

23

)

)

)

)

)

)

)

)

)

)

)

FEB 19 2013

BY _____ DEPUTY

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

1. This Court has jurisdiction over this action, and venue is proper in this Court. Plaintiff has met the requirements of Rule 92.02(b). All conditions to and requirements for the entry of this temporary restraining order have been satisfied.

2. Unless a temporary restraining order is entered, Plaintiff will suffer irreparable harm for which Plaintiff has no adequate remedy at law. The restraining order entered by this Order is necessary and proper to preserve the issues presented by the Petition, as supported by the Affidavits, for decision by this Court, in light of the state of balance between the harm Plaintiff will suffer and the injury that granting the injunction may inflict on Defendants, the likelihood of Plaintiff's success on the merits, and the public interest.

2. Unless a temporary restraining order is entered, Plaintiff will suffer irreparable harm for which Plaintiff has no adequate remedy at law. The restraining order entered by this Order is necessary and proper to preserve the issues presented by the Petition, as supported by the Affidavits, for decision by this Court, in light of the state of balance between the harm Plaintiff will suffer and the injury that granting the injunction may inflict on Defendants, the likelihood of Plaintiff's success on the merits, and the public interest.

THE COURT HEREBY ORDERS THAT PURSUANT TO RULE 92.02(b), the below temporary restraining order is granted without notice to Defendants. Notice defeats the purpose of this Order. The evidence supports that Defendants have, without Plaintiff's knowledge or consent, paid and charged as a Hotel operating costs, improper expenses, such as *personal* state and federal income taxes in excess of \$430,000. Plaintiff no longer trusts Defendants to lease, manage, and operate Plaintiff's Property, and there is a strong possibility that Defendants would increase or intensify their misconduct and/or mismanagement as to the Property (as defined below) should they receive notice of Plaintiff's efforts to re-take control of Plaintiff's asset.

IT IS HEREBY ORDERED:

1. Effective as of the date of this Order, Plaintiff has declared that it has terminated (i) that certain Hotel Operating Agreement between CWE Hospitality Services LLC ("CWE") and Kingsdell, L.P. ("Kingsdell"), dated December 1, 2006, as amended ("Existing Hotel Management Agreement"), and (ii) that certain Lease Agreement between Plaintiff and Kingsdell dated December 1, 2006, as amended. Plaintiff shall take immediate and exclusive possession, custody and control of the real property, improvements and personal property that are or that, until the date of this Order, have been, leased, operated, managed or controlled by any of the defendants CWE, Kingsdell, IFC, Inc. ("IFC"), and/or James L. Smith (individually, "Defendant" and collectively, "Defendants") (collectively, the "Property"), which Property is located in or relating to the City of St. Louis and State of Missouri, having a street address commonly known as 212 N Kingshighway Blvd., more particularly described on Exhibit A attached hereto. The "Property" also includes any business(es) relating to the Property (including, without limitation, the operation of a hotel commonly known as The Chase Park Plaza and the provision of services to for-sale condominiums and corporate apartments located on the Property), if and to the extent the same is owned, operated, managed or controlled by any of the Defendants, whether such business(es) be managed by the named Defendants or any of

their respective agents (any such business(es) generally referred to herein, individually and collectively, as the "Defendant Managed Business"). Plaintiff shall furthermore take immediate and exclusive possession, custody and control of all monies, gift cards, equipment, fixtures, furnishings, inventory (including, without limitation, all inventory of alcoholic beverages), assets, royalties, rents, receivables, accounts, deposits, equities, and profits, books and records, ledgers, financial statements, financial reports and all other business records (including, but not limited to, information contained on computers and any and all software and websites), and telephone or internet reservation systems (including toll free telephone numbers and domain names) relating thereto, as well as all banking records, statements, budgets, rent rolls, personnel records, real estate tax bills, construction and other bonds, governmental agency permits and approvals, advertisements and marketing materials, building permits, plans and specifications, surveys, architectural, contractor and subcontractor agreements, and architectural and engineering drawings for the buildings and improvements, pertaining to the Property and/or the Defendant Managed Business, wherever located, as Plaintiff deems necessary for the proper administration, management and/or control of the Property.

