

APR 11 2011

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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NOT FOR PUBLICATION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. NV-10-1278-HKiD
)
 VDG CHICKEN, LLC,) Bk. No. 09-32607
)
 Debtor.)
 _____)
)
 2010-1 CRE VENTURE, LLC,)
 Successor-in-Interest to the)
 Federal Deposit Insurance)
 Corporation, Receiver for)
 Community Bank of Nevada,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 VDG CHICKEN, LLC; MRG-RC4,)
 LLC; JOE MICATROTTA; UNITED)
 STATES TRUSTEE,)
)
 Appellee.)
 _____)

Argued and Submitted on February 18, 2011
at Las Vegas, Nevada

Filed - April 11, 2011

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Appearances: _____
 John B. Marcin of Marcin Lambirth, LLP argued for
 the Appellant; Lenard E. Schwartzer of Schwartzer
 & McPherson Law Firm argued for Appellee VDG
 Chicken, LLC.

Before: HOLLOWELL, KIRSCHER, and DUNN, Bankruptcy Judges.

¹ 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.

1 Creditor 2010-1 CRE Venture, LLC, Successor-in-Interest to
2 the Federal Deposit Insurance Corporation, Receiver for
3 Community Bank of Nevada ("FDIC"), appeals the orders confirming
4 the debtor's chapter 11² plan of reorganization and denying
5 FDIC's motion for reconsideration. We AFFIRM.

6 **I. FACTS**

7 VDG Chicken, LLC ("Debtor") was formed on January 11, 2008,
8 by its principals, Chris Lattanzio and Matthew Bear, as well as
9 trusts under their control ("Principals"). Debtor was formed to
10 develop a single parcel of commercial property on Centennial
11 Center Boulevard in Las Vegas, Nevada ("Property").

12 On February 5, 2008, Debtor entered into a 20-year, triple-
13 net, build-to-suit lease with MRG-RC4, LLC ("Tenant"), for
14 \$24,909.51 per month, plus payment of all of the expenses on the
15 Property. The Tenant's obligations under the lease were
16 guaranteed by Joseph P. Micatrotto, Connie Micatrotto, and the
17 Micatrotto Restaurant Group, LLC. The Micatrotto Restaurant
18 Group operates five Raising Cane's Chicken Fingers restaurants
19 in Las Vegas. The Tenant has been current on its lease
20 payments.

21 On February 20, 2008, Community Bank of Nevada ("Bank")
22 made Debtor a construction loan of \$2,250,000 secured by a first
23 position deed of trust and an assignment of rents and leases on
24 the Property ("Bank Loan"). On June 11, 2008, the Bank advanced

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

1 Debtor an additional \$270,000 on the Bank Loan. The interest
2 rate during the term of the Bank Loan was prime plus 1%, and the
3 default rate was prime plus 5%. The Bank Loan was personally
4 guaranteed by the Principals. The Bank Loan included a covenant
5 that required Bank approval for an equity transfer of more than
6 50%.

7 On February 19, 2008, Tyrone Rowland Havas, Trustee of the
8 Tyrone R. Havas Defined Benefit Plan ("Havas Trust"), lent
9 Debtor \$250,000 secured by a second priority deed of trust on
10 the Property ("Havas Loan").

11 On September 15, 2008, Applecourt Ventures, LLC
12 ("Applecourt") loaned Debtor \$850,000 secured by a third deed of
13 trust on the Property ("Applecourt Loan"). Applecourt's equity
14 holders are the members of High Desert Investment Group, Inc.,
15 and its president, Eli Applebaum ("Applebaum"). Applebaum is
16 also the manager of Applecourt.

17 The Bank Loan matured in April 2009, but was extended until
18 June 30, 2009. At that time, Debtor owed the Bank approximately
19 \$2,460,000. After the Bank Loan matured, the Tenant paid rent
20 directly to the Bank. Those payments exceeded the amount owed
21 to the Bank at the default rate of the Bank Loan.

22 On May 5, 2009, the Principals transferred all their
23 membership interests in Debtor to Applecourt in order to satisfy
24 the Applecourt Loan. As a result, after May 5, 2009, Applecourt
25 held 100% of the equity interests in Debtor.³

26
27
28 ³ On November 25, 2009, Debtor's manager was changed to VDG
Chicken Management, LLC, an entity managed by Applebaum.

