UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
Lexington Division

In re:	)	
	)	**Chapter 11**
CREEKSIDE SENIOR APARTMENTS	)	
LIMITED PARTNERSHIP, *et al.* [1]	)	**Case No. 10-53019**
	)	
Debtors.	)	**Hon. Tracey N. Wise**
	)	

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS, DENYING MOTION FOR RELIEF FROM STAY AS MOOT, AND DISAPPROVING DISCLOSURE STATEMENT AS MOOT

This case stands in a unique procedural posture because the Debtors and their General Partners[2] argued strenuously for a valuation of the Debtors' properties prior to Debtors proceeding with approval of a disclosure statement and plan. At their request, and over the objection of the Debtors' largest secured creditor, Bank of America ("Bank"), the Court held a valuation hearing on August 18, 2011 ("Valuation Hearing"). All of the parties specifically agreed that the purpose of the Valuation Hearing was to determine the value of each Debtor's property serving as collateral for the Bank's loan for use in connection with the plan, disclosure statement, and confirmation process. On September 12, 2011, the Court entered its Order Setting Market Value of Debtors' Low-Income Housing Tax Credit Properties ("Valuation Order") [Doc. 252]. However, contrary to their statements in open Court as discussed below, the Debtors did not propose a plan and disclosure statement upon entry of the Court's Valuation Order. Rather, for an additional period of nearly eight months after entry of the Valuation Order, they have continued

[1]The Debtors in these jointly-administered cases are: Creekside Senior Apartments, Limited Partnership ("Creekside"); Pennyrile Senior Apartments, Limited Partnership ("Pennyrile"); Nicholasville Greens, Limited Partnership ("Nicholasville Greens"); Franklin Place Senior Apartments, Limited Partnership ("Franklin Place"); and Park Row Senior Apartments, Limited Partnership ("Park Row").

[2] The Debtors' General Partners are: Alliant Holdings of Creekside, LLC, Alliant Holdings of Pennyrile, LLC, Alliant Holdings of Nicholasville Greens, LLC, Alliant Holdings of Franklin Place, LLC, and Alliant Holdings of Park Row, LLC. Where appropriate, the Debtors and General Partners are referred to collectively as the "Plan Proponents."

to delay the plan process until they were ordered to file a plan and disclosure statement and forced to proceed with the reorganization process they began upon the filing of their Petitions.

The issues currently before the Court are the Bank's motion to terminate the automatic stay ("Motion to Terminate Stay") [Doc. 300] and motion to dismiss or convert the Debtors' Chapter 11 cases ("Motion to Dismiss") [Doc. 308]. The Motion to Terminate Stay and Motion to Dismiss are referred to collectively as the "Bank's Motions." The Debtors and their General Partners filed responses to the Bank's Motions [Docs. 318 & 319]. Affidavits of witnesses, joint stipulations ("Joint Stipulations"), and witness and exhibit lists were filed and an evidentiary hearing was held on April 18, 2012 ("Evidentiary Hearing"). Also before the Court for approval on April 18, 2012, was the third amended disclosure statement ("Third Amended Disclosure Statement") [Doc. 356] proposed by the Plan Proponents and the objection thereto ("Objection to Disclosure Statement") [Doc. 365] filed by the Bank.

Due to the convoluted procedural posture of this case as outlined below, the Court sets forth the factual and procedural background, the Court's analysis of the evidence presented at the Evidentiary Hearing, the law governing the Bank's Motions and finally, the Court's analysis and conclusions as to its decision to grant the Motion to Dismiss. Further, as the Court will grant the Motion to Dismiss, decisions on the Motion to Terminate Stay and approval of the Third Amended Disclosure Statement are moot.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (G). The following constitutes the Court's findings of fact and conclusions of law.

INTRODUCTORY FINDINGS

Between September 22, 2010 and October 22, 2010 ("Petition Dates"), the Debtors filed their Chapter 11 petitions for bankruptcy under Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. ("Bankruptcy Code"). These cases are Single Asset Real Estate matters under § 101(51B) of the Bankruptcy Code, and are being jointly administered. Each Debtor is a limited partnership entity without employees. Each Debtor owns a parcel of real property on which is located a low-income housing apartment complex referred to as low-income housing tax credit properties or "LIHTC Properties." The apartment complex belonging to and the Petition Date for each Debtor are as follows:

Debtor	LIHTC Property	Petition Date
Creekside	Creekside Senior Apartments Nicholasville, Kentucky	9/22/2010
Franklin Place	Franklin Place Senior Apartments Princeton, Kentucky	10/19/2010
Nicholasville Greens	Nicholasville Greens Townhomes Nicholasville, Kentucky	10/19/2010
Pennyrile	Pennyrile Senior Apartments Hopkinsville, Kentucky	10/19/2010
Park Row	Park Row Senior Apartments Bowling Green, Kentucky	10/22/2010

Each Debtor has entered into a land use restriction agreement ("LURA") with the Kentucky Housing Corporation by which their respective LIHTC Property became subject to certain restrictions including limitations on the rental rate the Debtors can charge their tenants. The LURAs are recorded and the restrictions run with the land for an initial period of fifteen years ("Initial Compliance Period") and an extended use period of an additional fifteen years.

As an incentive to restrict their real property to low-income tenants, LIHTC Property owners, such as the Debtors, receive federal tax credits ("Tax Credits") during the first ten years after an LIHTC Property is put into service. The Tax Credits are subject to recapture if Debtors fail to comply with the restrictions and limitations set forth in the LURAs. *See* Title 26 of the United States Code § 42 ("Internal Revenue Code"). Under the Debtors' limited partnership agreements, 99.98% of the benefits, but not the ownership, of the Tax Credits flows to their respective limited partners or investors.

If the LIHTC Property is sold during the restriction period, the purchaser takes the property subject to the rental restrictions for the remaining period of time those restrictions are in effect. However, such purchaser also receives the benefit of any Tax Credits that have not been utilized

("Remaining Tax Credits").[3] Debtors' LIHTC Properties were placed into service in 2005 or 2006.

According to each Debtor's Financial Statements and Independent Auditors' Report dated December 31, 2009 ("Financial Statements"),[4] the Remaining Tax Credits available to each Debtor as of December 31, 2009, the Remaining Tax Credits used annually, and the Tax Credit Period Expiration Date[5] for each property are as follows:

LIHTC Property	Remaining Tax Credits as of 12/31/2009	Tax Credits Used Annually	Tax Credit Period Expiration Date
Creekside	1,181,748	-188,946	4/30/2016
Franklin Place	1,087,491	-164,357	8/31/2016
Nicholasville Greens	499,277	-88,943	11/30/2015
Pennyrile	1,463,665	-239,290	9/30/2016
Park Row	1,778,079	-327,033	9/30/2015
Totals	6,010,260	-1,008,569	

In valuing the LIHTC Properties, the Court took into consideration the negative impact of the rent restrictions and the beneficial impact of the Remaining Tax Credits in arriving at a market

[3] With respect to the acquisition of the LIHTC Property before the end of the Initial Compliance Period, the Internal Revenue Code provides that:

> [T]he credit allowable ... to the taxpayer for any period after such acquisition shall be equal to the amount of credit which would have been allowable ... for such period to the prior owner ... had such owner not disposed of the building.

Internal Revenue Code § 42(d)(7)(A)(ii). *See also* Internal Revenue Code § 42(f)(4) (providing that if an LIHTC Property is disposed of during any year for which tax credits are allowable, then such tax credits shall be allocated between the parties on the basis of the number of days during such tax year the LIHTC Property was held by each); Kenneth N. Alford & David C. Wellsandt, *Appraising Low-Income Housing Tax Credit Real Estate*, 10/1/10 Appraisal J. 350 (Oct. 1, 2010) ("The tax credits are not transferrable; they flow exclusively to the property owner on the basis of the ownership of the eligible LIHTC real property.") (citing Internal Revenue Code § 42(f)(4)).

[4] The Financial Statements are attached as Exhibits 8, 9, 10, 11 & 12 (see Note 8) to the Bank's Valuation Hearing Exhibit List [Doc. 204].

[5] "Tax Credit Period Expiration Date" is defined in the Third Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("Third Amended Plan") [Doc. 355] as "the last calendar day of the 10-year period beginning on the date that a [LIHTC] Property is placed into service during which tax credits accrue to those persons or entities who are entitled to claim such tax credits." (Third Amended Plan ¶ 1.68).

value for each LIHTC Property. The Remaining Tax Credits for each LIHTC Property have continued to be claimed throughout these bankruptcy proceedings subsequent to the Petition Dates. Brian Doran, President of Alliant Real Estate Investments, LLC ("AREI"), the sole member of each General Partner, testified at the Evidentiary Hearing that approximately $1,000,000 worth of Tax Credits are used annually among the five Debtors. Mr. Doran further testified that the Tax Credits for the years 2010 and 2011 have been claimed. The clear impact of the use of approximately $1,000,000 of the Remaining Tax Credits for the year 2011 since the Valuation Hearing is a decrease in the value of the LIHTC Properties. The parties stipulated that the value of each LIHTC Property continues to diminish.

It is uncontroverted that the Bank holds a valid first mortgage on each Debtor's LIHTC Property. Each Debtor's loan agreement with the Bank matured prior to the Debtor filing for bankruptcy, accelerating the indebtedness due and owing to the Bank. It is uncontroverted that prior to the filing of the Debtors' Chapter 11 Petitions, the Bank filed a foreclosure action against each Debtor. Further, the Bank had filed a receivership motion in each of the foreclosure actions, and the Debtors filed their Petitions within days or weeks of the hearings on the receivership motions.[6]

PROCEDURAL BACKGROUND

1. As noted above, Debtors' Petitions were filed between September 22, 2010 and October 22, 2010.

2. On December 3, 2010, the Court entered an order approving the employment of Novogradac & Co., LLP ("Novogradac") as Debtors' real estate appraiser [Doc. 137].

