

REVIEW OF MOTION

Lynn Porter and Donna Porter (“Debtor”) move for confirmation of a Chapter 12 plan requiring thirty-six monthly payments of \$3,300.00, beginning August 10, 2018. Debtor states that after those payments, they “will continue to make monthly payments directly to . . . Deutsche Bank, and USDA . . . on their secured claims, and on general unsecured claims.” Dckt. 24 at 1–2.

CHAPTER 12 TRUSTEE’S OPPOSITION

Jan Johnson (“the Chapter 12 Trustee”) filed an Opposition on July 16, 2018. Dckt. 27. The Chapter 12 Trustee argues that the Plan is infeasible and cannot be administered because it fails to specify if the claim of CarFinance.com will be paid by Debtor directly or by the Chapter 12 Trustee as part of the plan payment. He notes that Debtor’s declaration indicates that the Chapter 12 Trustee will make the payment as part of the plan payment, but the filing deadline for non-governmental units was June 7, 2018, and no proof of claim was filed for that creditor.

The Chapter 12 Trustee also opposes confirmation on the ground that the plan payment of \$3,300.00 is insufficient if it is supposed to include payment to CarFinance.com. Payment by the Chapter 12 Trustee would mean that plan payments need to be \$3,456.26, and direct payment by Debtor would mean that plan payments need to be \$3,358.26.

The Chapter 12 Trustee argues that the Plan is infeasible because it relies upon the court granting two motions to value for Deutsche Bank and USDA that have not been filed with the court, let alone ruled upon. A review of the docket shows that those motions have not been filed. The court cannot determine if the Plan is feasible without ruling on those necessary motions.

CREDITOR’S OPPOSITION

Deutsche Bank National Trust Company, Trustee, on behalf of the certificate holders of Morgan Stanley ABS Capital I Inc. Trust 2004-NC3, Mortgage Pass Through Certificates, Series 2004-NC3, its assignees and/or successors, by and through its servicing agent Select Portfolio Servicing, Inc., (“Creditor”) filed an Opposition on July 19, 2018. Dckt. 29. Creditor argues that Debtor has not filed a motion to value its claim, so the plan improperly bifurcates its claim into secured and unsecured.

Creditor also argues that the (improper) unsecured treatment proposed in the Plan is unfair because the Plan treats Creditor’s claim differently than it does other unsecured claims. 11 U.S.C. § 1222(a)(3). Specifically, Creditor notes that the proposal for its unsecured claim to be treated at 0% is different than USDA’s, which is proposed to receive a 20% dividend.

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 4.9%. Creditor’s claim is secured by a deed of trust on Debtor’s real property commonly known as 4249 Ellenwood Road, Oakdale, California. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the “formula approach” for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321

B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. As justification for raising the interest rate by 5.00%, Creditor argues that Debtor's default ranges back to October 2012, that no post-petition payments have been made, that no property taxes and insurance payments have been made; that the plan is cramming down the value of Creditor's claim; and that Debtor has bad credit. The court fixes the interest rate as the prime rate in effect at the commencement of the case, 4.75%, plus a ~~xxx~~% risk adjustment, for a ~~xxx~~% interest rate.

RULING

If the trustee or the holder of an allowed unsecured claim objects to confirmation of the Plan, then the court may not approve the Plan unless, as of the effective date of the Plan—

(A) the value of the property to be distributed under the Plan on account of such claim is not less than the amount of such claim;

(B) the Plan provides that all of Debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the Plan will be applied to make payments under the Plan; or

(C) the value of the property to be distributed under the Plan in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first distribution is due under the Plan is not less than Debtor's projected disposable income for such period.

(2) For purposes of this subsection, "disposable income" means income that is received by Debtor and that is not reasonably necessary to be expended—

(A) for the maintenance or support of Debtor or a dependent of Debtor or for a domestic support obligation that first becomes payable after the date of the filing of the petition; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of Debtor's business.

2. [18-90204-E-12](#) LYNN/DONNA PORTER
David Johnston

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
3-29-18 [1]

Final Ruling: No appearance at the August 2, 2018 status conference is required.

Debtors' Atty: David C. Johnston

The Status Conference is continued to 2:00 p.m. on September 27, 2018.

Notes:

Continued from 7/12/18 to be conducted in conjunction with the hearing on the Motion to Confirm a Plan in this case.

AUGUST 2, 2018 STATUS CONFERENCE

Debtor in Possession, Deutsche Bank National Trust Company, as Trustee, and the Chapter 12 Trustee having filed a Stipulation to continuing the hearing on the Motion to Confirm (Dckt. 32), and Debtor in Possession having filed a Status Report providing the court and parties in interest on what is being done to prosecute the case, the court continues the Status Conference.

