

**FILED**

JUL 06 2012

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

In re:	)	BAP No.	NV-11-1728-DKiPa
	)		NV-11-1737-DKiPa
WINDMILL DURANGO OFFICE, LLC,	)		(Related appeals)
	)		
Debtor.	)	Bk. No.	10-25594-lbr
_____	)		
BEAL BANK USA,	)		
	)		
Appellant,	)		
v.	)	<b>ORDER RE PUBLICATION</b>	
	)		
WINDMILL DURANGO OFFICE, LLC;	)		
UNITED STATES TRUSTEE; DP AIR	)		
CORPORATION,	)		
	)		
Appellees.	)		
_____	)		

Before: DUNN, KIRSCHER and PAPPAS, Bankruptcy Judges.

The Panel filed an unpublished memorandum decision in this appeal on June 27, 2012.

After further consideration, the Panel has decided to redesignate the memorandum of decision as an opinion for publication.

The disposition in the appeal is hereby ORDERED PUBLISHED.

A copy of the Opinion is attached to this order.

A Clerk's Notice regarding nonsubstantive changes to the decision will be entered concurrently with the entry of this order.

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WINDMILL DURANGO OFFICE, LLC;	)		
UNITED STATES TRUSTEE; DP AIR	)		
CORPORATION,	)		
	)		
Appellees.	)		

Argued and Submitted on June 15, 2012  
at Las Vegas, Nevada

Filed - June 27, 2012  
Ordered Published - July 6, 2012

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

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Appearances: Jeffrey R. Sylvester of Sylvester & Polednak, Ltd.  
argued for Appellant Beal Bank USA. Shara Larson  
of Marquis Aurbach Coffing argued for Appellee  
Windmill Durango Office, LLC.

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Before: DUNN, KIRSCHER and PAPPAS, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:

2  
3 Beal Bank USA ("Beal Bank") appeals two of the bankruptcy  
4 court's orders concerning the chapter 11 plan of the debtor,  
5 Windmill Durango Office, LLC.<sup>1</sup> Specifically, Beal Bank appeals  
6 the bankruptcy court's order ("ballot order") denying its motion  
7 to permit it to change a ballot accepting the debtor's chapter 11  
8 plan ("ballot motion").<sup>2</sup> Beal Bank also appeals the bankruptcy  
9 court's order confirming the debtor's chapter 11 plan ("plan  
10 confirmation order") over Beal Bank's objection. We AFFIRM the  
11 bankruptcy court's rulings in both appeals.

12 **FACTS**

13 A. The debtor's prepetition history

14 The debtor owns 4.49 acres of commercial real estate  
15 developed with a Class A office building ("real property"). The  
16

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17  
18 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

20 <sup>2</sup> Beal Bank has two related appeals before us: NV-11-1737  
21 and NV-11-1728. The first appeal, NV-11-1737, involves the  
22 ballot order. The second appeal, NV-11-1728, involves the plan  
confirmation order.

23 Beal Bank and the debtor submitted briefs and records in  
24 each appeal. We refer to Beal Bank's opening and reply briefs in  
25 the first appeal as "Appellant's Ballot Motion Opening Brief" and  
26 "Appellant's Ballot Motion Reply Brief," respectively. We refer  
to Beal Bank's opening and reply briefs in the second appeal as  
"Appellant's Plan Confirmation Opening Brief" and "Appellant's  
Plan Confirmation Reply Brief," respectively.

27 We refer to the debtor's brief in the first appeal as  
28 "Appellee's Ballot Motion Brief." We refer to the debtor's brief  
in the second appeal as "Appellee's Plan Confirmation Brief."

1 real property is valued at \$18.99 million.

2 The debtor leases most of the office building space to  
3 Allegiant Air ("Allegiant").<sup>3</sup> Allegiant is a national airline  
4 company, running its corporate headquarters out of the leased  
5 office building space. It is the debtor's primary tenant,  
6 occupying 87% of the office building and providing 95% of the  
7 real property's revenue.

8 Under the lease, Allegiant pays a monthly rent of  
9 \$182,006.12, including common area maintenance expense ("CAM")  
10 and parking. Allegiant's lease began in April 2008 and ends in  
11 April 2018. Allegiant may exercise an option to terminate the  
12 lease in April 2015. According to the debtor, if Allegiant  
13 exercises this option, it must pay the debtor an estimated \$1.2  
14 million cancellation fee.

15 The debtor purchased the real property prepetition through a  
16 loan with Community Bank of Nevada and Colonial Bank  
17 (collectively, "original lenders"). To document the loan, the  
18 debtor executed a promissory note in the original principal  
19 amount of \$16.5 million, secured against the real property.<sup>4</sup>

20 The original lenders later were closed down and placed into  
21 receivership with the FDIC. Until that time, the debtor was  
22 current on loan payments. The debtor tried to negotiate a  
23 purchase of the loan from the FDIC. During negotiations with the  
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25 <sup>3</sup> The debtor also leases a small office space to 1-800-  
26 Registry, which entered into a short-term lease with the debtor  
in October 2010.

27 <sup>4</sup> The promissory note matured by its non-accelerated terms  
28 on December 26, 2011.

1 FDIC, the debtor defaulted on the loan.<sup>5</sup> The FDIC ultimately  
2 sold the loan to Beal Bank.

3 On April 1, 2010, Beal Bank commenced a state court action  
4 against the debtor for breach of contract ("state court action").  
5 It also sought and eventually obtained the appointment of a state  
6 court receiver. Beal Bank recorded a notice of default and  
7 election to sell on April 9, 2010.

8 B. The debtor's chapter 11 bankruptcy case

9 1. The changing kaleidoscope of unsecured claims

10 The debtor filed its single asset real estate chapter 11  
11 bankruptcy petition on August 17, 2010. Windmill Durango, LP is  
12 the sole owner of the debtor.

13 The debtor scheduled \$1,121,261.11 in loans owed by Windmill  
14 Durango, LP, and \$168,000 in loans owed by Windmill Durango  
15 Office II, LLC as accounts receivable. It also scheduled  
16 \$99,844.79 in past due rent and CAMs owed by Allegiant as an  
17 account receivable.<sup>6</sup>

18 The debtor scheduled Beal Bank as its only secured creditor.  
19 The debtor initially reported a total of \$268,000 in unsecured  
20 nonpriority claims in its original Schedule F; Windmill Durango  
21 Office II, LLC held the largest unsecured nonpriority claim in  
22 the amount of \$265,000. The debtor specified the amount of only  
23 one other unsecured nonpriority claim: a \$3,000 business expense

24 \_\_\_\_\_  
25 <sup>5</sup> According to Beal Bank, the debtor failed to make payments  
26 from September 2009 to March 2010.

27 <sup>6</sup> Allegiant's debt arose from a state court order requiring  
28 Allegiant to pay this amount to the receiver for the debtor's  
benefit.

