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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
CAPITAL WEST INVESTORS, a California  
Limited Partnership,  
  
Debtor.

Case No. 93-53365-MM

Chapter 11

**MEMORANDUM DECISION AND  
ORDER THEREON**

Date: December 22, 1994  
Time: 2:30 p.m.  
Courtroom: 3070

Employer's Tax Identification No. 77-  
0060385

**INTRODUCTION**

Before the Court for consideration are the motions of Reilly Mortgage Group, Inc. and the United States, on behalf of the Secretary of Housing and Urban Development, pursuant to Fed. R. Civ. P. 59(e) to alter or amend the October 21, 1994 order confirming the debtor's chapter 11 plan. For the following reasons, the motions are granted to the limited extent as set forth herein and in the Court's separate opinion, which treats independently the issues originally raised by Reilly and subsequently by HUD.

Reilly and HUD have also raised the issue whether it was proper for the debtor to implement the plan pursuant to a technical amendment modifying the effective date. The Court finds that it was proper for the debtor to implement the confirmed plan. In the alternative, Reilly and HUD request a stay pending appeal, which is denied.

**FACTS**

Capital West Investors is a limited partnership that owns and operates The Woods Apartments, a 160-unit apartment complex located at 40640 High Street in Fremont, California. The debtor

1 purchased the property in February 1985 for \$8.4 million. The property is appraised at between \$7.8  
2 million and \$8.4 million. The debtor filed its chapter 11 petition on May 21, 1993 because it was unable  
3 to service the debt on the property secured by three deeds of trust.

4 Reilly Mortgage Group, Inc. is the servicing agent for Riggs National Bank of Washington, which  
5 holds the first deed of trust on the debtor's property in the approximate amount of \$2,630,000. The  
6 Department of Housing and Urban Development (HUD) is the insurer of the first deed of trust. Trilex  
7 Financial Services, Inc. is the servicing agent for Ceresa, the holder of the second deed of trust, which  
8 is in the amount of \$3,435,315. Jim Woodson and Denny McLarry hold a third deed of trust in the  
9 amount of \$1,334,871.

10 The debtor's plan provides that Reilly's note will be repaid at the contract rate of interest, 7.5%.  
11 However, it eliminates the requirement that the debtor make mortgage insurance payments and that it  
12 maintain "surplus cash" from which to service junior deeds of trust pursuant to the terms of HUD's  
13 Regulatory Agreement.

14 On October 21, 1994, the Court confirmed the debtor's plan of reorganization over the objections  
15 of Reilly and Trilex. The Court heard the objections in separate trials. Based on the objections that were  
16 raised, the Court held a trial during June and July 1994 on Reilly's objection to determine whether the  
17 debtor's plan met the requirements that it be fair and equitable, that it not unfairly discriminate against  
18 Reilly, and that it not be proposed by any means forbidden by law. The Court overruled Reilly's  
19 objections by a Memorandum Opinion issued on July 23, 1994. The Court subsequently held a trial  
20 during July and August 1994 to determine whether the interest rate proposed in the debtor's plan provides  
21 Trilex with payments constituting the present value of its secured claim, whether the plan is feasible, and  
22 whether the plan unfairly discriminates against Trilex. The Court ruled orally on September 30, 1994  
23 overruling Trilex's objection and confirming the plan.

24 At the conclusion of the Court's oral ruling on September 30, 1994, the debtor announced that  
25 it proposed to file technical amendments to the plan. The plan originally provided:

26 "Effective Date" shall mean the first day of the month following the  
27 entry of an order by the Court confirming the Plan, provided such  
28 order has become final (unless finality has been waived by the Debtor  
as the proponent of the Plan).

1 The proposed amendment provides:

2 2.24 "Effective Date" shall mean the first day of the month  
3 following two days after the Confirmation Date.

4 On October 6, 1994, the debtor served the proposed changes by facsimile and by mail on counsel for  
5 the creditors that had objected to confirmation, including Reilly and Trilex. The order confirming the  
6 plan was entered on October 21, 1994. Pursuant to the modification, the debtor filed its "Notice of  
7 Waiver of Finality of Order" on October 31, 1994 and implemented the plan on November 1, 1994.

