SO ORDERED: May 31, 2012.

Basil H. Lorch III
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	)	
	)	Case No. 11-01444-BHL-11
CASTLETON PLAZA, LP,	)	
	)	
Debtor.	)	
	)	

ORDER CONFIRMING THE DEBTOR'S PLAN OF REORGANIZATION

This matter is before the Court on the Debtor's Amended Plan of Reorganization [Doc. 188] filed December 12, 2011 (the "Plan"). Confirmation was contested by the Debtor's major creditor, EL-SNPR Notes Holdings, LLC. The parties briefed the matter thoroughly both before and after the confirmation hearing held March 8, 9, and 30, 2012, and since the confirmation hearing have each submitted to the Court proposed findings of fact and conclusions of law. Furthermore, the Court, on September 9, 2011, held a contested hearing on the value of the Debtor's real property, at which the parties presented evidence and argument. The Court takes judicial notice of those proceedings, along with the remainder of this bankruptcy case's docket and proceedings. Having considered the foregoing, and being otherwise duly and sufficiently

advised, the Court now ORDERS that the Debtor's Plan is confirmed based on the findings of fact and conclusions of law set forth herein.

Findings of Fact

Background

1. The Debtor is an Indiana limited partnership whose membership interests are owned by Castleton Plaza Management, Inc., a general partner, which holds a 2% interest in the Debtor, and George P. Broadbent, a limited partner, who holds a 98% interest in the Debtor.

2. The Debtor owns a 14.410 acre parcel of real estate and improvements located in Marion County, Indiana and commonly known as 6314-6398 East 82nd Street and 8238–8284 Center Run Road, Indianapolis, Indiana (the "Real Estate"). The Real Estate is located in the Castleton area, which is one of the most desirable retail submarkets in Indiana.

3. The improvements consist of four buildings totaling 175,738 square feet: three multi-store retail shopping complexes and a freestanding building together with a parking lot (collectively, the "Center").

4. The Real Estate and Center, along with the cash collateral, as that term is defined in § 363(a)[1] (the "Cash Collateral"), are the only assets owned by the Debtor.

5. The Debtor has no employees.

6. The Center is managed by The Broadbent Company, Inc. pursuant to a prepetition management agreement with the Debtor. The Broadbent Company has managed commercial properties for more than forty years and has approximately seventy employees who oversee the management of more than thirty separate commercial properties.

[1] Unless otherwise indicated, all statutory citations are to Title 11 of the United States Code (the Bankruptcy Code).

7. To finance the purchase, operation, and maintenance of the Real Estate and the Center, the Debtor obtained a loan in the amount of $9,500,000 (the "Loan") from Laureate Capital Corp., a South Carolina corporation, in exchange for a promissory note dated August 31, 2000 (as amended, restated, replaced, supplemented, assigned, or otherwise modified from time to time before the commencement of the instant case, the "Note"), in the principal sum of $9,500,000.

8. The Note contains, *inter alia*, a standard interest rate of 8.37%, a default interest rate of no less than 11.37%, limitations on prepayment, and late charges of 5% for delinquent payments.

9. To secure repayment of the Loan, as evidenced by the Note, the Debtor and Laureate entered into a mortgage and security agreement (the "Mortgage"), an assignment of leases and rents (the "Assignment"), an absolute and unconditional guarantee of payment and performance required by the Note, and related loan documents (collectively with the Note, the "Prepetition Loan Documents"), which encumber substantially all the Debtor's property, including the Real Estate and Center, leases thereof, and rents therefrom (collectively, the "Collateral"). The Mortgage and Assignment were recorded that day in the office of the Recorder of Marion County, Indiana. Laureate filed UCC-1 financing statements on August 31 and September 6, 2000, in the office of the office of the Indiana Secretary of State.

10. The Mortgage requires, *inter alia*, that reserve accounts be maintained and controlled by Laureate, and that the Debtor establish a lockbox account in the event of its default; that the Debtor obtain Laureate's approval of certain leases and renewals of existing leases; that the Debtor provide Laureate quarterly operating statements and access to its books and records; that the Debtor not take certain actions, like transferring the Real Estate and Center,

without Laureate's consent; that the Debtor maintain specified debt service coverage ratios; and that the Debtor pay for all expenses incurred by Laureate to protect its interest in the Collateral, to foreclose, or to collect from the Debtor, including reasonable attorney's fees.

11. The Prepetition Loan Documents do not include a guarantee of the Loan by anyone other than the Debtor.

12. Through a series of assignments, German American Capital Corporation became the owner and holder of the Prepetition Loan Documents.

13. On September 1, 2010, the Note matured by its terms and a balloon payment was due.

14. The Debtor's failure to make the balloon payment constituted a default under the Prepetition Loan Documents. German American was unwilling to extend the term of the Note.

15. On January 26, 2011, German American commenced a civil action in the Marion County, Indiana Superior Court, seeking relief including foreclosure of the Mortgage and the appointment of a receiver.

16. After commencement of the foreclosure action, EL-SNPR purchased the Prepetition Loan Documents at a discount.

17. On February 3, 2011, the state court entered an order setting a hearing on EL-SNPR's motion to appoint a receiver and set a hearing for February 17, 2011.

18. On February 16, 2011, the Debtor commenced the instant case by filing a voluntary petition under chapter 11 of the Bankruptcy Code, staying the foreclosure suit.

