ETHAN B. MINKIN (019902)
minkine@ballardspahr.com
ANDREW A. HARNISCH (024957)
harnischa@ballardspahr.com
JACLYN D. FOUTZ (024286)
foutzj@ballardspahr.com
DEAN C. WALDT (NJ SBN 037421985; ADMITTED PRO HAC VICE)
waldtd@ballardspahr.com
JON T. PEARSON (NV SBN 10182; ADMITTED PRO HAC VICE)
pearsonj@ballardspahr.com
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: (602) 798-5451
Facsimile: (602) 798-5595
Attorneys for Secured Creditor
JPMCC 2007-C1 Grasslawn Lodging, LLC

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: TRANSWEST RESORT PROPERTIES, INC., an Arizona corporation, Debtor. Jointly Administered with:	In Proceedings Under Chapter 11 Case No. 4:10-bk-37134-EWH Jointly Administered with Case Nos.:
TRANSWEST TUCSON PROPERTY, L.L.C., a Delaware limited liability company,	4:10-bk-37160- EWH
TRANSWEST HILTON HEAD PROPERTY, LLC, a Delaware limited liability company,	4:10-bk-37170- EWH
TRANSWEST TUCSON II, LLC, a Delaware limited liability company, and	4:10-bk-37151- EWH
TRANSWEST HILTON HEAD II, LLC, a Delaware limited liability company.	4:10-bk-37145- EWH
This Pleading applies to: ■ All Debtors ☐ Specified Debtors	**OBJECTION TO SECOND AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION DATED OCTOBER 4, 2011 AND THIRD AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION DATED NOVEMBER 17, 2011**

Table of Contents

JPMCC 2007-C1 Grasslawn Lodging LLC ("**Senior Lender**") hereby objects to the Debtors' Second Amended and Restated Joint Plan of Reorganization dated October 4, 2011 (the "**October Plan**") [Docket No. 515] and the Debtors' "Third Amended and Restated Joint Plan of Reorganization Dated November 17, 2011" (the "**November Plan**") [Docket No. 637]. The following objections are based on information presently known to Senior Lender. The Debtors did not receive the November Plan until 8:30 p.m. on November 17, 2011. Moreover, the precise terms of the November Plan were not disclosed until November 18, 2011 at 4:30 p.m. Even now, that disclosure is incomplete. As of the date of this Objection, Senior Lender has not received any updated projections or disclosures and Debtors have not provided the remainder of the proposed new loan documents. Senior Lender reserves the right to supplement this Objection to present other and new arguments, or to elaborate on the arguments contained in here, as additional facts become known to Senior Lender.

I. SUMMARY OF PLAN OBJECTIONS

A. Preliminary Objection: The Confirmation Hearing on the November Plan Should Not Proceed On November 28, 2011

The November Plan was filed on November 17th, just four business days before trial was set to commence on the October Plan. Contrary to the express representations to Senior Lender and this Court by Debtors' counsel and the new equity's counsel during a telephonic conference on November 17, 2011 in which counsel for Senior Lender sough a one-week adjournment of the confirmation hearing based on Debtors' representation that yet another plan would be filed, the Debtors materially altered Senior Lender's treatment in the November Plan. The last-minute material modifications to the plan, coupled with the voluminous proposed plan documents that were filed on November 18th, require that the Court either deny confirmation or continue the confirmation hearing to require adequate disclosure and voting on the November Plan.

B. 1129(a)(1) and (a)(2): The Plan and Plan Proponent Have Not Complied With Applicable Provisions of Title 11

The Plan Proponents have not complied with the applicable provisions of Chapter 11 with respect to the November Plan because (i) the November Plan does not provide treatment for

Senior Lender in the event it does not elect treatment under Section 1111(b)(2); (ii) the disclosures for the November Plan fail to comply with Section 1125; and (iii) solicitation and voting on the November Plan failed to comply with Section 1126.

C. **<u>1129(b)(2): The Plan is Not Fair and Equitable</u>**

The Plan, which provides for a 21-year, interest-only loan is not fair and equitable in its treatment of the Senior Lender's Claims. The interest rate, term, abrogation of the due-on-sale provision in the Loan Documents, other alterations of the Loan Documents and other derogatory treatments of Senior Lender's claim fail to meet the statutory standard.

D. **<u>1129(a)(3): The Plan is Not Proposed in Good Faith</u>**

Debtors' principals have used the Chapter 11 Plan process to benefit themselves at the expense of creditors.

E. **<u>1129(a)(11): The Plan is Not Feasible</u>**

Debtors cannot meet their burden of proof in showing that the plan will not result in the need for further reorganization or liquidation.

II. <u>ARGUMENT</u>

A. **<u>The Debtors Bear the Burden of Proof on All Elements of Section 1129</u>**

The Debtors bear the burden of proving every applicable element of Section 1129(a) and (b) by a preponderance of the evidence. *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 653 (9th Cir. 1997).

B. **<u>Senior Lender Objects to Plan Confirmation Going Forward on Four Business Days' Notice, or Alternatively, Request That Confirmation Be Denied</u>**

The Senior Lender objects to the confirmation hearing on the November Plan going forward as scheduled on November 28, 2011. This objection is founded on basic notions of procedural due process and compliance with the Federal Rules of Bankruptcy Procedure. Against the backdrop of a constantly shifting deal, Senior Lender has repeatedly requested that the Court schedule the confirmation process in a manner that would allow for reasonable discovery and time to formulate and present objections.

The most recent request for an adjustment to the hearing schedule was in a telephonic hearing on November 17, 2011. At that hearing, the Court was informed that although the parties were deep into discovery regarding the October Plan, the Debtors had informed the Senior Lender that they would be amending their plan again, for the fourth time in three months. Senior Lender asked for a one-week continuance of the confirmation hearing, in order to have a minimum period of time to (i) absorb the as-yet unfiled November Plan, (ii) conduct minimal discovery regarding the November Plan, and (iii) allow the Senior Lender's expert witnesses an opportunity to analyze the November Plan. Both the Debtors and the proposed new equity investor, Southwest Value Partners ("SWVP") opposed the continuance. SWVP's counsel went so far as to characterize the Senior Lender's concerns as "feigned outrage" because, according to the express representations on the record by the Debtors and SWVP, the treatment of Senior Lender was not going to change under the new plan.[1] The Court denied Senior Lender's request for an adjournment, presumably based on the representations of counsel for the Debtors and SWVP.

Contrary to the representations to this Court, the November Plan (filed at 8:30 p.m. on November 17th, the same day as the telephonic hearing), *did* change Senior Lender's treatment, materially and for the worse. Specifically, the Debtors lowered the Senior Lender's interest rate from 5.625% to 5.25%.[2] The proposed Plan Documents, which are supposed to govern, among other things, the operation and management of the Resorts and the Senior Lender's treatment during the 21-year term of the plan, were not filed until November 18th. Those documents further impair the Senior Lender's rights, by, among other things, abrogating due-on-sale clauses, eliminating guaranties, eliminating cash management protections, eliminating restrictions on

---

[1] SWVP advocated against any delay in the confirmation hearing despite its lack of standing in these cases. *See, In re Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983).

[2] This was the second time the Debtors lowered the proposed interest rate since the Court approved the disclosure statement in early October. In the October 4th Plan, the Senior Lender's interest rate was 6.125%. In the "As Served" plan and disclosure statement that were filed on October 20th, the Senior Lender's rate was reduced to 5.625%. This change was quietly made without court approval and with no notice to the Senior Lender or any other party. Finally, the Debtors reduced the rate to 5.25% in the November Plan.

further borrowing, and many other provisions that the Senior Lender and its experts have had just a few days to analyze.

Because of the last-minute filing of the November Plan and the even later submission of Plan Documents, the Senior Lender has had exactly three (3) business days to absorb the November Plan and prepare for the confirmation hearing. Senior Lender has received no financial or operational projections and no expert reports regarding the November Plan, and will have no opportunity to depose any witnesses about the differences between the October Plan and the November Plan. Where there is no emergency or other extenuating circumstance, a rush to trial is contrary to basic notions of due process and fairness. The Court ought not to force the Senior Lender, with almost no notice, to defend against a cramdown plan that seeks to bind the Senior Lender – Debtors' largest creditor comprising 98% face amount of all claims – for the next 21 years under a coerced loan the terms of which Debtors' own expert opines are below market.

Federal Rule of Bankruptcy Procedure 2002(b) requires at least 25 days notice for filing objections to confirmation of a Chapter 11 Plan. In this case, three (3) business days notice was provided, while the Debtors insisted on using four of the last five business days before the hearing for expert depositions related to reports on the October Plan, since none of the experts for either the Debtors or the Senior Lender had yet reviewed or considered the November Plan. While the 25-day notice period may be shortened under Rule 9006, this provision "should be sparingly involved and may only be involved for cause shown." *See, In re Sandra Cotter, Inc.* 65 B.R. 153 (W.D.N.Y. 1986) (administrative convenience does not justify an abbreviated notice; *In re Villareal*, 160 B.R. 1993 (Bankr. W.D. Tex 1993) (cause is not shown when the cause for expedited hearing is one of the movant's own making); *Official Committee of Disputed Litigation Creditors v. McDonald Investment Corp.*, 42 B.R. 981, 987 (N.D. Tex 1984) (abuse of discretion for bankruptcy court to shorten notice period when alleged emergency was of debtor's own making).

In this case, to continue to receive the benefit of plan exclusivity, Debtors filed a plan of reorganization without any financial means to proceed to confirmation. This was a mere tactic by the Debtors to defeat multiple motions to terminate plan exclusivity. Thus, the plan has been a moving target since July 2011. If Debtors have found an investor at the eleventh hour before a scheduled confirmation hearing, that does not justify filing a new plan and proceeding to confirmation on an unworkable schedule. Debtors have not even alleged that its potential investor will not proceed with the proposed plan absent an immediate hearing. All that has been represented is that the investor would like to close by the end of the calendar year. While it is doubtful this could be achieved on a practical level, the desire of a non-party to this action to close by year end cannot trump the basic procedural rights of the party representing 98% of the debt in these cases.

If Debtors wishes to proceed with the November Plan confirmation hearing on November 28th, the Court should deny confirmation and end the process which has added tremendous and wasteful costs to the estates of these Debtors and to the Senior Lender.

C. **The Plan and Plan Proponent Have Not Complied with Applicable Provisions of Title 11 – 11 U.S.C. §§ 1129(a)(1) & 1129(a)(2)**

The Court may not confirm a plan unless ***both*** "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]" ***and*** "the proponent of the plan complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. §§ 1129(a)(1) & 1129(a)(2). Under Section 1129(a)(1), "applicable provisions" that the plan must follow include the mandatory classification and treatment provisions of Sections 1122 and 1123. *See Matter of Cajun Elec. Power Co-op., Inc.*, 150 F.3d 503, 513 n. 3 (5th Cir. 1998); H.R. Rep. No. 95-595 at 412 (1979) ("Paragraph (1) [of § 1129(a)] requires that the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of plan"). Under Section 1129(a)(2), the "applicable provisions" that the plan proponent must follow include the disclosure and solicitation provisions of Sections 1125 and 1126. *In re City of Colorado Springs Spring Creek Gen. Imp. Dist.*, 177 B.R. 684, 688 (Bankr. D. Colo. 1995) ("Section 1129(a)(2) generally requires the proponent of a plan to comply with applicable provisions of Title 11 in order to have its plan confirmed. These include § 1126 which governs acceptance of a plan and § 1125 which sets out the requirements for disclosure statements").

Here, the November Plan fails both Sections 1129(a)(1) and 1129(a)(2), because (i) the plan fails to specify the treatment of the Senior Lender in the event that it does not make the 1111(b)(2) election; and (ii) the Debtor has failed to provide adequate disclosures and has not solicited votes for the November Plan.

1. The Material Modifications In The November Plan Permit The Senior Lender To Revisit Its Section 1111(b)(2) Election

On September 13, 2011, Senior Lender elected to be treated as fully secured under Section 1111(b)(2). The plan that was on file at the time the Senior Lender made its election was the "Joint Plan of Reorganization dated July 29, 2011" (the "**July Plan**") (Docket No. 407). In its "Notice of Election of JPMCC 2007-C1 Grasslawn Lodging, LLC Pursuant to Section 1111(b) of the Bankruptcy Code" (the "**Notice of Election**") (Docket No. 512), Senior Lender specifically reserved its right to withdraw its election if subsequent plan amendments contained material modifications. *See* Notice of Election at n.1.