8 Reilly and HUD's motions to alter or amend judgment raise new issues not previously raised  
9 and reargue some of the same issues already addressed by the Court in the Memorandum Opinion.  
10 The Court shall address each basis for amendment that has been raised by Reilly and HUD.

#### 11 DISCUSSION

##### 12 A. HUD Has Standing to File Motion to Alter or Amend Judgment.

13 Initially the Court must determine the threshold question whether HUD has standing. The  
14 debtor argues that HUD does not have standing to bring a motion to alter or amend judgment under  
15 Fed. R. Civ. P. 59(e) because it is not a "party" pursuant to Rule 59(a)<sup>1</sup> that participated in the  
16 contested confirmation hearing although it received notice of the confirmation hearing. The debtor  
17 also seeks sanctions against HUD for filing the motion. HUD responds that as a "party in interest"  
18 under § 1109(b), it is entitled to appear and be heard on any issue in this case.

19 The principles governing standing to invoke the court's authority to amend an order can be  
20 somewhat flexible. See, e.g., Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051  
21 (2d Cir. 1982)(non-party former employees permitted to bring motion to amend stipulated dismissal  
22 order under Rule 60(b) in age discrimination suit). Relief may be made available to non-parties to  
23 modify final judgments where the moving parties are sufficiently connected and identified with the  
24 parties. Id. at 1052.

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27 Fed. R. Civ. P. 59(a) provides in pertinent part:

28 A new trial may be granted to all or any of the parties and on all or a part of the issues . . . in an action tried  
without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of  
the United States.



1 discriminated or was not fair and equitable); see also In re Bludworth Bond Shipyard, Inc., 93 B.R.  
2 520, 521 (Bankr. S.D. Tex. 1988)(failure of party who received proper notice of confirmation hearing  
3 to object timely or to present evidence in opposition to plan results in waiver of right to object).  
4 Creditors cannot raise challenges to a reorganization plan for the first time after confirmation but  
5 must take an active role in protecting their claims. Ruti-Sweetwater, 836 F.2d at 1266-67. Although  
6 HUD argues that the court has an independent affirmative obligation to ensure that the requirements  
7 of confirmation are satisfied, the court is not obligated to inquire into specific confirmation issues if  
8 no party has objected on that basis. See id. at 1268. Nor is the court required to consider untimely  
9 objections. See In re Richard Buick, Inc., 126 B.R. 840 (Bankr. E.D. Pa. 1991).

10 Authorities construing Rule 59(e) similarly hold that the failure timely to raise an argument  
11 by presenting the issue before a motion to alter or amend a judgment results in waiver of the  
12 argument. Havoco of America, Ltd. v. Sumitomo Corp. of America, 971 F.2d 1332, 1336 (7th Cir.  
13 1992)(plaintiff's failure timely to assert a longer statute of limitations prior to the court's grant of  
14 summary judgment for the defendant); Weihaupt v. American Medical Ass'n, 874 F.2d 419, 425 (7th  
15 Cir. 1989)(plaintiff's failure timely to present adoptive admission argument prior to summary  
16 judgment). A motion to alter or amend a judgment under Rule 59(e) cannot be used to raise new  
17 arguments that could and should have been raised before judgment was issued. Havoco of America,  
18 971 F.2d at 1336; Weihaupt v. American Medical Ass'n, 874 F.2d at 425. HUD and Reilly had  
19 sufficient notice of the confirmation hearing and had ample opportunity to present their argument  
20 regarding present value prior to confirmation. They cannot thereafter raise this issue for the first time  
21 on a motion to alter or amend judgment under Rule 59(e), invoking the benefit of hindsight and  
22 unpredicted increased interest rates.

