IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
NEWBURY COMMON ASSOCIATES, LLC, et al.,	)	Case No. 15-12507 (LSS)
	)	Jointly Administered
Debtors.[1]	)	**Hearing Date: August 2, 2016 at 10:30 a.m. (ET)** **Objection Deadline: July 22, 2016 at 4:00 p.m. (ET)**

DEBTORS' MOTION FOR AN ORDER AUTHORIZING AND APPROVING INCENTIVE PAYMENT AND CERTAIN RELATED RELIEF

The above-captioned debtors (collectively, the "**Debtors**") hereby move the Court for the entry of an order pursuant to sections 105, 363(b), 363(c) and 503(c)(3) of title 11 of the United States Code (the "**Bankruptcy Code**") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") (i) authorizing and approving an incentive payment in the amount of $100,000 (the "**Bonus Payment**") to Gregory Stanton, and (iii) granting certain related relief.[2] In support of this Motion, the Debtors incorporate the statements contained in the

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

[2] Mr. Stanton holds an 8% equity interest, solely with respect to distributions, and holds no rights to management of, Seaboard Realty, LLC. Mr. Stanton also holds an assigned 4% indirect beneficial interest in Tag Forest, LLC, an assigned 2% indirect beneficial interest in One Atlantic Member Associates, LLC. With respect to each of these entities, Mr. Stanton holds no voting rights and is not a member. Further, Mr. Stanton holds a .20974% interest in Park Square West Associates, LLC, a .25449% in Seaboard Hotel Associates, LLC, PENSCO Trust Co., Cust. SEP IRA holds a .54250% interest in Seaboard Hotel LTS Associates, LLC, and Maria Stanton holds a .72269% interest in and Seaboard Hotel LTS Associates, LLC.

declaration of Marc Beilinson attached hereto as **Exhibit A** (the "**Beilinson Declaration**"), 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 herein are sections 105, 363(b), 363(c) and 503(c)(3) of the Bankruptcy Code and Bankruptcy Rule 6004.

FACTS RELEVANT TO MOTION

A. General Background

4. On December 13, 2015 (the "**Petition Date**"), the Original Debtors,[3] with the exception of Tag Forest, LLC ("**Tag**"), each commenced a voluntary case under chapter 11

[3] 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.

of the Bankruptcy Code. On December 14, 2015, Tag commenced its voluntary case under chapter 11 of the Bankruptcy Code.

5. On February 3, 2016, the Additional Debtors,[4] excluding 88 Hamilton Avenue Associates, LLC ("**88 Hamilton**"), each commenced a voluntary case under chapter 11 of the Bankruptcy Code. On February 4, 2016, 88 Hamilton commenced its voluntary case under chapter 11 of the Bankruptcy Code.

6. On March 17, 2016, 220 Elm Street II, LLC (collectively with the Original Debtors and the Additional Debtors, the "**Debtors**") commenced a voluntary case under chapter 11 of the Bankruptcy Code.

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. 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* [Docket No. 5] and the *Declaration of Marc Beilinson in Support of Additional Chapter 11 Petitions and First Day Pleadings* [Docket No. 177].

[4] 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.

RELIEF REQUESTED

9. As the Court is well aware, these cases have been fraught with conflict from their inception. In the first five months of these cases, the Debtors were confronted with the aftermath of widespread and pervasive prepetition fraud, multiple and continual objections to the use of cash collateral, objections to a proposed junior debtor in possession financing facility, a motion to appoint an examiner, multiple case-dispositive motions, as well as change in counsel two months into the case, all while trying to administer these cases and preserve the value of the Debtors' assets.

10. Fast forward to today and the Debtors have reached agreements with each of their mortgage lenders for the consensual use of cash collateral and have contracted to sell substantially all of the real estate in their real estate portfolio (collectively, the "**Properties**"), with the exception of the still uncompleted Residence Inn property (the "**Residence Inn Property**"). See Docket Nos. 438, 554, 560, 563, 687, 684, 681, 683, 795, 805 (orders approving the consensual use of cash collateral on a final basis with each of the Debtors' mortgage lenders) and Docket Nos. 903, 904, 906, and 915 (orders authorizing the sale of certain of the Debtors' properties).[5] Once the sales of the properties under contract have closed, the sales will have netted at least $19 million above their mortgage debt at certain Debtors.

