

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

)	
In re:)	
)	Chapter 11
SW BOSTON HOTEL VENTURE LLC,)	
<i>et al.</i> ¹)	
)	Case No. 10-14535-JNF
Debtors.)	
)	<i>(Jointly Administered)</i>

**DEBTORS' POST-TRIAL MEMORANDUM IN OPPOSITION
TO THE MOTION OF PRUDENTIAL INSURANCE COMPANY
OF AMERICA FOR RELIEF FROM THE AUTOMATIC STAY**

At the close of the evidence taken in connection with the Motion of Prudential Insurance

Company of America for Relief from the Automatic Stay and the Opposition by SW Boston Hotel Venture LLC thereto, the Court requested that SW Boston Hotel Venture LLC (the "Debtor" or SW Boston"), Prudential Insurance Company of America ("Prudential") and the City of Boston address the following issues:

1. Should the Court follow the holding of *NationsBank of Virginia, N.A. v. DCI Publishing of Alexandria, Inc.*, 160 B.R. 538 E.D. Va. 1993 (hereinafter, "*NationsBank*") in determining whether the Debtor has equity in the property subject to the Motion, pursuant to § 362(d)(2)(A); and
2. Has the SW Boston met its burden pursuant to § 362(d)(2)(B) in establishing that a successful plan of reorganization is in prospect?

¹ The other debtors in these jointly administered cases, besides SW Boston Hotel Venture, LLC ("SW Boston"), are Auto Sales & Service, Inc. (Case No. 10-14528-JNF), General Trading Company (Case No. 10-14532-JNF), General Land Corporation (Case No. 10-16174-JNF), Frank Sawyer Corporation (Case No. 10-14533-JNF), 100 Stuart Street, LLC (Case No. 10-14534-JNF), 30-32 Oliver Street Corporation (Case No. 10-16173-JNF), and 131 Arlington Street Trust (Case No. 10-16177-JNF) (hereinafter all the debtors shall be referred to as the "Debtors").

The Court further requested the parties submit proposed findings of fact addressing the weakness of the other party's valuation experts.

ARGUMENT

In *NationsBank of Virginia, N.A. v. DCI Publishing of Alexandria, Inc.*, 160 B.R. 538 (E.D. Va. 1993) (hereinafter referred to as "*NationsBank*"), the court held that only the value of the collateral pledged by the debtor is to be considered in determining whether the debtor has equity in the property in accordance with § 362(d)(2)(A). *NationsBank* is clearly factually distinguishable from the case before the Court. In *NationsBank*, the property which the debtor asked the court to consider in connection with determining equity pursuant to § 362(d)(2) was property owned by nondebtor guarantors, whereas in the present case, the additional collateral is held by Debtors whose estates are being jointly administered with SW Boston. Thus, in *NationsBank*, where the court was being asked to take into consideration property which was not the subject matter of the court's jurisdiction, in the present case the additional property is within the jurisdiction and control of the Court. While the Debtors have found no cases which reach a result expressly contrary to *NationsBank*, various courts have distinguished *NationsBank* and have declined to follow it on the basis of the specific facts presented in those cases. See *In re Colonial Center, Inc.*, 256 B.R. 452 (E.D. Pa. 1993); and *In re Franklin Equipment Company*, 416 B.R. 483 (E.D. Va. 2009).

Even if this Court were to follow *NationsBank* as to § 362(d)(2)(A), *NationsBank* does not restrict the Court from looking to other collateral in connection with determining whether a successful plan of reorganization is in prospect pursuant to § 362(d)(2)(B). *Colonial Center*, 256 B.R. at 462 (including property of debtor and property contributed by non-debtor guarantor in determining that a plan was feasible pursuant to §362(d)(2)(B)); *In re Ledgemere Land Corp.*, 125 B.R. 58, 64 (Bankr. D. Mass. 1991) (including real estate holdings of several debtors in

determining that there was a reasonable possibility of reorganization pursuant to §362(d)(2)(B) – “Each of the Debtors’ real estate holdings should be viewed as part of the whole.”) In the present case, Prudential is only minimally undersecured as to SW Boston, but the value of all of the other Debtors’ cash, marketable securities and real estate provide more than a sufficient economic basis upon which to premise a successful plan of reorganization.

In determining whether relief should be granted under § 362(d)(2), the Court must undertake a two-prong analysis. The first is whether the creditor moving for relief has established that the debtor has no equity in the property subject to the creditor’s liens. If the creditor establishes that the debtor lacks equity in the specific property, the burden then shifts to the debtor to establish that the property is necessary for an effective reorganization. In meeting its burden under the second prong of § 362(d)(2), a debtor is not required to show the probability of a successful reorganization or that any plan on file is confirmable, but rather that there was “a reasonable possibility of a reorganization within a reasonable period of time.” *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 376 (1988). It is further not necessary that the debtor establish at this stage of the case that their plan is feasible, but “at most they need only propose a plan that is not patently infeasible.” *Ledgemere*, 125 B.R. at 65.

