United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:16-13694 Egette Ibrahim Ibrahim Saad **Chapter 7**

#1.00 Motion for relief from the automatic stay [Unlawful Detainer]

DNE ASSOCIATES
Vs.
DEBTOR

Docket No: 13

***** VACATED *** REASON: OFF CALENDAR - VOLUNTARY WITHDRAWAL OF DNE ASSOCIATES' MOTION FOR RELIEF FROM THE AUTOMATIC STAY OR FOR ORDER CONFIRMING THAT THE AUTOMATIC STAY DOE NOT APPLY UNDER 11 USC §361(1) FILED 9-29-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Egette Ibrahim Ibrahim Saad	Pro Se

Movant(s):

DNE Associates	Represented By Rachelle Singer

Trustee(s):

Thomas H Casey (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:16-13464 Meral Knieling **Chapter 7**

#2.00 Motion for relief from the automatic stay PERSONAL PROPERTY

BMW BANK OF NORTH AMERICA
Vs.
DEBTOR; WENETA M. KOSMALA, CHAPTER 7 TRUSTEE

Docket No: 9

Tentative Ruling:

Grant. Appearance is optional.

Party Information

Debtor(s):

Meral Knieling	Represented By Brian J Soo-Hoo Brian J Soo-Hoo

Movant(s):

BMW Bank of North America	Represented By Marian Garza Timothy J Silverman

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:10-26699 Angel B Fabian and Leticia G Fabian **Chapter 13**

#3.00 Motion for relief from the automatic stay REAL PROPERTY

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION
Vs.
DEBTORS

Docket No: 110

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF VOLUNTARY DISMISSAL OF MOTION FOR RELIEF FROM AUTOMATIC STAY FILED 9-21-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Angel B Fabian	Represented By Don E Somerville Tate C Casey

Joint Debtor(s):

Leticia G Fabian	Represented By Don E Somerville Tate C Casey

Movant(s):

JPMORGAN CHASE BANK, NATIO	Represented By Joseph C Delmotte

Trustee(s):

Amrane (SA) Cohen (TR)	Represented By Amrane (SA) Cohen (TR)

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:11-27503 Steven Craig Morikawa and Mary-Colleen Morikawa **Chapter 13**

#4.00 Motion for relief from the automatic stay REAL PROPERTY

U.S BANK OF NATIONAL ASSOCIATION
Vs.
DEBTORS

Docket No: 55

Tentative Ruling:

Grant. Appearance is optional.

Party Information

Debtor(s):

Steven Craig Morikawa	Represented By Michael G Spector

Joint Debtor(s):

Mary-Colleen Morikawa	Represented By Michael G Spector

Movant(s):

U.S. Bank National Association, as trus	Represented By Joseph C Delmotte

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:13-13489 Barbara Nelson Haynes **Chapter 13**

#5.00 Motion for relief from the automatic stay REAL PROPERTY

HSBC BANK USA
Vs.
DEBTOR

Docket No: 40

Tentative Ruling:

Grant. Appearance is optional.

Party Information

Debtor(s):

Barbara Nelson Haynes	Represented By Halli B Heston Halli B Heston

Movant(s):

HSBC Bank USA, National Associatio	Represented By Joseph C Delmotte

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM
8:15-13699 Felesia Dailey **Chapter 13**

#6.00 Motion for relief from the automatic stay REAL PROPERTY

U.S. BANK NATIONAL ASSOCIATION
Vs.
DEBTOR AND AMRANE COHEN, CHAPTER 13 TRUSTEE

Docket No: 43

Tentative Ruling:

Grant. Appearance is optional.

Party Information

Debtor(s):

Felesia Dailey	Represented By Tate C Casey

Movant(s):

U.S. Bank National Association, as trus	Represented By Jennifer C Wong

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:16-13524 Rodrigo Hernandez **Chapter 7**

#7.00 Motion for relief from the automatic stay REAL PROPERTY

WELLS FARGO BANK, N.A.
Vs.
DEBTOR

Docket No: 9

Tentative Ruling:

Grant. Appearance is optional.

