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Chapter 11 Debtor and Debtor-in-Possession

8  
9 **UNITED STATES BANKRUPTCY COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **LOS ANGELES DIVISION**

12 In re ) CASE NO. 2:09-bk-39652-AA  
13 ) (Chapter 11)  
14 ) **NOTICE OF MOTION AND MOTION**  
15 ) **FOR ORDER APPROVING POST-**  
16 ) **PETITION SECURED-PRIMING**  
17 ) **FINANCING FOR THE DEBTOR;**  
18 ) **MEMORANDUM OF POINTS AND**  
19 ) **AUTHORITIES IN SUPPORT**  
20 ) **THEREOF**  
21 ) [Filed concurrently with Declarations]  
22 )  
23 ) DATE: August 25, 2010  
24 ) TIME: 10:00 a.m.  
25 ) PLACE: Courtroom # 1375

21 **TO THE HONORABLE ALAN M. AHART, UNITED STATES BANKRUPTCY**  
22 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, THE SECURED**  
23 **CREDITORS, THE 20-LARGEST UNSECURED CREDITORS, AND ALL PARTIES**  
24 **WHO HAVE REQUESTED SPECIAL NOTICE:**

25 **PLEASE TAKE NOTICE** that on Wednesday, August 25, 2010, at the hour of  
26 10:00 a.m. or as soon thereafter as the matter may be heard before the Honorable Alan

1 M. Ahart, United States Bankruptcy Judge, Courtroom #1375, Roybal Federal  
2 Courthouse, 255 East Temple Street, Los Angeles, CA 90012, a hearing will take place  
3 to consider the Motion of the Debtor and Debtor-In-Possession herein, Abdul Halim  
4 Sheikh (hereinafter sometimes referred to as the "Debtor"), for authority to borrow up to  
5 \$1.5 million in new funds on a post-petition basis from Lone Oak Fund (hereinafter  
6 sometimes referred to as the "Lender" or "Lone Oak") to: **(1)** fund tenant improvements  
7 for the recently constructed multiple unit commercial business and shopping center  
8 located at 4253-4263 Oceanside Boulevard, Oceanside, California (hereinafter referred  
9 to as the "Oceanside Project"); **(2)** pay administrative expenses incurred by the Estate;  
10 and **(3)** fund, to the extent needed, litigation of the Estate against the Debtor's lenders,  
11 East West Bank and Oaktree Investment Fund, LLC and its general contractor, Jaynes  
12 Corp. (hereinafter referred to as the "\$ 364 Motion").

13 The Lender intends to provide the Debtor with up to \$1.5 million secured by a first  
14 priority lien on the Oceanside Project ahead of all existing liens and encumbrances. The  
15 terms of the Lender's advance to the Debtor are set forth in the June 3, 2010-Letter of  
16 Intent (hereinafter referred to as the "LOI") attached to the Declarations of Halim Sheikh,  
17 John G. Slagle, Steve Willmore, Sherry LaMaison, and Denise Mardesich (hereinafter  
18 collectively referred to as the "Declarations") as Exhibit "A." The new loan provides for  
19 interest only payments of \$11,125.00/month, payment of a broker's fee of \$15,000.00,  
20 and an origination fee of \$26,250.00.

21 The reasons for the post-petition secured borrowing are as follows:

22 A. The Debtor filed this case as an emergency filing prompted by one of  
23 Debtor's secured creditors on the Oceanside Project seeking to complete non-judicial  
24 foreclosure sales on the Oceanside Project and to have a Receiver appointed by the San  
25 Diego Superior Court. In order to avoid the dismemberment of the Debtor's assets, the  
26 Debtor elected to file this case to preserve the status quo and proceed toward an orderly  
27 reorganization effort.

28

1 B. The Debtor believes that he can increase the cash flow of the Oceanside  
2 Project and thus increase the value of the Oceanside Project by: **(i)** completing  
3 construction and receiving from the City of Oceanside his four Final Certificates of  
4 Occupancy; **(ii)** completing leasing activates and signing new tenants for the Oceanside  
5 Project; **(iii)**, funding, where necessary, tenant improvements; **(iv)** paying the  
6 administrative expenses of the Estate; and **(v)** funding, if necessary, litigation with the  
7 Debtor's pre-petition lenders and the general contractor. Most of the new tenants require  
8 an expenditure of funds to complete required tenant improvements (hereinafter referred  
9 to as the "TI's"). A proposed Budget for the Oceanside Project showing the uses of the  
10 borrowing is attached to the Declarations as Exhibit "B."

11 C. The Debtor believes that the real property in the Estate has equity over and  
12 above the claims of the existing secured creditor and other lien holders. Thus, the  
13 allowing the new loan retains the existing lienholders' rights and does not decrease their  
14 collateral but rather enhances the cash flow and the value of the Oceanside Project.

15 D. The Debtor has been unable to obtain funding from another source on an  
16 unsecured or junior secured basis. The Debtor requires the advance from the Lender to  
17 complete TI's, to pay administrative expenses incurred during the course of this case,  
18 and to move this case toward plan confirmation.

