

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

)	
In re:)	
)	
SW BOSTON HOTEL VENTURE LLC,)	Chapter 11
<i>et al.,</i>)	Case No. 10-14535-JNF
)	
Debtors.)	
)	<i>(Jointly Administered)</i>

**APPLICATION TO EMPLOY OTIS & AHEARN, INC.
AS BROKER TO MARKET AND SELL CONDOMINIUM UNITS**

Pursuant to Section 327 of the Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and MLBR 2014-1, SW Boston Hotel Venture LLC (the "Debtor"), the debtor and debtor-in-possession in the above captioned jointly administered cases, respectfully requests that this Court enter an order authorizing the Debtor to retain Otis & Ahearn, Inc. ("O&A") as its real estate broker to market and sell condominium units. O&A has substantial experience and expertise in local real estate sales. In consideration of the Debtor's continuing efforts to sell condominium units, employment of O&A as real estate broker is appropriate under the circumstances. In further support of this application, the Debtors respectfully aver as follows:

JURISDICTION

1. This Court has jurisdiction to consider and determine this application pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Section 327 of the Bankruptcy Code and Rule 2014 and 2016 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

3. On April 28, 2010 (the “Petition Date”), the Debtor and its affiliates, General Trading Company, Frank Sawyer Corporation, 100 Stuart Street LLC and Auto Sales & Service, Inc. (collectively the “Debtors”), each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (“Code”) in the United States Bankruptcy Court for the District of Massachusetts (the “Court”).

4. The Debtors continue to operate as debtors in possession pursuant to Sections 1107 and 1108 of the Code. As of the date of this application, no official committee of creditors has been appointed in any of the Debtors’ cases.

5. The W Boston Hotel and Residences project (the “Project”) opened on October 29, 2009, and comprises a 350,650 square foot, 26-story building located at 100 Stuart Street in the heart of Boston’s Theatre District. The Project contains the 235–room, four-star Hotel, the 122 condominium units, and a two-level underground parking garage with capacity for 142 vehicles (the “Garage”).

6. The Project was designed by the internationally-known architectural firm of William Rawn and Associates Architects, together with the architect of record TRO/Jung Brannen, Inc.

7. The Hotel is branded as a “W” Hotel – the only W Hotel in New England – and serves Boston’s many national and international business travelers and tourists. The Hotel is operated by Starwood Hotels and Resorts Worldwide, Inc. (“Starwood”) through its affiliate, W Hotel Management, Inc. (the “Hotel Operator”). The Hotel includes a retail store operated by

Wink Retail Group, Inc., an affiliate of Starwood, a signature restaurant operated by Cullinary Concepts (Boston) LLC (the “Restaurant Operator”) at a prominent location along Tremont Street, and will also include a second floor spa with a first floor entrance and related retail space on the Stuart Street side of the Project (the “Spa”). The Hotel is also planned to include a below-grade theme bar/lounge with an entrance adjacent to the spa entrance on Stuart Street (the “Theme Lounge”). The Spa is in the final stages of construction and the Theme Lounge is planned to open in the fall. The Hotel Operator will operate the Spa and the Theme Lounge.

8. The Hotel restaurant, Market by Jean-Georges Vongrighen, is a 6,000 square foot, first-class, full-service restaurant that occupies the entire first floor of the Hotel along Tremont Street. Market is an important amenity for the city’s visitors and theatre-goers.

9. The condominium units consist of 122 studio, one (1), two (2) or three (3) bedroom luxury condominium units. The list prices for the condominium units range from \$600,000 to over \$4,000,000.

10. The Debtors filed these cases in order to preserve the value of their assets and their opportunity to reorganize.

RETENTION OF O&A

11. The Debtor seeks an order of this Court authorizing the employment and retention of O&A as their real estate broker in these Chapter 11 cases and performing services necessary to assist the Debtors to sell and close sales of condominium units.

12. The Debtors propose to employ O&A due to O&A’s extensive experience representing sellers of luxury condominiums. O&A served as the Debtors’ real estate broker prior to the Petition Date, and is intimately familiar with the Project and the condominium units.

The Debtors believe that O&A is well qualified to serve as their real estate broker in these Chapter 11 cases.

13. Prior to the Petition Date, on or about November 12, 2008, SW Boston and O&A entered into an Exclusive Sales and Marketing Consulting Agreement (the "2008 Agreement"), a copy of which is attached as Exhibit A.¹ Pursuant to the 2008 Agreement, O&A is to receive compensation of \$7500 per month, plus one percent (1%) of aggregate gross sale proceeds. The 2008 Agreement further provides for compensation of 5% of the amount by which aggregate gross sale proceeds exceed \$157,448,456 and 10% of the amount by which aggregate gross sale proceeds exceed \$175,185,806 and reimbursement of any budgeted or approved Project marketing costs and expenses incurred or advanced on behalf of the Debtor. Participating co-brokers will be paid a co-brokerage commission of 2.5%. Any of O&A's brokers (other than Kevin J. Ahearn and those who are members of the on-site sales team) may be participating co-brokers. The Debtor proposes to compensate O&A in accordance with the 2008 Agreement, and request authority to make such payments.

DISINTERESTEDNESS OF O&A

14. GMR has filed the affidavit of Kevin J. Ahearn in connection with this application and in accordance with Federal Rules of Bankruptcy Procedure 2014 and 2016, and MLBR 2014-1 (the "Affidavit").

15. To the best of the Debtors' knowledge, O&A has not represented, nor does it now represent, any interest adverse to the Debtors with respect to the matters on which O&A is to be employed. O&A and its principals and employees are otherwise disinterested persons with respect to the Debtors, as that term is defined in the Bankruptcy Code.

¹ The Debtor has not yet made determinations regarding the assumption of contracts, and does not seek to assume the 2008 Agreement at this time.

16. As of the Petition Date, O&A held an unsecured claim against the Debtor's estate in the amount of \$53,819.42, based upon O&A's current review of its internal records.

17. O&A will further amend or supplement the Affidavit to any extent necessary.

WHEREFORE, the Debtor respectfully requests that this Court enter an Order (a) authorizing the retention of Otis & Ahearn, Inc. as real estate broker to the Debtor under the terms and conditions set forth in this application; and (b) granting to the Debtor such other and further relief as the Court deems just and proper in the circumstances.

