UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA
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In re:	)	BK-S-09-23414-BAM
	)	
RAINBOW 215, LLC,	)	Chapter 11
a Nevada limited liability company,	)	
	)	Hearing Date: June 21, 2010
Debtor.	)	Hearing Time: 9:30am

MEMORANDUM ON CONFIRMATION

On July 27, 2009, Rainbow 215, LLC ("Rainbow 215" or "DIP") filed a voluntary chapter 11 bankruptcy petition.[1] It has served as the Debtor in Possession since. Eight months later, on March 5, 2010, Rainbow 215 filed its amended plan of reorganization. City National Bank ("City National"), one of Rainbow 215's two secured creditors, opposed and voted against Rainbow 215's plan.

The court held a confirmation hearing on June 21, 2010. At that hearing, the court heard testimony from appraisers as to the value of Rainbow 215's real property, from finance experts on an appropriate interest rate under cram down, from some of Rainbow 215's tenants and from one of its managing members. At the conclusion of the hearing, the court took the matter under submission. Having considered Rainbow 215's reorganization plan, the record and all relevant documents filed therein, the court now CONFIRMS Rainbow 215's plan of reorganization.

[1] In the text and footnotes of this opinion, all references to "Section" shall be to provisions of the Bankruptcy Code, appearing in Title 11 of the United States Code, unless otherwise indicated. All references to the "Code" are to the Bankruptcy Code.

BACKGROUND

A. The Debtor

Rainbow 215 is a Nevada limited liability company equally owned by two managing members: the Alireza Kaveh Family Trust and JPA Investments, LLC. Rainbow 215 owns real property consisting approximately of 3.24 acres of land located in the southeast corner of South Rainbow Boulevard at Clark County Route 215 in Las Vegas, Nevada (the "Property").[2] Rainbow 215 purchased this property as undeveloped land in 2005. After its purchase, Rainbow 215 commenced construction of a commercial retail shopping center on the Property. It completed this construction in 2008. The completed commercial retail shopping center comprises two separate buildings on the Property, which in the aggregate has approximately 42,007 square feet of rentable space.

To finance its construction of the improvements, Rainbow 215 obtained a loan from Business Bank of Nevada[3] in August 2006 for $8,706,844 (the "Construction Loan"). The Construction Loan is secured by a Deed of Trust and Assignment of Rents in favor of the bank, and was recorded on August 17, 2006. At some point before 2009, Rainbow 215 obtained additional financing from City National in the amount of $1,358,156, which Rainbow 215 intended to use to fund tenant build-outs and other improvements on the Property. With this additional financing, the maximum limit of the Construction Loan increased to $10,065,000. The maturity date on the Construction Loan was extended to April 12, 2009. For reasons that the parties dispute, however, the maximum limit on the loan was never disbursed. As 2009 approached, and Rainbow 215 realized that it likely would not be able to pay the loan when due, it sought to modify the Construction Loan's maturity date.

Rainbow 215 also obtained an additional loan in January 2009 from Vestin Originations,

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[2] The real property bears Clark County Assessor's Parcel Number 176-02-201-010.

[3] On or about February 2007, Business Bank of Nevada merged with City National Bank.

Inc. ("Vestin") in the amount of $1,000,000 (the "Vestin Loan"). Rainbow 215 asserts that it obtained this loan not only to fund tenant improvements and ongoing operations, but to provide itself with the ability to pay City National interest in the event that the bank agreed to modify the Construction Loan's maturity date.[4] The Vestin Loan had a one-year maturity date and is presently secured by a second Deed of Trust against the Property.

Rainbow 215's attempts to modify the due date on the Construction Loan proved to be unsuccessful. The April 2009 maturity date came and went without payment to City National. In response, City National initiated foreclosure proceedings on June 8, 2009, and also initiated state court litigation to have a receiver appointed to Rainbow 215. The hearing on the receiver in state court was initially continued while Rainbow 215 and City National attempted to negotiate on an extension on the maturity date of the Construction Loan. At some point over summer 2009, however, these negotiations broke down. Facing imminent foreclosure, Rainbow 215 filed for chapter 11 bankruptcy on July 27, 2009. At the time that it filed for bankruptcy, the principal amount due on the Construction Loan was $9,665,914.78.

B. Rainbow 215's Proposed Reorganization Plan

In its proposed plan for reorganization ("Plan"),[5] Rainbow 215 identifies five classes: Class 1 consists of City National's claim in the principal amount of $9,665,914.78; Class 2 consists of Vestin's claim in the principal amount of $750,000;[6] Class 3 consists of Rainbow 215's six unsecured creditors who hold claims in the aggregate amount of $198,766.36; Class 4 consists of Rainbow 215's five self-identified insiders who hold claims in the aggregate amount

[4] At the hearing, Ali Kaveh, trustee of the Alireza Kaveh Family Trust and principal of Rainbow 215, testified that in attempting to modify the maturity date of the Construction Loan, the Debtor offered to make a payment to the bank equivalent to one year's worth of interest payments. June 21, 2010 Tr. at 96.

[5] Dkt. no. 157.

[6] Prior to filing for bankruptcy, Rainbow 215 made a quarterly payment to Vestin, and thus reduced the principal owed on the Vestin Loan to $750,000.

of $675,926.56;[7] and Class 5 consists of Rainbow 215's two equity shareholders. The preceding five classes are all impaired under the Plan.[8]

In its Plan, Rainbow 215 proposes to pay the entirety of City National's secured claim in a balloon payment on or before December 31, 2015. In the meantime, Rainbow 215 proposes to make monthly interest payments to City National at a 4% interest rate based on a principal amount of $9,665,914.78. The Plan proposes similar treatment with respect to Vestin; that is, it will pay Vestin's claim in full on or before December 31, 2005. In the meantime, Rainbow 215 will make monthly interest payments to Vestin at a 10% interest rate, which represents a negotiated rate. Under the Plan, both City National and Vestin will retain their liens against the Property. Therefore, upon default of the Plan, either or both parties may seek appropriate remedies against Rainbow 215, including foreclosure of the Property.

The Plan also provides for payment in full to all members of Class 3, without interest, on or before five years from the effective date of plan confirmation. Alternatively, the Plan provides an option to this class; instead of receiving a balloon payment at the end of the fifth year, a member of Class 3 with a claim under $30,000 may elect to receive a one-time lump sum payment equal to 75% of its claim, which it would receive within ninety days from the effective date of plan confirmation. Rainbow 215, however, retains the right to unilaterally rescind an unsecured creditor's exercise of this option, and instead pay the unsecured creditor pursuant to its primary proposed scheme for Class 3 creditors.

Class 4 and 5 claims are subordinated to Class 3 claims; the Plan proposes distribution only if and when all payments to Class 3 are made pursuant to the Plan. However, the Plan does not actually propose any type of distribution to Class 5, merely proposing that its equity holders

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[7] These identified insiders are Kaveh; JPA Investments, LLC; Pascal and Gooya Abrar; Platinum Construction; and Platinum Realty.

