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13 UNITED STATES BANKRUPTCY COURT
14 EASTERN DISTRICT OF CALIFORNIA
15 SACRAMENTO DIVISION

16 In re:
17 AIAD AND HODA SAMUEL,
18 Debtors.

19 CASE NO.: 16-21585-A-11
20 Chapter 11
21 DCN: FWP-15

22 Date: January 23, 2017
23 Time: 10:00 a.m.
24 Judge: Hon. Michael S. McManus
25 Courtroom: 28, Department A

26 **TRUSTEE’S MOTION FOR AUTHORITY TO SELL REAL PROPERTY LOCATED**
27 **AT 900-974 SACRAMENTO AVENUE, WEST SACRAMENTO, CALIFORNIA FREE**
28 **AND CLEAR OF LIENS PURSUANT TO SECTION 363**
OF THE BANKRUPTCY CODE AND TO PAY COSTS OF SALE
INCLUDING BROKER’S COMMISSION AND FOR RELATED RELIEF

29 Scott M. Sackett, the duly-appointed Chapter 11 trustee in the above-referenced
30 bankruptcy case (the “Trustee” or “Seller”), hereby moves the Court for an order granting the
31 “Relief Requested” as described in Section II below, including: (1) approving the sale of the real
32 property commonly known as 900-974 Sacramento Avenue, West Sacramento, California
33 including any related personal property items identified in the proposed sale agreement
34 (collectively the “Real Property”) to RC Consulting, Inc. (the “Buyer”) free and clear of liens for
35 \$4,500,000, subject to overbidding and the bidding procedures set forth below which include a
36 potential “break-up fee,” pursuant to section 363 of Title 11 of the United States Code (the

1 “Bankruptcy Code”), (2) authorizing the Trustee to pay the real property taxes for the Real
2 Property through and including the closing date, including past due and pro-rated property taxes
3 in the estimated amount of \$153,882, (3) authorizing the Trustee to pay the estimated amount of
4 \$3,065,202.30 plus reasonable attorneys’ fees from the sale proceeds to Fairview Holdings II,
5 LLC (“Fairview”) in full satisfaction of the Fairview deed of trust on the Real Property, (4)
6 authorizing the Trustee to pay such other costs and expenses allocated to the Seller under the
7 proposed sale agreement, (5) authorizing the Trustee to pay the broker’s commission(s) and other
8 amounts related to the sale of the Real Property as explained below from the sale proceeds, (6)
9 authorizing the Trustee to pay potential assessments related to a Certificate of Nuisance recorded
10 by the City of West Sacramento Code Enforcement Division, (7) authorizing the Trustee to
11 reserve up to \$400,000 from the sale proceeds in a blocked account pending further order of the
12 Court, (8) authorizing the Trustee to pay the remaining net proceeds from the sale of the Real
13 Property to the United States of America the (“USA”) in partial satisfaction of the USA’s claim
14 against the Debtors but in consideration of its release of any and all liens or other interests in the
15 Real Property, and (8) granting such other relief as set forth below in the section entitled “Relief
16 Requested.”

17 The Trustee is informed and believes that the proposed sale will generate net proceeds for
18 the estate of approximately \$1,019,463.75 before payment of allowed Fairview attorneys’ fees,
19 funding the estate reserve, or payment to the USA. The Trustee submits that the Real Property
20 has been fully marketed, and that the proposed sale of the Real Property is in the best interests of
21 the estate.

22 This Motion is based on the memorandum of points and authorities below, the Declaration
23 of Scott M. Sackett (“Sackett Decl.”) filed in support of this Motion, the Declaration of Mark
24 Tabak filed in support of the Motion, the pleadings and papers on file in this case, and such other
25 evidence and argument as may be submitted before or during the hearing on this Motion.

26 I. JURISDICTION

27 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This
28 matter concerns the administration of this bankruptcy estate (the “Estate”), and accordingly, this

1 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper pursuant to 28 U.S.C.
 2 §§ 1408 and 1409. The statutory basis for relief is Bankruptcy Code section 363. Federal Rule of
 3 Bankruptcy Procedure (“Bankruptcy Rule”) 6004 is applicable to this Motion.

