UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 6, 2017 at 10:00 a.m.

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1. 15-29421-A-12 JERRY WATKINS — MOTION TO CONFIRM PLAN
CA-6 — 12-4-16 [78]

Tentative Ruling: The motion will be denied.

The hearing on this motion was continued from January 9, 2017, in order for the debtor to supplement the record. The debtor filed additional evidence on January 18, 2017 in the form of a declaration. Docket 104. An amended ruling from January 9 follows below.

The debtor seeks confirmation of his chapter 12 plan filed on December 4, 2016. The chapter 12 trustee opposes confirmation.

The motion will be denied for the following reasons:

(1) The court is unconvinced of the plan's feasibility. There is no evidence of the plan payment in the amount of $394. At the January 9 hearing the debtor stated that he made the payment, yet the payment was not received by the trustee. The court also sees no evidence of payment in the record of the two large amounts due under the plan on January 25, 2017, in the amounts of $7,000 (recurring monthly payment) and $11,000 (one-time payment).

More, the motion admits debtor's income is not regular and dependable. It states that "[t]he Debtors' [*sic*] . . . ability to earn . . . is . . . erratic." Docket 78 at 3. With this admission, and the fact that this is the debtor's fourth case, the court is unpersuaded that the debtor is able to perform under the proposed plan.

(2) The plan must be amended to reconcile who is the correct creditor, Ocwen Loan Servicing, LLC, Litton Loan Servicing, or U.S. Bank.

(3) The debtor's motion refers to the plan as a "chapter 13 plan." This is a chapter 12 case.

(4) The liquidation analysis is far from adequate. The motion states that general unsecured creditors would receive $25,201.57 in a chapter 7 liquidation, whereas the proposed chapter 12 plan is paying them $50,000. Docket 78 at 4. However, the court cannot tell from the motion how the debtor arrived at the $25,201.57 figure. This has not been addressed by the supplemental pleading.

(5) The debtor's good faith analysis is inadequate. Even though this is the debtor's fourth bankruptcy case since March 31, 2009, the alleged "circumstances beyond [the debtor's] control," including illness and

incarceration, explain the debtor's inability to prosecute his prior bankruptcy cases only from August 2013 forward. The debtor's supplemental declaration fails to explain why, for the 44 months prior to August 2013, when he was first diagnosed with cancer, his effort at financial reorganization failed. Docket 104.

2. 15-29421-A-12 JERRY WATKINS — MOTION TO DISMISS CASE
JPJ-1 — 11-21-16 [74]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

This case was filed on December 2, 2015, over one year ago. The debtor still has not obtained plan confirmation. The court has held only one substantive hearing on plan confirmation, on October 17, 2016. Docket 70. At that hearing, the court denied confirmation based on the debtor's admission that his plan cannot be confirmed. Id. The remaining hearings on plan confirmation were either continued, dismissed as moot or voluntarily dismissed by the debtor. Dockets 37, 45, 47, 62, 63.

Although the debtor filed an amended chapter 12 plan on December 4, 2016 (Docket 82), this case has been pending for over a year now and the debtor has made it clear that he is not eager to move forward with this case. It is up to the debtor to prosecute confirmation of his chapter 12 plan. The delay has been prejudicial to creditors and it is cause for dismissal. The motion will be granted and the case will be dismissed.

3. 14-22435-A-7 WILLIAM DUGO — MOTION TO WITHDRAW AS ATTORNEY
14-2152 DBJ-4 — 1-18-17 [127]
BANK OF STOCKTON V. DUGO

Tentative Ruling: The motion will be denied.

Attorney Douglas Jacobs asks for permission to withdraw as counsel for the defendant and debtor in the underlying bankruptcy case, William Dugo, as Mr. Dugo has not maintained communication with the movant.

Local Bankruptcy Rule 2017-1(e) provides: "Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in propria persona without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit."

"The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the trial court." American Economy Ins. Co. v. Herrera, No. 06CV2395-WQH, 2007 WL 3276326, at *1 (S.D. Cal. Nov. 5, 2007) (quoting Irwin v. Mascott, 2004 U.S. Dist. LEXIS 28264 (N.D. Cal. December 1, 2004), citing Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir.1982)). Factors considered by courts ruling on the withdrawal of counsel are (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. Herrera, at *1 (citing Irwin, 2004 U.S. Dist. LEXIS 28264 at 4).

California Rule of Professional Conduct 3-700 provides that:

"*(A) In General.*

"*(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.*

"*(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.*

"*(B) Mandatory Withdrawal.*

"*A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:*

"*(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or*

"*(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or*

"*(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.*

"*(C) Permissive Withdrawal.*

"*If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:*

"*(1) The client*
(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
(b) seeks to pursue an illegal course of conduct, or
(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
(f) breaches an agreement or obligation to the member as to expenses or fees.

