

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re ] Case No. 01-53251-ASW  
Jacqueline C. Melcher, aka ] Chapter 11  
Jacqueline Carlin, ]  
Debtor. ]

MEMORANDUM DECISION  
OVERRULING OBJECTION TO CONFIRMATION AND  
CONFIRMING JOINT PLAN OF REORGANIZATION

Before the Court is the Joint Plan of Reorganization ("Plan"), proposed for confirmation by Jacqueline C. Melcher ("Debtor"), the Debtor in this Chapter 11<sup>1</sup> case, and the Official Committee of Unsecured Creditors ("Committee"). An objection to confirmation has been filed by the Estate of Terrence P. Melcher ("Creditor").<sup>2</sup>

Debtor is represented by Terrance L. Stinnett, Esq. and Dennis D. Davis, Esq. of Goldberg, Stinnett, Meyers & Davis. The Committee is represented by John D. Fiero, Esq. of Pachulski,

<sup>1</sup> Unless otherwise noted, all statutory references are to Title 11, United States Code ("the Bankruptcy Code"), as amended on October 22, 1994.

<sup>2</sup> An objection to confirmation was also filed by Wells Fargo Bank, NA, but that objection has been resolved by stipulation.

1 Stang, Ziehl, Young, Jones, & Weintraub P.C. Creditor is rep-  
2 resented by Lance N. Jurich, Esq. of Loeb & Loeb LLP. The matter  
3 has been submitted for decision after trial and post-trial  
4 briefing. At trial, Debtor and Committee called Kevin A. Spellman  
5 ("Spellman"), an appraiser, and Debtor<sup>3</sup> as witnesses. Creditor  
6 called Rita E. Spence ("Spence"), an appraiser, as its witness.

7 This Memorandum Decision constitutes the Court's findings of  
8 fact and conclusions of law, pursuant to Rule 7052 of the Federal  
9 Rules of Bankruptcy Procedure.

10  
11 I.

12 BACKGROUND

13 Debtor commenced this case by filing a petition under  
14 Chapter 11 of the Bankruptcy Code on June 28, 2001. Debtor's main  
15 assets are her interests in five pieces of real property.

16 Creditor is the probate estate of Debtor's former husband  
17 Terrence Melcher. The estate asserts an ownership interest in two  
18 properties that are part of Debtor's estate as well as a  
19 \$168,839.05 unsecured claim based on other alleged rights of  
20 Terrence Melcher in the state court marital dissolution proceeding  
21 with Debtor.

22 The Plan proposes that the holders of security interests in  
23 Debtor's various properties will retain their security interests  
24 pursuant to their loan documents. Debtor will pay the secured tax  
25 claim of Monterey County in equal monthly installments within 120  
26 days after confirmation. The Plan also provides that allowed  
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28 <sup>3</sup> Debtor submitted her direct testimony by declaration and  
was cross-examined by Creditor at trial.

1 general unsecured claims, except the claims of Creditor and Ryan  
2 Melcher ("Ryan"), will be paid in full plus post-petition interest  
3 of 5%, five days after the Effective Date. Ryan's claim is not  
4 impaired under the Plan.

5       Regarding Creditor's claim, the Plan proposes that the two  
6 properties in which Creditor holds an alleged community property  
7 interest -- certain real property in Martha's Vineyard,  
8 Massachusetts ("Stonewall Beach Property") and the family residence  
9 located in Carmel, California ("Family Residence") -- shall remain  
10 as property of the estate under 11 U.S.C. §541 and subject to the  
11 automatic stay of 11 U.S.C. §362(a) until the respective rights of  
12 Debtor and Creditor are finally resolved in the California State  
13 Court.<sup>4</sup>

14       The Plan has been accepted by two impaired classes. Creditor  
15 was deemed unimpaired under the Plan and did not vote. If Creditor  
16 had voted, Creditor would have voted to reject the Plan.

17       Creditor objects to the Plan as follows:

18       1/     Creditor is impaired under the Plan and was not permitted  
19 to vote, so the solicitation process of the Plan violates the  
20 Bankruptcy Code and Rules, compliance with which is a prerequisite  
21 to confirmation pursuant to 11 U.S.C. §1129(a)(1).

22       2/     The Plan has not been proposed in good faith, which is a  
23 prerequisite to confirmation pursuant to 11 U.S.C. §1129(a)(3).  
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27       <sup>4</sup>     The California State Court includes all trial and appellate  
28 state courts that the Dissolution Proceeding issues will be before  
-- until such issues are determined by final and non-appealable  
orders.

4           4/     The Plan does not propose to pay Creditor at least as  
5 much as Creditor would receive if Debtor's estate were liquidated  
6 under Chapter 7, which is a prerequisite to confirmation pursuant  
7 to 11 U.S.C. §1129(a) (7) (A) (ii).

8           5/     The Plan is not "fair and equitable" to Creditor within  
9 the meaning of 11 U.S.C. §1129(b) (1), inasmuch as it violates  
10 11 U.S.C. §1129(b) (2) (B) .

## II.

## FACTS

Debtor and Creditor are former spouses and have been involved in a marital dissolution action ("Dissolution Proceeding") in the Monterey County Superior Court ("Monterey State Court") for many years.

18 Pre-petition, the Monterey State Court determined in the  
19 Dissolution Proceeding what property was community property and  
20 what property was separate property. With respect to Stonewall  
21 Beach Property, the Monterey State Court determined that Debtor  
22 held a separate property interest in it to the extent of \$800,000,  
23 and that the property was otherwise community property. In  
24 November 2000, the Monterey State Court ordered that Stonewall  
25 Beach Property be listed for sale at \$12,000,000; in February 2001,  
26 the Monterey State Court ordered that an offer for that amount be  
27 accepted.

1 Ryan is the son of Debtor and Terrence Melcher. Pre-petition,  
2 he filed an action in State Court in Massachusetts contending that  
3 his parents had previously agreed to hold Stonewall Beach Property  
4 in trust for him. In that action, he sought an injunction to  
5 prevent the sale of Stonewall Beach Property that had been ordered  
6 by the Monterey State Court. The injunction was denied, but the  
7 Massachusetts State Court did permit Ryan to maintain a recorded  
8 notice of a lis pendens asserting an interest in the property.

