SO ORDERED.

Dated: February 28, 2013

Eddward P. Ballinger Jr., Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re:	CHAPTER 11
GILBERT 3600, LLC,	Case No. 2-11-bk-00872-RTB
Debtor.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CONFIRMATION OF DEBTOR'S FOURTH AMENDED PLAN OF REORGANIZATION DATED DECEMBER 18, 2012**

This matter came before the Court on January 10, 2012 for a trial ("Trial") regarding the contested confirmation of Gilbert 3600, LLC's ("**Debtor**") *Fourth Amended Plan of Reorganization Dated December 18, 2012* ("**Plan**"). The Debtor appeared through counsel, Paul Sala and Michael Jones of Allen, Sala & Bayne, PLC. Multibank 2009-1 CRE Venture, LLC ("**Multibank**") appeared through counsel Peter Sorensen and David Cleary of Greenberg Traurig, LLP. Maureen Gaughan, Chapter 11 Trustee for Larry Miller's Bankruptcy Estate ("**Gaughan**"), appeared through counsel, Steven Brown of Steve Brown & Associates, LLC. Multibank holds a secured claim against undeveloped real property located at 14800 N. 78th Way, Scottsdale, AZ ("**Property**"), the Debtor's primary asset, and opposed confirmation of the Plan.

At Trial, the Debtor and Multibank presented witness testimony and other evidence by declaration, with such witnesses available at the Trial for cross examination. Based upon the evidence presented at the Trial, together with the arguments and representations of counsel and the entire record before the Court, and good cause appearing, the Court makes the findings of

fact and conclusions of law set forth below.[1]

THE COURT MAKES THE FOLLOWING FINDINGS OF FACT:

A. Kari Miller (99.9%) and Miller Matrix, LLLP (1%) are the current members of the Debtor.

B. The Debtor's primary asset is the Property, a 9.54 acre parcel of undeveloped real estate located near the Scottsdale Air Park. After real property taxes, Multibank holds the first priority lien on the Property. Multibank's debt exceeds the value of the Property based upon an appraisal by Stephen G. Leach, CBRE, Inc. – Valuation & Advisory Services, dated April 9, 2012 establishing the value of the Property to be $5,200,000.00. Accordingly, Multibank holds both a secured and unsecured/deficiency claim. Diversified Funding Group, LLC ("**DFG**"), which pre-bankruptcy held a second priority lien on the Property, is rendered an unsecured creditor pursuant to 11 U.S.C. § 506. The Property is necessary for the Debtor's reorganization.

C. Post-confirmation financing is necessary to the continuation of the Debtor's business operation, and the Debtor's incurring of post-confirmation indebtedness is within the exercise of the Debtor's sound business judgment. DFG and Ms. Miller will provide the funding necessary to fund the payments under the Plan. That funding includes a loan from DFG of $4.1 million to the Debtor. Additionally, DFG has agreed to provide two loans to Ms. Miller, individually and not as community property. The first, in the amount of $1,100,000.00, will be provided on a secured and limited recourse basis. The second, a line of credit in the amount of $700,000.00, is unsecured and with full recourse against Ms. Miller. Ms. Miller will contribute the full amount of the $1,100,000.00 loan and an initial draw of $500,000.00 on the line of credit in exchange for 100% of the equity in the Reorganized Debtor. The funding will allow Debtor to pay its secured creditors based upon the value of the Property. Indeed, on the Plan's Effective Date the Debtor will pay Multibank's secured claim in full. Additionally, on the

[1] To the extent that any provision designated herein as a finding of fact should properly be characterized as a conclusion of law, it is adopted as such. To the extent that any provision designated herein as a conclusion of law should properly be characterized as a finding of fact, it is adopted as such.

Effective Date the Debtor will have sufficient funds to pay administrative claims in full and to make a payment of $600,000.00 to general unsecured creditors; neither of which will be paid if the Plan is not confirmed.

D. The essence of the different iterations of the Debtor's plans of reorganization have all involved the same basic structure and economic terms. Ms. Miller, the Debtor's primary interest holder, would take ownership of the Debtor by virtue of a "new value contribution", a new loan would pay in full Multibank's secured claim, and the other creditors would receive a partial payment on their unsecured claims all assertedly in compliance with the "new value exception to the absolute priority rule" which is partially set forth in Section 1129(b) of the Bankruptcy Code ("**Code**").

