UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re	In Chapter 11 proceedings
SPECTRUM TOWN CENTER PROPERTY LLC	Case No. 2:09-bk-13764-CGC
Debtor.	**MEMORANDUM DECISION RE: CONFIRMATION OF SECOND AMENDED PLAN OF REORGANIZATION**

I. BACKGROUND

Debtor seeks confirmation of its Second Amended Plan of Reorganization. The matter was tried and the parties filed post-trial briefs. The Court now renders its decision.[1]

II. FACTS AND BACKGROUND

A. The Property

Debtor's principal asset, a shopping center called Spectrum Town Center (Property), opened in 2008 and consists of 170,759 square feet of leasable retail space on 21.5 acres of real estate. The Property, located at in Gilbert, Arizona, is anchored by major tenants Sprouts Farmers Market (Sprouts), Tuesday Morning, and Dollar Tree. The Property is managed by Capital Assets Management (Capital). Capital, through its president Rachelle Strole, assists with all aspects of operating the property, including lease negotiations, rent collections, and common-area maintenance (CAM). Capital began managing the Property in 2007, when the Property was approximately 60% occupied. By the date of the confirmation hearing, Ms. Strole testified that occupancy rates had been

[1] This Memorandum Decision constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052, 9014.

increased to about 85%.[2] Despite increasing occupancy rates under the management of Capital, Debtor was unable to agree to terms of an extension for secured financing and sought Chapter 11 protection on June 18, 2009.[3]

B. Debtor's Capital Structure

Debtor's two members, Williamsfield & Val Vista, LLC and Spectrum TC, Inc., hold membership interests of 99% and 1%, respectively. Williamsfield, in turn, is owned 90% by Greenstreet Properties, Inc. and 10% by five investors who contributed approximately $4,400,000 in equity to the Debtor.

In addition to the equity contributions, Debtor obtained two secured loans to fund construction of the Property. The first loan, currently held by 2010-1 CRE Ventures, LLC (CRE), was originally provided by Community Bank of Nevada (CBN).[4] The CBN loan is evidenced by a note in the original principal amount of $20,000,000, bearing non-default interest at 5%, and secured by a first deed of trust on the Property (CRE Note). The CRE Note matured on May 1, 2009.

Three entities, Vestin Realty Mortgage I, II and III (collectively, Vestin) funded the second loan and holds a second priority lien and security interest. Debtor incurred the $14,000,000 obligation to Vestin, pursuant to a one-year note with a non-default interest rate of 15.5% (Vestin Note). Debtor failed to make interest payments on the Vestin Note after January 2009, and subsequently, stopped paying interest on the CRE Note in May 2009.

C. Bankruptcy Proceedings and the Plan

On January 19, 2010, Debtor filed a Second Amended Plan of Reorganization (Second Amended Plan or Plan). The Second Amended Plan proposes to pay creditors in full, over a five year term. Claims are classified under the Plan as follows:

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[2] Other witnesses disagreed on the current occupancy rate. For feasibility analysis purposes, the Court will use 83% in year one, 87% in year two and 92% in year three and thereafter, based on testimony by Debtor's expert, Mr. Aaron.

[3] All facts are as of the time of the confirmation hearing. If any party believes that post-hearing facts impact the result, it should seek appropriate relief.

[4] CBN was taken over by the FDIC, as receiver, and subsequently, on August 10, 2010, FDIC transferred the note to 2010-1 CRE Venture, LLC.

Class 1- Administrative Claims
Class 2- Secured Tax Claims of Maricopa County
Class 3- Secured Claims under the CRE Note
Class 4- Secured Claims under the Vestin Note
Class 5- General Unsecured Claims
Class 6- Related Parties Unsecured Claims
Class 7- Membership Interests

Classes 1 and 7 are listed as unimpaired and non-voting. Administrative claims will be paid in full, in cash, on the effective date except as otherwise agreed, in accordance with § 1129(a)(9)(A). The Plan also leaves all membership interests in the Debtor in place.

The Plan designates Classes 2-6 as impaired. However, while impaired, Class 5 creditors, consisting of $335,780.68 in general unsecured claims, will be paid in full 120 days after the effective date of the plan, without interest. Likewise, the Plan proposes to pay Class 6 claims in full to the extent that Class 4 claims are previously paid in full.

Under the terms of the Plan, the remaining classes will be paid over time. Class 2, consisting of secured tax claims of Maricopa County will be paid quarterly, with interest at 16%[5], on a five year amortization schedule. Payments on the Class 3 CRE Note will also be paid quarterly at a rate of prime plus 1%, based on a 25 year amortization schedule with a balloon payment due at the end of a five year term. The Class 4 secured claim of Vestin will accrue interest at 12% after the effective date, with the full amount of the claim maturing three years after the effective date. Vestin will receive quarterly installments of interest to the extent that there is money left over after paying for operating expenses and making the required quarterly payments on the CRE claim and the Maricopa County tax claims. Each of the secured claimholders will also retain their liens.

Of the voting classes, only Class 3 voted to reject the plan. However, both CRE and one of Debtor's major tenants, Sprouts, filed objections to confirmation of the Plan.[6] Originally, Sprouts

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[5] Sections 511 and 1129(a)(9)(B) provide administrative priority taxes with interest at the applicable nonbankruptcy rate. Under A.R.S. § 42-18053, the applicable nonbankruptcy rate is 16%.

[6] Maricopa County filed its "Notice of Perfected Liens and Objection to Second Amended Plan of Reorganization Filed By Spectrum Town Center Property, LLC Dated January 19, 2010" on September 23, 2010, docket 240, after the bar date for objections and the conclusion of the confirmation hearing, but before the completion of briefing. In it, the County asserted a perfected priority claim of $1,010,387.15 based on unpaid taxes for tax years 2008, 2009, and 2010, and objected to the plan, but agreed to payment over five years from the date of filing at 16% interest.

objected to its treatment under the Plan, claiming that the Plan did not propose to cure defaults under its lease agreement arising from Debtor's lease to Dollar Tree. According to Sprouts, Debtor's lease to Dollar Tree violated an exclusivity provision in Sprouts' lease. On the morning of the confirmation hearing, the Debtor and Sprouts provided the terms of a settlement between the parties on the record. Under the terms of the settlement, Sprouts, which had been taking a 30% reduction in monthly rental payments, would receive future monthly payments at a 17.5% discount to the lease rate. In return for the lower than contract lease rate, Sprouts agreed to end the ongoing litigation and waive any future claims regarding violation of the exclusivity provision with regard to Dollar Tree.[7] As a result of the settlement with Sprouts, only the CRE objection remained an issue at the confirmation hearing.

D. The Experts

At the confirmation hearing, the parties disputed the proper valuation of the Property and the proper interest rate to compensate CRE for payment of its claim over five years. CRE's valuation expert, Richard Kalinowski, of Kalinowski & Associates, provided a value of $22,390,000, or $131.12 per square foot (Kalinowski Confirmation Valuation). Debtor's expert, Morris Aaron, of MCA Financial Group, suggested that the Property had an "as is" value of $28,000,000, or $164 per square foot (Aaron Confirmation Valuation). The interest rates the parties proposed were also supported by expert testimony. CRE presented testimony of Elliot Pollack, of Elliot D. Pollack and Co., who testified that an appropriate risk adjusted interest rate for a loan in the amount of CRE's claim, secured by the Property, was 8.55% (Pollack Interest Rate).[8] Mr. Aaron proffered the opinion on behalf of the Debtor that the 5% interest rate provided in the plan was "reasonable and supportable" (Aaron Interest Rate).

E. Appraisals of the Property Prior to the Confirmation Appraisals

Although both Debtor and CRE provided a valuation expert in conjunction with plan

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[7] The actual financial impact of the Sprouts settlement is unclear as no new projections were provided with the revised rent.

[8] This rate was adjusted based on a lower than expected appraisal by Mr. Kalinowski and a lower than expected value for CRE's claim, as stipulated by the parties.

confirmation, CRE's confirmation expert, Richard Kalinowski, also performed several prior valuations. The reports for each of the prior valuations were entered into evidence by the Debtor.

Mr. Kalinowski's four prior reports indicated a decline in the value of the Property between 2008 and 2009. Mr. Kalinowski's first valuation, dated as of March 24, 2008 (March 2008 Valuation), indicated that the Property had an "as is" value of $51,165,000. Mr. Kalinowski determined this value, like the value determined in the Kalinowski Confirmation Valuation, using the direct capitalization method by estimating a Year 1 Net Operating Income (NOI) for the Property and dividing that by a capitalization rate (OAR). The capitalization rates were derived from rates seen in recent comparable sales. In the March 2008 Valuation, Mr. Kalinowski estimated Year 1 NOI for the property of $3,834,925 and a capitalization rate of 7.25%. The March 2008 Valuation also estimated the value of the Property using a yield capitalization, or discounted cash flow method, and sales comparison approach, which were reconciled with the direct capitalization method for a final valuation.

