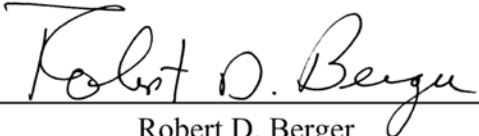


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 13th day of September, 2022.




Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**NABIL I. HADDAD and
PEGGY HADDAD,**

Debtors.

Case No. 21-20961
Chapter 11

ORDER DENYING PLAN CONFIRMATION

The issue before the Court is whether the Chapter 11 (subchapter V) plan of reorganization filed by debtors Nabil and Peggy Haddad can be confirmed under 11 U.S.C. § 1191(b).¹ The Court will deny confirmation because the Haddads have not demonstrated that their plan (1) satisfies §§ 1129(a)(7), (9)(C), and (11); (2) does not

¹ All of the statutes referenced in this order are part of Title 11, United States Code (the “**Bankruptcy Code**”).

“discriminate unfairly” as to Class 5 (general unsecured creditors); and (3) is “fair and equitable” to Class 5. If the Haddads would like to file an amended plan, they may do so within 45 days of the date of this order.

I. Factual Background

Debtor Nabil Haddad has been in the restaurant business for more than 60 years. He is the sole member of Timbercreek of Louisburg L.L.C., which operates Timbercreek Bar & Grill in Louisburg, Kansas. Nabil and his wife Peggy (the “**Haddads**”) receive a distribution of \$3,750 from Timbercreek every two weeks.

The Haddads’ son, David, has been in the restaurant business with Nabil for around 40 years. David is in charge of Timbercreek’s day-to-day operations and acts as its de facto COO.

In addition to Timbercreek, the Haddads own 93.45% of the Winstead’s Company,² which operates two restaurants, one on the Plaza and one in Overland Park. Winstead’s filed its own Chapter 11 bankruptcy in 2020; its consensually-confirmed subchapter V plan runs through March of 2028. David is the president of Winstead’s and receives a salary under the Winstead’s plan.

The Haddads receive no income from Winstead’s, but they do receive Social Security in addition to their Timbercreek distributions. Their amended Schedule I

² In their omnibus response to objections to confirmation, the Haddads clarified that they personally own 29.5% of the stock in Winstead’s, while another 63.95% of the stock is held in their revocable trust. *See* ECF 193 at 4. Nabil testified that the remaining Winstead’s stock is owned by the Haddads’ children.

reflects combined Social Security benefits of \$2,550 per month.³ Those benefits have since increased to \$3,375.80 (\$2,575.90 to Nabil and \$799.90 to Peggy) per month.⁴

The Haddads filed for bankruptcy under subchapter V of Chapter 11 on August 24, 2021. The Court held a plan confirmation hearing, at which Nabil and David testified, on June 15, 2022.⁵

II. Proposed Chapter 11 Plan; Confirmation Hearing

The Haddads' proposed Chapter 11 plan (the "**Plan**")⁶ states that they will reduce their distributions from Timbercreek to \$7,912 per month and use Timbercreek's remaining (after-tax) profits to make their plan payments.⁷

A. Timbercreek's Profits (Past and Projected)

Section 2.1(b) of the Plan provides a brief history of Timbercreek's yearly profits since 2018:

Timbercreek Bar & Grill had net profit of \$157,534 in 2018, \$216,741 in 2019, and \$251,236 in 2020. Debtors anticipate a total, pretax net profit of approximately \$380,000 for 2021.

³ See Schedule I, ECF 80 (filed Oct. 5, 2021).

⁴ See Monthly Operating Report for Small Business Under Chapter 11 (May 2022), ECF 206 (filed July 29, 2022).

⁵ At the hearing, creditor Frontier Farm Credit questioned whether the Haddads are within the \$7.5 million debt limit under § 1182(1)(A) for subchapter V cases. However, Fed. R. Bankr. P. 1020(b) requires such objections to be filed within 30 days of the meeting of creditors under § 341 or amendment of the debtor's statement that he is a small-business debtor, whichever is later.

