

JUDGE HERB ROSS (Recalled)

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA
605 West 4th Avenue, Room 138, Anchorage, AK 99501-2253 — (Website: www.akb.uscourts.gov)
Clerk's Office: 907-271-2655 (1-800-859-8059 In-State) — Judge's Fax: 907-271-2692

In re
MARLOW MANOR DOWNTOWN, LLC,
Debtor

Case No. A12-00421-HAR
In Chapter 11

MEMORANDUM DECISION REGARDING
*MOTION TO DETERMINE
CLASSIFICATION OF CLAIM PURSUANT
TO BANKRUPTCY RULE 3013* [ECF No.
102]

CONTENTS

Page

1. <u>SUMMARY</u>	1
2. <u>CLASSIFICATION ISSUE</u>	2
2.1. <u>Background</u>	2
2.2. <u>Analysis</u>	6
3. <u>CONCLUSION</u>	12

1. SUMMARY- Debtor's Second Amended Plan classifies the claim of Alaska Housing Finance Corp. (AHFC) as Class 4 on a wholly unsecured \$1,325,000 promissory note, separate from various other noninsider unsecured claims, which are grouped in Class 6. AHFC's loan servicer, Wells Fargo,¹ objected to the separate classification under FRBP 3013.²

The classification is improper since the AHFC claim is substantially similar to the separately classified, noninsider unsecured creditors, and there is insufficient business or

¹ Wells Fargo Bank, N.A., as servicing agent for AHFC.

² ECF No. 102.

1 economic reasons for the separate classification. Rather, the separate classification of the AHFC's
2 claim is a disfavored attempt to manipulate the voting on the plan to meet the confirmation
3 standard of having at least one class of noninsider claims approve the plan.³

4 Since such a classification is not permissible under Ninth Circuit case law, the Second
5 Amended Disclosure Statement is not approved.⁴

6 **2. CLASSIFICATION ISSUE-**

7 **2.1. Background-** The historical facts underlying this dispute are not in dispute. They are
8 set out in debtor's Second Amended Disclosure Statement.⁵

9 To save an historic multi-story building in Anchorage from being razed, Marc Marlow,
10 through his family trust and with others, started on a quest to renovate the building. It was
11 originally to be redesigned for use partly as 100 studio and one-bedroom apartments (floors 5-14
12 of the building, called condo Unit A of McKinley Tower) and partly for 52 units of senior assisted
13 living units (floors 2-4 and parts of the first floor, called condo Unit B of McKinley Tower).
14 Through an intricate and innovative structure of financing premised on the preservation of
15 blighted properties, including Municipality of Anchorage tax forgiveness and public funding, the
16 project pencilled out.

17 Only Unit B remains as property of the estate. AHFC funded the takeout financing for the
18 remodeled Unit B to include a first promissory note and deed of trust for \$4,125,000, secured by
19 Unit B,⁶ and a second promissory note and deed of trust, also secured by Unit B, for \$1,325,000.

21 ³ 11 U.S.C. § 1129(a)(10).

22 ⁴ It is, therefore, not necessary for the court to rule on the issue of whether the assignee of Northrim
23 Bank's claim, Knud Nielsen, can change Northrim's "no" vote on the Second Amended Plan to "yes" (ECF No.
24 103), or whether the court should designate Nielsen's vote (ECF No. 109).

25 ⁵ *Debtor's Second Amended Disclosure Statement Dated July 7, 2013.* ECF No. 91, at pages 4-7, *II*.
26 *Background.*

27 ⁶ Class 1 under the Second Amended Plan.

1 The \$4,125,000 first note is dated January 30, 2007, bears interest at 7.375% and is payable in
2 equal installments of \$28,490.35 per month over a 30 year term. This note is provided for in Class
3 2 of the Second Amended Plan. Since AHFC has indicated it will make a § 1111(b)(2) election for
4 Class 2, it will be treated as wholly secured.

5 Class 4 contains only the claim on the \$1,325,000 second promissory note. It is also dated
6 January 30, 2007, and bears interest at 1.5%. Like the first promissory note, it is also due in 30
7 years (or, February 1, 2037), but is payable on much more lenient, or at least different, terms. It is
8 payable during the 30 year term in annual installments only out of a percentage of “available cash
9 flow,” pursuant to a formula in the loan documents. Debtor has never had to make annual
10 installment payments on the second promissory note because it never earned enough for
11 payments to kick in. There is, however, a balloon payment for any unpaid balance due on
12 February 1, 2037.

