

MAR 01 2006

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re:)	BAP No.	NV-05-1147-MoBK
)		
VACATION VILLAGE, INC.,)	Bk. No.	S-00-18832-BAM
)		
Debtor.)	Adv. No.	03-01003-BAM
)		
_____)	Appeal Ref. No.	05-13
VACATION VILLAGE, INC.;)		
SHANGRI LA, LTD.; TERRIE HEERS))		
THOMPSON; TIM S. HEERS;)		
CATHLEEN HEERS NORCOTT; GARY))		
R. HEERS; CHERYL D. NOLTE,)		
)		
Appellants,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
FOOTHILL CAPITAL CORP.,)		
)		
Appellee.)		
_____)		

Argued and Submitted on November 30, 2005
at Las Vegas, Nevada

Filed - March 1, 2006

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding.

Before: MONTALI, BRANDT and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 Vacation Village, Inc. ("Debtor") and its affiliates appeal
2 from the bankruptcy court's judgment dismissing their claims
3 against creditor Foothill Capital Corporation ("Foothill") based
4 on claim preclusion and a reading of the confirmed plan of
5 reorganization in this case (the "Plan") not to release Foothill's
6 unsecured deficiency claim. Appellants argue, among other things,
7 that the bankruptcy court wrongly interpreted the Plan and should
8 not have reached the claim preclusion issues, but instead should
9 have dismissed their state law claims under the Rooker-Feldman
10 doctrine. We AFFIRM.²

11 I. FACTS

12 In September of 1999 Debtor entered into a Loan and Security
13 Agreement with Foothill for an \$18 million term loan and a series
14 of monthly nonrevolving advances in the total amount of \$1 million
15 (collectively, the "Loan"). The Loan was secured by a deed of
16 trust on Debtor's property known as the Vacation Village Hotel and
17 Casino in Las Vegas, Nevada ("Vacation Village"). The Loan was
18 further secured by a Pledge Agreement from Debtor's affiliate,
19 Shangri La, Ltd., a Nevada general partnership ("Shangri La"),
20 pledging its property known as Sundance Plaza also in Las Vegas,
21 Nevada ("Sundance Plaza"). A Continuing Guaranty was executed by
22 the five general partners of Shangri La ("Guarantors" or, with
23 Shangri La, the "Affiliates").

24 The Loan matured on September 14, 2000. On October 24, 2000,

25
26 ² Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
28 as enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 Foothill filed a complaint against Debtor and its Affiliates
2 (collectively, "Appellants") alleging that at Debtor's request
3 Foothill had agreed to forbear from exercising its rights and
4 remedies until October 14, 2000, that the outstanding indebtedness
5 was \$19,351,820.82 as of October 23, 2000, that the Loan had not
6 been repaid and the Continuing Guaranty had been breached, and
7 that Foothill was entitled to appointment of a receiver for
8 Vacation Village and Sundance Plaza, damages, and other relief
9 (Case No. A426036, Dist. Ct., Clark Co., Nevada, Dept. No. VIII)
10 (the "Nevada District Court Action"). Debtor filed its voluntary
11 Chapter 11 petition on November 17, 2000 (the "Petition Date").

12 In early 2003 Appellants asserted claims against Foothill in
13 three fora: (1) in the Nevada District Court Action, by way of
14 counterclaims, (2) in an action filed in another department of the
15 Nevada state court (Case No. A426036, Dist. Ct., Clark Co.,
16 Nevada, Dept. No. XI) (the "Nevada Business Court Action"), and
17 (3) in an adversary proceeding in the bankruptcy court (Adv. No.
18 03-1003) (the "Adversary Proceeding"). The state law claims in
19 all three actions (the "State Law Claims") are virtually
20 identical. The Adversary Proceeding includes additional claims
21 couched in terms of bankruptcy law: for turnover of property of
22 the estate (1st Claim), for implementation of the Plan (5th
23 Claim), and for disallowance of any unsecured claim asserted by
24 Foothill (6th Claim) (collectively, the "Bankruptcy Law Claims").
25 These Bankruptcy Law Claims all assert that Foothill received more
26 than it was entitled to and should return the excess, either based
27 on the State Law Claims or based on Appellants' interpretation of
28 the Plan.

1 The core issues in all three actions appear to be:

2 (A) whether Foothill violated provisions of the Loan
3 documents requiring it to pursue collection in a particular
4 sequence (the "Sequencing Provisions"),

5 (B) whether there is a deficiency or a surplus after
6 subtracting the Loan debt from the proceeds of liquidation of
7 collateral. There is no dispute that, on the one hand,
8 Nevada does not have any prohibition on deficiency judgments
9 after non-judicial foreclosure sales and, on the other hand,
10 Nevada anti-deficiency laws protect guarantors if a creditor
11 releases the principal obligor from a deficiency. The
12 parties do dispute whether Foothill was entitled to liquidate
13 not only Vacation Village but also Sundance Plaza, whether
14 the collateral was to be valued at fair market value or some
15 other valuation under Nevada law, and whether interest should
16 accrue at the "legal rate," the 14% contractual rate, or the
17 21% contractual default rate (collectively, the
18 "Deficiency/Surplus Issues"), and

19 (C) whether the Plan, which was proposed by Foothill,
20 released or preserved its deficiency claim (the "Plan
21 Issues").

22 Both Debtor and its Affiliates assert damages of at least
23 \$4.5 million. That is the fair market value of Sundance Plaza
24 according to findings of the Nevada District Court. Appellants'
25 theory appears to be that Foothill released its unsecured
26 deficiency claim, either by violating the Sequencing Provisions or
27 under Nevada anti-deficiency laws or under the terms of the Plan,
28 and that this barred Foothill not only from collecting any

1 deficiency from the Affiliates personally but also from pursuing
2 Affiliates' property, Sundance Plaza. When Foothill nevertheless
3 foreclosed on Sundance Plaza, Appellants appear to argue, it
4 should have at least credited the \$4.5 million value of Sundance
5 Plaza to reduce its secured claim against Debtor.

6 Appellants' claims for damages have been rejected in all
7 three fora, but Foothill has also been denied any deficiency
8 judgment:

9 (1) In the Nevada District Court Action, on May 3, 2001, a
10 judgment for breach of the Continuing Guaranty was entered
11 against Guarantors, jointly and severally and both
12 individually and as partners of Shangri La, in the amount of
13 \$19,351,820.82 "plus interest accruing thereon at the
14 contractual default rate [of 21%] from October 24, 2000 until
15 paid in full" (the "Original Judgment"). In 2003, Debtor's
16 Affiliates were denied leave to file amended answers and
17 counterclaims and their amended pleadings were stricken.
18 Debtor was permitted to assert counterclaims in its answer,
19 which it had not previously filed because of the automatic
20 stay, but ultimately the Nevada District Court dismissed
21 Debtor's counterclaims in an amended judgment on March 24,
22 2004 (the "March, 2004 Judgment"). That judgment also
23 dismissed Foothill's claims for a deficiency, superseding the
24 Original Judgment and other judgments that had awarded
25 Foothill a deficiency and had enabled Foothill to pursue
26 collection from Guarantors. The grounds for the March, 2004
27 Judgment are unclear from the excerpts of record but they
28 appear to be that (a) Foothill was entitled to liquidate both

1 Vacation Village and Sundance Plaza but (b) it is barred from
2 pursuing its claim for a deficiency, and perhaps also
3 (c) Foothill was entitled to only the "legal" rate of
4 interest and not the contractual default rate (although this
5 ruling might apply only post-judgment). Both Foothill and
6 Appellants have appealed to the Supreme Court for the State
7 of Nevada (the "Nevada Supreme Court") where their appeals
8 are pending.

