

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
NEWBURY COMMON)	Case No. 15 - 12507 (LSS)
ASSOCIATES, LLC, <u>et al.</u> ,)	
)	Original Debtors Jointly Administered
)	Additional Debtors Joint
Debtors. ¹)	Administration Requested
)	

**MOTION OF DEBTORS FOR ENTRY OF AN ORDER
AUTHORIZING THE PAYMENT OF PREPETITION WAGES AND
SALARIES AND THE PAYMENT AND HONORING OF PREPETITION
EMPLOYEE POLICIES AND BENEFITS**

The above-captioned debtors and debtors in possession (collectively, the “**Debtors**”), by and through their proposed undersigned attorneys, hereby file this motion (this “**Motion**”) for the entry of (i) an order, substantially in the form attached hereto as **Exhibit A** (the “**Order**”), authorizing the payment of prepetition wages and salaries and the payment and honoring of prepetition employee policies and benefits. In support of this Motion, the Debtors rely upon and incorporate by reference the *Declaration of Marc Beilinson in Support Of Chapter 11 Petitions* [Docket No. 5] (the “**First Day Declaration**”) and the *Declaration of Marc*

¹ The “**Original Debtors**” in these chapter 11 cases, along with the last four digits of each Original Debtor’s tax identification number, are: Newbury Common Associates, LLC (3783); Seaboard Realty, LLC (6291); 600 Summer Street Stamford Associates, LLC (6739); Seaboard Hotel Member Associates, LLC (8984); Seaboard Hotel LTS Member Associates, LLC (6005); Park Square West Member Associates, LLC (9223); Seaboard Residential, LLC (2990); One Atlantic Member Associates, LLC (4120); 88 Hamilton Avenue Member Associates, LLC (5539); 316 Courtland Avenue Associates, LLC (0290); 300 Main Management, Inc. (6365); 300 Main Street Member Associates, LLC (2334); PSWMA I, LLC (6291); PSWMA II, LLC (6291); and Tag Forest, LLC (8974).

The “**Additional Debtors**” in these chapter 11 cases, along with the last four digit of each Additional Debtor’s tax identification number, are: Newbury Common Member Associates, LLC (3909); Century Plaza Investor Associates, LLC (1480); Seaboard Hotel Associates, LLC (2281); Seaboard Hotel LTS Associates, LLC (8811); Park Square West Associates, LLC (9781); Clocktower Close Associates, LLC (3154); One Atlantic Investor Associates, LLC (7075); 88 Hamilton Avenue Associates, LLC (5749); 220 Elm Street I, LLC (7540); and 300 Main Street Associates, LLC (8501).

The Debtors’ corporate headquarters is located at, and the mailing address for each Debtor is, 1 Atlantic Street, Stamford, CT 06901.

Beilinson in Support of Additional Chapter 11 Petitions and First Day Pleadings (the “**Supplemental First Day Declaration**”),² filed contemporaneously herewith and incorporated by reference herein:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that this Court would lack Article III jurisdiction to enter such final order or judgment absent the consent of the parties.

2. Venue of these chapter 11 cases and this Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief sought hereby are sections 105(a), 363, and 507(a) of title 11 of the United States Code (the “**Bankruptcy Code**”), Rules 6003(b) and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rules 2014-1 and 2016-1 of the Local Rules.

BACKGROUND

4. On December 13, 2015 (the “**Initial Petition Date**”), the Original Debtors with the exception of Tag Forest, LLC (“**Tag**”) commenced a voluntary case under chapter 11 of the Bankruptcy Code. On December 14, 2015, Tag commenced its voluntary case

² Each capitalized term used but not defined herein shall have the meaning ascribed to it in the First Day Declaration or the Supplemental First Day Declaration.

under chapter 11 of the Bankruptcy Code. On the date hereof (the “**Petition Date**”), each of the Additional Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. No official committees have been appointed in these chapter 11 cases and no request has been made for the appointment of a trustee or an examiner. The Original Debtors’ chapter 11 cases are being jointly administered, for procedural purposes only, pursuant to Bankruptcy Rule 1015(b). Contemporaneously herewith, the Additional Debtors filed a supplemental motion seeking joint administration of their chapter 11 cases with the Original Debtors for procedural purposes only, pursuant to Bankruptcy Rule 1015(b).

5. Additional information regarding the Debtors’ businesses, capital structure, and the circumstances leading to the filing of these chapter 11 cases is set forth in the First Day Declaration and the Supplemental First Day Declaration.

THE EMPLOYEES

6. Currently, all employees are employed by Seaboard Property Management, Inc. (“**Seaboard Property Management**”). Seaboard Property Management is a property management owned by Mr. DiMenna, that prior to the Petition Date, actively managed the day-to-day operations of most of the Debtors (except for the Courtyard hotel, which was and is managed by Urgo Hotels, LLP an unaffiliated third party).³ Under the Debtors’ management agreements with Seaboard Property Management (the “**Management Agreements**”), Seaboard Property Management is authorized to pay or reimburse itself for all expenses and costs for operating the Debtors’ properties, including employees, from operating accounts with the Debtors. Under the Management Agreements, Seaboard Property Management is authorized to

³ Additional details regarding Seaboard Property Management are set forth in the Supplemental First Day Declaration.

hire, supervise, and pay all employees to be employed in connection with the management, maintenance, and operation of the Debtors' premises.

