

SIGNED.



Dated: December 07, 2010

*James M. Marlara*  
JAMES M. MARLAR  
Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re: ) Chapter 11  
RIDGE VILLAS MGMT, LLC, ) No. 2:09-bk-17998-JMM  
 ) **MEMORANDUM DECISION**  
Debtor. )

Presented to the court on November 9, 2010, was the plan of reorganization proposed for Ridge Villas Mgmt, LLC ("RVM" or the "Debtor") in this case.

Evidence was taken in the form of numerous documents and one witness, and the parties have filed written memoranda on legal points, and further addressed their positions through oral argument.

The court has considered all sides of the issues, has carefully reviewed the pertinent record in this case, and now rules.

**ISSUE**

Can the Debtor's Chapter 11 First Amended Plan of Reorganization (ECF No. 38) (the "Plan") be confirmed?

1 **FACTS**

2  
3 **The Debtor**

4  
5 RVM owns ten condominium units in a residential project in Prescott, Arizona, known  
6 as Villas at the Ridge (the "Development") It also owns a 6000 foot separate club/banquet facility,  
7 and a 3600 square foot storage building, along with certain vacant land appurtenant thereto.

8 The Development consists of 68 units in total. The project was built in 1987 and 1988  
9 by Antelope Resorts Estates LP, a limited partnership in which RVM's current equity owners held  
10 an ownership interest. The Development was originally built as a rental project.

11 RVM rents out on a short term basis, two (2) of the units it owns within the  
12 Development. The others are vacant or do not produce income. It continues to operate the separate  
13 club/banquet facility through a wholly owned subsidiary known as The Ridge Club, LLC. (Debtor's  
14 First Amended Disclosure Statement at 3, ECF No. 38) (the "Disclosure Statement"). However,  
15 during the pendency of this case, the Debtor has produced no income.

16 For some time, the Debtor has been embroiled in either litigation or persistent disputes  
17 with the homeowners' association of the development, Villas at the Ridge Condominium Council  
18 ("HOA"). The development consists of 68 units, total, of which the Debtor owns ten.

19 Due to the ongoing seriousness of these issues, RVM was unable to continue servicing  
20 its debt, or to pay property taxes on its properties within the Development. As a consequence, it  
21 filed a chapter 11 bankruptcy petition on July 30, 2009.

22 The Debtor's monthly operating reports reflect the following income and expenses:

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| <b>ECF No.</b> | <b>Month</b>    | <b>Income</b> | <b>Expenses</b> | <b>Profit (Loss)</b> |
|----------------|-----------------|---------------|-----------------|----------------------|
| 23             | August, 2009    | 720.38        | 709.00          | 11.38                |
| 27             | September, 2009 | -0-           | -0-             | -0-                  |
| 35             | October, 2009   | -0-           | -0-             | -0-                  |

|    |                             |          |                     |                     |
|----|-----------------------------|----------|---------------------|---------------------|
| 36 | November, 2009 <sup>1</sup> | 2,000.00 | 325.00 <sup>2</sup> | No operating profit |
| 56 | December, 2009              | -0-      | 530.26              | (530.26)            |
| 58 | January, 2010               | -0-      | 336.10              | (336.10)            |
| 59 | February, 2010              | -0-      | 2.50                | (2.50)              |
| 60 | March, 2010                 | -0-      | 2.50                | (2.50)              |
| 61 | April, 2010                 | -0-      | 327.50              | (327.50)            |
| 75 | May, 2010                   | -0-      | 5.00                | (5.00)              |
| 76 | June, 2010 <sup>3</sup>     | 1,500.00 | 295.44              | No operating profit |
| 77 | July, 2010                  | -0-      | 2.50                | (2.50)              |
| 78 | August, 2010                | -0-      | 978.22              | (978.22)            |
| 79 | September, 2010             | -0-      | 2.50                | (2.5)               |

The Debtor is not a revenue-generating enterprise. Its "income" over the last 14 months has been \$720.38. Its other \$3,500 has come from "loans" (presumably through its principals) sufficient to pay the periodic U.S. Trustee payments.

