

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

**Tuesday, October 25, 2016**

**Hearing Room 5B**

10:30 AM

**8:16-13868 Joseph Francis Crevier**

**Chapter 7**

**#1.00 Motion for relief from the automatic stay UNLAWFUL DETAINER**

ROBERT O. YOUNG; LISA GOODALL  
Vs.  
DEBTOR

Docket 11

**Tentative Ruling:**

The debtor raises no defense cognizable in bankruptcy law. This is a Chapter 7 liquidation, there is no equity and the case is not a reorganization. Section 362(d)(2). Other defenses, such as retaliatory "eviction" should be raised in UD court.

<b>Party Information</b>
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**Debtor(s):**

Joseph Francis Crevier Pro Se

**Trustee(s):**

Richard A Marshack (TR) Pro Se

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**8:16-13283 Ely M. Mercado**

**Chapter 7**

**#2.00** Motion for relief from the automatic stay PERSONAL PROPERTY

WELLS FARGO BANK, N.A.  
Vs.  
DEBTOR

Docket 14

**Tentative Ruling:**

Grant. Appearance is optional.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Ely M. Mercado

Represented By  
Peter Recchia

**Trustee(s):**

Karen S Naylor (TR)

Pro Se

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**8:10-20593 Laurie Carole Smith**

**Chapter 13**

**#3.00** Motion for relief from the automatic stay REAL PROPERTY  
(cont'd from 9-20-16)

MTGLQ INVESTORS, LP  
Vs.  
DEBTOR

Docket 83

**Tentative Ruling:**

Debtor admits to being almost \$8,000 delinquent post-petition instead of the \$16,491 claimed by movant. Debtor has no privilege to be delinquent at all post confirmation. Grant unless fully current within 30 days.

<b>Party Information</b>
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**Debtor(s):**

Laurie Carole Smith

Represented By  
Sunita N Sood

**Trustee(s):**

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court  
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10:30 AM

**8:12-24575 David J. Sukert and Denise R. Sukert**

**Chapter 13**

**#4.00** Motion for relief from the automatic stay REAL PROPERTY

CITIBANK, N.A.  
Vs.  
DEBTORS

Docket 72

**Tentative Ruling:**

Grant unless APO stipulation.

<b>Party Information</b>
--------------------------

**Debtor(s):**

David J. Sukert

Represented By  
Don E Somerville  
Tate C Casey

**Joint Debtor(s):**

Denise R. Sukert

Represented By  
Don E Somerville  
Tate C Casey

**Trustee(s):**

Amrane (SA) Cohen (TR)

Represented By  
Amrane (SA) Cohen (TR)

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**8:14-16707 Desmond E. Thompson**

**Chapter 7**

**#5.00 Motion for relief from the automatic stay REAL PROPERTY**

WELLS FARGO BANK  
Vs.  
DEBTOR

Docket 134

**Tentative Ruling:**

Grant. Appearance is optional.

<b>Party Information</b>
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**Debtor(s):**

Desmond E. Thompson

Represented By  
Vicki L Schennum  
Michael G Spector

**Trustee(s):**

Weneta M Kosmala (TR)

Pro Se

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**8:15-13042 Laury Jean Creyaufmiller**

**Chapter 13**

**#6.00** Motion for relief from the automatic stay REAL PROPERTY

GEORGE ELIAS  
Vs.  
DEBTOR

Docket 63

**Tentative Ruling:**

Grant. Appearance is optional.

<b>Party Information</b>
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**Debtor(s):**

Laury Jean Creyaufmiller

Represented By  
Travis G Kasper

**Trustee(s):**

Amrane (SA) Cohen (TR)

Pro Se

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8:15-13699 Felesia Dailey

Chapter 13

#7.00 Motion for relief from the automatic stay REAL PROPERTY  
(con't from 10-4-16)

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

Docket 43

\*\*\* VACATED \*\*\* REASON: OFF CALENDAR - SETTLED BY  
STIPULATION ENTERED 10-20-16

**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

Represented By  
Jennifer C Wong

**Trustee(s):**

Amrane (SA) Cohen (TR)

Pro Se

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**8:16-12595 John Ellis**

**Chapter 13**

**#8.00** Motion for relief from the automatic stay REAL PROPERTY

THE BANK OF NEW YORK MELLON  
Vs  
DEBTOR

Docket 38

**Tentative Ruling:**

Grant. Appearance is optional.

<b>Party Information</b>
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**Debtor(s):**

John Ellis

Pro Se

**Movant(s):**

The Bank of New York Mellon FKA

Represented By  
Christina J O

**Trustee(s):**

Amrane (SA) Cohen (TR)

Pro Se

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

**Chapter 11**

**#9.00** Motion for relief from the automatic stay REAL PROPERTY  
(cont'd from 10-4-16)

UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY OF NORTH  
CAROLINA  
Vs.  
DEBTORS

Docket 54

**Tentative Ruling:**

Tentative for 10/25/16:  
Status?

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Tentative for 10/4/16:  
Settlement?

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

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

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

**Party Information**

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

**Chapter 11**

**Debtor(s):**

John J Trejo

Represented By  
Michael Jones  
Sara Tidd

**Joint Debtor(s):**

Elsie Alfeche Baclayon

Represented By  
Michael Jones  
Sara Tidd

**Movant(s):**

United Guaranty Residential

Represented By  
Katherine G Heidbrink

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

**Chapter 11**

**#10.00** Motion for relief from the automatic stay ACTION IN NON BANKRUPTCY FORUM

WILMINGTON TRUST, N.A.  
Vs.  
DEBTORS

Docket 78

**Tentative Ruling:**

Grant. Appearance is optional. No levies without further order.