The subsequent three valuations by Mr. Kalinowski estimated the Property's value using similar methodologies, and indicated a sharp decline in value as real estate prices continued to plummet throughout the country. His October 30, 2008 valuation (October 2008 Valuation) indicated an "as is" value of $43,180,000, a decline of about $8,000,000 since the March 2008 Valuation. The October 2008 Valuation was based on a Year 1 NOI of $3,482,496 and a capitalization rate of 7.50%. Mr. Kalinowski's March 23, 2009 valuation (March 2009 Valuation), indicated a further decline of $13,000,000, resulting in an "as is" value of $30,380,000 based on Year 1 NOI of $2,940,125 and a capitalization rate of 8.50%. The October valuation (October 2009 Valuation) indicated an "as is" value for the Property of $29,565,000 as of October 9, 2009. This valuation was based on a Year 1 NOI of $2,808,473 and a capitalization rate of 9.50%.

III. Positions of the Parties

A. CRE's Objections to Confirmation

CRE objects to the Plan on several grounds involving two major interrelated issues; the propriety of the interest rate proposed by the Debtor for CRE's claim and feasibility of the Plan.

CRE objects that the 5% interest rate provided by the Plan for CRE's secured claim is insufficient to compensate for the risk of being paid over the five year term of the Plan. If adjusted to a proper interest rate, CRE argues that the income generated by Debtor will be insufficient to make payments on the CRE secured claim as required under the Plan.

i Interest Rate Arguments

As a result of what it perceives as a below market interest rate, CRE argues several fatal deficiencies exist. CRE argues that the below market interest rate proposed in the Plan would result in a negatively amortizing "loan."[9] In other words, payments at the proposed interest rate would not be sufficient to cover the interest payments at the proper interest rate, and as a result, CRE's claim would actually increase over the term of the Plan so that CRE would be owed more at the end of the Plan that it is currently owed. The payments under the negatively amortizing loan proposed, according to CRE, fail to meet the "best interest of creditors test," which requires that creditors receive at least as much under the Plan as they would in a hypothetical Chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7). CRE claims that it would actually receive more if they were allowed to foreclose on its collateral and sell the Property now, rather than being paid below market interest over the next five years.

CRE further argues that a negatively amortizing loan fails to meet the present value test of § 1129(b)(2)(A)(i)(II). Section 1129(b)(2) codifies the absolute priority rule, which requires, in part, that a class of creditors voting to reject the plan must receive deferred cash payments with a present value equal to the amount of its secured claim. According to CRE, Debtor's negatively amortizing loan does not meet this requirement because the payments over the term of the Plan at a below market interest rate, added to the payment of the full remaining portion of CRE's claim at the end of the plan, does not have a present value equal to the current value of CRE's collateral.

Although favorably citing *Till's* "prime plus" interest rate calculation, CRE claims that the correct method for calculating an interest rate sufficient to compensate CRE for the risk inherent in

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[9] The term "loan" will be used throughout to refer to the terms of repayment of CRE's claim because effectively, the Plan forces CRE to provide an involuntary loan to the Debtor over the term of the Plan.

the forced loan it would provide under the Plan is to use the "band of investment" method. *See In re Paradise Springs Associates*, 165 B.R. 913, 928 (Bankr. D. Ariz. 1993). The band of investment method involves determining what portion of debt would conform to a market institutional loan. This portion should receive interest at the market rate for bank loans. In a normal credit market, mezzanine lenders would typically be willing to fund the next portion, or band, of the loan at a higher interest rate. Some loans contain bands that even mezzanine lenders would be unwilling to fund, and the riskiest portion of these loans would have to be funded through the capital markets at equity return rates.

The band of investment method for calculating an interest rate relies heavily on the loan-to-value (LTV) ratio of the loan to determine the amounts of the relative "bands." Banks will typically lend at lower interest rates on so-called "conforming loans." One requirement for a conforming loan is an LTV ratio within a certain range, 65-70% according to CRE's interest rate expert. As a result, the value of the property and the amount of CRE's claim becomes important in calculating the proper interest rate. Although the parties stipulated that the amount of CRE's claim is $21,212,973.50, each side presented contrasting testimony on the value of the collateral. CRE's expert testified that the property was worth $22,390,000 while the Debtor's opinion of value was $28,000,000.

The LTV ratio of nearly 95% presented by CRE suggests a risky loan. Indeed, Mr. Pollack indicated that loans do not exist in the market at such high LTV ratios. Thus, significant mezzanine and equity investments would be necessary to fund the loan. When the band of investment method was applied by Mr. Pollack, he determined that the proper interest rate for CRE's secured claim is 8.55%.

ii Feasibility Argument

CRE also argues that Debtor's Plan is not feasible, as required by § 1129(a)(11), at the 8.55% interest rate required to compensate CRE for its risk. By CRE's calculations, the five year loan proposed by the Plan, with a 25 year amortization schedule, would require monthly payments of approximately $170,000 at an interest rate of 8.55%. CRE points out that Debtor's single highest

monthly NOI was $180,000. However, Debtor's average NOI during its bankruptcy has been only $144,000, less than the required monthly payment without even taking into consideration other budgeted costs that have not been paid during the bankruptcy, including tenant improvement allowances, certain reserves typically required under loan agreements and any other extraordinary expenditure required.

iii Other Arguments

a. Debtor's Bad Faith and Unfair Discrimination

Next, CRE claims that the Plan fails to meet the requirements of § 1129(a)(3). According to CRE, Debtor has proposed the Plan in bad faith because the Plan treats CRE less favorably than Vestin. Namely, CRE objects to Debtor's payment of the Vestin claims in three years, while requiring CRE to wait five years. CRE further objects to certain protections provided to Vestin, but not CRE. These protections include a cross-default provision, whereby any default on payments to CRE would allow Vestin to enforce its lien as well, and reporting requirements providing Vestin with monthly profit and loss statements, leasing activity reports, bank account activity reports, tax returns and actual v. budgeted line item comparisons of yearly operating reports.

b. The Plan is Not Fair and Equitable

CRE further objected that the Plan is not fair and equitable as required by §1129(b)(2)(A)(i)(I). Section 1129(b)(2)(A)(i)(I) requires that, in order to cramdown the Plan over CRE's rejecting class, CRE must retain its liens to the extent of its allowed secured claim. The Plan allows CRE's lien up to a value of $19,561,000, which CRE claims is less than the amount of its allowed secured claim. This objection has been resolved by the parties' stipulation to a secured claim by CRE in the amount of $21,212,973.50.

However, CRE maintains that even with the amount of the liens agreed upon, the granting of the liens is illusory because the Plan does not provide any means to enforce the liens. Debtor has failed to provide protections to CRE that are customary in plans of reorganization, including: 1) automatic perfection of the liens, 2) relief from the automatic stay to file any documentation of the liens desired by CRE and cooperation by Debtor to do so, 3) the right to enforce the liens upon

default without the necessity of notice and court approval, and 4) a first-priority lien on proceeds of any sale of CRE's collateral. CRE claims that Debtor's failure to provide these typical protections also prevents the Plan from being fair and equitable.

c. Third Party Release Provisions

Finally, CRE objects to certain third party releases in the Plan, which CRE claims violate binding Ninth Circuit law. The Debtor has removed these releases, thus resolving this objection.

B. Debtor's Position in Response to CRE's Confirmation Objections

Debtor responds that the Plan is feasible and provided testimony from an expert who concluded that the 5% interest rate provided in the Plan for CRE's claim was "supportable." Debtor's expert also testified that the Debtor could afford to carry out the Plan at an interest rate of 5%. Debtor's expert, Mr. Aaron, concluded that the Property was worth $28 million. According to Mr. Aaron, the LTV of a loan in the amount of CRE's claim, based on a property value of $28 million, is approximately 70%. Although at the high end of the range for conforming loan LTVs, Mr. Aaron concluded that due to the high occupancy rate of the Property, a loan in the amount of CRE's claim would be conforming. Mr. Aaron concluded that 5%, the interest rate provided by the Plan, was a " supportable" interest rate for a conforming loan similar to the loan contemplated by the Plan. Based on Mr. Aaron's conclusion that 5% was a reasonable interest rate, Mr. Aaron determined that the Plan is feasible. He concluded that Debtor's monthly NOI, in conjunction with nearly $2,000,000 in cash reserves was sufficient to fund the Plan.

