UNITED STATED BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
VAIL PLAZA DEVELOPMENT, LLC,	)	**Case No. 08-26920 HRT**
	)	**Chapter 11**
Debtor.	)	
	)	
	)	
In re:	)	**Case No. 08-26924 HRT**
	)	**Chapter 11**
VAIL PLAZA MEZZANINE, LLC,	)	
	)	
Debtor.	)	**Jointly Administered**
	)	**Under Case No. 08-26920 HRT**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is the Court's written ruling, which decision was summarized in an oral ruling in open Court on this date.

After a week-long evidentiary hearing concluding on December 18, 2009, the Court took under advisement the confirmation of four Chapter 11 plans:

1. Vail Plaza Mezzanine's Second Amended Plan of Reorganization Dated August 7, 2009 (the "Mezzanine Plan," docket #425);
2. Vail Plaza Development's Third Amended Plan of Reorganization Dated October 22, 2009 (the "Debtor's Plan," docket #516), which has been corrected by docket #626;
3. The First Amended Joint Chapter 11 Plan of Liquidation for Debtor Vail Plaza Development, LLC Filed by 176 Club Estate Owners and Capmark Bank, Dated December 17, 2009 (the "Joint Plan," docket #603); and
4. Shaw Construction LLC's Sixth Amended Plan of Liquidation under Chapter 11 of the Bankruptcy Code, Dated December 15, 2009 ("Shaw's Plan," docket #605).

Debtor Vail Plaza Mezzanine has admitted that the Mezzanine Plan does not meet the applicable requirements of § 1129(a). The Court will therefore deny confirmation of the Mezzanine Plan.

Three plans remain for this Court's consideration: the Debtor's Plan, the Joint Plan, and Shaw's Plan. The Debtor has withdrawn its objections to Shaw's Plan and urges the Court to confirm Shaw's Plan, with the Debtor's Plan as a backup. Shaw has withdrawn its objections to the Joint Plan and urges the Court to confirm the Joint Plan, with Shaw's Plan as a backup. The

Joint Plan Proponents are pursuing objections to Shaw's Plan and the Debtor's Plan. The Debtor objects to the Joint Plan, and Shaw objects to the Debtor's Plan. Given the pending objections to each plan, this Court must analyze each of the three competing plans for compliance with the requirements § 1129.

REQUIREMENTS OF § 1129(a):

(a) (1) The plan complies with the applicable provisions of Title 11.

The parties have raised various challenges to specific requirements of § 1129(a) and (b), and have repeated those challenges under this subsection. In order to avoid duplication, the Court will address each challenge in connection with the more specific requirement of § 1129(a) and (b), rather than here. Other than the specific requirements of § 1129(a) and (b), the Court finds that each plan complies with applicable provisions of Title 11, with one exception.

As this Court previously held, to the extent that the plans purport to cancel or otherwise impair the interests of Capmark Finance, which is itself a debtor in bankruptcy in Delaware, the plans violate the automatic stay. After this Court's ruling, the Joint Plan proponents and Shaw modified their plans so that the plans no longer impair Capmark Finance. The Court finds that those plans, as modified, do not violate the automatic stay. The Debtor's Plan has not been modified, and as currently proposed would violate the automatic stay. Any order confirming the Debtor's Plan would be subject to the Debtor's obtaining appropriate relief from the Delaware bankruptcy court.

(a) (2) The proponent of the plan complies with applicable provisions of Title 11.

As with subsection (1) above, the parties have repeated their challenges to specific requirements of § 1129(a) and (b) in this subsection. The Court will discuss each challenge more fully below, in connection with the more specific subsection. Other than the specific subsections below, the Court finds that each plan proponent has complied with applicable provisions of Title 11.

(a) (3) The plan has been proposed in good faith and not by any means forbidden by law.

The Debtor argues that the Joint Plan Proponents have not acted in good faith, citing the November 24, 2009, letter written by Mr. Clayton to counsel for the Vail Plaza Condominium Association (the "HOA"). While the Court has previously held that the letter crossed the line of appropriate plan solicitation, the Court has also already imposed a sanction that, in the Court's view, restored the parties to the position that they would have occupied had the letter not been sent. The letter was part of ongoing disputes between the Club Estate Owners and the HOA, which disputes were certainly hard-fought and included threatened and actual litigation. The

Court finds that the letter did not taint the entire solicitation process, and the proponents have otherwise acted in good faith. The letter does not warrant a finding that the Joint Plan Proponents have acted in bad faith or by a means forbidden by law.

