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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
HORSESHOE NAIL RANCH, L.P.,	§	Case No. 06-41556
	§	(Chapter 11)
Debtor.	§	

MEMORANDUM OPINION AND ORDER
REGARDING CONFIRMATION OF PROPOSED CHAPTER 11 PLANS

Horseshoe Nail Ranch, L.P. ("Horseshoe" or the "Debtor") seeks an order from this Court confirming its "Second Amended Plan of Reorganization Dated May 1, 2007," as modified. Brunswick Homes, LLC ("Brunswick") and Jeffrey H. Mims, in his capacity as the Chapter 7 trustee of the bankruptcy estate of James H. Moore (the "Moore Trustee"), object to confirmation. Brunswick seeks confirmation of its own "First Amended Plan of Reorganization for Horseshoe Nail Ranch, L.P.," to which the Debtor and the Moore Trustee object. The contested confirmation hearing concluded on August 2, 2007. The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, as incorporated into contested matters in bankruptcy cases by Federal Rules of Bankruptcy Procedure 7052 and 9014.

I. JURISDICTION

1. The Court has jurisdiction to consider the confirmation of the proposed Chapter 11 plans in this case pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final order regarding this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (L) and (O).

II. UNDERLYING FACTS

A. The Pre-Bankruptcy Operation of the Debtor

2. The Debtor was formed on or around May 22, 2001 for the purpose of purchasing, developing and subdividing certain real property known as Horseshoe Nail Ranch and Dane Ranch (collectively, the "Ranch"). The Agreement of Limited Partnership for Horseshoe Nail Ranch, L.P. (the "Partnership Agreement") anticipated that the Debtor would subdivide the Ranch into a total of 31 lots ranging in size from approximately 2.2 acres to 8.6 acres.

3. Trey Wasser is the General Partner of the Debtor as well as a 38% Limited Partner. Mia Hendrickson, who is related to Mr. Wasser, is a 10% Limited Partner of the Debtor, and Brunswick is a 51% Limited Partner of the Debtor. JHM Properties, which is owned and/or operated by James H. Moore, owns 50% of Brunswick. Mr. Wasser communicated with Brunswick through Mr. Moore – in fact, Mr. Wasser was unaware that anyone else had an interest in Brunswick and understood Mr. Moore to be Brunswick.

4. The Debtor executed a Management Agreement with James H. Moore and Associates, Inc. ("Associates") on May 29, 2001. The Debtor thereby appointed Associates as the "exclusive agent" for the management and development of the Ranch. In addition to his interest in Brunswick, Mr. Moore owned and operated Associates at that time.

5. Denton County approved a plat for the Ranch in or around October 2005. As approved, the plat consists of 15 developed lots totaling 67.81 acres, two parcels of undeveloped real property totaling 74.22 acres, and a 16-acre ranch. The 16-acre ranch

includes a large indoor arena with an attached barn, a two bedroom house with swimming pool, a two bedroom apartment, three additional barns with 64 stalls, a shop building, two additional storage buildings, two mobile homes and a horse walker.

6. Rod Miller, who owns 50% of Brunswick (directly or indirectly), became aware of certain irregularities in Mr. Moore's business dealings in or around May 2002. Additionally, after an investigation of the Debtor's books and records, Mr. Wasser formed the opinion that Mr. Moore had overcharged the Debtor approximately $300,000 for work allegedly performed by Associates. The relationship between Mr. Miller, Mr. Moore and Mr. Wasser deteriorated over the next several years.

7. The Debtor officially terminated Associates from its management role in December 2005, and Brunswick thereafter replaced Mr. Moore as the Debtor's manager. The Debtor asserts that Brunswick allowed the Debtor's property tax exemption for agricultural land to lapse while it had management control over the Ranch. At some point prior to bankruptcy, Brunswick ceased managing the Debtor.

8. On May 2, 2006, Mr. Moore filed a petition for relief under Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Texas. The Moore Trustee was appointed to administer the assets of Mr. Moore's Chapter 7 estate. According to the Moore Trustee, those assets include unpaid invoices from Associates to the Debtor for work performed by Associates on the Ranch.

B. The Debtor Files a Bankruptcy Petition

9. The Debtor's general partner, Mr. Wasser, commenced this bankruptcy case by filing a petition for relief under Chapter 11 of the Bankruptcy Code on September 22, 2006. The Debtor's bankruptcy schedules (the "Schedules"), which were also filed

on September 22, 2006, list real property valued at $3,700,000 and personal property valued at $8,000. The Schedules reflect no secured claims, three unknown priority claims in the amount of zero, and six unsecured claims totaling $165,617.45. Two of the scheduled unsecured claims are liquidated and undisputed – specifically, a claim by Mustang Special Utility District in the amount of $32,000 and a claim by Tony Langdon Auction Services in the amount of $2,200.

