



Entered on Docket
January 19, 2007

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:)
)
VESCOR DEVELOPMENT 3, LLC,)
)
Debtor.)

BK-S-06-12094-MKN
BK-S-06-12095-MKN
BK-S-06-12096-MKN

Chapter 11

In re)
)
BDL 2, LLC,)
)
Debtor.)

**[Jointly Administered Under
Case No. BK-S-06-12094-MKN]**

Date: December 18, 2006
Time: 9:30 a.m.

In re)
)
EDL 5, LLC,)
)
Debtor.)

Affects:)
)
 All Debtors)
 Vescor Development 3, LLC)
 BDL 2, LLC)
 EDL 5, LLC)

**MEMORANDUM DECISION ON MOTION FOR
DETERMINATION THAT CLASSES 1 AND 2 OF
DEBTORS' JOINT PLAN OF REORGANIZATION
ARE IMPAIRED**

The above-captioned Chapter 11 proceedings were commenced on August 16, 2006,
and were administratively consolidated by an order entered on September 26, 2006. Each of the

1 Debtors filed amendments to their petitions on August 27, 2006, each of which designates the
2 proceedings as involving “single asset real estate” businesses within the meaning of 11 U.S.C.
3 section 101(51B). (Hereafter, all references in this memorandum to “Section” will be to Title 11 of
4 the United States Code.)

5 Debtors filed a proposed joint Chapter 11 plan of reorganization (“the Plan”) on
6 November 11, 2006, that was accompanied by a proposed disclosure statement. Secured creditor
7 Apex Holding Company, LLC (“Apex Holding”) brought a motion for determination that its claims
8 under Classes 1 and 2 of the proposed Plan are impaired within the meaning of Section 1124. Apex
9 Holding also filed a motion for relief from stay pursuant to Section 362(d)(3). Debtors filed a
10 motion for conditional approval of their proposed Chapter 11 disclosure statement and to set a
11 combined hearing on final approval of the disclosure statement and confirmation of the joint Plan.
12 After all three motions were filed, the Debtors filed on December 15, 2006, a proposed first
13 amended joint plan of reorganization (“Amended Plan”) along with a proposed amended disclosure
14 statement.

15 All three motions were heard on December 18, 2006, and the appearances of counsel
16 were noted on the record. After entertaining oral argument, the Court took all three motions under
17 submission. Separate memorandum decisions and separate orders have been issued with respect to
18 each motion.

19 **DETERMINATION OF IMPAIRMENT**

20 As of the petition date, the parties do not dispute that the Debtors were in default on
21 their obligations under certain promissory notes in favor of Apex Holding or its affiliate. The
22 promissory notes are secured by a deed of trust against certain real property owned by two of the
23 Debtors. Based on those defaults, Apex Holding had accelerated its promissory notes and was
24 attempting to foreclose under its deed of trust when the Debtors commenced the Chapter 11
25 proceedings.
26

1 **A. Pertinent Provisions of the Debtors' Proposed Plan.**

2 Under the proposed Plan, a promissory note falls under the definition of a "Debt
3 Instrument". (Plan, Art. I, Sub. A, No. 27) The Apex Holding claims are treated under Class 1 and
4 Class 2 of the proposed Plan by providing that "on the Effective Date" any prepetition default "shall
5 be Cured or Reinstated". (Plan Art. IV, Subs. A and B) The proposed Plan further defines
6 "Effective Date" as being "The last to occur of: (a) the first Business Day that is at least eleven (11)
7 days after the Confirmation Date and on which no stay of the Confirmation Order is in effect; and
8 (b) the Business Day on which all of the conditions set forth in Article VII to this Plan have been
9 satisfied or waived." (Plan, Art. I, Sub. A, No.34) Reference to Article VII of the Plan reveals that
10 there are there are five "conditions precedent to the occurrence of the Effective Date". (Plan, Art.
11 VII, Sub. B) Although there are no time deadlines specified within the first four conditions
12 precedent, the fifth condition provides that "Notwithstanding these Conditions to Effectiveness, the
13 Effective Date shall not be later than ninety (90) days after the Confirmation Date." (Plan, Art. VII,
14 Sub. A, No.5) The Confirmation Date is defined as being "The date upon which the Bankruptcy
15 Court enters the Confirmation Order." (Plan, Art. I, Sub. A, No.20)