**Party Information**

**Debtor(s):**

John J Trejo

Represented By  
Michael Jones  
Sara Tidd

**Joint Debtor(s):**

Elsie Alfeche Baclayon

Represented By  
Michael Jones  
Sara Tidd

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**8:14-16910 Protection Patrol Services Inc.**

**Chapter 7**

**#11.00** United States Trustee For An Order Reopening Chapter 7 Case Pursuant to 11 U.S.C Section 350(b).

Docket 44

**Tentative Ruling:**

Grant. Appearance is optional.

**Party Information**

**Debtor(s):**

Protection Patrol Services Inc.

Represented By  
Karle Boyd

**Trustee(s):**

Karen S Naylor (TR)

Pro Se

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**8:14-16910 Protection Patrol Services Inc.**

**Chapter 7**

**#12.00** United States Trustee's Motion to Enjoin Bankruptcy Petition Preparer John Castro

Docket 45

**Tentative Ruling:**

Grant.

**Party Information**

**Debtor(s):**

Protection Patrol Services Inc.

Represented By  
Karle Boyd

**Trustee(s):**

Karen S Naylor (TR)

Pro Se

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**8:05-50128 William E Preston**

**Chapter 7**

**#13.00** Trustee's Final Report And Applications For Compensation:

TODD FREALY, Chapter 7 Trustee

LEWIS BRISBOIS, BISGAARD & SMITH, LLP, Attorney For Trustee

LECG, Accountant For Trustee

UNITED STATES BANKRUPTCY COURT

OFFICE OF THE UNITED STATES TRUSTEE

BANKRUPTCY ESTATE OF REED SLATKIN, Other Professional

BERKELEY RESEARCH GROUP, LLC, Other Professional

DEPARTMENT OF THE TREASURY

FRANCHISE TAX BOARD

R.TODD NEILSON, Other Professional

RFB ENTERPRISES, Other Professional

SHAMROCK BUSINESS ENTERPRISES, Other Professional

THOMAS W. HILBORN, OTHER PROFESSIONAL

Docket 855

**Tentative Ruling:**

So, finally it ends after eleven tortuous years. To call this a tragic and

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**William E Preston**

**Chapter 7**

disappointing case is putting it mildly. It is only the very smallest consolation that some administrative tax claims will actually be paid in full. The professionals and the trustees have accrued almost \$4 million in aggregate fees, but since only \$1,749, 208 is left on hand, there will necessarily be a steep administrative insolvency. It looks like roughly 50 % or less of administrative fees and costs can be actually paid. Pre-petition creditors will get nothing. Of course, the case has been pending so long that most prepetition creditors who are not dead yet will have written their claims off long ago. The court foresaw such a sad result years ago but seemingly no amount of admonition or cajoling could avoid the inevitable. Is there anyone to blame? Maybe this result was a foregone conclusion given the determined scorched earth tactics employed in the adversary proceedings, or in the attempt to recuse the judge, or in endless battles over the most basic issues such as signatures to the petition or mental capacity. There was a period about three or four years ago when it seemed every week brought another emergency motion about something or other, and constant wrangling clogged up the calendar. Like a bad imitation of a Dickens novel the wrangling did not finally stop until it became obvious to everyone that no one except the lawyers had any practical stake in the remaining assets, compelling a belated settlement. So, the court will not give into its impulse to create an estate for creditors by enlarging the administrative insolvency of the professionals. There is no question that the time was spent and there is no doubt that the efforts were competent. But were they needful? That is a closer question. Perhaps surrender to alleged depredations was so inimical to justice that any other path would have been unthinkable. Maybe this case had such a life of its own that an earlier change of course in time to preserve something for creditors was never in the cards. So, the +-50% insolvency will have to serve as its own statement. It is too bad that such a case is the last testament to a great creative soul who should be remembered only for his art, and not his sad departure or the mess he left behind. But no one among the living should be proud of it.

*Approve and allow fees and cost as prayed*

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**CONT... William E Preston**

**Chapter 7**

**Debtor(s):**

William E Preston

Represented By  
MARC L SALLUS  
MARC L SALLUS  
Raymond H. Aver  
Raymond H. Aver  
Janis L Turner  
Janis L Turner

**Trustee(s):**

Todd A. Frealy (TR)

Pro Se

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**8:15-15612 Martin Rojas and Maria Mercedes Rojas**

**Chapter 7**

**#14.00** Trustee's Final Report And Applicaitons For Compensation:

RICHARD A. MARSHACK, Chapter 7 Trustee

HAHN FIFE & COMPANY LLP, Other Professional

Docket 73

**Tentative Ruling:**

Allow as prayed. Appearance is optional.

**Party Information**

**Debtor(s):**

Martin Rojas

Represented By  
Bryn C Deb

**Joint Debtor(s):**

Maria Mercedes Rojas

Represented By  
Bryn C Deb

**Trustee(s):**

Richard A Marshack (TR)

Pro Se

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**8:16-10416 Steven Victor Brull**

**Chapter 7**

**#15.00 Debtor's Second Motion to Compel Abandonment of Estate Property**

Docket 101

**Tentative Ruling:**

The court observes two points that are pivotal:

1. The trustee apparently does not disagree with the motion, or he would have objected. If he needed more time to evaluate, he would have said so. The court reposes a measure of trust in the diligence and competence of trustees unless something compels another conclusion.

2. The objector does not make any offers to purchase any of the tangible or intangible assets. This speaks volumes.

Grant.

