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Liquidating Luxury: The Yellowstone Mountain Club Bankruptcy



April 26, 2010

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¹Picture of Yellowstone Mountain Club's Warren Miller Lodge, <http://www.yellowstoneclub.com>

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Introduction

The last few years of the first decade of the 21st century will probably be remembered most as a time of economic turmoil. Real estate was hit especially hard by the lean times as a decade long bubble burst. Property owners and real estate companies faced bankruptcy and foreclosure, from the lowly salaryman and his family home to huge tracts of land held by developers. It is at the latter end of the spectrum that we find the Yellowstone Mountain Club.²

By late 2008, what had begun as a dream of luxury timeshares and home sites for the super-wealthy was dying on a windswept mountaintop in Montana, not far from its namesake Yellowstone National Park. The club's credit had almost entirely dried up. Partially constructed amenities sat incomplete, gaunt promises of potential luxury left unfulfilled in the crisp Rocky Mountain fall.³ Edra Blixseth, the majority stakeholder in the company by way of a divorce settlement, was desperate to string the company along through the revenue-rich ski season.⁴ So on November 10, 2008 Yellowstone Mountain Club filed for Chapter 11 protection.⁵ This case is one to watch for several reasons. It is a rare glimpse into the lifestyles of the rich and famous. For instance, YMC counts among its clients big names such as Bill Gates and former Vice President Dan Quayle.⁶ The case is also interesting because almost immediately

² Hereinafter sometimes YMC or the debtors.

³ Robert Struckman, *Yellowstone Club Files for Bankruptcy*, NEW WEST, Nov. 11, 2008, available at http://www.newwest.net/topic/article/yellowstone_club_files_for_bankruptcy/C35/L35/.

⁴ In re *Yellowstone Mountain Club*, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #6 (Bankr. D. Mont. Nov. 10, 2008); Robert Struckman, *Yellowstone Club Files for Bankruptcy*, NEW WEST, Nov. 11, 2008, available at http://www.newwest.net/topic/article/yellowstone_club_files_for_bankruptcy/C35/L35/.

⁵ See, e.g., Robert Struckman, *Yellowstone Club Files for Bankruptcy*, NEW WEST, Nov. 11, 2008, available at http://www.newwest.net/topic/article/yellowstone_club_files_for_bankruptcy/C35/L35/.

⁶ Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 146.

upon filing for Chapter 11 protection, claims of improper lending practices began to arise surrounding the company's chief creditor and prepetition lender, Credit Suisse.⁷ Eventually Credit Suisse would be usurped as Yellowstone Mountain Club's lender by CrossHarbor, an investment fund.⁸ When the dust settled, CrossHarbor would be the majority stakeholder in the Yellowstone Mountain resort.⁹

The conclusion to Yellowstone Mountain Club's bankruptcy is still being written though. In the midst of her company's bankruptcy, Edra Blixseth declared a Chapter 11 personal bankruptcy.¹⁰ The filing was later converted into a Chapter 7 case by the court, the same judge that heard YMC's case, when she failed to get insurance for her estate.¹¹ Edra later moved to reestablish her Chapter 11 case, but this move was objected to by Timothy, her ex-husband. Among other complaints, he asserted that Edra had made an "expenditure of \$90,000 at a 'divorce celebration party' in California where guests beat a 'Tim' pinata and received as party favors, a roll of toilet paper containing Tim's photo on each sheet."¹² The Chapter 11 reconversion was denied by the court.¹³

⁷ See First Day Motion section *infra*. Credit Suisse sometimes referred to hereinafter as the prepetition lender.

⁸

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, THE DEBTORS' MOTION TO OBTAIN DIP FINANCING THROUGH CROSSHARBOR IS ALLOWED ON THE TERMS AND CONDITIONS SET FORTH IN THIS ORDER. THE OBJECTIONS OF CREDIT SUISSE AND NORMANDY HILL CAPITAL, LP TO APPROVAL OF THE DEBTORS' DIP CROSSHARBOR ARE OVERRULED., Dkt. #182, at 2 (Bankr. D. Mont. Dec. 17, 2008).

⁹ Jonathan Weber, *CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

¹⁰ Mike Coil, *Edra Blixseth's Case Becomes Complex*, THE BIG SKY WEEKLY, Jun. 17, 2009, available at <http://www.thebigskyweekly.com/node/182>.

¹¹ Mike Coil, *Edra Blixseth's Case Becomes Complex*, THE BIG SKY WEEKLY, Jun. 17, 2009, available at <http://www.thebigskyweekly.com/node/182>.

¹² Mike Coil, *Edra Blixseth's Case Becomes Complex*, THE BIG SKY WEEKLY, Jun. 17, 2009, available at <http://www.thebigskyweekly.com/node/182>.

The Main Characters

The Blixseths



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Timothy and Edra Blixseth were the founders and operators of Yellowstone Mountain Club.¹⁵ Edra was the debtor-in-possession for YMC’s bankruptcy.¹⁶ This husband and wife duo was listed among of the 400 richest Americans named by Forbes in 2007.¹⁷ However, their fall from grace was very public and their relationship did not survive.¹⁸ The Blixseths ascended to wealth in the timber and construction industries.

¹³ Mike Coil, *Edra Blixseth’s Case Becomes Complex*, THE BIG SKY WEEKLY, Jun. 17, 2009, available at <http://www.thebigskyweekly.com/node/182>. “Judge Kirscher was not persuaded that she had done all she could to pay her creditors by selling off some jewelry and discontinuing use of her private jet while she continued to live in her Porcupine Creek estate in California that has a private golf course and a staff of 35.” *Id.*

¹⁴ The Blixseths, *The Today Show* (MSNBC television broadcast Sep. 26, 2005), available at <http://today.msnbc.msn.com/id/9533080/>.

¹⁵ Kerry A. Dolan, *Inside a Billionaire’s Real Estate Troubles*, FORBES.COM, May 29, 2008, available at http://www.forbes.com/2008/05/29/blixseth-yellowstone-housing-forbeslife-cx_kd_0529realestate.html. Though Edra would eventually become the majority stakeholder as part of her and Tim’s divorce settlement. Mike Coil, *Edra Blixseth’s Case Becomes Complex*, THE BIG SKY WEEKLY, Jun. 17, 2009, available at <http://www.thebigskyweekly.com/node/182>.

¹⁶ A debtor serves as the debtor in possession unless they are removed and a trustee is appointed. 11 U.S.C. § 1101 (2006).

¹⁷ Kerry A. Dolan, *Inside a Billionaire’s Real Estate Troubles*, FORBES.COM, May 29, 2008, available at http://www.forbes.com/2008/05/29/blixseth-yellowstone-housing-forbeslife-cx_kd_0529realestate.html.

¹⁸ Mike Coil, *Edra Blixseth’s Case Becomes Complex*, THE BIG SKY WEEKLY, Jun. 17, 2009, available at <http://www.thebigskyweekly.com/node/182>.

Timothy Blixseth came from a poor family in Oregon and considered a music career before abandoning that pursuit and getting a big break selling timberland.¹⁹ He began purchasing timberland in the 1980s in Oregon and Idaho and had gained a reputation for successfully purchasing and reselling federal timber contracts.²⁰ However, the timber industry collapse in the early 1980s forced Blixseth into federal bankruptcy protection in November 1986.²¹ In the early 1990s, Blixseth set his sights on land swaps including unlogged timberland for previously logged land. This was an attempt to save some of the logged land and consolidate privately owned lands.²²

Michael Snow

Michael Snow came to Yellowstone Mountain with Greg Lemond, former Tour de France winner.²³ Lemond was in Big Sky, Montana looking for property when he heard about Blixseth's development.²⁴ After his first visit, Lemond invited his in-laws and Snow to come see the property and Blixseth sent a jet to bring them.²⁵ Soon they would all pay \$750,000 for a one percent ownership interest in Yellowstone Mountain Club and its affiliated Yellowstone

¹⁹ Tatiana Serafin, *Invest Like a Billionaire: Timothy Blixseth*, FORBES.COM, Dec. 8, 2006, http://www.forbes.com/2006/12/08/timothy-blixseth-investing-pf-ii_cz_ts_1208investbillionaire.html.

²⁰ Eric Dexheimer, *That's "Tim" as in "Timber"*, WESTWORLD, Jan. 12, 1994, available at <http://www.westword.com/1994-01-12/news/that-s-tim-as-in-timber/1>.

²¹ Eric Dexheimer, *That's "Tim" as in "Timber"*, WESTWORLD, Jan. 12, 1994, available at <http://www.westword.com/1994-01-12/news/that-s-tim-as-in-timber/1>. The trustee for that bankruptcy complained that the Blixseths failed to declare among other things, "a Canadian baby lynx fur coat valued at \$17,000; a natural-white, full-length mink coat valued at \$8,995; a 14-karat gold ring with a 1.198-carat diamond valued at \$13,700." Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 147.

²² Eric Dexheimer, *That's "Tim" as in "Timber"*, WESTWORLD, Jan. 12, 1994, available at <http://www.westword.com/1994-01-12/news/that-s-tim-as-in-timber/1>.

²³ Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 148.

²⁴ Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 148.

²⁵ Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 148.

Development.²⁶ Eventually Lemond would give up his ownership as part of a legal settlement with Blixseth, but Snow retained his interest.²⁷ After Yellowstone Mountain Club filed their first day motions, Snow filed a detailed objection two days later.²⁸ Snow's objection was the first to bring the Blixseths' potential dirty dealings to the court's attention.²⁹

Sam Byrne

Sam Byrne is the managing partner and co-founder of CrossHarbor Capital Partners, the company that would eventually buy the distressed Yellowstone Mountain Club.³⁰ CrossHarbor is a real estate private equity firm that manages a series of co-mingled funds.³¹ Byrne first came to the mountain as a guest, but he quickly fell in love. In his own words:

My wife's friend bought one of the first houses, and we were invited out for spring break[.] . . . I thought it would be a place for kids to learn, with a couple of runs. I just didn't think the skiing was going to be very good, but it was incredible. The headwalls are awesome. The chutes and Pioneer Bowl are like the tough stuff at Jackson Hole. It is just fantastic on a powder day, and the powder lasts all day. It really is private powder. It's just joyful—that's the word I use. After my second run, I was ready to buy a house.³²

²⁶Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 148.

²⁷Deidre Wollard, *Greg Lemond Reaches Settlement Over Yellowstone Club*, LUXIST, Aug. 17, 2008, <http://www.luxist.com/2008/08/17/greg-lemond-reaches-settlement-over-yellowstone-club/>.

²⁸See First Day Motion *infra*.

²⁹See First Day Motion *infra*.

³⁰Jonathan Weber, *CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

³¹Jonathan Weber, *Sam Byrne on the Future of Yellowstone Club*, NEW WEST, March 9, 2009, available at http://www.newwest.net/topic/article/sam_byrne_and_the_future_of_the_yellowstone_club/C35/L35/.

³²Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

Blixseth would eventually approach Byrne to be an investor in the development in addition to being a homeowner/member.³³ Prior to Yellowstone Mountain Club's bankruptcy, CrossHarbor had made an unsuccessful bid to purchase the development for \$400 million.³⁴

Byrne helped to create CrossHarbor in 1993.³⁵ Before CrossHarbor, he served as a management consultant, advising companies on corporate restructuring and bankruptcy. Byrne has also worked at Fleet Financial Group and the Bank of New England.³⁶ He has a degree in economics from Tufts University and sits on the Board of Trustees for the Peabody Museum.³⁷

CrossHarbor was represented by Benjamin P. Hursh of Crowley Fleck as local counsel and by Paul D. Moore of Duane Morris. Hursh "focuses on commercial litigation, creditor's rights, bankruptcy, and real and personal property foreclosures. [He] also represents insureds under title policies."³⁸ Moore is based out of Boston, Massachusetts where he focuses on business reorganizations.³⁹ In his 30 year practice he has represented dozens of corporations.⁴⁰

³³ Jonathan Weber, *Sam Byrne on the Future of Yellowstone Club*, NEW WEST, March 9, 2009, available at http://www.newwest.net/topic/article/sam_byrne_and_the_future_of_the_yellowstone_club/C35/L35/. CrossHarbor helped to develop the Sunrise Condominium project which is worth over \$150 million. They also own several single family homes and the golf course lots. *Id.*

³⁴ Jonathan Weber, *Sam Byrne on the Future of Yellowstone Club*, NEW WEST, March 9, 2009, available at http://www.newwest.net/topic/article/sam_byrne_and_the_future_of_the_yellowstone_club/C35/L35/.

³⁵ Profile of Samuel T. Byrne, AFFILIATED MANAGERS GROUP, available at <http://www.amg.com/ir/biography.aspx?page=board&name=Samuel%20T.%20Byrne&file=byrne&title=Managing%20Partner,%20CrossHarbor%20Capital%20Partners%20LLC>.

³⁶ Profile of Samuel T. Byrne, AFFILIATED MANAGERS GROUP, available at <http://www.amg.com/ir/biography.aspx?page=board&name=Samuel%20T.%20Byrne&file=byrne&title=Managing%20Partner,%20CrossHarbor%20Capital%20Partners%20LLC>.

³⁷ Profile of Samuel T. Byrne, AFFILIATED MANAGERS GROUP, available at <http://www.amg.com/ir/biography.aspx?page=board&name=Samuel%20T.%20Byrne&file=byrne&title=Managing%20Partner,%20CrossHarbor%20Capital%20Partners%20LLC>.

³⁸ Crowley Fleck, <http://www.crowleyfleck.com/profile.php?id=21>.

³⁹ Duane Morris, <http://www.duanemorris.com/attorneys/pauldmoore.html>.

⁴⁰ Duane Morris, <http://www.duanemorris.com/attorneys/pauldmoore.html>.