11. That being said, the Debtors' work in these cases has not come to an end. For instance, although Debtor Seaboard Hotel LTS Associates, LLC ("**Seaboard Hotel LTS**"), the owner of the Residence Inn Property, was recently served with a motion for stay relief by its mortgage lender, Israel Discount Bank of New York,[6] Seaboard Hotel LTS intends to undertake

[5] As of the date hereof, the Debtors are in the process of finalizing orders with respect to the sales of all of their real estate assets with the exception of the Residence Inn Property.

[6] See *Motion of Israel Discount Bank of New York for Relief from the Automatic Stay* [Docket No. 907], which

certain actions with respect to the Residence Inn Property, including market it for sale. Further, the Debtors intend to recommence their investigation, with the assistance of their professionals, into the extent and scope of the fraud that was undertaken by the Debtors' former management prior to the Petition Date in an effort to determine which and whether prepetition transactions and transfers need to be unwound through fraudulent conveyance actions, all in an effort to effectuate a return to all of the Debtors' stakeholders, including equity holders. Additionally, the Debtors need to undertake an analysis to determine the best and most equitable manner in which to apportion the restructuring costs incurred in connection with these chapter 11 cases among the various Debtors, a particularly difficult endeavor given the Debtors' unique corporate structure and the vocal opposition to schemes the Debtors have yet to even propose – opposition reminiscent of the contention surrounding the consensual use of cash collateral in the first several motions of these cases.

12. Indeed, the Debtors believe that they will have a single employee with the requisite institutional knowledge to help undertake the tasks that lay ahead – Gregory Stanton, who was the Director of Operations for Seaboard Property Management, Inc. since 1997 until he became an employee of the Debtors under the same title.[7] Mr. Stanton was instrumental to the success of the sale process and performed tasks outside of his normal duties including conducting many of the over seventy-five property tours undertaken by prospective bidder, responding to countless diligence requests for information by the Debtors' professionals for purposes of populating the data room and providing bidders with requested information,

(continued…)

was filed on June 29, 2016.

[7] Although Mr. Stanton holds the title of Direction of Operations, his duties and responsibilities are not those of an "insider" within the meaning set forth in the Bankruptcy Code. For instance, since the employment of Beilinson Advisory Group, Mr. Stanton has not had authority to commit capital, sign checks, make staffing decisions, or sign leases.

undertaking various additional duties after staff departures, and providing insight into the contracts and leases at the various Properties.[8] In addition, his efforts will be crucial to the Debtors' ability to quickly and efficiently close the sales approved by the Court, the Debtors' ability to formulate a plan of liquidation (especially helpful in this regard will be Mr. Stanton's familiarity with the Debtors' mezzanine lenders, creditors, and investors, which will also help facilitate a smooth and efficient claims reconciliation process). Mr. Stanton is also the only employee with a working familiarity of the tenants and unique provisions of various leases with respect to common area maintenance and the payment of real estate taxes. Finally, Mr. Stanton will be essential to the marketing and sale process of the Residence Inn Property, including its maintenance pending its sale. Looking forward, the Debtors believe that he will provide invaluable support during the next stage of these cases.

13. Accordingly, the Debtors request authorization to make the Bonus Payment to Mr. Stanton in order to incent the only person, in the opinion of the Debtors' management and independent director, with the knowledge necessary to effectively and efficiently assist the Debtors during the remainder of these cases.

