

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

**January 23, 2017 at 10:00 a.m.**

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1. 16-00206 -A-0 NEW CAL NEVA LODGE, LLC MOTION TO  
16-2226 TRANSFER CASE  
THE PENTA BUILDING GROUP, LLC 12-30-16 [11]  
V. NEW CAL-NEVA LODGE, LLC ET

**Final Ruling:** Based on the agreement of the parties who have appeared and pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014(a)(1), because the non-appearing party is in a pending bankruptcy case in the Reno Division of the District of Nevada, and because related litigation between the parties also is pending in the Nevada bankruptcy court, this proceeding will be transferred to Reno Division of the District of Nevada. The moving parties are to lodge a proposed order within seven days of the hearing date on this motion,

2. 16-00206-A-0 NEW CAL NEVA LODGE, LLC STATUS CONFERENCE  
16-2226 12-30-16 [11]  
THE PENTA BUILDING GROUP, LLC  
V. NEW CAL-NEVA LODGE, LLC ET AL

**Final Ruling:** The status conference will not be conducted given the transfer of the case.

3. 16-27960-A-11 MARCO PALMA ORDER TO  
SHOW CAUSE  
1-5-17 [38]

**Tentative Ruling:** The case will be dismissed.

The debtor was given permission to pay the petition filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment fee in the amount of \$430 due on January 3, 2017 has not been paid. This is cause for dismissal. See 11 U.S.C. § 1112(b)(1), (b)(4)(K).

4. 16-27960-A-11 MARCO PALMA STATUS CONFERENCE  
12-1-16 [1]

**Tentative Ruling:** None.

5. 16-27960-A-11 MARCO PALMA NOTICE OF  
INTENT TO DISMISS CASE  
12-1-16 [2]

**Tentative Ruling:** The case will be dismissed.

The court issued this notice of intent to dismiss the case unless:

(1) the debtor filed all missing bankruptcy petition documents, not filed on the petition date, including the list of 20 largest unsecured creditors, Schedules A/B, C, D, E/F, G, H, I, J, the statement of financial affairs, and the summary of schedules;

(2) the debtor files a motion for an extension of time to file the missing documents; or

(3) the debtor files a notice of hearing on the notice of intent to dismiss, supported by a statement of the issue and evidence.

As the debtor has done none of the foregoing, the court will dismiss the case. Dismissal is not closure of the case. Cases are not administratively closed as long as there are pending motions to be heard before the court.

6. 16-27960-A-11 MARCO PALMA  
AP-1  
WELLS FARGO BANK, N.A. VS.

MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
12-19-16 [31]

**Tentative Ruling:** The motion will be granted in part and dismissed as moot in part.

The movant, Wells Fargo Bank, seeks prospective and in rem relief from the automatic stay as to a real property in Stockton, California (Cayuga Drive) under 11 U.S.C. § 362(d) (1) and 362(d) (4).

The court will grant relief under section 362(d) (4), which prescribes that:

*"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . .*

*"with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either-*

*"(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or*

*"(B) multiple bankruptcy filings affecting such real property."*

This is the debtor's 17th bankruptcy case since October 25, 2010. The history of the debtor's prior filings is as follows.

(1) On October 25, 2010, the debtor filed a chapter 13 voluntary petition in this district. Case No. 10-48205. The case was dismissed on December 23, 2010 due to failure to make proposed plan payments, among other reasons.

(2) On August 2, 2012, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 12-34278. The case was dismissed on September 4, 2012, due to failure to file petition documents.

(3) On or about October 23, 2012, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 12-38747. The case was dismissed on November 28, 2012, due to failure to file a correct form of the chapter 13 plan and unreasonable delay prejudicial to creditors.