Members Ad Hoc Committee

The Ad Hoc Committee of Yellowstone Mountain Club members was formed early on in the legal debacle to protect the interests of the YMC homeowners.⁴¹ They operate a website to keep the members informed during the bankruptcy process.⁴² The committee was also actively involved in the proceedings, filing motions to ensure that the members' interests were considered.⁴³ The Ad Hoc Committee developed nine goals to guide their actions:

1. A cap on membership at the existing agreed upon level of 1,014 or lower as necessary to preserve the member experience and value if acceptable trade-offs can be negotiated.
2. A transfer of the Club (at no cost) to member ownership at some pre-specified future time.
3. A cap on dues, recognizing that operations are not run for a profit and the owner/developer subsidizes dues pro-rata based on unsold properties/memberships
4. The assumption of member contracts and the protection of member deposits.
5. A robust development plan is established for amenities.
6. The Club maintains adequate capital, including a sufficient cushion, to survive a continued unfavorable economic environment.
7. A proven, professional management company is retained to run operations and development.
8. There is going-forward transparency regarding development plans and financials.
9. The members are involved in future governance.⁴⁴

⁴¹ Yellowstone Club Members, <http://ycmembers.org/index.php>.

⁴² Yellowstone Club Members, <http://ycmembers.org/index.php>.

⁴³ See, e.g., In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection Filed by AD HOC COMMITTEE OF YELLOWSTONE CLUB MEMBERS, Dkt. #21 (Bankr. D. Mont. Nov. 12, 2008).

⁴⁴ Yellowstone Club Members, <http://ycmembers.org/index.php>.

The members were represented by Jonathan B. Alter of Bingham McCutchen and by John H. Grant of Jackson, Murdo & Grant (serving as local counsel).⁴⁵ There is not much information available about Grant. Alter is based out of Bingham's Hartford, Connecticut office. "Jonathan has assisted various major surety companies with numerous debtor-in-possession surety facilities, including in connection with the Kmart, Charter Communications, American Home Mortgage and Adelphia proceedings. He has also provided legal representation on surety matters in countless other contested cases such as Federal Mogul, Enron, Global Crossing and W.R. Grace."⁴⁶

Judge Ralph Kirscher

Judge Kirscher was appointed to the U.S. Bankruptcy Court for the District of Montana on November 18, 1999.⁴⁷ Prior to his appointment, Judge Kirscher worked first as an associate then as a principal at Worden, Thane and Haines, P.C.; and at Green, MacDonald & Kirscher. Worden, Thane, and Haines of Missoula, Montana are a general practice firm that covers a broad spectrum of practice areas.⁴⁸ The firm has spawned one other appointment to the federal bench; In 2003 Harry Haines became a judge on the United States Tax Court.⁴⁹ Judge Kirscher earned his B.A. from the University of Montana at Missoula, his M.P.A. from American University, and his J.D. from the University of Montana.⁵⁰

⁴⁵ Yellowstone Club Members, http://ycmembers.org/comm_members.php.

⁴⁶ Bingham McCutchen, <http://www.bingham.com/Lawyer.aspx?LawyerID=54>.

⁴⁷ United States 9th Circuit Court, http://www.ce9.uscourts.gov/ninthcircuit/bankruptcy_judges.html.

⁴⁸ Worden, Thane and Haines, P.C., http://www.wthlaw.net/missoula_law_practice_areas.htm. Worden,

⁴⁹ Thane and Haines, P.C., http://www.wthlaw.net/worden_thane_history.htm.

⁵⁰ United States 9th Circuit Court, http://www.ce9.uscourts.gov/ninthcircuit/bankruptcy_judges.html.

Throughout Yellowstone Mountain Club’s bankruptcy, Judge Kirscher has displayed a certain amount of personality. Some commentators have described it as “old fashioned Montana justice.”⁵¹ For instance, Judge Kirscher raises the issue that some attorneys who are just observing the proceedings are only wearing business casual when they should be wearing coats and ties.⁵² He also hustles attorneys around to try and keep billable hours down.⁵³

Yellowstone Mountain Club



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Yellowstone Mountain Club began in the 1990s when Timothy Blixseth acquired 13,600 acres of heavily timbered land in the hills above Big Sky, Montana, about fifty miles south of

⁵¹ Jonathan Weber, *CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

⁵² In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Transcript regarding Hearing Held 12/05/08 RE: EMERGENCY HEARING ON THE REQUEST AND MOTION FOR EXPEDITED HEARING CONCERNING LOCAL RULES 5074-1 AND 9014-1, DISCOVERY REQUESTS, AND A DEPOSITION SCHEDULING., Dkt. #678, at 13-14 (Bankr. D. Mont. Apr. 2, 2009).

⁵³ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Transcript regarding Hearing Held 12/05/08 RE: EMERGENCY HEARING ON THE REQUEST AND MOTION FOR EXPEDITED HEARING CONCERNING LOCAL RULES 5074-1 AND 9014-1, DISCOVERY REQUESTS, AND A DEPOSITION SCHEDULING., Dkt. #678, at 14 (Bankr. D. Mont. Apr. 2, 2009).

⁵⁴ Picture of Yellowstone Mountain Club’s Warren Miller Lodge, <http://www.yellowstoneclub.com>.

Bozeman.⁵⁵ His original plan was to create a private ski resort for his family. But when friends and business associates showed an interest in the product, Timothy Blixseth, ever the old horse (or in this case mule) trader,⁵⁶ began to offer them the opportunity to build their own homes on the land as well.⁵⁷ The private community would eventually grow to include an “18-hole Tom Weiskopf-designed golf course set against the panorama of the Spanish Peaks range, [a] massive stone-and timber lodge, [] blue-ribbon fly-fishing, and [a] private fire department.”⁵⁸

Yellowstone Mountain Club stands out as the only private community with its own world class skiing.⁵⁹ It has 2,200 acres of skiable terrain and boasts “extensive beginners’ areas, more than five dozen trails, a large section for open-bowl skiing, a true double black-diamond ridge of steep chutes, and 400 acres of incredible glade powder skiing.”⁶⁰ Another of YMC’s unique draws is its population scarcity. On its busiest days only around 1,000 skiers take to the slopes.⁶¹ That amounts to roughly three acres of ski slope per person. The ski slopes are also dotted with

⁵⁵Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>. Construction of the Yellowstone Mountain Club property netted the company the dubious honor of paying the Environmental Protection Agency’s largest fine for the unauthorized discharge of dredged material. All in all, YMC racked up 30 violations of the Clean Water Act. Anthony Effinger, *Trouble on Millionaire Mountain*, BLOOMBERG MARKETS, Dec. 2006, at 144.

⁵⁶ At age 15, Blixseth bought some donkeys for \$25 and resold them as pack mules for \$225. Tatiana Serafin, *Invest Like a Billionaire: Timothy Blixseth*, FORBES.COM, Dec. 8, 2006, http://www.forbes.com/2006/12/08/timothy-blixseth-investing-pf-ii_cz_ts_1208investbillionaire.html.

⁵⁷Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

⁵⁸Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

⁵⁹Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>. Other private communities only had connections to public ski slopes or bunny slopes for children. *Id.*

⁶⁰Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>. They even added off-piste snowcat skiing in 2009. *Id.*

⁶¹ Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

warming huts (affectionately referred to as “sugar shacks” by the members) where skiers can avail themselves of a cup of hot chocolate, a bowl of wild-game chili, or Gruyere and sun-dried-tomato buns.⁶²

Yellowstone Mountain Club grew primarily by word of mouth. Members would bring friends who would in turn become members.⁶³ Sixty-five percent of guests who were eligible to become members eventually did so.⁶⁴ The company made over forty-four million dollars of total income in 2007.⁶⁵ Yellowstone Mountain Club was structured as a limited liability corporation.⁶⁶ Blixseth Group, Inc. owned 86.73% of the company.⁶⁷ The remaining ownership interest was divided as follows:⁶⁸

⁶²

Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

⁶³

Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

⁶⁴

Scott Armstrong, *Pinnacle of Perfection*, ROBB REPORT, Feb. 2010, available at <http://www.robbreport.com/Real-Estate/Pinnacle-of-Perfection>.

⁶⁵

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Notice OF SCHEDULE G, H, BUSINESS INCOME AND EXPENSES, SUMMARY OF SCHEDULES, LIST OF EQUITY SECURITY HOLDERS, STATEMENT OF FINANCIAL AFFAIRS, EXHIBIT "C," DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR, STATEMENT OF CORPORATE OWNERSHIP AND VERIFICATION OF CREDITOR MATRIX, Dkt. #16, at 11 (Bankr. D. Mont. Nov. 11, 2008).

⁶⁶

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 3 (Bankr. D. Mont. Nov. 11, 2008).

⁶⁷

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Notice OF SCHEDULE G, H, BUSINESS INCOME AND EXPENSES, SUMMARY OF SCHEDULES, LIST OF EQUITY SECURITY HOLDERS, STATEMENT OF FINANCIAL AFFAIRS, EXHIBIT "C," DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR, STATEMENT OF CORPORATE OWNERSHIP AND VERIFICATION OF CREDITOR MATRIX, Dkt. #16, at 9 (Bankr. D. Mont. Nov. 11, 2008). Blixseth Group, Inc. is wholly owned by Timothy Blixseth.

⁶⁸

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Notice OF SCHEDULE G, H, BUSINESS INCOME AND EXPENSES, SUMMARY OF SCHEDULES, LIST OF EQUITY SECURITY HOLDERS, STATEMENT OF FINANCIAL AFFAIRS, EXHIBIT "C," DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR, STATEMENT OF CORPORATE OWNERSHIP AND VERIFICATION OF CREDITOR MATRIX, Dkt. #16, at 11 (Bankr. D. Mont. Nov. 11, 2008).

Name	Ownership Interest
A.C. & Linda Markkula, Trustees of Arlin Trust	1.02%
Bankers Financial Corp	1.02%
Blixseth Family Inv.	5.10%
Blixseth Family Investmt.	1.02%
Gregory C. Branch Family	1.02%
Michael L. Snow	1.02%
Mountain Vista Prop. AG	1.02%
Robert P. Watson	1.02%
Spano Yellowst. Holdings	1.02%

Yellowstone Mountain Club was also affiliated with Yellowstone Development (YD) and Big Sky, which were used to help develop the property.⁶⁹ Yellowstone Development was owned by the same owners in the same percents as Yellowstone Mountain Club, but Big Sky was held half by Edra Blixseth and half by Yellowstone Development.⁷⁰ Yellowstone Mountain Club and Yellowstone Development also owned interests in several affiliated companies as follows:⁷¹

⁶⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 3 (Bankr. D. Mont. Nov. 11, 2008).

⁷⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 4 (Bankr. D. Mont. Nov. 11, 2008). We believe that the motion erroneously refers to Big Sky as —Blue Skyl. Blue Sky is only mentioned here, not appearing anywhere else in the case.

⁷¹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 4 (Bankr. D. Mont. Nov. 11, 2008).

Affiliate	Ownership
Yellowstone Hotel Management	100% by YMC
Sunrise Ridge at Yellowstone Club, LLC	11.73% by YMC
Yellowstone Construction Co., LLC	100% by YD
Yellowstone Utilities, LLC	100% by YD
St. Andrew's Int'l Golf Club Ltd	100% by YD
Cosburn Investments B.V.	100% by YD

First Days of the Bankruptcy



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The Filing

On November 10, 2008, Edra Blixseth signed a corporate resolution allowing Yellowstone Mountain Club to file for bankruptcy and retain necessary professional guidance.⁷³

⁷²The Butte, Montana Federal Courthouse, <http://www.usmarshals.gov/district/mt/locations/images/butte.jpg>.

⁷³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Corporate Resolution, Dkt #1-1 (Bankr. D. Mont. Nov. 10, 2008).

The same day, YMC filed a bankruptcy petition in Montana's federal bankruptcy court.⁷⁴ YMC estimated that it had between 200 and 999 creditors, between \$100,000,000 and \$500,000,000 in assets, and the same amount for debts.⁷⁵

The filing is thankfully more specific in Exhibit "A" to the Voluntary Petition.⁷⁶ It lists Yellowstone Mountain's assets at \$599,945,015.94 and debts at \$399,218,621.86.⁷⁷ Among YMC's assets are: various snowmobiles, fire trucks, a Steinway piano, an aluminum buffalo, various draperies and rugs, a bronze Indian with skull, paintings, an upright bear, a model of a steam ship, a bronze bison, various office supplies, and the unsold club memberships.⁷⁸ The secured debts mostly consist of construction liens except for the now infamous prepetition loan from Credit Suisse.⁷⁹ Unsecured priority claims are entirely made up of unpaid wages.⁸⁰ Crucially, the filing lets us know that the Blixseths are Democrats, or at least they gave \$30,000 to the Democrat Governors Conference.⁸¹

⁷⁴In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Chapter 11 Voluntary Petition, Dkt #1 (Bankr. D. Mont. Nov. 10, 2008).

⁷⁵In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Chapter 11 Voluntary Petition, Dkt #1 (Bankr. D. Mont. Nov. 10, 2008).

⁷⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, 20 Largest Unsecured Creditors, Schedule A, Schedule B, Schedule D, Schedule E, Dkt #13 (Bankr. D. Mont. Nov. 10, 2008).

⁷⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, 20 Largest Unsecured Creditors, Schedule A, Schedule B, Schedule D, Schedule E, Dkt #13 at 1 (Bankr. D. Mont. Nov. 10, 2008).

⁷⁸ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, 20 Largest Unsecured Creditors, Schedule A, Schedule B, Schedule D, Schedule E, Dkt #13, at 12-37 (Bankr. D. Mont. Nov. 10, 2008).

⁷⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, 20 Largest Unsecured Creditors, Schedule A, Schedule B, Schedule D, Schedule E, Dkt #13, at 38-39 (Bankr. D. Mont. Nov. 10, 2008).

⁸⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, 20 Largest Unsecured Creditors, Schedule A, Schedule B, Schedule D, Schedule E, Dkt #13, at 42-68 (Bankr. D. Mont. Nov. 10, 2008).