⁶ Second Amended Plan of Reorganization, Feb. 6, 2022, ECF 155.

⁷ *Id.* § 8.1.

Exhibit B to the Plan provides projections of Timbercreek’s future profits—monthly ones for 2022 and yearly ones for 2023 through 2026 (the “**Projections**”). David, who prepared the Projections, testified that Timbercreek’s actual 2022 performance had, as of the hearing, been “very close” to the projected monthly figures. Specifically, he said, Timbercreek’s net profits from January through April 2022 had been “within \$5,000” of the total projected amount.⁸

The Projections anticipate that Timbercreek will have net profits of \$405,412 in 2022, \$148,303 of which will be available⁹ to fund the Plan. Going forward, the Projections predict 2% annual increases in Timbercreek’s profits,¹⁰ such that the amounts available for plan payments are projected to be \$163,168 in Year 2 of the Plan;¹¹ \$168,330 in Year 3; \$173,596 in Year 4; and \$178,966 in Year 5.

B. Payment Schedule

The Plan provides that the Haddads will make three payments per year for five years. All payments during the first two years will go toward the Haddads’

⁸ David explained that although Timbercreek’s income had exceeded projections by approximately \$6,000 a month during that time, Timbercreek’s expenses had also exceeded projections (which he ascribed to inflation).

⁹ I.e., left in Timbercreek after deducting \$94,944 (or \$7,912 x 12) for distributions to the Haddads and \$162,165 for income taxes.

¹⁰ At the hearing, David described the projected 2% increases as “modest” and “reasonable.”

¹¹ The Year 2 projection includes removal of a \$10,000 expense in addition to the 2% profit increase.

priority and secured tax debts (Classes 2 and 3, discussed *infra*). Exhibit C to the Plan sets out a payment schedule:¹²

Date	Payment ¹³	Recipient(s)
5/1/2022	\$49,795	Classes 2 and 3
9/1/2022	\$47,945	Classes 2 and 3
1/1/2023	\$47,945	Classes 2 and 3
5/1/2023	\$47,945	Classes 2 and 3
9/1/2023	\$47,945	Classes 2 and 3
1/1/2024	\$47,945	Classes 2 and 3
5/1/2024	\$78,060	Class 5
9/1/2024	\$56,110	Class 5
1/1/2025	\$56,110	Class 5
5/1/2025	\$57,865	Class 5
9/1/2025	\$57,865	Class 5
1/1/2026	\$57,865	Class 5
5/1/2026	\$59,655	Class 5
9/1/2026	\$59,655	Class 5
1/1/2027	\$59,658	Class 5

At the hearing, David testified that the Haddads had not made their first payment yet because the Plan had not been confirmed, but that Timbercreek has enough money in the bank to do so.¹⁴

¹² According to Exhibit C, the dates are approximate; the Haddads’ first payment will actually be due “30 days after the confirmation order becomes final.” Payments to Class 5 under the schedule would start two years after that—which seems to conflict with § 4.2(c) of the Plan, under which payments to Class 5 would start “on the 30-month anniversary of confirmation.”

¹³ It is unclear whether the Haddads are proposing to pay definite amounts, as opposed to minimum amounts, under the Plan. Exhibit C itself appears definite—whereas § 8.1 provides that “*all* [emphasis added] distributions from Timbercreek in excess of the Debtors’ expenses and tax obligations will be devoted to the Plan,” and § 4.2(c) provides that Class 5 “will be paid *no less than* [emphasis added] a total [of] \$542,844.21.”

¹⁴ David was also asked: “How much money is in the Timbercreek accounts now that is not going to be needed for an obligation of Timbercreek within the next 30 days?” He replied: “Approximately \$80,000.”