- (4) On March 22, 2013, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 13-23872. The case was subsequently dismissed on May 23, 2013, due to failure to make proposed plan payments, among other reasons.
- (5) On June 11, 2013, the debtor filed a voluntary petition under chapter 7 in this district. Case No. 13-27906. The case was dismissed on September 21, 2013, due to failure to appear at the meeting of creditors.
- (6) On October 8, 2013, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 13-33104. The case was dismissed on October 21, 2013, due to failure to file petition documents.
- (7) On November 22, 2013, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 13-34882. The case was dismissed on December 3, 2013, due to failure to file petition documents.
- (8) On December 9, 2013, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 13-35528. The case was dismissed on January 23, 2014, due to failure to file a correct form of the chapter 13 plan and unreasonable delay prejudicial to creditors, among other reasons.
- (9) On January 27, 2014, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 14-20709. The case was dismissed on February 20, 2014, due to failure to file a correct form of the chapter 13 plan and unreasonable delay prejudicial to creditors, among other reasons.
- (10) On February 27, 2014, the debtor filed a voluntary petition under chapter 7 in this district. Case No. 14-21908. The case was dismissed on March 17, 2014, due to failure to file petition documents.
- (11) On March 28, 2014, the debtor filed a voluntary petition under chapter 7 in this district. Case No. 14-23136. The case was dismissed on April 24, 2014, due to failure to file petition documents, including the means test form.
- (12) On November 16, 2015, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 15-28882. The case was dismissed on December 23, 2015, due to failure to provide the chapter 13 trustee with documents and unreasonable delay prejudicial to creditors, among other reasons.
- (13) On January 5, 2016, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 16-20030. The case was dismissed on February 23, 2016, due to failure to provide the chapter 13 trustee with documents and unreasonable delay prejudicial to creditors.
- (14) On May 19, 2016, the debtor filed a voluntary petition under chapter 13 in this district. Case No. 16-23258. The case was dismissed on June 6, 2016, due to failure to file petition documents.
- (15) On August 4, 2016, the debtor filed a voluntary petition under chapter 11 in this district. Case No. 16-25123. The case was dismissed on August 15, 2016, due to failure to file the verification and master address list.
- (16) On October 13, 2016, the debtor filed a voluntary petition under chapter 11 in this district. Case No. 16-26804. The case was dismissed on October 31, 2016, due to failure to file petition documents, among other reasons.

Although the debtor used different social security numbers and addresses to file his prior cases, the court is satisfied that the debtor here is the one who filed the 16 prior cases outlined above.

This was demonstrated to the court in an adversary proceeding filed by the United States Trustee in the debtor's 16th bankruptcy case, Case No. 16-26804, where the court entered a judgment against the debtor, enjoining him from filing future bankruptcy cases for a period of five years, without prior court approval. Adv. Proc. No. 16-2229, Dockets 12, 14, 17.

In short, the debtor never received a discharge in any of his prior 16 bankruptcy cases, and the cases were dismissed for various deficiencies, including failure to file documents, failure to cooperate with the trustee, failure to make chapter 13 plan payments, and/or unreasonable delay.

The debtor filed the instant chapter 11 case on December 1, 2016. This is his 17th bankruptcy case since October 25, 2010. The instant case contains identical deficiencies as found in the prior cases. The debtor has not filed petition documents in this case, nor has he paid his filing fee. See Docket 38.

And, each of the debtor's bankruptcy filings—since 2010—has affected the subject real property, as the debtor has owned the property since obtaining the loan held by the movant, back in 2005. Docket 34 at 2. The debtor obtained a loan in 2005 from the movant's predecessor in interest, World Savings Bank, FSB, securing it by the subject property. Id. The debtor defaulted under the loan in 2010. Docket 34 at 3. The debtor listed the property as one of his assets as recently as 2016. Case No. 16-20030, Docket 1, Schedule A.

From the foregoing, the court concludes that the filing of this case was part of a scheme to delay, hinder, or defraud creditors, involving multiple bankruptcy filings affecting the subject property. Accordingly, the court will grant relief under section 362(d)(4).

Next, the motion for prospective relief from stay will be dismissed as moot, as the stay did not go into effect when this case was filed.

11 U.S.C. § 362(c)(4)(A) provides that (i) "if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under section (a) shall not go into effect upon the filing of the later case; and (ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect."

The court has reviewed the dockets of the 12th prior case (chapter 13), 13th prior case (chapter 13), 14th prior case (chapter 13), 15th prior case (chapter 11), and 16th prior case (chapter 11) of the debtor, as outlined above, and has confirmed that those cases were pending within the previous year of the filing of the instant case and that the court dismissed those previous cases.

Accordingly, the motion for prospective stay relief will be dismissed as moot, as the automatic stay did not go into effect upon the filing of the instant case, on December 1, 2016.

Nevertheless, the court will confirm that the automatic stay did not go into

effect upon the filing of the instant case on December 1, 2016. See 11 U.S.C. § 362(c)(4)(A)(ii) & (j).

