

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re ) Bankruptcy Case  
ASK INVESTMENTS, INC., ) No. 95-30780TDM  
Debtor. ) Chapter 7

MEMORANDUM DECISION

I. Introduction

Before the court is the Motion To Sell Property Free And Clear Of Liens (the "Motion") of Edward F. Towers, the Chapter 7 Trustee ("Trustee"), seeking permission to sell to Hilda and Michael Sugarman (the "Sugarman") 6.11 limited partnership units of Sonoma Valley Inn, a limited partnership ("SVI"). At the various hearings on these matters, the following appearances were noted: for the Trustee, Reidun Stromsheim, Esq.; for the Sugarman, Kenneth J. Campeau, Esq.; for SVI, Gerald N. Hill, Esq.; for Jack Schleifer, Jeffrey J. Goodrich, Esq.; for the Richard and Theresa Krug Trust, Donald Drummond, Esq.

For the reasons stated on the record on November 24, 1998, and as set forth in greater detail below, the Motion will be denied, the objections will be sustained, and the court will order the limited partnership units of SVI sold to Jack Schleifer

1 ("Schleifer") for \$60,000.

2 II. Background<sup>1</sup>

3 On or about September 27, 1993, ASK Investments, Inc. (the  
4 "Debtor") and the Sugarmans entered into a Purchase, Assignment  
5 and Assumption Agreement (the "Agreement"). Included in the  
6 Agreement are a series of separate options in favor of Sugarmans  
7 to purchase limited partnership units in SVI. Prior to  
8 commencement of this bankruptcy case, the Sugarmans exercised the  
9 first of the options set forth in Agreement to purchase six units  
10 of SVI and Debtor transferred those units to the Sugarmans. SVI's  
11 partnership agreement was amended to reflect the execution of the  
12 Agreement, Sugarmans' ownership of the six limited partnership  
13 units, and their possible acquisition of additional units through  
14 exercise of the remaining options (the "Remaining Options") in the  
15 Agreement in the future.

16 On November 9, 1994, Debtor filed a voluntary Chapter 11  
17 petition in the Santa Rosa division of this court; the case was  
18 later transferred to this division.

19 On or about September 2, 1995, the Sugarmans timely exercised  
20 the Remaining Options, seeking to purchase 6.11 units of SVI for  
21 \$50,000. On December 4, 1995, Debtor, acting as debtor in  
22 possession, filed a motion for an order approving assumption of  
23 the Agreement, and in particular, the Remaining Options. The  
24 court held a hearing on the Debtor's motion but did not grant the  
25 request. The matter was dropped from calendar with no dispositive  
26 order following. Therefore, as of the conversion date, the  
27 Remaining Options had not been assumed.

28 On April 23, 1996, Trustee was appointed as the Chapter 11

1 trustee and on August 20, 1996, Debtor's Chapter 11 case was  
2 converted to Chapter 7; Trustee continued as the Chapter 7  
3 trustee. No action was taken on the Remaining Options within the  
4 next sixty days.

5 On May 15, 1998, Trustee filed the Motion<sup>2</sup> to sell the SVI  
6 limited partnership units to the Sugarmans. The Motion also  
7 sought to sell them free and clear of any interest claimed by  
8 Schleifer and Natalie Schlass, Schleifer's daughter. Schleifer  
9 has objected to the sale to the Sugarmans.<sup>3</sup>

10 Relying on Unsecured Creditors' Committee of Robert L. Helms  
11 Construction and Development Co. v. Southmark Corp. (In re Robert  
12 L. Helms Construction and Development Co., Inc.), 139 F.3d 702  
13 (9th Cir. 1998) ("Helms"), Trustee contended in the Motion that  
14 the Remaining Options were not executory contracts but were to be  
15 treated as an asset of the bankruptcy estate. There is no  
16 explanation by the Trustee how an option - a burden on the estate  
17 - is an asset under any definition of the term. Assuming Trustee  
18 really means that the limited partnership units are assets, he  
19 suggests that the Sugarmans could compel specific performance of  
20 the Remaining Options.

