

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
EASTERN DIVISION

IN RE:	)	
	)	
7 BAY CORP.	)	Chapter 11
	)	Case No. 15-14885-FJB
Debtor	)	
	)	

**MOTION BY DEBTOR FOR AUTHORIZATION OF (1) USE OF CASH COLLATERAL, (2) THE GRANTING OF REPLACEMENT LIENS, AND (3) ADDITIONAL RELIEF**

Pursuant to Section 105 and 363 of Title 11 of the United States Code, Federal Rules of Bankruptcy Procedure 2002, 4001 and 9014 and MLBR 4001-2, 7 BAY CORP, the above-captioned debtor and debtor-in-possession in this proceeding (the “Debtor”), hereby moves this Honorable Court for entry of an order authorizing the use of cash collateral, (the “Cash Collateral”) generated by the sale proceeds of Unit 2 of the condominium. This proposed use of Cash Collateral will directly increase the value of the Project Development, and allow the Debtor to pay ongoing administrative expenses and reduce the amounts owed to the DIP Lender and the senior pre-petition lender, UB Properties, LLC. The use of the cash collateral and the infusion of those proceeds into the project and payments of adequate protection and lot release sums to the existing lenders are all essential for the Debtor to successfully reorganize in Chapter 11.

Pursuant to this motion, the Debtor respectfully requests the entry of an order:

- (1) Authorizing use of Cash Collateral from a portion of the net sale proceeds generated by Unit 2;
- (2) Authorizing the expenditure of those funds in accordance with the Budget attached as **Exhibit A** to pay administrative costs and provide adequate protection

to the existing Lender, UB Properties, LLC, (“Lender”) for the use of Cash Collateral;

- (3) Granting replacement liens to the Lender, UB Properties, LLC (“UB”) to the extent described in this motion, and otherwise to provide adequate protection for the use of Cash Collateral; and
- (4) Allowing the DIP Loan facility to remain in place pending the execution of a new purchase and sale agreement for an unsold unit and enhance the site value; and
- (5) Provide for the continuing payment of the costs to properly maintain and insurance services to the project for current owners and prospective buyers.

## **I. Factual Background**

### **II.**

#### **A. General**

1. On December 17, 2015 (the “Petition Date”) the Debtor filed a voluntary for relief under Chapter 11 of the United States Bankruptcy Code (the “Code”) in the United States Bankruptcy Court for the Eastern District of Massachusetts (the “Court”).
2. The Debtor is a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.
3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M).

#### **B. Debtor’s Business**

4. The Debtor is the owner of an 11-unit condominium project located at 7 Bay Street, Hull, Massachusetts (referred herein as the “Real Property” or “The

Project”). In May 2015, Unit 1 of The Project was sold and on February 29, 2016 Unit #3 was sold. Debtor is the current owner of the remaining unsold eight (8) units.

5. Presently, the following exists<sup>1</sup>:
  - a. The remaining eight (8) units require approximately \$125,000 per unit to complete construction (except for the four larger units which completion would be approximately \$150,000), plus funds from a Buyer for the custom finishes requested. The expected sale price of these units range from \$480,000 to \$795,000. Debtor anticipates selling these units within 18-24 months;
6. The Debtor states that UB shall receive \$250,000 from the sale of Unit #2, in addition, DIP Lender, AE Kingsley will receive approximately \$150,000. After customary costs to close and credits to the buyer, UB will hold approximately \$47,000<sup>2</sup> for Debtor to use as cash collateral in accordance with the Budget attached.

### **C. Mortgagees**

7. In March 2013, United Bank approved Debtor for a \$2,600,000 construction loan. In addition, United Bank loaned Debtor \$375,000 on a revolving line of credit. Upon information and belief, in mid-2014, United Bank was merged with Rockville Bank. On or about December 16, 2015 United Bank assigned the mortgage to UB Properties, LLC.

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<sup>1</sup> The sale of Unit 2 is subject to Court approval under 11 U.S.C. sec. 363. An order approving the Sale was entered on October 11, 2016. The Court reserves the rights of the Parties in interest to oppose and be heard on the distribution of proceeds.

