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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

L.J. GIBSON, et al., Plaintiffs, v. CREDIT SUISSE AG, a Swiss corporation, et al., Defendants.	Case No. 1:10-cv-00001-EJL-REB MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS AND TO FILE COMPLAINT IN INTERVENTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2) and (b)(1)(B)

Proposed intervenor plaintiffs Timothy L. Blixseth and Alfredo Miguel ("**Proposed Intervenors**"), through their undersigned counsel, hereby file this Memorandum of Points and Authorities in support of their Motion to Intervene as Plaintiffs and to File Complaint in Intervention Pursuant to Federal Rule of Civil Procedure 24(a)(2) and (b)(1).

1. <u>INTRODUCTION</u>

Proposed Intervenors are the principal developers of the Yellowstone Club (or "Club") and Tamarack Resort, LLC ("Tamarack"). Mr. Miguel is Tamarack's founder, and was its chairman of the board of directors. Mr. Blixseth was the founder of the Yellowstone Club and, through his holdings companies, was the manager and developer of the Club until August of 2008. Through their ownership and management interests in their respective developments, Proposed Intervenors were defrauded by Defendants in much the same way that the existing plaintiffs were defrauded. Credit Suisse through its loans to the Yellowstone Club and Tamarack, and Cushman & Wakefield through its inflated appraisals of the resorts, created a parade of horribles for Proposed Intervenors and the existing plaintiffs. The damages suffered by Proposed Intevenors and the plaintiffs all stem from substantially the same facts involving Credit Suisse's loans to the Yellowstone Club, Tamarack, Lake Las Vegas and Ginn Sur Merr. Because of the similarity in both law and fact between the Proposed Intervenors' claims and the existing claims of the plaintiffs, Proposed Intervenors believe that this Court should grant their Motion allowing them to intervene under Federal Rule of Civil Procedure 24.

2. <u>FACTUAL BACKGROUND</u>

In or around 2004, Credit Suisse created a new and exotic real estate loan product. The idea was quite simple. Market a new loan product to the individuals who owned high-end real estate resort developments and sell the individual development owners on the idea that they should be able to presently enjoy all the future profits and equity from their developments, just as homeowners around the nation were tapping into their ever increasing home equities like ATM machines. However, for this loan product to be lucrative for Credit Suisse, it had to be large, and it had to be structured in a way that was different from traditional real estate development loans. In other words, Credit Suisse needed the loans to be as large as possible but it also needed to carry virtually no risk of loss, yet also position Credit Suisse to profit when the loans failed, which Credit Suisse knew or should have known that they would. Notably, unlike traditional real estate development loans that allow loan proceeds to only be disbursed for development purposes and only over-time and in separate tranches based on completion of development milestones and periodic financial forecasts, Credit Suisse's new loan product allowed the developers to receive all the loan proceeds at once at the front-end of the loan and to be used for any purposes that the individual principal developers believed to be appropriate.

Credit Suisse's loan product was structured so that the larger the loan amount, the greater the fees it earned in originating and managing the loan. Also, the larger the loan amount, the greater the likelihood that the loan would default and Credit Suisse could then own the resorts (which served as collateral for the loan) through foreclosure or bankruptcy proceedings.

Unlike traditional banking practices, Credit Suisse had virtually no incentive to lend only a prudent amount of money because it carried relatively little risk of loss. Instead, Credit Suisse "syndicated" the loan by first selling it to the individual resort developers and then collecting third party investors or "noteholders" to actually provide the money for the loans. Credit Suisse provided virtually none of its own money in the loans, but, put the loans together and inserted itself as the "lending advisor" to the resort developers and the "administrative agent" to the noteholders and in these roles acted as more than just a lender, it acted as a fiduciary to the resort developers. By becoming the "lending advisor" to the resort developers, Credit Suisse placed itself in a position of trust and confidence with access to all of the resorts' proprietary and confidential information and in functional business control of the resorts.

Because Credit Suisse carried virtually no risk of loss if the loans defaulted and in fact because the larger the loan amount, the more money in fees Credit Suisse earned, Credit Suisse needed a way to increase the loan amounts to the maximum extent possible.