1 On August 9, 2009, the Bank failed and FDIC became the
2 receiver and successor-in-interest with respect to the Bank
3 Loan.⁴ FDIC refused to extend Debtor's Bank Loan past June 30,
4 2009.

5 On November 30, 2009, Debtor filed for chapter 11 relief.
6 Debtor's schedules listed one unsecured creditor and two secured
7 creditors, FDIC and the Havas Trust.⁵ Debtor filed its plan of
8 reorganization and disclosure statement on December 18, 2009.

9 On January 26, 2010, FDIC filed an opposition to the
10 disclosure statement. FDIC asserted, among other things, that
11 the disclosure statement did not adequately disclose information
12 about insiders and managing members and the amounts of their
13 claims. On February 2, 2010, Debtor filed an amended disclosure
14 statement ("Disclosure Statement") and an amended plan of
15 reorganization ("Plan").

16 The bankruptcy court heard arguments on the adequacy of the
17 Disclosure Statement on February 9, 2010 ("Disclosure Hearing").⁶
18 On February 24, 2010, the bankruptcy court approved the
19 Disclosure Statement ("Disclosure Order"). FDIC did not appeal
20 the Disclosure Order.

22 ⁴ Some time before FDIC filed its appeal, Debtor's Bank Loan
23 was sold to 2010-1 CRE Venture, LLC.

24 ⁵ We have taken judicial notice of the bankruptcy schedules.
25 See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
26 887 F.2d 955, 957-58 (9th Cir. 1989) (reviewing court may take
judicial notice of underlying bankruptcy documents).

27 ⁶ There is no transcript of the Disclosure Hearing on the
28 bankruptcy court's docket, nor has it been provided to the Panel
in the record on appeal.

1 On March 2, 2010, Debtor filed the Disclosure Statement
2 that was approved by the bankruptcy court and its Plan. The
3 Plan proposed to fully pay secured and unsecured creditors'
4 claims from Tenant's \$24,909.51 monthly rental payments as
5 follows:

- 6 • Treat the Bank Loan of \$2,420,000⁷ as a fixed 10-year
7 loan with monthly payments amortized over 30 years at
8 6% interest, resulting in monthly payments of \$14,514,
9 with any remaining balance payable in full at the end
10 of the 10-year term;
- 11 • Convert the Havas Loan of \$290,000 into a 22.72%
12 equity interest in Debtor;
- 13 • Convert the Applecourt Loan of \$850,000 into a 77.28%
14 equity interest in Debtor;
- 15 • Fully pay the general unsecured creditor without
16 interest at a rate of \$500 each month pro rata for
17 approximately 30 months; and
- 18 • Fully pay all administrative expenses on the effective
19 date of the Plan.

20 FDIC opposed the Plan, contending it was proposed in bad
21 faith, not feasible, and not fair or equitable. FDIC contended
22 the Plan was filed in bad faith because the Disclosure Statement
23 did not provide sufficient information about Debtor's managing
24 members and that the equity ownership in Debtor had changed in
25 violation of the loan covenants "shortly before" the bankruptcy.
26 FDIC asserted that Debtor did not prove it could repay the
27 balloon payment at the end of the 10-year term. Additionally,
28 FDIC contended that the Plan was not fair and equitable because
the default interest rate should have been applied and amortized
over 20 years and the entire balance should have been paid in

⁷ FDIC stipulated that its claim did not exceed \$2,500,000.

1 four years rather than ten.

2 On May 5, 2010, the bankruptcy court held a contested
3 confirmation hearing ("Plan Hearing"). At the Plan Hearing,
4 FDIC did not dispute an appraisal of the Property which set its
5 value at between \$3,250,000 and \$3,500,000. Debtor estimated
6 that the liquidation value of the Property was \$2,500,000, which
7 was equal to or more than FDIC's claim. At the conclusion of
8 the Plan Hearing, the bankruptcy court orally announced its
9 findings of fact and conclusions of law. The bankruptcy court
10 overruled FDIC's objections and concluded that Debtor had
11 satisfied the elements for confirmation under §§ 1129(a) and
12 (b). A confirmation order was entered on May 18, 2010 ("Plan
13 Confirmation Order").