The Debtor has unquestionably met its burden in establishing that the SW Boston property is necessary for an effective reorganization. It was the consensus of the valuation experts, Randell Harwood of Cushman & Wakefield, Prudential’s valuation expert, and Paul Griesmer of FTI Consulting, the Debtor’s valuation expert, that a reasonable sell-out period for the Residences is thirty-six (36) months, and that the proceeds available to the owner of the Residences, after payment of costs of sale, condominium fees and real estate taxes, will be approximately \$116 million and \$118 million. Plaintiff’s Exhibits 4 and 6, Transcript of Hearing

on Prudential's Motion for Relief from Automatic Stay, November 9, 2010 ("Transcript Day 2") at 139-40. Neither expert considered the additional \$2,500,000 of proceeds that the Debtor would derive from leasing certain of the units during the sell-out period. Transcript of Hearing, November 8, 2010 (morning) ("Transcript Day 1 (morning)") at 112. When the lease proceeds are added to the net proceeds from the sale of the condominium units, the amount that would be generated from the sale and lease of condominium units to fund a plan of reorganization increases to between \$118 million and \$120 million. (See Defendants' Exhibit 6)²

The likelihood of SW Boston obtaining the projected lease proceeds, along with the reasonableness of the sell-out period and anticipated proceeds, was confirmed with the testimony of Kevin Ahearn. See Transcript Day 2 at 39. Mr. Ahearn, SW Debtor marketing expert, testified that SW Boston has executed seven (7) leases and that there is a reasonable prospect for SW Boston to lease the balance of the planned 20 to 25 units to obtain the projected additional income. *Id.* at 39. While challenged on cross-examination, Mr. Ahearn's testimony as to the reasonableness of SW Boston's projections to lease 20-25 units remained unrebutted. See *id.* at 40.

Mr. Ahearn also buttressed the opinions of the valuation experts that a thirty-six-month sell-out period is reasonable and that SW Boston could be reasonably expected to meet those projections. *Id.* at 35. Mr. Ahearn testified that notwithstanding the W Residences' entry into the market later than its competitors (45 Province and The Clarendon), the worst economic collapse since the Depression, and the taint of the bankruptcy, SW Boston has been able to sell an aggregate of 25 units, of which 12 units have been sold since the Chapter 11 filing, with 6 additional Purchase and Sale Agreements and 4 additional reservations. *Id.* at 18-20, 80-81. SW

² The Court has previously found that the leasing of the units would not be detrimental to the sale process and, in fact, would "enhance the sales of other units." See Order of Court, Docket No. 263.

Boston's sales velocity demonstrates a pace consistent with a thirty-six month sell-out.³ *Id.* at 35.

While challenged on cross-examination, Mr. Ahearn's testimony remained unrebutted with respect to the reasonableness of SW Boston's marketing strategy and sale efforts. Prudential offered no testimony to demonstrate that SW Boston's marketing efforts were in any way deficient or that SW Boston should pursue some other course of action. In fact, Prudential's expert acknowledged Mr. Ahearn's knowledge, skill and expertise with respect to the Boston market for luxury condominiums. Transcript Day 1 (morning) at 93-94. Mr. Harwood testified that Mr. Ahearn is someone he would ordinarily consult with to obtain information concerning the Boston market, and acknowledged that Mr. Ahearn was more knowledgeable and experienced than he and Mr. James Peko with respect to the Boston market for luxury condominiums. *Id.*

Mr. Ahearn supported SW Boston's position regarding the sell-out period and projected proceeds by testifying with respect to the current state of the Boston real estate market. Transcript Day 2 at 7, 13-14, 23-24. Mr. Ahearn provided unrebutted testimony that the market had improved and that he anticipated further improvement over the next several years. *Id.* at 7, 13. While, again, Mr. Ahearn was challenged on cross-examination, principally by reference to an earlier projection he had made before the impact of the economic collapse of October of 2008 was fully appreciated, his testimony remained unrebutted. *Id.* at 42-44.

Prudential had the opportunity but did not offer an expert to testify with respect to the current state of the Boston Market or to contradict Mr. Ahearn's testimony that the market was improving and, therefore, the thirty-six-month sell-out was reasonable.

³ Both valuation experts testified that the sale of the units would be on a bell curve with the higher velocity of sales in the second year.

Therefore, the only fair conclusion that the Court can draw from this substantially un rebutted testimony is that a thirty-six months sell-out period is reasonable and that it is reasonable to anticipate that SW Boston will receive (from the sale and lease of the condominiums units) between \$118 million and \$120 million in net proceeds, which will be available to fund the Debtors' plan.

