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**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF HAWAII**

In re:

HAWAII OUTDOOR TOURS, INC.  
dba Naniloa Volcanoes Resort and  
Naniloa Volcanoes Golf Club,

Debtor and Debtor-in-  
Possession.

Bk. No. 12-02279  
(Chapter 11)

Hearing:

Date: March 28, 2013

Time: 9:30 a.m.

Judge: The Hon. Robert J. Faris

**FIFTH STIPULATED INTERIM ORDER (i) AUTHORIZING USE OF  
CASH COLLATERAL PURSUANT TO 11 U.S.C. §§ 363(c)(2), (ii)  
GRANTING ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. §§ 363  
AND 364, (iii) SCHEDULING OF FINAL HEARING, AND (iv) GRANTING  
RELATED RELIEF; EXHIBITS “A”-“B”**

On November 20, 2012, HAWAII OUTDOOR TOURS, INC. dba  
NANILOA VOLCANOES RESORT AND NANILOA VOLCANOES GOLF

CLUB (“HOT” or “Debtor”) filed its Chapter 11 petition and its Motion for Order Authorizing Debtor to Use Cash Collateral Pursuant to 11 U.S.C. § 363(c)(2) on an Interim and Final Basis (“Cash Collateral Motion”), wherein the Debtor moved this Court for, among other things, entry of an interim order (“First Interim Order”) authorizing the Debtor’s use of cash collateral on an interim basis (the “Interim Relief”). After notice and at the November 21, 2012 hearing on the Motion for Interim Relief, the Court found, subject to the terms and conditions set forth in the First Interim Order, that (i) granting the First Interim Order requested in the Cash Collateral Motion was in the best interests of the Debtor, its estate and its creditors; (ii) that the First Interim Order was necessary to provide the Debtor with sufficient cash and liquidity to avoid immediate and irreparable harm during the term of the First Interim Order; (iii) in accordance with Rule 4001(a), (b) and (d) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and LBR 4001-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Hawaii (the “Local Rules”), and after due and proper notice of the Cash Collateral Motion; and (iv) upon the record presented, including, without limitation, statements of counsel, after due deliberation thereon, good and sufficient cause, the Court entered its First Interim Order Re: Use of Cash Collateral. The First Interim Cash Collateral Order was effective through

December 17, 2012, and then continued to further hearing on the Motion for Interim Relief on December 20, 2012.

HOT has continued to operate the Naniloa Volcanoes Resort and Naniloa Volcanoes Golf Club (the “Property”) during the period of the First Interim Cash Collateral Order. A Second Stipulated Interim Order (i) Authorizing Use of Cash Collateral Pursuant to §§ 363(c)(2), (ii) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 363 and 364, (iii) Scheduling of Final Hearing, and (iv) Granting Related Relief (“Second Interim Cash Collateral Order”) was filed on December 21, 2012 (Dkt. #89) which, among other things, extended the use of cash collateral to January 22, 2013. A Third Stipulated Interim Order (1) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363(c)(2(ii), Granting Adequate Protection Pursuant to 11 U.S.C. § 363 and 364, (iii) Scheduling of Final Hearing and (iv) Granting Related Relief (“Third Interim Cash Collateral Order”) was filed on February 25, 2013 (Dkt #188) which , among other things, extended the use of cash collateral to February 25, 2013. A Fourth Stipulation Interim Order (1) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363(c)(2(ii), Granting Adequate Protection Pursuant to 11 U.S.C. § 363 and 364, (iii) Scheduling of Final Hearing and (iv) Granting Related Relief (“Fourth Interim Cash Collateral Order”) was filed on March 6, 2013 (Dkt #207) which, among other things, extended the use of cash collateral to March 25, 2013 and subsequently to a continued hearing

on March 28, 2013. HOT continued to operate the Property during the periods of the Second Interim Cash Collateral Order, Third Interim Cash Collateral Order and Fourth Interim Cash Collateral Order.

THE COURT HEREBY FINDS AND CONCLUDES that,

## **I. BACKGROUND**

A. The Debtor is the owner and operator for the property located at 93 Banyan Drive, Hilo, Hawaii 96720, which includes the hotel known as the Naniloa Volcanoes Resort (the “Hotel”) and a nine-hole golf course known as the Naniloa Volcanoes Golf Club (the “Golf Course”) with the following real property tax identification numbers: (3) 2-1-001-012, (3) 2-1-005-013, (3) 2-1-005-016, (3) 2-1-005-017, (3) 2-1-005-027, (3) 2-1-005-032, (3) 2-1-005-046 (hereinafter referred to as the “Property”).

B. On November 20, 2012, (the “Petition Date”), the Debtor commenced this Chapter 11 case (the “Chapter 11 Case”) by filing a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 1101 et seq., as amended (the “Bankruptcy Code”), in the United States Bankruptcy Court for the District of Hawaii (the “Court”).

C. On November 22, 2012, this Court approved Debtor’s Motion for Order Authorizing Debtor to Use Cash Collateral Pursuant to 11 U.S.C. §

363(c)(2) on an Interim and Final Basis (“Cash Collateral Motion”), and granted entry of an interim order (“First Interim Order”) authorizing the Debtor’s use of cash collateral on an interim basis (the “Interim Relief”), which was effective from November 22, 2012 through December 17, 2012, and further continued to December 20, 2012. The First Interim Order allowed the Debtor to use cash collateral to operate the Property.

D. On December 21, 2012, the Second Interim Cash Collateral Order allowed the Debtor to use cash collateral to operate the Property in accordance with the terms and conditions of said order.

E. On February 25, 2013, the Third Interim Cash Collateral Order allowed the Debtor to use Cash Collateral to operate the Property in accordance with the terms and conditions of said Order.

F. On March 6, 2013, the Fourth Interim Cash Collateral Order allowed the Debtor to use Cash Collateral to operate the Property in accordance with the terms and conditions of said Order.

G. The Debtor continues to operate its business and manage the Property as Debtor-in-Possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this Chapter 11 Case. On or about December 20, 2012 an official committee of unsecured creditors (the

“Committee”) was formed. The Debtor seeks to continue the Fourth Interim Cash Collateral Order and continue to operate the Property pursuant to a Fifth Interim Order (i) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. 363(c)(2), (ii) Granting Adequate Protection Pursuant to 11 U.S.C. 363 and 364, (iii) Scheduling of Final Hearing, and (iv) Granting Related Relief (“Fifth Interim Cash Collateral Order”), on the terms and conditions set forth herein.

H. The Court has jurisdiction, pursuant to 28 U.S.C. §§ 157(b) and 1334, over this Chapter 11 Case, and over the persons and property affected hereby. Consideration of the Cash Collateral Motion constitutes a core proceeding as defined in 28 U.S.C. § 157(b)(2). The statutory predicates for the relief sought herein are Sections 105, 361, 363 and 507 of the Bankruptcy Code, Bankruptcy Rules 4001(a), (b) and (d) and 6003 and Local Rule 4001-2.

## **II. FIRST-CITIZENS BANK PRE-PETITION LOAN**

I. Prior to the Petition Date, on January 20, 2006, the State of Hawaii, as lessor, and Hawaii Outdoor Tours, Inc., as lessee, entered into General Lease No. S-5844 (the “General Lease”), dually recorded on February 1, 2006 in the Bureau of Conveyances, State of Hawaii, as Document No. 2006-021241, and on February 1, 2006, in the Office of the Assistant Registrar, Land Court, State of Hawaii, Document No. 3385990 and noted on of Certificates of Title Nos. 108,763 and

106,776. The General Lease is for a term of sixty-five (65) years, commencing on February 1, 2006, up to and including the 31st day of January 2071, for the Property situate at Waieka, South Hilo, on the Island of Hawaii, Hawaii, as more specifically described in Exhibit “A” to the General Lease.

J. On or about January 23, 2006, HOT as borrower, for value received, made, executed and delivered to Lender First Regional Bank (“First Regional”) a Promissory Note (the “Promissory Note”) and a Construction Loan Agreement the “Construction Loan Agreement”) in the principal amount of \$10,000,000.00.

