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2 **UNITED STATES BANKRUPTCY COURT**
3 **IN AND FOR THE DISTRICT OF ARIZONA**
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In Re	)	**Chapter 11 Proceedings**
	)	
VALLEY REALTY ADVISORS, LLC,	)	**Case No. 02-07-BK-04217-CGC**
	)	
	)	**UNDER ADVISEMENT MEMORANDUM DECISION RE: CONFIRMATION OF PLAN OF REORGANIZATION AND MOTION FOR RELIEF FROM STAY BY WEBBER AND ASSOCIATES**
Debtor.	)	
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12 **I. Introduction**

13 Before the Court is whether the Debtor's First Amended Plan of Reorganization, as modified,
14 should be confirmed or whether, in the alternative, the automatic stay should be modified or
15 conditioned in favor of Webber & Associates. Both issues were tried to the Court on March 24,
16 2008.

17 **II. Facts**

18 A. Procedural Posture

19 1. The Plan

20 A Plan of Reorganization was first filed on November 20, 2007 which was
21 superceded by a First Amended Plan on January 10, 2008. That Plan went to vote; objections and
22 negative votes were filed by secured creditors Twelve Northwest, L.L.C. ("12 Northwest"), Webber
23 & Associates ("Webber"), Harlan and Kyle Scott ("Scotts") and Maricopa County Treasurer
24 ("Maricopa County"). Through stipulation, more thoroughly discussed below, the objections of 12
25 Northwest, Scotts and Maricopa County were resolved, leaving only the objection of Webber. The
26 agreed treatment of Maricopa County and 12 Northwest were documented in Debtor's Notice of
27 Amendments filed February 22, 2008 (Dkt 134) (the "Notice"). The Plan treatment of Webber and
28 Scotts was also modified in the Notice, although Scotts' acceptance of the changes, with further oral

assurances, did not occur until the end of the trial on March 24, 2008. Webber continued to object to its proposed modified treatment.

2. Webber Stay Relief Motion

Webber filed for stay relief on January 11, 2008 pursuant to Section 362(d)(1) through (4). In the alternative, Webber sought adequate protection. Objections were filed by Debtor and junior secured creditor Statera Portfolio Advisors, LLC ("Stratera"). The final hearing on the motion was set contemporaneously with Plan confirmation.

B. Debtor and the Property

Private Lenders Funding Group, LLC ("PLFG") lent the previous owner of the property, Peak View Ranch, LLC ("Peak View"), approximately $5.5 million.[1] Debtor acquired the note for $5,000,000 from PLFG, paying through the delivery of a promissory note. The Debtor paid the note by transferring $5,112,500[2] to PFLG, primarily using proceeds from a loan from its affiliate, Stratera.[3] Following default by Peak View, Debtor foreclosed, thereby becoming the owner. The

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[1]Debtor's principal, Doug Smith, and Brent Nerguizian are the principals of PFLG, a real estate lending company. PFLG obtains its funding from private lenders, including pension funds, Indian tribes, and wealthy individuals. After PFLG made the Peak View loan, the Debtor purchased a $2 million participation interest in it using funds borrowed from Neptune Company Asset Holdings ("Neptune"), an entity wholly owned by Mr. Nerguizian, secured by its participation interest in the Peak View loan. PFLG then repurchased the $2 million participation interest in two separate transactions of $1.2 million and $800,000. The $2 million received was used to repay the Neptune loan to Debtor.

[2]The $5,112,500 was comprised of $5 million principal, accrued interest of $62,500 and a one point maturity extension fee of $50,000.

[3] Stratera is a single purpose lending LLC of which Mr. Smith is the principal. Stratera borrowed the funds that it lent to Debtor from Neptune and pledged its interest in the note and deed of trust from the Debtor to Neptune as security. After the Stratera note funded, the Debtor transferred $600,000 back to Stratera as an interest reserve. Debtor received approximately $427,000 in interest reserves from PFLG when it purchased the Peak View note. The current status of the Stratera interest reserve is unclear in the record; the Court cannot determine whether it is currently available to pay interest to Stratera over the term of the plan, whether it has been completely or partially exhausted through payments of interest to Neptune, whether it has been used to pay costs associated with entitling the Property or whether it has been used for another purpose. Therefore, the Court's analysis of feasibility will assume that the quarterly payments to be made to Stratera on its pre-

property was subject to senior liens in favor of Webber, 12 Northwest, the Scotts and the unpaid real estate taxes held by Maricopa County. After Webber commenced foreclosure proceedings, Debtor filed this case.

