

APR 05 2012

SUSAN M SPRAUL, CLERK
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NOT FOR PUBLICATION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. AZ-11-1091-PaDJu and
) AZ-11-1092-PaDJu
DEED AND NOTE TRADERS, LLC,)
) (Consolidated)
Debtor.) Bk. No. 10-03640

PNC MORTGAGE; BAC HOME LOANS)
SERVICING, LP, fka)
Countrywide Home Loans)
Servicing, L.P.; U.S. BANK,)
N.A.; AMERICA'S SERVICING)
COMPANY; WELLS FARGO BANK,)
N.A.; FLAGSTAR BANK, FSB;)
CHASE HOME FINANCE, LLC; THE)
BANK OF NEW YORK MELLON, fka)
The Bank of New York; DEUTSCHE)
BANK NATIONAL TRUST COMPANY;)
LITTON LOAN SERVICES;)
CITIBANK, N.A.; ONEWEST BANK,)
FSB; AURORA LOAN SERVICES,)
LLC; HSB MORTGAGE SERVICES;)
HSBC BANK USA, N.A.,)

Appellants,)

v.)

MEMORANDUM¹

DEED AND NOTE TRADERS, LLC,)

Appellee.)

Argued and Submitted on February 24, 2012
at Phoenix, Arizona

Filed - April 5, 2012

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

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

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
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

Appearances: David W. Cowles of Tiffany & Bosco, P.A. argued for Appellants Wells Fargo Bank, N.A., Chase Home Finance, LLC, Litton Loan Services, Deutsche Bank National Trust Company, U.S. Bank National Association, BAC Home Loans Servicing, LP, America's Servicing Company, PNC Mortgage, Flagstar Bank, FSB and The Bank of New York Mellon. Jessica R. Kenney of McCarthy, Holthus & Levine argued for Appellant Aurora Loan Services, LLC. Scott D. Gibson of Gibson, Nakamura & Green, PLLC argued for Appellee Deed and Note Traders, LLC.

Before: PAPPAS, DUNN and JURY, Bankruptcy Judges.

Appellants appeal the order of the bankruptcy court confirming the chapter 11² plan of reorganization filed in this case by debtor Deed & Note Traders, LLC ("DNT"). We AFFIRM.

FACTS

DNT is an Arizona limited liability company that was formed in 1993. Since then, it has engaged in the real estate business in Tucson, Arizona, purchasing, rehabilitating, leasing and selling residential properties. DNT is wholly owned by the Kinas Family Trust, and David Kinas ("Kinas") is the principal manager.

DNT financed the acquisition of its properties using its own operating income and through the many loans it obtained from individual investors. These were generally short-term, high interest loans. It was DNT's business practice to hold a

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. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 property for about a year, during which time it would
2 rehabilitate the property, and then refinance the loan with
3 traditional lenders at market rates. As property values
4 increased, DNT would also sell property in its inventory at a
5 profit.

6 In December 2006, the Arizona attorney general investigated
7 the business practices of DNT and, after lengthy negotiations,
8 DNT and the state entered into a Consent Agreement. Under the
9 terms of the agreement, DNT was obliged to sell a number of
10 houses back to their original owners and "agreed to pay a large
11 sum as and for attorney fees incurred by the state." These
12 payments and transactions occurred at the beginning of a
13 declining real estate market and, according to DNT, practically
14 eliminated any operating reserves previously held by DNT. DNT's
15 financial problems were exacerbated in August 2007 when First
16 Magnus Financial Corporation, a large provider of traditional and
17 other residential loan programs in Arizona, shut down and filed
18 for bankruptcy.

19 **DNT's First Bankruptcy Case**

20 The combination of fines, the loss of funding sources for
21 buyers from DNT's inventory, and the corresponding loss of sales
22 revenue caused DNT to file its first petition for protection
23 under chapter 11 on September 7, 2007. On September 20, 2007,
24 DNT filed its schedules in which it listed a total of
25 \$40,581,976.00 in real property assets and \$29,807,073.00 in
26 secured claims against those properties. The total unsecured
27 debt was \$706,208.12, most of which was debt held by insiders and
28 the secured creditors.

1 DNT filed its plan and disclosure statement on December 26,
2 2007; the plan was amended on April 24 and May 22, 2008. We
3 refer to the twice-amended plan as the "First Plan." All claims
4 of the appellants in this appeal were classified as Class 4
5 Secured Claims in the First Plan. These claims were to be
6 treated as follows:

7 - All claimants would retain their respective security
8 interests on the properties securing their claims.

9 - The arrears on these claims, together with accrued unpaid
10 interest at the contract rate, were added to the principal
11 balance on the secured debts as of the effective date of the
12 plan. This amount (i.e., the arrears plus the unpaid principal
13 balance) was the new "outstanding balance" on the secured
14 creditors' claims.