"*(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or*

"*(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or*

"*(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or*

"*(5) The client knowingly and freely assents to termination of the employment; or*

"*(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.*"

The court is unwilling to allow the movant to withdraw as counsel for Mr. Dugo at this time.

This adversary proceeding was filed on June 6, 2014. The parties were both prepared to go to trial on September 10, 2015. That trial was cut short when Judge Russell granted terminating sanctions against the plaintiff due to non-compliance with Local Bankruptcy Rule 9017-1. The plaintiff appealed the judgment and, on August 2, 2016, the appellate district court reversed the judgment and remanded for the bankruptcy court for trial. Now, the movant seeks to withdraw as counsel for the defendant, approximately two months prior to the reset March 29, 2017 trial date.

Permitting withdrawal would unduly prejudice Mr. Dugo given the impending trial. Also, counsel must be prepared for trial inasmuch as he answered ready for the earlier trial. Dockets 22, 64, 72.

Mr. Dugo's failure to communicate with the movant must be tempered with his right not to be prejudiced with representation at trial. Mr. Dugo's failure to communicate with the movant is likely to harm his defense (*e.g.*, failure to appear at trial). The court will not exacerbate this self-inflicted prejudice by permitting the movant to withdraw as his counsel. The length and history of the movant's representation of Mr. Dugo in this proceeding and close proximity of this motion to the trial date would greatly prejudice Mr. Dugo if the court were to allow withdrawal at this time. The motion will be denied.

4.	15-29136-A-12 NCK-8	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION TO APPROVE COMPROMISE 1-9-17 [455]

Tentative Ruling: The motion will be dismissed without prejudice because the proof of service reflects that only the chapter 12 trustee was served with the motion. There is no evidence of any creditors having been served with the motion. See Docket 462; see also Fed. R. Bankr. P. 2002(a)(3) (requiring all creditors to be served with compromise approval motions).

5. 15-29136-A-12 NCK-9 — P&M SAMRA LAND INVESTMENTS L.L.C. — MOTION TO APPROVE COMPROMISE 1-23-17 [467]

Tentative Ruling: The motion will be dismissed without prejudice because there is no evidence that it was served on anyone. For instance, there is no evidence of any creditors having been served with the motion. See Docket 472; see also Fed. R. Bankr. P. 2002(a)(3) (requiring all creditors to be served with compromise approval motions).

The motion will be dismissed also because it was set for hearing on 14 days notice in violation of Fed. R. Bankr. P. 2002(a)(3), which requires at least 21 days notice of the hearing on compromise approval motions. The motion was served on January 23, 2017, 14 days prior to the February 6 hearing. While Local Bankruptcy Rule 9014-(f)(2) permits motions to be set on as little as 14 days of notice, and permits opposition to be made at the hearing, this local rule also provides this amount of notice is permitted "unless additional notice is required by the Federal Rules of Bankruptcy Procedure. . . ." Because Rule 2002(a)(3) requires a minimum of 21 days of notice of the hearing and because only 14 days' was given, notice is insufficient.

Finally, although the movant has provided only 14 days' notice of the hearing on the motion, the notice of hearing requires written opposition at least 14 days before the hearing, in accordance with Local Bankruptcy Rule 9014-1(f)(1). Docket 468. Motions noticed on less than 28 days' notice of the hearing are deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). This rule does not require written oppositions to be filed with the court. Parties in interest may present any opposition at the hearing. Consequently, parties in interest were not required to file a written response or opposition to the motion. Because the notice of hearing stated that they were required to file a written opposition, however, an interested party could be deterred from opposing the motion and, moreover, even appearing at the hearing. Accordingly, the motion will be dismissed.

6. 15-29136-A-12 NCK-7 — P&M SAMRA LAND INVESTMENTS L.L.C. — MOTION TO CONFIRM PLAN 1-2-17 [447]

Tentative Ruling: The hearing on the motion will be continued.

The debtor seeks confirmation of its fourth amended chapter 12 plan filed on January 2, 2017. Docket 453. However, the hearing on this motion will be continued, as the court has not yet adjudicated the compromises with creditors Ag-Seeds Unlimited and Paul Hundal, which govern the treatment of the claims of those creditors under the plan.

7. 16-21585-A-11 RJ-5 — AIAD/HODA SAMUEL — MOTION TO STRIKE OR TO DISMISS CASE 1-9-17 [457]

Tentative Ruling: The motion will be denied.

Debtor Aiad Samuel moves the court to strike his petition and dismiss this case. Mr. Samuel complains that he made a mistake in filing the original petition and all subsequent documents. He contends that the petition should be stricken because he did not sign petition filed on the March 15, 2016.

The United States Trustee, the chapter 11 trustee, and creditor Brake Masters oppose the motion.

