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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FILANDRO ANAYA and
ODETTE ANAYA,
Debtors.

NO. 7-02-14552 SA

MEMORANDUM OPINION ON CONFIRMATION AND FINAL APPROVAL OF DISCLOSURE STATEMENT

This matter came before the Court for final approval of the Debtors' Disclosure Statement[1] (doc. 153), confirmation of Debtors' Chapter 11 Plan of Reorganization ("Plan")(doc. 152), as amended by the Supplement to Disclosure Statement and Plan (doc. 199) and by the post-confirmation hearing Second Supplement to Disclosure Statement and Plan to Provide Information Requested by the Court (doc. 226). Debtors appear through their attorney the Law Office of George "Dave" Giddens, P.C. (Dave Giddens). Also before the Court are the objections to confirmation[2] filed by Ranchers Bank ("Ranchers"

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[1] Debtors elected to be considered a small business. Doc. 109. Therefore, after the filing of the Disclosure Statement the Court entered its Order Conditionally Approving Disclosure Statement, setting deadlines, and setting confirmation and final approval of the Disclosure Statement. Doc. 156. But, Debtors probably do not qualify as a "small business" because their primary business is the owning of real property and activities incidental thereto. See 11 U.S.C. §101(51C). No party has raised this objection, so the Court will not pursue this question.

[2] Other objections were filed by the United States Trustee (doc. 167) and CitiCapital (doc. 170). These were withdrawn before confirmation.

or “Bank”)(docs. 173 and 180), Ranchers’ Response to Debtors’ Second Supplement (doc. 228), Debtors’ Motion to Strike Rancher’s Response to Second Supplement (doc. 230), and Debtors’ Reply to Rancher’s Response (doc. 231). Ranchers Bank appears through its attorney Hatch, Allen & Shepherd, P.A. (Dennis Hill).

The Court conducted the confirmation hearings on December 14, 2004 and January 19, 2005. Having considered and reviewed the material presented at trial, the Plan, the Disclosure Statement, the Schedules filed in this case, the supplementary materials provided, and being otherwise sufficiently informed and advised, the Court finds that confirmation of the Plan must be denied. In reaching this conclusion, the Court did not consider Rancher’s Response (doc. 228), and therefore will grant the Debtors’ Motion to Strike it (doc. 230). Having stricken the Response, the Court also did not consider Debtors’ Reply (doc. 231). This is a core proceeding. 28 U.S.C. § 157(b)(2)(L).

THE PLAN

The “Los Llanos Subdivision” consists of 40 acres in Santa Fe County, New Mexico. ¶1.38 [sic, should be ¶1.39].

This subdivision has 4 five-acre lots[3] and 1 ten-acre lot. ¶4.1.1. Debtors intend to subdivide the ten-acre lot into 2 five-acre lots and list them for $39,900. Id.[4]

The "Loma Linda Real Estate" consists of real estate in Edgewood, Santa Fe County, New Mexico, ¶1.39, consisting of 152 acres (Testimony of Debtor.) Debtors intend to subdivide[5] Loma Linda after a survey and compliance with applicable laws of Santa Fe County and New Mexico. ¶4.1.1. The Debtors intend to find investors to place infrastructure on the Loma Linda Real Estate. Id.; ¶6.6.3; APE Business Plan, at page 3, attached to Supplement to Disclosure Statement as Exhibit E (doc 199). Debtors employed Oden Miller & Associates to survey and prepare the property for subdivision. Id.

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[3] These lots have sold, some several times. See docket 187, 188, 213, 216, 223, 225 and 229. The selling price approved was $39,900 and anticipated a real estate commission of 10% plus applicable gross receipts taxes and some closing costs.

[4] Two five-acre lots were sold from this tract prior to the filing of the bankruptcy case. See APE Business Plan, at pages 3 and 4, attached to Supplement to Disclosure Statement as Exhibit E (doc 199). Despite those two sales, Debtors continue to list the parcel as consisting of 40 acres rather than 30 acres; e.g., Schedule A (doc 1).