15 - The claimants would receive monthly deferred interest-only
16 payments on the outstanding balance. The interest accruing on
17 the outstanding balance was based on the published 30-year
18 residential mortgage rate for the Tucson area provided on the
19 internet website, bankrate.com, from and after the effective
20 date.

21 - The claims would be paid in full by DNT, either at the
22 time of sale of the secured property or upon refinancing the
23 obligation, or on or before a stated maturity date. The maturity
24 date for first-priority liens was the seventh anniversary of the
25 effective date; the maturity date for any junior liens was the
26 fifth anniversary.

27 On September 16, 2008, DNT reported to the bankruptcy court
28 that all objections to the First Plan had been resolved by

1 stipulation. The bankruptcy court entered an order confirming
2 the First Plan on October 23, 2008. The effective date was
3 November 3, 2008.

4 In the year after the effective date, there were almost a
5 hundred motions for relief from stay, notices of default, or
6 associated pleadings filed by secured creditors alleging DNT's
7 failure to make monthly payments under the First Plan. Many of
8 these motions were granted. However, the record contains no
9 information regarding foreclosures or other actions taken by the
10 Class 4 Secured Creditors.

11 On March 9, 2009, DNT filed a motion for entry of a Final
12 Decree and Order Closing Case in the bankruptcy case. Three
13 creditors who are not involved in this appeal (the "Cherry
14 Group") filed objections to the entry of final decree, arguing
15 that DNT had failed to make payments under the First Plan and
16 other irregularities. On May 4, 2009, the Cherry Group filed a
17 motion asking the bankruptcy court to revoke the order confirming
18 the First Plan on generally the same grounds as their objections
19 to final decree. The bankruptcy court ordered that the motion to
20 revoke and DNT's motion for a final decree be considered at a
21 hearing on September 2, 2009.

22 At that hearing, counsel for DNT and the Cherry Group
23 jointly informed the bankruptcy court that the Cherry Group was
24 withdrawing the motion to revoke the confirmation order and the
25 objections to entry of a final decree. DNT represented that it
26 would prepare the order for the final decree.

27 Before entry of any final decree, appellant Wells Fargo,
28 N.A., moved to convert the bankruptcy case to a chapter 7 case on

1 November 11, 2009. Wells Fargo alleged, inter alia, that there
2 had been mismanagement of estate funds by DNT and diversion of
3 assets to insiders, and that DNT's actions constituted a material
4 default under the First Plan. After multiple continuances, the
5 bankruptcy court held a hearing on the motion to convert on
6 January 5, 2010. Again, at the hearing, counsel for the parties
7 informed the court that the issues had been resolved. A joint
8 stipulation withdrawing the motion to convert was entered on
9 February 5, and approved by the bankruptcy court on February 8,
10 2010. As all objections and impediments to entry of a final
11 decree had been overcome, on February 8, 2010, the bankruptcy
12 court also entered the final decree and order closing the case.

13 **DNT's Second Bankruptcy Case**

14 Only four days after entry of the final decree and order
15 closing the case in the first bankruptcy case, on February 12,
16 2010, DNT filed a second chapter 11 petition. DNT's schedules,
17 filed on March 16, 2010, list \$19,858,452.00 in real property
18 assets and \$27,085,119.94 in secured claims on those properties.
19 Total unsecured debt was \$591,935.88.

20 DNT proposed a plan of reorganization in the second
21 bankruptcy case on April 2, 2010 (the "Second Plan"). The only
22 significant difference between the First and Second Plans, as the
23 parties have acknowledged in this appeal, was DNT's proposal to
24 reduce the Class 4 Secured Creditors' allowed claims to the
25 "market value" of the properties securing those claims as of the
26 effective date of the plan. In other words, the Second Plan

1 proposed to "cramdown"³ these claims.

2 The Appellants, each holding loans secured by separate
3 properties, filed ten motions to dismiss the second bankruptcy
4 case on May 21, 2010. These motions argued in identical language
5 that DNT's Second Plan violated § 1127(b), and the principle of
6 finality of orders, and that DNT was attempting to circumvent the
7 prohibition on modification of a confirmed, substantially
8 consummated plan by a subsequent chapter 11 case.

9 In addition to the dismissal motions, over the next few
10 months, over sixty objections to confirmation of the Second Plan
11 were filed by creditors, including all of the Appellants. These
12 objections to confirmation generally parroted the arguments made
13 by the Appellants in the motions to dismiss.

