Real Estate

CONCURRENT SESSION

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2015 ABI ROCKY MOUNTAIN CONFERENCE

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Practice Pointers for Addressing Real Estate Issues in Bankruptcy

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Outline of *CRE/ADC Venture 2013, LLC v. Rocky Mt. Land Co., LLC* (*In re Rocky Mt. Land Co. LLC*), 2014 Bankr. LEXIS 1370, 2014 WL 1338292 (April 3, 2014) (Case No. 12-21643 HRT).

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2015 ABI ROCKY MOUNTAIN CONFERENCE

PRACTICE POINTERS FOR ADDRESSING REAL ESTATE ISSUES IN BANKRUPTCY

RELIEF FROM THE AUTOMATIC STAY, UNEXPIRED LEASES, VALUATUION, SECTION 1111(B) ELECTION &OTHER USEFUL TOPICS

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A. 11 U.S.C. § 362(d)(1): For Cause, Including Lack of Adequate Protection

Section 362(d)(1) provides: "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

i. For cause has been defined to include "any reason cognizable to the equity power and conscience of the court as constituting an abuse of the reorganization or rehabilitation process." In re Victory Constr. Co., 9 B.R. 549, 560 (Bankr. C.D. Cal.1981).

ii. In re Little Creek Development Corp., 779 F.2d 1068 (5th Cir. 1986) (SARE Case): Lack of good faith, or evidence of a bad faith filing, may be cause for terminating the automatic stay under § 362(d)(1). However, a statement by debtor's counsel that the bankruptcy case was filed to avoid posting a bond in a pre-petition state court lawsuit was not sufficient "cause" to grant relief from stay under § 362(d)(1).

iii. Lack of adequate protection: A secured creditor's interest is not adequately protected if the security is depreciating or declining in value. If the property is declining in value, then the secured creditor is entitled to adequate protection (generally cash payments or additional security in the amount of the decline, enough to compensation the creditor for the diminution in value). *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 370 (1988).

iv. Purpose of adequate protection, In re *DB Capital Holdings, LLC*:

> With respect to § 362(d)(1), the purpose of providing adequate protection is to insure that a creditor receives the value for which it bargained pre-bankruptcy. Adequate protection is, essentially, protection for the creditor to assure its collateral is not depreciating or diminishing in value and is evaluated on a case-by-case basis. The secured creditor "must, therefore, prove this decline in value — or the threat of a decline — in order to establish a prima facie case." The erosion, or threatened erosion, of a secured creditor's position "may be shown through evidence of declining property values, the increasing amount of the secured debt through interest accruals or otherwise, the non-payment of taxes or other senior liens, failure to insure the property, failure to maintain the property, or other factors that may jeopardize the creditor's present position."
>
> In re *DB Capital Holdings, LLC*, 454 B.R. 804, 816-817, 2011 Bankr. LEXIS 1931, 30-31 (Bankr. D. Colo. 2011) (citations omitted).

v. Examples of adequate protection:

- Section 361 and 362: The term "adequate protection" is not defined in the Bankruptcy Code. However, § 361 provides the following examples of adequate protection: (1) a cash payment or periodic cash payments (but only to the extent that the stay results in a decrease in the value of the secured creditor's interest in the property); (2) an additional or replacement lien (but only to the extent that the stay results in a decrease in the value of the secured creditor's interest in the property); or (3) other relief, as will result in the realization by the secured creditor of the indubitable equivalent of its interest in the property.

- In addition to cash payments (in the form of post-petition interest, principal and interest, or some other amount), other forms of adequate protection may include replacement liens, timely payment of post-petition property taxes, compliance with the Debtor's obligations to maintain proper insurance on the property, and providing the lender with an accounting of all income and expenses through the Monthly Operating Reports or more frequent weekly or biweekly reporting.

- In re *Rolanco, Inc.*, 43 B.R. 153, 156 (Bankr. E.D. Mo. 1984) (Debtor ordered to provide secured lender with adequate protection payments equal to the rental value of the farm land).

- *CRE/ADC Venture 2013, LLC v. Rocky Mt. Land Co., LLC (In re Rocky Mt. Land Co. LLC)*, 2014 Bankr. LEXIS 1370, 4, 2014 WL 1338292 (Bankr. D. Colo. Apr. 3, 2014) (Debtor ordered to continue to pay FDIC $5,000 per month as adequate protection between relief from stay hearing and confirmation hearing. The property involved was a 24,000 square-foot commercial office building built in 2008 with a value somewhere between $3,170,000 (FDIC value) and $2,200,000 (Debtor value), and debt of $ $4,410,856.05).

vi. Examples of diminution in value:

- Decline in market value: appraisals as of varying dates (pre-petition appraisal, petition date appraisal, and post-petition appraisal) or testimony from an appraiser regarding the market for the type of property at issue.

- Physical damage to the property: evidence in monthly operating reports.

- Loss of tenants or income: evidence in monthly operating reports.

- "The erosion may be shown through evidence of declining property values, the increasing amount of the secured debt through interest accruals or otherwise, the non-payment of taxes or other senior liens, failure to insure the property, failure to maintain the property, or other factors that may jeopardize the creditor's present position." In re Anthem Cmtys./RBG, LLC, 267 B.R. 867, 871, 2001 Bankr. LEXIS 1507, 7 (Bankr. D. Colo. 2001).

- In re Young: 2011 Bankr. LEXIS 3300, 19-23, 2011 WL 3799245 (Bankr. D.N.M. Aug. 29, 2011): A decline in the value of the estate's interest in property that is the creditor's collateral, which entitles the creditor to adequate protection, can result from such causes as a decline in the market value of the collateral, non-payment of interest accruing on a senior lien, or non payment of property taxes having priority over the creditor's lien. A threatened decline in the value of a creditor's collateral entitling the creditor to adequate protection can occur, for periodic inspections, or a failure to report information affecting the collateral. If a secured creditor has a security cushion sufficient to protect it from the declining value of its collateral, then the security cushion may provide adequate protection for the declining value. What constitutes adequate protection is a question of fact to be determined on a case-by-case basis.
In re Young, 2011 Bankr. LEXIS 3300, 19-23, 2011 WL 3799245 (Bankr. D.N.M. Aug. 29, 2011) (citations omitted).

B. 11 U.S.C. 362 § (d)(2): Lack of Equity and Necessary to an Effective Reorganization

Section 362(d)(2) provides, "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-- . . . (2) with respect to a stay of an act against property under subsection (a) of this section, if-- (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2).

<u>11 U.S.C. § 362(d)(2)(A): Lack of Equity</u>

i. Section 362(g) provides, "In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section - - (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and (2) the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g).

ii. In Nantucket Investors II v. California Fed. Bank, the Third Circuit Court of Appeals contrasted "lack of adequate protection" under § 362(d)(1) with "lack of equity" under § 362(d)(2) as follows:

The classic test for determining equity under section 362(d)(2) focuses on a comparison between the total liens against the property and the property's current value. "All encumbrances are totaled to determine equity whether or not all lienholders have requested relief from the stay."
. . .
In determining whether a secured creditor's interest is adequately protected [under section 362(d)(1)], most courts engage in an analysis of the property's "equity cushion" -

- the value of the property after deducting the claim of the creditor seeking relief from the automatic stay and all senior claims. Junior liens are disregarded for "equity cushion" analysis because the secured creditor is entitled to adequate protection only as to its claim; it may not claim protection for others. In contrast, all liens are considered in calculating the equity retained by the debtor under section 362(d)(2), because the equity analysis in that section focuses on "the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of all unsecured creditors." Thus, the analysis of the creditor's "equity cushion" under section 362(d)(1) differs from a calculation of the debtor's equity under section 362(d)(2).

Nantucket Investors II v. California Fed. Bank (In re Indian Palms Assocs.), 61 F.3d 197, 206-207, 1995 U.S. App. LEXIS 19597, 26-27 (3d Cir. N.J. 1995) (citations omitted). See also First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First Yorkshire Holdings, Inc.), 470 B.R. 864, 868, 2012 Bankr. LEXIS 2514, 10-11, 2012 WL 1658250 (B.A.P. 9th Cir. 2012) ("Equity, for purposes of § 362(d)(2)(A), is the difference between the value of the property and all encumbrances on it . . . . Pursuant to § 362(g), the moving party has the burden of proof on the issue of debtor's equity; the debtor has the burden of proof on all other issues.").

<u>11 U.S.C. § 362(d)(2)(B): Property is Not Necessary to an Effective Reorganization</u>

i. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 375-376 (1988) ("Once the movant under § 362(d)(2) establishes that he is an undersecured creditor, it is the burden of the debtor to establish that the collateral at issue is 'necessary to an effective reorganization.' See § 362(g). What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means . . . that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'")(citations omitted).

ii. Wells Fargo Bank NA v. Dilworth, 2014 U.S. Dist. LEXIS 146933 (E.D. Wis. Oct. 15, 2014): In addition to citing United Savings v. Timbers, the District Court went on to cite standards from other Courts, including that (1) the property "must be logically required for a reorganization which has a reasonable possibility of succeeding within a reasonable time;" and (2) "'The test is one of feasibility,' meaning that the bankruptcy judge need not find a plan per se confirmable; rather, it should be

iii. enough that a plan has a realistic chance of being confirmed." Wells Fargo Bank NV v. Dilworth, at *9-10.

iv. American Network Leasing v. Apex Pharms. (In re Apex Pharms.),203 B.R. 432,1996 U.S. Dist. LEXIS 18607(N.D. Ind.1996) ("a debtor's prior performance is probative evidence of the feasibility of a plan of reorganization" . . . "while it is true that a party advocating reorganization need not show at the § 362(d)(2) hearing that its plan is confirmable, that party nonetheless bears the burden of showing that the things which are proposed to be done after confirmation can be done as a practical matter.").

v. In re Phoenix Piccadilly, Ltd.,849 F.2d 1393, 1395 (11th Cir. Fla.1988) ("The possibility of a successful reorganization cannot transform a bad faith filing into one undertaken in good faith."). Interplay between § 361(d)(1) and (2).

vi. In re White Birch Park, Inc., 471 F. Supp. 159, 162 (E.D. Mich. 1979)(factors to consider include: "the value of the property, the amount of indebtedness due the secured creditor, the past and projected profit margins of the debtor and the probable feasibility of the debtor's Chapter XI plan for rehabilitation."

C. Sliding Scale Burden (early in case vs. later in case)

i. *American Network Leasing v. Apex Pharms.* (In re Apex Pharms.),203 B.R. 432 (N.D. Ind.1996: ("During the early stages of a bankruptcy case, the court 'must work with less evidence than might be desirable and should resolve issues in favor of the reorganization where the evidence is conflicting' to ensure that the debtor is given the 'breathing room' Congress intended the stay to provide. . . . Thus, the use of a 'sliding scale' burden of proof is intended to benefit debtors who have a realistic chance of reorganization but who have not had sufficient time to formulate a confirmable plan."

ii. *Wells Fargo Bank NA v. Dilworth*, 2014 U.S. Dist. LEXIS 146933(E.D. Wis. Oct. 15, 2014): "The debtor's burden to establish [that the property is necessary for an effective reorganization] increases over time.".

iii. *CRE/ADC Venture 2013, LLC v. Rocky Mt. Land Co., LLC (In re Rocky Mt. Land Co. LLC),* 2014 Bankr. LEXIS 1370, 11-12, 2014 WL 1338292 (Bankr. D. Colo. Apr. 3, 2014):

In assessing whether a debtor can prove "a reasonable possibility of a successful reorganization within a reasonable time," courts generally apply a lesser standard in determining whether the debtor has met its burden during the 120—day exclusivity period. See In re Apex Pharms., Inc., 203 B.R. 432, 441 (N.D.Ind.1996). This lesser standard has been referred to as the "sliding scale" burden of proof. However, "the use of the 'sliding scale' burden of proof is intended to benefit debtors who have a realistic chance of reorganization but who have not had sufficient time to formulate a confirmable plan." Id. at 442 (emphasis added). When relief from stay is requested near the expiration of the exclusivity period, the "sliding scale" or "moving target" burden of proof requires a greater showing than "plausibility." In re Holly's, Inc., 140 B.R. 643, 702 (Bankr. W.D. Mich. 1992). Rather, "a debtor must demonstrate that a successful reorganization within a reasonable time is 'probable.'" Id. "Probable" has been defined as having more evidence for than against, or supported by evidence which inclines the mind to believe, but leaves some room for doubt, or 'likely.'" In re Gunnison Center Apartments, LP, 320 B.R. 391, 402 (Bankr. D. Colo. 2005), citing BLACK'S LAW DICTIONARY 1201 (6th ed.1990).

. . .
Debtor had over a year to develop a plan; and therefore it is time for Debtor to overcome a higher hurdle, and show that a successful reorganization within a reasonable time is probable.

D. Valuation at Relief From Stay vs. Valuation at Confirmation

i. Valuation at Relief From Stay:

Valuation at the relief from stay hearing is important under both 362(d)(1) and (d)(2). A creditor's right to adequate protection payments depends, in part, on whether it is an over-secured or under-secured creditor. In general, an over-secured creditor is entitled to adequate protection of its claim, in the form of post-petition interest or some form of a principal and interest payment. To the contrary, an under-secured creditor is not entitled to post-petition interest or principal and interest payments. The under-secured creditor must prove a decline in value in order to receive adequate protection payments. Generally, the decline in value must be shown from the Petition to the date of the motion for relief from stay, or the date of the hearing on the motion for relief from stay (i.e. a post-petition decline in value).

ii. Valuation at Confirmation:

In *In re Hales*, the Bankruptcy Court for the District of Utah addressed the issue of "whether the date used in determining the value of real property should be the petition date or the plan confirmation date when the debtor proposes to retain the real property and 'cram down' secured claims on the property for purposes of a chapter 11 plan of reorganization." In re Hales, 493 B.R. 861, 861, 2013 Bankr. LEXIS 2501, 1, 2013 WL 3153851 (Bankr. D. Utah 2013). The Court found that "the confirmation date, or a date near confirmation of the plan of reorganization, was the appropriate date to use for valuation of the Debtors' real property." The issue was important because both parties recognized the value of the properties had risen since the petition date two years prior. The Bankruptcy Court discussed other case law regarding the proper valuation date, noting that "[d]epending on the purpose of the valuation, jurisdictions generally choose from four valuation dates: (1) the date of confirmation; (2) the date of the petition; (3) the date of the valuation hearing; or (4) the effective date of the plan." *Id.* at 864. For example, the petition date may be the appropriate valuation date for determining adequate protection (see In re Garn, 2013 Bankr. LEXIS 4381, 1, 2013 WL 5723746 (Bankr. D. Utah Oct. 21, 2013)), and valuation at or near the petition date is required in order to establish a post-petition decline in value under § 362(d)(1).

E. Options Other Than "Granting" or "Denying" Relief From Stay

Section 362(d) provides the Court with options other than simply granting or denying the motion. If the Court finds that grounds for relief from stay exist under Sections 362(d)(1), (2), (3), or (4) the Court shall grant relief from stay, "such as by terminating, annulling, modifying, or conditioning such stay." For example, under § 362(d)(1), the Court may condition the continuation of the automatic stay upon the debtor making adequate protection payments to the creditor. Under § 362(d)(2), the Court may condition the continuation of the automatic stay under the debtor confirming a plan of reorganization by a certain date. See related note on "sliding scale burden."

In In re Foxland Harbor Marina, LLC, the Bankruptcy Court for the Middle District of Tennessee stated, "The court finds that conditioning the stay on confirmation by a date certain will protect [creditor's] interest and allow the debtor to proceed to confirmation. Many of [creditor's] allegations supporting stay relief might also be confirmation issues, and the court would rather allow the debtor's plan to proceed to confirmation to test any remaining issues at that time." *In re Foxland Harbor Marina, LLC*, 2010 Bankr. LEXIS 1955 (Bankr. M.D. Tenn. June 18, 2010). In Foxland Harbor, the Court conditioned the continuation of the stay upon confirmation of a plan by a date certain, failing which the lender would obtain immediate from from stay. Id. See also In re Croatan Surf Club, LLC, 2012 Bankr. LEXIS 145, 5-6, 2012 WL 112980 (Bankr. E.D.N.C. Jan. 12, 2012) ("The statute mandates relief through use of the directive 'shall,' but the exact nature of the relief from stay (i.e. whether the stay is terminated, annulled, modified, or conditioned, all of which are listed as examples within the statute) lies within the discretion of the court.").

II. POST-HEARING CONSIDERATIONS:

If a secured creditor is granted relief from stay, the real property is still property of the estate and the Debtor is still the owner of the property. The granting of relief from stay simply gives the creditor the right to pursue its state law remedies, but does not necessarily mean the case is over. If a lender obtains an order granting it relief from stay, the lender does not always proceed with its state law remedies (including foreclosure), at least not right away. Even if a lender does proceed with its state law remedies, that may not end the Bankruptcy Court's jurisdiction.

A. Relief From Stay is Granted, But Foreclosure is Not Commenced

There are several issues and options that bankruptcy counsel should be aware of when a lender has been granted relief from stay, but has not yet commenced or completed a foreclosure on the property.

i. Is a Plan still pending? If so, the Plan process can move forward.

ii. Even without a pending Plan, the Debtor can attempt to negotiate a loan modification, refinance or repayment plan.

iii. Are there HOA dues at issue? If so, the Debtor is responsible for post-Petition fees or assessments related to a membership association on a condominium and homeowners associations. Such fees and assessments are non-dischargeable under 11 U.S.C. § 523(a)(16) "for as long as the debtor has a legal, equitable, or possessory ownership interest" in the property. § 523(a)(16). The Debtor should remain current on post-petition HOA dues.

iv. Similarly, because the Debtor is still on the title, the Debtor is liable for any injuries on the property and any code violations. The Debtor should maintain the property, including insurance, until title is officially out of the Debtor's name.

B. Relief From Stay is Granted and Foreclosure is Commenced

i. Lender attorney fees, costs and charges in foreclosure proceeding.

Wells Fargo Bank, N.A. v. 804 Cong., L.L.C. (In re 804 Cong., L.L.C.),756 F.3d 368,2014 U.S. App. LEXIS 11819,71 Collier Bankr. Cas. 2d (MB) 1359,Bankr. L. Rep. (CCH) P82,655,59 Bankr. Ct. Dec. 184 (5th Cir. Tex. 2014)

Issues: The issue before the Fifth Circuit Court of Appeals was "whether, after an automatic stay in bankruptcy has been lifted and a creditor is permitted to foreclose on real property, federal or state law governs an oversecured creditor's recovery of attorneys' and other fees from the sale proceeds." Id. at *1. The Court also addressed "whether the bankruptcy court has jurisdiction over the sale proceeds for purposes of determining the creditor's right to recover attorneys' fees and the Deed of Trust trustee's right to recover a contractually specified commission for conducting the non-judicial foreclosure sale." Id. at *2.

Facts: The case involved a debtor with an office building in Austin, TX. Wells Fargo Bank (in a first lien position) was granted relief from stay to proceed with a foreclosure sale. A non-judicial foreclosure sale was conducted, resulting in proceeds of $4.355 million. The trustee under the Wells Fargo Deed of Trust (Goldsby) determined the funds would be distributed:

a. $217,750 commission to the Deed of Trust Trustee (Goldsby),

b. $3,296,915 to indebtedness and management expenses of Wells Fargo (including attorneys' fees of more than $87,000),

c. $618,639.28 to VIA (the second lienholder), and

d. $221,695.72 to 804 Congress (the Debtor)

Bankruptcy Court: Because the Debtor did not have a debtor-in-possession account, Goldsby filed a motion seeking to disburse the $221,695.72 to the Debtor's attorney. The U.S. Trustee objected and the Bankruptcy Court exercised control over the entire proceeds, requiring each creditor to file a proof of claim. The issues came before the Court when the Debtor objected to the proofs of claim filed by Goldsby and Wells Fargo. The Bankruptcy Court then allowed VIA's claim in full, Wells Fargo's claim, in part (no attorney fees for lack of supporting documentation), and significantly reduced Goldsby's fee from $217,750 to $7,500 (based on 11 U.S.C. § 506 "reasonableness" and her hourly rate and actual time spent on the matter, rather than on a 5% fee stated in the deed of trust).

