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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 FR 160 LLC,

10 Appellant,

11 v.

12 Flagstaff Ranch Golf Club, et al.

13 Appellees.

No. CV-13-08180-PCT-GMS

**ORDER**

14 Pending before this Court are the briefs in FR 160's appeal from the bankruptcy  
15 court (Docs. 37, 43) and Flagstaff Ranch Golf Club's cross appeal (Docs. 42, 44).<sup>1</sup> For  
16 the reasons set forth below, the appeal is denied, and the cross appeal is dismissed as  
17 moot.

18 **BACKGROUND**

19 FR 160, LLC, owns 50 residential lots and a tract of land in Flagstaff, Arizona. Its  
20 largest creditor is the Flagstaff Ranch Golf Club ("Golf Club"). (Docs. 38–41, 44  
21 (collectively "AR") 21–22.) Previous litigation between FR 160 and Golf Club produced  
22 a Settlement Agreement under which FR 160 delivered to Golf Club promissory notes  
23 totaling \$5,310,000, secured by the real property. (*Id.*) In return, Golf Club placed certain  
24 golf club memberships in escrow. (AR 23.) FR 160 eventually ceased paying the money  
25 it owed to various entities including membership dues to Golf Club, dues to the Flagstaff

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27 <sup>1</sup> FR 160 requested oral argument on this motion. (Doc. 9.) The request is denied  
28 because the parties have had an adequate opportunity to discuss the law and evidence and  
oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Grp.,  
Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 Ranch Property Owners Association (“Owners Association”), and wastewater  
2 assessments to the Flagstaff Ranch Mutual Waste Water Company (“Waste Water  
3 Company”). (AR 79.) Golf Club sought to foreclose on the deeds of trust, but FR 160  
4 filed a voluntary bankruptcy petition on June 12, 2012. (AR 23, 79.)

5 The bankruptcy court rejected FR 160’s first plan of reorganization in January  
6 2013. FR 160 sought to amend its plan of reorganization and maintain the automatic stay  
7 under 11 U.S.C. § 362(a) that prevented Golf Club from foreclosing on the real property.  
8 The bankruptcy court agreed to extend the stay but also entered an Adequate Protection  
9 Order. (AR 286–87.)

10 FR 160 filed an amended plan of reorganization on April 1, 2013. (AR 337–77.)  
11 On June 18, 2013, the bankruptcy court held a one-day trial, and on June 25 the court  
12 rejected the amended plan. (AR 8–19, 434–35.) In doing so, the court made four  
13 determinations, all of which are challenged by the parties on appeal and cross appeal.  
14 (AR 8–19.) First, the court determined “that a plan can be confirmed under  
15 1129(b)(2)(A)(i) that reinstates a lien release provision even if it terminated prepetition  
16 due to default or for that matter maturity of the debt without violating *RadLAX*.” (AR 10.)  
17 The remaining determinations were all reasons why the plan could not be confirmed.  
18 Two of the three involved the requirement for FR 160 to have an impaired accepted class  
19 under 11 U.S.C. § 1129(a)(10).

20 In its second determination, the bankruptcy court found that Owners Association  
21 and Waste Water Company, Class 8, should have been included in the general unsecured  
22 creditor class, Class 12. (AR 11.) The court found that FR 160 had not met its burden to  
23 show how the claims of Owners Association and Waste Water Company are dissimilar  
24 from those other creditors. (AR 11–12.) It further concluded that the resulting combined  
25 class would not have accepted the plan. (AR 12.)

26 The bankruptcy court’s third determination was that NWRA Ventures I, LLC  
27 constituted “an insider, at least for purposes of 1129(a)(10).” (AR 12.) NWRA is the  
28 senior secured lender of Investors Mortgage Holdings Financial Corporation (“IMH”),

1 which is the parent company of FR 160. (AR 1003–07.) NWRA approved IMH’s annual  
2 budget and the annual budget of its subsidiaries including FR 160. (*Id.*) It also approved  
3 any variances to those budgets and was therefore involved in the approval of the amended  
4 plan at issue here. (*Id.*) The court found it was an insider “based upon the relative control  
5 that NWRA has over this plan of reorganization, which I think is the relevant issue, the  
6 Debtor argued, hey, NWRA doesn’t have any control over the day-to-day operation of  
7 the Debtor, and that’s undoubtedly true.” (AR 12.) It found that NWRA is a non-statutory  
8 insider because its dealings with FR 160 were not really arms-length. (AR 12–13.)