19 The § 364 Motion is made and is based upon this Notice of Motion and Motion, the  
20 attached supporting Memorandum of Points and Authorities, the Declarations of A. Halim  
21 Sheikh, John G. Slagle, Ph.D., MAI, of Real Estate Professionals, Steve Willmore, Sherry  
22 LaMaison, and Denise Mardesich, served and filed concurrently herewith, the  
23 statements, arguments, and representations of counsel who appear at the hearing on the  
24 § 364 Motion, 11 U.S.C. §§ 105, 361, 364(d), Fed.R.Bankr.P. Rule 4001(c), and any  
25 other evidence, oral or documentary, which may be presented at or prior to the hearing  
26 on the § 364 Motion and all other matters of which this Court may properly take judicial  
27 notice.

1           **PLEASE TAKE FURTHER NOTICE** that any objection, joinder, or response to the  
2 § 364 Motion must be in writing, must be accompanied by supporting evidence, must  
3 comply with Local Bankruptcy Rule 9013-1, and must be filed with the Court and served  
4 on the following parties not later than 14 (fourteen days) prior to the hearing on the § 364  
5 Motion: **(i)** counsel to the Debtor at the following address: The Law Offices of James  
6 Andrew Hinds, Jr., Attn: James Andrew Hinds, Jr., Esq., 21515 Hawthorne Blvd., Suite  
7 1150, Torrance, CA 90503, Facsimile: (310) 792-5977; and **(ii)** the Office of the United  
8 States Trustee, 725 S. Figueroa Street, Suite 2600, Los Angeles, CA 90017: Facsimile:  
9 (213) 894-2603. Local Bankruptcy Rule 9013-1 (h) states that if you do not timely file  
10 and serve an objection or response to the Motion, the Court may find that you have  
11 consented to the relief requested herein.

12  
13           **WHEREFORE**, the Debtor respectfully requests that this Court authorize and  
14 Order the following:

- 15           A.     Authorize the Debtor to incur a post-petition borrowing of \$1.5 million from  
16 Lone Oak Fund secured by a senior lien against the Oceanside Project;
- 17           B.     Find that notice of the § 364 Motion is appropriate under the circumstances;
- 18           C.     Find that the interests of the existing Lenders is adequately protected; and
- 19           D.     Grant such other and further relief as the Court deems just and proper.

20  
21 Dated: August 2, 2010

Respectfully submitted,  
JAMES ANDREW HINDS, JR.  
PAUL R. SHANKMAN  
HANNA B. RAANAN  
LAW OFFICES OF JAMES ANDREW HINDS, JR.

22  
23  
24  
25 By: /s/ James Andrew Hinds, Jr.  
          JAMES ANDREW HINDS, JR.  
26 Attorneys for Abdul Halim Sheikh, Chapter 11 Debtor  
and Debtor in Possession

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION AND STATEMENT OF FACTS**

4 1. The Debtor filed this chapter 11 case on October 27, 2009 (hereinafter  
5 referred to as the "Petition Date"). Since the Petition Date the Debtor has operated his  
6 business as the Debtor-In-Possession under §§ 1107 and 1108. (See Declaration of A.  
7 Halim Sheikh (hereinafter referred to as the "Sheikh Dec.") served and filed herewith  
8 at ¶ 2.)

9 2. The Debtor individually owns a recently constructed multiple unit  
10 commercial business and shopping center located at 4253-4263 Oceanside Boulevard,  
11 Oceanside, California (hereinafter referred to as the "Oceanside Project"). The  
12 Oceanside Project has been granted four conditional Certificates of Occupancy and  
13 approximately 90% of the rentable space is leased or subject to Letters of Intent. (See  
14 Declaration of Steve Willmore (hereinafter referred to as the "Willmore Dec.") at ¶¶ 1  
15 through 6 and Exhibit "C" thereto.) On a post-petition basis, the Oceanside Project has  
16 seen tenant activity increase the occupancy rate from 40% as of the date of the Petition,  
17 to approximately 90% today. Prior and subsequent to the Petition Date the Debtor has  
18 engaged in aggressive efforts to lease out the balance of the Oceanside Project and to  
19 locate funds to complete TI's. (See Sheikh Dec. at ¶¶ 3 and 4.)

20 3. This emergency chapter 11 filing was ultimately necessitated by the actions  
21 of the Debtor's senior lender to have a receiver appointed as part of its pending state  
22 court action against the Debtor and the Oceanside Project. The current holder of the first  
23 Trust Deed, Oaktree Investments LLC (hereinafter referred to as "Oaktree"), is the  
24 assignor of East West Bank (hereinafter referred to as the "Bank"), the construction  
25 lender for the Oceanside Project. (See Sheikh Dec. at ¶ 5.)

26 4. The Bank ceased funding the Oceanside Project prior to the last draw  
27 under the terms of the construction loan causing a default with the general contractor on  
28

5.

