

FEB 23 2012

ORDERED PUBLISHED

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP Nos.	AZ-11-1094-KiWiJu
)		AZ-11-1113-KiWiJu
7	LOOP 76, LLC,)		(Cross-Appeals)
)		
8	Debtor.)	Bk. No.	09-16799-RJH
)		
9	_____)		
	WELLS FARGO BANK, N.A.,)		
10)		
	Appellant,)		
11)		
	v.)		
12)		
	LOOP 76, LLC; GENESEE FUNDING,)		
13	LLC,)		
)		
14	Appellees.)		
)		
15	_____)		

O P I N I O N

Argued and Submitted on January 19, 2012,
at Phoenix, Arizona

Filed - February 23, 2012

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Susan G. Boswell of Quarles & Brady, LLP argued
for appellant, Wells Fargo Bank, N.A.;

Gerald M. Gordon of Gordon Silver argued for
appellee, Loop 76, LLC.

Before: KIRSCHER, WILLIAMS,¹ and JURY, Bankruptcy Judges.

¹ Hon. Patricia C. Williams, Bankruptcy Judge for the
Eastern District of Washington, sitting by designation.

1 KIRSCHER, Bankruptcy Judge:
2

3 We are asked to determine whether a third-party source for
4 recovery on a creditor's unsecured claim, such as a guarantor, is
5 a factor the bankruptcy court may consider when determining
6 whether claims are substantially similar under 11 U.S.C.
7 § 1122(a).² We conclude that it is, and we AFFIRM.³

8 **I. FACTUAL AND PROCEDURAL HISTORY**

9 Loop 76 is an Arizona limited liability company that was
10 formed in 2004 for the purpose of constructing, developing, and
11 operating an office/retail complex located in the Airpark Design
12 Center portion of Scottsdale, Arizona (the "Airpark Property").
13 Its owners are John Wright ("Wright"), who is an Arizona licensed
14 real estate agent, and Crown City Properties, LLC ("Crown City"),
15 an Arizona limited liability company. Wright and Crown City each
16 hold a 50% interest in Loop 76, and Wright is the managing
17 member. The principal member of Crown City is Michael Herlihy
18 ("Herlihy"). Herlihy is a licensed broker in California. Wright
19 and Herlihy have over 25 years experience as landlords,
20 developers, and real estate brokers.

21 In 2005, Loop 76 obtained a \$23,125,000 construction loan
22 from Wells Fargo Bank, N.A. ("Wells Fargo") secured by the
23 Airpark Property (the "Wells Fargo Loan"). Between March 2007
24

25 ² Unless specified otherwise, all chapter, code, and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 ³ At oral argument, Appellee, debtor Loop 76, LLC ("Loop
28 76"), withdrew its cross appeal of the interest rate applied to
Wells Fargo's secured claim.

1 and February 2008, Loop 76 sought permanent financing from Wells
2 Fargo, among others, before the Wells Fargo Loan matured on
3 December 31, 2008. Due to the tightened credit markets and the
4 downturn in Phoenix's real estate market, Loop 76 was unable to
5 secure replacement financing, and it defaulted on the Wells Fargo
6 Loan. In July 2009, Wells Fargo filed suit against Loop 76 in
7 state court seeking appointment of a receiver.

8 Loop 76, a single asset real estate case, filed a chapter 11
9 petition for relief on July 20, 2009. In September 2009, Wells
10 Fargo filed suit in state court against the guarantors of the
11 Wells Fargo Loan, including Wright, Herlihy, their respective
12 spouses, and Phyllis Krause, Crown City's other principal. That
13 suit remains pending.

14 After filing two plans and disclosure statements, to which
15 Wells Fargo filed objections, on April 9, 2010, Loop 76 filed its
16 First Amended Plan of Reorganization dated March 5, 2010, as
17 modified March 22, 2010, and the accompanying Disclosure
18 Statement (the "Plan"). For voting purposes, the Airpark
19 Property's stipulated value was \$17,050,000.

20 Class 3 consisted of an impaired secured claim by Genesee
21 Funding, LLC ("Genesee") for \$7,865.00 (the "Genesee Claim"). It
22 was secured by a piece of window washing equipment called a
23 Tractel Griphoist ("Griphoist"). Loop 76 proposed 24 equal
24 payments on the Genesee Claim at 3.25% interest, with the
25 remainder paid in full.

26 Class 2 consisted of the impaired secured claim of Wells
27 Fargo. Because Wells Fargo was an undersecured creditor, Loop 76
28 proposed two alternative treatments of its allowed claim

1 (approximately \$23 million) in the Plan. Under either
2 alternative, the Plan provided monthly payments to Wells Fargo at
3 the contract rate of 3.25% (or such other rate the court deemed
4 appropriate) for a period of ten years on the secured portion of
5 its claim. If Wells Fargo made a § 1111(b) election, it would
6 receive these same monthly payments, plus 3.25% interest, until
7 its \$23 million claim was paid in full. If Wells Fargo did not
8 make the § 1111(b) election, the unsecured deficiency portion of
9 its claim would be placed in its own class - Class 8(B) - and
10 receive a distribution of 10%.⁴ All remaining unsecured
11 creditors' claims (approximately \$181,000) were put into Class 8
12 (or Class 8(A) if Wells Fargo did not make the § 1111(b)
13 election) and would also receive a 10% distribution. In addition
14 to using encumbered and unencumbered cash on hand to fund the
15 Plan, Loop 76's equity holders agreed to contribute new value in
16 an amount of up to \$1 million, with \$500,000 in the form of a
17 cash deposit, and committed to provide up to another \$500,000, if
18 needed.

19 The bankruptcy court approved the Disclosure Statement on
20 April 12, 2010. Shortly thereafter, Wells Fargo purchased three

21
22 ⁴ Wells Fargo's claim against Loop 76 exceeded the value of
23 the Airpark Property, thus implicating § 506(a) and § 1111(b).
24 Section 506(a) provides that a claim secured by a lien on
25 property is considered secured up to the value of such property and
26 unsecured for the remainder. In short, Wells Fargo's claims have
27 been bifurcated into two claims - one secured and one unsecured.
28 Under § 1111(b), the creditor class may elect to have the claim
allowed as a secured claim for the full contractual amount
(including what would be the unsecured portion) rather than the
amount of the collateral's value. This is known as the
"§ 1111(b) election." Wells Fargo's claim is treated as a
recourse claim.

1 claims from various unsecured trade creditors. It filed notices
2 of transfer for each claim.

3 Wells Fargo declined the § 1111(b) election. As a result,
4 its claim was bifurcated into a secured claim in Class 2 and an
5 unsecured deficiency claim (about \$6 million) in Class 8(B). It
6 voted to reject the Plan for each of its claims. Impaired
7 Classes 3 (Genesee) and 8(A) (other unsecured trade claims) voted
8 to accept the Plan, with 100% of the claims and dollar amounts of
9 Class 3 voting to accept the Plan, and 60% of the claims and 84%
10 of the dollar amounts of Class 8(A) voting to accept the Plan.⁵

11 **A. The Genesee Claim objection.**

12 On May 14, 2010, Wells Fargo filed an objection to the
13 Genesee Claim, contending that it consisted of a bogus
14 transaction with a bogus company, and that it had been contrived
15 to create an accepting impaired class. Specifically, Wells Fargo
16 argued that although Loop 76 produced a UCC-1 Financing Statement
17 filed with the Arizona Secretary of State on July 21, 2009, which
18 was one day after the petition date, Loop 76 failed to ever
19 produce a security agreement. Therefore, without any terms of
20 the arrangement provided in the Disclosure Statement or
21 otherwise, no one could determine whether the Genesee Claim was
22 even impaired as Loop 76 asserted. Wells Fargo further contended
23 that Genesee was a bogus Colorado company that was not in good

24
25 ⁵ Class 4 consisted of an impaired claim filed by Maricopa
26 County for unpaid real estate taxes in the amount of \$536,863.68.
27 Wells Fargo subsequently purchased the tax claim, thereby
28 increasing the amount of its secured claim and eliminating Class
4 and its vote. Classes 5 and 6 were treated as unimpaired
administrative expenses and deemed to have accepted the Plan. No
claims existed in Class 7.