3. **IT IS ORDERED** that Defendants, and each of them, and their respective agents, partners, property managers, employees, assignees, successors, representatives, and all persons acting under, in concert with, or for them who have actual or constructive knowledge of this Order, and their agents and employees, are ordered to:

(A) *Turn over of Property:*

Immediately relinquish and turn over access, possession, and control of the Property and the Defendant Managed Business to Plaintiff;

(B) *Turn over of Keys, Books, and Records:*

Immediately turn over to Plaintiff and direct all property managers and other third parties in possession thereof to turn over all keys, leases, books, records, books of account, banking records, statements and cancelled checks, calendars of events, contact information, and request reservation information, and provide Plaintiff with all passwords needed to access all

records and files maintained on any computer located on or otherwise serving the Property, or any other computers on which such information is stored, together with passwords needed to access each Defendant's e-mail account, and all other business records relating to the Property, wherever located, and in whatever mode maintained;

(C) *Turn over of Licenses, Permits, and Taxpayer ID Number:*

Immediately turn over to Plaintiff all documents that pertain to all licenses, permits, or government approvals relating to the Property or the Defendant Managed Business and immediately advise Plaintiff of all Federal and State taxpayer identification numbers used in connection with the operation of the Property or the Defendant Managed Business. Plaintiff shall be entitled to utilize the aforementioned taxpayer identification numbers during the transition of Defendants' operation of the Property and the Defendant Managed Business to Plaintiff. The foregoing reference to licenses and permits shall include all liquor licenses and other licenses and permits, even if such licenses and permits are not issued in the name of any of the Defendants. If the issuing agency requires that the any or more of the Defendants execute a surrender, transfer or other instruments or documents, then, at Plaintiff's request (and without limiting Plaintiff's rights above), the applicable Defendants shall execute such instruments or documents.

Plaintiff is hereby given the power and authority to, either directly or through its designee, take possession of and operate in place of, and instead of Defendants, all licenses, permits and other government issued documents necessary or appropriate for the continued operation of the Property and the Defendant Managed Business in the ordinary course of business. This shall include all liquor licenses and other licenses and permits, even if such licenses and permits are not issued in the name of any of the Defendants, and shall specifically include, without limitation, all liquor licenses issued in the name of Kingsdell for use in connection with the Property, and Plaintiff is authorized to take any actions permitted under the liquor licenses or such other permits as may be required by the Missouri Division of Alcohol and Tobacco Control or the Excise Division of the City of St. Louis or any other city or state or other

governmental agency and regulates liquor licenses and/or the service or sale of alcoholic beverages. If the issuing agency requires that Plaintiff or its designee apply for new or different licenses (including, without limitation, a liquor license or licenses), permits or other documents or approvals, Plaintiff shall be allowed to do so in its, its designee's or in any of the Defendants' or their respective related party's name(s) and to continue to operate under the current permit or license until the new permit or license is issued to ensure no disruption of service or operations occurs. The issuing agencies of all permits and licenses (including, but not limited to, the Building Department, Planning Department, Department of Real Estate the Missouri Division of Alcohol and Tobacco Control, and the Excise Division of the City of St. Louis) shall be entitled to rely upon this Order for the authority of Plaintiff or its designee in its signing (on behalf of Plaintiff, its designee or any of the Defendants' or their respective related parties) of all documents and taking of all actions necessary or appropriate for the issuance or modification of any licenses, permits or other government issued documents or approvals. The provisions of this Section 3.(C) shall control in the case of any conflict between the provisions of this Section 3.(C) and the provisions of any other paragraph of this Order;

(D) *Turnover of Monies and Security Deposits:* Immediately turn over to Plaintiff any monies including, but not limited to, rent, security deposits, prepaid rent, or funds in property management bank accounts or other depository accounts for the Property or the Defendant Managed Business and, at Plaintiff's request, notify all the tenants occupying, using or leasing the Property, or any portion thereof, to make all future payments to Plaintiff or Hotel Manager (if any), as Plaintiff designates; and

(E) *Notify Regarding Insurance:* Immediately advise Plaintiff as to the nature and extent of insurance coverage on the Property and the Defendant Managed Business. Each Defendant is prohibited from canceling, reducing, or modifying any and all insurance coverage currently in existence with respect to the Property or the Defendant Managed Business.

