

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)
Riviera Drilling & Exploration Company,) Bankruptcy Case No. 10-11902
)
Debtor.) Chapter 11

ORDER ON CHAPTER 11 PLAN CONFIRMATION

THIS MATTER came before the Court on: (1) the Motion to Convert Case From Chapter 11 to Chapter 7 filed by Chapter 11 Trustee Kevin Kubie (the “Trustee”) on June 14, 2012 (docket #425),¹ the objection filed thereto by Gunnison Energy Corporation (“GEC”) (docket #427), the objection filed thereto by Rock Creek Ranch I, Ltd., et al. (docket #429), the Motion for Joinder in Objections to the Motion to Convert filed by the Thurner Parties² on August 24, 2012 (docket #443), the Objection to the Motion to Convert filed by Hill & Robbins, P.C. on August 28, 2012 (docket #445); and (2) the Amended Chapter 11 Plan filed by GEC on August 31, 2012 (the “Plan”) (docket #449), the Disclosure Statement filed by GEC on August 31, 2012 (docket #450), and the Objection to Plan Confirmation filed by the Thurner Parties (docket #465).³ On September 4, 2012, the Court ordered briefing on the applicability of 11 U.S.C. § 1121(e), and subsequently held an evidentiary hearing on confirmation of GEC’s Plan on October 22, 2012.⁴ The Thurner Parties have since filed a supplemental brief (docket #480), which, while filed out of time, the Court has nevertheless reviewed and considered. Based upon evidence and offer of proof presented in open court, the Court hereby finds and concludes as follows:

¹ In his Support Brief filed on October 16, 2012 (docket #468) the Trustee stated that he supported confirmation of GEC’s Plan, but if the Court could not confirm GEC’s Plan, the Trustee still supported conversion, rather than dismissal.

² The Thurner Parties’ entry of appearance by counsel (docket #442) lists Jacob Thurner, Thurner Explorations, Thurner Heat Treating Inc., Thurner Industries, Inc., Robert E. Thurner Family Trust, Doris Thurner Family Trust, 350 Saint Paul, LLC, and Scott Thurner.

³ The Objection to Confirmation filed by the United States on behalf of the Department of Interior, Office of Natural Resources Revenue (“ONRR”), and the Bureau of Land Management (docket #466) has since been withdrawn.

⁴ Due to the additional briefing, the Court finds that compelling circumstances prevented the Court from meeting the time limits established by 11 U.S.C. § 1112(b)(3).

BACKGROUND

Riviera Drilling and Exploration Company (“Debtor” or “Riviera”) owns 43.5% of the operating rights related to certain oil and gas leases located in the “Ragged Mountain” area in Gunnison and Delta counties, Colorado. Debtor is owned and operated by Scott Thurner and his sons, Jacob and Samuel Thurner. The remaining interest in the leases is primarily owned by the Thurner Parties. GEC and another entities, which will be collectively referred to as “SG,”⁵ are the record title lessees of a small portion of the leases, and they own a gas transportation system, the Ragged Mountain Pipeline (the “Pipeline”) that they use to transport gas from the leases to market. Debtor also uses the Pipeline to transport its gas to market. In November 2008, Debtor sued GEC and SG in the United States District Court for the District of Colorado, alleging certain antitrust violations, but the suit was ultimately dismissed for the failure of Debtor to obtain counsel. Debtor filed for Chapter 11 as a small business on February 2, 2010.

