Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
October 05, 2015

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 10-29932-MKN
	)	Chapter 11
CAREFREE WILLOWS, LLC,	)	
	)	Date: October 9, 2012
Debtor.	)	Time: 9:30 a.m.
	)	
	)	
	)	

MEMORANDUM DECISION ON DEBTOR'S FOURTH AMENDED PLAN OF REORGANIZATION[1]

An evidentiary hearing concerning two competing reorganization plans ("Confirmation Hearing") was conducted over the course of nine days.[2] One plan was proposed by petitioner Carefree Willows, LLC ("Debtor")[3] and the other plan was proposed by creditor AG/ICC

[1] In this Memorandum Decision, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

[2] The Confirmation Hearing took place on May 31, June 1, July 12, July 13, July 23, July 24, August 13, August 14, and August 27, 2012. The following individuals testified in open court and were subject to cross-examination: Alex Roudi, Edward McDonough, John White, Edward Erganian, Edward Burr, Deron Bocks, Grant Lyon, Elliott Burrell, Claudia Widhalm, Glenn Anderson, Thomas Anderson, Beverly Elrod, Harry Kogan, Kevin Close, Stanley Paher, Phillip Aurbach, and Kenneth Templeton.

[3] Debtor's reorganization proposal is set forth in Debtor's Fourth Amended Plan of Reorganization (ECF No. 578) and the First Amendment to Fourth Amended Plan (ECF No. 745), collectively referred to as appropriate as the Debtor's "Plan."

Willows Loan Owner, L.L.C. ("AG").[4] In addition to plan confirmation, the evidence also was presented in connection with separate motions brought by AG to designate the votes[5] of alleged creditor Willows Account, LLC ("Willows Account") or to recharacterize[6] the claim of Willows Account.[7] The same evidence was presented in connection with the additional motion by the Debtor to designate the claim of AG.[8] The appearances of counsel were noted on the record each day. Closing briefs were filed on September 26, 2012.[9] Reply briefs were filed on October 9, 2012.[10] Thereafter, the matters were taken under submission.[11]

Confirmation of the competing plans was dependent on the outcome of the parties' designation and recharacterization motions. Resolution of those matters was based on the

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[4] AG's reorganization proposal is set forth in the Second Amended Plan of Reorganization Proposed by AG/ICC Willows Loan Owner, L.L.C. ("AG Plan"). (ECF No. 617).

[5] See Motion to (1) Deem Willows Account, LLC an Insider; (2) Designate the Claim of Willows Account, LLC Pursuant to 11 U.S.C. § 1126(e); (3) Subordinate the Claim of Willows Account, LLC; and Objection to Claim No. 3 of Willows Account, LLC Pursuant to 11 U.S.C. § 502(d) ("AG Designation Motion"). (ECF No. 625). The motion was accompanied by the Declaration of Ali M.M. Mojdehi ("Mojdehi Designation Declaration") to which was attached 33 different exhibits. (ECF No. 628).

[6] See Motion to Recharacterize the Claim of Willows Account, LLC as Equity ("AG Recharacterization Motion"). (ECF No. 623).

[7] On November 16, 2010, PSACP Investments, LLC ("PSACP"), previously filed a proof of claim in the unsecured amount of $4,654,150.09. On May 9, 2012, Willows Account, as transferee of PSACP's claim, filed an amended proof of claim in the amount of $5,454,710.26.

[8] See Motion to Designate the Claim of AG/ICC and Affiliates ("Debtor's Designation Motion"). (ECF No. 219).

[9] ECF Nos. 877, 881, 882, 885, 886, 887, 888. Declarations and Errata to Briefs also were filed on September 26, 2012. (ECF Nos. 878, 879, 883). Additional Errata and an Appendix were filed on September 27, 2012. (ECF Nos. 889, 890, and 891).

[10] ECF Nos. 904, 905, 906, 907, 910, and 911.

[11] After the Confirmation Hearing was concluded, Debtor filed a Second Amendment to Debtor's Fourth Amended Plan of Reorganization on September 26, 2012. (ECF No. 884). Given the timing of that submission and the substantive changes in the proposed plan that were not subject to inquiry or objection by AG, the court has not considered the Second Amendment to Debtor's Fourth Amended Plan of Reorganization.

evidence presented at the Confirmation Hearing in addition to consideration of the live testimony previously presented by the Debtor in connection with other matters presented to the court.[12]

POST CONFIRMATION HEARING DEVELOPMENTS

After all of the matters were taken under submission, the parties attempted several times to introduce additional issues or materials after the record was closed. On October 17, 2012, the Guarantors filed a motion to redact portions of the transcripts of the evidentiary hearing on the Debtor's preliminary injunction request that had been held in November and December of the prior year, which were already part of the public record. (ECF No. 914). On December 21, 2012, Debtor objected to an amended proof of claim ("POC 10-2") that had been filed by AG based on certain valuation evidence submitted by the Debtor and Willows Account at the Confirmation Hearing. (ECF No. 939).[13] On February 11, 2013, Debtor filed a request for judicial notice regarding the status of certain appellate matters in the Guaranty Suit. (ECF No. 955).

On March 6, 2013, AG filed a notice of "supplemental authority" regarding a decision reached by the Seventh Circuit Court of Appeals that allegedly supports AG's objection to confirmation of the Debtor's proposed Plan. (ECF No. 959). On May 30, 2013, AG filed

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[12] On March 25, 2011, AG commenced an action against Carefree Holdings Limited Partnership ("Carefree Holdings") in the Eighth Judicial District Court, Clark County, Nevada, Case No. A-11-637829-C (the "Guaranty Suit"), alleging breach of certain guaranties as a result of the Debtor's non-payment of a prebankruptcy loan made by Union Bank of California, NA ("Union Bank") that later was acquired by AG. In the Guaranty Suit, AG seeks to recover in excess of $34,018,225.30 from Carefree Holdings. On September 19, 2011, Debtor commenced in the bankruptcy court an adversary proceeding against AG, Adversary No. 11-01262-MKN, seeking, inter alia, to enjoin AG from pursuing Carefree Holdings, Templeton Family Trust dated October 8, 1993, Ken II Trust dated May 4, 1998, Kenneth L. Templeton ("Templeton"), and MLPGP, L.L.C., as guarantors (collectively, "Guarantors") of the loan obligation that is the basis for AG's primary claim. On November 29, 2011 and December 1, 2011, an evidentiary hearing was conducted at which several witnesses called by the Debtor testified under oath. Those witnesses included Kevin Close, Kenneth Templeton, and Edward McDonough. On February 10, 2012, an order and accompanying memorandum decision ("Preliminary Injunction Decision") was entered denying a preliminary injunction. (Adversary ECF Nos. 123 and 122).

[13] Debtor's objection to POC 10-2 ("Claim Objection") was heard on January 23, 2013, and taken under submission.

another notice of "supplemental authority" regarding a decision reached by the Ninth Circuit Court of Appeals relevant to the AG Recharacterization Motion. (ECF No. 973). On June 12, 2013, Debtor filed a supplemental opposition to the AG Recharacterization Motion. (ECF No. 975). On December 10, 2013, AG filed a request for judicial notice regarding a loan payoff demand that it had received from Carefree Holdings. (ECF No. 1013). On December 27, 2013, Debtor filed a request for judicial notice regarding AG's purchase of various senior living facilities in Southern Nevada. (ECF No. 1017). Finally, on February 5, 2014, AG filed an application to reopen the evidentiary record regarding the matters addressed at the Confirmation Hearing. (ECF No. 1040). Debtor filed opposition to AG's reopening motion (ECF No. 1049) and AG filed a reply (ECF No. 1052). AG's reopening motion initially was noticed to be heard on March 5, 2014, but the hearing was continued to March 20, 2014.

On March 14, 2014, March 17, 2014, and March 18, 2014, separate memorandum decisions and accompanying orders were entered, respectively, denying the Debtor's Designation Motion, as well as granting the AG Recharacterization Motion and AG Designation Motion. (ECF Nos. 1058, 1060, 1063, 1064, 1067, 1068).[14] As a result of the disposition of those motions, AG withdrew its application to reopen the evidentiary hearing.[15]

Debtor appealed the order denying its designation motion. (ECF No. 1078). Willows Account appealed the AG Recharacterization Order. (ECF No. 1085). Debtor and Willows Account appealed the AG Designation Order. (ECF Nos. 1088 and 1090). All of the appeals were directed to the United States District Court for the District of Nevada ("District Court"). Willows Account further filed a motion seeking a stay pending appeal of the AG Recharacterization Order. (ECF No. 1114). An order denying the motion for stay pending

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[14] Where necessary, portions of the memorandum decisions will be referred to hereafter as "Debtor's Designation Decision," "AG Recharacterization Decision," and "AG Designation Decision." The orders granting the AG Recharacterization Motion and the AG Designation Motion will be referred to, respectively, as the "AG Recharacterization Order" and the "AG Designation Order."

[15] AG's reopening motion delayed the resolution of the matters under submission. As a result of the withdrawal of AG's reopening motion, the record of the Confirmation Hearing remained closed.

appeal was entered on May 20, 2014. (ECF No. 1174).

On June 4, 2014, Debtor then filed a further amended proposed plan of reorganization. (ECF No. 1186). An order was entered staying proceedings ("Stay Order") on the further amended plan on July 18, 2014. (ECF No. 1219). Debtor appealed the Stay Order. (ECF No. 1226). Debtor then sought a stay of the Stay Order. An order was entered denying that requested stay on August 15, 2014. (ECF No. 1254). Debtor then sought from the District Court leave to appeal the Stay Order. On October 23, 2014, the District Court entered an order denying leave to appeal the Stay Order. (ECF No. 1284). On October 28, 2014, Debtor then appealed to the Ninth Circuit Court of Appeals the District Court's order denying leave to appeal the Stay Order. (ECF No. 1285).

On October 29, 2014, Debtor then filed in the bankruptcy court a motion seeking clarification of the Stay Order even though the Debtor already had appealed the same order. (ECF No. 1287). Debtor also filed an ex parte motion for an order shortening time to have its clarification motion heard on an expedited basis. (ECF No. 1288).

On November 17, 2014, Debtor then filed a motion to reopen the evidentiary record on plan confirmation (ECF No. 1295) supported by the declaration of another valuation expert (ECF No. 1296). Debtor noticed the reopening motion to be heard on January 7, 2015. (ECF No. 1297).

On November 20, 2014, Debtor noticed its request for clarification of the Stay Order to be heard on January 7, 2015. (ECF No. 1299).

On December 10, 2014, Debtor filed a motion to modify a prior order authorizing use of cash collateral (ECF No. 1304)[16] supported by the declaration of its chief financial officer. (ECF No. 1305). Debtor noticed the cash collateral modification motion to be heard on January 7,

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[16] On November 12, 2010, an order was entered approving a stipulation between the Debtor and Union Bank for the interim use of the proceeds of Union Bank's security interest in the Debtor's assets ("cash collateral"). (ECF No. 34). On February 8, 2011, an order was entered approving a further stipulation between the Debtor and AG, as successor in interest to Union Bank, for use of cash collateral under certain terms on an ongoing basis, and authorizing both parties to file motions seeking to modify its terms any time after May 1, 2011 ("Cash Collateral Order"). (ECF No. 128).

2015. (ECF Nos. 1306 and 1312).

On December 12, 2014, an order was entered approving a stipulation continuing the hearings on Debtor's clarification motion, reopening motion, and cash collateral modification motion to January 14, 2015. (ECF No. 1317).

On December 31, 2014, AG timely filed its responses to all three motions. (ECF Nos. 1321, 1322, 1323 and 1324).

On January 7, 2015, Debtor timely filed its replies. (ECF Nos. 1326, 1327, and 1328).

On January 14, 2015, Debtor's clarification motion, reopening motion, and cash collateral modification motion were heard by the court and taken under submission.

On March 9, 2015, orders were entered granting Debtor's clarification motion (ECF No. 1350), denying Debtor's reopening motion (ECF No. 1344),[17] and denying Debtor's cash collateral modification motion (ECF No. 1348).

On March 9, 2015, an order was also entered overruling in part and sustaining in part the Debtor's Claim Objection regarding AG's POC 10-2 ("Claim Objection Order"). (ECF No. 1346).

On March 18, 2015, Debtor appealed the Claim Objection Order. (ECF No. 1361).

On March 25, 2015, Debtor filed a motion requesting the court to order the parties to participate in a settlement conference encompassing all pending matters between the parties. (ECF No. 1374). Debtor noticed the settlement participation motion to be heard on April 29, 2015. (ECF No. 1375).

On April 15, 2015, AG filed an opposition to the settlement participation motion. (ECF No. 1391). On April 22, 2015, Debtor filed its reply. (ECF No. 1401).

On April 29, 2015, a hearing was held on the Debtor's settlement participation motion. Counsel for the Debtor and AG appeared, but the parties' respective positions had not changed.

On May 4, 2015, an order was entered denying Debtor's request to require AG to

[17] Debtor's reopening motion further delayed the resolution of the competing plans of reorganization. As a result of the denial of the Debtor's reopening motion, the record of the Confirmation Hearing remained closed.

participate in a settlement conference. (ECF No. 1405).

On May 13, 2015, upon application of AG (ECF No. 1407), a status hearing was conducted. At the hearing, the court was advised that no stays pending appeal of the two designation orders or the AG Recharacterization Order, or other matters on appeal, have been obtained from the District Court or from any other court.

On May 20, 2015, Debtor commenced Adversary Proceeding No. 15-1086-MKN, allegedly seeking a determination of the validity, priority or extent of AG's POC 10-2. (ECF Nos. 1414, 1415).

On July 20, 2015, AG filed a motion to dismiss that adversary proceeding ("Adversary Dismissal Motion"). (AECF No. 11). A hearing on that motion was noticed for August 19, 2015. (AECF No. 12).

On July 22, 2015, AG filed a Motion for Order Directing Sale of Property, or, in the Alternative, for Conversion ("Conversion Motion"). (ECF No. 1424). A hearing on the Conversion Motion was noticed for August 19, 2015. (ECF No. 1423). On August 5, 2015, Debtor filed an opposition. (ECF No. 1430). On August 5, 2015, a joinder in the opposition was filed on behalf of the Guarantors. (ECF No. 1429). On August 12, 2015, AG filed a reply . (ECF No. 1436).

On August 19, 2015, the court held a hearing on both the Conversion Motion and the Adversary Dismissal Motion. After arguments were presented, the matters were taken under submission. During the hearing, the court also indicated, in accordance with Section 1112(b)(3), that a written decision on the Conversion Motion would be entered no later than August 26, 2015. The court also indicated that written decisions on the competing Chapter 11 plans, if necessary, would be entered no later than August 28, 2015, and that a written decision on the Adversary Dismissal Motion would be entered no later than September 4, 2015.

Despite the closure of the record and the matters being taken under submission, on August 21, 2015, AG filed a document entitled "Clarification and Waiver of Election under Plan in Light of August 19, 2015 Hearing." (ECF No. 1440). Thereafter, Debtor filed a response to that document on August 25, 2015 (ECF No. 1442), as well as an errata on August 26, 2015

(ECF No. 1443). AG then filed a reply on August 27, 2015. (ECF No. 1445).

An order with respect to the Conversion Motion finally has been entered concurrently herewith.

