

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)

Creditor the City of Boston’s Limited Objection to Debtor SW Boston Hotel Venture LLC and Frank Sawyer Corporation’s Motion for Authorization of (1) the Interim and Permanent Use of Cash Collateral, (2) the Granting of Replacement Liens, (3) Entry of Scheduling Order Regarding Continued Use of Cash Collateral and (4) Additional Relief

Pursuant to Section 363 of United States Bankruptcy code (the “Bankruptcy Code”), Federal Rules of Bankruptcy Procedure 4001, and MLBR 4001-2 and 9013-1, the City of Boston,

a Municipal Corporation in the Commonwealth of Massachusetts, acting by and through its Public Facilities Commission by the Director of the Department of Neighborhood Development (collectively, the "City of Boston"), hereby submit this limited objection to SW Boston Hotel Venture LLC's ("SW Boston") and Frank Sawyer Corporation's ("Sawyer Corporation") Motion for Authorization of (1) the Interim and Permanent Use of Cash Collateral, (2) the Granting of Replacement Liens, (3) Entry of Scheduling Order Regarding Continued Use of Cash Collateral and (4) Additional Relief ("Motion"). The City of Boston OBJECTS to the Debtor's attempt to use the \$4 million in cash pledged to the City of Boston (Motion ¶ 28). The City of Boston does not object to the Debtor's use of the funds remaining in the Fidelity Account (Motion ¶s 31-32), PROVIDED that these funds are used solely for the purposes for which they were loaned (*infra* § 1). In support hereof, the City of Boston states as follows:

I. Background

1. In 2009, the Debtor requested a loan from the City of Boston under the *Boston Invests in Growth Loan Pool* ("Loan Pool") which is an innovative program structured by the City of Boston under the United States Department of Housing and Urban Development ("HUD") Section 108 Loan Guaranty program to stimulate local real estate development. The developments assisted by the Loan Pool help the City of Boston meet a number of important economic development goals, including the promotion of tourism, which remains a crucial aspect of Boston's economy, and the generation of additional retail activity. Furthermore, such developments are important generators of jobs and tax revenues for the City of Boston and have a variety of secondary economic impacts. One of the purposes of the Loan Pool is to provide economic assistance to projects which are having difficulty obtaining conventional commercial financing. Due to the economic downturn

in 2009, the need was especially acute.

2. After reviewing the W Boston Hotel and Residences project (the "Project"), the City of Boston issued a Letter of Interest, and later a Commitment Letter, to provide funding to complete specifically defined spaces in the Project, namely, the restaurant, spa and theme bar (collectively, "Completion Spaces") which needed to be finished in order for the Hotel to be opened. The City of Boston determined that the proposed funding for the Completion Spaces met the criteria of the Loan Pool. The City of Boston was very aware that the Project needed to be finished quickly (including the Completion Spaces), and that there would be an immediate positive economic impact. If finished, the Project would create new jobs and provide significant economic development in Boston's Theatre District.
3. As part of the documentation of the City of Boston's \$10,500,000 loan, the City of Boston required the execution of an Employment Initiative Agreement which resulted in the hiring over 200 persons, a large percentage of whom were required to be low and moderate income people and residents of the City of Boston.
4. On December 9, 2009, the City of Boston and SW Boston entered into numerous loan documents including a Note and a Subordinate Loan Agreement (collectively, "City Loan Agreements") by which The City of Boston agreed to lend \$10,500,000 to build out the Completion Spaces. The City of Boston borrowed that \$10,500,000 from HUD, pursuant to its Section 108 program.
5. As security for the HUD 108 Loan, municipal borrowers, including The City of Boston, are required to provide security to HUD in the form of a pledge of future Community Development Block Grant funding (CDBG). CDBG funding is critically important to

the City of Boston because it funds important affordable housing and economic development programs.

6. On January 8, 2010, in connection with the closing of the 108 loan, the City of Boston advanced the sum of \$10,500,000 into Fidelity National Title Insurance Company ("Fidelity") for disbursement in accordance with an Escrow Agreement and a Letter Agreement with Fidelity.
 7. As part of the City Loan Agreements, the City of Boston required second mortgages on a variety of real estate including the Project, and also required the pledging of \$4,000,000 in cash. The cash was provided by Sawyer Corporation, which executed a Payment Guaranty, a Completion Guaranty and a Carveout Guaranty to benefit the City of Boston. The funds are held in an FDIC insured, non-interest bearing account standing solely in the name of the City of Boston at Boston Private Bank and Trust Company ("Boston Private Account") pursuant to a Pledge and Security Agreement and an Agency Agreement.
 8. The City of Boston has a perfected first priority security interest in the Boston Private Account. Pursuant to Intercreditor Agreements between the City of Boston and other secured lenders, each of them agreed that they had no interest in the Boston Private Account and would not acquire any lien on the Boston Private Account.
 9. On information and belief, the funds at Fidelity held pursuant to the Escrow Agreement total about \$2,600,000 which remain to be advanced to finish the spa and theme bar portions of the Completion Spaces, the restaurant having been completed and opened.
- II. The City of Boston Does Not Object to Use of the Fidelity Account in Accordance with the City Loan Agreement.**
10. The City of Boston has no objection to the Fidelity Account continuing to be used in