9 (2) In June of 2004 the Nevada Business Court dismissed
10 Appellants' claims, apparently based on claim preclusion from
11 the Nevada District Court Action. Appellants appealed to the
12 Nevada Supreme Court where their appeal is pending.

13 (3) On February 11, 2005, the bankruptcy court entered a
14 judgment in favor of Foothill and dismissed the Adversary
15 Proceeding, on the basis of claim preclusion as to the State
16 Law Claims and based on its reading of the Plan as to the
17 Bankruptcy Law Claims.

18 What follows is a more complete summary of the issues and
19 procedural history:

20 A. The Sequencing Provisions

21 There are lengthy portions of the Pledge Agreement (§§ 11.2-
22 12.2) that allow Foothill to pursue its remedies in any sequence
23 but they are subject to Sequencing Provisions that appear in
24 substantially identical form in several parts of the Pledge
25 Agreement (§§ 11.8, 12.5, 13.1):

26 11.8 . . . SO LONG AS NO GUARANTOR, [nor Debtor,
27 nor Shangri La are] SUBJECT TO A PROCEEDING UNDER 11
28 U.S.C., AND ARE NOT LIMITING OR RESTRICTING, OR
SEEKING TO LIMIT OR RESTRICT, THE EXERCISE BY
FOOTHILL OF ITS RIGHTS AND REMEDIES UNDER LAW OR ANY

1 OF THE LOAN DOCUMENTS (AS DEFINED IN THE LOAN
2 AGREEMENT), THEN FOOTHILL SHALL AGREE TO RECOVER
3 REPAYMENT OF THE SUMS OWING IT BY [Debtor] OR
4 GUARANTOR FIRST BY SEEKING RECOURSE AGAINST THE
5 COLLATERAL [owned by Debtor, including Vacation
6 Village], SECOND AGAINST THE COLLATERAL [owned by]
7 GUARANTOR OR [Shangri La], AND LASTLY AGAINST
8 GUARANTORS, INDIVIDUALLY. [Capitalization in
9 original, underlining added.]

6 The Continuing Guaranty has a nearly identical provision
7 (¶ 8(b)) and Debtor points to a similar concept in the letter of
8 intent for the Loan.³ Appellants allege that Foothill pursued
9 recovery in the "exact reverse sequence" from these Sequencing
10 Provisions by first pursuing Guarantors personally (starting with
11 naming them in the Nevada District Court Action), next pursuing
12 appointment of a receiver who collected rents and profits from
13 Sundance Plaza, next foreclosing on Sundance Plaza, and last
14 retaining all proceeds from the sale of Vacation Village.
15 Foothill's pursuit of Guarantors and Sundance Plaza allegedly
16 prevented them from offering "personal assets and personal
17 guarantees for any and all refinancing that might be sought for
18 [Vacation Village]," which Appellants claim was one of the
19 purposes of the Sequencing Provisions.

20 Foothill denies that it violated the Sequencing Provisions by
21 its initial step of filing the Nevada District Court Action.
22 Then, once Debtor filed its voluntary Chapter 11 petition on
23 November 17, 2000, Foothill argues that the Sequencing Provisions

24
25 ³ The Complaint in this adversary proceeding (Adv. No. 03-
26 1003) does not actually refer to the Sequencing Provisions of the
27 Pledge Agreement or the Continuing Guaranty. Those documents are
28 referred to in other documents filed later by Appellants. The
Complaint does quote from the letter of intent, stating that
Foothill will exercise its rights against the Affiliates "only
after exercising its rights and remedy, for a reasonable period of
time, under its first mortgage to the Borrowers [sic]."

1 became inapplicable by their own terms and it was free to pursue
2 its remedies in any sequence it chose. Appellants reply that
3 Foothill had already breached the Sequencing Provisions before
4 Debtor filed its bankruptcy petition.

5 After the Petition Date Foothill obtained the Original
6 Judgment, pursued Guarantors by filing in California a Notice of
7 Entry of Judgment on Sister-State Judgment, commenced non-judicial
8 foreclosure proceedings against Sundance Plaza, and sought
9 collection from Debtor by proposing the Plan, which provided for
10 the auction sale of Debtor's assets. The Plan was confirmed by
11 the bankruptcy court in August of 2001.

12 B. The Deficiency/Surplus Issues

13 On November 20, 2001, Vacation Village was auctioned for
14 \$17,800,000.00, or \$17,706,389.31 after costs of sale. Sundance
15 Plaza was sold at a non-judicial foreclosure sale on December 12,
16 2001, for a credit bid of \$500,000.00. Shortly thereafter, the
17 Vacation Village sale was confirmed by order of the bankruptcy
18 court and the sale closed.⁴

19 Foothill calculated that the proceeds from these sales was
20 \$18,206,389.31 -- consisting of net proceeds of \$17,706,389.31
21 from the sale of Vacation Village plus \$500,000.00 from the sale
22 of Sundance Plaza. According to Foothill, that was not enough to
23 pay the amount then owed on the Loan. Appellants argue that, to
24 the contrary, Foothill has received a surplus.

25
26 ⁴ On November 20, 2001, Foothill assigned all of its
27 rights under the Loan documents to FCC Holdings Limited, a
28 California corporation ("FCC"). Notwithstanding this assignment
to FCC, Foothill has continued to litigate with Appellants in its
own name.

1 1. Sundance Plaza

2 As noted above, Appellants apparently argue that foreclosing
3 on Sundance Plaza was effectively an attempt to collect a
4 deficiency in violation of Nevada's anti-deficiency laws.
5 Foothill responds that the resort to additional consensual
6 collateral (Sundance Plaza) does not constitute the pursuit of a
7 deficiency judgment, citing as persuasive authority the California
8 case of Dreyfuss v. Union Bank of California, 24 Cal.4th 400, 101
9 Cal.Rptr.2d 29, 11 P.3d 383 (Cal. 2000). Appellants argue that
10 Nevada would not follow Dreyfuss.

11 Foothill also argues that a lender with more than one
12 property as collateral does not have to obtain a deficiency
13 judgment after each non-judicial foreclosure, but instead can wait
14 until up to six months after the last parcel serving as security
15 is sold, citing N.R.S. § 40.455(2). It is not clear that
16 Appellants disagree, although they do assert that the six month
17 period has long since passed.