Since the Senior Lender made its election, the Debtors have filed *four* modified plans. The intervening plans have materially altered not only the Senior Lender's treatment, but the overall economic structure of the plan:

- On July 31, 2011, the Debtors filed a "Joint Plan of Reorganization dated July 29, 2011" (the "**July Plan**") (Docket No. 407) and a Disclosure Statement to the July Plan (the "**July Disclosure Statement**") (Docket No. 408). Under the July Plan, Senior Lender's claim had a cumulative 6.15% interest rate (base interest rate of 5.65% plus a cumulative additional 50 basis points for certain loan-to-value and debt service ratio covenants). *See* July Plan at § 3.2.2(a)(ii); July Disclosure Statement at § VII(E)(1)(c)(ii).

- On September 13, 2011, the Senior Lender made its Section 1111(b)(2) election.

- On September 14, 2011, the Debtors filed their "First Amended and Restated Joint Plan of Reorganization dated September 14, 2011" (the "**September Plan**") (Docket No. 520), which decreased the interest rate to a cumulative 6.125% (base interest rate of 5.625% plus a cumulative additional 50 basis points for certain loan-to-value and debt service ratio covenants).. *See* September Plan at § 3.2.3 (interest to be paid on Senior Lender's Section 1111(b) electing claim "at the ***applicable*** rate set forth in Section 3.2.2(a)"); September Disclosure Statement at § VII(E)(1.1.3) ("at the ***applicable*** rate set forth in Section 3.2.2(a)").

- On October 4, 2011, the day of the hearing on the Disclosure Statement for the September Plan, the Debtors filed their October Plan (Docket No. 550), along with the "Second Amended and Restated Disclosure Statement to Second Amended and

Restated Joint Plan of Reorganization dated October 4, 2011" (the "**October 4th Disclosure Statement**") (Docket No. 551).

- Under the October Plan, Senior Lender's claim retained a cumulative 6.125% interest rate, but the proposed investor changed to SWVP. *See* October Plan at § 3.2.3 ("at the ***applicable*** rate set forth in Section 3.2.2(a)"); October 4th Disclosure Statement at § VII(E)(1.1.3) ("at the ***applicable*** rate set forth in Section 3.2.2(a)").

- The October 4th Disclosure Statement (a) was on file for thirty minutes when the Court approved it, (b) had not been noticed out to creditors and other interested parties, and (c) had not been reviewed or evaluated by *any creditor*, including the Senior Lender.

- At the same hearing on October 4, 2011, the Court upheld Senior Lender's Section 1111(b)(2) election over the objection of the Debtors. The Section 1111(b) election related to the July Plan, which was the only Plan on file at the time the election was filed on September 13, 2011.

- On October 11, 2011, the Court issued its formal order approving the October 4th Disclosure Statement (Docket No. 565). The order specifically stated that only "non-material changes" to the October 4th Disclosure Statement "which may include, but are not limited to, clarifications, technical corrections, typographical and grammatical changes" may be made "without having to obtain further order of the Court."

- On October 20, 2011, the Debtors filed the purported "as-served" copy of the plan and disclosure statement (the "**October 20th Plan**" and "**October 20th Disclosure Statement**") (Docket Nos. 581 and 582). Without alerting the Court nor any creditors to any changes, and with the ***affirmative misrepresentation*** that they were merely as-served copies of the October Plan and October 4th Disclosure Statement, the October 20th Plan and October 20th Disclosure Statement contained a subtle but materially detrimental change to the treatment of Senior Lender's claim: Senior Lender's Section 1111(b) treatment changed from a cumulative 6.125% interest rate (base interest rate of 5.625% and up to an additional 50 basis points until certain loan to value and debt service ratios were met) to a base rate of 5.625% ***only***. *See* October 20th Plan at § 3.2.3 ("interest at the ***base*** rate set forth in Section 3.2.2(a)(ii)"); October 20th Disclosure Statement at § VII(E)(1.1.3) ("interest at the ***base*** rate set forth in Section 3.2.2(a)(ii)").

- On November 17, 2011, just four (4) business days before the start of the confirmation hearing, the Debtors filed the November Plan. The November Plan materially and detrimentally changed the Senior Lender's treatment ***<u>again</u>***. Among other things, the November Plan reduced Senior Lender's interest rate to 5.25%. *See* November Plan at § 3.2.2(a)(ii). Further, based on the underlying Plan Documents (final versions of which were not filed until November 18th, just three (3) business days before the confirmation trial), the November Plan stripped Lender of its Guaranty and abrogated a variety of important rights contained in the original loan documents. The structure and financial metrics of the November Plan impact the treatment of unsecured creditors as well.

- Although the Senior Lender has not indicated whether it will make the Section 1111(b)(2) election with respect to the November Plan, the November Plan fails to include any treatment for the Senior Lender's claim other than treatment under Section 1111(b)(2).

The November Plan fails under Section 1129(a)(1) because it does not provide for treatment of Senior Lender's claim in the event that the Senior Lender does not make the Section 1111(b)(2) election. Although Senior Lender previously made a Section 1111(b)(2) election when the July Plan was on file, that election cannot be automatically applied to the November Plan. As set forth above, the Senior Lender's treatment has changed several times since it filed its Notice of Election on September 13th. After lowering the Senior Lender's interest rate twice (and therefore increasing Senior Lender's balloon payment in year 21), the Debtors now seek to press the Senior Lender into a Section 1111(b)(2) election that was made based on a plan that no longer exists.

Because of the material modifications in the November Plan, the Senior Lender is entitled to make a new decision about whether to elect treatment under Section 1111(b)(2). *See In re Scarsdale Realty Partners LP*, 232 B.R. 300, 302-03 (Bankr. S.D.N.Y. 1999); *In re Paradise Springs Associates*, 165 B.R. 912, 918 (Bankr. D. Ariz. 1993) ("Every published decision which has considered the issue has determined that [an 1111(b)] election can be withdrawn by the electing creditor, provided there has been a material modification of the plan under which the modification was made subsequent to the time the creditor makes the election."); *In re Century Glove Inc.,* 74 B.R. 958, 962 (Bankr. D. Del. 1987); *In re Keller*, 47 B.R. 725, 730 (Bankr. N.D. Iowa 1985) ("a material alteration of the Plan by the Debtor is tantamount to filing a different plan…it would be inequitable to not allow a creditor to fully evaluate the proposal and determine whether it wished to elect treatment under § 1111(b)").

However, the November Plan provides no treatment of the Senior Lender's claim in the event it decides not to make the Section 1111(b) election. This violates Section 1123(a)(3), which requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan's non-compliance with Section 1123 makes it unconfirmable under Section 1129(a)(1).

Likewise, the lack of any description of the Senior Lender's non-1111(b) treatment violates the disclosure requirements of Section 1125. By design, the November Plan provides absolutely no indication of how Senior Lender will be treated if it chooses not to elect. The Senior Lender can make no informed decision under these circumstances. The Debtors' lack of disclosure violates the Bankruptcy Code, and therefore the plan is unconfirmable under Section 1129(a)(2).

2. <u>The November Plan Has Not Been Properly Served or Balloted</u>

In its haste to confirm the November Plan, the Debtors have dispensed with filing or seeking approval of a disclosure statement, and have not bothered to send out ballots for the November Plan. It appears that the Debtors did not even serve the November Plan on creditors, which means that *the vast majority of creditors don't know that the November Plan exists*. All of the ballots that were submitted by creditors on November 21st were submitted in the belief that they were voting on the October 4th Plan.[3]

Presumably, the Debtors will argue that the modifications to the November Plan are not material and do not require disclosure to creditors or re-balloting. However, the modifications contained in the November Plan materially impact *all* creditors – not just the Senior Lender – such that disclosure and solicitation are required. The treatment of unsecured creditors in particular is materially altered in at least the following ways:

- Since the Senior Lender's annual interest payments have been reduced, the "balloon payment" that is required to pay the Senior Lender its full secured claim at the end of the 21-year term (or upon a sale of the resorts) increases correspondingly.[4] This impacts plan feasibility, since it requires greater assumed appreciation of the Resorts over the term of the Plan. All creditors should be informed about the potential feasibility effect of the higher balloon payment before voting on the November Plan.

- Under the November Plan, unsecured creditors are entitled to, among other things, (i) payments of "Surplus Cash Flow" from the resorts, and (ii) payments of a "Membership Appreciation Amount."[5] *See* November Plan at § 8.2(b). However, the plan modifications directly impact both of these payments. The "Surplus Cash Flow" to unsecured creditors is now reduced because of the requirement to fund a "Working Capital Reserve Amount" in the aggregate amount of $3,500,000. *See* November Plan at § 21.90.

- The "Membership Appreciation Amount" to unsecured creditors is also directly impacted by (i) the increased balloon payment to the Senior Lender and (ii) the

---

[3] The ballot mailed to creditors even states that it is a "<u>Ballot For Accepting or Rejecting Second Amended and Restated Joint Plan of Reorganization Dated October 4, 2011</u>."

[4] As set forth above, the November Plan assumes that the Senior Lender will make the Section 1111(b)(2) election.

[5] "Surplus Cash Flow and "Membership Appreciation Amount" are defined terms under the November Plan. *See* November Plan at §§ 21.42, 21.80

> allegedly increased funding commitment from SWVP. The Membership Appreciation Amount is determined by the net sales proceeds from a sale of the Resorts *after full repayment of all liens* (i.e., after the increased balloon payment). In addition, unsecured creditors are not entitled to any payment on account of membership appreciation until SWVP is repaid its entire investment, plus a 13% preferred return. *See* November Plan at §21.42. Thus, under the November Plan, an increased investment by SWVP directly affects the return to unsecured creditors.

The material plan modifications contained in the November Plan and their impact on creditors require disclosure, solicitation, and balloting on the November Plan. The Debtors cannot force the new plan on creditors who voted for completely different treatment. The Debtors' failure to adequately disclose and solicit acceptances of the November Plan are violations of Sections 1125 and 1126. This renders the November Plan unconfirmable under Section 1129(a)(2).

D. **<u>The Plan Does Not Provide Fair and Equitable Treatment To The Claim of Senior Lender Under 11 U.S.C. § 1129(b)</u>**

The Plan fails to provide fair and equitable treatment to the Senior Lender in accordance with the requirements of Section 1129(b)(2)(A). Because Senior Lender has voted to reject the Plan, the Debtors must satisfy the requirements of Section 1129(b) to confirm the Plan. Section 1129(b) states that notwithstanding the non-acceptance of the plan by an impaired class, the plan may be confirmed if the plan complies with all other requirements of Section 1129(a), does not discriminate unfairly, and is fair and equitable with respect to each impaired class that has not accepted the plan. This is the so-called "cram-down" provision of the Bankruptcy Code. Under Section 1129(b)(2)(A)(i), the Plan may be crammed down on a secured creditor only if the secured creditor retains its liens and receives deferred cash payments totaling at least the allowed amount of such claim that have value that is equal to at least the value of such holders' interest in the estate's interest in such property, unless it otherwise receives the "indubitable equivalent" of its secured claim. Furthermore, mere technical compliance with one of the three prongs for the "cram-down" of secured creditor's claims does not necessarily satisfy the requirements of Section 1129(b)(1) that the Plan be "fair and equitable." *In re D & F Construction, Inc.*, 865 F.2d 673, 675-76 (5th Cir. 1989); *In re Sandy Ridge Development Corp.,* 881 F.2d 1349, 1352 (5th Cir.

1989) (Section 1129(b)(2) merely sets the minimum standards that a plan must meet and does not require that every plan not prohibited be approved).

1. <u>The Plan Fails to Provide The Present Value Of Senior Lender's Claims and Fails the *Till* Standard Enunciated by the Supreme Court</u>

In order for creditors to receive the full present value of their claims, a plan must provide that interest will accrue at market based rates from the effective date through the date on which the claims will be paid in full. "The appropriate interest rate is the rate the debtor would pay a commercial lender for a loan of equivalent amount and duration, considering the risk of the fault and any security." *Varela v. Dynamic Brokers Inc.* (*In re Dynamic Brokers Inc.*), 293 BR. 489, 499 (B.A.P. 9th Cir. 2003); (*United States v. Camino Real Landscape Maintenance Contractors Inc. (In re Camino Real Landscaping Maintenance Contractors Inc.*), 818 F.2d 1503, 1504 (9th Cir. 1987); *see also In re Linda Vista Cinemas LLC*, 442 BR. 724, 748 (Bankr D. Ariz. 2010) (The cram-down interest rate "is generally understood to be a market rate of interest, considering the terms, quality of the security and any risk to be borne by the affected creditor.") In short, the plan must provide that the "interest rate" paid on claims following confirmation of the plan is equivalent to the rate "the reorganizing debtor would have to pay a creditor in order to obtain a loan on equivalent terms in the open market." *Camino Real*, 818 F.2d at 1503-04.

