Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
December 23, 2014

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No. 12-17954-MKN
	)	
B-NGAE1, LLC,	)	Chapter 11
	)	
Debtor.	)	Date: October 15 and 18, 2013
	)	Time: 9:30 a.m.

MEMORANDUM DECISION ON DEBTOR'S AMENDED PLAN OF REORGANIZATION DATED MARCH 27, 2012[1]

An evidentiary hearing on confirmation of Debtor's Amended Plan of Reorganization Dated March 27, 2012 ("Plan") (ECF No. 12) in the above-captioned Chapter 11 bankruptcy case (the "Case") was conducted on October 15 and 18, 2013 (the "Confirmation Hearing"). The appearances of counsel were noted on the record each day. At the conclusion of the Confirmation Hearing, the matter was taken under submission.

BACKGROUND

On July 6, 2012 ("Petition Date"), the entity B-NGAE1, LLC ("Debtor") filed a "pre-

[1] In this Memorandum Decision, all references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101–1532 ("Code"). All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "NRS" are to the Nevada Revised Statutes.

packaged" voluntary Chapter 11 petition ("Petition").[2] (ECF No. 1).[3] On August 16, 2012, Debtor filed the Plan, the Amended Disclosure Statement for Debtor's Amended Plan of Reorganization Dated March 27, 2012 ("Disclosure Statement") (ECF No. 11), and the Certification of Acceptance and Rejection of Debtor's Amended Plan of Reorganization Dated March 27, 2012 (Ballot Summary) ("First Ballot Summary") (ECF No. 10).[4] Concurrent with these filings, Debtor filed the declaration of Thomas DeVore, chief operating officer of Debtor's manager, LEHM, LLC ("Mr. DeVore") ("DeVore Declaration").[5] (ECF No. 16).

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[2] The Petition identifies the nature of Debtor's business as a Single Asset Real Estate ("SARE"). Petition at 1. The Petition identifies the Location of Principal Assets of Business Debtor as "Victorville, CA APN: 3097-471-02-0-000" (the "Property"). Id. Debtor's Schedule "A" asserts Debtor holds the Property in fee simple, valued at $7.4 million. Id. at 9.

[3] No amendments to Debtor's Schedules and Statements appear on docket.

[4] No ballots or copies of ballots were submitted with the First Ballot Summary.

[5] The DeVore Declaration asserts it was submitted in support of Debtor's (then-concurrently-filed) motion for entry of an order (1) scheduling a combined hearing on Disclosure Statement adequacy and Plan confirmation, (2) approving procedures for filing Plan and Disclosure Statement objections, and (3) approving the form and manner of notice. See DeVore Declaration at 1:16 to 2:6. Nonetheless, the DeVore Declaration describes the relationships among the many actors involved with the events that apparently gave rise to Debtor's Case:

The Property was purchased by Debtor's parent company, NGA #2, LLC ("Parent"). DeVore Declaration at ¶ 3. The date of purchase is unclear. Bearing a signature date of August 16, 2012, the DeVore Declaration asserts, "In short, and as noted above, pursuant to the [Plan], the [Property] will be transferred from the [Parent] to the [Debtor] immediately prior to commencing this case[.]" Id. at 3:16-18 and 4:18.

Notably all representations by Debtor's counsel and representatives refer to the "Debtor's" actions prior to the Petition Date when the actions apparently were carried out by the Parent.

To facilitate purchasing the Property, the Parent borrowed $5,119,000.00 ("Loan") from a group of disparate investors (the "Lenders"). Id. at 2:7-12. The Loan, brokered through Builder's Capital ("Servicer"), was memorialized on July 13, 2005, in a promissory note ("Note") signed by John Ritter ("Mr. Ritter") as "Manager" of the Parent. Id. at 2, 16. Mr. Ritter also appears to have personally guarantied the Loan ("Ritter Guaranty"). Id. The Note was secured by the Ritter Guaranty, the personal guaranty of Andrew M. Flaherty ("Mr. Flaherty"), and a Deed of Trust and Assignment of Rents recorded on July 15, 2005 (the "Deed"). Id. at 2, 8, 16.

On October 16, 2012, an amended order was entered scheduling a combined hearing on Plan[6] confirmation and on the adequacy of Debtor's Disclosure Statement ("Combined Hearing"). (ECF No. 30). The Combined Hearing was set for February 4, 2013, and a status conference regarding the combined hearing was set for January 23, 2013 ("Status Conference"). Id.

On January 11, 2013, creditors Boyd Family Partnership, LP ("BFP")[7] and Paul A. and Janice D. Styer (the "Styers")[8] filed the Objection of Boyd Family Partnership, LP and Paul A. Styer and Janice D. Styer to Debtor's Amended Disclosure Statement and Amended Chapter 11 Plan Dated March 27, 2012 (the "BFP-Styers DS Objection").[9] (ECF No. 33).

The Deed references the Property's assessor's parcel number ("APN"), 3097-471-02-0-000, and is made between trustor "NGA#2 LLC, a Nevada Limited Liability Company" and trustee First American Title Company. Id. at 16. The Deed reflects it was signed on June 22, 2005, with the "Signature of Trustor(s)" bearing a typed "NGA#2 LLC, a Nevada Limited Liability Company" and Mr. Flaherty's signature. Id. at 17. Mr. Ritter did not sign the Deed. Id. The capacity in which Mr. Flaherty signed the Deed is not identified. Id.

Notably, Mr. Ritter was (and Mr. Flaherty was not) listed on Debtor's Schedule "H" as a person liable on any debts listed by Debtor in its Schedules and Statements. Petition at 29.

[6] There are three classes of claims provided in the Plan: Class 1 ("Class 1") is designated "Property Tax Claims" and is unimpaired under the Plan. Class 2 ("Class 2") is designated "Note Claims," and Class 3 ("Class 3") is designated "Equity Interests." Class 2 and Class 3 are impaired under the Plan.

Attached as Exhibit "A" to the Plan is a proposed Operating Agreement ("Operating Agreement").

[7] Debtor's Schedule "D" lists BFP as holding a claim in the amount of $1,000,000.00. (Petition at 14). BFP has not filed a proof of claim in the Case. BFP appeared through counsel at the Confirmation Hearing.

[8] Debtor's Schedule "D" lists the Styers as holding a claim in the amount of $100,000.00. (Petition at 22). The Styers have not filed a proof of claim in the Case. The Styers appeared at the Confirmation Hearing and were there represented by counsel.

[9] The BFP-Styers DS Objection asserts Debtor's Disclosure Statement should not be approved because it fails to provide adequate information that would enable one of the Lenders to cast an informed vote. See generally BFP-Styersss DS Objection at 2 to 4. Specifically, the BFP-Styersss DS Objection attests that the Disclosure Statement is inadequate in (1) its

Also filed on January 11, 2013, were the Brief of Boyd Family Partnership, LP Regarding Confirmation of Debtor's Amended Chapter 11 Plan Dated March 27, 2012 (the "BFP Confirmation Objection") (ECF No. 34) and the Brief of Paul A. Styer and Janice D. Styer Regarding Confirmation of Debtor's Amended Chapter 11 Plan Dated March 27, 2012 ("Styers Confirmation Objection") (ECF No. 35). The BFP Confirmation Objection and the Styers Confirmation Objection both objected to confirmation of Debtor's Plan.[10]

After the Status Conference, the Supplemental Brief of Paul A. Styer and Janice D. Styer Regarding Improper Tabulation of Ballots was filed on January 28, 2013 ("Styers' Supplemental Ballots Brief").[11] (ECF No. 36). Debtor's Response to Supplemental Brief of Paul A. Styer and

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description of the Parent's proposed contribution to the Plan; (2) its lacuna of discussion on the impact of BFP's pending appeal of a state court order directing BFP's affirmative vote on the Plan, see note 13, infra; (3) its paucity of information regarding the Property's management under the Plan, including as to proposed management's competency; (4) its failure to discuss the costs of maintaining the Property under the Plan; (5) its tepid discussion of NRS 645B as well as the necessity of, and legal ramifications of, abolishing the Ritter Guaranty; (6) its mention that the Plan proposes shared ownership of the Property with one of Mr. Ritter's entities as a "full satisfaction" of the Lenders' claims under the Note; (7) its discussion of the means by which the Property's value and proposed future value are assessed; and (8) that it is inconsistent with, if not contradictory to, specific provisions of the Plan and the various communications from Mr. Ritter or one of his employees, to Lenders, regarding the Loan and the Property.

[10] With little exception, the BFP Confirmation Objection and the Styer Confirmation Objection (collectively, the "BFP-Styers Confirmation Objection") present nearly identical objections to confirmation: (1) Debtor does not have sufficient votes to confirm a plan; (2) Debtor violated Sections 1125(b) and 1126(e); (3) Debtor cannot satisfy Section 1129(a) because the Plan does not comply with all applicable Code provisions; (4) the Plan was not proposed in good faith; (5) the Plan fails to satisfy Section 1129(a)(7)'s "best interests of creditors" test; (6) feasibility; and (7) the Plan does not meet the "technical" or the "implicit" requirements of Section 1129(b)'s "fair and equitable." See BFP Confirmation Objection at 2 to 6; see also Styers Confirmation Objection at 2 to 7.

[11] In it, the Styers objected to confirmation and argued the votes of Class 2 creditors were improperly tabulated. Specifically, the Styers asserted BFP did not submit an accepting ballot and should not have been included in the First Ballot Summary, either as part of the number of votes cast nor as part of the dollar amount of voting creditors from Class 2.

Janice D. Styer Regarding Improper Tabulation of Ballots was filed on January 31, 2013.[12] (ECF No. 37).

At the Combined Hearing, counsel presented oral arguments on the Section 1126 objection to Debtor's ballot tabulation. The court took the matter under submission and also set a provisional hearing date for Plan confirmation of April 1, 2013. See ECF No. 38. The court's Order Regarding Objection to Tabulation of Ballots ("Ballots Order") entered on docket March 26, 2013. (ECF No. 41). The Ballots Order sustained without prejudice the Section 1126 objection and vacated the April 1, 2013, hearing date. Id. The parties eventually stipulated to bifurcated hearings for the Disclosure Statement and Plan confirmation and set forth these dates, as well as the parties' respective briefing deadlines, in a stipulation filed with the court on May 30, 2013 ("Stipulation Bifurcating Hearings"). (ECF No. 48). The stipulation did not set forth deadlines for objecting to Debtor's Disclosure Statement or Plan. Id. An order on the Stipulation Bifurcating Hearings entered on docket May 31, 2013 ("Order Bifurcating Hearings"). (ECF No. 49).

On July 29, 2013, Debtor filed its Amended Certification of Acceptance and Rejection of Debtor's Amended Plan of Reorganization Dated March 27, 2012 (Ballot Summary) [sic] ("Second Ballot Summary"). (ECF No. 55). The Second Ballot Summary was accompanied by

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[12] Debtor had asserted that Class 2 accepted the Plan: The First Ballot Summary states that 28 claimants in Class 2 accepted the Plan and 27 claimants in Class 2 rejected the Plan. By percentage, these figures would represent 50.91% of the submitted Class 2 ballots accepting, with 49.09% rejecting. Based on these acceptance figures, the First Ballot Summary also reflects that the 28 accepting ballots totalled $3,136,000.00 in dollar amount, with the 27 rejecting ballots totaling $1,428,000.00 in dollar amount. By dollar amount, these figures represent acceptances by 68.71% and rejections by 31.29% of the dollar amount of voting creditors from Class 2. See First Ballot Summary; see also ECF No. 37.

Among the 28 claimants counted as accepting Class 2 treatment under the Plan, the First Ballot Summary asserted BFP cast an affirmative ballot amounting to 19.535% of the total dollar amount of Class 2 votes submitted. Id.

an affidavit of counsel Yanxiong Li ("Mr. Li") (the "Li Affidavit").[13] (ECF No. 56). The Second Ballot Summary[14] represented that 50.91% of votes cast, representing 68.71% of the "amount of claims," had accepted the Plan.[15]

On September 6, 2013, Debtor filed the document Debtor's Brief Concerning (1) the Adequacy of Its Amended Disclosure Statement in Support of Confirmation of Amended Plan of Reorganization Dated March 27, 2012 and (2) Omnibus Response to Objections of Secured

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[13] Both the Second Ballot Summary and the Li Affidavit provide that BFP's ballot bearing an affirmative vote in favor of the Plan (the "BFP Ballot") had by then been cast. (ECF Nos. 55, 56). Attached as Exhibit "A" to the Second Ballot Summary was a copy of the BFP Ballot. Attached as Exhibit "B" to the Second Ballot Summary was an order from the Eighth Judicial District Court in Clark County, Nevada ("EJDC") in Boyd Family Partnership v. Hidden Ridge, LLC, et al., case number A-09-599091-B ("State Court Case"), directing BFP to submit an affirmative ballot in favor of the Plan–otherwise the EJDC's Clerk of Court would submit an affirmative ballot in BFP's stead (the "State Court Order re BFP Ballot"). (ECF No. 55 at 7 to 9).

Judgment in the State Court Case had originally entered on July 3, 2012, largely in favor of BFP as against Mr. Ritter ("Judgment"). See ECF No. 67-5 at 41 to 44. A bench trial had prior been conducted in the State Court Case after which, on June 26, 2012 (before entry of the Judgment), the EJDC had entered its Findings of Fact, Conclusions of Law and Order (the "State Court Findings, Conclusions, and Order"). Id. at 15 to 39. On July 6, 2012, Debtor filed its Petition with this court.

[14] Other than a copy of the BFP Ballot, no ballots or copies of ballots were submitted with the Second Ballot Summary.

In addition, the Second Ballot Summary provides that, "the voting summary of creditor class, . . . remains unchanged[]" [sic]. Second Ballot Summary at 2:17. However the Second Ballot Summary and the Li Affidavit both assert an affirmative ballot had been only recently cast by BFP, a creditor holding a $1,000,000.00 claim.

It is difficult to see how the casting of the BFP Ballot would leave the voting summary of Class 2 creditors "unchanged." Given that copies of the ballots themselves do not appear until Debtor's September 6, 2013, filing, it is not possible to follow how Debtor arrived at this assertion. See ECF No. 57-3.

[15] These mimic the representations made in the First Ballot Summary. See note 12, supra.

Creditors [sic] ("Disclosure Statement Brief").[16] (ECF No. 57).[17]

At the September 23, 2013, hearing on the Disclosure Statement, the court granted Disclosure Statement approval under Section 1129(a) without prejudice to any disclosure or other issues related to confirmation being raised at the Confirmation Hearing. An order with this limiting language entered on docket October 1, 2013 ("Order Conditionally Approving Disclosure Statement"). (ECF No. 64).

An objection to confirmation submitted in proper person by Barbara Venturacci[18] was received by the court September 17, 2013 ("Venturacci Objection").[19] (ECF No. 60). An objection to confirmation submitted in proper person by creditor Susan Karahalis[20] was received by the court September 17, 2013 ("Karahalis Objection").[21] (ECF No. 61). An objection to

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[16] No declarations from Debtor's management were filed in support of Disclosure Statement approval.

[17] Debtor did not file an amended disclosure statement.

[18] Debtor's Schedule "D" lists Barbara Venturacci ("Creditor Venturacci") as holding a claim in the amount of $25,000.00. Petition at 13. Creditor Venturacci has not filed a proof of claim in the Case and did not appear at the Confirmation Hearing.

[19] Phrased as a request that the court "reject the Pre-packaged bankruptcy plan," the Venturacci Objection articulates Creditor Venturacci's position as objecting to the means by which ballots were collected, to the ballot tabulation in its entirety, and to the Plan term abolishing the Ritter Guaranty.

In addition, Creditor Venturacci asserts she "cast a no vote on the plan and my vote was not counted." See Venturacci Objection.

[20] Debtor's Schedule "D" lists "Susan Karahalis Trust, Susan Karahalis, Trustee" (hereafter "Creditor Karahalis") as holding a claim in the amount of $70,000.00. Petition at 24.

On November 11, 2012, Creditor Karahalis filed proof of claim no. 4-1 reflecting a claim amount of $122,686.02 ("Claim 4-1"). Debtor has not objected to Claim 4-1.

[21] Phrased as a request that the court "reject this Plan," the Karahalis Objection articulates Creditor Karahalis's position as several discrete objections: to the means by which ballots were administered and collected; to the ballot tabulation in its entirety; to the lack of notice that the Plan voting period had been extended; to discrepancies among the various representations re the Parent's monetary contribution to the Plan; to the Plan term abolishing the Ritter Guaranty if

confirmation submitted in proper person by Jerome Blum[22] was received by the court September 17, 2013 ("Blum Objection").[23] (ECF No. 59). An objection to confirmation submitted in proper person by creditor Karin Fagan[24] was received by the court September 18, 2013 ("Fagan

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51% of the Lenders vote in favor of the Plan; to the Disclosure Statement's valuation of the Property; to the (low) contribution of one-hundred fifty thousand dollars to the Plan, 40% of which must be repaid to the Parent upon the Property's sale, with interest; to the Plan's abolition of the Ritter Guaranty; to the Plan terms portending the possibility of additional mortgages on the Property; to the Debtor's continued modification of Plan provisions without providing Lenders adequate notice of the changes or filing an updated disclosure statement; and to the accuracy of Debtor's counsel's attestation that he effected service of the Disclosure Statement Brief upon Creditor Karahalis.

The Karahalis Objection also raises the specter of a missing ballot from Lender Carol Newby or her successors in interest. Karahalis Objection at 1.

Attached to the Karahalis Objection were five pages of what Creditor Karahalis identified as "Tax Bills" for the Property (the "Tax Statements"). Karahalis Objection at 4 to 9. The Tax Statements represent that, as of September 12, 2013, at 12:29:13 P.M., the Property had been in default on its obligations to the County of San Bernardino Tax Collector since June 30, 2011, and then currently owed $45,199.64 in back taxes, penalties, costs, and interest. Id. No declaration was filed in support of the Karahalis Objection.

Creditor Karahalis did not appear at the Confirmation Hearing.

