

**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. <sup>1</sup>	)	220 Elm Street II, LLC ( <i>Joint Administration</i>
	)	<i>Requested</i> )
	)	<b>Hearing Date: April 29, 2016 at 10:00 a.m. (ET)</b>
	)	<b>Objection Deadline: April 15, 2016 at 4:00 p.m. (ET)</b>

**DEBTORS’ APPLICATION FOR AN ORDER PURSUANT TO 11 U.S.C. §§ 327 AND 328(a), FED. R. BANKR. P. 2014 AND 5002, AND LOCAL RULE 2014-1, AUTHORIZING THE RETENTION AND EMPLOYMENT OF KEEN-SUMMIT CAPITAL PARTNERS LLC, SAVILLS STUDLEY, INC., AND FTI CONSULTING REALTY LLC AS REAL ESTATE BROKER FOR THE DEBTORS, *NUNC PRO TUNC* TO MARCH 31, 2016 AND WAIVING CERTAIN REPORTING REQUIREMENTS PURSUANT TO LOCAL RULE 2016-2(H)**

Newbury Common Associates, LLC and certain of its affiliates, as debtors and debtors in possession (collectively, the “**Debtors**”) file this application (this “**Application**”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, (i) authorizing the employment and retention of Keen-Summit Capital Partners LLC (“**Keen-Summit**”), Savills Studley, Inc. (“**Savills Studley**”), and FTI Consulting Realty LLC (“**FTI**” and, collectively with Keen-Summit and Savills Studly, the “**Broker**”) to serve as real estate broker for the Debtors,

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<sup>1</sup> 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); 300 Main Street Associates, LLC (8501); and 220 Elm Street II, LLC (7625). The Debtors’ corporate headquarters is located at, and the mailing address for each Debtor is, 1 Atlantic Street, Stamford, CT 06901.

*nunc pro tunc* to March 31, 2016, in accordance with the terms and conditions set forth in that certain retention agreement, dated as of March 31, 2016 (the “**Retention Agreement**”), a copy of which is attached hereto as **Exhibit B**, with respect to the sale of those certain parcels of real properties listed in the Retention Agreement (the “**Real Properties**”); (ii) approving the terms of the Broker’s employment, including the fee and expense structure and the indemnification, reimbursement and related provisions set forth in the Retention Agreement; and (iii) approving a waiver of certain reporting requirements pursuant to Rule 2016-2(h) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”). In support of this Application, the Debtors submit (i) the Declaration of Harold Bordwin of Keen-Summit (the “**Bordwin Declaration**”), attached hereto as **Exhibit C**, (ii) the Declaration of Andrew Seidman of Savills Studley (the “**Seidman Declaration**”), attached hereto as **Exhibit D**, and (ii) the Declaration of Alan Tantleff of FTI (the “**Tantleff Declaration**”), attached hereto as **Exhibit E**. In further support of the Application, the Debtors 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 Local Rule 9013-1(f), the Debtors consent to the entry of a final judgment or order with respect to this Application 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 is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 327(a) and 328(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Rule 2014-1 of the Local Rules.

### **BACKGROUND**

4. On December 13, 2015 (the “**Original Petition Date**”), the Original Debtors,<sup>2</sup> with the exception of Tag Forest, LLC (“**Tag**”), each 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 (the “**Tag Petition Date**”).

5. On February 3, 2016 (the “**Subsequent Petition Date**”), the Additional Debtors,<sup>3</sup> with the exception of 88 Hamilton Avenue Associates, LLC (“**88 Hamilton**”), each commenced a voluntary case under chapter 11 of the Bankruptcy Code. On February 4, 2016 (the “**88 Hamilton Petition Date**”), 88 Hamilton commenced its voluntary case under chapter 11 of the Bankruptcy Code.

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<sup>2</sup> The Original Debtors are: Newbury Common Associates, LLC; Seaboard Realty, LLC; 600 Summer Street Stamford Associates, LLC; Seaboard Hotel Member Associates, LLC; Seaboard Hotel LTS Member Associates, LLC; Park Square West Member Associates, LLC; Seaboard Residential, LLC; One Atlantic Member Associates, LLC; 88 Hamilton Avenue Member Associates, LLC; 316 Courtland Avenue Associates, LLC; 300 Main Management, Inc.; 300 Main Street Member Associates, LLC; PSWMA I, LLC; PSWMA II, LLC; and Tag Forest, LLC.

