Dated: July 20, 2021
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
EAS Graceland, LLC,
Debtor

Case No. 20-24484
Chapter 11
Subchapter V

MEMORANDUM OPINION AND ORDER CONFIRMING DEBTOR'S AMENDED CHAPTER 11 PLAN AND DENYING IBORROW REIT, L.P.'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

On April 19, 2021 through April 22, 2021, the Court held a hearing to determine if the Amended Small Business Subchapter V Plan of Reorganization (the "Amended Plan") of EAS Graceland, LLC ("EAS" or "Debtor") should be confirmed. At the hearing, EAS presented evidence in support of confirmation while iBorrow REIT, L.P. ("iBorrow"), the only creditor to

object to confirmation, presented evidence opposing confirmation. After reviewing (i) the Debtor's Plan, as amended, (ii) the Objections to confirmation filed by TN Department of Revenue[1] and iBorrow, (iii) the testimony given in this case, (iv) the complete record in this case, and (v) after receiving evidence and hearing arguments of counsel at the confirmation hearing, the Court makes the following findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this case by Fed. R. Bankr. P. 7052 and 9014. All findings of fact shall constitute findings of fact even if stated as conclusions of law, and all conclusions of law shall constitute conclusions of law even if stated as findings of fact. For the reasons set forth below, Debtor's Subchapter V Plan, as amended, is confirmed pursuant to 11 U.S.C. § 1191, and iBorrow's Motion for Relief from the Automatic Stay is denied.

FINDINGS OF FACT

1. The Debtor owns and operates a hotel located at 1471 E. Brooks Road, Memphis, Tennessee (the "Property"). The Debtor leased and operated the Property from April, 2016 until March, 2019, when the Debtor exercised an option to purchase. During this time, the Debtor made several leasehold improvements to the Property.

2. The Property contains 246 rooms of which 215 are operable, a conference center and three food and beverage facilities: the Blue Bar, Dad's Place, Trumpet's, and a full commercial kitchen. The Property operates under a Travelodge hotel franchise. The Property also has an outdoor pool, fitness room, computer workstation, guest laundry and vending areas. At the time the Debtor purchased the Property, the food and beverage facilities had not operated for a number of years prior to the Debtor leasing the Property.

[1] The objection filed by the TN Department of Revenue was resolved prior to the April 19-22, 2021 hearing. *See* DE 199.

3. On or about March 29, 2019, the Debtor executed a promissory note (the "Promissory Note") secured by a deed of trust in favor of iBorrow in the original principal amount of $3,160,000 (the "Loan"). [iBorrow Ex. 24[2]]

4. The Debtor purchased the Property for $1,825,000. The Debtor financed the purchase of the Property thru a loan with iBorrow, which loaned $2,260,000 towards the purchase price and $900,000 towards capital improvements.

5. As security for the repayment of the Debtor's indebtedness pursuant to the Promissory Note, on March 29, 2019, the Debtor executed that certain Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (as amended, supplemented, or otherwise modified, the "Deed of Trust"). [*Id*.] The Deed of Trust was recorded in the Shelby County Register's Office as Instrument No. 19030709 and subsequently amended and recorded as Instrument No. 20035149.

6. Pursuant to the Deed of Trust, iBorrow has a first priority deed of trust lien on the "Collateral" (as defined in the Deed of Trust), which includes, among other things, (i) the real property located at 1471 E. Brooks Road, Memphis, Tennessee; (ii) all items located on the Property, including any improvements to the Property; (iii) all fixtures and personal property listed in Exhibit B of the Deed of Trust; and (iv) all proceeds related to the foregoing. [*Id*.]

7. Prior to this Bankruptcy Case being filed, the Debtor listed the Property for sale with a broker in the fall of 2019, and it also, unsuccessfully, attempted to refinance the Loan.

8. On March 31, 2020, iBorrow declared EAS in default under the terms of the Promissory Note and accelerated the debt.

[2] At the Confirmation Hearing, the Court entered the parties' exhibits collectively. For ease of reference, all references to the record herein will utilize the original exhibit numbers so that "iBorrow Ex. 1" and "EAS Ex. 1" each refer to the first exhibits listed on iBorrow's and EAS's exhibit lists, respectively.

9. On September 15, 2020, EAS filed this case under Chapter 11 of the Bankruptcy Code. [DE 1] After filing this case, EAS and iBorrow negotiated the use of cash collateral and entered into approximately ten interim orders on the use of cash collateral. [DE 47, 48, 77, 97, 114, 142, 156, 207, 209, 231 and 239]

10. Each of the interim cash collateral orders required EAS to make monthly adequate protection payments to iBorrow in the amount of $25,600 plus fifty percent of any amount remaining after payment of items consistent with a budget attached as an exhibit to each of the cash collateral orders. [*Id*.] EAS made each adequate protection payment timely each month. [iBorrow Ex. 25]

11. On November 3, 2020, iBorrow filed its secured proof of claim in the amount of $3,337,831. [Claim No. 11]

12. On November 22, 2020, the Debtor amended its bankruptcy petition to convert this case to a Subchapter V Small Business Reorganization Case.[3] [DE 79]

13. On December 14, 2020, the Debtor filed its Small Business Subchapter V Plan of Reorganization. [DE 96] On April 14, 2021, the Debtor filed its First Amended Small Business Plan of Reorganization. [DE 184] On April 20, 2021, the Debtor filed its First Amendment to the Amended Plan. [DE 197] On April 21, 2021, the Debtor filed its Second Amendment to the Amended Plan. [DE 201] On June 8, 2021, the Debtor filed its Third Amendment to the Amended Plan (collectively, the "Amended Plan"). [DE 235]

14. The Debtor's Amended Plan proposes to modify iBorrow's allowed secured claim by re-amortizing the claim balance, including any unpaid post-petition interest for 30 years with interest at 5%. In addition, the Amended Plan modifies certain other provisions of iBorrow's loan

[3] No party objected to the change in designation.

agreement relating to late charges, post-petition fees, and fees paid to iBorrow's consultants. The Amended Plan preserves iBorrow's default remedies as provided in its loan documents, except as modified by the Amended Plan, but modifies such remedies to provide written notice of default to the reorganized Debtor and a thirty (30) day right to cure any post-confirmation default. [DE 184]

15. On or about January 18, 2021, iBorrow submitted a ballot rejecting the Debtor's Amended Plan and asserted a claim of $3,875,950.13. [DE 150]

16. On February 16, 2021, iBorrow filed its Objection to Confirmation of Debtor's Proposed Subchapter V Plan of Reorganization. [DE 148] On April 20, 2021, iBorrow filed its supplement to its objection to confirmation of the Debtor's Plan. [DE 200]

17. On April 2, 2021, iBorrow filed its Motion for Relief from the Automatic Stay. [DE 168]

18. On April 15, 2021, the Court entered an Agreed Order which allowed iBorrow's claim for voting purposes in the amount of $3,875,950.13. [DE 188]

19. From April 19, 2021 through April 22, 2021, the Court conducted an evidentiary hearing to consider confirmation of the Amended Plan [DE 184] (the "Confirmation Hearing") and iBorrow's motion to lift the automatic stay [DE 168] (the "Stay Motion").

20. During the Confirmation Hearing, the Debtor presented the testimony of:

(i) the Debtor's manager, Ms. Laure Marmontel ("Marmontel");

(ii) the manager of the Property, Mr. Harold Daniels ("Daniels");

(iii) a hotel broker, Mr. Joseph A. Strain ("Strain"); and

(iv) an appraiser with HVS Consulting & Valuation ("HVS"), Mr. Benjamin Levin ("Levin").

21. During the Confirmation Hearing, iBorrow presented the testimony of:

(i) iBorrow's Chief Executive Officer, Mr. Brian M. Good ("Good");

(ii) Certified Hotel Administrator, Mr. Michael F. Higgins ("Higgins");

(iii) an appraiser with CBRE Valuation & Advisory Services ("CBRE"), Mr. W. Scott Bradford ("Bradford").

