IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

In re:	)	
GRAND CENTREVILLE, LLC,	)	**Case No. 13-13590-RGM**
	)	**Chapter 11**
Debtor.	)	

MEMORANDUM OF KANG TRUSTEE IN SUPPORT OF FIRST AMENDED CHAPTER 11 PLAN OF REORGANIZATION

Raymond A. Yancey, the chapter 11 trustee for the bankruptcy estates of Min S. Kang and Man S. Kang (the "Proponent"), files this *Memorandum in Support of First Amended Chapter 11 Plan of Reorganization* (the "Memorandum") in support of the *First Amended Chapter 11 Plan of Reorganization* (the "Plan") filed by the Proponent in the above captioned bankruptcy case, and in support thereof states as follows:[1]

I. Introduction

The Plan represents the culmination of the efforts of the Proponent and his professionals to formulate a plan of reorganization under which the Debtor's creditors will be paid in full and a significant distribution made to holders of equity interests in the Debtor. The Proponent believes that the Plan satisfies all of the requirements for confirmation under section 1129 of the Bankruptcy Code, and that confirmation of the Plan is in the best interest of all parties.

[1] All capitalized terms used but not defined herein have the meanings given to them in the Plan.

WHITEFORD, TAYLOR & PRESTON, LLP
Bradford F. Englander, Esq., VSB #36221
David W. Gaffey, Esq., VSB #85088
3190 Fairview Park Drive, Suite 300
Falls Church, Virginia 22042
(703) 280-9081 (tel)
(703) 280-3370 (fax)

Special Counsel for Raymond A. Yancey, Chapter 11 Trustee for the Estates of Min Sik Kang and Man Sun Kang

II. Objections to the Plan

Objections to the Plan were filed by (1) the Secured Lender, Wells Fargo Bank, N.A., as Trustee for the Registered Holders of JPMorgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2005-CIBC13 (the "Secured Lender Objection") and (2) Mr. Sohn (the "Sohn Objection").

a. The Secured Lender Incorrectly Asserts That the Plan Fails to Provide for Payment of Post- Effective Date Interest or Charges.

The Secured Lender alleges that it is impaired under the Plan because the Plan fails to pay or to reserve on the Effective Date post-petition default interest, "reasonable fees, costs or charges provided for" under the Secured Lender's loan documents, and interest on the Pre-Petition Secured Lender Reserve, as required pursuant to section 506(b) of the Bankruptcy Code. *See* Secured Lender Objection, Dkt. no. 325 at 7, 10. The Secured Lender asserts that unless all possible default interest and asserted charges are "either paid on the Effective Date or included in the disputed claim reserve, the [Plan] cannot be confirmed." *See* Secured Lender Objection, Dkt. no. 325 at 10.

Section 1124(a) of the Bankruptcy Code states that a claim is impaired unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim." 11 U.S.C. § 1124(1). The Plan proposes to pay the Secured Lender all amounts to which it is legally entitled under to its loan documents and the Bankruptcy Code in accordance with the requirements of section 1124(a). The Proponent does not dispute that the Secured Lender is oversecured and that the Plan must pay any required interest and reasonable fees, costs, and charges accruing post-petition under section 506(b) in order to classify the Secured Lender as unimpaired under the Plan. Only the *amount* of any allowable interest (mainly, default interest), fees, costs, and charges owed to the Secured Lender is in dispute.

The Proponent filed his Secured Lender Claim Objection on March 30, 2015, to determine the allowed amount of the Secured Lender's claim. The Plan proposing to reserve the full amount of the Secured Lender's asserted claim was filed on April 14, 2015. The Secured Lender has not provided the Proponent with a statement of its total asserted claim despite knowing of the Plan's proposed treatment for approximately six weeks, and despite requests from the Proponent. The Secured Lender cannot now claim "impairment" because it has not yet provided the Proponent with a statement of its asserted claim.