13 The second promissory note provides that an event of a default spelled out in the second
14 loan agreement can accelerate the second promissory note. The second loan agreement also
15 provides that *an event of default under the first loan agreement, if not cured, can be declared to*
16 *be a default under the terms of the second promissory note.* This could lead to acceleration of the
17 second note.⁷ AHFC declared a default under the first promissory note, after various forbearances
18 and waivers were extended to debtor. Debtor has acknowledged the default of the first
19 promissory note.⁸ I am unsure AHFC declared a default under the second promissory note, but it
20 was entitled to have done so.

21 The default occurred due to a series of unfortunate economic events, principally (in
22 debtor’s view) because the State of Alaska would not commit to providing Medicaid funding for
23

24 ⁷ Second Note (ECF No. 114-1, pages 1-2) and Second Loan Agreement (ECF No. 114-2, Article V, Sec.
25 5.1(n), at page 29 and Sec. 5.2(a), at page 32).

26 ⁸ March 21, 2011 letter from Marc Marlow to Michelle Boutin, Wells Fargo’s attorney, acknowledging
27 the default in the first loan. ECF No. 21-9 (Exhibit I) to Wells Fargo’s motion for relief from stay.

1 subsidized senior assisted living at the levels debtor had projected in planning for the project. So,
2 the senior assisted living model had to be scrapped. Structural features of Unit B made it hard to
3 modify the space for another use. The debtor nonetheless redesigned the space, after AHFC
4 waived the requirement that Unit B be used for assisted living,⁹ to short term rental units to cater
5 to such renters as transient airline personnel and North Slope workers.

6 Long story short, financing that would once, on paper, have paid off the combined
7 \$5,450,000 debt to AHFC, is now valued at \$2,700,000, more or less.¹⁰ Not only is the first
8 promissory note under water by more than several million dollars, the second promissory note is
9 completely unsecured.

10 Marc Marlow is a co-maker of both promissory notes.¹¹ AHFC contends that Mr. Marlow
11 is not solvent because of many recent large unpaid judgments against him. Debtor has not
12 contested this claim of insolvency, and Mr. Marlow's testimony at the hearings on the
13 classification motion on October 4, 2013 confirms it.

14 Into this scenario, debtor proposed a Second Amended Plan, dividing the claims of
15 creditors who are not insiders into two classes:¹²

- 16 ■ “Class 4. – AHFC’s Subordinated Loan. This claim shall be allowed as an unsecured
17 claim in the amount of \$250,000 and shall be paid without interest in quarterly
installments of \$10,000 beginning on October 1, 2023. This Class is Impaired.”
- 18 ■ “Class 6 – Unsecured Claims, Except Those of AHFC and the Debtor’s Affiliates. No
19 interest shall be paid on account of the Allowed Claims in this Class. The holders of
20 Allowed Class 6 Claims will receive a distribution of \$20,000 on the Effective Date
21 of the Plan, prorated in proportion to the allowed claims in this Class, and shall
further receive prorated payments of \$10,000 per calendar quarter commencing
October 1, 2013, for a period of five years, with the final payment to be made July
1, 2018.”

22
23 ⁹ ECF No. 105, page 3.

24 ¹⁰ *Second Amended Disclosure Statement.* ECF No. 91, pages 8-9.

25 ¹¹ ECF No. 21-2 (the First Promissory Note) and ECF No. 114-1 (the Second Promissory Note).

26 ¹² ECF No. 90, pages 7-8.

1 The claimants in Class 6 are generally trade creditors, plus a \$575,000 unsecured debt on a
2 short term promissory note due to Northrim Bank.¹³ The Northrim note was bought by Knud
3 Nielsen, a business associate of Marc Marlow, who would change Northrim's "no" vote on the
4 plan to a "yes." The debtor anticipates it would be able to obtain the consenting vote of Class 6.

5 AHFC contends that the unsecured claims in both classes are substantially similar, and
6 there is no principled business or economic reason to treat them differently. Rather, AHFC says,
7 this treatment is a transparent attempt to get a consenting class by gerrymandering.¹⁴

8 The debtor says the separate classification is permissible because the claims are not
9 substantially similar, but even if they are, there are valid business and economic reasons why it
10 should be allowed.¹⁵ Principally, the debtor argues that the Class 4 second note claim has usual
11 terms; it is payable only out of excess cash flow. Class 6 claims are generally trade creditors,
12 except for a short term Northrim promissory note. The nub of debtor's argument is:

13 The second note is not ordinary debt; ordinary debt is due on demand or on a
14 definite payment schedule without regard to the borrower's ability to pay. The
15 creditors in Class 6 are all trade creditors, except for the Northrim Bank claim,
16 which is on a short term promissory note that matured according to its original
17 terms. The second AHFC note, in contrast, is only due if there is money to pay it.
As such, the second note has the character of a redeemable preferred stock or
similar equity investment which receives a dividend only if the issuer has the
ability to pay [footnotes omitted].¹⁶

18 To support the argument that Class 4 is more like equity than debt, debtor cites several tax cases
19 which I will discuss below.