7. All of the employees are paid through Seaboard Property Management and the Debtors fund the accounts with Seaboard Property Management as agent for the employee payments approximately two to three days before Seaboard Property Management funds those obligations, including the amounts owed for Payroll Service Fees, Payroll Taxes, and amounts due under the Health and Welfare Plans (each as defined below). The Debtors are in the process of transferring these employees to be official employees of Newbury Common Member Associates, LLC ("**Newbury Common Member**"). The Debtors anticipate that the employees will officially be employees of Newbury Common Member on or around March 1, 2016. In the meantime, the Debtors are seeking authority to honor their Employee Compensation and Benefits as if such employees were employees of Newbury Common Member, including paying all prepetition Wage Obligations, Contractor Payments and Expense Reimbursements (each as defined below), and to continue such Employee Compensation and Benefits going forward regardless of whether the employee is officially an employee of Seaboard Property Management or Newbury Common Member.

A. The Debtors' Workforce

8. As of the Petition Date, Seaboard Property Management employed on behalf of the Debtors approximately 13 employees (the "**Employees**"), 11 of which are salaried and 2 of which are paid hourly. None of the Employees is unionized.

9. The Debtors depend on the Employees to assist the Debtors' chief restructuring officer in managing the Debtors' businesses. The Employees' skills, their relationships with vendors, suppliers, tenants, and other third parties, and their specialized

knowledge and understanding of the Debtors' operations, are all essential to the Debtors' ability to continue their operations and reorganize successfully.

B. The Debtors' Workforce Obligations⁴

10. Seaboard Property Management participates in, or is obligated under, on behalf of the Debtors, a number of different salary and benefit structures and employee programs and plans. In addition to their standard salary and wage compensation programs, Seaboard Property Management is obligated to pay and to provide certain medical, dental, vision, and other related benefits to the Employees, and they reimburse employees for ordinary business expenses incurred on the Debtors' behalf.

11. Under these various structures, programs, and plans, the Employees are owed various payments and benefits that have not yet been paid or otherwise realized prior to and as of the Petition Date.

i. Salaries and Withholdings

12. Salaries and Wages. Seaboard Property Management, on behalf of the Debtors, typically pays obligations relating to salaries and wages for the Employees (collectively, the "**Wage Obligations**") on a bi-weekly basis (every other week), through direct deposits into the Employees' accounts. The Employees are paid every other Tuesday, for two weeks of work up until the Friday before payday. For example, the salaries and wages paid on January 26, 2016 cover work done from January 9, 2016 through January 22, 2016.

13. The Debtors make payment for payroll to Seaboard Property Management from two to three business days before the employees are paid and payroll is typically funded by

⁴ Subject to this Court's approval, the Debtors anticipate that as of March 1, 2016, Newbury Common Member will be the direct employer of the Employees and Contractors (as defined below), will be responsible for the Payroll Taxes (as defined below), and will be the obligor under certain the Health and Welfare Programs and the sponsor of the 401(k) Plan (as defined below).

Seaboard Property Management one day before the Employees are paid. Seaboard Property Management's current estimated payroll on behalf of the Debtors is approximately \$50,000 per month on an aggregate basis, which amount includes Seaboard Property Management's share of Payroll Taxes and obligations under the Health and Welfare Plans with respect to the Employees.

14. Contractor Payments. In the ordinary course of business, Seaboard Property Management, on behalf of the Debtors, occasionally utilize independent contractors (collectively, the "**Contractors**") to assist in work at the property level Debtors. As of the Petition Date, the Debtors utilize approximately 5 Contractors. The Contractors are typically compensated at an hourly, daily, plus normal expense reimbursement (collectively, the "**Contractor Payments**"), which is paid directly to the Contractors. Contractor Payments are generally made within 30 days after Seaboard Property Management receives an invoice, depending on when Seaboard Property Management is billed. On average, Seaboard Property management typically pays approximately less than \$1,000 in Contractor Payments each month for work performed for the Debtors. The Debtors estimate that less than \$1,000 in Contractor Payments is accrued and unpaid as of the Petition Date.

15. The Debtors owe Seaboard Property Management Wage Obligations and Contractor Payments for work performed before the Petition Date. As of the Petition Date, 12 days of salary and wages have accrued for prepetition services provided by the Employees.

16. Moreover, some checks that have been issued to Employees and Contractors may not have been presented for payment or may not have cleared through the banks and financial institutions (collectively, the "**Banks**") employed in the Debtors' cash management system. The Debtors believe that the aggregate amount of all such accrued but unpaid salaries, wages, and Contractor Payments is approximately \$35,000.

ii. Payroll Disbursement and Withholdings

17. The payroll for the Employees is distributed through direct deposit. Seaboard Property Management pays the Employees through a third-party payroll processing company, Paychex, Inc. (“**Paychex**”). Paychex (i) accesses their bank accounts to fund the checks or direct deposit to employees, (ii) makes certain withholdings - including the Seaboard Property Management’s share of Payroll Taxes and obligations under the Health and Welfare Plans (which the Debtors are obligated to pay Seaboard Property Management for), and (iii) funds payroll to and on behalf of the Employees.⁵ Included in Paychex’s cost for payroll processing are quarterly fees for processing garnishments, quarterly tax filings, and the cost for Paychex software to track hours worked with respect to hourly employees. The Debtors pay an average of \$1,000 per month in fees for the payroll services provided by Paychex via Seaboard Property Management (the “**Payroll Service Fees**”). Payment of these modest fees is crucial for the Debtors’ seamless entry into chapter 11 and to ensure that all employees are paid timely and accurately postpetition. Because Payroll Service Fees are paid to Seaboard Property Management before Paychex funds payroll, the Debtors believe they do not owe any amounts to Seaboard Property Management or Paychex for the Payroll Service Fees as of the Petition Date.