<sup>3</sup> The Additional Debtors are: Newbury Common Member Associates, LLC; Century Plaza Investor Associates, LLC; Seaboard Hotel Associates, LLC; Seaboard Hotel LTS Associates, LLC; Park Square West Associates, LLC; Clocktower Close Associates, LLC; One Atlantic Investor Associates, LLC; 88 Hamilton Avenue Associates, LLC; 220 Elm Street I, LLC; and 300 Main Street Associates, LLC.

6. On March 17, 2016, 220 Elm II, LLC (“**220 Elm II**”) commenced a voluntary case under chapter 11 of the Bankruptcy Code (the “**220 Elm II Petition Date**,” and together with the Original Petition Date, the Tag Petition Date, the Subsequent Petition Date, and the 88 Hamilton Petition Date, the “**Petition Dates**”).

7. No official committees have been appointed in these chapter 11 cases. On February 4, 2016, the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) filed the *United States Trustee’s Motion for an Order Directing the Appointment of an Examiner* [Docket No. 188] (the “**Examiner Motion**”). The Court denied the Examiner Motion at the hearing that took place on March 23, 2016. The Debtors’ chapter 11 cases are being jointly administered, for procedural purposes only, pursuant to Bankruptcy Rule 1015(b).

8. On March 18, 2016, the Debtors filed the *Debtors’ Emergency Motion for Entry of Interim and Final Orders Pursuant to Sections 105, 361, 362, 363, and 264 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, and 9014: (I) Authorizing Post-Petition Financing, (II) Granting Liens and Providing Superpriority Administrative Expense Priority, (III) Modifying the Automatic Stay, and (IV) Scheduling a Final Hearing* [D.I. 390]. Attached as Exhibit 2 to the DIP Motion is a letter of intent from the DIP Lender (as defined therein) to act as a stalking horse bidder for the purchase of substantially all of the Debtors’ assets.

9. On March 21, 2016, the Debtors filed the *Debtors’ Motion for Entry of (A) Order (I) Scheduling a Hearing to Consider Approval of the Sale or Sales of the Debtors’ Assets, and the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (II) Approving Certain Bidding Procedures, Assumption and Assignment Procedures,*

*and the Form and Manner of Notice Thereof, and (III) Granting Related Relief' and (B) One or More Orders (I) Approving the Sales or Other Acquisition Transactions for the Properties, (II) Authorizing the Sales Free and Clear of All Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* [D.I. 411], seeking approval of bid procedures and the sale of substantially all of their assets. The Debtors believe that a successful sale of their assets will result in the full satisfaction of all prepetition secured debt due and owing under the operative documents. The Debtors seek to retain the Broker to assist them in their efforts to sell the Real Properties.

10. 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 *Declaration of Marc Beilinson in Support of Chapter 11 Petitions* [D.I. 5] and the *Declaration of Marc Beilinson in Support of Additional Chapter 11 Petitions and First Day Pleadings* [D.I. 177].

#### **RETENTION OF THE BROKER**

11. The Debtors sought proposals regarding the sale of the Real Properties from several brokerages. Based upon the proposals received, the Debtors determined that retaining the Broker would maximize the value of the Real Properties and was in the best interests of the estates.

12. Keen-Summit, Savills Studley, and FTI each have extensive experience representing debtors and owners of distressed real estate assets in bankruptcy proceedings and other distressed and insolvency proceedings. Keen-Summit has advised numerous chapter 11

debtors in connection with similar issues related to their restructuring efforts, including in the following cases before the United States Bankruptcy Court for the District of Delaware: In re Coldwater Creek, Inc., Case No. 14-10867 (BLS); In re Friendly Ice Cream Corp., 11-13167 (KG); In re Hancock Fabrics, Inc., Case No. 07-10353 (BLS); In re The Lovesac Corp., 06-10080 (CSS); In re Brown Schools, Case No. 06-50861 (MFW); and In re Mobile Tool Int'l, Inc., Case No. 02-12826 (MFW).

13. Savills Studley is a full service real estate company that combines extensive investment sales expertise in the Metro New York market, including Southern Connecticut, with unmatched cross border placement capabilities, with unique access to nearly all major real estate capital sources worldwide. Savills Studley has 26 offices in North America and over 700 offices, with over 30,000 employees, worldwide. Savills Studley is a division of London-based Savills, a member of the FTSE 250, with annual revenues of \$1.5 billion. Within the United States, Savills Studley professionals include experts in retail, office, residential, hospitality, and industrial assets. Savills Studley is a market leader in the sale and capitalization of large, complex real estate development projects and joint venture programs as well as property and portfolio sales. These assignments require a unique blend of real estate and capital markets skills to successfully articulate the investment “story” and structure a transaction that maximizes value for the Debtors. Savills Studley capital markets track record in the United States includes over 35,000 residential units sold or capitalized, over 50 million square feet of retail premises with an aggregate value in excess of \$10 billion, and over 50 million square feet of office premises with an aggregate value in excess of \$10 billion.

