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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-10-1336-JuHBa
INDUSTRY WEST COMMERCE CENTER LLC,	Bk. No. 10-10088
Debtor.	
CENTRAL PACIFIC BANK,	
Appellant,	
v.	M E M O R A N D U M*
INDUSTRY WEST COMMERCE CENTER LLC; TODD JBRE, LLC,	
Appellees.	

Submitted on May 11, 2011
at San Francisco, California

Filed - May 24, 2011

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: Carl Lewis Grumer, Esq., Manatt, Phelps & Phillips, LLP argued for Appellant Central Pacific Bank
Monique Jewett-Brewster, Esq., MacConaghy & Barnier, PLC argued for Appellee Industry West Commerce Center, LLC
Steven Marc Olson, Esq., argued for Appellee Todd JBRE, LLC

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Before: JURY, HOLLOWELL, and BARRECA,[1] Bankruptcy Judges.

Appellant, secured creditor Central Pacific Bank ("CPB"), appeals the bankruptcy court's order confirming the Modified Plan of Reorganization dated August 16, 2010 (the "Modified Plan") filed by chapter 11[2] debtor and appellee Industry West Commerce Center, LLC.

We AFFIRM.

I. FACTS

Debtor is a California limited liability company that is engaged in the business of owning and operating investment real property. In January 2007, debtor obtained a short-term construction loan from CPB for $17 million to develop commercial property in Santa Rosa, California. The note was secured by a first deed of trust on the property, had a maturity date of July 11, 2008, and bore an interest rate based on the Prime Rate plus .25%. Under the terms of the note, debtor had the option to elect a Libor Rate under certain conditions.

Debtor later obtained two additional loans to complete the construction and development of the property. Debtor executed a promissory note in the amount of $1 million for a two-year term at 12% interest in favor of Clinton James Brown, Jr. and Cindy Lue Brown, as trustees of the Clinton James Brown, Jr. and Cindy

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[1] Hon. Marc L. Barreca, Bankruptcy Judge for the Western District of Washington, sitting by designation.

[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

Lue Brown Trustee U.T.D. The note was secured by a second deed of trust on the property and had a maturity date of May 1, 2010. This note was later assigned to appellee, Todd JBRE, LLC ("Todd").[3] Debtor executed another promissory note in the amount of $2 million in favor of Mark and Irma McClure, as trustees of the McClure Trust, which was secured by a third deed of trust on the property. The McClures held a 20% membership interest in debtor.

Debtor planned to obtain long term financing to replace CPB's loan once it matured, but that financing never materialized due to the constriction of credit markets starting in mid-2008. CPB extended the maturity date of its loan by one year to July 11, 2009, at which time debtor defaulted. Although it is not entirely clear from the record, the contract rate at the time of debtor's default was apparently around 3.55% and the default rate was 8.5%.

On September 30, 2009, CPB filed an action for judicial foreclosure and related relief against debtor, its guarantors, and its junior lienholders in the Sonoma County Superior Court. Debtor cross-complained for breach of the construction loan agreement. The parties attempted to negotiate a resolution toward the end of 2009, but those negotiations were unsuccessful.

On January 14, 2010, debtor filed its chapter 11 petition. Debtor's bankruptcy case was a single asset real estate case in which CPB had the most significant secured claim. Debtor filed

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[3] Todd joined in debtor's brief on appeal.

four reorganization plans and, as is typical in single asset real estate cases, CPB objected to the plan which required debtor to seek cramdown of the plan over its objection. In concept, each of debtor's plans were essentially the same with the primary dispute over whether the proposed cramdown interest rates were fair and equitable to CPB and Todd.

Debtor filed its original plan on February 19, 2010. Under the plan, debtor proposed to restructure the notes of CPB, Todd and the McClures by making interest-only payments with the notes becoming due and payable in seven years. The proposed interest rates varied, with CPB paid at the "Libor Rate Option" and/or the "Prime-Based Rate" as specified in the original note, Todd at the rate of 5.5% and the McClures at the rate of 5%.[4] Debtor further proposed to pay the $93,000 in general unsecured claims in full with interest, with quarterly installment payments commencing one year after the Effective Date of the plan.

