

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

BKY No.: 16-32038
Chapter 11 Case

Wayzata-Rochester 16 Hospitality
Associates, LLC,

FINAL ORDER ON DEBTOR'S MOTION
FOR AUTHORITY TO USE CASH
COLLATERAL AND NOTICE OF FINAL
HEARING

Debtor.

This matter is before the Court for hearing scheduled for October 31, 2016 (the "**Hearing**") on the *Motion Use Cash Collateral and For Adequate Protection* (the "**Motion**") filed on June 28, 2016 [Dkt. No. 7], by the Debtor, Wayzata-Rochester 16 Hospitality Associates, LLC (the "**Debtor**"), in the above-captioned chapter 11 case (1) requesting authority to use Cash Collateral (as defined below) pursuant to section 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq* (as amended, the "**Bankruptcy Code**") and (2) seeking authorization to provide adequate protection to Access Point Financial, Inc. ("**Access**" or "**Lender**"), as secured lender who holds a pre-petition claim against the Debtor.

Based on the Court's consideration of (1) the Expedited Hearing on the Motion which took place telephonically on June 30, 2016, (2) the Hearing on the Motion which took place telephonically on July 7, 2016, (3) the Motion, (4) the Stipulation dated July 12, 2016, between the Debtor and Lender which was filed with this Court on July 12, 2016 at Docket No. 44, (5) all matters brought to the Court's attention at the July 13, 2016 Hearing (the "**Interim Hearing**"); (6) the Amended Stipulation dated August 29, 2016, between the Debtor and Lender which was filed with this Court on August 30, 2016 at Docket No. 77 (the "**Amended Stipulation**")¹; (7) all matters brought to the Court's attention at the August

¹ Any capitalized but undefined terms used herein shall have the meaning ascribed thereto in the Amended Stipulation. Further, the Amended Stipulation and all exhibits to the Amended Stipulation entered at Docket No. 77 are incorporated herein by reference.

30, 2016 Hearing (the "**Second Interim Hearing**"); and (8) the Final Stipulation dated October 28, 2016, between the Debtor and Lender which was filed with this Court on October 28, 2016 at Docket No. 117 (the "**Stipulation**") pursuant to Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and after due deliberation and consideration, the Court, makes the following findings of fact and conclusions of law applicable to the Debtor's use of Cash Collateral (to the extent any finds of fact constitute conclusions of law, they are adopted as such, and *vice versa*).

THE COURT HEREBY FINDS AND DETERMINES:

A. **Petition Date.** On June 27, 2016 ("**Petition Date**"), the Debtor filed with the Court a voluntary petition for reorganization under the Bankruptcy Code and is continuing to manage its properties and to operate its business as debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed.

B. **Pre-Petition Debt and Liens.**

1. Based on the Stipulation, the Court finds that the Debtor borrowed from Access (collectively the "**Loans**"). In connection with each of the Loans, Debtor entered into certain Promissory Notes, Mortgage, Assignment of Rents, Security Agreement, Fixture Filing and related agreements (collectively the "**Loan Documents**"). As of the Filing Date, the Debtor was indebted to Access under those certain Promissory Notes (a) dated March 29, 2013 in the original principal amount of \$3,709,600.00 and (b) dated March 28, 2013 in the original principal amount of \$2,090,400.00.

2. Based on the Stipulation, the Court finds that the Debtor was indebted to Lender, as of the Petition Date, in the approximate amount of \$6,631,347.17 plus all legal expenses related to this bankruptcy case and (to the extent allowable under the Bankruptcy Code) all interest, fees, costs, legal expenses and other amounts hereafter accruing thereon or at any time chargeable to the Debtor in connection therewith, the "**Pre-Petition Debt**"). Based on the Stipulation, the Court finds that the Debtor has agreed that all of the Pre-Petition Debt is payable without defense, offset or counterclaim.