[5] Debtors anticipate subdividing this property into 65 lots. See Revised Exhibit F (submitted as trial exhibit) to the Supplement to Disclosure Statement (doc. 199).

Class 1 consists of the secured claim of Ranchers Bank. ¶3.1. This claim is secured by Los Llanos Subdivision and the Loma Linda Real Estate. Id. The Class 1 claim bears interest at the contract rate. ¶4.1.2. Class 4 consists of unsecured claims. ¶3.4. Class 4 claims bear interest at 6%. ¶4.4.1.

Debtors will fund the Plan with any cash on hand,[6] $700 per month from the Debtors' post-petition personal service earnings, any tax refunds received, sale of property of the estate, and by prosecution of a counterclaim against Ranchers Bank in a pending foreclosure action in Santa Fe County and any settlement or judgment awarded. ¶6.1.

The Plan is based on the concept of partial releases of lots from the Bank's mortgage as the subdivision progresses. ¶4.1.1. The Plan appears to provide that about 50%[7] of the net sales proceeds will be paid to the Bank, with the other 50% to be paid on priority tax claims until paid in full,[8] id.

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[6] The January 2005 operating report showed $539.30 on hand.

[7] The release price payable for Los Llanos is $20,000 per lot. ¶4.1.1. The release price payable for Loma Linda is $15,000 per lot. Supplement to Disclosure Statement, doc. 199, page 2.

[8] Mr. Anaya testified at confirmation that there are approximately $120,000 of priority tax claims. The January 2005 operating report also shows $19,939 of unpaid post-petition administrative taxes.

and ¶1.41 (definition of “Net Cash Proceeds”), then to other creditors, ¶6.29.1. Paragraph 4.1.4.1 discusses adequate protection for the Bank. It provides that the Bank “shall retain its lien and security interests in any collateral in which it had a lien on the Petition Date, and the proceeds of such collateral...” The lots are to be sold free and clear of all liens, with the liens attaching to net cash proceeds to the same extent, validity and priority as they had in the property. ¶6.6.1.

The unsecured creditors are not entitled to distribution until all higher classes have been paid in full. ¶6.29.1.

Debtors receive a discharge on the effective date of the plan. ¶8.1.1.

FINDINGS OF FACT

1. Debtors filed the tally of ballots at the confirmation hearing. Doc. 206. Class 1, consisting of Ranchers alone, rejected the Plan in the amount of $550,000. Class 4, consisting of the general unsecured creditors, had five votes in favor of the Plan in the total amount of $26,688.69. No other creditor or interest holder voted.
2. The Court finds that the Los Llanos subdivision is worth, at most, $211,934. This figure is derived from Debtors’

Revised Exhibit F that shows retail value of the lots at $239,000,[9] less real estate commissions of $23,940, gross receipts taxes on real estate commissions of $1,526, and the surveying costs to complete the subdivision of $1,600[10]. It does not factor in any unpaid real estate taxes or closing costs.

3. The Court finds that the Loma Linda real estate is worth, at most, $150,000 in its current undeveloped status. See Disclosure Statement, doc. 153, page 19. At the confirmation hearing, Mr. Anaya testified, without any explanation for the difference, that it was worth $400,000. Schedules A and D filed with the petition (doc 1) stated the "current market value" of the land was $1,235,000[11], encumbered by a Bank's mortgage of about $319,000.[12] The Court believes the Disclosure Statement.

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[9] On Schedules A and D, filed with the petition (doc 1), the Debtors listed this property as having a value of $240,000 encumbered by two Bank mortgages totaling about $74,000.

[10]This last number appears in Exhibit B to the Supplement to Disclosure Statement and Plan (doc. 199).

[11] This is probably what the Debtors believe the gross sales prices of the lot would be if the subdivision process is completed.

[12] The Debtors amended Schedule D but did not change this portion of the original (doc. 10); they never amended Schedule A.

