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MALIBU ASSOCIATES, LLC

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re MALIBU ASSOCIATES, LLC, a California limited liability company, dba MALIBU COUNTRY CLUB Debtor. Tax I.D. 20-4106767	Case No. 1:09-bk-24625-MT Chapter 11 **DEBTOR'S NOTICE OF MOTION AND MOTION TO APPROVE (1) POSTPETITION SECURED AND GENERAL UNSECURED FINANCING UNDER 11 U.S.C. § 364 AND (2) A SETTLEMENT AGREEMENT WITH U.S. BANK PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF THOMAS C. HIX AND ASHLEIGH A. DANKER IN SUPPORT THEREOF** **(Set On Shortened Time With Court Permission)** Date: May 17, 2011 Time: 2:30 p.m. Place: Courtroom 302 United States Bankruptcy Court 21041 Burbank Blvd. Woodland Hills, CA 91367

KAYE SCHOLER LLP

PLEASE TAKE NOTICE that on May 17, 2011 at 2:30 p.m. or as soon thereafter as counsel may be heard by the Honorable Maureen A. Tighe, United States Bankruptcy Judge, in Courtroom 302 located at 21041 Burbank Blvd., Woodland Hills, California 91367, debtor in possession Malibu Associates, LLC (the "Debtor" or "Malibu") in the above-captioned bankruptcy case shall move, and hereby does move, the Court to approve (1) postpetition secured financing (the "Modification") provided by U.S. Bank National Association (the "Bank") and general unsecured financing provided by certain of the Debtor's members (the "Member Loans"), including modification of the automatic stay to the extent necessary to implement the proposed financing, and (2) a settlement agreement between the Debtor and the Bank (the "Motion"). The Motion is brought pursuant to 11 U.S.C. §§ 105, 362, and 364, Federal Rules of Bankruptcy Procedure 2002, 4001, 9014, and 9019, and Local Bankruptcy Rules 4001-2, 9013-1, and 9019-1.

POSTPETITION FINANCING/LOAN MODIFICATION

The Bank is the Debtor's secured lender, with liens against substantially all of the Debtor's assets, including its primary asset, the approximately 648.5 acre parcel of real property commonly known as the Malibu Country Club (the "Property"). The proposed Modification provides the means for the Debtor to resume entitlement of the Property and is intended to continue beyond resolution of the Debtor's bankruptcy by confirmation of a plan of reorganization or voluntary dismissal to allow completion of the entitlement process. The Court is requested to approve the Modification on substantially the terms set forth in the proposed loan modification documentation (the "Loan Documents"),[1] attached hereto. Parties are directed to the

[1] The Debtor requests authority to make such non-material modifications to the Loan Documents as may be necessary to finalize such documentation prior to the closing of the Modification. Capitalized terms not otherwise defined herein have the same meanings ascribed to them in the Loan Documents.

Loan Documents for the material terms of the Modification. The following are some of the material terms of the Modification:[2]

1. Bank's Secured Loan Commitment. The Debtor's original term loan in the principal amount of $28,500,000 (the "First Loan") and the Debtor's original line of credit in a principal amount up to $11,500,000 (of which only $5,665,519 has been disbursed) (the "Second Loan" and, collectively with the First Loan, the "Original Loans") are consolidated into one loan (the "Consolidated Loan") and the maximum principal amount available is increased to $45,000,000. The Consolidated Loan is divided into three promissory notes. The first note in the amount of $40,000,000, of which $5,834,831 has not yet been disbursed, is referred to as the "Original Loan Note" or "Note A," the second note in the amount of $5,000,000, which has not yet been disbursed, is referred to as the "5MM Note" or "Note B," and the third note in the amount of $1,771,683.85, representing accrued and unpaid interest under the Original Loans for the period from April 1, 2009 through and including October 14, 2010 is referred to as the "AI Note" or "Note C." The unfunded portion of the Original Loan Note and the 5MM Note are available for disbursement, subject to satisfaction of the funding conditions set forth in the Loan Documents, for the payment of interest due on the Consolidated Loan and for the reimbursement of costs incurred by the Debtor in obtaining the Entitlements (defined below) in accordance with the Loan Documents.

2. Funding of the 5MM Note. The Bank will have no obligation to fund the 5MM Note unless and until the following conditions, among others, are satisfied on or before December 31, 2011: (i) the Debtor is timely proceeding with the Entitlements in accordance with the Loan Documents, (ii) there are no existing defaults under the Consolidated Loan and no uncured Potential Defaults (as defined in the Loan Documents) shall exist, and (iii) the Debtor has satisfied each of the Bank's disbursement conditions as provided in the Loan Documents.

[2] In the event of any discrepancies between the summary of the Modification and the Loan Documents, the terms of the final Loan Documents control.

3. Required Deposits. As a condition to closing the Modification, the Debtor shall deposit (i) $1,863,000 (the "Entitlement Deposit"), plus (ii) an amount, determined by the Bank to pay at least 20% of the interest accrued on the Consolidated Loan during the time period from the closing of the Modification until October 14, 2011 (the "Initial Interest Deposit") in immediately available funds with the Bank into a money market account (the "Borrower's Funds Account") to be held, controlled by, and pledged to the Bank as security.

4. Allocation of Deposits. The Entitlement Deposit will be allocated to and available for the reimbursement of Entitlement costs incurred by the Debtor in accordance with the Loan Documents. The Initial Interest Deposit will be allocated to and available for the payment of at least 20% of the interest accrued on the Consolidated Loan during the time period from the closing of the Modification until October 14, 2011. On October 15, 2011, and on the fifteenth day of October in each of the following years (each, an "Interest Deposit Date") until, but not including, the Maturity Date (defined below), the Debtor[3] shall deposit with the Bank an amount equal to the Required Interest Deposit (defined below) into the Borrower's Funds Account for the payment of the interest accrued on the Consolidated Loan during the year following the Interest Deposit Date. As set forth in detail in the Loan Documents, the Required Interest Deposit shall be calculated based on a formula and generally equal to 20% of the Estimated Yearly Interest (as defined in the Loan Documents).

5. General Unsecured Member Loans. The Entitlement Deposit, the Initial Interest Deposit, and any other amounts required to be funded by the Debtor at the closing of the Modification, including, without limitation, payment of any past due property taxes, shall be funded through general unsecured loans by one or more of the Debtor's members (the "Member Loans"). The Member Loans shall bear interest at the rate of 12% per annum. Outstanding principal and interest on the Member Loans shall be converted into new equity upon the effective

[3] Hereinafter, all references to the Debtor shall mean the Reorganized Debtor on or after the effective date of the Debtor's confirmed plan of reorganization or Malibu Associates, LLC following voluntary dismissal of the bankruptcy case.

date of the Debtor's plan of reorganization or upon voluntary dismissal of the Debtor's bankruptcy case in accordance with the terms thereof.