Shaw and the Joint Plan Proponents argue that the Debtor has not proceeded in good faith because the Debtor has proposed a plan that is not feasible and that benefits current management at the expense of creditors. Feasibility concerns will be discussed more specifically later. As to good faith, the Court notes that each plan contains provisions that feather the nest of its proponents, by providing them with special advantages or benefits over other parties or classes. While such provisions may be less than desirable, they are the product of the continued disputes among the proponents, and therefore are the unfortunate reality of this case. They do not rise to the level to support a finding of bad faith.

Finally, the Joint Plan Proponents argue that the Debtor has not proceeded in good faith because it has not obtained permission to use cash collateral of Capmark Bank. The Debtor disputes that it is using cash collateral. The Court notes that Capmark Bank filed a motion to prohibit the use of cash collateral, but never requested that this Court set the matter for hearing. Plan confirmation is not the time to bring a challenge to the use of cash collateral that has been going on for over a year. The Court will not consider any alleged use of cash collateral as an indicator of bad faith.

The Court concludes that all three pending plans have been proposed in good faith and not by any means forbidden by law. Section (a)(3) is therefore satisfied as to all plans.

> **(a) (4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.**

No party has challenged the Debtor's Plan or Shaw's Plan on this ground. It appears to the Court that both the Debtor's Plan and Shaw's Plan provide that any payments falling within this section are subject to approval of this Court.

The Debtor has challenged the Joint Plan, objecting to provisions in the Memorandum of Understanding ("MOU") between proposed purchaser Ferruco Vail Ventures LLC and certain Club Estate Owners that would require the HOA to pay attorney's fees incurred by the Isaacson Rosenbaum firm, which are estimated to be $600,000. There is no provision that the attorney's fees would be subject to this Court's review for reasonableness. The Debtor alleges that without a requirement for Court review, the attorney's fees reimbursement provision violates section (a)(4), since it is a payment by Ferruco Vail Ventures, which is acquiring property under the Joint Plan, for services or for costs and expenses incurred in connection with this case.

No party has cited any case law, but the Court has conducted its own research and finds two cases to be particularly helpful. The first case is *In re Cajun Electric Power Co-op.*, 150 F.3d 503 (5th Cir. 1998). In the *Cajun Electric* case, the Fifth Circuit held that the plain language of § 1129(a)(4) required court approval of payments of professional fees incurred in connection with a Chapter 11 case, even if those payments were made from the assets of third parties and in the context of a creditor's plan. In that case, a plan proponent had agreed to pay expenses of members of the creditor's committee. The court held that the expenses had to be reviewed for reasonableness at some point, not necessarily before confirmation or even before the payments were made, but at some point in the case, in order to satisfy section (a)(4).

The second case is *In re Johns-Manville Corporation*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988). In that case, parties argued that section (a)(4) required the bankruptcy court to review the fee arrangements between asbestos personal injury claimants and their attorneys, many of which were contingent fee arrangements. The court held that the fee arrangements were matters between third parties and were not subject to the jurisdiction of the court.

This Court notes that in both the *Cajun Electric* case and the *Johns-Manville* case, attorneys were to receive payments that could be traced from the assets of either a plan proponent or the debtor's estate. The two cases reached different results about the applicability of section (a)(4) because the two kinds of payment were different. In the *Cajun Electric* case, the payments were direct reimbursements from plan proponent to committee member, while in the *Johns-Manville* case, the payments were part of the allowed claim allocated to the particular asbestos personal injury claimant. The Court finds that here, the payments to be made to the Isaacson Rosenbaum firm are more like the *Johns-Manville* case than the *Cajun Electric* case. The funds are not paid directly from Ferruco Vail Ventures to the law firm. Instead, the payments are part of an allocation of the allowed claim of the HOA. It would be the HOA paying the fees, not the bankruptcy estate or the purchaser. The Court therefore concludes that the arrangement is an arrangement between third parties and does not violate section (a)(4).

The Court notes that it is somewhat of a close call. While it might be preferable for the Joint Plan Proponents to have modified their plan so that the payments would be subject to this Court's subsequent review, this Court will not re-write the plan for them. Of course, if the Joint Plan Proponents wish to modify their plan to provide for such review, the Court would allow that modification.

The Court concludes that all three plans satisfy section (a)(4).

