UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

IN RE:	**CHAPTER 11**
PREMIER ENTERTAINMENT BILOXI LLC (d/b/a HARD ROCK HOTEL & CASINO BILOXI) AND PREMIER FINANCE BILOXI CORP. **Debtors**	**CASE NO. 06-50975 ERG** **(Jointly Administered)**

OPINION

Premier Entertainment Biloxi LLC (d/b/a Hard Rock Hotel & Casino Biloxi) and Premier Finance Biloxi Corp, Debtors and Debtors in Possession in the above styled Chapter 11 proceedings ("Debtors"), filed the Debtors' Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code. Objections were filed by Pacific Investment Management Company LLC, Deutsche Asset Management, Western Asset Management and Castlerigg Master Investments Ltd. (collectively, the "Majority Noteholders"), as holders and/or managers on behalf of managed funds and accounts of 10 3/4% First Mortgage Notes, and by U.S. Bank National Association ("U.S. Bank") as indenture trustee for holders of Debtors' 10 3/4% First Mortgage Notes. A confirmation hearing was held. Having considered the evidentiary presentation, the testimony of witnesses, and the arguments of counsel, as well as the legal memoranda submitted on behalf of the parties, the court concludes that the Debtors' Joint Plan of Reorganization should be confirmed, conditioned upon the Debtors' increase of the Disputed Liquidated Damages Amount to fund the Disputed Liquidated Damages Escrow described and provided for in the Debtors' Joint Plan of Reorganization and Second Amended Disclosure Statement for Debtors' Joint Plan of Reorganization, as discussed below.

I. FACTUAL BACKGROUND[1]

Premier Entertainment Biloxi LLC d/b/a Hard Rock Hotel & Casino Biloxi, a gaming and entertainment resort along the Mississippi Gulf Coast in Biloxi, Mississippi, was granted a temporary certificate of occupancy on August 26, 2005, after completion of construction. Full service casino and hotel operations were scheduled to commence on or about August 31, 2005, or September 1, 2005. On August 29, 2005, Hurricane Katrina destroyed the casino and damaged related facilities, the hotel and parking garage.

During the months following the storm, the Debtors negotiated with and collected approximately $160.8 million in insurance proceeds from prepetition insurers.[2] On August 15, 2005, two weeks prior to Hurricane Katrina, the Debtors had obtained 14 separate property and casualty insurance policies covering the resort having an aggregate policy limit per occurrence of approximately $181.1 million for property damage and associated business interruption losses, to replace policies previously in effect during the construction phase of the resort.

The insurance proceeds from these policies were collected and deposited with U.S. Bank National Association, indenture trustee and loss payee. U.S. Bank serves as the indenture trustee with respect to $160 million in aggregate outstanding 10 3/4% First Mortgage Notes due 2012,

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[1] Factual background provided herein is taken from pleadings and briefs on file in these proceedings or from the evidentiary presentation.

[2] Disputes may remain with other insurers regarding collection of additional proceeds.

issued pursuant to that certain indenture dated as of January 23, 2004, as amended, between the Debtors, as issuers, and the Trustee, as indenture trustee. The bonds are beneficially held by investors through indirect holding systems and are readily tradable. Pursuant to the Indenture and the Cash Collateral and Disbursement Agreement, proceeds of the bonds were used for the design, construction, furnishing and opening of the resort, and to fund an interest reserve account for the payment of semi-annual interest payments on the bonds. The obligations are collateralized and secured by first priority liens on the resort and Debtors' related rights, including a deed of trust on certain real property and improvements including a hotel, parking garage, restaurants, and a security agreement granting a lien on all of the personal property rights of the Debtors including insurance proceeds related to the resort.

Disbursements were made from insurance proceeds by the Trustee to cover interest payments to the Bondholders, legal fees, insurance experts and certain other expenses. The Debtors and the Trustee were unable to agree upon disbursements of funds for the rebuilding of the resort or to pay trade obligations.[3]

On September 19, 2006, Premier Entertainment Biloxi LLC d/b/a Hard Rock Hotel &

[3] One of the major concerns cited in pleadings and briefs of the Bank and the Noteholders, and an apparent reason for denying disbursement requests, was over the amount of insurance coverage obtained during the hurricane season following Hurricane Katrina that the Bank and Noteholders considered insufficient. Issues relating to escalating costs of insurance premiums and reduction in availability of insurance coverage for the Debtors after Hurricane Katrina were briefed and discussed at length in prior proceedings before the court on the Debtors' motions for authorization to use cash collateral and to obtain postpetition financing. The issues relating to the amount of insurance coverage have been resolved through those proceedings and are not before the court.

Casino Biloxi and Premier Finance Biloxi Corporation,[4] a wholly owned subsidiary of Premier Entertainment Biloxi LLC, filed their petitions for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Mississippi, Southern Division. An order was subsequently entered directing joint administration of the Chapter 11 cases. The Debtors have cited their inability to obtain usage of the insurance proceeds held by U.S. Bank to fund the rebuilding of the casino as a primary reason for filing the petitions for relief. Through various hearings before this court and resulting orders regarding usage of cash collateral, the Debtors obtained authorization to utilize the insurance proceeds for the purposes of rebuilding the resorts. Interests of the Trustee and Noteholders were protected through the process. Rebuilding progressed and the Debtors moved forward toward its plan of reorganization and the confirmation process.

The Debtors' Disclosure Statement and Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code were initially filed on December 12, 2006, approximately three months after the filing of the petition. On February 22, 2007, an amended plan was filed and was noticed out for hearing in the Order Approving the Second Amended Disclosure Statement dated February 27, 2007.[5] A certification was filed with respect to the tabulation of votes on the Debtors' Joint Plan of Reorganization. The tabulation showed 100% acceptance of the Plan by

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[4] Premier Finance Biloxi Corporation was formed to fund capital expenditures in order to qualify for tax-exempt status. Certain expenditures are exempt from sales tax under Mississippi law if purchased with proceeds from industrial development revenue bonds issued by the Mississippi Finance Corporation. Premier Finance Biloxi Corporation does not have any material assets or operations.