<b>Party Information</b>
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**Debtor(s):**

Steven Victor Brull

Represented By  
Michael N Nicastro

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Richard A Marshack  
Ashley M Teesdale

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**8:14-14803 Kenneth Lloyd Tucker and Clarissa Jane Tucker**

**Chapter 7**

**#16.00** Chapter 7 Trustee's Motion For Order: (1) Authorizing Sale of Real Property Free and Clear of Liens, Claims and Interests Pursuant to 11 U.S.C. Section 363(b) and (f); (2) Approving Overbid Procedures; (3) Approving Buyer, Successful Bidder, and Back-Up Bidder as Good-Faith Purchaser Pursuant to 11 U.S.C. Section 363(m); (4) Authorizing Payment of Undisputed Liens, Real Estate Broker's Commissions and Other Ordinary Costs of Sale; and (5) Approving and Authorizing Payment of Real Estate Agent's Administrative Claim [4721 Howard Avenue, Los Alamitos, California 90720]

Docket 81

**Tentative Ruling:**

Grant.

**Party Information**

**Debtor(s):**

Kenneth Lloyd Tucker

Represented By  
Dana C Bruce

**Joint Debtor(s):**

Clarissa Jane Tucker

Represented By  
Dana C Bruce

**Trustee(s):**

Jeffrey I Golden (TR)

Pro Se

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**Hearing Room 5B**

11:00 AM

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

**Chapter 7**

**#17.00** Chapter 7 Trustee's Motion for Order (1) Authorizing Sale of Estate's Interest in Real Property (518 Harbor Island Drive, Newport Beach, CA) Free and Clear of Liens and Encumbrances Per 11 U.S.C. Sections 363(b) and 363(f), With Disputed Liens to Attach to the Sale Proceeds Pending Further Court Order; (2) Approving Compensation of Trustee's Real Estate Agent; (3) Approving Reimbursement of Expenses and Surcharge Per 11 U.S.C. Section 506(c); (4) Deeming Proposed Buyers to be Good Faith Purchasers Under 11 U.S.C. Section 363(m); (5) Authorizing Distribution of Sale Proceeds; and (6) Waiving 14 Day Stay Imposed by FRBP 6004(h)

Docket 285

**Tentative Ruling:**

This is Trustee Thomas H. Casey's ("Trustee") Motion for Order Authorizing Sale of Real Property located at 518 Harbor Island Drive, Newport Beach, CA 92260 ("Subject Property"). Trustee requests an order (1) authorizing the sale of Subject Property free and clear of liens under 11 U.S.C. §§363(b) and (f); (2) approving compensation of Trustee's real estate agent; (3) approving reimbursement to parties who have incurred expenses in maintaining the Subject Property; (4) determining that Proposed Buyers are good faith purchasers under 11 U.S.C. § 363(m); and (5) authorizing the distribution of sale proceeds; and (6) waiving the 14 day stay imposed under FRBP 6004(h).

**A. Facts**

Trustee subject to court approval has accepted an offer of \$4,800,000.00 to purchase the Subject Property from the Swartzbaugh Family Trust ("Proposed Buyer"). Title to the Subject Property was previously held by the 518 Harbor Island Trust ("518 Trust"). On April 7, 2014, the Court declared by order that the 518 Harbor Trust was and is a revocable trust settled by the Debtor ("Revocation Order"). The Subject Property became property of the bankruptcy estate after entry of the Revocation Order and the Trustee's written election to revoke. The 518 Trust has

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**Robert A. Ferrante**

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since appealed the Revocation Order, which has been upheld by the BAP, with the BAP ruling entered on August 26, 2015. Debtor has further appealed the BAP ruling to the Ninth Circuit, with the matter now fully briefed by all parties. Debtor has not requested and there is no stay pending appeal.

**B. Relevant Liens**

A preliminary title report furnished by Trustee reveals that the Subject Property is affected by a number of liens and encumbrances. Prominent lienholders include Bank of America, with a lien in the amount of \$1,065,391.08, the Franchise Tax Board ("FTB") with three liens totaling \$232,447.19, the California Employment Development Department ("EDD") with a lien in the amount of \$6,055.92, and Col. Seay with a judgment lien in the amount of \$6,717,323.21 (with interest reportedly accruing at \$1,626.076 daily), and Remar Investments with a lien in the amount of \$2,000,000.00 (A summary of all lienholders can be found in the table in Motion at 9-10).

The Motion provides that the Subject Property will be sold free and clear of liens, with the liens to then attach to the sale proceeds. There is some discussion in Trustee's Motion and in Opposition papers as to whether liens purportedly held by Mr. Franklin Lane ("Mr. Lane") are valid; Trustee argues that the liens have been extinguished and Mr. Lane argues that the liens are still valid. Given that Mr. Lane does not object to this motion because Trustee has acknowledged that any interest Mr. Lane may have will attach to the sale proceeds, the validity of Mr. Lane's liens will not be addressed at this juncture except to say that sale free of same, with liens attaching to proceeds, would be authorized under either of §§363(f)(2) or (4).

The priority of liens has already been the source of some litigation between Col. Seay and Remar Investments ("Remar"). On February 16, 2016, the court entered an order declaring that Remar was not a good faith encumbrancer and that Remar took the property subject to the Seay Lien ("February 16, 2016 Order"). This order was

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subsequently appealed by Remar to the District Court, with the District Court affirming the February 16, 2016 Order. The deadline to file an appeal was October 13, 2016. As of October 18, 2016 the District Court order has not apparently been appealed so it is likely the February 16 order is now final.

**C. The Seay Agreement**

On April 8, 2014, Trustee entered into an agreement with Col. Seay ("Seay Agreement"), where Col. Seay agreed to "carve out" and pay fifty percent of all net proceeds from the sale of the Subject Property for the benefit of the estate. The Seay Agreement was approved by this Court, with an order entered on June 18, 2014.