1 standing, and Greg Harrington ("Harrington"), its principal, was
2 an elusive character whom Wells Fargo was unable to locate and
3 whom the Arizona bankruptcy court, in an unrelated case, had
4 determined was involved in a number of bankruptcy misdeeds and
5 frauds, including a Ponzi scheme.

6 Loop 76 contended that no basis existed to disallow the
7 valid Genesee Claim, and that Wells's Fargo's objection was
8 merely an attempt to prevent confirmation of the Plan. Attached
9 to Loop 76's response were declarations from Herlihy, Wright, and
10 Harrington, and a Loan Agreement. According to Loop 76, Herlihy
11 had approached Wright in early 2009 about purchasing a window
12 washing system for the Airpark Property. The men decided that
13 Loop 76 would borrow the funds for the equipment rather than pay
14 cash for it. Wright learned that Harrington could procure the
15 equipment and financing for it. Wright referred Harrington to
16 Herlihy to discuss the purchase and financing of the equipment.
17 Herlihy agreed to purchase the equipment and finance it through
18 one of Harrington's companies. On May 1, 2009, Genesee sent a
19 letter offer to Loop 76. Loop 76 accepted the offer and the
20 parties entered into the Loan Agreement on May 4, 2009.

21 The Loan Agreement, governed by Arizona law, provided for a
22 maximum loan of \$100,000. The loan proceeds were to be used for
23 "general equipment purchases for maintenance" for the Airpark
24 Property and would be secured by any equipment Loop 76 purchased.
25 The loan's interest rate was to be between 13.5% to 15%. The
26 loan's term was 36 months, with interest-only payments for the
27 first six months. A condition precedent to any loan was
28 "[c]ompletion of the documentation and final terms of the

1 proposed financing satisfactory to Lender and Lender's counsel."

2 The only piece of equipment available at the time was the
3 Griphoist, which was in inventory at Harrington's other company,
4 Aries, so Harrington directed Aries to ship it to Loop 76. Loop
5 76 received the Griphoist sometime after July 4, 2009, but before
6 the petition date on July 20, 2009. Genesee filed a UCC-1
7 Financing Statement describing the Griphoist on July 21, 2009.
8 Loop 76 never made any loan payments to Genesee. After the
9 petition date, Loop 76 was no longer able to purchase the
10 remaining parts to the window washing system.

11 In its reply, Wells Fargo argued that no bill of sale or
12 invoice existed for the Griphoist and no evidence proved that
13 Aries received consideration for it or that Loop 76 ever took
14 possession of it. Wells Fargo further argued that Wright and
15 Herlihy's deposition testimony reflected that neither of them
16 discussed the equipment's financing terms with Harrington.
17 Finally, Wells Fargo contended that the Loan Agreement failed to
18 serve as a security agreement because it lacked the requisite
19 specificity.

20 **B. Wells Fargo's motion to determine classification of its**
21 **unsecured claim.**

22 On May 18, 2010, Wells Fargo moved to classify its unsecured
23 claim, requesting that its Class 8(B) claim be placed in the same
24 class as other unsecured claims in Class 8(A) ("Motion to
25 Classify Claim"). Wells Fargo contended that Loop 76's separate
26 classification of its deficiency claim was impermissible
27 "gerrymandering" of an accepting impaired class, which was
28 evidenced by Loop 76's failure to provide any business or

1 economic justification for why the claim, which was substantially
2 similar to other general unsecured claims, could be classified
3 separately.

4 Loop 76 countered that it had no need to "gerrymander" by
5 placing Wells Fargo's deficiency claim in Class 8(B); it fully
6 expected (at least initially) that at least three impaired
7 classes would vote to accept the Plan. Moreover, Loop 76
8 contended that Wells Fargo's deficiency claim was not
9 substantially similar to the unsecured trade claims, and
10 therefore required separate classification, because: (1) Wells
11 Fargo was partially secured; (2) Wells Fargo was embroiled in
12 litigation with the guarantors, who were a third-party source of
13 payment on the debt; and (3) if Wells Fargo was successful in
14 that litigation, it might be paid in full before other creditors.
15 In other words, argued Loop 76, the legal character of the claims
16 mandated separate classification.

17 **C. Wells Fargo's objections to the Plan.**

18 Wells Fargo filed its objection to confirmation of the Plan
19 on May 17, 2010. Although it raised numerous objections, only
20 two are pertinent to its appeal. First, Wells Fargo objected to
21 the Plan's proposed interest rate of 3.25% on its secured claim
22 and contended that 11.9% was a more appropriate rate. However,
23 at that rate, Wells Fargo argued that the Plan was not feasible
24 because Loop 76 could never generate sufficient cash flow to
25 service the debt. Second, as Wells Fargo asserted in its Motion
26 to Classify Claim, the Plan violated § 1122(a) because its
27 unsecured claim was placed in a class separate from the other
28 unsecured claims solely to gerrymander an affirmative vote on the

1 Plan.

2
3 **D. The bankruptcy court's decision on the Genesee Claim
objection and Motion to Classify Claim.**

4 The bankruptcy court held a hearing on the Genesee Claim
5 objection and the Motion to Classify Claim on July 7 and 8, 2010.
6 Witnesses Harrington, Wright, and Herlihy testified on July 7.
7 Closing arguments were presented on July 8.

8 Based on the portions of the provided July 7 transcript, as
9 to the Genesee Claim, Harrington testified that the Loan
10 Agreement did not set forth specific repayment terms for the
11 Griphoist because such terms would not have been reached until
12 Genesee had sourced all of the window washing equipment
13 encompassed in the commitment. Harrington explained that a
14 Griphoist lifts a person up to the second floor and is a
15 necessary component to a "maintenance" or window washing package.
16 In Harrington's opinion, the Griphoist was only stage one of the
17 system ordered by Loop 76; the high pressure washing equipment
18 was stage two, which Genesee never shipped due to the bankruptcy
19 filing.

20 Wright testified that Loop 76 continued to pay a service
21 company to wash the Airpark Property's windows because it
22 intended to acquire several pieces of equipment, like a lift and
23 a power washer, but all Loop 76 had time to acquire before the
24 bankruptcy was the Griphoist, which is only a lift and cannot
25 wash windows. Wright further testified that the Griphoist was
26 not really what Loop 76 wanted, but that it was something one of
27 Harrington's entities had in stock. Wright confirmed that Loop
28 76 has possession of the Griphoist and that it has never paid for

1 it. Wright admitted that no invoice for the Griphoist existed
2 and that he did not possess a copy of the Loan Agreement, even
3 though he is Loop 76's managing member and maintains all of its
4 books and records.