Debtor responds to CRE's remaining objections by arguing that the Plan has been proposed in good faith. Good faith, according to Debtor, is evidenced by the Plan's payment of 100% to all creditors. Accordingly, because Debtor asserts that CRE's objections are unfounded and the Plan otherwise complies with all of the requirements of § 1129(b), the Debtor requests that the Court confirm the Plan over the objections of CRE.

C. CRE's Motions in Limine

CRE filed four motions in limine. The first, Docket 219, sought to exclude evidence challenging CRE's claim amount. Given the stipulation of the parties, that motion is denied as moot.

The second, Docket 220, sought to exclude all live evidence. That motion was denied. The third, Docket 221, sought to limit the admissibility of Mr. Aaron's report and testimony. That motion was effectively denied during the trial. The final one, Docket 222, sought to exclude evidence on the terms of transfer of the claim to CRE. That motion is denied as moot.

IV. ANALYSIS

A. Valuation Testimony

Value is important in this case because it will directly affect the risk undertaken by the dissenting creditor, CRE, and therefore the appropriate discount rate for cram down purposes. For this reason, the Court needs first to reconcile the evidence and determine the appropriate value before determining the discount, or market, interest rate.

The experts for CRE and Debtor agreed about very little with regard to determining the value of the Property. Both agreed that a sales comparison analysis was appropriate under the circumstances, but both also agreed there were few recent comparable sales due to the state of the commercial real estate market. The experts also agreed that an income approach to valuation was an appropriate method to value the property. However, the parties differed as to their execution of an income-based analysis. Although the parties agreed on very little else, and the execution of their analyses were quite different, both experts came up with year one net operating income numbers that were fairly similar. These net operating incomes, however, were based on differing assumptions resulting in divergent valuations.

i Kalinowski Confirmation Valuation

Mr. Kalinowski's approach to valuing the property involved reconciling two valuations generated using the sales comparison approach and the income capitalization approach. The sales comparison approach attempted to estimate the current value of the Property by looking at recent sales of comparable properties and adjusting those actual sales prices for differences between the property sold and the Property. Mr. Kalinowski used five sales of retail properties that he considered to be comparable, but noted that, due to current economic conditions, comparable sales of similarly large community centers of similar age to the Property were unavailable.

Notably, Mr. Kalinowski's appraisal contained several inconsistencies when compared with his next most recent appraisal of the property, from October 2009. The Kalinowski Confirmation Valuation included one comparable sale analyzed in the October 2009 Appraisal (a property called Falcon Gateway), but excluded two other properties utilized in the October 2009 Appraisal, both of which sold more recently than Falcon Gateway and both of which were built in 2005, just one year before the Property was constructed. Not surprisingly, each of the two properties not utilized in the Kalinowski Confirmation Valuation sold at prices substantially higher than Mr. Kalinowski's per square foot appraisal of the property; $316.96 and $230.55 per square foot.[10] Of the eleven properties analyzed in the Kalinowski Confirmation Valuation and the October 2009 Appraisal, only two properties sold for less per square foot than the value estimate provided in the Kalinowski Confirmation Valuation. Those properties were constructed in 1975 and 1987. Further, only two other properties used in the two appraisals, including one property built in 1979 that sold for $130.53 per square foot, sold for less than $200 per square foot.

Further, in the October 2009 Appraisal, Mr. Kalinowski excluded the comparable sale at the upper and lower end of the range, presumably to prevent undue weight resulting from one particular outlier. In the Kalinowski Confirmation Valuation, this step was omitted, and instead, Mr. Kalinowski included an outlier comparable, built in 1975 and lacking an anchor storefront (Village Grove Plaza), with an adjusted per square foot sale price of $78.91. The adjusted per square foot value for the other properties ranged between $141.37 and $316.52. If the upper and lower adjusted comparable were excluded in the Kalinowski Confirmation Valuation, the new adjusted per square foot value for the Property would be $162.89. The unexplained exclusions and inconsistencies between the two appraisals raise some significant questions about the reliability of Mr. Kalinowski's comparable sales analysis.

Mr. Kalinowski also performed an income capitalization analysis. He explained that two

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[10] No adequate explanation was given for the lack of consideration of these two sales in the confirmation valuation.

types of income capitalization approaches exist; a yield capitalization method and a direct capitalization method. Yield capitalization, also referred to as a discounted cash flow analysis, calculates the present value of a property based on projections of future income and expenses.

Mr. Kalinowski utilized the direct capitalization method, explaining that the yield capitalization method was improper in today's economic conditions, because of the necessity to project income and expenses far into an uncertain future. The direct capitalization method utilizes estimates of Year 1 NOI and a comparable sale derived OAR, each of which is calculated in the Kalinowski Confirmation Valuation. In the direct capitalization method, Year 1 NOI is divided by the OAR to determine the value of the property. As a result, the lower the OAR chosen, the higher the resulting appraisal of the property. Mr. Kalinowski's calculation of the NOI generated by the Property in Year 1 actually exceeds the NOI proposed by Debtor's expert, although both are in the range of $2.1 - $2.4 million.

An additional problem with Mr. Kalinowski's valuation involves the lack of a full explanation for choosing a much higher capitalization rate for his Confirmation Valuation than any of the other previous valuations, relative to the average national and market OARs. Mr. Kalinowski chose the OAR in each of his reports based on a comparison of OARs in recent comparable sales and a national OAR survey. The average market and national OARs, as well as the OAR chosen for each of Mr. Kalinowski's valuations are summarized in the table below:

Valuation Report	*National Average OAR*	*Market Average OAR*	*OAR Chosen*
March 2008	Range- 5.80% to 9.00%[11] Average- 7.28%	6.10% to 7.53%	7.25%
October 2008	Range- 5.80% to 9.00%[12] Average- 7.33%	6.20% to 7.00%	7.50%

[11] OARs based on a survey of the First Quarter 2008 national averages as reported by PriceWaterhouseCoopers.

[12] OARs based on a survey of the Third Quarter 2008 national averages as reported by PriceWaterhouseCoopers.

March 2009	Range- 5.80% to 10.00%[13] Average- 7.63%	6.33% to 8.50%	8.50%
October 2009	Range- 7.50% to 11.00%[14] Average- 8.41%	7.22% to 9.35%	9.50%
Confirmation Valuation (April 2010)	Range- 7.25% to 11.40%[15] Average 8.49%	9.00%-10.00%	11.00%

The table indicates a general trend of rising OARs between March 2008 and April 2010. What raises questions about the OAR chosen by Mr. Kalinowski in his Confirmation Valuation is the dramatic jump from the capitalization rate chosen for the October 2009 Valuation. At a time when there was little change in the average OAR rates across the country (an increase of only .08%), Mr. Kalinowski chose an OAR a full 1.5% higher than the OAR chosen six months earlier.

Additionally, although it may appear that the average capitalization rate in the Phoenix metropolitan area jumped significantly, this range is somewhat misleading. The 10.00% capitalization rate was taken from the same "comparable" property that the Court questions in Mr. Kalinowski's comparable sales analysis- Village Grove Plaza. That is the "comparable" property built in 1975 with no anchor storefront. Further, the two comparable sales included in the October 2009 Appraisal but excluded from the Kalinowski Confirmation Valuation for purposes of the sales comparison analysis, were also left out for purposes of determining the proper OARs. Both of those sales, which occurred in the second half of 2009, had considerably lower OARs, 7.40% and 7.86%. Excluding the Village Grove Plaza property, and including the two more comparable sales used in the October 2009 Valuation, the OARs for the Phoenix market range from 7.40% to 9.85%, indicating a much smaller increase in the average OAR for the Phoenix market.

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[13] OARs based on a survey of the First Quarter 2009 national averages as reported by PriceWaterhouseCoopers.

[14] OARs based on a survey of the Third Quarter 2009 national averages as reported by PriceWaterhouseCoopers.

[15] OARS based on a survey of the First Quarter 2010 national averages as reported by PriceWaterhouseCoopers.