⁸¹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Notice OF SCHEDULE G, H, BUSINESS INCOME AND EXPENSES, SUMMARY OF SCHEDULES, LIST OF EQUITY SECURITY HOLDERS, STATEMENT OF FINANCIAL AFFAIRS, EXHIBIT "C," DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR,

The First Day Motion

On the same day as the petition, YMC filed a motion pursuant to bankruptcy code sections 105, 361, 362, 363, and 364 and bankruptcy rules 2002, 4001, and 9014 seeking orders authorizing the debtors to obtain post-petition financing; authorizing the debtors to use cash collateral; granting adequate protection to pre-petition secured lenders; and scheduling hearings.⁸² This type of motion is typically called a first day motion.⁸³ First day motions are motions filed by the debtor in a new case that require immediate consideration by the court.⁸⁴ First day motions are sometimes styled as emergency motions, but that practice is frowned upon unless it is truly an emergency because that can hurt a counselor's credibility with the judge.⁸⁵ Because the debtor needs the relief sought in first day motions to continue its business operations and avoid harm to the business, the debtor usually files such motions with the petition.⁸⁶ In accord with their urgency, the court considers the motions within a day or two of the filing of the case.⁸⁷

STATEMENT OF CORPORATE OWNERSHIP AND VERIFICATION OF CREDITOR MATRIX, Dkt #16, at 16 (Bankr. D. Mont. Nov. 10, 2008).

⁸² In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE- PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #6 (Bankr. D. Mont. Nov. 10, 2008).

⁸³ JONATHAN P. FRIEDLAND ET AL., CHAPTER 11 - 101 19 (2007).

⁸⁴ JONATHAN P. FRIEDLAND ET AL., CHAPTER 11 - 101 19 (2007).

⁸⁵ JONATHAN P. FRIEDLAND ET AL., CHAPTER 11 - 101 19 (2007).

⁸⁶ Northern District of Texas Bankruptcy Court, First Day Motions (2008), http://www.txnb.uscourts.gov/ecf/manual/First_day_motions.htm (while this information is not available on the Montana Bankruptcy Court website, it is a good description of first day motions which are the same in every jurisdiction).

⁸⁷ Northern District of Texas Bankruptcy Court, First Day Motions (2008), http://www.txnb.uscourts.gov/ecf/manual/First_day_motions.htm.

When taken by itself, there is nothing noteworthy about YMC's first day motion. The whole thing looks fairly standard. The first day motion becomes noteworthy though when the objections start rolling in. In particular there is Michael Snow's objection filed two days later on November 12th.⁸⁸

In his objection, Snow raises several issues. First, the principals of the debtors, the Blixseths, are currently involved in litigation where there have been public accusations that they misappropriated tens of millions of dollars from the prepetition loans.⁸⁹ "The allegations include: [] diverting funds for the purchase of homes; [] using funds to purchase airplanes; [] using funds to finance other failed business interests; and [] placing the funds in personal certificates of deposit."⁹⁰ Second, that given the above allegation a Chapter 11 Trustee may be requested and the proposed order would make it a default to appoint one.⁹¹ Third, that the prepetition lenders, Credit Suisse, were using their status as potential DIP lenders to get benefits that they were not entitled to as adequate protection.⁹² Fourth, the short time that YMC allotted

⁸⁸ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 2 (Bankr. D. Mont. Nov. 12, 2008).

⁸⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 2 (Bankr. D. Mont. Nov. 12, 2008).

⁹⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 2 (Bankr. D. Mont. Nov. 12, 2008).

⁹¹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 2 (Bankr. D. Mont. Nov. 12, 2008).

⁹² In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING

to third parties to determine their rights on the estate.⁹³ Therefore, Snow asked that the first day motion be denied.⁹⁴

The YMC members' ad hoc committee filed an objection of their own.⁹⁵ Their objection roughly mirrors Snow's except that they also object to inadequate assurances that the DIP plan would maintain normal operations of the YMC.⁹⁶ Judge Kirscher granted the first day motion on an interim basis though.⁹⁷ So the ad hoc committee filed another objection, reiterating their concerns with the DIP plan and noting that potential problems with the plan would only be exacerbated with the passage of time.⁹⁸ The dance continued through a few more versions before it was finally settled.

DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 2-3 (Bankr. D. Mont. Nov. 12, 2008). Snow argued that the DIP agreement allowed Credit Suisse to cross collateralize the prepetition liens to include liens on everything and kept the estate from investigating and pursuing claims against them. *Id.*

⁹³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 2-3 (Bankr. D. Mont. Nov. 12, 2008); See also *Id.* at 2-4 (containing the complete list of Snow's eleven objections).

⁹⁴In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED HEARINGS, AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28, at 4 (Bankr. D. Mont. Nov. 12, 2008).

⁹⁵In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Filed by AD HOC COMMITTEE OF YELLOWSTONE CLUB MEMBERS, Dkt #21 (Bankr. D. Mont. Nov. 12, 2008).

⁹⁶In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Filed by AD HOC COMMITTEE OF YELLOWSTONE CLUB MEMBERS, Dkt #21, at 2 (Bankr. D. Mont. Nov. 12, 2008).

⁹⁷In re Yellowstone Mountain Club, Case no. 08-61570-RBK, INTERIM ORDER (I) AUTHORIZING DEBTORS (A) TO OBTAIN POSTPETITION FINANCING AND (B) TO UTILIZE CASH COLLATERAL; (II) GRANTING LIENS, SECURITY INTERESTS AND SUPERPRIORITY CLAIMS; (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES AND (IV) SCHEDULING A FINAL HEARING. ORDER Setting FINAL Hearing ON DEBTOR'S MOTION (I) AUTHORIZING DEBTORS (A) TO OBTAIN POSTPETITION FINANCING AND (B) TO UTILIZE CASH COLLATERAL; (II) GRANTING LIENS, SECURITY INTERESTS AND SUPERPRIORITY CLAIMS; (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES AND (IV) SCHEDULING A FINAL HEARING, Dkt #40 (Bankr. D. Mont. Nov. 13, 2008).

DIP Financing

The Motion

On November 10, 2008, YMC moved to seek postpetition financing.⁹⁹ Initially, YMC requested approval for a Debtor in Possession financing package, the “DIP Facility”, that would provide a superpriority, postpetition term loan of \$4.45 million for three weeks of operations.¹⁰⁰ This loan would feature Credit Suisse, as the “bookrunner and sole lead arranger”, organizing other banks and lenders to arrange for the DIP facility.¹⁰¹

The debtors were insistent that they had pursued an arms length negotiation, and that they had pursued financing that was unsecured beyond the administrative priority available in section 364 (a) – (b) and section 503 (b)(1).¹⁰² The Bankruptcy Code, 11 U.S.C. section 364(a), states that “the trustee, [in this case the debtor], may obtain unsecured credit and incur unsecured debt in the ordinary course of business . . . as an administrative expense.”¹⁰³ Additionally, the trustee may obtain unsecured credit outside the ordinary course of business with approval from the court

⁹⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Reply/Response to MOTION AUTHORIZING POST PETITION FINANCING, Dkt #67, at 2 (Bankr. D. Mont. 11/12/08).

⁹⁹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 1 (Bank D. Mont Nov. 11, 2008).

¹⁰⁰In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) *AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING* (ii) *AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL*, (iii) *GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND* (iv) *SCHEDULING INTERIM AND FINAL HEARINGS*, Dkt. #6, at 10 (Bankr. D. Mont. Nov. 11, 2008).

¹⁰¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) *AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING* (ii) *AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL*, (iii) *GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND* (iv) *SCHEDULING INTERIM AND FINAL HEARINGS*, Dkt. #6, at 10 (Bankr. D. Mont. Nov. 11, 2008).

¹⁰²In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) *AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING* (ii) *AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL*, (iii) *GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND* (iv) *SCHEDULING INTERIM AND FINAL HEARINGS*, Dkt. #6, at 14 (Bankr. D. Mont. Nov. 11, 2008).

¹⁰³11 U.S.C. § 364(a) (2006).

“after notice and a hearing[.]”¹⁰⁴ These loans obtain administrative expense priority under section 503(b)(1), which allows priority for expenses incurred for “preserving the estate.”¹⁰⁵ However, the financial markets and bank liquidity concerns prevented them from obtaining such financing.¹⁰⁶ The DIP elected to seek an order allowing them to obtain financing by using liens on unencumbered property of the estate and giving subordinate liens on other property allowed under section 364 (c)–(d).¹⁰⁷ Under sections 364(c)-(d) of the Bankruptcy Code, the trustee may pursue authority from the court to provide super administrative expense priority to lenders secured by liens on unencumbered property and junior liens on property of the estate “subject to a lien”; however, the trustee must prove that they are “unable to obtain credit otherwise”, and that adequate protection of the interests of the senior or equal lien holder are provided.¹⁰⁸ The debtor relied heavily on the liquidity challenges in the credit markets and the importance of the winter ski season to their reorganization in the quest to secure court approval.¹⁰⁹ This explanation was also used to underscore the need for approval from the court to use cash

¹⁰⁴ 11 U.S.C. § 364(b) (2006).

¹⁰⁵ 11 U.S.C. § 503(b)(1) (2006).

¹⁰⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) *AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING* (ii) *AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL*, (iii) *GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND* (iv) *SCHEDULING INTERIM AND FINAL HEARINGS*, Dkt. #6, at 14 (Bankr. D. Mont. Nov. 11, 2008).

¹⁰⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) *AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING* (ii) *AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL*, (iii) *GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND* (iv) *SCHEDULING INTERIM AND FINAL HEARINGS*, Dkt. #6, at 16-18 (Bankr. D. Mont. Nov. 11, 2008).

¹⁰⁸ 11 U.S.C. § 362(c)-(d) (2006).

¹⁰⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) *AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING* (ii) *AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL*, (iii) *GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND* (iv) *SCHEDULING INTERIM AND FINAL HEARINGS*, Dkt. #6, at 13-14 (Bankr. D. Mont. Nov. 11, 2008).

collateral from the estate.¹¹⁰ YMC proposed that these funds would provide the necessary working capital to keep the business operating for the benefit of employees, creditors, and homeowners and others, while the company sought additional DIP financing.¹¹¹

The Objections

Unsurprisingly, these aforementioned arguments were met with objections from the Ad Hoc Committee of Yellowstone Club Members; Michael Snow, a minority owner of YMC; and the Montana Department of Revenue.¹¹² The Ad Hoc Committee of Yellowstone Club Members were concerned with the amount of fees and the terms and rights that would be given away under the priming financing agreement proposed by YMC.¹¹³ The Ad Hoc Committee of Yellowstone Members were specifically concerned with the fees that were being charged and the interest rate that would be obtained on a loan that would only fund operations for three weeks.¹¹⁴ They

¹¹⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 13 (Bankr. D. Mont. Nov. 11, 2008).

¹¹¹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 13 (Bankr. D. Mont. Nov. 11, 2008).

¹¹²

See In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt #21 (Bankr. D. Mont. Nov. 12, 2008); In re Yellowstone Mountain Club, Case no. 08-61570-RBK Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #28 (Bankr. D. Mont. Nov. 12, 2008); In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection to Motion (i) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (ii) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (iii) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS AND (iv) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt #29 (Bankr. D. Mont. Nov. 12, 2008) (objecting without detail).

¹¹³

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

¹¹⁴

In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

claimed that the fees and interest would amount to an interest rate of 425%.¹¹⁵ Furthermore, the Ad Hoc Committee was concerned that unnecessary professionals were being hired and being charged as an administrative expense.¹¹⁶ Specifically, the DIP Lender intended to hire a “chief restructuring officer” that would be paid \$150,000.00 and would function in addition to the YMC’s “top-tier resort management company.”¹¹⁷

The Ad Hoc Committee also suggested that alternative priming financing was available that would have financed operations for thirteen weeks as opposed to three.¹¹⁸ Someone suggested that CIP Yellowstone Lending LLC, a company functioning on behalf of CrossHarbor Capital Partners was willing and able to provide financing that would finance YMC operations through the majority of the ski season. It was argued the breathing space of thirteen weeks would allow for creation of a plan as opposed to occupying time of the debtor to negotiate additional financing in the initial month of bankruptcy.¹¹⁹

Finally, the Ad Hoc Committee was concerned with waiver of section 506(c) rights.¹²⁰ The Ad Hoc Committee implied that the membership fees they would pay to the club would enhance YMC’s value; however, used fees would not be an administrative priority for the estate

¹¹⁵ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

¹¹⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

¹¹⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

¹¹⁸ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 7 (Bankr. D. Mont. Nov. 12, 2008).

¹¹⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 7 (Bankr. D. Mont. Nov. 12, 2008).

¹²⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

based upon waiver of the section 506(c) rights in Credit Suisse's proposed DIP Financing. In essence, these fees could not be surcharged, as an expense, to the estate and payments for preservation of the estate made with these fees would vanish due to the waiver of rights. In essence Credit Suisse would have administrative priority, but the fees paid by the members would not be chargeable as an administrative expense.

Significant objections were also made by Snow; however, his main concern was the fact that Debtors' principals, Timothy and Edra Blixseth, had misappropriated millions in prepetition loans from the same group, Credit Suisse, that would be organizing and providing the initial priming DIP financing.¹²¹ Snow suggested that a Chapter 11 Trustee be pursued to replace Ms. Blixseth as Debtor in possession, but that approval of this priming instrument by the court would make her replacement a default by the estate protecting her management position.¹²² This priming loan created liens on all bankruptcy estate property and created administrative expense protection for a prepetition creditor.¹²³ Finally, Snow was concerned that the information supporting the motion failed to show revenues from the YMC. By focusing on the uses of cash collateral and leaving out revenue information, the proof for "need[]" of the DIP Loan was not adequately proven.¹²⁴

¹²¹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #28, at 2-3 (Bankr. D. Mont. Nov. 12, 2008).

¹²² In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #28, at 2 (Bankr. D. Mont. Nov. 12, 2008).