14 On June 1, 2010, FDIC filed a motion for reconsideration
15 ("Reconsideration Motion"), which was denied on July 7, 2010.
16 FDIC timely appealed.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C.
19 §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C.
20 § 158.

21 **III. ISSUES**

22 A. Did the bankruptcy court err when it confirmed Debtor's
23 Plan?

24 B. Did the bankruptcy court err when it denied the
25 Reconsideration Motion?

26 **IV. STANDARDS OF REVIEW**

27 "The ultimate decision to confirm a reorganization plan is
28 reviewed for an abuse of discretion." Computer Task Grp., Inc.

1 v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003).

2 A determination that a plan meets the requisite standards for
3 confirmation necessarily requires the bankruptcy court to make
4 certain factual findings and interpret the law. Id.

5 Accordingly, whether a plan is filed in bad faith, feasible, or
6 fair and equitable, are factual findings reviewed for clear
7 error. Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th
8 Cir. 1994); Acequia, Inc. v. Clinton (In re Acequia, Inc.),
9 787 F.2d 1352, 1358 (9th Cir. 1986); Pizza of Haw., Inc. v.
10 Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1377
11 (9th Cir. 1985).

12 Compliance with the disclosure requirements of § 1125 is
13 also a mixed question of law and fact that is reviewed de novo;
14 however, issues identifiable solely as factual issues are
15 reviewed for clear error. In re Brotby, 303 B.R. at 184; Duff
16 v. U.S. Trustee (In re Cal. Fiduciary, Inc.), 198 B.R. 567, 570
17 (9th Cir. BAP 1996) (citing Rose v. United States, 905 F.2d
18 1257, 1259 (9th Cir. 1990) (to the extent an issue within a
19 mixed question is one of fact, it is subject to the clearly
20 erroneous standard of review)).

21 A factual finding is clearly erroneous when "although there
22 is evidence to support it, the reviewing court on the entire
23 evidence is left with the definite and firm conviction that a
24 mistake has been committed." Anderson v. City of Bessemer City,
25 N.C., 470 U.S. 564, 573 (1985); see also United States v. Loew,
26 593 F.3d 1136, 1139 (9th Cir. 2010); United States v. Hinkson,
27 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc) (holding that a
28 court's factual determination is clearly erroneous if it is

1 illogical, implausible, or without support in the record).

2 We follow a two-part test to determine objectively whether
3 the bankruptcy court abused its discretion. United States v.
4 Hinkson, 585 F.3d at 1261-63. First, we determine de novo
5 whether the bankruptcy court identified the correct legal rule
6 to apply to the relief requested. Id. If it did, we next
7 determine whether the bankruptcy court's application of the
8 correct legal standard to the evidence presented was
9 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
10 inferences that may be drawn from the facts in the record.'" Id.
11 Id. at 1262 (citation omitted). If any of these three apply, we
12 may conclude that the court abused its discretion. Id.

13 A bankruptcy court's denial of a motion for reconsideration
14 is reviewed for an abuse of discretion. Zimmerman v. City of
15 Oakland, 255 F.3d 734, 737 (9th Cir. 2001).

16 V. DISCUSSION

17 A. The Bankruptcy Court Did Not Abuse Its Discretion In 18 Confirming The Plan.

19 The proponent of a chapter 11 plan must satisfy, by a
20 preponderance of the evidence, the requirements of § 1129.
21 United States v. Arnold & Baker Farms (In re Arnold & Baker
22 Farms), 177 B.R. 648, 654 (9th Cir. BAP 1994), aff'd, 85 F.3d
23 1415 (9th Cir. 1996), cert. denied, 519 U.S. 1054 (1997). FDIC
24 contends that the Plan failed to satisfy § 1129 because it was
25 not proposed in good faith, was not feasible, and was not fair
26 and equitable. See 11 U.S.C. §§ 1129(a)(3), (a)(11), (b).