19. Based on EL-SNPR's proof of claim, the total amount the Debtor owed EL-SNPR when it filed for bankruptcy relief was $10,244,659.39. The Debtor does not contest this figure.

20. Since the commencement of this case, the Debtor has operated its business as a debtor-in-possession under §§ 1107(a) and 1108.

21. The Debtor has not secured any post-petition or post-confirmation financing.

22. On May 17, 2011, the Debtor filed a disclosure statement and a plan of reorganization.

23. On the Debtor's motion, the Court on September 30, 2011, determined the value of the Real Estate and Center to be $8,250,000 [Doc. 147]. This figure still accurately reflects the value of the Real Estate and Center.

24. On December 12, 2011, the Debtor filed a revised disclosure statement and a revised plan of reorganization (i.e. the Plan), which is now before the Court for confirmation. On December 13, 2011, the revised disclosure statement was approved over the objection of EL-SNPR.

25. On December 15, 2011, the Debtor served a copy of the revised disclosure statement, the Plan, ballots for voting purposes, and a copy of the Court's above-referenced order of December 13, 2011 (collectively, the "Solicitation Package"), on all creditors, equity security holders, other parties in interest and the United States Trustee.

26. The Debtor now has cash on hand in excess of one million dollars.

The Debtor's Historical Operations

27. From 2006 to 2010, including periods prior to the economic downturn of 2008, the Debtor's gross income decreased every year. In 2011, the Debtor's gross income increased from the prior year.

28. The Center's annual vacancy rate increased from 2006 to 2008, then decreased until 2011, then increased again during the last year. The current vacancy rate for the Center exceeds 30% and is higher than any annual vacancy average over the past ten years.

29. The current retail leasing market is competitive. The Debtor must be able to provide incentives like rent deferrals and reductions and tenant improvement costs in order to retain current tenants and bring in new tenants.

30. For some time, the Debtor has realized decreased rent rates. Tenants who vacated the Center in the last several months have been replaced by tenants paying somewhat less for the space.

The Debtor's Projections

31. The Debtors' witnesses and EL-SNPR's expert were generally in agreement that the economy is improving and that the Center should benefit as a result, though they disagreed about the pace of the improvement and the extent to which it would benefit the retail sector, the Castleton submarket, and the Center in particular. Based on the evidence presented, there appears to be a general improvement in the Indianapolis retail market, especially in the northern part of Indianapolis where the Center is located.

32. Both parties' expectations that the value of the Real Estate and Center will increase significantly in the future were substantiated by the testimony of both of the Center's would-be owners, Mary Clare Broadbent and EL-SNPR, through its representative. Like the appraisers hired by both parties to testify at the hearing concerning the value of the property, both indicated their belief that the Center would be more valuable in the future. With respect to the future value Real Estate and Center, the Court accedes to the apparent consensus among the

witnesses that the property will perform significantly better at some point in the next several years and that its value will increase to reflect that.

33. The Debtor projects that the Center's vacancy rate will fall to 15% by the end of 2016, and that tenants will renew their leases at a higher rate than they have during the last few years. EL-SNPR's expert offered a less optimistic forecast, but testified that he expects the time required for the Debtor to relet vacant space will be shorter than it has been since 2008 because the economy is improving.

34. The Debtor projects an average increase in gross income of 7.9% annually through 2016, which would represent a turnaround from the average annual decrease in gross income of 7.6% from 2006 through 2011.

35. The Debtor forecasted the results of its operations through 2016. The Debtor maintained that its expense projections are liberal and its income projections are conservative. EL-SNPR insists that the projections have no basis in objective fact. In the Court's view, neither characterization is accurate. Observing that reality always trumps a model, EL-SNPR's expert effectively demonstrated the sensitivity of the Debtor's projections to unexpected expenses and other unanticipated changes in cash flows. His observations concerning the periodicity of Plan payments and the alleged inaccuracy of the Debtor's projections of repair and maintenance expenses showed the strong possibility that the relatively small capital infusion originally contemplated in the Plan would have left the Debtor with inadequate cash on hand at some point during the first few years after its reorganization. EL-SNPR's expert's other criticisms of the Debtor's projections (e.g. concerning the budgets for repairs, maintenance, and tenant incentives) were not significant enough to affect materially the Court's opinion of the Plan's feasibility. Both the Broadbent Company, which prepared the Debtor's projections, and EL-SNPR's expert

are competent at producing this sort of forecast. However, the Court finds that the differences between the parties' projections and the Court's concerns about the adequacy of the Debtor's capitalization were addressed by the Debtor's promise during the confirmation hearing to sell its reorganized equity interests for several times more than the Plan originally provided, as discussed below.

36. During the pendency of this case, the Debtor's have taken meaningful steps toward the commencement of a construction project that will enhance the Real Estate by creating a curb cut-through to allow traffic from a nearby, high-traffic mall to access the Center, and vice versa. By agreement of the parties during this case, the Debtor has been prohibited from completing the project until after the Court issues its ruling on confirmation. Though the parties have argued about the costs and benefits of the project throughout the case, they agree that it will add value and make the Center more attractive. Importantly, the Debtor's projections supporting its Plan do not account for the benefits of the project.