¹²³ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #28, at 3-4 (Bankr. D. Mont. Nov. 12, 2008).

¹²⁴ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #28, at 3-4 (Bankr. D. Mont. Nov. 12, 2008).

The Initial Acceptance and Then a Change of Heart?

Although the aforementioned objections were raised, Judge Kirscher “reluctantly” granted an interim order to approve the use of cash collateral and the initial priming loan from Credit Suisse.¹²⁵ Unfortunately for Credit Suisse, the interim order would not be the final word on the matter.¹²⁶ The Court informed Credit Suisse and the Debtor that it would consider its interim order and longer term financing in a hearing scheduled for November 25, 2008.¹²⁷ At this hearing, it became clear that Credit Suisse would not be able to coordinate enough lenders through the DIP Facility to provide the necessary continued financing of YMC.¹²⁸ The lack of additional financing through the DIP Lender meant that the YMC would be unable to remain open and would hurt not only the local economy of Big Sky Montana, but also injure the members of YMC who owned property and used it during the busiest season, the ski season.¹²⁹

After a recess of the hearing on November 25, 2008, CrossHarbor stepped forward with a financing offer that would fund operations through the ski season, and pay off the nearly \$4.5 million used as a priming loan from Credit Suisse.¹³⁰ Specifically, CrossHarbor would provide \$19.75 million in financing, including funds to pay Credit Suisse its initial loan plus interest and

¹²⁵In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 5 (Bankr. D. Mont. Nov. 26, 2008) (explaining that the approval of Credit Suisse’s financing in the interim order was because their was not a viable alternative and concerns over closing the doors of the business).

¹²⁶In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 5 (Bankr. D. Mont. Nov. 26, 2008).

¹²⁷In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 5 (Bankr. D. Mont. Nov. 26, 2008).

¹²⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 6 (Bankr. D. Mont. Nov. 26, 2008).

¹²⁹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 1 (Bankr. D. Mont. Nov. 26, 2008).

¹³⁰In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 6 (Bankr. D. Mont. Nov. 26, 2008).

approved professional fees.¹³¹ The loan would be accompanied with the requirement that CrossHarbor, through CIP Yellowstone Lending, LLC, receive a “priming l[ie]n on all collateral that exists under the interim DIP financing loan between the Debtors and Credit Suisse” and other benchmarks for the Debtor including the accelerated collection of membership dues from 80% of the members in two periods in December 2008 and February 2009.¹³² Ronald Greenspan (“Greenspan”), a restructuring real estate consultant hired by YMC¹³³, indicated that the members of Yellowstone Mountain Club were supportive of the arrangement collecting their dues in an accelerated fashion if CrossHarbor was approved.¹³⁴ Interestingly, they were supportive of CrossHarbor being the DIP financier prior to the approval of the interim order.¹³⁵

After learning that CrossHarbor was positioned to be the DIP Financier, Credit Suisse attempted to undercut the deal with an offer to provide 8.25 million in financing, but required the DIP to secure an additional \$5 million to \$7 million from another outside source by January 31, 2009.¹³⁶ Additionally, Credit Suisse would release the lien on 11 lots on the championship golf

¹³¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 6 (Bankr. D. Mont. Nov. 26, 2008).

¹³²In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 6 (Bankr. D. Mont. Nov. 26, 2008).

¹³³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order Granting DIP’s Application to Employ Ronald Greenspan and FTI Consulting as Chief Resturcture Officer and as a Financial Advisor, Dkt. #104, at 2 (Bankr. D. Mont. Dec. 3, 2008).

¹³⁴In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 7 (Bankr. D. Mont. Nov. 26, 2008).

¹³⁵In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Objection, Dkt. #21, at 6 (Bankr. D. Mont. Nov. 12, 2008).

¹³⁶In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 7 (Bankr. D. Mont. Nov. 26, 2008).

course, but they “tie[d] the [DIP’s] hands” by requiring any sale amount of said lots to be for reasonable value as opposed to fire sale value.¹³⁷

Recognizing the “unworkable” nature of this deal and the likelihood of “imminent failure” if Credit Suisse’s proposal were accepted, the court rejected it and called it “an effort to frustrate the [DIP’s] efforts to secure DIP financing from CrossHarbor.”¹³⁸ The Court further found that YMC needed “sufficient capital to operate . . . through the 2008-2009 ski season” and that CrossHarbor’s financing did not “impose a stranglehold on the Debtors.”¹³⁹

In response, Judge Kirscher noted that Credit Suisse raised concerns about the prior relationship between Edra Blixseth and CrossHarbor. Specifically, Credit Suisse pointed to a loan made for \$35 million to Ms. Blixseth to pay off a divorce settlement.¹⁴⁰ Credit Suisse also examined Greenspan to determine if they were adequately protected or if the DIP financing from CrossHarbor provided adequate protection to them.¹⁴¹ Greenspan was uncomfortable saying for sure, but he did indicate that they were likely undersecured.¹⁴²

Recognizing the statutory requirement that the secured creditors be adequately protected when their security is used in reorganization under § 364(d), the Court gave great weight to two factors. First, Judge Kirscher noted that Blixseth had testified on November 12, 2008 that the

¹³⁷In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 7-8 (Bankr. D. Mont. Nov. 26, 2008).

¹³⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 7-9 (Bankr. D. Mont. Nov. 26, 2008).

¹³⁹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 9 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴⁰In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 15 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 13-14 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴²In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

assets had a value of \$780 million. While it is the debtor’s responsibility to prove adequate protection as the moving party, the fact that Credit Suisse failed to challenge the value posed by Edra Blixseth and that reducing that amount by half would still leave Credit Suisse adequately protected led the Court to determine adequate protection existed.¹⁴³ Judge Kirscher also noted that Greenspan only said that Credit Suisse is “‘probably’ undersecured.”¹⁴⁴ Additionally, the Court was persuaded by Greenspan that “the benefit to all parties stemming from CrossHarbor’s DIP financing proposal . . . provide[d] adequate protection at this time, [and] . . . will provide prepetition secured creditors, such as Credit Suisse, with at least the same level of protection they would have absent CrossHarbor’s superpriority financing that primes Credit Suisse’s position.”¹⁴⁵ Second, Judge Kirscher found no evidence in the record supporting Credit Suisse’s claim that an improper relationship existed between YMC and CrossHarbor. The Court found that “[t]he only evidence that exists involves Mr. Byrne’s statement that he wants to see the Debtors succeed at reorganization and not go dark or be ‘moth balled’[.]”¹⁴⁶

Judge Kirscher was determined not to lose value for the creditors.¹⁴⁷ He was convinced “goodwill” would accompany a potential section 363 sale in the spring as opposed to dealing with “powerful upset people”, homeowners and members, who did not get to use the club during

¹⁴³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴⁴ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴⁵ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 15 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

ski season because of a business shut down.¹⁴⁸ Additionally, a potential section 363 sale would bring more value if YMC were still operating.¹⁴⁹

While this result makes sense under the circumstances of this individual case, it is curious that little in the record indicated, beyond Judge Kirscher's memorandum decision, any reluctance to accept YMC's original request that created the initial priming loan to Credit Suisse. The transcript does bring some of Judge Kirscher's questions to light, specifically the treatment of lienholders and the junior lien status that Credit Suisse would acquire on the loans.¹⁵⁰ Intelligently, CrossHarbor's proposal paid the \$4.45 million loan from Credit Suisse, and the proposal also paid fees and interest on the short-term priming loan. However, the fact that Credit Suisse was unable to put together a long-term financing package for the debtor in possession appears to be a turning point in this case.¹⁵¹ Judge Kirscher's description of Credit Suisse's last minute proposal that was rejected by the Court would display a pattern of displeasure that would result in an adversarial proceeding and a highly unusual equitable subordination of a secured lender.¹⁵²

¹⁴⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. 84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

¹⁴⁹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. 84, at 14 (Bankr. D. Mont. Nov. 26, 2008).

¹⁵⁰In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Transcript regarding Hearing Held 11/12/08, Dkt. 547, at 94 (Bankr. D. Mont. Mar. 10, 2009).

¹⁵¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 9 (Bankr. D. Mont. Nov. 26, 2008)(noting Credit Suisse's "last minute proposal" was an "effort to frustrate the Debtors' efforts to secure DIP financing").

¹⁵²In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #84, at 9 (Bankr. D. Mont. Nov. 26, 2008); In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

December 17, 2008, the Court entered its order approving the terms of the CrossHarbor DIP financing agreement.¹⁵³ The Court appreciated the fact that CrossHarbor’s DIP financing would be paid for by sale of the European castle, Chateau de Farcheville.¹⁵⁴ This asset could also provide additional capital for YMC as it continued through bankruptcy.¹⁵⁵ However, the sale of Farcheville would be a slow process and one that would still not be completed at the bankruptcy plan confirmation.¹⁵⁶ Credit Suisse would elicit testimony that the club’s value was \$310 million but Christopher Donaldson, a Court qualified expert, had valued the club on behalf of Timothy Blixseth in June of 2008 and entered a “Total Net Proceeds” evaluation valuing YMC at \$1,114,000,000.¹⁵⁷ Furthermore, Donaldson identified \$275 million in promissory notes that could be pursued by Credit Suisse on behalf of YMC. The Court noted, by securing “a mere \$20 million on the [p]romissory [n]otes [YMC or Credit Suisse] would more than offset CrossHarbor’s DIP financing[.]”¹⁵⁸

¹⁵³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #181, at 1 (Bankr. D. Mont. Dec. 17, 2008).

¹⁵⁴In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #181, at 21 (Bankr. D. Mont. Dec. 17, 2008).

¹⁵⁵ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #181, at 15 (Bankr. D. Mont. Dec. 17, 2008).

¹⁵⁶ *See generally* In re Yellowstone Mountain Club, Case no. 08-61570-RBK, ORDER GRANTING PREPETITION LENDERS’ EMERGENCY MOTION FOR ORDER COMPELLING DEBTORS TO AUTHORIZE FARCHEVILLE SALE AND DEBTORS ARE AUTHORIZED, DIRECTED AND COMPELLED TO AUTHORIZE DANIKA (OR OTHER DULY AUTHORIZED PERSON OR ENTITY) TO ACCEPT IMMEDIATELY THE OFFER TO PURCHASE FOR PURCHASE PRICE CONSIDERATION OF APPROXIMATELY \$20 MILLION EUROS, Dkt. #763 (Bankr. D. Mont. Apr. 15, 2009); In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Notice OF STATUS REPORT TO COURT REGARDING SALE OF CHATEAU FARCHEVILLE, Dkt. #790 (Bankr. D. Mont. Apr. 24, 2009); In re Yellowstone Mountain Club, Case no. 08-61570-RBK, IT IS FURTHER ORDERED THAT NOTWITHSTANDING ANY PRIOR ORDER OF THIS COURT, THE DEBTORS ARE AUTHORIZED AND DIRECTED TO TAKE ANY ACTION NECESSARY TO CONSUMMATE A SALE OF THE CHATEAU DE FARCHEVILLE, Dkt. #922 (Bankr. D. Mont. May 19, 2009).

¹⁵⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #181, at 8-9 (Bankr. D. Mont. Dec. 17, 2008).

Noting the debtor's willingness to pay for the financing from the Farcheville sale, and learning of \$275 million in promissory notes that could be pursued by Credit Suisse on behalf of YMC lead the court to find that Credit Suisse was adequately protected.¹⁵⁹ With this finding in place, the Court provided a final order concerning the DIP Financing.¹⁶⁰ While Credit Suisse would appeal, the financing would not be stayed, and the Court would allow for increases in the DIP financing as the case proceeded.¹⁶¹

Equitable Subordination for an Overreaching Lender

“Equitable subordination provides bankruptcy courts with the authority to place the first lien position of a self-enriching secured creditor in an inferior position to that of other secured or unsecured creditors.”¹⁶²

The Bankruptcy Court in the YMC Chapter 11 case found that Credit Suisse had engaged in “overreaching and predatory lending practices” that “shocked the conscience” of the court and subsequently led the Court to subordinate their loan.¹⁶³ This particular aspect of the YMC case

¹⁵⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #181, at 21 (Bankr. D. Mont. Dec. 17, 2008).

¹⁵⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #181, at 22 (Bankr. D. Mont. Dec. 17, 2008).

¹⁶⁰ See generally In re Yellowstone Mountain Club, Case no. 08-61570-RBK, THE DEBTORS' MOTION TO OBTAIN DIP FINANCING THROUGH CROSSHARBOR IS ALLOWED ON THE TERMS AND CONDITIONS SET FORTH IN THIS ORDER. THE OBJECTIONS OF CREDIT SUISSE AND NORMANDY HILL CAPITAL, LP TO APPROVAL OF THE DEBTORS' DIP FINANCING WITH CROSSHARBOR ARE OVERRULED, Dkt. #182 (Bankr. D. Mont. Dec. 17, 2008).

¹⁶¹ See In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Notice of Appeal, Dkt. #206 (Bankr. D. Mont. Dec. 29, 2008); In re Yellowstone Mountain Club, Case no. 08-61570-RBK, ORDER GRANTING DEBTORS' Motion PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 361, 362, 363, AND 364 AND BANKRUPTCY RULES 2002, 4001, AND 9014 FOR AN ORDER (I) AUTHORIZING DEBTORS TO OBTAIN INCREASED POST-PETITION FINANCING, (II) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, AND (III) GRANTING ADEQUATE PROTECTION, Dkt. #293 (Bankr. D. Mont. Jan. 22, 2009).

¹⁶² Marina Montes, In re Yellowstone Mountain Club: Equitable Subordination to Police Inequitable Conduct by Non-Insider Creditors, NORTH CAROLINA BANKING INSTITUTE, Feb 10, 2010.

¹⁶³ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

serves as perhaps one of the most important and dramatic aspects of this bankruptcy proceeding.

