

1 Christopher C. Simpson (AZ Bar #018626)
2 **STINSON MORRISON HECKER LLP**
3 1850 N. Central Avenue, Suite 2100
4 Phoenix, Arizona 85004-4584
5 Tel: (602) 279-1600
6 Fax: (602) 240-6925
7 csimpson@stinson.com

8 Mark S. Carder (*pro hac vice*)
9 **STINSON MORRISON HECKER LLP**
10 1201 Walnut, Suite 2900
11 Kansas City, Missouri 64105
12 Tel: (816) 842-8600
13 Fax: (816) 691-3495
14 mcarder@stinson.com

15 Attorneys for RREF II DFC Acquisitions, LLC

16
17
18
19
20
21
22
23
24
25
26

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

In re
250 AZ, LLC,

Chapter 11
Case No. 4:13-bk-00851-EWH

**OBJECTION OF RREF II DFC
ACQUISITION, LLC'S TO DEBTOR'S FIRST
AMENDED DISCLOSURE STATEMENT
FOR DEBTOR'S FIRST AMENDED PLAN
OF REORGANIZATION DATED
NOVEMBER 4, 2013**

Hearing Date: December 12, 2013
Hearing Time: 10:00 a.m.
Location: Courtroom #446
38 S Scott Ave
Tucson AZ 85701

Creditor RREF II DFC Acquisitions, LLC ("**RREF**"), through counsel, pursuant to 11 U.S.C. § 1125, objects to the proposed First Amended Disclosure Statement for Debtor's First Amended Plan of Reorganization Dated November 4, 2013 ("**Disclosure Statement**") filed by Debtor 250 AZ, LLC ("**Debtor**").

This Objection is supported by the following Memorandum of Points and Authorities incorporated herein by reference.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MEMORANDUM OF POINTS AND AUTHORITIES

I. **Preliminary Statement.**

As discussed more fully below, this Court should not approve the Disclosure Statement for two reasons. First, the Disclosure Statement discusses a plan which cannot be confirmed under 11 U.S.C. § 1129. Second, the Disclosure Statement does not contain "adequate information" as required by 11 U.S.C. § 1125. Accordingly, unless and until appropriate revisions are made, the Disclosure Statement should not be approved.

II. **The Disclosure Statement Should Not Be Approved Because the Plan is Unconfirmable.**

It is well settled that a disclosure statement should not be approved where a proposed plan is unconfirmable. *See, e.g., In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) (allowing an unconfirmable plan to accompany a disclosure statement not only would constitute inadequate information, but would be misleading and would be a needless expense to the estate); *see also In re Curtis Ctr. Ltd. P'ship*, 195 B.R. 631, 638 (Bankr. E.D. Pa. 1996). In determining whether a plan is unconfirmable as a matter of law, "the Court should view all inferences drawn from the underlying facts and matters contained in the Plan and the Disclosure Statement in a light most favorable to the Debtor." *In re Spanish Lakes Assocs.*, 92 B.R. 875, 877 (Bankr. E.D. Mo. 1988). However, when the "disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible,' the court should exercise its discretion to refuse to consider the adequacy of disclosures." *In re Eastern Maine Elec. Co-op., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) (citations omitted); *In re Farmland Indus., Inc.*, 294 B.R. 855, 891 (Bankr. W.D. Mo. 2003) (noting that the debtors' proposed "bare bones" plan contained several deficiencies and was unconfirmable on its face); *In re Cook*, 72 B.R. 976, 981 (W.D. Mo. 1987) (affirming the Bankruptcy Judge's conclusion that the debtor's proposed plan was not feasible and thus unconfirmable when viewed in terms of the debtors' resources and the continuing prejudice to the creditors); *In re Minkes*, 237 B.R. 476, 478 (B.A.P. 8th Cir. 1999) (noting that the debtor's plan was "incomplete and incomprehensible and thus was not confirmable); *In re Euerle Farms, Inc.*, 861 F.2d 1089, 1092 (8th Cir. 1988) (affirming the

1 bankruptcy court's conclusion that the debtor proposed a problematic and unconfirmable plan because
2 the "income and expense projections * * * show[ed] it [was] not realistic to believe that the Debtor
3 [was] capable of effectuating [the] plan' and [] dismissing the case.")

