

DEC 05 2014

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-14-1172-JuKiD
	)	
DUNLAP OIL COMPANY, INC.;	)	Bk. No. AZ-12-23252-BMW
QUAIL HOLLOW INN, LLC,	)	Bk. No. AZ-12-23256-BMW
	)	(jointly administered)
Debtors.	)	
<hr/>		
PINEDA GRANTOR TRUST II;	)	
PINEDA REO, LLC,	)	
	)	
Appellants,	)	
v.	)	<b>MEMORANDUM*</b>
	)	
DUNLAP OIL COMPANY, INC.;	)	
QUAIL HOLLOW INN, LLC,	)	
	)	
Appellees.	)	

Argued and Submitted on November 20, 2014  
at Phoenix, Arizona

Filed - December 5, 2014

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

Honorable Brenda Moody Whinery, Bankruptcy Judge, Presiding

Appearances: Bradley D. Pack of Engelman Berger, P.C. argued for appellants Pineda Grantor Trust II and Pineda REO, LLC; Lindsy M. Weber of Gallagher & Kennedy, P.A., argued for appellees Dunlap Oil Company, Inc. and Quail Hollow Inn, LLC.

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

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\* 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 Appellants Pineda Grantor Trust II and Pineda REO, LLC  
2 (collectively, Pineda) appeal from the bankruptcy court's order  
3 confirming the second amended joint plan (SAJP) filed by  
4 chapter 11<sup>1</sup> debtors, Dunlap Oil Company, Inc. (DOC) and Quail  
5 Hollow Inn, LLC (QHI). We AFFIRM.

## 6 I. FACTS

### 7 A. Prepetition Events

8 DOC was founded in 1959. It owned, operated, and leased  
9 gas stations and convenience stores throughout Arizona, owned  
10 and operated a shopping center known as Dunlap Plaza, and owned  
11 vacant land. Kenneth and Carol Dunlap, their two trusts,<sup>2</sup> and  
12 their son Theodore (Ted) Dunlap are shareholders of DOC.

13 The Dunlap Revocable Trust owned and operated an 83-room  
14 hotel in Wilcox, Arizona, under the Best Western brand. The  
15 trust conveyed the hotel to QHI in June 2012.

16 Financing for the acquisition, development, and operation  
17 of debtors' businesses was primarily provided by Canyon  
18 Community Bank (CCB) and Compass Bank (Compass). CCB loaned DOC  
19 in excess of \$8 million which was secured by four properties  
20 owned by DOC. Compass also made a series of loans to DOC which  
21 were evidenced by promissory notes and secured by seven

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22  
23 <sup>1</sup> Unless otherwise indicated, all chapter and section  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
25 "Rule" references are to the Federal Rules of Bankruptcy  
26 Procedure and "Civil Rule" references are the Federal Rules of  
27 Civil Procedure.

28 <sup>2</sup> The two trusts were The Kenneth T. Dunlap and Carol A.  
Dunlap Revocable Trust (Dunlap Revocable Trust) and The Kenneth  
T. Dunlap and Carol A. Dunlap Irrevocable Trust (Dunlap  
Irrevocable Trust).

1 properties owned by DOC and certain assets owned by QHI. Ken  
2 and Carol Dunlap, the Dunlap Revocable Trust, and Ted Dunlap  
3 were guarantors on the Compass loans.

4 Each of the Compass notes matured by their terms and DOC  
5 did not pay them off. Following DOC's default, the notes were  
6 modified through a series of modification and forbearance  
7 agreements whereby Compass agreed to forebear from taking any  
8 action to enforce the notes provided debtors remained in  
9 compliance with certain payment terms and other conditions. The  
10 forbearance obligation terminated on November 25, 2009. Debtors  
11 made no payments on the notes for several years. In October  
12 2012, Compass sought to have a receiver appointed in the state  
13 court.

#### 14 **B. Bankruptcy Events**

15 Before Compass could post the bond required for the  
16 receivership to take effect, DOC and QHI each filed a chapter 11  
17 petition on October 24, 2012. The bankruptcy court ordered the  
18 cases jointly administered.

19 Compass and CCB were debtors' primary secured creditors.  
20 Debtors also were delinquent on their real property taxes for  
21 most, if not all, of their properties. At the time of the  
22 filing, debtors owed Compass approximately seven million  
23 dollars.

##### 24 **1. The Cash Collateral Orders**

25 Early on, the bankruptcy court entered an interim order  
26 authorizing debtors to use cash collateral to pay ordinary and  
27 necessary postpetition expenses consistent with the attached  
28 budgets for each debtor. In November 2012, the bankruptcy court

1 entered a final order approving debtors' use of cash collateral  
2 as set forth in the interim order and attached budgets. The  
3 final cash collateral order stated that it was entered "without  
4 prejudice to any creditor seeking further relief upon motion for  
5 good cause shown."

6         Around this same time, Compass sold its interest in the  
7 notes to Pineda. As a result, Pineda maintained that it was the  
8 successor-in-interest to Compass, having received an assignment  
9 of all of Compass' right, title and interest in and to Compass'  
10 loans to DOC, and all loan agreements, promissory notes,  
11 security agreements, deeds of trust, guarantees and all other  
12 documents and agreements relating to or evidencing such loans.  
13 Pineda then challenged debtors' authority to use its cash  
14 collateral.

15         Pineda required, as a condition to use of its cash  
16 collateral, additional adequate protection, including monthly  
17 adequate protection payments and debtors' agreement to maintain  
18 a level of inventory consistent with its pre-petition inventory  
19 levels. As a result of these demands, Pineda and debtors  
20 entered into a stipulation regarding use of Pineda's cash  
21 collateral. Pineda agreed not to challenge debtors' use of cash  
22 collateral and, in exchange, debtors agreed to (1) maintain a  
23 level of inventory that was reasonably consistent with the  
24 inventory maintained prior to the petition date; (2) provide  
25 Pineda's counsel with a monthly report detailing the amount of  
26 the inventory; and (3) remain in compliance with the terms of  
27 the final cash collateral order and budgets.

28         The bankruptcy court approved the continued use of cash

1 collateral several times.

2 **2. Debtors' Joint Plan Of Reorganization**

3 Debtors reached stipulated valuations with Pineda and CCB  
4 for purposes of § 506(a) in connection with some of the real  
5 properties for purposes of plan confirmation. Debtors and  
6 Pineda stipulated that the liquidation value of the QHI hotel  
7 was \$1.9 million.

8 Debtors filed a joint plan of reorganization on December  
9 28, 2012. The plan proposed a partial dirt-for-debt swap,  
10 whereby DOC would deed certain collateral to CCB and Pineda for  
11 a credit against the secured debt and retain the remaining  
12 collateral. Debtors proposed to transfer the Benson Chevron,  
13 Benson Little General, QHI, and Sierra Vista Chevron to Pineda  
14 in exchange for a credit in the total amount of \$4,361,758,  
15 after accounting for the outstanding taxes relating to these  
16 properties.

17 The secured creditors would have secured claims equal to  
18 the value of the retained collateral, the balance of their  
19 claims would be classified as unsecured, and the secured claims  
20 would be paid on the basis of a twenty-five year amortization  
21 with interest at 5%. Debtors would make balloon payments to the  
22 secured creditors after five years.

23 Debtors proposed to fund the plan through revenue from  
24 continued operation of the retained properties and a \$150,000  
25 new value contribution. Unsecured creditors would be paid from  
26 debtors' net revenue, if any, remaining after payment of  
27 operating expenses and installment payments to secured  
28 creditors. Shareholders would retain their equity interest in

1 DOC and QHI would transfer the hotel to Pineda.<sup>3</sup>

2 Pineda, CCB, and others objected to debtors' plan. Pineda  
3 argued that (1) the plan was not fair and equitable under  
4 § 1129(b)(1); (2) debtors' proposed interest rate of 5% failed  
5 the fair and equitable test; (3) the plan was not fair and  
6 equitable because it violated the absolute priority rule and the  
7 proposed new value contribution failed as a matter of law;  
8 (4) the plan was not feasible under § 1129(a)(11) because the  
9 projections were unreliable; and (5) the plan was not filed in  
10 good faith under § 1129(a)(3). Pineda also objected to the  
11 proposed return of the Benson Chevron in exchange for a credit  
12 because this property did not secure Pineda's claim. Pineda  
13 maintained that it could not be compelled to accept title to  
14 this property in satisfaction of any part of its claim.

15 Debtors subsequently filed a first amended joint plan  
16 (FAJP) that provided for debtors to retain the Benson Chevron as  
17 well as the QHI hotel.

18 In support of confirmation, debtors submitted the  
19 declaration of Steven Odenkirk, a member of Peritus Commercial  
20 Finance (Peritus), who had assisted debtors in reaching workout  
21 solutions with various creditors for three years prior to the  
22 bankruptcy filing. Mr. Odenkirk opined that the plan was  
23 feasible based on historical projections and that a 5% cramdown

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24  
25 <sup>3</sup> Meanwhile, Pineda moved for relief from stay with respect  
26 to the hotel and real property collateral owned by DOC. Pineda  
27 maintained that stay relief was appropriate due to a lack of  
28 adequate protection, lack of equity in the properties, and the  
properties were not necessary for effective reorganization. The  
bankruptcy court set the final relief from stay hearings  
concurrently with the hearing on confirmation.

1 interest rate was appropriate. Debtors also submitted the  
2 declaration of Ted Dunlap, the president of DOC. He too opined  
3 that the plan was feasible and confirmed the new value  
4 contribution from the equity holders in the amount of \$150,000.