4. Ranchers' proof of claim is for $464,288.96. Claim #1. At closing argument, Ranchers' attorney represented that the current debt was approximately $613,000, but the Court does not take this as evidence. Debtors have not objected to the Bank's proof of claim nor sought a claim estimation of how much the Bank's claim ought to be reduced to account for the Debtors' lender liability counterclaim in the pending state court foreclosure action.[13] In consequence, the Court has taken the figure of $464,288.96 as the amount of the Bank's claim for purposes of this confirmation process.

5. Ranchers is undersecured by at least $102,355 based on its proof of claim.

6. Debtors presented no evidence at the confirmation hearing regarding any attempts they had made to find investors to develop the properties or the likelihood that they ever would do so.

7. Mr. Anaya is in poor health. He has not previously developed other land.

8. Ms. Anaya does not work outside the home, except occasionally for Mr. Anaya's father at his office.

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[13] The latter part of this statement assumes without deciding that 11 U.S.C. § 502(c) would be available for this purpose.

9. Debtors have virtually no liquid assets. See also supra note 6.

10. Although Debtors' business plan recites that "APE needs to have some working capital in order to pay for the development of Loma Linda", APE Business Plan, at page 5, Debtor testified that the only way to fund the Plan would be through sales of subdivided properties, and incurring debts for the development of the properties. Mr. Anaya's father ("Father") agreed to perform physical labor relating to the subdivision with the understanding that he would be paid later, after the sales. Father testified that he had maybe $1,000 in the Bank, that he needed to earn a living, and that he had no other financial resources.

11. The Debtors have three children.

12. The Plan proposes to pay Mr. Anaya no compensation for his services, other than his costs to develop the subdivisions.

13. Neither of the Debtors or Father own a bulldozer or grader. Father testified that he could rent a grader for $250 to $450 per day, but that a bulldozer would be more expensive. He had no idea how long it would take to do the roads. He testified that he would need to hire 1 or

2 people to assist in developing the roads. He also testified that he would need to purchase gravel for the roads, but had no idea how much this would cost or whether it would have to be paid for "up front."

14. Mr. Anaya testified that it would not be feasible to subdivide the entire developments now due to the cost. His Plan is to develop 4 lots at a time, and pay for each incremental development with proceeds of the prior development. He testified that if he were to develop only 4 lots at a time, he would not have to pave the roads, because there is an exception in the subdivision laws of Edgewood and Santa Fe County for subdivisions of 4 lots or less.

15. Mr. Anaya testified that it would cost approximately $8,000 per lot to put in infrastructure.

16. Mr. Anaya testified that his agreement with Father and Oden Miller & Associates were based on development of 4 lots at a time so he did not need to go through the subdivision laws.

17. Glenda Jo King, Debtors' Realtor, testified that she believed the Los Llanos lots were reasonably priced and that the market had recently been good. Her market analysis showed that 2 acre lots were on the market an

average of 6 months to 2 years. She also testified that, while she has no listing agreements for Loma Linda properties because there is no legal subdivision yet, she believed that each lot could sell for $32,995. However, she had "no crystal ball" and did not project how quickly those lots might sell, but that one lot every 6 months was possible.

18. The Debtors presented no evidence at the hearing about applicable subdivision law and regulations or about the tax consequences to the estate, particularly what the capital gains taxes might be arising from the sales of the land.[14]

DISCUSSION

Confirmation of a Chapter 11 Plan is governed by Section 1129, which provides in relevant part:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (1) The plan complies with the applicable provisions of this title.

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[14] The Disclosure Statement to Plan of Reorganization (doc 153), at 24, says "A summary of the Tax Consequences to the Estate will be provided." At closing argument, the Court requested Debtors to consider the tax impact, if any, and file a written report. Debtors complied. Doc. 226. The tax information provided (which the Court is not taking as evidence because it was never cross-examined) suggests that taxes may not be a material issue in this case. In any event, even if the computations are true, they would not impact the Court's decision.