18 2. Fair market value

19 According to Appellants, Nevada law calculates a deficiency
20 or surplus after foreclosure based on fair market value, not the
21 \$500,000.00 amount of FCC's credit bid. If Foothill disagrees, it
22 has not advanced any such argument on this appeal. Rather,
23 Foothill appears to argue that it may choose to seek a deficiency
24 judgment based solely on the consideration recited in the
25 trustee's deed, without reference to fair market value; if it
26 chooses not to seek a deficiency judgment then fair market value
27 is irrelevant; and if it does attempt to obtain a deficiency
28 judgment then any valuation can only be used by Debtor and its

1 Affiliates as a shield, not as a sword to obtain a recovery from
2 Foothill on account of any lost equity from allegedly low dollar
3 bids or credit bids at the auction and foreclosure sale.

4 The actual fair market values were found by the Nevada
5 District Court to be \$4.5 million for Sundance Plaza and \$19
6 million for Vacation Village, as of the times of their respective
7 dispositions. All parties appear to accept these valuations for
8 purposes of this appeal.

9 3. Interest rate

10 As noted above, the March, 2004 Judgment of the Nevada
11 District Court awarded interest at "the legal rate," at least
12 post-judgment, rather than the 14% contractual rate or, as
13 previously ordered in the Original Judgment, the 21% contractual
14 default rate of interest. Appellants prepared spreadsheets that
15 applied the legal rate of interest to "Foothill's own accounting"
16 of credits and debits. They calculated a surplus to Foothill of
17 over \$3 million immediately after Sundance Plaza and Vacation
18 Village were liquidated. Foothill concedes on this appeal that
19 application of the legal rate "would substantially reduce, if not
20 eliminate, Foothill's deficiency judgment in light of the fair
21 market value determinations already made by the [Nevada] District
22 Court."

23 C. The Plan Issues

24 The Plan Issues are made more complex by the procedural
25 history of this case: (1) Initially the bankruptcy court (Judge
26 Robert C. Jones) orally declined to adopt either Appellants' or
27 Foothill's interpretation of the Plan, declining to address even
28 the amount of Foothill's secured claim, let alone whether any

1 deficiency claim was released. Nevertheless, (2) Judge Jones
2 issued a written order that, read literally, suggests that
3 Foothill's deficiency claim was released by the Plan. Later
4 (3) the bankruptcy court (Judge Bruce A. Markell) issued a
5 memorandum decision that reads Judge Jones' written order as if,
6 consistent with his oral ruling, it avoided any decision regarding
7 the deficiency claim -- and, based on that reading, Judge Markell
8 ruled that any claims by Debtor against Foothill were implicitly
9 barred. In addition, (4) Judge Markell interpreted the Plan as
10 not releasing Foothill's deficiency claim. Meanwhile the Nevada
11 District Court relied on Judge Jones' written order, which
12 appeared to hold that the Plan released Foothill's deficiency
13 claim.

14 The disputed language appears in Section IX.D.4. of the Plan.
15 Appellants point to the contrast between the language explicitly
16 preserving a deficiency claim in the following paragraphs (a) and
17 (c) and the absence of such language in paragraph (b):

18 Proponent [Foothill] shall receive one (1) of the
19 following alternative treatments:

20 (a) In the event the collateral for Proponent's
21 allowed Secured Claim was not purchased at the
22 Auction, Debtor or Reorganized Debtor, as the case
23 may be, shall abandon on the Effective Date to
24 Proponent the collateral securing such Secured Claim
25 with Proponent having an allowed General Unsecured
26 Claim in Class 7 for the difference between its claim
27 and its allowed Secured Claim; or

28 (b) In the event Proponent's collateral for the
allowed Secured Claim was purchased at the Auction
Sale, the liens of Proponent shall attach in order of
pre-Petition Date priorities to the proceeds of the
Auction. On the Payment Date Proponent shall
receive, on account of its allowed Secured Claim,
cash equal to its allowed Secured Claim or such
lesser amount which Proponent may agree to receive in
full satisfaction and release of such allowed Secured

1 Claim; or

2 (c) In the event Proponent was a successful credit
3 bidder at the Auction, return of its collateral on
4 the Effective Date with Proponent having an allowed
5 General Unsecured Claim in Class 7 for the difference
6 between its claim and the credit bid. [Emphasis
7 added.]

8 These provisions ("Paragraphs (a), (b) and (c)") were the
9 subject of Appellants' motion for implementation of the Plan under
10 Section 1142 (the "Plan Implementation Motion"). Foothill opposed
11 the motion and the matter came on for hearing before the
12 bankruptcy court (Judge Jones) on January 7, 2003. Foothill
13 argued that the "Secured Claim" referred to in Paragraph (b) is a
14 defined term essentially incorporating the Bankruptcy Code's
15 bifurcation of claims into secured and unsecured portions,⁵ and
16 that any "satisfaction and release" of the Secured Claim had no
17 effect on Foothill's unsecured claim against Debtor. Transcript
18 Jan. 7, 2003, pp. 19:21-20:5.

19 Judge Jones initially questioned Foothill's counsel about
20 whether Foothill's Secured Claim for purposes of Paragraph (b)
21 would be equal to the auction proceeds from Vacation Village or
22 the potentially higher actual value of Vacation Village. Judge
23 Jones posed a hypothetical situation in which Vacation Village was
24 worth \$20 million but sold for \$17 million and asked whether
25 Paragraph (b), which provides for "full satisfaction and release"

26 ⁵ The Plan states, "Secured Claim. This term shall mean a
27 claim that is secured by a lien against property of the Estate to
28 the extent of the value of any interest in such property of the
Estate securing such claim or to the extent of the amount of such
claim subject to setoff in accordance with Section 553 of the
Bankruptcy Code, in either case as determined pursuant to Section
506(a) of the Bankruptcy Code." Plan § XVIII.K(10).

1 of Foothill's "Secured Claim," means that Foothill was "releasing
2 the balance of a secured claim up to a total of 20 [million
3 dollars] or does that mean that you were releasing simply a
4 secured claim against [Debtor] in the amount of \$17,000,000 only?"
5 Transcript Jan. 7, 2003, pp. 21:24-24:10.

6 Judge Jones then questioned Affiliates' counsel and
7 established that there had been no objection to Foothill's amended
8 proof of claim, which was therefore deemed allowed in the
9 approximate amount of \$24 million. Id. pp. 24:25-25:16. The
10 bankruptcy court next asked Affiliates' counsel:

11 THE COURT: Well, without referencing that at all
12 [i.e., without referencing Foothill's deemed allowed
13 claim for roughly \$24 million], would you be
14 satisfied with a ruling that simply says the
15 proponent agreed to and gave a full release and full
16 satisfaction of its allowed secured claim, and then
17 you'll have to raise in state court under state law
18 whether that provided a release for your
19 guarantors[?]

