UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE:
NEIL H. SAUNDERS,
DEBTOR.

Chapter 11
Case No. 11-12960-WCH

ORDER

In accordance with the Memorandum of Decision of even date, the Court approves the transmission of the Plan Preference Form to all classes under each plan.

William C. Hillman
United States Bankruptcy Judge
Of the District of Massachusetts
Sitting by Designation

Dated: January 16, 2013

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE:
NEIL H. SAUNDERS, Chapter 11
DEBTOR. Case No. 11-12960-WCH

MEMORANDUM OF DECISION

I. INTRODUCTION

The matter before the Court is the Joint Emergency Petition for Instructions (the "Petition for Instructions") filed jointly by Neil H. Saunders (the "Debtor") and creditor 02908 Club Holdings, LLC ("02908"). On January 7, 2013, I approved disclosure statements proposed by both the Debtor and 02908, set the a deadline of February 5, 2013 for the return of voting ballots, and scheduled an evidentiary hearing with respect to confirmation of the plans for February 19, 2013. Through the Petition for Instructions, the parties request that I rule on the appropriateness of sending "Plan Preference Forms" to unimpaired creditors so that they may indicate whether they have a preference between the two competing plans. In considering this request, I find that concurrent determination of a related issue that I deferred ruling on at the January 7, 2013 hearing—whether the Debtor is impaired under 02908's proposed plan—is appropriate. For the reasons set forth below, I find that the Debtor is impaired under 02908's proposed plan, and I will approve the usage of the proposed Plan Preference Form attached to the Petition for Instructions.

II. BACKGROUND

The Debtor filed a voluntary Chapter 11 petition on July 25, 2011. The Debtor's primary assets are twelve commercial investment properties in Providence, Rhode Island which serve the

as off-campus student housing for local area college students (the "Investment Properties"). Each property is subject to secured claims which exceed the respective property's value. Notably, five of the Investment Properties are subject to a blanket first mortgage held by Grant Court Development, LLC ("GCD") securing a claim totaling $1,372,533.

Both the "Debtor's Fourth Amended Plan of Reorganization" (the "Debtor's Plan") and the "Third Amended Chapter 11 Plan of Reorganization (submitted by The 02908 Club Holdings, LLC)" (the "02908 Plan") contemplate full repayment of all creditors within thirty days of the effective date of the plan. I note that the issues presented are unusual in that they are framed in the context of competing 100% plans in an individual Chapter 11 case. Accordingly, a few words about how each plan proposes to accomplish this goal is necessary to place the dispute in context.

The Debtor proposes to effectuate his plan by forming Red Door Realty, LLC ("Red Door"), a Delaware limited liability company authorized to do business in Rhode Island in which he will have a 66.67% equity interest, and capitalizing it with $1,000,000 from the debtor-in-possession accounts, $200,000 from the personal accounts of his wife, Ann Saunders, and a loan in the amount of $2,622,000 from David Malkin ("Malkin"), the principal of GCD, in exchange for a 33.33% equity interest in Red Door (the "Malkin Loan"). The Malkin Loan consists of two components: (1) Red Door will deliver a promissory note to GCD and assume the principal balance due from the estate as of the effective date in full satisfaction of the claim; and (2) Malkin will advance additional funds in the amount of $1,249,466.63 to Red Door. Red Door will then pay all outstanding claims in full.

In contrast, the 02908 Plan proposes full payment of all allowed claims through a private purchase of the Investment Properties by 02908. The purchase price for each Investment

Property will be the full amount of the secured claim. Additionally, 02908 will pay the balance of any priority and non-priority unsecured claims after the estate funds have been exhausted to ensure full repayment.

Because each plan provides full repayment for all allowed claims, both plan proponents assert that there are no impaired classes and that each is conclusively presumed to have accepted their respective plan pursuant to 11 U.S.C. § 1126(f).[1] Nevertheless, the Debtor argues that his equity interest is impaired under the 02908 Plan. Moreover, the parties disagree as to whether 11 U.S.C. § 1129(c) requires me to consider the preferences of unimpaired creditors who will be paid in full.

