1999 BNH 046 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-12287-JMD
Chapter 11

CGE Shattuck, LLC,
Debtor

Banc of America Commercial Finance Corporation,
Movant

v. CM No. 99-747

CGE Shattuck, LLC,
Respondent

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it NationsCredit Commercial Corporation's Renewed Motion For Relief From The Automatic Stay Or For Adequate Protection (the "Motion"), filed with this Court on September 22, 1999 by Banc of America Commercial Finance Corporation, formerly NationsCredit Commercial Corporation (the "Movant"). A final hearing on the Motion was held over the course of several days and closing arguments were heard on December 15, 1999, at which time the Court took the matter under advisement.

The Court has jurisdiction of this subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. BACKGROUND

An involuntary Chapter 11 petition was filed by creditors of CGE Shattuck, LLC (the "Debtor") on July 16, 1999. An order for relief issued on August 20, 1999. The Debtor owns an 18-hole golf course in Jaffrey, New Hampshire, which sits upon a large tract of land and includes a number of buildings used for clubhouse and pro-shop purposes.[1] A portion of the real property is not used for golf-related activities and is intended to be sold for residential development.

The Movant is the primary creditor of the Debtor. During 1996, the Movant lent the Debtor roughly $2.5 million pursuant to a promissory note (the "Note") and took a mortgage interest in the Debtor's real property. The current amount due the Movant is a matter of significant dispute. However, for purposes of resolving the motion for relief, the parties have stipulated that the Movant's claim is not greater than $2.6 million. The Movant alleges that the last payment made by the Debtor under the Note occurred on November 5, 1998.

The value of the property that secures the Movant's debt is also an issue of great contention. At the hearing, both parties presented extensive evidence concerning the value of the Debtor's business. Each party submitted an appraisal and offered supporting testimony by an independent appraiser. Not surprisingly, the chasm between each party's valuation is wide. The Movant's appraiser concludes that the Debtor's business is worth $2.78 million as a going concern.[2] The Debtor's appraiser, on the other hand,

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[1] The Debtor entered into a lease and operations agreement dated February 6, 1999 that purports to lease all of the Debtor's relevant real and personal property to Shattuck Realty Partners, LLC. The Movant questions the validity of such lease.

[2] This value encompasses $2.7 million for the golf course and $80,000 for the portion of real estate that may be developed as residential property. This value also assumed that the Debtor owned the

believes that the Debtor's going concern value is equal to $1.08 million.[3] Although the parties reach significantly different outcomes, each relies on similar valuation methodology. Both appraisers primarily base their conclusions on the "income approach,"[4] which essentially involves projecting future income over a finite period and discounting such future income streams to a present value amount. The value that flows from such an approach turns heavily on two primary variables: the discount rate and projected future income. Each appraiser employed similar discount rates, but relied on significantly different income projections. The difference in each appraiser's final valuation is primarily a result of the disparate income forecasts. The Movant's appraiser based his valuation on an annual sales estimate of 22,000 rounds of golf per year and applied regional and national expense information to compute net operating income. The Debtor's appraiser utilized a three year average of actual income and expenses (1996-98) adjusted for non-recurring income and expense items. Although the parties differ as to the value of the Debtor's business, the parties stipulated for purposes of this matter that the Movant is undersecured and that, therefore, the Debtor has no equity in the subject property.

The Movant first moved for relief from the stay or for adequate protection on July 22, 1999. By order dated July 30, 1999, this Court denied the Movant's motion for relief from the stay, but granted its request for adequate protection. More specifically, the Court ordered that the Debtor pay the Movant the sum of $4,500 as a tax escrow payment each month pending further order of the Court. The Court's order specifically noted that its denial of the Movant's motion for relief from the stay was without prejudice to its right to file another motion for relief from the stay. Accordingly, the Movant filed the instant motion, which again seeks relief from the stay, or alternatively further adequate protection payments, pursuant to 11

$200,000 of equipment necessary to maintain and operate the golf course. The Movant's appraiser conceded that if the Debtor did not own such equipment, then the capital cost of leasing such equipment would be added to the expenses, thereby decreasing the net operating income and the appraised value.