(a) (5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and (ii) the

appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

The Debtor argues that the Joint Plan does not satisfy section (a)(5) because it does not disclose future directors or officers of Development. The Court disagrees. The Joint Plan discloses that Tom Connolly will serve as plan administrator, and that he will serve as the sole officer. The Joint Plan sufficiently discloses the identify and affiliations of all individuals proposed to serve as directors, officers, or voting trustees.

The Joint Plan Proponents argue that the Debtor's Plan does not satisfy section (a)(5) because continued retention of current management is not consistent with the interests of creditors and equity security holders and with public policy. The Court is not persuaded. In the Court's opinion, if any of the parties in this case had serious concerns about the ability of the Debtor to perform its fiduciary obligations, that party should have moved for appointment of a trustee. In the absence of such a motion, and in the absence of evidence to support such a motion, the Court can only conclude that the Debtor's management may not be what each creditor would prefer, but the continuation of that management does not rise to the level that it can be said to violate the interests of creditors or public policy.

Finally, the Joint Plan Proponents argue that Shaw's proposed plan administrator is not as well-suited to the task at hand as Mr. Connolly, who is an experienced bankruptcy attorney. The Court finds that such argument is best made in the context of § 1129(c), if there is more than one confirmable plan. The Court concludes that each plan satisfies section (a)(5).

(a) (6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

This section does not apply to any of the pending plans.

(a) (7) With respect to each impaired class of claims or interests-- (A) each holder of a claim or interest of such class-- (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date . . . .

All parties agree that the Joint Plan and the Shaw Plan satisfy section (a)(7). Because both plans provide for the sale of the Debtor's assets, each claimant in each non-accepting class will receive a value that is not less than the amount the claimant would receive if the Debtor were liquidated under Chapter 7.

The Debtor's Plan does not provide for the sale of the Debtor's assets, and both the Joint Plan Proponents and Shaw argue that the Debtor's Plan is not in the best interests of creditors. Shaw argues that the Debtor's Plan is not feasible. The Court will discuss feasibility separately, in connection with section (a)(11). The Joint Plan Proponents argue that the Debtor's Plan does not provide Capmark Bank with the value it would receive in Chapter 7 because the Debtor's Plan does not provide for the payment of interest at the default rate. The Court disagrees. The Debtor's Plan does provide for payment of interest to Capmark Bank. The Court does not determine that the 11% default interest rate is necessary to satisfy the requirement of section (a)(7).

The Court therefore concludes that each plan satisfies section (a)(7).

(a) (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.

Each of the three plans fails this test. The Joint Plan was rejected by the mechanic's lienholders and by the HOA, pursuant to this Court's Order on the Debtor's Motion for Sanctions concerning the November 24, 2009, Clayton letter. Shaw's Plan was rejected by the HOA, Capmark Bank, and the Club Estate Owners. The Debtor's Plan was rejected by every impaired class other than the HOA, including the taxing authority, mechanic's lienholders, Capmark Bank, general unsecured creditors, and Club Estate Owners.

Because none of the plans satisfies section (a)(8), if any plan is to be confirmed, it must be done under § 1129(b). The Court will discuss those requirements separately.

(a) (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that-- (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive-- (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; (C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment

payments in cash-- (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and (D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

Regarding § 507(a) claims, the parties stipulated that the "tax savings escrow account" held by the Debtor holds $127,434.51. In addition, Debtor's special counsel Wells, Love & Scoby holds a significant amount in its trust account. The parties agree that these funds will be sufficient to pay the § 507(a)(2) claims of Sender & Wasserman, P.C., Wells, Love & Scoby, William H. Knapp, and Rocky Mountain Reprographics. The allowed administrative claim of D.H. Pace is $136,453.30. Duff & Phelps is due $212,427.97. There may also be some amount due HVS Capital as an administrative claim, but that claim has not yet been determined.

The Joint Plan Proponents and Shaw argue that the Debtor cannot pay administrative expense claims because all its funds are cash collateral of Capmark and/or Shaw and other mechanic's lienholders. The Debtor disagrees, pointing to the excess retainers above and to evidence that it will generate sufficient funds by hotel operations, particularly during peak ski season, to pay the allowed administrative expense claims. The Court finds that the Debtor has sufficiently demonstrated through the testimony of Douglas Baird and others that its operations will create sufficient proceeds to pay administrative expenses. The operating revenues to date that are available to Debtor will also be available to pay administrative expenses under both the Joint Plan and Shaw's Plan. Further, the Joint Plan provides for an additional $1.5 million to be used for administrative expenses, and the Shaw Plan provides for a delayed effective date. In both cases, the plans sufficiently provide for payment of administrative expenses.

