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Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
CASE NOS. 09-

In re:

TARRAGON CORPORATION, *et al.*,
Debtors-in-Possession.

Chapter 11
(Joint Administration Pending)

**NOTICE OF MOTION FOR AN ORDER
GRANTING THE DEBTORS RELIEF
FROM THE AUTOMATIC STAY
PURSUANT TO 11 U.S.C. § 362(d)(1), TO
THE EXTENT APPLICABLE, TO
ALLOW THE DEBTORS AND THIRD
PARTIES TO CONTINUE PENDING
ARBITRATION AND STATE COURT
PROCEEDINGS**

HEARING DATE AND TIME:
January __, 2009, at __: __.m.

ORAL ARGUMENT REQUESTED

TO: All Parties-in-Interest

PLEASE TAKE NOTICE that pursuant to and in accordance with an Order Regarding Application For Expedited Consideration of First Day Matters served herewith, on the ____ day of January, 2009, at ____: __.m., or as soon thereafter as counsel may be heard, the undersigned, proposed attorneys for Tarragon Development Corporation and Central Square



Tarragon LLC, two of the within debtors and debtors-in-possession (collectively, the “Debtors”), shall move before the assigned United States Bankruptcy Judge, at the United States Bankruptcy Court, Martin Luther King, Jr. Federal Building, 50 Walnut Street, Third Floor, Newark, New Jersey 07102, for entry of an Order granting the Debtors relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), to the extent applicable, to allow the Debtors and third parties to continue pending arbitration and state court proceedings (the “Motion”).

PLEASE TAKE FURTHER NOTICE that in support of the Motion, the undersigned shall rely on the Affidavit of William S. Friedman in support of “First Day Motions,” and the accompanying Application, which set forth the factual and legal bases upon which the requested relief should be granted. A proposed Order granting the relief requested in the Motion is also being submitted.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the requested relief in the Motion shall be presented in accordance with the Order Regarding Application for Expedited Consideration of First Day Matters.

PLEASE TAKE FURTHER NOTICE that unless objections are timely presented, the Motion shall be deemed uncontested in accordance with D.N.J. LBR 9013-1(a) and the requested relief may be granted without a hearing.

PLEASE TAKE FURTHER NOTICE that the undersigned requests oral argument on the return date of the Motion.

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
Proposed Attorneys for Tarragon Corporation,
et al., Debtors-in-Possession

By: /s/ Michael D. Sirota
Michael D. Sirota
Warren A. Usatine

DATED: January 12, 2009

**COLE, SCHOTZ, MEISEL,
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In re: : UNITED STATES BANKRUPTCY COURT
: FOR THE DISTRICT OF NEW JERSEY
: CASE NOS. 09-
TARRAGON CORPORATION, *et al.*, :
: Chapter 11
Debtors-in-Possession.: (Joint Administration Pending)
:
:

**APPLICATION IN SUPPORT OF MOTION
FOR AN ORDER GRANTING THE DEBTORS
RELIEF FROM THE AUTOMATIC STAY
PURSUANT TO 11 U.S.C. § 362(d)(1), TO THE
EXTENT APPLICABLE, TO ALLOW THE
DEBTORS AND THIRD PARTIES TO
CONTINUE PENDING ARBITRATION AND
STATE COURT PROCEEDINGS**

HEARING DATE AND TIME:

January ____, 2009 at __:__.m.

TO: Honorable Judge of the
United States Bankruptcy Court

The Application of Tarragon Development Corporation (“Tarragon Dev. Corp.”) and
Central Square Tarragon LLC (“Central Square”), two (2) of the within debtors and debtors-in-

possession (collectively, the “Debtors”),¹ by and through their proposed counsel, Cole, Schotz, Meisel, Forman & Leonard, P.A., respectfully states as follows:

I. INTRODUCTION AND JURISDICTION

1. This Application is submitted in support of the motion for an Order granting the Debtors relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), to the extent applicable, to allow the Debtors and third parties to continue pending arbitration and state court proceedings (the “Motion”).

2. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

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

II. BACKGROUND

4. On January 12, 2009 (the “Filing Date”), each of the Debtors filed a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). Since the Filing Date, the Debtors have remained in possession of their assets and continued management of their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

5. A detailed description of the Debtors’ businesses and facts precipitating the filing of the Debtors’ Chapter 11 proceedings is set forth in the Affidavit of William S.