3. [15-90811-E-7](#) ASSN., GOLD STRIKE CONTINUED STATUS CONFERENCE RE:
[16-9002](#) HEIGHTS HOMEOWNERS COMPLAINT
FARRAR V. MASSELLA ET AL 1-13-16 [1]

Final Ruling: No appearance at the August 2, 2018 status conference is required.

The Status Conference has been continued to 2:00 p.m. on January 10, 2018, by prior order of the court (Dckt. 70).

Plaintiff's Atty: Clifford W. Stevens
Defendant's Atty: James L. Brunello

Adv. Filed: 1/13/16
Answer: 2/23/16 [Robinson Enterprises Profit Sharing Plan]
 2/23/16 [Johnny Massella; Mary Massella]
Counterclaim Filed: 2/23/16 [Robinson Enterprises Profit Sharing Plan]
Answer: None
Counterclaim Dismissed 5/2/16
Counterclaim Filed: 2/23/16 [Johnny Massella; Mary Massella]
Answer: None
Counterclaim Dismissed 5/2/16

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 6/21/18 to allow the Parties the opportunity to consider such matters, the appeal, and whether they desire to stipulate to staying this Adversary Proceeding pending resolution of the appeal and the entry of the final judgment in the related adversary proceeding.

Stipulation to Stay Adversary Proceeding Pending Resolution of Related Litigation filed 7/26/18 [Dckt 69]

4. [18-90033](#)-E-7 SHIMON/DORIS KHAMO
[18-9004](#)
REDLINE AUTO SALES, INC. V.
KHAMO ET AL

STATUS CONFERENCE RE: AMENDED
COMPLAINT
6-1-18 [8]

Plaintiff's Atty: Steven S. Altman
Defendant's Atty: unknown

Adv. Filed: 5/2/18
Answer: none

Amd. Cmplt. Filed: 6/1/18
Answer: none

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury

The Status Conference is XXXXXXXXXXXXXXXXXXXX.

Notes:
Continued from 7/12/18. A stipulation for entry of judgment has been transmitted to Defendant-Debtor. If not settled, Plaintiff shall proceed with seeking the entry of a default judgment.

AUGUST 2, 2018 STATUS CONFERENCE

Plaintiff reported in its July 5, 2018 Status Conference Statement (Dckt. 14) that either a stipulated judgment would be entered or Plaintiff would seek entry of a default judgment. A review of the Docket as of the court's August 1, 2018 review discloses that neither has occurred.

At the Status Conference, Plaintiff reported XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

5. [18-90464-E-11](#) **PREMIER WEST COAST
PROPERTIES LLC
Mark Hannon**

**PRELIMINARY STATUS CONFERENCE
RE: VOLUNTARY PETITION
6-21-18 [1]**

Debtor's Atty: Mark J. Hannon

The Status Conference is XXXXXXXXXXXXXXXXXXXXXX.

Notes:

Preliminary Status Report of Premier West Coast Properties, LLC filed 7/16/18 [Dckt 16]

[MJH-1] Motion/Application to Retain and Employ Mark J. Hannon as Counsel for Debtor filed 7/19/18 [Dckt 18], set for hearing 8/2/18 at 2:00 p.m.

Trustee Report at 341 Meeting lodged 7/25/18. Meeting continued to 9/21/18 at 10:00 a.m.

AUGUST 2, 2018 STATUS CONFERENCE

At the Status Conference XXXXXXXXXXXXXXXXXXXXXX

Review of Schedules and Statement of Financial Affairs

The court reviewed the Petition and Schedules filed in this case, which have been signed by Brent Hill as “president” of the limited liability company debtor. Dckt. 1 at 4, 18. While using the title “president,” the court notes that under California law it is the members or a managing member who acts for the limited liability company. CAL. CORP. CODE § 17703.01.

In reviewing the Schedules filed under penalty of perjury by Brent Hill, it is stated that the debtor’s assets consist of the following as of the commencement of this case:

- A. 3609 Oakdale Road Property.....\$3,035,000 FMV;
- B. Cash and cash equivalents.....None;
- C. Deposit accounts.....None;
- D. Deposits or prepayments.....None;
- E. Inventory.....None;
- F. Office FF&E.....None; and
- G. Machinery, equipment.....None.

Dckt. 1 at 6–7. On Schedule G, the debtor lists three five-year leases with monthly rent and CAM of \$12,065.00. *Id.* at 14.