**D. Trustee's Arguments**

Trustee contends that a sound business purpose exists for the sale of the Subject Property, as the estate is estimated to receive approximately \$1,534,745.73 under the terms of the Seay Agreement as its portion of proceeds. In support, Trustee argues that the sale price is for fair market value, detailing the extensive marketing efforts employed by Trustee's real estate agent and the possibility of potential overbids. Additionally, Trustee highlights that the Proposed Buyer and its Trustees were not insiders of Debtor, and that all parties involved negotiated in good faith in an arms-length transaction.

Trustee also asserts that the Subject Property should be sold free and clear of liens under 11 U.S.C. § 363(f). According to Trustee, §§ 363(f)(2), (f)(3), (f)(4) and (f)(5) all provide sufficient grounds for the Subject Property to be sold free and clear of liens, with liens to attach to the sale proceeds. Under § 363(f)(2), Trustee contends that there is sufficient consent, as Col. Seay has agreed to the sale when entering into the Seay Agreement by virtue of its carve-out terms, and because lienholders have not objected. Moreover, Trustee argues that under the Collateral Value approach, the requirements to sell a property free and clear of liens under § 363(f)(3) have been met, as the sale price here is greater than the aggregate value of the liens junior to the Seay Lien. According to Trustee, the court may also approve the sale free and clear of liens

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under § 363(f)(4) because the liens are in *bona fide* dispute. The Trustee's argument here seems tied to the question of whether Remar appeals the District Court Order, but for reasons explained below, the court doubts that is a necessary prerequisite. Finally, Trustee argues that §363(f)(5) provides grounds to approve the sale free and clear of liens, as the lienholders could be compelled to accept a money satisfaction.

Lastly, Trustee argues under §506(c) that the expenses incurred by Trustee's professionals to maintain the Subject Property should be reimbursed, as the expenses were reasonable and necessary to preserve the value of the Subject Property. Furthermore, Trustee requests a 5% commission for Mr. Tim Smith of Coldwell Banker Residential Brokerage for work performed in marketing and selling the Subject Property, and a determination that the Proposed Buyer is a good faith purchaser for § 363(m) purposes. Neither the broker's fee nor good faith status appears to be controverted, and so these will be approved.

"A trustee may sell property of the estate other than in the ordinary course of business after notice and a hearing...The requirements of § 363(b) are designed to protect creditors' interests in the assets of the estate. *In re 240 N. Brand Partners, Ltd.*, 200 B.R. 653, 659 (9th Cir. B.A.P. 1996). A bankruptcy court can authorize the sale of substantially all of the assets of the estate under § 363(b) upon a proper showing that the sale is in the best interests of the estate, that there is a sound business purpose for the sale, and that it was proposed in good faith. See *id.* at 659; *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991); *In re Lionel*, 722 F.2d 1063, 1070 (2nd Cir. 1983)." *In re Kellogg-Taxe*, 2014 WL 1016045, at \*4 (Bankr. C.D. Cal. Mar. 17, 2014). "It is universally recognized, however, that the sale of a fully encumbered asset is generally prohibited." *In re KVN Corp., Inc.*, 514 B.R. 1, 5 (B.A.P. 9th Cir. 2014). Despite the general rule prohibiting the sale of fully encumbered property, chapter 7 trustees may seek to justify the sale through a negotiated agreement with the secured creditor." *Id.* at 6. "Although there is no *per se* ban on carve-out agreement, [these kinds of] agreements...have been reviewed under a standard of heightened scrutiny due to past abuses." *Id.* at 7. "Of course, the presumption of impropriety is a rebuttable one. To rebut the presumption, the case law

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directs the following inquiry: Has the trustee fulfilled his or her basic duties? Is there a benefit to the estate; i.e., prospects for a meaningful distribution to unsecured creditors? Have the terms of the carve-out agreement been fully disclosed to the bankruptcy court? If the answer to these questions is in the affirmative, then the presumption of impropriety can be overcome." *Id.* at 8.

There seems to be little question that the Subject Property is property of this estate. This determination was made by this court with its order later affirmed by the BAP. While Debtor has appealed the BAP decision to the Ninth Circuit, no stay pending appeal has been requested or issued. Accordingly, the sale motion can proceed and will likely moot the appeal if consummated. The Trustee supports the motion with evidence showing his extensive marketing efforts and the price does not appear unreasonable. The possibility of overbid is further assurance that fair market value is achieved. Moreover, under the Seay Agreement, the estate will receive approximately \$1,534,745.73 from the sale of the Subject Property. Any presumption of impropriety has been rebutted and has already been approved by the court, so this case is an example of a proper carve-out arrangement as mentioned in authorities such as *KVN Corp.*

**E. 11 U.S.C. § 363(f) Free of liens**

The issues, if any, arise in connection with the request that the sale be free of liens, with liens attaching to proceeds. Because the claimed liens exceed the price, some analysis is required. "Section 363(f)...empowers the trustee of an estate to sell the estate's property "free and clear of any interest in such property of an entity" if any one of the following five conditions is present: (1) an applicable non-bankruptcy law permits such a sale, (2) the entity at issue consents, (3) the interest is a lien and the property's selling price is greater than the aggregate value of all liens on such property, (4) the interest is in a bona fide dispute, or (5) the entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 11 U.S.C. § 363(f). Because Section 363(f) is written in the disjunctive, satisfaction of any one condition is sufficient to sell the property "free and clear of any interest." *SEC v. Capital Cove Bancorp LLC*, 2015 U.S. Dist. LEXIS 174856, at \*14 (C.D. Cal. Oct.

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13, 2015).