1 the Oceanside Project, Jaynes Corporation of California (hereinafter referred to as  
2 "Jaynes"). The Debtor contends that he and the Oceanside Project each hold claims  
3 against the Bank for fraud, lender liability, and breach of the terms of the construction  
4 loan based upon written and oral representations made to the Debtor and the Oceanside  
5 Project to provide both an extension on the construction loan and a mini-perm loan for  
6 the Oceanside Project. (Sheikh Dec. at ¶¶ 5 through 8.)

7 5. The Debtor was unable to complete and lease out all of the units at the  
8 Oceanside Project in a timely fashion as a result of material construction problems and  
9 delays caused by the general contractor, Jaynes. The actions of Jaynes caused the  
10 Oceanside Project to be completed late and allowed the Bank the option to cease  
11 funding the construction loan. The failure of the Bank to fund the final draws under the  
12 construction loan resulted in the Debtor falling behind in its payments to the general  
13 contractor and to subcontractors which, in turn, resulted in the recordation of multiple  
14 mechanics' liens against the Oceanside Project. (Sheikh Dec. at ¶ 6.)

15 6. Therefore, the emergency filing was mandated by the Debtor's desire  
16 preserve asset value and the continuation of going concern asset value of the Oceanside  
17 Project. The further prosecution of this case under chapter 11 is also mandated by the  
18 desire to preserve assets value and deal fairly with all of the creditors of the Estate.  
19 (Sheikh Dec. at ¶ 7.)

20 7. Pre-petition the Debtor was sued in the San Diego Superior Court by  
21 Oaktree. The Debtor Answered the Complaint, filed a Cross-Complaint, and removed  
22 the matter to this Court. (See Oaktree Investment Fund, LLC v. Sheikh, Adv. No. 2:010-  
23 ap-01312 AA.) In this matter the Debtor filed a Cross-Complaint against Oaktree and its  
24 assignor, East West Bank, seeking relief for (i) breach of contract, (ii) breach of the  
25 implied cotenant of good faith and fair dealing, (iii) fraud, (iv) non-disclosure, and (v)  
26 declaratory relief. (Sheikh Dec. at ¶ 8.) By Order entered by this Court this month, the

27 ///

1 claims for relief for non-disclosure and declaratory relief were dismissed with leave to  
2 amend. An Amended Cross-Complaint has been filed by the Debtor.

3 8. Pre-petition the Debtor was sued in the San Diego Superior Court by  
4 Jaynes in a matter entitled Jaynes Corporation of California v. Sheikh, Adv. No. 2:10-ap-  
5 01311 AA. In this matter, the Debtor filed a Cross-Complaint against Jaynes and  
6 Continental Casualty Company seeking relief for: **(i)** breach of written contract; **(ii)**  
7 declaratory relief; **(iii)** specific performance under bonds; and **(iv)** breach of covenant of  
8 good faith and fair dealing. (Sheikh Dec. at ¶ 9.)

9 9. Pre-Petition, Oaktree held a senior lien against the Oceanside Project, a  
10 junior lien against the Debtor's house, and a lien interest in the Debtor's family stock  
11 portfolio. The value of the Oceanside Project is believed to be between \$10.0 and \$12.0  
12 million based on an appraisal obtained by the Debtor this month (see paragraph 10  
13 below). This value could be as high as \$13.0 million based upon the broker's opinion of  
14 value. (See Willmore Dec. served and filed herewith.) The value of the Debtor's house  
15 is believed to be approximately \$2.9 million based on brokers' opinions of value obtained  
16 last month (see paragraph 11 below) and the current value of the Debtor's stock portfolio  
17 is \$100,000.00 (see paragraph 12 below). The alleged amount of the Oaktree claim is  
18 \$10.57 million (subject to offset for the fraud and breach of contract claims as held  
19 against the Bank). Hence, as of the Date of the § 364 Motion, the interests of Oaktree  
20 were protected by an equity cushion of at least \$2.0 million. (Sheikh Dec. at ¶ 13.)

21 10. The Debtor believes, based upon an appraisal dated July 6, 2010, that the  
22 Oceanside Project is today worth between \$10.0 (as-is value) and \$12.0 million (as  
23 seasoned). (See Declaration of John G. Slagle, Ph.D. (hereinafter referred to as "Slagle  
24 Dec.") at ¶ 5 and Exhibit "C" attached to the Declarations.)<sup>1</sup> The Slagle opinion is  
25

26 \_\_\_\_\_  
27 <sup>1</sup> The Court is requested to take Judicial Notice of the Declaration of John G. Slagle, Ph.D.  
28 MAI, filed January 13, 2010 (Docket Item # 41), containing an appraisal obtained by the Debtor's construction  
lender, East West Bank.

1 supported by the opinion of the brokers employed to assist the Debtor in leasing the  
2 Oceanside Project. (See Willmore Dec. at ¶¶ 10.)