Preliminarily, this motion is being brought solely by Mr. Samuel — it is not being brought by Mrs. Samuel. The attorney who filed this motion, Richard Jare, represents only Mr. Samuel. He does not represent Mrs. Samuel. She has not appeared and is not being represented on this motion.

This motion also has nothing to do with pleadings filed by debtor Hoda Samuel, which pleadings have been otherwise addressed by the court or have not been served and set for hearing. See Docket 450 (a motion to dismiss by Hoda Samuel not set for hearing); Docket 471 (a pleading by Hoda Samuel doubling as a supplement to the earlier motion to dismiss & objecting to the sales of the shopping centers, conducted by the chapter 11 trustee).

Also, while the subject motion also objects to the sales of the shopping centers by the chapter 11 trustee, the court has already addressed the objections of Mr. Samuel to those sales in the rulings on each respective sale motion (see rulings on motions to sell DCNs FWP-13 (Docket 599), FWP-15, FWP-17 (Docket 607)). To the extent applicable here, the court incorporates by reference its rulings on the motions to sell the shopping centers (see rulings on motions to sell DCNs FWP-13 (Docket 599), FWP-15, FWP-17 (Docket 607)).

This motion to strike the petition and dismiss the case will be denied.

First, Mr. Samuel fails to brief the legal basis for seeking dismissal of the case.

Second, the court will not strike the petition filed by Mr. Samuel on the March 15, 2016 even though it is unsigned because he filed a signed amended voluntary bankruptcy petition on May 2, 2016. Docket 63. The amended and signed bankruptcy petition related back to the petition date. It had the effect of having been filed on the petition date.

In his signed amended petition, Mr. Samuel declared that he is "aware that filing for bankruptcy is a serious action with long-term financial and legal consequences." Docket 63 at 7.

Mr. Samuel also appeared at the meeting of creditors and admitted that he prepared and signed the petition and the related schedules and statements, and that he is one of the debtors in this case. Docket 586 at 3-5; Docket 588, Ex. 5. Mr. Samuel then was aware of the serious repercussions when filing this case. There is no basis for striking the petition.

Third, the court rejects the argument that Mr. Samuel filed the petition documents under duress. The motion does not even make an effort at briefing the legal standard for duress.

Duress generally requires a *wrongful act* that is sufficiently *coercive* to cause a *reasonably prudent* person faced with *no reasonable alternative to succumb* to the perpetrator's pressure. See, e.g., Osanitsch v. Marconi PLC, Case No. CV 05-3988 CRB, 2009 WL 5125821, at * 5 (N.D. Cal., Dec. 21, 2009) (discussing the requirements of economic duress under California law).

Mr. Samuel contends that he filed the amended and signed petition documents on May 2, 2016 (Docket 63) under duress. He identifies two actions that purportedly amounted to duress: the appointment of a trustee by the court on

May 2, 2016; and someone "led [Mr. Samuel] to believe that the case would benefit him if he cooperated and did what he was told."

There was nothing wrongful about the appointment of the trustee. On May 2, this court appointed a chapter 11 trustee to preside over the administration of the estate. By appointing a trustee, the court removed the debtors from their role as administrators of the estate. Mr. Samuel's conduct, as described in the court's ruling appointing a trustee, warranted his removal and the installation of a trustee. See Docket 61 (containing the findings of fact and conclusions of law about the appointment of the trustee).

For instance, the court found that "Mr. Samuel admitted in open court that he is mismanaging the estate by not listing all assets and liabilities in the bankruptcy schedules and statements, by using cash collateral without a court order, by paying potentially pre-petition claims without a court order, and by utilizing professionals - including an attorney and a bookkeeper and/or tax preparer - without a court order authorizing their employment." Docket 61 at 3.

Also, the post bankruptcy appointment of a trustee could not have coerced Mr. Samuel when filing this case – the appointment came after the case was filed.

Further, the court made it clear to Mr. Samuel at several hearings prior to the appointment of trustee that he and his wife were not complying with the Bankruptcy Code, the Bankruptcy Rules, and the court's local rules in his prosecution of the case in many respects. To argue that he filed the signed amended petition and otherwise attempted to come into compliance with the law because the court told him to comply with the law is bizarre.

Instead, Mr. Samuel chose to act as his own attorney. He filed the signed amended petition without considering consequences and now he is attempting to blame everyone but himself about it. Even if the appointment of a trustee prompted Mr. Samuel to correct past errors, the court cannot be "blamed" for his belated decision to comply, or attempt to comply, with the law, such as by filing a signed amended petition.

Soon after filing the case on March 15, it should have become very clear to Mr. Samuel that he did not understand how to prosecute this case. For example, he did not know how to fill out basic chapter 11 forms, he did not list all his assets and liabilities in the bankruptcy schedules and statements, and he did not know that he should not be using cash collateral without court order. He should have retained an attorney to represent his interests even prior to filing this chapter 11 case. The fact that it did not and instead dug himself into an unfavorable position does not amount to duress.