10. On the eve of bankruptcy, Mr. Wasser sold some of the Debtor's construction materials, including railroad ties and surplus stone, to Woodrick Ranch for $7,039. Tricia Woodrick, Mr. Wasser's "significant other," owns Woodrick Ranch. Mr. Wasser testified that he sold those items to Woodrick Ranch in order to obtain the funds necessary to file for bankruptcy. In fact, on September 21, 2006, Mr. Wasser wrote a check to the Debtor's bankruptcy attorney for $7,039.[1]

11. After filing for bankruptcy, Mr. Wasser sold approximately 140 railroad ties and several tons of rock, among other things, to John Noles for the total amount of $2,737.20. Mr. Noles owns and operates a landscaping business. The items purchased by Mr. Noles were among those previously purchased by Woodrick Ranch. At Mr. Wasser's instruction, Mr. Noles made the checks payable to Woodrick Ranch. Mr. Wasser testified that he had agreed with Mrs. Woodrick that he would attempt to re-sell the items she had purchased from the Debtor prior to bankruptcy.

12. Five creditors filed claims against the Debtor. Those claims consist of one secured claim by Brunswick, which is discussed more fully below; two secured and

[1] In response to Question 14 in the Debtor's Statement of Financial Affairs, Mr. Wasser disclosed that the Debtor had paid for its bankruptcy by selling construction materials and that those materials remained in the Debtor's possession as of the Petition Date. Mr. Wasser listed Todd Grant as the purchaser. At the confirmation hearing, Mr. Wasser testified that Mr. Grant was unable to purchase the property as planned, and so, at the last minute, he sold the property to Ms. Woodrick.

priority tax claims by the County of Denton for a total of $75,184.08; and one claim by an unsecured creditor (Strittmatter Irrigation) for $373.00. Additionally, the Moore Trustee filed a claim against the Debtor in the total amount of at least $1,051,836.81, consisting of an allegedly secured claim in the principal amount of $500,000 and an unsecured claim of $500,000.[2]

13. The Debtor and the Moore Trustee objected to Brunswick's claim. Additionally, the Debtor and the Brunswick objected to the Moore Trustee's claim.

14. The Debtor filed an "Expedited Motion to Sell Real Property" on March 2, 2007. Brunswick initially objected to the motion, but the parties subsequently reached an agreement allowing for the sale of a portion of the Debtor's real property as set forth in the motion. In particular, the "Agreed Order Granting the Expedited Motion to Sell Real Property" (the "Agreed Order"), which was entered on April 2, 2007, authorized the sale of (1) 36.59 acres to William and Leslie Atkins for $1,100,000, and (2) the sale of Lot 3 to Reatta Builder, LLC for $89,910.

15. The Debtor filed a second "Expedited Motion to Sell Real Property" on March 27, 2007. In the motion, the Debtor sought to sell two additional lots. The Court entered an "Order Granting Debtor's Emergency Motion to Sell Real Property" on April 13, 2007, pursuant to which the Debtor was authorized to sell (1) Lot 4 to Holler Tree Homes for $76,410 and (2) Lot 7 to Reatta Builder, LLC for $167,000.

16. Brunswick subsequently appealed the entry of the April 13th sale order, complaining, *inter alia*, that it had never been provided with a copy of the final form of

[2] The Moore Trustee filed his claim after the bar date had passed. On April 27, 2007, the Moore Trustee filed a motion requesting that the Court permit him to file his claim after the bar date. The Court heard the Moore Trustee's motion on June 22, 2007, and the Court granted the motion at the conclusion of the hearing.

the contract for the sale to Holler Tree Homes approved by the Court. Although Brunswick did not obtain a stay of the proposed sales pending the resolution of its appeal, Brunswick sent letters to the prospective purchasers regarding its appeal. The Debtor had not yet closed on any of the sales approved by the Court at the conclusion of the confirmation hearing.

17. The four sales contracts approved by this Court are expected to produce a net sales price of $1,314,830 when consummated. In particular, with respect to the sale of the 36-acre parcel for $1,100,000, after deducting loan repayment of $4,000, closing costs of 4.5% or $49,500 per the Debtor's takedown schedule, rent of $25,000, and septic escrow of $27,000, the sale is expected to net $994,500. With respect to the sale of Lot 3 for $89,910, the sale is expected to net $87,662 after paying closing costs of 2.5% per the Debtor's takedown schedule. With respect to the sale of Lot 4 for $76,410, the sale is expected to net $72,207 after paying closing costs of 6.6% per the Debtor's takedown schedule. Finally, with respect to the sale of Lot 7 for $167,000, the sale is expected to net $160,461 after paying closing costs of 6.6% per the Debtor's takedown schedule.

C. Brunswick and the Debtor File Competing Plans

18. On January 24, 2007, the Debtor filed its original "Plan of Reorganization Dated January 24, 2007" and "Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Dated January 24, 2007." The Debtor has amended its proposed plan twice. The version of the Debtor's plan that was submitted to creditors for a vote was filed on May 1, 2007 and is entitled "Debtor Horseshoe Nail Ranch, L.P.'s Second Amended Plan of Reorganization Dated May 1, 2007" (the "Debtor's Solicited Plan"). Accompanying the Debtor's Solicited Plan was the "Third Amended Disclosure

Statement of Horseshoe Nail Ranch, LP Pursuant to §1125 of the Bankruptcy Code Dated May 1, 2007" (the "Debtor's Mailed Disclosure Statement").