3 11. The Debtor believes, based upon recent opinions of three real estate  
4 brokers familiar with the Debtor's house, that the house is today worth between \$2.9  
5 million and \$2.93 million. (See Declarations of Denise Mardesich and Sherry LaMaison  
6 and Exhibits "I," and "K" to the Declarations.)

7 12. The Debtor believes that the value of the Debtor's stock portfolio is  
8 \$100,000.00 based on the account statement from last month. (Sheikh Dec. at ¶¶ 12.)

9 13. The Debtor's exit strategy in this case is and has been to: **(i)** complete the  
10 leasing of the Oceanside Project and to allow rents to "season" so that the cash flow is  
11 matured; **(ii)** to aggressively prosecute his claims and causes of action against both  
12 Jaynes and Oaktree/East West Bank; and **(iii)** to raise third party money on a secured  
13 and unsecured basis to fund the continued leasing and development of the Oceanside  
14 Project. In either event, short of a full take out loan, the Debtor believes that raising post-  
15 petition funds to complete the TI's and allow for the prosecution of this chapter 11 case is  
16 necessary for the preservation of asset value of the Oceanside Project and this Estate.  
17 (Sheikh Dec. at ¶¶ 16.)

18 14. After a year long exhaustive search, the Debtor entered into the June 3,  
19 2010-LOI with Loan Oak for the proposed financing. The Lender intends to provide the  
20 Debtor with up to \$1.5 million secured by a senior lien on the Oceanside Project. The  
21 terms of the proposed lending are set forth in the LOI dated June 3, 2010 and attached to  
22 the Declarations as Exhibit "A." The Debtor has executed the LOI and is prepared to  
23 accept the loan on the terms set forth in the June 3, 2010-LOI with Lone Oak Fund,  
24 subject to this Court's approval. (Sheikh Dec. at ¶¶ 15 and Exhibit "A" to the  
25 Declarations.)

26 15. The Debtor's Budget showing the proposed uses for the borrowing is  
27 attached to the Declarations as Exhibit "B." All of loan proceeds will be used to: **(i)** pay  
28

1 for tenant improvements for the Oceanside Project; (ii) fund the Debtor's administrative  
2 expenses in this case; and (iii) fund, as and if needed, litigation with Oaktree/East West  
3 Bank and Jaynes. (Sheikh Dec. at ¶ 15 and Exhibit "B" to the Declarations.)

4 16. Based on the current value of the collateral held by Oaktree, the Debtor  
5 submits that the interests of Oaktree will not be prejudiced by the proposed borrowing by  
6 the Debtor. In addition to the junior lien interest in the Oceanside Project, Oaktree will  
7 retain its lien rights in the Debtor's house and the Debtor's stock portfolio. The equity  
8 cushion available to Oaktree exceeds \$2.0 million. In addition, as the Oceanside Project  
9 is leased up and seasons as tenant rents come on line and the final Certificates of  
10 Occupancy are obtained, the value of the pool of collateral available to Oaktree will be  
11 enhanced. (Sheikh Dec. at ¶¶ 3 and 10 through 13.)

12  
13 **II.**

14 **THE POST-PETITION SENIOR SECURED BORROWING WITH LONE OAK FUND**

15 Pursuant to this § 364 Motion, the Debtor seeks to borrow on a senior secured  
16 basis \$1.5 million from Lone Oak Fund. As noted in the Sheikh Declaration, the terms  
17 and conditions of the post-petition borrowing were the subject of significant and extensive  
18 post-petition negotiations between the Debtor and the Lender, and are thus fair and  
19 reasonable. As noted in the Sheikh Declaration, the Debtor sought out alternative  
20 sources of funds and has determined that the June 3, 2010-LOI with Lone Oak Fund  
21 represents the best alternative available to the Estate. (Sheikh Dec. at ¶¶ 15 through  
22 18.)

23 The terms of the proposed borrowing are set forth in the LOI with Lone Oak. The  
24 maximum draw under the loan will be \$1.5 million. The term will be 12-months (which  
25 may be extended). The interest rate is 8.90% with monthly interest-only payments due to  
26 Lone Oak of \$11,125.00. There is a loan origination fee of \$26,250.00 and a broker's fee  
27 of \$15,000.00, both of which will be paid through the funding of the loan. There is no  
28

1 prepayment penalty, there are no junk fees, and the closing will be upon entry of an  
2 Order approving the § 364 Motion. (Sheikh Dec. at ¶ 15 and Exhibit "A" to the  
3 Declarations.)

4 Like any other comprehensive financing arrangement, the post-petition borrowing  
5 confers a number of benefits on the Debtor and reflects several tradeoffs. The post-  
6 petition borrowing should provide the Debtor with adequate funding for the next round of  
7 TI funding to bring in new tenants to the Oceanside Project, maintain the Debtor's  
8 relationship with his professionals, and fund, if necessary litigation with the construction  
9 lender and general contractor until the Debtor can locate larger sums to finance his exit  
10 strategy. (Sheikh Dec. at ¶¶ 16 through 20.)