Overall, Mr. Kalinowski's Year 1 NOI estimate seems to be reasonable, and fairly consistent with the Mr. Aaron's estimate. However, Mr. Kalinowski's inclusion of the Village Grove Plaza property as a "comparable," and the resulting decrease in per square foot valuation using the comparable sales method, as well as the resulting increase in estimated OAR for the direct capitalization method raise concerns about the reliability of the Kalinowski Confirmation Valuation.

ii Aaron Confirmation Valuation

As with the Kalinowski Confirmation Valuation, the Aaron Confirmation Valuation is not without its problems. The most obvious problem is the eleven page report's lack of thorough explanations for the estimates involved. Mr. Aaron valued the Property at $28,000,000 on an "as is" basis. Mr. Aaron states that he reconciled the value of the Property derived under three methods: 1) sales comparison approach, 2) income approach, and 3) cost approach. The report actually contained no analysis under the cost approach.[16]

Mr. Aaron's sales comparison analysis looks at three properties sold between October 2009 and December 2009, with average prices per square foot ranging from $141.37 and $237.43. Mr. Aaron also looked at the value of the Property using the income (or discounted cash flow) approach. Under the income approach, Mr. Aaron projected revenues and expenses out over a three year period and discounted the NOIs from the three years back to the present. Additionally, Mr. Aaron presumed a sale of the Property in year three, which was calculated based on the Year 3 NOI divided by an OAR of 10.25%, which Mr. Aaron expects to be the proper OAR in Year 3.

At the Confirmation Hearing, Mr. Kalinowski testified that he did not believe the discounted cash flow approach used by Mr. Aaron to be an appropriate method for valuing the property in the current economic climate because it requires estimating revenues and expenses three years into a highly uncertain future. Additionally, CRE raised the issue that Mr. Aaron's presumed sale price of $31,823,177 in year 3 was not sufficient to cover the secured claims of both Vestin and CRE, which total over $36 million, without even taking into account Debtor's tax claims. Further, CRE suggested

[16] Though the report is sloppy in this regard, the lack of cost approach analysis is neither surprising nor unusual.

that Mr. Aaron's use of only three comparable sales in his sales comparison analysis was problematic because it did not provide a sufficient basis to ensure that the sale prices used were reasonable.

The Court is not as troubled with Mr. Aaron's use of only three comparable sales as it is with the use of the income approach and the proposed sale in Year 3. The three comparable sales used in the Aaron Confirmation Valuation are all included in the Kalinowski Confirmation Valuation. If Mr. Kalinowski had used the same method he had in his previous valuations, by throwing out the upper and lower prices, the Kalinowski Confirmation Valuation would have been left with the exact same three comparable sales.

The Court agrees with CRE that the discounted cash flow income approach is inappropriate under the circumstances, and finds that the direct capitalization method used by Mr. Kalinowski is more appropriate. This is because the direct capitalization approach only requires determining what Year 1 revenues and expenses will be, and this can be done to a fair degree of certainty by inspecting current contractual lease rates and payment histories of current tenants. Projecting out the additional two years introduces a large amount of additional speculation, as can be seen in the table above by the change in applicable OARs over the last two years. This is especially true in light of the fact that Mr. Aaron's estimate that Year 3 NOI will be $3.26 million. As pointed out by Mr. Kalinowski, the single highest monthly NOI achieved by the Debtor has been $180,000, which comes out to a yearly NOI of only $2.16 million.[17]

The Court is also skeptical about the sale transaction included in Mr. Aaron's income approach analysis. As pointed out by CRE, the sale transaction proposed would not be sufficient to pay the claims of all secured lenders in full as proposed by the Plan. Further, Debtor has not attempted to explain why its expert's valuation includes a sale in Year 3, but CRE will not be paid in full until the end of Year 5. At bottom, there is no adequate explanation of how a sale or refinance of the property can be accomplished to pay Vestin's claim without the requirement of paying CRE

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[17] The persuasiveness of Mr. Kalinowski's argument in this regard is tempered, in light of his estimate that *Year 1* NOI will be $2.46 million, significantly higher than the $2.16 million figure.

as well. What lender will either take out only Vestin's second (subject to CRE's first)? How will a sale or refinance occur without full payment to CRE and release of its lien? These are unanswered questions.

B. Court's Determination of Value

After considering the reports and testimony of both experts, the Court finds Mr. Kalinowski's methodologies to be more credible, but his choice of comparable sales, and as a result, his choice of an OAR are inappropriate. For example, the Court concludes that the Village Grove Plaza property is not comparable to the Property and should be excluded from the valuation.

The Court reconciles the evidence as follows. The value should be determined based upon both the sales comparison approach and the income approach.

i The sales comparison approach.

The appropriate price per square foot derived from the comparable sales is $155 to $160. This is slightly below the number obtained when the upper and lower value properties from the Kalinowski report are excluded (consistent with his prior methodology) and therefore takes into account current market conditions. This yields a value range of $26,495,545 - $27,350,24.

ii Income Capitalization approach

The appropriate Year 1 NOI is $2.4 million. This is between Aaron's $2.115 million and Kalinowski's $2.463 million.[18] The appropriate OAR is 10%. After adjusting the range of NOIs on comparables in the Phoenix market by excluding the outlier Mr. Kalinowski included, 10% is slightly above the Phoenix market range, in line with the analysis in his previous four appraisals.

iii Final reconciliation of value

Using the above adjustments supported by the evidence, the income capitalization approach estimate is $24,000,000 and the comparable sales approach is $26,500,000 to $27,350,000. As this is an income producing asset, the value derived from that the income capitalization approach is generally more indicative of value, suggesting a value closer to the lower end of the range.

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[18] It is also approximately the amount implied if you adjusted Mr. Pollack's $1.8 million upward by $500,000 for the CAM charges and tax reimbursements Pollack essentially admitted should be included.

Therefore, the Court will find the value of the real property for purposes of confirmation to be $25,000,000.

C. Interest Rate Testimony

Both the Debtor and CRE presented expert testimony on the proper interest rate to compensate CRE for the risk involved in receiving deferred cash payments. CRE's expert, Elliot Pollack, CEO of Elliot D. Pollack and Co., testified that an appropriate interest rate for CRE's claim was 8.55%. Debtor's expert, Morris Aaron, testified that the Plan's 5.00% interest rate was "supportable." The Court agrees with the approach of Mr. Pollack, and with several adjustments, consistent with the Court's other findings on value, concludes that the interest rate necessary to compensate CRE for its risk under the Plan is 6.76%.

Both experts agree that the proper interest rate would be the interest rate which Debtor could obtain for a loan in the amount of the CRE claim on terms similar to those in the Plan. Both experts also agree that the rate of such a loan would depend heavily on several factors, including the loan's loan-to-value ratio (LTV) and the debt service coverage ratio (DSC). Thus, the value of the Property plays heavily into the proper interest rate. Based on the agreed amount of CRE's claim and the property value determined by the Court above, the LTV ratio of a hypothetical loan in the amount of the CRE claim would be 83.5%.

Both experts used what they referred to as a "buildup" method for calculating the proper interest rate. However, the "buildup" method used by each expert differed. Mr. Pollack concluded that a so-called "conforming loan" required a LTV ratio of 65-70%. He determined that any loan with a LTV of greater than 70% must be sliced into tranches with a different interest rate for each tranche relative to increases in risk as the LTV increases. Mr. Aaron's "buildup" approach involved a much more straightforward calculation based on *Till*. Mr. Aaron simply started with the prime rate and added a risk premium to reflect default, security, and interest rate risks.

i Pollack Interest Rate

Mr. Pollack's interest rate analysis was based on a $22,390,000[19] valuation of the Property. Using the $22,390,000 value, Mr. Pollack calculated the conforming portion of the loan- $15,673,000. This portion could be funded at an interest rate of 5.25%, according to market data collected by Mr. Pollack. Mr. Pollack then determined that a mezzanine loan could be obtained, at 12.00% interest, for the portion above the conforming LTV, but only up to an 80% LTV. Above 80% was too risky even for a mezzanine loan. Any portion above 80% LTV would have to be funded by equity, which would require interest at 21.88%. Weighting the different interest rates for the relative sizes of their tranches, Mr. Pollack ends up with an interest rate of 8.55%.

ii Aaron Interest Rate

Mr. Aaron once again provided very little analysis regarding his "buildup" or "formula" approach. In his interest rate analysis, Mr. Aaron calculated a LTV ratio using the value of the Property as determined by Mr. Kalinowski in his three most recent appraisals prior to the Kalinowski Confirmation Valuation, and a loan amount of $19,651,000.[20] The LTV calculated using these three valuations ranged between 46 and 66%. Based upon this range of LTVs, Mr. Aaron concluded that the loan was a conforming loan, which he concluded required a LTV of 65%. To calculate the proper interest rate for this "conforming" loan, Mr. Aaron looked at the applicable five-

[19] Mr. Pollack's original report bases his interest rate analysis on a valuation of between $27 and $30. Additionally, he performed his analysis assuming a $22,213,877.38 claim by CRE. His declaration recognized that after his analysis was completed, the parties agreed that the proper amount of CRE's claim was $21,212,973.50. Strangely, Mr. Pollack's interest rate in his original report is 9%, as opposed to the 8.55% he testified to in his declaration. Contrary to what would be expected, the interest rate proposed by Mr. Pollack actually decreased by .45%, even as the value of the Property used to calculate the proper interest rate was reduced by $5 million. Part of this may be attributable to the decrease of $1,000,000 in the assumed value of CRE's claim. However, part of this reduction also results from an indication that the maximum LTV of a conforming loan was actually higher than Mr. Pollack had indicated in his original analysis- 65-70% rather than the original 55-65%.