3. Based on the Stipulation, the Court finds that as security for the payment of all Pre-Petition Debt, the Debtor granted to Lender pursuant to the Loan Documents, security interest in and liens (a) upon all assets of the Debtor's personal property, and other rights to payments, including, but not limited to, all accounts, documents, inventory, equipment, instruments, chattel paper, claims, deposits, contracts, trademarks, copyrights, goodwill symbols, permits, licenses, leases, general intangibles, agreements, licenses, income, rents, room rates, receipts, issues, profits, revenues for the use or occupancy of rooms and other public facilities in lodging facilities, including, without limitation, all revenue and credit card receipts collected from guest rooms, restaurants, bars, mini-bars, meeting rooms, banquet rooms, and receivables, customer obligations, installment payment obligations and other payment obligations, whether now owned or hereafter acquired, and all products and proceeds thereof as more specifically set forth in the filed and recorded financing statements and fixture filings at Exhibit "B" to the Stipulation and (b) a Mortgage, Assignment of Rents, Security Agreement and Fixtures Filings in favor of Access on March 29, 2013 which was recorded on April 26, 2013 with the Olmsted County Recorder as Document No. A1318909, the First Modification to Mortgage,

Assignment of Rents, Security Agreement and Fixtures Filing, Assignment of Leases and Rents and Other Loan Documents in favor of Access on September 26, 2013 which was recorded on September 30, 2013 with the Olmsted County Recorder as Document No. A1332690 (all such personal property, as the same existed on the Petition Date, together with all cash and non-cash proceeds thereof, the "**Pre-Petition Collateral**").

C. **Need for Use of Cash Collateral.** The Debtor does not have sufficient available sources of working capital to carry on the continued operation of its business without the use of cash collateral. Potentially irreparable harm to the Debtor, its creditors and its estate may occur absent authorization for the use of cash collateral. An immediate and ongoing need exists for Debtor to use the cash proceeds of the Collateral (as defined below) to continue the operation of its business as debtor-in-possession under Chapter 11 of the Bankruptcy Code, to minimize disruption of Debtor's business.

D. **Service of Motion; Objections.** The Debtor has certified that copies of the Motion and notice of the Hearing have been served by electronic mail, telecopy transmission, hand delivery, overnight courier or first class United States mail upon the Office of the United States Trustee (the "**United States Trustee**"), the creditors holding the 20 largest unsecured claims against the Debtor, counsel for Lender, and all parties who had filed requests for notices under Rule 2002 of the Bankruptcy Rules as of the date of the Motion. The Court finds that notice of the Motion, as it relates to this Final Order, is sufficient for all purposes under the Bankruptcy Code and the Bankruptcy Rules, including, without limitation, sections 102(1) and 363 of the Bankruptcy Code and Bankruptcy Rule 4001(b) and (d). Other than the objection filed by Access [Dkt. No. 16] which was resolved

via the Interim Order (Docket No. 51), there was a Limited Objection To Debtor's Motion for Approval To Use Cash Collateral And For Adequate Protection by Sean Hellein (Docket No. 74) which was resolved via the Order (Docket No. 83) and an Adversary Proceeding initiated by M.C.I., Inc. (Docket No. 93) which is being stayed subject to an agreement between the parties (Docket No. 117). Otherwise, no objections to the requested relief of the Motion were filed nor were any oral objections otherwise communicated to counsel for the Debtor or Lender.

E. **Finding Cause.** Good cause has been shown for the entry of this Final Order, the granting of adequate protection as set forth herein and authorization for the Debtor to use Cash Collateral during the Interim Period (as defined below). The Debtor's need for use of Cash Collateral is ongoing, immediate and critical. Entry of this Final Order will preserve the assets of Debtor's estate and its value and is in the best interests of the Debtor, its creditors and the Debtor's estate. The terms of the use of the Cash Collateral are fair and reasonable and reflect the Debtor's exercise of prudent business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration.

F. **Jurisdiction; Core Proceeding; Venue.** This Court has jurisdiction to enter this Final Order pursuant to 28 U.S.C. §§ 157(b) and 1334. Consideration of the Motion constitutes a core proceeding, as defined in 28 U.S.C. § 157(b)(2). Venue for this chapter 11 case and proceedings on the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

G. **Adequate Protection**. Lender has requested and is entitled to adequate protection of their interests in the Pre-Petition Collateral under 11 U.S.C. §§ 361 and 363 as set forth herein.

H. **Committee Formation**. No official committee of unsecured creditors (the "**Committee**") or any statutory committee pursuant to section 1102 of the Bankruptcy Code has yet been appointed in this case.

NOW, THEREFORE; IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

1. **Approval of Stipulation**. The Stipulation is approved and the Debtor is authorized to use the Cash Collateral in accordance with terms and conditions set forth in the Stipulation and in this Final Order until December 27, 2016.
2. **Grant of Motion; Authority to Use Cash Collateral**.
 - a. Subject to all of the terms, conditions and limitations of this Final Order and the Stipulation, the Debtor shall be authorized to use Cash Collateral (as defined below) for Permitted Purposes (as defined below) during the period (the "**Interim Period**") commencing on July 7, 2016, and ending on December 27, 2016.
 - b. The term "**Cash Collateral**" shall mean all monies (i) in the possession of the Debtor on the Petition Date consisting of Pre-Petition Collateral or (ii) received by the Debtor after the Petition Date

in respect of or arising out of Debtor's use, sale, consumption, collection, or other disposition of any Pre-Petition Collateral or Replacement Collateral (as defined below).

