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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re BAYMARK L.P.,  
Debtor.

Case No. 00-53226-MM  
Chapter 7  
**OPINION**

**INTRODUCTION**

This matter comes before the Court on the motion of Whitney Cressman Limited for retroactive appointment as broker and for payment of its real estate commission. For the reasons stated hereafter, the Court grants the motion for retroactive appointment and approves the application for award of the commission. Following the authority of Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000), the Court allows payment of the commission only to the extent that payment can be made from unencumbered funds of the estate.

**FACTUAL BACKGROUND**

In February 2000, Baymark L.P. engaged Whitney Cressman to sell a multi-unit real estate development located in Walnut Creek, California. On behalf of Whitney Cressman, Clayton Jew began marketing the property and eventually devoted over three hundred hours to the transaction. He prepared a four-color flyer, which he mailed to over one thousand potential buyers, and responded to inquiries about the property. He also prepared a thirty-one page Offering Memorandum, complete with schematics, renderings, plot plans, feasibility and demographic analyses, and forwarded it to selected prospects. Jew received several

1 offers to purchase and letters of intent, including an offer from Branagh Development Company. Branagh's  
2 offer was accepted after negotiations involving sixty to eighty hours of Jew's time.

3 While the property was being marketed, Baymark filed for relief under Chapter 11 of the Bankruptcy  
4 Code. The filing was prompted by an order entered in an action pending in the United States District Court  
5 between Baymark and Primecore Mortgage Trust, Inc. The District Court had ordered Baymark to post a  
6 \$1 million bond; if it failed to do so, Primecore would have been allowed to proceed with a foreclosure sale  
7 on the Walnut Creek property. Wayne Aosaza, Baymark's general partner, testified by declaration that he  
8 "informed Mr. Jew of the bankruptcy and assured Mr. Jew that [Whitney Cressman] would be paid upon a  
9 sale."

10 After the petition date, Baymark and Branagh executed a sale agreement, and Baymark sought  
11 bankruptcy court authority to sell the property. The proposed sale terms provided for \$5.1 million in cash at  
12 closing, an additional \$145,000 upon the approval of a building permit, and \$200,000 upon the completion of  
13 construction. The buyer also proposed to pay 10% of future profits to Baymark. Primecore opposed the sale  
14 because the cash payable at closing was insufficient to pay its secured claim of approximately \$5.4 million, and  
15 it was unwilling to bear the risk of non-completion of the project. Primecore independently contacted Branagh  
16 and negotiated the payment of \$5.4 million at closing. During negotiations over the sales price and other terms,  
17 Whitney Cressman voluntarily reduced its commission to 2%. Primecore subsequently dropped its opposition  
18 to the sale on condition that it receive \$4,375,000 at closing, that real property taxes be paid, and that the  
19 remainder of the proceeds be held pending resolution of Baymark's objections to Primecore's claim. The  
20 Court approved the sale on September 8, 2000. Six months later, a Trustee was appointed when the case was  
21 converted to Chapter 7 on motion by the United States Trustee.

22 Contemporaneous with the conversion motion, Whitney Cressman sought both retroactive appointment  
23 as real estate broker and payment of its 2% sales commission in the amount of \$110,000. Aosaza filed a  
24 declaration in support of the motion. Primecore objects to Whitney Cressman's request on the grounds that:  
25 (1) it is untimely, and a Whitney Cressman representative was present but silent in the sale hearing when the  
26 modified sale terms were approved; (2) the sale closed not as a result of Whitney Cressman's efforts but only  
27 because Primecore negotiated a higher sales price; (3) Primecore would be prejudiced if the motion were  
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1 granted because the funds reserved are still inadequate to pay the balance of its secured claim; and (4)  
2 Primecore’s consent to the sale free and clear of liens was expressly conditioned on payment only to Primecore  
3 and of the delinquent real property taxes until resolution of the objection to Primecore’s claim.

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5 **LEGAL DISCUSSION**

6 **A. Retroactive Employment Is Warranted Under the Circumstances.**

7 Although general bankruptcy counsel usually obtains authority for employment of the estate’s  
8 professionals, Whitney Cressman has standing to seek approval of its own employment. See Mehdipour v.  
9 Marcus & Millichap (In re Mehdi pour), 202 B.R. 474, 479-480 (B.A.P. 9<sup>th</sup> Cir. 1996), aff’d, 139 F.3d 1303  
10 (9<sup>th</sup> Cir. 1998). Bankruptcy courts have discretion to approve retroactive employment of a professional in  
11 “exceptional circumstances.” Law Offices of Ivan W. Halperin v. Occidental Fin. Group, Inc. (In re Occidental  
12 Fin. Group, Inc.), 40 F.3d 1059, 1062 (9<sup>th</sup> Cir. 1994). To establish “exceptional circumstances,” the  
13 professional seeking retroactive employment must satisfactorily explain its failure to obtain prior judicial  
14 approval and demonstrate that its services benefitted the estate in a significant manner. Atkins v. Wain, Samuel  
15 & Co. (In re Atkins), 69 F.3d 970, 974 (9<sup>th</sup> Cir. 1995).

