IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

IN RE:	CASE NO. 16-08008 (MCF)
KAMA MANAGEMENT, INC.	CHAPTER 11
Debtor	

OBJECTION TO CONFIRMATION OF *KAMA MANGEMENT INC. REORGANIZATION PLAN DATED JUNE 15, 2017*
(Related Docket No. 72)

TO THE HONORABLE COURT:

COMES NOW secured creditor Condado 5, LLC ("Condado 5"), successor-in-interest of Banco de Desarrollo Económico para Puerto Rico ("BDE"), through its undersigned counsel, and respectfully states and prays as follows:

Factual and Procedural Background

1. Prior to the Petition Date, on December 30, 2011, BDE extended to the Debtor a certain *Loan Agreement* ("Contrato de Préstamo") (hereinafter, the "Loan') in the principal amount of $1,300,000.00[1], authenticated through affidavit no. 1,786 before Notary Public Jean Paul Juliá Díaz.

2. As part of the collateral that secures the Loan, the following property (the "*Property*"), which is described in the Spanish language as follows, was mortgaged:

> DESCRIPCIÓN: URBANA: Solar radicado en el Barrio Cangrejos Arriba, del término municipal de Carolina, Puerto Rico, compuesto de mil sesentinueve metros cuadrados. En lindes por el NORTE, en cincuentitres metros con el solar #1 de Josefa Oliver Amill; por el SUR, en cincuenta y cuatro metros con la faja de terreno antes descrita; por el ESTE, en veinte metros doce centímetros con la zona marítima y por el OESTE, en veinte metros con la calle F de la Urbanización Biascochea. Contiene un edificio de concreto de dos plantas, que consta principalmente de sala, comedor, cocina, diez cuartos dormitorios, doce cuartos de baño y terraza.
>
> The *Property* is recorded at page 130 of volume 954 of Carolina, property number 16,394, Property Registry of Carolina, First Section.

[1] See the duly endorsed Promissory Note, Proof of Claim No. 5, p. 60-62.

3. The *Property* was mortgaged through *Mortgage Deed No. 46* ("*Deed No. 46*"), executed on December 10, 2007 before Notary Public Miguel Ricardo Garay Auban. *Deed No. 46* is recorded at the Property Registry at page no. 206 of volume no. 981 of Carolina, First Section. Such *Deed* secures a Mortgage Note (the "*Mortgage Note*") in the amount of $1,314,000.00 executed on same date, before the aforementioned Notary Public. See *Deed No. 46* and the *Mortgage Note*, Proof of Claim No. 5, pp. 35-50, p. 58, respectively.

4. The *Mortgage Note* was pledged as collateral to secure the Loan through the *Pledge Agreement* executed on December 20, 2011. See the *Pledge Agreement*, Proof of Claim No. 5, pp. 20-25.

5. On December 30, 2011, the following documents were executed: (a) *Security Agreement* (the "*Security Agreement*") between the Debtor and BDE authenticated through affidavit no. 1,788 before Notary Public Jean Paul Juliá Díaz[2]; (b) *Continuous and Unlimited Warranty* by the Debtor which is authenticated through affidavit no. 1,793 before the aforementioned Notary[3]; and (c) *UCC-1PR Financing Statement* which is duly recorded in the Commercial Transactions Registry of the Department of State of the Commonwealth of Puerto Rico in favor of BDE under registry no. 2012000781[4].

6. The *Security Agreement* grants Condado 5 a lien over, among others, on the following property (the "Collateral"):

> "(1) all personal property, equipment, securities, intangible property, all documents and instruments, inventory, furniture, machinery, cash, accounts receivable, books, records, archives, materials, and documents located or used in the operation of the Debtor's business, or in any other that the Debtor has or could have in the future, or anywhere where these are located, including those that are acquired in the future by swap, replacement or purchase; (2) all interest, cash, instrument or other property received from time to time or otherwise distributed in relation to or in exchange for any of the aforementioned properties, including the respective replacement, substitutes and products and any books, records and documents related directly or indirectly to these; and (3) all products, interest, or property of any type generated from the property described above."

[2] See the *Motion to Prohibit Use of Cash Collateral*, Docket No. 38-1.
[3] See Docket No. 38-2.
[4] See Docket No. 38-3.

Security Agreement, p. 2, ¶ 6 (translation provided).