4. **IT IS FURTHER ORDERED** that pending further order of the Court, Defendants, and each of them, and their respective agents, partners, property managers, employees, assignees,

successors, representatives, and all persons acting under, in concert with, or for them who have actual or constructive knowledge of this Order, and their agents and employees, shall not:

(A) *Commit Waste:*

Commit or permit any waste on the Property or any part thereof, or suffer, commit or permit any act on the Property or any part thereof that is in violation of law, or remove, transfer, encumber or otherwise dispose of any of the Property or the fixtures presently on the Property or any part thereof or relating to the Defendant Managed Business;

(B) *Collect Rents:*

Demand, collect, receive, discount, or in any other way divert or use any of the rents, revenues, income or profits from the Property or the Defendant Managed Business;

(C) *Interfere with Plaintiff:*

Directly or indirectly (through any of its officers, directors, owners, members, shareholders, managers, property managers, agents, representatives, professionals, contractors, employees or otherwise) interfere in any manner with Plaintiff's possession, control, operation or management of the Property or the Defendant Managed Business; by way of illustration, and not limitation, Defendants shall not (1) disparage Plaintiff or its members, (2) disparage the Property or any employees, guests, vendors or contractors related to the Property, or (3) communicate with any employees, guests, vendors or contractors related to the Property; and

(D) *Transfer or Encumber the Property:*

Expend, disburse, transfer, assign, sell, convey, devise, pledge, mortgage, create a security interest in, encumber, conceal or in any manner whatsoever deal in or dispose of the whole or any part of the Property, including, but not limited to, the rents, revenues, income or profits from the Property or the Defendant Managed Business without prior Court order.

5. **IT IS FURTHER ORDERED** that, except by leave of the Court, all lessors, lessees, customers, principals, investors, suppliers, and or creditors seeking to enforce any claim, right, or interest against Defendants, be barred by this Order from using any "self-help" or doing anything whatsoever to interfere in any way with Plaintiff's possession, control, operation or management

of the Property or the Defendant Managed Business.

6. **IT IS FURTHER ORDERED** that, as to the injunctive relief granted herein, this Order shall be binding on the parties to this action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them to whom Plaintiff provides actual notice of this Order. In order to promote judicial efficiency, all persons who receive actual or constructive notice of this Order are enjoined in any way from disturbing Plaintiff's possession, control, operation or management of the Property or the Defendant Managed Business.

7. **IT IS FURTHER ORDERED** that Plaintiff may at any time apply ex parte to the Court for further or other instructions and powers necessary to enable Plaintiff to properly preserve and protect its Property.

8. **IT IS FURTHER ORDERED** that Plaintiff is directed to post security in the amount of \$ 10,000.00 with the Circuit Court of the City of St. Louis in the form of cash, bond, or other acceptable security.

9. **IT IS FURTHER ORDERED** that the temporary restraining order shall remain in full force and effect until the earlier of the date the Court hears and rules upon Plaintiff's Motion for Preliminary Injunction or a period of ten (10) days from the date and time this Order is entered (or such extended dates as the Court may grant up to the maximum amount permitted by the Missouri Rules of Civil Procedure or as the parties otherwise agree in writing).

10. The Court sets Plaintiff's Motion for Preliminary Injunction for hearing on March 1, 2013 at 10:00 (a.m.) p.m. or as soon thereafter as Counsel may be heard.

This Order is issued this 19th day of February, 2013 at 1:15 o'clock P.m.

IT IS SO ORDERED:

David Dowd
JUDGE OF THE CIRCUIT COURT