6. Approved Entitlement Budget. The Debtor has submitted to the Bank an agreed budget (as may be modified with the consent of the Bank, the "Approved Entitlement Budget") setting forth the sources of funds available for disbursement to reimburse the Debtor for Entitlement costs and identifying the specific Entitlement costs to which such funds may be applied. On August 15, 2011, and on the first day of August in each of the following years, the Debtor will submit to the Bank an analysis of the actual vs. budgeted Entitlement costs for the prior year, the projected Entitlement costs going forward, and evidence that the funds available for Entitlement costs shall be "in-balance" as required by the Loan Documents. Funds will be made available for disbursement from the Original Loan Note, the 5MM Note, and the Borrower's Funds Account to reimburse the Debtor for Entitlement costs only in accordance with the then applicable Approved Entitlement Budget.

7. Interest Reserve. Funds from the Original Loan Note and the 5MM Note that are allocated for the payment of interest will be held back by the Bank in an interest reserve and made available for the payment of interest due on the Consolidated Loan in accordance with the Loan Documents. In no event shall the Bank disburse funds from the Original Loan Note and/or the 5MM Note to pay for more than 80% of each monthly interest payment due under the Consolidated Loan.

8. Interest/Late Charges. The Bank shall modify the non-default interest rate on the Consolidated Loan commencing retroactively to April 1, 2009 to the 1, 2, 3, or 6 months LIBOR Rate plus 3%, excluding the AI Note, which will accrue interest at 0%. The non-default interest rate under the AI Note will be 0%. At the closing of the Modification, interest accrued on the Original Loans from October 15, 2010 to the date of the closing will be funded by the Debtor and from the interest reserve in accordance with the Loan Documents. Thereafter, the Debtor will pay monthly payments of interest only on the Consolidated Loan (excluding the AI Note). At the closing of the Modification, the Bank shall waive all late charges incurred in connection with the Original Loans prior to the closing of the Modification.

9. Guarantors. Mark Kvamme, Richard Fuld, and Thomas Hix (collectively, the "Guarantors") shall personally guaranty the repayment of the Consolidated Loan, with the liability of each Guarantor capped at a maximum amount less than that provided under their original guarantees. On the closing of the Modification, Jeffrey Klein shall be released from his obligations under the guaranties executed in connection with the Original Loans, provided Jeffrey Klein or his bankruptcy trustee executes a release of the Bank as provided in the Modification.

10. Maturity Date. The Maturity Date of the Original Loan Note, the 5MM Note and the AI Note is October 15, 2014, with an option to extend the Maturity Date to October 15, 2015, provided (i) the Debtor pays the Bank a .5% fee, (ii) the Consolidated Loan has achieved a loan to value ratio equal to not more than 65% based on the as-is, appraised value of the Property as determined by an appraisal to be obtained by the Bank at the Debtor's cost, (iii) the Debtor has completed the Final Entitlement Hurdle (as defined in the Loan Documents),[4] and (iv) no defaults then exist under the Consolidated Loan.

11. Entitlement Schedule and Funding. The Bank has approved an initial entitlement plan and timeline (the "Entitlement Plan") which describes the Debtor's plan to entitle the Property for use as a retreat center with a golf course and transient lodging (the "Entitlement(s)") and establishes completion dates for certain Entitlement hurdles identified in the Loan Documents (each an "Entitlement Hurdle").

The Debtor has been unable to obtain credit on terms better than those provided by the Bank. The funds provided by the Modification and the Member Loans will enable the Debtor to re-start the entitlement process and see it through to completion. The Modification and the Member Loans will also enable the Debtor to amend its plan of reorganization and proceed with the confirmation process or resolve its bankruptcy case through a voluntary dismissal. Accordingly, the proposed Modification and the Member Loans are in the best interests of the estate and its creditors.

[4] The Bank has agreed in principle to a modification of this requirement which is more favorable to the Debtor and which will be reflected in the final version of the Loan Documents.

SETTLEMENT

As a condition of the Modification, the Debtor and the Bank have negotiated a settlement of the litigation between them, including the Debtor's lender liability claims against the Bank (the "Settlement Agreement"). A copy of the Settlement Agreement is attached hereto. The Settlement Agreement consists of the following material terms, among others:

1. The Debtor fully releases all claims against the Bank.

2. Dismissal of the following actions: (i) U.S. Bank v. Malibu Associates, LLC, *et al.,* in the Los Angeles Superior Court, Case No. SC104512, (ii) U.S. Bank v. Thomas C. Hix, *et al.*, JAMS Reference No. 1220041214, and (iii) Malibu Associates, LLC v. U.S. Bank, Adv. Proc. No. 1:10-ap-01287-MT, pending before this Court.

3. The Debtor and the Bank agree to each bear their own attorneys' fees and expenses incurred in connection with the Modification.

The Settlement Agreement is a condition of the Modification and resolves expensive, uncertain litigation with the Bank. Along with the Modification, the Settlement Agreement clears the path for the Debtor to emerge from bankruptcy. Accordingly, the terms of the Settlement Agreement are in the best interest of the estate and its creditors.

The Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the attached declarations of Thomas C. Hix and Ashleigh A. Danker, the attached exhibits, the record of this case, the arguments of counsel for the Debtor at the hearing in support of the Motion, and such other pleadings and evidence as may be presented at or before the hearing on the Motion.

PLEASE TAKE FURTHER NOTICE that if you do not oppose the Motion, you need take no further action. If you do oppose the Motion, **pursuant to authorization of the Court shortening the deadlines applicable to the Motion and the hearing on the Motion, any response to the Motion must be filed with the Court and served upon counsel for the Debtor at the address given in the upper left corner of the first page of this Notice not later than May 12, 2011.** The response shall contain a brief, but complete, written statement setting forth all of the reasons for opposing the Motion, a memorandum of points and authorities,

declarations, and all evidence on which the responding party intends to rely. Pursuant to Local Bankruptcy Rule 9013-1(h), the failure to file and serve a timely opposition to the Motion may be deemed by the Court to constitute consent to the Court's granting the relief sought therein.

PLEASE TAKE FURTHER NOTICE that the Debtor shall request the Court to find that the transactions contemplated by the Debtor under the Motion, including, without limitation, the Modification, Member Loans, and Settlement Agreement, are duly authorized under the Super-Majority voting provisions of the Debtor's Operating Agreement and do not require the unanimous consent of the Debtor's members.