As a result, Debtor holds a fee interest in approximately 392 acres of undeveloped raw land in the far northwestern part of the Valley between Lone Mountain Road and Dixileta Drive near the alignment of 235th Avenue in an unincorporated portion of Maricopa County near the town of Wittman (the "Property"). The Property is currently unentitled and has no infrastructure. Its proposed use is to be developed as a master planned residential community.

C. Creditors and Liens

1. Webber & Associates

Webber holds three loans secured by first liens on separate parcels of 70, 80 and 160 acres and a fourth loan secured by a second lien on 50 acres which comprises a portion of the 70 acre first lien security. The first lien notes carry an interest rate of 2 ½ % over prime with a floor of 11.5%. The second lien note carries an interest rate of 2 ½ % over prime with a floor of 12.75%. The current amounts and collateral status of these loans is more fully discussed below.

2. 12 Northwest

12 Northwest holds a promissory note in the original face amount of $1,640,000 plus accrued but unpaid interest and fees. The note bears interest at a contract rate of 16%. It is secured by first position lien on 40 acres and second position lien (junior to Webber) on the 80 acre parcel.

3. Scotts

Scotts hold a promissory note in the original amount of $1,652,400 that bears interest at a contract rate of 9% and is secured by a first lien on 40 acres that are otherwise unencumbered

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4. Stratera

Stratera is an entity wholly owned and controlled by Doug Smith, the sole owner of Debtor.

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petition obligation to Debtor will be made from the $2 million in exit financing provided by Stratera.

Stratera holds a blanket junior lien on all 392 acres securing a note in the original principal amount of $5,750,000.

D. Plan of Reorganization

The First Amended Plan, as modified, contemplates periodic payments to the secured creditors for approximately one year while the entitlement process proceeds and thereafter paying off the secured debt by either selling the Property or refinancing the existing debt.

Debtor's affiliate, Stratera, has agreed to extend exit financing in the amount of $2 million to pay effective date costs, provide working capital (for entitlement costs) and pay debt service during this period. Stratera has deposited the proposed loan proceeds of $2 million in a bank account; the proposed terms of the loan are monthly payments interest only at 12% with the principal due in 3 years. The Plan provides that Webber's claim will be paid on a 25 year amortization at a rate of 8%, or such other rate as may be set by the Court, on a quarterly basis, in arrears, commencing 90 days after the effective date. The Debtor contends that the Stratera exit financing is sufficient to pay all necessary amounts even if the Court sets an interest rate higher than 8%.

E. Objections and Issues to be Resolved

1. 12 Northwest Stipulation

12 Northwest has agreed with the Debtor that its claim will be paid quarterly in arrears beginning 90 days after the effective date on a 25 year amortization at the interest rate of 16%.[4] Although the Notice of Amendments does not specifically so provide, Mr. Smith testified that the agreement also includes waiver of default interest, late fees and a portion of 12 Northwest's attorneys fees.

2. Scotts Stipulation

The Debtor has agreed, and Scotts have accepted this treatment, to deed back the discreet

[4]The rate stated in the Notice of Amendments is the "non-default interest rate of the secured promissory note issued by West Coast Funding . . . to 12 [Northwest] . . ." Testimony established that this rate is 16%.

40 acre parcel that is the Scotts' collateral as of the effective date. This treatment is to be reflected in the confirmation order.

3. Maricopa County

Maricopa County's unpaid tax claims will be paid, with interest at the statutory rate of 16%, 180 days after the effective date.

4. Webber objection

a. Amount of claim

Webber disputes that its claim has been properly calculated in the Smith declaration, specifically that its over-secured claims are entitled to post-petition interest and that its second lien claim was omitted. The Court will address these issues below.

b. Interest rate

Webber disputes the interest rate of 8% and presented its expert's opinion that a rate of 12% to 15% would be appropriate, leaning toward the upper end.

c. Timing of payments

Webber argues that payment in arrears puts it at unreasonable risk, in effect allowing the debtor a 180 day free look period (90 day interest deferral followed by a 90 day foreclosure window) before it would have to decide whether to pay or to surrender the Property.

d. No interest on unsecured claims

Webber asserts that it acquired an unsecured claim and that interest must be paid because payment is deferred. In addition, Webber further argues that its second lien claim will be under-secured by the effective date and that the loss of value will constitute an unsecured claim that must be paid.[5]

At the trial, counsel for Debtor agreed to modify the plan by paying unsecured claims on the

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[5]The value analysis set out below belies this conclusion. In addition, Webber has not cited any authority for the proposition that post-petition encroachment on a junior lien by virtue of interest accrual on a senior lien creates a post-petition unsecured claim. Rather, the correct analysis is that such encroachment causes a diminution in collateral value justifying adequate protect or stay relief under *United Sav. Ass'n v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365 (1987).

effective date.

e. Lack of good faith

Webber asserts that Debtor has not acted in good faith. Specifically, Webber asserts that the acquisition of the Peak View loan, and, subsequently, the Property by the thinly capitalized Debtor from the well-capitalized PFLG (an entity owned in part by the principal of the Debtor) has put creditors, such as Webber, at risk while the Debtor tries to wait out a bad market.

