

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF PUERTO RICO**

In re:

SAN JUAN RESORT OWNER, INC.

Debtor.

Case No. 15-01627(MCF)

Chapter 11

**LEAVE TO FILE REPLY AND TENDERING  
REPLY TO UST'S OBJECTION TO THE SALE MOTION**

**TO THE HONORABLE UNITED STATES  
BANKRUPTCY COURT:**

**COME NOW** San Juan Resort Owner, Inc. (the “Debtor”) and secured creditor Banco Popular de Puerto Rico (“BPPR”) (jointly, the “Parties”), each by their respective undersigned counsel, and respectfully submit this this motion for leave to file a reply to the U.S. Trustee’s limited objection to the Sale Motion (the “UST’s Objection”) (Dkt No. 96), and tender the reply.

**Preliminary Statement**

On March 27, 2015, the Debtor and BPPR filed a motion for entry of a sale order authorizing the sale of assets, free and clear of liens, interest and encumbrances to the Stalking Horse Purchaser or to the Successful Bidder, seeking approval of the Asset Purchase Agreement, the Bidding Procedures, and the Settlement Agreement between the Parties (the “Sale Motion”) (Dkt No. 21). The U.S. Trustee opposes the approval of the Sale Motion based on two grounds: (1) that there is contradictory information in the Sale Motion as to the amount of the carve-out that BPPR has agreed upon, and (2) objects to the appointment of an “examiner” outside the provisions of Section 1104 of the Bankruptcy Code. The Parties hereby submit sufficient information for the US Trustee and the Court to conclude that the carve-out amounts are not contradictory, but can be, and are herein clarified. On the other hand, the Parties will supplement their Sale Motion to modify the appointment of an “examiner” to that of an auditor, who will

better serve the purpose of auditing the payments and use of the carve-out in conformity with the Settlement Agreement executed by the Parties. As a result, the US Trustee's Objection becomes moot.

### **Brief Background**

1. Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on March 5, 2015, and, since then, has been operating and managing its affairs as a debtor-in-possession in accordance with 11 U.S.C. §§ 1107 and 1108 (Dkt No. 1). As of the Petition Date, BPPR is the holder of a valid, perfected, secured interest claim in the amount of \$18,017,618.58 (Proof of Claim No. 4).

2. On March 27, 2015, the Debtor and BPPR filed a Motion for Entry of the Sale Order: (A) Approving the Asset Purchase Agreement and Sale of the Sale Assets, Free and Clear, to the Stalking Horse Purchaser or to the Successful Bidder, (B) Approving the Bidding Procedures to Solicit Higher and Better Offers and Select the Successful Bidder, and (C) Approving the Settlement Agreement with BPPR (the "Sale Motion") (Dkt No. 21).

3. On March 27, 2015, the Debtor and BPPR also filed a Notice of the Sale Motion, providing notice to all parties in interest that they had twenty one days, that is, through and including April 17, 2015 to file any responses to the Sale Motion (Docket No. 25).

4. On April 29, 2015, the Court entered an order scheduling a hearing for May 29, 2015 (the "Sale Hearing" and/or "Evidentiary Hearing"), to consider, among other things, the Sale Motion, as supplemented, any objections to the Sale Motion, and replies thereto (Dkt No. 83).

5. On May 4, 2015, the US Trustee filed its limited objection to the Sale Motion (Dkt No. 96).

### **Basis for Opposition**

#### **I. The Carve-Out amounts**

6. The Settlement Agreement between Debtor and BPPR specifically provides for a Carve-Out to be allowed by BPPR “from the Purchase Price in an amount that shall not exceed one million six hundred thirty two thousand and seventy dollars (\$1,632,070.00) to pay from such Carve-Out solely the amounts necessary to settle the existing debts set forth in [Exhibit 1] hereto, including as provided therein, the Borrower Closing Costs **and certain liabilities of Debtor’s affiliates.**” (Exhibit No. 3 to the Sale Motion, ¶ 26) (Emphasis ours).

7. As detailed in the Sale Motion, the Sale includes the Sale of assets owned by the Debtor and assets owned by an affiliate, Premier Hotel Management (“Premier”), to achieve the orderly sale of the ongoing operating hotel business. Accordingly, as to the Debtor, the Sale Motion conditions the Carve-Out to “an amount that shall not exceed \$1,181,627.00 to pay from such Carve-Out **solely as administrative and certain priority tax and other claims**, the amounts necessary to settle the existing claims and expenses set forth in Exhibit [2].

8. The difference between the amount originally set forth in the Settlement Agreement and the amount set forth in the Sale Motion is the purchase price for the sale of the assets of Premier (\$410,000.00), amount which will be paid directly by the Stalking Horse Purchaser to Premier through a separate asset purchase agreement. The Premier assets are not part of the bankruptcy estate and, as such, this transaction is not subject to the Bidding Procedures. In other words, Premier is bound to sell its assets to the Stalking Horse Purchaser or to any Successful Bidder for the Premier Purchase Price of \$410,000.00, pursuant to a private agreement.

9. Consequently, the Carve-Out set forth in the Sale Motion is only for expenses of the estate as detailed therein. The Purchase Price for the assets of Premier is used to satisfy solely expenses of Premier.

10. Also, there is a reduction (savings) to the amounts originally budgeted in the Settlement Agreement as part of the Carve-Out for closing costs related to the sale (\$40,000.00).

11. As a result, the Parties hereby clarify that as detailed in the Sale Motion BPPR has consented to the Carve-Out from the Purchase Price in an amount that shall not exceed \$1,181,627.00, to pay from such Carve-Out solely as administrative and certain priority tax and other claims, the amounts necessary to settle the existing claims and expenses set forth in Exhibit 2 to this motion, and unequivocally excluding payments to any of the Debtor's affiliates.

12. The Parties hereby supplement the Sale Motion to clarify this matter.

## **II. Appointment of an auditor**

13. The US Trustee objects to the proposition of naming an examiner to audit the payments and use of the Carve-Out amounts, for falling outside of the provisions of Section 1104 of the Bankruptcy Code.

14. The purpose of the examiner, as required by BPPR, was to oversee the payments made under the Carve-Out dispositions of the Settlement Agreement and have a safeguard tool to make sure said payments are made pursuant to the Carve-Out schedule, as proposed in the Sale Motion (*i.e.*, administrative, priority tax claims and other claims pursuant to Exhibit 2 to this motion).

15. Nevertheless, the Parties recognize that under Section 1104 of the Bankruptcy Code, an examiner's role is to investigate certain designated aspects of a case or the debtor's

business, and its designation falls under Bankruptcy Rule 2007.1, not applicable to the actual situation of the case.

16. Hence, the Parties hereby supplement the Sale Motion to replace the appointment of an “examiner” to that of an “auditor”, to audit and review the use of the Carve-Out in conformity with the Settlement Agreement, to be paid by BPPR. Under no circumstances would the auditor be employed or paid by the Debtor or the bankruptcy estate. Furthermore, if an auditor were to be hired, BPPR would give notice to the Court of such employment.

17. Based upon the clarifications included herein, and the supplement to the Sale Motion filed contemporaneously herewith, the Parties submit that the US Trustee’s Objection becomes moot.

**WHEREFORE**, for the reasons set forth herein, the Parties respectfully request that this Court grant this motion and enter an order denying the US Trustee’s Objection, as moot, with any further relief the Court deems appropriate in furtherance of the Sale.

**WE HEREBY CERTIFY** that on this date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties appearing in said system, including the U.S. Trustee.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 27th day of May 2015.

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