14. Finally, FTI has advised chapter 11 debtors in connection with similar issues related to their restructuring efforts, including the sale of the W Boston (United States Bankruptcy Court for the District of Massachusetts, In re SW Boston Hotel Venture LLC, Case No. 10-14535 (JNF)) and the sale of the Trenton Marriott (United States Bankruptcy Court for the District of New Jersey, In re Lafayette Yard Community Development Corporation, Case No. 13-30752 (MBK)). FTI has also represented Debtors in numerous cases before the United States Bankruptcy Court for the District of Delaware. Recent notable cases include In re RS Legacy Corporation (RadioShack Corporation), Case No. 15-10197 (BLS) and In re Sports Authority Holdings, Inc., Case No. 16-10527 (MFW).

15. The Debtors have determined that the Broker's services will substantially enhance their attempts to maximize the value of the sale of the Real Properties. The Debtors believe that the Broker is well qualified to perform all services contemplated by the Retention Agreement, and to represent the Debtors' interests in these chapter 11 cases, in a cost effective, efficient and timely manner.

#### **COORDINATION OF SERVICES**

16. Keen-Summit, Savills Studley, and FTI will coordinate their efforts in order to maximize the efficiency of the sales process. Keen-Summit will act as the project manager and the primary point of contact for the Debtors. Keen-Summit, with input from its partners, will develop a marketing plan for the Debtors' review and approval and, upon approval, will implement such plan. All firms will coordinate the completion and organization of due diligence and the creation of one or more confidential information memoranda. Keen-Summit

will organize and host the due diligence materials on an outsourced secure virtual data room. All firms will be actively involved in marketing, responding to prospects, showing the Properties, and soliciting offers. Keen-Summit, in conjunction with its partners, will organize and run any auctions.

### **BROKER RETENTION AGREEMENT<sup>4</sup>**

#### *Scope of Services*

17. As set forth in the Retention Agreement, the Debtors seek to engage the Broker to provide services in connection with the sale of certain of the Debtors' Real Properties, including:

- a. Park Square West Apartments, 101 Summer St., Stamford, CT
- b. 100 Prospect Apartments, 100 Prospect St., Stamford, CT
- c. 220 Elm St, New Canaan, CT
- d. 300 Main St, Stamford, CT
- e. 1 Atlantic St, Stamford, CT
- f. 88-122 Hamilton Avenue, Stamford, CT
- g. Courtyard Stamford, 275 Summer St, Stamford, CT
- h. Clocktower Close Condominiums, (6 units), 25 Grant Street, Norwalk, CT

18. The Broker, as further detailed in the Retention Agreement, will perform the following services for the Debtors (the "**Services**"):

- a. Meet with the Debtors' representatives to ascertain the Debtors' goals, objectives, and financial parameters;

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<sup>4</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Retention Agreement.



- b. Develop a marketing plan for the Real Properties and solicit offers therefor;
- c. Evaluate, structure, negotiate, and implement the terms and conditions of a proposed sale of the Real Properties; and
- d. If an auction format is selected, develop and implement an auction plan, including arranging auction logistics, assisting Debtors' counsel with auction bid procedures, assisting the Debtors to qualify bidders, and running the auction at the offices of Young Conaway Stargatt & Taylor, LLP or such other location that may be designated by the Debtors.<sup>5</sup>

***Term***

19. The term of the Retention Agreement shall be from March 31, 2016 through the confirmation of a plan of reorganization, the closing of all Transactions contemplated by the Retention Agreement, or for a period of twelve (12) months, whichever comes first, which term can be extended pursuant to the same terms and conditions and by the mutual consent of the parties without the need for further application to the Court.

***Indemnification***

20. The Debtors have agreed to indemnify the Broker, its affiliates, and their respective directors, officers, employees, agents, representatives and controlling persons (each an "**Indemnified Party**"), and hold each of them harmless from and against from and against any and all losses, claims, damages, expenses and liabilities related to or arising out of activities performed by or on behalf of an Indemnified Party pursuant to the Retention Agreement, unless such claims arise in whole or in part as the result of the Broker's gross negligence or willful misconduct (collectively, the "**Indemnification Provisions**").