The Debtor's Plan Generally

37. The Plan provides for five classes of claims: Class 1 (Allowed Secured Claim of EL-SNPR); Class 2 (Allowed Secured Tax Claim); Class 3A (Allowed Non-Priority Unsecured Claim of EL-SNPR); Class 3B (Allowed Non-Priority Unsecured Trade Claims); and Class 4 (Equity Interests).

38. The Plan requires the Debtor to pay Class 1 $300,000.00 shortly after confirmation, and thereafter monthly payments on a thirty-year amortized note (the "Amended Note") at 6.25% interest, with a balloon payment ten years later on all remaining amounts under the Amended Note. EL-SNPR would also receive an amended mortgage and an amended assignment of leases and rents (collectively with the Amended Note, the "Amended Loan

Documents") in order to secure the Debtor's performance under the Amended Note. After applying the downpayment to EL-SNPR's secured claim, the Amended Loan Documents would reflect a loan-to-value ratio of approximately ninety-seven percent. The amount of the balloon payment would be approximately equal to 85% of the present value of the Real Estate and Center and is expected to be at least $7,329,000. The precise amounts of the Debtor's proposed monthly payments and the balloon payment on the Amended Note are not liquidated but can be determined accurately because they are based on the value of EL-SNPR's secured claim at the time of confirmation, which increases each month this case is pending because the Debtor is accumulating cash subject to the lien of EL-SNPR based on the Prepetition Loan Documents.

39. A transaction such as the one proposed by the Plan and memorialized by the Amended Loan Documents would not occur outside bankruptcy. There is not an efficient market in which a loan can be obtained for more than 97% of the value of a shopping center with an occupancy rate less than 70% and the other characteristics of the Center.

40. Pursuant to the Plan, Class 2 would be paid $200,000.00 on the Distribution Date and the remaining debt owed would be paid through twelve equal quarterly payments at 8% interest.

41. Pursuant to the Plan, Classes 3A and 3B would be paid $0.15 per dollar of the allowed amount of such claims, with equal payments being made quarterly over the next five years. The amount of Class 3A, EL-SNPR's unsecured claim, decreases each month this case is pending as the Debtor accumulates cash and augments EL-SNPR's secured claim as described above.

42. Pursuant to the Plan, Class 4 would receive nothing.

43. In sum, the Plan requires the Debtor to pay its creditors between $709,000 and $725,000 during each of its first three years, and approximately $687,000 for each of the two years thereafter. These payments are realistic, based on the Debtor's projections, even though they are not supported by the Debtor's recent historical performance.

44. Pursuant to the Plan, entities owned by Mary Clare Broadbent, the wife of Mr. Broadbent, the 98% owner of Debtor, would purchase the equity interests in the reorganized Debtor for $75,000.[2] The sale of the equity interests would occur without bidding, auction, or an opportunity for any other party to purchase them. More specific findings concerning the ownership of the reorganized Debtor are set forth below.

45. On March 2, 2012, the Debtor filed a report certifying the method and results of the ballot tabulation by counsel for the Debtor for each of the voting classes voting to accept or reject the Plan.

46. EL-SNPR, the only creditor in Classes 1 and 3A, rejected the Plan in both classes.

47. Pursuant to § 1126(g), Class 4 is deemed to reject the plan because prepetition equity interests will be cancelled on the Plan's effective date.

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[2] Section 5.1 of the Plan, which does not reflect immaterial modifications made during trial and described in the Court's findings, provides as follows:

> On the Effective Date, all of the current Equity Interests in the Debtor will be cancelled, and the Reorganized Debtor will issue new Equity Interests as follows: the new limited partner of the Reorganized Debtor will receive ninety-eight percent (98%) of the Equity Interests in the Reorganized Debtor in exchange for a cash, capital infusion of $73,000.00 into the Reorganized Debtor; and the new general partner of the Reorganized Debtor will receive two percent (2%) of the Equity Interests in the Reorganized Debtor in exchange for a cash, capital infusion of $2,000.00 into the Reorganized Debtor. None of the funds that comprise this capital infusion will originate from the Debtor or an equity holder of the Debtor, and will be funds of the new limited and general partners of the Reorganized Debtor. The new limited and general partners of the Reorganized Debtor will be entities owned by Mary Clare Broadbent, who is the wife of the current owner and who is the sole owner of other retail shopping centers. Mary Clare Broadbent has no ownership interest in the Debtor, and no current owner of the Debtor will have an ownership interest in the limited and general partner of the Reorganized Debtor.

48. All other creditors that submitted ballots voted in favor of the Plan. Classes 2 and 3B accepted the Plan.

The Plan's Proposed Sale of Equity Interests and EL-SNPR's Response

49. The Debtor has not marketed the equity interests in the reorganized Debtor.

50. An officer of the Debtor testified that no third party has approached the Debtor about buying the equity interests and that she believes that there is no market for them.

51. The price for the sale of the equity interests was determined internally by the Debtor, the Broadbent Company, and the Debtor's lawyers. The Broadbent Company's representatives testified that they determined the figure based on the Debtor's projected capital needs, rather than on any market test.

52. During the confirmation hearing, a representative of EL-SNPR testified that it would be willing to pay up to $300,000 for the ownership of the Debtor.

53. In response to the testimonies of both EL-SNPR's representative concerning its willingness to purchase the Debtor and EL-SNPR's expert concerning the alleged undercapitalization of the reorganized Debtor, the Debtor proposed and Mrs. Broadbent promised to put more of her money into the Center, paying $375,000 for the equity interests in the Debtor, and to defer any distributions from the Debtor for a full five years.