9 The bankruptcy court’s fourth and final determination was that the plan did not  
10 satisfy the absolute priority rule because the new value contribution was *de minimis*. (AR  
11 13–14.) IMH planned to provide \$500,000 in cash to FR 160 as part of the plan, but the  
12 court found that “[m]ost of the money will go to payment of debts owed to NWRA and  
13 IMH, and that’s really not new capital in the sense of a recapitalization of the Debtor.”  
14 (*Id.*) The court treated that money as a forgiveness of a debt and did not consider it as  
15 new capital. (*Id.*) The bankruptcy court held that “the balance of the funds . . . are de  
16 minimis and, therefore, that this plan does not satisfy the new value corollary to the  
17 absolute priority rule.” (*Id.*)

18 FR 160 filed a motion seeking permission from this Court to appeal from that  
19 ruling, and Golf Club requested that it be allowed to cross appeal if the appeal was  
20 granted. (Doc. 2, 8.) This Court granted both the request for appeal and cross appeal.  
21 (Doc. 35.) The matter is now fully briefed. (Docs. 37–45.)

## 22 DISCUSSION

### 23 I. Jurisdiction

24 District courts must accept appeals from final decisions of bankruptcy courts, and  
25 they have discretionary authority to accept interlocutory appeals. *In re City of Desert Hot*  
26 *Springs*, 339 F.3d 782, 787 (9th Cir. 2003). This Court explained in its order granting  
27 leave to appeal that in this matter it has either mandatory jurisdiction under 28 U.S.C. §  
28 158(a)(1), or it accepts discretionary jurisdiction under § 158(a)(3). (Doc. 35.)

1     **II.     Standard of Review**

2             On appeal, courts review a “bankruptcy court’s findings of fact under the clearly  
3 erroneous standard and review its conclusions of law de novo.” *See In re Johnston*, 21  
4 F.3d 323, 326 (9th Cir. 1994). “The bankruptcy court’s factual determination is clearly  
5 erroneous if it is illogical, implausible, or without support in the record.” *See United*  
6 *States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009).

7             In general, a bankruptcy court makes a finding of fact when it determines whether  
8 claims are substantially similar, *In re Barakat*, 99 F.3d 1520, 1523 (9th Cir. 1996), or the  
9 insider status of a third party, *In re Friedman*, 126 B.R. 63, 67 (B.A.P. 9th Cir. 1991).  
10 Bankruptcy courts must have discretionary power and broad latitude to weigh the facts  
11 before them and the Ninth Circuit has reiterated that whether “a claim is or is not  
12 substantially similar to other claims, constitutes a finding of fact reviewable under the  
13 clearly erroneous standard.” *In re Johnston*, 21 F.3d at 327.

14             However, when an appeal focuses on a legal issue underlying the bankruptcy  
15 court’s otherwise factual determination, the legal issue is reviewed *de novo*. *Id.*  
16 (addressing whether the law places “any limitation on the separate classification of  
17 similar unsecured claims”); *cf. In re Loop 76, LLC*, 465 B.R. 525, 536–41 (B.A.P. 9th  
18 Cir. 2012) (addressing whether the law allows the bankruptcy court to consider a third-  
19 party source for payment in determining the similarity of claims). Similarly, “whether the  
20 bankruptcy court applied the correct legal standard” is a question of law that the courts  
21 review *de novo*. *In re Welsh*, 465 B.R. 843, 847 (B.A.P. 9th Cir. 2012) *aff’d*, 711 F.3d  
22 1120 (9th Cir. 2013). Finally, mixed questions, involving both law and fact, are reviewed  
23 *de novo*. *In re Chang*, 163 F.3d 1138, 1140 (9th Cir. 1998).