C. Classes 2 and 3: Priority and Secured Tax Claims

Class 2 consists of priority tax claims by the IRS, the Kansas Department of Revenue, and the Missouri Department of Revenue; Class 3 consists of a secured claim by the IRS. The Plan proposes to pay Classes 2 and 3 as follows:

Class	Claimant	Claim	Treatment
Class 2, Priority Tax Claims	IRS	\$101,738.48	Amortized over 2 years at 3.33% interest, with payments of \$17,624.03 every 4 months.
Class 2, Priority Tax Claims	Kansas Department of Revenue	\$51,731.64	Amortized over 2 years at 3.33%, with payments of \$8,961.41 every 4 months.
Class 2, Priority Tax Claims	Missouri Department of Revenue	\$1,850.18	Paid in full on Effective Date.
Class 3, IRS Secured Debt	IRS	\$123,303.08	Amortized over 2 years at 3.33%, with payments of \$21,359.64 every 4 months.

When the Plan was filed on February 6, 2022, the KDOR had filed only one priority claim (for \$51,731.64, as in the above table). However, the KDOR filed a number of additional claims ten days later. David testified that all but around eight or nine thousand dollars of that additional debt had been (or was about to be) paid. While the KDOR did subsequently amend several of its claims down to zero, its priority claims now total \$96,405.68 as filed.

D. Class 4: Stock Pledge (Citizens Bank)

A single claim by Citizens Bank and Trust spans Classes 4 and 5. The claim arises out of a loan from Citizens Bank to Winstead's that the Haddads pledged their Winstead's stock to secure and personally guaranteed. Class 4, which is not at issue, deals with the stock-pledge portion.¹⁵ The pledge acts as a lien on the stock for the Winstead's loan (which had a balance of around \$408,000 when the Haddads filed for bankruptcy in August 2021).

E. Class 5: General Unsecured Claims

Class 5 consists of general unsecured claims, including the Haddads' personal guarantee of the Winstead's loan. Section 4.2(c) of the Plan provides:

Debtors estimate that Class 5 claimants will be paid no less than a total **\$542,844.21** in nine installments, commencing on the 30-month anniversary of confirmation after payment of the Class 2 Priority Claims in full, and continuing every four months thereafter. Debtors will segregate the funds for payment of Class 5 claims in a separate account as they accrue.

David testified that § 4.2(c) uses the phrase "no less than" because the Haddads' accountant is working on amending their prior income tax returns, and that if the amended returns decrease the Haddads' Class 2 priority tax debt, payments to Class 5 will increase by the same amount.

¹⁵ More specifically, Class 4 provides that if Winstead's fails to pay the loan in full through its own Chapter 11 plan (under which Citizens Bank receives \$8,858 a month), the Haddads will execute a non-recourse promissory note in favor of Citizens Bank, secured by their stock in Winstead's, for the unpaid amount.

Class 5 is impaired under, and has not accepted, the Plan.¹⁶ All of the creditors who object to confirmation of the Plan are in Class 5.

F. Other Tax Debts (Timbercreek, Winstead's, and the Haddads)

David testified that Timbercreek had around \$100,000 of past-due payroll tax debt, adding that Timbercreek had the money to pay those taxes and would do so within a week of the hearing.¹⁷ He explained that Timbercreek's unpaid taxes had always been caused by a lack of time, not a lack of money. David testified that Winstead's also had around \$100,000 in past-due tax debt.

As to the Haddads' personal income taxes, David (who is an attorney-in-fact for his parents) testified that their tax preparer had filed an extension for the 2021 returns; that the 2021 returns had not been filed yet; that David didn't know what the Haddads would owe for 2021; and that he didn't believe the Haddads had

¹⁶ See Amended Ballot Report, ECF 201; *cf.* 11 U.S.C. §§ 1124, 1126(c).

¹⁷ David's cross-examination included the following exchange:

Q. Would that wipe out the 80,000 that's sitting there—

A. No.

...