9 Escrow for sale of Stonewall Beach Property was due to close  
10 on June 29, 2001, but the escrowholder would not insure the buyer's  
11 title due to the cloud represented by Ryan's notice of lis pendens.  
12 The escrowholder agreed to "close around" the lis pendens and  
13 insure title if it was indemnified by having \$8,000,000 of proceeds  
14 impounded for its use in litigating Ryan's claim. On or about  
15 June 25, 2001, at the request of Creditor's attorney in the  
16 Dissolution Proceeding, the Monterey State Court issued an order  
17 imposing such an impound for purposes of indemnifying the  
18 escrowholder. The day before close of escrow, Debtor filed her  
19 Chapter 11 petition and the automatic stay of §362(a) prevented  
20 escrow from closing.

21 Pre-petition, Debtor moved for reconsideration, filed appeals,  
22 and sought writs concerning many of the Monterey State Court's  
23 orders. Debtor appealed the Monterey State Court's order directing  
24 sale of Stonewall Beach Property and sought a stay of the sale  
25 pending appeal; stay was granted on condition that a bond of  
26 \$7,420,000 be posted, which Debtor credibly states that she was  
27 unable to do. Creditor does not contend that Debtor had or has an  
28 ability to post a bond in that amount.

1 Debtor filed her bankruptcy case in part due to her lack of  
2 funds. Between 1996 and 2001, the proposed purchaser of Stonewall  
3 Beach Property had rented that property for six weeks during the  
4 summer. In 2001, in anticipation of his purchase of the property,  
5 the purchaser withheld his \$40,000 rental payment due Debtor. In  
6 addition, Terrence Melcher had ceased making debt service and other  
7 expenses on the Stonewall Beach Property and the Family Residence  
8 since his separation from Debtor and had failed to pay child  
9 support to Debtor for five years. At the time of Debtor's  
10 separation from Terrence Melcher, Debtor had only \$35,000 in debt  
11 on one of her separate properties and ended up borrowing \$800,000  
12 on that property in large part to pay debt service on Stonewall  
13 Beach Property.

14 During Debtor's bankruptcy case, Creditor filed a motion for  
15 relief from stay. On October 8, 2002, this Court denied Creditor's  
16 motion and ordered, with Debtor's agreement, that to the extent  
17 that Creditor has an interest in Stonewall Beach Property, Debtor's  
18 interest in Stonewall Beach Property shall provide adequate  
19 protection for any diminution of value to that property as of  
20 December 4, 2001. At trial, the parties agreed that for purposes  
21 of adequate protection, Creditor's interest in Stonewall Beach  
22 Property as of December 4, 2001 is \$4,440,000.

23 At trial, each party offered expert witnesses to opine as to  
24 the current value of Stonewall Beach Property. Debtor's witness  
25 Spellman is an appraiser of residential real estate who was  
26 qualified to testify as an expert concerning the value of  
27 residential properties on Martha's Vineyard. Creditor's witness  
28 Spence is an appraiser of commercial and residential real property

1 who was qualified to testify as an expert concerning the value of  
2 residential properties on Martha's Vineyard and also on discount  
3 rates.

4 Spellman testified that he believed the fair market value of  
5 Stonewall Beach Property was \$13,000,000 as of May 20, 2005. He  
6 based that conclusion upon a cost analysis and a sales comparison  
7 analysis after a personal visit to Stonewall Beach Property.  
8 Spellman reviewed six comparable properties on Martha's Vineyard in  
9 determining his value -- three oceanfront properties in a nearby  
10 town of West Tisbury, one ocean view property in Chilmark, and two  
11 pond front properties in Edgartown, on the other side of Martha's  
12 Vineyard. Spellman determined that the value of Stonewall Beach  
13 Property ranged from \$12,000,000 to \$16,000,000 based on  
14 adjustments to the comparable properties and was \$11,353,600 based  
15 on his cost analysis.

16 Spellman has been an appraiser on Martha's Vineyard since  
17 1985. He explained that ocean front property, like the Stonewall  
18 Beach Property, is superior in value to ocean view property. With  
19 ocean front property, the owner owns the land to the high mean tide  
20 mark, essentially where the water meets the land. With ocean view  
21 property, the owner does not own the land in front of the property.  
22 Spellman testified that in Chilmark, Massachusetts, the town  
23 closest to Stonewall Beach Property, the town leases land to permit  
24 the public to have access to the beach, so ocean front property is  
25 at a premium. While the Stonewall Beach Property is right on the  
26 ocean, it does not have beach access since the property meets  
27 the water at a 20 to 30 foot cliff. Stonewall Beach Property holds  
28 a deeded easement across the property next door to gain access to

1 the beach. The deeded easement is a 3-foot wide path -- it is less  
2 than 1,000 feet from the house to the beach along that path.

3 Spellman testified that Chilmark has approximately 17 to 24  
4 sales per year and most of those properties are not ocean front  
5 properties. The number of sales is low because the entry level  
6 price for a 1 to 2 bedroom home on at least 3 acres of property  
7 that is in the woods and requires the owner to drive to the beach  
8 is \$1,000,000. Spellman stated that the small number of sales does  
9 not indicate a lack of demand for property because few properties  
10 are offered for sale. He also explained that the real estate  
11 market is still rising on Martha's Vineyard and prices have risen  
12 by 20% since 2002. Spellman testified that Stonewall Beach  
13 Property is well-known on Martha's Vineyard and, if put up for  
14 sale, would likely produce multiple bids.

15 Spellman noted that, on the property adjacent to Stonewall  
16 Beach Property that the deeded easement crosses, a new structure is  
17 under construction. Spellman testified that there is currently a  
18 new foundation poured and some framing in place. Spellman believes  
19 that the new structure will not obscure the ocean views from the  
20 upper floors of the house on Stonewall Beach Property, although it  
21 will likely obscure some of the current views from lower parts of  
22 the property. Additionally, the foundation is currently in the  
23 deeded easement, so a new path will need to be created for the  
24 deeded easement. Although he vacillated somewhat at first,  
25 Spellman testified that he incorporated these events into his  
26 valuation by taking a value of the property from the lower end of  
27 his value range to account for the new structure. Spellman  
28 believes that buyers would pay \$13,000,000 today for Stonewall



Beach Property knowing that a new structure was being built next door that will likely obscure some of the current lower views from Stonewall Beach Property.

