**IT IS ORDERED as set forth below:**

**Date: December 16, 2014**

**W. Homer Drake**
**U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF GEORGIA**
**NEWNAN DIVISION**

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| **IN THE MATTER OF**: | : | **CASE NUMBER** |
| | : | |
| DAN L. DUNSON AND NANCY M. DUNSON, DANNY DUNSON AND ANDREA DUNSON, DAVID M. DUNSON, AND EMD, LLC., | : | 13-10604-WHD<br>13-10605-WHD<br>13-10606-WHD<br>13-10607-WHD<br>(Jointly Administered) |
| Debtors. | : | |
| | : | |
| EMD, LLC., | : | CONTESTED MATTER |
| Movant. | : | |
| v. | : | |
| STABILIS FUND II, LLC, | : | IN PROCEEDINGS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE |
| Respondent. | : | |

**ORDER**

The above-styled bankruptcy case comes before the Court on the matter of

confirmation of the Chapter 11 Plan of Reorganization of EMD, LLC (hereinafter the "Plan"). The Plan is opposed by Stabilis Fund II, LLC (hereinafter "Stabilis"). Stabilis objects to EMD, LLC's (hereinafter the "Debtor") proposed cramdown rate of interest and questions the Plan's feasibility. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1) as a core proceeding defined under 28 U.S.C. §§ 157(b)(2)(A) & (L); 1334.

**Background**

The Debtor operates two multi-family apartment complexes located in Griffin, Georgia and commonly referred to as 330 East College Street, Griffin Georgia and 700 South Hill Street, Griffin, Georgia (collectively, the "Properties"). The Properties are valued at $1,970,000. The Debtor is owned in various percentages by members of the Dunson family and certain trusts established for their benefit. Dan L. Dunson manages the Properties and served as the Debtor's representative throughout these proceedings.

Stabilis is the primary creditor in this case, having acquired its interest from Regions Bank in 2012. Stabilis holds a cross-collateralized first in priority security interest on the Properties in the total amount of $1,914,450.[1]

[1] The Debtor and Stabilis stipulated to the amount of the Debt.

The Debtor classifies Stabilis' claim in Class 2 of the Plan and proposes to pay Stabilis' claim in full over time with a modified interest rate of 5.0% per annum amortized over twenty years with a seven-year balloon payment.[2] Pursuant to the budget, Stabilis shall receive $12,635 per month under the Plan. Stabilis's claim is impaired and Stabilis has rejected the Plan.[3]

The Court held a hearing on confirmation on July 30, 2014 (hereinafter the "Initial Hearing"). At that time, the parties reduced the issues before the Court to (1) a determination of the appropriate rate of interest to be paid on Stabilis' secured claim, and (2) the feasibility of the Plan.[4] Upon conclusion of the evidence, the Court took the matter under advisement and permitted the parties an opportunity to file post-trial briefs. By Order dated September 16, 2014, the Court reopened the proof so that it could consider evidence as to an across-the-board increase in rents

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[2] The Plan, as amended, anticipates the Debtor's refinancing the loan in Year-7, so as to buyout Stabilis' interest in the Properties.

[3] The junior secured creditor's claim is also impaired, but the junior creditor has voted in favor of the Plan.

[4] The Debtor proffered, without objection, that the Debtor's Plan satisfies all the provisions of 11 U.S.C. § 1129(a) not otherwise discussed in this Order. The Court finds that the Debtor fulfilled all other obligations for confirmation as set forth in Section 1129(a) of the Bankruptcy Code.

pertaining to the Properties.[5] The Court held the supplemental evidentiary hearing on October 29, 2014 (hereinafter the "Supplemental Hearing").

## Conclusions of Law and Fact

*I. Cramdown Interest Rate.*

a. Burden of Proof.

The debtor has the initial burden of establishing that a plan satisfies the requirements of 11 U.S.C. § 1129. In re Diplomat Constr., Inc., 2009 WL 6498180, at *2 (Bankr. N.D. Ga. 2009) (Diehl, B.J.). Once a debtor satisfactorily establishes a cramdown rate of interest, the burden shifts to the creditor to present evidence supporting a rate higher than that set forth by the debtor. In re Prescott, 2011 WL 7268057, at *2 (Bankr. S.D. Ga. 2011) (Barrett, C.B.J.)

b. Debtor's Expert Testimony

At the Initial Hearing, the Debtor presented the expert testimony and report of Richard Gaudet. Gaudet is a corporate restructuring and turnaround advisor

[5] The Debtor brought the issue of these rent increases to the Court's attention in its Reply Brief, dated August 18, 2014. After providing the parties an opportunity to litigate the matter sufficiently, the Court found the proposed evidence material to the Court's review of the Debtor's prospects going forward and found that Stabilis would not be unduly prejudiced by the evidence's inclusion, so long as Stabilis was given an opportunity to cross-examine the Debtor's witnesses and present rebuttal evidence. See In re Dunson, Case No. 13-10604-WHD, Doc. No. 707 (Bankr. N.D. Ga. Sept. 16, 2014).

with over 35 years of commercial banking experience. He currently acts as a managing director for HDH Advisors, LLC, which has been employed by the Debtor since the inception of this case to act as the financial advisor throughout these bankruptcy proceedings.