20 MR. RAY [Affiliates' counsel]: Yes. . . .
21 Transcript Jan. 7, 2003, p. 25:17-23 (emphasis added).

22 Judge Jones went on to state that he was "inclined to agree"
23 with Foothill that the Affiliates were not released as a matter of
24 bankruptcy law, but that Foothill was bound by the language of the
25 Plan and "thereby did provide a release and full satisfaction of
26 the allowed secured claim, period," and whether that had any
27 effect on "the obligation of the guarantors" is "a matter of state
28 law" that the bankruptcy court would leave to the state courts.
29 Id. pp. 26:21-27:12 (emphasis added). Judge Jones and the parties
30 studiously avoided going beyond this limited language, which
31 simply tracks Paragraph (b) in the Plan in which Foothill agreed
32 to receive "cash equal to its allowed Secured Claim," or such

1 lesser amount as it "may agree to receive," in "full satisfaction
2 and release of [its] allowed Secured Claim." Plan § IX.D.4(b)
3 (emphasis added). When Foothill's counsel later asked, "What is
4 Foothill's allowed secured claim?" and "Is it the value of the
5 property that was secured at the auction?" Judge Jones responded,
6 "Do you want me to rule on that?" and after consultation with his
7 client Foothill's counsel answered, "No. I think that's properly
8 a matter for the state court, actually." Id. pp. 27:20-28:3.
9 Affiliates' counsel immediately added, "We're satisfied," and
10 Debtor's counsel stated "We agree with your Honor's ruling on the
11 allowed secured claim for Vacation Village." Id. p. 28:4-10.

12 Notwithstanding these statements at the hearing, on February
13 19, 2003, Judge Jones signed an "Order Granting Joint Motion to
14 Order Implementation of Plan, Including the Satisfaction and
15 Release of Foothill's Claim" (the "Plan Implementation Order")
16 that grants the Plan Implementation Motion "as hereinafter
17 provided" and then states:

18 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
19 Foothill filed its Proof of Claim on June 26, 2001,
20 against [Debtor]; Foothill filed its Amended Proof of
21 Claim on November 16, 2001 in the amount of
22 \$24,314,131.47 plus accruing interest against
23 [Debtor]; and Foothill, as the proponent of the
24 confirmed [Plan] is bound by and obligated to the
25 language that it provided in the Plan and, in fact,
26 Foothill did provide a release and full satisfaction
27 of its filed claim against [Debtor]. [Emphasis
28 added.]

24 As the emphasized text shows, the words "filed claim" appear
25 in place of the words "Secured Claim" discussed at the hearing.
26 Appellants' attorneys submitted this order and Foothill's counsel
27 signed it under the words "Approved by." Both Appellants and
28 Foothill emphasize that no appeal was taken from this order, which

1 they each apparently view as favorable to themselves.

2 D. The Nevada District Court Action

3 After a number of appeals and amendments to earlier judgments
4 the Nevada District Court issued its March, 2004 Judgment, stating
5 as follows:

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
7 [Foothill's] claims against [Debtor], including the
8 Second Cause of Action [for "Recovery of [Debtor's]
9 Personal Property [Claim & Delivery]"] were ordered
10 released as to [Debtor] by the [bankruptcy court's
11 Plan Implementation Order], on February 19, 2003, and
12 as [Foothill] is seeking no further relief against
13 the remaining Defendants as to its request contained
14 within [that Cause of Action, those claims] are
15 hereby dismissed.

16 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
17 the legal rate of interest is the fair rate to which
18 Foothill is entitled pursuant to its Judgment [this
19 capitalized term is not defined in the March, 2004
20 Judgment], including the award entered May 3, 2001 on
21 the paper entitled "Judgment" filed on that date
22 [i.e., the Original Judgment].

23 * * *

24 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
25 all of the claims and counterclaims herein are now
26 dismissed by Judgment; that no Judgment amount is
27 awarded to any of the parties because the Judgment
28 amount on all claims is zero; and that the parties
agree that in light of the Court's ruling there is no
prevailing party and no costs or attorney's fees will
be awarded, although the parties reserve all of their
rights to challenge the Court's rulings on appeal.

As noted above, both Foothill and Appellants have filed
appeals from this March, 2004 Judgment. The appeals are pending
before the Nevada Supreme Court (Sup. Ct. Nos. 43185, 43740).

E. The Bankruptcy Court's rulings after the Plan
Implementation Order

Foothill filed motions for dismissal and for summary judgment
in the Adversary Proceeding and Debtor filed oppositions and a

1 cross-motion for partial summary judgment (collectively, the
2 "Dispositive Motions"). Most of Debtor's claims involve state law
3 issues, and the bankruptcy court (Judge Markell) held that those
4 claims are barred by claim preclusion in its Memorandum Opinion
5 Regarding Dismissal of Plaintiffs' Claims (the "A/P Decision").
6 Judge Markell also held that the bankruptcy court had no
7 jurisdiction over claims asserted by non-debtors Shangri La and
8 Guarantors because they have not filed claims, the bar date had
9 long since passed, and without the possibility of claims for
10 indemnification or contribution there is no conceivable effect on
11 the bankruptcy estate. Judge Markell also rejected Debtor's
12 Bankruptcy Law Claims for turnover of the alleged surplus under
13 Section 542, enforcement of the plan under Section 1142, and
14 disallowance of Foothill's unsecured claim under Section 502(b).
15 According to Judge Markell, the earlier Plan Implementation Order
16 (issued by Judge Jones)

17 establishes that Foothill's secured claims against
18 the estate were satisfied, and implicit in that order
19 is the converse: that the estate had no claims back
 against Foothill upon the security for the claim.

20 Judge Markell supported this interpretation of the Plan
21 Implementation Order by starting with some basic principles of
22 bankruptcy law under Section 506(a):

23 . . . a claim is not secured for bankruptcy purposes
24 if the creditor does not have a lien "on property in
25 which the estate has an interest." [11 U.S.C.
26 § 506(a)] Thus, if D owed C \$100, and the only
27 security C had was a mortgage on A's house, C's claim
28 would be unsecured in D's bankruptcy. Changing the
 hypothetical slightly, if C also had a security
 interest in D's \$50 house, C would change to a
 secured creditor, but only to the extent of the
 house's \$50 value. C would still have an unsecured
 deficiency claim for the \$50 difference.