On August 2, 2010, Debtor filed its first Chapter 11 Plan of Reorganization. GEC filed a motion to convert to Chapter 7 on August 31, 2010, and Debtor filed an Amended Plan on November 29, 2010.⁶ On December 16, 2010, the Court denied GEC’s motion to convert, and ordered the appointment of the Trustee. Approximately a year later, after extensive negotiations, the Trustee and the Thurner Parties agreed to sell 100% of the lease interests at auction, with a reserve minimum bid to account for underlying tax obligations that had to be recovered. At the auction, SG had the highest bid of approximately \$3 million, but the auction failed because the bid was significantly below the minimum bid amount. The Trustee then filed adversary proceeding #12-01079 against the Thurner Parties⁷ (the “Thurner Litigation”) and on June 14, 2012, filed a motion to convert to Chapter 7. Thereafter, GEC filed the Plan and disclosure statement. The disclosure statement was approved and the Plan was noticed for confirmation hearing, which drew objections from the Thurner Parties. After a status conference on the motion to convert, the Court requested briefing on the small business filing deadlines under § 1121(e), and conducted a continued status conference on the motion to convert and an evidentiary hearing on confirmation on October 22, 2012. On December 18, 2012, Debtor filed a “Supplemental Brief” which attached a December 12, 2012, ruling in a separate proceeding involving GEC, SC, and the United States, in the United States District Court for the District of Colorado. As will be discussed below, the Court has considered the Supplemental Brief in rendering its decision.

⁵ “SG” includes SG Interests I, Ltd., SG Interests VII, Ltd., and Margan Investments, LLC.

⁶ GEC filed a motion to deem this plan as withdrawn on December 28, 2010, for failure of Debtor to retain counsel (docket #300).

⁷ In addition to the Thurner Parties, the litigation also names as defendants Vicon, Holly Thurner, Sally Thurner, T Investment Group, and Timothy Thurner.

DISCUSSION

I. Application of § 1121(e).

11 U.S.C. § 1121(e) provides:

(e) In a small business case--

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is--

(A) extended as provided by this subsection, after notice and a hearing; or

(B) the court, for cause, orders otherwise;

(2) *the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief;* and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if--

(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed before the existing deadline has expired.

(emphasis added).

In its brief on the applicability of § 1121(e), GEC urges the Court to follow *In re Florida Coastal Airlines, Inc.*, 361 B.R. 286 (Bankr. S.D. Fla. 2007), which held that the 300-day deadline for plan filing in § 1121(e)(2) applies only to a debtor. In its brief, the Trustee takes the position that the 300-day deadline does not necessarily apply to a creditor's plan, especially under the facts of this case. The Thurner Parties, in their brief, contend that the "if any" in § 1121(e)(2) includes any plan and disclosure statement, rather than just a debtor's plan and disclosure statement; therefore, *any* party is precluded from filing a plan after the 300-day deadline.

In *Florida Coastal*, the court reasoned that prior to BAPCPA, § 1121(e)(2) specified that "all plans" must be filed within the applicable time period, and that when Congress modified this section, it used "the plan," evidencing an intent to narrow the applicability of the time limit to only the debtor. *Id.* at 291. That court also found this interpretation to be reinforced by § 1121(e)(3),

which allows the applicable time period to be extended only by the debtor. “It is wholly unreasonable to believe that Congress intended to put creditor plans at the mercy of a debtor’s willingness to demonstrate that confirmation is probable.” *Id.* The court thus reasoned that the 300-day deadline applies only to a debtor, and not to any other party in interest.

Since *Florida Coastal*, only one case has reached a contrary result. In *In re Randi’s Inc.*, 474 B.R. 783 (Bankr. S.D. Ga. 2012), no party filed a plan within the 300-day period. The debtor filed its only plan and disclosure statement 351 days after the petition date. *Id.* at 784. In response to the court’s concerns that the plan could not be confirmed due to the 300-day deadline, the sole shareholder of the debtor filed another plan on day 385, which was identical to the plan initially proposed by the debtor. *Id.* at 785. The court concluded that the debtor was merely trying to make an end-run around the deadline by filing the same plan under the name of its shareholder. The court reasoned that the facts differed from those presented in *Florida Coastal*, where a creditor had filed a truly competing plan. Thus, the court held that the plan violated the 300-day deadline and could not be confirmed. *Id.* at 787.

The Thurner Parties cite to 7 Collier on Bankruptcy 1121.07[4], which states that “if no party files a plan within the specified or extended time, no relief is available to the debtor in chapter 11.” This secondary source, however, cites no authority for its proposition, and this Court could not locate any. The Thurner Parties also interpret the “if any” language in § 1121(e)(2) to mean that “any” plan and disclosure statement must be filed within the 300-day deadline, meaning that any plan, whether filed by a debtor or another party in interest, must be filed within the deadline. The Trustee responds that the “if any” refers to the disclosure statement only. In other words, because § 1125(f) permits a small business debtor’s plan itself to serve as a disclosure statement, the language “[t]he plan and a conditionally approved disclosure statement (if any)” merely references the fact that the disclosure statement is optional. This Court agrees with the Trustee.