4 The Court should deny approval of a flawed Disclosure Statement to, among other things,
5 avoid the waste of time and expense associated with the distribution, review, and voting thereon. *See*
6 *In re Dow Corning Corp.*, 237 B.R. 380, 384 (Bankr. E.D. Mich. 1999); *In re Felicity Assocs., Inc.*,
7 197 B.R. 12, 14 (Bankr. D.R.I. 1996); *In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex.
8 1996); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1002 (Bankr. D. Mass. 1991). Courts have found
9 that undertaking the burden and expense of plan distribution and vote solicitation is unwise and
10 inappropriate if the proposed plan cannot be confirmed. *Pecht*, 57 B.R. at 139; *see In re Atlanta West*
11 *VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988) ("A court may refuse to approve a disclosure statement
12 when it is apparent that the plan which accompanies the disclosure statement is not confirmable. This
13 is to avoid engaging in a wasteful and fruitless exercise of sending the disclosure statement to
14 creditors and soliciting votes on the proposed plan when the plan is unconfirmable on its face. Such
15 an exercise in futility only serves to further delay a debtor's attempts to reorganize.").

16 Here, the Plan attached to the Disclosure Statement cannot be confirmed in the following
17 respects.¹

18 1. While Section 3.12.3.3 purports to permit RREF to retain its liens, the Plan instead
19 requires partial releases of RREF's collateral contrary to the deeds of trust securing its debt. *See*,
20 Exhibit E to the Plan (listing a sale of a portion of the collateral property located at 3390 W. Ina
21 Road, Tucson, Arizona, in year 3 and a subsequent sale of the collateral property located at 3391 W.
22 Ina Road, Tucson, Arizona, in year 4). The listed sale price for each property is less than RREF's
23 filed claim. This treatment violates 11 U.S.C. § 1129(b)(2)(A)(i)(I). The Debtor may not obtain
24 partial releases of RREF's collateral without RREF's consent. *PCC Inv., LLC v. Saguaro Guest*

25 ¹ RREF reserves the right to assert any other objections to confirmation of the Plan prior to any deadline for such
26 objections. In addition, RREF reserves the right to adopt any other objections to confirmation of the Plan asserted by any
other party. For now, the Plan objections noted herein are solely for the purpose of objecting to the Disclosure Statement.

1 *Ranch Mgmt. Corp. (In re Saguario Ranch Dev. Corp.)*, 2011 Bankr. LEXIS 2201 (Bankr. D. Ariz.
2 2011).

3 2. Section 3.12.3 of the Plan provides treatment of the secured claim held by RREF
4 based upon the Debtor's appraisal rather than the higher figure tentatively found by this Court after
5 conducting an evidentiary hearing on valuation. The Plan fails to adopt the valuation ultimately
6 found by the Court in its upcoming order on valuation of RREF's collateral. This treatment violates
7 1129(b)(2)(A)(i)(II).

8 3. While Section 3.12.3.2 of the Plan indicates that no interest payments will be made on
9 the secured claim during the first year. Such failure to pay interest results in a failure to provide a
10 note which has a present value equal to the amount of the secured claim. This treatment violates
11 1129(b)(2)(A)(i)(II).

12 4. Section 3.12.3.5 of the Plan provides that in the event of RREF's exercise of its
13 Section 1111(b) election, the Debtor may sell RREF's collateral pursuant to Section 363, but "RREF's
14 credit bid will be similarly limited to the amount of their allowed secured claim (as opposed to their
15 total allowed claim)." This treatment is impermissible. First, the result of RREF's exercise of its
16 Section 1111(b) election is to secure RREF's total allowed claim rather than the portion equal to the
17 present value of the collateral. 11 U.S.C. § 1129(b)(2). As discussed, RREF's lien on the collateral
18 property cannot be "partially" released without RREF's consent. Further, RREF's credit bid rights
19 may not be limited under the Supreme Court's decision in *RadLAX Gateway Hotel, LLC v.*
20 *Amalgamated Bank*, 132 S. Ct. 2065 (U.S. 2012).

21 5. The same section of the Plan impermissibly attempts to treat the Section 1111(b) claim
22 by paying interest-only for ten years with a balloon payment at the end of the period for the entire
23 debt. Such treatment impermissibly places RREF at the risk of diminution in value of the collateral
24 property over this long period with no corresponding reduction in debt secured thereby.

1 6. Moreover, section 3.12.3.5 only contemplates payment of \$3.5 million rather than the
2 full allowed claim owed by the Debtor. This violates 11 U.S.C. § 1129(b)(2)(A)(i)(II) because
3 Section 1111(b)(2) treats the entire allowed claim as the secured claim upon exercise of the election.