Respectfully Submitted,
SW BOSTON HOTEL VENTURE LLC,

By its proposed counsel,

/s/ Natalie B. Sawyer
Harold B. Murphy (BBO #362610)
D. Ethan Jeffery (BBO #631941)
Natalie B. Sawyer (BBO #660072)
HANIFY & KING, P.C.
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Dated: May 18, 2010

562512

EXHIBIT A

10/27/08 DRAFT

EXCLUSIVE SALES AND MARKETING CONSULTING AGREEMENT

This Exclusive Sales and Marketing Consulting Agreement ("Agreement") is entered into this 17th day of NOVEMBER, 2008, effective as of June 1, 2007, by and between SW Boston Hotel Venture LLC, having an address c/o Sawyer Enterprises, 200 Newbury Street, Boston, MA 02116 (the "Owner/Developer") and Otis & Ahearn, Inc., a Massachusetts corporation with a principal place of business at 200 Newbury Street, Boston, Massachusetts 02116 (the "Consultant").

WITNESSETH

WHEREAS, the Owner/Developer is the developer of the W Boston Hotel and Residences Project at 100 Stuart Street in Boston, Massachusetts (the "Project"), which will include approximately 123 market residential condominium units (the "Units"), a valet-only garage with indoor parking spaces (the "Spaces"), and certain storage units ("Storage Units") in such garage for owners of the Units.

WHEREAS, the Owner/Developer wishes to engage the Consultant as its exclusive sales and marketing consultant with respect to the marketing and sale of the Units, Storage Spaces, and Spaces at the Project; and

WHEREAS, the Consultant is willing to so act as the Owner/Developer's exclusive sales and marketing consultant on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants herein provided and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Exclusive Marketing Consultant. The Owner/Developer hereby engages the Consultant as its exclusive marketing consultant for the sale of Units, and Storage Units and Spaces at the Project and the Consultant accepts such engagement upon the terms and conditions set forth herein.

2. Duties of Consultant. The specific duties of the Consultant shall include the following:

- Attend all weekly job/marketing meetings; attendance shall be by either Kevin J. Ahearn or the Sales Director engaged by the Owner/Developer; provided that Kevin J. Ahearn shall attend at least 3 of such meetings each calendar month.

- Conceptualize, outline, and execute a marketing and sales strategy and program for the Project, and a marketing budget for the Project (the "Marketing Budget"), each to be reviewed and approved by the Owner/Developer; and after Owner/Developer's approval, execute such marketing and sales strategy.
- Propose and recommend an on-site sales staff to be engaged by the Owner/Developer. Such sales staff shall include a Sales Director and an Assistant Sales Director/sales administrator or two Sales Directors (both of whom will be responsible for performing their own administrative work). Such persons shall be compensated directly by Owner/Developer but Consultant shall provide oversight and direction for such personnel in its capacity as Owner/Developer's consultant.
- Arrange for the preparation of one or more independent contractor agreements to be entered into between Owner/Developer and the Sales Director, Assistant Sales Director and Sales Administrator for the residential portion of the Project.
- Prepare, approve and submit invoices for direct payment by Owner/Developer of all fees to sales personnel and other marketing expenses.
- Provide overall supervision of the Project sales staff in its capacity as Owner/Developer's consultant.
- Recommend to the Owner/Developer a creative team (the selection of which shall be approved by Owner/Developer), to be retained by the Owner/Developer to prepare marketing materials, brochure, advertisements, website, photography, signage, etc., and once the creative team is selected, assist in supervising the creative team in the development of such marketing materials.
- Place the Units on the list of downtown Boston inventory with the computer service "LINK," and encourage and coordinate active co-brokerage participation from the local brokerage community by creating an active participating co-brokerage program.
- Place the Units on the list of suburban inventory with the computer service "MLS," and encourage and coordinate active co-brokerage participation from the suburban brokerage community by creating an active participating co-brokerage program.
- To provide the Owner/Developer a preliminary Project marketing budget in the form attached hereto as Exhibit A. Consultant does not represent, warrant or guarantee that the actual marketing costs for the Project will not exceed the amounts set forth in the preliminary or final Project Marketing Budget.
- Provide the Owner/Developer with relevant market data.
- Coordinate preparation by the Sales Director and delivery to Owner/Developer, of (i) weekly reports, which shall include information on all Unit inspections, buyer applications, contracts

pending, contracts signed, closings, and such other information reasonably requested by Owner/Developer, and (ii) such other reports and information reasonably requested by Owner/Developer.

- Provide Owner/Developer on a monthly basis, with weekly summaries of condominium unit sales in Boston, to the extent retrieved by Consultant from computer services to which it subscribes.
- Market the Units in compliance with all local, state and federal laws and regulations, including fair housing and anti-discrimination laws and regulations.

3. Duties of Owner/Developer. The responsibilities of the Owner/Developer pursuant to this Agreement shall include the following:

- To pay all compensation due Consultant pursuant to the terms hereof, and marketing costs (or reimburse the Consultant for such costs to the extent paid by the Consultant as authorized by the Marketing Budget approved by Owner/Developer or otherwise approved by the Owner/Developer directly in writing or by email) on a timely basis, including all fees payable to the Consultant, the Sales Director, Assistant Sales Director and Sales Administrator.
- To engage the Sales Director, Assistant Sales Director and Sales Administrator in accordance with the compensation levels set forth in the Marketing Budget.
- To establish an expeditious decision making and approval process.
- To attend job meetings on a weekly basis or as otherwise mutually agreed by Owner/Developer and Consultant with respect to the marketing of the Project.
- To include reference to the Consultant as the exclusive marketing agent for the Project in the signage, advertising, public relations, and media releases relating to the Project.
- Subject to any restrictions that apply to Owner/Developer (under its purchase agreement, applicable laws, the condominium documents or otherwise), allow Consultant to place a sign on the exterior of the Project identifying the Consultant as the Owner/Developer's exclusive sales and marketing consultant for the Project, until such time as occupancy of the Project occurs. The cost of formulating such sign shall be the sole responsibility of Consultant, and Owner shall be responsible for the installation and maintenance of such sign.
- To provide complete and accurate information concerning the Project to enable the creative team to prepare accurate marketing materials and to review all market materials for accuracy and approve the same.
- To consider in good faith all recommendations made by the Consultant related to the marketing and sales of the Units and Spaces.