If a Chapter 11 plan proposes payment of an interest rate below the "range of prevailing market rates for loans of comparable risk and duration" or does not take into account the actual risk of that loan, confirmation must be denied because deferred payments will not yield the present value of the claim and therefore the plan is not fair and equitable and will not satisfy the requirements of Section 1129(b)(2)(A). *Linda Vista Cinemas*, 442 BR. at 748-749 ("The Ninth Circuit suggests that it is the burden of the debtor in a Chapter 11 case to introduce sufficient evidence which will establish that the proposed adjustments to the interest rate will take into consideration the term of deferment of present use and risk of default, as affected by any security.") (*quoting Camino Real*, at 818 F.2d at 1507).

The Debtors' expert, Mr. Hundley, testified without qualification at his deposition that the Debtors could not obtain a loan under the terms and conditions proposed to be crammed down on the Senior Lender in the present market place. See Deposition of Frank Hundley ("Hundley Dep.") at 90:9-24.

In this case, based on a variety of factors, including the undercapitalization of the Debtors and the present depressed value of the Resorts representing the Senior Lender's collateral, the Senior Lender determined to make an election under Section 1111(b) of the Bankruptcy Code based on the July Plan. The effect of an election under Section 1111(b)(2) is to give the electing creditor a stream of payments equal to the present value of its collateral and totaling the creditors total claim. *In re Weinstein*, 227 B.R. 284, 295 (B.A.P. 9th Cir. 1988). In addition, rather than having its secured claims stripped down to the value of its collateral pursuant to Section 506(d), the electing creditor will retain a lien in the full amount of its claim. As stated by the Ninth Circuit B.A.P., the purpose of Section 1111(b)(2) is to allow an undersecured creditor to capture the value of any post-confirmation appreciation of its collateral. *In re Weinstein*, 227 B.R. at 295. The purpose and function of an election under Section 1111(b)(2) has been explained as follows:

> Alternatively, the creditor may elect to have his claim treated as fully secured under 11 U.S.C. § 1111(b)(2). This means that the creditor relinquishes its right to vote on the plan [as an unsecured creditor] and to share in the distribution to unsecured creditors, but that the creditor must be paid the full amount of his claim over time, so long as the present value of such payments equals the value of the collateral. Under these circumstances, the creditor retains its liens to the full extent of its claims… the election allows an undersecured creditor to opt out of the lien-stripping found in Section 1129 in exchange for relinquishing its deficiency claim, retaining its lien for the full amount of its claim, and receiving payments totaling the entire allowed claim and having a present value equal to the secured amount.

Wade v. Bradford, 39 F.3d 1126, 1129 (10th Cir. 1994).

This Court has held that in the context of a Chapter 11 case in which a secured creditor invokes the provisions of Section 1111(b)(2), the appropriate interest rate (or discount rate) should be based upon the approach approved by the United States Supreme Court in *Till v. CSC Credit Corp* (*In re Till*), 541 U.S. 465, 124 S. Ct. 1951 (2004). *See In re Saguaro Ranch Dev. Corp.*, 2001 WL 2182416, *8 n.10 (Bankr. D. Ariz. 2011) (adopting the *Till* approach for determining rate for 1111(b) electing claim) (Hollowell, J.). Thus, we must look to the approach mandated by the Supreme Court in *Till* to determine whether the Debtors' proposed Plan meets the requirements of Section 1111(b)(2) as described by the Ninth Circuit B.A.P. in *Weinstein:*

> [w]hen an undersecured creditor makes a Section 1111(b)(2) election, its allowed secured claim is equal to its total claim rather than the value of its collateral. In order for a reorganization plan to now comply with cram-down requirements of 1129(b)(2)(A)(i)(I), the electing creditor must retain a lien equal to the total amount of its claim. The lien is not stripped down by Section 506(d). Subsection II of Section 1129(b)(2)(A)(i) guarantees an electing creditor stream of payments equal to its total claim. However, the stream of payments need only to have a present value of at least the value of such holder's interest in the estate's interest in such property, *i.e.*, the value of the collateral… in other words, the present value of the electing creditor's stream of payments need only equal the present value of the collateral, which is the same amount that must be received by a non-electing creditor, but the sum of the payments must be in an amount equal to at least the creditors total claim.

In re Weinstein, 227 B.R. at 294.

The United States Supreme Court has interpreted Section 1129(b)(2)(A)(i)(II) to require that secured creditors whose claims are paid out over time through a plan of reorganization must be paid in installments "calibrated to ensure that, over time, the creditor receives distributions whose total present value equals or exceeds that of the allowed claim." *Till*, 541 U.S. at 469. This requires the trial court to determine what interest rate is appropriate under the specific circumstances in the case in order to evaluate whether the present value of the proposed payments equals the value of the creditor's allowed secured claim. *See Green Tree Financial Servicing Corp. v. Smithwick*, 121 F.3d 211, 214 (5th Cir. 1997).

Pursuant to *Till*, in the absence of an efficient market to guide the trial court to the appropriate rate, the court may construct an interest rate by taking some riskless rate of return and build in a risk premium to adequately compensate the lender for the risk that the debtor will default in its plan obligations. *Till*, 541 U.S. at 477, n. 14. Even if there is no "efficient market" and the court sets a rate pursuant to *Till*, it should still look at what rate the market would set for such hypothetical loan. Specifically, in setting the interest rate under *Till*, once the appropriate base rate has been determined, the Supreme Court has instructed that "the appropriate size of the risk adjustment depends … on such factors as the circumstances of the estate, the nature of security, and the duration and feasibility of the reorganization plan." Id. at 479. S*ee also In re*

Briscoe Enterprises, 994 F.2d 1160, 1169, n. 47 (5th Cir. 1993) ("A properly calculated interest rate should factor the appropriate risk."); *In re Northwest Timberline Enterprises Inc.*, 348 B.R. 412, 434 (Bankr. N. D. Texas 2006) (in determining the rate of interest that will deliver to a lender an income stream equaling the present value of its claim, the court may properly consider "the amount financed, the ratio of the amount financed to the debtor's assets, the debtor's leverage, the debtor's performance history, [and the debtor's] industry"); *In re Guilford Telecasters Inc.*, 128 B.R. 622, 626 (Bankr. M.D. N.C. 1991) (considering "the quality of the collateral and the risk of subsequent default"); *In re Mirant Corp.*, 334 B.R. 800, 823 (Bankr. N. D. Tex. 2005) (in calculating the risk premium, the court may properly consider the market value of the loan, the feasibility of the plan, the nature and expected use of creditor's collateral, and the relative likelihood of default).

At the time the Supreme Court decided the *Till* case, this approach was already the prevailing rule in the Ninth Circuit. *See, In re Camino Real Landscaping Maintenance Contractors Inc.*, *supra.* In *Camino Real*, the Ninth Circuit explained that it is the burden of the debtor in a chapter 11 case to introduce "sufficient evidence" which will establish that the proposed adjustment to the interest rate will take into consideration "the term of deferment of present use and risk of default, as affected by any security." *Camino Real*, 818 F.2d at 1507.

Since *Till* was decided, the same approach has been followed in the Ninth Circuit. *See, In re Mendoza*, 2010 Bankr. Lexis 1308, *5 (Bankr. N.D. Cal. 2010) (agreeing that the appropriate interest rate should be calculated according to *Till*); *In re AHCB I, LLC*, 2009 Bankr. Lexis 638, *4 (Bankr. N. D. Cal. 2009) (citing *Till* for the proposition that an appropriate interest rate depends on such factors as the estate's circumstances, the nature of the security, the duration of the reorganization plan and feasibility, among other risk).

In the expert report prepared by Ronald F. Greenspan, Senior Managing Director of FTI Consulting Inc. dated November 8, 2011 (the "Greenspan Report"), a copy of which is attached hereto and incorporated herein by reference as **<u>Exhibit A</u>**, Mr. Greenspan applies the *Till* formula approach to the treatment of the claim of the Senior Lender set forth in the October Plan.[6] As noted in the Greenspan Report, Mr. Greenspan has considered the circumstances of the estate, the nature of the security, and the prospects of a feasible implementation of the proposed restructured debt over the twenty-one year duration proposed for the payment of the Senior Lender's secured claim. In applying appropriate risk adjustments based upon all of these factors, Mr. Greenspan has determined that under the formula approach established by *Till*, the adjusted interest rate of 8.7% would be appropriate under the circumstances proposed in the Second Plan.

In addition, Mr. Greenspan has applied a market test, indicating that the market for commercial real estate loans are again functioning and that new issuances of commercial real estate mortgages in 2010 were reported to be $118.8 billion with current activity for 2011 in excess of this level. Mr. Greenspan concluded that the market rate of interest with respect to the treatment of the secured creditor's claim under the Second Plan would be 9.8%. Ultimately, Mr. Greenspan adopted the lower interest rate of 8.7% based on the *Till* formula approach as

---

[6] As noted above, on Friday, November 18, 2011, four business days before the commencement of the confirmation hearing and after making an express representation to the Court during a telephonic hearing on November 17, 2011 that any further Plan amendments would not alter the treatment of the Senior Lender's claim, the Debtor filed the November Plan. The November Plan alters the treatment of the Senior Lender's claim, not only in the downward adjustment of the proposed interest rate, but also in the alteration of other terms and conditions of the restructured loan. In addition, the Debtor filed and served what purport to be final copies of some but not all of the proposed loan documents on November 17th, which also significantly alter and detrimentally effect the treatment of the Senior Lender's claim. Some key documents, such as the Deed of Trust on the Westin La Paloma Resort property and the Mortgage on the Westin Hilton Head property are omitted altogether. In addition, Debtors have provided no financial projections or any other data or factual analysis addressing the feasibility of the November Plan. Accordingly, since the Debtors have vehemently resisted the requests of the Senior Lender to delay the confirmation process so that the Senior Lender can retain some semblance of due process rights in connection with the analysis of an objection to confirmation of the November Plan, the Senior Lender has requested that the Bankruptcy Court deny confirmation of the November Plan because Debtors have failed to fulfill the basic obligations of due process to creditors and the basic requirements of the Bankruptcy Code and the Bankruptcy Rules. If the Court determines to move forward with a hearing on the confirmation of the November Plan, Senior Lender respectfully reserves all of its rights. Under these circumstances, Senior Lender is forced to focus its objections on the provisions of the October Plan and reference the November Plan as best it can, since it has had neither adequate time nor adequate information related to the November Plan in order to consider the content of the November Plan with its expert witnesses, or examine the Debtors with respect to the feasibility of the November Plan, given the radical change in the proposed capitalization from new equity and the downward adjustment interest rate.

reasonable and indicated this as the minimum rate necessary for the deferred Plan payments to provide the Senior Lender with the present value of its claim.

If the Court determines to proceed with a confirmation hearing based on the November Plan, despite the absence of any disclosure related to plan feasibility by the Debtors and any opportunity by the Senior Lender to test that disclosure through the discovery process, the Senior Lender specifically reserves the right to have Mr. Greenspan analyze the November Plan in open court at the time he testifies.[7] While this is an inefficient approach, and one that is both unfair and denies basic due process protections to the Senior Lender, absent prohibition of these procedures by the Court, the Senior Lender has no alternative but to proceed in this fashion and reserves all of its rights in connection with such procedure.

In contrast to Mr. Greenspan's conclusion, Debtors' expert, Mr. Hundley, has issued a report opining that the appropriate rate under a *Till* analysis is 5.25% under an interest only loan with a balloon payment at the end of 21 years. In reaching this conclusion, Mr. Hundley testified as follows in his deposition:

- Mr. Hundley arbitrarily removed over $40M from the amount of the Senior Lender's claim because it represents a pre-payment penalty (Hundley Deposition, 46:17-47:3.[8]

- Mr. Hundley disregarded any consideration of Loan to Value and Debt Service Coverage Ratio covenants based on the 1111(b) election, reasoning that Senior Lender volunteered to be undersecured so no base rate adjustment was required to reflect these risks (Hundley Deposition 50:8-53:1)

- Mr. Hundley did not adjust the base rate to reflect the abrogation of the due-on-sale clauses in the Loan Documents (Hundley Deposition, 62:24-63:5)

- Mr. Hundley did not adjust the base rate to reflect the rejection of SNDA agreements contained in the October Plan (Hundley Deposition 65:18-66:4)

- Mr Hundley did not adjust the base rate to reflect the rejection of clearing account agreements that provide the Senior Lender with cash control protections (Hundley Deposition 66:9-24)

---

[7] This reservation is without prejudice to Senior Lender's objection to any expert testimony offered by the Debtors in support of the November Plan.