[3] This value encompasses $1.0 million for the golf course and the Debtor's stipulation for purposes of the motion for relief that $80,000 is the value of the portion of real estate that may be developed as residential property.

[4] The Movant's appraiser also employed the "sales comparison approach," but primarily as a mechanism to confirm his conclusions using the income approach.

U.S.C. §§ 362(d)(1), (d)(2), and (d)(3).[5] The Debtor, of course, argues that grounds do not exist for relief from the stay or further adequate protection.

III. DISCUSSION

A. Section 362(d)(1)

Section 362(d)(1) allows relief from the stay "for cause, including the lack of adequate protection of an interest in property . . . ." 11 U.S.C. § 362(d)(1). The Movant argues that its interest in the subject property is not adequately protected insofar that it is undersecured and the property has been deteriorating in value. Indeed, an undersecured creditor's interest in property is not adequately protected if the underlying collateral is depreciating during the term of the automatic stay. See United States Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 370 (1988). However, as the Movant conceded at the hearing, the property interest entitled to protection is that which existed as of the petition date. The question, therefore, is whether the subject property has deteriorated in value since July 16, 1999. The only evidence offered by the Movant concerning deterioration of the golf course was testimony offered at the hearing by Richard Nekoroski, a loan officer for the Movant, and photos taken of the course during late October of 1999. Mr. Nekoroski testified that he had played the course on October 28, 1999 and that its condition had deteriorated since he last played the course in the summer of 1997. The Court finds that Mr. Nekoroski's testimony and the photos offered at the hearing suggest that the course may have deteriorated to some extent between 1997 and 1999. However, there was no evidence showing that the course has deteriorated since the petition date.

The burden of proof on the issue of adequate protection is on the party opposing relief from the automatic stay. See 11 U.S.C. § 362(g); In re Chorus Data Sys., Inc., 122 B.R. 845, 852 (Bankr. D.N.H. 1990). However, as this Court has previously explained:

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[5] Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code. The Movant originally sought relief pursuant to §§ 362(d)(1) and (d)(2). The Movant amended its motion on November 3, 1999 to include § 362(d)(3).

> [W]hen the term "burden of proof" is dissected, two distinct concepts emerge. The term "burden of proof" includes both the burden of production and the burden of persuasion. See Universal Electronics, Inc. v. United States, 112 F.3d 488, 492 (Fed. Cir. 1997); Stone v. Stone (In re Stone), 199 B.R. 753, 759 (Bankr. N.D. Ala. 1996) (stating that the burden of proof encompasses both the burden of production and the burden of persuasion). The burden of production is met when a party presents enough evidence to make out a prima facie case. See Black's Law Dictionary 178 (5th ed. 1979). In other words, the burden is satisfied when enough evidence is presented so that a reasonable person could infer the existence of the fact to be proven. See Strong et al., McCormick on Evidence 572 (4th ed. 1992). If the burden is not met, the party bearing it will suffer an adverse ruling on the relevant issue. See id. at 568. The burden of persuasion, on the other hand, is a higher one and requires enough evidence to persuade the trier of fact that the alleged fact is true by the relevant evidentiary margin. See id.; Black's Law Dictionary at 178.

Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999) (analyzing the burden of proof under 11 U.S.C. § 523(a)(15)). Under section 362(d)(1) the movant bears the burden of producing sufficient evidence to make an initial showing of cause for relief from the automatic stay. If the movant does so, the burden shifts to the debtor to persuade the Court that cause does not exist. See In re Sonnax Indus., Inc., 907 F.2d 1280, 1285 (2d Cir. 1990). If the movant fails to make an initial showing of cause, the Court may deny relief without requiring any showing from the debtor that it is entitled to continued protection. See id. Here, the Movant failed to present sufficient evidence to make an initial showing that the value of its collateral had deteriorated since the petition date. Accordingly, relief from the automatic stay for cause under § 362(d)(1) is denied.