[5] A Modification to Debtors' Joint Plan of Reorganization was subsequently filed on May 18, 2007, dealing with the treatment of claims owed to Peoples Bank, and adding Class 4A consisting of the Peoples Bank Premier Finance Claim.

Class 4 (Peoples Bank Secured Claim), Class 7 (General Unsecured PEB Claims),[6] and Class 10 (Affiliate Claims). The tabulation further showed a 96.10% rejection by Class 5 (Secured PEB Bond Claims) and a 95.45% rejection by Class 6 (Secured Premier Finance Bond Claims). Objections to the Plan were filed by the Majority Noteholders and by U.S. Bank as indenture trustee for the holders of Debtors' 10 3/4% First Mortgage Notes in the aggregate outstanding principal amount of $160,000, 000.00.[7]

Under sections 4.5 and 4.6 of the Plan, Classes 5 (Secured PEB Bond Claims) and 6 (Secured Premier Finance Bond Claims) are to receive the principal amount of the Bonds plus accrued interest in cash on the Effective Date (defined in § 1.36 of the Plan), and the amount, if any, of the Disputed Liquidated Damages Escrow to which Bondholders are entitled, in cash solely from the Disputed Liquidated Damages Escrow, promptly after resolution of the Disputed Liquidated Damages Claims by Final Order, including court approved settlement.[8]

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[6] The Debtors' Plan and Disclosure Statement refer to Premier Entertainment Biloxi LLC (d/b/a Hard Rock Hotel & Casino Biloxi) as "PEB", and refer to Premier Finance Biloxi Corp. as "Premier Finance," and collectively refer to them as "Debtors." Those designations may also be used herein.

[7] An objection to confirmation was also filed by Mpact, Inc. and was previously resolved by order dated May 21, 2007. Statements in support of the Debtors' Joint Plan of Reorganization were filed by the Official Committee of Unsecured Creditors, and by LUK-Ranch Entertainment, LLC and BHR Holdings, Inc., creditors and indirect equity holders of the Debtors.

[8] Under section 1.32 of the Debtors' Joint Plan, the Disputed Liquidated Damages Amount means the maximum damages provided in Section 6.02 of the Indenture for prepayment of the Bonds. Section VI (D) of the Second Amended Disclosure Statement provides that "the Plan provides an escrow for the Disputed Liquidated Damages Claims, namely the Disputed Liquidated Damages Escrow, so the Bankruptcy Court can resolve the Disputed Liquidated Damages Claims in due course, including post-confirmation, if necessary, while the Resort is being rebuilt and opened for business." Section 1.34 of the Debtors' Joint Plan provides that the Escrow shall be maintained by U.S. Bank "until such time as the Bankruptcy court determines the Indenture Trustee's and the Bondholders' entitlement to the Disputed Liquidated Damages

Briefs were submitted regarding objections to confirmation by the Majority Noteholders, U.S. Bank, the Debtors, the Official Committee of Unsecured Creditors and International Game Technology ("IGT"), an unsecured creditor with a claim of approximately $14 million. The hearing on confirmation commenced June 18, 2007. Closing arguments were heard June 27, 2007.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. § 1334 and § 157.

Section 1129 of the Title 11 of the United States Code contains the requirements for confirmation of the Debtors' Joint Plan of Reorganization. The burden is on the Debtors to establish the elements necessary for confirmation pursuant to 11 U.S.C. §1129(a) and § 1129(b) by a preponderance of the evidence standard. Heartland Federal Savings & Loan Association v. Briscoe Enterprises, Ltd., II., (In re Briscoe Enterprises, Ltd.), 994 F. 2d 1160 (5th Cir. 1993). The Debtors' brief in support of confirmation contains a lengthy discussion regarding satisfaction of many of the requirements under § 1129(a) that are largely not objected to or disputed. Additionally, the Debtors' evidentiary presentation included testimony from Joseph Billhimer, the President and Chief Executive Officer of Premier Entertainment Biloxi LLC, and President of Premier Finance, and from Todd J. Raziano, the Senior Vice President and Chief Financial Officer of Premier Entertainment Biloxi LLC, regarding the requirements necessary for confirmation. The court finds it unnecessary to discuss those subsections of § 1129(a) and

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Amount by Final Order..."

concludes, based upon testimony and legal arguments presented by the Debtors, that the Debtors have met the requirements, to the extent applicable, contained under § 1129(a)(1), (2), (4), (5), (6), (7), (9), (11), (12), (13), (14), (15), and (16). The remaining sections will be discussed below.

A.

The Majority Noteholders, joined by U.S. Bank as indenture trustee,[9] contend that the Debtors' Joint Plan does not satisfy requirements of § 1129(a)(10) that at least one impaired class of claims has accepted the plan.

Subsection (a)(10) of § 1129 provides that:

> **11 U.S.C. § 1129. Confirmation of plan**.
> (a) The court shall confirm a plan only if all of the following requirements are met:
> . . .
> (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10).

Under the Debtors' Plan and Modification to the Plan, Classes 4 (Peoples Bank Secured PEB Claim), Class 4A (Peoples Bank Premier Finance Claim), Class 5 (Secured PEB Bond Claims), Class 6 (Secured Premier Finance Bond Claims), Class 7 (General Unsecured PEB Claims), Class 8 (General Unsecured Premier Finance Claims) and Class 10 (Affiliate Claims) are designated as impaired classes. According to the tabulation of ballots, the Plan was accepted

[9] Without briefing this issue separately, U.S. Bank joined the arguments of the Majority Noteholders on the § 1129(a)(10) and (a)(3) issues.

by impaired Classes 4, 7 and 10.[10] Additionally, the accepting vote of class 4A was allowed during the confirmation hearing. The technical requirements of acceptance of the plan by an impaired class pursuant to § 1129(a)(10) have been met by the Debtors.