WHEREFORE, the Debtor respectfully requests that the Court grant the Motion, approve the Modification, approve the Member Loans, approve the Settlement Agreement, make the requested findings regarding the Debtor's authorization to act, and grant such other and further relief as the Court deems just and proper.

Dated: May 5, 2011

Respectfully submitted,
KAYE SCHOLER LLP
Marc S. Cohen
Ashleigh A. Danker

By: /s/ Ashleigh A. Danker
Ashleigh A. Danker
Attorneys for Debtor and Debtor in Possession
MALIBU ASSOCIATES, LLC

KAYE SCHOLER LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

By this Motion, debtor and debtor in possession Malibu Associates, LLC (the "Debtor")[5] seeks approval of a loan modification (the "Modification") and settlement (the "Settlement Agreement") with its secured lender, U.S. Bank National Association (the "Bank"). The Modification and Settlement Agreement resolve long-running disputes with the Bank regarding the Debtor's financing for its planned re-entitlement of its primary asset, the approximately 648.5 acre parcel of real property commonly known as the Malibu Country Club (the "Property"). Pursuant to the Modification, additional funds are made available to the Debtor by the Bank over a three-year period, with an option to extend for a fourth year, to enable the Debtor to resume and complete the re-entitlement of the Property. Other additional funds for the re-entitlement process are required to be provided by the Debtor and will be funded in the form of general unsecured loans by one or more of the Debtor's members (the "Member Loans").

Pursuant to the Settlement Agreement, pending litigation between the Debtor and the Bank is dismissed and the Debtor releases its claims against the Bank. By resolving its disputes with the Bank and obtaining the financing needed to resume the re-entitlement process, the Debtor will be in a position to modify its pending plan of reorganization and proceed with its confirmation process or resolve its bankruptcy case through a voluntary dismissal.

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[5] Hereinafter all references to the Debtor for any time period occurring after confirmation and the effective date of the Debtor's plan of reorganization shall be to the Reorganized Debtor or to Malibu Associates, LLC following a voluntary dismissal of the bankruptcy case.

II.

STATEMENT OF FACTS

On November 3, 2009 (the "Petition Date"), the Debtor filed the above-captioned chapter 11 bankruptcy case. Since the commencement of its case, the Debtor has been operating its business and managing its affairs as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. There is no committee of unsecured creditors appointed in this case.

The Debtor owns and operates the Property. The Bank, successor-in-interest to the Federal Deposit Insurance Corporation ("FDIC"), receiver for California National Bank ("CalNational"), is the Debtor's secured lender. On February 8, 2010, the Bank filed a proof of claim asserting a purported secured claim of "at least" $39,532,519.88 as of the Petition Date, plus postpetition default interest at the rate of 18% per annum and other fees and expenses accruing, secured by the Property (the "Claim").

Prior to the filing of the Debtor's bankruptcy case, the Debtor and CalNational filed litigation in the Los Angeles County Superior Court (the "Superior Court"), *U.S. Bank v. Malibu Associates, LLC, et al.,* Case No. SC104512 (the "Superior Court Action"), based on CalNational's assertion that the Debtor's loans had matured. The Debtor asserted that CalNational breached its loan agreement by failing to fund the Debtor's project as agreed and filed counterclaims on several lender liability theories. CalNational was seized by the FDIC on October 30, 2009 and its assets, including the Debtor's loans, sold to the Bank.

Following a motion by the Bank, a portion of the Superior Court Action involving non-equitable claims between the Bank and the guarantors of the Debtor's loans was transferred to an arbitrator, *U.S. Bank v. Thomas C. Hix, et al.,* JAMS Reference No. 1220041214 (the "Arbitration"). On July 22, 2010, the Debtor commenced an adversary proceeding in this case against the Bank asserting lender liability claims against the Bank and objecting to the Claim, *Malibu Associates, LLC v. U.S. Bank National Association,* Adv. Proc. No. 1:10-ap-01287-MT (the "Adversary Proceeding"). Following a motion by the Bank, the portion of the Adversary Proceeding involving the lender liability claims was transferred to the Arbitration.

On June 24, 2010, the Debtor filed its proposed *Second Amended Plan of Reorganization (Dated June 24, 2010)* (the "Plan") and its proposed *Second Amended Disclosure Statement Describing Debtor's Second Amended Plan of Reorganization (Dated June 24, 2010)* (the "Disclosure Statement"). The Plan proposed to give the Debtor the option to pay the Bank in full either (i) over four years with a balloon payment due upon maturity or (ii) pursuant to a lump sum payment, following determination of the Bank's allowed claim. The Bank objected that the Plan was not confirmable on its face because of provisions in the Plan which stayed the Bank's ability to seek collection from the Debtor's guarantors during the pendency of the Plan and also because of the potentially significant amount of time that might be needed to obtain a final determination of the Bank's allowed claim. The Court has not yet ruled on these objections.

On August 16, 2010, the Bank filed a motion requesting adequate protection payments and asserting that interest is accruing on the Claim at the default rate of 18% per annum. The Court preliminarily denied the motion, but indicated that it would consider the matter again after the Arbitration was decided. A continued hearing on the adequate protection motion is scheduled for May 5, 2011, but may be continued to the date of the hearing on this Motion.

III.

THE LOAN MODIFICATION AND MEMBER LOANS

The Debtor has negotiated the Modification with the Bank at arm's length and in good faith. The Court is requested to approve the Modification on substantially the terms set forth in the proposed loan modification documentation (the "Loan Documents")[6], attached hereto. Parties are directed to the Loan Documents for the material terms of the Modification. The Loan

[6] The Debtor requests authority to make such non-material modifications to the Loan Documents as may be necessary to finalize such documentation prior to the closing of the Modification. Capitalized terms not otherwise defined herein have the same meanings ascribed to them in the Loan Documents.