21 Helms specifically overruled Gill v. Easebe Enters (In re  
22 Easebe Enters), 900 F.2d 1417 (9th Cir. 1990) ("Easebe"), which  
23 held that all options are executory contracts. Trustee contended  
24 that, under Helms, he was required to sell to the Sugarmans  
25 because of their exercise of the Remaining Options during the  
26 Chapter 11 case. The Sugarmans took the same position, contending  
27 that Helms was retroactive to the date of this bankruptcy case  
28 commenced, and thus Easebe's treatment of the Remaining Options as

1 executory contracts, automatically rejected in the Chapter 7 case,  
2 did not apply. To support their position, the Sugarmans relied on  
3 Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S.Ct.  
4 2510 (1993) ("Harper").

5 At a hearing on July 9, 1998, the court considered  
6 preliminary arguments of the parties, requested further briefing,  
7 and gave Schleifer an opportunity to submit an overbid of at least  
8 20% more than the \$50,000 option price offered by the Sugarmans.  
9 As Schleifer was the only objecting party, the court stated that  
10 the Motion would be granted if Schleifer did not submit an  
11 overbid. He did make the overbid of \$60,000 in a timely manner.

12 SVI contends that there can be no transfer of the limited  
13 partnership units without its consent. It does not consent to a  
14 transfer to Schleifer although it does consent to a transfer to  
15 the Sugarmans. Schleifer, in turn, has acknowledged that all he  
16 can purchase from the Trustee are the economic interests  
17 represented by the partnership units. Stated otherwise, Schleifer  
18 as the successful purchaser will not become a limited partner in  
19 SVI and this court's order should not be construed as making him  
20 one. Rather, Schleifer will be entitled to all of the economic  
21 benefits (such as income or capital distributions) that are  
22 represented by the units. He will obtain nothing more than that  
23 which the Trustee has to sell. SVI does not dispute this  
24 characterization of the sale.

25 On October 19, 1998, Trustee supplemented the Motion.  
26 Without abandoning his argument that Helms compelled the result  
27 previously urged by him and the Sugarmans, in the supplement he  
28 argued that in his business judgment he could sell 6.43<sup>4</sup> limited

1 partnership units of SVI to the Sugarmans for \$50,000. Trustee  
2 contends that his principal obligation is to wind up this Chapter  
3 7 case as expeditiously as possible, and that therefore he should  
4 act in the best interests of the parties in interest by selling  
5 the units to the Sugarmans. As an additional justification for  
6 his disregard of the Schleifer overbid, he contends that in large  
7 measure this contentious bankruptcy case involves a dispute  
8 between two groups of creditors, one consisting of Schleifer and  
9 the members of his family or entities he controls, the other  
10 consisting of members of the family of Norman I. Krug, the prime  
11 mover of debtor's affairs, its authorized agent and the brother of  
12 Hilda Sugarman.

13       The Schleifer interests and the Krug interests have been  
14 engaged in litigation in the California courts for several years  
15 and Californian Properties, an entity now controlled by Schleifer,  
16 has obtained a substantial judgment against Debtor and Mr. Krug  
17 for conversion of its assets. That judgment has recently been  
18 affirmed by the California court of appeal. The Richard and  
19 Theresa Krug Trust (the "Krug Trust"), the trustees of which are  
20 also related to Mr. Krug, have brought an adversary proceeding in  
21 this court and a Rule 60(b) motion to set aside a sale of Debtor's  
22 interest in Californian Properties to Schleifer. It is likely  
23 that that litigation will go on for quite some time.

24       While it is true that there are virtually no creditors other  
25 than unpaid Chapter 7 and Chapter 11 expense of administration  
26 claimants, it is naive and unrealistic to assume that this case  
27 could be concluded promptly. There is always the possibility that  
28 the litigation between Schleifer and the Krug Trust could be

1 settled; it is inconceivable that such a settlement would not also  
2 involve a consensual disposition of the present dispute among  
3 Schleifer, the Sugarmans and the Trustee.