4 7. Section 4.1 of the Plan violates Section 1123(a)(7) by not providing any provisions,
5 much less any provisions that are "consistent with the interests of creditors and equity security
6 holders and with public policy" with respect to the manner of selection of any officer, director, or
7 successor to such officer or director. Section 4.9 of the Disclosure Statement provides insufficient
8 information concerning future management.

9 8. The Plan violates Section 1129(a)(5) by (a) not establishing that the appointment or
10 continuation of the Debtor's directors and officers is "consistent with the interests of creditors and
11 equity security holders and with public policy", and (b) the Plan has not disclosed all compensation
12 for such insiders, including but not limited to any expense reimbursement policies and practices,
13 benefits, and payments to affiliates for the benefit of any insider.

14 **III. The Disclosure Statement Does Not Contain Adequate Information.**

15 Bankruptcy Code § 1125(a)(1) requires that a disclosure statement provide "adequate
16 information" such that a hypothetical investor in a class of claims would be able to make an informed
17 judgment about the proposed plan. What constitutes "adequate information" depends on the
18 circumstances of the particular case. See, 11 U.S.C. § 1125 Notes of Committee on the Judiciary,
19 Senate Report No. 95-989; 95th Cong., 2nd Sess. 120 (1978); *In re Michelson*, 141 B.R. 715, 718
20 (Bankr. E.D. Cal. 1992) (opining that adequate information "is a flexible concept that permits the
21 degree of disclosure to be tailored to the particular situation," and revoking confirmation of a plan for
22 debtor's failure to disclose that the proposed Chief Financial Officer had been indicted for financial
23 crimes). Bankruptcy courts have developed a non-exclusive list of factors to guide the determination
24 of whether to approve a disclosure statement. *E.g.*, *In re Malek*, 35 B.R. 443 (Bankr. E.D. Mich.
25 1983) (denying approval of a disclosure statement); *In re A.C. Williams Company*, 23 B.R. 173
26 (Bankr. N.D. Ohio 1982) (approving disclosure statement); *In re Oxford Homes, Inc.*, 204 B.R. 264

1 (Bankr. D. Me. 1997) (disallowing fees for failure to include in disclosure statement); *In re*
2 *Metrocraft Publishing Services, Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984) (denying approval).²

3 In this case, for the reasons set forth below, the Debtor has failed to meet the standards for
4 disclosure. The Disclosure Statement does not provide adequate disclosure and provides an
5 incomplete and inadequate picture at best for the reasons listed below.

6 1. Section 2.2 of the Disclosure statement discusses current management. However,
7 the individuals responsible for current management of the Debtor are not disclosed. The Disclosure
8 statement refers to five mysterious individuals who are the Managing Members of the Manager of the
9 Debtor: Edgewater Management LLC. The Disclose Statement does not disclose that Edgewater
10 Management was originally formed by Debtor's attorney, Dennis M Breen, III in 2009. The names
11 and credentials of these five individuals acting as Managing Members of the Debtor's Manager are
12 not disclosed.

13 2. Exhibit E lists the Debtor's *pro forma* of anticipated income and expenses.
14 However, Debtor has not disclosed the accounting method or assumptions utilized to produce the *pro*
15 *forma* or the name of the accountants responsible for producing the *pro forma*.

16 3. The Debtor has not disclosed the individuals that will be responsible for the future
17 management of the Debtor or how those individuals will be selected or replaced.

18 ² *Metrocraft* summarized nineteen factors culled in large part from the case law:

19 Relevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events
20 which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value;
21 (3) **the anticipated future of the company**; (4) **the source of information stated in the disclosure**
22 **statement**; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the
23 scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) **the accounting**
24 **method utilized to produce financial information and the name of the accountants responsible for**
25 **such information**; (10) **the future management of the debtor**; (11) the Chapter 11 plan or a summary
26 thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the
collectibility of accounts receivable; (14) **financial information, data, valuations or projections**
relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant
to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery
of preferential or otherwise voidable transfers; (17) litigation likely to arise in a non-bankruptcy
context; (18) tax attributes of the debtor; and (19) **the relationship of the debtor with affiliates**.

Metrocraft, 39 B.R. at 568 (citations omitted) (emphasis added).

1 4. The relationships and voting power among the Debtor, Debtor's five Managing
2 Members, Edgewater Management, LLC and, if relevant, the Tenants-in-Common are not disclosed.