Q. So you have a hundred thousand sitting there to pay the Timbercreek federal withholding, just haven't gotten to it?

A. Correct.

already paid in any taxes for that year.¹⁸ As to the Haddads' 2020 income taxes, David testified that he was "pretty sure" returns had been filed but that he didn't know the status of any taxes owed.¹⁹

G. Asset Valuation

Section V(a) of the Plan values Nabil's interest in Timbercreek at \$100,000, reasoning that the company "has over \$1.4 Million in secured debt." Nabil agreed, testifying that Timbercreek is worth "maybe a hundred thousand."²⁰

Section V(a) of the Plan values the Haddads' stock in Winstead's at zero, reasoning that the company "is less than one year into a seven-year Chapter 11 Plan of Reorganization,²¹ and the stock has been pledged to Class 4 Creditor Citizen's Bank and Trust, which is owed over \$408,000." Nabil agreed that the Winstead's stock is worth "not much—nothing," reasoning that Winstead's has "seven years of payments in the bankruptcy." David did not offer an opinion about

¹⁸ Nabil similarly testified that his 2021 taxes had not been fully paid and that he didn't know how much he owed.

¹⁹ A debtor-in-possession in a small business case must attach either (A) his most recent federal income tax return, or (B) a statement made under penalty of perjury that no such return was filed, to his bankruptcy petition. *See* 11 U.S.C. § 1116(1). Citing § 1116(1)(B), the Haddads have filed an affidavit stating that the return "will be filed along with [their] bankruptcy petition," *see* ECF 4 ¶ 3, but do not appear to have filed the 2020 return itself.

²⁰ Although Nabil referenced an "appraisal" of Timbercreek as support for his testimony, and although footnote 4 of the Plan states that "[u]pon request, Debtors will email a copy of a recent, independent appraisal valuing [Timbercreek] at zero," Debtors have not provided such appraisal(s) to the Court.

²¹ The Winstead's plan was confirmed on March 31, 2021. *See* Case No. 20-20288, ECF 212.

the value of the stock but testified that Winstead's had \$550,000 in assets when its Chapter 11 plan was confirmed in 2021.

Nabil testified that a potential buyer had offered \$1.25 million or \$1.5 million for Winstead's two years earlier. Similarly, David testified that a buyer had offered around \$1.5 million for Winstead's about two or three years before.

In addition to their interests in Timbercreek and Winstead's, the Haddads have \$22,094 in other nonexempt assets.

III. Analysis

Although Class 5 has not accepted the Plan, section 1191(b)²² allows plan confirmation over the objection of an impaired class. Under § 1191(b), the Haddads must demonstrate by a preponderance of the evidence²³ that the Plan meets the requirements of § 1129(a) other than paragraphs (8), (10), and (15); does not discriminate unfairly; and is fair and equitable as to Class 5.

²² Section 1191(b) provides:

Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

²³ See *Magnet Media, Inc. v. Jubber (In re Paige)*, 685 F.3d 1160, 1177 (10th Cir. 2012).

A. Section 1129(a)(7): Best-Interests-of-Creditors Test

Section 1129(a)(7)²⁴ is known as the liquidation test, or the best-interests-of-creditors test. It requires the Haddads to show that the objecting creditors in Class 5 will receive at least as much under the Plan as they would in a hypothetical Chapter 7 liquidation of the Haddads' non-exempt assets.

The Haddads argue that liquidation of their non-exempt assets would yield \$100,000 for Timbercreek, nothing for Winstead's, and \$22,094 for their other assets—a total of \$122,094. Reasoning that Class 5 would therefore receive nothing in a hypothetical Chapter 7 liquidation (because the entire \$122,094 would go to the IRS's \$123,303 secured claim), whereas Class 5 will receive \$542,843 under the Plan,²⁵ the Haddads argue that the Plan satisfies the best-interests-of-creditors test as to Class 5.

²⁴ Section 1129(a)(7) requires that:

With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) 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 of this title on such date

²⁵ The Haddads' liquidation analysis, *see* Plan Ex. A, compares the zero dollars that Class 5 would receive in a hypothetical Chapter 7 liquidation to the \$542,843 that Class 5 will receive under the Plan. However, section 1129(a)(7) does not ask for a total dollar amount; it asks for the "value" of that amount "as of the effective date of

The problem is that the Court does not have enough evidence about the value of the Haddads' nonexempt assets—namely, Timbercreek and Winstead's—to make that determination. According to the Haddads, Timbercreek is worth \$100,000 because it has \$1.4 million in debt. But their conclusion is a *non sequitur*. Although there are a variety of ways to value a company (such as book value or the discounted cash flow method),²⁶ the Court is unaware of any method in which a company's value is a function of its debt alone. Creditors and the Court need to know *how* the Haddads valued Timbercreek (i.e., their method of valuation) and *all* of the inputs (i.e., numbers and/or assumptions) they used to do so.