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<sup>5</sup> To the extent that this Application and any summary provided in it are inconsistent with the actual terms of the Retention Agreement, the actual terms of the Retention Agreement shall control.

*Exclusivity*

21. The Retention Agreement contains the following exclusivity language:  
“Broker shall have the sole and exclusive authority to represent Company, on an exclusive right to sell basis, in the negotiation of Transactions.” Retention Agreement at 2.

*Compensation and Expenses*

22. In accordance with the terms of the Retention Agreement, the Broker will be paid as follows (the “**Fee Structure**”):

- a. Marketing Fee. If and when the Debtors close the Stalking Horse Transaction, then, in that event, the Broker shall have earned a fee of five hundred thousand dollars (\$500,000) for its services, payable in full, off the top, as a carve-out, from the first Gross Proceeds of the Transaction.
- b. Transaction Fee. In all instances other than a Stalking Horse Transaction, as and when the Debtors close a Transaction, whether such Transaction is completed individually or as part of a package, as part of a transaction that effects a transfer of the ownership in the property or as part of a plan of reorganization, then the Broker shall have earned compensation per Transaction equal to one and one-half percent (1.5%) of the first \$141,000,000 of cumulative Gross Proceeds (i.e., the aggregate of all Gross Proceeds of all Transactions relating to all Properties) plus two percent (2%) of cumulative Gross Proceeds in excess of \$141,000,000 of cumulative Gross Proceeds.
- c. Credit Bid Fee: In the event the mortgagee of a Real Property acquires such Property by means of a credit bid, then the Broker shall have earned a Credit Bid Fee of \$50,000 in lieu of the Transactional Fee, payable in cash at the closing by the credit bidding mortgagee.
- d. Timing of Payment. All Transaction Fees shall be paid, in full, off the top, as a carve-out from the Transaction proceeds or otherwise, within one (1) business day following the closing or other consummation of each Transaction.

- e. Survival: In the event the Debtors and any third party should enter into an agreement providing for a Transaction before the expiration of the Retention Agreement and the closing does not occur until after said expiration, then the Broker shall be entitled to a Transaction Fee in accordance with the terms of the Retention Agreement. If the Debtors, after the expiration of the Retention Agreement, arrange for a Transaction with a third party whom the Broker solicited or otherwise introduced to a Real Property or introduced to the Debtors or with whom the Broker dealt in connection with a Real Property or the Debtors prior to said expiration, in each case as evidenced by the last contact list provided to the Debtors by Broker prior to the expiration of the Retention Agreement, and the Transaction closing takes place within six (6) months after said expiration, then Broker shall be entitled to a Transaction Fee in accordance with the terms of the Retention Agreement.
  
- f. Litigation Support and Related Consulting Services and Fees: Company shall pay Broker on an hourly basis, at its then prevailing hourly rates, for its time, including travel time, in connection with (i) litigation support, (ii) time spent as a witness in connection with any contested matter, and/or (iii) time spent providing any real estate consulting services that are beyond the scope of the Retention Agreement and are expressly requested in writing by the Debtors. Broker will not maintain time records on a project category basis, but rather will maintain time records on a general, daily basis and in increments of one-half hour. Notwithstanding the foregoing, the first ten (10) hours of the Broker's time incurred under this section shall not be separately charged. Additionally, the Broker will submit for the Debtors' advance approval a written estimate of any services proposed to be performed on an hourly basis.
  
- g. Expenses: (A) All reasonable out of pocket costs and expenses incurred by the Broker in connection with performing the services required by the Retention Agreement, including but not limited to travel, lodging, FedEx, postage, telephone charges, photocopying charges, and the fees and reasonable expenses of counsel, etc., shall be paid by the Broker, as an advance for the benefit of the Debtors, and borne by the Debtors to be reimbursed out of the proceeds of the closing or other consummation of each Transaction; (B) with regards to the marketing of the Properties, the Broker shall prepare a marketing plan and budget for the Debtors' review and approval. The Broker shall be under no obligation to incur marketing expenses until such time as the Debtors have reviewed and approved the marketing budget; and

(C) The Broker shall not be responsible for any out-of-pocket due diligence costs and expenses, if any, including but not limited to updating appraisals, title reports, surveys, environmental reports, property condition assessments, etc. Any expenses in excess of \$500 will be pre-approved by the Debtors.