18. In addition, Seaboard Property Management, on behalf of the Debtors, is required by law to withhold certain amounts from the Wage Obligations (the “**Withholding Taxes**”) and to remit the same to the appropriate taxing authorities (collectively, the “**Taxing**”

⁵ Paychex currently make draws from Seaboard Property Management (to be made from the account at Newbury Common Member as of March 1, 2016), as described in the *Motion of Debtors for Entry of an Order Approving (I) the Debtors’ Continued Maintenance of Their Existing Bank Accounts and Use of Their Cash Management System, (II) the Payment of Certain Obligations Related Thereto, (III) the Continuation of Intercompany Transactions, (IV) Administrative Expense Status for Intercompany Claims, (V) the Debtors’ Continued Use of Existing Checks and Business Forms, and (VI) Granting the Debtors a Waiver of the Bond Requirement Contained in Bankruptcy Code Section 345(b) of the Bankruptcy Code*, filed contemporaneously herewith.

Authorities”).⁶ These withholding amounts relate to federal, state, and local income taxes, as well as social security and Medicare taxes. Seaboard Property Management, on behalf of the Debtors, may also be required to withhold amounts from the Wage Obligations for such items as court ordered child support payments, other attachments to, and/or garnishments of, wages, and government mandated savings plans. In addition, Seaboard Property Management, on behalf of the Debtors, is required to make contributions of their own funds to the Taxing Authorities. For instance, Seaboard Property Management is required to make matching payments for the Employees on account of social security and Medicare taxes and to pay, based on a percentage of gross payroll and subject to state-imposed limits, additional amounts to the Taxing Authorities for, among other things, state and federal unemployment insurance (collectively, the “**Employer Payroll Taxes**,” and together with the Withholding Taxes, the “**Payroll Taxes**”).

19. Because Paychex withholds and remits to the appropriate Taxing Authorities the Payroll Taxes and funds garnished or otherwise withheld and not yet remitted to the appropriate Taxing Authorities in connection with each payroll period, the Debtors do not believe that Seaboard Property Management, on their behalf, has withheld and not yet remitted to the appropriate Taxing Authorities any Payroll Taxes as of the Petition Date.

iii. Reimbursement of Expenses

20. In the ordinary course of business and subject to established guidelines, Seaboard Property Management, on behalf of the Debtors, reimburse various Employees and Contractors for business expenses incurred in connection with services rendered for the benefit of the Debtors, including transportation, meals, office supplies, and other general expenses (the “**Expense Reimbursements**”). Because these expenses are incurred as part of their official

⁶ Under the Management Agreements, the Debtors are responsible for reimbursing Seaboard Property Management for Payroll Taxes, as they are operating expenses of the Debtors.

duties and in furtherance of the Debtors' businesses, the Employees and Contractors are reimbursed in full after submission of appropriate documentation to Seaboard Property Management's accounting department. Expenses are reimbursed on a rolling basis, with a general lag time of approximately two weeks between submission and reimbursement. The Expense Reimbursements average approximately \$2,000 per month.

21. As of the Petition Date, certain Employees and Contractors may be entitled to an expense reimbursement but have not yet submitted a request or such requests may have been made but not yet processed. Although it is difficult for the Debtors to determine the amount of Expense Reimbursements outstanding at any particular time, based upon the outstanding expenses currently known to the Debtors and historical figures, the Debtors estimate that there may be as much as \$2,000 of Expense Reimbursements outstanding as of the Petition Date.

iv. Vacation, Sick Days, and Holidays

22. The salaried Employees are eligible, in certain circumstances, to receive their full wages for, among other things, vacation, sick/emergency days, and holidays (collectively, the "**PTO Benefits**"). Eligible employees accrue vacation benefits on a vesting schedule based on years of service. Full-time salaried Employees receive three weeks of vacation per calendar year upon working for the Debtors (or Seaboard Property Management) for five years. All other full-time salaried Employees receive two weeks of vacation per calendar year. Unused vacation time cannot be carried over into the subsequent year. The Debtors anticipate that the Employees will utilize any accrued vacation time in the ordinary course of business, which will not create any material cash flow requirements beyond the Debtors' normal payroll obligations to Seaboard Property Management.

23. The Debtors/Seaboard Property Management provide sick days to their Employees, on an as needed basis.

24. The Debtors/Seaboard Property Management also administer other paid time off programs for holidays, bereavement, and jury duty.

25. The Debtors estimate that after giving employees credit for accrued and unpaid PTO Benefits, when coupled with outstanding compensation accrued prior to the Petition Date, none of the Employees will exceed the \$12,475 statutory cap.