1 1. Good Faith

2 A determination of good faith is made on a case-by-case
3 basis taking into account the totality of the circumstances of
4 the case and considering whether the plan will fairly achieve a
5 result consistent with the objectives and purposes of the
6 Bankruptcy Code. Platinum Capital, Inc. v. Sylmar Plaza, L.P.
7 (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074-75 (9th Cir.
8 2002); Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.),
9 84 B.R. 167, 171-72 (9th Cir. BAP 1998). FDIC argues that
10 Debtor's Plan failed to satisfy § 1129(a)(3) because the
11 Disclosure Statement and Plan contained inadequate information
12 and because the case suffered from "new debtor syndrome."

13 FDIC argues that the Disclosure Statement did not provide
14 adequate information about Debtor's new manager, Applebaum, such
15 as his social security number and personal financial
16 information. It contends that this lack of information
17 disadvantaged creditors.

18 Section 1125 requires the disclosure of adequate
19 information to those who are entitled to accept or reject the
20 plan. "Adequate information" is:

21 . . . information of a kind, and in sufficient detail, as
22 far as is reasonably practicable in light of the nature and
23 history of the debtor and the condition of the debtor's
24 books and records, including a discussion of the potential
25 material Federal tax consequences of the plan to the
26 debtor, any successor to the debtor, and a hypothetical
27 investor of the relevant class to make an informed judgment
28 about the plan. . . .

11 U.S.C. § 1125(a)(1).

27 Adequate information is "a flexible concept that permits
28 the degree of disclosure to be tailored to the particular

1 situation." Official Committee of Unsecured Creditors v.
2 Michelson (In re Michelson), 141 B.R. 715, 718-19 (Bankr. E.D.
3 Cal. 1992). However, at an "irreducible minimum," a disclosure
4 statement must provide information about the plan and how its
5 provisions will be effected. Id. What is adequate is a
6 subjective determination to be made on a case-by-case basis.
7 In re Brotby, 303 B.R. at 193 (quoting In re Tex. Extrusion
8 Corp., 844 F.2d 1142, 1157 (5th Cir. 1988)).

9 There is no transcript available of the Disclosure Hearing,
10 where the bankruptcy court made oral findings of fact and
11 conclusions of law that supported the Disclosure Order. In its
12 objection to the Disclosure Statement, FDIC argued that there
13 was insufficient information about Debtor's managers, but did
14 not raise specific concerns about the lack of Applebaum's
15 personal information. Debtor argues FDIC's failure to do so
16 constitutes a waiver of that issue.⁸ Because there is no record
17 to demonstrate that FDIC raised the lack of Applebaum's personal
18 information at the Disclosure Hearing, FDIC waived the issue.

19 Even if the argument was not waived, we find no abuse of
20 discretion in the bankruptcy court's determination that the
21 Disclosure Statement was adequate. At the Confirmation Hearing,
22 the bankruptcy court considered FDIC's argument that creditors
23 typically rely on a borrower's personal financial information;
24 however, it found that FDIC's discomfort about the lack of
25 Applebaum's personal information was relevant "only to the
26

27
28 ⁸ FDIC did not challenge the bankruptcy court's findings of
fact or conclusions of law that supported the Disclosure Order.

1 extent that the elements of its discomfort are the elements of
2 fair and equitable."

3 We agree with the bankruptcy court because the Bankruptcy
4 Code ordinarily does not require the disclosure of personal
5 financial information of insiders. In re Michelson, 141 B.R. at
6 718. The Disclosure Statement properly identified Applebaum as
7 an insider of Applecart and disclosed that Applecart was the
8 equity owner of Debtor. Applebaum was not the borrower on the
9 Bank Loan. The record reflects that Applebaum was not going to
10 be an on-site manager of the reorganized Debtor. His role was
11 primarily to receive and distribute rental income from his
12 office in New York. Therefore, we conclude the bankruptcy court
13 did not err in its determination that the Disclosure Statement
14 was adequate and complied with the good faith requirement of
15 § 1129(a)(3).