K. The Promissory Note and Construction Loan Agreement were secured by a Construction Mortgage, which encumbers the Property, dated January 23, 2006 (hereinafter the "Mortgage"), and dually recorded on February 1, 2006, in the Bureau of Conveyances, State of Hawaii, as Document No. 2006-021243 and on February 1, 2006 in the Office of the Assistant Registrar, Land Court, State of Hawaii, as Document No. 3385991 and noted on Certificate of Title Nos. 108,763 and 106,776.

L. The Promissory Note, Construction Loan Agreement, Mortgage and other Loan Documents were subsequently assigned to First-Citizens Bank & Trust Company (“First-Citizens Bank”).

M. The Promissory Note, Mortgage, Commercial Security Agreement, and other Loan Documents matured on February 1, 2011, and all amounts due and owing under said documents became and are now due and owing.

N. On or about October 5, 2012, First-Citizens Bank made a payment to the State of Hawaii Department of Land and Natural Resources (“DLNR”), in the amount of \$260,015.95 to cure Debtor’s default under the performance bond of the General Lease (the “Bond Payment”).

O. In August 2012, Debtor failed and neglected to make a lease payment in the amount of \$262,000.00 to the DLNR for lease rent owed under the General Lease (“August Lease Payment”).

P. First-Citizens Bank made the August Lease Payment to the DLNR, on behalf of Debtor, and as an advance to Debtor, and First-Citizens Bank, with court approval pursuant to the Second Interim Cash Collateral Order, was allowed a super-priority administrative expense claim (the “Super-Priority Claim”) in the amount of \$262,000.00 plus interest accruing at 6.50% per annum from and after December 27, 2012.

Q. To secure its obligations under the Secured Loan Agreements, Debtor granted to First-Citizens Bank a first priority security interest in, a lien upon, and a right of set off against, and assignment to First-Citizens Bank as security, among



other things, all property of the Debtor, whether now owned or hereinafter acquired or existing, and wherever located (collectively, including “Cash Collateral” (defined below), the “Pre-Petition Collateral”):

- i. The Property.
- ii. All of the Debtor’s assets, owned now or acquired in the future and wherever located, including but not limited to: inventory, accounts, fixtures, equipment, plans, permits, books, records, contract rights, deposits, prepaid rents, instruments, letters of credit, claims, causes of action, lawsuits, judgments, awards, general intangibles and loan proceeds; accessions, additions, replacements, and substitutions related to the foregoing, all records of any kind relating to any of the foregoing; all proceeds related to the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and accounts proceeds).
- iii. Assignment of all rent derived from the Property located in the County of Hawaii, State of Hawaii.
- iv. This does not include Debtor’s leasehold interest in real property identified by tax identification number (3) 9-8-001-002 (the “Ka’u State Lease”).

R. First-Citizens Bank claims, and the Debtor acknowledges, that in accordance with the terms of the Secured Loan Agreements, the Debtor is truly and justly indebted to First-Citizens Bank, without defense, recoupment claim,

counterclaim or offset of any kind, and that as of December 20, 2012, (i) with respect to the loans made and not including accrued and unaccrued interest, costs and fees, pursuant to the Secured Loan Agreements in the principal amount of approximately \$9,736,403.67 together with interest thereon as stated in the Secured Loan Agreements (the “Pre-Petition Loan Indebtedness”), and (ii) pursuant to the Secured Loan Agreements, the Debtor may be liable to First-Citizens Bank for, among other things, accrued and unpaid interest, commitment fees, advances, attorneys’ and advisors’ fees, other out-of-pocket expenses, costs and indemnities (collectively, subsections (i) and (ii) of this section are the “Secured Loan Obligations”).

S. Without prejudice to the rights of any other party, including the Debtor, the Debtor acknowledges and stipulates that under the Secured Loan Agreements and as security for repayment of the Secured Loan Obligations, the Debtor granted to First-Citizens Bank a security interest in, and liens upon, the Cash Collateral, Pre-Petition Collateral, and the Property.

T. First-Citizens Bank claims that it holds a security interest in, and liens on, the Pre-Petition Collateral which were properly perfected and are valid and enforceable first priority liens on and security interests in the Pre-Petition Collateral. The Debtor acknowledges that its cash on hand and cash equivalent as of the Petition Date are proceeds of the Pre-Petition Collateral and cash collateral

of First-Citizens Bank within the meaning of Bankruptcy Code § 363(a) (“Cash Collateral”). First-Citizens Bank is entitled, pursuant to Bankruptcy Code §§ 361 and 363(e), to adequate protection of its interest in the Pre-Petition Collateral, including for the use of Cash Collateral, the use, sale or lease of the Pre-Petition Collateral other than Cash Collateral, and for the imposition of the automatic stay.

U. The Department of Taxation, State of Hawaii (the “Department”) claims valid, perfected, and unavoidable statutory liens against all of the Debtor’s property, pursuant to the following Certificate of Tax Liens filed at the Bureau of Conveyances, State of Hawaii:

(i) Certificate of Tax Lien, recorded July 28, 2011 filed as Document No. 2011-118459.

(ii) Certificate of Tax Lien, recorded August 31, 2011 filed as Document No. 2011-139606.

(iii) Certificate of Tax Lien, recorded September 30, 2011 filed as Document No. 2011-159801.

(iv) Certificate of Tax Lien, recorded October 31, 2011 filed as Document No. 2011-179216.

(v) Certificate of Tax Lien, recorded November 29, 2011 filed as Document No. 2011-200499.

(vi) Certificate of Tax Lien, recorded January 13, 2012 filed as Document No. A-43950774.

(vii) Certificate of Tax Lien, recorded February 13, 2012 filed as Document No. A-44260563.

(viii) Certificate of Tax Lien, recorded April 11, 2012 filed as Document No. A-44841318.

(ix) Certificate of Tax Lien, recorded June 1, 2012 filed as Document No. A-45350896.

(x) Certificate of Tax Lien, recorded June 29, 2012 filed as Document No. A-45630830.

V. The outstanding balance of the secured tax claim by the Department as of the Petition Date is \$473,535.80.

W. The Department claims junior lien interests in the assets of the Debtor held as of the Petition Date.

X. In accordance with Section 552(b) of the Bankruptcy Code, the Pre-Petition Collateral includes, without limitation, all proceeds, products and profits

of the Pre-Petition Collateral, whether existing before or after the commencement of the Chapter 11 Case. “Available Cash” shall consist of the Debtor’s cash and cash equivalents that are subject to the existing liens and security interests of First-Citizens Bank. The Debtor acknowledges and stipulates that, as of the Petition Date, all of the Available Cash were the proceeds, products and profits of the Pre-Petition Collateral.

Y. The Debtor acknowledges and agrees that all of the Available Cash held on the Petition Date together with any cash or cash equivalent proceeds of the Pre-Petition Collateral received on or after the Petition Date shall constitute Cash Collateral.

Z. Without prejudice to the rights of any party, including the Debtor for purposes of this Fifth Interim Cash Collateral Order, the Debtor acknowledges and agrees that (i) the Secured Loan Obligations constitute legal, valid and binding obligations of the Debtor, enforceable in accordance with the terms of the Secured Loan Agreements (other than in respect of the stay of enforcement arising from Section 362 of the Bankruptcy Code), (ii) no offsets, defenses, recoupment claims or counterclaims exist to the currently outstanding Secured Loan Obligations, (iii) First-Citizens Bank liens, security interests and assignments are first priority, valid, enforceable, perfected and not subject to avoidance, subordination, challenge or disallowance; and (iv) no portion of the Secured Loan Obligations is subject to

avoidance, subordination, challenge or disallowance pursuant to the Bankruptcy Code or applicable non-bankruptcy law.

AA. The Debtor acknowledges and agrees, for the purposes of the Fifth Interim Cash Collateral Order, that First-Citizens Bank is entitled to adequate protection payments for the use of Cash Collateral through April 29, 2013.