5 Herlihy testified that he directed Harrington by phone to
6 obtain a window washing system for Loop 76. Herlihy confirmed
7 that no purchase order for the Griphoist was ever drafted and
8 that he and Harrington never discussed the Griphoist's price.
9 Herlihy also confirmed that the Griphoist is not what Loop 76
10 wanted, although he has never seen it since he lives in
11 California. Herlihy testified that he did not discuss specific
12 financing terms for the equipment with Harrington, but that he
13 believed Wright had discussed the terms with Harrington.

14 Wells Fargo had no evidence to present on the claim
15 classification issue. After Loop 76 rested on the matter, the
16 court expressed its opinion that the threshold question was
17 whether the claims were substantially similar and, only if that
18 answer was yes, would it reach the second question of whether
19 justification existed for separate classification.

20 At the end of closing argument on July 8, 2010, the
21 bankruptcy court ordered the parties to file further briefing on
22 both issues. In Wells Fargo's supplemental brief regarding the
23 Genesee Claim objection, it contended that no enforceable
24 contract for the Griphoist existed under Arizona law because the
25 Loan Agreement lacked essential terms, including a specific
26 interest rate, repayment terms, and any remedies for default.
27 Further, argued Wells Fargo, Wright and Herlihy's testimony
28 established that they had never discussed terms for the Griphoist

1 with Harrington, so therefore no meeting of the minds existed
2 sufficient to form a contract. Thus, if the Loan Agreement
3 failed as a contract, it could not suffice as a security
4 agreement, which is an essential element for attachment of a
5 security interest, and therefore the Genesee Claim failed. Wells
6 Fargo alternatively argued that the bankruptcy court should
7 designate Genesee's vote accepting the Plan under § 1126(e)
8 because the totality of the circumstances surrounding it
9 "screamed" bad faith.

10 Loop 76 contended in its supplemental brief that the Loan
11 Agreement's terms were sufficiently specific, but even if one or
12 more of the terms were left open, the contract did not fail for
13 indefiniteness under Arizona law. Loop 76 further asserted that
14 Genesee waived any conditions precedent to its making the loan by
15 performing under the Loan Agreement and delivering the Griphoist.

16 In its supplemental brief in support of its Motion to
17 Classify Claim, Wells Fargo contended that the inquiry in
18 determining whether claims are substantially similar is to
19 evaluate the "nature" of the claim as it relates to assets of the
20 debtor, not on factors extrinsic to the bankruptcy case. Thus,
21 argued Wells Fargo, the existence of a third-party source of
22 payment could not be a basis for determining that a deficiency
23 claim is not substantially similar to other unsecured claims
24 because the guaranty does not change the nature or priority of
25 the unsecured claim against the debtor.

26 Loop 76 argued that, contrary to Wells Fargo's assertion,
27 the Ninth Circuit provides for a more flexible standard to
28 determine if claims are substantially similar. According to Loop

1 76, courts in this circuit are allowed to look beyond the legal
2 nature or rank of the claim as to the debtor and consider various
3 factors, such as whether the claim is secured by collateral of a
4 third party or whether the claim can be offset by the debtor's
5 claims against the creditor. Therefore, contended Loop 76,
6 because Wells Fargo could look to the guarantors for payment on
7 its deficiency claim, its claim was not substantially similar to
8 other unsecured claims and § 1122(a) mandated its separate
9 classification.

10 The bankruptcy court entered its memorandum decision denying
11 the Genesee Claim objection on September 23, 2010. Based on the
12 evidence, it found that Loop 76 owed a debt to Genesee for the
13 Griphoist. The court specifically found that the Loan Agreement
14 constituted a security agreement because it evidenced the
15 parties' intent that Genesee have a security interest in all
16 equipment subsequently delivered to Loop 76.⁶ While the court
17 acknowledged that the business dealings between the parties were
18 "sloppy at best," that some of the basic terms for repayment were
19 missing, that Genesee's response to Wells Fargo's discovery had
20 been less than candid, and that Harrington had been found guilty
21 of fraud in another bankruptcy case, none of these facts were
22 sufficient to conclude that the debt did not exist or that it was
23 not secured.

24 On November 22, 2010, the bankruptcy court filed an opinion
25

26 ⁶ Although not disputed on appeal, the bankruptcy court also
27 found that Genesee held a security interest in the Griphoist
28 because the UCC-1 filing on July 21 was within the grace period
allowed under Arizona law for purchase money security interests,
and it was not stayed by §§ 362(b)(3) and 546(b)(1)(A).

1 denying the Motion to Classify Claim. In re Loop 76, LLC, 442
2 B.R. 713 (Bankr. D. Ariz. 2010). The court held that based on
3 the language, structure and purpose of § 1122(a), the history of
4 the former Bankruptcy Act, Ninth Circuit case law, particularly
5 Steelcase Inc. v. Johnston (In re Johnston), 21 F.3d 323, 327
6 (9th Cir. 1994), and the legislative intent of § 1129(a)(10), a
7 claimant who has a third-party source of repayment for its claim
8 is dissimilar from a claimant who lacks such alternative sources
9 of payment. Therefore, if the preponderance of the evidence at
10 the upcoming confirmation hearing supported that conclusion, then
11 § 1122(a) mandated that Wells Fargo's deficiency claim be
12 separately classified.⁷ In re Loop 76, LLC, 442 B.R. at 714.

13 **E. Trial on the Plan.**

14 The bankruptcy court held a plan confirmation trial on
15 December 7, 8 and 13, 2010. Based on what little of the
16 transcripts from December 7 and 8 Wells Fargo provided, Phyllis
17 Krause testified that she had a net worth over \$3 million.
18 Herlihy testified that his net worth was about \$800,000. Wright

19 _____
20 ⁷ At the end of its opinion, the bankruptcy court noted that
21 the parties were free to introduce evidence at the confirmation
22 hearing tending to show why the existence of the guaranty of
23 Wells Fargo's deficiency claim either was or was not a
24 significant factor affecting creditors' votes on the plan. In re
25 Loop 76, LLC, 442 B.R. at 724. In other words, if Wells Fargo
26 could show that it was no longer pursuing the guaranty, or that
27 all of the guarantors were insolvent, then perhaps the existence
28 of a guaranty was not an appropriate distinguishing
characteristic to render the claims dissimilar.

26 Wells Fargo initially objected to allowing evidence of the
27 guarantors' solvency, contending that any such evidence should
28 have been submitted back in July 2010 at the initial hearing on
the Motion to Classify Claim. Wells Fargo does not contest this
evidentiary issue on appeal.

1 testified that he had \$1 million in the form of cashier's checks
2 to provide a capital contribution to the Plan, and that he had
3 other assets available to satisfy the guaranty on the Loan,
4 including a cashier's check for \$300,000, \$163,000 in cash from a
5 tax refund, and \$700,000 in proceeds from real property sales
6 closing that month.

7 After hearing from all of the expert witnesses on December
8 8, the bankruptcy court orally announced its preliminary findings
9 regarding the interest rate on Wells Fargo's secured claim and
10 the Plan's feasibility. It opined that an appropriate interest
11 rate would be 6.5%, but that this rate would render the Plan not
12 feasible for the first three years. On the other hand, the court
13 found that Loop 76 would be able to service the debt at a 6.5%
14 interest rate in years four through ten. Therefore, the primary
15 issue with feasibility was getting over the initial three-year
16 period. However, the court found that the feasibility problem
17 could be cured if: (1) Wright increased his commitment to \$2
18 million; and (2) Wright secured his guaranty for that \$2 million.

