UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

January 22, 2018 at 10:00 a.m.

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1. 13-35308-A-7 DOROTHY PARENT — MOTION TO EXPAND PERIOD WITHIN WHICH TO FILE A NOTICE OF APPEAL
15-2229 LB-16
FUKUSHIMA V. SWENDEMAN
12-6-17 [237]

Tentative Ruling: The motion will be dismissed as moot.

Defendant Cynthia Swendeman, individually and as trustee of the Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April 28, 2004, asks the court to extend the time for the filing of a notice of appeal from the court's November 26, 2017 judgment the court entered on November 27, 2017 against the defendant.

"*I request that the court grant me an extension pursuant to FRBP 8002(d)(1)(A) of 14 days (but not before January 2, 2018), to submit the notice of appeal in this matter.*" Docket 237 at 3.

The plaintiff and trustee in the underlying chapter 7 case, Alan Fukushima, opposes the motion.

Fed. R. Bankr. P. 8002 provides:

"***(a) In general***

(1) Fourteen-day period

Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

. . .

(d) Extending the time to appeal

(1) When the time may be extended

Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion that is filed:

(A) within the time prescribed by this rule; or

(B) within 21 days after that time, if the party shows excusable neglect.

(2) When the time may not be extended

The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

. . . .”

The judgment in question was entered on November 27, 2017. Docket 234. The deadline for filing a notice of appeal from the judgment was on December 11, 14 days after entry of the judgment. As this motion was filed on December 6, 2017, it is timely.

The judgment in question does not fall into any of the categories described in Fed. R. Bankr. P. 8002(d)(2). The judgment avoids a judicial lien on a real property and declares the related abstract of judgment as invalid, of no force or effect, and not being a cloud on title of the real property. Docket 234 at 2.

Counsel requested an extension of “14 days (but not before January 2, 2018).” This was December 25, 14 days after the December 11 deadline. Docket 237 at 3. The language “(but not before January 2, 2018)” tells the court that the movant actually seeks an extension up until January 2 to file her notice of appeal.

A review of the docket indicates the movant did not file a notice of appeal on or before January 2, 2018. Nor has the movant filed a notice of appeal after January 2.

As the movant has not filed a notice of appeal by the proposed extended deadline, January 2, this motion is moot. While the court would have granted an extension to January 2, absent a notice of appeal filed by January 2, nothing can be accomplished by granting an extension to January 2 on January 22.

To the extent counsel may believe that he could not file a notice of appeal unless and until this motion was granted, the court has three responses.

First, it was not necessary to set a hearing on this motion. Nothing in Rule 8002 requires notice and a hearing on the motion. Had the motion been presented ex parte, the court would have considered and granted it.

Second, to the extent counsel believed a hearing was necessary, it made no sense to ask for an extension to January 2 but set a hearing on January 22. Local Bankruptcy Rule 9014-1(f) requires a minimum of 14 days’ notice of a hearing on a motion. The court had available hearing days on December 26 and

January 2. Yet, counsel did not set a hearing on those dates. To the extent these dates were inconvenient, counsel could have requested an order shortening notice pursuant to Local Bankruptcy Rule 9014-1(f)(3) and the court would have considered the motion on some other day before January 2.

Third, if a hearing could not be set before January 2, counsel should have filed a notice of appeal and then asked the court to grant the extension thereby ratifying the filing of a notice after the initial 14-day appeal period.

This case has been pending for over two years, since November 30, 2015. The court entered an order granting summary judgment pursuant to which the subject judgment was entered, on November 17, 2016, over one year ago. Docket 74; see also Docket 230 at 3, 7-8. The movant has had more than sufficient time to prepare a notice of appeal.

Since granting summary judgment on November 17, 2016, the court made no new substantive determinations on the causes of action asserted in this proceeding. Counsel for the movant has been aware of the issues for over a year now.

2.	17-26125-A-11	FIRST CAPITAL RETAIL, L.L.C.	STATUS CONFERENCE 9-14-17 [1]

Tentative Ruling: None.

3.	17-27528-A-11 KMT-1	THE FOUNDATION OF HUMAN UNDERSTANDING	MOTION TO DISMISS CASE 12-19-17 [26]

Tentative Ruling: The motion will be granted.

The debtor, The Foundation of Human Understanding, through Richard Alan Masters and Roy Masters, seeks dismissal of this case, asserting that this chapter 11 case was filed by persons without authority to act on behalf of TFHU.

