

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re NEWBURY COMMON ASSOCIATES, LLC, ET AL Debtors. ¹	Chapter 11 Case No. 15-12507 (LSS) Jointly Administered Re: Dkt Nos. 176, 240, 348, 455, 540, 563, 1284, 1336, & 1402.
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**A. PAPPAJOHN COMPANY’S MOTION FOR
ENLARGEMENT OF TIME TO MARCH 1, 2017 TO FILE AN ADVERSARY
PROCEEDING CHALLENGING THE AMOUNT, VALIDITY, OR ENFORCEABILITY
OF THE SECURED OBLIGATIONS OR THE
PERFECTION OR PRIORITY OF THE PRE-PETITION LIENS IN AND
TO THE PREPETITION COLLATERAL²**

A. Pappajohn Company, a secured creditor and party in interest in the above-captioned case (“APC”), by and through undersigned counsel, and pursuant to Rule 9006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rules 9006-1 and 9006-2 of

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

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

² Terms not otherwise defined in the instant motion shall have the meanings defined in the *Final Order for Seaboard Hotel LTS Associates, LLC (I) Approving Entry Into Letter Agreement; (II) Authorizing the Continued Use of Cash Collateral; and (III) Granting Other Relief* [Doc. Id. No. 1336] (the “Final Cash Collateral Order”).

the Local Rules of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) moves for an extension of time (the “Extension Motion”) for APC to file an adversary proceeding challenging the amount, validity, or enforceability of the Secured Obligations or the perfection or the priority of the IDB Mortgage (as hereinafter defined)³ in and to the Prepetition Collateral (the “Challenge Period”) to March 1, 2017.⁴ In support of the Extension Motion, APC states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to section 1334 of title 28 of the United States Code (“Title 28”). This Motion is a core proceeding within the meaning of section 157(b)(2) of Title 28. Venue is proper under sections 1408 of Title 28. The legal predicate for the relief sought herein is Bankruptcy Rule 9006, Local Rules 9006-1 and 9006-2 and the Final Cash Collateral Order.

FACTUAL AND PROCEDURAL BACKGROUND

2. On or about December 28, 2012, IDB agreed to provide financing to Seaboard Hotel LTS Associates, LLC (“LTS”) in the amount of \$6,000,000 (the “IDB First Loan”) for the construction of a project at real property located at 23-25, 35, and 37 Atlantic Street in Stamford Connecticut (the “Real Property”) known as “Residence Inn by Marriott” (the “Project”). The IDB First Loan was secured by a mortgage on the Real Property (the “IDB Mortgage”).

3. On or about February 21, 2014, APC entered into a written construction contract with LTS (the “Contract”) calling for the construction of certain improvements and additions to

³ The Final Cash Collateral Motion (has hereinafter defined) and the Final Cash Collateral Order refer to the IDB Mortgages as the Prepetition Liens.

⁴ In the event the court denies the extension motion, as the extension motion was filed prior to the deadline established in the final cash collateral order, pursuant to Local Rule 9006-2, the deadline is automatically extended until February 2, 2017, the date of the hearing on the extension motion.

land located at 25 Atlantic Street, Stamford, Connecticut for a project known as “Residence Inn by Marriott” (the “Project”).

4. In accordance with the Contract and with the express written authorization of LTS, APC entered into subcontracts with various laborers, subcontractors, and material suppliers to furnish labor, materials and equipment for construction of the Project. Certain of these subcontractors also entered into agreements with sub-subcontractors to also furnish labor, materials and equipment for construction of the Project.

5. Shortly after the Contract was executed APC and its subcontractors and vendors commenced performance of their work for the Project.

6. On or about July 18, 2014, IDB provided additional financing to LTS in the amount of \$5,000,000 for construction of the Project (the “IDB Second Loan”). The IDB Mortgage was modified and increased to \$11,000,000.

7. On or about November 18, 2014, after LTS ceased making payments to APC, LTS directed APC to suspend all non-critical path work and to re-bid all trades except for site work, concrete, electrical and plumbing.

8. At various times between December 10, 2014 and March 5, 2015, LTS and IDB represented to APC that IDB would provide the additional financing necessary for completion of the Project.

9. On March 5, 2015, after LTS failed to make payment to APC under the terms of the Contract, APC placed a mechanic’s lien against the Property in the amount of \$5,973,767.80.