The court will dismiss as moot the motion for prospective relief from stay also because it is dismissing the case, in connection with the order to show cause and notice of intent to dismiss, also being heard on this calendar. Dockets 2 & 38; see also 11 U.S.C. § 362(c)(2)(B) (prescribing automatic dissolving of the stay upon dismissal).

7. 11-34267-A-13 PAUL/DOROTHY LEACHMAN MOTION TO  
16-2213 AMH-2 DISMISS  
LEACHMAN ET AL V. BANK OF AMERICA, N.A. ET AL 12-12-16 [18]

**Tentative Ruling:** The motion will be granted in part and denied in part.

One of the defendants in this proceeding, Bank of America, N.A., seeks dismissal of the amended complaint filed on November 28, 2016, pursuant to Fed. R. Civ. P. 12(b)(6). Docket 11. The plaintiffs, Paul and Dorothy Leachman, the debtors in the underlying chapter 13 case, oppose the motion.

The plaintiffs filed the underlying chapter 13 case on June 7, 2011 and obtained confirmation of a chapter 13 plan on September 23, 2011. Case No. 11-34267, Dockets 1 & 50. In connection with their plan confirmation, the plaintiffs obtained an order valuing Bank of America's interest in their real property in Elk Grove, California at \$0.00. Case No. 11-34267, Docket 60. Bank of America's interest in the property is based on a mortgage claim secured by a second deed of trust against the property.

The plaintiffs completed payments under the plan on July 1, 2016 and sent a request to Bank of America on July 18, 2016, requesting compliance with Cal. Civ. Code § 2941(b)(1), which requires reconveyance of a deed of trust within 30 days of satisfaction of the claim secured by the deed.

The plaintiffs filed this adversary proceeding naming Bank of America as a defendant because it failed to reconvey its deed of trust after the completion of the plan. The plaintiffs obtained a chapter 13 discharge on November 4, 2016.

The plaintiffs filed an amended complaint on November 28, 2016 against Bank of America, The Bank of New York Mellon, and Nationstar Mortgage, L.L.C., asserting the following causes of action:

(1) claim 1 for declaratory relief determining that Bank of America no longer has interest in the property (as to all defendants),

(2) claim 2 for violation of Cal. Civ. Code § 2941 for the failure to reconvey the deed of trust (as to all defendants),

(3) claim 3 for violation of the Rosenthal Fair Debt Collection Practices Act, California Civil Code §§ 1788-1788.32 (as to all defendants excluding Bank of America),

(4) claim 4 for slander of title, contending that "Defendants are falsely alleging an ownership interest in the property" (Docket 11 at 10) (as to all defendants), and

(5) claim 5 for attorney's fees based on the loan agreement, deed of trust and Cal. Civ. Code § 1717 (as to all defendants).

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990) (as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

*"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'"*

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

*"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'*

*"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court*

*should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."*

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

The court rejects the plaintiffs' contention that Bank of America is a "necessary" party for a "quiet title" remedy sought in connection with the first cause of action in the amended complaint.

The amended complaint does not meet the injury in fact requirement of standing as to Bank of America.

A plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9<sup>th</sup> Cir. 2004) (citing Lujan, 504 U.S. at 560-61).

There is no need for the court to quiet title to the property. The plaintiffs' confirmed and now completed chapter 13 plan did not involve any challenges to the plaintiffs' ownership interest in the property. It treated them as owners of the subject property.

Under the amended complaint, no one has ever challenged that the plaintiffs own the subject real property. Nor does the failure to reconvey the deed of trust, by Bank of America or anyone else, constitute such a challenge, necessitating a quiet title remedy.

More, the amended complaint states that Bank of America owns no interest in the property. According to the complaint, under the plan Bank of America held, as of the petition filing date, a claim secured by a second deed of trust against the property. Docket 11 at 4 ¶ 23.

The amended complaint further asserts that, after plan confirmation, Bank of America transferred its claim and security interest to Nationstar, on August 14, 2013. Docket 11 at 4 ¶ 27. It also alleges that The Bank of New York Mellon is the beneficiary of the deed of trust. Docket 11 at 4-5.

The amended complaint is clear that Bank of America has no interest in the property and thus there is no plausible basis for liability of Bank of America under claim 1.