19 Prior to the third day of trial, Loop 76 filed an amendment
20 to the Plan on December 10, 2010. In light of the bankruptcy
21 court's findings on December 8, the equity holders now proposed
22 to contribute \$1 million cash in new value, and they committed to
23 fund any shortfalls during the first three years of the Plan, up
24 to another \$1 million. The \$1 million commitment was to be
25 secured by collateral in a form acceptable to Wells Fargo or the
26 bankruptcy court. The amendment also increased the interest rate
27 on Wells Fargo's secured claim from 3.25% to 6.5%, or such other
28 rate the bankruptcy court determined appropriate. On December

1 13, 2010, the parties discussed the proposed amendments to the
2 Plan and provided closing arguments.

3 The bankruptcy court issued its memorandum decision
4 confirming the Plan on December 21, 2010. It incorporated the
5 court's preliminary findings from December 8 that Loop 76 would
6 have sufficient cash flow to service the debt at a 6.5% interest
7 rate in years four through ten of the Plan. As for feasibility
8 of the Plan's first three years, the court found both expert
9 witnesses to be credible, but concluded that neither of them
10 provided a fair picture of the most likely performance of the
11 Airpark Property; the truth was somewhere in between. In the
12 bankruptcy court's opinion, the quality of the property's
13 management, particularly when considering the horrendous market
14 and in face of both a bankruptcy and a lawsuit on the guaranty,
15 demonstrated both a management ability and a commitment to the
16 success of the property, which constituted good evidence that
17 Airpark Property would significantly outperform Wells Fargo's
18 pessimistic projections, even if it would not perform as well as
19 Loop 76 predicted. The bankruptcy court further noted that even
20 Wells Fargo's expert acknowledged that Airpark Property is a high
21 quality property, and that Loop 76 has been performing as well as
22 can be expected. Feasibility was "substantially enhanced" by the
23 solvent equity holders' commitment to fund up to \$2 million
24 (secured by collateral of equivalent value) to cover shortfalls
25 in the Plan's first three years, and that the additional funding
26 was almost sufficient to cover debt service even under Wells
27 Fargo's experts' pessimistic analysis, which the court rejected.
28 Based on these reasons, the bankruptcy court found that the Plan

1 was feasible and not likely to be followed by liquidation or
2 further financial reorganization.

3 An order confirming the Plan was entered on February 23,
4 2011.⁸ Wells Fargo timely appealed.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157
7 (b) (2) (L) and 1334. To the extent the bankruptcy court's
8 decisions regarding the Genesee Claim objection and the Motion to
9 Classify Claim were interlocutory, they merged into the final,
10 appealable order confirming the Plan. See United States v. 475
11 Martin Lane, 545 F.3d 1134, 1141 (9th Cir. 2008) (under merger
12 rule interlocutory orders entered prior to the judgment merge
13 into the judgment and may be challenged on appeal). Therefore,
14 we have jurisdiction under 28 U.S.C. § 158.

15 **III. ISSUES**

16 1. Did the bankruptcy court err in holding that a factor a
17 court may consider in determining whether a creditor's claim is
18 "substantially similar" to other unsecured claims is whether the
19 creditor has a third-party source for payment of its unsecured
20 claim?

21 2. Did the bankruptcy court err in determining that a contract
22 existed for the Genesee Claim and that the Genesee Claim was not
23 contrived warranting designation under § 1126(e)?

24
25 ⁸ The confirmation order stated that it was incorporating
26 all of the bankruptcy court's prior findings and conclusions set
27 forth in prior minute entries, orders, opinions, and/or
28 memorandum decisions, including its tentative rulings and
conclusions stated on the record at the end of the confirmation
hearing on December 8, 2010.

1 3. Did the bankruptcy court clearly err in determining that the
2 Plan was feasible?

3 **IV. STANDARDS OF REVIEW**

4 We review findings of fact for clear error and issues of law
5 de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),
6 369 B.R. 506, 509 (9th Cir. BAP 2007). The bankruptcy court's
7 factual determination is clearly erroneous if it is illogical,
8 implausible, or without support in the record. United States v.
9 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009).

10 When the facts are undisputed, whether a contract exists is
11 a matter of law we review de novo. Kapp v. Nat'l Football
12 League, 586 F.2d 644, 649 (9th Cir. 1978). Under de novo review,
13 "we consider a matter anew, as if it had not been heard before,
14 and as if no decision had been previously rendered." B-Real, LLC
15 v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP
16 2008).

17 Whether claims are substantially similar is a question of
18 fact reviewed for clear error. In re Johnston, 21 F.3d at 327.

19 The issue of whether a plan is feasible is one of fact,
20 which we review under the clearly erroneous standard. Sherman v.
21 Harbin (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007) (citing
22 Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw.,
23 Inc.), 761 F.2d 1374, 1377 (9th Cir. 1985)).

24 ///

25 ///

26 ///

27 ///

28 ///

1 V. DISCUSSION

2 A. In re Johnston supports the bankruptcy court's holding that
3 a third-party source for recovery on a creditor's unsecured
4 claim is a factor the court can consider when determining
5 whether claims are substantially similar under § 1122(a).

6 1. Section 1122(a) and governing law.

7 Classification of claims is governed by § 1122(a), which
8 provides that "a plan may place a claim or an interest in a
9 particular class only if such claim or interest is substantially
10 similar to the other claims or interests of such class." The
11 Code does not expressly state whether a plan must classify
12 similar claims together. However, § 1122(a) mandates that
13 dissimilar claims cannot be placed into the same class. The
14 bankruptcy court has broad discretion in classifying claims under
15 § 1122(a). As such, a bankruptcy court's finding that a claim is
16 or is not substantially similar to other claims constitutes a
17 question of fact reviewable under the clearly erroneous standard.
18 In re Johnston, 21 F.3d at 327.

19 The threshold question for the bankruptcy court when
20 applying § 1122(a) is to determine whether the claims are
21 "substantially similar." The Code is silent on how to ascertain
22 whether claims are "substantially similar." The Ninth Circuit
23 has determined that the bankruptcy judge "must evaluate the
24 nature of each claim, i.e., the kind, species, or character of
25 each category of claims." In re Johnston, 21 F.3d at 327 (citing
26 In re Los Angeles Land & Invs., Ltd., 282 F. Supp. 448, 453-54
27 (D. Haw. 1968), aff'd, 447 F.2d 1366, 1367 (9th Cir. 1971)
28 (hereinafter "Los Angeles Land"). Because § 1122(a) mandates
that dissimilar claims may not be placed into the same class, if

1 the bankruptcy court determines that the claims are not
2 substantially similar, the inquiry ends there.

3 However, if the claims are substantially similar, the plan
4 may place such claims in different classes if the debtor can show
5 a business or economic justification for doing so. Barakat v.
6 Life Ins. Co. of Va. (In re Barakat), 99 F.3d 1520, 1526 (9th
7 Cir. 1996). Absent a business or economic justification, it is
8 not enough to justify separate classification solely on the basis
9 of the unsecured creditor's right to make an § 1111(b) election.
10 Id. at 1526 (citing Oxford Life Ins. Co. v. Tucson Self-Storage,
11 Inc. (In re Tucson Self-Storage, Inc.), 166 B.R. 892 (9th Cir.
12 BAP 1994) (separate classification of unsecured claims solely on
13 their right to make an § 1111(b) election is impermissible and
14 violates § 1122(a)). Furthermore, a court must not approve a
15 plan placing similar claims differently solely to gerrymander an
16 affirmative vote on the reorganization plan. Id. at 1525 (citing
17 Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re
18 Greystone III Joint Venture), 995 F.2d 1274, 1279 (5th Cir.
19 1992), cert. denied, 113 S. Ct. 72 (1992).