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[6] Pennyrile's Petition was filed the day before the Bank's receivership motion was set to be heard; Park Row's and Nicholasville Greens' Petitions were filed three days before; Franklin Place's Petition was filed a week before; and Creekside's Petition was filed 4 weeks before receivership motions were set to be heard.

3. On or about December 17, 2010, Creekside[7] made an adequate protection payment in the amount of $3,000 to the Bank under § 362(d)(3)(B).[8] The payment represented the amount equal to the non-default contract rate of interest on the Bank's interest in Creekside's LIHTC Property. The Bank has argued that the Debtor did not satisfy the requirements of § 362(d)(3)(B)(ii) because in making the calculation of the amount to be paid, Creekside used its own alleged value of its LIHTC Property. The Bank argues that Creekside's value was inaccurate, thereby making the amount paid to the Bank lower than what the Bank should have received.

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[7] Creekside's Petition Date is September 22, 2010. Therefore, as of December 17, 2010, it was the only Debtor close to the 90 day requirement for it to have either filed a plan or make the payment under § 362(d)(3).

[8] 11 U.S.C. § 362(d)(3) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
> . . .
>
> (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--
>
> (A) the debtor has filed a plan of reorganization that has a *reasonable possibility of being confirmed within a reasonable time*; or
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> (B) the debtor has commenced monthly payments that—
>
> (i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
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> (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate.

11 U.S.C. § 362(d)(3) (emphasis added).

4. On December 23, 2010, the Debtors filed their first motion to extend the exclusive period within which Debtors could file a plan of reorganization and solicit acceptances of a plan [Doc. 141]. As part of their argument that cause existed for the extension, Debtors asserted that because the Bank was contesting the value of the LIHTC Properties an evidentiary hearing on that issue was likely to be needed, and it would be difficult and impractical to complete discovery, a valuation hearing, and plan confirmation prior to the expiration of Creekside's solicitation period on March 21, 2011. Without objection by the Bank, the motion was granted by order [Doc. 149] entered January 27, 2011, extending the period for Debtors to file their plan and disclosure statement to February 18, 2011, and the time to solicit acceptances of a plan to April 29, 2011.

5. The Bank filed a proof of claim secured by each Debtor's respective LIHTC Property on January 10, 2011. The Bank's claims against the Debtors are as follows: Creekside $1,272,589.35 plus interest, fees and costs; Franklin Place $863,467.53 plus interest, fees and costs; Nicholasville Greens $714,857.43 plus interest, fees and costs; Pennyrile $466,294.67 plus interest, fees and costs; and Park Row $1,037,461.15 plus interest, fees and costs.

6. On January 14, 2011, Franklin Place, Nicholasville Greens, Pennyrile and Park Row made their first adequate protection payments to the Bank under § 362(d)(3) in the following amounts: Franklin Place paid $1,000; Nicholasville Greens paid $2,000; Pennyrile paid $1,500; and Park Row paid $2,000. Again, the Debtors used their own alleged value of their respective LIHTC Property which the Bank asserts was improper.

7. Debtors filed their second motion to extend the exclusivity period for Debtors to file their plan and disclosure statement [Doc. 157] contending again that the extension was warranted because it was necessary for the Court to hold an evidentiary hearing on the issue of valuation. The motion was filed on February 16, 2011, and was granted by order [Doc. 168] entered March 16, 2011, extending the period for Debtors to file their plan and disclosure statement to March 30, 2011.

8. On February 18, 2011, all of the Debtors made an additional adequate protection payment to the Bank in the same amounts reflected above. No further adequate protection payments required under § 362(d)(3) were made to the Bank by the Debtors.

9. Several months after obtaining their original extension of exclusivity periods relying on the need for a valuation hearing, the Debtors finally filed a motion to schedule an evidentiary hearing on the value of the LIHTC Properties [Doc. 164]. The Debtors argued that it was necessary to determine the secured portions of the Bank's claims in advance of the Debtors soliciting acceptances and seeking confirmation of a plan.

The Original Plan and Disclosure Statement

10. On March 17, 2011, the Plan Proponents filed the Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("Original Plan") [Doc. 170] and a Disclosure Statement ("Original Disclosure Statement") [Doc. 171]. Even though the appraisals for Creekside, Franklin Place, Nicholasville Greens and Pennyrile had been completed and a report prepared and dated February 8, 2011, the Plan Proponents did not disclose their assessment of the value of any of the LIHTC Properties. The Plan Proponents failed to disclose their breakdown of the secured and unsecured portions of the Bank's claims although they had the information available. Instead, the Original Plan provided that "[e]ach Allowed Secured Claim of Bank of America against each Debtor shall be equal to the fair market value of Bank of America's interest in such Debtor's Property as *determined by the Court at the Valuation Hearing*." (Original Plan ¶ 4.1 (emphasis added)). Property is defined in the Original Plan as the low-income housing apartment complex of each Debtor. Despite these statements and as reflected below, the Plan Proponents failed to take any action to amend the Original Plan and Disclosure Statement once the Valuation Order was entered until forced to do so by order of this Court. As discussed in more detail below, when the Plan Proponents finally did amend their plan and disclosure statement subsequent to the Valuation Hearing, they did not use the fair market value of the Bank's interest as "determined by the Court at the Valuation Hearing."

11. In the Original Plan, the Plan Proponents proposed to pay the Bank's Allowed Secured Claims (Class 1) in equal monthly installments amortized over 30 years, plus simple interest at the Bank's prevailing prime rate plus 1.5% per annum, with a balloon payment of the outstanding principal and interest due on the seventh anniversary of the Effective Date. No interest accrued on the Bank's Allowed Secured Claim from the Petition Date to the Effective Date of the Original Plan.

12. The Allowed Unsecured Deficiency Claims of the Bank (Class 3) were placed in a separate class from the general unsecured claims (Class 4). However, the Bank's treatment was identical to the treatment of the unsecured creditors. Both classes were to be paid quarterly (on a 30-year amortization schedule) for fifteen years. Both classes were to receive a balloon payment of the remaining principal and interest on the fifteenth anniversary of the Effective Date of the Original Plan. The interest rate on the claims of both classes was to be the rate applicable to federal judgments in effect as of the Effective Date.

13. The Original Plan was to be funded by the Debtors' operational cash flow, net proceeds of sale or refinancing and where those sources were insufficient, the plan provided for a Capital Contribution by the General Partners and Limited Guarantees to be made by four of the General Partners. However, by its definition, the Capital Contribution was not available for payments on the Bank's claims. Further, as defined, the "Limited Guarantees" were applicable only to Creekside, Franklin Place, Nicholasville Greens and Park Row, excluding Pennyrile. The time periods during which the Limited Guarantees were available were limited, but those limitations were not disclosed in the Original Plan or Disclosure Statement. The Limited Guarantees were to be provided by a Debtor's respective General Partner and were capped at the amount of the shortfall in the projections for that Debtor for each given year rather than on a cumulative basis. However, no projections were provided with the Original Plan and/or Original Disclosure Statement for any of the Debtors.

14. In the Bank's objection [Doc. 173] to the Debtors' request for a valuation hearing, the Bank pointed out the numerous deficiencies in the Original Plan and Disclosure Statement and argued that a valuation hearing was premature until the Debtors submitted a disclosure statement providing "adequate information" as required by 11 U.S.C. § 1125.[9] Most significant among the deficiencies identified by the Bank was the fact that although the Debtors alleged that all of the Bank's Claims were not fully secured, Debtors withheld, and were continuing to withhold, any information related to Debtors' appraisals of the LIHTC Properties. Without information in the Original Disclosure Statement regarding the Debtors' purported value of their real property assets, the Bank reasonably asserted that it was unable to make an informed judgment about the Original Plan.

15. To prevent the granting of a motion for relief from stay under § 362(d)(3), single asset real estate debtors, such as these Debtors, must either make adequate protection payments pursuant to § 362(d)(3)(B)(ii) or file a "plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time." 11 U.S.C. § 362(d)(3)(A) & (B). Even though the Original Plan was obviously deficient as noted above and in no condition to be confirmed, the Debtors ceased making adequate protection payments to the Bank as of February 18, 2011.

16. On March 28, 2011, an Order Scheduling Valuation Hearing [Doc. 177] was entered setting a hearing date of May 25, 2011, for the valuation of Debtors' LIHTC Properties. The Valuation Hearing was rescheduled multiple times with the hearing finally being held on August 18, 2011.

17. On April 29, 2011, Debtors filed their second motion to extend the exclusivity period during which the Debtors were to solicit acceptances of their plan [Doc. 190]. The motion was granted by order [Doc. 194] entered May 18, 2011, extending the period for the Plan

[9] Section 1125 requires that the disclosure statement provide information of a kind and in sufficient detail that would enable an investor in a relevant class to make an "informed judgment" about the plan. 11 U.S.C. § 1125(a).

Proponents to solicit acceptances of their plan to a date sixty days after entry of the Valuation Order.

18. The witness and exhibit lists for the Valuation Hearing [Docs. 201, 204, 205 & 207] and affidavits of expert witnesses [Docs. 202 & 206] were filed on July 11, 2011. The Bank's expert witness was David A. Donan of Allgeier Company. The Debtors' and General Partners' expert witness was Brad Weinberg of Novogradac.

19. Less than two days prior to a scheduled pre-hearing conference and less than a week before the rescheduled Valuation Hearing, the Debtors and General Partners filed an objection ("Objection to Bank's Appraisal") [Doc. 214 & 218] to the Bank's inclusion of the Tax Credits in the Bank's appraisals along with a Motion *In Limine* [Doc. 215] to exclude portions of Mr. Donan's testimony related to the impact of the Remaining Tax Credits on the market value of the Debtors' LIHTC Properties. In seeking to exclude testimony relating to the Remaining Tax Credits, the Debtors argued in part that the Tax Credits are held by the Debtors' limited partners and not by the Debtors; and, therefore, the Tax Credits are not property of the bankruptcy estates.

