Dated: February 23, 2024
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
THE LAKE DISTRICT, LLC,
Debtor.

Case No. 23-21496-L
Chapter 11

MEMORANDUM OPINION AND ORDER DENYING CONFIRMATION OF DEBTOR'S SECOND AMENDED PLAN OF REORGANIZATION AS AMENDED

THIS BANKRUPTCY CASE came before the Court for hearing to consider confirmation of the *Second Amended Plan of Reorganization* filed by The Lake District, LLC ("Debtor") on August 18, 2023 [ECF No. 164], as amended on August 25, 2023 [ECF No. 168], September 21, 2023 [ECF No. 179], January 29, 2024 [ECF No. 235], and February 5, 2024 [ECF No. 252] (collectively the "Plan"). Objections to the Plan have been filed by TIG Romspen US Master Mortgage LP ("Romspen") [ECF Nos. 180, 237], and the City of Lakeland, Tennessee, [ECF No. 248]. In connection with confirmation, Romspen has filed its *Motion for Allowance of*

Postpetition Interest, Fees, Costs and/or Charges Pursuant to Section 506(b) [ECF No. 182], to which the Debtor has filed a response [ECF No. 202]. The hearing on confirmation commenced Monday, February 5, 2024, and was completed on Wednesday, February 7, 2024. After the hearing was complete, the Debtor filed a *Fifth Amendment to Second Amended Plan of Reorganization*, February 9, 2024 [ECF No. 257]. Romspen strongly opposes the consideration of this fifth amendment filed after the close of proof. [ECF No. 261].

The assets of the Debtor consist in a partially completed, mixed-used development of real property located in Shelby County, Tennessee, located generally at the corner of Interstate 40 and Canada Road in Lakeland (the "Property"). The proposed Plan is in fact a plan of liquidation rather than reorganization. The Debtor proposes to complete the leasing of its shopping center property and to sell it and all of its other properties within twelve months after the effective date in order to pay Romspen and its other creditors. Romspen has filed a secured proof of claim in the amount of $49,446,186.80. Claim No. 3-1.

The Court has carefully considered the testimony of the witnesses, the trial exhibits, and the entire record in this case and makes the following findings of fact and conclusions of law.

JURISDICTION, AUTHORITY, AND VENUE

Jurisdiction over a contested matter arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. §157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The consideration of the confirmation of a bankruptcy plan arises under the Bankruptcy Code and thus is a core proceeding.

See 11 U.S.C § 1129(a) and (b); 28 U.S.C. § 157(b)(2)(L). The bankruptcy court has authority to enter a final order confirming or denying confirmation of a bankruptcy plan subject only to appellate review. *See* 28 U.S.C. § 157(b)(1). Venue of this contested matter is proper to the Western District of Tennessee because this matter arises in a bankruptcy case pending in this district. *See* 28 U.S.C. § 1409(a).

STIPULATED FACTS

In their *Joint Pretrial Statement* filed January 30, 2024, [ECF No. 238] the Debtor and Romspen stipulated to the following facts:

1. On March 24, 2023 (the "Petition Date"), the Debtor filed a voluntary petition for protection under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") as a single asset real estate ("SARE") case.

2. The Debtor continues to operate its business and affairs as debtor in possession.

3. Prior to the Petition Date, Romspen agreed to make a loan to the Debtor in the original principal amount of up to Sixty Million Dollars ($60,000,000.00) (the "Loan") in connection with the Debtor's mixed-use development of the real property located in Shelby County, Tennessee located generally at Interstate 40 and Canada Road in Lakeland (the "Property").

4. The Loan is evidenced by, *inter alia*, the following documents by and between Romspen and Debtor:

a. that certain Construction Loan Agreement dated February 14, 2020 (as amended, modified and/or restated from time to time, the "Loan Agreement"); and

b. that certain Promissory Note dated February 14, 2020, given by Debtor in favor of Romspen in the original principal amount of the Loan (as amended, modified and/or restated from time to time, the "Note").

5. In connection with the Loan Agreement, the Debtor executed the following documents in favor of Romspen:

a. that certain Open-End Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated as of February 14, 2020, as recorded in the Office of the Register of Deeds of Shelby County, Tennessee at Instrument Number 20017001 (the "Deed of Trust");

b. that certain Pledge and Collateral Assignment of Economic Incentives dated February 14, 2020, recorded together with the Deed of Trust (the "Economic Incentives Assignment");

c. that certain Assignment of Rights Under Covenants, Conditions and Restrictions, Permits and Development Documents dated as of February 14, 2020, recorded together with the Deed of Trust (the "Development Documents Assignment" and, collectively with the Deed of Trust and the Economic Incentives Assignment, the "Recorded Documents");

d. that certain Security Agreement dated February 14, 2020 (as amended, modified and/or restated from time to time, the "Security Agreement"); and

e. that certain Collateral Assignment of Plans, Specifications, Contracts, Licenses and Permits dated as of February 14, 2020 (the "Plans & Specs Assignment" and, together with the Recorded Documents, and the Security Agreement, the "Security Documents").

6. Romspen asserts its security interests in and to Debtor's personal property are properly perfected by virtue of Romspen recording the Deed of Trust, the Economic Incentives Assignment, and the Development Documents Assignment; and by filing a UCC Financing Statement in the Delaware Secretary of State's Office on February 18, 2020, at File No. 2020 1181108.

