

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
Division**

<b>IN RE:</b>	:	
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<b>CREECH FUNERAL HOME, INC.,</b>	:	<b>Chapter 11</b>
	:	<b>Case No. 06-60058</b>
<b>Debtor</b>	:	<b>Judge Joseph M. Scott</b>
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<b>IN RE:</b>	:	
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<b>DONALD CLYDE CREECH and</b>	:	<b>Chapter 11</b>
<b>BONITA BINGHAM CREECH,</b>	:	<b>Case No. 06-60374</b>
	:	<b>Judge Joseph M. Scott</b>
<b>Debtors</b>	:	
	:	
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**ORDER CONTINUING MOTIONS TO CONVERT OR DISMISS  
AND SUSTAINING IN PART AND OVERRULING IN PART  
MOTION ON DEFAULT OF INDIVIDUAL DEBTORS**

These matters involving Creech Funeral Home, Inc. (“Corporate Debtor”) and Donald Clyde Creech and Bonita Bingham Creech (“Individual Debtors”) came before the Court for hearings on November 17, 2011 and December 22, 2011 (“December Hearing”), on the following motions:

1. A Motion to Convert or Dismiss Chapter 11 Cases for Cause and for Failure to Comply with the Confirmed Plan Herein, or in the Alternative, to Remove, and Replace the Directors of the Reorganized Corporate Debtor with a Liquidating Officer (“Motions to Convert”) filed by Premier Capital, LLC, assignee of National City Bank<sup>1</sup> (“Premier”) against both the Corporate Debtor and the Individual Debtors (CD Doc. 175; ID Doc. 173).<sup>2</sup> The Corporate

<sup>1</sup> National City Bank’s claims against the Corporate Debtor and the Individual Debtors were transferred to Premier by an Affidavit and Assignment of Claim filed on January 20, 2009. (CD Doc. 152; ID Doc. 135).

<sup>2</sup> References to the docket in the Corporate Debtor’s case are (CD Doc. \_\_\_\_). References to the docket in the Individual Debtors’ case are (ID Doc. \_\_\_\_).

Debtor and Individual Debtors (collectively, the “Debtors”) filed Responses (CD Doc. 180; ID Doc. 183) to the Motions to Convert, and

2. With respect to the Individual Debtors, a Motion for Declaration of Default, Termination of the Continuing Stay Imposed by the Confirmation Order Regarding the Individual Debtors and Their Assets Including Their Residence on Haywood Road in Middlesboro, Kentucky and Abandonment of the Assets of the Individual Debtors and For an Expedited Hearing on the Motion (“Motion on Default”) (ID Doc. 188) also filed by Premier.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and these are core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C) and (O).

#### **RELEVANT FACTS AND PLAN PROVISIONS**

1. Corporate Debtor filed its chapter 11 petition on February 24, 2006.
2. The Individual Debtors filed their joint chapter 11 petition on July 10, 2006.
3. A joint chapter 11 plan (“Plan”) for the Debtors was confirmed on June 21, 2007 (CD Doc. 121; ID Doc. 110).
4. With respect to Premier, the Plan is modified by an Agreed Order (“First Agreed Order”) (CD Doc. 116; ID Doc. 102) entered on June 18, 2007.
5. Class 1 of the Plan, as modified by the First Agreed Order, represents Premier’s secured claim against the Corporate Debtor secured by real estate owned by the Corporate Debtor and referred to as the “Funeral Home Property.”<sup>3</sup> The Class 1 debt is to be paid at \$4,000 per month with interest at 11.25% per annum. Payments are to increase to \$10,000 per month after payment of secured and priority tax claims and unsecured claims. (First Agreed Order ¶ 2).
6. Premier also has a second position judgment lien against a six-unit apartment building located at 121-123 S. 21st St., Middlesboro, KY (“Apartment Building”), owned by the Individual Debtors. (First Agreed Order ¶ 2).

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<sup>3</sup> Certain real property located at 112 South 21st Street, Middlesboro, Kentucky, upon which is located the Creech Funeral Home, Chapel and Parking Lot. (Plan ¶ 1.46).

