

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:)
)
AUTO SALES & SERVICE, INC.,)
)
Debtor.)

Chapter 11
Case No. 10-14528-JNF

In re:)
)
GENERAL TRADING COMPANY,)
)
Debtor.)

Chapter 11
Case No. 10-14532-JNF

In re:)
)
FRANK SAWYER CORPORATION,)
)
Debtor.)

Chapter 11
Case No. 10-14533-JNF

In re:)
)
100 STUART STREET LLC,)
)
Debtor.)

Chapter 11
Case No. 10-14534-JNF

In re:)
)
SW BOSTON HOTEL VENTURE LLC,)
)
Debtor.)

Chapter 11
Case No. 10-14535-JNF

(Joint Administration Request Pending)

DEBTORS' MOTION FOR AUTHORITY TO (A) ASSUME AND CONSUMMATE PENDING PURCHASE AND SALE AGREEMENTS FOR CONDOMINIUM UNITS; (B) MAKE AND CONSUMMATE NEW SALES FOR CONDOMINIUM UNITS; AND (C) FOR RELATED RELIEF

Pursuant to Sections 105, 363 and 365 of Title 11 of the United States Code, Federal Rules of Bankruptcy Procedure 2002, 6003, 6004, 6006 and 9014, and MLBR 2002-1 and 6004-1, SW Boston Hotel Venture LLC ("SW Boston"), General Trading Company ("General

Trading”), Frank Sawyer Corporation (“Sawyer Corporation”), 100 Stuart Street LLC (“Stuart Street”) and Auto Sales & Service, Inc. (“Auto Sales” and together with SW Boston, General Trading, Sawyer Corporation and Stuart Street the “Debtors”), the above-captioned debtors and debtors-in-possession, hereby move this Court, for the entry of an order (a) authorizing the Debtors to assume and consummate eleven (11) purchase and sale agreements for condominium units, and (b) authorizing the Debtors to enter into new purchase and sale agreements for condominium units and consummate same. In order to avoid immediate and irreparable harm to the estates, the Debtors request, pursuant to Fed. R. of Bankr. P. 6003 and 6004(h), that any Order on this Motion be deemed to be effective upon entry.

In further support of this motion, the Debtors aver as follows:

I. JURISDICTION AND VENUE

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

II. BACKGROUND

3. On April 28, 2010 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (“Code”) in the United States Bankruptcy Court for the District of Massachusetts (the “Court”).
4. The Debtors continue to operate as debtors in possession pursuant to Sections 1107 and 1108 of the Code. As of the date of this Motion, no official committee of creditors has been appointed in any of the Debtors’ cases.
5. SW Boston is a Delaware limited liability company formed by a local family, descendants of the late taxicab/parking businessman Frank Sawyer, to develop and own the W

Boston Hotel and Residences project (the “Project”). The Project is comprised of a 350,650 square foot, 26-story building located at 100 Stuart Street in the heart of Boston’s Theatre District. The Project contains a four-star hotel (the “Hotel”), residential condominium units, and a two-story underground parking garage. The Hotel is branded as a “W” Hotel – the only W Hotel in New England – and is a first-class hotel serving Boston’s many national and international visitors and tourists. The Hotel includes a retail store, a signature restaurant at a prominent location along Tremont Street, a second floor spa with a first floor entrance and related retail space on the Stuart Street side of the Project, and a theme lounge with an entrance adjacent to the spa entrance on Stuart Street. The Spa is in the final stages of construction and the Theme Lounge is planned to open in the fall.

6. Stuart Street is a Delaware limited liability company that owns 100% of the membership interests in SW Boston. Stuart Street is a single purpose entity formed to own the membership interests in SW Boston.

7. Sawyer Corporation is a Massachusetts corporation that owns approximately sixty-five percent (65%) of Stuart Street. Sawyer Corporation manages Stuart Street.

