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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

INVESTMENT COMPANY OF THE SOUTHWEST, INC.,

Debtor. NO. 11-02-17878 SA

MEMORANDUM OPINION SUPPORTING CONFIRMATION OF CHAPTER 11 PLAN

This matter came before the Court on February 5, March 23, June 2 and June 25, 2004, on 1) the Objection by Creditor Compass Bank (doc 225) to Confirmation of Debtor's modified Second Amended Chapter 11 Plan and 2) the Objection by Creditor Bank of America (doc 226) to Confirmation of Modification to and Restatement of Second Amended Chapter 11 Plan. The debtor in possession ("Debtor" or "ICS") appeared through its counsel Daniel J. Behles. Creditor Compass Bank ("Compass" or "Bank") appeared through its attorney Douglas M. Tisdale. Creditor Bank of America appeared through its attorney Sharon Hankla, represented by Steve Sessions. Creditor Four Hills Associates appeared through its attorney Robert H. Jacobvitz in support of confirmation.

Compass Bank objects to the confirmation of the Modified and Restated Second Amended Chapter 11 Plan that materially consists of two documents (docs 214 and 228) titled respectively Modification and Restatement of Second Amended Chapter 11 Plan and Modification of Chapter 11 Plan to Address

Compass Bank Objections. The specific issue raised is whether the Plan complies with the provisions set forth in 11 U.S.C. §1129(b)(1) and (b)(2)(A).[1] The Court conducted a hearing pursuant to 11 U.S.C. §1128(a) on June 2, 2004 and heard closing arguments on June 25, 2004.

Having considered the arguments of counsel, and having reviewed the testimony and exhibits and the file in this case, including previous rulings,[2] and being otherwise informed and advised, the Court will confirm the Modified and Restated Second Amended Chapter 11 Plan ("Plan"). This is a core proceeding, 28 U.S.C. § 157(b)(L), and this opinion constitutes findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

FACTS

Investment Company of the Southwest, Inc. ("ICS") is a corporation formed for the purpose of purchasing, developing, and

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[1] Throughout the confirmation hearing, the Bank was careful to reiterate that it was incorporating into its objections to confirmation all the previous objections it had raised throughout the course of the chapter 11 case to date. The Court has reviewed those objections and finds that the various objections are either moot or are sufficiently (re)addressed by implication in this decision such that they need not be specifically addressed, except as otherwise noted in this decision.

[2] The Court made oral Findings of Fact and Conclusions of Law on April 6, 2004 on Debtor's 2nd Amended Plan (Minutes, doc 209). The factual findings from that hearing are reincorporated here as additional findings.

selling real property. While several other entities have dealt with ICS, the Bank holds the majority of the liens in the real property. Before the commencement of this case, the Bank had pursued its state court rights of foreclosure against ICS and obtained a judgment declaring the principal owed at $2,003,331.21. Most but not all of the Bank's notes were included in the foreclosure action, so that most of the notes had been reduced to judgment and all that remained was to hold a series of foreclosure sales in execution of the judgment. As to the remaining notes, the Bank would need to litigate those to judgment. The Bank recorded its judgment and obtained liens on other properties through transcripts of judgment recorded in some but not all the New Mexico counties in which the Debtor owned real property. The petition then stayed any further collection activities. Bank's claim now is approximately $2.2 million, plus unliquidated attorney fees.

The Plan provides that the Bank will be paid in full over seven years. On or before each anniversary of the effective date, ICS must make a principal reduction payment equal to 1/7 or more of the original principal balance, together with any accrued but unpaid interest, costs and allowed attorney fees.[3] The Plan

[3] It is established in New Mexico that interest accrued or accruing is to be paid before the principal. Armijo v. Henry, 89 P. 305, 14 N.M. 181, 193 (N.M. 1907).

also provides that the Bank will be paid by the sale of properties and subsequent tender of release prices set forth in ¶ 3.2(D), although the paydown to the Bank must occur regardless of how quickly the properties are being sold. In the event of a default, the Bank is entitled to resume its foreclosure activities immediately.

CONCLUSIONS OF LAW

The main issue presented to the Court is whether the Plan is confirmable under 11 U.S.C. § 1129(b) despite the objections of Compass Bank and Bank of America.[4] This sub-section allows confirmation of a plan so long as it is "fair and equitable" as defined in one of three provisions set forth in 11 U.S.C.

[4] The provisions of 11 U.S.C. § 1129(a) other than subsection (a)(8) are met in the Plan pursuant to the Court's oral ruling of April 6, 2004 and for the most part will not be discussed further.

§1129(b)(2).[5] The Plan conforms with the provisions of 11 U.S.C. §1129 for the following reasons.

I.

A Chapter 11 plan is confirmable as "fair and equitable" despite objection with respect to secured claims when it provides for the realization of the "indubitable equivalent" of those claims. 11 U.S.C. §1129(B)(2)(A)(iii). As discussed in the

[5] Section 1129(b) provides in relevant part:

(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph 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.

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

(A) With respect to a class of secured claims, the plan provides–

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totalling (sic) 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;

...

; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

March 23, 2004 hearing, the Code's "indubitable equivalent" standard is derived from In re Murel Holding Corp., 75 F.2d 941, 942 (2nd Cir. 1935) and has been interpreted by the 10th Circuit in Travelers Insurance Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.) 779 F.2d 1456, 1460-61 (10th Cir. 1985). In both cases the courts conducted a fact-specific inquiry to determine the amount and terms of payment required to provide the "indubitable equivalent" of the payment to which the creditor would be entitled.

Pikes Peak recites only that secured claims must be paid in full over a reasonable time with an appropriate interest rate, id. at 1461, although the context of the case makes it clear that keeping the liens in place, with sufficient value in the collateral to ensure that the lien is fully covered, are also prerequisites. Id. Here, the Plan has the Bank retaining its liens on each piece of collateral until it is sold at or above specified release prices, or until the Bank has been paid in full. And the values of the unsold property on which the Bank retains its liens will easily be sufficient to fully collateralize those liens. See Part II below.