54. In response to Mrs. Broadbent's testimony, EL-SNPR's representative testified to its willingness to pay $600,000 for the Debtor and to similarly defer any distributions for five years after confirmation. EL-SNPR indicated that it would immediately pay the Debtor's other creditors in full if it were permitted to purchase the Debtor. This would mean that the trade creditors, with claims totaling approximately $55,000, would be paid in full with interest rather than receive a fifteen percent dividend over time, and that the county treasurer would receive

immediate payment of all the outstanding property taxes rather than receive payment for two-thirds of the obligation now and one third of the obligation over time. Apart from the treatment of trade creditors and the county treasurer,[3] the price EL-SNPR would pay to own the Debtor is insignificant because the excess capital could immediately be returned to EL-SNPR.

55. Mrs. Broadbent, to whom the Plan proposes to sell the Debtor, has no ownership interest in the Debtor. She is the wife of the limited partner of the Debtor, Mr. Broadbent.

56. The Debtor believes that having Mrs. Broadbent as the owner of the reorganized Debtor and the Broadbent Company as its property manager is in the best interests of the Debtor and its trade creditors. Mrs. Broadbent has a personal net worth of more than ten million dollars. She owns six other retail shopping centers, including one near the Center. She is the owner of the Broadbent Company, Inc., which manages the Center, along with her other shopping centers and several dozen other shopping centers owned by Mr. Broadbent. Apart from her belief that the Center will be a profitable investment in its own right, she wants to own the Center because it complements her existing portfolio and because her ownership will ensure that it continues to provide business for the Broadbent Company. The Court finds credible Mrs. Broadbent's testimony that she would contribute additional money to the reorganized Debtor to ensure that its ongoing obligations are satisfied if it requires additional capital during the life of the Plan.

57. EL-SNPR is not a property manager. It owns no property in Indiana. Its representative testified that it would, if it were able to acquire ownership of the Center, hire a local property manager and would consider retaining the Broadbent Company for that purpose. Similarly, EL-SNPR would evaluate existing vendor contracts and consider hiring new vendors as well as retaining current ones. EL-SNPR acknowledged that, as owner, it could sell the Real

[3] Payment of the property taxes, which are secured by a lien superior to the Mortgage, also directly benefits EL-SNPR, which would have to pay them if it acquired the Real Estate and Center through a credit bid at a sheriff's sale.

Estate and Center at any time, though it would not choose to do so until it considers the value of the property to have stabilized.

58. The owners of two of the Debtor's unsecured trade creditors, holders of Class 3B claims constituting more than half of the Class's total value, testified in favor of the Plan. The owner of a landscaping company with an unsecured claim of approximately $14,500 testified that he values his long-term business relationship with the Broadbent Company, which includes contracts for services he provides at the Center and at other shopping centers, such that he would prefer the Debtor's plan to the Center's ownership by EL-SNPR even if the latter were to pay his company's claim in full with interest. Those sentiments were echoed by the owner of a construction company with an unsecured claim of approximately $25,000 and a similar long-term relationship with the Broadbent Company. For these trade creditors, it is more valuable to receive only a 15% distribution on their claims and continue to have the Debtor and the Broadbent Company as a customer than to receive a 100% distribution and lose those relationships.

59. With respect to the value of the reorganized Debtor, the Debtor's expert testified that the reorganized Debtor will be insolvent on a balance-sheet basis and that the value of the Real Estate and Center will not stabilize until 2014 or 2015. Because this would make for a high-risk investment for the reorganized Debtor's owner, an investor would, in the Debtor's expert's opinion, require an expected return between thirty and thirty-five percent. EL-SNPR's expert generally agreed that a prospective investor in the reorganized Debtor, approaching the transaction from arm's length, would demand an extraordinarily high rate of return on an equity investment. The Court concludes that there is not an efficient market for the equity interests of

the reorganized Debtor, standing alone and subject to EL-SNPR's interest in the Amended Loan Documents.

Conclusions of Law

60. The Court has jurisdiction over this bankruptcy case pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Confirmation of a plan is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

61. The Debtor is a single-asset real estate entity, as defined in § 101(51B).

62. EL-SNPR is the rightful holder of the Prepetition Loan Documents and has valid, binding, enforceable, unavoidable, and properly perfected first priority liens and security interests in the Collateral, subject to the first lien of the Marion County, Indiana, Treasurer, including the Cash Collateral held by the debtor. The Debtor has waived its right to contest or to challenge the perfection and priority of the liens and security interests of EL-SNPR in the property.

63. The Solicitation Package was served in accordance with Rule 3017 of the Federal Rules of Bankruptcy Procedure, and the procedures used to distribute it were fair and conducted in accordance with the Bankruptcy Code, the Bankruptcy Rules, and all other applicable law. Due, adequate, and sufficient notice of the revised disclosure statement and Plan and of the confirmation hearing, along with all deadlines for voting on or filing objections to confirmation of the Plan, has been given to all creditors, equity security holders, other parties in interest, and the United States Trustee. Creditors' votes for the Plan were solicited in good faith and in compliance with §§ 1125 and 1126, Rules 3016 and 3017 of the Federal Rules of Bankruptcy Procedure, the revised disclosure statement, orders of this Court, the Local Rules of the United

States Bankruptcy Court for the Southern District of Indiana, and any applicable general orders and all other applicable provisions of the Bankruptcy Code.