4 II. RELIEF REQUESTED

5 The Trustee requests approval of the following:

- 6 a. The sale of the Real Property to the Buyer in exchange for the Buyer’s
 7 payment of the purchase price in the amount of \$4,500,000, subject to
 8 overbidding, in accordance with the terms and conditions set forth in the
 9 Standard Offer, Purchase Agreement and Deposit Receipt and any addenda or
 10 amendments thereto (the “Sale Agreement”) attached to the Exhibit Document
 11 as **Exhibit A**. The sale of the Real Property is on an “AS-IS” basis. The
 12 Trustee anticipates that all buyer contingencies to the sale, other than
 13 Bankruptcy Court approval of the sale and the Trustee’s related motion to
 14 assume and assign the lease agreements related to the Real Property¹, shall be
 15 removed or satisfied;
- 16 b. In the alternative, the sale of the Real Property, on the same terms and with no
 17 conditions, to the best overbidder that is approved by the Trustee and the Court
 18 at the hearing on this Motion, taking into consideration all factors, and
 19 approval of a “back-up” buyer;
- 20 c. The use of bidding procedures (the “Bidding Procedures”), at the beginning of
 21 hearing on the Motion, as set forth in Section IV of this Motion, including a
 22 break-up fee of \$10,000 to be paid to the Buyer from the sale proceeds in the
 23 event that the Property is sold to a third party overbidder;
- 24 d. The payment through escrow of (i) past due real property taxes and
 25 assessments in the estimated amount of \$153,882 and pro-rated current
 26 amounts, (ii) the estimated amount of \$3,065,202.30 plus reasonable attorneys’
 27 fees to Fairview in full satisfaction of and in exchange for release of its liens
 28 and deed of trust on the Real Property, (iii) closing costs and expenses
 allocated to Seller, (iv) the broker’s commission(s), (v) amounts due under a
 Certificate of Nuisance recorded by the City of West Sacramento, (vi) the
 remaining net proceeds from the sale of the Real Property to the USA after
 reserving up to \$400,000 (vii) such amounts as may be necessary to satisfy the
 Estate’s cure claim obligations, or other payment obligations, as set forth in the
 accompanying motion to assume and assign leases;
- e. The sale of the Real Property free and clear of (i) if necessary, the Fairview
 deed of trust if the Trustee and the Fairview are unable to agree upon the
 amount demanded by Fairview to payoff to satisfy the obligations secured by
 its deed of trust, and (ii) any claims or interests of Peter A. Samuel,
 individually or as trustee;
- f. the buyer of the Real Property as a good faith purchaser under 363(m);
- g. The waiver of any applicable state and/or federal stay of immediate

¹ The Trustee has filed a separate motion to assume and assign leases and set that motion for
 hearing at the same date and time as the hearing on this Motion.

1 enforceability of the order approving the Motion when entered; and

2 h. Authorizing the Trustee in his discretion to revoke the Aiad and Hoda Samuel
3 Family Trust, under trust dated October 17, 2001;

4 i. Such other relief as is just and appropriate in circumstances of this case.

5 **III. BACKGROUND AND FACTS IN SUPPORT OF THE MOTION**

6 **A. Background**

7 1. On March 15, 2016 (“Petition Date”), Aiad and Hoda Samuel (the “Debtor”) filed
8 a voluntary petition under chapter 11 of the Bankruptcy Code. The Debtor’s principal business
9 enterprise is real estate management and leasing.

10 2. On May 10, 2016, the Court approved the Trustee’s appointment as the Chapter 11
11 Trustee for the Debtor’s Estate. (Dkt. No. 75).

12 **B. The Real Property and Title**

13 3. The Real Property, identified by Assessor parcel number APN# 010-320-71, has
14 been improved with a retail commercial shopping center.

15 4. The official records of the Yolo County Recorder’s Office² show that on or about
16 April 11, 2013, a deed conveying full title to the property was executed and recorded by Aiad
17 Samuel and Hoda Samuel, husband and wife, as joint tenants, as Grantor, to Peter A. Samuel,
18 Trustee of the Peter A. Samuel sole and separate property trust, dated April 1, 2013, as Grantee,
19 recorded April 12, 2013, as Instrument No. 2013-0011917-00 of Official Records.

20 5. The official records of the Yolo County Recorder’s Office show that on or about
21 May 14, 2015, a deed conveying full title to the property was executed and recorded by Peter A.
22 Samuel, Trustee of the Peter A. Samuel sole and separate property trust, dated April 1, 2013, as
23 Grantor, to Aiad Samuel and Hoda Samuel, Trustees of the Aiad and Hoda Samuel Family Trust,
24 under trust dated October 17,2001, as Grantee, recorded May 21, 2015, as Instrument No. 2015-
25 0013767-00 of Official Records.

26 6. The Real Property is also identified as real property owned by the Debtors on the
27 Petition Date on the Debtor’s original and amended Schedule A filed on March 29, 2016 (Dkt.

28 ² To the extent necessary, the Trustee requests judicial notice of all Official Records of the
County Recorder’s Office

1 No. 31), May 2, 2016 (Dkt. No. 65), and September 28, 2016 (Dkt. No. 336). Accordingly, the
2 Real Property is property of the Debtor's Estate.

3 7. Fourteen retail suites at the Real Property are currently leased to tenants, who are
4 obligated to pay monthly rent to the Estate under those leases. The Trustee seeks an order
5 approving the assumption and assignment of those leases together with a parking arrangement to
6 the winning Buyer in connection with this proposed sale. (See FWP-16, Sackett Decl., ¶ 7.) The
7 assignment of those leases is a critical component of the proposed sale. Accordingly, the Trustee
8 seeks the authority to pay out of escrow such amounts as may be necessary to satisfy the Estate's
9 cure claim obligations, or other payment obligations, as set forth in the accompanying motion to
10 assume and assign leases.