4. Costs and Expenses. The Consultant shall have no responsibility for any of the ~~costs of marketing the Units (other than general overhead of the Consultant's business)~~ and all such costs and expenses, to the extent set forth in the Marketing Budget or otherwise approved by the Owner/Developer in writing (which may be by email), shall be paid directly by the Owner/Developer, or reimbursed by the Owner/Developer to the Consultant to the extent paid directly by the Consultant. All requisitions which are submitted to the Owner/Developer on or before the fifth (5th) day of the month will be paid on or before the last business day of that month. Requisitions submitted to the Owner/Developer after the fifth (5th) day of any month will be paid on or prior to the last business day of the next following month. The Consultant may submit requisitions for its costs and expenses in advance of the date that the Consultant will be obligated to pay any third party with respect to such expense so that Consultant will not be required to use its own funds to pay such expenses in advance of reimbursement by Owner/Developer; provided that such costs and expenses are set forth in the Marketing Budget or otherwise approved by the Owner/Developer in writing or by email. All persons serving sales and marketing functions with respect to the Project shall be independent contractors of the Owner/Developer. The Owner/Developer shall be solely responsible for payment of compensation to such sales personnel, to the extent set forth in the Marketing Budget or otherwise approved by the Owner/Developer pursuant to written agreements with such personnel or otherwise. The Owner/Developer shall indemnify, defend and hold the Consultant harmless from any and all liabilities, claims, actual losses, actual costs and expenses (including attorneys' fees) arising out of or relating to any costs or expenses of marketing the Units, to the extent set forth in the Marketing Budget or otherwise approved by the Owner/Developer in writing, or any claim of any independent contractor employed by the Owner/Developer with respect to the Project unless arising from the gross negligence or willful misconduct of the Consultant, or the Consultant's breach of the terms of this Agreement, including the authorization of costs and expenses not included in the Marketing Budget or not otherwise authorized by the Owner/Developer.

5. Consulting Fees. The Owner/Developer shall pay the Consultant a non-refundable consulting fee ("Consulting Fee") of \$15,000.00 per month during the period of September 1, 2007 through the later of (i) October 1, 2009, or (ii) the date of the issuance of the first Certificate of Occupancy for any portion of the residential portion of the Project (such date, the "Trigger Date"). Thereafter, the Owner/Developer shall pay the Consultant a Consulting Fee of \$7,500 per month until the first to occur of (i) the sellout of the Units, or (ii) the one year anniversary of the Trigger Date. As used in this Agreement, "sellout" shall mean the actual closing of the sale of all Units in the Project. At the time of signing this Agreement, Owner/Developer shall pay the Consultant (i) \$195,000, representing unpaid Consulting Fees for the thirteen month period of September, 2007 through September, 2008; (ii) reimbursement for Consultant's out of pocket round trip New York travel expenses and for payments made by the Consultant for compensation to the sales staff and Consultant's out of pocket photography costs; (iii) the \$75,000 predevelopment consulting fee provided for at Section 6(g) and (iv) Consultant's October, 2008 invoice.

6. Incentive Commissions. In addition to the Consulting Fees payable under Section 5, the Consultant shall be entitled to Incentive Commissions and Additional Incentive Commissions as provided in this Section 6.

- (a) The Consultant shall be paid an Incentive Commission upon the sale of each Unit, Space and Storage Unit Space (but not if such space is leased) equal to 1% of the Aggregate Gross Sale Proceeds (as hereafter defined) from each such sale, until such time as the Aggregate Gross Sale Proceeds for all Units, Spaces and Storage Units equals the Incentive Base (as hereinafter defined).
- (i) In addition to the Incentive Commissions, if the Aggregate Gross Sale Proceeds exceed the Incentive Base but do not exceed the Additional Incentive Base (as hereinafter defined), Consultant shall be paid a first bonus commission of an additional 5% of the amount by which the Aggregate Gross Sale Proceeds exceeds the Incentive Base (the "First Bonus Commission"). For example, if Aggregate Gross Sale Proceeds are \$161,000,000, Consultant shall be paid (A) \$1,574,485 (.01 x \$157,448,456), and (B) \$177,577 (5% of \$161,000,000 less \$157,448,456).
- (ii) In addition to the Incentive Commissions and the First Bonus Commission, if the Aggregate Gross Sale Proceeds exceed the Additional Incentive Base (as hereinafter defined), Consultant shall be paid a Second Bonus Commission of an additional 10% of the amount by which the Aggregate Gross Sale Proceeds exceed the Additional Incentive Base. For example, if Aggregate Gross Sale Proceeds are \$180,000,000, Consultant shall be paid (A) \$1,574,485 (.01 x \$157,448,456), (B) \$886,867 (5% of \$175,185,806 less \$157,448,456) and (C) \$481,419 (10% of \$180,000,000 less \$175,185,806).
- (iii) In addition to the Incentive Commissions, First Bonus Commission (if applicable) and Second Bonus Commission (if applicable), if the Aggregate Gross Sale Proceeds at the sellout of the Project equal or exceed the Incentive Base and 75% of all of the Units were under purchase and sale agreement within 180 days from the later of (a) the date of the installation of Project signage, or (b) the date that the Project website becomes operational (which the parties agree was July 1, 2008), the Consultant shall be paid a special bonus commission at the sellout of the Project equal to \$75,000 times a fraction, the numerator of which shall be the Aggregate Gross Sale Proceeds at sellout of the Project and the denominator of which shall be the Incentive Base ("Special Bonus Commission").
- (iv) In addition to the Incentive Commissions, First Bonus Commission (if applicable), Second Bonus Commission (if applicable) and Special Bonus Commission (if applicable), if the Aggregate Gross Sale Proceeds at the sellout of the Project equal or exceed the Incentive Base and all Units were under purchase and sale agreement within 360 days from July 1, 2008, the Consultant shall be paid a Special Sellout Bonus Commission at the sellout of the Project equal to

\$75,000 times a fraction, the numerator of which shall be the Aggregate Gross Sale Proceeds at the sellout of the Project and the denominator of which shall be the Incentive Base.