The same is true for Winstead's. According to the Haddads, their Winstead's stock is worthless because (1) Winstead's is operating under its own Chapter 11 plan; (2) that plan valued Winstead's assets at \$550,000 at confirmation; and (3) the Winstead's stock is subject to Citizens Bank's \$408,000 lien. But again, the

the plan"—i.e., the *discounted present value* of the payments. *See, e.g., In re Hockenberry*, 457 B.R. 646, 653 (Bankr. S.D. Ohio 2011) (citing *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 & n.10 (2004)). While this distinction makes no difference to the outcome of the Haddads' liquidation analysis as stated in the Plan (since the present value of the payments to Class 5 would be greater than zero with any nonzero discount rate), it could make a difference if the inputs to the analysis change.

N.B.: One can easily calculate the discounted present value of a payment stream using the NPV function in Microsoft Excel. *See NPV Function*, <https://support.microsoft.com/en-us/office/npv-function-8672cb67-2576-4d07-b67b-ac28acf2a568> (last visited Aug. 1, 2022). Other useful Excel functions include PMT (which calculates a payment amount using interest rate, number of payments, and present value) and NPER (which calculates the number of payments using interest rate, principal amount, and present value).

²⁶ *See, e.g.,* Hon. Christopher S. Sontchi, *Valuation Methodologies: A Judge's View*, 20 Am. Bankr. Inst. L. Rev. 1, 2 (2012).

Haddads' conclusion does not (necessarily) follow from their premises. Are all companies in Chapter 11 worth nothing? Do the Haddads no longer believe that the Winstead's plan is feasible, i.e., that it offers at least a reasonable assurance of success? Do they believe that Winstead's assets, worth \$550,000 in 2021, will be worth nothing at the end of Winstead's plan?²⁷ How does Citizens Bank's \$408,000 lien on the Winstead's stock affect its liquidation value?²⁸

This is not to say that the Plan is necessarily *wrong* to value Timbercreek at \$100,000 and the Winstead's stock at \$0—only that the Haddads have not provided enough evidence for creditors and the Court to determine whether those values are *right*. To borrow a phrase from math class: the Haddads need to show their work. Until then, the Court cannot find that the Plan satisfies § 1129(a)(7).

²⁷ For instance: assume that the Winstead's plan lasts for six more years, that the Winstead's plan has a 75% chance of success, and that Winstead's will consist of nothing but goodwill worth \$500,000 at the end of its plan. Under those assumptions, and with a discount rate of n , wouldn't a rational investor be willing to pay $0.75(\$500,000/(1+n)^6)$ for Winstead's now?

²⁸ The Haddads argue that “unsecured creditors would not realize anything from the sale of the Winstead's stock unless it was valued (and sold) for more than \$408,000 because the first \$408,000 in proceeds would go to Citizen[s] Bank.” ECF 193 at 8-9. But paying the first \$408,000 in proceeds to Citizens Bank also means paying off Winstead's \$408,000 debt; the money would—in effect—be reinvested into Winstead's. That means that if the Winstead's stock were sold, the lien would have two effects: it would decrease proceeds to unsecured creditors (by diverting money to Citizens Bank), but it would also *increase* those proceeds (by reinvesting the money into Winstead's itself, thus increasing what the buyer was willing to pay for the stock in the first place). The Haddads' argument speaks only to the first effect—which may be why Frontier Farm Credit argues, *see* ECF 160 ¶ 6, that the Haddads' calculation “counts the \$408,000 CBT lien twice.”