### **III. THE DEBTOR'S NEED FOR USE OF CASH COLLATERAL**

BB. An immediate need exists for the Debtor to have access to the Cash Collateral in order to continue its operations, meet its payroll and other necessary, ordinary course business expenditures, administer and preserve the value of its estate, and maintain adequate access to cash in amounts customary and necessary for a company of its size in this industry to maintain customer and vendor confidence. The ability of the Debtor to finance its operations by way of working capital requires its access to cash resources, the absence of which would immediately and irreparably harm the Debtor, its estate, and its creditors. The Debtor requires these cash resources to operate its businesses, preserve the confidences of vendors, suppliers and customers, and to preserve the value of their businesses.

CC. The Debtor further requests, pursuant to Section 363(c) of the Bankruptcy Code, that First-Citizens Bank consent to the Debtor's use of the Cash

Collateral and the Debtor's use, sale and lease of the other Pre-Petition Collateral pursuant to the terms and conditions of the Fourth Interim Cash Collateral Order during the Fifth Interim Cash Collateral Period (as defined below). The Debtor acknowledges and agrees, subject to this Court's determination, that First-Citizens Bank is entitled to adequate protection pursuant to Sections 361 and 363(e) of the Bankruptcy Code with respect to Cash Collateral and other Pre-Petition Collateral, including, without limitation, to compensate First-Citizens Bank for any loss or diminution in the value of Cash Collateral or other Pre-Petition Collateral resulting from the Debtor's use of Cash Collateral, the use, sale or lease of other Pre-Petition Collateral and the imposition of the automatic stay during the Fifth Interim Cash Collateral Period.

DD. Subject to the entry, and continued effectiveness, of this Fifth Interim Order, First-Citizens Bank and the Department have consented to the Debtor's use of Cash Collateral and use, sale or lease of other Pre-Petition Collateral during the Fifth Interim Cash Collateral Period. The foregoing notwithstanding, nothing in this Fifth Interim Cash Collateral Order shall be construed as limiting or prohibiting First-Citizens Bank or the Department from objecting to any relief sought by the Debtor in this Chapter 11 case, including, without limitation, any DIP Financing<sup>1</sup> or any motion for the further use of Cash Collateral, other than the

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<sup>1</sup> The term "DIP Financing" means any debtor-in-possession financing facility, cash loans or liquidity

entry of this Fifth Interim Cash Collateral Order and any Final Order entered on the Cash Collateral Motion (“Final Order”), provided such Final Order is on terms acceptable to First-Citizens Bank and the Department, and approved by this Court.

EE. The Fifth Interim Relief requested herein is, subject to the terms and conditions hereof, necessary, essential and appropriate for the continued operations of the Debtor’s business and the preservation of its estate and the value of the Debtor’s business.

FF. Good and sufficient cause has been shown for the entry of this Fifth Interim Cash Collateral Order. Among other things, the entry of this Fifth Interim Order is in the best interests of the Debtor, its creditors and its estate because it will enable the Debtor to (i) continue operating its businesses and avoid an immediate shutdown of operations, (ii) meet obligations for payroll, necessary expenditures, and other operating expenses, (iii) pay necessary fees under the Bankruptcy Code and make payments authorized under other orders entered by the Court, (iv) obtain needed goods and services, (v) retain vendor, customer and employee confidence, and (vi) maintain adequate cash resources customary and necessary for a hotel operations of this size, and thereby avoiding immediate and irreparable harm to the Debtor’s estate.

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facility provided to the Debtor pursuant to Section 364 of the Bankruptcy Code secured by liens on and against property of the Debtor’s estate. Any party that provides the Debtor with DIP Financing shall be referred to as a “DIP Lender.”



GG. Prior notice of the hearing (the “Fifth Interim Hearing”) for the entry of the Fifth Interim Cash Collateral Order and the Fifth Interim Relief requested in the Cash Collateral Motion was given by the Debtor to (i) the office of the United States Trustee for the District of Hawaii; (ii) First-Citizens Bank; (iii) counsel to First-Citizens Bank; (iv) all known parties asserting liens on the Debtor’s assets; (v) the State of Hawaii, Department of Taxation; (vi) counsel to the State of Hawaii, Department of Taxation and Department of Land and Natural Resources; (vii) the Committee and its counsel; and (viii) the parties listed on the Debtor’s list of twenty (20) largest unsecured creditors (the “Initial Notice Parties”). Requisite, due and proper notice has been provided in accordance with Bankruptcy Rule 4001 and Local Rule 4001-2, which notice is sufficient for all purposes under the Bankruptcy Code and no other notice need be provided for entry of this Fifth Interim Cash Collateral Order.

HH. The Debtor has requested immediate entry of this Fifth Interim Cash Collateral Order pursuant to Bankruptcy Rule 6004(g), and First-Citizens Bank and the Department have consented to the Interim Relief contained herein. Good and sufficient cause has been shown for the entry of this Fifth Interim Cash Collateral Order.

II. Other than First-Citizens Bank’s Super-Priority Claim, there have been no administrative claims filed with the Court.

JJ. Pursuant to 11 U.S.C. § 365(d)(4)(B), the Debtor obtained an order extending the deadline to June 18, 2013 to assume or reject Debtor's unexpired non-residential leases, including without limitation, the State General Lease (Dkt #238).

KK. First-Citizens Bank filed a Motion for Appointment of Trustee ("Motion") (Dkt #172) was heard on March 25, 2013. This Motion was denied without prejudice.

LL. No reserve has been set aside for Debtor's attorneys' fees and costs and the Committee's attorney's fees and costs.

NOW, based upon the Cash Collateral Motion of the Debtor and the record before the Court with respect to the Cash Collateral Motion made by the Debtor at the Fourth Interim Hearing, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED effective immediately that:

1. The Fifth Interim Cash Collateral Motion is GRANTED with respect to the Interim Relief on the terms and conditions set forth herein. The findings and conclusions above are true in all respects and incorporated by reference in this Fifth Interim Cash Collateral Order.

2. (a) Period of Interim Relief. Any provision of the Bankruptcy Code or the Bankruptcy Rules notwithstanding, this Fifth Interim Cash Collateral Order shall take effect immediately. So long as no breach of the termination provisions hereof has occurred, this Fifth Interim Cash Collateral Order shall remain in effect until the earliest (i) of the close of business on April 29, 2013, (ii) the conclusion of the final hearing on the Cash Collateral Motion authorizing the Debtor's continued use of the Cash Collateral (the "Final Hearing") or (iii) the breach of the termination provisions provided in Section 16 of this Fifth Interim Cash Collateral Order (such period, as it may be extended pursuant to the following proviso, the "Fifth Interim Cash Collateral Period"). The Debtor's ability and authorization to use Cash Collateral during the Fifth Interim Cash Collateral Period shall at all times be subject to the termination provisions of this Interim Order.

(b) During the Fifth Interim Cash Collateral Period, subject to the Court's ruling, the Debtor waives any right to seek relief under the Bankruptcy Code, including, without limitation, under Sections 105(a) and 363(c), and 506(c) to the extent any such relief would in any way restrict or impair the rights and remedies of First-Citizens Bank or the Department as set forth in this Fifth Interim Cash Collateral Order; provided, however, (i) after the occurrence of a termination event set forth in Section 16 hereof, the Debtor may seek entry of an

Order authorizing the use of Cash Collateral over First-Citizens Bank's and/or the Department's objection; (ii) at any time, the Debtor may seek to sell the Pre-Petition Collateral; and (iii) with respects to sub-paragraphs (i) and (ii) above, First-Citizens Bank and the Department reserve all rights and remedies, under the Bankruptcy Code, this Fifth Interim Cash Collateral Order or otherwise, including, without limitation, the right to object to such relief. If the Debtor, or any other person, challenges the expiration or termination of the Fifth Interim Cash Collateral Period, any such objector's remedy shall be limited to requesting a hearing before the Court, with at least three (3) business days' written notice to First-Citizens Bank and the Department. In any such hearing, the sole issue before the Court shall be whether the Fifth Interim Cash Collateral Period expired or was terminated pursuant to the terms of this Fifth Interim Cash Collateral Order. A change in circumstances shall not be grounds for modification of this Section 2(b).