Gaudet posits that a modified interest rate of 5.0% is an acceptable cramdown interest rate for this Plan. Gaudet's interest rate analysis begins with the threshold question of whether an efficient market for a loan of this type currently exists, and acknowledges that should an efficient market exist for a loan of the type described, then that market rate serves as the best proxy for an appropriate discount rate. However, should an efficient market be absent, Gaudet states that his understanding of the law is that the Debtor should undergo a process called "rate stacking," whereby an interest rate is built by starting with a reasonable presumptive rate and making adjustments based upon debtor-specific risks.

In this case, both parties generally agree that an efficient market does not exist. Gaudet hypothesizes that a seven-year fixed loan of this magnitude could be acquired in the market at a rate between 4.21% and 4.44%, where there was a reasonable loan-to-value ratio of approximately 75% and a debt service coverage ratio greater than 1.20x (preferably 1.25x)—standard criteria for underwriting a

commercial loan of this kind. Because the Debtor has a loan-to-value ratio of 97% and a debt service coverage ratio of less than 1.20x, Gaudet concludes that an efficient market does not exist.

In turning to the "rate stacking" approach, Gaudet begins with the national prime rate of interest, currently at 3.25%, as the presumptive rate. However, because the National Prime rate is derivative of the Federal Reserve's discount rate and influenced thereby by the Federal Reserve's monetary policy, Gaudet believes that in periods of extreme policy influence the national prime rate needs to be adjusted to adhere to the principles addressed by the Supreme Court in Till v. SCS Credit Corporation, 541 U.S. 465 (2004). According to Gaudet, the national prime rate reflects the financial market's estimate of the amount a commercial bank would charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Gaudet elaborates that subsequent to the Till decision, the United States economy experienced a severe recession and the Federal Reserve has since kept its discount rate low, artificially suppressing the national prime and resulting in a 17% average compression of the net interest margins experienced by banks, thus, necessitating most banks to set baseline loan rates greater than prime for purposes of

sustainability. Consistent therewith, Gaudet makes an upward adjustment of .67% in establishing a presumptive rate that is not punitive to the financial industry.

Gaudet makes a second adjustment to the presumptive rate before turning his attention to the risk specific to the Debtor. According to Gaudet, the national prime rate accounts for all risk except credit risk. He explains that credit risk can likewise be broken down into two components: credit risk associated with the debtor and credit risk specific to the purpose of the lending. Before turning to the debtor-specific lending risk, Gaudet believes it appropriate to gauge the increase to a baseline risk that can be expected in the market for loans of similar kind. To accomplish this task, Gaudet examines two categories of loans using the Call Report data: (1) all loans secured by real estate, and (2) all loans secured by multi-family residential property. Based upon an expected loss analysis, Gaudet determines that the presumptive rate should be adjusted upward .27% to account for the expected loss attributable to all real estate loans (the higher industry risk of the two categories), and when added to the national prime rate and the upward adjustment for an artificially suppressed national prime rate, the adjusted presumptive rate becomes 4.19%.[6]

[6] Gaudet further compares this adjusted presumptive rate to the market rates he found for similarly situated loans in an efficient market. Because the 4.19%

Upon determining the adjusted presumptive rate, Gaudet needed only to make adjustments for the risk associated with this debtor. Gaudet quantifies this default risk by ascertaining and multiplying the increased probability of default due to circumstances specific to the Debtor by the loss that Stabilis could expect to suffer upon default and, then, by allocating that amount over a seven-year period. He then further quantifies that figure into an interest rate adjustment, which accounts for the payments.

Gaudet identifies three factors that impact the Debtor's risk of default going forward. First, the debt service coverage ratio—the excess cash flow above debt service requirements—is 1.17x, which increases the probability of default by 7.7%. Second, the debtor's sponsorship strength—the financial strength of the sponsor that could be relied upon to address unforeseen financial needs—is poor, as the principals of the Debtor are also emerging from bankruptcy. This increases the probability of default by 6.4%. Finally, the bankruptcy exit risk—the risk associated with emerging from bankruptcy—makes it 80% more likely that the Debtor would default than a typical nonbankruptcy borrower in this market.

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approximates the efficient market's 4.21% to 4.44%, he believes this confirms that his methodology adequately accounts for what a creditworthy customer would receive prior to consideration for borrower specific risks associated with a loan.

Because the market demonstrated an average default rate of 3.83% over the past five years, the increase in probability of default for this factor becomes 3.06%. Combined, the increased risk of default due to circumstances of the Debtor equals 17.16%.

According to Gaudet, Stabilis' expected loss given default in this case is calculated by comparing the loan-to-value ratio, 97.18%, to what the industry considers safe, 75%. The difference between the two is 22.18% that, when multiplied by the value of the loan amount, $1,914,450, equals an expected loss, given default, of $424,625.

As noted above, application of Gaudet's formula calls for the multiplication of the loss given default, $424,625, by the increased risk of default, 17.16%, resulting in an average expected loss of $72,866.[7] Amortizing this average expected loss over a seven-year term results in a monthly increase of $867.46 to the payments necessary to service the loan. The incremental increase in the monthly payment requires a .62% increase in the interest rate, raising the adjusted presumptive rate to 4.81%. Gaudet, therefore, believes that the Debtor's proposed rate of 5.0% exceeds the rate required by a "rate stacking" analysis.