7. Debtor further assigned to Romspen its right to receive distributions from the Industrial Development Board of the City of Lakeland, Tennessee, a public nonprofit corporation ("Lakeland IDB"), pursuant to that certain Development Agreement dated September 5, 2017, between Lakeland IDB and the Debtor ("Lakeland Development Agreement"). These rights are specifically contemplated in the Economic Incentives Assignment and discussed in the Loan Agreement at Section 7.21.

8. The economic incentives derived from the Lakeland Development Agreement include Tax Incremental Funding ("TIF") reimbursements.

9. Section 9.2 of the Loan Agreement contemplates sales of "Outparcels," which are certain portions of the Property depicted on the approved site plan, for specified release prices. Outparcel sale proceeds were intended to pay down principal which would, in turn, increase availability for further construction cost advances.

10. Section 2.5 of the Loan Agreement required the Debtor to contribute $15,900,000 as an initial equity requirement prior to funding of the initial advance on the Loan. The Debtor's full acquisition costs were included as part of the Initial Equity Requirement. The Debtor satisfied the initial equity contribution.

11. The Loan Agreement also requires, among other things, a Debtor equity infusion of $3 million after completion of the building shell of the project space designated for a grocery store. The grocery store build was to involve a related party, so the $3 million equity infusion was intended to address the related party nature of the space.

12. Under the Loan Agreement, the unpaid principal amount of the Loan accrues interest at the "Interest Rate," which equals 10.75% per annum.

13. During a Default Period or following the Maturity Date, the unpaid principal amount of the Loan accrues interest at the "Default Rate," which equals the Interest Rate plus five percentage points.

14. The Loan had an original maturity date only 18 months after the Loan's inception.

15. Debtor had a six-month maturity extension option, which was subject to certain conditions.

16. The Loan Agreement authorized Romspen, in its sole discretion, to extend a "Maturity Grace Period" of one month after loan maturity.

17. Section 2.1.1 of the Loan Agreement provides that "each advance shall be made in the sole discretion of Lender."

18. Pursuant to Section 7.21 of the Loan Agreement, Debtor is obligated to obtain Lakeland IDB's acknowledgement of the assignment of the Debtor's rights under the Lakeland Development Agreement and the economic incentives relating thereto, including TIF reimbursements.

19. Debtor did not fund the $3 million equity infusion following completion of construction on the grocery store shell on the Stock Market Space.

20. The Debtor was unable to satisfy the maturity date extension conditions.

21. Debtor did not pay the outstanding balance of the Loan when it matured on July 31, 2021.

22. Romspen exercised its discretionary Maturity Grace Period, but Debtor did not repay the Loan when the Maturity Grace Period expired.

23. After expiration of the Maturity Grace Period, Debtor, Romspen, and the guarantors of the Loan ("Guarantors") executed that certain Forbearance & Loan Modification Agreement (the "First Forbearance Agreement") whereby Romspen agreed to conditionally forbear from enforcing

certain of its rights and remedies arising from the Debtor's failure to repay the loan until no later than January 31, 2022.

24. Under the First Forbearance Agreement, the Debtor and the Guarantors acknowledged, among other things, (i) the occurrence of a material adverse effect or Material Adverse Change (as defined in the Loan Agreement); (ii) Debtor's failure to maintain a loan-to-value ratio of not more than sixty-five percent (65%); and (iii) Debtor's failure to repay the Loan in full when it matured on August 31, 2021 (collectively, the "Forbearance Defaults").

25. The Debtor also acknowledged, among other things, that the outstanding principal balance of the loan as of September 1, 2021, was no less than $33,017,973.46; and the enforceability, validity, and collectability of the Loan Documents.

26. Under the First Forbearance Agreement, the parties agreed to modify the "Loan Amount" (as defined in the Loan Agreement) by reducing it from $60 million to $43,489,627.00.

27. In the First Forbearance Agreement, Romspen extended the deadline for the Debtor to obtain Lakeland IDB's consent to the assignment of the Debtor's rights under the Lakeland Development Agreement.

28. As of the end of the forbearance period provided under the First Forbearance Agreement, the Debtor had sold two Outparcels - one that was occupied by Starbucks, and one designated for townhouse construction.

29. Romspen released its lien on those outparcels in connection with receipt of the sale proceeds, applied as a partial principal paydown.

30. At the end of the forbearance period in the First Forbearance Agreement, Debtor failed to repay the Loan and had not obtained Lakeland IDB's consent to the assignment of the Debtor's rights under the Lakeland Development Agreement.

31. On April 8, 2022, Romspen agreed to another period of conditional forbearance until no later than September 31, 2022, as set forth in that certain Second Forbearance & Loan Modification Agreement dated April 8, 2022, but made effective as of January 31, 2022 (the "Second Forbearance Agreement") and executed by Romspen, the Debtor and the Guarantors.

32. Under the Second Forbearance Agreement Debtor acknowledged (i) the Forbearance Defaults; (ii) the outstanding balance of the Loan as of March 21, 2022, as no less than $38,693,750.65 (after application of the Outparcel sale proceeds); and (iii) the enforceability, validity, and collectability of the Loan Documents.

33. Under the Second Forbearance Agreement Romspen also extended the deadline for Debtor to obtain Lakeland IDB's consent to the assignment of the Debtor's rights under the Lakeland Development Agreement to June 30, 2022.