5 Pineda did not submit a declaration of its own expert, but  
6 CCB submitted the declaration of Mark A. Farr in opposition.  
7 Mr. Farr, the vice president of CCB, concluded that debtors'  
8 plan was not feasible. He opined that Mr. Odenkirk's analysis  
9 was flawed because he used only favorable historical information  
10 from a five-year period to validate the income projection.  
11 Mr. Farr also pointed out other discrepancies with  
12 Mr. Odenkirk's analysis.

13 On June 12 and July 11, 2013, the bankruptcy court held  
14 hearings on confirmation. At the first hearing, debtors agreed  
15 to stay relief with respect to the properties they proposed to  
16 give back to Pineda and CCB, which were their most unprofitable  
17 locations.<sup>4</sup> After the second hearing, the bankruptcy court took  
18 the matter under advisement. The parties completed post-trial  
19 briefing by August 13, 2013.

### 20 **3. Debtors Fail To File Operating Reports**

21 Debtors failed to file operating reports for June and July  
22 2013. In August 2013, CCB filed a motion to compel debtors to  
23 provide monthly operating reports for those months. After  
24 receiving those reports only from DOC, CCB filed a second motion  
25 in late September to compel debtors to provide the operating  
26

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27  
28 <sup>4</sup> The bankruptcy court subsequently entered stipulated  
orders for relief from stay on these properties.

1 report for August 2013. Pineda joined in that motion, noting  
2 that QHI had failed to file operating reports for the months of  
3 May, June, July, and August 2013. Pineda argued that debtors'  
4 failure to file the operating reports constituted cause for the  
5 conversion or dismissal of the case. Pineda further asserted  
6 that the bankruptcy court could consider these reports, which  
7 showed continuing losses, when weighing the feasibility of  
8 debtors' plan.

9 The bankruptcy court heard the motions to compel on  
10 October 17, 2013, and ordered debtors to file the operating  
11 reports by the following Friday. Debtors complied. QHI's June  
12 2013 operating report showed an unauthorized transfer of  
13 \$177,000 of cash, reflected only as a disbursement to "other."<sup>5</sup>

14 After receiving the late-filed reports, Pineda filed a  
15 motion for immediate stay relief and termination of cash  
16 collateral authority or, alternatively, a motion to convert the  
17 case to chapter 7. Pineda argued that QHI's undisclosed and  
18 unauthorized transfer of \$177,000 was a serious violation of the  
19 bankruptcy court's cash collateral orders and its duties as a  
20 debtor-in-possession. On the same day, CCB filed a motion to  
21 convert debtors' case to chapter 7 based on, among other things,  
22 QHI's unauthorized use of cash collateral.

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23  
24 <sup>5</sup> As further explained below, these funds were transferred  
25 to an entity by the name of KT Market which was formed and owned  
26 by the Dunlaps. KT Market, a grocery store, subleased space in  
27 the Dunlap Plaza shopping center from an anchor tenant that had  
28 gone out of business. Ted Dunlap explained that the money was  
used for tenant improvements and that without an anchor tenant  
such as the grocery store, the shopping center would lack  
corresponding revenue.

1           **4.    The Bankruptcy Court Denies Confirmation Of Debtors'**  
2           **FAJP.**

3           On November 18, 2013, the bankruptcy court orally recited  
4 its findings of fact and conclusions of law on the record,  
5 denying confirmation of debtors' FAJP plan and granting the  
6 motions for relief from stay previously filed by CCB and Pineda.  
7 The bankruptcy court observed that debtors made the unauthorized  
8 intercompany loan of \$177,000 in direct violation of the cash  
9 collateral orders. Due to this violation, the bankruptcy court  
10 concluded that debtors violated § 1129(a)(2), which requires the  
11 plan proponent to comply with all applicable provisions of  
12 Title 11, and also failed to act in good faith pursuant to  
13 § 1129(a)(3).

14           Next, the bankruptcy court found that the feasibility  
15 requirement was not met under § 1129(a)(11) because debtors  
16 provided no evidence that there was a reasonable likelihood that  
17 they could obtain future financing to make the balloon payment.  
18 The court also noted that debtors had suffered, and continued to  
19 suffer, increasing operating losses and a severe depletion of  
20 inventory and available cash, even after they ceased operations  
21 at the four locations on which stay relief was granted.  
22 Additionally, the court found that debtors' operating reports  
23 showed that they did not have sufficient cash to meet the  
24 effective date payments, the remaining administrative claims,  
25 and the monthly payments to secured creditors, which would be  
26 required to commence under the plan.

27           In the end, since the provisions of § 1129(a)(2), (3), and  
28 (11) were not met, the bankruptcy court denied confirmation of

1 debtors' FAJP. The bankruptcy court entered the order, which  
2 incorporated its oral ruling denying confirmation of debtors'  
3 FAJP, on November 19, 2013.

4 **5. Debtors' Motion For Reconsideration**

5 Debtors moved for reconsideration of the bankruptcy court's  
6 order. At the December 17, 2013 hearing on the matter, debtors'  
7 counsel argued that feasibility was no longer an issue because  
8 (1) the equity holders would contribute an additional \$100,000  
9 in new value; (2) Mr. Martin<sup>6</sup> and Ted Dunlap agreed to a  
10 combined \$50,000 salary deferral which would free up additional  
11 cash; and (3) DOC's fuel supplier, Jackson Oil, would provide a  
12 \$200,000 fuel credit which would allow DOC to "fill its tanks."

13 In support, debtors filed the declarations of Ted Dunlap,  
14 who confirmed the additional new value contribution, and  
15 Mr. Odenkirk, who concluded that with these new developments the  
16 income and expense projections would support feasibility.

17 The bankruptcy court found that debtors' arguments did not  
18 meet the requirements for reconsideration under Rule 9024, but  
19 essentially suggested a revised plan. Accordingly, the court  
20 denied debtors' motion, but noted that its ruling did not  
21 preclude debtors from filing an amended plan to address the  
22 issues that they raised concerning the additional funding and  
23 feasibility. The bankruptcy court also decided that it would  
24 enter the orders granting Pineda's and CCB's motions for relief  
25 from stay, but that it would not rule on their motions to  
26 convert or dismiss at that time.

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27  
28 <sup>6</sup> Mr. Martin is debtors' comptroller.

1           **6. The Bankruptcy Court Confirms Debtors' SAJP.**

2           On December 27, 2013, debtors filed the SAJP. The SAJP  
3 differed from the FAJP in that, among other things, it provided  
4 for the sale of the QHI hotel. Upon the closing of the sale and  
5 payment of the outstanding secured real property taxes, Pineda  
6 would receive the stipulated value of the hotel, and the excess  
7 proceeds would be transferred to DOC. The SAJP further provided  
8 that the proposed sale would close within six months of the  
9 effective date of the plan.

10           The amended plan also stated that the new value  
11 contribution from equity holders would be increased from  
12 \$150,000 provided in the initial plan to \$250,000. In addition,  
13 the equity holders agreed to a real property new value  
14 contribution consisting of a fee simple interest in two  
15 properties known as Benson Little General and Benson Chevron.  
16 The Dunlap Revocable Trust owned the Benson Little General,  
17 which is a gas station/convenience store located in Benson,  
18 Arizona, and the Dunlap Irrevocable Trust owned Benson Chevron.  
19 Debtors reported that (1) they had received favorable credit  
20 terms from certain suppliers which were projected to realize  
21 between \$30,000 to \$45,000 in additional cash on an annual  
22 basis; (2) Jackson Oil committed a \$200,000 line of credit for  
23 fuel purchases; (3) additional cash would also be freed up due  
24 to salary deferrals in the annual amount of \$50,000; and  
25 (4) cashing in a \$100,000 key man insurance policy would also  
26 provide liquidity for the plan.

27           Pineda moved to vacate the confirmation hearing scheduled  
28 for January 28, 2014, on the grounds that debtors could not

1 proceed to confirmation without a newly approved disclosure  
2 statement and re-solicitation of votes. In the alternative,  
3 Pineda requested the court to continue the confirmation hearing  
4 so that it could conduct discovery.

5 Debtors filed an emergency motion seeking to extend the  
6 stay of the orders granting Pineda and CCB relief from stay.

7 The bankruptcy court heard Pineda's motion to vacate and  
8 debtors' motion to extend the stay on January 13, 2014. The  
9 court concluded that debtors should be given the opportunity to  
10 amend their plan. The court stated, however, that the  
11 confirmation hearing on the SAJP was not open-ended. Rather,  
12 debtors would be allowed to address the issues which caused the  
13 prior denial of confirmation. The bankruptcy court also decided  
14 that no new disclosure statement or balloting was necessary, and  
15 it extended the stay on the relief from stay orders until the  
16 confirmation hearing was completed. The court rescheduled the  
17 confirmation hearing for February 7, 2013.

18 Pineda and debtors thereafter entered into a stipulated  
19 order incorporating the bankruptcy court's ruling as well as  
20 establishing certain procedural matters agreed to by the  
21 parties. The order provided that at the evidentiary hearing on  
22 confirmation, the bankruptcy court would consider evidence  
23 relating to feasibility, debtors' compliance with § 1129(a)(2),  
24 debtors' good faith, debtors' ability to make plan payments  
25 required under § 1129(a)(9) (secured tax claims), and  
26 satisfaction of the new value exception to the absolute priority  
27 rule, as well as evidence relating to the value of the QHI  
28 hotel. In addition, the bankruptcy court would consider the

1 testimony and exhibits admitted at the hearings on confirmation  
2 of debtors' FAJP. The bankruptcy court entered the order on  
3 January 16, 2014.