19. In the Debtor's Solicited Plan, the Debtor proposes to pay all claims through the sale of its real property. Mr. Wasser would remain as the Debtor's General Partner and would exercise complete control of the sales process. The Debtor would retain 20% of the proceeds from the sale of any property (less costs of sale and payment of administrative and priority claims) and would use those proceeds to create an operating reserve. Additionally, in the Debtor's Mailed Disclosure Statement, the Debtor states that Mr. Wasser will be entitled to a salary of $3,000 per month for the management of the Debtor's property.

20. Brunswick filed its own "Plan of Reorganization for Horseshoe Nail Ranch, L.P." and "Disclosure Statement for Plan of Reorganization for Horseshoe Nail Ranch, L.P." on February 23, 2007. Brunswick subsequently filed an "Amended Plan of Reorganization for Horseshoe Nail Ranch, L.P." ("Brunswick's Plan"), which is the version that was submitted to creditors. Accompanying Brunswick's Plan was an "Amended Disclosure Statement for Plan of Reorganization for Horseshoe Nail Ranch, L.P." ("Brunswick's Disclosure Statement").

21. In Brunswick's Plan, Brunswick proposes to create a new entity – Brunswick Acquisitions – that will acquire all of the Debtor's assets. Brunwick proposes that Rod Miller will manage Brunswick Acquisitions for no compensation. The purchase price will consist of the assumption of the debt to Brunswick and the payment of all allowed claims in full. Brunswick will subordinate its claims for the benefit of other creditors and will pay all allowed administrative claims, priority claims, secured tax

claims and unsecured claims in full within 60 days of the effective date. Under Brunswick's Plan, the Partnership Agreement will be terminated and equity holders will receive nothing on account of their interest in the Debtor.

22. The Court set a hearing to consider confirmation of the proposed Chapter 11 plans on July 13, 2007 (the "Confirmation Hearing"). The hearing on the objections to the Moore Trustee's was not scheduled to occur until after the Confirmation Hearing and, therefore, the Moore Trustee filed a motion to temporarily allow his claim for voting purposes. The Court scheduled the Moore Trustee's motion for temporary allowance of claim as well as the objections to Brunswick's claim for the same date and time as the Confirmation Hearing.

23. On July 13, 2007, the Court commenced a hearing on the objections to Brunswick's claim, which lasted for several more days. As a consequence, the Court continued the Confirmation Hearing to July 23, 2007 so that the hearing on Brunswick's claim could be concluded. The Court announced at the hearing on July 13, 2007, that the Moore Trustee's claim would likely be addressed in its ruling on the objections to Brunswick's claim and, therefore, that it would refrain from ruling on the Moore Trustee's motion for temporary allowance of his claim.[3]

24. On July 20, 2007, the Court entered an "Order Granting in Part and Denying in Part Objections to the Claim of Brunswick Homes, LLC" (the "Brunswick Claim Order"). The Court thereby granted Brunswick an allowed secured claim against the Debtor in the amount of $1,138,404.31 and an allowed unsecured claim in the amount

[3] The objections to Brunswick's proof of claim involved, among other things, a determination of whether certain claims belonged to Brunswick or the Moore Trustee. The Court ruled in favor of Brunswick, to the extent the Court found that the claims existed, in the Brunswick Claim Order.

of $1,244,016.69. Brunswick, the Moore Trustee and the Debtor have appealed the Court's July 30th order.

25. On July 23, 2007, the Court commenced the re-scheduled Confirmation Hearing on Brunswick's Plan and the Debtor's Solicited Plan. Due to time constraints, the Confirmation Hearing did not conclude on July 23, 2007, but, instead, was continued to August 2, 2007.

26. Since the end of the first day of the Confirmation Hearing, the Debtor has filed two modifications to the Debtor's Solicited Plan – a modification on July 25th and an amended modification on July 30th. These modifications include (i) a modification to the description of Class 1 claims in that attorneys' fees previously estimated at $15,000 are now estimated at $50,000; (ii) a modification to the description of Class 2 claims in that allowed tax creditor claims previously estimated at $36,000 are now estimated at $75,000; (iii) the creation of a new Class 3 to treat Brunswick's allowed secured claim and a new Class 4 to treat Brunswick's allowed unsecured claim; (iv) the inclusion of an 18-month "drop dead" date by which Brunswick's allowed secured claim must be paid in full; and (v) the inclusion of a new provision that would modify the Partnership Agreement to provide for the removal of Mr. Wasser as the Debtor's general partner if Brunswick's secured claim is not paid in full within 18 months or if Brunswick's unsecured claim is not paid in full within 24 months of the date on which this Court's order confirming the Debtor's proposed plan becomes final.

