UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

May 26, 2022 at 2:00 p.m.

FINAL RULINGS

1. **20-90210-E-11** **JOHN YAP AND IRENE LOKE** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
21-9016 **CAE-1** **12-10-21 [1]**
YAP ET AL V. PNC FINANCIAL SERVICES GROUP, INC. ET AL

Final Ruling: No appearance at the May 26, 2022 Status Conference is required.

Plaintiff's Atty: Arasto Farsad, Nancy W. Weng
Defendant's Atty: unknown

Adv. Filed: 12/10/21
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 2/17/22

[AF-1] Motion for Default Judgment filed 5/4/22 [Dckt 23], set for hearing 6/16/22 at 10:30 a.m.

[CAE-1] Status Conference Statement [Plaintiff-Debtor] filed 5/16/22 [Dckt 29]

The Status Conference is continued to 10:30 a.m. on June 16, 2022, to be conducted in conjunction with the hearing on the Motion for Entry of Default Judgment.

2. 21-90378-E-11 MOBREWZ, LLC

CONTINUED APPROVAL OF CHAPTER 11 PLAN OF REORGANIZATION
11-16-21 [33]

Final Ruling: No appearance at the May 26, 2022 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor's Attorney, Chapter 11 Trustee, creditors, and Office of the United States Trustee on November 23, 2021. By the court's calculation, 51 days' notice was provided. The court issued an Order setting the hearing date for January 13, 2022. Order, Dckt. 34.

The Confirmation of Plan of Reorganization has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Hearing on the Confirmation of Plan of Reorganization is continued to 10:30 a.m. on June 16, 2022 (Specially Set Time) .

CONTINUANCE OF MAY 26, 2022 HEARING

Due to the unavailability of the Judge to whom this case is assigned to attend the May 26, 2022 hearing, the court continues the hearing.

The court has identified below an issue of whether the court's entry of the order confirming the Plan is a clerical error and should be vacated. The court will address that issue at the continued hearing, or prior thereto if the effected parties in interest with the amendments to the Plan concur that the Amended Plan is correct.

MAY 26, 2022 HEARING

Upon review of the Minutes from the April 21, 2022 hearing, it appears that the court may have prematurely entered the order confirming the Modified Plan. Civ. Minutes 81. The Minutes and Order reflect that the final amended plan and a redline version were to be filed on or before May 6, 2022. Dckts.

81, 83. Thus, the court may have committed a clerical error in issuing the order, and that such is subject to a *sua sponte* vacating of the order.

In the Order continuing the hearing on confirmation to May 26, 2022, the court also ordered:

> Counsel for Debtor/Debtor in Possession shall, upon the timely [May 6, 2022, stated in the preceding paragraph in the order] filing of the Final Amended Plan and redline version, shall lodge with the court a proposed order confirming the Final Amended Plan, with a copy of said Plan attached as Addendum A to the confirmation order.
>
> The court will delay entry of the order confirming the Final Amended Plan for two weeks to allow parties in interest to review the Final Amended Plan and raise with the court any concerns that the final language is not drafted consistent with their understanding of the agreed to terms.

Order, Dckt. 83. No Amended Plan and redline version were filed by May 6, 2022. No redline version of the Amended Plan showing the changes was ever filed. No service of the Amended Plan and redline version has been documented on the Docket.

It may well be that the parties worked out the language, belatedly, and have agreed to the Amended Plan. It may be that they forgot to document agreeing and waiving service of the redline of the Amended Plan.

Rather than immediately vacating the order confirming and creating serious potential confusion, the court addresses this at the May 26, 2022 hearing.

REVIEW OF PLAN

The Debtor in Possession Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

> November 23, 2021 Plan, Disclosure Statement, Disclosure Statement Order, and Ballot Mailed
>
> December 23, 2021 Last Day for Submitting Written Acceptances or Rejections
>
> December 23, 2021 Last Day to File Objections to Confirmation
>
> January 6, 2022 Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

Tabulation of Ballots:

Class	Voting	Ballot Percentage Calculation	Claim Percentage Calculation
Class 1 (Unimpaired)	For: 0 Against: 0	100%	100%
Class 2 (Impaired)	For: 1 Against: 0	100%	100%
Class 3 (Unimpaired)	For: 0 Against: 0	100%	100%
Class 4 (Impaired)	For: 2 Against: 2	**50%**	70 %
Class 5 (Impaired)	For: 2 Against: 0	**75%**	100%

The Declaration of Bridgette Berry filed in support of confirmation provides evidence of compliance with the necessary elements for confirmation in 11 U.S.C. § 1129:

11 U.S.C. § 1129(a)

1. The plan complies with the applicable provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

   Evidence: Dckt. 48, pg. 1

2. The proponent of the plan complies with the applicable provisions of the Bankruptcy Code.

   Evidence: Dckt. 48, pg. 2

3. The plan has been proposed in good faith and not by any means forbidden by law.

   Evidence: Dckt. 48, pg. 2

4. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

   Evidence: Dckt. 48, pg. 2

5. (A)(I) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the

debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

Evidence: Dckt. 48, pg. 2

7. With respect to each impaired class of claims or interests–

(A) each holder of a claim or interest of such class–

(I) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective dates of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 et seq., on such date; or

(B) if section 1111(b)(2) of this title [11 U.S.C. § 1111(b)(2)] applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Evidence: Dckt. 48, pg. 2 & 3

8. With respect to each class of claims or interests–

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

Evidence: Dckt. 48, pg. 2 & 3

9. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that–

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of the Bankruptcy Code, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

Evidence: Dckt. 48, pg. 3

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of the Bankruptcy Code, each holder of a claim of such class will receive–

(I) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

Evidence: Dckt. 48, pg. 3

(C) with respect to a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code, the holder of such claim will receive on account of such claim regular installment payments in cash–

(I) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim that would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

Evidence: Dckt. 48, pg. 3

10. If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

Evidence: Dckt. 48, pg. 3

11. Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Evidence: Dckt. 48, pg. 3

12. All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

Evidence: Dckt. 48, pg. 3

13. The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title [11 U.S.C. § 1114], at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title [11 U.S.C. § 1114], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

Evidence: Dckt. 48, pg. 3

14. If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first becomes payable after the date of the filing of the petition.

Evidence: Dckt. 48, pg. 3

15. In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan–

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

Evidence: Dckt. 48, pg. 3

16. All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

Evidence: Dckt. 48, pg. 3

11 U.S.C. § 1129(b)

1. Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Evidence: Dckt. 48, pg. 3

2. For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides–

(I) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (I) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

Evidence: Dckt. 48, pg. 3

(B) With respect to a class of unsecured claims–

(I) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class, will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

Evidence: Dckt. 48, pg. 3

(C) With respect to a class of interests–

(I) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation

preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

Evidence: Dckt. 48, pg. 3

DISCUSSION

Federal Rule of Bankruptcy Procedure 3020(b)(2) states:

The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

Creditor's Response

On December 14, 2021, Creditor, Korinn Berry, filed a Response to Debtor in Possession's Confirmation of Chapter 11 Plan. Dckt. 40. Creditor requests for an extension on the hearing to vote on a plan because Creditor has not had adequate time to seek out Bankruptcy Counsel. Creditor further states she was not consulted or included in the decision making process of this plan and has not received adequate time to review the books of the business. Creditor has a thirty-three percent (33.3%) equal ownership stake in the business. The other equal shares are thirty-three percent (33.3%) to Bridgette Berry (ex-wife) and thirty-three percent (33.3%) to Becky Berry (Bridgette's Mother).