1 In other words, under the Bankruptcy Code Foothill's claim is
2 bifurcated into a secured claim against Debtor -- a claim secured
3 by Vacation Village -- and a deficiency claim that was
4 collateralized by Sundance Plaza but was unsecured as against
5 Debtor. The A/P Decision states that the Plan Implementation
6 Order is consistent with this bifurcation:

7 So it was in this case. The [Plan] Implementation
8 Order settled the status of Foothill's secured claim
9 against the estate, but as all agree, the [Plan]
Implementation Order studiously avoided stating
anything about the overall debt owed to Foothill.^[6]

10 Judge Markell reasoned from this that the Plan Implementation
11 Order left open the possibility that Foothill had an unsecured
12 deficiency claim, and conversely it implied that Foothill did not
13 owe any money back to the estate:

14 This establishes that there might have been a
15 deficiency. In other words, there remained the
16 possibility that the [Plan] Implementation Order did
17 not indicate all debt was satisfied, just debt equal
18 to the secured claim. But this determination carries
19 within it the implicit notion that Foothill did not
20 owe any money back to the estate. Put another way,
21 implicit in the order was the fact that the total
22 debt owed to Foothill equaled or exceeded the amount
of proceeds received. Otherwise, as [Appellants]
allege, the foreclosure would have yielded a surplus.
And given the vigor with which every issue in this
case seems to have been litigated, such a lacuna
would surely have been seized upon by one side or the
other. If the auction of the Debtor's property had
yielded more than what Foothill had been owed, that

23 ⁶ In fact, Appellants do not agree that the Plan
24 Implementation Order avoided "stating anything about the overall
25 debt owed to Foothill." Appellants appear to be correct: as
26 quoted above, that order recites that Foothill filed its amended
27 proof of claim in the amount of "\$24,314,131.47 plus accruing
28 interest" and that Foothill's "filed claim" had been released by
the Plan. Nevertheless, as discussed further below, at the time
of the hearing on January 7, 2003, the intent of Judge Jones and
all of the parties appears to have been to avoid stating anything
about the overall debt owed to Foothill. The written Plan
Implementation Order is contrary to this intent.

1 issue surely would have been raised at the time of
2 the implementation hearing. The [Plan]
3 Implementation Order, however, does not acknowledge
4 that Foothill's claims were less than the agreed
5 amount of foreclosure proceeds, and this
6 acknowledgment [sic] dooms the Debtor's claims based
7 on receipt of excess funds at the time of the
8 foreclosure auction process.

9 This leads to the conclusion that Foothill did not
10 receive more than its secured claim from the Debtor's
11 estate. If it did not, then there is no issue of
12 fact, material or otherwise, that needs to be
13 resolved, and judgment can be entered for Foothill on
14 the Debtor's Bankruptcy Claims. [Emphasis in
15 original.]

16 On February 11, 2005, the bankruptcy court issued a judgment
17 stating: "JUDGMENT IS ENTERED FOR DEFENDANT [Foothill], as to all
18 causes of action, and the matter is hereby dismissed" (the "A/P
19 Judgment"). Appellants filed a notice of appeal.

20 On June 10, 2005, a motions panel of the BAP denied
21 Foothill's motion to dismiss the appeal as untimely because
22 Appellants had filed a motion to amend the A/P Judgment that
23 extended the time to appeal.⁷ On November 1, 2005, a motions

24 ⁷ We have an independent duty to consider our jurisdiction
25 and are not bound by the motions panel's determination, but we
26 agree with the motions panel. Within the time provided for
27 tolling motions under Rules 8002 and 9006, Appellants filed a
28 motion entitled "Motion to Amend, to Alter and Amend and Motion
for Stay" (the "Motion to Amend"). Within ten days after the
bankruptcy court denied that motion Appellants filed their notice
of appeal. Therefore the issue is whether the Motion to Amend
extended the time to appeal under Rule 8002(b). Fed. R. Bankr. P.
8002(b).

If the Motion to Amend simply requested a stay it would not
extend the time for appeal, but it does more than this. See In re
Peters, 191 B.R. 411, 418-420 (9th Cir. BAP 1996) (nomenclature is
not controlling and "[i]n order to qualify as a tolling motion, a
pleading must seek 'substantive, not merely ministerial or
clerical, relief,'" quoting Munden v. Ultra-Alaska Assoc., 849
F.2d 383, 387 (9th Cir. 1988)); In re Curry and Sorensen, Inc., 57
B.R. 824, 827 (9th Cir. BAP 1986) (motion extends time to appeal

(continued...)

1 panel denied Appellants' motion to stay this appeal because of the
2 pending appeals before the Nevada Supreme Court, denied a motion
3 to strike Foothill's brief, and took under advisement Foothill's
4 request for judicial notice of the briefs filed with the Nevada
5 Supreme Court.⁸

6 II. ISSUES

7 A. Do the parties have standing, and does the bankruptcy
8 court have jurisdiction over the State Law Claims?

9 B. Does the Rooker-Feldman doctrine bar the State Law Claims?

10 C. If not, is the bankruptcy court correct that claim
11 preclusion bars the State Law Claims?

12 D. Is Foothill entitled to dismissal of the Bankruptcy Law
13 Claims based on the Plan Implementation Order?

14
15 _____
16 ⁷(...continued)
17 if it "draws into question the correctness of the trial court's
18 decision"); Miller v. Transamerican Press, Inc., 709 F.2d 524, 527
19 (9th Cir. 1983).

20 The Motion to Amend asks the bankruptcy court to amend the
21 A/P Decision and A/P Judgment by "adding a finding and an
22 appropriate ruling in the context of this adversary proceeding and
23 the Court's previous orders of abstention that it is in the best
24 interests of judicial economy and the parties to stay the entry of
final judgment" (Emphasis added.) We are persuaded that
the motion is, in the language of Rule 8002, "a timely motion:
(1) to amend or make additional findings of fact under Rule 7052,
whether or not granting the motion would alter the judgment; (2)
to alter or amend the judgment under Rule 9023; (3) for a new
trial under Rule 9023; or (4) for relief under Rule 9024 if the
motion is filed no later than 10 days after the entry of
judgment." Fed. R. Bankr. P. 8002(b). The appeal was timely.

25 ⁸ Appellants opposed this request for judicial notice on
26 grounds of lack of authentication or any statement as to the
27 purpose of requesting judicial notice. Foothill filed a
28 declaration authenticating the briefs and a reply stating that a
full history is important given the complex, lengthy history and
interaction of the proceedings in Nevada state courts and the
bankruptcy court. We hereby grant the request for judicial
notice.

1 E. If not, is Foothill entitled to dismissal of the
2 Bankruptcy Law Claims for alternative reasons?

3 III. STANDARDS OF REVIEW

4 "We review the bankruptcy court's conclusions of law and
5 questions of statutory interpretation de novo, and factual
6 findings for clear error. When there are two permissible views of
7 the evidence, the trial judge's choice between them cannot be
8 clearly erroneous." Village Nurseries v. Gould (In re Baldwin
9 Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999) (citations
10 omitted).

11 We review a grant of summary judgment or a motion to dismiss
12 de novo. Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1496 (9th
13 Cir. 1995). Rooker-Feldman issues are reviewed de novo. Mfg.
14 Home Cmtys., Inc. v. City of San Jose, 420 F.3d 1022, 1025 (9th
15 Cir. 2005). Claim and issue preclusion are reviewed de novo. In
16 re Moncur, 328 B.R. 183, 186 (9th Cir. BAP 2005).