CPB objected to the plan, arguing then, as it does now, that debtor sought to place all the risk on CPB by proposing a cramdown interest rate that was too low over a seven-year term. CPB maintained that the rate should be 9.65% interest due to the length of the plan and other risks. Finally, CPB asserted that the property should be sold because debtor was solvent and could pay all non-insider secured and unsecured claims in full if

[4] The McClures accepted the plan and the 5% rate of interest.

there was a sale.[5]

In support of its objection, CPB filed the declaration of Steven D. Dunn ("Dunn"), a licensed real estate appraiser. Dunn opined that the "as is" market value of the property as of April 13, 2010, was $18,740,000.

CPB also submitted the declaration of Richard W. Ferrell ("Ferrell"), a real estate finance consultant. Ferrell declared that the appropriate interest rate under the circumstances was between 9.65% and 11.41%. To support those rates, Ferrell stated that debtor presented several risk factors which compelled a higher interest rate, including (but not limited to) the loan to value ratio, the debt service coverage ratio, the seven-year term of the plan, the fact that leases were expiring during the term of the plan, the presence of two subordinate trust deeds, and the oversupply of industrial space in debtor's geographical area. In the end, Ferrell concluded that the plan was not feasible because there was inadequate cash flow to support payment of the 9.65% rate.

On May 31, 2010, debtor submitted a modified plan which proposed to increase the interest rate to 4.45% for CPB's claim and 5.75% for Todd's claim. The seven-year term remained.

In support, debtor submitted the declaration of Raymond B.

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[5] Todd's objection was similar to that of CPB's. Todd also objected to the cramdown rate of interest on its claim and further contended that the plan was not feasible since debtor could not establish that the payoff at the end of the seven-year term could occur. Todd requested that the court deny confirmation of the plan and convert the case to chapter 7 on the ground that liquidation of the property would provide for payment of the creditors in full.

Mattison ("Mattison"), a licensed real estate appraiser. Mattison declared that the fair market value of the property "as is" was $23,640,000 as of August 24, 2009. He further opined that the fair market value was $24,730,000 if it was fully leased. Finally, Mattison stated that if the buildings were sold "in bulk," the "as is" value was $22,460,000 and a "prospective bulk stabilized value" (fully leased) was $23,490,000.

Debtor also submitted the declaration of its financial advisor, Patrick W. Kilkenny ("Kilkenny"). Kilkenny concluded that there was no efficient market rate of interest for the three loans on debtor's property. Kilkenny attributed his conclusion to several factors, including, but not limited to: the current market constriction, the capital adequacy issues facing lenders, uncertainty of the global creditor markets, more restrictive underwriting criteria and lenders' desire to curtail lending to commercial real estate until there was more certainty in the market.

Kilkenny further testified that using the Prime Rate and considering numerous "risk" factors, it was his opinion that the interest rate for CPB should be 4.45% (Prime Rate of 3.25% plus 130 basis points). He further opined that the Todd loan should carry an interest rate of 5.75%.

Finally, debtor submitted the declaration of Vincent Rizzo ("Rizzo"), who was the Managing Member of Rizzo & Associates, LLC, an entity which held a 64.33% membership interest in debtor and was responsible for its management. Rizzo stated that the property was 60% occupied and that he believed the property

would generate positive cash flow to pay the proposed higher interest rates of 4.45% to CPB and 5.75% to Todd. Rizzo also opined that at the end of the seven-year period "we will be out of the current downturn." Last, Rizzo declared that the property was "high quality" and there was little existing or planned inventory with the same quality. Based on his beliefs, Rizzo concluded that debtor would be able to sell or refinance the project at the end of the plan term.

On June 3, 2010, the bankruptcy court conducted an evidentiary hearing at which it heard testimony from the various experts, Rizzo and others. The court took the matter under submission. In a Memorandum Decision dated June 8, 2010, the court concluded that debtor's modified plan was unconfirmable because it did not offer "fair and equitable" treatment to Todd. The court did not address CPB's treatment under the plan.

After entry of the court's decision, debtor attempted to negotiate a consensual plan with Todd, but was unsuccessful. Debtor filed a second modified plan on July 10, 2010, addressing the court's concerns with respect to Todd, but made no changes to its treatment of CPB's claim.