Further, what others may have led Mr. Samuel to believe about the chapter 11 bankruptcy process was in no way coercive. Mr. Samuel complains that his petition preparer, Derek Gilna, and a bankruptcy auditor with the United States Trustee "led [him] to believe that the purported bankruptcy filing can be dismissed voluntarily at any time." Docket 457 at 3. However, these statement are hearsay. Fed. R. Evid. 802.

Even if true, who Mr. Samuel chooses to believe about what he should be doing in this case is entirely his decision. He cannot blame others for making wrong choices in whom he trusted. Mr. Samuel is free to make any choices as to who he retains and listens to, and whose advice he takes, about what he should be doing in this case.

If Mr. Samuel wanted the court to consider an earlier dismissal of the case, he should have filed and served a motion to dismiss that was set for hearing. If he did not know how to do this, he could have retained an attorney to assist him.

The court disagrees that there are no unsecured claims against the estate warranting dismissal of the case. As admitted even by Mr. Samuel, approximately $94,401 in unsecured proofs of claim have been filed. Mr. Samuel has not presented a solution to the payment of these claims in the event of a dismissal. These unsecured creditors represent an adequate reason for completion of the administration of this estate.

Additionally, now that the trustee has nearly completed his administration of the estate, dismissal is no longer an option. Mr. Samuel is seeking dismissal at the eleventh hour. He has had nearly one year to retain an attorney and seek dismissal. Instead, Mr. Samuel chose to wait until sale of the shopping centers had come to fruition. Dismissal now would prejudice all other parties in the case, including the trustee, his professionals and the estate's creditors. The court will not allow their efforts in administering the estate to be wasted. Importantly, the court has granted approval for the sale of two of the debtors' shopping centers already. Dockets 599 & 607.

Finally, as already discussed in the rulings on the sale motions, the trustee did nothing wrong in rejecting Mr. Samuel's refinance offer, which was made only after the trustee went forward with marketing the sale of the shopping center properties.

The trustee had evaluated the possibility of refinancing the shopping centers for approximately two months after his appointment. Docket 75. That is why the trustee did not employ a real estate broker until late July 2016. He concluded that refinancing would not be possible or in the best interest of the creditors and the estate given the sizeable claim of the United States, the disrepair and deferred maintenance issues with the properties, and the rental income generated by the property. The trustee determined that sale of the properties would be in the best interests of the creditors and the estate. It is no surprise then that the trustee rejected in November 2016 Mr. Samuel's eleventh hour offer to refinance the shopping centers.

The court also rejects the notion that the trustee was somehow constrained from entering into a sale agreement because he was discussing a possible refinance of the properties with Mr. Samuel's attorney. Mr. Samuel did not enter into an exclusive negotiation agreement with the trustee. The trustee is free to exercise his business judgment and enter into contracts for the benefit of the estate and the creditors, subject to section 363(b), notwithstanding any negotiations with Mr. Samuel.

The court is unsurprised that the trustee accepted an offer for the purchase of the properties and rejected the purported refinance offer from Mr. Samuel.

The debtors have had many months to come up with their own solution to the administration of the property. This case has been pending for nearly one year and the appointment of the chapter 11 trustee was precipitated solely due to their unreliability and mismanagement of this chapter 11 estate. The debtors did not initially retain legal representation for the filing and prosecution of this case. After the court appointed the trustee, Mr. Samuel failed to promptly retain an attorney and failed to cooperate with the trustee during the period he represented himself. Now that the trustee is on the doorstep of

completing administration of the shopping centers, Mr. Samuel has decided that the case should be dismissed or the trustee should wait for him to refinance the properties. This is impermissible.

The motion will be denied.

8. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO SELL AND TO PAY 12-23-16 [417]
FWP-15

Tentative Ruling: The motion will be granted in part.

The chapter 11 trustee requests authority to sell as is and free and clear of liens for $3,850,000 (decreased from $4,500,000) the estate's interest in a shopping center real property in West Sacramento, California on Sacramento Avenue to RC Consulting, Inc. The transaction includes the sale of some personal property items identified in more detail in the sale agreement.

The property is subject to:

(1) a mortgage claim held by Fairview Holdings, L.L.C. in the approximate amount of $3,327,933.19 plus accrual of daily interest at $826.54 through closing,

(2) outstanding property taxes in the estimated amount of $153,882,

(3) potential assessments relating to a nuisance certificate recorded with West Sacramento Code Enforcement Division,

(4) a judgment lien for approximately $3,029,412.64 held by the United States of America, based on a restitution criminal judgment against debtor Hoda Samuel.

The trustee expects that the United States will release its lien on the property.

The sale is also subject to a right of first refusal of the debtors, assuming the trustee and the debtors come to an agreement over the exercise of the right. If the trustee does not reach an agreement with the debtors over the right, the sale will proceed without exercise of the right. If the trustee reaches an agreement with the debtors over the right, such an agreement shall be subject to court approval prior to exercise of the right.