20. At the pre-hearing conference held on July 27, 2011, the parties reiterated that the purpose of the Valuation Hearing was to determine the value of the real estate securing the Bank's claim for use in connection with the plan and disclosure statement and confirmation process. *See* Amended Order Regarding Valuation Hearing [Doc. 223 at 1]. By this order, the Valuation Hearing was rescheduled once again to August 18, 2011, to permit the Bank time to respond to the Objection to Bank's Appraisal and the Motion *in Limine*.

21. An Order and Notice for Hearing on Disclosure Statement [Doc. 224] was entered requiring the Debtors to file any amendments to the Original Plan and Disclosure Statement on or before August 11, 2011. A hearing on approval of the Original Disclosure Statement, as amended, was scheduled for September 15, 2011.

The First Amended Plan and Disclosure Statement

22. On August 11, 2011, the Plan Proponents filed a First Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("First Amended Plan") [Doc. 231] and the First Amended Disclosure Statement Under 11 U.S.C. § 1125 in Support of First Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("First Amended Disclosure Statement") [Doc. 232].

23. The treatment of the Bank's secured and unsecured claims were not modified insofar as the amortization schedule and period of payments. Projections were provided which disclosed interest rates of 4.75% per annum on secured debt and .26%[10] per annum on unsecured debt. Further, as an alternative treatment with respect to its unsecured claims, the Bank could elect to receive on the Effective Date of the First Amended Plan a lump-sum cash payment equal to 35% of its Class 3 Allowed Unsecured Deficiency Claims.

24. The First Amended Plan modified the Original Plan by providing the amount of the Bank's secured and unsecured claims as calculated by the Debtors' appraiser, Novogradac. The First Amended Plan further modified the sources from which payments would be made. The payment of the Bank's secured claims were to be made from three main sources: (1) net operating income of each LIHTC Property as calculated and projected in the cash flow projections ("Net Operating Income"); (2) an escrow to be established by AREI with limited duration, in the initial amount of $120,000 to be used, as necessary, to fund cash flow shortfalls, up to the amounts in the cash flow projections, on a year-by-year basis and not on a cumulative basis ("Cash Flow Shortfall Escrow");[11] and (3) the proceeds of a refinancing of each LIHTC Property, less the sum of the reasonable costs of such transaction ("Net Refinancing Proceeds").

[10] This figure is the rate applicable to federal judgments which the Plan Proponents proposed would be in effect as of the Effective Date.

[11] The Cash Flow Shortfall Escrow was apparently put in place to replace the Limited Guarantees of the General Partners in the Original Plan.

25. Under the First Amended Plan, the sources for payment of the Bank's unsecured claims were the: (1) Net Operating Income; (2) Cash Flow Shortfall Escrow; (3) Net Refinancing Proceeds; and (4) proceeds of a sale, transfer, or other disposition of a LIHTC Property (other than refinancing), less the sum of the reasonable costs of such transaction.

26. A few days prior to the Valuation Hearing, an Order Overruling Objection and Motion *In Limine* [Doc. 235] was entered in which the Court found in part that the "limited partners may have become entitled to the *allocation* of the Tax Credits through the respective partnership agreements, but they did not become the *owners* of the Tax Credits through those agreements." The Court further found that the Tax Credits do in fact "affect the value that a willing buyer would pay a willing seller for a LIHTC Property" and that evidence regarding the Tax Credits is relevant to the value of the Bank's secured claims. [Doc. 235 at 4-5 (emphasis added)].

27. On August 18, 2011, the Valuation Hearing was held and the matter was taken under submission.

28. Prior to the Court's determination of the value of the Bank's collateral, the Debtors and General Partners filed a notice of appeal [Doc. 246] to the Bankruptcy Appellate Panel of the Sixth Circuit ("BAP") of the Order Overruling Objection and Motion *In Limine*. A motion for leave to appeal [Doc. 247] was also filed. The BAP entered an order [Doc. 268] denying the motion for leave to appeal on October 27, 2011.

29. The Valuation Order was entered on September 12, 2011, and the Court set the following values for the LIHTC Properties:

LIHTC Property	**Court Value (Doc. 252)**
Creekside Senior Apartments	1,058,718.67
Franklin Place Senior Apartments	816,244.42
Nicholasville Greens Townhomes	467,475.86
Pennyrile Senior Apartments	1,201,188.44
Park Row Senior Apartments	1,592,427.01

30. As of the Petition Dates, the Bank's secured claims and unsecured claims, based on the amounts set forth in the Bank's proofs of claim and the market values of the LIHTC Properties as set forth in the Valuation Order are:

LIHTC Property	Bank's Total Claim	Court Value (Doc. 252)	Bank's Secured Claim	Bank's Unsecured Claim
Creekside Senior Apartments	1,272,589.35	1,058,718.67	1,058,718.67	213,870.68
Franklin Place Senior Apartments	863,467.53	816,244.42	816,244.42	47,223.11
Nicholasville Greens Townhomes	714,857.43	467,475.86	467,475.86	247,381.57
Pennyrile Senior Apartments	466,294.67	1,201,188.44	466,294.67	0.00
Park Row Senior Apartments	1,037,461.15	1,592,427.01	1,037,461.15	0.00

31. At the disclosure statement hearing on September 15, 2011, Debtors' counsel conceded that the First Amended Disclosure Statement could not be approved as filed. Counsel stated that there were issues pending regarding the Valuation Order, that Debtors' counsel had engaged in discussions with the Bank's counsel and the parties might reach a resolution for a consensual plan, and basically, the Debtors needed time to consider how to proceed. Counsel further stated that if the Debtors decided to file an appeal, they would seek a stay of the bankruptcy court proceedings pending appeal. To give the Debtors time to negotiate with the Bank and to decide on a course of action, the Court continued the hearing on the First Amended Disclosure Statement for a status hearing until November 16, 2011.

32. On September 26, 2011, the Debtors and General Partners filed a notice of appeal [Doc. 261] of the Valuation Order, BAP Case No. 11-8072 ("Appeal of the Valuation Order"). As noted below, the Debtors and General Partners did not seek a stay of this Court's proceedings until December 9, 2011. Nor did they file a second amended plan and disclosure statement in compliance with the values determined by the Court in the Valuation Order until ordered to do so by the Court.

33. On November 11, 2011, Debtors filed their third motion to extend the exclusivity period during which the Debtors were to solicit acceptances of their plan [Doc. 273]. The Bank

objected [Doc. 287] to this third request for extension. The matter was set for hearing on December 21, 2011, at which time the third request for extension was denied.

34. At the status hearing on November 15, 2011, the Debtors again stated that they were working on this matter and were attempting to obtain refinancing. The hearing was continued to December 21, 2011.

35. More than two months after filing the Appeal of the Valuation Order, the Plan Proponents filed a motion ("Bankruptcy Court Motion for Stay Pending Appeal") [Doc. 282] requesting this Court to stay the proceedings in the Bankruptcy Court pending a decision by the BAP on the appeal. The motion was set for hearing on December 21, 2011.

36. At the hearing on December 21, 2011, counsel for the Debtors conceded that if the cases proceeded to confirmation that either the Debtors or the Bank would have a right to appeal the Court's confirmation order. Counsel further conceded that it was possible for the Plan Proponents to propose a plan providing for alternative treatment of the Bank's secured and unsecured claims depending on whether the Valuation Order was affirmed or reversed.

37. The Bankruptcy Court Motion for Stay Pending Appeal was denied from the bench at the hearing on December 21, 2011, and an order [Doc. 310] to that effect was entered on January 6, 2012.

38. On January 4, 2012, the Bank filed the Motion to Terminate Stay and on January 5, 2012, the Bank filed the Motion to Dismiss. A hearing on the Banks' Motions was scheduled for February 29, 2012.

39. More than a month after this Court denied the Bankruptcy Court Motion for Stay Pending Appeal and less than three weeks before the Court was to hear the Bank's Motions, the Debtors and General Partners filed a motion for stay pending appeal with the BAP in the Appeal of the Valuation Order ("BAP Motion for Stay Pending Appeal").

40. Six days before the scheduled hearing on the Bank's Motions, the Debtors and General Partners filed a motion to adjourn the hearing [Doc. 320] on the bases that this Court no

longer had jurisdiction or it should abstain from adjudicating the Banks' Motions because of the filing of the BAP Motion for Stay Pending Appeal.

41. On February 28, 2012, the Court entered the Order Denying Motion to Adjourn Hearing [Doc. 325], finding that this Court did have jurisdiction to hear the Bank's Motions.

42. At the hearing on February 29, 2012, the Court determined that an evidentiary hearing was necessary to adjudicate the Bank's Motions. By an Order Scheduling Evidentiary Hearing [Doc. 329], the Evidentiary Hearing was scheduled for April 18, 2012. Pursuant to the same order, various deadlines were set, including a deadline of April 4, 2012, for the parties to submit joint stipulations. The Bank timely submitted proposed stipulations as ordered by the Court. Only after the Court held a telephonic show cause hearing on April 16, 2012, did the Debtors engage in any meaningful discussions and negotiations as to the joint stipulations of fact, and on April 17, 2012, the Joint Stipulations [Doc. 367] approved by both the Bank and the Debtors were filed.[12] The Joint Stipulations were substantially in the form originally proposed by the Bank to the Debtors on April 3, 2012 and filed by the Bank on April 4, 2012.

43. More than five months after entry of the Valuation Order, Debtors still had not filed an amended plan and disclosure statement in compliance with the Court's Valuation Order. Therefore, the Court entered a second Order to File Amended Disclosure Statement and Plan [Doc. 328] requiring the Debtors to file any further amendments to the First Amended Plan and First Amended Disclosure Statement on or before March 14, 2012. A hearing on approval of the disclosure statement was scheduled for April 18, 2012.