1 owed to Green Thumb Maintenance. The debtor listed the remaining  
2 unsecured nonpriority claims in "unknown" amounts. The debtor  
3 named DP Air Corp. and Otis Elevator Company among the creditors  
4 holding unsecured nonpriority claims in unknown amounts. It also  
5 reported in its Schedule H executory contracts with DP Air Corp.  
6 and Otis Elevator Company.

7 The debtor amended its Schedule F three times over the  
8 course of its bankruptcy case.<sup>7</sup> In the first amended Schedule F,  
9 the debtor reduced Windmill Durango Office II, LLC's unsecured  
10 nonpriority claim to \$32,000. In the second amended Schedule F,  
11 the debtor listed Marquis & Aurbach with a \$6,835.02 unsecured  
12 nonpriority claim for prepetition attorney fees incurred in the  
13 state court action. In the third amended Schedule F, the debtor  
14 listed John Benedict, Esq. ("Benedict") with a \$1,520 unsecured  
15 nonpriority claim for prepetition attorney fees incurred from  
16 representing the receiver in the state court action.

17 The deadline for general creditors to file proofs of claim  
18 was January 5, 2011 ("claims bar date"). Otis Elevator Company,  
19 DP Air Corp., Marquis & Aurbach and Benedict filed proofs of  
20 claim, all of which were unsecured nonpriority claims based on  
21 services performed for the debtor. Otis Elevator Company and  
22 DP Air Corp. timely filed their proofs of claim. The two  
23 remaining creditors filed their proofs of claim some weeks after  
24 the claims bar date; Marquis & Aurbach filed its proof of claim  
25

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26 <sup>7</sup> The debtor filed the first amended Schedule F on  
27 September 23, 2010 (docket no. 40), the second amended Schedule F  
28 on February 3, 2011 (docket no. 89) and the third amended  
Schedule F on March 24, 2011 (docket no. 125).

1 on March 1, 2011, and Benedict filed his original proof of claim  
2 on March 21, 2011, and his amended proof of claim on April 1,  
3 2011.

4 The total amount of the unsecured nonpriority claims filed  
5 was \$14,673.12. Otis Elevator Company filed two proofs of claim;  
6 the first was in the amount of \$1,500 and the second was in the  
7 amount of \$648.59. DP Air Corp.'s proof of claim was in the  
8 amount of \$4,506.20. Marquis & Aurbach's proof of claim was in  
9 the amount of \$6,498.33. Benedict's proof of claim was in the  
10 amount of \$1,520.<sup>8</sup>

11 2. The debtor's disclosure statement

12 The debtor filed its original disclosure statement and plan  
13 on January 26, 2011. An amended disclosure statement and amended  
14 plan were filed on March 16, 2011. Although Beal Bank objected  
15 to the original disclosure statement, it did not object to the  
16 amended disclosure statement.

17 Under the amended disclosure statement, the debtor placed  
18 Beal Bank into Class 1 and the unsecured nonpriority creditors  
19 into Class 3. It estimated Beal Bank's total secured claim to be  
20 \$16,188,110.62. It believed that the real property had  
21 \$3 million in equity based on an appraised value of  
22 \$19.4 million.<sup>9</sup> The debtor pointed out that Beal Bank never  
23

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24 <sup>8</sup> Benedict filed two proofs of claim, claim no. 6 and claim  
25 no. 7. Claim no. 7 amended claim no. 6.

26 <sup>9</sup> The debtor stated in the amended disclosure statement that  
27 the real property was valued at \$19.4 million. In the third  
28 amended plan filed on December 19, 2011, see infra n. 11, the  
(continued...)

1 disputed the appraised value of the real property. It further  
2 noted that Beal Bank was over-secured, given the appraised value  
3 of the real property and the amount of its secured claim.

4 The debtor proposed paying Beal Bank a total principal  
5 amount of \$16,188,100.62, fully amortized over 30 years with  
6 2.75% interest. It proposed paying \$66,086.53 per month, with  
7 the balance of the unpaid principal of \$12,189,347.85 due and  
8 payable in ten years. The debtor would make a final balloon  
9 payment on the unpaid principal balance.

10 The debtor intended to refinance or sell the real property  
11 in order to make the proposed balloon payment. It believed that  
12 the real property's value would increase over ten years. Even if  
13 the real property's value remained the same, the debtor estimated  
14 that there would be 40% in equity built up at the end of the  
15 plan's ten-year term.

16 The debtor also proposed to pay 100% of the allowed claims  
17 of the unsecured nonpriority creditors without interest ninety  
18 days after entry of the plan confirmation order.

19 Following hearings on March 9, 2011, and March 30, 2011, the  
20 bankruptcy court entered an order approving the amended  
21 disclosure statement ("disclosure statement order") on April 5,  
22 2011. The bankruptcy court set May 31, 2011, as the deadline by  
23 which creditors were required to submit their ballots accepting  
24

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25 <sup>9</sup>(...continued)  
26 debtor iterated this value. At the December 13, 2011 hearing,  
27 the bankruptcy court found that the real property was "worth as  
28 all concede at a minimum of \$18.99 million." Tr. of December 13,  
2011 hr'g, 5:18-19.



1 or rejecting the plan ("ballot deadline").

2 3. Beal Bank's ballot motion

3 Beal Bank, Marquis & Aurbach and Benedict timely submitted  
4 their ballots. Beal Bank voted to reject the plan, but Marquis &  
5 Aurbach and Benedict voted to accept the plan. Two and a half  
6 weeks before the ballot deadline, Otis Elevator Company and  
7 DP Air Corp. withdrew their respective proofs of claim.<sup>10</sup>

8 One week before the ballot deadline, Beal Bank filed an  
9 "Unconditional Transfer and Assignment of Claim After Proof of  
10 Claim Filed" ("claim transfer"). Beal Bank disclosed in the  
11 claim transfer that Benedict assigned his claim to Beal Bank in  
12 exchange for \$1,250.

13 Three days after filing the claim transfer, Beal Bank filed  
14 the ballot motion. In the ballot motion, it sought the  
15 bankruptcy court's permission to withdraw Benedict's vote  
16 accepting the plan and submit a substitute ballot rejecting the  
17 plan under Rule 3018(a).

18 Beal Bank admitted that it purchased Benedict's claim in  
19 order to block plan confirmation, as the debtor was seeking  
20 cramdown under § 1129(b)(2)(B). It noted that if the bankruptcy  
21 court allowed Beal Bank to withdraw Benedict's ballot and change  
22 the vote, the debtor could not use cramdown under the plan, as it  
23 would have no consenting impaired class as required under  
24 § 1129(a)(10).

25 Beal Bank averred that its purchase of Benedict's claim as a

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26  
27 <sup>10</sup> Otis Elevator Company withdrew its proof of claim on  
28 May 10, 2011, and DP Air Corp. withdrew its proof of claim on  
May 13, 2011.

1 means to block plan confirmation did not constitute bad faith.  
2 It asserted that it had no improper motivation in wanting to  
3 withdraw Benedict's ballot voting to accept the plan. Rather,  
4 Beal Bank simply wanted to protect its own claim. It also  
5 pointed out that it sought to withdraw Benedict's ballot and  
6 change the vote before the ballot deadline.