64. The treatment of impaired Classes is set forth in Article III of the Plan. All five Classes are impaired.

65. Pursuant to the requirements of §§ 1124 and 1126, Classes 2 and 3B are each impaired classes that voted to accept the Plan, determined without including acceptance by an insider of the Debtor.

66. The votes against the Plan of Classes 1 and 3A, consisting of EL-SNPR's secured and unsecured claims, respectively, prevent consensual confirmation under § 1129(a) and require the Debtor to seek confirmation under § 1129(b), which provides that a chapter 11 plan that is accepted by at least one impaired class can be confirmed despite its rejection by an impaired class if it does not discriminate unfairly and is fair and equitable with respect to each class.

67. Section 1129(b) requires that all requirements of § 1129(a), except for § 1129(a)(8) (consent of all impaired classes), be satisfied in order for a debtor's plan to be confirmed.

68. EL-SNPR's objection is fourfold. It maintains that the Plan fails to satisfy three of the applicable requirements imposed by § 1129(a), *viz*. the requirements that a plan (i) be proposed in good faith, 1129(a)(3); (ii) pay more to creditors than they would receive if the debtor were liquidated, § 1129(a)(7); and (iii) be feasible, § 1129(a)(11). Further, EL-SNPR insists that the Plan is not (iv) fair and equitable, as § 1129(b) requires of nonconsensual plans.

69. The Debtor bears the burden of establishing that each requirement of § 1129(a) and (b), apart from consent, has been met by a preponderance of the evidence. *See In re*

Mayslake Village-Plainfield Campus, Inc., 441 B.R. 309, 316 (Bankr. N.D. Ill. 2010). The Court addresses each of EL-SNPR's objections in turn.

The Plan Was Proposed in Good Faith

70. EL-SNPR asserts that the Plan was not proposed in good faith as required by § 1129(a)(3) and therefore may not be confirmed because the commencement of this bankruptcy case prevented it from pursuing foreclosure and the appointment of a receiver in the suit it had commenced in state court.

71. The good faith that is required to confirm a plan of reorganization requires the plan to achieve a result consistent with the objectives and purposes of the Bankruptcy Code. *In re Madison Hotel Assoc.*, 749 F.2d 410, 424–425 (7th Cir. 1984). A court assesses good faith in proposing a plan of reorganization by looking at the totality of the circumstances surrounding the plan. *Id.*

72. The filing of a bankruptcy case on the eve of the appointment of a receiver is not bad faith per se. On the contrary, many bankruptcy cases are commenced under such circumstances, as is proper where debtors try to negotiate a consensual restructuring of their debts before seeking the intervention of a bankruptcy court. The Debtor was unable to refinance its obligations with its mortgagee or outside lenders and faced the imminent loss of its asset and the demise of its business, so it sought bankruptcy relief at the last minute. This is entirely unremarkable.

73. That this case is essentially a two-party dispute between the Debtor and EL-SNPR does not indicate bad faith. SARE cases, which are specifically contemplated by the Bankruptcy Code, often involve a mortgagee that is owed the lion's share of the total debt. As one court has observed, "[I]f the prevention of foreclosure by a mortgagee were a basis for objecting to

confirmation, no real estate reorganization under the bankruptcy law could ever occur…." *In re HRC Joint Venture*, 187 B.R. 202, 214 (Bankr. S.D. Ohio 1995).

74. During the course of this case, where EL-SNPR has questioned the Debtor's conduct, the Debtor has shown that it acted in good faith. Apart from various legal positions taken by the Debtor which are not to EL-SNPR's liking and which are addressed on the merits below, EL-SNPR does not point to anything that distinguishes this case from other SARE cases.

The Plan Satisfies the Liquidation Test

75. Given the Court's determination of the value of the Real Estate and Center, and the conclusion, *infra*, that the proposed treatment of EL-SNPR's Class 1 claim is fair and equitable, it is axiomatic that the Plan satisfies the liquidation test. If the Debtor were liquidated, EL-SNPR would receive the proceeds of the sale of the Real Estate and Center, less the balance due on the property taxes that prime its lien, plus the Cash Collateral. The Court has determined the value of the Real Estate and Center to be $8,250,000. That determination was made pursuant to the standard articulated in *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 960 (1997), which provides that "the value of the property and thus the amount of the secured claim under § 506(a) is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller," rather than "foreclosure-value." As discussed more fully below with respect to the appropriateness of the terms of the Amended Loan Documents, the Plan provides for the Debtor to receive more than the net present value of the Real Estate and Center, as determined by the Court pursuant to *Rash*, plus the value of the cash collateral. Since the value determined by the Court is greater than the liquidation value, and EL-SNPR will receive more than that, the Plan satisfies the liquidation test.

The Plan Is Feasible

76. Section 1129(a)(11) provides, in pertinent part, that a plan of reorganization can only be confirmed if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the [reorganized] debtor…."

77. EL-SNPR challenges the Plan's feasibility, both in the near-term, questioning the reorganized Debtor's ability to make the periodic payments required by the Plan, and in the long-term, insisting that the Debtor has not demonstrated that it will be able to make the balloon payment in ten years required by the Amended Loan Documents. EL-SNPR insists that the Debtor's projections are inaccurate and insufficient.