5. Stay Relief

Webber argues that stay relief should be granted: 1) under Section 362(d)(1) for cause because of the steadily eroding equity cushions on its first liens and the encroachment of the first liens on its second lien; 2) under Section 362(d)(2) because there is no equity in the Property and no effective reorganization is in prospect; 3) under Section 362(d)(3) because no interest payments have been commenced in this single asset real estate case and the plan that was filed does not have a reasonable chance of confirmation within a reasonable period of time; and 4) under Section 362(d)(4) because the manner in which Debtor acquired the Property was pursuant to a scheme to hinder, delay or defraud creditors by removing a solvent entity (PFLG) as the foreclosing lender in favor of a shell entity (Debtor), thereby avoiding the necessity either of payment or bankruptcy by PFLG.

F. Evidence at Trial

1. Appraisals

Two appraisals were stipulated into evidence without testimony from either appraiser.[6] Both were prepared at the request of the Debtor; the first, by PGP Valuation, Inc. ("PGP"), has a valuation date of August 10, 2007 and a value conclusion of $30,371 per acre, and the second, by Appraisal Technology, Inc. ("ATI"), has a valuation date of October 12, 2007 and a value conclusion of $40,000 per acre.

[6]Webber reserved the right to call an appraiser at a later hearing if the Court was unable to find a value based upon the evidence presented. Because the Court does find such a value, further evidence will not be required.

Both appraisers properly concluded that only the comparable sales method of valuation was appropriate for this tract of raw land. Between the two appraisals, nine different raw land sales within the time frame from April 2006 to June 2007 were considered and analyzed; PGP chose seven sales as comparable and ATI chose four sales as comparable. Two sales, one dated December 6, 2006 of 320.01 acres and one dated July 25, 2006 of 188.7 acres, were included in both appraisals.

As proper appraisal methodology requires, both appraisers reviewed each sale for comparability and made such adjustments as they thought appropriate based upon their professional judgment. In the absence of cross-examination and with the one exception noted below, the Court will not speculate whether one appraiser's adjustments were more appropriate than the other's, but will accept the adjusted value suggested by each as fairly representing an appropriate basis for rendering an opinion of value.

The nine land sales are summarized below, showing the date of the sale, the adjusted price, the average of the selected comparable sales and the appraiser's ultimate opinion of value:

10-Aug-07	PGP	
1	28-Apr-06	$33,750
2	31-Jul-06	$48,953
3	25-Jul-06	$21,005
4	6-Dec-06	$35,541
5	6-Dec-06	$33,210
6	8-Feb-07	$18,618
7	13-Jun-07	$29,751
AVG		$31,547
Value		$30,371

12-Oct-07	ATI	
1	13-Jun-07	$37,625
2	19-Mar-07	$41,464
3	6-Dec-06	$29,303
4	25-Jul-06	$55,800
AVG		$41,048

Value $40,000

PGP's sale number 5 is the same as ATI's sale number 3; PGP's sale number 3 is the same as ATI's sale number 4.

The difference between the adjusted December 6 adjusted sales numbers (ATI #3; PGP ##5) results from using different percentage adjustments; in the case of PGP, the sale was adjusted downward by 16%; in the case of ATI, the downward adjustment was 25%. The Court will not revisit the correctness of these adjustments for the reasons stated above.

However, the difference in the two appraisals between the July 25 adjusted sales numbers (ATI #4; PGP #3) is striking: $55,800 and $21,005 and is not explainable by a mere difference of professional opinion. Rather, there is a difference of **fact** in the numbers relied upon by each appraiser. PGP reported the sales price of its Sale Number 3 as $4,955,078; ATI reported the sales price of its Sale Number 4 as $11,700,000. The ATI appraiser calculated the price as the sum of an option price and an additional purchase price; PGP does not elaborate on the source of its sales data.

Given the rather large number of other comparable sales, the Court concludes that it is not necessary to reconcile this difference on this record or to receive additional evidence to resolve it. The Court concludes that an appropriate value can be determined by simply removing the questionable transaction from the mix and then recalculating. Both appraisers settled upon numbers in the mid range between their high end and low end sales; there is no reason to conclude that they would do any differently if the questionable sale were simply removed from consideration.

