UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	
	)	Chapter 11
RIVER ROAD HOTEL PARTNERS, LLC,	)	Case No. 09-30029
et al.,	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Bruce W. Black

MECHANICS LIEN CLAIMANTS' JOINT OBJECTION TO CONFIRMATION OF LENDERS' THIRD AMENDED JOINT CHAPTER 11 PLAN

Walsh Construction Company ("Walsh") and certain parties with whom Walsh entered into contracts pertaining to real property owned by one or another of the Debtors herein, namely F.E. Moran, Inc., International Decorators, Inc., American Building Services, LLC, Boelter Contracting, LLC, Warren F. Thomas Plumbing Co., and Walsh Landscape Construction, Inc. (collectively with Walsh, the "ML Claimants") hereby jointly object to confirmation of the Lenders' Third Amended Joint Chapter 11 Plan for River Road Hotel Partners, LLC, Expansion Partners, LLC and River Road Restaurant Pads, LLC (the "Plan") filed by Amalgamated Bank and U.S. Bank National Association (the "Lenders"). The ML Claimants' objections are as follows (any capitalized term used, but not otherwise defined herein, shall have the meaning ascribed to such term in the Plan):

BACKGROUND

1. River Road Hotel Partners, LLC, ("Hotel Partners") together with its affiliated entities, (collectively, the "Debtor") including River Road Hotel Expansion Partners, LLC ("Expansion Partners") and River Road Restaurant Pads, LLC

(“Restaurant Pads”), filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code (“Bankruptcy Code”) on or about August 17, 2009 (the “Petition Date”).

2. Hotel Partners is the owner of certain real estate together with the improvements located thereon at 5300 North River Road, Rosemont, IL 60018 (the “Hotel”).

3. Expansion Partners is the owner of certain real estate together with the improvements located thereon at 9400 W. Foster Avenue and 5300 North River Road, Rosemont, IL 60018 (the “Expansion Space” and, collectively with the Hotel, the “Hotel Complex”).

4. Walsh entered into two separate contracts (collectively, the “Contracts”) for improvements to the property owned by Hotel Partners and Expansion Partners (collectively, the “Property”).

5. Hotel Partners hired Walsh, pursuant to a written contract (the “Hotel Contract”) to construct a hotel, including meeting space and an attached parking structure on the Property (hereinafter, the “Hotel Project”).

6. Under a separate contract (the “Expansion Contract”), Expansion Partners hired Walsh to construct a 48,500 square foot one story expansion to the Hotel (the “Expansion Project”) consisting of ballrooms, pre-function and meeting spaces and a warming kitchen on the Expansion Property.

7. Walsh entered into numerous subcontracts with respect to the Contracts, including subcontracts with the other ML Claimants (the “Subcontracts”).

8. Walsh fully performed under both the Hotel Contract and the Expansion Contract and the other ML Claimants fully performed under their respective Subcontracts, completing the Hotel Project and the Expansion Project.

9. Despite the ML Claimants' performance, Hotel Partners and Expansion Partners each defaulted on their payment obligations under the Hotel Contract and the Expansion Contract, respectively.

10. To protect its rights, and those of the relevant subcontractors, Walsh recorded an *Original Contractors' Claim For Mechanics Lien Pursuant To 770 ILCS 60/1-22 and 770 ILCS 60/24-35, et seq.* against the Hotel and an *Original Contractors' Claim For Lien* against the Expansion Space with the Cook County Recorder of Deeds.

11. Some of the relevant subcontractors have served and recorded their own notices and thereby perfected their own mechanics lien with respect to the Expansion Project, the Hotel Project, and other properties and projects in which the Debtors have an interest.

12. There is currently pending in the Circuit Court of Cook County, County Department Chancery Division, Mechanics Lien Section a cause of action entitled "Circle Flooring, LLC et al. vs. Amalgamated Bank et al. General Number 2009-CH-10780", which cause of action (the "State Court Mechanics Lien Litigation") was commenced prior to the Petition Date and is intended to foreclose mechanics liens against the real estate owned by Hotel Partners and the real estate owned by Expansion Partners.