The debtor, The Foundation of Human Understanding, through David Masters, Mark Masters, and Michael Lofrano, opposes the motion.

11 U.S.C. § 1112(b)(1) provides that "*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.*"

Some examples of cause are enumerated in 11 U.S.C. § 1112(b)(4). However, these are not exhaustive. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000).

"*A petition in bankruptcy arising out of a two-party dispute does not per se constitute a bad-faith filing by the debtor. Id. But courts find bad faith based on two-party disputes where '"it is an apparent two-party dispute that can be resolved outside of the Bankruptcy Court's jurisdiction."' Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 616 (9th Cir. BAP 2014) (quoting Oasis at Wild Horse Ranch, LLC v. Sholes (In re Oasis at Wild Horse Ranch, LLC), 2011 WL 4502102, at *10 (9th Cir. BAP Aug. 26, 2011) (citing N. Cent. Dev. Co. v.*

Landmark Capital Co. (In re Landmark Capital Co.), 27 B.R. 273, 279 (Bankr. D. Ariz. 1983))). See also, In re Silberkraus, 253 B.R. 890, 902-03 (Bankr. C.D. Cal. 2000) (bad faith may be found under § 1112(b) where the debtor has filed bankruptcy as a litigation tactic—e.g., forum shopping)."

Greenberg v. United States Trustee (In re Greenberg), Case No. SC-16-1350-BJuF, 2017 WL 3816042, at *5 (B.A.P. 9th Cir., Aug. 31, 2017).

" '*It is generally accepted that a bankruptcy case filed on behalf of an entity by one without authority under state law to so act for that entity is improper and must be dismissed.' In re Real Homes, LLC, 352 B.R. 221, 225 (Bankr. D. Id. 2005). State law and the terms of the organizational documents and operating agreements control the question of whether the filing of a bankruptcy petition by an LLC was authorized. Id.; see also In re Corporate & Leisure Event Prods., Inc., 351 B.R 724, 731 (Bankr. D. Ariz. 2006); In re Avalon Hotel Partners, LLC, 302 B.R. 377 (Bankr. D. Or. 2003).*"

Oasis at Wild Horse Ranch, L.L.C. v. Sholes (In re Oasis at Wild Horse Ranch, L.L.C.), Case Nos. AZ-11-1142-DKIMY & 11-1124-JMM, 2011 WL 4502102, at *9 (B.A.P. 9th Cir., Aug. 26, 2011); see also In re Sterling Mining Co., Case No. 09-20178-TLM, 2009 WL 2475302, at *4 (Bankr. D. Id., Aug. 11, 2009).

Once the party moving to dismiss the chapter 11 case filed on behalf of the corporate debtor presents prima facie evidence that the filing was unauthorized, the evidentiary burden shifts to the debtor, to prove that the filing was authorized and proper. In re Real Homes, L.L.C., 352 B.R. 221, 227-28 (Bankr. D. Id. 2005); Oasis at 9 (citing Real Homes and unequivocally holding that "[Debtor] Oasis bore the burden of proving that the filing of the Petition was "authorized and proper").

This is consistent with the Supreme Court's seminal case on authority to file corporate bankruptcies, Price v. Gurney, 324 U.S. 100 (1945), which holds that a bankruptcy court has no power to adjudicate a voluntary petition filed on behalf of a corporation by persons without authority under the applicable state corporate law. Price at 106. Without authority to file, the court "has no alternative but to dismiss the petition." Id.

This case was filed on November 15, 2017. The petition and related documents were signed by David Masters as president of TFHU. Docket 1 & 1 at 4. The Statement Regarding Ownership of Corporate Debtor is also signed by David Masters as president of TFHU. Docket 6. In the Statement of Financial Affairs, David Masters, Mike Lofrano, and Mark Masters are identified as officers of TFHU. David Masters is identified as President, Mike Lofrano is identified as Secretary and Treasurer, and Mark Masters is identified as Vice President. Docket 1 at 45.

The motion asserts that David Masters and Mark Masters were removed from the board as directors of TFHU by the Founder of TFHU Roy Masters, on September 27, 2016.

Notwithstanding their removal, on September 6, 2017 they (David Masters and Mark Masters), in their alleged capacity of TFHU directors, noticed a *special* TFHU board director meeting for September 8. Docket 30, Ex. 5. Although the noticed meeting was described merely as a meeting of TFHU's members, it appears that the notice was referring to members of TFHU's board of directors. Id.