District Court: The District Court reversed and "held that when the bankruptcy court lifted the stay and the foreclosure sale occurred, the bankruptcy court ceased to have jurisdiction over the property and the sale proceeds." Id. at *6.

Fifth Circuit Court of Appeals: "[F]ederal law governs what is to be distributed to a secured claimant that is oversecured. When a 'secured claim is secured by property the value of which, after any recovery [of certain amounts by the bankruptcy trustee], is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.' By the terms of § 506(b), an oversecured creditor may recover, on a secured basis, 'fees, costs, or charges provided for under the agreement . . . under which such claim arose,' such as the Deed of Trust at issue in this case, but only to the extent that the fees, costs, or charges are reasonable. We do not read § 506(b) as applying only when a sale occurs by the trustee in bankruptcy under § 363." Id. at *7-8 (citations omitted). The Fifth Circuit upheld the Bankruptcy Court's reduction of Goldsby's fee and disallowance of Wells Fargo's attorney fees, but remanded on the issue of whether such fees were recoverable under § 502.

Practice Pointers / Questions / Considerations:

- Reasonableness of fees and costs under § 506 still applies in the foreclosure context. Why? "[T]o prevent the first-priority creditor from getting a windfall by extracting attorneys' fees in excess of what could legitimately be demanded in a bankruptcy proceeding." Id. at 10 (citation omitted).

- Why does it matter if this distribution was right? More money to the Debtor if amounts to the Trustee/Goldsby and 1st and 2nd lienholders are reduced. If this were an under-secured creditor, it could reduce the deficiency amount and amount owed by any personal guarantees.

- How may a debtor or second lienholder raise this issue in a bankruptcy proceeding? Section 506 motion, claim objection.

- How may secured creditors avoid the Bankruptcy Court's scrutiny under § 506? (Abandonment of the property? Dismissal of the case?). The Fifth Circuit specifically stated, "Lifting the automatic stay to allow Wells Fargo to foreclose was not tantamount to an abandonment of the property." Id. at 17.

- Is there a distinction between interest and fees/costs/charged? Yes. § 506(b) does not qualify interest, but does require "fees, costs or charged provided under the agreement" be "reasonable." The Fifth Circuit found the trustee's contractual 5% commission/fee to be subject to "reasonableness" under § 506.

ii. Abandonment and relief from stay: do you need one or the other, or both?

- A notice of abandonment and Report of No Distribution "are not sufficient to effectuate an administrative abandonment in the absence of a Bankruptcy Rule 6007(a) notice being given." Cook v. Wells Fargo Bank, N.A. (In re Cook), 2012 Bankr. LEXIS 1764 (B.A.P. 10th Cir. Apr. 19, 2012).

iii. Deficiency Claims After Foreclosure.

- For Plans that continue after relief from stay has been granted, Debtors should follow up with secured creditors to request amended proofs of claim be filed after a foreclosure sale to ascertain the proper unsecured/deficiency claim to debtor and any personal/corporate guarantees.

III. PROPERTY VALUATION

The Statute: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claimed. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a)(1) (2014).

Valuation Documentary Evidence: Appraisals vs. BPOs. Valuation of real property extremely important in foreclosure and recovery process, as it affects rights and remedies post-foreclosure and in any bankruptcy proceedings. Market conditions and fluctuation have made property valuation challenging. Values may fluctuate dramatically within just a few months and become outdated during the course of the foreclosure process. Appraisals can be costly. Many lenders are using BPOs (broker price opinions) as an alternative or, at a minimum, as an update, gauge for valuation. BPOs may not be sufficient evidence for certain court proceedings or hearing.

Valuation Methodology: Consider what valuation may be used for. See 11 U.S.C. § 506(a) (stating in relevant part that "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest"). May need different valuations—as is, completed, bulk value, individual lots, etc. Some state law deficiency or valuation statutes use only the term "fair market value." See, e.g., Utah Code § 57-1-32 (2014). Case law example of FMV determination under state law: Capital Assets Financial Services v. Jordanelle Development, LLC, 247 P.3d 411 (Utah Ct. App. 2010).

Facts and Procedural History: Plaintiff held a third position trust deed on Defendant's property. Value of property free from all encumbrances was $2 million.

Liens senior to Plaintiff's trust deed secured debt totaling $1.1 million; Plaintiff's trust deed secured debt of $1.5 million. Defendant defaulted and Plaintiff conducted a non-judicial foreclosure. Plaintiff bought property at the trustee's sale with a credit bid of $1 million. Plaintiff sought a deficiency judgment against Defendant in the amount of $500,000, which represented the total amount owed Plaintiff less the $1 million trustee's sale purchase price. Defendant moved to dismiss under Rule 12(b)(6), arguing that they owed no deficiency because the property's unencumbered fair market value of $2 million exceeded the amount owed Lender. District Court agreed, Plaintiff appealed.

Holding: (i) In determining fair market value, the question "is what a willing, knowledgeable buyer would be willing to pay for property sold at a trustee's sale." "Such a buyer would be aware of any prior encumbrances. This buyer would also be aware that, at the conclusion of the sale, the trustee would convey title to the property subject to any such encumbrances." (ii) The "'fair market value of the property at the date of sale,' must refer to the actual fair market value of the property subject to any prior liens, rather than to some hypothetical fair market value calculated as if the property was free of liens." (iii) "In sum, section 57-1-32's reference to 'the fair market value of the property at the date of sale' means the fair market value of the property as encumbered by any senior encumbrances as of the date of the sale.

An Oldie but Goodie: Property that sold within the strictures of a state-prescribed foreclosure sale is worth less. It is no more realistic to ignore the fact that state foreclosure law permits the mortgagee to sell property at forced sale than it is to ignore other price-affecting characteristics such as a change in the property's zoning. Foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and concomitant inutility of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure price itself. BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994).

Valuation Testimony: Owner may testify as to value of property because of special knowledge and familiarity with his own property. Such testimony may be offered without caveat or qualification. Owner may be entitled to testifying expert privileges when speaking to value of his own property. See United States v. 10,031.98 Acres of Land, More or Less, 850 F.2d 624 (10th Cir. 1988); see also James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207 (10th Cir. 2011) (Under the Federal Rules of Evidence, landowner testimony about land value is considered expert opinion. Such witnesses are considered 'skilled witnesses' under Rule 702. Allowing business owners to testify about the value of their businesses does not allow Rule 702 testimony to be admitted under Rule 701.); Ryan Development Co. v. Indiana Lumbermens Mut. Ins. Co., 711 F.3d 1165 (10th Cir. 2013) (The advisory committee notes to Rule 701 explain that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701 advisory committee motes. We have noted that Rule 701 allows lay witnesses to offer "observations that are common enough and require a limited amount of expertise, if any." James River, 658

F.3d at 1214. Because the accountants used basic arithmetic, personal experience and no outside expert reports in calculating lost income, the testimony was admissible under FRE 701.)

Valuation Evidence

i. Key Witnesses: Appraisal; BPO; Tax statement; Insurance

ii. Key Witnesses: Debtor individual or representative; Certified Appraiser; Realtor/Broker

Other Valuation-related Issues

i. *B10 Claim Form:* Include or not include property valuation? And if include, what value do I use? Appraisal? Broker's Price Opinion? Tax Valuation? Statements and Schedules?

ii. *Surcharge:* Section 506(c) provides: "The trustee may recover from property secured an allowed claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property."

iii. *Turnover:* Section 542(a) of the Bankruptcy Code provides in relevant part "an entity ... in possession, custody, or control, during the case, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." Recent case law concluded that "lack of a benefit" is a defense to a turnover demand under Section 542. See In re CW Mining, 477 B.R. 176 (10th Cir. 2014).

iv. *Credit Bidding:* Query whether and how recent cases involving credit bidding in asset sales and note purchase transactions may impact matters where real estate collateral involved? See generally In re Fisker Automotive Holdings, Inc., 510 B.R. 55 (Bankr. D. Del. 2014) (limiting the amount a secured creditor may credit bid); In re RML Dev., Inc. dba Pinetree Place Apts. dba Raintree Apts., Case No. 13-29244 (Bankr. W.D. Tenn. July 10, 2014) ("This § 363 sale process seemingly became somewhat contentious and riddled with ancillary problems. The court is aware of numerous pending allegations in Tennessee, New York, and perhaps even Poland. These allegations are serious and primarily assert a Ponzi scheme, fraudulent transfers, breaches of fiduciary duty, and the like. Unfortunately the court at this stage of the estate administration cannot turn a blind eye to these allegations and blindly ignore objections to claims. Because of this, the court finds under the particular facts and circumstances of this case that sufficient cause exists under § 363(k) to modify Silverpoint's credit bid rights. That is, Silverpoint shall be allowed a right to credit bid at the § 363 sale established by the bid procedures in this order; however, its right to offset shall be limited to $2,354,759.55." (copy of Memorandum Decision attached)); In re Free Lance-Star Publishing Co. of Fredericksburg, VA, 512 B.R. 798 (Bankr. E.D. Va.

2014) (capping secured creditor's right to credit bid where creditor engaged in aggressive loan-to-own strategy).

v. *Default Interest:* I am a secured creditor, so I am entitled to default interest, right? Secured creditors or purchasers of secured claims should not assume that their claims will include default rate interest. Rather, whether secured creditors will receive default rate interest as part of their allowed claim is dependent on the relevant facts and circumstances, including the language of the credit agreement, the rate of interest and the nature of the default giving rise to the default rate interest. The allowance of default rate interest may also be dependent on the impact of such allowance on unsecured creditors. See 2014 Creditors' Rights: Implications of a Changing Landscape for Secured Creditors, Chapman and Cutler LLP Whitepaper Publication (Oct. 2014), available at http://www.chapman.com/insights-publications.html (citing, inter alia, In re 785 Partners LLC, 470 B.R. 126, 131 (Bankr. S.D.N.Y. 2012); In re Northeast Industrial Dev. Corp., Case No. 13-37619, at 29 (Bankr. S.D.N.Y. July 29, 2014); In re SW Boston Hotel Venture, LLC, 748 F.3d 393, 415 (1st Cir. 2014)).

In re RML Development, Inc., dba Pinetree Place Apartments dba Raintree Apartments, Chapter 11, Debtor. Tax ID / EIN: XX-XXXXXXX.

Case No. 13-29244.

United States Bankruptcy Court, W.O. Tennessee, Western Division.

July 10, 2014.

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MEMORANDUM AND ORDER AMENDING THE COURT'S JUNE 9, 2014 ORDER AND JUNE 18, 2014 SUPPLEMENTAL ORDER COMBINED WITH NOTICE OF THE ENTRY THEREOF

DAVID S. KENNEDY, Bankruptcy Judge.

RML Development, Inc., dba Pinetree Place Apartments dba Raintree Apartments, the above-named Chapter 11 debtor ("RML"), previously sought to sell two residential apartment complexes located in Memphis, Tennessee, outside the ordinary course of business under 11 U.S.C. § 363 prior to the approval of the § 1125 disclosure statement. The court entered two prior orders authorizing RML to sell the two residential apartment complexes. SPCP Group Ill CNI1, LLC ("Silverpoint") asserts a valid first mortgage security interest in the two apartment complexes and also seeks to be allowed to credit bid under§ 363(k) at a § 363 auction sale.

The court now addresses, considering a totality of the particular facts and circumstances and applicable law of this case, whether Silverpoint should be allowed to credit bid at the § 363 sales and additionally whether the court's prior orders should be amended, in part. The following shall constitute the court's findings of fact and conclusions of law. These findings of fact and conclusions of law may be referred to as the court's "Amended§ 363 Sale Order."

Relevant Background

Silverpoint filed the instant "Motion to Amend Sale Order" on June 24, 2014, seeking to amend the court's prior§ 363 sale orders to allow it a right to credit bid under§ 363(k) and also to establish bid procedures that essentially establish an auction sale process. The motion was brought pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59. Notice was provided to all parties in interest, and the court held a hearing on July 8, 2014. This is a core proceeding under 28 U.S. C.§ 157(b)(2)(N), (A), and (0). The bankruptcy court has exclusive jurisdiction over these properties and also has the statutory and constitutional authority to hear and determine the matters regarding these properties of the estate. 28 U.S.C. §§ 1334(e) and 157(b)(2); *see* also *Executive Benefits Insurance Aqencv v. Ark/son 1/n re Bellingham /nsuranceAgencv.lnc.),* 134 S.Ct. 2165 (2014).

RML's § 541 (a) bankruptcy estate primarily includes two residential apartment complexes located in Memphis, Tennessee, Pinetree Apartments**[1]** and the Raintree

Apartments**[2]** (collectively the "Real Properties"). Silverpoint asserts a valid, first claim (POC #5) secured by the Real Properties in the amount of $2,543,579.65. The supporting documentation to Silverpoint's claim indicates that its claim arose pursuant to a promissory note, deed of trust, and other documents that all were executed on August 2, 2012. Its claim is not a purchase money security interest. RML filed a limited objection to Silverpoint's claim. Also, Mr. Slawomir Wisniewski ("Mr. Wisniewski") asserts a claim (POC #25) secured by the Real Properties in the amount of $3,860,000.00. Mr. Wisniewski's claim is based on a constructive trust theory for his asserted superior legal interest that arose prior to Silverpoint's financing arrangement. Silverpoint objected to Mr. Wisniewski's claim.**[3]**

Furthermore, one of RML's shareholders, Mr. Roman SledziejowskERi, filed bankruptcy in the Southern District of New York. Ms. Marianne O'Toole ("Ms. O'Toole") was subsequently appointed the Chapter 7 Trustee of the estate of Roman Sledziejowski ("Mr. Sledziejowski").**[4]** Ms. O'Toole alleges in the Southern District of New York that Mr. Sledziejowski operated a Ponzi scheme to defraud his creditors. Ongoing proceedings in New York seek, among other things, to substantively consolidate this chapter 11 case with Mr. Sledziejowski's chapter 7 case and possibly other estates as well. At this time in this case, it is unclear what role RML may have played, if any, in Mr. Sledziejowski's alleged scheme.

RML originally filed a § 363 sale motion**[5]** on December 17, 2013, to sell the Real Properties outside the ordinary course of business. Objections were raised by the U.S. Trustee for Region 8 (Tennessee and Kentucky), Silverpoint, and Ms. O'Toole. RML employed Mr. Steve Woodyard ("Mr. Woodyard") with court approval as its Real Estate Professional to market and sell the Real Properties. The original § 363 sale motion was withdrawn and a second motion**[6]** was filed on March 6, 2014. Objections followed. The court held numerous hearings on these proceedings. Mr. Woodyard testified at several of the prior§ 363 hearings that, among other things, offers were made on the Real Properties and that creating an orderly sale process is absolutely needed to bring the offerors to a successful closing.

After several more court hearings, which as a practical matter seemingly accomplished little, the court entered its first order on June 9, 2014, authorizing RML, among other things, to sell the Pinetree Apartments for the amount of $1,700,000.00 to WI Memphis, LLC, and, also, to allow WI Memphis, LLC, a due diligence period through July 10, 2014. On June 18, 2014, the court entered a supplemental order to its June 9, 2014 order that authorized RML and Mr. Woodyard to close the§ 363 sale of Pinetree and escrow the proceeds pending further order of the court and, also, to market, sale, close, and escrow the proceeds from Raintree. Both sales were to be free and clear of all asserted liens, claims, rights, interests, and encumbrances with all such liens, claims, rights, interests, and encumbrances being transferred to the sale proceeds to be held pending further order of this court. Neither sale has closed to date. Silverpoint now moves to amend the court's prior orders to expressly permit it to "credit bid" under§ 363(k) at a § 363 auction sale.

Conclusions of Law

The term "credit bid" is not defined or even found in the Bankruptcy Code and instead is a colloquial term used to express a secured creditor's right to bid at the sale of its collateral and then, at closing, offset the purchase price by the value of its outstanding claim secured by the collateral being purchased. This colloquial term aptly describes a secured creditor's rights as articulated In 11 U.S. C.§ 363(k); hence, a secured creditor's assertion of its§ 363(k) rights is commonly referred to as "credit bidding."

Though the term "credit bid" seems straightforward enough, the mechanics of§ 363(k) credit bidding deserve special attention and provide guidance that will prove helpful in this discussion. Section 363(k) reads:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures *an allowed claim,* unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k) (emphasis added). This subsection specifically provides the holder of an allowed secured claim the right to credit bid at a§ 363(b) sale. The sale of property under§ 363(b) may be free and clear of any interest in such property under the statutory conditions enumerated in § 363(f), including where an interest is in bona fide dispute. See 11 U.S.C. § 363(1)(4). A claim is "deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502(a). Upon a timely objection, the claim is no longer deemed allowed and may only be allowed after notice, hearing, and the court's determination. 11 U.S. C.§ 502(b). Where resolution of a claim cannot occur timely and would unduly delay the administration of the case, the court may estimate the allowed claim. 11 U.S.C. § 502(c)(1). Therefore, only an allowed claim under§ 502 is entitled to "credit bid" at§ 363(b) sale.

Section 363(k) provides the holder of an allowed secured claim with two rights: (1) it "may bid at such sale" (i.e., a right to bid) and (2) if it is the purchaser at such sale, it "may offset [its] claim against the purchase price" (i.e., a right to offset (a.k.a. setoff**[7]**)). Thus, at a§ 363(b) sale of property of the estate that has been properly marketed and noticed**[8],** the holder of the allowed secured claim may make a bid or offer for the property, and, if the trustee (debtor in possession) accepts that bid or offer, the holder of the allowed secured claim may offset or setoff the contract price at closing by the amount of its allowed secured claim.

Interestingly, both the right to bid and the right to offset are further conditioned by the language of§ 363(k), which states that the two rights may be exercised "unless the court for cause orders otherwise." 11 U.S.C. § 363(k). Thus, the bankruptcy court "for cause" may order that the right to bid or the right to offset, as both are articulated under the normal procedure of§ 363(k), be modified or denied.**[9]** "Cause" is not statutorily defined in the Bankruptcy Code. "Because the Code provides no definition of what constitutes 'cause' ... , courts must determine whether discretionary relief is appropriate on a case-by-case basis." *In re Laguna* Associates *Lid. PartnershiP* 30 F.3d 734. 737 (6th Cir. 1994). "Although what constitutes cause is 'discretionary with the bankruptcy court,' this discretion does not give the bankruptcy court the authority to act arbitrarily or to be freewheeling. In other words, the standard is not standardless." *In re Davis*. 237 B.R. 177. 182 (M.D. Ala. 1999).

Intrinsically, acting "for cause" looks to the court's equity powers that allow the court to balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors. See *Florida Dept. of Revenue v. Piccadillv Cafeterias Inc.* 554 U.S. 33 51 (2008): *N.L.R.B. v. Bildisco and Bildisco,* 465 U.S. 513. 527 (1984); *Ketchen v. Landv.* 382 U.S. 323, 336 (1966) ("bankruptcy courts are inherently proceedings in equity''). However, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law v.* Siegel, 134 S. Ct 1188 1194-95 (2014) *(quoting Norwest Bank Worthington v. Ahlers* 485 U.S. 197 206 (19881) (quotation marks omitted). Here, the language of§ 363(k), "unless the court for cause orders otherwise,'' allows the bankruptcy court to exercise its inherent equitable powers to modify or deny the rights otherwise provided under§ 363(k). *See* also 11 U.S.C. § 105(a). The confines of§ 363(k) of the Bankruptcy Code statutorily provide that the bankruptcy court may exercise its equitable powers**.[10]** Therefore, "credit bidding" under§ 363(k) does *not* allow the holder of an allowed secured claim to exercise an absolute right to purchase its collateral and offset that purchase by its allowed secured claim. See, for example, *In re The Free Lance-Star Publishing* Co. *of Fredericksburg,* VA, 2014 WL 2505627, '5 (Bankr. E. D. Va. 2014) ("Credit bidding ... is not an absolute right."); *In re Fisker Automotive Holdings. Inc,* 510 B.R. 55 59 (Bankr. D. Del. 2014) (" ... the right to credit bid is not absolute."); *In re Theroux.* 169 B.R. 498, 499, n. 3 (Bankr. D. R.I. 1994) (" ... there is no absolute entitlement to credit bid ... ").**[11]** The bankruptcy court should only modify or deny a § 363(k) credit bid when equitable concerns give it cause. This court believes such a modification or denial of credit bid rights should be the extraordinary exception and not the norm.