Real estate loans are heavily regulated by both the states and the federal government under, among other laws and standards, the Financial Institutions, Reform, Recovery, and Enforcement Act ("FIRREA") and the Uniform Standards of Professional Appraisal Practice ("USPAP"). Both USPAP and FIRREA are designed to ensure that real estate loans are prudently originated by, among other things, regulating the appraisal standards which value the real estate collateral for such loans. If real estate collateral is appropriately appraised based on uniformly accepted appraisal standards then there is certainty about the true value of the collateral. With banks lending at appropriate loan-to-value ratios based on USPAP and FIRREA compliant appraisals, as they are required to do, then both the lenders and the borrowers are protected from predatory lending practices that could otherwise doom the borrowers.

For Credit Suisse, however, the USPAP and FIRREA requirements would not allow the appraised values for the resorts to be as high as Credit Suisse wanted them to justify the exorbitant loans that Credit Suisse wanted to sell the Yellowstone Club and Tamarack under Credit Suisse's new no-risk/huge profit loan program.

Thus, Credit Suisse recruited an internationally respected real estate services and appraisal firm, Cushman & Wakefield, to concoct a new appraisal methodology that would value the resorts at a greater price more in line with Credit Suisse's desire. Credit Suisse and Cushman & Wakefield therefore created a new valuation methodology called "Total Net Value." At its most fundamental level, the Total Net Value ("TNV") methodology simply totaled up the gross sum of cash flow to the resorts derived from real estate lot sales over the life of the resorts. However, the TNV methodology did not apply an appropriate discount rate to that gross cash flow figure and was therefore misleadingly high because it did not account for the host of variables that figure into a current fair market valuation of the resorts. For a number of reasons, the TNV methodology violated FIRREA and USPAP.

That the TNV appraisals concluded to grossly misleading valuations is best demonstrated by example. On September 21, 2004, Cushman & Wakefield conducted a purported USPAP and FIRREA compliant appraisal of the Yellowstone Club for American Bank and concluded to a value of $420 million. However, on July 1, 2005, Cushman performed an "updated" appraisal of its September 2004 appraisal of the Yellowstone Club for Credit Suisse but used the TNV methodology and concluded to a staggering value of $1,165,000,000.00.

Similarly for Tamarack, Cushman & Wakefield prepared a draft appraisal for Tamarack around December 31, 2005, showing Tamarack with an "As-Is Market Value" conclusion of $284 million. Thus, with a $250 million loan amount to Tamarack, the true loan-to-value ratio was approximately 90% using what Cushman itself believed to be the true market value of Tamarack.

With a complicit and respected appraisal firm willing to perform the exotic and non-FIRREA, non-USPAP compliant TNV appraisals, Credit Suisse was all set to market its no-risk/huge profit loan product to high-end real estate resort developments. However, knowing that its new loan product violated the state and federal laws to which it was subject, Credit Suisse needed to employ a device that it felt would help it evade its responsibilities under federal and state law. Credit Suisse therefore added one last twist to its no-risk/huge profit loan program. It arranged the loans through its Cayman Islands branch and not the domestic Credit Suisse entities and offices which had marketed and negotiated the loans with Proposed Intervenors.

Having set up the necessary aspects to implement its no-risk/huge profit loan program, Credit Suisse was ready to deploy it. Unfortunately, for the Proposed Intervenors and the existing plaintiffs, the no-risk/huge profit loan program was in reality a “loan to own” program. Although it manifested itself in different ways for Tamarack and the Yellowstone Club, once originated, the Credit Suisse loans doomed the resorts to failure but in a manner that was designed for Credit Suisse to ultimately own the resorts or otherwise profit from their failure.

For both Proposed Intervenors, Credit Suisse represented to them that the loans would be good for their resorts, that the loans complied with all law, that use of the loan proceeds for non-development purposes as allowed under the terms of the loans were lawful, and that Credit Suisse was acting in the best interest of them and the resorts. Credit Suisse failed, however, to disclose that the appraisals upon which the loans were based did not comply with FIRREA, did not comply with USPAP, did not reflect the fair market value of the resorts, were grossly inflated and that the loan amounts were far in excess of what would be allowed under federal and state laws and were likely, if not intended, to default.