13. On June 4, 2010, the Debtors filed a plan of reorganization which proposed, among other things, an auction sale of the Hotel Complex, based on a "stalking horse" bid of approximately $41.2 million (the "Stalking Horse Bid").

14. By the Lenders' estimate, non-duplicative Mechanics Lien Claims, including the claims of the ML Claimants, aggregate $8,978,466, consisting of Claims in the approximate amount of $4,384,751 against Hotel Partners, $4,529,003 against Expansion Partners and $64,712 against Restaurant Pads. Therefore, if (i) the Stalking Horse Bid reflects the market value of Hotel Complex, and (ii) the Mechanics Lien Claims are determined to be senior in priority, then it is highly likely that the Mechanics Lien Claims are not only oversecured, but are protected by an equity cushion in the completed Hotel Complex *of three to four hundred percent*.

THE PLAN

15. The Plan provides that all of the Lenders' collateral, other than collateral they contribute for the benefit of certain subordinate creditors, will be deeded or otherwise transferred on the Effective Date to the Plan Transferee, which will be an entity designated and controlled by the Lenders for their benefit. Thus, the Plan Transferee will receive the Hotel Complex and the Restaurant Properties, as well as all of the Debtors' personal property and will arrange for the management of the Hotel Complex as a going concern until it is sold.

16. Mechanics Lien Claims are classified under the Plan as Class 3 Claims (there is a separate Class 3 for each Debtor). Under the Plan, Class 3 Claims are impaired. (Plan ¶¶ 3.3, 3.11, 3.19 and 5.2.)

17. The Plan provides that Class 3 Claims will be treated in one of two ways, depending on whether they are ultimately determined in the pending State Court Mechanics Lien Litigation, i.e. to be either senior in priority or, alternatively, junior to

the Lenders' Claims and thus Unsecured Claims, as a practical matter. (Plan ¶¶ 4.4, 4.12 and 4.20.)

18. In the event certain Class 3 Claims are determined in State Court Mechanics Lien Litigation to be senior in priority to the Lenders' Claims (such Class 3 Claims being defined in the Plan as "Senior Mechanics Lien Claims"), the Plan purports to treat them as fully Secured Claims. (Plan ¶¶ Sections 4.4(a), 4.12(a) and 4.20(a).) Any Class 3 Claims secured by a lien determined to be junior in priority to the Lenders' Liens, will be treated as Unsecured Claims. (Plan ¶¶ 4.4(b), 4.12(b) and 4.20(b).)

19. Even though the Lenders acknowledge that Senior Mechanics Lien Claims are fully Secured Claims, the Plan makes no provision for deferred payments having a present value equal to the claim's allowed amount to holders of such Class 3 Claims. There is no provision in the Plan for sale free and clear of the Hotel Complex and the Restaurant Properties, subject to the right of Senior Mechanics Lien Claim holders under §363(k), with such Liens to attach to the proceeds of such sale. Finally, holders of Senior Mechanics Lien Claims do not have an unqualified right, under the Plan, to retain the Liens securing their Claims to the extent of the allowed amount of their Secured Claims.

20. Rather, the Lenders have the right to substitute *other collateral* for the Mechanics Liens on the Hotel Complex and the Restaurant Properties.[1] If the Lenders

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[1] Article Six of the Plan, "Means for Implementation of the Plan," provides at Section 6.2(b)(i) as follows:

"(b) Escrow Account, Letter of Credit and Settlement Options. The Lenders may elect at any time after the Effective Date to do one or more of the following:

(i) establish and fund an Escrow Account or post a Letter of Credit in an amount equal to one hundred twenty-five percent (125%) of the amount of any specific asserted Class 3 Mechanics Lien Claim, provided that pursuant to the terms hereof and without further action or order by the Bankruptcy Court or State Court, upon funding the Escrow Account or issuance of a Letter of Credit (x) any Mechanics Lien Claim asserted against the Hotel, the Expansion Space or the Restaurant Properties, as the case may be, shall simultaneously attach to such Escrow Account or Letter of Credit, as the case may be, to the same extent exercise this right, they may elect to substitute one of two forms of financial asset as replacement collateral: (i) a Standby Letter of Credit in the form attached hereto as **Exhibit A** (a "Letter of Credit"); or (ii) a Lien Release Escrow Agreement in the form attached hereto as **Exhibit B** (an "Escrow Agreement" and, collectively with a Letter of Credit, the "Financial Assets").