...
(8) With respect to each class of claims or interests--
(A) such class has accepted the plan; or
(B) such class is not impaired under the plan.
...
(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.
(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b)
(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
(A) With respect to a class of secured claims, the plan provides--
(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
(II) that each holder of a claim of such class receive on account of such claim deferred cash payments 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;
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

The Debtor has the burden of proof of establishing by a preponderance of the evidence that a Chapter 11 Plan is confirmable. Heartland Fed. Sav. & Loan Assn. v. Briscoe Enter., Ltd. II (In re Briscoe Enter., Ltd. II), 994 F.2d 1160, 1165 (5th Cir.), cert. denied, 510 U.S. 992 (1993). The Court has an independent duty to determine if all elements of confirmation are established[15], even in the absence of an objection. In re Shadow Bay Apartments, Ltd., 157 B.R. 363, 366 (Bankr. S.D. Ohio 1993); In re E.I. Parks No. 1 Limited Partnership, 122 B.R. 549, 558 (Bankr. W.D. Ark. 1990).

[15] Except the good faith element of 1129(a)(3). See Fed.R.Bankr.P. 3020(c). ("The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.")

Because Ranchers has not accepted the Plan, see §1129(a)(8), the Plan can be confirmed over Ranchers' objection only by the alternative "cram down" provisions of § 1129(b). The Court will address the requirements of § 1129(a) other than subsection (8) and then will address the requirements of § 1129(b).

1. **The plan must comply with the applicable provisions of Title 11 (11 U.S.C. § 1129(a)(1)).**

A. The Plan violates Section 1122(a)[16].

Ranchers is undersecured. The Plan does not separately classify Ranchers' unsecured claim from its secured claim. Unsecured deficiency claims are not substantially similar to secured claims. See In re 183 Lorraine Street Assoc., 198 B.R. 16, 28 (E.D. N.Y. 1996)(In general, secured claims cannot be classified with unsecured claims. The undersecured portion of a creditor's claim must be classified with other unsecured claims absent compelling business reasons. The purpose of this requirement is to allow the undersecured creditor a right to

[16] That section provides: "Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

potentially dominate the vote within the unsecured class.)(Citations and internal punctuation omitted.); In re Stoneridge Apartments, 125 B.R. 794, 796-97 (Bankr. W.D. Mo. 1991)(Court denies approval of disclosure statement for plan that does not include undersecured claim in unsecured class.)

B. The Plan violates Section 1111(b).

Section 1111(b) allows a class of undersecured creditors to elect to be treated as fully secured. However, the creditors must make this election, not the Debtor. Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (In re Tucson Self-Storage, Inc.), 166 B.R. 892, 897 (9th Cir. BAP 1994). By treating Ranchers as fully secured, the Plan does not give this creditor the option to elect that treatment, and violates Section 1111(b).

C. The Plan violates Sections 361 and 363.

The proceeds from the sale of Ranchers' collateral are cash collateral as defined in Section 363(a). The Plan contemplates using these proceeds other than to pay Ranchers' claim. Section 363(c)(2) states that a trustee may not use cash collateral unless the creditor consents or the Court

approves such use. The Court approves the use only if there is adequate protection, section 363(e), and the trustee has the burden of proof of adequate protection, section 363(o)(1). As discussed below under "indubitable equivalence" the Court finds that the Plan does not provide adequate protection for its provisions for payment of priority taxes and future development costs for the sub-divisions. See In re Midway Investments, Ltd., 187 B.R. 382, 391 (Bankr. S.D. Fla. 1995).

2. **If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan (11 U.S.C. § (a)(10))**.

Had Ranchers' claim been properly bifurcated into a secured claim and an unsecured claim, Ranchers would have dominated the unsecured class and would have prevented acceptance by that class[17]. There would have been no accepting class and the Plan would be unconfirmable. Boston Post Road Ltd. Partnership v. FDIC (In re Boston Post Road Ltd. Partnership), 21 F.3d 477, 479 (2nd Cir. 1994), cert. denied, 513 U.S. 1109 (1995); 183 Lorraine Street Assoc., 198 B.R. at 28; Midway Investments, Ltd., 187 B.R. at 392. See also Peter E. Meltzer,

[17]See Tally of Ballots, doc. 206.

Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment, 66 Am. Bankr. L.J. 281, 284-85 and n. 9 (1992). Therefore, the Court finds that no impaired class has accepted the Plan.