B. Section 362(d)(2)

Section 362(d)(2) allows relief from the stay when two elements are satisfied: (1) the debtor lacks equity in the subject property; and (2) the property is "not necessary to an effective reorganization . . . ." 11 U.S.C. § 362(d)(2). Because the parties have stipulated for purposes of this matter that the Debtor lacks equity in the relevant property, the Movant is entitled to relief from the stay if the second prong of § 362(d)(2) is satisfied. The Debtor bears the burden of proving that the property is necessary to an effective reorganization. See 11 U.S.C. § 362(g). See also Timbers, 484 U.S. at 375.

The Supreme Court has adopted the view that to avoid triggering the second prong of § 362(d)(2), a debtor must show that there is "a reasonable possibility of a successful reorganization within a reasonable time," and that the relevant property is necessary to such a reorganization. See Timbers, 484 U.S. at 376.

See also 3 King et al., Collier on Bankruptcy ¶ 362.07[4][b] (15th rev. ed. 1997). Although a debtor need not show that its proposed plan satisfies all of the confirmation requirements as provided by § 1129, it must prove that confirmation is feasible or, in other words, that there is reasonable possibility of confirmation within a reasonable time. See Marder v. Turner (In re Turner), 161 B.R. 1, 4 (Bankr. D. Me. 1993) (the debtor must show that the planned reorganization is feasible); In re Bldg. 62 Ltd. Partnership, 132 B.R. 219, 223 (Bankr. D. Mass. 1991) ("The Debtor . . . is not required to presently demonstrate that the plan will meet all of the confirmation requirements set out in § 1129."); In re Pelham St. Assocs., 131 B.R. 260, 262-63 (Bankr. D.R.I. 1991) ("§ 362(d)(2)(B) requires only that there be a reasonable possibility of confirmation, within a reasonable time"). The Debtor filed a plan of reorganization on November 22, 1999 (the "Plan"). For the purposes of determining if the Debtor has a reasonable possibility of confirming a plan within a reasonable time in the context of a stay relief motion under § 362(d)(2), the Court need not conduct a full dress rehearsal of a confirmation hearing, but the Court must determine that the Debtor has a basis for proposing a confirmable plan within a reasonable period of time. The Movant has argued that the Plan is not confirmable on its face and, therefore, the Debtor does not have a reasonable possibility of confirming a plan within a reasonable time.

1. Reasonable Possibility of Reorganization: Classification of Claims

The Plan separately classifies the Movant's unsecured deficiency claim from other unsecured claims. The Movant contends that separate classification of its deficiency claim from other general unsecured trade creditors is not permissible under § 1122(a). The First Circuit Court of Appeals has stated that "[t]he general rule regarding classification is that 'all creditors of equal rank with claims against the same property should be placed in the same class.'" Granada Wines, Inc. v. New England Teamsters and Trucking Ind. Pension Fund, 748 F.2d 42, 46 (1st Cir. 1984) (quoting In re Los Angeles Land and Invs., Ltd., 282 F.Supp. 448, 453 (1968)). Granada adopts the strict approach under pre-Code Chapter X cases which required that a plan must classify all legally similar claims together regardless of business or economic issues. See In re Barney & Carey Co., 170 B.R. 17, 24 (Bankr. D. Mass. 1994). However, no other Circuit Court of Appeals has followed the First Circuit's strict approach. Courts of Appeals for the Second,