Party Information

Debtor(s):

Rodrigo Hernandez — Pro Se

Movant(s):

Wells Fargo Bank, N.A. — Represented By
Darlene C Vigil

Trustee(s):

Karen S Naylor (TR) — Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

10:30 AM

8:16-13799 Nicholas Maalouli **Chapter 13**

#8.00 Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate

Docket No: 10

Tentative Ruling:

Per OST opposition due at hearing.

Party Information

Debtor(s):

Nicholas Maalouli — Represented By Ahren A Tiller

Movant(s):

Nicholas Maalouli — Represented By Ahren A Tiller

Trustee(s):

Amrane (SA) Cohen (TR) — Pro Se

10:30 AM

8:15-15931 John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

#8.10 Motion for relief from the automatic stay REAL PROPERTY
(cont'd from 9-27-16)

UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY OF NORTH CAROLINA
Vs.
DEBTORS

Docket No: 54

Tentative Ruling:

Tentative for 10/4/16:
Settlement?

Tentative for 9/27/16:
Same tentative. Grant absent APO.

Tentative for 9/20/16:
Where is the APO stip referenced last time? Grant absent stipulated plan treatment.

Tentative for 8/23/16:
Grant if Rule 4001 notice given.

Party Information

Debtor(s):

John J Trejo — Represented By
Michael Jones
Sara Tidd

10:30 AM

CONT... John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

Joint Debtor(s):

Elsie Alfeche Baclayon	Represented By Michael Jones Sara Tidd

Movant(s):

United Guaranty Residential Insurance	Represented By Katherine G Heidbrink

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

11:00 AM

8:16-12465 Minh Tran **Chapter 7**

#9.00 US Trustee's Motion for an Order Imposing Fines and Directing Disgorgement of Fees Against Bankruptcy Petition Preparer Pursuant to 11 USC Section 110

Docket No: 11

Tentative Ruling:

Grant.

Party Information

Debtor(s):

Minh Tran Pro Se

Trustee(s):

Karen S Naylor (TR) Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

11:00 AM

8:11-26359 Martina Maria Rau **Chapter 7**

#10.00 Motion to Avoid Lien with Sky Community Association
(cont'd from 9-13-16)

Docket No: 45

Tentative Ruling:

Tentative for 10/4/16:
Still did not serve *all* lienholders.
No declaration from appraiser. Appraisal has different fair market value than what Debtor asserts is the value in the motion.
Deny.

Tentative for 9/13/16:
This motion is incomplete. It would be easier if Debtor used the court's form. Debtor needs to provide better evidence of fair market value (reference to Schedule D and a self-serving declaration are obviously insufficient) and a complete list of lienholders. The other lienholders should be served. Debtor should also provide better evidence of the amounts of the liens. *Deny*.

Party Information

Debtor(s):

Martina Maria Rau	Represented By Matthew C Mullhofer Benjamin C Swinburn

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

11:00 AM

8:11-26359 Martina Maria Rau **Chapter 7**

#11.00 Motion to Avoid Lien with Jonathan Neil & Associate, Inc.
(cont'd from 9-13-16)

Docket No: 46

Tentative Ruling:

Tentative for 10/4/16:

Deny. Appraisal value of $705 does not support the motion.

Tentative for 9/13/16:

This motion is incomplete. It would be easier if Debtor used the court's form. Debtor needs to provide better evidence of fair market value (reference to Schedule D and a self-serving declaration are obviously insufficient) and a complete list of lienholders. The other lienholders should be served. Debtor should also provide better evidence of the amounts of the liens. *Deny*.