4 On January 28, 2014, debtors filed a notice of plan  
5 amendments which further modified the SAJP. The plan was  
6 amended to allow CCB and Pineda to continue orally any trustee  
7 sales during the twelve months following the effective date and  
8 to allow such sales to proceed if a default occurred under the  
9 plan that debtors failed to cure. Another amendment provided  
10 that certain tax claims were re-amortized over forty-four months  
11 rather than sixty months so debtors could complete payments  
12 within sixty months of the petition date.

13 Pineda objected to confirmation of the SAJP on the grounds  
14 that (1) issue preclusion<sup>7</sup> and the law of the case doctrine  
15 precluded re-litigation of the issues concerning debtors'  
16 violations of the cash collateral orders, bad faith, and their  
17 inability to reorganize within a reasonable period of time;  
18 (2) debtors continued to make unauthorized transfers of cash  
19 after the bankruptcy court denied debtors' FAJP; (3) the  
20 provisions for the sale of the hotel impermissibly stripped  
21 Pineda of its right to credit bid in violation of  
22 § 1129(b) (2) (A) (ii); (4) all proceeds from the sale of the hotel  
23 must be paid to Pineda to be applied against its secured claim;  
24 and (5) there were multiple grounds for conversion of debtors'

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25  
26 <sup>7</sup> "Issue preclusion" is the more modern nomenclature for  
27 "collateral estoppel." See Paine v. Griffin (In re Paine),  
28 283 B.R. 33, 38 (9th Cir. BAP 2002) (noting that "issue  
preclusion" includes the doctrines of direct estoppel and  
collateral estoppel).

1 cases.

2 Pineda also filed a notice of recorded judgment in the  
3 amount of \$7 million dollars against Ken and Carol Dunlap, the  
4 Dunlap Revocable Trust, and Ted Dunlap based on their respective  
5 guarantees of the loans. Due to its recorded judgment, Pineda  
6 objected to the SAJP to the extent it adversely affected its  
7 right to foreclose its judgment lien on the Benson Chevron,  
8 which the Dunlaps proposed to contribute to DOC to assist in  
9 DOC's reorganization.

10 On February 6, 2014, debtors filed a second notice of plan  
11 amendments, which provided, among other things, that if the sale  
12 of the hotel did not close within six months, debtors would  
13 transfer the hotel to Pineda in exchange for a credit against  
14 Pineda's secured claim in the amount of the stipulated value,  
15 less secured taxes. They also filed a memorandum in support of  
16 confirmation and in response to confirmation objections.

17 On February 7, 2014, the bankruptcy court held the  
18 evidentiary hearing on confirmation. Direct testimony was  
19 provided by the supplemental declarations of Mr. Odenkirk and  
20 Ted Dunlap in support and Mr. Farr in opposition. Cross  
21 examination and redirect of each of the declarants was conducted  
22 live.

23 At the conclusion of the hearing, the bankruptcy court  
24 found that the stipulated value of the QHI hotel relied upon in  
25 the context of the FAJP was not binding upon Pineda given that  
26 the SAJP contemplated a sale of the hotel. The court also gave  
27 the parties the option to submit closing briefs.

28 Based upon the evidence presented at the confirmation

1 hearing, the bankruptcy court entered an order on February 14,  
2 2014, finding that the value of the hotel was \$2.5 million for  
3 purposes of confirmation of the SAJP.

4 After the hearing, debtors submitted a brief in support of  
5 confirmation and response to confirmation objections and a  
6 closing brief. Pineda filed a summary of unauthorized  
7 intercompany transfers and a closing brief. Pineda argued that  
8 debtors made intercompany transfers which were unauthorized and  
9 failed to explain how they used the \$177,000 in funds. Pineda  
10 noted that the invoices debtors produced in response to Pineda's  
11 request for all documents showing how the funds were used  
12 reflected purchases totaling only \$35,173.75. According to  
13 Pineda, debtors provided no explanation as to how the remaining  
14 \$142,000 in funds were spent. Finally, Pineda maintained that  
15 the evidence did not support debtors' argument that the  
16 transferred funds were repaid. With respect to feasibility,  
17 Pineda asserted that debtors failed to demonstrate they would  
18 have enough cash on the effective date to pay administrative  
19 claims and there was no evidence that the new value contribution  
20 would actually be funded.

21 Given the bankruptcy court's ruling on valuation of the QHI  
22 hotel, on February 14, 2014, debtors filed a third notice of  
23 plan amendments whereby they proposed to transfer the hotel  
24 property to Pineda on the effective date of the plan, subject to  
25 secured tax claims. According to debtors, this amendment was  
26 intended to resolve any objections to the plan raised by Pineda  
27 relating to its treatment with respect to the QHI hotel.

28 Shortly thereafter, the bankruptcy court entered an order

1 requiring debtors to strictly comply with the terms of the cash  
2 collateral orders and prohibiting any transfers of cash  
3 collateral from QHI to insiders or affiliates except for  
4 ordinary salary or payroll obligations or reimbursement to DOC  
5 for ordinary payroll expenses and tax obligations.

6 Debtors filed a notice of funds regarding the new value  
7 contribution. This notice stated that \$139,000 had been  
8 received from the key man life insurance policy and that  
9 additional funds in the amount of \$111,000 would be obtained  
10 from a business acquaintance and would be available upon entry  
11 of the confirmation order.<sup>8</sup>

12 On March 6, 2014, the bankruptcy court read its ruling  
13 granting confirmation of the SAJP into the record.<sup>9</sup> The  
14 bankruptcy court entered the order confirming the SAJP on  
15 March 12, 2014. As a condition of confirmation, the order  
16 required that all amounts owed to QHI from KT Market must be  
17 repaid on or prior to the effective date. The effective date of  
18 the plan was March 28, 2014.

19 **7. Pineda's Motion To Alter Or Amend The Confirmation**  
20 **Order Under Rule 9024**

21 Pineda moved to alter or amend the order pursuant to  
22 Rule 9024. Pineda maintained that (1) the confirmation order  
23 should expressly provide that QHI would transfer the hotel to a  
24

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25 <sup>8</sup> It is not entirely clear from the record whether the key  
26 man life insurance policy was used to credit part of the  
\$250,000.

27 <sup>9</sup> The bankruptcy court's ruling is discussed in further  
28 detail below in connection with Pineda's arguments on appeal.

1 special purpose entity designated by Pineda, rather than being  
2 transferred directly to Pineda; (2) the confirmation order  
3 should require QHI to account for and immediately turn over to  
4 Pineda all accumulated cash collateral, plus all personal  
5 property; (3) the plan amendments made after confirmation  
6 required the hotel to be revalued at its liquidation value of  
7 \$1.9 rather than the sale value of \$2.5 million.

8 Pineda also filed an emergency motion to prohibit Ken and  
9 Carol Dunlap and their trust from transferring to DOC the cash  
10 surrender proceeds of a key man life insurance policy and the  
11 fee simple interests in Benson Little General and Benson Chevron  
12 to DOC. Since Ken and Carol Dunlap had filed a bankruptcy  
13 petition themselves, Pineda maintained that the proceeds from  
14 the life insurance policy and the Benson properties were  
15 property of the Dunlaps' bankruptcy estate.

16 In addition, Pineda filed a motion to stay the confirmation  
17 order pending resolution of the above-referenced motions and  
18 sought an expedited hearing.

19 The bankruptcy court heard Pineda's motions on March 27,  
20 2014. The court denied the stay of the effective date of the  
21 plan and denied Pineda's motion to alter or amend the  
22 confirmation order.

### 23 **8. Pineda Appeals**

24 On April 10, 2014, Pineda filed its notice of appeal of the  
25 order confirming debtors' SAJP.

26 On September 24, 2014, the Panel issued an order for  
27 supplemental briefing on whether this appeal had become moot.

28 The parties subsequently submitted their supplemental briefs and

1 supplemental record on the mootness issue.

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction over this proceeding  
4 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). Because the SAJP has  
5 been confirmed, distributions commenced, properties transferred,  
6 and there is no stay pending appeal of the confirmation order,  
7 the question arises whether this appeal is moot and subject to  
8 dismissal. If an appeal is constitutionally moot, we must  
9 dismiss. Drummond v. Urban (In re Urban), 375 B.R. 882, 887  
10 (9th Cir. BAP 2007). Moreover, we may dismiss if equitably  
11 moot. Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC),  
12 391 B.R. 25, 33-35 (9th Cir. BAP 2008). We consider the  
13 mootness question below and conclude that the appeal is not  
14 constitutionally or equitably moot. Therefore, we have  
15 jurisdiction under 28 U.S.C. § 158.

16 **III. ISSUES**

17 A. Whether this appeal is moot;

18 B. Whether the bankruptcy court erred in finding that  
19 debtors complied with § 1129(a)(2);

20 C. Whether the bankruptcy court erred in finding that  
21 debtors had satisfied the requirements for feasibility under  
22 § 1129(a)(11);

23 D. Whether the bankruptcy court erred in finding that the  
24 proper cramdown interest rate was 5%; and

25 E. Whether the bankruptcy court erred in finding that the  
26 requirements for the new value exception to the absolute  
27 priority rule were satisfied.