7. Based on the above, Condado 5 has a perfected pre-petition security interest over the Debtor's accounts receivables.

8. On October 5, 2016, the Debtor filed the instant Chapter 11 bankruptcy petition. See Docket No. 1.

9. On January 17, 2017, Condado 5 filed Proof of Claim No. 5 in the secured amount of $1,423,989.44. Such Proof of Claim has not been objected by the Debtor.

10. On June 15, 2017, the Debtor filed *Kama Management Inc. Reorganization Plan Dated June 15, 2017* (the "*Plan*", Docket No. 72).

11. The *Plan* states that Condado 5's secured portion amounts to $1,420,876.00 and will be treated as follows:

> The amounts due under this class will be paid a monthly adequate protection payment of $6,000 and then a lump sum payment of $900,000 on month eighteen (18) of the plan.

Plan, Docket No. 72, p. 5.

12. For the reasons stated below, Condado 5 hereby objects to confirmation of the proposed *Plan*.

Applicable Law

(A) Confirmation Requirements, Generally

13. The Debtor carries the burden to prove through the preponderance of the evidence that all of the elements for confirmation have been met under Section 11129 of the Bankruptcy Code. Hence, "the proponent [of the plan] bears the burdens of both introduction of evidence and persuasion that each subsection of Section 1129(a) has been satisfied". 7-1129 Collier on Bankruptcy ¶ 1129.05 (16th 2016). Also see In re Rivers End Apartments, Ltd., 167 B.R. 470 (Bankr. S.D. Oh. 1994); In re Keaton, 88 B.R. 154 (Bankr. S.D. Ohio 1988); In re Ponce de Leon, 1403, Inc., 523 B.R. 349, 395 (Bankr. D.P.R. 2014); Broude, Richard F.,

Reorganizations Under Chapter 11 of the Bankruptcy Code, Law Journal Press, ¶ 12.02, p. 12-5 (ed. 2009).

14. Even in the absence of an objection to a plan by parties in interest, the Court has an independent obligation to determine *sua sponte* whether all tests necessary for confirmation have been met. See 11 U.S.C. §1129(a); In re Cypresswood Land Partners, I, 409 B.R. 396, 421 (Bankr. S.D.Tex. 2009) ("This Court has an independent duty to ensure that all of the requirements of § 1129 are met."); In re Williams, 850 F.2d 250, 253 (5th Cir.1988) ("the court has a mandatory independent duty to determine whether the plan has met all of the requirements necessary for confirmation"); In re Ambanc La Mesa Ltd. Partnership, 115 F.3d 650, 653 (9th Cir. 1997) ("The bankruptcy court ha[s] an affirmative duty to ensure that the Plan satisfied all 11 U.S.C. § 1129 requirements for confirmation"); In re Salem Suede, Inc., 219 B.R. 922, 932 (Bankr. D. Mass. 1998) ("This Court has an independent duty to review plans and ensure that they comply with the provisions of 11 U.S.C. § 1129"); In re Future Energy Corporation, 83 B.R. 470, 481 (Bankr. S.D. Ohio 1988).

15. "There are two means for confirming a chapter 11 plan. First, if the plan is consensual, that is, when the plan has been accepted by all impaired classes, the provisions are in § 1129(a). Second, if not all of the impaired classes accept the plan, then the applicable provisions are those in § 1129(b), commonly known as the 'cram down' provisions for confirmation. The cram down provisions in § 1129(b) include all the requirements of § 1129(a), except for § 1129(a)(8)." In re Melendez Perez, 2015 WL 2065276, at *2 (Bankr. D.P.R. 2015).

16. In the instant case, Condado 5 is an impaired class and does not accept the *Plan*. See the *Plan*, Docket No. 72, p. 5. Therefore, the Debtor must comply with the provisions of Section 1129(b) of the Bankruptcy Code.

(B) Feasibility

17. "Section 1129(a)(11) [of the Bankruptcy Code] obliges a Court to find that: 'confirmation of the plan is not likely to be followed by the liquidation, or the need for further

financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation is proposed in the plan.' The purpose of this requirement, which was adopted from the 1898 Bankruptcy Act's requirement of feasibility, is to ensure that the plan offers a reasonably workable prospect of success and is not a visionary scheme." In re Merrimack Valley Oil Co., Inc., 32 B.R. 485, 487–88 (Bankr. D. Mass. 1983). Also see 11 U.S.C. § 1129(a)(11); Hon. W. Homer Drake, Jr., Chapter 11 Reorganizations § 14:7 (2nd ed. 2015-2016); In re Save Our Springs (S.O.S.) Alliance, Inc., 632 F.3d 168, 172 (5th Cir. 2011) ("To obtain confirmation of its reorganization plan, a debtor must show by a preponderance of the evidence that its plan is feasible, which means that it is 'not likely to be followed by … liquidation, or the need for further financial reorganization.'"); In re Irving Tanning Co., 496 B.R. 644, 658 (B.A.P. 1st Cir. 2013) (the "feasibility requirement" is as "a condition of confirmation that the plan is not likely to be followed by liquidation, or the need for further financial reorganization unless such liquidation or reorganization is proposed in the plan.")