Moreover, Bank of America does not deny that it owns no interest in the property. It admits it holds no interest in the property. "Bank of America is not asserting any interest in the property." Docket 24 at 2. Bank of America states that it is no longer a creditor secured by the property. "On August 14, 2013 a Transfer of Claim Other Than For Security was filed with the Bankruptcy Court by Nationstar - confirming it is the current transferee of the claim for the Subject Loan." Docket 18 at 2. "[Bank of America] has no ability to reconvey the Subject Deed of Trust because it no longer services the Subject Loan, and there is no relief that BANA can provide the Plaintiffs." Docket 18

at 4.

Bank of America's lack of plausible liability is true as to claims 2, 4, and 5 as well. As the bank did not own a mortgage interest in the property in 2016, when the plaintiffs satisfied the claim held by Bank of America as of plan confirmation, it could not have violated Cal. Civ. Code § 2941's reconveyance requirement. Nor could Bank of America have committed slander of title when it failed to reconvey the deed it previously had an interest in, prior to transfer of its interest in the property to Nationstar. Without any other basis for liability, the plaintiffs have no plausible claim for attorney's fees either.

The motion will be granted and claims 1, 2, 4 and 5 will be dismissed as to Bank of America.

The motion will be denied as unnecessary as to claim 3, given it is not directed at Bank of America.

8. 11-34267-A-13 PAUL/DOROTHY LEACHMAN STATUS CONFERENCE  
16-2213 11-28-16 [11]  
LEACHMAN ET AL V. BANK OF  
AMERICA, N.A. ET AL

**Tentative Ruling:** None.

9. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO  
FWP-13 SELL AND TO PAY  
12-23-16 [409]

**Tentative Ruling:** The motion will be conditionally granted in part.

The chapter 11 trustee requests authority to sell as is and free and clear of liens for \$1,100,000 the estate's interest in a shopping center real property in Sacramento, California on Power Inn Road to Susan Thuyminh Lee and Hoang Joseph Duc Nguyen. The transaction includes the sale of some personal property identified in more detail in the sale agreement.

The property is subject to:

- (1) a mortgage claim held by JPMorgan Chase Bank in the approximate amount of \$667,640.84 (excluding attorney's fees),
- (2) outstanding property taxes in the estimated amount of \$16,741.57,
- (3) utility liens in the total amount of approximately \$535.05,
- (4) a lien for \$2,583 recorded post-petition by Jackson & Ekstrom, and
- (5) 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 trustee seeks approval of the sale free and clear of:

- (i) JPMorgan Chase Bank's claim, in the event the trustee and the bank cannot



agree to an exact amount for the satisfaction of its claim;

(ii) Jackson & Ekstrom's lien as it was created by a post-petition recordation in violation of the automatic stay;

(iii) 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 \$10,000 to the buyers in the event another person is the prevailing over-bidder;

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

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

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

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

(f) approval to pay the outstanding and current pro-rated property taxes, utility liens, the claim of JPMorgan Chase Bank, and closing costs and expenses allocated to the trustee;

(g) 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

(h) authority to pay the remaining sale proceeds (per the motion, estimated at approximately \$351,831.79) to the United States, on account of its restitution judgment lien.

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 court rejects the debtors' opposition to the motion. 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 543 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 August 1, 2016, for several months, prior to receiving the offer for the subject sale. Docket 543 at 3.

Given the trustee's marketing of the property with a real estate broker on multiple listing services since August 1, 2016 and given that this sale is subject to overbids, the court is not persuaded that the property is being sold at a discount. The fair market value of the property is whatever a willing buyer is willing to pay to a willing seller, after adequate marketing of the property. The property has been adequately marketed.

The court also notes that the valuation of the property by Mr. Samuel's appraiser, David Hayward, at \$2.5 million, is based on a potential capitalization rate, meaning that Mr. Hayward is relying not on the actual income the property is currently generating but on the *potential* income the property can generate, assuming certain factors are satisfied. Mr. Hayward says nothing about what potential income he factored in appraising the property at \$2.5 million. Docket 480.

A problem with the property is its substantial disrepair and 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 centers, the trustee has decided that liquidation at their present condition is the best course of option. 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 and negotiating 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 not surprised that the trustee accepted an offer for the purchase of the property, while rejecting the purported refinance offer from Mr. Samuel. This case has been pending for nearly one year and the appointment of the chapter 11 trustee was precipitated solely due to Mr. Samuel's unreliability in and mismanagement and incompetence at administering this chapter 11 estate. Mr. Samuel neglected retaining adequate 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.