44. On March 5, 2012, the BAP denied the BAP Motion for Stay Pending Appeal filed in the Appeal of the Valuation Order.

[12] *Compare* Debtors' first response to the Bank's proposed joint stipulations [Doc. 372] with the Bank's first proposed joint stipulations [Doc. 349] and final Joint Stipulations [Doc. 377] as filed by the parties.

The Second Amended Plan and Disclosure Statement

45. As ordered, the Plan Proponents filed a Second Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("Second Amended Plan") [Doc. 333] and a Second Amended Disclosure Statement Under 11 U.S.C. § 1125 in Support of Second Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("Second Amended Disclosure Statement") [Doc. 334].

46. Again, the Plan Proponents failed to attach any projections to the Second Amended Disclosure Statement, and it was necessary for the Court to order [Doc. 341] their counsel to file a supplement to the Second Amended Disclosure Statement providing the exhibits referred to in the disclosure statement which included financial information, projections, and a liquidation analysis. This information, at a bare minimum, was obviously essential for the Bank and all other creditors to have adequate information to make an informed judgment regarding the Second Amended Plan. This Court considers it inexcusable that the Plan Proponents again withheld critical information from its creditors until ordered to supplement the Second Amended Plan and Disclosure Statement. The supplement [Doc. 342] was filed on April 2, 2012.

The Third Amended Plan and Disclosure Statement

47. On April 5, 2012, the Plan Proponents filed a Third Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("Third Amended Plan") [Doc. 355] and the Third Amended Disclosure Statement Under 11 U.S.C. § 1125 in Support of Third Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners ("Third Amended Disclosure Statement") [Doc. 356].[13] The Third Amended Plan provides for alternative treatments of the Bank's claims depending on whether the Valuation Order is affirmed ("Alternate Plan A") or reversed ("Alternate Plan B").

[13] Because the treatment of the Bank's secured and unsecured claims in the Third Amended Plan is substantially similar to the treatment in the Second Amended Plan, the Court provides a discussion of the Bank's treatment in the Third Amended Plan, highlighting any substantial differences between the Second and Third Amended Plans.

48. The Third Amended Disclosure Statement set forth the following values with respect to the Bank's secured and unsecured claims:

LIHTC Property	Bank's Claim Per Proofs of Claim	Court Value of LIHTC Property (Doc. 252)	Debtors' Proposed Value as of June 2012 of Bank's Secured Claim	Debtors' Proposed Value as of June 2012 of Bank's Unsecured Claim
Creekside Senior Apartments	1,272,589.35	1,058,718.67	993,090.67	279,498.68
Franklin Place Senior Apartments	863,467.53	816,244.42	732,805.42	130,662.11
Nicholasville Greens Townhomes	714,857.43	467,475.86	437,478.86	277,378.57
Pennyrile Senior Apartments	466,294.67	1,201,188.44	500,498.14	0.00
Park Row Senior Apartments	1,037,461.15	1,592,427.01	1,092,937.59	0.00

49. As is apparent from the above chart, the Plan Proponents failed to comply with the Court's Valuation Order and used values lower than those set by the Court for Creekside, Franklin Place and Nicholasville Greens.[14] They failed to abide by their own statements that the purpose of the Valuation Hearing was to obtain values of the LIHTC Properties for use in the confirmation, plan and disclosure statement process. Their failures belie their motives for their request for the Valuation Hearing which caused a substantial delay in this case.

50. A further deficiency in the Third Amended Plan and Disclosure Statement is the utter failure of the Plan Proponents to provide any explanation of their calculations in arriving at their values of the LIHTC Properties.

<u>Alternate Plan A</u>

51. As noted above, Alternate Plan A of the Third Amended Plan is effective unless or until the Valuation Order is reversed.

52. Under Alternate Plan A, the Bank's treatment of its Allowed Secured Claims with respect to its two oversecured properties, Pennyrile and Park Row, is as follows: The Bank's

[14] The increase in values for Pennyrile and Park Row are due to the addition of interest on those oversecured claims between the Petition Date and the Effective Date. However, the Plan Proponents failed to disclose how those figures were calculated.

secured claim against these two Debtors includes interest between the Petition Date and the Effective Date. From the Effective Date until the respective Debtor's Tax Credit Period Expiration Date (September 30, 2016 for Pennyrile and September 30, 2015 for Park Row), the Bank will receive monthly payments calculated by dividing a number which the Debtors assert is the value of the Remaining Tax Credits as of June 12, 2012 ($150,000 for Pennyrile and $500,000 for Park Row[15]), by the number of months from the Effective Date to the respective Debtor's Tax Credit Period Expiration Date. During this time period, the Bank will receive interest at 4.75% per annum on the value of the real estate[16] as determined under the Valuation Order. From the respective Debtor's Tax Credit Period Expiration Date to the tenth anniversary of the Effective Date, the Bank will receive monthly payments on its Allowed Secured Claim amortized over 20 years with a balloon payment due on or before the tenth anniversary.

53. The Bank's treatment on its Allowed Secured Claim with respect to the undersecured properties, Creekside, Franklin Place and Nicholasville Greens, does not include interest between the Petition Date and the Effective Date. Otherwise, the Bank's treatment of these secured claims is the same as that of Pennyrile and Park Row, with two exceptions: (i) monthly payments to the Bank between the Effective Date and each Debtor's respective Tax Credit Period Expiration Date will be the value by which the Debtor's Remaining Tax Credits diminish each month, and (ii) with respect to Nicholasville Greens, the monthly payments

[15] Additional numbers for which Debtors provide no explanation of how they are calculated.

[16] It is unclear why the Plan Proponents chose to specify that interest is calculated on the value of the real estate in the Valuation Order. The Court's Valuation Order determined the value of the Bank's collateral, which is the real estate, taking into consideration the impact of the Remaining Tax Credits. The Plan Proponents are playing games with the Valuation Order by suggesting that the Court established a separate value for the Tax Credits. As is clear from a full review of the valuation factors, the Court only valued the real property. This is best illustrated by the calculation of the real estate taxes, which is calculated on the total value of the real estate including the impact of the Remaining Tax Credits. Thus, the value of the Remaining Tax Credits is not intended to be separate from the market value of each apartment complex. Therefore, under this Court's interpretation of the Third Amended Plan, the value of the "real estate" is the total market value of each apartment complex given in the Valuation Order and as set forth in ¶ 29 above.

between the Tax Credit Period Expiration Date and the tenth anniversary of the Effective Date are amortized over 15 years instead of 20 years. The Tax Credit Period Expiration Dates for the undersecured properties are: Creekside April 30, 2016; Franklin Place August 31, 2016 and Nicholasville Greens November 30, 2015.

54. Under Alternate Plan A, the Bank's treatment on its Class 3 Allowed Unsecured Deficiency Claims is still identical to the treatment of Class 4 general unsecured claims: No payments will be made to the Bank until after the Tax Credit Period Expiration Date applicable to each Debtor. Further, since payments will not commence on the Bank's unsecured claims until the first business day of the first full calendar quarter following the applicable Tax Credit Period Expiration Date, payments will be delayed an additional three or four months after the end of the Tax Credit Period Expiration Date. Therefore, unsecured payments will not commence for Creekside until 47 months after the Effective Date; for Franklin Place until 51 months after the Effective date; and for Nicholasville Green until 42 months after the Effective Date. Once started, the Bank will receive quarterly payments plus interest at the rate applicable to federal judgments (.18%) amortized over 20 years with respect to Creekside and Franklin Place and over 15 years with respect to Nicholasville Greens. On or before the tenth anniversary, the Bank will receive a balloon payment.

55. Under Alternate Plan A, there is also an Alternate Unsecured Claim treatment available to the Bank and all general unsecured creditors of a 35% cash payment on the Effective Date in full satisfaction of the debt.

<u>Alternate Plan B</u>

56. Alternate Plan B in the Third Amended Plan comes into effect if the Valuation Order is reversed and the effective date for implementation of Alternate Plan B would be the date of any such reversal ("Reversal Date"). Until such event, however, payments under the Third Amended Plan are to be made pursuant to Alternate Plan A.

57. Under Alternate Plan B, the Bank's treatment on its Allowed Secured Claims with respect to each of the Debtors is as follows: From the Reversal Date until the seventh anniversary of the Effective Date, the Bank will receive monthly payments on its Allowed Secured Claims amortized over 20 years, plus interest at 4.75%. On or before the seventh anniversary, the Bank will receive a balloon payment.

58. Under Alternate Plan B, the Bank is required to return Plan Overpayments to the Debtors. "Plan Overpayment" is defined as any payment the Bank received with respect to its Allowed Secured Claims in excess of what it would have received had the Valuation Order been reversed on the Effective Date.

59. In addition, with respect to Pennyrile and Park Row, the Bank's Allowed Secured Claims will be immediately reduced by interest accruing between the Petition Date and the Effective Date and any attorney fees included in such claims.

60. Under Alternate Plan B, with respect to its Allowed Unsecured Deficiency Claims, the Bank is again treated the same as the general unsecured Class 4 claimants. The Bank will not receive any payments until after the Reversal Date at which time quarterly payments (amortized over 20 years) plus interest at the rate applicable to federal judgments (.18%), will be made until the twelfth anniversary of the Effective Date. On or before the twelfth anniversary, the Bank will receive a balloon payment.

61. Under Alternate Plan B, there is also an Alternate Unsecured Claim treatment available to the Bank which is substantially the same as under Alternate Plan A.

Sources of Plan Funding

62. There are significant differences in the source of funding between the First Amended Plan and the Second Amended Plan. Alliant Capital, Ltd. ("Alliant Capital") is introduced for the first time in the Second Amended Plan as a major source of funding. The Plan Proponents emphasize that the "Additional Plan Funding is ***backed by a guaranty*** from Alliant Capital, Ltd." (Second Amended Disclosure Statement at 31 (emphasis in original)). Further,

the definition of "Additional Plan Funding" in the Second Amended Plan provides that Alliant Capital, Ltd. provides a guaranty to the General Partners for the benefit of the Debtors' Estates and **Bank of America**. (Second Amended Plan ¶ 1.1 (emphasis added)).