[20] The proper amount of CRE's claim had been disputed, and Mr. Aaron was requested to provide an interest rate analysis based on a CRE claim in the amount of $19,561,000. As with Mr. Pollack, Mr. Aaron was only told of the agreed $21,212,973.50 CRE claim after he completed his analysis. Mr. Aaron, like Mr. Pollack, adjusted the testimony in his declaration accordingly. Unlike Mr. Pollack, Mr. Aaron did not provide detailed calculations of a new interest rate in his declaration, stating that "the LTV ratio only increases to 70% if you were to use MCA's opinion of value from its June 3, 2010 report…."

year treasury rate, which he estimated at 1.36%.[21] He then concluded that "based upon all factors considered," the proper risk premium for a conforming loan was 400 basis points.

Mr. Aaron did not explain why 400 basis points was the proper risk premium, but did provide a market survey approach to confirm his estimate. He indicated that the banks he contacted that would lend on a 65% LTV generally would require interest at LIBOR plus 350-600 basis points, with an interest rate floor of 4.5% to 6.5%. Based on a then-current 3 month LIBOR of .29%, the 5% was within the range of interest rates determined by Mr. Aaron's market survey.

CRE raised two main objections to Mr. Aaron's testimony regarding the proper interest rate. First, Mr. Aaron indicates in his declaration that the LTV ratio is 70% when using the value in the Aaron Confirmation Valuation. However, the 70% number was only reached as a result of adding nearly $2,000,000 in cash on hand to the $28,000,000 valuation in that opinion of value. Mr. Aaron testified that the cash on hand was part of CRE's collateral and should be included when determining the LTV ratio. Mr. Pollack on the other hand, testified that a large portion of the $2,000,000 should be excluded from the LTV calculation. Namely, Mr. Pollack testified that to qualify as for treatment as a conforming loan, the borrower must keep a segregated account for tenant improvement and leasing commission reserves, which could reduce the Debtor's cash position by up to $1,000,000. Additionally, by statute, the lien of Maricopa County, in the amount of $521,000, has priority over the CRE claim, so Mr. Pollack stated that the collateral value of the cash on hand should be further reduced by this amount.

The other concern expressed by CRE was that the Plan calls for a fixed-rate loan, but the quotes provided by Mr. Aaron were almost exclusively for adjustable-rate loans. Rates for the two types of loans, according to CRE, cannot be directly compared because the adjustable-rate loan removes a large portion of the interest rate risk that would generally be borne by the bank in the case of a fixed-rate loan.

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[21] In his original report, Mr. Aaron used the two year treasury rate, based on a previous plan proposing a three year term. Mr. Aaron adjusted for the new plan by using the five year treasury rate and explaining the difference in his declaration.

D. Court's Determination of the Proper Interest Rate

The Court is persuaded by the methodology used by Mr. Pollack to calculate the proper interest rate. However, Mr. Pollack's determination of the value of the Property differs from the value determined by the Court.[22] Therefore, the proper interest rate for CRE's claim differs from the one calculated by Mr. Pollack.

Mr. Aaron used a "build-up" approach that more closely approximating the interest rate calculation adopted in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (adopting a prime-plus formula approach for calculating the proper interest rate for cram down of an auto loan in a Chapter 13 case). However, commercial real estate loans have vastly different characteristics from auto loans. Auto lenders routinely lend with an understanding that their loan will be underwater (i.e. that the LTV ratio of their loan will exceed 100%). Mr. Pollack testified that this practice is unheard of in the commercial real estate market. *See e.g. In re Paradise Springs Associates*, 165 B.R. 913, 928 (Bankr. D. Ariz. 1993) (using a band of investment approach to calculate the interest rate on a commercial real estate loan because "no lender will make 100%-to-value loans....").

Both experts indicated that commercial real estate interest rates are driven by whether a loan is conforming, implying a maximum LTV ratio of 70-75%. Based on a $25,000,000 value for the Property, any loan in the amount of CRE's stipulated claim, $21,212,973.50, would have a LTV ratio of about 83.5%. Because this LTV ratio far exceeds the conforming loan ratio, any loan to the Debtor in the amount of CRE's claim would have to be constructed by obtaining a conforming loan for the first 70-75% of the value of the property from a bank, after which, mezzanine loans or equity investments would have to be obtained for the remaining portion of the "loan." This is the exact method suggested by Mr. Pollack and used to calculate the proper interest rate in the *Paradise*

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[22] Mr. Pollack testified that he used a Year 1 NOI of $1.8 million, well below the $2.2 to 2.4 million Year 1 NOI calculated by the valuation experts. Mr. Pollack testified that he did not add CAM charge reimbursements to his Year 1 NOI figure because he had no evidence that the tenants were actually reimbursing Debtor for their portion of the CAM charges. Mr. Pollack conceded, however, that if the CAM reimbursements were being paid, the Year 1 NOI could increase by approximately $500,000. Additionally, Mr. Pollack originally calculated his interest rate assuming CRE's claim had a value of $22,213,877.38. The parties later stipulated to a claim amount of $21,212,973.50, about $1,000,000 lower. This decrease in the amount of CRE's claim would result in a lower LTV, and, as a result, a lower interest rate.

Springs case. The Court concludes that the band of investment approach is more appropriate than the *Till* approach in this case, involving a commercial real estate loan rather than a car loan, and that therefore adherence to *Till*, as precedent, in this context is not required.

In order to apply the band of investment approach, the Court must determine the proper width for each of the bands, or tranches, that would make up a hypothetical loan in the amount of CRE's claim. Additionally, the proper interest rate for each tranche must be determined. The Court accepts the widths, as a percentage of value, and interest rates proposed by Mr. Pollack for each tranche.

Mr. Pollack and Mr. Aaron and both testified regarding the maximum LTV ratio for a conforming loan. Mr. Pollack testified that a conforming loan, in the current market, has a maximum LTV ratio of 65-70%. Mr. Aaron, on the other hand, testified that a conforming loan, according to his survey of lenders, has a maximum LTV ratio of 65-75%.

The Court adopts Mr. Pollack's testimony that the maximum LTV ratio for a conforming loan is 65-70% for two reasons. First, Mr. Aaron's survey of lenders included only one lender that would consider a 75% LTV ratio conforming. This lender, National Bank of Arizona, is a relationship-based lender that Mr. Aaron conceded would likely not make a loan to the Debtor. Additionally, the National Bank of Arizona rate, as well as at least three of the other four rates in Mr. Aaron's survey, are based on variable-rate loans,[23] whereas the Plan proposes a fixed interest rate for CRE. As Mr. Pollack indicated, variable-rate loans and fixed-rate loans are not comparable. In the case of a variable-rate loan, a lender may be willing to take a lower initial interest rate or consider a loan with a higher LTV conforming because the lender is protected from interest rate risk. In the event that interest rates rise, an adverse occurrence for the lender of a fixed-rate loan, the variable-rate lender is protected because the interest rate on the loan will also increase. For these reasons, the Court finds Mr. Pollack's testimony more persuasive, and finds that a conforming fixed-rate loan has a maximum LTV ratio of 70%.

[23] It is unclear whether the final rate, from Newmark Realty Capital, is based on a fixed or variable-rate loan. Additionally Newmark indicated a maximum LTV ratio of 65% for a conforming loan.

For the same reasons that the Court adopts Mr. Pollack's estimate of the maximum conforming LTV ratio, the Court adopts Mr. Pollack's 5.25% interest rate for the conforming tranche. Here again, all of the interest rates in Mr. Aaron's survey, with the possible exception of the Newmark rate, are for variable-rate loans, which require very different considerations from the fixed-rate loan proposed by the Plan. Additionally, the Newmark rate of 6.25% is substantially higher than the 5% rate proposed by the Plan. The Court concludes that Mr. Pollack's 5.25% interest rate is an appropriate rate for the conforming portion of the loan.