[8] Debtors have filed a Motion objecting to the amount of the Senior Lender's claim which will be considered by the Court, along with the response of Senior Lender, at the time of the confirmation hearing.

- Mr. Hundley exclusively considered the formula approach under *Till* without regard to the market test approach (Hundley Deposition 67:1-7; 78:3-9)

- Mr. Hundley used limited published information to determine the base rate using a projected rate for a "CMBS loan." However, Mr. Hundley stated that typical CMBS qualified loans have a term of 5-10 years and he is not aware of any CMBS loans in the hospitality industry that have a 20 year term and knows of no empirical data indicating that such loans exist. He also stated that the Debtors could not obtain a loan in the market under the same terms and conditions proposed for the treatment of the Senior Lender's claim under the October Plan. (Hundley Deposition 80-90)

- Mr. Hundley gave no consideration to the modification or removal of contractual protections for the Senior Lender in the amended loan documents in calculating adjustments to the base rate (Hundley Deposition, 117:6-15)

- Mr. Hundley testified that he conducted no research regarding the projected prime rate of interest in 21 years (Hundley Deposition, 124:25-125:15)

The U.S. Supreme Court has determined that, in the absence of an efficient market for comparable financing, the appropriate determination of the interest rate for an obligation subject to cram-down in a bankruptcy proceeding is based on a formula approach which starts with a base rate and adds additional adjustments for certain risk factors or, if an efficient market is found to exist, with reference to what a market rate of interest would be for a stream of deferred payments with comparable risk. *See generally Till v. SCS Credit Corporation*, 541 U.S. 465 (2004). With regard to the formula approach, the Supreme Court identified four such objective risk factors that should be considered, specifically, " the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." *Id.* Mr. Greenspan analyzed these factors and concluded that the minimum appropriate discount rate (interest rate) applicable to deferred payments to the Senior Lender under the Debtors' Plan is 8.7%.

Although Mr. Hundley uses a formula type approach, his approach does not comport with the methodology described by the United States Supreme Court in *Till*. More specifically, rather than starting with a base rate (equal to Prime Rate or comparable US Treasury Rate) and adding additional adjustments for risk factors, Mr. Hundley starts with a base rate based on purportedly similar loans (although he admits that he treatment of the Senior Lender's claim is outside all market parameters) and adds and subtracts adjustments for risk facts. As a result, Mr. Hundley concludes that the Senior Lender's "credit risk is not dissimilar to a typical financing."[9] Hundley Report page 5. His approach not only is unique to himself, but his conclusion that the risk of a twenty-one year loan (versus industry standard five to ten year term) with an 86% loan-to-value (versus "industry standard" 60-70% loan-to-value) that is secured by properties that even the Debtors' projections show cannot make debt service payments during the first three years and depend upon a heroic "hockey stick" improvement in performance to make debt service thereafter, is the same as a typical loan to stabilized cash flowing properties operated by successful owners, is fatally flawed.

Till's Footnote 14 states that in a Chapter 11 case, "…it might make sense to ask what rate an efficient market would produce." *Id.* at 477 n. 14. Thus, when formulating an opinion regarding an appropriate interest rate for a cram-down claim in bankruptcy, a realistic "sanity check" for the formula approach described in *Till* is, when possible to compare it to current market interest rate quotations. Mr. Greenspan applied a weighted average cost of capital ("WACC") methodology and confirmed the reasonableness of his conclusion that an appropriate rate of interest for deferred payments to the Senior Lender under the Plan is 8.7%. Mr. Hundley did not even consider a WACC analysis because "I prefer the method I used." (Hundley Deposition, 78:3-9).

The Supreme Court makes it clear that where market information is available, it should be considered. While Mr. Hundley considers market data to determine a "benchmark market rate" of 5.25% used in his formula approach, Mr. Hundley admits there is no current market for the Senior Lender Claim. In fact, the current market rate for less risky hospitality loans is higher than his conclusion and the market rate for a loan with the characteristics of the Debtors' Plan is above 9% (Greenspan Report page 24).

The interest rate proposed by the Debtors' Plan is unreasonably low and fails to compensate the Senior Lender for a highly risky loan with a twenty-one year maturity. Assuming,

---

[9] Mr. Hundley starts with a base rate of 5.25% and after adding and subtracting adjustments for risk factors ends with a rate of 5.25%.

arguendo, the Net Operating Income in the Debtors' Plan projections are achievable, but substituting a more appropriate interest rate of 8.7% on the Senior Lender Claim, and adjusting for an adequate operating cash reserve of $3 million, results in a depletion of the debt service reserve account, exhaustion of liquidity and inadequate cash flow to make Plan payments in 2014 and thereafter.

2. <u>The Material Alterations Contained in the Proposed Plan Documents Render the Debtors' Plan Non-Confirmable, as Such Alterations Cannot Be Found to Be Fair and Equitable</u>

As noted above, a mere technical compliance with one of the three prongs of 1129(b)(2)(A), does not necessarily satisfy the requirement of Section 1129(b)(1) that the plan be fair and equitable. In this regard, the Debtors' proposed Plan must fail. Even assuming the retention of its liens by the Senior Lender and the provision of an appropriate discount rate which renders the proposed payments under the Plan the equivalent of the present value of the full amount of the Senior Lender's secured claim pursuant to its election under Section 1111(b)(2), the proposed Plan makes broad reaching and deep cuts into the contractual protections bargained for by the Senior Lender at the time it extended a loan in the principal amount of $209 million to the property Debtors. It cannot be gainsaid that these radical alterations are proposed in respect of Loan Documents that were breached by certain of the Debtors not even a year after loan origination. These sweeping alterations can be divided into two categories. First, the abrogation of the due-on-sale clauses and restriction on assignment clauses as contained in the present loan documents. Second, the abrogation of other contractual protections contained in the present loan documents. These issues are addressed separately.

a. <u>The Elimination of the Due On Sale Clause is Not Fair and Equitable.</u>

Both the Deed of Trust securing the Senior Lender's interest in the Westin La Paloma property and the Mortgage securing the Senior Lender's interest in the Westin Hilton Head property contain standard due-on-sale provisions. (See Deed of Trust § 7.2; Mortgage § 7.2.) Pursuant to Sections 2.4 and 2.5 of the Loan Agreement dated as of December 5, 2007, other than a defined event of defeasance, which involves substitution of collateral of equal or greater value as a precondition of a release of a lien on one of the Resort properties, the Senior Lender is only required to provide a release of its liens upon payment in full of all principal and interest due under the loans and any and all amounts due and payable under the Loan Documents, in accordance with the provisions and terms thereof. Pursuant to Section 2.5 of the Loan Agreement, except for defined event of defeasance, the Lender cannot be required to release any portion of its lien upon repayment, prepayment, or defeasance of all or any portion of the loan. Accordingly, the Senior Lender cannot be compelled under the present Loan Documents to allow its collateral to be sold without payment in full of any and all obligations to the Senior Lender. All of these provisions can be collectively referred to as a "due-on-sale clause," a common provision in nearly every commercial mortgage.

The proposed Plan seeks to abrogate the protections of the due-on-sale clause. The Plan provides that any time between the 60th and 180th month after the Effective Date, the Reorganized Debtors may transfer the Resorts subject to the continued obligations of the transferee to pay the obligations of the Reorganized Debtor to the Senior Lender under the Plan, provided that (1) the Reorganized Debtors are not in default, (2) the Reorganized Debtors pay a $1.5 million reassignment fee, and (3) the Senior Lender approves the qualifications of the transferee, which approval may only be reasonably withheld based upon the financial or operational qualifications of the transferee. Furthermore, the Plan provides that if the Reorganized Debtors determine to sell one of the Resorts, they may do so based upon a "mutually-agreed released price" of the Senior Lender. Presumably, this allows the Reorganized Debtors to return to the Bankruptcy Court to "cram down" a release price on the Senior Lender, should it not agree. None of these actions are presently permitted under the existing Loan Documents. This proposed abrogation of the due-on-sale clauses in the existing Loan Documents cannot meet the requirements in Section 1129(b).[10]

---

[10] Debtors may argue that the Plan does not abrogate the due-on-sale clause because Section 5.2.11 of the Loan Agreement allows for a one-time sale or transfer of the properties under certain circumstances. However, such an argument would be without merit. First, this provision only applies prior to a default. Second, the Senior Lender has the right to approve the sale based solely on reasonableness grounds (which might include having the loan paid under its original term at the

(continued...)

This Court faced an analogous situation to the present case in the recent case *In re Saguaro Ranch Development Corp., supra.* In that case, the debtor sought to impose required release prices on a secured creditor upon the sale of individual residential lots. This plan was proposed within the context of the secured creditor's election under 1111(b). The Court held that the compelled release of the secured creditor's collateral in exchange for a release price the debtors sought to impose as part of its plan required the court to move its confirmation analysis into the realm of Section 1129(b)(2)(A)(iii), which requires the secured creditor to receive the "indubitable equivalent" of its claim. The Court stated as follows:

> To satisfy Section 1129(b)(2)(A)(iii), the debtors must show, by a preponderance of the evidence, that the 3rd Plan meets the standards set forth in *Metropolitan Life Insurance Co. v. Murel Holding Corp. In re Murel Holding Corp.* I, 75 F.2d 941 (2d Cir. 1935), that when a plan of reorganization denies a creditor its money or its collateral, the creditor must receive "a substitute of the most indubitable equivalent … the substitute provided to the creditor 'must both compensate for present value and ensure the safety of the principal' …
>
> Even [if] the proposed present value payments are assumed to be adequate, the debtors still have to meet the second "safety of the principal" requirement of the indubitable equivalent standard. One court has explained that the debtor must demonstrate that there is "no reasonable doubt" that its creditor will receive the full value of what it bargained for."

Saguaro Ranch, 2011 WL 2182416 *8 (citation omitted).

In *Saguaro Ranch*, the Court denied plan confirmation because the debtor was unable to meet this standard. The Court held that the plan deprived the secured creditor of significant bargained-for rights without compensating the secured creditor for the loss of those rights. The Court noted that "while Section 1129(a)(5)(E) and (F) permit the debtors to modify [the secured creditor's] lien and contractual rights, they may only do so if they satisfy the requirements of

---

(...continued)
original interest rate with the original lender protections). Third, the proposed transferee must be a Qualified Transferee, which is defined as an institutional purchaser with real estate equity assets of at least $1 billion. These restrictions, among others in the Loan Documents, are designed to allow the seamless transfer to an institutional transferee which mirrors a defeasance event and allows for the continued qualification of the loan for CMBS purposes. After default, that opportunity has passed. In any event, the proposed provision in the substitute Loan Agreement bears no resemblance to this provision. Any attempt to mimic the provisions of Section 5.2.11 to lift the right to transfer while stripping away the related restrictions and protections is specious.

[Section] 1129(b)(2)(A)(iii)." *Id.* The Court noted that the "crux of the problem" lied with the fact that the release provisions contained in the debtor's plan were substantially below those contained in the loan agreements and also modified the "due-on-sale" provisions contained in the loan agreement. The Court held that when an undersecured creditor "is required to release a portion of its collateral before receiving payments equal to its full value, it is effectively impossible for a debtor to propose a plan that will guarantee that the creditor is fully protected because the creditor's collateral base is being eroded." *Id.*

In this case, the Plan seeks to give new equity the right to abrogate the due-on-sale clause contained in the existing Loan Documents during years five to fifteen of the restructured loan arrangement under the Plan. The intent of this provision is transparent. Under the plan, new equity intends to infuse additional capital into the Resorts with the presumed intention of enhancing their value. After a period of five years, one might project that the Resorts could be financially stabilized and in a prime position for sale. The question becomes who will reap the benefits of this appreciation. As the plan clearly indicates, it is the intention of the Reorganized Debtors to make sure that this appreciation inures to the benefit of equity rather than the secured creditor. By allowing the Reorganized Debtors to assign to a new buyer debt service obligations that could never be achieved in the market place according to Debtors' own expert (*e.g.,* a loan in excess of $240 million for a twenty-one year term with interest-only payments of 5.25%) existing equity can exit the investment, recover their initial investment, plus a return representing the appreciation of the collateral, and leave the secured creditor to wait for up to fifteen more years in the hope that at the end of that time period, under management and financial conditions yet to be determined, the Resorts will be able to generate a final balloon payment in excess of their present value. This seems to be a good deal for new equity if they can get it. However, the Bankruptcy Code does not allow this result.[11]

---

[11] Mr. Hundley, Debtors' expert, testified at his deposition that he has never seen a $200 million real estate loan with a term of less than 10 years without a due-on-sale clause and his research did not locate any commercial loans similar to this one in which a due-on-sale clause is absent. (Hundley Deposition 55:16-56:12; 60:8-17.)