26. The Debtors estimate that the Employees are owed, in the aggregate, approximately \$7,000 in PTO Benefits as of the Petition Date. Because the PTO Benefits are essential features of the employment benefits and failure to provide these benefits could harm employee morale and encourage the premature departure of employees, the Debtors request authority to honor all of their obligations relating to the PTO Benefits as and when they come due, regardless of when such PTO Benefits accrued, subject to the \$12,475 cap in the Order approving this Motion.

v. Health and Welfare Plans

27. Seaboard Property Management, on the Debtors' behalf, sponsors several health care packages for the Employees, including, medical insurance, dental insurance, and vision care (collectively, the "**Health and Welfare Plans**").⁷ The salaried Employees that work 37 or more hours per week are eligible for the benefits offered under the Health and Welfare

⁷ Seaboard Property Management offers the Employees the option of purchasing life, accidental death and dismemberment and critical illness insurance. These insurance programs are not administered by the Seaboard Property Management. Should an Employee elect coverage under such insurance program, Paychex deducts funds from the Employee's paycheck, and remits to the appropriate insurance company. Additionally, Employees are offered a flexible spending plan. None of the Employees are enrolled in the flexible spending plan.

Plans. Additionally, Employees have the option of enrolling eligible dependents⁸ in the Health and Welfare Plans. New Employees become eligible for benefits offered under the Health and Welfare Plans on the first day of their employment.

28. The Health and Welfare Plans for the employees are administered by Aetna. In 2015, the Debtors paid Seaboard Property Management approximately \$230,000 to pay to Aetna in order to provide the Health and Welfare Plans to the Employees, offset by approximately \$46,000 in Employee-funded payroll contributions.

29. Medical Plans. The medical insurance packages for the salaried Employees are provided through a fully-insured medical plan administered by Aetna (the “**Medical Plans**”). Through Aetna, the Employees are offered two comprehensive, high-quality plans, which include prescription drug coverage. The Medical Plans differ based on deductible amounts and the eligibility to see out of network providers. Approximately 11 Employees participate in the Medical Plans.

30. Dental Plans. Dental coverage is provided to salaried Employees through a fully-insured plan administered by Aetna (the “**Dental Plans**”). Through Aetna, the Employees are offered one dental coverage option. Approximately 11 Employees participate in the Dental Plans.

31. Vision Plan. Salaried Employees are provided a fully insured vision plan (the “**Vision Plan**”) through Aetna. Approximately 10 Employees participate in the Vision Plan.

32. Health and Welfare Plan Premiums. The Debtors pay approximately \$17,000 per month to Seaboard Property Management for the premiums under the Health and

⁸ Eligible dependents include: (i) spouses or domestic partners; (ii) child(ren) up to age 26 regardless of marital or student status; and (iii) unmarried children of any age who are incapable of supporting themselves due to a mental or physical disability and who are totally dependent on the Employee.

Welfare Plans. Aetna receives payment from Seaboard Property Management twice a month (at the time of the first two payroll cycle payments, as some months there are three payroll cycle payments) from Paychex. As of the Petition Date, the Debtors believe that Aetna is owed approximately \$6,000 for premiums owed under Health and Welfare Plans.

33. The costs incurred for the funding of the monthly premiums under the Health and Welfare Plans are reduced through Employee contributions. The contributions are withheld by payroll deductions twice a month (at the time of the first two payroll cycle payments, as some months there are three payroll cycle payments). The amount of Employee contributions averages approximately \$5,100 per month for the Health and Welfare Plans. Because Employee contributions are withheld by Paychex at payroll and directly remitted to Aetna, no funds will have been withheld from the salaries or wages of Employees before the Petition Date but not yet transferred and applied to the Health and Welfare Plans.

vi. The 401(k) Plan

34. For the Employees, Seaboard Property Management sponsors a 401(k) retirement investment plan (the “**401(k) Plan**”) and withholds from the wages of participating employees contributions towards the 401(k) Plan (the “**Withholding Contributions**”). Eight of the Employees participate in the 401(k) Plan, administered by Merrill Lynch. All of Merrill Lynch’s fees are covered by revenue sharing agreements with the fund companies that operate the investment funds that hold the investments of the 401(k) Plan. The 401(k) Plan participants pay the expense ratio for each investment fund. Seaboard Property Management does not provide any matching contributions. As of the Petition Date, Seaboard Property Management has not deducted any employees’ payroll contributions with respect to the 401(k) Plan.

35. The Debtors do not have any pension plans.

36. Based upon the foregoing, the Debtors believe that the aggregate amount of the employee obligations, including, but not limited to, the benefits described herein (collectively, the “**Employee Compensation and Benefits**”) accrued and unpaid as of the Petition Date does not exceed \$50,000.

C. The Need to Honor Workforce Obligations

37. The Debtors need the support of the Employees to continue their business operations. Any delay or disruption in the Employee Compensation and Benefits will impair employee morale at the very time when the Debtors have a need for dedication, confidence, and cooperation from the Employees to ensure as smooth a transition as possible into operating under chapter 11.

38. The Debtors believe that if these obligations are not satisfied, the Debtors risk that the Employees might seek other employment immediately, which would cause a disruption in the Debtors’ business operations and staffing during this sensitive time of transition.