7 The debtor opposed the ballot motion, arguing that Beal Bank  
8 failed to satisfy Rule 3018(a). Rule 3018(a) requires that a  
9 creditor must show cause to change or withdraw an acceptance or  
10 rejection of the plan. The debtor contended that Beal Bank  
11 failed to show cause for withdrawing acceptance of the second  
12 amended plan. Instead, Beal Bank merely stated that it was  
13 trying to protect its interest and that it was making the change  
14 before the ballot deadline.

15 The debtor cited In re Kellogg Square P'ship, 160 B.R. 332  
16 (Bankr. D. Minn. 1993), for the proposition that a bankruptcy  
17 court usually allows a creditor to change its vote as long as the  
18 creditor's reason for the change is not improperly motivated. If  
19 the creditor's proposed change is challenged, it must demonstrate  
20 the propriety of the change. According to the debtor, in Kellogg  
21 Square P'ship, the bankruptcy court determined that where an  
22 entity acquires a creditor's claim after the creditor voted to  
23 accept or reject the plan, the assigning creditor's "evidenced  
24 commitment to that specific participation in the case is a  
25 permanent, binding limitation on the transferred claim." Id. at  
26 335. Here, Beal Bank did not provide any evidence indicating  
27 that Benedict's vote accepting the second amended plan was  
28 contrary to his true intention.

1 At the June 13, 2011 hearing on the ballot motion, Beal Bank  
2 again admitted that it sought to change Benedict's vote "so it  
3 could block confirmation inasmuch as the debtor would not be able  
4 to meet the numerosity requirements to have a consenting impaired  
5 class." Tr. of June 13, 2011 hr'g, 5:11-14. See also Tr. of  
6 June 13, 2011 hr'g, 6:8-10. It also admitted that it knew that  
7 Benedict had voted to accept the second amended plan at the time  
8 it purchased his claim and that it had purchased Benedict's claim  
9 after he voted. Beal Bank claimed, however, that there was  
10 nothing "untoward . . . in its efforts to obtain a blocking  
11 vote." Tr. of June 13, 2011 hr'g, 6:11-12. Beal Bank argued  
12 that simply because its purpose in changing the vote was self-  
13 motivated did not mean that it was improperly motivated.

14 Quoting Kellogg Square P'ship, Beal Bank further contended  
15 that "creditors should be given the full benefit of the right of  
16 franchise under Chapter 11 so long as it complied in the first  
17 instance with the ministerial rules governing that exercise."  
18 Tr. of June 13, 2011 hr'g, 15:13-15. Benedict complied with the  
19 disclosure statement order by timely casting his vote, so he  
20 should be given the full benefit of his right of franchise to  
21 change his vote, especially if he did so before the ballot  
22 deadline. Beal Bank argued that the fact that Benedict assigned  
23 his claim to Beal Bank was of no import. As successor-in-  
24 interest, Beal Bank also should be able to exercise the right of  
25 franchise to change the vote accepting the second amended plan.

26 The bankruptcy court denied Beal Bank's ballot motion,  
27 determining that Beal Bank did not show cause for changing or  
28 withdrawing Benedict's vote. It opined that cause "can't merely

1 be I want to change my mind or else why [did Rule 3018(a)] use  
2 the word 'cause'?" Tr. of June 13, 2011 hr'g, 16:17-18. See  
3 also Tr. of June 13, 2011 hr'g, 16:21-23 ("cause include[d]  
4 something other than I've changed my mind or else you don't need  
5 the word 'cause' [in Rule 3018(a)]."). The bankruptcy court  
6 determined that cause could not "be shown by the fact that [Beal  
7 Bank] want[ed] to block confirmation." Tr. of June 13, 2011  
8 hr'g, 20:7-8. The bankruptcy court opined that it was not  
9 "appropriate [for creditors] to wait 'til the plans [were]  
10 balloted and then decide what claims [they were] going to buy."  
11 Tr. of June 13, 2011 hr'g, 20:9-10.

12 The bankruptcy court moreover reasoned that "it [did] the  
13 process violence by the buying of a claim to specifically block  
14 confirmation after [the balloting was done]." Tr. of June 13,  
15 2011 hr'g, 20:21-24, 21:3-4.

16 The bankruptcy court entered the ballot order, which  
17 incorporated the fact findings and legal conclusions orally made  
18 on the record at the June 13, 2011 hearing. Beal Bank timely  
19 appealed the ballot order.

20 4. The debtor's plan confirmation

21 The debtor filed its second amended plan on April 6, 2011.<sup>11</sup>  
22 The second amended plan repeated the terms set forth in the  
23

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24  
25 <sup>11</sup> The debtor titled the second amended plan as "Windmill  
26 Durango Office, LLC's [Proposed] Chapter 11 Plan of  
27 Reorganization." It filed a third amended plan on December 19,  
28 2011, following hearings on July 7, 2011, and December 13, 2011.  
The debtor titled the third amended plan as "Windmill Durango  
Office, LLC's Second Amended Chapter 11 Plan of Reorganization."

1 amended disclosure statement.<sup>12</sup>

2 Beal Bank objected to the second amended plan ("plan  
3 objection"), arguing that the debtor did not satisfy the  
4 requirements of § 1129(a) and (b). It noted that the debtor  
5 proposed a nonconsensual cramdown plan, which required the debtor  
6 to satisfy all applicable elements of § 1129(a) and (b). It  
7 contended that the debtor failed to satisfy §§ 1129(a)(10) and  
8 1126(c) which require at least one impaired class to accept the  
9 plan and for that impaired class to accept a plan by creditors  
10 holding 2/3 in the allowed claim amount and more than 1/2 in the  
11 number of allowed claims. It pointed out that the debtor only  
12 had two impaired classes: Beal Bank formed one impaired class and  
13 Maquis & Aurbach and Benedict formed the other impaired class  
14 ("unsecured nonpriority creditor class"). Beal Bank voted to  
15 reject the second amended plan. It also acquired Benedict's  
16 claim "for the express purpose of controlling the unsecured class  
17 vote." Thus, even if Marquis & Aurbach voted to accept the plan,  
18 Beal Bank argued, the debtor did not have the requisite number of  
19 consenting creditors under § 1126(c). Without a consenting  
20 impaired class, the debtor could not use the cramdown provisions  
21 of § 1129(b) to confirm its second amended plan.

22 Beal Bank contended that the debtor also failed to satisfy  
23 § 1129(a)(3) because it did not file the second amended plan in  
24

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25  
26 <sup>12</sup> Beal Bank filed a proof of claim in the amount of  
27 \$16,979,353. At the time of plan confirmation, it contended the  
28 amount of its secured claim was \$17,404,669.85. The debtor  
countered that the amount of Beal Bank's secured claim was  
\$16,188,110.62.