28

1 **IV. STANDARDS OF REVIEW**

2 Mootness is a question of law reviewed de novo. Nelson v.  
3 George Wong Pension Trust (In re Nelson), 391 B.R. 437, 442 (9th  
4 Cir. BAP 2008).

5 We review the bankruptcy court's ultimate decision to  
6 confirm a chapter 11 reorganization plan for an abuse of  
7 discretion. Computer Task Grp., Inc. v. Brotby (In re Brotby),  
8 303 B.R. 177, 184 (9th Cir. BAP 2003). We apply a two-part test  
9 to determine whether the bankruptcy court abused its discretion.  
10 United States v. Hinkson, 585 F.3d 1247 (9th Cir. 2009) (en  
11 banc). We first determine de novo whether the bankruptcy court  
12 "identified the correct legal rule to apply to the relief  
13 requested." Id. at 1251. If it did, we then determine "whether  
14 [the bankruptcy court's] application of the correct legal  
15 standard was (1) 'illogical,' (2) 'implausible,' or (3) without  
16 'support in inferences that may be drawn from the facts in the  
17 record.'" Id. If any of these three determinations applies, we  
18 may be left with a definite and firm conviction that the  
19 bankruptcy court abused its discretion in making a clearly  
20 erroneous factual finding. Id.

21 "Of course, a determination that a plan meets the requisite  
22 confirmation standards necessarily requires a bankruptcy court  
23 to make certain factual findings and interpret the law."  
24 In re Brotby, 303 B.R. at 184.

25 The issue whether a plan is feasible – is not likely to be  
26 followed by liquidation or further reorganization – is one of  
27 fact, which we review under the clearly erroneous standard.  
28 Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352,

1 1358 (9th Cir. 1986).

2 The bankruptcy court's application of the factors under the  
3 formula approach articulated in Till v. SCS Credit Corp.,  
4 541 U.S. 465 (2004), to this case is a question of fact reviewed  
5 for clear error. We give substantial deference to the  
6 bankruptcy court in making cramdown interest rate  
7 determinations. In re Yett, 306 B.R. 287, 290 (9th Cir. BAP  
8 2004) (citing Farm Credit Bank v. Fowler (In re Fowler),  
9 903 F.2d 694, 696 (9th Cir. 1990)); In re Red Mountain Mach.  
10 Co., 451 B.R. 897, 905-06 at n.19 (Bankr. D. Ariz. 2011).

11 "[W]hether a particular plan gives old equity a property  
12 interest 'on account of' its old ownership interests in  
13 violation of the absolute priority rule or for another,  
14 permissible reason is a factual question." In re Red Mountain  
15 Mach. Co., 451 B.R. at 905-06 n.18.

16 In reviewing factual findings, if the bankruptcy court's  
17 "account of the evidence is plausible in light of the record  
18 viewed in its entirety," the appellate court may not reverse,  
19 even if it was convinced that it would have weighed the evidence  
20 differently. Anderson v. City of Bessemer City, N.C., 470 U.S.  
21 564, 573-74 (1985). "Where there are two permissible views of  
22 the evidence, the factfinder's choice between them cannot be  
23 clearly erroneous." Id.

24 We may affirm the bankruptcy court on any basis supported  
25 by the record. Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir.  
26 2008).

1 V. DISCUSSION

2 A. Pineda's Appeal Of The Order Confirming Debtors' SAJP Is  
3 Not Moot.

4 In analyzing constitutional mootness, the appellate court  
5 asks whether it can give the appellant "any effective relief in  
6 the event that it decides the matter on the merits in [its]  
7 favor. If it can grant such relief, the matter is not moot."  
8 Felton Pilate v. Burrell (In re Burrell), 415 F.3d 994, 998 (9th  
9 Cir. 2005). We conclude that this appeal is not  
10 constitutionally moot because we could reverse plan confirmation  
11 or require modification of the SAJP, thereby giving relief to  
12 Pineda.

13 The equitable mootness question requires more analysis due  
14 to the Ninth Circuit's "comprehensive test" for determining  
15 whether an appeal is equitably moot:

16 We will look first at whether a stay was sought, for  
17 absent that a party has not fully pursued its rights.  
18 If a stay was sought and not gained, we then will look  
19 to whether substantial consummation of the plan has  
20 occurred. Next, we will look to the effect a remedy  
21 may have on third parties not before the court.  
22 Finally, we will look at whether the bankruptcy court  
23 can fashion effective and equitable relief without  
24 completely knocking the props out from under the plan  
25 and thereby creating an uncontrollable situation for  
26 the bankruptcy court.

27 Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe  
28 Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012).

29 In applying these factors to this case, we decline to  
30 dismiss this appeal on equitable mootness grounds.<sup>10</sup> Although

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31 <sup>10</sup> Pineda's supplemental brief on mootness mostly discussed  
32 debtors' conduct after confirmation and issues which remained  
33 (continued...)

1 Pineda sought a stay from the bankruptcy court and did not seek  
2 one from the Panel, "failure to obtain a stay is one factor to  
3 be considered in assessing equitable mootness, but is not  
4 necessarily controlling." Id. at 881-82.

5 Moreover, the plan may be substantially consummated as  
6 defined in § 1101(2): "Substantial consummation means  
7 (A) transfer of all or substantially all of the property  
8 proposed by the plan to be transferred; (B) assumption by the  
9 debtor or by the successor to the debtor under the plan of the  
10 business or of the management of all or substantially all of the  
11 property dealt with by the plan; and (C) commencement of  
12 distribution under the plan." Debtors have transferred certain  
13 real property to its secured creditors, including Pineda, in  
14 compliance with the plan, assumed management of the business and  
15 property dealt with by the plan, and commenced distributions to  
16 all classes of creditors.

17 However, even if the plan is substantially consummated, we  
18 can "still assess whether effective relief might be given  
19 without fully impairing the prior plan and other pertinent  
20 circumstances." In re Thorpe Insulation Co., 677 F.3d at 882

21 \_\_\_\_\_  
22 <sup>10</sup>(...continued)  
23 unresolved in the confirmation order. Pineda argued that debtors  
24 failed to turn over Pineda's cash collateral from the QHI hotel,  
25 and debtors' distribution to unsecured creditors was not  
26 authorized and insubstantial. Moreover, Pineda maintains that  
27 the bankruptcy court's confirmation ruling left numerous  
28 outstanding issues unresolved such as the amount of Pineda's  
secured and unsecured claims and whether Pineda was entitled to  
an administrative claim. Other than bearing on whether the plan  
has been substantially consummated, these arguments, are  
irrelevant to the constitutional and equitable mootness analysis  
under Burrell and Thorpe.

1 n.7. We thus consider "whether modification of the plan of  
2 reorganization would bear unduly on the innocent." Id. at 882.

3 Debtors point out that some of the real property  
4 transferred to its secured creditors pursuant to the SAJP has  
5 been subsequently transferred to third parties. Debtors also  
6 maintain that other parties have acted in reliance on the plan  
7 and confirmation order. Specifically, the equity holders have  
8 contributed \$250,000 to the plan from various sources,  
9 management took a reduction in salary to fund the first  
10 distribution to unsecured creditors under the plan, and third  
11 party suppliers, vendors, and customers have acted in reliance  
12 on the plan by extending favorable credit terms to assist with  
13 post-confirmation operations. Therefore, according to debtors,  
14 reversal of confirmation would unfairly prejudice these parties  
15 and would lead to an inequitable result for parties not even  
16 before this court.

17 We are not persuaded. Even if we adopted Pineda's position  
18 on appeal, debtors' transfer of the real properties to their  
19 secured creditors would not have to be modified since the  
20 estates were transferring those properties in any event,<sup>11</sup> and  
21 any distributions previously made to creditors would not have to  
22 be reduced. Further, although the equity holders made the  
23 required new value contribution, they do not qualify as "third  
24 parties" who are not before the court. Any adverse consequences  
25 to the equity holders were foreseeable as they opted to press  
26

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27  
28 <sup>11</sup> What happened to the properties after the secured  
creditors took title is not pertinent.

1 forward with confirmation. Harm to debtors' management who  
2 agreed to reduced salaries and harm to vendors and suppliers who  
3 agreed to extend credit is lacking as well. Debtors have not  
4 explained in any detail what inequitable result might ensue to  
5 these groups if the confirmation order were reversed.

6 In sum, it would not be impossible for the bankruptcy court  
7 to fashion effective relief for Pineda nor has there been such a  
8 comprehensive change of circumstances to render it inequitable  
9 to consider the merits of the appeal. Focus Media, Inc. v.  
10 Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916,  
11 922-23 (9th Cir. 2004) (citing Trone v. Roberts Farms, Inc.  
12 (In re Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981)).  
13 "Where equitable relief, though incomplete, is available, the  
14 appeal is not moot." In re Thorpe Insulation Co., 677 F.3d at  
15 883. As this appeal is not moot, we now turn to the merits.

#### 16 **B. Plan Confirmation**

17 Debtors had the burden of proving all the elements  
18 governing plan confirmation. Leavitt v. Soto (In re Leavitt),  
19 209 B.R. 935, 940 (9th Cir. BAP 1997), aff'd, 171 F.3d 1219 (9th  
20 Cir. 1999); United States v. Arnold & Baker Farms (In re Arnold  
21 & Baker Farms), 177 B.R. 648, 653 (9th Cir. BAP 1994). The  
22 requirements for plan confirmation are listed in § 1129(a)  
23 (stating that the court shall confirm a plan only if all the  
24 following requirements have been met). If the only condition  
25 not satisfied is the eighth requirement, § 1129(a)(8), the plan  
26 must satisfy the "cramdown" alternative to this condition found  
27 in § 1129(b). Cramdown requires that the plan "does not  
28 discriminate unfairly" against and "is fair and equitable"

1 towards each impaired class that has not accepted the plan.