<sup>2</sup> This amount may be slightly less as there are certain credits owed to the Buyer due to the delay in finishing the unit caused by this Bankruptcy Case and the time delay attributed to the proceedings and her increased costs of alternate housing and moving.

8. On or July 3, 2013, Dennis P. Geisser & Sons, Inc., d/b/a Atlas Systems of New England (“Geisser”) filed a Notice of Contract against the Debtor and Pentagon Construction<sup>3</sup>. On or about September 25, 2013, Geisser filed a Complaint with Plymouth County Superior Court (1383CV01019) against the Debtor and Pentagon. Prior to the sale of Unit #1, Debtor’s principal, Steven Buckley, purchased a bond with respect to this debt. In or around April 2016 the Debtor and Geisser entered into a Settlement Agreement and Mutual Release which resolved the Civil Action. The Parties agreed that Geisser would receive payment of \$26,000 from the Bond, the Debtor would receive \$20,000 and the remaining funds would be paid to Steven Buckley, who originally funded the bond.
9. Construction of the exterior of the building was completed in 2014. The Real Property consisted of 11 townhouse units ranging in size from 1,876 to 2,970 square feet.
10. In addition, in October 2013, Debtor granted a mortgage to National Lumber in the approximate amount of \$243,041.22. This mortgage was for sums due from Pentagon Construction for construction of the building and materials used on the site. This mortgagee secures the sums advanced under a materials credit agreement between National Lumber and Pentagon Construction and National Lumber does not hold an interest in Debtor’s cash collateral.
11. In April 2014, Debtor granted a mortgage to Avidia Bank in the amount of \$250,000. The primary purpose of these funds were for use to construct the interior of the units and common areas. The funds that were advanced by Avidia were all deposited directly into an account of Pentagon Construction. Approximately 80% of the funds were used by the Debtor on this project. Payments to Avidia have been made by Pentagon and Pentagon will continue to make these payments.

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<sup>3</sup> 100% owned by Steven Buckley, Debtor’s principal.

12. In May 2015 Debtor sold Unit 1. UB received \$450,000 towards its loan from the Unit 1 closing and National Lumber received \$25,000.
13. On March 1, 2016, UB received \$475,000 towards its loan from the Unit 3 closing.
14. Debtor asserts that the Real Property, “as-completed”, is worth approximately \$5,000,000 - \$5,500,000.
15. UB asserts a claim in the amount of \$2,600,000<sup>4</sup>.
16. Debtor believes that National Lumber (“NL”) holds a claim in the approximate amount of \$250,000 (exclusive of accruals)<sup>5</sup>. NL has asserted a claim for approximately \$287,000 with interest accruing at 18%. Upon information and belief there is no Promissory Note and the mortgage was granted by the Debtor to secure the obligations of Pentagon under a NL “form” Credit Agreement. The Debtor believes that NL does not hold an interest in cash collateral.
17. Debtor believes that Avidia Bank holds a claim in the approximate amount of \$250,000<sup>6</sup>. The Debtor believes that Avidia does not hold an interest in the cash collateral from the Sale.
18. The Debtor has asserted that the liens of both NL and Avidia are subject to a bona-fide dispute pursuant to 11 U.S.C. § 363(f)(4).
19. On June 17, 2016, the Court authorized the Debtor to obtain debtor-in-possession financing, on a first priority secured basis, up to \$275,000 for construction of the remaining units. Debtor is allowed to draw down the funds upon execution of a

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<sup>4</sup> Debtor reserves the right to object to the amount, extent, priority and validity of this claim.

<sup>5</sup> Debtor reserves the right to object to the amount, extent, priority and validity of this claim.

<sup>6</sup> Debtor reserves the right to object to the amount, extent, priority and validity of this claim.

purchase and sale agreement and approval of the sale by the Court. The Debtor has used approximately \$150,000 to “close” the DIP Facility and construct Unit #2 in order to complete this sale.

