UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

RIVERSIDE DIVISION

In re: Terry Lee Fleming, Sr Debtor(s).	Case No.: 6:17-bk-19513-MW CHAPTER 11 **MEMORANDUM DECISION OVERRULING OBJECTIONS OF HAVASU LAKESHORE INVESTMENTS, LLC TO CONFIRMATION OF JOINT PLAN PROPONENTS' AMENDED CHAPTER 11 PLAN DATED FEBRUARY 12, 2021** Date: May 18, 2021 Time: 2:00 PM Courtroom: 225

Creditor Havasu Lakeshore Investments, LLC ("HLI") objects to confirmation of the Joint Plan Proponents' Amended Chapter 11 Plan Dated February 12, 2021 (the "2021 Plan"). HLI's objections are made on a variety of grounds, such as an alleged violation of the law of the case doctrine and alleged multiple failures to satisfy plan confirmation requirements set forth in 11 U.S.C. § 1129. However, it is apparent that each of these alleged shortcomings (with one exception that is discussed below) is

based upon HLI's interpretation of a previous ruling of the United States Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") and the interaction of such interpretation with provisions of the 2021 Plan. Phrased differently, each of HLI's arguments (with one exception) is based upon the premise that HLI's interpretation of the BAP's previous ruling is correct and that this Court is precluded from confirming the 2021 Plan because the 2021 Plan took account of a credit against the Debtor's obligations to HLI in the amount of $3.694 million in respect of previous conveyances of real property to HLI.

The real property referred to above consisted of 3 finished homesites and 46 finished but vacant lots located in Lake Havasu, California in a community known as Vista Del Lago (the "Properties"). The Properties were conveyed by Deed to HLI pursuant to, and following, this Court's confirmation of a previous plan of reorganization (the "2019 Plan"). The basis for this Court's confirmation of the 2019 Plan was that HLI would receive the "indubitable equivalent" of its claims within the meaning of 11 U.S.C. § 1129(b)(2)(A)(iii) pursuant to payments and conveyances under the 2019 Plan.

HLI appealed the confirmation of the 2019 Plan to the BAP. The issue before the BAP on appeal was whether the entire package of consideration provided to HLI under the 2019 Plan constituted the "indubitable equivalent" of HLI's claims. It is important to note that what HLI received under the 2019 Plan was not merely the Properties but, in addition, millions of dollars worth of other consideration as well, such as, for example, a large cash down payment and a secured promissory note pursuant to which a stream of payments would be made to HLI over approximately a five-year period.

The BAP determined that the entire package of consideration provided to HLI under the 2019 Plan did not satisfy the requirement of indubitable equivalence: " . . . plan treatment consisting of cash payments in addition to the transfer of real property at the bankruptcy court's valuation does not provide HLI with the indubitable equivalent of its secured claim under § 1129(b)(2)(A)(iii)." BAP Opinion at page 3. The BAP most specifically did not find this Court's valuation of the Properties at $3.694

million to be clearly erroneous: " . . . we do not determine whether the valuation here was clearly erroneous . . . ." BAP Opinion at 13.

The issue now before the Court with respect to confirmation of the 2021 Plan is not one of indubitable equivalence. Rather, the issue is whether the stream of payments being provided to HLI with respect to its partially paid-down claim (i.e., paid down by a prior conveyance of the Properties) satisfies the requirements not of 11 U.S.C. § 129(b)(2)(A)(iii) but rather of 11 U.S.C. § 1129(b)(2)(A)(i).

The simple fact of the matter is that HLI's claim has been partially paid down by the conveyance of the Properties to HLI. This has already occurred. The bell cannot be unrung. Conveyance of the Properties to HLI is not part of the 2021 Plan because that has already happened. The question before the Court is to what extent HLI's claim was partially paid down by reason of this conveyance. The answer, quite obviously, is that HLI's claim was paid down by an amount equal to the fair market value of the Properties. THE BAP quite explicitly did not disturb this Court's valuation of the Properties, and that valuation is $3.694 million.

This Court's determination of the fair market value of the Properties (and, correspondingly, the extent to which HLI's claim was paid down by the conveyance of the Properties to it) is not governed by any type of "indubitable equivalent" standard. When a court determines the fair market value of real property for this purpose, such valuation need not be "indubitably" correct. "Indubitable" is defined as "too evident to be doubted." Webster's Ninth New Collegiate Dictionary. It is likely the case that a forward-looking valuation of property, even publicly-traded property, can never be indubitably correct. Prices fluctuate, and the fact that a particular stock traded at closing at X dollars and cents per share is no guarantee it will open at such price the following morning.

HLI's contention that its claim should not be considered to be reduced by the fair market value of the Properties it received (as determined by this Court after a lengthy evidentiary hearing) but instead by some lesser amount is contrary to reason and logic.

HLI has cited the Court to no authority for the proposition that if a creditor is paid, in money or money's worth, X dollars, the creditor is entitled to reduce the claim it holds against the debtor by some amount less than X dollars.