Third, Fourth, Fifth, Eighth and Ninth Circuits have held that a debtor proposing a cramdown plan must show a reason for separately classifying unsecured claims other than the need to secure the vote of an impaired class of claims. See In re Boston Post Road Ltd. Partnership, 21 F.3d 477, 481-83 (2d Cir. 1994), cert. denied, 513 U.S. 1109 (1995); John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs., 987 F.2d 154, 159 (3rd Cir. 1993); In re Bryson Properties XVIII, 961 F.2d 496, 502 (4th Cir.), cert. denied, 506 U.S. 866 (1992); In re Greystone III Joint Venture, 995 F.2d 1274, 1279-80 (5th Cir. 1991), cert. denied, 506 U.S. 821 (1992); In re Lumber Exchange Bldg. Ltd. Partnership, 968 F.2d 647, 649 (8th Cir. 1992); In re Barakat, 99 F.3d 1520, 1526 (9th Cir. 1996), cert. denied, 520 U.S. 1143 (1997). Those cases hold that separate classification of legally similar claims is not prohibited, but may only be undertaken for business or economic reasons independent of the debtor's need to secure the acceptance of a plan by an impaired accepting class of creditors for purposes of confirmation of a cramdown plan of reorganization.

The majority of bankruptcy court decisions in the First Circuit hold that, as a general matter, deficiency claims cannot be classified separately from general unsecured claims. See Barney and Carey Co., 170 B.R. at 24 (Feeney, J.); In re Cranberry Hill Assocs. Ltd. Partnership, 150 B.R. 289, 290 (Bankr. D. Mass. 1993) (Kenner, J.); In re Main Road Properties, Inc., 144 B.R. 217, 220-21 (Bankr. D.R.I. 1992) (Votolato, J.); In re Cantonwood Assocs. Ltd. Partnership, 138 B.R. 648, 653-57 (Bankr. D. Mass. 1992) (Goodman, J.). See also In re Gato Realty Trust Corp., 183 B.R. 15, 20 (Bankr. D. Mass. 1995) (stating that this is the majority position). There are, however, cases that hold that § 1111(b) affords deficiency claims a different legal rank, character and status which justify separate classification under the strict standard in Granada. See id. at 21-22 (Boroff, J.); In re Bjolmes Realty Trust, 134 B.R. 1000, 1002-04 (Bankr. D. Mass. 1991) (Queenan, J.). This Court notes that the vast majority of Circuit Courts have rejected separate classification solely on the basis of rights under § 1111(b) even though they would permit separate classification of legally similar claims based upon business or economic distinctions. See Greystone, 995 F.2d at 1280-81.

The Debtor's schedules list $2,036,532 in unsecured claims, of which at least $1,690,080 are held by current members of the Debtor, leaving $346,452 in claims not held by insiders. The Movant has

alleged that its claim as of the petition date is $2,929,891.54. Depending upon the valuation of the Movant's collateral ($2.78 million or $1.08 million), less accrued real estate taxes (net of adequate protection payments, $81,968.18), its deficiency claim, without reference to the various legal claims which the Debtor maintains that it has against the Movant, would be between $232,000 and $1,932,000. Accordingly, if the Movant's deficiency claim cannot be separately classified or substantially reduced through the Debtor's successful pursuit of its various legal claims, the Debtor will be unable to confirm any plan of reorganization over the objection of the Movant due to the voting requirements of § 1129(a)(10). This fact coupled with the Plan's identical treatment of the Movant's deficiency claim and the general unsecured creditor class suggest that the classification scheme of the Plan is based upon solely voting considerations, thereby rendering the Plan unconfirmable. However, the loan agreement between the Debtor and the Movant is complex and the Debtor has alleged several pre-petition breaches by the Movant which may warrant a legal distinction between the Movant's claim and the general trade creditors or a reduction in the Movant's claim. Based upon the summary nature of the hearing on the motion for relief and the state of the record, the Court is unable to find that separate classification is either necessary or cannot be justified.