After thoroughly reviewing the briefs, applicable statutes and case law, the Court concludes that *Florida Coastal* is the most persuasive authority under the facts presented here. Debtor initially filed its plan within the 300-day deadline. After GEC moved to convert or dismiss, the Court denied that motion and found that cause existed to merit the appointment of a Chapter 11 Trustee. The Trustee worked diligently for over a year to reach a solution satisfactory to all parties. It was only when these efforts failed, and the Trustee moved to convert or dismiss, that GEC filed its competing plan of confirmation. The Court will thus decline to apply the 300-day deadline to GEC, especially since it finds that GEC’s Plan is in the best interests of creditors and the estate, as will be detailed below. *See Colorado Mountain Express, Inc. v. Aspen Limousine Serv., Inc.*, 193 B.R. 325, 333 (D. Colo. 1996) (“Section 1121(e) should not be read in a vacuum.”).

II. Confirmation of plan under § 1129(a).

GEC’s Plan contemplates the purchase by GEC of either (1) 100% of the lease interests for an amount equal to the lesser of (a) \$3 million, or (b) the amount necessary to pay all allowed claims in full, excluding those held by GEC and Riviera insiders; or (2) roughly 72% of the lease

interests in an amount equal to \$1.5 million. GEC is committed to provide financing of \$600,000 to administer the estate and fund the Thurner Litigation, and to buy the Buccaneer Receivable for \$10,000. The \$600,000 includes: (1) payment of \$200,000 in allowed administrative expense claims; (2) an initial 10% distribution to holders of allowed Class Two general unsecured claims other than GEC (provided that funds shall not exceed \$100,000); and (3) post -confirmation expenses up to \$300,000 to administer the estate and prosecute the Thurner Litigation. The Thurner Litigation seeks (1) substantive consolidation of the non-Riviera lease interests into Debtor's bankruptcy case; (2) equitable subordination of Riviera insider claims; and (3) avoidance and recovery of roughly \$110,000 in fraudulent transfers made to Jacob Thurner. A plan administrator, Thomas Kim, shall be appointed to replace the Trustee as plaintiff in the Thurner Litigation, and a plan committee, consisting of three significant non-insider creditors, shall be formed to oversee the Thurner Litigation. In the event the Thurner Litigation is unsuccessful in substantively consolidating non-Debtor lease interests into the estate, or the lease interests are not otherwise sold to GEC, GEC shall receive all of Debtor's assets, including its lease interests, in satisfaction of the Plan financing.

At the hearing on confirmation of GEC's Plan, counsel for GEC provided an extensive offer of proof and evidence as to each of the 16 requirements under § 1129(a), which were largely unchallenged by the Thurner Parties. The Court also heard testimony from the Trustee and from Scott Thurner, and the Thurner Parties had the opportunity to call other offered witnesses to the stand for cross-examination, but did not. The Thurner Parties' objection primarily was that the Plan was not feasible and not proposed in good faith. For the following reasons, the Court finds these objections to be without merit, and believes the Plan is in the best interests of creditors and the estate.

A. Requirements of § 1129(a)

1. The following provisions of §1129(a) were not objected to:

(a) (1) The plan complies with the applicable provisions of Title 11. This provision is not disputed.

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

This provision normally involves the adequacy of the disclosure statement, which the Court has already approved. At the hearing, GEC offered to call to the stand Mr. Brad Robinson, President of GEC, who would testify that no representative of GEC solicited acceptances of the Plan prior to approval of the disclosure statement.

(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 Plan on this ground, and it appears to the Court that the Plan terms satisfy this section.