3. **Confirmation of the plan is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor (11 U.S.C. § 1129(a)(11)).**

The Court finds the Plan to be not feasible for a variety of reasons, including Mr. Anaya's health, his inexperience, the Debtors' total lack of financial resources to draw upon to complete the subdivisions, the lack of equipment necessary to work on the subdivision and the inability to fund renting it, the unenforceability of Father's promise to work now and get paid later, the uncertainty of whether Father has the ability to work on this project to the extent necessary in light of his need to earn a living, the unenforceability of Debtors' commitments to complete the project, the lack of compensation from the project that will enable this family of 5 to survive, the lack of any reliable studies on the time it would take to sell the lots, and a concern regarding New Mexico subdivision law.

Regarding the subdivision concerns, at closing argument the Court asked Debtors' attorney if it were possible to evade the zoning requirements by developing only 4 lots at a time, and asked for a supplemental memorandum. Debtors filed this memorandum, doc. 226. It cites to and attaches the Town of Edgewood[18] Subdivision Regulations, Ordinance No. 1 999-R ("Ordinance"). Ordinance § 5 ¶ 19 defines "Subdivision, Minor" as a subdivision containing not more than five lots and not in conflict with any provision of these Regulations, or Master Plan or Zoning Ordinances of the Town. This section alone could support Debtors' theories, assuming the Master Plan or Zoning Ordinances (neither of which are in evidence) were satisfied. However, Ordinance § 4 states:

> These Regulations are held to be minimum requirements to carry out the purpose stated herein and are not intended to interfere with any other laws, covenants, or ordinances. Whenever any of the provisions of these Regulations are more or less restrictive than

[18] Plan ¶4.1.1 states "The Loma Linda Real Estate will become a subdivision after survey and compliance with applicable laws of the County and State." The New Mexico statutes contain a patchwork of jurisdiction distributed among the state, county and municipalities. See, e.g., N.M. Stat. Ann. § 3-20-5 (1978). No evidence was presented at confirmation that conclusively showed which laws applied.

> other laws, covenants, or ordinances, then whichever is more restrictive shall govern.

The Court has taken judicial notice of the New Mexico statutes. N.M. Stat. Ann. § 47-6-2(J)(1978) defines a "subdivision" as "the division of a surface area of land ... into two or more parcels for the purpose of sale, lease or other conveyance or for building development, whether immediate or future..." (emphasis added). N.M. Stat. Ann. § 47-6-16 (1978), "Succeeding subdivisions" states:

> Any proposed subdivision may be combined and upgraded for classification purposes by the board of county commissioners with a previous subdivision if the proposed subdivision includes:
> A. A part of a previous subdivision that has been created in the preceding seven-year period; or
> B. any land retained by a subdivider after creating a previous subdivision when the previous subdivision was created in the preceding seven-year period.

Debtors propose that the Loma Linda subdivision will have a total of 65 lots. Under N.M. Stat. Ann. § 47-6-2(O) (1978), this would be considered a "type-two subdivision." Summary procedures are not available for type-two subdivisions. See N.M. Stat. Ann. § 47-6-9(A)(17) (1978).

In interpreting the subdivision laws, the New Mexico courts look not only to the language of the statutes, but to the object to be achieved. New Mexico ex. rel. Udall v. Cresswell, 125 N.M. 276, 284, 960 P.2d 818, 824 (Ct. App.), cert. denied, 125 N.M. 147, 958 P.2d 105 (1998). (citation omitted.) The object of subdivision laws is to provide a means for insuring the harmonious development of a municipality and its environs in order to coordinate proposed developments with existing municipal plans. Id. (citation omitted.) "Simply put, those who profit from dividing and selling unimproved land must bear some of the cost of making that land habitable." Id. at 285, 960 P.2d at 825. Consequently, the courts look to the "substance, as well as the form, of efforts by illegal subdividers to circumvent the Subdivision Act and evade their responsibility to provide necessary infrastructure." Lorentzen v. Smith, 129 N.M. 278, 280, 5 P.3d 1082, 1084 (Ct. App. 2000). See also Ordinance, ¶ (Same, but also stating the purpose is "accurate and complete surveying, and preparation and recording of plats thereof safety and suitability of land for contemplated development." (Emphasis added.))