14 The bankruptcy court held several hearings on the motions to
15 dismiss and confirmation of the Second Plan, beginning in
16 August, and culminating on December 22, 2010.⁴ Before the
17 December 22 hearing, DNT had submitted a unilateral offer to
18 amend the plan so as to not cramdown on six of the ten loans
19 involved in the motions to dismiss, and either to abandon those
20 properties or consent to relief from stay in favor of the secured
21 creditor. As to the remaining four loans and properties

23 ³ "Cramdown" is a bankruptcy term of art referring to a
24 proposal to confirm a reorganization plan without the consent,
25 and frequently over the objection, of the secured creditors. See
26 Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R.
25, 50 (9th Cir. BAP 2008).

27 ⁴ For reasons unknown, the transcript of the December 22,
28 2010 hearing is the only one provided by the parties to the Panel
in the excerpts of record or docket.

1 pertaining to creditors filing motions, DNT indicated its
2 position that the properties were worth more than the amount of
3 the respective debts secured by them, such that the creditors'
4 rights were thus not impaired under the Second Plan.

5 At the hearing, after counsel were heard, the bankruptcy
6 court denied the motions to dismiss the bankruptcy case,
7 concluding that, as the result of DNT's amendment, none of the
8 secured creditors were impaired under the Second Plan. The
9 denial of these motions to dismiss was not appealed.

10 The bankruptcy court then conducted an evidentiary hearing
11 on plan confirmation. The court heard testimony from Kinas
12 regarding his management of DNT, why DNT failed to meet its
13 obligations under the First Plan, and the requirements for
14 confirmation of the Second Plan. Kinas was then cross-examined
15 by attorneys for various creditors. After hearing the testimony
16 and closing arguments of counsel, the bankruptcy court overruled
17 the objections to confirmation and confirmed the Second Plan.

18 In its oral decision, the bankruptcy court first observed
19 that, in its earlier ruling denying the motions to dismiss, it
20 had not commented on the focus of the secured creditors'
21 argument, that DNT was attempting to violate § 1127(b). The
22 bankruptcy court rejected this argument and found that DNT was
23 not attempting to thwart the First Plan's treatment of over-
24 secured creditors because the Second Plan treated them no
25 differently. Simply put, as to over-secured creditors, the court
26 concluded that they were not significantly impaired under either
27 Plan, and that DNT had not violated § 1127(b) and the principle
28 of finality of confirmation orders regarding those creditors.

1 As the court then observed, DNT's proposed cramdown of the
2 claims of under-secured creditors was a different matter:

3 A more difficult call is for the properties and the
4 creditors secured by those properties who were not
5 crammed down in the first case and are being crammed
6 down in the second case, all of the arguments about
7 1127 and 1141 clearly the debtor here is seeking a
8 modification of the terms of the first plan. The
9 question is - is it justifiable[?] Is it justifiable?
10 And if it's justifiable, is the treatment being offered
11 to these creditors in good faith? That it seems to me
12 is the crux of the difficult decision here. I look at
13 this under the totality of the circumstances test, I
14 believe, for good faith. So the plan terms are short
15 basically. This is not an extended period of time of a
16 stretch out. The interest rate isn't being modified
17 from the first plan. Those are good things. It's the
18 cramdown itself which is the essence of the problem.
19 But unlike the few cases I've been able to find on
20 this, I'm not sure this is a situation where all of the
21 burden is being shifted to the secured creditors
22 because, in fact, all they were ever going to get is
23 the value of the property because of the nature of the
24 anti-deficiency statute in Arizona. I believe that the
25 debtor has met its burden here, but I would say it's a
26 very, very close call.

16 The bankruptcy court decided that the Second Plan should be
17 confirmed, and the objections to confirmation overruled. It
18 entered an order confirming the Second Plan on February 10, 2011.
19 Appellants filed a timely appeal on February 24, 2011.

20 JURISDICTION

21 The bankruptcy court had jurisdiction under 28 U.S.C.
22 §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C.
23 § 158.

24 ISSUE

25 Whether the bankruptcy court abused its discretion in
26 confirming the Second Plan.

27 Whether the bankruptcy court clearly erred in determining
28 that the Second Plan was filed in good faith as required under

1 § 1129(a)(3).

2 **STANDARDS OF REVIEW**

3 While a bankruptcy court's decision to confirm a chapter 11
4 plan is reviewed for an abuse of discretion, its determination
5 that the plan satisfies the confirmation requirements necessarily
6 requires the bankruptcy court to make factual findings, which are
7 reviewed under a clear error standard. Acequia, Inc. v. Clinton
8 (In re Acequia, Inc.), 787 F.2d 1352, 1358 (9th Cir. 1986);
9 Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177,
10 184 (9th Cir. BAP 2003).

11 Clear error exists when the reviewing court is left with a
12 definite and firm conviction that a mistake has been committed.
13 In re Brotby, 303 B.R. at 184.