Mr. Pollack testified that the portion of the loan above a 70% LTV would require mezzanine and equity financing. Mr. Pollack explained that the portion of the loan between 70% and 80% LTV could be obtained from a mezzanine lender at a 12% interest rate. For any portion of the loan above the 80% LTV threshold, equity investment would be needed, with a required return of 21.88%. Because Mr. Aaron indicated that a hypothetical loan by CRE would be a conforming loan, based on a Mr. Aaron's valuation of $28 million, Mr. Aaron did not testify regarding required rates for any non-conforming portion of the loan. As a result, the Court adopts Mr. Pollack's undisputed interest rates for the non-conforming tranches.

Using the appropriate tranches and interest rates for a hypothetical loan to Debtor in the amount of CRE's claim, the Court derives a final interest rate as follows:

Conforming Loan: 70% LTV x $25,400,000[24] = $17,780,000 x 5.25% = $933,450
Mezzanine Loan: 10% LTV x $25,400,000 = $2,540,000 x 12% = $304,800
Equity Tranche 8.4% LTV x $25,400,000 = $892,974 x 21.88% = $195,383
Total Year 1 Interest Payment = $933,450 + $304,800 + $195,383 = $1,433,633
Interest Rate = $1,433,633/ $21,212,973.50[25] = 6.76%

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[24] $25 million of this number constitutes the value of the Property as determined by the Court above. The other $400,000 is a portion of the cash the debtor had on hand, which is also CRE's collateral. The debtor suggested that all $1.9 million of cash on hand should be added to the value. As this is highly volatile, easily dissipated and will be used to fund the plan, including payments to creditors other than CRE, the Court determines that $1.5 million of the cash should be excluded. This number is based on Mr. Pollack's testimony that any lender would require at lest $1 million in reserves for tenant improvements and other costs associated with leasing, including commissions. The other $500,000 to be excluded results from the senior lien held by Maricopa County. Because this lien is senior to the lien of CRE, the county's lien reduces the value of the collateral available to satisfy CRE's secured claim. There is some uncertainty about the amount of the county's lien, which will be discussed further infra, but as of the time of the confirmation hearing, the only testimony the Court had received indicated that the county's lien was approximately $500,000.

[25] The amount of CRE's claim, i.e. the amount of the hypothetical loan.

As can be seen, by calculating the interest payment on each tranche and computing the total interest payment in Year 1, the Court derives a proper interest rate of 6.76%.

E. Feasibility

The final of the three intertwined issues involves CRE's objection that the Plan fails the so-called feasibility test of §1129(a)(11). Section 1129(a)(11) requires that confirmation of a proposed plan must not be likely to be followed by the need for additional reorganization or liquidation. Essentially, this provision requires the Court to determine whether the proposed Plan is feasible. Having determined the appropriate value of the Property and the appropriate interest rate for deferred payment of CRE's claim, the Court concludes that the Plan is not feasible as constructed. However, the Court determines that the plan is not feasible because the Debtor is unable to pay the accepting Vestin class in full as required by the Plan, and *not* because the Plan treats CRE's secured claim as a negatively amortizing loan or because Debtor will be unable to make the proposed payments to the objecting CRE class.

The Plan is not feasible even assuming numbers favorable to the Debtor.[26] The Court has assumed that Year 1 NOI will be $2.4 million, even though the Debtor's single highest monthly NOI was $180,000, indicating a yearly NOI of $21,600,000. Additionally, the Court has assumed conservatively that the rental rates will increase by 1% each year, and that the occupancy rate will increase to 87% in Year 2 and 92% in Year 3 as estimated by Mr. Aaron. Further, the Court has assumed that Maricopa County agreed to accept quarterly payments over the remainder of the five

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[26] The assumptions discussed below are incorporated into a spreadsheet used by the Court to determine the feasibility of the Plan. The spreadsheet is included as Exhibit A to this decision and will be available in .xls format to the parties upon request to the Courtroom Deputy. Exhibit B are amortization schedules for the claims of CRE, Vestin and Maricopa County.

year period after the petition date, the minimum acceptable treatment under §1129(a)(9)(C).[27] With all of these favorable assumptions, the Plan is still not feasible.

The Plan is not feasible because it requires payment of Vestin's claim in full at the end of Year 3. Debtor provided no evidence on how this would be accomplished. Mr. Aaron's discounted cash flow analysis included a sale at the end of Year 3. However, Mr. Aaron recognized that the sale value in his model would not be sufficient to pay off CRE's senior lien and the Vestin junior liens in full. Even if Debtor could sell the property in Year 3 for $32 million, as proposed by Mr. Aaron, there was no indication of what Debtor would do with the money between the end of Year 3, when the sale would occur, and the end of Year 5 when CRE would be paid in full under the Plan. Alternatively, Debtor provided no evidence that it would be able to obtain refinancing of the underwater second lien loan in Year 3 to enable a cash-out of Vestin. A refinancing of an underwater second lien loan seems extremely unlikely, and without evidence that such a refinancing would be possible, the Court finds that payment of Vestin in full, in Year 3 is not feasible.[28] As a result, the Plan as a whole is not feasible.

F. CRE's Other Arguments

CRE makes three other arguments relevant to confirmation. First, CRE argues that the Plan is proposed in bad faith and unfairly discriminates against CRE by providing operating reports, leasing activity reports, and other relevant documentation to Vestin, but not to CRE. *See* §§ 1129(a)(3) & 1129(b)(1). CRE also objects to the cross-default clause provided to Vestin but not

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[27] Section 1129(a)(9)(C) specifies that the minimum acceptable treatment of priority tax claims is regular payments ending not more than five years after the petition date. However, §1129(a)(9)(C)(iii) further specifies that the priority tax claimant may not be treated "in a manner less favorable than the most favored nonpriority unsecured claim provided for by the plan" unless the tax claimant agrees to the less favorable treatment. In this case, the Plan proposes to pay unsecured creditors in full 120 days after the effective date. In the absence of agreement by Maricopa County, the Court questions whether payment over time would be permissible under the Plan. However, Maricopa County's late filed objection is clear evidence of its acceptance of less favorable treatment so long as payments are made within the 5 year window from the date of filing at 16%. The Court's feasibility spreadsheet includes this statutorily required minimum treatment.

[28] The Court's calculations indicate that Debtor could not pay CRE and Vestin in full at the end of Year 5 either. Even using the rosy assumptions discussed above, the Vestin claim would have swelled to over $23 million by the end of Year 5 based on the 12% interest rate provided in the Plan. Under those assumptions, a sale in Year 5 (with an assumed OAR of 10%) would produce sufficient funds to pay CRE in full, but leave just over $10 million for Vestin.

CRE on the same bases. Last, CRE claims that the Plan is not fair and equitable because the Plan does not provide CRE with any means of enforcing its rights should Debtor default under the Plan. *See* §§1129(b)(1) - (2). Namely, CRE contends that the Plan should provide for: 1) automatic perfection of CRE's liens, 2) relief from the automatic stay to file any documentation of the liens desired by CRE and cooperation by Debtor to do so, 3) the right to enforce the liens upon default without the necessity of notice and court approval, and 4) a first-priority lien on proceeds of any sale of CRE's collateral. The Court agrees.

Although the rule against unfair discrimination usually becomes relevant in the context of two creditors with equal priority, the rule applies to any class of claims that will be crammed down. Here, the Plan provides for reports and information sharing, as well as a cross-default provision, so that Vestin can monitor the performance of the Debtor and determine the status of its lien. Because Debtor must collect this information already, it seems that the only reason that Debtor refuses to provide this information to CRE is to punish CRE for not accepting the Plan. Not only is this unfair discrimination, especially in light of CRE's senior status, but this treatment could also be viewed as unfair or inequitable. For the same reason, the cross-default provision provided to Vestin must also be provided to CRE.

Likewise, the Plan provisions involving perfection and enforcement of CRE's interest must be included for the Plan to be fair and equitable. Without the provisions, CRE would be left with a claim against the Property, but would not be able to enforce the claim in the event of a default by Debtor. Provisions providing for perfection of a secured creditor's interest in its collateral are typical in Chapter 11 Plans, and necessary for a fair and equitable plan in this case.