Under the straightforward standard articulated by the Court in *Saguaro Ranch*, what is the indubitable equivalent being offered by the Plan for the abrogation of its "due-on-sale clause," which would otherwise allow the secured creditor to reap the benefits of any appreciation in its collateral at the time of sale? The answer is nothing.

Such a proposal is particularly egregious within the context of an 1111(b) election. Indeed, Section 1111(b) was placed in the Bankruptcy Code to avoid this exact result. This is succinctly addressed by the Court in *Weinstein*, as follows:

> The real benefit of the election is that it protects the creditor against a quick sale of its collateral. The amount of the creditor's secured claim may be determined at a time when the value of the collateral is temporarily depressed. Without the election, the debtor could sell the collateral when its value quickly rebounds and net a considerable gain. By making the election, the creditor guards against such an opportunistic sale because it retains a lien on the collateral equal to the full amount of its claim, albeit without interest. *If there is a quick sale, the creditor is entitled to payment on its full claim*. Similarly, an electing creditor benefits if there is an appreciation in the value of the collateral and the debtor defaults on its plan payments.

In re Weinstein, 227 B.R. at 295, n. 12 (emphasis added).

A plan fails to provide fair and equitable treatment when it seeks to deprive an electing creditor of its ability to recoup its full claim in the event of a sale or default. *See In re Brice Road Developments LLC*, 392 B.R. 274, 287 (B.A.P. 6th Cir. 2008) (plan not fair and equitable where it fails to provide for payment of electing creditor's full claim upon sale or default). Specifically, courts have required the inclusion of a due-on-sale clause in post-confirmation loan documents to protect a secured creditor's right to recapture appreciation on its collateral. *See In re 222 Liberty Associates*, 108 B.R. 971, 996 (Bankr. E.D. PA. 1990) (confirmation denied where creditors sought to strike the due-on-sale clause in the loan documents of a creditor making an 1111(b) election); *In re IPC Atlanta Ltd. Partnership*, 163 B.R. 396, 401 (Bankr. N.D. GA 1994) (requiring due-on-sale clause in plan note where secured creditor elected treatment under Section 1111(b)(2)); s*ee also 7 <u>Collier on Bankruptcy</u> at ¶* 1111.03 [6][b] (16th ed.) (opining that due-on-sale covenant should be included in loan documents whenever an election is made under Section 1111(b)(2)).

The background and purpose of Section 1111(b) is well-described in the case of *In re D.R.W. Property Co.*, 57 B.R. 987 (Bankr. N.D. Tex. 1986). In *D.R.W.*, the court reviewed

Congress's inclusion of Section 1111(b) in an attempt to cure the harsh result of the holding in *Great National Life Insurance Co. v. Pine Gate Associates, Ltd.*, 2 E.C.D. 1478 (Bankr. N.D. Ga. 1976), a case decided under Chapter XII of the former Bankruptcy Act. In the *Pine Gate* case, a non-recourse lender was disenfranchised because it had no ability to vote an unsecured deficiency claim and was crammed down to the appraised value of its collateral without any ability to effectively object to its treatment. The court in *D.R.W.* explained that:

> As a result of the *Pine Gate* decision, it became clear that (under the former Bankruptcy Act) a debtor could file bankruptcy proceedings during a period when real property values were depressed, propose to repay the secured indebtedness only to the extent of the then-appraised value of the property, "cramdown" the secured lender class and thereby preserve all potential future appreciation for the debtor.

57 B.R. at 990.

The *D.R.W.* case explains that Congress included Section 1111(b) in the Bankruptcy Code to alleviate the *Pine Gate* problem and to attempt to restore the benefit of the bargain to non-recourse secured creditors. *Id.* As stated by the court, "Section 1111(b) protects the legitimate expectation of the secured lender that the bankruptcy laws will be used only as a shield to protect debtors and not as a sword to enrich debtors at the expense of secured creditors. *Id.* at 991. The court explained that Section 1111(b) was designed to prevent a repetition of the *Pine Gate* scenario in two ways. First, the non-recourse mortgagee is deemed to have a recourse claim and may use its often significant unsecured sufficiency claim to protect its interest within the context of the plan confirmation process. However, Section 1111(b) provides a second option which also protects the non-recourse secured creditor during times of depressed market values:

> Second, if secured creditor elects under Section 1111(b)(2), he loses his recourse status, and any unsecured claim, but gains an allowed secured claim for the amount of the debt, not the value of the property. Hence, unlike the lender in *Pine Gate*, he may benefit from any increase in the value of the property.… Section 1111(b) allows an undersecured creditor to escape the non-recourse terms of their loan documents if the debtor wishes to use the creditor's property in the reorganization process.

Id. at 991 (internal citations omitted).

The *D.R.W.* court goes on to explain that there are two instances where a recourse claim does not arise. The first exception is the 1111(b)(2) election which would usually be made by a secured creditor during a "slump market."

> If the non-recourse creditor elects under Section 1111(b)(2), he loses the recourse status given to him under Section 1111(b) and thus any right to an unsecured deficiency claim, but gains an allowed secured claim for the amount of the total indebtedness, not just the potentially depressed value of the property. Unlike the lender in *Pine Gate*, the undersecured creditor may now benefit from any future increase in the value of the property.

Id. at 997.

The second exception to the Chapter 11 general rule of recourse treatment of non-recourse creditors under Section 1111(b) is the "sale of the collateral exception" contained in Section 1111(b)(1)(A)(ii). *Id.* Here, "recourse treatment is denied to a non-recourse claim holder where the property securing the claim is sold under Section 363 prior to confirmation or is to be sold under the [proposed] plan of reorganization." *Id.* The court explains the reason for this as follows:

> Accordingly to the legislative history, 'sale of property under Section 363 or under the plan is excluded from treatment under Section 1111(b) because of the secured party's right to bid in the full amount of its allowed claim at any sale of collateral under Section 363(k) of the House amendment'.

Id. at 992 (*citing* Bankr. L.ED. Legislative History § 81:3).

Thus, the *D.R.W.* court explains that the <u>entire structure of Section 1111(b) is inextricably linked to Section 363(k) and the right of a secured creditor to credit bid at a sale either prior to plan confirmation or as contemplated in a confirmed plan</u>. If a property is sold in a "slump market," the secured creditor can protect its right to future appreciation and protect itself against the inopportune derogation of its secured claim by exercising its right to credit bid in obtaining the property itself, thus gaining for itself the benefit of any future appreciation. The right to credit bid is protected so that a secured creditor receives the value of future appreciation rather than that value becoming a windfall for the debtor. This was precisely the result in *Pine Gate* that Congress intended to remedy by placing Section 1111(b) in the Bankruptcy Code. In the case where the debtor retains the property, an 1111(b)(2) election allows a secured creditor to accomplish the same purpose by safeguarding the value of future appreciation upon the eventual sale or disposition of the property by a reorganized debtor who has retained possession under a confirmed plan.

In *In re Midway Investments, Ltd.*, 187 B.R. 382 (Bankr. S.D. Fla 1995), the court addressed a bad faith dismissal motion in the context of a proposed plan that made no provision for either a credit bid or a Section 1111(b) election. If finding such an approach violative of Section 1129(b)(2)(A)(ii), the court noted the reciprocal relationship between Section 363(k) and Section 1111(b). The court noted:

> Both Section [363(k)] and Section 1111(b) protect the non-recourse secured creditor from the result in *In re Pine Gate Assoc. Ltd.* … The *Pine Gate* decision was criticized on the grounds that it allowed the debtor to have the exclusive benefit of any future appreciation of the collateral and imposed on the secured creditor the entire risk of undervaluation … In enacting Section 1111(b)(1)(A), Congress intended to overrule *Pine Gate.*

187 B.R. at 391 (citations omitted).

A more recent analysis of the same issue was undertaken by Judge Ambro in *In re Submicron Systems Corp.,* 432 F.3d 448 (3rd Cir. 2006). In *Submicron*, one of the many issues addressed by the court was the continued validity of a secured creditor's credit bid right under Section 363(k) in the face of the debtor's allegation that some portion of the claim was undersecured and therefore not technically an "allowed secured claim" under Section 506(a). 432 F.3d at 459. In rejecting this argument, Judge Ambro held that it "is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under Section 363(k)." *Id.*. The court stated that any interpretation of Section 363(k) that would allow credit bids to be capped at their economic value based on the value of the underlying collateral would be "theoretically nonsensical." *Id.* at 460. The court reasoned that "[b]ecause no one could buy the property without the lender's consent, unless the lender is paid in full, the allowed claim of the lender must (for purposes of credit bidding) be its total claim without reference to the value of the property." *Id.* at 460 n. 14 (internal citation omitted). As part of this analysis, the court explained the connection between the Section 1111(b) election right and the credit bid right under Section 363(k) as follows:

> The [*Pine Gate*] case made clear that under the former Bankruptcy Act a debtor could file bankruptcy proceedings during a period when real property values were depressed, propose to repay secured non-recourse lenders only to the extent of their then-appraised value of the property and cram down the secured lender class, preserving any future appreciation of the property for the debtor. Congress

> attempted to remedy this problem by enacting Section 1111(b)(1)(A) which provides such creditors with an opportunity to elect to have their liens treated as recourse claims if their debtors intend to retain the property secured. The provision explicitly excepts sales of property under Section 363, however… The rationale for this exception presupposes that Section 363(k) credit bidders can bid the full value of their secured claims. Congress intended to protect the nonrecourse undersecured creditor only if such a creditor is not permitted to purchase the collateral at a sale or if the debtor intends to retain the collateral after bankruptcy and not repay the debt in full.

Id. at 460 n. 15 (internal citations omitted).

Most recently, the connection between the credit bid right under Section 363(k) and the election right under Section 1111(b)(2) was noted by the Seventh Circuit in *In re River Road Hotel Partners LLC*, 651 F.3d 642 (7th Cir. 2011). In *River Road*, the court specifically rejected the decision of the Third Circuit in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010) which held that a sale under a plan of reorganization could take place without regard to a secured creditors credit bid right under Section 363(k). In holding that a secured creditor's credit bid under Section 363(k) remains inviolate in the context of a sale pursuant to a plan of reorganization, the court ruled that to allow a debtor to strip off the credit bid right and then sell a property, thereby keeping the appreciated value for itself, would be contrary to the entire scheme contained in the Bankruptcy Code with regarding to the treatment of undersecured creditors. The court stated that

> "[b]y granting secured parties this ability [to credit bid], the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value. If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit bid to trump the existing bids and take possession of the asset." *Id.* at 650.

The court ruled that "[b]ecause the Debtor's proposed auctions would deny secured creditors the ability to credit bid, they lack[ed] a crucial check against undervaluation. Consequently, there is an increased risk that the winning bids in these auctions would not provide the Lenders with the current market value of the encumbered assets." *Id.* at 651. Making this analysis, the 7th Circuit also noted the link between Section 363(k) and Section 1111(b)(2). The court stated: "similarly, Section 1111(b) provides secured creditors with means to protect their claims when a debtor seeks to retain possession of an encumbered asset." Id at 652 (*citing*, *In re 680 Fifth Avenue Associates,* 29 F.3d 95, 97-98 (2d Cir. 1994)).

In the present case, Debtor's Plan seeks to abrogate one of the basic protections Congress has made available to secured creditors holding undervalued collateral as security for their loans. If undersecured collateral is sold either prior to confirmation or in connection with plan confirmation, the secured creditor is protected by its right to credit bid under Section 363(k). In that way, if the collateral is sold now, the secured creditor can recoup any appreciated value. When the undersecured creditor makes the election to credit bid, it loses its nonrecourse status and the concomitant unsecured claim pursuant to Section 1111(b)(A). Conversely, if a debtor elects to retain the undervalued collateral of a secured lender, the secured lender enjoys the same protection by making an election under Section 1111(b). When such an election is made, the secured creditor also waives its nonrecourse unsecured claim and has the means to recoup the future appreciated value of the collateral. As Judge Ambro noted in *Submicron*, it is "nonsensical" to cap a credit bid at the present value of the collateral by arguing that is all the claim is presently worth. 432 F.3d at 659. Conversely, it is equally "nonsensical" to propose that a plan can strip a due-on-sale provision away from an electing secured creditor under Section 1111(b) by arguing that the creditor is, after all, getting the present value of its secured claim. In both instances, the Bankruptcy Code preserves for the undersecured creditor the right to retain the appreciated value of its collateral as the *quid pro quo* for retaining its non-recourse status and waiving its deficiency claim under provisions of Section 1111.