Creditor's Opposition

On December 23, 2021, Creditors, Gustavo Navarro, Federico Ramirez, and Sylvia Navarro, Objected to Debtor in Possession's Confirmation of Chapter 11 Plan. Dckt. 45. Creditors hold Class 4, non-priority unsecured claims totaling $56,379.00. The Creditors object to the confirmation of this Plan because the Plan proposes to pay Creditors and other unsecured creditors at a thirty percent (30%) dividend over the next five years. Creditors further state there is no rational basis or reason why that number should not be one hundred percent (100%) if the business improves in the future. The Creditors further contend the Projected Post-Confirmation Cash Receipts, attached as Exhibit A, is not entirely accurate because it only provides for six months when it should provide for three or five years.

Debtor in Possession's Response

On January 6, 2022, Debtor in Possession filed Bridgette Berry's, the responsible representative of the Debtor in Possession, Declaration In Support of the Chapter 11 Plan. Dckt. 48. In the Declaration Debtor addresses the concerns raised by both Creditors in Paragraphs 20 and 21.

Addressing the first Creditor, Korinn Berry, Debtor states she disagrees with Creditor's accusation Creditor has been denied access to financial records. However, Debtor in Possession is not opposed to a continuance and has provided Creditor with the log in information for Quick Books to review financial information.

Addressing the other Creditors, Gustavo Navarro, Federico Ramirez, and Sylvia Navarro, concerns, Debtor stipulates she has prepared five year projections but has not had the ability to review with the Debtor's attorney. Granting the continuance requested by Korinn Berry will allow for such review to take place. Debtor further states specific repairs to the kitchen must be completed in order for the business to sell coffee. Additionally, the present plan is to sell pre-packaged snacks with basic coffee in addition to the rotation food trucks which come to the taproom.

Further, marketing is extremely expensive because the last Yelp advertising cost was $600.00, which only generated twenty (20) hits on the business's Yelp page. The Debtor clarifies the confusion revolving around the three different addresses for the business. One address is for the cold storage to store the beer, another for the taproom to sell the beer, and the last one is where the brewing process takes place. Lastly, Debtor does intend to substantially increase the dividend on Class 4 claims and will know the payment schedule and dividend within the next week.

Continuance

The Subchapter V Trustee stated that Korinn Berry's correspondence to the court is in the nature of an alternative plan. Counsel for Creditors Ramirez and Navarro, said that they are reviewing a proposed 60% dividend.

At the hearing, the parties agreed to a continuance to allow for discovery and further discussions. The hearing is continued to 2:00 p.m. on March 10, 2022.

MARCH 10, 2022 HEARING

As of the court's March 7, 2022 review of the Docket, nothing further had been filed by the Debtor/Debtor in Possession or other party in interest. The court addressed the evidence presented and issues raised. The parties discussed increasing the dividend to creditors holding general unsecured claims to sixty percent (60%) from thirty percent (30%). Korinn Berry expressed her concerns in the case, but has not obtained bankruptcy counsel and has not yet filed an objection to confirmation.

APRIL 8, 2022 CREDITOR REPLY

On April 8, 2022, Creditor Korinn Berry filed a reply stating that she would be willing to agree to confirmation of Plan if it contained the following amendment (which Korinn Berry states she believes are very reasonable):

1. Creditor Korinn is willing to contribute $10,000.00 to the reorganization, if the other two partners each contribute an additional $10,000.00.

2. Creditor Korinn does not agree with the terms of the Plan to have ownership of the reorganized Debtor to be 50/50 and be owned by Beck Berry and Bridgette Berry.

3. For the SBA Loan, Creditor Korrin states that all three of the pre-petition shareholders have liens on their homes to secure that claim.

Dckt. 23. Creditor Berry then states that she "leaves it to the judge" to determine whether such amendments are proper, indicating that there is no agreement for any of the amendments.

APRIL 21, 2022 HEARING

At the hearing, the Debtor/Debtor in Possession reported that an agreement has been with the major creditors holding general unsecured claims to: (1) increase the minimum dividend on all general unsecured claims to at least 60% (from the 30% in the proposed plan), (2) for there to be an annual status review of the business under the Plan, and (3) increases in the dividend above 60% based on an agreed formula/factors based on the business operations.

These terms will be put in a Final Amended Plan which will be filed with the court, along with a redline version, and served on parties in interest.

In looking at the file the court notes that the following monthly operating reports were filed by the Debtor/Debtor in Possession:

1. December 2021 Monthly Operating Report (Dckt. 75) – Due January 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....($1,906)

    c. Professional Fees Paid since filing the case.....$1,625

2. January 2022 Monthly Operating Report (Dckt. 73) --Due February 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....$138

    c. Professional Fees Paid since filing the case.....$2,025

3. February 2022 Monthly Operating Report (Dckt. 74) – Due March 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....$2,414.00

    c. Professional Fees Paid since filing the case.....$2,025

4. March 2022 Monthly Operating Report (Dckt. 76) – Due April 14, 2022

    a. Filed.....April 13, 2022

    b. Net Cash Flow for Month.....$719.00

    c. Professional Fees Paid since filing the case.....$2,525

With respect to the Professional Fees paid in the amount of $2,525 since this case was filed, the information on the Monthly Profit and Loss Statement with each Monthly Operating Report identifies them as:

1. December 2021 (Dckt. 75 at 5)

    a. Legal & Professional Services.....$300.00

    b. On the Debtor/Debtor in Possession disbursement register the payment is for

        (1) Priest Amistadi CPA Services, $300. (Dckt. 75 at 6).

2. January 2022 (Dckt. 73 at 5)

    a. Legal & Professional Services.....$400.00

    b. On the Debtor/Debtor in Possession disbursement register the payment is for

        (1) Priest Amistadi CPA Services, $500. (Dckt. 73 at 9).

3. February 2022 (Dckt. 74 at 5)

    a. Legal & Professional Services.....$0.00

4. March 2022 (Dckt. 76 at 5)

    a. Legal & Professional Services.....$500.00

    b. On the Debtor disbursement register the payment is for

        (1) Priest Amistadi CPA Services, $500. (Dckt. 76 at 7).

The above payments to the CPA accounts for $1,200 of the $2,525 in professional fees paid.

The Debtor/Debtor in Possession earlier filed set of four Monthly Operating Reports filed in January 2022, the Legal & Professional Fees paid are identified as:

1. August 2021 Monthly Operating Report filed on January 11, 2022

    a. $750.00 (Dckt. 51 at 12,10); LZC LegalZoom.com

2. September 2021 Monthly Operating Report filed on January 11, 2022

a. $200.00 (Dckt. 52 at 14, 8); Priest Amistadi CPA Services.

3. October 2021 Monthly Operating Report filed on January 11, 2022

a. $375.00 (Dckt. 53 at 11, 9); Priest Amistadi CPA Services.

4. November 2021 Monthly Operating Report filed on January 11, 2022

a. None (Dckt. 54).

In reviewing the file in this case, the court cannot find an order authorizing the employment of the CPA or order authorizing the payment of fees. It is not clear from the Monthly Operating Report why LZC LegalZoom.com was paid $750.00 on August 25, 2021, seven days after this bankruptcy case was filed.

At the hearing, no opposition was presented. Korrin Berry, a pre-bankruptcy one-third interest holder in the pre-petition Debtor and former spouse of the managing member of the Debtor (who will be a 50% interest holder, along with the former spouses mother in the Reorganized Debtor) submitted an alternative proposal for a plan (Dckt. 72), for which no support by the Debtor/Debtor in Possession or creditors was stated.