63. However, a copy of the guaranty executed by Alliant Capital was not attached to the Second Amended Plan. No information is provided regarding Alliant Capital's financial stability or ability to fund the plan. Information on Alliant Capital's affiliation with the Debtors is also missing.

64. Payments to the Bank on its Allowed Secured Claims under the Second Amended Plan were to be made from: (1) Net Operating Income; (2) as necessary and applicable escrow accounts established by Alliant Capital to annually fund cash flow shortfalls, up to the amounts projected in Alternate Plan A Projections ("Plan A Cash Flow Shortfall Escrow") and/or Alternate Plan B Projections ("Plan B Cash Flow Shortfall Escrow"); (3) as necessary and applicable, funding provided by Alliant Capital to fund payments to the Bank from the Effective Date to December 31, 2015, under Alternate Plan A ("Additional Plan Funding"); (4) Net Refinancing Proceeds; and (5) proceeds of a refinancing, sale, transfer, or other disposition of an LIHTC Property, less reasonable costs of such transaction ("Net Transaction Proceeds").

65. Payments to the Bank on its Allowed Unsecured Deficiency Claims under the Second Amended Plan were to be made from Net Operating Income; Capital Contribution, as applicable; the Plan A and/or Plan B Cash Flow Shortfall Escrow, as necessary and applicable; and Net Refinancing Proceeds or Net Transaction Proceeds.

66. Between the time of the filing of the Second Amended Plan on March 14, 2012 and filing of the Third Amended Plan on April 5, 2012, the Alliant Capital "guaranty" was removed from the plan and replaced with a "commitment." (Third Amended Plan ¶ 1.1 (striking guaranty

language and also providing for funding of the Additional Plan Funding on a monthly basis rather than an annual basis[17])).

67. The commitment letter ("Commitment Letter") from Alliant Capital to AREI (rather than directly to the Debtors) is attached as Exhibit C to the Third Amended Plan. The Commitment Letter provides that Alliant Capital commits to funding the Plan A and Plan B Cash Flow Shortfall Escrow, the Additional Plan Funding, and the Additional Plan Funding Reserve accounts so long as a Debtor is not in default under the plan which results in a dismissal or conversion of a Debtor's case or so long as relief from stay or other relief is not given which permits creditors to enforce their state law rights and remedies against a Debtor and/or its property. Alliant Capital's commitment further ceases if a Debtor's case is voluntarily dismissed or converted or upon any other termination of the plan. Apparently so there is no confusion as to the extent of Alliant Capital's "commitment," the letter provides that neither "the commitment to fund provided herein by Alliant Capital nor any other matter herein shall . . . be deemed an assumption or guaranty by Alliant Capital or any of its affiliated entities of any liabilities of the Debtors or their General Partners in connection with the Cases, the Plan, or otherwise."

68. On April 13, 2012, the Bank filed its Objection to Disclosure Statement regarding the Third Amended Disclosure Statement on the bases that it fails to provide sufficient information as to Alliant Capital's role in funding the Third Amended Plan and that the Debtors' classification of the Bank's unsecured deficiency claim into a class separate from the general unsecured claims is an improper attempt at gerrymandering the voting process. The Bank's Objection to Disclosure Statement further requested the Court rule on the classification issue prior to confirmation pursuant to Federal Rule of Bankruptcy Procedure 3013.

[17] An "Additional Plan Funding Reserve Account" is established in the Third Amended Plan to hold funds equal to the aggregate amount of the cash flow shortfall projections for a three-month period as reflected in the Plan A projections. It appears that this account ceases to exist as of the Tax Credit Period Expiration Date for each Debtor.

69. The Evidentiary Hearing on the Bank's Motions was held on April 18, 2012. A hearing on approval of the Third Amended Disclosure Statement was also held and the matters were taken under submission.

70. Subsequent to the Evidentiary Hearing, on April 25, 2012, the Plan Proponents filed a Third Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners (Revised) ("Revised Third Amended Plan") [Doc. 385] and the Third Amended Disclosure Statement Under 11 U.S.C. § 1125 in Support of Third Amended Joint Plan of Reorganization Proposed by the Debtors and the General Partners (Revised) ("Revised Third Amended Disclosure Statement") [Doc. 384].

71. The changes made to the Third Amended Plan by the Revised Third Amended Plan included providing information relating to Alliant Capital's affiliation with the Debtors and corrections of errors in the Debtors' financial projections that were pointed out at the Evidentiary Hearing.

72. The amendments also included projections of the amount of the various balloon payments under Alternate Plans A and B that will be due to the Bank.

73. The structure of the payments under the Revised Third Amended Plan remains the same as that described above with respect to the Third Amended Plan.

THE EVIDENTIARY HEARING

Three witnesses testified at the Evidentiary Hearing. Brian Doran, President and founder of AREI testified on direct by affidavit ("Doran Affidavit") [Doc. 346]. In his affidavit, Mr. Doran testified:

> I am generally familiar with the Debtors' day-to-day operations, business affairs, and books and records. Except as otherwise indicated, I have personal knowledge of the matters set forth herein or have gained knowledge of such matters from Christie George, Senior Vice President of AREI, the Debtors' retained advisors, or the General Partners' retained advisors.

(Doran Affidavit ¶ 4). Mr. Doran further testified that he reviewed the projections filed in connection with the Third Amended Disclosure Statement and believed them to be reasonable and feasible. Finally, Mr. Doran testified that:

> Based upon, among other things, the Debtors' stable financial and operational performance during these cases, the Projections, and the financial support of Alliant Capital, Ltd. under the Third Amended Plan, I believe that the Debtors have a strong likelihood of confirming plans of reorganization and achieving rehabilitations of these cases.

(Doran Affidavit ¶ 27). On cross examination, Mr. Doran conceded that in the aggregate, the Debtors cannot currently meet plan payments and operating expenses under Alternate Plan A of the Third Amended Plan, and that there is an approximate $22,000 monthly deficit in the cash flow projections for Alternate Plan A. A review of the aggregate Alternate Plan A cash flow projections indicates that this negative cash flow status will continue through 2019. This deficit makes the assistance of the General Partners and Alliant Capital critical to the Debtors' success.

On cross examination, Mr. Doran testified that he had reviewed the cash flow projections numerous times with Christie George, the Senior Vice President of AREI, the latest review being within the week before the Evidentiary Hearing. However, he was unable to answer the most basic questions relating to the cash flow projections for either Alternate Plan A or B and in particular why the projections failed to provide for full payment of the Bank's claims. After the Plan Proponents corrected the cash flow projections and submitted the Revised Third Amended Plan and Disclosure Statement, it can be seen that the aggregate deficit under Alternate Plan A will continue until the year 2020 and that that there will also be an aggregate deficit in Alternate Plan B through 2019.

Further, although Mr. Doran knew Alternate Plans A and B were structured with balloon payments and he knew the balloon payments could be achieved, Mr. Doran was unable to provide even a ballpark figure of the anticipated amount of the balloon payments. He had no idea why those figures, although calculated, were not provided in the Third Amended Disclosure Statement. Although the Third Amended Plan speaks in terms of refinancing and/or sale of the

LIHTC Properties to fund the balloon payments, Mr. Doran stated that the intent is not to refinance, but rather to sell the LIHTC Properties.

When pushed on how he was sure that the Debtors would be able to obtain sufficient funds from the sale of the LIHTC Properties to make the balloon payments when Debtors have presently asserted such low market values for the LIHTC Properties, Mr. Doran stated that the values of the LIHTC Properties would be at least what was shown in the Debtors' appraisals if not more. This, he explained—although it is not mentioned in the Third Amended Disclosure Statement—is because once the LIHTC Properties meet the initial fifteen-year restriction period, the properties can be resyndicated. According to Mr. Doran, resyndication results in the LIHTC Properties being worth substantially more than traditional market values. In essence, after year fifteen, the property values escalate with the availability of new tax credits, and a whole new transaction will be completed. This testimony belies the Plan Proponents' attempts at arguing that the Remaining Tax Credits do not impact the value of the real estate. Mr. Doran's own testimony supports that the Tax Credits have a significant impact on the traditional value of the real estate. Finally, Mr. Doran stated that analyses were made of the anticipated fair market values of the LIHTC Properties as of the time the balloon payments are to be made. However, for unexplained reasons, those analyses were not included in the Third Amended Disclosure Statement.

Mr. Doran also testified as to the Plan Proponents' motivation in separately classifying the Bank's Allowed Unsecured Deficiency Claims (Class 3) separate from the general unsecured claims (Class 4). Mr. Doran stated that the Bank has different motivations as a lender than the other general unsecured creditors who are service providers. He also stated that the Bank is a huge competitor of Alliant Capital implying that the Bank would vote against the Third Amended Plan to intentionally harm Alliant Capital. Mr. Doran, however, could offer no evidence that the Bank had any motivation to cause financial harm to Alliant Capital. Mr. Doran's testimony in this regard is further discounted due to the fact that the separate classification of the Bank's Allowed

Unsecured Deficiency Claim was present in the Original Plan and Disclosure Statement—many months before Alliant Capital was introduced as an entity that had a stake in the Debtors' successful reorganizations.

The only other reason Mr. Doran could give for separately classifying the Bank's Allowed Unsecured Deficiency Claim was that "without a doubt Bank of America . . . could wipe out everybody."