16 The Plan further defines "Cure" as being "The payment on the Effective Date or as soon
17 as thereafter practicable of Cash, or such other property as may be agreed upon by the parties or
18 ordered by the Bankruptcy Court,....with respect to any....Debt Instrument, in an amount equal to all
19 unpaid monetary obligations...required to pay or bring current the Debt Instrument and thereby
20 reinstated the debt and return to the pre-default conditions, to the extent such obligations are
21 enforceable under the Bankruptcy Code and applicable on-bankruptcy law." (Plan, Art. I, Sub. A,
22 No. 25) The implementation provisions of the proposed Plan provide that "On the Payment
23 Date,....any monetary cure amounts due on the Payment Date to Claimants in Classes 1, [and]
24 2...shall be paid in full in cash by the Disbursing Agent." (Plan, Art. V, Sub. B, No. 1) The
25 "Payment Date" under the Plan is further defined as being "The Business Day occurring as soon as
26 practicable after the Effective Date...." (Plan, Art. I, Sub. A., No. 49)

1 The proposed Plan also defines “Reinstated” as meaning, in relevant part, “(b)
2 notwithstanding any contractual provision or applicable law that entitled the holder of a Claim to
3 demand or receive accelerated payment of such Claim after the occurrence of a default: (i) Cure any
4 such default that occurred before or after the petition Date, other than a default of a kind specified in
5 Section 365(b)(2) of the Bankruptcy Code; (ii) reinstating the maturity of such Claim as such
6 maturity existed before such default; (iii) compensating the holder of such Claim for any damages
7 incurred as a result of any reasonable reliance by such holder on such contractual provision or such
8 applicable law; and (iv) not otherwise altering the legal, equitable, or contractual rights to which
9 such Claim entitled the holder of such Claim; **provided, however, that any contractual right that
10 does not pertain to the payment when due of principal and interest on the obligation on which
11 such Claim is based, including, but not limited to, financial covenant ratios, negative pledge
12 covenants, covenants or restrictions on merger or consolidation, and affirmative covenants
13 regarding corporate existence or prohibiting certain transactions or actions contemplated by
14 this Plan, or conditioning such transactions or actions on certain factors, shall not be required
15 in order to accomplish Reinstatement.**” (Plan, Art. I, Sub. A, No.57)

16 **B. Analysis of the Apex Holding Objections.**

17 In view of the proposed treatment of Class 1 and Class 2 claims, the proposed
18 Plan states that Apex Holding’s secured claims are not impaired pursuant to Section 1124(2). (Plan,
19 Art. IV, Subs. A and B) Unimpaired classes would be conclusively presumed to have accepted the
20 Plan and their votes on the Plan would not need to be solicited pursuant to Section 1126(f). A
21 creditor that is not permitted to vote, however, is still permitted to object to confirmation of a
22 proposed plan on the grounds available under Section 1129(a). Apex Holding has expressed its
23 intention to object on grounds that the Debtors’ proposals are not feasible pursuant to Section
24 1129(a)(11). Such a finding necessarily will be based on the evidence presented at the time of the
25 confirmation hearing. Nonetheless, Apex Holding contends that its claims are impaired for three
26 reasons and that it is entitled to vote on the proposed Plan.

1 **1. Alteration of Rights to Foreclose under the Deeds of Trust.**

2 The proposed Plan provides for the Debtors’ real property to be sold to raise the “Plan
3 Distribution Cash”, which in turn is defined to mean “The Cash to be paid pursuant to this Plan to
4 the holders of Allowed Claims in all Classes....on or after the Effective Date....” (Plan, Art. V, Sub.
5 A and Plan, Art. I, Sub. A, No. 53) The sale proceeds will be used to cure the defaults under the
6 promissory notes to Apex Holding. In providing for the Debtors’ real property to be sold, i.e., the
7 security for the Apex Holding promissory notes, Apex Holding argues that the proposed Plan
8 eliminates the “substantive remedies and procedural mechanisms available to it under state law,
9 including its right to foreclose upon the encumbered property”. See Apex Holding Motion at 9:14-
10 18.

11 On its face, however, the proposed Plan treatment seeks to cure the prepetition defaults
12 and reinstate the maturity date on the Apex Holding promissory notes pursuant to Sections
13 1124(2)(A and B). There is no provision in the Plan to eliminate Apex Holdings’ foreclosure or
14 related rights under the deed of trust in the event of a subsequent default. If it did so, such treatment
15 would not comply with Section 1124(2)(E).

16 Apex Holding’s further reliance on the decision in In re L&J Anaheim Associates, 995
17 F.2d 940 (9th Cir. 1993) is misplaced. The appeal in L&J Anaheim involved the application of
18 Section 1124(1), rather than the cure and reinstatement provisions of Section 1124(2). The
19 resourceful creditor in L&J Anaheim impaired his own class by substituting a more favorable sale
20 process for his foreclosure rights in order to cramdown his proposed plan on a dissenting creditor.
21 995 F.2d at 941-42. That decision is both legally and factually inapposite. There is no
22 impermissible alteration of Apex Holding’s right to foreclose on its deed of trust under the Debtors’
23 proposed Plan.

