any, to the proposed relief shall be filed with the Clerk of the Bankruptcy Court in accordance with the Court’s electronic filing procedures and served upon counsel for the Debtor, Goldberg Weprin Finkel Goldstein LLP, 1501 Broadway, 22nd Floor, New York, New York 10036, with a courtesy copy delivered to Judge Craig, so as to be received no later than February 14, 2017.

Dated: New York, New York
February 3, 2017

Goldberg Weprin Finkel Goldstein LLP
Attorneys for the Debtor
1501 Broadway – 22nd Floor
New York, New York 10004
(212) 221-5700

By: Kevin J. Nash, Esq.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

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**DEBTOR’S MOTION FOR AUTHORIZATION TO ASSUME CONTRACT TO PURCHASE
REAL PROPERTY AND APPROVAL OF RELATED MORTGAGE FINANCING**

**TO THE HONORABLE CARLA E. CRAIG,
UNITED STATES BANKRUPTCY JUDGE:**

MADDD West 38, LLC (the “Debtor”), as and for its motion to authorize the Debtor to assume its executory contract to purchase certain real property located at 402 West 38th Street, New York, NY, and to approve related mortgage financing, respectfully states and alleges as follows:

Background

1. The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 28, 2016 and has continued as a debtor-in-possession pursuant to section 1107 and 1108 of Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

2. The focal point of this Chapter 11 case is the Debtor’s effort to close and purchase certain real property located at 402 West 38th Street, New York, NY for the total sum of \$33,450,000 pursuant to a contract of sale dated March 16, 2016, as amended (the “Contract”).

3. The original closing date was extended under a series of amendments, the last of which was executed on November 29, 2017 and extended the closing until December 29, 2016. Under the various amendments to the Contract, the deposit was increased from an initial

payment \$2 million to \$9.5 million, all of which was released to the Seller prior to bankruptcy under the various amendments.

4. The Chapter 11 petition was filed shortly before a closing deadline to gain the benefit of the sixty day extension provided under Section 108(b)(1) of the Bankruptcy Code. That sixty day period ends on February 27, 2017.

5. Post-petition, the Debtor has acted quickly to position itself to close on the transaction. Among other things the Debtor (i) obtained approval of a zoning subdivision involving an adjoining property; (ii) confirmed the availability of mortgage financing to permit the closing to go forward within the sixty day period; and (iii) filed a plan of reorganization (ECF #14) (the "Plan") providing for the assumption of the contract, approval of the mortgage financing, and closing on the sale. The Court entered an Order (ECF #21) conditionally approving the Amended Disclosure Statement (ECF #18) and scheduling a combined hearing on confirmation of the Plan and final approval of the Amended Disclosure Statement for February 15, 2017.

Relief Requested

The Debtor Should Be Authorized To Assume The Contract

6. While the Debtor expects the Plan to be confirmed within sixty days, the Debtor is moving prophylactically to assume the Contract pursuant to Section 365(a) of the Bankruptcy Code, so as to insure that a closing can occur within the Section 108 sixty day deadline even if confirmation of the Plan is delayed for some unforeseen reason.

7. Section 365(a) permits the assumption of an executory contract subject to the requirement of Section 365(b) that any defaults be cured prior to assumption. By filing the Chapter 11 petition before the last deadline for closing, the Debtor avoided a default, and

believes that it is fully compliant with the terms of the Contract, so long as the closing is concluded by February 27. To the extent any defaults are asserted and subsequently allowed, Section 4.3 of the Plan provides that all monetary defaults will be cured at the closing.

8. The decision to assume an executory contract is committed to the Debtor's business judgment. *In re Penn Traffic Co.*, 524 F.3d 373, 383 (2d Cir. 2008) (“that the debtor's interests are paramount in the balance of control is underscored by the business judgment standard employed by courts in determining whether to permit the debtor to assume or reject the contract. *See Orion Pictures*, 4 F.3d at 1099 (“[B]ankruptcy court reviewing a trustee's or debtor-in-possession's decision to assume or reject an executory contract should examine a contract and the surrounding circumstances and apply its best ‘business judgment’ to determine if it would be beneficial or burdensome to the estate to assume it.... [T]he process of deciding a motion to assume is one of the bankruptcy court placing itself in the position of the trustee or debtor-in-possession and determining whether assuming the contract would be a good business decision or a bad one.” (citations omitted)).