4 Notwithstanding the Trustee's insistence that the court  
5 approve the sale of the limited partnership units to the Sugarmans  
6 for \$50,000, he also argues that "the ultimate purpose of a sale  
7 [in bankruptcy] is to obtain the highest price for the property  
8 sold. In re Chung King, Inc., 753 F.2d 547 (7th Cir. 1985)."

9 He concedes that the 6.43 limited partnership units are worth  
10 more than \$60,000, yet seeks to sell them to the Sugarmans for  
11 \$50,000 and to disregard the Schleifer overbid. Apparently, as a  
12 litigation tactic, the members of the Krug faction have advised  
13 the Trustee that if the Remaining Options are honored and the  
14 units sold to the Sugarmans, they will not claim any money from  
15 this bankruptcy estate, and if the Schleifer offer is accepted  
16 they will be getting money against their wishes. From this  
17 Trustee argues, without proof, that Schleifer, if he is  
18 successful, "... will be paying more to receive less."

19 III. Discussion

20 A. The Remaining Options Were Automatically Rejected.

21 At the time the Debtor, as debtor in possession, filed its  
22 initial motion to assume the Agreement, Easebe was the law of this  
23 circuit, the Remaining Options were unquestionably executory  
24 contracts, and in fact Debtor and Sugarmans both contended that  
25 the Agreement was an executory contract. In her declaration in  
26 support of the initial motion, Hilda Sugarman recited under  
27 penalty of perjury that she and her spouse intended "... to  
28 exercise our two (2) remaining options and we are ready, willing

1 and able, to deliver \$50,000 to Debtor in exchange for the agreed  
2 upon 6.11 units of SVI." In the body of the motion the debtor in  
3 possession argued that assumption of the Agreement between it and  
4 the Sugarmans was in the best interest of all parties concerned  
5 and prayed for authority for the "debtors [sic] and all the  
6 parties to the contract to assume the Agreement between the  
7 Sugarmans and the Debtor." Now they want Helms to abrogate that  
8 characterization.

9 Section 348(c)<sup>5</sup> provides that section 365(d) applies in a  
10 converted case as if the conversion order were the order for  
11 relief. Thus, section 365(d)(1) treated the Agreement and the  
12 Remaining Options as rejected since no order on the debtor in  
13 possession's initial motion was entered and the Trustee did not  
14 assume them within sixty days of the August 20, 1996 conversion  
15 order.

16 Section 365(g) treats rejection of a nonassumed executory  
17 contract as a breach immediately before the filing of the  
18 petition. Thus the Remaining Options and any other obligations  
19 set forth in the Agreement, not having been assumed within sixty  
20 days of August 20, 1996, are deemed rejected as of November 9,  
21 1994 and any damage claims could be asserted as pre-petition  
22 claims in this case. That should end the inquiry.

23 B. Helms Does Not Apply Retroactively.

24 Notwithstanding the foregoing statutory analysis that leads  
25 inevitably to the conclusion that the Remaining Options have been  
26 rejected as executory contracts, the Sugarmans rely on Harper and  
27 argue that Helms' overruling of Easebe in 1998 was retroactive to  
28 the date this bankruptcy case began. Indeed, Harper states:

1        "... we hold that this Court's application of a rule of  
2        federal law to the parties before the Court requires every  
3        court to give retroactive effect to that decision."

3        509 U.S. at 90 (emphasis added).