16 Another basis for FDIC's claim that the Plan was proposed
17 in bad faith was its assertion that Debtor's case contained the
18 hallmarks of "new debtor syndrome." Contrary to FDIC's
19 assertion, the "new debtor syndrome" does not apply in this
20 case. See Duvar Apt. v. FDIC (In re Duvar Apt.), 205 B.R. 196,
21 200 (9th Cir. BAP 1996). In In re Duvar Apt., the debtor filed
22 chapter 11 after he created a shell corporation and transferred
23 ownership in a distressed property to the corporation, without
24 consideration, for the purpose of retaining the property and
25 avoiding personal liability. Id. at 201.

26 Unlike the debtor in In re Duvar Apt., who parked a debt in
27 a newly created entity for personal protection and to abuse the
28 purposes of the Bankruptcy Code, Debtor, here, provided

1 consideration for the transfer of ownership by exchanging the
2 Applecart Loan for an equity interest in Debtor. The transfer
3 of interest in Debtor occurred after the Bank Loan matured and
4 seven months before the petition was filed.

5 The bankruptcy court found that "the change of ownership
6 was perfectly appropriate under the circumstances and that there
7 was no ulterior motive or no intent to harm the holder of the
8 loan originated by Community Bank." Additionally, it found that
9 there was no evidence demonstrating that the secured creditor
10 was harmed by the equity transfer. On review, we perceive no
11 error in the bankruptcy court's findings that § 1129(a)(3) was
12 satisfied because the pre-petition transfer of Debtor's equity
13 interests occurred months after the Bank Loan matured, the
14 transfer was not forbidden by the Bankruptcy Code, and the
15 transfer of the equity was commercially reasonable because
16 consideration was paid.

17 2. Feasible

18 FDIC argues the Plan is not feasible because there was no
19 evidence that Debtor would be able to make the balloon payment
20 required by the Plan. Under the feasibility requirement of
21 § 1129(a)(11), a debtor must demonstrate that the plan "has a
22 reasonable probability of success." Acequia, Inc. v. Clinton
23 (In re Acequia, Inc.), 787 F.2d 1352, 1364 (9th Cir. 1986).

24 Bankruptcy courts consider several factors when evaluating
25 the feasibility of a plan, including: (1) the adequacy of the
26 capital structure; (2) the earning power of the business;
27 (3) economic conditions; (4) the ability of management; (5) the
28 probability of the continuation of the same management; and

1 (6) any other related matters which determine the prospects of a
2 sufficiently successful operation to enable performance of the
3 provisions of the plan. Wiersma v. O.H. Kruse Grain & Milling
4 (In re Wiersma), 324 B.R. 92, 113 (9th Cir. BAP 2005), rev'd on
5 other grounds, 483 F.3d 933 (9th Cir. 2007).

6 Additionally, a plan that proposes a final balloon payment
7 requires credible evidence that obtaining future financing is
8 reasonably likely. F.H. Partners, L.P. v. Inv. Co. of the Sw.,
9 Inc. (In re Inv. Co. of the Sw., Inc.), 341 B.R. 298, 311, 313-
10 14, 316-17 (10th Cir. BAP 2006) (finding plan not feasible when
11 debtor had negative and uncertain cash flow with which to fund
12 proposed balloon payment).

13 FDIC relies on First Nat'l Bank v. Fantasia (In re
14 Fantasia), 211 B.R. 420 (1st Cir. BAP 1997), to support its
15 contention that Debtor failed to prove the feasibility of the
16 Plan because it did not demonstrate exactly how it would make
17 the balloon payment in 10 years. The First Circuit BAP, in
18 In re Fantasia, found a debtor's chapter 13 plan, which
19 restructured rental property debt, not feasible because the
20 property lacked equity, had uncertain cash flow and occupancy,
21 and because there was no evidence presented to suggest the
22 debtor could make the proposed balloon payment from other
23 assets. Id. at 423-25.

24 Here, the parties stipulated that Debtor could make the
25 Plan payments over the 10-year life of the Plan because the
26 Tenant personally guaranteed the triple-net lease for 20 years.
27 The Bank Loan was also secured by a high loan-to-value ratio.
28 Furthermore, there was testimony that, in a normal market,

1 lenders would compete to do business with Debtor because the
2 long-term Tenant's business was profitable and stable.
3 Therefore, the bankruptcy court found that it could reasonably
4 infer that the proposed balloon payment would be made through a
5 refinancing of the Bank Loan or sale of the Property. The
6 finding is supported by the evidence in the record, and is
7 neither implausible nor illogical.