11 8. No formal appraisal has been performed on the Real Property for the Estate.

12 **C. The Real Property Liabilities or Encumbrances**

13 9. The Trustee has obtained a preliminary title report for the Real Property that shows
14 no monetary liens, claims, or encumbrances other than (i) past due real property taxes on the Real
15 Property estimated at approximately \$153,882 as of November 22, 2016, (ii) a deed of trust
16 recorded by Tri-Counties Bank, and assigned to Fairview, to secure payment of certain
17 indebtedness in the amount of \$3,250,000 as of January 1, 2010 (the "Fairview Deed of Trust")
18 and (iii) a lien recorded by the USA to secure payment of a restitution Judgment in the amount of
19 \$3,029,412.64 as of February 12, 2015 (the "USA Restitution Lien").

20 10. The Trustee is informed and believes that the Fairview Deed of Trust shown on the
21 preliminary title report relates to a loan (the "Real Property Loan") made by Fairview's
22 predecessor, Tri-Counties Bank, to the Debtors in December 2009/January 2010 evidenced by a
23 promissory note (the "Real Property Note") in the original principal amount of \$3,250,000 and
24 secured by the Fairview Deed of Trust recorded January 7, 2010 as instrument number 2010-
25 0000455-00 against the Real Property. Tri Counties Bank filed a Proof of Claim (the "Tri-
26 Counties Claim") designated as Claim Number 1 on the Claims Register in the amount of
27 \$2,925,040.89 related to the Real Property Loan with copies of the Real Property Note and Deed
28 of Trust attached. On May 16, 2016, a notice of the transfer of the Tri-Counties Claim to

1 Fairview was filed in this case. As a result of the foregoing, the Trustee is informed and believes
2 that the Tri-Counties Claim is fully held by Fairview and constitutes Fairview's claim in this case
3 (the "Fairview Claim").

4 11. The Trustee contends that the amount necessary to satisfy the Fairview Claim in
5 full as of December 23, 2016 is \$3,065,202.30, plus reasonable attorneys' fees, and that the
6 Fairview Claim will accrue interest after that date at the rate of \$495.27 per day. The Trustee
7 disputes the validity of any amounts asserted by the Fairview above such amounts or attorneys'
8 fees in excess of the amounts that the Trustee determines as reasonable.

9 12. The Trustee is informed and believes that the USA Restitution Lien relates to an
10 Amended Judgment in a criminal case entered against Debtor Hoda Samuel on or about July 3,
11 2014, which included a restitution penalty in the amount of \$3,029,412.64. The USA filed a
12 Proof of Claim designated as Claim Number 25 on the Claims Register in the amount of
13 \$3,153,389.02 (the "USA Claim"). The USA Claim includes a recorded notice of lien recorded
14 with the Yolo County Recorder on February 12, 2015, as instrument number 2015-0003290-00.

15 13. The City of West Sacramento recorded a Certificate of Nuisance on July 6, 2011
16 which states that the property may be assessed under certain West Sacramento Municipal Code
17 sections and other applicable laws. The City of West Sacramento has not filed a proof of claim in
18 this case. Therefore, the Trustee is informed and believes that no such assessments have been
19 levied.

20 14. The Trustee is not aware of any other monetary liens or encumbrances on the Real
21 Property.

22 15. The Trustee is informed and believes that certain leases, a notice of nuisance,
23 dedications, licenses and/or easements have been recorded with respect to the Real Property and
24 that the sale of the Real Property shall be subject to all such non-monetary liens or encumbrances.

25 **D. Marketing Related to the Real Property**

26 16. The Real Property has been extensively exposed to the market. The Real Property
27 has been listed for sale by real estate broker Mark Tabak of Cushman and Wakefield of
28 California, Inc. ("Cushman") since soon after Cushman's employment was approved on July 27,

1 2016. Cushman has extensive experience selling real property, including real property
2 comparable to the Real Property, and Cushman is familiar with the real estate market in West
3 Sacramento, where the Real Property is located. The Real Property has been listed by Cushman
4 for sale on the multiple listing service generally used by sellers of real estate of the same type as
5 the Real Property, and any buyer, or broker representing a buyer, would have access to that
6 listing. The Buyer's present agreement to pay \$4,500,000 is the best offer the Trustee has
7 received.

8 17. The Estate's listing with Cushman was approved by the Court, and that listing
9 agreement provides for the Estate to pay a broker's commission of 5% of the gross purchase
10 price. (see Dkt. No. 203.) After that order was entered, the offer for the proposed sale was
11 received and the Sale Agreement entered wherein Cushman is identified as the broker for both the
12 Estate, as the Seller, and the broker for the Buyer. To the extent that any supplemental disclosure
13 is appropriate, the broker and the Trustee disclose that Cushman is representing both the Buyer
14 and the Seller in the proposed sale.