On January 22, 2010, the Debtor filed its Plan. An evidentiary hearing thereon was held November 9, 2010 (ECF No. 83). The Debtor presented one witness and some exhibits. The Plan was opposed.

The Debtor valued its real property at \$2,365,000, against which it listed liens of at least \$1,241,742 (Schedule A, ECF No.13; Disclosure Statement). It has very little personalty, which it valued at \$2,120 (Schedule B, ECF No. 17) (*see* Disclosure Statement at 17, 10). The Debtor has not paid its real estate taxes for some period of time, and owes about \$91,000 to Yavapai County.

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<sup>1</sup> Loan.

<sup>2</sup> U.S. Trustee quarterly payment.

<sup>3</sup> Loan.

## The Plan

The Plan's major features can be summarized in the following manner. The plan provides for initial funding from rental income. Debtor may also sell its land and/or commercial real property, and eventually, also sell one or more of the condominium units.

The Plan and its voting are:

| Class | Claim Type  | Treatment   | Amount    | Impaired | Vote                  |
|-------|---|---|-----------|----------|-----------------------|
| I     | Administrative  | Paid in full in cash within 30 days of the Effective Date, or as otherwise agreed.  | \$ 20,500 | n/a      | n/a                   |
| II    | Yavapai County property tax   | Paid in full with statutory interest, 12 months following the Effective Date. Taxes shall be kept current thereafter.   | 91,000    | n/a      | --                    |
| II    | Miller Farm Investments-- secured claim on Units 110, 111 & 113 (\$130,000 lien on each)                  | Paid in full, at non-default interest rate, no later than 7 years from the Effective Date, commencing 13 months following the Effective Date, with monthly payments of \$900 per unit, and increasing to \$1,300 on month 25. Retain liens.   | 390,000   | Yes      | Accepts               |
| IV    | Sonlight Investments Land Trust-- secured claim on units 117 (\$140,000); 217, 218 & 219 (\$150,000 each) | Paid in full, at non-default interest rate, no later than 7 years from the Effective Date, commencing 13 months following the Effective Date, with monthly payments of \$1,200 per unit, and increasing to \$1,500 on month 25. Retain liens. | 590,000   | Yes      | No ballot. (Insider.) |
| V     | Paul Rinderer priority wage   | Paid in full without interest within 24 months from the Effective Date.   | 4,500     | Yes      | Accepts.              |
| VI    | IRS and ADOR income and payroll tax   | Paid in 60 equal monthly installments beginning 30 days following the later of the Effective Date or date of allowance, at 5% interest per annum.   | 28,317    | Yes      | No ballot.            |

|      |  |   |                                       |     |                       |
|------|--|---|---------------------------------------|-----|-----------------------|
| VII  | Villas HOA--two claims for (a) homeowners assessments & (b) lawsuit for alleged construction defects on units claimant purchased from Debtor | <ul style="list-style-type: none"> <li>• Claim for pre-petition homeowners assessments, if approved by the court, will be paid in full with 5% interest, calculated from and after the date of the approval of the claim, but no later than 30 months after the Effective Date.</li> <li>• Claim for post-petition homeowners assessments, shall be paid within 30 days of the date of a final non-appealable order entered by the court approving such claim.</li> <li>• Debtor shall pay nothing on the disputed construction defect claim. Villas HOA can look solely to an insurance policy maintained by the Debtor with Travelers Insurance.</li> </ul> | 65,500<br><br>8,200 Admin.<br><br>-0- | Yes | Rejects.              |
| VIII | Quantum Lenders Trust  | Debtor shall pay nothing. Debtor's equity holders will pay this debt.   | 1,069,000                             | Yes | No ballot. (Insider.) |
| IX   | General unsecured  | To be paid in full amount of allowed claim, without interest, upon sale of a condominium unit, but not later than 3 years from the Effective Date   | 150,000                               | Yes | Accepts               |
| X    | Equity holders   | As all senior classes will be paid in full, the equity holders shall retain their equity interests in the debtor.   | --                                    | No  | No ballot.            |

At the confirmation hearing, the only witness was Mr. Lynn Meyers, the Debtor's principal. After describing the general state of the Debtor's affairs, and updating the parties as to the status of a pending lawsuit involving construction defects, Mr. Meyers began to explain how the Plan would be implemented.