2. Reasonable Possibility of Reorganization: Impact of LaSalle

The Plan provides that a pre-petition holder of an equity interest in the Debtor, and/or its affiliates, will acquire a controlling interest in the reorganized debtor for the contribution of cash for new membership interests. A minority equity interest in the reorganized debtor will be held by new investors and unsecured creditors who elect to receive such interests in lieu of an immediate cash distribution. The Movant contends that the Plan does not comply with the dictates of Bank of America Nat'l Trust & Savings Ass'n v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed. 607 (1999), the recent Supreme Court decision exploring the new value exception to the absolute priority rule. Because unsecured creditor claims will not be paid in full under the Plan, the so-called "absolute priority rule" is implicated. See 11 U.S.C. § 1129(b)(2)(B)(ii); LaSalle, 119 S.Ct. at 1416; In re Waterville Valley Town Square Assocs., 208 B.R. 90, 99 (Bankr. D.N.H. 1997). Accordingly, since at least one existing equity holder will retain a significant, if not majority equity interest, in the reorganized debtor, the Plan may not be confirmable unless the Court recognizes the "new value corollary." In LaSalle, the Supreme Court intentionally avoided ruling on the existence of the new value corollary to the absolute priority rule which was first articulated in Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 60 S.Ct. 1, 84 L.Ed. 110 (1939). See LaSalle, 119 S.Ct. at 1417-19. However, prior decisions in this district have held that the new value corollary exists under the Bankruptcy Code and this Court will follow those decisions. See In re Beauchesne, 209 B.R. 266, 270 (Bankr. D.N.H. 1997); Waterville Valley Town Square, 208 B.R. at 98-99.

The application of the new value corollary to any plan of reorganization must now follow the dictates in LaSalle. The implications of the decision in LaSalle are uncertain and the subject of much debate. See ABI Real Estate Committee A Roundtable Discussion: Supreme Court Decision 203 N. LaSalle St. Partnership, 7 ABI L. REV. 389. While the implications of the decision in LaSalle for the confirmation standards to be applied to a plan of reorganization utilizing the new value corollary may be uncertain, two things are clear. First, a plan of reorganization that provides pre-petition equity holders the exclusive right to acquire equity in the reorganized debtor without providing the opportunity for anyone else to either compete for that equity or to propose a competing reorganization plan is not confirmable. See LaSalle, 119 S.Ct. at

1422. Second, assuming the new value corollary exists, the amount of new value to be paid by pre-petition equity holders must be determined by some form of competitive choice. See id. at 1423-24.

The precise means of achieving market competition will be determined on the facts in a given case, but will involve either competing plans of reorganization or a right for third parties to bid for the same interest sought by old equity. See id. at 1424. The Plan was proposed by the Debtor during the period in which the Debtor holds the exclusive right to propose a plan of reorganization and does not provide for any competitive bid procedure or other market determination of the value to be paid by the holders of the pre-petition equity in the Debtor. The Debtor contends that because the Plan offers up to 30% of the equity in the reorganized debtor to electing unsecured creditors the LaSalle decision is not applicable to the Plan. Under the Plan, one hundred percent of the new value to be paid for the equity interests in the reorganized debtor is coming from a new entity organized by a pre-petition equity holder who alone, or with its affiliates, is contributing a majority of the new value. Accordingly, the financial substance of the Plan is not materially different from the plan of reorganization in LaSalle. The Court finds that the Plan in its current form is not confirmable. Although the issues raised by LaSalle appear nettlesome, they are certainly not insurmountable. The Debtor and the plan proponents can undoubtedly amend the Plan to provide for a competitive market determination of the value of the new equity which satisfies the standards enunciated in LaSalle.

3. Reasonable Possibility of Reorganization: Within a Reasonable Time

In addition to showing a reasonable possibility of a successful reorganization, Timbers also requires that the reorganization occur within a reasonable time. What is a reasonable time will depend on the facts of each case and the stage of the case when the motion for relief is considered. See In re Bldg. 62 Ltd. Partnership, 132 B.R. at 221 ("If the debtor is required to establish the prospects for an effective reorganization at an early stage in the proceedings the burden on the debtor is not as great as it would be in the later stages of the proceeding"). In this case the seasonal nature of the Debtor's business and the adverse impact on value that would occur if the Debtor's business was not in a position to timely reopen in calendar year 2000 dictate that the Debtor's plan of reorganization proceed on a schedule which will

accomplish that result. The Debtor and the Movant have been actively arguing and litigating the issues between them in one form or another throughout most of 1999. The proponents of the Plan claim to have secured financial commitments of between $900,000 and $1,100,000 to fund a reorganization. Accordingly, it is both possible and reasonable to conclude that a reasonable time for the Debtor to confirm a plan of reorganization is not later than the middle of April 2000 and that the Debtor can meet that timetable. The Court notes that confirmation of a plan of reorganization by that date will require approval of a disclosure statement not later than the end of February 2000.