After debtor filed its second modified plan, it reached an agreement with Todd. Therefore, debtor filed a third modified plan which provided that Todd would be paid its prepetition contract rate of 12% and a $200,000 cash payment immediately after plan confirmation. The modified plan also reduced the loan term to three years with another extension possible on the payment of an extension fee of 200 basis points ($15,000). CPB's treatment remained unchanged.

On July 29, 2010, CPB filed an objection to this plan, raising objections similar to those it had raised before. In response, debtor argued that its plan would not be feasible if the court set the interest rate anywhere near the 9.65% requested by CPB and also provided a declaration that the proposed plan interest rate of 4.45% was purportedly higher and more profitable than current loans being underwritten and serviced by CPB. CPB refers to this as the "new evidence" that debtor introduced.[6]

On August 5, 2010, the bankruptcy court held a confirmation hearing on the modified plan and again took the matter under submission. On August 16, 2010, the court issued a Memorandum Decision denying confirmation of the July 21, 2010 modified plan, but specified the terms under which the plan would be confirmed. The court found the seven-year term reasonable, but concluded that the proposed interest rate on CPB's loan should be adjusted upward to 4.95%.

The court arrived at its decision by relying on the Sixth Circuit's decision in Bank of Montreal v. Official Comm. of Unsecured Creditors (In re Am. Homepatient, Inc.), 420 F.3d 559, 567-68 (6th Cir. 2005), cert denied, 549 U.S. 942, 127 S.Ct. 55,

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[6] Debtor submitted a rate sheet that showed CPB was lending at a rate of 3.75% and evidence regarding cost of funds. There is no indication that the bankruptcy court considered this evidence and we suspect that it did not. At the close of the August 5, 2010 confirmation hearing, counsel for CPB made clear that if the court took the matter under submission and was going to consider new evidence, it wanted the opportunity to present rebuttal evidence first. There is nothing in the record that shows the court requested rebuttal evidence when it took the matter under submission.

166 L.Ed.2d 251 (2006). The Sixth Circuit in American Homepatient held that a bankruptcy court should first determine whether there was an efficient market for the type of loan at issue, and, if not, then use the formula approach.

The bankruptcy court explained that there was no efficient market rate of interest to be applied as the cramdown interest rate for CPB's loan. Therefore, it applied the formula approach. The court started with the current Prime Rate of 3.25% and enhanced it for risk factors, while considering the contract rate as some sort of vague admission by the secured creditor.

The court viewed the primary risk as the possibility that the commercial real estate market would implode due to a lack of available money in the future. The court found this risk required an adjustment up from prime, but not to the extent argued by the Bank, "as there remains the possibility that Congress would intervene to make funds available rather than allow the commercial real estate market to tank." The court further explained that the fact the property was not fully leased and that some of the leases would expire during the term of the plan also presented significant risk. On the other hand, the court recognized that there was at least $1 million in equity in the property over and above CPB's lien which militated for a lower interest rate.[7] The court concluded that 120 basis

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[7] At the hearing, the court observed that debtor's appraisal was at $22 million and CPB's appraisal was at $19 million. The court noted that "an appraisal is not an exact science, so we're looking at somewhere around 20 million dollars (continued...)

points should be added to the Prime Rate to cover the risk of further economic downturn and 50 basis points should be added for risks associated with possible declining lease revenue. Accordingly, the court determined that the cramdown interest rate should be 4.95%.

Debtor amended its plan to comport with the bankruptcy court's ruling. On August 20, 2010, the court entered the order confirming the Modified Plan and overruled all other objections to confirmation.

On September 2, 2010, CPB timely filed this appeal, but did not seek a stay pending appeal from the bankruptcy court or this Panel. On December 15, 2010, debtor filed a motion to dismiss this appeal as moot. Debtor's motion was considered with the merits at oral argument.

II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the bankruptcy court erred in determining that the 4.95% post-confirmation cramdown rate of interest provided CPB with the present value of its claim under the fair and equitable test set forth in § 1129(b)(1); and

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[7](...continued)
value." Presumably the court arrived at the $1 million in equity by using the $20 million number and subtracting the roughly $18.8 million in debt against the property which was listed in debtor's disclosure statement.