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 five offers received for the property. Docket 541 at 2.

The court will not conduct 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 substantial proceeds to satisfy the principal involuntary encumbrance of the United States. No negative tax consequences are anticipated from the sale.

Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b). The court will approve the sale free and clear of JPMorgan Chase Bank'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 approve the sale free and clear of Jackson & Ekstrom's post-petition lien under section 363(f)(4), as it is in bona fide dispute; it appears to have been created in violation of the automatic stay.

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 proposed break-up fee of the subject stalking horse buyers and it will waive the 14-day period of Rule 6004(h). 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 buyers 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.

The sale is in the best interests of the creditors and the estate.

**Tentative Ruling:** The motion will be conditionally granted in part.

The chapter 11 trustee seeks to assume and assign three unexpired leases involving the estate's Power Inn Road real property, which is being sold via a motion also heard on this calendar (DCN FWP-13). The estate is the lessor under each of the leases and the assignees are the buyers of the property, Susan Thuyminh Lee and Hoang Joseph Duc Nguyen 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:

- Petite Hair & Nails;
- Metro PCS; and
- Subway.

The trustee also is 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 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 (9<sup>th</sup> 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 \$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 by reference its ruling on the related motion to sell, DCN FWP-13.

There are no cure amounts under any of the leases.

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

The court will authorize the trustee to transfer the security deposits to the buyers 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-13. 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.

**Tentative Ruling:** The motion will be conditionally granted in part.

The chapter 11 trustee requests authority to sell as is and free and clear of liens for \$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 \$3,065,202.30 (excluding attorney's fees),
- (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 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 \$10,000 to the buyer, in the event another person is the prevailing over-bidder;
- (b) waiver of the 14-day period of Fed. R. Bankr. P. 6004(h);
- (c) waiver of any other state and/or federal stay on the enforceability of the order approving the sale;
- (d) a good faith finding under 11 U.S.C. § 363(m);
- (e) approval to pay the real estate broker's commission;
- (f) 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;

(g) 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

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

The trustee expects to have \$1,019,463.75 to pay Fairview's attorney's fees and fund the \$400,000 estate reserve, with the remaining funds to be paid to the United States, on account of its criminal restitution judgment lien.

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 view of Fairview's response, challenging the motion's \$3,065,202.30 figure (excluding attorney's fees) of Fairview's claim, the court makes no determination at this time of the correct amount of Fairview's claim, as the parties are working to resolve this issue.

The court rejects the debtors' opposition to the motion. 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 August 1, 2016, for several months, prior to receiving the offer for the subject sale. Docket 555 at 3.

Given the trustee's marketing of the property with a real estate broker on multiple listing services since August 1, 2016 and given that this sale is subject to overbids, the court is unpersuaded that the property is being sold at a discount. The fair market value of the property is whatever a willing buyer is willing to pay to a willing seller, after adequate marketing of the property. The property has been adequately marketed.

The court also notes that the valuation of the property by Mr. Samuel's appraiser, David Hayward, at \$9.3 million, is based on a potential capitalization rate, meaning that Mr. Hayward is relying not on the actual income the property is currently generating but on the *potential* income the property can generate, assuming certain factors are satisfied. Mr. Hayward



says nothing about what potential income he factored in when appraising the property at \$9.3 million. Docket 498.

A problem with the property is its substantial disrepair and 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 centers, the trustee has decided that liquidation at their present condition is the best course of option. 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 and negotiating 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 not surprised that the trustee accepted an offer for the purchase of the property, while rejecting the purported refinance offer from Mr. Samuel. This case has been pending for nearly one year and the appointment of the chapter 11 trustee was precipitated solely due to Mr. Samuel's unreliability in and mismanagement and incompetence at administering this chapter 11 estate. Mr. Samuel neglected retaining adequate 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.

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.

The court will not conduct 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 substantial proceeds to satisfy the principal involuntary encumbrance of the United States. No negative tax consequences are anticipated from the sale.

Hence, 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 proposed break-up fee of the subject stalking horse buyer and it will waive the 14-day period of Rule 6004(h). 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.

The sale is in the best interests of the creditors and the estate.

12. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO  
FWP-16 ASSUME LEASE OR EXECUTORY CONTRACT  
12-23-16 [422]

**Tentative Ruling:** The motion will be conditionally granted in part.

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 is also 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 (9<sup>th</sup> 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.

13. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO  
FWP-17 SELL  
12-23-16 [425]

**Tentative Ruling:** The motion will be conditionally granted in part.

The chapter 11 trustee requests authority to sell as is and free and clear of liens for \$1,200,000 the estate's interest in a shopping center real property in Sacramento, California on Stockton Boulevard to Susan Thuyminh Lee and Hoang Joseph Duc Nguyen. The transaction includes the sale of some personal property

items identified in more detail in the sale agreement.

The property is subject to:

- (1) outstanding property taxes in the estimated amount of \$13,433.93,
- (2) potential assessments relating to a pending enforcement action recorded by the County of Sacramento,
- (3) 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 trustee seeks approval of the sale free and clear of:

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 \$10,000 to the buyers, in the event another person is the prevailing over-bidder;
- (b) waiver of the 14-day period of Fed. R. Bankr. P. 6004(h);
- (c) waiver of any other state and/or federal stay on the enforceability of the order approving the sale;
- (d) a good faith finding under 11 U.S.C. § 363(m);
- (e) approval to pay the real estate broker's commission;
- (f) approval to pay the outstanding and current pro-rated property taxes, the enforcement action assessment, closing costs and expenses allocated to the trustee;
- (g) 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
- (h) authority to pay the remaining sale proceeds to the United States, on account of its restitution judgment lien.

The trustee expects to have \$1,116,952.20 to fund the \$400,000 estate reserve, with the remaining funds to be paid to the United States on account of its criminal restitution judgment lien.

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 court rejects the debtors' opposition to the motion. 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 565 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. Docket 513. The property was also marketed for sale since August 1, 2016, for several months, prior to receiving the offer for the subject sale. Docket 565 at 3.

Given the trustee's marketing of the property with a real estate broker on multiple listing services since August 1, 2016 and given that this sale is subject to overbids, the court is not persuaded that the property is being sold at a discount. The fair market value of the property is whatever a willing buyer is willing to pay to a willing seller, after adequate marketing of the property. The property has been adequately marketed.

The court also notes that the valuation of the property by Mr. Samuel's appraiser, David Hayward, at \$2.7 million, is based on a potential capitalization rate, meaning that Mr. Hayward is relying not on the actual income the property is currently generating but on the *potential* income the property can generate, assuming certain factors are satisfied. Mr. Hayward says nothing about what potential income he factored in when appraising the property at \$2.7 million. Docket 514.

A problem with the property is its substantial disrepair and 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 centers, the trustee has decided that liquidation at their present condition is the best course of option. 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 and negotiating 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 not surprised that the trustee accepted an offer for the purchase

of the property, while rejecting the purported refinance offer from Mr. Samuel. This case has been pending for nearly one year and the appointment of the chapter 11 trustee was precipitated solely due to Mr. Samuel's unreliability in and mismanagement and incompetence at administering this chapter 11 estate. Mr. Samuel neglected retaining adequate 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.

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 nine offers received for the property. Docket 565 at 3.

The court will not conduct 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 proceeds to fund a \$400,000 reserve for the estate to pay professionals' fees and pay up to \$50,000 to unsecured creditors, with the remainder (including from the \$400,000) to satisfy the principal involuntary encumbrance of the United States. No negative tax consequences are anticipated from the sale.

Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b).

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 proposed break-up fee of the subject stalking horse buyer and it will waive the 14-day period of Rule 6004(h). 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 buyers 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.

The sale is in the best interests of the creditors and the estate.

14. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO  
FWP-18 ASSUME LEASE OR EXECUTORY CONTRACT  
12-23-16 [430]

**Tentative Ruling:** The motion will be conditionally granted in part.

The chapter 11 trustee seeks to assume and assign four unexpired leases involving the estate's Stockton Boulevard real property, which is being sold via a motion also heard on this calendar (DCN FWP-17). The estate is the lessor under each of the leases and the assignees are the buyers of the property, Susan Thuyminh Lee and Hoang Joseph Duc Nguyen 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:

- Family Chiropractic Dr. Truong Nguyen;
- Elegant Portraits;
- Fly Cuts & Styles Barber Shop; and
- Bultee BBQ Koyang Inc. (Dba Hip Hop Jeans).