[8] The Plan also identifies ten creditors whose claims Rainbow 215 disputes; however, none of these creditors filed a proof of claim in the bankruptcy. As such, pursuant to FED. R. BANKR. P. 3003(c)(2), these creditors have no right to vote on or receive distribution under the Plan. *See In re Trans Max Technologies, Inc.*, 349 B.R. 80, 85 (Bankr. D. Nev. 2006).

will retain their ownership interests in Rainbow 215.

At voting, all of Rainbow 215's eligible creditors voted in favor of the Plan – with the exception of City National. City National rejected the Plan and objects to confirmation. Specifically, City National objects citing Sections 1129(a)(3), (a)(11), and (b)(2).

DISCUSSION[9]

To successfully confirm a plan of reorganization under chapter 11, the debtor must satisfy all sixteen requirements for confirmation under Section 1129(a), unless the provisions are inapplicable to the debtor[10] or a creditor votes against plan confirmation. If a creditor votes against the debtor's proposed reorganization plan, the debtor may still confirm the plan through nonconsensual cramdown. Cramdown excuses the debtor from satisfying Section 1129(a)(8), and instead requires the satisfaction of the applicable elements of Section 1129(b).

Section 1129(b)(1) requires that a nonconsensual cramdown plan is both fair and equitable and not contain any unfair discrimination as to dissenting impaired classes. *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship* (*In re Ambanc La Mesa Ltd. P'ship*), 115 F.3d 650, 653 (9th Cir. 1997) (citing *In re Arnold and Baker Farms*, 177 B.R. 648 (B.A.P. 9th Cir. 1994), *cert. denied*, 519 U.S. 1054 (1997)). Only after these elements are met may the bankruptcy court confirm a plan over the objections of a dissenting creditor. *In re Trans Max*, 349 B.R. at 80.

To confirm a plan, the debtor must prove all of Section 1129's requirements by a

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[9] The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. Specifically, this matter constitutes a core proceeding as defined in 28 U.S.C. § 157(b)(2)(L).

[10] The following paragraphs of Section 1129(a) are inapplicable:

- Section 1129(a)(6), because Rainbow 215 is not a utility or other type of entity subject to regulation by a governmental agency.
- Section 1129(a)(13), because Rainbow 215 does not have any interests that require the continued payment of retiree benefits.
- Section 1129(a)(14), because Rainbow 215 is not an individual debtor.
- Section 1129(a)(15), because Rainbow 215 is not an individual debtor.
- Section 1129(a)(16), because Rainbow 215's reorganization plan does not contemplate the transferring of any property.

preponderance of the evidence. *In re Ambanc La Mesa Ltd. P'ship,* 115 F.3d at 653. It is the bankruptcy court's independent duty to ensure that the proposed plan satisfies the requirements for plan confirmation. *Id.*

The remainder of this memorandum will address whether Rainbow 215's proposed plan of reorganization meets the requirements for confirmation as delineated by Section 1129 and the Code. The court will first quickly address the elements of confirmation that City National did not object to. The remaining issues – namely, that Rainbow 215 did not propose the Plan in good faith pursuant to Section 1129(a)(3); that the Plan is not fair and equitable to City National under Section 1129(b); and that the Plan is not feasible pursuant to Section 1129(a)(11) – will be discussed later in order.

A. Application of Uncontested Paragraphs of Section 1129 to Rainbow 215's Proposed Plan of Reorganization

Broadly speaking, a debtor satisfies Section 1129(a)(1) and (a)(2) if the plan proponent and its proposed plan comply with the Code. Aside from meeting the confirmation requirements, Section 1129(a)(1) generally addresses the form and content of the proposed plan, whereas Section 1129(a)(2) generally addresses on the activities of the plan proponent. 7 COLLIER ON BANKRUPTCY ¶ 1129.02 [1] & [2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). The legislative history on both these subsections provides some useful guidance; the legislative history of Section 1129(a)(1) makes specific reference to Sections 1122 and 1123 as examples of requisite compliance under Section 1129(a)(1). The legislative history to Section 1129(a)(2) makes specific reference to Sections 1125 and 1126 as examples of requisite compliance under Section 1129(a)(2). *Id.*

Here, the court has reviewed the Plan, and finds that Rainbow 215 and its Plan substantively and technically comply with applicable provisions of the Code, particularly as discussed below in further detail. The Plan correctly classifies claims pursuant to the types of claims involved against Rainbow 215. Moreover, the court has approved Rainbow 215's

disclosure statement.[11] Therefore, the court finds that Rainbow 215 has satisfied Sections 1129(a)(1) and (a)(2).

Under Section 1129(a)(4), the court must find that any payments made by the debtor for services, costs, or expenses in connection to its bankruptcy case are reasonable. In conjunction, Section 1129(a)(5) requires the debtor disclose and identify any person that will serve as a director, officer, or voting trustee of the reorganized debtor. In reviewing the record, the court finds that payments Rainbow 215 has made to third parties in connection with its bankruptcy for services, fees, or expenses have been reasonable. Rainbow 215 has also adequately disclosed the identity of its reorganized management and insiders, as well as the professional fees paid, or to be paid, to this management. Therefore, the court finds that Rainbow 215 has satisfied Sections 1129(a)(4) and (a)(5).

Section 1129(a)(7) addresses what is referred to as the "best interests of the creditors" test. Under this subsection, where an impaired class of creditors objects to a plan, such class must receive at least as much under the reorganization plan as it would receive under the chapter 7 liquidation of the debtor. Therefore, this element only applies to impaired creditors that vote against the debtor's proposed plan. *M & I Thunderbird Bank v. Birmingham* (*In re Consolidated Water Utilities, Inc.*), 217 B.R. 588, 592 (B.A.P. 9th Cir. 1998). Since City National is the only creditor that objected to the Plan, the court need only determine whether City National will receive at least as much under the Plan as it would if Rainbow 215 was liquidated under chapter 7.

In its disclosure statement, Rainbow 215 outlines a brief analysis estimating how its creditors would fare under a hypothetical liquidation.[12] In doing so, Rainbow 215 points out that because there is no current market for loans in Las Vegas involving this size and type of real

[11] Dkt. no. 135.

[12] Dkt. no. 107.

property, any purchase would likely be limited to cash only transactions and buyers seeking extreme discounts of 50% or so of the appraised value.[13] Given that the market has been in downward flux, the court finds credible Rainbow 215's hypothesis of potential buyers at a liquidation sale. Additionally, City National did not contest confirmation on the basis of the best interests of the creditors' test, and no evidence was presented that Rainbow 215's brief liquidation analysis is unreasonable. Under this context, the court finds that City National will, at a minimum, obtain the value of its claim under the Plan as it would under a hypothetical liquidation of Rainbow 215. Therefore, the court finds that Rainbow 215 satisfies Section 1129(a)(7).

Section 1129(a)(8) provides that each class of claims or interests either accept the debtor's proposed plan or be left unimpaired under such plan. Therefore, this section is satisfied only if each class accepts the debtor's proposed plan[14] or is left unimpaired under the plan. Here, each eligible voting class of Rainbow 215's creditors has accepted the Plan with the exception of City National. As such, the court finds that Rainbow 215 does not satisfy Section 1129(a)(8). Rainbow 215, however, seeks to cram down the Plan over the bank's objection; the court will further discuss this below in the context of cram down.

