

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re: SANDIA RESORTS, INC.,
Debtor.

No. 11-15-11532 JA

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
MOTION TO ESTIMATE CLAIMS AND FOR TEMPORARY
ALLOWANCE OF SIAN CLAIM UNDER RULE 3018(a)**

THIS MATTER is before the Court on the Motion to Estimate Claims and for Temporary Allowance of Sian Claim Under Rule 3018(a) (“Motion for Temporary Allowance of Claim”). *See* Docket No. 186. The Court held a final, evidentiary hearing on the Motion for Temporary Allowance of Claim on August 26, 2016 and on September 6, 2016 and took the matter under advisement. Christopher Solis appeared at the final hearing on behalf of Harminder Sian, and Richard M. Leverick appeared at the hearing on behalf of NCG, LLC (“NCG”). Mr. Sian, principal of Sandia Resorts, Inc. (“Sandia Resorts”), asserts an unsecured claim in the amount of \$66,000 relating to damages he asserts arise from a lease for three rooms at the America’s Best Value Inn (“Hotel”) owned and operated by Sandia Resorts. As explained below, the Court will temporarily allow Mr. Sian’s claim in the amount of \$1,500.00 for purposes of voting, representing approximately sixteen months’ rental rebate for one room. Accordingly, the Court will grant, in part, and deny, in part, the Motion for Temporary Allowance of Claim.

FACTS

Sandia Resorts filed a voluntary petition under Chapter 11 of the Bankruptcy Code on June 9, 2015. Sandia Resorts owns and operates the Hotel located at Alameda and I-25 in Albuquerque, New Mexico. Harminder Sian is Sandia Resorts’ principal; he is Sandia Resorts’ sole officer, director, and shareholder. In January of 2014, Mr. Sian entered into a rental

agreement with Sandia Resorts for Rooms 201, 202, and 203 at ABV (the “Lease”). *See* Exhibit 3. Mr. Sian signed the Lease individually, as tenant, and as landlord-manager, on behalf of Sandia Resorts. *Id.* The Lease provided for pre-paid rent in the amount of \$300.00 per month for a term of 40 months in the form of improvements to the leased premises valued at \$12,000. *Id.* Monthly rental payments under the Lease are due in advance on the 25th day of each month. *Id.* Mr. Sian made improvements to Rooms 201 and 202 by connecting the two rooms and by installing a range, kitchen sink, cabinets, countertops, and tile flooring. The receipts for the purchase of the appliances that Mr. Sian testified were installed to improve Rooms 201 and 202 date to July of 2012. *See* Exhibit 1. Mr. Sian has been using Rooms 201, 202, and 203 since July of 2012. Occupancy Summary and Housekeeping by Zone Reports from 2013 indicate that Room 203 was not included in the hotel guest unit inventory at that time. *See* Exhibits 4 and 5. Mr. Sian also had Dish Network service installed for Rooms 201, 202, and 203. The remainder of the rooms at the Hotel have Direct TV. By living on site, Mr. Sian was able to run the Hotel on behalf of Sandia Resorts more efficiently.

Sandia Resorts’ primary lender filed a foreclosure action in state court seeking to foreclose its interest in the note and mortgage secured by ABV (the “State Court Foreclosure Action”). On September 29, 2014, C. Randel Lewis, of Western Receiver, Trustee & Consulting Services, Ltd. (the “Receiver”) was appointed receiver in the State Court Foreclosure Action. *See* Exhibit D-7 (the “Receivership Order”). Under the Receivership Order, Sandia Resorts and Harminder Sian were required to cooperate with the Receiver in transitioning management of the Hotel to the Receiver. *Id.*

A few days before the Receiver was appointed in the State Court Foreclosure Action, on September 25, 2015, Harminder Sian filed a voluntary petition under Chapter 7 of the

Bankruptcy Code. *See* Case No. 7-14-12868 (the “Chapter 7 Case”) – Docket No. 1.¹ Mr. Sian filed a motion in the Chapter 7 Case asserting that the lender had violated the automatic stay by obtaining the Receivership Order and by interfering with Mr. Sian’s possessory rights in the Hotel. *See* Chapter 7 Case – Docket No. 11. The Court entered an order that included the following provisions:

The [Receivership Order] . . . is void with respect to [lender] asserting control over the debtor’s personal property located in the apartment rooms and storage space occupied by the Debtor on the hotel property owned by Sandia Resorts, Inc. and the Debtor’s personal letters located in the hotel office.