15 **E. The Proposed Sale**

16 18. Subject to the Court's approval, and overbidding, the Trustee seeks to sell the Real
17 Property to the Buyer pursuant to the Sale Agreement attached to the Exhibit Document as
18 **Exhibit A** together with the Addenda and Contingency Removal. The terms of the Sale
19 Agreement include the following (all capitalized terms used in the summary shall refer to the
20 defined terms in the Sale Agreement unless otherwise noted):

- 21 a. The sale of the Real Property to the Buyer for \$4,500,000;
- 22 b. The Trustee's assumption and assignment of the four tenant leases at the Real
23 Property;
- 24 c. All contingencies to the sale, other than Bankruptcy Court approval of this
25 Motion and the related motion to assume and assign, are expected to be
26 removed or satisfied;
- 27 d. The sale of the Real Property is on an "AS-IS/WHERE-IS" basis; and
- 28 e. The close of escrow is scheduled to occur within 15 days after entry of an
order approving the sale, assuming that the Court waives any stay of the
effective date of the Court's order.

1 19. The Trustee seeks approval for payment of a commission in the amount of 5% of
2 the gross sales price of \$4,500,000 for a total commission amount of \$225,000 (the
3 “Commission”). Cushman represents both the Buyer and the Seller in this transaction, so the full
4 Commission would be paid to Cushman upon close of escrow with the Buyer. If the Real
5 Property is sold to an overbidder and the successful over-bidder is represented by another broker,
6 the Commission will be split 50/50 by Cushman and the broker for the successful over-bidder.

7 20. The Sale Agreement further provides that the Estate shall pay unpaid and pro-rated
8 property taxes and customary closing costs such as escrow fees, title insurance fees, and
9 recording fees as provided in the Sale Agreement.

10 21. Based upon the Trustee’s estimates, the Trustee is informed and believes that the
11 Estate will receive net proceeds from the sale of the Real Property in the amount of
12 approximately \$1,019,463.75 before payment of allowed Fairview attorneys’ fees, funding the
13 estate reserve, or payment to the USA, which is likely to be the highest net return to the Estate
14 from any of the Estate’s properties. While the Real Property is generating monthly revenue for
15 the Estate from the tenant leases, the Estate continues to accrue expenses such as maintenance,
16 property taxes, insurance, etc., and the property is encumbered by the claims asserted by Fairview
17 and the USA. The Trustee believes that it is in the best interests of the Estate to obtain the net
18 proceeds from the sale of the Real Property.

19 22. As stated in Addendum No. 1 to the Sale Agreement, the Break-Up Fee of \$10,000
20 shall be paid to the Buyer from the proceeds of the sale of the Real Property to a successful
21 overbidder. This fee is intended to compensate the Buyer for its costs incurred and time and
22 energies expended in completing its due diligence and related investigations relating to the Real
23 Property.

24 23. Based upon the information currently available to the Trustee, it appears that the
25 sale of the Real Property is not likely to result in any material tax claims against the Estate.³
26

27 _____
28 ³ The Trustee is not acting as a tax professional for the Debtors individually or giving them tax
advice.

1 **F. Short Sale Consent from the USA**

2 24. The Trustee is informed and believes that the USA will agree to release its liens on
3 the Real Property in exchange for receipt of payment on the USA Claim (the “USA Payment”)
4 from the proceeds of the sale of the Property in the amount of the remaining net sales proceeds
5 after payment/reserve for the Fairview Claim, the property taxes, the broker’s commission, the
6 costs of sale, and a reserve of up to \$400,000 (the “Estate Reserve”) in the aggregate from the
7 sale of all estate properties.⁴ The Trustee is expects that the USA will agree to waive any right to
8 credit bid at the sale hearing. The USA will retain the remaining balance of its claim secured by
9 its lien on other Estate property.

10 25. The reserve of up to \$400,000 shall be set aside by the Trustee for payment of
11 allowed Trustee’s fees and professional fees to the extent that there are no unencumbered funds
12 on hand to pay such fees and up to \$50,000 reserved for unsecured creditors (the “Estate
13 Contribution”).

14 26. Based upon the Trustee’s current information and projections, and the Proof of
15 Claim filed by the USA, the Trustee projects that the USA will have a deficiency claim against
16 the Estate after the sale of the Real Property in excess of \$2,000,000.

17 **IV. BIDDING PROCEDURES**

18 The Trustee requests adoption of bidding procedures for the sale of the Real Property
19 subject to overbid, summarized as follows:

20 (a) Valuation of the consideration being received by the Estate from the sale of the
21 Real Property at \$4,500,000;

22 (b) the initial overbid must be at least \$25,000 higher than the \$4,500,000 gross sale
23 price that the Estate will receive from a sale to the Buyer, and each successive bid thereafter must
24 be at least \$10,000 more than the previous highest qualified overbid or such other amounts as the
25 Trustee determines is appropriate;

26 (c) before being permitted to bid, any overbidder must deliver to the Trustee a deposit

27 ⁴ The Trustee is contemporaneously filing motions to sell the estate’s Power Inn and Stockton
28 Boulevard shopping centers. The Trustee will fund the Estate Reserve from the proceeds from
the sale of these centers in the order of closing.