24     **III.     Issues on Appeal**

25             A bankruptcy court can only approve a plan if it meets all of the requirements of  
26 the Bankruptcy Code. FR 160 appeals three determinations that the bankruptcy court  
27 made about why the plan did not meet those requirement and Golf Club cross appeals  
28 that the plan should have also been rejected for failing to meet another requirement.

1           The first two issues on appeal concern the requirement from 11 U.S.C. §  
2 1129(a)(10) that when there are any impaired classes of claims in a plan, at least one  
3 impaired class must accept the plan and that class cannot be an insider. The Parties agree  
4 that the plan has impaired classes, and therefore, FR 160 needs to show that at least one  
5 impaired class accepted its plan and that the accepting class was not an insider.

6           The first issue is whether FR 160's plan permissibly segregated the impaired  
7 claims of Owners Association and Waste Water Company, who rejected the plan, into a  
8 separate class from the class of similar unsecured creditors that accepted the plan. The  
9 second issue is whether the bankruptcy court properly determined that NWRA was an  
10 insider whose acceptance does not satisfy the requirement.

11           In order to merit a reversal and remand, FR 160 must prevail on one of these first  
12 two claims because it needs at least one qualified accepting vote. If it does, then it also  
13 must prevail on its third issue, that its plan does not violate the absolute priority rule. Golf  
14 Club's cross appeal argues an independent basis upon which the plan could be rejected  
15 under *RadLAX* but that only become relevant if FR 160 prevails on its appeal.

#### 16 **IV. Classification of Parties**

17           The Bankruptcy Code provides that claims may only be placed together in the  
18 same class if they are "substantially similar." 11 U.S.C. § 1122(a). Based on other  
19 provisions and purposes of the Code, Courts have implied a corollary edict that "thou  
20 shalt not classify similar claims differently in order to gerrymander an affirmative vote on  
21 a reorganization plan." *In re Barakat*, 99 F.3d at 1526.

22           The Ninth Circuit has a two-pronged analysis for determining whether claims have  
23 been permissibly separated into different classes. *In re Loop 76*, 465 B.R. at 536-37. The  
24 trial court should determine (1) whether the claims are substantially similar, and (2) if so,  
25 whether there is a business justification for separately classifying them. *Id.* If the claims  
26 are not substantially similar, their separate classification is not only permissible, but  
27 required under § 1122(a). If the claims are substantially similar, that implicates the  
28 gerrymandering concern, but the debtor may still separately classify them "if the debtor

1 can show a business or economic justification for doing so.” *Id.* (citing *In re Bakarat*, 99  
2 F.3d. at 1526).

3 Here, the bankruptcy court found that the claims of Owners Association and  
4 Waste Water Company in Class 8 were substantially similar to the other unsecured  
5 claims in Class 12, and therefore, they could not be separately classified. FR 160 first  
6 appeals that determination under the first prong that the claims are substantially similar.  
7 That determination is a finding of fact that this Court reviews for clear error. During the  
8 hearing, the bankruptcy court said that “there is no evidence or at least the plan proponent  
9 did not carry a burden of proving that the claims are dissimilar.” (AR 11.) FR 160 argues  
10 that it presented evidence showing that Owners Association and Waste Water Company  
11 had another source of recovery because they could get money from Golf Club. If the  
12 bankruptcy court had unequivocally held that there was “no evidence” of dissimilarity,  
13 that might have been in error, but here the court restated and clarified that FR 160 “did  
14 not carry a burden of proving” any dissimilarity. FR 160 presented its evidence and  
15 argument about the alternative source for recovery to the bankruptcy court and Golf Club  
16 presented its rebuttal. This Court finds, based on the record and the summary of those  
17 arguments presented here, that the bankruptcy court did not clearly err in its factual  
18 determination that FR 160 did not carry its burden.