As for sales of the individual condominium units, Mr. Meyers noted that only two were currently rented, but not producing income (or the monthly Operating Reports would so reflect), and that there were no sales contracts on them, or indeed any of the Debtor's properties.

On cross-examination, Mr. Meyers agreed that seven of the condominium units had no equity above the liens thereon. The clubhouse facility has generated very little if any income (*see* Operating Reports), since the case was filed on July 30, 2009, almost one and one-half years ago.

As for where the cash would come from to pay administrative and ongoing expenses projected under the Plan, Mr. Meyers could only respond that, "I'll find the money," or that he was

1 "working at generating it." When probed about this further, Mr. Meyers responded, "I will deal with  
2 it," or "I will have to put it in," or "I'm not prepared to tell you that now."

3 Pressed, Mr. Meyers said that he expected to have all of the units at 100% occupancy  
4 within 8-12 months. He provided no evidence to support this optimism. Mr. Meyers testified that  
5 he had no loans, exit financing or capital infusions currently committed. For many of the  
6 outstanding obligations, Mr. Meyers, testified that the source of payment would come from "funds  
7 loaned to it by equity owners" (Disclosure Statement at 5).

8 For monetary needs not directly paid out of any revenues, Mr. Meyers stated that other  
9 entities he owned or controlled could contribute. However, his Disclosure Statement nowhere  
10 mentions these entities nor provides information as to their financial bona fides.

## 11 **THE CONFIRMATION ELEMENTS OF § 1129--THE 16 ELEMENTS**

12  
13  
14 Confirmation has two major parts (1) the § 1129(a) factors, comprised of 16 separate  
15 areas of inquiry and proof, and (2) § 1129(b)'s scrutiny for whether a plan treats dissenting classes  
16 fairly and equitably. If it is found to have done so, a plan can be confirmed in spite of the  
17 objections, and those dissenters will be bound by the plan.

18 The court is charged with the responsibility of determining whether a debtor has  
19 proven each of the applicable elements of § 1129. It does this by measuring the factual evidence  
20 against the appropriate legal standards.

### 21 **A. Sections 1129(a)(1) and (2)--General Compliance**

22  
23  
24 The section requires that the plan and plan proponent (here, the Debtor) has complied  
25 with applicable bankruptcy law. This means that the law has been followed throughout the  
26 administrative portion of the case, appropriate fees and reports have been tendered, that the court  
27 and creditors have been privy to financial information, that in all respects a debtor has been  
28

1 transparent and candid in its communications, and that it has materially complied with the  
2 substantive bankruptcy statutes and rules.

3 Here, the administrative record supports the finding that these elements have been  
4 met. All necessary professionals in the case have been appointed by the court, fees for such  
5 professionals have been disclosed and vetted, and procedures for noticing out the Debtor's Plan with  
6 adequate disclosure (§ 1125) have been followed. There has been no assertion that the vote  
7 solicitation process for votes has been tainted or is otherwise improper. Therefore, it appears that,  
8 in general, these provisions of the Bankruptcy Code have been satisfactorily met.

### 9 10 **B. Section 1129(a)(3)--Good Faith**

11  
12 Good faith is an inherent requirement which runs throughout the entire Bankruptcy  
13 Code. Because the bankruptcy court is a court of equity, as well as a court of law, and because of  
14 the fluidity of bankruptcy proceedings, equity demands a constant balancing of the competing needs  
15 of the various constituencies. It is essential that bankruptcy proceedings be transparent, candid and  
16 always operate in that spirit.