1 by cashier check payable to the Estate, in an amount equal to \$100,000, and if an overbid is
2 successful, the deposit by the successful overbidder shall be non-refundable; in addition, any
3 person or entity seeking to overbid must identify the proposed overbidder and any principals,
4 owners, members, or shareholders of the bidder and provide evidence of the prospective buyer’s
5 source of capital or other financial ability to complete the contemplated transaction(s), the
6 adequacy of which the Trustee and his advisors will determine in their sole discretion;

7 (d) any overbid must be on the same terms and conditions as the Sale Agreement, and
8 any overbidder must agree to sign a purchase and sale agreement for the purchase of the Real
9 Property in substantially the same form and terms as the Sale Agreement, except that all
10 contingencies shall be deemed satisfied, waived, or otherwise removed and close of escrow shall
11 occur on or before 15 days after the Court enters an order approving the sale;

12 (e) RC Consulting, Inc., as the stalking horse buyer for the Real Property under the
13 terms of the Sale Agreement, shall be paid a break-up fee in the amount of \$10,000 from the
14 proceeds of the sale of the Real Property to a successful overbidder; and

15 (f) approval by the Court of the second highest bid as a back-up buyer on same terms
16 and conditions.

17 **V. LEGAL ARGUMENT IN SUPPORT OF SALE OF THE PROPERTY**

18 **A. The Sale of the Real Property Pursuant to the Sale Agreement Is Authorized by**
19 **Section 363 as a Sound Exercise of the Trustee’s Business Judgment**

20 Section 363 of the Bankruptcy Code provides that a debtor, “[a]fter notice and a hearing,
21 may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11
22 U.S.C. §363(b). Although section 363 of the Bankruptcy Code does not specify a standard for
23 determining when it is appropriate for a court to authorize the use, sale, or lease of property of the
24 estate, such use, sale, or lease should be authorized in the sound business judgment of the debtor
25 or trustee. *See The Official Committee of Unsecured Creditors v The LTV Corp. (In re*
26 *Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992); *Committee of Equity Sec. Holders v.*
27 *Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring “some
28 articulated business justification” to approve the use, sale, or lease of property outside the

1 ordinary course of business). In that regard, a sale of assets is appropriate if the debtor or trustee
2 demonstrates a “sound business purpose” for the sale. *See, e.g., In re American Development*
3 *Corp.*, 95 B.R. 735, 739 (Bankr. C.D. 1989); *In re Walters*, 83 B.R. 14 (9th Cir. BAP 1988).
4 Indeed, “[w]here the debtor articulates a reasonable basis for its business decisions as distinct
5 from a decision made arbitrarily or capriciously, courts will generally not entertain objections to
6 the debtor’s conduct.” *Committee of Asbestos-Related Litigants and/or Creditors v. Johns-*
7 *Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

8 Courts have considered a number of factors in determining whether to approve a sale of
9 assets under Section 363(b) including: (1) whether a sound business reason exists for the
10 proposed transaction; (2) whether fair and reasonable consideration is being provided; (3)
11 whether the transaction has been proposed and negotiated in good faith; and (4) whether adequate
12 and reasonable notice has been provided. *See, e.g., In re Ewell*, 958 F.2d 275 (9th Cir. 1992).

13 **1. Sound Business Purpose.**

14 The proposed sale fits squarely within the parameters of the business judgment test. Here,
15 the Trustee has demonstrated a sound business purpose for the proposed sale, given the
16 circumstances, including market conditions and the benefits of the sale at this time. The Trustee
17 projects that the Real Property is likely the Estate’s most valuable asset and that the sale will
18 generate significant net proceeds for the estate. As set forth above, the Real Property has been
19 marketed for over four months. While the Real Property is generating monthly revenue for the
20 Estate from the tenant leases, holding the property also carries costs and the property is
21 encumbered by the claims asserted by Fairview and the USA. Both Fairview and the USA have
22 urged the Trustee to promptly sell the Real Property. Fairview, in particular, has conditioned its
23 support for the Trustee’s use of cash collateral on the Trustee moving towards a sale of the Real
24 Property. The Trustee believes that it is in the best interests of the Estate to obtain the net
25 proceeds from the sale of the Real Property rather than continue to own the property. The Trustee
26 has evaluated alternatives to a sale, such as refinancing, and determined that those alternatives are
27 not feasible or not in the best interests of the estate’s creditors. Due to the amount of secured
28 claims on the estate’s assets the debt service for the estate’s properties would be too large relative

1 to the income from the properties. Moreover, due to the Debtors' long history of deferred
2 maintenance, the estate would need to incur significant additional debt to continue owning and
3 operating the Real Property.

4 The Buyer's present agreement to pay \$4,500,000 is the best offer the Trustee has
5 received. Moreover, if any person values the Real Property at greater than \$4,500,000, that buyer
6 can seek to qualify itself as an overbidder and seek to bid at the sale hearing.