1 good faith, as it artificially impaired the unsecured nonpriority  
2 creditor class. Although the claims of the unsecured nonpriority  
3 creditor class only totaled \$8,018.33 and sufficient operating  
4 cash was available to pay them, the debtor nonetheless proposed  
5 to pay the unsecured nonpriority creditor class without interest  
6 after ninety days. Beal Bank contended that the debtor purposely  
7 impaired the unsecured nonpriority creditor class to force the  
8 second amended plan upon Beal Bank, the only truly impaired  
9 creditor.

10 Beal Bank also objected to the proposed interest rate to be  
11 paid on its secured claim as it did not provide sufficient value.  
12 Under Till v. SCS Creditor Corp., 541 U.S. 465 (2004), the  
13 appropriate rate of interest is the prime rate plus a 1% to 3%  
14 adjustment for risk factors. Here, the debtor proposed paying  
15 Beal Bank 2.75% interest on its secured claim, even though the  
16 prime rate of interest was 3.25% at the time. The interest rate  
17 proposed by the debtor therefore fell below the minimum  
18 established by Till.

19 Beal Bank further argued that the debtor's second amended  
20 plan was not feasible as required under § 1129(a)(11). The  
21 debtor primarily relied on the rental income from its lease with  
22 Allegiant to fund the second amended plan. If Allegiant  
23 exercised its option to terminate the lease early, the debtor  
24 would be unable to continue business operations and fund the  
25 second amended plan. Beal Bank moreover questioned the debtor's  
26 ability to make the proposed balloon payment in ten years, given  
27 that the debtor did not provide any information regarding the  
28 probability of refinancing.

1 The debtor filed its ballot summary on June 14, 2011. It  
2 reported that the sole creditor in class 1, Beal Bank, voted to  
3 reject the second amended plan. The debtor further reported that  
4 both Marquis & Aurbach and Benedict voted to accept the plan.

5 The debtor also filed a reply to Beal Bank's plan objection.  
6 It noted in its reply that it would amend the plan to provide an  
7 appropriate rate of interest consistent with its expert witness  
8 testimony, to the extent that the bankruptcy court found that the  
9 proposed interest rate on Beal Bank's secured claim was  
10 inappropriate for cramdown purposes.

11 The debtor argued that it did not file the second amended  
12 plan in bad faith because it had economic and business  
13 justifications for not paying the unsecured nonpriority creditors  
14 preconfirmation. It claimed that it needed to have significant  
15 cash reserves to maintain Allegiant's office space, as Allegiant  
16 required the office space to be fully functional 24 hours a day,  
17 7 days a week. It also needed significant cash reserves to pay  
18 for any maintenance and repair for the office building's  
19 equipment and utilities.

20 The debtor further explained it needed cash reserves  
21 following tax season and any CAM reconciliation disputes with  
22 Allegiant. It also needed cash reserves to make any tenant  
23 improvements, should it secure a new tenant.

24 The debtor pointed out that Beal Bank would receive  
25 substantially more through the second amended plan than through  
26 any other available alternative. Under the second amended plan,  
27 Beal Bank would receive deferred cash payments totaling the  
28 allowed amount of its claim plus interest while retaining its

1 lien on the real property.

2 As to Beal Bank's argument regarding feasibility, the debtor  
3 purposely chose to pay \$66,086 per month to Beal Bank so it could  
4 save the difference between its monthly operating budget and the  
5 monthly rents to continue funding the plan in the event Allegiant  
6 terminated its lease early. As noted above, the debtor would be  
7 entitled to a \$1.2 million cancellation fee if Allegiant  
8 terminated the lease early.

9 The debtor also anticipated that in ten years, the real  
10 property would be encumbered by less debt, the economy would have  
11 improved, and the real property's value would have increased.  
12 Even if the real property's value remained stagnant,  
13 approximately 35 to 40% of the real property's value would  
14 provide an equity cushion for the debtor.

15 With respect to Beal Bank's argument regarding the proposed  
16 interest rate on its secured claim, the debtor offered to adjust  
17 it to 4.25%. It revealed that, in light of the ballots submitted  
18 and objections filed, its expert witness, Kenneth Funsten  
19 ("Funsten") believed that the second amended plan should be  
20 assessed under Till. Even at the 2.75% interest rate, the second  
21 amended plan proposed to pay Beal Bank over \$20 million in  
22 principal and interest over ten years, which exceeded the present  
23 value of Beal Bank's secured claim.

24 Two days before the July 7, 2011 evidentiary hearing on the  
25 second amended plan ("evidentiary hearing"), the debtor and Beal  
26 Bank filed a joint pretrial statement (docket no. 222). In the  
27 joint pretrial statement, the debtor and Beal Bank presented the  
28 following issues to be determined by the bankruptcy court at the



1 evidentiary hearing: (1) whether an impaired class existed with a  
2 genuine interest to consent to the second amended plan;  
3 (2) whether the debtor filed the second amended plan in good  
4 faith; (3) whether the second amended plan sets forth the  
5 appropriate interest rate on Beal Bank's secured claim for the  
6 purposes of cramdown; and (4) whether the second amended plan was  
7 feasible.

8 At the start of the evidentiary hearing, the bankruptcy  
9 court found that at least one impaired class (i.e., class 3, the  
10 unsecured nonpriority creditor class) had accepted the debtor's  
11 second amended plan. Relying on Conn. Gen. Life Ins. Co. v.  
12 Hotel Assocs. of Tucson (In re Hotel Assocs. of Tucson), 165 B.R.  
13 470 (9th Cir. BAP 1994), it held that the debtor satisfied the  
14 requirement of § 1129(a)(10), though it acknowledged that the  
15 issue of class gerrymandering might be relevant to the issue of  
16 good faith under § 1129(a)(3).

17 The bankruptcy court heard testimony from various witnesses,  
18 including the debtor's expert witnesses, on the appropriate  
19 interest rate to be paid on Beal Bank's secured claim and the  
20 value of the real property. During the evidentiary hearing, the  
21 bankruptcy court emphasized that the second amended plan's  
22 feasibility depended on a determination of the appropriate  
23 interest rate to be paid on Beal Bank's secured claim.

24 At the end of the evidentiary hearing, the bankruptcy court  
25 asked the parties to submit supplemental briefs as to the second  
26 amended plan's feasibility. The parties were to include  
27 calculations of the potential monthly payment amounts and the  
28 balloon payment amount, based on the interest rates and the

1 amounts of Beal Bank's secured claim as advanced by each of the  
2 parties. The debtor and Beal Bank both filed their supplemental  
3 briefs on September 19, 2011 (docket nos. 254 and 255).<sup>13</sup>

4 The debtor contended in its supplemental brief that the  
5 second amended plan was feasible if the bankruptcy court accepted  
6 any of the interest rates proposed by the debtor. The debtor  
7 claimed that the appropriate interest rate was 4.25%, the Till  
8 build-up rate. But even at the highest interest rate of 4.79%,  
9 the blended rate, or at 4.52%, the average of the Till build-up  
10 rate and the blended rate, the debtor's second amended plan still  
11 was feasible. Applying any of these interest rates to the higher  
12 claim amount of \$17,404,669.85 asserted by Beal Bank, the debtor  
13 noted that the calculated monthly payments were close to the  
14 \$88,047 monthly adequate protection payment it had been making to  
15 Beal Bank over the course of the bankruptcy case. The debtor  
16 calculated that the monthly payment to Beal Bank would be  
17 \$85,620.51 at the 4.25% interest rate, \$88,393.86 at the 4.52%  
18 interest rate or \$91,211.10 at the 4.79% interest rate.<sup>14</sup>

19 The debtor also anticipated that it would be able to make  
20 the balloon payment at the end of the plan term. The debtor

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21  
22 <sup>13</sup> Beal Bank included in the record before us a copy of the  
23 debtor's supplemental brief, but did not include a copy of its  
24 own supplemental brief. We obtained a copy of Beal Bank's  
25 supplemental brief from the bankruptcy court's electronic docket.  
26 See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),  
27 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan  
28 Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP  
2003).