B. Whether the bankruptcy court erred in confirming the Modified Plan because it was not filed in good faith in violation of § 1129(b)(3).

IV. STANDARDS OF REVIEW

"The ultimate decision to confirm a reorganization plan is reviewed for an abuse of discretion." Computer Task Grp., Inc. v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003). Under the abuse of discretion standard, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the bankruptcy court identified the correct legal rule, we then determine under the clearly erroneous standard whether its factual findings and its application of the facts to the relevant law were: "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id.

The ultimate conclusion of whether a plan provides fair and equitable treatment for a secured creditor is a question of law which we review de novo because it requires analysis of the meaning of the statutory language in the context of the Bankruptcy Code's "cram down" scheme. See Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1421 (9th Cir. 1996); cf. Patterson v. Fed. Land Bank (In re Patterson), 86 B.R. 226, 227 (9th Cir. BAP 1988) (In chapter 12 case, the determination of what factors to apply in a valuation calculation under § 1225 is an interpretation of a statute which is reviewed de novo, but the application of the factors involved

in a valuation calculation is a question of fact which is reviewed under a clearly erroneous standard).

A bankruptcy court's findings on the issue of whether the total deferred payments under the plan provide a secured creditor with the present value of its claim are factual findings reviewed under the clearly erroneous standard. Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1358 (9th Cir. 1986); Conn. Gen. Life Ins. Co. v. Hotel Assocs. of Tucson (In re Hotel Assocs. of Tucson), 165 B.R. 470, 474 (9th Cir. BAP 1994). We give substantial deference to a bankruptcy court's cramdown interest rate determination. Farm Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 696 (9th Cir. 1990).

A bankruptcy court's finding of good faith is also a factual finding which will not be overturned unless clearly erroneous. Brotby, 303 B.R. at 184.

A factual determination is clearly erroneous if the appellate court, after reviewing the record, has a definite and firm conviction that a mistake has been committed. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985); Hinkson, 585 F.3d at 1263 (holding that a court's factual determination is clearly erroneous if it is illogical, implausible, or without support in the record).

We may affirm the bankruptcy court's decision on any ground fairly supported by the record. Wirum v. Warren (In re Warren), 568 F.3d 1113, 1116 (9th Cir. 2009).

V. DISCUSSION

A. Mootness

At the outset, we consider whether this appeal is moot. Failure to seek a stay pending appeal does not automatically render an appeal moot. Jorgensen v. Fed. Land Bank of Spokane (In re Jorgensen), 66 B.R. 104, 107 (9th Cir. BAP 1986). However, we may dismiss an appeal based on equitable mootness when a debtor has substantially consummated its plan or the rights of third parties would be prejudiced if we were to reverse the bankruptcy court's decision. See Arnold Baker Farms, 85 F.3d at 1420. As the party asserting mootness, debtor has the burden of proof. Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1116-17 (9th Cir. 2003).

Debtor contends its plan has been substantially consummated[8] thereby rendering this appeal moot. Debtor's position is belied by ¶ 6.16.3 of its Modified Plan, entitled Final Decree, which states:

> After the Plan is substantially consummated, the Reorganized Debtor will file an application for a Final Decree, and will serve the application as provided in the Local Rules.

We have reviewed the bankruptcy court's docket and there is no docket entry showing that debtor has ever moved for a Final

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[8] "'[S]ubstantial consummation' means – (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." § 1101(2).

Decree.[9] "In light of this significant omission, it is difficult to divine how substantial consummation allegedly occurred." See Pioneer Liquidating Corp. v. United States Trustee (In re Consol. Pioneer Mortg. Entities), 248 B.R. 368, 375 (9th Cir. BAP 2000).

At any rate, substantial consummation by itself does not resolve the issue. We still must consider whether we could grant effective relief. First Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R. 284, 289 (9th Cir. BAP 1998). Based on the record before us, we conclude that no events or transactions have occurred that make it impossible for us to grant relief that is both effective and equitable.