17 A confirmed plan of reorganization is essentially a contract
18 and is interpreted as such. Miller v. U.S., 363 F.3d 999, 1003-04
19 (9th Cir. 2004). For the reasons we discuss below we would affirm
20 the bankruptcy court's interpretation of the Plan under any
21 standard of review. Therefore we need not decide the precise
22 standard of review applicable to the bankruptcy court's
23 interpretation of the particular Plan in this case, and whether
24 that standard of review would be less deferential in this case
25 because the parties did not introduce extrinsic evidence to aid in
26 interpreting the Plan qua contract. Compare, e.g., Agricredit
27 Acceptance, LLC v. UAP Northwest, 65 Fed.Appx. 187, 189 (9th Cir.
28 2003) ("We assume, without deciding, that the bankruptcy court's

1 interpretation of a confirmed plan is entitled to deference and is
2 reviewed for an abuse of discretion.") with Hillis Motors, Inc. v.
3 Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993)
4 ("When parol evidence is employed to explain the intent of the
5 parties who drafted the document, intent becomes a question of
6 fact," although remand unnecessary where only one construction of
7 plan would not be clearly erroneous) (citations omitted). See
8 also In re Harvey, 213 F.3d 318, 321-322 (7th Cir. 2000)
9 (questioning Hillis Motors' application of state law to plan
10 interpretation, as opposed to "the four corners principle that
11 governs federal consent decrees").

12 IV. DISCUSSION

13 It is not clear whether the bankruptcy court, in rendering
14 the A/P Judgment in favor of Foothill, granted Foothill's motion
15 to dismiss or its motion for summary judgment or both. It does
16 not matter for our purposes because the analysis is substantially
17 the same where the central issues are purely legal.

18 In deciding whether summary judgment was appropriate, we must
19 determine, viewing the evidence in the light most favorable to the
20 non-moving party, whether there are any genuine issues of material
21 fact and whether the bankruptcy court correctly applied the
22 relevant substantive law. In re Green, 198 B.R. 564, 566 (9th
23 Cir. BAP 1996). Summary judgment is appropriate if the moving
24 party shows by "the pleadings, depositions, answers to
25 interrogatories, and admissions on file, together with the
26 affidavits, if any, . . . that there is no genuine issue as to any
27 material fact and that the moving party is entitled to a judgment
28 as a matter of law." Green, 198 B.R. at 566 (citations omitted)

1 (quoting Hansen v. United States, 7 F.3d 137, 138 (9th Cir.
2 1993)). See generally Anderson v. Liberty Lobby, Inc., 477 U.S.
3 242, 247-257 (1986) (discussing requirement that any disputed
4 issues of fact be "genuine" and "material" under applicable
5 substantive law and evidentiary standards).

6 On a motion to dismiss for failure to state a claim, the
7 complaint should not be dismissed unless it appears beyond doubt
8 that the plaintiff can prove no set of facts in support of the
9 claim that would warrant relief. Hartford Fire Ins. v.
10 California, 509 U.S. 764, 811 (1993) (quotation marks and
11 citations omitted). The court must assume the truth of the
12 material facts as alleged in the complaint and read the
13 allegations in the light most favorable to the non-movant. Davis
14 Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S.
15 629, 633 (1999); H.J. Inc. v. Northwestern Bell Telephone Co., 492
16 U.S. 229, 249-250 (1989). The court need not, however, accept
17 legal conclusions couched as factual allegations. B.H. Papasan v.
18 Allain, 478 U.S. 265, 286 (1986).

19 A. Standing and Jurisdiction

20 The parties have not raised the issue of standing.
21 Nevertheless we have an independent duty to consider it. In re
22 Lucas Dallas, Inc., 185 B.R. 801, 804 (9th Cir. BAP 1995).

23 It is not obvious how Debtor is injured by an allegedly
24 wrongful foreclosure of someone else's property -- Sundance Plaza,
25 which is Shangri La's property. Nevertheless, the Complaint
26 asserts that Debtor is itself entitled to some of the funds from
27 the sale of Vacation Village, since Foothill was in Appellants'
28 view limited by the Plan to a maximum recovery equal to the (\$19

1 million) value of Vacation Village, and yet had already obtained
2 property worth \$4.5 million through foreclosure of Sundance Plaza.
3 In addition, the Complaint alleges that all Appellants were
4 damaged because Debtor's Affiliates were unable to refinance the
5 Loan after Foothill took its initial allegedly wrongful steps to
6 collect the Loan debt. Therefore, Debtor has alleged at least
7 some injury in fact, causation, and redressability, and we are not
8 prepared to say on the pleadings that Debtor lacks standing. See
9 generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
10 (1992) (describing minimum constitutional requirements for
11 standing).

12 We also question whether Foothill is the proper party before
13 us, given its assignment of all of its rights under the Loan
14 documents to its affiliate, FCC. Nevertheless, there is some
15 indication in the excerpts of record that Foothill retained or
16 took back an interest in the subject matter of this litigation.
17 More importantly, it has no choice about being the defendant in
18 the actions brought by Appellants, so presumably it would be up to
19 Foothill argue that FCC should be substituted as the proper party,
20 if that is so. Therefore, we are not prepared to say that
21 Foothill lacks standing.

22 Finally, we agree with the bankruptcy court that it lacked
23 jurisdiction to adjudicate the non-debtor Appellants' claims.
24 Appellants have made no argument to the contrary on this appeal,
25 as their counsel confirmed at oral argument. The bar date for
26 Shangri La and Guarantors to assert indemnity or contribution
27 claims against Debtor has long since past, so the outcome of any
28 proceeding on their claims against Foothill could not conceivably

1 have any effect on the bankruptcy estate, let alone have a "close
2 nexus to the bankruptcy plan or proceeding." See In re Fietz, 852
3 F.2d 455, 457 (9th Cir.1988) (adopting "conceivable effect" test
4 of Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)) and
5 In re Pegasus Gold Corp., 394 F.3d 1189, 1194-95 (9th Cir. 2005)
6 (following Third Circuit's more limited "close nexus" test for
7 post-confirmation jurisdiction); 28 U.S.C. § 1334(b).

8 B. The Rooker-Feldman doctrine is not applicable

9 We are somewhat troubled by Appellants' argument that their
10 own State Law Claims should have been rejected by the bankruptcy
11 court under the Rooker-Feldman doctrine, which they find more
12 acceptable than the bankruptcy court's ruling that those claims
13 are barred by claim preclusion. Nevertheless, Foothill has not
14 argued that judicial estoppel or any other doctrine trumps the
15 well established right of parties to raise jurisdictional issues
16 at any time (In re Crown Vantage, Inc., 421 F.3d 963, 971 n. 5
17 (9th Cir. 2005)), and we have an independent duty to consider our
18 jurisdiction (Lucas Dallas, 185 B.R. at 804), so we address the
19 merits of Appellants' Rooker-Feldman argument.

20 The Supreme Court has recently emphasized the narrow reach of
21 the Rooker-Feldman doctrine:

22 The Rooker-Feldman doctrine, we hold today, is
23 confined to cases of the kind from which the doctrine
24 acquired its name: cases brought by state court
25 losers complaining of injuries caused by state-court
26 judgments rendered before the [federal] court
27 proceedings commenced and inviting [federal] court
28 review and rejection of those judgments. Rooker-
Feldman does not otherwise override or supplant
preclusion doctrine or augment the circumscribed
doctrines that allow federal courts to stay or
dismiss proceedings in deference to state-court
actions.

