

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
OCT 05 2000
KEVIN E. O'BRIEN, CLERK
UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re) Chapter 11
)
LEEWARD HOTELS, L.P., an) No. B-99-09162-ECF-GBN
Arizona Limited Partnership,)
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
) REGARDING CONFIRMATION
) OF PLAN PROPOSED BY
) LA SALLE NATIONAL BANK
Debtor.)

Confirmation of the chapter 11 plan proposed by La Salle National Bank, as trustee for registered holders of certain mortgage certificates serviced through Lennar Partners, Inc., ("Lennar" or "creditor") was tried before the court. Post trial briefing occurred and closing argument was presented. All appearances are reflected in the record.

The court has considered creditor's plan of February 1, 2000, as amended June 12, 2000, and further amended on August 7, 2000, post hearing briefs, the declarations, reports and testimony of witnesses, admitted exhibits, the joint pretrial statement filed June 19, 2000, and the facts and circumstances of this case. The following findings and conclusions are entered:

1 February 1, 2000 plan, a ballot and the stipulated order
2 establishing a confirmation hearing schedule were mailed to all
3 creditors on the master mailing matrix on March 22, 2000. Supra,
4 at 9-10.

5 4. The order approving the competing disclosure
6 statements provided that if no valid ballot is received with
7 respect to a particular class of claims under either of the
8 competing plans, such class is deemed to have accepted that plan.
9 Supra at 10. But see Bell Road Investment Company v. M. Long
10 Arabians (In re M. Long Arabians), 103 B.R. 211, 215-16 (B.A.P.
11 9th Cir. 1989). No creditor has objected to this order.

12 5. Debtor and Lennar employed P. Greg Curry ("Curry")
13 of Navigant Consulting, Inc. as balloting agent to receive all
14 ballots and report the voting result. Curry filed an affidavit
15 on May 18, 2000, attaching ballot summaries. The litigants do
16 not challenge the accuracy of his affidavit and summaries. Id.
17 Classes 1 through 5 of creditor's plan are unimpaired and are
18 deemed to have accepted the plan. Supra at 12. Impaired classes
19 6-15, and 18, consisting entirely of Lennar's various secured
20 claims have voted to accept this creditor plan. Id. Impaired
21 class 16 did not vote. Impaired classes 17, 19-22 have voted to
22 reject the plan. Rejecting class 21, consisting of insider
23 claims, has been deleted as a class by Lennar's plan amendment.

24 6. As of June 19, 2000, the prime lending rate was
25 9.5 percent. Supra at 13.

26 7. Objections to confirmation of the Lennar plan were
27 filed by the debtor in possession, Kilburg Management L.L.C. and
28

1 Kilburg Employment L.L.C. ("Kilburg"), which are both insiders of
2 debtor; Ramada Franchise Systems, Inc. and Days Inn Worldwide,
3 Inc. ("Ramada"); the County of Taylor, City of Abilene, Abilene
4 Independent School District, County of Williamson and Williamson
5 County RFM ("tax objections").

6 8. Lennar has amended its plan to address objections
7 raised by Ramada and the tax agencies' objections. Those parties
8 did not actively participate in the confirmation litigation.
9 Their objections are deemed resolved.

10 9. The objections of insider Kilburg joined and
11 incorporated debtor's objections and independently objected to
12 subordination of its claim for contract rejection damages.
13 Lennar subsequently amended its plan and placed all Kilburg
14 claims into general unsecured claims class 20 for equal
15 treatment. Consequently, Kilburg did not actively participate in
16 the confirmation litigation. Objections regarding subordination
17 are deemed resolved.

18 10. To the extent any of the following conclusions of
19 law should be considered findings of fact, they are incorporated
20 by reference.

21 CONCLUSIONS OF LAW

22 1. To the extent any of the above findings of fact
23 should be considered conclusions of law, they are incorporated by
24 reference.