78. To demonstrate that a plan is feasible, a debtor must show that it provides for a "reasonable assurance of commercial viability." *Bank of Am. Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St. P'ship*, 126 F.3d 955, 962 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434 (1999). The debtor bears the burden of proving feasibility by preponderance of the evidence. *Save Our Springs Alliance, Inc. v. WSI (II)-COS, L.L.C.*, 632 F.3d 168, 172 (5th Cir. 2011); *Danny Thomas Props. II Ltd. P'ship v. Beal Bank, S.B.B. (In re Danny Thomas Props. II Ltd. P'ship)*, 241 F.3d 959, 963 (8th Cir. 2001). Evidence of feasibility must be "firmly rooted in predictions based on objective fact," *S & P, Inc. v. Pfeifer*, 189 B.R. 173, 182 (N.D. Ind. 1995) (quotation and citation omitted), but it is not a guarantee of success. It is erroneous to confirm a plan where there is no basis for the future projections. 7 COLLIER ON BANKRUPTCY ¶ 1129.02[11] (16th Ed. 2009); *see Crestar Bank*, 165 B.R. 994. "Where the financial realities do not support the proposed plan's projections or where proposed assumptions are unreasonable, confirmation of the plan should be denied." *In re Young Broad. Inc.*, 430 B.R. 99, 128–129 (Bankr. S.D.N.Y. 2010) (internal quotations omitted).

79. The difficult economic realities the Debtor faces, as evidenced by its historical performance, along with the parties' general consensus that the market will improve during the next few years, are reasonably reflected in the Debtor's projections.

80. With respect to the feasibility of the balloon payment, which the Debtor proposes to satisfy through a refinancing, the Debtor has demonstrated the likelihood that it will be able to obtain such financing. The balloon will be equal to approximately 85% of the present value of the Real Estate and Center. The parties unanimously agree that the property will be worth more then than it is now. Moreover, during the course of this case there was considerable testimony that the availability of such loans is at its nadir in the wake of the financial crisis, as lenders continue to avoid new retail credits in an attempt to rebalance their portfolios. It is reasonable to expect that the availability of commercial real estate loans will have improved in ten years, and that the Debtor will be able to refinance its obligations timely under the Amended Loan Documents.

81. The Debtor has established by a preponderance of the evidence that the projections supporting the Plan are based on objective fact and provide a reasonable assurance of commercial viability. Accordingly, based upon the evidence, the Court believes that confirmation of the Plan is not likely to be followed by the liquidation or further financial reorganization of the reorganized Debtor and the Plan is feasible as required by § 1129(a)(11).

The Plan Is Fair and Equitable

82. Section 1129(b) requires that nonconsensual chapter 11 plans not discriminate unfairly in their classifications and be "fair and equitable" with respect to each impaired class. EL-SNPR asserts that this requirement is not met by two features of the Plan: the treatment of its secured claim, and the proposed sale of the ownership of the reorganized Debtor.

83. Section 1129(b)(2)(A) "defines what constitutes 'fair and equitable' treatment in the secured creditor context." *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 647 (7th Cir. 2011), *aff'd sub nom. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, ___ S.Ct. ____, 2012 WL 1912197 (2012). Where a debtor proposes to retain a secured creditor's collateral, the standard by which the Court is to evaluate a secured creditor's treatment is explicit: such a plan must provide

> (I) that the holders of such claims retain the liens securing such claims… to the extent of the allowed amount of such claims; and
> (II) that each [secured claimant] receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property[.]

§ 1129(b)(2)(A)(i).

84. EL-SNPR maintains that the Plan cannot be confirmed because the Amended Note features an interest rate that would not be available in the market.

85. However, where, as here, there is not an efficient market for the kind of lending contemplated, the appropriate interest rate in a cramdown context is determined according to the formula set forth in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). The *Till* formula begins with the national prime rate of interest and, based on evidence presented to the court, makes an upward adjustment depending on factors such as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. *Id*. at 479. *Till* was a chapter 13 case, but its formula is applicable to chapter 11. *E.g. Bank of Montreal v. Official Comm. of Unsecured Creditors (In re Am. Homepatient, Inc.)*, 420 F.3d 559 (6th Cir. 2006); *In re Greenwood Point, LP*, 445 B.R. 885 (Bankr. S.D. Ind. 2011); *In re Griswold Bldg., LLC*, 420 B.R. 666 (Bankr. E.D. Mich. 2009); *In re Nw. Timberline Enters., Inc.*, 348 B.R. 412 (Bankr. N.D. Tex. 2006); *see Till*, 541 U.S. at 476 n. 14.

86. At the time of the confirmation hearing, the prime rate of interest was 3.25%. The Debtor proposes to add three hundred basis points to the prime rate based on several risks, including the lack of a guarantor, the high loan-to-value ratio, and the Center's low occupancy rate. Based on the evidence, the Court concludes that the appropriate *Till* rate of interest to be paid on the Class 1 allowed secured claim of EL-SNPR is 6.25%, and that EL-SNPR is receiving the present value of its secured claim as required by § 1129(b)(2)(A)(i)(II).

87. Apart from the interest rate under the Amended Note, EL-SNPR contests the treatment of its secured claim insofar as the Amended Loan Documents feature certain non-pecuniary terms that would not be available in the market and lack others that the market would require. According to EL-SNPR, these deviations from the terms that would be required by the market deprive it of the indubitable equivalent of its collateral.