14 In applying an abuse of discretion test, we first "determine
15 de novo whether the [bankruptcy] court identified the correct
16 legal rule to apply to the relief requested." United States v.
17 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the
18 bankruptcy court identified the correct legal rule, we then
19 determine whether its "application of the correct legal standard
20 [to the facts] was (1) illogical, (2) implausible, or (3) without
21 support in inferences that may be drawn from the facts in the
22 record." Id. If the bankruptcy court did not identify the
23 correct legal rule, or its application of the correct legal
24 standard to the facts was illogical, implausible, or without
25 support in inferences that may be drawn from the facts in the
26 record, then the bankruptcy court has abused its discretion. Id.

1 DISCUSSION

2 **I. Appellants have standing because at least one of**
3 **the appellants, Wells Fargo, is aggrieved.**

4 As a preliminary matter, DNT argues that the Appellants lack
5 standing to appeal the bankruptcy court's order. DNT appears to
6 argue that because the Appellants filed the motions to dismiss as
7 the vehicle for arguing that §§ 1127(b) and 1129(a)(3) prohibit
8 the bankruptcy court from confirming a second plan that modifies
9 the terms of a confirmed plan, and since the bankruptcy court, in
10 denying those motions, ruled that the Appellants were not
11 impaired under the terms of the Second Plan, therefore any
12 provisions in the Second Plan modifying the rights of secured
13 creditors did not apply to the Appellants. We disagree with DNT
14 that the Second Plan did not impair the rights of any of the
15 Appellants.

16 In the Ninth Circuit, a party has standing to appeal a
17 bankruptcy court order if the party is "aggrieved" by the order.
18 In re Commercial W. Fin. Corp., 761 F.2d 441, 443 (9th Cir.
19 1985). An appellant is aggrieved if "directly and adversely
20 affected pecuniarily by an order of the bankruptcy court"; in
21 other words, the order must diminish the appellant's property,
22 increase its burdens, or detrimentally affect its rights. Duckor
23 Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),
24 177 F.3d 774, 777 (9th Cir. 1999) (quoting Fondiller v. Robertson
25 (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983)).

26 In this appeal, it cannot be seriously disputed that DNT is
27 attempting a cramdown of the Appellants' secured claims. Simply
28 put, through the Second Plan, DNT is attempting to restructure

1 the rights granted to some of the Appellants through the First
2 Plan and to reduce the amount of secured debt it will pay to some
3 of them. In this sense, DNT is unquestionably attempting to
4 "detrimentally affect the rights" of some of the secured
5 creditors. As a result, the Appellants whose claims are to be
6 restructured have standing to appeal confirmation of DNT's Second
7 Plan.

8 Moreover, even if one or more of the individual appellants
9 arguably lack standing to appeal, there is at least one creditor
10 that did not file a motion to dismiss, yet filed an objection to
11 confirmation and that holds a claim targeted in the Second Plan
12 for cramdown. Wells Fargo holds a claim secured by a lien on the
13 DNT property located on North Orchard Street in Tucson. Wells
14 Fargo did not file a motion to dismiss, but it did object to
15 confirmation of the Second Plan on August 6, 2010. According to
16 the appendix to the declaration of Kinas submitted by DNT in
17 support of plan confirmation on December 22, 2010, the current
18 balance due on the Wells Fargo loan on the North Orchard property
19 was \$82,317.88, and current market value of the property was
20 \$70,000. In the Second Plan, DNT proposed to cramdown the Wells
21 Fargo secured claim to \$70,000. Unlike claims secured by other
22 properties involved in the motions to dismiss, DNT did not make
23 any offer to abandon, or to consent to relief from stay, on that
24 property. Put another way, Wells Fargo's rights were
25 detrimentally affected, or in other words, it was "aggrieved,"
26 when the bankruptcy court confirmed the Second Plan.

27 If one appellant has standing, there is no need to examine
28 the standing of the other appellants. Carey v. Population

1 Servs., Int'l, 431 U.S. 678, 682 (1977) (holding that if one
2 party has the requisite standing to appeal, the appellate court
3 "has no occasion to decide the standing of the other
4 appellees."); W. Watersheds Project v. Kraayenbrink, 632 F.3d
5 472, 485 (9th Cir. 2011) (same). We therefore decline to
6 entertain DNT's objection to the Appellants' standing to appeal.