8. General Trading is a Massachusetts corporation that provides administrative services for the Debtors as well as various non-debtor affiliates of the Debtors. The Chief Executive Officer of General Trading is Carol Sawyer Parks, and the Vice President of Development in charge of the Project is John P. Connolly.

9. Auto Sales is a Massachusetts corporation.

10. On January 15, 2008, SW Boston and The Prudential Insurance Company of America (the “Prudential”) entered into a *Construction Loan Agreement Between SW Boston Hotel Venture LLC and The Prudential Insurance Company of America* (the “Prudential Loan

Agreement”) dated January 15, 2008. As collateral for the Prudential Loan, SW Boston granted Prudential a mortgage on, assignment of leases and rents and security interest in the Project. The Prudential Loan Agreement establishes certain Minimum Sales Prices (the “Minimum Sales Prices”) which are required for a purchase and sale agreement for the sale of a Condominium to be deemed a Qualified Sale Contract under the Prudential Loan Agreement.

11. On December 9, 2009, SW Boston and the City of Boston (the “City” and together with Prudential the “Mortgage Holders”) entered into a *Subordinate Loan Agreement* (the “City Loan Agreement”) whereby the City agreed to provide \$10,500,000 (the “City Loan”) to finance the completion of the spa and the theme bar within the Project. As collateral for the City Loan, SW Boston granted the City a second mortgage on and assignment of leases and rents in the Project.

12. The condominium units consist of 122 luxury condominium 1, 2 and 3 bedroom units. Pre-construction pricing ranges from \$600,000 to over \$4,000,000. Prior to the Petition Date, the Debtors closed sales on twelve (12) condominium units, representing adjusted gross proceeds in the aggregate amount of \$8,315,052. At the time of the Petition, the Debtors had entered into twelve (12) additional purchase and sale agreements for the sales of the following condominium units (the “Existing Sales”), representing adjusted gross proceeds in the aggregate amount of \$11,752,029: Unit Nos. 16A, 16C, 16D, 16F, 16H, 17H, 18A, 19J, 21I, 22I, 25B and PH4.

13. All sales of condominium units are, and have been, arms length transactions with non-insider third parties. The Existing Sale of one unit, Unit No. 17H, is to a broker employed by Otis & Ahearn for fair market value. The Debtors intend to market and sell additional condominium units during this proceeding (the “New Sales”).

III. RELIEF REQUESTED

14. The Debtors contract in the ordinary course of their business with third parties for the sale of the condominium units. The Debtors' ability to satisfy their contractual obligations to purchasers and continue to contract for and complete the sale of condominium units is critical to the Debtors' business and necessary for a successful reorganization of the Debtors' affairs. By this motion, the Debtors request the entry of an order authorizing the Debtors to (i) assume the pending purchase and sale agreements and consummate the Existing Sales free and clear of all liens, claims and encumbrances, and (ii) enter into New Sales and consummate same free and clear of all liens claims and encumbrances without the necessity of further court order. The Debtors further request the entry of an order requiring all Lienholders (as defined below) to deliver discharges to the Debtors as set forth below.

15. Debtors believe that they are authorized to sell condominium units in the ordinary course of business without the need of a court order. Nonetheless, the Debtors seek the instant relief out of an abundance of caution and in order to provide comfort and clarity to purchasers of the condominium units and clear and efficient procedures for the discharge of liens upon each sale. Requiring the Debtors to seek individual court orders approving each of the Existing Sales and New Sales would be time consuming, expensive and chilling to the Debtor's efforts to market and sell the condominium units.

A. The Debtors Should be Authorized to Assume and Consummate the Existing Sales

16. Assumption of the purchase and sale agreements for the Existing Sales will allow the estates to generate adjusted gross proceeds of \$11,752,029 and further the Debtors goal of a successful reorganization and restructuring of their obligations.