¹ The other debtors are Tarragon Corporation (“Tarragon Corp.”), Tarragon Development Corporation, Tarragon South Development Corp., Tarragon Development Company LLC, Tarragon Management, Inc., Bermuda Island Tarragon LLC, Orion Towers Tarragon, LLP, Orlando Central Park Tarragon L.L.C., Fenwick Plantation Tarragon LLC, One Las Olas, Ltd., The Park Development West LLC, 800 Madison Street Urban Renewal, LLC, 900 Monroe Development LLC, Block 88 Development, LLC, Central Square Tarragon LLC, Charleston Tarragon Manager, LLC, Omni Equities Corporation, Tarragon Edgewater Associates, LLC, The Park Development East LLC, and Vista Lakes Tarragon, LLC.

Friedman (the “Friedman Affidavit”) submitted in support of the Debtors’ various “First Day Motions.” Those facts are incorporated herein by reference.

6. As set forth in the Friedman Affidavit, Tarragon Corp. and its direct and indirect, debtor and non-debtor affiliates (collectively, “Tarragon”) are real estate developers, owners and managers. Tarragon operates two (2) business divisions, a real estate development division (the “Development Division”) and an investment division (the “Investment Division”). The Development Division focuses on developing, renovating, building and marketing homes in high-density, urban locations and in master-planned communities. The Investment Division owns and operates a portfolio of stabilized rental apartment communities.

7. As a developer, Tarragon and its development subsidiaries and affiliates often are involved in litigation relating to issues involving the development and physical construction of their projects. Among the actions that were pending as of the Filing Date, were two (2) actions in which the Debtors asserted affirmative claims against a contractor, a contractor’s bonding company and/or Tarragon’s insurer for, among other things, breach of contract and construction defects. By this Motion, the Debtors seek relief from the automatic stay, to the extent applicable, to allow those matters to proceed without interruption.

A. Alta Mar Litigation

8. Alta Mar Development LLC, a non-debtor Tarragon affiliate (“Alta Mar”), developed a condominium apartment complex in Fort Myers, Florida (the “Alta Mar Development”). The residential units of the Alta Mar Development have been sold.

9. In connection with the construction of the Alta Mar Development, Alta Mar engaged Soares Da Costa Construction Services, LLC (“SDC”) as the contractor on the project pursuant to the terms of a construction contract (the “Construction Contract”). Before the Filing Date, SDC filed a Demand for Arbitration (the “Alta Mar Arbitration Demand”) against

Alta Mar, Balsam Acquisitions, LLC (another non-debtor affiliate) and debtor Tarragon Dev. Corp. (collectively, the “Alta Mar Defendants”) with the American Arbitration Association, bearing case number 50 110 S 00346 06. The Alta Mar Arbitration Demand alleges the Alta Mar Defendants did not perform under the Construction Contract and caused SDC to suffer delay damages in connection with the Alta Mar Development. SDC currently seeks damages against the Alta Mar Defendants in the amount of \$5,653,962.

10. In response to the Alta Mar Arbitration Demand, the Alta Mar Defendants asserted counterclaims against SDC and Insurance Company of the State of Pennsylvania, SDC’s bonding company, for damages incurred as a result of SDC’s inability to complete the construction of the Alta Mar Development (the “Alta Mar Counterclaim,” which together with the Alta Mar Arbitration Demand is collectively referred to as the “Alta Mar Litigation”). The Alta Mar Counterclaim currently seeks damages in the total amount of \$17,368,197.04. The Alta Mar Defendants believe their likelihood of success on the Alta Mar Counterclaim is strong and any recovery on those claims will exceed any liability to SDC.