22. The Court has considered the testimony and the credibility of the witnesses in making these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. Exclusive Jurisdiction and Core Proceeding. The Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A),(L) and (O). The Court may exercise its subject matter jurisdiction pursuant to 28 U.S.C. § 157(b)(1). The Debtor is and remains qualified as a "Debtor" under 11 U.S.C. § 109.

2. Venue. Venue in the Western District of Tennessee is proper as of the Petition Date and remains proper under 28 U.S.C. §§ 1408 and 1409.

3. Judicial Notice. The Court takes Judicial Notice of the docket in this Chapter 11 case maintained by the Clerk of Court, including all pleadings and other documents filed, all Orders entered, evidence and arguments made, offered, or introduced at the hearings, including, but not limited to, the Plan, as amended.

4. The Court finds that the Amended Plan adequately provides the information required by 11 U.S.C. § 1190(1).

5. Confirmation of Debtor's Amended Subchapter V Plan of Reorganization

(i) 11 U.S.C. §§ 1191 and 1129

In a non-subchapter V case, the court must confirm a Chapter 11 plan if all the requirements of § 1129(a) are met. 11 U.S.C. § 1129(a). Additionally, when all of the requirements of § 1129(a) are met, except the requirement in paragraph (a)(8) requiring that all

impaired classes accept the plan, § 1129(b)(1) permits "cramdown" confirmation "if the plan does not discriminate unfairly, and is fair and equitable" with regard to each impaired class that has not accepted the plan. 11 U.S.C. § 1129(b)(1). Finally, § 1129(b)(2) sets forth the rules for the "fair and equitable" requirement for classes of secured claims, unsecured claims, and interests. 11 U.S.C. § 1129(b)(2). The effects of confirmation are the same even if cramdown confirmation occurs under § 1129(b).

Section 1191 states the requirement for confirmation in a subchapter V case. 11 U.S.C. § 1191. The starting point is that § 1129(b) does not apply. 11 U.S.C. § 1181(a). Section 1129(a), however, remains applicable in a subchapter V case except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual, if an unsecured creditor invokes it. *Id.* If all the applicable requirements in § 1129(a) are met, except for the projected disposable income rule of paragraph (a)(15), § 1191(a) requires the court to confirm the plan. 11 U.S.C. § 1191(a). Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it. *Id*. This, of course, is referred to as a consensual plan.

In a case in which a subchapter V debtor cannot obtain full consent for the plan (i.e. one or more impaired classes of claims or interests rejects the plan), 11 U.S.C. § 1191(b) sets forth the requirements for cramdown and replaces the requirements of § 1129(b), which as stated above do not apply in a subchapter V case. 11 U.S.C. § 1181(a). Instead, under § 1191(b), the court shall confirm a subchapter V plan that satisfies the confirmation requirements, other than the requirements of § 1129(a)(8) (providing that all classes vote to accept the plan or not be impaired by the plan), § 1129(a)(10) (requiring at least one impaired class to accept the plan), and § 1129(a)(15) (requiring payment of unsecured creditors in full or devoting allocated projected

disposable income to the plan), so long as the plan does not discriminate unfairly against any impaired, non-consenting class, and is fair and equitable regarding each class of impaired claims or interests, that has rejected the plan. 11 U.S.C. § 1191(b). As such, the Court must first determine whether, other than paragraphs 8, 10, and 15 of § 1129(a), the requirements of § 1129(a) have been met.

(ii) Requirements of § 1129(a)

a) Section 1129(a)(1)

The first requirement of § 1129(a) is that the plan must comply with "the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). "The legislative history reflects that 'the applicable provisions of chapter 11 include such sections as 1122 and 1123, governing classification and contents of a plan.'" *In re Pearl Res. LLC*, 622 B.R. 236, 252 (Bankr. S.D. Tex. 2020) (*quoting* H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6368, 5787, 5912). Debtor's Amended Plan sets forth ten (10) classes of claims and interests. [DE 184] Upon review, the Amended Plan properly classifies claims and interests in accordance with §§ 1122 and 1123(a)(1). [DE 184] The claims and interests placed in each class are substantially similar to other claims and interests in each such class. [DE 184] Valid business, factual, and legal reasons exist for separately classifying the various classes of claims and interests created under the Plan, and such classes, and the Plan's treatment thereof, do not unfairly discriminate between holders of claims or interests in each class. The Plan also provides for the same treatment by Debtor of each claim or interest in each respective class, thereby satisfying § 1123(a)(4). Therefore, the Amended Plan satisfies §§ 1122 and 1123(a). Accordingly, Debtor's Amended Plan satisfies § 1129(a)(1).

b) Section 1129(a)(2)

Section 1129(a)(2) requires that "[t]he proponent of the plan compl[y] with the applicable

provisions of this title." 11 U.S.C. § 1129(a)(2). No party objected to the Amended Plan for failing to comply with the provisions of title 11. This Court accordingly concludes that the Debtor established by a preponderance of the evidence that it complied with the applicable provisions of the Bankruptcy Code, including the provisions regarding the contents of a subchapter V plan of reorganization, thereby satisfying § 1129(a)(2).[4] [Transcript of April 19, 2021 Hearing, 45:1-4]

c) Section 1129(a)(3)

Under § 1129(a)(3), a plan must have "been proposed in good faith and not by any means forbidden by law." As an initial matter, the Court concludes that the Amended Plan has not been proposed by any means forbidden by law. No party-in-interest has suggested otherwise and leaving that aspect of § 1129(a)(3) aside, the Court focuses on the requirement of good faith. The Bankruptcy Code does not define the term "good faith," but the Sixth Circuit has held that "§ 1129(a)(3) expressly requires an inquiry into the debtor's motives in proposing the plan ...." *Village Green I, GP v. Fed. Nat'l Mortgage Ass'n (In re Village Green I, GP)*, 811 F.3d 816, 819 (6th Cir. 2016). "[T]he important point of inquiry is the plan itself and whether such plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984); *see also In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 468 (Bankr. S.D. Ohio 2011). One of the primary purposes of Chapter 11 is the preservation of the business as a going concern. *See Trenton Ridge*, 461 B.R. at 469. Another is the "maximization of the value of the estate." *Id.* (quoting *Bonner Mall P'ship v. U.S. Bancorp Mortgage Co. (In re Bonner Mall P'ship)*, 2 F.3d 899, 916 (9th Cir. 1993)). In assessing whether the Debtor proposed the Plan in order to achieve a result consistent with the purposes of the

[4] All that is required in a subchapter V plan is that the debtor include a brief history of its business operations, a liquidation analysis, and projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.