Documents include, without limitation, the following documents, copies of which are attached hereto:

- Consolidation Agreement **[Exhibit B]**
- Consolidated, Amended and Restated Loan Agreement **[Exhibit C]**
- Consolidated, Amended and Restated Deed of Trust Note **[Exhibit D]**
- Deed of Trust Note ($5,000,000) **[Exhibit E]**
- Deed of Trust Note ($1,771,683.85) **[Exhibit F]**
- Consolidated, Amended and Restated Deed of Trust, Assignment of Leases and Rents, Security Agreement an Fixture Filing **[Exhibit G]**
- Consolidated, Amended and Restated Guaranty Agreement **[Exhibit H]**
- Consolidated, Amended and Restated Environmental Indemnity Agreement **[Exhibit I]**
- Consolidated, Amended and Restated Assignment of Rights Under Permits and Development Documents **[Exhibit J]**
- Pledge Agreement (Cash Collateral Account) **[Exhibit K]**
- Limited Release by Bank **[Exhibit L]**
- Subordination and Standstill Agreement **[Exhibit M]**

The following are some of the material terms of the Modification[7] :

1. Bank's Secured Loan Commitment. The Debtor's original term loan in the principal amount of $28,500,000 (the "First Loan") and the Debtor's original line of credit in a principal amount up to $11,500,000 (of which only $5,665,519 has been disbursed) (the "Second Loan" and, collectively with the First Loan, the "Original Loans") are consolidated into one loan (the "Consolidated Loan") and the maximum principal amount available is increased to $45,000,000. The Consolidated Loan is divided into three promissory notes. The first note in the amount of $40,000,000, of which $5,834,831 has not yet been disbursed, is referred to as the

[7] In the event of any discrepancies between the summary of the Modification and the Loan Documents, the terms of the final Loan Documents control.

"Original Loan Note" or "Note A," the second note in the amount of $5,000,000, which has not yet been disbursed, is referred to as the "5MM Note" or "Note B," and the third note in the amount of $1,771,683.85, representing accrued and unpaid interest under the Original Loans for the period from April 1, 2009 through and including October 14, 2010 is referred to as the "AI Note" or "Note C." The unfunded portion of the Original Loan Note and the 5MM Note are available for disbursement, subject to satisfaction of the funding conditions set forth in the Loan Documents, for the payment of interest due on the Consolidated Loan and for the reimbursement of costs incurred by the Debtor in obtaining the Entitlements (defined below) in accordance with the Loan Documents.

2. Funding of the 5MM Note. The Bank will have no obligation to fund the 5MM Note unless and until the following conditions, among others, are satisfied on or before December 31, 2011: (i) the Debtor is timely proceeding with the Entitlements in accordance with the Loan Documents, (ii) there are no existing defaults under the Consolidated Loan and no uncured Potential Defaults (as defined in the Loan Documents) shall exist, and (iii) the Debtor has satisfied each of the Bank's disbursement conditions as provided in the Loan Documents.

3. Required Deposits. As a condition to closing the Modification, the Debtor shall deposit (i) $1,863,000 (the "Entitlement Deposit"), plus (ii) an amount, determined by the Bank to pay at least 20% of the interest accrued on the Consolidated Loan during the time period from the closing of the Modification until October 14, 2011 (the "Initial Interest Deposit") in immediately available funds with the Bank into a money market account (the "Borrower's Funds Account") to be held, controlled by, and pledged to the Bank as security.

4. Allocation of Deposits. The Entitlement Deposit will be allocated to and available for the reimbursement of Entitlement costs incurred by the Debtor in accordance with the Loan Documents. The Initial Interest Deposit will be allocated to and available for the payment of at least 20% of the interest accrued on the Consolidated Loan during the time period from the closing of the Modification until October 14, 2011. On October 15, 2011, and on the

fifteenth day of October in each of the following years (each, an "Interest Deposit Date") until, but not including, the Maturity Date (defined below), the Debtor [8] shall deposit with the Bank an amount equal to the Required Interest Deposit (defined below) into the Borrower's Funds Account for the payment of the interest accrued on the Consolidated Loan during the year following the Interest Deposit Date. As set forth in detail in the Loan Documents, the Required Interest Deposit shall be calculated based on a formula and generally equal to 20% of the Estimated Yearly Interest (as defined in the Loan Documents).

5. General Unsecured Member Loans. The Entitlement Deposit, the Initial Interest Deposit, and any other amounts required to be funded by the Debtor at the closing of the Modification, including, without limitation, payment of any past due property taxes, shall be funded through general unsecured loans by one or more of the Debtor's members (the "Member Loans"). The Member Loans shall bear interest at the rate of 12% per annum. Outstanding principal and interest on the Member Loans shall be converted into new equity upon the effective date of the Debtor's plan of reorganization or upon voluntary dismissal of the Debtor's bankruptcy case in accordance with the terms thereof.

6. Approved Entitlement Budget. The Debtor has submitted to the Bank an agreed budget (as may be modified with the consent of the Bank, the "Approved Entitlement Budget") setting forth the sources of funds available for disbursement to reimburse the Debtor for Entitlement costs and identifying the specific Entitlement costs to which such funds may be applied. On August 15, 2011, and on the first day of August in each of the following years, the Debtor will submit to the Bank an analysis of the actual vs. budgeted Entitlement costs for the prior year, the projected Entitlement costs going forward, and evidence that the funds available for Entitlement costs shall be "in-balance" as required by the Loan Documents. Funds will be made available for disbursement from the Original Loan Note, the 5MM Note, and the

[8] Hereinafter, all references to the Debtor shall mean the Reorganized Debtor on or after the effective date of the Debtor's confirmed plan of reorganization or Malibu Associates, LLC following voluntary dismissal of the bankruptcy case.

Borrower's Funds Account to reimburse the Debtor for Entitlement costs only in accordance with the then applicable Approved Entitlement Budget.

7. Interest Reserve. Funds from the Original Loan Note and the 5MM Note that are allocated for the payment of interest will be held back by the Bank in an interest reserve and made available for the payment of interest due on the Consolidated Loan in accordance with the Loan Documents. In no event shall the Bank disburse funds from the Original Loan Note and/or the 5MM Note to pay for more than 80% of each monthly interest payment due under the Consolidated Loan.

8. Interest/Late Charges. The Bank shall modify the non-default interest rate on the Consolidated Loan commencing retroactively to April 1, 2009 to the 1, 2, 3, or 6 month LIBOR Rate plus 3%, excluding the AI Note, which will accrue interest at 0%. The non-default interest rate under the AI Note will be 0%. At the closing of the Modification, interest accrued on the Original Loans from October 15, 2010 to the date of the closing will be funded by the Debtor and from the interest reserve in accordance with the Loan Documents. Thereafter, the Debtor will pay monthly payments of interest only on the Consolidated Loan (excluding the AI Note). At the closing of the Modification, the Bank shall waive all late charges incurred in connection with the Original Loans prior to the closing of the Modification.

9. Guarantors. Mark Kvamme, Richard Fuld, and Thomas Hix (collectively, the "Guarantors") shall personally guaranty the repayment of the Consolidated Loan, with the liability of each Guarantor capped at a maximum amount less than that provided under their original guarantees. On the closing of the Modification, Jeffrey Klein shall be released from his obligations under the guaranties executed in connection with the Original Loans, provided Jeffrey Klein or his bankruptcy trustee executes a release of the Bank as provided in the Modification.

