UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: **MONDAY**
DATE: **SEPTEMBER 20, 2021**
CALENDAR: **1:30 P.M. CHAPTERS 9, 11 AND 12 CASES**

RULINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

"**No Ruling**" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"**Tentative Ruling**" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"**Final Ruling**" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: "**[Since posting its original rulings, the court has changed its intended ruling on this matter]**".

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("$880," not "$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. 21-22404-A-11 **IN RE: PAR 5 PROPERTY INVESTMENTS, LLC**
SW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-16-2021 [68]

IAIN MACDONALD/ATTY. FOR DBT.
ADAM BARASCH/ATTY. FOR MV.
YAMAHA MOTOR FINANCE CORPORATION, U.S.A. VS.

Final Ruling

Motion resolved by stipulation and order, ECF No. 87, the matter is dropped from calendar.

2. 21-22814-A-11 **IN RE: AK BUILDERS AND COATINGS, INC**
ETW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-17-2021 [20]

MICHAEL NOBLE/ATTY. FOR DBT.
EDWARD WEBER/ATTY. FOR MV.
IRA SERVICES TRUST COMPANY CFBO KRISTAN E. EVANS IRA412995 VS.

Final Ruling

Motion: Stay Relief under § 362(d)(4)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Civil minute order

Subject: Vacant Land, 10777 Walker Trail Road, Copperopolis, CA and 10779 Walker Trail Road, Copperopolis, CA

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

Movant is the holder of a note in the original principal amount of $920,000.00. The note is secured by a deed of trust recorded against the subject property. See Declaration in Support of Motion for Relief From the Automatic Stay, or Confirm No Stay, ECF No. 22, 2:18-25. Under 11 U.S.C. Section 362(d)(4). Movant seeks relief from the automatic stay contending that debtor's multiple bankruptcy filings, including the filing of the instant case on August 2, 2021, after the court granted relief from stay in a prior chapter 7 case, constitutes a scheme to delay, hinder or defraud creditors. Movant

also requests waiver of the 14 day stay under Fed. R. Bankr. P. 4001(a)(3).

BASIS FOR RELIEF

Section 362(d)(4) authorizes binding, in rem relief from stay with respect to real property "if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property." 11 U.S.C. § 362(d)(4).

The Bankruptcy Appellate Panel has specified the elements for relief under this subsection of § 362. "To obtain relief under § 362(d)(4), the court must find three elements to be present. [1] First, debtor's bankruptcy filing must have been part of a scheme. [2] Second, the object of the scheme must be to delay, hinder, or defraud creditors. [3] Third, the scheme must involve either (a) the transfer of some interest in the real property without the secured creditor's consent or court approval, or (b) multiple bankruptcy filings affecting the property." *In re First Yorkshire Holdings, Inc.*, 470 B.R. 864, 870–71 (B.A.P. 9th Cir. 2012) (footnote omitted). [4] Fourth, the movant creditor must be a creditor whose claim is secured by real property. *In re Ellis*, 523 B.R. 673, 678 (B.A.P. 9th Cir. 2014) ("Applying its plain meaning, this provision of the Code authorizes a bankruptcy court to grant the extraordinary remedy of in rem stay relief only upon the request of a creditor whose claim is secured by an interest in the subject property.").

An order entered under this subsection must be recorded in compliance with state law to "be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order." § 362(d)(4).

BURDEN OF PROOF

> (g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
> (2) the party opposing such relief has the burden of proof on all other issues.

11 U.S.C. § 362(g)

The debtor has the burden of proof in opposing the motion, yet the debtor has failed to file opposition or otherwise defend against the motion. This gives further credence to movant's argument.

APPLICATION

Serial Bankruptcy Filings

Debtor has filed four different bankruptcy cases since 2016 which impacted the subject property as follows:

1. 16-25556	Chapter 11 filed-8/23/16	dismissed-12-15-16
2. 17-24904	Chapter 11 filed-7/26/17	dismissed-8-14-17
3. 19-24759	Chapter 11 filed-2/29/19	converted to Ch 7
4. 21-22814	Chapter 11 filed 8/02/21	pending

The previous chapter 7 case (19-24759) remains pending. In the prior chapter 7 case, on April 20, 2021, the court granted the Motion to Abandon Property of the Estate (HSM-3) filed by the chapter 7 trustee. See Order Granting Motion to Abandon Property of the Estate, Case No. 19-24759, ECF No. 23. Also on April 20, 2021, and in the previous case, the court granted the Movant's Motion for Relief From the Automatic Stay, ETW-1, under 11 U.S.C. § 362(d)(1). See Civil Minutes, Case No. 19-24759, ECF No. 23.