7 Based on the foregoing, the Trustee concludes that the proposed sale of the Real Property
8 to the Buyer is in the best interests of the Estate and the Trustee's negotiation of the Sale
9 Agreement is a reasonable exercise of his business judgment.

10 **2. Fair and Reasonable Consideration.**

11 The Trustee believes that the sale should be approved because fair and reasonable
12 consideration is being provided. As explained above, the Real Property has been extensively
13 marketed and the sale price is a reasonable offer for the Real Property. The net proceeds to the
14 Estate from the sale are significant and are likely to provide the Estate with its greatest net return
15 from a sale of the Estate's properties.

16 **3. Good faith.**

17 As set forth in the Trustee's Declaration, the Sale Agreement was negotiated in order to
18 obtain a feasible and beneficial sale of Real Property. The Real Property has been listed and
19 offered for sale to the public for over four months. The Sale Agreement is the result of good faith
20 bargaining by the Trustee and the Buyer to maximize value from the Real Property for the Estate.
21 The Trustee intends to submit a declaration from the Buyer and/or a winning bidder establishing
22 the buyer's good faith in the purchase of the Real Property.

23 **B. The Sale of the Real Property Free and Clear of Liens and Other Interests Is**
24 **Authorized by Section 363(f).**

25 The Trustee seeks to pay the only known and valid monetary liens, which are the property
26 tax liens and the claims of Fairview in the amount of \$3,065,202.30 plus reasonable attorneys'
27 fees and accrued interest through escrow, and the partial payment to the USA in exchange for its
28 consensual release of its Judgment lien on the Real Property. The Trustee submits that there are

1 no other valid liens on the Real Property.

2 If the Trustee and the Fairview are unable to reach an agreement by the hearing of this
3 Motion as to the amount to be paid to Fairview in full satisfaction of the Fairview Claim, if Peter
4 A. Samuel were to assert an interest in the Real Property, or if any other party asserts a lien on the
5 Real Property, the Trustee would dispute the lien or interest and ask the Court for approval of the
6 sale of the Real Property pursuant to Section 363(f) of the Bankruptcy Code, with any such
7 disputed liens attaching to a segregated fund of \$10,000 from the net sale proceeds of the Real
8 Property to the extent applicable. In addition, the USA's lien shall also attach to the segregated
9 reserve of up to \$400,000 to secure payment of such funds to the USA in the event that the
10 amount is unnecessary to pay allowed Trustee fees, professional fees, or unsecured claims.

11 Section 363(f) of the Bankruptcy Code authorizes a debtor or trustee to sell assets free and
12 clear of liens, claims, interest, and encumbrances if:

- 13 (1) applicable nonbankruptcy law permits sale of such property free and clear
14 of such interests;
- 15 (2) such entity consents;
- 16 (3) such interest is a lien and the price at which such property is to be sold is
17 greater than the value of all liens on such property;
- 18 (4) such interest is in bona fide dispute; or
- 19 (5) such entity could be compelled, in a legal or equitable proceeding, to
20 accept a money satisfaction of such interest.

21 11 U.S.C. §363(f).

22 Because Bankruptcy Code section 363(f) is drafted in the disjunctive, satisfaction of any
23 one of its five requirements will suffice to permit the sale of the Real Property "free and clear" of
24 liens and interests. *In re Dundee Equity Corp.*, 1992 Bankr. LEXIS 436, at *12 (Bankr. S.D.N.Y.
25 March 6, 1992) ("[s]ection 363(f) is in the disjunctive, such that the sale free of the interest
26 concerned may occur if any one of the conditions of §363(f) have been met."); *In re Bygaph, Inc.*,
27 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986) (same); *Michigan Employment Sec. Comm'n v*
28 *Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991)
(stating that Bankruptcy Code section 363(f) is written in the disjunctive; holding that the

1 court may approve the sale “free and clear” provided at least one of the subsections of
2 Bankruptcy Code section 363(f) is met). Section 363(f) is supplemented by section 105(a) of the
3 Bankruptcy Code, which provides that “[t]he Court may issue any order, process, or judgment
4 that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C.
5 §105(a).

6 Here, the Trustee proposes to pay the valid amount of the Fairview Claim in full through
7 escrow in principal amount of \$2,925,040.89, plus accrued interest of \$140,161.41 through
8 December 23, 2016 and additional per diem interest of \$495.27 for each day from December 23,
9 2016 through closing. The Trustee disputes any Fairview claim of interest in excess of 6.25% per
10 annum. In addition, the Trustee does not know the amount of attorneys’ fees claimed by
11 Fairview, since the Fairview Claim does not specify an amount. The Trustee objects to any
12 attorneys’ fees claimed by Fairview in excess of a reasonable amount related to the Fairview
13 Claim. The Trustee is hopeful that he can reach a resolution of these issues with the Fairview
14 prior to the hearing. However, if no resolution is reached the Trustee requests an order
15 authorizing the Trustee to sell free and clear of the Fairview Deed of Trust with the Fairview lien
16 attaching to the \$10,000 in funds set aside for the disputed liens.