21. Under Illinois law, mechanics liens bear simple interest at the rate of 10% per annum until judgment. Under the Plan, the Financial Assets will be issued or funded, as the case may be, in an amount equal only to 125% of the amount of any specific asserted Class 3 Mechanics Lien Claim. To the extent the Lenders elect to substitute the Financial Assets for the Hotel Complex, the Plan does not provide any other means for the full funding and payment of accrued interest on a Mechanics Lien Claim.

22. The ML Claimants estimate that most of the Mechanics Lien Claims will have accrued approximately two years of interest by the date of Confirmation Hearing and up to 40% interest before a Final Order is entered in the Mechanics Lien Litigation determining the validity and priority of the Mechanics Lien Claims. For example, Walsh's Mechanics Lien Claim against the Hotel states that the last day of work was October 17, 2008. Walsh's Mechanics Lien Claim against the Expansion Space states that the last day of work was July 31, 2009. As of the Confirmation Hearing date, accrued interest owing on these two Mechanics Lien Claims will be approximately twenty six percent (26%) and nineteen percent (19%), respectively. Many of Walsh'

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and with the same priority as it attached to the Hotel, the Expansion Space or the Restaurant Properties, pending a Final Order determining the validity, priority and amount of such alleged Class 3 Mechanics Lien Claim in the State Court Mechanics Lien Litigation, (y) such Escrow Account or Letter of Credit shall serve as substitute collateral for such Mechanics Lien Claim in lieu of the Hotel, the Expansion Space or the Restaurant Properties, as the case may be and (z) the Hotel, the Expansion Space or the Restaurant shall simultaneously be discharged and released from the Lien of such Mechanics Lien Claim..."

subcontractors will have completed their work earlier than Walsh's last days of work and, therefore, will be owed substantially more interest on their Mechanics Lien Claims than Walsh.

23. The validity and priority of the Mechanics Lien Claims will be determined by the State Court Mechanics Lien Litigation. This is complicated litigation involving twenty or more separate Mechanics Lien Claims, each of which may have to go through the discovery and trial stages before its validity and priority are determined. It is unlikely that the trial court stage of this litigation will be resolved within one year after June 16, 2011. After that, the Lenders will have the ability to appeal the State Court Mechanics Lien Order, potentially delaying payment an additional year. As a result, it is likely that at the time the validity and priority of the Mechanics Line Claims are determined by Final Orders within the meaning of the Plan more than 40% of interest will have accrued.

OBJECTION TO CONFIRMATION OF THE PLAN

Legal Standard

In order for a Chapter 11 plan to be confirmed, the proponent of the plan has the burden of proving by at least a preponderance of the evidence that the requirements of §1129 of the Bankruptcy Code are satisfied. *In re Rusty Jones, Inc.*, 110 B.R. 362, 373 (N.D. Ill. 1990); *see also In re 203 North LaSalle Street Limited Partnership*, 190 B.R. 567, 576 (N.D. Ill. 1995). "[T]he proponent of a plan must affirmatively demonstrate that the plan is confirmable…[and] the Bankruptcy Code imposes upon the court the responsibility of determining whether the requirements of 11 U.S.C. § 1129(a), and if applicable 11 U.S.C. §1129(b), have been met." *Rusty Jones, Inc.*, 110 B.R. at 373. "The filing or voicing of an objection to a plan of reorganization does not shift the burden of proving that the plan satisfies all of the requirements of 11 U.S.C. § 1129(a) away from the proponent of the plan." *Id*.