- (v) If Consultant achieves 58% presales by the Trigger Date and this Agreement is not otherwise terminated the Owner/Developer shall pay to the Consultant an additional \$75,000 paid at the closing of the Unit which results in 58% of all Units having closed. This amount may be incorporated by the Consultant as an incentive and retention device as part of the onsite sales compensation packages. This strategy is employed to try to control overall the upward cost pressure of onsite compensation costs existing in the marketplace as well as provide an incentive to stay with the Project until completion.
 - (b) As used herein, "Aggregate Gross Sale Proceeds" shall mean the gross sale proceeds payable to the Owner/Developer from the sale of Units, Spaces and Storage Units, if any.
 - (c) As used herein, "Incentive Base" shall mean \$157,448,456 based on a sale price of \$1,061.56 per square foot, based on the Project consisting of 148,318 net saleable square feet (such saleable square footage not including the square footage of the Spaces and the Storage Units).
 - (d) As used herein, the "Additional Incentive Base" shall mean \$175,185,806 based on the Project consisting of 148,318 net saleable square feet (as hereinabove defined).
 - (e) If the net saleable square footage of the Project is reduced below 148,318 square feet, the Incentive Base and Additional Incentive Base shall be proportionately reduced.
 - (f) If any Unit or Space is sold to an affiliate of the Owner/Developer at a discounted price, for the purpose of computing Aggregate Sales Proceeds, such Unit or Space shall be treated as if sold at the Unit's then fair market value, determined by reference to the price list used for financing purposes with an average sellout of \$1,061.56 /sf.
 - (g) Owner/Developer agrees to pay the Consultant \$75,000, representing a fair and equitable predevelopment fee for the consulting services rendered by the Consultant during the period prior to September, 2007. Owner/Developer agrees that such predevelopment fee shall be paid to the Consultant at the time of the signing of this Agreement. In addition, at the time of signing this Agreement, Owner/Developer shall reimburse the Consultant for out-of-pocket travel expenses for Consultant's round trip travel to New York and for Consultant's out-of-pocket expenses for photography work for the Project.
7. Co-Brokerage. Owner/Developer shall pay a co-brokerage commission of 2.5% to participating co-brokers. Any of Consultant's brokers (other than those who are members of the on-site sales team) may be participating co-brokers.

8. Term; Termination.

- (a) The term of this Agreement shall commence as of June 1, 2007 and shall continue until the sale of the last Unit in the Project, unless sooner terminated as hereinafter provided.
- (b) Owner/Developer shall have the right to terminate this Agreement, upon 30 days' prior written notice to Consultant.
- (c) Owner/Developer shall also have the right to immediately terminate this Agreement in the event of any breach or failure of the Consultant to perform its obligations under this Agreement, which breach or failure to perform is not cured within ten (10) days after written notice from the Owner/Developer, or if such breach or failure cannot reasonably be cured within such ten (10) day period, such period of time (not to exceed twenty (20) days) needed to cure such breach or failure, provided that the Consultant promptly commences to cure such breach or failure within ten (10) days after such notice and diligently prosecute such cure to completion.
- (d) Owner/Developer shall also have the right to terminate this Agreement, upon fourteen (14) days' prior written notice to Consultant, if any Sales Milestone (as hereinafter defined) is not achieved; provided that Owner/Developer shall exercise the termination right provided in this Section (d) with respect to any Sales Milestone within 15 business days after the failure to meet such Sales Milestone. As used herein, each of the following events shall be a "Sales Milestone" hereunder: (i) the execution by the Owner/Developer of purchase and sale agreements (or reservation agreements which successfully transition into purchase and sale agreements) of either 50% of the Units or for aggregate purchase prices which total 50% of the Incentive Base by the Trigger Date, and (ii) thereafter the execution of purchase and sale agreement (or reservation agreements which successfully transition into purchase and sale agreements) for at least 4 Units during each calendar month during the term of this Agreement commencing with the month following the Trigger Date for the building. If more than 60% of the Units are under purchase and sale (or reservations which transition to purchase and sale) or purchase and sale agreements (or reservations which successfully transition into purchase and sale agreements), are entered into for purchase prices which total 60% of the Incentive Base by the Trigger Date and/or more than four purchase and sale agreements (or reservations agreements which successfully transition into purchase and sale agreements) are entered into in any month after the Trigger Date ("Surplus Agreements"), such Surplus Agreements shall be carried over and credited against any shortfall in purchase and sale agreements in any subsequent month for purposes of computing Sales Milestones.
- (e) Upon the termination of this Agreement, neither the Owner/Developer nor the Consultant shall have any further rights or obligations under this Agreement, except to the extent such rights or obligations expressly survive the termination hereof.
- (f) Notwithstanding anything to the contrary contained in this Agreement, if the Owner/Developer shall terminate this Agreement pursuant to this Section 8, the Owner/Developer shall remain obligated to pay to the Consultant the Incentive

Commission with respect to the sale of any Unit or Space which closes after the termination hereof, if such Unit or Space, as of the date of termination of this Agreement, was subject to a binding purchase and sale agreement or a binding reservation agreement which is successfully transitioned into a purchase and sale agreement ("binding agreements"); such Incentive Commissions shall be payable upon the closing of the sale of such Unit or Space. The Owner/Developer shall also remain obligated to pay the Additional Incentive Commissions (i.e., the First Bonus Commission and the Second Bonus Commission) to the Consultant (to the extent not previously paid) if the sum of the Aggregate Gross Sale Proceeds from (i) the sale of all Units and Spaces sold during the term of this Agreement and (ii) the sale of Units and Spaces which were under binding agreements at the time of termination exceeds the Incentive Base and Additional Incentive Base, respectively. The Owner/Developer shall also remain obligated to pay the Special Bonus Commission and Special Sellout Bonus Commission if the percentage of sales criteria for such as set forth in Sections 6(a)(iii) and (iv), respectively, have been satisfied prior to the termination of the Agreement and taking into account the Units and Aggregate Gross Sale proceeds from (i) the sale of all Units and Spaces sold during the Term of this Agreement and (ii) the sale of Units and Spaces which were under binding agreement at the time of termination.