The Plan also conforms to the Pikes Peak standard by providing for the full payment of the secured claims. At a minimum Compass will be paid the entire amount of its claim over

seven years in equal annual principal installments, together with accrued interest and allowable attorney fees and costs.[6]

Finally, the Plan provides for an interest rate of 7.0%.[7] This rate is based on the recent Supreme Court decision in Till v. SCS Credit Corporation, 124 S.Ct. 1951 (2004). In a plurality opinion, that court determined that the appropriate interest rate for "cram down" loans in a Chapter 13 is the "formula approach" that looks to the national prime rate as the appropriate estimate of compensation for inflation, opportunity cost, and the risk of default for the average credit-worthy borrower. Then, the bankruptcy court is required to adjust that rate for the higher non-payment risk of a debtor in bankruptcy. Additionally, the Supreme Court conjectured that the generally approved adjustments of this type are between 1% and 3%.[8] Id. at 1962.

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[6] Plan ¶ 3.2(E).

[7] Plan ¶ 3.2(C).

[8] The Court is aware of Hardzog v. Federal Land Bank of Wichita (In re Hardzog), 901 F.2d 858 (10th Cir. 1990), which requires that the words "value, as of the effective date of the plan,..." be interpreted ordinarily as "the current market rate of interest used for similar loans in the region." Id. at 860. Hardzog, which dealt with an over-secured creditor, id. at 859 n.5, was a chapter 12 case, and thus a close cousin of a chapter 13 case (Till), but the case points out (as does Till, 124 S.Ct. at 1958 n.10) that the Code language at issue is identical with that in chapter 11. 901 F.2d at 859 nn. 4 and 6. The Tenth Circuit applied Hardzog to chapter 11 cramdown cases in Wade v. Bradford, 39 F.3d 1126 (10th Cir. 1994), approving an 8% market rate instead of the 10% contract rate. Id. at 1130.

Till arose out of a chapter 13 case, not a chapter 11 case, but the Supreme Court addressed the meaning of the phrase "value, as of the effective date of the plan", a phrase which appears repeatedly throughout the Code, especially in chapter 11, including § 1129(b)(2)(A)(i)(II). Id. at 1958 n.10. The Supreme Court found that there was no market for coerced chapter 13 loans (i.e., cramdown) but did cite to two web sites as evidence that there is such a market for chapter 11 cramdown financing. Id. at 1959 n.14.

In this case, the testimony of both parties was essentially that there was no market for this specific sort of loan. To begin with, there was no testimony from either side that any of the national debtor-in-possession financing entities would have any interest in this homegrown real estate sales/development company. The Debtor's testimony was presented by Peter Gineris, a loan officer at Charter Commercial Mortgage, whom the Court found to be a credible witness presenting at least marginally probative evidence. Boiled down to its essence, Mr. Gineris' testimony was that Charter would not make a seven year loan for this kind of situation but would make a five-year loan or a twenty-four month loan with a refinance after that, and that the rate would be 5.5% to 6.5% (based on a current prime rate of 4%).

It is true, as Compass points out,[9] that the Debtor failed to qualify Mr. Gineris as an expert.[10] However, Compass did not object to the witness' testimony as an expert, and appears to have explicitly conceded his expertise in commercial lending on income producing properties, although it did object to (but obtained no ruling on) his expertise on residential lending. The Court then started to observe that there had been no request to have Mr. Gineris treated as an expert, at which point Debtor's counsel interrupted the Court to question the witness about residential interest rates.[11] In summary, although Mr. Gineris was not formally tendered as an expert witness, the Bank did not object to his testimony, and thus the Court has taken into consideration all of Mr. Gineris' testimony.

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[9] Compass Bank's Brief in Opposition to Confirmation of Debtor's Second Amended Chapter 11 Plan (doc 200), at 22. The Debtor makes the same charge concerning the testimony of Mr. O'Mara. Debtor's Reply to Compass Bank's Brief in Opposition to Confirmation, at 11 (doc 201).

[10] It is ordinarily the Court's practice, at the conclusion of direct or redirect testimony of a witness presumably presented as an expert but not so tendered, to ask specifically whether counsel meant to tender the witness as an expert. The Court also routinely inquires whether counsel intended to tender exhibits which have been used during examination but not tendered. These practices help ensure that matters get decided on the merits rather than by inadvertence or error.

[11] Transcript of hearing held February 19, 2004, page 10 line 13 through page 11 line 6 (doc 213). The foregoing sequence of events illustrates one of the many reasons why interrupting a judge is generally not a good idea.

The Bank's representative Chris O'Mara was qualified as an expert. He testified that the Bank would not make a sixteen-year[12] loan, and in any event, if such a loan were available, it would be at a junk bond rate: 11% to 13%. Under questioning from his counsel, Mr. O'Mara went on to emphasize how unique this situation was, what with, in the Bank's view, a debtor representative leading a "Jaguar life style" who seeks refinancing not only of the real estate but also of his personal home, a stable of horses and a collection of cars. In effect Mr. O'Mara's testimony made it clear that the Supreme Court's suggestion in Till that there is a readily determinable market for debtor in possession financing is not applicable to this case. And the testimony of both the experts made it equally clear that there is no readily determinable current market rate of interest in the region because there are no closely similar loans being made. Thus Hardzog and Wade v. Bradford, 39 F.3d 1126, are also inapplicable.

For these reasons, the Court finds that relying on the "formula rate" as described in Till makes the most sense.[13]

[12] This was the effective term of the financing proposed in the Second Amended Plan, reduced in the (subsequently filed) Plan to seven years.

[13] However, given the testimony, the Court also finds that if Hardzog and Wade v. Bradford are applicable, they support the Plan's 7% interest rate.

Although it was a chapter 13 case, Till provides a rationale for its application equally in a chapter 11 case as in a chapter 13 case:

> "These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value." 124 S.Ct. at 1960.