**II. REQUESTED USE OF CASH COLLATERAL AND OFFER OF ADEQUATE PROTECTION**

**A. Use of Cash Collateral**

20 The Debtor requires the use of the Cash Collateral in order to continue construction of the Debtor’s ongoing development of the Project as contemplated in the original loan agreements and pursuant to 11 U.S.C. 363(c)(2)(A) and pay administrative costs. Absent the use of the Cash Collateral proceeds from the sale of unit #2, the Debtor and the Project will remain stagnant and all classes of creditors and the condominium unit owners will be unfairly prejudiced. In addition, Debtor will incur administrative expenses if these customary and necessary expenses are not paid. The use of the Cash Collateral is therefore necessary to preserve and increase the value of the Debtor’s estate and is in the best interest of all creditors in that the project value will be maximized and sales goals can be met.

21. The Debtor requests authority to utilize, substantially in accordance with the proposed Budget (attached as Exhibit A).

22. This initial use of the Cash Collateral will allow the project to pay its administrative expenses on an immediate and interim basis for a period through March 31, 2017 while the hearing on the Debtor’s Disclosure Statement and Plan is held and meshed into the Project continuation and construction, development and sales of the remaining 8 units. The Debtor is also seeking exit financing as part of its overall strategy.

23. The Debtor proposes to adequately protect the Lenders for the use of any Cash Collateral as follows:

a. by paying a lot release price on the sale of each lot to UB. The characterization of payments to be determined by the Court at the appropriate time or upon final determination of the allowed claim of the Lenders or upon mutual agreement of the parties;

b. by maintaining insurance on Debtor's real and personal property and by paying all post-petition vendor and other administrative costs on a timely basis from the fund established as a result of the sale proceeds of Unit 2; and

d. by continuing the development of the Project and pursuing the Plan of Reorganization and the appropriate level of DIP funding for construction of units pursuant to a new purchase and sale agreement and for Chapter 11 plan confirmation purposes.

24. Debtor believes that as an ongoing and completed development Project including its exclusive rights to use the permits and plans, the value of completion is worth approximately \$5,000,000 - \$5,500,000.

25. Approval of this Motion and the use of this limited amount of Cash Collateral on the terms identified in this Motion and the budget attached hereto, is in the best interest of the Debtor, the Debtor's estate and all the creditors (the senior and junior lienholders and unsecured creditors), including the present unit owners/occupants.

**C. Adequate Protection**

26. 11 U.S.C. Section 363 of the Code provides that a party with an interest in property proposed to be used, sold, or leased by the debtor may receive adequate protection of

such interest before the debtor may use, sell or lease such property. The Debtor proposes to provide adequate protection to Lender through payment of lot release prices upon the sale of each individual unit, and through granting of post-petition liens on the Debtor's real property, (subject to Court approval) and through the use of the Cash Collateral to improve, construct and maintain the going concern value of the Debtor's property, namely the construction and sale of the remaining 8 units.

27. Section 361 of the Code provides that when adequate protection is required under Section 363 of the Code such adequate protection may be provided by –

“(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under Section 362 of this title, use, sale or lease under section 363 of this title...

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease or grant results in a decrease in the value of such entity's interest in such property; or...”

28. Debtor proposes to use the Cash Collateral in order to continue the development of a viable Project. As such, Debtor proposes a series of periodic payments through unit sales and use of the net proceeds, after unit release payments, to continue the construction process and condominium development. The Debtor will use and devote all other available proceeds to building units and sales on a steady and determined pace. Debtor has proposed a Chapter 11 Plan that provides for the sale of all units which pays Lenders in full, pays undisputed lien claims and allowed claims with remaining proceeds.

29. What constitutes adequate protection varies with the facts and circumstance of each particular case. Bankruptcy courts are vested with discretion to determine the form of

protection that best reflects the spirit and intent of Section 361. *See In re Lackow Brothers, Inc.*, 10 B.R. 717, 720 (Bankr. S.D. Fla. 1981); *In re Family Investments, Inc.* 8 B.R. 572 (Bankr. W.D. Ky. 1981).

30. Regardless of its form, the entitlement to and measure of the adequate protection required is always determined by the extent of the diminution of value, if any, in the secured creditor's collateral, during the course of the bankruptcy case. *See In re First South Savings Assoc.* 820 F.2d 700, 710 (5<sup>th</sup> Cir. 1987).