In concluding this section, the Court simply does not have enough information regarding the facts or the applicability of the various ordinances, master plans, zoning ordinances, Santa Fe County regulations, or the various state statutes that may or may not apply to make an informed decision. It is Debtors' burden to satisfy a feasibility determination, and the Debtors have not done so in terms of the propriety of their serial subdivision plan.

Finally, the Debtors' case for confirmation was characterized by a confusing presentation of the evidence. The problems included the inaccurate exhibits (compare the original "Exhibit F" (to the Supplement to the Disclosure Statement, doc 199) tendered as the pro forma for the development of the real estate with Revised Exhibit F as marked up)(attached as last page of Exhibit to Second Supplement (doc. 226)) and the contradictory testimony about who prepared the cost estimate for lot development (Exhibit 2). Several of the problems were raised by the Court in the colloquy with Debtors' counsel that began the closing arguments. The confusion and contradiction lead the Court to conclude that the Debtors really do not have a grasp of what it will take to

succeed at consummating this Plan, nor the other resources to do so. Indeed, it is clear that without an adjudication on their counterclaims against the Bank which would have substantially reduced or eliminated the Bank's mortgage debt, the Debtors never had any realistic chance to confirm a workable plan over the Bank's objections.

4. Cramdown under § 1129(b)(2)(A).

"If an impaired class of claims or interests fails to accept the plan, the debtor has the burden to show that the plan is fair and equitable and does not unfairly discriminate with respect to each nonaccepting class." Shadow Bay Apartments, Ltd., 157 B.R. at 366.

A. Unfair Discrimination.

"Similar to the issue of impermissible classification is the issue of unfair discrimination. ... A plan discriminates unfairly if it singles out the holder of some claim or interest for particular treatment." Tucson Self-Storage, Inc., 166 B.R. at 898 (Citation omitted.) The Plan before the Court proposes to pay Ranchers undersecured claim with interest at the contract rate before paying general unsecured creditors'

claims with interest at 6%. It unfairly discriminates.

B. Fair and Equitable.

Section 1129(b)(2)(A) sets forth three disjunctive tests to determine whether a secured creditor's treatment is fair and equitable. Satisfaction of any of the three is sufficient. In re Sparks, 171 B.R. 860, 865 (Bankr. N.D. Ill. 1994).

(i) Retention of Liens.

"Clause (i) is satisfied if the plan permits the secured creditor to retain its lien on the collateral and the secured creditor receives the present value of its claim over the course of the plan." Id. (Citation omitted.) The Debtors' Plan does not meet the requirements of clause (i) because it requires Ranchers to release its lien on each lot as it is sold. See Id. (Plan that provided for releases by undersecured creditor on condominiums as they were converted from rental units and sold did not satisfy (i).).

(ii) Sale of Collateral and Payment of Proceeds.

> [Clause (ii)] allows the sale of collateral free and clear of the creditor's lien, and is essentially a means of converting secured property into cash collateral. Under this alternative, the debtor may either pay the proceeds of a sale of collateral to the creditor or retain the proceeds subject to a lien, with the proceeds or their equivalent being distributed in some manner to the creditor.

Id. The Debtors' Plan does not meet the requirements of clause (ii) because it provides for payment of release prices only[19], with the Debtors retaining the rest for payment of taxes, administrative expenses, and further development expenses for the subdivision. See Id. (Plan that provided for releases by undersecured creditor with the excess being retained by debtors to finance conversions of condominiums did not satisfy (ii).).

(iii) Indubitable Equivalent.

In Traveler's Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.), 779 F.2d 1456, 1460-61 (10th Cir. 1985), the Tenth Circuit noted that the Code's "indubitable equivalent" standard is derived from In re Murel Holding Corp., 75 F.2d 941, 942 (2nd

[19] The Plan, ¶4.1.4.1 states that Ranchers will retain its lien in any collateral and the proceeds of such collateral. That this is not true is evidenced by the release price provisions and payment of priority tax debts.