Bankruptcy Code, the Court must examine the totality of the circumstances. *See Trenton Ridge*, 461 B.R. at 468-69. Considering the totality of the circumstances, the Court concludes that the Debtor has established by a preponderance of the evidence[5] that it filed the Amended Plan as part of its efforts to preserve its business as a going concern and to maximize the value of its estate and that the Debtor therefore has proposed the Amended Plan in good faith. [DE 184, Section 3.1; *see also* Transcript of April 19, 2021 Hearing, 45:1-4; 47:20-24 - 48:7] No party has contended otherwise. Accordingly, the Court finds that § 1129(a)(3) is satisfied.

d) Section 1129(a)(4)

Section 1129(a)(4) provides that "any payment" made or to be made by the plan proponent or the debtor for services "in or in connection with" the plan or the case must be approved by or "subject to the approval of" the bankruptcy court as "reasonable." 11 U.S.C. § 1129(a)(4). Pre-confirmation payments for fees and expenses incurred in a bankruptcy case have been held to be within the scope of § 1129(a)(4). *In re Pearl Res. LLC*, 622 BR at 261 (*citing In re Cajun Elec. Power Coop., Inc*., 150 F.3d 503, 513-14 (5th Cir. 1998)). Thus, there must be disclosure, and two, the court must approve the reasonableness of payments. *In re Pearl Res. LLC*, 622 BR at 261 (*citing* 7 Collier on Bankruptcy ¶ 1129.03[4] (16th ed. 2015)). Section 1129(a)(4) is designed to ensure compliance with the Code policy that the bankruptcy court police the awarding of fees in title 11 cases, so that holders of claims and interests derive the benefit of such information as it might affect their decision to accept or reject the plan. Here, no party-in-interest has filed an objection to the Amended Plan regarding this provision. Additionally, the Court has reviewed the Amended Plan and finds that it complies with the requirements of § 1129(a)(4). [DE 96, 184, 197,

[5] The standard of proof required by the debtor to prove that a Chapter 11 plan was proposed in good faith is by a preponderance of the evidence. *In re Pearl Res. LLC*, 622 B.R. at 260 (*citing In re Briscoe Enter., Ltd., II,* 994 F.2d 1160, 1165 (5th Cir. 1993)).

201, 235] Accordingly the Amended Plan satisfies § 1129(a)(4). [*See also* Transcript of April 19, 2021 Hearing, 46:4-7]

e) Section 1129(a)(5)

Section 1129(a)(5) imposes as a requirement for confirmation that the plan proponent disclose any individual proposed to serve, after confirmation, "as a director, officer, or voting trustee of the debtor," and that the holding of such office by each individual "is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5). Here, the Court notes that no party-in-interest has filed an objection to the Amended Plan regarding this provision. Nevertheless, § 1129(a) obligates this Court to make a finding under § 1129(a)(5), whether or not any party has objected to the plan on § 1129(a)(5) grounds. *See* 11 U.S.C. § 1129(a) ("The court shall confirm a plan only if all of the following requirements are met."). In this case, Debtor's Amended Plan proposes to reinstate the pre-petition ownership structure of Debtor. [DE 184 at 5.01, Class 10; *see also* Transcript of April 19, 2021 Hearing, 46:8-11] Thus, if Debtor's Amended Plan is confirmed, Ellem, Inc. and Mosery Investments, LLC shall retain their membership interests. This Court views this disclosure as acceptable and in compliance with § 1129(a)(5). Accordingly, Debtor's Amended Plan satisfies § 1129(a)(5).

f) Section 1129(a)(6)

Section 1129(a)(6) requires that "any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). Such provision is not applicable to Debtor. [Transcript of April 19, 2021 Hearing, 46: 23-25] Accordingly, Debtor's Amended Plan satisfies § 1129(a)(6).

g) Section 1129(a)(7)

Section 1129(a)(7) provides:

(a) The court shall confirm a plan only if all of the following requirements are met:
...
(7) With respect to each impaired class of claims or interests—
(A) each holder of a claim or interest of such class—
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date ....

11 U.S.C. § 1129(a)(7). Section 1129(a)(7) requires a plan of reorganization meet the "best interests" test, which requires that each dissenting creditor receive at least as much as it would receive in a hypothetical Chapter 7 liquidation of the debtor. 11 U.S.C. § 1129(a)(7)(A). Here, no party-in-interest objected to plan confirmation on this ground. Nevertheless, the Court finds each class of claims has either accepted the Amended Plan or will receive more than it would in a Chapter 7 liquidation. [DE 184, Section 3.2; Transcript of April 19, 2021 Hearing, 47:1-4] Debtor provided a hypothetical liquidation analysis, which the Court finds credible. [DE 184, Section 3.2] The Court concludes that the requirement of § 1129(a)(7) of the Bankruptcy Code has been satisfied with respect to Debtor's Amended Plan.

h) Section 1129(a)(8)

Section 1129(a)(8) provides that "[w]ith respect to each class of claims or interests (A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8). Section 1129(a)(8) is satisfied only if each class under a proposed plan has either accepted the plan or is not impaired under the plan. Debtor's Amended Plan does not satisfy § 1129(a)(8) as there are eight impaired classes and of the eight impaired classes, only two have accepted the Plan.[6] [DE 184, Article V; DE 150] However, as set forth above, § 1129(a)(8) is one of three subsections of § 1129(a) that does not have to be satisfied for a subchapter V plan to be

[6] Six of the impaired classes did not return their ballots. [DE 150]

confirmed. 11 U.S.C. § 1191(b). A plan that does not satisfy § 1129(a)(8) nonetheless can be confirmed if the plan satisfies the cramdown requirements contained in § 1191(b). Section 1191(b) permits a plan proponent to "cramdown" a plan over a dissenting class if the plan does not "discriminate unfairly" and provides "fair and equitable" treatment to the dissenting classes that are impaired under the plan. Before a plan proponent may cramdown a plan, it must establish that all of the other requirements of § 1129(a) are met. Accordingly, the Court will address the remaining requirements of § 1129(a) before discussing the cramdown requirements of § 1191(b).

i) Section 1129(a)(9)

As discussed supra, classification of claims is covered in § 1122, which provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). A debtor possesses considerable, but not complete, discretion to classify claims and interests in its Chapter 11 plan of reorganization. While considerable, that discretion is tempered at least with respect to unsecured priority tax claims. Section 1123(a)(1) provides that a plan shall "designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests." 11 U.S.C. § 1123(a)(1). Here, no objection to designation of a claim or interest was asserted by any party-in-interest under 11 U.S.C. § 1129(a)(9). [*See* Transcript of April 19, 2021 Hearing, 47:17-19] The Court therefore concludes that Debtor has demonstrated by a preponderance of the evidence that the Plan complies with § 1129(a)(9).

j) Section 1129(a)(10)

Under § 1129(a)(10), "[i]f a class of claims is impaired under the plan," then it must be the case that "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).

As one court stated, "[s]ection 1129(a)(10) operates as a statutory gatekeeper barring access to cramdown where there is absent even one impaired class accepting the plan. Cramdown is a powerful remedy available to plan proponents under which dissenting classes are compelled to rely on difficult judicial valuations, judgments, and determinations. The policy underlying Section 1129(a)(10) is that before embarking upon the tortuous path of cramdown and compelling the target of cramdown to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan." *In re Pearl Res. LLC*, 622 B.R. at 263 (citing *One Times Square Ltd. P'ship v. Banque Nationale de Paris (In re One Times Square Assocs. Ltd. P'ship)*, 165 B.R. 773 (S.D.N.Y. 1994)).

As outlined above, § 1129(a)(10) does not have to be satisfied for a subchapter V plan to be confirmed. 11 U.S.C. § 1191(b). Nonetheless, in this case, Class 2-Memphis Heat & Air along with Class 9-Allen Electric Company, Balton Sign Company, Central Laundry Equipment, Inc., Harold A. Daniels, Douglas Emmer, Evans Petree, Garcia's Landscaping, Jackson Place Equity Partners, LLC, Life Corporation, Ashley Lovelady, Memphis Ice Machine Rental, Merchants Bonding Company, Robert Rodriguez, State Chemical Solutions, State Systems, Inc., Travel Media Group are all non-insider, impaired classes, that voted in favor of Debtor's Amended Plan. [DE 150; DE 184, Article V; Transcript of April 19, 2021 Hearing, 47:11-13] Accordingly, the Court finds that Debtor's Amended Plan meets the requirement of § 1129(a)(10).

k) Section 1129(a)(11)

Section 1129(a)(11) is commonly referred to as the "feasibility" requirement of confirmation. A debtor's plan is feasible if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor ... unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). "Under the feasibility standard, a debtor must demonstrate that its plan offers a reasonable possibility of

success by a preponderance of the evidence." *In re Pearl Res. LLC*, 622 B.R. at 263 (*citing Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship),* 116 F.3d 790, 801 (5th Cir. 1997)). "The court need not require a guarantee of success." *Id.* at 263 (*citing In re Lakeside Global II, Ltd.*, 116 B.R. 499, 507 (Bankr. S.D. Tex. 1989)). "Essentially, a debtor must be able to show that it can accomplish what it proposes to do, in the time period allowed, and on the terms set forth in the plan. The bankruptcy court must make a specific finding as to feasibility after engaging in a peculiarly fact intensive inquiry that involves a case-by-case analysis, using as a backdrop the relatively low parameters articulated in the statute." *Id.* at 263 (*citing Lakeside Global,* 116 B.R. at 507 and *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 266 (Bankr. S.D. Tex. 2015)). "To confirm a plan, the bankruptcy court must make a specific finding that the plan as proposed is feasible." *Id.* at 263 (*citing In re M & S Assoc., Ltd.,* 138 B.R. 845, 848 (Bankr. W.D. Tex. 1992)).