18. The feasibility test does not require a guaranteed success, but rather it is a fact-intensive standard that seeks "a reasonable assurance of viability, and consider[s] a variety of factors [..], including the debtor's performance during Chapter 11, capital structure, earning power, economic conditions, management skills and the terms of the plan." Hon. Joan N. Feeney *et al.*, Bankruptcy Law Manual, § 11:63 Vol. 2 (5th ed. 2016).

19. To comply with Section 1129(a)(11) of the Bankruptcy Code, "[t]he Court must find that the financial projections [that] support a plan of reorganization are derived from realistic and reasonable assumptions which are capable of being met". In re Alco Corp., 2013 WL 1123853, at *5 (Bankr. D.P.R. 2013).

20. Plans premised on speculative refinancing are not confirmable under Section 1129(a)(11) of the Bankruptcy Code. Courts have repeatedly stated that the statutory feasibility requirement requires debtors to present competent evidence --beyond visionary promises-- providing a realistic and workable framework for effectuating the terms of a plan.

See *e.g.*, Andover Covered Bridge, LLC, 553 B.R. 162, 175 (B.A.P. 1st Cir. 2016) ("A plan for rehabilitation under Chapter 11 must be based on more than speculative data."); In re Made in Detroit, Inc., 299 B.R. 170, 176-77 (Bank. E.D. Mich. 2003) (refinancing too speculative for confirmation where no assurance that loan would ever close or that property would appraise at a value high enough for $9 million loan); In re Hoffman, 52 B.R. 212, 215 (Bankr. D.N.D. 1985) (proposed sale of real estate on which plan funding was based was not "sufficiently concrete to assure either consummation within the two-years or that even if sold within the two-year period the price obtained would be sufficient" to pay the secured creditor); In re Thurmon, 87 B.R. 190, 192 (Bankr. M.D. Fla. 1988) (plan conditioned on sale, which, in turn, was conditioned on speculative financing was not feasible); In re Kovalchick, 1995 Bankr. LEXIS 296, 1995 WL 118171, at *8 (Bankr. E.D. Pa. 1995) (noting that a court's scrutiny regarding feasibility "must grow more exacting as the payment term lengthens").

(C) Fair and Equitable Treatment

21. If an impaired creditor rejects the proposed plan of reorganization, then the debtor must demonstrate that the plan is "fair and equitable". See 11 U.S.C. § 1129(b)(1).

22. "Section 1129(b)(2)(A) provides three (3) alternatives for a Chapter 11 plan to be fair and equitable standard to a dissenting class of secured claims. A secured claim pursuant to 11 U.S.C. §506(a) is one that is either 'secured by a lien on property in which the estate has an interest' or one that is 'subject to setoff under section 553.'" In re Ponce de Leon, 1403, Inc., 523 B.R. 349, 388 (Bankr. D.P.R. 2014), quoting 11 U.S.C. § 506(a).

23. One of the alternatives is "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". 11 U.S.C. § 1129 (b)(2)(A)(II).

24. "Where the plan provides that the secured creditor retains its lien in the collateral to the extent of the allowed amount of the secured claim and receives deferred cash payments

which total the allowed amount of the claim and which have a present value equal to the value of the collateral, such treatment is fair and equitable. In other words, if the plan proposes to satisfy a secured claim by lien retention and paying deferred cash payments, the sum of those payments must be at least as valuable as full payment of the allowed secured claim on the effective date of the plan." Hon. Joan N. Feeney *et al.*, Bankruptcy Law Manual, § 11:65 Vol. 2 (5th ed. 2016) (underline added).

25. Another alternative to satisfy the "fair and equitable" standard is by providing the creditor with the "indubitable equivalent" of its claim. See 11 U.S.C. § 1129(b)(2)(A)(iii); In re Ponce de Leon 1403, Inc., 523 B.R. at 388.