### **GOOD FAITH, RELIANCE AND CONDUCT**

3. The Debtor, First-Citizens Bank, and the Department and their respective agents, advisors and employees have acted in good faith in negotiating, consenting and agreeing to the Debtor's use of Cash Collateral and use, sale and lease of other Pre-Petition Collateral as contemplated and provided by this Fifth Interim Cash Collateral Order. The negotiation of the terms and provisions of this Fifth Interim Cash Collateral Order has been conducted at arm's length, and the

Court finds that such terms and conditions are fair and reasonable, under the circumstances.

4. To the extent First-Citizens Bank and the Department are not secured in the Pre-Petition Collateral, they shall not have a Replacement Lien (as defined below) or a Superpriority Claim (as defined below) with regard to any use of such Cash Collateral which is not found to be Cash Collateral of First-Citizens Bank or the Department pursuant to Section 363 of the Bankruptcy Code; provided, however, that First-Citizens Bank shall have its Super-Priority Claim as set forth herein. In the event that any Court of competent jurisdiction determines, in a final non-appealable order, that First-Citizens Bank or the Department was undersecured or unsecured as of the Petition Date, and not entitled to be paid interest, fees and related charges post-petition, then (i) the Debtor's obligations to make all payments and to comply with all other terms and conditions established by this Fifth Interim Cash Collateral Order shall not terminate or abate, but all such payments of interest, fees and related charges paid during the Fourth Interim Cash Collateral Period shall be applied to the secured amount of the Secured Loan Obligations as of the Petition Date, or as may otherwise be provided by court order, and (ii) First-Citizens Bank and the Department shall be entitled to a hearing before the Court with at least three (3) business days' written notice to the Debtor and its counsel, re-examining the adequate protection of its secured interests in the

Pre-Petition Collateral and Replacement Collateral, and the authority of the Debtor to use Cash Collateral.

5. (a) Nothing in this Fifth Interim Cash Collateral Order, shall in any way be construed or interpreted to impose or allow the imposition upon First-Citizens Bank and the Department or its agents, advisors or employees (in their capacities as such) any liability for any claims arising from the activities of the Debtor or any of its affiliates, before or after the Petition Date, in the operation of its businesses, or in connection with its restructuring efforts.

(b) In exercising any of its rights or remedies, as and when permitted pursuant to this Fifth Interim Cash Collateral Order, First-Citizens Bank shall not be deemed to be in control of the operations of the Debtor.

6. Based on the findings set forth in this Fifth Interim Order, and First-Citizens Bank and the Department's reliance in good faith on the terms thereof, if any of the provisions of this Fifth Interim Order are hereafter modified, vacated or stayed by an order of this Court or another court, such stay, modification or vacation shall not affect the validity and enforceability of any claim, lien, security interest or priority authorized for First-Citizens Bank and/or the Department's benefit that is granted or attaches prior to the effective date of such stay, modification or vacation, and any use of Cash Collateral or use, sale or lease of other Pre-Petition Collateral by the Debtor pursuant to this Fifth Interim

Order prior to the effective date of such modification, stay or vacation shall be governed in all respects by the original provisions of this Interim Order.

### **AUTHORIZED USE OF CASH COLLATERAL**

7. The Debtor is hereby authorized to use Cash Collateral during the Fifth Interim Cash Collateral Period, subject to the conditions and limitations set forth herein.

8. Authorized Uses of Cash Collateral. The Debtor may use Cash Collateral during the Fifth Interim Cash Collateral Period, as limited by the Budget attached hereto as Exhibit A, to pay only the ordinary and reasonable expenses of operating the Debtor's businesses which are necessary to avoid immediate and irreparable harm including, without limitation, the quarterly fees payable to the United States Trustee, as they become due in the ordinary course. No Cash Collateral or any other property of Debtor shall be disbursed to any insiders of Debtor, Debtor's attorneys, or Debtor's professionals, other than wages, salaries, and employee benefits expressly authorized by the Bankruptcy Court. In the event of any unauthorized disbursement of cash collateral occurring since the Petition Date, the Debtor shall take all steps reasonably necessary to recover from the recipient the amount of such unauthorized disbursement.

9. Secured Loan Agreement Amendments. During the Fifth Interim Cash Collateral Period, the material terms of the Secured Loan Agreements

shall continue in full force and effect except as may be modified by operation of law or pursuant to the terms of this Fifth Interim Order.

**ADEQUATE PROTECTION IN FAVOR OF FIRST-CITIZENS  
BANK FOR THE DEBTOR'S USE OF CASH COLLATERAL**

10. Adequate Protection. On account of the Debtor's use of Cash Collateral, its use, sale or lease of the other Pre-Petition Collateral and the imposition of the automatic stay pursuant to Section 362 of the Bankruptcy Code, in each case during the Interim Cash Collateral Period, First-Citizens Bank is hereby granted the following adequate protection pursuant to Sections 361 and 363(e) of the Bankruptcy Code:

(a) Interim Payment. No later than April 20, 2013, the Debtor shall make a post-petition payment of \$55,000.00 (the "April Adequate Protection Payment") to First-Citizens Bank, and promptly provide counsel for First-Citizens Bank evidence that the April Adequate Protection Payment was made.

Thereafter reoccurring monthly payments in the amount of \$55,000.00 shall be paid by Debtor no later than the 20<sup>th</sup> day of each month. All such payments shall be applied in accordance with the terms of the Secured Loan Agreements. The Debtor shall strictly and timely comply with the requirements of the April Adequate Protection Payment and any subsequent monthly payment.



(b) Replacement Collateral and Replacement Liens. The Debtor hereby grants, assigns and pledges to First-Citizens Bank a valid, perfected and enforceable first priority and senior replacement lien and security interest (the “Senior Replacement Lien”) in all of the Borrower Accounts created from and after the Petition Date and all of the Debtor’s right, title and interest in, to and under the Pre-Petition Collateral, to the extent same existed on the Petition Date and the proceeds, products, offspring, rents and profits of all of the foregoing, all as may otherwise be described in the Secured Loan Agreements, (collectively, the “Senior Replacement Collateral). The Debtor also hereby grants, assigns and pledges to the Department a valid, perfected and enforceable a second priority replacement lien and security interest, junior to the Senior Replacement Lien of First-Citizens Bank (the “Junior Replacement Lien”) in all of the Borrower Accounts created from and after the Petition Date and all of the Debtor’s right, title and interest in, to and under the Pre-Petition Collateral, to the extent same existed on the Petition Date and the proceeds, products, offspring, rents and profits of all of the foregoing (collectively, the “Junior Replacement Collateral). The Replacement Liens granted hereunder shall be limited in amount to the aggregate diminution in value of the interests of First-Citizens Bank and the Department in the Pre-Petition Collateral and Cash Collateral during the Fifth Interim Cash Collateral Period (the “Interim Replacement Value”). In the event the case is

converted to a Chapter 7 case, the liens and security interests of First-Citizens Bank will be subordinated to the fees and expenses of the Chapter 7 trustee but will not be subordinated to the professional fees and expenses incurred by any professional employed by a Chapter 7 trustee.

(c) Automatic Perfection of Replacement Liens. The Replacement Liens granted under this Fifth Interim Order shall be valid, perfected and enforceable against the Replacement Collateral as of the Petition Date without further filing or recording of any document or instrument or the taking of any further actions, and shall not be subject to dispute, avoidance or subordination as to the Interim Replacement Value.

(d) Priority of Replacement Liens. The Replacement Liens granted hereunder shall be subject and subordinate in priority to any liens, security interests and other encumbrances, existing as of the Petition Date, or which attach to the Replacement Collateral after the Petition Date, that are senior, valid, perfected, enforceable and unavoidable, that are granted with First-Citizens Bank's and the Department's consent or that are otherwise senior to the pre-petition liens in favor of First-Citizens Bank and the Department. The Replacement Liens shall be valid and enforceable against any trustee appointed in this Chapter 11 case, or in any subsequent proceeding affecting the Debtor, including any conversion of this

Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code or dismissal of this case.