Silverpoint's Right to Credit Bid under§ 363(k)

Here, Silverpoint filed its proof of claim pursuant to 11 U.S.C. § 501; however, RML's objection to Silverpoint's claim created a contested matter pursuant to and governed by Fed. R. Bankr. P. 9014 and caused Silverpoint's claim not to be "deemed allowed" under 11 U.S. C.§ 502(a). Resolving the clairn objection may require extensive discovery and certainly will require a notice and a hearing. Fed. R. Bankr. P. 3007(a). This will inevitably further delay the sale of the Real Properties and could likely cause a deprivation of the present value of the bankruptcy estate; not the maximization of the bankruptcy estate that the court seeks to foster. Thus, the sale of the Real Properties should occur before the contested matter regarding the claim objection can be judicially resolved.

Though the court cannot resolve the objection to a claim in a § 363 sale proceeding, the court may, however, estimate the allowed claim to avoid unduly delaying the administration of the estate- here, the§ 363 sale. 11 U.S. C.§ 502(c)(1). RML's objection to Silverpoint's claim is limited and does not seek a full disallowance of the claim. Rather, it objects to Silverpoint's calculation of interest and reconciliation of payments and fees used to arrive at its claim amount totaling $2,543,579.65. It apparently admits that Silverpoint's claim should be allowed in an amount totaling $2,354, 759.55.

At this time, no party in interest appears to dispute that Silverpoint has an allowed secured claim, but a bona fide dispute exists to the extent of the amount of that claim between RML and Silverpoint. Since RML admits that the amount of the claim is $2,354, 759.55, the court is prepared at this time to "estimate" Silverpoint's allowed secured claim and determine that, for purposes of credit bidding at the § 363 sale, Silverpoint may bid an allowed secured claim equal to the uncontested portion of its claim, $2,354, 759.55.

This § 363 sale process seemingly became somewhat contentious and riddled with ancillary problems. The court is aware of numerous pending allegations in Tennessee, New York, and perhaps even Poland. These allegations are serious and primarily assert a Ponzi scheme, fraudulent transfers, breaches of fiduciary duty, and the like. Unfortunately the court at this stage of the estate administration cannot turn a blind eye to these allegations and blindly ignore objections to claims. Because of this, the court finds under the particular facts and circumstances of this case that sufficient cause exists under§ 363(k) to modify Silverpoint's credit bid rights. That is, Silverpoint shall be allowed a right to credit bid at the § 363 sale established by the bid procedures in this order; however, its right to offset shall be limited to $2,354,759.55. If Silverpoint is the successful bidder and its bid exceeds $2,354,759.55, Silverpoint shall be required to pay such amount that exceeds $2,354,759.55 in cash (or the equivalent thereof) at closing. These potential excess proceeds shall be held in escrow pending further orders of the court regarding, among other things, RML's objection to Silverpoint's claim.

Furthermore, the court, relying on statements of counsel, believes that Mr. Wisniewski, Ms. O'Toole, and Silverpoint have either settled their disputes and objections to claims or are in the process of settling them. Mr. Wisniewski, Ms. O'Toole, and Silverpoint each assert claims that allege to be the senior legal interest in the Real Properties. Silverpoint has formally objected to Mr. Wisniewski's claim. Mr. Wisniewski and Ms. O'Toole have reserved their right to object to Silverpoint's claim if the settlement is not consummated. The court is not prepared at this immediate time to resolve these competing claims in the context of a §363 sale motion if the parties cannot consensually come to an agreement. If, for whatever reason, these disputes are not settled or to be settled by the § 363 sale date, the court for cause orders Silverpoint's credit bid rights under§ 363(k) to be further modified as follows. In order to exercise its credit bid rights and/or receive a distribution from the § 363 sales proceeds if a settlement is not reached, Silverpoint shall provide a letter of credit, surety bond, or other instrument of the like, as approved by the court, in the amount of its proposed credit bid and/or distribution from the § 363 sale proceeds. If such an instrument is provided, Silverpoint may offset its purchase price and/or receive a distribution from the sales proceeds equal to the amount of its allowed claim, being $2,354,759.55 for purposes of this§ 363 sale.

Otherwise, Silverpoint shall have no credit bid right to offset at closing, and RML is ordered to escrow the sales proceeds pending further court order regarding the competing claims and objections. Again, the orders in this instant paragraph are contingent upon Mr. Wisniewski, Ms. O'Toole, and Silverpoint not reaching a settlement agreement.

Obviously, if a third party is the successful bidder and purchaser of the Real Properties, this credit bidding discussion is moot. Regardless of the identity of the purchaser, the court reserves the right to approve RML's final sale motion to assure that it is fair and reasonable and based upon a sound business justification. *See Stephens Industries. Inc. v. McClung* 789 F.2d 386 (6th Cir. 1986). Furthermore, Mr. Woodyard appears to be an expert regarding the sale of similarly situated properties in Memphis and gives substantial credibility to the sales process, which has been noted by nearly every party during the numerous hearings. Armed with these two protections along with the now modified §363(k) credit bid rights, the court is confident the parties expediently will market and sell these Real Properties to preserve the present value of this § 541 (a) estate.

Bid Procedures

Alongside the credit bid dispute, the parties failed to formalize bid procedures related to the § 363 sale. The court's two prior orders provided that the § 363 sale should be conducted consistent with the ordinary sale of real property: (1) the owner markets the property for sale, (2) the owner receives an offer or offers for the property, (3) the owner accepts the highest and best offer, thus, creating a purchase contract between the owner and offeror, and (4) the parties to the purchase contract execute the necessary documents and financing to complete the transfer and close the sale.
Silverpoint seeks to amend the two prior orders to change the bid procedures and, thereby, conduct an auction sale under§ 363. Mr. Wisniewski and Ms. O'Toole support such an amendment.

An auction sale is enticing because it offers certainty, finality, and orderliness to the § 363 sale process. As previously mentioned, the instant § 363 sale process has been somewhat contentious and drawn out. This contention and delay potentially jeopardizes the entire sales process here and may even cause diminution in the present value of this estate. Therefore, the court finds under these particular facts and circumstances that an auction sale will serve the best interests of this estate, its creditors, and other parties in interest because this allows the Real Properties to be sold in a manner that finally resolves the pending§ 363 sale motion in an orderly and expedient manner.

Accordingly, the court's June 9, 2014 order**[12]** and its June 18, 2014 supplement order**[13]** are hereby amended and restated, in their entirely, by this order, and shall have no further force or effect. The "Notice Re Incorporated Bid, Auction and Sale Terms and Procedures" (the "Sale Procedures") attached hereto and incorporated hearing by reference are hereby ratified and approved in all respects to the sale of the Real Properties.

Mr. Woodyard and RML are authorized to market and sale the Real Properties in accordance with the terms and conditions of the incorporated Sale Procedures.

Multi-South Management Services, LLC, the court-appointed custodian of the Real Properties (the "Custodian"), (i.e., the pre-petition receiver), shall continue to maintain and manage the Real Properties through the closing date of this §363 sale (the "Closing Date"). The Custodian shall pay any and all ordinary and customary operating expenses through the Closing Date. The Custodian shall pay any and all outstanding and current taxes relating to the Real Properties, including but not limited to real estate and school taxes, through the Closing Date. The Custodian shall make any and all payments under this paragraph from monies generated from the operation of the Real Properties.

This sale shall be free and clear of all asserted liens, claims, rights, interests, and encumbrances in accordance with 11 U.S.C. § 363(f). All liens, claims, rights, interests, and encumbrances on the Real Properties shall be transferred to the§ 363 sale proceeds. If all conditions of this order are satisfied, RML is authorized to pay Silverpoint's allowed secured claim up to and totaling $2,354,759.55 from the§ 363 sale proceeds. If excess§ 363 sales proceeds exist after paying Si1verpoint's allowed secured claim, RML is ordered to escrow these excess proceeds pending further order of this court with any competing and countervailing claims being transferred to such surplus proceeds.

If Silverpoint is selected as a successful bidder and closes on the purchase of one or both of the Real Properties, it shall be (i) deemed to be a good faith, arm's length purchaser of the Real Properties, (ii) fully entitled to the protections afforded by the 11 U.S.C. § 363(m), and (iii) shall be deemed not to be a successor in interest to RML.

The purchase price for the Real Properties, whether they are sold jointly or individually, is exclusive of any and all federal, state, and local transfer sales, recording, stamp, or other similar taxes that may be imposed by reason of the sale, transfer, assignment, and delivery of the Real Properties (collectively, the "Transfer Taxes"), which Transfer Taxes are the sole obligation of the Purchaser or Purchasers and must be delivered to RML at the closing by certified check made payable to the appropriate taxing authority(ies).

The stays provided in Fed. R. Bankr. P. 6004(h) and 6006(d) are waived, and this order shall be effective immediately upon its entry.

This court shall retain jurisdiction *over* any matters related to or arising out of or from the implementation of this order.

Based on the forgoing and the entire case record as a whole, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that Silverpoint's Motion to Amend is granted, in part, and that the court's prior§ 363 sale orders are amended consistent with and as detailed in the court's discussion above, which includes the incorporated and attached Sale Procedures.

The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Order, and Notice to be sent to the following entities.

SO ORDERED.

[1] Real property located at 2146 East Shelby Drive In Memphis, Shelby County, Tennessee.

[2] Real property located at 742 East Raines Road in Memphis, Shelby County, Tennessee.

[3] *See* Fed. R. Bankr. P. 3007(a) and (b). Resolution of Mr. Wisniewski's asserted constructive trust claim and Silverpoint's objection
may be the type of relief that requires an adversary proceeding pursuant to Fed. R. Bankr. P. 7001 (2), (7), and/or (9).

[4] Mr. Sledziejoski's case was originally filed as a chapter 11 case but was later converted to a case under chapter 7.

[5] See docket # 88.

[6] See docket# 155.

[7] The right to offset is fundamentally the same as a right to setoff. "Courts use the term 'offset' and 'setoff' interchangeably, often switching between them from sentence to sentence, supporting the conclusion that there Is no substantive difference between them." *Black's Law Dictionary* 1120 (8th ed. 2004). (citing 4 Ann Taylor Schwing, California Affirmative Defenses 2d § 44:1, at 4w5 (1996). "The right of setoff (also called 'offset') allows entitles that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when Bowes A.'" *Citizens Bank of Maryland v. Strumpf*. 516 U.S. 16. 18 (1995) *(citing Studley v. Boylston Nat. Bank,* 229 U.S. 523, 528 (1913)); *see also* 11 U.S.C. § 553.

[8] *See* Fed. R. Bankr. P. 6004 and 2002(c).

[9] *In re River Road Hotel Partners. LLC,* f:01 0 WL 66346031 *2 (Bankr. N. D. Ill. 201 0), *aff'd sub nom. River Road Hotel Partners. LLC v. Amalgamated Bank*. 651 F.3d 642 (7th Cir. 2011). *aff'd sub nom. RadLAX Gateway Hotel. LLC v. Amalgamated Bank*. 132 S.Ct. 2065 (20121 (Section 363 allows a bankruptcy court to place "conditions upon a secured creditor's right to credit bid without denying the right altogether. For example, courts have required secured creditors to put cash in escrow, pay a portion of the bid in cash, or furnish a letter of credit when the amount and validity of an alleged senior lien is in dispute.") (citations omitted).

[10l *Compare* to 11 U.S.C. § 522(k) and *Law v. Siegel,* 134 S. Ct. 1188 (2014) (holding that the bankruptcy court cannot use its
equitable powers to equitably surcharge an exemption where§ 522(k) statutorily prohibits such a surcharge).

[11] Though each of these cases correctly determines that there is no absolute right to credit bid, this court is not prepared to go as far as some of these courts and hold that the mere "chilling" of third party bids is sufficient cause to justify modifying or denying a secured creditor's rights. The modification or denial of credit bid rights for cause under§ 363(k) should be an extraordinary exception that is used only upon equitable considerations (e.g., competing claims, collusion, or other fraudulent or bad faith acts). This court Is convinced that, where a creditor holds an uncontested secured claim, it should ordinarily be permitted to bid at a§ 363 sale of its collateral regardless of its intrinsic Impact on other bidding.

[12] See Docket# 184.

[13] See Docket# 189.

IV. UNEXPIRED LEASES

A. Relevant Code Sections (§ 365, § 502, § 503)

Section 365 only applies to a contract or lease in existence at the commencement of the case. An executory contract must be assumed or rejected in its entirety. Section 365(d)(3) requires the trustee to "timely perform all the obligations of the debtor" arising from and after the order for relief under any unexpired lease of nonresidential real property. This requirement applies only when the debtor is the lessee, not the lessor.

i. *Leases for Residential Property*. The trustee must decide whether to assume or reject an executory contract or residential real property lease within 60 days after the order for relief unless the court, for cause, within the 60 day period grants additional time. In re Food Barn Stores, Inc., 174 B.R. 1010, 1014 (Bankr. W.D. Mo. 1994). If the trustee fails to act within the 60-day period, the contract or lease is deemed rejected. If the 60-day period expires, the court has no power to extend it thereafter. Laches and waiver have been held to create an exception to this rule. Chapman Inv. Assocs. v. American Healthcare Mgmt., Inc. (In re American Healthcare Mgmt., Inc.), 900 F.2d 827, 832 (5th Cir. 1990). The trustee may assume or reject an executory contract or unexpired residential lease or lease of personal property at any time before confirmation of the plan. A trustee may, before assumption and cure of defaults, exercise a lease renewal option that is otherwise exercisable under the lease only if the lease is not in default. When a case is converted from another chapter to chapter 7, the 60 days will run from the date of the conversion if the time to assume or reject has not yet expired. Carrico v. Tompkins (In re Tompkins), 95 B.R. 722 (BAP 9th Cir. 1989). If the time has expired, conversion does not start a new time period within which to assume or reject. Affordable Effiiciencies v. Bane (In re Bane), 228 B.R. 835 (Bankr. W.D. Va. 1998).

ii. *Leases for Non-Residential Real Property*. The trustee has 120 days after the date of the order for relief, or until the date of the entry of a plan confirmation order, whichever is earlier, to assume a lease of nonresidential real property. If the trustee does not assume within the deadline, the lease shall be deemed rejected and the trustee must immediately surrender the non-residential real property to the lessor. The court may extend the 120-day deadline once for cause, but only before the expiration of the deadline and only for up to 90 days. If the court grants a first extension, the court may only grant a subsequent extension upon the prior written consent of the landlord.

B. Extending or Reducing the Time to Assume or Reject

Any order extending the initial 120-day period to assume or reject must be entered before the expiration of the deadline. 11 U.S.C. § 365(d)(4)(B). More than one extension is permitted. *Legacy, Ltd. v. Channel Home Centers, Inc. (In re Channel Home Centers, Inc.), 989 F.2d 682 (3d Cir. 1993).* On motion of party, the Court may order shorter period of time for assumption or rejection but such requests are rarely granted. 11 U.S.C. § 365(d)(2). The standard for the grant of an extension of time to assume or reject is "for cause". 11 U.S.C. § 365(d)(4)(B).

C. Limitations on Assumption

Cure Defaults. Cure the default or provide adequate assurance that the default will be promptly cured, compensate loss resulting from the default, and provide adequate assurance of future performance under the contract or lease.

There is no general definition of the term "adequate assurance". *ReGen Capital I, Inc. v. UAL Corp.* (In re UAL Corp.), 635 F.3d 312, 323 (7th Cir. 2011). It must simply appear that the obligation will be met. *In re M. Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008). In determining adequate assurance of future performance, courts have considered some of the following factors: the debtor's payment history; presence of a guarantee; presence of a security deposit; evidence of profitability; a plan which would earmark money exclusively for the landlord; the general outlook in the debtor's industry; and whether the unexpired lease is at, or below, the prevailing rate. *Id.* Adequate assurance may be of something other than the availability of cash to cure or compensate.

D. Curing Pre-Petition Non-Monetary Defaults

Certain non-monetary defaults, such as continuous operations clauses, cannot be cured because the trustee cannot go back in time and cause the debtor to operate in the past during the time it did not operate. Prior to BAPCPA, courts prevented the assumption of real property leases under which the debtor had violated a continuous operations clause. BAPCPA amended § 365(b)(1)(A) to specifically authorize a trustee/debtor to cure a default on a non-monetary lease obligation by complying with all lease obligations at the time of assumption. Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.), 360 F.3d 291 (1st Cir. 2004). As a condition of curing a non-monetary default, the trustee/debtor must compensate the party harmed by the default for pecuniary losses caused by the default. Id. Section 365(b)(1)(A) only applies to real property leases and not to personal property leases and nonlease executory contracts.

E. Post-Petition/Pre-Assumption Obligations of the Debtor

Section 365(d)(3) requires the trustee to "timely perform all the obligations of the debtor" arising from and after the order for relief under any unexpired lease of nonresidential real property. Performance of the lease obligations shall not be extended beyond 60 days of filing. This requirement applies only when the debtor is the lessee, not the lessor. The requirement that the trustee perform all obligations terminates upon rejection.

Section 365(d)(5) applies only in chapter 11 cases, and applies from the 61st day after filing until the trustee/debtor assumes or rejects the lease. Pursuant to 365(d)(4)(A)(ii), debtor has until confirmation of the plan to assume or reject.

F. Legal Standard Used by Court in Granting Motions to Assume/Reject

The statute does not provide a standard to be applied in determining the propriety of the trustee's decision to assume or reject. The decision to assume or reject is significant to the estate because, if the contract is assumed, any liability thereafter will be an expense of administration. If the contract is rejected, the estate will lose any benefit from the contract and will be liable for damages for breach.

Under the Code, most courts have applied a "business judgment" test to the trustees' decisions to assume or reject contracts or leases. Cor Route 5 Co., LLC v. Penn Traffic Co. (In re Penn Traffic Co.), 524 F.3d 373 (2d Cir. 2008). The focus should be the business judgment of the trustee or debtor-in-possession, not the court's own business judgment. The presumption is that the trustee or the debtor-in-possession acted in good faith and in the best interest of the bankruptcy estate. Agarwal v. Pomona Valley Medical Group, Inc. (In re Pomona Valley Medical Group, Inc.) 476 F.3d 665 (9th Cir. 2007). In applying the business judgment test, the size of the claim for rejection damages is generally not considered. Shell Oil Co. v. Waldron (In re Waldron), 785 F2d 936 (11th Cir. 1986).

G. Rejection

Rejection of a contract or lease that has not previously been assumed constitutes a breach immediately before the date of the filing of the petition. By placing the time of the breach prepetition, section 365(g) makes any claim that the lessor may have a prepetition claim. Section 365(g)'s deemed breach is solely a timing mechanism to determine claim priorities (prepetition v. postpetition) and to permit the creditor to seek allowance of its claim under section 502. Contract rejection damages are measured as of the petition date, not as of the rejection date. Rejection constitutes a breach. It does not terminate the contract because termination may have consequences that affect parties other than the debtor and the other party to the contract or lease.

