

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
(Eastern Division)**

In re:

**SW BOSTON HOTEL VENTURE, LLC, et
al.,¹**

Debtors.

Chapter 11

Case No. 10-14535-JNF

(Jointly Administered)

**DEBTORS' JOINDER IN THE CITY OF BOSTON'S MEMORANDUM CONCERNING
NON-ASSIGNABILITY OF VOTING RIGHTS**

SW Boston Hotel Venture, LLC ("SW Boston") and the Affiliated Debtors (collectively, the "Debtors"), debtors and debtors-in-possession in the above-captioned Chapter 11 proceedings, respectfully submit this joinder in *The City of Boston's Memorandum Concerning Non-Assignability of Voting Rights*.

In further support thereof, the Debtors state as follows:

BASIS FOR JOINDER

The purported assignment of voting rights contained in the Intercreditor and Subordination Agreement between the City of Boston (the "City") and the Prudential Insurance Company of America ("Prudential") is unenforceable as such provision impermissibly attempts to override the express provisions of the Bankruptcy Code. It would be particularly inequitable to allow Prudential to vote the City's claims where, as here, the City provided approximately \$10.5 million to SW Boston to enable the completion of the W Hotel and Residences, enhancing the value of Prudential's collateral, but Prudential is attempting to foreclose any recovery for the

¹ The other debtors in these jointly administered cases besides SW Boston are Auto Sales & Service, Inc., General Trading Company, Frank Sawyer Corporation, 100 Stuart Street, LLC, General Land Corporation, 131 Arlington Street Trust and 30-32 Oliver Street Corporation (the "Affiliated Debtors").

City on its claims through its outsized request for postpetition interest and intends to vote the City's claims in a manner adverse to the City's interests.

It is settled law that private parties cannot contract to nullify the provisions of bankruptcy law. The Supreme Court has stated “[c]ontracts, however express, cannot fetter the constitutional authority of Congress...Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.” *Connolly v. PBGC*, 475 U.S. 211, 223-24, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308, 55 S.Ct. 407, 79 L.Ed. 885 (1935). Upon the filing of a bankruptcy, “[t]he Bankruptcy Code substantively alters the rights and remedies of both debtors and creditors in the most fundamental way.” *In re Pease*, 195 B.R. 431, 434 (Bankr. D. Neb.1996) (citations omitted). “[A]ny attempt by a creditor in a private pre-bankruptcy agreement to opt-out of the collective consequences of a debtor’s future bankruptcy filing is generally unenforceable. The Bankruptcy Code pre-empts the private right to contract around its essential provisions.” *Id.* at 434-435.

Numerous bankruptcy courts have declined to enforce provisions in contracts that attempt to alter the treatment of parties in bankruptcy. See, e.g., *Klingsman v. Levinson*, 831 F.2d 1292, 1296 n. 3 (7th Cir. 1987) (a debtor may not “contract away the right to a discharge”); *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 651-52 (9th Cir. BAP 1998) (Noting that many Courts have held the prepetition waivers of bankruptcy benefits are unenforceable, finding a pre-petition discharge waiver unenforceable); *In re ABC-NACO, Inc. v. Bank of America, N.A.*, 331 B.R. 773, 782 (Bankr. N.D. Ill. 2005) (Debtor and bank could not contract regarding which preference law would apply to their transactions); *Bisbach v. Bisbach (In re Bisbach)*, 36 B.R. 350, 352

(Bankr. W.D. Wis. 1984) (prepetition waiver in a divorce agreement that described debt as “maintenance and support” and therefore nondischargable was unenforceable.)

In a well-reasoned opinion, the court in *In re North LaSalle Street Partnership*, 246 B.R. 325 (Bankr. N.D. Ill. 2000) (“LaSalle”), examined an assignment of voting rights in a subordination agreement and determined that while the subordination agreement governed the priority of payments among creditors, Section 1126(a) of the Bankruptcy Code governs the voting rights of those creditors. *LaSalle*, 246 B.R. at 330-331. Section 1126(a) states in relevant part that the “holder of a claim or interest allowed under Section 502 of this title may vote to accept or reject a plan.” 11 U.S.C. § 502. The *LaSalle* Court determined that the junior creditor’s assignment of its voting rights to the senior creditor was unenforceable, stating that the junior creditor should be allowed to vote its own claim under “the plain language of Section 1126(a).” *LaSalle*, 246 B.R. at 331. The *LaSalle* Court further reasoned that 11 U.S.C. § 510, governing the enforcement of subordination agreements, does not allow the waiving of voting rights, which provision is beyond the scope of a subordination agreement. *Id.*, citing *Beatrice Foods Co. v. Hart Ski Mfg. Co. (In re Hart Ski Mfg Co.)*, 5 B.R. 734, 736 (Bankr. D. Minn.1980) (“Hart Ski”). Section 510(a) allows consensual and contractual priority of payments to be maintained among creditors in a bankruptcy proceeding. *Hart Ski*, 5 B.R. at 736. Congress did not intend to allow creditors to alter the bankruptcy laws unrelated to the distribution of assets. *Id.*

CONCLUSION

The purported assignment of the voting rights of the City to Prudential contained in the Intercreditor and Subordination Agreement is unenforceable as a matter of law and should not be allowed to override the express provisions of the Bankruptcy Code. The City should be allowed to vote its claims.

Respectfully submitted,

SW BOSTON HOTEL VENTURE, LLC, et al.
By their attorneys,

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