17 The sale of the Real Property free and clear of the USA’s liens is authorized by Section
18 363(f)(2). The Trustee is seeking to sell the Real Property with the USA’s consent to the release
19 of its lien on the Real Property in exchange for payment of the net proceeds, as described above,
20 to be paid out of escrow at closing from the sales proceeds. The only other recorded monetary
21 lien, the unpaid property taxes, will be paid in full and satisfied, and the Sale Agreement provides
22 for payment of those property taxes from escrow. Similarly, while the Trustee does not believe
23 that the City of West Sacramento has assessed the Real Property pursuant to the Certificate of
24 Nuisance, the Trustee seeks authorization to pay valid assessments.

25 As to Peter A. Samuel (the “Samuel Son”), the Estate does not owe anything to Samuel
26 and Samuel does not hold any recorded interest in the Real Property. The Samuel Son has not
27 filed a proof of claim in this case. Any interest asserted by the Samuel Son would be disputed
28 and to facilitate title insurance the Trustee requests that the Court enter an order allowing the

1 Trustee to sell the Real Property free and clear of any claim or interest asserted by the Samuel
2 Son.

3 The Trustee believes that \$10,000 should be a sufficient amount of funds to be set aside
4 for the disputed liens. The amount of funds should be sufficient to cover any attorneys' fees
5 claimed by Fairview above the amount that Trustee deems reasonable. The Samuel Son is not
6 owed anything and has not asserted a claim against the Estate, so there is no basis to set aside any
7 additional funds. And the Trustee is agreeing to pay Fairview's reasonable attorney's fees
8 through escrow. So, any attorneys' fees claimed by Fairview above what the Trustee determines
9 as reasonable should not be expected to exceed the \$10,000 set aside.

10 **C. The Bid Procedures Are Appropriate and Will Maximize the Value Received for the**
11 **Membership Interests and the Additional Properties.**

12 Courts have made clear that a debtor or trustee's business judgment is entitled to
13 substantial deference with respect to the procedures to be used in selling assets from the estate.
14 *See, e.g., Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re*
15 *Integrated Resources, Inc.),* 147 B.R. 650, 656-657 (Bankr. S.D.N.Y. 1992); *In re 995 Fifth Ave.*
16 *Assocs., L.P.,* 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (same). The paramount goal in any
17 proposed sale of property of the estate is to maximize the proceeds received by the estate. *See,*
18 *e.g., Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.),* 107 F.3d 558, 564-
19 565 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the
20 value of the estate at hand"); *Integrated Resources*, 147 B.R. at 659 ("It is a well-established
21 principle of bankruptcy law that the . . . [debtors'] duty with respect to such sales is to obtain the
22 highest price or greatest overall benefit possible for the estate.") (quoting *Cello Bag Co. Inc. v*
23 *Champion Int'l Corp. (In re Atlanta Packaging Products, Inc.),* 99 B.R. 124, 130 (Bankr. N.D.
24 Ga. 1988).

25 To that end, courts uniformly recognize that procedures intended to enhance competitive
26 bidding are consistent with the goal of maximizing the value received by the estate and therefore
27 are appropriate in the context of bankruptcy sales. *See, e.g., In re Montgomery Ward Holding*
28 *Corp.,* Case No. 97-1409 (PJW) (Bankr. D. Del. Aug 6, 1997); *In re Fruehauf Trailer Corp.,*

1 Case No. 96-LS63 (PJW) (Bankr. D. Del. Feb. 26, 1997); *Integrated Resources*, 147 B.R. at 659
2 (such procedures “encourage bidding and to maximize the value of the debtor’s assets”); *In re*
3 *Financial News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) (“court –imposed rules
4 for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and
5 [should] provide for a fair and efficient resolution of bankrupt estates”).

6 The proposed Bidding Procedures will allow the Trustee to conduct the sale of the Real
7 Property in a controlled, fair, and open fashion that will encourage participation by financially
8 capable bidders who demonstrate the ability to close a transaction, thereby increasing the
9 likelihood that the Trustee will receive the best possible consideration for the Real Property by
10 helping ensure a competitive and fair bidding process. They also allow the Trustee to undertake
11 the sale process in as expeditious a manner as possible, which the Trustee believes is essential to
12 maintaining and maximizing the value of the Estate. The Trustee believes that the Bidding
13 Procedures will encourage bidding for the Real Property on reasonable terms and are appropriate
14 under the relevant standards governing auction proceedings and bidding incentives in bankruptcy
15 proceedings. *See Integrated Resources*, 147 B.R. at 659; *995 Fifth Avenue Assocs.*, 96 B.R. at 28.