<sup>14</sup> The debtor continued to maintain, however, that the  
amount of Beal Bank's secured claim was \$16,188,110.62.

1 asserted that it would have \$6 million in equity to work with at  
2 the end of the plan term, based on its proposed payoff schedule  
3 and the assumption that the real property's market value remained  
4 static. The debtor therefore believed that it would be able to  
5 refinance successfully or sell the real property to satisfy the  
6 balloon payment.

7 Beal Bank argued that the appropriate interest rate was  
8 8.1%, the blended rate, as calculated by its own expert, Daniel  
9 Van Vleet ("Van Vleet"). Applying this interest rate to the  
10 \$17,404,669.85 claim amount asserted by Beal Bank, the monthly  
11 payment amortized over thirty years would be \$128,925. Even at  
12 the \$16,188,111 claim amount asserted by the debtor, Beal Bank  
13 calculated that the monthly payments amortized over thirty years  
14 would be \$119,913.

15 Beal Bank pointed out that the debtor's proposed loan term  
16 was ten years, maturing in 2021. If Allegiant early terminated  
17 its lease in April 2015 or continued with the lease to the end of  
18 its contracted term in April 2018, the debtor's cash flow  
19 potentially would be severely restricted well before the proposed  
20 loan maturity date. According to Beal Bank, the debtor did not  
21 provide any evidence that it could continue to service the debt  
22 obligation to Beal Bank following early termination or  
23 termination of the lease with Allegiant. Thus, Beal Bank  
24 concluded, the debtor's second amended plan was not feasible.

25 On December 13, 2011, the bankruptcy court held a hearing,  
26 orally issuing its fact findings and legal conclusions on the  
27 record. The bankruptcy court made detailed fact findings as to  
28 feasibility under § 1129(a)(11). With respect to the issue of

1 good faith under § 1129(a)(3), the bankruptcy court stated that  
2 "the [second amended] plan meets all the other requirements of  
3 Chapter 11 . . . ." Tr. of December 13, 2011 hr'g, 15:3-4. See  
4 also Tr. of December 13, 2011 hr'g, 4:3-4.

5 The bankruptcy court found that the 4.52% interest rate  
6 testified to by the debtor's expert was the appropriate cramdown  
7 interest rate. It adopted the 4.52% interest rate in light of  
8 the approach set forth by Till, which required the bankruptcy  
9 court to start with the prime rate and then build up or add to it  
10 based on risk factors. The bankruptcy court opined that Till  
11 only set 1% to 3% as the general range for risk factors, not as  
12 the limit.

13 The bankruptcy court adopted the findings set forth by  
14 Funsten, the debtor's expert, agreeing with his analysis of the  
15 risk factors. It adopted his conclusions "based upon the  
16 character of the loan, the fact that . . . [there was] a building  
17 that's rented, a stable tenant, and the rent above market and  
18 above the amount needed to pay the debt, the collateral which  
19 again relate[d] to the building, and the circumstances peculiar  
20 to this debtor." Tr. of December 13, 2011 hr'g, 13:15-20. The  
21 bankruptcy court explained that it adopted the 4.52% interest  
22 rate "to account for the high risk if the debt [was] equal to  
23 [Beal Bank's] current claim." Tr. of December 13, 2011 hr'g,  
24 13:24-25, 14:1.

25 It found Van Vleet's calculation of the interest rate to be  
26 flawed in several respects. The bankruptcy court determined that  
27 Van Vleet used a coerced-loan approach, not the blended-rate  
28 approach he claimed to have used. It moreover found that he

1 "double-calculated" the risk to Beal Bank under the plan,  
2 applying an equity investor rate.

3 The bankruptcy court determined that the second amended plan  
4 was feasible based on the 4.52% interest rate proposed by the  
5 debtor and the \$17,404,669.85 claim amount asserted by Beal Bank.  
6 The bankruptcy court was careful to note that it was assuming the  
7 higher claim amount without deciding, "[f]or the purposes of  
8 determining the appropriate rate of interest which, in turn,  
9 require[d] an analysis based upon the amount of the debt[.]"  
10 Tr. of December 13, 2011 hr'g, 4:11-14.

11 The bankruptcy court also found it reasonably possible that  
12 the second amended plan was feasible because the debtor had  
13 sufficient income to fund it as the debtor received rental income  
14 exceeding the monthly payment amount to Beal Bank and would  
15 receive substantial damages from Allegiant in the event of early  
16 lease termination. The bankruptcy court believed it unlikely  
17 that Allegiant would early terminate the lease, given relocation  
18 costs and the special features offered by the office building.  
19 The bankruptcy court further reasoned that even if Allegiant did  
20 not renew the lease in April 2018, the debt to Beal Bank would be  
21 reduced to \$15,153,193.

22 It also recognized that the debtor had been making payments  
23 to Beal Bank in an amount equal to or close to the amount  
24 proposed under the second amended plan. The bankruptcy court  
25 further noted that the debtor's most recent operating report  
26 revealed that the debtor had a healthy cash balance.

27 The bankruptcy court found it reasonably possible that the  
28 debtor would be able to sell or refinance the real property such

1 that it would be able to make the balloon payment at the end of  
2 the ten-year plan term. The bankruptcy court determined that  
3 Funsten's report provided evidence as to the feasibility of a  
4 sale or refinance of the real property. It further determined  
5 that there was "nothing to suggest that the subject [real]  
6 property [would] decline in value," though it acknowledged that  
7 "any attempts to opine on the market conditions may be pure  
8 speculation with respect to the state of the economy and the  
9 market [in the area] in ten years[.]" Tr. of December 13, 2011  
10 hr'g, 8:1-5. The bankruptcy court thus concluded that Beal Bank  
11 not only had an equity cushion at the time of the evidentiary  
12 hearing, but would have an even greater one in ten years because  
13 the debtor would have made payments under the second amended  
14 plan.

15 The bankruptcy court entered the plan confirmation order on  
16 December 21, 2011. Beal Bank timely appealed the plan  
17 confirmation order.

18 At oral argument, it was reported that the general unsecured  
19 claims had been paid in full, and payments to Beal Bank under the  
20 confirmed plan were current.