Schedule I in the petition states that "[t]he two Directors sent a Notice of

Meetings to the former President, then held a meeting at which a quorum was present, at which the former president and director was replaced with an unrelated director, and the officers were re-appointed." Dockets 1 at 48 & 30 at 100 (Ex. 11).

At the September 8 meeting Michael Lofrano was elected as another board director and the three of them (David, Mark, and Michael) became officers of TFHU. This is reflected in a September 28, 2017 letter from Michael Lofrano to Roy Masters, Ann Masters, Diane Masters Linderman, and Alan Masters. Docket 30, Ex. 7.

In the same letter, sent in conjunction with an email directed solely to Roy Masters, Michael Lofrano demands on behalf of the "new" board the turnover of TFHU's books and records. Docket 30, Exs. 6 & 7.

The motion also asserts that Washington Federal Bank was contacted by David Masters, Mark Masters, Michael Lofrano, or someone associated with them, to locate accounts belonging to TFHU.

On September 29, 2017, an agent of David Masters, Mark Masters, and/or Michael Lofrano forcibly entered the premises of TFHU at 744 East Pine Street Central Point, Oregon.

On November 1, 2017, TFHU via Richard Alan Masters and Roy Masters initiated a state court action in Oregon against David Masters, Mark Masters, and Michael Lofrano, seeking declaratory relief as to TFHU's controlling officers and directors and preliminary injunction. Docket 30, Ex. 10.

David Masters also filed a seemingly similar action against TFHU in Sacramento County Superior Court. Docket 1 at 35.

David Masters, Mark Masters, and Michael Lofrano filed the instant voluntary chapter 11 petition on behalf of TFHU on November 15, 2017.

This bankruptcy case will be dismissed. The pendency of the pre-petition state court actions, where the same corporate governance issues raised by this motion are being litigated, convinces the court that there is a genuine and material dispute over who has the authority to govern TFHU and file and prosecute a bankruptcy case on behalf of TFHU. As such, bankruptcy is not ripe for prosecution.

The proximity of the filing of the Oregon action prior to the filing of this case – only 15 days – also suggests an improper purpose for this filing, namely, to chill further litigation of the pre-petition actions.

This is corroborated by the absence of pressing debt or reorganization issues. The parties have not raised any imminent debt administration or reorganization issues. For instance, there are no pending stay relief motions. There are no allegations, much less evidence, that TFHU creditors are on the verge of collecting debt and/or compromising TFHU operations or assets.

To the extent David Masters complains on behalf of TFHU that it has not been paying its bills, he is purporting to represent and act on behalf and in the best interest of TFHU, not TFHU's creditors.

It is in the best interest of TFHU to resolve its corporate governance conflicts prior to assessing its needs for bankruptcy relief, deciding on

whether to pursue bankruptcy relief, and/or prosecuting a bankruptcy case.

Moreover, it is state law that governs the resolution of the corporate governance issues raised by the parties. As such, it is best for the relevant state court to adjudicate the issues raised in the pleadings.

Even if the court were to ignore the foregoing, however, this case should still be dismissed because the ultimate burden of persuasion on the authority for filing this bankruptcy case has not been satisfied.

The movant has produced sufficient prima facie evidence negating the authority of David Masters, Mark Masters, and Michael Lofrano to file and prosecute this case on behalf of TFHU. The record contains a ledger that is part of TFHU's corporate records, reflecting the removal of David Masters and Mark Masters as directors from the TFHU board on September 27, 2016 by Roy Masters, the founder of TFHU. Docket 30, Ex. 4.

The court record also contains the bylaws of TFHU, which provide that "[d]irectors shall be appointed by the Founder [Roy Masters] and shall serve until their death, disability, resignation or removal by the Founder." Docket 30, Ex. 2, Art. I, Sec. 1; Docket 30, Ex. 2, Art. III, Sec. 1.

The bylaws expressly state that "The Founder may at any time remove any member or members of the Board of Directors, written notice to the removed director, effective immediately." Docket 30, Ex. 2, Art. III, Sec. 6.

The bylaws permit only the Founder, Roy Masters, to remove directors. The bylaws do not allow for directors to be removed by other directors, unless the director is the Founder. See Docket 30, Ex. 2, Art. I, Sec. 1 & Art. III, Sec. 6.