The automatic stay applies to any action by the [lender] or the receiver to evict the Debtor from his apartment at the hotel premises.

Order Granting, In part, and Denying, In Part, Emergency Motion to Enforce Automatic Stay, Chapter 7 Case (“Order on Application of Automatic Stay”) – Docket No. 13.

The lender filed a motion for relief from stay (the “Stay Motion”) in the Chapter 7 Case, asserting, in part, that the Receiver had been unable to take possession of Room 201 or Room 202. *See* Chapter 7 Case – Docket No. 18. The Stay Motion did not mention Room 203. In response to the Stay Motion, Mr. Sian referenced the Lease for Rooms 201, 202, and 203. *See* Chapter 7 Case – Docket No. 21. Mr. Sian also amended his schedules in the Chapter 7 Case to list his claimed leasehold interest in Rooms 201, 202, and 203 at ABV. *See* Chapter 7 Case – Docket Nos. 22 and 23. Mr. Sian received a discharge in the Chapter 7 Case on January 6, 2015, and the Chapter 7 Case was closed on January 9, 2015. *See* Chapter 7 Case – Docket Nos. 31, 33, and 34. Because the Chapter 7 Case was discharged and closed, which had the effect of terminating the automatic stay, the Court never held a hearing on the Stay Motion in the Chapter 7 Case because the Stay Motion was moot.

¹ With the parties’ permission, the Court took judicial notice of the docket and the documents filed of record in Mr. Sian’s individual Chapter 7 bankruptcy case.

The Receiver appointed in the State Court Action returned possession of the Hotel to Sandia Resorts on or about May 31, 2016. During the period of the receivership, Mr. Sian remained in possession of Rooms 201 and 202. On July 8, 2016, Mr. Sian filed a proof of claim asserting an unsecured claim in Sandia Resorts' bankruptcy case in the amount of \$66,000. *See* Claim No. 12-1. His claim has two components: 1) loss of use of Room 203 for twenty months from October 1, 2014 (the date the Receiver took over the Hotel) through May 31, 2016 (the date the Receiver returned possession of the Hotel to Sandia Resorts); and 2) anticipated damages if NCG's proposed Chapter 11 plan is confirmed and the Lease is rejected. Mr. Sian's calculation of the claim is premised on a per room rental rate of \$1,500 per month.²

Including Rooms 201, 202, and 203, ABV has 80 rooms. An addendum to the America's Best Value Inn Membership Agreement Between Vantage Hospitality Group, Inc. and Sandia Resorts dated December 20, 2012, is based on a guest room count of 77, excluding Rooms 201, 201 and 203. *See* Exhibit 6. It was Mr. Sian's typical practice to give up possession of Room 203 during the Balloon Fiesta so that the Hotel could sell Room 203 for use by hotel guests. Balloon Fiesta happens every year on the first and second weekends in October.³ After Balloon Fiesta, Mr. Sian historically would retake possession of Room 203 and remove Room 203 from the hotel guest unit inventory.

² Room 203:

20 months (period of time the Receiver allegedly denied Mr. Sian access to the room) X \$1,500/mos. = \$30,000.

Rooms 201, 202, and 203 if Lease is rejected through confirmation of NCG's Chapter 11 plan:

8 months (remainder of 40 month term of Lease) X \$4,500 (\$1,500 per room) = \$36,000.

³ The Court takes judicial notice of the dates of Balloon Fiesta. *See* Fed. R. Evid. 201(c) (providing that "[t]he court . . . may take judicial notice on its own"); Fed. R. Evid. 201(b)(1) and (2) (providing that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . is generally known within the trial court's territorial jurisdiction; or . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Van Woudenberg v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000) ("[T]he court is permitted to take judicial notice of . . . facts which are a matter of public record.") (citation omitted), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001).