16 Whitney Cressman has established the “exceptional circumstances” warranting retroactive employment  
17 by the estate. First, Whitney Cressman’s failure to seek prior judicial approval has been satisfactorily  
18 explained. While Jew is an experienced commercial real estate broker, this was his first transaction in  
19 bankruptcy court. He is not an attorney and was unaware of the necessity of court approval. He appears to  
20 have been acting in good faith by rendering services without court approval of his employment. It also was  
21 reasonable under the circumstances for him to rely on Aosaza’s assurances that Whitney Cressman would  
22 receive its commission. See Atkins, 69 F.3d at 976 (finding a satisfactory explanation existed where “the  
23 debtors led the firm to believe that they would secure the requisite court approval”).

24 With respect to the second requirement, Whitney Cressman’s services were of significant benefit to  
25 the estate. Through his extensive efforts to market the property, Jew located a buyer that was ready, willing  
26 and able to perform, not only on the initial sale terms but also on renegotiated terms. He also continued to  
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1 market the property even after receiving Branagh's offer so that Baymark would not be left without a buyer  
2 if Branagh failed to close escrow.

3 **B. The Amount of the Commission is Approved.**

4 Section 330(a) authorizes reasonable compensation for the actual, necessary services of a professional.  
5 Jew expended over three hundred hours in connection with this transaction and incurred numerous expenses,  
6 including on-site signage, advertising in the Wall Street Journal and on two Websites, and preparation of the  
7 flyer and Offering Memorandum. Additionally, he spent approximately sixty to eighty hours negotiating with  
8 the eventual buyer. As a result of these services, he brought a qualified buyer to the table. Approval of the  
9 amount of Whitney Cressman's commission under § 330(a) is appropriate.

10 **C. Payment of the Commission Must Be From Unencumbered Estate Funds.**

11 Approval of the commission, however, merely allows Whitney Cressman an administrative claim under  
12 § 503(b), which provides for allowance of the actual, necessary costs and expenses of preserving the estate.  
13 The more problematic issue is payment of the commission since, as a general rule, administrative expenses do  
14 not have priority over secured claims and may not be charged against a secured creditor's collateral. 11  
15 U.S.C. § 506(c); Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 5 (2000); Central  
16 Bank of Montana v. Cascade Hydraulics and Utility Service, Inc. (In re Cascade Hydraulics and Utility  
17 Service, Inc.), 815 F.2d 546, 548 (9<sup>th</sup> Cir. 1987).

18 **1. The Commission May Not Be Paid as a § 506(c) Claim.**

19 An exception to this general rule exists where the administrative expense is incurred primarily for the  
20 benefit of the secured creditor or where the secured creditor consents to the expense. Hartford Underwriters,  
21 530 U.S. at 5; Compton Impressions, Ltd. v. Queen City Bank, N.A. (In re Compton Impressions, Ltd.), 217  
22 F.3d 1256, 1260 (9<sup>th</sup> Cir. 2000). Section 506(c) provides:

23 (c) The trustee may recover from property securing an allowed secured claim the reasonable,  
24 necessary costs and expenses of preserving, or disposing of, such property to the extent of any  
benefit to the holder of such claim.

25 Interpreting § 506(c), the Supreme Court determined that only the trustee or the debtor in possession has  
26 standing to bring a motion to surcharge a secured creditor's collateral. Hartford Underwriters, 530 U.S.

1 at 6. The reason for this limitation is in the text of the Bankruptcy Code.

2 [T]he statute appears quite plain in specifying who may use § 506(c) – “[t]he trustee.” It is  
3 true, however, . . . that all this actually “says” is that the trustee may seek recovery under the  
4 section, not that others may not. The question thus becomes whether it is a proper inference  
5 that the trustee is the only party empowered to invoke the provision.

6 Id. (footnote omitted). The Supreme Court concluded that an administrative claimant does not have an  
7 “independent right” to seek payment of its claim from property encumbered by a secured creditor’s lien. Id.  
8 at 11-13.