27. The Debtor received the following votes with respect to its Solicited Plan. The County of Denton, which holds an impaired tax claim, accepted the Debtor's

Solicited Plan.[4] Two of the Debtor's three equity holders (Mia Hendrickson and Mr. Wasser) voted to accept the plan. Brunswick, the remaining equity holder and a holder of secured and unsecured claims against the Debtor, rejected the Solicited Plan. The Moore Trustee and Alan Strittmatter, who allege unsecured claims against the Debtor, also rejected the Debtor's Solicited Plan.

28. The same parties voted on Brunswick's Plan. The County of Denton, Brunswick and Alan Strittmatter voted to accept Brunswick's Plan. However, Mia Hendrickson, Mr. Wasser and the Moore Trustee voted to reject Brunswick's Plan.

29. In addition to voting against both proposed plans, the Moore Trustee has objected to both plans. The Debtor also objects to Brunswick's Plan, and Brunswick, in turn, objects to the Debtor's Solicited Plan as well as the Debtor's subsequent modifications to its Solicited Plan. The parties' objections to the competing plans encapsulate the proverbial kitchen sink.[5]

29. At the Confirmation Hearing, Brock Stephenson, a home builder who operates as Reatta Builders, LLC, testified that he has been in the home building business for approximately 15 years. He has previously purchased lots in the same general area as the Debtor's property. Mr. Stephenson testified, credibly, that he believed the Debtor's prices for its lots were fair and that he was paying a fair price for the two lots he agreed to

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[4] Denton County's acceptance is conditional on certain modifications to its treatment under the Debtor's Solicited Plan. The Debtor's modifications to its Solicited Plan include the modifications requested by Denton County. The Court, therefore, treats Denton County's vote as an acceptance of the Debtor's Solicited Plan for purposes of its confirmation analysis.

[5] In his objection to Brunswick's Plan, the Moore Trustee asserts a series of objections to Brunswick's definition of an "Allowed Claim," including objections to the impact of that definition on his own claim. The Moore Trustee specifically objects that his claim is excluded from Brunswick's definition of an "Allowed Claim." The Moore Trustee argues that his claim should be deemed to be an allowed claim unless and until an objection is filed. *See* 11 U.S.C. §502(a). However, several hours before the Moore Trustee filed his objection to Brunswick's Plan, both the Debtor and Brunswick filed objections to the Moore Trustee's claim.

buy from the Debtor. He testified that sales to Reatta have not been consummated as a result of a letter he received from Brunswick notifying him of Brunswick's appeal of the April 13th sales order approving, among other things, the sale of Lot 7 to Reatta Builders, LLC.

30. As of August 2, 2007, the Debtor had approximately $20,000 in its bank account. At the confirmation hearing, both parties presented expert testimony regarding the value of the Debtor's real property. Both parties' appraisers testified that the Debtor could sell its remaining real property within approximately 12 months.

31. In addition to Mr. Stephenson's testimony regarding the value of the Debtor's real property, the Court heard testimony from two appraisers. The Debtor's appraiser, Gerald Slater of Gage and Associates, appraised the Debtor's property as independent lots rather than as a subdivision. He valued the Debtor's 15 lots and an approximately 57.22-acre tract of unimproved land at $2,607,094. He specifically appraised the total value of Debtor's 15 lots at $1,918,454 and the approximately 57.22 acres of unimproved land at $686,640 for a total value of all realty of $2,607,094. Significantly, Mr. Slater's valuation included the three lots and the track of unimproved property that this Court previously authorized the Debtor to sell, and his appraised values for Lots 3, 4 and 7 were all higher than the sales contracts approved by the Court.

32. Brunswick's appraiser, Scott Cameron of Cameron Appraisal Group, valued the Debtor's remaining 11 lots and an approximately 56.74 acre tract of unimproved land at a net present value $1,260,000. Mr. Cameron appraised the net present value of the 11 lots at $870,000 and the net present value of the approximately 57.22 acres of unimproved land at $360,000. Mr. Cameron applied a discount rate of

17% (which included developer profit) to reach the net present value of the 11 lots, thereby reducing their appraised value.

33. According to Brunswick's appraiser, when the net proceeds of the sales previously approved by the Court in the amount of $1,314,830 are added to his valuation of the Debtor's remaining real property, the total value of the Debtor's real property is $2,574,830.

34. Brunswick's secured claim of $1,138,404.31 had accrued interest in the amount of $74,266 as of August 2, 2007. Additionally, Brunswick asserted at the Confirmation Hearing that it has incurred more than $200,000 in attorneys' fees, which are recoverable as part of its secured claim. Brunswick argued that, assuming it is entitled to recover its attorneys' fees and that half of those fees should be allocated to Brunswick's unsecured claim, Brunswick holds a secured claim of at least $1,312,670 and unsecured claims in the amount of $1,278,590, for a total claim of $2,716,443.