Further, the bylaws do not permit the removal of the Founder, Roy Masters, as a director from the board. See Docket 30, Ex. 2, Art. I, Sec. 1 & Art. III, Sec. 6. The bylaws contemplate only death or resignation by Roy Masters as a director or Founder. Docket 30, Ex. 2, Art. III, Sec. 3.

Also, under the bylaws, only the Founder may qualify directors and select them for such a position. Under the "Directors" "Qualifications" headings, "Directors shall be selected by the Founder on the basis of their integrity and adherence to Foundation principals [*sic*] and ability to carry out responsibilities." Docket 30, Ex. 2, Art. I, Sec. 2.

It is then impossible for David Masters and Mark Masters to have elected Michael Lofrano as a director of TFHU, even if they were directors of TFHU in September 2017. It is also impossible for the three of them to have relieved Roy Masters from his directorship or his status as Founder.

Additionally, when David Masters and Mark Masters held the September 8 board meeting, they were only two of seven TFHU directors, even if they were directors as of that time. "The number of directors of the corporation shall be seven. The number of directors may be amended by the Founder without the necessity of amending the Articles of Incorporation." Docket 30, Ex. 2, Art. I, Sec. 3.

The foregoing is sufficient as prima facie evidence of lack of authority for David Masters, Mark Masters, and Michael Lofrano to file this case on behalf of TFHU.

On the other hand, David Masters, Mark Masters, and Michael Lofrano have not met their ultimate burden of persuasion on establishing authority to file on behalf of TFHU.

First, they have produced no admissible evidence with their opposition to the motion. While they have attached many exhibits to the opposition, there are no declarations or affidavits establishing any of the factual assertions in the opposition or authenticating any of the exhibits to the opposition.

Second, they have not explained how or why they had the authority to elect Michael Lofrano as a director and officer of TFHU and how or why they had the authority to relieve Roy Masters and the other members of the board.

Third, they have not explained why David Masters and Mark Masters constituted quorum for the September 8 meeting, when there were five other board members not present at that meeting.

The bylaws are silent on what constitutes quorum. This means that, as also argued by the opposition, Cal. Corp. Code § 5211(a)(7) applies. It states that "(a) Unless otherwise provided in the articles or in the bylaws, all of the following apply . . . (7) A majority of the number of directors authorized in or pursuant to the articles or bylaws constitutes a quorum of the board for the transaction of business."

Two of seven board members present at the September 8 meeting did not constitute majority or quorum. As such, David Masters and Mark Masters could not have legally conducted the September 8 meeting.

Fourth, the September 8 meeting noticed by David Masters and Mark Masters was a "special" meeting. Docket 30, Ex. 5.

Under the bylaws, only the Founder has the authority to call a special meeting. "*Special meetings of the Board of Directors may be called at any time by the Founder, and the Founder shall call a special meeting at any time upon the written request of three directors. Written notice of the time and place of a special meeting shall be given to each director, either personally or by sending a copy thereof by mail or by telegraph.*" Docket 30, Ex. 2, Art. I, Sec. 6.

Roy Masters did not call the September 8 meeting and David Masters and Mark Masters could not have legally compelled him to call the meeting because they were lacking a third director.

Fifth, the reference to Mark Masters having become the Founder of TFHU due to prior incapacity of Roy Masters is inconsistent with the bylaws, which provide that Ann Masters "shall" succeed Roy Masters as the Founder of TFHU. Docket 30, Ex. 2, Art. III, Sec. 2. The opposition makes no effort to address this part of the bylaws.

Sixth, the arguments challenging Roy Masters' position as a Founder under the bylaws by attacking his actions and character as inconsistent with the purposes of TFHU are not helpful. If the bylaws do not provide a solution to the improprieties alleged in the opposition, there are other remedies. For instance, governmental authorities such as the California Attorney General may investigate and take legal action against Roy Masters as to improprieties in the operation of TFHU.

However, whatever the actions and character of Roy Masters, actions violating TFHU's existing bylaws are unjustified.