88. Section 1129(b)(2)(A) is written in the disjunctive, providing three alternative standards to evaluate a plan's proposed treatment of a secured creditor. Subsection (i) applies where, as here, a debtor proposes to retain collateral; subsection (ii) applies where a debtor proposes to sell collateral free of encumbrances; subsection (iii) applies where neither subsections (i) nor (ii) applies. *River Road*, 651 F.3d at 652. *See also RadLAX*, 2012 WL 1912197 at *5 ("The question [of the standard by which the treatment of a secured claim is to be judged] is not whether debtors must comply with more than one clause [of § 1129(b)(2)(A)], but rather which one of the three they must satisfy."). The indubitable equivalence standard is imposed by § 1129(b)(2)(A)(iii), which has no application here.

89. Contesting the treatment of its Class 3A unsecured claim, EL-SNPR also challenges the Plan's compliance with the "fair and equitable" standard based on the Debtor's proposal to sell the ownership interest in the reorganized Debtor to an insider of the prepetition

owner without allowing EL-SNPR to bid. EL-SNPR maintains that this sale of property violates the Bankruptcy Code, whether the sale is to be evaluated under both §§ 1129(b) and 363 or just the latter.

90. Mary Clare Broadbent and the entities she owns, the proposed owners of the reorganized Debtor, are insiders of the Debtor. *See* § 101(31)(C).

91. Pursuant to § 1121, a debtor has the basic right to file a plan at any time during a voluntary case. As the proponent, the debtor has the absolute right to formulate its plan, including selection of the owner of the reorganized debtor, and the terms of the plan are confined only by the Bankruptcy Code.

92. Section 1129(b)(2)(B)(ii), as interpreted by *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999), establishes the absolute priority rule, which prohibits the holders of prepetition equity interests from retaining an interest in a reorganized debtor "on account of" their position as prepetition owners. *See Id.* at 458 (forbidding the confirmation of "plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation").

93. EL-SNPR's argument that the Plan violates the absolute priority rule is based on a reading of *LaSalle* that characterizes the exclusive ability of a debtor to designate a non-owner as the post-confirmation owner as the retention of a property interest. Such a reading of *LaSalle* is not supported by its holding, which addressed whether prepetition owners could purchase the equity of a reorganized debtor without marketing the interests. *Id.* at 454 (observing that "the Debtor's exclusive opportunity to propose a plan… is not itself 'property' within the meaning of [§ 1129](b)(2)(B)(ii)").

94. EL-SNPR cites only one case that has applied such a broad reading of *LaSalle*. In *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 49 (Bankr. D. Del. 2000), the court determined that the "exclusive opportunity" to determine who will be the owner of the reorganized debtor is a property interest that must be marketed even when the proposed owner is neither a creditor nor current owner of the debtor.

95. *Global Ocean* ignores the plain language of § 1129(b)(2)(B)(ii), and creates an additional requirement for plan confirmation. Congress easily could have explicitly included insiders in the statute's detailed language. "There is no prohibition against a private sale or against a sale to insiders; and there is no requirement that the sale be by public auction. Rather, for a plan of reorganization to be confirmed, it is the statutory requirements of 11 U.S.C. § 1129 which must be satisfied." *Penn Mut. Life Ins. Co. v. Woodscape Ltd. P'ship (In re Woodscape Ltd. P'ship)*, 134 B.R. 165, 174 (Bankr. D. Md. 1991). *Accord Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship*, 248 B.R. 668, 680 (D. Mass. 2000) ("The Bankruptcy Code does not prohibit [exclusive] sales [to insiders of prepetition owners], and instead relies on the confirmation requirements as the safety net."); *see also Troy Sav. Bank v. Travelers Motor Inn, Inc.*, 215 B.R. 485 (N.D.N.Y. 1997) (confirming plan that proposed to sell equity in the reorganized debtor to a company owned by a personal friend of the debtor's principal). Most recently, in *Greenwood Point*, 445 B.R. at 910, the court adopted a plain language interpretation of § 1129(b)(2)(B)(ii), stating that "the absolute priority rule does not apply to individuals who are not current owners of the debtor, whether or not those individuals are insiders." The exclusive sale of equity interests in a reorganized debtor was neither addressed nor prohibited in *LaSalle*, and is not contrary to the plain language of § 1129(b)(2)(B)(ii). The Court concludes that the absolute priority rule does not apply to insiders who are not prepetition owners.

96. Though the absolute priority rule does not apply to this case, the sale of equity interests in a reorganized debtor is a sale of property of the debtor's estate, and the standards of § 363 guide a court's assessment of such a proposal. *See Command Performance Operators, Inc. v. First Int'l Serv. Corp. (In re First Int'l Serv. Corp.)*, 25 B.R. 66, 70 (Bankr. D. Del. 1982).

97. Courts are typically deferential to the choice of a debtor-in-possession to sell property of the estate, and sales outside the ordinary course of business under § 363(b) should be approved if supported by a sound business justification. *See, e.g., Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (2d Cir. 1983); *In re Condere Corp.*, 228 B.R. 615 (Bankr. S.D. Miss. 1998); *In re Mallory Co.*, 214 B.R. 834 (Bankr. E.D. Va. 1997). Some courts have explicitly required showings of good faith, *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143 (3d Cir. 1986), or that the transaction is "fair and equitable," *In re Phoenix Steel Corp.*, 82 B.R. 334 (Bankr. D. Del. 1987), or in the best interests of the estate, *WBQ P'ship v. Commw. of Va. Dep't of Med. Assistance Servs.*, 189 B.R. 97 (Bankr. E.D. Va. 1995). All of these requirements are consistent with one another, and apply to the Plan's proposed sale of equity interests.