Section 1129(a)(9) addresses the priority of certain claims under the proposed reorganization plan, drawing distinctions between administrative claims, gap claims, priority non-tax claims, priority unsecured tax claims, and secured tax claims. 7 COLLIER, *supra* at ¶ 1129.02[9]. The court finds that the Plan provides for payment of administrative claims pursuant to applicable provisions of the Code, that is, these payments will be made on the effective date of plan confirmation. There are no additional claims that fall under the purview of this subsection,

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[13] Dkt. no. 156 at 20.

[14] This section, however, does not require unanimity among the debtor's creditors, but simply that more than half of a given class with claims aggregating more than two-thirds of the claims vote in favor of the plan. 11 U.S.C. § 1126(c).

and thus, the court finds that Rainbow 215 has satisfied Section 1129(a)(9).

Section 1129(a)(10) requires that at least one class of impaired claims accept the debtor's proposed plan who is not considered an "insider." Necessarily, Classes 4 and 5 are eliminated from qualifying under this provision because Class 4 is comprised of self-identified Rainbow 215 insiders and Class 5 is comprised of Rainbow 215 equity shareholders. This leaves Classes 1, 2 and 3 as non-insiders or non-equity shareholders of Rainbow 215. Both Classes 2 and 3 are impaired under the Plan and have accepted the Plan. Therefore, the court finds that Rainbow 215 satisfies Section 1129(a)(10).

Section 1129(a)(12) requires that debtor's proposed plan provide for the fees of the U.S. Trustee, as determined by this court, on or by the proposed effective date of the plan. This provision is substantially encapsulated in Section 507(a)(1) and 1129(a)(9). 7 COLLIER, *supra* at ¶ 1129.02[12]. Because no party, including the U.S. Trustee, has raised an objection under this element, the court finds that Rainbow 215 has satisfied Section 1129(a)(12).

B. Application of Contested Paragraphs of Section 1129 to Rainbow 215's Proposed Plan of Reorganization

1. Good Faith – 11 U.S.C. § 1129(a)(3)

Section 1129(a)(3) requires that the plan be proposed "in good faith and not by any means forbidden by law." Although good faith is not defined by the Code, "[a] plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code." *Platinum Capital, Inc. v. Sylmar Plaza, L.P.* (*In re Sylmar Plaza, L.P.*), 314 F.3d 1070, 1074 (9th Cir. 2002). The court makes this determination based on the totality of the circumstances. *Id.* Examples of a lack of good faith on the debtor's part may be found when the debtor files to avoid or delay ongoing state court litigation, when the debtor is solvent but uses the Code to take advantage of provisions that the debtor could not obtain outside of bankruptcy, or when the debtor uses bankruptcy to gain an upper hand against a rival. *In re Trans Max Technologies, Inc.*, 349 B.R. at 89.

City National argues that Rainbow 215 failed to propose its Plan in good faith because it reserved the right to amend the Plan (and thus, treatment of City National) at the confirmation hearing.[15] This argument is without merit. There has been no evidence presented that Rainbow 215 filed its bankruptcy case or proposed its reorganization plan in a manner inconsistent with the objectives and purposes of the Code. Rainbow 215 is seeking to reorganize its debts. It is not merely using the Code for an advantage not available to it outside the context of bankruptcy or using bankruptcy to gain an upper hand against a rival.

Moreover, the debtor's ability to modify its proposed plan before confirmation is consistent with Section 1127. *See* 11 U.S.C. § 1127; *see, e.g.*, *In re Rhead*, 179 B.R. 169, 176 (Bankr. D. Ariz. 1995) (determining that the debtors could amend their chapter 11 plan before confirmation without filing a new disclosure statement or re-soliciting ballots, where the amended plan did not impact upon or affect the rights of the dissenting creditors). Therefore, under the totality of the circumstances, the court finds that Rainbow 215 has filed its bankruptcy case and proposed its reorganization plan in good faith and accordingly, satisfies Section 1129(a)(3).

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

The court will defer its discussion on the feasibility of the Plan until Section 4 below, given the interrelationship between the economics of cramdown and the requirements of feasibility.

3. Cramdown – 11 U.S.C. § 1129(b)

City National's rejection of the Plan leaves Rainbow 215 with only one avenue to confirm its plan - nonconsensual cramdown. As discussed above, in order to cram down a reorganization plan over the objections of a dissenting creditor, the plan must not unfairly discriminate and must be fair and equitable to each class of impaired claims. 11 U.S.C. §

[15] City National Bank's Objection to Debtor's First Amended of Reorganization, Dkt. no. 273 at 13.

1129(b)(1). Before proceeding to examine whether Rainbow 215 meets these requirements under cram down, the court must first determine the extent to which City National's claim is secured by the Property. This is because appropriate cramdown treatment turns on the extent of a creditor's security. Section 506(a) determines whether a claim is an allowed secured claim. *See* 11 U.S.C. § 506(a) (providing that a creditor's claim secured by a lien on debtor's property is secured to the extent of the value of the property and unsecured for the amount, if any, beyond that value); 4 COLLIER, *supra* at ¶ 506.02 (noting that, with the exception of a section inapplicable to this matter, "the term 'secured claim' as used throughout the Code refers to a claim that is determined to be a 'secured claim' as set forth under [S]ection 506(a)"). Therefore, the cram down analysis necessarily requires a determination as to value of the Property and the extent to which the Property is secured.

a. Valuation

Both Rainbow 215 and City National submitted respective appraisals of valuation as to the Property. At the confirmation hearing, the court heard testimony from both sets of appraisers. Both appraisers identified the same three approaches to real property valuation analysis: (i) the cost approach; (ii) the sales comparison approach; and (iii) the income capitalization approach. Unsurprisingly, each appraiser reached differing opinions of value as to the Property.

i. PGP Appraisal

Rainbow 215 retained First Service PGP Valuation ("PGP"), a national real estate appraisal firm, to conduct its valuation. The appraisal was conducted by Lance Dore and Jonathan Fletcher, real estate appraisers employed by PGP, both of who hold Member of Appraisal Institute ("MAI") designations. Dore is a certified appraiser, licensed in California, having 27 years of experience conducting appraisals;[16] Fletcher is a certified appraiser in six

[16] Dore testified that he obtained a temporary license from the state of Nevada for the purposes of conducting this valuation. June 21, 2010 Tr. at 15; Ex. 8 addenda.

states, including Nevada. The PGP appraisers submitted their first report on March 23, 2010,[17] and subsequently submitted an updated report on June 15, 2010,[18] accounting for an increase in cash flow due to newly signed tenant leases (collectively referred to hereafter as the "PGP Report").[19] After conducting their analysis, the PGP appraisers arrived at an "as is" value of $12,750,000.00 (as of June 8, 2010) and stabilized market value of $13,110,000.00 (as of March 1, 2011).[20]

To derive its stabilized market value, the PGP appraisers performed an analysis under each of the three valuation methods. At the confirmation hearing, Dore testified that in reconciling the values under each method, the PGP appraisers placed the most weight on the income approach because of "the number of tenants and the cash flow requirements."[21] Dore noted that in calculating value under this approach, the PGP appraisers took the gross value of market rents, and made appropriate deductions for vacancy, allowances, and expenses. The appraisers concluded that, accounting for vacant space at $2.25 per square foot/month, the average market rents were $2.68 per square foot/month for in-retail space on the Property.[22] Separately, the appraisers concluded a $1.75 per square foot/month for the office space. Based on this, the appraisers calculated an annual net operating income of $1,114,338.00, which they then capitalized. Using a 8.5% capitalization rate, the PGP appraisers concluded a complete and stabilized value of $13,109,857.000, which they rounded to $13,110,000.000.[23]

Although the PGP appraisers also undertook analysis under the cost approach and the

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[17] PGP Report, Ex. 7.