H. Lessor's Right to Rent Payable in the Period Prior to an Assumption or Rejection

In the period prior to an assumption or rejection, the rent payable is the full pre-rejection rent provided in the lease, rather than the value of the benefit received by the estate. Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9th Cir. 1994). The rent is payable immediately when due. Ansel Properties v. Nutri/System of Florida Assocs. (In re Nutri/System of Florida Assocs.). 178 B.R. 645 (E.D. Pa. 1995). When the trustee or debtor-in-possession fails to pay post-petition rent, the lessor may still seek to recover rent payments that may not have been made for the period before rejection and will usually seek administrative expense or superpriority treatment for the claim. If lease is rejected, damages are treated as breach of contract damages (see above). These damages are generally an unsecured claim. Pre-petition claim is capped by 11 U.S.C. § 502(b)(6). That section is "designed to compensate the landlord for his loss while not permitting a claim so large as to prevent other general unsecured creditors from recovering a dividend from the estate." 4 Collier on Bankruptcy ¶ 502.03[7][a] at 502-42. Lessor is entitled to one year of lease payments without acceleration or 15% of 3 years of lease payments with acceleration plus any unpaid rent owed on the date of the petition. The time period for calculating 1 or 3 years runs from the earlier of the date of the filing of the petition or the date on which the lessor repossessed the property. Perry v. One Sugar Lakes Prof. Centre Partners, LP (In re Perry), 2009 WL 2753183 (Bankr. S.D. Tex.).

I. Treatment Lessor's Post-Petition Claims

"Stub rent" refers to the rent for the interim period between the day the order for relief was entered in the bankruptcy case and the end of that month. The majority view on stub rent is that post-petition rent for the month in which the debtor filed is an administrative claim rather than a prepetition obligation. In re Leather Factory, Inc., 475 B.R. 710 (Bankr. C.D. Calif. 2012). A related issue is a debtor's liability post rejection but prior to vacating the premises.

In chapter 7, the trustee has to pay post-petition rent as it becomes due. 11 U.S.C. § 365(d)(3).

In chapter 11, a majority of courts interpret § 365(d)(3) as granting the lessor automatic administrative expense treatment for rent incurred post-petition, independent of section 503(b), which ordinarily governs allowance of administrative expenses, for the amount called for by the lease. Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9th Cir. 1994). A minority of courts interpret section 365(d)(3) as requiring current payment of rent during the post-petition period, but have refused to automatically grant administrative status to the lessor's claim if the trustee or debtor-in-possession defaults on that obligation. In re Orvco, Inc., 95 B.R. 724 (BAP 9th Cir. 1989). The Court of Appeals for the Fourth Circuit has taken a middle ground. CIT Communications Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.), 406 F.3d 229 (4th Cir. 2005). The court concluded that the lessor has an administrative expense claim under section 503(b), not under section 503(b)(1), which bases the claim on "use and occupancy" of leased premises. The lessor is, therefore, to be treated to the same as other administrative expense claimants. 3 Collier on Bankruptcy, ¶ 365.04[1][b] at 365-38 (16th Ed.)

J. Superpriority Claims

Several courts have considered whether the lessor might be entitled to a superpriority for rent during the period covered by section 365(d)(3). A superpriority would enable the lessor to obtain payment of its rent claim before any other administrative expense claims were paid. The argument for a superpriority claim is that section 365(d)(3) requires that rent for the period be paid on a current basis. Most courts reject any superpriority for the lessor's claim. CIT Communications Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.), 406 F.3d 229 (4th Cir. 2005). Courts recognize that the lessor is in no different position from that of other administrative claimants and should be entitled to no better treatment than other administrative claimants. In re Orvco, Inc., 95 B.R. 724 (BAP 9th Cir. 1989). 3 Collier on Bankruptcy, ¶ 365.04 [1][b] at 365-39 (16th Ed.).

K. Security Deposits

A majority of courts find that, under both § 365(d)(3) and § 553, pre petition security deposits may be applied against pre petition claims, whether arrearages or rejection damages, rather than administrative claims. The Bankruptcy Code protects the landlord by requiring the trustee to pay the landlord for use of the premises post petition until the lease is rejected. Allowing the trustee to use the premises to benefit the estate and then pay for that use by recovery of the deposit designed to protect the landlord against defaults strips the landlord of the protections of § 365(d)(3) and unfairly benefits the estate at the expense of the landlord. This conclusion is consistent with case law interpreting the legislative history of § 502(b)(6) as requiring application of security deposits to rejection claims. In re Leather Factory Inc., 475 B.R. 710, 715-719 (Bankr. C.D. Cal. 2012).

V. VALUATION OF DEFERRED CASH PAYMENTS AT CONFIRMATION

A. Valuation and Cramdown in Plan Confirmation

Section 1129(b) of the Bankruptcy Code (the "Code") provides, in relevant part:

Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Also, with respect to a class of secured claims, the plan provides—
[E]ach holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property . . . .

The Code is devoid of any method for determining the value as of the effective date of the Plan in connection with a stream of deferred cash payments.

B. The Supreme Court Decision in Till v. SCS Credit Corp., 541 U.S. 465 (2004)

The issue in *Till* involved what discount rate should be used to calculate the present value of the deferred cash payments under the Debtor's Chapter 13 plan. The Supreme Court found that the proper approach to determine a discount rate in Chapter 13 was to employ a formula approach. This formula approach was to begin with the Prime Rate.[1] According to *Till*, "bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly."[2] Further, the Supreme Court identified four factors to be considered in determining the amount of risk adjustment over the prime rate: (1) circumstances of the estate, (2) nature of the security, (3) plan feasibility and (4) plan duration.[3]

Several bankruptcy courts have applied the Till bright-line formula approach to Chapter 11 cases despite the cautious language stated in footnote 14. In this commonly quoted footnote, the Supreme Court stated that:

> [T]here is no readily apparent Chapter 13 "cram down market rate of interest": Because every cramdown loan is imposed by a court over the objection of the secured lenders. Interestingly, the same is not true in the Chapter 11 context, as

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[1] The U.S. Prime Rate is a commonly used short-term interest rate in the banking system of the United States. All types of American lending institutions use the U.S. Prime Rate as a reference rate for pricing various short- and medium-term credit facilities. It used to be the rate charged to very credit worthy commercial borrowers. The reality is that now most of these borrowers would borrow based upon the London Interbank Offered Rate (LIBOR) and not the Prime Rate. Additionally, it would seem that the Supreme Court equates a solvent commercial borrower with one that would obtain funding at the Prime Rate. Not all solvent borrowers qualify for loans at the Prime Rate.

[2] *Till,* 541 U.S. at 479.

[3] *Id.* at 485

> numerous lenders advertise financing for Chapter 11 debtors in possession. Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce. In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure. [4]

In *Wells Fargo Bank N.A v. Texas Grand Prairie Hotel Realty, LLC (In the Matter of Texas Grand Prairie Hotel Realty, LLC)*, however, the Fifth Circuit held that the majority opinion in Till "d[id] not decide the proper scale for the risk adjustment," but observed that "other courts have generally approved adjustments of 1% to 3%."[5] Did the Supreme Court mandate a range for the risk adjustment of 1% to 3%? Under the right circumstances, to properly reflect risk as assessed by the financial expert, could the expert propose a risk adjustment outside this range? For example, what happens if one or more of the NOI, LTV, and DSCR metrics are problematic going forward as proposed in the Plan? Moreover, the Prime Rate is a short term rate while real estate loans are generally long term in nature. Is it possible to properly adjust for the differences between short term and long term rates within the 1% to 3% range?

Proponents of this range argue that it is well within the historical limits of conducting risk adjustments. The proponents of this argument, however, fail to recognize that the United States is currently in an unprecedented period of very, very low interest rates due to well-publicized actions of the Federal Reserve. Given this anomaly with interest rates, including the Prime Rate, this calls into question whether or not the 1% to 3% range for risk adjustments properly reflects the credit risks borne by the secured lenders.

To add to the confusion, footnote 5 of *Texas Grand* states that "[w]hile courts often acknowledge that *Till's* Footnote 14 appears to endorse a 'market rate' approach under Chapter 11 if an 'efficient market' for a loan substantially identical to the cramdown loan exists, courts almost invariably conclude that such markets are absent."[6] Is this view universally accepted? If so, in the post-Lehman environment, obtaining a new loan identical in collateral, rate, and term to the cramdown loan is virtually impossible. Lenders are then limited to the bounds of the Prime Rate plus 1% to 3% to determine the cramdown rate to discount the stream of deferred cash payments pursuant to a Plan to present value as of the confirmation date.

The Honorable D. Michael Lynn, United States Bankruptcy Judge for the Northern District of Texas, opined in a 2011 ruling that, "*Till's* direction to use a formula approach to fixing an interest rate does not require, from case to case, use of the prime

[4] 541 U.S. at 476 n. 14.
[5] F.3d 324, 332 (5th Cir. 2013).
[6] *Id.* at 333.

rate."[7] Judge Lynn's ruling then states, *inter alia*, that both financial experts in the case before him found no efficient market existed for the type of loan needed by the Debtor. Subject to certain adjustments, Judge Lynn held that one expert's "methodology [was] an appropriate approach to use to determine an interest rate."[8] This expert applied a formula approach using a weighted average rate based upon a risk-free rate plus: (i) an amount for senior debt based upon an LTV in compliance with a 65% LTV; (ii) a layer for mezzanine debt equal to approximately the next 20% of value based upon the DSCR; and (iii) an equity strip for the remainder of the debt. While the above methodology is termed a "formula approach," does it resemble an attempt at a "market approach"?

VI. Section 1111(b) Election

A. History

In re Pine Gate Associates Ltd., 2 B.C.D. 1478 (N.D.Ga. 1976): This case dealt with a failing residential apartment complex with a value considerably below the amount of the original mortgage. The lenders made nonrecourse loans to the debtor. The Bankruptcy Act in effect at the time permitted and the district court held that the secured lenders payments under the reorganization plan could be limited to the appraised value of the collateral, in full satisfaction of the lender's claim. Thereafter, the owners received a windfall from the post-confirmation increase in the value of the collateral.

To avoid results like Pine Gate, in 1978, Congress enacted section 1111(b). It attempts to protect undersecured creditors from having their nonrecourse debt written down to a fraction of the original amount as a result of market declines. Its purpose is to allow undersecured creditors a way to realize more from their collateral than the value provided by a depressed market. It allows a nonrecourse undersecured creditor to share in the post-confirmation appreciation of collateral by giving the undersecured creditor the right to elect to treat its entire claim as a secured claim.

B. The Statute

11 U.S.C. § 1111(b)(1) (A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title [11 USCS § 502] the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless (i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

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[7] *In re Village at Camp Bowie I, L.P.*, 454 B.R. 702, 713 (2011). It should be noted that, on February 26, 2013, the Fifth Circuit affirmed Judge Lynn's order in this case as to the issue of the confirmation of the debtor's plan of reorganization despite artificial impairment.
[8] *Id*. at 714.

(ii) such holder does not have such recourse and such property is sold under section 363 of this title [11 USCS § 363] or is to be sold under the plan.
(B) A class of claims may not elect application of paragraph (2) of this subsection if--
(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or (ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title [11 USCS § 363] or is to be sold under the plan.
(2) If such an election is made, then notwithstanding section 506(a) of this title [11 USCS § 506(a)], such claim is a secured claim to the extent that such claim is allowed.

C. Bankruptcy Code Sections and Federal Rules of Bankruptcy Procedure Implicated By An Election Under 11 U.S.C. § 1111(b)

11 U.S.C. § 506(a): Bifurcates the total allowed claim of an undersecured creditor into two parts: (1) an allowed secured claim for the value of the creditor's lien in the collateral, and (2) an allowed unsecured claim for the amount due and owing to the creditor above the value of the lien. See U.S. v. Ron Pair Enter., Inc., 489 U.S. 235, 239 & n. 3, 109 S. Ct. 1026, 1029 & n. 3, 103 L. Ed. 2d 290 (1989). The allowed secured claim is less than the total allowed claim.

11 U.S.C. § 1122(a): Generally, bifurcated claims are separately classified in reorganization plans. This often raises gerrymandering of classification issues.
F.R.B.P. 3018(d): An undersecured claimant may vote in each class in which its bifurcated claim is classified.
11 U.S.C. § 1129(b)(2)(A)(I) and(II): A secured claimant who objects to a reorganization plan must (I) retain its lien up to the amount of the allowed secured claim, and (2) receive deferred cash payments totaling the face value of at least the allowed secured claim and deferred cash payments when discounted to present value that are at least equal to the face value of the allowed secured claim. The net present value of the deferred cash payments and the deferred cash payments must be at least equal to the allowed secured claim.
11 U.S.C. § 1129(b)(2)(B): An unsecured creditor who objects to a reorganization plan is not paid in full pursuant to the proposed reorganization plan, junior claimants cannot receive or retain property on account of their prior interests in the debtor, absent a new value contribution.

11 U.S.C. § 1129(a)(11): The plan proponent must demonstrate that the reorganized debtor will be able to make all of the proposed deferred cash payments in respect of the allowed secured claim.

11 U.S.C. § 1129(a)(7)(b): with respect to each impaired class of claims…

> if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the

value of such holder's interest in the estate's interest in the property that secures such claims.

F.R.B.P. 3014: Election must be made in open court by the conclusion of the disclosure statement hearing unless a deadline is otherwise set by the court or in writing before the disclosure statement is approved.

D. When to Elect?

The real benefit of election is to protect the creditor from a post-confirmation, quick sale of its collateral to its detriment. It protects an undersecured creditor from having its nonrecourse debt written down as a result of market declines and potentially realize more from its collateral than it would from a depressed market.

Value Plan Treatment

Determine the net present value at confirmation of the undersecured creditor's bifurcated claims under the proposed reorganization plan. Consider the type of collateral, debtor's projections, as well as possible conversion or dismissal.

Value Election Treatment

Determine whether the undersecured creditor can create a blocking position without being required to proceed through a contested confirmation hearing or can receive more value by making the section 1111(b) election.

If the undersecured creditor makes a section 1111(b) election, the reorganization plan must meet an additional requirement to comply with 1129(b)(2)(A)(2), that the sum of all of the deferred cash payments of at least the amount of its total allowed claim, versus only the allowed secured claim. See First Federal Bank of California v. Weinstein (In re Weinstein), 227 B.R. 284 (B.A.P. 9th Cir. 1998).
The present value of the electing creditor's deferred cash payments need only equal the present value of the collateral, which is the same amount that must be received by the non-electing creditor. The difference is that the sum of the deferred cash payments must be in an amount equal to at least the creditor's total allowed claim. See General Electric Credit Equities, Inc. v. Brice Road Developments, LLC (In re Brice Road Developments, LLC), 392 B.R. 274 (B.A.P. 6th Cir. 2008).

If an undersecured creditor makes a section 1111(b) election, its claim is treated as fully secured, and it relinquishes its right to vote on the plan and to share in any distribution to unsecured creditors. See Wade v. Bradford, 39 F.3d 1126, 1129 (10th Cir. Okla. 1994).

Undersecured creditors are not entitled to interest on the unsecured portion of their total allowed claim, notwithstanding section 1111(b). PCC Inv., LLC v. Saguaro Guest Ranch Mgmt. Corp. (In re Saguaro Ranch Dev. Corp.), 2011 Bankr. LEXIS 2201 (Bankr. D. Ariz. June 1, 2011).

After two plans were filed attempting to circumvent a section 1111(b) election, the Seventh Circuit upheld the bankruptcy court's refusal to consider a third proposed reorganization plan. *In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012).

Consider all possible outcomes arising from any amended plan proposed by a debtor after the undersecured creditor makes a section 1111(b) election.

Section 1111(b) election generally waives objections to confirmation based on claim classifications, violations of the absolute priority rule, and unfair discrimination against its unsecured claims.

General rule: They are not effective! Automatic default. Waivers of automatic stay. Fixing the amount of the claim.

Importance of Bankruptcy Court Decisions

Bankruptcy courts are deciding issues that were previously often decided by state courts regarding valuation, mortgage holder, assignment of interests, foreclosure process, treatment of mortgages, etc.

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VII. Difficulties in Satisfying § 1129(a)(10)'s Requirement of an Impaired, Accepting Class in a Real Estate Case

Finding an impaired, accepting class may be difficult in many cases, but it can be especially difficult in real estate-related cases. Often the primary secured lender's deficiency claim will dominate and control the vote in the general unsecured creditor class. In the typical single asset real estate case, the debt structure consists only of the primary secured creditor, the county's real estate tax claim, and an unsecured creditor class comprised of the lender's deficiency claim and a small amount of trade debt. In this very common scenario, the only possibility of obtaining an affirmative vote is from the county's tax claim. But can the secured tax claim qualify as an impaired class?

[The following analysis contains excerpts from Judge Brown's decision, In re K Lunde, LLC, 513 B.R. 587 (Bankr. D. Colo. 2014).]

Section 1124 defines the Bankruptcy Code's concept of impairment. It provides that "[e]xcept as provided in section 1123(a)(4) of this title, a class of claims . . . is impaired under a plan unless, with respect to each claim . . . the plan" provides one of two specified forms of treatment. 11 U.S.C. § 1124 (prefatory clause). In essence, this wording establishes a presumption of impairment and then provides two exceptions.[9] The first exception is when the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim . . . ." 11 U.S.C. § 1124(1). For this exception to apply, the plan must not alter the claimant's rights in any respect. The second exception builds on the first. It allows for only one alteration, the deceleration of a debt following a default. If the contract or applicable law would otherwise allow the claimant to accelerate payment in the event of a default, this subsection provides that the claim will nevertheless be deemed unimpaired if the plan cures the default and reinstates its pre-default maturity date, as long as the claimant is compensated for any resulting damages or losses and no other rights are altered. 11 U.S.C. § 1124(2). Thus, impairment equates to an alteration of the creditor's rights.

While even the slightest alteration may suffice to establish impairment, § 1124 is particular about the source of the impairment. The foundation of § 1124's concept of impairment is built on plan impairment. If the source of impairment is a law that limits claims in some respect, such as state usury law, that is not a form of impairment recognized by § 1124. The same is true if the source of the impairment is a Bankruptcy Code provision, rather than the plan itself.

For example, in Solow v. PPI Enterprises (U.S.), Inc. (In re PPI Enterprises (U.S.), Inc.), 324 F.3d 197 (3d Cir. 2003), the landlord asserted his claim was impaired and, therefore, he was entitled to vote because his rent claim had been capped under § 502(b)(6). The Third Circuit concluded that this was statutory impairment, not plan impairment. "This language in § 1124(1) does not address a creditor's claim 'under nonbankruptcy law.'. . . In other words, a creditor's claim outside of bankruptcy is not the relevant barometer for impairment; we must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights." Id. at 204.

Similarly, in In re American Solar King Corp., 90 B.R. 808, 819-22 (Bankr. W.D. Tex. 1988), the bankruptcy court held that it was § 510, not the plan itself, that required subordination of the damage claims of a class of shareholders previously engaged in securities litigation.

[9] Actually, the introductory clause of § 1124 contains a third exception to the presumption of impairment in its prepositional phrase, "[e]xcept as provided in section 1123(a)(4) of this title." 11 U.S.C. § 1124. Section 1123(a)(4) states that a plan shall "provide the same treatment for each claim . . . of a particular class, unless the holder of a particular claim . . . agrees to a less favorable treatment of such particular claim . . . ." 11 U.S.C. § 1123(a)(4) (emphasis added). An agreement or consent to a particular treatment removes the claim from the presumption of impairment. "Agreement" or "consent" of a creditor is not to be confused with a class vote accepting the plan. Impairment is to be specified in advance of voting and, in fact, unimpaired classes are deemed to accept the plan and, therefore, solicitation of unimpaired classes is not required. 11 U.S.C. §§ 1123(a)(2) and 1126(f). But whenever a particular creditor has agreed or consented to less favorable treatment, which is usually evidenced through some form of stipulation or agreement, then the claim of this creditor is deemed unimpaired under § 1124.

> It is the Bankruptcy Code itself which creates the concept of claims, according broader legal rights in some ways and restricting legal rights in other ways. . . . If a plan leaves a claimholder subject to a given provision of the Code relating to the treatment of certain claims, the plan has certainly left unaltered the legal rights to which such claim entitles its holder.