Spence conducted an appraisal of Stonewall Beach Property in 1999 but did not visit the property for this matter and did not update her appraisal. Spence valued Stonewall Beach Property at \$5,300,000 as of June 14, 1999. Spence has been an appraiser on Martha's Vineyard since 1993. Spence testified that any appraisal of Stonewall Beach Property would need to be discounted by 15% because this type of property would take an average of 510 days to sell and, based upon Spence's conversations with seven other brokers on Martha's Vineyard, there is increasing resistance to sales of property on the upper end of the market, like Stonewall Beach Property.

Debtor filed an equity analysis hypothesizing the sale of all of her properties. As of March 4, 2005, Debtor expects net proceeds after deduction of selling expenses and payment of taxes on the gain for her properties as follows:

Property	Value	Mortgage	Equity	Net Proceeds
Stonewall Beach	\$12,000,000	\$2,098,266	\$9,901,734	\$3,024,951 <sup>5</sup>
Moshup Trail	1,500,000	769,947	730,053	207,117 <sup>6</sup>
Holt Road	3,350,000	1,575,406	1,774,594	691,617 <sup>7</sup>

<sup>5</sup> Debtor projects \$720,000 in selling expenses and \$3,131,832 in taxes on the gain. The net proceeds represents Debtor's 1/2 community property interest in this property.

<sup>6</sup> Debtor projects \$120,000 in selling expenses and \$402,936 in taxes on the gain. Creditor does not allege any community property interest in this property.

<sup>7</sup> Debtor projects \$201,000 in selling expenses and \$881,977 in taxes on the gain. Creditor does not allege any community property interest in this property.

25535 Tierra Grande	1,500,000	642,085	857,915	619,265 <sup>8</sup>
Family Residence	1,240,000	675,000	565,000	226,923 <sup>9</sup>

Debtor testified that the net proceeds do not account for the approximately \$1,800,000 of her separate funds she has expended since 1997 in connection with paying debt service, property taxes and maintenance to protect the value of Stonewall Beach Property and the over \$200,000 of her separate funds Debtor put into the Family Residence prior to Creditor being added to the title. If Creditor is found to have a community property interest in Stonewall Beach Property or the Family Residence, Debtor would assert these expenditures as offsets to any monies owed to Creditor.

Post-petition, Debtor also received Court authority to borrow \$1,400,000 as a second mortgage against Stonewall Beach Property. From the loan funds, Debtor sequestered approximately \$140,000 ("Sequestered Account") to fund the loan payments for the first year. At the time of trial, Debtor had approximately \$43,000 in the Sequestered Account to pay the second mortgage payments on Stonewall Beach Property through September 2005.

Debtor currently rents out each of her properties. However, the rents received on Stonewall Beach Property are insufficient to pay the debt service on that property once the funds in the Sequestered Account run out this October, so Debtor will need to

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<sup>8</sup> Debtor projects \$120,000 in selling expenses and \$118,650 in taxes on the gain. Creditor does not allege any community property interest in this property.

<sup>9</sup> Debtor projects \$99,200 in selling expenses and \$11,954 in taxes on the gain. The net proceeds represents Debtor's 1/2 community property interest in this property.

1 provide additional funds to cover the shortfall. There are several  
2 ways in which Debtor can easily satisfy this shortfall.

3 First, Debtor has a bank account that includes the net proceeds  
4 from the borrowing of \$1,400,000 secured by Stonewall Beach Property  
5 (not including the funds put in the Sequestered Account discussed  
6 above) and the refinancing of the Holt Road Property ("Impound  
7 Account"). Debtor has a commitment from Cedar Mortgage Company to  
8 lend Debtor \$1,000,000 secured by property located at 25535 Tierra  
9 Grande, Carmel, California ("Tierra Grande Rental Property").<sup>10</sup>

10 Debtor testified that there will be \$1,409,663 in the Impound  
11 Account once her loan with Cedar Mortgage Company has closed. That  
12 loan is ready to close upon this Court's confirmation of the Plan.  
13 After Debtor pays all claims that need to be paid on the Effective  
14 Date of the Plan, there will be approximately \$280,950 remaining in  
15 the Impound Account. Those funds can be used to pay debt service on  
16 Stonewall Beach Property after the funds in the Sequestered Account  
17 are depleted -- until Debtor either refinances or sells one of her  
18 properties. This will provide Debtor with approximately two years  
19 worth of payments for the Stonewall Beach Property second mortgage.

20 Second, Debtor testified at trial that she talked with a real  
21 estate broker about selling the Tierra Grande Rental Property and,  
22 based on an increase in the value to \$1,800,000 and a decrease in  
23 the debt, that property currently has approximately \$1,200,000 in  
24 equity. Debtor used an 8% estimate of the selling costs for the  
25 property (\$144,000) and the Court projects that taxes on the gain

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28 <sup>10</sup> The Cedar Mortgage Company loan will take out the  
approximately \$650,000 of secured debt on the Tierra Grande Rental  
Property and provide Debtor with \$350,000 in additional funds.

1 would increase to \$206,550,<sup>11</sup> leaving Debtor with net proceeds of  
2 approximately \$450,000<sup>12</sup> if she were to sell the Tierra Grande  
3 Rental Property at \$1,800,000 after confirmation.

4 Debtor also presented credible evidence that, arguendo, if  
5 Stonewall Beach Property were valued today at \$9,000,000 (a figure  
6 far below what this Court finds the property is worth) and were sold  
7 in one year, Debtor's interest in Stonewall Beach Property would  
8 have sufficient equity to cover any diminution of value of  
9 Creditor's stipulated \$4,440,000 interest as of December 4, 2001.  
10 Debtor assumed that the hypothetical \$9,000,000 value today would be  
11 decreased by 10% for delay, leaving \$8,100,000 present value for the  
12 property. From that amount, Debtor deducted costs of sale of  
13 \$486,000 and the community mortgage of approximately \$700,000 for  
14 net proceeds of \$6,914,000 to be divided between Creditor and  
15 Debtor. Each party would receive \$3,457,000, from which Debtor's  
16 \$800,000 separate property interest would be deducted from  
17 Creditor's interest and added to Debtor's interest, leaving Creditor  
18 with a \$2,657,000 distribution and Debtor with a \$4,257,000  
19 distribution.