#### 21 JURISDICTION

22 The bankruptcy court had jurisdiction under 28 U.S.C.  
23 §§ 1334 and 157(b)(2)(L) and (O). We have jurisdiction under  
24 28 U.S.C. § 158.

#### 25 ISSUES

26 (1) Did the bankruptcy court err in denying Beal Bank's  
27 ballot motion?

28 (2) Did the bankruptcy court err in confirming the debtor's

1 second amended plan by finding that the debtor demonstrated that  
2 it was feasible?

3 (3) Did the bankruptcy court err in confirming the debtor's  
4 second amended plan by finding that the debtor filed it in good  
5 faith?

6 **STANDARDS OF REVIEW**

7 The debtor and Beal Bank initially disagreed as to the  
8 standard of review that we should apply in reviewing the  
9 bankruptcy court's ruling under Rule 3018(a). At oral argument,  
10 counsel for the debtor agreed with Beal Bank that we should  
11 conduct our review under the abuse of discretion standard.

12 We have been unable to locate authority within the Ninth  
13 Circuit and elsewhere directly addressing this issue. We further  
14 note that the Bankruptcy Code does not define "cause." We  
15 nonetheless agree with the parties that the abuse of discretion  
16 standard of review applies here, as, within the context of  
17 chapter 11 cases, this standard of review has been applied to  
18 dismissals of chapter 11 cases for bad faith as "cause" under  
19 § 1112(b). See Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828  
20 (9th Cir. 1994) (per curiam) (reviewing for abuse of discretion  
21 bankruptcy court's decision to dismiss chapter 11 case as bad  
22 faith filing under § 1112(b)). We also note that Rule 3018(a)  
23 provides that the bankruptcy court may, but not necessarily must,  
24 permit a creditor to change its cast ballot, certainly implying  
25 that the court is vested with discretion in making its decision.  
26 We also review the bankruptcy court's decision to confirm a  
27 chapter 11 reorganization plan for an abuse of discretion.  
28 Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177,

1 184 (9th Cir. BAP 2003).

2 We apply a two-part test to determine objectively whether  
3 the bankruptcy court abused its discretion. United States v.  
4 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).  
5 First, we “determine de novo whether the bankruptcy court  
6 identified the correct legal rule to apply to the relief  
7 requested.” Id. Second, we examine the bankruptcy court’s  
8 factual findings under the clearly erroneous standard. Id. at  
9 1262 & n.20. We must affirm the bankruptcy court’s factual  
10 findings unless those findings are “(1) ‘illogical,’ (2)  
11 ‘implausible,’ or (3) without ‘support in inferences that may be  
12 drawn from the facts in the record.’” Id.

13 “Of course, a determination that a plan meets the requisite  
14 confirmation standards necessarily requires a bankruptcy court to  
15 make certain factual findings and interpret the law.” Brotby,  
16 303 B.R. at 184. We review the bankruptcy court’s factual  
17 determinations regarding feasibility under § 1129(a)(11) and good  
18 faith under § 1129(a)(3) for clear error. Id. We will not  
19 disturb the bankruptcy court’s factual determinations unless,  
20 after reviewing the entire evidence, we have a definite and firm  
21 conviction that a mistake has been made. Hinkson, 585 F.3d at  
22 1260. We reverse the bankruptcy court only if we conclude that  
23 the bankruptcy court’s factual determinations were illogical,  
24 implausible or without support in the record. Id. at 1261. If  
25 the bankruptcy court’s “account of the evidence is plausible in  
26 light of the record viewed in its entirety,” we may not reverse,  
27 even if we are convinced that, had we been in the position of  
28 factfinder, we would have weighed the evidence differently.



1 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74  
2 (1985). "Where there are two permissible views of the evidence,  
3 the factfinder's choice between them cannot be clearly  
4 erroneous." Id. at 574.

5 We review de novo the following issues as they involve  
6 questions of law: (1) whether plan treatment "impairs" a  
7 creditor's claim and (2) the bankruptcy court's determination of  
8 what factors to apply in a value determination. Conn. Gen. Life  
9 Ins. Co. v. Hotel Assocs. of Tucson (In re Hotel Assocs. of  
10 Tucson), 165 B.R. 470, 473 (9th Cir. BAP 1994). We accord  
11 substantial deference to the bankruptcy court's cramdown interest  
12 rate determinations. Id.

13 We may affirm on any basis supported by the record. Shanks  
14 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

15 **DISCUSSION**

16 A. The bankruptcy court did not err in denying Beal Bank's  
17 ballot motion

18 Rule 3018(a)<sup>15</sup> allows a creditor to change its vote only on  
19 a showing of cause. As one bankruptcy court points out, the  
20 Bankruptcy Code does not provide any guidance as to what  
21 constitutes cause under Rule 3018(a). In re CGE Shattuck, LLC,  
22 2000 WL 33679416 (Bankr. D.N.H. 2000).

23 The test for determining whether cause has been shown  
24 should not be a difficult one to meet. As long as the  
25 reason for the vote change is not tainted, the change of  
26 vote should usually be permitted. The court must only  
27 ensure that the change is not improperly motivated.

---

28 <sup>15</sup> Rule 3018(a) provides, in relevant part, "For cause  
shown, the court after notice and hearing, may permit a creditor  
. . . to change or withdraw an acceptance or rejection."

1 Kellogg Square P'ship, 160 B.R. at 334 (citing 8 Collier on  
2 Bankruptcy ¶ 3018.01[4] (15th ed. 1990)).

3 Here, Beal Bank emphasizes that the threshold to show cause  
4 under Rule 3018(a) is low. A creditor only need demonstrate that  
5 it has no "tainted" or improperly motivated reason for  
6 withdrawing its vote. Beal Bank freely admitted to the  
7 bankruptcy court and at oral argument that it bought Benedict's  
8 claim for the express purpose of blocking confirmation of a plan  
9 it believed to be proposed in bad faith by the debtor. According  
10 to Beal Bank, the bankruptcy court did not find this reason for  
11 its request to change Benedict's vote to be either tainted or  
12 improperly motivated. Appellant's Ballot Motion Opening Brief  
13 at 15. Because it did not find Beal Bank's request to withdraw  
14 Benedict's vote to be improper, Beal Bank argues, the bankruptcy  
15 court simply should have granted the ballot motion.

16 Beal Bank moreover contends that cause under Rule 3018(a)  
17 should be presumed to exist when a creditor seeks to withdraw its  
18 vote before the ballot deadline. Appellant's Ballot Motion  
19 Opening Brief at 26. Beal Bank argues that to deny a creditor's  
20 request to withdraw its vote when it was made before the ballot  
21 deadline would deprive the creditor "the full benefit of their  
22 right of franchise under Chapter 11." Appellant's Ballot Motion  
23 Opening Brief at 28. As long as the debtor suffers no prejudice  
24 from the creditor's withdrawal of the vote, Beal Bank reasons,  
25 the bankruptcy court should allow the creditor to do so. Id.