Through different means, Credit Suisse implemented its loan to own scheme on Tamarack and the Yellowstone Club and in the process committed various actionable conduct against Proposed Intervenors. The unique facts relevant to Credit Suisse’s wrongful conduct toward each Proposed Intervenor is set forth briefly below.

A. Factual Background with Respect to Mr. Miguel

In late 2005, Credit Suisse approached Tamarack through its agent Jean-Pierre Boespflug to sell a $250 million loan to Tamarack. Thereafter Proposed Intervenor Alfredo Miguel met with Mr. Boesflug concerning Credit Suisse's proposed credit facility. After repeated sales efforts by Credit Suisse to convince Mr. Miguel and his partners to utilize its credit facility, Credit Suisse sold its $250 million loan to Tamarack and induced Mr. Miguel to personally guaranty repayment. This sales effort included a presentation to Mr. Miguel in January of 2006 by Arik Prawer as director of Credit Suisse's sales team, representing that Tamarack was worth $1.5 billion and that its proposed $250 million loan would significantly benefit Tamarack through Credit Suisse's "unrivaled credentials" in the resort financing industry. Credit Suisse's January 2006 presentation failed to mention that this $250 million loan would be supported by a Total Net Value appraisal contrived by Cushman & Wakefield that failed to comply with federal and state laws, was based on distorted financial models created by Credit Suisse, was grossly inflated above the true market value of Tamarack, or that the loan would be funded by the Credit Suisse Cayman Islands branch (the January 2006 presentation makes no mention of the Cayman Islands branch, but instead references "Credit Suisse First Boston" on each page).

On or about March of 2010, Highland Capital Management, L.P., which owned a significant portion Credit Suisse's loan to Tamarack, invited Mr. Miguel to a meeting at Highland's offices in Dallas, Texas to resolve certain pending litigation concerning Credit Suisse's attempt to collect on Mr. Miguel's personal guaranty of the Tamarack loan as well as to discuss the future of Tamarack. Mr. Miguel was lead to believe that an agreement had been reached to terminate the personal guaranty for $200,000. However, Highland requested that Mr. Miguel not bring his attorneys to this meeting. On March 26, 2010, Mr. Miguel, along with his

CPA Leonard De Los Prados, attended a meeting in Dallas, Texas under the firm belief that Credit Suisse and Highland Capital were interested in settling the litigation and addressing various issues Tamarack was facing. During the meeting, Ted Dameris of Highland Capital in the presence of Mr. Miguel, Mr. de Los Prados, Jim Pfertner, Thomas M. Lynch of Credit Suisse and Scott Turlington, reneged the $200,000 deal and accused Mr. Miguel of criminal conduct and as such, that Mr. Miguel better settle with Credit Suisse for $1.2 million. Mr. Dameris represented that Highland Capital had already had a buyer for the guaranty amount who was close to the FBI and was prepared to use "unorthodox methods" to collect on the guaranty. This was met with complete silence by Mr. Lynch and without invitation to discuss the future of Tamarack or any of the issues it was facing. This sting went on for about 30 days with a clear and present pattern of premeditation.

B. Summary of Factual Background with Respect to Mr. Blixseth

In 2004, Credit Suisse approached Mr. Blixseth with its new loan to own program. Credit Suisse's solicitation of Mr. Blixseth was based on specific marketing protocols designed by Credit Suisse to gain the trust and confidence of Mr. Blixseth and in turn cause Mr. Blixseth to have the Yellowstone Club turn over all of its proprietary and confidential financial information regarding the Club past and historic sales models, financial statements, financial projections as well as marketing strategies and business plans. With its working knowledge of the Club, Credit Suisse then caused Mr. Blixseth to have the Club "engage" Credit Suisse to be its "lending advisor." At first, Credit Suisse suggested lending the Club $150 million but after the TNV appraisal for the Club showed it to have a value over $1.1 billion Credit Suisse increased the loan amount to $375 million, thereby generating even greater fees for Credit

Suisse.