20 Under the stipulation against diminution of value, Debtor would  
21 owe Creditor an additional \$1,783,000 from her \$4,257,000  
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23 <sup>11</sup> Debtor stated that the Tierra Grande Rental Property had a  
24 taxable gain of \$404,949 with a value of \$1,500,000. Increasing  
25 the taxable gain by the additional \$300,000 in value and  
26 multiplying \$704,949 by 20% for federal capital gains taxes  
(\$140,990) and 9.3% for state capital gains taxes (\$65,560), the  
Court estimates taxes on the gains to total \$206,550.

27 <sup>12</sup> This number is lower than the equity shown by Debtor as of  
28 March 4, 2005 because in Debtor's calculations the secured debt  
against the property is \$642,085 while the Cedar Mortgage Company  
loan (which will pay off the \$642,085 secured debt) is for  
\$1,000,000.

1 distribution to bring Creditor's portion to \$4,440,000. Thus, after  
2 the additional payment to Creditor and repayment of Debtor's  
3 \$1,400,000 loan against Stonewall Beach Property, Creditor would  
4 receive \$4,440,000 and Debtor would receive \$1,074,000 from the  
5 hypothetical \$9,000,000 sale one year from now.

6 Creditor asserts that it may be owed interest at the rate of  
7 10% on the Monterey State Court's determination of community  
8 property, totaling approximately \$2,220,000 a year from now and  
9 Debtor's interest would not cover that payment. The parties agreed  
10 that Debtor's \$9,000,000 sale analysis did not cover Creditor's  
11 interest argument or Debtor's alleged offsets.<sup>13</sup>

12  
13 III.

14 ANALYSIS

15 As set forth above, Creditor's objections to confirmation  
16 require consideration of whether the following criteria for  
17 confirmation have been met:

18 1/ Solicitation of the Plan complies with the Bankruptcy Code  
19 and Rules, as required by 11 U.S.C. §1129(a)(1).

20 2/ The Plan must have been proposed in good faith, as  
21 required by 11 U.S.C. §1129(a)(3).

22 3/ Confirmation of the Plan is not likely to be followed by a  
23 liquidation or need for further reorganization, as required by  
24 11 U.S.C. §1129(a)(11).

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28 <sup>13</sup> Because Creditor asserts an ownership (community property)  
interest in two properties in Debtor's estate, Creditor's argument  
that it is entitled to interest is not self-evident.

1 4/ The Plan must propose to pay Creditor at least as much as  
2 Creditor would receive if Debtor were liquidated under Chapter 7, as  
3 required by 11 U.S.C. §1129(a)(7)(A)(ii).

4 5/ The Plan must be "fair and equitable" to Creditor within  
5 the meaning of 11 U.S.C. §1129(b)(1) by not violating the Absolute  
6 Priority Rule of 11 U.S.C. §1129(b)(2)(B)(ii).

7 As the proponents of the Plan, Debtor and Committee bear the  
8 burden of establishing each of these elements, see In re Acequia,  
9 Inc., 787 F.2d 1352 (9th Cir. 1986), by a preponderance of the  
10 evidence, see In re Arnold and Baker Farms, 177 B.R. 648 (9th Cir.  
11 BAP 1994), aff'd, 85 F.3d 1415 (9th Cir. 1996), cert. denied,  
12 519 U.S. 1054, 117 S.Ct. 681 (1997).

13  
14 A. Plan Solicitation

15 Creditor contends that its class (Class 10) is impaired under  
16 the Plan and is entitled to vote.<sup>14</sup> Because the Plan deemed its  
17 class to be unimpaired, it did not receive a ballot. Creditor  
18 contends that Debtor's failure to solicit Creditor's vote on the  
19 Plan means the Plan does not comply with 11 U.S.C. §1126<sup>15</sup> and,  
20 therefore, the Plan cannot be confirmed under 11 U.S.C. §1129(a)(1).  
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23 <sup>14</sup> Under Bankruptcy Codes section 1124(1), a creditor is  
24 impaired under the Bankruptcy Code if the plan alters that  
creditor's legal, equitable or contractual rights.

25 <sup>15</sup> Bankruptcy Code section 1126(a) provides:

26 The holder of a claim or interest allowed under  
27 section 502 of this title may accept or reject  
a plan. If the United States is a creditor or  
28 equity security holder, the Secretary of the  
Treasury may accept or reject the plan on  
behalf of the United States.

Creditor claims it is impaired because the Plan alters its rights in that the Plan: (1) fails to provide post-petition interest on the Monterey State Court order; (2) permits Debtor to continue prosecuting the California State Court appeals without posting an appeal bond; (3) prevents Creditor from enforcing the Monterey State Court order immediately; and (4) contains only a naked promise that Creditor will be paid once Creditor's claims are allowed.

Debtor claims that her treatment of Creditor under the Plan does not impair Creditor because the continuation of the automatic stay under the Plan does not alter Creditor's rights that Creditor currently holds, citing In re PPI Enterprises (U.S), Inc., 324 F.3d 197 (3rd Cir. 2003) ("PPI Enterprises") and In re American Solar King Corp., 90 B.R. 808 (Bankr. W.D. Tex. 1988) ("Solar King").

In PPI Enterprises, the debtor's former landlord objected to the debtor's proposed plan of reorganization because the plan capped the landlord's damages pursuant to 11 U.S.C. §502(b)(6) and treated the landlord as unimpaired. The Third Circuit held that because 11 U.S.C. §502(b)(6) altered a creditor's non-bankruptcy claim irrespective of any proposed plan, the proposed plan could not depart from that limitation and the plan did not alter the landlord's legal, equitable or contractual rights, stating:

A plan which "leaves unaltered" the legal rights of a claimant is one which, by definition, does not impair the creditor. A plan which leaves a claimant subject to other applicable provisions of the Bankruptcy Code does no more to alter a claimant's legal rights than does a plan which leaves a claimant vulnerable to a given state's usury laws or to federal environmental laws. The Bankruptcy Code itself is a statute which, like other statutes, helps to define the legal rights of persons, just as surely as it limits contractual rights. Any alteration of legal rights is a consequence not of the plan but of the bankruptcy filing itself.