10. On or about April 8, 2015, APC and LTS entered into a Reaffirmation Agreement, reaffirming the Contract and memorializing the terms and conditions under which

APC would receive outstanding payments, remobilize and commence the performance of Work on the Project. The Reaffirmation Agreement was approved by IDB.

11. An Escrow Agreement was also entered into between APC, LTS and the title insurance company and agent of IDB. In that Escrow Agreement, a representation was made that IDB would hold APC's earned contract retainage. The Escrow Agreement further outlined the process under which funds advanced by IDB would be paid directly to APC and its subcontractors for the Project.

12. On April 8, 2015, in reliance upon the representations in the Reaffirmation Agreement and Escrow Agreement, APC executed a release of the mechanic's lien that APC filed on March 5, 2015, as well as executed certain Subordination Agreements required by IDB in exchange for consideration including partial payment of amounts outstanding.

13. On or about April 15, 2015, IDB provided "interim" financing in the amount of \$7,000,000 (the "IDB Third Loan") to pay APC and its subcontractors the amounts outstanding for work in place (less retainage) and to cover a limited amount of future construction costs while LTS finalized documents with IDB for the issuance of the permanent financing necessary to complete the Project.

14. Starting on or about April of 2015 until December 11, 2015, APC continued to work on the Project and LTS continuously failed to make timely payments to APC under the Contract. Despite nonpayment, APC continued to work on the Project in reliance of LTS and IDB's continued representations that IDB would soon provide permanent financing.

15. On December 11, 2015, after issuing several notices of default to LTS for nonpayment and with no permanent financing forthcoming, APC suspended work on the Project.

This was the last date that APC furnished labor, materials or equipment to the Project.

Thereafter, LTS advised APC that it would not be securing permanent financing.

16. On December 14, 2015, the Original Debtors filed for protection under chapter 11 of the Bankruptcy Code. On February 3, 2016 the Additional Debtors, including LTS, filed their chapter 11 bankruptcy petitions. On January 5, 2016, APC placed a mechanic's lien against the Real Property in the amount of \$5,249,493.43 (the "APC Lien"). On November 7, 2016, APC filed its *Notice of Mechanic's Lien Held By A. Pappajohn Company With Respect to Property Owned by Seaboard Hotel LTS Associates, LLC* (the "Perfection Maintenance Filing") [Doc ID NO. 1277] in this Court. The Perfection Maintenance Filing maintained and continued the perfection of the APC Lien pursuant to Sections 362(b)(3) and 546(b)(2) of the Bankruptcy Code.

17. IDB has claimed a first priority security interest in the Real Property through the IDB Mortgage securing the IDB First Loan, IDB Second Loan and IDB Third Loan (the "IDB Loans").

18. APC claims a secured interest in Real Property through the APC Lien. APC challenges the priority of the IDB Mortgage based upon the conduct and representations of IDB and LTS during the Project. Specifically, APC has good cause to believe that claims exist against IDB based upon the doctrines of equitable estoppel or equitable subordination, or both, which elevate the status of APC Lien ahead of the IDB Loans and Mortgage. IDB and LTS acted in concert making representations directly to APC that permanent financing was to be provided for completion of the Project; and that APC must continue working on the Project in order for the financing to close and the funds to be advanced. The additional work provided by APC, for which no payment was ever made, is valued at more than \$5 Million Dollars and

substantially increased the value of the Real Property (*the collateral securing the IDB Mortgage*). APC also has good cause to believe that independent tort claims exist against IDB for the associated conduct. As a result, APC has good cause to believe a claim exists that the APC Lien is valid, enforceable, *and prior in right to the IDB Mortgage*.

19. Over the past several months, APC has been engaged in ongoing settlement discussions with IDB and potential purchasers of the IDB Loans and the IDB Mortgage.

20. On November 8, 2016, LTS filed its *Motion to Approve Use of Cash Collateral - Motion for Final Order (I) Approving Entry into Letter Agreement; (II) Authorizing the Continued Use of Cash Collateral; and (III) Granting Other Relief* (the “Final Cash Collateral Motion”) [Doc ID No 1284]. In the Final Cash Collateral Motion, LTS sought the approval of that certain Letter Agreement by and between LTS and the IDB.