34. Under the Second Forbearance Agreement, the parties agreed to modify the "Loan Amount" to $47,303,161.00.

35. The Second Forbearance Agreement amended the Loan Agreement to substitute a new Schedule II listing the sources and uses of loan funds. Substituted Schedule II provided for subsequent advances of $4,959,303.77 to construct improvements in the Project, $1,131,790.00 to pay for tenant improvements, $213,118.66 to pay for leasing commissions and $94,428.00 to pay for miscellaneous expenses in accordance with the Budget. Following entry into the Second Forbearance Agreement, Romspen advanced $2,062,596.94 towards the foregoing expenses. Substituted Schedule II also contemplated an advance of $3,401,425.46 to fund an interest reserve for Romspen and $793,064 to pay fees and expenses to Romspen. These advances were made.

36. Under the Second Forbearance Agreement, the Debtor agreed, among other things, to: (i) make monthly interest payments to be paid out of the interest reserve; (ii) make a $2 million

paydown of the Loan by no later than July 31, 2022, in connection with the sale of Outparcels; and (iii) establish a restricted account and to deposit all collected rents into such account, with any collected rents not timely deposited to be held in trust for Lender's benefit.

37. The Debtor has not made any monthly interest payments since the depletion of the interest reserve on or about July 19, 2022, including after the Petition Date.

38. Since execution of the Second Forbearance Agreement, Debtor has not deposited all collected rents into a restricted account.

39. Debtor failed to repay the Loan in full upon the expiration of the conditional forbearance period set forth in the Second Forbearance Agreement, which date was no later than September 31, 2022.

40. Romspen, through counsel, issued a letter on December 22, 2022, demanding repayment in full by no later than January 6, 2023.

41. On February 24, 2023, the first notice of a non-judicial foreclosure sale of the Property, scheduled for March 24, 2023, was published in *The Daily News*.

42. Debtor filed this bankruptcy case the morning that the non-judicial foreclosure sale of the Property was scheduled.

43. On May 5, 2023, Romspen filed a proof of claim in the total amount of $49,446,186.80. (Claim No. 3-1).

44. On September 21, 2023, Romspen filed its *Motion for Allowance of Postpetition Interest, Fees, Costs and/or Charges Pursuant to Section 506(b)* (ECF No. 182) (the "506(b) Motion"). On November 2, 2023, the Debtor filed its *Response to the 506(b) Motion* (ECF No. 202).

45. Since the Petition Date, Debtor has sold Outparcel Lots 2, 3, and 4 to Chick-Fil-A Inc. ("CFA") for a gross purchase price of $3,000,000.00, less a $350,000.00 holdback for the installation of a traffic signal at the entrance to the CFA Outparcels. (ECF No. 174).

46. On June 22, 2023, Debtor filed its proposed *Plan of Reorganization* (ECF No. 100) and accompanying *Disclosure Statement* (ECF No. 101).

47. The Debtor subsequently filed an *Amended Plan of Reorganization* on August 15, 2023 (ECF No. 161), a *Second Amended Plan of Reorganization* on August 18, 2023 (ECF No. 164), a *First Amendment to the Second Amended Plan of Reorganization* on August 25, 2023 (ECF No. 168), a *Second Amendment to the Second Amended Plan of Reorganization* on September 21, 2023 (ECF No. 179), and a *Third Amendment to the Second Amended Plan of Reorganization* on January 29, 2024 (ECF No. 235).

48. At a high level, the Plan provides for (a) a one-year period to repay Romspen's claim in full, accruing interest at a market rate; (b) a one-year marketing period for Debtor to attempt to sell the Property and/or refinance the debt owed to Romspen.

49. Romspen filed its Objection to the Plan on September 21, 2023. (ECF No. 180) and its Supplemental Objection to the Plan on January 30, 2024. (ECF No. 237).

FINDINGS OF FACT

The Motion for Relief from Stay

In its prior Memorandum Opinion issued June 28, 2023, in connection with Romspen's motion for relief from stay, the Court credited the testimony of Romspen's expert witness, Ronald Neyhart, Executive Vice President of CBRE, Inc., who divided the Debtor's property into three groups based upon their designated use and the type of buyer that would be interested in them. In his opinion, the Outparcels could be sold in bulk to a single developer, the Shopping Center Parcel

could be sold as-is to a single investor, and the remaining parcels, which he termed the "Remaining Development Area," could be sold as-is to a single project developer. Mr. Neyhart valued the groups of parcels as of February 28, 2023. Applying discounts for holding costs until sales close and for sales in bulk, Mr. Neyhart valued the Outparcels at $12,000,000, the Shopping Center Parcel at $17,000,000, and the Remaining Development Area at $6,600,000. Although the sum of these figures is $35,600,000, Mr. Neyhart specified that additional discounts should be applied if he were attempting to determine the as-is value of the Property as a whole (because of the difficulty in finding one buyer for the Property). Mr. Neyhart testified that he had not performed that calculation, but that the resulting value would certainly be less than $35,600,000.

While the motion for relief from stay was under consideration, the Debtor filed its initial Plan of Reorganization [ECF No. 100]. The Court denied the motion for relief from stay. Although it concluded that the Debtor has no equity in the Property (the Property secures liens in the aggregate amount of $50,934,574.19), it also found that the Property was necessary to the Debtor's reorganization efforts and that the Debtor had filed a plan that had a reasonable possibility of being confirmed. *Memorandum Opinion*, June 28, 2023, ECF No. 106, pp. 16-19.

Romspen filed a motion to reconsider the Court's order denying its motion for relief from stay on July 12, 2023 [ECF No. 125]. The Debtor filed a timely objection [ECF No. 140]. The Court delayed decision on the motion to reconsider pending the outcome of the confirmation process. The parties agree that the motion to reconsider has been fully briefed and submitted to the Court for decision. They also agree that no additional evidence is needed concerning Romspen's entitlement to relief from the automatic stay in the event the Plan cannot be confirmed.