III. DISCUSSION

A. Is the Debtor Impaired under the 02908 Plan?

The Debtor argues that his equity interest is impaired under the 02908 Plan because he will lose his ownership rights in the Investment Properties. 02908 responds that it "defies logic" that the Debtor's equity interest could be impaired where, according to his own disclosures, he has no equity in the Investment Properties. Ultimately, the Debtor has the better side of the argument.

Under 11 U.S.C. § 1124, a claim is not impaired if the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest" or if the plan cures or compensates for past default.[2] "It is well established that, with

[1] Although the Debtor asserts that no class is impaired under the Debtor's Plan, he repeatedly hedges this statement by explaining that he will provide GCD a ballot to the extent it is deemed to have the right to vote. Inconsistencies aside, it is enough to say that under the circumstances, GCD would vote to accept the Debtor's Plan if given the opportunity. GCD's counsel said as much at the January 7, 2013 hearing on the disclosure statements.

[2] 11 U.S.C. § 1124(1).

this language, 'Congress define[d] impairment in the broadest possible terms.'"[3] There is no question that the Debtor's equity interest subsumes his individual ownership interest in the Investment Properties.[4] Nevertheless, by pointing to the Debtor's lack of equity in the Investment Properties, 02908 conflates value with rights. Although the current value of his equity interest may be zero in light of the claims against the Investment Properties, he still enjoys the plethora of rights that come with ownership. Therefore, a loss of those rights through a (compulsory) private sale under the 02908 Plan clearly impairs the Debtor's equity interest.

B. Should Unimpaired Classes Indicate their Preference?

Section 1129(c) of the Bankruptcy Code provides:

> Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.[5]

The Debtor contends that the use of the word "shall" indicates that not only that I must consider the preferences of creditors and equity security holders, but that I need to first determine those preferences. As such, he asserts that use of the Plan Preference Form, which is substantially similar to that used in other cases, is the most logical means to supply me with the necessary information to make a required finding. 02908, on the other hand, urges that 11 U.S.C. § 1129(c) is meant to address the preferences of creditors only where impaired creditors are being treated differently under the competing plans and makes no sense where the

[3] *L & J Anaheim Associates v. Kawasaki Leasing Int'l, Inc. (In re L & J Anaheim Associates)*, 995 F.2d 940, 942 (9th Cir. 1993) (*quoting In re Madison Hotel Associates*, 749 F.2d 410, 418 (7th Cir.1984)). *See Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 28 (2d Cir.1982).

[4] *Unruh v. Rushville State Bank of Rushville, Mo.*, 987 F.2d 1506, 1508 (10th Cir. 1993) (*citing* 5 Collier on Bankruptcy ¶ 1141.01 at 1141–6 n. 12 (15th ed.1992)).

[5] 11 U.S.C. § 1129(c).

creditors are being paid in full because it will likely lead to solicitations by both plan proponents on matters other than treatment.[6]

While I understand the concerns raised by 02908 regarding the solicitation of creditors who will be paid in full, the United States Supreme Court instructs that "where . . . the statute's language is plain, 'the sole function of the courts is to enforce it to its terms.'"[7] Here, the statute simply says that when faced with two confirmable plans, I "shall consider the preferences of creditors and equity security holders."[8] 02908 would have me create an exception not encompassed by the statute. Therefore, regardless of whether the creditors are receiving payment in full and are unimpaired, the Bankruptcy Code requires that I consider their preferences. As suggested by the Debtor, the Plan Preference Form is an appropriate means to this end.

[6] I do not understand 02908 to be objecting to the substance of the Plan Preference Form, but merely its usage under these circumstances.

[7] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (*quoting Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)).

[8] 11 U.S.C. § 1129(c).

IV. CONCLUSION

In light of the foregoing, I will enter an order approving the transmission of the Plan Preference Form to all classes under each plan.

William C. Hillman
United States Bankruptcy Judge
Of the District of Massachusetts
Sitting by Designation

Dated: January 16, 2013

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