

1 GORDON SILVER
 GERALD M. GORDON, ESQ.
 2 Nevada Bar No. 229
 E-mail: ggordon@gordonsilver.com
 3 THOMAS H. FELL, ESQ.
 Nevada Bar No. 3717
 4 E-mail: tfell@gordonsilver.com
 CANDACE C. CLARK, ESQ.
 5 Nevada Bar No. 11539
 E-mail: cclark@gordonsilver.com
 6 3960 Howard Hughes Pkwy., 9th Floor
 Las Vegas, Nevada 89169
 7 Telephone (702) 796-5555
 Facsimile (702) 369-2666

8 HELLER, DRAPER, HAYDEN,
 9 PATRICK & HORN, L.L.C.
 DOUGLAS S. DRAPER, ESQ. (Admitted Pro Hac Vice)
 10 Louisiana Bar No. 5073
 E-mail: ddraper@hellerdraper.com
 11 WILLIAM H. PATRICK, III, ESQ. (Admitted Pro Hac Vice)
 E-mail: wpatrick@hellerdraper.com
 12 Louisiana Bar No. 10359
 LESLIE A. COLLINS, ESQ. (Admitted Pro Hac Vice)
 13 E-mail: lcollins@hellerdraper.com
 Louisiana Bar No. 14891
 14 650 Poydras St., Suite 2500
 New Orleans, LA 70130
 15 Telephone (504) 581-9595
 Facsimile (504) 299-3300
 16 Attorneys for Desert Capital REIT, Inc.

17 **UNITED STATES BANKRUPTCY COURT**
 18 **FOR THE DISTRICT OF NEVADA**

19 In re:
 20 DESERT CAPITAL REIT, INC.,
 21 Debtor.

Case No.: 11-16624-LBR
 Chapter 11

Date: September 28, 2011
 Time: 2:00 p.m.

22 **APPLICATION BY DEBTOR FOR ENTRY OF AN ORDER AUTHORIZING THE**
 23 **EMPLOYMENT AND RETENTION OF REED SMITH, LLP AS SPECIAL COUNSEL**
 24 **FOR DEBTOR, NUNC PRO TUNC AS OF JUNE 15, 2011 PURSUANT TO**
 25 **SECTION 327(e) AND 328 OF THE BANKRUPTCY CODE**

26 Desert Capital REIT, Inc. ("Debtor"), a Nevada corporation, Debtor and Debtor-in-
 27 possession, by and through its attorneys, the law firms of Heller, Draper, Hayden, Patrick &
 28 Horn, LLC and Gordon Silver, hereby applies to this Court for an order authorizing Debtor's
 retention of Reed Smith, LLP as Debtor's special counsel, *nunc pro tunc* as of June 15, 2011

1 pursuant to Sections¹ 327(e) and 328 of Chapter 11 of Bankruptcy Code, and Bankruptcy Rules
2 2014(a) and 2016(b).

3 This application (the "Application") is made and based upon the points and authorities
4 herein, the Omnibus Declaration of David M. Bagley in Support of Debtor's Motions (the
5 "Omnibus Declaration")² [ECF No. 57], which Declaration is incorporated herein in its entirety
6 by this reference, and the Declaration of David M. Bagley in Support of Application by Debtor
7 for Entry of an Order Authorizing the Employment and Retention of Reed Smith, LLP as Special
8 Counsel for Debtor, Nunc Pro Tunc as of June 15, 2011 Pursuant to Sections 327(e) and 328 of
9 the Bankruptcy Code (the "Bagley Declaration"), filed contemporaneously herewith, the
10 affidavit and declaration of David E. Weiss (the "Affadavit"), also filed contemporaneously
11 herewith, the points and authorities which follow, the pleadings and papers and other records
12 contained in this Court's file, judicial notice of which is respectfully requested, and any evidence
13 or oral argument presented at the time of the hearing on this Application.

14
15 **I.
INTRODUCTION**

16 1. On April 29, 2011 (the "Petition Date"), Taberna Preferred Funding VI, Ltd.
17 ("Taberna VI"), Taberna Preferred Funding VIII, Ltd. ("Taberna VIII," and together with
18 Taberna VI, "Taberna"), and Sage Trust, and its participants (collectively, "Sage Trust," and
19 with Taberna, the "Petitioning Creditors"), filed an involuntary petition for relief (the
20 "Involuntary Petition") under Chapter 11 against Debtor, thereby commencing the above-
21 captioned bankruptcy case (the "Chapter 11 Case"). See ECF No. 1.

22 2. With the consent of Debtor, an Order for Relief, pursuant to Chapter 11 of the
23 Bankruptcy Code, was entered by this Court on the 15th day of June, 2011 (the "Date of Order
24 for Relief"). See ECF Nos. 34-35.

25 ¹ All references to "Chapter" and "Section" herein shall be to the Bankruptcy Code appearing in Title 11 of the U.S.
26 Code; all references to a "Bankruptcy Rule" shall refer to the Federal Rules of Bankruptcy Procedure; and all
27 references to a "Local Rule" shall refer to the Local Rules of Bankruptcy Practice of the U.S. District Court for the
28 District of Nevada.

² All capitalized, undefined items not otherwise defined herein shall have those meanings ascribed in the Omnibus
Declaration.

1 3. Debtor continues to operate its business as debtor and debtor-in-possession
2 pursuant to Sections 1107(a) and 1108. See generally docket.

3 4. As of the date of this Application, no official committee of unsecured creditors
4 has been appointed. See generally docket.

5 **II.**
6 **JURISDICTION AND VENUE**

7 5. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
8 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding
9 pursuant to 28 U.S.C. § 157(b)(2).

10 6. The statutory predicate for the relief sought herein are sections 327(e), 329 and
11 1107(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a), 2016 and 5002.

12 **III.**
13 **RELIEF REQUESTED**

14 7. By this Application, the Debtor seeks authority from this Court to employ and
15 retain Reed Smith as special counsel in connection with American International Specialty Lines
16 Insurance Company (" AISLIC ") regarding insurance coverage issues arising from the *Second*
17 *James, Inc., et al v. Todd Parriott, et al.* litigation (the " James Litigation "), pending in the Eighth
18 Judicial District Court of Clark County Nevada under Case Number A-540243, Department
19 Number XI. Specifically, the Debtor respectfully requests entry of an order pursuant to sections
20 327(e), 328 and 1107 of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016, authorizing
21 Reed Smith to perform the services that will be necessary during this Chapter 11 Case, as more
22 fully described below and in the engagement letter (the " Engagement Letter ") attached as
23 Exhibit 1 to the Bagley Declaration.

24 **IV.**
25 **BASIS FOR RELIEF.**

26 8. The Debtor has selected Reed Smith to act as special counsel in this Chapter 11
27 Case because of Reed Smith's (i) extensive experience; (ii) knowledge and their familiarity with
28 the AISLIC insurance coverage issues; and (iii) pre-petition representation of the Debtor in the
James Litigation.

1 9. The Debtor seeks to retain Reed Smith subject to the oversight of this Court and
2 such retention is sought pursuant to section 327(e) of the Bankruptcy Code, which states:

3 The trustee, with the court's approval, may employ, for a specified special
4 purpose, other than to represent the trustee in conducting the case, an
5 attorney that has represented the debtor, if in the best interest of the estate,
6 and if such attorney does not represent or hold any interest adverse to the
debtor or to the estate with respect to the matter on which such attorney is
to be employed.

7 11 U.S.C. § 327(e).

8 10. Attorneys retained pursuant to section 327(e) of the Bankruptcy Code are not
9 required to meet the "disinterested" standard set forth in section 327(e) of the Bankruptcy Code.
10 *See generally In re Boot Hill Biofuels, LLC*, 2009 WL 982190 (Bankr. D.Kan. March 2009); *In*
11 *re Team Financial, Inc.*, 2010 WL 2836877 (Bankr. D.Kan. July 2010). *See also In re Henlar,*
12 *Ltd.* 1997 U.S. Dist. LEXIS 134, at *10-11 (D. E.D. La. 1997); *In re Roy Frischhertz Contru.*
13 *Co.*, 2007 Bankr. LEXIS 2898, at *6-7 (Bankr. E.D. La. 2007). Special counsel retained
14 pursuant to section 327(e) of the Bankruptcy Code "need only avoid possession interests adverse
15 to the debtor or to the estate with respect to the matter on which such attorney is to be
16 employed." *In re West Delta Oil Co., Inc.*, 432 F.3d 347, 357 (5th Cir. 2005); *see also In re*
17 *NRG Resources, Inc.*, 64 B.R. 643 (D. W.D. La. 1986).

18 11. As required by Bankruptcy Rule 2014(a),³ this Application, the Bagley
19 Declaration, and the Affidavit set forth: (a) the specific facts showing the necessity for Reed
20 Smith's employment; (b) the reasons for the Debtor's selection of Reed Smith as its special
21 counsel; (c) the professional services to be provided by Reed Smith; (d) the arrangement between

22 _____
23 ³ Bankruptcy Rule 2014(a) provides that an application seeking the employment of professional persons pursuant to
section 327 of the Bankruptcy Code:

24 shall state the specific facts showing the necessity for the employment, the name of the person to be
25 employed, the reasons for the selection, the professional services to be rendered, any proposed
26 arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's
27 connections with the debtor, creditors, any other party in interest, their respective attorneys and
28 accountants, the United States trustee, or any person employed in the office of the United States
trustee. The application shall be accompanied by a verified statement of the person to be employed
setting forth the person's connections with the debtor, creditors, any other party in interest, their
respective attorneys and accountants, the United States trustee, or any person employed in the office
of the United States trustee.

1 the Debtor and Reed Smith with respect to Reed Smith's compensation (as well as the
2 reasonableness thereof); and (e) to the best of the Debtor's knowledge, the extent of Reed
3 Smith's connections, if any, to certain parties in interest in this matter.

4 **V.**
5 **QUALIFICATIONS OF PROFESSIONALS.**

6 12. The Debtor has selected Reed Smith as its special counsel because Reed Smith
7 has been representing the Debtor in this matter since October 2010. The Debtor submits the cost
8 of bringing in new counsel is prohibitive.

9 **VI.**
10 **SCOPE OF SERVICES**

11 13. The Debtor anticipates that Reed Smith will render legal services to the Debtor
12 which include, but shall not be limited to, the following:

- 13 i. Analyzing and responding to AISLIC's coverage position, including its
14 position that it need only allocate 15% of the defense expenses to covered
15 loss under the applicable policy;
- 16 ii. Engage in discussions and potential negotiations regarding the issues; and
- 17 iii. All necessary administrative and professional services necessary in
18 representing the Debtor in the James Litigation.

19 14. Subject to the Court's approval of the Application, Reed Smith is willing to serve
20 as the Debtor's special counsel and to perform the services described above.

21 **VII.**
22 **DISINTERESTEDNESS**

23 15. Notwithstanding the foregoing, based upon the Affidavit, the Debtor believes that,
24 except as set forth therein, Reed Smith does not hold or represent any interest adverse to the
25 Debtor with respect to the matters for which Reed Smith is to be employed.

26 16. Based upon the Weiss Affidavit, the Debtor believes that Reed Smith does not
27 have any connection with the Debtor, the Debtor's directors and executive management, the
28 Debtor's other professionals, the Debtor's equity holders, the Debtor's primary secured creditors,
the Debtor's largest unsecured creditors, the Bankruptcy Judges of the United States Bankruptcy

1 Court for the District of Nevada, the United States Trustee and the Assistant Trustees and trial
2 attorneys for the office of the United States Trustee, except as set forth in the Affidavit.

3 17. Reed Smith anticipates that allowed fees and expenses will be satisfied from
4 assets of the Debtor's estate, including, without limitation, the Debtor's cash collateral.

5 18. The Debtor believes that the employment of Reed Smith as special counsel would
6 be in the best interests of the Debtor and its estate and desires to employ Reed Smith effective as
7 of June 15, 2011, with compensation to be determined upon application to this Court.

8 **VIII.**
9 **COMPENSATION**

10 19. Section 328 of the Bankruptcy Code provides, in relevant part, that the Debtor,
11 "with the courts approval, may employ or authorize the employment of a professional person
12 under section 327 ... on any reasonable terms and conditions of employment, including on a
13 retainer, on an hourly, on a fixed or percentage fee basis, or on a contingent fee basis...." 11
14 U.S.C. § 328(a). Accordingly, Section 328 of the Bankruptcy Code permits the compensation of
15 professionals on flexible terms that reflect the nature of their services and market conditions, and
16 specifically contemplates approval of the hourly retention pursuant to the Engagement Letter
17 requested in this Application.

18 20. Pursuant to the terms of the Engagement Letter, and subject to the Court's
19 approval of this Application, Reed Smith intends to (a) charge for its legal services on an hourly
20 basis in accordance with ordinary and customary hourly rates in effect on the date services are
21 rendered, and (b) seek reimbursement of actual and necessary expenses and other charges that
22 Reed Smith incurs.

23 21. Reed Smith's hourly rates are set at a level designed to fairly compensate Reed
24 Smith for the work of its attorneys and paralegals and to cover fixed and routine overhead
25 expenses. Hourly rates vary with the experience and seniority of the individuals assigned. These
26 hourly rates are subject to periodic adjustments to reflect economic and other conditions, and are
27 consistent with the rates charged elsewhere. Reed Smith's hourly fees are comparable to those
28

1 charged by attorneys of similar experience and expertise for engagements of scope and
 2 complexity similar to this Chapter 11 Case, and are accordingly reasonable.

3 22. Reed Smith's hourly billing rates for its work in connection with this matter range
 4 from \$330.00 to \$635.00 for attorneys and \$250.00 to \$300.00 for paralegals. The fees are based
 5 upon the complexity of the case and the issues involved in the matter. The following
 6 professionals are presently expected to have primary responsibility for providing services to the
 7 Debtor with current applicable rates as follows:

8	David E. Weiss	\$635.00
9	Associates	\$330.00-\$500.00
	Paralegals	\$250.00-\$300.00

10 23. Reed Smith will also seek reimbursement for actual and necessary expenses
 11 incurred in connection with its engagement by the Debtor, which may include, but are not
 12 limited to, postage, overnight mail, courier delivery, transportation, overtime expenses, computer
 13 assisted legal research, photocopying, outgoing facsimile transmissions, airfare, meals, and
 14 lodging.

15 24. Reed Smith intends to maintain detailed, contemporaneous time records and to
 16 apply to the Court for the allowance of compensation for professional services and
 17 reimbursement of expenses in accordance with applicable provisions of the Bankruptcy Code,
 18 the Bankruptcy Rules, and any additional procedures that may be established by the Court in this
 19 Chapter 11 Case. Reed Smith has agreed to accept as compensation such sums as may be
 20 allowed by the Court. Reed Smith understands that interim and final fee awards are subject to
 21 approval by this Court.

22 25. On or about October 20, 2010, Reed Smith received \$5,000.00 as a retainer for
 23 services to be performed and expenses to be incurred. This retainer amount of \$5,000.00 on
 24 receipt was placed in a trust account and has been drawn upon to cover ongoing work.

25 26. Reed Smith currently holds approximately \$2,500.00 as security for fees and
 26 expenses to be incurred. Reed Smith will utilize the remaining funds and apply them to fees and
 27 costs as they are incurred. At such point as the funds are depleted, Reed Smith will expect
 28 payment from the Debtor.

1 27. No previous application for the relief requested herein has been made to this or
2 any other Court.

3 **IX.**
4 **NOTICE**

5 28. Notice of this pleading has been provided by e-mail, facsimile, or overnight
6 delivery to (a) the Debtor; (b) counsel for the Debtor; (c) any official committees appointed in
7 the case and their respective counsel; (d) the Office of United States Trustee; (e) the top 20
8 largest unsecured creditors of the Debtor until any official committee for unsecured creditors is
9 formed; (f) the Internal Revenue Service; (g) United States Attorney; (h) Attorney General of the
10 United States; and (i) all parties who request notices pursuant to Rule 2002 of the Federal Rules
11 of Bankruptcy Procedure. In light of the nature of the relief requested, the Debtor submits that
12 no further notice is required.

13 **X.**
14 **CONCLUSION**

15 WHEREFORE, the Debtor respectfully requests that this Court approve the retention and
16 employment of Reed Smith, L.L.P. as special counsel for the Debtor, *nunc pro tunc* as of June
17 15, 2011 and for such other and further relief as may be just and equitable.

18 DATED this 25th day of August, 2011

19 GORDON SILVER

20 By:  _____

21 GERALD M. GORDON, ESQ.
22 THOMAS H. FELL, ESQ.
23 CANDACE C. CLARK, ESQ.
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169

24 HELLER, DRAPER, HAYDEN,
25 PATRICK & HORN, L.L.C.
26 DOUGLAS S. DRAPER, ESQ. (Admitted *Pro Hac Vice*)
27 WILLIAM H. PATRICK, III, ESQ. (Admitted *Pro Hac Vice*)
28 LESLIE A. COLLINS, ESQ. (Admitted *Pro Hac Vice*)
650 Poydras St., Suite 2500
New Orleans, LA 70130
Attorneys for Desert Capital REIT, Inc.