An Occupancy Summary Form for the Hotel dated May 31, 2016 shows total 78 total rooms in inventory, with 25 rooms sold. *See* Exhibit 5. A Housekeeping By Zone report for the following day, June 1, 2016, includes Room 203 in the hotel guest unit inventory. *See* Exhibit 4. Earlier Housekeeping by Zone reports from 2013 do not include Room 203 in the hotel guest unit inventory. *Id.* The Occupancy Summary Form dated May 31, 2016 and the Housekeeping by Zone report from June 1, 2016 indicate that Mr. Sian was not occupying Room 203 at that time. Room 203 has been converted from Dish Network (which was in place when Mr. Sian occupied Room 203) to Direct TV.

At the time the Receiver and Peak Hospitality, LLC (“Peak”) (the management company the Receiver hired) took over operation of the Hotel in late September or early October of 2014, Room 203 was included in the hotel guest unit inventory. This time frame is consistent with the dates of the annual Balloon Fiesta and Mr. Sian’s historic practice of returning Room 203 to the hotel guest unit inventory during that event. Shortly after the appointment of the Receiver, on or about October 3, 2014, Peak returned six boxes of personal property to Mr. Sian. Mr. Sian signed a receipt.

Mr. Sian testified that, after the Receiver and Peak took over the management and operation of the Hotel, he asked Walter Barela, Peak’s principal, on two occasions to return possession of Room 203 to him. Mr. Sian testified further that Mr. Barela demanded that Mr. Sian pay \$40 to \$45 per night per room for the continued use of the rooms. Mr. Sian never made a written request to the Receiver or to Peak for the return or use of Room 203. He did not seek relief in his Chapter 7 Case regarding the return of possession of Room 203. He did not request his counsel to make a demand for the return of Room 203 to his possession. Mr. Barela does not recall Mr. Sian ever asking him for the return of a room. To the contrary, Mr. Barela testified

that Mr. Sian never requested use of Room 203. Mr. Barela testified further that, if Mr. Sian had made that request, he would have referred Mr. Sian to the Receiver. A copy of the Lease was presented to Peak at the time it started managing the Hotel. Even though the Lease specifically references Room 203, Mr. Barela testified that Peak only knew about Room 203 because certain television items were returned to Mr. Sian from Room 203.

The average Hotel room rate is around \$50.00 per night. *See* Exhibit 5. If rented as a suite, Mr. Sian estimated that Rooms 201 and 203 as improved could be rented for \$100 to \$150 per night. On October 1, 2013, the Hotel's occupancy rate was 21.62%. *See* Exhibit 5. On May 31, 2016, the Hotel's occupancy rate was 33.78%.

Sandia Resorts and NCG each filed a proposed Chapter 11 plan. *See* Debtor's Second Amended Plan of Reorganization Dated August 1, 2016 – Second Chapter 11 Case, Docket No. 162; and Amended Chapter 11 Liquidation Plan (Docket No. 161) (together the “competing plans”). The confirmation hearing on the competing plans has been rescheduled for November 29, 2016 through December 2, 2016. *See* Docket No. 256.

DISCUSSION

Holders of allowed claims may vote to accept or reject a Chapter 11 plan. *See* 11 U.S.C. § 1126(a) (“The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.”) A timely filed proof of claim is deemed allowed unless an interested party objects. *See* 11 U.S.C. § 502(a) (“A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed unless a party in interest . . . objects.”). To prevent an interested party from blocking a creditor's vote by objecting to the claim shortly before the confirmation

hearing,⁴ Fed. R. Bankr. P. 3018(a) allows a creditor to seek the temporary allowance of its claim for purposes of voting. It provides:

Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

Fed. R. Bankr. P. 3018(a).