21 ¹³ ECF No. 103, debtor's motion to change Northrim's "no" vote on the Second Amended Plan to "yes,"
22 after the Northrim claim had been purchased by Knud Nielsen, a business associate of Marc Marlow.

23 ¹⁴ *Objection to Confirmation of Debtor's Second Amended Plan of Reorganization*, ECF No. 97, pages
24 4-7 (*V. The Plan Improperly Classifies AHFC's Class 4 Unsecured Claim*) and *Reply to Opposition to Motion
Regarding Separate Classification of AHFC's Note Secured By Second Deed of Trust*, ECF No. 110.

25 ¹⁵ *Opposition to Motion Regarding Separate Classification of AHFC's Note Secured By Second Deed of
Trust*. ECF No. 105.

26 ¹⁶ ECF No. 105, page 6.
27

1 The debtor has also alluded to the fact that the State of Alaska agency governing Medicaid
2 subsidies backed out on a commitment or suggestion that it would approve funding at about \$127
3 per day per unit, but only offered a \$99 per day subsidy.¹⁷ Debtor suggests that AHFC should be
4 conflated with this agency. I am not sure that debtor is suggesting this as a reason for separate
5 classification, but if so, I will address it in the following Analysis section.

6 **2.2. Analysis-** Wells Fargo, as servicer of AHFC's debt, filed a motion under FRBP 3013,
7 *Classification of Claims and Interests:*

8 For the purposes of the plan and its acceptance, the court may, on motion
9 after hearing on notice as the court may direct, determine classes of
10 creditors and equity security holders pursuant to §§1122, 1222(b)(1), and
11 1322(b)(1) of the Code.

12 Section 1122 of the Bankruptcy Code governs classification of claims and interests:

13 (a) Except as provided in subsection (b) of this section, a plan may place a
14 claim or an interest in a particular class only if such claim or interest is
15 substantially similar to the other claims or interests of such class.

16 (b) A plan may designate a separate class of claims consisting only of every
17 unsecured claim that is less than or reduced to an amount that the court
18 approves as reasonable and necessary for administrative convenience.

19 Only claims which are substantially similar can be placed in the *same* class. Claims that
20 are substantially similar can, however, be placed in *different* classes, but subject to some court
21 imposed restrictions. Ninth Circuit circuit court and BAP cases flesh out these concepts.

22 The first is *In re Johnston*,¹⁸ a circuit case. The court decided "the proper standard when
23 an unsecured claim may be classified separately from other unsecured claims under 11 U.S.C.
24 § 1122(a). . ." ¹⁹ The court affirmed a separate classification of the claim of a creditor, Steelcase,
25 from other unsecured creditors. While the treatment of the other classes of unsecured claims is
26 not described in detail, their treatment differed from that of Steelcase. Steelcase's unsecured

27 ¹⁷ From the Second Amended Disclosure Statement. ECF 91, page 6.

28 ¹⁸ *In re Johnston*, 21 F3d 323 (9th Cir. 1994).

¹⁹ *Id.*, at 325.

1 claim was contested in a pending litigation, and alleged to be subject to a complete offset. It was
2 also partially secured by the assets of a nondebtor company which was both the primary obligor
3 of the Steelcase claim and was related to debtor Johnston, . If Steelcase was successful in the
4 litigation, it was to be paid in full within 120 days under the terms of the confirmed plan.