17. The standard to be applied by a court in determining whether an executory contract or unexpired lease should be assumed is the “business judgment” test, which is premised upon the trustee’s business judgment that assumption and assignment would be beneficial to the estate. See, e.g., Eagle Ins. Co. v. BankVest Capital Corp. (In re BankVest), 290 B.R. 443, 447 (B.A.P. 1st Cir. 2003); In re III Enterprises, Inc. V., 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) (“Generally, a court will give great deference to a debtor’s decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment – a standard which we have concluded many times is not difficult to meet.”) (citing cases), aff’d, 169 B.R. 551 (E.D. Pa. 1994). Upon finding that a trustee has exercised sound business judgment to determine that assumption is in the best interests of its estate, the court should approve the assumption under Section 365(a) of the Bankruptcy Code. See, e.g., In re Child World, Inc., 142 B.R. 87, 89 (Bankr. S.D.N.Y. 1992); In re TS Indus., Inc., 117 B.R. 682, 685 (Bankr. D. Utah 1990); In re Del Grosso, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990); In re Ionosphere Clubs, Inc., 100 B.R. 670, 673 (Bankr. S.D.N.Y. 1989). In these Chapter 11 cases, it is clear that sound business judgment supports the assumption and consummation of the purchase and sale agreements for the Existing Sales, and that assumption and consummation will be beneficial to the estates.

18. The purchase and sale agreements for the Existing Sales are in full force and effect, have not been rejected or terminated or deemed rejected or terminated under Section 365(d) of the Bankruptcy Code, and are therefore eligible for assumption pursuant to Section 365 of the Bankruptcy Code.

B. The Debtors Should Be Authorized to Make and Consummate New Sales

19. Continuation of the Debtors' condominium unit sales is critical to their reorganization effort and consistent with sections 363(c) and 1108 of the Bankruptcy Code which, together, authorize the continued operation of a business in the ordinary course by Chapter 11 debtors. *See* 11 U.S.C. § 363(c)(1) (providing that, so long as "the business of the debtor is authorized to be operated under section ...1108... and unless the court order otherwise, the trustee may enter into transaction, including the sale or lease of property of the estate in the ordinary course of business, without notice and a hearing, and may use property of the estate in the ordinary course of business, without notice or a hearing ..."); 11 U.S.C. § 1108 (debtor in possession, as trustee, may operate the debtor's business unless court orders otherwise).

20. Even if the Debtors' continued sale of condominium units could possibly be construed as being outside the ordinary course of business (which the Debtors dispute), this Court has the authority to grant the relief requested herein pursuant to section 363(b) of the Bankruptcy Code, which provides in relevant part that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ..." 11 U.S.C. § 363(b)(1).

21. Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, courts have required that such use, sale of lease be based upon the sound business judgment of the debtor. *See Institutional Creditors of Cont'l Airlines, Inc. v. Cont'l Airlines, Inc. (In re Cont'l Airlines)*, 780 F.2d 1233, 1255-26 (5th Cir. 1986); *Official Comm. of Unsecured Creditors of LTV Aerospace and Def. Co. v. LTV Corp. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2nd Cir. 1992); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d

1063, 1070 (2nd Cir. 1983) (requiring “some articulated business justification” to approve the use, sale or lease of property outside the ordinary course of business); *In re Tropical Sportswear Int’l Corp.*, 320 B.R. 15, 17-18 (Bankr. M.D. Fla. 2005) (applying sound business justification standard in authorizing payment of prepetition claims pursuant to section 363(b)).

22. In these Chapter 11 cases, it is clear that sufficient business justification exists for the Debtors to make New Sales in the ordinary course of their businesses without the need for further court approval. During these proceedings, the Debtors intend to continue to market and sell condo units to satisfy their indebtedness and restructure their obligations to their creditors.