It is worth noting that the Supreme Court stated in Till that "if the court could somehow be certain a debtor would complete his plan, the prime rate would be adequate to compensate any secured creditors forced to accept cram down loans." 124 S.Ct. at 1961 n.18. In this instance, given the considerable equity cushion and the immediate access to a foreclosure sale, Compass is fully protected whether the Plan completes or not, and a 7% interest rate is ample compensation to Compass for the use of its money and the essentially nonexistent risk of nonpayment.

The prime rate on June 25, 2004 was 4.00%.[14] Thus, the proposed interest rates on the claims of both Compass Bank and

[14] The Court has taken judicial notice of The Federal Reserve Board, Federal Reserve Statistical Release H.15 (Historical Data), available at http://www.federalreserve.gov/releases/h15/data/d/prime.txt (last visited Sept. 10, 2004). In addition, at the February 5, 2004 hearing, the Bank's counsel stipulated that Compass' prime rate was 4%.

Bank of America[15] fall within the limits set out in Till. Because the proposed plan provides for the full payment of those creditors' claims over a reasonable time with a reasonable interest rate and for those creditors to retain their liens, the banks are provided an indubitable equivalent of the secured claims that renders the Plan fair and equitable, and therefore, confirmable.

II.

There were several additional arguments opposing confirmation that need to be addressed. One objection was that the Plan is unfeasible. The operating reports disclose break-even cash flow and relatively few sales of property during the chapter 11 case. Based on the testimony and the appraisals (for example, exhibit E to the Third Amended Disclosure Statement (doc 134)), the Court finds that it is more likely than not that the estate can and will make the sales needed to make the required plan payments.

Compass Bank also objects that the release prices are such that the Bank's claim may be left undersecured over the course of

[15] Paragraph 3.4 of the Plan proposes a 6.25% interest rate for Bank of America's loan on the townhouse at 520 Sanchez. Given the very substantial equity cushion and the fact that the collateral is easily marketable residential real property, the proposed interest rate is probably high. So Bank of America's objection, that it ought to be paid 7%, is denied.

the Plan. The aggregate of the proposed release prices set forth in ¶ 3.2(D) of the Plan provides for payments that are approximately 25% more than the amount of the Bank's allowed claim. There is no requirement that the percentage represented by the release prices compared to the equities in the properties be the same for each property. What is important is that the aggregate sum offer adequate security, even if only a portion of the property (and perhaps only the most valuable property) has been sold when and if a default occurs.

Similarly, the raw value of the properties listed in ¶ 3.2(D) is at least 200% of the Bank's claim. The Court's previous oral confirmation ruling established values of some real estate collateral, as follows:

Woodland Hills	$3,300,000
Residence	250,000
Menaul office	400,000
Juan Tabo lot	100,000
Corona del Sol	195,000
Four Hills	2,500,000
Waters Edge	0
Total	$6,745,000

The Four Hills property is subject to a first mortgage to Four Hills Associates of approximately $1.4 million, which leaves available to pay the Bank's debt a net equity in the above listed

properties of about $5.35 million. However, there are other properties to which ICS has attached release prices which serve as additional protection for Bank's lien: 1) the properties subject to the Calcott lien, Edith at Industrial (value $200,000), 520 Sanchez ($75,000) and the Edgewood lots (8 at $15,000 each for a value of $120,000), for a total value $395,000 with the Calcott lien of $356,000 and equity of $39,000;[16] 2) Vail condo, value $25,000; 3) Hillcrest condo, value $40,000; 4) Indian Hill lots, (2 @ $5,000) $10,000 value; 5) 536 Sanchez NW, value $75,000 subject to Midland Mortgage lien of approximately $36,000 and equity of about $39,000; 6) 5430 6th Street NW, value $75,000 subject to Bank of America lien of approximately $23,000 and equity of about $52,000; 7) 525 Berry NW, value $75,000 subject to Bank of America lien of approximately $23,000 and equity of about $52,000; 8) the properties subject to the Swayden lien, (525 Berry NW, value $75,000) and the San Pedro Building (value $240,000), total value $315,000 with Swayden lien of

[16] The parties' closing exhibits agree that the release prices for these 3 properties are: Edith, $111,000; 520 Sanchez, $28,000; and Edgewood lots, 8 @ $9,500 or $76,000. However, the release prices fixed by the plan will govern. These additional properties serve to add additional security to the Bank's claim, which is already adequately secured.

$157,000, and equity of $158,000; and 9) the Bernalillo County "50% acres", value $157,000.[17]

The total equity in the real estate securing Bank's liens is over $6 million. The total of the release prices associated with the properties is approximately $3.1 million (compare closing exhibits, Debtor claims $3,109,344 versus Bank claims $3,146,424). Compare Pikes Peak, 779 F.2d at 1459 (at the end of the three-year negatively amortizing plan [the plan provided for no interim payments whatever], creditor would have a $2.9 million debt secured by collateral worth $3.5 million); Affiliated National Bank - Englewood v. TMA Associates, Ltd. (In re TMA Associates, Ltd.), 160 B.R. 172, 177 (D. Colo. 1993) (negatively amortizing plans are not per se inequitable).

The Plan also provides for the Bank's immediate use of the previous foreclosure action in the event of default. Notably in Pikes Peak, the Tenth Circuit found no error in a plan which provided that at the end of the three years, the creditor would be allowed to begin a foreclosure action if it had not been paid. Because the provisions of the ICS Plan augment the security of the Bank over and above the Pikes Peak standard, the Bank's position is sufficiently protected despite the ability of the

[17] This asset appears on the Debtor's schedules as an interest in a partnership called "Calcott-Tinley" which owns 12 acres in Bernalillo County, New Mexico and has a value of $156,816.

debtor in possession to "cherry pick" the most lucrative properties for the tender of release prices.[18]

Similarly, the absolute priority rule does not bar the confirmation of the plan. The idea of absolute priority is perhaps best stated by Collier that:

> ...a plan of reorganization may not allocate any property whatsoever to any junior class on account of their interests or claims in a debtor unless all senior classes consent, or unless such senior classes receive property equal in value to the full amount of their allowed claims or the debtor's reorganization value, whichever is less.