17 In its most basic sense, "good faith" means honesty in purpose, faithfulness to one's  
18 duty or obligation, observance of concepts of fair dealing, and the absence of intent to defraud or  
19 to seek unconscionable advantage. BLACK'S LAW DICTIONARY (9th ed. 2009). The bankruptcy  
20 definition most commonly applied is that the good faith, that is needed to confirm a plan of  
21 reorganization, requires the plan to achieve a result consistent with the objectives and purposes of  
22 the Bankruptcy Code. *In re Sylmar Plaza, L. P.*, 314 F.3d 1070, 1074 (9th Cir. 2002) (*citing In re*  
23 *Corey*, 892 F.2d 829, 835 (9th Cir.1989)); *In re Stolrow's, Inc.*, 84 B.R. 167, 172 (9th Cir. BAP  
24 1988); *In re Jorgensen*, 66 B.R. 104, 108-09 (9th Cir. BAP 1986). In order to determine good faith,  
25 a court must inquire into the totality of circumstances surrounding the plan, the application of the  
26 principal of fundamental fairness in dealing with creditors, and whether the plan itself will fairly  
27 achieve a result consistent with the objectives and purposes of the Code. *Sylmar Plaza*, 314 F.3d  
28

1 at 1074; *Stolrow's*, 84 B.R. at 172; *Jorgensen*, 66 B.R. at 109; *see also In re Kemp*, 134 B.R. 413,  
2 414-15 (Bankr. E.D. Cal. 1991); *In re Jasik*, 727 F.2d 1379, 1383 (5th Cir. 1984).

3 The court finds this § 1129(a)(3) element to have been satisfied.

4  
5 **C. Section 1129(a)(4)--Payments In Connection With the**  
6 **Case or Incident to the Case Must Be Approved and Reasonable**  
7

8 Typically, this Code section refers to the court's supervision over professional fees.  
9 To date, all professionals who are required to do so have applied to the court for fees or will do so,  
10 have or will circulate their requests to the primary constituents and the U.S. Trustee, and have or  
11 will give parties the opportunity to object.

12 Procedures will be followed, if the Plan is confirmed, to allow the final entry of  
13 orders. The court retains jurisdiction, for this purpose, post-confirmation.

14 The court finds and concludes that § 1129(a)(4) has been met by the Plan and its  
15 proponents.

16  
17 **D. Section 1129(a)(5)--Post-Confirmation**  
18 **Officers and Directors, Insiders and Compensation**  
19

20 A Chapter 11 plan may not be confirmed if the continuation in management of the  
21 persons proposed to serve as officers or managers of debtor is not in the interests of creditors and  
22 public policy. § 1129(a)(5)(A)(ii); *see In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D.  
23 Cal. 2003) (citing *In re Sovereign Group, 1984-21 Ltd.*, 88 B.R. 325, 329 (Bankr. D. Colo. 1988)).  
24 Indeed, continued service by prior management may be inconsistent with the interests of creditors  
25 and public policy if it directly or indirectly perpetuates incompetence, lack of discretion,  
26 inexperience or affiliations with groups inimical to the best interests of the debtor. *Beyond.com*, 289  
27 B.R. at 145 (citing *In re Polytherm Indus., Inc.*, 33 B.R. 823, 829 (W.D. Wis. 1983)); *In re*  
28 *Sherwood Square Assocs.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989); *In re SM 104 Ltd.*, 160 B.R.



1 202 (Bankr. S.D. Fla. 1993) (manager who diverted rents, violated court orders, made  
2 misrepresentations to secured creditors, commingled funds and maintained a grossly inadequate  
3 accounting system, was prohibited by § 1129(a)(5) from continuing in that capacity). Here, Mr.  
4 Meyers will continue to control and supervise the Debtor's affairs.

5 The Debtor has satisfied its burden as to § 1129(a)(5).

6  
7 **E. Section 1129(a)(6)--Governmental Rate Control**

8  
9 This element of § 1129(a) is inapplicable to this Debtor. No creditor or class raised  
10 an objection on this ground, and thus the court finds that § 1129(a)(6) does not apply.