7 **II. The bankruptcy court did not clearly err in determining**
8 **that extraordinary and unforeseen circumstances were present**
9 **in this case which justified DNT's proposal to cramdown**
10 **secured claims in the Second Plan.**

11 The Code makes clear that a debtor's right to modify a
12 confirmed chapter 11 plan is subject to conditions. The
13 appellants have maintained, both in the bankruptcy court and on
14 appeal, that § 1127(b)⁵ prohibits DNT's confirmation of a
15 chapter 11 plan proposing to change the terms of the treatment of
16 their claims under the substantially consummated First Plan.
17 While case law unquestionably allows debtors to engage in serial
18 filings of chapter 11 cases, what is in dispute here is the sort
19 of justification required before a bankruptcy court should

20
21 ⁵ **§ 1127. Modification of plan.**

22 * * *

23 (b) The proponent of a plan or the reorganized debtor may modify
24 such plan at any time after confirmation of such plan and before
25 substantial consummation of such plan, but may not modify such
26 plan so that such plan as modified fails to meet the requirements
27 of sections 1122 and 1123 of this title. Such plan as modified
28 under this subsection becomes the plan only if circumstances
warrant such modification and the court, after notice and a
hearing, confirms such plan as modified, under section 1129 of
this title.

1 endorse a debtor's second plan proposing to modify the terms of a
2 prior, confirmed and substantially consummated plan.

3 The only two courts of appeals to examine this question hold
4 that serial chapter 11 filings are not per se impermissible. In
5 Fruehauf Corp. v. Jartran (In re Jartran), the Seventh Circuit
6 observed that,

7 there is no prohibition of serial good faith Chapter 11
8 filings in the Code – indeed, there is not even a time
9 limit on successive filings parallel to that imposed on
10 individuals or family farmers. 11 U.S.C. § 109(g). As
11 the district court noted, Congress could easily have
included repeat corporate debtors in that section; its
failure to do so indicates that corporate debtors are
exempt from even the minimal constraints on serial
filings imposed on other kinds of debtors.

12 886 F.2d 859, 869-70 (7th Cir. 1989). The court addressed
13 another serial chapter 11 case in In re Official Comm. of
14 Unsecured Creditors, 943 F.2d 752, 757 (7th Cir. 1991). Although
15 both of these cases painted the authority to file serial
16 chapter 11's with broad brush strokes, neither provided clear
17 guidance on whether, and to what extent, the plan proposed in the
18 second chapter 11 case could modify creditor treatment in the
19 first plan.

20 Following shortly after the Seventh Circuit decisions, the
21 Fifth Circuit decided In re Elmwood Dev. Corp., 964 F.2d 508, 511
22 (5th Cir. 1992). As described by the court,

23 This case raises for this circuit the de novo issue of
24 the extent to which a serial filing of a Chapter 11
25 petition evidences a lack of good faith on the part of
26 the debtor. We conclude that the mere fact that a
27 debtor has previously petitioned for bankruptcy relief
28 does not render a subsequent Chapter 11 petition "per
se" invalid. This conclusion is consistent with the
Supreme Court's recent teaching in Johnson v. Home
State Bank [111 S.Ct. 2150 (1991)]. The Johnson Court
held that serial Chapter 7 and Chapter 13 petitions
are not categorically prohibited. The Court reasoned

1 that because Congress has enumerated certain instances
2 in which serial filings are per se impermissible, there
3 is no absolute prohibition in instances not so
4 enumerated. The Court considered the good faith
5 requirement to be adequate protection from abusive
6 serial filings.

7 Id. at 511. In providing guidance on when a second plan may
8 modify the terms of the first, the court states: "A second
9 petition would not necessarily contradict the original
10 proceedings because a legitimately varied and previously unknown
11 factual scenario might require a different plan to accomplish the
12 goals of bankruptcy relief." Elmwood, 964 F.2d at 511-12. In
13 short, Elmwood stands for the proposition that, in proposing yet
14 a second chapter 11 plan, the debtor must demonstrate some sort
15 of genuine need to reorganize as the result of unforeseen changes
16 in circumstance which contribute to the debtor's default under
17 its obligations under the earlier plan. Id. Indeed, in Elmwood,
18 the court cited the national credit crunch in the early 1990s as
19 an example of changed circumstances in real estate markets that
20 might have justified modification of the debtor's earlier plan.
21 But because the credit crunch and resulting depressed real estate
22 market had existed for several years before substantial
23 consummation of the first plan, the Fifth Circuit ruled that
24 those conditions, under the facts of that case, were sufficiently
25 foreseeable that they would not justify a modification of the
26 first plan. Id. at 512.

27 Arizona bankruptcy courts have recognized that serial
28 chapter 11 filings are permissible if made in good faith. United
States v. Shepherd Oil, Inc. (In re Shepherd Oil, Inc.), 118 B.R.
741, 747 (Bankr. D. Ariz. 1990) (citing favorably to Jartran).