14. The Debtors propose that the Bonus Payment[9] be deemed earned and payable as follows (collectively, the "**Milestones**"):

a. Seventy-five percent (75%) shall be payable within thirty (30) days of the date on which the last of the Properties has closed, or at an earlier date, the latter being in the sole discretion of the Debtors' Chief Restructuring Officer and upon entry of an Order approving this Motion (the "**First Milestone**"); and

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8 As set forth in the Beilinson Declaration, the Debtors intentionally waited to file this Motion until the conclusion of the auctions with respect to the Properties to avoid creating a distraction during the sale process that would have inevitably occurred given the nature and tenor of these cases until very recently in most instances.

9 The Debtors propose that the Bonus Payment be treated as a restructuring cost.

b. Twenty-five percent (25%) shall be payable the earlier of (i) the transfer of the Residence Inn Property, or (ii) four (4) months following the date on which the last of the Properties has closed, or at an earlier date, the latter being in the sole discretion of the Debtors' Chief Restructuring Officer and upon entry of an Order approving this Motion (the "**Second Milestone**").

15. Notwithstanding the above, the Debtors shall have no obligation to, and the Bonus Payment shall not be deemed earned, in the event, subsequent to the occurrence of the First Milestone, Mr. Stanton (a) engages in willful misconduct, or is grossly negligent, in the performance of his duties; (b) voluntarily terminates his employment prior to the occurrence the Second Milestone; or (c) is involuntarily terminated prior to the occurrence of the Second Milestone.

16. In addition, prior to the receipt of any portion of the Bonus Payment, Mr. Stanton shall fully execute and return to the Debtors an irrevocable general release and waiver of claims (the "**Release**"), in a form substantially acceptable to the Debtors' management and independent director.

17. In light of Mr. Stanton's efforts in connection with the sale of substantially all of the Debtors' assets, and the anticipated assistance he will provide in connection with concluding the work necessary to close these cases and provide a return to applicable creditors and holders of equity, the Debtors believe that the Bonus Payment is fair, equitable, will maximize the value of the estates for all stakeholders, and, accordingly, is in the best interests of the estates. Further, the cost to the estates is *de minimis* in light of the value already, and to be, provided, and the amounts the Debtors are anticipated to net with respect to their asset sales.

ARGUMENT

A. Sufficient Business Justification Exists to Authorize the Bonus Payment

18. Pursuant to section 105(a) of the Bankruptcy Code, a "[c]ourt may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 363(b) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). Although section 363(b) does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, courts have required that such use, sale or lease be based upon the sound business judgment of the debtor. *See, e.g.*, *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (internal citation omitted); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070–71 (2d Cir. 1983); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147–48 (3d Cir. 1986) (implicitly adopting the "sound business judgment" test of *In re Lionel Corp.*); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175–76 (D. Del. 1991) (holding that the Third Circuit adopted the "sound business judgment" test in Abbotts Dairies); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) (same).

19. The demonstration of a valid business justification by the debtor leads to a strong presumption "that in making [the] business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

20. The Debtors believe that their sound business purpose for making the Bonus Payment is apparent. Indeed, as discussed above, the Bonus Payment is necessary to incent Mr. Stanton, an essential employee who proved instrumental in facilitating the Debtors' marketing and sales efforts with respect to the Properties, to continue providing key assistance during the coming months, in order to preserve and maximize the value of the Debtors' estates for all stakeholders. *See In re Global Home Prods. LLC*, 369 B.R. 778, 784 (Bankr. D. Del. 2007) ("The reasonable use of incentives and performance bonuses are considered the proper exercise of a debtor's business judgment." (internal citation omitted)); *see also In re IPC Int'l Corp.*, No. 13-12050 (MFW) (Bankr. D. Del. Sept. 3, 2013) [Docket No. 144] (approving debtors' key employee incentive plan); *In re Synagro Techs., Inc.*, No. 13-11041 (BLS) (Bankr. D. Del. May 13, 2013) [Docket No. 132] (same); *In re Prommis Holdings*, No. 13-10551 (BLS) (Bankr. D. Del. Apr. 17, 2013) [Docket No. 174] (same); *In re DDMG Estate (f/k/a Digital Domain Media Grp., Inc.)*, No. 12-12568 (BLS) (Bankr. D. Del. Oct. 22, 2012) [Docket No. 319] (same); *In re Local Insight Media Holdings, Inc.*, No. 10-13677 (KG) (Bankr. D. Del. Mar. 29, 2011) [Docket No. 462] (same).