Finally, as to Alliant Capital's commitment to "back stop" the cash needs of the Debtors if necessary so that Debtors could meet their obligations under the Third Amended Plan, Mr. Doran testified that as Vice President of Alliant Capital, he had the authority to sign the Commitment Letter on behalf of Alliant Capital and that Alliant Capital is financially able to make such a commitment. Mr. Doran basically testified that Alliant Capital would make whatever payments were necessary under either Alternate Plan A or B in the Third Amended Plan to support Debtors for the purpose of protecting Alliant Capital's own business and to prevent any negative consequences or impact on Alliant Capital's investor pool. However, when questioned by the Court, Mr. Doran admitted that the Third Amended Plan and Disclosure Statement do not currently provide for such support. In fact, the support of Alliant Capital is specifically limited to the amounts set forth in the cash projections, which at the time of the Evidentiary Hearing did not include any estimate of the amount of the balloon payments to be made to the Bank under either Alternate Plan A or B.[18] Further, it is questionable whether Alliant Capital is obligated to cover shortfalls in excess of the projections or any shortfalls given the language of the Commitment Letter as discussed above.

[18] These figures were provided in the cash flow projections attached to the Revised Third Amended Disclosure Statement filed after the Evidentiary Hearing. The definition of "Additional Plan Funding" was also amended in the Revised Third Amended Plan to provide that Alliant Capital would fund the Final Distributions or balloon payments under Alternate Plans A and B to the extent other specified sources were insufficient to fund the Final Distributions. However, no changes were made to the Commitment Letter to include the Final Distributions within the funds provided by Alliant Capital. Nor was the language of the Commitment Letter changed to provide any more assurance that Alliant Capital was legally obligated to provide such funding.

During his testimony, Mr. Doran made it very clear that the main concern for the Debtors and General Partners is not the best interests of the Debtors' Estates and/or Debtors' creditors. Rather, they are extremely concerned that their investors not be harmed by a potential recapture of the Tax Credits that flowed to the investors. Mr. Doran's testimony was that Alliant Capital would do anything to prevent any negative consequences or impact to its investor pool. Mr. Doran testified that after their respective Tax Credit Period Expiration Dates, there is an additional five year period during which the Debtors must continue to comply with the restrictions. Otherwise, as counsel argued in closing, the investors could suffer.

Based on this testimony, it is evident that Alliant Capital's concern about a recapture of the Tax Credits against its investors ends at the time the LIHTC Properties can be resyndicated. Mr. Doran testified that resyndication can occur five years after the Tax Credit Period Expiration Dates. It is clear the balloon payments are proposed to occur *after* the dates the LIHTC Properties can be resyndicated (and after the investors' risk of recapture has expired). With the investors "off the hook" by the time the balloon payments are due, the Court has a serious concern as to Alliant Capital's incentive to continue to fund the Third Amended Plan.

Christie George testified on direct ("George Affidavit') [Doc. 347], that she oversees the preparation of the Debtors' monthly operating reports, and that she has personal knowledge of the Debtors' budgets and ability to implement the terms set forth in the Third Amended Plan. However, Ms. George was also unable to answer questions posed to her regarding why Pennyrile and Park Row were included as unsecured creditors under Alternate Plan A when the Valuation Order provided that the Bank's claims were oversecured with respect to these two Debtors.

Brad Weinberg, partner of Novogradac and the Debtors' appraiser, testified on direct by affidavit ("Weinberg Affidavit") [Doc. 348]. Mr. Weinberg testified that in preparation of his affidavit he reviewed the Third Amended Plan, the Third Amended Disclosure Statement, the cash flow projections for Alternate Plans A & B dated 4-4-2012, and the Valuation Order.

Mr. Weinberg testified generally that in his opinion the Third Amended Plan is reasonable and feasible. Mr. Weinberg based his opinion on the commitment of the General Partners and Alliant Capital to fund certain obligations under the Third Amended Plan and the ready access to the Bankruptcy Court for creditors to enforce their rights under the Third Amended Plan.

On cross examination, Mr. Weinberg testified that he had not reviewed any other documents other than those listed in the Weinberg Affidavit reviewed above. Therefore, as noted by counsel for the Bank, Mr. Weinberg's testimony is flawed in its feasibility conclusion because he did not examine or review the financial data of Alliant Capital and/or the General Partners in reaching his conclusion. As clearly set forth above, the financial wherewithal of the General Partners to make the promised Capital Contribution and most importantly, the financial wherewithal and incentive of Alliant Capital to provide the funds it has committed to provide are essential to the success of the Debtors' Third Amended Plan.

The Court notes that Mr. Weinberg's analysis is further flawed by his assumption that the creditors have ready access to the Bankruptcy Court to enforce their rights under the Third Amended Plan with respect to enforcing any commitment given by Alliant Capital and/or the General Partners. The "commitment" provided by Alliant Capital is illusory at best given the many bases for Alliant Capital to withdraw its commitment.

On balance, the Debtors' witnesses lack credibility, and the actions and inaction of the Debtors speaks louder than their proffered conclusory statements.

LAW AND ANALYSIS REGARDING MOTION TO DISMISS

Bank of America filed the Motion to Dismiss pursuant to 11 U.S.C. § 1112 for cause, on the bases of (i) lack of good faith on the part of the Debtors, (ii) the continuing loss to or diminution of the bankruptcy estate, coupled with the absence of a reasonable likelihood of rehabilitation, and (iii) the Debtors' inability to effectuate a plan. The Bank seeks to have the cases dismissed or in the alternative, converted to cases under Chapter 7.

In their objection to the Motion to Dismiss ("Objection to Dismissal") [Doc. 318] the Debtors and General Partners assert (i) the Court does not have jurisdiction to adjudicate the Motion to Dismiss; (ii) if it does have jurisdiction, the Court should abstain;[19] (iii) the Bank has failed to demonstrate "cause" to dismiss or convert the Debtors' cases; and (iv) the Debtors' cases were not filed in bad faith.

With respect to dismissing or converting a Chapter 11 case to one under Chapter 7, 11 U.S.C. § 1112(b) provides in relevant part:

> (b)(1) Except as provided in paragraph (2) . . . , on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.
>
> (2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter . . . if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—
>
> > (A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and
> >
> > (B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—
> >
> > > (i) for which there exists a reasonable justification for the act or omission; and
> > >
> > > (ii) that will be cured within a reasonable period of time fixed by the court.
>
> . . .
>
> (4) For purposes of this subsection, the term "cause" includes—
>
> > (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
> >
> > . . .
> >
> > (E) failure to comply with an order of the court;
> >
> > . . .

[19] As the Court has previously addressed the jurisdictional issues in its Order Denying Motion to Adjourn Hearing, those issues will not be addressed in this Memorandum Opinion and Order.

> (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court.

11 U.S.C. § 1112(b). The Bank bears the burden of proof on its Motion to Dismiss by the preponderance of the evidence. *In re New Batt Rental Corp.*, 205 B.R. 104, 106-07 (Bankr. N.D. Ohio 1997). Once the Bank establishes that "cause" exists to dismiss the case, then the Court must determine whether Debtors have identified unusual circumstances which establish that conversion or dismissal is not in the best interests of the estate and/or creditors. *See* 11 U.S.C. § 1112(b)(2). Finally, if no unusual circumstances exist, then the Court must determine whether to convert, dismiss or appoint a trustee in the Chapter 11 case. 11 U.S.C. § 1112(b)(1); *see also Keven A. McKenna, P.C. v. Official Comm. of Unsecured Creditors*, No. CA-10-472 ML, 2011 WL 2214763, at *2 (D.R.I. May 31, 2011) (outlining three-step analysis under § 1112(b)).

In addition to "cause" under specific subsections of § 1112(b), the Bank also argues that there is sufficient cause to dismiss the cases because of the Debtors' lack of good faith. "While a number of courts have stated that a debtor bears the burden of establishing its good faith, the Court is unconvinced that a creditor can shift the burden of proof in an action under § 1112(b) merely by alleging that a debtor lacks good faith." *In re New Batt Rental Corp.*, 205 B.R. at 107 (citations omitted). However, the Sixth Circuit has found that where debtor's good faith is put into question, the debtor bears the burden of proving that the filing was made in good faith. *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991) (citing *In re Bingham*, 68 B.R. 933 (Bankr. M.D. Pa. 1987). Based on *Zick*, the Debtors bear the burden of proving that their filings were made in good faith.

Section 1112(b)(4) provides a list of acts or omissions that are included within the meaning of "cause" to dismiss a chapter 11 case. Lack of good faith is not one of the listed acts or omissions, but the list is not all inclusive. 11 U.S.C. § 102(3) ("'include' and 'includes' are not limiting"); *In re Forum Health*, 444 B.R. 848 (Bankr. N.D. Ohio 2011) (list of "causes" provided in § 1112(b)(4) is not exhaustive). The Sixth Circuit has found that the debtor's lack of good faith constitutes "cause" for dismissal under § 1112(b)(1). *See Laguna Assocs. Ltd. P'ship v. Aetna Casualty & Surety Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994) ("we have long acknowledged that 'bad faith may serve as a ground for dismissal of a petition.'") (quoting *Mich. Nat'l Bank v. Charfoos (In re Charfoos)*, 979 F.2d 390, 392 (6th Cir. 1992)); *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985) ("an implicit prerequisite to the right to file is 'good faith' on the part of the debtor, the absence of which may constitute cause for dismissal under § 1112(b)").[20] In determining what constitutes a "lack of good faith," the Sixth Circuit has acknowledged that:

> Good faith is an amorphous notion, largely defined by factual inquiry. Or, as stated on another occasion, no list is exhaustive of all the conceivable factors that could be relevant in analyzing a particular debtor's good faith. Thus, dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. In an effort to offer some guidelines, this circuit has cautioned that dismissal for lack of good faith should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct or gross negligence.