At the hearing, the court addressed with counsel for the Debtor/Debtor in Possession, with the managing member and her mother present in court, the shortcomings of the Responsible Representative and counsel for the Debtor/Debtor in Possession is allowing for the payment of professionals without court order authorizing the employment or authorizing the payment of fees. Counsel for the Debtor/Debtor in Possession offered that the U.S. Trustee has stated that such was proper. The Assistant U.S. Trustee quickly responded that no such interpretation was ever stated by the U.S. Trustee and directed the court to specific statutory provisions which were violated and dictated the opposition of what counsel for the Debtor/Debtor in Possession asserted.

The court addressed with counsel for the Debtor/Debtor in Possession, with the members of the Reorganized Debtor present, the fiduciary duties of plan administrators and their offices, agents, managing members and representatives in the performance of a confirmed bankruptcy plan. In performing the plan, they could not use that position to improperly seek to damage the interests of another, such as a former space, as part of marital dissolution proceedings.

Upon the consideration of the evidence, the updated tabulation of ballots showing that all impaired classes of claims has accepted the Plan as amended (Dckt. 78), the amendments stated in the supplemental pleading filed on April 21, 2022 at 1:43 p.m. (shortly before commencing the 2:00 p.m. confirmation hearing on April 21, 2022); the court determines that the Plan as proposed and accepted by all creditor classes with impaired complies with the requirements of 11 U.S.C. § 1129(a) and is confirmed pursuant to 11 U.S.C. § 1191(a).

April 25, 2022 Court Order

On April 25, 2022, the court issued a ruling on the Confirmation of Plan of Reorganization and stated the Counsel for Debtor/Debtor in Possession shall lodge with the court a proposed order confirming

the Final Amended Plan with a copy of said Plan attached as Addendum A to the confirmation order. Dckt. 83. The court would then delay entry of the order confirming for two weeks to allow parties to review the Plan and address any concerns with the court.

May 19, 2022 Court Order Confirming Plan

On May 19, 2022, the court entered an order confirming the Plan filed on November 16, 2021 as Modified on April 19, 2022. Dckt. 86. As the Plan is confirmed, this hearing is taken off calendar.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 11 Plan filed by MoBrewz, LLC ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Plan of Reorganization is continued to 10:30 a.m. on June 16, 2022 (Specially Set Time).

3. 21-90484-E-11 TWISTED OAK WINERY, LLC

CONTINUED APPROVAL OF AMENDED CHAPTER 11 PLAN OF REORGANIZATION
2-28-22 [72]

Items 3 thru 5

Final Ruling: No appearance at the May 26, 2022 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Though Oppositions have been filed, the court cannot locate a Certificate of Service having been filed by the Debtor/Debtor in Possession documenting service having been made by the Debtor/Debtor in Possession .

At the hearing, Counsel for the Debtor/Debtor in Possession reported that this was a clerical error which would be shortly corrected. The court authorized the late filing of the Certificate of Service.

The hearing on the Amended Chapter 11 Plan is continued to 10:30 a.m. on June 16, 2022.

The court orders Jeff Stai, Responsible Representative of the Debtor/Debtor in Possession; Brian Haddix, Esq., counsel for the Debtor in Possession; Nicola Merrifield-Olivia, Senior Vice President of Mechanics Bank; and Tom Normandin, Esq., counsel for Mechanics Bank; and each of them, to appear in person as the June 16, 2022 continued hearing –

Telephonic Appearances Permitted.

CONTINUANCE OF MAY 26, 2022 HEARING

Due to the unavailability of the Judge to whom this case is assigned to attend the May 26, 2022 hearing, the court continues the hearing.

Additionally, as addressed below, the court has identified what appear to be some very significant legal and evidentiary issues (and short comings) in connection with this and related proceedings. The continuance may allow the parties and their counsel to meet and confer in good faith, identify any "miscommunications" and prepare a stipulation that resolves some, if not all, of their disputes.

Other than a joint stipulation, the court does not authorize the filing of any further pleadings in this contested matter without further order of the court following the continued hearing.

REVIEW OF PLAN CONFIRMATION

The Plan Proponent's Counsel reported that the following Service and Filing Requirements for Confirmation were complied with:

March 4, 2022 Plan to be served along with a copy of the February 28, 2022 court Order Setting Hearing and Related Deadlines (Dckt. 73), a ballot for voting, a copy of a notice confirmation hearing on the trustee, United States Trustee, and all creditors and other parties in interest.

Within Three Days of the above service, a certificate of service shall be filed demonstrating compliance. No such Proof of Service has been filed.

April 4, 2022 Last Day to File Objections to Confirmation

April 14, 2022 Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

and that a Certificate of Service will be filed, it's omission arising from a clerical error when it was being uploaded.

Treatment of Claims

Creditor/Class	**Treatment**	
Class 1: None	**Claim Amount**	
	Impairment	Not Impaired. Debtor does not anticipate any Priority Claims.
	If there is a Priority Claim allowed, Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan or the date which such claim is allowed by a final non-appealable order.	
Class 2: Mechanics Bank	**Claim Amount**	$2,540,119.29

	Impairment	Class 2 is impaired. Mechanics Bank shall retain its security interest according to the instruments and statutes creating same. Mechanics Bank's principal shall be paid in full with interest of 4.50% per annum on 25 years amortization with a January 1, 2033 maturity date. Interest and principal payments are $10,577 per month, commencing October 1, 2022 for 123 months and then a balloon payment for the remaining balance due on January 1, 2033. Mechanics Bank's pre-petition interest shall be paid in full with 0% interest per annum in the amount of $1,000 per month, commencing October 1, 2022, then a balloon payment for the remaining balance due on January 1, 2033.
Class 3: U.S. Small Business Administration	**Claim Amount**	$157,119.86
	Impairment	Class 3 is unimpaired by the plan.
Class 4: Non-Insider Non-Priority Unsecured Claims, Stange/Metate	**Claim Amount**	
	Impairment	Class 4 is unimpaired by the plan. Creditor Stange/Metete is the only creditor in Class 4 and their claim is disputed. If Stange/Metete has an allowed claim, they are to be paid as follows: Stange/Mesete's claim must first be offset against any claim or recovery of Debtor. If there is no recovery of Debtor, in equal installments beginning July 1, 2022 for a period of six (6) months.

Class 5: Insider Non-Priority Unsecured Claims	**Claim Amount**	
	Impairment	Class 5 is unimpaired by the plan. Class 5 will only be paid if all other allowed claims have been paid in full on such terms Debtor and class 5 agree on.
Class 6: Equity Interests	**Claim Amount**	
	Impairment	Equity Holders are unimpaired and retain current membership interest in Debtor.

Debtor states in their plan there are no known Priority Claims. However, the Internal Revenue Service has filed a priority claim in the amount of $2,016.45 unsecured priority claims and $200.00 in unsecured general claims. This is estimated as returns for numerous tax periods have not been filed: December 2019; September 30, 2021; and December 31, 2021. See Proof of Claim 3-1.

Creditor's Objection

February 28, 2022, Creditor Mechanics Bank filed an Objection to Confirmation (Dckt. 74) stating:

1. Debtor did not obtain an Order extending the time to confirm a Small Business Plan outside of forty-five days.

2. The case should be converted the Chapter 7 liquidation.

3. The Second Amended Plan is not fair and equitable because:

    a. The Note and Commercial Guaranties are in almost three (3) years of default.

    b. Debtor's sole manager receives $10,000.00 per month in rent from Debtor but Creditor has not received anything in almost three (3) years.

    c. The Debtor has filed a series of proposed plans.

    d. The plan forces Creditor to accept an interest rate of 3.75% which is far below the current lending market.

    e. The Plan is devoid of any reference to Debtor's principals and Guarantors of the Note and ability to contribute to the Plan.

f. The Plan continues to use Creditor's cash collateral over Creditor's objection when Debtor has made no monthly adequate protection payments to Creditor.