(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 disclosure statement provided adequate information concerning the plan administrator, Mr. Thomas Kim. The Court is familiar with Mr. Kim and with his reputation as a well-qualified, experienced bankruptcy professional. The Court is confident that Mr. Kim will be able to make progress on many fronts that have stymied the Debtor's reorganization efforts to date.

(a) (6) concerns regulatory approval of utility rates. At the hearing, the Trustee testified that the Debtor does not have regulated rates.

(a) (9) concerns the plan's Treatment of § 507(a) claims. The Plan terms themselves establish compliance with this section.

(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.

The ballot report shows compliance, as Class Two has voted to accept, not counting any votes of insiders. Class Two consists of general unsecured claims, excluding SG and Riviera insiders, and includes McFadden Consulting Group, Roger and Janice Day, William and Shari Bird, Winford Fowler, Hill and Robbins, P.C.,⁸ and Gunnison Riviera Corporation, all who voted for the Plan. Other creditors in Class Two who did not vote on the plan, Performance Sciences, Inc. and the ONRR, are deemed to have accepted the plan. *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1266-67 (10th Cir. 1988).

⁸ On the day of the confirmation hearing, the Thurner Parties filed an objection to Hill and Robbins' proof of claim # 6-2. The objection was filed without a certificate of service or notice to Hill and Robbins of any objection period. The Thurner Parties failed to file a certificate of service or notice by October 31, 2012, as required by this Court's order to file (docket #476). The objection is thus stricken for failure to comply with a Court order. Alternatively, even without the acceptance of the Hill and Robbins claim, Class Two still accepted by more than 2/3 in amount and more than 1/2 in number of those voting.

(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.

This section allows for liquidation. The Plan provides for the sale of all Debtor's lease interests to GEC and thus satisfies the requirements of section (a)(11). GEC has provided sufficient funding for the administration of the Plan and, therefore, the Court finds the Plan is feasible.

(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 the Plan satisfies section (a)(12).

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

Sections 13 through 15 are not applicable.

(a) (16): All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial operation or trust.

The Trustee testified that transfer of the lease interests is governed by the ONRR, and that their objection has been resolved and thus withdrawn.

2. The remaining requirements of § 1129(a) are contested, and will be resolved below:

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

In their objection to plan confirmation, the Thurner Parties argue that GEC "caused" the Debtor's bankruptcy by charging high Pipeline transportation rates, and now GEC is attempting to take over the Debtor's business. They argue that the Plan is "self-serving and attempts to liquidate rather than reorganize Debtor." They also contend that for the Plan to be approved, the Court would have to substantively consolidate the non-Debtor lease interests with the Debtor's and equitably subordinate the Thurner Parties' claims. GEC responds that it does not propose that substantive consolidation occur by virtue of plan confirmation. Instead, substantive consolidation and related claims will be resolved in an adversary proceeding, the Thurner Litigation. GEC merely presented evidence at the confirmation hearing supporting the Plan's classification and subordination of the Thurner Parties' claims.

To determine whether a plan is proposed in good faith, this Court must decide whether “there is a reasonable likelihood that the plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code; that is, is the plan feasible, practical, and would it enable the company to continue its business and pay its debts in accordance with the plan provisions.” *In re Paige*, 685 F.3d 1160, 1178-79 (10th Cir. 2012) (citing *Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.)*, 779 F.2d 1456 (10th Cir. 1985)). In *Paige*, the Tenth Circuit emphasized that “a plan proponent's self-interested motive does not necessarily indicate a lack of good faith.” *Id.* at 1179. Further, a competitor who proposes a competing plan to take over the debtor does not act in bad faith *per se*. See *In re Trikeenan Tileworks, Inc.*, 2011 WL 2898955, at *8 (Bankr. D. N.H. 2011) (“To the contrary, the Supreme Court has noted that lifting exclusivity to propose a competing plan opens the door for other parties to bid for the equity of the company. There is no requirement that a competing plan must be friendly to the existing management or ownership of a debtor. Nor is there any bar in the Bankruptcy Code against a competitor proposing a take over of the debtor.”)