4        Clearly under Harper if the United States Supreme Court had  
5        issued the Helms decision, this court would be required to apply  
6        it, and not Easebe, which was in effect at the time of the deemed  
7        rejection. The Harper court, however, limited its broad  
8        retroactivity decision to cases decided by "this Court," i.e., the  
9        United States Supreme Court. Unfortunately, neither Harper nor  
10       subsequent case law sets forth a clear rule as to its application  
11       to federal circuit court decisions.<sup>6</sup> Moreover, Ninth Circuit case  
12       law is not consistent, which is understandable given the Supreme  
13       Court's convoluted treatment of the doctrine of civil  
14       retroactivity this decade. See, e.g., American Trucking  
15       Associations v. Smith, 496 U.S. 167 (1990) (plurality decision  
16       rejecting per se rule of retroactivity); Ashland Oil, Inc. v.  
17       Caryl, 497 U.S. 916 (1990) (per curiam ruling noting that prior  
18       decision was retroactive because it did not state a new principle  
19       of law); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529  
20       (1991) (plurality decision with five opinions, no one commanding  
21       more than three votes; "[O]nce retroactive application is chosen  
22       for any assertedly new rule, it is chosen for all others who might  
23       seek its prospective application."); Harper, 509 U.S. at 90  
24       (applying per se retroactivity rule to Supreme Court decisions).

25       On the one hand, the Ninth Circuit has followed James Beam  
26       and held that where a court "has applied a rule to the litigants  
27       in one case[,] it must apply the rule to all litigants whose cases  
28       were pending on direct review." See, BFI Medical Waste Systems v.

1 Whatcom County, 983 F.2d 911, 914 (9th Cir. 1992). The Ninth  
2 Circuit has noted that “[a]lthough not constitutionally mandated,  
3 retroactive application of judicial decisions is the rule and not  
4 the exception.” Coopers & Lybrand v. Sun-Diamond Growers of  
5 California, 912 F.2d 1135, 1138 (9th Cir. 1990); Sarbaz v. Feldman  
6 (In re Sarbaz), \_\_\_ B.R. \_\_\_, 198 W.L. 838914 (9th Cir. BAP 1998).  
7 On the other hand, the Ninth Circuit has also recently stated in  
8 George v. Camacho, 119 F.3d 1393, 1396 (9th Cir. 1997), that

9 The Supreme Court has noted that “retroactivity is not  
10 favored in the law.” [Citation omitted.] Therefore, there is  
11 a strong presumption against retroactive application  
12 [citation omitted]. As the Court has forcefully stated,  
13 [e]lementary considerations of fairness dictate that  
14 individuals should have an opportunity to know what the law  
15 is and to confirm their conduct accordingly; settled  
16 expectations should not be lightly disrupted.

17 This principle is of particular importance when time limits  
18 are involved and litigants have been advised of the time by  
19 which must decide their course of action.

20 This court believes that the better rule to apply here lies  
21 between the per se retroactivity rule of Harper (which, by its  
22 terms, applies only to Supreme Court decisions) and the language  
23 contained in George. That rule is found in Coopers & Lybrand,  
24 which favors retroactivity except where the decision overrules  
25 prior law and would produce substantial inequitable results if  
26 applied retroactively. See, Coopers & Lybrand, 912 F.2d at 1137.  
27 In this case, Helms clearly overruled controlling precedent  
28 existing when the rights of the parties vested: i.e., at the time  
of the deemed rejection under section 365(g). Substantial  
inequitable results would occur if Helms could operate to undo  
rejections that have already occurred, even where the underlying  
bankruptcy case remains open or pending. For that reason, this

1 court believes that Helms is not retroactive.

2 C. Even If Applied, Helms Does Not Change The Result.

3 If this court must treat the 1998 Helms decision as the  
4 controlling circuit law to be considered in this 1995 case, the  
5 outcome is the same. Nothing in the decision suggests that  
6 contracts previously rejected as a matter of law spring back into  
7 existence. Thus, Trustee has no executory contract to assume by  
8 the Motion.