One day before the confirmation hearing for the 2021 Plan, on May 17, 2021, HLI filed a Supplement to Objection of Havasu Lakeshore Investment, LLC's to Confirmation of: Joint Plan Proponents' Amended Chapter 11 Plan of Reorganization Dated February 12, 2021, Docket No. 664 (the "Supplemental Objection"). The Supplemental Objection states that HLI has entered into a contract for the sale of 46 vacant lots at a price of $2,246,000. HLI argues from this that the reduction in its claim by reason of the conveyance of the 46 lots and three finished homesites should be approximately $3 million instead of the $3.694 million number used by this Court. (The three finished homesites sold in the aggregate for about $728 thousand). In effect, what HLI is arguing is that, by reason of the BAP decision, HLI is entitled to limit the reduction in its claim by reason of the real estate conveyance to the values at which it ultimately was able to sell the lots, not by their fair market value on the date such properties were conveyed to HLI.

This Court rejects such a proposed resolution of the issue. HLI acquired all the benefits and burdens of ownership of the 46 lots when it acquired them in approximately July 2019. If the 46 lots had tripled or quadrupled in value between July 2019 and June/July 2021, HLI presumably would not be asking the Court to use the tripled or quadrupled values in determining how much its claim should be reduced. As it turned out – hardly surprising in view of the onset of the greatest pandemic in a century – is that the value of the 46 lots diminished over time, it did not increase. HLI must accept the bad with the good by reason of its fee ownership of the 46 lots (as any other property owner would have to do).

To the extent HLI is arguing that a sale in June/July 2021 is a good comparable for determining the fair market value of the 46 lots in July 2019, such argument is seriously flawed. First, there is a foreclosure pending with respect to the 46 lots by

reason of HLI's failure to pay homeowner fees to the Vista Del Lago HOA, so the sale is a distressed sale – not a good indicator of true value. Second, as stated above, lying between the 2019 conveyance and a sale in June/July 2021 is one of the greatest pandemics in history. Vastly changed circumstances are obvious. Third, the upcoming sale is structured as a sale in bulk. This Court, based upon the expert testimony of Dr. Vanderley, Debtor's valuation expert, determined that a bulk sale is not a commercially reasonable sale. A retail lot-by-lot sale is commercially reasonable, whereas a bulk sale is not. For all these reasons, the Court concludes that the value to be realized by HLI by reason of the sale that is now in the works is not a credible indicator of the fair market value of the 46 lots when those lots were conveyed to HLI in July 2019.

In summary, the Court determined that the fair market value of the Properties was $3.694 million. The Properties have been conveyed to HLI. The BAP did not disturb this Court's determination that the Properties in fact had a fair market value of $3.694 million. Therefore, the amount of HLI's claim at the present time that is now before the Court for purposes of analysis under 11 U.S.C. § 1129(b)(2)(A)(i) is not the amount of the claim HLI held before the Properties were conveyed to it but instead the amount of the claim it now holds, which of necessity must reflect a reduction in the amount of $3.694 million because that was the fair market value of the Properties. All of HLI's arguments (except the one discussed immediately below) are based upon the faulty premise that when a creditor's claim is partially paid down during a bankruptcy case through a conveyance of property, the amount of the claim reduction is not the fair market value of such property but instead some lesser amount determined by the creditor instead of the bankruptcy court.

Apart from these matters, HLI argues that the 2021 Plan fails to account for or pay HLI's claims as evidenced by Proof of Claim Numbers 8-1, 9-1, 11-1 and 12-1, aggregating approximately $250,000. Claim Number 8-1 states that it is a secured claim and relates to a $200,000 appeals bond. Claim Numbers 9-1, 11-1 and 12-1

are based upon attorneys' fees awards in litigation between HLI and Debtor and are stated to be unsecured claims. Bankruptcy's absolute priority rule, *see* 11 U.S.C. § 1129(b)(2)(B), requires that unsecured claims be paid in full if a debtor is to retain any property under a confirmed chapter 11 plan. HLI argues that the 2021 Plan fails to provide for the full payment of the afore-mentioned claims and therefore violates the absolute priority rule and cannot be confirmed.

Claim Numbers 9-1, 11-1 and 12-1 are classified as Class 9 claims under the 2021 Plan and will be paid in full along with other Class 9 claims over a period of not more than five years with interest at the federal judgment rate from and after the 2021 Plan's effective date. Such treatment satisfies the absolute priority rule.

The 2021 Plan provides that IFIC, the issuer of the appeals bond referenced above, shall have an allowed secured claim of $200,000 and an allowed unsecured claim of $25,000. Pursuant to a settlement agreement, IFIC "shall pay the $200,000 of Cash Collateral that IFIC is holding in its Escrow Account to HLI to satisfy HLI's claim against the IFIC Bond . . . ." 2021 Plan, page 18 of 43. This provision of the 2021 Plan adequately provides for the full payment of Claim Number 8-1 and therefore satisfies the requirements of the absolute priority rule.

For these reasons, the Court overrules the objections of HLI to confirmation of the Plan.

IT IS SO ORDERED.

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Date: May 21, 2021

Mark S. Wallace
United States Bankruptcy Judge