

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

Tuesday, November 08, 2016

Hearing Room 5B

10:30 AM

8:16-14071 Mark Murillo

Chapter 7

#1.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

U.S. BANK TRUST, N.A.
Vs.
DEBTOR

Docket 8

***** VACATED *** REASON: OFF CALENDAR - CASE DISMISSED
ON 11-03-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Mark Murillo

Pro Se

Movant(s):

U.S. Bank Trust, N.A. as Trustee for

Represented By
Randall D Naiman

Trustee(s):

Richard A Marshack (TR)

Pro Se

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

Tuesday, November 08, 2016

Hearing Room 5B

10:30 AM

8:16-14119 Eric F Taylor

Chapter 7

#2.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

CHUNSHAN JIA
Vs.
DEBTOR

Docket 8

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Eric F Taylor

Pro Se

Movant(s):

Chunshun Jia

Represented By
Barry L O'Connor

Trustee(s):

Thomas H Casey (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
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Tuesday, November 08, 2016

Hearing Room

5B

10:30 AM

8:16-13834 Connor Scott McCarl

Chapter 7

#3.00 Motion for relief from the automatic stay PERSONAL PROPERTY

FINANCIAL SERVICES VEHICLE TRUST

Vs.

DEBTOR; RICHARD MARSHACK , CHAPTER 7 TRUSTEE

Docket 10

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Connor Scott McCarl

Represented By
Richard McAndrew

Movant(s):

Financial Services Vehicle Trust

Represented By
Timothy J Silverman

Trustee(s):

Richard A Marshack (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Courtroom 5B Calendar**

Tuesday, November 08, 2016

Hearing Room

5B

10:30 AM

8:15-15334 Kirk P Howland and Karen W Howland

Chapter 13

#4.00 Motion for relief from the automatic stay PERSONAL PROPERTY

AMERICREDIT FINANCIAL SERVICES, INC. DBA GM FINANCIAL
Vs.
DEBTORS

Docket 48

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Kirk P Howland

Represented By
Christopher J Langley

Joint Debtor(s):

Karen W Howland

Represented By
Christopher J Langley

Movant(s):

AmeriCredit Financial Services, Inc.

Represented By
Sheryl K Ith

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
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Tuesday, November 08, 2016

Hearing Room

5B

10:30 AM

8:15-10554 Michael F. Klaus and Nicole Klaus

Chapter 13

#5.00 Motion for relief from the automatic stay REAL PROPERTY

WELLS FARGO BANK, N.A.
Vs
DEBTORS

Docket 55

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Michael F. Klaus

Represented By
Gary Leibowitz

Joint Debtor(s):

Nicole Klaus

Represented By
Gary Leibowitz

Movant(s):

Wells Fargo Bank, N.A.

Represented By
Brett P Ryan

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, November 08, 2016

Hearing Room

5B

10:30 AM

8:16-13705 Bertha A Barajas

Chapter 13

#6.00 Motion for relief from the automatic stay REAL PROPERTY

WELLS FARGO BANK, N.A.

Vs

DEBTOR

Docket 12

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Bertha A Barajas

Pro Se

Movant(s):

Wells Fargo Bank, N.A.

Represented By
Darlene C Vigil

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, November 08, 2016

Hearing Room

5B

11:00 AM

8:11-23675 Sean Willis

Chapter 7

**#7.00 Debtor's Motion to Reconsider Order Denying Motion to Avoid Lien Under
11 USC Section 522(F) (Real Property)**

Docket 30

***** VACATED *** REASON: OFF CALENDAR - DEBTOR'S NOTICE
OF WITHDRAWAL OF MOTION TO RECONSIDER ORDER DENYING
MOTION TO AVOID LIEN UNDER 11 USC \$522(F) FILED 11-01-16**

Tentative Ruling:

Party Information

Debtor(s):

Sean Willis

Represented By
Lenelle C Castille

Movant(s):

Sean Willis

Represented By
Lenelle C Castille

Trustee(s):

John M Wolfe (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, November 08, 2016

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11:00 AM

8:11-26359 Martina Maria Rau

Chapter 7

#8.00 Motion to Avoid Lien with Sky Community Association
(cont'd from 10-4-16)

Docket 45

Tentative Ruling:

Tentative for 11/8/16:

Service on voluntary lienholders still does not comply with FRBP 7004. The court will hear argument as to why it should waive the defect.

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

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11:00 AM

8:11-26359 Martina Maria Rau

Chapter 7

#9.00 Motion to Avoid Lien with Jonathan Neil & Associate, Inc.
(cont'd from 10-4-16)

Docket 46

Tentative Ruling:

Tentative for 11/8/16:
See #8.

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

**United States Bankruptcy Court
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11:00 AM

8:16-10416 Steven Victor Brull

Chapter 7

#10.00 Debtor's Second Motion to Compel Abandonment of Estate Property
(Cont'd from 10-25-16)

Docket 101

***** VACATED *** REASON: OFF CALENDAR - ORDER ON 2ND
MOTION TO COMPEL ABANDONMENT OF ESTATE PROPERTY
ENTERED 11-04-16**

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.