Finally, the opposition's contention that the powers of Roy Masters under the bylaws are void because of Cal. Corp. Code § 5227 makes no sense. The statute provides that:

"*(a) Any other provision of this part notwithstanding, not more than 49 percent of the persons serving on the board of any corporation may be interested persons.*

"*(b) For the purpose of this section, "interested persons" means either:*

"*(1) Any person currently being compensated by the corporation for services rendered to it within the previous 12 months, whether as a full- or part-time employee, independent contractor, or otherwise, excluding any reasonable compensation paid to a director as director; or*

"*(2) Any brother, sister, ancestor, descendant, spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, or father-in-law of any such person.*

"*(c) A person with standing under Section 5142 may bring an action to correct any violation of this section. The court may enter any order which shall provide an equitable and fair remedy to the corporation, including, but not limited to, an order for the election of additional directors, an order to enlarge the size of the board, or an order for the removal of directors.*

"*(d) The provisions of this section shall not affect the validity or enforceability of any transaction entered into by a corporation.*"

The court does not see how the 49% requirement of section 5227(a) makes Roy Masters' powers under the bylaws void, when he could exercise all such powers in compliance with section 5227(a), as long as he does not appoint more than 49% of interested directors to the board.

And, no violation of section 5227 would render bylaws void. Section 5227(c) specifically requires a legal "action to correct any violation of this section." At best, then, a violation of section 5227 would make bylaws voidable but not void.

David Masters, Mark Masters, and Michael Lofrano have not met their ultimate burden of persuasion to establish authority to file this case on behalf of TFHU. Accordingly, the motion will be granted and the case will be dismissed.

4. 17-27528-A-11 THE FOUNDATION OF HUMAN UNDERSTANDING
17-2240 THE FOUNDATION OF HUMAN UNDERSTANDING V. MASTERS ET AL
ORDER TO SHOW CAUSE
1-2-18 [9]

Tentative Ruling: The court will strike the complaint.

The plaintiff, The Foundation of Human Understanding, through attorney David Epstein, filed a complaint in this adversary proceeding on December 16, 2017, without paying the $350 filing fee. As the fee has not been paid, the court will strike the pleading.

5. 17-27528-A-11 THE FOUNDATION OF HUMAN UNDERSTANDING — STATUS CONFERENCE 11-15-17 [1]

Tentative Ruling: None.

6. 17-26329-A-11 SHIV SINGH AND POOJA THAKUR — STATUS CONFERENCE 9-23-17 [1]

Tentative Ruling: None.

7. 17-26036-A-7 PAMELA FREDRICK
17-2176 RSL-1
FREDRICK V. NAVIENT ET AL — MOTION TO DISMISS OR FOR SUMMARY JUDGMENT 12-15-17 [17]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the plaintiff and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Navient Solutions, L.L.C. (d.b.a. Navient Department of Education Loan Servicing) asks for dismissal of the sole 11 U.S.C. § 523(a)(8) claim in this case against it, contending that it is not an owner of the debt the plaintiff and debtor in the underlying chapter 7 case, Pamela Fredrick, is attempting to discharge. See Docket 8, Amended Complaint. Navient claims to be only a servicer of the debt.

Navient has been named as a defendant in this proceeding as Navient, U.S. Department of Education Student Loan Servicing.

The court is satisfied that Navient is only a servicer and has no interest in the debt the plaintiff is seeking to discharge. Docket 19. Navient is servicing the debt for the benefit of its owner, the United States Department of Education. Accordingly, the motion will be granted and the claim against Navient will be dismissed.

8. 17-26036-A-7 PAMELA FREDRICK
17-2176
FREDRICK V. NAVIENT ET AL — CONTINUED STATUS CONFERENCE 11-9-17 [8]

Tentative Ruling: None.

9. 17-27936-A-11 ABACUS INVESTMENT GROUP, INC. — STATUS CONFERENCE 12-5-17 [1]

Final Ruling: The status conference will be dropped from calendar as the case was dismissed on December 26, 2017.

10. 16-21585-A-11 AIAD/HODA SAMUEL
FWP-32

MOTION TO
SELL AND TO PAY
12-21-17 [949]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee requests authority to sell as is and free and clear of liens for $2,200,000 the estate's interest in real properties commonly known as 912-1000 Oak Lane and 6775-6801 Curved Bridge Road, Rio Linda, California including any related personal property items identified in the proposed sale agreement to Stephen B. Tresnor. The sales price will be reduced by $100,000 if an appeal is filed related to the sale of the real properties to the buyer and the buyer's title insurance policy excludes the appeal as an exception to such insurance.

The trustee also asks for approval of the payment of a 5% real estate broker's commission and asks for waiver of the 14-day period of Fed. R. Bankr. P. 6004(h).