23. In no event shall the Broker be entitled to hourly compensation for (a) providing assistance in seeking and obtaining Court approval of the Retention Agreement, including testimony and Court time related thereto, and (b) providing assistance in obtaining Court approval of a Transaction, which assistance may include responding to requests for information and preparing for and testifying in Court so long as such testimony and Court appearance, per Property, begins and ends in one business day.

***Allowance of Fees***

24. Pursuant to Local Rule 2016-2(h), the Debtors request that the Court modify the reporting requirements set forth in Local Rule 2016-2(d) with respect to the Broker. The Broker is being employed by the Debtors pursuant to sections 327(a) and 328(a) of the Bankruptcy Code to provide real estate consulting and brokerage services. It is standard practice in the Broker's industry for professionals providing services relating to the sale of real property on a flat fee percentage basis, rather than on an incremental hourly basis, for such services.

25. The Debtors propose that for all Services, if and when the Debtors seek Court approval for a Transaction monetizing the value of one or more of the Debtors' assets pursuant to the terms of the Retention Agreement, the Debtors shall, as part of that application to the Court, seek approval of the payment, on an interim basis, of the Broker's fees. Upon such approval by the Court, the Broker shall be paid its Transaction Fee directly from the proceeds of

the Transaction, in full, off-the-top (prior to disbursements to creditors), within one (1) business day following the closing or other consummation of such Transaction. Upon completion of their work for the Debtors, the Broker will file a final fee application for review by the Court and parties in interest pursuant to section 328(a) of the Bankruptcy Code for all Services.

26. In addition, the Broker shall apply for reimbursement of expenses in accordance with the procedures set forth in sections 330 and 331 of the Bankruptcy Code, applicable Bankruptcy Rules, Local Rules, and orders of the Court, and such other procedures as may be fixed by order of this Court.

27. The Debtors believe that an application submitted in the manner set forth in herein will provide the Court and other parties in interest with sufficient information to monitor the amount and types of services rendered to the Debtors by the Broker. Accordingly, the Debtors request that the Court modify the requirements set forth in Local Rule 2016-2(d) and permit the Broker to receive compensation in the manner set forth herein.

28. As described above, Keen-Summit, Savills Studley, and FTI are acting as joint-venture partners in this engagement. Keen-Summit, Savills Studley, and FTI have agreed amongst themselves to be compensated in a manner consistent with each's partner's anticipated respective role and responsibilities in the venture. Putting aside this joint venture, a) no commitments have been made or received by Keen-Summit, Savills Studley, or FTI with respect to compensation or payment in connection with these cases other than in accordance with the provisions of the Bankruptcy Code and b) consistent with section 504 of the Bankruptcy Code, neither Keen-Summit, Savills Studley, nor FTI will share any compensation received by

Keen-Summit, Savills Studley, or FTI in connection with these chapter 11 cases with any other person or entity.

**PAYMENTS PRIOR TO THE PETITION DATES**

29. During the 90 days prior to the commencement of these chapter 11 cases, Keen-Summit, Savills Studley, and FTI did not receive any payments from the Debtors, and the Debtors did not owe Keen-Summit, Savills Studley, or FTI for any fees or expenses incurred prior to the Petition Dates.

**DISINTERESTEDNESS**

30. To the best of the Debtors' knowledge, except as may otherwise be set forth herein and in the Bordwin Declaration, Keen-Summit (a) is not a creditor, equity security holder or insider of the Debtors, (b) is not and was not, within 2 years before the Petition Date, a director, officer or employee of the Debtors, (c) does not hold or represent any interest materially adverse to the interests of the Debtors' estates or any class of creditors or equity security holders and (d) is not related to any judge of this Court, the Office of the United States Trustee for the District of Delaware ( the "U.S. Trustee"), or any employee of the U.S. Trustee.

31. To the best of the Debtors' knowledge, except as may otherwise be set forth herein and in the Seidman Declaration, Savills Studley (a) is not a creditor, equity security holder or insider of the Debtors, (b) is not and was not, within 2 years before the Petition Date, a director, officer or employee of the Debtors, (c) does not hold or represent any interest materially adverse to the interests of the Debtors' estates or any class of creditors or equity security holders

and (d) is not related to any judge of this Court, the U.S. Trustee, or any employee of the U.S. Trustee.

32. To the best of the Debtors' knowledge, except as may otherwise be set forth herein and in the Tantleff Declaration, FTI (a) is not a creditor, equity security holder or insider of the Debtors, (b) is not and was not, within 2 years before the Petition Date, a director, officer or employee of the Debtors, (c) does not hold or represent any interest materially adverse to the interests of the Debtors' estates or any class of creditors or equity security holders and (d) is not related to any judge of this Court, the U.S. Trustee, or any employee of the U.S. Trustee.