5 The court affirmed the separate classification of Steelcase's unsecured claim. The court
6 held that a bankruptcy court has broad discretion in deciding whether a claim is substantially
7 similar for classification purposes.²⁰ The court said:

8 Whether the issue on appeal is denial of separate classification or approval of
9 separate classification, the question resolved by the bankruptcy court is the
10 same: are the claims substantially similar? To resolve that question,
11 bankruptcy court judges must evaluate the nature of each claim, i.e., the
12 kind, species, or character of each category of claims. *Cf. In re Los Angeles*
13 *Land and Invs., Ltd.*, 282 F.Supp. 448, 454 (D.Haw.1968) (interpreting
14 analogous provision of former Bankruptcy Act to require consideration of
15 "nature" of claim not as that word is intended in its "technical sense in law
16 but [as it] is used in its ordinary common vernacular"), *aff'd*, 447 F.2d 1366,
17 1367 (9th Cir.1971). We held in *In re Commercial Western*, 761 F.2d at
18 1334, that whether a note and deed of trust securing one claim is different
19 from a note and deed of trust securing another claim is a question of fact.
20 Whether a claim is secured, partially secured, or unsecured, is, in our view,
21 also a question of fact. So, too, are the questions of whether one claimant
22 alone holds a secured or partially secured claim; whether a particular claim
23 [of many] is the subject of litigation; and whether pending litigation could
24 result in full payment of the claim in issue prior to the time that other
25 claims of other creditors are paid.²¹

26 Applying the law to the facts, the *Johnston* court concluded:

27 Steelcase does not dispute that its claim, unlike all others, is partially secured
28 by collateral of COS, the primary obligor. Steelcase must also concede that
it, unlike all other unsecured creditors, is embroiled in litigation with
Johnston, and that its claim thus may be offset or exceeded by Johnston's
own claim against Steelcase. Steelcase cannot deny the possibility, if not
necessarily the probability, that, if successful in the litigation, it could be
paid in full before all other unsecured creditors. Under these circumstances,
the bankruptcy court was not clearly erroneous in concluding that

25 ²⁰ *Id.*, at 327.

26 ²¹ *Id.*, at 327.

1 Steelcase's claim is distinguishable from Class 19, Class 20, and Class 22
2 claims.²²

3 So, the "possibility" of success in the litigation and the existence of partial non-estate
4 collateral was enough to sanction separate classification.

5 The holding of *Johnston* was relied on in the 9th Circuit BAP case, *In re LOOP 76, LLC*.²³
6 This was a single asset real estate case with a large unsecured deficiency claim and a very small
7 amount of unsecured trade claims.

8 The creditor in LOOP cried "gerrymander." The debtor said there were differences in the
9 creditor's claim from other unsecured claimants justifying separate classification:

10 Moreover, Loop 76 contended that Wells Fargo's deficiency claim was not
11 substantially similar to the unsecured trade claims, and therefore required
12 separate classification, because: (1) Wells Fargo was partially secured; (2)
13 Wells Fargo was embroiled in litigation with the guarantors, who were a
14 third-party source of payment on the debt; and (3) if Wells Fargo was
15 successful in that litigation, it might be paid in full before other creditors. In
16 other words, argued Loop 76, the legal character of the claims mandated
17 separate classification.

18 The bankruptcy court held that the third-party source of repayment made the deficiency claim
19 dissimilar from other claimants that did not have such an external source.²⁴ And, the BAP
20 affirmed:

21 The threshold question for the bankruptcy court when applying § 1122(a) is
22 to determine whether the claims are "substantially similar." The Code is
23 silent on how to ascertain whether claims are "substantially similar." The
24 Ninth Circuit has determined that the bankruptcy judge "must evaluate the
25 nature of each claim, i.e., the kind, species, or character of each category of
26 claims." *In re Johnston*, 21 F.3d at 327 (citing *In re Los Angeles Land &*
27 *Invs., Ltd.*, 282 F.Supp. 448, 453-54 (D.Haw.1968), *aff'd*, 447 F.2d 1366, 1367
28 (9th Cir.1971) (hereinafter "*Los Angeles Land*"). Because § 1122(a)
mandates that dissimilar claims may not be placed into the same class, if the
bankruptcy court determines that the claims are not substantially similar,
the inquiry ends there.

24 ²² *Id* at 329.

25 ²³ *In re LOOP 76, LLC*, 465 B.R. 525 (9th Cir. BAP 2012).

26 ²⁴ *Id* at 523-24.