9 In deciding Helms, the Ninth Circuit had to consider Easebe,  
10 believed by the initial three judge panel in Helms to be wrongly  
11 decided, but binding nevertheless. In Easebe the debtor held a  
12 lease with an option to purchase the leased property, and when it  
13 filed Chapter 11 it sought authority to assume the unexpired  
14 lease. The bankruptcy court granted the application to assume the  
15 lease, but made no specific mention of the option to purchase.  
16 Later the debtor tendered the purchase price and the bankruptcy  
17 court determined that the option was nonassumable under  
18 section 365(c)(2) because it was a contract to extend debt  
19 financing and financial accommodations.

20 In affirming, the Ninth Circuit reiterated the notion that an  
21 executory contract "generally includes contracts on which  
22 performance remains due to some extent on both sides." Easebe,  
23 900 F.2d at 1419 (citations omitted). It then stated, without any  
24 detailed analysis, that an "option contract is an executory  
25 contract." Plainly it was examining the issue from the point of  
26 view of the optionee, the debtor/lessee. The balance of the  
27 court's analysis turns on the lessor's contention that the  
28 underlying lease option was nonassumable under section 365(c)(2)

1 and whether or not the lessors waived their right to raise that  
2 defense.

3 In Helms, the en banc court set out to test the wisdom of  
4 Easebe. Again, the clear focus of the court's analysis is from  
5 the optionee's point of view. There is no analysis of an option  
6 as it might be enforced against the optionor. The decision is  
7 replete with convincing evidence that the rule it announced should  
8 be confined to cases where the debtor in bankruptcy is the  
9 optionee:

- 10 • In the second paragraph of the decision, the court  
11 dwells on the fact that Southmark's<sup>7</sup> concluded  
12 reorganization was based on a plan that assumed various  
13 contracts and rejected all others. The option to buy  
14 the property that is the subject of the dispute (the  
15 "Double Diamond Ranch") was not listed, so would have  
16 been deemed rejected, and no one raised the question  
17 below and the Texas bankruptcy court did not rule on the  
18 matter. 139 F 3d. at 702.
- 15 • Next the court points out that in the Nevada bankruptcy<sup>8</sup>  
16 a sale of the Double Diamond Ranch free and clear of  
17 Southmark's lien was requested, and that such a sale was  
18 valid only if the option had been stripped away in the  
19 Texas bankruptcy. The Nevada bankruptcy court relied on  
20 Easebe to conclude that the option had been rejected in  
21 the Texas bankruptcy. Id.

19 There was no analysis of the option as an executory contract  
20 in the Nevada bankruptcy case. There did not need to be any such  
21 analysis.

- 22 • Later on the court concedes that if the plan in the  
23 Texas bankruptcy treated the option as an unassumed  
24 executory contract it would have to be deemed rejected  
25 as a matter of res judicata. Id. at 703.
- 25 • After that the court expressed doubts about the Texas  
26 bankruptcy. Because of the incomplete record and its  
27 inability to determine whether the option was treated as  
28 an executory contract or how Southmark dealt with  
undisclosed assets, it remanded to the Nevada bankruptcy  
court to answer those questions. Id.

1 Certainly an option binding the optionor (Double Diamond) to  
2 sell the Double Diamond Ranch could not have been considered an  
3 asset.

- 4 • The court next addressed the argument that  
5 section 541(c)(1) makes an ipso facto provision in the  
6 option unenforceable. The Double Diamond Ranch  
7 Committee, contending that the property that was the  
8 subject of the Southmark option in the bankruptcy of  
9 Double Diamond, had argued that section 541(c)(1) does  
10 not apply if the option is no longer property of the  
11 estate of the confirmed debtor. The court responded:

12 "That is precisely the question at issue - the option  
13 ceased to be property of the estate only if it was  
14 rejected, and that in turn depends on whether or not the  
15 option was an executory contract."

16 139 F.3d at 705.

- 17 • A few paragraphs later the court focuses on the goals of  
18 bankruptcy law, and in particular that of maximizing the  
19 estate's value. It argues that applying Easebe gave the  
20 optionor (Double Diamond) an "undeserved windfall." by  
21 treating the option as rejected, and noted that debtors  
22 frequently fail to recognize that "some assets, such as  
23 options, are executory contracts, and so fail to  
24 expressly assume them." Id.