- (g) Notwithstanding anything to the contrary contained in this Agreement, if the Owner/Developer shall terminate this Agreement under Section 8(b), the Owner/Developer shall pay to the Consultant, upon such termination, in addition to any other fees payable hereunder, a termination fee equal to the excess, if any, of (i) \$50,000 for each month with respect to which the Consultant was entitled to receive monthly Consulting Fees pursuant to Section 5, over (ii) the total Incentive Commissions paid to Consultant prior to the date of such termination or earned and payable thereafter under Section 8(f).
- (h) On or prior to the effective date of termination of this Agreement, Consultant shall deliver to Owner/Developer all books, records, documents, applications, purchase agreements, brochures, advertisements, plans, financial statements, reports and any other documents, papers or memoranda in connection with the formulation or promulgation of the marketing plan and the offering for sale of the Units. Consultant may not retain copies of the same without the prior written consent of Owner/Developer. Consultant also agrees to cooperate with Owner/Developer and any subsequent Owner/Developer of the Project, and their representatives and agents, and to provide them with all necessary information regarding the status of current negotiations with potential purchasers. The provisions of this Section shall survive the termination of this Agreement.

9. General Marketing Strategy / Use of Office. The Owner/Developer and the Consultant have agreed to a general strategy for the marketing of the Project, which general strategy shall be reviewed and updated from time to time by the parties. The Owner/Developer shall, at its cost and expense, retrofit a conference room currently located at the Owner/Developer's (or its affiliate's) office at 200 Newbury Street, Boston, Massachusetts to function as a marketing center for presale marketing activities (the "Sales Center"). The

Owner/Developer, with the recommendation of Consultant, will incrementally add sales staff and/or a sales administrator to work from the Sales Center. It is anticipated that marketing activities will continue to take place at the Sales Center until such time the parties mutually determine that it is desirable for marketing activities to take place at the Project. The parties anticipate that the Owner/Developer will hire a Sales Director for the Project in autumn 2008. At such time as the sales activities move to the Project, the Owner/Developer will add to or name the sales staff for the Project. The Consultant agrees that, subject to its ability to enter into an agreement with its landlord, 200 Newbury Street Corporation ("Landlord"), as hereinafter provided, it shall make available to the Owner/Developer a single office within the Consultant's office at 200 Newbury Street, Boston, Massachusetts, for use by the Owner/Developer as part of the Sales Center. Consultant's obligation to make such office available shall be subject to its Landlord's agreement to provide Consultant with a monthly rent reduction equal to the proportionate share of rent and additional rent (i.e., taxes and common area charges) payable by the Consultant on its lease for such office space during such period of time. Such arrangement shall continue until such time as the Owner/Developer moves the Sales Center to the Project and subject to the continued existence of Consultant's lease. Owner/Developer shall fully restore the office space at 200 Newbury Street to its original condition at Owner/Developer's expense, including the moving in and out of furniture and the storage of office furniture.

10. Independent Contractor; Notice of Competition. The Owner/Developer agrees that the Consultant is acting under this Agreement solely as an independent contractor and not as a partner, joint venturer or employee of the Owner/Developer. Consultant shall be solely responsible for all license registration, insurance, taxes, and other expenses incurred by Consultant in the course of its business, except to the extent such expenses are to be paid by Owner/Developer pursuant to the provisions of this Agreement. The Consultant agrees that it shall provide the Owner/Developer with at least 5 business days' prior written notice before it or any of its affiliates shall enter into any agreement to serve as a sales and/or marketing consultant for any residential condominium project in the City of Boston, Massachusetts (which includes any residential condominium component of a mixed-use project). Owner/Developer acknowledges that the Consultant currently serves as a sales and/or marketing consultant for the following projects: (i) 500 Atlantic Avenue, (ii) Repton Place (Watertown), (iii) Nouvelle at Natick, (iv) The Bryant on Columbus, (v) Westwood Station, (vi) The Penmark, (vii) The Moorings at Hingham Shipyard, (viii) Simon Copley, (ix) 285 Columbus Lofts, and (x) Fairmont/Battery Wharf.

11. Limitation of Liability; Indemnity. Absent gross negligence, willful misconduct or a willful or intentional violation of the terms of this Agreement, the Consultant shall not be liable to the Owner/Developer for indirect, consequential, special or indirect damages, including, without limitation, lost business, profits or damages arising from or connected with the loss of goodwill. The Consultant shall indemnify, defend and hold the Owner/Developer and the Owner/Developer harmless from any and all liabilities, claims, losses, costs and expenses (including attorneys fees) arising out of or relating to the Consultant's gross negligence, willful misconduct or a willful or intentional violation of this Agreement (including marketing the Units, the Storage Spaces or the Spaces in violation of any applicable laws). No member, manager, trustee, officer, employee, agent or officer of Owner/Developer or any member thereof shall

have any personal liability hereunder. The liability of Owner/Developer hereunder shall be limited to Owner/Developer's interest in the Project.

12. Entire Agreement. This document contains the entire Agreement of the parties with respect to the matters set forth herein. No representations were made or relied upon by either party other than those as are expressly set forth herein. This Agreement may not be altered or amended except by an agreement in writing signed by each party.

13. Governing Law; Jurisdiction; Jury Trial Waiver. This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Massachusetts without regard to principles of conflicts of law. All judicial proceedings brought with respect to this Agreement shall be brought in any state or federal court of competent jurisdiction in the Commonwealth of Massachusetts and by execution of this Agreement, the parties accept such jurisdiction and irrevocably agree to be bound by any judgment rendered thereby. Each party irrevocably waives any objection, including, without limitation, the objection to venue or based on the grounds of forum convenes which it may now or hereafter have to the bringing of any such action or proceedings in such respective jurisdiction. The parties hereby waive any right they may have to a jury trial in any proceeding arising under this Agreement. The provisions of this Section 13 shall survive the termination of this Agreement.

14. Severability. In the event that any provision of this Agreement is held to be invalid or unenforceable by a Court of competent jurisdiction, the remaining provisions of this Agreement shall remain in full force and effect.