Party Information

Debtor(s):

Martina Maria Rau	Represented By Matthew C Mullhofer Benjamin C Swinburn

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

11:00 AM

8:10-10310 Robert A. Ferrante **Chapter 7**

#12.00 Chapter 7 Trustee's Motion to Approve Overbid Procedures for the Sale of Real Property (518 Harbor Island Drive, Newport Beach, California 92660)

Docket No: 278

Tentative Ruling:

This is Trustee's Motion to Approve Overbid Procedures for the Sale of Real Property, located at 518 Harbor Island Drive, Newport Beach, CA 92660 ("Subject Property"). Although related, this Motion is not seeking approval of a sale of the Subject Property under §363 (although some implications are briefly discussed below). Rather, this Motion seeks to approve overbid procedures and also requests that Lt. Col. William Seay ("Col. Seay") either be denied entirely or at least to make certain cash payments prior to exercising his right under §363(k) to credit bid on the Subject Property. As with so much else in this case, the motion raises complicated and difficult issues. Some background is helpful:

A. Background on the Debtor and his Trusts

Debtor Robert A. Ferrante ("Debtor" of "Ferrante") filed a chapter 7 petition on January 11, 2010. At the time the petition was filed, Oscar Chacon as trustee of the 518 Harbor Island Drive Trust held title to the Subject Property. On April 7, 2014, this Court entered an order declaring that the 518 Harbor Trust was a revocable trust settled by Debtor. Later, in conjunction with an Agreement between the Estate and Col. Seay, the Trustee revoked the trust and it became property of the estate.

B. Relevant Liens

There are five lienholders with liens that are relevant here: (1) Bank of America, (2) Col. Seay, (3) Remar Investments ("Remar"), (4) the Franchise Tax Board ("FTB"), and (5) the State of California Employment Development Department ("EDD"). Trustee also asserts that there are other liens on the property which will be referenced in an upcoming Motion to Approve Sale, but that these liens are not

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CONT... Robert A. Ferrante **Chapter 7**

relevant here.

On August 10, 1990, a first deed of trust was recorded in favor of Bank of America. The current amount of this lien is approximately $1,065,391.08, with the lien being in first position. According to Trustee, the amount and priority of the lien is not in dispute but it may be that Col. Seay continues to dispute the existence and priority of Bank of America's deed of trust. However, his lawsuit disputing that priority was very recently dismissed, just before entry of an order granting Bank of America judgment under Rule 56. FTB has three liens totaling $256,830.20. The first two FTB liens attached in 1997, and were reportedly extended by recordings in 2007. The third FTB lien attached in 1998, and was reportedly extended by a recording in 2008. EDD's lien totals $6,055.92. This lien attached in 2000 and was reportedly extended by a recording in 2010.

On May 20, 2004, Col. Seay recorded an abstract of judgment referencing the judgment of $2,471,057.16 entered by the Superior Court of California, Los Angeles, in his favor. On January 4, 2008, Col. Seay recorded a writ of execution in the amount of $3,369,491.19, with the judgment lien extended by a document recorded on November 21, 2013. Col Seay now reports the obligation owed him inclusive of accrued interest and fees and secured by the judgment lien at over $6.8 million (although there exists a proceeds sharing arrangement with the estate as reported immediately under discussion of the Seay Agreement below).

On December 27, 2010, a deed of trust in favor of Remar was recorded in the amount of $2,000,000.00. A notice of default in connection with this deed of trust was recorded on March 5, 2013, and a notice of trustee's sale was recorded June 18, 2013. On February 16, 2016, this Court entered an order ("February 16, 2016 order") in adversary proceeding 8:13-ap-01204-TA specifying that the Seay Lien was senior to the Remar Lien. Remar appealed the February 16, 2016 order to the District Court. The District Court affirmed the February 16, 2016 order on September 13, 2016. The court has no information whether Remar has filed yet further appeals to the Ninth Circuit. It should also be noted that aside from the question of priority as to Col. Seay, existence of the Remar lien as a *bona fide* encumbrance at any level is disputed

by both the estate and Col Seay. Adversary proceedings filed by the Trustee (8:14-ap-01194-TA) and Col. Seay (8:13-ap-01204-TA) were consolidated by stipulation by order entered June 30, 2015 and all pleadings are filed under case 8:13-ap-01204-TA. A "Consolidated Second Amended Adversary Complaint" was filed by the Trustee and Seay on May 15, 2015. In that complaint, the Trustee seeks outright avoidance of Remar's 2010 deed of trust and also seeks judicial determination that there was a violation of the automatic stay and that the Remar loans were usurious. As best as the Court can tell, these issues have not yet been adjudicated, but it is safe to conclude that the Remar lien is in "*bona fide* dispute " within the meaning of §363(f).