25 2. Pursuant to 28 U.S.C. section 1334(a),
26 jurisdiction of this case is vested in the United States District
27 Court for the District of Arizona. That court has referred,

28

1 pursuant to 28 U.S.C. section 157(a), all cases under title 11
2 and all proceedings arising under title 11 or related to a case
3 under title 11 to this court. Amended General Order of May 20,
4 1985. This case having been so appropriately referred, this
5 court has jurisdiction to enter a final order dealing with plan
6 confirmation pursuant to 28 U.S.C. section 157(b)(1) and
7 (b)(2)(L).

8 3. Bankruptcy Code section 1129(a)(1) permits the
9 court to confirm a plan only if the plan complies with applicable
10 provisions of title 11, United States Code. The legislative
11 history suggests the applicable provisions referenced in section
12 1129(a)(1) involve the plan's internal structure and drafting,
13 such as sections 1122 and 1123. No party has objected to the
14 plan on such a basis. The court concludes Lennar's plan complies
15 with section 1129(a)(1).

16 4. Bankruptcy section 1129(a)(2) states that the
17 court shall confirm a plan only if the proponent of the plan
18 satisfies applicable provisions of the Bankruptcy Code, such as
19 whether the plan proponent has complied with section 1125
20 regarding disclosure and solicitation of plan acceptances. No
21 party has objected to the plan on this basis. The court
22 concludes creditor has complied with section 1129(a)(2).

23 5. Bankruptcy Code section 1129(a)(3) requires that
24 a plan be proposed in good faith and not for any means forbidden
25 by law. Debtor and creditor Kilburg have objected to this plan
26 on the basis that it is not proposed in good faith. A number of
27 independent unsecured creditors voted in favor of the Lennar

1 plan. No bad faith is shown by Lennar's prosecution of a
2 creditor plan out of enlightened self interest. Figter Ltd. v.
3 Teachers Insurance & Annuity Association of America (In re Figter
4 Ltd.), 118 F.3d 635, 638-40 (9th Cir. 1997) (discussing good faith
5 within the context of section 1126(e)). The court concludes that
6 proposal of this liquidating plan is consistent with the
7 objectives and purposes of the Bankruptcy Code, is in good faith
8 and complies with section 1129(a)(3).

9 6. Bankruptcy Code section 1129(a)(4) requires that
10 any payment made or to be made in connection with the case or
11 plan has been approved by or is subject to approval by the court.
12 The plan satisfies this requirement. No party has objected to
13 the contrary.

14 7. Bankruptcy Code section 1129(a)(5)(A) requires the
15 plan proponent to disclose the identity and affiliations of any
16 individual proposed to serve after confirmation as an officer of
17 debtor or a successor of the debtor under the plan. Creditor
18 modified its plan to provide that debtor would continue to own
19 and operate the Albuquerque hotel for approximately 18 months.
20 Debtor and its management company have not agreed to do so. The
21 creditor's plan fails to disclose a replacement management entity
22 to serve after confirmation. Consequently, Lennar has failed to
23 comply with section 1129(a)(5)(A) in this plan.

24 8. Section 1129(a)(6) requires, as a condition
25 precedent to confirmation, that any governmental regulatory
26 entity with jurisdiction post confirmation over the rates of the
27 debtor has approved any rate change provided in the plan. The

1 plan does not propose any such rate change. Accordingly, this
2 section is not applicable.

3 9. Section 1129(a)(7) provides that with respect to
4 each impaired, dissenting class, each claim holder will receive
5 or retain property valued as of the effective date, which is not
6 less than the amount the claim holder would receive under chapter
7 7 liquidation. No party has filed an objection based on this
8 section. Classes 1 through 5 of the plan are unimpaired and thus
9 not covered by this provision. Classes 6 through 15 and 18 are
10 impaired, but controlled by Lennar. Each of these impaired
11 classes voted to accept the plan, pursuant to section
12 1129(a)(7)(A)(i).