11. Before the Filing Date, the parties to the Alta Mar Litigation engaged in extensive discovery in preparation for the final hearing before a panel of three (3) arbitrators. That final hearing commenced in November 2008 **and is scheduled to resume on January 13, 2009, one (1) day after the Filing Date, and continue on January 14th through January 16th and January 20th through January 23rd**. The arbitration will then continue in addition one week sessions in both February and March. Those dates were selected before the Filing Date to accommodate the busy schedules of the arbitrators, the attorneys and the many witness scheduled to testify, some of whom must travel from out-of-town. In the event the Alta Mar Litigation is not able to continue on January 13, 2009, it will be very difficult to coordinate the schedules of

all parties involved and establish new hearings dates in the near future. Any delay in the Alta Mar Litigation resulting from the Debtors' Chapter 11 filing will cause several individuals, who have coordinated their schedules around that proceeding, to incur unnecessary expense and wasted time.

B. Central Square Litigation

12. Central Square owns vacant land in Lauderdale Lakes, Florida that, as of the Filing Date, was being held for future development into a rental apartment community. Before the Filing Date, Central Square commenced a lawsuit against Great Divide Insurance Company ("Great Divide") in the Circuit Court of the 17th Judicial Circuit, Broward County, Florida, bearing Case No. 07000612 (the "Central Square Litigation," which together with the Alta Mar Litigation are collectively referred to herein as the "Litigations"). The Central Square Litigation seeks damages against Great Divide in the amount of \$2,977,929 plus attorneys' fees for breach of contract arising from its failure to remit insurance proceeds to Central Square for hurricane damage that was covered by an insurance policy.

13. Before the Filing Date, Central Square and Great Divide engaged in discovery and prepared for trial. The trial on the Central Square Litigation was scheduled to commence before the Filing Date, but has postponed to February or March 2009.

IV. BASIS FOR RELIEF REQUESTED

14. The Debtors seek relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), to the extent applicable, to allow the Debtors and third parties to continue the pending Litigations without interruption. The Debtors assert that the automatic stay does not apply to the Alta Mar Counterclaim or the Central Square Litigation because neither action falls squarely within Section 362(a) of the Bankruptcy Code. See Maritime Electric Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1991) (stating the clear and unambiguous language in

Section 362(a)(1) stays only proceedings **against** a debtor which, if successful, would inure to the benefit of the bankruptcy estate). Out of an abundance of caution, however, and to ensure those actions proceed without delay, the Debtors seek an order allowing those proceedings to continue.

15. Under certain circumstances, the automatic stay may be terminated or modified under Section 362(d) which provides in pertinent part:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay...

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1).

16. Neither the Bankruptcy Code nor the legislative history of Section 362(d)(1) define the phrase “cause,” and it is therefore given application on a case by case basis. “Cause” for purposes of relief from the automatic stay under Bankruptcy Code Section 362(d) is a broad and flexible concept, and the facts relating to each request will determine whether relief is appropriate under the circumstances. See In re The Score Board, Inc., 238 B.R. 585, 598 (D.N.J. 1999).

17. The determination of whether “cause” exists to vacate the automatic stay is committed to the sound discretion of the bankruptcy court. See In re Sonnax Industries, Inc., 907 F.2d 1280, 1286 (2d Cir. 1990) (citing Holtkamp v. Littlefield (In re Holtkamp), 669 F.2d 505, 507 (7th Cir. 1982). In making this determination, courts must consider “the interests of the debtor, the claimant and the estate.” In re MacInnis, 235 B.R. 255, 259 (Bankr. S.D.N.Y. 1998); see also In re Peregrine Systems, Inc., 314 B.R. 31, 47 (Bankr. D. Del. 2004). Courts generally consider the following three (3) factors in deciding whether cause exists: (a) prejudice suffered

by the debtor and its estate if the stay is lifted; (b) the balancing of hardships between the parties; and (c) the probability of success on the merits if the stay is lifted. Id.; see also In re Continental Airlines, Inc., 152 B.R. 420, 424 (D. Del. 1993).

18. Cause exists for this Court to grant the Debtors relief from the automatic stay (to the extent applicable) to allow the Litigations to continue in the ordinary course. In particular, and for the reasons articulated above, the Debtors respectfully request the Court grant the relief requested to ensure no delay is experienced in the Alta Mar Litigation, **which is scheduled to continue before a panel of arbitrators on January 13, 2009.**

19. As set forth above, a final hearing before the arbitrators in the Alta Mar Litigation has already begun and the Central Square Litigation is scheduled to go to trial in the near future. In light of their current posture, it is most efficient for the Litigations to proceed in their current forums.