15. Assignment. The Consultant may not assign this Agreement hereunder without the prior approval of the Owner/Developer, except that no approval shall be required to collaterally assign its rights to receive payments under this Agreement as security for a loan; provided that such loan shall not encumber any Unit, Space or Storage Space or any other portion of the Project. The Owner/Developer may assign its rights under this Agreement to any successor owner of the Project or the residential portion thereof (provided such person or entity assumes the Owner/Developer's obligations under this Agreement) or to any lender as security for a loan secured by the Project or any portion thereof.

16. Successors Bound. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and permitted assigns.

17. Attorneys' Fees. In the event of any litigation between the parties arising out of this Agreement, upon the final resolution of such matter, the prevailing party shall be entitled to recover its reasonable attorney's fees.

18. Broker's License. Consultant represents and warrants that it is duly licensed under the Commonwealth of Massachusetts as a real estate broker authorized by the Commonwealth of Massachusetts to sell residential units (License #2994) and shall maintain such license in full force and effect during the term of this Agreement. Consultant shall promptly inform Owner/Developer if any complaint about Consultant has been filed with the

Board of Registration of Real Estate Brokers & Salespersons for the Commonwealth of
Massachusetts.

19. Confidentiality. Consultant agrees that it will keep all information it receives from Owner/Developer relating to the financing or finances of the Project, the Owner/Developer, the construction and design of the Project, and other designated by Owner/Developer or other members of its consultant team (e.g., the development manager or the architect) confidential from, and shall not release or reveal any such information to, any persons other than its agents, employees, consultants and attorneys, and purchasers and prospective co-brokers, who shall be similarly bound as to confidentiality. This covenant shall not apply to any information required to be disclosed by law or which is otherwise known to the public through any other source not known by Consultant to be subject to a similar confidentiality agreement with Owner/Developer. The provisions of this Section 19 shall survive the termination of this Agreement.

20. Business Days. As used herein, "business days" means days other than Saturday, Sunday or banking holidays in Suffolk County, Massachusetts.

[Signatures on following page.]

Executed as an instrument under seal as of the date first set forth above.

Otis & Ahearn, Inc.

By: 

Kevin J. Ahearn, President

SW Boston Hotel Venture LLC

By: **100 Stuart Street LLC, its Manager**

By: **Frank Sawyer Corporation,
its Manager**

By: 

Carol Sawyer Parks, President

Exhibit A

Form of Project Marketing Budget

(See attached)

8-9-06

DRAFT FORM MARKETING BUDGET

10/29/2008 12:01 PM
Page 1 of 3 pages

Assumption: _____ month Sales Absorption including commencement of Pre Sale Marketing

Item #	Description	Budget
501	Sales Staff Compensation (Annual Average See Notes)	<u>\$0</u>
	Sales Director (1) _____ months	\$0
	Sales Associate (2) _____ months	\$0
	Sales Administrator (3) _____ months	\$0
	(Does NOT include weekend "greeters" paid hourly for events OH's - if necessary / needed)	
502	Brochure Creative & Printing	<u>\$0</u>
	Project logo, 4-color, 6-8 pages, stationary, business cards, floor plan "shells" - floor plans not printed	
503	Advertising	<u>\$0</u>
	Boston Globe display & alphabetical weekly (____ page, 4 color, \$____ / 2 x / month average x 24 months) print only = \$____	
	O&A contract price, weekly alphabetical \$____ / week x _____ weeks = \$____, 8, 4 color \$____ display (slightly smaller ad size) = \$____) *	
	Boston Homes & Condominiums (\$____ / full page, 4 color 2/month x _____ months)	\$0
<i>Downtown Media</i>	Boston Courant (\$____ / ____ 2 page, 4-color, 2/month x _____ months)	\$0
	Boston Magazine or Boston Common Magazine (\$____ / full page, 4 color x 15 insertions	\$0
	* Boston.Com incorporated into advertising strategy	
	condoDomain.Com - recently launched real estate portal (\$____ / month) media buy for _____ months (will be a better deal for 1-2 year contract)	\$0
504	Public Relations _____ months x \$____ / month average) or as needed basis	<u>\$0</u>
505	Event Planner (____/yr x _____ years @ \$____/each) Event Fee	<u>\$0</u>
506	Special Events (Broker/Public)	<u>\$0</u>
	Party, food, liquor, flowers, entertainment, miscellaneous event fee, invitations, lighting, donation, parking, insurance, etc.	
507	Web site	<u>\$0</u>
	Creative & Technical Creation & Updating (2 / yr x _____ years)	
508	Signage exterior of building	<u>\$0</u>
	Creative, fabrication, permits, installation = \$____ \$____ x _____ (# of signs) + exterior up lighting = \$____	
	(Purely an estimate due to not having a design concept)	
509	Onsite Vignette Model(s) + Marketing Sales Center (Estimate)	<u>\$0</u>
	____ Unit vignette models estimate based on other projects. \$____ / \$____ / model = \$____ 1 Building model \$____ estimate	\$____ - \$____ \$0

8-9-06

DRAFT FORM MARKETING BUDGET

10/29/2008 12:01 PM
Page 2 of 3 pages

	Interior Design fee for _____ vignette models, fabrics, finishes = \$ _____ / model (estimate)	\$0
	Interior designer fee for sales office (estimate)	\$0
	Furnishings Sales Office - carpet, furniture, fixtures, drapes, drapes = \$ _____ (estimate)	\$0
510	Hard Costs / Rent	
511	Virtual Tour (of building model, lobby + vignette with models)	<u> </u> \$0
512.	Sales Office Expenses FAX, PC, Phone, Delivery Service, Flowers, Utilities, Supplies, Postage, Sales Staff Monthly Parking, Staff Cell Phones, Fed Ex, Xeroxing, Client Short Term Parking \$ _____ / month (includes parking @ \$ _____ / month)	<u> </u> \$0
513	Business Entertainment \$ _____ x /month x _____ months	<u> </u> \$0
514	CAD Rendering or Photography of Vignette Model (architect's contract ?) \$ _____ each x _____	<u> </u> \$0
515	Direct Mailing(s) Tickler Ad Creative, Lists, Printing, Postage _____ @ \$ _____ each	<u> </u> \$0
516	Broker Functions (Luncheons) Quarterly (_____ months) = _____ @ \$ _____ each Plus restaurant certificate drawings _____ x \$ _____ x _____ Plus miscellaneous	\$0 \$0 \$0
517	Photography (Estimate) Brochure, View Study, Ads, Usage Fees	<u> </u> \$0
518	MLS Listing \$ _____ / quarter / person (assume _____ people)	<u> </u> \$0
519	LINK Listing, Software, Reports (LINK requires projects to list separately, not under O&A) (\$ _____ annual fee for separate office identity) + (\$ _____ per week, per person x _____ people)	<u> </u> \$0
520	O&A Consulting Fee \$ _____ / month - _____ months	<u> </u> \$0
521	O&A Incentive Commission _____% - NIC Bonus Schedule	<u> </u> \$0