24 **2. Failure to Cure Defaults on the Effective Date.**

25 As previously noted, “Cured” under the proposed Plan is defined to mean “payment on
26 the Effective Date or as soon as thereafter practicable....” (Plan, Art. I, Sub. A, No. 25)

1 Additionally, the “Payment Date” under the Plan is defined as the “Business Day occurring as soon
2 as practicable after the Effective Date.” (Plan, Art. I, Sub. A, No. 49) Because these defined terms
3 would allow for payments to be made at an indefinite time after the Effective Date, Apex Holding
4 argues that Classes 1 and 2 are impaired notwithstanding the language in Article IV, subsections A
5 and B providing for any defaults to be Cured or Reinstated on the Effective Date. See Apex
6 Holding Motion at 11:20 to 12:1, citing In re Tucson Self-Storage, Inc., 166 B.R. 892, 895 n.2 (9th
7 Cir. B.A.P. 1994)(payment of unsecured trade creditor class 60 days after effective date); In re
8 Hotel Association of Tucson, 165 B.R. 470, 475 (9th Cir. B.A.P. 1994)(payment of general
9 unsecured creditors class 30 days after effective date).

10 Although neither of the cases cited by Apex Holding involved payments to cure a
11 default under Section 1124(2), Debtors’ response offers to amend the proposed Plan to provide a
12 certain date for payment. Under the Amended Plan, the time for the payment required under
13 Section 1124(2)(A) to cure the defaults is specified as well as a means for determination of the
14 actual damage payment required under Section 1124(2)(C). (Amended Plan, Art IV, Subs. A and
15 B) Under the Amended Plan, the definition of “Cure” is amended to provide for cure payments to
16 be made on “the Payment Date” which in turn is amended to mean “The third Business Day after
17 the Effective Date.” (Amended Plan, Art I, Sub. A, Nos. 25 and 49) The Court believes that the
18 amendment provides sufficient certainty of the deadline for commencement of payments if the
19 proposed Amended Plan is confirmed.

20 **3. Unreasonable Delay in the Effective Date.**

21 As previously discussed, the fifth condition precedent to the effectiveness of the Plan
22 provides that “the Effective Date shall not be later than ninety (90) days after the Confirmation
23 Date.” (Plan, Art. VII, Sub. A, No.5) Because the cure payments required by Section 1124(2)(A)
24 therefore might not take place until 90 days after a confirmation order is entered, Apex Holding
25 contends that even if the cure payments occur on the Effective Date, the 90 day delay results in an
26 impairment of its Class 1 and Class 2 claims. See Apex Holding Motion at 12:10-18. Apex

1 Holding argues that the effective date should be no later than the date on which any plan
2 confirmation order becomes final, i.e., the day after the ten day appeal period under Bankruptcy
3 Rule 8002(a) elapses. Id. at 14:8-11. Not unexpectedly, the Debtor disagrees and argues that the
4 bankruptcy court may permit an effective date delayed by months or years after plan confirmation if
5 it would be reasonable under the circumstances. See Debtors' Opposition at 11:6 to 12:4.

6 Although the term "effective date" appears in various places in the Bankruptcy Code, it
7 is not defined in the statute. The cases cited by both parties are examples at best and none are
8 controlling. All of the cases cited by the parties, and more, are collected in the course reference
9 materials on Chapter 11 Business Reorganizations published by the American Law Institute-
10 American Bar Association in June 2005. See Novikoff & Jacobs, "Post-Confirmation Issues:
11 Ascertaining the Effective Date; Post-Confirmation Jurisdiction Serial Filing; Post-Confirmation
12 Litigation Vehicles", SK092 ALI-ABA 631 (June 9-11, 2005). In those cases, the suggested
13 permissible plan effective dates range from the date of the plan confirmation hearing to even
14 "months or years" thereafter.

15 In addition to the absence of a statutory definition of a Chapter 11 plan's "effective
16 date", there also is no language in Section 1124(2) that specifies when a cure payment must be
17 made under subsection (2)(A) or when the creditor must be compensated for "damages" or "actual
18 pecuniary losses" under subsections (2)(C) and (2)(D). In contrast, other sections of the Bankruptcy
19 Code that provide for defaults to be cured do impose time constraints. See, e.g., 11 U.S.C. §
20 365(b)(1)(A) ["cures, or provides adequate assurance that the trustee will promptly cure, such
21 default" in executory contract or unexpired lease]; 11 U.S.C. § 1110(a)(2)(B) [default under security
22 agreement, lease or sale contract for aircraft equipment or vessels must be cured within 60 days
23 after petition date]; 11 U.S.C. § 1112(b)(2)(B)(ii) [act or omission of the debtor "will be cured
24 within a reasonable period of time fixed by the court" to prevent conversion or dismissal]; 11
25 U.S.C. § 1168(a)(1)(B) [default under security agreement, lease or sale contract for rolling stock
26 equipment must be cured within 60 days after commencement of case]; 11 U.S.C. § 1322(c) [default

1 with respect to debtor's principal residence may be cured until residence is sold at foreclosure sale].