The trustee's anticipated terms of agreement with the debtors over the exercise of the right of first refusal are detailed in the trustee's second supplement to this motion. Docket 609 at 3-5.

The trustee seeks approval of the sale free and clear of:

(i) Fairview's claim, in the event the trustee and Fairview cannot agree to an exact amount for the satisfaction of its claim;

(ii) any interest or claim asserted by an individual named Peter Samuel, who held an interest in the subject property for approximately 25 months pre-petition, from about April 2013 through May 2015, when he transferred the property back to the debtors.

The trustee also asks for:

(a) approval of a break-up fee of $40,000 as a fixed amount (increased from a maximum of $10,000) to the buyer, in the event another person is the prevailing over-bidder;

(b) approval of a proposed break-up fee of $20,000 to an overbidder other than the stalking horse buyer, in the event the right of first refusal is exercised;

(c) waiver of the 14-day period of Fed. R. Bankr. P. 6004(h);

(d) waiver of any other state and/or federal stay on the enforceability of the order approving the sale;

(e) a good faith finding under 11 U.S.C. § 363(m);

(f) approval to pay the real estate broker's commission;

(g) approval to pay the outstanding and current pro-rated property taxes, the claim of Fairview, nuisance assessments, closing costs and expenses allocated to the trustee;

(h) authority to reserve $400,000 from the sale proceeds for the payment of professionals' fees—to the extent no unencumbered funds are available to pay such fees, and $50,000 to be reserved (from the $400,000) exclusively for payment of unsecured claims; whatever remains from the $400,000 reserve after payment of the professionals' fees and unsecured claims up to $50,000 is subject to the lien of the United States; and

(i) authority to pay the remaining sale proceeds to the United States, on account of its restitution judgment lien.

After payment of Fairview's claim and related sales costs, the trustee estimates the estate to generate $132,536, prior to funding the $400,000 estate reserve and prior to any payment on account of United States' criminal restitution judgment lien claim.

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.

In light of Fairview's response to the motion, the court makes no determination at this time of the correct amount of its claim, as there has been no final calculation of Fairview's claim amount.

The debtors' opposition to the motion will be overruled.

The court finds no merit in Mr. Samuel's challenges to the purchase price, value of the property, marketing of the property, timeliness of entry into the subject sale agreement given refinance negotiations with Mr. Samuel, the qualifications of the trustee's real estate broker, or the trustee's broker's representation of both the seller and buyer in the transaction. Nor will the

court prematurely adjudicate Mr. Samuel's motion to strike the chapter 11 petition and dismiss the case. That motion has been set for hearing on February 6, 2017.

The property has been adequately marketed on LoopNet and CoStar, the multiple listing services for commercial properties like the instant one. Docket 555 at 2. Mr. Samuel's contention that the property should have been marketed on Metrolist makes no sense, as that multiple listing service is for residential properties only. The property was also marketed for sale since approximately August 1, 2016, for several months, prior to receiving the offer for the subject sale. Docket 555 at 3.

The property has been marketed sufficiently. The trustee's exhibits showing LoopNet activity for the property only since approximately September 29, 2016 was intended to establish only that the property had been part of over 1,200 search results as of that time. It does not establish that the property was listed with LoopNet only as of September 29. Docket 556, Ex. 1.

Nevertheless, assuming the property had been listed on the multiple listing services only as of September 29, and not on August 1, the property was marketed adequately. This motion was not filed until December 23, nearly three months later. The trustee received the subject offer on November 28, 2016, within about 60 days of the September 29 date. Docket 421. And, the property is being sold subject to overbids at the February 6, 2017 hearing on this motion.

Given the trustee's marketing of the property and given that this sale is subject to overbids, the court is not persuaded that the property is being sold at a discount. The best measure of fair market value of the property that has been sufficiently marketed is what a willing buyer will pay to a willing seller. The property has been marketed adequately.

The valuation of the property by Mr. Samuel's appraiser, David Hayward, at $9.3 million, is based on a potential capitalization rate. That is, Mr. Hayward is relying, not on the actual income from the property, but on its *potential* income if the property is rehabilitated and fully leased. And, Mr. Hayward's appraisal fails to disclose the potential income stream he assumed when appraising the property at $9.3 million. Docket 498.

The property is in substantial disrepair and there are many deferred maintenance issues. In other words, if the estate had sufficient cash to inject into the subject property, it could generate more rental income, which in turn would possibly increase the property's capitalization rate. However, the estate has no funds to make repairs and address deferred maintenance issues in order to maximize income from the property. Due to the poor condition of the shopping center, the trustee has decided that liquidation in its present condition is the best course. The court does not disagree.