11  
12 **III.**

13 **THE DEBTOR'S REQUEST FOR THE POST-PETITION SENIOR SECURED**  
14 **BORROWING SHOULD BE APPROVED SINCE IT MEETS THE STANDARDS OF**  
15 **§ 364(d) OF THE CODE**

16 A. Jurisdiction And Venue Are Proper Before This Court.

17 This Court has jurisdiction over this chapter 11 case and this Motion pursuant to  
18 28 U.S.C. §§1334 and 157(b), and venue is proper in this District pursuant to 28 U.S.C.  
19 Sections 1408 and 1409.

20  
21 B. The Debtor's § 364 Motion Meets The Standard In The Code.

22 By this § 364 Motion the Debtors seeks, inter alia, pursuant to Bankruptcy Code  
23 §§ 105, 361, 362(a), 363(e), and 364(d)(I), and Rules 2002, 4001<sup>2</sup> and 9014 of the  
24 Federal Rules of Bankruptcy Procedure, the following: (i) authority to incur secured Post-  
25 Petition financing on a superpriority basis pursuant to 11 U.S.C. 364(d); (ii) a finding of

26 \_\_\_\_\_  
27 <sup>2</sup> Fed.R.Bank.P. Rule 4001(c) sets out a detailed list of items to be included in borrowing  
28 motions under §364(c) and (d), including among others a copy of the credit agreement and a form of  
proposed order.

1 adequate protection to Oaktree pursuant to §§ 361 and 364; (iii) authority to obtain  
2 secured post-petition financing from the Lender, up to an aggregate principal amount not  
3 to exceed \$1.5 million, secured by automatically perfected first-priority security interests  
4 in the Debtor's ownership interest in the Oceanside Project pursuant to §364(d) on the  
5 terms contained in the June 3, 2010-LOI (Exhibit "A" to the Declarations); and (iv) the  
6 granting of Lone Oak Fund superpriority status pursuant to Bankruptcy Code § 364(d).

7 The Bankruptcy Code establishes relatively few requirements for the obtaining of  
8 priming financing as proposed in this § 364 Motion. See 11 U.S.C. § 364(d).<sup>3</sup> First, the  
9 debtor must establish that it is otherwise unable to obtain such credit. Second, the  
10 requested priming lien can only be obtained after notice and a hearing. Third, the debtor  
11 must show that in connection with a priming lien the interests of the existing secured  
12 creditor is adequately protected. 11 U.S.C. § 364(d)(2). Here, the debtor has the burden  
13 of establishing that Oaktree's lien will be adequately protected if the priming lien is  
14 permitted. In re Mosello (Bankr. S.D. N.Y. 1996) 195 B.R. 277, 288, citing In re Dunes  
15 Casino Hotel (Bankr. D.N.J. 1992) 69 B.R. 784, 793-94, which quotes H.R. Rep. No. 595  
16 at 339, 1978, U.S. Code Cong. & Ad. News at 5787, 6295.

17  
18 C. The Interests Of Oaktree Are Adequately Protected By Its Junior Lien In  
19 The Oceanside Project, Its Junior Lien Against The House, And Its Lien  
20 Against The Stock Portfolio In This Case.

21 Section § 364(d)(1)(B) requires the Debtor to show that the interests of the primed  
22 lien holder is adequately protected. Here the interests of Oakwood are adequately  
23 protected by the increase in the value of the Oceanside Project as the TI's are

24 \_\_\_\_\_  
25 <sup>3</sup> 11 U.S.C. § 364(d) provides: (1) The court, after notice and a hearing, may authorize the  
26 obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is  
27 subject to a lien only if – (A) the trustee is unable to obtain such credit otherwise; and (B) there is adequate  
28 protection of the interest of the holder of the lien on the property of the estate on which such senior or equal  
lien is proposed to be granted. (2) In any hearing under this subsection, the trustee has the burden of proof  
on the issue of adequate protection.

1 completed, the rents seasoned at the Oceanside Project, the existing lien on the Debtor's  
2 house, and the existing lien on the Debtor's stock portfolio. The equity cushion in these  
3 three items exceeds the amount of the proposed senior secured borrowing. (Sheikh Dec.  
4 at ¶¶ 10 through 13.)

5 Adequate protection may be provided by, among other things: "(1) periodic cash  
6 payments; (2) additional or replacement liens; or (3) other relief resulting in the  
7 'indubitable equivalent' of the secured creditor's interest." In re Stony Creek  
8 Technologies, LLC (Bank. E.D. Penn. 2007) 364 B.R. 882, 890 citing 11 U.S.C. § 361.  
9 What constitutes adequate protection must be determined on a case-by-case basis and  
10 is a "question of fact rooted in measurements of value and the credibility of witnesses."  
11 In re Snowshoe Co. (4th Cir. 1986) 789 F.2d 1085, 1088.