Dckt. 74.

United States Trustee's Objection

The United States Trustee filed an objection on April 4, 2022 (Dckt. 85) stating:

1. The Plan improperly terminates Trustee's duties if it is confirmed non-consensually. Trustee states the court should not confirm the Plan unless it is amended to remove any such language.

2. The Debtor has not filed a proof of service evidencing compliance with the proof of service requirement under Federal Rules of Bankruptcy Procedure 2002(b).

Creditor's Supplemental Objection

Creditor Mechanics Bank filed a supplemental objection on April 14, 2022 "confirming its objection" as set forth in its previous objection under Docket No. 74. Dckt. 87.

DISCUSSION

Federal Rule of Bankruptcy Procedure 3020(b)(2) states:

> The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

Here, there has been no notice of hearing as required by the court's February 28, 2022 Order. Dckt. 73. There has been no certificate of service evidencing a copy of the Third Amended Subchapter V Plan, a ballot for voting on the Subchapter V Plan, and a copy of a notice of confirmation hearing on the case trustee, or standing trustee, the United States Trustee, and all creditors and other parties of interest has been served. Additionally, there has been no copies of ballots or ballot tabulation filed with the court at least seven (7) days prior to the hearing, as required by the February 28, 2022 Order.

At the Status Conference, counsel for Debtor/Debtor in Possession believes that all of the outstanding issues could be resolved, but as discussed below, the concerns of Mechanics Bank as to adequate protection may required a ruling by the court.

The service documentation is being corrected. The Debtor/Debtor in Possession amends the Plan to remove the section which provides for the discharge of the Subchapter V Trustee even if it is not a consensual confirmation of the Plan.

With respect to Mechanics Bank objections, an issue exists as to the Bank's collateral, the Debtor/Debtor in Possession will confirm that there are no rents being generated and the extent to which there are any grapes on the property encumbered by the Bank's Deed of Trust and Agricultural Lien (as they are perfected) which are used in the wine making process or sold. The court will consider the use of such collateral and how it impacts the Bank's Adequate Protection.

Mechanics Bank objected to there being a 3.5% interest rate for its secured claim, stating that under the Till analysis, that is the current prime rate, and there are no upward adjustments for the risk it is facing over the ten year repayment period under the Plan.

In the Third Amended Plan, the interest rate has been increase to 4.5%. The court will consider any additional "risk" adjustment necessary in light of the Bank's adequate protection, limitations thereto, time period for payment, and other factors.

Mechanics Bank complains that it wasn't paid for three years prior to the bankruptcy case being filed and has not been paid since this case was filed on October 4, 2021. Additionally, a principal of the Debtor has been paid $10,000 a month in rent from Debtor, and that is fair and equitable.

Counsel for the Debtor/Debtor in Possession reported that such rent was for a tasting room formerly used by Debtor and that such rent has been terminated.

Adequate Protection Factors

The U.S. Supreme Court addressed the principle of bankruptcy adequate protection in *United Saving Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370, in the context of relief from the automatic stay, referencing the statutory definition in 11 U.S.C. § 361 which provides:

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

The Supreme Court's discussion of the interests to be adequately protected, the Court concluded, "The language in those other provisions, and the substantive dispositions that they effect, persuade us that the "interest in property" protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure."

In considering the statutory definition for a secured claim stated in 11 U.S.C. § 506, the court concluded that for a creditor with an undersecured claim, adequate protection did not include granting them

interest for the time value of their claim. This was in context of a pre-confirmation period, but underscores that while having a secured claim gives the creditor an enhanced position in a bankruptcy case, it is not a ticket to unlimited profits.

For confirmation of bankruptcy plans and the treatment of a secured claim in which the plan terms modify the original contract (such as changing the interest rate and payment terms), the U.S. Supreme Court address this issue in *Till v. SCS Credit Corporation*, 541 U.S. 465 (2004). Mechanics Bank does not cite to this case and the *Till* factor in its opposition to confirmation, Dckt. 74, but instead discusses the terms for making a new loan today. At the April 22, 2022 hearing, counsel for Mechanics Bank did mention Till, stating that a 1% point increase of the interest to 4.5% did not adequately protect/compensate Mechanics Bank for the extraordinary risk it face in the payments of its claim over the next ten years. The court addresses below the extraordinary risk facts identify by Mechanics Bank.

Mechanics Bank filed Proof of Claim 2-1 on December 13, 2021. As the court noted at the April 21, 2022, it appears that Mechanics Bank has provided accurate and truthful information in this Proof of Claim consistent with it being made under penalty of perjury (and subject to the civil and criminal penalties for filing a fraudulent claim). Key information provided in Proof of Claim 2-1 and the attachments thereto include the following:

A. The amount of the claim is ($2,540,119.29), which claim amount includes ($15,889.76) in foreclosure fees and costs, plus further interest, fees, and costs. POC ¶ 7.

   1. In the Declaration filed with the opposition, it is stated that the interest rate floor for the claim is 7.25%, and there is an additional 5.00% interest added when the obligation is in default. Thus, it appears that Merchants Bank has been adding 12.25% in interest to this claim in the past three years it is asserted to have been in default. Dec. ¶¶ 8, 12,

B. The Claim is secured by real estate, which Mechanics Bank states has a value of $4,641,208.000. POC ¶ 9. This is the same value as stated by Debtor on Schedule A/B. Dckt. 1 at 55.

   1. With a value of $4,641,208 and a claim of ($2,540,119.29), Mechanics Bank states that its claim is fully secured and it has no unsecured claim. POC ¶ 9.

   2. Using these values, there is a $2,101,088 equity cushion in the real estate protecting Merchants Bank in excess of ($2,540,119.29) claim. This is an equity cushion of 82.7% of the amount of the Claim.

In the Opposition, Mechanics Bank asserts that it is not fair and equitable for the interest rate to be set for the present value repayment under Till, but that it should be based on the current lending rate. Opposition, ¶ a, p. 3; Dckt. 74.

Mechanics Bank's Senior Vice President states in her declaration, verbatim of what is stated in the Opposition, her belief and legal opinion that the proposed plan treatment is not "fair and equitable" as stated in 11 U.S.C. § 1129(b)(2)(A), with said Senior Vice President expressly citing to that Code section in stating her legal conclusion, and testifying under penalty of perjury:

> 12. The Debtor's Second Amended Plan is far from "fair and equitable" as required under Bankruptcy Code§ 1129(b)(2)(A):
>
> a. The Plan is not fair and equitable when it forces Mechanics Bank to accept an interest rate (3. 75% per annum) which is far below that which the Debtor could obtain in the current lending market. The interest rate in today's lending market for a $2.5 million to a borrower such as Debtor is nine percent (9.0%) per annum. Moreover, under the terms of the Note, there is an interest rate floor of 7.250% per annum. In addition, the Note provides that in the Event of Default, the interest rate increases by 5.0% per annum, The Debtor ignores these contractually-agreed-upon terms between third parties and attempts to force a non-market rate of interest of 3.75% per annum in the Plan; . . .

With respect to the $2,101,088 equity cushion not providing adequate protection, the Senior Vice President provides no testimony.