25 It is hard to believe that the court would consider the  
26 burden on an optionor as an asset that may carelessly be lost.  
27 The only way to "lose" the option is to reject it. Similarly, if  
28 the Helms court intended a bankrupt optionor to be bound despite  
the "windfall" to the optionee if rejection is not permitted, it  
is very cryptic in how it reaches that result.

- In the same paragraph the court cautions against the  
risk of an unassumed executory contract being rejected  
either in Chapter 7 (automatically under section  
365(d)(1)) or in Chapter 11 (under a plan) "when the  
trustee has no intention of abandoning the asset." Id.

As stated above, there is no asset to consider saving when  
looked at from the optionor's point of view. The only asset to  
save is the asset that is burdened with the option in favor of the

1 optionee, and that asset should be freed from the options by  
2 rejection, in the interest of maximizing estate value, an  
3 important goal recognized by the Helms court.

- 4 • After stating that Easebe's broad rule must be rejected,  
5 the court instructs that courts look to see if  
6 performance is due from either side as of the petition  
7 date. It then stresses that performance due only if the  
8 optionee chooses "doesn't count unless he has chosen to  
9 exercise it", but says an option may be executory where  
10 the optionee has "announced that he is exercising the  
11 option" but has not yet followed through with the  
12 purchase. Id. The optionee commits no breach by doing  
13 nothing. Id.

14 There is nothing about the analysis from the point of view of  
15 the optionor, even though it is bound to perform a negative  
16 covenant (i.e., not to sell the property) until the optionee  
17 declines to exercise the option. Negative performance, viz., the  
18 obligation not to do something, still leaves the obligation  
19 executory and subject to rejection. Fenix Cattle Company v.  
20 Silver (In re Select-A-Seat Corporation), 625 F.2d 290 (9th Cir.  
21 1980) (violation of debtor's obligation not to sell software to  
22 other parties would constitute material breach; burdensome  
23 contracted rejected)<sup>9</sup>. Double Diamond in Helms, like Debtor in  
24 this case, may not have been obligated to do anything  
25 affirmatively (other than to refrain from selling the property) as  
26 of the date of bankruptcy, but performance was conditionally due  
27 upon Southmark's (in Helms) and Sugarmans' here, exercise of their  
28 respective options. Certainly, both Double Diamond and Debtor  
remained obligated NOT to dispose of the property burdened with  
the option, for had either done so, then exercise by the optionee  
would have constituted a material breach. Rejection would free  
each from this burden.<sup>10</sup> If the Helms court intended to overrule

1 Select-A-Seat on this point it would have said so.

- 2 • Finally, the disposition in Helms is equally telling.  
3 The case was remanded to the Nevada bankruptcy court to  
4 determine if the Southmark plan resolved the question;  
if not, then the court was to apply the tests set forth  
by the en banc court and referred to above. Id.

5 Had the court been wedded to the idea that option contracts,  
6 considered from the optionors side were not executory contracts,  
7 it could have simply reversed and spared the bankruptcy court the  
8 effort that it and the parties were directed to expend.

9 In sum, if this court must treat Helms as controlling  
10 precedent, then it concludes that the rule announced in that case  
11 does not apply for all the reasons stated here and in Part A.

12 D. The Trustee's Purported Exercise Of Business Judgment  
13 Should Be Overruled.

14 As stated above, the Trustee in his supplement to the Motion  
15 sought to sell the SVI limited partnership units to the Sugarmans  
16 for \$50,000 and refused to consider the Schleifer \$60,000 overbid.