- c. The term "**Permitted Purposes**" shall mean the use by the Debtor of Cash Collateral in the ordinary course of the Debtor's business solely, consistent with the terms of the Stipulation, for the purposes of supporting the Debtor's ongoing working capital needs, to the extent and up to the amounts set forth in the budget attached to this Final Order (as may be amended with the written consent of Lender and the Debtor, the "**Budget**"), including a five percent (5%) permitted negative variance on aggregate collections and disbursements during any calendar week. Notwithstanding the foregoing, no Cash Collateral may be used pursuant to the Budget or otherwise to pay any pre-petition claim against the Debtor other than amounts specifically approved by the Court after notice and hearing.

3. **Collection of Accounts Receivable; Use of Blocked Accounts.** The Debtor shall diligently attempt to collect all of its pre-petition and post-petition accounts receivable and all other rights to the payment of money and shall cause all such collections remitted by its customers and other account obligors to be promptly deposited in the Debtor's operating accounts which may consist of lockbox or deposit accounts in existence prior to the Petition Date and used in connection with the Debtor's pre-petition cash management system.

4. **Acknowledgement of Secured Claim.** The Debtor has agreed and acknowledged that the Pre-Petition Debt is absolutely and unconditionally due and payable to Lender without offset, defense or counterclaim. The Debtor has further agreed and acknowledged that the Pre-Petition Debt is secured by a properly perfected first security interest in all assets of the Debtor's personal property, and other rights to payments, including, but not limited to, all accounts, documents, inventory, equipment, instruments, chattel paper, claims, deposits, contracts, trademarks, copyrights, goodwill symbols, permits, licenses, leases, general intangibles, agreements, licenses, income, rents, room rates, receipts, issues, profits, revenues for the use or occupancy of rooms and other public facilities in lodging facilities, including, without limitation, all revenue and credit card receipts collected from guest rooms, restaurants, bars, mini-bars, meeting rooms, banquet rooms, and receivables, customer obligations, installment payment obligations and other payment obligations, whether now owned or hereafter acquired, and all products and proceeds thereof as more specifically set forth in the filed and recorded financing statements and fixture filings at Exhibit "B" to the Stipulation (collectively, the "**Pre-Petition Liens**"). These agreements are binding on the Debtor and Access's lien on the Collateral (as defined herein) shall continue to have the same priority, dignity, and effect post-petition as Access had immediately prior to the Filing Date.
5. **Use of Cash Collateral.** The Debtor's use of Cash Collateral is subject to the strict adherence to the terms and conditions set forth in this Final Order

and in the Stipulation. The Debtor's use of Cash Collateral shall cease upon the earlier to occur of the following (the "**Termination Date**"):

(a) December 27, 2016 at 5:00 p.m. CST (the "**Stated Expiration Date**");

(b) The Bankruptcy Court enters an order confirming a plan of reorganization; or

(c) An Event of Default (as defined in the Stipulation) occurs.

6. **Replacement Lien**. Access is GRANTED a replacement lien and security interests on all property of the same types as Access's Collateral, respectively, now existing or at any time becoming property of the estate of the Debtor, including all post-petition cash, cash equivalents, income, issues, profits, rents, accounts receivable, instruments, contract rights, deposit accounts, books and records, inventory, receivables, and equipment coming into existence after the Petition Date, and on their products and proceeds (the "**Replacement Collateral**" or "**Post-Petition Collateral**") and together with the Pre-Petition Collateral, collectively, the "**Collateral**" or "**Access Collateral**"). The replacement lien and security interest herein granted shall be a valid, perfected and non-avoidable post-petition replacement lien (the "**Post-Petition Liens**" or "**Replacement Liens**"), having the same dignity and effect as the Pre-Petition Liens of Access on Access's Collateral. The Replacement Liens shall secure any diminution in the value of Collateral occurring after the Filing Date, including diminution from use of Collateral. The Replacement Liens shall be in addition to the Pre-Petition Liens in favor

of Access on the Collateral. The Replacement Liens granted herein do not include a lien on the causes of action, or any proceeds thereof, arising under Chapter 5 of the Bankruptcy Code, including any claims that the Debtor may have against third parties. The Post-Petition Liens shall be deemed legal, valid, binding, enforceable and perfected liens, not subject to subordination or avoidance for all purposes in this Chapter 11 Case and any subsequent proceedings under the Bankruptcy Code, including, without limitation, any Chapter 7 proceeding if the case is converted to a case under Chapter 7 of the Bankruptcy Code.