The Majority Noteholders argue that the Debtors' Plan artificially impairs classes of creditors, specifically Class 7 and Classes 4 and 4A, for the sole and improper purpose of creating an accepting impaired class of non-insider creditors, and that the Plan is not proposed in good faith pursuant to § 1129(a)(3)[11] and § 1129(a)(10) and cannot be confirmed. Under the Debtors' Plan, Class 7 (General Unsecured PEB Claims) will receive 100% of their claims with post-petition interest at the federal judgment rate. The Plan provides that each holder of an Allowed General Unsecured PEB Claim shall receive Cash in an amount equal to 50% of its claim on the Effective Date of the Plan, and the remaining 50% within 60 days thereafter. Testimony indicated that Class 7 holds approximately $38 million in claims. The class voted 150 to 0 in favor of the Plan. The Majority Noteholders argue that the Debtors have the liquidity

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[10] Class 10 Affiliate claims are held by insiders of the Debtors pursuant to the Debtors' Disclosure Statement and, therefore, acceptance by this class does not satisfy § 1129(a)(10) which excludes insider acceptance, and it is not discussed herein.

[11] Section 1129(a)(3) requires that, "The plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). In Brite v. Sun Country Development Inc., (In re Sun Country Development, Inc.), 764 F. 2d 406 (5th Cir. 1985), the court held that:

> The requirement of good faith must be viewed in light of the totality of circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code to give debtors a reasonable opportunity to make a fresh start. Public Finance Corp. v. Freeman, 712 F.2d 219, 221 (5th Cir.1983). Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied. See In re Hewitt, 16 B.R. 973, 981 (Bankr.D.Alaska 1982) (whether petition for reorganization was filed in good faith).

Id. at 408.

necessary to pay non-insider unsecured claims in full on the Effective Date, that the short delay in payment does not constitute impairment, and that a claim is not impaired if rights are altered solely by the debtors' exercise of discretion.[12]

The Majority Noteholders also argue that the Plan's treatment of the Class 4 Peoples Bank Secured Claim constitutes artificial impairment that does not satisfy § 1129(a)(10) and § 1129(a)(3). The Peoples Bank Secured Claim relates to a $1.25 million advance on a $10 million secured line of credit with interest at LIBOR plus 4.25%. The Debtors' Plan provides that Peoples Bank shall receive the principal amount of the loan on the Effective Date plus accrued interest at 7%, a reduction from the contractual rate of interest. The Majority Noteholders point out that Peoples Bank was originally in Class 3 and was unimpaired, but when the Debtors' Plan was modified to provide postpetition interest to Class 7, it was also modified to separately classify the Peoples Bank claim and to provide interest on the claim at a slightly reduced interest rate. The Majority Noteholders also argue that the Trustee is holding funds in escrow for the payment of the Peoples Bank claim demonstrating the Debtors' liquidity to pay claims, and that assent of a "barely impaired" creditor does not advance the purposes of § 1129(a)(10).

Regarding classification, the Debtors respond, initially, that the claims in Classes 4[13] and 7 have been properly classified in accordance with Phoenix Mutual Life Insurance Company v.

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[12] The Majority Noteholders arguments include citations to Sandy Ridge Development Corp. v. Louisiana National Bank (In re Sandy Ridge Development Corp.), 881 F. 2d 1346 (5th Cir. 1989) and Windsor on the River Associates, Ltd. v. Balcor Real Estate Finance, Inc. (In re Windsor on the River Associates, Ltd., 7 F. 3d 127 (8th Cir. 1993) in support of its arguments regarding payments proposed to be made after the Effective Date. The circumstances of these cases are distinguishable by those of the Debtors, described herein.

[13] References to Class 4 also includes reference to Class 4A where applicable.

Greystone III Joint Venture (In re Greystone III Joint Venture), 995 F. 2d 1274 (5^{th} Cir. 1991). The court agrees with the Debtors' arguments that good business reasons justify separate classification of the Peoples Bank claim where treatment is not the same as other secured claims and where collateral is unique as to other secured creditors.[14] The Debtors have justified an interest rate lower than the contractual amount because the underlying loan was never fully funded. As for the general unsecured Class 7 claims, the Plan has appropriately classified these non-insider claims against PEB separately.

Whether a class is impaired under § 1129 may be determined by reference to § 1124, which provides:

> 11 U.S.C. § 1124. Impairment of claims or interests
>
> Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan –
>
> > (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; ...

11 U.S.C. § 1124(1). As pointed out by the Debtors, Classes 4 and 7 are impaired under the Plan. Impairment in these classes includes not being provided the contractual rates of interest on claims, and not being provided other contractual fees and costs, and with respect to Class 7, claims are not being paid in full on the Effective Date of the Plan.[15] The Majority Noteholders

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[14] Class 3 consists of construction lien holders owed $720,000. The Peoples Bank Class 4 loan is a $10 million credit facility.

[15] See, L & J Anaheim Associates v. Kawasaki Leasing International, Inc. (L & J Anaheim Associates), 995 F. 2d 940 (9^{th} Cir. 1993)(any alteration of rights constitutes impairment even if value is enhanced). As pointed out by the Debtor, the 1994 Bankruptcy Reform Act deleted subparagraph (3) from § 1124 resulting in payment in full no longer rendering a class of claims unimpaired. In re Valley View Shopping Center, L.P., 260 B.R. 10

have argued that the claims in these classes are artificially impaired for the purpose of creating an accepting impaired class under § 1129(a)(10). The Debtors argue the artificial impairment doctrine is now defunct, citing among other cases, In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, (Bankr. D.N.J.2000).[16]

The court concludes that to the extent that the artificial impairment doctrine may remain viable, if at all, the record, arguments of counsel and cases cited do not justify a determination that impairment under the Debtors' Plan is artificial, but rather, shows that the alteration of legal,

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(Bankr. D. Kan. 2001), the court commented:

> Since the amendment, some courts continue to apply the doctrine of artificial impairment without addressing the effect of the 1994 amendments. But another line of cases that follows the solid analysis in In re Atlanta-Stewart Partners, recognizes that with the deletion of the cash out exception, since classes that receive payment in full on the effective date of the plan are impaired, claims that are cashed out some time after the effective date must be impaired, as well.

Id. at 32.