1 PPI Enterprises, 324 F.3d at 204 (quoting Solar King, 90 B.R. at  
2 819-20).

3 Similarly, in Solar King, the creditor objected to its  
4 treatment as a subordinated creditor pursuant to 11 U.S.C. §510(b).  
5 The Bankruptcy Court held that to the extent that the proposed plan  
6 provided the creditor with the same treatment as provided in the  
7 express provisions of 11 U.S.C. §510(b), the plan did not impair the  
8 creditor. "To the extent the plan goes beyond Section 510(b) to  
9 deprive them of any property on account of their claims, it impairs  
10 the class." Solar King, 90 B.R. at 822.

11 Here Debtor argues that because Stonewall Beach Property and  
12 the Family Residence remain property of the estate under the Plan  
13 and subject to the automatic stay, the Plan does not alter  
14 Creditor's rights. Creditor currently is subject to the provisions  
15 of the automatic stay and will remain subject to them after  
16 confirmation of the Plan.

17 Bankruptcy Code Section 1141(b) permits a debtor to maintain  
18 property in a confirmed plan as property of the estate.<sup>16</sup>  
19 Bankruptcy Code section 362(c)(1) provides that the automatic stay  
20 continues so long as such property remains property of the estate.  
21 Thus, the Plan's provision for retention of the automatic stay is  
22 expressly authorized by the Code -- the treatment of Class 10 does  
23 not alter Creditor's current legal, contractual or equitable rights  
24 and the Plan does not impair Creditor.

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26 <sup>16</sup> Bankruptcy Code section 1141(b) provides:

27 Except as otherwise provided in the plan or the  
28 order confirming the plan, the confirmation of  
a plan vests all of the property of the estate  
in the debtor.



1        Creditor's argument that the Plan only provides it with a naked  
2        promise to pay is simply incorrect. The Plan provides Creditor with  
3        whatever legal rights the California State Court determines that  
4        Creditor holds -- no more, no less. Thus, for example, if the  
5        California State Court were to determine that Creditor has a  
6        community property interest in the Stonewall Beach Property, then  
7        Creditor will have such an interest under the Plan. The Plan is  
8        straightforward in this respect. Moreover, because the Stonewall  
9        Beach Property and the Family Residence remain property of the  
10       estate pursuant to the Plan, Debtor cannot sell or hypothecate them  
11       without further court order -- on notice to Creditor. Therefore,  
12       the Plan provides Creditor with far more legal rights than a naked  
13       promise to pay.

14       Even, assuming arguendo, the Court had found that the Plan  
15       impairs Creditor's claim, Creditor has confirmed that it would vote  
16       against the Plan. The parties submitted post-trial briefing on  
17       whether, assuming Creditor is impaired by the Plan, Debtor's failure  
18       to solicit Creditor's vote is fatal to confirmation of the Plan.  
19       None of the parties found a case determinative of the issue. The  
20       case most directly related to this issue is In re Jones, 32 B.R. 951  
21       (Bankr. D. Utah 1983). In Jones, the debtors' plan proposed to cure  
22       the defaults of two creditors by making monthly installment payments  
23       commencing 30 days after the effective date. The plan stated that  
24       those creditors were not impaired. At the confirmation hearing, the  
25       bankruptcy court sua sponte questioned whether those creditors were  
26       impaired. The bankruptcy court held that such treatment did impair  
27       those creditors and if the debtors proposed to treat the creditors  
28       in that fashion, the debtors "must amend the plan to specify that

1 classes B-2 and B-3 are impaired and permit them to vote.” Jones,  
2 32 B.R. at 960. However, the Jones court did not reach the question  
3 whether the creditors could be assumed to have voted against the  
4 plan for confirmation purposes and there is no holding that such a  
5 modification and voting could not be summarily conducted. Moreover,  
6 Jones is not binding authority in any event.

7 In this case, if the Court were to determine that Creditor was  
8 impaired, Creditor has stated clearly that it would vote against the  
9 Plan, so there is nothing to gain by requiring Debtor and the  
10 Committee to modify the Plan, solicit Creditor’s vote and, absent a  
11 Court order shortening the period, wait 20 days for Creditor to send  
12 in a ballot rejecting the Plan. It would be a futile exercise.  
13 Plus, Creditor has filed its objections to plan confirmation --  
14 which the Court has carefully considered. The parties fully briefed  
15 Creditor’s objections and the Court has conducted an evidentiary  
16 hearing on those objections that contained factual elements.  
17 Creditor has made its position on the Plan perfectly clear. The  
18 Court will deem that if Creditor were impaired, Creditor would vote  
19 to reject the Plan and so the Court will evaluate whether Debtor and  
20 the Committee meet the requirements of 11 U.S.C. §1129(b) (1).  
21

22 B. Good Faith

23 The term “good faith” in the context of 11 U.S.C. §1129(a) (3)  
24 is not statutorily defined but has been interpreted by case law as  
25 referring to a plan that “achieves a result consistent with the  
26 objectives and purposes of the Code.” In re Sylmar Plaza, L.P.,  
27 314 F.3d 1070, 1074 (9th Cir. 2002), cert. denied, 538 U.S. 1035,  
28 123 S.Ct. 2097 (2003), citing In re Corey, 892 F.2d 829, 835 (9th

1 Cir. 1989), cert. denied, 498 U.S. 815, 111 S.Ct. 56 (1990). "The  
2 requisite good faith determination is based on the totality of the  
3 circumstances." Id., citing In re Stolrow's, Inc., 84 B.R. 167, 172  
4 (9th Cir. BAP 1988).

5 Creditor asserts that the Plan is not proposed in good faith  
6 because the Plan: (1) provides for indefinite imposition of the  
7 automatic stay; and (2) improperly provides for preempting of state  
8 court orders. Neither of these are the case.