Operating Results

More than seven months have passed since the Court denied Romspen's motion for relief from stay. In that period of time, the following has occurred:

1. Debtor completed the sale of Outparcel Lots 2, 3, and 4 to Chick-Fil-A Inc. ("CFA") for a gross purchase price of $3,000,000, less a $350,000 holdback for the installation of a traffic signal at the entrance to the CFA Outparcels. [ECF No. 174].

2. The Debtor has entered into a purchase and sale agreement dated January 10, 2024, with Swaney Management & Capital, LLC ("Swaney") for the sale of Outparcel Lot 9 intended for the construction of a Marshall Steakhouse for a purchase price of $3,000,000. This is the second purchase and sale agreement with Swaney. The first, dated October 19, 2023, failed to close when Swaney was unable to raise the $10,000,000 needed to complete the project. Mr. Randall Swaney testified that he is more confident about his ability to obtain necessary funding now because he intends to borrow 80% of the necessary funds through a facility guaranteed by the United States Department of Agriculture ("USDA"). Although Swaney has applied for USDA approval, it had not received that approval at the time of Mr. Swaney's testimony, nor has it received a loan commitment. Swaney has not provided the $100,000 earnest money called for in the purchase and sale agreement to the Debtor.

3. Despite his best efforts, Mr. Yehuda Netanel, manager of the Debtor, testified that he has been unable to find a lender willing to refinance the debt owed to Romspen on terms acceptable to Romspen. The Debtor received one proposal from US Capital proposing a $55 million facility that would have paid $ 32 million to Romspen, far less than the amount of its allowed claim.

4. Despite his best efforts, Mr. Netanel was unable to find any additional purchasers for any of the Debtor's property other than the contracts with Swaney.

5. Despite his best efforts, Mr. Netanel was unable to find any additional tenants for the Shopping Center.

6. Despite the Court's approval of the Debtor's employment of The Shopping Center Group, LLC ("TSCG"), on July 12, 2023, the Debtor did not actually engage its successor, TSCG, to market and sell the Outparcels and the Shopping Center until mid-January 2024. The principal of TSCG, Shawn Massey, was an impressive witness who expressed enthusiasm for the Debtor's project, but he is only now in the process of preparing marketing materials for the project and has not received any written letters of intent or other concrete expressions of interest since his engagement.

7. The Debtor's Monthly Operating Report for December 2023 shows total receipts from operation of the Shopping Center since the inception of the bankruptcy case of $806,231, total disbursements over the same period of $602,640, for net income of $203,591. The Debtor had cash on hand at the end of December 2023 of $387,030. The Debtor has not yet filed its January operating report, but Mr. Netanel testified that the Debtor's current cash balance is approximately $500,000.

The Proposed Plan

The Plan that is before the Court for consideration is the *Second Amended Plan of Reorganization of The Lake District, LLC*, filed on August 18, 2023 [ECF No. 164], as amended August 25, 2023 [ECF No. 168], September 21, 2023 [ECF No. 179], January 29, 2024 [ECF No. 235], and February 5, 2024 [ECF No. 252]. Literally in the last moment allotted for trial, the Debtor announced oral amendments to its Second Amended Plan. Then, on Friday, February 9, 2024, the Debtor filed its *Fifth Amendment to Second Amended Plan of Reorganization of The Lake District, LLC* [ECF No. 257] ("Fifth Amendment"). The Fifth Amendment makes additional

adjustments to the Plan not announced at the close of the hearing. The Court agrees with Romspen that it is inappropriate and unfair for the Court to consider amendments made after the close of proof. The Court will not consider the late-filed Fifth Amendment in making its decision.

The Plan divides creditors into five classes:

Class 1: Pre-petition Secured Claim of Romspen

Class 2: Pre-petition Secured Claims of Creditors with Materialman's Liens

Class 3: Pre-petition Secured Claim of Taxing Authorities

Class 4: Pre-petition Unsecured Non-Priority Claims

Class 5: Interests of Equity Holders

Class 6: Pre-petition General Unsecured Claim of Arch Insurance Company (added in the Third Amendment).

With respect to Class 1, the plan proposes to treat Romspen as an oversecured creditor with a new principal amount consisting of the sum of Romspen's prepetition claim ($49,446,186.80); its post-petition, preconfirmation interest ($6,444,078.94 at 15%), and estimated legal fees ($500,000), for a total of $56,390,265.74.[1] See Third Amendment, ECF No. 235, p. 2; Dr's Ex. 37.

The Debtor proposes that Romspen's restated principal amount be paid at the non-default interest rate provided in the Loan Agreement (10.75%) or, in the event of cram down, such other cram down interest rate as the Court determines if different from the non-default rate. Third Amendment, p. 2. Romspen's expert, Mr. Keith Bierman, CPA and Senior Managing Director of MCA Financial Group, Ltd., testified that if a loan such as that described in the proposed plan

[1] Romspen's calculation of the restated principal amount was slightly lower than this at $55,217,855.90, but the Court finds the differences to be immaterial in light of its conclusion that the Plan is not capable of confirmation. See Romspen Ex. 44.

were available, it would carry an interest rate of not less than 11.75%. Mr. Bierman's opinion was constrained by the guidance provided by the Supreme Court in *Till*. He testified that he did not believe such a loan would be made, and that if it were, it would bear interest at a rate greater than 15%.