The plan at issue is straightforward. There are no complicated transactions to unravel because, since confirmation, debtor has simply been making interest-only payments to its secured creditors and has paid 50% of the amount owed to its unsecured creditors. Further, the $200,000 cash payment which was paid to Todd does not require unraveling. Under the Modified Plan, debtor retained the power to sell its property, but the property has not been sold and remains available to satisfy the secured claims of CPB and Todd. Thus, debtor's payment to Todd simply means that it owes Todd $200,000 less in the event the property is sold.

Finally, CPB and Todd are parties to this appeal and debtor

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[9] We take judicial notice of the documents filed with the bankruptcy court through the electronic docketing system. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

has cash reserves that could easily pay the balance owed to unsecured creditors. In short, a reversal of the bankruptcy court's decision would not require any disgorgements nor would the rights of absent third parties be prejudiced.[10] Accordingly, we conclude that the appeal is not moot and we have jurisdiction to consider the merits of CPB's appeal.

B. The Fair And Equitable Requirement Under § 1129(b)(1)

Generally, a chapter 11 reorganization plan may be confirmed only with the assent of each class of impaired creditors. §§ 1126(c); 1129(a)(8). However, if an impaired class of creditors rejects a plan, the plan nonetheless may be confirmed if the other requirements of confirmation are met and the plan is "fair and equitable" under § 1129(b), the so-called "cramdown provision."

"Fair and equitable" treatment of CPB requires debtor to (1) provide for CPB to retain its lien on the property and (2) provide for payments that include an appropriate rate of interest so that CPB realizes the present value of its secured claim. § 1129(b)(2)(A). The first element is not at issue in this appeal because debtor's Modified Plan provided for CPB to retain its lien. Under the second element, two separate valuations are involved: "[f]irst, the court must determine the value of the creditor's collateral. Second, the court must determine the value of the deferred payments proposed by the

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[10] Rizzo's declaration also stated that Mark and Irma McClure pledged their third deed of trust as collateral to a third party. However, the pledge does not support debtor's mootness argument because there was no evidence in the record that the third party in any way relied upon the confirmed plan.

plan to determine whether the present value of such payments at least equals the value of the collateral." Wells Fargo Bank N.W. v. Yett (In re Yett), 306 B.R. 287, 291 (9th Cir. BAP 2004). CPB does not assign error to the court's decision concerning the first valuation – the value of the property.[11]

Under the second valuation determination, courts in the Ninth Circuit have used the "formula approach" to calculate a permissible cramdown rate of interest. The "formula" or "risk plus" method starts with a standard measure of risk free lending, such as the Prime Rate or the rate on treasury obligations, and adds an upward adjustment based on the debtor, the plan, and the security for the loan. Fowler, 903 F.2d at 697-99; United States v. Camino Real Landscape Maint. Contractors, Inc. (In re Camino Real Landscape Maint. Contractors, Inc.), 818 F.2d 1503, 1508 (9th Cir. 1987). Both debtor and CPB in their respective briefs accept the formula approach as applicable under these circumstances, relying on Till v. SCS Credit Corp., 541 U.S. 465 (2004)[12] and to a lesser

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[11] At the June 3, 2010 hearing, the bankruptcy court noted that there was not that much of a difference between the two appraisals – CPB's at approximately $19 million and debtor's at approximately $22 million. The court observed that an appraisal "is not an exact science" and that "we're looking at somewhere around $20 million dollars value." The attorney for CPB agreed that the value of the property "really [wasn't] a big issue."

[12] Till was a chapter 13 debtor and the cramdown interest rate pertained to a truck. Under Till, the court found that the appropriate interest on a secured claim is calculated based on the national Prime Rate and then adding a risk premium - to account for the dual risks of inflation and default, considering such issues as the nature of the security and duration and

(continued...)

extent on the Sixth Circuit's decision in American HomePatient, 420 F.3d at 567-68. In any event, the bankruptcy court's approach was consistent with Ninth Circuit precedent. Therefore, the applicability of the above mentioned authorities does not matter in the outcome of this appeal.

CPB's main complaint is that the bankruptcy court erred in its application of the formula by failing to properly assess the risks. In particular, CPB contends that the court did not give due consideration to the evidence they presented which demonstrated that a higher interest rate was warranted.

