

Petitions and First Day Pleadings (the “**Supplemental First Day Declaration**”),² filed contemporaneously herewith, and respectfully state as follows:

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, 507(a), and 541(d) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rules 6003(b) and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy 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 under chapter 11 of the Bankruptcy Code. On the date hereof, (the “**Petition Date**”), each of the

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.

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 Rule 1015(b) of the Bankruptcy Rules.

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 PREPETITION TAXES³

A. Franchise Taxes

6. For the privilege of conducting business in certain jurisdictions, certain state governments require the Debtors to pay business entity taxes by the taxing jurisdiction (collectively, the "**Franchise Taxes**").

7. The Debtors historically have paid approximately \$5,000.00 per year on account of the Franchise Taxes. As of the Petition Date, the Debtors believe that their aggregate accrued and unpaid obligations in respect of the Franchise Taxes are approximately \$5,000.00.

B. Sales Taxes

8. In the ordinary course and in connection with operating their business, the Debtors collect, on behalf of state and local taxing authorities sales and use taxes in connection with the operation of their businesses. The Debtors pay:

³ While the Debtors owe certain property taxes, they are not seeking relief to pay such taxes through this Motion.

- (a) sales and use tax to the City of Stamford (“**Stamford Sales Tax**”);
- (b) sales tax related to the operation of the Courtyard by Marriott Hotel (the “**Courtyard Property**”) in Stamford, Connecticut, which is owned by debtor Seaboard Hotel Associates, LLC (and managed by Urgo Hotels, LLP (“**Urgo**”));
- (c) bed tax related to the operation of the Courtyard Property (collectively (b) and (c), the “**Courtyard Property Sales Tax**”); and
- (d) sales tax on parking fees for various buildings of the Debtors (the “**Parking Sales Tax**,” and together with the Stamford Sales Tax and the Courtyard Property Sales Tax, the “**Sales Taxes**”).

9. The Debtors historically have paid approximately \$7,000 per year on account of the Stamford Sales Tax. As of the Petition Date, the Debtors believe that approximately \$1,000 in Stamford Sales Tax has accrued but has not yet been paid.

10. Urgo collects and remits on behalf of the Debtors all Courtyard Property Sales Tax. At the end of each month Urgo calculates the Courtyard Property Sales Tax due for the previous month, prepares the appropriate remittance forms and forwards the funds directly to the governmental agencies. The Debtors historically have paid to Urgo approximately \$1.2 million per year on account of Courtyard Property Sales Tax. Urgo has made, and the Debtors have reimbursed Urgo, the Courtyard Property Sales Tax due for December 2015. As of the Petition Date, the Debtors believe that they owe Urgo approximately \$100,000 in accrued but unpaid Courtyard Property Sales Tax.

11. The Parking Sales Tax is paid quarterly, and is due on the last day of the month after the quarter-end. The Debtors historically have paid approximately \$1,088 per year on account of Parking Sales Tax. For the last quarter of 2015, the Debtors paid \$272 in Parking Sales Tax. As of the Petition Date, the Debtors believe that approximately \$100 in Parking Sales Tax has accrued prepetition but has not yet been paid.

12. As of the Petition Date, the Debtors believe that approximately \$101,100 for all Sales Tax has accrued prepetition but has not yet been paid.

C. City of Stamford Multi-Family Dwelling License

13. In the ordinary course and in connection with operating their business, the Debtors pay for a City of Stamford multi-family dwelling license (the “**License Fee**,” and together with the Franchise Taxes and Sales Taxes, the “**Prepetition Taxes**”) in order to operate certain of their residential properties. As of the Petition Date, the Debtors believe that approximately \$29,895.33 in License Fees for the properties at 101 Summer Street and 100 Prospect Street has accrued prepetition but has not yet been paid.