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**1.      § 363(f)(2) Consent**

Under 11 U.S.C. § 363(f)(2), "[a] bankruptcy trustee may sell property of the estate free and clear of a lien or other interest where the holder of the lien or interest consents... 'The consent required is consent to a sale free of liens or interests, not merely consent to the sale of assets.'" *Pac. Capital Bancorp, N.A. v. E. Airport Dev., LLC (In re E. Airport Dev., LLC)*, 443 B.R. 823, 831 (B.A.P. 9th Cir. 2011)(quoting in part 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[3], 363-51 (16th ed., 2010)). See also *In re Smith*, 2014 Bankr. LEXIS 779 at \*5 (U.S. Bankr. D. Or. Feb. 26, 2014)("Our interpretation of § 363(f)(2) is] consistent with *Pac. Capital Corp. v. East Airport Dev., LLC (In re East Airport Dev., LLC)*, 443 B.R. 823 (9th Cir. BAP 2011), wherein the court determined that a lack of objection did not constitute consent for purposes of § 363(f)(2)")(emphasis added).

Here, only a handful of lienholders appear to have consented to the sale: Col. Seay, Remar, and Mr. Lane (to the extent he has a valid lien). Other lienholders however, have not expressly consented to the sale of the Subject Property free and clear of their liens. See tabular summary of lienholders in Motion at 9-10. Trustee cites to case law from other circuits, arguing that these courts have held that lienholders need not provide express consent and that a court may find implied consent if the lienholders fail to object. But case law from this circuit, while only persuasive and not binding, does not follow this approach. See *Pac. Capital Bancorp, N.A. v. E. Airport Dev., LLC (In re E. Airport Dev., LLC)*, 443 B.R. 823, 831 (B.A.P. 9th Cir. 2011). Rather, courts have found that consent cannot be inferred from a failure to object. See also *In re Smith*, 2014 Bankr. LEXIS 779 at \*5 (U.S. Bankr. D. Or. Feb. 26, 2014). Moreover, each of the "consents" are in some respects conditional. Remar's "consent" could be read to require that there remain proceeds to which their lien could in fact attach. That conclusion may not follow under these facts, particularly if, as the Trustee and Seay separately urge, the proceeds of the Seay lien are disbursed in whole or in part and not held. But, if the Seay proceeds are in fact disbursed, the sale can proceed as to Seay but, at least not on this theory, as to Remar.

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But there may be other paths to this result, as discussed below.

**2. § 363(f)(3) Greater than value of liens**

Under § 363(f)(3), "a trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate only if such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3).

As acknowledged by Trustee, bankruptcy courts have not reached a consensus as to meaning of the "aggregate value of all liens..." Trustee argues that the value should be accorded the same meaning as understood under § 506(a). Under this interpretation, the value of the lien is measured by the economic value of the collateral that is secured by the lien. While this interpretation has been recognized by some courts, at least some case law from this circuit has rejected this approach (this interpretation is commonly referred to as the Collateral Value Approach). See *Clear Channel Outdoor Inc., v. Knupfer ( In re PW, LLC )* ["Clear Channel"], 391 B.R. 25, 39 (B.A.P. 9th Cir. 2008).

In rejecting the Collateral Value approach, the *Clear Channel* court noted that this reading "expands § 363(f)(3) too far...[as it] would essentially mean that an estate representative could sell estate property free and clear of any lien, regardless of whether the lienholder held an allowed secured claim...If Congress had intended such a broad construction, it would have worded the paragraph very differently." *Id.* at 40. Furthermore, the *Clear Channel* court reasoned that this understanding also rendered § 363(f)(3) toothless. That is, "if 'aggregate value of all liens' means the aggregate amount of all secured claims as used in § 506(a), then the paragraph could never be used to authorize a sale free and clear in circumstances...[where] the claims exceed the value of the collateral that secures them." *Id.* Moreover, if the case involved property being sold "less than the total amount of claims will equal, not exceed, the sales price." *Id.* In sum, by rejecting the Collateral Value Approach, the *Clear Channel* court held that "aggregate value of the liens" should be understood to

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encompass the face value, rather than the economic value of the liens.

It seems that neither approach would allow for a sale of the Subject Property free and clear of all liens under §363(f)(3). Here, Trustee has stated that his real estate agent Mr. Smith found the Subject Property to have a fair market value of \$5,800,000 to \$5,900,000 in January 2016. See Declaration of Thomas H. Casey at 62, item 74. Under the Collateral Value approach, the liens would be valued based off the fair market value of the Subject Property. According to Trustee, the undisputed liens total \$8,021,217.40 and the disputed liens total \$4,827,993.58, with all liens totaling \$12,849,210.98. The sale price for the Subject Property is \$4,800,000. Because the sale price is (arguably) less than the fair market value, the Subject Property cannot be sold free and clear of the liens under the Collateral Value approach; the total value of the liens—which would be under secured—would be worth somewhere between \$5,800,000 to \$5,900,000, which exceeds the sale price of \$4,800,000. Moreover, if the liens were to be valued under the *Clear Channel* court's interpretation, the liens would be worth significantly more than the sale price. Accordingly, § 363(f)(3) is a problematic solution, but is not the only path available.

**3. § 363(f)(4) Bona Fide Dispute**

"[A] trustee may sell estate property free and clear of a non-debtor's interest that is in 'bona fide dispute.' 11 U.S.C. § 363(f)(4)...In ruling on a motion to sell estate property free and clear under § 363(f)(4), 'a court need not determine the probable outcome of the dispute, but merely whether one exists'...The parties must provide some factual grounds to show some objective basis for the disputes...To qualify as a *bona fide* dispute under § 363(f)(4), the disputed lien need not be the subject of an immediate or concurrent adversary proceeding..." *In re Kellogg-Taxe*, 2014 Bankr. LEXIS 1033, at \*23 (U.S. Bankr. C.D. Cal. Mar. 17, 2014).