Removing the July 25 sale results in the following:

	PGP
1	$33,750
2	$48,953
4	$35,541
5	$33,210
6	$18,618
7	$29,751
AVG	$33,304

	ATI
1	$37,625
2	$41,464
3	$29,303
AVG	$36,131

Viewed in this way, the data, all of which are based upon adjustments made by qualified appraisers, readily suggest a value of $35,000 per acre.

The final issue to consider is whether to adjust this indicated value based upon a change in market conditions from the time of the last appraisal until today. The Court declines to do so because the record is silent on this score. Neither appraiser performed a "bring down" report and no other competent witness testified on the subject. Mr. Aaron, the Debtor's interest rate expert, explicitly declined to offer an opinion on the general question of change in market conditions. Mr. Pollack, Webber's interest rate expert and a real estate investor himself, testified that today's market was the worst in his decades of experience. However, he also explicitly agreed that he was not an appraiser and had not been engaged to offer an opinion on value. His testimony on market conditions was given in the context of assessing the current market for financing, not offering an opinion on value. Therefore, in the absence of any supporting expert evidence that a downward adjustment would be appropriate, the Court finds the current value to be $35,000 per acre.

2. Doug Smith testimony and Amount of Claims

Mr. Smith testified about his background, the purchase of the Peak View note and the subsequent acquisition of the Property, the efforts underway to entitle the Property (including hydrology studies and engineering work), other real estate developments in the general area and the amount and treatment of claims under the plan. The latter point is the most salient for the purposes of this decision.

Page three of the Smith declaration (Ex. 3) is a list of "Payments to Secured Creditors." Mr. Smith testified that to the best of his knowledge these numbers represented the amounts and treatment of the various creditor claims. Those amounts, however, do not include post-petition

interest and do not list the second lien claim held by the Webber group. Therefore, the amounts set forth in Exhibit 3 cannot be accepted as is but must be restated to reflect the true facts relating to the Webber group of claims.

Exhibit V is a compilation of liens and amounts of Webber's various claims, including post-petition interest through February 1, 2008.[7] Given the Court's determination of value at $35,000 per acre, the Court will restate these amounts as of June 1, 2008:[8]

$35,000 Value per acre

Acres	*Collateral Value*	*Loan Amount*	*Loan to Value*
FIRST LIENS			
70	$2,450,000	$1,719,859	70.2%
80	2,800,000	884,909	31.6%
160	5,600,000	2,715,625	48.5%
310	10,850,000	5,320,393	49.0%
SECOND LIEN[9]			
50	730,141	452,283	61.9%[10]

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[7]Both parties stipulated that these amounts could be admitted for the purposes of this hearing.

[8]This restatement is based upon simple interest accruing on the petition date amount at an annual rate of 11.5%. This is not intended as a finding on the amount of Webber's first lien claim but rather as a benchmark for purposes of evaluating the pending plan confirmation and stay relief motion.

[9]A review of the claims register reveals that Webber's claims comprise several distinct loans owned by different investors. The second lien claim, held by Jewel Investment Company, is junior to a loan secured by a senior lien held by another investor in the Webber group and is therefore subsumed within the total Webber collateral package of approximately 310 acres.

[10]These numbers are extrapolated from Exhibit V and are intended to be a benchmark for purposes of confirmation, not a finding on the specific amount of Webber's second lien claim. The basic calculation is:

	First	Second
Value	$2,450,000	$2,450,000
Debt	$1,719,859	$2,172,142
Equity	$730,141	$277,858
LTV	70.2%	61.9%

FIRST and SECOND LIENS COMBINED

$11,356,293	$5,777,266	50.8%

As pointed out repeatedly by Webber's counsel during the trial, each of the Webber notes stands on its own and is secured only by the specific collateral to which it relates. The notes and deeds of trust do not contain either cross-default or cross-collateralization provisions. Therefore, the issue that must be analyzed is whether distinct interest rates need to be assigned to individual loans in order to properly reflect the risk inherent in a payout over time.

The claims of 12 Northwest may be summarized in this way:

12 Northwest Claim and LTV Analysis

Acres	$/acre	Value	Senior Debt	Equity
80	$35,000	$2,800,000	$884,909	$1,915,091
40	$35,000	$1,400,000	$0	$1,400,000
		TOTAL	Value	$3,315,091
			Debt	$2,015,160
			Equity	$1,299,931
			LTV	60.8%

3. The interest rate experts

a. Background

Each party put on evidence of the appropriate interest rate to be applied to the Webber claims in order to reflect the deferred payments under the plan and thereby satisfy Section 1129(b)(2)(B).