Notwithstanding the Secured Lender's failure to provide its asserted claim amount, the treatment of the Secured Lender in the Plan protects the full amount of the Secured Lender's potential interest. The Secured Lender Claim Objection conceded both the principal amount of the Secured Lender's claim and its entitlement to non-default interest (net of any payments made during this case), but objected to the payment of default interest on the grounds that such interest is not owed under the loan documents. *See* Dkt. No. 280. The Plan specifically provides in Article III(B)(1) that the Debtor will pay "the amount of the [Secured Lender's] claim as determined by the Bankruptcy Court." This amount will necessarily include any and all post-petition default interest, reasonable fees, costs or charges, and interest on the Pre-Petition Secured Lender Reserve that the Secured Lender demonstrates it is owed under its loan documents and the Bankruptcy Code. The Plan therefore does not affect the Secured Lender's rights in any cognizable way; it proposes to pay the full claim in whatever amount is determined by the Court. The Secured Lender's assertion that the Plan fails to pay the full amount of its claim is incorrect.[2]

[2] The Secured Lender's error lies in its assumption that its asserted claim, and the constituent fees, costs, and interest demanded, is conclusively valid. While a proof of claim initially is deemed to be *prima facie* valid, a timely filed objection to the claim containing sufficient

The Secured Lender's related assertion that the Plan does not reserve sufficient funds in the Pre-Petition Lender Reserve to leave the Secured Lender unimpaired fails for similar reasons. The Secured Lender concedes that it will not be impaired if the Plan places an amount in reserve sufficient to pay its claim in full once allowed. *See, e.g.* Secured Lender Objection, Dkt. No. 325 at 10 ("Unless the full amount of the Lender's allowed secured claim – including post-petition default interest, legal fees and other charges incurred – is either paid on the Effective Date *or included in the disputed claim reserve*, the Trustee's Plan cannot be confirmed.") (emphasis added). Courts have held that a disputed claim remains unimpaired if a sufficient reserve is set aside. *See, e.g. In re Sierra-Cal*, 210 B.R. 168, 176 (Bankr. E.D. Cal. 1997) ("Lack of impairment in the context of a disputed claim that, if undisputed, would be immediately due, owing, and payable, would require a cash reserve sufficient to pay the maximum possible award.").

Article III(B)(1) of the Plan provides that the required amount of the Pre-Petition Lender Reserve will either be agreed upon by the Proponent and the Secured Lender or will be determined by the Court. As discussed above, the Secured Lender has not responded to the Proponent's request for a statement of the full amount asserted by the Secured Lender. Accordingly, absent an agreement prior to the Confirmation Hearing the Court will determine what reserve amount is legally required to satisfy section 1124. The amount determined by the Court will be placed into the Pre-Petition Lender Reserve, whatever that amount may be.

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evidence to rebut the presumption of validity shifts the burden of proof to the creditor. *See In re Smith*, 419 B.R. 622, 627-628 (Bankr. E.D. Va. 2008). The Plan does not impair the Secured Lender's claim simply by disputing the legitimacy of the amounts demanded. *See See Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 960 (2d Cir. 1993) (holding that a disputed claim may be unimpaired if the creditor's interest is protected pending resolution of the dispute).

b. The Secured Lender Incorrectly Asserts That It Is Impaired Because the Plan Might Result In Payment Of The Secured Lender's Claim After The Stated Maturity Date Of Its Note.

The potential that the Effective Date of the Plan might occur after the July 1, 2015, maturity date of the Secured Lender's note does not alter the Secured Lender's legal, equitable, or contractual rights under the loan documents in any respect. The Secured Lender claims it has a "right under the loan documents to full payment" on the maturity date. To the extent that this is a "right" as contemplated by section 1124, the Plan does not alter the Secured Lender's right to be paid upon maturity. Contrary to the Secured Lender's suggestion, "leav[ing] unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim" does not require the Plan to enforce the rights of the Secured Lender on the Lender's behalf; it only requires that those rights are not modified by the Plan. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999) ("Claims are unimpaired if they retain all of their prepetition legal, equitable, and contractual rights against the debtor.").

Here, if the Secured Lender is not paid by July 1, 2015, it will remain entitled to assert the same rights and remedies in this bankruptcy case upon a maturity default that it could have asserted had the maturity date occurred prior to the filing of the Plan or prior to the Petition Date. The only change following the maturity date will be a potential increase dollar amount of the claim asserted by the Secured Lender as a result of any additional interest or fees, which the Plan proposes to pay in full to the extent allowed by the Court. This is not impairment under section 1124.