(e) Taxes. The Debtor shall and hereby agrees to timely file any and all state and federal tax returns and to pay any and all post-petition federal, state and county taxes as and when due, regardless of whether such taxes appear on the Budget. The Debtor shall promptly provide copies and notify in writing First-Citizens Bank and the Department of any and all such filed tax returns and payments.

(f) Super-Priority Administrative Expense Claim. The Debtor and the Committee acknowledge and reaffirm the validity of the Super-Priority Claim allowed and authorized by the court in favor of First-Citizens Bank in the principal amount of \$262,000.00 plus interest accruing at 6.50% per annum from and after December 27, 2012.

(g) Motion to Assume Non-Residential Leases. No later than Friday May 3, 2013, Debtor shall file and serve a motion to assume all non-residential leases (“Assumption Motion”). The Assumption Motion shall be heard on Monday, June 10, 2013 at 9:30 a.m. The Assumption Motion and any proposed order granting the Assumption Motion shall be in a form mutually acceptable to First-Citizens Bank and the Department.

## **THE BUDGET**

11. Attached hereto as Exhibit A is a budget (the “Budget”) for the next 30-60-90 days of operation, ending July 31, 2013, which has been prepared by the Debtor. The Budget reflects, on a line-item basis, anticipated cash receipts and expenditures and includes all necessary and required expenses which the Debtor expects to incur during the term of the Budget in order to avoid immediate and irreparable harm. The Debtor is authorized to use the Cash Collateral only for payment of such items as is set forth in the Budget, with allowance for a ten percent (10%) aggregate (and not line-item) variance on a rolling forward, cumulative basis and also subject to the terms and conditions set forth in the Secured Loan Agreements and this Fifth Interim Order; provided, however, there shall be no line item reflecting, or payment of, any professional fees during the time period covered by this Fifth Interim Order; and further provided that the Parties reserve all rights with respect to the payment of any accrued professional fees and/or motion or action by Debtor to obtain a “carve-out” of cash collateral to pay professional fees or any portion of such fees. Any disbursement by the Debtor other than for budgeted amounts as set forth in the Budget shall constitute a termination event in accordance with the provisions of this Interim Order unless First-Citizens Bank and the Department give prior consent to those changes in writing or the Court enters an Order, after notice to First-Citizens Bank and the

Department and a hearing. First-Citizens Bank is not required to advance to the Debtor any amounts that may be available for lending under the Secured Loan Agreements. So long as no default exists under this Fifth Interim Order, First-Citizens Bank and the Department shall consent to the use by the Debtor of such amounts of Cash Collateral authorized for use by the Debtor pursuant to the terms and conditions of this Interim Order and the Budget. No later than April 22, 2013, for the monthly post-petition period of March 2013, the Debtor shall provide to First-Citizens Bank, the Department, and the Committee a comparison of the prior projected budgets in the Third Interim Order and Fourth Interim Cash Collateral Orders as to total actual revenues and disbursements. The projected/actual comparison provided will be for all line items on the respective monthly projected budgets.

### **DISCLOSURE REQUIRED OF THE DEBTOR**

12. As a continuing obligation and as additional adequate protection and the Debtor shall provide First-Citizens Bank and the Department, by electronic mail or other reasonably acceptable means, the following information during the Fifth Interim Cash Collateral Period:

(a) Reporting. Copies of all reports as are required by the Secured Loan Agreements or such additional reports as First-Citizens Bank or the Department may reasonably request from time to time, all in form, detail and

substance reasonably satisfactory to First-Citizens Bank and the Department. Debtor shall immediately deliver to First-Citizens Bank and the Department the following documents:

(i) a report for aged post-petition account receivables;

(ii) any appraisal of the Property obtained by Debtor in 2012 or 2013;

(iii) any written offers or letters of interest to purchase the Property, invest in the Property or refinance the Property;

(iv) In addition, Debtor shall deliver to First-Citizens Bank and the Department any documents upon which Debtor intends to rely or present as evidence in support of confirmation of a plan of reorganization promptly after such documents become available and Debtor determines in good faith that it may rely upon or present them.

(b) Daily Reports. Debtor shall provide the Secured Creditors with daily cash reports (including without limitation the payee for any disbursements and a full and complete detailed, itemized listing of any and all receipts and disbursements on a daily basis) of its operations on or before 4:00 p.m. of the following business day. Upon written notice (which may be made by email to Debtor's counsel) from First Citizens to the Debtor of any failure by the

Debtor to strictly and timely comply with production of Daily Reports, and the failure of the Debtor to promptly cure any such failure, such failure shall constitute a default under this Fifth Interim Cash Collateral Order.

(c) Copies of Documents. To the extent not already produced, Debtor shall produce copies of (i) all non-privileged reports, appraisals, business plans, investigations, reports of physical condition of the Hotel and Golf Course or other similar documents provided to First-Citizens Bank and the Department, its counsel or Committee counsel or any potential DIP Lender, (ii) any and all audits or financial statements prepared by the Debtor's controller. Debtor has agreed to cooperate with discovery requests made by First-Citizens Bank, and, to the extent not already produced, shall produce any updated documents identified on Exhibit B attached hereto and complete the production of documents requested by April 10, 2013;

(e) Copies of Electronic Accounting Files. Debtor shall continue to timely provide current copies of electronic accounting files on a hard drive and information identifying Peachtree or other accounting software for First-Citizens Bank and its counsel to access and read the electronic accounting files.

(f) Requests for Additional Information. Within three (3) business days or such other time period agreed to at the time of the request by

First-Citizens Bank or the Department, the Debtor shall, to the extent possible, provide such requested non-privileged reports, analysis, documents and information as reasonably requested, including without limitation copies of the documents and information described in Exhibit B attached hereto; and

13. If the Debtor fails to deliver the reports, documents, information and analysis to First-Citizens Bank or the Department by the dates and times required under Section 12, First-Citizens Bank or the Department may request that the Court further restrict the Debtor's use of the Cash Collateral, and the Debtor agrees that First-Citizens Bank or the Department's request shall be heard in an expedited manner by the Court with at least three (3) business days' written notice to the Debtor.

14. Upon telephonic notice by First-Citizens Bank or the Department, the Debtor shall permit any of First-Citizens Bank's and/or the Department's agents, advisors, auditors and employees full and reasonable access, during normal business hours, to inspect, review and photocopy or otherwise duplicate (as applicable) the Debtor's books, records and place of business to verify the existence, condition, value and location of property in which First-Citizens Bank and the Department hold liens or security interests. The Debtor shall permit, without material disruption to the operation of the Debtor's business, First-Citizens Bank's and the Department's agents and consultants, respectively, (the



“Creditors’ Consultants”), full access to examine the respective corporate, financial and operating records, and, at the Debtor’s expense, make copies thereof, inspect the assets, properties, operations and affairs of the Debtor, visit any or all of the offices of the Debtor to discuss such matters with its officers, independent auditors (and the Debtor hereby authorizes such independent auditors to discuss such matters with the Creditors’ Consultants), and the Debtor shall cooperate with the Creditors’ Consultants in all respects. The Debtor shall provide First-Citizens Bank, the Department and the Creditors’ Consultants, with reasonable promptness, such financial information concerning the Debtor’s cash flow projections, business plan, and other aspects of operations as such parties may reasonably request from time to time except matters and documents that are privileged.

15. Debtor shall permit advisors and consultants of First Citizens Bank and/or the Department full and reasonable access, during normal business hours, to inspect, review, photograph or videotape the Hotel and Golf Course during a two-week period commencing on April 8, 2013 in order for First Citizens Bank and/or the Department to prepare a report on the physical condition of the Hotel, Golf Course, furniture, fixtures, and Debtor’s equipment, machinery, electrical systems, plumbing systems, elevators and other property. Debtor shall produce any and all documents concerning construction of improvements from

2007 to present and reports regarding the physical condition of the Hotel and Golf Course.