23  
24 **C. Plan May Modify Statutory Rights of Parties.**

25 Both HUD and Reilly argue that the Court improperly confirmed a plan that eliminates Reilly's  
26 contractual rights to mortgage insurance payments by the debtor and surplus cash to ensure that the  
27 debtor maintains sufficient reserves to service its debt. This argument is a reiteration of Reilly's  
28 arguments in opposition to confirmation. They now add to the argument that the modifications

1 impermissibly impair Reilly's statutory rights under the National Housing Act and that the Court failed  
2 to reconcile and harmonize the two competing statutes as required by National Labor Relations Board  
3 v. Bildisco & Bildisco, 465 U.S. 513, 104 S. Ct. 1188 (1984).

4 Motions under Rule 59(a) serve to correct manifest errors of law or fact, or to consider the  
5 import of newly discovered evidence. In re Maurice, 167 B.R. 114, 130 (Bankr. N.D. Ill. 1994). The  
6 function of a motion made pursuant to Rule 59(e) is not to serve as a vehicle to relitigate old matters  
7 or present the case under a new legal theory. Id. The purpose of a motion to alter or amend "is not  
8 to give the moving party another `bite at the apple' by permitting the arguing of issues and procedures  
9 that could and should have been raised prior to judgment." Id. (*quoting In re BNT Terminal, Inc.*,  
10 125 B.R. 963, 976-77 (Bankr. N.D. Ill. 1990).

11 To the extent that the issue is not fully addressed in the earlier Memorandum Opinion issued  
12 by the court and notwithstanding that motions to alter or amend a judgment cannot be used to  
13 relitigate issues or to raise new arguments, the Court has re-examined the propriety of confirming a  
14 plan that modifies the statutory rights of creditors. Modification of a party's statutory rights through  
15 bankruptcy is supported by authority. See, e.g., Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 83  
16 L.Ed.2d 649 (1985)(liability for hazardous waste cleanup under state environmental laws is  
17 dischargeable in chapter 11); N.L.R.B. v. Bildisco, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482  
18 (1984)(chapter 11 debtor may unilaterally reject collective bargaining agreement pursuant to 11  
19 U.S.C. § 365 in contravention of National Labor Relations Act); In re Medicar Ambulance Co., Inc.,  
20 166 B.R. 918 (Bankr. N.D. Cal. 1994)(suspension by Department of Health and Human Services of  
21 Medicare reimbursements to service provider in chapter 11 violates automatic stay); In re Davenport,  
22 153 B.R. 551 (Bankr. 9th Cir. 1993)(chapter 12 plan may provide for forced redemption of debtor's  
23 land bank stock contrary to provision of Farm Credit Act), *opinion vacated*, 1994 WL 620859, \_\_\_  
24 F.3d \_\_\_ (9th Cir. November 4, 1994)(vacating opinion of Bankruptcy Appellate Panel based on  
25 mootness of appeal resulting from voluntary dismissal of underlying bankruptcy case). Contrary to  
26 HUD's contention that the Court failed to consider the policy goals of the National Housing Act, the  
27 Court again has attempted to reconcile and harmonize the policy goals of the two governing statutes.  
28 Those issues are addressed in the separate opinion which amends the court's earlier Memorandum

1 Opinion.

2 **D. Reilly Is Not Entitled To Both**  
3 **Present Value And Indubitable Equivalent.**  
4 **1. § 1129(b)(2)(A) Is Disjunctive.**

5 HUD further argues that in order for the plan to be fair and equitable with respect to  
6 treatment of Reilly's claim, the plan must provide Reilly with both the present value of its claim as  
7 well as the indubitable equivalent of its claim. Section 1129(b)(2)(A) provides:

8 (2) [T]he condition that the plan be fair and equitable with respect  
9 to a class includes the following requirements:

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

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

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

20 \* \* \*

21 or

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

24 11 U.S.C. § 1129(b)(2)(A)(emphasis added).