[7] In other words, 83% of the time, it is estimated that Stabilis will lose nothing, presumably because the Debtor's business operations succeed. The other 17% of the time, it will lose the full amount of the $424,625.

c. Creditor's Expert Testimony

The Creditor relies upon the expert testimony and report of Andrew Manley. Manley has over 25 years of experience in the real estate industry, with extensive focus on underwriting, structuring, and asset management of debt and equity investments. Manley currently acts as a managing partner of High Bridge Advisors, an advisory firm formed to provide capital market, transactional, and investment management services, and as a managing partner of South Charles Capital Partners, a real estate investment firm formed in 2012 to invest in commercial real estate assets.

Manley asserts that the appropriate cramdown rate of interest is between 6.95% and 8.3%. He reaches this conclusion by utilizing two separate interest rate methodologies: a blended rate methodology and a build-up rate methodology.

Similar to Gaudet, Manley concludes that "[c]ommercial real estate loans are not available at the LTV ratio indicated by the Plan." See Stabilis's Initial Hr'g Ex. 1, at 11. He does, however, indicate that if the loan-to-value ratio and the debt service coverage ratio approximated the standard underwriting criteria, referenced above, a loan in an efficient market would yield between 4.4% and 4.7%. Id. at 14-15.

Manley's blended rate methodology assumes that, because of the 97% loan-to-value ratio, a lender should be compensated for the full risk of funding subordinate debt and equity components of the capital structure in addition to the senior debt. Because no senior lender would take on the entirety of the risk in an efficient market, Manley proposes establishing tranches of senior debt and mezzanine debt, along with the costs of equity capital and then calculating a weighted average based on the weight of each relative to the value of the underlying collateral and the cost of each component.

As discussed above, Manley states that a senior lender would be willing to lend 75% of loan-to-value at a rate between 4.4% and 4.7%, assuming a sufficient debt service coverage ratio. According to Manley, a mezzanine lender would be willing to finance the real estate from 75% to the 90% at an average rate of 11%. Manley further testifies that equity investors require the highest returns and could finance the last 10%[8] of the venture at an average rate of 20%. Applying Manley's weighted average results in a low end estimate of 6.95%[9] and a high end

[8] It was pointed out at the Initial Hearing that the equity calculation should have only applied to 7% and not 10%, as the loan-to-value ratio is 97%.

[9] Senior debt – 4.4% (cost of capital) x 75% (% of secured claim) = 3.3%
Mezzanine debt – 11% (cost of capital) x 15% (% of secured claim) = 1.65%
Equity – 20% (cost of capital) x 10% (% of secured claim) = <u>2.0%</u>

estimate of 7.18%[10]

As an alternative approach, Manley utilizes a build-up rate methodology similar to that proposed by Gaudet. Manley begins with the national prime rate of 3.25% as the presumptive risk free rate and makes two adjustments, one for the durational risk associated with the length of the loan and another for the enhanced risk of default.

Manley observes that certain risks are a function of time and that yields are typically greater in relation to the duration of these time-related risks. Manley believes that the difference between the yield of a 1-year U.S. Treasury bond, .10%, and that of a U.S. Treasury bond of equal length to the terms of the Plan, 2.03%,[11] adequately accounts for these risks, resulting in an adjustment of 1.93%.

Manley's second adjustment reflects the enhanced risk of default that persists as a fundamental characteristic of lending. Manley considers commercial real

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Sum = 6.95%

[10] Senior debt – 4.7% (cost of capital) x 75% (% of secured claim) = 3.53%
Mezzanine debt – 11% (cost of capital) x 15% (% of secured claim) = 1.65%
Equity – 20% (cost of capital) x 10% (% of secured claim) = <u>2.0%</u>
Sum = 7.18%

[11] This figured was modified from Manley's report's initial use of 3.03%, because of the change in the terms from a twenty-year straight amortization to a twenty-year amortization with a seven-year balloon. <u>See</u> Test. of Andrew Manley, Initial Hr'g Tr. 2:46:30-2:46-50, July 30, 2014.

estate assets as having a similar risk profile to sub-investment grade corporate bonds, and he believes the risks inherent to this loan's highly leveraged position and exposure to vacancy and defaulting tenants may adequately be quantified by comparing the yields of these sub-investment grade corporate bonds to yields of investment grade corporate bonds. He points out that the current yield of the Merrill Lynch High-Yield bond index indicates a premium of 312 to 209 basis points over prevailing investment grade corporate bonds, that when added to the presumptive risk free rate of 3.25% and the durational adjustment of 1.93%, results in a figure of 7.27% on the low end and 8.3% on the high end.

d. Legal Background

Section 1129(b) provides that a debtor may confirm a plan of reorganization, despite an impaired class's nonacceptance of the plan, so long as the plan does not discriminate unfairly and is fair and equitable with respect to each class of nonaccepting impaired claims. 11 U.S.C. § 1129(b)(1). The demand that a cramdown plan be "fair and equitable" with respect to a secured claim includes the requirement that a secured claim holder "receive on account of such claim deferred cash payments totaling . . . of a value, as of the effective date of the plan" the amount of its secured claim. 11 U.S.C. § 1129(b)(2)(A)(i)(II). Bankruptcy courts

have uniformly understood this language to require deferred cash payments over time, utilizing an appropriate rate of interest, equivalent to the present value of the allowed secured claim. See In re S. States Motor Inns, Inc., 709 F.2d 647, 650 (11th Cir. 1983).