35. In addition to Brunswick's claim, the Debtor owes property taxes in the amount of approximately $75,000. The Debtor also owes payment for several liquidated, undisputed, unsecured claims – specifically, an unsecured claim of Mustang Special Utility District of $32,000; an unsecured claim of Tony Langdon of $2,200; an unsecured claim of Strittmatter Irrigation of $373; and estimated administrative claims of professionals of $50,000. Thus, accepting Brunswick's arguments regarding the amount of its claim, the allowed claims to be paid through the Debtor's reorganization total $2,876,016 (which consists of $159,573 plus $2,716,443).

DISCUSSION

1. Chapter 11of the Bankruptcy Code contemplates that every creditor whose rights will be impaired by reorganization will be notified, assigned to a class, and will vote on the plan of reorganization. *See* 11 U.S.C. §§ 1123, 1125, 1126, 1129(a)(10). The right to vote on the plan belongs to holders of those claims "allowed under section 502." 11 U.S.C. § 1126(a). Additionally, any "party in interest," which is defined non-exclusively as "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee," may object to plan confirmation. 11 U.S.C. §§ 1109 and 1128(b).

2. As previously discussed, the Moore Trustee requested that the Court temporarily allow his claim, as amended, "in an amount which the court deems proper" for voting purposes. *See* FED. R. BANKR. P. 3018(a). The Court's July 30th order on the objections to Brunswick's claim held or implied that Brunswick is the holder of the claim for unpaid invoices that the Moore Trustee purports to hold and that the $500,000 promissory note between Brunswick and Associates, which forms the remainder of the Moore Trustee's claim, was never funded. The Court's decision, however, is currently on appeal. In order to allow the Moore Trustee to be heard on confirmation, and in light of the Moore Trustee's pending appeal, the Court will temporarily allow the Moore Trustee's claim at $1 for purposes of voting and confirmation.[6]

3. In order to obtain confirmation, a plan proponent must establish, by a preponderance of the evidence, that a proposed plan of reorganization satisfies all

[6] Whether the Moore Trustee's claim is allowed at $1 million or $1.00 does not affect confirmation. Although the Moore Trustee voted his impaired claims against both Brunswick's Plan and the Debtor's Solicited Plan, an impaired class has voted in favor of each of the proposed plans as required for "cramdown" under 11 U.S.C. §1129(a)(8).

requirements for confirmation. *See, e.g., Fin. Sec. Assurance Inc v. T-H New Orleans Ltd P'ship (In re T-H New Orleans Ltd. P'ship),* 116 F.3d 790, 801 (5th Cir. 1997); *Heartland Fed Sav. & Loan Assoc. v. Briscoe Enter., Ltd., II (In re Briscoe Enter., Ltd.),* 994 F.2d 1160, 1165 (5th Cir.1993). Section 1129(c) provides that this Court may confirm only one plan and, "[i]f the requirements of subsection (a) and (b) of this section are met with respect to more than one plan, the Court shall consider the preferences of creditors and equity security holders in determining which plan to confirm." If a voting party accepts more than one plan, he or she may indicate a preference among them. *See* FED. R. BANKR. P. 3018(c).

A. The Debtor's Solicitation of Votes

4. As an initial matter, Brunswick objects to the confirmation of the Debtor's Solicited Plan, as modified, on the grounds that the Debtor's modifications to its Solicited Plan are material and have not been put to creditors for a vote. Brunswick does not suggest that the modifications would alter its own vote, but asserts that the modifications raise "significant due process concerns" in that the Debtor's other creditors and interest holders may be unaware of the changes to the Debtor's Solicited Plan.

5. Section 1127(a) of the Bankruptcy Code grants a plan proponent authority to modify a proposed Chapter 11 plan "at any time before confirmation." The proposed plan, as modified, "becomes the plan." 11 U.S.C. §1127(a). After confirmation, however, modification requires notice and hearing. *See* 11 U.S.C. § 1127(b); FED. R. BANKR. P. 3019.

6. In this case, "the situation … is slightly different than that actually contemplated by §1127" in that the modifications were made during the course of the

hearings on confirmation. *In re T-H New Orleans Ltd. Partnership,* 88 B.R. 799, 808-09 (E.D. La. 1995). In determining whether the Debtor must begin the solicitation process again with its modified plan, "the "crucial issue is whether the modifications so alter the plan as to call in §1127's requirement of notice and hearing." *Id.* at 809.

7. The Court agrees that the Debtor's modifications in this case significantly and materially alter the Debtor's Solicited Plan. The Debtor's proposed plan is, in essence, a new, modified plan – with much higher administrative and priority claims to be paid on the effective date and with new provisions providing a hard deadline for the payment of Brunswick's claims as well as providing for the removal of Mr. Wasser as the Debtor's general partner if the deadlines are not met. Additionally, as discussed more fully below, the Debtor's Solicited Plan, as modified, fails to comply with all relevant sections of the Bankruptcy Code.