D. The Need to Pay Prepetition Taxes⁴

14. The Debtors believe that, if the Prepetition Taxes are not paid, many of the taxing authorities to which these taxes are owed may audit the Debtors, file liens, submit motions for relief from the automatic stay, or take other aggressive action against the Debtors during these chapter 11 cases. If that were to occur, it would divert the Debtors’ attention from their business operations and reorganization efforts and could cause the Debtors’ estates to incur interest expenses, penalties, fees, and/or litigation costs, all to the detriment of the Debtors’ creditors and other parties-in-interest.

15. Moreover, payment of certain of the Prepetition Taxes, such as the Franchise Taxes, is necessary for the Debtors to maintain their good standing to operate in the jurisdictions in which they do business. Any dispute with taxing authorities over the payment of these taxes could impair the Debtors’ ability to conduct business in a particular jurisdiction and

⁴ The Debtors do not seek authority to collect and pay state and federal employee withholding taxes under this motion but rather request such authority as part of their *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*, filed concurrently herewith.

could negatively affect the Debtors' businesses as a whole by creating a risk that the regulatory authorities will cancel or fail to renew necessary permits or authorizations.

RELIEF REQUESTED

16. The Debtors seek the entry of an order authorizing, but not directing, them to pay⁵ any Prepetition Taxes⁶ that are determined to be owing as of the Petition Date, as and when they become due, up to a maximum of \$135,995.33.⁷

17. The Debtors further request that their depository banks be authorized and directed, when requested by the Debtors, to receive, process, honor, and pay any and all checks drawn on the Debtors' accounts for the Prepetition Taxes, whether such checks were presented before or after the Petition Date, provided that sufficient funds are available.

BASIS FOR RELIEF REQUESTED

A. Payment of the Prepetition Taxes Is Essential To Preserve the Value of the Debtors' Businesses

18. 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).

⁵ Nothing in this Motion should be construed as impairing the Debtors' right to contest the amount of any taxes that may be due to the relevant taxing authorities.

⁶ By this Motion, the Debtors seek to pay only current Prepetition Taxes, not delinquent or historical taxes.

19. Under the “necessity of payment rule” or the “doctrine of necessity,”⁸ 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).

20. The doctrine of necessity recognizes that paying prepetition obligations outside of a plan of reorganization is often necessary to realize the paramount purpose of a chapter 11 reorganization, *i.e.*, preventing the piecemeal 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”).

21. Numerous courts in this District have permitted debtors in large chapter 11 cases to pay prepetition obligations relating to sales and use, franchise, and other taxes because, among other reasons, the payment of such taxes was necessary to the success of the bankruptcy proceedings. See, e.g., In re Colt Holding Co., Case No. 15-11296 (LSS), [Docket Nos. 75 &

⁷ Along with the Prepetition Taxes that the Debtors believe to be owing as of the Petition Date, as set forth above, the Debtors seek the relief requested herein with respect to any amounts that the Debtors may later discover to have been owing as of the Petition Date, whether such amounts are attributable to a “true up” occurring after the Petition Date, a miscalculation or oversight by the Debtors or the taxing authorities, or dishonored checks relating to the payment of the Prepetition Taxes.

⁸ 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.

195] (Bankr. D. Del. June 16, 2015 and July 10, 2015) (granting interim and final relief); In re Molycorp, Inc., Case No. 15-11357 (CSS), [Docket No. 87] (Bankr. D. Del. June 26, 2015); In re Allied Nevada Gold Corp., Case No. 15-10503 (MFW), [Docket Nos. 59 & 187] (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. 164] (Bankr. D. Del. Feb. 9, 2015); In re Endeavour Operating Corp., Case No. 14-12308 (KJC), [Docket Nos. 56 & 145] (Bankr. D. Del. Oct. 15, 2014 and Nov. 6, 2014) (granting interim and final relief); In re Trump Entm't Resorts, Inc., Case No. 14-12104 (KG), [Docket Nos. 45 & 382] (Bankr. D. Del. Sept. 10, 2014 and Oct. 30, 2014).⁹

22. As set forth in detail above, the Debtors believe that payment of the Prepetition Taxes is critical to the ongoing operations of the Debtors' businesses. To summarize, if the Prepetition Taxes are not paid, the Debtors will risk tangible and intangible loss of value of their businesses, including, among other things, losses related to actions by taxing authorities seeking to collect the outstanding Prepetition Taxes and losses related to the impairment of the Debtors' ability to do business in certain jurisdictions.