The Plan proposes that no payments be made to Romspen except from sales of the Debtor's Property in separate parcels based upon the entitlements each parcel has obtained (multi-family, single-family residential, etc.). Third Amendment, pp. 5-6.

The Plan proposes that the Debtor will provide Romspen fifteen days to credit bid on any parcel proposed for sale in an amount not less than the purchase price. Third Amendment, p. 5.

The Plan proposes that net proceeds of any sale after payment of outstanding taxes (prorated), real estate commissions, customary and usual closing costs, including attorneys' fees, be paid to allowed secured claims in the order of their priority, but the Debtor reserves the right to pay real estate taxes owed with respect to other parcels not being sold prior to distribution to allowed claims in the order of their priority. Third Amendment, p. 5.

The Plan reserves to the Debtor the right to explore refinancing all of Romspen's loan or a part of it while it actively markets the Property. Jurisdiction is reserved to the Court to determine whether Romspen is adequately protected in the event of any dispute concerning proposed partial refinancing. Third Amendment, p. 6.

Upon maturity, one year from the effective date of the Plan, Romspen has the right to enforce its deed of trust and security interests with respect to any unsold collateral. Third Amendment, p. 6.

The Plan retains to the Debtor the right to monetize the TIF and to sell the right to receive all or part of any future TIF distributions in connection with the sale of any piece of Property. Third Amendment, p. 6.

The Plan proposes to substantially modify the Loan Agreement by deleting, among other provisions, all events of default and the requirement that the Debtor make monthly payments to fund tax and insurance escrows. Third Amendment, pp. 2-5.

With respect to Class 2, the Plan proposes that holders of Materialman's Liens be paid, pro rata, from the sales of parcels of the Property after all closing costs, expenses, and senior liens have been paid.

With respect to Class 3, Taxing Authorities, the Plan proposes to pay $1,299 per month for the property taxes due the City of Lakeland and $3,701 per month for the property taxes due to Shelby County commencing the first month after the Effective Date. First Amendment, ECF No. 168. The Plan also proposes that these claims be paid from proceeds of sales of parcels of the Property. Second Amended Plan, ECF No. 164, p. 15.

With respect to Class 4, Unsecured Non-Priority Claims, the Plan proposes to pay these claims, aggregating approximately $4,032,431.72, from proceeds of sales of parcels of the Property. Second Amended Plan, pp. 15-16.

With respect to Class 5, Interest of Equity Holders, the Plan proposes that if all creditors are paid in full, the members will retain their membership interests in the Reorganized Debtor. If all creditors are not paid in full, the members will retain no interests in the Debtor. Second Amended Plan, p. 16.

With respect to Class 6, Prepetition Unsecured Claim of Arch Insurance Company, the Plan proposes to assume the Lake District Phase 1 Development Contract with the City relating to

the Surety Bond on the Effective Date. On and after the Effective Date, the Arch Security Bond Program and all of the Surety Bond Obligations shall be treated by the Debtor and Arch in the ordinary course of business as if the Debtor's Chapter 11 case had not been commenced. Third Amendment, pp. 6-8.

The Plan proposes that all tenant leases, the Development Contract with the City of Lakeland, the TIF Agreement, and the Surety Bond with Arch Insurance be assumed. Third Amendment, pp. 8-9.

The Plan proposes that Mr. Netanel will serve as Chief Manager of the reorganized Debtor. The Plan proposes that he be reimbursed for travel, lodging and ordinary out of pocket business related expenses following confirmation but that he not draw any compensation until all allowed claims of creditors have been satisfied. Fourth Amendment, ECF No. 252, pp. 2-3.

Amended Talley of Ballots

All classes have accepted the Plan except Class 1, which consists of the claim of Romspen. *Amended Ballot Summary and Certification on Debtor's Plan of Reorganization*, February 1, 2024, ECF No. 247.

The Objections

The City of Lakeland objects to confirmation of the Plan and asserts that the Lake District Phase 1 Development Contract ("Development Contract") between the Debtor and the City has expired as the result of the Debtor's failure to complete certain improvements, among other things, within four years of the City's Board of Commissioners' approval of the Development Contract, which occurred on August 8, 2019. Therefore, the City says, the Development Contract is no longer executory and is not subject to assumption. The City further asserts that upon expiration of the Development Contact, the Debtor is no longer authorized to continue with development

activities at the Property. *See City of Lakeland, Tennessee's Objection and Reservation of Rights to Debtor's Third Amendment to Second Amended Plan of Reorganization*, February 2, 2024, ECF No. 248. The City has made claim upon the Arch Surety Bond for costs related the construction of the traffic signal referenced in the Chick-Fil-A Contract.

Romspen raises numerous objections to the Plan in its initial objection, filed September 21, 2023 [ECF No. 180]; its supplemental objection, filed January 30, 2024 [ECF No. 237]; and in its *Renewed and Continuing Objection to Confirmation*, filed February 14, 2024 [ECF No. 261]. Its primary objection is that (1) the Plan is not feasible, but it also objects that (2) the Plan does not provide adequate means of implementation; (3) the Plan does not comply with the Bankruptcy Code; (4) the Plan is not proposed in good faith; (5) the Plan does not treat Romspen fairly and equitably; (6) the Plan violates section 363 of the Bankruptcy Code, (7) the Third Amendment to the Plan impermissibly added a sixth class to the Plan that was not included in the Disclosure Statement or any prior version of the Plan; (8) the Plan fails to assume necessary contracts and cannot assume the contracts it proposes to assume; (9) the Development Contract has expired and cannot be assumed; (10) the Debtor cannot satisfy the conditions of the Chick-Fil-A sale; (11) the Plan's language on refinancing is deficient; (12) the Plan is silent concerning the administration of claims; (13) the Plan impermissibly allows post-confirmation modification by a Debtor that is not an individual; (14) the Plan's proposed substantial consummation standard violates the Bankruptcy Code; and (15) the proposed Fifth Amendment comes two days after the close of all evidence and argument and should be disregarded by the Court. As stated previously, the Court agrees that the Fifth Amendment was not timely filed and will be disregarded.