V. CONCLUSION

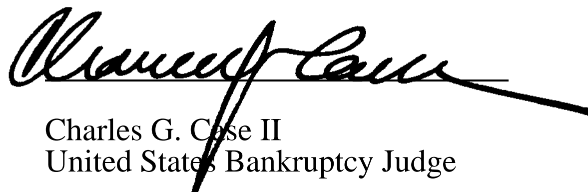
Debtor's Second Amended Plan of Reorganization will not be confirmed because Debtor failed to carry its burden of showing that the Plan is feasible. As discussed above, even using assumptions favorable to Debtor's position, Debtor has provided no evidence regarding how it will pay Vestin in full in Year 3. Even if Debtor were to wait until Year 5 and sell the Property, the Court determines that the proceeds would be insufficient to fully satisfy the claims of both CRE and

Vestin. Additionally, the Plan may not be confirmed because the Debtor's grant of a cross-default provision and access to information to Vestin, but not the senior CRE, unfairly discriminates against CRE for not accepting the Plan. Debtor must provide CRE with the typical provisions that would allow CRE to perfect its interest in the collateral and enforce its liens in the event that Debtor defaults under the terms of the Plans. Finally, the plan must pay real estate taxes in accordance with the Code-mandated treatment of 11 U.S.C. § 1129(a)(9).

Debtor shall have 30 days from the entry of this decision in which to file an amended plan in accordance with this decision. If such a plan provides modified treatment for CRE, the County and Vestin that is consistent with the findings and conclusions of this decision, and acceptable to the parties affected, then the amended plan may be confirmed without further hearing. If not, a status hearing will be held on a date to be scheduled to determine what further proceedings are necessary or desirable. If Debtor fails to file an amended plan within 30 days after entry of this decision, CRE may lodge an order dismissing the case.

So ordered.

DATED: March 31, 2011



Charles G. Case II
United States Bankruptcy Judge

Exhibit A

Feasibility

	CRE	Vestin	Maricopa
Claim	$21,212,974	$14,868,000	$1,010,387
Proposed Interest Rate	5.00%	12.00%	16.00%
Actual Interest Rate	6.76%	12.00%	16.00%
Monthly Payments	$146,674		$34,773
Quarterly Payments	$440,022		$104,320
Yearly Payments	$1,668,102		$417,280

Property Value and NOI	
Year 1 NOI	$2,400,000
Property Value	$25,000,000
Cash on Hand	$1,900,000
Reserve	$1,500,000
Value of CRE C(	$25,400,000

NOI Assumptions	
Lease Rev. Grth	1.00%
Current Occ	83%
Yr 2	87%
Yr 3	92%
Yr 2 factor	104.82%
Yr 3 factor	105.75%

Interest Rate Calculation			
$25,400,000	$21,212,974		83.5%
$17,780,000	5.25%	$933,450	70%
$2,540,000	12.00%	$304,800	10%
$892,974	21.88%	$195,383	20%
$21,212,974		$1,433,633	
	6.76%		

	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12
Beginning Cash	1,900,000	2,025,000	2,225,000	1,825,000	1,689,219	1,889,219	1,489,219	1,689,219	1,889,219	1,489,219	1,689,219	1,889,219	1,489,219	1,700,954	1,912,689	1,489,219	1,700,954
NOI	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	211,735	211,735	211,735	211,735	211,735
Admin. Exp. Claims	75,000																
Unsecured Claims				335,781													
CRE Claim			440,022			$440,022			$440,022			$440,022			$440,022		
Vestin Claim			$ 55,659			$55,659			$55,659			$55,659			$90,863		
Maricopa County Claim			104,320			$104,320			$104,320			$104,320			$104,320		
Ending Cash	$2,025,000	$2,225,000	1,825,000	1,689,219	1,889,219	1,489,219	1,689,219	1,889,219	1,489,219	1,689,219	1,889,219	1,489,219	1,700,954	1,912,689	1,489,219	1,700,954	1,912,689

	Oct-12	Nov-12	Dec-12	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Jan-14	Feb-14
Beginning Cash	1,912,689	1,489,219	1,700,954	1,912,689	1,489,219	1,700,954	1,912,689	1,489,219	1,715,362	1,941,505	1,489,219	1,715,362	1,941,505	1,489,219	1,715,362	1,941,505	1,489,219
NOI	211,735	211,735	211,735	211,735	211,735	211,735	211,735	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143
Admin. Exp. Claims																	
Unsecured Claims																	
CRE Claim	440,022			440,022			440,022			440,022			440,022			440,022	
Vestin Claim	90,863			90,863			90,863			134,086			134,086			134,086	
Maricopa County Claim	104,320			104,320			104,320			104,320			104,320			104,320	
Ending Cash	1,489,219	1,700,954	1,912,689	1,489,219	1,700,954	1,912,689	1,489,219	1,715,362	1,941,505	1,489,219	1,715,362	1,941,505	1,489,219	1,715,362	1,941,505	1,489,219	1,715,362

	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15
Beginning Cash	1,715,362	1,941,505	1,489,219	1,715,362	1,906,731	1,454,446	1,680,589	1,906,731	1,454,446	1,680,589	1,906,731	1,454,446	1,680,589	1,906,731	1,454,446	1,682,850	1,911,254
NOI	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	226,143	228,404	228,404	228,404
Admin. Exp. Claims																	
Unsecured Claims																	
CRE Claim		440,022			440,022			440,022			440,021.52			440,021.52			440,021.52
Vestin Claim		$134,086			$238,406			$238,406			$238,406			$238,406			$245,191
Maricopa County Claim		104,319.95		$34,773													
Ending Cash	$1,941,505	$1,489,219	$1,715,362	$1,906,731	$1,454,446	$1,680,589	$1,906,731	$1,454,446	$1,680,589	$1,906,731	$1,454,446	$1,680,589	$1,906,731	$1,454,446	$1,682,850	$1,911,254	$1,454,446

	Aug-15	Sep-15	Oct-15	Nov-15	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16
Beginning Cash	1,454,446	1,682,850	1,911,254	1,454,446	1,682,850	1,911,254	1,454,446	1,682,850	1,911,254	1,454,446
NOI	228,404	228,404	228,404	228,404	228,404	228,404	228,404	228,404	228,404	230,688
Admin. Exp. Claims										
Unsecured Claims										
CRE Claim			440,022			440,022			440,022	
Vestin Claim			245,191			245,191			245,191	
Maricopa County Claim										
Ending Cash	$1,682,850	$1,911,254	$1,454,446	$1,682,850	$1,911,254	$1,454,446	$1,682,850	$1,911,254	$1,454,446	$1,685,134

Sale at end of Year 5					
Proceeds	$	27,682,574	Cap Rate		10.0%
Cash	$	1,685,134			
CRE	$	(19,336,015)			
Vestin	$	10,031,693	$	23,325,818	Remaining for Vestin Claim
			$	(13,294,125)	Unsatisfied Vestin Claim

Exhibit B

Amortization

Maricopa County

$	1,010,387		($34,773.32)	amortized monthly, paid quarterly		
37						
16%		1.33%				
1	$ 1,010,387	$13,472	($34,773.32)	$	989,086	
2	$ 989,086	$13,188	($34,773.32)	$	967,500	
3	$ 967,500	$12,900	($34,773.32)	$	945,627	
4	$ 945,627	$12,608	($34,773.32)	$	923,462	
5	$ 923,462	$12,313	($34,773.32)	$	901,001	
6	$ 901,001	$12,013	($34,773.32)	$	878,241	
7	$ 878,241	$11,710	($34,773.32)	$	855,178	
8	$ 855,178	$11,402	($34,773.32)	$	831,807	
9	$ 831,807	$11,091	($34,773.32)	$	808,124	
10	$ 808,124	$10,775	($34,773.32)	$	784,126	
11	$ 784,126	$10,455	($34,773.32)	$	759,808	
12	$ 759,808	$10,131	($34,773.32)	$	735,165	
13	$ 735,165	$9,802	($34,773.32)	$	710,194	
14	$ 710,194	$9,469	($34,773.32)	$	684,890	
15	$ 684,890	$9,132	($34,773.32)	$	659,249	
16	$ 659,249	$8,790	($34,773.32)	$	633,265	
17	$ 633,265	$8,444	($34,773.32)	$	606,936	
18	$ 606,936	$8,092	($34,773.32)	$	580,255	
19	$ 580,255	$7,737	($34,773.32)	$	553,218	
20	$ 553,218	$7,376	($34,773.32)	$	525,821	
21	$ 525,821	$7,011	($34,773.32)	$	498,059	
22	$ 498,059	$6,641	($34,773.32)	$	469,926	
23	$ 469,926	$6,266	($34,773.32)	$	441,419	
24	$ 441,419	$5,886	($34,773.32)	$	412,531	
25	$ 412,531	$5,500	($34,773.32)	$	383,258	
26	$ 383,258	$5,110	($34,773.32)	$	353,595	
27	$ 353,595	$4,715	($34,773.32)	$	323,536	
28	$ 323,536	$4,314	($34,773.32)	$	293,076	
29	$ 293,076	$3,908	($34,773.32)	$	262,211	
30	$ 262,211	$3,496	($34,773.32)	$	230,934	
31	$ 230,934	$3,079	($34,773.32)	$	199,239	
32	$ 199,239	$2,657	($34,773.32)	$	167,123	
33	$ 167,123	$2,228	($34,773.32)	$	134,578	
34	$ 134,578	$1,794	($34,773.32)	$	101,599	
35	$ 101,599	$1,355	($34,773.32)	$	68,180	
36	$ 68,180	$909	($34,773.32)	$	34,316	
37	$ 34,316	$458	($34,773.32)	$	0	
			($1,286,612.74)			