The Supreme Court addressed the issue of how a bankruptcy court should set cram down interest rates in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L.Ed. 2d 787 (2004). Justice Stevens' opinion reviewed four alternatives suggested by the case law – the formula rate, the coerced loan rate, the presumptive contract rate and the cost of funds rate – and adopted the formula rate, rejecting the other three.[11] While *Till* was a Chapter 13 case, other courts and commentators

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[11]In short, the formula rate starts with the "national prime rate" and then requires the bankruptcy judge to consider whether that presumptively risk-free rate should be enhanced to reflect additional risk to the lender in the particular case.

have broadly suggested that the *Till* formula is appropriate in a Chapter 11 context. While *Till* is, of course instructive, it does not provide a final answer for several reasons.

First, the formula rate embraced by Justice Stevens' opinion did not command a majority of the Court. While Justice Thomas concurred in the judgment, he did so by adopting a fifth alternative – the risk free rate –, rejecting the notion that **any** risk factor would be appropriate under the precise wording of the statute. Second, the plurality hinted, but necessarily could not and did not decide, that the "prime plus" formula might be appropriate in Chapter 11 cases if there was no "efficient market" indicating an actual rate. This comment is itself ambiguous because the plurality seemingly relied upon the availability of voluntary DIP financing in Chapter 11 cases as proof of an "efficient market" for setting cram down rates. However, DIP loans command substantial fees, super-priority treatment and strict newly negotiated covenants. Thus, they are a market quite different in this Court's eyes from that for a restructured loan "crammed down" over the objection of a pre-petition secured creditor. Third, a number of justices equal to the plurality supported in the dissent the presumptive contract rate.

The conundrum caused by the lack of majority in *Till* is artfully examined in *In re Cook*, 322 B.R. 336 (Bankr.N.D. Ohio 2005) where the court concluded that even the application of the Supreme Court's own rule for interpreting plurality decisions, the so-called "narrowest grounds" test, does not yield a binding precedential principle. *Cook*, 322 B.R. at 343-44. Further, there is no post-*Till* appellate authority in the Ninth Circuit to guide the lower courts in determining the issue; the one BAP case that discusses *Till* defers consideration to another day. *In re Trejos*, 374 B.R. 210 (9th Cir. BAP 2007).

Against this background, this Court will make the interest rate determination based on the totality of the evidence, the credibility of the expert opinions, and the particular circumstances of this case, guided, but not bound, by the discussion of the issue in the *Till* opinion.

b. MCA

Morrie Aaron, principal of MCA Financial Group, Ltd., offered an opinion that 8% is a "reasonable and supportable" interest rate for the Webber claims. MCA did not opine on the value

of the land or the feasibility of the plan. Although MCA did break out the Webber claims into three categories (first liens on 231 acres, first liens on 80 acres and second lien on 50 acres), it opined only as to one overall rate for all of the Webber obligations. The opinion was based upon 1) the formula approach (building a rate starting with the prime rate) and 2) current market rates of interest. MCA relied primarily on the formula approach, using the market approach to verify the reasonableness of the formula conclusions.

In its formula analysis, MCA started with the prime rate as of February 1, 2008 of 6% and added 200 basis points for risk. It categorized types of risk as default risk, security risk, interest rate risk and industry risk. It added 200 basis points for default and security risk but no additional additions for either interest rate risk or industry risk.

Mr. Aaron's declaration states that he contacted three lenders, Alliance Bank of Arizona, National Bank of Arizona and First National Bank of Arizona, all of which confirmed that a conforming loan for raw, unentitled land would have a loan to value ratio of 50%, carry a premium over prime of 100 to 300 basis points, and would have a term of two to three years with a 20 to 25 year amortization. However, neither the declaration nor his testimony identified a lender that would actually make this loan today on these terms.[12] In his view, the survey of market interest rates confirmed the 8% conclusion he reached based on the formula approach.

To assess whether the Webber loans would be "conforming", MCA relied upon the PGP and ATI appraisals, which showed an overall LTV ranging from 52% to 40.3%. For the three categories described above, the LTV ratios ranged from 32.5% to 97% (PGP) and from 24.8% to 97% (ATI). As noted above, the Court's determination of value of 31.6% to 89.3% with a blended LTV of 50.3%.

c. Elliott D. Pollack

Elliott D. Pollack, principal of Elliott D. Pollack & Company, offered an opinion on behalf

[12]Mr. Aaron acknowledged on cross-examination that he did not know of a lender who would actually make a loan at prime plus 2 to take out the Webber loans.

of Webber in the nature of a review of MCA's opinion. He identified three flaws in the MCA opinion: 1) a lack of consideration of the current state of the economy and credit markets; 2) an unrealistic picture of the extent that a 50% to 65% land loan will be available to potential customers, and 3) an error as to the interest rate that would be charged for such a loan if it indeed were to be made. Further, considering the remote location of the Property and current uncertainty in the real estate market, he opined that such a loan would either not be available or, if available, would be priced between 12% and 15%.