17 Whether or not the Krug and Sugarman interests would claim  
18 nothing from the proceeds of sale, Schleifer remains a creditor in  
19 this bankruptcy case. Whether or not his claim of lien on the SVI  
20 limited partnership units is invalid (as is strenuously and  
21 somewhat persuasively argued by Trustee) it follows that he is  
22 entitled to share in whatever is left over after payment of  
23 priority claims. Thus, it is inappropriate for the Trustee to  
24 refuse to sell to Schleifer because Schleifer may recover some of  
25 the proceeds of sale. As for the "pay more - get less" argument,  
26 this court adheres to the "pay more - get more for the estate"  
27 policy.

28 This court has "the power to disapprove a propose sale

1 recommended by a trustee or debtor in possession if it has an  
2 awareness there is another proposal on hand which, from the  
3 estate's point of view, is better or more acceptable." In re  
4 Broadmoor Place Investments, L.P., 994 F.2d 744 (10th Cir. 1993);  
5 see also, In re Summit Corp., 891 F.2d 1, 5 (1st Cir. 1989) ("In  
6 order to achieve the goals of maximizing the value of the estate  
7 and protecting the interests of creditors, the court has plenary  
8 power to provide for competitive bidding.") In this case, from the  
9 estate's point of view, the Schleifer offer is the higher and  
10 better bid. To "fulfill its paramount obligation of determining  
11 the highest and best bid," the court is duty-bound to consider the  
12 Schleifer bid. In re Wintex, Inc., 158 B.R. 540, 544 (D.Mass.  
13 1992). As noted by the Court of Appeals for the Eighth Circuit:

14 "Had the court blindly proceeded to enter an order confirming  
15 the original Purchase Agreement without giving the slightest  
16 thought to Schnuck's substantially higher bid, it might have  
17 been accused of dereliction in its duty to guarantee that the  
18 particular assignment was in the best interest of the estate  
19 and the unsecured creditors."

20 In re Food Barn Stores, Inc., 107 F.3d 558, 567 n. 16 (8th  
21 Cir. 1997).

22 The court recognizes that a \$10,000 differential in sale  
23 price<sup>11</sup> may be small compared to the delays that might be  
24 occasioned by appeals of this decision and by the fact that the  
25 Sugarmans may assert a damage claim arising from the rejection of  
26 the Remaining Options as executory contracts. As to the delays,  
27 it is equally likely that approval of the Sugarmans' sale could  
28 and no doubt would result in delays by an appeal by Schleifer.<sup>12</sup>

As to the possibility of a damage claim, the court recognizes  
that rejection may give rise to damages and the Trustee is

1 justifiably concerned about the potential that any such damage  
2 claim by the Sugarmans could be entitled to expense of  
3 administration priority despite section 365(g). While the court  
4 expresses no opinion on what priority would be afforded any such  
5 claim asserted by the Sugarmans, it does note that Schleifer has  
6 volunteered, and the court has agreed, to consummate the sale that  
7 is authorized by this decision only when the order approving it  
8 has become final. Thus, if the Trustee or the Sugarmans prevail  
9 at a higher court on either theory advanced by them, the 6.43  
10 limited partnership units of SVI will be available for transfer to  
11 the Sugarmans and Schleifer will get his \$60,000 back. Although  
12 the court believes that Schleifer is a good faith purchaser under  
13 section 363(m), this voluntary stay will not render an appeal  
14 moot. While it is not certain that Sugarmans would not assert  
15 some additional claim, the manner in which Schleifer has offered  
16 to proceed, gives some satisfaction that a reversal of this  
17 decision on appeal can be treated much like a rescission permitting  
18 the Sugarmans to tender \$50,000 for the 6.43 units, allowing  
19 refund of \$60,000 to Schleifer, and concluding the case once the  
20 Schleifer v. Krug Trust litigation is over. The court has taken  
21 this factor into account in overriding the Trustee's exercise of  
22 business judgment.

#### 23 IV. Disposition

24 For the reasons stated above, the court concludes that the  
25 Agreement and the Remaining Options have been rejected as a matter  
26 of law. The sale to Sugarmans for \$50,000 is not in the best  
27 interests of the estate in light of the Schleifer \$60,000 offer  
28 and his willingness to withhold consummation of the sale until the

1 order approving the sale to him becomes final. The Motion will be  
2 denied and the Schleifer overbid approved. An Order consistent  
3 with this Memorandum Decision is being issued concurrently.