Credit Suisse's biggest selling point to Mr. Blixseth was that he as an owner of the Club could take the loan proceeds as either a profit distribution, or as a new loan from the Club to him or one of his entities. Either way, Credit Suisse encouraged Mr. Blixseth to use the loan proceeds in any manner he saw fit and represented to Mr. Blixseth that such a use was completely appropriate. Mr. Blixseth saw this allowable use of the loan proceeds as a business opportunity for the Club. Mr. Blixseth specifically used a large part of the $375 million loan proceeds to take the Yellowstone Club brand worldwide. Mr. Blixseth's vision was to purchase exclusive and unique properties world-wide and allow access to them for the ultra-wealthy on a club membership basis. Accordingly, Mr. Blixseth through his entities used a large portion of the $375 million Credit Suisse loan to purchase real estate around the world. Unbeknownst to Mr. Blixseth, the $375 million loan doomed the Club to failure from its inception.

As part of the $375 million Credit Agreement between Credit Suisse and the Club entities and its managing entity, Credit Suisse specifically included a provision that excluded Mr. Blixseth from personal liability for repayment of the loan. As will be seen shortly, Credit Suisse breached this obligation.

In 2008, one of Credit Suisse's note-holders in the $375 million loan, CrossHarbor Capital Partners LLC ("CrossHarbor"), began crafting a plan to own the Club through bankruptcy proceedings. Through its inside position as a note-holder controlling a portion of the $375 debt, CrossHarbor was able to gain access to the Yellowstone Club's confidential and proprietary financial information and was also situated in a position to negotiate and persuade Credit Suisse and the other note-holders that was not in the best interests of the Club. In short, CrossHarbor put the Club into bankruptcy and then once in bankruptcy, CrossHarbor and Credit

Suisse negotiated a plan of reorganization that called for both CrossHarbor and Credit Suisse to have ownership interests in the Club's assets. Most nefariously, however, the reorganization plan called for Credit Suisse to specifically breach its obligation to Mr. Blixseth not to hold him personally liable for the $375 million loan. Credit Suisse did this by creating a liquidating trust to sue Mr. Blixseth on behalf of Credit Suisse to recover the balance of the $375 million. Within this litigation, Credit Suisse using the proxy of the Yellowstone Club Liquidating Trust has maligned the reputation of Mr. Blixseth by falsely portraying him as a thief who stole from the Club by fraudulently using the $375 million in loan proceeds and breaching his fiduciary duties to the Club by using the loan proceeds in the very manner that Credit Suisse encouraged him and led him to believe was appropriate and lawful. In addition to harm to his reputation, the litigation pursued against Mr. Blixseth by Credit Suisse has cost Mr. Blixseth years of litigation and stress and has resulted in lost business opportunities worth hundreds of millions of dollars.

Had Mr. Blixseth known that Credit Suisse's loan was grossly inflated, unlawful or of Credit Suisse's true intentions, Mr. Blixseth would never have engaged in the transaction with Credit Suisse. As it turned out, Credit Suisse perpetrated a fraud of Mr. Blixseth and the Club and then compounded its fraud by using the bankruptcy proceedings for its own profit and to breach its obligations to not seek repayment of the loan from Mr. Blixseth personally.

3. ARGUMENT

A. Intervention is Mandatory

Proposed Intervenors are entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(1). Rule 24(a)(1) provides that "the court must permit anyone to intervene who: … (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

"To intervene as of right under Rule 24(a)(2), the proposed intervenor must demonstrate that '(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.' The party seeking to intervene bears the burden of showing that all the requirements for intervention have been met. In determining whether intervention is appropriate, courts are guided primarily by practical and equitable concerns, and the requirements for intervention are broadly interpreted in favor of intervention." *Sullivan*, *v. Quality Loan Service Corp.*, 2011 WL 124280 at *4 (D. Idaho, Jan. 11, 2011)) (internal citations and quotations omitted).

(1) The Proposed Intervenors Have a Significant Protectable Interest Relating to the Transactions at Issue

Proposed Intervenors have a significant protectable interest relating to the loan transactions that are the subject of the pending lawsuit between the homeowners and the Defendants. "A sufficient interest in an action for purposes of intervention is a 'practical, threshold inquiry.' No specific legal or equitable interest needs to be established. By allowing a party with a practical interest in the outcome of the case to intervene, courts prevent or simplify future litigation and allow additional interested parties to express its views before the court." *Portfolio FB-Idaho, LLC v. Federal Deposit Ins. Corp. as Receiver for First Bank of Idaho*, 2010 WL 5391442 at *2 (D. Idaho, Dec. 17, 2010) (quoting *United States v. City of Los Angeles*, 288

F.3d 391, 397 (9th Cir.2002)) (internal citations and quotations omitted).