A scheme to delay, hinder, or defraud creditors may be based upon circumstantial evidence. Because direct evidence of a scheme to delay, hinder and defraud creditors is rare, the court may *infer* the existence and contents of an unlawful scheme from circumstantial evidence. [*In re Duncan & Forbes Develop., Inc.,* 368 BR 27, 32 (BK CD CA 2006);] see also *In re Porzio,* 622 BR 134, 137 (D CT 2020) — court may infer intent to hinder, delay and defraud from fact of serial filings alone]

Additional Facts Support a Scheme to Delay, Hinder, and Defraud

Additional facts give weight to the movant's argument. The instant case was filed on August 2, 2021, while relief from stay in the prior case had only been granted on April 20, 2021.

The previous Chapter 11 (later converted to chapter 7) case was filed on July 29, 2019, (19-24579) after the movant had set a foreclosure sale on July 30, 2019. See Declaration in Support of Motion for Relief From the Automatic Stay, ECF No. 22,3:1-10.

The debtor is in default under the terms of the note. Exhibit C, ECF No. 23, filed in support of this motion and the Declaration in Support of Motion for Relief From Automatic Stay, ECF No. 22, 3:11-16, show that the payoff amount on the note is $1,382,369.85. The final payment on the note was due as of March 1, 2019, *Declaration Id*. at 2:24-25.

The posture of the instant case also supports the movant's argument. The Chapter 11 Plan has not yet been filed. Neither has the List of Equity Security Holders been filed, and the List filing is delinquent pursuant to Fed. R. Bankr. P. 1007(a)(3). A debtor who has filed three previous chapter 11 cases should be prepared to properly prosecute the case.

The court finds that the filing of this chapter 11 case by the debtor was part of a scheme to delay, hinder, or defraud creditors that involved either—(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property." 11 U.S.C. § 362(d)(4). The court will grant the motion

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The motion for relief from the automatic stay under § 362(d)(4) has been presented to the court.

IT IS ORDERED that the automatic stay of 11 U.S.C. § 362(a) is vacated with respect to real property commonly known as vacant land known as: (1) 10779 Walker Trail Road, Copperopolis; and (2) 10777 Walker Trail Road, Copperopolis, CA.

IT IS FURTHER ORDERED, under 11 U.S.C. § 362(d)(4), that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either transfer of all or part ownership of, or other interest in, the aforesaid real property without the consent of the secured creditor or court approval; or multiple bankruptcy filing affecting such real property.

IT IS FURTHER ORDERD that the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

IT IS FURTHER ORDERED that if the movant needs an order that may be recorded in the office of the county recorder they may lodge an order in recordable form that supersedes this civil minute order but contains the same terms.

3. 21-22814-A-11 **IN RE: AK BUILDERS AND COATINGS, INC**

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
8-2-2021 [1]

MICHAEL NOBLE/ATTY. FOR DBT.

Final Ruling

After the court enters the relief on the motion for stay relief, the case will be dismissed. The debtor failed to file the list of equity holders. Fed. R. Bankr. P. 1007(a)(3). But for the pending motion for stay relief, which sought relief under 11 U.S.C. § 362(d)(4), this case would have been dismissed prior to the hearing. The status conference is concluded. The court will issue a civil minute order.

4. 20-25396-A-11 **IN RE: RACEDAY CYCLE, INC.**

CONFIRMATION OF SECOND AMENDED PLAN OF REORGANIZATION FILED BY DEBTOR
7-28-2021 [96]

STEPHEN REYNOLDS/ATTY. FOR DBT.

Tentative Ruling

Motion: Confirmation of Second Amended Plan of Reorganization, ECF No. 96
Notice: LBR 9014-1(f)(1); Amended Order Setting Confirmation Hearing, ECF No. 108; Written opposition required
Disposition: Denied
Order: Civil minute order

Raceday Cycle, Inc. prays confirmation of its Second Amended Plan of Reorganization, ECF No. 96.