The Court therefore concludes that all three plans satisfy section (a)(9).

(a) (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.

Both the Joint Plan and the Shaw Plan have been accepted by their respective tax claim classes, satisfying the requirements of section (a)(10).

The Debtor argues that acceptance by the HOA classes, pursuant to this Court's ruling on the Debtor's Motion for Sanctions, constitutes acceptance of its plan by an impaired, non-insider class. The Joint Plan Proponents and Shaw argue that the HOA should be considered an insider.

The Court first looks to the definition of "insider" in the Bankruptcy Code, which begins with the phrase "The term 'insider' includes . . ." 11 U.S.C. § 101(31). The use of the word "includes" indicates that the categories listed are illustrative rather than exhaustive. Therefore, it is not determinative that this particular situation is not listed in § 101(31).

The legislative history for the definition of "insider" states that "an insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." S. Rep. No. 95-989, at 25 (1978), H.R. Rep. No. 95-595, at 312 (1977). Here, the evidence shows that the Debtor initially appointed one of its employees, Connie Dorsey, as the sole director of the HOA. The Owners sought representation on the board but were rebuffed. The Owners subsequently sued the HOA, as a result of which Mr. Dorsey resigned, and the size of the board was increased. The Owners appointed one director, and the Debtor appointed two directors, both of whom were employees of the Debtor. Whether or not the Debtor or its management ever gave the employees specific direction or orders on how they should exercise their voting rights to control HOA decisions is not determinative. Although as a result of Mr. Clayton's November 24, 2009, letter, the employees have since resigned, the Debtor retains the right to appoint two replacement members to the board, which would result in a board majority. The Court finds that the HOA has a sufficiently close relationship with the Debtor that it cannot be considered to be dealing with the Debtor at arms' length.

This same issue was decided in the case of *In re Locke Mill Partners*, 178 B.R. 697 (Bankr. M.D.N.C. 1995), cited by the parties. In the *Locke Mill* case, the developer appointed 50% of the directors of the association. The court looked at the definition of the term "insider" and the amount of control that the developer had exercised over the association, ultimately concluding that the association was an insider of the developer. Here, it is undisputed that the Debtor has at all times prior to the November 24, 2009, Clayton letter, controlled at least a majority of the board. The Court therefore concludes that the HOA is an insider, and its acceptance of the Debtor's Plan cannot be considered the acceptance of an impaired class within section (a)(10).

(a) (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.

Both the Joint Plan and the Shaw Plan provide for liquidation of the Debtor, either through an initial sale or through a subsequent auction. Both plans therefore satisfy the requirements of section (a)(11).

The Debtor's Plan provides for continuing operations and the payment over time to creditor classes from a percentage of future net profits and the sale of fractional interest units. In order to satisfy section (a)(11), the Debtor must show that its continuing operations will not result in liquidation or the need for further reorganization. Both the Joint Plan Proponents and Shaw argue that the Debtor's Plan is not feasible.

The Court notes that the Debtor's Plan would not provide an immediate mechanism for removing the existing mechanics' liens. Such liens would remain as a cloud on the title of each of the Club Estate units, to be released by further order of this Court or another court of applicable jurisdiction. In the Court's opinion, the continued existence of the liens would make future sales of the Club Estate units difficult, if not unlikely. Without the sale of Club Estate units, the Debtor's Plan is not likely to succeed.

Ultimately, the Court's determination as to feasibility comes down to the credibility of Mr. Prado and the strength of his projections. As to credibility, the Court observed the testimony of Mr. Prado and found him to be a strong supporter of the hotel project, which is essentially his current life's work. Mr. Prado has invested a great deal of his own money into the project and is determined to see the project succeed. He must be given the credit for the successes the hotel project has achieved to date. But, as is probably typical of developers, Mr. Prado may be guilty of excessive optimism. His belief that he will successfully prevail despite all obstacles – from the mechanics' lien litigation, to the disputes with the Club Estate Owners, to the loan defaults asserted by Capmark Bank, and even the difficult conditions of today's economy and its impact not only on financing but also on the leisure travel industry – may be admirable in many respects. But the Debtor's situation requires more than optimism or even sheer force of will. This Court must make a feasibility determination based on objective evidence.