B. Section 1129(a)(9)(C): Priority Tax Claims Under § 507(a)(8)

Under §1129(a)(9)(C)(i),²⁹ a Chapter 11 plan must pay priority tax claims in full unless the claimholder agrees to different treatment. The Haddads argue that the Plan will pay priority tax claims (i.e., Class 2) in full.

The problem is that the Plan proposes to pay the KDOR only \$51,731.64 (plus interest) on priority tax claims that total \$96,405.68 as filed. Although David's testimony suggests that some of the difference may have already been paid, claims are deemed allowed unless a party in interest objects. *See* 11 U.S.C. § 502(a). And a request to determine the amount of a priority claim may be made only by motion or in a claim objection. *See* Fed. R. Bankr. P. 3012(b). Since the Haddads have neither objected to allowance of the KDOR's claims nor filed a motion to determine the priority amount of those claims, the Court must use the as-filed amount to determine whether the Plan satisfies § 1129(a)(9)(C). Because the Haddads have not established that the KDOR has agreed to receive less than full payment of its

²⁹ Section 1129(a)(9)(C)(i) requires:

Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim

priority tax claims as filed,³⁰ the Court cannot find that the Plan satisfies § 1129(a)(9)(C).

C. Section 1129(a)(11): Feasibility

Section 1129(a)(11)³¹ requires a plan proponent to show that the plan is “feasible.” *See FB Acquisition Prop. I, LLC v. Gentry (In re Gentry)*, 807 F.3d 1222, 1225 (10th Cir. 2015). “[A] feasible plan is not a guarantee of success but rather offers a reasonable assurance of success.” *Id.* (citing *In re Ames*, 973 F.2d 849, 851 (10th Cir. 1992)).

Because the Haddads intend to fund the Plan with Timbercreek’s profits, they have submitted the Projections—i.e., projections of Timbercreek’s future performance—as evidence of feasibility. Ordinarily in a Chapter 11 case, creditors and the Court can compare a plan’s projections with the debtor’s past performance and monthly operating reports to determine whether the projections are realistic, and thus whether the debtor’s proposed Chapter 11 plan is feasible. But the monthly operating reports filed by the Haddads reflect only their own cash flow—i.e., how they spend their Social Security income and biweekly \$3,750 Timbercreek distributions. And the Haddads will not fund the Plan with their biweekly

³⁰ The Court notes that because the KDOR did not vote on the Plan and did not object to confirmation, the KDOR is deemed to have “accepted” the Plan for purposes of § 1129. *See Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.)*, 836 F.2d 1263 (10th Cir. 1988).

³¹ Section 1129(a)(11) requires that “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.”

distributions—they will fund the Plan with the profits that remain in Timbercreek *after* those distributions. Because the Haddads’ monthly operating reports say nothing about *Timbercreek’s* cash flow, those reports are largely (if not entirely) irrelevant as to the accuracy of the Projections or the feasibility of the Plan.

The only evidence of Timbercreek’s past performance is a single sentence in the Plan: “Timbercreek Bar & Grill had net profit of \$158,534 in 2018, \$216,741 in 2019, and \$251,236 in 2020.”³² And the only evidence of Timbercreek’s current performance is David’s testimony that Timbercreek’s net profits during the first four months of 2022 were “within \$5,000” of the total projected amount, which the Court calculates as \$86,026.³³ But within \$5,000 of \$86,026 in which direction? And how much money was actually available for the Plan during that time? David’s testimony did not address those questions—although his lack of specificity and Timbercreek’s past-due tax debt both suggest that his answers might not have been favorable.

During closing arguments, and perhaps by way of explaining why they have provided so little information regarding Timbercreek, the Haddads pointed out that Timbercreek itself is not in bankruptcy. While that is the case, it is also the case

³² Plan § 2.1(b). While David testified that Timbercreek’s “annual consolidated income statements” are the source of the profit figures in § 2.1(b), the Haddads have not provided those income statements, or cash flow statements, or their own income tax returns, or any other supporting documentation. Nor have they explained whether those figures take Timbercreek’s \$100,000 of past-due tax debt into account.