7 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 1129.04[4][a] (15th ed.). Clearly, the Plan allows (requires) the Bank to receive property equal in value to the full amount of its claims through the release price mechanism. The question becomes, then, whether the full amount of the claims must be paid chronologically *before* the junior classes in the plan or whether the mere satisfaction of the claim through the plan is sufficient even if it means unsecured creditors receive some or all of their payments prior to Compass receiving all its payments. In James Wilson Associates v. Metropolitan Life Insurance Company, 965 F.2d 160 (7th Cir. 1992), the court determined that the absolute

[18] The Bank is merely the lender and not the owner; it is entitled only to be paid in full, whereas it is the owner that is entitled the determine the order of sale of the properties.

priority rule was not violated when a plan allowed rent payments and attorneys fees and the security of a junior lien despite the mortgagee's secured interest. There was no violation when the secured claim was paid in full with interest through the plan regardless of the chronological sequence of payment. Here, the Bank is somewhat oversecured as discussed above and its payment through the plan does not violate the rule.

Perhaps more to the point, the absolute priority rule does not apply to the interests of secured creditors. 11 U.S.C. § 1129(b)(2)(B)(ii) codifies the absolute priority rule with respect to "a class of unsecured claims."[19] There is identical language in 11 U.S.C. §1129(b)(2)(C)(ii) regarding "a class of interests."[20] But in the section specifically addressing secured interests,[21] there is no such codification of the rule; this omission evidences Congressional intent to make the absolute priority rule not applicable to secured claims. See also Corestates Bank, N.A. v. United Chemical Technologies, Inc., 202 B.R. 33, 55 (Bankr. E.D. Pa. 1996) (the statutory language implies Congress intended that the absolute priority rule applies only to unsecured claims). As Four Hills Associates points out, the absolute priority rule has no meaning in a context in which

[19] 11 U.S.C. § 1129(b)(2)(B)
[20] 11 U.S.C. § 1129(b)(2)(C)
[21] 11 U.S.C. § 1129(b)(2)(A)

allowed secured claims must in any event be paid in full in order to satisfy § 1129(b)(2)(A). Four Hills Associates Brief in Reply to Compass Bank's Brief (doc 202), at 3. In summary, there is no basis for the application of the absolute priority rule both on the grounds that the Bank is over secured (and will be paid in full) and that its claim does not fall within the class of interests (or, more specifically, the sorts of claims) to which the rule may be applied.

III.

Throughout the confirmation process, Compass has continually reserved and incorporated into each new set of objections all the previous objections it has filed. Many of those objections have been addressed already in this decision, either explicitly or implicitly. This section of the memorandum opinion lists and addresses as necessary every specific objection raised by Compass.

Secured Creditor Compass Bank's Objection to Confirmation of Debtor's Second Amended Chapter 11 Plan (doc 165):

Paragraph 5 objects to the "secret injunction" contained in the Second Amended Plan. That defect is cured in paragraph 6 of the Modification of Chapter 11 Plan to Address Compass Bank Objections ("Modification") (doc 228) at 2, by eliminating the provision for an injunction against the individuals.

Paragraphs 6 and 9 object to the treatment of the Bank's claim: a single claim for voting but multiple notes owed by the Debtor for purposes of execution of the Plan. That defect, if it is one, is cured by the Modification's first paragraph that permits Compass to enforce a default by reverting to its existing foreclosure judgment without being required to initiate foreclosure actions on any of the new notes. This objection is one of many examples of Compass characterizing its displeasure with the proposed treatment of its claim as bad faith on the Debtor's part.

Paragraph 7 asserts that the Second Amended Plan does not comply with the Code because the Tinleys have misused estate assets for personal purposes, are late on filing operating reports and have not obtained a bar date. The short answer to these objections is that the Court has considered all the evidence of alleged misuse of estate assets and found no material misuse, the operating reports are current, and (assuming that no bar date is even a basis for not confirming the plan, which the Court finds unlikely) the Debtor moved for and noticed out a proposed bar date months ago (docs 173 and 178 respectively), albeit it has yet to submit an order for same.

Paragraph 8 claims that a 16-year payout evidences a lack of good faith; the seven-year payout now provided for moots that objection.

Paragraph 10 objects that shorter payoff times on vehicle loans evidences bad faith; the objection ignores the fact that vehicles have a far shorter "life" than does land, and land has generally depreciated more slowly in value, or not at all, than a vehicle. In fact, each secured claim is in a somewhat different position from the other secured claims, either because of different collateral or a different priority on the same collateral (which is why each secured claim frequently has its own class); thus different treatment of each claim can be expected and is permitted.

Paragraph 11 objects that the Second Amended Plan does not have the form notes attached to it; that defect is cured by the note attached to Modification to and Restatement of Second Amended Plan ("Restated Plan") (doc 214) at 18.

Paragraph 12 asserts that the Plan does not disclose the post-confirmation compensation of the Tinleys. The Restated Plan (Paragraph 4.10) provides that Bob Tinley will continue as president and Patsy Tinley will continue to be employed. There is, however, no disclosure of any compensation to be paid to them, and thus the Court finds that the Plan as currently written

does not entitle the Tinleys to any compensation.[22] As a result, there is no violation of § 1129(5)(B). On the other hand, it is quite clear that the Tinleys are sufficiently suited to continue managing the estate which they have built up over time. This is not to say that someone else could not manage the estate better than they, but only that the overall evidence demonstrated to the Court that the Tinleys have sufficient skills and incentive to do the job.

Paragraph 13 asserts that the Plan does not pay Compass what it would receive in a chapter 7 liquidation and that the Plan has no liquidation analysis. Compass will receive payment in full of principal, interest and costs, which is the most it could receive in a chapter 7 case. And the Court has already ruled that Debtor's Fourth Amended Disclosure Statement (doc 139) met the requirements of § 1125, so there has been sufficient disclosure of liquidation values. The time for litigating the adequacy of disclosure passed with the approval of the disclosure statement.