13 Impaired class 16 did not vote, but its sole member,
14 General Motors Acceptance Corporation ("GMAC"), has consented to
15 a prior settlement with debtor of its claim. This settlement is
16 not modified by the Lennar plan. GMAC did not object to this
17 plan. Thus, class 16 is deemed to have consented to the plan.
18 Impaired secured creditor ACP Mortgage L.P., the sole member of
19 class 17 and administrative convenience class 19, voted to reject
20 the plan. Lennar alleges these creditors will receive or retain
21 under the plan value not less than they would receive or retain
22 under a chapter 7 liquidation. § 1129(a)(7)(A)(ii). These
23 creditors have not argued or objected to the contrary. Class 20,
24 which now includes the prior impaired insider claims under
25 creditor's amended plan, and class 22, which contains impaired
26 equity interest claims in debtor, have both rejected the plan.
27 The plan proponent argues these Code subordinated interests are
28

1 not to receive, under this plan, more than they would in a
2 chapter 7 liquidation. No objections have been filed based on
3 section 1129(a)(7). The court concludes the plan meets this
4 requirement.

5 10. Creditor concedes its plan fails to meet the
6 requirement that each class either accept the plan or is not
7 impaired by it. 11 U.S.C. § 1129(a)(8). Consequently, the court
8 must consider confirmation, if at all, pursuant to section
9 1129(b).

10 11. Bankruptcy Code section 1129(a)(9) establishes
11 rules applicable to chapter 11 priority claims. Unless the claim
12 holder agrees to less favorable treatment, first and second
13 priority claims are to be fully paid in cash on the effective
14 date. 11 U.S.C. § 1129(a)(9)(A). Creditor proposes to pay the
15 class 1 administrative claims of approximately \$400,000 out of
16 the estimated \$845,000 in available cash collateral on the
17 effective date. This appears feasible and in compliance with the
18 statute. See Jorgensen v. Federal Land Bank of Spokane (In re
19 Jorgensen), 66 B.R. 104, 108 (B.A.P. 9th Cir. 1986).

20 12. Bankruptcy Code section 1129(a)(10) requires, as
21 a condition of confirmation, that if a class of claims is
22 impaired under the plan, at least one impaired class has accepted
23 the plan. The impaired classes dominated by creditor have voted
24 to accept the plan. A creditor can impair itself under its own
25 plan to meet the requirements of section 1129(a)(10). L & J
26 Anaheim Associates v. Kawasaki Leasing International, Inc. (In re
27 L & J Anaheim Associates), 995 F.2d 940, 942-43 (9th Cir. 1993).

1 Further, by revised order of May 19, 2000, creditor was
2 temporarily given the right to vote on the competing plans.
3 Administrative docket no. 312.

4 13. Bankruptcy Code section 1129 (a)(11) requires
5 that the court find that confirmation of this plan is not likely
6 to be followed by the need for further financial reorganization
7 of the debtor or any successor to the debtor under the plan. The
8 feasibility standard is whether the plan offers a reasonable
9 assurance of success, although success need not be guaranteed.
10 Mutual Life Insurance Co. of New York v. Patrician St. Joseph
11 Partners Ltd. (In re Patrician St. Joseph Partners Ltd), 169 B.R.
12 669, 674 (Bankr. D. Ariz. 1994).

13 Priority tax claims of \$523,000 and secured tax claims
14 of \$235,000, have been asserted. The plan obligates Lennar to
15 commence its credit bidding for each hotel at 75% of the
16 determined value plus all unpaid taxes attributed to each hotel
17 property. Higher bids of necessity must include sufficient,
18 earmarked funds to pay classes 4 and 5 in full. The
19 miscellaneous secured claim of Mavco Construction in class 5 is
20 also to be paid out of the \$845,000 cash collateral fund. These
21 proposals meet the feasibility standard.