This memorandum decision addresses only the confirmation of the Debtor's proposed plan of reorganization. An order addressing AG's proposed plan will be entered separately.[18]

BACKGROUND

Debtor owns and operates Carefree Willows, a 300-unit senior housing community situated on approximately eleven acres of real property located at 3250 S. Town Center Drive, Las Vegas, Nevada (the "Property").[19] Debtor filed a voluntary Chapter 11 petition ("Petition") on October 22, 2010, to which was attached its schedules of assets and liabilities ("Schedules") and Statement of Financial Affairs ("SOFA"). (ECF No. 1). Schedule "A" reflects the Property as the only parcel of real property owned by the Debtor. Schedule "D" identifies three secured creditors. Debtor lists "Union Bank"[20] as having a secured claim against the Property in the

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[18] A separate order also will be entered with respect to the Adversary Dismissal Motion.

[19] Debtor is a single-asset real estate ("SARE") entity; its sole asset is the Property and improvements comprising the age-restricted apartment complex. See Order on Motion for Order Determining that Debtor is a Single Asset Real Estate Entity ("SARE Order"). (ECF No. 118). The Debtor is owned by Carefree Holdings and Willows Investment Group. See Second Amended Disclosure Statement Describing the Second Amended Plan of Reorganization Proposed by AG/ICC Willows Loan Owner, L.L.C. ("AG Disclosure Statement") at 3. (ECF No. 618). Debtor is owned primarily by Carefree Holdings, which has 96.3933% of the membership interest, with Willows Investment Group having 3.7067%. See SOFA at Item 21. The ownership interest of Carefree Holdings actually may be 99.957% with Willows Investment Group holding a 0.0244% interest. See AG Recharacterization Decision at 2. Carefree Holdings is a limited partnership that apparently has approximately 160 limited partners. See Application to Employ Attorney for Debtor Nunc Pro Tunc at 2. (ECF No. 195). See also AG Recharacterization Decision at 19. The Property is operated by Ken Templeton Realty & Investment, Inc. ("KTRI") pursuant to a management agreement between KTRI and Carefree Holdings, which is signed by Ken Templeton as the President of KTRI and as the manager of MLPGP, LLC, which is the manager of Carefree Holdings. See Ex. 31 accompanying AG Designation Motion. KTRI operates the Property and is an affiliate of the Debtor within the meaning of Section 101(2)(D). Accordingly, KTRI is an insider of the Debtor under Section 101(31)(E).

[20] On October 10, 2010, Union Bank of California, N.A. sold to AG its rights under a certain December 16, 2005, Construction Loan Agreement, as modified by the March 10, 2009

amount of $30,000,000.00, and an unsecured claim in the amount of $1,536,646.93.[21] Debtor also lists the Clark County Treasurer as having a statutory lien against the Property fully securing a claim in the amount of $98,448.84. Debtor also lists "Service 1st Bank" as having a claim in the amount of $38,438.21 fully secured by a 32-passenger bus owned by the Debtor.[22]

On January 14, 2011, Debtor filed a motion ("Valuation Motion") seeking to establish the value of the Property at $30,000,000 "for purposes of confirmation." (ECF No. 88). The Valuation Motion was based on two appraisal reports: one valuing the Property as of September 2, 2010, prepared by Timothy R. Morse & Associates ("Morse") and another valuing the Property as of August 24, 2010, prepared by Anderson Valuation Group, LLC ("Anderson"). On February 2, 2011, AG filed opposition that requested an evidentiary hearing to determine the value of the Property. (ECF No. 123). On February 8, 2011, Debtor filed a reply (ECF No. 129) accompanied by the Declaration of Kenneth Templeton (ECF No. 130) attesting that a confirmable plan could be proposed if the court establishes a value of the Property of at least $30,000,000. On February 15, 2011, AG withdrew its opposition to the Valuation Motion after reviewing the two appraisal reports that accompanied the motion. (ECF No. 134).

On February 28, 2011, AG filed a proof of claim assigned Claim No. 10-1 ("POC 10-1"). The total amount of the claim was $32,562,189.24. Of the amount, the claim states that $30,000,000 is secured based on a value of $30,000,000 for the Property and that the remaining amount of $2,562,189.24 is unsecured. Although POC 10-1 was filed on February 28, 2011, it did not include any interest that might have accrued postpetition pursuant to the underlying loan

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Amended and Restated Promissory Note (the "Loan"). On November 10, 2010, Union Bank recorded in favor of AG an assignment of its Deed of Trust against the Property. See Omnibus Declaration of Alex Roudi, Ex. B. (ECF No. 766).

[21] Schedule "H" lists several entities as co-debtors with respect to the obligations to Union Bank. Those co-debtors are listed as Carefree Holdings, LP, Ken II Trust, Kenneth L. Templeton, and Templeton Family Trust.

[22] On February 16, 2011, AG acquired the secured loan from Service 1st Bank. See Declaration of Elliott Burrell-Crowe in Support of AG/ICC Willows Loan Owner, L.L.C.'s Opposition to Motion to Designate Claims of AG/ICC and Affiliates ("Burrell Declaration"), Ex. C at 3. (ECF No. 271).

documents.

On February 28, 2011, in addition to filing POC 10-1, AG filed a proposed plan of reorganization (ECF No. 138) along with a proposed disclosure statement (ECF No. 137).[23]

On March 2, 2011, Debtor filed its proposed plan of reorganization (ECF No. 145) accompanied by a proposed disclosure statement (ECF No. 146).

On March 14, 2011, an order submitted by Debtor's counsel was entered on the Valuation Motion stating that the value of the Property "for purposes of the Debtor's proposed Plan of Reorganization **is at least** Thirty Million Dollars ($30,000,000)." (ECF No. 156). (Emphasis added).

On March 17, 2011, an amended order submitted by counsel was entered on the Valuation Motion stating that the value of the Property "for purposes of plan confirmation **is** Thirty Million Dollars ($30,000,000)" ("Valuation Order"). (ECF No. 163).[24] (Emphasis added).

On March 25, 2011, Debtor filed an objection to POC 10-1. (ECF No. 178). On May 3, 2011, AG filed a response. (ECF No. 268). On May 10, 2011, Debtor filed a reply. (ECF No. 279). On May 24, 2011, an order was entered overruling Debtor's objection to POC 10-1. (ECF No. 323).

On February 29, 2012, Debtor filed a proposed Fourth Amended Disclosure Statement ("Debtor Disclosure Statement") (ECF No. 577) along with its proposed Fourth Amended Plan.

On April 3, 2012, an order was entered conditionally approving the disclosure statements filed by both AG and the Debtor, and scheduling a confirmation hearing on both plans to commence on May 31, 2012. (ECF No. 599). That order also provided that any modifications

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[23] Debtor filed its voluntary Chapter 11 petition on October 22, 2010. Under Section 1121(b), it had a 120-day exclusive period of time to be able to propose a Chapter 11 plan. No extension of the exclusivity period was sought or obtained by the Debtor pursuant to Section 1121(d), and the exclusivity period ended on February 21, 2011. Termination of the plan exclusivity period allowed AG or any other party in interest, including the Debtor's equity security holders, to file a proposed plan.

[24] As both the Debtor and AG had filed Chapter 11 plans, the language of the amended Valuation Order was not limited to the Debtor's proposed plan.

of the plans and disclosure statements must be made before April 27, 2012.

On April 26, 2012, AG filed a proposed Second Amended Plan along with a Second Amended Disclosure Statement Describing the Second Amended Plan ("AG Disclosure Statement"). (ECF No. 618).

On May 26, 2012, Debtor filed its First Amendment to Fourth Amended Plan.

On May 30, 2012, prior to the Confirmation Hearing, Debtor filed a ballot summary ("Ballot Summary"). (ECF No. 760).[25] According to the Ballot Summary, Classes 1, 3 and 4 are impaired under the proposed Plan.[26] AG was the only member of Classes 1 and 3 and voted in both classes to reject the Debtor's proposed Plan. The Ballot Summary also represents that general unsecured creditors, Class 4, unanimously accepted the Plan.[27]

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[25] On the same date, AG also filed an Omnibus Declaration of Alex Roudi ("Roudi Omnibus Declaration") in support of its position on all of the matters being heard during the Confirmation Hearing. (ECF No. 766).

[26] Under the Fourth Amended Plan, Class 1 consists solely of the AG Secured Claim, Class 2 consists solely of the AG Unsecured Claim, Class 3 consists of the Service 1st Bank claim, Class 4 consists of general unsecured claims, and Class 5 consists of the interest of the Debtor's members, i.e., equity holders. The Fourth Amended Plan defines the AG Unsecured Claim to mean "the difference between the AG Note Balance at Petition date and the sum of $30,000,000.00." The Fourth Amended Plan provides that under Class 2, the AG Unsecured Claim will be paid in full on the effective date unless separate classification of the claim is not allowed. The Fourth Amended Plan states that Classes 2 and 5 are unimpaired. The First Amendment to Debtor's Fourth Amended Plan was filed on May 26, 2012. Under that amendment, Class 2 is renamed "Guaranteed Unsecured Claims" instead of "AG Unsecured Claim" because the class is changed to include the claim of Pause 1, LLC, in addition to the AG Unsecured Claim. Neither the Fourth Amended Plan nor the First Amendment to that plan defined the Pause 1 claim, but the record reflects that Pause 1 filed a proof of claim on March 22, 2011, in the unsecured amount of $150,000 ("Pause 1 POC"). The First Amendment also provides that the claims in Class 2, i.e., both the AG Unsecured Claim and the Pause 1 claim, will be paid in full, in cash, on the effective date of the plan.

[27] A ballot cast by Willows Account is included in the Ballot Summary for Class 4. As previously discussed, AG sought both to designate the vote of Willows Account and to recharacterize the Willows Account debt as an equity contribution. As previously mentioned, the court entered the Recharacterization Order determining the Willows Account claim to be an equity contribution. The court likewise entered the AG Designation Order disallowing the votes of Willows Account. Designation of the Willows Account votes prevents the Willows Account ballot from being counted as a vote in Class 4. On its face, however, removal of the Willows Account vote does not affect the Class 4 tabulation results, as the remaining general unsecured

Debtor's proposed Plan is fairly straightforward. Debtor intends to retain the Property, pay its creditors over time, and have existing equity holders maintain control of the business operations. Debtor proposes to finance the reorganization process with a $9,000,000 contribution from Templeton Investment Corporation.[28] See First Amendment to Fourth Amended Plan, Section 7.2. In exchange for this contribution, the current members of the Debtor will retain their equity in the reorganized debtor. See Fourth Amended Plan, Section 4.5.

The Plan proposes to pay over time AG's Class 1 claim secured by the Property[29] as well as AG's Class 3 claim secured by the bus.[30] Additionally, the Plan proposes to use the $9,000,000 contribution to pay in full the Class 2 deficiency claim of AG[31] as well as the claim of Pause 1,[32] to pay $250,000.00[33] to Willows Account,[34] and to pay approximately $10,000 to

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creditors in Class 4 voted unanimously to accept plan treatment.

[28] Templeton Investment Corporation apparently is an entity that is owned or controlled through Kenneth Templeton. In its various Disclosure Statements, Debtor has described Templeton as "the principal of Carefree Holdings, LP, the managing member of Carefree Willows, LLC, and a principal of Willows Investment Group, LLC, the other member of Carefree Willows, LLC. Ken Templeton is the founder and owner of The Templeton Group, a diversified group of companies that is made up of Templeton Development Corporation, Carefree Senior Living, Ken Templeton Realty and Investment, Inc., a casino, and Templeton Gaming Corporation." Debtor Disclosure Statement at 9. The Debtor's first mention of Templeton Investment Corporation appears in its First Amendment to Fourth Amended Plan as being the source of a $9,000,000 contribution to fund the Debtor's proposed Plan.

[29] AG would be paid in part on the effective date of the plan, with the remaining amount paid over a ten-year period using a 30-year amortization, with a balloon payment at the end of a thirty-nine month period. See First Amendment to Fourth Amended Plan, Sections 4.1 and 7.2.

[30] Paid over forty-eight months with 6% interest. See First Amendment to Fourth Amended Plan, Section 4.3.

[31] AG objects to the Debtor's proposed separate classification and treatment of the AG deficiency claim from the remaining unsecured claims. See AG/ICC Willows Loan Owner, L.L.C.'s Objection to Confirmation of Debtor's Fourth Amended Plan of Reorganization ("AG Confirmation Objection") at 4-6. (ECF No. 719).

[32] See First Amendment to Fourth Amended Plan, Sections 3.1, 4.2, and 7.2.

[33] This payment amount resulted from Willows Account's election of alternative treatment under Section 4.4 of the Plan. See First Amendment to Fourth Amended Plan, Section 7.2). As mentioned at 4 and note 27, supra, the Willows Account claim has been designated and

the Class 4 general unsecured creditors[35] on the effective date. See First Amendment to Fourth Amended Plan, Sections 4.1, 4.2, and 7.2.

To the extent permitted by the Code, Debtor seeks to apply all post-petition payments to AG's secured claim. See First Amendment to Fourth Amended Plan, Section 4.1. After paying guarantied claims in Class 2, and general unsecured claims in Class 4 as discussed above, the Plan applies the balance of the $9,000,000 contribution (approximately $5,787,823.00) to AG's Class 1 secured claim on the effective date of the Plan. Id., Sections 4.1, 4.2, 7.2.

The remaining balance on AG's Class 1 secured claim (the "Amortized Secured Balance")[36] will be paid over thirty-nine months, using a 30-year amortization for the monthly payment amounts, and will bear interest at the rate of 3.75% per annum from and after the effective date, or such other rate as the court determines is appropriate. See First Amendment to Fourth Amended Plan, Sections 4.1(C) and 4.1(D). The Debtor intends to refinance the Property prior to the maturity date on the Amortized Secured Balance in order to pay the then-remaining Amortized Secured Balance. Id., Section 7.3.

Debtor rents the housing units located on the Property to senior citizens and uses the income from the rentals to pay the expenses and maintain the Property. Debtor included four years' rental and earned net income ("EBITDA") information in its Disclosure Statement. See Debtor's Fourth Amended Disclosure Statement ("Disclosure Statement") at 11. (ECF No. 577). From 2008 through 2011, Debtor had earned gross rental income and earned income of:

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recharacterized as an equity contribution. Willows Account therefore would not receive a distribution as a creditor if the Debtor's Plan was confirmed.

[34] See First Amendment to Fourth Amended Plan, Section 7.2.

[35] This figure represents approximately 95% of the allowed claims of general unsecured creditors, without interest. See First Amendment to Fourth Amended Plan, Sections 4.4 and 7.2.

[36] The Plan defines the Amortized Secured Balance as AG's $30 million secured claim less all post-petition payments made by Debtor (to the extent permitted under the Code), and less the remainder of the $9,000,000 (after paying the other identified claims). See First Amendment to Fourth Amended Plan, Section 4.1(B).

	Gross Rental Income	Earned Income
2008	$1,947,532.00	$446,958.00
2009	$2,778,472.00	$1,197,243.00
2010	$2,910,805.00	$1,434,983.00
2011	$3,296,195.00	$1,817,777.00

See Disclosure Statement at 11.

A five-year projection of the Property's income, expenses, and net operating income available for debt service is attached to the Debtor Disclosure Statement as Exhibit "A." Debtor's proposed operating budget reflects both steadily increasing occupancy percentages,[37] as well as annual declining rent concessions,[38] the combination of which increases total property income from $3,224,881 in the first year after confirmation to $4,212,249 in the fifth year after confirmation.[39]

Debtor's projected operating budget reflects increasing funds available for debt service in each of the first five years after confirmation, specifically:

$1,796,796.00 in the first year
$2,019,207.00 in the second year,
$2,210,610.00 in the third year,
$2,376,495.00 in the fourth year, and
$2,521,949.00 in the fifth year.