2 **1. The Bankruptcy Court Did Not Err By Finding That**  
3 **The SAJP Complied With § 1129(a)(2).**

4 Section 1129(a)(2) requires that the plan proponent comply  
5 with the applicable provisions of the Bankruptcy Code. The  
6 section's primary purpose is to assure that the plan proponents  
7 have complied with the disclosure and solicitation requirements  
8 of §§ 1125 and 1126. See In re MacGibbon, 2006 WL 6810935, at  
9 \*9 (9th Cir. BAP August 14, 2006) (Section 1129(a)(2) primarily  
10 addresses adherence to the disclosure and solicitation  
11 provisions in §§ 1125 and 1126); In re Sierra-Cal, 210 B.R. 168,  
12 173 (Bankr. E.D. Cal. 1997) (Adequacy of disclosure is an  
13 essential element for plan confirmation by way of § 1129(a)(2)).  
14 However, bankruptcy courts have interpreted § 1129(a)(2) to  
15 require the plan proponent's compliance with court orders issued  
16 in furtherance of the reorganization process. See In re Multiut  
17 Corp., 449 B.R. 323, 339 (Bankr. N.D. Ill. 2011) (citing  
18 In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 220-21  
19 (Bankr. D.N.J. 2000)).

20 Some courts have strictly construed § 1129(a)(2) and denied  
21 plan confirmation for any violation of the Bankruptcy Code. See  
22 In re Greate Bay Hotel, 251 B.R. at 236-37 (collecting cases).

23 Other courts have taken a more lenient approach:

24 Congress did not intend to fashion a minefield out of  
25 the provisions of the Bankruptcy Code. In fact, the  
26 legislative history mentions the provision only in  
27 passing, offering as an example of compliance that the  
28 debtor meet the disclosure requirements of § 1125 to  
satisfy § 1129(a)(2). Certainly, if Congress had  
meant that any infraction, no matter how early on in  
the case, no matter how minor the breach, and  
regardless of whether the court has remedied the

1 violations, should result in a denial of confirmation,  
2 Congress would have given some clearer indication in  
3 the legislative history or made the statutory  
4 provision far more express.

5 In re Landing Assocs., Ltd., 157 B.R. 791, 811 (Bankr. W.D. Tex.  
6 1993). "Nonetheless, 'serious violations of the Bankruptcy Code  
7 by a [proponent] can and should result in a denial of  
8 confirmation of a plan under § 1129(a)(2).'" In re Greate Bay  
9 Hotel, 251 B.R. at 237 (quoting In re Landing Assocs., 157 B.R.  
10 at 810).

11 In deciding that § 1129(a)(2) did not preclude confirmation  
12 of debtors' SAJP, the bankruptcy court found:

13 [I]t is clear that the transfers between DOC and QHI  
14 have been occurring since the beginning of the case.  
15 There does not appear to be any bad intent or improper  
16 use of such funds. Neither Pineda nor CCB raised any  
17 objection to such practices except with respect to the  
18 \$177,000 loan to a non-debtor entity, all but  
19 [\$]23,000 of which has been repaid.

20 While the court does not condone the debtors' failure  
21 to seek court approval with respect to the non-debtor  
22 loan, given the explanations provided, the court is  
23 not going to use this one issue to preclude  
24 consideration of the second-amended plan . . . .

25 Pineda argues on appeal that the bankruptcy court  
26 misapplied § 1129(a)(2) to the facts of this case and thus erred  
27 as a matter of law in confirming the SAJP. Pineda asserts that  
28 it is undisputed that debtors made the \$177,000 intercompany  
transfer and it was not fully repaid. Pineda further maintains  
that § 1129(a)(2) mandates compliance with court orders  
regardless of debtors' intent.

29 Relying on Multiut, Pineda contends the facts in this case  
30 are analogous. There, a plan proponent professed a  
31 misunderstanding of a court order requiring a deposit of

1 \$100,000. The debtor deposited just \$70,000. When the debtor  
2 failed to provide evidence that the remaining \$30,000 had been  
3 deposited following the court's clarification of this order, the  
4 court found § 1129(a)(2) was not satisfied and denied plan  
5 confirmation. In re Multiut, 449 B.R. at 341-42. Pineda argues  
6 that debtors' violations of the cash collateral orders  
7 throughout this case constitute an even more serious failure to  
8 comply with court orders than the failure to comply in Multiut.

9 Finally, Pineda asserts that it had no duty to constantly  
10 monitor debtors' conduct to determine whether they were  
11 complying with their fiduciary duties, and there is no evidence  
12 in the record that Pineda knew about the intercompany transfers  
13 in order to object. Pineda maintains that debtors had the  
14 obligation to comply with § 1129(a)(2) whether or not creditors  
15 objected to their violations of the cash collateral orders.

16 We have not had occasion to discuss the circumstances, if  
17 any, under which the violation of a court order should preclude  
18 confirmation under § 1129(a)(2) nor have we found Ninth Circuit  
19 precedent on point. Pineda advocates a rule that requires  
20 denial of confirmation where there are "serious" violations of a  
21 court's order. However, even if we were to adopt such a rule,  
22 the bankruptcy court has broad discretion to determine whether a  
23 particular violation of the court's order is so serious as to  
24 require denial of confirmation under § 1129(a)(2).<sup>12</sup>

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25  
26 <sup>12</sup> Indeed, the bankruptcy court has the tools to fashion a  
27 number of remedies for violations of cash collateral orders under  
28 other sections of the Bankruptcy Code. See § 1112(b)(4)(D) and  
(E) (conversion or dismissal); § 1104 (appointment of a chapter 11  
(continued...))

1 On this record, we cannot say the bankruptcy court abused  
2 its discretion. The record shows that the bankruptcy court  
3 implicitly understood and applied the "serious violation" legal  
4 standard articulated in In re Greate Bay Hotel. In reaching its  
5 decision, the court neither condoned nor minimized debtors'  
6 conduct with respect to the intercompany transfers. Moreover,  
7 contrary to Pineda's assertions, in deciding whether debtors'  
8 violations of the cash collateral orders were so egregious as to  
9 preclude confirmation of the SAJP, the bankruptcy court did  
10 consider all relevant facts and circumstances such as debtors'  
11 intent, improper use of the funds, or debtors' failure to pay  
12 the funds back.

13 Here, Ted Dunlap provided a supplemental declaration  
14 regarding the \$177,000 transfer from QHI to KT Market and the  
15 other intercompany transfers between debtors that had occurred  
16 throughout the case. Mr. Dunlap testified that the \$177,000  
17 transferred from QHI to KT Market were used to pay for freezer,  
18 electrical upgrades, signage, merchandise displays and other  
19 tenant needs for stocking and opening a grocery store in Dunlap  
20 Plaza. Mr. Dunlap explained that the plaza needed an anchor  
21 tenant after the two prior grocery store tenants vacated the  
22 space. He further testified that not a dime of the QHI loan  
23 went to the principals of DOC or QHI and that the funds were  
24 repaid either in full or mostly in full.

25 Finally, Mr. Dunlap explained that DOC provided payroll  
26

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27 <sup>12</sup>(...continued)  
28 trustee); § 363(e) (adequate protection).

1 functions for QHI and covered other expenses for QHI (including  
2 insurance and taxes). The transfers between DOC and QHI were  
3 largely for reimbursements for payment of QHI expenses that were  
4 and are a part of the cash collateral budgets. Mr. Dunlap  
5 testified that debtors did not believe the loan from QHI to  
6 KT Market or other ordinary course intercompany transfers were  
7 prohibited and that they did not intend to violate any court  
8 orders. Pineda had the opportunity to cross examine Mr. Dunlap  
9 at the confirmation hearing.

10 Given the bankruptcy court's findings regarding no bad  
11 intent or improper use of the funds, the bankruptcy court must  
12 have found Ted Dunlap's testimony credible. The court  
13 apparently was convinced by the evidence in the record that  
14 debtors repaid all but \$23,000 of the funds to QHI. Moreover,  
15 as a condition of confirmation, the bankruptcy court required  
16 KT Market to pay all amounts owed to QHI prior to the effective  
17 date.

18 Here, the bankruptcy court's factual findings regarding no  
19 bad intent, no improper use of the funds, and substantial  
20 repayment are supported by the record and not clearly erroneous.  
21 Given these mitigating factors, the bankruptcy court could  
22 reasonably conclude that debtors' non-compliance with the cash  
23 collateral orders was not so egregious as to preclude  
24 confirmation of debtors' SAJP. If the bankruptcy court's  
25 "account of the evidence is plausible in light of the record  
26 viewed in its entirety," we cannot reverse even if we are  
27 convinced that we would have weighed the evidence differently.  
28 Anderson, 470 U.S. at 573-74. There is thus no basis for

1 reversal of the confirmation order on the grounds alleged.