What originated as a typical struggle between stakeholders over an insolvent real estate development, eventually, turned more hostile. The Official Committee of Unsecured Creditors were granted leave to file an adversary proceeding¹⁶⁴ against Credit Suisse, on behalf of and for the benefit of the Debtors, captioned *Official Committee of Unsecured Creditors v. Credit Suisse, Cayman Islands Branch, and John Does 1-15*.¹⁶⁵ In response to this complaint, the Lender sought a post petition expedited declaratory judgment confirming the validity of a prepetition secured claim in the principal amount of \$309,021,984.26 million arising out of a \$375 million prepetition secured loan made to the Debtors.¹⁶⁶ The Debtors and creditors committee counterclaimed to disallow or subordinate the Lender's secured claim, asserting, among other things, that the loan and the security granted in support of it constituted a fraudulent obligation or transfer, respectively, and that the Lender had aided and abetted the Debtors' majority shareholder (Timothy Blixseth) in breaching his fiduciary duties to the Debtors.¹⁶⁷

During this adversary proceeding, the Bankruptcy Court focused principally on various actions and inactions of the Lender. Pursuant to the final reorganization plan, a liquidating trust was established with the primary purpose of managing the bankruptcy estate with a secondary purpose to recover any monies from possible fraudulent debtor actions of Timothy and Edra

¹⁶⁴ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Summons In An Adversary Proceeding, Dkt. #3-1, at 1 (Bankr. D. Mont. Feb. 25, 2009).

¹⁶⁵ In re Yellowstone Mountain Club, Case no. 08-61570-11-RBK, UCC Complaint Against Credit Suisse, Exhibit A (Bankr. D. Mont. Feb. 25, 2009).

¹⁶⁶ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Motion for Declaratory Relief, Dkt. #1, at 2 (Bankr. D. Mont. Feb 25, 2009).

¹⁶⁷ Matt Gouras, *Blame game continues in Yellowstone hearings*, ASSOCIATED PRESS ONLINE, Feb. 25, 2010, <http://abcnews.go.com/Business/wireStory?id=9941477>.

Blixseth—the YMC majority shareholders.¹⁶⁸ As Timothy and Edra Blixseth are now divorced, there are separate and ongoing legal actions to address their conduct concerning the Credit Suisse loan. Edra Blixseth’s estate is currently in Chapter 7 Bankruptcy and Timothy Blixseth is currently in litigation to defend against fraud and breach of fiduciary duty claims related to the Credit Suisse loan.¹⁶⁹ But we digress, back to the subordination of the Credit Suisse loan, the Bankruptcy Court found that the Lender’s actions were so objectionable that they should result in the equitable subordination of the loan.¹⁷⁰

Facts

In the early 2000s, YMC achieved prominence and cache in the real estate community as the world’s only private ski and golf community.¹⁷¹

More than a few of the 140 members who have bought so far will tell you they think they got a good deal. A nice home on 2 acres in Vail or Aspen--assuming you could even find a lot that big proximate to the slopes—would cost just as much, and you'd still have to share the slopes with 10,000 schmoes.¹⁷²

Thus, around December 2004, Jeffrey Barcy, a Director in the Lender’s Investment Bank Division, made numerous attempts to contact Timothy Blixseth, YWC’s founder, majority

¹⁶⁸ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order Confirming Debtor’s Proposed Plan of Reorganization, Dkt. #1026, at 2 (Bankr. D. Mont. Feb. 25, 2009).

¹⁶⁹ Amy Linn, *Blixseth’s Fate in a Judge’s Hands*, NEW WEST, Feb. 26, 2010, available at http://www.newwest.net/city/article/blixseths_fate_in_a_judges_hands/C8/L8/.

¹⁷⁰ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 20 (Bankr. D. Mont. May 13, 2009).

¹⁷¹ Eric L. Berg, *In re Yellowstone Mountain Club, LLC—the pitfalls of “equitable subordination” for the unwary lender*, WHITE AND CASE, June 4, 2009, <http://www.whitecase.com/alert-in-re-yellowstone-mountain-club-llc-the-pitfalls-of-equitable-subordination-for-the-unwary-lender-06-04-2009/>.

¹⁷² Kerry A. Dolan, *Private Powder*, FORBES, Mar. 1, 2004, available at <http://www.forbes.com/forbes/2004/0301/112.html>.

shareholder, President, and CEO to sell a new loan product.¹⁷³ The Lender’s marketing collateral referred to their new loan as a “syndicated term loan.”¹⁷⁴ Recognizing that syndicated loans were already in existence, this was a new loan product that would be marketed to high-end real estate developers. Blixseth eventually responded to Barcy’s e-mails by telephone and during the conversation, Barcy further described the new loan product as “something akin to a ‘home equity loan’.”¹⁷⁵

Barcey testified that this loan product was also being marketed to a number of other high-end luxury resort master-planned residential and recreational communities such as Tamarack Resort, Promontory, Ginn, Turtle Bay, and Lake Las Vegas.¹⁷⁶ Each of the aforementioned properties received a syndicated term loan from the Lender’s Cayman Islands Branch—a branch that Credit Suisse created in 2005 to facilitate these types of loan transactions.¹⁷⁷ The defining characteristic of a “syndicated term loan” is that the equity holders are permitted to take sizable personal distributions. After initially declining Credit Suisse’s loan offer, Blixseth agreed to obtain a \$150 million loan from the Lender. After several additional months of negotiations between Blixseth and the Lender, the proposed amount of the loan grew to \$375 million, and the

¹⁷³In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 5 (Bankr. D. Mont. May 13, 2009).

¹⁷⁴In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 5 (Bankr. D. Mont. May 13, 2009).

¹⁷⁵In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 5 (Bankr. D. Mont. May 13, 2009).

¹⁷⁶In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 5 (Bankr. D. Mont. May 13, 2009).

¹⁷⁷L.J. Gibson v. Credit Suisse, Case no. 1:10-cv-00001-EJL, Complaint, Dkt. #1, at 2 (D. Idaho Jan. 3, 2010), (alleging Credit Suisse defrauded members of \$24Billion from Tamarack Resort, Yellowstone Club, Lake Las Vegas, and Ginn Sur Mer Resorts with a pattern of racketeering and money laundering with their loan products).

parties entered into a credit agreement in September 2005.¹⁷⁸

Prior to entering into the credit agreement, the Lender conducted due diligence on Blixseth and the rest of the Debtors.¹⁷⁹ These checks included conducting a background check on Blixseth, hiring an appraisal firm to provide an independent assessment of the Debtors' cash flows, and hiring a law firm to undertake a legal investigation of the Debtors' assets with respect to title and similar property rights.¹⁸⁰ In addition, the Lender hired a financial advisor to analyze the Debtors' cash flows and perform a newly devised form of valuation methodology, "Total Net Value", of the Debtors' business.¹⁸¹ According to the Bankruptcy Court, the Total Net Value methodology was developed by Credit Suisse to sell their syndicated term loan product and did not comply with the financial safeguards emplaced by the Financial Institutions Recovery Reform act of 1989.¹⁸² Further, the Court noted that the Lender "curiously...never requested *audited* financial statements from the Debtors" and appeared "to have relied exclusively on the historical and future projections provided by Blixseth and the Debtors".¹⁸³ Nevertheless, the "as-is market value" of the Debtor's assets was accepted to be \$420 million—meaning that the loan

¹⁷⁸In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 5 (Bankr. D. Mont. May 13, 2009).

¹⁷⁹In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 7 (Bankr. D. Mont. May 13, 2009).

¹⁸⁰In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 7 (Bankr. D. Mont. May 13, 2009).

¹⁸¹In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 7 (Bankr. D. Mont. May 13, 2009) (describing that this new valuation methodology relied almost exclusively on the Debtors' future financial projections, even though such projections bore no relation to the Debtors' historical or present reality).

¹⁸²In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 7 (Bankr. D. Mont. May 13, 2009) (The Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA) was enacted in the wake of the savings and loan crisis of the 1980s. Among other things, it established new regulations for real estate appraisals and it also established new capital reserve requirements).

¹⁸³In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 7 (Bankr. D. Mont. May 13, 2009).

had about 90% loan to value.¹⁸⁴

Further exacerbating the paucity of the Lender's due diligence, several years preceding this loan, the Debtors had experienced negative cash flow and had carried a debt load ranging from a low of approximately \$4 to \$5 million to a high of approximately \$60 million on a revolving line of credit.¹⁸⁵ The Debtor's senior accountant testified that the Yellowstone Club was persistently behind in its accounts payable.¹⁸⁶ In fact, the day before the loan transaction, the Yellowstone Club carried approximately \$19-\$20 million in debt on its books.¹⁸⁷ Finally, the Debtors missed their profitability projections by a "substantial amount."¹⁸⁸ Despite all the red flags, Blixseth signed the credit agreement on behalf of YMC, pledged all the YMC assets to Credit Suisse without consulting the minority shareholders or seeking their consent.¹⁸⁹ In consideration of this promise, \$342,1110,262.53 was wired to YMC (this amount reflects the \$375 million loan less administrative expenses and a payoff for preexisting debt).¹⁹⁰

Of the \$375 million lent by the Lender to the Debtors on a senior secured basis, the credit agreement designated up to \$209 million of the loan proceeds to be used as "distributions or

¹⁸⁴In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 8 (Bankr. D. Mont. May 13, 2009).

¹⁸⁵In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 10 (Bankr. D. Mont. May 13, 2009).

¹⁸⁶In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 11 (Bankr. D. Mont. May 13, 2009).

¹⁸⁷In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 10 (Bankr. D. Mont. May 13, 2009).

¹⁸⁸In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 11 (Bankr. D. Mont. May 13, 2009).

¹⁸⁹ William D. Cohan, *Paradise Lost*, FORTUNE MAGAZINE, Feb. 6, 2008, available at http://money.cnn.com/2008/02/04/lifestyle/paradise_lost.fortune/index.htm.

¹⁹⁰In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 11 (Bankr. D. Mont. May 13, 2009).

loans” for “purposes unrelated” to the Yellowstone Club.”¹⁹¹ Additionally, up to \$142 million was authorized to be used for investments into “unrestricted subsidiaries” for “purposes unrelated” to the Yellowstone Club development.¹⁹² Therefore, only about \$24 million was indisputably used for the Debtors’ corporate purposes—to refinance existing debt. In exchange, the Lender received \$7.5 million in fees in the transaction.¹⁹³

Soon after the Lender transferred the loan proceeds to YMC, Blixseth, in his capacity as a YMC Director, approved an unsecured promissory note from YMC to Blixseth Group International (a wholly-owned Blixseth company)¹⁹⁴; then paid himself \$209 million from this unsecured loan and used part of another \$142 million unsecured loan to buy expensive real estate in Europe and Mexico – “\$28 million to buy Château de Farcheville, a 12th-century extravaganza on 1,125 secluded acres outside Paris; \$40 million to buy the Tamarindo resort on Mexico's Pacific Coast, once owned by Sternlicht's Starwood Resorts; \$28 million for a private island and 30,000-square-foot resort in the Turks and Caicos; and \$12 million as a down payment for property near St. Andrews, in Scotland.”¹⁹⁵

According to the Debtors’ Chapter 11 pleadings, their decreasing revenues, brought on by, among other things, economic factors that caused difficulties in obtaining new credit and

¹⁹¹In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 9 (Bankr. D. Mont. May 13, 2009).

¹⁹²In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 9 (Bankr. D. Mont. May 13, 2009).

¹⁹³In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 9 (Bankr. D. Mont. May 13, 2009).

¹⁹⁴In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 12 (Bankr. D. Mont. May 13, 2009).

¹⁹⁵ William D. Cohan, *Paradise Lost*, FORTUNE MAGAZINE, Feb. 6, 2008, available at http://money.cnn.com/2008/02/04/lifestyle/paradise_lost.fortune/index.htm.

declines in the real estate market, ultimately impaired their ability to pay creditors.¹⁹⁶ The Debtors, therefore, commenced their Chapter 11 case on November 9, 2008 to address perceived liquidity shortfalls, to preserve and maximize their business as a going concern, to restructure and reorganize their business affairs and capital structure and develop a reorganization plan.¹⁹⁷

Legal Analysis

Equitable subordination is a court-created doctrine incorporated into Article 510(c) of the US Bankruptcy Code, which allows a court to “subordinate for purposes of distribution” all or part of an allowed claim or interest to all or part of another allowed claim or interest when equitable principles require.¹⁹⁸ The Bankruptcy Code does not provide guidance as to when such subordination should take place, but courts in the 9th Circuit generally apply the following test:

The subordination of claims based on equitable considerations Generally requires three findings: “(1) that the claimant engaged in some type of inequitable conduct, (2) that the misconduct injured creditors or conferred unfair advantage on the claimant, and (3) that subordination would not be inconsistent with the Bankruptcy Code.”¹⁹⁹ *Feder v. Lazar (In re Lazar)*, 83 F.3d 306, 309 (9th Cir.1996)²⁰⁰ (citing *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir.1977)).²⁰¹

¹⁹⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 361, 362, 363, AND 364 AND BANKRUPTCY RULES 2002, 4001, AND 9014 FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (II) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (III) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS, AND (IV) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 8-9 (Bankr. D. Mont. Nov. 10, 2008).

¹⁹⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 361, 362, 363, AND 364 AND BANKRUPTCY RULES 2002, 4001, AND 9014 FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING (II) AUTHORIZING DEBTORS TO UTILIZE CASH COLLATERAL, (III) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED LENDERS, AND (IV) SCHEDULING INTERIM AND FINAL HEARINGS, Dkt. #6, at 8-9 (Bankr. D. Mont. Nov. 10, 2008).

¹⁹⁸ 11 U.S.C. § 510 (2006).

¹⁹⁹ Quoting *In re First Alliance Mortg. Co.*, 471 F.3d 977, 1006 (9th Cir. 2006).

²⁰⁰ *Feder v. Lazar*, 83 F.3d 306, 309 (9th Cir.1996).