31. "It is intended by the Bankruptcy Code only to assure that a secured creditor, during the pendency of a bankruptcy case, does not suffer a loss in the value of its interest in property of the bankruptcy estate." *In re Markos Gurnee Partnership* 252 B.R. 712, 716 (Bankr. N.D. Ill. 1997). *See also United Savings Association of Texas v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365 (1988).

32. The Cash Collateral will be used as described in Debtor's budget attached as Exhibit A. As such, the Cash Collateral is being used to preserve, increase the value and maintain the Debtor's Project. *See In re McCann*, 140 B.R. 926, 929 (Bankr. D. Mass. 1992) *citing with approval In re Prichard Plaza, L.P.* 84 B.R. 298 (Bankr. D. Mass. 1988).

33. In addition, the Debtor's property is fully insured with several policies (flood, liability and casualty) of not only the Debtor, but the site builder/contractor, Pentagon Construction and the HOA policies. This provides further adequate protection to Lenders.

34. For all the foregoing reasons, Lenders' collateral is not diminishing in value and the use of the Cash Collateral for this period through March 31, 2017, is therefore warranted.

**III. NOTICE**

32. The Debtor has served this Motion on (a) all known secured creditors; (b) the Office of the United States Trustee; (c) the Debtors' 20 Largest Unsecured Creditors; and (d) all parties who have filed a notice of appearance and request for notices in this proceeding.

WHEREFORE, the Debtor respectfully requests that this Court enter an Order:

- a. Approving the notice of this motion as described above;
- b. Authorizing the Debtor to use Cash Collateral from the sale of Unit #2;
- c. Granting Lender, UB Properties, LLC, a replacement lien where appropriate and in accordance with the terms of this motion;
- d. Scheduling additional consideration of the use of the Cash Collateral following the expiration of the authorization in this motion; and
- e. Granting such other relief as is just and proper.

Respectfully submitted  
The Debtor,  
By its Attorney,

/s/ John M. McAuliffe  
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Dated: October 12, 2016

**EXHIBIT A**

Net Proceeds from Sale of Unit 2 <sup>1</sup>		\$457,737.60
Payments to Secured Creditors		
	AE Kingsley (DIP Loan)	-\$150,000.00
	UB Properties (Unit Release)	-\$250,000.00
Credit to Buyer at Closing <sup>2</sup>		-\$10,000.00
<b>Funds to Debtor as Cash Collateral</b>		<b>\$47,737.60</b>
Expenses (5 months) (Nov - March)		
US Trustee Fees <sup>3</sup>		-\$10,875.00
Condo Fees <sup>4</sup>		
Insurance <sup>5</sup>		-\$4,761.00
Payment to McAuliffe & Associates		-\$10,000.00
Water <sup>6</sup>		-\$5,000.00
Sewer <sup>6</sup>		-\$5,000.00
Maintenance/Landscaping		-\$1,200.00
Snow Removal		-\$2,000.00
Contingency		-\$1,000.00
RE Taxes (Nov. 1 & Feb 1 = \$1,800/quarter)		-\$3,600.00
Reserves		-\$4,301.60
Total Expenses		-\$47,737.60
<p>1. This represents a sale price of \$570,337.02, less \$81,337.02 for buyer deposit (\$51,000) and change orders (\$30,337.02) and less \$31,262.40 (broker fees, deed stamps, closing costs) in closing costs as detailed in Sale Motion.</p>		
<p>2. Represents the delay in closing time and alternative housing/moving for the Buyer Also, a credit for the allowance of certain fixtures and appliances below initial estimates and allowances.</p>		
<p>3. United States Trustee Fees - \$6,000 due 10/15/16 and \$4875 due 1/31/17</p>		
<p>4. Condo fees - Debtor pays its share of real estate taxes, water &amp; sewer and insurance separately.</p>		
<p>5. Flood insurance paid through May 2017. Liability insurance is due in March 2017 after payment through December 2016.</p>		
<p>6. Debtor is requesting an audit of the water and sewer charges as the costs appear unreasonably high in comparison to similar multi-family units.</p>		