[16] In that case, the court commented as follows:

> Since the passage of the 1994 amendment to § 1124 ... which confirmed that even a class of creditors receiving full cash payment on the effective date of the plan is impaired, and may therefore vote as an impaired accepting class for § 1129(a)(10) purposes, the concept of artificial impairment is much more difficult to justify. In re Atlanta-Stewart Partners, 193 B.R. 79 (Bankr.N.D.Ga.1996). I join the courts which have followed Atlanta-Stewart to conclude that "a claim need not and cannot be artificially impaired." John R. Clemancy and Glenn A. Saks, "Even an Act of Congress Can't Stop the Fight Over Artificial Impairment", 17 Am.Bankr.Inst.J. 18, 25 (Nov.1998). See, e.g., In re Crosscreek Aparts., Ltd., 213 B.R. 521, 536 (Bankr.E.D.Tenn.1997). There is no ambiguity in the statute. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). Under the statutory scheme for the classification and treatment of claims, a plan proponent may impair a class of claims. If an impaired class accepts the plan, the requirement of section 1129(a)(10) is satisfied. Of course, the classification and treatment of classes of claims is always subject to the good faith requirements under § 1129(a)(3).

Id. at 240. Cf. In re Combustion Engineering, Inc., 391 F. 3d 190 (3rd Cir. 2004).

equitable or contractual rights, thereby impairment to classes of claims, is based upon logical and justifiable business reasons of the Debtors.[17] The court further concludes that the record is insufficient to show that the Debtors did not act in good faith in proposing their Plan.[18] In fact, where a plan of reorganization proposes to maximize creditors' recovery and to pay creditors in full, the plan may be presumed to be proposed in good faith.[19] Therefore, the court concludes, in

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[17] The Debtors point out that they do not have sufficient cash on the Effective Date to pay secured bond claims, fund the escrow, pay Peoples Bank and pay the general unsecured creditors, rather, they require an exit facility of $180 million to fund these payments. Additionally, the Debtors will incur less interest expense by paying 50% of the General Unsecured Claims on the Effective Date by the ability to draw down less funds under the exit facility at that time, and the possibility of paying funds out of operations rather than borrowing under the facility. It is also noted that this case is distinguishable in that this is a new company without an operating history and the first weeks of operation could be critical with regard to cash flow. Although the evidentiary presentation indicated there may be excess liquidity that could allow payments to be made upon the Effective Date, Raziano, CFO, testified that the company's cash position on the effective date is very thin and indicated the need for flexibility. There are logical business justifications for the proposed delay of large cash payments to creditors to allow this new company to commence operations.

[18] The Majority Noteholders have taken issue with the timing of the Debtors' amendments to the plans as being reflective of an improper manipulation of classes or artificial impairment calculated to gain acceptance of an impaired class for purposes of § 1129(a)(10) requirements. Having reviewed the circumstances, and having noticed the timing and content of modifications, the court is satisfied with the Debtors' explanations regarding the reasons for the changes, i.e. the expedient nature with which the Debtors attempted to have a plan of reorganization on file, logical changes that were made to classifications after further review of claims and negotiation with creditors. Apparent oversights that needed to be corrected were corrected quickly, such as the addition of Class 4A for Premier Finance Biloxi Corporation. Furthermore, there has been no evidence presented to the court to indicate a lack of good faith on the part of the Debtors regarding these issues, and a debtor's obvious intent and desire to have its plan confirmed does not, in itself, prove a willingness to act in bad faith to accomplish such. See, In re Global Ocean Carriers Ltd., 251 B.R. 31, 42 (Bankr. D. Del. 2000)(court noted that while timing suggested that modified treatment was proposed to meet requirements of § 1129(a)(10), court did not desire to adopt a rule that would chill ability of debtor to make deals with creditors to achieve consensual plan or reduce opposition to plan).

[19]See, In re Reinicke, 338 B.R. 292, 296 (Bankr. N.D. Tex. 2006)(there should be a presumption of good faith where substantial unsecured debt is to be satisfied); In re Foxridge

light of the totality of circumstances, that the Debtors have satisfied statutory requirements for confirmation under § 1129(a)(3) and § 1129(a)(10).

B.

The Debtors have satisfactorily complied with all statutory requirements for confirmation under § 1129(a), except the requirement under § 1129(a)(8) that each class has accepted the plan or is not impaired, due to the rejection by Classes 5 and 6. Section 1129(b) provides the statutory requirements for confirmation of a non-consensual plan.

> **11 U.S.C. § 1129. Confirmation of plan**
> . . .
> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
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> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides–
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>> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

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Ltd. Partnership, 238 B.R. 810, 819 (Bankr. W.D. Mo. 1999)(plan satisfied good faith requirement where there was maximization of recovery to creditors and interests holders); In re McCall, 1997 WL 428580 (Bankr. D. D.C. 1997)(plan that provided payment in full of all creditors' claims was proposed in good faith); Ryan v. Loui (In re Corey), 892 F. 2d 829, 835 (9th Cir. 1989)(plan was proposed in good faith where it resulted in payment of all creditors with a substantial portion of estate remaining in the debtor); Financial Security Assurance Inc. v. T-H New Orleans Ltd. Partnership (In re T-H New Orleans Ltd. Partnership), 116 F. 3d 790, 802 (5th Cir. 1997)(good faith is viewed in light of the totality of circumstances and the good faith requirement is satisfied where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success).

> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
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> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C.A. § 1129(b)(1), (2)(A).

1.

The Majority Noteholders and U.S. Bank contend that the Debtors' Plan does not provide the indubitable equivalent of their Claims under § 1129(b)(2)(A)(iii). In Sandy Ridge Development Corp. 881 F.2d 1346, (5th Cir. 1989), the Fifth Circuit commented as follows on the indubitable equivalence requirement:

> Since the "indubitable equivalent" language is part of section 1129(b)(2)(A), it deals only with secured claims, and thus section 1129(b)(2)(A)(iii) can be accurately read to state "the realization of the holders of secured claims of the indubitable equivalent of their secured claims." Since the value of LNB's secured claim is equal to the value of Brightside, a plan which provides that LNB will realize the indubitable equivalent of Brightside will satisfy the requirements of section 1129(b)(2)(A)(iii). The current plan provides that LNB will receive Brightside itself, and since common sense tells us that property is the indubitable equivalent of itself, this portion of the current plan satisfies the "indubitable equivalent" requirement.
>
> Furthermore, this result accords with the development of the term "indubitable equivalence." It is settled that the concept of indubitable equivalence is rooted in the language of In re Murel Holding Corp., 75 F.2d 941 (2d Cir.1935). See 124 Cong. Rec. H 11089 (daily ed. September 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S.Code Cong. & Admin.News 6436 at 6475. In Murel, the court stated that

> "a creditor who fears the safety of his principal will scarcely be content with ... [interest payments alone]; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that ... unless by a substitute of the most indubitable equivalence." Murel, 75 F.2d at 942 (emphasis added).
>
> The key word is "substitute."