accordance with its stated purpose and the terms of the City Loan Agreement. Indeed, in its Motion, at paragraph 41, the Debtors state their intention to use the Cash Collateral in the Fidelity account “in accordance with the requisition process set forth in the City Loan Agreement and related City Loan agreements and will be used to complete the construction of the Spa and the Theme Bar.”

III. The City of Boston Does Not Object to the Use of Rents and Leases in Continuation of Business.

11. The City of Boston holds a second mortgage on and an assignment of leases and rents in the Project. The City of Boston has no objection to the Debtors’ use of proceeds from leases and rents during the pendency of their reorganization. The City of Boston believes that the use of such proceeds will be in Debtors’ and its own best interests.

IV. The City of Boston Objects to Any Use of the Boston Private Account.

12. As written, the body of Debtors’ Motion could be interpreted as requesting authorization to access the Boston Private Account as Cash Collateral, even though that account is not specifically called out in the Motion. See Debtors’ Motion at Paragraph 38: “The Debtors request the use of cash collateral, as that term is defined in Section 363(a) of the Bankruptcy Code, including without limitation, all cash in the Debtors’ various bank accounts [sic] including **pledged accounts** and the Fidelity Account. . .” (Emphasis added).
13. However, Exhibit C to Debtors’ Motion setting forth their proposed budget using the petitioned-for Cash Collateral does not make mention of the Boston Private Account¹.

¹Debtors’ Beginning Cash & Investments as listed on Exhibit C total \$10,049,000, and appear to correlate to those assets detailed in Paragraphs 23 and 24 of the Motion. The Boston Private Account is not encompassed in those assets. Nor does the Boston Private Account appear anywhere else on Exhibit C, though the Fidelity Account is specifically enumerated.

Accordingly, it would seem that while the definition of “Cash Collateral” in the Motion might leave room to access the Boston Private Account, Debtors do not make any use of it in their budget (Exhibit C).

14. To the extent, however, that Debtors seek a broad reading of “Cash Collateral” so as to encompass the Boston Private Account, the City of Boston objects to Debtors’ Motion.
15. Section 363 of the Code permits the Debtors’ use of cash collateral, but only so long as they furnish “adequate protection” to the party whose interest in property is being used, sold or leased.
16. Here, Debtors propose to provide adequate protection to Lienholders, including the City of Boston, using Replacement Liens which they aver would have the same priority, validity and enforceability as the pre-petition liens. To the extent that this is meant to apply to the City of Boston’s rights to rental income and leases, the City of Boston has no objection.
17. It is difficult to imagine what Replacement Lien the Debtors could offer the City of Boston on account of the \$4,000,000 in cash it holds at Boston Private. The only adequate protection for use of the cash would be replacement of it, which Debtors are not in a position to do. Upon information and belief, Debtors are operating the Hotel at a loss, and require Cash Collateral from other sources to meet said operating expenses. It is unlikely that there would be sufficient left-over income to replenish the Boston Private Account if Debtor were permitted to draw it down.
18. The funds being held in the Boston Private Account are being held as security for the City of Boston’s loan to SW Boston to complete the build-out of the Theme Bar and Spa. According to the Debtor’s proposed budget, the Fidelity Account funds are more than

sufficient to cover the remaining build-out.

19. In paragraph 52 of their Motion, Debtors indicate that the Hotel and Garage continue to generate revenue, creating sufficient grounds to authorize the proposed Replacement Liens. While this may be true with respect to the income stream from the Hotel and Garage, the same does not hold true for the funds in the Boston Private Account. So long as the Hotel and Garage are generating replacement income, that may be adequate protection for creditors who are interested in the income from the Project, but it is not sufficient reason to allow the Debtors to invade the Boston Private Account.

WHEREFORE the City of Boston requests that this Honorable Court deny Debtors' Motion to the extent that it seeks (1) to use the Fidelity Account other than in accordance with the City Loan Agreement, and (2) to access as Cash Collateral the Boston Private Account standing in the name of the City of Boston.

Respectfully submitted,

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Dated: May 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 4, 2010:

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