B. The Implementation of the Bonus Payment Is Warranted Under Section 363(b)(1) of the Bankruptcy Code as an Appropriate Exercise of the Debtors' Business Judgment

21. Section 363 of the Bankruptcy Code provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under section 363(b), courts require only that the debtor "show that a sound business purpose justifies such actions." *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) (citations omitted); *see also In re Delaware & Hudson R.R. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335–36

(Bankr. D. Del. 1987). Moreover, "[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citation omitted); *see also Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 238 (3d Cir. 2005) ("Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.").

22. Based on the facts set forth herein and in the Beilinson Declaration, the Debtors respectfully submit that the implementation of the proposed Bonus Payment is a sound exercise of their business judgment and, therefore, should be approved under section 363(b). As discussed above, Mr. Stanton has been and is essential to the Debtors' ability to achieve certain strategic goals, including the recovery of funds improperly distributed prior to the Petition Date and the expeditious and successful resolution of these chapter 11 cases. The Debtors believe that Mr. Stanton will be properly motivated to continue his efforts to maximize value for the Debtors, their estates, their creditors, and other parties in interest throughout the course of these cases. In addition to their normal day-to-day responsibilities, Mr. Stanton will assist with the closing of the sales of the various properties and will be tasked with other considerable additional responsibilities as a direct result of these cases. Despite being asked to take on this increased work-load, Mr. Stanton is not currently offered incentive opportunities to compensate him for his substantial contributions and enhanced responsibilities, as would be consistent with market practice. As such, the Debtors, in their sound business judgment, believe that the implementation of the Bonus Payment is justified under the circumstances and will greatly benefit all parties in interest in these cases.

23. Additionally, the Debtors submit that the amount of the Bonus Payment is reasonable in light of the amount of value that has been generated for the estates to date. Importantly, the Debtors' independent director, in conjunction with the Debtors' management, thoughtfully reviewed and considered both the need for the Bonus Payment and the terms thereof, and decided, in the sound exercise of their business judgment, to approve the Bonus Payment as reasonable and necessary for the Debtors' continued success in these cases. Accordingly, the Debtors believe that valid business reasons exist for implementation of the Bonus Payment and, thus, that implementation of the proposed Bonus Payment should be approved under section 363(b).

24. Once a debtor articulates a valid business justification for a particular form of relief, the Court reviews the debtor's request under the "business judgment rule." The business judgment rule applies in chapter 11 cases and shields a debtor's management from judicial second-guessing. *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.),* 147 B.R. 650, 656 (S.D.N.Y. 1992) (*quoting Smith v. Van Gorkom,* 488 A.2d 858, 872 (Del. 1985)). "The business judgment rule is a presumption 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." *See id.*

25. In that regard, courts in this District and others have found that a debtor's use of reasonable performance bonuses and other incentives for employees, akin to the Bonus Payment contemplated herein, is a valid exercise of a debtor's business judgment. *See, e.g., In re Dendreon Corp.,* Case No. 14-12515 (PJW) (Bankr. D. Del. Dec. 17, 2014) (approving key employee incentive program with payments based on achieving certain transaction value thresholds); *In re Synagro Techs., Inc.*, Case No. 13-11041 (BLS) (Bankr. D. Del. May 13, 2013)