In support of this argument, CPB first points out that the bankruptcy court did not explain how it came up with the numbers that it did and cited no evidence to support them. We are unpersuaded with this argument because a bankruptcy court, as fact finder, does not need to enumerate all the minutiae in the evidence. Rather, it is enough that the court's findings are sufficiently explicit to provide us with a clear understanding of the basis for the cramdown interest determination. Fowler, 903 F.2d at 699. "The extent of findings required will vary depending on the circumstances of each case and the evidence presented in the bankruptcy court." Id. Under these circumstances and based on the evidence presented, we conclude that the bankruptcy court's findings were sufficiently explicit

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[12](...continued)
feasibility of the plan. 541 U.S. at 479. In passing, the court acknowledged the differences between cramdown loans in chapter 13 cases versus chapter 11 cases and suggested that it may be appropriate in the chapter 11 context for a court to determine the rate of interest in an "efficient" market, assuming such a market existed. Id. at 477 n.14.

to provide us with a basis for its decision.

The record shows that the parties' experts presented a range for the cramdown interest rate between 4.45% and 11.41% depending upon how the various risks were assessed. The court heard extensive testimony from debtor's expert, Kilkenny, who opined that an interest rate of 4.45% was appropriate for an interest-only $16.8[13] million loan, secured by collateral worth $22 million, with a seven-year balloon payment. Kilkenny testified that property values in the Santa Rosa area had somewhat stabilized, subject to what might happen in the economy in the future. He also testified that in determining the appropriate interest rate, he considered that the current lending market was looking for a 60% loan to value ("LTV") ratio. He viewed CPB as having a LTV of 72%, which was high.

Kilkenny testified that he added 50 basis points to the Prime Rate of 3.25% by considering "circumstances of the estate." These circumstances included how debtor evolved into bankruptcy, the nature of the tenants, and the current market conditions. He then added 25 basis points after considering the nature of the collateral, i.e., that the property was Class A, that it was new and in a desirable location, did not need repairs, and could accommodate larger vehicles, which was beneficial for the tenants who were mostly distribution type tenants. Kilkenny added another 25 basis points for plan feasibility after examining cash flow and considering the

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[13] Actually, the parties disputed the exact amount owed. Debtor contends that it owed CPB approximately $16.25 million and CPB contends debtor owed it $16.875 million.

experience of management.

Finally, he further added 20 basis points for plan duration. Kilkenny testified that he examined the original note which gave debtor an option of a "mini-perm" or extension of the loan for five years.[14] Therefore, Kilkenny opined that a five to seven year term for the type of loan at issue would not be "unusual." Further, he mentioned a report that showed 1.4 trillion dollars was coming due in the commercial real estate market between 2010 and 2014, of which 40% were underwater. Based on the report, Kilkenny stated that it made sense for debtor to go beyond 2014.

Ferrell, CPB's witness, testified regarding his opinion that the interest rate should be between 9.65% and 11.41%. Ferrell assigned the biggest risk enhancement to the security as between 440 and 615 basis points. Depending upon which appraisal was used, Ferrell testified that the risk went up when the property was valued at $19 million rather than $22 million because of the diminished equity cushion. On cross-examination, debtor's attorney attempted to discredit Ferrell's opinion regarding the security enhancement based on Ferrell's previous opinion with respect to the security enhancement component in another bankruptcy case where he used the same numbers for a

[14] The court questioned CPB's counsel regarding the mini-perm aspect of the note. Counsel argued that the five-year option was available under only very specified circumstances, certain loan to value, debt service coverage ration, etc. He stated that some of the conditions occurred, but many of them did not.

nearly vacant, aging office building in downtown Detroit.[15]

Ferrell also added 150 basis point for plan feasibility. In connection with feasibility, Ferrell relied on an economic report which optimistically predicted that there would be a 20% rebound in commercial real estate transactions in 2010 in the North Bay area. However, Ferrell also used his 9.65% interest rate to determine whether the plan would be feasible. He concluded that the plan would not be feasible because debtor would have a $625,000 cash shortfall the first year.

In applying the formula approach, the bankruptcy court appropriately considered what it viewed as the heightened risks associated with debtor and its property. We recognize that describing the positive and negative aspects of the collateral and debtor was not that difficult, but ascribing a particular number of basis points to the overall risk factor is easier said than done. The Ninth Circuit recognized this in Camino Real stating that "rough estimates are better than no estimates" and holding that they were willing to "rely on the expertise of the bankruptcy judge." 818 F.2d at 1508.