39. In addition, the Debtors would incur out-of-pocket and intangible costs to recruit and train new employees if existing Employees seek other employment. If the Debtors are unable to pay the Employees and the Employees consequently seek other employment, the Debtors’ relationships with vendors, customers, suppliers, and other parties may be compromised. Moreover, it should not be overlooked that Employees would suffer financial and personal hardship, and perhaps lose access to critical services or be unable to meet their own personal obligations through no fault of their own, if the Debtors are unable to satisfy the obligations described herein.

40. For all of these reasons, the Debtors have determined that payment of the amounts described in this Motion is necessary to maintain the morale and continued dedication of the Debtors' workforce. As such, the requested authority to satisfy prepetition obligations to their employees will help preserve the going concern value of the Debtors' businesses.

RELIEF REQUESTED

41. The Debtors seek the entry of the proposed form of Order authorizing, but not directing, them to continue to honor their Employee Compensation and Benefits obligations pursuant to sections 363(b) and 105(a) of the Bankruptcy Code.

42. In connection with the Debtors' request for authorization to continue their Employee Compensation and Benefits obligations, the Debtors seek the entry of the proposed form of Order authorizing, but not directing, them to, among other things:

- a. to pay the Wage Obligations and related benefits, Contractor Payments, and all Expense Reimbursements;
- b. to pay all amounts associated with the Health and Welfare Plans, including prepetition premiums or costs due;
- c. to pay all costs and expenses due for the administration, servicing, and processing of Employee Compensation and Benefits described in this Motion, including the Payroll Service Fees;
- d. to honor the PTO Benefits; and
- e. to continue the employee benefits described in this Motion in the ordinary course.

43. The Debtors are requesting the entry of the Order authorizing the payment and honoring of the Employee Compensation and Benefits, provided that the maximum amount of prepetition Wage Obligations that the Debtors may pay to any individual employee under the Order would be \$12,475.

44. Additionally, the Debtors request that its Banks and any other third-party agents be authorized, when requested by the Debtors, to receive, process, honor and pay any and all wire transfers or checks drawn on the Debtors' accounts for any payments authorized by this Court, whether such wire transfers or checks were presented before or after the Petition Date, provided that sufficient funds are available, and to rely on all of the Debtors' representations in this Motion.⁹

BASIS FOR RELIEF REQUESTED

A. Payment of the Claims Described Herein Is Essential To Preserve the Value of the Debtors' Businesses Through Continued Operations

45. Section 105(a) of the Bankruptcy Code empowers this Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" 11 U.S.C. § 105(a). The purpose of section 105(a) is to ensure a bankruptcy court's power to take whatever action "is appropriate or necessary in aid of the exercise of [its] jurisdiction." 2 COLLIER ON BANKRUPTCY, ¶ 105.01 (15th rev. ed. 1997); see also Mgmt. Tech. Corp. v. Pardo, 56 B.R. 337, 339 (Bankr. D.N.J. 1985) (recognizing that court possesses equitable powers under section 105 of the Bankruptcy Code).

⁹ Nothing contained in this Motion or any actions taken by the Debtors pursuant to relief granted in the Order is intended or should be construed as: (i) an admission as to the validity of any particular claim against a Debtor entity; (ii) a waiver of the Debtors' rights to dispute any particular claim on any grounds; (iii) a promise or requirement to pay any particular claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (vi) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Motion are valid, and the Debtors expressly reserve their rights to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtors' rights to subsequently dispute such claim.

46. Under the “necessity of payment rule” or the “doctrine of necessity,”¹⁰ courts often allow the immediate payment of prepetition claims where the payments are essential to the debtor’s continued operations, even though the Bankruptcy Code may not explicitly authorize payment. See, e.g., In re Just for Feet, Inc., 242 B.R. 821, 824 (Bankr. D. Del. 1999); In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (noting that a debtor may pay a class of prepetition creditors in advance of a confirmed plan if essential to the continued operation of the business).

47. The doctrine of necessity recognizes that paying prepetition obligations outside of a plan of reorganization is often necessary to realize the paramount purpose of chapter 11 reorganization, *i.e.*, preventing the liquidation of the debtor in possession and preserving its potential for rehabilitation. See, e.g., In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (holding that the doctrine of necessity permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid”).

48. This Court has authorized debtors to pay prepetition claims for compensation, benefits, and expense reimbursements, among other things, on the ground that the payment of such claims was necessary to effectuate a successful reorganization. See, e.g., In re Molycorp, Inc., Case No. 15-11357 (CSS), [Docket Nos. 82 & 223] (Bankr. D. Del. June 26, 2015 and July 17, 2015) (granting initial relief and further relief); In re Colt Holding Co., Case No. 15-11296 (LSS), [Docket Nos. 79 & 200] (Bankr. D. Del. June 16, 2015 and July 10, 2015) (granting interim and final relief); In re Allied Nevada Gold Corp., Case No. 15-10503 (MFW),

¹⁰ This doctrine, first articulated by the United States Supreme Court in Miltenberger v. Logansport, C&S W. R. Co., 106 U.S. 286, 311-312 (1882), recognizes the existence of judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.