In arguing that the liens are in *bona fide* dispute, Trustee argues that Remar may likely appeal the February 16, 2016 Order of this court, which determined in part that the Seay Lien has priority over the Remar Lien because Remar was not a good faith encumbrancer. According to Trustee, if Remar were to successfully appeal the

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District Court Order affirming this court's order, the validity and priority of all liens recorded after the Seay Lien would be in *bona fide* dispute. While this may be true, the deadline to appeal the District Court Order has since passed (Trustee states that the deadline was October 13, 2016). Therefore, this argument may no longer have any merit. But there are apparently disputes over the efficacy of the Remar lien transcending the question of priority. 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 2009 and 2010 deeds of trust, and also seeks judicial determinations that the Seay Lien attached to the Subject Property in a senior position to any Remar liens, there was a violation of the automatic stay, and that the Remar loans were usurious. These issues or Claims for Relief 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)(4) because actual adjudication (or even pendency of a proceeding) is not required; all that is required is some objective basis for a dispute. *Kellogg-Taxe* at\*23.

**4. § 363(f)(5) Compelled Monetary Satisfaction**

Section 363(f) authorizes a bankruptcy trustee to "sell property ... free and clear of any interest in such property of an entity other than the estate, only if ... (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." The leading case in this circuit interpreting § 363(f)(5), *In re PW, LLC*, 391 B.R. 25, 41 (9th Cir. BAP 2008), "parse[s] this paragraph to contain at least three elements: that (1) a proceeding exists or could be brought, in which (2) the nondebtor could be compelled to accept a money satisfaction of (3) its interest." *Id.* at 41. The first prong in particular requires the trustee "to identify a qualifying proceeding under nonbankruptcy law ... that would enable them to strip" the interest by compelling a money satisfaction. *In re Hassen Imports P'ship*, 502 B.R.

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851, 858–59 (C.D. Cal. 2013).

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Trustee appears to have met these three requirements. For prong one, Trustee states that "[u]nder California law there is a legal or equitable proceeding that could compel junior lienholders to accept money satisfaction of its interest, or if insufficient proceeds, to either accept less than the full value of their interest and to have their lien extinguished. If a senior lienholder forecloses on real property the junior liens are extinguished." Motion at 39, lines 5-9. While Trustee seems to cite California foreclosure law generally as a "proceeding" that meets the requirements under § 363(f)(5), Trustee's very general proposition lacks specificity, at least as to prong 2 of the *PW, LLC* requirements. See also *In re Hassen Imports P'ship*, 502 B.R. at 862 (holding that the potential foreclosure proceeding would not satisfy § 363(f)(5) because the lienholders would not receive a money satisfaction). But nevertheless the court agrees with the logic of the argument.

In *In re Jolan, Inc.*, 403 B.R. 866 (Bankr. W.D. Wash. 2009), the court considered "whether §363(f)(5) permits a sale free and clear of liens when the sale price is insufficient to satisfy all liens." *Id.* at 868. In *Jolan*, the chapter 7 trustee attempted to sell personal property of the estate free and clear of liens. Ultimately, the *Jolan* court held that "there are legal and equitable proceedings in Washington in which a junior lienholder could be compelled to accept a money satisfaction..." *Id.* at 869. Therefore, "[b]ecause there are in Washington legal and equitable proceedings by which lienholder may be compelled to accept money satisfactions, § 363(f)(5) here permits a sale free and clear of liens, with the liens attaching to the proceeds, notwithstanding that those proceeds may be insufficient to pay all liens." *Id.* at 870. Although the facts in *Jolan* involved sale of personal property, the court opined that "were the trustee proposing to sell real property, judicial and nonjudicial foreclosures in Washington operate to clear junior lienholders' interests, and their liens attach to proceeds in excess of the costs of sale and the obligation of judgment foreclosed." *Id.* The *Jolan* court subsequently cited to Wash. Rev. Code Ann. § 61.24 in support. Although not expressly stated, the *Jolan* court implied that Wash. Rev. Code § 61.24 satisfied § 363(f)(5) because it was a legal proceeding that compelled lienholders to

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accept money satisfaction.

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California law parallels Wash. Rev. Code Ann. § 61.24. Like Washington, California too provides that the excess proceeds from a trustee's sale are distributed to junior lienholders in order of priority. Wash Rev. Code § 61.24.080 states in part, "Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property, as determined by the court." Similarly, Cal. Civ. Code. § 2924k(a)(3) provides that "[t]he trustee...shall distribute the proceeds...in the following order of priority...to satisfy the outstanding balance of obligations secured by any junior liens." See also *Caito v. United California Bank*, 20 Cal. 3d 694, 701, 576 P.2d 466, 469 (1978)("Following a foreclosure sale and satisfaction of the obligation of the creditor who forecloses, subordinate liens against the foreclosed property attach to the surplus proceeds in order of their priority"). To the same effect is CCP§701.810(d) in the context of a sheriff's sale. In short, because California law provides for a proceeding (a trustee's sale/foreclosure sale or sheriff's sale) that compels a money satisfaction to junior lienholders, § 363(f)(5) is satisfied.

This reasoning has also been followed elsewhere. A New York bankruptcy court noted that the "existence of judicial and nonjudicial foreclosure actions and enforcement actions under state law can satisfy section 363(f)(5)." *In re Boston Generating, LLC*, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010)(citing *In re Jolan, Inc.* at 870). The court then concluded that because "numerous legal and equitable proceeding exist [under state law] by which the [opposing parties] could be forced to accept less than full payment...section 363(f)(5)" was therefore satisfied. *Boston Generating* at 333.