(Docket No. 132) (approving KEIP tied to debtors' sale process as valid exercise of debtors' business judgment); *In re Midway Games Inc.*, Case No. 09-10465 (KG) (Bankr. D. Del. Apr. 23, 2009) (approving key employee incentive program with payments tied to achievement of certain events tied to debtors' business plan); *In re KB Toys, Inc.*, No. 08-13269 (KJC) (Bankr. D. Del. Jan. 14, 2009) (Docket No. 264) (approving incentive plan based on successfully completing identifiable "tasks" consistent with targets, which plan applied to certain members of debtor's management); *In re Dura Auto. Sys., Inc.*, No. 06-11202 (KJC) (Bankr. D. Del. June 28, 2007) (Docket No. 1369) (approving key employee incentive program payable, in part, upon submission of business plan, filing plan of reorganization and disclosure statement, and confirmation of chapter 11 plan); *In re Am. W. Airlines, Inc.*, 171 B.R. 674, 678 (Bankr. D. Ariz. 1994) (noting that it is the proper use of a debtor's business judgment to propose bonuses for employees who helped propel the debtor successfully through the bankruptcy process); *In re Interco Inc.*, 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991) (stating that a debtor's business judgment was controlling in the approval of a "performance/retention program").

26. In this case, authorizing the Debtors' implementation of the Bonus Payment will accomplish a similarly sound business purpose. The Debtors have determined that the costs associated with additional postpetition compensation Bonus Payment is more than justified by the benefits the Debtors have and will realize by creating appropriate incentives for Mr. Stanton, whose experience, institutional knowledge, skills, and diligent efforts have been and are critical to the ultimate success of these cases.

C. The Bonus Payment Is Incentivizing and Thus Not Governed by Bankruptcy Code Sections 503(c)(1) and 503(c)(2)

27. Bankruptcy Code section 503(c) governs retention and severance payments to insiders. By its plain language, section 503(c)(1) of the Bankruptcy Code pertains

solely to retention payments to insiders, and section 503(c)(2) of the Bankruptcy Code pertains solely to severance payments to insiders. Neither of these sections applies to performance-based incentive plans such as the Bonus Payment, which only provides for a payment based on the successful achievement of certain targeted and personalized metrics, does not provide a benefits to Mr. Stanton upon his voluntary termination of his employment with the Debtors, or termination with cause. *See, e.g., In re Nobex Corp.,* No. 05-20050 (CSS) (Bankr. D. Del. Jan. 12, 2006), Hrg. Tr. at 67 (section 503(c)(1) of the Bankruptcy Code does not apply to incentive programs); *In re Warner Holding Co., Inc.*, Case No. 06-10578 (KJC) (Bankr. D. Del. July 20, 2006; Aug. 22, 2006 and Dec. 20, 2006) (ordering various relief requested in connection with debtors' incentive bonus plans pursuant to sections 363(b) and 503(c) of the Bankruptcy Code); *In re Dana Corp.*, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) (applying section 503(c)(3) of the Bankruptcy Code to evaluate management incentive plan in absence of applicability of sections 503(c)(1) or 501(c)(2) of the Bankruptcy Code); *In re Calpine Corp.*, No 05-60200 (Bankr. S.D.N.Y. Apr. 26, 2006), Hrg. Tr. at 84-85 (sections 503(c)(1) and 503(c)(2) of the Bankruptcy Code do not apply to incentive programs).

28. Further, the Bonus Payment is not intended merely to encourage Mr. Stanton to retain his position with the Debtors. In particular, the Bonus Payment comprises a targeted incentive payment to Mr. Stanton, who, for the reasons set forth herein, is critical to completing the next steps necessary in order to close the sale transactions and to maximize the value of the Debtors' estates.

29. Moreover, section 503(c)(2) is further inapplicable because it applies only to severance. The Debtors' proposed Bonus Payment is not a severance plan because, among

other things, the compensation to be awarded thereunder is not triggered by, or otherwise dependent upon, the termination of Mr. Stanton's employment.

30. Therefore, the Debtors respectfully submit that the sections 503(c)(1) and 503(c)(2) of the Bankruptcy Code do not apply to the Bonus Payment.

D. Authorization and Approval of the Proposed Bonus Payment Is Justified by the Facts and Circumstances and Therefore Satisfies Section 503(c)(3) of the Bankruptcy Code

31. Finally, the Bonus Payment satisfies the standard set forth in Bankruptcy Code section 503(c)(3), which provides that "[t]here shall neither be allowed, nor paid":

> . . . (3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11. U.S.C. § 503(c)(3).