Here, this Court specifically finds that the Amended Plan is feasible and has a reasonable assurance of commercial viability based on the following: (1) that the Debtor was able to service the adequate protection payments during the pendency of this case which were $25,600 per month compared to a monthly payment required under the Amended Plan of $17,918 per month [Transcript of April 19, 2021 Hearing, 185:1-11], (2) the Debtor has been able to weather the COVID-19 pandemic and the hospitality economic storm that ensued by coming up with innovative ways to generate income which allowed Debtor to outperform its competition [Transcript of April 20, 2021 Hearing, 34:17-36:15], (3) the ability of Debtor's general manager along with management [Transcript of April 20, 2021 Hearing, 10:1-36:15], (4) third-party interest in the Property [EAS Ex. 9-14], (5) potential untapped earning ability from on-site restaurant(s) and bar(s) [Transcript of April 20, 2021 Hearing, 30:22-32:9] and (6) the economic

outlook for the hospitality industry in general now that COVID-19 vaccines are readily available and individuals are beginning to travel again. Accordingly, Debtor's Amended Plan satisfies § 1129(a)(11).

l) Section 1129(a)(12)

Section 1129(a)(12) requires the payment of "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan[.]" 11 U.S.C. § 1129(a)(12). Under § 507, such fees are afforded priority as administrative expenses. 11 U.S.C. § 507. The Amended Plan provides for the payment of such fees on the effective date and thereafter, as may be required. [DE 184 at 1.01, 4.01, 6.02] Accordingly, the Court finds that Debtor's Amended Plan complies with § 1129(a)(12).

m) Section 1129(a)(13)

Section 1129(a)(13) requires that a plan provide for "the continuation . . . of payment of all retiree benefits, . . . at the level established pursuant to . . . section 1114 of [the Bankruptcy Code], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). Pursuant to the Amended Plan, this section is inapplicable to the instant Debtor. [DE 184] Accordingly, the Amended Plan satisfies the requirements of § 1129(a)(13).

n) Section 1129(a)(14)

Section 1129(a)(14) of the Bankruptcy Code requires that if the debtor is mandated by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor must have paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition. 11 U.S.C. § 1129(a)(14). Here, Debtor is not required by a judicial or administrative order, or by statute, to pay any domestic support obligation; accordingly, the Amended Plan satisfies the requirements of § 1129(a)(14).

o) Section 1129(a)(15)

Section 1129(a)(15) requires that if the debtor is an individual, and the holder of an allowed unsecured claim has objected to confirmation of the plan, the property to be distributed to the holder must be not less than the value required by § 1129(a)(15). 11 U.S.C. § 1129(a)(15). Here, § 1129(a)(15) does not apply because Debtor is not an individual; accordingly, the Amended Plan satisfies the requirements of § 1129(a)(15).

p) Section 1129(a)(16)

Section 1129(a)(16) requires that "[a]ll transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust." 11 U.S.C. § 1129(a)(16). Here, upon review, all transfers of property under the Amended Plan will be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation of trust; accordingly, the Amended Plan satisfies the requirements of § 1129(a)(16).

Now that the Court has determined that Debtor's Amended Plan meets the applicable requirements under § 1129(a), other than § 1129(a)(8), the Court will turn its attention to confirmation of Debtor's Amended Plan pursuant to § 1191(b).

(iii) Confirmation Pursuant to § 1191(b) and "Cramdown"

Under the cramdown rules in § 1191(b), if all other confirmation elements are met (with exception of paragraphs (8), (10) or (15) of § 1129), the court must confirm a plan on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. 11 U.S.C § 1191(b). These two general standards are the same as the ones that govern in a cramdown under § 1129(b). While subchapter

V does not affect any change in the unfair discrimination requirement, § 1191(c) does provide a new "rule of construction" in subchapter V cases for the condition that a plan be "fair and equitable," replacing the detailed definition of that term contained in § 1129(b). Subchapter V does not change existing law regarding permissible cramdown treatment of secured claims because with regard to a class of secured claims, a subchapter V plan is "fair and equitable" if it meets the existing rules for secured claims stated in § 1129(b)(2)(A). 11 U.S.C § 1191(c)(1). Section 1129(b)(2)(A) states:

> (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—
>
> (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
> (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;
>
> (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. § 1129(b)(2)(A).[7] The general standards for confirmation (i.e. that the subchapter V

[7] Nevertheless, § 1191(c) does not state a "fair and equitable" rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement ("best efforts" test), which requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. 11 U.S.C § 1191(c). Notably, in a subchapter V case, the absolute priority rule under § 1129(b)(2)(B) is eliminated for cramdown, which will allow existing owners to retain their full ownership without giving any new value, but only if the plan provides for the debtor to distribute all of its projected disposable income over at least three years from the date the first payment is due under the plan (or property having a value of at least that amount). 11 U.S.C § 1181(a). The absolute priority rule has been replaced with the "fair and

plan does not discriminate unfairly against any impaired, non-consenting class and is fair and equitable) shall be evaluated in light of iBorrow's objection.

iBorrow asserts that the Amended Plan fails to meet the requirements for cramdown under § 1129(b)(2)(A), made applicable here under § 1191(c)(1), because the Amended Plan as proposed is not fair and equitable as to its claim. iBorrow contends that while the Amended Plan provides for iBorrow to retain its prepetition liens, the Amended Plan fails to provide iBorrow with deferred cash payments totaling the allowed amount of iBorrow's claim. [DE 148, pp.6-13; 11 U.S.C. § 1129(b)(2)(A)(i)]

The fair and equitable requirement may be satisfied in several ways. The Debtor relies on the provision of the Bankruptcy Code under which a plan is deemed to be fair and equitable as to a class of secured claims that has rejected the plan if each member of the class retains its lien and receives "deferred cash payments totaling at least the allowed amount of [its] 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." 11 U.S.C. § 1129(b)(2)(A)(i)(II) (emphasis added). The phrase "value, as of the effective date of the plan" requires the application of an appropriate rate of interest so that the value of the payments received by the creditor over time equals the value of the creditor's interest in its collateral.

"As the legislative history to section 1129 explains, Congress included this language to 'recogniz[e] the time value of money,' by requiring 'a present value analysis that will discount value to be received in the future.'" *Unsecured Creditors' Comm. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 580 n.10 (6th Cir. 1998) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 408, 413-14 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6364, 6369-

equitable" requirement to protect dissenting unsecured classes similar to those requirements found in applicable Chapters 12 and 13 cases and individual Chapter 11 cases.

70). And, as the Supreme Court has stated, a creditor paid over time "receives the 'present value' of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments." *Rake v. Wade*, 508 U.S. 464, 472 n.8, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993).