The court also rejects the notion that the trustee was somehow constrained from entering into a sale agreement because he was discussing a possible refinance of the property with Mr. Samuel's attorney. Mr. Samuel did not enter into an exclusive negotiation agreement with the trustee. The trustee is free to exercise his business judgment and enter into contracts for the benefit of the estate and the creditors, subject to section 363(b), notwithstanding any negotiations with Mr. Samuel.

The court is unsurprised that the trustee accepted an offer for the purchase of

the property and rejected the purported refinance offer from Mr. Samuel. The trustee evaluated the possibility of refinancing the property for approximately two months after his appointment. Docket 75. That is why the trustee did not employ a real estate broker until late July 2016. He concluded that refinancing would not be possible or in the best interest of the creditors and the estate given the sizeable claim of the United States, the disrepair and deferred maintenance issues with the property, as demonstrated by the decrease in the purchase price, and the rental income generated by the property. The trustee determined that sale of the property would be in the best interests of the creditors and the estate. It is no surprise then that the trustee rejected in November 2016 Mr. Samuel's eleventh hour offer to refinance the property.

The debtors have had many months to come up with their own solution to the administration of the property. This case has been pending for nearly one year and the appointment of the chapter 11 trustee was precipitated solely due to their unreliability and mismanagement of this chapter 11 estate. The debtors did not initially retain legal representation for the filing and prosecution of this case. After the court appointed the trustee, Mr. Samuel failed to promptly retain an attorney and failed to cooperate with the trustee during the period he represented himself. Now that the trustee is on the doorstep of liquidating the shopping centers, Mr. Samuel has decided that the case should be dismissed or the trustee should wait for him to refinance the properties.

Next, the court rejects the contention that, in the event the case is dismissed as to Hoda Samuel alone, the trustee could not sell the property.

Prior to the debtors' transfer of the property to Peter Samuel in 2013, as discussed below, the property was the debtors' community property. Mr. Samuel's counsel admitted this at the hearing on this motion on January 23. When Peter Samuel transferred the property back to the debtors in 2015, the debtors were still married and there is no plausible argument that the property did not continue as their community property. In 2015, Peter Samuel re-transferred the property to the debtors' revocable inter vivos family trust. Docket 556, Ex. 4. The debtors have presented no authority or evidence that a transfer of this community property to their son for no consideration (beyond taking the property subject to its encumbrances) at a time when Mrs. Samuel was under federal indictment and subject to a substantial risk of a large restitution award, and its later retransfer back to the debtors somehow had the effect of transmuting community property into something else. Docket 556, Ex. 4.

Community property is liable for the debts of both spouses incurred during the course of the marriage. See Cal. Fam. Code § 910. The result is no different in bankruptcy. Even when only one spouse is a debtor, the community property interests of both spouses becomes property of the estate. See 11 U.S.C. § 541(a)(2). The trustee will use the proceeds from the liquidation of that community property to pay the claims of community creditors. See 11 U.S.C. §§ 726(c) & 1129(a)(7)(A)(ii).

Whether or not Mrs. Samuel is a debtor in this case, her community property interest in property owned with Mr. Samuel remains property of the estate in a bankruptcy case filed by Mr. Samuel. And, while the $3.029 million judgment of the United States is against Mrs. Samuel only, it was entered in July 2014 while Mr. and Mrs. Samuel were married. Docket 20. Hence, the claim can be satisfied from the community property of both spouses.

The court also finds no merit in the argument that Peter Samuel transferred the

property back to the debtors in 2015 under duress. First, that is claim for Peter Samuel to make and he has not made it nor objected to the sale. Second, as admitted by Mr. Samuel's counsel at the January 23 hearing, Peter Samuel transferred the property back to the debtors in 2015 when he was told that he would be named as a defendant in a fraudulent conveyance suit if the property was not reconveyed. This was approximately two years after the transfer by the debtors to him and his decision to reconvey the property was with assistance of counsel as admitted by Mr. Samuel's counsel at the hearing on this motion. It appears, then, that Peter Samuel made the transfer with assistance of counsel and had more than enough time to consider its advisability. Third, doing something because of a lawsuit is threatened, at least under these circumstances, is not duress.

The recordation of the United States' lien in 2014, before the retransfer of the property to debtors in 2015, is of no consequence. A judgment lien will attach to after-acquired property of a judgment debtor. The fact that the property was reacquired after the recordation of the judgment lien impacts only the debtors' ability to exempt the property, not the attachment of the lien. See e.g., SBAM Partners, L.L.C. v. Wang, 164 Cal. App.4th 903, 907-08 (2008). When the debtors re-acquired the property from Peter Samuel in 2015, the United States' 2014 lien attached to the property.

The court adjudicated the qualifications of the estate's real estate broker, Cushman & Wakefield of California, Inc., at the time it approved its retention by the trustee. Docket 188. If Mr. Samuel was not convinced of Cushman's qualifications, he should have objected in connection with its approval of employment. Mr. Samuel did not do that.