32. Courts that have analyzed this prohibition on unjustified transfers have determined that the governing standard under section 503(c)(3) is the same as that applied under section 363(b), namely, whether the decision to use estate property outside of the ordinary course of business is a proper exercise of the debtor's business judgment. *See, e.g.*, *In re Dana Corp.*, 358 B.R. at 576; *In re Dura Automotive Systems, Inc.*, No. 06-11202 (KJC) (Bankr. D. Del. Oct. 30, 2006); *In re Nobex Corp.*, No. 05-20050 (Bankr. Del. Jan. 12, 2006) (The Court: "So I do read (c)(3) to be the catch-all and the standard under (c)(3) for any transfers or obligations made outside the ordinary course of business are those that are justified by the facts and circumstances of the case. Nothing more – no further guidance being provided to the Court by Congress, I find it quite frankly nothing more than a reiteration of the standard under 363 . . . under which courts had previously authorized transfers outside the ordinary course of business and that is, based on the business judgment of the debtor, the court always considered the facts and circumstances of

the case to determine whether it was justified."); *4 Collier on Bankruptcy* ¶ 503.17[1] (16th ed. 2016) (non-insider employee retention "plans are reviewed under the much easier business judgment test in section 503(c)(3), and several courts have approved non-insider plans under that section"); *In re Patriot Coal Corp.*, 492 B.R. 518, 531 (Bankr. E.D. Mo. 2013) ("justified by the facts and circumstances of the case . . . means that the business judgment standard of Section 363(b) applies").

33. In assessing a debtor's business judgment regarding the implementation of key employee incentive payments, courts, including this one, have looked to the factors laid out in the *Dana Corp.* case for guidance to evaluate a proposed incentive program under Bankruptcy Code section 503(c)(3). The *Dana Corp.* factors are: (i) whether a reasonable relationship existed between the proposed plan and the desired results; (ii) whether the cost of the plan was reasonable in light of the overall facts of the case; (iii) whether the scope of the plan was fair and reasonable; (iv) whether the plan was consistent with industry standards; (v) whether the debtor had put forth sufficient due diligence efforts in formulating the plan; and (vi) whether the debtor received sufficient independent counsel in performing any due diligence and formulating the plan. *In re Dana Corp.*, 358 B.R. at 576-77.

34. The Debtors respectfully submit that, based on the facts discussed above and set forth in the Beilinson Declaration, each of the *Dana Corp*. factors is met with respect to the Bonus Payment. The Debtors have designed Bonus Payment to motivate and reward Mr. Stanton for his significant efforts, fairly compensate Mr. Stanton for the increased demands placed upon him in connection with these Cases, and to ensure that he continues to focus his full effort and attention on the Debtors' day-to-day operations and affairs while also assisting the Debtors in achieving their goals during this second stage of these cases, thereby maximizing the

value of the Debtors' estates for the benefit of all parties in interest. Further, the cost associated with the Bonus Payment is reasonable and well-justified given the amount of work and success that has been accomplished in these cases to date and the critical importance to the estates of a smooth operation of the Properties prior to closing and a timely closing of the sales. Finally, the Bonus Payment has been approved by the Debtors' independent director.

E. The Bonus Payment is an Administrative Expense

35. The Debtors request that their obligations to make the Bonus Payment, once earned, be deemed to be administrative expenses pursuant to section 503(b) of the Bankruptcy Code, entitled to priority under section 507(a)(2) of the Bankruptcy Code.

NOTICE

36. The Debtors will provide notice of this Motion 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 request that this Court enter an order, in substantially the form attached hereto as **Exhibit B**, (a) approving, and authorizing the Debtors to implement, the Bonus Payment, and (b) granting the Debtors such other and further relief as this Court deems appropriate.

Dated: July 8, 2016
Wilmington, Delaware

Respectfully submitted,

By: */s/ Maris J. Kandestin*

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