The Secured Lender fails to cite any case law supporting the proposition that it is impaired unless it is paid in full on the upcoming maturity date of its note. Although the Secured Lender quotes a sentence from Colliers on Bankruptcy purporting to hold that the payment of a

claim after its contractual maturity is impairment, the Secured Lender uses this sentence out of context and without consideration of the cases on which Colliers relies. The cases cited by Colliers in support of this statement contain no discussion of maturity dates whatsoever and instead address the payment of a creditor's claim over time rather than in full on the effective date of a plan. 7 Collier on Bankruptcy ¶ 1124.03, at fn5 (Alan A. Resnick & Henry J. Sommer eds. 16th ed.). The case of *In re G.L. Bryan Investments, Inc.* holds that the payment of claims over time in "five annual pro rata distributions" and at a reduced interest rate constituted impairment. *In re G.L. Bryan Investments, Inc.*, 340 B.R. 386 (Bankr. D. Colo. 2006) ("The Court concludes that the Objecting Creditors are impaired under the Fourth Amended Plan because (a) they are receiving deferred payments over time and (b) the interest to which they would receive under the State Court Judgment is reduced from 8% per annum to 4.3% per annum."). The maturity date is not considered or addressed. The other case cited by Colliers, *In re Brewery Park Assocs., L.P.*, also involved the deferred payment of a claim and did not involve maturity date issues. *In re Brewery Park Assocs., L.P.*, 2011 Bankr. LEXIS 1596 (Bankr. E.D. Pa. Apr. 29, 2011) ("Neither TRF's nor the city's secured claim in the 3000-3050 Master Street property is left entirely unaltered by TRF's proposed plan. Both must wait at least six months to receive any plan distribution."). The Secured Lender's assertion that it is impaired unless it is paid prior to the maturity date of its note lacks a legal foundation.

c. The Secured Lender Incorrectly Argues That Payment In Full Upon Determination Of Its Claim Constitutes Impairment

Prior to the 1994 amendment to section 1124, section 1124(3) specifically provided that a creditor receiving full payment of an allowed claim on the effective date was not impaired. Congress deleted subsection (3) from section 1124 following a decision of the United States Bankruptcy Court for the District of New Jersey in *In re New Valley Corp*. holding that a class of

unsecured creditors of a solvent debtor was unimpaired and not permitted to vote under a plan despite not being paid post-petition interest. *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994). Congress described its rationale for deleting section 1124(3) by stating:

> In a recent Bankruptcy Court decision (New Valley), unsecured creditors were denied the right to receive post petition interest . . . . In order to preclude this unfair result in the future, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code.

H.R. Rep. No. 103-835, at 47-48 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3356-57.

The clear majority of courts considering impairment following the 1994 amendment have held that Congress's clear intent was "to eliminate the anomalous result created by the New Valley decision" and to ensure "that to be unimpaired, the claim must receive postpetition interest." *In re PPI Enters.*, 228 B.R. 339, 352 (Bankr. D. Del. 1998). These courts differentiate between the deleted section 1124(3), which required only that a claim be paid in full on the effective date, and the surviving and more robust section 1124(1), which requires that the plan "leave[] unaltered the legal, equitable, and contractual rights to which [a] claim . . . entitles the holder of such claim." *See, e.g., id.* ("If, in a nonbankruptcy context, the creditor would be entitled to interest on its claim to the date of payment, then in a bankruptcy context the claim is altered absent the interest payment. Section 1124(3) may be viewed as an exception to the test set forth in § 1124(1).").

Accordingly, section 1124(1) may be satisfied where, as here, payment in full with all applicable interest on the effective date of a plan will provide a creditor with all that the creditor is entitled to under its loan documents and applicable law. *Id.* ("This result puts the creditor in the same position it would be in if no bankruptcy occurred and a fully solvent debtor satisfied the obligation by cash payment in full with interest to the date of payment. The creditor could demand no more outside of bankruptcy; why should it be entitled to more in bankruptcy?

Indeed, it strikes me as anomalous to suggest that a creditor should be able to vote on whether to accept all that it is entitled to by contract and law.") (emphasis added).

d. The Secured Lender Argues That The Plan Is Unconfirmable Because It Does Not Give Mr. Sohn The Right To Settle The Debtor's Disputes With The Lender

The Secured Lender asserts that because the Plan Administrator will have "'all of the powers and rights of a Trustee or debtor-in-possession permitted under the Bankruptcy Code' and is further allowed to exercise such powers standing in the shoes of the Debtor," including the ability to propose settlements under section 9019, the Plan Administrator has an "inequitable" monopoly over the resolution of disputes to the exclusion of Mr. Sohn." *See* Secured Lender Objection, Dkt. no. 325 at 11. The Secured Lender lacks standing to raise an objection on behalf of Mr. Sohn. *See 641 Assocs. v. Balcor Real Estate Fin.*, 140 B.R. 619, 630 (Bankr. E.D. Pa. 1992) ("We also note that Balcor, as a secured creditor, appears to lack standing to raise the APR as a basis for objection to the plan, since the APR affects only the interests of unsecured creditors."). The Secured Lender is being paid in full on the Effective Date and has no direct interest in the issue of who may submit settlements to the Court on the behalf of the Debtor. The Secured Lender does not get to pick his negotiating partner.