In this case, Debtors transparently attempt to thwart this legislative purpose by allowing a sale of the collateral and facilitating the recoupment of appreciated value by equity in derogation of the rights of the secured creditor during years five through fifteen of the Plan. Common sense indicates that these are the years when the Reorganized Debtors anticipate that the value of the collateral may be maximized through the capital improvements proposed and the period when new equity will receive the greatest return on its investment. All the while, the Section 1111(b) election made by the Senior Lender is eviscerated, because the Senior Lender is left with the assignment of its payment stream, based on the present value of the collateral, to an known purchaser. The secured creditor is reduced to waiting, in this case, an incredible twenty-one years, to receive a balloon payment based on sheer speculation, beyond any ability to foresee the potential value of its collateral and beyond any argument that any reasonable commercial loan would be extended for this period of time. In short, the Plan is nothing other than an attempt to eliminate the protections of Section 1111(b) and shift the benefit of future appreciation to equity and transfer the risk of a long-term investment in the property to the Senior Lender. [12]

This is exactly opposite of the normal economic calculus which yields a lower return for secured debt based on a lower risk and a higher return for equity based on greater risk. In our free market system, risk and yield are directly proportional. Secured Lenders bear less risk, enjoying first returns from their collateral, and receive a lower rate of return. Equity bears greater risk, accepting subordinate returns from the pledged asset, but receives a higher rate of return. Under the Plan, Debtors seek to reverse this equation by harvesting the first return on appreciation value and shifting the higher risk of subordinated returns to the Senior Lender. In short, the Plan is a *Pine Gate* plan. It reads Section 1111(b) and Section 363(k) out of the Bankruptcy Code and

---

[12] Two cases are sometimes cited that have attractive "sound bites" for creditors seeking to dilute a due-on-sale clause. In *In re Airadigm Communications Inc.,* 396 B.R. 747 (W.D. Wisc. 2007), the court rejected an argument by the FCC that licenses to provide wireless communication services could not be sold by the debtor because a "due-on-sale provision" was an essential part of the FCC's liens on such licenses. *Id.* at 755. The FCC argued that a "due-on-sale clause" is a component of the actual lien, without offering any authority for this proposition. The court rejected the theory, stating that while due-on-sale loan is a valuable contractual right, it is not part of an actual lien such that it must be preserved under Section 1129. *Id.* An equally anomalous case is *In re Coastal Equities Inc.,* 33 B.R. 898 (Bankr. S.D. Cal., 1983) in which the court *in dicta* provides an attractive sound bite for debtors seeking to negatively impact a due-on-sale clause. In *Coastal Equities*, the court stated "a due-on-sale clause is not something so sacrosanct that it is immune from modification in a bankruptcy setting." *Id.* at 905. However, the sole issue decided in *Coastal Equities*, a real estate Ponzi scheme case, was whether a federal statute regulating Savings and Loan Associations required due-on-sale clauses to be honored without modification. The actual reasoning of the court was an analysis of general language contained in the applicable federal banking statutes which did not specifically limit the provisions of Section 1129 of the Bankruptcy Code. Moreover, the court noted in *Coastal Equities* that the plan allowed Coast Federal Savings to bring a motion for relief from the automatic stay at any time should it believe that it was not adequately protected. Thus, the case involved an interpretation of federal banking law in its relationship to the Bankruptcy Code in a Ponzi scheme case and has absolutely nothing to do with the proposed abrogation of the due-on-sale clause in the present case.

assumes that Debtors can file for bankruptcy in a depressed market, force a non-recourse lender to accept the present value of its collateral and reap the benefits of future appreciation for itself. This takes us back to the pre-Code world of *Pine Gate* and negates the very foundation of 1111(b). The Bankruptcy Code was specifically designed to prohibit this result.

b. The Plan Is Not Fair and Equitable Based On the Extended Term.

When a plan proposes deferred payments to a secured creditor over an extended period of time, courts require, as a condition of a cram-down, that the secured creditor's interest in the debtor's property be adequately protected during the term of the plan. *In re White*, 36 B.R. 199, 204 (Bankr. D. Kan. 1983). Thus, where an asset is depreciable, the term of the repayment should not exceed the remaining useful life of the collateral. *In re California Golf Partnership,* 48 B.R. 959, 964 (E.D. La. 1984). Plans with long repayment terms may be unconfirmable where they place excessive risk of non-payment on the secured creditor. *See In re Manion*, 127 B.R. 887, 890 (Bankr. N.D. Fla. 1991). Plans with longer repayment terms require "stricter proof" of feasibility and proof that a secured creditor's lien will be adequately protected and require a showing that the real property collateral will not depreciate over the life of the plan, *In re Muinix*, 54 B.R. 481, 484 (N.D. Iowa 1985), or that it is likely to appreciate, *In re White*, 26 B.R. at 204. However, the primary method for adequately protecting a lien on real estate over a long repayment term is to provide amortization payments, thereby providing a creditor with a growing equity cushion in the later (and more speculative) years of a plan. *See, e.g., In re Murel Holding Corp.*, 75 F.2d 941, 942-43 (2nd Cir. 1935) (denying confirmation of a plan for lack of adequate protection where the mortgagee is compelled to forego all amortization payments for ten years and take its chances as to the fate of its lien at the end of that period") (Hand, J.).

The court in *Manion*, *supra*, provides a brief survey of case law regarding the impermissible shift of risk to a secured creditor caused by extended term outs of coerced loan restructures in a cram-down context. 127 B.R. at 890. In *Manion*, the court found that a twenty-year term out was not reasonable, but approved a twenty-year amortization schedule with a seven year balloon at an above-market interest rate. *Id.* at 891. In reaching this conclusion, the court stated as follows:

> It has been consistently held that Section 1129 does not *per se* prohibit long term payouts. Section 1129(b) requires that the dissenting claim receive full payment over a *reasonable* period of time. In this light it is clear that the Bankruptcy Code allows the restructuring of debts through extensions only on a *reasonable* basis. The debtor's proposed plan does not meet this "reasonable" requirement.
>
> There are obvious pitfalls with plans proposing long term payouts. In *In re 750 Ave. Assoc.*, *5 B.C.D.* 368 (Bankr. S.D.N.Y. 1979), the debtor attempted to extend a mortgage over twenty (20) years. The court held: "There is nothing in the record here to indicate that this debtor will have the wherewithal to retire its debt to the bank in 20 years. Clearly, such a proposed arrangement would impermissibly allow the debtor to speculate with the bank's funds."

Id. at 890 (citations omitted).

Similarly, the court in *In re Country Green Ltd. Partnership,* 3 B.C.D. 427 (Bankr. W.D. VA. 1977) rejected a thirty (30) year extension because the court felt that the plan would allow the debtor to speculate with the secured creditor's money. In the case of *In re KRO Assoc.*, 4 B.C.D. 462, Bankr. S.D.N.Y. 1978), the court held that payments over longer periods of time require stricter proof by the debtor of feasibility of the plan and adequate protection of the creditor. Taking this approach to the present case, we cannot allow the debtor to speculate with [the bank's] money for such a long period of time given the specific type of loan and security involved.

In the present case, none of the factors which would render a twenty-one (21) year payout term reasonable exist. First, a twenty-one (21) year term is a transparent attempt to force the requirements for the treatment of a secured creditor making an election under Section 1111(b) into an economic package that will not fit. Applying the interest rate proposed by the Debtors and assuming the Debtors' calculation for the amount of the secured claim of the Senior Lender, the actual term of the payout without a balloon payment would be nearly fifty (50) years. Perhaps realizing the fifty (50) year term would be ridiculous, the Debtors structured their Plan to provide for a balloon payment in twenty-one (21) years and engineered a below market interest rate to create a comfortable payment. However, under any calculation, the amount of the balloon payment due in twenty-one (21) years equals or exceeds the present stipulated value of the collateral. No credible testimony can be offered that the collateral will be worth the amount of the balloon payment at the end of the twenty-one (21) year term. Indeed, there is no credible evidence that the value of the collateral will not depreciate during the term.

Second, there is admittedly no equity cushion provided to the Senior Lender. Even with the proposed equity infusion in the Plan, the value of the collateral is significantly less than the full amount of the payments due to the Senior Lender.

Third, the normal method of dealing with the creation of an equity cushion over the term of the loan (*i.e.* amortization payments) are absent from the Senior Lender's treatment under the proposed Plan. The Debtors propose to pay *interest only* for a period of twenty-one (21) years, thus making no provision through loan amortization payments for the adequate protection of the Senior Lender's interests.

Accordingly, the twenty-one (21) year term with interest only payments and an incredibly large balloon payment secured by collateral whose value can only be the subject of complete speculation in the twenty-first year of the Plan cannot meet the standards of reasonableness required for the Court to find that the proposed treatment of the Senior Lender's claim is fair and equitable.

c. The Plan Is Not Fair and Equitable Based On Alterations to Terms of the Loan.

On Friday, November 18, 2011, the Senior Lender received what purports to be a set of "Loan Documents" which will govern the treatment of its claim under the November Plan. In the first instance, the "Loan Documents" are incomplete. Among other things, the Debtors have not provided a Deed of Trust with regard to the Arizona property or a Mortgage with regard to the South Carolina property. Other essential Loan Documents are missing, including those documents which will provide a security interest in certain reserves and escrows, all of which are mentioned in the Plan in vague and ambiguous terms. What has been provided is a Loan Agreement, approximately 34 pages in length which purports to replace the pre-petition Loan Agreement, which is approximately 125 pages in length. While the length of the document does not necessarily indicate the degree of protection provided to the Senior Lender, it is clear that the Debtors have substantially altered the terms of the pre-petition Loan Agreement.

"The creditor whose debt is restructured under a confirmed plan of reorganization makes a 'new loan' to the reorganized debtor, in the sense that its pre-petition rights to payment are expunged in favor of the new complex of pecuniary rights under the plan." In exchange for the forced entry into that loan, the creditor is entitled to demand both pecuniary and nonpecuniary terms that are sufficient to shelter it from the risks inherent in the Debtor's proposal" *In re Kellogg Square Partnership* 160 B.R. 343 (Bankr. Minn. 1993), (*citing In re Fisher*, 930 F.2d 1361, 1364; *United States v. Arnold*, 878 F.2d 925, 926 (6th Cir. 1989).

In the *Kellogg Square* case, the court denied confirmation of the debtor's plan because the debtor failed to provide market standard terms for the proposed restructured loan to Prudential, the secured lender. *Id*. at 369. The court held that the debtor's proposal deviated from current norms and failed to provide Prudential with the "indubitable equivalent" of its current secured rights. *Id.* The court stated as follows:

> Prudential is well-put to insist on a novation of its secured rights, to correspond to those which it could reasonably demand were it willing to extend credit in an arms-length transaction, on the pecuniary terms proposed by the debtor. This makes the "new contract" of the plan a new one in all respects – and it preserves the Bankruptcy Code's general statutory balance between creditors' rights and debtors' remedies.

Id.

Similarly, in *Saguaro Ranch,* this Court denied confirmation because the debtors failed to propose a feasible plan that provided the secured creditor with the indubitable equivalent of its claim, based in part, upon a substantial change in contractual loan terms. 2011 WL 2182416 *8. The court stated as follows: "While Section 1123(a)(5)(E) and (F) permit the Debtors to modify [the senior lender's] lien and contractual rights, they may only do so if they satisfy the requirement of Section 1129(b)(2)(A)(iii)." *Id.*

In *Saguaro Ranch*, the Court held that the crux of the problem lied in the debtor's attempt to modify lot release provisions and the due-on-sale provisions in the pre-petition loan documents without providing the secured creditor with the indubitable equivalent of its pre-petition protections. The Court held that the debtor could only require an undersecured creditor to release a portion of its collateral before receiving payments equal to its full value if it provided substitute collateral of equal value. *Id.* Absent doing so, the court held that 'it is effectively impossible for a debtor to propose a plan that will guarantee that a creditor is fully protected because the creditor's collateral base is being eroded.' *Id.*

In the present case, the Debtors propose to radically alter the terms of the Senior Lender's protections under the pre-petition Loan Documents. Attached hereto as Exhibit B is a chart showing some of the major, but certainly not all, of these proposed changes.[13] Among other things, the proposed replacement Loan Agreement eliminates the existence of a guarantor, changes the interest rate from 6.859% to 5.25%, alters the payment schedule from an amortizing loan maturing on January 1, 2018 to a non-amortizing interest only loan maturing in 2032, with an anticipated balloon payment in excess of the present value of the collateral, significantly reduces default interest and late payment percentages, completely eliminates a pre-payment penalty, allows for the sale and release of the lien on one of the two hotel properties if compelled by the Bankruptcy Court in a non-descript future proceeding, provides for no lockbox or effective cash management controls by the Senior Lender and, most significantly, as noted above, alters the due-on-sale provisions to allow equity to remove any appreciated value of the collateral between the fifth and fifteenth year of the loan.