4. Reasonable Possibility of Reorganization: Conclusion

Despite the actual and potential confirmation issues in the Plan, the Court finds the Debtor has at this stage of the case satisfied its burden to show that there is a reasonable possibility of a successful reorganization within a reasonable time. It is the Court's view that the Debtor has taken meaningful steps toward an effective reorganization, steps that evidence a reasonable possibility of confirmation of a plan of reorganization. The Court notes, however, that whether confirmation is feasible is a close call in this case. As discussed above, the Plan as currently drafted suffers from substantive infirmities and will need to be amended. Thus, although the Court will not grant the Movant relief from the stay pursuant to § 362(d)(2), it will order the Debtor to comply with certain interim requirements as adequate protection to the Movant to ensure that any reorganization which may be proposed will be confirmed within a reasonable time.

C. Section 362(d)(3)

Section 362(d)(3) provides that a court must grant relief from the stay in a "single asset real estate" case unless, within 90 days following an order for relief, the debtor either (1) files a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable period of time, or (2) makes certain monthly interest payments to creditors whose claims are secured by the relevant property. See 11 U.S.C. § 362(d)(3). The threshold requirement of § 362(d)(3) is that the bankruptcy case is of the single asset real estate variety. Accordingly, the Movant is potentially entitled to relief from the stay pursuant to § 362(d)(3) only if the instant case qualifies as single asset real estate.

Single asset real estate is a defined term under the Bankruptcy Code. Section 101(51B) provides that single asset real estate exists when four elements are present:

1. Real property constituting a single property or project, other than residential real property with fewer than four residential units;

2. Such real property generates substantially all of the gross income of the debtor;

3. No substantial business is being conducted by the debtor other than the operation of the real property and the activities incidental thereto; and

4. The debtor's aggregate non-contingent, liquidated secured debts do not exceed $4 million.

See 11 U.S.C. § 101(51B). See also In re Philmont Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995). The Court finds that the instant case does not qualify as a single asset real estate case. Testimony at trial revealed that a significant percentage of the Debtor's revenues are derived from pro shop operations and other non-real property sources. Accordingly, the Debtor's real property does not generate substantially all of the Debtor's gross income. Moreover, the Court finds that the Debtor's non-real property business activities (i.e., pro shop, golf cart rentals, and other golf-related services) constitute substantial business other than the operation of the real property. The Debtor's operations, therefore, do not fit within the statutory definition of single asset real estate.

The Court's conclusion that the instant case does not qualify as a single asset real estate case is well supported by the case law interpreting § 101(51B). Section 101(51B) is generally viewed to encompass "a building or buildings which were intended to be income producing, or raw land." In re Kkemko, Inc., 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995). When faced with business operations that go beyond the mere operation of real estate, most courts find that § 101(51B) is not satisfied. See, e.g., Kkemko, 181 B.R. at 51 (finding that the operation of a marina does not fall within the purview of § 101(51B) given that the "business of the marina is something more than simply rental of moorings"); Centofante v. CBJ Dev., Inc. (In re CBJ Dev., Inc.), 202 B.R. 467, 473 (B.A.P. 9th Cir. 1996) (concluding that a full service hotel does not qualify as single asset real estate since the operation of a restaurant, bar, and gift shop constituted significant other business). The term "single asset real estate" is normally reserved for those situations in which a debtor merely owns real estate without noteworthy ancillary business operations. See Philmont,