[22] Debtor's Schedule "D" lists "Blum Family Trust, Jerome and Mayda Blum, Trustees" (hereafter "Creditor Blum") as holding a claim in the amount of $25,000.00. Petition at 13. Creditor Blum has not filed a proof of claim in the Case and testified at the Confirmation Hearing.

[23] Phrased as presenting "some of my objections to the [Plan]," the Blum Objection presents Creditor Blum's position as objecting to the clarity of the Plan term abolishing the Ritter Guaranty if 51% of the Lenders vote in favor of the Plan; to the Plan terms portending the possibility of future capital calls when the Property is worth only 11% of the Lenders' initial investment; to the adequacy of disclosure regarding the nature of the Parent's proposed contribution of one-hundred fifty thousand dollars; to the means by which ballots were tabulated; and to the general adequacy of notice given the Lenders.

The Blum Objection also generally asserts, "there are many other objections, including investors whose vote was not counted, and others who have never been notified that will be submitted to the court." Blum Objection at 2. However Creditor Blum does not name or otherwise identify Lenders whose votes were not counted or who were not notified of the Plan. Id.

[24] The mailing matrix attached to Debtor's certificate of service at ECF No. 58 reflects two entries containing a Karin Fagan: "Pual J. Schwarz, Karin Fagan Beneficiary" [sic] and

Objection").[25] (ECF No. 62).

The Plan does not provide for the treatment of tax claims other than those related to property taxes. See generally Plan at 14:15 to 15:3.[26] However creditor Internal Revenue Service ("Creditor IRS")[27] did not file an objection to Plan confirmation.[28] As well, the County

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"Karin Fagan Living Trust." See ECF No. 58. Debtor's Schedule "D" lists "Pual J. Schwarz, Karin Fagan Beneficiary, c/o Karin Fagan" [sic] as holding a claim in the amount of $25,000.00. Petition at 23. However the Karin Fagan Living Trust does not appear in Debtor's Schedule "D." See generally Petition at 13 to 25.

No proof of claim appears to have been filed by "Paul J. Schwarz, Karin Fagan Beneficiary." However on August 22, 2012, Karin Fagan, as Manager of the Karin Fagan Living Trust, filed proof of claim no. 2-1 reflecting a claim amount of $40,542.93 ("Claim 2-1"). Debtor has not objected to Claim 2-1.

All references in this Order to "Creditor Fagan" are collectively to Karin Fagan in these capacities.

[25] It is unclear from the Fagan Objection if these objections are made on behalf of Claim 2-1 or as the beneficiary of "Pual Schwarz," or both: the signature block of the Fagan Objection contains a typed "Karin Fagan," although just above this block is a signature which appears to read "Karin Fagan TITEE."

The Fagan Objection, presented as an "object[ion] to the court ruling in favor of the [Plan]," articulates Creditor Fagan's position as objecting to the adequacy of disclosure regarding the Parent's proposed contribution of one-hundred fifty thousand dollars and objecting to Debtor's valuation of the Property.

Creditor Fagan did not appear at the Confirmation Hearing.

[26] And Debtor's Schedule "E" asserts Debtor has no creditors holding unsecured priority claims to report. Petition at 26.

[27] On July 12, 2012, creditor IRS filed proof of claim no. 1-1 reflecting a claim amount of $100.00 ("Claim 1-1"). Debtor has not objected to Claim 1-1.

[28] Creditor IRS did not appear at the Confirmation Hearing. The certificate of service at ECF No. 58 asserts that Mr. Li served the Disclosure Statement Brief upon Creditor IRS by mail. See ECF No. 58. Notably this certificate of service also asserts Mr. Li served each party in the mailing matrix with a notice of hearing on the Disclosure Statement Brief, although no notice of hearing on the Disclosure Statement Brief appears on docket. Id.

Related certificates of service variously attest that Mr. Li also served the Confirmation Brief and one of its exhibits upon each party in Debtor's mailing matrix, including Creditor IRS. See ECF Nos. 72, 74.

of San Bernardino Tax Collector did not file an objection to Plan confirmation[29]

Debtor's Brief in Support of Confirmation of Amended Plan of Reorganization Dated March 27, 2012 and Omnibus Response to Objections of Secured Creditors [sic] ("Confirmation Brief") was filed October 4, 2012. (ECF No. 67).[30] Concurrently therewith and also on October 12, 2013, Debtor filed its related exhibits. See ECF Nos. 67, 69, 70, 71, 73.

In accord with counsel's representations made at the Confirmation Hearing, the declaration of Michael R. Brooks, counsel for the Styers and for BFP ("Mr. Brooks"), was filed on October 24, 2013 ("Brooks Declaration").[31] (ECF No. 80).

THE EVIDENTIARY RECORD

Fifty-six exhibits were admitted into evidence. Six witnesses testified at the Confirmation Hearing, and each was subject to cross-examination.

A. The Exhibits.[32]

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[29] The Plan contemplates, and the parties appear to agree, that Debtor is delinquent in assessed property taxes and owes the County of San Bernardino Tax Collector an unidentified sum for apparently years of unpaid property taxes (plus penalties, costs, and interest) on the Property. See Disclosure Statement at 13:18-20 and 20:17 to 21:5; see also Plan at 14:20 to 15:3.

The County of San Bernardino Tax Collector is not listed in Debtor's Schedules and Statements. See generally Petition. Nor does the entity appear in Debtor's mailing matrix. See, e.g., ECF No. 58. No proof of claim was filed on behalf of the County of San Bernardino Tax Collector. It is unclear how the County of San Bernardino Tax Collector is a creditor of Debtor's, although the parties do not appear to contest this.

The County of San Bernardino Tax Collector did not appear at the Confirmation Hearing.

[30] Debtor did not amend the Plan or file an amended plan of reorganization.

[31] Attached to the Brooks Declaration as Exhibit "A" is a document identified as the Styers' objections and responses to Debtor's first set of interrogatories ("Styers' Objections and Responses"). Id. The Brooks Declaration asserts that, on or about January 9, 2013, Mr. Brooks prepared and served the Styers' Objections and Responses upon Debtor's counsel and that thrice therein Creditor Blum is identified as a testifying witness the Styers expected to call at the Confirmation Hearing. Id. at 1:25 to 2:3.

[32] The exhibits offered by BFP and the Styers were marked alphabetically, e.g., "Ex. A," and the exhibits offered by Debtor were also marked alphabetically, e.g., "Ex. A." To denote the

Debtor's exhibits admitted at the hearing included copies of the DeVore Declaration (Debtor's Ex. "A") (ECF No. 67-1; see also ECF No. 16); the Styers' Supplemental Ballots Brief (Debtor's Ex. "B") (ECF No. 67-2; see also ECF No. 36); Debtor's response to the Styers' Supplemental Ballots Brief (Debtor's Ex. "C") (ECF No. 67-3; see also ECF No. 37); the Ballots Order (Debtor's Ex. "D") (ECF No. 67-4; see also ECF No. 41); an ex parte application for order to show cause filed in the State Court Case on May 6, 2013, by Debtor's counsel and against BFP (Debtor's Ex. "E") (ECF No. 67-5); the State Court Order re BFP Ballot (Debtor's Ex. "F") (ECF No. 69-1; see also ECF No. 59 at 7 to 9, ECF No. 71-3); the Second Ballot Summary (Debtor's Ex. "G") (ECF No. 69-2; see also ECF Nos. 55 and 69-10); the Plan (Debtor's Ex. "H") (ECF No. 69-3; see also ECF No. 12); the declaration of Amanda Dalton Stewart ("Ms. Stewart") ("Stewart Declaration") (Debtor's Ex. "I") (ECF No. 69-4; see also ECF No. 17); a June 7, 2012, letter from Mr. Ritter to "Lenders" and a June 6, 2012, letter from Mr. DeVore to "Lender" (Debtor's Ex. "J") (ECF No. 69-5); the Petition (Debtor's Ex. "K") (ECF No. 69-6; see also ECF No. 1); a July 9, 2012, letter from Mr. DeVore to "Lender" (Debtor's Ex. "L") (ECF No. 69-7); a declaration by Mr. Li dated October 4, 2013 (Debtor's Ex. "M") (ECF No. 69-8; see also ECF No. 68); the First Ballot Summary (Debtor's Ex. "N") (ECF No. 69-9; see also ECF No. 10); the Second Ballot Summary (again) (Debtor's Ex. "O") (ECF No. 69-10; see also ECF Nos. 55 and 69-2); approximately eighty pages of ballots (Debtor's Ex. "P") (ECF No. 70-1; see also ECF No. 57-3); transcript of January 24, 2013, deposition of Bradley W. Boyd (Debtor's Ex. "Q") (ECF No. 70-2); transcript of January 24, 2013, deposition of Paul A. Styer (Debtor's Ex. "R") (ECF No. 70-3); the Order Bifurcating Hearings (Debtor's Ex. "S") (ECF No. 70-4; see also ECF No. 49); the Disclosure Statement Brief (Debtor's Ex. "T") (ECF No. 70-5; see also ECF No. 57); the Order Conditionally Approving Disclosure Statement" (Debtor's Ex. "U")

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difference, exhibits offered by BFP and the Styers are herein referred to by the notation "Creditors' Ex.;" exhibits offered by the Debtor are herein referred to by the notation "Debtor's Ex."

(ECF No. 70-6; see also ECF No. 64); an order scheduling the Combined Hearing (Debtor's Ex. "V") (ECF No. 70-7; see also ECF No. 30); the BFP-Styers DS Objection (Debtor's Ex. "W") (ECF No. 70-8; see also ECF No. 33); the BFP Confirmation Objection (Debtor's Ex. "X") (ECF No. 70-9; see also ECF No. 34); the Styers Confirmation Objection (Debtor's Ex. "Y") (ECF No. 70-10; see also ECF No. 35); a February 26, 2010, order in bankruptcy case no. 09-33470 (Debtor's Ex. "Z") (ECF No. 70-11); the State Court Findings, Conclusions, and Order (Debtor's Ex. "AA") (ECF No. 71-1; see also ECF No. 67-5 at 15 to 49); the Judgment (Debtor's Ex. "BB") (ECF No. 71-2; see also ECF No. 67-5 at 41 to 44); the State Court Order re BFP Ballot (again) (Debtor's Ex. "CC") (ECF No. 71-3; see also ECF No. 59 at 7 to 9, ECF No. 69-1); the Fagan Objection (Debtor's Ex. "DD") (ECF No. 71-4; see also ECF No. 62); a Valemount Capital "Focus Management Distressed Land Sale and Economic Review Las Vegas Market" dated June 2009 ("Valemount Report") (Debtor's Ex. "EE") (ECF No. 73); an appraisal report of the Property by Mission Property Advisors, Inc. (Debtor's Ex. "FF") (ECF Nos. 71-5 and 71-6); the Karahalis Objection (Debtor's Ex. "GG") (ECF No. 71-7; see also ECF No. 61); the Blum Objection (Debtor's Ex. "HH") (ECF No. 71-8; see also ECF No. 59); the Venturacci Objection (Debtor's Ex. "II") (ECF No. 71-9; see also ECF No. 60); the Disclosure Statement (Debtor's Ex. "JJ") (see ECF No. 11); and a color copy of Ms. Stewart's ballots tabulation as of July 6, 2012 (Debtor's Ex. "KK") (cf. ECF No. 61 at 16, ECF No. 71-7 at 17).

The exhibits of creditors BFP and the Styers admitted at the hearing included copies of the Note (Creditors' Ex. "A"); the Ritter Guaranty (Creditors' Ex. "B"); the Deed (Creditors' Ex. "C"); a Disclosure Statement for Debtor's Plan of Reorganization Dated December 2, 2009, and a Debtor's Plan of Reorganization Dated December 2, 2009, for debtor B-NGAE1, LLC, listing a bankruptcy case number "[t]o [b]e [d]etermined" (Creditors' Ex. "D"); a March 30, 2012, letter from the Parent to "Valued Investor," signed by Mr. Ritter (Creditors' Ex. "E"); the Styers' unsigned ballot for this Case (Creditors' Ex. "F"); an April 3, 2010, letter to "Investor" signed by Mr. Ritter regarding extending an April 2010 voting period (Creditors' Ex. "G"); a June 4, 2009,

letter on Focus Property Group letterhead, signed by Mr. Ritter, listing Builder's Capital's address, having the salutation "Ladies and Gentlemen," and accompanied by a Property Update Report for the quarter ending March 31, 2009 (Creditors' Ex. "H"); an email from Creditor Karahalis dated May 9, 2012 (Creditors' Ex. "I"); an email from Creditor Karahalis dated April 10, 2012 (Creditors' Ex. "J"); an email from Creditor Karahalis dated April 9, 2012 (Creditors' Ex. "K"); an email from Paul Styer dated May 10, 2012 (Creditors' Ex. "L"); a Trustee's Deed Upon Sale for a property in San Bernardino, California, having parcel number A.P.N. 3097-461-01 (Creditors' Ex. "M"); maps of property parcels in the "Focus Assemblages" property groups located near Victorville, California (Creditors' Ex. "N"); map of property parcels in the "Focus Assemblages" property groups located near Victorville, California, marking the Property (Creditors' Ex. "O"); an October 14, 2013, printout from the San Bernardino County Tax Collector's website showing taxes due on the Property (Creditors' Ex. "P"); a "Bill Display" for the Property, effective date July 1, 2010, from the San Bernardino County Tax Collector's website (Creditors' Ex. "Q"); a "Bill Display" for the Property, effective date July 1, 2011, from the San Bernardino County Tax Collector's website (Creditors' Ex. "R"); and a "Bill Display" for the Property, effective date July 1, 2012, from the San Bernardino County Tax Collector's website (Creditors' Ex. "S").

B. The Witnesses.

Live witness testimony was presented by Mr. DeVore, Ms. Stewart, Steven Fontes, R. Patrick Lamb, Paul Styer (testified telephonically), and Jerome Blum.

1. Thomas DeVore ("Mr. DeVore").

Mr. DeVore is the president and chief operating officer of Focus Management Services, Inc., an entity which manages various "Focus" entities, including the Parent, and provides payroll and management services to the Focus Property Group investment entities.

Mr. DeVore described the Property as part of an assemblage of properties intended for development as a master planned community, Crossings II, a sister master-planned community

to another "Focus"-developed assemblage of properties called The Crossings. Mr. DeVore described "Focus" as engaging in the business of assembling smaller parcels of raw land into larger parcels that can be more economically developed, usually for home construction. Mr. DeVore described The Crossings as having approval from the city of Victorville, California, as a master planned community; he asserted that this was due to the efforts of a "Focus" entity.[33] Mr. DeVore described Crossings II as outside the boundaries of the city of Victorville and much earlier in its development process than The Crossings. By Mr. DeVore's account, Crossings II would have to be first annexed to the city of Victorville before work on the properties' entitlements could commence. Mr. DeVore identified target "end users" as home builders.

Mr. DeVore identified Mr. Ritter as the chief executive officer and one of the founders of Focus Property Group, and he stated that the Loan (serviced by Builder's Capital[34]) was guarantied by Mr. Ritter.

Mr. DeVore discussed the history of the Loan, including the Parent's default and a prior forbearance agreement that was reached with the Servicer and signed by Mr. Ritter, where the Servicer continued with its "administrative duties" during the term of the forbearance. Mr. DeVore represented that BFP sued to challenge the forbearance agreement on the bases that it was reached without the consent of all Lenders and the Servicer had acted at least without BFP's consent in undertaking the forbearance agreement.

He also represented that the Loan is not the only obligation the Parent had undertaken. Upon the expiration of the initial term of the forbearance agreement, and in light of the continued economic downturn, Mr. DeVore stated "we" floated the idea of using pre-packaged

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[33] Mr. DeVore represented he was involved but did not state how (he referred to this process and its perceived success in the first person plural).

[34] The "Servicer." See also note 5, supra.

bankruptcies to "do something other than just wait around."[35] Mr. DeVore represented that negotiations were then undertaken with various "active" lenders, including BFP, to work on the structure that became the pre-packaged bankruptcy entities, of which Debtor is one. Mr. DeVore stated the operating agreement that forms the crux of the Plan[36] was negotiated between "Focus" and a lender group that included BFP, and the Operating Agreement is different in form from the operating agreements used in other pre-packaged entities formed to discharge loans on which BFP was not a lender.[37, 38]

In addition, Mr. DeVore testified that, as a product of the settlement of some litigation involving BFP, BFP was to approve any solicitation of votes from other creditors prior to the commencement of the solicitation process. He asserts BFP's approval to commence solicitation for the Plan was sought and received in line with this. A meeting was then held with the creditors at Red Rock Casino.[39] The vote failed; Mr. DeVore blames BFP for the failure.

Some time later, BFP commenced a lawsuit against Mr. Ritter on the Ritter Guaranty and

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[35] Mr. DeVore asserted "Focus" carried nearly one billion dollars across its land portfolio, and that Mr. Ritter had personally guarantied upwards of $900 million in debt–of which the Property and the Loan were a part.

Mr. DeVore later testified that Mr. Ritter had has resolved approximately all of the debt except for $200 million which "remains to be handled." Therefore he is no longer obligated on about $700 million of personal guaranties.

[36] The Operating Agreement. See note 6, supra.

[37] Mr. DeVore did not further articulate or specify the differences between the types of operating agreements.

[38] Mr. DeVore also testified that negotiations between "Focus" and the lender group that included BFP were undertaken regarding the form of disclosure statement. He did not specifically identify this Disclosure Statement and Plan (at issue in this Case) as the product of these negotiations but seemed to refer to them generally as such.

[39] The date of this is unknown.

on Mr. Ritter's personal guaranties of other loans. Mr. DeVore identified Debtor's Ex. "AA"[40] as the findings of fact and conclusions of law arising from this lawsuit. Mr. DeVore identified Debtor's Ex. "BB"[41] as the July 2012 judgment arising from this lawsuit.

Mr. DeVore identified Ms. Stewart as the person in his office, and under his direction, that "manages" the process of solicitation. Mr. DeVore represented that BFP did not sign a ballot approving the Plan in accord with this process. He identified Debtor's Ex. "CC"[42] as an order from the state court case directing BFP to submit an affirmative ballot in support of the Plan, and he stated that BFP did eventually submit an affirmative ballot (the BFP Ballot).