Id. at 1350 (footnote omitted).

The Debtors commented as follows regarding the indubitable equivalence requirement:

> Common sense also dictates that cash is the indubitable equivalent of cash; and replacement liens on cash are the indubitable equivalent of liens of cash . . . Under the Plan, the Bondholders are receiving exactly that – the principal amount of their Allowed Claims on the Effective Date plus accrued interest through the Effective Date, plus first priority liens on the Escrow to cover any potential damages to which they may be determined to be entitled. Accordingly, establishment of the Escrow and the granting of liens thereon satisfies the indubitable equivalence requirement.

Debtors' Brief in Support of Confirmation of Debtors' Joint Plan of Reorganization at 44. The court agrees with this reasoning and concludes that payment in cash to the Bondholders on the Effective Date of the Plan in the full amount of their principal and accrued interest to that date, plus first priority liens on the escrow satisfies the technical requirements under § 1129(b)(2) for the realization of the Bondholders of the indubitable equivalent of their claims.[20]

2.

However, as argued by the objecting parties, satisfaction of the technical requirements

[20] The Majority Noteholders and U.S. Bank have argued that they bear risk under the Debtors' Plan, particularly with respect to the escrow. However, the Plan actually eliminates all of the risk to the Noteholders as far as payment on their claims, except as to the damages issues. Additionally, it is noted that risk to the Noteholders, alone, was significantly reduced during the period in which insurance proceeds were held by U.S. Bank.

under § 1129(b) does not render a plan fair and equitable for purposes of the statute. In Federal Savings & Loan Insurance Corp. v. D & F Construction, Inc. (In re D & F Construction Inc.), 865 F.2d 673 (5^{th} Cir. 1989) the court concluded that:

> Section 1129(b)(1) of the bankruptcy code provides that a debtor may "cram down" its plan over the objection of a creditor "if the plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Section 1129(b)(2) then sets forth requirements which must be met for a plan to be "fair and equitable." [FN2] A plan which does not meet the standards set forth in § 1129(b)(2) cannot be "fair and equitable." However, technical compliance with all the requirements in § 1129(b)(2) does not assure that the plan is "fair and equitable." 5 Collier on Bankruptcy ¶ 1129.03 at 1129-52 (15th ed. 1988). Section 1129(b)(2) merely states that "the condition that a plan be fair and equitable with respect to a class includes the following requirements...." 11 U.S.C. § 1129(b)(2) (emphasis added). Section 102(3) of the bankruptcy code states that the word "includes" is not limiting. 11 U.S.C. § 102(3). The sponsors of the Bankruptcy Reform Act of 1978 noted:
>
>> Although many of the factors interpreting 'fair and equitable' are specified in paragraph (2), others, which were explicated in the description of section 1129(b) in the House report, were omitted from the House amendment to avoid statutory complexity and because they would undoubtedly be found by a court to be fundamental to 'fair and equitable' treatment of a dissenting class.
>
> 124 Cong.Rec. 32,407 (1978). Section 1129(b)(2) sets minimal standards plans must meet. However, it is not to be interpreted as requiring that every plan not prohibited be approved. A court must consider the entire plan in the context of the rights of the creditors under state law and the particular facts and circumstances when determining whether a plan is "fair and equitable." See In re Spanish Lake Associates, 92 B.R. 875, 878 (Bankr.E.D.Mo.1988); In re Edgewater Motel, Inc., 85 B.R. 989, 998 (Bankr.E.D.Tenn.1988).

Id. at 675 (footnote omitted). The objecting parties argue that the Plan is not fair and equitable:

> By failing to satisfy the Noteholders' claims in all respects and depriving them of their contractual rights, while fully compensating or leaving unimpaired all junior interests – including equity holders – the Plan does not satisfy the applicable requirements for "fair and equitable" treatment of the Noteholders' secured claims under section 1129(b) of the Bankruptcy Code.

Opening Brief of Majority Noteholders in Support of Objection to Debtors' Joint Plan of Reorganization at 25.[21] U. S. Bank states that, "The real issues . . . are whether the Plan is "fair and equitable" and the Disputed Liquidated Damages Escrow sufficiently funded." Reply Memorandum of U. S. Bank National Association, as Indenture Trustee, in Support of Objection to Confirmation of Debtors' Joint Plan of Reorganization at 14-15.

The Majority Noteholders and U.S. Bank urge applicability of the solvent debtor rule reasoning that solvent debtors must comply with their prepetition contracts and that the role of equitable principles is significantly reduced. U.S. Bank states that under the solvent debtor doctrine a creditor's state law claims must be paid in full under the plan to be fair and equitable, and argues that the doctrine is particularly applicable to postpetition interest and fees including default interest and prepayment premiums.[22] The Debtors, on the other hand, emphasize that the

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[21] As noted by IGT, however:

> Congress' omission of language prohibiting payment of a junior secured class over a senior secured class negates the absolute priority rule with respect to secured creditors. See Corestates Bank, N.A. v. Untied Chemical Technologies, Inc., 202 B.R. 33, 54-55 (E.D.Penn. 1996)(court would not apply absolute priority rule to secured creditors as an implicit requirement to confirmation); In re New Midland Plaza Associates, 247 B.R. 877, 893-94 (Bankr. S.D. Fla. 2000)("absolute priority rule is explicit, not implicit, in § 1129(b)(2)"). Therefore a debtor must simply comply with the requirements of § 1129(b)(2)(A) in treating secured creditors under its plan of reorganization.

IGT's Response Memorandum at 21.