Id. at 820 (emphasis original); see also Weiting Hsu, Recognizing Impaired Accepting Class of Secured Tax Claims, 31 Am. Bankr. Inst. J. 48, 48 (May 2012).
In determining whether the plan is the source of its impairment, it is instructive to consider the historical treatment of secured tax claims. Prior to the enactment of § 1129(a)(9)(D) in 2005, if the plan was not a consensual plan accepted by all impaired classes, payment of a secured tax claim, like any other secured claim, was governed by § 1129(b)(2)(A). Under this section, the plan had to provide for the retention of the secured creditor's lien and its receipt of deferred cash payments representing the present value of its collateral, but the statute otherwise permitted a wide range of options for the treatment of its secured claim. Theoretically, payment could be stretched out over any number of years, with a balloon payment at the end of the term, even if the general unsecured class received more favorable treatment. If a plan proposed this type of treatment of a secured tax claim before 2005, then the plan itself clearly impaired the secured tax claimant's legal rights.

With the adoption of § 1129(a)(9)(D) in 2005, the subset of secured tax claims that would otherwise qualify for priority treatment under § 507(a)(8) but for their liens must now receive the treatment specified in § 1129(a)(9)(C) and § 511 (which requires the payment of interest at the rate specified by non-bankruptcy law). Section 1129(a)(9)(C) requires "regular installment payments in cash" totaling the present value of the full amount of the claim, over a period "ending not later than 5 years after the date of the order for relief," and "in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan" (other than an administrative convenience class). 11 U.S.C. § 1129(a)(9)(C). This section still leaves a few treatment options open. "Regular installment payments" could refer to monthly, quarterly, or annual payments. It could refer to either payments of principal and interest, or interest-only payments, with a balloon principal payment. "Not later than 5 years" could refer to a time period ranging anywhere from payment in full on the effective date to five years from the order for relief. What is not mentioned explicitly is a requirement that this subset of secured tax claims retain their liens.

If a plan provides the secured tax claim with the treatment required by § 1129(a)(9)(D), does this treatment now constitute statutory impairment as opposed to plan impairment? This is not as clear cut as the cases previously described, involving a § 502(b)(6) statutory cap on landlord damage claims and the statutory subordination under § 510 of shareholders' damage claims. In both of those cases, a Bankruptcy Code provision limited the claims, regardless of any plan filed. Here, we have a Code provision—§ 1129(a)(9)(D)—that limits treatment of secured tax claims only if a chapter 11 plan is filed. In other words, the applicable Code provision is one that defines what a chapter 11 plan must provide. Because the statute requires a particular plan treatment, one could argue it results in plan impairment.

On the other hand, if a debtor's plan provides the treatment specified by § 1129(a)(9)(D), one could argue that the plan is merely affording the claim the treatment mandated by the Code. "If a plan leaves a claimholder subject to a given provision of the Code relating to the treatment of certain claims, the plan has certainly left unaltered the legal rights to which such claim entitles its holder." Amer. Solar King Corp., 90 B.R. at 820 (emphasis original). Admittedly, § 1129(a)(9)(D) only applies in the context of plan confirmation, but it is not the only section of the Bankruptcy Code that impairs secured tax claims. In chapter 7 cases, the secured tax claim may be subordinated to the payment of certain administrative expense and priority claims. 11 U.S.C. § 724(b).

CRE/ADC Venture 2013, LLC v. Rocky Mt. LAnd Co., LLC (In re Rocky Mt. Land Co. LLC)

United States Bankruptcy Court for the District of Colorado
April 3, 2014, Decided
Case No. 12-21643 HRT, Chapter 11

Reporter: 2014 Bankr. LEXIS 1370

In re: ROCKY MOUNTAIN LAND COMPANY LLC, Debtor.CRE/ADC Venture 2013, LLC, Movant, v. ROCKY MOUNTAIN LAND COMPANY, LLC, Respondent.

Core Terms

reorganization, interest rate, confirmation, courts, requires, secured claim, projections, valuation, lease, feasible, impaired, new value, classification, proponent, property value, Engineering, provides, holder, fair and equitable, gerrymandering, collateral, unsecured claim, formula, tax claim, secured creditor, equity interest, net profit, circumstances, classified, provisions

Case Summary

Overview

HOLDINGS: [1]-A Chapter 11 bankruptcy plan that was proposed by an LLC that owned an office building in Arvada, Colorado, did not meet all requirements for confirmation under the Bankruptcy Code, and because the LLC did not have any equity in the property and could not propose a plan that could be confirmed, a creditor that held a secured interest in the building was entitled to an order under 11 U.S.C.S. § 362(d)(2) which granted relief from the automatic stay so it could proceed with foreclosure action; [2]-The plan's treatment of the creditor's unsecured deficiency claim was grossly disparate to its treatment of other unsecured claims, and the LLC did not have enough income to make payments on secured debt it owed the creditor based on the court's determination that seven percent was a reasonable rate of interest for the LLC to pay on the creditor's secured claim.

Outcome

The court denied confirmation of the debtor's plan and granted the creditor's motion for relief from the automatic stay.

LexisNexis® Headnotes

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Debtor's Lack of Equity

HN1 See 11 U.S.C.S. § 362(d)(2).

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Debtor's Lack of Equity

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Feasibility Test

Evidence > Burdens of Proof > Allocation

HN2 If a party who seeks relief under 11 U.S.C.S. § 362 from the automatic stay establishes that a Chapter 11 debtor lacks equity in real property, the burden shifts to the debtor to show that there is a reasonable possibility of a successful reorganization within a reasonable time. What this requires is not merely a showing that if there is conceivably to be an effective reorganization, the property will be needed for it, but that the property is essential for an effective reorganization that is in prospect. If evidence indicates that a successful reorganization within a reasonable time is impossible, the court must then grant relief from the automatic stay.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Feasibility Test

HN3 In assessing whether a Chapter 11 debtor can prove a reasonable possibility of a successful reorganization within a reasonable time, courts generally apply a lesser standard in determining whether the debtor has met its burden during the 120-day exclusivity period. This lesser standard has been referred to as the ″sliding scale″ burden of proof. However, the use of the ″sliding scale″ burden of proof is intended to benefit debtors who have a realistic chance of reorganization but who have not had sufficient time to formulate a confirmable plan. When relief from stay is requested near the expiration of the exclusivity period, the ″sliding scale″ or ″moving target″ burden of proof requires a greater showing than ″plausibility.″ Rather, a debtor must demonstrate that a successful reorganization within a reasonable time is probable. ″Probable″ has been defined as having more evidence for than against, or supported by evidence which inclines the mind to believe, but leaves some room for doubt, or ″likely.″

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN4 Valuation of a creditor's secured claim differs depending upon the purpose and circumstances for which it is undertaken. In Associates Commercial Corp. v. Rash, the United States Supreme Court considered how to value collateral retained by a Chapter 13 debtor exercising the cramdown option in *11 U.S.C.S. § 1325(a)(5)(B)*. The Court distinguished that option from the alternative available to a Chapter 13 debtor, in which its collateral would be surrendered, when deciding the proper valuation standard under *11 U.S.C.S. § 506(a)*. When a debtor elects to use collateral to generate an income stream as in a cramdown, the Court noted, the use of a foreclosure-value standard would be improper because a foreclosure sale will not take place. The Court thus held that under *§ 506(a)*, the value of property retained is the cost a debtor would incur to obtain a like asset for the same proposed use, i.e., its replacement value. Courts have recognized that similar reasoning applies with equal force in the Chapter 11 reorganization context. Where a Chapter 11 plan of reorganization provides for a debtor to retain and use collateral to generate income with which to make payments to creditors, a *§ 506(a)* valuation based upon a hypothetical foreclosure sale would not be appropriate, as it would be inconsistent with the provision's dictates.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN5 In Till v. SCS Credit Corp., the United States Supreme Court considered four approaches to selecting an appropriate interest rate in a bankruptcy plan that proposes to reduce the contract rate of interest a debtor owes to a creditor: the formula rate, the coerced loan rate, the presumptive contract rate, or the costs of funds rate. A plurality determined that the formula rate was appropriate.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

Evidence > Burdens of Proof > Allocation

HN6 To give a creditor the present value of its allowed claim, deferred cash payments must be valued as of the effective date of a debtor's bankruptcy plan, and must consist of an appropriate interest rate and an amortization of the principal which constitutes the secured claim. To determine an appropriate interest rate, a plurality of the United States Supreme Court required, in Till v. SCS Credit Corp., use of the ″formula approach″ that starts with a standard measure of risk-free lending, such as the prime rate, and adds an upward adjustment based on the debtor, the plan, and the security for the loan. The evidentiary burden for establishing an appropriate interest rate under Till falls squarely on a debtor's creditors.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN7 Under the United States Supreme Court's plurality decision in Till v. SCS Credit Corp., the interest rate a debtor proposes to use to repay a creditor must take into account the risks to the creditor, given that lenders will not generally lend on a 100 percent loan-to-value ratio.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN8 Because the United States Supreme Court's plurality decision in Till v. SCS Credit Corp. was a Chapter 13 bankruptcy case, there is some ambiguity about the correct approach for calculating interest rates under a Chapter 11 plan. In footnote 14 of Till, the Supreme Court noted that ″a coerced loan rate″ may be appropriate in Chapter 11 because numerous lenders advertise financing for Chapter 11 debtors in possession. In Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Home Patient, Inc.), the United States Court of Appeals for the Sixth Circuit evaluated Till's footnote 14 and created a two-step process to determine the appropriate interest rate in a Chapter 11 case. First, a court should assess whether an efficient market exists. If so, the court should apply the market rate. If not, the court should apply Till's prime-plus formula rate. Numerous courts have used this two-step process in a Chapter 11 context. However, as the United States Court of Appeals for the Fifth Circuit has noted, while courts often acknowledge that Till's footnote 14 appears to endorse a ″market rate″ approach under Chapter 11 if an efficient market for a loan substantially identical to the cramdown loan exists, courts almost invariably conclude that such markets are absent.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN9 An analysis under the United States Supreme Court's plurality decision in Till v. SCS Credit Corp. of a below-contract rate of interest a debtor proposes to use to repay debt the debtor owes to a creditor must consider: (1) the circumstances of the debtor's bankruptcy estate; (2) the nature of the security; (3) plan feasibility; and (4) the loan term.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN10 Among the courts that follow the United States Supreme Court's plurality decision in Till v. SCS Credit Corp. formula method in the Chapter 11 bankruptcy context, "risk adjustment" calculations generally have ranged between one and three percent above the prime rate.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

HN11 While the United States Court of Appeals for the Tenth Circuit has not addressed the issue of whether the United States Supreme Court's plurality decision in Till v. SCS Credit Corp. applies in Chapter 11 bankruptcy cases, the United States Bankruptcy Court for the District of Colorado agrees with the reasoning of those courts applying Till's rationale in Chapter 11 cases where no efficient market exists.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Good Faith Requirement

HN12 The test of good faith is met if there is a reasonable likelihood that a Chapter 11 bankruptcy plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code, i.e., is the plan feasible, practical, and will it enable the debtor to continue its business and pay its debts in accordance with the plan provisions? There is no hard and fast definition of "good faith," and a court must look to the totality of the circumstances in any given case.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Good Faith Requirement

HN13 The new value exception means that an interest holder in a Chapter 11 debtor whose plan violates the absolute priority rule may in some circumstances retain the interest because it provides "new value" to the debtor, in the form of new capital or similar contributions. In Coones v. Mutual Life Ins. Co. of New York, the United States Bankruptcy Court for the District of Wyoming applied a two-part test to determine whether or not a post-confirmation contribution by a debtor would meet the standard the United States Supreme Court adopted in Case v. Los Angeles Lumber Prod.: (1) the new value must represent a substantial contribution, which (2) must equal or exceed the value of the interest in property retained by the debtor. The Los Angeles Lumber test requires that the contributions be substantial, necessary to the success of the reorganization, and equal to or exceeding the value of the retained interest in the estate.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Good Faith Requirement

HN14 Some courts have noted that a contribution of less than four percent of the value of a debtor's collateral is de minimus as a matter of law for purposes of determining whether a debtor's bankruptcy plan can be confirmed.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

HN15 Plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of [*11 U.S.C.S. § 1129(b)(2)(B)(ii)*] (the "absolute priority rule").

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Feasibility Test

HN16 [*11 U.S.C.S. § 1129(a)(11)*] requires a finding that confirmation of a Chapter 11 bankruptcy plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan. This feasibility requirement requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable. A plan is not feasible where income projections are not based on concrete evidence of financial progress, or are speculative, conjectural, or unrealistic, and a court should not approve a plan if it depends on successful fulfillment of every assumption of the debtor to be feasible and is so narrowly constructed that any swing in the assumptions to the negative causes the plan to fail. Thus, where the financial realities do not accord with a proponent's projections or where the proposed assumptions are unreasonable, a plan should not be confirmed.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Feasibility Test

HN17 In determining whether a Chapter 11 bankruptcy plan is feasible, a court should consider: (1) the adequacy of the debtor's capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Feasibility Test

HN18 *11 U.S.C.S. § 1129(a)(11)* requires the proponent of a Chapter 11 bankruptcy plan to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan.

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Feasibility Test

HN19 A plan proposal to extend a matured, recourse, short term loan over a substantially longer term is subject to particularly close scrutiny. In In re Investment Company of the Southwest, Inc., the United States Bankruptcy Appellate Panel for the Tenth Circuit observed that when determining whether a plan is feasible, courts often consider a debtor's cash flow projections showing the debtor's ability to simultaneously make plan payments and fund projected operations. The projections must be based upon evidence of financial progress and must not be speculative, conjectural, or unrealistic. While courts often do not require projections for the same period over which a long-term plan spans, a debtor must still sustain its burden to somehow prove that it will be able to perform all obligations it is assuming under the plan. This is especially true when significant balloon payments are required in years not covered by the projections.

Bankruptcy Law > Claims > Types of Claims > Claim Classification

Bankruptcy Law > ... > Administrative Expenses > Priority > Taxes

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Administrative & Gap Claims

HN20 *11 U.S.C.S. § 507(a)(8)* grants priority to certain unsecured tax claims. Generally, claims under *§ 507(a)(8)* cannot be classified in a proposed plan. The BAPCPA added *11 U.S.C.S. § 1129(a)(9)(D)* to the Bankruptcy Code, which imposes the same payment for secured priority tax claims under a Chapter 11 bankruptcy plan as for unsecured priority tax claims under *§ 1129(a)(9)(C)* if the claim would otherwise meet the description under *§ 507(a)(8)* but for the secured status of the claim.

Bankruptcy Law > Claims > Types of Claims > Claim Classification

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Impaired Class Consent

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Plan Compliance With Code

HN21 Confirmation of a Chapter 11 bankruptcy plan requires the consent of at least one impaired class of claims, not counting insiders. For a class to accept a plan, at least two-thirds in amount and more than one-half in number of the allowed claims of the class must vote in favor of the plan. *11 U.S.C.S. § 1126(c)*. Insiders' votes are not counted. *11 U.S.C.S. § 1129(a)(10)*. *Section 1129(a)(1)* provides that a court may confirm a Chapter 11 plan only if the plan complies with applicable provisions of the Bankruptcy Code. The phrase "applicable provisions" has been interpreted to include *11 U.S.C.S. § 1122*, which governs the classification of claims and interests under a Chapter 11 plan. *Section 1122(a)* provides that a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

Bankruptcy Law > Claims > Types of Claims > Claim Classification

HN22 There is no controlling Tenth Circuit law on whether substantially similar claims may be separately classified. The United States Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits impose restrictions on a plan proponent's ability to separate similar claims. The United States Court of Appeals for the Seventh Circuit is the only court of appeals to hold otherwise.

Bankruptcy Law > Claims > Types of Claims > Claim Classification

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Impaired Class Consent

Evidence > Burdens of Proof > Allocation

HN23 In In re Deming Hospitality, LLC, the United States Bankruptcy Court for the District of New Mexico noted that the main judicial gloss on *11 U.S.C.S. § 1122(a)* is that *§ 1122(a)* prohibits a debtor from separately classifying similar claims to "gerrymander" a consenting class. If a creditor objects to a Chapter 11 plan's classification scheme on gerrymandering grounds, most courts require the plan proponent to justify the classification.

Bankruptcy Law > Claims > Types of Claims > Claim Classification

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Impaired Class Consent

Evidence > Burdens of Proof > Allocation

HN24 In In re Deming Hospitality, LLC, the United States Bankruptcy Court for the District of New Mexico adopted the "one clear rule" against gerrymandering to satisfy *11 U.S.C.S. § 1129(a)(10)*, whether the source of the rule is *11 U.S.C.S. § 1122(a)* or *§ 1129*. The court reasoned that since a Chapter 11 bankruptcy plan proponent has the burden of proving compliance with § 1129 in any event, the burden should be placed on the plan proponent to justify any separate classification of substantially similar claims, if a party in interest objects on gerrymandering grounds. If a plan proponent carries its burden of showing that substantially similar claims were not separately classified to gerrymander a consenting class of impaired claims, the court should make no further inquiry into whether the separate classification of similar claims violates § 1122(a); any remaining confirmation issues would be addressed under § 1129. Analyzing separate classification objections in this way protects creditors from gerrymandering and/or other improper classification attempts, while not taking undue liberties with the text of § 1122(a). The United States Bankruptcy Court for the District of Colorado agrees with much of the Deming analysis.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > General Overview

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Evidence > Burdens of Proof > Preponderance of Evidence

HN25 11 U.S.C.S. § 1129(a) and (b) set forth the minimum requirements a Chapter 11 bankruptcy plan must satisfy to be confirmed. If a plan does not satisfy these requirements, a court cannot confirm the plan. A plan's proponent carries the burden of proof in showing that all of the requirements for confirmation set forth in § 1129 are satisfied, and must prove by a preponderance of the evidence that (a) the plan satisfies all confirmation requirements, or (b) that the only condition not satisfied is the requirement that all impaired classes accept the plan, and, if so, that the plan satisfies the cramdown alternative, which requires that the plan not discriminate unfairly against objecting impaired classes and is fair and equitable towards each objecting class.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Evidence > Burdens of Proof > Allocation

HN26 11 U.S.C.S. § 1129(b)(1) provides that a Chapter 11 bankruptcy plan must be fair and equitable and cannot discriminate unfairly. To determine whether a plan discriminates unfairly, courts have considered: (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) the treatment of the classes discriminated against. Courts have used a "rebuttable presumption" test or "Markell" test, which is met by showing that, outside of bankruptcy, a dissenting class would receive less than a class receiving a greater recovery, or that the alleged preferred class has infused new value which offset its gain. Regardless of the standard used, courts agree that if the treatment of substantially similar claims is "grossly disparate," it is very difficult for a plan proponent to show "fair" discrimination.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

Evidence > Burdens of Proof > Allocation

HN27 Under 11 U.S.C. § 1129(b)(1), a debtor must show that its Chapter 11 bankruptcy plan is fair and equitable with respect to impaired creditors who have not accepted the plan. With respect to non-accepting secured creditors whose claims are impaired, a debtor must show that its secured creditors retain the liens securing their claims and payments totaling at least the allowed amount of their claims, and, if their rights are altered, that secured creditors receive the "indubitable equivalent" of their claims. 11 U.S.C.S. § 1129(b)(2)(A).

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

HN28 Under 11 U.S.C.S. § 1129(b)(2)(B)(ii), with respect to a class of unsecured claims that is not paid in full, the holder of any claim that is junior to that class cannot receive or retain under a Chapter 11 bankruptcy plan on account of such junior claim or interest any property (the "absolute priority rule"), unless the new value exception is met.

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Debtor's Lack of Equity

HN29 A bankruptcy court must grant relief from the automatic stay when a debtor does not have any equity in property and the debtor has not demonstrated that a successful reorganization within a reasonable time is probable or likely. 11 U.S.C.S. § 362(d)(2).

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

Real Property Law > Bankruptcy > Secured Claims

HN30 A secured creditor may not be denied leave to exercise its rights for an extended period of time, based only on the hope that a debtor will be able to gain advantage by a low property valuation and interest rate, by improved profits during the debtor's plan, and by refinancing being available at the end of the balloon period.

Counsel: [*1] For Rocky Mountain Land Company LLC, Debtor: Harvey Sender, Katherine M. Swan, David Wadsworth, Denver, CO.

US Trustee, U.S. Trustee: Joanne C. Speirs, Denver, CO.

Judges: Howard R. Tallman, Chief United States Bankruptcy Judge.