10. Maturity Date. The Maturity Date of the Original Loan Note, the 5MM Note and the AI Note is October 15, 2014, with an option to extend the Maturity Date to October 15, 2015, provided (i) the Debtor pays the Bank a .5% fee, (ii) the Consolidated Loan has achieved a loan to value ratio equal to not more than 65% based on the as-is, appraised value of the Property as determined by an appraisal to be obtained by the Bank at the Debtor's cost, (iii)

the Debtor has completed the Final Entitlement Hurdle (as defined in the Loan Documents),[9] and (iv) no defaults then exist under the Consolidated Loan.

11. Entitlement Schedule and Funding. The Bank has approved an initial entitlement plan and timeline (the "Entitlement Plan") which describes the Debtor's plan to entitle the Property for use as a retreat center with a golf course and transient lodging (the "Entitlement(s)") and establishes completion dates for certain Entitlement hurdles identified in the Loan Documents (each an "Entitlement Hurdle").

The Debtor has been unable to obtain credit on terms better than those provided by the Bank. The funds provided by the Modification and the Member Loans will enable the Debtor to re-start the entitlement process and see it through to completion. The Modification and the Member Loans will also enable the Debtor to amend its plan of reorganization and proceed with the confirmation process or resolve its case through a voluntary dismissal. Accordingly, the proposed Modification and the Member Loans are in the best interests of the estate and its creditors.

IV.

THE SETTLEMENT

As a condition of the Modification, the Debtor and the Bank have negotiated a settlement of the litigation between them, including the Debtor's lender liability claims against the Bank (the "Settlement Agreement"). A copy of the Settlement Agreement is attached hereto as **Exhibit A**. The Settlement Agreement consists of the following material terms, among others:

1. The Debtor fully releases all claims against the Bank.

2. Dismissal of the State Court Action, the Arbitration, and the Adversary Proceeding.

[9] The Bank has agreed in principle to a modification of this requirement which is more favorable to the Debtor and which will be reflected in the final version of the Loan Documents.

3. The Debtor and the Bank agree to each bear their own attorneys' fees and expenses incurred in connection with the Modification.

The Settlement Agreement is a condition of the Modification and resolves expensive, uncertain litigation with the Bank. Along with the Modification, the Settlement Agreement clears the path for the Debtor to emerge from bankruptcy. Accordingly, the terms of the Settlement Agreement are in the best interest of the estate and its creditors.

V.

ARGUMENT

A. The Modification and Member Loans Should Be Approved

1. Sound Business Justifications Exists for the Debtor to Enter into the Modification and Member Loans.

Pursuant to Bankruptcy Code § 364, a debtor may, in the exercise of its business judgment, incur secured debt if the debtor has been unable to obtain unsecured credit and the borrowing is in the best interests of the estate. See, 11 U.S.C. 364(c), (d); see also, e.g., In re Simasko Prod. Co., 47 B.R. 444, 448-49 (D. Colo. 1985) (authorizing interim financing agreement where debtor's best business judgment indicated financing was necessary and reasonable for benefit of estate): In re Ames Dept. Stores, Inc., 115 B.R. 34, 38 (Bankr. S.D. N.Y. 1990) (with respect to postpetition credit, courts "permit debtors-in-possession to exercise their basic business judgment consistent with their fiduciary duties"); see also 3 Collier on Bankruptcy ¶ 364.03 at 364-7-18 (15th ed. rev. 1999).

Section 364(d)(1), which governs the incurrence of postpetition debt secured by superpriority or "priming" liens, provides that the Court may, after notice and a hearing,

> authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--
>
> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate 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.

11 U.S.C. § 364(d)(1).

The Debtor has satisfied the requirements of § 364 because (i) the Modification and Member Loans are an efficient vehicle for the Debtor to obtain the postpetition financing that it needs to resume the re-entitlement process and confirm a plan of reorganization or exit bankruptcy through a voluntary dismissal of the case, (ii) the Debtor is unable to obtain credit otherwise due to generally tight credit markets and lack of interest by lenders in entitlement-stage projects, and (iii) the Bank has consented to the Modification and the Member Loans are necessary for the Debtor to close the Modification.

The Debtor has sound business justifications for entering into the Modification with the Bank and the Member Loans. Through the Modification and Member Loans, the Debtor is able to resolve expensive, uncertain litigation with the Bank and immediately re-start the re-entitlement process. Moreover, the Modification also provides the bulk of the financing needed for the Debtor to exit bankruptcy and complete the re-entitlement process over time through a confirmed plan or voluntary dismissal of the bankruptcy case.

2. The Debtor Has Been Unsuccessful in Obtaining Alternative Financing.

In satisfying the standards of § 364, a debtor does not need to seek credit from every possible source. Rather, it should make a reasonable effort to seek other sources of credit of the type set forth in §§ 364(a) and (b). See, e.g., In re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1986) (finding that the trustee had demonstrated by good faith effort that credit was not available without the granting of senior liens; "the statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable"); Ames, 115 B.R. at 40 (finding that debtors demonstrated the unavailability of unsecured financing where debtors approached several lending institutions).

The Debtor has discussed with other potential lenders the possibility of extending debtor in possession financing and/or exit financing. However, because of the difficult economic climate in the country and the inherent uncertainty associated with a financing to obtain

entitlements -- as opposed to a construction loan where the entitlements are already in place -- the Debtor has been unable to find a lender willing to provide financing on terms better than the Bank. For these reasons, the Debtor does not believe that it is possible to obtain financing on an unsecured basis pursuant to § 364(a) or § 364(b) of the Bankruptcy Code or allowable solely as an administrative expense under § 503(b) of the Bankruptcy Code. Accordingly, the Debtor believes that the Bank is the only financial institution willing and capable of providing postpetition and exit financing to the Debtor. The Member Loans shall be provided on a general unsecured basis and converted to equity upon the effective date of a plan of reorganization or voluntary dismissal of the Debtor's bankruptcy case.

3. There is Adequate Protection of all Security Interests Affected by the Modification.

With regards to adequate protection required by 11 U.S.C. § 364(d)(1)(B), the Modification provides for certain cash deposits by the Debtor at the closing and during the term of the Modification which will provide adequate protection to the Bank, including for the 5MM Note. The Modification also requires the Debtor to provide an Approved Entitlement Budget, Entitlement Plan, and Entitlement Hurdles which serve as additional adequate protection. Finally, the Bank has no obligation to make disbursements under the Consolidated Loan during any time that the undisbursed funds are not sufficient to obtain all of the Entitlements for the Property in accordance with the Entitlement Plan and to pay all charges relating to such Entitlements, *i.e.*, the Consolidated Loan is not "in-balance," and may demand that the Debtor make such deposits as are necessary to render the Consolidated Loan in-balance. Thus, there is adequate protection of the Bank's interests.