[18] PGP Report, Ex. 8.

[19] For the purposes of valuation, when referencing to the PGP Report, this Memorandum is referring to the latter of the two reports, dated June 15, 2010, which reflects the most current PGP appraisal.

[20] As of March 2011.

[21] June 21, 2010 Tr. at 24.

[22] PGP Report, Ex. 8 at 48.

[23] June 21, 2010 Tr. at 19-20.

sales comparison approach, the court finds that under the current recessionary market in Las Vegas, those calculations are not as helpful as the valuation under the income cost approach. This is because, as both Rainbow 215 and City National's experts testified, the real estate market is currently in a fragile state and this court is aware of the challenges presented with trying to find comparable sales in a true market of a willing buyer and seller. Notwithstanding this, the court also notes that the values derived under the three methods of valuation in the PGP Report are relatively close in number. For example, the difference between the highest value, derived under the cost approach ($13,330,000) and the lowest value, derived under the sales comparison approach ($13,030,000) is $300,000.[24] Because these values are relatively close in amount, the court is inclined to accept the PGP Report's value based off the income approach as its prospective complete and stabilized market value.

In terms of its "as is" value, the PGP appraisers used a discounted cash-flow analysis based on its projections of Rainbow 215's annual cash flow over a 10-year period. The appraisers estimated a 10% discount rate, based on a spread of 150 basis points above the capitalization rate used in the direct capitalization analysis. Thus, the appraisers discounted the present value of annual cash flow based on the 10% discount rate, and concluded that the "as is" value is $12,750,000.00.

ii. Snyder Appraisal

City National retained Snyder Valuation, a Nevada real estate appraisal firm, to conduct its valuation of the Property. The appraisal was conducted by Larry Snyder and Lori Nelson, real estate appraisers who are both certified with the state of Nevada and hold MAI designations. The Snyder appraisers completed their valuation and issued their report on December 2, 2009 (the "Snyder Report"). This valuation reflects an "as is" value of $7,300,000.00 (as of November 20, 2009) and stabilized market value of $9,060,000.00 (as of November 20, 2015). At the

[24] PGP Report, Ex. 8 at 64.

confirmation hearing, Nelson testified that the 2015 date was "based on the amount of time that it would take the property to absorb space to a stabilized rate based on current market indicators."[25]

Like the PGP appraisers, the Snyder appraisers identified the three common approaches to valuation analysis. However, the Snyder appraisers declined to conduct analysis under the cost approach because in the current market, "property owners are unable to receive an immediate return on their investment."[26] Therefore, they did not employ the cost approach because the "highest and best use as vacant for this particular property was to hold for future investment and development."[27]

Under the income approach, the Snyder Report reflected a sharp difference in market rent than the PGP Report. The Snyder Report determined that the market rents for the Property were above market, compared to similar commercial retail properties. Nelson testified that City National asked the Snyder appraisers to employ market rent if the appraisers determined that the tenants' rents received by the DIP were above market rate.[28] The Snyder appraisers decided that tenant rents were above market and concluded that the appropriate *blended* market rate was $2 per square foot/per month, with the exception of the Einstein Bros. Bagels space, which yields a higher market rate due to its physical location on the Property.[29] This blended market rent reflects the combination of both the retail and office market rent. Taking in potential gross revenue, and subtracting vacancy rates and expenses, the Snyder appraisers determined a net operating income of $815,721 on an annual basis.[30] The Snyder appraisers then performed direct

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[25] June 21, 2010 Tr. at 220.

[26] *Id.*

[27] *Id.* at 201.

[28] *Id.* at 217.

[29] Einstein Bros. Bagels occupies an "end-cap" position in one of the buildings on the Property, which according to the Snyder Report, has high visibility and merits the higher market rent not attributable to the remaining tenants on the Property. Snyder Report, Ex. B at 120.

[30] This is $298,617 less than the PGP appraisers determined in net operating income.

capitalization analysis on this income amount, employing a 9% capitalization rate. Based on this, the Snyder appraisers calculated a stabilized market value of $9,063,567, which they rounded to $9,060,000.00.

Under the sales comparison approach, the Snyder appraisers compared five in-line retail properties. Like the PGP appraisers, the Snyder appraisers acknowledged the difficulty in finding a recent arm's length sales transaction in Las Vegas involving the same type and size of improved real property. Thus, only one of the five properties used by the appraisers was actually comparable to the Property in terms of size. The remaining four properties used by the Snyder appraisers ranged from 4,840 to 7,985 square feet of rentable space. Additionally, the single property comparable in size to the Property was a sales listing and thereby, had not been sold yet. Because of this, the Snyder appraisers averaged the value of the comparable sales or listing, and accounting for adjustments, determined that the value for the Property under the comparable sales approach was $9,451,575, or $9,450,000 rounded. Nonetheless, the Snyder appraisers determined that the value under the income approach was stronger; this is because their discussions with Las Vegas brokers and market participants indicated that in-line retail investments such as the Property were considered risky in the current Las Vegas market and therefore, there is little to no buyer demand.[31]

In terms of "as is" value, the Snyder appraisers examined comparable properties for absorption rates, thus calculating the loss of revenue over a hypothetical stabilization period. The Snyder appraisers also engaged in a discounted cash flow analysis on a 10-year basis. They discounted the present value of annual cash flow pursuant to a 11% discount rate, and concluded that the "as is" value is $7,296,000, which they rounded to $7,030,000.

iii. Determination of Value

In comparing the two appraisal reports and the respective methods of calculating value,

[31] Snyder Report, Ex. B at 134.

the court finds that the PGP Report better reflects the true value of Rainbow 215's market rents, and therefore, the value of the Property. This finding is strengthened by the fact that the PGP Report utilized data that was both more complete and recent than the data used in the Snyder Report.[32] The Snyder Report based its value on data comprised of two rent rolls[33] and a list of rents paid as of October 26, 2009.[34] In the court's opinion, this source of data was insufficient and provides a limited and skewed snapshot of Rainbow 215's earning capacity. For example, in lieu of providing funding to tenants for tenant improvements, in some instances Rainbow 215 provided concessions to its tenants such as months of "free rent." Therefore, Snyder's analysis of the value under the income approach, which may reflect a "free month" with respect to tenant concessions, would accordingly result in skewed results and thereby, a skewed value. Additionally, calculating value based on a very small sampling of data where more data was available is troubling, especially in the context of this DIP, who is generating regular monthly income. The Snyder appraisal also concludes a value based on blended rental rates for both in-line retail and office spaces; that is, it calculated the rental rates combining both types of leasing options despite the fact that the office spaces comprise approximately ten percent[35] of the commercial retail center. As noted in Dore's testimony, this analysis leads to additional skewing

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[32] Belynda Newman, an executive from City National, conducted further analysis on the actual rents received by Rainbow 215's tenants. Newman testified that she conducted an effective rent analysis to evaluate the leases on an equal basis, taking into account the rent as stated on the lease and subtracting "free rent" and tenant improvement concessions. June 21, 2010 Tr. at 141-422. Based on her analysis, Newman derived an "effective rent" of $1.92 per square foot on a month. *Id*.