20. Neither the Debtors, their estates nor creditors will suffer undue prejudice or hardship if the automatic stay is modified. Rather, the Debtors believe they have very compelling cases and there is a significant likelihood that the Debtors will recover on account of their claims in the Litigations (in excess of any claims asserted against them in the Alta Mar Litigation) for the benefit of their creditors. Therefore, it is important that the Litigations continue in the ordinary course to maximize value of the Debtors' estates for the benefit of creditors. Any delay in moving forward with the Alta Mar Litigation, however, will increase the litigation costs and deduct from any recovery on the Alta Mar Counterclaim.

21. The relief requested would only allow the Alta Mar Arbitration Demand to proceed up to entry of a judgment, but would not permit SDC to enforce any potential judgment in its favor. Any distribution on account of such a judgment would be made pursuant to a plan of

reorganization. Accordingly, SDC will not have any advantage over the Debtors' other creditors by virtue of the relief requested.

WHEREFORE, Debtors respectfully request that the Court grant the Motion and such other and further relief as is just and proper.

Respectfully submitted:

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
Proposed Attorneys for Tarragon Corporation,
et al., Debtors-in-Possession

By: /s/ Michael D. Sirota
Michael D. Sirota
Warren A. Usatine

Dated: January 12, 2009

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-2(c)
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In re:

TARRAGON CORPORATION, *et al.*,

Debtors-in-Possession.

Case Nos. 09-

Judge:

Chapter 11

Hearing Date: January ____, 2009

**ORDER GRANTING THE DEBTORS RELIEF FROM AUTOMATIC STAY PURSUANT
TO 11 U.S.C. § 362(d)(1), TO THE EXTENT APPLICABLE, TO ALLOW THE DEBTORS
AND THIRD PARTIES TO CONTINUE PENDING ARBITRATION AND STATE COURT
PROCEEDINGS**

The relief set forth on the following pages, numbered two (2) and three (3), is hereby
ORDERED.

(Page 2)

Debtor: TARRAGON CORPORATION, *et al.*,
Case No. 09-
Caption of Order: ORDER GRANTING THE DEBTORS RELIEF FROM AUTOMATIC
STAY PURSUANT TO 11 U.S.C. § 362(d)(1), TO THE EXTENT
APPLICABLE, TO ALLOW THE DEBTORS AND THIRD PARTIES
TO CONTINUE PENDING ARBITRATION AND STATE COURT
PROCEEDINGS

THIS MATTER having been opened to the Court by Tarragon Development Corporation, LLC and Central Square Tarragon LLC, two (2) of the within debtors and debtors-in-possession (collectively, the “Debtors”), by and through their proposed attorneys, Cole, Schotz, Meisel, Forman & Leonard, P.A., upon motion for entry of an Order granting the Debtors relief from the automatic stay to pursuant to 11 U.S.C. § 362(d)(1), to the extent applicable, to allow the Debtors and third parties to continue pending arbitration and state court proceedings (the “Motion”);¹ and good and sufficient notice of the hearing on the Motion having been provided in accordance with the Order Regarding Application for Expedited Consideration of First Day Matters, previously entered by the Court, as evidenced by the Affidavit of Service filed with the Court; and the Court having considered the Motion, the opposition thereto, if any, and the arguments of counsel; and good cause appearing for the entry of this Order,

IT IS ORDERED as follows:

1. Pursuant to 11 U.S.C. § 362(d)(1), the automatic stay, to the extent applicable, is vacated to allow the Litigations to continue.

¹ All capitalized terms shall have the meanings ascribed to them in the Verified Application submitted in support of the Motion.

(Page 3)

Debtor: TARRAGON CORPORATION, *et al.*,
Case No. 09-
Caption of Order: ORDER GRANTING THE DEBTORS RELIEF FROM AUTOMATIC
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PROCEEDINGS

2. Notwithstanding the relief in paragraph 1 of this Order, SDC shall be entitled to proceed with the Alta Mar Arbitration Demand up to entry of a judgment against Tarragon Dev. Corp. with any further relief subject to further order of this Court.

3. The Debtors' proposed counsel shall serve a copy of this Order on all parties-in-interest within seven (7) days.