Paragraph 14 asserts that the Debtor has not presented information about the asset values sixteen years out, an

[22] This ruling does not apply to the Tinleys' occupation of their house and use of the vehicles, which are sufficiently disclosed. And this ruling is not intended to preclude the Tinleys from seeking a post-confirmation modification of the Plan pursuant to § 1127(b), if they wish to remedy this oversight. In the meantime, they should not be drawing any further compensation from the estate.

objection which is mooted by the reduction to seven years of the time for the Bank’s payout.

Paragraph 16 objects that because no bar date has been set, some unidentified creditor could file such a large claim that the unsecured creditors might not be paid according to the Plan. While the Bank’s solicitude for the unsecured creditors is admirable, its mere speculation about what claims might be filed is insufficient to support its objection.

Paragraph 17's feasibility objection has already been dealt with earlier in this memorandum opinion.

Paragraph 18 objects that the creditors are not provided the protections that creditors in a liquidating plan would normally enjoy and the Debtor has not provided a reasonable time frame for liquidation of assets. Whatever protections creditors in liquidating plans would “normally” enjoy and whatever a time frame is “reasonable” (both unspecified by Compass), Compass is in fact getting paid, regardless of when the assets are liquidated.

Paragraph 19 objects that the United States Trustee fees are not getting paid by the Plan; however, those fees are at a minimum treated as administrative claims and paragraph 3.1 of the Restated Plan provides that administrative claims will be paid in full on the effective date of the Plan.

Paragraph 20 argues that the "Compass Claim" is changed from a secured claim to a "highly 'debtor-friendly' promissory note", which recharacterization violates § 1129(b)(2)(A). In fact, the Plan leaves Compass with all its collateral intact and the right to revert immediately to current status of the foreclosure action in the event of a default, so that the objection, at least as it applies to the Plan, is inaccurate.

Memorandum in Support of Compass Bank's Objection to Confirmation of Debtor's Second Amended Chapter 11 Plan (doc 179):

In addition to the objections raised in the Bank's Objection (doc 165), the Memorandum (doc 179) raises additional objections, as follows:

Compass (page 2-3) claims the Plan does not provide for postpetition interest, costs or attorney fees for the Bank's claim. The Plan does so provide.

Compass (page 5) complains that the Debtor has not amended its charter to preclude the issuance of nonvoting stock, as required by § 1123(a)(6). This appears to be an accurate objection, and because it is specifically mentioned in the Code, it is probably not immaterial. Therefore, the Confirmation Order shall contain a provision that Debtor shall, within one month of the entry of the Confirmation Order, take all steps necessary to provide for the inclusion in the charter or other appropriate

corporate documents a provision prohibiting the issuance of nonvoting equity securities. The Confirmation Order shall also provide that the Debtor shall not issue any nonvoting equity securities pending amendment of its charter. Because the Debtor does not have (and will not have) more than one class of securities possessing voting power, the provisions of Section 1123(a)(6) concerning the distribution of such power are inapplicable. In re Eagle Bus Manufacting, Inc., 134 B.R. 584, 597 (Bankr. S.D. Tex. 1991), aff'd 158 B.R. 421 (S.D. Tex. 1993).

Compass (page 5) also complains that the proposed asset sales do not comply with § 363. As explained above, the Plan provides payment of release prices to the Bank that adequately compensate it for the estate's use of the collateral. The Plan also provides Compass with sufficient protection of its interests – the indubitable equivalent of its interests pursuant to § 1129(b)(2)(A)(iii) – which precludes the necessity for the Debtor to comply with the requirements of §§ 1129(b)(2)(A)(ii) and 363(k). See Wade v. Bradford, 39 F.3d at 1130 (cramdown requirements written in the disjunctive; compliance with subsection (i) precluded need to comply with subsection (iii)).

Compass (page 7-8) complains that the Plan contemplates further reorganization in violation of § 1129(a)(11). Compass misconstrues the language of the Second Amended Plan, which

merely makes clear (at least six times) that the Debtor will sell property or otherwise dispose of assets to insure that it meets its obligations.

Compass (page 8) claims that the Debtor violates § 1129(a)(7) – the best interests of creditors test – by not paying it more than the Bank would receive in a chapter 7 case. The Bank is not entitled to be paid more than in full (including interest and allowed costs); indeed, given a plan which pays all claims in full with interest, the "best interests" test loses its much of its significance. Thus, the caption of that part of the Bank's brief, that "IDS has not Shown that Compass Bank will Receive more under the Plan than it will in a Chapter 7 Liquidation" is both absolutely true and absolutely irrelevant.

Compass (page 10) accurately asserts that the Debtor filed the petition to forestall the foreclosure action, and this constitutes bad faith. In fact, forestalling foreclosure is part of what is at the heart of bankruptcy practice, and thus cannot by itself constitute bad faith.

Compass (page 11) also argues that Bob Tinley's business projections are not reliable. After considering the exhibits and the testimony, including observing the witnesses over the course of this entire case, the Court concludes that Mr. Tinley is

sufficiently experienced and credible for this Court to accept his valuations and projections.

Compass Bank's primary witness, on the other hand, testified firmly in stay litigation at the beginning of the case that Compass' claim was approximately $211,000 undersecured, whereas under cross examination in February, he testified that he could not say whether the Bank's claim was undersecured or oversecured. What is clear is that Compass has now asserted, by asking for attorney fees, for example, that its claim is oversecured, without any explanation of how that change in valuation took place. Despite the citation to § 506(a) by Mr. Tisdale (who was not counsel for the Bank at the time of the first stay hearing early in the case) in reconciling the two positions taken by the Bank, the Court finds itself simply unable to fully credit all that the Bank's witness has asserted later in the case, wondering where genuine truth-telling left off and perceived self-interest took over. The Court is of course well aware of the practical dictate of § 506(a), that the value of the property shall be determined in light of the purpose of the evaluation and of the proposed disposition of the property, so that property might in one case be valued at fire sale values and in another instance as part of a going concern, for example. But that provision was not intended to justify the wholesale change in valuation on no

apparent basis other than an attempt to gain a tactical advantage by thwarting the proposed reorganization at the outset of the case. In consequence, the Court has some question about the Bank's testimony concerning interest rates and related issues, and has taken that into account in making its decision.