On the Statement of Financial Affairs, Mr. Hill states under penalty of perjury that in the first five and one-half months of 2018 the debtor had \$95,872.00 in income, in 2017 had \$208,846.00 in income, and in 2016 had \$228,663.00, with that income from operating a business. *Id.* at 19.

No information is provided in response to Question 28 of the Statement of Financial Affairs, which requires an answer to the following:

List the debtor’s officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.

Id. at 24.

A separate list of equity security holders has been filed, which states that Brent Hill and Sheryl Hill are each a 50% “Limited Partner” of the limited liability company debtor (not identified as members of the limited liability company). Dckt. 4 at 1.

On June 22, 2018, a “Balance Sheet” was filed (which is not attested to under penalty of perjury by anyone) stating that as of June 11, 2018, Premier West Coast Properties, LLC, had the following assets:

- A. Check/Savings.....\$3,341.92;
- B. Real property.....\$3,287,000.07; and
- C. Loan fees—Scedco.....\$26,585.15.

Dckt. 9. The above is inconsistent with the information provided under penalty of perjury in the Schedules.

The Schedules, which have been prepared by counsel and signed by Mr. Hill under penalty of perjury, raise serious questions as to the accuracy of the information. First, taken as true, Mr. Hill states under penalty of perjury that the debtor had no personal property assets at the commencement of the case. Though generating almost \$100,000 in the first five months of 2018 (and over \$200,000 in the prior two years), the debtor had no money—no cash, no savings account, no checking account, and no business account.

Further, the debtor had no accounts receivable, nor did it have any intangible assets. It is stated under penalty of perjury that the debtor had no office equipment, no equipment, and no other personal property relating to its multi-million dollar rental company.

A Preliminary Status Report was filed on July 16, 2018, for the first Chapter 11 Status Conference. Dckt. 16. The document is stated to be filed by “Debtor.” *Id.* at 1:15. Because this is a Chapter 11 case, the debtor in possession, as the fiduciary of the bankruptcy estate in lieu of a trustee being

appointed, should be the party filing the status report. The Status Report states that “Debtor” intends to continue to operate the business. It appears that “Debtor” does not understand, and is not aware, that all of the property of the debtor, both real and personal, is now property of the bankruptcy estate (11 U.S.C. § 541). Furthermore, the debtor is not “Debtor,” but Debtor in Possession, exercising the powers of a bankruptcy trustee that operates the business and controls the property of the bankruptcy estate. 11 U.S.C. §§ 1106–1108.

6. [18-90464-E-11](#) **PREMIER WEST COAST** **MOTION TO EMPLOY MARK J.**
MJH-1 **PROPERTIES LLC** **HANNON AS ATTORNEY(S)**
 Mark Hannon **7-19-18 [18]**

APPEARANCE OF MARK HANNON, ESQ.;
BRENT HILL, “PRESIDENT” OF THE DEBTOR; AND
SHERYL HILL, “VICE PRESIDENT” OF THE DEBTOR
REQUIRED AT THE HEARING

NO TELEPHONIC APPEARANCES PERMITTED

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Not Provided. No Proof of Service was filed for the Motion. The court set the hearing for 2:00 p.m. on August 2, 2018. Dckt. 20.

The Motion to Employ was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----.

The Motion to Employ is XXXXXXXXXXXXXXXXXX.

On July 19, 2018, Premier West Coast Properties LLC (“Debtor in Possession” or “Movant”) filed an application for an order authorizing the employment of Mark Hannon (“Counsel”) to represent the debtor and then have the debtor’s counsel represent Debtor in Possession.

The court reviewed the Petition and Schedules filed in this case, which have been signed by Brent Hill as “president” of the limited liability company debtor. Dckt. 1 at 4, 18. While using the title “president,” the court notes that under California law it is the members or a managing member who acts for the limited liability company. CAL. CORP. CODE § 17703.01.

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The Motion requests that the court authorize “Debtor” to employ counsel. The statutory basis for a request for an authorization for “Debtor” to employ counsel is 11 U.S.C. § 327.

Congress provides in 11 U.S.C. § 327 for a *trustee* to employ professionals, including counsel for the *trustee*. Congress provides that in a Chapter 11 case the debtor in possession can be authorized to employ counsel as part of performing duties and rights of the debtor in possession in lieu of a trustee being appoint. 11 U.S.C. §§ 327, 1107(a) & (b).

The court set this Motion for hearing to address the existence of a debtor in possession in this case to exercise the duties and fiduciary obligations of a trustee. Dckt. 20.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the

trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Counsel filed a Supplemental Declaration on July 26, 2018. Dckt. 21. In it, he states that he was paid a \$10,000.00 retainer from the funds of "the President of Premier West Coast Properties, LLC Brent Hill." *Id.*, at 1:18–20. Further, he states that the retainer is for him to be counsel for "debtor Premier West Coast, LLC."