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. Under 11 U.S.C. § 363(f), the trustee may sell property of the estate free and clear of liens only if: 1) applicable nonbankruptcy law permits sale of such property free and clear of such liens; 2) the entity holding the lien consents; 3) the proposed purchase price exceeds the aggregate value of the liens encumbering the property; 4) the lien is in bona fide dispute; or 5) the entity could be compelled to accept a money satisfaction of the lien.

The property is subject to the following encumbrances:

- a lien in favor of the United States in the amount of $3,153,389.02 of which approximately $1.3 million remains unpaid. The trustee asks that the sale be approved free and clear of the secured claims held by the United States if it does not consent to the sale at the hearing on the motion as anticipated.

The gross sales proceeds of $2,200,000 will distributed as follows:

- $49,439.02 in past due and prorated real property taxes;

- $110,000 (or $105,000 if the purchase price is reduced to $2,100,000), to the estate's real estate broker, Mark Tabak of Cushman and Wakefield of California, Inc., with 50% of the commission to be payable to the buyer's broker, if any(total commissions equal to 5% of the purchase price);

- closing costs only including transfer tax (docket 954, Ex. A at 12);

- $7,332.21 and $4,651.16 in delinquent utilities;

- $6,000 in assessments related to a Notice of Pending Enforcement Action recorded by the County of Sacramento; and

- $1.1 million for United States claim.

Additionally, the trustee seeks authorization to deposit the remaining net proceeds from the sale into a blocked account pending further order of the court with any unpaid portion of the United States' secured claim to attach to those funds.

Pro se co-debtor Hoda Samuel filed a document on December 4, 2017, which the court construes to be an opposition. Docket 947. The docket does not reflect that this document was served. Further, the opposition is devoid of any legal or factual basis. Nor does it offer any evidence for the court to consider. Accordingly, the opposition is wholly unpersuasive.

On January 16, 2018, co-debtor Aiad Samuel filed a *pro se* motion to extend time. The motion requests a 30 day extension "to gain access to West Sacramento, Stockton Blvd., and Rio Linda Shopping centers," but does not reference a related motion nor does it make clear what deadline is to be extended. Docket 993 at 1. The court assumes he seeks to continue the hearing on this motion in order to gain access to access to the properties to obtain paper and electronic files necessary for the preparation and filing of his 2016 tax return.

The court finds no basis for granting an extension of time since this is a sale of real property and there is no evidence that these records will be transferred in connection with the sale. While the motion states that the sale of real properties will include "an related personal property items identified in the proposed sale agreement" (docket 949 at 1), the proposed sales agreement indicates that there is no personal property to be included in the transaction (docket 954, Ex. A at 4). Thus, the court has no evidentiary basis for presuming that this sale will impede Mr. Samuel's ability to obtain the records necessary to file his tax returns. Accordingly, the motion to extend time is denied.

The court will now turn to the opposition filed by Mr. Samuel's counsel of record which alleges that the sales price is insufficient based on an appraisal dated October 4, 2016 valuing the real properties at $7,400,00. See docket 985.

The standard for determining whether to approve a sale of estate assets is the business judgment test which factors the following: (1) whether a sound business reason exists for the proposed transaction; (2) whether fair and reasonable consideration is being provided; (3) whether the transaction has been proposed and negotiated in good faith; and (4) whether adequate and reasonable notice has been provided. See, e.g., In re Ewell, 958 F.2d 275 (9th Cir. 1992).

Mr. Samuel's opposition takes issue with the second factor - whether fair and reasonable consideration is being provided. For the following reasons, the court is convinced that the $2,200,000 sales price is fair and reasonable.

First, the trustee has received multiple written offers with $2,200,000 being the best offer received. These offers are evidence of the fair market value of the property. According to the declaration of Mark Tabak, the estate's real estate broker, the real properties have been extensively exposed to the market since before April 6, 2017, the date of substantive consolidation. Docket 988 at ¶ 4. Mr. Tabak also cites applicable comparable sales with purchase prices of $1,460,000, $2,250,000, and $2,868,862. Id. at ¶ 7.

Second, the debtor's appraisal contains discrepancies and inaccuracies. It does not mention the property improvements costs, the cost of deferred maintenance, carrying costs, tenant improvement costs or allowances. The appraiser, who is based in Southern California, assumes that there is high demand in the immediate area within which the real properties are located. But Mr. Tabak, who is locally based, testifies that there is in fact low demand.