Neither the Bankruptcy Code nor the Bankruptcy Rules provide any guidelines for determining how to temporarily allow a claim for voting purposes. *See In re Experient Corp.*, 535 B.R. 386, 405 (Bankr. D. Colo. 2015) (“The Bankruptcy Code and Rules do not provide the courts with any guidance about how and when to temporarily allow a claim.”) (quoting *In re Innovasystems, Inc.*, 2014 WL 7235527, *7 (Bankr. D.N.J. Dec. 18, 2014)); *In re Pac. Sunwear of Cal., Inc.*, 2016 WL 4250681, *5 (Bankr. D. Del. Aug. 8, 2016) (acknowledging that “there is no guidance in the Bankruptcy Code on how to determine the proper amount of the claim” under Rule 3018(a)). The Court, therefore, has some discretion to determine the amount of a claim for the limited purpose of voting. *See Armstrong*, 294 B.R. at 354 (temporary allowance of a claim under Rule 3018(a) “is left to a court’s discretion.”) (citations omitted); *Experient*, 535 B.R. at 405 (“temporary allowance is left to the discretion of the court.”) (quoting *Innovasystems*, 2014 WL 7235527 at *7); *Pension Ben. Guar. Corp. v. Enron Corp.*, 2004 WL 2434928, *5 (S.D.N.Y. Nov. 1, 2004) (unreported) (Rule 3018(a) “specifically and elastically provides that a court may, for the purposes of voting, temporarily allow a claim or interest *in an amount which the court deems proper.*”) (quoting *Matter of Johns-Manville Corp.*, 68 B.R. 618, 631 (Bankr. S.D.N.Y. 1986) (emphasis in *Enron*)).

⁴ *See In re Armstrong*, 294 B.R. 344, 354 (10th Cir. BAP 2003) (“The policy behind temporarily allowing claims is to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors.”) (citing *Stone Hedge Properties v. Phoenix Capital Corp. (In re Stone Hedge Properties)*, 191 B.R. 59, 64 (Bankr. M.D. Pa. 1995) (remaining citation omitted)).

The claimant requesting temporary allowance of its claim under Rule 3018(a) bears the burden of presenting “sufficient evidence that it has a colorable claim capable of temporary evaluation.” *Armstrong*, 294 B.R. at 354. *See also Experient*, 535 B.R. at 405 (agreeing with *Armstrong*).⁵ Finally, temporary allowance fixes the amount of the claim only for a limited time and only for a limited purpose; it does not conclusively establish the amount of the claim in the bankruptcy case. *See Armstrong*, 294 B.R. at 354 (“Temporary allowance of a claim under Rule 3018(a) is not dispositive as the amount of the claim; it provides only limited voting authority to a creditor.”).

Mr. Sian did not fully meet his burden. The Lease provides for pre-paid rent of \$12,000 for a 40-month term. The Lease is dated January 1, 2014. However, the evidence established that Mr. Sian occupied Rooms 201, 202, and 203 since 2012 and made the improvements to Rooms 201 and 202 in July or August of 2012. He therefore enjoyed the benefit of the pre-paid rent beginning from at least September 1, 2012 (allowing time for the delivery and installation of the appliances in Room 201). At the time the Receiver took over operation of the Hotel on or about October 1, 2014, there were approximately 15 months of unused, pre-paid rent.

There is conflicting evidence concerning whether Mr. Sian was prevented from the use and occupancy of Room 203 after the Receiver was appointed and Peak took over the management of the Hotel. Mr. Sian insists that he was locked out of Room 203 and twice asked Mr. Barela for the return of Room 203. Yet, Mr. Sian never made a written request or demand for the return of Room 203 and did not file a motion in his personal bankruptcy case in an effort to enforce the Order on Application of Automatic Stay. Mr. Barela testified that he did not recall

⁵ *But see Stone Hedge*, 191 B.R. at 64-65 (questioning whether the burden of proof ought to be placed on the objecting party); *Pac. Sunwear*, 2016 WL 4250681 at *5 (observing that, “because a Rule 3018 proceeding is meant to enfranchise claimants, there is an inconsistency in using the burden of proof rules that apply to objections to claims.”).

Mr. Sian ever asking for the return of Room 203. The Court cannot infer based on this evidence that the Receiver or Peak deprived Mr. Sian of use of Room 203.