19 FR 160 next argues that the bankruptcy court made an error by stopping at the first  
20 prong of similarity. In its oral explanation of its ruling from the bench, the bankruptcy  
21 court did not separately address the second prong by making findings about whether there  
22 are business or economic justifications for the separate classification here. However, it  
23 repeatedly referenced *Bakarat*, and this Court will not assume that the bankruptcy court  
24 misapplied the legal test from that case. The proper question before this Court is whether  
25 it should reverse the bankruptcy court for failing to make factual findings for each of the  
26 prongs from *Bakarat*.

27 In bench trials, a court should “find the facts specially and state separately its  
28 conclusions of law thereon.” *Vance v. Am. Hawaii Cruises, Inc.*, 789 F.2d 790, 792 (9th

1 Cir. 1986) (quoting Fed. R. Civ. P. 52(a)); *see also In re Veal*, 450 B.R. 897, 919 (B.A.P.  
2 9th Cir. 2011) (citing *Vance* and noting that Rule 52 applies in adversary bankruptcy  
3 proceedings by incorporation through the bankruptcy rules). The purpose is to “aid the  
4 appellate court’s understanding of the basis of the trial court’s decision,” and that  
5 “purpose is achieved if the district court’s findings are sufficient to indicate the factual  
6 basis for its ultimate conclusions.” *Vance*, 789 F.2d at 792. The court in *Vance* held that  
7 failing to make such findings

8 does not require reversal unless a full understanding of the  
9 question is not possible without the aid of separate findings.  
10 *Alpha Distributing Co. v. Jack Daniel Distillery*, 454 F.2d  
11 442, 453 (9th Cir. 1972). We will affirm the district court if  
12 the findings are sufficiently comprehensive and pertinent to  
13 the issues to provide a basis for the decision, or if there can be  
14 no genuine dispute about omitted findings. *Magna Weld Sales  
15 Co. v. Magna Alloys & Research Party*, 545 F.2d 668, 671  
16 (9th Cir. 1976).

17 *Id.* As the Ninth Circuit reiterated more recently, even “[c]onclusory and unhelpful  
18 findings of fact do not necessarily require reversal if the record supports the district  
19 court’s ultimate conclusion.” *Simeonoff v. Hiner*, 249 F.3d 883, 891 (9th Cir. 2001); *see*  
20 *also In re Veal*, 450 B.R. at 919 (holding that appellate review may proceed based on the  
21 record as a whole even without formal findings).

22 There is no reason to assume error and reverse if the record as a whole and the  
23 findings the bankruptcy court did make support the ultimate conclusion. That ultimate  
24 legal conclusion here is that FR 160’s separate classification fails the *Bakar* test  
25 because the claims are similar and there is not an adequate business or economic  
26 justification to separately classify them. FR 160 argues that the Owners Association can  
27 be separately classified because it has a third-party source of recovery. It also argues that  
28 the other claims can be separated because they are nonrecurring. Golf Club argues that  
there can be no business or economic justification for separate classification where the  
plan treats both classes the same. Golf Club also argues that FR 160 is wrong to  
characterize them as nonrecurring because FR 160’s parent and sister companies continue

1 to use those same trade debtors.

2 The bankruptcy court's ultimate conclusion is supported by the record as a whole.  
3 That record shows that the judge ruled that "this plan . . . cannot be confirmed for lack of  
4 a proper accepting impaired class." The judge went on to "elaborate a little bit" and  
5 briefly explained from the bench the issues that were key to his decision. FR 160's  
6 proposed economic and business justifications parallel its arguments that the claims are  
7 not similar, and they were implicitly rejected by the court's finding under the first prong.

8 The BAP has held that there is no business or economic justification for separate  
9 classification when the separately classified claims are otherwise treated the same under  
10 the plan. *In re Montclair Retail Ctr., L.P.*, 177 B.R. 663, 665 (B.A.P. 9th Cir. 1995). That  
11 is the case here and FR 160 fails to distinguish this case from *Montclair* or provide  
12 contrary authority. Its reference to a bankruptcy court in another circuit is not controlling.  
13 *In re Loop 76*, is not comparable to this case because the bank was allowed to choose its  
14 treatment under the plan.