FACTS

Raceday Cycle, Inc. operates a bicycle shop in Lincoln, California. It is located in an area of "planned residential construction" and adjacent to riding areas in the foothills and valley that bicyclists frequent. Plan 3:19-28, ECF No. 96. As expected, it sells bicycles and accessories and offers bicycle repair services. As an added incentive for bicycle enthusiasts it has a "large covered patio" and serves beverages, e.g., coffee, beer, and wine, as well as food. *Id.*

It sought Subchapter V, Chapter 11 protection after disputes with Specialized Bicycle Components, one of its suppliers, and Richard Burns, a personal guarantor of its debts who was formerly affiliated with Raceday Cycles. *Id.* at 4:2-18. Both before and during its

Chapter 11 filing, the debtor faced headwinds from the national virus pandemic and from changes in foreign policy pertaining to trade relations with the People's Republic of China. As the debtor described in the problem, "The repeated [Covid-19] shutdowns have serious interrupted and suppressed sales in 2020 and into 2021. Debtor believes that 'normal' sales will not be seen until late summer 2021 at the earliest." *Id.* at 4:15-17.

PROCEDURE

Raceday Cycles filed its Second Amended Plan of Reorganization, ECF No. 96. It contained four classes, all of which were impaired: Class 1-Specialized Bicycle Components; Class 2-Richard Burns; Class 3-General Unsecured Creditors; and Class 4-Equity Interests. Under the terms of the plan, secured creditors (Specialized Bicycle Components and, potentially, Richard Burns) will receive full payment of their secured claims, priority creditors (Subchapter V trustee Lisa Holder and certain pre-petition taxes) will be paid in full; and unsecured creditors will receive nothing. Raceday Cycle, Inc.'s only shareholder Marc Sanders will retain his equity position. The plan will be funded by a one-time payment of $45,000.

The court issued an order setting a confirmation hearing. Amended Order, ECF No. 108.

The debtor-in-possession did not achieve consensual confirmation. Class 1 voted in favor of plan confirmation. Tabulation of Ballots, ECF No. 126. Classes 2 and 3 voted to reject confirmation. *Id.* Class 4 did not vote, but since only Marc Sanders, the debtor's principal, is an equity holder the court presumes support for the plan.

Richard Burns, holds a secured claim. Proof of Claim No. 4-1. The total amount of his claim is $37,531. The debtor filed a motion to estimate his claim, as $10,000 secured and the remainder as unsecured. Mot. to Est. Claim, ECF No. 100.

Richard Burns made a timely § 1111(b)(2) election. Notice, ECF No. 118. To date, no party has challenged timeliness, nor entitlement to, make such an election.

JURISDICTION

This court has jurisdiction. 28 U.S.C. § 1334(a)-(b); *see also* General Order No. 182 of the Eastern District of California. This is a core proceeding. 28 U.S.C. § 157(b)(2)(L).

DISCUSSION

The plan proponent bears the burden of proof on plan confirmation. *In re Arnold & Baker Farms*, 177 B.R. 648, 654-655 (9th Cir. BAP 1984); *In re Acequia, Inc.*, 787 F.2d 1352, 1358 (9th Cir. 1986).

No July 2021 Monthly Operating Report

Ordinarily, Subchapter V, Chapter 11 debtors do not file disclosure statements. 11 U.S.C. § 1125(a), 1181(b). But the court may order otherwise. *Id.* In this case, the court did not order the debtor to file a disclosure statement. But it noted that the debtor had not filed all of its Monthly Operating Reports. LBR 2015-1. The order setting the confirmation hearing stated:

> Not later than August 9, 2021, the debtor shall file a true, correct and complete Monthly Operating Report for June 2021; *all subsequent monthly operating reports shall be filed complete and in a timely manner. True, complete and correct monthly operating reports are necessary for parties in interest to determine whether to support or oppose confirmation and to vote in favor or against the plan.* Failure to file operating reports as indicated herein is grounds for summary denial of confirmation.

Amended Order Setting Confirmation Hearing ¶ 8(A), ECF No. 108 (emphasis added).