9 First, while the Plan does provide for the continuation of the  
10 automatic stay with respect to Creditor's Class 10, under Plan  
11 section IV.A.10.a.iii., that stay lifts "at such time as all issues  
12 in the Dissolution Proceeding have been determined by final and non-  
13 appealable orders, except those involving child or spousal support."  
14 Plan at 11:3-5. Thus, the automatic stay lifts when the Dissolution  
15 Proceeding is complete and the stay has a definite termination.

16 Moreover, confirmation of a plan in a bankruptcy case is  
17 legitimate when the filing debtor is faced with an appeal bond that  
18 would severely disrupt its business. In re Marshall, 298 B.R. 670  
19 (Bankr. C.D. Cal. 2003). In Marshall, the debtors filed their  
20 bankruptcy petition on the eve of a hearing where a creditor sought  
21 an order requiring the debtors to transfer substantially all of  
22 their assets to Texas to satisfy a \$12 million judgment in probate  
23 court. The judgment was on appeal and required an \$18 million  
24 appeal bond. The debtors did not have sufficient liquid assets to  
25 post a bond of this size and the bankruptcy court found that the  
26  
27  
28

1 debtors' plan of reorganization was filed in good faith. Marshall,  
2 298 B.R. at 683-84.<sup>17</sup>

3 Here Debtor does not have sufficient liquid assets to post the  
4 required \$7,420,000 appeal bond and Creditor does not claim that she  
5 does. Debtor supports herself in large part from the rental income  
6 of her properties and so selling those properties would eliminate  
7 that rental income. Debtor's proposal to pay her general unsecured  
8 creditors in full and keep the Stonewall Beach Property and the  
9 Family Residence as part of the estate until the Dissolution  
10 Proceeding is complete is consistent with the objectives and  
11 purposes of the Code. Debtor merely seeks to complete the  
12 California State Court litigation and receive a determination of the  
13 parties' respective legal rights. Creditor is fully protected by  
14 the retention of the two properties to insure that its claim will be  
15 paid, if upheld on appeal, and Debtor is permitted to pursue her  
16 appeal without having to liquidate the real property that provides  
17 her income.

18 Second, the Plan does not preempt state court orders. Under  
19 Plan section IV.A.10.a.ii., both Debtor and Creditor are "bound by  
20 the terms of any final non-appealable orders made and entered in the  
21 Dissolution Proceeding whether at the appellate level or at the  
22 trial court level." Plan at 10:23-24. The Plan does reserve  
23 Debtor's right to object to the allowance of any proof of claim or  
24 request for payment of expense of administration filed by Creditor  
25 in this case, but that caveat does not mean Debtor has the right to

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27 <sup>17</sup> In Marshall, the debtors' plan originally proposed to pay  
28 the judgment creditor in full, however the judgment creditor failed  
to file a proof of claim in the bankruptcy case. The debtors  
amended their plan to discharge the judgment creditor's unfiled  
claim.

1 relitigate the California State Court proceedings in this Court and  
2 Debtor has stated that she will not.<sup>18</sup>

3 Moreover, the fact that the Plan leaves the automatic stay in  
4 place pending the California State Court decision in the Dissolution  
5 Proceeding does not leave Creditor without legal rights. Creditor  
6 is free to file a motion to lift the automatic stay at anytime and a  
7 decision by the bankruptcy court to grant or deny such a motion is  
8 appealable. As noted above, Bankruptcy Code section 1141(b)  
9 expressly permits a debtor to maintain property in a confirmed plan  
10 as property of the estate.

11 The Court finds that the Plan is proposed in good faith  
12 pursuant to 11 U.S.C. §1129(a)(3).

13  
14 C. Feasibility

15 The Court can confirm a plan only if the Court determines that  
16 confirmation is not likely to be followed by liquidation, or the  
17 need for further reorganization pursuant to 11 U.S.C. §1129(a)(11);  
18 this is commonly referred to as the "feasibility" requirement.

19 To demonstrate that a plan is feasible, a debtor  
20 need only show a reasonable probability of  
21 success. The Code does not require the debtor  
22 to prove that success is inevitable, and a  
23 relatively low threshold of proof will satisfy  
24 §1129(a)(11), so long as adequate evidence  
25 supports a finding of feasibility. [Citations  
26 omitted].

27 In re Brotby, 303 B.R. 177, 191 (9th Cir. BAP 2003).

28 Creditor claims the Plan is not feasible because success of the  
Plan depends upon Debtor's success in her appeals, her ability to  
service her debt, stagnant interest rates, and real estate market

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<sup>18</sup> This Court's order confirming the Plan will also so provide.

1 conditions. Further, according to Creditor, Debtor will not be able  
2 to pay Creditor's obligations after the Effective Date.

3 Debtor testified credibly that all general unsecured claims  
4 will be paid from the Impound Account and additional funds from the  
5 Cedar Mortgage Company loan. Debtor will provide a reserve for  
6 contested claims. Debtor will have sufficient funds to pay the  
7 administrative claims not subject to subordination and all general  
8 unsecured claims with interest. Debtor also testified credibly that  
9 she has over \$3,350,000 in equity in her separate properties and  
10 will have \$324,000 in excess funds between the Impound Account and  
11 the Sequestered Account to service the second mortgage on Stonewall  
12 Beach Property after payments required on the Effective Date to  
13 provide a cushion for payment of debt service until one of her  
14 properties sells.<sup>19</sup> Debtor testified that she recently talked with  
15 a real estate broker about selling the Tierra Grande Rental Property  
16 and that property has approximately \$1,200,000 in equity. Debtor  
17 believes the property can sell quickly, taking less time than the  
18 normal one year it takes to sell multi-million dollar homes. The  
19 Court finds there will be sufficient liquid funds in the future to  
20 service the debt on the various properties.

21 Finally, Stonewall Beach Property and the Family Residence  
22 remain property of the estate under the Plan and Debtor cannot sell  
23 or further encumber those properties without a court order. Thus,  
24 those properties will be available to pay Creditor should its claim  
25  
26

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27 <sup>19</sup> The \$324,000 is comprised of the \$43,000 in the Sequestered  
28 Account and the approximately \$280,950 remaining in the Impound  
Account after all claims that need to be paid on the Effective Date  
are paid.

1 be upheld in the California State Court. There is sufficient equity  
2 in these properties to insure Creditor will be paid.