22 Creditor's amended plan proposes that the Albuquerque
23 hotel property be held by debtor and managed by debtor's insiders
24 until a sale or refinance of the property occurs, no later than
25 December 31, 2001. Creditor proposes to keep in place an April
26 10, 2000 stipulation between debtor and secured creditor ACP
27 Mortgage L.P ("ACP"). Trial Ex. 35. Under this stipulation, ACP

1 retains its lien on the Albuquerque real and personal property,
2 and receives interest only monthly payments at 10.25%, commencing
3 the first month after the effective date. The entire balance,
4 and a payoff fee of \$38,500, is due on December 31, 2000.
5 Extensions of the due date are available pursuant to conditions
6 stipulated between debtor and ACP. Supra. Debtor is required to
7 maintain a capital reserve account, provide ACP with monthly
8 reports and meet all other terms of the existing loan and
9 security documents.

10 Under creditor's modification, this stipulated
11 treatment of ACP's secured claim, to which Lennar is not a party,
12 is incorporated into creditor's amended plan at section 5.3.
13 Debtor entered into this stipulation as part of efforts to
14 confirm its own plan, where it retains and operates the Lennar
15 hotels. There is no indication debtor will honor its
16 stipulation, operate the Albuquerque property and pay ACP if
17 creditor's liquidation plan is confirmed. Accordingly, the
18 proposal to pay secured creditor ACP and unsecured creditors in
19 this manner is not feasible. See § 5.6.2 of the amended
20 creditor's plan.

21 14. Bankruptcy Code section 1129(a)(12) mandates
22 payment of all fees required under 28 U.S.C. section 1930,
23 including filing fees and the United States Trustee's quarterly
24 fees. The creditor's plan provides for the payment of all unpaid
25 United States Trustee's fees. All filing fees have been paid.
26 This requirement is satisfied.

27
28

1 15. The debtor is not obligated for any retiree
2 benefits as that term is defined in section 1114. Section
3 1129(a)(13) is not applicable.

4 16. Since the creditor's plan does not meet the
5 requirements of 11 U.S.C. section 1129(a)(8), it can be confirmed
6 only in accordance with section 1129(b), as set forth below.

7 17. For cramdown confirmation under section 1129(b),
8 the plan must comply with all paragraphs of section 1129(a),
9 other than paragraph (8), and meet specified standards of
10 fairness to dissenting creditors and equity security holders. As
11 previously noted, the court has concluded this amended plan fails
12 to comply with sections 1129(a)(5)(A) and (11).

13 Debtor and the Kilburg entities have invoked section
14 1129(b)(1) and objected that the creditor's plan discriminates
15 unfairly and is not fair and equitable.

16 18. The proponent must show that the plan does not
17 discriminate unfairly with respect to each impaired class which
18 did not accept the plan. 11 U.S.C. § 1129(b)(1). This
19 requirement is separate and distinct from the fair and equitable
20 requirement.

21 There can be discrimination, as long as it is fair.
22 Discrimination between classes must satisfy four criteria in
23 order to be fair under section 1129(b): (1) the discrimination
24 must be on a reasonable basis; (2) the plan cannot be confirmed
25 or consummated without the discrimination; (3) the discrimination
26 is proposed in good faith; and (4) the degree of discrimination
27 is directly related to the basis or rationale for the

1 discrimination. Liberty National Enterprises v. Ambanc La Mesa
2 Limited Partnership (In re Ambanc La Mesa Limited Partnership),
3 115 F3d 650, 656 (9th Cir. 1997).

4 Creditor amended its plan to ensure that all allowed
5 unsecured claims, including insider claims, are classified and
6 treated together. Given this amendment, there is no basis to
7 argue that creditor's amended plan discriminates unfairly.

8 19. Having concluded that the plan's treatment of the
9 dissenting, impaired class is not unfairly discriminatory, the
10 court must consider whether the plan's treatment of the objecting
11 Kilburg class is fair and equitable.