Id. at ¶ 8. The appraisal calculates that it will take 12-18 months to achieve a stabilized 95% occupancy at a much higher rent than is actually being paid by current tenants under existing leases. Id. at ¶ 8. This is highly unlikely given the lack of high demand in the area.

Third, debtor's counsel admitted, in open court on October 30, 2017, that the real property was worth $2,200,000. Docket 943 (The admission can be heard at approximately 1:05:30 of the audio file from that hearing.).

Fourth, the proposed sale is subject to overbidding in increments of $10,000 with an initial bid of at least $50,000 more than the $2,200,000 gross sales price. If the debtor or any potential buyer believes that the proposed sale price is too low, they can seek to qualify as a bidder and bid more at the sale hearing..

Finally, the passage of time will accrue increased interest, attorneys' fees, and other administrative expenses while not yielding a significantly higher sales offer, if any. Rather, the estate would risk selling the real property for a lower price, which together with the continued carrying costs would result in a significantly lower recovery for the estate.

The totality of evidence demonstrates that the proposed sale is within the sound business judgment of the trustee. The sale will generate some proceeds for distribution to creditors of the estate. Hence, the sale will be approved pursuant to 11 U.S.C. §§ 363(b) and 363(f)(2), if consent is given to the sale by the United States.

The court will approve the sale free and clear of the claim held by the United States if it does not consent to the sale at the hearing as the trustee anticipates. The motion does not identify other claims of which the sale could be approved under 11 U.S.C. § 363(f).

The sale is in the best interests of the creditors and the estate. The court will approve the payment of the real estate commission to Mark Tabak of Cushman and Wakefield of California, Inc. Dockets 184 & 189. The court will waive the 14-day period of Rule 6004(h).

11. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT
FWP-33 — 12-21-17 [956]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee seeks to assume and assign six unexpired leases involving the estate's 912-1000 Oak Lane and 6775-6801 Curved Bridge Road real properties and any personal property items identified in the proposed sale agreement. The estate is the lessor under each of the leases.

The property is being sold by the trustee and he is seeking to assign the leases in connection with the sale. The assignment of the leases is part of the sale of the property. The proposed assignment is to Stephen B. Tresnor (the buyer of the property), his designee, or any successful overbidder.

The parties to the leases include Rio Linda Laundromat, Bank of America, Bowinkle's Hamburgers, Taqueria Mi Lindo Apatzingan, Creekside Diner, and I&C Bakery LLC.

The trustee is also seeking:

- determination of the cure amounts under each of the four leases;

- authority to pay any cure amounts; authority to transfer the security deposits held by the estate as a lessor under the leases;

- declare that the estate has no liability as stated under section 365(k); and

- waive the 14-day stay for orders authorizing the assignment of unexpired leases.

11 U.S.C. § 365(a) and (b)(1) provides that:

"*(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.*

"*(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--*

"*(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;*

"*(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and*

"*(C) provides adequate assurance of future performance under such contract or lease.*"

11 U.S.C. § 365(d)(2) prescribes that "In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease."

11 U.S.C. § 365(f) further provides that:

"*(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the*

assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

"*(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--*

"*(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and*

"*(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.*

"*(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.*"

The standard for determining whether to approve the assumption of unexpired leases and/or executory contracts is the business judgment test. Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U.S. 523 (1943); Robertson v. Pierce (In re Chi-Feng Huang), 23 B.R. 798, 800-01 (B.A.P. 9th Cir. 1982) (holding that the primary issue is whether rejection or assumption would benefit the general unsecured creditors, which may also involve a balancing of interests).

The court "should approve the rejection [or assumption] . . . unless it finds that the debtor-in-possession's conclusion that rejection [or assumption] would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.' [. . . .] Such determinations, clearly, involve questions of fact . . . which we review for clear error." Agarwal v. Pomona Valley Medical Group, Inc. (In re Pomona Valley Medical Group, Inc.), 476 F.3d 665, 670 (9th Cir. 2007).

"The Bankruptcy Court, in evaluating the debtor's decision, 'should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate.' It should approve the decision to reject [or assume] . . . 'unless it finds that the debtor-in-possession's conclusion that rejection [or assumption] would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'" In re Yellowstone Mountain Club, LLC, Case Nos. 08-61570-11, 0861571-11, 08-61572-11, 08-61573-11, CV-09-48-BU-SEH, 2010 WL 5071354, at *2 (D. Mont. Dec. 7, 2010) (quoting and citing to Pomona Valley Medical Group at 670).