Furthermore, Mr. Sohn lacks a membership interest in the Debtor that would give him the right to propose settlements on behalf of the Debtor. On November 14, 2014, the Court entered a judgment in Adversary Proceeding 12-1496 holding that Mr. Sohn does not have any ownership interest in the Debtor. Without an ownership interest, Mr. Sohn has no standing to propose settlements for the Debtor. Mr. Sohn's rights arise from the Settlement Agreement approved by this Court. The Sohn Settlement specifically provides that "Mr. Sohn shall not have any authority to enter into any agreement on behalf of [Grand] Formation or [the Debtor], or to bind

[Grand] Formation or [the Debtor] with respect to any matter." *See* Dkt. no. 226. This settlement was not objected to by the Secured Lender, was approved by the Court, and is binding on Mr. Sohn. The Secured Lender's objection should be overruled.

e. Mr. Sohn Incorrectly Argues That The Plan Is Inconsistent With The Sohn Settlement Agreement

Mr. Sohn filed a limited objection to the Plan on the grounds that it "does not provide a basis for reviewing the administrative expenses to be charged to the Debtor's estate." *See* Dkt. no. 324. Article V(K) of the Plan provides that the "Plan Administrator, in his discretion, may use the services of his Professionals engaged in the Kang Bankruptcy Case, and may use the Professionals engaged by the Debtor and/or the Receiver in the Debtor's Bankruptcy Case, to assist him in the administration and consummation of the Debtor's bankruptcy case" and that the Debtor shall be responsible for the payment of the such professionals with respect to services rendered in connection with preparation, negotiation, confirmation, implementation and administration of the Plan and the affairs of the Debtor. *See* Dkt. no. 300. The Plan further provides that "[t]o the extent that fees and expenses are subject to approval of the Bankruptcy Court under the Bankruptcy Code or the Bankruptcy Rules, the compensation of the Plan Administrator and his Professionals shall remain subject to the filing and allowance of applications in the Kang Bankruptcy Case, even if services are performed with respect to the Debtor." *Id*. All of the fees and expenses of the Plan Administrator (i.e., Mr. Yancey, the Kang Trustee) and his professionals are, of course, subject to Court approval. As a party in interest, Mr. Sohn has standing to be heard on the relevant applications. Based on discussions among counsel, it appears that Mr. Sohn's objection has been resolved.

III. The Treatment of Mrs. Han Under The Plan Exceeds Legal Obligations To Her, And Is Fundamentally Fair And Equitable

The treatment of Mrs. Han under the Plan is fair and equitable. Following trial on Count VII of the Kang Trustee's adversary complaint against Mrs. Han and others, the Court held that the March 2009 transaction by which Mrs. Han purported to obtain an interest in the Debtor was "void and ineffective." The Court further held that Grand Equity and Grand Formation (both owned by the Kang estates) own 100% of the interests in the Debtor. Mrs. Han has no interest to protect, and thus no standing under Section 1129(b)(2)(C) of the Bankruptcy Code.

Nevertheless, to assure fundamental fairness and to avoid issues on appeal, out of an abundance of caution the Plan proposes to protect Mrs. Han's asserted interest in the Debtor by creating a reserve. The Plan does not even require that Mrs. Han bear the burden of filing a motion for a stay (she has not filed such a motion), or post a bond (something she undoubtedly cannot do). The amount of the reserve is the value of her asserted interest in the Debtor, as of the confirmation date. As the expert testimony to be presented at the confirmation hearing will show, the value of Mrs. Han's asserted interest is not large.