C. The Seay Agreement

Trustee and Col. Seay entered into an agreement (the "Seay Agreement") on April 8, 2014, with this Court entering an order after notice to creditors approving the Seay Agreement on June 18, 2014. The Seay Agreement provided in part that the Trustee would sell the Subject Property free and clear of all liens (see Exhibit 1 at 26, item 2.1.7) and that Trustee and Col. Seay would each receive 50% of the net proceeds of the sale of the Subject Property (see Exhibit 1 at 27, item 2.2.1). Additionally, Col. Seay would receive 50% of any recovery of estate property by Trustee (see Exhibit 1 at 28, item 2.2.3) and Col. Seay would agree to subordinate his unsecured claim until the estate received $3 million. Unfortunately, the Seay Agreement is silent on the question of credit bidding, although, as discussed below, it does seem to the court that the parties only contemplated a sale *to a third party* and division of resulting proceeds, not credit bids.

D. "Cause" for denial or to impose conditions of credit bidding

The Trustee argues that under 11 §§ U.S.C. 363(b) and (k), the proposed overbid procedures and cash payments should be approved by the Court. The Trustee reportedly has located a cash buyer at $4.8 million. Except for the question of credit bidding by Col Seay, other proposed terms on such issues as qualifications of overbidding, timing and size of minimum bids seem very standard and are not controversial. See *In re Mama's Original Foods, Inc*., 234 B.R. 500, 505 (Bankr.

C.D.Cal.1999). Those terms are not opposed and will be approved.

While Trustee seemingly acknowledges that Col. Seay can exercise his right to credit bid, the Trustee points to the statutory language and argues that the Court is permitted to limit this right for "cause" under § 363(k). According to Trustee, permitting Col. Seay to credit bid runs contrary to the Seay Agreement because the estate would have to wait until Col. Seay sells the property to receive its 50% share of the sale funds. Furthermore, allowing Col. Seay to credit bid is problematic because Col. Seay would be able to cut in front of other senior lienholders in a fashion that might jeopardize the recovery of all creditors.

Col. Seay responds by arguing that "cause" does not exist to limit his right to credit bid. Moreover, Col. Seay argues that Trustee is unfairly discriminating against him, and that it is in the best interest of the estate and other creditors if Col. Seay owns the Subject Property, as he will own it subject only to the Bank of America lien, making it easier to refinance. Once Col. Seay is able to refinance, he argues, he will have sufficient funds to restore the property so that it can be sold for more money for the estate (instead of what he characterizes as a "fire sale"). Of note, Col. Seay claims that he had no knowledge of the FTB and EDD liens prior to the current Motion. How exactly Col. Seay thinks he as prospective owner of the Subject Property would qualify for refinancing, or even of his ability to obtain financing either to pay off Bank of America's $1,065,000, or to obtain construction financing for repairs and improvements (especially since he has earlier argued that his credit was ruined in his disputes with Bank of America) is not explained. Also left unclear is Col. Seay's health. In prior hearings he has repeatedly emphasized that he is advanced in years (now 89?) and may be at death's door.

Under 11 U.S.C. § 363(k), lienholders may credit bid "unless the court for cause orders otherwise..." " 'Cause' is not statutorily defined in the Bankruptcy Code. Because the Code provides no definition of what constitutes 'cause' ..., courts must determine whether discretionary relief is appropriate on a case-by-case basis." *In re RML Dev., Inc.*, 528 B.R. 150, 155 (Bankr. W.D. Tenn. 2014). "Although what constitutes cause is 'discretionary with the bankruptcy court,' this discretion does not

give the bankruptcy court the authority to act arbitrarily or to be freewheeling. In other words, the standard is not standardless." *Id.* "The bankruptcy court should only modify or deny a § 363(k) credit bid when equitable concern gives it cause." *Id.*