See Disclosure Statement, Ex. A.

AG raises several arguments[40] involving the Debtor's Plan, including that the Debtor's

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[37] The average occupancy rate increases in five percent increments from eighty-five percent to ninety-five percent in three years, holding steady at ninety-five percent in years three through five. See Debtor Disclosure Statement, Ex. A.

[38] Projected rent concessions decline steadily from $814,445 the first year, to $651,556 in year two, $521,245 in year three, $416,996 in year four, and $333,597 in the fifth year after confirmation. See Debtor Disclosure Statement, Ex. A at 5.

[39] Total property income is projected at $3,224,881 in the first year after confirmation, $3,508,842 in year two, $3,763,857 in year three, $3,996,551 in year four, and $4,212,249 in the fifth year after confirmation. See Debtor Disclosure Statement, Ex. A at 5.

[40] These arguments are raised in the AG Confirmation Objection, as well as the Combined Omnibus Reply to (1) Debtor's Plan Confirmation Brief and Proposed Findings Of

Plan was proposed in bad faith and is not feasible.[41] AG generally argues that the Debtor miscalculated the value of AG's claim and fails to "satisfy the fair and equitable requirement of Section 1129(b)." AG Omnibus Reply at 24-42. Subsumed within these arguments, significant questions arise regarding the value of AG's Secured Claim and whether AG's claim was fully secured at the time of the Confirmation Hearing.[42] See AG Confirmation Objection at 17. See also Objection to Debtor's First Amendment to Debtor's Fourth Amended Plan of Reorganization ("AG Objection to First Amendment to Fourth Amended Plan") at 3-4. (ECF No. 769). For the convenience of the parties and consistency of approach, the court will analyze

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Fact and Conclusions Of Law (ECF No. 885); (2) Guarantors' Plan Confirmation Opening Brief (ECF No. 881) and [Proposed] Findings Of Fact and Conclusions Of Law Regarding Confirmation (ECF No. 883); and (3) Willows Account LLC'S Post-Trial Brief (ECF No. 888) and Proposed Findings of Fact and Conclusions of Law, filed by AG ("AG Omnibus Reply") (ECF No. 911).

[41] See AG Confirmation Objection at 4-10; AG/ICC Willows Loan Owner, L.L.C.'s Brief in Support Findings of Fact and Conclusions of Law on Plan Confirmation and Related Matters ("AG Post Hearing Brief") at 14-15 and 17-18 (ECF No. 887); AG Omnibus Reply at 3-24.

[42] Debtor's expert used two appraisals, dated November 2011 and March 2012, in preparing his expert testimony for use in the Confirmation Hearing. The appraisals valued the Property at $36-36.2 million, significantly greater than the value stated in the Valuation Order, and high enough to potentially convert AG from a partially secured creditor to a fully secured creditor. Although the Debtor's expert used the appraisals, the Guarantors assert that "the appraisals were ordered by the Guarantors as part of the state court litigation. Specifically, the appraisals were ordered at the behest of the Guarantors' counsel, David Duncan. See 7/24 (p.m.) pp.58:13-16; 101:8-10. The appraisals were produced well in advance of this trial despite being privileged under the work-product doctrine." Guarantors' Plan Confirmation Reply Brief ("Guarantors Brief") at 6 n. 9. (ECF No. 906).

Debtor attempts to distance itself and its interest rate/feasibility expert, Edward Burr, from the appraisals, stating "Ted Burr's report is based on many facts, not just the Anderson Appraisal [Exhibit CCCC]. Just because Mr. Burr included the Anderson Appraisal in his expert report does not mean the Property has a higher value for all purposes. The same would be true if Mr. Burr relied on an appraisal having a lower value. The facts are that the Debtor did not rely on the Anderson Appraisal for its Plan, for its calculations, or for its feasibility analysis." Debtor's Post-Confirmation Reply Brief at 8 (emphasis added). (ECF No. 904). Debtor is incorrect. As more fully explored below, Mr. Burr's Report, declaration, and testimony are replete with references to the higher Property valuation, specifically in reference to the loan-to-value ratio analysis when rendering an opinion related to the Plan's feasibility and to his risk analysis.

the Debtor's Plan using both valuations for the Property, where the valuation issue is relevant.

As more fully explained below, the court concludes that the Debtor's proposed Plan fails to meet all of the requirements of Sections 1129(a) and 1129(b) regardless of which valuation is used for the Property. The court concludes that Debtor's Plan does not meet all of the requirements for "cramdown" under Section 1129(b). As to the impaired classes that have not accepted plan treatment, i.e., AG in Classes 1 and 3, the court concludes that the treatment of such claims is not fair and equitable within the meaning of Section 1129(b)(2)(A) and that the Plan unfairly discriminates against AG regarding its secured claim.

LEGAL ANALYSIS

Confirmation of a plan of reorganization is governed by Section 1129. The court has an affirmative duty to determine whether a proposed plan satisfies all of the requirements for confirmation. See Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa), 115 F.3d 650, 653 (9th Cir. 1997), cert denied, 522 U.S. 1110 (1998). In determining whether the requirements have been met, the court may, and in this instance does, take into account all previous proceedings and matters of record in the case. See In re Acequia, Inc., 787 F.2d 1352, 1358 (9th Cir. 1986).

Generally, a plan of reorganization can be confirmed in one of two ways. If all sixteen requirements of Section 1129(a) are satisfied by the plan proponent, a plan can be confirmed consensually if all eligible parties vote to accept their proposed treatment. See RadLAX Gateway Hotel, LLC v. Amalgamated Bank ("RadLAX"), 132 S.Ct. 2065, 2069, 182 L.Ed.2d 967 (2012); see also United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994). In the instant case, AG voted against confirmation in Classes 1 and 3.[43] Accordingly, Debtor's Plan cannot be confirmed consensually.

If a plan proponent satisfies all of the requirements set forth in Section 1129(a) except the

[43] Debtor's Fourth Amended Plan incorrectly refers to Service 1st Bank of Nevada, not AG, as the creditor holding the secured claim regarding the bus. See Fourth Amended Plan at Section 3.1 and 4.3.

voting requirement in Section 1129(a)(8),[44] then the court may still confirm the plan as long as the plan "does not discriminate unfairly" against and "is fair and equitable" towards each impaired class that has not accepted the plan. 11 U.S.C. § 1129(b)(1).[45] See RadLAX, 132 S.Ct. at 2069; Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship ("203 N. LaSalle"), 526 U.S. 434, 441 (1999); Ambanc La Mesa,115 F.3d at 653. This second, nonconsensual method of confirmation is commonly referred to as "cramdown."[46] RadLAX, 132 S.Ct. at 2069; 203 N. LaSalle, 526 U.S. at 441.

AG voted to reject the Debtor's Plan regarding Class 1, AG's secured claim regarding the Property, and Class 3, AG's secured claim regarding the 32-passenger bus. Thus, the only method of confirmation available to the Debtor is cramdown under Section 1129(b).

AG attacks several aspects of Debtor's proposed Plan,[47] arguing, inter alia, that the Plan was proposed in bad faith, incorrectly valued AG's claims, is not feasible, see AG Confirmation Objection at 4-10, AG Post Hearing Brief at 5-6, 14-15, 17-18, and AG Omnibus Reply at 3-24), and cannot satisfy the fair and equitable requirement of Section 1129(b). See AG Omnibus Reply at 24-42. Although AG does not attack the Plan regarding each element of Section

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[44] "With respect to each class of claims or interests - (A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8). Thus, under Section 1129(a)(8), each class must either accept the plan, or be unimpaired within the meaning of Section 1124.

[45] "[I]f 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." 11 U.S.C. § 1129(b)(1).

[46] "Courts use 'cramdown' and 'cram down' and 'Cram-down' interchangeably to refer to nonconsensual confirmation." In re Shat, 424 B.R. 854, 585 n.7 (Bankr. D. Nev. 2012).

[47] AG additionally argued that the Plan violates Section 510(a) as it relates to the AG subordination agreement contained in the Loan by paying in full the subordinated Willows Account claim, while not also paying AG in full. See AG Confirmation Objection at 5-6; AG Post Hearing Brief at 11, 13. AG's subordination argument was rendered moot when the court granted the AG Recharacterization Motion and the AG Designation Motion, ensuring that Willows Account would not receive a distribution of an allowed claim under the Plan.

1129(a), the court has an independent duty to consider each requirement of Section 1129 when considering a plan for confirmation. See Ambanc La Mesa, 115 F.3d at 653.

A. The Requirements Under Section 1129(a).

1. Section 1129(a)(1) — Plan compliance with the applicable provisions of the Code.

Pursuant to Section 1129(a)(1), the court may not confirm a plan unless "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). This provision generally concerns whether the proposed plan contains provisions required or authorized by Section 1123 and that the classifications included in the proposed plan comply with Section 1122. See 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (Alan N. Resnick & Henry J. Sommer, eds.,16th ed. 2009).

In this case, the Debtor's Plan generally complies with the mandatory and permissive content provisions of Section 1123. It designates classes of claims and interests, specifies whether the classes are unimpaired, and specifies the treatment of any class that is impaired. It sets forth a means to implement the Plan, including the selection of postconfirmation management. It also provides for the impairment of classes of claims and the modification of rights of holders of claims. On its face, the content provisions of Section 1123 are met.

It appears, however, that Section 1122(a) was violated when the proposed First Amendment to the Fourth Amended Plan added Pause 1 as a claimant in Class 2. Section 1122 is explicit: "a plan may place a claim . . . in a particular class only if such claim . . . is substantially similar to the other claims . . . of such class." 11 U.S.C. § 1122(a). As a general rule, the undersecured portion of a secured creditor's claim constitutes an allowed general unsecured claim. See Barakat v. The Life Ins. Co. Of Va. (In re Barakat), 99 F.3d 1520, 1526 (9th Cir. 1996). An undersecured portion of such a claim may be classified separately from other general unsecured claims where there is a legitimate business or economic justification, such as the presence of third-party guarantors. See, e.g., Wells Fargo Bank v. Loop 76, LLC (In re Loop 76, LLC), 465 B.R. 525, 536-41 (B.A.P. 9th Cir. 2012).

The inclusion in Class 2 of the undersecured portion of the Debtor's obligation to AG is

predicated on the obligation of the Guarantors. See Debtor's Plan Confirmation Brief at p. 9. (ECF No. 885). Debtor's interest in protecting the Guarantors has been the subject of other matters during the course of this reorganization proceeding.

A review of the Pause 1 POC reflects that it is filed as an unsecured claim. Attached to the proof of claim is a copy of an Assignment of Creditor's Claim ("Assignment") dated March 2, 2011, along with a copy of a $150,000 promissory note that the Debtor executed on March 3, 2009 in favor of Stanley Paher ("Paher"). There is no deed of trust or other indication that the note ("Paher Note") is secured. The Assignment makes no reference to a personal guaranty, although the record indicates that a "Limited Personal Guaranty" was executed by Templeton individually and by Carefree Holdings. Compare Pause 1 POC with Mojdehi Designation Declaration, Ex. 26.[48]

This comparison of the Pause 1 claim and the undersecured deficiency claim of AG supports only a conclusion that they are not substantially similar at all. First, Pause 1 does not have a deficiency claim, the allowance of which would be governed by Section 506(a). Second, Pause 1 does not have a secured claim, the allowance of which also would be governed by Section 506(a). Third, Pause 1 may not even have a claim against the Guarantors as the Assignment attached to the Pause 1 POC apparently did not include the limited personal guaranties of the Paher Note. Inclusion of the Pause 1 claim in Class 2 under the First Amendment to the Fourth Amended Plan is not permitted by Section 1122(a). Thus, there also is no compliance with Section 1129(a)(1).

2. **Section 1129(a)(2) — Debtor's compliance with the applicable provisions of the Code.**

Section 1129(a)(2) provides that the court may not confirm a plan unless "[t]he proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2).

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[48] Debtor's Schedule F listed Paher as having a unsecured claim in the amount of $150,000 and Schedule H listed Carefree Holdings and Templeton as codebtors with respect to Paher. The Assignment attached to the Pause 1 POC, however, includes integration language reflecting it to be the full and complete understanding and agreement of the parties. As there was no mention of the guaranties, it appears that they were never assigned by Paher to Pause 1.

> The legislative history of the Section indicates that Congress was concerned "that the proponent of the plan must comply with the applicable provisions of title 11, such as . . . disclosure and solicitation requirements of sections 1125 and 1126."

7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[2], at p.1129-19, quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977). See also In re Idearc, Inc., 423 B.R. 138, 163 (Bankr. N.D. Tex. 2009); In re Sierra-Cal, 210 B.R. 168, 176 (Bankr. E.D. Cal. 1997). Section 1125 requires the disclosure statement to provide "adequate information" to parties in interest to enable them to make an "informed judgment about the plan." 11 U.S.C. § 1125(a)(1).[49] Adequate information is "a flexible concept that permits the degree of disclosure to be tailored to the particular situation." In re VDG Chicken, LLC, 2011 WL 3299089 at *4 (B.A.P. 9th Cir. 2011), citing Official Com. of Unsecured Creditors v. Michelson (In re Michelson), 141 B.R. 715, 718–19 (Bankr. E.D. Cal. 1992). However, at an "irreducible minimum," a disclosure statement must provide information about the plan and how its provisions will be effected. See Michelson, 141 B.R. at 718.

Determining the adequacy of the information is subjective and is made on a case-by-case basis. See Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003). This determination is largely within the discretion of the bankruptcy court. Id.;[50]

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[49] Section 1125(a)(1) provides in part that "'adequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, . . ."

[50] In making such a determination, courts have considered relevant factors such as: (1) a description of the available assets and their value; (2) the scheduled claims; (3) the estimated return to creditors under a Chapter 7 liquidation; (4) the collectability of accounts receivable; (5) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (6) litigation likely to arise in a non-bankruptcy context; (7) tax attributes of the debtor; and (8) the relationship of the debtor with affiliates. See In re Pac. Shores Dev., Inc., 2011 WL 778205 at *4 (Bankr. S.D. Cal. 2011), citing In re Reilly, 71 B.R. 132, 134 (Bankr. D. Mont. 1987)); In re Neutgens, 87 B.R. 128, 129 (Bankr. D. Mont. 1987); see also In re Diversified Investors Fund XVII, 91 B.R. 559, 561 (Bankr. C.D. Cal. 1988).

Micro-Waste Corp. v. Sanitec Indus., Inc. (In re Sanitec Indus., Inc.), 2009 WL 7809007 at *15 (B.A.P. 9th Cir. 2009).

On April 3, 2012, after due notice and a hearing, the court entered an order[51] that, inter alia, conditionally approved the Debtor Disclosure Statement, finding that it contained "adequate information" within the meaning of Section 1125 of the Code, and established procedures for the Debtor's solicitation of votes on Debtor's then-existing plan.

In accordance with Section 1125 and pursuant to the Disclosure Statement Order, the Debtor solicited acceptances or rejections of that Plan from holders of claims in each class of impaired claims that are to receive distributions under the then-existing Plan. Classes 1, 3, and 4 of the Plan are impaired, receive distributions under the Plan, and were solicited to vote on the then-existing Plan. Class 2, comprising only AG's unsecured deficiency claim and the Pause 1 claim,[52] and Class 5, Membership Interests in the Debtor, purportedly are unimpaired. See First Amendment to Fourth Amended Plan, Sections 4.1 to 4.5. As a result, pursuant to Section 1126(f), AG's deficiency claim, Pause 1's claim, and Debtor's Membership Interests are conclusively presumed to have accepted the Plan.