7. Another Agreed Order (“IRS Agreed Order”) (CD Doc. 162; ID Doc. 162) among Debtors, the IRS and the Kentucky Revenue Cabinet (“KRC”) was entered on February 18, 2011. Pursuant to the IRS Agreed Order, the parties agree that as of December 31, 2010, the Debtors owed post-confirmation payroll taxes in the amount of \$95,634.74 to the IRS and \$14,456.92 to KRC, including accrued interest and penalties. Also pursuant to the IRS Agreed Order, the IRS was paid \$32,000 and KRC was paid \$8,000 from Corporate Debtor’s counsel’s IOLTA Escrow Account. Further, \$10,000 was retained for payment of fees of Corporate Debtor’s counsel, Individual Debtors’ counsel and the Debtors’ accountant.

8. Premier was not a party to the IRS Agreed Order.

9. The Plan is further modified with respect to Premier by a Supplement to Agreed Order (“Supplement Agreed Order”) (CD Doc. 172; ID Doc. 170) entered on April 19, 2011.

10. According to the Supplement Agreed Order, Premier agreed that Corporate Debtor did not have to make payments on the Class 1 claim for February and March 2011. Starting April 2011, the Corporate Debtor was to start making payments to Premier in the amount of \$2,000 on the Class 1 claim. Corporate Debtor was to continue to make payments of \$2,000 per month until “the earlier of August 31, 2011, or the closing of a sale of the Funeral Home Property.”<sup>4</sup> (Supplement Agreed Order ¶ 5).

11. The Supplement Agreed Order also provides that if the sale of the Funeral Home Property does not yield an amount to pay Premier in full, then Premier has a right to assert an administrative expense claim for payments that should have been made on the Class 1 claim from February 2011 forward, less any payments made.

12. Class 13 of the Plan, as modified by the First Agreed Order, is Premier’s secured claim against the Individual Debtors secured by their residence located on Haywood Road, Middlesboro, KY (“Residence”). The Class 13 debt is to be paid at \$3,543.95 per month with interest at 11.25% per annum. As of June 14, 2007, the principal amount of the Class 13 claim

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<sup>4</sup> This phrase should probably have been the latter of the two events rather than the earlier.

was \$360,855.32. Payments were to increase to \$10,000 per month after payment of the Class 1 claim, secured and priority tax claims and unsecured claims. (First Agreed Order ¶ 3). There were no changes made to the payment of the Class 13 claim in the Supplement Agreed Order.

13. The Debtors are in default under the Plan if they fail to substantially comply with the terms of the Plan or fail to “pay or comply with any term of any adequate protection order assumed herein with the Secured Creditors and Tax Claimant(s), except to the extent that the payment terms therein has been changed by the terms of this Plan.” (Plan ¶ 6.12). The Debtors’ payment terms under the Plan have been modified by the various agreed orders as noted above.

14. Premier asserts that from August 2011 to date, Debtors have failed to make payments to Premier as required under the Plan, as amended by the First Agreed Order and Supplement Agreed Order. Debtors admitted at the December Hearing that they are in default in their payments to Premier.

15. Pursuant to the Plan, upon Debtors’ default, Premier is entitled to report the default to the Court and seek an appropriate remedy, “which can include liquidation of the Debtors’ Assets or such other remedy decided by the Court in its discretion” (Plan ¶ 6.13(a)) or, as a secured creditor, Premier “shall have the relief rights and such other remedies afforded [it] in [its] adequate protection order” (Plan ¶ 6.13(c)). Unless the Court in its discretion permits, Premier is not entitled to the relief requested regarding removal of the Corporate Debtor’s directors and replacing them with a liquidation trustee. According to the Plan, that remedy is only available to the unsecured creditors (Plan ¶ 6.13(b)).

