

**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)	
)	Req. Hearing Date: Aug. 30, 2016, at 2:00 p.m. (ET)
)	Req. Obj. Deadline: Aug. 26, 2016 at 10:00 a.m. (ET)

**MOTION OF DEBTOR SEABOARD HOTEL ASSOCIATES, LLC
TO ASSUME GROUND LEASE**

Seaboard Hotel Associates, LLC, one of the above-captioned debtors and debtors in possession in these chapter 11 cases (“**Seaboard**” or the “**Debtor**,” and together with the other debtors, the “**Debtors**”), submits this motion (this “**Motion**”) for entry of an order, substantially in the form attached hereto as **Exhibit A** (the “**Proposed Order**”), pursuant to section 365 of title 11 of the United States Code (the “**Bankruptcy Code**”), authorizing the Debtor to assume the unexpired Ground Lease (as defined below). In support of this Motion, the Debtor respectfully states as follows:

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, LLC (7625). The Debtors’ corporate headquarters is located at, and the mailing address for each Debtor is, 1 Atlantic Street, Stamford, CT 06901.

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 Property 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 is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicate for the relief requested herein is section 365 of the Bankruptcy Code, and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedures (the “**Bankruptcy Rules**”).

BACKGROUND

A. General Background

4. On December 13, 2015, the Original Debtors,² 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.

² 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.

5. On February 3, 2016 (the “**Petition Date**”), the Additional Debtors, with the exception of 88 Hamilton Avenue Associates, LLC (“**88 Hamilton**”) and 220 Elm II, LLC (“**220 Elm II**”), 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. On March 17, 2016, 220 Elm II commenced a voluntary case under chapter 11 of the Bankruptcy Code.

6. 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).

7. 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].

B. Debtors’ Requests for 365(d)(4) Extension

8. On May 2, 2016, the Debtor, along with the other Additional Debtors filed the *Additional Debtors’ Motion for Entry of an Order Extending Time to Assume or Reject Unexpired Leases of Nonresidential Real Property* [Docket No. 700] (the “**365(d)(4) Motion**”). On May 17, 2016, the Court entered an order approving the First 365(d)(4) Motion (the “**365(d)(4) Order**”) and extended the time by which the Additional Debtors must decide to

assume or reject Unexpired Leases to August 31, 2016 (the “**365(d)(4) Deadline**”) [Docket No. 738]. Pursuant to section 365(d)(4) of the Bankruptcy Code, absent an agreement from the counterparty to the Ground Lease, the Debtor’s ability to assume and assign the Ground Lease will expire on August 31, 2016.

C. Background Regarding Sale

9. Since the 365(d)(4) Order was entered, the Court has entered orders authorizing the sales (the “**Sales**”) of substantially all of the real estate in the Debtors’ real estate portfolio (collectively, the “**Properties**”), including the Courtyard Marriott Hotel (the “**Courtyard Sale**”) located in Stamford, Connecticut (the “**Courtyard Marriott Property**”) See Docket No. 915 (the “**Courtyard Sale Order**,” approving the sale of the Courtyard Marriott Property to ANNEMID, LLC). As of the date hereof, the Courtyard Sale has not closed, although the Debtors anticipate that it will close by the end of August. Part of the consideration for the purchase price for the Courtyard Marriott Property was the Debtors’ assumption and assignment of that certain Ground Lease between TR Summer, LLC, as Tenant, and Edith B. Miller and Arthur I. Miller, Co-Trustees, et al., as Landlord, dated January 22, 2001, assigned to Seaboard Hotel Associates, LLC as of April 29, 2011 (including all amendments and modifications, side letters, memoranda of understanding, documents incorporated by reference, attachments and exhibits thereto, the “**Ground Lease**”). The Ground Lease was listed on the Debtors’ *Notice of Assumption, Assignment and Cure Amount With Respect to Executory Contracts and Unexpired Leases of the Debtors* with a zero cure amount [Docket No. 755] (the “**Cure Notice**”). The deadline for the counterparty to the Ground Lease to object to (a) adequate assurance of future performance with respect to ANNEMID, LLC as the proposed assignee, and (b) the proposed cure amount of \$0.00 was June 28, 2016. No objections to either were received.