As there has been no plan confirmation yet in this case and the court has not set an independent deadline for the assumption of unexpired leases in this case, the deadline of section 365(d)(2) does not restrict the proposed assumption by the trustee.

The assumption will benefit the estate substantially as it will allow it to sell one of its real properties, generating approximately $1,950,000 in proceeds for the benefit of creditors, while freeing the estate from

substantial ongoing obligations in owning the property.

There are no cure amounts under the leases.

The court will permit the assignment of the leases. The buyer, Mr. Tresnor, has submitted a declaration, indicating that he has the ability to close on the proposed purchase of the property, at the purchase price of $2,200,000, as made clear by the trustee's sale motion. Docket 949. The court is satisfied then that there is adequate assurance of future performance by the buyer.

The court will authorize the trustee to pay the cure amounts, if any, in connection with the sale of the property. The court will also authorize the trustee to transfer the security deposits, if any, to the buyer of the property, in connection with the sale. And, the court will waive the 14-day stay of Rule 6006(d), given the impending sale of the property.

But, the court will make no declarations about the estate's liability under 11 U.S.C. § 365(k), which states that "Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment."

There is no case or actual controversy for the court to make any declarations under section 365(k). The trustee has not identified any liability based on the breach of a lease, implicating section 365(k).

More, declaratory relief under section 365(k) seems to require an adversary proceeding. See Fed. R. Bankr. P. 7001(1) and (9). The court is unaware of any statutory provision permitting the court to make declarations under section 365(k) on a motion. The motion will be granted.

12. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO USE CASH COLLATERAL AND FOR REPLACEMENT LIENS
FWP-6 — 7-24-17 [871]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee seeks authority to use cash collateral generated from the rental of a shopping center in Rio Linda, California ($8,268.40 in rents monthly), for the period of November 1, 2017 through January 31, 2018. This center was brought into the estate in April 2017 via a substantive consolidation of the debtors with their limited liability company. See Docket 927.

The other three estate shopping centers have been sold. The sales closed in March 2017. Docket 727 at 2. The trustee seeks to use rental income to pay for, among other things, the maintenance, security, insurance, ground keeping, and utilities of the center. The trustee is currently marketing the center for sale. He believes its value exceeds its encumbrances. The property is encumbered by a single lien of the United States, in the approximate amount of $3,029,412.64. Docket 927 at 4.

The chapter 11 trustee also seeks permission to use cash collateral generated from the rent of the remaining two residential real properties (209 Prairie Circle (rented at $800 a month) and 148 Estes Way (rented at $1,000 a month)), for the period of November 1, 2017 through January 31, 2018. The other four

residential properties were abandoned by the trustee months ago. The trustee proposes to use the rental income, of up to $2,000.00 a month per property, to maintain their condition.

Only the United States and JPMorgan Chase Bank are asserting interests in cash.

11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed use of cash collateral will preserve the going concern of the shopping center and two residential properties, allowing the trustee to continue operating them, pending further administration. This is especially true with respect to the shopping center at this time, given the substantial flood damages it sustained recently and the trustee's efforts to remedy such damages. The proposed use of cash collateral is in the best interests of the creditors and the estate.

The proposed budget here is similar to the budgets pursuant to which the court has authorized prior use of cash collateral. See, e.g., Dockets 109, 150, 174, 203, 794, 897, 925. The trustee proposes to grant the secured creditors replacement liens in further generated cash collateral and other cash of the estate. This includes replacement liens to the United States on cash (approximately $99,000) from accounts against which the United States was attempting to satisfy its judgment on the petition date. The replacement liens, to the extent applicable, shall not attach to the part of the further cash collateral designated as a "carve-out" for administrative expenses.

Given that the secured creditors agree to the cash collateral use and given that the proposed budget is substantially similar to the budget of the estate's prior cash collateral requests, the motion will be granted as to the shopping center and residential properties.

By authorizing cash collateral use, the court is not approving the compensation of estate professionals, even if such compensation is accounted for in the cash collateral budget.

13. 16-21585-A-11 AIAD/HODA SAMUEL — STATUS CONFERENCE 3-15-16 [1]

Tentative Ruling: None.