ANALYSIS

A Chapter 11 plan can be confirmed only if all of the requirements of section 1129(a) of the Bankruptcy Code are satisfied. If there are one or more classes of claims that are impaired under the plan but have not accepted the plan, a plan must also comply with the requirements of section 1129(b) (the cram down provision). The Plan designates Classes 1 through 5 as impaired under the Plan. Classes 2-5 have voted to accept the Plan, but Romspen, the holder of the Class 1 claim, has not. Class 6, consisting in the claim of Arch Insurance Company is not impaired. Because one class of impaired creditors has rejected the Plan, the Plan can only be confirmed if it satisfies all of the requirements of section 1129(a) except subparagraph (8) and the requirements of section 1129(b).

Before the Court takes up the question of the viability of the Development Contract, raised by both the City of Lakeland and Romspen, the Court will consider Romspen's primary objection that the Plan is not feasible.

The Plan is Not Feasible

Section 1129(a)(11) requires that confirmation of a plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. The Debtor argues that this section is satisfied because the proposed Plan contemplates liquidation of the Debtor's Property. Romspen counters that the Plan merely delays the inevitable foreclosure of its interests in the Property.

The Debtor, as plan proponent, must prove the feasibility of the Plan by a preponderance of the evidence. *In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997), citing *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. Partnership (In re Ambanc La Mesa Ltd.*

Partnership), 115 F.3d 650, 653 (9th Cir.1997), cert. denied, 522 U.S. 1110, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1165 (5th Cir.), cert. denied, 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993); *In re Trevarrow Lanes, Inc.*, 183 B.R. 475. 479 (Bankr. E.D. Mich. 1995). The purpose of this section of the Code is to "prevent confirmation of visionary schemes which promise creditors more under a proposed plan than that which the debtor can possibly attain after confirmation." *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997), quoting *In re Trail's End Lodge, Inc.*, 54 B.R. 898, 903–04 (Bankr. D. Vt.1985). "To establish feasibility, a proponent must demonstrate that its plan has a reasonable prospect of success and is workable." *Crosscreek Apts.*, 213 B.R. at 539. Ordinarily, it is easier to determine the feasibility of a plan of shorter duration. *See, e.g., In re Edgewater Motel, Inc.*, 85 B.R. 989, 996-97 (Bankr. E.D. Tenn. 1988). But, a feasible plan must be "firmly rooted in predictions based on objective fact." *In re Griswold Bldg., LLC*, 420 B.R. 666, 697 (Bankr. E.D. Mich. 2009).

At the hearing on Romspen's motion for relief from stay, the Court determined that the Debtor has no equity in its Property. The liens secured by the Property on the petition filing date amounted to $50,934,574.19, while according to Mr. Neyhart, the expert credited by the Court at that time, and the only appraiser to give testimony in connection with confirmation, the Property should be valued at something less than $35,600,000. The Debtor has had seven months since the hearing on the motion for relief from stay and eleven months since the petition was filed to prove Mr. Neyhart and the Court wrong. In that time, according to the Debtor's calculation, Romspen's claim has increased from $49,446,186.80 to $56,390,265.74. Debtor 's Ex. 37. Any equity cushion that the Debtor believed to have been present when the case was filed has eroded by more than $6,000,000.

Since the petition was filed, the Debtor received approval for one sale of outparcel property to Chick-Fil-A, Inc. which has resulted or will result in payment to Romspen of $2,504,971.51. See, Buyer/Seller Disbursement Agreement, Romspen Ex. 48. The Chick-Fil-A contract was one that was under negotiation when the bankruptcy case was filed. The Debtor has received only one other contract during the pendency of its case. Swaney Management & Capital, LLC proposes to purchase one or more of the Outparcels in order to construct a steakhouse, but a prior contract with this same potential purchaser has already failed for lack of financing. If the new contract actually does close, it will reduce Romspen's debt by $3,000,000, less than 10% of the remaining balance.

The Court approved the Debtor's application to employ The Shopping Center Group, LLC as real estate broker on July 12, 2023, but the Debtor did not actually employ TSCG, successor to The Shopping Center Group, until mid-January 2024. Romspen Ex. 32. No explanation was given for this delay. Despite the testimony of Mr. Massey, TSCG's principal, concerning the excellent prospects for the Lake District, he was able to identify no prospective purchasers for the Shopping Center or the Outparcels at the time of the hearing, more than a month after his contract was signed. Moreover, TSCG has not been engaged to market all of the Property, but only the Outparcels and the Shopping Center. All the Property Mr. Neyhart designated the Remaining Development Area has not been marketed for sale.

Despite the fact that Romspen's claim has *increased* over the life of the bankruptcy case and the fact that the Debtor has obtained only one proposed contract for the purchase of a relatively small portion of its Property during that period, the Debtor projects that Romspen can be paid in full together with interest over a twelve-month period. The Debtor's projection is not rooted in objective fact.