Opinion by: Howard R. Tallman

Opinion

ORDER DENYING PLAN CONFIRMATION AND GRANTING RELIEF FROM STAY

This case comes before the Court on the Debtor's First Amended Plan of Reorganization (docket #131), filed on June 12, 2013, the Objection thereto (docket #140) filed on July 29, 2013, the Motion for Relief from the Automatic Stay (docket #142) filed by Movant[1] on July 31, 2013 (the ″Motion″), and the response filed by Debtor on September 16, 2013 (docket #166). The parties stipulated to a full-day evidentiary hearing on both plan confirmation and relief from stay (docket #160), and the hearing was held on November 22, 2013. After reviewing the entire record in the case, the Court is now ready to rule.

I. BACKGROUND

Debtor owns property located at 5690 Webster Street, Arvada, Colorado (the ″Property″), a 24,000 square-foot commercial office building built in 2008. Joseph Jehn, a licensed professional engineer, owns and operates Debtor. The Property houses his engineering firm, Jehn Engineering, as well as several other tenants. Bank of Choice, the original lender for three loans on the Property, leased space in the Property until the bank was placed in FDIC receivership in July 2011. The FDIC then began to pursue collection of the loans, which had reached maturity. Debtor filed its Chapter 11 petition on June 1, 2012. In Schedule A, Debtor valued the Property at $2,200,000.00, with a secured claim against it of $4,123,565.28.[2] Movant's amended proof of claim No. 3-4 is in the total amount of $4,410,856.05, with $4,103,125.00 as secured, based on notes and deeds of trust for the three loans on the Property.[3] In the Motion, Movant states the [*3] loans matured on June 2, 2011, with all principal and interest immediately due and payable, and Debtor has failed to make any payments on the loans since that time. Movant began foreclosure proceedings against the Property in early 2012, which were stayed upon the filing of Debtor's bankruptcy.

Movant's first motion for relief from stay on the Property was filed on February 21, 2013. The Court held a hearing on that motion and the Debtor's response on April 24, 2013. At that hearing, the Court heard testimony from Jehn, as well as from Jaimee D. Keene, a Certified General Real Estate Appraiser, and Fran Schneider, a real estate broker and Certified Commercial Investment Member. Both Ms. Keene and Mr. Schneider were acknowledged as expert witnesses by the Court. Ms. Keene testified she valued the Property at a $3,170,000.00 market value in May 2012. Mr. Schneider testified he valued the Property at [*4] a $2,200,000.00 market value in February 2013. In their testimony, both experts acknowledged the commercial real estate market had changed since May 2012, although there was some dispute as to how much the change impacted the Property's value.

On May 6, 2013, this Court denied relief from stay, determining that valuation remained an issue for the confirmation hearing, and noting that Movant should provide a more recent valuation of the Property. The Court concluded at that time that the Property might be needed for an effective reorganization, and there was a plan in prospect (which had not yet been filed but was presented as Exhibit B at that hearing). The Court, however, also stated that there were several problems with the plan in prospect, and conditioned the continuance of the automatic stay by ordering Debtor to pay Movant the amount it had set aside for adequate protection, and continue to pay Movant $5,000 per month until a plan was confirmed. Debtor has paid the Movant the adequate protection payments as ordered.

[1] The Objection and the Motion for Relief from Stay were originally filed by Keycorp Real Estate Markets, Inc. (″Keycorp″), as servicer for the Federal Deposit Insurance Corporation (″FDIC″). On October 17, 2013, Keycorp sold the FDIC assets to CRE/ADC Venture 2013-1 (″CRE/ADC″). On November 19, **[*2]** 2013, CRE/ADC filed a Motion to take Judicial Notice of the sale (docket #178), and an unopposed Notice of Substitution of Parties (docket #179). CRE/ADC also filed amended proof of claim No. 3-4, naming CRE/ADC as creditor, on December 26, 2013.

[2] At the time of filing, Debtor also owned other property, including condominium units referred to in prior proceedings as the ″Grandview Units.″ The Grandview Units have since been sold.

[3] The original contract rate of interest on the largest note securing the Property was 7.75%. (Exhibit 4C).

The Debtor's initial plan designated the following classes:

Class 1: Secured Tax Claims of Jefferson County, Colorado

Class 2(a): Secured Claim of FDIC (Grandview Units—First [*5] Deed of Trust)

Class 2(b): Secured Claim of FDIC (Grandview Units—Secured portion of claim under Second Deed of Trust)

Class 3: Secured Claim of FDIC (the Property)—Secured portion of Claim under First Deed of Trust)

Class 4: Unsecured Claims of FDIC (deficiency claims)

Class 5: Administrative Convenience Claims

Class 6: Equity Interests

Class 7: Late filed claims

Under the initial plan, Debtor would: 1) pay Class 1 secured tax claims on both the Property and the Grandview Units in the amount of $92,469.31; 2) sell the Grandview Units within 90 days after the plan effective date for not less than $600,000; 3) pay the net sale proceeds to the Movant up to the allowed amount of its secured claim under the first deed of trust on the Grandview Units; 4) allow Class 2(b) in an amount equal to the market value of the Grandview Units less the allowed amount of the Class 1 and 2(a) Claims, including interest; 5) allow the secured obligation in Class 3 in an amount equal to the value of the Property ($2,200,000.00); 6) pay this secured obligation from the operation of Debtor's business over a 30-year loan at a 4.5% interest rate, with the entire remaining principal balance due in full seven years [*6] following the effective date; 7) pay allowed Class 4 claims from the Net Profits fund and Class 5 Claims at 50% of their allowed amounts; 8) infuse a $100,000 capital contribution as new value in exchange for 100% of the equity interests in the reorganized debtor, to pay the Class 1 and 5 claims and to fund ongoing operations; and 9) if the Property is sold, pay 25% of the net proceeds from the sale to the Net Profits fund for distribution to the allowed Class 4 claims holder, with the remaining 75% to be distributed to equity holders in the reorganized Debtor.

Debtor filed its initial plan of reorganization on May 1, 2013, and its first amended plan of reorganization on June 12, 2013. The amended plan (the "Plan") proposed that, with respect to Class 3, the Court would determine the value of the Property, and the claim would be treated as a secured obligation in an amount equal to that value. The claim would then be paid in one of two ways: (1) the reorganized debtor would obtain exit financing in an amount sufficient to refinance the secured claim in the amount determined by the Court ("Option 1"); or (2) the reorganized debtor would pay the amount of the secured claim from the proceeds [*7] of the operation of Debtor's business ("Option 2"). Specifically under Option 2, the reorganized debtor would make interest-only payments at a rate of 4.5% for seven years following the Effective Date, when the entire remaining balance of the secured portion of the claim would be due in full. The unsecured deficiency amount would be included in Class 4. Class 4 claims would be paid 50% of the reorganized debtor's net profits for five years. Class 5 claims (administrative convenience claims) also would be paid at 50%. With respect to Class 6 (equity interests), the capital contribution was increased to $200,000, under Option 1, in exchange for 100% of the equity interests in the reorganized debtor. (The capital contribution remained at $100,000 under Option 2). The capital contribution would also serve as the initial stalking horse bid, with any other creditor or party in interest able to provide new consideration with a minimum amount of $160,000 above the capital contribution. Finally, if Debtor exercised Option 1, then in the event the Property were sold within one year of the Effective Date, the reorganized debtor would pay 100% of any amount realized from the net sale amount in [*8] excess of the allowed amount of the Class 3 claim to the Class 3 claim holder. Under Option 2, if the Property were sold, after the Effective Date during the life of the Plan, the reorganized debtor would pay 50% of the net proceeds to the net profits funds for distribution to the Class 4 claim holder, and 50% to the Class 6 equity interests.

Prior to the November 22, 2013, evidentiary hearing, the parties filed a pretrial stipulation, whereby the parties agreed on the following:

- The Grandview Units were sold for $597,096.18, and the net sale proceeds were paid to the Class 2(a) and (b) Claim holder.
- The allowed amount of the Class 2(a) secured Claim was paid in full at $346,086.48; the remainder of funds ($251,009.70) determined the amount of the Class 2(b) secured Claim, leaving a deficiency claim in the amount of $91,383.35, which Claim is treated in Class 4.
- The Debtor's Plan complies with § 1129(a)(4) and (a)(5).
- § 1129(a)(6) is not applicable.

The parties agreed there were three contested issues of fact at the heart of the dispute with respect to confirmation of the Debtor's Plan: (1) the value of the Property as of November 22, 2013; (2) the reasonable market rate of interest [*9] for secured debt; and (3) whether the Debtor's Plan is proposed in good faith. The parties also agreed that, based on those findings, the Court would further need to determine:

> • Whether the terms proposed for the restructured loan are fair and equitable;
>
> • Whether the capital contribution by the Jehn family that is proposed in exchange for the equity in the reorganized debtor is a contribution of new value that is ″substantial, necessary to the success or reorganization, and equal to or exceeding the value of the estate,″ consistent with the absolute priority rule;
>
> • Whether the Plan provides sufficient opportunity for others to obtain equity in the reorganized debtor;
>
> • Whether, if the Debtor elects to treat Class 3 under Option 2, the reorganized debtor will be able to make required payments on a restructured loan (feasibility); and
>
> • Whether the Plan's classification scheme ″does not discriminate unfairly″ and provides ″fair and equitable treatment″ to the dissenting Classes that are impaired under the Plan.

II. DISCUSSION

Movant moves for relief from stay under *11 U.S.C. § 362(d)(2)*, or, in the alternative, *§ 362(d)(1)*. *Section 362(d)(2)* provides:

> ***HN1*** On request of a party in interest and [*10] after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . with respect to a stay of an act against property under subsection (a) of this section, if —
>
> > (A) the debtor does not have an equity in such property; and
> >
> > (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d)(2).

HN2 Movant established and the Debtor's valuation amount demonstrates that the Debtor lacks equity in the Property. Upon that showing, the burden shifts to Debtor to show that there is ″'a reasonable possibility of a successful reorganization within a reasonable time.'″ *United Sav. Ass'n v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 376, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)*. ″What this requires is not merely a showing that if there is conceivably to be an effective reorganization, [the] property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*.″ *Id*. (Emphasis in original). If evidence indicates that a successful reorganization within a reasonable time is impossible, the court must then grant relief from the automatic stay. [*11] *Id. at 376*.

HN3 In assessing whether a debtor can prove ″a reasonable possibility of a successful reorganization within a reasonable time,″ courts generally apply a lesser standard in determining whether the debtor has met its burden during the 120—day exclusivity period. *See In re Apex Pharms., Inc., 203 B.R. 432, 441 (N.D.Ind.1996)*. This lesser standard has been referred to as the ″sliding scale″ burden of proof. However, ″the use of the 'sliding scale' burden of proof is intended to benefit debtors who have a realistic chance of reorganization but who have not had sufficient time to formulate a confirmable plan.″ *Id. at 442* (emphasis added). When relief from stay is requested near the expiration of the exclusivity period, the ″sliding scale″ or ″moving target″ burden of proof requires a greater showing than ″plausibility.″ *In re Holly's, Inc., 140 B.R. 643, 702 (Bankr. W.D. Mich. 1992)*. Rather, ″a debtor must demonstrate that a successful reorganization within a reasonable time is 'probable.'″ *Id*. ″Probable″ has been defined as having more evidence for than against, or supported by evidence which inclines the mind to believe, but leaves some room for doubt, or 'likely.'″ *In re Gunnison Center Apartments, LP, 320 B.R. 391, 402 (Bankr. D. Colo. 2005)*, [*12] citing BLACK'S LAW DICTIONARY 1201 (6th ed.1990).

Debtor filed this Chapter 11 case on June 1, 2012, and several motions to extend the exclusivity period were granted, the latest of which extended the 120-day period to May 1, 2013. Debtor filed its first Chapter 11 plan on that date. As previously noted, Movant's first motion for relief from stay was filed in February 2013. The Court held a hearing on that motion in April 2013, entered its order denying relief from stay, and ordered adequate protection payments shortly thereafter. Debtor's Amended Plan was filed on June 12, 2013, which drew a second motion for relief from stay from the lender. Debtor had over a year to develop a plan; and therefore it is time for Debtor to overcome a higher hurdle, and show that a successful reorganization within a reasonable time is probable.

A. Valuation

To determine whether the Property is essential for an effective reorganization, the value of the Property must be determined. At the November 22, 2013, hearing, Ms. Keene testified that she had re-evaluated the Property's value as of August 1, 2013, and her new appraisal was admitted as Exhibit 1A. In the appraisal, she noted that the Property was 95% [*13] leased and occupied, with Jehn Engineering occupying 8,000 square feet of the 23,472 net rentable square feet. She arrived at a fee simple value of $3,055,000, and a leased fee value of $2,610,000. The fee simple value assumed that the 8,000 square feet would be leased at a market rate. The leased fee value assumed that Jehn Engineering would continue to lease the 8,000 square feet at a below market rate.[4]

Debtor's expert witness, Mr. Schneider,[5] testified that in his opinion as a real estate broker, using comparative market sales, the Property was worth $2,200,000, and using an income approach to value, the Property was worth between $2,200,000 and $2,300,000.

During his testimony, Mr. Jehn advised that he anticipated increasing the rent that Jehn Engineering paid to Debtor from $6,000 per month to $10,000 per [*14] month by February 2014. Ms. Keene then testified that her revised valuation of the Property, considering the Jehn lease at $10,000 per month, would be $2,955,000.

HN4 Valuation of a creditor's secured claim differs depending on the purpose and circumstances for which it is undertaken. In re Stembridge, 394 F.3d 383, 386 (5th Cir. 2004). In Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997), the Supreme Court considered how to value collateral retained by a Chapter 13 debtor exercising the cram down option in § 1325(a)(5)(B) of the Code. The Court distinguished that option from the alternative available to the Chapter 13 debtor, in which its collateral would be surrendered, when deciding the proper valuation standard under § 506(a). Id. at 962. When a debtor elects "to use the collateral to generate an income stream" as in a cram down, the Court noted, the use of a foreclosure-value standard would be improper because "a foreclosure sale ... will not take place." Id. at 963. The Court thus held that "under § 506(a), the value of property retained ... is the cost the debtor would incur to obtain a like asset for the same 'proposed use,'" i.e., its replacement value. *Id.*

Courts have recognized [*15] that similar reasoning applies with equal force in the Chapter 11 reorganization context. *See, e.g.,* In re Mayslake Village—Plainfield Campus, Inc., 441 B.R. 309, 320 n. 2 (Bankr.N.D.Ill.2010) ("The same [replacement] value can be used in this matter, even though a Chapter 11 cram down plan is involved."). Where a Chapter 11 plan of reorganization provides for a debtor to retain and use collateral to generate income with which to make payments to creditors, a § 506(a) valuation based upon a hypothetical foreclosure sale would not be appropriate, as it would be inconsistent with the provision's dictates. *In re Heritage Highgate, Inc.* 679 F.3d 132, 141 (3rd Cir. 2012).

In his appraisal, Mr. Schneider reviewed a number of office buildings that had sold within the prior year. The buildings had been built in the late 50s, mid-80s, mid-90s, 2004, and 2006. He concluded that, on average, those buildings had sold for less than replacement value, "considerably below $100 per square foot." He noted that "there was an unusually high office vacancy rate in the West Metro Area which is estimated to be in the area of 15%." Mr. Schneider determined that the Property was worth $2,200,000 using a comparative [*16] market sales approach to value. He also valued the Property using an income approach to value. He stated that, because the tenants in the Property were not "national credit tenants," the capitalization rate was in the 9.5 to 10% range. He used a vacancy and credit loss factor of 15% and a projected range of $18 per square foot, with operating expenses of $6 per square foot. He opined that using the income approach, the value of the Property was between $2.2 million and $2.3 million.

Ms. Keene's valuation included an analysis of the Metro Denver area and the neighborhood where the Property is located. She opined that the commercial real estate market reflected rising rents, by 3 to 5%, in 2013, and decreased vacancy rates. She specifically examined the vacancy rates within a three-mile radius of the Property and noted that the rates had trended downward since 2011. Ms. Keene further noted that a rail line, two blocks south of the Property, was scheduled to open its Gold Line expansion in 2016. Just south of the rail line were new improvements such as a multi-screen movie theater and several big box stores. Ms. Keene stated that, while vacancy rates in the Northwest Denver office market [*17] generally were 15%, vacancy rates within a three-mile radius of the Property were only 9%.

Like Mr. Schneider, Ms. Keene valued the Property using a sales comparison approach and an income approach. She categorized the Property as Class C construction, Investment class B, with LEED silver certified improvements. The comparable buildings she selected

[4] Ms. Keene testified that the market rate was $18 per square foot, and Jehn Engineering was paying $9.90 per square foot.

[5] Movant objected to Mr. Schneider's testimony based on bias and the Court took that objection under advisement. Because the Court has determined, on other grounds, to accept Ms. Keene's valuation rather than Mr. Schneider's valuation, the objection is now moot.

were similar in construction and built in the late 90s and 2000s, with the oldest comparable built in 1997. Her sales comparison approach yielded a value of $3.4 million. However, she recognized that lease-up costs would change the value to $3.2 million, and that the "as is" value of the Property was $2.9 million. Using an income approach, Ms. Keene analyzed the rent roll for the Property and noted that the average rent rate was $15.68 per square foot, whereas the prevailing market rate in the immediate area was $18 per square foot. She determined the value of the Property using the income approach to be $3,055,000 fee simple value (using the $18 per square foot figure) and $2,610,000 leased fee value (assuming the current lease rates).

After a thorough review of both valuations, the Court accepts Ms. Keene's valuation. Ms. Keene is a Managing [*18] Director of Butler Burgher Group and has been appraising commercial real estate since 2000. Her valuation considers important aspects of the Property, such as its newer construction, LEED certified features, and location in an area likely to increase in investment value. Her valuation most accurately considered the use of the Property, rather than its liquidation value. Mr. Schneider, as a certified real estate broker, focused primarily on the liquidation value of older properties that were not as comparable to the Property in construction and location.

Therefore, the Court determines the value of the Property to be $2,955,000. This is the amount Ms. Keene testified to at trial, after considering Mr. Jehn's testimony that he anticipated increasing the rent that Jehn Engineering paid to Debtor. Thus, according to the Plan terms, the value of the Movant's secured claim in Class 3 is $2,955,000. At trial, Debtor provided evidence of a loan commitment from Mr. Ted Blank for a five-year loan in the amount of $2,200,000, at a rate of 6%,[6] to enable exit financing under Option 1 of the Plan. Because the commitment is not enough to refinance the Movant's Class 3 secured claim, Option 1 fails. [*19] As a result, it is necessary to determine whether, under Option 2, the proposed terms for the restructured loan are fair and equitable.

B. Interest Rate Analysis for Proposed Restructured Secured Loan

At trial, Mr. Richard W. Ferrell, Movant's expert witness, opined that the appropriate interest rate for a cram down of the Movant's secured claim was at least 8%. This rate was determined using the prime plus formula[7] in *Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004)*. The Plan asks the Court to approve a restructured loan at 4.5% for a seven-year term, interest-only payments, with a balloon payment at the end of the term. Mr. Ferrell opined that the proposed interest rate was insufficient to compensate Movant for the risk of non-payment and to ensure that Movant received payments of a present value at least equal to the value of the secured claim.

HN6 To give a creditor the present value of its allowed claim, deferred cash payments must be valued as of the effective date of the plan, and must "consist of an appropriate interest rate and an amortization of the principal which constitutes the secured claim." *In re VDG Chicken, LLC, 2011 Bankr. LEXIS 1795, 2011 WL 3299089, *7 (B.A.P. 9th Cir. 2011)*. To determine an appropriate interest rate, *Till* requires the "formula approach" that starts with a standard measure of risk-free lending, such as the Prime Rate, and adds an upward adjustment based on the debtor, the plan, and the security for the loan. *Till, 541 U.S. at 479*. The evidentiary burden for establishing an appropriate interest rate under *Till* falls "squarely on the creditors." [*21] *Id*.