³³ The Projections anticipated that Timbercreek would have net profits of \$13,425 in January 2022; \$8,721 in February; \$25,009 in March; and \$38,871 in April, for a total of \$86,026. *See* Plan Ex. B.

that the Plan’s feasibility depends entirely on Timbercreek’s performance. Because feasibility hinges on Timbercreek, its operations cannot remain in a black box. Without additional evidence regarding Timbercreek’s performance, cash flow, and outstanding tax debt, the Court cannot find that the Plan offers a reasonable assurance of success—i.e., that the Plan is feasible under § 1129(a)(11).

D. The Haddads’ 2021 Income Tax Debt

Neither the Haddads’ budget nor the Plan provides for payment of the Haddads’ 2021 income tax debt. Such debt may create a payment-of-priority-claims issue under § 1129(a)(9)(A) and/or (C),³⁴ a feasibility issue under § 1129(a)(11), or both. Without an explanation of how and when the Haddads intend to pay their 2021 income taxes, the Court cannot find that the Plan satisfies §§ 1129(a)(9) and (11).

E. Section 1191(b): Unfair Discrimination

Section 1191(b) requires the Haddads to show that the Plan does not “discriminate unfairly” as to Class 5. The objecting creditors argue that the Plan is unfair because Class 5 will not receive any payments during the first 30 months of the Plan, during which Classes 2 and 3 will be paid in full.³⁵ The Haddads respond that there are two reasons why such treatment is not unfair: first, that paying

³⁴ “Courts have wrestled with how to treat a claim for income tax for the tax year that straddles the petition date.” 4 *Collier on Bankruptcy* ¶ 503.07[2][a][ii] (Richard Levin & Henry J. Sommer eds., 16th ed.).

³⁵ See ECF 160 ¶ 9 (arguing that “payments should commence prior to May 1, 2024”); ECF 171 ¶ 5 (arguing that for Class 5 to receive no payment for 30 months “appears unfair to Class 5 in violation of 11 U.S.C. § 1191(b)”).

Classes 2 and 3 first will increase overall distributions to Class 5 “because there is less interest paid”; and second, that earlier payments to Class 5 would be so small that they would be neither “administratively feasible” nor “efficient.”

The objecting creditors offer no support for their position that making Class 5 wait two and a half years for payment constitutes unfair discrimination under § 1191(b). But the Haddads’ pro-fairness position is likewise unsupported. Their first argument overlooks the time value of money. *Cf. supra* note 24 (distinguishing between total dollar amount and discounted present value of a payment stream). And their second argument provides no information about the hypothetical infeasible payments to Class 5. (How much would the payments be? How were those amounts calculated? When would they occur? What would make them inefficient or infeasible?) Because the Haddads have the burden to show that the Plan does not discriminate unfairly as to Class 5, and because they have not adequately explained why it is fair to make Class 5 wait more than two years for payment while Classes 2 and 3 are paid in full, the Court cannot find that the Plan satisfies the unfair-discrimination element of § 1191(b).

F. Section 1191(c): Fair and Equitable

Section 1191(b) requires that the Plan be “fair and equitable” to Class 5.

Under § 1191(c),³⁶ to establish that the Plan is fair and equitable, the Haddads must show that (1) they will pay all of their “projected disposable income” into the Plan; (2) there is at least a reasonable likelihood that they will be able to make all payments under the Plan; and (3) the Plan provides appropriate remedies for nonpayment.

³⁶ Section 1191(c) provides:

For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:

. . .

(2) As of the effective date of the plan—

(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan

(3) (A) (i) The debtor will be able to make all payments under the plan; or

(ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

(B) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

1. Projected disposable income

The objecting creditors argue that the Plan is not fair and equitable under § 1191(c) because the Haddads did not include their Social Security benefits (which as of May 2022, were \$3,375.80 a month combined) in calculating their projected disposable income.³⁷ The Haddads respond that it is “well-settled” that “projected disposable income” does not include Social Security.

The Court agrees that projected disposable income does not include Social Security—in Chapter 13 and non-small-business Chapter 11 cases. In those cases, a debtor’s disposable income is defined in terms of his “current monthly income,”³⁸ which, as defined by § 101(10A), specifically excludes Social Security benefits. But because this is a subchapter V case, different provisions apply.