Here, the debtor did file the June 2021 and August 2021, Monthly Operating Reports in a manner and at a time consistent with the court's order. Monthly Operating Report, ECF No. 113. The July monthly operating report was due August 14, 2021. LBR 2015-1(c). It was never filed. Creditors and other parties in interested had until August 30, 2021, to cast their ballots in favor, or against, plan confirmation. Most creditors voted against plan confirmation anyway. Because the plan is funded by a one-time lump sum cash infusion, this information probably only bears on non-consensual plan confirmation. 11 U.S.C. § 1191(b). But it was ordered by this court and the debtor has not complied with applicable local rules, LBR 2015-1(c) and by the orders of this court.

Not Feasible

The plan must be feasible. "Confirmation 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." 11 U.S.C. §§ 1129(a)(11); 1191(a).

This plan is not feasible. The plan provides for a single payment of $45,000 to fund the plan. Plan 2:7-8, 21:6-7, ECF No. 96. The plan contains no other provisions for funding. Id. It does not provide for submission of future earnings or income to fund the plan. 11 U.S.C. § 1190(a)(2). From that amount, the plan must pay: (1) Specialized Bicycle Components $28,000, Plan 2:4-5, ECF No. 96; (2) Subchapter V trustee $6,000 or less, Plan 11:10-12; Subchapter V Trustee Fee and Expense Estimate, ECF No. 129;[1] and (3) priority

[1] Because unsecured creditors only receive $5,291 less "administrative priori fee paid to the Subchapter V trustee," Plan 10:21-23, ECF NO. 96, and because the Subchapter V trustee's fees are $6,000, general unsecured creditors will receive no distribution.

taxes $1,708, Plan 9:27-10:2. It must also pay in full the secured component of Richard Burn's claim. Plan 9:11-13, 10:13-20.

The question is the amount of that secured claim. The debtor has attempted to value the secured component of Burn's claim at $10,000. Mot. to Est. Claim 1:20-22, ECF No. 100; *Compare* Suppl. 3:4-8 (suggesting "no value supporting the secured claim of Ricard Burns"), with Fed. R. Bankr. P. 9013 (the motion itself must state with particularity the relief sought, making no provision for subsequent filings increasing the scope of the relief sought).

But Richard Burns has made an § 1111(b) election. That section provides:

> (b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless--
>
> (i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or
>
> (ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.
>
> (B) A class of claims may not elect application of paragraph (2) of this subsection if--
>
> (i) the interest on account of such claims of the holders of such claims in such property is of *inconsequential value*; or
>
> (ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.
>
> (2) *If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed*.

11 U.S.C. § 1111(b) (emphasis added).

Where confirmation is sought by cram down, a § 1111(b) election alters the calculus thusly:

> Effect of undersecured creditor's § 1111(b)(2) election: If an eligible undersecured creditor elects to be treated as fully secured under 11 USC § 1111(b)(2)....deferred payments received by that creditor under the plan must equal the combined allowed amount of the creditor's secured and unsecured claims under § 506(a).
>
> '*In other words, the present value of the electing creditor's stream of payments need only equal the present value of the collateral, which is the same amount that*

> *must be received by the nonelecting creditor, but the sum of the payments must be in an amount equal at least [to] the creditor's total claim.'* [See *In re Weinstein* (9th Cir. BAP 1998) 227 BR 284, 294 (emphasis added); *accord In re Brice Road Developments, LLC* (6th Cir. BAP 2008) 392 BR 274, 285; *see also In re S.E.T. Income Properties, III* (BC ND OK 1988) 83 BR 791, 793]

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Chapter 11 Cases, Nonconsensual Cramdown Confirmation Requirements § 11:1710 (Rutter Group December 2020) (emphasis added).

As a result, Burns must be paid an amount equal to his claim, $37,548. Plan 1:16, ECF No. 96; Proof of Claim 4-1.

The sum of payments due Specialized Bicycle Components, Richard Burns, Subchapter V trustee Lisa Holder, and priority taxes is $73,286. Since the plan provides only for $45,000 in funds the plan is not feasible.