15 Here, the bankruptcy court's findings provide a basis for its decision. Further,  
16 there can be no dispute that the record establishes that the separate categories were not  
17 treated differently. Accordingly, no business or economic justification would have been  
18 served by their separate classification. The bankruptcy court did not abuse its discretion  
19 in its explicit determination under the first prong or its implicit resolution at prong two.  
20 This Court finds no reversible error in the bankruptcy court's legal determination that the  
21 plan failed to satisfy the test from *Bakarat*.

## 22 **V. Insider Status**

23 An insider's vote to confirm the plan does not fulfill the requirement of §  
24 1129(a)(10). The Bankruptcy Code provides a definition of insider that varies based on  
25 the type of debtor and includes different individuals who are insiders depending on  
26 whether the debtor is a person, corporation, partnership, or municipality. § 101(31).  
27 However, "the respective insider definitions do not attempt or purport to be all inclusive."  
28 *In re Friedman*, 126 B.R. 63, 69 (B.A.P. 9th Cir. 1991). An insider can either fall into

1 one of these *per se* classifications listed in the statute, or be a non-statutory insider who  
2 has a “professional or business relationship with the debtor . . . where such relationship  
3 compels the conclusion that the individual or entity has a relationship with the debtor,  
4 close enough to gain an advantage attributable simply to affinity rather than to the course  
5 of business dealings between the parties.” *Id.* at 70. A creditor-debtor relationship that  
6 includes a degree of personal interaction does not automatically become an insider  
7 relationship “so long as the parties transact their business at arm’s length.” *Id.*

8 Other courts have described various standards for identifying such non-statutory  
9 insiders. One of the cases cited by FR 160 notes that “courts generally focus on two  
10 factors: (1) the closeness of the relationship between the parties; and (2) whether the  
11 parties’ transactions were conducted at arm’s length.” *In re Fourthstage Technologies,*  
12 *Inc.*, 355 B.R. 155, 159 (Bankr. D. Ariz. 2006). Another case cited by FR 160 similarly  
13 notes that “[t]he relevant inquiry is into the closeness of the relationship between the  
14 parties, and whether the transactions at issue were conducted at arm’s length.” *In re*  
15 *Greenwood Point, LP*, 445 B.R. 885, 897 (Bankr. S.D. Ind. 2011).

16 Here, FR 160 argues that the bankruptcy court created a unique definition for an  
17 insider within the context of § 1129(a)(10) that differs from the one used by courts when  
18 identifying insiders in other portions of the Bankruptcy Code. FR 160 argues that this is  
19 contrary to the general canon of construction that words should have the same meaning  
20 whenever they are used by Congress, and particularly so when they are used repeatedly  
21 within the same set of statutes. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1142  
22 (9th Cir. 2002). Specifically, FR 160 argues that the bankruptcy court should have  
23 considered only the level of day-to-day control that NWRA had over FR 160, which FR  
24 160 describes as the standard test of insider status in other parts of the Bankruptcy Code.  
25 Instead the bankruptcy court considered the control that NWRA had over FR 160 in  
26 relation to the proposal and approval of the plan, which FR 160 describes as a new test  
27 that is specific to § 1129(a)(10).

28 Although a repeated word in a statute is generally presumed to have the same

1 meaning, the word “insider” has been defined and interpreted in a way that takes into  
2 account both the parties involved and the transactions at issue. The statutory definition  
3 itself is not a one-size-fits-all definition, and it lists different insiders based on the  
4 identity of the debtor as an individual, corporation, partnership, or municipality.  
5 Therefore the first factor of the “relationship of the parties” is always a context-specific  
6 one which considers both the identity of the debtor and the identity of the potential  
7 insider. FR 160 does not contest the principle that the definition or standard for an insider  
8 varies based on the identity of the parties.