1 Later case law supports both the principle that serial chapter 11
2 filings are not per se impermissible, and that a second plan may
3 modify the first plan where there are extraordinary circumstances
4 that are unforeseeable. In re Tillotson, 266 B.R. 565, 569
5 (Bankr. D. Md. 2001); In re Adams, 218 B.R. 597 (Bankr. D. Kan.
6 1998); In re Northtown Realty Co., L.P., 215 B.R. 906, 911
7 (Bankr. E.D.N.Y. 1998); In re Bouy, Hall & Howard & Assocs.,
8 208 B.R. 737 (Bankr. S.D. Ga. 1995); In re Casa Loma Assocs.,
9 122 B.R. 814 (Bankr. N.D. Ga. 1991). Even the Appellants appear
10 to agree that "a confirmed plan of reorganization that has been
11 substantially consummated is not subject to modification by
12 filing a second bankruptcy case unless the second filing is in
13 good faith and necessitated by unforeseeable circumstances."
14 Appellants' Reply Br. at 8 (emphasis added).

15 The question presented to the Panel is, did the bankruptcy
16 court clearly err in finding that there were extraordinary,
17 unforeseeable circumstances present that allowed DNT to propose a
18 second chapter 11 plan that modified the secured creditors'
19 rights under the First Plan? The bankruptcy court found that,
20 while it was a "close call," justification for this extraordinary
21 approach to dealing with DNT's finances existed:

22 Those cases do talk about the fact that a simple change
23 in economic circumstances isn't enough. . . . This
24 was, at least in this state, a depression. The level
25 at which things fell off the cliff was not foreseeable
26 in my opinion and more importantly what was not
27 foreseeable was the freeze in the credit markets that
28 would have made it impossible for the Debtor to get
refinancing. So, I find in the circumstances of this
case that what happened to the economy was the
equivalent of an airplane flying into a factory. So
that's the finding.

Hr'g Tr. 18:24-19:10, December 22, 2010.

1 The bankruptcy court indicated on the record that it had
2 invested time in reviewing real property appraisals connected
3 with this case. Tr. Hr'g 87:18-23, December 22, 2010. It is
4 axiomatic that in a busy bankruptcy court such as Arizona, a
5 bankruptcy judge is frequently exposed to facts and information
6 about how economic conditions in that district affect the parties
7 coming before the court. The bankruptcy judge need not ignore
8 its particular knowledge of such matters; the Supreme Court has
9 endorsed on multiple occasions the principle that a federal judge
10 may take judicial notice of catastrophic economic conditions.
11 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249 (1978)
12 (discussing "the broad and desperate emergency economic
13 conditions of the early 1930's"); Home Building & Loan Ass'n. v.
14 Blaidsdale, 290 U.S. 398, 445 (1934) (recognizing emergency
15 powers of a state in response to severe economic conditions);
16 Edwards v. Kearzey, 96 U.S. 595, 602-03 (1877) (discussing
17 economic conditions in several states of the South after the
18 Civil War). In short, the bankruptcy court had a legal and
19 evidentiary foundation for its finding of fact that extraordinary
20 circumstances were present in this bankruptcy case.

21 The Appellants have not challenged the bankruptcy court's
22 analysis of extraordinary market conditions surrounding DNT's
23 reorganization cases. Rather, they contend that the
24 deteriorating real estate market was foreseeable to DNT,
25 observing that immediately following confirmation of DNT's First
26 Plan, its manager admitted that the Arizona real estate market
27 was in decline. But the Appellants confuse two distinct economic
28 conditions: the real estate market (i.e., the supply and demand

1 for properties) and the state of the credit market (i.e., the
2 availability of loans for property acquisition and financing).

3 While the real estate market may have been in decline in
4 2007 prior to confirmation of the First Plan, the extent of the
5 problems to come in the broader credit market, on which DNT would
6 have to rely for funding of its acquisitions, refinancing, and to
7 fund purchasers of its properties, would devolve into what one
8 court described as a "seizure" following the bankruptcy filing of
9 Lehman Brothers in September 2008. Bd. of Tr. of the AFTRA Ret.
10 Fund v. JP Morgan Chase Bank, N.A., 806 F. Supp.2d 662, 677
11 (S.D.N.Y. 2011). As it turned out, there was a "crisis in the
12 subprime market that . . . spread to the rest of the real estate
13 market, collapse of the financial markets generally, [and]
14 market-wide liquidity crisis." In re Lehman Bros. Sec. & ERISA
15 Litig., 799 F. Supp.2d 258, 264 (S.D.N.Y. 2011). It was this
16 unanticipated collapse in the general availability of credit, not
17 the possibly foreseeable decline in the Arizona housing market,
18 that convinced the bankruptcy court in this appeal to find:

19 The level at which things fell off the cliff was not
20 foreseeable in my opinion, and more importantly what
21 was not foreseeable was the freeze in the credit
22 markets that would have made it impossible for the
23 debtor to get refinancing.