12 The determination of adequate protection is a fact-specific inquiry. "It's application  
13 is left to the vagaries of each case . . . but its focus is protection of the secured creditor  
14 from diminution in the value of its collateral during the reorganization process." "Given  
15 the fact that super priority financing displaces liens on which creditors have relied in  
16 extending credit, a court that is asked to authorize such financing must be particularly  
17 cautious when assessing whether the creditors so displaced are adequately protected."  
18 Mosello, supra, 195 B.R. at 288-289 (citations omitted).

19  
20 D. In This Case The Interests Of The Existing Lenders Is Protected By A  
21 Substantial Equity Cushion.

22 The most common way to establish adequate protection is to demonstrate the  
23 existence of an "equity cushion." See, e.g., In re C.B.G Ltd. (Bankr. M.D. Pa. 1992) 150  
24 B.R. 570, 572-73 (16% equity cushion not adequate to support priming lien); In re Plabell  
25 Rubber Products, Inc. (Bankr. N.D. Ohio 1992) 137 B.R. 897, 899-901 (extensive equity  
26 cushion adequate). For example, in Dunes Casino Hotel, supra, the debtor proposed to  
27 incur \$700,000 in priming indebtedness, whereas the pre-petition debt against the subject  
28

1 property was \$17.5 million and the property was valued at \$26.2 million. The bankruptcy  
2 court found the equity cushion more than adequate under the circumstances. 69 B.R. at  
3 793.

4 The Debtor has the burden of proof on the issue of adequate protection. The  
5 Tenth Circuit Court of Appeals explains that: "The whole purpose in providing adequate  
6 protection for a creditor is to insure that the creditor receives the value for which the  
7 creditor bargained prebankruptcy. In determining these values, the courts have  
8 considered 'adequate protection' a concept which is to be decided flexibly on the  
9 proverbial 'case-by-case' basis." Dallas Bank, N.A. v. O'Connor (In re O'Connor), (10<sup>th</sup>  
10 Cir. 1987), 808 F.2d 1393, 1396-97. The existence of an equity cushion is, as the Ninth  
11 Circuit Court of Appeals has stated, "the classic form of protection for a secured debt . . .  
12 ." Pistol v. Mellor (In re Mellor) (9<sup>th</sup> Cir. 1984), 734 F.2d 1396, 1400; see also In re  
13 Interstate Distrib. Co., Inc., (Bankr. D.Mont. 1992), 13 B.R. 86, 89-90 (recognizing that an  
14 equity cushion is the classic form of protection for a secured debt, and its existence,  
15 standing alone, can provide adequate protection under the Bankruptcy Code.)

16 The Mellor Court defined the term "equity cushion" as "the value in the property,  
17 above the amount owed to the creditor with a secured claim, that will shield that interest  
18 from loss due to any decrease in the value of the property during the time the automatic  
19 stay remains in effect." Id. at 1400 n.2. This statement is consistent with § 361 which  
20 provides that adequate protection is required to the extent the debtor's "use, sale, lease  
21 or grant results in a decrease in the value of such entity's interest in property." 11 U.S.C.  
22 § 361(1), (2), (3).

23 Generally speaking, adequate protection protects a pre-existing lien holder against  
24 a decrease in the value of its collateral. See, e.g., In re Planned Systems, Inc. (Bankr.  
25 S.D. Ohio 1987) 78 B.R. 852, 861-62. This standard applies equally with respect to a  
26 proposed "priming" financing under § 364(d)(1)(B). See, e.g., In re Hubbard Power &  
27 Light (Bankr. E.D.N.Y. 1996) 202 B.R. 680, 685 ("The goal of adequate protection for  
28

1 purposes of the provision entitling a debtor to obtain financing secured by liens senior to  
2 all other interests is to safeguard the secured creditor from diminution in the value of its  
3 interests."); In re Aqua Assoc. (Bankr. E.D. Pa. 1991) 123 B.R. 192, 196; In re Beker Ind.  
4 Corp. (Bankr. S.D.N.Y. 1986) 58 B.R. 725, 741-42. Here, the value of the Oceanside  
5 Project is increasing and the net impact of the proposed senior secured borrowing will  
6 have a positive impact on the position of the prior lenders.

7           The purpose of 'adequate protection' for a creditor is to [e]nsure that the  
8 creditor receives the value for which he bargained prebankruptcy. The goal of  
9 adequate protection is to safeguard the secured creditor from diminution in the  
10 value of its interest during the Chapter 11 reorganization. In other words, the  
11 proposal should provide the pre-petition secured creditor with the same level of  
12 protection it would have had if there had not been post-petition superpriority  
13 financing.