The Plan, under Option 2, proposes to pay the Movant's Class 3 secured claim from the proceeds generated by the operation of Debtor's business. Debtor proposes to pay interest-only payments, at an interest rate of 4.5%, with a balloon payment due in seven years. Movant argues that this treatment is not "fair and equitable" because this interest rate does not reflect the risk factors inherent in the loan and, thus, does not include the necessary upward adjustment required by *Till*. ***HN7*** Under *Till*, the interest rate must take into account the risks to the Movant, given that lenders will not generally lend on a 100% loan-to-value ratio. The Movant contends that the risk of non-payment in this case is much greater than in other cases in which bankruptcy courts approved higher cram down rates, citing *In re VDG Chicken, 2011 Bankr. LEXIS 1795, 2011 WL at *8* (6% interest rate appropriate given 70% loan to value ratio); *In re Red Mountain Mach. Co., 448 B.R. 1, 12-13 (Bankr. D. Ariz. 2011)* (6.5% interest rate appropriate); and *In re Nw. Timberline Enters., Inc.*, 348 B.R. 412, 434 (Bankr. N.D. Tex. 2006) (*Till* rate of

[6] The stated rate in the commitment letter was "6% 3 year adjustable, adjusting to prime plus 2.75% in 3 years," with estimated monthly principal and interest payments of "about $13,000.00 with the remaining principal and accrued interest due at maturity." The letter also required a loan fee of $22,000.00 and a $100,000 escrow payment account.

[7] ***HN5*** In **[*20]** *Till*, the Supreme Court considered four approaches to selecting the appropriate interest rate: the formula rate, the coerced loan rate, the presumptive contract rate, or the costs of funds rate. A plurality determined that the formula rate was appropriate. The dissent stated that the contract rate (which adjusts the pre-bankruptcy contractual rate to adjust for changed circumstances) should be used to determine what interest rate a cramdown plan should apply to a secured creditor.

interest for gas station/convenience store bankruptcy held to be prime plus 5.75% to provide fair and [*22] equitable treatment to secured lender).

HN8 Because *Till* was a Chapter 13 case, there is some ambiguity about the correct approach for calculating interest rates under a Chapter 11 plan. *See* Gary W. Marsh and Matthew M. Weiss, *Chapter 11 Interest Rates After Till*, 84 Am. Bankr. L. J. 209 (Spring 2010). In footnote 14 of Till, the Supreme Court noted that "a coerced loan rate" may be appropriate in Chapter 11 because "numerous lenders advertise financing for Chapter 11 debtors in possession." In *Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Home Patient, Inc.), 420 F.3d 559 (6th Cir. 2005)*, the Sixth Circuit evaluated *Till's* footnote 14 and created a two-step process to determine the appropriate interest rate in a Chapter 11 case. First, a court should assess whether an efficient market exists. If so, the court should apply the market rate. If not, the court should apply *Till*'s prime-plus formula rate. Numerous courts have used this two-step process in a Chapter 11 context.[8] However, as the Fifth Circuit recently noted, "While courts often acknowledge that *Till*'s Footnote 14 appears to endorse a 'market rate' approach under Chapter 11 if an 'efficient market' [*23] for a loan substantially identical to the cramdown loan exists, courts almost invariably conclude that such markets are absent." *In re Texas Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324, 333 (5th Cir. 2013)*.[9]

Mr. Ferrell testified that an efficient market did not [*24] exist for an "under-secured and overleveraged loan" like that proposed in the Plan. Nevertheless, he opined that an interest rate using a "blended rate" approach, involving an analysis of loans in other Chapter 11 cases, would be in excess of the 8% rate he identified using the *Till* analysis. ***HN9*** A *Till* analysis considers: 1) the circumstances of the estate; 2) nature of the security; 3) plan feasibility; and 4) loan term. Using this analysis, Mr. Ferrell started with the prime rate of 3.25%, and added 4.75%, for the specific risk factors, arriving at an interest rate of 8%.

This Court notes that, ***HN10*** among the courts that follow *Till*'s formula method in the Chapter 11 context, "risk adjustment" calculations generally have ranged between 1% and 3% above the prime rate. *See* *Pamplico, 468 B.R. at 794* ("[T]he general consensus among courts is that a one to three percent adjustment to the prime rate is appropriate, with a 1.00% adjustment representing the low risk debtor and a 3.00% adjustment representing a high risk debtor"); *In re Lilo Props., LLC, 2011 Bankr. LEXIS 4407, 2011 WL 5509401 at *2 (Bankr.D.Vt.2011)* ("The Court starts with the premise that the lowest-risk debtors would pay prime plus 1% and the highest-risk [*25] debtors would pay prime plus 3%.").

Mr. Ferrell's suggested increase of 4.75% is higher than the 3% increase that courts generally add to the prime rate in the case of a high-risk debtor. The Plan's proposed interest rate of 4.5% is just slightly over a 1% increase, which courts have used in cases of low-risk debtors. This Court determines the *Till* analysis is a starting point to determine the risk category in which the Debtor falls. For example, in *In re Griswold Bldg., LLC, 420 B.R. 666 (Bankr. E.D. Mich. 2009)*, a case in many ways similar to this one,[10] the bankruptcy court accepted a risk adjustment of 5% above prime based on the testimony of an expert who examined each of the *Till* factors and made specific risk adjustments for each of them, including a 2% risk adjustment based on the circumstances of the case and a 3% risk adjustment to reflect his belief that there was a substantial risk of nonpayment because of the lack of feasibility of the debtor's plan. The bankruptcy court rejected an additional 2% risk adjustment based on the nature of security because the court was not convinced the building securing the loan would deteriorate.

Mr. Ferrell examined each of the *Till* factors and adjusted the interest rate accordingly, as follows:

1. Circumstances of the Estate

Mr. Ferrell opined that the project to build the Property was undertaken with inadequate equity which left Debtor vulnerable to the 2008 financial melt-down. Additionally, the success of the project was tied to the success of Jehn Engineering, which was similarly vulnerable. Jehn Engineering is focused primarily on engineering rather

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[8] *In re Nw. Timberline Enters.*, 348 B.R. at 412 (applying prime-plus formula after concluding that the evidence was insufficient to establish the existence of an efficient market); *In re Pamplico Highway Dev., LLC*, 468 B.R. 783, 795 (Bankr. D.S.C. 2012); *In re Walkabout Creek Ltd. Dividend Hous. Ass'n Ltd.*, 460 B.R. 567, 574 (Bankr. D.D.C.2011); *In re 20 Bayard Views, LLC*, 445 B.R. 83, 106 (Bankr.E.D.N.Y.2011); *In re Hockenberry*, 457 B.R. 646, 657 (Bankr.S.D.Ohio 2011); *In re Riverbend Leasing LLC*, 458 B.R. 520, 536 (Bankr.S.D.Iowa 2011); *In re Bryant*, 439 B.R. 724, 742-43 (Bankr.E.D.Ark.2010).

[9] The Tenth Circuit has not yet addressed the application of *Till* to Chapter 11 cases, although the Bankruptcy Appellate Panel of the Tenth Circuit has applied *Till* in a Chapter 12 case. *First National Bank v. Woods (In re Woods)*, 465 B.R. 196 (BAP 10th Cir. 2012), *rev'd on other grounds*, 743 F.3d 689, 2014 WL 630470 (10th Cir. 2014).

[10] That case involved a debtor who owned office **[*26]** buildings encumbered by a large amount of debt and a proposed plan calling for a balloon payment with "an unrealistic hope" of being able to pay the lender at the conclusion of the plan.

than property management, and enjoys a below-market rate lease with an option to extend at that rate until 2018. Mr. Ferrell concluded that the below market lease shifted the economic burden to Movant, and added a .5% upward interest rate adjustment.[11]

2. Nature of the Security

Mr. Ferrell noted that a substantial 1.5% risk premium above the prime rate is associated with loans secured by office building collateral, and that most of those [*27] loans are at 70% LTV, not the 100% LTV situation presented here. Further, the restructured loan is not amortized so there is no proposed repayment of principal over the seven-year term, which increases the risk of non-payment. Mr. Ferrell determined this factor merited a 1.5% upward interest rate adjustment.

3. Plan Feasibility

Mr. Ferrell's examination of the leases between Debtor and the Property's tenants (Exhibit AA) revealed that only one tenant has a lease extending beyond 2015, with 11 of the 16 tenants leasing on a month-to-month basis with leases expiring at the end of 2013. Thus, there was significant lease-up risk associated with the Property especially if Debtor's efforts to raise lease rates results in certain short-term tenants to move. The proposed 4.5% interest rate applied to a $3 million loan amount would require annual debt service payments of $137,745, an amount greater than the Debtor's own projections showed the building leases might generate for payment of Class 3.[12] Also, Mr. Ferrell noted that the Property would need to appreciate almost 43%, or would require more than the $100,000 equity contribution Debtor proposed, to allow a refinance of the collateral using [*28] loan proceeds from a 70% LTV financing upon Plan termination in seven years. Accordingly, without such enhancements, Debtor's Plan is not feasible and effectively shifts the risk of the Property underperforming to Movant. Mr. Ferrell added a 1% increase over the prime rate due to this factor.

4. Term

The prime rate generally is used for short-term loans of two to three years. Here, the seven-year proposed term merited an increase in the rate, especially considering that interest rates are presently at historic lows and are predicted to rise. Mr. Ferrell added a 1.75% increase over the prime rate for this factor.

Thus, in Mr. Ferrell's opinion, the cumulative effect of the interest rate adjustments resulted in an 8% appropriate interest rate for the cram-down restructure of the loan on the Property (3.25 + 4.75). Clearly, this is substantially greater than Debtor's proposed 4.5% rate for a restructured loan. The Debtor provided no opposing expert to refute his opinion.

The Court agrees [*29] in large part with Mr. Ferrell's *Till* analysis, and believes it is a good starting point to determine the appropriate interest rate in this case. ***HN11*** While the Tenth Circuit has not addressed the issue of whether *Till* applies in Chapter 11 cases, this Court agrees with the reasoning of those courts applying *Till*'s rationale in Chapter 11 cases where no efficient market exists. In this case, Mr. Ferrell testified that no efficient market existed. The Court agrees. There was evidence of a $2.2 million loan offer at a 6% interest rate; however, that loan had a five-year, rather than seven-year, term, and there was no indication that the loan would have been offered for a longer term and larger amount. There was no evidence before the Court as to whether this loan was indicative of an efficient market.

The 8% estimated rate is 4.75% over prime, which is substantially higher than the 3% over prime that many courts use with a high risk debtor. The Court will reduce Mr. Ferrell's 8% rate by .5% due to Jehn Engineering's willingness to increase their lease to $10,000 monthly. The Court also will reduce Mr. Ferrell's upward adjustment of 1.5% by .5% under the "nature of security" factor. Mr. Ferrell [*30] based his adjustment partly on the "1.5% risk premium associated with loans secured by office building collateral." In this case, however, the particular office building is in a very good location and likely to increase in value. Nevertheless, some percentage of risk adjustment is appropriate given there is no repayment of principal over the seven-year term and given the 100% LTV ratio. The Court believes a 1% adjustment, rather than a 1.5% adjustment, is warranted under this factor. Thus, the Court determines an appropriate interest rate to be 7%.[13]

C. Good Faith.

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[11] With Jehn Engineering's proposed lease adjustment to $10,000 monthly, this .5% arguably can be subtracted.

[12] Debtor's projections (Exhibit HH) are based on a $2.2 million value of the Property, which at 4.5% interest rate, result in the Debtor's proposed monthly loan payment of $11,147.08, or $133,764.96 per year.

[13] The original contract rate on the largest of the three notes was 7.75%. While the *Till* plurality endorsed the formula approach, the dissent stated it would "instead adopt the contract rate — *i.e.*, the rate at which the creditor actually loaned funds to the debtor — as a presumption that the bankruptcy judge could revise on motion of either party." *Till* at 492. The Court notes the evidence suggests that interest rates have come down slightly since the original loan was made, making a downward adjustment

Having addressed the valuation and interest rate issues, the Court must consider the third contested issue raised by the parties, whether the Plan is proposed in good faith. ***HN12*** "The test of good faith is met if there is a reasonable likelihood that the plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code, that is, is the plan feasible, practical, and would it enable the company to continue its business and pay its debts in accordance with the plan provisions." *In re Global Water Techs., Inc., 311 B.R. 896, 902 (Bankr. D. Colo. 2004)*(citing *Travelers Ins. Co. v. Pikes Peak Water Co., 779 F.2d 1456, 1459 (10th Cir. 1985))*. "There is no hard and fast definition of good faith, but the Court must look to the totality of the circumstances in any given case." *Id*. In this case, pursuant to the parties' pretrial stipulation, an analysis of good faith requires the Court to answer the following:

- Whether the capital contribution by the Jehn family that is proposed in exchange for the equity in the reorganized debtor is a contribution of new value that is "substantial, necessary to the [*32] success or reorganization, and equal to or exceeding the value of the estate," consistent with the absolute priority rule;
- Whether the Plan provides sufficient opportunity for others to obtain equity in the reorganized debtor;
- Whether, if the Debtor elects to treat Class 3 under Option 2, the reorganized debtor will be able to make required payments on a restructured loan (feasibility); and
- Whether the Plan's classification scheme "does not discriminate unfairly" and provides "fair and equitable treatment" to the dissenting Classes that are impaired under the Plan.

1. New Value

HN13 The new value exception means that an interest holder in a Chapter 11 debtor whose plan violates the absolute priority rule may in some circumstances retain the interest because it provides "new value" to the debtor, in the form of new capital or similar contributions. *In re H.T. Pueblo Prop., LLC, 2011 Bankr. LEXIS 5231, 2011 WL 6962754 (Bankr. D. Colo. 2011)* (citing *Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle St. P'ship., 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999))*. In *Coones v. Mutual Life Ins. Co. of New York, 168 B.R. 247 (D.Wyo.1994)*, the court applied a two-part test to determine whether or not a post-confirmation contribution [*33] by a debtor would meet the *Los Angeles Lumber*[14] standard: (1) the new value must represent a substantial contribution; which (2) must equal or exceed the value of the interest in property retained by the debtor.

Under Option 2, Debtor proposes a contribution of $100,000 by the members of the Debtor. Movant contends that this contribution is not material or substantial, given the amount Debtor owes to Movant. The Court agrees with Movant. Debtor is contributing $100,000 in new value for 100% of the equity interests. The Movant receives none of this money, which will most likely be consumed by administrative costs. While the contribution does show a certain level of commitment by the members of the Debtor, it is only 3.4% of the value of the collateral.[15]***HN14*** Some courts have noted that a contribution of less than 4% of the value of the collateral is *de minimus* as a matter of law. *See In re Ambanc La Mesa Ltd. P'ship, 115 F.3d 650, 655 (9th Cir. 1997)* [*34] (collecting cases).

The Court also notes that under Option 1, the Debtor's members offered to pay $200,000.00 in new value in order to obtain a $2.2 million loan from Ted Blank, but reduce that to $100,000.00 under the loan restructure of Option 2. The difference is apparently a result of the separate loan costs and the need for larger reserves. Given the lack of equity in the Property, the Debtor's members are paying in $100,000 for an asset that currently has a zero or negative value. The equity interest holders are therefore investing in the potential upside resulting from the appreciation of the Property over time. Should that occur, and the Property is sold during the seven years of the Plan, the equity interest holders and Movant will split the surplus 50/50 based on a $100,000 contribution by the equity interest holders and a $2.1 million unsecured Class 4 Claim held by Movant. Thus, for example, upon a future sale that results in a $200,000 surplus, the equity interest [*35] holders will receive a return equal to 100% of their investment in the

from the contract rate appropriate. Accordingly, using either the formula approach or the presumptive contract rate approach, the appropriate **[*31]** interest rate is generally in the same range, at 7%.

[14] The *Los Angeles Lumber* test requires that the contributions be substantial, necessary to the success of the reorganization, and equal to or exceeding the value of the retained interest in the estate. *Case v. Los Angeles Lumber Prod.*, 308 U.S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939).

[15] $100,000.00 is 3.4% of $2,955,000.00, the value of the Property as determined by the Court and 4.5% of the Debtor's asserted value of $2,200,000.00. Either value is marginal at best under these circumstances.

Debtor, while Movant will receive a surplus distribution equal to 4.8%.

Accordingly, the Court finds that the contribution of new value is not sufficient under the Bankruptcy Code. *See In re Sun Cruz Casinos, LLC, 298 B.R. 833, 842 (Bankr. S.D. Fla. 2003)* ("In essence, from the debtor perspective, the proposed new value is like putting money in the bank. The debtor's principals put the money in, and presumably the value of the [property] will increase which inures to the benefit of the debtor's principals. In the meantime, the secured creditor, who bargained for a first lien position, runs the ultimate risk of the project's failure with no upside potential. Such a result is not fair and equitable and violates the absolute priority rule.")

2. Opportunity for Others to Obtain Equity

Movant alleges that Debtor has not exposed the investment opportunity in any way. Movant also argues that under the terms of the Plan, potential investors are subject to different conditions that render the competition provisions unfair. For instance, any third-party contribution must exceed the Jehns' contribution by $160,000, resulting [*36] in an overbid requirement of 160% of the initial contribution offer. Third-party investors also must provide personal guarantees "if necessary." Debtor responds that the process is intended to ensure that "the maximum price that a third party is willing to pay for the equity is, in fact, the cost of obtaining equity," thus maximizing the value to the estate.

The Court finds that the Plan does not provide sufficient opportunity for others to obtain equity. The Plan's overbid and possible guarantee requirements appear to have chilled any bidding in this case. The bid structure sets a standard apparently to maximize any equity contribution by third parties, but in the Court's view it sets a significant hurdle that protects the proposed new equity contribution, keeping it as low as possible. *See Sun Cruz Casinos at 841* (***HN15*** "plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of *section 1129(b)(2)(B)(ii)* [the "absolute priority rule"]").

3. Feasibility

HN16 *Section 1129(a)(11)* requires a finding that the "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need [*37] for further financial reorganization, of the debtor or any successor to the debtor under the plan." This feasibility requirement "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." *In re Beyond.com Corp., 289 B.R. 138, 145—46 (Bankr. N.D. Cal. 2003)* (citations omitted); *see Affiliated Nat'l Bank-Englewood v. TMA Assocs. (In re TMA Assocs.), 160 B.R. 172, 177 (D. Colo. 1993)*. A plan is not feasible where income projections are not based on concrete evidence of financial progress, or are speculative, conjectural, or unrealistic. *In re Merrimack Valley Oil Co., Inc., 32 B.R. 485, 488 (Bankr. D. Mass. 1983)*. The Court should not approve a plan if it depends on successful fulfillment of every assumption of the debtor to be feasible and is "so narrowly constructed that any swing in the assumptions to the negative causes the plan to fail." *In re Cott, 49 B.R. 570, 571-72 (Bankr. W.D. Mo. 1985)*. Thus, "[w]here the financial realities do not accord with the proponent's projections or where the proposed assumptions are unreasonable, the plan should not be confirmed." *Lakeside Global*, 116 B.R. at 507.

HN17 In determining [*38] feasibility, a court should consider (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. *See Teamsters Nat'l Freight Ind. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.), 800 F.2d 581, 589 (6th Cir. 1986)*; *In re Gulph Woods Corp., 84 B.R. 961, 973 (Bankr. E.D. Pa. 1988)*.

(1) Adequacy of Capital Structure

In this case, the Debtor has employed an aggressively leveraged capital structure with inadequate equity, based on the large loan from Bank of Choice . The success of the Property hinged on the success of that bank and of Jehn Engineering, a related party. The Plan's 100% LTV and 3.4% new value contribution doesn't change the inadequacy of the capital structure.

(2) Earning Power of the Business

Debtor's earning power derives from its lease income, which, as noted above, is variable given the terms of the leases and dependency on the Jehn Engineering lease. The Court [*39] did not have evidence of the earning power of Jehn Engineering. As noted below, the Debtor's own projections show that its earning power will not adequately cover its Plan obligations.