11  
12 **F. Section 1129(a)(7)--Best Interests of Creditors Test**

13  
14 This section of § 1129(a) requires, with respect to each impaired class of claims or  
15 interests, that each holder of a claim or interest in the class either accept the plan or receive under  
16 the plan at least as much as it would receive on liquidation. *In re Mid Pac. Airlines, Inc.*, 110 B.R.  
17 489 (Bankr. D. Haw. 1990). This is commonly referred to as the "best interests of creditors test."  
18 *In re M. Long Arabians*, 103 B.R. 211, 215 (9th Cir. BAP 1989).

19 In its Disclosure Statement, the Debtor detailed its best estimation of how creditors  
20 would fare in a hypothetical liquidation. For unsecured creditors, the estimated recovery would be  
21 nothing for each claim.

22 The Debtor has therefore sustained its burden of proof relative to § 1129(a)(7), and  
23 that element of § 1129 has been satisfied.

24  
25 **G. Section 1129(a)(8)--Each Class Must Accept or is Left Unimpaired**

26  
27 This provision of the Code is the counterpart of §§ 1129(a)(10) and 1129(b)(1). If  
28 each class accepts or is left unimpaired, this provision is satisfied. If one or more classes dissent

1 and reject the plan, then the debtor must have at least one other impaired class which consents to  
2 the plan. § 1129(a)(10). Then, if all of the other § 1129(a) factors are satisfied, the case may  
3 proceed to the fair and equitable considerations of § 1129(b) (the "cramdown").

4 Here, the Debtor cannot satisfy § 1129(a)(8) because it does not have unanimous class  
5 consent for its Plan.

6 But, since the Plan has at least one impaired consenting class, § 1129(a)(8) simply  
7 becomes inapplicable, and is replaced by § 1129(a)(10) and § 1129(b)(1).

#### 8 9 **H. Section 1129(a)(9)--Priorities**

10  
11 No party objected on this ground or the objection has been mooted (the Debtor noted  
12 that it had agreements from such tax creditors). The court finds it to be satisfied.

#### 13 14 **I. Section 1129(a)(10)--At Least One Impaired Consenting Class**

15  
16 As noted above, in the § 1129(a)(8) discussion, the Debtor has cleared this statutory  
17 hurdle, because it has several impaired classes, not including "insiders," which have voted in favor  
18 of the Plan.

19 Section 1129(a)(10) has been satisfied.

#### 20 21 **J. Section 1129(a)(11)--Feasibility**

22  
23 Feasibility is the heart of every Chapter 11 reorganization case. It is the most  
24 important element of § 1129(a). Section 1129(a)(11) permits confirmation only if:

25 Confirmation of the plan is not likely to be followed by the  
26 liquidation, or the need for further financial reorganization, of  
27 the debtor or any successor to the debtor under the plan, unless  
28 such liquidation or reorganization is proposed in the plan.

1 "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise  
2 creditors and equity security holders more under a proposed plan than the debtor can possibly attain  
3 after confirmation." *In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) (quoting 5  
4 COLLIER ON BANKRUPTCY ¶ 1129.02[11], at 1129-34 (15th ed. 1984)).

5 "A plan meets this feasibility standard if the plan offers a reasonable prospect of  
6 success and is workable. . . .The prospect of financial uncertainty does not defeat plan confirmation  
7 on feasibility grounds since a guarantee of the future is not required. . . . The mere potential for  
8 failure of the plan is insufficient to disprove feasibility." *In re Patrician St. Joseph Partners Ltd.*  
9 *P'ship*, 169 B.R. 669, 674 (D. Ariz. 1994).

10 Every debtor is required to present "ample evidence to demonstrate that the Plan has  
11 a reasonable probability of success." *In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir. 1986); *see*  
12 *also* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[11], at 1129-52, (16th ed. 2010). Section 1129(a)(11)  
13 "requires the plan proponent to show concrete evidence of a sufficient cash flow to fund and  
14 maintain both its operations and obligations under the plan." *Id.* at 1129-53 (citation omitted). In  
15 order to determine whether § 1129(a)(11) is satisfied, a court must "scrutinize the plan to determine  
16 whether it offers a reasonable prospect of success and is workable." *In re Sagewood Manor Assocs.*  
17 *Ltd. P'ship*, 223 B.R. 756, 762 (Bankr. D. Nev. 1998). Plans which are based on speculation are  
18 not proper candidates for reorganization. *Pizza of Haw., supra*.