9 This result is not affected by Bank of Honolulu v. Anderson (In re Anderson), 66 B.R. 97 (B.A.P. 9<sup>th</sup>  
10 Cir. 1986), which held that a commission to a third party real estate broker benefits the secured party. 66 B.R.  
11 at 100. In that case, real property was sold by a trustee who had retained a real estate agent to facilitate the  
12 sale. The sale proceeds were insufficient to satisfy the claim of secured creditor Bank of Honolulu, which had  
13 been about to foreclose at the time the bankruptcy petition was filed. Nevertheless, the Bankruptcy Appellate  
14 Panel found that the Bank received a benefit from the sale and that the broker was entitled to surcharge the  
15 proceeds. Consent of the secured party was not necessary for payment of the real estate commission. Id.  
16 However, on the issue of standing, Anderson has been effectively overruled by Hartford Underwriters.

17 The Supreme Court anticipated Whitney Cressman’s problem when it considered the policies  
18 underlying § 506(c) and the argument that a trustee may lack incentive to pursue payment on behalf of an  
19 administrative creditor. Its response to this concern is that a trustee must seek recovery under § 506(c)  
20 “whenever his fiduciary duties so require,” or alternatively, that administrative creditors have other remedies,  
21 including “paying attention to the status of their accounts, a protection which, by all appearances, [was]  
22 neglected here.” Hartford Underwriters, 530 U.S. at 12. A creditor may also safeguard its interests by insisting  
23 on cash payment, negotiating directly with the secured creditor, or seeking superpriority or secured status under  
24 § 364. Id.

25 The facts in this case are more compelling than those in Hartford Underwriters. Whitney Cressman  
26 could not insist on cash payment, its interests were not protected by the debtor in possession, and the Chapter  
27 7 Trustee has no fiduciary duty to it. Whitney Cressman’s only culpability appears to be that, like Hartford  
28 Underwriters, it “neglected its own account.” Nonetheless, § 506(c), as interpreted in Hartford Underwriters,  
does not afford relief to Whitney Cressman.

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**2. The Court May Not Impose an Equitable Lien Without Further Proceedings.**

With respect to Whitney Cressman’s request for an equitable lien, the imposition of an equitable lien requires a separate adversary proceeding in order to satisfy due process requirements. See Fed. R. Bankr. P. 7001(2); Wolf v. Mahrdt (In re Chenich), 100 B.R. 512, 515 (B.A.P. 9<sup>th</sup> Cir. 1987). Whitney Cressman will further be required to establish its entitlement to an equitable lien under California law. See Kabayan v. Yepremian, 190 B.R. 389, 393-94 (C.D. Cal. 1995), aff’d, 116 F.3d 1295 (9<sup>th</sup> Cir. 1997); Jones v. Sacramento Savings and Loan Ass’n, 56 Cal. Rptr. 741, 746 (Cal. Ct. App. 1967) (“equity permits imposition of an equitable lien where the claimant’s expenditure has benefited another’s property under circumstances entitling the claimant to restitution”). See also Grappo v. Coventry Fin. Corp., 286 Cal. Rptr. 714, 722-723 (Cal. Ct. App. 1991) (no equitable lien where party continued to advance funds despite explicit refusals to grant a security interest).

**CONCLUSION**

Whitney Cressman’s motion for retroactive employment is granted. Also, its real estate commission in the amount of \$110,000 is approved and may be paid as an administrative claim to the extent there are sufficient unencumbered funds in the estate.

DATED: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

1 Case No. 00-53226

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UNITED STATES BANKRUPTCY COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CERTIFICATE OF SERVICE

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I, the undersigned, a regularly appointed and qualified Law Clerk for the Honorable Marilyn Morgan of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

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That I am familiar with the method by which items to be dispatched in official mail from the Clerk's Office of the United States Bankruptcy Court in San Jose, California processed on a daily basis: all such items are placed in a designated bin in the Clerk's office in a sealed envelope bearing the address of the addressee, from which they are collected at least daily, franked, and deposited in the United States Mail, postage pre-paid, by the staff of the Clerk's Office of the Court;

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That, in the performance of my duties, on the date set forth below, I served the **OPINION** in the above case on each party listed below by depositing a copy of that document in a sealed envelope, addressed as set forth, in the designated collection bin for franking, and mailing:

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Jeffrey H. Belote  
Lanahan Reilly LLP  
1100 Larkspur Landing Circle, Suite 340  
Larkspur, California 94939

Ben I. Hamburg  
99 El Camino Real  
Menlo Park, California 94025

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In addition, I am familiar with the Court's agreed procedure for service on the United States Trustee, by which a copy of any document to be served on that agency is left in a designated bin in the Office of the Clerk, which bin is collected on a daily basis by the United States Trustee's representative. In addition to placing the above envelopes in the distribution bin for mailing, I placed a copy of the **OPINION** in the United States Trustee's collection bin on the below date.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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Executed on:

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\_\_\_\_\_  
Law Clerk

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