98. A proposed sale to an insider of a debtor is subject to a higher degree of scrutiny than a court would normally exercise. *See generally In re Tidal Constr. Co.*, 446 B.R. 620, 624 (Bankr. S.D. Ga. 2009); *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 424 (Bankr. S.D. Tex. 2009); *Mallory Co.*, 214 B.R. at 837. Some courts considering sales to insiders have developed their own market tests of one form or another. *See, e.g., In re Unbreakable Nation Co.*, 437 B.R. 189, 199 (Bankr. E.D. Pa. 2010) (approving sale to insiders after unsuccessful marketing efforts); *Mallory Co.*, 214 B.R. at 838 (requiring purchase price to equal lesser of appraised value or tax-assessed value); *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 550 (Bankr. S.D.N.Y. 1997)

(rejecting sale without outside valuation); *see also Gulf Coast Oil*, 404 B.R. at 425 (rejecting pre-confirmation sale of all assets without taking all steps required for plan confirmation).

99. In this case, the Court concludes that the heightened scrutiny occasioned by the insider sale does not require the Court to formulate and impose a special test. It would be wasteful to require a marketing process where considerable evidence suggests that there would not be any disinterested buyers at $75,000, much less at $375,000 and subject to the severe restrictions on distributions proposed by the Debtor. Apart from Mrs. Broadbent, the only party who would conceivably be interested in owning the reorganized Debtor is EL-SNPR, who believes the Real Estate and Center is undervalued and would own it free and clear if it were able to acquire the equity piece. However, as stated in the findings above, EL-SNPR's willingness to pay more than Mrs. Broadbent has no practical significance apart from the treatment of the trade creditors, who overwhelmingly support the Plan. In contesting the sale, EL-SNPR seeks more than the benefit of its bargain; it bought paper that entitles it to payment and security as determined by the Bankruptcy Code, not ownership of the collateral.

100. Considering the Debtor's many disadvantages, the Court finds the terms of the proposed sale of the equity interests to Mrs. Broadbent, as modified in open Court to include her increased contribution of $375,000 and restrictions on her right to distributions, to be fair equitable and to comply otherwise with the standards of § 363(b).

ACCORDINGLY, IT IS THEREFORE CONSIDERED AND ORDERED AS FOLLOWS:

A. Confirmation. The Plan, as modified at the confirmation hearing and described herein, is approved and confirmed under § 1129(b). The terms of the Plan and its exhibits, as

amended at the confirmation hearing and as may be modified in their final version, are incorporated herein by reference and are an integral part of this confirmation order.

B. Objections. Except as otherwise provided herein, all objections to confirmation of the Plan that have not been withdrawn, waived, or settled, and all reservations of rights included therein, hereby are overruled on the merits.

C. Provisions of the Plan and Confirmation Order Nonseverable and Mutually Dependent. The provisions of the Plan and this confirmation order, including the findings of fact and conclusions of law set forth herein, are nonseverable and mutually dependent.

D. Executory Contracts. Effective on and as of the Effective Date, as defined in the Plan, and except as otherwise provided in the Plan, each executory contract listed on Exhibit D to the Plan shall be deemed assumed by the Debtor and assigned to the reorganized Debtor pursuant to §§ 365 and 1123. Effective on and as of the Effective Date, and except as otherwise provided in the Plan, any and all executory contracts that exist between the Debtor and any party which are not specified on Exhibit D to the Plan shall be deemed rejected pursuant to §§ 365 and 1123, all to the same extent as if such rejection had been effectuated pursuant to an order of the Court authorizing such action pursuant to § 365 and entered prior to confirmation.

E. Implementation and Consummation of the Plan. The Debtor and reorganized Debtor are authorized to take any and all actions necessary or appropriate to implement, effectuate, perform, and consummate the terms and provisions of the Plan, all transactions contemplated by the Plan and/or this confirmation order, and all other agreements related thereto, including but not limited to cancellation of all current equity interests in the Debtor and issuance of new equity interests in the reorganized Debtor in accordance with the Plan.

F. Retention of Jurisdiction. Pursuant to §§ 105(a) and 1142, and notwithstanding the entry of this confirmation order or the occurrence of the Effective Date, the Court shall retain exclusive jurisdiction as provided in the Plan over all matters arising out of, and relating to, this bankruptcy case and the Plan to the fullest extent permitted by law, including, among other items and matters, jurisdiction over those items and matters set forth in Article XI of the Plan.

G. References to Plan Provisions. The failure to include or specifically reference any particular provision of the Plan in this confirmation order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Plan be confirmed in its entirety.

H. Notice of Confirmation Order. Promptly following entry of this confirmation order by the Court, the Debtor shall serve notice of this confirmation order pursuant to Rules 2002(f)(7), 2002(k) and 3020(c) of the Federal Rules of Bankruptcy Procedure on all creditors, equity security holders, other parties in interest, and the United States Trustee, by causing a notice of this confirmation order to be delivered to such parties by first class mail, postage prepaid, or electronic transmittal.

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