C. The Debtors Should Be Authorized to Convey the Condominium Units Free and Clear of Liens, Claims Encumbrances and Other Interests

23. Pursuant to section 363(f) of the Bankruptcy Code, a debtor may sell property free and clear of liens, claims, encumbrances and other interests if any one of the following conditions is satisfied:

- (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
- (2) the [lienholder] consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) [the lienholder] could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

See 11 U.S.C. § 363(f); *see also, e.g.*, *Citicorp Homeowners Servs., Inc. v. Elliot* (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988) (stating that a “free and clear” sale may be approved provided at least one of the subsections of 363(f) is met); *In re Gulf States*, 285 B.R. 497 (Bankr. N.D. Ala. 2002); *In re 18th Ave. Dev. Corp. a Modular Paving, Inc.* (In re 18th Ave. Dev. Corp.), 14

B.R. 862, 863-4 (Bankr. S.D. Fla. 1981) (stating that before “free and clear” sale of property, only one of the five conditions must be met).

24. The Existing Sales are at or above the minimum purchase prices (the “Minimum Purchase Prices”) established by the Prudential Loan Agreement and, therefore, the Mortgage Holders are deemed to have effectively consented to the Existing Sales pursuant to section 363(f)(2). The Debtors seek authority to make New Sales at or above the Minimum Purchase Prices, or upon the consent of the Mortgage Holders.

25. The Debtors request that Existing Sales and New Sales be free and clear of any and all liens, claims, interests and encumbrances held or asserted by any party (the “Lienholders”), including, without limitation, all lien claims, whether asserted or unasserted, known or unknown, with all such liens attaching to the proceeds of such sales in the same force, effect and priority as such liens had immediately prior to the closing of such sale, subject to the rights and defenses of the Debtors and any party in interest.

26. Upon information and belief, the Existing and New Sales also satisfy section 363(f)(3) in as much as the value of the condominium units, Hotel and other collateral held by the Mortgage Holders substantially exceed the amounts due to the Mortgage Holders.

27. In order to provide for expeditious closings and comfort to both the Existing Sales purchasers and the New Sales purchasers, the Debtors request that the Court order Mortgage Holders to deliver documents necessary to evidence a release and or discharge of their respective liens on a particular condominium unit (the “Unit Discharges and Releases”) to the Debtors’ closing attorney in a manner consistent with prepetition procedures, and all other Lienholders to deliver Unit Discharges and Releases to the Debtors’ closing attorney within three (3) business days of a written request from the Debtors.

D. Any Order on this Motion Should Be Immediately Effective to Avoid Immediate and Irreparable Harm

28. Pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding, *inter alia* (i) a motion to sell, or (ii) a motion to assume, within twenty-one (21) days after the filing of the petition if necessary to avoid immediate and irreparable harm.

29. Pursuant to Bankruptcy Rule 6004, the Court may order that the fourteen (14) day stay of an order authorizing the use, sale or lease of property is not applicable to a particular order.

30. As described above, the ability to continue to sell condominium units is integral to the Debtors' business operations and necessary to maintain the confidence and good will of potential purchasers of the condominium units, which is critical to facilitate a successful reorganization. Absent the immediate authority, potential purchasers and purchasers may be unwilling to sign purchase and sale agreements or to close Existing and New Sales. The filing of the Petition has delayed the closings of three Existing Sales, Unit Nos. 16A, 18A and 22I, and three additional Existing Sales are scheduled to close within thirty days, Unit Nos. 16C, 16D, and 19J. Immediate authority is necessary to allow the Debtors to consummate these sales for the benefit of their estates.

IV. NOTICE

31. The Debtors will serve this Motion on (a) secured creditors, (b) any taxing authority that has a claim against the estates, (c) the 20 largest unsecured creditors of each Debtor, (e) the Office of the United States Trustee, (f) all parties to the Existing Sales, and (g) all parties who have filed a notice of appearance in these cases. The Debtors believe that such service provides sufficient notice in light of the nature of the relief requested and request that the Court approve such notice.