Party Information

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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11:00 AM

8:13-10243 Vito A Francone

Chapter 7

#11.00 Motion For Order Approving Sale of Real Property (32 Coveseide Court, Buena Park, CA) Free and Clear of Liens and Sale Agreement With Non-Filing Spouse, and Ancillary Relief

Docket 173

Tentative Ruling:

The court reads this motion as providing a net \$32,000, approximately, for the estate. This would provide consideration for waiver of Jacobson rights the trustee might otherwise enjoy. Assuming this reading is correct (the motion is not entirely clear) the court can approve the sale/motion as prayed.

Grant.

Party Information

Debtor(s):

Vito A Francone

Represented By
Barry E Borowitz

Trustee(s):

Jeffrey I Golden (TR)

Represented By
Erin P Moriarty

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Hearing Room

5B

11:00 AM

8:13-18057 Banyan Limited Partnership, a Nevada limited partn

Chapter 7

#12.00 Chapter 7 Trustee's Motion RE: Objection to Claim Number 6 by Claimant Lodgen Lacher Golditch Sardi Saunders & Howard, LLP
(Cont'd from 11-1-16 per order approving stip to cont. entered 10-20-16)

Docket 90

***** VACATED *** REASON: OFF CALENDAR - ORDER APPROVING STIPULATION RESOLVING OBJECTION TO CLAIM NO. 6(LODGEN IACHER GOLDITCH SARDI SAUNDERS & HOWARD, LLP) ENTERED 11-03-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Banyan Limited Partnership, a

Represented By
Hutchison B Meltzer

Trustee(s):

Thomas H Casey (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

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Hearing Room 5B

2:00 PM

8:10-10310 Robert A. Ferrante

Chapter 7

#13.00 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)
(Cont'd from 10-25-16)

Docket 285

Tentative Ruling:

Tentative for 11/8/16:

This is the continued hearing on the Trustee's motion to sell the real property commonly known as 518 Harbor Island Drive, Newport Beach ("Property") free of liens under 11 U.S.C. §363(f). The court continued the hearing from October 25, 2016 largely out of due process concerns raised by one of the lienholders, Remar Investments ("Remar"). The court incorporates herein by reference its tentative decision posted for the October 25 hearing. The reader may refer to that tentative opinion for useful background on this matter and for defined terms.

Remar correctly noted that the court in its tentative decision had unexpectedly departed from the relief requested by the Trustee. The Trustee had proposed in his motion to hold disbursement of the sale proceeds owed Col. Seay under the Seay Agreement amounting to approximately \$1,534,000 (but not to hold various other disbursements such as to compensate expenses advanced by realtor Clarence Yoshikane, by the Trustee and by Trustee's counsel amounting in aggregate to approximately \$90,613). On this basis Remar had "consented" to the motion with the understanding that its lien would attach to proceeds. But in its tentative decision the court proposed to disburse the Seay proceeds, believing wrongly that Remar had abandoned its appeal of the February 16, 2016 Order which had declared that Remar was not a good faith encumbrancer. The February 16 Order was affirmed by the

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District Court. The court was not aware of the subsequent appeal by Remar to the Ninth Circuit when it issued its tentative decision for the October 25 hearing. Remar argues persuasively that to disburse the proceeds would be to deny adequate protection of its lien, because there is still a chance that the February 16 Order could be reversed. Section 363(e) clearly requires that in conducting sales adequate protection of all interests must be provided, and in this context Remar has at least a colorable claim to a first lien on the proceeds (after the Bank of America and other senior liens are paid). So Remar is correct that the court should no longer rely on the "consent" prong of §363(f)(2) in authorizing disbursement to Seay, but must more closely examine the alternative prongs discussed in the tentative decision, i.e. §§363(f)(4) [*bona fide* dispute] and (f)(5)[could be compelled to accept money satisfaction]. The court also believes that Remar is correct that the *bona fide* dispute subsection clearly contemplates the existence of proceeds to which the disputed lien could attach. *In re Kellogg-Taxe* (Bankr. C.D. Cal. March 17, 2014 (2014 WL 1016045 at *6. So long as Remar is not indisputably out of the money, it would be wrong to order disbursements to the rival lien creditors such as to Seay without consent. Because the tentative decision reflected erroneous premises, the court thought it consistent with due process that Remar be given further opportunity to address the alternative bases for a sale free of liens, such as under §§363(f)(4) and (5); hence this continued hearing.

The court for similar reasons is not impressed with the shift in position of the Trustee in his latest papers now suggesting that the sale proceeds be disbursed to Seay *subject to* Remar's lien. There is no showing that this provides any greater adequate protection and so does not effectively side step the issue. It is similarly unavailing to argue that Remar could still ask for a stay pending appeal. That is, of course, always the case. But this last ditch remedy does not absolve the court from its § 363(e) duty to ensure that its § 363 order provide "adequate protection" in the first place. Of course, the upshot of all of this is that now it will be argued by Seay that *his* consent to the sale is vitiated as he required immediate disbursement to him as a condition to his consent. Consequently, it would appear that consent under §363(f)(2) is simply off the table to govern disbursements except as to undisputed liens or even to the sale at any level. But the further briefs have assisted the court in focusing on the alternative bases for authorizing the sale, leaving disbursements for another day.