E. Pursuant to Bankruptcy Rule 3017(d) and the *Order Approving Debtor's First Amended Disclosure Statement and Fixing Time for Filing Acceptance or Rejection of Plan, Combined with Notice of Hearing* ("**Order and Notice**") (DE #68), and as evidenced by the *Affidavit of Mailing* (DE #69), the Debtor timely served all interested parties in this case with the following: (i) the Order and Notice; (ii) Debtor's First Amended Disclosure Statement (with all exhibits); (iii) Plan (with all exhibits); (iv) Voting Instructions; and (v) Ballots.

F. Pursuant to the Order and Notice, written objections to the Plan were required to be filed on or before October 11, 2011, with copies served on Debtor's counsel.

G. The following parties filed objections to the Plan: (i) Maricopa County; (ii) Multibank; (iii) Gaughan; (iv) MW Housing Partners III, LP ("**MW Housing**"); and (v) the U.S. Trustee. Resolution of the Plan Objections is summarized as follows:

(i) Maricopa County's Objection was resolved by amendments incorporated into the Plan. Maricopa County did not appear at the Trial.

(ii) Multibank presented its Objections at the Trial and the Objections are overruled. Multibank made a number of assertions that the Plan fails to comply with Section 1129 and, therefore, cannot be confirmed. Multibank alleged there is a lack of good faith by the Debtor and that DFG's vote should be designated and not counted due to its conduct pursuant to Code Section 1126. Based on the actual

terms of the three DFG loans, the Court rejects Multibank's bad faith and designation arguments. It is very significant to this conclusion that the actual terms are materially different from proposed terms or stated goals of DFG. If the actual terms were certain of the terms or goals asserted or sought at an earlier time by DFG, the decision would probably be different. The fact that the final loan terms do not include the payment of DFG's pre-petition claim which was apparently sought by DFG during the negotiations, is compelling evidence to this Court of the Debtor's good faith and good faith efforts to obtain loan terms that are consistent with the Code.

Multibank also asserts that (1) the Plan's classification of its deficiency claim in a separate class and (2) the new value standard and requirement, both do not meet the Code and case law requirements. The Plan's separate classification of Multibank's deficiency claim meets the requirements set forth in In re Loop 76, LLC, 465 B.R. 525 (9th Cir. B.A.P. 2012) because Multibank's debt was guaranteed by a third party ["... We reject Wells Fargo's argument that a third-party guarantor does not render its deficiency claim dissimilar from other unsecured claims"]. The new value exception/corollary to the absolute priority rule has been a less than clear "rule" for bankruptcy courts to apply in specific cases. In this case, it is undisputed that (1) on a balance sheet analysis this Debtor has a large negative net worth and (2) that the Debtor's exclusive right and time to file a plan of reorganization ended months ago. Based upon the rationale and analysis of Bank of America v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) and In re Red Mt. Mach. Co., 448 B.R. 1 (Bankr. D. Ariz. 2011), this Court concludes that this Plan satisfies the requirements for the new value exception; the new value is new, money, necessary and substantial. Specifically and as in Red Mt. ..."Because exclusivity has expired long ago, the Court finds as a fact that there is no "option value" (or any other value) ... to the exclusive right to propose a new value plan" 448 B.R. at 19. Hence and based upon the

"balance sheet approach" the new value contributed by Ms. Miller, the Debtor's interest holder, far exceeds the value, if there is any, to the equity interests received under the Plan.

Multibank further asserted that the Plan fails both the best interests of creditors test and is not feasible. These assertions are inter-related and not correct. Multibank purported that the best interests of creditors test is not met because it was losing its collateral to a junior lien holder and that it would receive more in a Chapter 7 liquidation. There is no credible evidence that Multibank would receive more in a Chapter 7 case. To the contrary, in a Chapter 7 case Multibank would foreclose on the Property and there would be nothing for the other creditors; here they are receiving more by virtue of the full payment of their secured claim and a partial payment on their unsecured claim. Also, Multibank is not losing its collateral to a junior creditor. Rather, the debtor is retaining its asset, the Property, by paying in full the one secured claim of Multibank, making a significant payment to its unsecured creditors, and providing the Debtor with the capital/new value to significantly fund its future obligations. As to the feasibility of the Debtor's Plan, the Plan has a reasonable probability of success; that is the standard and the Court so finds and concludes.

Finally, Multibank claims that the Debtor does not own the Property and that Miller is not the equity security holder. The Court has previously ruled that Multibank is not correct on the ownership issue and DFG by its representations to this Court agrees that the Debtor is the record owner of the Property. Finally Multibank asserts that the amendments to the Plan require that there is a new disclosure statement and balloting. The core aspect of the Debtor's Plan has remained essentially the same, i.e., a substantial new value/equity contribution and new loan allowing for full payment of Multibank's secured claim, partial payment to the remaining unsecured claims, with a "new value" Plan. The actual changes are not sufficient to require further disclosure and balloting.

(iii) Gaughan presented her Objection at the Trial and the Objection is overruled. Ms. Miller's equity interest in the Debtor is not absolute or conclusive due to her spouse's Chapter 7 bankruptcy but Gaughan does not object to the confirmation of the Plan on the terms proposed. The Court could conclude that any interest of the Chapter 7 estate has been effectively abandoned because it is of inconsequential value, as more fully explained above.

(iv) MW Housing joined in Gaughan's Objection. The Objection is addressed in the same manner as Gaughan's Objection and is overruled. MW Housing did not appear at the Trial.

(v) The U.S. Trustee's Objection is addressed in the same manner as Gaughan's Objection and is overruled. The U.S. Trustee did not appear at the Trial.

H. Votes on the Plan have been accepted from all creditors and equity security holders whose acceptances are required by law, as evidenced by the Ballot Report (DE #83). Three classes of impaired claims voted to accept the Plan. The accepting classes are Classes III(c) (DFG's secured claim), III(d) (Michael Smith's secured claim), and IV(b) (general unsecured claims). Two classes of impaired claims voted to reject the Plan. The rejecting classes are Class III(a) (Multibank's secured claim), and Class IV(a) (unsecured claims with third party obligors). One class did not vote on the Plan, consisting of Class III(b), the Maricopa County Treasurer's secured claim.

I. After the balloting was completed, the Debtor amended the Plan and provided notice of such amendments to all interested parties in this case. With each amendment, the core concept of the Plan essentially remained the same, and the actual changes were not sufficient to require further disclosure and balloting.

J. The Plan has been proposed in a good faith attempt to satisfy creditor claims, including Multibank's secured claim based upon the $5,200,000 valuation of the Property. The Plan further provides for Effective Date payment of all administrative claims and $600,000.00 to unsecured claims; each of which would otherwise go unpaid.

K. The Plan is feasible and confirmation is not likely to be followed by liquidation

or by the further reorganization of Debtor.

L. Each holder of a claim or interest in the Debtor has accepted the Plan or will receive or retain under the Plan property of a value, as of the Effective Date, that is not less than the amount such holder would receive or retain if Debtor were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date. With respect to the objecting claims, the secured creditor claims are being paid in full on the Effective Date, and unsecured claims are receiving $600,000.00 that they would otherwise not receive; which is coming from Ms. Miller's new value cash infusion. Ms. Miller's contribution of new value is (1) new; (2) substantial; (3) in the form of money or money's worth; and is (4) necessary for successful reorganization. Additionally, the new value contribution provides more than reasonably equivalent value of the Debtor's equity interests.

M. The Plan does not unfairly discriminate, and is fair and equitable, with respect to any class of claims or interests that is impaired under the Plan and has not accepted it.

N. All of the Debtor's payments made or promised for services, costs, or expenses in or in connection with the cases, or in connection with the Plan and incident to the cases, have been fully disclosed and approved or, if to be fixed after confirmation of the Plan, will be subject to the approval of the Court.

O. The Debtor has fully disclosed the identity and affiliations of any individuals proposed to serve after confirmation of the Plan as a director, officer, or voting trustee and the nature of all compensation to be paid to such individuals. The employment of such individuals after confirmation of the Plan is equitable and consistent with the interests of creditors and equity security holders, and with public policy.

P. All fees payable under 28 U.S.C. § 1930 have been paid, and the Plan provides for the payment of any unpaid fees on the Effective Date.

Q. The Plan provides for the payment, on the Effective Date, of all administrative and priority claims and expenses, except as the holders of such claims and expenses may otherwise agree.

R. The estate is not obligated for the payment of any "retiree benefits" as that term

is defined in 11 U.S.C. § 1114.

S. The Debtor, as proponent of the Plan, has complied with the provisions of the Bankruptcy Code, and the Plan has been proposed in good faith and not by any means forbidden by law.

T. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933.

BASED UPON THE FOREGOING, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. The classification of claims and interests in the Plan is proper, complies with applicable law, and satisfies the requirements of the Bankruptcy Code, including but not limited to 11 U.S.C. §§ 1122 and 1123.

2. The notices provided to creditors and interested parties in regard to approval of the First Amended Disclosure Statement and confirmation of the Plan satisfy the requirements of Rules 2002(b), 3017, and 3018, Federal Rules of Bankruptcy Procedure.

3. All members of classes designated as unimpaired in the Plan are conclusively presumed to have accepted the Plan, pursuant to 11 U.S.C. § 1126(f).

4. The Plan complies with the applicable requirements of the Bankruptcy Code including, without limitation, 11 U.S.C. §§ 1122, 1123, and 1129.

5. The Plan complies with the applicable provisions of the Bankruptcy Code. Accordingly, the Plan complies with the requirements of 11 U.S.C. §§ 1129(a)(1) and (2).

6. The Plan has been proposed in good faith and not by any means forbidden by law. Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(3).

7. Any payments made by the Debtor, or the reorganized Debtor, for services or for costs and expenses in or in connection with the case, or in connection with the Plan and incident to the case, have been approved by, or are subject to the approval of, the Court as reasonable. Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(4).

8. The Debtor has provided adequate disclosure pursuant to 11 U.S.C. §§ 1129(a)(5)(A) and (B).

9. The Plan does not require any rate change for which approval from a government regulatory commission is necessary. Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(6).

10. Three impaired classes of claims have accepted the Plan and the "cramdown" requirements of 11 U.S.C. § 1129(b) have been satisfied. The Plan does not discriminate unfairly against, and is fair and equitable as to, each non-accepting impaired class. Additionally, each class of claims will receive or retain at least what they would if the Debtor were liquidated in a Chapter 7 bankruptcy. Accordingly, the Plan complies with the requirements of 11 U.S.C. §§ 1129(a)(7)(A)(i) and (ii) and (b)(1) and (2).

11. No secured creditor has elected to be treated as a fully secured creditor pursuant to Section 1111(b)(2) of the Bankruptcy Code. Accordingly, 11 U.S.C. § 1129(a)(7)(B) is not applicable in this case.

12. The Debtor has no claims specified in 11 U.S.C. § 507(a)(2) or (a)(3). Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(9)(A).

13. The Debtor has no claims of the kind specified in 11 U.S.C. §§ 507(a)(1), (4), (5), (6), or (7). Accordingly, 11 U.S.C. § 1129(a)(9)(B) is not applicable in this case.

14. The Debtor has no claims specified in 11 U.S.C. § 507(a)(8). Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(9)(C).

15. The Debtor has no claims of the kind specified in Code Section 1129(a)(9)(D). Accordingly, 11 U.S.C. § 1129(a)(9)(D) is not applicable in this case.

16. Three classes of creditors which are impaired under the Plan have accepted the Plan (determined without including any acceptance of the Plan by any insider). Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(10).

17. Confirmation of the Plan is not likely to be followed by a liquidation or the need for further financial reorganization of the reorganized Debtor. Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(11).

18. The Plan provides for the payment of all bankruptcy fees payable under 28 U.S.C. § 1930 on the effective date of the Plan. Accordingly, the Plan complies with the

requirements of 11 U.S.C. § 1129(a)(12). The Debtor does not provide and has not provided retiree benefits as that term is defined in 11 U.S.C. § 1114. Accordingly, 11 U.S.C. § 1129(a)(13) is not applicable in this case.

19. The Debtor is not required to pay any domestic support obligation. Accordingly, 11 U.S.C. § 1129(a)(14) is not applicable in this case.

20. The Debtor is not an individual. Accordingly, 11 U.S.C. § 1129(a)(15) is not applicable in this case.

21. The Plan does not contemplate any transfer of property other than payments to creditors. Accordingly, the Plan complies with the requirements of 11 U.S.C. § 1129(a)(16).

22. Where exclusivity expired in this case more than one year ago, where the Property has been offered for sale throughout the course of the bankruptcy case, and where no alternative Plan has been forthcoming, the Plan meets the applicable requirements of Bankruptcy Code § 1129(b). Moreover, Ms. Miller's cash infusion satisfies the new value corollary.

DATED AND SIGNED ABOVE.