3 The Court specifically finds that Stonewall Beach Property is  
4 currently worth at least \$13,000,000. The Court finds Spellman's  
5 analysis of the value of the Stonewall Beach Property much more  
6 credible and well supported than that of Spence. There was a firm  
7 offer for the property for \$12,000,000 in 2001 and Spellman  
8 testified that it might now be worth as much as \$16,000,000 and that  
9 the real estate values on Martha's Vineyard have been, and are,  
10 increasing. Stonewall Beach Property will retain this value  
11 notwithstanding the likely construction on the Cohen property.  
12 Spellman testified that there were no ocean front properties of this  
13 price range sold in 2004 and that there are few properties  
14 available. If it were necessary to sell Stonewall Beach Property,  
15 it is likely that there would be multiple offers for this prime  
16 piece of realty, as Spellman testified. This has already been shown  
17 -- Debtor received two offers of \$12,000,000 and \$12,100,000,  
18 respectively -- when in 2001 the Monterey State Court required  
19 Debtor to sell the property.

20 Moreover, assuming arguendo, the Stonewall Beach Property was  
21 sold for the extremely low price of \$9,000,000 one year from now,  
22 Debtor has shown that she has sufficient equity in her interest in  
23 that property to cover the adequate protection payment Debtor agreed  
24 to pay Creditor. Debtor can clearly pay Creditor for whatever  
25 interest the California State Court determines Creditor may have in  
26 the two properties.

27 Further, Debtor testified without contradiction that there is  
28 over \$450,000 in equity in the Family Residence and the value of

1 that property is increasing. This cushion is more than adequate to  
2 protect Creditor while the automatic stay of the Plan is in place.

3 The Court finds the Plan is feasible.

4  
5 D. Chapter 7 Test

6 A Chapter 11 plan must propose to pay creditors holding  
7 impaired claims who do not vote to accept the plan at least as much  
8 as the creditor would receive in liquidation under Chapter 7,  
9 pursuant to 11 U.S.C. §1129(a)(7)(A)(ii); this is commonly referred  
10 to as the "best interest of creditors test", or the "Chapter 7  
11 test". The Plan proposes to distribute to Creditor any amounts  
12 required upon a final determination by the California State Court  
13 that Debtor is liable to Creditor.

14 Creditor contends that in a liquidation, Creditor would be paid  
15 in full since Debtor has over \$13,800,000 in equity in her various  
16 properties and only \$1,900,000 in administrative and general  
17 unsecured claims. Creditor asserts that in a Chapter 7 liquidation,  
18 it would receive half of the proceeds from sale of the Stonewall  
19 Beach Property and the Family Residence. However, the Court finds  
20 that this is not the case.

21 Under the Plan, Creditor is to be paid in full upon a  
22 determination of its claims, if any, against Debtor and its  
23 interests, if any, in property of the estate. Creditor will receive  
24 exactly what it is entitled to once the California State Court  
25 litigation over the parties' respective rights has been concluded.  
26 In a Chapter 7 liquidation, Creditor would not receive any portion  
27 of the proceeds from a sale of Stonewall Beach Property or the  
28 Family Residence until the respective rights of Debtor and Creditor



1 in those properties is determined. Creditor assumes that it would  
2 be paid from any sale of Stonewall Beach Property and the Family  
3 Residence, but the Chapter 7 trustee would litigate -- and the  
4 bankruptcy court would determine -- what, if any, claims Creditor  
5 had against Debtor prior to distributing monies to it. This is  
6 precisely what Debtor proposes to do under the Plan. The Chapter 7  
7 trustee would not need a bond to litigate Creditor's claims -- the  
8 Chapter 7 trustee could do the same thing Debtor is doing under the  
9 Plan. Creditor's argument is premised on Debtor being denied her  
10 day in court if the bankruptcy case were converted to chapter 7 --  
11 but Debtor's estate would have the same rights to contest Creditor's  
12 claim in a Chapter 7 that Debtor does in a Chapter 11. The Court  
13 finds that the Chapter 7 test is met.

14  
15 E. Absolute Priority Rule

16 The Plan has been accepted by two of its four classes:

17 Classes 1, 2, 4, 5, 6, 8, 9, 10, 11 and 15 are unimpaired and  
18 therefore deemed to accept pursuant to §1126(f).

19 Classes 12<sup>20</sup> and 16 are impaired and voted to accept.

20 Classes 3<sup>21</sup> and 14 are impaired and did not vote.

21  
22 <sup>20</sup> Creditor objects to confirmation of the Plan on the basis  
23 that because the general unsecured creditors are receiving post-  
24 petition interest, they are actually unimpaired and cannot vote on  
25 the plan. Debtor and the Committee assert that because Class 12 is  
26 receiving less interest than they would be allowed under either  
27 state law or their contracts, Class 12 is impaired. Because Class  
16 -- the claim of Monterey County Bank -- is impaired and voted  
for the Plan, whether Class 12 is impaired is irrelevant because  
Debtor and the Committee have an impaired assenting class. In any  
event, the Court agrees with Debtor and the Committee that the  
general unsecured creditors are impaired under the Plan.

28 <sup>21</sup> Class 3 is the allowed secured claim of Wells Fargo Bank.  
Debtor and Wells Fargo Bank have entered into a stipulation  
resolving the objection to the Plan and rendering Wells Fargo Bank

Classes 7 and 13 are intentionally omitted.

Compliance with the Absolute Priority Rule is one of two pre-requisites for "cramdown", which is permitted by 11 U.S.C.

§1129(b) (1) if a plan fails to meet the requirement of 11 U.S.C.

§1129(a) (8) that each impaired class has voted to accept the plan, but does meet each other applicable requirement of 11 U.S.C.

§1129(a) :

... 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.

Debtor and the Committee request confirmation under the "cramdown" provisions of 11 U.S.C. §1129(b) (1) .

With respect to the first prerequisite for cramdown, Creditor complains that the Plan unfairly discriminates against it because, under the Plan, the general unsecured creditors are paid in full in cash with post-petition interest while it receives no payment of any kind. First, Creditor has asserts a \$168,839.05 unsecured claim against the estate. Creditor's claim is the subject of a pending objection. This Court's order confirming the Plan will provide for payment of Creditor's unsecured claim with post-petition interest if and when allowed. In addition, Creditor claims an ownership (community property) interest in the Stonewall Beach Property and Family Residence. However, under In re Johnston, 21 F.3d 323 (9th

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unimpaired.