B. Section 1129(a)(1) of the Bankruptcy Code

8. Pursuant to §1129(a)(1) of the Bankruptcy Code, a plan of reorganization must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of §1129(a)(1) of the Bankruptcy Code indicates that a principal objective of this provision is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests (§1122) and the contents of a plan of reorganization (§1123). *See* S.Rep.No. 95-989, at 126 (1978); H.R.Rep. No. 95-595, at 412 (1977); *see also In re JT Thorpe Co.,* 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003).

1. The Contents of the Proposed Plans

9. Here, both proposed plans are dated and identify the entity submitting it as a proponent, thereby satisfying Bankruptcy Rule 3016(a). Both proposed plans specify impaired classes as required by §1123(a)(2) and specify the treatment of impaired classes as required by §1123(a)(3) of the Bankruptcy Code. Both plans disclose post-confirmation officers and directors, if any, as required by §1123(a)(7). Section 1123(a)(6) is inapplicable, since neither of the proposed plans provides for the issuance of new securities.

2. The Debtor's Classification of Brunswick's Claims

10. Under §1123(a)(1), a plan must "designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interest." Section 1122(a) provides that only "substantially similar" claims may be classified together. Section 1123(a)(4) further provides that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."

11. Although substantially similar claims must be grouped together, §1122(a) does not require that all such claims must be placed in the same class. A plan proponent is afforded significant flexibility in classifying claims provided there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar. *See Phoenix Mut Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture),* 995 F.2d 1274, 1278-81 (5th Cir. 1991). Decisions interpreting §1122(a) generally uphold separate classification of different groups of claims when a reasonable

basis exists for that classification. *See In re Briscoe Enter. Ltd., II,* 994 F.2d at 1167 (the debtor's business operations would be affected if separate classification of claims were not allowed).

12. In this case, both Brunswick and the Debtor classify Brunswick's secured claim, as allowed by the Court in its July 30th order, separately from other creditors. In Brunswick's Plan, Brunswick's remaining unsecured claim is classified with the claims of other general unsecured creditors in compliance with §1122(a) of the Bankruptcy Code. However, the Debtor's Solicited Plan, as modified, classifies Brunswick's unsecured claim separately from other unsecured claims.[7] The Debtor has offered no rational basis for its classification of Brunswick's unsecured claim – other than a desire to treat Brunswick differently than similarly situated creditors. The Court, therefore, concludes that the Debtor's Solicited Plan, as modified, does not fully comply with §1122(a) of the Bankruptcy Code.

3. The Debtor's Third Party Release

13. Section 524(e) of the Bankruptcy Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on ... such debt." 11 U.S.C. §524(e). Section 6.4 of the Debtor's Solicited Plan provides:

> None of the Debtor, the Debtor-in-possession, the Reorganized Debtor nor any of their employees, officers, directors, agents or representatives, nor any professionals employed by them or any of their members, agents, representatives or professional advisors, shall have or incur any liability to any person or entity for any act taken or omission made in good faith in connection with or related to formulating, implementing, confirming or

[7] Class 3 of the Debtor's Solicited Plan consisted of "allowed Brunswick claims." After this Court entered its Brunswick Claim Order, the Debtor amended its proposed plan to provide that Class 3 would consist of Brunswick's allowed secured claim, and Class 4 would consist of Brunswick's allowed unsecured claim.

> consummating this Plan, the Disclosure Statement or any contract, instrument, release or other document created in connection with this Plan.

Brunswick objects to this language, suggesting that it could be construed to release Mr. Wasser from his liability on pre-bankruptcy claims. The Court disagrees – nothing in Section 6.4 of the Debtor's Solicited Plan appears to affect Mr. Wasser's liability on any pre-bankruptcy claim.

14. Brunswick also objects that Section 6.4 of the Debtor's Solicited Plan could be construed to release Mr. Wasser from his liability as a general partner of a Texas limited partnership. The Court agrees that this provision may be construed to provide for the satisfaction of Mr. Wasser's personal liability to the Debtor's creditors through a sale of the Debtor's assets by providing that he "shall have or incur no liability to any person or entity for any act taken or omission made in good faith in connection with … implementing … or consummating this Plan …." Although courts have, in some cases, approved reorganization plans containing third party releases and injunctions to enforce those releases, the necessity and purpose of a release of Mr. Wasser in this case are unclear from the record, and the Debtor's plan has not been accepted by a "large majority" of creditors. *See In re Seatco, Inc.,* 257 B.R. 469, 474 (Bankr. N.D. Tex. 2001) (discussing the factors to be considered when evaluating a third party release).

15. For the foregoing reasons, the Court concludes that the Debtor's Solicited Plan, as modified, does not fully comply with the requirements of §§ 1122 and 1123 of the Bankruptcy Code. Accordingly, the Debtor's Solicited Plan, as modified, does not comply with §1129(a)(1) and may not be confirmed.