The Plan also meets the Bank's objections (pages 12-14) that its treatment does not meet the "fair and equitable" test of § 1129(b)(2)(A). In addition to or as discussed in the findings set out above, the Plan now pays Compass a sufficient rate of interest, allows it to keep its liens until the property is sold and to credit bid at any foreclosure,[23] and gives to Compass the indubitable equivalent of its interest in the collateral.

Compass Bank's Brief in Opposition to Confirmation of Debtor's Second Amended Chapter 11 Plan (doc 200):

Compass objects that the plan violates the absolute priority rule (Part I) and is not feasible (Part II), contentions that have already been addressed.

Compass also objects (Part IV [sic]) that the Plan unfairly discriminates against it and others by providing different interest rates for different creditors, by making balloon

[23] The Plan provides that the right to credit bid occurs only at foreclosure and not pursuant to § 363(k). In consequence the Court need not consider the issue of, if the Bank were to credit bid on the sale of a lot, how much of its claim, if not all of it, would be offset pursuant to § 363(k).

payments to some creditors, and by paying Ms. Harris interest only for ten years. To begin with, as Four Hills points out, it has only a single parcel of real estate and no guaranty from the Tinley's. Compass on the other hand has a diversity of real estate to draw on if necessary, and the principals' guaranties. These differences alone are sufficient reasons for the slight difference in treatment (a fixed 7% for Compass and a rate that varies around 7% over time plus a balloon payment for Four Hills). And Compass' concern for Ms. Harris, who receives interest only for about ten years, is misplaced; perhaps she prefers her arrangement with the Debtor rather than the Bank's (perfectly permissible) "get all you can as soon as you can" approach. In any event, it is Ms. Harris' duty and right, not the Bank's, to protect her interests.

Compass asserts (Part V) that the Plan is not fair and equitable because Compass bears all the risk, it is not receiving the indubitable equivalent of its value, and it is also not receiving a market rate of interest. The last two objections have been dealt with already. As to the first, Compass' claim is amply secured; virtually every creditor would love to bear the "risk" that Compass complains of in this case.

Part II [sic] objects that the best interest test of creditors is not met because of an inadequate chapter 7 analysis

and only two years of cash projections. As Debtor points out in its brief, doc 201 at p. 13, the nonconsenting classes are all secured creditors. In a Chapter 7 liquidation these creditors would receive the value of their collateral, at a minimum, and at the most the amount of their claim. The nonconsenting classes are all oversecured, and will receive 100% of their allowed claim. The assets securing the claims will still secure the claims after confirmation. The plan is a 100% plan, and pays interest on the claims after confirmation. And, while it is true that Debtor provided only two years of cash projections, Debtor's primary source to pay the secured claims is from the sale of assets, not from income. And, as Mr. Tinley pointed out in his testimony, any projections beyond two years would have been unreliable. The Court finds that two years of projections in this case are sufficient. Similarly, Compass objected to a lack of evidence on the liquidation values of personal property. As the Court notes, however, the objecting creditors are fully secured (actually oversecured) by the assets on which they have liens, and can never receive more than their claims. So, the value of the personal property only further enhances Debtor's ability to comply with the plan.

Part IV (sic) argues that the Plan fails to comply with three (sic) provisions of Chapter 11: 1) it fails to pay post-

petition interest or contractual fees and costs; 2) it contains a secret injunction in violation of Section 524(e); 3) the Plan has failed to disclose information sufficient to enable the creditors or Court to make an informed decision about the plan; 4) Debtor has not disclosed the text of the new promissory notes; and 5) Debtor has not disclosed the release prices. The Modification to and Restatement of Second Amended Chapter 11 Plan (doc 214) cures the first objection in Paragraph 3.2.A. The Modification of Chapter 11 Plan (doc 228) cures the second objection in item 6 ("Confirmation order shall only act as an injunction against the pursuit of claims against the debtor.") Compass does not state with particularity its third objection; it alleges a general lack of information overall. There was extensive litigation regarding the disclosure statement in this case. The disclosure statement was amended several times. The Plan has gone through numerous modifications and amendments. The final version of the Plan classifies creditors, and in Part IV details how the Plan will be implemented. With respect to Compass specifically, the Court finds that the Plan's classification and treatment is clear. So, with respect to Compass the Court finds the third objection not well taken. The fourth objection is cured through Debtor's attachment of the proposed promissory note to the Modification to and Restatement of Second Amended Chapter 11 Plan (doc 214). The

fifth objection is cured (to the extent it was not already clear) through the Modification to and Restatement of Second Amended Chapter 11 Plan (doc 214) at Paragraph 3.2.D and the exhibit (final page) of Modification of Chapter 11 Plan to Address Compass Bank Objections (doc 228).

Part V (sic) objects to Debtor's treatment of a sale of the Juan Tabo property during the case. Debtor meets this objection through its Modification of Chapter 11 Plan to Address Compass Bank Objections (doc 228) at item 5 ("Compass must be paid its release price in cash before a release may be recorded.")