The threshold requirements for confirmation are set forth at 11 U.S.C. §1129(a). Among the most important requirements of §1129(a) is that

> [w]ith respect to each impaired class of claims or interests—
> (A) each holder of a claim or interest of such class—
> (i) has accepted the plan; or
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date…

11 U.S.C. §1129(a)(7).

The "best interest of creditors" test, thus, establishes a floor for the treatment of any impaired claim whose holder rejects the plan. *See Rusty Jones, Inc.*, 110 B.R. at 373; *see also In re Multiut Corp.*, Bankr. No. 09 B 17575, 2011 Bankr. LEXIS 1468, at *44 (N.D. Ill. April 19, 2011). The treatment which the plan provides to the objecting holder of an impaired claim must be no worse than the treatment the holder would receive in a hypothetical liquidation of the debtor's property on the effective date of the plan. *Id*., *see also In re 203 North LaSalle Street Partnership*, 126 F.3d 955, 969 (7th Cir. 1997).

If an entire class of impaired claims votes by the requisite majorities to reject a plan, then the plan can only be confirmed under the "cram down" standards set forth at 11 U.S.C. §1129(b). These standards require, among other things, that the plan "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).

Section 1129(b)(2)(A) provides the following cram down requirements with respect to a class of secured claims:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, 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.

For the reasons set forth below, subsection of §1129(b)(2)(iii) is the most pertinent cram down standard with respect to the ML Claimants, i.e. whether the Plan provides for the realization by holders Class 3 Claims of the "indubitable equivalent" of such claims.

"[T]he question whether the interest received by a secured creditor under a plan of reorganization is the 'indubitable equivalent' of his lien is one of fact." *In re James Wilson Associates*, 965 F.2d 160, 172 (7th Cir. 1992) (treatment including an interest rate that compensates the secured creditor "for the opportunity cost of its money and the risk of default" provides the indubitable equivalent of the claim).

The "indubitable equivalent" standard set forth in §1129(b)(2)(A)(iii) is just as exacting as the standards set for under subsections (b)(2)(A)(i) and (b)(2)(A)(ii). "Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel. Quite the contrary, [the examples in the legislative history] focus on what is really at stake in secured credit: repayment of principal and the time value of money." *In re The Pacific Lumber Co.*, 584 F.3d 229, 246 (5th Cir. 2009). "Clauses (i) and (ii) explicitly protect repayment to the extent of the secured creditors' collateral value and the time value compensating for the risk and delay of repayment. Indubitable equivalent is therefore no less demanding a standard than its companions." *Id*.

"Though broad, the phrase 'indubitable equivalent' is not unclear. Indubitable means 'not open to question of doubt,'…while equivalent means one that is 'equal in force or amount' or 'equal in value.'" *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 310 (3rd Cir. 2010), quoting Webster's Third New Int'l Dictionary, 1154 (1971). "[T]he 'indubitable equivalent' under subsection (iii) is the unquestionable value of a [creditor's] secured interest in the collateral." *Id.* at 310.

Indubitable equivalence "requires more than the payment of interest; it requires the protection of the creditor's rights 'to get his money or at least the property.'" *In re Sparks*, 171 B.R. 860, 866 (N.D. Ill. 1994), quoting *In re Murel Holding Corp*, 75 F.2d 941, 942 (2d Cir. 1935). "In the context of the 'fair and equitable' standard, courts have explained that a particular plan meets the 'indubitable equivalent' requirement if the plan '(1) provides the creditor with the present value of its claim, and (2) insures the safety of its principle.'" *Sparks*, 171 B.R. at 866, quoting *In re Monarch Beach Venture, Ltd.*, 166 Bankr. 428, 434 (C.D. Cal. 1993). "[A] court must examine (1) whether the substituted security is completely compensatory and (2) the likelihood that the secured creditor will be paid." *Sparks,* 171 B.R. at 866, quoting *In re San Filipe at Voss, Ltd.*, 115 Bankr. 526, 529 (S.D. Tex. 1990).