In re Charfoos, 979 F.2d at 393 (internal quotations and citations omitted); *see also In re Lee*, No. 11-12011, slip op. at 12-13 (BAP 6th Cir. Apr. 18, 2012). Good faith analysis in the Sixth Circuit requires consideration of the totality of the circumstances. *In re Laguna Assocs. Ltd. P'ship*, 30 F.3d at 738. "No list [of the indicia of bad faith] is exhaustive of all the conceivable factors which could be relevant when analyzing a particular debtor's good faith." *Id.* (internal quotations and citations omitted). Finally, in determining that a Chapter 7 debtor's bad faith may prevent conversion from a Chapter 13 to Chapter 7, "[t]he Supreme Court has 'emphasized' that, to support a finding of bad faith, the debtor's conduct must have been 'atypical,' and the case must be 'extraordinary.'" *Webb Mtn, LLC v. Whaley (In re Webb Mtn, LLC)*, No. 3:07-CV-437, 2008

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[20] In *In re Laguna Assocs. Ltd. P'ship*, the Sixth Circuit stated that it saw "no substantive difference between the cause requirement for dismissal of the petition under Section 1112(b) and the cause requirements for relief from an automatic stay under Section 362(d)(1)." *In re Laguna Assocs. Ltd. P'ship*, 30 F.3d at 737-78.

WL 361402, *3 (E.D. Tenn. Feb. 8, 2008) (citing *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374-75 n.11, 127 S. Ct. 1105, 1111-12 n.11, 166 L. Ed. 2d 956 (2007)).

I. <u>“Cause” Exists to Dismiss the Debtors’ Cases</u>.

A. <u>Pre-Petition Conduct</u>. In addition to the factors noted above, courts in the Sixth Circuit have looked to the following factors in determining good faith of Chapter 11 debtors:

> (1) the debtor has only one asset;
>
> (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;
>
> (3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;
>
> (4) the debtor's financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action;
>
> (5) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;
>
> (6) the debtor has little or no cash flow;
>
> (7) the debtor can't meet current expenses including the payment of personal property and real estate taxes; and
>
> (8) the debtor has no employees.

Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp., 139 B.R. 828, 832 (W.D. Ky. 1992); *see also Trident Assocs. Ltd. P’ship v. Metro. Life Ins. Co. (In re Trident Assocs. Ltd. P’ship)*, 52 F.3d 127, 131 (6th Cir. 1995) (analyzing debtor’s good faith under factors substantially similar to the above factors and affirming bankruptcy court’s dismissal under 11 U.S.C. § 1112(b) for “cause” based on debtor’s lack of good faith); *In re Laguna Assocs. Ltd. P’ship*, 30 F.3d at 738.

The vast majority of the above factors are present in the Debtors’ cases. However, both *In re Laguana* and *In re Trident* had an additional factor evidencing bad faith. In both of those cases, the debtor’s prepetition conduct was improper. A significant prepetition factor was that in violation of loan documents, the debtor in each of those cases was reorganized into a different entity on the eve of filing bankruptcy. The purpose of the reorganization was to remove general partners from a position of general liability to limited liability. This factor is not present with any of these Debtors and their prepetition conduct does not weigh against them other than the fact that the filings of their petitions were in close proximity to the hearings on the Bank's motions to appoint receivers. That prepetition factor by itself is not sufficient to find that the prepetition conduct of the Debtors rises to the level of the egregiousness present in *In re Laguana* and *In re Trident*.

Further the Debtors point out that the cases cited by the Bank outlining and discussing the factors for determining bad faith all predate the 2005 amendments to the Bankruptcy Code which amendments specifically provide for single asset real estate ("SARE") cases. The gist of Debtors' argument is that SARE cases are not per se impermissible. *See* 11 U.S.C. §§ 101(51B), 362(d)(3); *see also Webb Mtn, LLC v. Whaley (In re Webb Mtn, LLC)*, No. 3:07-CV-437, 2008 WL 361402, *3-4 (E.D. Tenn. Feb. 8, 2008) (SARE factors may be bad faith indicia, but do not, without more, constitute adequate evidence of bad faith to support dismissal of case). The court in *In re Webb Mtn.* found that "[m]ere filing [of bankruptcy] by a business or individual in order to avoid foreclosure is, in and of itself, neither atypical nor extraordinary." *In re Webb Mtn.*, 2008 WL 361402, *4. Although the debtor in *In re Webb Mtn*. shared some of the above characteristics of bad faith, the court there determined that the "mere presence of those characteristics" is insufficient to make a bad faith determination without careful inquiry into the specifics of those factors; i.e., a review of the total circumstances of the case. *Id.*

This Court does not find that the Debtors initial filing of their Petitions was made in bad faith. However, the Debtors' post-petition conduct belies their proffer of good faith as more specifically set forth below.

B. <u>Post-Petition Conduct</u>. Considering the totality of the circumstances in these cases, it is evident that cause exists to dismiss Debtors' cases, such cause includes Debtors' lack of good faith and as defined under subsections (A), (E) and (J) of § 1112(b). The Court finds the Debtors' goal in filing and pursuing the "reorganization" cases was to protect the Debtors' investors and while this in and of itself is not bad faith, their actions in pursuing this goal were taken to the detriment of their creditors to whom they owed a fiduciary obligation. This conclusion is evidenced by:

1. Debtors' unreasonable delay in advancing their cases and their gamesmanship as set forth in findings of fact above and summarized generally as follows:

a. Debtors filing their Original Plan and Disclosure Statement without providing any value for their LIHTC Properties even though they had that information available and failing to provide financial and other critical information;

b. Debtors discontinuing adequate protection payments required by § 362(d)(3)(B) after they filed the Original Plan and Disclosure Statement knowing that they had not filed a plan with a reasonable possibility of being confirmed within a reasonable time;

c. Debtors' delay in filing the motion for valuation hearing after having twice used the necessity of such a hearing to obtain extensions of the exclusivity periods;

d. Debtors' delay in filing the Motion *In Limine* until just before the Valuation Hearing;

e. Debtors' delay of more than five months after the Valuation Hearing in the filing of amendments to their First Amended Plan and Disclosure Statement and not making such filing until ordered to do so by the Court;

f. Debtors' failure to file their Second Amended Plan and Disclosure Statement information following the Valuation Hearing until (again) ordered to do so by the Court and their failure to include in that Plan/Disclosure Statement the LIHTC Property values established by the Valuation Order or other critical financial, liquidation and affiliate information; and

g. Debtors' delay in seeking stays of the Valuation Order both from this Court and the appellate court.

2. Debtors' proposed Plans provisions providing for payment periods with no meaningful distributions to the Bank or unsecured creditors (and thus no meaningful performance requirement or risk of default) until after the recapture period expires as to the investors.

3. Debtors' admitted overriding interest to maximize value for their investors rather than for the estate and their creditors.

4. Debtors' illusory commitment of Alliant Capital to fund their plan.

5. The substantial and continuing diminution of the estate as evidenced by the Joint Stipulations and in the testimony of Mr. Doran at the Evidentiary Hearing.

Based on the foregoing, the Court finds that the Bank has met its burden of showing "cause" for dismissal.

II. Debtors' Lack of Good Faith in Classifying Claims.

The Bank objected alternatively to Debtor's improper classification of claims as evidence of a lack of good faith and further grounds to grant the relief requested by the Bank. This objection is well taken.

A. Classification Generally. The Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Although the Plan Proponents argue that the classification is a plan confirmation issue, Bankruptcy Rule 3013 provides that "the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity holders pursuant to §[ ] 1122 . . . of the Code." FED. R. BANKR. P. 3013. In its Objection to Disclosure Statement, the Bank requests the Court consider its classification objection as a motion under Bankruptcy Rule 3013. Therefore, the Plan Proponents were on notice that claims classification was an issue for the hearing on April 18, 2012. Even absent a motion pursuant to Bankruptcy Rule 3013, it has been found that a bankruptcy court properly granted a motion to dismiss filed by an undersecured mortgagee on the basis that the debtor could not propose a confirmable plan without improperly classifying creditors. *Lumber Exch. Bldg. Ltd. P'ship v. Mutual Life Ins. Co. of N.Y. (In re Lumber Exch. Bldg. Ltd. P'ship)*, 968 F.2d 647, 650 (8th Cir. 1992) (granting motion to dismiss where debtor had no legitimate reason to separately classify mortgagee's unsecured claim from general unsecured creditors' claims; such separate classification was impermissible and was a thinly veiled attempt to manipulate the vote to assure acceptance of the plan by an impaired class and meet the requirements of 11 U.S.C. § 1129(a)(10)).

A straightforward reading of Section 1122 does not require that all similar claims be placed in the same class. The Sixth Circuit has acknowledged as much. *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.)*, 800 F.2d 581, 585 (6th Cir. 1986) ("The statute, by its express language, only addresses the problem of dissimilar claims being included in the same class. It does not address the correlative problem— the one we face here—of similar claims being put in different classes."). However, the Sixth Circuit, acknowledging that allowing similar unsecured claims to be classified differently could lead to abuse in the plan process, stated:

> In this case, [debtor] is using its classification powers to segregate dissenting (impaired) creditors from assenting (impaired) creditors (by putting the dissenters into a class or classes by themselves) and, thus, it is assured that at least one class of impaired creditors will vote for the plan and make it eligible for cram down consideration by the court. We agree with the Teamsters Committee that there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise. Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

U.S. Truck Co., 800 F.2d at 586. The Sixth Circuit clearly recognized, and U.S. Truck Co. had admitted, that U.S. Truck Co.'s purpose in classifying claims in the manner it did was for the purpose of obtaining approval of the plan by an impaired class for purposes of cram down. *Id*. at 586-87. The Sixth Circuit permitted such a classification where the Teamsters Committee's interest in U.S. Truck Co. was substantially different than that of other impaired creditors. *Id.* at 587. Because of the differences, the Teamsters Committee had a different stake in the future viability of the reorganized company and an alternative means of protecting its claim. In allowing the separate classification, the Sixth Circuit further noted that the Teamsters Committee had other Bankruptcy Code protections which prohibited the plan from discriminating unfairly against it and the Bankruptcy Code required that the plan be fair and equitable with respect to the committee. *Id.; see also In re Dow Corning Corp.*, 244 B.R. 634, 645 n.5 (Bankr. E.D. Mich. 1999) (even if plan proponents admit that classification is for purpose of obtaining accepting impaired class, the classification can be upheld so long as there is another legitimate reason supporting the separate classification) (citing *In re U.S. Truck Co.*, 800 F.3d 586 & n.8); *RW Louisville Hotel Assocs., LLC*, No. 10-35356, *slip op*. (Bankr. W.D. Ky. Sept. 30, 2011) (plan confirmation denied where debtor's stated business purpose was suspect and gerrymandering of vote was the only other reason for classification of claims); *In re Am. HomePatient, Inc.*, 299 B.R. 152, 167-68 (Bankr. M.D. Tenn. 2003) ("Classification of unsecured claims is measured by a flexible standard in the Sixth Circuit.").