The question, then, is what interest rate the Amended Plan must propose so that the stream of payments made toward iBorrow's secured claim equals the present value of iBorrow's collateral. Although § 1129(b) does not state the appropriate interest rate to be paid in order to confirm a Chapter 11 plan in the face of the rejection of the plan by a secured class, case law does dictate the method for calculating the applicable rate.

In *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004), the Supreme Court addressed the interest rate required to be paid to a secured creditor in a Chapter 13 case so that the property to be distributed to the creditor has a "value, as of the effective date of the plan" at least equal to the allowed amount of the creditor's claim. 11 U.S.C. § 1325(a)(5)(B)(ii). This is the same phrase used in § 1129(b)(2)(A)(i)(II), and the *Till* plurality found it "likely that Congress intended bankruptcy judges ... to follow essentially the same approach when choosing an appropriate interest rate" under § 1129(b)(2) and other provisions of the Bankruptcy Code that use the same language. *Till*, 541 U.S. at 474, 124 S.Ct. at 1959. The approach adopted by the *Till* plurality is the formula approach. The *Till* Court also stated that "when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Till*, 541 U.S. at 476 n.14, 124 S.Ct. at 1959 n. 14.

Given the guidance set forth in *Till*, the Sixth Circuit has formulated a two-step approach to be used when determining the appropriate cramdown interest rate for a secured claim under

a Chapter 11 plan. *See Bank of Montreal v. Official Comm. of Unsecured Creditors (In re Am. HomePatient, Inc.)*, 420 F.3d 559 (6th Cir. 2005) (*reh'g denied)*.

In *American HomePatient*, the Sixth Circuit held that "the market rate should be applied in Chapter 11 cases where there exists an efficient market," but that "where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality." *Id.* at 568; *see also Momentive Performance Materials Inc. v. BOKF, N.A. (In re MPM Silicones, L.L.C.)*, 874 F.3d 787, 800 (2d Cir. 2017) ("We adopt the Sixth Circuit's two-step approach, which, in our view, best aligns with the Code and relevant precedent.").

To determine if an efficient market exists, courts consider the terms of the restructured debt, the type of collateral, the duration of the loan, and the amount of the loan. *See Gen. Elec. Credit Equities, Inc. v. Brice Road Devs., L.L.C. (In re Brice Road Devs., L.L.C.)*, 392 B.R. 274, 280-81 (6th Cir. 2008). "A market analysis by experts should be performed to ascertain whether the type of loan that the debtor is proposing in a plan can be obtained or whether an efficient market is lacking." *In re SW Boston Hotel Venture, LLC*, 460 B.R. 38, 54 (Bankr. D. Mass. 2011), *vacated on other grounds*, Nos. BAP 11-087, BR 10-14535-JNF, 2012 WL 4513869 (B.A.P. 1st Cir. Oct. 1, 2012) (*vacated and remanded* 748 F.3d 393 (1st Cir. 2014)). Courts, including the Sixth Circuit in *American HomePatient,* have rejected blended financing arrangements as evidence of an efficient market specifically because that was not the type of arrangement proposed by the debtor. *In re Am. Homepatient, Inc.,* 420 F.3d at 568–69; *Wells Fargo Bank, N.A. v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 337 (5th Cir. 2013).

"It is fair to say the courts 'almost invariably conclude' that efficient markets are absent

in a Chapter 11 case." *In re LMR, LLC*, 496 B.R. 410, 429 (Bankr. W.D. Tex. 2013) (*citing Texas Grand,* 710 F.3d at 333). *See, e.g., In re N.W. Timberline Enters.,Inc.,* 348 B.R. 412, 432, 435 (Bankr. N.D. Tex. 2006) (applying prime-plus formula after concluding that the evidence was insufficient to establish the existence of an efficient market); *In re Pamplico Highway Dev., LLC,* 468 B.R. 783, 793 (Bankr. D.S.C. 2012) (same); *In re Walkabout Creek Ltd. Dividend Hous. Ass'n Ltd. P'ship,* 460 B.R. 567, 574 (Bankr. D.D.C. 2011) (same); *In re 20 Bayard Views, LLC,* 445 B.R. 83, 111-12 (Bankr. E.D.N.Y. 2011) (same); *In re SW Boston Hotel,* 460 B.R. at 55 (same); *In re Hockenberry,* 457 B.R. 646, 657 (Bankr. S.D. Ohio 2011) (same); *In re Riverbend Leasing LLC,* 458 B.R. 520, 536 (Bankr. S.D. Iowa 2011) (same); *In re Bryant,* 439 B.R. 724, 742–43 (Bankr. E.D. Ark. 2010) (same).

iBorrow presented no expert testimony on the existence of an efficient market for the type of loan the Debtor has proposed in its plan. In fact, iBorrow did not provide any evidence at all of an efficient market other than the testimony of Brian Good, who stated in his declaration that "in the current lending environment, iBorrow's base interest rate for hotel loan is at a minimum 6.25% over the current prime rate. . . ," "13% reflects current market conditions for the Debtor," and that "iBorrow would not approve issuing a loan to the Debtor." [DE 180, ¶¶ 23, 26 & 27] He further testified that he "wouldn't issue a loan to this debtor, period." [Transcript of April 21, 2021 Hearing, 159:13-14] Good's testimony failed to provide any information on any lender who would be willing to make the type of loan proposed in the Amended Plan and then cements that no efficient market exists by stating that iBorrow would not make *any* type of loan to EAS. By contrast, the Debtor offered the testimony of Joseph Strain, a broker familiar with hotel financing markets. Strain testified that there was no efficient market for distressed hotel financing on the terms proposed by the Debtor.

[Transcript of April 20, 2021 Hearing, 111:17-21] Therefore, the Court finds that iBorrow has failed to meet its burden on this issue and finds that no efficient market exits. Thus, under *American HomePatient*, the Court must apply the formula approach to determine the cramdown interest rate.

The formula approach "begins by looking to the national prime rate," which "reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default." *Till*, 541 U.S. at 478–79, 124 S.Ct. at 1961.

The prime rate as of the date of the Confirmation Hearing (and at the time this Order was entered) was 3.25%. *See* http://www.federalreserve.gov/releases/h15/ (visited July 20, 2021). Under the formula approach, the Court must "adjust the prime rate" based on the risk of nonpayment "[b]ecause bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers. . . ." *Till*, 541 U.S. at 479, 124 S.Ct. at 1961. The next question is how the prime rate should be adjusted. As discussed below, courts adjust the prime rate by considering several relevant factors, by doing so holistically, and by bearing in mind that an adjustment of 1% to 3% has generally been found to be sufficient to compensate for the risk of nonpayment. *See, e.g., In re Prussia Assocs*., 322 B.R. 572, 591 (Bankr. E.D. Pa. 2005) ("The risk premium, per *Till,* will normally fluctuate between 1% and 3%.")(citation omitted); *In re Riverbend Leasing LLC*, 458 B.R. at 535 ("[T]he general consensus that has emerged provides that a one to three percent adjustment to the prime rate as of the effective date is appropriate.")(citation omitted); *see also In re Pamplico*, 468 B.R at 794 -95 (collecting cases).

Addressing the factors to be considered, the *Till* plurality first stated that "[t]he appropriate size of th[e] risk adjustment depends ... on such factors as the circumstances of the estate, the

nature of the security, and the duration and feasibility of the reorganization plan." *Till,* 541 U.S. at 479, 124 S.Ct. at 1961. It then noted that "the resulting 'prime-plus' rate of interest depends only on the state of financial markets"—a factor accounted for by use of the national prime rate as the base rate—"the circumstances of the bankruptcy estate, and the characteristics of the loan[.]" *Id*.