[22] Among other cases, the Majority Noteholders and U.S. Bank rely upon Official Committee of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.), 456 F. 3d 668 (6th Cir. 2006) cert. denied, 127 S.Ct. 1874, 167 L.Ed. 2d 385 (2007); Debentureholders Protective Committee of Continental Investment Corp. v. Continental Investment Corp., 679 F. 2d 264 (1st Cir. 1982); In re 360 Inns Ltd., 76 B.R. 573 (Bankr. N.D. Tex. 1987); In re Vest Associates, 217 B.R. 696, (Bankr. S.D.N.Y,1998)(debtor's solvency is an important factor in determining whether to allow default interest), to support its arguments regarding application of the solvent debtor rule. In the Dow case the court commented that:

requirements for confirmation are set out in § 1129 and that there is no solvency rule or exception articulated in the Code,[23] and makes the further argument that the Debtors are equitably insolvent.

The court does not find it necessary to formally adopt or reject the solvent debtor rule, or to make a determination regarding the Debtors' solvency. The court recognizes, as urged by the Debtors, that the rule is not codified. The court further recognizes, on the other hand, that it is

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> When a debtor is solvent, then, the presumption is that a bankruptcy court's role is merely to enforce the contractual rights of the parties, and the role that equitable principles play in the allocation of competing interest is significantly reduced.

Id. at 679. The Majority Noteholders argue that their contractual rights include prohibition on prepayment of the Notes prior to February 1, 2008, liens securing the Notes, subordination of other debt and liens, and the right to damages, including the prepayment premium for breach of Indenture.

[23] The Debtors cite Liberty National Bank and Trust Co. of Louisville v. George 70 B.R. 312 (W.D. Ky 1987) in which the court stated:

> However, the bankruptcy court below concluded that the only solvency exceptions that survived the enactment of the 1978 Code were those expressly included by Congress in Sections 506(b) and 726(a)(5) stating "If Congress had intended for the solvency exception to relate to secured claims as well as unsecured as evidenced by § 726(a)(5), then it could have included such an exception in § 506(b). It did not, however, do so."
> "It is an elementary rule of statutory construction that we initially look to the plain language of the statute to determine the meaning of legislation." McBarron v. S & T Industries, 771 F.2d 94, 97 (6th Cir.1985).

Id. at 314 -315. See also, Consumer Product Safety Commission v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980)(starting point for interpreting a statute is the language of the statute itself). The Official Committee of Unsecured Creditors commented regarding applicability of the solvent debtor rule:

> As a general principal, bankruptcy courts are often less willing to countenance extensive modifications to the rights of objecting creditors under a plan of reorganization when the debtor is solvent . . . This does not mean, however, that the full value of the objecting creditors' claims as claimed by those creditors must be paid for the plan to be "fair and equitable."

Official Committee of Unsecured Creditors' Memorandum of Law in Support of Confirmation at 27 (citations omitted).

prudent to consider a debtor's solvency in the overall context of determining confirmability of a debtor's plan, in assessing a debtor's ability to provide satisfaction of claims under the plan, and in determining whether a plan is fair and equitable for purposes of § 1129(b). However, the true issue here, is not whether contractual provisions are being enforced where the Debtors may be solvent, but rather, involves a dispute over which contractual provisions are applicable for determining damages or premiums.[24] In this regard, the court does not consider the solvent debtor cases to be applicable to the factual circumstances of this case. The Debtors' Plan, in fact, provides for the principal debt plus contract interest, for damages under the contract (to be held in escrow until determination of entitlement thereto) and for liens to be retained on escrowed funds.[25] Therefore, even if the solvent debtor rule were applied, the court would conclude that

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[24] As stated by U.S. Bank, "the real issue is whether the Debtors' Plan can be crammed down as "fair and equitable" over a dissenting class of creditors with less than full funding of a disputed claims reserve." Reply Memorandum of U.S. Bank at 15.

[25] The Plan also provides, however, for prepayment of the Notes where the Indenture contains a prepayment prohibition. The court recognizes the holding in In re Calpine Corp., 2007 WL 685595 (Bankr. S.D.N.Y. 2007) on the point that such provisions are unenforceable:

> Generally, no-call provisions that purport to prohibit optional repayment of debt are unenforceable in chapter 11 cases . . .The "essence of bankruptcy reorganization is to restructure debt .... and adjust debtor-creditor relationships." See In re Ridgewood Apts. of DeKalb County, Ltd., 174 B.R. 712, 720 (Bankr.S.D.Ohio 1994). It would violate the purpose behind the Bankruptcy Code to deny a debtor the ability to reorganize because a creditor has contractually forbidden it. Continental Securities Corp. v. Shenandoah Nursing Home Partnership, 188 B.R. 205 (W.D.Va.1995).

Id. at 3.

Additionally, though the objecting parties urge application of the solvent debtor rule to argue that contractual provisions should be enforced, it is also noted that the Indenture itself contains provisions for damages or prepayment premiums indicating that such prepayment was contemplated, bargained for, and contractual provisions agreed upon in relation thereto.

the Debtors have complied with contractual obligations in a manner sufficient to satisfy the fair and equitable requirements of § 1129(b).

3.

In the overall context of considering whether the treatment provided to the dissenting classes that have rejected the Plan is fair and equitable, the court looks to the specific treatment in the Debtors' Joint Plan regarding the Disputed Liquidated Damages Escrow and the funding of the Escrow. Under the Plan, the disputed prepayment premium or penalty is to be paid after resolution of the dispute over entitlement to the funds. However, the Debtors' Plan proposal limits the amount to be placed in the Escrow account to the amount of prepayment premium or damages as provided under Section 6.02 of the Indenture.[26] The Majority Noteholders and U.S. Bank object to the amount of the Escrow and have disputed the applicability of this section.

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[26] Section 6.02 of the Indenture includes the following provision:

> If an Event of Default occurs prior to February 1, 2008 by reason of any willful action (or inaction) taken (or not taken) by or on behalf of the Issuers with the intention of avoiding the prohibition on redemption of the Notes prior to such date, then, upon acceleration of the Notes, an additional premium shall also become due and be immediately due and payable in an amount, for each of the years beginning on February 1 of the years set forth below, as set forth below (expressed as a percentage of the principal amount of the Notes on the date of payment that would otherwise be due but for the provisions of this sentence:

YEAR	PERCENTAGE
2004	110.75000%
2005	109.40625%
2006	108.06250%
2007	106.71875%

Indenture § 6.02. The Debtors Plan provides for the Escrow to be funded at the amount provided under this section. The amount provided under this section for the year 2007, at 106.71875%, computes to $10,750,000. The Plan also proposes for $1 million to be included in the escrow for litigation fees and expenses in connection with the dispute. The Debtor notes that under § 6.01, the commencement of a voluntary case constitutes an Event of Default under § 6.02.