With respect to the ability of the Debtors to propose a plan, the Debtors offered the testimony of Lawton Bloom. Mr. Bloom presented a financial model upon which a plan of reorganization could be premised. (See Exhibit 8 "Argus Model") Transcript of Hearing, November 10, 2010 ("Transcript Day 3") at 6-7. The Argus Model utilized the Cushman & Wakefield and FTI appraisals with respect to the anticipated proceeds from the sale and lease of the Residences, along with the cash flow from the operation of the Hotel. *Id.* at 6-8. While the Argus Model rested primarily upon the FTI appraisal, the difference between the FTI and the Cushman & Wakefield appraisals was not material to the overall financial model prepared by Argus. *Id.* at 18, 23.

The Argus Model, [which is an agreed-upon exhibit], clearly demonstrated that the Debtors would have sufficient cash so as to make an initial payment under a plan of reorganization to unsecured creditors, pay all administrative expenses, and sufficient funds to service the City of Boston debt at its contract rate. *See Defendants' Exhibit 8.*

The Argus Model projects that as of December 31, 2013, the Prudential debt will have been reduced by approximately \$113,339,000,⁴ leaving approximately \$49,061,000 of debt to be serviced by the Hotel operations. *See Defendants' Exhibit 8.*

⁴ \$113,339,000 being the proceeds from the sale and lease of condominium units after payment of certain reorganization expenses, operating expenses and post-confirmation interest to Prudential, that would be paid to Prudential to reduce the principal of the debt.

The Argus Model further establishes, utilizing the Hotel's net operating income from the FTI appraisal (though it could equally have been premised upon the Hotel's net operating income set forth in the Cushman & Wakefield appraisal), that the Debtors could service the Prudential debt at an interest rate of 5.25%.⁶ See Transcript Day 3 at 9, 41. The Debtors had a Fix Charged Coverage in excess of 1, thus demonstrating excess cash after payment of operating expenses and debt service to Prudential. *Id.* at 20. Further, only SW Boston offered any testimony with respect to the reasonableness of a 5.25% interest rate. Prudential offered no expert testimony with respect to an applicable interest rate and, in fact, the sole witness offered by Prudential was unable to testify to any market interest rates, and his sole testimony was limited to mathematical calculations based upon presumed interest rates which had no factual support and therefore no relevance to the issues at hand.⁷

The Argus Model also included an analysis of the loan-to-value ratio following the sell-out of the Residences. Under the Argus Model, at the end of 2013, the loan-to-value ratio would be 55%. See Defendants' Exhibit 8. Accordingly, while the Argus forecast extends through 2020, it is clear that the Debtors could refinance the Prudential debt sooner than that date. See *id.*

Lastly, on the question of the Debtors' ability to propose a plan, SW Boston offered the testimony of M. Freddie Reiss, a nationally recognized reorganization professional with extensive experience with Chapter 11 reorganizations, to discuss the feasibility of a plan. Mr.

⁶ The Argus model was premised upon an interest rate to Prudential of 5.25%. An earlier version of the model, however, demonstrated that even at an interest rate of 6.25%, the debt to be serviced by the hotel following the sell-out of the condominiums was feasible.

⁷ Prudential's witness Mr. Peko did not qualify as an expert to opine on the issue of the Boston Market for sales of luxury condominiums, the value of the debtor's assets, market interest, nor the feasibility of a plan. Mr. Peko's testimony was limited merely to extrapolating from the debtor's limited performance without any basis to conclude that the historical facts would continue into the future to make his statement relevant.

Reiss testified, based upon the Cushman & Wakefield appraisal, the FTI appraisal, the Argus Model, and his general knowledge and experience, that in his opinion a successful reorganization within a reasonable time was in prospect. Transcript Day 3 at 51. Prudential did not offer any testimony to contradict Mr. Reiss's expert opinion, and that opinion remains unrebutted.

As demonstrated above, the Debtors offered substantial evidence to support a finding that the Debtors could propose a successful plan of reorganization within a reasonable time.

Contrasted with the extensive evidence offered by SW Boston, Prudential offered no substantive evidence on the crucial issues with respect to marketing, interest rates and feasibility. The only witness proffered by Prudential on any issue other than valuation of the Debtors' assets⁸ was the testimony of James Peko. Mr. Peko provided the Court with nothing other than mathematical calculations based upon assumptions not supported by any evidence. For example, Mr. Peko prepared certain chalks (which were not accepted into evidence) purporting to show that based upon SW Boston's limited history, it would take SW Boston more than 36 months to sell-out the Residences. Plaintiff's Chalks A-D. However, Mr. Peko was not qualified to discuss current market conditions or future conditions. He did not (nor was he qualified to) offer any testimony to support his assumption that SW Boston's pace of sales would remain constant or that his projections based upon prior sales without reference to the current market or other conditions was reasonable. *See* Transcript Day 1 (afternoon at 170).¹⁰ Absent such evidence, Mr. Peko's calculations are of little assistance to the Court.