1 Cir. 1994), the classification and treatment of Creditor's claim  
2 complies with 11 U.S.C. §1129(b)(1).

3 In Johnston, creditor Steelcase held a claim that was the  
4 subject of ongoing litigation and was provided for in a separate  
5 class. Under the plan of reorganization, all unsecured claims were  
6 to be paid in full, plus interest. Payment to Steelcase was  
7 contingent upon the success of the litigation. The plan called for  
8 the claim to be paid in full within 120 days of the entry of the  
9 judgment. The Ninth Circuit held that the treatment of Steelcase's  
10 claim was not unfair and discriminatory treatment because there were  
11 reasonable, nondiscriminatory reasons for the separate treatment.

12 In this case, there are reasonable, nondiscriminatory reasons  
13 for the treatment of Creditor's claim. First, Creditor's claim is  
14 disputed and is in the process of being litigated. The Plan  
15 provides for Creditor's claim to be paid in full once determined by  
16 the California State Court. Chapter 11 plans routinely and  
17 appropriately provide that a creditor whose claim is disputed has to  
18 wait to be paid until the dispute over the claim has been resolved.

19 As noted above, Creditor claims a community property interest  
20 in the Stonewall Beach Property and the Family Residence. At this  
21 point, Creditor is not entitled to post-petition interest on any  
22 state court order, so that fact that general unsecured creditors are  
23 receiving post-petition interest on their claims and the Plan does  
24 not specifically provide the same for Creditor is not unfair  
25 discrimination. If the California State Court determines that  
26 Creditor is entitled to post-petition interest, Debtor shall provide  
27 for that payment, subject to her offsets.

1 Further, the two properties in which Creditor asserts an  
2 interest are being retained as property of the estate under the Plan  
3 and will be available to satisfy Creditor's claim if the California  
4 State Court determines that it has one. If the California State  
5 Court awards Creditor with a community property interest in  
6 Stonewall Beach Property and the property ultimately sells for  
7 \$13,000,000 or \$16,000,000 or more, Creditor will benefit from the  
8 higher price and receive even more money from the property.  
9 Creditor's downside risk as an owner of Stonewall Beach Property has  
10 been essentially eliminated by Debtor's agreement that any  
11 diminution of the value of the Stonewall Beach Property below  
12 \$12,000,000 shall come out of Debtor's share of the sale proceeds.  
13 As demonstrated above, even if the Stonewall Beach Property were to  
14 sell for as little as \$9,000,000 next year, there is sufficient  
15 equity in Debtor's interest in the property to adequately protect  
16 Creditor's interest.

17 The second prerequisite for cramdown -- fair and equitable  
18 treatment of an impaired class that did not vote to accept a plan --  
19 is defined for purposes of unsecured creditors by 11 U.S.C.  
20 §1129(b) (2) (B), which embodies what is commonly referred to as the  
21 Absolute Priority Rule:

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

25 (ii) the holder of any claim or interest that is  
26 junior to the claims of such class will not  
27 receive or retain under the plan on account of  
such junior claim or interest any property.  
28

1 Thus, as used in 11 U.S.C. §1129(b)(2)(B), the “phrase ‘fair and  
2 equitable’ is not a vague exhortation to bankruptcy judges that they  
3 do the right thing; rather, it implements the so-called absolute  
4 priority rule under which an objecting class must be paid in full  
5 before any claim or interest junior to it gets anything at all.” In  
6 re Perez, 30 F.3d 1209, 1212-13 (9th Cir. 1994).

7 Creditor argues that the Absolute Priority Rule is not met here  
8 because Debtor will continue in existence and in possession of her  
9 property, even though Creditor will not be paid in full. However,  
10 this is true for any disputed claim that is being litigated post-  
11 confirmation. In this connection, the Absolute Priority Rule has  
12 two parts and 11 U.S.C. §1129(b)(2)(B)(i) provides that “each holder  
13 of a claim of such class receive or retain on account of such claim  
14 property of a value, as of the effective date of the plan, equal to  
15 the allowed amount of such claim.”

16 Here, Creditor retains, as of the Effective Date of the Plan,  
17 value equal to the allowed amount of its claim. First, Creditor  
18 does not have an allowed claim, so there is no legal requirement  
19 that it “retain” anything under the Bankruptcy Code. However, the  
20 Plan provides that Creditor’s possible interest in Stonewall Beach  
21 Property will be repaid from a sale of the property or other means  
22 by Debtor to satisfy the debt if the California State Court  
23 determines that it has such an interest. The same holds true for  
24 the Family Residence. There is no need for Debtor to provide a  
25 reserve or post a bond because the Stonewall Beach Property and the  
26 Family Residence remain property of the bankruptcy estate under the  
27 Plan and, as the Court has found and finds today, adequately protect  
28 Creditor’s interests. Plus, under 11 U.S.C. §363 and §364, Debtor

1 cannot sell or encumber those properties without further order of  
2 the Court.

3  
4 IV.

5 CONCLUSION

6 Debtor and Creditor engaged in contentious litigation in the  
7 Dissolution Proceeding. Debtor filed this Chapter 11 case in part  
8 to permit her to remedy what she considers to be injustices  
9 inflicted upon her in the Dissolution Proceeding. Debtor is unable  
10 to provide a bond to stay the Dissolution Proceeding while she  
11 pursues her appeals. The Plan is designed to maintain the status  
12 quo and protect Creditor while Debtor appeals the Dissolution  
13 Proceeding. The Court finds that the Plan appropriately protects  
14 Creditor during the appeals and is an appropriate use of Chapter 11.

15 For the reasons set forth above, Creditor's objection to  
16 confirmation of the Plan is overruled and the Plan shall be  
17 confirmed. Counsel for Debtor shall submit a form of order so  
18 providing, after review as to form by counsel for Creditor and the  
19 Committee.

20  
21 Dated:

22  
23 ARTHUR S. WEISSBRODT  
24 UNITED STATES BANKRUPTCY JUDGE  
25  
26  
27  
28