²⁰¹ *Benjamin v. Diamond*, 563 F.2d 692, 699-700 (5th Cir.1977).

Normally, before a non-insider claim is equitably subordinated, “egregious conduct” must be “proven with particularity,” and is a high standard to meet—it requires proof that the claimant “is guilty of gross misconduct tantamount to fraud, overreaching or spoliation to the detriment of others.”²⁰²

Application of Law to the Facts

The syndicated term loan and its intended application was simply lending to an owner based on a judgment of accreted equity value, thus allowing the owner to monetize the gain.²⁰³ The Bankruptcy Court found nothing in the record suggesting that the loan between the Lender and Debtor (disregarding, however, the minority shareholders) was not at arm’s length.²⁰⁴ In fact, the decision specifically noted that Blixseth had been successful in reducing the Lender’s transaction fee from three percent to two percent (apparently, Blixseth and the Lender “flipped a coin” to determine the loan fee).²⁰⁵

The problem, noted by the Bankruptcy Court, was apparently the nature of the Lender’s marketing and credit analysis. Noting that the new financial “product” the Lender was offering to owners of luxury second-home developments permitted them the opportunity “to take their profits up front while mortgaging their development projects to the hilt”.²⁰⁶ The Bankruptcy

²⁰² In re First Alliance Mortg. Co., 497 F.3d at 1006.

²⁰³ Eric L. Berg, *In re Yellowstone Mountain Club, LLC—the pitfalls of “equitable subordination” for the unwary lender*, WHITE AND CASE, June 4, 2009, <http://www.whitecase.com/alert-in-re-yellowstone-mountain-club-llc-the-pitfalls-of-equitable-subordination-for-the-unwary-lender-06-04-2009/>.

²⁰⁴ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 9 (Bankr. D. Mont. May 13, 2009).

²⁰⁵ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 9 (Bankr. D. Mont. May 13, 2009).

²⁰⁶ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 16 (Bankr. D. Mont. May 13, 2009).

Court was concerned that while the Lender earned a substantial fee on the transaction and sold off most of the credit to loan participants, and the development owners benefited by taking most of the money out as a profit dividend, the developments themselves were left saddled with debt.²⁰⁷ The developments, along with the creditors of the developments, bore all of the risk of loss.²⁰⁸ Pointing to similar syndicated term loans that the Lenders had previously marketed and provided to other luxury residential and recreational communities, the Bankruptcy Court was concerned that a number of such entities such as Tamarack Resort, Promontory, Ginn, Turtle Bay, and Lake Las Vegas²⁰⁹ had also failed financially from similar loan products.²¹⁰ These entities have since filed an action separate to this bankruptcy proceeding that alleges Credit Suisse defrauded similarly situated syndicate term loan recipients of \$24 billion with a pattern of racketeering and money laundering.²¹¹

According to creditors committee attorney, Tom Beckett, in his opening argument “The Credit Suisse loan is very odd, very peculiar.”²¹² He cited its “enormity;” the fact that was a term loan rather than the credit line that’s usually used in development loans; that was made without a “fair market value” appraisal (and thus had to be made out of a Cayman Islands

²⁰⁷ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 16 (Bankr. D. Mont. May 13, 2009).

²⁰⁸ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 16 (Bankr. D. Mont. May 13, 2009).

²⁰⁹ Jonathan Weber, *Tim Blixseth Defends Yellowstone Club*, NEW WEST, Apr. 29, 2009, available at http://www.newwest.net/topic/article/tim_blixseth_defends_yellowstone_club_deals/C589/L35/.

²¹⁰ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 16 (Bankr. D. Mont. May 13, 2009).

²¹¹ L.J. Gibson v. Credit Suisse, Case no. 1:10-cv-00001-EJL, Complaint, Dkt. #1, at 2 (D. Idaho Jan. 3, 2010), (alleging Credit Suisse defrauded members of \$24Billion from Tamarack Resort, Yellowstone Club, Lake Las Vegas, and Ginn Sur Mer Resorts with a pattern of racketeering and money laundering with their loan products).

²¹² Jonathan Weber, *Tim Blixseth Defends Yellowstone Club*, NEW WEST, Apr. 29, 2009, available at http://www.newwest.net/topic/article/tim_blixseth_defends_yellowstone_club_deals/C589/L35/.

subsidiary of Credit Suisse since U.S. law requires such an appraisal); and that there was “a huge distribution of cash to the owner.”²¹³ Attorney Troy Greenfield, also representing YMC, said Credit Suisse itself has referred to this loan product as a “gravy train,” and “that gravy train ran wildly off the rails.”²¹⁴

The Bankruptcy Court found that the Lenders only earned fees if they sold loans whereas the fee amount increased with the size of the loan. This led the Lenders to devise “a loan scheme that encouraged developers of high-end residential resorts, such as Blixseth, to take unnecessary loans—clearly self-serving for Credit Suisse.”²¹⁵ Further, the Bankruptcy Court found that the “fee structure was undoubtedly the catalyst that led to the most shocking aspect of the Lender’s newly developed loan product”, namely, that it authorized developers to take a substantial portion of the loan proceeds as a distribution (or as in Blixseth’s case, an undocumented loan).²¹⁶ Citing the \$209 million “loan” to Blixseth authorized by the credit agreement, the Bankruptcy Court held that “[a] sophisticated lender such as Credit Suisse had to have known what a distribution would do to the Debtors’ financial statements, and in particular, their balance sheet, yet the Lender proceeded with the loan and thus earned its large fee.”²¹⁷

The Bankruptcy Court also noted the Lender’s “almost all but non-existent” financial due diligence, indicating that the Lender relied almost exclusively on the Debtors’ future financial

²¹³ Jonathan Weber, *Tim Blixseth Defends Yellowstone Club*, NEW WEST, Apr. 29, 2009, available at http://www.newwest.net/topic/article/tim_blixseth_defends_yellowstone_club_deals/C589/L35/.

²¹⁴ Jonathan Weber, *Tim Blixseth Defends Yellowstone Club*, NEW WEST, Apr. 29, 2009, available at http://www.newwest.net/topic/article/tim_blixseth_defends_yellowstone_club_deals/C589/L35/.

²¹⁵ *In re Yellowstone Mountain Club*, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 17 (Bankr. D. Mont. May 13, 2009).

²¹⁶ *In re Yellowstone Mountain Club*, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 17 (Bankr. D. Mont. May 13, 2009).

²¹⁷ *In re Yellowstone Mountain Club*, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 17 (Bankr. D. Mont. May 13, 2009).

projections “even though such projections bore no relation to the Debtors’ historical or present reality.”²¹⁸ The Bankruptcy Court was also concerned with the Lender’s property appraisal that utilized the “total net value” methodology—an accounting system that did not comply with the stricter Financial Institutions Recovery Reform Act of 1989²¹⁹ but did, however, create the chimera of a lower loan to value ratio.²²⁰

Moreover, the Bankruptcy Court expressed incredulity that the Lender would increase the Debtors’ debt load (which, previously had fluctuated from between \$4–\$5 million on the low end to \$60 million on the high end) by at least six times.²²¹ The Court noted that under no set of circumstances could the Debtors service such an increased debt load, particularly when they had previously experienced “several years of net operating losses, mixed in with a couple of years of net operating revenues.”²²² Further, the Court observed that from “2005 through the filing of the bankruptcy, the Yellowstone Mountain Club was persistently behind in its accounts payable”, and when funds were tight, instead of making demand on the promissory note that Blixseth’s company had issued in respect of the \$209 million loan, the Debtors instead looked to YMC

²¹⁸ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 18 (Bankr. D. Mont. May 13, 2009).

²¹⁹ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 18 (Bankr. D. Mont. May 13, 2009), (90 percent loan to value ratio and would thus have made syndication more difficult for the Lender).

²²⁰ Evan Weinberger, *Credit Suisse Faces \$24B Suit Over Resort Losses*, LAW 360, Jan. 4, 2010, available at <http://www.law360.com/articles/141392> (Lender was assisted by the real estate firm Cushman and Wakefield Inc. to assist in the Total Net Value YMC property assessment. Cushman and Wakefield are now co-defendants with Credit Suisse in the aforementioned \$24B lawsuit alleging fraud, money laundering and racketeering).

²²¹ In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 18 (Bankr. D. Mont. May 13, 2009).

²²² In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 18-19 (Bankr. D. Mont. May 13, 2009).

members to obtain funding for operating costs.²²³

The Bankruptcy Court was also dubious of the Lender's financial transparency. Bank officials testified that Credit Suisse created a Cayman Islands 'branch' in 2005 to sell these loans. Blixseth testified "In reality, there was no phone and no staff in the bank's phony branch. They used the Caymans to circumvent U.S. banking laws and to issue inflated loans that Credit Suisse executives called a 'gravy train' in internal memos. Credit Suisse pocketed tens of millions in fees in the process."²²⁴

The Bankruptcy Court found that the "only plausible explanation for the Lender's actions is that it was simply driven by the fees it was extracting from the loans it was selling, and letting the chips fall where they may", and that the Lender had "lined its pockets on the backs of unsecured creditors." "The corporate greed of Credit Suisse and Mr. Blixseth's sense of entitlement "were a toxic combination."²²⁵ These actions "shocked the conscience of the court."²²⁶

Holding

The Bankruptcy Court held that the only equitable remedy to compensate for the Lender's overreaching and predatory lending practices was to subordinate the Lender's first lien position to that of CrossHarbor's super-priority debtor-in-possession financing and to subordinate such

²²³In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 12-13 (Bankr. D. Mont. May 13, 2009).

²²⁴ Amy Linn, *Credit Suisse Execs Subpoenaed Over "Predatory" Yellowstone Club Loans*, NEW WEST, Sept. 15, 2009, available at http://www.newwest.net/city/article/credit_suisse_execs_get_subpoenas_for_predatory_yellowstone_club_loans/C8/L8/.

²²⁵ Jonathan Weber, *Tim Blixseth Defends Yellowstone Club*, NEW WEST, Apr. 29, 2009, available at http://www.newwest.net/topic/article/tim_blixseth_defends_yellowstone_club_deals/C589/L35/ (Testimony from YMC attorney Greenfield).

²²⁶In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

lien to that of the allowed claims of unsecured creditors.²²⁷ The Court limited the amount of the Lender's secured claim to \$232 million²²⁸ for the purposes of an upcoming auction of the Debtor's assets; and equitably subordinated the amount of the reduced claim to the allowed claims of all unsecured nonmember creditors in the case.²²⁹ The Court did permit the lender to credit bid its \$232 million secured claim at the upcoming auction of the Debtors' assets, however, because such claim was equitably subordinated, the Bankruptcy Court required the lender to provide as a component of its credit bid, sufficient funds to repay the debtor-in-possession financing, the administrative fees and costs of the Debtors' bankruptcy estate and the allowed unsecured claims of the creditors to whom it was subordinated.²³⁰

What does this ruling mean for the financial community? This ruling, we believe, may encourage borrowers to challenge senior lenders' claims on grounds previously thought frivolous, such as:

- "The bank let me borrow too much money"
- "The bank permitted me to take distribution of the loan proceeds so it must have been OK"²³¹

²²⁷In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

²²⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Memorandum of Decision, Dkt. #880, at 2 (Bankr. D. Mont. May 13, 2009)(Pursuant to a separate Memorandum of Decision, the Bankruptcy Court adopted a valuation estimate of \$232 million as the value of the lender's collateral).

²²⁹In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

²³⁰In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19-20 (Bankr. D. Mont. May 13, 2009).

²³¹Gary Eisenberg, *Your First Lien is Breaking!*, HERRICK, FEINSTEIN LLP, June 24, 2009, <http://www.herrick.com/siteFiles/News/81CFF00B9AAE3BCA762D400B30A0814D.pdf>.

The Plan(s)

“[T]he Beginning of the End”²³²

The debtor’s third amended plan for reorganization was confirmed by order on June 2, 2009.²³³ This confirmation was preceded by multiple plans dating as far back as February of 2009.²³⁴ Following a disputed auction of YMC, CrossHarbor and Credit Suisse, the two major players in this bankruptcy decided to create a settlement that would make CrossHarbor the purchaser of the club for \$115 million in “cash and debt.”²³⁵

CrossHarbor agreed to a settlement with Credit Suisse and other creditors who had objected to the YMC’s plan of reorganization.²³⁶ The Yellowstone Club Settlement Term Sheet (hereinafter “Term Sheet”) would create the basis of the deal between CrossHarbor, the eventual “acquirer” and the multiple creditor classes in this bankruptcy.²³⁷

While not clear from any of the documents in the docket, popular press and circumstances indicate that Judge Kirscher was in complete control and effectively produced an acceptable result in this case.²³⁸ Specifically, the attorney for the Official Committee of

²³² Jonathan Weber, *Poor Little Rich Club Lives On: CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

²³³ In re Yellowstone Mountain Club, Case no. 08-61570-11-RBK, Order Confirming THE THIRD AMENDED Chapter 11 Plan, Dkt. 1026, at 1 (Bankr. D. Mont. June 2, 2009).

²³⁴ In re Yellowstone Mountain Club, Case no. 08-61570-11-RBK, Chapter 11 Plan of Reorganization, Dkt. 384 (Bankr. D. Mont. February 13, 2009).

²³⁵ Jonathan Weber, *Poor Little Rich Club Lives On: CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

²³⁶ Jonathan Weber, *Poor Little Rich Club Lives On: CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

²³⁷ See In re Yellowstone Mountain Club, Case no. 08-601570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12 (Bankr. D. Mont. May 22, 2009).