With respect to Mr. Blixseth, that he has a significant protectable interest that is implicated by the existing lawsuit is made clear by the fact that he is identified throughout the Third Amended Complaint as being the principal of the Yellowstone Club and the individual manager of the Yellowstone Club who executed the subject loan documents and who negotiated with Credit Suisse in connection with loan. Undoubtedly, as the present litigation moves forward, Mr. Blixseth will be a key witnesses in connection not only with the representations and promises that Credit Suisse made in connection with the origination of the loan and its fraudulent conduct related thereto, but then Credit Suisse's subsequent conduct toward the Club to use its lender controls as a means of gaining ownership of the Club.

Because Mr. Blixseth was the party ultimately responsible for deciding to have the Yellowstone Club engage in business with Credit Suisse and is therefore a key witness thereto, he has a significant and protectable interest in ensuring that the facts associated with this business relationship are not adjudicated in his absence. This is particularly true because many of the facts set forth in the Third Amended Complaint are identical to the facts which support Mr. Blixseth's claims against Credit Suisse and Cushman & Wakefield as set forth in the pleading which the Proposed Intervenors seek to file.

With respect to Mr. Miguel, the same is also true. As one of the principals of Tamarack, Mr. Miguel was similarly responsible for the management and business decisions of Tamarack as it related to the Credit Suisse loan. Mr. Miguel was a key player in negotiating the loan with Credit Suisse and ultimately deciding to have Tamarack enter into a business relationship with Credit Suisse. As with Mr. Blixseth, many of the same facts associated with Credit Suisse's and Cushman & Wakefield's representations and promises to Mr. Miguel and Tamarack and which form the basis for the current lawsuit, are also foundational facts associated with Mr. Miguel's claims against the Defendants in the attached proposed pleading.

(2) Disposition of the Existing Case May Impair the Proposed Intervenors' Ability to Protect Their Interests

In determining whether disposition of the existing lawsuit will impair the ability of the Proposed Intervenors to protect their interests, "[t]he question must be put into practical terms rather than legal terms, and the rule is satisfied whenever disposition of the action would put the applicant at a practical disadvantage in protecting its interest." *Portfolio FB-Idaho, LLC*, 2010 WL 5391442 at *2.

Proposed Intervenors would be put at a practical disadvantage if they were not allowed to assert their claims against Defendants in the existing lawsuit. There is extensive factual overlap between the claims asserted by the existing plaintiffs and those asserted by the Proposed Intervenors. If Proposed Intervenors were not allowed to participate in the existing litigation for the purpose of developing this evidence in a manner that is appropriate and most effective for their own claims against the Defendants, then certainly they would be subject to collateral estoppel and res judicata defenses if they were forced to assert their claims against the Defendants in subsequent or unrelated litigation. Being subject to such defenses would significantly impair their claims against Defendants if the Proposed Intervernors were not allowed to develop their evidence for their claims in a manner that was best suited to them.

Moreover, Proposed Intervenors have causes of action that are different than those being asserted by the plaintiffs in the existing case, but these causes of action are founded in large part, on the same facts as the claims of the existing plaintiffs. For example, Proposed Intervenors are asserting RICO, direct fraud, and bad faith breach of the duty of good faith and fair dealing under the common law and the Uniform Commercial Code, amongst other causes. These claims are distinct from those being asserted by the present plaintiffs but are nevertheless based in large part on the same nucleus of operative facts. As such, Proposed Intervernors have a significant interest in developing those facts in a manner that is best suited to their needs so that they will not be later subject to res judicata and collateral estoppels defenses by Credit Suisse and Cushman & Wakefield.