Mr. Peko's prepared a chalk regarding the payout of the Prudential debt based upon interest rates of 8 or 9 percent. Prudential's Chalk F. Mr. Peko was not qualified to speak to

⁸ The Appraisals themselves were dated as of May 24, 2010, not updated or supplemented, thus substantially stale.

¹⁰ Citations to the afternoon session of the first day of the hearing refer to the draft transcript as the final version was not available at the time of filing.

interest rate issues and therefore could not speak to the appropriateness of an 8 or 9 percent interest rate as a cram-down rate of interest. Transcript Day 1 at 169-70. So, again, Mr. Peko's assumptions as to the interest rate lacks support, and without such evidentiary support, his mathematical calculations are of little value.

No weight should be accorded Mr. Peko's mathematical calculations because they were based on assumptions for which no evidence was offered or which were contrary to the consensus opinion of all other experts regardless of who called them.

CONCLUSION

In conclusion, the Court is left with the unrebutted testimony of the Debtors' experts which establishes that a successful plan of reorganization can be proposed within a reasonable period of time. Thus, the Debtors have met their burden under § 362(d).

FINDINGS OF FACT

1. Cushman & Wakefield on behalf of Prudential valued the Residences as of May 24, 2010 of \$86 million [Plf. Ex. 1]
2. FTI on behalf of SW Boston valued the Residences as of August 1, 2010 at \$90.6 million [Plf. Ex. 6].
3. Both Cushman & Wakefield and FTI relied upon substantially the same assumption at arriving at their respective opinions of value, which were a sell-out period of 36 months and net proceeds from the sale of the Residences after payment of cost of sale, condominium fees and real estate tax of \$116 million and \$118 million, respectively. [Plf. Ex. 1 and Plf. Ex. 6].
4. The difference in value between Cushman & Wakefield and FTI as to the Residences is *de minimis* and not material to a resolution of the matter before the Court.

5. Cushman & Wakefield appraised the Hotel at \$55 million as of May 24, 2010.

6. Cushman & Wakefield undervalued the Hotel for the following reasons:

(a) In arriving at its discount cash flow, Cushman & Wakefield included the cost of completing the Spa at \$1.9 million as an operating expense against reserves. In fact, the cost of completion of the Spa was funded from the proceeds of a loan from the City of Boston and as such, should not be treated as an operating expense. If you deduct the cost of completion from the Spa operating cost, the value ascribed by Cushman & Wakefield to the Hotel would increase by between \$1.5 million and \$1.8 million.

(b) Cushman & Wakefield assumed the continuation of the Trigen Lease as an operating expense against Hotel reserves. However, the proper treatment of the Trigen Lease would be to assume it is paid given its imputed interest rate of approximately 14%.

(c) If the Cushman & Wakefield value of the Hotel is adjusted for the Spa cost to complete and the Trigen Lease, the value would increase to \$59.4 million.

7. The Cushman & Wakefield appraisal of the Hotel failed to include in its projections of revenues and revenues attributable to the Theme Bar. If projected Theme Bar revenues are included in the Cushman & Wakefield appraisal, the value would increase.

8. If Cushman & Wakefield had not included the Spa cost of completion, the Trigen Lease, and did include the Theme Bar revenues in its discounted cash flow, it would have arrived at a value for the Hotel of approximately \$62.5 million.

SW BOSTON HOTEL VENTURE LLC

By its attorneys,

/s/ Charles R. Bennett, Jr.

Charles R. Bennett, Jr. (BBO #037380)
Harold B. Murphy (BBO #326610)
Hanify & King, Professional Corporation
One Beacon Street, 21st Floor
Boston, MA 02108-3107
Telephone: (617) 423-0400
Facsimile: (617) 423-0498
Email: crb@hanify.com

Dated: November 18, 2010

CERTIFICATE OF SERVICE

I, Charles R. Bennett, Jr., hereby certify that on November 18, 2010, I served the foregoing *Debtors' Post-Trial Memorandum In Opposition To The Motion Of Prudential Insurance Company Of America For Relief From The Automatic Stay* by causing a copy of same to be emailed and delivered by operation of the Court's CM/ECF system or by electronic mail to:

Emanuel C. Grillo
Goodwin Procter LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
egrillo@goodwinprocter.com

Gina L. Martin, Esq.
Goodwin Procter LLP
Exchange Place
Boston, MA 02109
gmartin@goodwinprocter.com

E. Kate Buyuk
Lyne, Woodworth & Evarts LLP
12 Post Office Square, 2nd Floor
Boston, MA 02109
kbuyuk@lwelaw.com

/s/ Charles R. Bennett, Jr.

Charles R. Bennett, Jr.