The unifying precept of all of these authorities is that it is not necessary to determine that proceeds of a hypothetical foreclosure or sheriff's sale would necessarily be sufficient to pay the claim in full, but only that if law exists under which if a proceeding is initiated by a senior interest the junior claim is compelled by law to accept whatever comes from the "waterfall" of proceeds as satisfaction of the

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claim in the subject property, §363(f)(5) is satisfied. California has such law.

So, even if there were some question about Remar's conditional consent, the sale can still be approved under §363(f)(5).

**5. Surcharge Under 11 U.S.C. § 506(c)**

"Generally, bankruptcy administrative expenses may not be charged to or against secured collateral...Section 506(c) codifies a common law exception to this rule where a trustee demonstrates 'that the incurred expenses were (1) reasonable, (2) necessary, and (3) beneficial to a secured creditor.'" *In re Choo*, 273 B.R. 608, 611 (B.A.P. 9th Cir. 2002).

The requirements that the expenses be reasonable, necessary, and beneficial to the secured creditor have been met here. First, Trustee has provided detailed reports of the expenses incurred to maintain the Subject Property, all of which appear reasonable. Additionally, the fact that no creditor has objected to reimbursement of these expenses also speaks to their reasonableness. Second, the expenses were necessary. Trustee states that many real estate professionals and potential buyers expressed hesitation to purchase the Subject Property because of the additional expenses required to renovate it. In fact, one party who initially offered \$5,000,000 for the Subject Property later reportedly retracted their offer after deciding that the renovation costs would be too burdensome. In short, numerous parties expressed concern about having to refurbish the property. Because neglecting maintenance of the Subject Property would have exacerbated these concerns and potentially driven away even more potential buyers, the expenses incurred to maintain the property were necessary. Finally, the incurred expenses were beneficial to secured creditors, as the expenses were used to maintain the Subject Property, therefore helping mitigate any additional loss in value. Accordingly, Trustee's requests for surcharge should be approved.

**6. Good Faith Determination under 11 U.S.C. § 363(m)**

The court finds that both the Proposed Buyer and trustees of Proposed Buyer

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are good faith purchasers under § 363(m). The evidence here demonstrates these parties engaged in good faith negotiations at arms-length with Trustee. Note, there is some case law from this circuit that holds a court cannot make a good faith finding under § 363(m) when a sale is approved under both §§ 363(b) and (f), but this authority is not binding and should not be followed. See (*In re PW, Inc.*), 391 B.R. 25 (B.A.P. 9th Cir. 2008). A failure to make a good faith determination would likely torpedo the sale, resulting in the estate and its creditors losing out on a distribution, with more fees incurred to sell the Subject Property, likely at a lower sale price.

**7. FRBP 6004(h) and Real Estate Professional Fees**

The 14-day stay under FRBP 6004(h) should be waived here. As indicated by Trustee, time is of the essence because the Proposed Buyer can purchase the property, and there appears no reason to make the creditors wait any longer for a distribution in a prolonged case that so far has lasted 6 years. Ongoing expenses are considerable. Accordingly, the 14 day stay will be waived. Trustee is requesting that Mr. Tim Smith be paid 5% of the commission of the sale price. Given that Mr. Smith has engaged in extensive marketing efforts, this request appears reasonable. Additionally, this court has already entered an order approving Mr. Smith's employment. No one has apparently objected to the commission. For these reasons the court should approve the 5% commission fee for Mr. Smith.

**8. Col. Seay's Disbursement**

Col. Seay consents to the sale, but only on the condition that Trustee's request that Col. Seay's disbursement be delayed until further court order be denied. Trustee's primary basis for making this request was that the Seay Lien may be in dispute should Remar decide to appeal this court's February 16, 2016 Order. Because no appeal has reportedly been taken and no stay issued, there seems to be no reason to further delay Col. Seay's disbursement. Col. Seay's argument that maintenance expenses should not be deducted from his disbursement is not persuasive. For the reasons explained above, Col. Seay benefitted as a secured creditor from the expenses incurred to maintain the Subject Property, his collateral. Accordingly, Trustee's estimated distribution of

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\$1,534,745.73 to Col. Seay will be approved (as opposed to Col. Seay's estimated distribution of \$1,628,052.905).

*Grant as described above.*

<b>Party Information</b>
--------------------------

**Debtor(s):**

Robert A. Ferrante

Represented By  
Richard M Moneymaker  
Arash Shirdel

**Trustee(s):**

Thomas H Casey (TR)

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

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**8:16-13769 Kevin Michael Treadway**

**Chapter 7**

**#18.00** Motion of Creditors Dish Television, Inc and Shawn A Aguilar to Dismiss Bankruptcy Case with Prejudice Pursuant to 11 USC Sections 707(b)(1) and (3) (A), 349 and 105, or Alternatively Under 11 USC Sections 707(a), 109(g)(1), 349 and 105

Docket 28

**Tentative Ruling:**

These matters are considered together as there is considerable overlap in the principles considered and the arguments raised. They are, respectively, a motion for dismissal with a bar to re-filing and for sanctions. The moving parties, Dish Television, Inc. and Shawn Aguilar, have been engaged over a five year period in litigation with the debtor and his corporation, Caliber One Wireless, Inc. The moving parties have gotten the better of the litigation and now hold judgments. Debtor and his corporation have found it inconvenient or impossible to pay and have tried to utilize bankruptcy filings to avoid or delay enforcement activities. The fact that the bankruptcies coincide with litigation enforcement attempts is not by itself surprising or even unusual. What is more unusual here is that multiple bankruptcies have been filed followed by dismissals, after debtors (Caliber One was twice a debtor also) have repeatedly failed to follow through with the papers and materials required under the LBRs or the Bankruptcy Code. The last dismissal of Caliber One was with a six-month bar to re-filing. In the meantime, and in between bankruptcies, there has occurred much discovery or enforcement effort, largely with a lack of cooperation on debtors' part, or so movants now argue. So now movants seek to put a final end to all of it not only with a dismissal but with a heavy sanctions award as well.