8 3. Fair and Equitable

9 The bankruptcy court may confirm a plan without the consent
10 of an impaired class of secured creditors if the plan meets the
11 cramdown provisions of § 1129(b). Varela v. Dynamic Brokers,
12 Inc. (In re Dynamic Brokers, Inc.), 293 B.R. 489, 498 (9th Cir.
13 BAP 2003). A plan proposing a cramdown of a secured claim may
14 be confirmed if the plan is fair and equitable with respect to
15 the objecting class. 11 U.S.C. § 1129(b)(1).

16 Fair and equitable treatment of a secured creditor requires
17 that the creditor retain the lien securing its claim
18 (§ 1129(b)(2)(A)(i)(I)) and that the creditor receive deferred
19 cash payments with a present value at least equal to the value
20 of its claim (§ 1129(b)(2)(A)(i)(II)). In re Arnold & Baker
21 Farms, 85 F.3d at 1420. Deferred cash payments to an impaired
22 class must be valued as of the effective date of the plan and
23 "consist of an appropriate interest rate and an amortization of
24 the principal which constitutes the secured claim." Heartland
25 Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe
26 Enters), 994 F.2d 1160, 1169 (5th Cir. 1993).

27 The bankruptcy court found that the Plan met the
28 requirement under § 1129(b)(2)(A)(i)(I) because "[t]he lien

1 stays in place and on the property that exists." The bankruptcy
2 court also found that the Plan met the present value
3 requirements of § 1129(b)(2)(A)(i)(II).

4 The Property was valued at between \$3,250,000 and
5 \$3,500,000⁹ and FDIC stipulated to a maximum claim of \$2,500,000.
6 Thus, at confirmation, FDIC had "something close to a 70-percent
7 loan-to-value ratio." The Plan proposed to pay the FDIC monthly
8 cash payments of \$14,514, which was based on a 30-year
9 amortization schedule at 6% interest. At the end of 10 years,
10 Debtor would owe FDIC approximately \$1,700,000. By that time,
11 the Tenant would have paid Debtor approximately \$2,989,141,
12 which exceeds the value of FDIC's maximum claim. Furthermore,
13 the Tenant's lease term would not have expired at the end of the
14 10-year term, so Debtor would still have an income stream.

15 Therefore, the bankruptcy court found that "under those
16 circumstances even under this unusual real estate market one can
17 say that the value of the residual there is going to be equal to
18 or at least exceeding whatever the FDIC is owed at that point."
19 The bankruptcy court found that although the Plan did not
20 explain what would happen upon the termination of the 10-year
21 term, it could be "fairly inferred that the debt will either be
22 refinanced or the property sold at some point." We agree with
23 the bankruptcy court's findings given that Debtor's residual
24 value would at least equal the value of FDIC's claim at the end
25 of 10 years.

26 FDIC relies on Imperial Bank v. Tri-Growth Centre City,
27

28 ⁹ FDIC did not contest the Property value.

1 Ltd. (In re Tri-Growth Centre City, Ltd.), 136 B.R. 848, 852
2 (Bankr. S.D. Cal. 1992), to support its argument that fair and
3 equitable treatment required that the Plan offer faster
4 amortization and a shorter term so that the risks of operating
5 real estate under a long-term lease would not be unfairly
6 shifted to FDIC. Unlike the situation in Tri-Growth Centre
7 City, Ltd., FDIC is oversecured and Debtor's income exceeds the
8 proposed Plan payments to FDIC. Moreover, there was testimony
9 at the Confirmation Hearing stating that a 10-year loan term was
10 appropriate.

11 The bankruptcy court, using a formula approach, determined
12 that a 6% interest rate for the flow of payments to FDIC was
13 appropriate. That approach is consistent with the holding of
14 Till v. SCS Credit Corp., 541 U.S. 465, 476 n.14 (2004).