(3) Economic Conditions

The evidence indicates that the economic environment in the Debtor's location should be improving. However, it also shows that the Debtor does not now or will in the future have sufficient cash flow to take advantage of any coming upswing in real estate values. Time does not seem to be on Debtor's side.

(4) Ability of Management

There was also only limited evidence on Debtor's experience with operating office buildings, but in general, Debtor appeared to be primarily engaged in managing the engineering business rather than acting as a commercial property investor and manager.

(5) Probability of Continuation of the Same Management

The same management would continue under the Plan.

(6) Any Other Related Matter that Determines the Prospects of a Sufficiently Successful Operation to Enable Performance of the Provisions of the Plan

The feasibility of the plan is mainly dependent on this last factor. ***HN18*** "Section 1129(a)(11) requires the plan proponent to show concrete evidence of a sufficient [*40] cash flow to fund and maintain both its operations and obligations under the plan." S&P, Inc. v. Pfeifer, 189 B.R. 173, 183 (N.D. Ind. 1995). Based on its review of the Debtor's monthly financial reports (Exhibits I-X) and cash flow projections (Exhibit HH) the Court concludes that the Plan is not feasible. The Court has previously determined the value of the Property is $2,955.000.00 and an appropriate interest rate under the Plan is 7.0%. A 100% LTV, interest-only restructured loan results in a monthly payment of $17,237.50 or an annual total of $206,850.00. This is substantially greater than the $11,147.00 monthly payment ($133,764.00 annually) Debtor's Plan proposes given a $2.2 million value. Even if the Court includes the projected Net Profits interests the Plan contemplates and the Debtor's Cash on Hand as of its last monthly financial report, the Court finds that the Debtor does not have sufficient cash flow to service the payments to the Class 3 secured claim.[16] The Court concludes Debtor cannot meet debt service payments at a 7% interest rate applied to a loan for $2,955,000.00.

Further, ***HN19*** a plan proposal to extend a matured, recourse, short term loan over a substantially longer term is subject to particularly close scrutiny. In re Tri-Growth Centre City, Ltd., 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992). In In re Investment Company of the Southwest, Inc., 341 B.R. 298, 311 (BAP 10th Cir. 2006), the Tenth Circuit BAP observed that:

> When determining whether a plan is feasible, courts often consider a debtor's cash flow projections showing its ability to simultaneously make plan payments and fund projected operations. The projections must be based upon evidence of financial progress and must not be speculative, conjectural, or unrealistic. While courts often do not require projections for the same period over which a long-term plan spans, a debtor must still sustain its burden to somehow prove that it will be able to perform all obligations it is assuming under the plan. This is [*42] especially true when significant balloon payments are required in years not covered by the projections.

The evidence showed that the Property would need to appreciate almost 43% to allow a refinance of the collateral using loan proceeds from a 70% LTV financing upon Plan termination; or the projected cash flows would have to grow markedly to service the required debt load during the life of the Plan. The Court determines that such increased appreciation or profitability is too speculative and unrealistic to support confirmation of the Plan.

4. Classification

Movant argues that Jefferson County's tax claim should have either not been classified, or it should not be allowed to vote to accept or reject Debtor's Plan. Movant also contends that Debtor should not have separately classified the Movant's unsecured deficiency claim and the purported Administrative Convenience Claims. Once Classes 4 and 5 are combined, and provided that Jefferson's County's claim is not classified or entitled to vote, the Movant's unsecured deficiency claims are large enough that the unsecured class cannot vote in favor of the Plan.

(a) Tax Claim

HN20 11 U.S.C. § 507(a)(8) grants priority to certain unsecured tax claims. [*43] Generally claims under this section cannot be classified in a proposed plan. In re Sullivan, 26 B.R. 677, 678 (W.D. Wis. 1983); In re Gregory Boat Co., 144 B.R. 361, 365 (Bankr. E.D. Mich. 1992). BAPCPA added §1129(a)(9)(D), which imposes the same payment for secured priority tax claims under a Chapter 11 plan as for unsecured priority tax claims under § 1129(a)(9)(C) if the claim would otherwise meet the description under § 507(a)(8) but for the secured status of the claim.

Thus, Movant argued in its objection to confirmation (filed July 29, 2013) that the secured priority tax claim of

[16] In Exhibit HH, the projected Net Profits for the first year of the Plan (January, 2014 - December, **[*41]** 2014) total $18,787.00. Debtor's Cash on Hand as of September 30, 2013 (Exhibit X) is $52,451.00. Even with this additional $71,000.00 source of potential cash, Debtor still has insufficient cash to fully fund the Class 3 payments for the first year of the Plan, much less subsequent years.

Jefferson County is not impaired, and therefore, any vote in favor of the plan by Jefferson County should not be used to effectuate a cram down under § 1129(a)(10).

However, Debtor's ballot summary, filed on August 7, 2013, indicates: "Class 1-Secured Claims of Jefferson County: No vote (not entitled to vote)." Thus, it would appear that the argument about the classification of the tax claims is no longer relevant. Regardless of the classification of the tax claim, the classification scheme fails anyway for the reasons set forth below.

(b) Separate Classification of Unsecured Deficiency Claim

HN21 Plan confirmation [*44] requires the consent of at least one impaired class, not counting insiders. For a class to accept a plan, at least two-thirds in amount and more than one-half in number of the allowed claims of the class must vote in favor of the plan. 11 U.S.C. § 1126(c). Insiders' votes are not counted. 11 U.S.C. § 1129(a)(10). Section 1129(a)(1) provides that a court may confirm a chapter 11 plan only if the plan complies with the applicable provisions of the Bankruptcy Code. *In re Acequia, Inc., 787 F.2d 1352, 1358 (9th Cir. 1986)*. The phrase "applicable provisions" has been interpreted to include § 1122, which governs the classification of claims and interests under a Chapter 11 plan. *See* Cal. Fed. Bank, F.S.B. v. Moorpark (In re Moorpark Adventure), 161 B.R. 254, 256 (Bankr. C.D. Cal. 1993). Section 1122(a) provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

Debtor placed the Movant's unsecured deficiency claims in a different class as the other five unsecured claims, estimated by Debtor to total no more than $3,609.76. Movant argues that the classification scheme is [*45] being proposed by the Debtor for the sole purpose to obtain plan approval under *Section 1129* by having an administrative convenience class of claims make up the only impaired, accepting class. Movant notes that, once the classes 4 and 5 are combined, Movant's unsecured deficiency claim makes it impossible for the general unsecured class to vote in favor of the Plan.

Debtor responds that *§ 1122(a)* does not mean that all similar claims must be in the same class; it only means that if claims are in a class together, they must be substantially similar, citing *In re Woodbrook Assocs., 19 F.3d 312, 317 (7th Cir. 1994)*. Debtor argues that the claims of the creditors in Class 5 bear no similarity to the claims of the creditors in Class 4, "for the creditor in Class 4 was a sophisticated lender whose claim is a deficiency claim arising from the Bank of Choice's long-term loans to Debtor."

HN22 There is no controlling Tenth Circuit law on whether substantially similar claims may be separately classified. *In re Deming Hospitality, LLC, 2013 Bankr. LEXIS 1428, 2013 WL 1397458 (Bankr. D. N.M. 2013)*. Seven Circuit Courts impose restrictions on a plan proponent's ability to separate similar claims (Second, Third, Fourth, Fifth, [*46] Sixth, Eighth and Eleventh Circuits). *See* Boston Post Road Ltd. Partnership v. F.D.I.C. (In re Post Road Ltd. Partnership), 21 F.3d 477, 483 (2nd Cir.1994); John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assoc., 987 F.2d 154, 159-60 (3d Cir.1993); Lumber Exch. Bldg. Ltd. Partnership v. Mutual Life Ins. Co. (In re Lumber Exch. Bldg. Ltd. Partnership), 968 F.2d 647, 649 (8th Cir.1992); Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII), 961 F.2d 496, 502 (4th Cir.1992); Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture, 995 F.2d 1274, 1278—1279 (5th Cir.1991); Olympia & York Florida Equity Corp. v. Bank of N.Y. (In re Hollywell Corp.), 913 F.2d 873, 880 (11th Cir.1990); Teamsters Nat'l Freight Indus. Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.), 800 F.2d 581, 586 (6th Cir.1986).

The Seventh Circuit is the only Circuit to hold otherwise. In *In re Woodbrook Associates*, that court held that §§ 1111(b) and 1122(a) required separate classification of an unsecured deficiency claim from the general unsecured claims in the debtor's plan. The court reasoned that a § 1111(b) creditor would receive no distribution on account of its [*47] deficiency claim in a Chapter 7 liquidation; therefore, it would be anomalous for such a creditor to hold up a Chapter 11 confirmation by demanding that it receive the same payment made to general unsecured creditors. The court also opined that if general unsecured creditors were included in the same class as the deficiency claimant, they could control the vote as to whether the secured creditors should forego their deficiency claim and instead elect fully secured status. *See* Id. at 318-319.

The reasoning of the Seventh Circuit has been criticized. In *In re JRV Indus., Inc., 342 B.R. 635, 638 (Bankr. M.D. Fla. 2006)*, the court noted that "the Seventh Circuit Court of Appeals has held that because deficiency claims of non-recourse claimants that become recourse pursuant to § 1111(b) would not exist outside of a bankruptcy case, the claims are so dissimilar to general unsecured claims that they mandate separate classification." However, the "alleged distinction" arises under state law, which is "irrelevant where, as here, the Code has eliminated the legal distinction between non-recourse deficiency claims and other unsecured claims." *Id. (citing* Phoenix Mut. Life Ins. Co v. Greystone III Joint Venture, 995 F.2d 1274, 1278-1279 (5th Cir.1991)). [*48] In any event, Movant here did not elect § 1111(b) treatment prior to the approval of Debtor's Disclosure Statement, nor did the Plan provide that treatment as an option.

HN23 In *Deming Hospitality*, the New Mexico bankruptcy court noted, "the main judicial gloss on [§ 1122(a)]() is that the subsection prohibits a debtor from separately classifying similar claims to "gerrymander" a consenting class." *[Deming, 2013 Bankr. LEXIS 1428, 2013 WL 1397458 at *2]()*. If a creditor objects to the classification scheme on gerrymandering grounds, most courts require the plan proponent to justify the classification. *See [In re Barakat, 99 F.3d 1520, 1526 (9th Cir.1996)]()* (business or economic justification required); *[In re Heritage Organization, LLC, 375 B.R. 230, 303 (Bankr.N.D.Tex.2007)]()* (discussing when separate classification justified). See also *[In re City of Colorado Springs Spring Creek General Imp. Dist., 187 B.R. 683, at 688, n. 4]()* (collecting cases).

HN24 The *Deming* court adopted the "one clear rule" against gerrymandering to satisfy [§ 1129(a)(10)](), whether the source of the rule is [§ 1122(a)]() or [§ 1129](). The court reasoned as follows:

> Since the plan proponent has the burden of proving compliance with [§ 1129]() in any event, the court placed the burden [*49] on the plan proponent to justify any separate classification of substantially similar claims, if a party in interest objects on gerrymandering grounds. If the plan proponent carries its burden of showing that substantially similar claims were not separately classified to gerrymander a consenting class of impaired claims, the Court will make no further inquiry into whether the separate classification of similar claims violates [§ 1122(a)](); any remaining confirmation issues would be addressed under [§ 1129](). Analyzing separate classification objections in this way protects creditors from gerrymandering and/or other improper classification attempts, while not taking undue liberties with the text of [§ 1122(a)]().

This Court agrees with much of the *[Deming]()* analysis. The Court is not troubled by Debtor's assertion that [§ 1122]() does not prohibit putting even similar claims into different classes. But, Debtor did not provide any justification for separately classifying the Movant's unsecured deficiency claim, other than stating that the claims are "different" and that Debtor is unable to pay all unsecured claims in full with interest. There are only a few unsecured creditors; namely, Cintas, Huddleston [*50] Brothers Plumbing, the Town of Frederick, Western States Fire Protection, and Public Service Company of Colorado. These claims total only $3,609.76 and as class 5 creditors they will be paid fifty (50) percent of their claim within sixty (60) days of the Effective Date. The Debtor's members will be paying up to $100,000 in "new value" to retain their interests and, as the Court has noted previously, Debtor reported more than $52,000.00 in Cash on Hand within two months of the confirmation hearing. However it appears that Debtor will not use an additional $1,804.88 from these funds to pay in full the Class 5 administrative convenience class. In the Court's experience, convenience classes are generally used by a plan proponent to clear out numerous small claims soon after plan confirmation. This eliminates the need to pay small, periodic pro rata divided checks to such creditors. It is truly an administrative convenience to do so. Given the small number of general unsecured claims the Debtor has placed in Class 5, the Court concludes that Debtor's classification artificially impairs those claims and gerrymanders the vote to obtain an accepting class. But, even if the Court did not decide [*51] whether the Debtor has gerrymandered the unsecured classes and would allow the classification, the Court finds another flaw in the Plan's treatment of creditors.

(c) Unfair Discrimination; Fair and Equitable

HN25 [Section 1129(a)]() and [(b)]() set forth the minimum requirements a plan must satisfy to be confirmed. If the plan does not satisfy these requirements, the court cannot confirm the plan. *See [In re Ambanc La Mesa Ltd. P'ship, 115 F.3d 650, 653 (9th Cir. 1997)]()* (stating that courts have an affirmative duty to ensure all confirmation requirements are met). Debtor, as the Plan's proponent, carries the burden of proof in showing that all the requirements for confirmation set forth in [§ 1129]() are satisfied. *See [In re Briscoe Enter., Ltd., 994 F.2d 1160 (5th Cir. 1993)]()*. Debtor must prove by a preponderance of the evidence that: (a) the Plan satisfies all confirmation requirements, or (b) that the only condition not satisfied is the requirement that all impaired classes accept the Plan, and, if so, that the Plan must satisfy the cram down alternative, which requires that the Plan not discriminate unfairly against objecting impaired classes and is fair and equitable towards each objecting class. *[In re Ambanc, 115 F.3d at 653]()*.

Regardless [*52] of the classification scheme, ***HN26*** [§ 1129(b)(1)]() provides that a plan must be fair and equitable and cannot discriminate unfairly. To determine whether a plan discriminates unfairly, courts have considered: (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) the treatment of the classes discriminated against. Other courts have used a "rebuttable presumption" test or "Markell" test, which is met by showing that, outside of bankruptcy, the dissenting class would receive less than the class receiving a greater recovery, or that the alleged preferred class had infused new value which offset its gain.

Regardless of the standard used, courts agree that if the treatment of substantially similar claims is ″grossly disparate,″ it is very difficult for the plan proponent to show ″fair″ discrimination.

The Court cannot find that the Plan's discrimination between Class 4 and 5 is supported by a reasonable basis. As previously discussed, all unsecured claims, other than Movant's, are put into Class 5, which shall be paid fifty (50) percent [*53] of the allowed amounts of their respective claims within sixty (60) days after the Effective Date. However, the Class 4 claimant (Movant) receives the following: ″commencing 30 days after the first anniversary of the Effective Date and on an annual basis thereafter for five years, the reorganized debtor shall make pro rata payments on each allowed Class 4 Claim from the net profits fund.″ Should the Property be sold during the Plan, the reorganized debtor shall pay 50% of the net proceeds from the sale into the Net Profits fund, with 50% distributed to Class 4 and the other 50% distributed to the equity holders (Class 6).

The Court concludes that Debtor's proposed treatment of Movant's unsecured deficiency claim is ″grossly disparate″ to its treatment of other unsecured claims. The Court has already found that the classification and treatment of Class 5 in Debtor's Plan is an attempt to obtain an impaired, accepting class to meet the requirements for a contested plan confirmation to ″cram down″ Movant's Class 3 and 4 claims. Such artificial impairment does not have a supportable, reasonable basis. Class 5 is paid fifty (50) percent in two months, Class 4 is paid fifty (50) percent of [*54] net profits beginning thirteen (13) months after the Effective Date and paid such amount annually for the next five years. This shifts the risks associated with the Debtor's continued operations to the Movant. It is not certain that the Debtor will have net profits from which these annual payments can be made.[17] Also, whether there are net profits will be in the control of the Debtor based upon the expenses and charges it may incur over that six year period. If the Property is sold within that payout period, the Movant and the new Equity Interest will share equally the net proceeds of the sale. The Movant might receive half the net proceeds for an unsecured claim that is in excess of $2 million and the Equity Interests will receive the same amount for their $100,000.00 new value contribution.

Debtor cannot confirm its Plan without this discrimination, because confirmation requires the consent of at least one impaired class. Given that discrimination, since it strongly suggests it was done to gerrymander [*55] the classes to obtain an accepting impaired class, the Court finds that the classification unfairly discriminates and is inequitable as to Movant.

HN27 Under *11 U.S.C. § 1129(b)(1)*, the Debtor must show that its Plan is fair and equitable with respect to impaired creditors who have not accepted the Plan. With respect to non-accepting secured creditors whose claims are impaired, the Debtor must show that its secured creditors retain the liens securing their claims and payments totaling at least the allowed amount of their claims, and, if their rights are altered, that secured creditors receive the ″indubitable equivalent″ of their claims. *11 U.S.C. § 1129(b)(2)(A)*; *In re Investment Co. of the Southwest, 341 B.R., at 318*. The Plan, under Option 2, proposes to pay the Movant's Class 3 secured claim from the proceeds generated by the operation of Debtor's business. Debtor proposes to pay interest-only payments, at an interest rate of 4.5%, with a balloon payment due in seven years.

Although Movant retains its lien, the Plan does not pay the allowed amount of Movant's claim. With regard to Movant's Class 3 secured claim the Plan's assigned value of $2.2 million is too low, the 4.5% interest rate [*56] is too low, and the loan is not amortized to reduce the principal balance pending the seven-year payment stream. As to both its Class 3 and Class 4 claims, the Movant bears the risk of Debtor's nonperformance since the multiple year payout is based upon the Debtor's operation results and projections which the evidence shows are insufficient. The Court cannot say that Movant is receiving the ″indubitable equivalent″ of its Class 3 secured claim under the Plan.

HN28 Under *11 U.S.C. § 1129(b)(2)(B)(ii)*, with respect to a class of unsecured claims that is not paid in full, the holder of any claim that is junior to that class cannot receive or retain under the plan on account of such junior claim or interest any property (the absolute priority rule), unless the new value exception is met. *See* *Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle St. P'ship., 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999)*. The classification of Movant's unsecured deficiency claim in a separate Class 4 is not fair and equitable due to the artificial impairment of Class 5, the discriminatory treatment of Class 4 and Class 5 unsecured claims, and the insufficient amount of new value contributed to the Plan.

III. CONCLUSION

HN29 This Court [*57] must grant relief from stay when there is no equity in the Property and the Debtor has not

[17] The Court has also found that Debtor's cash flow is not sufficient to fund the necessary payments on the Class 3 secured claim, even by including the projected Net Profits to do so.

demonstrated that a successful reorganization within a reasonable time is probable or likely. *11 U.S.C. § 362(d)(2)*; *In re Holly's, 140 B.R. at 702*; *Gunnison, 320 B.R. at 402*. Accordingly, the Court grants Movant's Motion for Relief from the Automatic Stay.[18]

The Debtor has had the opportunity the Code provides to debtors-in-possession to reorganize their affairs. Debtor's lack of reorganization prospects does not reflect any lack of effort or diligence by its management. The Court is satisfied that management has pursued whatever reorganization possibilities exist. Nonetheless, ***HN30*** a secured creditor may not be denied leave to exercise its rights for an extended period of time, based only on the hope that the Debtor will be able to gain advantage by a low property valuation and interest rate, by improved profits during the plan, and by refinancing being available at the end of the balloon period.

For all the foregoing reasons, the Court hereby

ORDERS [*58] that Movant's Motion is **GRANTED**, and confirmation of the Plan is **DENIED**.

Dated this 3rd day of April, 2014.

BY THE COURT

/s/ Howard R. Tallman

Howard R. Tallman, Chief Judge

United States Bankruptcy Court

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[18] Having granted relief from stay under *11 U.S.C. § 362(d)(2)*, the Court need not address the alternative relief requested under *11 U.S.C. § 362(d)(1)*.