In analyzing these factors, "courts typically select a rate on the basis of a holistic assessment of the risk of the debtor's default on its restructured obligations." *In re Texas Grand*, 710 F.3d at 334 (citations omitted). That is, it is unnecessary to assign a risk adjustment to each particular factor. *See In re LMR, LLC*, 496 B.R. 410, 432–33 & n.12 (Bankr. W.D. Tex. 2013) ("[C]ourts typically select a cramdown rate based on a 'holistic' assessment of the risk of the debtor's default while evaluating several factors. The word 'holistic' means an analysis of the whole, rather [than] an analysis of its parts—which would seem to refute the notion that each risk factor must be assigned a specific percentage of increase to the prime rate." (citations omitted)). Another guidepost is the fact that, as the *Till* plurality noted, "other courts have generally approved adjustments of 1% to 3%." *Till*, 541 U.S. at 480, 124 S.Ct. at 1962 (citation omitted). As the Fifth Circuit has pointed out, among the courts that follow *Till*'s formula method in Chapter 11s – as this Court must do under *American HomePatient*—risk-adjustment calculations have generally remained within the plurality's suggested range of 1% to 3%. *See Texas Grand*, 710 F.3d at 333 ("Among the courts that follow *Till*'s formula method in the Chapter 11 context, 'risk adjustment' calculations have generally hewed to the plurality's suggested range of 1% to 3%.") (citations omitted). And as one bankruptcy court put it, "the general consensus among courts is that a one to three percent adjustment to the prime rate is appropriate, with a 1.00% adjustment representing the low risk debtor and a 3.00% adjustment representing a high risk debtor[.]" *In re Pamplico Highway Dev., LLC*, 468 B.R. at 794 (footnote omitted); *see also In re Riverbend Leasing LLC*,

458 B.R. at 535 ("[T]he general consensus that has emerged provides that a one to three percent adjustment to the prime rate as of the effective date is appropriate.")(citation omitted); *In re Prussia Assocs.*, 322 B.R. at 591 ("The risk premium, per *Till*, will normally fluctuate between 1% and 3%.")(citation omitted); Gary W. Marsh & Matthew M. Weiss, *Chapter 11 Interest Rates After Till,* 84 AM. BANKR. L.J. 209, 227–28 (2010) ("Generally, lower courts have adhered to *Till*'s broad guidelines concerning risk adjustments, creating a general spectrum on which a risk adjustment can be imposed. At the lower end, courts will apply a risk adjustment of roughly 1% where there is a low risk of non-payment on the Chapter 11 cramdown. ... Where there is an 'intermediate' risk of nonpayment by the debtors, bankruptcy courts have imposed a risk adjustment of roughly 1.5%.... Finally, where there is a significant risk of nonpayment by the debtor, bankruptcy courts are likely to approve higher risk adjustments.").

This makes sense, because the Supreme Court stated in *Till* that if a bankruptcy court "determines that the likelihood of default is so high as to necessitate an 'eye-popping' interest rate, the plan probably [is not feasible and] should not be confirmed." *Till*, 541 U.S. at 480–81, 124 S.Ct. at 1962 (citation omitted). Conversely, if a plan is feasible, then it would make little sense to impose an interest rate much higher than one calculated by starting with the prime rate and adding 1% to 3%.

The evidentiary burden as to the appropriateness of the upward risk adjustment is borne by iBorrow. "[I]f the debtor proposes a rate that would compensate the creditor for inflation risk and a relatively slight risk of default (*i.e.*, something approximating the prevailing prime rate), then the evidentiary burden of an upward risk-based adjustment should be on the creditor." *In re Hockenberry*, 457 B.R. at 655 (citations omitted); *Till*, 541 U.S. at 479, 124 S.Ct. at 1961 ("[S]tarting from a concededly *low* estimate and adjusting *upward* places the evidentiary burden

squarely on the creditors[.]"); *Gen. Elec. Credit Equities, Inc. v. Brice Road Devs., L.L.C. (In re Brice Road Devs., L.L.C.)*, 392 B.R. 274, 280 (B.A.P. 6th Cir. 2008) (relying on *Till* held in a Chapter 11 case that "[i]t is [the creditor's] burden to demonstrate that a higher rate than that proposed by the Debtor is appropriate"); *In re Griswold Bldg., LLC*, 420 B.R. 666, 693 (Bankr. E.D. Mich. 2009) ("The evidentiary burden is on the creditors to establish the appropriate risk adjustment.")(citations omitted).

The Plan provides that iBorrow's secured note shall bear interest at the rate of 5.0% per annum. This 5.0% cramdown interest rate is based on a 1.75% upward adjustment to the prime rate - a risk adjustment in the middle of the range suggested by the *Till* plurality. For the reasons explained below, the Court finds that iBorrow has failed to meet its burden of showing that a cramdown interest rate higher than the 5.0% provided on the iBorrow secured note is necessary for the Amended Plan to satisfy § 1129(b)'s fair and equitable standard.

In reaching this conclusion, the Court has considered the evidence presented at the Confirmation Hearing and assessed the demeanor and credibility of the witnesses who provided confirmation testimony.

While iBorrow is not content to accept a cramdown interest rate based on a risk adjustment in the middle of the *Till* plurality's recommended 1-3% range, iBorrow asserts that it is entitled to more, arguing that "[l]enders, including iBorrow, require that prospective borrowers provide company and guarantor specific information including, [sic] historical income statements and balance sheets, projected financial information, asset lists, appraisals, and guarantor financial statements." [DE 148 ¶ 26] These factors go beyond what the plurality contemplated in *Till,* which borrowed four factors from Justice Scalia's dissent for determining the appropriate risk adjustment: "(1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the

liquidity of the collateral market; and (4) the administrative expenses of enforcement." 541 U.S. at 484, 124 S.Ct. at 1964. The *Till* Court envisioned the risk adjustment to be compensation for the chance that the secured creditor would either not collect all its payments under the plan or fail to recoup what it was owed from the collateral after a default - not, as iBorrow suggests, that the creditor apply the analysis it would outside of bankruptcy as to whether it would loan funds to the debtor.

As such, the Court finds that iBorrow is not entitled to an interest rate of 8.25%. In fact, there was no evidence presented to the Court as to what the appropriate risk adjustment under *Till* should be (a burden that iBorrow bears) besides Brian Good's declaration in which he stated what he believed the interest rate would be for the Debtor outside of bankruptcy. [DE 180, ¶¶ 23 & 26] This is not the appropriate analysis under *Till*.[8] Further, the Court found Good's testimony spotty and unhelpful. Good appeared to not recall information contained in documents he signed (or related attachments), or information relating to iBorrow's proof of claim. [Transcript April 21, 2021 Hearing, 137:7-159:9] Good could not testify as to why escrow deposits were being held without being paid to the proper taxing authority, yet his declaration used as part of direct testimony outlines Debtor's failure to timely pay liens against the Property. [Transcript April 21, 2021 Hearing, 149:1-7; *Compare* iBorrow Ex. 25]

The Court also heard testimony from competing appraisers. In the end, the Court finds the confirmation testimony offered by Ben Levin of HVS to be more persuasive than that of W. Scott Bradford of CBRE (as detailed below). CBRE, thru Bradford, appraised the Property four times: February 2019, March 2020, January 2021 and April 2021. [iBorrow Ex. 13-16] HVS, thru Levin, appraised the Property three times: July 2020, January 2021, and April 2021 [iBorrow Ex. 17-20]

[8] In fact, Good's testimony was that he simply "wouldn't issue a loan to this debtor, period." [Transcript April 21, 2021 Hearing, 159:10-14]

A summary of the appraisals is as follows:

CBRE Appraisals	As Is	When Stabilized
February 2019 [iBorrow Ex. 13]	$4,675,000-4,900,000	$6,725,000-$6,900,000[9]
March 2020 [iBorrow Ex. 14]	$4,575,000-$4,700,000[10]	
January 2021 [iBorrow Ex. 15]	$3,700,000	$4,000,000
April 2021 [iBorrow Ex. 16]	$3,725,000	$3,950,000