While uniform understanding of this concept is simple enough, uniform application has escaped the courts, even within the same circuit. See 7 COLLIER ON BANKRUPTCY ¶ 1129.05[2][c] (Alan R. Resnick & Henry J. Sommers eds., 16th ed.) ("Courts have used many different rates, and formulas to obtain rates."). The problem is that the statute does not specify how bankruptcy courts are to calculate an appropriate rate of interest. While the United States Supreme Court's 2004 plurality decision in Till v. SCS Credit Corporation provided clarity in the context of Chapter 13, it may have unintentionally exacerbated the confusion where a Chapter 11 debtor proposes a cramdown plan. See Till v. SCS Credit Corp., 541 U.S. 465 (2004).

In Till, the Court addressed the appropriate interest rate for cramdown plans in Chapter 13 by examining the four prominent methods used by bankruptcy courts for calculating a cramdown rate of interest: (1) the coerced loan approach, (2) the presumptive contract approach, (3) the cost of funds approach, and (4) the formula

approach. Id. In its discussion, the Court endorsed the formula approach, having rejected the other methods:

> These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value.

Id. at 477. The Court particularly criticized the coerced loan approach, finding that it "requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors—an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans." Id. at 477.

The Court endorsed the formula approach seemingly because it minimizes the evidentiary burden on the debtor; promotes consistency, objectivity, and simplicity; and avoids the inherent defects of the other approaches, as well as potentially absurd results. Id. at 477-79. The formula approach advocated in Till starts with the risk-free national prime rate of interest, which is easily identifiable—as this is a daily published rate—and creates a standard starting point. See id. at 479; see also In re Tex. Grand Prairie Hotel Realty, L.L.C, 710 F.3d 324, 332 (5th Cir. 2013). Till then requires a court to adjust the prime rate for risk

specific to the debtor, depending, "of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan[,]" Till, 541 U.S. at 479, characteristics that, presumably, a bankruptcy court is much better suited to scrutinize, given its familiarity with the debtor, as opposed to such inquiries pertaining to external markets and/or creditor operations. See id. at 477-79.

Till, however, was a Chapter 13 case. So, despite the clarity given to that context, the Court is somewhat ambiguous on the decision's applicability in Chapter 11. The statutory language for a cramdown plan in Chapter 13 echoes that used in Chapter 11. Compare 11 U.S.C. §1325(a)(5)(B)(ii), with 11 U.S.C. § 1129(b)(2)(A)(i)(II). Early in the opinion, the plurality found that "the Bankruptcy Code includes numerous provisions that, like the [Chapter 13] cramdown provision, require a court to 'discoun[t] . . . [a] stream of deferred payments back to the[ir] present dollar value" and "likely [] Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under" all such provisions. Till, 541 U.S. at 474.

However, in now one of the more discussed footnotes, the plurality qualified

the theoretical scope of its opinion. See id. at 477 n.14. In footnote 14, the Court recognized that there are no "readily apparent" markets for cramdown loans in Chapter 13, as every cramdown loan is forced upon a creditor over said creditor's objection. Id. Nevertheless, the same is not necessarily true in Chapter 11, where occasionally markets for debtor-in-possession financing exist. Id. Thus, as the plurality opined, "when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." Id.

Unfortunately, this little footnote has disrupted the uniformity that it seems the plurality strove initially to achieve in Till. At least two circuit courts have addressed the matter and several outside commentators have made their opinions clear. The Sixth Circuit refused "blindly [to] adopt *Till's* endorsement of the formula approach . . . in the Chapter 11 context." In re Am. HomePatient, Inc., 420 F.3d 559, 568 (6th Cir. 2005). Instead, the Sixth Circuit chose a bifurcated approach. Id. Taking its cue from footnote 14, the Court held that the market rate should be used where an efficient market exists, but in the absence of such an efficient market, courts should employ Till's formula approach. Id. As the Court found, this approach should alleviate the concerns of scholars that argue efficient cramdown markets in Chapter 11 cases are "'just as illusory as in chapter 13.'"

See id.; see also id. at 567-68 (quoting Collier on Bankruptcy and citing other scholarly works, advocating for Till's application in Chapter 11 because the two contexts are "not all that dissimilar").

The Fifth Circuit, meanwhile, found Till's "precedential value[, as a splintered decision,] limited even in the Chapter 13 context." In re Tex. Grand Prairie Hotel Realty, L.L.C, 710 F.3d 324, 331 (5th Cir. 2013). Notwithstanding, it seemingly agreed with the bankruptcy court's finding of Till as "instructive, if not controlling under Chapter 11[,]" and confirmed the bankruptcy court's "straightforward application of the [formula] approach . . . ." Id. at 337. However, the Fifth Circuit qualified its holding as neither the "only" nor "optimal" method for calculating a cramdown interest rate in Chapter 11, essentially leaving interest rate determinations to the individual bankruptcy courts. Id.

It appears that many, if not a majority, of the courts adopt the two-step or bifurcated approach articulated by the Sixth Circuit. See In re 20 Bayard Views, LLC, 445 B.R. 83, 107-08 (Bankr. E.D.N.Y. 2011) ("Courts in [the Second Circuit] have concluded that the two-step analysis . . . is an appropriate way to determine the interest rate that should apply in a Chapter 11 cramdown situation."); id. at 108 ("The majority of courts outside [the Second] Circuit to consider the issue have

similarly applied the two-step analysis described by the Sixth Circuit . . . .") (citing cases from the Sixth Circuit Bankruptcy Appellate Panel, the Middle District of Florida, the Eastern District of Tennessee, the Eastern District of Arkansas, the District of Arizona, the Northern District of Texas, the District of New Jersey, the Middle District of North Carolina, and the Eastern District of Pennsylvania); see also In re SW Boston Hotel Venture, LLC, 460 B.R. 38 (Bankr. D. Mass. 2011) ("Thus many courts attempting to determine the appropriate rate for post-confirmation interest of a restructured loan in Chapter 11 cases follow a two-step process."), *vacated on other grounds*, 2012 WL 4513869, at *54 (1st Cir. B.A.P. 2012). Still, some courts adhere to Till's dicta, regardless of the chapter, see In re Prescott, 2011 WL 7268057, at *2 (Bankr. S.D. Ga. 2011) (Barrett, C.B.J.); while others revert to pre-Till precedent, see In re Gillikin, 2011 WL 7704353, at *6 (Bankr. S.D. Ga. 2011) (Davis, B.J.) ("I conclude that—in setting post-confirmation interest rates in a Chapter 11—pre-*Till* interest rate precedent is still good law."). Given the Eleventh Circuit's adherence to prior panel precedent, unless a contrary Supreme Court ruling is "clearly on point," see In re McNeal, 477 F. App'x 562, 564 (11th Cir. 2012) (internal quotations omitted), and acknowledging that Till was decided by a plurality, see U.S. v. Hill, 643 F.3d 807,

856 (11th Cir. 2011) (noting that plurality opinions are limited in precedential value to their narrowest application), the Court agrees with Judge Davis that Eleventh Circuit pre-Till precedent governs interest rate questions in Chapter 11. See In re Gillikin, 2011 WL 7704353, at *6 (Bankr. S.D. Ga. 2011) (Davis, B.J.).

The leading Eleventh Circuit case analyzing this issue in Chapter 11 is Matter of Southern States Motor Inns, 709 F.2d 647 (11th Cir. 1983). In Southern States, the court examined the "rate of interest to be applied in calculating deferred payments of delinquent federal taxes" required by the Bankruptcy Code for confirmation under 11 U.S.C. § 1129(a)(9)(C). Id. at 649. In its decision, the Eleventh Circuit quoted favorably an excerpt from Collier setting forth certain factors relevant to determining an appropriate interest rate.

> The appropriate discount [interest] rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount [interest] rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.

Id. at 651 (quoting 5 COLLIER ON BANKRUPTCY ¶ 1129.03, at 1129-65 (15th ed. 1982)).

Notably, the "substance" of the adjustments applied in Southern States is indistinguishable from those applied in Till. In re Gillikin, 2011 WL 7704353, at

*7 (Bankr. S.D. Ga. 2011). The primary difference between the two approaches is Southern States' use of the "prevailing market rate." Fortunately, for reasons best articulated by Judge Bihary in In re Oaks Partners, Ltd., 135 B.R. 440 (Bankr. N.D. Ga. 1991), this Court long ago adopted the formula approach (consistent with Southern States[12]) for constructing a market rate. See In re IPC Atlanta Ltd P'ship, 142 B.R. 547, 557 (Bankr. N.D. Ga. 1992) (Drake, B.J). Consequently, the Court finds itself conducting an analysis substantively tantamount to that under Till. The interest rate is determined "by first taking the appropriate risk-free rate, and adding to that base rate an additional amount of interest to take into account the risks associated with the debtor, the security, and the plan." Id.

e. Interest Rate Conclusions

As an initial matter, the Court rejects Stabilis' use of the blended rate approach in producing a market rate. The rationale for discussing what markets afford is premised upon the comparables within the market being of the same general nature as the loan in question. However, a blended rate approach's use of tiered financing "bears no resemblance to the single, secured loan contemplated

[12] As stated in In re Oaks Partners, Ltd., the Eighth Circuit adopted a formula approach after citing favorably to an earlier decision which specifically followed Southern States. In re Oaks Partners, Ltd., 135 B.R. 440, 446 (Bankr. N.D. Ga. 1991).

under a cramdown plan." In re Tex. Grand Prairie Hotel Realty, L.L.C, 710 F.3d 324, 337 (5th Cir. 2013); see also In re Am. HomePatient, Inc., 420 F.3d 559, 569 (6th Cir. 2005) ("Indeed, the only type of debt contemplated by American's reorganization plan was senior secured debt."). Moreover, Stabilis' argument runs counter to one of the expressed reasons adopted by this Court for rejecting the coerced loan or forced loan approach for determining a market rate under Southern States, which is the all-to-often absurdity and inconsistency of the argument. See In re Oaks Partners, Ltd., 135 B.R. at 444. As Judge Bihary discussed—

> [t]he creditor introduces experts who, like [Stabilis'] expert[], testify that there is no market for this loan and that conventional lenders would not make a loan where the debt is equal to the value of the property. After they acknowledge the absence of a market as such, they go on to give their opinions that [] lender[s] would only make the loan if the[ir] interest rate were such and such. It is no coincidence that the rates to which they opine render the debtor's plan unfeasible.

Id. at 444-45. Finally, a blended rate approach subjects itself to the probability of over-compensating the creditor. In re Am. HomePatient, Inc., 420 F.3d at 569. A blended rate approach exceeds the Court's purpose of protecting the creditor for risk and compensating the creditor only for the present value of the claim. Id. A blended approach, instead, rewards a creditor for a new loan, without identifying and extracting such components as profit margin and overhead and transaction

costs. See id.; see also In re Gillikin, 2011 WL 7704353, at *7 (Bankr. S.D. Ga. 2011).

Accordingly, the Court's attention turns to the two build-a-rate approaches utilized by the parties. The parties' approaches diverge in two fundamental respects: (1) a difference in determining what the appropriate risk adjustment should be and (2) a difference of whether the interest rate should include a time adjustment. For the following reasons, the Court finds that 5.0%, as set forth in the Plan, reflects an appropriate rate of interest for compensating Stabilis for the risks involved.

The Court finds that the Debtor satisfied its initial burden in setting forth 5.0% as the cramdown interest rate. Consistent with this Court's approach in In re IPC Atlanta, the Debtor begins with an appropriate risk free rate of interest, the national prime rate of 3.25%. The Debtor then adjusted upward based on risks specifically associated with the Debtor (or circumstances of the estate), the security (or nature thereof), and the Plan (including its duration and feasibility). See In re S. States Motor Inns, Inc., 709 F.2d 647, 651 (11th Cir. 1983); Till v. SCS Credit Corp., 541 U.S. 465, 479 (2004). For instance, the risk of default analysis focused on issues concerning the Debtor and the Debtor's estate that may increase the

possibility of post-confirmation default; the expected loss analysis took into account the security and its relatively high loan-to-value ratio; and the average expected loss given default estimated the payments to be distributed over the seven-year term of the Plan in quantifying the interest rate adjustment.

Stabilis' risk adjustment, on the other hand, relies on a comparison to sub-investment grade bonds (a speculative and unfounded comparison with which to begin) and then compares the expected yield to investment grade bond yields. While this methodology may have had some bearing if the Debtor were a large corporate borrower attempting to restructure subordinate unsecured debt, it utterly fails to merit influence over consideration of the appropriate interest rate in these proceedings. Additionally, this risk adjustment does not engage in even a semblance of a pretense of incorporating circumstances specific to the Debtor, the security, or the Plan.

Stabilis' durational adjustment warrants legitimate consideration. "[L]onger repayment terms may justify an increase in the applicable interest rate . . . ." In re Bryant, 439 B.R. 724, 743 (Bankr. E.D. Ark. 2010) (citing In re American Trailer, 419 B.R. 412, 440 (Bankr. W.D. Mo. 2009)). "An interest rate is generally said to have three components: (1) inflationary expectations, (2) a

"real" interest rate and (3) a risk component." In re Oaks Partners, Ltd., 135 B.R. 440, 445 (Bankr. N.D. Ga. 1991) (internal citations omitted). Because "safe" investments presumably account for the inflation and "real" risk, bankruptcy courts are not generally expected to make findings concerning these first two components. Id. at 445-46. Indeed, the Supreme Court stated that the national prime rate "reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default." Till v. SCS Credit Corp., 541 U.S. 465, 479 (2004). Notwithstanding, the national prime rate only contemplates a relatively short-term loan.[13] BLACK'S LAW DICTIONARY 937 (10th ed. 2014) ("prime rate. (1952) The interest rate that a commercial bank holds out as its lowest rate for a short-term loan to its most creditworthy borrowers . . . ."). Accordingly, Stabilis requests an adjustment for the unaccounted seven-year duration of the Plan.

However, the Court finds Stabilis' adjustment inconsistent. By adding the differential yield of a seven-year treasury bond to the national prime, Stabilis' rate,

[13] Undoubtedly, the national prime's relatively short-term explains why Judge Bihary chose, and this Court adopted, the yield on a treasury obligation of matching maturity to the payout period in a plan as the "most appropriate risk-free rate." In re Oaks Partners, Ltd., 135 B.R. at 446.

excluding risk profiles associated with any theoretical loan, equals 5.18%. Should the Court accept this as true, then a bank's most creditworthy customer would expect, at a minimum, to obtain no less than 5.18%. Yet, the market realities, as depicted in Stabilis' own expert report, show that loans within the standard underwriting guidelines, obtained by qualified borrowers (which are not necessarily a bank's "most credit worthy customers") and presumably accounting for at least some individualized risk, could garner an interest rate of approximately 4.4% to 4.7%, at least half a percentage point less. The abstract simplicity of Stabilis' adjustment is seductive, but its real application proves impractical.

The Court agrees that a cramdown interest rate should account for the duration of the Plan. Under ideal circumstances, the Court would substitute as the presumptive risk-free rate the yield rate of a seven-year U.S. Treasury bond for the national prime rate.[14] See IPC Atlanta Ltd. P'ship, 142 B.R. 547, 557 (Bankr. N.D. Ga. 1992) (Drake, B.J) ("The appropriate risk-free base rate is determined by looking to the yield on a treasury note which matures at approximately the same

[14] The Court notes that, if 2.03% replaced the national prime's rate of 3.25%, under the Debtor's analysis, 5.0% would well exceed the "rate stacking" interest rate and under Stabilis' own rate-building approach, the interest rate would barely exceed 5.0% on the high end. Such a substitution would nullify any need for further durational adjustment.

date as the note . . . ."). However, the evidence before the Court presupposes use of the national prime rate. Without knowing what alterations, if any, substituting the presumptive risk-free rate would require, the Court cannot perform such a replacement analysis. Notwithstanding, the Court acknowledges that the Debtor made two adjustments to prime, both in Stabilis' favor, which account for the Federal Reserve's monetary influence and the underlying market risk for loans of similar kind, and which are not otherwise required by any legal precedent. The result of these adjustments is an increase in the interest rate by .94%. The Court is satisfied that these superfluous adjustments adequately cover for any necessary durational adjustment.

For the reasons discussed above, the Court finds that the Debtor satisfied its burden establishing 5.0% as an acceptable cramdown interest rate. After due consideration, the Court declines to increase the rate based on the arguments advanced by Stabilis. Therefore, the cramdown interest rate shall be 5.0%.

*II. Feasibility*

Stabilis further objects to the Plan's feasibility. The Bankruptcy Code provides that the Court shall confirm a plan of reorganization only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the

need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C § 1129(a)(11). The Debtor bears the burden to prove each element by the preponderance of the evidence. In re Olde Prairie Block Owner, LLC, 467 B.R. 165, 169 (Bankr. N.D. Ill 2012). Feasibility does not require a guarantee of success. Kane v. Johns-Manville Corp. 843 F.2d 636, 649 (2d Cir. 1988). However, it does require the Court to gauge whether the Debtor can realistically carry out the provisions of the Plan and whether the Plan has a reasonable prospect of success. In re Haas, 162 F.3d 1087, 1090 (11th Cir. 1998). A determination requires an examination of the totality of the circumstances, with a focus upon capital structure and earning power, economic conditions, and the ability and consistency of management. IPC Atlanta Ltd. P'ship, 142 B.R. 547, 560 (Bankr. N.D. Ga. 1992). For the purpose of feasibility, the Court makes the following findings of fact and disposes of the issue as follows:

1. The Properties are "Class A" properties in excellent condition, managed by an exceedingly competent manager, located in well-established neighborhoods, and screened for and occupied by high quality tenants. See Test. of Dan Dunson, Initial Hr'g Tr. 2:09:35-2:10:49, July 30, 2014.

2. Average turnover of the Properties is acceptable, and, in the event of turnover, the Properties do not stay vacant for long periods of time. Id. at 2:10:10-2:10:30.

3. The Debtor's Monthly Operating Reports (hereinafter the "MORs") reflect that the average monthly rental income for the period ending May 31, 2014, excluding the partial first month of March 2013, is $32,170.71. See Stabilis' Initial Hr'g Ex. 8.

4. The Debtor initially projected average net monthly rental income of $33,439. Debtor's Initial Hr'g Ex. E-3.

5. The Debtor secured across-the-board rent increases with all tenants in the Properties. The additional revenue created by these across-the-board rent increases results in an increase of $2,133 beginning in October of 2014 with a subsequent increase in the amount of $455 within a year. See Debtor's Supp. Hr'g. Ex. D-2.

6. The Debtor subsequently projected, after calculating for the rent increase, net monthly rental revenue of $35,680. See Debtor's Supp. Hr'g Ex. D-5.

7. The Debtor's starting cash balance is $33,950. See Debtor's Supp. Hr'g Ex. D-5.

8. Average operating expenses, including amounts set aside for turnover costs and capital reserves, for the first two years on the Properties total $15,410 per month. See Debtor's Supp. Hr'g Ex. D-5.

9. Estimated property taxes for the first two years are $35,612 per year, and are due in the twelfth and twenty-fourth months of the Plan. See Debtor's Supp. Hr'g Ex. D-5.

10. After the first two years, operating expenses, taxes, and revenue are estimated to increase by 3.0% annually. See Debtor's Supp. Hr'g Ex. D-5.

11. At 5.0% interest, the average monthly Plan payment to Stabilis equals $12,635. See Debtor's Supp. Hr'g Ex. D-5.

12. The junior secured creditor shall receive under the Plan payments of $1,750 per month. See Debtor's Supp. Hr'g Ex. D-5.

13. The priority tax claims shall be paid an average monthly payment of $1,522 for 3.25 years. See Debtor's Supp. Hr'g Ex. D-5.

14. Debtor intends to pay a total of $25,000 in administrative expenses within the first three months of the Plan. See Debtor's Supp. Hr'g Ex. D-5.

15. There have been no material increases in vacancies since the

rental increase took effect in October and no indications that anyone intends to take advantage of a 60-day notice of termination provision, contained in the leases, because of the modest rent increase. See Test. of Dan Dunson, Supp. Hr'g Tr. 10:00:26.

The fundamental objection advanced by Stabilis is that the Debtor's projections overestimate the Debtor's rental income and that actual rental income is insufficient to satisfy both the operational expenses and the obligations required by the Plan.[15] Stabilis primarily focuses on the fact that the MORs consistently show actual rental income as less than that projected in the budget. Accordingly, if the Court hypothetically finds the Plan feasible based on the MORs average income rather than the Debtor's revenue projections, it alleviates Stabilis' primary concern by recharacterizing the Plan and negates the need to assess the debate concerning the credibility of the projected income. The Court shall now proceed in conducting that analysis. In doing so, the Court notes, as discussed below, that this

[15] Stabilis collaterally attacks the foundation of the Debtor's projections by showing potentially inaccurate vacancy rates and that the Debtor's tenants reserve the right to terminate the lease with sixty days of notice. Yet, there is no evidence that the Debtor's projections are substantively inaccurate, or that the Debtor anticipates that any of its tenants will actually terminate their leases. Furthermore, by utilizing the actual income as demonstrated in the MORs, the Court need not rely solely on the income projections asserted by the Debtor.

analysis is a worst-case scenario and generally views positively the work of Jessica Peterson, Debtor's financial advisor, in developing the budgets. Since Stabilis raised no objections to expenses, taxes, and inflation as depicted in the budget, the Court accepts those figures as accurate and incorporates them below.

The actual income, as set forth in the MORs, amended to account for the immediate increase in rents of $2,133, is $34,303.71 ($32,170.71 + $2,133) per month. Deducting operating expenses of $15,410 leaves the Debtor with $18,893.71 ($34,303.71 - $15,410) of monthly operating income to service the Plan. Excluding administrative fees and real property taxes, the total required to service the Plan is $15,907 ($1,522 + $12,635 + $1,750) per month. Thus, Debtor's monthly operating income appears more than satisfactory ($2,986.71 positive cash flow) to service the ordinary terms of the Plan.

A remaining issue is whether the Debtor's making of nonrecurring administrative expense payments of $10,000, $10,000, and $5,000 in the first three months results in the prospect of default. In the first and second months, the additional expense of $10,000 causes the Debtor to realize a monthly negative cash flow of $7,013.29 ($10,000 - $2,986.71). In the third month, the additional expense of $5,000 causes the Debtor to realize a negative cash flow of $2,013.29

($5,000 - $2,986.71). Therefore, the first three months result in negative cash flow of $16,039.87 ($7,013.29 + $7,013.29 + 2,013.29). Because the Debtor's starting balance is $33,950, it appears that these payments will not force the Debtor to default.

The final consideration for the Court is whether the payment of annual property taxes could cause a default, especially at the end of Year-1.[16] At the end of the third month of the Plan, Debtor should have cash-on-hand of no less than $17,910.13 ($33,950 - $16,039.87). In the fourth month through the eleventh month of Year-1 of the Plan, the Debtor should net $23,893.68 ($2,986.71 * 8), bringing the cash on hand to $41,803.81 ($23,893.68 + $17,910.13), which exceeds the estimated property taxes for Year-1 of $35,612 by $6,191.81. In Year-2, without the necessity of paying administrative expenses, the Debtor should net no less than $35,840.52 ($2,986.71* 12) with which to make its property tax payment, resulting in a positive cash flow for the year of $228.52. Because the Debtor estimates both operating expenses and revenue to increase annually at an equal rate of 3.0% thereafter, it appears that beginning in Year-2, the Debtor's cash balance

[16] Prior to the Supplemental Hearing, the Debtor earmarked funds in its operating account for 2014's property taxes. The budget was updated to show less cash on hand and 2015's property taxes due in the twelfth month of the Plan going forward.

will likewise increase annually. This effect is heightened at the end of Year-3 when the priority tax burden is reduced by nearly $12,000 and again at the end of the first quarter of Year-4 when the remaining priority tax obligation of $4,567 has been completely paid off.

Additionally, the Court views this hypothetical as a worst-case scenario. In fact, the Court looks favorably upon much of the work of Peterson. Peterson possesses significant experience in her role as a financial advisor. At the time of the Initial Hearing, Peterson had been working alongside the Debtor and its principals for 17 months, aiding the Debtor in its record keeping, preparing the Debtor's MORs, and monitoring the Debtor's financial performance throughout the case. She proved intimately familiar with the business and adequately explained the reasons why the projections were greater than the revenues reflected in the MORs. Moreover, Dan Dunson demonstrated a particular competence and a unique personal relationship with his tenants. The Court finds him credible, and when he states that none of his tenants intend to opt out of their leases, the Court trusts his opinion. Consequently, the Court is convinced that the Debtor's performance going forward should exceed the worst-case hypothetical constructed for its analysis. Nevertheless, even under the worst-case scenario, the Debtor cash

balance never dips into the negative, and begins to emerge as early as Year-2, once it frees itself from the burdens of its administrative expenses. Therefore, the Court finds that the Debtor has satisfied its burden of persuasion under 11 U.S.C. § 1129(a)(11). As a result, Stabilis' objection to feasibility is overruled.

## Conclusion

In sum, the Court concludes that the cramdown interest rate of 5.0% is fair and equitable with respect to Stabilis' secured claim. The Court also concludes that the Debtor's Plan is feasible. Thus, considering that all requirements of Section 1129 have been met, the Court finds the Plan in a confirmable posture. Accordingly, it is hereby

**ORDERED** that Stabilis' objections to the confirmation of the Plan are **OVERRULED.**

It is **FURTHER ORDERED** that the Plan shall be **CONFIRMED** upon the Court's entry of a separate order, prepared with all the necessary formalities by the Debtor, following the entry of this Order.

The Clerk is **DIRECTED** to serve this Order on the Debtor, Stabilis, respective counsel, and the United States Trustee.

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