181 B.R. at 224 (holding § 101(51B) to be satisfied where the debtor merely owned a group of semi-detached houses). As the Debtor's business activities evidence, the operation of a golf course involves significant income-producing activities that exist independently of the operation of real estate. Such circumstances cut against a single asset real estate finding. In fact, at least one bankruptcy court has specifically held that the operation of a golf course does not qualify as single asset real estate since the business involved the rental of golf carts, the providing of a pool and concessions, and the ownership of adjacent land for sale. See In re Larry Goodwin Golf, Inc., 219 B.R. 391, 393 (Bankr. M.D.N.C. 1997). The Goodwin case is on point and only confirms this Court's conclusion that the operation of the Debtor's golf course does not meet the statutory definition provided by § 101(51B).

Although the Court concludes that the operation of the Debtor's golf course does not qualify as single asset real estate pursuant to § 101(51B), there is a further wrinkle in the facts of this case that the Movant argues compels the application of § 363(d)(3). The Movant argues that, because the Debtor has leased all of its real and personal property to Shattuck Realty Partners, LLC, the Debtor's income derives solely from the lease of its property and therefore its operations fit within the purview of § 101(51B). The Court finds that this position attaches too much weight to form at the expense of substance. The lease is a relatively recent occurrence, one that the Debtor explained at the hearing was intended merely to provide needed operating capital to the Debtor and not to alter the character of its business operations. The lease does not substantively alter the fact that the Debtor's true primary business is the operation of a golf course. Consequently, the lease does not alter the Court's conclusion that this is not a single asset real estate case as defined by § 101(51B).

Because this Court concludes that the instant matter does not fit within the single asset real estate definition provided by § 101(51B), a necessary precondition to the application of § 362(d)(3) is not present. Accordingly, the Movant cannot look to § 362(d)(3) for relief from the stay.

D. Valuation

At the hearing, counsel for Torrance Family Limited Partnership requested that the Court make a determination as to the value of the Debtor's business. Although the parties presented a great deal of

evidence concerning the Debtor's value, the Court is hesitant to make such a determination given the First Circuit Court of Appeal's view that motions for relief are to be summary in nature and therefore limited in scope. See Grella v. Salem Five Cent Savs. Bank, 42 F.3d 26, 32-35 (1st Cir. 1994). More specifically, the Grella decision provides:

> [W]e find that a hearing on a motion for relief from stay is merely a summary proceeding of limited effect, and . . . a court hearing a motion for relief from stay should seek only to determine whether the party seeking relief has a colorable claim to property of the estate. The statutory and procedural schemes, the legislative history, and the case law all direct that the hearing on a motion to lift the stay is not a proceeding for determining the merits of the underlying substantive claims, defenses, or counterclaims.

Id. at 33. The exact value of the Debtor's business is not necessary to this Court's determination of whether or not the Movant is entitled to relief from the stay as the parties have stipulated that the Debtor lacks equity in the relevant property. Although the parties might wish a valuation ruling for the purposes of plan negotiations or confirmation, in light of Grella's directive that motions for relief be summary in character, the Court declines the invitation to establish a value with respect to the Debtor's business for purposes beyond the motion for relief.

IV. ORDER

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

A. The motion for relief under § 362 (d)(1) is denied without prejudice;

B. The motion for relief under § 362(d)(2) is denied without prejudice;

C. The motion for relief under § 362(d)(3) is denied without prejudice;

D. The Debtor shall continue to make adequate protection payments to the Movant on or before the first day of each month in the amount of $4,500 in accordance with this Court's Order of July 30, 1999 (Docket No. 18);

E. If the Debtor fails to make adequate protection payments required above, the Movant may seek relief from the automatic stay without a hearing by submitting an affidavit to the Court in accordance with LBR 9071-1; and

F. If the Debtor has not obtained approval of a disclosure statement on or before February 25, 2000, the Movant may seek relief from the automatic stay without a hearing by submitting an affidavit to the Court in accordance with LBR 9071-1.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DONE and ORDERED this 20th day of December, 1999, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge