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IT IS SO ORDERED.
Signed October 30, 2014

A handwritten signature in cursive script that reads "Arthur S. Weissbrodt". The signature is written in black ink on a white background.

Arthur S. Weissbrodt
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re: Case No. 11-59479-ASW
ESTERLITA CORTES TAPANG, Chapter 11

ORDER DENYING 523 BURLINGAME
AVE., LLC'S *IN LIMINE* MOTION TO
PRECLUDE PHILLIP GILLET FROM
TESTIFYING AS A MARKET RATE OF
INTEREST EXPERT BECAUSE HE IS
NOT A MARKET RATE OF INTEREST
EXPERT AND FOR OTHER REASONS

Debtor.

_____ /
This matter comes before the Court on 523 Burlingame, LLC's
("Creditor's") Motion to Preclude Phillip Gillet from Testifying as
a Market Rate of Interest Expert (Docket # 524). Creditor is
represented by attorney David Wiseblood. The Court denies Creditor's
motion.

Creditor argues that Mr. Gillet is not competent under FED. R.
EVID. 702. Rule 702, pertaining to Testimony by Expert Witnesses,
provides:

A witness who is qualified as an expert by knowledge,
skill, experience, training, or education may testify in
the form of an opinion or otherwise if: (a) the expert's
scientific, technical, or other specialized knowledge will
help the trier of fact to understand the evidence or to

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1 determine a fact in issue; (b) the testimony is based on
2 sufficient facts or data; (c) the testimony is the product
3 of reliable principles and methods; and (d) the expert has
reliably applied the principles and methods to the facts
of the case.

4 Debtor, who is represented by attorney Francisco Aldana, seeks
5 to admit Mr. Gillet's expert witness testimony to assist the Court
6 in determining the proper market rate of interest on Creditor's
7 secured claim. The parties agree that when determining an
8 appropriate cramdown interest rate, the Court should apply the
9 formula rate or prime plus rate approach approved in the Supreme
10 Court case, *Till v. SCS Credit Corp.*, 541 U.S. 465, 479-80 (2004).
11 Although *Till* involved a Chapter 13 case, bankruptcy courts
12 generally rely on the *Till* Court's reasoning to support a formula
13 rate approach in Chapter 11 confirmation cases. *In re Industry West*
14 *Commerce Ctr. LLC*, 2011 WL 3300187, at *7 (9th Cir. BAP May 24,
15 2011). The *Till* formula begins with the National Prime Rate, then
16 increases that rate based on certain risk factors, including (1) the
17 circumstances of the estate; (2) the nature of the security; (3) the
18 duration and feasibility of the reorganization plan; and (4) the
19 loan to collateral ratio. *Till*, 541 U.S. at 479.

20 Creditor contends that Mr. Gillet is not qualified as an expert
21 under FED. R. EVID. 702 because he does not possess the requisite
22 "knowledge, skill, experience, training, or education." FED. R. EVID.
23 702(a). Furthermore, Creditor argues that the manner in which Mr.
24 Gillet arrived at his opinion is not in conformance with FED. R. EVID.
25 702(b)-(d). Creditor contends that Mr. Gillet did not properly apply
26 *Till's* formula because Mr. Gillet's did not analyze any of the
27 particular risk factors. Creditor also contends that it would
28 premature to employ the *Till* formula because the third factor, the

1 duration and feasibility of the reorganization plan, cannot be
2 evaluated because Debtor has not submitted an amended plan.

3 **1) Mr. Gillet's Qualifications to Testify**

4 "Courts have liberally construed [the qualification]
5 requirement, holding that an expert's qualification can be based on
6 a broad range of knowledge, skill, expertise, training, or
7 education." *In Re Young Broadcasting, Inc.*, 430 B.R. 99, 122
8 (S.D.N.Y. 2010) (citations omitted). Disputes regarding matters such
9 as an expert's credentials go to the weight, not admissibility, of
10 an expert's testimony. *Young Broadcasting, Inc.*, 430 B.R. at 122
11 (emphasis added). A bankruptcy court can disregard the testimony of
12 an expert witness that it finds not credible. *In re 3dfx*
13 *Interactive, Inc.*, 389 B.R. 842, 867-68 (Bankr. N.D. Cal. 2008).

14 Mr. Gillet is qualified to serve as an expert under FED. R. EVID.
15 702. Debtor's Expert Witness Report shows that Mr. Gillet has
16 graduate education credentials in accounting, taxation, and law. He
17 taught business and accounting at several academic institutions and
18 practiced as a bankruptcy attorney for several years in California.
19 A real estate and finance background are appropriate knowledge bases
20 for opining on the *Till* factors in this context. *Industry West*
21 *Commerce Ctr. LLC*, 2011 WL 3300187, at *2-*3. Here, Mr. Gillet's
22 accounting and business background are pertinent to assessing *Till*
23 "risk" factors (3) and (4): the loan to collateral value, and
24 duration and feasibility of the reorganization plan. Mr. Gillet is
25 also a California-licensed real estate broker which makes him
26 qualified to assess factors (1) and (2): circumstances of the estate
27 and nature of the security. To the extent that the Court has
28 reservations about the adequacy of Mr. Gillet's credentials or
experience in making financial calculations such as the Chapter 11

1 cramdown rate, the Court may accord Mr. Gillet's report less weight,
2 or no weight, when making its factual findings.

3 **2) Reliability of Mr. Gillet's Expert Witness Report**

4 An expert's testimony must be relevant and reliable. FED. R.
5 EVID. 702; *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 589
6 (1993). An expert's report is relevant if it assists the trier of
7 fact in making a factual determination. FED. R. EVID. 702.
8 Reliability requires a preliminary assessment of whether the
9 reasoning or methodology is scientifically valid and of whether
10 that reasoning or methodology can properly be applied to the facts
11 in issue. FED. R. EVID. 702. This inquiry does not require the
12 expert to produce the best foundation or methodology. *Young*
13 *Broadcasting*, 430 B.R. at 124. Moreover, the safeguards provided
14 for in the case which made courts the "gatekeepers" of expert
15 witness testimony, *Daubert v. Merrell Dow Pharms. Inc.*, "are not
16 essential in a case where a . . . judge sits as trier of fact in
17 place of a jury." *In re Texas Grand Prairie Hotel Realty, L.L.C.*,
18 710 F.3d 324, 329 (5th Cir. 2013).
19
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21 Mr. Gillet's expert report gives some foundation for his
22 opinion of the appropriate interest rate. Mr. Gillet evaluates
23 the third *Till* factor, nature of the security, by briefly
24 describing the property in question as an "R-1 zoned residential
25 property with a conditional use permit." Mr. Gillet also explains
26 that he accounted for adjustments to the prime rate, 3.25%, by
27 studying the "availability of financing from major mortgage
28

1 lenders, smaller local lenders, and private financing." He also
2 explains that he looked at the published rates for available
3 mortgages from major mortgage lenders and applied his own
4 "understanding of those markets." The methods employed in arriving
5 at his opinion are sufficient to be admissible under FED. R. EVID.
6 702, as Mr. Gillet explains the sources for his analysis and how
7 those sources affected the prime rate.

8
9 To the extent that the Court, as fact finder, has
10 reservations about Mr. Gillet's methods of analysis, or omission
11 of analysis with regard to the remaining *Till* factors, the Court
12 may choose to accord the testimony little or no weight in its
13 determination of the cramdown rate in Debtor's Chapter 11
14 Reorganization Plan. *Young Broadcasting, Inc.*, 430 B.R. at 122.

15 For the aforementioned reasons, Creditor's motion *in limine*
16 is denied. The report is admitted, and Mr. Gillet may testify in
17 court. The Court will give the report and his testimony the
18 appropriate weight when the Court issues its findings with regard
19 to the proper market rate of interest.
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21 IT IS SO ORDERED.

22 ** END OF ORDER **
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Court Service List

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Parties to be noticed electronically.