Debtor argues health concerns and blames lack of follow through on his or Caliber's lawyers. The court is not impressed. Movants argue that debtor is hiding assets, but if that were so, maybe having the debtor pinned in a Chapter 7 proceeding would be an advantage, not a disadvantage. The Chapter 7 trustee has not appeared on this motion which is usually a clue that there are no administrable assets involved

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here. So, the only real purpose would be a discharge of the debtor. This is an important goal but one reserved for people acting in good faith with an earnest intent to file what is required on time and to cooperate. The debtor tried to get even more time to file schedules on emergency motion Oct. 5, but this was denied by the court by order entered Oct. 6. This largely was because the debtor has had plenty of time and opportunities to get it right, so asking for yet still more time smells like a dodge. The papers are full of wrangling about whether this is primarily a consumer case or a business case. But it is largely a two –party case in any event.

The case will be dismissed but the bar will be only 180 days, not the three years requested. Maybe after that period the debtor will decide that he is in earnest and is ready to cooperate in full and on time. Although the debtor’s behavior is suspect it is not among the worst the court has seen, so sanctions will be denied, this time; the §109(g) bar will suffice on that score.

*Dismiss with 180-day bar. Sanctions denied.*

<b>Party Information</b>
--------------------------

**Debtor(s):**

Kevin Michael Treadway

Represented By  
Solomon A Cheifer

**Trustee(s):**

Karen S Naylor (TR)

Pro Se

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**8:16-13769 Kevin Michael Treadway**

**Chapter 7**

**#19.00** Motion of Creditors Dish Television, Inc and Shawn A. Aguilar for Imposition of Sanctions Against Debtor and Debtor's Counsel Pursuant to Fed R Bankr P 9011(b), 11 USC § 105, and/or 28 USC § 1927

Docket 37

**Tentative Ruling:**

These matters are considered together as there is considerable overlap in the principles considered and the arguments raised. They are, respectively, a motion for dismissal with a bar to re-filing and for sanctions. The moving parties, Dish Television, Inc. and Shawn Aguilar, have been engaged over a five year period in litigation with the debtor and his corporation, Caliber One Wireless, Inc. The moving parties have gotten the better of the litigation and now hold judgments. Debtor and his corporation have found it inconvenient or impossible to pay and have tried to utilize bankruptcy filings to avoid or delay enforcement activities. The fact that the bankruptcies coincide with litigation enforcement attempts is not by itself surprising or even unusual. What is more unusual here is that multiple bankruptcies have been filed followed by dismissals, after debtors (Caliber One was twice a debtor also) have repeatedly failed to follow through with the papers and materials required under the LBRs or the Bankruptcy Code. The last dismissal of Caliber One was with a six-month bar to re-filing. In the meantime, and in between bankruptcies, there has occurred much discovery or enforcement effort, largely with a lack of cooperation on debtors' part, or so movants now argue. So now movants seek to put a final end to all of it not only with a dismissal but with a heavy sanctions award as well.

Debtor argues health concerns and blames lack of follow through on his or Caliber's lawyers. The court is not impressed. Movants argue that debtor is hiding assets, but if that were so, maybe having the debtor pinned in a Chapter 7 proceeding would be an advantage, not a disadvantage. The Chapter 7 trustee has not appeared on this motion which is usually a clue that there are no administrable assets involved here. So, the only real purpose would be a discharge of the debtor. This is an

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important goal but one reserved for people acting in good faith with an earnest intent to file what is required on time and to cooperate. The debtor tried to get even more time to file schedules on emergency motion Oct. 5, but this was denied by the court by order entered Oct. 6. This largely was because the debtor has had plenty of time and opportunities to get it right, so asking for yet still more time smells like a dodge. The papers are full of wrangling about whether this is primarily a consumer case or a business case. But it is largely a two –party case in any event.

The case will be dismissed but the bar will be only 180 days, not the three years requested. Maybe after that period the debtor will decide that he is in earnest and is ready to cooperate in full and on time. Although the debtor’s behavior is suspect it is not among the worst the court has seen, so sanctions will be denied, this time; the §109(g) bar will suffice on that score.

*Dismiss with 180-day bar. Sanctions denied.*

<b>Party Information</b>
--------------------------

**Debtor(s):**

Kevin Michael Treadway

Represented By  
Solomon A Cheifer

**Trustee(s):**

Karen S Naylor (TR)

Pro Se

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**8:16-13769 Kevin Michael Treadway**

**Chapter 7**

**#20.00** Motion Of Creditors Dish Television, Inc And Shawn A Aguilar To Dismiss Bankruptcy Case With Prejudice Pursuant To 11 U.S.C. §§ 707(b)(1) AND (3) (A), 349 And 105, Or Alternatively Under 11 U.S.C. §§ 707(a), 109(g)(1), 349 And 105

Docket 11

**\*\*\* VACATED \*\*\* REASON: OFF CALENDAR; VOLUNTARY  
DISMISSAL OF MOTION FILED 10/1/16. MOTION WAS REFILED ON  
10/1/16 CORRECTLY.**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Kevin Michael Treadway

Represented By  
Solomon A Cheifer  
Solomon A Cheifer

**Trustee(s):**

Karen S Naylor (TR)

Pro Se