33. Accordingly, the Debtors believes that Keen-Summit, Savills Studley, and FTI are each a "disinterested person" within the meaning of section 101(14), as modified by section 1107(b), of the Bankruptcy Code, and their joint representation of the Debtors is permissible under sections 327(a) and 328(a) of the Bankruptcy Code and is in the best interests of all parties-in-interest.

#### **RELIEF REQUESTED**

34. By this Application, pursuant to sections 327 and 328 of the Bankruptcy Code, the Debtors request authority to retain the Broker as its real estate broker with respect to the Real Properties, *nunc pro tunc* to March 31, 2016, pursuant to the terms and conditions set forth in the Retention Agreement.

#### **BASIS FOR RELIEF**

35. Section 327(a) of the Bankruptcy Code provides that a debtor is authorized to employ professional persons "that do not hold or represent an interest adverse to

the estate, and that are disinterested persons, to represent or assist the [Debtors] in carrying out [their] duties under this title.” 11 U.S.C. § 327(a). Additionally, section 328(a) of the Bankruptcy Code, which provides, in relevant part, that the Debtors “with the court’s approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis . . . .” 11 U.S.C. § 328(a).

36. Bankruptcy Rule 2014 requires that an application for retention include: specific facts showing the necessity for the employment, the name of the firm to be employed, the reasons for the selection, the services to be rendered, any proposed compensation arrangement, and, to the best of the applicant’s knowledge, all of the firm’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee. Fed. R. Bankr. P. 2014(a).

37. Section 328(a) of the Bankruptcy Code permits the compensation of professionals on flexible terms that reflect the nature of their services and market conditions. Section 328(a) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to provide that a debtor may employ a professional person on any reasonable terms and conditions of employment, including “on a fixed or percentage fee basis, or on a contingent fee basis.” 11 U.S.C. § 328(a). This new language makes clear the ability of a trustee to retain, with court approval, a professional on a fixed percentage fee basis or a contingent fee basis such as the fees in the Retention Agreement.



38. The Court should approve the Debtors' engagement of the Broker because it will apply its extensive industry experience in marketing and selling distressed real estate, it will tap into its deep network of investors, and it will utilize its national and global network of professionals to market the Real Properties for the highest and best price in an expedient manner. The Broker should be employed as a professional person pursuant to section 327 of the Bankruptcy Code, with its compensation subject to the standard of review of section 328(a) of the Bankruptcy Code and not any other standard, including that provided in section 330 of the Bankruptcy Code.

39. The Debtors believe that the Fee Structure and the Indemnification Provisions are reasonable terms and conditions of employment and should be approved under Section 328(a) of the Bankruptcy Code. The Fee Structure and the Indemnification Provisions are reasonable in light of, among other things, (a) industry practice, (b) market rates charged for comparable services both in and out of the chapter 11 context, (c) the Broker's substantial experience with respect to real estate consulting and advisory services and (d) the services to be performed by the Broker. The Fee Structure and the Indemnification Provisions appropriately reflect the nature and scope of services to be performed by the Broker in these chapter 11 cases and the fee structures and indemnification provisions typically approved for the Broker's retention.

40. The terms and conditions of the Retention Agreement were negotiated by the Debtors and the Broker at arm's length and in good faith. The Debtors respectfully submit that the indemnification, reimbursement, and other provisions contained in the Retention

Agreement, viewed in conjunction with the other terms of the Broker's proposed retention, are reasonable and in the best interests of the Debtors, their estates and creditors in light of the fact that the Debtors require the Broker's services to maximize the value of the Debtors' estates for all parties in interest. Further, the Broker is well qualified to perform all services contemplated by the Service Agreement, and to represent the Debtors' interests in these chapter 11 cases, in a cost-effective, efficient and timely manner. Accordingly, as part of this application, the Debtors respectfully request that the Court approve the terms of the Retention Agreement.

**NOTICE**

41. The Debtors will provide notice of this Application to: (a) the U.S. Trustee; (b) the prepetition mortgage loan servicers, trustees, lenders and their respective counsel; (c) the parties included on the Debtors' list of largest unsecured creditors; and (d) 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.

WHEREFORE, the Debtors respectfully requests that the Court enter an order in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as the Court deems appropriate.

Dated: April 1, 2016

*/s/ Marc Beilinson*  
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Marc Beilinson  
Chief Restructuring Officer