8-9-06

DRAFT FORM MARKETING BUDGET

10/29/2008 12:01 PM
Page 3 of 3 pages

522 Co-Brokerage Commissions (paid to outside brokers)
Assuming \$ _____ M + sellout @ 50% / K

\$0

Sub-Total

\$0

523 Contingency +/- 2%

\$0

TOTAL PROJECTED SALES & MARKETING BUDGET

\$0

NOTES:

(1)

The sales staff compensation package(s) includes 3 components: monthly consulting, sales commissions and a sell out bonus; sales commissions and sell out bonuses are paid at unit closings and sellout of the project; we work it backwards as an average annual package based on market demand for sales people and their expectation level on a total project and annual basis and a realistic sales absorption schedule.

Service, Inc. (collectively the "Debtors"), and those entities listed by the Debtor as being creditors.

3. Based upon the review, described above, in accordance with Bankruptcy Rule 2014(a), neither I nor any principal or associate of O&A, insofar as I have been able to ascertain, has any connections or relationships with the Debtors, their creditors or any other parties-in-interest, or their respective attorneys and accountants, the United States Trustee or any person employed in the office of the United States Trustee, except that:

(a) Gilmartin, Magence & Ross LLP ("GMR"), which is a creditor in this case, has represented O&A and the undersigned Kevin J. Ahearn, and certain other legal entities in which I have an interest, in various legal matters involving the purchase and sale of real estate which are not related to this case or the Project;

(b) GMR has provided legal services to buyers, sellers and mortgage lenders in numerous real estate transactions not related to this case or the Project in which O&A acted as a broker (or marketing consultant) and received compensation;

(c) Craig Gilmartin ("Gilmartin") is a member of GMR. Gilmartin is a limited partner in Boston Residential SG Co-Invest Fund Limited Partnership ("Boston SG"), a Massachusetts limited partnership. I am a limited partner of Boston SG and I am also a manager of KA & JS Realty Management Company LLC, a Massachusetts limited liability company, which is the sole general partner of Boston SG. Boston SG has no interest in the Debtor or the Project. Gilmartin was a member of CQ Co Investment Associates LLC ("CQ"), a Massachusetts limited liability company. I was the manager of CQ and was also a member of CQ. CQ has no interest in the Debtor or the Project;

(d) O&A occupies a portion of the fourth floor of 200 Newbury Street, Boston, Massachusetts ("Leased Space") pursuant to a lease dated June 1, 2005 (as amended) entered into with Two Hundred Newbury Street Corporation ("200 NS Corp"). I believe that 200 NS Corp is owned or controlled by the same individuals who own or control the Debtor;

(e) Kortenhaus Communications, Inc., which is a creditor in this case, provides services to RBW, LLC in connection with the marketing of condominium units at 2-5 Battery Wharf, Boston, Massachusetts ("Battery Wharf Project"). O&A is the exclusive sales and marketing consultant for the Battery Wharf Project and O&A receives compensation from RBW LLC for its services in marketing the condominium units at the Battery Wharf Project;

(f) Ultimate Parking LLC ("UP") , which is a creditor in this case, operates the parking facility for the condominium project at 500 Atlantic Avenue, Boston, Massachusetts ("500 Atlantic Project") developed by Extell Boston Residential LLC ("Extell"). O&A is the marketing consultant for Extell in connection with the sale of condominium units at the 500 Atlantic Project which sales may involve related parking rights in the parking facility operated by UP. O&A receives compensation from Extell in connection with sales of condominium units at the 500 Atlantic Project which may involve associated rights in such parking facility;

(g) Prudential Insurance Co. of America ("Prudential") is a creditor in this case and the undersigned believes that an entity controlled by Prudential had a financial interest in Navy Yard Four Associates LLC or of Navy Yard Four Associates Limited Partnership (collectively, "Navy Yard") or an affiliate of Navy Yard, the developer of the Harborview Condominium Project in Charlestown, Massachusetts. O&A had previously been the marketing and sales consultant for the Harborview Condominium Project. O&A no longer provides any services to

the Harborview Condominium Project and is not owed any amounts for its past services at the Harborview Condominium Project.

4. Based upon the review as described above, I am not presently aware of any representation by O&A of any creditors of the Debtors or other parties-in-interest except that, as described at Paragraph 3(g) above, it is believed that Prudential, which is a creditor in this case, controls an entity which had a financial interest in the entity which developed the Harborview Condominium Project and O&A had previously provided marketing services for the Harborview Condominium Project. Because of the size and diversity of O&A's business, it is possible that O&A may represent or may have represented other creditors, equity security holders, or parties-in-interest or their respective attorneys and accountants, but does not represent any such entity in connection with the Debtors. With respect to the parties listed above, O&A has not and will not represent such parties in any matters related to the Debtor's bankruptcy case, except that individual real estate brokers affiliated with O&A (other than Kevin J. Ahearn) have acted (and continue to act) as co-brokers for buyers and prospective buyers of condominium units at the Project in transactions in which commissions will be paid to O&A to be divided with such individual real estate broker.

5. As of the Petition Date based on O&A's current review of its internal records, O&A held an unsecured claim against the Debtor's estate in the amount of \$53,819.42.

6. O&A does not represent, nor is it represented by, any other authorized professional specifically in connection with this case or on a regular basis or in connection with a substantial matter in another case, except that GMR, which has provided legal services to the Debtor, has provided legal services to the undersigned Kevin J. Ahearn and to certain legal

entities in which I hold an interest, in various legal matters involving the purchase and sale of real estate which are not related to this case.