4. The Debtor Should be Authorized to Enter Into the Member Loans.

The Debtor has no funds of its own with which to satisfy the initial deposits required of the Debtor under the Modification. Accordingly, the Debtor shall obtain these funds in the form of general unsecured loans from one or more of the Debtor's members. In conjunction with the

Debtor's plan or voluntary dismissal of the bankruptcy case, it is contemplated that the Debtor's equity will be restructured and the Member Loans converted into equity.

B. The Court Should Modify the Automatic Stay to Allow Effectuation of the Modification or Member Loans

The Debtor requests the Court to modify the automatic stay to the extent that any aspect of the effectuation of the Modification, including recordation of the new deed of trust, or Member Loans may implicate 11 U.S.C. § 362.

C. The Settlement Agreement Should Be Approved

1. Standards for Approval of Compromises.

Federal Rule of Bankruptcy Procedure 9019(a) provides that on the trustee's motion and after a hearing on notice to creditors, the debtor and indenture trustees, as provided in Rule 2002(a), and such other entities as the Court may designate, the Court may approve a compromise or settlement.

The Supreme Court in Protective Committee for Independent Stock Holders of TNT Trailer Fairy, Inc. v. Anderson, 390 U.S. 414, 425 (1968), held that a bankruptcy court, in considering whether to approve a compromise, should apprise itself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. It also explained that the court should form an educated estimate of the complexity, expense and likely duration of such litigation, the possibility of collection on any judgment that might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Id.; see also Martin v. Kane (In re A&C Properties), 784 F.2d 1377, 1380-84 (9th Cir. 1986), cert. denied, 4794 .S. 854 (1986). The Court need not, however, conduct an exhaustive investigation into the validity of the claims to be compromised nor is the Court expected to conduct a mini-trial on the merits. Walsh Constr., Inc. v. Alaska Nat'l Bank of the North (In re Walsh Constr., Inc.), 669 F.2d 1325, 1328 (9th Cir. 1982).

The purpose of any compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. Walsh Constr., 669 F.2d at 1328 (citing Wil-Rud Corp. v. Lynch (In re Cal. Assoc. Prod.), 183 F.2d 946, 949-50 (9th Cir. 1950)). The law favors compromise and not litigation for its own sake. Port O'Call Inv. v. Blair (In re Blair), 538 F.2d 849, 851 (9th Cir. 1976).

The Ninth Circuit in A&C Properties, 784 F.2d at 1381 reiterated that in determining the fairness, reasonableness and adequacy of a proposed settlement agreement, a court should consider: (1) the probability of success in litigation, (2) the difficulties, if any, to be encountered in the matter of collection, (3) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it, and (4) the paramount interest of the creditors and the proper deference to their reasonable views. Consideration of these factors does not require the Court to decide questions of law and fact in the parties' dispute or to determine that the settlement is the best possible resolution; instead the Court need only determine whether the settlement falls below the lowest point of the range of reasonableness. See Burton v. Ulrich (In re Schmitt), 215 B.R. 417, 423 (B.A.P. 9th Cir. 1997).

2. The Settlement Agreement Should be Approved Under Bankruptcy Rule 9019.

Applying the above standards to the circumstances herein, the Settlement Agreement should be approved.

The Settlement Agreement resolves the litigation between the Debtor and the Bank, including the Debtor's lender liability claims against the Bank, through dismissal with prejudice of the State Court Action, Arbitration, and Adversary Proceeding and a general release of all claims by the Debtor against the Bank. Although the Debtor's lender liability claims potentially have great value, there is a material risk that the Debtor might not prevail on its claims. Among other things, the Bank has argued that the Debtor's loans were in default due to maturity at the time that the Bank froze the Debtor's line of credit and that interest is accruing on the loans at a default rate of 18% per annum. The Bank has also denied the existence of an agreement for an extension of the loans, citing the refusal of the Debtor to execute the documentation purporting to

implement the term sheet agreed by the parties. In addition, limitations on the scope of discovery in the Arbitration -- where the lender liability claims are being litigated -- have hampered the Debtor's ability to fully investigate the facts regarding the Bank's conduct. As a result, the events concerning the dispute between the Debtor are subject to a high degree of interpretation by the Arbitrator, making the probability of success very uncertain and weighing in favor of the Settlement Agreement.

Difficulties in collection are not a factor because any recovery by the Debtor against the Bank would be unlikely to exceed the amount owed by the Debtor to the Bank on account of the loans and would be offset against such amount.

The disputes between the Debtor and the Bank are being fiercely fought in three separate fora. The underlying facts, and the implications of the underlying facts, are open to debate. Even if the Debtor prevails at trial, the Bank has the financial resources to appeal -- and has stated that it would do so. Thus, the expense, inconvenience, and delay associated with continued fighting with the Bank weigh in favor of the Settlement Agreement.

Finally, the Settlement Agreement is a condition of the Modification. Together, the Settlement Agreement and the Modification clear the path for the Debtor to resume both the re-entitlement effort and the confirmation process. Accordingly, approval of the Settlement Agreement serves the paramount interests of creditors.

D. REQUEST FOR FINDINGS OF AUTHORIZATION TO ACT

The Debtor is comprised of ten members, some of which are developers, some which are investors, and one which is both a developer and an investor as follows:

Developer Members:	Investor Members:
Pacific Capital Investments, LP ("PCI") (20.25%) Pacific Capital Holdings, Inc. ("PCH") (1%) T&J Investment Partners, LLC ("T&J") (20.25%) Hix Rubenstein Companies ("HRC") (1%)	MPK (4.762%) The Leone-Perkins Trust (14.286%) Crankstart Foundation (14.286%) Third Millennium Trust (9.524%) RSF, Jr., LLC (4.762%) David B. Agus (2.380%)

MPK Development, LLC ("MPK") 7.5%)	

A copy of the Debtor's Operating Agreement is attached hereto as **Exhibit N.** Section 4.6 of the Operating Agreement provides for the Debtor to take certain actions by a Super-Majority percentage vote (75% or more) of the aggregate total percentage interests of all of the members, including, pursuant to Section 4.6(viii), any "Reorganization of the Company." The term "Reorganization" is not defined in the Operating Agreement. The Debtor believes that all of the transactions contemplated by the Motion fall within the scope of Section 4.6(viii) and, therefore, may be authorized by a Super-Majority percentage of the members. All of the Debtor's members, with the exception of PCI and PCH, have affirmatively consented to the actions contemplated by the Motion and certain of the Debtor's members have agreed to fund the Member Loans. Thus, the Debtor believes that the transactions contemplated by the Motion are duly authorized by the requisite percentage interests of the members. *See*, declaration of Thomas C. Hix ("Hix Decl."), attached hereto, ¶¶ 8-9 .

Section 5.5 of the Operating Agreement provides that certain transactions by the Debtor may only be approved upon unanimous consent of the Debtor's members including (i) "[t]he encumbrance of Company property or assets, to secure a loan or otherwise" [Section 5.5(f)], (ii) "[t]he settlement of any material claim or claims against the Company" [Section 5.5(j)], and (iii) "[C]ause the Company to incur any indebtedness for borrowed money in an amount in excess of $500,000 in the aggregate" [Section 5.5(l)]. The Debtor does not believe that the Modification, Members Loans, or Settlement Agreement are within the scope of the foregoing sections of Section 5.5 of the Operating Agreement -- and, therefore, are satisfied by Super Majority[10] approval under Section 4.6 and not unanimous approval of the members under Section 5.5 --

[10] The Debtor also notes that Section 5.5(m) purportedly provides for unanimous consent to "[a]ny other transaction described in this Agreement as requiring the vote, consent, or approval of the Members, whether by Majority in Interest, a Super-Majority in Interest or unanimously." The Debtor believes that this provision is poorly drafted and, rather than vitiating all other voting provisions in the Operating Agreement, is correctly read as deferring to the voting requirements contained in other sections of the Operating Agreement, including Section 4.6.

because all of the proposed transactions are occurring within the "Reorganization of the Company," subject to notice to all creditors and Court approval. Hix Decl., ¶ 10.

To the best of the Debtor's knowledge, neither PCI nor PCH objects to the Motion. The Debtor is uncertain, however, who has authority to give consent on behalf of PCI or PCH -- and does not believe that such consent is necessary under the Super-Majority provisions of Section 4.6 of the Operating Agreement. In the past, the Debtor has communicated with PCI and PCH through Jeffrey S. Klein, a guarantor of the Original Loans. Mr. Klein is a chapter 7 debtor in a bankruptcy case pending in the Middle District of Florida, Case No. 8:09-bk-23914-CED, in which he waived his discharge. He has abandoned his personal obligations and duties under the Operating Agreement and related development agreement and disavowed his guaranty of the Original Loans. As a result, pursuant to the Modification, the Bank has agreed to release Mr. Klein from his obligations under his guaranty of the Original Loans. Hix Decl., ¶ 11.

Out of an abundance of caution, the Debtor has given notice of the Motion to PCI and PCH at the mailing address provided in the Operating Agreement as well as all other known mailing addresses for PCI, PCH, Mr. Klein, and counsel for Mr. Klein. The Debtor has been unable to determine the state of organization, if any, for PCI and PCH. Hix Decl., ¶ 12.

Based on the foregoing, the Debtor requests the Court to find that the transactions contemplated by the Motion, including, without limitation, the Modification, the Member Loans, and the Settlement Agreement, are duly authorized under the Super-Majority voting provisions of Section 4.6 of the Operating Agreement and do not require unanimous approval of the Debtor's members under Section 5.5 of the Operating Agreement.

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E. CONCLUSION

For the reasons set forth above, the Debtor respectfully requests that the Court enter an order granting this Motion, approving the Modification, approving the Member Loans, approving the Settlement Agreement, and making the requested findings regarding the Debtor's authorization to enter into the transactions contemplated by the Motion. The Debtor also requests the Court to grant such other and further relief as the Court deems just and proper under the circumstances.

Dated: May 5, 2011

Respectfully submitted,

KAYE SCHOLER LLP
Marc S. Cohen
Ashleigh A. Danker

By: /s/ Ashleigh A. Danker
Ashleigh A. Danker
Attorneys for Debtor and Debtor in Possession
MALIBU ASSOCIATES, LLC

DECLARATION OF THOMAS C. HIX

I, Thomas C. Hix, declare as follows:

1. I am the President of Hix Rubenstein Companies ("HRC"), a managing member of debtor and debtor-in-possession Malibu Associates, LLC (the "Debtor"). I have been involved in the development and management of real estate for over thirty (30) years, including many projects similar to the redevelopment of the Property contemplated by the Debtor. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto. Capitalized terms not otherwise defined herein have the same meanings ascribed to them in the pleading to which this declaration is attached.

2. The Debtor has a team highly experienced with developing projects similar to its plans for the Property. I lead the re-entitlement effort. Dan Rubenstein and I founded HRC in 1985. It is a full service, innovative land development company focusing primarily on resort and residential development. HRC has expertise in land acquisition, entitlement processing, infrastructure development, vertical and final product build-out. It was the developer of the Cordevalle Golf Club in San Martin, California, ranked in the top 25 golf clubs in the country.

3. HRC's current projects -- all of which I supervise at the senior level -- include Pronghorn, a premier private golf community, in Bend, Oregon - which is fully entitled and in the build-out stage; Tuscany Hills on the shores of Lake Tulloch in Central California's Calaveras County, a master-planned, premier golf community, which contemplates the development of 335 single family residential units - which is now fully entitled and awaiting build-out; The Bluff's at Riverbend overlooking the San Joaquin River in Madera County, California, a master-planned, premier golf community, which contemplates the development of 400 residential units - which is before the Board of Supervisors for approval and expected to complete the entitlement process in the next few months; and Northwest Innovation Park located in Bend, Oregon, an eco-friendly business hotel with approximately 100 rooms, executive suites, and conference facilities, an athletic club, and a golf academy attached to a six hole golf course that provides alternating fairways that create an 18 hole experience - which is now fully entitled and awaiting build-out.

Virtually all of HRC's projects are located in areas of great natural beauty and had to satisfy rigorous approval requirements from numerous state and local authorities as part of the entitlement process.

4. Thus, HRC and I, in particular, have abundant experience developing exactly the type of property on which the Property is located, whether the final approved project is a golf community with single family residences (the current entitlements for the Property already allow for 29 residential estate lots) and casitas or an educational institute, with a few private homes and a golf academy similar to Northwest Innovation Park, or a some combination of these elements.

5. I and my team have discussed with other potential lenders the possibility of extending debtor in possession financing and/or exit financing. However, because of the difficult economic climate in the country and the inherent uncertainty associated with a financing to obtain entitlements -- as opposed to a construction loan where the entitlements are already in place -- the Debtor has been unable to find a lender willing to provide financing on terms better than the Bank. For these reasons, I do not believe that it is possible to obtain financing on an unsecured basis or allowable solely as an administrative expense. Accordingly, I believe that the Bank is the only financial institution willing and capable of providing postpetition and exit financing to the Debtor.