1 Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, ___,
2 125 S.Ct. 1517, 1521-22 (2005) (emphasis added, citing Rooker v.
3 Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia
4 Ct. App. v. Feldman, 460 U.S. 462 (1983)).

5 The March, 2004 Judgment in the Nevada District Court Action
6 was not rendered before the Adversary Proceeding commenced. See
7 Exxon Mobil, 544 U.S. at ___, 125 S.Ct. at 1526-27 ("neither
8 Rooker nor Feldman supports the notion that properly invoked
9 concurrent jurisdiction vanishes if a state court reaches judgment
10 on the same or related question while the case remains sub judice
11 in a federal court" rather, "[d]isposition of the federal action,
12 once the state-court adjudication is complete, would be governed
13 by preclusion law"). Moreover, Appellants' own opposition to
14 Foothill's motion for summary judgment states that they "in no
15 way, shape or form suggest or request that the [bankruptcy] Court
16 in any way act as an appellate tribunal to the [Nevada District
17 Court] or the Business Court." The Rooker-Feldman doctrine is
18 inapplicable.

19 C. Appellants' State Law Claims are barred by claim
20 preclusion

21 Our de novo review confirms the bankruptcy court's ruling
22 that claim preclusion bars Debtor's State Law Claims. We apply
23 the law of Nevada because that is where the bankruptcy court sits.
24 28 U.S.C. § 1738. The elements of claim preclusion under Nevada
25 law are (1) a valid and final judgment on a claim, and (2) a
26 second suit brought against the same party on the same claim.
27 Executive Mgmt., Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 835;
28 963 P.2d 465, 473 (1998).

1 There is no suggestion that the March, 2004 Judgment is
2 invalid, and it appears to be final because it disposes of all
3 claims in the Nevada District Court Action. Although the March,
4 2004 Judgment is on appeal to the Nevada Supreme Court it is still
5 final for purposes of claim preclusion: "Nevada appears to follow
6 the general view -- according finality to judgments
7 notwithstanding opportunities to appeal." Clements v. Airport
8 Authority of Washoe County, 69 F.3d 321, 329 n.7 (9th Cir. 1995)
9 (citing Baker v. Leary, 70 Nev. 152, 261 P.2d 1013 (1953)).

10 Appellants admit that the State Law Claims in all three fora
11 are almost word-for-word identical, so the claims are certainly
12 the same for claim preclusion purposes. The parties are the same
13 in all three fora. Therefore, all the elements of claim
14 preclusion are satisfied.

15 Appellants point out that Foothill presented the Nevada
16 District Court with several alternative grounds for disposing of
17 their State Law Claims, and the excerpts of record have almost no
18 information about the basis of the March, 2004 Judgment, so it is
19 difficult to know what issues the Nevada District Court addressed
20 and how it ruled on each issue. That ambiguity would be relevant
21 to issue preclusion, not claim preclusion. "[C]laim preclusion
22 embraces all grounds of recovery that were asserted in a suit, as
23 well as those that could have been asserted, and thus has a
24 broader reach than issue preclusion." Executive Mgmt., 114 Nev.
25 at 835, 963 P.2d at 473 (emphasis added, internal quotation marks,
26 brackets, and citation omitted). Therefore, claim preclusion bars
27 Appellants' State Law Claims in the Adversary Proceeding.

28

1 D. The Plan Implementation Order did not bar claims against
2 Foothill

3 Judge Markell ruled in the A/P Decision that the Plan
4 Implementation Order must be read to embody “the implicit notion
5 that Foothill did not owe any money back to the estate.”
6 (Emphasis in original.) While we respect the bankruptcy court’s
7 interpretation of its own order (albeit an order issued by a
8 different judge) we cannot agree.

9 Judge Jones’ Plan Implementation Order itself states only
10 that Foothill filed an original and amended proof of claim, the
11 dollar amount, and that “Foothill, as the proponent of the
12 confirmed [Plan] is bound by and obligated to the language that it
13 provided in the Plan and, in fact, Foothill did provide a release
14 and full satisfaction of its filed claim against [Debtor].” That
15 language alone says nothing about whether Foothill owes money back
16 to the estate.

17 Judge Markell’s A/P Decision also relies on the notion that
18 Appellants would have asserted claims if they had intended to
19 preserve them. They did. On January 3, 2003, just four days
20 before the hearing on the Plan Implementation Motion, Appellants
21 filed their Complaint commencing the Adversary Proceeding in which
22 they asserted among other things a claim for turnover of
23 approximately \$3.2 million based on the theory that “when Foothill
24 elected its treatment under Article IX, Section D.4(b) [of the
25 Plan], Foothill was only entitled to approximately \$14,600,000 of
26 the proceeds.” We do not believe that the lack of discussion of
27 these claims at a hearing on a different matter four days later
28 amounts to an implicit surrender of those claims.

1 Our view is reinforced by the transcript of that hearing,
2 which shows that the parties and Judge Jones avoided determining
3 broader issues and intended to keep the Plan Interpretation Order
4 narrowly focused on Paragraph (b) (Plan § IX.D.4(b)). For
5 example, Judge Jones noted that Foothill's amended proof of claim
6 was deemed allowed in the approximate amount of \$24 million, but
7 then made his oral ruling "without referencing that at all."
8 Transcript Jan. 7, 2003, p. 25:17-22. Similarly, Judge Jones
9 briefly explored whether the amount of Foothill's Secured Claim
10 would be the fair market value of Vacation Village or the actual
11 sales price, but the parties all explicitly agreed with Judge
12 Jones that the bankruptcy court would not to decide that issue.
13 Id. pp. 27:20-28:10. We do not believe that, when the parties and
14 Judge Jones were so carefully avoiding any decision even as to the
15 amount of Foothill's Secured Claim, they were implicitly deciding
16 that Debtor had no claim back against Foothill.

17 Finally, we note that at the hearing before Judge Markell on
18 the Dispositive Motions Foothill's own counsel conceded that he
19 was not sure the Plan Implementation Order could be read to bar
20 any claim against Foothill:

21 MR. ZIRZOW [Foothill's counsel]: So the question is
22 whether Foothill is -- whether the [Plan]
23 [I]mplementation [O]rder not only adjudicated a
24 release of --

25 THE COURT [Judge Markell]: It terminated Foothill's
26 status as a creditor, but, also, did it have within
27 it the notion that Foothill was not a debtor[?]
28 That, in fact, everything was even between the
parties[?]

29 MR. ZIRZOW: You know, I sure would like it to say
30 that, but I'm not sure if it does to be perfectly
31 honest. I'm looking at it right now.