In the Opposition, the assertion that Mechanics Bank's secured claim is not adequately protected is only referenced (using the words "adequate protection") in the following context:

> d. The Plan is not fair and equitable when the Debtor continues to use Mechanics Bank's cash collateral over Mechanics Bank's objection. The Debtor has made no monthly adequate protection payments to Mechanics Bank.

Opposition, ¶ d, p. 4; Dckt. 74.

In reviewing the Opposition as written, the general proposition presented appears not to be whether the bankruptcy plan properly provides for the repayment of the secured claim as permitted under the Bankruptcy Code, but that Mechanics Bank should be paid more than its claim for the Debtor to atone for past financial sins.

In the Opposition, as repeated verbatim in the Senior Vice President's Declaration, Mechanics Bank appears shocked that after apparently extensive negotiations to try and modify the repayment of the debt outside of bankruptcy, when Mechanics Bank went to foreclose the Debtor filed Chapter 11 to force repayment terms on Mechanics Bank as permitted under the Bankruptcy Code (recognizing that Mechanics Bank raises some issues of whether the proposed repayment is "fair and equitable" as required under the Bankruptcy Code).

Beginning with the Bankruptcy Code and treatment of secured claims under a bankruptcy plan, 11 U.S.C. § 1129(b)(1), (2), as applicable to the proposed plan treatment for the Mechanics Bank secured claim, provides that if the creditor does not agree to the plan treatment for the secured claim:

> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) [acceptance of plan by the class of claims] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i) (I) that the **holders of such claims retain the liens securing such claims**, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim **deferred cash payments totaling at least the allowed amount of such claim**, of a value, as of the effective date of the plan, **of at least the value of such holder's interest in the estate's interest in such property**;

. . .

(iii) for the realization by such holders of the indubitable equivalent of such claims.

The Plan provides for Mechanics Bank retaining its lien, which will be clarified to the extent that any of its collateral is being used so that the court may determine whether it is receiving the "indubitable equivalent" of its oversecured claim.

In *Till*, the U.S. Supreme Court was wrestling with the appropriate amount of interest under the Chapter 13 plan to be paid the creditor with the secured claim so that it would receive at least the allowed amount of its claim as of confirmation (commonly considered a present value calculation). The discussion by the Supreme Court includes expressly rejecting the creditor's contention that the interest was to be set at what the creditor could make new loans at if it could get paid in one lump sum on confirmation. *Till v. SCS Credit Corp.*, 541 U.S. 465, 471 (2004). In determining the correct interest rate for a cramdown (non creditor agreed plan term) payment in the bankruptcy plan, the Supreme Court adopted the "formula approach," states as follows:

> The formula approach has none of these defects. Taking its cue from ordinary lending practices, the approach begins by looking to the **national prime rate, reported daily in the press**, which reflects the financial market's estimate of **the amount a commercial bank should charge a creditworthy commercial borrower to compensate** for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a **greater risk of nonpayment** than solvent commercial borrowers, **the approach then requires a bankruptcy court to adjust the prime rate accordingly**. The appropriate size of that risk adjustment depends, of course, on **such factors as** the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment. Some of this evidence will be included in the debtor's bankruptcy filings, however, so the debtor and creditors may not incur significant additional expense. Moreover,

> **starting from a concededly low estimate and adjusting upward places the evidentiary burden squarely on the creditors**, who are likely to have readier access to any information absent from the debtor's filing (such as evidence about the "liquidity of the collateral market," post, at 1973 (SCALIA, J., dissenting)). **Finally, many of the factors relevant to the adjustment fall squarely within the bankruptcy court's area of expertise.**
>
> Thus, unlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. Moreover, the **resulting "prime-plus" rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate**, and the characteristics of the loan, **not on the creditor's circumstances or its prior interactions with the debtor.** For these reasons, the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code.

Id., 478-480 (emphasis added).

The Supreme Court did not establish a scale for the above prime rate adjustment, but noted that such adjustments range between 1% and 3%. *Id*., 480. The interest rate adjustment is to be for minor amounts of risk, with the Supreme Court further stating,

> Together with the cramdown provision, this requirement obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan. If the court determines that the likelihood of default is so high as to necessitate an "eye-popping" interest rate, 301 F.3d, at 593 (Rovner, J., dissenting), the plan probably should not be confirmed.

Id., 480-481.

Consideration of Interest Rate For Mechanics Bank Secured Claim

Beginning with the proposed Plan treatment, the basic terms are:

1. Amount of Secured Claim.....($2,540,119.29) [to be adjusted for interest and other accrued amounts since filing to confirmation]

2. Repayment of the non-pre-petition accrued interest of the ($2,540,119.29) will be:

    a. Claim amortized over 25 years at 4.5% interest per annum;

    b. With monthly payments of $10,557 commencing October 1, 2022 and continuing for 123 months; and

    c. A balloon payment of the remaining balance on January 1, 2033. This portion of the claim to be paid is (see the following) projected

to be ($1,899,000), and with monthly payments of $10,557 applied to that principal amount and the interest at 4.5%, the remaining balance to be paid is projected to be ($1,363,581). That would be a 28.2% reduction of the principal amount of the secured claim through the monthly payments.

Using the Microsoft Loan Amortization Calculator, with an interest rate of 4.5% and a 25 year amortization, the portion of the secured claim to be paid as provided above would be ($1,899,000), leaving ($641,119) to be paid as provided below.

3. The pre-petition interest arrearage portion of the claim, ($641,119) as computed above, will be paid at the rate of $1,000.00 a month, commencing October 1, 2022, and continuing for 123 months, and

   a. The a balloon payment for remaining balance to be paid in full January 1, 2033, which remaining balance is computed to be ($518,119), which is a 19.1% reduction in this portion of the claim through the monthly payments.

While the claim is not fully amortized over the 123 months when the balloon payment comes due, neither is it fully amortized over the twenty-five (25) years.

Interest Rate, Proper Calculation

In the Plan now before the court, Debtor provides a 1% point bump to the 3.5% current prime rate. (There was no dispute at the April 21, 2022 hearing as to the current prime rate.) In the Opposition, and as stated verbatim in the Declaration by Mechanics Bank Senior Vice President, Mechanics Bank argues for an the prime interest rate, with modest adjustments, that a commercial bank should charge a creditworthy commercial borrower which has built into it the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default, as the U.S. Supreme Court requires in *Till*, but instead advocates for an interest rate made to a debtor, driven to bankruptcy, having a property with an almost 100% equity cushion and facing imminent foreclosure. The U.S. Supreme Court expressly rejected this distressed borrow interest rate computation, with its comments including:

> These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value. For example, **the coerced loan approach** requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors—an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans. In addition, **the approach overcompensates creditors** because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court—administered and court—supervised cramdown loans.
> . . .

> The **cost of funds approach**, too, is improperly aimed. Although it rightly disregards the now-irrelevant terms of the parties' original contract, it mistakenly focuses on the creditworthiness of the creditor rather than the debtor. In addition, the approach has many of the other flaws of the coerced loan and presumptive contract rate approaches. For example, like the presumptive contract rate approach, the cost of funds approach imposes a significant evidentiary burden, as a debtor seeking to rebut a creditor's asserted cost of borrowing must introduce expert testimony about the creditor's financial condition. Also, under this approach, a creditworthy lender with a low cost of borrowing may obtain a lower cramdown rate than a financially unsound, fly-by-night lender.

Till v. SCS Credit Corp., 541 U.S. at 477-478 (emphasis added).