As an alternative to selling its Property to repay Romspen, the Debtor's Plan proposes to refinance some or all of Romspen's loan during its one-year term. Romspen's loan originally matured on July 31, 2021. Romspen granted two periods of forebearance before the Debtor's petition was filed on the day a non-judicial foreclosure sale was scheduled to occur. The Debtor has attempted to refinance its obligation with Romspen at least since the original maturity date of the Romspen loan with no success. Mr. Netanel testified that the Debtor has hired a mortgage banker, Salem Partners, to expose Lake District to funds around the country and has received at least two term sheets, one from Paramount in San Antonio, Texas, and another from US Capital. The only expression of interest presented at the hearing, however, was the initial term sheet provided by US Capital for a $55,000,000 facility that would result in payment of $32,000,000 to Romspen, far less than its outstanding balance. The Debtor's projection that it will be able to find a lender willing to refinance its indebtedness to Romspen over the next twelve-month period is not rooted in objective fact.

The Plan is simply not feasible. It proposes to prevent Romspen from exercising its rights in collateral by another twelve months while at the same time asking Romspen to bear all risk of the Debtor's failure. The Plan is not capable of confirmation because it is not feasible.

The Plan is Neither Fair nor Equitable

When one or more impaired classes does not accept a proposed plan, the court must evaluate the plan under section 1129(b), which permits the court to confirm a plan that "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)(1) is only available when all the other requirements of section 1129(a) are met except paragraph (8), which requires the acceptance of all impaired classes. *See, e.g., In re Apple Tree P'ners. Ltd.*, 131

B.R. 380, 392-393 (Bankr. W. D. Tenn. 1991). The Court has already found that the Plan is not feasible and thus does not meet an additional requirement of section 1129(a), paragraph (11). This failure alone precludes confirmation of the Plan, but the Court will consider the Plan under the fair and equitable standard. As we have seen, the Plan proposes to prevent Romspen from exercising its rights in collateral over an additional twelve-month period while the Debtor attempts to find purchasers and/or another lender. The Plan proposes no payments to Romspen during that period except from speculative sales or refinancing, none of which are in progress now.[2]

The Debtor's monthly operating reports filed during the pendency of the bankruptcy case show that the Debtor has net cash flow from operations of only $200,000 through the end of December notwithstanding the fact that no debt service payments were paid. *Monthly Operating Report for December 2023*, February 1, 2024, ECF No. 246, p. 2. Interest on a loan of $50,000,000 at a very conservative 5% interest accrues at $200,000 per month. Romspen's debt is likely to *increase* substantially during the term of the Plan.

The Debtor has no funds available to complete infrastructure required to make the area Mr. Neyhart identified as the Remaining Development Area available to end users, making a bulk sale almost inevitable. The City of Lakeland has proceeded with obtaining and accepting a bid for the construction of the traffic light contemplated in the Chick-Fil-A Contract because it believes that the Development Contract has expired. Even if that were not true, the Debtor does not have funds to construct the traffic light in the manner required by the City (even though $350,000 of the proceeds of the Chick-Fil-A contract is reserved for this purpose and the Debtor has negotiated with the owner of the property across from the Debtor's Property to provide $95,000 toward the

[2] Although the Debtor has one signed contract from Swaney Management & Capital, LLC for the purchase of two of the Outparcels, a previous contract with Swaney has already failed for lack of financing, no earnest money has been deposited, and Randall Swaney testified that he has still not found sufficient financing for the project.

project). Mr. Netanel's response is that no date for completion of the traffic light is specified in the Development Contract.[3] The Court credits the determination of the City of Lakeland that construction of a traffic light should begin now for the health and safety of persons traveling to the Property. The failure of the Debtor to be able to supply this need in a timely manner makes it less likely that it will be able to meet its projected sales and more likely that Romspen will suffer additional harm due to its delay.

The traffic light is but one example of the inability of the Debtor to complete the development of the Lake District according to the proposed Plan. Mr. Michael Walker, City Manager for the City of Lakeland, testified under subpoena on behalf of Romspen. Mr. Walker produced a punch list prepared by Emily Harrell, City Engineer, of substantial items needed to bring the project to substantial completion. See Romspen's Ex. 20. Mr. Walker also testified that the City takes the position that the Development Contract expired as the result of the Debtor's failure to timely reach substantial completion. The Debtor disagrees, but Mr. Walker found laughable the characterization of the punch list items as not necessary for substantial completion. The punch list includes items such as regrading and site stabilization; installation of surface asphalt; replacement of curb and gutter failures; installation of traffic and street name signage; replacement of trees; and furnishing and installing 113 streetlights. These are not insubstantial items, and they relate only to the first phase of the proposed development. The Debtor has no available funds to complete the punch list items. Failure to complete these items makes it less likely that Debtor will meet its projection of sales under the Plan and more likely that Romspen will suffer additional loss.

[3]The Chick-Fil-A Purchase and Sale Agreement calls for the Debtor to complete installation of the traffic light within 12 months after the Closing date of the sale. See, *Debtor's Motion to Approve Sale of Outparcel Lots . . . Pursuant to 11 U.S.C. § 363*, Ex. 2, pp. 96-97, ECF. No. 97. The Distribution Sheet from the sale is dated September 15, 2023. Romspen's Ex. 48.

The Plan strips out all default provisions from the Loan Agreement. The Debtor attempted to remedy this defect literally at the last moment of the hearing through an oral amendment and again through its Fifth Amendment. As Romspen says in its Renewed and Continuing Objection, these amendments come too late. It is completely unfair to require Romspen to respond to a constantly shifting target of plan language, projections, and terms. The Court established deadlines to complete discovery and preparation based upon the requests of the parties.