As Mr. DeVore described, the fundamental tenet of the Plan is to transfer the Property to a company. Upon Debtor's counsel's prompt regarding why the Property and the Loan "gets [sic] transferred to a new entity, which is the Debtor in this action?," Mr. DeVore stated this was to avoid "mixing the collateral" between multiple different properties that the Parent held and to provide that lenders on each of the Parent's properties could be "treated the same" with respect to "the debt they invested in." Mr. DeVore stated any property transfer occurs pre-petition and only once the Plan has been approved by the Lenders. Further, upon confirmation, the Parent's ownership interest in the new entity transfers to the Lenders, who become "Class A" members under the Operating Agreement, and the Parent becomes a "Class B" member under the Operating Agreement. There forward, the Lenders are to manage the Property's ownership through a steering committee (a "Board" in the "Boyd versions" of the Operating Agreement) and make decisions regarding costs and collections on capital calls. The steering committee is also to make decisions regarding when the Property is to be marketed and for how much. But

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[40] The State Court Findings, Conclusions, and Order.

[41] The Judgment.

[42] The State Court Order re BFP Ballot.

any decision to sell the Property must be approved by 60% of the "Class A" members.[43]

Mr. DeVore estimated the Debtor will need "roughly" $150,000 over the next "about a 5-year period" to cover property taxes (including arrears), property insurance, and payment to an administrative agent for accounting and bookkeeping.[44] The Parent initially offered to contribute $60,000 as capital[45] to the company moving forward and "ultimately" agreed to increase this to $150,000. The additional $90,000 would not be a capital contribution but would serve as a "payment" to the company.

Mr. DeVore identified Debtor's Ex. "J"[46] as an effort to address what "we" perceived to be misinformation disseminated by and among the Lenders to one another. He asserted that in this letter "we" describe the increase in the Parent's proposed contribution to the Plan. Mr. DeVore asserted that, after the letter went out, the vote passed.

According to Mr. DeVore, if the parent expends $150,000, the capital calls to "Class A" members are anticipated. However, he then stated that "Class A" members are not required to make capital contributions. He also variously asserted that failure of a "Class A" member to make a capital contribution does not "work against their interest necessarily" but that other, paying members contributing this money on behalf of the non-paying "Class A" member will receive priority distribution for any "supplemental capital calls" plus 12%–paid out of the proceeds otherwise due the non-paying "Class A" member. In addition, all "new capital contributions" receive an 8% return once the Property sells. Of what is left after this, ninety

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[43] Mr. DeVore testified that, per the Operating Agreement, the Parent cannot make any decisions on behalf of the Debtor without going through the Board's "approval process."

[44] Which he described as bringing the taxes current and paying carry costs going forward.

[45] The $60,000 is considered a "capital contribution" subject to a return of 8%, as with the capital contributions of any "Class A" member.

[46] A June 7, 2012, letter from Mr. Ritter to "Lenders" and a June 6, 2012, letter from Mr. DeVore to "Lender." See also ECF No. 69-5.

percent of the proceeds go to "Class A" members and ten percent goes to the "Class B" member (Parent),[47] until the original amount of the Loan (without interest) has been repaid to the Lenders. Then seventy percent goes to "Class A" members and thirty percent to the "Class B" member, until all proceeds are disbursed.

Mr. DeVore believes the Plan is "feasible" because this is the forty-fifth pre-packaged bankruptcy plan for which "we" have sought confirmation, and other plans have operated post-confirmation, including collecting capital from their membership, without a large initial cash infusion from the Parent.[48] None of these companies have sold their property and have largely all been able to cover carry costs. Although apparently some did have difficulty raising capital.

Mr. DeVore described that the Plan provides that Lenders who vote for it release the Ritter Guaranty. Mr. DeVore characterized the release of the Ritter Guaranty as "not that significant" and not having much value when considered in light of Mr. Ritter's financial circumstances. He asserted this provision was included because "Focus" provides its expertise and the expertise of "its" team to maximize the value of the Property–a recovery of value which is anticipated to involve several years as well as sizeable effort. Because of this, Mr. Ritter is unwilling to risk being sued on one of his guaranties after he and his entities expend effort to develop or obtain entitlements on the properties.

Mr. DeVore also stated Class 1 (property tax claims) was unimpaired, Class 2 (Lenders)

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[47] Mr. DeVore testified this is termed the "Property Manager" in the "Boyd versions" of the Operating Agreement.

[48] Mr. DeVore correctly stated that the Parent has successfully confirmed many similar pre-packaged bankruptcy plans for other similarly created entities. In none of the prior confirmation proceedings, however, has an evidentiary hearing been conducted at the request of any objecting Lenders or other interested parties. In the majority of the previous cases, no objections to disclosure statement approval or plan confirmation were ever raised. Thus, the instant Case presents the first instance in which substantive testimony on salient plan confirmation elements, subject to cross-examination, has been presented.

was impaired, and Class 3 (Parent) was impaired[49] under the Plan. Mr. DeVore believed the Plan provided a better option for the Lenders than to foreclose on the Property.[50] He again asserted that his belief in the Plan's success was bolstered by "our" successful experiences with a number of other similarly-structured plans. Mr. DeVore described Debtor's Ex. "L"[51] as a letter to Lenders wherein he explained "the process." He also stated he believed the Plan was proposed in good faith, largely because he believed it provided the Lenders a structure for them to work together to manage themselves and accomplish decisions without unanimous approval. He also characterized the Parent's monetary contribution as something "we" have done to assist the Lenders because this would enable the Lenders to hang on to the Property for five more years.

Mr. DeVore represented that none of the Parent's proposed contribution will be used to pay attorney's fees, court costs, Office of the United States Trustee ("OUST") fees–these all will be paid by the Parent.

Regarding the blank in section 7.2 of the Plan, where "Property Manager" is to be identified, Mr. DeVore stated that another "Focus" entity, LEHM, LLC, would serve as the Property Manager under the Plan. He identified LEHM as the Debtor's current manager. And he identified Mr. Ritter as the manager of LEHM.[52] Mr. DeVore identified himself as the chief operating officer of LEHM and represented he had been designated by Mr. Ritter to work on the administration and management of "this company" (presumably LEHM). Mr. DeVore stated the

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[49] Although how it is currently impaired was not articulated.

[50] However Mr. DeVore could not recall how many of the Lenders held a fractional interest in the Note in the one percent to two percent range.

[51] A July 9, 2012, letter from Mr. DeVore to "Lender." See ECF No. 69-7.

[52] There is no declaration in support of confirmation from Mr. Ritter, nor from Mr. DeVore. Mr. Ritter was not proffered as a witness at the Confirmation Hearing.

documentation filed at ECF No. 4 in this Case accurately reflects this designation of authority.[53]

Mr. DeVore stated he believed the Plan is in the best interests of the creditors because he believes it (i) provides the Lenders with a management structure, (ii) allows the Lenders to hold on to the Property while land values recover more completely, and (iii) will provide a greater recovery for the Lenders on their initial investment. Mr. DeVore stated he believed the Property, if sold at the time of the Confirmation Hearing, will not yield as much as it will once properties near Riverside, California, and the "Inland Empire" become unaffordable, which he estimates will occur within the next three to five years.

On cross examination Mr. DeVore identified Creditors' Ex. "E"[54] as the letter sent with ballots to the Lenders, describing the Parent's $60,000 "contribution" to the Plan. Although Creditors' Ex. "E" does not contain the term "capital contribution" and does not define the Parent's proposed $60,000 contribution as such, Mr. DeVore stated that this $60,000 was considered a "normal capital contribution" and not a "supplemental capital contribution" (a term which was defined in the Plan).[55] However he also characterized the $60,000 as an additional capital contribution. Mr. DeVore confirmed that "Additional Capital Contribution" is a defined

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[53] ECF No. 4 provides in part:

> Unless extended in writing and executed by me or any future successor Manager of LEHM, Mr. DeVore's authority under LEHM with regard to its management of B-NGAE1 will terminate on the earlier of: (1) written notification by me terminating this authorization, (2) sixty (60) days after the entry of an order by the bankruptcy court confirming a Plan of Reorganization for B-NGAE1, or (3) **December 31, 2012**.

(Emphasis added). No documentation extending Mr. Ritter's grant of authority to Mr. DeVore has been produced. Without an extension, by the plain language of this grant Mr. DeVore's authority to act on behalf of and serve as a representative of the Debtor seems to have expired on December 31, 2012.

[54] A March 30, 2012, letter from the Parent to "Valued Investor," signed by Mr. Ritter.

[55] Mr. DeVore denied the characterization of this as a loan, although this money is to be repaid to the Parent, with 8% interest, upon the sale of the Property.

term in the Disclosure Statement with a specific meaning (that the money be repaid upon sale of the Property), although he was unsure why the $60,000 was not identified as such (specifically, Debtor's Ex. "JJ" at 13:16-20). He maintains that use of the word contribute (see Debtor's Ex. "JJ" at 13:18) is sufficient to indicate the treatment of these funds because this word has a specific meaning in the parlance of partnerships and limited liability companies, although he acknowledges the Lenders are lenders under a loan and creditors of the Debtor but not members in a limited liability company. He stated it may be possible the Lenders did not understand the significance of the parlance but asserted it "should have been very clear" to the Lenders because the sentence appears in a section of the Disclosure Statement discussing what the Parent will contribute to the Plan.[56]

Regarding numbered paragraph 5 of Debtor's Ex. "J,"[57] wherein Mr. DeVore stated, "the Plan we will propose in the bankruptcy proceeding will provide for the funding of $150,000 to the new LLC– . . . ." (emphasis omitted) but failed to use the parlance contribute, Mr. DeVore asserts it was his intent to convey this amount was an increase of the $60,000 contribution previously discussed. He stated that he used fund in this instance because money funded to a company is "typically" contributed capital, and his use of the word fund refers to a capital contribution. Mr. DeVore acknowledged he failed to distinguish between the $60,000 capital contribution and the $90,000 gift in Debtor's Ex. "J." He stated the letter had been drafted at a

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[56] When prodded by counsel regarding the introductory phrase of the relevant paragraph ("If a Supplemental Capital Loan is not returned within ninety days after such Supplemental Capital Loan is made, ..." (Debtor's Ex. "JJ" at 13:11-12)) as not providing a context for understanding the term contribute, Mr. DeVore stated he believed it was "clear" that the parlance indicated the Parent was contributing capital.

[57] Mr. Ritter's June 7, 2012, letter to Lenders, attached to which is a June 6, 2012, letter from Mr. DeVore having the salutation "Lender." During cross-examination Mr. DeVore affirmed that Debtor's Ex. "J" is a single document because Mr. Ritter's letter contained Mr. DeVore's letter as an attached correspondence. The page numbers of Debtor's Ex. "J" referenced herein refer to the page numbers assigned upon docketing this exhibit, at ECF No. 69-5.

time when he believed they were going to have insufficient votes in support of the pre-packaged bankruptcy and that they would be proceeding with a traditional bankruptcy.[58] Mr. DeVore stated this letter was written "in the middle of the voting period . . . the extended period." When asked to define the "extended period" for voting, Mr. DeVore stated only that this was when "we were still talking to various lenders."

Regarding solicitation: Mr. DeVore identified Creditors' Ex. "F"[59] as a copy of the ballot sent to each of the Lenders and affirmed that this document reflected a voting deadline of May 4, 2012. He represented that he believed, as of May 4, 2012, there were insufficient votes to confirm the Plan[60] and stated this was because he had been told BFP had voted "no" but was not certain. He stated he believed there had been an extension of the voting deadline but could not identify documentation which provided notice to the Lenders that the deadline had been extended.[61] He also represented that "we" continued to discuss the "process" with "certain" of

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[58] Mr. DeVore, prompted, read aloud the following excerpt:

> Because of this, we have decided to proceed to file the bankruptcy petition for this loan and work through the bankruptcy court process to see that the Plan is properly presented and considered.

(ECF No. 69-5 at 3). Mr. DeVore also read aloud a second excerpt occurring later in the letter:

> Because we are convinced that the Pre-pack Plan and the preservation of the Property is in your best interest, the Plan we will propose in the bankruptcy proceeding will provide for the funding of $150,000 to the new LLC – . . . .

Id. at 4 (emphasis omitted). Last, the following excerpt was read into the record:

> Once the bankruptcy petition has been filed, you will receive additional information from the debtor entity and the Bankruptcy Court.

Id. at 5.

[59] The Styers' unsigned ballot for this Case.

[60] Mr. DeVore was unable to state how many votes "short" the Plan was on May 5, 2012.

[61] The center sentence of the last paragraph on page 1 of Debtor's Ex. "L" provides in part, "we extended the vote and continued to accept ballots and ballot changes until last Friday (July 6, 2012)." See ECF No. 69-7 at 1.

the creditors but did not identify whom. Mr. DeVore identified Debtor's Ex. "J" as written in the middle of the extended voting period, which he again recalled as extended because they were still talking with certain creditors during that time. He represented that tabulating votes was still occurring behind the scenes at the time Debtor's Ex. "J" was written. He also asserts the "process" was still an "open process," and they were still receiving "yes" and "no" votes at this time.[62] When asked why, if this were the case, he wrote to the Lenders to say the Parent would be filing a traditional bankruptcy, Mr. DeVore stated that "we" believed "we weren't going to get to a sufficient voting level" as the reason for his contradictory representations. Mr. DeVore stated that Debtor's Ex. "J" was sent to all of the Lenders and was unsure if, aside from Debtor's Ex. "J," there was any other communication issued to the Lenders after May 4, 2012, and before the Petition Date.[63]

Regarding Debtor's Ex. "L,"[64] Mr. DeVore asserts he wrote this letter and that this letter was sent to all of the Lenders. He acknowledged the letter as containing no language that the balloting had been extended until July 6, 2012. Regarding the characterization of the $150,000, the letter uses the parlance contribution in describing the Parent's increased contribution from $60,000. Although the letter does not specify the true "split" nature of the incoming $150,000, Mr. DeVore asserts the situation is "better" for the Lenders than this letter provides.

Mr. DeVore stated the intent was to put the Property and the Lenders group in a position to raise capital, if needed, and to provide a management structure that would be able to make decisions recognized by a title company when it came time to sell the Property. However the ultimate goal is to hold the Property and allow the market to recover. Mr. DeVore characterized

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[62] Debtor's Ex. "P" rebuts this statement and provides evidence to the contrary.

[63] He was also unaware that any "yes" votes had changed to "no" votes since July 9, 2012.

[64] The July 9, 2012, letter from Mr. DeVore to "Lender." See ECF No. 69-7.

that selling the Property at a value greater than its current value is the "best thing" that could happen because not only would it possibly provide some recovery on the Lenders' initial investment, but it would also enable Lenders to "recover the capital that they've had to contribute to this company." It is his position that any value realized in appreciation will be nearly a direct result of the Property's status as a component of one of the Parent's assemblages of residential property, which he called Crossings I and Crossings II. Primary to this will be the Parent attaining entitlements necessary to build the projects, although there have been significant losses in the properties within the Crossings II assemblages since 2006: some have gone back to the Lenders, others have gone into pre-packaged entities.

Creditors' Ex. "N" is an overhead depiction including the "Debellis" property[65] (the largest parcel in Crossings II) which had undergone a fractional interest foreclosure, which is immediately adjacent to the Property. Before Crossings II can be entitled, before infrastructure can be planned, and before the Property can be developed, this land must be annexed by the City of Victorville. Mr. DeVore stated "we" worked with the "Debellis" group after foreclosure and "a number of the other groups"[66] that hold title to various properties in the Crossings II assemblage to achieve annexation, in order to maximize value of all properties. He articulated the goal as to sell Crossings II "as a whole" to an end-user, which he prior defined as a developer. Mr. DeVore testified the Disclosure Statement[67] provides that the intent is to procure

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[65] Regarding this property, when presented with Creditors' Ex. "M" (showing a loan number for the "Debellis" group and a 2008 foreclosure), Mr. DeVore testified the documentation was consistent with his understanding of "early on" in terms of when this property underwent foreclosure. He did not recognize the loan number on the document, but he recognized "Dr. Debellis" by name. Mr. DeVore states he remembers that loan went into default in February of 2008.

[66] He did not identify these other groups.

[67] ECF No. 11 at 17-18; see also Debtor's Ex. "JJ."

entitlements and complete annexation.[68] The Property is "being developed" and Focus Investments as a "developer" means they were starting the entitlement process, which is an initial stage in the development process. Debtor's Ex. "JJ" provides, "the community is being developed," and Mr. DeVore asserts the intention of the Disclosure Statement is to describe the current status of the Property–here they had started the process, which is the "fundamental entitlements" needed to eventually build houses. He was unaware where in the Disclosure Statement this additional description is provided–i.e., what does it mean to be "developed."

Mr. DeVore believes it is important to have a group of owners working in the same direction on "pursuing the development process"; the loss of a property at foreclosure could be a material event impacting value and the development process, but these depend on "how cooperative" the new owners of the property are. Mr. DeVore does not know how many parcels in Crossings II have been foreclosed upon. He thinks, of these, two or three parcel owners in addition to "Dr. Debellis" are working with the Parent, but he does not recall who or what properties.

Regarding The Crossings, three or four out of ten parcels have been lost to foreclosure, but this development is farther along: it has the entitlements and a master plan approved by the city of Victorville, and mapping has begun. Mr. DeVore estimates and anticipates "Focus" doing this some day and that "fairly quickly" development and construction of infrastructure would happen, although "Focus" does not have the capital to do this, and it has not happened yet. However development of Crossings II is not tied to development of The Crossings. Although Crossings II is behind, the intent was to develop a "sequence" of The Crossings first and then Crossings II.