10. As noted above, the Debtor's ability to assume and assign unexpired leases expires on August 31, 2016. Although the Debtor anticipates that the Courtyard Sale will close on or before August 30, 2016, out of an abundance of caution, the Debtor is seeking to assume the Ground Lease to ensure its ability to assign such lease at the closing of the Courtyard Sale.

BASIS FOR RELIEF

A. The Debtor's Assumption of the Ground Lease Represents a Sound Exercise of the Debtor's Business Judgment

11. Section 365(a) of the Bankruptcy Code permits a debtor-in-possession, "subject to the court's approval, [to] assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). By enacting section 365(a) of the Bankruptcy Code, Congress intended to allow a debtor to assume those contracts that benefit the estate, and to reject those that are of no value to, or that are burdensome to, the estate. See, e.g., In re Whitcomb & Keller Mortg. Co., 715 F.2d 375, 379 (7th Cir. 1983); In re Sandman Assocs., L.L.C., 251 B.R. 473, 480 (W.D. Va. 2000) ("The authority granted by section 365 allows the trustee or debtor in possession to pick and choose among contracts, assuming those that are favorable and rejecting those that are not.").

12. It is well established in the Third Circuit, as well as in other jurisdictions, that decisions to assume or reject executory contracts or unexpired leases are matters within the "business judgment" of the debtor. Sharon Steel Corp. v. Nat'l Fuel Gas Dist. Corp., 872 F.2d 36, 40 (3d Cir. 1989); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984); In re Federal Mogul Global, Inc., 293 B.R. 124, 126 (D. Del. 2003) ("The business judgment test dictates that a court should approve a debtor's decision to reject a contract unless that decision is the product of bad faith or gross abuse of discretion."); In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993), cert. dismissed, 511 U.S. 1026 (1994). Accordingly, courts approve the assumption of an

unexpired lease unless evidence is presented that the debtor's decision to assume or reject "was so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." In re Richmond Metal Finishers, Inc., 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Indeed, to impose more exacting scrutiny would slow a debtor's reorganization, thereby increasing its cost and undermining the "Bankruptcy Code's provisions for private control" of the estate's administration. Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1311 (5th Cir. 1986).

13. The Debtor's decision to assume the Ground Lease is supported by its sound business judgment, as set forth in connection with the Courtyard Sale and as approved by the Courtyard Sale Order.

B. The Debtor Has Provided Adequate Assurance of Future Performance Under the Ground Lease

14. Under section 365(b)(1) of the Bankruptcy Code, if there has been a default in an unexpired lease, a debtor may not assume such unexpired lease unless, at the time of assumption, the debtor provides adequate assurance of future performance under such lease. See 11 U.S.C. § 365(b)(1)(C).

15. Prior to entry of the order approving the Courtyard Sale, the purchaser provided adequate assurance of future performance to the lessors under the Ground Lease, as evidenced by the findings in the Courtyard Sale Order. See Docket No. 915, ¶ DD (finding that "[t]he Buyer is able to demonstrate adequate assurance of future performance with respect to any Assigned Agreements in accordance with sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code.") and ¶ 27 (finding that [t]he Buyer is able to provide and has provided adequate assurance of future performance under the relevant Assigned Agreements within the

meaning of sections 365(b)(1)(C), 365(b)(3) (to the extent applicable), and 365(f)(2)(B) of the Bankruptcy Code.”).

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

16. Bankruptcy Rule 6004(h) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). To the extent applicable to the Proposed Order, the Debtor submits that there is sufficient justification here for a waiver of the 14-day stay, as it will allow the Debtor to assume the Ground Lease in a timely and efficient manner. Therefore, to the extent applicable, the Debtors submit that the 14-day stay set forth in Bankruptcy Rule 6004(h) should be waived. Such a waiver will benefit the Debtor, its estate and creditors, and no party in interest, including the counterparty to the Ground Lease, will be prejudiced thereby.

[Remainder of page intentionally left blank.]

NOTICE

17. The Debtor will provide notice of this Motion via electronic mail and/or expedited delivery on 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; (d) the counterparty under the Ground Lease; and (e) all parties who have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

Dated: August 18, 2016
Wilmington, Delaware

Respectfully submitted,

By: /s/ Maris J. Kandestin
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