Section 1129(b)(2)(C) provides that equitable treatment of an interest in the Debtor requires in relevant part that:

> (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

11 U.S.C. § 1129(b)(2)(C)(i).

The value of an equity interest is the amount that a willing buyer would pay for the interest on the open market. *See In re Meruelo Maddux Props.*, 2013 U.S. Dist. LEXIS 112105 (C.D. Cal. Aug. 7, 2013) ("section 1129(b)'s 'fair and equitable' requirement demanded that they

receive the 'fair market value' of the stocks they were forced to sell"). The value of Mrs. Han's purported interest will be determined based on its fair market value as of the confirmation hearing. That value must be determined in light of (a) the risks that a hypothetical purchaser would face with respect to monetizing her interest, (b) the costs that a hypothetical purchaser would incur in monetizing her interest, (c) the time value of money, and (d) the returns that a hypothetical purchaser would require in order to justify the purchase of her asserted interest. Under the circumstances, valuation of Mrs. Han's asserted interest will turn largely (but not exclusively) on the Court's assessment of her claims in the ongoing litigation, her prospects on appeal, and her prospects with respect to trial on Count II of the adversary complaint (which would be tried if the 4th Circuit were to reverse this Court's ruling in favor of the Kang Trustee on Count VII). *See, e.g., Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm. Network, Inc.),* 490 F.3d 1325, 1335 (11th Cir. 2007) (fair value of contingent assets and liabilities must be valued based on likelihood that contingency will materialize); *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 200 (7th Cir. 1998) (same); *Harden v. Stephenson (In re Stephenson),* 2012 Bankr. LEXIS 4568 (Bankr. E.D.N.C. 2012) (same). The evidence will show that Mrs. Han's prospects in litigation are dim, and that a reasonable hypothetical investor would not pay much to buy into Mrs. Han's continued litigation folly.

Mrs. Han has not objected to the Plan's proposed treatment of her alleged interest. Mrs. Han did not file an objection to the Proponent's first *Disclosure Statement With Respect to Chapter 11 Plan of Reorganization* filed on February 12, 2015, the *Disclosure Statement With Respect to First Amended Chapter 11 Plan of Reorganization* filed on April 14, 2015, or the Plan itself. The Plan is fair and equitable with respect to Mrs. Han.

IV. Sale Free and Clear of "Ghost" Liens and Encumbrances

The title search with respect to the Shopping Center reveals the existence of several old liens and encumbrances of record. These liens and encumbrances pre-date the Debtor's ownership of the Shopping Center, and several acquisition and refinancing loans made with respect to the Shopping Center. Under the circumstances, it is quite clear that these encumbrances of record relate to obligations long since satisfied or terminated, some in favor of entities long since deceased. These liens and encumbrances appear to be "ghosts" that have remained of record through clerical error or inadvertence even though they support no remaining obligation. Nevertheless, the "ghost" liens and encumbrances must be dealt with in order to satisfy conditions to closing in the Sale Agreement. Ample notice of the Proponent's intention to extinguish such liens and encumbrances has been given to the parties of record. Not surprisingly, none of those parties has appeared or objected to the Plan. These liens and encumbrances may (and here, must) be extinguished by the Plan and the confirmation order. *See Universal Suppliers, Inc. v. Reg'l Bldg. Sys. (In re Reg'l Bldg. Sys.)*, 254 F.3d, 528, 530-31 (4th Cir. 2001) (provided notice is given, confirmation of plan will extinguish liens on property that is dealt with by the plan unless the plan expressly preserves such liens). *Accord Airadigm Communs., Inc. v. FCC (In re Airadigm Communs., Inc.)*, 519 F.3d 640, 647-648 (7th Cir. 2008); *In re To*, 2010 Bankr. LEXIS 1114, at *5 (Bankr. E.D. Va. Apr. 13, 2010) (Mitchell, J.) ("There is authority that actual strip-off requires an adversary proceeding and cannot be accomplished by motion practice. *Of course, confirmation of a chapter 11 plan may ultimately result in extinguishment of the lien*.") (citing *Universal Suppliers*) (emphasis added).

V. Conclusion

For the foregoing reasons, the Proponent requests that the Court (1) overrule any objections to the Plan, (2) confirm the Plan, and (3) grant such other relief as the Court deems necessary and proper.

Dated: June 1, 2015

WHITEFORD TAYLOR & PRESTON LLP

/s Bradford F. Englander

Bradford F. Englander, Esq., VSB #36221
David W. Gaffey, Esq., VSB # 85088
3190 Fairview Park Drive, Suite 300
Falls Church, Virginia 22042
Telephone: (703) 280-9081
Facsimile: (703) 280-3370
Email: benglander@wtplaw.com

Special Counsel for Raymond A. Yancey, Chapter 11 Trustee for the Estates of Min Sik Kang and Man Sun Kang, Plan Proponent

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2015, a copy of the foregoing was served via the Court's CM/ECF system on all parties receiving notice thereby.

/s/ Bradford F. Englander
Counsel