WHEREFORE, the Debtors respectfully request that the Court enter an Order:

- A. Approving this Motion;
- B. Authorizing the Debtors, on the terms set forth in this Motion, to continue to close on Existing Sales and to continue to contract for and complete the New Sales free and clear of liens, claims and encumbrances in the ordinary course of business;
- C. Requiring Mortgage Holders to deliver Unit Discharges and Releases to the Debtors' closing attorney in a manner consistent with prepetition procedures, and all other Lienholders to deliver Unit Discharges and Releases to the Debtors' closing attorney within three (3) business days of a written request from the Debtors;
- E. Authorizing the Debtors to proceed immediately with the Existing and New Sales notwithstanding the provisions of Rules 6003 and 6004(h); and
- F. Granting such other relief as this Court deems proper.

Respectfully Submitted,

AUTO SALES & SERVICE, INC.,
GENERAL TRADING COMPANY,
FRANK SAWYER CORPORATION, 100
STUART STREET LLC, and SW BOSTON
HOTEL VENTURE LLC,
By their proposed counsel,

/s/ Harold B. Murphy
Harold B. Murphy (BBO #362610)
D. Ethan Jeffery (BBO #631941)
Natalie B. Sawyer (BBO #660072)
HANIFY & KING, P.C.
One Beacon Street
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Tel: (617) 423-0400
Fax: (617) 556-8985
nbs@hanify.com

Dated: May 3, 2010
562050

Pursuant to 28 U.S.C. § 1746, I, Steven Kravetz, hereby declare under oath that I have personal knowledge regarding the facts set forth above, and that such facts are true and correct to the best of my knowledge and belief.

Signed this 3rd day of May, 2010.

/s/ Steven Kravetz
Steven Kravetz

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

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Chapter 11
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(Joint Administration Request Pending)

ORDER GRANTING DEBTORS AUTHORITY TO (A) ASSUME AND CONSUMMATE PENDING PURCHASE AND SALE AGREEMENTS FOR CONDOMINIUM UNITS; (B) MAKE AND CONSUMMATE NEW SALES FOR CONDOMINIUM UNITS; AND (C) FOR RELATED RELIEF

This matter having come before the Court on the Debtors' Motion For Authority to: (A) Assume and Consummate Pending Purchase and Sale Agreements For Condominium Units; (B) Make and Consummate New Sales For Condominium Units; and (C) For Related Relief (the

“Motion”), filed by the above-captioned debtors and debtors-in-possession (the “Debtors”); the Court having reviewed the Motion; the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (c) venue of this Chapter 11 case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (d) notice of the Motion was sufficient under the circumstances; the Court determining that the legal and factual bases set forth in the Motion establish just cause for the relief granted by this Order; and it appearing that the relief requested is in the best interests of the Debtor’s estate, its creditors and other parties in interest;

IT IS HEREBY ORDERED THAT:

- A. The Motion is GRANTED in its entirety.
- B. The Debtors are authorized to assume the purchase and sale agreements for the Existing Sales and to sell Unit Nos. 16A, 16C, 16D, 16F, 16H, 17H, 18A, 19J, 21I, 22I, 25B and PH4 free and clear of all liens, claims, interests and encumbrances held or asserted by any party, including, without limitation, all lien claims, whether asserted or unasserted, known or unknown.
- C. The Debtors are authorized to sell condominium units for purchase prices at or above the Minimum Sales Prices, or with the consent of the Mortgage Holders, free and clear of all liens, claims, interests and encumbrances held or asserted by any party, including, without limitation, all lien claims, whether asserted or unasserted, known or unknown, without the necessity of a further court order.
- D. All Mortgage Holders shall deliver Unit Discharges and Releases to the Debtors’ closing attorney in a manner consistent with prepetition procedures, and all other Lienholders shall deliver Unit Discharges and Releases to the Debtors’ closing attorney within three (3) business days of a written request from the Debtors

E. Notwithstanding the provisions of Fed. R. Bankr. P. 6003 and 6004, this Order shall be effective immediately upon entry.

Dated: _____, 2010

Hon. Joan N. Feeney
United States Bankruptcy Judge

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