1 Transcript Sept. 8, 2004, p. 40:16-25.

2 For all of these reasons, we cannot agree with Judge Markell
3 that the Plan Implementation Order implicitly barred Debtor's or
4 Appellants' claims against Foothill. Nevertheless, we affirm on
5 the alternative grounds discussed below. "An appellate court in
6 the Ninth Circuit may consider any issue supported by the record
7 and may affirm on any basis supported by the record, even where
8 the issue was not expressly considered by the bankruptcy court."
9 In re Fernandez, 227 B.R. 174, 177 (9th Cir. BAP 1998), aff'd 208
10 F.3d 220 (9th Cir. 2000) (table).

11 E. Judge Markell properly corrected the Plan Implementation
12 Order to be consistent with Judge Jones' oral ruling, and
13 then properly ruled that the Plan does not bar Foothill's
14 deficiency claim

15 Although Judge Jones' Plan Implementation Order, as written,
16 appears to bar Foothill's deficiency claim, it is inconsistent
17 with his oral ruling at the hearing on January 7, 2003. We
18 interpret Judge Markell's A/P Decision as correcting the written
19 order to reflect Judge Jones' oral decision and to clarify that
20 the Plan does not bar Foothill's deficiency claim.

21 Such correction of an interlocutory order is both permissible
22 and appropriate. See Moses H. Cone Mem. Hosp. v. Mercury Constr.
23 Corp., 460 U.S. 1, 12 and n. 14 (1983) ("every order short of a
24 final decree is subject to reopening at the discretion of the
25 [trial court] judge"); City of Los Angeles, Harbor Div. v. Santa
26 Monica BayKeeper, 254 F.3d 882, 885-87 (9th Cir. 2001) (court has
27 "inherent procedural power to reconsider, rescind, or modify an
28 interlocutory order for cause seen by it to be sufficient")

1 (citation, internal quotation marks, and emphasis omitted); In re
2 White Crane Trading Co., Inc., 170 B.R. 694, 700-701 & n. 9
3 (Bankr. E.D. Cal. 1994) (under the "law of the case" doctrine
4 reconsideration of an interlocutory order is a matter of the trial
5 court's "good sense," and trial judges constantly reexamine their
6 rulings on the basis of new information or argument or just fresh
7 thoughts) (citations omitted). See also 11 U.S.C. § 105(a), Fed.
8 R. Bankr. P. 9024.⁹

9 The Plan Implementation Order states that Foothill provided a
10 "release and full satisfaction" of not just its "Secured Claim" as
11 defined in the Plan but its entire "filed claim" for
12 "\$24,314,131.47 plus accruing interest." Read literally, this
13 order would appear to bar Foothill's deficiency claim for the
14 difference between the \$19 million value of Vacation Village and
15 the \$24,314,131.47 filed claim.

16 At the hearing leading to this order, however, Judge Jones
17 and the parties studiously avoided any determination of the amount
18 of Foothill's Secured Claim, let alone whether its deficiency
19 claim was released. Everyone agreed to a form of order, proposed
20

21 ⁹ We note that the Nevada District Court relied on the
22 Plan Implementation Order as written, before it was corrected by
23 Judge Markell in the A/P Decision. Therefore a preliminary issue,
24 which neither party has addressed, is whether this reliance by the
25 Nevada District Court is binding on the bankruptcy court. We do
26 not believe it is. Deference to state courts has limits, and we
27 do not believe it precludes the bankruptcy court from
28 reconsidering its own order. Cf. In re Gruntz, 202 F.3d 1074 (9th
Cir. 2000) (state court may determine applicability of automatic
stay, but such determination not binding on bankruptcy court).

Of course, the Nevada state court actions might be affected
by the fact that the bankruptcy court's order, on which the Nevada
District Court apparently relied, has now been superseded by the
A/P Decision, the A/P Judgment, and our disposition of this
appeal. That is a matter for the state courts to determine.

1 by Judge Jones, that "without referencing" the amount of
2 Foothill's Secured Claim should track the language of the Plan and
3 "simply say[] [that] the proponent [Foothill] agreed to and gave a
4 full release and full satisfaction of its allowed secured claim
5" Transcript Jan. 7, 2003, pp. 25:17-23, 27:20-28:10
6 (emphasis added). Plan § IX.D.4(b).

7 Judge Markell treated the written Plan Implementation Order
8 as if it were consistent with what everyone agreed to at the
9 hearing on January 7, 2003. That correction is proper.

10 Judge Markell also held that the Plan meant what it said, and
11 only what it said: by electing Paragraph (b) Foothill accepted
12 the auction proceeds from the sale of Vacation Village in full
13 satisfaction and release of its allowed Secured Claim, without in
14 any way affecting its unsecured deficiency claim. We agree. To
15 hold otherwise would ignore the specific definition of Secured
16 Claim in the Plan (see footnote 5 above), the provisions of
17 Section 506(a), and the entire body of caselaw concerning
18 bifurcation of claims under the Bankruptcy Code. See, e.g.,
19 Dewsnup v. Timm, 502 U.S. 410 (1992). Paragraph (b) simply
20 applies hornbook law on bifurcation. There is nothing
21 inconsistent in Paragraph (c), which attempts to go further and
22 define the amount of Foothill's deficiency claim as "the
23 difference between its claim and the credit bid" -- a potential
24 windfall to Foothill if its credit bid were in a small dollar
25 amount. Plan § IX.D.4(c). Nor is there anything inconsistent
26 about Paragraph (a), which first provides that if Vacation Village
27 were not purchased by anyone at the Auction then Debtor shall
28 "abandon" Vacation Village to Foothill and then takes the

1 precaution of explicitly stating that this does not waive
2 Foothill's deficiency. Plan § IX.D.4(a). For all of these
3 reasons, under any standard of review we agree with the bankruptcy
4 court that Paragraph (b) meant only what it said: it released
5 Foothill's "Secured Claim" but had no effect on Foothill's
6 deficiency claim.

7 All of Debtor's Bankruptcy Law Claims rest either on its
8 interpretation of the Plan as releasing Foothill's unsecured
9 deficiency claim, which Judge Markell rightly rejected, or else on
10 the State Law Claims, which were rightly dismissed on claim
11 preclusion grounds. Therefore, the bankruptcy court properly
12 dismissed all of Debtor's Bankruptcy Law Claims against Foothill.

13 **V. CONCLUSION**

14 The unfortunate history of the parties' disputes includes
15 litigation in three fora, numerous appeals, and a written order of
16 the bankruptcy court that did not accurately reflect its oral
17 ruling. The bankruptcy court properly corrected the written order
18 and clarified that Foothill's Plan meant what it said and only
19 what it said: when Foothill received the full amount of its
20 secured claim that claim was satisfied and released, but the Plan
21 did nothing to release Foothill's deficiency claim. Whether or
22 not Foothill has a deficiency claim is a matter of state law. The
23 state courts have rejected Debtor's State Law Claims, and those
24 rulings are binding on the bankruptcy court as a matter of claim
25 preclusion. Accordingly, all of Appellants' claims were properly
26 dismissed, and the A/P Judgment is AFFIRMED.