In his view, the market for all types of loans, with the exception of consumer loans, has been tightening since the third quarter of 2007. He further opined that the unease in the financial markets is also reflected in the increased spread between high yield corporate bonds and comparable treasury obligations, noting that the spread had increased from an average of 350 basis points during the period beginning in 2004 through mid-2007 to an average today of approximately 750 basis points.

The crux of the Pollack opinion is that the MCA opinion is based upon a stable and growing economy and is disconnected from the reality of today's lending marketplace and deteriorating economy. Although he suggests that the formula approach would also yield a rate in the vicinity of 12% to 15%, he did not testify directly on that point. Mr. Aaron's declaration indicates that a review of Pollack's work papers suggests two build up formulas: 1) prime (6%) plus a risk factor of 8% and 2) a three year treasury rate of 1.84% plus the spread for high yield (but still investment grade)[13] corporate bonds plus additional risk of 3.5%.

In reaching his conclusions, Mr. Pollack did not initially survey National Bank of Arizona or First National Bank of Arizona (two of the real estate lenders contacted by MCA) but did contact them later. He testified that his later survey revealed that First National Bank of Arizona is currently making no new land loans and has not for the last several months. National Bank of Arizona

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[13] Aaron's declaration and, apparently Pollack in his deposition, stated that the BBB bonds upon which he based this analysis were non-investment grade or "junk" bonds. Although Debtor's counsel sought to undermine Pollack's credibility on this point, it remains an issue of fact, not opinion. And, in fact, the BBB bonds upon which he relied are the lowest level of investment grade bonds.

advised that it was not making land loans and that a borrower should look to non-traditional lenders. Mr. Pollack surveyed two non-traditional lenders who advised that pricing would be in the 12-15% range. He relied upon these interviews in arriving at his conclusion of an appropriate interest rate.

Debtor's counsel established that Mr. Pollack is well known in Arizona as an expert on real estate and economic affairs and questioned him at length about statements and presentations he made during the period of January 2005 through September 2007 about the robust nature of the Arizona economy and the excellent potential for west side development as well as real estate investments he had personally made in the last few years. In addition, Mr. Pollack made statements in 2008, which he confirmed in testimony, that the real estate market will take between three to five years to recover.

4. Deposition testimony

Deposition testimony of Doug Smith and Brent Nerguizian was received in evidence. The relevant portions of that testimony have been incorporated in the factual findings set forth in this decision.

III. Discussion

A. Interest Rates

The Court has already determined the value of the Property to be $35,000 per acre. This establishes the loan to value ratios for the various parcels as set forth in the tables above.

The Court agrees with Webber that its loans have to be examined individually as they are not cross-collateralized. As explained above, *Till* is neither binding nor fully explanatory, but it does give useful direction. Although there is no discernable common denominator, the fact is that five members of the Court concluded that a formula approach of some sort is appropriate, the difference being Justice Thomas' conclusion that the language of the statute does not compel the addition of any risk factor. However, there is not a vacuum on what to do in the absence of Supreme Court precedent. The Ninth Circuit in *In re Camino Real Landscape Contractors Maintenance Contractors, Inc*, 818 F.2d 1503 (9th Cir. 1987) and *In re Fowler*, 903 F.2d 694 (9th Cir. 1990) adopted a market approach using a build up formula, not unlike the result in plurality in *Till.* Given

Till's ambiguous outcome, those precedents remain vital today. The Court said in *Camino Real*:

> The appropriate discount rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.

Id. at 1504.

At the same time, a "market" approach does not mean that a Court, in setting a cram down interest rate, should rely entirely upon whether or not a loan would be commercially available in the market place. As noted by the Supreme Court in *Till*, loans to debtors may simply not be available in the market place. The same may be true for any borrower, as Mr. Pollack suggests is the case today. That does not mean that Section 1129(b)(2)(B) becomes inoperative; the concept necessarily implies that payment of the crammed down debt is involuntary and on terms that may not be actually available in the market place. To make sense of the "present value" concept of Section 1129(b)(2)(B), risk needs to be assessed not only in a subjective sense based upon today's transitory market conditions but also upon risk in a more objective economic sense, whether or not a particular chief credit officer is or is not approving loans today.