6. The funds provided by the Modification and the Member Loans will enable the Debtor to re-start the entitlement process and see it through to completion. The Modification will also enable the Debtor to amend its plan of reorganization and proceed with the confirmation process or resolve its case through a voluntary dismissal. Accordingly, I believe that the proposed Modification and the Member Loans are in the best interests of the estate and its creditors.

7. The Settlement Agreement is a condition of the Modification and resolves expensive, uncertain litigation with the Bank. Along with the Modification and the Member Loans, the Settlement Agreement clears the path for the Debtor to emerge from bankruptcy. Accordingly, the terms of the Settlement Agreement are in the best interest of the estate and its creditors.

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8. The Debtor is comprised of ten members, some of which are developers, some which are investors, and one which is both a developer and an investor as follows:

Developer Members:	Investor Members:
Pacific Capital Investments, LP ("PCI") (20.25%) Pacific Capital Holdings, Inc. ("PCH") (1%) T&J Investment Partners, LLC ("T&J") (20.25%) Hix Rubenstein Companies ("HRC") (1%) MPK Development, LLC ("MPK") 7.5%)	MPK (4.762%) The Leone-Perkins Trust (14.286%) Crankstart Foundation (14.286%) Third Millennium Trust (9.524%) RSF, Jr., LLC (4.762%) David B. Agus (2.380%)

9. A copy of the Debtor's Operating Agreement is attached hereto as **Exhibit N.** Section 4.6 of the Operating Agreement provides for the Debtor to take certain actions by a Super-Majority percentage vote (75% or more) of the aggregate total percentage interests of all of the members, including, pursuant to Section 4.6(viii), any "Reorganization of the Company." The term "Reorganization" is not defined in the Operating Agreement. I believe that all of the transactions contemplated by the Motion fall within the scope of Section 4.6(viii) and, therefore, may be authorized by a Super-Majority percentage of the members. I have consulted with all of the Debtor's members, with the exception of PCI and PCH, regarding the transactions contemplated by the Motion. All of the Debtor's members, with the exception of PCI and PCH, have affirmatively consented to the actions contemplated by the Motion and certain of the Debtor's members have agreed to fund the Member Loans. Thus, I believe that the transactions contemplated by the Motion are duly authorized by the requisite percentage interests of the members.

10. Section 5.5 of the Operating Agreement provides that certain transactions by the Debtor may only be approved upon unanimous consent of the Debtor's members including (i) "[t]he encumbrance of Company property or assets, to secure a loan or otherwise" [Section 5.5(f)], (ii) "[t]he settlement of any material claim or claims against the Company" [Section 5.5(j)], and (iii) "[C]ause the Company to incur any indebtedness for borrowed money in an amount in excess

of $500,000 in the aggregate" [Section 5.5(l)]. I do not believe that the Modification, Members Loans, or Settlement Agreement are within the scope of the foregoing sections of Section 5.5 of the Operating Agreement -- and, therefore, are satisfied by Super Majority[11] approval under Section 4.6 and not unanimous approval of the members under Section 5.5 -- because all of the proposed transactions are occurring within the "Reorganization of the Company," subject to notice to all creditors and Court approval.

11. To the best of my knowledge, neither PCI nor PCH objects to the Motion. I am uncertain, however, who has authority to give consent on behalf of PCI or PCH -- and I do not believe that such consent is necessary under the Super-Majority provisions of Section 4.6 of the Operating Agreement. In the past, I have communicated with PCI and PCH through Jeffrey S. Klein, a guarantor of the Original Loans. Mr. Klein is a chapter 7 debtor in a bankruptcy case pending in the Middle District of Florida, Case No. 8:09-bk-23914-CED, in which he waived his discharge. He has abandoned his personal obligations and duties under the Operating Agreement and related development agreement and disavowed his guaranty of the Original Loans. As a result, pursuant to the Modification, the Bank has agreed to release Mr. Klein from his obligations under his guaranty of the Original Loans.

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[11] I also note that Section 5.5(m) purportedly provides for unanimous consent to "[a]ny other transaction described in this Agreement as requiring the vote, consent, or approval of the Members, whether by Majority in Interest, a Super-Majority in Interest or unanimously." I believe that this provision is poorly drafted and, rather than vitiating all other voting provisions in the Operating Agreement, is correctly read as deferring to the voting requirements contained in other sections of the Operating Agreement, including Section 4.6.

12. Out of an abundance of caution, the Debtor has given notice of the Motion to PCI and PCH at the mailing address provided in the Operating Agreement as well as all other known mailing addresses for PCI, PCH, Mr. Klein, and counsel for Mr. Klein. After searching online, I have been unable to determine the state of organization, if any, for PCI and PCH.

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

Dated: May 4, 2011

Thomas C. Hix

DECLARATION OF ASHLEIGH A. DANKER

I, Ashleigh A. Danker, declare:

1. I am a bankruptcy counsel at Kaye Scholer LLP ("Kaye Scholer"), proposed counsel for debtor-in-possession Malibu Associates, LLC (the "Debtor"). I am one of the attorneys at Kaye Scholer with primary responsibility for the representation of the Debtor. I have personal knowledge of the facts in this declaration and, if called as a witness, I could and would testify competently thereto. Capitalized terms not otherwise defined herein have the same meanings ascribed to them in the motion to which this declaration is attached.

2. A copy of the proposed Settlement Agreement with the Bank is attached hereto as **Exhibit A.**

3. The Loan Documents include, without limitation, the following documents, copies of which are attached hereto:

- Consolidation Agreement **[Exhibit B]**
- Consolidated, Amended and Restated Loan Agreement **[Exhibit C]**
- Consolidated, Amended and Restated Deed of Trust Note **[Exhibit D]**
- Deed of Trust Note ($5,000,000) **[Exhibit E]**
- Deed of Trust Note ($1,771,683.85) **[Exhibit F]**
- Consolidated, Amended and Restated Deed of Trust, Assignment of Leases and Rents, Security Agreement an Fixture Filing **[Exhibit G]**
- Consolidated, Amended and Restated Guaranty Agreement **[Exhibit H]**
- Consolidated, Amended and Restated Environmental Indemnity Agreement **[Exhibit I]**
- Consolidated, Amended and Restated Assignment of Rights Under Permits and Development Documents **[Exhibit J]**
- Pledge Agreement (Cash Collateral Account) **[Exhibit K]**

- Limited Release by Bank **[Exhibit L]**
- Subordination and Standstill Agreement **[Exhibit M]**

4. A copy of the Debtor's Operating Agreement is attached hereto as **Exhibit N.**

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

Dated: May 5, 2011

Ashleigh A. Danker