

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:

SW BOSTON HOTEL VENTURE LLC,

Debtor.

Chapter 11
Case No. 10-14535-JNF

STARWOOD HOTELS & RESORTS WORLDWIDE, INC.'S RESPONSE TO DEBTOR'S MOTION FOR AUTHORIZATION OF (1) THE INTERIM AND PERMANENT USE OF CASH COLLATERAL, (2) THE GRANTING OF REPLACEMENT LIENS, (3) ENTRY OF SCHEDULED ORDER REGARDING CONTINUED USE OF CASH COLLATERAL AND (4) ADDITIONAL RELIEF

Starwood Hotels & Resorts Worldwide, Inc., on behalf of itself and certain of its affiliates including W Hotel Management, Inc. (collectively, "Starwood"), a contract counterparty that licenses certain intellectual property to, and manages the hotel of, SW Hotel Venture LLC (the "Debtor") known as the W Hotel Boston (the "Hotel") hereby submits this response to the Debtor's Motion For Authorization Of (1) The Interim And Permanent Use Of Cash Collateral, (2) The Granting Of Replacement Liens, (3) Entry Of Scheduled Order Regarding Continued Use Of Cash Collateral And (4) Additional Relief (the "Motion"). Starwood supports the use of cash collateral for the purpose of continuing operations of the Hotel. Starwood submits this reply (the "Reply"), however, because, due to time constraints facing all, the budget relating to operations of the Hotel for which authority is sought provides insufficient detail as to the expenses that Starwood, as the sole controller of cash receipts and disbursements associated with Hotel operations, is entitled to pay, subjecting it to potential financial risk. In further support of this Reply, Starwood states the following.

1. The Debtor commenced this case through filing a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code on April 28, 2010 (the "Petition Date"). Since that time, the Debtor has remained in control of its assets and operations as debtor-in-possession pursuant to §§1107 and 1108 of the Bankruptcy Code.

2. Among the Debtor's assets is a hotel property located in the Theater District of Boston, Massachusetts which operates under the name of the W Hotel Boston.

3. W Hotels is a trade name owned and used by Starwood in connection with its operations. Starwood is an international hotel management company that licenses to the Debtor the right to use the "W" trade name, as well as the trade marks and trade dress associated with the "W" brand, and that manages and operates the Hotel. Both the intellectual property license provisions and the management provisions are set forth in the Management Contract For W Boston originally executed on August 23, 2005 as subsequently amended (the "Management Contract").

4. The Management Contract has an initial term of twenty (20) years. In general, under the terms of the Management Contract, Starwood is responsible for operation and management of the Hotel, including collecting all revenue, employing all employees for the Hotel, as well as paying all expenses to the extent of funds available through operations and mandatorily contributed by the Debtor. In consideration of its undertaking its obligations under the Management Contract, Starwood is entitled to receive reimbursement of all costs and expenses incurred in the operation of the Hotel, including its payment of the employees working at the Hotel, payment of certain tax obligations of the Debtor and payment to the vendors that supply goods or services in connection with the Hotel. Starwood is also entitled to disburse to itself certain fees, including a "Base Fee" and an "Incentive Fee." Finally, in the event that there

are sufficient funds on deposit after satisfaction of those obligations, the Management Agreement provides for disbursement of certain funds from the accounts to the Debtor.

5. Of particular import to consideration of the Motion, the Management Contract requires that Starwood deposit all revenues in certain accounts in the name and under the tax identification number of the Debtor, but to which Starwood has sole control and signatory authority. The Management Agreement further requires disbursement of those funds in satisfaction of obligations delineated in that agreement.

6. The Debtor has filed the Motion, seeking authority to use cash collateral in which The Prudential Insurance Company of America ("Prudential") holds an interest.

7. Prepetition, the Debtor, Starwood and Prudential entered into a Subordination, Non-Disturbance and Attornment Agreement dated as of January 15, 2008 (the "SNDA"). The SNDA provides, generally, that, in the event of a foreclosure by Prudential or a successor to Prudential, the Management Agreement would remain in full force and effect. The SNDA further provides that Starwood's Management Agreement provided rights to use of the funds in the various accounts and generated by operations of the Hotel would not be disturbed or altered by Prudential or any successor to Prudential.

8. According to the Motion, and, in particular, Exhibit D to the Motion, the Debtor indicates an expectation that the Hotel operations will generate \$2.226 million in revenues and expenses of \$2.141 for May, and revenues of \$2.296 in June and expenses of \$2.34 million in June.

9. Given the time constraints facing all, that budget is understandably sparse on details. That time-constraint generated lack of detail, however, has given rise to a lack of clarity as to what unidentified line items within the identified gross disbursement amount Starwood is

authorized to pay. Given that Starwood has sole control over the funds generated by the Hotel's operations, and sole disbursement rights as to those funds, it would very much appreciate a greater degree of clarity as to certain potentially controversial payments.