B. A Significant Portion of the Prepetition Taxes Are Entitled to Priority Treatment

23. Claims for certain of the Prepetition Taxes likely would be entitled to priority under section 507(a)(8) of the Bankruptcy Code.¹⁰ Amounts that are paid on account of the Prepetition Taxes that otherwise would be entitled to priority treatment would not otherwise be available for distribution to unsecured creditors and therefore no harm should be caused to the

⁹ 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.

¹⁰ In addition, the prepetition obligations to the taxing authorities discussed above would be paid in full under a chapter 11 plan. See 11 U.S.C. § 1129(a)(9)(C). In any event, they would be paid ahead of all general unsecured claims. See 11 U.S.C. § 726. Therefore, the payment of the Prepetition Taxes at this time affects only the timing of payment and does not alter the rights of other creditors.

Debtors' unsecured creditors by permitting such obligations to be satisfied in the ordinary course of business during the Debtors' chapter 11 cases rather than at the conclusion of these cases pursuant to a plan of reorganization.

C. The Relief Requested Herein Is Authorized By Section 363 of the Bankruptcy Code

24. Further, 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).

25. 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 Dev. 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). To the extent that payment of the Prepetition Taxes is not within the ordinary course of the Debtors' businesses, the Debtors submit that, for the reasons discussed herein, it would be a sound and prudent exercise of their business judgment to pay the Prepetition Taxes.

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

26. 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. Also, 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 Prepetition Taxes. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and that all applicable banks and other financial institutions should be authorized and directed, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the Prepetition Taxes.

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

27. 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). For the reasons set forth above and in the First Day Declaration, the Debtors submit that the payment of the Prepetition Taxes is necessary to prevent immediate and irreparable harm to the Debtors and their estates.

WAIVER OF RULE 6004 STAY

28. Because the payment of the Prepetition Taxes when due is essential to prevent irreparable harm to the Debtors’ reorganization efforts, the Debtors submit that with respect to the entry of a final order approving this Motion, cause exists for a waiver of the 14-day stay imposed by Rule 6004(h) of the Bankruptcy Rules, to the extent applicable.

NOTICE

29. 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 taxing authorities known to the Debtors; (h) the parties included on the Debtors’ list of largest unsecured creditors; and (h) 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.

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 CERTAIN PREPETITION TAXES

Upon consideration of the motion (the “**Motion**”)² of the Debtors for the entry of an order authorizing them to pay certain Prepetition Taxes; and it appearing that 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; and after due deliberation thereon; and this Court having found that good and sufficient cause exists for granting the Motion; and upon consideration of the First Day Declaration, and the files and records in these cases; and upon the arguments and statements in support of the Motion presented at the hearing before this Court; and it appearing that the relief requested is in the best interests of the Debtors’ estates, their creditors, and other parties-in-

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.

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 required, in their sole discretion, to pay to the appropriate taxing authorities the Prepetition Taxes collected or incurred in the ordinary course of the Debtors' businesses, up to a maximum of \$135,995.33, regardless of whether such Prepetition Taxes were incurred or accrued prior to the Petition Date; and it is further

ORDERED that the Debtors' depository institutions are authorized and directed, at the Debtors' request, to (i) receive, process, honor, and pay any and all checks or wire transfer requests drawn on the Debtors' accounts for the Prepetition Taxes, 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 nothing herein shall impair the Debtors' ability to contest the validity or amount of any claim obligation related to the Prepetition Taxes; 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 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 this 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