2           **a.    The Bankruptcy Court Did Not Err By Finding That**  
3           **The Law Of The Case Doctrine Was Inapplicable To**  
4           **Its Earlier Ruling Denying Confirmation Of**  
5           **Debtors' FAJP For Violation of § 1129(a)(2).**

6           Next, Pineda argues that the bankruptcy court's prior  
7 determination that debtors' non-compliance with the cash  
8 collateral orders warranted denial of debtors' FAJP is the law  
9 of the case and, therefore, should be given preclusive effect in  
10 connection with the SAJP. Pineda further maintains that the  
11 bankruptcy court's earlier ruling was not clearly erroneous and  
12 nothing changed between the hearing on the FAJP and the hearing  
13 on the SAJP that would justify departure from the court's  
14 previous ruling.

15           The bankruptcy court found the law of the case doctrine  
16 inapplicable. The court noted that the doctrine was not a  
17 limitation on the court's power, but expressed only the practice  
18 of courts generally to refuse to reopen questions formerly  
19 decided. U.S. v. Maybusher, 735 F.2d 366, 370 (9th Cir. 1984).  
20 The bankruptcy court concluded that the doctrine did not  
21 preclude it from reexamining the issue of debtors' failure to  
22 comply with the court's orders in the context of the SAJP  
23 especially when its prior findings of non-compliance were made  
24 in support of an interlocutory order.

25           We agree with the bankruptcy court's ruling. The law of  
26 the case doctrine precludes a court from "reconsidering an issue  
27 that has already been decided by the same court . . . in the  
28 identical case." United States v. Alexander, 106 F.3d 874, 876  
(9th Cir. 1997). Application of the doctrine "is discretionary,

1 not mandatory” and is in no way “a limit on [a court’s] power.”  
2 City of L.A. v. Santa Monica Baykeeper, 254 F.3d 882, 888 (9th  
3 Cir. 2001); Maybusher, 735 F.2d at 370. The doctrine does not  
4 effect the bankruptcy court’s power to reconsider its own  
5 interlocutory order denying confirmation of debtors’ FAJP. A  
6 contrary conclusion would be irreconcilable with § 1127(a) which  
7 states that the plan proponent may modify a plan at any time  
8 before confirmation and Civil Rule 54(b), incorporated by  
9 Rule 7054, which states in relevant part:

10 [A]ny order or other decision, however designated,  
11 that adjudicates fewer than all the claims or the  
12 rights and liability of fewer than all the parties  
13 does not end the action as to any of the claims or  
parties and may be revised at any time before entry of  
a judgment adjudicating all the claims and all the  
parties’ rights and liabilities.

14 Accordingly, the bankruptcy court was not bound by the law of  
15 the case doctrine when it reconsidered or rescinded its prior  
16 decision concerning debtors’ non-compliance with the cash  
17 collateral orders as grounds for denial of confirmation under  
18 § 1129(a)(2).

19 **b. The Bankruptcy Court Properly Found That The**  
20 **Claim And Issue Preclusion Doctrines Did Not**  
21 **Apply To Its Earlier Ruling Denying Confirmation**  
**Of Debtors’ FAJP For Violation Of § 1129(a)(2).**

22 Pineda also relies on claim and issue preclusion to  
23 support its arguments under § 1129(a)(2).

24 Federal common law determines the preclusive effect of a  
25 federal judgment. Taylor v. Sturgell, 553 U.S. 880, 891 (2008);  
26 W. Sys., Inc. v. Ulloa, 958 F.2d 864, 871 n.11 (9th Cir. 1992).

27 The party asserting issue preclusion must establish that (1) the  
28 issue was actually decided by a court in an earlier action,

1 (2) the issue was necessary to the judgment in that action, and  
2 (3) there was a valid and final judgment. N.H. v. Maine,  
3 532 U.S. 742, 748 (2001). The doctrine of claim preclusion  
4 requires: (1) the identity of claims, (2) a final judgment on  
5 the merits, and (3) privity between the parties. Tahoe-Sierra  
6 Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d  
7 1064, 1077 (9th Cir. 2003). On appeal, Pineda mentions only the  
8 finality element, which is required under either doctrine.

9 Citing Lievsay v. W. Fin. Savings Bank (In re Lievsay),  
10 118 F.3d 661, 662 (9th Cir. 1997), the bankruptcy court found  
11 that neither doctrine applied because the order denying debtors'  
12 FAJP was interlocutory and not final. Pineda argues that this  
13 was in error because the bankruptcy court's orders granting it  
14 relief from stay were final. To connect the bankruptcy court's  
15 FAJP ruling with the relief from stay orders, Pineda asserts  
16 that the orders granting relief from stay were predicated on the  
17 same evidence the court relied upon for denial of confirmation.  
18 According to Pineda, it follows that debtors' non-compliance  
19 with the cash collateral orders as a basis for denial of plan  
20 confirmation was "necessarily decided" in connection with the  
21 relief from stay motions. Pineda then concludes, without  
22 analysis, that "all elements of res judicata and collateral  
23 estoppel were satisfied."

24 We disagree. Pineda did not argue before the bankruptcy  
25 court that the relief from stay orders provided an independent  
26 basis for application of the claim and issue preclusion  
27 doctrines. Because Pineda failed to raise this issue before the  
28 bankruptcy court, it has been waived. Consol. Mktg., Inc. v.

1 Marvin Props., Inc. (In re Marvin Props., Inc.), 854 F.2d 1183,  
2 1187 (9th Cir. 1988). In any event, even if not waived,  
3 Pineda's reliance on the final relief from stay orders does not  
4 aid its position. As noted above, the bankruptcy court could  
5 revisit its findings on plan confirmation at any time before  
6 entry of the confirmation judgment under Civil Rule 54(b).  
7 Further, relief from stay proceedings are primarily procedural;  
8 they determine whether there are sufficient countervailing  
9 equities to release an individual creditor from the collective  
10 stay. Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740-41  
11 (9th Cir. 1985). There is no indication that the bankruptcy  
12 court's denial of confirmation based on debtors' non-compliance  
13 with the cash collateral orders was "necessary" to the court's  
14 decision granting Pineda relief from stay. Accordingly, there  
15 is no basis for reversal of the confirmation order on claim or  
16 issue preclusion grounds.

17 **2. The Bankruptcy Court Did Not Err By Finding That The**  
18 **SAJP Complied With § 1129(a)(11).**

19 Section 1129(a)(11) provides that a plan is confirmable  
20 only if "[c]onfirmation of the plan is not likely to be followed  
21 by liquidation, or the need for further financial  
22 reorganization, of the debtor or any successor to the debtor  
23 under the plan, unless such liquidation or reorganization is  
24 proposed in the plan." Feasibility requires only that the  
25 debtor demonstrate that the plan has a "reasonable probability  
26 of success." In re Acequia, Inc., 787 F.2d at 1364. "The Code  
27 does not require the debtor to prove that success is inevitable  
28 or assured, and a relatively low threshold of proof will satisfy

1 § 1129(a)(11) so long as adequate evidence supports a finding of  
2 feasibility.” Wells Fargo Bank v. Loop 76, LLC (In re Loop 76,  
3 LLC), 465 B.R. 525, 544 (9th Cir. BAP 2012).

4 “If a final payment, in the form of a ‘balloon’ payment, is  
5 proposed to come from new financing to be acquired by the  
6 [d]ebtor in the form of some new lending vehicle, then proof of  
7 feasibility is necessary. Whether that balloon payment can  
8 likely be made, and new financing acquired, requires credible  
9 evidence proving that obtaining that future financing is a  
10 reasonable likelihood.” In re Seasons Partners, LLC, 439 B.R.  
11 505, 515 (Bankr. D. Ariz. 2010).

12 In evaluating the feasibility of the SAJP, the bankruptcy  
13 court recited and recognized these standards. The court first  
14 considered the SAJP’s provisions for implementing the plan.  
15 Payments under the plan would be funded through cash flow  
16 generated by the continued operations of the debtors’ business;  
17 equity holders would infuse new capital in the amount of  
18 \$250,000 and contribute their fee simple interests in the Benson  
19 Little General and Benson Chevron; debtors had received  
20 significant support from fuel and merchandise vendors that would  
21 generate an additional \$30,000-\$45,000 in additional cash on an  
22 annual basis; Jackson Oil had committed to a \$200,000 line of  
23 credit available for fuel purchases upon confirmation of the  
24 plan; a \$100,000 cash contribution from a key man life insurance  
25 policy would provide additional liquidity for the plan; and  
26 salary deferrals in the amount of \$50,000 for Ted Dunlap and  
27 Mr. Martin would further assist with liquidity if needed. The  
28 bankruptcy court also noted that the transfer of the QHI hotel

1 to Pineda would mean that no proceeds from the hotel would be  
2 available to fund the plan, but it also meant that the secured  
3 payments to Pineda would be reduced by the value of its secured  
4 claim against the hotel, which would also improve feasibility of  
5 the plan.

6 With respect to the witness testimony, the bankruptcy court  
7 found Mr. Odenkirk's testimony credible. The bankruptcy court  
8 recited portions of Mr. Odenkirk's testimony that it found  
9 persuasive in its findings. First, Mr. Odenkirk concluded that  
10 based on the additional sources of cash and credit made  
11 available to debtors, and upon review of the financial impact of  
12 the updated credit offered to debtors by its vendors relating to  
13 fuel and merchandise sold by DOC, there should be ample cash  
14 available to purchase fuel and merchandise to meet projections.  
15 Next, Mr. Odenkirk confirmed that the Jackson fuel credit of  
16 \$200,000 alone would allow DOC to purchase the one load of fuel  
17 per day needed to hit the projected fuel sales.