24 Hr'g Tr. 19:3-7, December 22, 2010.

25 The Appellants offered no evidence to the bankruptcy court,
26 nor have they given us a reasoned argument, to show that the
27 credit market freeze in Autumn 2008 would have been foreseeable
28 when DNT submitted its First Plan in December 2007, or its
29 amended plans in early 2008. Instead of advancing any fully-
30 developed argument why the filing of DNT's second bankruptcy

1 case, and the need for its Second Plan, was not under
2 extraordinary and unforeseeable circumstances, the Appellants have
3 repeatedly challenged the good faith of DNT in pursuing a second
4 bankruptcy filing. In their briefs, the Appellants suggest that
5 DNT manipulated the bankruptcy system by seeking entry of a final
6 decree, waiting eleven months for entry of that decree without
7 amending its plan, and then filing a second chapter 11 case only
8 four days after entry of the final decree. The facts do not
9 support the Appellants' bad faith argument.

10 It is true that eleven months elapsed from the time DNT
11 filed its motion and entry of the final decree. But that delay
12 was not solely caused by any lack of diligence on DNT's part.
13 The facts instead establish that DNT submitted the motion for
14 final decree after substantially consummating the First Plan by
15 beginning the distributions to creditors, something the
16 Appellants have not disputed. But three creditors objected to
17 the motion, and in turn moved to revoke confirmation of the First
18 Plan in May. The bankruptcy court decided that it could not
19 enter a final decree while a motion to revoke was on the table,
20 so it ordered that the motions to revoke and for final decree be
21 heard together. After several continuances, the hearing was held
22 on September 2, 2009, at which DNT and the creditors announced a
23 settlement and withdrawal of the motion to revoke. DNT indicated
24 to the court that it would prepare a final decree order.

25 Shortly thereafter, Appellant Wells Fargo moved to convert
26 the case to chapter 7 on November 11. Again, entry of the final
27 decree was continued along with the conversion motion. After
28 more continuances, the bankruptcy court held a hearing on the

1 motion to convert on January 5, 2010. Wells Fargo opted to
2 withdraw the motion to convert, and a joint stipulation doing so
3 was filed on February 5, and approved by the bankruptcy court on
4 February 8, 2010. All objections and impediments to entry of
5 final decree being withdrawn, on February 8, 2010, the court then
6 entered the final decree and order closing the case. In short,
7 the eleven-month delay between filing the motion for final decree
8 and entry of the order was not necessarily the result of delay by
9 DNT, and we find no merit in the Appellants' suggestion that the
10 facts demonstrate a lack of good faith in this respect. Like the
11 bankruptcy court, in light of changing financial conditions, we
12 also find it unsurprising that DNT would quickly file a second
13 petition under chapter 11 within four days. Indeed, according to
14 the testimony of Kinas, DNT's worsening cash flow problems and
15 lack of access to credit threatened the existence of the company
16 at the time of filing the second petition.

17 **III. The bankruptcy court did not abuse its discretion in**
18 **confirming the Second Plan and did not clearly err in ruling**
19 **that the plan met the good faith standard of § 1129(a)(3).**

20 From the beginning of the second bankruptcy case, the
21 bankruptcy court cautioned the parties that the lynchpin for
22 confirmation of a second plan would center on the requirement
23 that DNT was proceeding in good faith as required in
24 § 1129(a)(3). It is the bankruptcy court's decision on this
25 single confirmation element that forms the basis of the
26 Appellants' appeal.⁶

27 ⁶ The Appellants have not argued that DNT did not satisfy
28 any of the other § 1129(a) confirmation requirements. While

(continued...)

1 Section 1129(a)(3) provides that a bankruptcy court shall
2 confirm a plan only if the "plan has been proposed in good faith
3 and not by any means forbidden by law." Section 1129(a)(3) does
4 not define good faith. Platinum Capital, Inc. v. Sylmar Plaza,
5 L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074 (9th Cir.
6 2002) (citing In re Madison Hotel Assocs., 749 F.2d 410, 425 (7th
7 Cir. 1994)). However, under the decisions interpreting this Code
8 provision, a plan may be found to be proposed in good faith where
9 it achieves a result consistent with the objectives and purposes
10 of the Code. Id. (citing Ryan v. Loui (In re Corey), 892 F.2d
11 829, 835 (9th Cir. 1989)); see also Madison Hotel, 749 F.2d at
12 425 ("For purposes of determining good faith under section
13 1129(a)(3) . . . the important point of inquiry is the plan
14 itself and whether such plan will fairly achieve a result
15 consistent with the objectives and purposes of the Bankruptcy
16 Code."). The bankruptcy court's good faith determination must be
17 based on the totality of the circumstances. Smyrnos v. Padilla
18 (In re Padilla), 213 B.R. 349, 352 n.2 (9th Cir. BAP 1997). The
19 debtor, as plan proponent, has the burden of showing, by a
20 preponderance of the evidence, that its chapter 11 plan is
21 proposed in good faith. Farmers Home Admin. v. Arnold & Baker
22 Farms, 177 B.R. 648, 653 (9th Cir. BAP 1994). A bankruptcy
23 court's finding of a debtor's good faith in proposing a
24

25 ⁶(...continued)
26 there was some discussion by the parties in the bankruptcy court
27 hearings regarding whether the Second Plan was feasible for
28 purposes of § 1129(a)(11), the feasibility question has not been
raised in this appeal.