On the other hand, the evidence establishes that Mr. Sian did not, in fact, use Room 203 during the period Peak managed the Hotel on behalf of the Receiver. The date the Receiver was appointed coincided with Balloon Fiesta, the time of year that Mr. Sian historically returned Room 203 to the hotel guest room inventory. Mr. Barela testified that Room 203 was included in the hotel guest room inventory when the Receiver took over the operation and management of the Hotel. The Occupancy Summary report from May 31, 2016 and the Housekeeping by Zone report for June 1, 2016 show that Room 203 was included in the hotel guest room inventory on those dates. From these reports, the Court infers that Room 203 remained in the hotel guest room inventory during the period of the receivership, and that Mr. Sian did not enjoy the use of Room 203 during that time.

Because Mr. Sian did not, in fact, use Room 203 from October 1, 2014 through May 31, 2016, and because a portion of the pre-paid rent under the Lease remained unused during a portion of that period, Mr. Sian is entitled to a claim representing a rental rebate for Room 203. Forty months' pre-paid rent from September 1, 2012 would have been fully exhausted as of January 1, 2016. The pre-paid monthly per-room rent is \$100 ($\$300/\text{month} \div 3 \text{ rooms}$). October 1, 2014 through January 1, 2016 is a period of fifteen months. Mr. Sian is, therefore, entitled to an unsecured claim for purposes of voting in the amount of \$1,500.00, representing fifteen months' unused pre-paid rent credit attributable to Room 203.


The second component of Mr. Sian's claim is for anticipated rejection damages in the event NCG's plan is confirmed. Damages arising from the rejection of a pre-petition unexpired lease are treated as a pre-petition claim. *See* 11 U.S.C. § 365(a) (providing for the assumption or

rejection of unexpired leases and executory contracts); 11 U.S.C. 502(g)(1) (a claim arising from the rejection of an unexpired lease is treated as if “such claim had arisen before the date of the filing of the petition.”); *In re Valley View Shopping Center, L.P.*, 260 B.R. 10, 25 (Bankr. D. Kan. 2001) (“rejection of an unexpired lease . . . constitutes a breach under 365(g) which gives rise to a ‘claim’ for damages in favor of the non-debtor party. This ‘claim’ created by the rejection is afforded treatment similar to other unsecured claims.”). *See also, Landsing Diversified Properties v. First National Bank and Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 595 (10th Cir. 1990) (explaining that “the rejection of an executory contract [or unexpired lease] ‘constitutes a breach of that contract’ . . . for which damages ordinarily allowed in contract are available.”) (quoting 11 U.S.C. § 365(g) (emphasis and citation omitted)).

The Lease has a stated forty-month term beginning January 1, 2014. But the evidence establishes that Mr. Sian occupied Rooms 201, 202, and 203 and made the improvements to Rooms 201 and 202 that form the basis of the pre-paid rent under the terms of the Lease since September 2012 at the latest. Mr. Sian thus received the full benefit of the pre-paid rent under the Lease as of January 1, 2016 (less the rebate of \$1,500.00 for Room 203 for the period from October 1, 2014 through January 1, 2016). The pre-paid rent was exhausted long before the anticipated rejection of the Lease. Mr. Sian is not, therefore, entitled to a temporarily allowed claim for purposes of voting on NCG’s plan based on anticipated rejection damages.

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Temporary Allowance of Claim is GRANTED, in part, and DENIED, in part as follows:

1. Mr. Sian has a temporarily allowed unsecured claim in the amount of \$1,500.00 for purposes of voting on the competing plans.
2. The Motion is denied in all other respects.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: November 2, 2016

COPY TO:

Shay E Meagle
Attorney for Sandia Resorts, Inc.
Meagle Law, P.A.
315 Alameda Blvd. NE., Ste. D
Albuquerque, NM 87113

Richard Leverick
Attorney for NCG, LLC
5120 San Francisco Rd NE
Albuquerque, NM 87109-4610

Christopher E. Solis
Attorney for Harminder Sian
The Law Office of George Dave Giddens, P.C.
10400 Academy Rd NE, Suite 350
Albuquerque, NM 87111