AG attacks the validity of the Debtor Disclosure Statement, arguing that it fails to provide "adequate information" within the meaning of Section 1125 with respect to the First Amendment to the Fourth Amended Plan. AG asserts the following problems exist with the Debtor Disclosure Statement:

- It describes the Debtor's Plan prior to it being materially amended. As such, it is materially inaccurate and fails to satisfy the purpose of Section 1125 of, at a minimum, informing creditors of how their claims will be treated.

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[51] Joint Order Conditionally Approving Disclosure Statements, Fixing Time for Filing Acceptances or Rejections of the Plans, Fixing Time for Filing Objections to the Disclosure Statements and to Confirmation of the Plans, and Fixing Time for Hearing on Final Approval of Disclosure Statements, Confirmation of the Plans and Matters Relating to Claims, Combined With Notice Thereof ("Disclosure Statement Order"). (ECF No. 599).

[52] Pause 1 was shifted from Class 4 to Class 2 in the First Amendment to Fourth Amended Plan. Pause 1 is included in the Ballot Summary under Class 4. Since Pause 1 is unimpaired in the First Amendment to Fourth Amended Plan, it is not entitled to vote and its vote has been disregarded when reviewing the ballots for the general unsecured class.

- It fails to provide adequate disclosure of the source of funding for the Debtor's plan.[53]
- It fails to disclose that the Debtor's objection to AG's secured claim in connection with the Loan was overruled by the Court. And, is further misleading in its statement that "[u]nless the secured debt (Class 1) is restructured, the secured creditor will foreclose on the assets leaving no distribution to unsecured creditors."
- It fails to disclose all section 502(d) disabilities, including those against affiliates, insiders, and friends like Mr. Erganian.[54]
- It omits substantial information pertaining to the relationship between Templeton[55] and Erganian, disclosing only that his entity performed due diligence services for Ken Templeton Realty & Investment ("KTRI").
- It omits the Debtor's role in brokering the assignment of the . . . [intercompany receivable], first to PSACP and then to Willows Account, or brokering the assignment of the Paher claim to Pause 1, LLC ("Pause 1").

See AG Post Hearing Brief at 9.

AG's arguments are well taken. The Plan that the Debtor ultimately sought to confirm was substantially different from the one that formed the basis for the Debtor Disclosure Statement that the court had previously approved on an interim basis and upon which the various creditors had voted. After creditors votes were solicited, Debtor amended Sections 3.1, 4.1(A), 4.1(C), 4.1(D), 4.2, 7.2, and 7.3 of the proposed Plan to:

- shift Pause 1 from Class 4 into Class 2 with AG's deficiency claim;
- convert Pause 1 from an impaired creditor to an unimpaired creditor;
- shorten the Plan payment period for Class 1 from ten years to thirty-nine months;
- increase the Plan funding contribution from $3,212,177 to

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[53] Debtor's reorganization under the Fourth Amended Plan of Reorganization was funded by "Kenneth L. Templeton, Carefree Holdings, LP, MLPGP, LLC, the Templeton Family Trust Dated October 8, 1992, the Ken II Trust Dated May 4, 1998, and any other affiliated entities." Disclosure Statement at Section 11.2. Debtor's reorganization under the First Amendment to Fourth Amended Plan of Reorganization is funded by Templeton Investment Corporation. See First Amendment to Fourth Amended Plan at Section 7.2.

[54] Edward Erganian ("Erganian") is the principal of Willows Account. See Designation Decision at 7 n.21.

[55] Templeton is the Debtor's manager and the principal of both of its two equity security holders. See discussion at note 28, supra.

> $9,000,000;
> - change the identity of the entity funding the Plan contribution;
> - change the manner in which the Plan funding contribution was to be allocated among the various creditors and creditor classes;
> - eliminate one of the two methods by which the unpaid balloon payment would be retired, stating that the debtor would refinance the debt; and
> - note two appraisals for the Property,[56] both of which valued the Property above the court-determined $30,000,000 stipulated confirmation value.

See First Amendment to Fourth Amended Plan at 1-4.

The court agrees that the numerous differences between the Plan that was presented during the Confirmation Hearing and the plan that was solicited for votes, are problematic. As reflected above, the two plans are not remotely alike. Describing the details of the earlier plan in the Debtor Disclosure Statement did not provide "adequate information" regarding the details of the later plan that Debtor sought to confirm after the Confirmation Hearing.

More importantly, the Debtor Disclosure Statement[57] failed to accurately describe the

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[56] "There are two appraisals of the Senior Housing Complex. Based on the Appraisal of the Senior Housing Complex prepared by Timothy R. Morse, MAI, as of September 2, 2010, the market value of Carefree Willows 'As Is' as of September 2, 2010 was **Thirty Million Dollars ($30,000,000)** and it has Market Value "as Though Stabilized" of Carefree Willows was **Thirty One Million One Hundred Thousand Dollars ($31,100,000)**. Based on the Appraisal of the Senior Housing Complex prepared by Glenn M. Anderson, MAI, the market value of Carefree Willows "As Is" as of August 24, 2010 was **Thirty Million Two Hundred Twenty Thousand Dollars ($30,220,000)** and Market Value of Carefree Willows subject to the condition that the property has reached a stabilized occupancy was **Thirty Million Eight Hundred Twenty Thousand Dollars ($30,820,000)**." Debtor Disclosure Statement at 12. (emphasis in original).

[57] Debtor states:

> 14.4 History and Background of the PSACP Claim.
>
> Carefree Holdings, LP originally held a claim against the Debtor in the principal amount of $4,654,000.00. This claim was based upon advancements made by CFHLP for pre-development, construction overruns, negative cash flow during lease-up of the Property. No additional funds were made available by Union Bank and therefore were provided by CFHLP to sustain the project. All loans made by CFHLP to Debtor were accurately documented by accounting entries in the regular course of the Debtor's business. On October 13, 2010, CFHLP assigned its claim to PSACP Investment, LLC for the amount of $5,000.00. PSACP Investment, LLC is managed by Phil Aurbach, Esq. Mr. Aurbach has represented the Debtor in

personal relationship among Debtor, Templeton, Erganian, Willows Account, Deters, and Pause 1.[58] The Debtor's lack of candor regarding its relationships to the individuals controlling how the Willows Account and the Pause 1[59] claims would be voted is troubling. Although the

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> various state court litigation.
>
> PSACP assigned the claim to Willows Account, LLC. Willows Account, LLC is managed by Edward Erganian. Mr. Erganian is a Director and Secretary of NAC Development, Inc. which provided due diligence services to Ken Templeton Realty and Investment for Integrated Financial Services from August of 2010 to September of 2011.

See Debtor Disclosure Statement at 24-25.

[58] The relationship, interactions, and inter-company debt gamesmanship between the Debtor, Templeton, Erganian, Pause 1, and Willows Account was the subject of much litigation, including the AG Designation Motion and the AG Recharacterization Motion. In the AG Designation Decision and the AG Recharacterization Decision, the court detailed the creation of the inter-company receivable, its dissemination to hand-picked recipients, and the close personal relationship between Templeton, Debtor's principal, and Erganian, principal for Willows Account. The findings and conclusions set forth in those decisions are incorporated in the instant memorandum.

An additional discussion of this relationship and the Willows Account claim can be found in the court's Preliminary Injunction Decision. During the course of live witness testimony on Debtor's request for a preliminary injunction, Templeton testified regarding the acquisition of the Willows Account claim. That testimony established, inter alia, that Willows Account is owned or controlled by Erganian, a long-time business and social acquaintance of Templeton. The court specifically found Templeton's testimony concerning his relationship and transactions with Erganian to be evasive and contradictory. See Preliminary Injunction Decision at 25-28. The findings and conclusions set forth in the Preliminary Injunction Decision are incorporated in the instant memorandum.

[59] The same date that PSACP assigned the inter-company receivable claim to Willows Account, Debtor arranged for the sale of a $150,000 claim held by Paher. This claim was based upon a note guaranteed by both Templeton and Carefree Holdings. See Pause 1 POC; Mojdehi Designation Declaration, Ex. 26. The claim was transferred to Pause 1, which is owned and controlled by Tim Deters ("Deters"). Similar to Erganian's relationships with both Integrated Financial Associates ("IFA") and KTRI, Deters has a working relationship with both IFA and KTRI. The undisclosed relationship of both Templeton and Erganian to IFA was considered in connection with the AG Designation Motion. See AG Designation Decision at 10, 14, 17-18.

Deters has a real estate license under KTRI and is paid $8,500 monthly. See Mojdehi Designation Declaration, Ex. 23 ("Deters Deposition") at 33-35. This constitutes Deters's only source of income other than undocumented loans from Erganian to one of Deters' entities that are not expected to be repaid until the real estate market recovers and Deters gets back on his feet financially. See Mojdehi Designation Declaration, Ex. 10 ("Erganian Deposition") at 14-16;

Disclosure Statement briefly mentions Erganian, it makes no reference to the Pause 1 claim. This disclosure is insufficient.

The court's discussion in In re Applegate Property, Ltd., 133 B.R. 827 (Bankr. W.D. Tex. 1991), regarding the scope of disclosure required by a debtor, is instructive and persuasive in this regard. In Applegate, an entity related to debtor covertly purchased claims in order to gain an advantage in the debtor's reorganization plan voting process. The entity buying up the claims was a sister corporation to the debtor's general partners. The debtor's disclosure statement failed to disclose that relationship. The court was asked whether the relationship among the debtor, the purchaser of the claims, and the debtor's general partners and the attendant claims acquisitions should have been disclosed in the debtor's disclosure statement. The court said that it should have been, and noted that disclosure of the relationship and claims acquisition:

Deters Deposition at 106.

Deters filed personal bankruptcy in 2010, having incurred liability relating to a suit brought by investors in connection with NAC Development. See Deters Deposition at 97-98. Deters has an office in Templeton's building without a written lease and for which he is paying no rent. Id. at 33.

Deters also had a long-standing relationship with Erganian; they were both officers of NAC Development, and shared ownership interests in several other companies. See Deters Deposition at 11, 14, 26. Deters testified that he is a friend of Templeton's and, like Erganian, works with Templeton's son at KTRI. Id. at 26-27. Deters and Paher did not discuss the claim assignment and did not meet each other until nearly a year later, at an IFA creditor's committee meeting. See Deters Deposition at 77. As with the Erganian Receivable transfer, Kevin Close, Templeton's CFO, prepared the assignment document and ensured that it was executed by both parties. See Erganian Deposition at 28-29; Deters Deposition at 78. Mr. Close apparently prepared the Pause 1 proof of claim that, to the best of Deter's recollection, was filed by Erganian. See Erganian Deposition at 28; Deters Deposition at 94-96; Mojdehi Designation Declaration, Ex. 29. Similar to Willows Account, Mr. Close also ensured that Pause 1 was an entity in good standing with the Nevada Secretary of State. See Deters Deposition at 88-89. As with the PSACP-to-Erganian transfer, Deters performed no due diligence with respect to the note purchase, instead relying upon Erganian's representations that the note was guaranteed by "Kenny or one of his entities." Id. at 86.

The Paher claim, although transferred to Pause 1, was financed by Erganian. Erganian lent Pause 1 the funds to purchase the claim. Since the assignment, Carefree Holdings has paid monthly interest to Pause 1. See Deters Deposition at 91-92. Pause 1, in turn, pays the entirety of what it receives to Erganian as payment of principal and interest on the amount that it borrowed from Erganian to purchase the claim. Id. Indeed, Templeton originally "presented" the Paher claim to Erganian for purchase. See Erganian Deposition at 25; Deters Deposition at 91-92.

> is properly mandated in the bankruptcy context as well, because it is a material fact relevant to the voting process, for at least three reasons. First, it is material to creditors of the class in which claims were acquired, as only some of the claims might have been acquired, and not all claims might have received the same consideration. Second, it is material to the court's determination of whether the confirmation standards have been met, as claims acquired by an insider entity might no longer count toward acceptance for purposes of Section 1129(a)(10), and the process of acquisition may undermine the good faith requirements of Section 1129(a)(3). Third, it is material to other classes of creditors who might well challenge whether the claims acquisition amounts to de facto unfair discrimination.

133 B.R. at 830. In the present case, the court agrees that the fact of a claim acquisition by a statutory or non-statutory insider is material to creditors in this case as well as to the court's consideration of the confirmation standards in the Code.[60] The Applegate court went on to observe that when considering the disclosure statement:

> we need only ask whether a hypothetical reasonable investor in the position of the estate's creditors, i.e. ". . . typical of holders of claims or interests of the relevant class . . . ," would want to know that a related entity of the Debtor was acquiring claims in a potentially controlling class in order to dominate such class for voting purposes. See 11 U.S.C. § 1125(a)(1). The obvious answer is yes.

133 B.R. at 830 (emphasis added). This court agrees with that observation as well. Debtor cannot legitimately argue that a hypothetical reasonable investor could be expected to make an informed decision regarding Debtor's Plan without information regarding Debtor's creation and control over who owned and voted the $4.5 million intercompany account receivable held by Willows Account as well as the $150,000 claim held by Pause 1.

In light of the above factual inaccuracies and omissions, the court concludes that the Debtor Disclosure Statement is misleading. It portrays the class of unsecured creditors as unrelated when, in fact, that class was dominated and arguably controlled by Willows Account, a

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[60] The Applegate court also observed that "A court's legitimate concern under Section 1125 is assuring that hypothetical reasonable investors receive such information as will enable them to evaluate for themselves what impact the information might have on their claims and on the outcome of the case, and to decide for themselves what course of action to take." 133 B.R. at 831.

non-statutory insider to the Debtor,[61] and Pause 1, giving Debtor ultimate control over the outcome of its own plan and a blocking position on other plans. See Applegate, 133 B.R. at 831. The cumulative effect of the factual misstatements and omissions leads the court to conclude that the Debtor Disclosure Statement does not contain adequate information to permit interested parties to make an "informed judgement about the plan" as contemplated by Section 1125(a).

In addition to AG's other arguments, AG asserts that the Debtor Disclosure Statement materially misrepresents the value of the Property as Debtor believed it to be in November 2011. See AG Post Hearing Brief at 10. As of November 2011, Debtor's principal, Templeton, had received a verbal statement of value of $36.0 million from a real estate appraiser regarding the Property. Id. Debtor filed its Disclosure Statement on February 29, 2012. The verbal statement of value was formalized as a written property appraisal roughly 10 days later, in March 2012.[62] Thus, the evidence presented at the Confirmation Hearing reflects that Debtor was aware in November 2011 that the Property value exceeded the $30.0 million stated in its Disclosure Statement.[63]

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[61] This court found that Willows Account was a non-statutory insider of the Debtor as part of its analysis in granting AG's Designation Motion. See AG Designation Decision at 10-20.

[62] See AG Post Hearing Brief at 10-11; Disclosure of Expert Witnesses and Reports, Ex. C, Timothy R. Morse & Associates Summary Appraisal Report ("Morse Appraisal") and Ex. D, Anderson Valuation Group, LLC Appraisal Report ("Anderson Apprisal"). (ECF No. 639).