1 However, if the claims are substantially similar, the plan may place such
2 claims in different classes if the debtor can show a business or economic
3 justification for doing so. *Barakat v. Life Ins. Co. of Va. (In re Barakat)*, 99
4 F.3d 1520, 1526 (9th Cir.1996). Absent a business or economic justification,
5 it is not enough to justify separate classification solely on the basis of the
6 unsecured creditor's right to make an § 1111(b) election. *Id.* at 1526 (citing
7 *Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (In re Tucson Self-Storage,*
8 *Inc.)*, 166 B.R. 892 (9th Cir. BAP 1994)) (separate classification of unsecured
9 claims solely on their right to make an § 1111(b) election is impermissible
10 and violates § 1122(a)). Furthermore, a court must not approve a plan
11 placing similar claims differently solely to gerrymander an affirmative vote
12 on the reorganization plan. *Id.* at 1525 (citing *Phoenix Mut. Life Ins. Co. v.*
13 *Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d
14 1274, 1279 (5th Cir.1992), *cert. denied*, 113 S.Ct. 72, 506 U.S. 821, 822, 121
15 L.Ed.2d 37 (1992)).

9 Notably, many courts have conflated the two-prong analysis required for
10 classifying claims under § 1122(a), often glossing over the first prong of
11 determining whether the claims are substantially similar, and proceeding to
12 the second prong to determine whether gerrymandering has occurred or
13 whether the plan proponent showed a business or economic justification for
14 separately classifying similar claims. This explains, as the bankruptcy court
15 phrased it, the "paucity of case law defining what constitutes either
16 similarity or substantial similarity of claims." *In re LOOP 76, LLC*, 442 B.R.
17 at 716. *In re Johnston* is the only Ninth Circuit case to squarely address this
18 issue since the enactment of the Code in 1978.²⁵

15 In short, the BAP followed *Johnston* and distinguished *Barakat* :

16 Accordingly, we reject Wells Fargo's argument that a third-party guarantor
17 does not render its deficiency claim dissimilar from other unsecured claims.
18 Its argument is based on case law inconsistent with *In re Johnston's* holding
19 that whether the claim is substantially similar does not rest entirely on how
20 it relates "to the assets of the debtor."

21 We also reject Wells Fargo's argument that the bankruptcy court's holding is
22 inconsistent with *In re Johnston* and *In re Barakat* because neither case
23 expressly held that a third-party source of payment made the claim at issue
24 dissimilar to the other unsecured claims. As for *In re Johnston*, the
25 third-party source for recovery was collateral, not money. Presumably, the
26 court's lack of any reference to a cash source was because it was not a fact in
27 the case. Furthermore, the Ninth Circuit is not in the business of issuing
28 advisory opinions on issues not raised before it. In *In re Barakat*, the court
had no reason to address a third-party source of payment because none
existed.[footnote omitted]²⁶

25 ²⁵ *Id.* at 536-37.

26 ²⁶ *In re LOOP 76, LLC*, at 540-41.

1 *In re Barakat*²⁷ was decided several years after *Johnston*. It involved an apartment building
2 worth \$4,000,000, encumbered by a claim of \$4,600,000. The debtor’s plan proposed to classify
3 the unsecured \$600,000 deficiency claim separately from several other classes of unsecured
4 creditors, including a class of trade debt. While recognizing the possibility of classifying similar
5 claims in different classes, the court also said that there are limits to that right. One of the limits
6 is that separate classification should not be condoned “in order to gerrymander an affirmative vote
7 on a reorganization plan.” A second is that, if claims are substantially similar, there must be a
8 valid business or economic reason for separate classification. It approved a BAP decision saying
9 that the right to make a § 1111(b)(2) election was not such a valid reason.²⁸

10 I conclude that the classification decision in this case is controlled by *Barakat*. While the
11 claim has a co-debtor, Marc Marlow, he is apparently not personally solvent and has many unpaid
12 money judgments against him. He is not like the creditor in *Johnston*, which had viable
13 guarantors to collect from, at least in part. Nor is there any other collateral than the real and
14 personal property securing the two loans owed to AHFC, valued at no more than \$2,700,000.

15 The claim on the second promissory note is very similar to a garden variety unsecured
16 claim, notwithstanding its “easy terms.” 11 USC § 502(b)(1) makes the claim presently allowable
17 despite being an unmatured claim, the balance of which is due in 2037. Also, under the terms of
18 the Second Loan Agreement, the second promissory note can be accelerated due to the default
19 under the first promissory note.²⁹ And, even if second promissory note had been nonrecourse
20 (which it is not), in chapter 11 it is treated as a recourse claim.³⁰

23 ²⁷ *In re Barakat*, 99 F.3d 1520 (9th Cir. 1996).

24 ²⁸ *Id* at 1527, citing *In re Tucson Self-Storage, Inc.*, 166 B.R. 892, 897 (9th Cir. BAP 1994).

25 ²⁹ Second Loan Agreement (ECF No. 114-2, Article V, Sec. 5.2(a), at page 32.