9. Here, the Debtor's determination to move forward with the acquisition serves the interests of all concerned and prevents a forfeiture of a deposit totaling \$9.5 million. Thus, the assumption of the Contract should be approved by the Bankruptcy Court as being plainly in the best interest of the Debtor's estate.

B. The Mortgage Financing Should Be Approved

10. To finance the acquisition, the Debtor has negotiated for mortgage financing (the “Exit Facility”) from an affiliate of G4 Capital Bridge LLC known as G4 18168 LLC, (hereinafter the “Take-Out Lender”). The mortgage financing is termed the Exit Facility in the Plan. Again, the Debtor is moving for approval of the mortgage financing separately from

the Plan confirmation process in the event that confirmation is delayed for any reason so the closing can occur within the sixty day deadline.

11. The basic terms of Exit Facility are set in the mortgage note, a copy of which is annexed as Exhibit "A" to the Amended Disclosure Statement, and is also attached to this Motion as Exhibit "A" for the convenience of creditors and the Court. Additional loan and collateral documents will be filed as a supplement prior to the confirmation hearing on February 15.

12. The Exit Facility will be a first priority senior mortgage loan in the principal amount of up to \$31,500,000 from the Take-Out Lender. From these proceeds, the Debtor will pay the balance of the purchase price of \$23,950,000 due under the Contract, as well as creditors, who have claims scheduled by the Debtor in the total amount of \$3,627,3sixty (subject to final review and reconciliation). Thus, the Exit Facility is sufficient to pay the balance of the purchase price, and all allowed claims, as well as allowed Professional Fees and U.S. Trustee Fees. Any surplus proceeds from the Exit Facility shall be retained by the Debtor for working capital requirements.

13. The term of the Exit Facility is an initial period of eighteen (18) months, subject to an extension of six (6) months. The interest rate under the notice is 8.25% for the initial term.

14. The Take-Out Lender's estimated fees and expenses were set forth in the Amended Disclosure Statement, and will be updated with any additional charges, including internal fees and the fees of counsel. As with the additional loan documents, this information will be filed as a supplement prior to the February 15 confirmation hearing.

15. Section 364(d) of the Bankruptcy Code permits a debtor to borrow funds on a secured basis, so long as there is no priming of liens, as is the case here.

16. As with the assumption of the Contract, the decision to obtain financing is also committed to the Debtor's business judgment. *In re YL W. 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010)(Courts have generally deferred to a debtor's business judgment in granting section 364 financing. *In re Ames Dept. Stores*, 115 B.R. 34, 40 (Bankr.S.D.N.Y.1990); *In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1088 (4th Cir.1986); *In re Curlew Valley Assocs.*, 14 B.R. 506, 513–514 (Bankr.D.Utah 1981); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (Bankr.D.Colo.1985)).

17. The Debtor's negotiations with the Take-Out Lender pre-dated the bankruptcy filing. The mortgage financing terms represent commercially reasonable terms for a transaction of this type. The proposed Exit Facility will permit the closing to be completed prior to the February 27, 2017 deadline, preserving the Debtor's \$9.5 million deposit, and providing sufficient funds to pay creditors. Accordingly, in the Debtor's best business judgment, the Exit Facility should likewise be approved.

Notice

18. Creditors have already received notice through the Amended Disclosure Statement of the Debtor's intention to assume the Contract and obtain mortgage financing under the Exit Facility. This motion is filed as a backup, and will likewise be served on all creditors and other parties in interest, as previously alluded to in the Amended Disclosure Statement.

WHEREFORE, the Debtor respectfully requests entry of an order consistent with the foregoing, and granting such other and further relief as is just and proper.

Dated: New York, New York
February 3, 2017

GOLDBERG WEPRIN
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By: /s/ Kevin J. Nash
A Member of the Firm