In evaluating whether a plan has been filed in good faith, a court should look to the totality of the circumstances, including: (1) whether a plan comports with the provisions and purpose of the Code and the chapter under which it is proposed, (2) whether a plan is feasible, (3) whether a plan is proposed with honesty and sincerity, and (4) whether a plan's terms or the process used to seek its confirmation was fundamentally fair. *In re Global Water Technologies, Inc.*, 311 B.R. 896, 903 (Bankr. D. Colo. 2004).

This is a plan that GEC proposed after the Debtor’s failure to propose a confirmable plan, and after the Trustee’s extensive efforts to craft a successful sale that came close to its goal. If the sale had been successful, the Thurner Litigation would be unnecessary. The Thurner Parties have previously agreed to a liquidation of their interests, but they now object since GEC is the bidder. GEC’s Plan also pays significant up-front cash to creditors and funds the estate administration. While GEC does stand to gain from the Plan, the fact that the Plan provides GEC with advantages over other parties or classes does not, in itself, support a finding of bad faith. After reviewing the totality of the circumstances in this case, the Court concludes that GEC’s Plan is filed in good faith.

The Thurner Parties’ Supplemental Brief attaches the December 12, 2012, ruling by the United States District Court for the District of Colorado in a suit brought by the United States against GEC and SG. In that ruling, the court refused to approve a settlement agreement between those parties concerning alleged violations by GEC and SG of antitrust regulations during BLM auctions in 2005. The Thurner Parties assert that this ruling supports their argument that GEC’s Plan is not proposed in good faith. The Court has reviewed the ruling and is not persuaded that GEC’s conduct during the pendency of this bankruptcy has risen to the level of bad faith that would prevent plan confirmation.

(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

At the hearing, the Trustee's testimony showed that the Ragged Mountain lease interests are 43.5% held by Riviera, with the remaining assets held by insiders. The value of the lease interests was determined by the Trustee through communication with all parties. In his business judgment, the Trustee determined that the minority interest was unmarketable, that any sale had to include at least 50% of the lease interests, and the best option would be to sell 100% of the lease interests. The Thurner Parties were involved in the sale process and selection of the broker. Despite the Trustee's best efforts, the sale did not produce a bid as high as the reserve minimum. The Trustee testified that the lease interests have a fair market value of \$3 million, and no other party has offered to purchase them for more than that since the auction. The Trustee further testified that the minority interests are worth under \$200,000, and if the case was converted to Ch. 7, these interests would meet administrative expenses only. In the Trustee's opinion, GEC's Plan is in best interest of the creditors and the estate, and the Court agrees.

(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.

Based on the Court's review of the most recently filed ballot report, not all impaired classes accepted. Class Four, representing the Riviera insiders' general unsecured claims, and Class Five, representing equity interests, rejected the Plan. Because the Plan does not satisfy section (a)(8), if the Plan is to be confirmed, it must be done under § 1129(b). The Court will discuss those requirements below.

B. Requirements of § 1129(b)

This section provides:

(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.

To determine whether a plan discriminates unfairly, courts have considered: (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) the treatment of the classes discriminated against. *In re Aztec Co.*, 107 B.R. 585, 590

(Bankr. M.D. Tenn. 1989). Other courts have used a “rebuttable presumption” test or “Markell” test, which is met by showing that, outside of bankruptcy, the dissenting class would receive less than the class receiving a greater recovery, or that the alleged preferred class had infused new value which offset its gain. *In re Dow Corning Corp.*, 244 B.R. 696 (Bankr. E.D. Mich. 1999). Regardless of the test used, however, a Chapter 11 plan does not unfairly discriminate if it has "a rational or legitimate basis for discrimination and the discrimination must be necessary for the reorganization." *Id.* at 701.