Regarding the liquidation analysis (ECF No. 11 at 32-33), Mr. DeVore believes a value

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[68] In later testimony, Mr. DeVore described section 7.11 of the Operating Agreement as discussing hypothetical select entities that would carry out entitlement work.

trough occurred in approximately 2010 but thinks the recovery process from this has begun. Mr. DeVore stated he had not established a value of the property as of March 2012 (when the Solicitation Packages were mailed) although he "generally understood" the value was depressed at that time. The estimated value of $375,000 to $750,000 from the Valemount Report[69] rang true for him because (1) there was not much "trading" of property in the area at that time and (2) he believed nothing would "trade" for more than $10,000/acre if it did (the Property is 75 acres). He relied upon Valemount's 2009 valuation for both the 2009 original plan as well as the Plan (2012) and used the same value for the Property in both. Mr. DeVore asserted he talked with Valemount but could not specify when or with whom and also asserted "we" did not think an update was necessary because they had not seen "land traded" in the area where the Property was located. He represented "their" own judgment was used to make the determination that values had not increased significantly (and therefore an updated valuation was not necessary): they did not believe circumstances had changed enough between 2009 and 2012 to warrant a revisit of the $9.375 million to $13.125 million five-to-seven-year "horizon" in the Valemount Report. In particular, he pointed to recovery "down the hill" as an indicator that would eventually translate into recovery in Victorville, so the "horizon" numbers in the Valemount Report were "potentially still achievable" and "there was no reason to make that change."

Regarding the likelihood of developing Crossings II, Mr. DeVore represented it "was not out of the question" that Crossings II would be developed on the "medium-term horizon." He would "not necessarily" characterize "potentially feasible" as less than a fifty-percent chance of occurring, but he did not answer the question whether feasible is something that *may* happen but is not necessarily *likely* to happen. He also believed values had changed "somewhat" between 2008 and 2012, but "not enough" to justify a "firesale" of the property (a liquidation). It was in his opinion better to hold on to the Property and let the value increase, which would be "in the

[69] See ECF No. 73. (Debtor's Ex. "EE").

best interests of" the Lenders.

Mr. DeVore identified Pat Lamb and Rob Emmanuel as primary contacts at Valemount Capital; Mr. DeVore remains in contact with Mr. Lamb. He could not locate in the Valemount Report where Valemount was certified as an expert in real estate in southern California that would be qualified to render an opinion regarding southern California land values. However Mr. DeVore believed Mr. Lamb's experience as a bank underwriter and former attorney provided sufficient expertise to determine and analyze property values. Mr. DeVore stated he would not characterize the report as "principally focused" on Las Vegas real estate even though pages 1-6 cover Las Vegas and page 7 covers California. Mr. DeVore viewed the report as looking at Victorville land valuation "in the context" of what was occurring in Las Vegas and "down the hill"–then describing Victorville as a satellite of markets "down the hill"[70]–and used these similarities to carry out an "analysis" of "what he thought" values in Victorville were. Mr. DeVore explains it as, because there was decreasing employment in both regions (Las Vegas and Victorville)–regardless of any differences in the types of employment decreasing in each area–housing demand decreased, therefore land demand decreased, therefore property values decreased.[71]

Regarding what happens to a non-paying "Class A" member who does not answer a call for capital contribution, a supplemental capital loan from a paying "Class A" member or from the "Class B" Parent will cover the shortfall: section 4.3 of the Operating Agreement gives a

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[70] Mr. DeVore had previously used "down the hill" to describe regions of the Inland Empire of California.

[71] In his prior testimony, Mr. DeVore had discussed Victorville as being impacted by housing growth and job demand in the Inland Empire, not Las Vegas. When confronted with the disparity in testimony, he responded by reiterating that job loss is responsible for diminished values regardless of geography (and did not address his prior testimony that the increase is due to recovery in the Inland Empire). Because both markets (Las Vegas and Victorville) were in a "trough" at the time, he believed there were similarities between them.

payor the right to collect on a supplemental capital loan from the non-paying members.[72] There is no "cap" on the amount that can be borrowed, but Mr. DeVore represented it could not be more than the original contribution of that non-paying member to the Loan. The interest accrual on supplemental capital loans is 20% (8% plus 12%), which breaks down as follows: all capital contributions (here, called "additional capital contributions") receive an 8% return from the Debtor, but when there is a shortfall whoever contributes the shortfall will receive this 8% plus an additional 12% taken from proceeds otherwise payable[73] to the non-paying member. Mr. DeVore could again not recall how many of the forty-four other "prepacks" have had supplemental capital calls, nor could he recall how much money was paid out as supplemental capital loans in these entities.[74]

The Operating Agreement provides that "supplemental capital loans" made by paying members cover costs unpaid by non-paying members and that "supplemental capital loans," will be paid at close of escrow. The provision, "Costs shall be borne through an adjustment in the percent interest of the non-paying members" means that, when this amount goes unpaid for a certain period of time, the person who made the supplemental capital loan can call for the loan to be converted to equity that would be taken from the non-paying member on whose behalf the supplemental capital loan was made.[75] Mr. DeVore has not seen this happen in other "prepacks"

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[72] See also Disclosure Statement at 78.

[73] There is apparently no assurance this money will be there because returns on original capital (the Loan) are only paid out after all supplemental capital loans have been repaid with 20% interest.

[74] Mr. DeVore earlier testified he is the Parent's representative on the governing board of each of these forty-four entities.

[75] Mr. DeVore could not remember if LEHM was to contribute a supplemental capital loan whether it would be able to elect to convert to equity or not. It is unclear from his testimony but seems the election could be made by the "Class B" member according to language in section 4.3 of the Operating Agreement.

that contain this provision. Nevertheless, members can wait to recover when capital is returned upon a sale (and their money would be paid out using money that would otherwise go to the non-paying members). If there are insufficient funds to repay the supplemental capital loans, paying members do not have rights against non-paying members because the system is "self-regulating" in that Mr. DeVore believes it "unlikely" there would ever be a sale of the Property at an amount less than what is necessary to "at least" recover the capital amounts (additional or supplemental) and the returns on those amounts. He stated that even if the Property was "firesold" today there would be sufficient amounts to cover this.[76] However he did not believe the Disclosure Statement dealt with this situation in detail.

Mr. DeVore was unable to provide information as to why or how a Nevada mortgage broker (Builder's Capital) could broker a loan on a California property (the Property), or why, as the Plan mentions, Nevada mortgage statutes would apply to a piece of California property. Mr. DeVore testified he performed no independent analysis of the Nevada statutes relevant to discharge of indebtedness by a subset of members of a limited liability company, even though the Plan discusses this.

Regarding article 4 of the Plan, capitalization: he testified the $1,000 capital contribution by the Parent[77] is a placeholder for a subsequent contribution and does not reflect the true amount. Because the Parent paid all costs of the bankruptcy including attorneys' fees and "trustee's fees," the "Class B" Member entry is also a "placeholder" for what the actual contribution would be. Mr. DeVore stated he "understood" that the number $60,000 would go into that blank.

Mr. DeVore stated he did not recall who the Operating Agreement provides will manage

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[76] He later testified that, per section 4.8 of the Operating Agreement, if the Property is sold at a price less than that needed to repay all supplemental capital calls, members can only seek to be made whole by the company and not by the members on whose behalf they paid.

[77] See Disclosure Statement at 77-78.

the Property, although the hanging paragraph under section 7.11 of Operating Agreement identifies LandTek, LLC (a development management company) and Quadrant Planning (an entitlement and planning company).[78, 79] Mr. DeVore was unaware whether either entity was licensed to do property management in the state of California, but he asserted it would be inaccurate to read the Operating Agreement as providing that either of these companies will manage the Debtor, because neither "were going to be property managers." He therefore believed a licensed property manager was not necessary. However Mr. DeVore then asserted LEHM[80] will manage the entity (termed a "property manager" in the Operating Agreement), and that this portion of the Operating Agreement merely provided Debtor *could* "use these entities" to accomplish various tasks. Under section 7.12 of the Operating Agreement, "Focus Commercial Group" will be the selling agent and listing agent for the Property and would earn a commission upon the Property's sale. All companies would be paid "for services rendered"; all are affiliates of the Parent.[81]

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[78] See also Disclosure Statement at 89.

[79] The companies are affiliates of the Parent. Mr. DeVore testified they will be paid using "industry standard terms" but did not elaborate. See also section 7.11 of the Operating Agreement (ECF No. 11 at 89; ECF No. 12 at 50).

[80] Mr. DeVore identified LEHM as an affiliate of the Debtor.

[81] Also according to Mr. DeVore, LEHM will not receive payment from the Debtor, although it will carry out the management work and LEHM will benefit from the Plan. Mr. DeVore "lumps" LEHM with the Parent in his assessment of any benefits which may be conferred by the Plan and described LEHM as an affiliate of the Parent, "the entity through which the Parent will perform its function, its 'Class B' member function." Other than this there is no special benefit to LEHM by way of the Plan.

As well, Mr. DeVore testified that the Parent owns LandTek, LLC and Quadrant Planning, as well as Focus Commercial Group–all entities which would be paid for services rendered in aiding the sale of (and in developing prior to the sale of) the Property. However Mr. DeVore denied that Mr. Ritter, "CEO of Focus," owns these entities. He did state that Focus Property Group does not have an interest in Quadrant Planning but did not clarify further except to call it an "affiliate" with whom "we" have done a lot of business.

Regarding taxes on the Property, Mr. DeVore testified he was aware property taxes are currently due but is not sure how far back the taxes go. Creditors' Ex. "P" provides $53,000 as due for APN 3097-471-02-000, but Mr. DeVore did not recognize the APN. He acknowledged that Creditors' Ex. "Q" appeared to show that defaults predate the pre-confirmation solicitation and the Petition's filing in this Case. However, he stated the first monies contributed to the Debtor will go to pay property taxes that "should have [been] paid . . . previously." He was unsure if there existed an annual tax assessment for the property.

In all, it was Mr. DeVore's position that the Debtor gains resolution of a currently-defaulted loan ("in our minds [it is] in limbo"), that the Plan organizes a disparate group of lenders so as to manage collateral and hold the Property to allow the market to recover, and provides "capital to be collected" and "bills to be paid." When asked the benefit to the Lenders, he asserted the Lenders benefit because an outstanding loan will be resolved; then he returned to the Parent's benefit: "it allows us to put this piece of collateral into a place where we[82] know that it can be managed" and that the Lenders "can" ultimately achieve a return on the Property. He denied that the Plan would mean the Parent retains control.[83]

Under the Plan the Parent retains ten percent of the sale proceeds of the Property. If a sale results in a significant return (as in, the amount of the Loan is returned to the "Class A" members "plus one percent per year"), the "split" changes, and the Parent, not the Debtor, would get the benefit of a "thirty percent" disbursement under the new "split." According to Mr. DeVore, this step-up is merited because if there *were* additional proceeds they would be attributable to "Focus or the manager of the company" having done a "good job" at maximizing the Property's value.

Mr. DeVore characterized the Plan as abolishing the Ritter Guaranty only for those

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[82] Clarified "we" meant the Parent.

[83] He then stated, "we" retain control meaning the Debtor maintains control.

Lenders who vote in favor of the Plan and stated he was unaware that if fifty-one percent of Lenders vote in favor of the Plan the Ritter Guaranty was abolished in its entirety. Regarding Ex. "JJ" (at 10, 14), Mr. DeVore stated NRS 645B.340 is merely "pointed out" and that "if" Mr. Ritter "wished" to enforce this language, he could (abolish the Ritter Guaranty). He testified that the Plan does not provide the bankruptcy court will abolish the Ritter Guaranty upon confirmation even though the Plan provides that a vote in favor of the Plan is equivalent to a contractual release of a lender's right to pursue Mr. Ritter on the Ritter Guaranty.[84] Mr. Ritter will receive compensation for the work his entities perform under the Plan but still seeks release of the Ritter Guaranty because compensation would not be enough consideration for the negotiations that took place. Mr. DeVore testified the Debtor was unwilling to omit the provision of the Plan that abolishes the Ritter Guaranty "for all of the reasons" Mr. DeVore provided.[85]

2. Amanda Stewart ("Ms. Stewart").

Ms. Stewart is employed with Focus Management Services, Inc., as "director of loan and escrow operations." She describes the Parent as a "Focus-affiliated LLC" that was used to purchase land. She describes the Debtor as an "entity formed specifically for [the Property] to solicit for a pre-packaged bankruptcy." She described the relationship between her employer and the Debtor: her employer "provides services to [the Debtor] to basically solicit the prepacks." Solicitation of votes is part of her job responsibilities.

Solicitation on the Plan began March 27, 2012, when the Disclosure Statement was

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[84] As Mr. DeVore again explained, Mr. Ritter does not want to put the work into developing the Property and then face being sued on his guaranty. Mr. DeVore testified that negotiation over this provision occurred with a "group" of lenders but did not identify that any of the Lenders, other than BFP, participated in this. He was unaware whether Creditor Blum, Creditor Karahalis, Creditor Fagan, or Creditor Venturacci participated in this negotiation.

[85] Mr. DeVore stated again that he works for Focus Management Services, Inc. as president and chief operating officer.

prepared. The initial deadline set for accepting ballots was May 4, 2012. She did not recall the ballot count on May 4, 2012, but she recalls the vote was not "sufficient" for bankruptcy requirements. She stated "Mr. Boyd did not vote" as one of the reasons behind the insufficiency. Ms. Stewart described Debtor's response to the situation on May 4, 2012, as sending a letter. Debtor's Ex. "J" is the letter.

Between May 4, 2012, and the Petition Date, Ms. Stewart asserts the Debtor received communications from Lenders, communications she described as "we continued to have votes come in" of both accepting and rejecting ballots.[86] She characterized the majority of votes coming in "after the June 6th letter" (Debtor's Ex. "J") as "no" votes changing to "yes" votes and as votes from Lenders who had not voted previously.[87] However, she asserted that by July 6, 2012, there were "sufficient votes" to approve the Plan. She also represented that the Debtor received communications after the Petition Date from Lenders and that these were prior "no" votes and changed to "yes" votes.[88]

Ms. Stewart described Debtor's Ex. "L" as a form letter "we" send out after each bankruptcy plan is approved. The letter confirms that a petition had been filed for a pre-packaged bankruptcy.

As per all loans "we" have with Builder's Capital, Ms. Stewart asserts she received an investor list from Builder's Capital containing names, addresses, phone numbers, and the dollar

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[86] As with the analogous portion of Mr. DeVore's testimony, Debtor's Ex. "P" belies Ms. Stewart's assertion–unless Debtor's Ex. "P" does not contain all of the votes received (although it purports to).

Notably the Karahalis Objection raised the specter of a missing ballot from Lender Carol Newby or her successors in interest. Karahalis Objection at 1; see also note 21.

[87] She did not elaborate further.

[88] These ballots cast post-petition were not provided or identified, nor do they appear to have been tallied in the First Ballot Summary or the Second Ballot Summary. These votes are also not included among the ballots provided in Debtor's Ex. "P."

amount invested. Ms. Stewart testified she works off of this list when preparing and compiling the ballots. She assembles form ballots with "the" cover letter, the disclosure statement,[89] the plan, the operating agreement, and a prepaid envelope addressed to her. She prepares a ballot for each individual and then mails the complete packet ("Solicitation Package") to each individual investor.

Ms. Stewart described attachment "A" of Debtor's Ex. "I" as "the form," in other words the actual form of the ballot she compiled. She explained the cover page has the name of the debtor with the date of the plan, and the next page has an acceptance or rejection with debtor's "information" and requires the investor's signature.

Ms. Stewart testified she tabulated ballots as they came in and input them into a spreadsheet. She kept the original ballots. She identified Debtor's Ex. "KK" as documenting, by differently-colored categories, the ballots as follows: light yellow is an original "yes," orange is rejecting ballots received, dark yellow is changed votes from "no" to "yes" "after the June 6th letter,"[90] and purple is the votes received after July 6th.[91] She testified that the Code requirements for "more than half in number" were satisfied as of July 6, 2012, and more than two-thirds the amount of claims had approved of the Plan as of that date as well.

Regarding Debtor's Ex. "I," Ms. Stewart again affirmed this is the ballot she prepared and mailed March 27, 2012. She testified she accepted both "yes" and "no" votes, and that she

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[89] Ms. Stewart stated she was not involved in the preparation of the Disclosure Statement or any of its supporting documents.

[90] Ms. Stewart was responsible for packaging and mailing but not drafting the contents of this letter package sent to Lenders.

[91] Again, this is not substantiated by Debtor's Ex. "P." However, including these purple votes would amount to a total number of "yes" votes after July 6, 2012, of 30, with 25 rejecting. This would equate to fifty-five percent voting "yes" with approximately sixty-nine percent of the beneficial interests approving.

did not only count votes which switched from "no" to "yes" after the May 4, 2012, deadline.[92] She also answered that, in her opinion, acceptance of the votes after the May 4, 2012, deadline was not done in bad faith or "in any way improper."[93]

Regarding the Operating Agreement (Debtor's Ex. "H" at 17): only two "Class A" members have requested to be on the board: Mary Campbell and Robert Ferra. The "Class B" member on the board would be Mr. DeVore.

Ms. Stewart testified she has packaged the solicitations for all forty-five pre-packaged debtor entities related to "Focus Management," including the December 2, 2009, disclosure statement and solicitation package of this Debtor. She followed the same procedure each time and used the same list to contact the Lenders for both of this Debtor's solicitations.

Ms. Stewart testified there is a protocol followed when there is a need to extend the balloting: "we normally send out" a letter stating that the voting period had been extended. She testified this had been done in this Case but then retracted her statement. Regarding Creditors' Ex. "G," a letter indicating the voting period was extended on this Debtor's original (December 2009) plan, she testified this Case involves the same Loan, same Lenders, same "everything"–except no letter was sent "this time" (re extending the voting period).[94] It was her stated position this was contrary to their own protocol.

Ms. Stewart testified she communicated by phone and email with the Lenders and handled many of the communications with various beneficiaries. She does not recall specific

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[92] This is unsupported by Debtor's Ex. "P."

[93] The relevance of this statement was unclear, nor was Ms. Stewart's capacity to express such an opinion established.