19 In evaluating the feasibility of a plan, the Ninth Circuit's BAP has directed courts to  
20 consider several factors, including: (1) the adequacy of the capital structure; (2) the earning power  
21 of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the  
22 continuation of the same management; and (6) any other related matters which determine the  
23 prospects of a sufficiently successful operation to enable performance of the provisions of the plan.  
24 *In re Wiersma*, 324 B.R. 92, 113 (9th Cir. BAP 2005), *aff'd in part and rev'd in part on other*  
25 *grounds*, 483 F.3d 933 (9th Cir.2007).

26 A court may not confirm a plan if its feasibility depends on future refinancing or sales,  
27 unless there is an adequate evidentiary showing that such refinancing or sales are likely to occur.  
28 *See In re Made in Detroit, Inc.*, 299 B.R. 170, 179-80 (Bankr. E.D. Mich 2003) (plan not confirmed

1 when proponent made inadequate showing of ability to obtain financing); *In re Vanderveer Estates*  
2 *Holding, LLC*, 293 B.R. 560 (Bankr. E.D.N.Y. 2003) (similar); *In re Walker* 165 B.R. 994 (E.D.  
3 Va. 1994) (similar with respect to future sale of property).

4 Weighing the evidence, the court finds and concludes that feasibility has not been  
5 proven, and that the Plan is speculative. On the entire record before the court, the Plan is not  
6 feasible.

7 The Debtor failed to prove 11 U.S.C. § 1129(a)(11).

8  
9 **K. Section 1129(a)(12)--Fees**

10  
11 The U.S. Trustee has not objected on the grounds that its fees, or related fees, are  
12 unpaid. No creditor has suggested that compliance with this section is incomplete.

13 The court therefore finds and concludes that this provision of the Code has been  
14 satisfied.

15  
16 **L. Section 1129(a)(13)--Retiree Benefits**

17  
18 This section is not applicable to this Debtor.

19  
20 **M. Section 1129(a)(14)--Domestic Support Obligations (Alimony; Child Support)**

21  
22 This section is not applicable to this Debtor.

23  
24 **N. Section 1129(a)(15)--Individual Chapter 11 Case**

25  
26 This section is not applicable to this Debtor.

1 **O. Section 1129(a)(16)--Transfers of Property**

2  
3 The Plan does not intend to transfer any of the Debtor" assets, except in the ordinary  
4 course of business through sales.

5 Therefore, this section either does not apply, or the Debtor has met whatever minimal  
6 burdens satisfy this Code provision.

7  
8 **CONCLUSION**

9  
10 Other than the Debtor's unsubstantiated hopes, the Debtor has not proven that it has  
11 a viable plan. At best, Mr. Meyers' vision is sincere but unsupported by realistic projections or other  
12 evidence of financial viability. The Plan therefore fails the feasibility test of 11 U.S.C.  
13 § 1129(a)(11). The Plan cannot be confirmed.

14 Moreover, based on the state of the entire record, the court cannot find that providing  
15 the Debtor another chance at filing a feasible plan would be productive. Therefore, the court will  
16 dismiss this case.

17 Because the case will be dismissed, it is unnecessary to decide the issues concerning  
18 the disputed HOA claim. It too will be denied, on mootness grounds.

19  
20 DATED AND SIGNED ABOVE.

21  
22 COPIES to be sent by the Bankruptcy Notification  
23 Center ("BNC") to the following:

24 J. Kent MacKinlay, Attorney for Debtor  
25 Peter M. Gennrich, Attorney for Villas at the Ridge Condo Council  
Greg Marble, Attorney for IRS  
Office of the U.S. Trustee