Here, the Thurner Parties have filed unsecured claims totaling in excess of \$36 million. No supporting documentation has been submitted with these claims. There exist significant questions about whether these claims are in fact unsecured obligations or rather are capital or equity contributions made by the Thurner Parties over the years. GEC has demonstrated, for plan confirmation purposes, that classification of these insider claims from the Class Two general unsecured claims is reasonable and rationally based under the circumstances of this case. Based on the Trustee’s testimony, a plan without discrimination cannot be confirmed since 100% of the lease interests must be sold to maximize value for all creditors. And, the subordination of insider claims is necessary to carry out the priority of distribution requirements of the Bankruptcy Code. If in fact such insider claims are eventually subordinated, the Plan will provide the proper distribution to the insider claimants consistent with the Code. The Thurner Parties have not provided any evidence or argument that rebuts the need for the treatment of insider claims under the Plan. Therefore, the Court finds the classification scheme has a rational and legitimate basis, and it is reasonable and necessary for the reorganization.

The condition that a plan be fair and equitable with respect to a class includes the requirement that “[w]ith respect to a class of interests ... 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.” §§ 1129(b)(2), 1129(b)(2)(C)(ii). This requirement, known as the absolute priority rule, “requires that certain classes of claimants be paid in full before any member of a subordinate class is paid.” *See Allen v. Geneva Steel Co. (In re Geneva Steel Co.)*, 281 F.3d 1173, 1180 n. 4 (10th Cir. 2002). The Tenth Circuit has indicated that a plan can be fair and equitable once the absolute priority rule is satisfied. *In re Paige*, 685 F.3d at 1183-84.

The Court has reviewed GEC’s Plan and finds that it is fair and equitable and satisfies the requirements of § 1129(b). Class Four creditors are being treated fairly since the funds to be obtained will be used to pay creditors to the greatest extent possible. No lower class is preferred since the equity holders do not receive anything unless there is a surplus after paying all allowed unsecured and subordinated claims. Further, GEC adequately demonstrated at the hearing that, if the requirements are proven at trial in the Thurner Litigation, the Thurner Parties’ claims are subject to equitable subordination under the 13 factors enumerated by the Tenth Circuit in *In re Hedged Investments Associates, Inc.*, 380 F.3d 1292 (10th Cir. 2004), or the debts should be recharacterized.

In *Hedged Investments*, the Tenth Circuit adopted the *Mobile Steel* factors to determine whether debts should be recharacterized: (1) “inequitable conduct” on the part of the claimant sought to be subordinated; (2) injury to the other creditors of the bankrupt or unfair advantage for the claimant resulting from the claimant's conduct; and (3) consistency with the provisions of the Bankruptcy Code. *Id.* at 1300. Inequitable conduct can involve the claimant’s use of the debtor as a mere instrumentality or alter ego; undercapitalization, or fraud, illegality and breach of fiduciary duty. *Id.* at 1301. At the hearing, GEC provided sufficient evidence of insider transactions, intent to hinder other creditors, poor record-keeping, inadequacy of capitalization, and hedged investments to justify the pursuit of the Thurner Litigation to maximize the return to the estate.

Additionally, this Court agrees with GEC that, if the requirements are proven at trial, substantial consolidation would be in the best interests of the estate. Substantial consolidation should be granted if: (i) the debtor’s financial affairs are so intertwined with the other entities’ that it is either impossible or costly to untangle them; (ii) creditors have dealt with the various entities as a single unit; or (iii) there is a substantial identity between the entities and consolidation is necessary to avoid some harm or realize some benefit. *See, e.g., In re Auto-Train Corp., Inc.*, 810 F.2d 270 (D.C. Cir.1987); *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d. Cir. 1988).

Accordingly, the Court finds GEC’s evidentiary proffer, regarding the justifications for substantive consolidation of all, or substantially all, of the Ragged Mountain lease interests and the equitable subordination of the Thurner Parties’ claims, to be sufficient support for confirmation of the Plan. And, the Court finds, based on such evidence, that the Plan does not unfairly discriminate against, and is fair and equitable in its treatment of, Class Four and Class Five.

CONCLUSION

After reviewing the entire record the Court does not find the Thurner Parties’ objection to confirmation persuasive. GEC’s Plan is feasible, proposed in good faith, and meets the applicable requirements of §§ 1129(a) and (b) of the Bankruptcy Code. For the reasons discussed, the Court will, by separate order, confirm GEC’s Plan.

Dated this 19th day of December, 2012.

BY THE COURT:



Howard R. Tallman, Chief Judge
United States Bankruptcy Court