26 ³⁰ 11 U.S.C. § 1111(b)(2).

1 Debtor has also suggested that AHFC should be treated differently than other unsecured
2 creditors because it is part of, or close to, a state agency which, in a sense, lead debtor down a
3 primrose path into believing its assisted living proposal for Unit B would receive an adequate
4 Medicaid subsidy to make the numbers work. Debtor argues that AHFC should bear some of the
5 blame for the failure of the initial plan and that this justifies a separate classification.

6 Other than making this contention or suggestion, debtor has not followed through with
7 sufficient evidence, facts or legal analysis to support it. A cursory look at the Alaskan Statutes
8 governing AHFC³¹ shows it is not the same as the state agency governing Medicaid subsidies.
9 AHFC is a public corporation,³² and unless debtor can connect the dots to the Medicaid agency, I
10 must conclude that the connection is not closely enough related to justify tagging AHFC with
11 alleged malfeasance by a completely distinct state agency. *Both* the debtor and AHFC had the rug
12 pulled out from under them due to the change in projected Medicaid subsidies.

13 Finally, debtor argues that the second note is akin to an equity contribution, thus justifying
14 its separate Class 4 status from other unsecured claims in Class 6.³³ To support this argument,
15 debtor cites several tax cases in which the courts were concerned with determining whether
16 certain payments to a corporation should be treated as capital contributions as opposed to loans.³⁴
17 Those courts used a number of factors to make this determination. *Roth Steel* said the factors are:

18 This court has identified a number of factors to be used in making the
19 capital contribution versus loan determination: (1) the names given to the
20 instruments, if any, evidencing the indebtedness; (2) the presence or absence
21 of a fixed maturity date and schedule of payments; (3) the presence or
22 absence of a fixed rate of interest and interest payments; (4) the source of

22 ³¹ AS 18.55.

23 ³² *Bridges v. Alaska Housing Authority*, 375 P.2d 696, 702 (Alaska 1962).

24 ³³ *Opposition to Motion Regarding Separate Classification of AHFC's Note Secured By Second Deed of*
25 *Trust*. ECF No. 105, pages 6-10.

26 ³⁴ *Roth Steel Tube Co. v. CIR*, 800 F2d 625 (6th Cir 1984) and *Indmar v. CIR*, 444 F3d 771 (6th Cir
27 2006).

1 repayments; (5) the adequacy or inadequacy of capitalization; (6) the
2 identity of interest between the creditor and the stockholder; (7) the
3 security, if any, for the advances; (8) the corporation's ability to obtain
4 financing from outside lending institutions; (9) the extent to which the
5 advances were subordinated to the claims of outside creditors; (10) the
6 extent to which the advances were used to acquire capital assets; and (11)
7 the presence or absence of a sinking fund to provide repayments. [citations
8 omitted]³⁵

9 There appears to be little similarity between those tax cases and the classification issue in
10 this case. Given the public nature and mission of AHFC, and the substantial similarities in the
11 structure of the first and second loan agreements and promissory notes – notwithstanding the
12 difference in the payment terms of the second promissory note – the second promissory note is
13 undeniably an unsecured claim and not a capital contribution.

14 **3. CONCLUSION-** The separate classification of Class 4 and Class 6 is not justified under
15 *Barakat*. The separate classification is disapproved. The Second Amended Disclosure Statement,
16 which is based on this classification of claims, is therefore also not approved.

17 This decision makes it unnecessary for the court to decide whether Knud Nielsen, assignee
18 of Northrim Bank's Proof of Claim No. 3-1 can change its vote to an acceptance of the plan³⁶ or
19 AHFC's motion to designate that vote.³⁷

20 I will enter an order adopting this decision and giving the debtor until **Tuesday, November**
21 **12, 2013** to file an amended disclosure statement and plan.

22 DATED: October 9, 2013

23 _____
24 /s/ Herb Ross
25 HERB ROSS
26 U.S. Bankruptcy Judge

27 Serve :
28 _____

29 ³⁵ *Roth Steel Tube Co. v. CIR*, 800 F2d at 630.

30 ³⁶ Debtor's *Motion Pursuant to Rule 3018(a) to Change Vote on Second Amended Plan*, ECF No. 103.

31 ³⁷ AHFC's *Motion to Designate*, ECF No. 109.

1 David Bundy, Esq., for debtor
2 Gary Sleeper, Esq., for Wells Fargo, servicer for AHFC
3 William Courshon, Attorney for the US Trustee

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28