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 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 (9<sup>th</sup> 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 by reference its ruling on the related motion to sell, DCN FWP-17.

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

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

The court will authorize the trustee to transfer the security deposits to the buyers 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-17. 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.

15. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO  
FWP-19 APPROVE COMPENSATION OF CHAPTER  
11 TRUSTEE  
12-30-16 [443]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The chapter 11 trustee, Scott Sackett, on behalf of Sackett Corporation, the company retained to manage the debtors' shopping center real properties, has filed a first interim motion for approval of compensation for services rendered by SC from August 1, 2016 through December 31, 2016. The requested compensation consists of \$15,544.50 in fees and \$0.00 in expenses.

This case was filed on March 15, 2016. The court approved the chapter 11 trustee's appointment on May 10, 2016. SC's retention by the trustee was approved by the court on August 29, 2016. Docket 239. SC's fees are \$650 a month or 5% of the gross rents from the properties, whichever is greater. See Docket 146.

The fees for the Power Inn and Stockton Boulevard properties are \$650 a month for five months (August through December 2016) for each property. The fees for the Sacramento Avenue property are \$9,044.52 for that same period, based on gross rental revenue for each month during that period, of \$33,450.07, \$33,610.07, \$41,970.07, \$35,930.07 and \$35,930.07, correspondingly.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." SC's services included assisting the trustee with the management of the debtors' three shopping centers, including, without limitation, administering the leases at the properties, collecting rents, administering service contracts, and preparing income and expense statements.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The compensation will be approved.

16. 16-21585-A-11 AIAD/HODA SAMUEL  
FWP-6

MOTION TO  
USE CASH COLLATERAL  
7-18-16 [170]

**Tentative Ruling:** The motion will be conditionally granted.

The chapter 11 trustee seeks approval to use the cash collateral of several creditors secured by three shopping centers and six residential rental properties from February 1, 2017 through April 30, 2017.

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 real properties, pending their administration, such as the sale of the shopping centers, allowing the trustee to continue operating them as rentals, thus permitting eventual liquidation at a maximum value. This is in the best interest of the estate and the creditors.

The three shopping centers involved in this motion include:

- on Stockton Boulevard in Sacramento, California (no voluntary liens, encumbered solely by the United States' \$3,029,412.64 criminal restitution judgment lien);
- on Sacramento Avenue in West Sacramento, California (valued at \$4.3 million and subject to an approximately \$2.925 million first priority claim held by Fairview Holdings II, L.L.C. and United States' second priority criminal restitution judgment);
- on Power Inn Road in Sacramento, California (valued at \$1.2 million and subject to an approximately \$650,000 first priority claim held by JP Morgan Chase Bank and the United States' second priority criminal restitution judgment).

The proposed budget here is substantially similar to the budgets pursuant to which the court has authorized prior use of cash collateral to the estate. Dockets 109, 150, 174, 207, 385. The trustee proposes to make adequate protection payments to the shopping center secured creditors, up to \$5,000 a month and to the extent proceeds are available, and to grant them replacement liens.

The trustee shall make, however, a minimum adequate protection payment of \$3,000 to Fairview Holdings, the creditor secured by the property on Sacramento Avenue. As further adequate protection for Fairview, the United States of America has stipulated to a lien on the Stockton Boulevard shopping center, on terms and conditions outlined in the motion.

The trustee anticipates that the secured creditors will stipulate to the proposed cash collateral use.

Given that the secured creditors will be stipulating to the cash collateral use and given that the proposed budget is substantially similar to the budgets of the estate's prior approved cash collateral uses, the motion will be granted as to the three shopping centers.

As to the residential properties, they are all in Sacramento, California and include:

- 130 Prairie Circle (rented at \$825 a month),
- 180 Prairie Circle,
- 186 Prairie Circle,
- 209 Prairie Circle (rented at \$825 a month),
- 5924 Pony Trail Way (rented at \$825 a month), and
- 148 Estes Way (rented at \$1,000 a month).

Thus far, the trustee has discovered that JP Morgan Chase Bank, Bank of America and The Bank of New York Mellon are each secured by one or more of the residential properties. The trustee requests authority to use as necessary up to \$2,000 a month per residential property in cash collateral, to maintain the residential properties.

Subject to hearing from any creditors secured by the residential properties, the court will authorize the requested use of cash collateral from those properties.

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