20 Notably, many courts have conflated the two-prong analysis
21 required for classifying claims under § 1122(a), often glossing
22 over the first prong of determining whether the claims are
23 substantially similar, and proceeding to the second prong to
24 determine whether gerrymandering has occurred or whether the plan
25 proponent showed a business or economic justification for
26 separately classifying similar claims. This explains, as the
27 bankruptcy court phrased it, the "paucity of case law defining
28 what constitutes either similarity or substantial similarity of

1 claims.” In re Loop 76, LLC, 442 B.R. at 716. In re Johnston is
2 the only Ninth Circuit case to squarely address this issue since
3 the enactment of the Code in 1978.

4 **2. Johnston and Barakat.**

5 In In re Johnston, the issue before the Ninth Circuit was
6 whether the bankruptcy court erred in determining that an
7 unsecured creditor’s claim was not substantially similar to the
8 other unsecured claims. Just prior to filing his own chapter 11
9 bankruptcy, Johnston had filed a chapter 11 petition for one of
10 his businesses, Capital Office Systems, Inc. (“COS”). Steelcase
11 had filed a \$2 million claim in COS’s case secured by office
12 furniture and related systems that it had manufactured and
13 delivered to COS pursuant to a financing agreement personally
14 guaranteed by Johnston. On the same day the COS bankruptcy was
15 filed, Johnston and COS filed suit against Steelcase in state
16 court. Steelcase’s counterclaim asserted, inter alia, a claim
17 against Johnston based on his personal guaranty.

18 Johnston’s individual chapter 11 plan placed Steelcase’s
19 unsecured claim in its own class. The bankruptcy court confirmed
20 Johnston’s plan over Steelcase’s objection that the plan
21 improperly placed similar unsecured claims in separate classes.
22 The bankruptcy court determined that because Steelcase was
23 situated differently from all other unsecured claims, its claim
24 was not substantially similar, and therefore separate
25 classification was proper. The BAP affirmed.

26 The Ninth Circuit also affirmed, holding that Steelcase’s
27 separate classification did not violate § 1122(a) because “the
28 legal character of its claim [was] not substantially similar to

1 the other claims.” Id. at 328 (emphasis in original) (citing Los
2 Angeles Land, 282 F. Supp. at 453-54, which held that separate
3 classification of unsecured claims is justified “where the legal
4 character of their claims is such as to accord them a status
5 different from other unsecured creditors.”). The In re Johnston
6 court agreed with the bankruptcy court that the claims were not
7 substantially similar because:

- 8 (1) Steelcase’s claim, unlike the other unsecured
9 claimants, was partially secured by collateral of COS,
10 the primary obligor;
- 11 (2) Steelcase, unlike the other unsecured claimants, was
12 embroiled in litigation with Johnston, and thus its
13 claim may be offset or exceeded by Johnston’s own claim
14 against Steelcase; and
- 15 (3) Steelcase, if successful in the litigation, could be
16 fully paid before other unsecured creditors.

17 Id. at 328.

18 In In re Barakat, a single asset real estate case, the
19 bankruptcy court rejected debtor’s plan, holding that it was
20 impermissible, absent a business justification, to separately
21 classify the creditor’s deficiency claim from the general
22 unsecured class. The bankruptcy court further found that debtor
23 had failed to show a business justification. The legal issue
24 before the Ninth Circuit was whether § 1122(a) sets any
25 limitation on the separate classification of similar unsecured
26 claims. In re Barakat held that, absent a legitimate business or
27 economic justification, the debtor could not classify the
28 creditor’s unsecured deficiency claim separately from general
unsecured claims. 99 F.3d at 1526. It rejected debtor’s
argument that under In re Johnston the claims were not
substantially similar and required separate classification. The

1 court distinguished In re Johnston, concluding that Barakat's
2 case lacked any of the "special circumstances" involved in In re
3 Johnston, such as another source of recovery for the creditor's
4 claim. Id. The court concluded that the claim at issue in In re
5 Barakat was "simply a legally created recourse debt[,] " allowed
6 by a creditor's right to make a § 1111(b) election. Id.

7 **3. The bankruptcy court's ruling.**

8 The bankruptcy court concluded that In re Johnston allows a
9 court to consider whether the claimant has a nondebtor source for
10 repayment of its claim in determining whether claims are or are
11 not substantially similar. In re Loop 76, LLC, 442 B.R. at 717-
12 18. In other words, In re Johnston holds that the bankruptcy
13 court is not restricted to considering the legal character of the
14 claim "as it relates to the assets of the debtor,"⁹ but that it
15 can consider in its analysis other interests held by the
16 claimant. Id. at 718. Ultimately, the bankruptcy court
17 concluded that the existence of a third-party source of payment -
18 the guarantors - rendered Wells Fargo's deficiency claim
19 dissimilar to the unsecured trade claims.

20 To support its position on In re Johnston, the bankruptcy
21 court examined case law under the former Bankruptcy Act, Chapters
22 X and XI, and concluded that the Code did not adopt Chapter X's
23 classification rule, which utilized a more rigid standard of
24 considering only the "nature" of the claim - i.e., its rank or
25 priority. Rather, in the court's opinion, the Code adopted the
26

27 ⁹ Id. at 718 (citing Los Angeles Land, 282 F. Supp. at 453-
28 54).

1 much more flexible standard of Chapter XI's classification scheme
2 allowing the plan proponent to classify claims on some basis
3 other than according to its "nature." Id. at 719-20. The
4 bankruptcy court reasoned that because In re Johnston found
5 determinative the fact of Steelcase's nondebtor source for
6 payment of its claim, which has no bearing on the "nature" of the
7 claim as so defined, In re Johnston necessarily rejected pre-Code
8 case law, including the Chapter X case of Los Angeles Land, which
9 considered only the "legal character or the quality of the claim
10 as it relates to the assets of the debtor." Id. at 720.

11 **4. Analysis.**

12 Wells Fargo raises several arguments on appeal. First, it
13 contends that the bankruptcy court erred in holding that under In
14 re Johnston the existence of a third-party source of payment
15 renders a deficiency claim dissimilar to other unsecured claims.
16 Specifically, Wells Fargo argues that the bankruptcy court erred
17 in concluding that pre-Code case law was superseded by the Code,
18 and that In re Johnston confirmed this notion. Wells Fargo
19 contends that the Ninth Circuit requires classification to be
20 based on the nature of the claim as it relates to the assets of
21 the debtor. We disagree.

22 When Congress enacted the Code in 1978, it cobbled together
23 parts of old Bankruptcy Act, Chapters X, XI, and XII, to form the
24 new Code Chapter 11. Code § 1122 is derived from Act §§ 597
25 (Chapter X) and 751 (Chapter XI) (Repealed 1978). Teamsters
26 Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re
27 U.S. Truck Co.), 800 F.2d 581, 585 (6th Cir. 1986). As the Sixth
28 Circuit noted in U.S. Truck:

1 It is difficult to follow Congress' instruction to
2 apply the old case law to the new Code provision. The
3 old case law comes from two different sources. Chapter
4 X of the old Act was designed for thorough financial
5 reorganizations of large corporations. It imposed a
6 very formal and rigid structure to protect the
7 investing public. Chapter XI was designed for small
8 nonpublic businesses, did not permit the adjustment of
9 a secured debt or of equity, and thus contained few
investor-protection measures. The idea behind Chapter
11 of the Code was to combine the speed and flexibility
of Chapter XI with some of the protection and remedial
tools of Chapter X. Thus, Congress has incorporated,
for purposes of interpreting section 1122, the case law
from two provisions with different language, that were
adopted for different purposes, and that have been
interpreted to mean different things.