[Docket Nos. 60 & 193] (Bankr. D. Del. Mar. 11, 2015 and Apr. 15, 2015) (granting interim and final relief); In re Radioshack Corp., Case No. 15-10197 (BLS), [Docket No. 169] (Bankr. D. Del. Feb. 9, 2015); In re Endeavour Operating Corp., Case No. 14-12308 (KJC), [Docket Nos. 55 & 206] (Bankr. D. Del. Oct. 15, 2014 and Nov. 7, 2014) (granting interim and final relief); In re Trump Entm't Resorts, Inc., Case No. 14-12104 (KG), [Docket No. 50] (Bankr. D. Del. Sept. 10, 2014).¹¹

49. While Seaboard Property Management is controlled by Mr. DiMenna and the Debtors are reserving all of their rights with respect to any claims that the Debtors might have against Seaboard Property Management, it would be devastating for the Debtors if the Employee Compensation and Benefits of the Employees were not continued in the ordinary course. The payments contemplated by this Motion are for the benefit of the Employees, who are important to the Debtors' continued operations and ultimate success of any reorganization, and as such, the Debtors need to ensure that the Employees are paid.

50. Failure to grant the relief requested herein will undermine the morale of the Employees. Employee morale currently is at a very sensitive stage because of the filing of these chapter 11 cases, and employees are being asked to commit significant time and energy to the Debtors' restructuring efforts.

51. In addition, many of the Employees are the sole source of support for their families and are dependent upon the salaries, wages, reimbursements, and benefits. If the amounts owed to the Debtors' employees are not received, or insurance premiums are not paid in the ordinary course, the employees may suffer extreme personal hardship and, in many cases, would be unable to pay their basic living expenses, causing serious harm to their families. This

¹¹ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this Motion. Copies of these orders are available upon request to the Debtors' proposed counsel.

potential hardship and harm would severely disrupt the Debtors' relationships with the Employees, irreparably impair their morale at the very time when their dedication, confidence, and cooperation are most critical, and jeopardize the Debtors' ability to operate in the ordinary course postpetition. The Debtors believe that the failure to pay Employee Compensation and Benefits would cause many of their employees to either terminate their employment with the Debtors or, at a minimum, to seek alternative employment.

B. There Are Sound Business Reasons For the Relief Requested Herein

52. Section 363(c)(1) of the Bankruptcy Code authorizes a debtor in possession to use property of the estate in the ordinary course of business without notice or a hearing. See 11 U.S.C. § 363(c)(1). The Debtors submit that the payments sought for approval herein are payments that they would make in the ordinary course of business as they are (i) commonly made in the Debtors' industry and (ii) those that the Debtors' creditors have expected and would expect the Debtors to make. Cf. In re Crystal Apparel, Inc., 207 B.R. 406, 409 (Bankr. S.D.N.Y. 1997) (explaining the horizontal and vertical tests).

53. In any event, section 363(b) of the Bankruptcy Code provides this Court with additional authority to grant the relief requested herein. Under this section, the Debtors may use property of their estates outside of the ordinary course of business if doing so is within their sound business judgment. See In re Filene's Basement, Case No. 11-13511, 2014 WL 1713416, *12 (Bankr. D. Del. Apr. 29, 2014) (noting that under Section 363(b), "[w]here the debtor articulates a reasonable basis for its business decisions . . . courts will generally not entertain objections to the debtor's conduct") (quoting In re Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)); In re Landsource Communities Development LLC, Case No. 08-11111, 2009 WL 4874670, ¶ 15 (Bankr. D. Del. Nov. 25, 2009) ("Where valid business

justification exists, a presumption exists ‘that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.’”) (quoting In re Integrated Res., Inc., 147 B.R. 650, 656 (S.D.N.Y. 1990)). In fact, courts within this District have employed section 363(b) to allow a debtor to pay a prepetition claim as an outside of the ordinary course transaction. See, e.g., In re Longview Power, LLC, Case No. 13-12211 (BLS), [Docket No. 249] (Bankr. D. Del. Sept. 24, 2013) (granting final relief); In re Furniture Brands Int’l, Inc., Case No. 13-12329 (CSS), [Docket No. 234] (Bankr. D. Del. Sept. 30, 2013) (same); In re Exide Techs., Case No. 13-11482 (KJC), [Docket No. 320] (Bankr. D. Del. July 11, 2013) (same). The Debtors submit that, for the reasons discussed herein, it would be a sound and prudent exercise of their business judgment to pay the employees’ prepetition claims for salaries and benefits, among the other amounts the Debtors seek authority to pay under this Motion.

C. The Debtors’ Employee Wages are Entitled to Priority Treatment under the Bankruptcy Code

54. Section 507(a) of the Bankruptcy Code further justifies the relief requested herein. Specifically, section 507(a)(4) of the Bankruptcy Code grants a priority claim for wages, salaries, and commissions, including vacation, severance, and sick leave pay, earned by an individual within 180 days before the date of the filing of the petition, up to \$12,475 for each such individual. See 11 U.S.C. § 507(a)(4). In addition, section 507(a)(5) grants a priority claim for contributions to employee benefit plans arising from services rendered within 180 days before the filing of a bankruptcy petition, to the extent that the \$12,475 limit per employee on priority wage claims is not reached. See 11 U.S.C. § 507(a)(5).