Raceday Cycle might interpose the argument that Burn's § 1111(b) election is not valid and, if Burn's secured claim is valued at $10,000, as prayed in its motion, the plan is feasible. But that argument fails. The election was timely. *Compare* Amended Order Setting Confirmation Hearing ¶ 5 (deadline is 21 days after service of order) *with* Proof of Service, ECF No. 112 (service accomplished August 9, 2021), *with* Notice of Election, ECF No. 118 (filed August 30, 2021). Two other defenses merit discussion. A creditor may not make an election under § 1111(b) for property that has, or will be, sold under 11 U.S.C. § 363. 11 U.S.C. § 1111(b)(1)(B)(ii). It has not been sold out of the ordinary course of business and the plan does not contemplate that. A second, and somewhat closer, exception to a creditor's right to a § 1111(b) election arises where the creditor's interest in the collateral is of "inconsequential value." 11 U.S.C. § 1111(b)(1)(B)(i). Courts agree that wholly unsecured creditors may not make a § 1111(b) election.

> Most courts agree a creditor whose lien is *completely unsecured* has no right to make the § 1111(b)(2) election. [*In re O'Leary* (BC D MA 1995) 183 BR 338, 341 (collecting cases); *In re Atlanta West VI* (BC ND GA 1988) 91 BR 620, 624, fn. 5; *In re Baxley* (BC D SC 1986) 72 BR 195, 198].

California Practice Guide: Bankruptcy § 11:1442.1 (Rutter Group December 2020).

Undersecured creditors are treated slightly differently. The Ninth Circuit has not definitively decided the appropriate test for determining whether a property has inconsequential value. But one commentator stated it this way:

> [11:1442.3] Effect where creditor undersecured? But where a creditor is undersecured, courts disagree what constitutes "inconsequential value" for the purpose of claiming the § 1111(b)(2) election:

> [11:1442.4] Where lien "inconsequential" as compared to creditor's total claim amount: Some courts compare the value of the creditor's lien on collateral to the total amount of the creditor's claim to determine "inconsequential value": "This court believes that when a claim cannot be paid in full, either amortized annually or in a lump sum payment at the end of a specified period of time (i.e. thirty to forty years), without exceeding the present value of the collateral, the creditor's claim is probably of inconsequential value and an 1111(b) election should not be allowed." [*In re Wandler* (BC D ND 1987) 77 BR 728, 733—where lien's value ($15,000) was 4% of creditor's $390,000 claim, debtors could not make payments totaling $390,000 with a present value of $15,000 (because payment of such a proportionately small value cannot be amortized)].
>
> [11:1442.5] Where value of collateral securing creditor's lien is "inconsequential": Other courts compare the value of the creditor's lien to the value of the asset securing the lien; if the collateral has no value, the creditor's lien is "inconsequential" and the § 1111(b)(2) election cannot be made. [*In re McGarey* (D AZ 2015) 529 BR 277, 284 (election permitted where stipulated value of property was $80,000); *see also In re Rosage* (BC WD PA 1987) 82 BR 389, 390 (creditor prohibited from making § 1111(b)(2) election where collateral had no market value based on senior liens)].

Id. at § 11:1442.3-11:1442.5.

Argument might be made that this case is similar to *Rosage*, given the senior lien of Specialized Bicycle Components. But this court rejects such an argument given the debtor's admission that the value of Richard Burns' secured claim is properly fixed at $10,000. Mot. to Est. Claim 1:20-22, ECF No. 121. Moreover, applying *Wandler*, the court finds that Richard Burns interest in the collateral, $10,000, against debt of $37,548 is 27% and not inconsequential.

Not Fair and Equitable

This plan cannot be confirmed consensually, 11 U.S.C. §§ 1129(a)(8), 1191(a); Tabulation of Ballots, ECF No. 126 (Classes 2 & 3 rejecting confirmation); confirmation may be achieved only by cram down. 11 U.S.C. § 1191(b). That section authorizes confirmation over creditors objection if it "does not discriminate unfairly, and is "fair and equitable." *In re Trib. Co.*, 972 F.3d 228, 232 (3d Cir. 2020) ("discriminate unfairly" is a horizontal comparative assessment applied to similarly situated creditors...[F]air and equitable should be pictured vertically, as it "regulates priority among classes of creditors having higher and lower priorities").

Because Marc Sanders is to retain his shares of the debtor the plan must pass the vertical, "fair and equitable" test is now statutorily defined. Section 1191 provides:

> Rule of Construction.--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:
> (1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.
> (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; *or*
> (B) *the value of the property to be distributed under the plan in the 3-year period*, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan *is not less than the projected disposable income of the debtor*.
> (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.