While the court appreciates Newman's calculation, it finds that this analysis was constructed more so in the context of the underwriting process. Therefore, the court does not give weight to this additional analysis in terms of the value of the Property.

[33] March and September 2009.

[34] Snyder Report, Ex. B at 10. The appraisers also considered a copy of a tenant lease that it noted was "not included on the rent roll but [was] in place at the time of [the appraisers'] exterior inspection."

[35] June 21, 2010 Tr. at 108.

of the true value of Rainbow 215's rental rates and accordingly, the value of the Property.[36]

In contrast to the Snyder appraisal, the PGP analysis is based on more complete data, thereby reflecting a more accurate calculation of value. The PGP appraisers also provided the court an updated analysis within the same month of the confirmation hearing, thus taking into account the more recently signed tenant leases in its determination of value. Moreover, the Snyder Report concluded that the Property was not yet stabilized since it was not fully occupied or constructed, and did not possess an anchor tenant. The report further found that in the current market, it would be incredibly difficult for Rainbow 215 to obtain new tenants, particularly at rent rates above $2 per square foot/month.[37] However, these findings are contradicted by Rainbow 215's performance since filing for bankruptcy. Since filing in July 2009, Rainbow 215 has signed new leases with tenants and increased the percentage of occupancy to nearly 80% as of June 2010. Although Rainbow 215 does not have an anchor tenant, it is physically situated across the street from Arroyo Crossings, a large shopping retail center in the Las Vegas valley with several anchor retail stores. It is reasonable for this court to infer that the Property obtains some derivative benefits from its location, both because it is situated across the street of one of the busiest commercial retail centers in the Las Vegas valley and also because it is located in a prime location right off the Rainbow Boulevard exit at Clark County Route 215. In fact, both sets of appraisers agree that Rainbow 215's location is a strong asset.[38]

Based on the foregoing, the court adopts the values as established by the PGP Report for

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[36] *Id.* at 28-29.

[37] On a side note, the court observes that it does not help the bank's case for asserting that its value of the Property is superior when it unnecessarily embarrasses the DIP during cross-examination of one of its tenant's testimony by asking a question to which the answer has no bearing on the issue of valuation. See Nydam Test. at 75-76, ¶ 24-25; 1-3.

[38] This is further supported by the testimony of Rainbow 215's tenants. See June 21, 2010 Tr. at 71 and 83.

the purposes of confirmation.[39] Under this basis, City National's claim against Rainbow 215 is fully secured by the Property.

b. Fair and Equitable

Because City National is a fully secured creditor, the Plan must, at a minimum, provide for at least one of the following three alternatives to the bank:

> (i)
>
> > (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
> >
> > (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A)(i)-(iii); *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d at 653 (determining that Section 1129(b)(2) requires "that a fair and equitable plan provide one of three alternatives" delineated above to a secured dissenting and impaired creditor).[40]

Here, Rainbow 215 intends to pay City National a stream of interest payments and allow it to retain its lien. Accordingly, the court analyzes this treatment under Section 1129(b)(2)(A)(i). Under this construct, the court examines the appropriate interest rate to be paid to the bank under the Plan, and whether such interest rate will provide City National the present

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[39] The court notes that it could determine its own value based on the appraisals provided by the PGP and Snyder Reports; however, it finds that the factual assumptions underlying the PGP Report are within a range of reasonableness and therefore, the value of opinion provided therein is valid and appropriate.

[40] Although *In re Ambanc La Mesa Ltd. P'ship* instructs courts that a proposed re-organization plan must meet one of the delineated options in 11 U.S.C. § 1129(b)(2)(A) as to secured creditors, *see also East West Bank v. Ravello Landing, LLC*, 2010 WL 3613882, *10 (D. Nev. 2010), it is this court's position that this list is not exhaustive in terms of satisfying the fair and equitable requirement; this is because of the qualifying word "includes" in 11 U.S.C. § 1129(b)(2)(A). *See* 11 U.S.C. § 102(3) (providing that the term "includes" is "not limiting").

value of its fully secured claim. Determining this interest rate is essential to the debtor's satisfaction, at a minimum, of the first option under Section 1129(b)(2)(A); this is because such interest rate essentially provides the equivalence of present value, or the value of money to be received by the creditor in the future, as contemplated by the Code in Section 1129(b). *See* 7 COLLIER, *supra* at ¶ 1129.05[2][b]-[c] (stating that "when [an] interest rate on the promise to pay equals the discount rate, a promise to pay, or note, has a present value equal to its face amount"); H.R. REP. NO. 595, 95TH CONG., 1ST SESS. 414 (1977) ("if the interest rate paid is equivalent to the discount rate used, the present value and face future value will be identical."); *see also In re North Valley Mall, LLC*, 432 B.R. 825, 830 (Bankr. C.D. Cal. 2010) ("[r]estated in basic terms, present value is the mirror image of interest rate ....") (internal quotation omitted). Therefore, an appropriate interest rate on deferred cash payments provides a dissenting and impaired creditor the present value of its claim.

i. Interest Rate

Although courts have used a variety of methods to deduce the appropriate interest rate, the Supreme Court provided guidance on the issue in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In that case, the court examined the issue of an appropriate interest rate on a secured creditor's loan under cram down in a chapter 13 case. In doing so, the court acknowledged that the Code provides little to no guidance on the issue of determining an appropriate interest rate. *Id.* at 473. After reviewing four different types of methods for determining this rate utilized by other courts, the *Till* court approved the formula rate (or prime-plus) approach as the method that "best comports with the purposes of the Bankruptcy Code" when determining an appropriate interest rate. *Id.* at 479-80. Under this approach, the bankruptcy court takes the prime rate and adjusts accordingly for risk factors such as the "the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." *Id.* at 479. Although the *Till* court expressly declined to address the proper risk adjustment in the specific case before it,

it observed that bankruptcy courts generally employ a 1% to 3% adjustment for risk factors, noting that "the court [should] select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan." *Id.* at 480. That is, the bankruptcy court is advised against setting the interest rate at an "eye-popping" rate. *Id.* at 480-81. If such rate is required, then the court should opt against confirming the plan. *Id.*

Although *Till* involved a chapter 13 case, bankruptcy courts generally rely on the *Till* court's reasoning to support a formula rate approach in Chapter 11 confirmation cases. *See*, *e.g.*, *East West Bank v. Ravello Landing, LLC*, 2010 WL 3613882, at *8 (D. Nev. Sept. 07, 2010); *In re Caviata Attached Homes, LLC*, 2010 WL 4853305, at *3 (Bankr. D. Nev. Apr. 12, 2010); *In re Linda Vista Cinemas, LLC*, --- B.R. ----, 2010 WL 4882773, at *21-23 (Bankr. D. Ariz. 2010); *In re Seasons Partners, LLC*, 439 B.R. 505, 519-20 (Bankr. D. Ariz. 2010); *In re North Valley Mall, LLC*, 432 B.R. at 831-32; *In re Bashas' Inc.*, 437 B.R. 874, 919 (Bankr. D. Ariz. 2010); *In re Hand*, 2009 WL 1306919, at *16 (Bankr. D. Mont. May 05, 2009); *In re Mendoza*, 2010 WL 1610120, at *2 (Bankr. N.D. Cal. Apr. 20, 2010); *In re AHCB I, LLC*, 2009 WL 755280, at *2 (Bankr. N.D. Cal. Feb. 26, 2009).