In light of these parameters, we conclude that the bankruptcy court's findings and upward adjustments to Kilkenny's

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[15] To the extent the bankruptcy court's findings rested on determinations regarding the credibility of the witnesses, we must give "even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Anderson, 470 U.S. at 575; see also Fed. R. Civ. P. 52(a) (made applicable by Fed. R. Bankr. P. 7052) (requiring the reviewing court to give due regard "to the trial court's opportunity to judge the witnesses' credibility."); Rule 8013 (same).

proposed interest rate were based on a plausible account of the evidence considered against the entirety of the record. Thus, we may not reverse the court even if we were convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson, 470 U.S. at 574.

CPB further contends that the court relied on speculation and its own views for its decision, rather than the evidence. CPB refers to the court's statement that "a plan which avoids a sale is generally in the best interests of the economy as a whole, as it results in one less property available for sale, thereby assisting in maintaining overall property value." CPB takes the court's statement out of context. At the August 5, 2010 hearing, there was a discussion on the record regarding whether it was improper for debtor to protect its equity even though the requirements for confirmation had otherwise been met. The court recognized that a debtor's solvency did not prevent confirmation of its plan as long as the plan was otherwise confirmable. "The whole idea is that in appropriate cases, even though we could sell, it's better for everybody if we don't." The court simply restated this view in its Memorandum Decision, albeit in connection to the economy as a whole. Under these circumstances, the court's statement is simply dicta.

In reality, CPB has steadily complained that the plan is not fair and equitable because debtor is solvent and could pay all non-insider creditors in full from a sale of its property now rather than making CPB wait seven years for its money.

However, the plain language of § 1129(b) requires that a creditor simply receive the "present value" of its secured claim for a cramdown confirmation to succeed – there is nothing in the Bankruptcy Code to suggest that this value should change with a debtor's level of financial solvency.

CPB also references the court's remark in its August 16, 2010 Memorandum Decision about the possibility that Congress would bail out the commercial real estate market rather than let it fail. Contrary to CPB's implication, we cannot reasonably infer that the court totally ignored the evidence presented and based its decision on a possible bail out. Therefore, we affirm because the court's decision is sustainable based on the evidence in the record, as discussed above. Warren, 568 F.3d at 1116.

In short, under the clearly erroneous standard of review, we are required to uphold the bankruptcy court's determination when it falls within a broad range of permissible conclusions. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). Further, in Till, the Supreme Court recognized that the factors relevant to the risk adjustment fell squarely within the bankruptcy court's area of expertise and noted that the court must "select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan." 541 U.S. at 479-80. Applying the foregoing authorities and standards, we conclude that there is nothing in the record before us that indicates the bankruptcy court's determination of the cramdown interest rate was completely outside the range of permissible conclusions.

C. The Good Faith Requirement Under § 1129(a)(3)

We do not have much to add on the topic of debtor's good faith because CPB has intertwined its arguments regarding the fair and equitable requirements with those for good faith. Suffice it to say that § 1129(a)(3) does not define good faith, but a plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Bankruptcy Code. Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074–75 (9th Cir. 2002).

The only basis for CPB's good faith argument is that debtor's Modified Plan places all the risk on CPB while leaving debtor solvent. However, insolvency is not a prerequisite to a finding of good faith under § 1129(a). Id. "In enacting the Bankruptcy Code, Congress made a determination that an eligible debtor should have the opportunity to avail itself of a number of Code provisions which adversely alter creditors' contractual and nonbankruptcy rights." Id.

Although the bankruptcy court did not make an explicit finding of good faith in its August 16, 2010 Memorandum Decision, its comments on the record demonstrate that it certainly recognized the tenets expressed in Sylmar. Debtor, solvent or not, simply did what it was entitled to do under the Code by meeting the requirements for confirmation of its plan. In short, CPB points to no evidence in the record which would support its argument that the requirements under § 1129(a)(3) were not met.

VI. CONCLUSION

For the reasons discussed above, we AFFIRM.