16 In addition, the Trustee submits that the proposed break-up fee to the Buyer of \$10,000
17 (less than 1% of the gross sales price) in connection with the Court’s approval of the sale to a
18 successful overbidder will also provide more benefit to the estate by securing the benefit of the
19 Buyer’s stalking horse bid. The existence of a firm stalking horse offer is essential to the
20 Trustee’s sale of the Real Property because the stalking horse Sale Agreement provides a firm
21 commitment by the Buyer to complete a sale of the Real Property for the proposed purchase price
22 and any other buyer that might overbid must bid more than the purchase price in the Sale
23 Agreement. In other words, the existence of the stalking horse Buyer will facilitate competitive
24 bidding and induce interested parties to make their best offers for the Real Property. Further,
25 although the Estate would bear the cost of the break-up fee, overbidders effectively pay those
26 costs because their overbids must be in an amount in excess of the break-up fee and must have
27 additional consideration as set forth in the Bidding Procedures.

28 In consideration of the benefits of the bid protections and the value of the Real Property,

1 the Trustee submits that the bid protections are reasonable and appropriate. Numerous
 2 bankruptcy courts have approved a range of reasonable bid protections for stalking horse bidders.
 3 *See, e.g., In re Wickes Holdings, LLC, et al.*, Case No. 08-10212 (KJC) (Bankr. D. Del, Feb. 19,
 4 2008) (authorizing debtor to enter into stalking horse agreement providing break-up fee of up to
 5 3%); *In re Radnor Holdings*, Case No. 06-10110 (Bankr. D. Del. Sept. 22, 2006) (aggregate fee
 6 and expense reimbursement of 3% permitted); *In re GT Brands Holdings LLC*, Case No. 05-
 7 15167 (PCB) (Bankr. S.D.N.Y. July 28, 2005) (approving break-up fee equal to 3.13%); *In re*
 8 *Vartec Telecom, Inc.*, Case No. 04-81694 (Bankr. N.D. Tex. June 30, 2005) (HDH) (approving
 9 break-up fee equal to 3.25%); *In re ATA Holdings Corp.*, Case No. 04-19866 (BHL) (Bankr. S.D.
 10 Ind. Nov. 19, 2004) (approving break-up fee equal to 3.71%); *In re Genuity, Inc.*, Case No. 02-
 11 43558 (PCB) (Bankr. S.D.N.Y. Dec. 16, 2002) (approving break-up fee equal to 4.13%).

12 **D. The Successful Bidder shall be a Good Faith Purchaser and is Entitled to the Full**
 13 **Protection of Section 363(m) of the Bankruptcy Code, and the Transfer of the Sale**
 14 **Assets Does Not Violate Section 363(n).**

15 The Trustee requests that the Court find that the Buyer or a successful overbidder is
 16 entitled to the full protections of section 363(m) of the Bankruptcy Code. A party would have to
 17 show fraud or collusion between the buyer and the debtor in possession or trustee or other bidders
 18 in order to demonstrate a lack of good faith. *See Kabor Assocs. Of West Islip, LLC v. Colony Hill*
 19 *Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276 (2d Cir. 1997) (“[t]ypically, the
 20 misconduct that would destroy a [buyer]’s good faith status at a judicial sale involves, fraud,
 21 collusion between the [buyer] and other bidders or the trustee, or an attempt to take grossly unfair
 22 advantage of other bidders”); *see also In re Bakalis*, 220 B.R. 525, 537 (Bankr. E.D.N.Y. 1998).
 23 The Trustee’s declaration shows that the Buyer is entitled to section 363(m) protection. (Sackett
 24 Decl., ¶¶ 27-32.) In addition, the Trustee intends to submit a declaration from the Buyer and/or a
 25 winning bidder establishing the buyer’s good faith in the purchase of the Real Property.

26 **E. Relief Under Bankruptcy Rule 6004(h) Is Appropriate.**

27 Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale, or lease of
 28 property . . . is stayed until the expiration of 14 days after entry of the order, unless the court
 orders otherwise.” The Trustee requests that any order approving the sale of the Real Property be

1 effective immediately by providing that the 14-day stay under Bankruptcy Rule 6004(h) is
2 waived.

3 The Trustee requests that the Court waive the 14-day stay period under Bankruptcy Rule
4 6004(h) so that the Trustee may close on the sale of the Real Property as expeditiously as
5 possible. All contingencies to the sale have been satisfied or lifted. Delaying the sale will only
6 increase the risk of further expense or loss to the Estate. Moreover, the Sale Agreement provides
7 for the closing to occur within 10 days of the Court’s order approving the sale.

8 **VI. CONCLUSION**

9 WHEREFORE, the Trustee respectfully requests that the Court authorize the sale of the
10 Real Property and grant the “Relief Requested” as detailed in Section II above.

11 Dated: December 23, 2016

12 FELDERSTEIN FITZGERALD
13 WILLOUGHBY & PASCUZZI, LLP

14 By: /s/ Jason E. Rios
15 JASON E. RIOS
16 Attorneys for Scott M. Sackett,
17 Chapter 11 Trustee
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