HVS Appraisals	As Is	When Stabilized
July 2020 [iBorrow Ex. 17]	$5,790,000[11]	$7,490,000
January 2021 [iBorrow Ex. 18]	$5,990,000[12]	$7,490,000
April 2021 [iBorrow Ex. 20]	$5,990,000[13]	$7,490,000

The Court focuses on Bradford's appraisals and testimony. Bradford sufficiently explained why he applied a discount to his February 2019 appraisal to his March 2020 appraisal (i.e. the Swift Transportation contract did not materialize). However, the Court is not convinced that Bradford's discounts to the value of the Property between March 2020 and April 2021 (about a year) are completely reliable. Bradford acknowledged in his March 2020 appraisal that $625,000 had been spent on the Property post-February 2019 purchase. [iBorrow Ex. 14, p. 2; Transcript April 22,

[9] Assumed PIP improvements would be complete of $1,150,000. [iBorrow Ex. 13, p 54]
[10] Discounted from previous year due to contract with Swift Transportation not materializing. [iBorrow Ex. 14, p 1-2]
[11] Assumes Capital expenditure of $300,000. [iBorrow Ex 17, p. 3]
[12] Assumes Capital expenditure of $300,000. [iBorrow Ex 18, p. 3]
[13] Assumes Capital expenditure of $100,000. [iBorrow Ex 20, p. 3]

2021 Hearing, 33:12-34:1] In this March 2020 appraisal which no longer considered the Swift Transportation contract (and acknowledged there had been $625,000 in post-purchase repairs made (in addition to the repairs made by Debtor during the time it leased the property)), Bradford came to the opinion that the value of the Property was $4,575,000 based on sales approach [iBorrow Ex. 14, p. 2; Transcript April 22, 2021 Hearing, 34:2-14] and $4,575,000 based on income capitalization approach[14] [Ex. 14, p.18 as numbered; Transcript April 22, 2021 Hearing, 42:23-43:3]

The Court heard testimony that Bradford changed Debtor from a full-service hotel (which he used February 2019) [iBorrow Ex. 13, p. 2; Transcript April 22, 2021 Hearing, 8:1-6] to limited service hotel, yet he acknowledged in his March 2020 appraisal that the service facilities were capable of operating. [iBorrow Ex. 14, p. 2; Transcript April 22, 2021 Hearing, 28:21-29:17] What the Court does not find creditable is Bradford's January 2021 appraisal. In the January 2021 appraisal, Bradford uses the same comparable hotel comp group, yet he now, less than a year later, values the Property at $3,525,000 under the Sales Comparison Approach.[15] [iBorrow Ex. 15, p. viii as numbered; Transcript April 22, 2021 Hearing, 53:2-16] The Court has also reviewed Bradford's March 2021 appraisal which was prepared for the sole purpose of valuing the Property if it was not operating under a franchise. The Court finds that there is little to no change between Bradford's January and March 2021 appraisals to give much weight to the argument that the rejection of franchise agreement will impact the value of the Property. [*Compare* iBorrow Ex. 16, p. x as numbered, *with* iBorrow Ex. 15]

The Court gives greater weight to the testimony of Ben Levin and the HVS appraisals.

[14] Direct Capitalization value of $4,425,000 and Discounted Cash Flow analysis of $4,700,000. [iBorrow Ex. 14, p. 18 as numbered]

[15] Bradford discounted room value from $21,628 [iBorrow Ex. 14, p. vi as numbered] to $16,395 [iBorrow Ex. 15, p. viii as numbered].

Levin testified that he "selected properties regionally, that were…similar properties sold at similar price per [room]. The sales . . . selected were the Nashville Airport Inn and Suites, which is similarly an airport economy hotel…La Quinta Inn Suites, which is similarly a limited service hotel that has a conference center component in this case…[and] Motel 6 in Downtown Memphis…an economy hotel in Memphis." [Transcript April 20, 2021 Hearing, 160:9-21] While iBorrow's counsel focused cross-examination on the cost of renovations/cost to bring all rooms into rentable inventory, the estimated cost of those repairs was between $100,000 and $300,000. [Transcript April 20, 2021 Hearing, 165:1-4] Even placing the highest cost on the capital improvements, the appraisal would only be discounted $300,000 (which still shows significant equity in the Property). The Court also considered the PIP and the original $1,150,000 capital improvements that were to be completed on the Property post-purchase. Of the $1,150,000, iBorrow's own witness acknowledged that the lessee invested approximately $1,175,000 in renovations to the hotel from 2016 through 2018 (pre-purchase) and completed an additional $625,000 in renovations during 2019 after closing on the acquisition. [iBorrow, Ex 14, p 1] Further, while there was dueling testimony as to what capital improvements had been made and what still needed to be done, the Court finds Daniels a very creditable witness. Daniels outlined major capital improvements that were done since he became the general manager which included: $60,000 hot water system, new carpet in all hallways, $100,000 lock system, electronic lock key system, new carpet in some of the rooms, 90% of the PTAC replaced (i.e. room air-conditioner units)-wireless controllers on wall to control the PTAC, lower roof replaced, two top level roofs replaced, $20,000 in the kitchen area, Dad's Place, and the Blue Bar and the public bathroom to bring it up to code (according to Shelby County standards), all the refrigerators have been replaced along with microwaves and other room amenities, replaced ceiling tiles in lobby area, $10,000

security door from lobby to rooms, patched holes in parking lot, gate around parking area for secure parking, paint & new carpet in Dad's Place, new carpet in Blue Bar, instant hot water system. [Transcript April 20, 2021 Hearing 26:8-28:1; 29:13-14] Daniels further testified (and the Court finds based on Bradford's testimony), no further capital expenditures are needed to reopen Blue Bar, Trumpet's or Dad's Place. [Transcript April 20, 2021 Hearing 29:5-30:11]

The Court recognizes that the Debtor objected to iBorrow's claim. [DE 173] Based on iBorrow's response to the Debtor's objection, iBorrow waived close to $400,000 of late charges against the Debtor and asserts a claim as of April 9, 2021 in the amount of $4,141,218.87. [DE 222] The Court finds that there is equity in the Property based on iBorrow's claim. The Court finds the Property is valued *at a minimum* of $4,700,000.[16]

Moreover, it is worth questioning whether the concerns about the Debtor's financial future raised by iBorrow and its witnesses are sincerely held or are merely being asserted for tactical advantage given iBorrow's equity cushion. iBorrow's appraiser even acknowledged that the Debtor had not seen the same decline in room occupancy and revenue as others in the Memphis hospitality industry. [Transcript April 22, 2021 Hearing 49:14-50:16] Further, iBorrow's webpage shows a loan to value on the Property of 48.1%[17], yet Good testified that he believed a year and a half after issuing the loan and signing the press release, the Property has no equity. [Transcript April 21, 2021 Hearing, 153:19-155:5] This is simply not creditable.

There is always a risk of a future default. To account for that risk, the Debtor offers iBorrow a 1.75% upward adjustment to the prime rate—a risk adjustment in the upper mid-range suggested by the *Till* plurality.[18]

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[16] [iBorrow Ex. 14]

[17] [Transcript April 21, 2021 Hearing, 155:6-157:18]

[18] In applying *Till*'s prime-plus formula, some bankruptcy courts have required adjustments to the prime rate outside this 1–3% range. *See, e.g.*, *Couture Hotel Corp.*, 536 B.R. 712, 746–47(Bankr. N.D. Tex. 2015)

Facing a competitive marketplace and the economic issues created by the COVID-19 pandemic, the Debtor will undoubtedly encounter challenges ahead. But having conducted its own "holistic assessment of the risk of ... [a] default [by EAS] on [the iBorrow secured note]," *Texas Grand Prairie Hotel*, 710 F.3d at 334, the Court concludes that the proposed cramdown interest rate of 5.0% is sufficient to compensate iBorrow for that risk. Put differently, the deferred payments iBorrow will receive under the new iBorrow secured note, when discounted to present value by applying the 5.0% cramdown interest rate, equal the allowed amount of the iBorrow secured claim. The Amended Plan accordingly complies with § 1129(b)(2)(A)(i)(II) of the Bankruptcy Code and, thus, is fair and equitable.