Mechanics Bank does not assert that the Plan is not feasible and that Mechanics Bank does not stand a likelihood of being paid, just that it's interest rate should be higher because if the Debtor were forced to go to the marketplace with a pending foreclosure hanging around its neck, the lenders could extract a higher interest rate than what is permitted under the Bankruptcy Code.

Mechanics Bank also argues that interest rates will go up in the future (as everyone, including lenders currently setting the prime interest rate at 3.5% know from the news), thus Mechanics Bank is entitled to an enhancement over the prime rate. In making such argument, Mechanics Bank is contradicting the U.S. Supreme Court which states that such "opportunity costs" are included in the prime rate.

At the April 21, 2022 hearing, Mechanics Bank added the additional argument that as interest rates go up, the value of real estate declines. While stating it in a apocalyptic, Great Recession category, nothing has been presented to the court that current lending, consumer and commercial, has approached the wild, liar loans, negatively amortizing, continually rolling over and refinancing loans that business could not pay, and the like which was seen for the Great Recession, the Dot Com Bubble Burst, the drop in the early 1990's, and the lending implosion of domestic and foreign loans in the early 1980's.

Rather, it appears that there will be a "more normal" drop in real estate prices (which from their meteoric high with the historically low sub-3% interest rates recently seen) based on how much the monthly payment is and the ability to repay the loan from the business operation. As interest rates go up, the borrow can afford to borrow less principle for the purchase as the amount of interest it has to pay increases.

The court, using the Microsoft Excel Loan Amortization Program has generated several examples below, assuming a 10% down payment, amortization over 25 years, and upward adjusted interest rates to show monthly loan payment projections.

Projected Property Value	**Less 10% For Amount Financed**	**Interest Rate**	**Monthly Payment For Adjusted Interest Rate**	**Projected Equity Cushion for $2,540,119 Secured Claim**	
				Dollar Amount	Percentage
$4,641,208*	$4,117,087	3.50%	$22,884.00	$2,101,089	45%
$4,905,000	$4,145,000	4.00%	$22,918.00	$2,364,881	48%
$4,333,333	$3,900,000	5.00%	$22,799.00	$1,793,214	41%
$3,944,444	$3,550,000	6.00%	$22,872.00	$1,404,325	36%
$3,583,333	$3,225,000	7.00%	$22,794.00	$1,043,214	29%
$3,288,888	$2,960,000	8.00%	$22,846.00	$748,769	23%
$3,027,777	$2,725,000	9.00%	$22,868.00	$487,658	16%
$2,788,889	$2,510,000	10.00%	$22,898.00	$248,770	9%

* Agreed current value of the property securing Mechanics Bank claim.

In looking at possible prime interest rate increases, if the interest rate increases to 8% (a 128% increase over the current prime rate), there would still be a 23% equity cushion (without taking into account reductions in the amount of the claim for payments made under the Plan). Even if the prime rate were to climb to 10%, there is still a substantial equity cushion.

Given that Mechanics Bank has made a wise choice of collateral, there does not appear to be a risk of lack of adequate protection in a decrease in the value of its collateral.

The proposal of 4.5% interest by the Debtor/Debtor in Possession is at the low end of the range envisioned by the U.S. Supreme Court. However, given the substantial equity cushion, there should be little for Mechanics Bank to do then collect the monies coming in or exercising its rights in the event of default.

The proposed Plan provides that in the event of a default:

> If Debtor defaults in a payment or covenant under the Plan, Debtor shall cure the default, without consequence, within 30 days of the date of default. The 30-day cure period will begin upon receipt by the Debtor and its attorney of a notice of such default. If the Debtor fails to cure the default within the 30-day period, the affected creditor or party will be free to enforce its rights and collect its claim, as modified by the Plan.

Proposed Plan, ¶ 10.02; Dckt. 72. Within 30 days of Mechanics Bank notifying the Debtor, as the Plan Administrator, of the default, either the default will be cured or Mechanics Bank is free (without further order of the court, to enforce its rights. There is little risk or roadblocks in connection with enforcing Mechanics Bank's rights in the event of a default.

The court continues the hearing to allow for the filing of supplemental pleadings.

Debtor/Debtor in Possession's
Supplemental Brief

On April 30, 2022, Debtor/Debtor in Possession filed a supplemental brief in support of confirmation of their Third Amended Chapter 11 Plan. Dckt. 102. Debtor/Debtor in Possession provides background of Creditor Mechanic Bank's claim and addresses Creditor's issues with the Plan:

A. Failure to Obtain an Order Extending Time to Confirm - 11 U.S.C. §§ 1121 and 1129(e) do not apply to Subchapter V.

B. Inducing Creditor to Lend Money to Borrower - Debtor/ Debtor in Possession never did business or borrowed money from Creditor.

C. Creditor's Collateral in Personal Property or Profits - Creditor failed to attach to their Proof of Claim any documentation evidencing a perfected Uniform Commercial Code security interest in Debtor/Debtor in Possession's personal property or "profits." Per the Deed of Trust, this would be a Uniform Commercial Code security interest requiring perfection separately from recording the Deed of Trust. Therefore, the filed proof of claim is deficient pursuant to Federal Rules of Bankruptcy Procedure 3001(d). Debtor/Debtor in Possession argues Creditor's collateral consists of: (1) 4280 Red Hill Access Rd. ("Property"); (2) an absolute assignment of Debtor/Debtor in Possession's right, title, and interest in and to all present and future leases of the Property; and (3) all rents from the Property.

D. Fair and Equitable - Debtor/Debtor in Possession's Plan is fair and equitable because the proposed interest rate of 4.50% is reasonable in applying the *Till* method.

E. Cash Collateral - Any cash collateral issue is nominal.

F. Adequate Protection - The collateral has $2,101,088.71 value in excess of the secured claim which constitutes adequate protection.

G. Amendments to Plan - Debtor/Debtor in Possession will strike section 10.01 in the Order Confirming Plan.

H. Notice issues - Debtor/Debtor in Possession filed and served a Continued Notice of Hearing and filed a Certificate of Service.

Debtor/Debtor in Possession's

Amended Brief

On April 30, 2022, Debtor/Debtor in Possession filed an Amended Brief clarifying why Debtor never did business nor borrowed money from Creditor. Amended Brief at 5, Dckt. 105. Additionally, the Amended Brief states there are three (3) categories of collateral in the Deed of Trust, not four (4) and Creditor's collateral only consists of (1) the Property and (2) an absolute assignment of Debtor/Debtor in Possession's right, title, and interest in and to all present and future leases of the Property. *Id.* at 6.

Debtor/Debtor in Possession filed the following exhibits (Dckt. 106) in support of the Brief:

Exhibit A - Debtor/Debtor in Possession's Schedules

Exhibit B - Creditor's Proof of Claim 2-1

Exhibit C - Creditor's Objection to Plan

Exhibit D - Declaration of Nicola Merrifield in Support of Creditor's Objection

Exhibit E - Evidence in Support of Creditor's Objection.

Mechanic Bank's Memorandum in Support of Proof of Claim and Supplemental Objection

On May 13, 2022, Creditor Mechanic Bank filed a Memorandum in Support of their Proof of Claim and a Supplemental Objection. Dckt. 109. Creditor states Claim 2-1 is valid because there is no legal principle or lending practice requiring a lender to file a Uniform Commercial Code Financing Statement with California's Secretary of State when a deed of trust is properly recorded. Additionally, any objection must be raised through a separate adversary. Also, Creditor states a fair market interest rate for a $2,600,000 loan exceeds 4.5% interest rate. Creditor states an interest rate of 7.25% would be appropriate.