16. As noted above, the remedies available to Premier under its Agreed Order of Adequate Protection (CD Doc. 36) entered March 29, 2006, were incorporated into the Plan by the First Agreed Order. As of March 29, 2006, the Individual Debtors had not filed their chapter 11 petition; and therefore, the Agreed Order of Adequate Protection relates only to the Corporate Debtor. Pursuant to ¶ 21 of the Agreed Order of Adequate Protection, Premier is to give notice to

the Corporate Debtor's counsel of any payment not received within five days of its due date. Corporate Debtor then has ten days to cure the default, after which Premier may file an affidavit of default and submit an order to the Court terminating the automatic stay. The order may be entered by the Court in its discretion. There are no notices or affidavits of default pending against the Corporate Debtor in the record.

### **MOTIONS TO CONVERT**

The Motions to Convert were scheduled for hearing on November 17, 2011, at which time the parties entered into an agreed order (CD Doc. 184; ID Doc. 187) continuing the hearing to the December Hearing. The continuation was given for the Debtors to pursue a potential sale of the assets of the Corporate Debtor to Foundation Partners Group, LLC ("Foundation"). Pursuant to that agreed order, prior to the December Hearing, the Debtors were required to file either (i) appropriate motions seeking authority to sell the assets of the Corporate Debtor, or (ii) status reports regarding the present status of the asset sale.

The Debtors filed timely Status Reports (CD Doc. 186; ID Doc. 189) with respect to the potential sale of the assets of the Corporate Debtor to Foundation. In the Status Reports Debtors advised that Foundation had withdrawn its original letter of intent dated August 23, 2011. Instead Foundation made a verbal proposal for a second offer—at \$100,000 less than the original offer. In the second offer, Foundation proposed to buy the Corporate Debtor's assets for \$1 Million in cash and an additional \$1,908,000 over time. Debtors have countered with \$2 Million in cash and \$908,000 over time. Debtors expect to have entered into a new letter of intent with Foundation prior to the end of December 2011.

For cause on the Motion to Convert, Premier asserts that (i) upon information and belief of Premier, Debtors have failed to pay post-petition withholding and income taxes, and (ii) from August 2011 to date, Debtors have failed to make payments to Premier as required under the Plan, as amended by the First Agreed Order and Supplement Agreed Order.<sup>5</sup> Debtors do not

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<sup>5</sup> Premier also asserted that Debtors failed to file quarterly operating reports as required under

deny that they have not made payments to Premier and it is apparent from statements of counsel at the December Hearing that Debtors do not intend to make payments to Premier until the completion of the sale of assets of the Corporate Debtor.

Debtors state that the reorganization plan contemplated a potential default in payment of taxes and the negotiated liquidation and sale procedures are set forth in §§ 6.17.10 and 6.24 of the Plan. Debtors request that these Plan provisions for appointment of a liquidating agent and Plan procedures for sale of assets set forth in the Plan should be employed rather than converting or dismissing the cases. The provisions set forth in §§ 6.17.10 and 6.24 of the Plan, however, apply only when a notice of default is filed by the Tax Creditor.

At the December Hearing, counsel for the IRS indicated that while progress with the sale of the Corporate Debtor's assets appears to have been made, it has not been done as expeditiously as expected. Counsel advised the Court that the IRS is ready to declare a default under the Plan if the case is not ready for approval of a sale of the Corporate Debtor's assets by February 2012.

With respect to converting or dismissing a chapter 11 case to a chapter 7 case, 11 U.S.C. § 1112(b) provides:

(b)(1) Except as provided in paragraph (2) . . . , on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

. . .

(4) For purposes of this subsection, the term 'cause' includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate; . . .

(I) failure to pay taxes owed after the date of the order for relief or to file tax return due after the date of the order for relief; . . .

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the Plan. However, the Debtors have subsequently filed the missing reports.

(M) inability to effectuate substantial consummation of a confirmed plan;

...

(N) material default by the debtor with respect to a confirmed plan.

11 U.S.C. § 1112(b). Premier bears the burden of proof on their Motions to Convert by a preponderance of the evidence. *In re Player Wire Wheels, Ltd.*, 421 B.R. 864, 868 (Bankr. N.D. Ohio 2009) (on motion to dismiss or convert a case pursuant to § 1112(b), movant bears burden of proof by a preponderance of the evidence); *see also In re New Batt Rental Corp.*, 205 B.R. 104, 106-07 (Bankr. N.D. Ohio 1997) (same).