26. "The phrase 'indubitable equivalent' is a term of art. It means, in essence, that the treatment afforded to the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim and also insure the integrity of the creditor's collateral position." Alan N. Resnick & Henry J. Sommer, 4 Collier on Bankruptcy ¶ 506.043[7][d][i] (16th ed. 2016). "The concept of 'indubitable equivalence' originated from Judge Learned Hand's opinion in Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.), 75 F.2d 941 (2nd Cir.1935)." In re Ponce de Leon, 1403, Inc., 523 B.R. at 390.

27. The U.S. Court of Appeals for the Second Circuit in In re Murel Holding Corp., 75 F.2d at 942, explained the concept of "indubitable equivalence" as follows:

> It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property...

28. The test of indubitable equivalence has two requirements: "(1) that the secured creditor receive the present value of its secured claim; and (2) that the Plan 'ensures the safety' of the secured creditor's principal." Id.

29. Still, "a plan may satisfy the standards of 11 U.S.C. §1129(b)(2)(A)(i), (ii), or (iii) and not be 'fair and equitable' if it unduly shifts the risk of loss to a secured creditor". Id. at 389.

30. To determine if a proposed repayment period is "fair and equitable", "courts often look to the applicable markets, when at all possible, to determine what is reasonable, and should consider the preexisting contract length and the customary length of repayment for similar loans." In re Bryant, 439 B.R. 724, 744 (Bankr. E.D. Ark. 2010) (emphasis added).

31. The most fundamental aspect of a proposed new term is that it must not unduly shift the risk relating to the operations and financial performance of the reorganized debtor, and must be fair and equitable to the secured creditor. See In re TCI 2 Holdings, LLC, 428 B.R. 117, 167-168 (Bankr. D.N.J. 2010), citing In re D & F Const. Inc., 865 F.2d 673 (5th Cir.1989).

32. To determine whether the proposed arrangement imposes impermissible risk shifting upon the primary secured creditor, a court will consider: (i) the debtors' demonstration of feasibility; (ii) the protections and risks to the secured creditor, and (iii) the general reasonableness of the proposals in light of the circumstances. See In re Kennedy, 158 B.R. 589, 599 (Bankr.D.N.J.1993). See also In re EFH Grove Tower Associates, 105 B.R. 310, 313 (Bankr.E.D.N.C.1989).

(D) Present value of claim

33. "'Present value' is the current value of a future payment, and takes into account various risks that may arise between the present and future payment date(s). To compensate the creditor, an additional rate of interest, i.e., the discount rate, is added to take into account the time value of money and the risk or uncertainty of the anticipated payments." In re Moultonborough Hotel Group, LLC,, 2012 WL 5464630, at *6 (Bankr. D.N.H. 2012).

34. The appropriate interest rate used in a cramdown loan is a factual determination made on a case-by-case basis. Id. at *11.

35. In determining the appropriate amortization of a secured claim to be paid through deferred cash installments, the threshold issue is determining the length of time over which payments may be made. The primary consideration in analyzing the appropriate term for payment of a secured claim is the type of property securing the claim. Also, courts have stated

that when determining if the repayment terms of a plan are appropriate, due consideration should be given to the original terms of the note. See In re Lockard, 234 B.R. 484 (Bankr. W.D. Mo. 1999). The shorter the original term of the loan, the more scrutiny a court should give to a proposed long-term payout. See Collier on Bankruptcy ¶1225.03[4][b]; In re Howard, 212 B.R. 864 (Bankr. E.D. Tenn. 1997) (setting a 15-year amortization where original loan term was 15 years).

36. Courts have determined that the appropriate interest to which creditors are entitled under a plan should consist of prime rate plus risk factor, to be determined based on nature and extent of creditor's security and feasibility of repayment. See Till v. SCS Credit Corp., 541 U.S. 465 (2003) (the correct method for determining the rate of interest payable to a secured lender over the life of a Chapter 13 cram-down plan was the national prime rate plus a risk factor depending on the creditworthiness of the debtor). This analysis is based on the proposition that a debtor's promise of future payments is worth less that an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment. Id.

37. "In Till, the Supreme Court articulated an approach to cramdown interest rates in chapter 13 cases that has since been applied to cases under chapter 11. Dubbed the 'formula approach', the Supreme Court began by looking at the national prime rate, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. The Court then adjusted the interest rate upward to account for a bankrupt debtor's greater risk of nonpayment, looking at factors including the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan, noting that such adjustments usually range between 1–3%." In re Turner, 2013 WL 6198205, at *3 (Bankr. D.N.H. 2013) (internal citations omitted).