(3) This Motion is Timely Made

"To determine whether a motion is timely, the court considers (1) the stage of the proceedings at which intervention is sought; (2) prejudice to the other parties, and (3) the reason for and length of any delay." *Sullivan*, 2011 WL 124280 at *4 (citing *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir.2004)). The Proposed Intervenors' Motion to Intervene is timely. It appears that the existing case has not progressed beyond the pleading stage, that discovery has not yet commenced, and that no trial has been set. Thus, neither the existing plaintiffs nor the defendants will be delayed in having their day in court or in re-doing discovery. For Mr. Blixseth's part, from June of 2009 until May 25, 2011, he was prohibited from initiating any lawsuit against Credit Suisse because of overly-broad and constitutionally defective exculpation clauses in the Yellowstone Club Third Amended Plan of Reorganization which exculpated Credit Suisse from any and all liability to Mr. Blixseth. These exculpation clauses were conclusively voided when the Ninth Circuit Court of Appeals on May 25, 2011 dismissed several appeals of the order of the U.S. District Court for the District of Montana which reversed the bankruptcy court order confirming the Third Amended Plan of Reorganization because of the over-breadth of the plan's exculpation clauses. See Docket No. 28, 9th Circuit Case No. 10-

36038; See Docket No.72, Case No. 09-47, U.S. District Court for the District of Montana.

Thus, up until May 25, 2011, Mr. Blixseth was legally incapacitated from asserting claims against Credit Suisse related to the Yellowstone Club and its bankruptcy.

With respect to Mr. Miguel and Mr. Blixseth, there was frankly no sense in attempting to intervene in the present case until March 31, 2011 when this Court denied in part the Defendants' motions to dismiss and thereby allowed the present case to move forward. Because only three months have passed since this Court definitively allowed the case to move forward, Proposed Intervenors cannot be said to have delayed their filing of this Motion in any meaningful manner.

(4) Proposed Intervenors' Interests Are Not Adequately Represented by the Plaintiffs.

"The Court considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Portfolio FB-Idaho, LLC*, 2010 WL 5391442 at *3 (citing *Arakaki v. Cateyano*, 324 F.3d 1078, 1086 (9th Cir.2003)).

The current plaintiffs will not adequately represent Proposed Intervernors' interests. Proposed Intervenors are asserting RICO and direct fraud claims against the Defendants. Plaintiffs are not asserting these claims and therefore will not "make all of [] proposed intervenors' arguments." Additionally, Proposed Intervenors have personal claims against Defendant Credit Suisse relating to its conduct toward them once their respective resorts became distressed. For example, Mr. Blixseth alleges that Credit Suisse engaged in tortious conduct when it used the Yellowstone Club bankruptcy proceedings to convert its non-personally guaranteed loan into a personally guaranteed loan through the sham creation of the Yellowstone Club Liquidating Trust. Mr. Miguel's claims involve, in part, how Credit Suisse breached its duty of good faith and fair dealing when it demanded to meet with Mr. Miguel privately and insisted that Mr. Miguel not bring his attorneys, and then during the meeting Credit Suisse through Highland Capital extorted Mr. Miguel with threats of criminal prosecution and unorthodoxed collection practices unless Mr. Miguel acceded to Credit Suisse's settlement demands. The allegations and their associated causes of action are unique to the Proposed Intervenors and will not be advanced by the Plaintiffs. Yet, they do arise and involve the same common nucleus of operative facts which the Proposed Intervenors have an interest in developing for their purposes and those purposes are distinct from those of the existing plaintiffs. Thus, the existing plaintiffs do not adequately represent the Proposed Intervenors' interests.

B. <u>Intervention is Permissive</u>

Under Rule 24(b)(1)(B), "the court may permit anyone to intervene who: … (B) has a claim or defense that shares with the main action a common question of law or fact."

"An applicant who seeks permissive intervention under Rule 24(b) (1)(B) must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims.. The Court must also consider 'whether intervention will unduly delay the main action or will unfairly prejudice the existing parties.'" *Scenic Valley View, L.L.C. v. Ridgeway Holdings, LLC*, 2010 WL 2103974, 3 -4 (D. Idaho May 24, 2010) (citing and quoting *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir.1998) (internal quotations and citations omitted).