[63] The Debtor's interest rate and feasibility expert, Edward "Ted" Burr ("Burr"), relied upon the March 2012 appraisals to render his opinion on the appropriate cramdown interest rate and feasibility of the Debtor's Plan. See Declaration of Edward M. Burr, Jr., Regarding Applicable Interest Rate under Plan ("Burr Declaration") at 2 and Ex. A, Report of Edward M. Burr, Jr. ("Burr Report"). (ECF No. 746). Debtor relied on the March 2012 appraisals to argue that its post-petition cash collateral payments to AG must be credited against the principal of AG's claim because the Property is appreciating in value. See Reply to AG/ICC Willow Loan Owner's Objection to Confirmation of Debtor's Fourth Amended Plan of Reorganization ("Debtor's Reply to AG's Objection to Fourth Amended Plan") at 15 (ECF No. 750). Debtor argued that the Property value increase weighed against "AG's argument that the Debtor's Plan is not feasible." (Id. at 20). The Guarantors filed a "statement" naturally agreeing with the Debtor's position that the court was not bound by the $30 million Property value when considering "the best interests of creditors." Statement of Position As To Debtor's Proposed Plan of Reorganization and Opposition to AG/ICC's Plan of Reorganization ("Guarantor's

As more fully discussed below, the value of the Property is critical when considering the Plan, because the higher value may convert AG from having a partially secured claim to a fully secured claim under Section 506(a). There is a split of opinion regarding when to value property for purposes of determining if a creditor is secured or unsecured under Section 506 for purposes of confirmation and plan treatment. This court agrees with the courts that hold the proper date to value collateral for purposes of plan confirmation is the date of confirmation. See In re Brook View Apartments v. Republic Fed. Sav. And Loan Ass'n (In re Brook View Apartments), 24 F.3d 245, *2 (9th Cir. 1994) (table) ("[T]he proper date to value collateral for purposes of plan confirmation is the date of confirmation, not the date of the petition."). Accord, In re Heritage Highgate, Inc., 679 F.3d 132, 143 (3rd Cir. 2012); In re Benafel, 461 B.R. 581, 587 (B.A.P. 9th Cir. 2011); In re Abdelgadir, 455 B.R. 896, 902 (B.A.P. 9th Cir. 2011). Treating AG as fully secured dramatically changes the manner in which Debtor would be required to address AG's claim and the type and amount of payments that Debtor would be required to make.

The court agrees that the value attributed to AG's claim in the Debtor Disclosure Statement was understated. Significantly, the higher value may materially alter AG's claim from partially secured to fully secured; a change that would require an entirely different treatment from what was actually presented in the Debtor's Disclosure Statement and Plan. These additional factual inaccuracies and omissions buttress the court's conclusion that the Debtor Disclosure Statement is misleading and cannot be approved on a final basis.

Because Debtor has not complied with Section 1125, and the requirements for adequate disclosure, Debtor's First Amendment to Fourth Amended Plan is not confirmable under Section 1129(a)(2). Nevertheless, the court will review the remaining aspects of the Plan under Section 1129.

3. Section 1129(a)(3)— Proposal of a plan in good faith and not by any means forbidden by law.

Section 1129(a)(3) states that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) does not define good

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Support for Debtor's Plan") at 4. (ECF No. 708).

faith.[64] See Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074 (9th Cir. 2002), cert. denied, 538 U.S. 1035 (2003); Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC), 481 B.R. 51, 68 (B.A.P. 9th Cir. 2012). A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code. See Sylmar Plaza, 314 F.3d at 1074; Windmill Durango, 481 B.R. at 68. "Good faith" under Section 1129(a)(3) is determined on a case-by-case basis, taking into account the totality of the circumstances of the case. See Sylmar Plaza, 314 F.3d at 1074-75;[65] Windmill Durango, 481 B.R. at 68. A proposed Chapter 11 plan "must deal with creditors in a fundamentally fair manner." In re Marshall, 298 B.R. 670, 676 (Bankr. C.D. Cal. 2003).

AG argues that Debtor's bankruptcy was not filed in good faith both because it was filed as a litigation tactic immediately after AG's predecessor sought a receiver in state court and because Debtor created the intercompany receivable held by Willows Account solely for the purpose of manufacturing an impaired consenting class to confirm Debtor's Plan. See AG Post Hearing Brief at 15. AG additionally argues that Debtor's Plan was not proposed in good faith since Debtor has the ability to refinance the loan obligation and pay off AG, but has consistently attempted to put the Debtor or its insiders before creditors. See AG Objection to First Amendment to Fourth Amended Plan at 3; AG Objection to Confirmation at 8-9; AG Post Hearing Brief at 14-15.

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[64] A legal distinction exists "between the good faith that is a prerequisite to filing a Chapter 11 petition and the good faith that is required to confirm a plan of reorganization." Pac. First Bank v. Boulders on the River, Inc. (In re Boulders on the River, Inc.), 164 B.R. 99, 103 (B.A.P. 9th Cir. 1994); In re Stolrow's Inc., 84 B.R. 167, 171 (B.A.P. 9th Cir. 1988). Under Section 1112(b), a Chapter 11 petition may be dismissed for cause "if it appears that the petition was filed in bad faith." Id. at 170. "Bad faith exists if there is no realistic possibility of reorganization and the debtor seeks merely to delay or frustrate efforts of secured creditors." Boulders on the River, 164 B.R. at 103.

[65] In Sylmar Plaza, the Ninth Circuit rejected the use of per se rules in determining whether good faith exists and upheld a finding of good faith where the debtor invoked a provision of the Code preventing a creditor from receiving a higher default interest rate under a loan agreement. 314 F.3d at 1074–76. The Sylmar Plaza panel concluded that the debtor's filing for bankruptcy relief was consistent with the objectives and purposes of the Code, even though the case dealt primarily with a single creditor. Id.

In this circuit, an absence of good faith may be found where a debtor files a Chapter 11 petition solely as a litigation tactic. See, e.g., St. Paul Self Storage Ltd. P'ship v. Port Auth. (In re St. Paul Self Storage Ltd. P'Ship), 185 B.R. 580, 582-83 (B.A.P. 9th Cir. 1995); In re Erkins, 253 B.R. 470, 474-75 (Bankr. D. Idaho 2000).[66] In the present case, Debtor filed its bankruptcy petition shortly after Union Bank, AG's predecessor, sought to have a receiver appointed in state court. The timing of the Chapter 11 filing, in conjunction with the fact the Debtor in this SARE reorganization proceeding has very few creditors other than AG, suggests that this is primarily a two-party dispute that could have been resolved in state court. This circumstance indicates a lack of good faith. See St. Paul Self Storage, 185 B.R. at 582-83; Erkins, 253 B.R. at 474-75. Accord, In re LCGI Fairfield, LLC, 424 B.R. 846, 851 n.9 (Bankr. N.D. Cal. 2010), citing In re State Street Houses, Inc., 356 F.3d 1345, 1347 (11th Cir. 2004).

In addition to the timing of a bankruptcy filing, the creation of an impaired class in "an attempt to gerrymander a voting class of creditors is indicative of bad faith" for purposes of Section 1129(a)(3). See Windmill Durango, 481 B.R. at 68; Conn. Gen. Life Ins. Co. v. Hotel Assocs. of Tucson (In re Hotel Assocs. of Tucson), 165 B.R. 470, 475 (B.A.P. 9th Cir. 1994); Save Our Springs (S.O.S.) Alliance, Inc. v. WSI (II)-COS, LLC (In re Save Our Springs (S.O.S.) Alliance, Inc.), 632 F.3d 168, 174 (5th Cir. 2011) ("[D]ebtors cannot place claims into separate classes to gerrymander the vote-that is, to create an impaired class that will approve the plan."). In the present case, Debtor attempted to manufacture an impaired accepting class.

The sequence of events related to the creation of the intercompany receivable, the timing of its initial transfer to an external entity, the identity of the purchasers, and the relatively *de minimis* value given for the intercompany receivable by the various buyers in this case were highly dubious. What ultimately became the Willows Account claim started out as a series of

[66] Accord, Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th Cir. 1994); In re Brotby, 303 B.R. at 197-98. See also, In re 15375 Mem'l Corp. v. Bepco, L.P., 589 F.3d 605, 625 (3rd Cir. 2009); In re Cedar Shore Resort, Inc., 235 F.3d 375, 379 (8th Cir. 2000).

intercompany transfers from Carefree Holdings to the Debtor.[67] See Debtor Disclosure Statement, Section 14.4. The transactions were entered into the Debtor's general ledger and that of Carefree Holdings as an intercompany account. As noted previously, Union Bank, the then-holder of the Note and mortgage on the Property, filed suit in state court to enforce the Note and to appoint a receiver for the Property on September 17, 2010. On October 13, 2010, nine days prior to the Debtor's bankruptcy filing, Carefree Holdings assigned its rights to the intercompany account (then valued at $4,654,150.09) to PSACP[68] for the total amount of $5,000.00.[69]

PSACP filed Proof of Claim 3-1 regarding the intercompany receivable on November 16, 2010. Shortly thereafter, AG began investigating the PSACP claim. See Motion for Rule 2004 Examination filed January 7, 2011. (ECF No. 81). Not long after AG sought discovery regarding the creation and details of the intercompany receivable, Templeton arranged to transfer the intercompany receivable from Aurbach to Erganian, the principal of Willows Account, who also is a close personal friend of Templeton. See Notice of Transfer of Claim Other than for Security. (ECF No. 149).

Each step in this transaction chain was facilitated by Templeton personally, or through Templeton's chief financial officer ("CFO"), Mr. Close,[70] at Templeton's direction.[71]

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[67] The details of these transactions are discussed more fully in the AG Designation Decision and the AG Recharacterization Decision, as well as the personal, professional and financial ties between the principals of the Debtor, Carefree Holdings, PSACP, Willows Account, and related entities.

[68] PSACP was a newly-created entity controlled by Templeton's long-time friend, associate and attorney, Phillip Aurbach ("Aurbach").

[69] See Mojdehi Designation Declaration, Ex. 1, Deposition of Phillip Aurbach ("Aurbach Deposition"), taken April 26, 2011.

[70] Mr. Close drafted the transfer and assignment documents and facilitated the initial transfer from Carefree Holdings to PSACP, assisted PSACP in filing its proof of claim, directly assisted Erganian in acquiring the Claim from PSACP, and assisted Erganian by setting up and paying the filing fees for Willows Account. See Aurbach Deposition at 108-10; Mojdehi Designation Declaration, Ex. 7, Deposition of Kevin Close ("Close Deposition") at 158-59; Erganian Deposition at 214-216.

[71] See Aurbach Deposition at 108-10; Close Deposition at 158-59.

Templeton, through Mr. Close, hand-delivered the inter-company receivable first to Aurbach and then to Erganian. Aurbach and Erganian did not negotiate the sale of the intercompany receivable; they never communicated about the purchase/sale price for the intercompany receivable. See Aurbach Deposition at 108-10; Erganian Deposition at 195. Erganian admitted that he did no due diligence on the intercompany receivable purchase when he bought it from Aurbach. See Erganian Deposition at 197. "It was a very small investment for me, and I did no due diligence." Id. Neither Aurbach nor Erganian gave fair value for the intercompany receivable. Aurbach paid $5,000 for the $4.65 million intercompany receivable (one tenth of one percent of the face value of the intercompany receivable); Erganian paid $10,000 for the intercompany receivable (two tenths of one percent of the face value of the intercompany receivable). Based upon the timing of the transfers, the nominal purchase prices, and the close relationships between Templeton, Aurbach and Erganian, neither transfer appears to be an arm's-length transaction. Debtor had every expectation that PSACP and then Willows Account would vote in favor of the Debtor's Plan.

As noted previously,[72] the sequence of events leading up to the Pause 1 claim, and its possession by someone with close personal and professional allegiance to Templeton, was also highly dubious. Debtor had every expectation that Deters would vote in favor of the Debtor's Plan, as Deters was not only occupying office space in Templeton's building without a lease, but also paying no rent while doing so.

The combination of the timing of Debtor's bankruptcy filing, Debtor's efforts to create an impaired consenting class as well as putting those claims in the hands of persons likely to vote in favor of Debtor's Plan, and Mr. Templeton's contradictory and evasive testimony regarding his relationship with Erganian,[73] leads inexorably to the conclusion that the Debtor neither filed its

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[72] See notes 58 and 59, supra.

[73] Templeton testified under oath regarding the scope and nature of his relationship with Erganian; it was evasive and misleading. See Preliminary Injunction Decision at 26. Such lack of candor denotes bad faith dealing on the part of the Debtor and is injurious to bona fide creditors of the estate who are left without adequate disclosure as to the true nature of the claims against the Debtor.

bankruptcy petition nor its Plan in good faith. See Univ. Creek Plaza, Ltd. v. New York Life Ins. Co. (In re Univ. Creek Plaza Ltd.), 176 B.R. 1101, 1019 (Bankr. S.D. Fla. 1995). Debtor has not satisfied its burden under Section 1129(a)(3).[74]

4. Section 1129(a)(4)—Payments to professionals and others.

Section 1129(a)(4) requires that fees for those working on a debtor's case be submitted to the court and be approved as reasonable. Debtor's Plan includes these provisions and this section of the Code appears to be satisfied.[75]

5. Section 1129(a)(5)—Debtor's future officers and directors.

A Chapter 11 plan may not be confirmed if the continuation in management of the persons proposed to serve as officers or managers of debtor is not in the interests of creditors and public policy. See 11 U.S.C. § 1129(a)(5)(A)(ii). See, e.g., In re Beyond.com Corp., 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003). Continued service by prior management may be inconsistent with the interests of creditors and public policy if it "directly or indirectly perpetuates incompetence, lack of discretion, inexperience or affiliations with groups inimical to the best interests of the debtor." In re Linda Vista Cinemas, L.L.C., 442 B.R. 724, 735-36 (Bankr. D. Ariz. 2010), citing Beyond.com Corp., 289 B.R. at 145.

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[74] As mentioned at note 30, AG has objected to the separate classification of its deficiency claim. Ordinarily, a secured creditor's deficiency claim must be treated as a general unsecured claim. See discussion at 18-19, supra. Separate classification of unsecured claims generally is appropriate only if there is an economic or business justification. Id. at 18. Where classification is designed to gerrymander classes to obtain acceptance by an impaired class, the plan is not proposed in good faith. The court having otherwise determined that the Debtor has not proposed the Plan in good faith, it is not necessary to reach the classification objection raised by AG as to its deficiency claim.

[75] As of the Confirmation Hearing, only the Debtor's prior bankruptcy counsel sought and obtained court approval of its professional fees. See Order Granting First and Final Application for Compensation for Schwartzer & McPherson Law Firm, Attorneys for Debtor and Debtor-in-Possession. (ECF No. 357). Prior counsel sought and obtained permission to withdraw from further representation of the Debtor. See Order Granting Motion to Withdraw as Attorney of Record for Debtor and Debtor-in-Possession. (ECF No. 347). No interim applications for professional compensation have been filed by the Debtor's current bankruptcy counsel nor any other professionals employed by the Debtor in this proceeding.

Section 1129(a)(5)[76] compels a number of disclosures relating to the post confirmation management of the reorganized debtor. A leading treatise has observed that:

> Section 1129(a)(5)(A)(i) requires the plan proponent to disclose two attributes of post confirmation management: their identity; and their "affiliations." Identity is unambiguous . . .
>
> The required disclosure must be of the "director[s], officer[s], or voting trustee[s]." This leaves out analogous management for partnerships or limited liability companies, although some courts have extended the reach of this section to such noncorporate entities.