"Two attributes of the substituted collateral, its *value* and the degree of *risk* that it imposes on the secured creditor, determine whether the new collateral is sufficiently 'safe' and 'completely compensatory.'" *Sparks*, 171 B.R. at 866 (emphasis in the original). Or, as the Seventh Circuit has expressed the point:

> It might appear that if the security is worth much more than the loan (almost twice as much here), the risk of default will be negligible... But the appearance is misleading. The risk of default may be great. … Nor is the risk of default a costless one to the secured creditor merely because his lien is oversecured. More important than the expenses of foreclosure (should there be a default) is the possibility that the security will decline in value over the life of the loan … to the point where it is no longer adequate.

James Wilson Associates, 965 F.2d 160, 172 (7th Cir. 1992).

Risk of default and risk as to the value of the substituted collateral are key components to whether a plan truly offers the "indubitable equivalence". As the *Sparks* court states:

> New collateral with a value less than the value of the original collateral cannot be 'completely compensatory.' Similarly, new collateral with a value projected to be equal to, or even more than, the original collateral is not 'completely compensatory' if the new collateral is so much riskier than the original collateral that there is a substantially greater likelihood that the secured creditor will not be paid.

171 B.R. at 866 (N.D. Ill. 1994). The plan proponent must prove "not merely that the risk is reasonable, but that the risk to [the secured creditor] would not be increased by reason of the change in its collateral." *Id*. at 867.

Analysis

The Plan cannot be confirmed because of its inadequate treatment of Class 3 Claims. The Plan deprives the holders of Class 3 Claims of potentially first and paramount liens on more than $41 million of commercial real estate and instead offers

Financial Assets, having a fraction of that value, over which the Lenders, who are *junior lien holders* and *litigation adversaries*, retain significant control. Plainly, the Plan is designed to give the Lenders settlement leverage against the Mechanics Lien Claimants which the Lenders would never otherwise have. For that very reason, the Plan is neither in the best interest of creditors under §1129(a)(7), nor fair and equitable under §1129(b)(2)(A).

1. Under the Plan, Mechanics Lien Claimants Do Not Receive or Retain Property Having an Effective Date Value Equal to What They Would Receive or Retain Under Chapter 7.

Analysis of the Plan under the "best interest of creditors" test -- §1129(a)(7) -- is straightforward. The Plan is a liquidating plan. What will happen if the Plan is confirmed is similar in many respects to what would happen in a hypothetical Chapter 7 liquidation of the Debtors' estates. There is no equity in the Debtors' properties. A Chapter 7 trustee would likely abandon the Hotel Complex to permit the secured creditors not only to establish lien priorities in the State Court, but also to liquidate their collateral under applicable non-bankruptcy law. The Lenders and the ML Claimants have obtained relief from the stay to determine in State Court which, if any, mechanics liens are senior to the Lenders' mortgage liens, just as they would do in chapter 7.

The focus, then, of the "best interest of creditors" test must be on how the Plan differs from a hypothetical Chapter 7, namely, on the Plan's *proposed changes to the collateral securing Class 3 Claims*. Under the Plan, the Lenders who, the ML Claimants submit, are junior undersecured creditors, are empowered to strip the liens of Class 3 Creditors from collateral that provides an equity cushion of 300% to 400% and substitute Financial Assets that provide almost no equity cushion at all. At the time of the

Confirmation Hearing, the total amounts of the Mechanics Lien Claims under state law will be between approximately 119% to 126% of the original principal amounts of those Claims, or more. The Financial Assets, which may be substituted at the Lenders' discretion, will only be in the amount of 125% of the "specific asserted Class 3 Mechanics Lien Claim." Nothing in the Plan requires either the Letter of Credit or the Escrow Agreement to provide for interest that accrues in excess of 25% of the principal amount of the Mechanics Lien Claims. Thus, the treatment the Plan provides to Class 3 will likely fail to provide holders of Mechanics Lien Claims with the "present value" of their Claims.

In a Chapter 7 liquidation, on the other hand, the holders of Senior Mechanics Lien Claims, as a practical matter, would never risk becoming undersecured. They would be protected by the almost 400% difference between the total pool of Mechanics Lien Claims (approximately $9 million) and the $41.2 million Stalking Horse Bid for the Hotel Complex (an amount which may be far below its real fair market value). The Lenders, as junior lien holders and defendants in the State Court Mechanics Lien Litigation, could extend the Litigation, appeal adverse holdings and otherwise delay the lien foreclosure process. Mechanics Lien Claimants would have to pay higher legal fees (which they likely cannot recover under Illinois law). But, realistically, they would never exhaust their equity cushion in the Hotel Complex by virtue of interest accruals.