(1) Proposed Intervenors' Claims Present Common Questions of Law and Fact

The Proposed Intervenors' claims most certainly present questions of fact and law that are common to the claims of the existing plaintiffs. A review of the Proposed Intervenors' complaint makes the commonality rather obvious. Fundamentally, the existing case and the Proposed Intervenors' claims both arise out of the same fraudulent loan-to-own and inflated appraisal scheme perpetrated by Credit Suisse and Cushman & Wakefield with respect to the Yellowstone Club and Tamarack.[1] More specifically, the Proposed Intervenors' claims and the claims of the existing plaintiffs arise out of the following common facts: (1) the Defendants' use of improper appraisal methodologies of the Yellowstone Club and Tamarack which knowingly violated FIRREA and USPAP; (2) Credit Suisse's employment of its Cayman Islands branch to skirt federal and state laws that governed its loans to Tamarack and the Yellowstone Club; (3) Credit Suisse's excessive loans to the Yellowstone Club and Tamarack which doomed the resorts to failure from the moment of their inception; (4) Credit Suisse's false representations and material omissions to the Proposed Intervenors and other agents of the resorts regarding the legitimacy and propriety of its loans to the Yellowstone Club and Tamarack; (5) Credit Suisse's "bait-and-switch" with respect to the dealings of its domestic entities and agents with the resorts

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[1] From a review of the pleadings, briefs and motions in the present case, it is clear that the commonality between the Proposed Intervenors' claims and the Plaintiff's claims extend not only to Tamarack and the Yellowstone Club, but also to the Plaintiff's claims as they relate to Lake Las Vegas and Ginn Sur Mer. In short, the allegations in the Proposed Intervenors' Complaint and the Plaintiff's Third Amended Complaint demonstrate that the conduct of Credit Suisse and Cushman & Wakefield toward Proposed Intervenors with respect to Tamarack and Yellowstone Club were also perpetrated in similar fashion at Ginn Sur Mer and Lake Las Vegas

but then using its Cayman Islands branch to fund the loans to purportedly evade federal and state laws; (6) Credit Suisse's false representations and material omissions to the Proposed Intervenors regarding the ability of the Yellowstone Club and Tamarack to afford and repay the subject loans; (7) Credit Suisse's material omission to the Proposed Intervenors regarding Credit Suisse's true "loan-to-own" intentions; (8) Credit Suisse's role as a fiduciary to the Yellowstone Club and Tamarack; (9) the extent of Credit Suisse's financial and capital control and domination over Tamarack and the Yellowstone Club that Credit Suisse exerted through the vehicle of its loans which placed Credit Suisse in the role of co-developer and fiduciary; (10) Credit Suisse's promises and representations to the Proposed Intervenors and plaintiff that it would act in the best interests of the Yellowstone Club and Tamarack; (11) the structure of Credit Suisse's loans to the Yellowstone Club and Tamarack which allowed Credit Suisse to earn huge fees from administering and originating its loan, but pass all risk of loss from default to third parties; (12) the role that credit default swaps played in Credit Suisse's loans to the Yellowstone Club and Tamarack and whether such credit default swaps evidence or constitute Credit Suisse's breach of fiduciary duties to the plaintiff and Proposed Intervenors or evidence or constitute fraudulent conduct toward Proposed Intervenors and plaintiffs; (13) the impropriety of Credit Suisse encouraging, allowing, and representing as lawful, Proposed Intervenors use of its loan proceeds for non-resort purposes; (14) Credit Suisse's use of bankruptcy and foreclosure proceedings to obtain ownership of the Yellowstone Club and Tamarack as it had planned to do from the beginning for its own profit.

Based on the above summary of common facts between the claims in the existing case

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as part of a larger single scheme. That larger scheme is of course the *Loan to Own* program alleged in the Third Amended Complaint and the Proposed Intervenors' Complaint.

and Proposed Intervenors' claims, the Proposed Intervenors have more than satisfied the common issues of fact and law requirement of Rule 24(b)(1)(B).

(2) The Motion is Timely

For the reason set forth in the section regarding timeliness under Rule 24(a), the Proposed Intervenors' Motion is timely under Rule 24(b).

(3) The Proposed Intervenors' Claims Have Independent Subject Matter Jurisdiction

"Permissive intervention ordinarily requires independent jurisdictional grounds." *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). Here, Proposed Intervenors' claims present independent jurisdictional grounds. First and foremost, Proposed Intervenors' claims present a federal question under 18 U.S.C. § 1964(c) (RICO) and therefore this Court has subject matter jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction of the Proposed Intervenors' related state law claims under 28 U.S.C. § 1367.