Unsecured Creditors (hereinafter sometimes called UCC), J. Thomas Beckett, described the ruling as “. . . substantial justice.” May 12, 2009, the Court issued its order concerning the equitable subordination of Credit Suisse’s claim.²³⁹ On May 13, 2009, the Court entered an order concerning the necessary components of a credit bid that would be accepted from Credit Suisse.²⁴⁰ Under the order, Credit Suisse was required to “commit in excess of \$57 million” in cash and a note.²⁴¹ The note, secured by assets of the Yellowstone Club, would be senior to Credit Suisse’s prepetition claim, but would not have priority over “the \$80 to \$90 million [that Credit Suisse would inject to the club in the future if it were the successful bidder for the club].”²⁴² While YMC’s counsel, Mr. Patten, suggested that this left unsecured creditors, with

²³⁸ Jonathan Weber, *Bankers on Trial: Citing “Naked Greed” Judge Eviscerates Credit Suisse in Yellowstone Club Case*, NEW WEST, May 12, 2009, available at http://www.newwest.net/topic/article/stinging_setback_for_credit_suisse_in_yellowstone_club_case/C35/L35/.

²³⁹In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

²⁴⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, IT IS ORDERED that Credit Suisse shall be allowed to exercise its right to credit bid, provided such credit bid contains a cash component of not less than approximately \$43.075 million (\$35.375 million plus \$7.7 million) and provided such credit bid includes a note payable of up to \$14.3 million for payment of allowed unsecured claims. Such allowed unsecured claims could also be paid from other assets of the estate, thereby reducing the amount payable under the \$14.3 million note. The \$14.3 million note payable shall be secured by the assets that are the subject of the auction and the note payable shall have priority over Credit Suisse’s \$232 million allowed secured claim. However, the \$14.3 million note payable will not have priority over any new money that might be injected by Credit Suisse into the Yellowstone Club, Dkt. #880 (Bankr. D. Mont. May 13, 2009)(noting that Credit Suisse agreed to increase the cash component of their bid to \$43.075 million and execute a note up to \$14.3 million to pay administrative expenses, priority unsecured claims and unsecured claims).

²⁴¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, IT IS ORDERED that Credit Suisse shall be allowed to exercise its right to credit bid, provided such credit bid contains a cash component of not less than approximately \$43.075 million (\$35.375 million plus \$7.7 million) and provided such credit bid includes a note payable of up to \$14.3 million for payment of allowed unsecured claims. Such allowed unsecured claims could also be paid from other assets of the estate, thereby reducing the amount payable under the \$14.3 million note. The \$14.3 million note payable shall be secured by the assets that are the subject of the auction and the note payable shall have priority over Credit Suisse’s \$232 million allowed secured claim. However, the \$14.3 million note payable will not have priority over any new money that might be injected by Credit Suisse into the Yellowstone Club, Dkt. #880, at 4 (Bankr. D. Mont. May 13, 2009).

²⁴²In re Yellowstone Mountain Club, Case no. 08-61570-RBK, IT IS ORDERED that Credit Suisse shall be allowed to exercise its right to credit bid, provided such credit bid contains a cash component of not less than approximately \$43.075 million (\$35.375 million plus \$7.7 million) and provided such credit bid includes a note payable of up to \$14.3 million for payment of allowed unsecured claims. Such allowed unsecured claims could also be paid from other assets of the estate, thereby reducing the amount payable under the \$14.3 million note. The \$14.3 million note

priority under the subordination order, at risk; the Court pointed out that similar if not more substantial risk was proposed in the \$70 million note provided for under CrossHarbor's bid that would be subordinated to CrossHarbor's new money.²⁴³ This move by Judge Kirscher allowed Credit Suisse to participate as a second bidder in the Second Amended Plan's Auction of YMC with CrossHarbor, the suggested acquirer in the second amended plan.²⁴⁴

Prior to these orders, the disclosure statement for the Second Amended Joint Plan made recommendations based upon CrossHarbor being the winning bidder for the club that would be sold under the plan.²⁴⁵ CrossHarbor would purchase YMC and would form a new limited liability company named "New CH YMC Acquisitions LLC."²⁴⁶ CrossHarbor would purchase the membership interest in the new LLC for:

"\$100,000,000, of which (a) \$375,000.00 shall be paid by Acquirer to the Liquidating Trusts for Debtor[] estate[], and \$29,625,000.00 shall be paid to the Disbursing Agent on behalf of the Debtor[] on the closing date . . . [t]he balance of the purchase price (i.e., \$70,000,000.00) shall be satisfied by the execution by Reorganized Debtors of new loan documents."²⁴⁷

payable shall be secured by the assets that are the subject of the auction and the note payable shall have priority over Credit Suisse's \$232 million allowed secured claim. However, the \$14.3 million note payable will not have priority over any new money that might be injected by Credit Suisse into the Yellowstone Club, Dkt. #880, at 4-5 (Bankr. D. Mont. May 13, 2009).

²⁴³ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, IT IS ORDERED that Credit Suisse shall be allowed to exercise its right to credit bid, provided such credit bid contains a cash component of not less than approximately \$43.075 million (\$35.375 million plus \$7.7 million) and provided such credit bid includes a note payable of up to \$14.3 million for payment of allowed unsecured claims. Such allowed unsecured claims could also be paid from other assets of the estate, thereby reducing the amount payable under the \$14.3 million note. The \$14.3 million note payable shall be secured by the assets that are the subject of the auction and the note payable shall have priority over Credit Suisse's \$232 million allowed secured claim. However, the \$14.3 million note payable will not have priority over any new money that might be injected by Credit Suisse into the Yellowstone Club, Dkt. #880, at 4 (Bankr. D. Mont. May 13, 2009).

²⁴⁴ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Disclosure Statement, Dkt. #692, at 44 (Bankr. D. Mont. Apr. 3, 2009)(explaining CrossHarbor's bid and its effect on other debtors under the "Description of Definitive Agreement" in the Disclosure Statement to the Second Amended Plan).

²⁴⁵ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Disclosure Statement, Dkt. #692, at 44 (Bankr. D. Mont. Apr. 3, 2009)

²⁴⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Disclosure Statement, Dkt. #692, at 44 (Bankr. D. Mont. Apr. 3, 2009)

The Second Amended Plan would establish Yellowstone Club Liquidating Trust and a Trade Creditors Fund that would provide funds to unsecured creditors and other trade creditors.²⁴⁸ Specifically, the debtor would provide non-project property like the Farcheville and St. Andrews, Fife, Scotland, 265 acres to be developed as a private golf club.²⁴⁹ The Liquidating Trust would also be charged with distributing other property obtained through avoidance actions.²⁵⁰

Judge Kirscher's approval of the disclosure statement on April 07, 2009, subordination of Credit Suisse's claim on May 12, 2009, and approval of Credit Suisse's motion to credit bid with some requirements discussed above, created an environment of negotiation between Credit Suisse and CrossHarbor and the Judge delayed the auction.²⁵¹ Out of this negotiation between the parties came a settlement signed by Credit Suisse, UCC, and YMC.²⁵²

Fear of the Future Brings Compromise and Conclusion

At a hearing "May 1[8], 2009", attorneys for the Debtor, Credit Suisse, CrossHarbor and other interested parties (including the UCC and Greg LeMond) held a hearing to update the

²⁴⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Disclosure Statement, Dkt. #692, at 44 (Bankr. D. Mont. Apr. 3, 2009)

²⁴⁸ In re Yellowstone Mountain Club, Case no. 08-61570, Disclosure Statement, Dkt. #692, at 58-61(Bankr. D. Mont. Apr. 3, 2009) (listing property provided to Yellowstone Club Liquidating Trust and Funds from the Purchase to pay Trade Creditors Fund).

²⁴⁹ In re Yellowstone Mountain Club, Case no. 08-61570, Disclosure Statement, Dkt. #692, at 59 (Bankr. D. Mont. April 3, 2009).

²⁵⁰ In re Yellowstone Mountain Club, Case no. 08-61570, Disclosure Statement, Dkt. #692, at 59-60 (Bankr. D. Mont. April 3, 2009).

²⁵¹ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 60 (Bankr. D. Mont. May 18, 2009).

²⁵² See In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940 (Bankr. D. Mont. May 18, 2009).

judge on a “settlement term sheet” reached after the Judge had recessed the auction of YMC.²⁵³ The Court very dutifully went through objections and their resolution or lack thereof.²⁵⁴ At this point, CrossHarbor and Credit Suisse were working in tandem to find agreement with non-signatory groups that maintained objection.²⁵⁵ The Class B Ad Hoc Members Committee raised concerns that they were not a party to the agreement and wanted to ensure that they were not losing rights to pursue through litigation equity interests that they might have. Patten and Chehi both explained that while they were able to join forces with the liquidation trust and pursue their claims, they were equity and the last to be paid and they could not disrupt the agreements between parties with claims and parties with equity.²⁵⁶ Judge Kirscher seemed to focus his comments toward Whitmore, attorney for the Class B Ad Hoc Members, and indicated that as they are not members to the agreement, their rights should not be affected.²⁵⁷ Patten indicated that his feeling was that the plan did not preclude action by the Class B’s to secure payment through equity if property of the estate were to “be distributed to the equity.”²⁵⁸

²⁵⁸ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 25 (Bankr. D. Mont. May 18, 2009).

²⁵⁹ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 28-29 (Bankr. D. Mont. May 18, 2009).

²⁶⁰ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 29 (Bankr. D. Mont. May 18, 2009).

²⁶¹ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 31-32 (Bankr. D. Mont. May 18, 2009).

Other objecting parties included Timothy Blixseth and Desert Ranch LLP, through their attorney Joel Guthals, who indicated that the settlement would not solve their objection. In addition to the IRS, the Montana Department of Revenue was awaiting language from the YMC concerning the plan that would cure the objection, but both groups felt that their issues would likely be resolved.²⁵⁹ Mr. Birinyi, a bankruptcy lawyer for the debtor, indicated that language was already being circulated and it would be worked out in the modified plan documents.²⁶⁰

Final Issues and Confirmation

After walking through remaining objections, the Court moved toward an explanation of the term sheet.²⁶¹ The terms of the deal included: (1) the parties would agree to support the dismissal of a pending appeal against CH DIP Loan, the UCC will encourage all unsecured creditors to support plan if resolicitaiton is necessary, Credit Suisse will encourage its class of creditors, previously objecting to the plan (Class 3 and Class 8), to support it; (2) the signatories would support payment of all fees for the CrossHarbor Loan; (3) the UCC agreed to dismiss the adversarial proceeding that had resulted in an interim order equitably subordinating Credit Suisse's prepetition secured claim, and would not seek future claims in Chapter 7 or 11 against Credit Suisse and Judge Kirscher would vacate his interim order against Credit Suisse; (4) CrossHarbor's lending arm, CIP, would not foreclose on Porcupine Creek, the home of Edra

²⁵⁸ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 25 (Bankr. D. Mont. May 18, 2009).

²⁵⁹ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 28-29 (Bankr. D. Mont. May 18, 2009).

²⁶⁰ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 29 (Bankr. D. Mont. May 18, 2009).

²⁶¹ In re Yellowstone Mountain Club, Case no. 08-61570, Transcript regarding Hearing Held 05/18/09 RE: SETTLEMENT DISCUSSIONS AND OBJECTIONS AND PLAN CONFIRMATION, Dkt. #940, at 31-32 (Bankr. D. Mont. May 18, 2009).

Blixseth, until the earlier of “(x) July 30 and (y) 30 days after the Effective Date.”²⁶²

Additionally, CrossHarbor increased the debt portion of their bid to \$80 million and the cash portion to \$35 million.²⁶³ The \$80 million dollar note would be secured from Credit Suisse.²⁶⁴

The Trade Creditors Fund would receive \$15 million, and the liquidating trust would receive \$375 thousand and an additional \$2 million in expenses.²⁶⁵ Non-project assets obtained by the liquidating trust would be paid to the Trade Creditors Fund then to CIP Lending, the allowed Class 4 Claims, and finally, Credit Suisse.²⁶⁶ Classes 3 and 8 would be paid from the new \$80 million dollar note and would obtain all decision-making authority related to the French Castle, Farcheville.²⁶⁷ Credit Suisse would also be given the right to “co-invest in CrossHarbor’s acquisition of the New Membership Interest . . . (estimated to be approximately \$30 [million]).”²⁶⁸

The agreement would be placed in the third amended plan; however, resolicitation of the vote from the entire group of creditors was unnecessary because they had waived their

²⁶² In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 4-5 (Bankr. D. Mont. May 18, 2009).

²⁶³ In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 5 (Bankr. D. Mont. May 18, 2009).

²⁶⁴ In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 21 (Bankr. D. Mont. May 18, 2009); Jonathan Weber, *Bankers on Trial: Citing “Naked Greed” Judge Eviscerates Credit Suisse in Yellowstone Club Case*, NEW WEST, May 12, 2009, available at http://www.newwest.net/topic/article/stinging_setback_for_credit_suisse_in_yellowstone_club_case/C35/L35/.

²⁶⁵ In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 8 (Bankr. D. Mont. May 18, 2009).

²⁶⁶ In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 9 (Bankr. D. Mont. May 18, 2009).

²⁶⁷ In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 9-10 (Bankr. D. Mont. May 18, 2009).

²⁶⁸ In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. #947-12, at 11 (Bankr. D. Mont. May 18, 2009).

objection.²⁶⁹ Instead, only two groups would be solicited, Class 3 and Class 8, all members of Credit Suisse prepetition lending arm.²⁷⁰ While the structure was not substantially different from the Second Amended Plan, the dollar amounts contributed and the plan's treatment of Credit Suisse was changed.²⁷¹

Title 11 U.S.C section 1125 requires that a plan meet several criteria before being confirmed. Among these are:

. . . [t]he proponent of the plan complies with the applicable provisions of this title. [] The plan has been proposed in good faith and not by any means forbidden by law. [] Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable. . . . [] [E]ach holder of a claim or interest of such class [] has accepted the plan; or [] will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 . . . [i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider. [] Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization[. . .].²⁷²

After the filing of the Third Amended Plan, the Court noted that the remaining objections were centered on Timothy Blixseth, Robert Sumpter, whose objection was dismissed because he failed to argue the objection by the deadline, and Highland Capital, a syndicate of Credit Suisse. The court rejected all objections because they were either insiders like Timothy Blixseth,

²⁶⁹In re Yellowstone Mountain Club, Case no. 08-61570, Memorandum of Decision, Dkt. #1025, at 2-4 (Bankr. D. Mont. May 18, 2009).