14 In re Mosello (Bankr. S.D.N.Y. 1996) 195 B.R. 277, 288 (internal quotations and citations  
15 omitted).

16           Where, as here, the Debtor operates a mature (but perhaps over-leveraged)  
17 business and can present realistic projections establishing enhanced value resulting from  
18 the priming financing, the debtor may be in a better position to establish adequate  
19 protection. See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)  
20 (4th Cir. 1986) 789 F.2d 1085, 1087-90 (noting the importance of projections prepared in  
21 good faith with expert assistance). The key issue is whether incurring the additional  
22 indebtedness will correspondingly increase the debtor's value. See generally id. Here,  
23 the evidence is not in dispute that the value of the Oceanside Project will increase with  
24 the proposed borrowing. (Slagle Dec. at ¶ 5 and Sheikh Dec. at ¶ 20.)

25 ///

26 ///

27 ///

28

1 E. The Debtor's Inability To Locate Unsecured Credit In This Case Meets The  
2 Requirements Of The Code And Must Be Granted.

3 Since well before the Petition Date the Debtor has been in search of cash to  
4 complete the Oceanside Project and fund the needed TI's. The Debtor submits that after  
5 a diligent search, the Debtor has not been able to obtain on an unsecured (or any other)  
6 basis credit to move this case forward toward plan confirmation. (Sheikh Dec. at ¶¶ 15  
7 through 19.) In these circumstances, "[t]he statute imposes no duty to seek credit from  
8 every possible lender before concluding that such credit is unavailable." Bray v.  
9 Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co. (4<sup>th</sup> Cir. 1986) 789 F.2d 1085,  
10 1088. A debtor need only demonstrate "by a good faith effort that credit was not  
11 available without" the protections of section 364. Id. at 1088; see also In re Plabell  
12 Rubber Prods., Inc. (Bankr. N.D. Ohio 1992) 137 B.R. 897, 900. Where there are few  
13 lenders likely able and/or willing to extend the necessary credit to the debtor, "it would be  
14 unrealistic and unnecessary to require [the debtor ] to conduct an exhaustive search for  
15 financing." In re Sky Valley, Inc. (Bankr. N.D. Ga. 1988) 100 B.R. 107, 113. This rule is  
16 particularly applicable here where the macro economic factors have taken most lenders  
17 out of the marketplace.

18 The Debtor's efforts in this regard satisfy the statutory requirement of § 364 of the  
19 Bankruptcy Code. See, e.g., Snowshoe, supra, 789 F.2d at 1088 (explaining that the fact  
20 that the trustee contacted other financial institutions in the immediate geographic area  
21 and was unsuccessful satisfied the requirements of § 364); In re 495 Central Park Ave.,  
22 Corp. (Bankr. S.D.N.Y. 1992) 136 B.R. 626, 630-31 (explaining that unsuccessful  
23 attempts to secure financing from other sources justified senior priority loan under §364);  
24 In re Ames Dep't Stores, 115 B.R. at 40 (explaining that debtors' discussions with four  
25 lenders satisfied the requirement of §364 that the debtors were unable to obtain  
26 comparable financing on an unsecured basis); In re Stanley Hotel, Inc., 15 B.R. 660, 663

27 ///

1 (D. Colo. 1981) (finding that two national banks refusing to grant unsecured loans was  
2 sufficient to support the conclusion that § 364 requirement was met).

3 No party-in-interest can seriously contend that the Debtor does not need access to  
4 cash to complete TI's at the Oceanside Project and to fund the final consummation of the  
5 Plan in this case. Nor can there be any argument with the Debtor's need to fund the  
6 litigation with the Bank and Jaynes. Access to sufficient cash is therefore critical to the  
7 continued viability of the Debtor's interest in the Oceanside Project and the ultimate  
8 ability to propose and confirm a Plan. (Sheikh Dec. at ¶¶ 14 through 20.)

9 The terms of the proposed advance were negotiated in good faith and at arms'  
10 length among the parties. The terms are fair, reasonable, and adequate in that the terms  
11 do not prejudice the powers and rights that the Bankruptcy Code confers for the benefit  
12 of all creditors, nor do they prevent motions by parties-in-interest from being decided on  
13 their merits. As contemplated by the policies underlying the Bankruptcy Code, the  
14 purpose of the proposed loan is to enable the Debtor to complete needed TI's at the  
15 Oceanside Project and thus to move toward confirmation of its plan of reorganization in  
16 this case. (Sheikh Dec. at ¶¶ 14 through 20) See In re First South Sav. Ass'n (5<sup>th</sup> Cir.  
17 1987) 820 F.2d 700, 710-15.

18 As described hereinabove, after appropriate investigation and analysis, the Debtor  
19 concluded that obtaining the proposed secured loan is the best way to obtaining needed  
20 cash to complete the construction of the Oceanside Project, to complete the TI's, and to  
21 fund the administrative expenses in this case. (Sheikh Dec. at ¶¶ 14 through 20.)  
22 Bankruptcy courts routinely defer to the debtor's business judgment on most business  
23 decisions, including the decision to borrow money. See Group of Institutional Investors v.  
24 Chicago Mil. St. P. & Pac. Ry. (1943) 318 U.S. 523, 550; In re Simasko Prods. Co. (D.  
25 Colo. 1985) 47 B.R. 444, 449 ("Business judgments should be left to the board room and  
26 not to this Court."); In re Lifeguard Indus., Inc. (Bankr. S.D. Ohio 1983) 37 B.R. 3, 17  
27 (same). "More exacting scrutiny would slow the administration of the debtor's estate and  
28

1 increase its costs, interfere with the Bankruptcy Code's provision for private control of  
2 administration of the estate, and threaten the Court's ability to control a case impartially."  
3 Richmond Leasing Co. v. Capital Bank, N.A. (5<sup>th</sup> Cir. 1985) 762 F.2d 1303, 1311.