1 chapter 11 plan is a finding of fact and reviewed for clear
2 error. In re Brotby, 303 B.R. at 184.

3 In this case, while there are facts supporting the
4 bankruptcy court's view that it was a "very, very close call,"
5 the court did not clearly err in determining that the plan was
6 proposed in good faith. The court's analysis on this issue
7 conformed with that dictated by Ninth Circuit case law, in that
8 the bankruptcy court considered the totality of the
9 circumstances. The court found that the interest rate terms
10 proposed for secured creditors' claims were unchanged between the
11 First and Second Plans. The repayment term for secured loans
12 under the Second Plan was relatively short, not an extended
13 "stretch out." As discussed above, the court also determined
14 that § 1127(b) was not a bar to DNT's proposed cramdown in the
15 Second Plan because, the court found, extraordinary, unforeseeable
16 circumstances existed as compared to those surrounding
17 confirmation of the First Plan. And finally, the court
18 determined that, under Arizona's anti-deficiency law, the most a
19 creditor with a lien on a house would likely receive in a
20 liquidation or relief from stay scenario would be the foreclosure
21 value of that property ("All the [creditors] were ever going to
22 get is the value of the property because of the nature of the
23 anti-deficiency statute in Arizona." Hr'g Tr. 84:7, December 22,
24 2010.) Thus, DNT's proposal to pay secured creditors the "market
25 value" was consistent with the value of their state law rights.

26 The bankruptcy court was correct in this last assumption.
27 In Arizona, two statutes protect borrowers from lenders seeking
28 to collect debt that remains outstanding after foreclosure on the

1 house securing a purchase-money loan(s). See Ariz. Rev. Stat.
2 § 33-729 (2007).⁷ When land is secured by a deed of trust,
3 whether or not the loan was used to purchase the property, the
4 homeowner is protected from those seeking deficiency judgments by
5 Ariz. Rev. Stat. § 33-814 (2007).⁸

6 The bankruptcy court found, under all these circumstances,
7 that DNT had shown it acted in good faith by filing the second
8 bankruptcy petition and in proposing its Second Plan. Opposed to
9 this was the Appellants' continuing argument that DNT made a
10 calculated and tactical decision to wait for the first bankruptcy
11 case to be closed rather than in good faith seeking to amend the
12 First Plan. But the bankruptcy court's finding on good faith

13 _____
14 ⁷ **§ 33-729. Purchase money mortgage; limitation on**
15 **liability** A. . . . [I]f a mortgage is given to secure the
16 payment of the balance of the purchase price, or to secure a loan
17 to pay all or part of the purchase price, of a parcel of real
18 property of two and one-half acres or less which is limited to
19 and utilized for either a single one-family or single two-family
20 dwelling, the lien of judgment in an action to foreclose such
21 mortgage shall not extend to any other property of the judgment
22 debtor, nor may general execution be issued against the judgment
23 debtor to enforce such judgment, and if the proceeds of the
24 mortgaged real property sold under special execution are
25 insufficient to satisfy the judgment, the judgment may not
26 otherwise be satisfied out of other property of the judgment
27 debtor, notwithstanding any agreement to the contrary.
28 A.R.S. § 33-729 (2011).

24 ⁸ **§ 33-814. Action to recover balance after sale or**
25 **foreclosure on property under trust deed**
26 G. If trust property of two and one-half acres or less which is
27 limited to and utilized for either a single one-family or a
28 single two-family dwelling is sold pursuant to the trustee's
power of sale, no action may be maintained to recover any
difference between the amount obtained by sale and the amount of
the indebtedness and any interest, costs and expenses.

1 rejected this contention, resolving a disputed question of fact.
2 Even if there are facts to support the Appellants' argument,
3 where there are "two permissible views of the evidence, the
4 factfinder's choice between them cannot be clearly erroneous."
5 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400-01 (1990).

6 Having settled the only objection to confirmation under
7 § 1129(a), and finding that all other provisions of that section
8 were satisfied, the bankruptcy court acted properly in deciding
9 to confirm the Second Plan. In doing so, it did not abuse its
10 discretion.

11 **CONCLUSION**

12 We AFFIRM the bankruptcy court's order confirming the Second
13 Plan.