If, for whatever reason, Proposed Intervenors' RICO claims are dismissed, Proposed Intervenors' remaining state law claims invoke this Court's diversity jurisdiction under 28 U.S.C. § 1332 because both of Proposed Intervenors have diversity of citizenship from the Defendants. Mr. Miguel as a citizen of Mexico, Mr. Blixseth is a citizen of the State of Washington. Defendants are citizens of neither the State of Washington or the country of Mexico. Thus, Proposed Intervenors have diversity of citizenship from all Defendants as alleged in their proposed complaint.

(4) This Court Should Exercise its Discretion to Grant Permissive Intervention to Proposed Intervenors

Where a putative intervenor has demonstrated that the three threshold requirements for permissive intervention under Rule 24(b)(1)(B) are met, the district court must still consider other factors to determine how properly to exercise its discretion in granting or denying the motion to intervene. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009). Non-exclusive factors which a district court should consider in exercising its discretion are found in *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977) and include: (1) the nature and extent of the intervenors' interest; (2) their standing to raise relevant legal issues; (3) the legal position they seek to advance, and its probable relation to the merits of the case; (4) whether changes have occurred in the litigation so that intervention that was once denied should be reexamined; (5) whether the intervenors' interests are adequately represented by other parties; (6) whether intervention will prolong or unduly delay the litigation; (7) and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *Id*.

An analysis of these factors and common sense should lend this Court toward allowing the Proposed Intervenors to intervene.

Many of the *Spangler* factors have already been addressed in this brief and will therefore not be discussed again. Fundamentally, however, this Court should exercise its discretion to allow the Proposed Intervenor's to intervene because it just makes sense. Proposed Intervenors and the existing plaintiffs claim will involve development of substantially the same discovery and evidence. Thus, granting Proposed Intervenors Motion makes the most practical sense for the plaintiffs and Proposed Intervenors because it would avoid them having to duplicate their own discovery efforts and the Defendants' discovery efforts if they were otherwise forced to litigate the same facts in separate cases and perhaps in different courts.

Additionally, Proposed Intervnor's presence in this case would help to more fully develop discovery because even though the facts involving the plaintiffs' and Proposed Intervenors' claims are substantially similar, due to the differing nature of their causes of action against the Defendants, there might be factual nuance to their respective claims that neither one might develop or take advantage without the other being present. This of course provides a mutual benefit to Proposed Intervenors and plaintiffs and the Court due to the full factual development of this case which promotes the interest of discovering the truth.

In a similar vein, allowing intervention would avoid the risk of different courts and different juries from making inconsistent factual findings and legal conclusions on substantially similar issues; which would be a distinct risk if Proposed Intervenors were forced to pursue their claims against the Defendants in separate litigation.

Finally, little, if any, delay will result with Proposed Intervenors being present in this case. The parties have not yet progressed beyond the pleading stage. The parties have not undergone discovery and given the substantial overlap between the plaintiffs and Proposed Intervenors' claims, the length of discovery and trial are not likely to be any greater with Proposed Intervenors present.

DATED this 22nd day of July, 2011.

By: /s/ Andrew E. Hawes

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system which sent a Notice of Electronic Filing to the following persons:

Randall A. Peterman, attorney for Defendant Credit Suisse	Jason I. Lichter, attorney for Defendant Credit Suisse
David J. Lender, attorney for Defendant Credit Suisse	David W. Dummer, attorney for Defendant Credit Suisse
Thomas R. Guy, attorney for Defendant Credit Suisse	James L. Martin, attorney for Defendant Credit Suisse
Richard C. Boardman, attorney for Defendant Cushman & Wakefield	Rebecca H. Benavides, attorney for Defendant Cushman & Wakefield
Donald L. Morrow, attorney for Defendant Cushman & Wakefield	Panteha Abdollahi, attorney for Defendant Cushman & Wakefield
Barry G. Sher, attorney for Defendant Cushman & Wakefield	Christopher J Conant, attorney for Plaintiffs
Tyler J Anderson, attorney for Defendant Credit Suisse	Chris Flood, attorney for Plaintiffs
Christine Salmi, attorney for Defendant Cushman & Wakefield	John Flood, attorney for Plaintiffs
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