10 Id. at 586 (citations omitted).

11 In reviewing both Chapters X and XI and the related
12 jurisprudence, it is clear that they did not use the same
13 classification requirements. Under Chapter X, the court
14 classified claims and interests according to the "nature of their
15 respective claims." 11 U.S.C. § 597 (Repealed 1978). According
16 to the interpretive case law, substantial differences in the
17 nature of claims dictated separate classification, although the
18 courts were afforded some discretion. See Los Angeles Land, 282
19 F. Supp. at 453. Alternatively, Chapter XI expressly validated
20 "provisions for treatment of unsecured debts on a parity with the
21 other, or for the division of such debts into classes and the
22 treatment thereof in different ways or upon different terms." 11
23 U.S.C. § 757(1) (Repealed 1978).

24 It is readily apparent that the case law dealing with
25 Chapter X classifications differs widely from that
26 under Chapter XI. Classification and treatment of
27 claims under Chapter XI allowed the debtor broad
28 latitude in developing its plan. The standard for
classification required that the division of unsecured
claims be reasonably necessary and proper so that the
plan provided all creditors with at least as much
compensation as they would receive in a liquidation

1 proceeding. Classification under Chapter X, in
2 contrast, was considerably more restrictive. Although
3 classification was dependent on individual factual
4 circumstance and broad judicial discretion, claims
ordinarily were classified according to their legal
character and priority rank.

5 William Blair, Classification of Unsecured Claims in Chapter 11
6 Reorganization, 58 AM. BANKR. L.J. 197, 217 (1984) (noting that
7 the lack of a single classification standard in Chapters X and XI
8 renders somewhat uncertain the explanation in the legislative
9 history that the § 1122 classification standard is found in prior
10 case law). Although the Code draws on portions of both Chapters
11 X and XI, it is silent as to which, if either, of the two prior
12 approaches to classification of similar claims the Code adopted.
13 As observed in U.S. Truck, legislative history sheds little, if
14 any, light on the matter. 800 F.2d at 586.

15 We agree with the bankruptcy court, and the other authority
16 noted above, that Chapter 11 bears greater resemblance to the
17 Act's Chapter XI than it does to the Act's Chapter X with respect
18 to claim classification. In re Loop 76, LLC, 442 B.R. at 720.
19 As such, the Ninth Circuit's pre-Code holding in Los Angeles
20 Land, that classification be based on the nature of the claim as
21 it relates to the assets of the debtor, is not consistent with
22 the more flexible approach to claim classification under the
23 Code.

24 In re Johnston recognized the Code's flexibility on this
25 issue. While In re Johnston cited Los Angeles Land for the
26 proposition that bankruptcy judges must evaluate the "nature" of
27 each claim to determine similarity, Los Angeles Land's definition
28 of nature of the claim as "an analysis of the legal character or

1 the quality of the claim as it relates to the assets of the
2 debtor" was not incorporated into the In re Johnston holding. In
3 re Johnston, 21 F.3d at 327. In re Johnston did adopt, however,
4 Los Angeles Land's holding that the bankruptcy court has "broad
5 latitude" in determining the similarity of claims, and that it
6 need not follow some narrow definition. Id. When the In re
7 Johnston court considered third-party sources of recovery for
8 Steelcase's unsecured claim as a basis for dissimilarity, it was
9 clearly looking beyond just Johnston's assets. Thus, while not
10 expressly overruling Los Angeles Land, In re Johnston rejected
11 its narrow definition of "nature" of the claim by holding that,
12 at minimum, a bankruptcy court may consider sources outside of
13 the debtor's assets, such as the potential for recovery from a
14 nondebtor or nonestate source.

15 Accordingly, we reject Wells Fargo's argument that a third-
16 party guarantor does not render its deficiency claim dissimilar
17 from other unsecured claims. Its argument is based on case law
18 inconsistent with In re Johnston's holding that whether the claim
19 is substantially similar does not rest entirely on how it relates
20 "to the assets of the debtor."¹⁰

21
22 ¹⁰ Wells Fargo relies heavily on In re AOV Indus., Inc., 792
23 F.2d 1140, 1151 (D.C. Cir. 1986) for the proposition that the
24 focus of claim classification under § 1122(a) is the legal
25 character of the claim "as it relates to the assets of the
26 debtor." First, AOV does not reflect the law in the Ninth
27 Circuit. Moreover, while AOV held that "[t]he existence of a
28 third-party guarantor does not change the nature of a claim
vis-a-vis the bankrupt estate and, therefore, is irrelevant to a
determination of whether claims are 'substantially similar' for
classification purposes," this does not square with that
circuit's prior decision in a 1982 case which considered this

(continued...)

1 We also reject Wells Fargo's argument that the bankruptcy
2 court's holding is inconsistent with In re Johnston and In re
3 Barakat because neither case expressly held that a third-party
4 source of payment made the claim at issue dissimilar to the other
5 unsecured claims. As for In re Johnston, the third-party source
6 for recovery was collateral, not money. Presumably, the court's
7 lack of any reference to a cash source was because it was not a
8 fact in the case. Furthermore, the Ninth Circuit is not in the
9 business of issuing advisory opinions on issues not raised before
10 it. In In re Barakat, the court had no reason to address a
11 third-party source of payment because none existed.

12 Wells Fargo further argues that the bankruptcy court's
13 decision is inconsistent with In re Barakat's express holding
14 that deficiency claims are so "substantially similar" to other
15

16 ¹⁰(...continued)
17 issue under both § 1122(a) and § 1322(b):

18 We think the courts erred in holding that section
19 1122(a) prohibits classification based on the presence of a
20 co-debtor. Section 1122(a) specifies that only claims which
21 are "substantially similar" may be placed in the same class.
22 It does not require that similar claims must be grouped
23 together, but merely that any group created must be
24 homogenous. Although some courts have held that section
25 1122(a) prohibits classification based on any criterion
26 other than legal right to the debtor's assets, the plain
27 language of the statute contradicts such a construction.
28 Moreover, section 1122(a) so interpreted would conflict with
section 1322(b) (1), which specifically authorizes
designation of more than one class of unsecured creditor,
each presumably with equal legal rights to the debtor's
estate.

Barnes v. Whelan (In re Barnes), 689 F.2d 193, 201 (D.C. Cir.
1982) (citations omitted) (emphasis added).

1 unsecured claims they cannot be classified separately from other
2 unsecured claims, absent a business or economic justification.
3 The In re Barakat court, relying on In re Johnston, obviously
4 looked for something to distinguish the deficiency claim from the
5 other unsecured trade claims, but found that nothing rendered it
6 dissimilar - it was "simply a legally created recourse debt." In
7 re Barakat, 99 F.3d at 1526 (discussing In re Johnston and
8 concluding that the none of the "special circumstances" rendering
9 the claims dissimilar in In re Johnston were present). In re
10 Barakat supports In re Johnston in that certain characteristics
11 or "special circumstances" can distinguish unsecured claims,
12 including deficiency claims, and render them dissimilar. The
13 bankruptcy court here engaged in the same analysis as the Ninth
14 Circuit did in In re Johnston and In re Barakat, but, unlike the
15 court in In re Barakat, it found that Wells Fargo's deficiency
16 claim did have distinguishing characteristics that rendered it
17 dissimilar from the unsecured trade claims. Therefore, we see no
18 inconsistency.