Also, as pointed out by the trustee, the representation by Cushman of both the seller and buyer in this transaction is in the best interest of the creditors and estate because the offer from the instant buyer was highest among the six offers received for the property. Docket 555 at 3.

There is no need for an evidentiary hearing as there are no material disputed facts, nor is the opposition accompanied by a separate statement of such facts, as required by Local Bankruptcy Rule 9014-1(f)(1)(B), which prescribes that "[i]f the responding party does not [] consent ['to the Court's resolution of disputed material factual issues pursuant to Fed. R. Civ. P. 43(c) as made applicable by Fed. R. Bankr. P. 9017'], the opposition shall include a separate statement identifying each disputed material factual issue." The request for discovery will be denied for the same reason.

The objection to the sale by Hoda Samuel will be overruled as well. See Docket 471. Her pleading is unsupported by evidence, such as a declaration establishing her factual assertions. Id.; Local Bankruptcy Rule 9014-1(d)(7). Her objection also has nothing to do with the merits of the proposed sale. The objection argues that she did not consent to the filing of this case and that the court has no jurisdiction over the sale. Nonetheless, the signatures of both her and Mr. Samuel are found on their chapter 11 petition. See Docket 63, Amended Petition.

The sale will generate sale proceeds to pay the voluntary encumbrances in full and pay some proceeds to satisfy the principal involuntary encumbrance of the United States and/or other claims against the estate. No negative tax consequences are anticipated from the sale.

But, the court is unprepared to declare at this time that the sale is in the

best interest of the creditors and the estate. From the existing record, the court cannot tell anything about the extent and gravity of the issues with the property's roof, parking lot, and lease terms. The trustee shall file a declaration in connection with the February 6 hearing on the motion, providing more details about why these issues warranted a $650,000 decrease in the purchase price.

Hence, subject to this additional evidence, the sale will be approved pursuant to 11 U.S.C. § 363(b). The court will approve the sale free and clear of Fairview's claim under section 363(f)(3), in the event there is no agreement on the final amount owed on that claim, by the hearing on this motion.

The court will not approve the sale free and clear of any claims of Peter Samuel, as he has not asserted any such claims and there is nothing in the record indicating that he has a claim against the property. There is no "just-in-case" provision of section 363(f).

The court will approve the sale of assets, as specified by the sale and purchase agreement, only to the extent such assets are property of the estate.

The court will approve the proposed break-up fee of the subject stalking horse buyer and it will waive the 14-day period of Rule 6004(h). In the event the right of first refusal is exercised, the court will approve a break-up fee of $20,000 to overbidders other than the stalking horse buyer. The court will not waive any other stays on the enforceability of the order on the motion, as no other stays have been identified by the motion.

The court will make a good faith finding under section 363(m), on the condition a declaration from the buyer is filed; no such declaration has been filed thus far.

The court will authorize payment of the real estate commission, consistent with the estate's broker's court-approved terms of employment. It will also authorize all other payments proposed by the trustee.

Finally, the court will strike the documents filed by:

- Hoda Samuel (Dockets 581 & 582) on January 19, 2017, four days before the January 23 hearing on this motion, titled as "sur-response" and corresponding proof of service; and

- Mr. Samuel (Dockets 583, 584, 585) on January 22, 2017, one day before the January 23 hearing on this motion, consisting of three declarations.

The court's local rules do not provide for the filing of sur-replies or sur-responses to a motion. The moving party has the last word. It may file a reply to timely written opposition to a motion no later than seven days prior to the hearing. See Local Bankruptcy Rule 9014-1(f)(1). Hence, the trustee's reply, prior to the January 23 hearing, ended the briefing of this motion. The debtors obviously have the opportunity to respond to any further supplement to the motion by the movant. See Docket 601 (setting a briefing schedule for supplements and further responses to the motion).

9. 16-21585-A-11 AIAD/HODA SAMUEL
FWP-16

MOTION TO
ASSUME LEASE OR EXECUTORY CONTRACT
12-23-16 [422]

Tentative Ruling: The motion will be granted in part.

The hearing on this motion was continued from January 23, in order for the trustee to evaluate changes to the terms of the underlying sale. The trustee has filed a supplement to this motion, but it implicates only the related sale motion (DCN FWP-15). The court then makes no changes to the instant ruling.