25 Were the Court to consider HUD's argument at this late juncture, its argument would  
26 nevertheless fail because § 1129(b)(2)(A) is to be read in the disjunctive. The plan need satisfy only  
27 one requirement of § 1129(b)(2)(A) to be confirmable as fair and equitable over a creditor's objection.  
28 Wade v. Bradford, 39 F.3d 1126 (10th Cir. 1994); In re Briscoe Enterprises Ltd., II, 994 F.2d 1160,  
1168 (5th Cir. 1993) *cert. denied*, 114 S.Ct. 550 (1993); In re Pine Mountain, Ltd., 80 B.R. 171,  
173-74 (Bankr. 9th Cir. 1987); In re Temple Zion, 125 B.R. 910, 921 (Bankr. E.D. Pa. 1991); In re  
Broad Assoc. Ltd. Partnership, 110 B.R. 632, 636 n. 7 (Bankr. D. Conn. 1990), *aff'd*, 1990 WL  
293699 (D. Conn. 1990).



1 118 B.R. 683, 711 (Bankr. E.D. Mo. 1990); In re Martin, 66 B.R. 921, 929 (Bankr. D. Mont. 1986).  
2 The higher interest rate compensates Woodson and McLarry for a greater risk of default and for a  
3 lesser loan-to-value ratio. Such disparate treatment is permissible and appropriate.

4  
5 **F. Debtor's Implementation of Plan Was Proper.**

6 Reilly and HUD argue that the effect of the modification is to permit the debtor to unilaterally  
7 elect to implement the plan absent a final confirmation order. The debtor did not make the November  
8 1994 mortgage payment to Reilly, recapitalized the loan, adding unpaid interest, and made its first  
9 payment to Reilly on December 1, 1994 under the terms of the confirmed plan. The debtor responds  
10 that the modification does not substantially change the rights of creditors under the plan.

11 Bankruptcy Rule 3019 provides that after acceptance and before confirmation of a chapter  
12 11 plan, the plan proponent may modify the plan without notice to creditors if the modification does  
13 not adversely change the treatment of any claims.<sup>3</sup> The advisory committee note to Bankruptcy Rule  
14 3019 provides that the rule makes clear that a modification may be made after acceptance of the plan  
15 without submission to creditors and equity security holders if their interests are not affected.

16 The materiality of the modification is determined by the likelihood that the change would  
17 motivate an accepting creditor to reconsider its acceptance. In re American Solar King Corp., 90  
18 B.R. 808, 824 (Bankr. W.D. Tex. 1988). Where modifications, taken as a whole, do not negatively  
19 affect repayment to creditors, the length of the plan, or the protected property interests of parties in  
20 interest, the modifications do not materially change the treatment of claims of creditors under the  
21 plan. In re Mount Vernon Plaza Community Urban Redevelopment Corp. I, 79 B.R. 305, 306  
22 (Bankr. S.D. Ohio 1987). Further disclosure is required only if the debtor intends to solicit votes  
23 from previously dissenting creditors or when modification materially and adversely impacts parties  
24 who previously voted for the plan. American Solar King Corp., 90 B.R. at 824. In American Solar

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26 Bankruptcy Rule 3019 provides in part:  
27 If the court finds after hearing on notice to the trustee, any committee appointed under the Code and any other  
28 entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any  
creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed  
accepted by all creditors and equity security holders who have previously accepted the plan.

1 King, the proposed modification effectively reclassified a claim such that it would receive stock,  
2 thereby diluting the distribution to equity and to unsecured creditors who elect a stock distribution.  
3 The court held that a one percent dilution of shares was de minimis, would not trigger reconsideration  
4 by creditors, and would not warrant new disclosures and the opportunity to change votes. Id. See  
5 also In re A.H. Robins Co., Inc., 88 B.R. 742, 750 (E.D. Va. 1988) (technical modification permitting  
6 the creation of a trust before the consummation date to make and administer "start up" payment under  
7 plan not adverse effect), aff'd, 880 F.2d 694 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989). The  
8 selection of an effective date for a plan of reorganization does not adversely affect substantial rights  
9 of the parties. In re Jorgensen, 66 B.R. 104, 105 (Bankr. 9th Cir. 1986)(otherwise holding that  
10 unauthorized payments to creditors constituted material modification in violation of B.R. 3019). See  
11 also In re Commodore Corp., 86 B.R. 564, 567-68 (N.D. Ind. 1988)(bankruptcy court has  
12 jurisdiction to approve technical amendments modifying plan definitions of "Effective Date" and  
13 "Final Order" notwithstanding pending appeal on unrelated confirmation issues).