26 Little authority exists addressing this issue. In In re  
27 Kellogg Square P'ship, 160 B.R. 332 (Bankr. D. Minn. 1993), the  
28 bankruptcy court faced facts similar to the matter before us. In

1 Kellogg Square P'ship, Prudential Insurance Company of America  
2 ("Prudential"), the debtor's largest and only secured creditor,  
3 purchased claims from several of the debtor's unsecured  
4 creditors. Prudential obtained assignments of these claims after  
5 these creditors had cast their votes accepting the debtor's plan.  
6 Prudential then moved to change the acceptances to rejections  
7 under Rule 3018(a). Like Beal Bank, Prudential's strategy in  
8 purchasing the claims and changing the votes was to defeat  
9 confirmation of the debtor's plan so as to avoid cramdown  
10 treatment of its secured claim.

11 The bankruptcy court found that Prudential did not show  
12 cause under Rule 3018(a) to modify the votes, as the only cause  
13 alleged by Prudential was that it would not have voted the claims  
14 in favor of the debtor's plan. Kellogg Square P'ship, 160 B.R.  
15 at 335. The bankruptcy court reasoned that allowing an assignee-  
16 creditor to change the vote previously cast by the assignor  
17 undermines a basic principle of assignments. Id. Generally, "an  
18 entity which acquires a claim [against a bankruptcy estate] steps  
19 into the shoes of that claimant, enjoying both the benefits and  
20 the limitations of the claim, as a successor in interest." Id.  
21 (quoting In re Applegate Prop., Ltd., 133 B.R. 827, 833 (Bankr.  
22 W.D. Tex. 1991) (internal quotation marks omitted)). The  
23 bankruptcy court concluded that "where an entity acquires a  
24 creditor's claim after the creditor has already cast a vote on a  
25 plan of reorganization, the assignor-creditor's evidenced  
26 commitment to that specific participation in the case is a  
27 permanent, binding limitation on the transferred claim." Id.

28 It further reasoned that allowing an assignee-creditor to

1 change the assignor's previously cast vote would undercut the  
2 "certainty in the dynamics of reorganization under chapter 11."  
3 Id. "[W]ere pre-transfer votes not binding on the assignees of  
4 claims, creditors would be left to select not the best plan [of  
5 reorganization] but the best deal they might be able to  
6 individually negotiate, with the major constituencies vying for  
7 control of the case, behind the scene of the confirmation  
8 process." Id. (quoting Applegate Prop., Ltd., 133 B.R. at 836  
9 (internal quotation marks omitted)).

10 Beal Bank contends that the reasoning of Kellogg Square  
11 P'ship goes against current Ninth Circuit authority concerning  
12 the law of assignments as set forth in Boyajian v. New Falls  
13 Corp. (In re Boyajian), 564 F.3d 1088 (2009). Boyajian  
14 established that an assignee-creditor may pursue a § 523(a)(2)(B)  
15 action against a debtor as long as the assignee-creditor shows  
16 that the original creditor relied on the debtor's materially  
17 false statement. Because the reasoning of Kellogg Square P'ship  
18 conflicts with Boyajian, Beal Bank argues, it does not apply  
19 here.

20 We do not quibble with Beal Bank in its assertion that, as  
21 the assignee-creditor, it had the right to seek withdrawal of  
22 Benedict's vote. But Beal Bank misses the essential point of  
23 Kellogg Square P'ship: like the bankruptcy court here, the  
24 Kellogg Square P'ship bankruptcy court found that Prudential did  
25 not establish cause under Rule 3018(a) to change the vote of the  
26 assignor-creditors.

27 The bankruptcy court in In re MCorp Fin., Inc., 137 B.R. 237  
28 (Bankr. S.D. Tex. 1992), also considered a motion to allow a

1 change in vote on a chapter 11 plan. In MCorp Fin., Inc., an  
2 unsecured creditor moved to change his vote rejecting the chapter  
3 11 plan to one accepting it shortly after he reached an agreement  
4 with the debtor regarding treatment of his claim in the chapter  
5 11 plan. After pointing out that a change in vote under Rule  
6 3018(a) is the exception rather than the rule, id. at 238, the  
7 bankruptcy court went on to indicate that the standard for such a  
8 change is fairly relaxed, echoing the Kellogg bankruptcy court in  
9 citing Collier. The bankruptcy court then listed examples  
10 justifying vote changes, including "a breakdown in communications  
11 at the voting entity, misreading the terms of the plan, or  
12 execution of the first ballot by one without authority. In such  
13 circumstances, the vote could be changed in order to allow the  
14 voting entity to intelligently express its will." Id.

15 The bankruptcy court in MCorp Fin., Inc. ultimately denied  
16 the unsecured creditor's motion to change his vote, determining  
17 that his requested vote change was "prompted by a subsequent  
18 agreement, and was made in writing only after testimony in the  
19 confirmation hearing which made the ballot important." Id. at  
20 239. It found that "the timing of the change [was] highly  
21 suspect, and the evidence [did] not overcome the possibility of  
22 improper motivation." Id. The bankruptcy court concluded that  
23 the unsecured creditor failed to meet his burden of proof to  
24 establish that the requested change was not improperly motivated.  
25 Id.

26 Beal Bank maintains that the bankruptcy court did not find  
27 that it had an improper motivation in seeking to withdraw  
28 Benedict's claim. But the bankruptcy court did make such a

1 finding: it found that Beal Bank's reason to block confirmation  
2 "did the process violence." It further found that it was not  
3 "appropriate [for creditors] to wait 'til the plans [were]  
4 balloted and then decide what claims [they were] going to buy."

5 The bankruptcy court moreover found that "cause" under  
6 Rule 3018(a) required something more than a mere change of heart.  
7 It determined that withdrawing a previously cast vote for the  
8 purpose of strategy (i.e., for the purpose of blocking plan  
9 confirmation) was not cause under Rule 3018(a).

10 The bankruptcy court found that Beal Bank did not establish  
11 cause for withdrawing Benedict's vote. It further found that  
12 Beal Bank's reason for withdrawing Benedict's vote was improperly  
13 motivated. While it is a close question, we conclude that the  
14 bankruptcy court did not abuse its discretion in denying the  
15 ballot motion.

16 B. The bankruptcy court did not err in finding that the  
17 debtor's second amended plan was feasible

18 "To confirm a plan, a bankruptcy court must find that the  
19 plan is feasible, meaning that confirmation of the plan is not  
20 likely to be followed by the liquidation, or the need for further  
21 financial reorganization, of the debtor." Sherman v. Harbin  
22 (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007). Feasibility  
23 requires only that the debtor demonstrate that the plan has a  
24 "reasonable probability of success." Acequia, Inc. v. Clinton  
25 (In re Acequia, Inc.), 787 F.2d 1352, 1364 (9th Cir. 1986). "The  
26 Code does not require the debtor to prove that success is  
27 inevitable or assured, and a relatively low threshold of proof  
28 will satisfy § 1129(a)(11) so long as adequate evidence supports

1 a finding of feasibility." Wells Fargo Bank v. Loop 76, LLC  
2 (In re Loop 76, LLC), 465 B.R. 525, 544 (9th Cir. BAP 2012). The  
3 debtor cannot confirm a plan that is "a visionary scheme which  
4 promises more than the debtor can deliver." Id. (quoting Wiersma  
5 v. O.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92,  
6 112-13 (9th Cir. BAP 2005), aff'd in part, rev'd in part on other  
7 grounds, 227 Fed. Appx. 603 (9th Cir. 2007) (internal quotation  
8 marks omitted)). "Because feasibility is an issue of fact, we  
9 give due regard to the bankruptcy court's evaluation of witness  
10 testimony and any inferences drawn by the court." Loop 76, LLC,  
11 465 B.R. at 544.