C. Section 1129(a)(2) of the Bankruptcy Code

16. Section 1129(a)(2) requires that the proponent of a plan of reorganization must comply "with the applicable provisions of this title." Here, the Debtor has failed to comply with the applicable provisions of the Bankruptcy Code. More specifically, as previously discussed, the Debtor failed to comply with §§ 1125 and 1126 of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure in connection with its request for confirmation of a materially modified version of the Debtor's Solicited Plan.

D. Section 1129(a)(3) of the Bankruptcy Code

17. Section 1129(a)(3) requires that a plan be proposed in good faith and not by any means forbidden by law. The requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start. *See In re Sun Country Dev., Inc.,* 764 F.2d 406, 408 (5th Cir. 1985). "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement ... is satisfied." *Id.*.

18. In this case, neither proposed plan appears to promote the rehabilitative objectives and purposes of the Bankruptcy Code. *See In re Block Shim Dev. Co.,* 939 F.2d 289, 292 (5th Cir. 1991) ("To be proposed in good faith, a plan must fairly achieve a result consistent with the Code."). The goal of each plan proponent is not rehabilitation of the Debtor or restructuring of the Debtor's relationships with its creditors, but victory in a struggle between Mr. Wasser and Mr. Miller that began prior to the Debtor's

bankruptcy.[8] That struggle is primarily focused on whether Mr. Wasser or Mr. Miller will retain any meaningfully equity in the Debtor and the distribution of the net profit, if any, from the sale of the remainder of the Ranch.

19. Significantly, one of Brunswick's objections to the feasibility of the Debtor's Solicited Plan, as modified, is that the Debtor has so far been unable to close on four sales approved by this Court. However, Brunswick is at least partially responsible for this delay. Mr. Stephenson testified, credibly, that he was unwilling to consummate the purchase of two lots from the Debtor after receiving a letter from Brunswick notifying him of its appeal of one of this Court's orders approving a sale of one of the Debtor's lots to his company. Instead of seeking a stay of the disputed sale order pending its appeal, Brunswick interfered with the Debtor's ability to close on the transaction by sending the prospective purchaser a letter designed to cause the purchaser to back away from the sale.

20. On the other hand, it is also significant that Mr. Wasser plans to pay himself a salary from the proceeds of the sale of the Ranch before making a distribution to the Debtor's other limited partners. *See* Tr. Confirmation Hearing at p. 80, July 23, 2007. The Partnership Agreement does not provide for a salary for the Debtor's general partner, and Mr. Wasser has not previously received a salary. Moreover, Brunswick, the 51% limited partner of the Debtor, objects to the payment of a salary to Mr. Wasser.

21. The parties' respective plans are primarily supported by their proponents. Only two creditors voted on the proposed plan, and one of those two creditors (Denton County) voted in favor of both plans without any indication of a preference as to either of

[8] This dispute originated with improper conduct by Mr. Moore, who was a partner in Brunswick and was Brunswick's representative in its dealings with the Ranch and Mr. Wasser.

the proposed plans. The other creditor, Alan Strittmatter, holds an unsecured claim of less than $500 according to his proof of claim.

22. Based on the record before it and the totality of the circumstances, the Court concludes that neither plan was proposed in good faith and that neither plan complies with §1129(a)(3) of the Bankruptcy Code.

E. Section 1129(a)(8) of the Bankruptcy Code

23. Section 1129(a)(8) generally provides that all impaired classes must accept the plan in order for it to be confirmed. However, the Bankruptcy Code anticipates that not all reorganizations will proceed with the assent of all participants, and §1129(b) contains both specific and general rules for nonconsensual confirmation. If the requirements of §1129(b) are met, confirmation can be "crammed down" the throat of a dissenting class.

24. In order to "cram down" a plan, all requirements of §1129(a) must be met (except for requirement in §1129(a)(8) that plan must be accepted by each impaired class of claims or interests). Critical among these requirements are the conditions that the plan be accepted by at least one class of impaired creditors, *see* §1129(a)(10), and satisfy the "best-interest-of-creditors" test, *see* §1129(a)(7). Additionally, §1129(b)(1) provides that the plan may be confirmed only if it does not discriminate unfairly, and only if it is fair and equitable with respect to each impaired class of claims or interests which did not accept the plan.

25. Section 1129(b)(2) defines the meaning of "fair and equitable" as it pertains to certain classes. With respect to unsecured classes, §1129(b)(2)(B) states that a claim is fair and equitable if unsecured classes are to receive the full value of their

allowed claim, or, alternatively, all junior claims receive no distribution under the plan. In other words, dissenting classes of unsecured creditors must be paid in full before any junior claim or interest can receive or retain any property.

26. Here, neither proposed plan complies with §1129(a)(8) because of the rejection of the plans by impaired classes. Nonetheless, Brunswick and the Debtor seek confirmation of their respective plans pursuant to §1129(b) of the Bankruptcy Code. The Court need not reach the "cram down" issue since, as discussed herein, the proposed plans do not meet the requirements of various additional provisions of §1129 of the Bankruptcy Code, including (a)(3), (a)(5) and (a)(11) of the Bankruptcy Code.