²⁷⁰In re Yellowstone Mountain Club, Case no. 08-61570, Memorandum of Decision, Dkt. #1025, at 2-4 (Bankr. D. Mont. May 18, 2009).

²⁷¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order Confirming THE THIRD AMENDED Chapter 11 Plan, Dkt. #1026, (Bankr. D. Mont. June 2, 2009); In re Yellowstone Mountain Club, Case no. 08-61570, Third Amended Chapter 11 Plan, Dkt. 3947-12 (Bankr. D. Mont. May 18, 2009).

²⁷²11 U.S.C. § 1129 (2006).

executory contracts that may be rejected, or in the case of Highland Capital, bound under agreements with Credit Suisse.²⁷³ In the Memorandum Decision, Judge Kirscher noted that other than the objections he denied above, the plan was consensual.²⁷⁴ With that being said, the plan met the obligations set out above.²⁷⁵ In fact, Judge Kirscher determined that the Third Amended Plan provided the creditors with as much money than they would have received otherwise, and that the plan was fair and equitable to objecting creditors like Timothy Blixseth.²⁷⁶ With these matters settled, the Third Amended Plan of Reorganization was confirmed on June 2, 2009.²⁷⁷

Yellowstone Club Liquidating Trust

The Yellowstone Club Liquidating Trust was established to pursue claims on behalf of the creditors after confirmation of the plan.²⁷⁸ As noted above, the liquidating trust would receive assets not purchased by CrossHarbor as project assets. Notably this would not include the Farcheville Castle.²⁷⁹ Credit Suisse would have four members, the UCC would have 2, and Ad Hoc Class B Members Committee would have 1 member of the board that would govern the

²⁷³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order Confirming THE THIRD AMENDED Chapter 11 Plan, Dkt. #1026, at 4-5 (Bankr. D. Mont June 2, 2009).

²⁷⁴In re Yellowstone Mountain Club, Case no. 08-61570, Memorandum of Decision, Dkt. #1025, at 2-4(Bankr. D. Mont. May 18, 2009).

²⁷⁵*See generally* In re Yellowstone Mountain Club, Case no. 08-61570, Memorandum of Decision, Dkt. #1025 (Bankr. D. Mont. May 18, 2009)

²⁷⁶In re Yellowstone Mountain Club, Case no. 08-61570, Memorandum of Decision, Dkt. #1025, at 12(Bankr. D. Mont. May 18, 2009)

²⁷⁷In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order Confirming THE THIRD AMENDED Chapter 11 Plan, Dkt. #1026, at 2 (Bankr. D. Mont June 2, 2009).

²⁷⁸In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 7-11(Bankr. D. Mont. May 22, 2009); In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. #995, 32-33 (Bankr. D. Mont. May 29, 2009).

²⁷⁹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 7-11 (Bankr. D. Mont. May 22, 2009)

trust.²⁸⁰ The Liquidating Trust would be left with the rights to pursue avoidance actions on behalf of the trust, including claims against Timothy and Edra Blixseth.²⁸¹ The Liquidating Trust would also be charged with the legal administration of claim disputes and determining which claims to fight as unallowed and those to accept and pay.²⁸² To pay the claims, the Liquidating Trust would have access to funds paid by CrossHarbor, promissory notes in the estate owned by BGI, other non-project property and avoidance actions that maybe won.²⁸³ As noted above, Credit Suisse could not be pursued for their actions in lending the Blixesths money; however, the Liquidating Trust could pursue the Blixseths.²⁸⁴

Some of Edra's personal assets may eventually be liquidated to pay the claims that Yellowstone Mountain Club's estate has against her. The Yellowstone Mountain Club creditors' committee is also in the process of pursuing a fraud case against Timothy and Edra in connection with the way they spent the proceeds from the prepetition loan.²⁸⁵ Eventually, some of both Timothy and Edra's personal assets may be coming back to the estate if the assets are found to have been fraudulently acquired.

²⁸⁰In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 8 (Bankr. D. Mont. May 22, 2009)

²⁸¹In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 16-21(Bankr. D. Mont. May 22, 2009)

²⁸² In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 7-11 (Bankr. D. Mont. May 22, 2009)

²⁸³In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 7-11 (Bankr. D. Mont. May 22, 2009)

²⁸⁴In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Third Amended Chapter 11 Plan, Dkt. 947-12, at 7-11 (Bankr. D. Mont. May 22, 2009)

²⁸⁵ Jonathan Weber, *CrossHarbor Wins Battle for Yellowstone Club*, NEW WEST, May 18, 2009, available at http://www.newwest.net/topic/article/crossharbor_wins_battle_for_yellowstone_club/C35/L35/.

Judge Kirscher's Willingness to Send a Message

As noted above, Judge Kirscher ran an efficient process related to this bankruptcy. Specifically, he placed the debtors, secured creditors, and CrossHarbor in a position to negotiate. While not suggesting that anything improper happened, the Court was astute in playing the parties off one another to bring about a settlement and plan that was accepted by all involved except the insiders. Furthermore, Judge Kirscher understood his ability to send signals from the bench.

One example of this was related to the payment of attorney fees related to the case. On August 25, 2009, Judge Kirscher rejected fees of a firm working for CrossHarbor, Goulston & Storrs, P.C., in the real estate area.²⁸⁶ The Court took issue with the details and explanations related to telephone calls and conferences by Adam T. Curry among others.²⁸⁷ While there were no objections to the fees filed, the Court felt that the lack of information concerning the nature and subject of the noted information made denial of the claim appropriate.²⁸⁸ The Court rejected

²⁸⁶ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order the Application for payment of DIP Loan Fees and Expenses (Application) filed by CrossHarbor and CIP Lending on August 4, 2009, (Docket No. 1167) is approved in part and denied in part; DIP Lendings general counsel Duane Morris LLP is awarded reasonable fees in the amount of \$223,839.00 plus reimbursement for costs of \$2,385.43; local counsel Crowley Fleck PLLP is awarded fees in the amount of \$21,157.50 and costs of \$2,139.46; and CIP Lending is awarded reimbursement for actual, reasonable and necessary expenses incurred by CIP Lending in the sum of \$113,932.15. IT IS FURTHER ORDERED the Application is denied with respect to real estate counsel Goulston & Storrs, P.C.; and Goulston is granted leave to refile an Application for compensation in conformity with Mont. LBR 2016-1(a), LBF 17, Dkt. #1208, at 7 (Bankr. D. Mont Aug. 25, 2009).

²⁸⁷ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order the Application for payment of DIP Loan Fees and Expenses (Application) filed by CrossHarbor and CIP Lending on August 4, 2009, (Docket No. 1167) is approved in part and denied in part; DIP Lendings general counsel Duane Morris LLP is awarded reasonable fees in the amount of \$223,839.00 plus reimbursement for costs of \$2,385.43; local counsel Crowley Fleck PLLP is awarded fees in the amount of \$21,157.50 and costs of \$2,139.46; and CIP Lending is awarded reimbursement for actual, reasonable and necessary expenses incurred by CIP Lending in the sum of \$113,932.15. IT IS FURTHER ORDERED the Application is denied with respect to real estate counsel Goulston & Storrs, P.C.; and Goulston is granted leave to refile an Application for compensation in conformity with Mont. LBR 2016-1(a), LBF 17, Dkt. #1208, at 5-8 (Bankr. D. Mont Aug. 25, 2009).

²⁸⁸ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order the Application for payment of DIP Loan Fees and Expenses (Application) filed by CrossHarbor and CIP Lending on August 4, 2009, (Docket No. 1167)

Goulston's application for \$469,769.50 in fees.²⁸⁹ The Court did grant leave to refile the application and would subsequently grant the full amount of fees after Goulston filed a more detailed statement.²⁹⁰

With this in mind, the Court's willingness to send a message to the parties involved is clear. The Court would use its authority to encourage behavior, and this is a specific example. When you view the Court's action in this case, it is clear that Judge Kirscher was interested in an efficient and effective resolution to this case. This example combined with his orders in matters like the equitable subordination and the bidding procedures indicate an environment that encouraged bargaining and deal making between the debtor and the creditors. Hence the agreement to a liquidating plan that would result in confirmation.

is approved in part and denied in part; DIP Lending's general counsel Duane Morris LLP is awarded reasonable fees in the amount of \$223,839.00 plus reimbursement for costs of \$2,385.43; local counsel Crowley Fleck PLLP is awarded fees in the amount of \$21,157.50 and costs of \$2,139.46; and CIP Lending is awarded reimbursement for actual, reasonable and necessary expenses incurred by CIP Lending in the sum of \$113,932.15. IT IS FURTHER ORDERED the Application is denied with respect to real estate counsel Goulston & Storrs, P.C.; and Goulston is granted leave to refile an Application for compensation in conformity with Mont. LBR 2016-1(a), LBF 17, Dkt. #1208, at 2 (Bankr. D. Mont. Aug. 25, 2009).

²⁸⁹ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order the Application for payment of DIP Loan Fees and Expenses (Application) filed by CrossHarbor and CIP Lending on August 4, 2009, (Docket No. 1167) is approved in part and denied in part; DIP Lending's general counsel Duane Morris LLP is awarded reasonable fees in the amount of \$223,839.00 plus reimbursement for costs of \$2,385.43; local counsel Crowley Fleck PLLP is awarded fees in the amount of \$21,157.50 and costs of \$2,139.46; and CIP Lending is awarded reimbursement for actual, reasonable and necessary expenses incurred by CIP Lending in the sum of \$113,932.15. IT IS FURTHER ORDERED the Application is denied with respect to real estate counsel Goulston & Storrs, P.C.; and Goulston is granted leave to refile an Application for compensation in conformity with Mont. LBR 2016-1(a), LBF 17, Dkt. #1208, at 8 (Bankr. D. Mont. Aug. 25, 2009).

²⁹⁰ In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order the Application for payment of DIP Loan Fees and Expenses (Application) filed by CrossHarbor and CIP Lending on August 4, 2009, (Docket No. 1167) is approved in part and denied in part; DIP Lending's general counsel Duane Morris LLP is awarded reasonable fees in the amount of \$223,839.00 plus reimbursement for costs of \$2,385.43; local counsel Crowley Fleck PLLP is awarded fees in the amount of \$21,157.50 and costs of \$2,139.46; and CIP Lending is awarded reimbursement for actual, reasonable and necessary expenses incurred by CIP Lending in the sum of \$113,932.15. IT IS FURTHER ORDERED the Application is denied with respect to real estate counsel Goulston & Storrs, P.C.; and Goulston is granted leave to refile an Application for compensation in conformity with Mont. LBR 2016-1(a), LBF 17, Dkt. #1208, at 8 (Bankr. D. Mont. Aug. 25, 2009); In re Yellowstone Mountain Club, Case no. 08-61570-RBK, Order Granting CIP LENDING'S SUPPLEMENTAL Application for PAYMENT OF DIP LOAN FEES AND EXPENSES INCURRED BY GOULSTON & STORRS, PC.; GOULSTON & STORRS PC IS AWARDED FEES IN THE AMOUNT OF \$469,796.00 AND COSTS IN THE AMOUNT OF \$8,224.58 TO BE TREATED AS AN ADMINISTRATIVE EXPENSE, Dkt. #1252 (Bankr. D. Mont. Sept. 18, 2009).

Conclusion

“The dream had darkened into a nightmare and a vicious battle erupted over who was to blame and what would happen to the insolvent club.”²⁹¹ After several months of legal wrangling and a court finding that the \$375 million Credit Suisse loan was, “overreaching and predatory”,²⁹² YMC was sold under a reorganization plan in which all trade creditors would be paid before the Credit Suisse Lenders got their money back (“Members and the new owner considered the trade creditor payments to be crucial, lest they be viewed as pariahs in Big Sky”).²⁹³ Edra Blixseth was forced to file personal bankruptcy, and is being sued by a number of parties that lent her many millions of dollars. Timothy Blixseth still faces legal claims that could exceed \$200 million (probably more than his remaining fortune).²⁹⁴

CrossHarbor, a real estate investment firm led by Sam Byrne, will now acquire the club for \$115 million in cash and debt, and commit to investing up to \$75 million going forward. All unsecured trade creditors should be paid in full under the plan. The Credit Suisse lender group will get a new \$80 million note, and may be able to recover additional funds from the sale of the Chateau de Farcheville in France and from legal claims against Timothy Blixseth.²⁹⁵ However,

²⁹¹ Erin Cole, *Of Myth and Money at the Yellowstone Club*, NEW WEST, Sept. 1, 2009, available at http://www.newwest.net/topic/article/myth_and_reality_at_the_yellowstone_club/C35/L35/.

²⁹² In re Yellowstone Mountain Club, Case no. 09-00014-RBK, Partial and Interim Order, Dkt. #289, at 19 (Bankr. D. Mont. May 13, 2009).

²⁹³ Erin Cole, *Of Myth and Money at the Yellowstone Club*, NEW WEST, Sept. 1, 2009, available at http://www.newwest.net/topic/article/myth_and_reality_at_the_yellowstone_club/C35/L35/.

²⁹⁴ Erin Cole, *Of Myth and Money at the Yellowstone Club*, NEW WEST, Sept. 1, 2009, available at http://www.newwest.net/topic/article/myth_and_reality_at_the_yellowstone_club/C35/L35/.

²⁹⁵ Jonathan Weber, *Yellowstone Club Gains Final Approval*, NEW WEST, June 6, 2009, available at http://www.newwest.net/topic/article/yellowstone_club_sale_gains_final_approval/C589/L35/.

payment will depend upon the Liquidating Trust and Liquidating Committee's ability to actually recover property from avoidance actions. The amount of the recovery will also hinge upon the number of claims that are allowed in the case. Currently that number is being determined under the plan.