[94] Ms. Stewart later testified that, regarding Creditors' Ex. "H," a letter on Focus Property Group letterhead dated June 4, 2009, pertaining to the Loan and these Lenders, that she signed the letter (for Mr. Ritter), copied it, and sent it out with the attached property report (which had been prepared by a Focus Property Group employee, although Ms. Stewart did not recall whom).

conversations with individual Lenders in the days after May 4, 2012,[95] although she stated that between May 4, 2012, and June 6, 2012, there was some communication with Lenders.[96] Ms. Stewart also testified she solicited additional votes after Debtor's Ex. "J" (the June 2012 letter) was mailed but could not recall how many.

She next represented the voting deadline set forth in the Solicitation Package was May 4, 2012, and there were apparently insufficient "yes" votes as of this date. Ms. Stewart did not recall how many "yes" votes short she was on May 4, 2012, but she recalled there were 28 "yes" and 27 "no" votes as of July 6, 2012. She counted BFP's vote in both the May 4, 2012, and July 6, 2012, tallies (including it on the tabulation as a "yes" vote), and she specifically noted the vote as "per court order."[97] Yet she testified that, as of July 6, 2012, she did not possess an actual ballot from BFP and could not recall who directed her to count this ballot as a "yes" vote. Without BFP's ballot, she was at 27 "yes" and 27 "no" votes on July 6, 2012. Of her dark yellow category (see Debtor's Ex. "KK"), seven new or changed votes occurred after May 4, 2012; the BFP ballot is not included in this group. She did not recall how many of these seven were new votes but agreed it could be up to three (dark yellow without a notation).[98]

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[95] She did recall communicating with Mr. Styer that there were not enough votes in favor of the Plan. Regarding Creditors' Ex. "L," an email chain between her and Mr. Styer regarding his inquiry on the results of the vote, she recognized her May 10, 2012, response as including, "At this point we do not have sufficient support to confirm the [Plan]. We are working on it and considering various options." She acknowledged this does not mention the vote would be extended.

[96] She could not recall what specifically but stated there were always calls. She characterized communications after the June 2012 letter as people wishing to convert from "no" to "yes" votes.

[97] However she affirmed there was no vote from BFP as of July 6, 2012.

[98] Ms. Stewart testified she added the Mangione ballot as a new vote after May 4, 2012; she did not dispute that she added the First Trust of Onaga ballot (a $16,000 claim) as a new vote. She also did not dispute she added the Goffstein ballot (a $200,000 claim). Regarding Helen Clifton, who voted four times, Ms. Clifton switched her vote from "no" to "yes" during

Regarding Debtor's Ex. "J," the letter indicates a traditional bankruptcy would be pursued. Ms. Stewart testified she was not involved in conversations in the "Focus" group regarding the filing of a traditional bankruptcy, but she was instructed to send out the letter to Lenders stating one would be filed. She could not recall being asked to gather information in anticipation of filing a traditional bankruptcy.

Last, Ms. Stewart confirmed balloting was closed as of July 6, 2012, and any notice of the extension of the balloting period to July 6, 2012, was given to the parties after the bankruptcy was filed. However Ms. Stewart stated she believes it was not reasonable for Lenders to believe voting had ended after May 4, 2012, and she believes it was not reasonable specifically for the Styers to believe voting had ended on May 4, 2012, based on her communication with Mr. Styer that the vote had been unsuccessful. However, regarding Debtor's Ex. "J," the June 2012 letter that a traditional bankruptcy would be filed, Ms. Stewart believed it was possible for the Lenders to assume voting had been closed after May 4, 2012.

3. Steven Fontes ("Mr. Fontes").

Mr. Fontes is a Licensed Real Estate Broker in the state of California and is also a Certified General Real Estate Appraiser in California. Mr. Fontes was admitted as an expert.

He was asked to provide an as-is value opinion of the Property on March 1, 2013, and a hypothetical value opinion of the Property also on March 1, 2013. Mr. Fontes described the sales comparison approach he used for both analyses. Mr. Fontes testified he would not use the term "liquidation value" when describing the as-is market value of the Property, which he placed at $250,000, and stated the value at which he arrived was valid as of March 1, 2013. Regarding the hypothetical market value, this is so termed because he was instructed to presume some

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this time. Also changing their votes to "yes" votes were Mr. Ellis (as trustee) and Lisa Beth Isabelle. In spite of representing she had the original ballots in her possession at the Confirmation Hearing, Ms. Stewart could not confirm the vote of Mr. Nevins as having changed from a "no" to a "yes" after May 4, 2012.

conditions which were not (yet) in effect as of March 1, 2013: (1) that the Property had been annexed into the city of Victorville, (2) that the Property had received tentative map approval, and (3) the density approval was at six units per acre. If these three conditions were to occur, Mr. Fontes's opinion was the Property's hypothetical value as of March 1, 2013, was $1,510,000.

Mr. Fontes's valuations were, again, as of March 1, 2013, and he was not prepared to comment on any material change in value which may have occurred between this date and the Confirmation Hearing. Regarding the hypothetical conditions, he did not independently confirm whether any of these three conditions were to occur and stated the three conditions were prescribed as assumptions he incorporated into his analysis. He did not recall being provided with information regarding the status of any attempts to annex the Property. As well, he testified he did not have independent knowledge regarding the accuracy of the statements (in Creditors' Ex. "H") regarding any likelihood of annexation. He stated he was not independently aware of the financial viability of the city of Victorville and did not have independent knowledge whether city staff were instructed (by the City Manager) to suspend work on annexation documents.

4. R. Patrick Lamb ("Mr. Lamb").

Mr. Lamb is currently a principal of Valemount Management, a consulting business he has operated since 2007, and is the president of a residential mortgage banker entitled Homeowner's Financial Group in Scottsdale, Arizona. He describes his background as including time with a banking organization called First Heritage Bank, in California, and that part of his role for that entity involved him sitting on the loan committee for much of the eight years he was with the organization. The bank itself operated in Orange County, but he described the bank as also "doing commercial real estate lending" in "lots of different" southern California markets, including Riverside County and San Bernardino County. Mr. Lamb was admitted as an expert.

Regarding Debtor's Ex. "EE," his report (the Valemount Report): he performed an

"analysis and review" for "Focus"[99] in 2009. He describes his analysis as a "parallel" of a review that a loan committee would perform; this includes examining the "strategic direction" of the company and also what the company wishes to do with the property in question. He describes this as different from the focus employed by an appraiser because Mr. Lamb's analysis folds in various other factors including economic factors and the direction of the specific company requesting the report. He states that, at the time the report was written, he had a relationship with "Focus" such that he was "very familiar" with their activities "everywhere they had land holdings" and what they intended to do with their various holdings of real property. He describes his "charge" in preparing this report as to examine economic trends, look at the then-current market (knowing what he understood "Focus's objectives to be"), and then provide "them" an "assessment of the potential of that property."

In order to complete the Valemount Report, he undertook two main activities: (i) look at the market and economics and the "big picture framework" of the relevant geographic area and (ii) examine the intended use of the Property (which involved looking at "Focus" and its plans for the Property).

As to why he undertook an analysis of the Las Vegas market in his report, he explained that, due to the "specific nature of the business" that "Focus" was in and its focus on the southern Nevada market in particular, he felt it was important to provide a context for the report. It was his opinion that Pahrump is similar to Victorville's relationship to the coastal markets, so he wanted to provide southern Nevada information as well to "give context" to this analogy. Specific to Victorville, they looked at "the same type of information" as it relates to California and, to the extent possible, Victorville. He explained that he tried to draw comparisons to "come to the same analysis" as he had done in southern Nevada. This all brought him to the

[99] He did not describe who or what "Focus" is, nor did he identify which "Focus" entity employed him to prepare the report.

conclusions (Debtor's Ex. "EE" at 8), in November of 2009, that the Property could then sell for $375,000 to $750,000 because of a "dramatic" lack of liquidity in the land market at that time. In November of 2009 he also arrived at the potential sale value of $9.375 million to $13.125 million (which would be realized after holding the property in "the type of mechanism" currently proposed in the Plan).

As to why he did not update these numbers in March of 2012, he concluded this was not necessary because the important number was the floor ($375,000 to $750,000),[100] and there had not been "substantial change" in that "end" since the 2009 analysis. He testified they still felt there was a "significant upside" regarding California market returns that meant no change in quantifying this was merited. In March of 2012, he still felt the $9.375 million to $13.125 million "upside" was valid because the coastal markets of California had started to recover well, and that in March of 2012 "we felt" there was potential the recovery could "sustain" and potentially grow more quickly, depending on other economic and political trends (therefore the high end was also not adjusted).

Regarding the time from March of 2012 to the Confirmation Hearing, he testified he believes unresolved political issues and uncertainties were affecting home values; even though values had improved since the time of the initial report (2009), he believes it possible these issues "put some real question marks to" the high values identified in his report. However, he believed that, even with those issues at play, there is a "significant upside" from where the values currently stand to holding on to the Property. Specifically, he believes that, even if additional capital is required under the Plan, holding on to the Property for an additional five years will net "significantly more" money than if the Property were liquidated at the time of the Confirmation Hearing.

[100] He testified this was important because it highlights what "we feel" is the low end of the range.

At the time he prepared his report he was no longer working with the various banks he mentioned; he separated from them in 2007.

He could not recall how much he was paid to prepare the report. He prepared a number of reports on behalf of the various "Focus" property entities, and this report is similar to the other reports (one of the differences is that this report is for a property in a different geographic location). He typically used Las Vegas as a baseline valuation for the reports he prepared for the "Focus" properties. Whether this practice reflects what he typically performed when he worked with banks "would depend on the bank." He described his process as that he would sometimes draw comparisons to the local market of the loan committee if he wanted them to understand any similarities and differences with the geographical market of the proposed loan. He described this as "present to your audience." Therefore when working with what he termed the "largest private landholder" in the Las Vegas market (i.e., "Focus"), he used Las Vegas to give "common language" to make comparisons and enable discussion on a level where "they" would have an understanding based on similarities to what they look at on an everyday basis. He testified they had looked at median home prices and housing supplies for San Bernardino County when working on the report but chose not to include these data in the write-up.

Mr. Lamb testified he believes the driver for the Property's market is the coastal communities in California, although he thinks some markets are recovering more quickly than others. By March of 2012, things were "more improved" as compared to 2009 in certain areas (for example liquidity in the financial markets generally had improved), although land prices were still generally suppressed for several reasons including political uncertainty and investor-driven buyout of current inventory (which would have had to occur before increasing demand "trickled down" to affect and raise land prices).

Regarding the timing of his 2009 report and those projections being approximately so far off from the Property's 2013 value, he stated that several factors affect this discrepancy, namely the federal government being shut down affects what people are willing to pay for "non-liquid

assets" like raw land; he also cited to federal debt ceiling problems and the political landscape (including Victorville-specific issues). When prompted, Mr. Lamb did not articulate what he thinks will change among these three factors in the coming year or two that would make it possible for his estimate of approximately $9 million to 13 million to be realized. However, what he thinks has changed since 2009 is that (1) $5.5 billion dollar high speed rail from Las Vegas to Victorville that would funnel coastal markets into Victorville is no longer viable (as of approximately summer 2013), due to changes in the Congressional landscape;[101] (2) "other opportunities" such as southern California's recovery; (3) "out of control" state and federal budgets that will hopefully recover; and (4) diminishing political uncertainty (e.g., if the federal government starts back up, this would facilitate market stability). He again articulated the reasons he was wrong as political uncertainty created by turmoil in government, failure of the high-speed rail, and the California market not recovering as he had initially hoped it would.[102]

Regarding the appraiser's vastly different (hypothetical) value for the Property, Mr.

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[101] When prompted by counsel, he stated that "we" discussed it in our review of "the city" (presumably, Victorville), but "we" did not put it in "our report." He also asserts that the high-speed rail option had been in play as of 2009.

[102] Mr. Lamb testified he knew this in 2012, but did not alter his report or its projections. He then stated he did not think it was necessary to change the projections because, by March of 2012, they had seen "more steady" recoveries and felt they were on a level "footing" in southern California with property prices appreciating. He testified they felt this was translating into homebuilders being active again, but he could not define "steady improvement" in the marketplace.

When asked regarding the monthly compounding at 72%-per-year appreciation necessary to cover the difference between the "current" and "future" values in his report in five years, Mr. Lamb confirmed this would occur in an "extremely hot" market. When asked why he would, given the concerns expressed regarding the conditions in 2012, still expect to see this kind of appreciation, he could not answer. However he did emphasize that, were he to assess "today" (at the Confirmation Hearing), he did not think that the $9 million to $13 million range would be an "achievable" number; however he believed it more important to stress the $375,000 to $750,000 estimate he placed on then-current value. When prompted, Mr. Lamb defined "achievable" as "it can be done" but could not place a percentage on the likelihood that the Property would achieve a value of $9 million. It was his opinion that, whether investors would look for an "achievable" value or something more concrete would depend on the kind of investment and its structure.

Lamb stated he had no reason to dispute that valuation because of the short time frame in which an appraiser assesses property values, as opposed to his valuation's time frame.[103] To explain, he described their roles as vastly different: the appraiser is looking at current value under current assumptions, and Mr. Lamb looks at the "larger picture" and "landscape" and "what potentially could or might happen" or "where we see the trends going in terms of the marketplace,"[104] such as the number of people who may be looking for houses and what "we understand" about "Focus's ability to put together an assemblage and bring it to market"–in other words, find homebuilders who are looking for this kind of property.

Regarding the ongoing political turmoil, a lack of a high-speed rail, and tepid economic recovery, Mr. Lamb did not still have the same opinion of the Property's expected value as stated in his report. He testified that, at the time of the Confirmation Hearing he would estimate future value at somewhere between $3.5 million to $4 million. He could not provide a concrete answer for the differences in his valuation assessments (March of 2012–no update; October of 2013–update) except that the "significant upside" formerly expected to come from the high-speed rail is not going to "show up." He iterated that he was not of the opinion that the Property, as of the date of the Confirmation Hearing, carried a future value of $9 million to $13 million, but he would have to assess future value as somewhere between "the two numbers" (his in the

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[103] He later added that the appraiser (Mr. Fontes) assessed a hypothetical value under three assumptions, but his own assessment is a five-year horizon–this is why his $3.5 million to $4 million estimate is still vastly different from the appraiser's hypothetical future value.

[104] Mr. Lamb later testified that an appraiser does not look at ongoing population growth projections in Victorville and San Bernardino County, the unemployment rate and its expected decreases, or where are the major trends with large homebuilders in the southwestern U.S. and how these affect trends in sub-urban "out of market" areas or the ripple effect therefrom. Mr. Lamb stated that he looked at all of this when compiling his 2009 report. He also articulated that they took into account the data on unemployment rates, and the information and data on population growth, and assessed how these factors affect property values–"discussing again in the context of Las Vegas and translating that into, 'here's how it compares to southern California'".

2009 report and the appraiser's hypothetical future value). He represented he was not asked to do an update on Victorville.

5. Paul A. Styer ("Mr. Styer").

Mr. Styer is an attorney and currently serves as senior vice president and general counsel for "Copart, Inc." He is the trustee of his trust; his trust is one of the Lenders. He states he is an experienced investor. He states that the Debtor has defaulted on payments on the Loan. He received a solicitation packet and ballot for a pre-packaged bankruptcy plan in March of 2012.

Regarding Creditors' Ex. "E," he states he testified he received this letter as part of the Solicitation Package. Regarding Creditors' Ex. "F" (ballot), he acknowledged he received the second page of this document (his ballot) and voted the ballot as a "no." He reviewed the Disclosure Statement before he voted. Upon his review of the Disclosure Statement, he understood the Parent would contribute $60,000 to the bankruptcy, but he did not understand that this contribution was to be repaid to the Parent with interest once the Property was sold. He testified his understanding of the Plan reflected the same.

He stated he had reviewed the Plan's liquidation analysis and did not find it credible. He understood that part of the Plan's purpose was to maintain the Property in an assemblage so as to enable the construction of a master-planned community. He represented he would want to know whether any portions of the proposed assemblage were lost to foreclosure because this would be important to his decision-making regarding whether to approve the Plan. He stated he believed the Plan to be an "exercise" for Mr. Ritter to be "exonerated" from the Ritter Guaranty.

He testified that he attempted to contact other Lenders after he received his ballot in order to attempt to convince them to reject the Plan. He states this involved working with another of the Lenders, Creditor Karahalis, to prepare emails and letters to explain why the Plan was not in the Lenders' interest and to describe other potential alternatives the Lenders may pursue. Part of his efforts involved reviewing and/or editing materials prepared by Creditor Karahalis. It was his opinion that none of the materials he reviewed or was provided in this

capacity were inaccurate or contained gross misstatements.

He stated he understood the deadline to cast ballots was May 4, 2012, and that this was noted on the ballot he received. He testified that, after this deadline, he had followed up with Ms. Stewart at "Focus." He cannot recall specific telephone conversations with Ms. Stewart but believes he had email and telephone contact with her. Regarding Creditors' Ex. "L," after he received this email he understood the pre-packaged bankruptcy was a "dead issue" because the voting had failed and there was insufficient support for the Plan. Based on Ms. Stewart's representations in this regard, he understood the Plan to have been "defeated" and took no further action regarding his contacts with other Lenders.

Regarding Debtor's Ex. "J," Mr. Styer represents his review of this letter did not affect his understanding regarding the pre-packaged Plan because he viewed it as Mr. Ritter trying to clarify what Mr. Ritter had termed misinformation. Because the letter indicated "they" were abandoning the pre-packaged bankruptcy, his receipt of and review of the letter did not change his opinion regarding the direction or status of the pre-packaged bankruptcy.

Regarding Debtor's Ex. "L," the July 9, 2012, letter, Mr. Styer stated he received this letter from Creditor Karahalis, although he was unsure how long after July 9, 2012, he received it. He stated this was a "surprising communication" to receive, particularly in light of the other communications he had received regarding the status of the pre-packaged bankruptcy. He represents he had then felt duped. Had he known the balloting was open, he would have not ceased his efforts, with Creditor Karahalis, in communicating with the Lenders that the pre-packaged bankruptcy was not a good option for them.

Mr. Styer stated he understood one possibility of non-confirmation was sale of the Property, and he was not aware of any conditions which may provide a higher return currently than what market forces may determine in the future. However he also testified that he believed the knowledge necessary to determine how he can maximize his future recovery is dependent on information not currently available (at the time of the Confirmation Hearing). He further

asserted his belief that this information would not be available to any party to be able to assess future value or future returns. He stated he has no reason to believe he will receive a net recovery on his investment if the Plan is confirmed.

6. Jerome Blum ("Creditor Blum").

Creditor Blum is one of the Lenders. He represented that he agreed to lend money for the Loan because the investment promised a 12% return. He also based this decision on the information provided him regarding Mr. Ritter's $263 million net worth and prior income tax payment of $22 million, although it is unclear how this information was disseminated. He also stated the Ritter Guaranty was vital to his determination whether to lend money.

He testified he received a ballot sent by "Ritter" in March of 2012, and the ballot asked him to agree to vote for a "prepack." He stated he voted "no" because this did not match the intention behind his initial decision to invest: he wanted an investment that paid 12% per year, he did not want to be a landowner. He testified he endeavored to convince other Lenders to vote "no" on the Plan. He stated the deadline to cast a ballot was May 4, 2012, and that he followed up with "Focus Management Group" regarding the status of the ballots after this. He testified that he spoke with Ms. Stewart and that she represented to him there were insufficient votes "to sustain the 'prepack.'" He therefore understood "we had won" and that there was no further purpose to "do anything more." He stated that, as a result of Ms. Stewart's representations, he understood the "prepack" had failed.

He testified he received a letter on or about June 6, 2012 , apparently Debtor's Ex. "J," and this letter did not have "any effect" on changing his mind about the bankruptcy. He did not take any action in response to this letter.

He received a letter in July of 2012 from Mr. DeVore (Debtor's Ex. "L"). Creditor Blum recalled the letter has having stated voting was extended to July 6, 2012, but he testified he received the letter on or about July 9, 2012. He stated his response to the letter was that it was a "ruse" and represented something "underhanded." He postulated that "[Mr. Ritter] was afraid of

us coming back and us discussing the reasons" why the pre-packaged bankruptcy was not a good idea. He testified that, had he known the deadline would be extended to July 6, 2012, "we" would have continued talking with and conversing with the other Lenders.

Creditor Blum still does not want to approve the pre-packaged Plan; his opinion of the Plan has not changed.

Regarding Creditors' Ex. "F," Creditor Blum testified he received a form ballot similar to this back in March of 2012. He was asked to read the line, "If your ballot is not received on or before 5:00 prevailing Pacific Time on May 4, 2012, and such deadline is not extended, your vote will not count as either an acceptance or rejection of the [Plan]." He stated his initial reading of this portion of the document left him with the understanding that the balloting deadline could not be extended.

Regarding Debtor's Ex. "L," even though Creditor Blum felt angry after receiving this letter, he could not recall any specific action he may have taken in response to receiving it. He did not, at the time of this letter, believe contacting "Focus" or Ms. Stewart any further would be useful because he did not believe it would do any good.

Last, Creditor Blum stated he had shown up in 2008 to a meeting that Mr. Ritter held at the Red Rock Casino to voice his objection to the situation at that time. He also recalls showing up to prior hearings in this Case. (He testified he had made this appearance as an objecting creditor and had wanted to find out further information.) But he reiterated that did not believe that talking with Ms. Stewart in July of 2012 or thereafter would prove fruitful, so he did not.

DISCUSSION

Confirmation of a plan of reorganization is governed by Section 1129 of the Code. No competing plans of reorganization were filed in the above-captioned bankruptcy Case. However under Section 1129, the court has an affirmative duty to ensure that the Plan satisfies all of the requirements for confirmation. See Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa), 115 F.3d 650, 653 (9th Cir. 1997).

Under Section 1129(a), the court shall confirm a plan only if each of the sixteen subsections, if applicable, are met. Sections 1129(a)(1) and (a)(2) require the court to consider whether the Plan and the Debtor have complied with the Code. In determining whether the standard has been met, the court may take into account all previous proceedings and matters of record in the case. See Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1358 (9th Cir. 1986).

Generally, a plan of reorganization can be confirmed in one of two ways. Initially, if all sixteen subsections of Section 1129(a) are satisfied by the plan proponent, a plan can be confirmed consensually under Section 1129(a). See RadLAX Gateway Hotel, LLC v. Amalgamated Bank ("RadLAX"), 132 S. Ct. 2065, 2069 (2012); see also United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994), aff'd, 85 F.3d 1415 (9th Cir. 1996). If a plan proponent satisfies all paragraphs of Section 1129(a) except the unanimous voting requirement of Section 1129(a)(8), then the court may still confirm the plan as long as the plan "does not discriminate unfairly" against and "is fair and equitable" towards each impaired class that has not accepted the plan. 11 U.S.C. § 1129(b)(1); RadLAX, 132 S. Ct. at 2069; Bank of Am. Nat'l Trust Ass'n v. 203 N. LaSalle St. P'ship (203 North LaSalle), 526 U.S. 434, 441 (1999); In re Ambanc La Mesa, 115 F.3d at 653. This second, nonconsensual, method of confirmation is commonly referred to as "cramdown."[105] RadLAX, 132 S. Ct. at 2069; 203 North LaSalle, 526 U.S. at 441.

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[105] Courts use "cramdown" and "cram down" and "cram-down" interchangeably to refer to nonconsensual confirmation. Indeed, Justice Douglas once combined different forms in the same paragraph. Blanchette v. Conn. Gen. Ins. Corps., [419 U.S. 102, 167] (1974) (Douglas, J., dissenting). The hyphenated version appears to have been the first locution used by a court. New England Coal & Coke Co. v. Rutland R.R. Co., 143 F.2d 179, 189 n.36 (2d Cir. 1944). The earliest print references to the term use either the two-word or the hyphenated form. Compare Robert T. Swaine, Present Status of Railroad Reorganizations and

In the instant Case, Class 2 is the only impaired non-insider class of creditors voting under the Plan. Certain members of Class 2 assert that, due to voting irregularities, Debtor's characterization of Class 2 as an accepting impaired class is inaccurate.

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

Pursuant to Section 1129(a)(1), the court may not confirm a plan unless "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). This provision generally concerns whether the proposed plan contains provisions authorized by Section 1123 and that the classifications included in the proposed plan comply with Section 1122. See 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2014).[106]

In this case, the Plan designates classes of claims and interests, specifies whether the classes are unimpaired, and specifies the treatment of any class that is impaired. It provides for equal treatment of claims within each class and sets forth a means to implement the Plan,

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> Legislation Affecting Them, A.B.A. PROC. SEC. ON COMM. LAW 15, 15 (1940) (two-word form) and Warner Fuller, The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations–A Survey, 7 LAW & CONTEMP. PROBS. 377, 389, 390 (1940) (hyphenated form).

In re Shat, 424 B.R. 854, 858 n.7 (Bankr. D. Nev. 2012).

[106] The BFP-Styers Confirmation Objection includes a cursory reference to Section 506(b) that appears to fall under the ambit of its general objection to confirmation under Section 1129(a)(1). Section 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

Even amid the parties' disagreement over the value of the Property, it is not readily apparent how a possible future allowance of reasonable fees, costs, or charges for an oversecured claim under Section 506(b) is precluded by the proposed Plan.

including the selection of postconfirmation management. It also provides for the impairment of classes of claims and the modification of rights of holders of secured claims. Thus, the court concludes that the proposed Plan complies with the applicable provisions of Section 1123 as well as Section 1122.

2. Section 1129(a)(2): Plan proponent's compliance with applicable provisions of the Code.

Pursuant to Section 1129(a)(2), the court may not confirm a plan unless "[t]he proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). "The legislative history of the Section indicates that Congress was concerned 'that the proponent of the plan comply with the applicable provisions of title 11, such as . . . the disclosure and solicitation requirements of [S]ections 1125 and 1126.'" 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[2]; see also In re Idearc, Inc., 423 B.R. 138, 163 (Bankr. N.D. Tex. 2009).

A. Disclosure.

Section 1125 requires the disclosure statement to provide "adequate information" to the creditors in order for them to make an "informed judgement about the plan." 11 U.S.C. § 1125(a)(1). "While including false information is a more serious matter than a mere lack of information, . . . , 'the determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.'" Computer Task Grp., Inc. v. Brotby (In re Brotby), 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003), quoting In re Tex. Extrusion Corp., 844 F.2d 1142, 1157 (5th Cir. 1988).

The adequacy of disclosure statement information has been evaluated using numerous factors, including the present condition of the debtor while in Chapter 11, the classes and claims within the reorganization plan, the estimated administrative expenses (including attorneys' fees), financial information and projections relevant to the decision to accept or reject the debtor's plan, and information relevant to the risks posed to creditors under the debtor's plan. See In re Reilly, 71 B.R. 132, 134-35 (Bankr. D. Mont. 1987); 7 COLLIER ON BANKRUPTCY, supra,

¶ 1125.02[2].

Even if a disclosure statement previously has been approved, the adequacy of disclosure may be revisited at plan confirmation. See Official Comm.of Unsecured Creditors v. Michelson (In re Michelson), 141 B.R. 715, 719 (Bankr.E.D.Cal. 1992). As the Michelson court observed:

> Compliance with the disclosure and solicitation requirements is the paradigmatic example of what the Congress had in mind when it enacted section 1129(a)(2). According to both the House and Senate Reports, that section "requires that the proponent of the plan comply with the applicable provisions of title 11, such as section 1125 regarding disclosure." H.R.Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 126 (1978); 1978 U.S.Code Cong. & Ad.News 5787 at 5912, 6368.
>
> Reassessing the adequacy of disclosure from the vantage of the confirmation hearing is an efficient safeguard of the integrity of the reorganization process. When the adequacy of information is initially determined during the presolicitation phase, the court is acting in a context in which information may be sketchy and preliminary. The court does not conduct an independent investigation and relies upon its reading of the document for apparent completeness and intelligibility, as well as objections raised by parties in interest.
>
> By the time of the confirmation hearing, the context has changed. More information is available. The plan proponent has specific facts to prove. The plan proponent's natural enemies have had an opportunity to conduct discovery. [footnote omitted.] What once appeared to be adequate information may have become plainly so inadequate and misleading as to cast doubt on the viability of the acceptance of the plan and to necessitate starting over.

141 B.R. at 719. See also In re Renegade Holdings, Inc., 2010 WL 2772504 at *3 (Bankr.M.D.N.C. 2010) ("Notwithstanding the earlier approval of a plan proponent's disclosure statement, the requirement of section 1129(a)(2) regarding compliance with section 1125 is that the court reassess at the confirmation hearing whether the disclosure contemplated by section 1125 has been provided.").

i. Classification.

Debtor's Plan provides there are only three classes of creditors and asserts that Class 1 ("Property Tax Claims") is unimpaired, while both Class 2 ("Note Claims")–the Lenders–and

Class 3 ("Old Membership Units")–insiders[107]–are impaired. See Plan at 14-15. Because its rights are unimpaired, the lone member of Class 1, County of San Bernardino Tax Collector, is conclusively presumed to have accepted the Plan. See 11 U.S.C. § 1126(f).

Classification of claims is governed by Section 1122(a).[108] The Code does not mandate that all substantially similar claims be classified together, provided that there is a reasonable basis for not doing so.[109] However, Section 1122(a) requires that dissimilar claims cannot be placed into the same class. The bankruptcy court has broad discretion in classifying claims under Section 1122(a). See Wells Fargo Bank v. Loop 76, LLC (In re Loop 76), 465 B.R. 525, 536 (B.A.P. 9th Cir. 2012).

Here, the Debtor classified all Lenders in Class 2. Only three Lenders filed proofs of claim in this Case. See Claim 2-1, Claim 3-1,[110] and Claim 4-1; see also notes 20, 24, supra. Debtor's classification of the Lenders does not distinguish between Lenders who filed a proof of

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[107] By Mr. DeVore's and Ms. Stewart's testimony, the Parent, through various identities, controls the Debtor. As such, the Parent is an "insider" pursuant to Section 101(31)(B)(iii) and is not permitted to vote on Debtor's plan. 11 U.S.C. § 1129(a)(10).

[108] Section 1122(a) provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a).

[109] "The separate classification of otherwise substantially similar claims and interests is acceptable as long as the plan proponent can articulate a 'reasonable' justification for separate classification." 7 COLLIER ON BANKRUPTCY, supra, ¶ 1122.03[1][a]; accord In re Adelphia Comm. Corp., 368 B.R. 140, 246-47 (Bankr. S.D.N.Y. 2007) (separate classification of substantially similar claims is permissible if there is a reasonable basis for doing so).

[110] On November 6, 2012, on behalf of David B. Miner, Managing Member of the David B. Miner Family Investment Company, LLC, Proof of Claim No. 3-1 was filed reflecting a claim amount of $98,795.00 ("Claim 3-1"). Debtor has not objected to Claim 3-1.

Debtor's Schedule "D" lists "David B. Miner Family Investment Co, LLC, David B. Miner, Managing Member" ("Creditor Miner") as holding a claim in the amount of $7,400,000.00. Petition at 14. However Creditor Miner's ballot–prepared by Ms. Stewart–provides that Creditor Miner votes as the holder of a "claim against the Debtor in the unpaid principal amount of [$60,000.00]." (ECF No. 70-1 at 55).

Creditor Miner did not appear at the Confirmation Hearing.

claim and Lenders who did not.

As well, Debtor's Plan does not provide for treatment of creditors who filed a proof of claim but are not among the three classes of creditors treated under the Plan, such as Creditor IRS. See Plan at 14:15 to 15:18. Therefore by way of Debtor's classification, Creditor IRS was disabled from voting on the Plan, as would be any other creditor not accounted for in Debtor's classification scheme. Failing, in the pre-packaged bankruptcy context, to identify all creditors who may (once the petition is filed) file a proof of claim in the case may be less problematic than confirming a plan which does not account for an entire potential class of creditors. However Creditor IRS filed Claim 1-1 on July 12, 2012, six days after the Petition Date and thirty-five days before the First Ballot Summary, the Disclosure Statement, and the Plan were filed. See note 27, supra. Neither the Disclosure Statement nor the Plan were ever amended to account for this new class of creditor.

In this regard, Debtor's Disclosure Statement fails to provide accurate information regarding the number, scope, and types and classes of claims in the Case.

ii. Administrative Expenses.

Debtor's Disclosure Statement does not identify or otherwise state the amount or types of administrative expenses to be paid under the Plan. Part VII.A.1. of the Disclosure Statement provides in part:

> As provided in Section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, including, without limitation, Claims for Professional Fees against the Debtor . . . are instead treated separately in accordance with Article 2 of the Plan and in accordance with the requirements set forth in Section 1129(a)(9)(A)[.]
>
> Administrative Claims other than Claims for Professional Fees shall be paid in full in Cash [sic] by the Debtor on the Effective Date, except as otherwise permitted by the Bankruptcy Code or as otherwise agreed by the Debtor and the holders of any such Administrative Claims. All requests for payment of Administrative Claims, **other than requests for payment of Claims for Professional Fees**, must be filed by the Administrative Claim Bar Date or the holders thereof shall be forever barred from asserting such Administrative Claims against the Debtor or the reorganized

> Debtor.
> Notwithstanding the foregoing, payments on account of Administrative Claims shall be funded by the Developer.

Disclosure Statement at 19:13-27 (emphasis added).[111] In addition, Part VIII.B.(d) of the Disclosure Statement states that, as a condition precedent to the effective date of the Plan, the court "shall have made a specific finding in the Confirmation Order that the Plan is feasible because the Developer has agreed to fund all [administrative expenses, including professional fees and U.S. Trustee fees]." Disclosure Statement at 27:3-6.

However, Article 2.2.1 of the Plan provides:

> Each Administrative Claim other than a Claim for Professional Fees shall be paid in full in Cash **by the Debtor** on the later to occur of (a) the Effective Date; (b) the tenth (10th) day after such Administrative Claim is Allowed; and (c) such date as the holder of any such Administrative Claim and the Debtor may agree. Notwithstanding the foregoing, payments on account of Administrative Claims shall be funded by the Developer.

Disclosure Statement at 52:18-22 (emphasis added). Yet Part XIV of the Disclosure Statement also provides in part:

> Under the Plan, the Parent and the Developer are prepared to pay the cost of the Plan process only so long as such cost is reasonable, including, without limitation, by contributing capital to the Debtor to pay filing fees, Administrative Clams [sic], including Professional Fees, post-Effective Date Professional Fees and U.S. Trustee's Fees. If there are lengthy objections to the Plan or if Administrative Claims are higher than anticipated, such parties may refuse to continue to fund the Debtor.

Disclosure Statement at 31:26 to 32:4.

These varying representations do not appear to accord with one another, let alone provide accurate information regarding the scope of Debtor's administrative claims. In this regard, Debtor's Disclosure Statement is inadequate.

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[111] "Developer" was previously defined as "Focus Investment Group, LLC." Disclosure Statement at 17:16-17.

iii. Information relevant to the risks posed to creditors under the Plan.

Part XIV of the Disclosure Statement provides in part, "Under the Plan, the carry costs[112] of the Property must be voluntarily borne by the Lenders receiving Class A Membership Interests in the Debtor." Disclosure Statement at 31:1-2. And Part IV.A. states in part, "The operations of the Debtor shall be funded by voluntary capital contributions (each an "Additional Capital Contribution") from the holders of Class A Membership Interests[.]" Id. at 12:22-23.

Yet later in Part IV.A., the Disclosure Statement provides:

> In the event that some Class A Members fail to make a capital contribution as required by the New Operating Agreement, the remaining Class A Members shall be entitled to contribute the difference to the Debtor (each a "Supplemental Capital Loan") in an amount equal to their Pro Rata Share of the Class A Members prepared to contribute such Supplemental Capital Loan. In the event that the Supplemental Capital Loan provided by the Class A Members is insufficient to cover the shortfall, **the Class B Members shall be entitled to contribute the remaining shortfall**. Supplemental Capital Loans shall bear interest at the rate of 12% per annum until returned. **The cost of any Capital Shortfall Loan, as well as the interest of any Supplemental Capital Loan, shall be borne by the Class A Members that fail to make a requested Additional Capital Contribution** (the "Non-Paying Members") on a pro rata basis in proportion to their respective shortfalls. **Such costs shall be borne exclusively through an adjustment in the percentage interests of such Non-Paying Members**[.]

Disclosure Statement at 13:2-9 (emphases added).

While using voluntary and voluntarily to describe anticipated capital contributions from "Class A" members, the Disclosure Statement also appears to provide that the ownership interest of any "Class A" members failing to "voluntarily [bear]" carry costs will be charged against, with interest, to repay either the Parent or another "Class A" member who "voluntarily"

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[112] Defined in the Operating Agreement as including "real estate taxes." See Disclosure Statement at 72. However Part IV.A. of the Disclosure Statement provides in part, "The Parent has agreed to contribute $60,000 to the newly formed entity, payable upon confirmation of the Plan. This amount represents **all back taxes currently owed and an estimated three years of property taxes** going forward." Id. at 13:18-20 (emphasis added).

contributes on the non-paying member's behalf.

In addition, with respect to the Debtor's intent to develop the Property and eventually sell it, the Disclosure Statement only discusses that the "Property Manager . . . has the experience and expertise to complete pre-development work in respect of the Property and to market the Property[.]" Disclosure Statement at 18:25-28. However what is "pre-development work" and how long this will take are not discussed. As well, nowhere in the Disclosure Statement is information regarding annexation or entitlement work–that would be required to be done on the Property before it were sold under the Plan–discussed.[113]

Not only does the Disclosure Statement contain conflicting information about the financial risks that "Class A" members will face under the Plan, it contains zero information regarding what must be undertaken to annex, entitle, and develop the Property (or "bring it to market," to use Mr. DeVore's terminology)–including not only the processes themselves, but also their projected time lines and the risks associated with the uncertainties inherent to the processes themselves.

In these regards, Debtor's Disclosure Statement does not contain adequate information.

iv. Financial information and projections relevant to the decision to accept or reject.

Part IV.A. of the Disclosure Statement estimates the amount of Class 2 claims as the face value of the Loan and states these claimants will receive a pro rata share of the "Class A" membership interests authorized under the appended Operating Agreement.[114] Disclosure

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[113] That the Property has not yet been annexed by the city of Victorville is also not mentioned. Information regarding annexation, entitlement work, and the Parent's intent to develop the Property as a component of Crossings II were elicited from Mr. DeVore at the Confirmation Hearing. Sections 7.1 and 7.4 of the Operating Agreement only briefly mention entitlement–as in, "supervision of the entitlement and marketing of the [Property]." Disclosure Statement at 85, 87.

[114] The Disclosure Statement also asserts an "estimated amount" for Class 1 "claims" of "$0," but then states that Class 1 claimants will receive cash in the amount of their allowed

Statement at 11:13-14 and at 15:16 to 16:5. However there is no value provided for the "Class A" membership interests or what these interests are actually worth. In addition, the Disclosure Statement does not provide an appraised value of the Property–instead it references the Valemount Report (not provided) and states the Property is currently valued at what the Valemount Report provides, $350,000 to $750,000. See Disclosure Statement, Part XV at 32:26 to 33:5; see also Exhibit "B" to Disclosure Statement at 104. This same part of the Disclosure Statement also includes the following passage: "Valemount has also estimated that the price of the Property, if properly marketed and held over the next five to seven years, would be between $9,375,000 and $13,125,000, a considerable increase in value." Disclosure Statement at 33:2-4. By Ms. Stewart's testimony, the Disclosure Statement was mailed in March of 2012. Notably absent in it is any mention that the Valemount Report was written in 2009.

The Disclosure Statement also does not include an estimated amount of Class 3 claims, providing only that equity will be "exchanged" for "Class B" membership interests authorized under the appended Operating Agreement. Id. at 16:1-5. In accord with this, there is no value provided for the "Class B" membership interests or what these interests are actually worth.

Given the lack of disclosure that the Valemount Report's projections and valuation were over three years old, and given the paucity of financial information regarding the current and potential monetary values of not only the creditor classes under the Plan but also of the proposed "Class A" and "Class B" membership interests, it is not possible to find that the Disclosure Statement provides accurate financial information and projections relevant to the decision to accept or reject the Plan.

The court therefore concludes that Debtor's Disclosure Statement does not contain "adequate information" that would enable a hypothetical investor to make an informed judgment

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claims plus interest at the applicable statutory rate. Disclosure Statement at 15:19-22. This is unclear.

about the Debtor's Plan and that Debtor has not complied with the applicable provisions of Section 1125 of the Code. Because Debtor has not complied with Section 1125 of the Code, and the requirements for adequate disclosure, the Debtor's Plan is not confirmable under section 1129(a)(2). Regardless, the court will review the remaining aspects of Plan under Section 1129.

B. Solicitation.

Evidence was presented that Debtor, in its Solicitation Package, notified the Lenders of the voting deadline on the Plan, May 4, 2012. See, e.g., Debtor's Ex. "I" (Stewart Declaration) at 7. No credible evidence was presented to indicate Lenders were given notice of any extension of this deadline. However, testimony from Mr. DeVore and Ms. Stewart indicated that voting was extended after May 4, 2012, and the voting period did not conclude until July 6, 2012. During this period Mr. DeVore and Mr. Ritter sent letters to the Lenders stating that a traditional bankruptcy would be pursued. See Debtor's Ex. "J" (ECF No. 69-5). It was Ms. Stewart's testimony that, in other "prepacks" (including a 2009 vote solicitation on an earlier version of this Debtor's Plan), the Parent provided notice to the Lenders group that the vote had been extended. Ms. Stewart also testified that she had been instructed to note in her ballots tabulation (Debtor's Ex. "KK"), that BFP was an accepting vote and "per court order," although she could not recall by whom. Ms. Stewart testified she is employed with an affiliate of the Parent and Debtor (Focus Management Services, Inc.) as "director of loan and escrow operations" and that solicitation of votes on the pre-packaged bankruptcy plans comprises part of her job responsibilities.

Ms. Stewart also testified that she was and "we were" in contact with various of the Lenders after May 4, 2012. She could not recall the nature of the communications but asserted they largely comprised responding to telephone calls and emails from Lenders. Mr. DeVore also testified that "we" were in contact with various of the Lenders after May 4, 2012, although he did not elaborate upon the nature of the contact he mentions.

Debtor's Ex. "P," the copies of ballots submitted, shows that as of May 4, 2012, twenty

"yes" votes and thirty-one "no" votes had been received. Of these, seven ballots–six of which reflect changed votes (two to "yes"; four to "no")–appear to be additional or subsequent ballots submitted by their respective Lenders.

Debtor's Ex. "P" also shows that as of June 22, 2012 (after Debtor's Ex. "J" was mailed), twenty-four "yes" votes and twenty-nine "no" votes had been received. Of these, three ballots–two of which reflect changed votes, to "yes," since May 4, 2012–appear as additional or subsequent ballots submitted by their respective Lenders. Also, two new ballots appear by June 22, 2012–both accepting.

Debtor's Ex. "P" as well shows that, as of July 6, 2012, twenty-seven "yes" votes and twenty-seven "no" votes had been received. Of these, two ballots–both reflecting changed votes, to "yes," since June 22, 2012–appear as additional or subsequent ballots submitted by their respective Lenders. Last, one new ballot appears during the period between June 22, 2012, and July 6, 2012–it accepts the Plan.

As to the twelve additional or subsequent ballots cast between May 4, 2012, and July 6, 2012–three of whom were cast by one creditor–Ms. Stewart did not testify that she provided these or any other Lenders wishing to change their vote with fresh ballots. Ms. Stewart also did not testify that any other form ballots were prepared; her testimony was, in fact the opposite: the ballot form attached to her declaration accurately reflected the form of ballot she prepared and mailed each of the Lenders in the Solicitation Package. See ECF No. 17 at 7.

However Debtor's Ex. "P" shows that ballots of at least three different forms were accepted, including ballots entitled, "Acceptance or Rejection of the Plan This Ballot Supercedes My/Our Previous Ballot." Notably nowhere in Ms. Stewart's testimony did she discuss transmission or preparation of additional ballots as part of her role at Focus Management Services, Inc.

That multiple ballots were cast using different forms, that the Lenders group was not given notice of the extension of the voting deadline until after the extension had ended, and that

employees of the Parent's affiliate (notably, including Mr. DeVore) appear to have been in various forms of contact with certain members of the Lenders group during the questionable extension of the voting period, are all reasons to find that the Debtor did not solicit votes on the Plan in accordance with Section 1125 of the Code.

3. Section 1129(a)(3): Plan proposed in good faith and not by any means forbidden by law.

Section 1129(a)(3) requires that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) does not define good faith.[115] See Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza), 314 F.3d 1070, 1074 (9th Cir. 2002), cert. denied, 538 U.S. 1035 (2003); Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango), 481 B.R. 51, 68 (B.A.P. 9th Cir. 2012).

A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code. See In re Sylmar Plaza, 314 F.3d at 1074; In re Windmill Durango, 481 B.R. at 68. "Good faith" under Section 1129(a)(3) is determined on a case-by-case basis, taking into account the totality of the circumstances of the case. See In re Sylmar Plaza, 314 F.3d at 1074-75;[116] In re Windmill Durango, 481 B.R. at 68; Stolrow v. Stolrow's Inc. (In re Stolrow's Inc.), 84 B.R. 167, 172 (B.A.P. 9th Cir.1988).

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

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

Here, the Debtor has shifted virtually all of the risk of failure of the Property's reorganization to the Lenders, whose claims far exceed the appraised current value of the Property and also exceed Mr. Lamb's estimated "future value" of the Property. If the Debtor's reorganization fails, the Lenders will shoulder all of the loss (except for the Parent's possible loss of a $60,000 contribution).[117] Further, it is unclear how much capital the "Class A" members will be required to contribute to the (reorganized) Debtor post confirmation. It is also unclear for how long "Class A" members will live under the Damoclean Sword of "contribute-or-face-your-membership-interest-being-charged." If the reorganization succeeds, the Parent and its related entities[118] will benefit. Under these circumstances, it is difficult to conclude that the Debtor's filing for bankruptcy relief was consistent with the objectives and purposes of the Code.

The timing of Debtor filing its Petition so soon after entry both of the State Court Findings, Conclusions, and Order and of the Judgment, see note 13, supra, in combination with the allocation of substantially all of the risk of failure of the Plan to the Lenders group, leads this court to conclude that the Debtor has not met its burden of demonstrating that the Plan is proposed in good faith.

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

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[117] At the Confirmation Hearing, the parties and counsel oft referenced the Parent's contribution of $150,000 to the Plan. However the Plan does not discuss a $150,000 contribution (or a $60,000 contribution, for that matter). The lone mention of the Parent's proposed monetary contribution to the Debtor appears to be in section 4.1 of the version of the Operating Agreement attached to the Plan, which provides in part, "The Class B member has made a Capital Contribution of One Thousand Dollars ($1,000.00), and has been issued the Class B interest in consideration for such contribution." See Plan at 38.

Contrast this with the Disclosure Statement, which provides (in Part IV.A.) one mention: "The Parent has agreed to contribute $60,000 to the newly formed entity, payable upon confirmation of the Plan." See Disclosure Statement at 13:18-20. The version of the Operating Agreement attached to the Disclosure Statement contains the same sentence in section 4.1 of the Operating Agreement regarding the Parent's contribution. Id. at 77.

[118] Whom, according to Mr. DeVore's testimony, will be paid upon sale of the Property.

Section 1129(a)(4) requires that fees for those working on a debtor's case be submitted to the court and be approved as reasonable. 11 U.S.C. § 1129(a)(4). To date no fee applications have been submitted in this Case. However Debtor's Plan provides that applications for professionals' fees and compensation comply with all Code and FRBP requirements. This section of the Code is satisfied.

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

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

Section 1129(a)(5)[119] compels a number of disclosures relating to post confirmation management of the reorganized debtor. "Section 1129(a)(5)(A)(i) requires the plan proponent to disclose two attributes of post confirmation management: their identity; and their 'affiliations.' Identity is unambiguous, but 'affiliations' can potentially cause confusion. . . . The required

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[119] 11 U.S.C.§ 1129(a)(5) provides:

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

disclosures must be of the 'director[s], officer[s], or voting trustee[s].' This leaves out analogous management for partnerships or limited liability companies, although some courts have extended the reach of this section to such noncorporate entities." 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[5][b].

Section 7.2 of the Operating Agreement provides, "[Focus management entity]" as the Property Manager of the (reorganized) Debtor. See Disclosure Statement at 85; see also Plan at 47. However, during his testimony Mr. DeVore identified LEHM, a "Focus" entity, as the Debtor's Property Manager. No evidence to contradict Mr. DeVore's assertions was presented. Based on Mr. DeVore's testimony, Section 1129(a)(5) has been met.

6. Section 1129(a)(6): Regulatory bodies.

Section 1129(a)(6) requires governmental approval of any rates charged by a debtor that are subject to regulation. This provision does not appear to apply to the Plan.

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

Under Section 1129(a)(7), creditors with impaired claims must either accept the proposed Plan or receive as much from the Plan as they would under a Chapter 7 liquidation. Specifically, Section 1129(a)(7) provides in part:

> The court shall confirm a plan only if all of the following requirements are met: . . . (7) With respect to each impaired class of claims or interests–(A) each holder of a claim or interest of such class–(i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a **value, as of the effective date of the plan, that is not less than the amount that such holder so would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date** . . . .

(Emphasis added). The Debtor's Plan includes one class it asserts as unimpaired (Class 1) and two classes it asserts are impaired, Class 2 and Class 3. Debtor represents that Class 3 has accepted the Plan. See First Ballot Summary; see also Second Ballot Summary.

With respect to Class 2, it is unclear whether the Lenders ("Class A" members under the

Plan) will retain under the Plan on account of their interests property of a value not less than the amount they would receive if the Debtor were liquidated. The Valemount Report is from 2009, and its author's testimony (Mr. Lamb) at the Confirmation Hearing was that he would (in 2013) place the high end of the range of the Property's "future value" even lower than that provided in the report, at $3.5 million to $4 million in five years. However, out of any sale proceeds would go payments to the "Focus" affiliates (i.e., affiliates of the Parent) for services rendered, repayment of post confirmation capital contributions at 8% interest, and repayment of any supplemental capital loans (at 20% interest, or 12% additional interest above the 8% paid on any post confirmation capital contribution).[120]

Because Debtor did not establish its needs for capital moving forward, it is not possible to ascertain what portion of the sale proceeds will be expended on simply repaying all of the carry costs expended between the effective date of the Plan and the close of escrow on any sale of the Property. These estimations also do not address the possibility that the (reorganized) Debtor may undertake additional encumbrance(s) to meet its financial needs if capital contributions from members are not forthcoming. Any additional encumbrances may likely be repaid from sale proceeds–further diminishing the proportion of sale proceeds that will go to the Lenders in satisfaction of their original investment with the Parent.

Mr. Fontes appraised the current market value of the Property as of March 1, 2013, at $250,000. See ECF Nos. 71-5 and 71-6. Members of Class 2 would likely receive the bulk of any sale proceeds were the Property sold immediately (and outside of the Plan) because no "Focus" entities will have provided development, entitlement, or annexation work on the

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[120] And it was Mr. DeVore's testimony that members contributing capital on behalf of a non-paying "Class A" member will receive priority distribution for any "supplemental capital calls" plus 12%–paid out of the proceeds otherwise due a non-paying "Class A" member. In addition, all "new capital contributions" receive an 8% return once the Property sells.

Further, of what is left after this point, ninety percent of the proceeds go to "Class A" members and ten percent go to the "Class B" member (Parent), until the original amount of the Loan, without interest, has been repaid.

Property and because there would be no capital calls to repay out of sale proceeds.

Any assessment of what members of Class 2 are likely to receive under the Plan must also consider the market fluctuations, economic conditions, and political uncertainties Mr. Lamb testified as contributing to the depressed value of the Property. Whether these issues will cease or whether their impact on the value of the Property over the next several years (under the Plan) will diminish, cannot be ascertained. Even though the potential future value of the Property under the Plan is significantly higher than the Property's current appraised value, the Debtor has failed to established that, under the Plan, the members of Class 2 "**will receive or retain** under the plan on account of such claim or interest" property of a value that is not less than the amount that such holder so would so receive or retain if the debtor were liquidated under chapter 7 of the Code. It therefore has not met its burden of proving that the Plan satisfies Section 1129(a)(7).

8. Section 1129(a)(8): Impairment and Acceptance.

Under Section 1129(a)(8), for a plan to be confirmed, each class of claims or interests must either be unimpaired by the proposed plan, or it must accept the treatment proposed by the plan. Regarding plan acceptance, Section 1126(c) provides in relevant part:

> A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number **of the allowed claims of such class** held by creditors . . . that have accepted or rejected such plan.

11 U.S.C. § 1126(c) (Emphasis added). Therefore whether a class of claims has accepted depends on the votes of creditors holding "allowed claims of such class."

Section 1126(a) permits creditors holding claims or interests allowed under Section 502 to vote to accept or reject a Chapter 11 debtor's plan of reorganization. See 11 U.S.C. § 1126(a); see also In re Trans Max Techs., Inc., 349 B.R. 80, 85 (Bankr. D. Nev. 2006). Section 502(a) provides in pertinent part:

> A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, . . . , objects.

And Section 501(a) provides:

> A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

No proofs of interest have been filed in this Case. The only proofs of claim filed in this Case are Claim 1-1 (Creditor IRS), Claim 2-1 (Creditor Fagan), Claim 3-1 (Creditor Miner), and Claim 4-1 (Creditor Karahalis). The parties do not dispute that BFP and the Styers[121] hold valid secured claims.[122] Nor do they dispute the Parent has a claim against the Debtor.

The Debtor asserts that members of Class 2 and Class 3 are impaired, could receive distributions under the Plan, and are entitled to vote. See Plan at 14-15. The parties do not dispute that Class 2 and Class 3 are impaired.[123] No accepting ballot from the Parent was ever submitted. See Debtor's Ex. "P." However, taking at face value the assertions that Class 3 *voted* to accept the Plan, this leaves Class 2.

The First Ballot Summary and the Second Ballot Summary contain identical representations regarding the tabulation of votes and both assert, "Classes 2 and 3 have accepted the Plan." (ECF Nos. 10 and 55, at 1-2).[124] The Styers objected to the First Ballot Summary's representations that BFP had cast a "yes" vote in favor of the Plan, making Class 2 an accepting class. See Styers' Supplemental Ballots Brief; see also notes 11, 12, supra. The court sustained without prejudice the Styers' Section 1126 objection, see Ballots Order at 5, which effectively

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[121] Nor do the parties dispute that Creditor Blum, Creditor Venturacci, Creditor Karahalis, or Creditor Fagan hold valid claims.

[122] Section 101(12) provides, "The term 'debt' means liability on a claim." Whether Debtor is liable for any Lenders' claims against the Parent has not been shown, as assignments of (i) the Note, from the Parent to the Debtor, and (ii) the Deed, from the Parent to the Debtor, were not provided. However the parties have not raised and do not appear to dispute this issue.

[123] Further, with the Loan having an original amount of $5.119 million, any payments to Class 2 members totaling less than this amount would render the Lenders impaired.

[124] The First Ballot Summary was filed August 16, 2012, eleven months before BFP's vote on the Plan was cast "per court order attached to this ballot." See Second Ballot Summary, ECF No. 55 at 5.

rejected Debtor's assertion in the First Ballot Summary that both impaired classes had accepted the Plan.

Thereafter the Debtor sought to procure BFP's "yes" vote on the Plan by seeking to enforce a prior ruling in the State Court Case–hence, the State Court Order re BFP Ballot. See Second Ballot Summary at 7-9. The Second Ballot Summary and the Li Affidavit both provide that, in June of 2013, an affirmative ballot was cast by BFP, a creditor holding a $1,000,000.00 claim.[125]

Therefore, by Debtor's tally, as of June 2013 and prior to the Confirmation Hearing, more than one-half in number of the Class 2 creditors, holding at least two-thirds in amount of the allowed claims of Class 2, had accepted the Plan.[126] However, several of the objections to Debtor's plan challenged Debtor's solicitation process. See discussion at 2.B., supra. FRBP

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[125] The BFP-Styers Confirmation Objection asserts the Plan cannot be confirmed because it violates Section 1126(e). See note 10, supra. Section 1126(e) provides:

> On **request of a party in interest**, and after notice and a hearing, the court **may designate** any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(Emphases added). Section 1126(e) does not appear to impose upon debtors an additional confirmation requirement. By its plain language, Section 1126(e) deals with designating the vote of an "entity whose acceptance or rejection" was not procured in accordance with the provisions of the Code. Further, Section 1126(e) relief may be sought by any party in interest; the Code does not specify that only debtors may seek designation of a vote.

No motion to designate is before the court, nor was one brought in this Case. The objections by Styers and BFP provide no authority for the contention that Debtor's not requesting designation under Section 1126(e) is concomitant with Debtor failing to meet the confirmation requirement set forth in Section 1129(a)(1)–that of "compli[ance] with the applicable provisions of this title." That the BFP Ballot was cast without a party in interest using Section 1126(e) as the vehicle to procure or compel its submission does not, on its own, provide a basis for denying confirmation. The court therefore rejects Objecting Creditors' 1126(e) contentions and declines to find Debtor's failure to seek designation under Section 1126(e) constitutes a basis for denying Plan confirmation.

[126] Although Ms. Stewart testified she accepted other ballots post-petition, neither the First Ballot Summary, the Second Ballot Summary, nor Debtor's Ex. "P" reflect the post-petition tabulation of any ballots other than the BFP Ballot.

3018(b) provides in part:

> A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that . . . that the solicitation was not in compliance with § 1126(b) of the Code.

Section 1126(b)(2) provides:

> [A] holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if– . . . (2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in [Section 1125(a)].

Because Debtor's Disclosure Statement did not provide adequate information (as that term is used in Section 1125(a)), see discussion at 2.A., supra, the ballots Debtor solicited prior to the Petition Date cannot be deemed to have accepted or rejected the Plan.

This leaves the BFP Ballot, which was cast after the Petition Date and which did accept the Plan. As it was cast after the Petition Date, Section 1125(g) does not appear to apply, but the court still must examine whether Section 1125(b) is met.

Section 1125(b) provides in relevant part:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

Here, pursuant to Debtor's request and after notice and a hearing, the court had scheduled a combined hearing on Debtor's Plan and Disclosure Statement (the Combined Hearing).[127] Yet at the time and date scheduled for the Combined Hearing, counsel presented oral argument on the Styers' Section 1126 objection to Debtor's ballot tabulation. After the Ballots Order was entered

[127] An exception to the solicitation strictures set forth in Section 1125(b).

on March 26, 2013, the parties eventually stipulated to bifurcate the hearings on Debtor's Plan and Disclosure Statement, and the Court's Order Bifurcating Hearings was entered on May 31, 2013.[128]

The BFP Ballot appears to have been cast July 2, 2013. The court's Order Conditionally Approving Disclosure Statement entered on docket October 1, 2013.[129] Therefore the post-petition procurement of the BFP Ballot occurred prior to entry of the Order Conditionally Approving Disclosure Statement and not in conformance with Section 1125(b).

Even if the timing of the solicitation of the BFP Ballot complied with Section 1125(b), the court must take into account all of the other ballots as well. Because none of the ballots cast, including the BFP Ballot, was based on adequate information within the meaning of Section 1125(a), the Debtor has not shown that Class 2 has accepted the Plan. Accordingly, Section 1129(a)(8) has not been met in this case.

However, a plan may be confirmed even where Section 1129(a)(8) is not met, if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Whether Debtor's Plan may be confirmed pursuant to Section 1129(b) is discussed below.

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

"Section 1129(a)(9)(A) requires that holders of administrative claims and gap claims be paid 'cash equal to the allowed amount of such claim' on the 'effective date of the plan[.]'" 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[9][a]. Under section 2.1 of the Plan, all administrative claims will be treated in accordance with Section 1129(a)(9)(A) of the Code. See

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[128] This brought procurement of the BFP Ballot back within the realm of Section 1125(b).

[129] The adequacy of disclosure may be revisited at plan confirmation. See In re Michelson, 141 B.R. at 720; In re Renegade Holdings, Inc., 2010 WL 2772504 at *3 (Bankr.M.D.N.C. 2010).

Plan at 13:11-16. Further, section 2.2 of the Plan provides that administrative claims other than a claim for professionals' fees shall be paid in full in cash within ten days of the effective date of the Plan.[130] See Plan at 13:17-22. Accordingly, Section 1129(a)(9) has been satisfied.

10. Section 1129(a)(10): Acceptance by at Least One Impaired Non-insider Class.

Section 1123(a)(1) requires all proposed Chapter 11 plans to designate classes of claims, but Section 1123(b)(1) simply permits, but does not require, that all designated classes be impaired. Section 1129(a)(10) provides that if a plan proponent chooses to impair classes of creditors in its proposed plan, then at least one impaired class must accept plan treatment. See 11 U.S.C. § 1129(a)(10). In this Case, the Debtor asserts that Class 2 and Class 3 are the only impaired classes and that both accepted the Plan. Class 3 is the Parent of the Debtor and therefore an insider within the meaning of the Code. See note 107, supra. See also 11 U.S.C. § 101(31)(E) and 11 U.S.C. § 101(2). Thus, Class 2 is the lone non-insider impaired class. As the court already has concluded that Class 2 is not an accepting class for the reasons discussed, Section 1129(a)(10) has not been satisfied.

11. Section 1129(a)(11): Feasibility/Future Liquidation.

Section 1129(a)(11) requires that confirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. See 11 U.S.C. § 1129(a)(11); see also Sherman v. Harbin (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007); In re Roberts Rocky Mtn. Equip. Co., Inc., 76 B.R. 784, 790 (Bankr. D. Mont. 1987). The Ninth Circuit Bankruptcy Appellate Panel has defined feasibility as a factual determination and "as whether the things which are to be done after confirmation can be done as a practical matter under the facts." Jorgensen v. Fed. Land Bank of Spokane (In re Jorgensen), 66 B.R. 104,

[130] Or on a date otherwise agreed upon, or on the tenth day after the administrative claim is allowed. Plan, ECF No. 12, at 13:17-22.

108 (B.A.P. 9th Cir. 1986), citing In re Clarkson, 767 F.2d 417 (8th Cir. 1985); see also In re Ambanc La Mesa Ltd. P'ship, 115 F.3d at 657.

The plan proponent bears the burden of establishing the feasibility of its proposed plan by a preponderance of the evidence. See In re Indian Nat'l Finals Rodeo, 453 B.R. 387, 402 (Bankr. D. Mont. 2011); Danny Thomas Prop. II Ltd. P'ship v. Bank (In re Danny Thomas Prop. II Ltd. P'ship), 241 F.3d 959, 963 (8th Cir. 2001); see also In re Young Broad. Inc.,430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010).

The court has a duty under Section 1129(a)(11) to protect creditors against "visionary schemes." Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985); In re Linda Vista Cinemas, L.L.C., 442 B.R. at 737; In re Las Vegas Monorail, 462 B.R. 795, 801 (Bankr. D. Nev. 2011); In re Windmill Durango, 481 B.R. at 67; In re Loop 76, 465 B.R. at 544.

While a reorganization plan's success need not be guaranteed, the court cannot confirm a plan unless it has at least a reasonable chance of success. See In re Danny Thomas Prop. II Ltd. P'ship, 241 F.3d at 963; In re Acequia, Inc., 787 F.2d at 1364; In re Brotby, 303 B.R. at 191-92. "Some possibility of liquidation or further reorganization is acceptable and often unavoidable." In re DBSD N. Am., Inc., 634 F.3d at 106-07.

To establish the feasibility of a plan, the debtor must present proof through reasonable projections that there will be sufficient cash flow to fund the plan. However, such projections cannot be speculative, conjectural, or unrealistic. See In re M & S Assocs., Ltd., 138 B.R. 845, 849 (Bankr. W. D. Tex. 1992). Reorganization plans:

> [N]eed not completely amortize reorganization debt to be confirmed. . . . "[S]ection 1129(a)(11) requires the plan proponent to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan." S & P, Inc. v. Pfeifer, 189 B.R. 173, 183 (N.D. Ind. 1995), quoting In re SM 104 Ltd., 160 B.R. 202, 234 (Bankr. S.D. Fla. 1993). Against this background, courts have refused to confirm plans whose feasibility turned on future sales of property, or future refinancings, absent an adequate showing that such sales or refinancings would

be likely to occur.

In re Las Vegas Monorail, 462 B.R. at 800; In re Vanderveer Estates Holding, LLC, 293 B.R. 560 (Bankr. E.D.N.Y. 2003).[131]

A plan proponent need only demonstrate that there exists a reasonable probability that the plan provisions can be performed. See Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship), 116 F.3d 790, 801, quoting In re Landing Assocs., Ltd., 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993). Just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. See In re Cajun Elec. Power Co-op, Inc., 230 B.R. 715, 745 (Bankr. M.D. La. 1999). The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required. Id.; In re U.S. Truck Co., Inc., 47 B.R. 932, 944 (E.D. Mich. 1985), aff'd, 800 F.2d 581 (6th Cir. 1986).

The likelihood of a future sale can be demonstrated by other evidence in certain circumstances. See 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 financing); Crestar Bank v. Walker (In re Walker), 165 B.R. 994 (E.D. Va. 1994) (similar regarding future sale of property).

Bankruptcy courts consider several factors when evaluating whether a particular plan is feasible, including: (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matters which determine the

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[131] Even so, there are decisions finding proposed plans feasible without evidence of marketing efforts or a firm offer to purchase. See, e.g., In re T–H New Orleans, 116 F.3d at 801-02 (plan proposing to repay secured creditor out of revenues, with a sale of collateral if in default, was feasible without evidence of a sale offer or marketing efforts); In re Barnes, 309 B.R. 888, 895 (Bankr. N.D. Tex. 2004) (plan calling for future sale of assets was feasible when those assets had been increasing in value).

prospects of a sufficiently successful operation to enable performance of the provisions of the plan. See In re Linda Vista Cinemas, L.L.C., 442 B.R. at 738; In re Las Vegas Monorail, 462 B.R. at 802; see also 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[11].

It is unclear, although plausible, that the Debtor would be able to obtain the capital it needs to operate the Property going forward. The reorganized Debtor has no demonstrated earning power except to call upon the "Class A" membership for capital contributions, and the Property appears to be the Debtor's only significant asset. In addition, the Plan provides no mechanism for generating revenue other than capital contributions: the Parent cannot be called upon to contribute capital, and the Lenders will not be able to pursue Mr. Ritter on the Ritter Guaranty.

However, even if the Debtor were able to obtain the operating capital it needs in the short term, it is unclear for how long the Debtor would be able to do so. Although the Parent appears to contemplate a point in the future when the Property will be sold, it is unclear from the evidence presented how many years into the future this will be. Debtor's sole reliance on so-called voluntary capital contributions will only take the Debtor so far.[132] And without a stop-gap of some sort, it is shaky at best to characterize the Debtor's capital structure as adequate to successfully complete a reorganization.

Debtor also leaves open the possibility of further encumbering the Property if capital calls prove insufficient. However, the Property already is underwater. Taking on additional debt in order to pay carry costs that *might* help the Property to sell one day, at the high end, for

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[132] Although the Plan provides a mechanism for "charging" non-paying members for their capital contributions–assuming another "Class A" member or the "Class B" member pays on their behalf–the "charge" can only succeed to the extent of that "Class A" member's initial contribution to the Loan. Assuming that the twenty-seven Lenders who voted "no" on the Plan refuse to meet the capital calls, and assuming the Parent or another of the Lenders even covers these dead capital calls, the "charge-back" mechanism only provides the Debtor less than $1.5 million over the life of the Plan. At some point the "charge" mechanism effectively may expire, and the Debtor is still left with its "wait and see" approach to finance.

perhaps eighty percent of the amount of its *current* encumbrances, would likely make the Debtor's Plan even more financially untenable.

Even though the Plan contemplates an eventual liquidation, the Debtor is proposing not only that its creditors wait for an unknown period of time–for entitlements and mapping and annexation and development to occur–but it proposes that the creditors fund this waiting period or face having their financial stake in the reorganized Debtor charged, or even lost in its entirety.

Allowing the Debtor's Plan to go forward seems to merely delay the inevitable sale of the Property, and Debtor has not shown it will sufficiently recoup money from a sale of the Property that will even repay the Lenders their initial investment. And even if the Property yields the full value of the Loan upon sale ($5.119 million–a value higher even than what Mr. Lamb's testimony estimated the Property will garner in five years) the Lenders will not be made whole, for two primary reasons: the Parent's entities, including the "Class B" member, will be paid out of any sale proceeds, and (even if they were not) the Lenders will not receive the present value of their claims.[133]

Even though Mr. DeVore testified that there have been other lender groups which have succeeded in their efforts to raise capital via capital contributions, he was unable to identify the groups or recall how many were unsuccessful versus not. Simply put, the Debtor has not provided sufficient evidence to show it will be able to obtain the capital it needs moving forward. Debtor has failed to meet its burden of demonstrating that its Plan is feasible.

12. Section 1129(a)(12): Fees

It is not clear from the record whether Debtor is current in payment of U.S. Trustee's fees although section 6.2 of the Plan provides that an affiliate of the Parent "has agreed to fund" U.S. Trustee's Fees. See Plan at 20:3-6. As of the date of the Confirmation Hearing, the U.S. Trustee

[133] The Plan merely proposes that the Lenders wait an unspecified number of years to potentially be repaid money they first loaned the Parent in 2007.

had not made an appearance in this Case or asserted that U.S. Trustee fees had not been paid. Nor have monthly operating reports been filed evidencing that such fees have been paid.

13. Sections 1129(a)(13), (14), (15), and (16): Retirement Benefits, Domestic Support Obligations, Individual Debtors, Transfers of Property.

Section 1129(a)(13) requires retiree benefits to be paid, but there are no such obligations as the Debtor was formed to hold the Property going forward. Section 1129(a)(14) requires the plan proponent to pay all domestic support obligations required after the bankruptcy petition date. Section 1129(a)(15) requires certain treatment of allowed unsecured claims when the Chapter 11 debtor is an individual. Section 1129(a)(16) provides for the continued enforcement of any applicable nonbankruptcy restrictions on transfers by nonprofit entities in Chapter 11. There is no dispute that these provisions are not applicable to the Debtor in this Case.

14. Section 1129(b): Cram down.

If a plan proponent satisfies all paragraphs of Section 1129(a) except the unanimous voting requirement of Section 1129(a)(8), then the court may still confirm the plan as long as the plan "does not discriminate unfairly" against and "is fair and equitable" towards each impaired class that has not accepted the plan. 11 U.S.C. § 1129(b)(1). See RadLAX, 132 S.Ct. at 2069; 203 North LaSalle, 526 U.S. at 441; In re Ambanc La Mesa, 115 F.3d at 653.

As previously discussed, the court has concluded that the only non-insider impaired class under the Plan, i.e., Class 2, has not accepted plan treatment. As a result, the Debtor has not satisfied Section 1129(a)(10). Because Section 1129(b) requires Section 1129(a)(10) to be satisfied before determining whether the requirements for cramdown of dissenting secured creditors, unsecured creditors, and interest holders are met, no further inquiry is necessary.[134]

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[134] The BFP-Styers Confirmation Objection asserts that the Plan does not meet the "technical" or the "implicit" requirements of Section 1129(b)'s "fair and equitable." However because the Debtor has no accepting non-insider class, Section 1129(b) is not available as an avenue by which the Debtor may pursue confirmation. As such, the court does not reach whether the Plan meets any other requirement of Section 1129(b).

CONCLUSION

For the reasons discussed, the Debtor has failed to meet its burden of proof on the elements for confirmation under Section 1129. A separate order has been entered denying plan confirmation.

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