14 The modification to the definition of "Effective Date" is not material. It is unlikely that either  
15 assenting or dissenting creditors would have been sufficiently motivated by the modification to change  
16 their votes. The modification does not negatively affect repayment to creditors, the length of the  
17 plan, or the protected property interests of parties in interest under the plan. It is significant in this  
18 case that the modification did not expand the debtor's rights under the plan because Section 14.3 of  
19 the plan provides that any term in the plan may be waived by the party benefitted by the term to be  
20 waived. Clearly, waiver of the finality requirement of the confirmation order benefits the debtor  
21 because the requirement of finality was included to allow the debtor to decide whether to proceed  
22 if an appeal was pending. As pointed out by the debtor, it is illogical to conclude that the requirement  
23 of finality was put in the plan for the benefit of a losing creditor who could then stop implementation  
24 by filing an appeal.

25 Rule 3019 requires that notice of the modification be given to the trustee, any appointed  
26 committees, or any other entity designated by the court. Notice was adequate under the  
27 circumstances. 11 U.S.C. § 102(1)(A). Reilly received notice of the modification on October 6,  
28 1994 through its counsel. Although HUD did not receive notice of the modification, HUD did not

1 object to the debtor's plan and had not participated in the confirmation hearings. Moreover, Reilly  
2 represented HUD's interest. Rule 3019 also requires the court to hold a hearing to determine whether  
3 the proposed modification would adversely change the treatment of the claim of any creditor or the  
4 interest of any equity security holder who has not accepted the modification. However, it is sufficient  
5 that the hearing on modification be conducted within the confirmation hearing. American Solar King,  
6 90 B.R. at 823; In re Sweetwater, 57 B.R. 354, 358 (D. Utah 1985). All interested parties were duly  
7 represented and had sufficient notice of the hearings on confirmation. The Court also allowed  
8 counsel for Reilly and HUD an opportunity to address the issue at the hearing on reconsideration and  
9 in their post-hearing briefs. The Court concludes that the modification allowing the debtor to  
10 implement the plan absent a final order was proper.

11 In the alternative, Reilly and HUD have requested a stay pending appeal. Absent a stay  
12 pending appeal, the debtor is free to implement a confirmed reorganization plan according to its  
13 terms. In re Public Service Co. of New Hampshire, 963 F.2d 469, 473 (1st Cir. 1992), cert. denied,  
14 113 S. Ct. 304 (1992). The Court's authority to issue a stay pending appeal derives from Bankruptcy  
15 Rules 7062 and 8005. The standard for granting a stay pending appeal is the same as that for  
16 granting a preliminary injunction. In re Wymer, 5 B.R. 802, 806 (Bankr. 9th Cir. 1980).<sup>4</sup> The Court  
17 finds that a stay is not warranted in this case because the Court has heard the parties, received  
18 extensive testimony and argument, considered the arguments and briefs, and reconsidered the  
19 confirmation order pursuant to the parties' motions. Reilly and HUD have not advanced any new law  
20 or facts different than those previously considered by the Court; therefore the Court is not persuaded  
21 that they likely will be successful on appeal or that they will suffer irreparable injury. See In re Roth  
22 American, Inc., 90 B.R. 94, 97 (Bankr. M.D. Pa. 1988). Therefore, the request for a stay is denied.

## CONCLUSION

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The factors for the court's consideration are 1) the likelihood of success on the merits; 2) the risk of irreparable injury to the moving party if the stay is not granted; 3) the risk of substantial harm to the non-moving party; and 4) whether the public interest will be served by granting or denying the stay. In re Wymer, 5 B.R. at 806.

**UNITED STATES BANKRUPTCY COURT**  
**For The Northern District Of California**

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For the reasons stated, the motions of HUD and Reilly to alter or amend judgment is granted to the limited extent set forth herein. The debtor's implementation of the plan was proper, and a stay pending appeal is denied.