55. Because some amounts of potential claims entitled to priority under section 507(a)(4) or (5) are unknown at this time, it is difficult for the Debtors to set forth the

exact amount due and owing to each employee for the prepetition period. The Debtors expect that no employee will have claims for salary and wages totaling more than \$12,475, including amounts owed for PTO Benefits. Thus, granting the relief requested herein likely would only affect the timing of the payment of the Debtors' employees and would not prejudice the rights of other creditors.

D. The Debtors Have Sufficient Funds to Make the Payments Sought Herein

56. The Debtors represent that they have sufficient availability of funds to pay the amounts described herein in the ordinary course of business by virtue of cash reserves, expected cash flows from ongoing business operations, and anticipated access to cash collateral. Under the Debtors' proposed cash management system, the Debtors represent that checks or wire transfer requests can be readily identified as relating to an authorized payment in respect of the Employee Compensation and Benefits. Accordingly, the Debtors believe there is little risk that checks or wire transfer requests unrelated to authorized payments would be honored inadvertently, and that their Banks, and any other third-party agents should be authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the obligations to the employees.

E. Failure to Authorize Payment in the First 21 Days Would Cause Immediate and Irreparable Harm

57. Rule 6003(b) of the Bankruptcy Rules allows the use of property of the estate, or the payment of prepetition claims, within 21 days of the Petition Date if the relief would prevent "immediate and irreparable harm." See FED. R. BANKR. P. 6003(b). Accordingly, for the reasons set forth above and in the First Day Declaration, the Debtors submit that the relief requested herein is necessary to prevent immediate and irreparable harm to the Debtors and their estates.

WAIVER OF RULE 6004 STAY

58. Because the payment of prepetition wages and salaries and the payment and honoring of prepetition employee policies and benefits is essential to prevent irreparable harm to the Debtors' reorganization efforts, the Debtors submit that cause exists for a waiver of the 14-day stay imposed by Rule 6004(h) of the Bankruptcy Rules, to the extent applicable.

NOTICE

59. Notice of this Motion will be provided by overnight delivery and/or e-mail or facsimile to: (a) the Office of the United States Trustee for Region 3, serving the District of Delaware; (b) the prepetition mortgage loan servicers, trustees, lenders and their respective counsel; (c) the mezzanine lenders and their counsel to the extent known; (d) the United States Attorney's Office for the District of Delaware; (e) the United States Attorney General; (f) the Internal Revenue Service; (g) the parties included on the Debtors' list of largest unsecured creditors; (i) the Banks; and (j) all parties who have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

[Remainder of Page Intentionally Left Blank]

CONCLUSION

WHEREFORE, the Debtors respectfully request that this Court enter the proposed form of Order and grant the Debtors such other and further relief as is just and proper.

Dated: February 3, 2016
Wilmington, Delaware

Respectfully submitted,

By: /s/ Robert S. Brady
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*Proposed Attorneys for the Debtors and
Debtors in Possession*

EXHIBIT A

Proposed Form of Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
)	
NEWBURY COMMON)	Case No. 15 – 12507 (LSS)
ASSOCIATES, LLC, <u>et al.</u> ,)	
)	Jointly Administered
Debtors. ¹)	
)	Re: Docket No. _____

**ORDER AUTHORIZING THE PAYMENT OF PREPETITION WAGES
AND SALARIES AND THE PAYMENT AND HONORING OF
PREPETITION EMPLOYEE POLICIES AND BENEFITS**

Upon consideration of the motion (the “**Motion**”)² of the Debtors for the entry of an order authorizing them to pay prepetition salaries and wages and to pay and honor other prepetition employee benefits and related obligations; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that good and sufficient cause exists for granting the Motion; and upon consideration of the First Day Declaration, the Supplemental First Day Declaration, and the files and records in these chapter 11 cases; and upon the arguments and statements in support of the Motion presented at the hearing before the Court; and it appearing

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s tax identification number, are: Newbury Common Associates, LLC (3783); Seaboard Realty, LLC (6291); 600 Summer Street Stamford Associates, LLC (6739); Seaboard Hotel Member Associates, LLC (8984); Seaboard Hotel LTS Member Associates, LLC (6005); Park Square West Member Associates, LLC (9223); Seaboard Residential, LLC (2990); One Atlantic Member Associates, LLC (4120); 88 Hamilton Avenue Member Associates, LLC (5539); 316 Courtland Avenue Associates, LLC (0290); 300 Main Management, Inc. (6365); 300 Main Street Member Associates, LLC (2334); PSWMA I, LLC (6291); PSWMA II, LLC (6291); Tag Forest, LLC (8974); Newbury Common Member Associates, LLC (3909); Century Plaza Investor Associates, LLC (1480); Seaboard Hotel Associates, LLC (2281); Seaboard Hotel LTS Associates, LLC (8811); Park Square West Associates, LLC (9781); Clocktower Close Associates, LLC (3154); One Atlantic Investor Associates, LLC (7075); 88 Hamilton Avenue Associates, LLC (5749); 220 Elm Street I, LLC (7540); and 300 Main Street Associates, LLC (8501). The Debtors’ corporate headquarters is located at, and the mailing address for each Debtor is, 1 Atlantic Street, Stamford, CT 06901.