10. More specifically, there are a series of payments which, under the Management Contract, Starwood is obligated to the Debtor to pay post-petition, relating to obligations incurred in connection with operations or ownership of the Hotel prepetition. The total of those obligations is approximately \$364,233.54 plus Starwood fees. In most instances, the Hotel incurred the charge prepetition, under the Management Contract Starwood is obligated to the Debtor to satisfy the charge post-petition, and further under the Management Agreement Starwood is entitled to reimbursement from the Hotel revenues and the funds held in the account owned by the Debtor but controlled by Starwood post-petition. Further, in each instance, Starwood has reason to believe that the reimbursement is contemplated within the gross disbursement amount set forth in Exhibit D to the Motion and submits that, because Starwood is obligated to make the payment under the terms of the Management Contract, and entitled to reimbursement under that same Management Contract, the amounts are an appropriate subject of recoupment. Those obligations include, but are not limited to, the following:

- On April 30, 2010, Starwood satisfied its payroll obligations to its employees that work at the Hotel for services rendered by those employees in the week prior to the Petition Date. Starwood is entitled to reimbursement of those amounts under the Management Contract, has reason to believe that the reimbursement amount is included in the budget for which the Debtor seeks approval and submits that it is entitled to recoup those amounts.

- On April 30, 2010, real estate taxes due to the City of Boston in the amount of \$145,000 came due that relate in whole or in part to the prepetition period. Starwood is obligated under the Management Agreement to make a post-petition payment of those real estate taxes and is entitled to reimbursement for and recoupment of the amount paid under the terms of the Management Agreement.
- On April 30, 2010, a property insurance payment in the amount of \$28,000 came due for insurance finance premiums under the terms of an agreement entered prepetition. Starwood is obligated under the Management Agreement to make a post-petition payment of those real estate taxes and is entitled to reimbursement for and recoupment of the amount paid under the terms of the Management Agreement.
- On April 30, 2010, utility bills for the month of March in the amount of approximately \$60,000 came due that relate in whole to the prepetition period. Starwood is obligated under the Management Agreement to make a post-petition payment of those utility bills and is entitled to reimbursement for and recoupment of the amount paid under the terms of the Management Agreement.
- On May 15, 2010, occupancy and sales taxes in the amount of \$250,000 will come due to the Commonwealth of Massachusetts that relate in whole or in part to the prepetition period. Starwood is obligated under the Management Agreement to make a post-petition payment of those taxes and is entitled to reimbursement for and recoupment of the amount paid under the terms of the Management Agreement.

11. Finally, under the Management Contract, calculation of amounts due for reimbursement and fees earned by Starwood, as well as payment of the reimbursement amounts and fees due, are made as of the end of each calendar month and paid in arrears. The payments

to which the Debtor is entitled are also due under the Management Agreement, payable in arrears, and paid on the 15th of the month. To the extent expense reimbursement and fee payments are not made as and when due, the unpaid reimbursements and fees would be a proper subject or recoupment from any amounts due to the Debtor under the Management Agreement.

12. Starwood's intent in filing this Reply is not to put the Debtor to the task of having to decide whether to assume or reject the Management Agreement at this early stage of the case, which assumption would carry with it the obligation to satisfy any reimbursement and fee obligations due to Starwood. Starwood also, however, does not want to submit itself to the accusation that it has made improper post-petition transfers towards obligations that some may seek to characterize as prepetition debt in violation of §549 of the Bankruptcy Code. Starwood has reason to believe that each of the payments outlined above is included in the gross disbursement amount for which the Debtor seeks authority in the Motion, but respectfully submits that a greater degree of clarity and authority is warranted.

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WHEREFORE, Starwood respectfully submits that the Motion be allowed, but requests that any order expressly authorize Starwood to disburse all amounts associated with operation of the Hotel in the ordinary course of business, including, but not limited to, reimbursement of amounts and payment of fees due to Starwood under the Management Agreement.

Respectfully submitted,

STARWOOD HOTELS & RESORTS
WORLDWIDE, INC., et al.

By its attorneys,

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Dated: May 4, 2010

CERTIFICATE OF SERVICE

I, John J. Monaghan, Attorney for Starwood Hotels & Resorts Worldwide, Inc. in connection with the above-captioned bankruptcy proceeding, hereby certify that on this 4th day of May, 2010, I served copies of the foregoing *Response to Debtor's Motion For Authorization Of (1) The Interim And Permanent Use Of Cash Collateral, (2) The Granting Of Replacement Liens, (3) Entry Of Scheduled Order Regarding Continued Use Of Cash Collateral And (4) Additional Relief* by first-class mail, postage-prepaid, upon the parties on the attached service list who do not receive ECF service.

/s/ John J. Monaghan

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