12 Beal Bank contends that the debtor failed to provide  
13 evidence of sufficient cash flow to fund and maintain its  
14 business operations and pay its plan obligations. Beal Bank  
15 moreover argues that the debtor did not provide any evidence that  
16 it likely will be able to refinance or sell the real property at  
17 the end of the plan term to make the balloon payment. In  
18 particular, Beal Bank argued that the debtor offered no expert  
19 testimony on feasibility or on the likelihood of refinancing the  
20 real property and no projections or other "concrete" evidence of  
21 sufficient cash flow. Beal Bank further argued that the debtor  
22 also failed to offer evidence as to the value of the real  
23 property beyond the confirmation date; it provided no evidence of  
24 the real property's value on early termination or termination of  
25 the lease with Allegiant or the maturity date of the loan with  
26 Beal Bank.

27 Beal Bank points out that the bankruptcy court relied on a  
28 statement made by Funsten in his interest rate report in

1 determining that the plan was feasible. Specifically, on page  
2 520 of his report, Funsten stated that "if commercial property  
3 values in 2021 are no different than today, the remaining  
4 principal to be refinanced will have a loan-to-value ("LTV") of  
5 68%." Beal Bank stresses that Funsten was the debtor's interest  
6 rate expert and was not qualified as an expert on financing or  
7 any other aspect of feasibility. It also contends that the real  
8 property valuation report provided by the debtor's other expert  
9 witness, Charles Jack, was faulty in its assumption that the real  
10 property's value will remain unchanged.

11 Beal Bank overstates the bankruptcy court's reliance on  
12 Funsten's report in its feasibility determination. The  
13 bankruptcy court mentioned that Funsten's report provided  
14 evidence as to the potential for refinancing or sale of the real  
15 property, but it looked to other evidence in determining the  
16 second amended plan's feasibility. The bankruptcy court found  
17 that the second amended plan was feasible because: (1) the debtor  
18 had sufficient income to fund the second amended plan because the  
19 rental income it received exceeded the monthly payments to Beal  
20 Bank; (2) the debtor stood to receive substantial damages  
21 (approximately \$1.2 million) from Allegiant in the event of early  
22 lease termination; (3) Beal Bank had a sizeable equity cushion,  
23 based on the current real property valuation, which only would  
24 grow over time as the debtor made payments under the second  
25 amended plan; and (4) the debtor had a healthy cash balance.<sup>16</sup>

---

26  
27 <sup>16</sup> We also point out that the debtor presented evidence that  
28 it intended to save the difference between the rental income from  
(continued...)



1 The bankruptcy court further determined that there was  
2 nothing in the evidence before it suggesting that the real  
3 property's value would decline. It also determined that it was  
4 unlikely that Allegiant would terminate the lease early, based on  
5 the real property's unique characteristics and the costs to  
6 Allegiant in relocating. Beal Bank moreover did not offer any  
7 evidence indicating that the real property's value would decline.  
8 Beal Bank also did not dispute the debtor's current valuation of  
9 the real property.

10 Although the debtor apparently did not provide income  
11 projections, its monthly operating reports suffice to show that  
12 it had sufficient cash flow to fund the second amended plan.  
13 Beal Bank did not object to any of the monthly operating reports  
14 submitted by the debtor or offer any evidence of its own  
15 indicating that the debtor had insufficient cash flow to fund the  
16 second amended plan.

17 Based on the record before us, we conclude that it supports  
18 the bankruptcy court's feasibility determination.

19 C. The bankruptcy court made determinations as to good faith  
20 under § 1129(a)(3)

21 "Section 1129(a)(3) does not define good faith. A plan is  
22 proposed in good faith where it achieves a result consistent with  
23 the objectives and purposes of the Code. The requisite good  
24 faith determination is based on the totality of the

25 \_\_\_\_\_  
26 <sup>16</sup>(...continued)

27 Allegiant and the payments to Beal Bank to build up its cash  
28 reserves to continue funding the plan if Allegiant terminated the  
lease early.

1 circumstances." Platinum Capital, Inc. v. Sylmar Plaza, LP  
2 (In re Sylmar Plaza, LP), 314 F.3d 1070, 1074 (9th Cir. 2002)  
3 (citations omitted). The creation of an impaired class in "an  
4 attempt to gerrymander a voting class of creditors is indicative  
5 of bad faith" for purposes of § 1129(a)(3). Conn. Gen. Life Ins.  
6 Co. v. Hotel Assocs. of Tucson (In re Hotel Assocs. of Tucson),  
7 165 B.R. 470, 475 (9th Cir. BAP 1994).

8 Beal Bank asserts that the debtor did not propose the second  
9 amended plan in good faith because it created an artificially  
10 impaired class by providing deferred, no-interest payments to  
11 Marquis & Aurbach and Benedict, though the debtor had ample funds  
12 with which to pay them in full on the effective date.

13 The record in its totality amply supports a conclusion that  
14 the debtor's second amended plan achieves a result consistent  
15 with the objectives and purposes of the Bankruptcy Code. See  
16 Shanks, 540 F.3d at 1086; In re Sylmar Plaza, LP, 314 F.3d at  
17 1074. The debtor presented a feasible plan that will pay all  
18 allowed claims in full over time. Beal Bank will retain its  
19 security interest in the real property until its allowed claim,  
20 with interest at an appropriate rate, is paid in full. As noted  
21 above, the evidence submitted by the debtor in support of  
22 confirmation presented multiple business and economic reasons for  
23 deferring payment of allowed unsecured claims. In light of our  
24 review of the entire record, we do not have a definite and firm  
25 conviction that the bankruptcy court erred in determining that  
26 the debtor proposed its second amended plan in good faith, or in  
27 its ultimate determination that the debtor satisfied the  
28 requirements for confirmation of its second amended plan.

**CONCLUSION**

1  
2 Because the bankruptcy court did not find that Beal Bank had  
3 cause under Rule 3018(a) to withdraw Benedict's vote accepting  
4 the second amended plan, it did not err in denying Beal Bank's  
5 ballot motion. The bankruptcy court also did not err in finding  
6 that the debtor satisfied the requirements for confirming its  
7 second amended plan. We therefore AFFIRM the bankruptcy court's  
8 rulings on the ballot motion and plan confirmation.