² Each capitalized term used but not defined herein shall have the meaning ascribed to it in the Motion.

that the relief requested is in the best interests of the Debtors' estates, their creditors, and other parties-in-interest; and it appearing that notice of the Motion was adequate and proper under the circumstances of these cases and that no further or other notice need be given; it is hereby

ORDERED that the Motion is GRANTED as set forth herein; and it is further

ORDERED that the Debtors are authorized, but not directed, to pay cash in an amount not to exceed \$12,475 to each individual employee or workforce member for outstanding prepetition Wage Obligations, Contractor Payments and PTO Benefits (not to exceed \$43,000 in the aggregate for prepetition Wage Obligations); and it is further

ORDERED that the Debtors are authorized, in their sole discretion, to pay all Expense Reimbursements, in an amount to not exceed \$2,000 in the aggregate; and it is further

ORDERED that the Debtors are authorized, in their sole discretion, to honor all PTO Benefits, subject to the \$12,475 cap; *provided, however*, that the Debtors are permitted to cash out unpaid time with respect to PTO Benefits upon termination of an employee in excess of the cap set forth in section 507(a)(4) of the Bankruptcy Code if applicable state law requires such payment; and it is further

ORDERED that the Debtors are authorized, in their sole discretion, to pay all amounts, including prepetition premiums, associated with the Debtors' Health and Welfare Plans, in an amount not to exceed \$6,000 in the aggregate; and it is further

ORDERED that the Debtors are authorized, in their sole discretion, to pay all costs and expenses due for the administration, servicing, and processing of employee benefits as more fully set forth in the Motion, including, but not limited to, all amounts due to Paychex, Aetna and Merrill Lynch; and it is further

ORDERED that the Debtors are authorized, in their sole discretion, to continue the Employee Compensation and Benefits as more fully set forth in the Motion in the ordinary course of business regardless of whether such employee is an employee of Seaboard Property Management or Newbury Common Member; and it is further

ORDERED that the Debtors are authorized, in their sole discretion, to hire the employees of Seaboard Property Management; and it is further

ORDERED that the Debtors' Banks, financial institutions, Paychex, Aetna, Merrill Lynch, and any other third-party agents of the Debtors are authorized, when requested by the Debtors and without further order of the Court, to (i) receive, process, honor, and pay any and all checks, drafts, or wire transfer requests drawn on the Debtors' accounts in respect of the claims paid pursuant to this Order, whether such checks or wire transfer requests were presented or made prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments, and (ii) rely upon representations of the Debtors as to which such checks, drafts, or wire transfer requests are payment of claims pursuant to this Order; and it is further

ORDERED that if the Banks honor a prepetition check at the direction of the Debtors, in good faith based on belief that the Court has authorized such check to be honored, or as a result of an innocent mistake made despite the implementation of reasonable item handling procedures, the Banks shall not be liable to the Debtors or their estates or otherwise in violation of this Order; and it is further

ORDERED that, notwithstanding the relief granted in this Order and any actions taken pursuant to this Order, nothing herein shall be deemed (i) an admission as to the validity of any particular claim against a Debtor entity; (ii) a waiver of the Debtors' rights to dispute any

particular claim on any grounds; (iii) a promise or requirement to pay any particular claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (vi) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law; and it is further

ORDERED that authorization to pay the amounts authorized for payment herein shall not create any additional obligation on the part of the Debtors or their directors, officers, attorneys or agents to pay such amounts, and nothing in this Order shall be deemed to increase, reclassify, elevate to administrative expense status or otherwise affect any asserted obligations to the extent any amounts authorized for payment herein are not paid; and it is further

ORDERED that nothing in this Order shall be deemed to increase, reclassify, elevate to administrative expense status, or otherwise affect any asserted obligations to the extent any amounts authorized for payment herein are not paid; and it is further

ORDERED that within three (3) business days of the entry of this Order, the Debtors shall serve a copy of the Motion and this Order upon (i) the Office of the United States Trustee for Region 3, serving the District of Delaware; (b) counsel to the prepetition mortgage loan servicers, trustees, lenders; (c) counsel to the mezzanine lenders; (d) the United States Attorney's Office for the District of Delaware; (e) the United States Attorney General; (f) the Internal Revenue Service; (g) the parties included on the Debtors' list of largest unsecured creditors; (i) the Banks; and (j) all parties who have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002 *provided*, that in each case the Debtors may provide service of the Motion and this Order by email to those parties who have provided email address to the Debtors; and it is further

ORDERED that service of the Motion as provided therein shall be deemed good and sufficient notice of such Motion; and it is further

ORDERED that the requirements set forth in Rule 6003(b) of the Bankruptcy Rules are satisfied by the contents of the Motion or otherwise deemed waived; and it is further

ORDERED that Rule 6004(a) of the Bankruptcy Rules is waived, for the purposes of the Motion, and notwithstanding any applicability of Rule 6004(h) of the Bankruptcy Rules, this Order shall be immediately effective and enforceable upon its entry; and it is further

ORDERED that the Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion; and it is further

ORDERED that the Court shall retain jurisdiction to hear and determine all matters arising from or relating to the interpretation, implementation, or enforcement of this Order.

Dated: _____, 2016
Wilmington, Delaware

The Honorable Laurie Selber Silverstein
United States Bankruptcy Judge