"It is beyond peradventure that a secured creditor is entitled to credit bid its allowed claim." *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014). "But the right to credit bid is not absolute...Specifically, Section 363(k) of the Bankruptcy Code provides that a party may credit bid 'unless the court for cause orders otherwise…' The term 'cause' is not defined by the Bankruptcy Code[.]" *In re Aéropostale, Inc.*, No. 16-11275 (SHL), 2016 Bankr. LEXIS 3146, at *118 (U.S. Bankr. S.D.N.Y. Aug. 26, 2016). Rather, "Section 363 gives courts the discretion to decide what constitutes 'cause' and the flexibility to fashion an appropriate remedy by conditioning credit bidding on a case-by-case basis." *In re River Road Hotel Partners, LLC,* 2010 Bankr. LEXIS 5933, 2010 WL 6634603, at *1 (Bankr. N.D. III. Oct. 5, 2010), aff'd*, River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011). "Intrinsically, acting 'for cause' looks to the court's equity powers that allow the court to balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors." *In re RML Dev., Inc.*, 528 B.R. 150, 155 (Bankr. W.D. Tenn. 2014).

Furthermore, "[a] credit bid does not necessarily relieve a secured creditor of any need to come up with cash as part of the sale price. If the creditor has a junior lien, the creditor will be required to pay off or otherwise settle with the senior lienors in the sale." See 3-363 Collier on Bankruptcy P 363.09 (16th)(citing *In re Daufuskie Isl. Props., LLC*, 441 B.R. 60 (Bankr. D.S.C. 2010)). Additionally, "the court may charge a secured creditor with the costs of sale to the extent of any benefit of the creditor." Id. (citing 11 U.S.C. § 506(c)). In short, "[a] court may deny [or limit] the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization [.]" *In re Phila. Newspapers, LLC*, 559 F.3d 298, 329 n.14 (3d Cir. 2010). "Additionally, "the court may charge a secured creditor with the costs of sale to the extent of any benefit of the creditor." *Id.* (citing 11 U.S.C. §

506(c)). In sum, the right to credit bid is not absolute. *In re Fisker Auto Holdings, Inc*., 510 B.R. at 60.

Here, Trustee requests the Court require Col. Seay to make a total cash payment of $3,299,041.42 before being allowed to credit bid. This figure is calculated as follows:

- $97,000.00 for 2% Costs of Sale
- $242,500.00 for 5% Real Estate Commission
- $86,361.55 for Reimbursement for Maintenance Cost
- $1,065,391.08 for Bank of America's Lien
- $250,774.28 for the three FTB Liens, senior to the Seay Lien
- $6,055.92 for EDD's Lien, senior to the Seay Lien
- $1,550,958.59 for the Estate's 50% of the net proceeds of the sale, as provided under the Seay Agreement

E. Should Seay be allowed to credit bid at all?

A good case could be made that credit bids from Col. Seay should be denied altogether. As discussed above, "cause" is an amorphous standard, directed to the sound discretion of the court and highly fact-dependent. There are strong reasons not to entertain *any* credit bids. First, if Col Seay were allowed to credit all or most of $6 million, it would be a strong disincentive for any rival bidder to invest the time and money into seriously exploring a purchase. In effect, the property would have to sell for some $7.3 million or more (Bank of America's $1,065,391+ tax liens+ Col Seay's $6 million) for any rival to obtain title though sale. That is well above anything remotely close to fair market value. The Trustee has reported that efforts have been made over a 26 month period to sell the Subject Property, to evict debtor Ferrante, to clean it up, and to arrange title insurance on any basis. As far as the court is aware, no

one has been servicing any of the liens on the Subject Property, thus accruing interest, fees and costs, for years now. Until now Col Seay's complaint has been that the Trustee is not moving fast enough. But now that a real buyer for real dollars has finally been located, Col Seay wants to short circuit the sale by a threatened credit bid. On top of this, Col Seay has complained repeatedly that he is in bad health and may not live much longer. His efforts have been described as primarily for his widow's benefit. Why should the court allow the entire recovery of everyone but Col. Seay's widow to be jeopardized and certainly delayed? Under Col Seay's theory, he will take title by credit bid subject to senior liens (maybe $1.5 million) and then hope to renovate the property further, thus attracting a higher price. He hopes this means the ultimate net will be larger. Refinancing is mentioned but only in the vaguest terms. We are given no clue whether Col Seay has access to that kind of credit or what his other circumstances might be which could offer some clue on either financing or carrying of the senior liens while this projected refurbishment is ongoing. We only have the vaguest guess as to how long any of this might take or the means.

Once title is vested in Col Seay, the continued protection of the automatic stay is problematic (although some argument could still be made that there is an ongoing property of the estate interest given the Seay Agreement still protected). This might mean that absent ongoing servicing of the senior liens, the property could be lost through foreclosure by the seniors. We also have no assurance what the market will look like in 12 months (or more, maybe much more) from now, but we read that interest rates are headed up. Lastly, although the Seay Agreement does not mention credit bidding, the most obvious reading of the terms would be that the Trustee was expected to sell as soon as prudently possible to a third party for cash, such that there would, in fact, be cash proceeds. Indeed, at ¶2.1.7 of the Seay Agreement, the Trustee is given the sole discretion to lower prices after an initial six-month period, which has long passed. At ¶2.2.1, it is clear that net proceeds subject to the 50/50 split with the estate were to be figured *after* senior liens and costs of sale. None of this makes much sense where Col. Seay obtains title not by auction, but by credit bid, particularly if the senior liens remain in place. While the court is reluctant at this juncture and on this record to rule that credit bidding was outright waived in the Seay Agreement, these

points add weight to a finding of "cause."

F. Senior Liens

The Trustee has argued that Col Seay at a minimum should be required to pay senior liens as a condition of credit bidding. As stated above, there is ample authority for this. See e.g. *In re Daufuskie Isl. Props*., LLC, 441 B.R. 60 (Bankr. D.S.C. 2010). Certainly there is at least $1,065,391 owed to Bank of America. Although Col. Seay says he has not heard about them, there is also a likelihood of another $256,830.20 of senior tax and EDD liens. The total of senior liens would then be about $1,322,221.20.

G. Maintenance Expenses

The Trustee does not provide documentation of the maintenance expenses he is requesting be paid. Although there is no express requirement in the Code (or seemingly in binding case law from this circuit or others) that expenses benefiting creditors be confirmed by requiring a lienholder to pay cash in order to credit bid, it does not seem inequitable to require Col. Seay to make a cash payment of $86,361.55 for funds used to benefit the estate. The veracity of that figure would be subject to proof, of course. 11 U.S.C. §506(c) provides that "the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

H. Costs of Sale, Real Estate Commission

There is authority permitting courts to require payment of auction costs prior to credit bidding. *See In re Daufuskie* 441 B.R. at 65-66. Accordingly, the requested costs associated with sale (the 2% Costs of sale and a 5% Real Estate Commission) might be permissible, although the subject costs are in some ways different from those in *Daufuskie*. The argument is that the sales effort (or in *Dafuskie*, an auction) creates a platform from which either the proposed buyer or the credit bidder can obtain title; without incurring such a cost there would be no credit bid nor sale. Thus a benefit is

conferred which requires compensation. The court does not find imposing such costs inequitable. Professionals have incurred a great deal of time and effort to market this very difficult property and to bring it to a place where it might actually sell. It hardly seems right to deny them any recovery at the last moment through a credit bid.

I. The Seay Agreement

The Seay Agreement provides that 50% of the net sale proceeds be distributed to the estate. However, as acknowledged by both parties, the Seay Agreement does not address credit bidding. If the Proposed Buyer were to complete the sale, then the estate would certainly receive its portion. Trustee asserts that he would not immediately receive this portion (and might never do so) if Col. Seay credit bids and, therefore, Col. Seay should pay this amount first, in cash, presumably figured on the amount of the proposed sale, with upward adjustment once the ultimate price is known. Although it has some appeal to equity, there is little or no authority for such a proposition. But this scenario has seemingly not arisen before in any reported cases, and as the court has discussed above, a decent argument could be made that the Seay Agreement precludes *any* credit bidding by implication. The court's view is that, if anything, the existence of the Seay Agreement is "cause" to completely deny credit bids on any basis rather than trying to fashion some awkward half measure based on no authority. It certainly contributes to "cause."

J. Conclusion

"The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan…" See FN 2 of *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070 (U.S. 2012). Because the meaning of "cause" under 11 U.S.C. §363(k) is somewhat amorphous, it is difficult to say with certainty whether all of these cash payments requested by the Trustee should be approved. If Col. Seay were to be required to make every single payment as requested by Trustee, it is likely that Col. Seay would

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CONT... Robert A. Ferrante **Chapter 7**

not be able practically to credit bid at all. Because the underpinning policy behind credit bidding is to prevent the sale of estate assets at a depressed price, the court must seek an elusive balance between the rights of the lienholder and the rest of the estate. But allowing Col. Seay to credit bid without any restraint could have the effect of chilling or discouraging the bidding process, at point upon which past courts have looked unfavorably. See *In re Phila. Newpapers, LLC*, 599 F.3d 298 (3d Cir. Pa. 2010); *In re Fisker Auto Holdings, Inc.,* 510 B.R. 55, 60 (Bankr. D. Del. 2014). Moreover, given the amount of time the Subject Property has been on the market, and the several problems that the Trustee has been required to confront in the sales effort, the court is not concerned that the proposed sale is a "fire sale" as Col. Seay has characterized it. Col Seay's proposed remedy of refurbishment and eventual sale at a higher price is not without serious drawbacks as well. Consequently, the court is satisfied that the primary reason for allowing credit bids as explained in *RadLAX* and similar authority is already fulfilled, and the competing concerns of equity for the other creditors suggest "cause" to either disallow or at least to condition the right of overbid.

The court will adopt a middle course, i.e. requiring cash payment of all senior liens and maintenance expenses/costs of sale as a precondition of overbid, but letting the 50% interest of the estate be further delayed following the Subject Property until its ultimate disposition.

Credit bid right is modified for "cause" to require as a precondition the deposit in cash with the Trustee of the senior liens, maintenance and improvement expense and costs of sale in the combined sum of $1,748,082.83 not later than 48 hours before the sale.

Party Information

Debtor(s):

Robert A. Ferrante — Represented By
Richard M Moneymaker
Arash Shirdel

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

11:00 AM

CONT... Robert A. Ferrante **Chapter 7**

Trustee(s):

Thomas H Casey (TR)	Represented By Thomas H Casey Thomas A Vogele Kathleen J McCarthy Brendan Loper

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, October 04, 2016 **Hearing Room 5B**

11:00 AM

8:14-14092 David A. Sanchez, M.D., Inc. **Chapter 7**

#13.00 Chapter 7 Trustee's Motion for Order: (1) Authorizing Sale of the Estate's Interest in Real Property (1800 North Bush Street, Santa Ana, California) Free and Clear of Any and All Liens and Encumbrances Pursuant to 11 U.S.C. Sections 363(b) and 363(f), Including the Liens of the Employment Development Department and the Internal Revenue Service, With Disputed Liens to Attach to Sale Proceeds Pending Further Court Order Pursuant to 11 U.S.C. Section 363 (b) and (f) and Assignment of Certain Commercial Leases; (2) Approving Overbid Procedures; (3) Approving Compensation and Expense Reimbursement of Trustee's Real Estate Co-Agents; (4) Deeming Proposed Buyer to be a Good Faith Purchaser Pursuant to 11 U.S.C. Section 363(m); (5) Authorizing Distribution of Sale Proceeds; and (6) Waiving 14-Day Stay Imposed by FRBP Rule 6004(h)

Docket No: 278

Tentative Ruling:

Grant.

Party Information

Debtor(s):

David A. Sanchez, M.D., Inc.	Represented By Joshua R Engle Joshua R Engle

Trustee(s):

Thomas H Casey (TR)	Represented By Thomas H Casey Kathleen J McCarthy Steve Burnell Michael J. Weiland Beth Gaschen