At the December Hearing, Debtors' counsel acknowledged that the Debtors have not been making Plan payments as they are required to under the Plan. Other than counsel's acknowledgment, there is no evidence before the Court sufficient to constitute "cause" to convert or dismiss the case at this time. Based on counsel's acknowledgment, "cause" has been established under only § 1112(b)(4)(I) for failure to pay taxes as they come due after the Petition Date. As noted above, the IRS is willing to give Debtors until February 2012 to consummate a sale of the Corporate Debtor's assets and pay taxes. The Court does not ignore the fact that Debtors have not paid Premier since August 2011. The Court's understands that if the potential sale to Foundation is consummated, then Premier will be paid in full.

Based on the foregoing, the Court will **CONTINUE** the Motions to Convert until the Court's docket at 9:00 a.m. on January 26, 2012.

#### **MOTION ON DEFAULT**

Premier filed the Motion on Default only with respect to the Individual Debtors. In the Motion on Default, Premier reiterates that neither the Corporate Debtor nor the Individual Debtors have made a payment to Premier since August 2011. Premier requests that if the Court does not dismiss the Individual Debtors' case that it (i) declare a default under the Plan; (ii) terminate the continuing stay imposed on Premier pursuant to the Plan and (iii) (a) authorize Premier to pursue the Individual Debtors personally, (b) authorize Premier to collect from the Individual Debtors'

assets pursuant to Premier's state court judgment, (c) authorize Premier to foreclose on the Individual Debtors' Residence; and (d) order the abandonment of the Residence from the Estate.

Although the Debtors' failure to make four monthly payments under the Plan is insufficient, at this time, to warrant conversion or dismissal of these cases, it is sufficient to grant, in part, the relief requested by Premier in the Motion on Default. Debtors are in default under the provisions of ¶ 6.12 of the Plan and pursuant to ¶ 6.13, this Court is authorized in its discretion to fashion a remedy as set forth below.

### **CONCLUSION**

Having reviewed the record and the pleadings and having considered the arguments of counsel, **IT IS, HEREBY, ORDERED** that

1. The Motions to Convert are hereby **CONTINUED** to **9:00 a.m. on Thursday, January 26, 2012**, in the U. S. Bankruptcy Courtroom, 2nd Floor, Community Trust Bank Building, 100 East Vine Street, Lexington, Kentucky.

2. On or before **Noon on Tuesday, January 24, 2012**, the Debtors shall file a detailed report regarding the status of the sale of the Corporate Debtor's assets and in particular whether a binding letter of intent has been entered into between the Debtors and Foundation or another third party and the terms of such sale.

3. On or before **Noon on Tuesday, January 24, 2012**, the Debtors shall file operating reports for the fourth quarter of 2011.

4. The Motion on Default is **SUSTAINED** to the extent that the stay imposed on Premier by the Plan is terminated with respect to the Apartment Building owned by the Individual Debtors located at 121-123 S. 21st St., Middlesboro, KY. Premier may proceed with its state court remedies with respect to the Apartment Building.

5. To the extent that it requests any additional relief, including the request to terminate the stay on the Individual Debtors' Residence and/or other assets, the Motion on Default is **CONTINUED** to **9:00 a.m. on Thursday, January 26, 2012**, in the U. S. Bankruptcy



Courtroom, 2nd Floor, Community Trust Bank Building, 100 East Vine Street, Lexington, Kentucky, at which time the Court will consider the status of the sale of the assets of the Corporate Debtor and whether Debtors are paying their obligations under the terms of the Plan, as amended. If the Corporate Debtor and Individual Debtors have not otherwise reached an agreement with Premier or the sale of the Corporate Debtor's assets is not contractually bound to occur, then additional stay relief will be granted to Premier to permit Premier to proceed with its state court remedies with respect to the Individual Debtors' Residence.

**Copies to:**

W. Thomas Bunch, Esq. (for service)  
John Hamilton, Esq.  
M. Tyler Powell, Esq.  
David Middleton, Esq.  
U. S. Trustee

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Wednesday, December 28, 2011**  
**(jms)**