18 He also described how the increase in fuel supply would  
19 translate into greater sales and higher profits on the retained  
20 locations. Mr. Odenkirk explained that the debtors did not  
21 require vast amounts of inventory on hand at any given time.  
22 Rather debtors' fuel and merchandise inventory rotated on a  
23 daily or weekly basis, and consequently debtors would have  
24 access to more than enough inventory for the plan to succeed.

25 Finally, Mr. Odenkirk opined that DOC should be able to  
26 obtain financing for the balloon payments called for under the  
27 plan so long as the plan payments were made. The bankruptcy  
28 court noted that on this last point, the evidence was

1 uncontroverted.

2       The bankruptcy court also recited portions of Ted Dunlap's  
3 testimony that it relied upon. Ted Dunlap confirmed that  
4 debtors typically store approximately 50,000 to 65,000 gallons  
5 of fuel in their tanks at any given time, with the average being  
6 50,000 gallons, and that this inventory is constantly rotating  
7 and being replaced. He further testified that the DOC stations  
8 were capable of storing and rotating approximately \$200,000 in  
9 merchandise inventory, not the \$800,000 suggested in Mr. Farr's  
10 analysis.

11       The bankruptcy court explained why it did not find  
12 Mr. Farr's testimony compelling. Mr. Farr was the only witness  
13 offered to controvert Mr. Odenkirk's testimony on feasibility.  
14 Mr. Farr is the vice-president of CCB, having worked as a  
15 commercial loan officer for over twenty-five years. He  
16 testified that he had not operated gas stations or convenience  
17 stores and had no particular expertise in this industry. He  
18 also did not prepare his own projections for DOC. During cross  
19 examination Mr. Farr admitted that there were errors in his  
20 analysis and that portions of his analysis regarding loss of  
21 cash and inventory at DOC since the petition date was not  
22 prepared by him but by CCB's counsel. The court also  
23 discredited Mr. Farr's argument that the cash position on the  
24 petition date and the current cash position were different  
25 because testimony and evidence showed that a few days after the  
26 petition date a significant payroll for both companies was paid  
27 that reduced cash to approximately the exact level of cash that  
28 existed as of December 31, 2013. Given Mr. Farr's failure to

1 prepare independent projections and the errors in his analysis,  
2 and considering his lack of independence in this matter, the  
3 bankruptcy court did not find his testimony compelling.

4 The bankruptcy court concluded that the totality of the  
5 evidence, including the increased funding and credit terms in  
6 the SAJP and the testimony of Mr. Odenkirk, combined with the  
7 testimony of Mr. Dunlap which the court found more credible than  
8 that of Mr. Farr, showed the SAJP was feasible within the  
9 meaning of § 1129(a)(11).

10 Pineda argues that the bankruptcy court erred in its  
11 feasibility analysis on several grounds. First, debtors' cash  
12 flow projections did not account for the full amount of Pineda's  
13 allowed secured claim, which includes the value of Pineda's lien  
14 on debtors' personal property and accumulated cash collateral.  
15 Second, the cash flow projections were based on the inaccurate  
16 assumption that Pineda would have no administrative claim for  
17 failed adequate protection. In this regard, Pineda maintains  
18 that the bankruptcy court's finding that sufficient funds should  
19 be available to pay the administrative claims due on the  
20 effective date was clearly erroneous. Pineda also contends the  
21 projections were not supported by the evidence because there was  
22 a glaring discrepancy between the projections and debtors'  
23 historical performance. Pineda points out that debtors did not  
24 once earn a profit during the six years prior to plan  
25 confirmation and posted a loss of nearly \$9 million dollars from  
26 January 2008 through May 2013. According to Pineda,  
27 Mr. Odenkirk's testimony could not cure these flaws and he  
28 simply reviewed the projections debtors provided and checked

1 whether the math on the projections was correct.

2 Finally, Pineda asserts that debtors provided no evidence  
3 of their ability to make the balloon payments. Pineda points  
4 out that debtors will owe millions of dollars in balloon  
5 payments at the end of the five-year term and the only evidence  
6 debtors presented on this issue was Mr. Odenkirk's statement  
7 that if DOC and QHI make the payments called for under the plan  
8 it is reasonable to expect that DOC will be able to obtain  
9 conventional bank financing or private financing for the balloon  
10 payments called for under the plan. According to Pineda, this  
11 self-serving, unsupported and conclusory opinion is insufficient  
12 as a matter of law to sustain a finding of feasibility.

13 We acknowledge that knowing the amount and character of  
14 claims is vital to assessing feasibility. While Pineda  
15 complains that the bankruptcy court has not yet determined the  
16 amount of its secured claim, the SAJP set forth stipulated  
17 values of Pineda's secured claim on the retained properties for  
18 purposes of plan confirmation. Whether or not those values will  
19 turn out to be different, we cannot say. Moreover, there was no  
20 evidence in the record showing Pineda was entitled to an  
21 administrative claim of over \$500,000 for failed adequate  
22 protection. The bankruptcy court noted that Pineda had not  
23 moved for approval of any administrative priority claim prior to  
24 the confirmation hearing.

25 Because feasibility is an issue of fact, we give due regard  
26 to the bankruptcy court's evaluation of witness testimony and  
27 any inferences drawn by the court. In re Loop 76, LLC, 465 B.R.  
28 at 544. Factual issues such as how increases in fuel supply

1 will translate into greater sales and higher profits were  
2 central to the feasibility analysis. Certainly, the judge who  
3 heard the relevant testimony was in a better position to assess  
4 the testimony than we are on a paper record. Since  
5 Mr. Odenkirk's testimony was consistent with the evidence, we  
6 will not disturb the bankruptcy court's assessment of  
7 credibility on appeal. See Anderson, 470 U.S. at 575.

8 Finally, we are not persuaded that the bankruptcy court's  
9 findings regarding the balloon payments are clearly erroneous.  
10 Mr. Odenkirk's opinion that the balloon payments could be made  
11 if DOC made all the payments required under the SAJP was not  
12 binding on the bankruptcy court even if no contradictory  
13 evidence was offered by the other side. See Ark. Natural Gas  
14 Corp., 321 U.S. 620, 627-28 (1944) (it is not error for the  
15 factfinder to reject expert opinion evidence, even if  
16 uncontroverted). However, the bankruptcy court had discretion  
17 whether to credit Mr. Odenkirk's opinion regarding the balloon  
18 payment and afford it the appropriate weight. Here, the  
19 bankruptcy court observed that there was no evidence that the  
20 real property would decline in value over the term of the plan.  
21 Moreover, Mr. Odenkirk's opinion regarding refinance was  
22 conditioned on DOC's payments under the SAJP to its secured  
23 creditors. Under these circumstances, the bankruptcy court  
24 could reasonably conclude that it was conceivable DOC could  
25 refinance the properties at the end of the five-year term.

26 In sum, upon our review of the record, there was adequate  
27 evidence to support debtors' relatively low threshold of proof  
28 on feasibility. Accordingly, the bankruptcy court's finding of

1 feasibility was not clearly erroneous.

2 **3. The Bankruptcy Court Did Not Err By Finding That The**  
3 **SAJP Complied With § 1129(b) (2) (A) (i) (II) .**

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

11 Fair and equitable treatment of a secured creditor requires  
12 that the creditor retain the lien securing its claim  
13 (§ 1129(b) (2) (A) (i) (I)) and that the creditor receive deferred  
14 cash payments with a present value at least equal to the value  
15 of its claim (§ 1129(b) (2) (A) (i) (II)). In re Arnold & Baker  
16 Farms, 85 F.3d at 1420. Deferred cash payments to an impaired  
17 class must be valued as of the effective date of the plan and  
18 "consist of an appropriate interest rate and an amortization of  
19 the principal which constitutes the secured claim." Heartland  
20 Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe  
21 Enters.), 994 F.2d 1160, 1169 (5th Cir. 1993).

22 The SAJP provides that Pineda's secured claims will be  
23 amortized over twenty-five years and paid monthly with interest  
24 at 5% per annum, with the remaining balance to be paid at the  
25 end of year five of the plan. In determining whether the 5%  
26 cramdown interest rate was appropriate, the bankruptcy court  
27 used the formula approach set forth in Till, 541 U.S. at 476.

28 In deciding on an interest rate in a chapter 11 case,

1 a bankruptcy court should apply the market rate of  
2 interest where there exists an efficient market. And,  
3 when no efficient market exists for a Chapter 11  
debtor, then the Bankruptcy Court should employ the  
formula approach endorsed by the Till plurality.

4 In re VDG Chicken LLC, 2011 WL 3299089, at \*8 (9th Cir. BAP  
5 April 11, 2011) (citing Mercury Capital Corp. v. Milford Conn.  
6 Assocs., L.P., 354 B.R. 1, 11-12 (D. Conn. 2006); Bank of  
7 Montreal v. Official Comm. of Unsecured Creditors (In re Am.  
8 Homepatient, Inc.), 420 F.3d 559 (6th Cir. 2005) (finding the  
9 bankruptcy court did not err as a matter of law when it applied  
10 the Till formula to a chapter 11 cramdown)).

11 The bankruptcy court first found that it was undisputed  
12 that there was no efficient market for a loan to debtors. Next,  
13 the court considered the testimony of Mr. Odenkirk, who  
14 concluded that a 5% cramdown interest rate was fair and  
15 equitable. Although Mr. Odenkirk had used the 1.01% yield for a  
16 five-year treasury note as the base rate and then added a 4%  
17 risk factor, the bankruptcy court found that his ultimate  
18 conclusion of a 5% interest rate was supported by the formula  
19 approach in Till and current market lending conditions.