7. **Super Priority Claims**. Access has requested adequate protection and shall be entitled to an administrative priority claim under Section 507(b) of the Bankruptcy Code against all assets of the estate for the amount, if any, by which the protections afforded to Access herein for the Debtor's use, sale, consumption or disposition of any Pre-Petition Collateral (including, without limitation, Cash Collateral) prove to be inadequate to protect Access's interest in such Pre-Petition Collateral (such claims referred to herein as the "**Super Priority Claims**") with the exception of all statutory fees of the United States Trustee.
8. **Consent to use of Cash Collateral**. The Debtor is authorized, during the Interim Period and in accordance with the Budget attached to the Stipulation as Exhibit "D", to use Cash Collateral only to the extent, and subject to the terms, provided in the Stipulation.
9. **Remedies**. Upon the occurrence of any Event of Default (as defined in the

Stipulation), Access shall serve and file a notice of such Event of Default, and thereafter may file a certification to this Court that the Debtor has failed to cure such Event of Default (to the extent such default is curable as set forth in the Stipulation). If no objection disputing the occurrence of such default or failure to cure such default is filed within five days of the filing and service of the notice of an Event of Default, then Access may exercise all rights and remedies set forth in its Loan Documents and exercisable upon the occurrence of an Event of Default and the stay under Section 362 of the Bankruptcy Code shall be terminated and the stay or any other restriction to the enforcement of its Pre-Petition Liens and its Post-Petition Liens shall be ended. Access shall be permitted, at its option, to take all steps that may be appropriate to proceed against and/or realize upon the Pre-Petition Collateral and the Post-Petition Collateral to obtain repayment of any of Indebtedness, all without further order of the this Court.

10. **Survival of Provisions of This Final Order.** The provisions of this Final Order and any action taken pursuant to the terms hereof shall survive the entry of any order dismissing this chapter 11 case to a case under chapter 7 of the Bankruptcy Code, and all of the terms and conditions of this Final Order as well as the liens and security interests granted pursuant hereto shall continue in this or in any superseding case under the Bankruptcy Code, and such liens and security interests shall retain their priorities provided by this Order until satisfied and discharged.
11. **Final Order Immediately Effective; Survival.** Notwithstanding anything to

the contrary in the Federal Rules of Bankruptcy Procedure or otherwise, the effectiveness of this Final Order shall not be stayed, and this Final Order shall be immediately effective upon its entry. The provisions of this Final Order shall survive any dismissal or conversion of this chapter 11 case.

12. **Deadline for Challenge to Pre-Petition Claims and Liens.** Any interested party, except for the Debtor, having standing to do so may commence an appropriate adversary proceeding or contested matter objecting to the validity or amount of the Pre-Petition Debt or the validity, extent, perfection, priority or non-avoidability of the Pre-Petition Liens in the Pre-Petition Collateral, which adversary proceeding or contested matter must be filed no later than sixty (60) days after the service of the Interim Order on Debtor's Motion For Authority To Use Cash Collateral (Docket No. 51), provided however that any Committee hereafter appointed shall have sixty (60) days after the appointment of such Committee to challenge the validity or amount of the Pre-Petition Debt and the validity, extent, perfection, priority or non-avoidability of the Pre-Petition Liens (collectively, the "**Challenge Deadline**").
- Notwithstanding anything in the Stipulation or this Order, nothing herein shall limit the claims that may be brought by any party, except for the Debtor, against Access prior to the Challenge Deadline. If such adversary proceeding or contested matter is not filed prior to the expiration of the Challenge Deadline, then, except as it relates to a subsequently appointed chapter 7 trustee, (i) the liens and security interests of Access in the Pre-

Petition Collateral shall be deemed finally and conclusively legal, valid, binding enforceable, perfected and unavoidable, and (ii) all of the Pre-Petition Debt shall be allowed, conclusive and binding upon all parties in interest in this case and in any superseding chapter 7 case, as a legal, valid, binding, enforceable fully secured claim that is not subject to offset, surcharge, counterclaim, equitable subordination, recharacterization or other defense or claim.

Dated: *October 31, 2016*

/e/ William J. Fisher

William J. Fisher
United States Bankruptcy Judge