Another reason the Plan fails to provide Class 3 Claimants with as much as they would receive under Chapter 7 is found in the contractual provisions of the Financial Assets. For example, under the express terms of the Escrow Agreement and the Plan, holders of Senior Mechanics Lien Claims cannot even obtain the proceeds of their new, inferior collateral without the Lenders directing the Escrow Agent to make payment. Because such control of collateral by junior lien holders would never arise in a Chapter 7 liquidation, Mechanics Lien Claimants would be far better off with their *existing collateral* under Chapter 7.

The Plan results, then, in holders of Class 3 Claims receiving or retaining much less value than they would receive or retain in a Chapter 7 liquidation. The Plan is not in the best interest of Class 3 creditors, as required by §1129(a)(7) and, therefore, cannot be confirmed.

2. The Plan Does Not Provide Holders of Mechanics Lien Claims with the Indubitable Equivalent of Their Claims.

Even if the substitution of Financial Assets for a Senior Mechanics Lien on the Hotel Complex could satisfy the "best interest of creditors" test (which it cannot), such treatment does not satisfy the requirement for cram down under §1129(b)(1). The Plan can only be crammed down on Class 3 pursuant to the indubitable equivalent requirement of §1129(b)(2)(A)(iii). Subsections (b)(2)(A)(i) and (b)(2)(A)(ii) are inapplicable. The Plan does not entitle holders of Senior Mechanics Lien Claims to retain the Liens securing their Claims to the extent of the allowed amount of such Secured Claims and provide them deferred payments of a value on the Effective Date equal to the allowed amounts of such Claims. Nor does the Plan require that the Hotel Complex and the Restaurant Properties be sold free and clear, subject to §363(k), with Senior Mechanics Liens attaching to the proceeds. Therefore, the only cram down standard the Plan could satisfy is set forth in §1129(b)(2)(A)(iii). Thus, the Plan must provide to holders of

Allowed Class 3 Claims the "indubitable equivalent" of such Claims. The Plan does not and, therefore, cannot be confirmed.

The substitute collateral which the Plan empowers the Lenders to impose on the ML Claimants does not permit them to realize the indubitable equivalent of their claims. Section 6.2(b)(i) of the Plan permits the Lenders unilaterally to substitute either a Letter of Credit or an Escrow Agreement for at least $41.2 million in fully developed commercial real estate currently securing the Mechanics Lien Claims.[2] The inadequacy of these Financial Assets is evident both from their face value (only 125% of the original principal amount of the Mechanics Lien Claims) and from the express terms under which they can be liquidated.

The Plan's treatment of Class 3 fails to account for the time value of money. *See In re Pacific Lumber*, 584 F.3d at 246. What the Lenders claim is a 25% "equity cushion" has already been consumed by accrued interest. The Plan makes no provision for the interest that will accrue by the time the State Court Mechanics Lien Litigation is resolved in whole or in part by Final Orders. Under Illinois law, the interest accruals become part of the Mechanics Lien Claims and are fully secured by the value of the Hotel Complex to which they attach. If the Lenders substitute Financial Asset collateral, as the ML Claimants expect they will, some Mechanics Lien Claims will go from being fully secured to undersecured as of the Effective Date. Precisely because the Financial Assets are insufficient to compensate for the time value of money, the Lenders will be able to

[2] For the purpose of this analysis, the Court should assume the Lenders will exercise their right under Section 6.2(b)(i) of the Plan to substitute Financial Assets for a Mechanics Liens on the Hotel Complex. Doing so will give the Lenders substantial negotiating leverage in the State Court Mechanics Lien Litigation. While the Lenders will need to commit some amount of capital to fund Escrow Agreements or secure Letters of Credit and pay associated fees, as large financial institutions themselves, the Lenders will likely be able to procure Financial Assets less expensively than other businesses could.

pressure holders of Mechanics Lien Claims to settle. The Financial Assets offered under the Plan, therefore, cannot constitute the "indubitable equivalent" of mechanics liens on the Hotel Complex because the Financial Assets are not completely compensatory. *See In re Sparks*, 171 B.R. at 866.