Courts also utilize a blended rate method, based on the formula rate approach, to determine an appropriate interest rate on a deferred payment obligation under cram down. *In re North Valley Mall, LLC*, 432 B.R. 825, 831-32 (Bankr. C.D. Cal. 2010) (citing to *Pacific First Bank v. Boulders on the River, Inc.* (*In re Boulders on the River, Inc.*), 164 B.R. 99, 105 (B.A.P. 9th Cir. 1994) (citing to *In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990); *In re El Camino Real*, 818 F.2d 1503, 1508 (9th Cir. 1987))).

In *North Valley Mall*, a chapter 11 case involving a large commercial retail center, the bankruptcy court determined that applying the formula rate approach was suitable to find an interest rate "that can be said to approximately compensate for the level of risk proposed under the plan." 432 B.R. at 831. In addition, the court determined that as to the loan there, that is, a

real estate loan on a large commercial real estate center, the blended rate approach was the best way to determine the market interest rate. *Id.* at 832. Under this approach, the bankruptcy court determines the interest rate by first splitting the principal amount of the loan into at least two tranches.[41] The court roughly applies the prime interest rate to the first tranche, adding points as necessary to address relevant risk factors. The percentage of the loan assigned to the first tranche is calculated pursuant to an appropriate market rate loan to value ratio. The balance of the loan is then assigned to a second tranche at a higher interest rate that accommodates a higher loan to value ratio. Once the interest rates for each tranche are determined, the amounts are "blended" to arrive at a final interest rate. *See id.* (citing *Boulders on the Rock*, 164 B.R. at 106, n. 5).

Both Rainbow 215 and City National presented expert opinions as to the appropriate interest rate on Rainbow 215's payment of the Construction Loan. Rainbow 215 retained Kenneth Funsten, principal of FamCo Advisory Services, to provide an analysis of this interest rate. During the hearing, Funsten testified that he reviewed both the PGP and Snyder Reports as well as Rainbow 215's rent rolls and the proposed Plan. He determined that Rainbow 215 was generating enough income to pay adequate interest to City National, and that there was a sufficient debt service coverage ratio.[42] Because the two appraisals varied so much, Funsten attempted to find a middle ground and consequently, valued the Property at $11,355,000, an approximate split between the PGP and Snyder appraisals, which he felt was a conservative amount.[43] In doing so, Funsten acknowledged that this value could possibly increase if both PGP and Snyder updated their appraisals with more recent data, but determined that he, nonetheless, felt comfortable adopting the more conservative mid-point range.

Under his analysis, Funsten determined that currently, there is no efficient market rate for

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[41] The loan at issue in *North Valley Center* was actually split into three levels: the first tranche, a second mezzanine tranche and the remainder of the loan into the third tranche. 432 B.R. at 832.

[42] Funsten Report, Ex. 4 at 15.

[43] Funsten's value is $1,755,000 lower than the PGP valuation, but $2,295,000 higher than the Snyder valuation.

similar loans.[44] Therefore, he employed the blended rate approach in calculating the appropriate interest rate. Under this approach, Funsten bifurcated the principal amount of the Construction Loan into two tranches:

	Loan to Value Ratio[45]	Proposed Interest Rate
Tranche One	65%	3.25%
Tranche Two	35%	9.75%
"Blended" Interest Rate	4.79%	

Using *Till* as a starting basis, Funsten applied the current prime rate (3.25%) to the first tranche. He then determined a 9.75% interest rate for the second tranche, pursuant to the 10% interest rate on the consensual Vestin Loan. Funsten testified that it would be inappropriate and financially impractical to assign a higher interest rate to the second tranche of the Construction Loan than the interest rate on the Vestin Loan, a second trustee. Under this construct, the 9.75% interest rate for the second tranche reflects an interest rate that is three times the amount of the prime rate. Pursuant to the blended rate approach, Funsten determined a "blended" interest rate of 4.79%.

City National retained John Moran, principal of Moran Financial Services, LLC, to provide an analysis of the appropriate interest rate. In his declaration and testimony, Moran stated that he disagreed with both the PGP Report opinion of value and Funsten's determination

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[44] An efficient market rate is something the *Till* court briefly touched upon in footnote 14 of its opinion. In that footnote, the court acknowledged the existence of a market for cram down financing. 541 U.S. at 477. Because of this, the court observed that "when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Id.* An evolving approach under case law suggests that courts first look at whether there is an efficient market rate of interest and if it determines none exists, then application of the formula rate approach is appropriate as expressed in *Till*. *See In re Linda Vista Cinemas, LLC*, 2010 WL 4882773, *21 (citing *In re American Homepatient, Inc.*, 420 F.3d 559 (6th Cir. 2005); *Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1 (D. Conn. 2006)); *In re Am. Trailer and Storage, Inc.*, 419 B.R. 412, 438 (Bankr. W.D. Mo. 2009) (adopting the evolving approach under *Till* to interest rate determination); *cf. In re Am. Home Mortg. Holdings, Inc.*, --- F.3d ----, 2011 WL 522945, at *9 (3d Cir. Feb. 16, 2011) (concurring with the bankruptcy court's reasoning that when the market is dysfunctional, and consequently, there is no market rate available to properly determine the value of an asset, the court may rely on alternative methods to determine value).

[45] Funsten determined this ratio for the Construction Loan based on his understanding of a "good" loan to value ratio applied to the debt service coverage ratio in Rainbow 215's case. Funsten Report, Ex. at 17-18; June 21, 2010 Tr. at 67-68.

of the appropriate interest rate on the Construction Loan. Instead, Moran relied on the Snyder "as is" value in analyzing his opinion as to the interest rate. Moran opined that because the property was not stabilized, Rainbow 215's sole option would likely be re-financing the Construction Loan through hard money financing. Under this type of the loan, Moran predicted that Rainbow 215 would likely only be able to borrow 50% of the value of the Property, at a minimum interest rate of 15%; the remaining 50% of the loan would be financed at a minimum interest rate of 20%.[46]

Moran also rejected Funsten's blended rate approach utilizing two tranches, asserting that the valuation Funsten relied on was incorrect and thus, the loan to value ratio was incorrect. However, Moran provided that even if the court adopted a blended rate approach, the more appropriate interest rates would be 7.5% for the first tranche and 20% for the second tranche. The 7.5% interest rate reflected a minimum floor rate that Moran opined lenders typically assign to this type of loan, based on a prime rate of 3.25% plus a 3% spread. The spread was based on market conditions and risk factors such as the age and occupancy of the Property, the lack of an anchor tenant and the local Las Vegas market. For the second tranche, Moran proposed a minimum 20% interest rate, which reflected financing through a hard money loan, which again Moran asserted would likely be Rainbow 215's sole option when re-financing. Although Funsten testified that it would be inappropriate to impose a higher interest rate on the second tranche than on the Vestin Loan, Moran testified that he believed the 10% interest rate on the Vestin Loan to be an "accommodation," and that the interest rate on the Vestin Loan should have been closer to 20% plus fees.[47] In spite of this, Moran opined that the interest rate on the Vestin

[46] Moran Declaration, Dkt. no. 88 at 3.

[47] Although there was plenty of speculation as to the true motive behind the Vestin Loan's 10% interest rate, the court heard no concrete evidence as to whether there was in fact some nefarious reason for this. Therefore, the court dismisses any argument that the interest rate "should" be higher, and adopts the rate as stated in the loan documents.

Loan was in actuality closer to 14%.[48]

After reviewing both experts' approaches, conclusions and testimony as to the interest rate going forward on the Construction Loan, the court concludes that is more persuaded by Funsten's proposed interest rate because his analysis and conclusion better comport with the *Till* court's reasoning as to appropriate interest rate. During the confirmation hearing, the court heard testimony about the current Las Vegas market, or lack thereof; both experts agreed that in the past year, there has been a paucity of loans in the same range as the Construction Loan or involving the same type and size as the Property. Therefore, as inferred by the *Till* court, when there is a lack of an efficient market to obtain a market rate, the appropriate proxy for determining the interest rate is calculated under the formula approach. City National argues that the 4% interest rate proposed by Rainbow 215, or alternatively, the 4.79% interest rate proposed by Funsten, is too low and does not adequately provide City National the present value of the Construction Loan. However, the bank neglects to take into account that the current prime rate is not riskless – it includes some built-in risk.[49]

Moreover, although Funsten's proposed first tranche does not add additional points for risk, the blended interest rate of 4.79% is above the prime rate plus some points, and thus, accounts for additional risk on top of the built-in risk included in the prime rate. Funsten's proposed rate reflects Rainbow 215's cash generating capacity; on the other hand, Moran's proposed interest rate is fundamentally flawed because it is based on Snyder's "as is" value. As discussed above, this value is flawed because it is based on limited data that this court finds is not accurate or reflective of Rainbow 215's true cash flow and income. Based on this reasoning, the court adopts Funsten's conclusions as to the appropriate interest rate on the Construction Loan, that is, an annual fixed rate of 4.79%, until December 31, 2015.

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[48] Moran calculated the interest rate on the Vestin Loan to be closer to 14%, which he concluded by taking the loan's 10% interest rate and adding the 1% quarterly fee of $750,000.

[49] June 21, 2010 Tr. at 53.

Circling back to the issue of fair and equitable treatment under cram down, as it stands, City National will retain its lien as first trustee against the Property. This treatment satisfies the first prong of Section 1129(b)(2)(A)(i). Accordingly, the next inquiry is whether Rainbow 215's treatment of City National under the Plan will provide the bank with deferred cash payments totaling the allowed present value of its claim, pursuant to Section 1129(b)(2)(A)(i)(II). The court finds that because the rate proposed is as close to a market rate as can be fixed, it does. As previously stated, when a note bears a market rate of interest, its present value is equivalent to the face amount of the note. *See* 7 COLLIER, *supra* at ¶ 1129.05[2][b]-[c]; H.R. REP. NO. 595.

As briefly noted above, Rainbow 215 proposed in its Plan a 4% interest rate on its monthly interest payments to City National. Funsten projected that even at this 4% interest rate, the bank will ultimately receive sufficient value for its claim against Rainbow 215. It should be noted that this projection is based on Funsten's calculation of the interest rate based on the mid-point value of $11,355,000. As adjusted for the higher PGP value that the court has adopted, the court finds that the 4.79% annual interest rate and monthly interest payments will provide City National with the present value of its claim. It is the court's belief that Rainbow 215's current occupancy and rents received have begun to stabilize. This, coupled with the experience and management of the property, mitigate the risks the bank asserts it is exposed to in confirming the Plan. Therefore, the court finds that Rainbow 215 has satisfied Section 1129(b)(2)(A)(i). As such, further analysis under the remaining alternatives under Section 1129(b)(2)(A) is unnecessary.

City National also argues that the Plan is not fair and equitable because it extends the loan payment for an additional six years.[50] However, deferring full payment of a loan through a balloon payment is not the antithesis of fair and equitable. A debtor's re-organization plan may call for a balloon payment to a secured creditor after a deferred period of time, assuming the

[50] At the entry of this memorandum decision, the loan will now come due in five years, not six.

debtor meets the requisite elements of confirmation. *See generally* 11 U.S.C. § 1123; *In re Bashas' Inc.*, 437 B.R. at 915-18; *In re North Valley Mall, LLC*, 432 B.R. at 838. By its very definition, nonconsenual cram down against a secured creditor invokes expected objection from the creditor. But the court finds that City National's status as first trustee against the Property and being fully secured provide further basis for satisfaction of the fair and equitable requirement under cram down. City National's position as first lien holder is not being impaired or changed by the Plan. Nor is Rainbow seeking to pay the bank less than the principal amount it owes on the Construction Loan. Particularly in this economic climate, this longer period of time gives Rainbow 215 a fair and reasonable opportunity to re-organize its debts and successfully emerge from bankruptcy. This in turn comports with the purposes of reorganization under the Bankruptcy Code.

c. Unfair Discrimination

To further survive cramdown under Section 1129(b), the debtor's proposed plan must also refrain from discriminating unfairly among the impaired and dissenting classes. Although the Code does not provide an express definition of unfair discrimination, the Code also does not prohibit discrimination among classes of creditors. *See In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 863 (Bankr. S.D. Tex. 2001) (noting that Section "1129(b) obviously permits some discrimination, since it only prohibits *unfair* discrimination.") (emphasis in original).

There are various types of treatment which effectuate discrimination among classes in a cramdown situation. *See generally* 7 COLLIER, *supra* at ¶ 1129.03[3][b]. However, treatment that does not amount to unfair discrimination includes paying an unsecured creditor before a secured creditor, or disparate treatment between secured creditors under a reorganization plan.[51] This is because "[u]nfair discrimination works only among claimants of equal nonbankruptcy priority." *Id.* at ¶ 1129.03[3][b][ix]. Accordingly, a creditor objecting on the basis of unfair

[51] Instead, this type of objection "can and [is] raised under the 'fair and equitable' requirement" of cramdown. 7 COLLIER, *supra* at ¶ 1129.03[3][b][ix].

discrimination may only object with respect to those creditors possessing the same level of priority outside of bankruptcy.