9         Instead, FR 160 argues that the bankruptcy court cannot change the definition or  
10 standard for an insider with respect to the second factor, the arm’s length nature of the  
11 transaction. FR 160 argues that the question should always be whether the parties’  
12 general day-to-day dealings with each other are at arm’s length. Although FR 160 cites  
13 the decision of an Arkansas bankruptcy court in support of this position, *In re Armstrong*,  
14 231 B.R. 746, 749–50 (Bankr. E.D. Ark. 1999), FR 160 also cites other court decisions,  
15 including one by the BAP, which are not as limited. In *In re Friedman*, the BAP  
16 considered “[t]he transaction that formed the basis for Friedman’s preference claim” and  
17 found “[t]here is no indication that the parties negotiated and executed [that transaction]  
18 at anything other than arm’s length.” 126 B.R. at 70. The other opinions cited by FR 160  
19 and quoted above also involved a consideration of control over the specific transaction at  
20 issue and not only the general day-to-day control. *See In re Fourthstage Techs.*, 355 B.R.  
21 at 160 (“With respect to . . . the challenged transfer” the alleged insider did not receive it  
22 “because of its affinity with the Debtor.”); *In re Greenwood Point*, 445 B.R. 885, 897  
23 (“whether the transactions at issue were conducted at arm’s length”). FR 160’s similar  
24 argument about the level of control that NWRA needs to have over FR 160 to constitute  
25 an insider is unavailing for the same reason. The court permissibly considered the level of  
26 control as to the transaction at issue rather than in general or on a day-to-day operational  
27 basis.

28         Further, it is not clear that the bankruptcy court created a new standard in this

1 context when it stated that NWRA was “an insider, at least for purposes of 1129(a)(10).”  
2 Courts often and prudentially limit their findings and holdings to avoid deciding matters  
3 that are not before them because of “the difficulty of interpreting the statute in a single  
4 opinion that would apply to all possible fact situations.” *Dewsnup v. Timm*, 502 U.S. 410,  
5 416 (1992). In *Dewsnup*, the Supreme Court was asked to decide what “allowed secured  
6 claim” meant throughout the Bankruptcy Code, but it only determined what the phrase  
7 meant in the case before it, leaving further development and application to other parts of  
8 the Bankruptcy Code for another day. *Id.* The bankruptcy court’s limiting language here  
9 is not an affirmative statement that NWRA is only an insider for purposes of §  
10 1129(a)(10), but rather a note that the court was only deciding the issue before it.

11 Here, the bankruptcy court correctly considered the two primary factors for  
12 identifying insiders that have been discussed in case law: the relationship between the  
13 parties and the arm’s length nature of the transaction. The court’s consideration of the  
14 arm’s length nature of the specific transaction at issue, the creation and approval of the  
15 plan, is consistent with *In re Friedman* and the other cases noted. Therefore, the  
16 bankruptcy court applied the correct legal standard in making its determination.

17 FR 160 states in its brief, that “FR 160’s issue on appeal is whether the  
18 Bankruptcy Court used the correct legal standard to evaluate the facts.” (Doc. 43 at 9–  
19 10.) Nevertheless, the parties both present arguments about the facts and which facts the  
20 bankruptcy court relied upon in reaching its conclusion. The only issue that FR 160 raises  
21 is whether the correct legal standard was applied and therefore the Court need not  
22 consider whether the bankruptcy court made a clear error in its factual determination.

### 23 CONCLUSION

24 The parties raised four issues on appeal and cross appeal but FR 160 needed to  
25 prevail on either issue one or two to show that it had an accepting class. This court found  
26 no reversible error as to the determination that the claims were improperly separated and  
27 that NWRA was an insider. Therefore, FR 160 does not prevail on either claim one or  
28 two and the Bankruptcy Court’s ruling is affirmed.

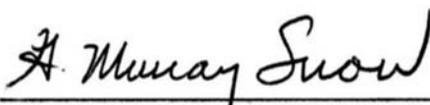
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**IT IS HEREBY ORDERED** that FR 160's appeal from the bankruptcy court is (Doc. 37) is **DENIED**.

**IT IS FURTHER ORDERED** that Flagstaff Ranch Golf Club's cross appeal (Doc. 42) is **DISMISSED AS MOOT**.

**IT IS FURTHER ORDERED** directing the Clerk of Court to terminate this action.

Dated this 18th day of July, 2014.

  
\_\_\_\_\_  
G. Murray Snow  
United States District Judge