3 5. Section 4.8 of the Disclosure Statement is titled "Anticipated Future of Debtor."
4 However, Debtor's plans to develop the Tucson Property and the anticipated future for those sites are
5 not discussed.

6 6. Section 4.12 of the Disclosure Statement fails to disclose the name of any
7 professional providing information for the Disclosure Statement.

8 In summary, the Disclosure Statement fails to provide adequate information for creditors and
9 parties in interest to make an informed decision on the Plan and does not comply with the standards
10 of § 1125 of the Bankruptcy Code.

11 CONCLUSION

12 For the foregoing reasons, RREF prays that the Court:

13 (1) Deny approval of the Disclosure Statement because the proposed Plan is not
14 confirmable on its face;

15 (2) Alternatively, order that the Disclosure Statement be supplemented to include
16 adequate information concerning the inadequate disclosures set forth above;

17 (3) Decline to approve the Disclosure Statement unless it cures the deficiencies set out
18 above; and

19 (4) Grant RREF such other and further relief to which it may be entitled.
20
21
22
23
24
25
26

1 RESPECTFULLY SUBMITTED this December 4, 2013.

2 **STINSON MORRISON HECKER LLP**

3 By: /s/ Christopher C. Simpson (#018626)

4 Christopher C Simpson
5 Mark S Carder
6 1850 N. Central Avenue, Suite 2100
7 Phoenix, Arizona 85004-4584
8 Attorneys for RREF II DFC Acquisitions, LLC

9 COPY of the foregoing sent this December
10 4, 2013 to:

11 Dennis M Breen, III, Esq.
12 BREEN OLSON & TRENTON LLP
13 4720 N Oracle Rd #100
14 Tucson AZ 85705-1673
15 dennis@botlawfirm.com
16 Attorneys for Debtor

17 Office of the U.S. Trustee
18 230 N First Ave #204
19 Phoenix AZ 85003
20 ustpreion14.px.ecf@usdoj.gov

21 Lori L Winkelman, Esq.
22 QUARLES & BRADY LLP
23 Two N Central Ave
24 Phoenix AZ 85004-2391
25 lwinkelman@quarles.com
26 Attorneys for U.S. Bank NA

Keith C. Owens, Esq.
Jennifer L. Nassiri, Esq.
VENABLE LLP
2049 Century Park E #2100
Los Angeles CA 90067
kowens@venable.com
jnassiri@venable.com
Attorneys for U.S. Bank NA

Gerald L Shelley, Esq.
FENNEMORE CRAIG PC
3003 N Central Ave #2600
Phoenix AZ 85012-2913
gshelley@fclaw.com
Attorneys for QuikTrip

1 Ronald E Gold Esq.
Lindsey F Baker Esq.
2 FROST BROWN TODD LLC
301 E Fourth St
3 Cincinnati OH 45202
4 rgold@ftblaw.com
lbaker@ftblaw.com
Attorneys for Columbia Development Corp

5 Robert M Charles Jr Esq.
LEWIS AND ROCA LLP
6 One S Church Ave #700
7 Tucson AZ 85701-1611
rcharles@lrlaw.com
8 Attorneys for Columbia Development Corp

9 Sally M Darcy Esq.
McEVOY DANIELS DARCY
4560 E Camp Lowell Dr
10 Tucson AZ 85712
darcysm@aol.com
11 Attorneys for Susan S Courtney

12 Mark S Bosco Esq.
Leonard J McDonald
13 David W Cowles
TIFFANY & BOSCO PA
14 2525 E Camelback Rd #300
Phoenix AZ 85016
15 msb@tblaw.com
ljm@tblaw.com
16 dcw@tblaw.com
Attorneys for 250 AZ LLC

17 Barbara LaWall Esq.
King Grant Winston Esq.
18 PIMA COUNTY ATTORNEY
19 Civil Division
32 N Stone Ave #2100
20 Tucson AZ 85701
pcaevbk@pcao.pima.gov
21 Attorneys for Pima County

22 Thomas D Laue Esq.
UDALL LAW FIRM LLP
23 4801 E Broadway Blvd #400
Tucson AZ 850711-3638
24 tdlaue@udalllaw.com
25 Local Counsel for CBRE
26

1 Mark E Leipold Esq.
2 GOULD & RATNER LLP
3 222 N LaSalle St #800
4 Chicago IL 60601
5 mleipold@gouldrattner.com
6 Attorneys for CBRE

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
/s/ Rebecca J. McGee