The Debtor has no funds available for tenant improvements. Mr. Netanel testified that he believed that prospective tenants will be willing to finance their own improvements, but the Debtor's track record during the past eleven months shows that this is unlikely. Even if a tenant could be found willing to do so, the cost of the improvements would be offset against the rent that otherwise would be payable to the Debtor, thus making it less likely that Romspen can be paid.

The Debtor did not present additional appraisal testimony at the hearing but relied on three brokers' opinions of value. Mr. Shawn Massey of TSCG, opined that if stabilized, the Shopping Center would be valued between $26,067,802.92 at a capitalization rate of 8.5% and $31,653,760.69 at a capitalization rate of 7%. Mr. Gray Fiser of Newmark testified that the as-is value of the land slated for multi-use development is $8,000,827 to $13,499,345. Mr. Allen Green of John Green & Company testified that the value of the 40.8 acres proposed for single family residents should be valued at $3,010,000. The most optimistic of these opinions results in an aggregate value of $48,163,106 based on many counter-factual assumptions. The Debtor's own February 2024-February 2025 Projections, amended in the midst of the hearing, show Romspen being paid in full only in the ninth month of the Plan relying upon sale of the Shopping Center for $30,000,000, close to the top value assumed by Mr. Massey. These projections also presume a sale of two outparcels to Marshall Steak House, a proposal that has failed once and for which no earnest

money has been deposited now because the funding for the $10,000,000 project has not been obtained. Testimony of Mr. Randall Swaney.

Despite all of this new testimony, Mr. Neyhart's assessment of the project remained the same. He testified that interest rates have reduced slightly since his original report was written, but that lenders remain reluctant to lend. He testified that it was unlikely that all three of the parcels that he identified in his original report, the Shopping Center, the remaining Outparcels, and the remaining Development Property, would be sold in the twelve-month term of the Plan, and that if they were, they would be sold to a master developer who would resell them to end users. The Court again credits Mr. Neyhart's more conservative and realistic analysis given the results of the Debtor's efforts during the administrative phase of this bankruptcy case.

In addition to Mr. Neyhart's testimony, Romspen presented the testimony of Mr. Keith Bierman of MCA Financial Group, Ltd. Mr. Bierman, CPA, Senior Managing Director of MCA, was engaged to provide an analysis of the feasibility of the Plan and the proper interest rate to be provided to Romspen under a "Till" analysis. See MCA Financial Group, Ltd. Report, Romspen's Ex. 21. Mr. Bierman's report summarizes his findings as follows: (1) the Debtor's forecasts are highly speculative and aggressive and bear no relationship to the Debtor's actual historical performance; (2) the Debtor and the Plan fail to provide a forecast that illustrates how and whether the Property can generate sufficient cash flow from operations and parcel sales to pay all proposed plan payments; (3) based upon the Debtor's forecast, the Plan does not generate sufficient cash flow to meet all operating expenses, expenses not contemplated in the Plan, all plan payments, and debt service payments to Romspen at an appropriate interest rate; (4) there is no assurance that the Debtor will achieve forecasted cash flow from projected tenant leases; (5) the Plan lacks a source of current, committed cash available to fund the Plan; (6) the Plan does not illustrate how the

Debtor could pay the balloon payment that would be necessary should it fail to achieve its forecasts; and (7) the Plan does not satisfy the requirements of section 1129(b)(2)(A)(i)(II) because the Plan provides no "stream" of deferred cash payments. None of the commercial lenders surveyed by Mr. Bierman reported that they would consider making a loan to the Debtor. The more likely source of refinancing funds to the Debtor, according to Mr. Bierman, would be a mezzanine lender who would consider lending at 50% to 55% loan to value on the vacant anchor space and vacant land parcels. Rates for such loans would range from 14% to more than 15%, plus 2% to 3% for an origination fee over a term of 12 to 18 months.

The Court could go on, but concludes it is unnecessary to do so. The Debtor's historical experience and performance provide no support for the proposals contained in the Plan. Compelling Romspen to participate in such a visionary scheme is neither fair nor equitable. Moreover, the Debtor's monthly operating reports show no employees. As the Court has found that it is highly unlikely that even Romspen will be paid in full under the proposed Plan, the only persons who would benefit from its confirmation are the Guarantors and they would benefit only insofar as confirmation of the Plan might result in further delay of the exercise of Romspen's rights and remedies.

The Plan Cannot Be Confirmed

Because the Court has found that the Plan does not satisfy all of the requirements of section 1129(a) except paragraph (8) because it is not feasible as required in paragraph (11), and because the Court has found that even if the Plan were feasible, it does not satisfy the requirements of section 1129(b) because it is neither fair nor equitable to Romspen, the Court need not consider the remaining objections of Romspen. The Court also declines to render an opinion concerning the dispute between the Debtor and the City of Lakeland concerning whether the Development

Contract may be assumed because it is irrelevant to the outcome of the Court's decision that the Plan is not capable of confirmation.

ORDER

Based upon all of the foregoing, (1) Romspen's Objection to the Fifth Amendment is **GRANTED**; the Fifth Amendment is stricken and disregarded as untimely; (2) confirmation of the Debtor's Second Amended Plan as Amended is **DENIED**; and (3) motions to allow administrative claims shall be filed on or before **March 24, 2024**.

By separate order, Romspen's *Motion to Reconsider* [ECF No. 125] and *Motion for Relief from the Automatic Stay* [ECF No. 41] will be granted and the Debtor's permission to use cash collateral will be revoked.

cc: Debtor
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