15 In deciding on an interest rate in a chapter 11 case,
16 a bankruptcy court should apply the market rate of
17 interest where there exists an efficient market. And,
18 when no efficient market exists for a Chapter 11
debtor, then the Bankruptcy Court should employ the
formula approach endorsed by the Till plurality.
19 Mercury Capital Corp. v. Milford Conn. Assocs., L.P., 354 B.R.
20 1, 11-12 (D. Conn. 2006)(internal quotations and citations
21 omitted); Bank of Montreal v. Official Comm. of Unsecured
22 Creditors (In re Am. Homepatient, Inc.), 420 F.3d 559 (6th Cir.
23 2005)) (finding the bankruptcy court did not err as a matter of
24 law when it applied the Till formula to a chapter 11 cramdown).¹⁰

25
26 ¹⁰ This approach has been used by many courts in chapter 11
27 cases and has been widely discussed. For a discussion of trends
28 following Till, see generally Gary W. Marsh & Matthew M. Weiss,
Chapter 11 Interest Rates After Till, 84 AM. BANKR. L.J. 209

(continued...)

1 The bankruptcy court considered testimony regarding the
2 efficiency of the market and the national prime rate, as
3 required by Till. Id. at 11-13. First, the bankruptcy court
4 found that traditional lenders were unavailable to provide term-
5 loans after construction loans matured. The bankruptcy court
6 found that a rate of 6% was reasonable because (1) it is 100-200
7 basis points above the current rate for 10-year treasuries; and,
8 (2) consistent with expert testimony that reasonable rates,
9 considering the risk, were between 4.59% and 6.09%.

10 As a result, the bankruptcy court determined that under the
11 Plan, FDIC would receive payments totaling the present value of
12 its claim. The bankruptcy court's findings are supported by the
13 record. Accordingly, the bankruptcy court did not err in
14 concluding that Debtor's Plan complied with the requirements for
15 confirmation under § 1129(b) and did not abuse its discretion in
16 entering the Confirmation Order.

17 **B. The Bankruptcy Court Did Not Abuse Its Discretion In**
18 **Denying The Reconsideration Motion.**

19 The bankruptcy court has wide discretion in deciding
20 whether to reconsider its own judgment or orders. A motion for
21 reconsideration should not be granted absent highly unusual
22 circumstances. Orange St. Partners v. Arnold, 179 F.3d 656, 665
23 (9th Cir. 1999). Amendment or alteration of a judgment is
24 appropriate under Fed. R. Civ. P. 59(e) only if the court (1) is

25
26 ¹⁰(...continued)
27 (Spring 2010) (review of development of cramdown interest rates
28 since 2004); C.B. Reehl & Stephen P. Milner, Chapter 11 Real
Estate Cram-down Plans: The Legacy of Till, 30 CAL. BANKR. J. 405
(2010).

1 presented with newly discovered evidence that was not available
2 at the time of the original hearing, (2) committed clear error
3 or made an initial decision that was manifestly unjust, or
4 (3) there is an intervening change in controlling law. Id.;
5 Zimmerman, 255 F.3d at 740. A motion for reconsideration is not
6 permitted to rehash the same arguments made the first time or to
7 simply express an opinion that the bankruptcy court was wrong;
8 or, to assert new legal theories that could have been raised
9 before the initial hearing. In re Greco, 113 B.R. 658, 664
10 (D. Haw. 1990), aff'd and remanded, Greco v. Troy Corp., 952
11 F.2d 406 (9th Cir. 1991).

12 FDIC's Reconsideration Motion did not present the
13 bankruptcy court with new arguments or newly discovered
14 evidence. FDIC simply reasserted its argument that the
15 Disclosure Statement was inadequate and that its treatment in
16 the Plan was not fair or equitable. As discussed above, the
17 bankruptcy court addressed these issues, finding that the Plan
18 met the requirements of § 1129. We do not find any error in the
19 bankruptcy court's findings. Because we have concluded that the
20 bankruptcy court did not abuse its discretion in entering the
21 Confirmation Order, it follows that it did not commit manifest
22 injustice by denying the Reconsideration Motion.

23 VI. CONCLUSION

24 For the reasons stated above, we AFFIRM.
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