Mr. Prado's projections were not based on the hotel project's past performance. Instead, they were largely based on projections made by consultant HVS back in 2007, before the hotel was fully operational. Those projections could not have anticipated the current state of the economy. They further did not take into account the effect of the mechanic's liens and the disputes with the Club Estate Owners, which have further negatively impacted the Debtor's ability to succeed. Those factors have all contributed to the Debtor's failure to meet its projections to date, and those factors are all likely to remain in existence after the effective date of the Debtor's Plan. The projections have other deficiencies, as Shaw's witness Clark Atkinson explained. The Court found Mr. Atkinson's testimony to be both helpful and persuasive in pointing out the many reasons that the Debtor will be unlikely to achieve its projected revenues. The Court also considered the deposition testimony of Connie Dorsey, who testified as to the Debtor's failure to reach its past projections and who testified that the hotel's projections for the year 2010 would need to be further reduced. Considering all the evidence, the Court finds that the Debtor has not met its burden of showing that confirmation of its plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor. The Debtor's Plan does not satisfy section (a)(11).

(a) (12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

There is no dispute that all plans satisfy section (a)(12).

(a) (13) through (a) (15)

Sections 13 through 15 are not applicable to any of the pending plans.

Summary

For the reasons discussed, the Court concludes that both the Joint Plan and the Shaw Plan satisfy all applicable requirements of § 1129(a) other than section (a)(8). The Court will proceed with consideration of both of these plans under § 1129(b).

REQUIREMENTS OF § 1129(b):

(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. (B) With respect to a class of unsecured claims-- (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section. (C) With respect to a class of interests-- (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.**

In light of the Court's conclusions that the Debtor's Plan does not satisfy § 1129 (a)(10) or (a)(11), the Court need not further consider the Debtor's Plan. But even if the Debtor's Plan had satisfied applicable requirements of § 1129(a), the Court would nevertheless find that the Debtor's Plan could not be confirmed under § 1129(b). The Debtor's Plan would allow equity holders, including Mr. Prado, to receive benefits from continued operation of the hotel and club, including cash payments, continued employment and benefits, parking spaces and a storage locker, before secured and unsecured creditors receive property equal in value to their secured claims, in violation of the absolute priority rule. The Debtor's secured and unsecured creditors would bear the risks of postconfirmation financial or operational default, which this Court finds are substantial. The Debtor's Plan is therefore not fair and equitable as to the Debtor's creditors, both secured and unsecured, all of whom have objected to confirmation of the Debtor's Plan.

The Court next turns to the Joint Plan. Shaw does not dispute that the Joint Plan satisfies § 1129(b). The Debtor's objections are based on its arguments that the Joint Plan does not satisfy the requirements of § 1129(a), none of which the Court found persuasive. The Debtor has not identified a particular requirement of § 1129(b) that is not satisfied, nor has it argued that any particular provision of the Joint Plan unfairly discriminates, or is anything other than fair and equitable as to any dissenting class. No other objection has been made by an impaired, non-accepting class.

The Court has reviewed the Joint Plan and finds that proposes to sell the Debtor's assets for cash, and proposes to distribute that cash to creditors, according to their respective priorities. The Joint Plan does not unfairly discriminate among classes; its classifications are based on priorities accorded to the creditors by applicable state law and applicable provisions of the Bankruptcy Code. The Joint Plan is fair and equitable as to each class. The Joint Plan treats all holders of secured claims similarly and provides for sale of the property that is subject to their liens with such liens to attach to the proceeds of sale, as required by § 1129(b)(2)(A)(ii). The Court concludes that the Joint Plan satisfies the requirements of § 1129(b).

Finally, the Court turns to Shaw's Plan. The Joint Plan Proponents argue that the Shaw Plan cannot be confirmed over the dissenting vote of Class 3 (Secured Claim of Capmark Bank). The Court notes that Shaw's Plan proposes to sell the Debtor's assets for a combination of cash and a promissory note. The cash amount will be insufficient to pay the secured claim of Capmark Bank. Presumably, payment to Capmark would be made from payments under the $26 million promissory note delivered by the buyer "to the estate of Debtor," which note has no fixed payment schedule and a five year maturity. Payments prior to maturity depend upon sales of Club Estates, which sales Shaw has not quantified or projected. The Court finds that Shaw's Plan provides a materially greater risk to dissenting creditor Capmark. To be sure, Capmark and Shaw do not share equal priority under nonbankruptcy law, but the disparity in treatment is such that the Court cannot find that the Shaw Plan is fair and equitable to, and does not unfairly discriminate against, Capmark.