Interpreting the Sixth Circuit's decision in *U.S. Truck Co.,* the U.S. District Court for the Eastern District of Michigan found that if the stated requirements of § 1122(a) are met, as they are in the cases before this Court, then the question for the Court is not a question of whether substantially similar claims must be placed in a single class. Rather, the inquiry here is whether the classification is arranged so as to gerrymander votes, and the inquiry becomes a question of the Debtors' "good faith" in proposing the plan. *In re Dow Corning Corp.*, 255 B.R. 445, 496 (E.D. Mich. 2000) ("Sixth Circuit's main concern [is] that the classification of claims not [ ] be used to gerrymander votes or that unfair dealing and breach of fiduciary obligations [occur] in the classification of claims.") (citing *In re U.S. Truck Co.*, 800 F.2d at 586-87).

When questioned about the separate classification of the Bank's claim, Mr. Doran's testimony was that "without a doubt Bank of America . . . could wipe out everybody." By this testimony, the Debtors have admitted that the purpose of the separate classification is to gerrymander the voting so Debtors can obtain the favorable vote of an impaired class of claims. Debtors argue, however, that they have legitimate business reasons for such classification. If in fact there is such a reason, then pursuant to *U.S. Truck Co.*, the separate classification may stand. If, however, there is no legitimate business reason, then with their fifth attempt and more than eighteen months after their Petition Dates, the Debtors still have not proposed a confirmable plan.

B. Improper Classification. Plan Proponents argue the following as legitimate business reasons for the separate classification: (i) the Bank's unsecured deficiency claims are (outside of bankruptcy) non-recourse obligations which are entitled to specific treatment under § 1111(b) of the Bankruptcy Code, whereas the unsecured claims of the Debtors' trade creditors are recourse obligations against the Debtors; (ii) the Bank will vote its unsecured deficiency claim to affect the treatment of its secured claims; and (iii) the Bank is a competitor of Alliant Capital.

The Plan Proponents cite *In re Creekside Landing, Ltd.*, 140 B.R. 713 (Bankr. M.D. Tenn. 1992) and *In re Aztec Co.*, 107 B.R. 585 (Bankr. M.D. Tenn. 1989) as support for their separate classification on the basis that outside of bankruptcy the Bank's unsecured deficiency claims are non-recourse obligations. *Creekside Landing* and *Aztec Co.* are distinguishable from the instant cases and are not binding on this Court. In those cases, the bankruptcy court found that the mortgagee "would have every incentive to vote its large deficiency claim to affect the treatment of its *secured* claim by defeating confirmation of *any* plan. On these facts, the debtor is permitted by *U.S. Truck* to separately classify the non-recourse deficiency claim." *Aztec Co.*, 107 B.R. at 587 (first emphasis in original; second emphasis added).

In these cases, however, no evidence was presented that the Bank would vote to defeat confirmation of *any* plan. The Bank has articulated specific objections to the proposed plans; i.e., the significant ten to twelve year maturity dates, particularly where the Bank's loans had matured prepetition and the Bank's concerns about the feasibility of the proposed plans. Debtors chose not to address those objections. As indicated above, testimony and the cash flow projections show that the Debtors cannot fund either Alternative Plan A or B of the Third Amended Plan without the assistance of their General Partners and/or Alliant Capital. The "commitment" given by Alliant Capital to assist the Debtors in funding the proposed plan is illusory without Alliant Capital being legally bound or obligated to do so. Having no obligation to provide funding, Alliant Capital's incentive to fund the plan after the investors' recapture period expires will evaporate.

Further, there was a much more substantial difference between the claims separately classified in *U.S. Truck Co.* and the Bank's claims herein. In that case, the Teamsters Committee's claims were permitted to be placed in a separate class, partially because the claims were held by union employees who had a "virtually unique interest" in that the Teamsters Committee held a *noncreditor* interest; i.e., its members had an ongoing employment relationship with the debtor. *U.S. Truck Co.*, 800 F.2d at 587. Therefore, it was proper to place the Teamsters Committee's claim in a class separate from the other impaired creditors. Here, the Bank is a creditor, not an employee or other noncreditor with a "virtually unique interest" in the Debtors. There is nothing unique about the Bank's interest in the Debtors with regard to its deficiency claim. The Bank has the same interests as other general unsecured creditors *and in fact is afforded the same treatment as unsecured creditors*.

This Court agrees with the Fifth Circuit in *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274 (5th Cir. 1991) that the "state law distinction between Code-created unsecured deficiency claims and other unsecured claims does not alone warrant separate classification." *Id.* at 1280. The Court further finds persuasive the Fifth Circuit's concerns that permitting the separate classification of claims solely on the basis of whether a creditor may or may not elect recourse status under § 1111(b) and thereby obtain the right to vote in the unsecured class is meaningless if the debtor is allowed to disenfranchise such creditor by placing it in a separate class. *Id.* Finally, the Court finds that the Plan Proponents' treatment of Class 3 and Class 4 claims in exactly the same manner is also suspect. *Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496, 502 (4th Cir. 1992) (citing *Greystone* and finding that "where all unsecured claims receive the same treatment in terms of Plan distribution, separate classification on the basis of natural and unnatural recourse claims is, at a minimum, highly suspect").

With respect to the assertion that the Bank is a competitor of Alliant Capital, the Debtors have failed to prove this assertion other than to state that both entities engage in the business of syndicating tax credit properties. Such assertion without any analysis or proof of whether the two entities have engaged in competition with each other for the same investors, is insufficient. More to the point, however, is the total lack of any evidence on the part of the Debtors and General Partners that the Bank has any intention to financially harm Alliant Capital whom it was unaware was even involved in funding the plan until less than a month before the Evidentiary Hearing on the Bank's Motions and the hearing on approval of the Third Amended Disclosure Statement. The timing of the introduction of Alliant Capital into the plan process and assertion of the alleged competition between Alliant Capital and the Bank as a legitimate business purpose is also suspect because the Bank's claim has been separately classified from the general unsecured claims since the filing of the Original Plan and Disclosure Statement over a year ago. Wild speculation without evidence does not amount to a legitimate business purpose to separately classify the Bank's unsecured deficiency claims separately from the general unsecured claims.

The Plan Proponents have failed to present any legitimate business reasons for their claims classification scheme in the Third Amended Plan. Such classification was proposed for the sole purpose of gerrymandering the vote so that the Plan Proponents could obtain an accepting class of impaired claims for the purposes of cramming down their Third Amended Plan under § 1129(a)(10). Based on this improper classification, the Plan has not been filed in good faith and the Plan Proponents cannot achieve confirmation.

III. <u>The Debtors Have Failed to Establish Unusual Circumstances</u>.

With the Bank having established cause for dismissing these cases, the burden shifts to the Debtors to show that unusual circumstances exist and "there is a reasonable likelihood that a plan will be confirmed within . . . a reasonable period of time." 11 U.S.C. § 1112(b)(2)(A).[21] Debtors did not present any evidence establishing unusual circumstances or that they can propose a plan that will be confirmed within a reasonable period of time. As indicated above, the

[21] 11 U.S.C. § 1112(b)(2)(B) does not apply in this case as the basis for dismissal includes subsection (A) of § 1112(b)(4).

current plan and disclosure statement were not proposed in good faith and the Plan Proponents' actions in the eighteen months these cases have been pending show that at this point, the Chapter 11 is a place to park the Debtors while the Tax Credits are utilized and the recapture period expires.

The Debtors may contend that the Appeal of the Valuation Order gives them the right to delay these cases and that the appeal is somehow an unusual circumstance. It is not unusual for some aspect of a Chapter 11 case to be appealed. Further, as Debtors' counsel admitted and as has been shown by the Second Amended Plan and Disclosure Statement, it was certainly possible for Debtors to have quickly filed a plan after entry of the Valuation Order with alternatives pending the outcome of the Appeal of the Valuation Order. There was no need for delaying these cases other than for the benefit of the investors. Debtors have not met their burden under § 1112(b)(2)(A).

IV. Dismissal is in the Best Interest of the Estate and Creditors.

The Bank requests that these cases be dismissed. The Bank is by far the largest creditor of the Debtors, both secured and unsecured. It is also the only active creditor. These are two party cases in which the Bank is undersecured in three of the cases. Although the Bank is oversecured in the other two cases, the value of the LIHTC Properties is rapidly diminishing. Conversion to a Chapter 7 would likely be met with an immediate motion for relief. The Bank can effectively address its interests in state court. The Debtors have offered no reason or preference for conversion (or appointment of a trustee) over dismissal. These jointly administered cases will be dismissed.

CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED that the Motion to Dismiss as to these jointly administered cases is **GRANTED**.

IT IS FURTHER ORDERED that the Motion for Relief from Stay is **DENIED** as **MOOT**.

IT IS FURTHER ORDERED that Approval of the Third Amended Disclosure Statement is **DENIED** as **MOOT**.

IT IS FURTHER ORDERED that the Clerk is directed to file a copy of this Memorandum Opinion and Order in each of the jointly administered cases.

Copies to:
Ellen Arvin Kennedy, Esq.
Robert D. Gordon, Esq.
Daniel E. Hitchcock, Esq.
Rachelle C. Dodson, Esq.

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The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Tracey N. Wise
Bankruptcy Judge
Dated: Wednesday, May 30, 2012
(tnw)
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