19 Here, we have an undersecured creditor who has a third-party
20 source of recovery for its deficiency claim, the guarantors, whom
21 it has already sued. Even if Loop 76 makes the 10% payment on
22 the claim, Wells Fargo can still proceed to collect its entire
23 debt from the guarantors. This is clearly a "special
24 circumstance" that does not apply to any other unsecured
25 claimants and accords Wells Fargo a different status. In re
26 Barakat, 99 F.3d at 1526; In re Johnston, 21 F.3d at 328.
27 Contrary to Wells Fargo's argument, we see no legal distinction
28 between whether the claimant can recover against collateral held

1 by a third party, or whether the claimant can recover from a
2 third-party guarantor, when determining the similarity of the
3 claims. See Principal Mutual Life Ins. Co. v. Baldwin Park Towne
4 Ctr., Ltd. (In re Baldwin Park Towne Ctr., Ltd.), 171 B.R. 374,
5 377 (Bankr. C.D. Cal. 1994) (citing In re Johnston and finding
6 that an unsecured deficiency claim was not of the same "species"
7 and dissimilar to the unsecured trade claims because, inter alia,
8 the trade claimants could pursue the general partner for
9 recovery).

10 We conclude that In re Johnston allows the bankruptcy court
11 to consider the existence of a third-party source for payment,
12 including a guarantor, when determining whether unsecured claims
13 are substantially similar under § 1122(a). Accordingly, we see
14 no error by the bankruptcy court.¹¹

16 ¹¹ Based on our decision, we need not address the issue of
17 whether Loop 76 provided a business or economic justification for
18 separately classifying similar claims. We also need not consider
19 whether Loop 76 separately classified similar claims in order to
20 gerrymander an affirmative vote for the Plan.

21 Furthermore, to the extent Wells Fargo argues that evidence
22 of the guarantors' financial condition was inconclusive, which is
23 a question of fact, collectability of the debt was never
24 discussed in In re Johnston. Thus, we question whether it is
25 even a factor to consider. In any event, we are unable to
26 adequately review this issue because Wells Fargo failed to
27 provide the entire transcript reflecting the guarantors'
28 testimony from December 7, 2010. See Kritt v. Kritt (In re
Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995) (when appealing a
question of fact appellant must include the entire record relied
upon by the trial court for review); 9th Cir. BAP Rule 8006-1
(excerpts of record shall include the transcripts necessary for
adequate review in light of the standard of review to be applied
to the issues before the Panel); FRAP 10(b)(2).

Accordingly, we affirm the bankruptcy court's finding in its
December 21, 2010 Memorandum that the guarantors were solvent.

(continued...)

1 **B. The bankruptcy court did not err when it overruled Wells**
2 **Fargo's objection to the Genesee Claim.**

3 The parties agree that Arizona law governs this issue.
4 Although raised previously, Wells Fargo no longer contends that
5 Genesee failed to perfect its security interest in the Griphoist.
6 What Wells Fargo does contend on appeal is that the Loan
7 Agreement lacks sufficient specification of terms under Arizona
8 law to constitute a contract. Thus, if no contract exists, then
9 Genesee's claim fails. Alternatively, Wells Fargo contends that
10 because the evidence suggests the Genesee Claim was contrived and
11 not procured in good faith under § 1126(e),¹² then Genesee's vote
12 in favor of the Plan should not count. Wells Fargo complains
13 that the bankruptcy court failed to make any findings on the "bad
14 faith" issue.

15 **1. Applicable law.**

16 For an enforceable contract in Arizona, "an offer, an
17 acceptance, consideration, and sufficient specification of terms
18 so that obligations involved can be ascertained" must exist.
19 K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n, 677 P.2d

21 ¹¹ (...continued)
22 Kyle v. Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004),
23 aff'd, 170 F. App'x 457 (9th Cir. 2006) (failure to provide
24 necessary transcripts may be grounds for summary affirmance of
25 the appeal).

26 ¹² Section 1126(e) provides:

27 On request of a party in interest, and after notice and a
28 hearing, the court may designate any entity whose acceptance
or rejection of such plan was not in good faith, or was not
solicited or procured in good faith or in accordance with
the provisions of this title.

1 1317, 1320 (Ariz. Ct. App. 1983). The requirement of certainty
2 is not so much a contractual validator as it is a factor relevant
3 to determining the ultimate element of contract formation, i.e.,
4 whether the parties manifested assent or intent to be bound.
5 Schade v. Diethrich, 760 P.2d 1050, 1058 (Ariz. 1988). "The
6 requirement of reasonable certainty of terms arises from the
7 inescapable fact that the uncertainty of the promises may
8 indicate that a proposal or acceptance was not intended to be
9 understood as a binding offer or acceptance." Id.

10 **2. Analysis.**

11 Wells Fargo contends that the Loan Agreement was merely an
12 "agreement to agree" and does not constitute a contract because:
13 (1) it does not contain any terms by which the court could
14 determine breach or enforcement of a remedy; (2) it does not
15 contain repayment start dates or amounts; (3) no agreement was
16 reached on the interest rate; and (4) the parties never discussed
17 the financing terms.

18 We agree the Loan Agreement does not contain any precise
19 remedy provisions in case of breach, but it does contain an
20 indemnity clause and a waiver to a jury trial in any suit,
21 action, proceeding or counterclaim arising out of or related to
22 the Loan Agreement. It also lacks a start date for repayment,
23 but it does set forth a payment term of 36 months, with a balloon
24 payment due at the end of month 36. It is also true that
25 Herlihy, Wright, and Harrington never discussed in detail the
26 financing terms. However, Wells Fargo cites to no authority for
27 the proposition that an oral discussion regarding financing terms
28 must precede the written agreement the offeree accepted.

1 Finally, the Loan Agreement does not contain a specific interest
2 rate, but it does contain a range of rates from 13.5% to 15%.
3 The lack of a specific rate is explained by the agreement's
4 condition precedent that any loan would not be extended to Loop
5 76 until the financing terms were satisfactory to Genesee.
6 However, Genesee waived that particular condition by performing
7 under the Loan Agreement and delivering the Griphoist to Loop 76.
8 See Calamari & Perillo, *The Law of Contracts* 273 (1st ed. 1970)
9 ("After a failure of an express condition . . . the party for
10 whose benefit the condition exists normally has the power to
11 elect to cancel his performance or to proceed with performance.
12 An election may be, and often is, manifested by conduct.
13 Thus, an election to waive a condition exists if the promisor
14 continues his own performance (if the performance was dependent
15 upon the condition) or by acceptance and retention of a defective
16 performance.").

17 In this case, the parties' action shows conclusively that
18 they intended to form a binding agreement, and therefore the few
19 missing terms left open or to be agreed upon is not fatal.
20 Schade, 760 P.2d at 1058. Here, Wright referred Harrington to
21 Herlihy to discuss Loop 76's purchase of a window washing system.
22 Harrington told Herlihy that he could procure such equipment as
23 well as provide the requisite financing. Herlihy agreed and
24 directed Harrington to proceed. Genesee caused the Loan
25 Agreement to be sent to Loop 76. Herlihy and Wright executed the
26 Loan Agreement on the debtor's behalf, thereby accepting its
27 terms, and sent it back to Genesee. Genesee then caused the
28 Griphoist to be delivered to Loop 76, and Loop 76 received it.