In Rainbow 215's case, there are no two classes that have equal priority outside the context of bankruptcy. Moreover, City National has not objected to confirmation on the basis of unfair discrimination. Therefore, this element is inapplicable to Rainbow 215, and analysis as to whether the Plan discriminates unfairly under cramdown is unnecessary.

4. Feasibility, Re-visited – 11 U.S.C. § 1129(a)(11)

Returning to the issue of feasibility, Section 1129(a)(11) addresses the proposed plan's "feasibility" requirement for confirmation. Under this subsection, the court must determine that its confirmation of the proposed plan will not subsequently result in liquidation or further reorganization at a later point in time, unless such liquidation or reorganization is proposed in the plan. The purpose of this requirement is to "prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Pizza of Hawaii, Inc. v. Shakey's, Inc.* (*Matter of Pizza of Hawaii, Inc.*), 761 F.2d 1374, 1382 (9th Cir. 1985) (citing 5 COLLIER ON BANKRUPTCY ¶ 1129.02[11] at 1129-34 (15th ed. 1984)). "Feasibility has been defined as whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Jorgensen v. Federal Land Bank of Spokane* (*In re Jorgensen*), 66 B.R. 104, 108 (B.A.P. 9th Cir. 1986) (citing *Clarkson v. Cooke Sales and Service Co.* (*In re Clarkson*), 767 F.2d 417 (8th Cir. 1985)).

Generally speaking, the debtor's threshold to demonstrate the feasibility of a plan is relatively low. *Computer Task Group, Inc. v. Brotby* (*In re Brotby*), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003). That is, the "debtor need only show a reasonable probability of success." *Id.* (citing *Acequia, Inc. v. Clinton* (*In re Acequia, Inc.*), 787 F.2d 1352, 1364 (9th Cir. 1986)). There is no statutory requirement in the Code that mandates the debtor to prove that the plan will be successful. *Id.* (citing *In re WCI Cable, Inc.*, 282 B.R. 457, 486 (Bankr. D. Or. 2002)).

Instead, the debtor only needs to provide adequate evidence to the court that there is a reasonable probability of successful reorganization under proposed plan. *Id.* In determining whether a plan is feasible, courts consider a variety of factors, including:

> (1) the adequacy of the debtor's capital structure;
>
> (2) the earning power of its business;
>
> (3) economic conditions;
>
> (4) the ability of the debtor's management;
>
> (5) the probability of the continuation of the same management; and
>
> (6) any related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

In re Trans Max Technologies, Inc., 349 B.R. at 92; *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756, 763 (Bankr. D. Nev. 1998).

Accordingly, the relevant inquiry under the feasibility requirement is whether Rainbow 215 has "sufficiently established its postconfirmation viability, and its ability to meet its future obligations." *In re Trans Max Technologies, Inc.*, 349 B.R. at 92. Rainbow 215 has ongoing business operations, which provide it sufficient cash flow and income to meet its obligations to creditors as proposed under the Plan. *See id.* (stating that the debtor must "show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan.") (citing *S & P, Inc. v. Pfeifer,* 189 B.R. 173, 187 (N.D. Ind. 1995)). This is not a situation involving a debtor that solely owns an undeveloped parcel of real property with no assets other than the property itself and with no meaningful avenue of generating income to meet its obligations. Nor is this a situation where the plan results in projected income shortfalls that will preclude the DIP from meeting its requisite payments to creditors. Rainbow 215 continues to increase tenant occupancy, as evidenced during the pendency of this bankruptcy itself. This lends tremendous support to the projections under the Plan.

Under the Plan, Rainbow 215 will make monthly interest payments of $38,583.11 under a

4.79% interest rate to City National. Pursuant to his analysis, Funsten determined a monthly net operating income of $76,979 after expenses as of March 2010, accounting for Rainbow 215's tenants that began paying rent in March and June 2010.[52] Under this calculation, Rainbow 215's proposed payments to the bank are feasible and will compensate the bank for its risks as to the Construction Loan. The court has taken judicial notice of the DIP's Monthly Operating Reports for the past few months, and observes that Rainbow 215's generated income as detailed in the Monthly Operating Reports is in line with Funsten's projections.[53]

In addition, Rainbow 215 has consistently made monthly interest payments to City National during the pendency of this bankruptcy, which further evidences its ability to continue doing so under the Plan. Although the bank argues that the Plan scheme places all the risk on the bank while the DIP reaps all the benefits, the bank fails to remember that Rainbow 215 will be liable and responsible for the principal of the Construction Loan at the end of December 2015. Rainbow 215's priority in the next five years will be to profitably manage the Property so that it may emerge successfully from bankruptcy. In this respect, the monthly interest payments on fully secured real property shift the burden from City National so that it will not bear the entire risk of non-payment post-confirmation. Because Rainbow 215 has been able to make monthly interest payments to City National for approximately the last year and a half, the court is satisfied that it will be able to maintain operations and pay its creditors over the next five years while it attempts to re-finance the Construction Loan under improved market conditions.

Moreover, as discussed under the context of cramdown, Rainbow 215's proposed re-financing of the Construction Loan at the end of 2015 does not in and of itself render the plan unfeasible. *See In re Bashas' Inc.*, 437 B.R. at 915-18 (court determined that the debtor's plan was feasible where it called for the re-financing of a $155 million loan three years from the

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[52] Funsten Report, Ex. 4 at 9-10.

[53] Dkt. no. 313.

plan's effective date); *In re North Valley Mall, LLC*, 432 B.R. at 838 (court determined that the debtor's plan was feasible where it involved a projected refinance of the loan and balloon payment at the end of seven years from the plan's effective date). Although the court acknowledges that current market conditions are less than desirable, it finds that the five-year period proposed under the Plan is a reasonable and sufficient period of time for it to further establish a consistent history of tenancy and market rents, which in turn will facilitate re-financing Rainbow 215's Construction Loan.

Last, the court notes that Platinum Realty will remain as manager of Rainbow 215. Based on the evidence and testimony presented, Platinum Realty has successfully managed Rainbow 215 and increased its tenant occupancy, thereby increasing its cash profits and income despite the severe economic downturn in Las Vegas. Platinum Realty also has experience managing other properties in the Las Vegas valley, so the court is satisfied that it will continue to manage Rainbow 215 in an experienced and competent manner necessary to propel Rainbow 215 forward post-confirmation. Given the relatively low threshold in demonstrating feasibility and that a guarantee of success under the Plan is not required, the court finds that Rainbow 215 has met its burden in demonstrating feasibility of the Plan. *See In re North Valley Mall, LLC*, 432 B.R. at 838 (observing that the "*possibility* of [plan] failure is not fatal" to confirmation) (emphasis in original)).

CONCLUSION

The court finds that Rainbow 215 has met by a preponderance of the evidence the applicable requirements for confirmation under Section 1129(a), with the exception of the eighth requirement, and has met the applicable requirements for nonconsensual cramdown under Section 1129(b). Based on the foregoing, the court will confirm Rainbow 215's plan for reorganization. This memorandum constitutes the court's findings of fact and conclusions of law under FED. R. BANKR. P. 7052.

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