They argue that the appropriate section under the Indenture is the defeasance section under 12.01, which "creates a contractual right of Debtors to satisfy their obligations under the Indenture and obtain a release of liens by depositing with the Trustee at any time after February 1, 2007, and prior to February 1, 2008, cash or government securities in an amount sufficient ... to pay the principal due on the Notes on February 1, 2008, and to pay interest and premium payments when and as they become due." Memorandum of U.S. Bank at 7-8.[27] The Debtors argue that it does not intend to redeem the Bonds under that section, but to satisfy the Bonds and cancel the Indenture.

Generally, the court finds that the provision for the Disputed Liquidated Damages Escrow does not discriminate unfairly and is fair and equitable with respect to the claims of the Majority Noteholders and U.S. Bank. Specifically, however, the court finds the Disputed Liquidated Damages Amount to be less acceptable. The court concludes that if it were to limit the Disputed Liquidated Damages Amount to be placed in the Escrow to the amount proposed by the Debtors' Plan, it would in essence be making a judicial determination at confirmation, in favor of the Debtors' argument as to the applicability of § 6.02 of the Indenture over the objection of the

[27] This amount would require $160,000,000 of principal plus $8,600,000 of interest due on August 1, 2007 and on February 1, 2008, plus a prepayment premium in the amount of $8,600,000, or payment in cash or government securities having a value of $185,800,000, after accounting for interest on the government securities between deposit dates and due dates for payments on the Notes. Exhibit No. 142 presented at the confirmation hearing by the Majority Noteholders and U.S. Bank, is entitled "Dollar Shortfall in the Payment/Deposit Proposed by Premier." This exhibit sets out the amounts the objecting parties claim would be required by § 12.01 of the Indenture, and shows the "shortfall" after subtracting amounts proposed by the Debtors to be paid under the Plan, including the escrow. The Exhibit further indicates that Premier would need to deposit $2,960,115.32 more than the Plan proposal to provide sufficient yields on Treasury Bills and Notes.

Noteholders and U.S. Bank, in the face of Plan and Disclosure provisions indicating the escrow would be maintained until such time that entitlement thereto was determined. U.S. Bank has recognized this point in this way:

> Importantly, the Debtors have acknowledged in their Brief that they are willing to deposit the higher Section 12.01 amount if the Court determines that it is required . . . While Debtors argue that the Disputed Liquidated Damages Escrow would be adequately funded with $10,750,000, the whole point of a disputed claims reserve is to avoid the dispute for now and have adequate reserves to pay creditors if the Debtors are ultimately incorrect. Requiring the Debtors to deposit the higher amount as a condition of confirmation would secure the legitimate benefit of avoiding potential delay while at the same time protecting the rights of Noteholders. It would preserve a true bifurcation of the issues regarding the Noteholders' damages or claims relating to the prohibited prepayment. If Debtors reserve only $10,750,000 for these claims, this Court would be forced to make an initial determination on Noteholders' claims now which would complicate the Plan confirmation process and present issues for appeal.

Reply Memorandum of Law of U.S. Bank National Association at 2-3.

The court does not find Section 1.32 of the Debtors' Joint Plan of Reorganization, which limits the Disputed Liquidated Damages Amount for prepayment of the Bonds to the amount provided in Section 6.02 of the Indenture, to be fair and equitable for purposes of § 1129(b), and finds that the funding for the Escrow is insufficient. The Debtors have indicated, however, that "Should the Court determine that the funding for the Escrow is insufficient, the Debtors will satisfy the difference." Debtors' Brief at n. 26. Based upon this commitment by the Debtors to increase the Disputed Liquidated Damages Amount to fund the Escrow, the court finds that the Debtors' Joint Plan of Reorganization does not discriminate unfairly and is fair and equitable with respect to Classes 5 and 6. This finding is conditioned upon the Debtors' modification of the Plan to increase the Disputed Liquidated Damages Amount by $2,960,115.32 as referenced in footnote 27, and as argued by the Majority Noteholders and U.S. Bank, so the dispute is reserved for determination at a later date.

C.

The Majority Noteholders and U.S. Bank also argue that the Plan's exculpation provision[28] and its treatment of the Rank note[29]are not in accordance with Chapter 11 and

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[28] Section 11.7 of the Debtors' Plan contains the Exculpation provision:

> Notwithstanding anything herein to the contrary, as of the Effective Date, none of the Debtors, the Reorganized Debtors, the Administrative Agent, the Exit Facility Lenders and the Creditors' Committee, and their respective officers, directors, members, employees, accountants, financial advisors, investment bankers, agents, and attorneys and representatives (but, in each case, solely in their capacities as such) shall have or incur any liability for any Claim, cause of action or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of, the Reorganization Cases, the formulation, dissemination, confirmation, consummation or administrative of the Plan, property to be distributed under the Plan or any other act or omission in connection with the Reorganization Cases, the Plan, the Disclosure Statement or any contract, instrument, document or other agreement related thereto; provided, however, that the foregoing shall not affect the liability of any person that otherwise would result from any such act or omission to the extent such act or omission is determined by a Final Order to have constituted willful misconduct or gross negligence. Nothing in this Section 11.7 shall limit the liability of the professionals of the Debtors, the Reorganized Debtors, the Administrative Agent, the Exit Facility Lenders and the Creditors' Committee, and the respective officers, directors, members, employees, accountants, financial advisors, investment bankers, agents and attorneys and representatives to their respective clients pursuant to DR 6-102 of the Code of Professional Responsibility.