20 On appeal, Pineda contends that the bankruptcy court  
21 misapplied the formula approach. Pineda argues that the formula  
22 approach involves a two-step process: (1) it begins by looking  
23 to the national prime rate and (2) the court then adjusts the  
24 rate upward to account for various risk factors, including "the  
25 circumstances of the estate, the nature of the security, and the  
26 duration and feasibility of the reorganization plan. Till,  
27 541 U.S. at 479. Following this two step approach, Pineda  
28 asserts that the bankruptcy court should have added the risk

1 factor of 4% found by Mr. Odenkirk to the prime rate of 3.25%  
2 for a cramdown rate of 7.25%. Pineda maintains that the  
3 bankruptcy court's methodology was in error because the prime  
4 rate does not reflect any of the risks of lending to an  
5 insolvent chapter 11 debtor.

6 According to Pineda, even if the interest rate is reviewed  
7 under a clearly erroneous standard, there is no evidence in the  
8 record to support the appropriate risk adjustment is 1.75% since  
9 Mr. Odenkirk's testimony that the risk factors required a 4%  
10 adjustment was the only evidence on this issue. Pineda asserts  
11 that the court thus improperly substituted its own opinion of  
12 the correct risk adjustment for the evidence of record.

13 We disagree. Pineda overlooks that the Supreme Court in  
14 Till placed the evidentiary burden on the creditor to present  
15 evidence of a higher interest rate (the portion associated with  
16 the risk factor), reasoning that the creditors "are likelier to  
17 have readier access to any information absent from the debtor's  
18 filing." Till, 541 U.S. at 479.

19 The appropriate size of that risk adjustment depends,  
20 of course, on such factors as the circumstances of the  
21 estate, the nature of the security, and the duration  
22 and feasibility of the reorganization plan. The court  
23 must therefore hold a hearing at which the debtor and  
24 any creditors may present evidence about the  
25 appropriate risk adjustment. Some of this evidence  
26 will be included in the debtor's bankruptcy filings,  
27 however, so the debtor and creditors may not incur  
28 significant additional expense. Moreover, starting  
29 from a concededly low estimate and adjusting upward  
30 places the evidentiary burden squarely on the  
31 creditors, who are likely to have readier access to  
32 any information absent from the debtor's filing (such  
33 as evidence about the 'liquidity of the collateral  
34 market,' . . . Finally, many of the factors relevant  
35 to the adjustment fall squarely within the bankruptcy  
36 court's area of expertise.

1 Here, the bankruptcy court did not have to accept  
2 Mr. Odenkirk's 4% risk factor and Pineda offered no evidence of  
3 its own on the risk adjustment. The bankruptcy court properly  
4 considered the national prime rate (3.25%), market conditions,  
5 the feasibility of the plan, and noted that there was no  
6 evidence that the real property would decline in value over the  
7 term of the plan. In addition, the court noted that the prime  
8 rate already had a built in risk factor. Accordingly, based on  
9 the totality of the circumstances in the case, the bankruptcy  
10 court could reasonably conclude that a risk adjustment of 1.75%  
11 was appropriate and thus the appropriate cramdown interest rate  
12 should be 5%. Since we give substantial deference to the  
13 bankruptcy court's cramdown interest rate determination, the  
14 bankruptcy court's finding was not clearly erroneous.  
15 In re Yett, 306 B.R. at 290.

16 **4. The Bankruptcy Court Did Not Err By Finding That The**  
17 **SAJP Complied With § 1129(b) (2) (B) (ii) .**

18 Since debtors' SAJP Plan was not accepted by every impaired  
19 class of claims, it may only be confirmed pursuant to the  
20 so-called cram down provisions of § 1129(b), which bring into  
21 play the absolute priority rule. The absolute priority rule,  
22 which is set forth in § 1129(b) (2) (B) (ii), requires that "'a  
23 dissenting class of unsecured creditors . . . be provided for in  
24 full before any junior class can receive or retain any property  
25 [under a reorganization] plan.'" Norwest Bank Worthington v.  
26 Ahlers, 485 U.S. 197, 202 (1988).

27 In this case, the Dunlaps, as equity holders, are in a  
28 class of creditors junior to Pineda's unsecured claims which are

1 not being paid in full. Thus, application of the absolute  
2 priority rule would bar the Dunlaps from retaining any property,  
3 including their ownership interest in the reorganized debtor,  
4 DOC. However, debtors sought to utilize the new value exception  
5 to overcome the absolute priority rule.

6 To satisfy the new value exception to the absolute priority  
7 rule, and to satisfy § 1129(b)(2)(B)(ii) notwithstanding the  
8 objection by an unsecured class that is not paid in full, former  
9 equity owners are "required to offer value that was 1) new,  
10 2) substantial, 3) money or money's worth, 4) necessary for a  
11 successful reorganization and 5) reasonably equivalent to the  
12 value or interest received." In re Bonner Mall P'ship, 2 F.3d  
13 at 909. The bankruptcy court found that all these elements were  
14 met. The court found that the funds were "clearly new" and that  
15 the \$250,000 was substantial because it constituted in excess of  
16 5% of debtors' unsecured claims. The bankruptcy court also  
17 found the funds were money or money's worth and were necessary  
18 for an effective reorganization. Finally, the court found that  
19 the cash contribution was more than reasonably equivalent to the  
20 value of the equity interest retained.

21 On appeal, Pineda challenges the bankruptcy court's finding  
22 on the substantial element. Citing case law where the courts  
23 rejected a new value contribution when the proposed new value  
24 was equal to 3.7% to 4.4% of unsecured debt, Pineda contends  
25 that the 5.49% which applies to this case is insufficient.  
26 Next, Pineda contends that a portion of the new value  
27 contribution is a transfer of the cash surrender value of a life  
28 insurance policy held by a self-settled trust of Ken and Carol

1 Dunlap. According to Pineda, because the Dunlaps are debtors in  
2 their own bankruptcy, this transfer is avoidable as a fraudulent  
3 transfer and an unauthorized post-petition transfer.

4 The Ninth Circuit has declined to specifically adopt a  
5 particular methodology for determining whether a contribution is  
6 substantial, holding instead that a "de minimis contribution"  
7 does not satisfy the new value exception. Liberty Nat'l Enters.  
8 v. Ambanc La Mesa Ltd. P'ship, 115 F.3d 650, 655 (9th Cir.  
9 1997). There, the court noted that several different  
10 considerations may be relevant in the analysis, including  
11 comparing the amount of the contribution to total unsecured  
12 claims, comparing the contribution to the amount of claims being  
13 discharged, and considering the extent of the dividend being  
14 paid on unsecured claims by virtue of the contribution. Id.

15 While the bankruptcy court considered only the first  
16 comparison – the amount of the contribution to total unsecured  
17 claims – it implicitly concluded that the 5.49% was not so de  
18 minimis as to fail the substantial contribution factor as a  
19 matter of law. Compare Matter of Woodbrook Assoc., 19 F.3d 312,  
20 320 (7th Cir. 1994) (\$100,000 contribution not substantial  
21 because it is only 3.8% of \$2.6 million unsecured debt);  
22 In re Snyder, 967 F.2d 1126, 1132 (7th Cir. 1992) ("the  
23 disparity between the contribution and the unsecured debt," at  
24 most \$22,000 or 2.2% of approximately \$1,000,000 unsecured  
25 claims, was "so extreme . . . there [was] no need to proceed any  
26 further . . . ."); and Travelers Ins. Co. v. Olson  
27 (In re Olson), 80 B.R. 935 (Bankr. C.D. Ill. 1987) (\$5,000, or  
28 only 1.56% on the \$320,000 due all unsecured creditors, held

1 insubstantial), aff'd, 1989 WL 330439 (C.D. Ill. Feb.8, 1989),  
2 with State St. Bank and Trust Co. v. Elmwood, Inc.  
3 (In re Elmwood, Inc.), 182 B.R. 845, 853-54 (D. Nev. 1995)  
4 (affirming bankruptcy court's decision that \$150,000  
5 contribution which was less than 4% of unsecured debt was  
6 substantial in light of other factors).

7 Here, the 5.49% ratio is above those in the case law cited  
8 above, none of which is binding on the bankruptcy court or this  
9 Panel. We are thus not convinced that the bankruptcy court made  
10 an error in its determination that the contribution, when viewed  
11 as a percentage of the unsecured claims, was substantial.  
12 Furthermore, there is no indication that the parties or the  
13 court took into consideration that the equity holders were  
14 contributing real property. See Matters of Treasure Bay Corp.,  
15 212 B.R. 520 (Bankr. S.D. Miss. 1997) (Real property that equity  
16 holders proposed to contribute in return for interest in  
17 reorganized debtor qualified as "money or money's worth," which  
18 could be counted in deciding whether equity holders'  
19 contribution was sufficient to permit application of the new  
20 value exception to the absolute priority rule). Given our  
21 deferential review standards, we uphold the bankruptcy court's  
22 conclusion that the requirements for the new value exception  
23 have been met.

24 The bankruptcy court made no findings concerning Pineda's  
25 fraudulent transfer theory and there is no evidence in the  
26 record to support such a theory.

## 27 VI. CONCLUSION

28 In sum, Pineda's arguments do not provide a basis for

1 reversal of the confirmation order. For the reasons stated, we  
2 AFFIRM.<sup>13</sup>

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27 <sup>13</sup> In light of our conclusion, we do not address the  
28 bankruptcy court's decision denying Pineda's motion to convert or  
dismiss.