F. Section 1129(a)(11) of the Bankruptcy Code

27. Generally referred to as a requirement that a plan be feasible, the test set forth in §1129(a)(11) requires the Bankruptcy Court to determine whether the proposed plan is workable and has a reasonable likelihood of success. *See T-H New Orleans,* 116 F.3d at 801; *In re Cajun Elec.,* 230 B.R. at 744-45. The Fifth Circuit has stated that "'the [bankruptcy] court need not require a guarantee of success ..., [o]nly a reasonable assurance of commercial viability is required.' All the bankruptcy court must find is that the plan offer 'a reasonable probability of success.'" *T-H New Orleans,* 116 F.3d at 801 (quoting *Briscoe Enter.,* 994 F.2d at 1165-66). *See also Cajun Elec.,* 230 B.R. at 745.

28. Here, the Debtor and the Moore Trustee claim Brunswick's Plan violates §1129(a)(11) and §1123(a)(5) (and therefore § 1129(a)(1)) because it does not provide adequate means for its implementation. In particular, the Debtor and the Moore Trustee complain that Brunswick's Plan contains no information regarding the ability of Brunswick Acquisitions to make the necessary payments under Brunswick's Plan. The

Moore Trustee also points out that Brian Swigert, the accounting manager for Brunswick, testified at the hearing on the objections to Brunswick's claim that Brunswick owes its creditors $4.5 million and that Brunswick's capital accounts are "askew" in the amount of $2.5 million. *See* Brunswick Claim Order at p.13.

29. With respect to the Debtor's Solicited Plan, as modified, Brunswick objects that the plan is a "visionary scheme" based entirely on future sales of the Debtor's real property. Brunswick argues that the Debtor's historical operations do not support the viability of this scheme. As support for this argument, Brunswick points out that the Debtor has not yet closed on any of the four sales approved by this Court during the pendency of this bankruptcy case.

30. To establish the feasibility of a plan, the proponent must present proof that there will be sufficient funding for the plan, and such proof cannot be speculative, conjectural, or unrealistic. *In re M & S Assocs. Ltd.,* 138 B.R. 845, 849 (Bankr. W.D. Tex. 1992). A plan proponent must demonstrate that there exists a reasonable probability that the plan provisions can be performed. *T-H New Orleans,* 116 F.3d at 801 (quoting *In re Landing Assocs., Ltd.,* 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993)). "However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility." *Cajun Elec.,* 230 B.R. at 745. The *Cajun Elec.* court continued that "[t]he mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required." *See Cajun Elec.,* 230 B.R. at 745; *see also T-H New Orleans,* 116 F.3d at 801.

31. In this case, the Debtor does not presently have the funds necessary to effectuate its planned reorganization. The Debtor proposes to use the proceeds of sales of

property to pay administrative expenses and the Denton County Tax claim, and to keep 10% of the remaining net proceeds of any sale to create an operating reserve for its own use. The success of the Debtor's Solicited Plan, as modified, depends entirely on Mr. Wasser's ability to sell the Debtor's property. His sales record to date does not inspire confidence in his ability to quickly sell the Debtor's property, even when the Court takes into account the fact that some of the delays and frustrations Mr. Wasser has experienced in connection with his efforts to sell the Debtor's property have been caused, in part, by Brunswick. Moreover, the Debtor's Solicited Plan, as modified, fails to provide for the payment of the Moore Trustee's claim should any portion of that claim be upheld and/or determined to be a secured claim.

32. On the other hand, Brunswick failed to establish that the cancellation of all equity interests in the Debtor represents the exercise of sound business judgment. Brunswick's Plan does not contain any specific provision for funding its proposed reorganization. Similar to the Debtor's Solicited Plan, as modified, Brunswick's Plan does not clearly provide for the payment of the Moore Trustee's claim if the objections to his claim are overruled and his claim is allowed as filed. More generally, Brunswick's financial ability to consummate and implement its proposed plan is unclear. The Court and creditors are simply left to trust that Brunswick will come up with the required funds at some point in the future.

33. The Court, therefore, concludes that neither of the proposed plans complies with §1123(a)(5) or §1129(a)(11) of the Bankruptcy Code.

CONCLUSION AND ORDER

As demonstrated by the record and by a preponderance of the evidence, the the Debtor's Solicited Plan, as modified, and Brunswick's Plan do not comply with all relevant sections of the Bankruptcy Code, including, without limitation, §§ 1122, 1123, 1125, 1126, 1127, and 1129 of the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law relating to the confirmation of the Plan. In particular, Brunswick's Plan and the Debtor's Solicited Plan, as modified, fail to comply with all of the requirements of section 1129(a) of the Bankruptcy Code. Accordingly, confirmation of the Debtor's Solicited Plan, as modified, and Brunswick's Plan shall be, and is hereby, **DENIED.**

Signed on 12/6/2007

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE