ORDERED.

Dated: November 13, 2015

Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

SNIIIC TWO, LLC,

Chapter 11
Case No. 6:13-bk-14308-CCJ

Debtor.
_______________________________________/

ORDER CONFIRMING DEBTOR'S
AMENDED PLAN OF REORGANIZATION

This case came before the Court for hearing on January 22, 2015 and again on June 10, 2015, on confirmation of the debtor's Amended Chapter 11 Plan (Doc. No. 75; the "Proposed Plan") and the debtor's motion to cramdown the secured claims of JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., and Select Portfolio Servicing, Inc. (Doc. Nos. 166, 168, and 169, respectively; collectively, the "Cramdown Motions"). JPMorgan, Wells Fargo, and Select Portfolio (the "Banks") object to the Proposed Plan and the Cramdown Motions (Doc. Nos. 206, 208, and 207, respectively; collectively, the "Objections"). For the reasons set forth below, the

Objections are overruled, the Cramdown Motions are granted, and the Proposed Plan is confirmed.

Facts

Prior to the Petition Date the debtor purchased residential properties at foreclosure sales with the intent of turning the properties into rental units. At the evidentiary hearing on confirmation, the debtor's owner testified that at the time of purchase he believed he was buying the properties free and clear of liens because senior mortgages to the lien being foreclosed would be extinguished by the foreclosure sale. As the debtor later learned, his belief was mistaken.

Instead, the debtor acquired properties still encumbered by mortgages, at least some of which had become due on sale. This problem was complicated by the fact that--as a foreclosure sale purchaser--the debtor was not in contractual privity with any of the mortgagees. This fact made it impossible for the debtor to negotiate a resolution of these debts.

Facing foreclosure itself, the debtor filed this case to untangle the mess caused by its owner's mistake. By the Proposed Plan, the debtor seeks to cramdown each of the secured claims encumbering its properties. The Banks object to cramdown and confirmation. In support, the Banks argue that the debtor's lack of privity is a bar to cramdown. In the alternative, the Banks argue that the debtor's attempt to modify secured claims without contractual privity proves bad faith and an abuse of the Bankruptcy Code, making the plan unconfirmable under Section 1129.

Discussion

The Court holds that a debtor's lack of privity is not a bar to cramdown. And as to bad faith, privity is only one of the totality of circumstances that must be considered.

The Banks argue that cramdown is barred when a debtor lacks contractual privity with a secured claimholder because it is not “fair and equitable” under Section 1129(b).[1] It is not “fair and equitable”, the Banks contend, because their mortgages are being crammed down by a debtor that they never agreed to lend to. Although the result seems counterintuitive, because of controlling case authority, the Court disagrees.

Section 1123 provides that a plan may “modify the rights of holders of secured claims”.[2] When a class of claims rejects its treatment, the debtor may nonetheless confirm the plan (that is, “cram it down”), provided that the treatment is “fair and equitable”.[3] The Code defines what the minimum treatment of secured creditors must be to show the plan is “fair and equitable”. And there is no requirement that there be privity between the debtor and the claimholder.[4] The Court declines to add such a requirement.[5] Instead, Section 1123 and the fair and equitable rule permit the treatment of all secured “claims”, classes of “claims”, and “holders of claims.”[6] The question is, therefore, resolved by determining whether the Banks hold “claims”. The Court concludes that they do.

---

[1] The Banks make three additional objections, namely that the Proposed Plan (i) fails to comply with the absolute priority rule, *see* 11 U.S.C. § 1129(b)(2)(B)(ii), (ii) fails to provide adequate interest to the Banks’ claims, *see Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), and (iii) fails to provide for postpetition escrow advances. These objections are overruled. *First*, the absolute priority rule does not apply here because the members of the unsecured class who voted accepted the plan. *See* 11 U.S.C. 1129(b)(1); (Doc. No. 211, at 3); *see also In re Adelphia Commc’ns. Corp.*, 368 B.R. 140, 260 (Bankr. S.D.N.Y. 2007); (Doc. No. 76, at 15). *Second*, the Court finds that the 4% interest provided by the Proposed Plan is adequate. And, *third*, the debtor and the Banks agreed at a subsequent hearing that the Banks could file administrative claims for postpetition advances, mooting the third objection.
[2] 11 U.S.C. § 1123(b)(5).
[3] 11 U.S.C. § 1129(b)(1).
[4] *See* 11 U.S.C. § 1129(b)(2)(A).
[5] *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012) (“[N]othing in the generalized statutory purposes of protecting secured creditors can overcome the specific manner of that protection which the text . . . contains”.).
[6] *See* 11 U.S.C. §§ 1123(b)(5) and 1129(b)(2)(A)(i)–(iii).

While there is no reasoned authority on this question in the Chapter 11 context,[7] there are several cases in the Chapter 13 context that *have* discussed privity between debtors and mortgagees and held that even when there is no such privity, the mortgagee nonetheless holds a "claim" that may be treated through the Chapter 13 plan.[8] In so holding the Courts conclude that notwithstanding the lack of privity, the mortgagee still holds a "claim" against the debtor's *property*. A claim against the debtor's property falls within the broad definition of "claim" promulgated by the Supreme Court in *Johnson v. Home State Bank*.[9] In that case, the Court noted that "Congress intended . . . to adopt the broadest available definition of 'claim'",[10] and inferred that "Congress fully expected that an obligation enforceable only against a debtor's property would be a 'claim'".[11] Because the mortgagee holds a "claim" against the debtor's property, the debtor may modify the mortgagee's rights with respect to the claim through the plan.

This logic applies with equal force in Chapter 11. Indeed, Chapter 11 provides additional protections for secured claimholders that are unavailable in Chapter 13, such as recourse for non-recourse secured claimholders, and the ability for the secured claimholder to elect to be treated as fully-secured.[12]

Other courts--and the Banks--disagree.[13] They argue that Congress did not envision modifications without privity, and that the definition of "claim" does not include interests when

[7] The Banks point to an oral ruling in *In re Hanna*, 13-17854-PGH (Bankr. S.D. Fla. July 11, 2014), (Doc. No. 205), but that ruling--as oral rulings commonly are--is presented without the court's analysis.
[8] *See, e.g.*, *In re Curinton*, 300 B.R. 78, 80 (Bankr. M.D. Fla. 2003) (collecting cases); *In re Trapp*, 260 B.R. 267, 270 (Bank. D.S.C. 2001). *But see, e.g., Ulster Savs. Bank v. Kizelnik (In re Kizelnik)*, 190 B.R. 171, 175–179 (Bankr. S.D.N.Y. 1995).
[9] *Johnson v. Home State Bank*, 501 U.S. 78 (1991).
[10] *Id.* at 83.
[11] *Id.* at 86.
[12] *See* 11 U.S.C. § 1111(b); *see also In re Hill*, 440 B.R. 176, 182 (Bankr. S.D. Cal. 2010).
[13] *See United Enters., Ltd. v. ACI Sunbow, LLC (In re ACI Sunbow, LLC)*, 206 B.R. 213, 224 (Bankr. S.D. Cal. 1997); *In re Kizelnik*, 190 B.R. 171 (Bankr. S.D.N.Y. 1995).

the mortgagee lacks privity with the debtor. These points are unpersuasive in light of the Supreme Court's broad definition of "claim" and the language of the Code, which makes no mention of privity. In any event, these concerns appear to be rooted in a fear of bad faith abuse of the Bankruptcy Code. On this point, the Supreme Court has warned, "we do not believe that Congress intended the bankruptcy courts to use the Code's definition of 'claim' to police the [bankruptcy] process for abuse".[14]

Having held that a lack of contractual privity is not a bar to cramdown, the Court considers the Banks' arguments that the debtor is acting in bad faith. The Banks make three arguments regarding bad faith. First, that the debtor's lack of privity with the Banks is an indicator of bad faith under the *Phoenix Piccadilly* analysis.[15] Second, that the debtor seeks to impermissibly change its business model to pursue renting out the properties as an ongoing business, rather than--as the Banks allege--renting out the properties for the short term until an inevitable foreclosure.[16] And, third, that a lack of privity is *per se* bad faith.[17]

The search for bad faith is not subject to a *per se* approach.[18] In fact, the Eleventh Circuit has instructed that courts may consider "any factors" to determine whether the debtor has acted in bad faith.[19] As such, the Court rejects any argument that the debtor's lack of privity--standing alone--controls the inquiry. Instead, the Court examines the debtor's lack of privity in context.

As stated above, the debtor did not arrive here as part of a scheme to buy property and invoke the bankruptcy process as part of a business model. To the contrary, the debtor was forced here by its owner's misunderstanding of the effect of foreclosure on senior mortgages. By

[14] *Johnson*, 501 U.S. at 88.
[15] (Doc. No. 208, at 5–7 (citing *Phoenix Piccadilly, Ltd v. Life Ins. Co. of Va. (In re Phoenix Piccadilly)*, 849 F.2d 1393, 1394 (11th Cir. 1988))).
[16] (*Id.* at 7–12 (citing *In re Victory Const. Co., Inc.*, 9 B.R. 549, 563–65 (Bankr. C.D. Cal. 1981))).
[17] (*Id.* at 13-15 (citing *In re ACI Sunbow, LLC*, 206 B.R. 213 (Bankr. S.D. Cal. 1997))).
[18] *E.g.*, *In re Venice-Oxford Assocs. Ltd. P'ship*, 236 B.R. 805, 810 (Bankr. M.D. Fla. 1998).
[19] *Phoenix Piccadilly*, 849 F.2d at 1394.

the Proposed Plan, the debtor seeks to use the properties that it purchased as a source of rental income as it always planned. This is not a new business model or some "speculative venture" that envisioned litigation as a likely resort.[20] The debtor has played by the rules, and it seeks to rehabilitate and implement its original business model with the tools provided by Chapter 11. As such, the Court finds that the debtor has acted in good faith.

The Banks also urge this Court to consider implications beyond this case. The Banks argue that mortgagees will face a plague of cramdown by foreclosure sale purchasers, and that the mortgagors who lose their properties in foreclosure may face uncertainty as the mortgagees attempt to collect from the foreclosure sale purchaser. The Court declines the Banks' invitation to second-guess the policy choices made by the drafters of the Bankruptcy Code by adding to the already-detailed list of statutory confirmation requirements.[21] The Court notes however, that the result in this case is dictated by its unique facts and the debtor's clear good faith--and it is appropriately limited to those facts. A lack of privity may easily serve as a badge of bad faith in another case.

Conclusion

For the reasons set forth above, it is ORDERED that:

1. The Objections are overruled.
2. The Cramdown Motions are granted.
3. The Proposed Plan is confirmed.

Attorney Taylor J. King is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

[20] *See Victory Const.*, 9 B.R. at 564.
[21] *See Law v. Siegel*, 134 S. Ct. 1188, 1196, 1197–98 (2014); *RadLAX*, 132 S. Ct. at 2073.