At the hearing, ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

~~————— Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Mark Hannon as Counsel for Debtor in Possession. Approval is subject to the provisions of 11 U.S.C. § 328 and review of fees at the time of final allowance of fees for the professional.~~

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Employ filed by Premier West Coast Properties, LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

~~————— **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Mark Hannon as Counsel for Debtor in Possession.~~

~~————— **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.~~

~~————— **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.~~

8. [18-90376-E-12](#) **CARLOS/BERNADETTE ESTACIO STATUS CONFERENCE RE:
David Jenkins** **VOLUNTARY PETITION**
5-22-18 [1]

Debtors' Atty: David R. Jenkins

The Status Conference is XXXXXXXXXXXXXXXXXXXX.

Notes:

Order of the court setting status conference filed 7/13/18 [RHS-1]. Debtors and Debtors' counsel to appear in person, no telephonic appearance permitted. Debtors to file a status report on or before 7/26/18.

Trustee Report at 341 Meeting lodged 7/2/18. Continued to 8/8/18 at 1:00 p.m.

[DRJ-2] Motion for Order Approving Stipulation for Dismissal of Chapter 12 Case with a Bar to Refiling filed 7/12/18 [Dckt 20], set for hearing 8/2/18 at 10:30 a.m.

[SW-1] Ally Financial Inc.'s Motion for Relief from Automatic Stay filed 7/16/18 [Dckt 28], set for hearing 8/2/18 at 10:00 a.m.

[RHS-1] Case Status Report Dated July 26, 2018 filed 7/26/18 [Dckt 34]

AUGUST 2, 2018 STATUS CONFERENCE

A Motion to Approve a Stipulation to Dismiss the Case, conditioned upon Debtor agreeing to waive their right to file a bankruptcy case under Chapters 11, 12, or 13 for a period for forty-two (42) months was heard on August 2, 2018.

Debtor in Possession filed a Status Report on July 26, 2018, (Dckt. 34) in which he states the "mistakes" and "reasons" why dismissal of this second bankruptcy case is in good faith. It is asserted that Counsel for the Debtors in Possession and Debtors in Possession have now concluded "that the Debtors do not belong in a reorganization plan." Status Report ¶ 2, Dckt. 34. Some of the reasons for this conclusion include:

- ◆ This is Debtors' second attempt at restructuring their debts under Chapter 12. . . .
- ◆ Debtors do not belong in a reorganization chapter.
- ◆ They lack sufficient regular income to fund a feasible plan
- ◆ They appear not to be sufficiently well organized to comply with their duties as debtors in possession.

- ◆ The multiple problems that have occurred in this case are a product of simple human mistakes and do not evidence bad faith on the part of the Debtors.

Id.

- ◆ Counsel then recounts his calendaring error for the First Meeting of Creditors, which caused the Debtors and Counsel to miss the Meeting. The Status Report then reviews other grounds upon which the dismissal, with a waiver of the rights to file a Chapter 11, 12, or 13 case, is explainable for grounds, which include:
- ◆ Schedules I and J containing information that was, at the very least suspect, and arguably obviously false were filed to avoid dismissal of the case.
- ◆ Counsel, juggling the matters concerning a motion to sell property free and clear of liens and the stipulation for failed to review the Debtors' schedules I and J with sufficient care before permitting them to be filed.
- ◆ Counsel attempted to work on a motion to authorize the Chapter 12 Trustee to sell the property free and clear. The Trustee was not willing to participate in such a sale.
- ◆ Counsel then commenced work on a motion to sell free and clear including compliance with the requirements of §363(f). Counsel for Khatri Brothers contacted counsel almost immediately after the filing of the bankruptcy case. Through several discussions by phone, it became apparent that Khatri Brothers would be willing to consider an extension of time for the Debtors to repay Khatri Brothers' loan in exchange for a dismissal of the Chapter 12 case

Id. ¶ 4.

In connection with the Motion to Approve Stipulation to Dismiss, the case the court addressed points that included: (1) Given Debtors inability to proceed with an orderly sale of the property within the protection of a bankruptcy case, how they can be reasonably expected to obtain the value of the current property of the estate for the benefit of all creditors, rather than one creditor foreclosing on the property and taking the equity; and (2) the legal basis for the court to enforce a contractual agreement for Debtors to waive, and a creditor to require, Debtors' rights to file bankruptcy.

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