Debtors' Joint Plan of Reorganization § 11.7

[29] The Rank Note is described in the Debtors' Amended Disclosure Statement. PEB borrowed $10 million from Rank America, Inc. which owns Hard Rock Licensing. The note was acquired by LRE (LUK-Ranch Entertainment, LLC), a wholly-owned subsidiary of Leucadia National Corporation, in April of 2006. (On April 25, 2006, LRE indirectly acquired an interest in PEB by indirectly acquiring equity interest). The Rank note is subordinated to payment of the Bonds. Under the Debtors' Plan, the note is to be reinstated and paid out of available cash after the reopening of the resort. No payments are to be paid in respect of the note until after holders of Bond claims have received principal plus accrued interest on the Bonds and the Disputed

applicable law as required by § 1129(a)(1) and (3), and that the Plan cannot be confirmed on that basis. The Majority Noteholders argue that the Plan cannot provide for discharge, release or exculpations of claims creditors may have against nondebtor parties.[30] They express concern over limiting the creditors' ability to pursue claims and actions, including any against Leucadia and its affiliates relating to actions in connection with the commencement of the petitions. As pointed out by the Debtors, however, the exculpation is limited and does not insulate any party from gross negligence or willful misconduct. Additionally, the court's ruling regarding an increase in the Disputed Liquidated Damages Amount for the Escrow should operate to reduce pursuit of claims by the objecting parties.

Courts have considered various factors for balancing of equities regarding third party injunctions such as follows:

> [C]ourts have analyzed several factors in evaluating whether a release/permanent injunction in favor of a non-debtor third party was appropriate including:
>
> (1) The third party has made an important contribution to the reorganization;
> (2) The release is "essential" or "important" to the reorganization;
> (3) A large majority of the impacted creditors has approved the plan containing the release;
> (4) A close connection between the cases against the third party and the case against the debtor exists; and
> (5) The plan provides for payment of substantially all of the claims affected by the release.
> These factors are not "rigid" and it is not necessary to establish all of them. See In re Master Mortgage Invest. Fund, 168 B.R. 930, 935 (Bankr.W.D.Mo.1994) ("The courts seem to have balanced the five listed factors most often.").

Liquidated Damages Escrow has been funded.

[30] The Noteholders cite Feld v. Zale Corp. (In re Zale Corp.), 62 F. 3d 746 (5th Cir. 1995) to support their argument.

In re Seatco, Inc. 257 B.R. 469, 474 (Bankr. N.D.Tex. 2001), modified, 259 B.R. 279 (2001). The court finds that all of these factors weigh in favor of the exculpation requested by the Debtors' Plan. Additionally, as cited by the Debtor, the type of exculpatory clause provided in the Debtors' Plan is of a typical variety, is narrowly tailored, and includes those parties that contributed to the reorganization process and plan formulation. See, BCPM Liquidating LLC v. PricewaterhouseCoopers, LLP (In re BCP Management, Inc.), 320 B.R. 265 (Bankr. D. Del. 2005)(describes garden variety release, not a general release, typically found in chapter 11 plans); In re PWS Holding Corp., 228 F.3d 224, (3rd Cir. 2000)(refers to release as a commonplace provision in Chapter 11 plans); In re ABB Lummus Global Inc., 2006 WL 2052409 (Bankr. D. Del. 2006)(non-debtor entities that benefitted from release contributed substantial assets or other benefits to the debtor's reorganization).

The Majority Noteholders and U.S. Bank also argue that the treatment of the Rank note violates the subordination provisions of 11 U.S.C. § 510(a):

> The Rank Note, now held by a Leucadia affiliate, is subject to the Rank Intercreditor Agreement and the subordination provisions of sections 4.07 and 4.09 of the Indenture, which provide that no payments are to be made on account of the Rank Note until the Noteholders are paid in cash and in full. To the extent a payment is made in violation of these agreements, such payment must be turned over to the Trustee for the benefit of the Noteholders.

Reply Brief of Majority Noteholders at 23. The Debtors point out that the Intercreditor Agreement expressly allows the Rank Note Holder to receive and accept an instrument of equal priority in a PEB bankruptcy case, and that the holder is receiving an instrument of identical priority. Additionally, as the Debtors argue, there is no impediment to repayment of the Rank note once the Bondholder claims are satisfied. For purposes of the subordination issue and the argument regarding the Rank note, the court finds that the Bondholder claims will be satisfied on the Effective Date by the provision of cash for the full principal amount owed plus contractual interest, and by the funding of the Disputed Liquidated Damages Escrow with the provision for replacement liens thereon.[31]

D.

The court finds that Premier Entertainment Biloxi LLC (d/b/a Hard Rock Hotel & Casino Biloxi) and Premier Finance Biloxi Corporation have satisfactorily met their burden in establishing all of the elements required for confirmation under § 1129(a) and § 1129(b), except as stated herein;[32] that the Debtors' Plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under and has not accepted the Plan; and that the Debtors' Joint Plan of Reorganization should be confirmed, conditioned upon the modification to increase the Disputed Liquidated Damages Amount to fund the Disputed Liquidated Damages Escrow, as discussed herein, so that the disputed issues regarding recovery

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[31] The court notes and agrees with comments set forth by IGT:

> The Debtors simply must comply with the requirements set forth in § 1129(b)(2)(A) in providing for fair and equitable treatment of the Rank Note Claim and Noteholders' Claims. With respect to the Noteholders, the Debtors have undoubtedly succeeded in complying with these requirements by paying the Noteholders' claims in full plus interest and providing the replacement lien on the Disputed Liquidated Damages Escrow. Accordingly, the Plan treatment of the Noteholders' claim does not violate the subordination agreement between the parties and meets the requirements for cramdown set forth in § 1129(b)(2)(A). Likewise, reinstating the Rank Note satisfies § 1129(b)(2)(A) for the Class 9 Rank Note Claim.

IGT's Response Memorandum at 21-22.

[32] This court does not find it necessary to address any other points that may have been raised by the parties for purposes of making this decision to confirm the Debtors' Joint Plan of Reorganization.

of damages, if any, may be reserved for resolution or determination at a later date.[33]

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 30th day of July, 2007.

/s/ Edward R. Gaines
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UNITED STATES BANKRUPTCY JUDGE

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[33] See, Crestar Bank v. Walker (In re Walker), 165 B.R. 994 (E.D. Va. 1994)(bankruptcy court has authority to impose conditions on confirmation of a plan).

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