In addition, the plan purports to reject the subordination and non-disturbance agreements ("SNDA's") between the respective property Debtors, Starwood and the Senior Lender. The SNDA's provide a significant degree of protection for the Senior Lender, since they ensure the ability of the Senior Lender to maintain continuity of the Westin flag and Starwood management in a case of default and the exercise of remedies. In the November Plan, the Debtors purport to assume the SNDA's, in an apparent attempt to ameliorate this radical change in the bargained for protections of the Senior Lender. However, the Debtors fail to take into consideration the fact that the SNDA's do not allow the substantial modification of the existing Management Agreement

[13] Since the Loan Documents provided by the Debtors are incomplete, the Senior Lender must reserve its rights to object to any additional undisclosed loan documents.

without the Senior Lender's consent.[14] The Debtors have failed to consult the Senior Lender with respect to the terms of the replacement Management Agreement with Starwood and it is impossible for that Management Agreement to be executed without the approval of the Senior Lender, unless the Debtors intend to breach the existing SNDA's immediately upon their assumption. Of course, if the Debtors breach the existing SNDA's they cannot meet the requirements of Section 363(a) and cannot assume them. Accordingly, by freezing the Senior Lender out of the negotiation process, the Debtors have created a Catch-22 situation which they cannot overcome absent consent of the Senior Lender.

Finally, the proposed Plan contains gratuitous provisions which have no substantial benefit within the context of plan confirmation, but are an apparent attempt to benefit insiders. For example, Section 3.2.4 of the plan provides that immediately upon the effective date the Debtors will be deemed to have cured, or the Senior Lender will be deemed to have waived, any existing defaults under the existing Loan Agreements, including "any default arising *ipso facto* as a result of any of the Debtors filing bankruptcy petitions or as a result of the Resorts becoming assets in a voluntary bankruptcy proceeding." There is only one reason for the inclusion of this provision of the Plan. The Debtors' principals, Mr. Hanson and Mr. Dix, are both guarantors and their guarantee liabilities arose because of the filing of the Chapter 11 cases of the Property Debtors. Mr. Hanson is a debtor in his own Chapter 11 case. Mr. Dix is a defendant in a pending action based on his guarantee liability in United States District Court. Inclusion of this gratuitous provision in the Plan is an obvious attempt by the Debtors to benefit Mr. Hanson and Mr. Dix by having this Court declare that the defaults which gave rise to their guarantee liabilities are deemed waived by the Senior Lender. Undoubtedly, the proposed confirmation order will then be used in Mr. Hanson's Chapter 11 case and in Mr. Dix's District Court case to claim that the basis for their guarantee liabilities has been extinguished under the *res judicata* affect of a confirmation order. This is the type of legal shenanigan that should not be sanctioned by the Bankruptcy Court and has absolutely no purpose with regards to the Debtors' proposed "reorganization."

[14] *See*, Assignment and Consent, Subordination and Non-Disturbance and Attornment Agreements, Paragraph 9.

E. **Feasibility – 11 U.S.C. § 1129(a)(11)**

The so-called "feasibility requirement" for a Chapter 11 Plan is contained in Section 1129(a)(11) of the Bankruptcy Code, which states as follows:

> 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 or reorganization is proposed in the plan.

11 U.S.C. § 1129)(a)(11).

The United States Bankruptcy Court for the District of Arizona has characterized the element of feasibility as "the heart of every Chapter 11 reorganization case" and as the "most important element of Section 1129(a)." *In re Seasons Partners LLC*, 439 B.R. 505, 514 (Bankr. D. Ariz. 2010). In evaluating the feasibility of a proposed plan, the Ninth Circuit B.A.P. has directed the court to consider several factors, 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 matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan." *In re Wiersma,* 324 B.R. 92, 113 (B.A.P. 9th Cir. 2005), *aff'd* in part and *rev'd* in part on other grounds, 483 F.3d 933 (B.A.P. 9th Cir. 2007). Although guaranty of future performance is not required, a debtor must show that the plan is based on more than pure speculation. "The purpose of Section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *In re Pizza of Hawaii Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985). Overly optimistic or unrealistic projections are not sufficient to satisfy the feasibility requirement. *In re Saguaro Ranch,* 2011 W.L. 2182416 *7 (plan not feasible where a debtor's projections assume the best of all possible post-confirmation worlds). Thus, a debtor must present "ample evidence to demonstrate that the plan has a reasonable probability of success." *In re Acequia Inc.*, 787 F.2d 1352, 1364 (9th Cir. 1986). Section 1129(a)(11) "requires the plan proponent to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and its obligations under the Plan." 7 Collier on Bankruptcy, ¶ 1129.02 [11], at 1129-53 (16th ed. 2010).

The Plan proposed by the Debtors is not feasible. As noted in the Greenspan Report , if net operating income prior to actual and reserve capital contained in the Debtors' projections is actually realized, there will still be insufficient cash in 2014 to make payments after adjusting for the appropriate interest rate to the Senior Lender and necessary operating cash reserves. The shortfall in cash reserves would occur earlier without a debt service reserve account funded at the Effective Date and depleted by occurring deficiencies each year from 2012 to 2014. Thus, Mr. Greenspan notes that even if the Debtors' projections of net operating income are achieved, after the appropriate adjustments for interest rate and adequate operating reserves, there will be insufficient funds available to continue the operations as envisioned in the Debtors' Plan.

As noted in Mr. Greenspan's report and in prior pleadings filed by the Senior Lender with the Court, from 2007 to 2010, the Westin La Paloma property experienced a decline in revenue of 28% from $57.1 million in 2007 to $40.9 million in 2010. During the same period, net operating income at that property declined 69% from $14.3 million to $4.4 million. Similarly, during the same period, the Westin Hilton Head experienced a decline in revenue of 22% from $33.7 million in 2007 to $26.2 million in 2010 and during that period experienced decline in net operating income of 67%, from $5.6 million in 2007 to $1.9 million in 2010. It appears that the combined net operating income forecasted by the Debtors for 2011 will be approximately $4 million. (Dix Deposition, 68:5-10).

The Debtors' Plan projections are wholly dependent upon the infusion of new money. At the time of the October Plan, the Debtors proposed that $14.5 million would be budgeted for new capital improvements. Even assuming this new money is received, the Debtors base the ultimate feasibility on the Plan on the assumption that they can achieve aggressive projections and that the future value of the Resorts will be sufficient to either sell the Resorts or obtain financing sufficient to repay the Senior Lender's claim within the term of the Plan. As Mr. Greenspan has opined, the Debtors' Plan is inherently infeasible.

Furthermore, the longer the proposed repayment term of a secured debt under the Plan, the more difficult it is for a debtor to present credible, non-speculative evidence that it will be able to (1) meet its deferred payment obligations and (2) satisfy the balloon payment through the sale or refinancing of the collateral. *See In re White*, 36 B.R. at 205 ("sliding scale" makes proof of feasibility as easier task when payout is done over a shorter period of time).

Courts have refused to confirm plans with long payout terms where the debtor cannot reliably project its financial condition during the entire term of the plan. *See e.g., In re Trenton Ridge Investors LLC*, 2011 WL 4442270 *49-50 (Bankr. S.D. Ohio 2011) (a twenty-year repayment term denied where debtor could not establish adequate income or reserves to extend the economic life of apartment complex through the entire term of the plan); *In re White*, 36 B.R. at 205 (a thirty-year term denied where debtor's business projections were based on six months of profitable operations); *In re Manion*, 127 B.R. at 891 (debtor could not establish the property would be profitable for a twenty-year term so the court approved a seven year balloon note instead). Factors that tend to establish a reasonable likelihood of long-term performance include consistent pre-petition profitability, lack of payment defaults, reliable projections, market stability, competent management and adequate post-petition capitalization. *See In re Patrician St. Joseph Partners L.P.*, 169 B.R. 669 (Bankr. D. Ariz. 1994) (a ten year repayment term approved where debtor operated without default for eight years pre-petition and bankruptcy was caused by maturity of note rather than payment default). None of these factors are present in this case.

In addition, where, as here, the final balloon payment is proposed to be paid from the refinancing or sale of the collateral, Section 1129(a)(11) further requires an adequate evidentiary showing that such refinancing or sale is likely to occur. *In re Seasons Partners,* 439 B.R. at 515. The debtor must present credible, non-speculative evidence of a reasonable likelihood that the balloon payment can be made, new financing can be acquired, or the property can be sold at an adequate price to satisfy secured lender's claim. *See In re Inv. Co. of the Southwest, Inc.*, 341 B.R. 298, 311, 314, 316 (10th Cir. B.A.P. 2006) (plan not feasible where there was not evidence as how the debtor would be able to fund the required balloon payments); *In re Made in Detroit Inc.*, 299 B.R. 170, 179-80 (Bankr. E.D. Mich. 2003) (plan not confirmed when proponent made inadequate showing of ability to obtain refinancing); *In re Walker*, 165 B.R. 994, 1005 (E.D. Va. 1994) (plan not feasible where insufficient evidence of terms of future sales of real estate).

In *In re Trenton Ridge Investors LLC*, 2011 W.L. 4442270 *49-50 (Bankr. S.D. Ohio 2011), the court gave close scrutiny to a plan in light of a proposed 30-year repayment term. The court held that "evidence of feasibility would be lacking even if the debtors had demonstrated a reasonable probability that they would meet their five-year projections." *Id.* at 71. The court noted that the debtors "failed to introduce any evidence regarding the remaining economic life [of the collateral]." In *Trenton Ridge*, the debtors proposed to pay PNC, the senior lender, over a 30-year term with a balloon payment. At the time, the collateral properties, apartment complexes, were approximately forty years old, and they would be seventy years old during the final years of the repayment period. The debtors failed to provide sufficient evidence as the remaining economic life of the properties. The court held that this was fatal on the issue of feasibility. The court stated as follows:

> The remaining economic life of income-producing property depends not only on the number of years that the property will be physically visible, but also on the number of years that the property will be able to produce annual income sufficient to offset items such as expenses and taxes. The debtors, however, have provided no evidence of the remaining life of the apartment complexes …
>
> [I]t may well be that the debtors could, if they had another opportunity, demonstrate that the remaining economic life of the apartment complexes is thirty years or more. But the court cannot simply assume that this is the case. Because the debtors have not yet establish the economic life of the property is long enough to generate sufficient income to pay PNC's claims over thirty years, the court cannot find that the plans are feasible.

Id. at 72-73.

In the present case, the Debtors, at best, provide optimistic short-term cash flow projections indicating that the Debtors' economic performance will drastically and immediately improve upon confirmation of the Plan. While the Senior Lender questions the accuracy and legitimacy of these projections (which do not even relate to the November Plan), those projections are only part of the burden that must be borne by the Debtors in order to establish feasibility. At the end of the proposed 21 year term, the properties constituting the Senior Lender's collateral will be approximately fifty (50) years old. The Debtors have provided absolutely no evidence as to the ability of fifty-year-old destination resort properties to continue to produce income at a level sufficient to meet the Debtors' obligations under the proposed Plan. In addition, the Debtors have made no showing as to the ability of the Debtors to fund cyclical renovations required to maintain aging properties during the proposed Plan term. The reason for this is apparent. The proposed new equity seeks to improve the properties in the short term and then cash out their equity investment and obtain an expected rate of return within the fifth to fifteenth year of the Plan. New equity will harvest the appreciated value resulting from the expected improved performance of the Resorts and Secured Lender will be left to wait until year 21 to see what value remains at the end of the day.