12 Section 1129(b)(2) sets forth specific criteria for
13 the fair and equitable treatment of unsecured claims. The plan
14 must provide that each claim holder receives, on account of such
15 claim, property valued on the effective date equal to the allowed
16 claim amount, or junior claims receive no property on account of
17 their claims. 11 U.S.C. § 1129(b)(2)(B). Stated more
18 succinctly, this general rule prevents confirmation if any junior
19 class retains any interest without also providing to senior
20 objecting creditors property equal to the present value of their
21 claim. In re Ambanc La Mesa Limited Partnership, 115 F.3d at
22 654. No dissenting unsecured class member has litigated an
23 objection on this basis, except for the Kilburg creditors. The
24 plan provides pro rata payment of unsecured claims in classes 19
25 and 20, after all senior claims are fully paid. In turn, there
26 is a distribution to debtor's equity interests only after full
27 payment to all other classes, including classes 19 and 20. This

1 meets the requirements of the absolute priority rule of section
2 1129(b) (2) (B) and (b) (2) (C) .

3 20. The court concludes that the first modification
4 of creditor's plan relates only to the treatment of the secured
5 claim of ACP. The plan now provides for the exact treatment
6 negotiated by ACP and debtor pursuant to their stipulation for
7 claim allowance and plan treatment of April 10, 2000. Trial ex.
8 35, amended plan ¶¶ 5.3.1-.2. Creditor ACP has not objected to
9 this treatment. No other creditor or interest holder is
10 adversely impacted by this modification. The creditor's
11 disclosure statement, previously approved by the court, contains
12 adequate information regarding the claims of ACP and their
13 possible effect on the claims and interests of other parties.
14 Since ACP has not objected and this modification leaves
15 unimpaired the claims and interests of other parties, those who
16 have accepted the creditor's original plan are deemed to have
17 accepted this plan modification. 11 U.S.C. § 1126(f); Rule 3019,
18 Fed. Bankr. R.

19 21. The creditor has also modified section 5.6 of its
20 plan to include insider claims within class 20 and allow pro rata
21 treatment of allowed insider claims. Sections 5.6.1 and .2. The
22 amendment to 5.6.2 requires debtor to pay operating income from
23 the Albuquerque hotel, as well as net proceeds from a sale or
24 refinancing of the facility to ACP. Thereafter cash flow, net of
25 debt service to ACP and effective date payments to classes 1
26 through 5, will be paid by debtor to unsecured creditors, until
27

1 an anticipated sale or refinancing of the property by December
2 31, 2001.

3 22. Creditor explains these modifications allow
4 debtor to continue to own and Kilburg to continue to operate the
5 Albuquerque facility until December 31, 2001. Creditor predicts
6 such an operation will allow full payment of unsecured claims,
7 assuming Kilburg voluntarily subordinates its \$990,000 insider
8 claim. Creditor's post trial brief filed Aug. 7, 2000, at 11-17.
9 Debtor has objected to creditor's proposed modifications and
10 subordination. Debtor's response filed Aug. 11, 2000, at 4-6.
11 Although debtor does not directly so state, apparently it and its
12 insiders will not serve as the proposed disbursing agent and
13 property manager. Supra, at 4, n.1.

14 Given this refusal, the proposed modification impairs
15 debtor, Kilburg and the unsecured creditors debtor must pay under
16 section 5.6.2. The disclosure statement approved by the court
17 did not contain adequate information regarding this material
18 modification and the apparent refusal to serve. Accordingly,
19 this aspect of the proposed modification fails to meet section
20 1127(a) and (c). See Andrew V. Coopersmith (In re Downtown
21 Investment Club III), 89 B.R. 59, 65 (9th Cir. Bankr. 1988).

22 23. Creditor is not entitled to an order approving
23 plan modification or confirming the plan as modified.

24 ---

25

26

27

28

1 Bret A. Maidman
2 Lewis and Roca LLP
3 40 N. Central
4 Phoenix, AZ 85004-4429

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
By *D. Temple*
Deputy Clerk