11 U.S.C. § 1191(c) (emphasis added).

So, as measured by time or by dollars, the debtor must pay all of the debtor's disposable income for a period of not less than three years. *Id.*

Disposable income is a term of art.

> (d) Disposable income. 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--
> (1) for--
> (A) the maintenance or support of the debtor or a dependent of the debtor; or
> (B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or
> (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

11 U.S.C. § 1191(d).

Here, the plan does not commit disposable income to the plan over time; it satisfies § 1191(c) if and only if it pays an equivalent sum of money into the plan. The debtor contends that it has

consistently lost money since filing this case. Mem. P.& A. 8:9-6, ECF No. 124; Plan 4:12-18, ECF No. 96. But that is not true. Chapter 11 Monthly Operating Report ¶ 3(e), column 4, April 12, 2021, ECF No. 77 (showing profit for the first four months of the case to be $12,104).

More importantly, Marc Sanders, the sole shareholder, has provided insufficient evidentiary support on the point:

> A problem will we struggled with in the prior plans was projected disposable income when the history of the debtor is ongoing losses. We avoid that problem by making a one-time payment to all creditor in an amount well more than any likely profits would be over the next thirty-six months.

Sanders decl. 2:20-24, ECF No. 125.

This is a conclusion, not a fact, and is contrary to at least some of the debtor's prior filings and to the debtor's representation that sales may return to normal as early as late summer 2021. Plan 4:16-19, ECF NO. 96.

For each of these reasons the court finds that Raceday Cycle, Inc. has not carried its burden of proof as to plan confirmation.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Raceday Cycle, Inc.'s motion to confirm Chapter 11 Plan, has been presented to the court. Having considered the motion together with papers filed in support and opposition, if any, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.

5. 20-25396-A-11 **IN RE: RACEDAY CYCLE, INC.**

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
12-1-2020 [1]

STEPHEN REYNOLDS/ATTY. FOR DBT.

No Ruling

6. 20-25396-A-11 **IN RE: RACEDAY CYCLE, INC.**
RLC-4

CONTINUED MOTION TO VALUE COLLATERAL OF RICHARD BURNS
7-29-2021 [100]

STEPHEN REYNOLDS/ATTY. FOR DBT.

No Ruling

7. 21-22496-A-11 **IN RE: LILLIAN/ISAGANI SISAYAN**
LP-2

MOTION TO EMPLOY LEWIS PHON AS ATTORNEY(S)
8-13-2021 [45]

LEWIS PHON/ATTY. FOR DBT.

No Ruling

8. 20-24098-A-11 **IN RE: SLIDEBELTS, INC.**
RLC-1

CONTINUED MOTION TO USE CASH COLLATERAL, MOTION FOR REPLACEMENT LIENS AND MOTION/APPLICATION TO APPROVE DIP BUDGET
8-27-2020 [12]

STEPHEN REYNOLDS/ATTY. FOR DBT.

No Ruling

9. 21-22898-A-11 **IN RE: HEATH V. FULKERSON LLC**

STATUS CONFERENCE RE: VOLUNTARY PETITION
7-28-2021 [1]

GABRIEL LIBERMAN/ATTY. FOR DBT.
HEATH V. FULKERSON LLC/ATTY. FOR MV.

No Ruling

10. 21-22898-A-11 **IN RE: HEATH V. FULKERSON LLC**
GEL-1

MOTION TO EMPLOY GABRIEL E. LIBERMAN AS ATTORNEY(S)
8-30-2021 [55]

GABRIEL LIBERMAN/ATTY. FOR DBT.

Tentative Ruling

Application: Employment of Counsel for Debtor in Possession
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved
Order: Prepared by applicant

Unopposed applications are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 11 debtors in possession may employ counsel to advise and assist them in the discharge of their statutory duties. *See* 11 U.S.C. § 327(a). Employment may be authorized if the applicant neither holds nor represents an interest adverse to the estate and is disinterested. *Id.* §§ 101(14), 327(a). The applicant satisfies the requirements of § 327(a), and the court will approve the application.

The order shall contain the following provision: "Nothing contained herein shall be construed to approve any provision of any agreement between [counsel's name] and the debtor in possession for indemnification, arbitration, choice of venue, jurisdiction, jury waiver, limitation of damages, or similar provision." The order shall also state its effective date, which date shall be 30 days before the date the employment application was filed except that the effective date shall not precede the petition date.