The Amended Plan is Feasible

iBorrow's final argument is that the Amended Plan is not feasible. The standard for feasibility in a Subchapter V is different than that in a standard Chapter 11 as the debtor must show 1) that "there is a reasonable likelihood that the debtor will be able to make all payments under the plan" and 2) that "the plan provides appropriate remedies . . . to protect the holders of claims or interests in the event that the payments are not made." 11 U.S.C. § 1191(c)(3). Subchapter V is meant to provide a faster, cheaper alternative for small businesses, which is made clear by the fact that the language in subchapter V mirrors language found in

(3.5% upward risk adjustment to the prime rate was appropriate due to management shortcomings and impediments to foreclosure arising from fact that a portion of the property securing the loan was located in a foreign jurisdiction); *CRE/ADC Venture 2013, LLC v. Rocky Mountain Land Co., LLC (In re Rocky Mountain Land Co., LLC)*, No. 12-21643 HRT, 2014 WL 1338292 at *9 (Bankr. D. Colo., Apr. 3, 2014) (3.75% upward risk adjustment appropriate where secured creditor with lien on commercial office building would receive interest-only payments for seven years followed by a balloon payment, questions existed as to plan's feasibility, and one of the primary tenants had below-market lease); *Griswold Bldg.*, 420 B.R. at 693–704 (5% upward risk adjustment to the prime rate required where court found that plan was not feasible, a substantial portion of loan was unsecured, and plan did not provide for equity contributions or funds for either tenant alterations or leasing commissions). The considerations that warranted risk adjustments over and above the high end of the *Till* plurality's suggested 1-3% range in the above-cited cases are not present here.

Chapter 13. *See* 11 U.S.C. § 1325(a)(6) (". . . the debtor will be able to make all payments under the plan and to comply with the plan.").

The evidence establishes that, while the pandemic has severely impacted the hospitality industry, the Debtor, unlike the vast majority of hotels, has managed to maintain its pre-pandemic performance. [EAS Ex. 8, Tab 3 - 4] Moreover, notwithstanding the pandemic, the Debtor has been able to make monthly post-petition adequate protection payments pursuant to agreed orders authorizing cash collateral of $26,500, substantially more than the restructured payment contemplated by the Amended Plan. [iBorrow Ex. 25.]

The Objection argues that the Debtor has failed to meet its burden in proving that the Amended Plan is feasible because the Debtor made inaccurate projections in relation to the use of cash collateral and the Debtor's intent to reject the franchise agreement with Travelodge Hotels, Inc. The Court disagrees.

First, the evidence shows that the Debtor's projections were fairly accurate with one exception - food and beverage. Comparing the cash collateral projections to the Debtor's profit and loss statements, iBorrow concluded that the Debtor over-projected its room sales by $226,180.59 from October 2020 through March 2021. [iBorrow Ex. 21 p. 2] Marmontel testified that the Debtor had accrued a little more than $180,000 in account receivables during October 2020 through March 2021 and that these receivables do not appear on the profit and loss statements. [Transcript of April 19, 2021 Hearing, 180:16-20.] When these receivables are added to the Debtor's room sales, the amount the Debtor over-projected is reduced to $45,180.59, which is only 3-3.1%[19] of the total projected sales during the period. [*See* iBorrow Ex. 21 p. 2] The Court does not believe that this 3-3.1% variance during an unprecedented

[19] $45,180.59/$1,463,578=0.03087

pandemic is particularly worrisome; however, the evidence also establishes that this 3-3.1% over-projection was not foreseeable as the Debtor's projections for February 2021 account for $112,030.54 of the total over-projection (*Id.*) but that month shows an unusual snowstorm that shut down the entire City of Memphis for approximately a week. The Court finds that the Debtor's projections as to room sales were sufficiently accurate and do not make the Amended Plan unfeasible.

With respect to the Debtor's F&B revenue projections, the Debtor acknowledged that the F&B revenue projections included with the cash collateral orders were inaccurate. During the pandemic, the Debtor obtained additional revenue by selling rooms to the governmental entities and non-profits to provide temporary housing and meals to guests who qualify for special programs. When the Debtor prepared its projections early in the case, the Debtor anticipated considerably more food revenue because it was told by the non-profits that more meals were needed. [Transcript of April 19, 2021 Hearing, 49:19-50:3] The projections relating to the Amended Plan were not derived the same way. [*Id.* at 50:8-19] The projections in the Amended Pro Forma were appropriately reduced and appear to be in line with the Debtor's historical performance. [*See id.* at 51]

While iBorrow believes that the Debtor's business decision to reject the franchise agreement with Travelodge Hotels, Inc. will "most likely hinder the Debtor's business operations going forward," this assertion is without weight. The evidence shows that the Debtor has not seen any noticeable benefit from the Travelodge name but has endured the costs of utilizing the name since entering into the agreement. [*See* EAS Ex. 6] Prior to entering into its agreement with Travelodge Hotels, Inc., the Property had a period where it operated without a nationally recognized brand. [*Id.*] Room occupancy and revenues for that period were

substantially similar as they are under the Travelodge banner. [*Id.*] The Court further notes that the loss of the Travelodge brand was accounted for in the expert opinions of HVS and Strain. [EAS Ex. 16; EAS Ex. 2] Finally, as detailed above, the Court reviewed Bradford's March 2021 appraisal which was prepared for the sole purpose of valuing the Property if it was not operating under a franchise. The Court finds that there is little to no change between Bradford's January and March 2021 appraisals to give much weight to the argument that the rejection of franchise agreement will impact the value of the Property (or feasibility). [*Compare* iBorrow Ex. 16, p. x *with* iBorrow Ex. 15]

The Debtor Will Likely be Able to Satisfy the Balloon Payment

The Court finds that there is a likelihood that the Debtor will be able to satisfy the balloon payment December 31, 2025. The Debtor is actively soliciting purchasers for the Property and received multiple letters of intent which indicates a market for a potential sale. [EAS Ex. 9-14] Moreover, at the time of the Confirmation Hearing, the Debtor entered into a letter of intent with Southern Accommodations for a sale price of $5.1 million which, if it results in a sale, will generate sufficient funds to satisfy iBorrow's claim. [EAS. Ex. 18]

Additionally, should a sale not occur, and the Debtor continues to operate the Property, the evidence presented as to value of the Property is such that the Debtor should be able to seek long-term financing. Such financing will allow the Debtor to make the balloon payment to iBorrow in full satisfaction of its claim.

The Amended Plan Does Provide Appropriate Remedies to Protect iBorrow in the Event that Amended Plan Payments are Not Made

The Amended Plan provides iBorrow with protections in the event that plan payments are not made. Section 11.08 of the Amended Plan specifically states that iBorrow will retain the default remedies as set forth in the Promissory Note and other loan documents subject to

a cure period of 30 days before it may exercise its rights. Under the terms of the Amended Plan, iBorrow must provide written notice of any alleged default and provide the Debtor with 30 days in which to cure, then, assuming the Debtor fails to cure, iBorrow may proceed with any remedy available to it under the Promissory Note and other loan documents. [DE 184].

Providing a secured creditor with all the default remedies it had pre-bankruptcy is adequate to protect its interests in the case of a default. Therefore, the Court finds that the default remedies provided for by the Amended Plan are enough to protect iBorrow's interest and the Amended Plan will be confirmed.

CONCLUSION

An Order consistent with this Memorandum Opinion will be entered on the docket simultaneously herewith.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

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The Matrix