In a subchapter V case, section 1191(d) defines a debtor’s disposable income not by his “current monthly income,” but by his “income.”³⁹ The Bankruptcy Code does not define “income,” so the Court must look to the ordinary meaning of the term. *Cf. Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (“Because the Code does not define ‘applicable,’ we look to the ordinary meaning of the term.”) (citing *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010)). The ordinary meaning of

³⁷ ECF 171 ¶ 7; ECF 160 ¶ 4.

³⁸ *See* 11 U.S.C. §§ 1129(a)(15), 1325(b)(2).

³⁹ *Compare* 11 U.S.C. § 1191(d) (“For purposes of this section, the term ‘disposable income’ means the *income* that is received by the debtor and that is not reasonably necessary to be expended”) (emphasis added), *with* 11 U.S.C. § 1325(b)(2) (“For purposes of this subsection, the term ‘disposable income’ means *current monthly income* received by the debtor . . . less amounts reasonably necessary to be expended”) (emphasis added).

“income” is “a gain or recurrent benefit usu. measured in money,”⁴⁰ which would include Social Security payments.⁴¹ Accordingly, the Court holds that the Haddads must include their Social Security in calculating their projected disposable income for purposes of § 1191(c).⁴²

This does not mean that the Haddads must necessarily pay those benefits to their creditors as a condition of plan confirmation. According to § 8.1 of the Plan, the Haddads intend to save their Social Security benefits “as a cushion for unexpected medical expenses.” If they still wish to do so (without reducing their planned distributions from Timbercreek), they should provide evidence that such a “cushion” is “reasonably necessary to be expended” for one of the purposes set forth in § 1191(d).⁴³ As of now, though, because the Haddads omitted Social Security from their calculations, they have not demonstrated that all of their projected disposable income will be applied to make plan payments.

⁴⁰ *Income*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2020).

⁴¹ The official form for Schedule I, which all individual debtors must complete, likewise includes Social Security benefits as a component of income. See Official Form 106I (“Schedule I: Your Income”) (including Social Security under “all income regularly received”). Indeed, bankruptcy courts routinely refer to such benefits as “Social Security income”—the Court’s Westlaw search for the phrase “social security income” yielded 474 bankruptcy cases as of August 24, 2022.

⁴² Was this an oversight by the drafters of § 1191? Maybe. But the Court “must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Wadsworth v. Word of Life Christian Ctr. (In re McGough)*, 737 F.3d 1268, 1273 (10th Cir. 2013) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

⁴³ I.e., for the Haddads’ maintenance and support, or for the continuation, preservation, or operation of their businesses.

2. Reasonable likelihood of ability to make payments

Without additional evidence regarding Timbercreek's performance, cash flow, and outstanding tax debt, and the Haddads' 2021 personal income taxes, *see supra* §§ III(B)-(D), the Court cannot find a reasonable likelihood that the Haddads will be able to make their plan payments.

3. Appropriate remedies

Section 12.2 of the Plan provides for liquidation of the Haddads' non-exempt assets if they fail to cure a payment default. In the absence of any argument from the objecting creditors as to why this provision is insufficient, the Court finds that the Plan provides appropriate remedies for nonpayment.

4. The Haddads have not established that the Plan is fair and equitable to Class 5

Because the Haddads have not established (1) that they will apply all of their projected disposable income to plan payments or (2) a reasonable likelihood that they would be able to make those payments, the Court cannot find that the Plan is fair and equitable to Class 5 under § 1191(b).

IV. Conclusion

For the reasons stated above, the Court finds that the Haddads have failed to prove, by a preponderance of the evidence, that the Plan (1) satisfies 11 U.S.C. §§ 1129(a)(7), (9), and (11); (2) does not discriminate unfairly as to Class 5; and (3) is fair and equitable as to Class 5. If the Haddads would like to submit an amended plan, they may do so within 45 days of the date of this order.

IT IS SO ORDERED.

###