## **ACCOUNTS**

16. Except to the extent Section 345(b) of the Bankruptcy Code requires otherwise, the Debtor shall maintain its cash management system as in existence as of the Petition Date, except as may be modified by any final Order entered on the Debtor's Motion for Order Pursuant to 11 U.S.C. Sections 105(a), 363(c), 345(b) and 364 (I) Authorizing Continued Use of Existing (A) Bank Accounts, (B) Cash Management System and (C) Business Forms, (II) Granting an Extension of Time to Comply with the Deposit Requirements of Section 345(b) of Bankruptcy Code and (III) Authorizing Continuation of Intercompany Transactions and According Administrative Expense Status to Claims for Such Transactions including the maintenance of the accounts specified.

## **TERMINATION OF THE DEBTOR'S ABILITY TO USE CASH COLLATERAL**

17. The Debtor's ability to use Cash Collateral during the Fifth Interim Cash Collateral Period will terminate (i) immediately upon the occurrence of any event described in subsections (a), (c), (e), (f), (g) or (i) below, (ii) immediately at the close of business on the business day following the occurrence of an event described in either subsection (h) or (j), after a short notice hearing (3 day

notice)(unless such event of default has been cured), or (iii) if any event described in any other subsection below shall occur, three (3) business days after First-Citizens Bank or the Department delivers written notice to the Debtor that an event of default has occurred, unless such event of default has been fully cured within such three (3) business day period:

(a) unless cured during the Fifth Interim Cash Collateral Period, any written notice of default to Debtor delivered to Debtor by First-Citizens Bank during the Third Interim Cash Collateral Period or Fourth Interim Cash Collateral Period shall be continued and deemed a written notice delivered during the Fifth Interim Cash Collateral Period;

(b) the expiration of the Interim Order as provided in Section 2 hereof, other than due to the entry of the Final Order or any other order of the Court approving the Debtor's use of Cash Collateral (subject to consent of First-Citizens Bank and the Department), without First-Citizens Bank or the Department's prior written consent to such extension of the Fifth Interim Cash Collateral Period;

(c) the Debtor's failure to comply with/any of the material terms or conditions of this Interim Order;

(d) the modification or extension of this Interim Order, without providing First-Citizens Bank or the Department a minimum of three (3) business days prior written notice of the hearing on such modification or extension;

(e) the Debtor fails to remit any payments required and when as due under this Fifth Interim Order; an application is filed by the Debtor, without the prior written consent of First-Citizens Bank and the Department, for the approval of any claim arising under Section 507(b) of the Bankruptcy Code or any lien in the Chapter 11 Case which is pari passu with or senior to the Super-Priority Claim or Replacement Liens, excluding, in all cases, the Super-Priority Claim, Replacement Liens or other liens arising under or otherwise permitted by this Fifth Interim Order or prior Orders of this Court;

(f) the commencement of any action by the Debtor against First-Citizens Bank, the Department, their agents, advisors and/or employees, to subordinate, avoid, challenge or disallow any liens, security interests, obligations of Debtor or Guarantors, or claims made in connection with the Secured Loan Obligations;

(g) (i) if the Chapter 11 case shall be dismissed or converted to a case under Chapter 7 of the Bankruptcy Code; (ii) the Debtor shall file a motion, or other pleading, seeking dismissal of the Chapter 11 case under Section

1112 of the Bankruptcy Code, or otherwise; or (iii) a trustee under Chapter 11 of the Bankruptcy Code, a responsible officer or an examiner with enlarged powers relating to the operation of the Debtor's business (powers beyond those set forth in Section 1106(a)(3) and (4) of the Bankruptcy Code) under Section 1106 of the Bankruptcy Code shall be appointed or elected in any of the Chapter 11 Cases;

(h) (i) the Debtor shall assert in any pleading filed in any court that any material provision of this Fifth Interim Order is not valid and binding for any reason, or (ii) any material provision of this Fifth Interim Order shall for any reason, other than the entry of the Final Order, or any other order of this Court approving the Debtor's use of Cash Collateral, cease to be valid and binding without the prior written consent of First-Citizens Bank;

(i) The Debtor fails in any material respect to comply with any provisions in the Secured Loan Agreements, except to the extent such compliance is excused by operation of the Bankruptcy Code;

(j) in the event First-Citizens Bank and the Department consent in writing to any DIP Financing, the occurrence of a default, material breach or termination event under the terms of such DIP Financing, or an order approving such DIP Financing, shall constitute an event of default under this

Interim Order as though this Interim Order contained such provisions in their entirety; or

(k) there shall occur a condition or event after the Petition Date that, in the reasonable judgment of First-Citizens Bank and the Department, could be reasonably expected to have a material adverse effect on the property, business, condition (financial or otherwise) or prospects of the Debtor.

Upon the occurrence of a termination event as set forth above (and including any applicable cure period), First-Citizens Bank's consent and the Department's consent to the Debtor's use of Cash Collateral shall automatically terminate and the Debtor may not use, sell or lease Cash Collateral and shall segregate and account for any Cash Collateral in their possession, custody or control, and shall hold such Cash Collateral for the exclusive benefit of First-Citizens Bank, subject to further order of the Court.

#### **EXERCISE OF REMEDIES BY FIRST-CITIZENS BANK**

18. Limitation on Exercise of Rights and Remedies. Neither First-Citizens Bank nor the Department shall take any action during the Fifth Interim Cash Collateral Period to seize or take control over any of the Cash Collateral, Pre-Petition Collateral, Replacement Collateral or the Debtor's other property, nor shall First-Citizens Bank or the Department impose freezes of assets or seek to

exercise any alleged right of setoff or recoupment, or exercise any other right or remedy against the Pre-Petition Collateral, Cash Collateral, Replacement Collateral or the Debtor's other property during the Fifth Interim Cash Collateral Period; provided, that First-Citizens Bank and the Department may do any of the foregoing after application to, and receiving authority from, the Court, to the extent necessary, upon a breach or violation by the Debtor of any of the terms or conditions of, or upon the termination of, this Fifth Interim Order.

19. Additional Relief. Notwithstanding any provision hereof, this Fifth Interim Order is without prejudice to First-Citizens Bank's or the Department's rights to seek any other or additional relief in, or relating to, the Chapter 11 case, including, without limitation, relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code, and the filing of objections and/or claims relating to motions for adequate protection, or the use, sale, lease or other disposition or use of the Pre-Petition Collateral, Replacement Collateral or Cash Collateral. First-Citizens Bank and the Department expressly reserves its rights to claim that the provisions of this Fifth Interim Order do not constitute "adequate protection" for the purposes of Sections 361 and 363(c) and (e) of the Bankruptcy Code, or otherwise, and to request additional or supplemental protection over and above the provisions of this Interim Order.

20. No Waiver. Except as expressly set forth herein, no rights of First-Citizens Bank or the Department are waived pursuant to, or modified by, this Fifth Interim Order. First-Citizens Bank's rights and remedies pursuant to the Secured Loan Agreements and this Interim Order, and the Department's rights and remedies pursuant to law and this Interim Order shall be cumulative, and the exercise or waiver of any such right or remedy shall not preclude or inhibit the exercise of any additional rights or remedies. First-Citizens Bank's or the Department's failure, at any time or times hereafter, to require strict performance by the Debtor of any provision of this Interim Order shall not waive, affect or diminish any right of First-Citizens Bank or the Department thereafter to demand strict compliance and performance herewith. Any failure or delay on First-Citizens Bank or the Department in the exercise of any rights, remedies, claims, powers, benefits or privileges under the Secured Loan Agreements or this Fifth Interim Order shall not constitute a waiver by First-Citizens Bank or the Department, subject First-Citizens Bank or the Department to any liability to any entity under this Fifth Interim Order or preclude any other or further exercise of any such right or remedy or the exercise of any other right or remedy. None of First-Citizens Bank's or the Department's rights or remedies under this Fifth Interim Order shall be deemed to have been suspended or waived by First-Citizens Bank or the



Department unless such suspension or waiver is in writing and directed to the Debtor or the Court specifying such suspension or waiver.