7. The Debtors may retain various professionals during the pendency of this case. O&A will take steps not to unnecessarily duplicate the efforts of any other professional retained in these cases. In that regard, O&A will coordinate with all other professionals retained in these cases to ensure that O&A does not unnecessarily duplicate work being performed by other professionals.

8. Insofar as I have been able to ascertain, based on the review and except as described above, O&A, the principals and associates thereof do not hold or represent any interest adverse to that of the Debtors' estates, except that (a) individual real estate brokers affiliated with O&A (other than Kevin J. Ahearn and those who are members of the on-site sales team) have acted and may in the future act as co-broker for buyers in connection with sales of condominium units at the Project in transactions in which co-broker commissions would be paid to O&A to be divided with such individual real estate broker; and (b) O&A and its affiliated individual real estate brokers have and will continue to act as brokers representing sellers and buyers of real estate which may be competitive with the Project. O&A acts and will continue to act as marketing consultant for real estate developers of other projects which may be competitive with the Project.. Notwithstanding the disclosures contained in paragraph three and above, I believe that I and each shareholder and consultant of O&A is a "disinterested person" as that term is defined in 11 U.S.C. § 101(14). Furthermore, insofar as I have been able to ascertain, neither O&A nor any principal or associate thereof is connected with any Bankruptcy Judge in the District of Massachusetts, or the United States Trustee or any person employed in the office of

the United States Trustee, so as to render the appointment of O&A as broker for the Debtor inappropriate under Fed. R. Bankr. P. 5002(b).

9. O&A and I have conducted, and will continue to conduct, research into any relationships we may have with the Debtors and their creditors, any accountants, attorneys or other professionals of the foregoing, and any other parties interested in this case. Although GMR has undertaken, and will continue to undertake, an investigation to identify any contacts with the Debtors or parties-in-interest, it is possible that such contacts have not been revealed. To the extent any such contacts are discovered, O&A will notify the Court by filing and serving a supplemental affidavit.

10. Any compensation, fee or allowance which may be claimed by me or by O&A will belong wholly to O&A and will not be divided, shared or pooled, directly or indirectly, with any other person or firm except for payment to O&A's brokers and salespersons.

11. O&A seeks compensation of \$7500 per month, plus one percent (1%) of aggregate gross sale proceeds plus 5% of the amount by which aggregate gross sale proceeds exceed \$157,448,456, 10% of the amount by which aggregate gross sales proceeds exceed \$175,185,806 and reimbursement of any budgeted or approved Project marketing costs and expenses incurred or advanced on behalf of the Debtor. Participating co-brokers will be paid a co-brokerage commission of 2.5%. Any of O&A's brokers (other than Kevin J. Ahearn and those who are members of the on-site sales team) may be participating co-brokers.

12. O&A has not been provided with a security retainer for services rendered or to be rendered in connection with its representation of the Debtor.

13. I shall amend this statement immediately upon my learning that (A) any of the within representations are incorrect or (B) there is any change of circumstances relating thereto.

14. I have reviewed the provisions of MLBR 2016-1.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Kevin Ahearn", is written over a horizontal line.

Kevin Ahearn

Dated: _____, 2010

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

)
In re:)
)
)
SW BOSTON HOTEL VENTURE LLC,)
et al.,)
)
Debtors.)

Chapter 11
Case No. 10-14535-JNF

(Jointly Administered)

DECLARATION REGARDING ELECTRONIC FILING

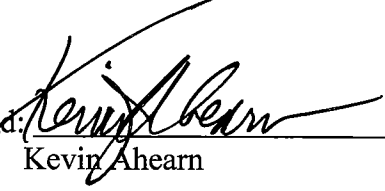
PART I - DECLARATION OF PETITIONER

I, Kevin Ahearn, hereby declare under penalty of perjury that the information contained in the *Affidavit of Kevin Ahearn in Support of Application to Employ Otis & Ahearn, Inc. as Broker to Market and Sell Condominium Units* (the "Document") filed electronically is true and correct.

I understand that this DECLARATION is to be filed with the Clerk of Court electronically with the electronic filing of the Documents. I understand that failure to file this DECLARATION may cause the Documents to be struck and any request contained or relying thereon to be denied, without further notice.

I further understand that pursuant to the Massachusetts Electronic Filing Local Rule (MEFLR)-7(a) all paper documents containing original signatures executed under the penalties of perjury and filed electronically with the Court are the property of the bankruptcy estate and shall be maintained by the authorized CM/ECF Registered User for a period of five (5) years after the closing of this case.

Dated: May __, 2010

Signed: 

Kevin Ahearn

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

)	
In re:)	
)	
SW BOSTON HOTEL VENTURE LLC,)	Chapter 11
<i>et al.</i>)	Case No. 10-14535-JNF
)	
Debtors.)	
)	<i>(Jointly Administered)</i>

**ORDER GRANTING APPLICATION TO EMPLOY OTIS & AHEARN, INC.
AS BROKER TO MARKET AND SELL CONDOMINIUM UNITS**

Upon the application (the "Application") of the above-referenced debtor and debtor-in-possession (the "Debtor") for entry of an order pursuant to Section 327 of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure and MLBR 2014-1, authorizing the Debtor to retain Otis & Ahearn, Inc. ("O&A") as its real estate broker to market and sell condominium units; and the Court having considered the Application and the *Affidavit of Kevin Ahearn in Support of Application to Employ Otis & Ahearn, Inc. as Broker to Market and Sell Condominium Units*; and the Court being satisfied that O&A holds no interest adverse to the Debtors or their estates as to the matters upon which it is to be engaged and is disinterested under Section 101(14) of the Bankruptcy Code, as modified by Section 1107(b) of the Bankruptcy Code; and the Court having jurisdiction to consider the Application and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that the relief requested by the Application is necessary and in the best interests of the Debtor, its estate and its creditors; and it appearing that proper and adequate notice of the Application has been given and that no other or further notice is necessary or required; and after due deliberation and good and sufficient cause appearing therefore, it is hereby **DETERMINED, ORDERED AND ADJUDGED**, that:

1. The Application is hereby approved and granted in its entirety.
2. The Debtor is hereby authorized to retain Otis & Ahearn, Inc. on the terms and conditions set forth in the Application.

Dated: _____, 2010

Joan N. Feeney
United States Bankruptcy Judge

563799