Creditor filed unlabeled and non-indexed exhibits (Dckts. 111, 112) in support of their Supplemental Objection, in violation of Local Rule 9004-2.

Declaration of Nicola Merrifield-Olivia

The declaration of Nicola Merrifield-Olivia, a Senior Vice President, Commercial Special Assets Department Manager. Dckt. 110. In it she provides her personal knowledge, factual testimony (Fed. R. Evid. 601, 602), which includes:

A. She is "merely" informed and believes that Pacific State Bank was closed, then sold to Rabobank, N.A., and that later RaboBank, N.A. was merged into Mechanics Bank. Dec., ¶ 3; Dckt. 110.

B. She is familiar customary and "habitual practices" in the lending industry, and she then provides her legal analysis of California law relating to perfecting security interests in real and personal property. She personally extensively quotes California statutes in her testimony under penalty of perjury. *Id.*, ¶ 5.

C. She then testifies that the 4.5% interest rate proposed in the plan is neither "fair nor equitable," thus providing her legal testimony that the legal standard for setting an interest rate in a bankruptcy plan is whether it is"fair or equitable," without regard to the actual finances. *Id*., ¶ 7

D. In ¶ 7(d) of her testimony under penalty of perjury, she provides her legal testimony as to "admissible evidence."

E. She testifies, based on her personal knowledge, that (improperly under the Local Bankruptcy Rules) attached to her Declaration is a third-party appraisal by someone who is not before this court, and admits that a valid value for the property securing Mechanics Bank's claim is only $2,226,400 (after deducting the 8% costs of sale which she states must be considered). *Id*. ¶ 7(e).

Finally, Ms. Merrifield-Olivia admits that she has no personal knowledge and cannot provide testimony under penalty of perjury by improperly modifying the penalty of perjury oath, and qualifying that her testimony is only to the "best of her knowledge" and may well not be true at all, stating:

> I declare under penalty of perjury, under the laws of the United States of America that the foregoing is true and correct **to the best of my knowledge**. Executed on May 11, 2022 at Ventura, California.

Id., p. 5:3-5.

This "testimony" is not made under penalty of perjury as required by federal law. Congress provides in 28 U.S.C. § 1746 (emphasis added):

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1)
>
> If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that **the foregoing is true and correct**. Executed on (date).

(Signature)".

(2)

If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that **the foregoing is true and correct**. Executed on (date).

(Signature)".

No provision is made for testimony to be made on "information and belief" or "the best of my knowledge" (which may indicate that "it's my knowledge because then my side will win."

Additionally, there is no evidence of Ms. Merrifield-Olivia having legal training or being a lawyer. Additionally, if she had legal training, why she would be testifying as to the law, rather than counsel for Creditor providing such legal analysis in his points and authorities.

May 26, 2022 Hearing

The court has reviewed the copy of the Deed of Trust that secures Creditor's Claim which is attached to Proof of Claim 2-1. With respect to the scope of the security interest, it states (the court reformatting the sentence so that each item of collateral can be cleanly identified:

CONVEYANCE AND GRANT. For valuable consideration, Trustor irrevocably grants, transfers and assigns to Trustee in trust, with power of sale, for the benefit of Lender as Beneficiary. all of Trustor's right, title, and interest in and to the following described

real property,

together with

all existing or subsequently erected or affixed buildings, improvements and fixtures;

all easements, rights of way, and appurtenances;

all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights);

and

all other rights, royalties, and profits relating to the real property, including without limitation all

minerals, oil, gas, geothermal and similar matters,

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Chapter 11 Subchapter V Plan filed by Twisted Oak Winery, LLC ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Amended Chapter 11 Plan is continued to **10:30 a.m. on June 16, 2022** (Specially Set Time).

IT IS FURTHER ORDERED that Jeff Stai, Responsible Representative of the Debtor/Debtor in Possession; Brian Haddix, Esq., counsel for the Debtor in Possession; Nicola Merrifield-Olivia, Senior Vice President of Mechanics Bank; and Tom Normandin, Esq., counsel for Mechanics Bank; and each of them, to appear in person as the June 16, 2022 continued hearing –**Telephonic Appearances Permitted**.

IT IS FURTHER ORDERED that no further or supplemental pleadings may be filed in this contested matter without further court authorization (which will not be given until after the continued hearing – with the exception that the Debtor/Debtor in Possession and Mechanics Bank may file a stipulation clarifying what issues have been resolved and what issues remain for adjudication.

4. 21-90484-E-11 BSH-6 — TWISTED OAK WINERY, LLC — OBJECTION TO CLAIM OF MECHANICS BANK, CLAIM NUMBER 2 — 4-26-22 [97]

Final Ruling: No appearance at the May 26, 2022 Hearing is required.

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Subchapter V Trustee, and Office of the United States Trustee on April 26, 2022. By the court's calculation, 30 days' notice was provided. 30 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2). Debtor, creditors, the Subchapter V Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Objection to Proof of Claim Number 2-1 is continued to 10:30 a.m. on June 16, 2022.

The court orders Jeff Stai, Responsible Representative of the Debtor/Debtor in Possession; Brian Haddix, Esq., counsel for the Debtor in Possession; Nicola Merrifield-Olivia, Senior Vice President of Mechanics Bank; and Tom Normandin, Esq., counsel for Mechanics Bank; and each of them, to appear in person as the June 16, 2022 continued hearing –

Telephonic Appearances Permitted.

CONTINUANCE OF MAY 26, 2022 HEARING

Due to the unavailability of the Judge to whom this case is assigned to attend the May 26, 2022 hearing, the court continues the hearing.

Additionally, as addressed below, the court has identified what appear to be some very significant legal and evidentiary issues (and short comings) in connection with this and related proceedings. The continuance may allow the parties and their counsel to meet and confer in good faith, identify any "miscommunications" and prepare a stipulation that resolves some, if not all, of their disputes.

Other than a joint stipulation, the court does not authorize the filing of any further pleadings in this contested matter without further order of the court following the continued hearing.

REVIEW OF PLAN CONFIRMATION

Twisted Oak Winery, LLC, Debtor/Debtor in Possession, ("Objector") requests that the court disallow the claim of Mechanics Bank ("Creditor"), Proof of Claim No. 2-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $2,540,119.29. Objector asserts that Creditor does not have an interest in Debtor's personal property because the Deed of Trust expressly contemplates a separate UCC security interest which as never perfected. Additionally, the Proof of Claim fails to comply with Federal Rules of Bankruptcy Procedure 3001(c)(1) because the UCC security interest is not attached to the Proof of Claim. Objector seeks to "expunge" the Proof of Claim to the extent that it is unenforceable against any alleged UCC security interest in personal property.

Objector also seeks attorney's fees for bringing this objection.

Creditor's Response

Creditor filed a response (Dckt. 109) on May 13, 2022 stating that California Civil Code § 2938(b) provides perfection of a security interest is made by recording a Deed of Trust. Creditor states there is no requirement to file a UCC Financial Statement when a deed of trust is properly recorded.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Upon the court's review of California Civil Code § 2938(b), an assignment in leases, rents, issues, or profits of real property is (emphasis added):

> fully perfected as of the time of recordation with the same force and effect as any other duly recorded conveyance of an interest in real property, notwithstanding a **provision of the assignment or a provision of law that would otherwise preclude or defer enforcement of the rights granted** the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor, or the assignee's obtaining possession of the real property or the appointment of a receiver.