4 Dated: December 14, 1998

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 Dennis Montali

United States Bankruptcy Judge

7 1. There are no material facts in dispute. The following  
8 discussion constitutes the court's findings of fact and  
9 conclusions of law. Fed. R. Bankr. P. 7052(a).

10 2. As drafted, the Motion sought to sell 12.11 limited  
11 partnership units of SVI; counsel for Trustee later acknowledged  
12 that the correct number of units subject to the Remaining Options  
13 was 6.11.

14 3. Counsel for Schleifer and Ms. Schlass have never challenged  
15 Trustee's right to sell free and clear of their disputed claims  
16 under 11 U.S.C. § 365(f) and thus the proceeds of the sale being  
17 authorized by the court are to be held subject to their disputed  
18 claim.

19 4. For reasons unclear to the court and perhaps to the parties,  
20 Trustee holds approximately 0.33 limited partnership units in SVI  
21 which are not subject to the Remaining Options. The difference  
22 between the 6.11 units which are the subject to the Remaining  
23 Options and the actual amount now sought to be sold by the Trustee  
24 is de minimus and not relevant to the court's decision. Wherever  
25 the documents refer to 6.11, 6.43 will be deemed inserted.

26 5. Unless otherwise indicated, all section references are to the  
27 Bankruptcy Code, 11 U.S.C. §§ 101-1330.

28 6. In Miller v. County of Santa Cruz, 39 F.3d 1030, 1035-36 (9th  
Cir. 1994), the Ninth Circuit applied Harper in holding that a  
state court appellate decision was retroactive.

7. The optionee, Southmark, was the party with the right to  
exercise the option. 139 F.3d 702, 705, n. 8. It had been a  
debtor in a successful Chapter 11 case in Texas.

8. Double Diamond Ranch Limited Partnership ("Double Diamond")  
along with Robert L. Helms Construction & Development Co., Inc.  
filed their own bankruptcies in Nevada sometime after the  
Southmark plan was confirmed. The dispute that led to the Ninth  
Circuit decision had to do with whether the option was valid at  
the time Double Diamond sold the Double Diamond Ranch. Its sale  
free and clear of Southmark's disputed option rights under section  
363(f) has been resolved favorably to Double Diamond. See 193 F.3d  
at 704, fn. 2. Because the entire Helms analysis of the option as

1 an executory contract is from the point of view of the optionee  
2 (Southmark) this court is of the view that the bankruptcy of  
3 Double Diamond is wholly coincidental and extraneous to the  
4 executory contract analysis.

5 9. Select-A-Seat was decided under the former Bankruptcy Act, but  
6 it was in that case that the Ninth Circuit adopted the Countryman  
7 definition of executory contracts that was reaffirmed in Helms.  
8 See, 139 F.3d at 705, n. 7. There is no reason to presume it is  
9 not good law under the present Bankruptcy Code.

10 10. This is the way the court analyzed the same issue in In re  
11 Waldron, 36 B.R. 633 (Bankr. S.D. Fla. 1984), rev'd on other  
12 grounds, 785 F. 2d 936 (11th Cir. 1986) (debtors, in entering into  
13 option agreement, had agreed to relinquish their right to revoke  
14 their offer to sell (to optionee)), a decision that the Helms  
15 three-judge panel found inapposite, but the en banc court  
16 dismissed as being of marginal value. 139 F.3d at 705.

17 11. Once Schleifer submitted his \$10,000 overbid, the Sugarmans,  
18 SVI itself and other parties in interest were invited to bid  
19 further. Trustee has advised the court, and counsel for SVI and  
20 the Sugarmans have confirmed, that they do not wish to bid.

21 12. Regardless of the potential for an appeal, the court makes  
22 the decision based upon the facts and law presented to it.  
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