4  
5 F. Approval Of The Senior Secured Financing Is Supported By The Exercise  
6 Of The Debtor's Sound Business Judgment.

7 The fact that the Debtor has satisfied the requirements of Bankruptcy Code §  
8 364(d), of course, does not end the inquiry as these sections are permissive, not  
9 mandatory. See 11 U.S.C. § 364 ("after notice and a hearing . . . the court . . . may  
10 authorize the obtaining of credit or the incurring of debt") (emphasis added). Generally,  
11 however, courts give broad deference to business decisions of a debtor-in-possession.  
12 See, e.g., Richmond Leasing v. Capital Bank, N.A. (5th Cir. 1985) 762F.2d 1303, 1311.  
13 Moreover, a bankruptcy court generally will respect a debtor-in-possession's business  
14 judgment regarding the need for and the proposed use of funds. As the Court noted in In  
15 re Ames Dep't Stores. Inc.:

16 A court's discretion under section 364 is to be utilized on grounds that permit  
17 reasonable business judgment to be exercised so long as the financing agreement  
18 does not contain terms that leverage the bankruptcy process and powers or its  
19 purpose is not so much to benefit the estate as it is to benefit a party in interest.

20 In re Ames Dep't Stores, Inc., supra, 115 B.R. at 40.

21 In the present case, the Debtor's decision to enter into the post-petition borrowing  
22 with Lone Oak Fund represents an exercise of sound business judgment in the continued  
23 operation of the Debtor's business and preservation of asset value. (Sheikh Dec. at  
24 ¶¶ 14 through 20.) Like most business decisions, the Debtor's decision to enter into the  
25 post-petition borrowing will both confer a number of benefits on the Debtor and impose  
26 several tradeoffs. The post-petition borrowing should provide the Debtor with sufficient  
27 capital to fund the TI's and move the Oceanside Project forward in the ordinary course of  
28

1 the Debtor's business. The Lender has also agreed to fund certain carve-outs for  
2 payment of statutory fees, professional fees, and other necessary business expenses.

3  
4 **IV.**

5 **CONCLUSION**

6 Based upon the forgoing, the Debtor respectfully requests that this Court grant the  
7 Debtor's request for the post-petition borrowing from Loan Oak be allowed the under  
8 § 364(d) and for such other and further relief as the Court deems just and proper under  
9 the circumstances. The post-petition borrowing is the result of arms' length negotiations  
10 between the Debtor and Loan Oak. In sum, the substantial benefits the Debtor will derive  
11 from the proposed financing amply justify the Debtor's decision to enter into the post-  
12 petition secured borrowing, a decision that this Court should ratify as being in the best  
13 interests of the Debtor and the Estate.

14  
15 Dated: August 3, 2010

16 Respectfully submitted,  
17 JAMES ANDREW HINDS, JR.  
18 PAUL R. SHANKMAN  
19 HANNA B. RAANAN  
20 LAW OFFICES OF JAMES ANDREW HINDS, JR.

21 By: /s/ James Andrew Hinds, Jr.  
22 JAMES ANDREW HINDS, JR.  
23 Attorneys for Abdul Halim Sheikh, Chapter 11 Debtor  
24 and Debtor in Possession  
25  
26  
27  
28

In re: ABDUL HALIM SHEIKH,	Debtor(s).	CHAPTER 11 CASE NUMBER 2:09-bk-39652 AA
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**NOTE:** When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

**PROOF OF SERVICE OF DOCUMENT**

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: LAW OFFICES OF JAMES ANDREW HINDS, JR., 21515 Hawthorne Blvd., Suite 1150, Torrance, California 90503

The foregoing document described as: NOTICE OF MOTION AND MOTION FOR ORDER APPROVING POST-PETITION SECURED-PRIMING FINANCING FOR THE DEBTOR; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On August 4, 2010, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

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Service information continued on attached page

**II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL**(indicate method for each person or entity served):

On August 4, 2010 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

**Via Federal Express**

Law Clerk to the Honorable Alan M. Ahart  
United States Bankruptcy Judge  
255 E. Temple Street, Room 1382  
Los Angeles, CA 90012

Service information continued on attached page

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

August 4, 2010	Rodaba S. Farid	/s/ RODABA S. FARID
Date	Type Name	Signature

In re: ABDUL HALIM SHEIKH,  Debtor(s).	CHAPTER 11  CASE NUMBER 2:09-bk-39652 AA
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