Cir. 1935). In both of those cases, the courts conducted a fact-specific inquiry to determine the amount and terms of payment required to provide the "indubitable equivalent" of the payment to which the creditor would be entitled. "Pikes Peak recites only that secured claims must be paid in full over a reasonable time with an appropriate interest rate, [779 F.2d at] 1461, although the context of the case makes it clear that keeping the liens in place, with sufficient value in the collateral to ensure that the lien is fully covered, are also prerequisites. Id." In re Investment Co. of the Southwest, Inc., No. 11-02-17878 SA, Memo Opinion at 6 (doc. 248)(Bankr. D. N.M. Sept. 28, 2004). See also Metropolitan Life Ins. Co. v. San Felipe @ Voss, Ltd. (In re San Felipe @ Voss, Ltd.), 115 B.R. 526, 529 (S.D. Tex. 1990):

> If a reorganization plan proposes to satisfy an allowed secured claim with anything other than the secured creditor's collateral, a court must examine (1) whether the substituted security is completely compensatory and (2) the likelihood that the secured creditor will be paid.

Furthermore, any collateral offered as a substitution of the original collateral may not

increase the creditor's risk exposure. In re Keller, 157 B.R. 680, 683-84 (Bankr. E.D. Wash. 1993).

Consequently, some courts have allowed payment of release prices when there is sufficient remaining original collateral to adequately collateralize the remaining obligation without any increased risk exposure. See In re James Wilson Assoc., 965 F.2d 160, 171 (7th Cir. 1992); Investment Co. of the Southwest, Inc., Memo Opinion at 6, 12-16. And, other courts have allowed payment of release prices when the Debtor offers substitute collateral in an amount and quality to ensure payment of the principal balance. Keller, 157 B.R. at 684 (Finding that an annuity contract offered as additional collateral would be completely compensatory, but refusing to confirm on other grounds.); San Felipe @ Voss, 115 B.R. at 527-28 and 531-32 (A package of cash, stock and guarantees that had a value of 21% over the secured creditor's claim is indubitable equivalent, justifying release of creditor's lien.)

On the other hand, if a creditor is undersecured, the collateral is the "indubitable

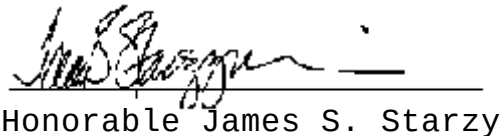
equivalent of itself," so full surrender of the collateral or an offer of full substitution is necessary to meet the indubitable equivalent requirement. Sandy Ridge Dev. Corp. v. Louisiana Natl. Bank (In re Sandy Ridge Dev. Corp.), 881 F.2d 1346, 1350 (5th Cir. 1989). See also In re May, 174 B.R. 832, 837 (Bankr. S.D. Ga. 1994)(same.). And, an unenforceable commitment to provide something in the future is not an indubitable equivalent. Sunflower Racing, Inc. v. Mid-Continent Racing & Gaming Co. I (In re Sunflower Racing, Inc.), 226 B.R. 673, 687 (D. Kan. 1998).

The Debtors' Plan does not meet the requirements of clause (iii) because 1) Ranchers is undersecured and does not have any equity to protect its position if Debtors convey lots in the subdivision without full payment of all proceeds, 2) Debtors have not offered substitute collateral, except to the extent that they believe the remaining land would have an increased value, 3) there is no enforceable commitment on behalf of the Debtors to actually continue to improve the subdivision, and 4) the Court has found the plan infeasible, so it is

unlikely that the Debtors could achieve their goals even if they had an enforceable commitment to do so.

CONCLUSION

For the reasons set forth above, the Court finds that final approval of the Disclosure Statement should be denied, and that Confirmation of Debtors' Plan should be denied. The Court also finds that it should set a status conference in this case in order to consider further disposition of the case, including any motions that may be filed addressing that issue. An Order will enter.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 24, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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