Shaw almost concedes this point, acknowledging that further arrangements will need to be made in order to satisfy Capmark's objection. The Court appreciates Shaw's candor. It may be the case that Shaw and Capmark could come to a resolution, even though consensual resolutions in this case have unfortunately been few and far between. But without such a resolution in place, and without further detail as to how Capmark would be paid over time, including specifics as to the terms of the promissory note, this Court cannot find that the Shaw has satisfied the requirements of section (b).

The Court is also concerned with provisions of Shaw's Plan that would prevent the arbitrator from considering the Debtor's defenses and counterclaims against Shaw in the pending mechanics' lien arbitration. While Mr. Atkinson explained that Shaw was concerned with double jeopardy, he also admitted on cross-examination that Shaw's concern could have been addressed in other ways. The Court finds that Shaw's Plan unnecessarily deprives the Debtor's estate of the right to assert defenses and counterclaims that could potentially benefit the estate. The Court therefore finds that the Shaw Plan is not fair and equitable with respect to junior secured and unsecured creditors, and Shaw's Plan cannot be confirmed under § 1129(b).

REQUIREMENTS OF § 1129(c):

Because the Court finds that only one plan is confirmable, the Court need not reach § 1129(c), which would require the Court to pick one of two or more confirmable plans. If the Court were to reach that section, however, the Court would have selected the Joint Plan.

As the Joint Plan Proponents note, creditor support for the two creditor plans fell largely along proponent lines – each plan drew support primarily from its own proponents (and in the case of Shaw, from its subcontractors). Acceptances and expressions of preference among "neutral" creditors were inconclusive. The largest unsecured creditor who is not a Shaw subcontractor, Ballard Spahr, voted in favor of the Joint Plan and gave it a first priority preference. The Debtor expressed a preference for the Shaw Plan. And, Shaw has expressed a preference for the Joint Plan. The Court has taken that into consideration, but there are also additional factors favoring the Joint Plan.

First is the Joint Plan's proposed plan administrator, Tom Connolly. The Court is familiar with Mr. Connolly and with his reputation as a well-qualified, experienced bankruptcy professional. The Court has a great deal of confidence that Mr. Connolly will be able to make progress on many fronts that have stymied the Debtor's reorganization efforts to date. This is not to say that the Court had any concerns about Shaw's proposed plan administrator, who appears to be a professional with significant experience in the hotel and fractional interest industry, but in the Court's view this is a case that calls for the expertise of a bankruptcy professional rather than an industry professional.

The second additional factor favoring the Joint Plan is its accompanying MOU and agreements between the proposed purchaser and 176 of the Club Estate Owners. The Court believes that such agreements will greatly reduce the amount of pending litigation surrounding this case, which will have a great benefit to the estate, particularly to junior secured and unsecured creditors.

Finally, and perhaps most importantly, the Joint Plan provides the highest price, at a million dollars more than that of the Shaw Plan, and provides that the payment will be all cash, which is in all cases preferable to a promissory note.

CONCLUSION

For the reasons discussed, the Court denies confirmation to the Mezzanine Plan, the Debtor's Plan and Shaw's Plan. The Court will, by separate order, confirm the Joint Plan.

The Court recognizes that its decision dispossesses the Debtors and relieves Mr. Prado of his authority over assets into which he has quite literally poured his heart and soul. Here, the Chapter 11 process did not result in a successful reorganization of the Debtor's business affairs. But, in the final analysis, the competing plan process has clearly demonstrated that the creditors' overwhelming preference is to liquidate the project for cash now, rather than accept the promise of uncertain future payment from the Debtor's continued operations in a depressed real estate and travel market. The Court finds that their choice is a rational one and one that was within their power to make.

The Debtor and its affiliates shall preserve, operate and maintain the Vail Plaza Hotel and Club, including the fractional interest condominium project, pending further instruction by the

Plan Administrator or the eventual purchaser. The Court thanks the parties and their counsel, who have put so much hard work into this process

Accordingly, it is HEREBY ORDERED that:

1. Confirmation of the Mezzanine Plan, docket #425, is DENIED;

2. Confirmation of the Debtor's Plan, docket #516, which has been corrected by docket #626, is DENIED;

3. The Court will confirm the Joint Plan, docket #603, by separate order; and

4. Confirmation of Shaw's Plan, docket #605, is DENIED.

Dated this 4th day of January, 2010.

BY THE COURT:

Howard Tallman

Howard R. Tallman, Chief Judge
United States Bankruptcy Court