1 “The fact that one of [the parties], *with the knowledge and*
2 *approval of the other*, has begun performance is nearly always
3 evidence that they regard the contract as consummated and intend
4 to be bound thereby.” Schade, 760 P.2d at 1059 (quoting 1 A.
5 Corbin, CORBIN ON CONTRACTS § 95, at 407 (1963) (emphasis in
6 Schade). The fact that the Griphoist turned out not to be
7 exactly what Loop 76 wanted does not make the contract any less
8 valid. Furthermore, considering the simplistic nature of the
9 transaction, we are certain that a court in reviewing the terms
10 of the Loan Agreement could determine what constitutes breach and
11 fashion an appropriate remedy for the non-breaching party. See
12 ARIZ. REV. STAT. ANN. (“A.R.S.”) § 47-2204(C) (“Even though one or
13 more terms are left open a contract for sale does not fail for
14 indefiniteness if the parties have intended to make a contract
15 and there is a reasonably certain basis for giving an appropriate
16 remedy.”).¹³

17
18 ¹³ To the extent Wells Fargo contends that the Loan
19 Agreement does not constitute a security agreement, we disagree.
20 A.R.S. § 47-9102(A) (72) provides that a “security agreement” is
21 “an agreement that creates or provides for a security interest.”
22 A.R.S. § 47-9203 requires that a security agreement describe the
23 collateral. A.R.S. § 47-9108 provides that collateral is
24 sufficiently described in a security agreement if it identifies
25 the collateral by, inter alia, specific listing, category, or
26 quantity. Evidence within the transactional documents between
27 the parties can indicate whether they intended to create a
28 security interest. Bank of Am., N.A. v. Outboard Marine Corp.
(In re Outboard Marine Corp.), 300 B.R. 308, 324 (Bankr. N.D.
Ill. 2003).

Here, the transactional documents evidence Genesee’s and
Loop 76’s intent to create a security agreement in the Griphoist.
While the Loan Agreement does not specifically describe the
Griphoist, it clearly shows that the intended use of the loan
proceeds was to purchase general equipment for maintenance of the
(continued...)

1 As for Wells Fargo's alternative bad faith argument, the
2 bankruptcy court acknowledged the parties' business dealings were
3 "sloppy at best," that Genesee's response to Wells Fargo's
4 discovery had been less than candid, and that Harrington had been
5 involved in fraud in another bankruptcy case. However, it
6 concluded that none of these facts were sufficient to conclude
7 that the debt did not exist or that it was not secured. By these
8 findings, the bankruptcy court essentially found that the Genesee
9 Claim was not contrived, and therefore it did not need to address
10 the issue of designating Genesee's vote under § 1126(e).

11 We review the bankruptcy court's finding on the issue of bad
12 faith for clear error. Rosson v. Fitzgerald (In re Rosson), 545
13 F.3d 764, 774 (9th Cir. 2008). In considering that standard of
14 review, and that we must afford the bankruptcy court great
15 deference regarding the credibility of witnesses (Retz v. Samson
16 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)), we conclude
17 that the court's finding of lack of bad faith is not illogical,
18 implausible, or without support in the record. Hinkson, 585 F.3d
19 at 1261-62.

20 **C. The bankruptcy court did not err when it determined that the**
21 **Plan was feasible.**

22 **1. Applicable law.**

23 To be confirmed, a plan of reorganization must be feasible.

24
25 ¹³(...continued)
26 Airpark Property. The Griphoist, which is specifically described
27 in the UCC-1 Financing Statement, is a "category" of equipment
28 that can be used for building maintenance, and therefore complies
with A.R.S. § 47-9108. Whether taken alone, or with the UCC-1
Financing Statement, the evidence established the existence of a
security agreement between the parties.

1 Section 1129(a)(11) provides, in relevant part, that a plan is
2 not feasible if the plan is "likely to be followed by the
3 liquidation, or the need for further financial reorganization, of
4 the debtor." In this circuit, all a debtor need demonstrate is
5 that the plan "has a reasonable probability of success."
6 Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352,
7 1364 (9th Cir. 1986). The Code does not require the debtor to
8 prove that success is inevitable or assured, and a relatively low
9 threshold of proof will satisfy § 1129(a)(11) so long as adequate
10 evidence supports a finding of feasibility. Computer Task Group,
11 Inc. v. Brotby (In re Brotby), 303 B.R. 177, 191 (9th Cir. BAP
12 2003). The proposed plan must not be a "visionary scheme which
13 promises more than the debtor can deliver." Wiersma v. O.H.
14 Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 112-13 (9th
15 Cir. BAP 2005), aff'd in part, rev'd in part on other grounds,
16 227 F. App'x 603 (9th Cir. 2007) (citing In re Pizza of Haw.,
17 Inc., 761 F.2d at 1382).

18 **2. Analysis.**

19 Wells Fargo argues that the bankruptcy court erred in only
20 determining that the Plan was feasible in its first three years,
21 and that it failed to consider feasibility for the Plan's
22 remaining term. Because feasibility is an issue of fact, we give
23 due regard to the bankruptcy court's evaluation of witness
24 testimony and any inferences drawn by the court. In re Wiersma,
25 324 B.R. at 113. Not only does Wells Fargo misstate the
26 bankruptcy court's findings, but our review of this issue is
27 impeded because Wells Fargo failed to provide in its excerpts of
28 record the transcripts containing any of the testimony from Loop

1 76's feasibility expert witness. It also failed to include the
2 cross-examination of its own expert witness. Wells Fargo further
3 included only snippets of the testimony from Loop 76's
4 principals.

5 As appellant, Wells Fargo has the burden to provide an
6 adequate record. In re Kritt, 190 B.R. at 386-87. Because
7 feasibility is a finding of fact, Wells Fargo has the burden to
8 demonstrate that the bankruptcy court's findings of fact are
9 clearly erroneous. Gionis v. Wayne (In re Gionis), 170 B.R. 675,
10 681 (9th Cir. BAP 1994); Rule 8009(b); 9th Cir. BAP Rule 8006-1.
11 To show clear error, Wells Fargo has to show how the findings
12 were not supported by the record (i.e., the testimony and
13 evidence upon which the court relied in issuing its ruling).
14 "'Appellants should know that an attempt to reverse the trial
15 court's findings of fact will require the entire record relied
16 upon by the trial court be supplied for review.'" In re Kritt,
17 190 B.R. at 387 (quoting Burkhart v. Fed. Dep. Ins. Corp. (In re
18 Burkhart), 84 B.R. 658, 661 (9th Cir. BAP 1988)). See also FRAP
19 10(b)(2) ("If the appellant intends to urge on appeal that a
20 finding or conclusion is unsupported by the evidence or is
21 contrary to the evidence, the appellant must include in the
22 record a transcript of all evidence relevant to that finding or
23 conclusion.").

24 By submitting virtually only one side of the story, Wells
25 Fargo has fallen short of meeting its burden. Therefore, we
26 cannot confirm that the "record established" what Wells Fargo
27 says it did (or did not). While perhaps the necessary
28 transcripts are available on the bankruptcy court's electronic

1 docket, the Panel is not obligated to scour the record to try to
2 make Wells Fargo's case of clear error. In re Kritt, 190 B.R. at
3 386-87. Based on what record Wells Fargo did provide, however,
4 we believe it supports the bankruptcy court's feasibility
5 determination.

6 Accordingly, we affirm the bankruptcy court's finding that
7 the Plan was feasible. In re Kyle, 317 B.R. at 393.

8 **VI. CONCLUSION**

9 Based on the foregoing reasons, we AFFIRM.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28