7 COLLIER ON BANKRUPTCY ¶ 1129.02[5][a], p. 1129-31 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.2009) (footnotes omitted).

According to Debtor's Plan as well as its Disclosure Statement, "[t]he Debtor shall be managed post-confirmation by Ken Templeton Realty & Investment, Inc., which shall receive a management fee of 6% of monthly collections." Fourth Amended Plan at 11; Debtor Disclosure Statement at 21. Debtor fails to provide further details about the Reorganized Debtor's post-petition management, but suggests in its proposed findings of fact and conclusions of law that this language complies with the requirements of Section 1129(a)(5):

> 12. The Debtor's Plan complies with the requirements of Section 1129(a)(5) of the Bankruptcy Code in that the Debtor has disclosed the identity, affiliation, and compensation of the individual(s) proposed to serve, after confirmation of the Debtor's Plan, as the manager(s) of the Reorganized Debtor under the Debtor's Plan and that the appointment to, or continuance in, such office of such

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[76] The statutory language is as follows:

> (A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
>
> (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

11 U.S.C. § 1129(a)(5).

> individual(s) is consistent with the interests of Creditors and Equity Security Holders and with public policy.

Debtor's Plan Confirmation Brief, Ex. A at 13, ¶ 12 (ECF No. 885). Thus, Debtor's Plan identified KTRI in response to Section 1129(a)(5)'s disclosure requirements.

This disclosure is inadequate. KTRI is an entity that operates the Property under a management agreement with Carefree Holdings. While the management agreement was signed by Templeton as the president of KTRI, see note 19, supra, nothing else is disclosed about the entity. KTRI itself is not a proposed officer, director, or voting trustee of the Debtor. KTRI's officers, directors, and principals are subject to change at any time and without notice. As the proponent of the Plan, Debtor simply fails to identify the specific individual(s) who the Debtor intends to serve as the reorganized Debtor's management.

Additionally, the Plan fails to disclose if any of the potential employees of the Reorganized Debtor are insiders and, if so, the nature of their compensation. See 11 U.S.C. § 1129(a)(5)(B). Thus, the court finds that Debtor's Plan is deficient with respect to the Section 1129(a)(5)(A) and (B) disclosure requirements.

6. Section 1129(a)(6)—Rate regulation.

Section 1129(a)(6) concerns rates charged by a debtor that would be subject to governmental regulation. This provision is not applicable to the Debtor.

7. Section 1129(a)(7)—Best interests of creditors.

Under Section 1129(a)(7), creditors with impaired claims must either accept the proposed Plan or receive as much from the Plan as they would under liquidation. See 11 U.S.C. § 1129(a)(7)(A). The Debtor's Plan includes three impaired classes: Classes 1, 3, and 4. See Fourth Amended Plan, Sections 3.2 and 4 at 5-6.

Class 3, AG's secured claim regarding the thirty-two-passenger bus, will be paid in forty-eight equal monthly installments, starting on the first day of the first month following the Effective Date, and will bear interest at the rate of 6% per annum. See Fourth Amended Plan, Section 4.3 at 7. In a liquidation, the bus would be sold and the proceeds of sale remitted up to the amount of the claim, or, the bus would be abandoned to AG. Debtor asserts that this claim is

fully secured; AG does not question Debtor's valuation. Accordingly, the court finds that Class 3 will receive as much under the proposed Plan as it would under liquidation.

Class 4, general unsecured creditors, will be paid less than 100% of their claims. Members of Class 4 could choose to receive either 95% of their allowed claims on the Effective Date of the Plan or up to a maximum of 14% of their claim over time.[77] Class 4 voted unanimously to accept the Plan. In a liquidation, the holders of unsecured claims in Class 4 would receive nothing because the Debtor's assets are fully encumbered. Under these circumstances, payment of at least 14% of the claim amounts would exceed the amount the claimants would receive in a liquidation.

Class 1, AG's secured claim on the Property, is valued at $30 million in the Plan,[78] less the post-petition payments made by Debtor. See First Amendment to Fourth Amended Plan, Section 4.1(A). AG will be paid approximately $5,787,823.00 on the effective date. Id. at Section 4.1(C). The remaining part of AG's Claim will bear interest at 3.75% and be paid

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[77] Debtor's proposed Plan describes the election as follows:

> Class 4 creditors may elect either one of the following alternative treatments:
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> > Alternative One: Allowed Unsecured Claims electing this alternative shall be paid 95% of their Allowed Claims, without interest, on the Effective Date.
> >
> > Alternative Two: allowed Unsecured Claims electing this alternative shall be paid 5.37% of their allowed claim on the Effective Date, and shall receive 50% of the net proceeds above the amount of $35,000,000.00 derived from any sale or refinance of the Property under the terms of this Plan up to a maximum amount of 14% of the Allowed Claim of such creditor.

See Fourth Amended Plan, Section 4.4 at 7.

[78] See First Amendment to Fourth Amended Plan at Section 4.1(A). Although this amount is consistent with the Valuation Order, it is inconsistent with the November 2011 and March 2012 appraisals that Debtor and the Guarantors received prior to the Confirmation Hearing. The appraisals valued the property at $36-36.2 million, significantly above the amount set forth in the Valuation Order.

monthly on a 30-year amortization with a balloon payment being made on or before the 39th month following the effective date. See First Amendment to Fourth Amended Plan, Sections 4.1(C) and 4.1(D).

AG attacks the Debtor's Plan regarding the secured claim on the Property from several different directions. AG objects to the amount that it will receive under the Plan if the court uses the $30 million Property value established in the Valuation Order. AG initially objects to the Debtor's proposed reduction of AG's claim by the amount of post-petition payments made by Debtor during the pendency of the case. AG argues that:

> the Debtor's Plan would still fail the best interests of the creditors test because it improperly credits the Debtor's post-petition cash collateral payments to reduce the secured portion of AG's claim, thereby causing AG to recover less than even the $30 million value in a hypothetical liquidation.

AG Post Hearing Brief at 16.[79]

In the Ninth Circuit, if an undersecured creditor is secured by income-producing property and its lien extends to the rents or other income generated by the property, then the amount of the secured claim determined pursuant to Section 506(a) includes both the value of the real property and the amount of the accumulated cash collateral. See Ambanc La Mesa,115 F.3d at 654; In re Arden Properties, Inc., 248 B.R. 164, 168 (Bankr. D. Ariz. 2000). "[W]hen rents that are collateral are paid to the [secured] creditor during the case, the effect on the amount of the undersecured claim is a 'wash.'" Arden Properties, 248 B.R. at 170, citing In re Paradise

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[79] Debtor initially relied upon In re Weinstein, 227 B.R. 284, 297 n. 15 (B.A.P. 9th Cir. 1998) for the proposition that where there is no depreciation in real property collateral, there is no entitlement to adequate protection payments, and any post-petition payments made are to be credited against AG's secured claim. See Debtor's Reply to AG Objection to Confirmation of Fourth Amended Plan of Reorganization ("Reply to AG Objection to Fourth Amended Plan") at p. 16. (ECF No. 750). Weinstein is inapposite to this proceeding. The court in Weinstein noted that the rent payments in that case were "not rent or other cash collateral." 227 B.R. at 297 n. 15. The court then found that the rent payments "are payments on the Bank's Lien." (Id.) In this case, AG has a security interest in the rents and other cash collateral. As such, the Weinstein analysis is not applicable and the post-petition payments to AG do not constitute payments on AG's lien. Debtor later argued that the post-petition payments should be credited against AG's unsecured deficiency claim. See Debtor's Plan Confirmation Brief at 9 n. 1. As more fully explained below, the court disagrees with the Debtor's position.

Springs Assoc., 165 B.R. 913, 926 (Bankr. D. Ariz. 1993). Thus, the lender's secured claim is not reduced by the rents received from the debtor.

Contrary to both the procedure set forth in Debtor's Plan[80] and to the position initially espoused by Debtor - that the post-petition payments should reduce AG's secured claim-[81] Debtor currently argues that the above-quoted "wash" language used by the court in Arden Properties stands for the proposition that AG's secured claim is unaltered, but that AG's unsecured deficiency claim is reduced. See Debtor's Plan Confirmation Brief at 9 n.1. The court disagrees. Neither of AG's claims is reduced by Debtor's post-petition payments.

The court in Arden Properties rejected the same argument, explaining the so-called "wash" concept as follows:

> a deduction from the principal amount of the undersecured claim would be appropriate if the adequate protection payments had derived from some source that was not the creditor's collateral. See, e.g., In re Wabash Valley Power Ass'n, Inc., 72 F.3d 1305, 1322 (7th Cir.1995), cert. denied, 519 U.S. 965, 117 S.Ct. 389, 136 L.Ed.2d 305 (1996). But when the payments derived from rents that were the creditor's collateral, the debtor is in effect receiving that credit. Under the rule of Ambanc, the secured creditor's secured claim includes the value of the real property "plus the net amount of rents collected post-petition," not just those remaining on hand at confirmation. That means that National's secured claim should also be increased by the $5,300 of additional net rents collected during each of the 17 months from the date of the cash collateral order until the Confirmation Order, for an additional $90,100. But since those funds have already been paid to National, the Debtor is given an offsetting credit in that amount.

248 B.R. at 169-170 (emphasis added). Thus, if the secured creditor has a security interest in rents and cash collateral, then the allowed amount of the secured claim is both increased by the amount of rent collected by the debtor and then reduced by the amounts paid to the secured creditor. Therefore, if AG did not have a security interest in Debtor's rents and other cash collateral, then Debtor's post-petition payments would properly be deducted from AG's secured

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[80] See First Amendment to Fourth Amended Plan at Section 4.1(A).

[81] See Debtor's Reply to AG Objection to Fourth Amended Plan at 16.

claim. See Weinstein, 227 B.R. at 297 n. 15; Arden Properties, 248 B.R. at 169. In this case, however, AG has a security interest in the Debtor's rents and cash collateral and Debtor's post-petition payments are deemed a "wash," meaning they neither increase nor decrease AG's allowed secured claim.

To the extent the Debtor's proposed plan treatment sets the amount of AG's secured claim as $30 million "less all post-petition payments made by the Debtor to the extent allowed by the Bankruptcy Court . . .," see First Amendment to Fourth Amended Plan, Section 4.1(A) (emphasis added), the court cannot allow the proposed reduction for the reasons discussed above.

More important, AG argues that the Plan "provides AG will [sic] substantially less recovery than it would receive in a liquidation scenario, even discounting the $36-36.24 million value of the Property."[82] AG Post Hearing Brief at 16. AG appears to be correct. Debtor's Plan proposes to pay AG roughly $33 million.[83] See First Amendment to Fourth Amended Plan, Sections 4.1, 4.2 and 7.2. In a Chapter 7 liquidation, AG would not be subject to the Valuation Order, and its allowed secured claim would be based on a valuation that may well exceed $33 million according to the very evidence that the Debtor wants considered for interest and feasibility purposes, but not for valuation of the Property. Upon this evidentiary record, it therefore appears that AG would receive under the proposed Plan a value less than the amount it would receive in a Chapter 7 liquidation.

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[82] AG likewise argues that the best interest test requires application of the Loan subordination agreement under Section 510 and disallowance under Section 502(d). See AG Post Hearing Brief at 16. As previously noted, this argument is of no consequence since the Willows Account claim has been treated as equity and Willows Account would receive no distribution under the Debtor's Plan.

[83] This amount includes both AG's Secured Claim of $30 million, less $5,787,823.00 cash on the effective date, plus 3.75% interest on the remaining amount as a balloon payment, and AG's unsecured Claim of roughly $2.7 million. See First Amendment to Fourth Amended Plan, Sections 4.1, 4.2 and 7.2. These amounts fail to recognize the increased value of the Property in the later appraisals. These amounts likewise fail to account for AG's Section 506(b) entitlement to attorney fees, costs, and contract interest which might arise from being fully secured. 11 U.S.C. § 506(b). See AG Omnibus Reply at 26-27.

Under these circumstances, the court concludes that Debtor's proposed Plan does not comply with Section 1129(a)(7), regardless of which Property valuation the court employs in its analysis, and may not be confirmed on that basis.

8. Section 1129(a)(8)—Class Acceptance.

Under Section 1129(a)(8), for a plan to be confirmed, each class of claims or interests must either be unimpaired by the proposed plan, or it must accept the treatment proposed by the plan. AG voted both its Class 1 and its Class 3 claims against confirmation of Debtor's Plan. Accordingly, Section 1129(a)(8) has not been met in this case. However, a plan may be confirmed even where Section 1129(a)(8) is not met 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." 11 U.S.C. § 1129(b)(1). The court more fully discusses whether the Debtor's plan is "fair and equitable" under Section 1129(b)(1) below.

9. Section 1129(a)(9)—Administrative Claims.

"Section 1129(a)(9)(A) requires that holders of administrative claims and gap claims be paid 'cash equal to the allowed amount of such claim' on the 'effective date of the plan[.]'" 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[9][a] at p. 1129-43. The Plan pays all administrative claims arising under Section 507(a)(1) in full on the effective date of the Plan, unless the claimant has elected some alternative treatment. See Fourth Amended Plan, Section 5.1 at 9. Accordingly, the court finds that Section 1129(a)(9) has been satisfied.[84]

10. Section 1129(a)(10)—Acceptance by at Least One Impaired Class.

If a class of claims is impaired under the plan, at least one class of impaired claims, excluding insider claims, must accept the plan. 11 U.S.C. § 1129(a)(10). The general unsecured creditor class, Class 4, is impaired and has unanimously accepted the Debtor's Plan.

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[84] To the extent that AG has a deficiency claim at all, and that its deficiency claim, if any, must be treated as a general unsecured claim, the amount of such deficiency claim may well dwarf all of the Debtor's other unsecured claim. As a result, a rejecting vote of any such deficiency claim by AG could prevent acceptance by Class 4. See 11 U.S.C. §1126(c) [a majority of ballots cast and two-thirds in dollar amount of ballots cast determines class acceptance].

Accordingly, Section 1129(a)(10) has been satisfied.

11. Section 1129(a)(11)—Feasibility.

Section 1129(a)(11) requires that confirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. See Sherman v. Harbin (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007); Windmill Durango, 481 B.R. at 67. Feasibility is a factual determination based on "whether the things which are to be done after confirmation can be done as a practical matter under the facts." In re Jorgensen, 66 B.R. 104, 108 (B.A.P. 9th Cir. 1986), citing In re Clarkson, 767 F.2d 417 (8th Cir. 1985). See also Ambanc La Mesa, 115 F.3d at 657.

Debtors bear the burden of establishing the feasibility of their plans by a preponderance of the evidence. See In re Indian Nat'l Finals Rodeo, 453 B.R. 387, 402 (Bankr. D. Mont. 2011); Danny Thomas Prop. II Ltd. P'ship v. Bank (In re Danny Thomas Prop. II Ltd. P'ship), 241 F.3d 959, 963 (8th Cir. 2001); see also In re Young Broadcasting Inc.,430 B.R. 99, 128 (Bankr. S.D. N.Y. 2010). The court has a duty under Section 1129(a)(11) to protect creditors against "visionary schemes." Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985); Windmill Durango, 481 B.R. at 67.[85]

While a reorganization plan's success need not be guaranteed, a court cannot confirm a plan unless it has at least a reasonable chance of success. See Danny Thomas Prop., 241 F.3d at 963; Acequia, Inc., 787 F.2d at 1364; Brotby, 303 B.R. at 191-92.[86] "Some possibility of liquidation or further reorganization is acceptable and often unavoidable." DBSD, 634 F.3d at 106-107.