In this case, there is evidence from both interest experts that gives guidance as to the correct approach. First, two of the loans have low LTV's: the 80 acre loan at 31.6% and the 160 acre loan at 48.5%. MCA's opinion is that loans of this type would be conforming and would command rates at between 100 and 300 basis points over prime. Taking prime at 6%, as it was when the opinions were rendered, and taking into consideration, but not being controlled by, the historically difficult market described by Mr. Pollack, this suggests a rate at the lower end for the 80 acre loan (7%) and at the high end for the 40 acre loan (9%).

The 70 acre loans are of a completely different nature. The first has an LTV of 70.2% and the second (calculating the loan against the amount of equity available to it that is junior to the first) has an LTV of 61.9%, but with additional risk because of the senior foreclosure risk and the risk of erosion of equity from accruals on the first. There is no evidence from MCA about how to treat loans with these elevated LTV ratios but there is from Pollack. Either through a build up rate or

a market rate from non-traditional lenders, the suggested range is 12% to 15%. The first has less risk because of its priority and will be assigned a rate of 12%. The second has the risks noted and will be assigned a rate of 15%.

These allocated rates yield an overall rate of 10%, calculated in this way:

Loan	Rate	% of overall debt	Allocated rate	Comments
70 1st	12.0%	29.79%	3.6%	bottom end of non-traditional range
70 2nd	15.0%	7.83%	1.2%	top end of non-traditional range
80	7.0%	15.33%	1.1%	+100
160	9.0%	47.04%	4.2%	+300
		100.00%	10.1%	

Therefore, an overall rate of 10.1% will be set to be allocated among the claims as set forth in the table above.

B. Feasibility

Attached as Exhibit A is a feasibility analysis, including a table of payments to secured and unsecured creditors and a "sources and uses" of funds. The Court has made the following assumptions:

1. The claim amounts and interest rates are as set forth herein or in the plan, as amended.

2. Both the pre-petition payments due to Stratera under its junior lien and the post-petition exit financing interest payments are to come from the exit financing reserve. To the extent either of these assumptions is untrue, the analysis would be altered, but Debtor would have to demonstrate either a source of payment or Stratera would have to agree to lower pay rates or an interest holiday.

3. The costs for engineering, legal and zoning are fixed at $310,000 per Mr. Smith's deposition.[14] One of the Debtor's underlying assumptions is that the Property will be more readily sold or refinanced once entitled and that the value would be enhanced.[15] The payment exhibits to Mr. Smith's declaration did not include this working capital expense.

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[14]The Disclosure Statement estimates these costs at $400,000.

[15]PGP estimates a 10% enhancement upon entitlement; ATI's report is silent on this point.

To the extent these amounts will not be paid out of the exit financing or should be estimated at a different amount(s), the Debtor will have to demonstrate a source of payment and/or justify a different amount.

4. Payments to Webber are to be made monthly based on a 25 year amortization. Webber raises the valid point that payments 90 days in arrears in essence gives Debtor 6 months without having to pay Webber anything. The good faith objections raised by Webber can be addressed by starting the payments 30 days after the effective date rather than 90 days thereafter. In addition, this will protect the junior lien on the 70 acres from additional equity erosion during the one year following confirmation of the plan.

5. The final feasibility objection is that the Debtor's assumptions of sale or refinance at the end of a year are blue sky. There is some validity to this position. Of course, we cannot predict the future but we can protect against consequences of the unknown. Here, the Notice provides that the Webber (and 12 Northwest) claims will be due and payable 3 years after the effective date, although funding is only provided for the first year. There is evidence in the record supporting a one year marketing and/or refinance timetable, although the Disclosure Statement suggests that this period will be two years. However, the Debtor may have the opportunity to see if it can accomplish this task only if the treatment of the dissenting creditor Webber is fair and equitable to Webber. That concept is not fully satisfied simply by providing for a stream of payments at a market rate and the retention of Webber's liens. It may also encompass other protections. In this case, the Notice does not specify what remedies are available in the event of default, other than specifying that a default rate of interest would apply. Likewise, the general provisions of the Plan (e.g. Articles 12.5 and 12.9) do not specifically address remedies available upon default. Therefore, the confirmation order must specify that upon default in any of the monthly payments required to be made to Webber, Webber may immediately exercise its contractual remedies, including commencing and concluding a trustee's sale.

Exhibit A demonstrates that, if the Court's assumptions as stated above are correct, there is

a shortfall of $277,557 in Month 12. For this Plan to be confirmed, that shortfall must be eliminated by plan amendments that either reduce the amounts owed (consistent with this order) or identify an additional funding source (such as an equity infusion or increased exit financing). Based upon the evidence, one year is the minimum time under a reasonable case scenario for the Debtor to be able either to sell or refinance; therefore, to be feasible, the Plan must provide funding for that minimum period of time.