Here, Debtor/Debtor in Possession implies there is a provision in the Deed of Trust in which there is required to be a separate UCC security interest. Upon review of the Deed of Trust, the language provides, "Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest." Deed of Trust, Exhibit B, Dckt. 100 at 38. This appears to be the only language referencing any financing statement. Additionally, it appears that "this Agreement," the Deed of Trust, was sufficient to perfect the security interest. Therefore, it appears a UCC filing was not required.

The court has reviewed the copy of the Deed of Trust that secures Creditor's Claim which is attached to Proof of Claim 2-1. With respect to the scope of the security interest, it states (the court reformatting the sentence so that each item of collateral can be cleanly identified:

> CONVEYANCE AND GRANT. For valuable consideration, Trustor irrevocably grants, transfers and assigns to Trustee in trust, with power of sale, for the benefit of Lender as Beneficiary. all of Trustor's right, title, and interest in and to the following described
>
> real property,
>
> together with
>
> all existing or subsequently erected or affixed buildings, improvements and fixtures;
>
> all easements, rights of way, and appurtenances;
>
> all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights);
>
> and
> all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters,

With respect to such security interest covered by a deed of trust, the following excerpt from Miller & Starr provides an overview of the property interests that are lienable under a mortgage or deed of trust (footnote references removed and emphasis added):

> § 13:18. Property interests that are lienable
>
> Generally. Any interest in real property that is transferable may serve as the security for a deed of trust. Only the property interest of the trustor can be subjected to the lien, but this interest need not be the complete fee title. A security interest can be given by the owner on property adversely possessed by another. The lien of a deed of trust also can attach to the separate interest of a tenant in common or joint tenant.

Miller and Starr California Real Estate, 5 Cal. Real Estate § 13.18 (4th ed.)

> Lien on appurtenances, fixtures, easements and water rights. As with any conveyance of land, a deed of trust includes any appurtenance that passes with the land, whether

or not it is specifically mentioned in the legal description. **Thus, the lien of a deed of trust attaches to all appurtenant easements, even though they are not specifically referenced in the deed of trust.** On a foreclosure sale, the purchaser receives the title to both the property described in the deed of trust and all of the easements appurtenant to that property. **The same principle applies to water rights appurtenant to the land described in the deed of trust.**

Lien on an easement, whether express or implied. The lien of a deed of trust can be imposed on an easement, whether the easement is express or implied. When the deed of trust describes the dominant tenement as security and also describes an appurtenant easement across another parcel of property owned by the trustor, the lien attaches to the easement, even though the trustor could not have an easement across his or her own property.

Id.

Lien of a deed of trust includes personal property that has become a fixture. A deed of trust that encumbers real property also encumbers fixtures that have become a part of the realty. A fixture is an appurtenance to land and passes with a transfer of the land without express reference. **Between the parties to the deed of trust, personal property that becomes affixed to the land in such a manner as to become a fixture is collateral for the lien of the deed of trust in the same manner as any other permanent improvement placed on the property, even if the fixture is attached after the execution of the deed of trust.**

Lien of a deed of trust may also include personal property that is not a fixture. The lien of a deed of trust on real property does not include a lien on personal property that is not a fixture unless it expressly provides for a lien on personal property. **Under current law, this means that the deed of trust must satisfy the requirements of the Uniform Commercial Code to create a security interest in the collateral**; these requirements are not difficult to achieve and essentially require that the security agreement satisfy the requirements for formation of a contract, describe the collateral and the obligation secured, and be agreed to by the debtor. A mortgage or **deed of trust that expressly includes a security interest in personal property items that are not fixtures** creates an enforceable security interest between the parties, but it is not perfected against other creditors of the trustor unless it is also sufficient as a **financing statement and is filed in the manner required to perfect a security interest in personal property. Usually this means that the beneficiary must file a UCC-1 financing statement** in the appropriate state office, in addition to recording the deed of trust in the local recorder's office.

Deed of trust must actually describe the personal property collateral. In order for a deed of trust to operate as a security agreement that creates a UCC security interest in particular personal property, it must actually describe the personal property that is intended as additional collateral in addition to the real property security.

Id. § 13:20.

§ 13:60. Assignments of rents—In general

Assignment of rents may be contained in the deed of trust or a separate instrument. **Whether contained in a separate recorded instrument executed by the trustor as assignor, or included as part of the mortgage or deed of trust, an assignment of rents is enforceable by the beneficiary-assignee.** Most printed forms and institutional deeds of trust include an assignment of rents, but an absolute deed taken as a mortgage or other hidden security transaction will not include an assignment. Also, occasionally the parties by intention or inadvertence will omit the assignment of rents from the security instrument. In the absence of an assignment of rents, the mortgagee or beneficiary has no right to possession or to collect the rents merely by virtue of a mortgage or deed of trust.

Assignment creates immediate, perfected security interest. A written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by real property, upon execution and delivery by the assignor, is effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property. This is so irrespective of whether the assignment is denoted as absolute, absolute conditioned upon default, additional security for an obligation, or otherwise.

"Rents" defined. For purposes of the statute, "**leases, rents, issues, and profits of real property" includes the cash proceeds thereof, and "cash proceeds" means "cash, checks, deposit accounts, and the like.**"

Comment:
Revenue or receipts from a business operated on the property is not "rents" and is subject to the Commercial Code rather than the assignment of rents statute.

§ 13:60. Assignments of rents—In general, 5 Cal. Real Est. § 13:60 (4th ed.)

Value of Secured Claim

In connection with this Objection to Claim and it's Opposition to Debtor/Debtor in Possession's Subchapter V Plan, while originally stating under penalty of perjury that its collateral had a value of $4,641,208 (Proof of Claim 2-1, Part 2, § 9), Creditor now admits that its collateral has a value of only ($2,226,400 and that such value must be considered as the value of its collateral in this bankruptcy case. Supp. Opposition, ¶ e, Dckt. 109; Dec. Nicola Merrifield-Olivia, Sr. V.P. Mechanics Bank, ¶ e, Dckt. 110. In light of Creditor arguing for the higher interest rate and advancing an asserted "As Is" and "Liquidation Value," the court accepts Creditor's assertion of these lower values, and taking the lowest, as the admission as to value by Creditor.

The Objection to the Proof of Claim is **xxxxxxx**.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to Claim of Mechanics Bank ("Creditor"), filed in this case by Twisted Oak Winery, LLC, Debtor/Debtor in Possession, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection to Proof of Claim 2-1 of Creditor is continued to **10:30 a.m. on June 16, 2022** (Specially Set Time).

IT IS FURTHER ORDERED that Jeff Stai, Responsible Representative of the Debtor/Debtor in Possession; Brian Haddix, Esq., counsel for the Debtor in Possession; Nicola Merrifield-Olivia, Senior Vice President of Mechanics Bank; and Tom Normandin, Esq., counsel for Mechanics Bank; and each of them, to appear in person as the June 16, 2022 continued hearing –**Telephonic Appearances Permitted**.

IT IS FURTHER ORDERED that no further or supplemental pleadings may be filed in this contested matter without further court authorization (which will not be given until after the continued hearing – with the exception that the Debtor/Debtor in Possession and Mechanics Bank may file a stipulation clarifying what issues have been resolved and what issues remain for adjudication.

5. **21-90484-E-11 CAE-1** **TWISTED OAK WINERY, LLC** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 10-4-21 [1]**

Final Ruling: No appearance at the May 26, 2022 Status Conference is required.

Debtor's Atty: Brian S. Haddix

Notes:
Continued from 4/21/22 to be heard in conjunction with the continued hearing on Confirmation of the Proposed Plan.

The Status Conference is continued to 10:30 a.m. on June 16, 2022 (Specially Set Time).