Part VI (sic) argues that Debtor did not file the Plan in good faith. In support of this argument, Compass claims that 1) the Plan loses money, 2) it delays payment to creditors, 3) it allows Debtor to speculate on the appreciation potential of future projects, and 4) it allows the Tinleys to retain assets and a "lifestyle." The Court finds this objection not well taken. First, the Court does not find that the Plan proposes to lose money. To the contrary, the Court found the evidence credible that this Plan is feasible. Furthermore, even if the Debtor were to sustain a loss, which Compass has not proved, Compass will receive 100% of its claim from the assets alone. Second, every Chapter 11 plan delays payments to creditors; this cannot be bad faith. The Court also finds a seven-year payback

period reasonable. Third, the Court disagrees with Compass' characterization that the Plan allows Debtor to "speculate." If the properties appreciate in value during the life of the Plan, so much the better. Compass is not entitled to more than its claim, but as long as Compass remains unpaid and then has to foreclose on unsold properties, the additional equity provides even more security for Compass' claim. See Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (chapter 7 case). Fourth, the Plan by its terms does not deal with the Tinley's personal assets. If Compass has a claim to those assets, it is beyond the scope of this Chapter 11. To the extent Compass is repeating its "lifestyle" objection, the Court has already addressed that earlier in this opinion.

Part VII (sic) argues that Debtor has presented no evidence to show that retaining Bob Tinley as President is consistent with the interests of creditors. In support of this claim, Compass argues that the Tinleys have seriously misused estate property. This is simply a rephrasing of the lifestyle objection, which the Court has overruled. Furthermore, there is a presumption that a Debtor will remain in possession during a case. Mr. Tinley has operated that Debtor during the case, and has proposed a plan which, in the Court's view, is satisfactory and confirmable, and which protects all creditors' interests. If Compass believed

that there was serious mismanagement, it could have filed a motion to appoint a trustee, but it did not.

Compass' final issue, Part VIII (sic) seems to be that it is somehow bad faith for the Debtor to have continued to pursue confirmation of this plan. This objection has been met through the various amendments as discussed above.

Compass Bank's Response to ICS's Memorandum of Points and Authorities in Support of Confirmation (doc 203):

Item I deals with the third party injunction. As discussed above, Debtor amended to remove this provision. See Doc 228 item 6.

Item II argues indubitable equivalence and Compass' perceived increase in risk exposure. As discussed above in this memorandum opinion, the Court finds that the Plan meets the indubitable equivalence requirements of the Code. And, the Court finds that Compass will remain 100% secured throughout the life of the plan. While it is true that the equity cushion may decrease in dollar terms as properties are sold, so will Compass' claim. Compass will always have adequate security.

Item III asserts that the plan is not feasible. As discussed above, the Court disagrees.

Item IV argues that TMA Associates, 160 B.R. 172 does not stand for the simplistic proposition that a plan with release

prices provides a creditor with the indubitable equivalent of its collateral. The Court agrees, but this does not give Compass the result it seeks. The Court's decision on indubitable equivalence in this case is based on the facts in this case.

Item V again argues that Debtor has not disclosed adequate information about its plan. The Court disagrees. See discussion above related to Compass Bank's Brief in Opposition to Confirmation (doc 200), Part IV (sic), 3rd objection.

Item VI reargues the best interest of creditors test. The Court dealt with this above regarding Compass Bank's Brief in Opposition to Confirmation (doc 200), Part II (sic). Basically, 100% is 100%.

Item VII simply restates various arguments that have been fully addressed above.

Compass Bank's Objection to Confirmation of Debtor's Modified Second Amended Chapter 11 Plan (doc 225):

After the Court denied confirmation of Debtor's Second Amended Plan, Debtor filed its Modification to and Restatement of Second Amended Chapter 11 Plan (doc 214). In response, Compass filed its Objection to confirmation thereof (doc 225). Compass makes clear that it was maintaining all of its previous objections (with citations to the docket provided) to confirmation of earlier versions of the plan, and in this

Objection would only address defects to plan criteria as ruled on by the Court at the hearing that denied confirmation. The Court will deal with those new objections in turn.

Item I objects to certain language in the Restated Plan (doc 214) that would allow Debtor to cure a default at any time prior to foreclosure. The Court expressly stated at the earlier confirmation hearing that this provision would not be acceptable. The Restated Plan provision is:

> If the Debtor defaults in any post confirmation obligation due to Compass Bank, Compass shall be entitled to exercise its state-court rights to foreclose its liens; However, Debtor may still obtain releases of collateral at any time prior to foreclosure by tendering the release price to Compass for any parcel which the debtor desires to be released. If the Court determines that the provision for paying Release Prices and obtaining releases after a default renders this Plan unconfirmable, then the Debtor will delete from this Plan the provision entitling it to releases after default.

Compass characterizes the inclusion of this language as bad faith per se. The Court disagrees. Debtor no doubt believes it is entitled to this provision, and intended to reargue that portion of the Court's earlier ruling. In fact, in his opening statement at the June 2, 2004 hearing, Mr. Behles explained in detail why Debtor had included this provision and believed it was entitled to this treatment based on the state court foreclosure

judgment. However, the Court maintains its earlier opinion that this language is unacceptable in this Chapter 11 plan. The simple solution is that the Court reiterates that this provision makes the Plan unconfirmable, and therefore considers it stricken from the Plan. In other words, if Debtor defaults it may not thereafter tender release prices for any property.[24] Debtor's attorney shall include language in the confirmation order that deletes the offending provision.

Item II points out that the Restated Plan has inconsistent provisions regarding how Compass shall apply payments it receives. Compass' observation is well taken. As discussed above in footnote 3, New Mexico follows the "United States Rule" (or "Massachusetts Rule") that requires that payments be applied first to interest and then to principal. Therefore, Debtor's confirmation order shall explicitly provide that payments are applied first to interest, then to fees and costs, and finally to principal.

Item III objects to its claim being divided into separate interest and principal promissory notes. During opening argument on June 2, 2004, counsel for Compass stated that it would no longer challenge this treatment. Additionally, upon review of

[24] Of course, nothing would preclude the Bank from voluntarily accepting a payoff on a lot from the Debtor following a default.

the plan and the explanation of Debtor's counsel on June 2, 2004, the Court finds that the issue would not be sufficiently material to defeat confirmation in any event. The state court judgment, for some reason unexplained by either of the parties, essentially capitalized accrued interest into the judgment and awarded interest on the entire amount. Debtor's classification is to take the entire claim as of the petition date (principal and all accrued interest) and classify this as the "principal." The separate classification "old interest" is interest that accrued (and remained unpaid through adequate protection and other payments) through the effective date. This "old interest" claim is represented to be about $90,000 and will be repaid without interest over 7 years in equal annual instalments. The Plan, as discussed above in this memorandum opinion, will apply payments from releases to unpaid accrued interest on principal, fees and costs, and then to the principal balance.