C. Loan from Stratera

Currently, the loan from Stratera is a proposed loan with funds deposited in a separate bank account. The loan must be formalized, with the proceeds deposited into Debtor's bank account as of the effective date of the Plan.

D. Other Confirmation Objections

All other objections to confirmation are overruled, with the following exceptions: 1) the identity of the debtor's principals must be identified in the confirmation order (the Court assumes this will be Mr. Smith and overrules Webber's objection to his designation); 2) the confirmation order should provide that payments for any professionals engaged by the estate are subject to court approval.

E. Stay Relief

1. Section 362(d)(1). As noted above, the Webber claims are adequately protected as of today by equity cushions ranging from 68.4% to 29.8%.[16] As such, stay relief is not presently warranted for lack of adequate protection.

2. Section 362(d)(2) and (3). Each of these sections require that there is a plan that has a reasonable possibility of being confirmed within a reasonable time.[17] Therefore, continuation of the automatic stay is conditioned upon the Debtor's filing, within 30 days of the date of this order, an amendment to the plan that adequately addresses the feasibility issues outlined above or the

[16]These percentages correspond to LTV's of 31.6% to 70.2%.

[17]For purposes of Section 362(d)(2), the debtor will have no equity in the Property upon Stratera's advance of the exit financing.

parties agreeing to a stipulated order of confirmation in light of this memorandum decision. If there is no stipulated confirmation order filed, the matter will be set for a continued confirmation hearing at the earliest possible date.

3. Section 362(d)(4). The Court has carefully reviewed the deposition testimony submitted in furtherance of Webber's motion pursuant to this section. Based on this evidence, the Court declines to find that the filing of this petition was part of a scheme to delay, hinder or defraud creditors that involved a transfer of an interest in this real Property without the consent of Webber. The Court finds that there were valid business reasons for the various transactions between PFLG and Debtor that resulted, ultimately, in full ownership by Debtor of the junior debt that was thereafter foreclosed and that the facts of this case are not within either the letter or the spirit of Section 362(d)(4). Therefore, relief under this section will be denied.

IV. Conclusion

Confirmation of the First Amended Plan, as amended, will be denied without prejudice to the Debtor's filing further amendments that adequately address the feasibility deficiencies identified in this memorandum decision. Counsel for Debtor is to submit a form of order.

Stay relief under Sections 362(d)(1) and (4) is denied. Continuation of the automatic stay will be conditioned under Sections 362(d)(2) and (3) as set forth above.

Counsel for Webber is to submit a form of order.

So ordered.

DATED: May 29, 2008

Charles G. Case II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or
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EXHIBIT A

Payments to Secured Creditors

	12 NW	Webber	Pre Strat	Post Strat	Minnigerode
Principal	$2,015,160	$5,777,266	$5,150,000	$2,000,000	$13,500
Interest Rate	16.0%	10.1%	12.0%	12.0%	6.0%
Payable Int Rt	16.0%	10.1%	8.0%	12.0%	6.0%
Acc Int Rt	0.0%	0.0%	4.0%	12.0%	0.0%
Monthly Pmt	$27,384	$52,906	$39,749	$20,000	$261
Qtly Pmt	$82,151	$158,718	$119,246	$60,000	$783
Yearly Pmt	$328,605	$634,870	$476,982	$240,000	$3,132

Sources and Uses of Funds

	Eff Date	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12
Bal Fwd	$2,000,000	$1,771,354	$1,671,831	$1,573,092	$1,272,956	$1,173,434	$1,074,695	$719,238	$619,716	$520,977	$220,841	$121,319	$22,579
Eff Dt Pmts	-$219,208												
Unsec's	-$9,439												
County							-$55,320						
Webber		-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906	-$52,906
12 NW				-$82,151			-$82,151			-$82,151			-$82,151
Pre Strat				-$119,246			-$119,246			-$119,246			-$119,246
Post Strat		-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000	-$20,000
Minn		-$783			-$783			-$783			-$783		
Eng & Zoning		-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833	-$25,833
TOTAL	-$228,647	-$99,522	-$98,739	-$300,136	-$99,522	-$98,739	-$355,456	-$99,522	-$98,739	-$300,136	-$99,522	-$98,739	-$300,136
Balance	$1,771,354	$1,671,831	$1,573,092	$1,272,956	$1,173,434	$1,074,695	$719,238	$619,716	$520,977	$220,841	$121,319	$22,579	-$277,557

Engineering, Legal and Zoning per Smith depo $310,000