The chapter 11 trustee seeks to assume and assign 15 unexpired leases involving the estate's Sacramento Avenue real property in West Sacramento, California, which is being sold via a motion also heard on this calendar (DCN FWP-15). The estate is the lessor under each of the leases and the assignee is the buyer of the property, RC Consulting, Inc. or any successful over-bidder. The trustee 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 parties to the leases include:

- United States Postal Service;
- Victoria's Massage & Health Products / Elena's Health Products;
- Keystone Christian Missionary Church;
- Muscle Systems, MVP Sports Nutrition;
- Continental Wash & Dry KVR, L.L.C.;
- I.R. Smoke Shop;
- Departis America Sporting Goods;
- Precious Nail Salon / Hair Salon;
- Arteaga Super Market;
- Berezko European Market;
- Low Cost Liquor;
- Xpress Check Cashing / X Press Press Ta & Financial Services, L.L.C.;
- Taqueria Lay Jalisco #1;
- My Family Dentist Dr. Alexander Klimushkin; and
- Russian Church of Evangelical.

The trustee also is seeking:

- determination of the cure amounts under each of the 15 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 of Fed. R. Bankr. P. 6006(d) 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, 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 $50,000 for unsecured creditors and paying a substantial portion of an over $3 million judicial lien against all real properties of the estate. The court incorporates its ruling on the related motion to sell by reference, DCN FWP-15.

There are no cure amounts under any of the 15 leases.

The court will permit the assignment of the leases, subject to the submission of evidence at the hearing on the motion that the buyer has the ability to close on the proposed purchase of the property and has the financial wherewithal to perform under the leases in the future. The motion has no evidence from the buyer establishing adequate assurance of future performance.

The court will authorize the trustee to transfer the security deposits to the buyer of the property, in connection with the sale. The court will also 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.

Finally, the court will overrule the oppositions/objections of the debtors, in accordance with the court's ruling on the related motion to sell, DCN FWP-15. That ruling is incorporated here by reference. Their responses filed here are nearly identical to their responses to the related motion to sell.

The motion will be conditionally granted in part.

10. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO APPROVE COMPROMISE
FWP-20 — O.S.T.
2-2-17 [634]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee requests approval of a compromise between the estate and the debtors, resolving the exercise of a right of first refusal by the debtors for the purchase of the West Sacramento and Rio Linda shopping centers. The effective date of this agreement is February 1, 2017.

Under the terms of the compromise, upon the debtors' payment of $50,000 to the estate, as an initial deposit toward their purchase(s) — to be made prior to the February 6 hearing on the trustee's motion to sell the West Sacramento shopping center, the debtors shall have a right of first refusal for: (1) the purchase of the West Sacramento shopping center by matching the highest qualified bid for the property plus $100,000, or paying $4 million, whichever is greater; and (2) the purchase of the Rio Linda Center for $2,350,000, or such lesser amount as the trustee may agree prior to the February 6 sale hearing. The right may be exercised by Mr. Samuel individually, the debtors jointly, or by the family trust of their son, Peter Samuel. There is no requirement that they exercise their right of first refusal.

If they exercise the right, the $50,000 initial deposit shall become non-refundable. Upon exercising the right, they shall be required to pay the trustee additional $50,000 as a further deposit toward their purchase(s), no later than February 21, 2017. If this payment is not made, the debtors' right of first refusal will become void.

If the debtors exercise the right of first refusal, they shall have until March 6, 2017 to close the purchase of the West Sacramento shopping center and shall have until April 7, 2017 to close the purchase of the Rio Linda property. The closing dates may be extended at the discretion of the trustee.

If the debtors breach any aspect of this agreement, the trustee may sell either or both of the shopping centers to the highest bidder at the hearings on the sales of the two shopping centers, without notice to the debtors or further approval of the court.

Further, as of the February 1 effective date of the agreement, the debtors

shall be deemed to (i) consent to the trustee's sale of all four shopping centers (Power Inn, West Sacramento, Stockton Blvd, Rio Linda); (ii) have withdrawn all objections to the sale of all shopping centers and the assumption and assignment of any leases related to the shopping centers, (iii) waive and release any existing or future objections to the sale of any and all shopping centers or assumption and assignment of leases, (iv) waive and release any rights to appeal any order authorizing the sale of any shopping center, and (v) release the estate, the trustee, his professionals, and his representatives from any and all claims.

The debtors also stipulate and acknowledge the validity of their bankruptcy petition and stipulate to denial of their dismissal motions. The debtors further agree to drop and refrain from further prosecution any claims that the bankruptcy petition is invalid.

Also, upon request of the trustee, the debtors shall stipulate and agree to the substantive consolidation of the St. Mena and St. Marcorious L.L.C. with the bankruptcy estate, or such other action as the trustee may request to bring the Rio Linda shopping center into the estate.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

As the Rio Linda shopping center is owned by the St. Mena and St. Marcorious L.L.C. and not the estate, the court expects that the substantive consolidation of the limited liability company with the estate will take place prior to the estate's sale of the Rio Linda shopping center to anyone other than as pursuant to the compromise.

With this proviso, the court concludes that the Woodson factors balance in favor of approving the compromise. That is, given that sale to the debtors would still generate sufficient proceeds to pay all estate claims in full, given the global nature of the settlement, and given the inherent costs, risks, delay and inconvenience of further litigation, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.