The terms of the Financial Assets also expose holders of Class 3 Claims to payment default risks incompatible with the "indubitable equivalent" standard. Indeed, the proposed Financial Assets may be wholly unavailable to satisfy Senior Mechanics Lien Claims when the State Mechanics Lien Claim Litigation is resolved. For example:

(a) <u>The Form of Letter of Credit Creates New Risks for Mechanics Lien Claimants</u>.

(i) The Letter of Credit may expire before the State Court Mechanics Lien Litigation is resolved. The form of Letter of Credit has a blank expiration date. No one knows what that date will be. Actual Letters of Credit issued after the Effective Date will not be subject to further approval by the Court. Although Section 11.1(g) of the Plan does provide for this Court's continued jurisdiction over certain disputes under Section 6.2 and 6.3 of the Plan, it is not clear that such jurisdiction extends to disputes over the terms or adequacy of particular Letters of Credit.

(ii) There is no opportunity to draw on the Letter of Credit upon notice of non-renewal, or otherwise, if it expires before a Final Order is entered in the State Court Mechanics Lien Litigation. If the Letter of Credit expires before entry of a Final Order, the Mechanics Lien Claimant will have no collateral, even if the State Court later determines that it had a Senior Mechanics Lien Claim.

(iii) A draw on the Letter of Credit has to be made at the "issuers' office." This office could be anywhere in the world where a bank organized in the United States could have its "issuers" office. This is a substantial impairment of the value of the Letter of Credit.

(iv) A draw can only be made based upon "certified" documents, but other than a Final Order in the State Court Mechanics Lien Litigation, it is unclear who is to certify what. For example, who certifies "a certified true copy of a Mechanics Lien Settlement Agreement"?

(v) The Letter of Credit form states that the credit cannot be transferred. Ordinarily a Mechanics Lien Claimant would have the right to assign or transfer its lien. The prohibition on transfer diminishes the value of the Letter of Credit.

(b) The Form of Escrow Agreement Enhances Lenders' Negotiation Levereage at the Expense of Mechanics Lien Claimants.

(i) The funds escrowed on account of a Mechanics Lien Claim are to be disbursed only at the Lenders' direction and only after a release of the Mechanics Lien *is recorded*. Once a lien release is recorded, the Mechanics Lien Claimant's lien is lost. Even though a Mechanics Lien Claim may have been determined by a Final Order, the lien must be released before payment is made. If after a release is recorded, the Lenders refuse to authorize a disbursement from the escrow, the Claimant's only remedy will be litigation.

(ii) The Escrow Agent is instructed to invest the escrowed funds. If there are losses, there is no provision for replenishing the escrow. The Mechanics Lien Claimant will suffer the loss.

(iii) It is unclear whether the State Court or the Bankruptcy Court has any jurisdiction over the Escrow Agent. The Escrow Agent is not bound by the Plan, is not a party to the State Court Mechanics Lien Litigation or to any other agreement other than the Escrow Agreement. The Escrow Agent is indemnified by the Lenders which means that it will in most instances follow the Lenders' instructions. It is quite conceivable under these circumstances that after a Final Order is entered, the successful Mechanics Lien Claimant will have to institute a new suit against the Escrow Agent and the Lenders to recover its money.

Both the *value* and the *risk* attributes of the Financial Assets render them significantly and substantially less than the "indubitable equivalent" of the statutory liens on real estate now securing the Mechanics Lien Claims. Therefore, the Plan is not fair and equitable to holders of Class 3 Claims and cannot be confirmed.

CONCLUSION

For the reasons set forth above, the ML Claimants urge the Court to deny confirmation of the Plan.

Respectfully submitted, this 2nd day of June, 2011.

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