While this may be an attractive prospect for new equity, it does little to enable the Debtors to sustain the burden of feasibility. In fact, the Debtors have offered no evidence, shown no study, or even suggested that there are destination resort hotels in the fifty-year-age bracket that continue to generate adequate cash flow and to maintain adequate property values such that Debtors will be able to meet their financial obligations under the Plan, including but not limited to, the sale or refinancing of the Resorts to generate funds in excess of the Resorts' present market value. Anything beyond short-term cash flow projections is sheer speculation and the Debtors offer nothing other than that speculation in support of Plan confirmation. Accordingly, based on the standards established by the Ninth Circuit Bankruptcy Appellate Panel, the Debtors' Plan is infeasible and cannot be confirmed.

F. **<u>The Plan Does Not Meet The Good Faith Requirement of Section 1129(a)(3)</u>**

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be proposed in good faith and not by any means forbidden by law. A plan is proposed in good faith when it achieves a result consistent with the objectives and purposes of the Bankruptcy Code. *Platinum Capital Inc. v. Sylmar Plaza L.P.* (*In re Sylmar Plaza*), 314 F.3d 1070, 1074 (9th Cir. 2002) (*citing In re Corey*, 892 F.2d 829, 834 (9th Cir. 1989); *In re Madison Hotel Association*, 749 F.2d 410 (7th Cir. 1984). The burden to establish good faith is on the plan proponent. *In re PPI Enterprises Inc.*, 324 F.3d 197, 211 (3rd Cir. 2003). The requisite good faith determination is based on the totality of the circumstances. *Platinum Capital*, 314 F.3d at 1074.

Good faith has been described alternatively as requiring that: "(1) the plan be consistent with the objectives of the Bankruptcy Code; (2) the plan be proposed with honesty and good intentions and with the basis for expecting that reorganization can be achieved; or (3) there was fundamental fairness in dealing with the creditors." *In re T.C.I. 2 Holdings*, 428 B.R. 117, 143 (Bankr. D.N.J. 2010) (*citing In re Learnout & Hauspie Speech Products N.V.*, 308 B.R. 672, 675 (D. Del. 2004).

"The focus of the good faith requirement is on the plan itself and whether the plan achieves a reorganization objective that is consistent with the Bankruptcy Code. Nevertheless, a demonstration of a breach of fiduciary duty by officers or directors of a debtor may certainly defeat the confirmability of the debtor's plan on lack of good faith grounds." *In re T.C.I. 2 Holdings LLC*, 428 B.R. at 143-144 (Bankr. D.N.J. 2010); *citing In re Coran Healthcare Corp.* 271 B.R. 228 (Bankr. D. Del. 2001) (refusing to approve confirmation under Section 1129(a)(3) because the debtor's CEO had an actual conflict of interest regardless of lack of harm to the debtor or disclosure cured during confirmation); s*ee also Mosser v. Darrow*, 341 U.S. 261, 271 (1951) ("equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting").

A trustee (or debtor-in-possession) is accountable for all property received and has a duty to maximize value for the estate. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985). Failure to maximize value to the estate and to engage in self dealing to retain value for the principals of the debtor constitutes a lack of good faith. *Tenn-Fla Partners v. First Union National Bank of Florida*, 229 B.R. 720 (W D. Tenn. 1999). In *Tenn-Fla Partners*, a trustee for secured bond holders brought an adversary proceeding to revoke confirmation of a Chapter 11 plan. *Id.* at 724. In that case, the debtors orchestrated a sale of the debtor's primary asset, an apartment complex located in Florida. Debtors engaged in a series of non-disclosed negotiations with respect to purchasers and ultimately chose the purchaser that failed to yield maximum value to the estate, but provided a substantial benefit to the debtor's equity holders. The debtor's equity holders stated in a solicitation letter to the secured bond holders that the proposed offer was the only alternative and the bond holders "could be left without a buyer." *Id.* at 725-26At the same time, the equity holders knew of other expressions of interest and, in fact, had negotiated a post-confirmation deal wherein the asset would be resold producing a benefit for the insiders. The Bankruptcy Court revoked confirmation and the District Court affirmed. *Id.* at 724.

The *Tenn-Fla* Court affirmed the findings of the Bankruptcy Court that the debtor's equity holders "knew of willing and able buyers but temporarily spurned their offers and parked their interest, all for the purpose of preventing the secured bond holders from realizing or capturing the true value of their collateral. The court may not simply call this creative reorganization, when the debtor's strategy, *inter alia*, undermines the integrity of the Chapter 11 process." *Id.* at 734. The court noted that Section 1107 of the Bankruptcy Code places upon a debtor-in-possession the duties of a trustee and a debtor-in-possession must comply with Section 1107 to be in compliance with Section 1129. "As a debtor-in-possession, [the debtor] owed a fiduciary duty to both the estate and to the court." *Id.* The *Tenn-Fla* upheld the finding of the Bankruptcy Court that the debtor's equity holders failed to maximize the value to the estate of its primary asset, which failure constituted a breach of fiduciary duty. The court stated as follows:

> The willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee. It is true that a debtor-in-possession owes a fiduciary duty to both creditors and equity holders. This does not allow a debtor-in-possession to favor equity holders over creditors, however, or to engage in conduct that essentially amounts to concealing assets and self dealing. To the contrary, the hierarchy of the Bankruptcy Code provides that the interests of creditors are paramount to the interests of the equity holders and a trustee must act in accordance with this hierarchy…
>
> The debtor-in-possession does not act in his own interest until he reverts to his former status upon discharge and confirmation of the plan. The extent of the fiduciary duty should not vary with the identity of the one who performs that role.

229 D.R. at 736; *see also, In re Unit Cast Inc.*, 214 B.R. 992, 1004 (Bankr. N. D. Ohio, 1997), *aff'd* 219 B.R. 741 (6th Cir. B.A.P. 1998) (finding the premise in a bankruptcy case that it should be administered by a debtor-in-possession to maximize the value of the estate for the debtor's creditors); *In re Ralph C. Tyler PE, PS, Inc.*, 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993) (finding debtor-in-possession as duty to maximize value of the estate and must pursue claims against shareholders of debtor).

In the present case, the two principals of the Debtors, Mr. Dix and Mr. Hanson, have admitted within the context of deposition testimony that their "marketing" efforts on the part of the Debtors were limited to the solicitation of an equity investment in which they individually, or an entity in which they have an interest, would receive a financial benefit. Indeed, Mr. Hanson has provided testimony indicating that potential offers superior to the actual equity infusion proposals contained in prior iterations of the Plan were rejected, because they did not provide sufficient benefit to Mr. Hanson or an entity in which Mr. Hanson owned an interest. The following exchange occurred during the deposition of Mr. Dix:

> Question: During the pendency of the case did the debtors explore any options, aside from Chapter 11, that did not involve the continued participation of Mr. Hanson and/or yourself or some entity with which you were involved?
>
> Answer: No, not that I am aware.

Randal Dix Transcript, 42:24-43:3.

The following exchanges took place during Mr. Hanson's deposition:

> Question: As part of considering options for the plan of reorganization, did the debtors ever explore any option for exiting from Chapter 11 that did not involve the continued participation of either you or Mr. Dix or an entity in which you have or would have an interest?
>
> Answer: Well, uh, again, during mediation, you know, we agreed to put the property on the market as the highest bidder if the creditor agreed to accept the highest bid, which they wouldn't do.
>
> Question: Other than that proposal, was there anything else considered outside the parameters that I have described?
>
> Answer: It was always our plan to reorganize the debtor.
>
> Question: And did you understand that in the context of those discussions with the Senior Lender in June that one of the things the Debtors were asking the Senior Lender to do in connection with any proposed sale of the property would be to waive its credit bid right?
>
> Answer: Yes.
>
> Question: And was the Senior Lender willing to do that?
>
> Answer: No.
>
> Question: So do I understand that other than the discussions in June of the negotiations with the Senior Lender, the plan formulation process by the debtor did not involve any options that failed to include participation by you or Mr. Dix or one of your entities?
>
> Answer: We would have been involved with all plans of reorganization.

Question: Mr. Hanson, to your knowledge, was anyone presented with an opportunity to invest in the Resorts without the involvement of a Transwest entity or NCH or another entity in which you have an interest as a financial participant in the deal?

Answer: No. It was always our plan. No. It was always our plan to reorganize the current debtor.

Michael Hanson Transcript, 32:1-34:1; 52:25-53:5; 135:15-136:5.

There is absolutely no dispute that from the inception of this case the equity interests held by Mr. Dix and Mr. Hanson, through intermediary entities, had no ultimate value given the fact that the Senior Lender was radically undersecured. Nevertheless, Mr. Dix and Mr. Hanson, as principals of the debtor-in-possession, have consumed one year of time and caused the estates to retain professionals who have incurred well over $1 million in fees for one admitted purpose, to "reorganize" Debtors that are incapable of reorganization.

Mr. Dix and Mr. Hanson knew that they were financially incapable of contributing any new value to the Debtors and that a reorganization under the circumstances of these cases was impossible. That did not discourage Mr. Dix and Mr. Hanson from engaging all of their efforts as debtors-in-possession in searching for an "equity partner" who would allow them to participate in the future value of a reorganized debtor. Under the various iterations of the Plan which the Court has seen, that negotiated interest involved an actual equity ownership in the reorganized debtor. When Mr. Hanson and Mr. Dix realized this presented certain legal problems, they attempted to disguise that equity participation in various ways. Nevertheless, even in the last iteration of the Plan, that disguised equity participation remains. In the "Management Services Agreement" disclosed for the first time on November 18, 2011, Transwest Properties, Inc., an entity owned by Mr. Hanson and Mr. Dix, is to be paid an annual "consulting fee" of 0.499% of gross operating revenue for an indefinite period of time. Coincidentally, this is the same percentage in prior iterations of the Plan ascribed to an equity interest in "Newco." The Agreement can be terminated at any time for any reason, yielding a $million "Termination Fee," which decreases by $400,000 per year. That decrease appears to be covered by the annual percentage payments. Accordingly, Mr. Hanson and Mr. Dix are receiving $2 million for "consulting" on an as-needed basis. As both

Mr. Hanson and Mr. Dix testified, their efforts have always been focused on getting some benefit for themselves from the bankruptcy process.

What has emerged through this one-year process is, for all practical purposes, the only legally cognizable outcome of the cases from the very first day, the sale of the Resorts. While the sale is being structured as the sale of equity rather than a sale of assets, it is a simple sale nonetheless. That sale has been privatized by Mr. Hanson and Mr. Dix in an attempt to obtain a personal financial benefit. There has been no exposure of the Resorts to the marketplace in general. Whether another investor or buyer is available is unknown for sure, but is likely. Mr. Dix and Mr. Hanson have been the sole arbiters regarding which offers would be acceptable and ultimately included within a plan of reorganization. The admitted criteria for the triage of those potential offers is the level of benefit received by Mr. Hanson and Mr. Dix.

The entire process of these Chapter 11 cases has been an exercise in lack of good faith. These Debtors have never had the ability to reorganize. Mr. Hanson and Mr. Dix have never had a legal basis upon which they could negotiate some financial benefit for themselves within the context of these cases. A year of delay, well over $1 million in administrative costs, and a further deterioration of the Resorts have all been the result of the misguided efforts of the Debtors' principals to personally benefit from the Chapter 11 process, to ignore their fiduciary duties as debtors-in-possession and to continue to treat the Resorts as their personal property, rather than items of collateral held for the benefit of creditors to whom they owed a fiduciary duty. The Plan that is the product of this process is tainted with bad faith and cannot meet the statutory requirements of Section 1129(a)(3), partially given the financial participation of Mr. Hanson and Mr. Dix from the hand of their chosen "investor."

III. **CONCLUSION**

For the reasons set forth hereinabove, confirmation of the October Plan and the November Plan should be DENIED.

//

//

//

Dated: November 23, 2011.

BALLARD SPAHR LLP

By: /s/ Dean C. Waldt
Ethan B. Minkin
Andrew A. Harnisch
Jaclyn D. Foutz
Dean C. Waldt
Jon T. Pearson
Attorneys for Secured Creditor
JPMCC 2007-C1 Grasslawn Lodging, LLC

I certify that on this 23rd day of November 2011, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Bankruptcy Court, using the CM/ECF System, for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants:

COPY of the foregoing will be mailed the 28th day of November 2011, to:

U.S. Trustee
Office of the U.S. Trustee
230 N. First Ave., Ste. 204
Phoenix, AZ 85003

And via email on the 25th day of November and via U.S. Mail on the 28th day of November, to those parties listed on Schedule 1, attached hereto.

/s/ Kathleen Reynolds