21. Under the Letter Agreement, LTS and IDB agreed to a complex, multi-step process relating to the transfer of ownership of the Real Property. The first step permitted LTS to quitclaim the Real Property to IDB by on or about December 27, 2016 in lieu of IDB foreclosing the Real Property through a Connecticut Superior Court foreclosure proceeding (the “Deed in Lieu of Foreclosure”). Notably, the Letter Agreement vested with IDB the unilateral right to reject the Deed in Lieu of Foreclosure.

22. In the event that IDB refused to accept the Deed in Lieu of Foreclosure by December 27, 2016, the Letter Agreement provides that LTS would file a motion to approve bidding procedures related to a Section 363 sale of the Real Property. According to the Letter Agreement if the bidding procedures did not result in a sale above a certain “release price”, the Real Property would be transferred from LTS to IDB free and clear of liens, claims and interests, **including the APC Lien, pursuant to Section 363 of the Bankruptcy Code.**

23. The Final Cash Collateral Motion also provided for a Challenge Period.

24. On November 28, 2016, the Court entered the Final Cash Collateral Order, setting January 12, 2017 as the last date of the Challenge Period.

25. As discussed in further detail herein, APC now moves for cause to extend the Challenge Period to March 1, 2017.⁵

SUMMARY OF BASIS FOR RELIEF

26. Pursuant to Rule 9006(b) of the Federal Rules of Bankruptcy Procedure, “[w]hen an act is required or allowed to be done at or within a specified period... by order of the court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request theretofore is made before the expiration of the period prescribed.” Fed.R.Bankr.P. 9006(b). “Rule 9006(b) specifically provides that the court, in its discretion, may enlarge the time period for completing any act required under the Federal Rules of Bankruptcy.” *In re Fundamental Long Term Care, Inc.*, 501 B.R. 784, 787-88 (Bankr. M.D. Fla. 2013). The broad term “cause” gives the presiding court wide discretion in deciding a motion under Bankruptcy Rule 9006. *See Good v. Blankenship (In re Heartland Steel, Inc.)*, No. 1:03-cv-802-DFH, 2003 U.S. Dist. LEXIS 23123, at *5 (S.D. Ind. Dec. 16, 2003).

27. Cause exists for the granting of the Extension Motion, which will allow APC until March 1, 2017 to challenge the priority of the IDB Mortgage. For the past several months—including during the Challenge Period, which Challenge Period included two (2) national holidays—APC has devoted considerable time and resources engaging in lengthy and serious discussions with IDB and potential purchasers of the IDB Loans and IDB Mortgage in an effort to resolve APC’s claim prior to the commencement of litigation. Indeed, resolving APC’s claims

⁵ In the event that the Court denies the Extension Motion, APC respectfully requests that the Bridge Order provided for under Local Rule 9006-2 be extended to Thursday, February 2, 2017, or seven days following the expected hearing on the Extension Motion.

without the need of filing and prosecuting an adversary proceeding would be in the best interest of APC, IDB, and the LTS bankruptcy estate.

28. It was only recently that APC learned that the negotiations between IDB and a prospective purchaser of the IDB Loans and IDB Mortgage (the “Developer”) had broken down. A resolution between IDB and the Developer would have likely resulted in a resolution of APC’s claims against IDB. In light of the breakdown of the negotiations between IDB and the Developer, APC files this Extension Motion, and seeks an extension of the Challenge Period, so that it can conduct limited discovery⁶ and file its adversary proceeding. The extension of the Challenge Period may also permit additional time for IDB and the Developer to negotiate the sale of the IDB Loans and IDB Mortgage and clear a path toward a consensual resolution of the APC claims without the need of litigation.⁷

29. As such, cause exists to grant the Extension Motion.

NO PREVIOUS RELIEF REQUESTED

30. APC has not previously sought the relief requested in this motion.

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⁶ On this date, APC has also served its Notice of Deposition with document requests on IDB so that it may conduct limited discovery in advance of filing an adversary proceeding.

⁷ Upon information and belief, a settlement conference may be occurring on Tuesday, January 10, 2017 between IDB and the Developer. If Extension Motion is granted, and a settlement results between IDB and the Developer, APC believes that pursuing its equitable claims against IDB may not be necessary.

WHEREFORE, APC respectfully requests that it be allowed up through and including **March 1, 2017 at 4:00 p.m.** to file an adversary proceeding challenging the amount, validity, or enforceability of the Secured Obligations or the perfection or the priority of the IDB Mortgages.

Dated: Wilmington, Delaware
January 9, 2016

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