21. No Reliance. In the negotiation of this Fifth Interim Order, First-Citizens Bank did not, and during the Fifth Interim Cash Collateral Period, First-Citizens Bank or the Department do not, have any obligation or duty to any other entity to exercise any of their rights, remedies, claims, powers, benefit or privileges. No entity may rely upon any delay or failure or in any way seek to assert a defense to any obligation owing to First-Citizens Bank or the Department based on First-Citizens Bank's or the Department's failure or delay to exercise its rights or remedies.

#### **ADDITIONAL PROVISIONS GOVERNING RIGHTS OF THE PARTIES**

22. Proofs of Claim. First-Citizens Bank shall not be required to file a proof of claim, in respect of claims arising from the Secured Loan Agreements, in the Chapter 11 Case, such claims being fully acknowledged by the Debtor and asserted by First-Citizens Bank with notice to all parties in interest.

23. Marshalling. Notwithstanding any other term or condition hereof, or of the Secured Loan Agreements, neither First-Citizens Bank nor the Department shall be subject to the equitable doctrine of "marshalling" or any

similar doctrine with respect to any of the Pre-Petition Collateral or the Replacement Collateral.

### **MISCELLANEOUS**

24. Binding Effect. The provisions of this Fifth Interim Order shall be binding upon and inure to the benefit of the Debtor, First-Citizens Bank, the Department, the Committee, and any trustee subsequently appointed for the estate of the Debtor, whether in this Chapter 11 case or in the event of a conversion to a case under Chapter 7 of the Bankruptcy Code. Such binding effect is an integral part of this Fifth Interim Order.

24. Force and Effect, Jurisdiction. In the event that any order dismissing this Chapter 11 case is entered pursuant to Section 1112 of the Bankruptcy Code, or otherwise, (a) the Secured Loan Obligations, Replacement Liens and Super-Priority Claim granted to or for the benefit of First-Citizens Bank and the Department pursuant to this Fifth Interim Order shall continue in full force and effect and shall maintain their priorities as provided in this Fifth Interim Order until all of the Secured Loan Obligations shall have been indefeasibly paid in full, and (b) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing such claims and liens.

25. Continuing Effect of Secured Loan Agreements. Except to the extent this Fifth Interim Order expressly provides otherwise, the Debtor shall continue to faithfully perform, and be bound by, terms of the Secured Loan Agreements. In the case of any conflict between the terms of the Secured Loan Agreements and this Fifth Interim Order, this Fifth Interim Order shall control.

26. Titles and Headings. The titles and headings in this Fifth Interim Order are and shall be without substantive meaning or content of any kind whatsoever.

27. Time of the Essence. Time is of the essence as to all terms, conditions and provisions set forth in this Fifth Interim Order.

28. Amendment and Modification. The terms and conditions in this Fifth Interim Order may not be amended, altered, modified or affected without the prior written consent of the Debtor, First-Citizens Bank and the Department; provided, however, First-Citizens Bank, the Department and the Debtor may make non-material modifications or amendments to the Budget in a writing signed by all three parties without further order of this Court, and all actions taken pursuant to such modified Budget shall be and hereby are expressly authorized hereunder.

29. Immediate Effect. This Fifth Interim Order shall constitute findings of fact and conclusions of law and shall take effect and be fully enforceable immediately upon execution thereof.

### **NOTICE OF FINAL HEARING**

30. Final Hearing. The Final Hearing or additional interim hearing on the Cash Collateral Motion is scheduled for April 29, 2013 at 9:30 a.m.. Following entry of this Fifth Interim Order, the Debtor shall immediately provide notice of the Cash Collateral Motion and a copy of this Fifth Interim Order and notice of the Final Hearing of further Interim Hearing to (i) the Initial Notice Parties, (ii) any counsel the Committee, and (iii) any party that has filed a request for notice in the Chapter 11 Case within 24 hours of the entry of this Order. Such notice shall constitute good and sufficient notice of the Final Hearing. The notice of approval of this Fifth Interim Order shall state that any party in interest objecting to the use of Cash Collateral or the terms of the Final Order shall file written objections with the Clerk of the Bankruptcy Court no later than Monday, April 22, 2013, which objections shall be served so that the same are received on or before such date by: (a) counsel to the Debtor, (b) counsel to the Committee; (c) the U.S. Trustee; (d) counsel to First-Citizens Bank; (e) counsel to the Department. Any objections by creditors or other parties in interest to any of the provisions of

this Fifth Interim Order shall be deemed waived unless filed and served in accordance with the notice on or before the close of business on such date.

31. Retention of Jurisdiction. The Bankruptcy Court has and will retain jurisdiction to enforce this Interim Order according to its terms.

32. Waiver. Nothing herein shall constitute a waiver of any rights, remedies, or issues of the Debtor, First-Citizens Bank, the Department, the Committee, or any other creditor or party in interest except as expressly provided herein.

DATED: April 9, 2013


/s/ James A. Wagner  
JAMES A. WAGNER  
NEIL J. VERBRUGGE  
Attorney for Debtor  
HAWAII OUTDOOR TOURS, INC.  
dba Naniloa Volcanoes Resort and  
Naniloa Volcanoes Golf Club,

/s/ Ted N. Pettit  
TED N. PETTIT  
Attorney for Secured Creditor  
FIRST-CITIZENS BANK

/s/ Cynthia M. Johiro  
CYNTHIA M. JOHIRO  
DAMIEN A. ELEFANTE  
Attorney for the State of Hawaii

/s/ Christopher J. Muzzi  
CHRISTOPHER J. MUZZI  
Attorney for the Official Committee  
of Unsecured Creditors

**Approved and So Ordered:**

 */s/ Robert J. Faris*  
**United States Bankruptcy Judge**  
Dated: April 9, 2013

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*In re Hawaii Outdoor Tours, Inc.*, Case No. 12-02279 (Chapter 11); FIFTH STIPULATED INTERIM ORDER (i) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. §§ 363(c)(2), (ii) GRANTING ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. §§ 363 AND 364, (iii) SCHEDULING OF FINAL HEARING, AND (iv) GRANTING RELATED RELIEF; EXHIBITS “A”-“B”

**DETAILED DEBTOR-IN-POSSESSION 6 MONTH BUDGET PROJECTIONS**

## PROJECTIONS

MONTH 1	MONTH 2	MONTH 3	MONTH 4	MONTH 5	MONTH 6
FEB	MAR	AP	MAY	JUNE	JULY

## REVENUES:

Room	419,373	430,000	440,000	370,000	370,000	412,000
Food	36,640	39,000	56,000	42,000	62,000	65,000
Beverage	5,129	12,000	14,500	15,500	27,500	28,500
Sundry	1,794	1,599	1,760	1,480	1,480	1,648
Golf	9,290	11,500	12,000	13,000	14,000	14,000
Long Term Rental	9,462	9,352	9,352	9,352	11,000	11,000
			20,000	15,000	20,000	20,000
<b>TOTAL REVENUES</b>	<b>481,688</b>	<b>503,451</b>	<b>553,612</b>	<b>466,332</b>	<b>505,980</b>	<b>552,148</b>

## COST OF SALES:

Food	16,116	12,870	18,480	13,860	20,460	21,450
Liquor	1,575	3,000	3,625	3,875	6,875	7,125
Snacks	1,536	750	880	740	740	824
Sundry						
Golf	164	200	200	200	200	200
<b>TOTAL COST OF SALES</b>	<b>19,391</b>	<b>16,820</b>	<b>23,185</b>	<b>18,675</b>	<b>28,275</b>	<b>29,599</b>