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[85] See also, Loop 76, 465 B.R. at 544; In re Las Vegas Monorail, 462 B.R. 795, 801 (Bankr. D. Nev. 2011); Linda Vista Cinemas, 442 B.R. at 737.

[86] See also DBSD, 634 F.3d at 106-7; United States v. Haas (In re Haas), 162 F.3d 1087, 1090 (11th Cir. 1998); Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship), 116 F.3d 790, 801 (5th Cir. 1997).

To establish the feasibility of a plan, the debtor must present proof through reasonable projections that there will be sufficient cash flow to fund the plan. Such projections cannot be speculative, conjectural or unrealistic. See In re Save Our Springs (S.O.S.) Alliance, Inc., 632 F.3d at 173 & n.5. A plan proponent, however, need only demonstrate that there exists a reasonable probability that the plan provisions can be performed. See T-H New Orleans, 116 F.3d at 801, citing Landing Assocs., 157 B.R. at 820. "[J]ust as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility." In re Cajun Elec. Power Co-Op., Inc., 230 B.R. 715, 745 (Bankr. M.D. La. 1999). The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required. Id. See also In re U.S. Truck Co., Inc., 47 B.R. 932, 944 (E.D. Mich. 1985), aff'd, 800 F.2d 581 (6th Cir. 1986).

This court previously has observed that reorganization plans:

> need not completely amortize reorganization debt to be confirmed. But if refinancing is anticipated, the plan proponent has to produce some credible evidence about the likelihood of that refinancing. "[S]ection 1129(a)(11) requires the plan proponent to show concrete evidence of a sufficient 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) (quoting In re SM 104 Ltd., 160 B.R. 202, 234 (Bankr. S.D. Fla. 1993)). Against this background, courts have refused to confirm plans whose feasibility turned on future sales of property, or future refinancings, absent an adequate showing that such sales or refinancings would be likely to occur.

Las Vegas Monorail, 462 B.R. at 800. See In re Vanderveer Estates Holding, LLC, 293 B.R. 560 (Bankr. E.D. N.Y. 2003). Thus, Debtor has the burden of showing that the proposed refinancing would be likely to occur.

The likelihood of future financing can be demonstrated by other evidence in certain circumstances. See In re Seasons Partners, LLC, 439 B.R. 505, 515 (Bankr. D. Ariz. 2010); In re Made in Detroit, Inc., 299 B.R. 170, 179–80 (Bankr. E.D. Mich. 2003), aff'd, 414 F.3d 576 (6th Cir. 2005) (plan not confirmed when proponent made inadequate showing of ability to obtain financing); In re Journal Register Co., 407 B.R. 520, 539-40 (Bankr. S.D.N.Y. 2009) (confirmed plan that included an exit financing commitment letter plus solid financial projections showing

that even under the worst case scenario debtor would satisfy its financial obligations).

Bankruptcy courts consider several factors when evaluating whether a particular plan is feasible, including: (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 matters that determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. See Linda Vista Cinemas, 442 B.R. at 738; Las Vegas Monorail, 462 B.R. at 802. See also 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[11] at p. 1129-52.

Consideration of these factors indicates that the Debtor's proposed Plan is not feasible within the meaning of Section 1129(a)(11).

a. Capital structure.

The court finds it likely that the reorganized debtor would be able to obtain the capital it needs for operations going forward. Although the Debtor does not have earnings power beyond its tenant rent revenues, the evidence reflects that rent revenues are increasing annually and the Debtor likely could obtain operating capital if it needs to do so during the thirty-nine month Plan.

b. Earnings power of the business.

The court finds it likely that the Reorganized Debtor would have sufficient earnings power to be able to continue operating. As noted above, the Reorganized Debtor does not have earnings power beyond its tenant rent revenues. However, as stated above, the rental revenues are increasing annually and the rent concessions are simultaneously decreasing.

c. Economic conditions.

Economic conditions within the region are slowly recovering, but have not fully rebounded. Conditions are better than when the Debtor's case was originally filed, but are not yet back to pre-correction levels. The court views this element as neutral, neither aiding nor inhibiting the Debtor's chances of reorganization.

d. Ability of management.

Continued management by the debtor's principal after confirmation may take into

account evidence of the principal's performance prior to confirmation. The court in Linda Vista Cinemas observed:

> As for future management concerns, this proof is also critical in evaluating the feasibility of a reorganization plan. See, e.g., In re Gulph Woods Corp., 84 B.R. 961, 974 (Bankr. E.D. Pa. 1988); In re Rusty Jones, Inc., 110 B.R. 362, 367, 372, 375 (Bankr. N.D. Ill. 1990) (finding Chapter 11 plan not to be feasible, in part, because "there can be no assurance of proper management in the future" due to management's lack of experience in the debtor's business and their prior bad acts).

442 B.R. at 738. Accord In re Bashas' Inc., 437 B.R. 874, 916 (Bankr. D. Ariz. 2010) (proof of future management capabilities is critical in evaluating the feasibility of a reorganization plan). It is unclear who will manage the Debtor if its proposed Plan is confirmed. As previously discussed, Debtor's Plan and post-confirmation brief state only that:

> [t]he Debtor shall be managed post-confirmation by Ken Templeton Realty & Investment, Inc., which shall receive a management fee of 6% of monthly collections."

Fourth Amended Plan, Section 7.7; Debtor Disclosure Statement at p. 21. Debtor's failure to specifically identify who will manage the Reorganized Debtor makes gauging this critical element of feasibility impossible. Templeton signed the management agreement as president of KTRI. As a legal fiction, KTRI functions only through its officers, directors, and employees, any of whom are subject to change at any time and without notice. As neither the Plan nor the Disclosure Statement identifies the individuals who will manage KTRI, the court is unable to gauge the abilities of the Debtor's management.

e. Continuation of the same management.

The court will not speculate who is going to manage the Debtor. For the reasons discussed above, Debtor's failure to identify specifically who will manage the Debtor makes gauging this element of feasibility impossible.

f. Prospects of successful operations to enable performance of the provisions of the plan.

Debtor's Plan now proposes refinancing the AG Secured Claim balloon debt as its sole

method of paying this claim.[87] "[I]f refinancing is anticipated, the plan proponent has to produce some credible evidence about the likelihood of that refinancing." Las Vegas Monorail, 462 B.R. at 800. AG argues that Debtor's Plan is not feasible[88] because Debtor will not be able to refinance the Property until after the Guaranty Suit in state court has been resolved. See AG Omnibus Reply at 20-21; AG Post Hearing Brief, Ex. A, Proposed Findings of Fact and Conclusions of Law, ¶¶ 81-90, at 19-21. AG asserts that:

> Debtor has affirmatively admitted that the plan is not feasible. The testimony of Close and Templeton established that the feasibility of the Debtor's plan turns on the outcome of the Guaranty Suit. And, the Debtor failed to make an adequate showing of the Guarantors' likelihood of success in that litigation. Third, there has been no substantive change in circumstance since the injunction proceeding wherein the Debtor categorically represented that it could not reorganize in the absence of an injunction against the Guaranty Suit, particularly where enforcement would create a "domino effect." [See ECF No. 887, Ex. A, p. 19, ¶¶ 81-84.]

AG Omnibus Reply at 20-21 (case and record citations omitted). The Debtor apparently agrees that without the Guarantors, it is incapable of refinancing the Property:

> The Debtor and Guarantors have tried repeatedly and unsuccessfully to obtain new financing, all the way up to the eve of this confirmation hearing. Without the Guarantors, the Debtor has no ability to refinance. It is only with the assistance of Carefree Holdings (which has 150 owners), and Ken Templeton, together with his affiliates, that a refinance could even be considered.

Debtor's Reply to AG's Objection to Debtor's Fourth Amended Plan of Reorganization at 10. (emphasis added). Both Mr. Close and Templeton testified at the Confirmation Hearing that the Property could not be refinanced as long as the Guaranty Suit is pending. The Guaranty Suit is, as far as the court is aware, still pending.

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[87] Earlier versions of the plan included sale as a possible method of paying AG's Secured Claim. See Fourth Amended Plan of Reorganization, Section 7.3.

[88] AG argues that Debtor cannot meet its debt burden when an appropriate interest rate is applied to AG's debt. See AG Confirmation Opposition at 16-17. Because the court agrees that Debtor is unlikely to secure financing to refinance AG's debt as long as the Guaranty Suit is pending, the court finds it likely that the Debtor will default on the balloon payment regarding AG's secured obligation regardless of the interest rate applied to AG's secured claim. See, e.g., DBSD, 634 F.3d at 106-108.

A bankruptcy court is required to evaluate the possible effect of ongoing civil litigation on the feasibility of a proposed plan. See Harbin, 486 F.3d at 519. "A plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely." In re American Capital Equip., LLC, 688 F.3d 145, 156 (3d Cir. 2012); see also, In re Jensen, 425 B.R. 105, 110 (Bankr. S.D. N.Y. 2010); In re Ewald, 298 B.R. 76 (Bankr. E.D. Va. 2002) (plan dependent on an uncertain litigation outcome cannot be confirmed because it is not feasible). Given Debtor's prior legal arguments and the testimony at the Confirmation Hearing regarding the pendency of the state court Guaranty Suit and its negative effect on Debtor's ability to refinance the Property to pay AG claim, the court finds that speculation on this front renders Debtor's Plan not feasible, independent of the other factors being evaluated.

Even if the Guaranty Suit were not an issue, the court questions Debtor's ability to refinance the Property at the end of the Plan period. When a court is dealing with an intermediate time frame, the level of proof required from a debtor will be less than that necessary to show it can operate the property during the next two years, but more than that when trying to extrapolate to financing twenty-years into the future. See DBSD, 634 F.3d at 106-108. The level of proof required will be somewhere in the middle. In this context, the court concludes that the Debtor would be unlikely to avoid a further reorganization or liquidation after thirty-nine months.

Debtor failed to present persuasive evidence that it can refinance the Property when the balloon payment comes due at the end of the thirty-nine month Plan period. Debtor's expert, Mr. Burr, noted that

> [w]hile we have not been provided financial statements or other information to indicate the net worth of the Contributing Entities or the nature of their assets, Debtor's counsel has assured us that the Contributing Entities have the resources to pay the amount outlined in the Plan.

Burr Report at 17. Thus, Mr. Burr is not in the position to opine that either Debtor's principals or the Contributing Entities have the resources to individually fund the amounts necessary to refinance the Property and complete the Plan. The evidence of record at the Confirmation

Hearing potentially reflects the opposite.

According to Mr. Burr, the Property has a current loan-to-value ratio of 83.6%, assuming a value of $36.2 million. See Burr Report at 4. After 39 months, Mr. Burr asserts that the Property will still have a loan-to-value ratio of 63.5% (remaining loan amount of approximately $22,938,000), assuming a value of $36.2 million and a 3.75% interest rate. Even so, Mr. Burr believes that he could "find a loan for [the Property]," in the current inefficient market.

The Property's loan-to-value ratios are substantially different from Mr. Burr's estimates if the original $30 million value is used. If that amount is used, then the current loan-to-value rate for AG's Secured Claim is 100%, which is reduced to only 77% (remaining loan amount of approximately $22,938,000), using a 3.75% interest rate at the end of the thirty-nine month Plan period.[89]

Mr. Burr attested that "it was likely that the Debtor would be able to repay the loan on the maturity date." Burr Declaration at 2. Mr. Burr's Report echos this sentiment, stating:

> Debtor will be able to meet the payments proposed in the Plan and pay off the AG Loan in full at Maturity. Therefore it is my opinion that the Plan is feasible, has a high probability of success, and the Debtor is unlikely to have further need of financial reorganization.

Burr Report at 10-11. Burr's Report and Declaration were both prepared regarding Debtor's Fourth Amended Plan of Reorganization, the terms of which were substantially changed just prior to the Confirmation Hearing by the First Amendment to the Fourth Amended Plan of Reorganization. In his testimony at the Confirmation Hearing, Mr. Burr's opinion had shifted from "likely that the Debtor would be able to repay the loan on the maturity date"[90] and "a high probability of success, and the Debtor is unlikely to have further need of financial reorganization"[91] to testifying that "I could call on, you know, numerous people. I could probably find a loan for it . . . . There will be a handful of people." Ultimately, Mr. Burr believed that he could "find a loan for [the Property]" at a loan-to-value ratio of more than 60%,

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[89] The loan-to-value ratio increases to 78% if an interest rate of 4.25% is used.

[90] Burr Declaration at 2.

[91] Burr Report at 10-11.

but that the market was not efficient. Mr. Burr did not identify anyone that he would target for such a loan or whom he believed would be interested in refinancing the Property at the end of the thirty-nine month Plan period.

Based upon all of the factors discussed above, the court finds that Debtor has failed to prove that its Plan is feasible. Debtor failed to identify who will manage the Reorganized Debtor, and failed to present persuasive evidence that the state court Guaranty Suit will both be concluded and be concluded in favor of the Debtor's Guarantors so that the Guarantors can independently refinance or backstop refinancing of the Property. Additionally, Debtor failed to present persuasive evidence that it can refinance the Property at the end of the Plan period, independent of the Guarantors. Given that Debtor's Plan requires the Property be refinanced as its sole method of paying the balance of the AG secured claim, the Debtor has not met its burden of proving that its proposed Plan is feasible.

12. Section 1129(a)(12)—Fees.

All required court and U.S. Trustee fees have been paid and are current. Thus, Section 1129(a)(12) has been satisfied.

13. Sections 1129(a)(13) through (16)—Retirement Benefits, Domestic Support Obligations; Individual Chapter 11; Transfers.

These provisions do not apply in this case.

B. The Requirements Under Section 1129(b).

If all impaired classes do not accept a proposed Chapter 11 plan in compliance with Section 1129(a)(8), the plan proponent can still seek confirmation as long as all other requirements of Section 1129(a), including Section 1129(a)(10), have been met. Cramdown over the objection of dissenting classes of creditors is permissible only if the plan "does not discriminate unfairly" and is "fair and equitable" with respect to its treatment of each dissenting class.

1. Cramdown of Dissenting Secured Claims.

A plan is "fair and equitable" under Section 1129(b)(1) with respect to a class of secured claims if the plan provides:

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each 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;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A)(i) - (iii). Debtor's Plan purports to employ the first alternative means of fair and equitable treatment, making deferred cash payments equal to the present value at the effective date.[92]

Notwithstanding the Property value used, AG argues, and the court agrees, that Debtor's plan is not fair and equitable because it converts short-term construction financing into permanent financing and simultaneously shifts the risk of loss to AG.[93] See AG Confirmation Objection at 19. The original ten-year Plan duration has been shortened under the First Amendment to Fourth Amended Plan to thirty-nine months, which would, ordinarily, be viewed as potentially reducing the risk of the Plan based upon its duration. See Burr Report at 16. In this case, however, risk reduction is based on the prospect of the Debtor refinancing the Property after an initial principal reduction. As discussed above, the parties are in agreement that the Debtor's ability to refinance the Property is negated as long as the Guaranty Suit is pending in

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[92] The proper date to value collateral for purposes of plan confirmation is the date of confirmation. See discussion at 28, supra.