CRE

$21,212,974	($146,673.84)	amortized monthly, paid quarterly		
300		3		
6.76%	$ (440,022)			
1	$21,212,974	$119,469		$21,332,443
2	$21,332,443	$120,142		$21,452,585
3	$21,452,585	$120,819	$ (440,022)	$21,133,382
4	$21,133,382	$119,021		$21,252,404
5	$21,252,404	$119,691		$21,372,095
6	$21,372,095	$120,366	$ (440,022)	$21,052,439
7	$21,052,439	$118,565		$21,171,004
8	$21,171,004	$119,233		$21,290,237
9	$21,290,237	$119,905	$ (440,022)	$20,970,120
10	$20,970,120	$118,102		$21,088,222
11	$21,088,222	$118,767		$21,206,989
12	$21,206,989	$119,436	$ (440,022)	$20,886,403
13	$20,886,403	$117,630		$21,004,033
14	$21,004,033	$118,293		$21,122,326
15	$21,122,326	$118,959	$ (440,022)	$20,801,263
16	$20,801,263	$117,151		$20,918,414
17	$20,918,414	$117,810		$21,036,224
18	$21,036,224	$118,474	$ (440,022)	$20,714,677
19	$20,714,677	$116,663		$20,831,340
20	$20,831,340	$117,320		$20,948,660
21	$20,948,660	$117,981	$ (440,022)	$20,626,619
22	$20,626,619	$116,167		$20,742,786
23	$20,742,786	$116,821		$20,859,607
24	$20,859,607	$117,479	$ (440,022)	$20,537,065
25	$20,537,065	$115,663		$20,652,728
26	$20,652,728	$116,314		$20,769,042
27	$20,769,042	$116,969	$ (440,022)	$20,445,990
28	$20,445,990	$115,150		$20,561,140
29	$20,561,140	$115,798		$20,676,938
30	$20,676,938	$116,450	$ (440,022)	$20,353,367
31	$20,353,367	$114,628		$20,467,995
32	$20,467,995	$115,274		$20,583,269
33	$20,583,269	$115,923	$ (440,022)	$20,259,170
34	$20,259,170	$114,098		$20,373,268
35	$20,373,268	$114,740		$20,488,008
36	$20,488,008	$115,386	$ (440,022)	$20,163,373
37	$20,163,373	$113,558		$20,276,931
38	$20,276,931	$114,198		$20,391,129
39	$20,391,129	$114,841	$ (440,022)	$20,065,948
40	$20,065,948	$113,009		$20,178,958
41	$20,178,958	$113,646		$20,292,604
42	$20,292,604	$114,286	$ (440,022)	$19,966,868
43	$19,966,868	$112,451		$20,079,319
44	$20,079,319	$113,085		$20,192,404
45	$20,192,404	$113,722	$ (440,022)	$19,866,104
46	$19,866,104	$111,884		$19,977,988
47	$19,977,988	$112,514		$20,090,502
48	$20,090,502	$113,148	$ (440,022)	$19,763,629
49	$19,763,629	$111,307		$19,874,935
50	$19,874,935	$111,934		$19,986,869
51	$19,986,869	$112,564	$ (440,022)	$19,659,412
52	$19,659,412	$110,720		$19,770,131
53	$19,770,131	$111,343		$19,881,475
54	$19,881,475	$111,971	$ (440,022)	$19,553,424
55	$19,553,424	$110,123		$19,663,547
56	$19,663,547	$110,743		$19,774,290
57	$19,774,290	$111,367	$ (440,022)	$19,445,635
58	$19,445,635	$109,516		$19,555,151
59	$19,555,151	$110,133		$19,665,284
60	$19,665,284	$110,753	$ (440,022)	$19,336,015

Vestin

$14,868,000	accrued monthly, paid quarterly by excess cash flow			
12.00%				
May-11	$14,868,000	$148,680		$15,016,680
Jun-11	$15,016,680	$150,167		$15,166,847
Jul-11	$15,166,847	$151,668		$15,318,515
Aug-11	$15,318,515	$153,185		$15,471,700
Sep-11	$15,471,700	$154,717		$15,626,417
Oct-11	$15,626,417	$156,264	$ (55,659)	$15,727,023
Nov-11	$15,727,023	$157,270		$15,884,293
Dec-11	$15,884,293	$158,843		$16,043,136
Jan-12	$16,043,136	$160,431	($55,659)	$16,147,909
Feb-12	$16,147,909	$161,479		$16,309,388
Mar-12	$16,309,388	$163,094		$16,472,482
Apr-12	$16,472,482	$164,725	($55,659)	$16,581,548
May-12	$16,581,548	$165,815		$16,747,364
Jun-12	$16,747,364	$167,474		$16,914,837
Jul-12	$16,914,837	$169,148	($90,863)	$16,993,122
Aug-12	$16,993,122	$169,931		$17,163,054
Sep-12	$17,163,054	$171,631		$17,334,684
Oct-12	$17,334,684	$173,347	($90,863)	$17,417,168
Nov-12	$17,417,168	$174,172		$17,591,339
Dec-12	$17,591,339	$175,913		$17,767,253
Jan-13	$17,767,253	$177,673	($90,863)	$17,854,062
Feb-13	$17,854,062	$178,541		$18,032,603
Mar-13	$18,032,603	$180,326		$18,212,929
Apr-13	$18,212,929	$182,129	($90,863)	$18,304,195
May-13	$18,304,195	$183,042		$18,487,236
Jun-13	$18,487,236	$184,872		$18,672,109
Jul-13	$18,672,109	$186,721	($134,086)	$18,724,743
Aug-13	$18,724,743	$187,247		$18,911,991
Sep-13	$18,911,991	$189,120		$19,101,111
Oct-13	$19,101,111	$191,011	($134,086)	$19,158,035
Nov-13	$19,158,035	$191,580		$19,349,616
Dec-13	$19,349,616	$193,496		$19,543,112
Jan-14	$19,543,112	$195,431	($134,086)	$19,604,457
Feb-14	$19,604,457	$196,045		$19,800,501
Mar-14	$19,800,501	$198,005		$19,998,506
Apr-14	$19,998,506	$199,985	($134,086)	$20,064,405
May-14	$20,064,405	$200,644		$20,265,049
Jun-14	$20,265,049	$202,650		$20,467,699
Jul-14	$20,467,699	$204,677	($238,406)	$20,433,970
Aug-14	$20,433,970	$204,340		$20,638,310
Sep-14	$20,638,310	$206,383		$20,844,693
Oct-14	$20,844,693	$208,447	($238,406)	$20,814,733
Nov-14	$20,814,733	$208,147		$21,022,880
Dec-14	$21,022,880	$210,229		$21,233,109
Jan-15	$21,233,109	$212,331	($238,406)	$21,207,034
Feb-15	$21,207,034	$212,070		$21,419,104
Mar-15	$21,419,104	$214,191		$21,633,295
Apr-15	$21,633,295	$216,333	($238,406)	$21,611,222
May-15	$21,611,222	$216,112		$21,827,334
Jun-15	$21,827,334	$218,273		$22,045,607
Jul-15	$22,045,607	$220,456	($245,191)	$22,020,873
Aug-15	$22,020,873	$220,209		$22,241,081
Sep-15	$22,241,081	$222,411		$22,463,492
Oct-15	$22,463,492	$224,635	($245,191)	$22,442,936
Nov-15	$22,442,936	$224,429		$22,667,366
Dec-15	$22,667,366	$226,674		$22,894,039
Jan-16	$22,894,039	$228,940	($245,191)	$22,877,789
Feb-16	$22,877,789	$228,778		$23,106,567
Mar-16	$23,106,567	$231,066		$23,337,633
Apr-16	$23,337,633	$233,376	($245,191)	$23,325,818