## EXPENSES:

Advertising	997	750	1,750	1,750	2,200	2,200
Amortization	22	439	439	439	439	439
Supplies	10,571	5,536	6,098	5,129	5,565	6,075
Credit Cards	7,588	7,550	8,304	6,994	7,589	8,282
Payroll Processing	247	300	300	300	300	300
Emp - Dental	721	718	718	718	718	718
Medical	13,625	14,666	14,666	14,666	14,666	14,666
FICA/FUTA/SUCI	11,812	11,288	11,288	10,608	11,288	12,648
TDI	0	0	993	0	0	976
WC	3,917	3,917	3,917	3,917	3,917	3,917
Fee Software	1,938	1,430	1,430	1,430	1,430	1,430
Gas/Diesel	730	1,200	1,200	1,200	1,200	1,200
Insurance - Flood	0	0	0	0	0	0
Insurance	16,146	16,146	16,146	16,146	16,146	16,146
Interest	55,055	55,000	55,000	55,000	55,000	55,000
Lease Rental	250,000	0	0	0	0	0
Misc	416	1,500	1,500	1,500	1,500	1,500
Music/Entertainment	1,575	2,800	2,800	3,500	3,500	2,800
Repair & Maintenance	6,913	5,000	5,000	5,000	5,000	5,000
Room Commissions	6,918	5,590	5,720	4,810	4,810	5,356

Salaries/Wages	86,000	83,000	83,000	78,000	83,000	93,000
Taxes - GE	17,192	20,969	23,063	19,427	21,079	23,002
TAT	33,864	36,990	37,851	31,829	31,829	35,442
RPT	61,074	0	0	0	0	0
Telephone	5,755	2,500	2,500	2,500	2,500	2,500
Utility - Electric	46,183	52,000	52,000	49,000	50,000	56,000
Propane	9,253	10,500	10,500	9,252	9,252	10,000
Waste Removal	6,231	6,000	6,000	6,000	6,000	6,000
Water	8,490	6,500	6,500	6,500	6,500	6,500
Cable TV	1,994	1,994	1,994	1,994	1,994	1,994
Other - Prof Services						
Other - US Trustee Fee		0	6,500	0	0	6,500
<b>TOTAL EXPENSES</b>	<b>665,227</b>	<b>354,283</b>	<b>367,177</b>	<b>337,609</b>	<b>347,422</b>	<b>379,591</b>
NET INCOME	-202,930	132,348	163,250	110,048	158,558	142,958
CARRY OVER	333,701	130,771	263,119	426,369	536,417	694,975
ENDING SUB-BALANCE	130,771	263,119	426,369	536,417	694,975	837,933

<b>NOTE:</b>	
Actual Cash in Bank 1/18	382,531
Total Outstanding Checks	72,832
Actual Cash on Hand in Bank ("old"/DIP Accts)	309,699

NOTE: This budget only includes expenses and costs the Debtor is expressly authorized to pay under the terms of the Third Interim Cash Collateral Stipulation between the Debtor and Lender, but this budget does not include the amount of professional fees the Debtor is accruing but has not yet paid, and which the Debtor estimates to be \$40,000 per month.

amended 3-26-2013

Note 2: The debtor will be receiving a quote to do free fall tests for all of the elevators which are due every five years. There will also be a quote to repair one elevator that can be used by the fire department in case of an emergency. We do not have any estimates of costs to date. All payments must be paid in advance including regular maintenance must be paid in full for one year.



## EXHIBIT B

### DOCUMENTS TO BE PRODUCED BY DEBTOR IN POSSESSION HAWAII OUTDOOR TOURS, INC.

#### **List of Documents to Be Produced By Debtor (Updated As Needed)**

##### **A. BORROWER DOCUMENTS**

1. Certified Financial Statements (signed and dated), including detailed asset and liability listing
2. Detailed Inter-Company Transactions (Including, but not limited to, Hawaii Outdoor Tours and any companies owned, operated, by Kenneth Fujiyama/Ken Direction Corporation)
3. All State and Federal Tax Returns of Debtor for last 4 years
4. Debt Schedule (include secured and unsecured obligations, collateral, personal guarantees, payment/maturity status and additional collateral pledges)
5. Certified Bank/Brokerage Statements (past 24 months - signed and dated)
6. Schedule of Sales, Transfers, Debt Financings, Re-capitalizations of properties and/or interests (last 3 years)
7. Bank Statements and copies of cancelled checks (last 3 years)
8. Copies of any offers to purchase Property from Borrower
9. Check Register for 2009 through present
10. Pending or In-Process Litigation
11. Any lawsuits or claims made against Borrower over last 5 years

##### **B. GUARANTOR DOCUMENTS**

1. Guarantor Certified Financial Statements (signed and dated), including detailed asset and liability listing

## EXHIBIT B

### DOCUMENTS TO BE PRODUCED BY DEBTOR IN POSSESSION HAWAII OUTDOOR TOURS, INC.

2. All State and Federal Tax Returns of Guarantors last 4 years
3. Debt Schedule (include secured and unsecured obligations, collateral, personal guarantees, payment/maturity status and additional collateral pledges)
4. Certified Bank/Brokerage Statements (past 24 months – signed and dated)
5. Schedule of Sales, Transfers, Debt Financings, Re-capitalizations of properties and/or interests (last 3 years)
6. Pending or In-Process Litigation
7. Any lawsuits or claims made against Guarantors over last 5 years

### **C. COLLATERAL LEVEL DOCUMENTS**

1. Monthly Operating Statements (January 2009-Current)
2. Capital Expenditures (January 2009 through Current; and 12 month projected forecast)
3. Monthly Budgets and Forecasts (current year and forward year)
4. Furniture, Fixtures & Equipment Schedule
5. Rent Rolls (if applicable)
6. Market Data (comp sets, market reports/studies/analysis, etc)
7. Monthly online hotel bookings report (past 36 months)
8. Hotel and travel website information (including number of site visits, online bookings, frequency of updates to cite)
9. Business Plans
10. Physical Inspection Reports

## EXHIBIT B

### DOCUMENTS TO BE PRODUCED BY DEBTOR IN POSSESSION HAWAII OUTDOOR TOURS, INC.

11. Any and all documents pertaining to construction or improvements (last 4 years)
12. Books & Accounting Records (including Bank Statements, A/R aging, A/P aging, check registers, G/L's)
13. Significant Contracts, Licenses, Leases and Vendors including Management Agreements, Franchise Agreements
14. Liquor License and Authorization for Liquor License
15. Any and all documents pertaining to Tradenames, Trademarks, and/or Intellectual Property Rights
16. Property Tax Bills & Assessments (including YTD and prior 2 years)
17. Sales & Use Tax Reports and Schedules
18. Violation Notices
19. Survey & Plat Maps
20. Site Plans
21. Past and Present Insurance Claims
22. Pending or In-Process Litigation
23. Copies of Insurance Policies (current)
24. Golf course monthly operating and expense reports (2009- Present)
25. Inventory of golf course collateral and rentals
26. Expense report of repairs and renovations for golf course and hotel (last 3 years; and anticipated repairs and renovations upcoming year)
27. Any and all documents or correspondence pertaining to potential investors or DIP Lenders.

## EXHIBIT B

### DOCUMENTS TO BE PRODUCED BY DEBTOR IN POSSESSION HAWAII OUTDOOR TOURS, INC.

#### **D. RELATED PARTY INFORMATION**

1. List of related parties or affiliates (eg. advisory, asset management, property management, etc.)
2. Salaries and fees paid to related parties

#### **E. ADDITIONAL DOCUMENTS REQUESTED**

1. Articles of Incorporation for Hawaii Outdoor Tours, Inc.
2. Corporate By-Laws and any and all other documents pertaining to corporate governance.
3. Any and all copies of minutes and correspondence from Board of Directors meetings for Hawaii Outdoor Tours, Inc. from January 2006-Present.
4. Any and all copies of minutes and correspondence from Shareholders meetings for Ken Direction Corporation from January 2006- Present.
5. Any and all copies of loans and promissory notes between Debtor's insiders (ie. Kenneth Fujiyama, Lee Harlow, Kristie Kosmides, Nani Mau Inc., Volcano House, Nicole Fujiyama, Kim Fujiyama, Beau Fujiyama, Ken Direction Corporation) and Hawaii Outdoor Tours, Inc.
6. Any and all copies of agreements of paintings/artwork/collectables in the hotel by and between Kristie Kosmides and Kenneth Fujiyama, Ken Direction Corporation, or Hawaii Outdoor Tours, Inc.
7. Copies of electronic accounting files on a hard drive and information identifying the Peachtree or other accounting software necessary to access and read the electronic accounting files.