[93] AG initially argued that Debtor's Plan "is acutely inequitable when the Debtor is capable of refinancing the Property now and instead simply prefers to refinance it 10 years from now at the sole expense of AG." AG Confirmation Objection at 19. AG also argued that the Plan was not feasible because Debtor cannot refinance the loan at the end of the thirty-nine month plan period. It is not clear how the Property is capable of being refinanced now, but not capable of being refinanced thirty-nine months from now when the principal balance of AG's claim will have been reduced.

state court. The Guaranty Suit is still pending and the court will not speculate as to when it may be resolved.[94]

AG additionally attacks the amounts proposed by Debtor on the basis that the total amount paid will not provide AG with the present value of its claim. See AG Confirmation Objection at 16-17; AG Objection to First Amendment to Fourth Amended Plan at 10-11. Debtor argues that there is no efficient market for a loan similar to that proposed by the Debtor in the Plan, so Debtor proposes a Till-based[95] interest rate of 3.75% for the Plan, comprised of the Prime Rate (3.25%) and a risk premium of 0.50%.[96] See Burr Report at 7-10. AG argues both that there is an efficient market for the loan proposed in the Plan, and that even if there is no efficient market, Debtor's proposed 3.75% interest rate is inadequate compensation to comply with Section 1129(b)(2)(A)(i)(II). See AG Confirmation Objection at 16-17; AG Objection to First Amendment to Fourth Amended Plan at 10-11.

In Till, a Chapter 13 case, the Supreme Court established a "prime plus" approach to setting interest rates to determine the present value of secured claims. Using this approach, the court would take the prime rate and adjust for risk, based on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The creditor has the burden of proving that a higher interest rate than prime is appropriate. See Till, 541 U.S. at 484–85, 124 S.Ct. at 1964. The bankruptcy appellate panel for this circuit has

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[94] Of course, nothing prevents the Guarantors from negotiating with AG to minimize the effect of the Guaranty Suit on the Guarantor's efforts to refinance.

[95] Till v. SCS Credit Corp., 541 U.S. 465, 474, 124 S.Ct. 1951 (2004).

[96] The evidence introduced at the Confirmation Hearing established that, currently, there is no efficient marketplace in the Las Vegas region for loans similar to that sought by the Debtor in this case. Lenders are not lending to borrowers like the Debtor due to its bankruptcy status and loan-to-value ratio. Thus, pursuant to Till, 541 U.S. at 474, and consistent with other Ninth Circuit decisions such as Farm Credit Bank of Spokane v. Fowler (In Re Fowler), 903 F.2d 694, 697-99 (9th Cir. 1990) and United States v. Camino Real Landscape Maint. Contractors, Inc. (In re Camino Real Landscape Maint. Contractors, Inc.), 818 F.2d 1503, 1508 (9th Cir. 1987), where there is no efficient marketplace to establish the interest rate in a cramdown, the court will use the current Prime Rate and add basis points to the extent that the loan is determined to be risky, and in a number sufficient to compensate for the unusual risk.

observed that courts should use the market rate if there is an "efficient market" but if there is no such market, the Till rate should be applied. See VDG Chicken, 2011 WL at *8. Most courts have held that an "efficient market" for financing exists in Chapter 11 only if the market offers a loan under the terms, conditions and circumstances comparable to the forced loan contemplated by the proposed plan. See In re 20 Bayard Views, LLC, 445 B.R. 83, 110-11 (Bankr. E.D. N.Y. 2011); SW Boston Hotel Venture, 460 B.R. at 55. Courts typically conclude that an efficient market is absent in a Chapter 11 case.[97]

AG's expert suggests that there is an efficient market for similar properties and that a market-based interest rate is appropriate to use in this case. See Declaration of Grant Lyon ("Lyon Declaration), Ex. A , Interest Rate & Ability to Refinance Analysis of Grant Lyon ("Lyon Report") at 10. (ECF No. 768). In that regard, AG points to the Burr Report which discusses Greystone Financial Group, one of Fannie Mae's 23 Designated Underwriter and Servicers ("DUS") for multifamily loans. See Burr Report at 18-19. AG asserts that "[t]he fact that there are 23 DUSs competing for multi-family loans is perhaps the best indicator there is an efficient market for multi-family loans between 65% and 80%."[98] AG's interest rate expert, Mr. Lyon, used two methodologies to calculate an appropriate interest rate for AG's Secured Claim. The market approach calculated a blended interest rate for the AG Secured Claim based upon the rate of return requirements for senior debt, mezzanine debt, and equity. See Lyon Report at 4,14-17.

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[97] See, e.g., In re Nw. Timberline Enters., 348 B.R. 412, 432, 435 (Bankr. N.D. Tex. 2006)(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, 793 (Bankr. D. S.C. 2012)(same); In re Walkabout Creek Ltd. Dividend Hous. Ass'n Ltd., 460 B.R. 567, 574 (Bankr. D. D.C. 2011)(same); In re 20 Bayard Views, LLC, 445 B.R. 83 (Bankr. E.D. N.Y. 2011)(same); SW Boston Hotel, 460 B.R. at 55 (same); In re Hockenberry, 457 B.R. 646, 657 (Bankr. S.D. Ohio 2011)(same); In re Riverbend Leasing LLC, 458 B.R. 520, 536 (Bankr. S.D. Iowa 2011)(same); In re Bryant, 439 B.R.724, 742–43 (Bankr. E.D. Ark. 2010)(same).

[98] See Lyon Declaration, Ex. B, Interest Rate & Ability to Refinance Supplemental Analysis, ("Lyon Supplemental Report") at 7.

Debtor's expert disagreed, suggesting that a "handful of people" willing to lend at "ridiculously high rates" would not establish an efficient market. Mr. Burr testified that an efficient lending market must have numerous participants competing with each other. He reiterated his conclusion that the current real estate market is not efficient. See Burr Report at 13. Conversely, Mr. Burr supported a market rate, to the extent that one is used, of something less than 4.0%. He indicated that:

> [t]he average rate for the above recently-completed transactions is 4.04%, which is within the range of rates for 10 year multifamily loans based on the Greystone DUS term sheet. If these rates represent an average "market" rate, under the theory that a cram-down rate should be below what is available in the market for new loans, a rate somewhat lower than 4% would be considered an appropriate cram-down rate.

Burr Report at 20.

In the event that the court determined that there was no efficient market and sought to use a formula-based method for ascertaining the appropriate interest rate, AG proposed a formula-based interest rate of prime (3.25%) plus and added a premium based on the risk of the Debtor's nonperformance, including administrative risk, duration risk, and feasibility risk. The risk premiums associated with the AG Secured Claim amounted to 4.65% and a total interest rate of 7.91%. See Lyon Report, at 14-17. In other words, AG argues that a 7.91% interest rate is required while the Debtor asserts a 3.75% interest rate is sufficient to satisfy Section 1129(b)(2)(A)(i)(II).

That the Debtor and AG would be so far apart in their risk assessment, with AG suggesting an interest rate more than double the current prime, is hardly surprising.

Under the formula approach in Till, there are three factors that should be considered: "the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." 541 U.S. at 479. Here, there are circumstances that increase the risk of nonpayment, such as the Plan's thirty-nine month duration, during which tenants at the senior housing complex may fail to pay rent, or other unforseen economic changes may interfere with the Debtor's ability to make plan payments. In addition, the assumption in the Valuation Order that AG's claim is not fully secured warrants an upward adjustment for risk of nonpayment.

The positive attributes of the Debtor's estate and Plan, however, significantly counterbalance AG's risk of nonpayment. The proposed initial $5,787,823 principal payment that would reduce the balance of AG's claim secured by the Property is a favorable consideration that significantly reduces the amount required to be refinanced. Other facts supportive of a lower interest rate are that the Property's stipulated value is at least $30 million and the disputed evidence is that the Property may be worth much more. Additionally, the earned income figures set forth in the Debtor Disclosure Statement, see discussion at 13, supra, suggest that the Debtor's operation of a senior housing complex produces significant revenues that have increased steadily both before and after commencement of the Chapter 11 proceeding.

Weighing all of these considerations, a 1.00% increase over the prime rate adequately provides for AG's risk of the Debtor's nonpayment. The court therefore concludes that an interest rate of 4.25% accommodates the cramdown risk, and thus would be appropriate under Section 1129(b)(2)(A)(i)(II) for the fair and equitable treatment of the secured portion of AG's claim. Debtor's proposed interest rate of 3.75% is insufficient.

2. Cramdown of Dissenting Unsecured Claims.

A plan is "fair and equitable" under Section 1129(b)(1) with respect to a class of unsecured claims if the plan provides:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

11 U.S.C. § 1129(b)(2)(B)(i, ii).

a. Debtor's Plan does not meet the requirements of Section 1129(b)(2)(B)(i).

Additionally, Debtor's Plan is not fair and equitable to AG's unsecured claim because it fails to provide AG with the present value of the amount of its unsecured claim. See 11 U.S.C. §

1129(b)(2)(B).[99] Debtor's plan defines "AG's Unsecured Claim" as the difference between the AG Note Balance at the Petition date and the sum of $30,000,000.00." Fourth Amended Plan, Section 2(G). The Plan purports to pay this amount in cash on the Effective Date. See First Amendment to Fourth Amended Plan, Section 4.2; Fourth Amended Plan, Section 4.2.

AG argues that the Plan is not fair and equitable because it fails to pay AG the full value of its unsecured claim:

> AG is entitled to claim its postpetition fees and costs, pursuant to contract, as part of its unsecured claim. Because the Debtor's plan does not provide for payment of these amounts, AG is impaired and not "paid in full."

AG Objection to First Amendment to Fourth Amended Plan at 7. The court agrees. The Ninth Circuit has found that creditors are permitted to claim their post-petition fees, pursuant to contract, as part of their unsecured claim. See SNTL Corp. v. Centre Ins. Co. (In re SNTL Corp.), 571 F.3d 826, 842-44 (9th Cir. 2009); In re Warkentin, 461 B.R. 636, 639-41 (Bankr. D. Or. 2011). Failure to include these amounts in AG's unsecured claim necessarily means that Debtor's Plan does not pay AG in full on its unsecured claim. Accordingly, Debtor's Plan is not fair and equitable to AG's unsecured claim because it fails to provide AG with the present value of the amount of its unsecured claim.

b. Debtor's Plan does not meet the requirements of Section 1129(b)(2)(B)(ii).

Section 1129(b)(2)(B)(ii) requires that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." The Ninth Circuit has stated that "In plainer English the provision bars old equity from receiving any property via a reorganization plan 'on account of' its prior equitable ownership when all senior claim classes are not paid in full." Bonner Mall

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[99] As previously discussed, the Valuation Order stipulated by the Debtor and AG acknowledged that AG would have an allowed unsecured claim. The evidence presented by the Debtor and the Guarantors at the Confirmation Hearing, however, suggests that AG's claim may be fully secured. To the extent that AG has an allowed unsecured claim that should have been included in Class 4, and which might prevent acceptance of the class, consideration of Section 1129(b)(2)(B) is required.

P'ship v. U.S. Bancorp Mortg.Co. (In re Bonner Mall P'ship), 2 F.3d 899, 908 (9th Cir.1993), mot. to vacate denied and cert. dismissed, 513 U.S. 18 (1994), citing Snyder v. Farm Credit Bank of St. Louis (In re Snyder), 967 F.2d 1126, 1130 (7th Cir. 1992).[100]

This provision has been called the "absolute priority rule," and it generally requires that all unsecured creditors be paid in full before equity security holders are allowed to retain any ownership interest in the debtor. See Ambanc La Mesa, 115 F.3d at 654; Bonner Mall P'ship, 2 F.3d at 906-07. There is an exception to this rule, or perhaps a corollary to it known as the "new value exception." The new value exception to the absolute priority rule allows junior interest holders (e.g. shareholders of a corporate debtor) to receive a distribution of property under a plan if they offer "value" to the reorganized debtor that is: (1) new; (2) substantial; (3) money or money's worth; (4) necessary for a successful reorganization; and (5) reasonably equivalent to the value or interest received. See Ambanc La Mesa, 115 F.3d at 654, citing Bonner Mall P'ship, 2 F.3d at 908.

In 1999, the Supreme Court had an opportunity to discuss both the absolute priority rule and the new value corollary to that rule in 203 N. LaSalle. Although the Supreme Court granted certiorari to resolve a "circuit split" regarding the new value corollary to the absolute priority rule, the Court ultimately did not decide whether Section 1129(a) "includes a new value corollary or exception." 526 U.S. at 443, 119 S.Ct. at 1417. Instead, the Court limited the scope of its decision to ruling that the proposed plan before it failed to satisfy the provisions of Section 1129(b)(2)(B)(ii). Id.

The Court determined that old equity could acquire or retain its equity interest only if it paid full value, meaning "top dollar" for that property interest. But old equity could not satisfactorily demonstrate that it had paid top dollar for the property under a plan giving it exclusive rights to buy such equity and absent a competing plan of some sort. The court noted that ". . . the best way to determine value is exposure to a market." 203 N. LaSalle, 526 U.S. at

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[100] See also Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.), 800 F.2d 581, 588 (6th Cir. 1986); Prudential Ins. Co. v. F.A.B. Indus. (In re F.A.B. Indus.), 147 B.R.763, 768–69 (C.D. Cal. 1992); In re Pullman Constr. Indus, 107 B.R. 909, 944 (N.D. Ill. 1989).

457, 119 S.Ct. at 1423.

The Court stopped short of saying how the market based valuation should be discerned, stating "[w]hether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity is a question we do not decide here. It is enough to say, assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)." 203 N. LaSalle, 526 U.S. at 457, 119 S.Ct. at 1423.

Debtor's Plan proposes that current equity interest holders, i.e., Carefree Holdings and Willows Investment Group, retain their equity positions after confirmation. See Fourth Amended Plan, Section 4.5 at 7. The Plan provides that "members shall retain their membership interests in the Reorganized Debtor." Id. The Plan calls for a contribution of $9.0 million, but does not establish a market value for the equity being retained. See Fourth Amended Plan, Section 7.2 at 3. As previously discussed at 12 & note 28, supra, the source of the funds is Templeton Investment Corporation, rather than Carefree Holdings or Willows Investment Group. The latter entities, however, will retain their equity positions in the Debtor. On its face, the Debtor's proposed Plan gives its current members an exclusive right to retain their equity interests in the Debtor entity even though the current members are not themselves providing "money or money's worth" in exchange for property. See Fourth Amended Plan, Section 4.5 at 7. The Plan therefore does not appear to fit within the new value exception at all, nor does not it propose to test the "market" to see if there is any interest by the creditors or third parties in acquiring the equity interests.[101]

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[101] In contrast to 203 N. LaSalle, 526 U.S. at 438-39, 119 S.Ct. at 1414, the Debtor did not seek nor obtain an extension of the plan exclusivity period. As a result, a competing plan has been offered by AG, which includes a provision for the senior housing community to be managed by an outside party and a foreclosure sale of the Property to be conducted. Because only one plan may be confirmed in a Chapter 11 proceeding as long as it meets all other requirements for confirmation, the presence of competing plans arguably satisfies the concerns expressed by the Court in 203 N. LaSalle.

Debtor's Plan provides junior interest holders with exclusive opportunities free from competition and without benefit of market valuation to retain their equity positions. This clearly falls within the prohibition of Section 1129(b)(2)(B)(ii). See 203 N. LaSalle, 526 U.S. at 457, 119 S.Ct. at 1423. To the extent that AG holds an unsecured claim encompassed by Class 4 of the Debtor's proposed Plan, the treatment is not fair and equitable.

CONCLUSION

For the reasons set forth above, the Debtor's proposed Plan cannot be confirmed. A separate order denying plan confirmation has been entered concurrently herewith.

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