Discussion

(A) Plan does not provide for Condado 5's secured claim in full

38. Condado 5 filed Proof of Claim No. 5 in the secured amount of $1,423,989.44. See Proof of Claim No. 5, which has not been objected and thus, is deemed allowed under 11 U.S.C. § 502(a).

39. In the instant case, the Debtor is proposing to pay Condado 5 the alleged secured amount of $1,420,876.00. See the *Plan*, Docket No. 72, p. 5.

40. The *Plan* does not provide for the payment of Condado 5's secured claim in full and therefore, does not comply with the requirements of Section 1129(b)(2)(A) of the Bankruptcy Code.

(B) Feasibility

41. As stated above, plans premised on speculative refinancing are not confirmable under Section 1129(a)(11) of the Bankruptcy Code.

42. In the instant case, the Debtor is proposing to pay Condado 5's claim through "a monthly adequate protection payment of $6,000 and then a lump sum payment of $900,000 on month eighteen (18) of the plan." *Plan*, Docket No. 72, p. 5.

43. The Debtor's proposed monthly adequate protection payments do not cover the monthly interest amount of the current loan.

44. The Debtor does not state or otherwise specify the source of the lump sum payment, with which the Debtor proposes to pay the vast majority of Condado 5's claim.

45. Therefore, the *Plan* as proposed, is not feasible because the *Plan* is devoid of any evidence as to the viability of the lump sum payment with which the majority of Condado 5's claim shall be paid and thus, does not comply with Section 1129(a)(11) of the Bankruptcy Code.

46. We also bring to the attention of the Court that the proposed *Plan* does not provide for improvements to the Debtor's real property, which is essential to their line of business. This raises further challenges to feasibility.

(C) Fair and Equitable Standard and Present Value of Condado 5's Claim

47. The Loan in this case became due and payable in its entirety on January 5, 2017. See Proof of Claim No. 5, p. 60.

48. The Debtor failed to make monthly payments and failed to comply with the balloon payment as per the terms of the Loan. The balance for the Loan at present is $1,423,989.44. See 11 U.S.C. § 502(a). That is, approximately six (6) years after the Loan's inception, **the Debtor has not serviced the Loan**, which was extended for a principal amount of $1,300,000.00. See id.

49. Furthermore, the interest rate for the Loan is 11%. See id. That is, the interest rate of 8% plus an additional 3% default rate. For instance, if the 8% interest rate is applied, then the monthly payment would be $9,493; if the default 11% rate is applied, then the monthly payment would be

50. Moreover, before the loan in its entirety became due, the monthly installments as per the terms of the Loan were $10,134.22. See id.

51. Condado 5 asserts that the Debtor's proposed repayment term of eighteen (18) months through monthly installments of $6,000.00 without providing any interest, with about ¾ of its claim being paid through an undetermined and unfeasible balloon payment, is not fair and equitable and does not provide Condado 5 with the present value of its claim.

52. The significant reduction in monthly payments and extension of the repayment period of a Loan that is due and payable and has not been serviced with a balloon payment constituting the vast majority of Condado 5's claim, without disclosing the source of this balloon payment of providing any evidence of the feasibility of such payment, augments the high risk of nonpayment and does not provide Condado 5 with the present value of its claim.

53. The decrease in monthly payments, lack of any interest rate considering the high risk of nonpayment upon the Debtor's payment history, and unreasonable payment in light of a balloon payment that Condado 5 asserts is not feasible result unfair and insufficient in light of

Condado 5's rights and under a review of the circumstances in this case. It also shifts the risk of loss unduly to Condado 5, all of which makes the proposed *Plan* unconfirmable.

54. Finally, it is important to note that Condado 5's liens not only encumber the *Property* but also the Debtor's accounts receivable, which is the main source of funding of the *Plan*.

55. Therefore, Condado 5 asserts that the proposed treatment is not fair and equitable and thus, does not comply with Section 1129(b) of the Bankruptcy Code.

Prayer for Relief

WHEREFORE, Condado 5 respectfully requests the Court to deny confirmation of the *Plan* (Docket No. 72) and to grant any other relief it deems just and proper.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on this 12th day of July, 2017.

Certificate of Service

We hereby certify on this same date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in this case.

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