Item IV claims that the Plan has conflicting and inconsistent provisions regarding remedies in the event of default. The Modification (doc 228) paragraph 1 solves this problem. It makes clear that Compass has a pre-petition foreclosure judgment which it is entitled to enforce, and clarifies that Compass is entitled to enforce its existing foreclosure judgment upon default.

Item V argues that the Plan unfairly discriminates against Compass by allowing Debtor to delay payments until its claim is resolved. Debtor modified this treatment in its Modification (doc 228) paragraph 2. Compass admitted in opening statement at the June 2, 2004 confirmation hearing that this problem had been addressed. Additionally, the Court can treat the resolution of any objection to Compass' claim on an expedited basis.

Item VI argues that Debtor has not provided a basis or rationale for its proposed release prices. In essence, Compass' objection is that while it now is "comfortably oversecured", it will be put at risk unless it receives at least 90% of the collateral from all sales. First, Compass has not provided evidence of this, nor has it explained from where the 90% figure comes. Second, the Court has found earlier in this opinion that Compass will remain fully secured throughout the life of the plan. There is no Code requirement that a fully secured creditor be provided with a certain percentage equity cushion while their claim is being paid down over a reasonable period of time. Furthermore, the Debtor did not arbitrarily decide release prices. All of the release prices are those the Court ordered (rounded up to the nearest thousand) after the litigation that ensued when the parties could not agree on release prices.

Item VII is not well taken. As Mr. Jacobvitz, attorney for Four Hills, correctly pointed out in the June 25, 2004 closing arguments, section 1129(b)(2)(A) is stated in the disjunctive; by providing the indubitable equivalent of Compass' claim, the Debtor need not also give section 363(k) rights. This plan section was most clearly explained by Mr. Tinley's testimony on June 2, 2004: the credit bid provisions of the Plan are intended to apply only in the event of a foreclosure sale by Compass, so Compass may not credit bid as Debtor sells individual parcels to its customers. Furthermore, the Court finds that this makes economic sense because 1) it ensures a cash flow to Debtor (by paying only the release price) to enable it to meet its other obligations, including any taxes that might become due upon sale, and 2) it prevents Compass from interfering with individual contracted-for sales to customers, which interference could adversely impact the Debtor's reputation regarding ability to close contracted-for sales. Item VII, dealing with transfers to related entities, is cured by the Modification (doc 228) paragraph 4.

Item VIII deals with the timing of releases, and assurance of payment before the release occurs. Debtor addressed and cured this concern with its Modification (doc 228) paragraph 5.

Item IX claims that plan language can be construed to allow Debtor two bites at the apple concerning the state court's award of attorney fees and costs allowed under the original loan documents. First, the Court does not read the language of the Plan as allowing this. Bankruptcy Court is not an appellate court for state court decisions.[25] Second, until Debtor attempts to challenge a state court award in the bankruptcy court the issue is not ripe; and Mr. Tinley testified that there was no intention to contest an attorney fee award in the Bankruptcy Court. The Court has also previously ruled that it is up to the state court judge to rule or not to rule on the prepetition attorney fee issue, and that should the state court decide not to rule, this Court will. Finally, the Court believes that the Plan language is sufficiently clear that, if the decision on fees and costs is rendered after execution of the promissory note, Debtor will still be obligated to abide by the ruling.

Item X complains that there is an insufficient accounting to allow all parties to assess the risk of the Plan. Only Compass

[25] If a state court makes this decision, the Rooker-Feldman doctrine [Rooker v. Fidelity Trust Co., 263 U.S. 413, 414-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)] ordinarily prevents a federal court from reviewing that decision.

has raised this objection, and as long as the release prices are clear as to Compass, that is all that is required.

Item XI argues the secret injunction again. This memorandum opinion has dealt with that issue. Furthermore, it is clear from the Modification (doc 228) paragraph 6 that the confirmation order acts only as an injunction against the pursuit of claims against the Debtor.

Item XII complains that the proposed promissory note is not on one of Compass' standard forms. The Court finds that this is not required. Furthermore, Compass does not complain that the proposed note is deficient in any material respect.

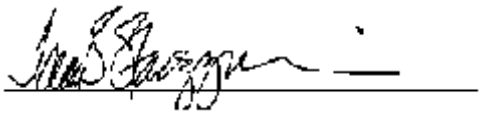
CONCLUSION

The Bank has in previous hearings raised other objections which the Court has ruled upon. To the extent those objections are again relevant as objections to confirmation of the Plan and are not addressed specifically in this memorandum opinion, they are overruled.

From the outset Compass has sought to block the Debtor's attempts at reorganization at every turn, at times questionably. See, for example, the Bank's Objection to Motion to Extend Time to File Schedules of Assets and Liabilities and Statements (sic) of Affairs (doc 12) in response to the Debtor's motion for an extension filed fifteen days after the case was filed. Yet, as

intended by the Code, a successful reorganization will preserve for the Debtor and its other creditors value, perhaps substantial value, that would be otherwise lost in a foreclosure sale. Although it has perhaps taken the Debtor unduly long to obtain confirmation of a Plan, now that it has done so, it is now time for the Debtor to consummate its Plan, and for the case to move on.

The objections of Compass Bank and of Bank of America should be overruled, and the Plan confirmed, subject to the minor amendments required by this memorandum opinion. Debtor's counsel is hereby directed to submit an order in conformity with this opinion, approved at least as to form by counsel for Compass Bank, Bank of America and Four Hills Associates.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on September 28, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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