2
3 A previous version of Section 1124 did include a third means for leaving a class
4 unimpaired. Prior to being deleted by the 1994 amendments to the Bankruptcy Code, Section
5 1124(3) provided that a class of claims is impaired unless the creditor received "on the effective
6 date of the plan" cash equivalent to the allowed amount of its claim. See 7 L. King, Collier on
7 Bankruptcy, ¶ 1124.LH[2] (15th ed. rev. 2003). That subsection was deleted to prevent results
8 inconsistent with the best interests test for plan confirmation under Section 1129(a)(7) for a solvent
9 reorganization estate. Id. The deletion of former Section 1124(3) clearly is not dispositive of
10 whether Congress intended to eliminate all timing considerations from the statute. Like the other
11 sections of the Bankruptcy Code previously mentioned, however, presence of the former section
12 does illustrate that Congress has the ability to include time constraints in Section 1124 when it so
13 desires.

14 Based on its review of the authorities cited, the Court concludes that the requirements
15 of Section 1124(2) must be met within a reasonable period after entry of the plan confirmation order
16 since the effect of the 'non-impairment' is to disenfranchise a creditor from voting on a proposed
17 plan. Since the additional effect may be to deny the creditor of the protection afforded by the
18 cramdown provisions of Section 1129(b), care must be taken to ensure that any delay is neither
19 indefinite or excessive.

20 In this case, the Court concludes that the proposed delay is neither indefinite nor
21 excessive. The proposed Plan provides for a 90 day delay between the entry of the plan
22 confirmation order and its Effective Date. The proposed Amended Plan would reduce that period to
23 60 days. (Amended Plan, Art. VIII, Sub. B, No. 5) The Amended Plan further provides for Plan
24 Payments to commence on the third "Business Day" after the Effective Date rather than "as soon as
25 practicable after the Effective Date" as originally proposed. (Amended Plan, Art. I., Sub. A, Nos.
26 25 and 49) A "Business Day" is defined under the Plan and the Amended Plan as excluding

1 Saturdays, Sundays and bank holidays. (Plan and Amended Plan, Art. I., Sub. A, No. 13) Under
2 these provisions, the proposed Amended Plan now provides for the cure payments to Classes 1 and
3 2 to be made no later than 66 calendar days after entry of a confirmation order. That period of time
4 is not unreasonable.

5 **C. Non-Compliance with Section 1124(2)(D).**

6 Notwithstanding the foregoing, the Court believes that the Class 1 and Class 2 claims
7 may be impaired to the extent the Debtors' proposals do not comply with Section 1124(2)(D).

8 As previously noted, the proposed Plan provides for any defaults under Classes 1 and 2
9 to be "Cured or Reinstated". (Plan, Art. IV, Subs. A and B) The Plan further defines "Cure" as
10 being "The payment on the Effective Date or as soon as thereafter practicable of Cash, or such other
11 property as may be agreed upon by the parties or ordered by the Bankruptcy Court,....with respect to
12 any....Debt Instrument, in an amount equal to all unpaid monetary obligations ...required to pay or
13 bring current the Debt Instrument and thereby reinstate the debt and return to the pre-default
14 conditions, to the extent such obligations are enforceable under the Bankruptcy Code and applicable
15 on-bankruptcy law." (Plan, Art. I, Sub. A, No. 25) These provisions appear designed to meet the
16 cure requirements of Section 1124(2)(A).

17 As previously noted, however, the definition of "Reinstated or Reinstatement" in the
18 proposed Plan includes the following: "**provided, however, that any contractual right that does
19 not pertain to the payment when due of principal and interest on the obligation on which such
20 Claim is based, including, but not limited to, financial covenant ratios, negative pledge
21 covenants, covenants or restrictions on merger or consolidation, and affirmative covenants
22 regarding corporate existence or prohibiting certain transactions or actions contemplated by
23 this Plan, or conditioning such transactions or actions on certain factors, shall not be required
24 in order to accomplish Reinstatement.**" (Plan, Art. I, Sub. A, No.57)

25 Section 1124(2)(D) was added by the Bankruptcy Abuse Prevention and Consumer
26 Protection Act of 2005 and became effective on October 17, 2005. It provides that, in addition to