There does not appear to be much dispute that §363(f)(4) applies, i.e. the Remar lien is in *bona fide* dispute. Remar admits as much in its papers. But the logical

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corollary is that the Seay lien is also in dispute, or at least its relative priority vis á vis Remar is in dispute (Trustee, however, contends that the Seay Lien is not in dispute). So the only question is over what can or should be done with the proceeds. Remar is correct that the purpose of the statute is to allow liquidation of estate assets not to be delayed by protracted disputes over liens. But this only works if the liens can then attach to proceeds representing their value for determination on another day. See e.g. *Kellogg-Taxe*, 2014 WL 1016045 at *6 n. 15 citing *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (9th Cir.BAP2001); *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 590–91 (Bankr. Ariz. 2009). So, the court can authorize the sale under §363(f)(4) and the Trustee may close the escrow. Unfortunately, only the indisputably senior liens to Bank of America, the FTB, the EDD and the commission to the sales agent can be disbursed at this time because, as to only these the court sees no opposition and, effectively, consent. As to all other proceeds the disputed liens attach.

But since the parties have (with the encouragement of the court) also briefed § 363(f)(5), the court will analyze whether this is an alternative basis for authorizing the sale. This is a vexing question because the case law is not entirely consistent and the language of the statute is obscure. First, we consider the language of the statute:

"The 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...

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

Any discussion of this question must begin with the preeminent case in the Ninth Circuit, *Clear Channel Outdoor Inc., v. Knupfer (In re PW, LLC)* ["Clear Channel"], 391 B.R. 25, 39-42 (B.A.P. 9th Cir. 2008). The *Clear Channel* court parsed the language of the subsection to find that it contains three elements: (1) that a proceeding exists or could be brought in which (2) the nondebtor could be compelled to accept a money satisfaction of (3) its interest. The *Clear Channel* court found that liens are clearly "an interest" in the property. But the *Clear Channel* court appeared to have trouble with accepting that compelling money satisfaction fitted the situation of an interest such as sold out junior liens where the proceeds are insufficient in a mere foreclosure sale to reach the liens. The *Clear Channel* court cited the precept that words of a statute must be read in their context and so reasoned that such a reading would render subsection 363(f)(3) [such interest is a lien and the price exceeds all

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liens] largely superfluous since in all cases (f)(5) would apply whether or not the proceeds were sufficient. *Id.* at 42-44; *see also id.* at 39 citing *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)("[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). After citing to other authorities interpreting §(f)(5) that have held more or less exactly that, i.e. that full payment is not necessary, only that a mechanism exists to compel extinguishment of a lien for less than payment in full (e.g. *id.* at p. 43 citing *In re Terrace Chalet Apts.*, 159 B.R. at 829; *WBQ P'ship v. Virginia Dep't of Med. Assistance Servs (In re WBQ P'ship)* 189 B.R. 97, 107 (Bankr. E.D.Va. 1995) the *Clear Channel* court implicitly concluded that such "legal or equitable proceeding" must mean something other than a vanilla foreclosure. Looking to harmonize the subsections so as to not render any of them superfluous the *Clear Channel* court gave examples of other kinds of "proceedings" such as specific performance actions to force buy-out arrangements under partnership agreements or enforcing liquidated damages in real estate purchase transactions. *Id.* at 43. The *Clear Channel* court focused on the language "legal or equitable proceeding" as the main reason for necessary separateness from (f)(3). So as to harmonize the subsections the *Clear Channel* court concluded that the trustee must be able to cite to the existence of such proceedings (apparently other than simple foreclosure), which had not been done in that case. *Id.* at 46. But it should be noted that nowhere in the *Clear Channel* opinion does the BAP explicitly state that simple foreclosure proceedings do not qualify as the "proceeding required by § 363(f)(5)."

While the court agrees with *Clear Channel* that the language of the statute is somewhat difficult and that there is considerable overlap between subsections (f)(3) and (f)(5), the court disagrees that it must therefore strip subsection (f)(5) of such an obviously applicable interpretation. *See Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)("The starting point in discerning congressional intent is the existing statutory text...and not the predecessor statutes. It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'). *Clear Channel* has not been universally acclaimed. "[T]he overwhelming weight of authority disagrees with [Clear Channel's] holding that the § 363(m) stay does not apply to the 'free and clear' aspect of a sale under § 363(f) [.]" *In re Nashville Senior Living, LLC*, 407 B.R. 222, 231 (B.A.P. 6th Cir. 2009); *see*

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also Joseph S. Bolnick, Revisiting Clear Channel - Acquiring Real Property in A Section 363 Bankruptcy Sale "Free and Clear" of Liens, 20 Am. Bankr. Inst. L. Rev. 517, 520 (2012)("Clear Channel has limited precedential value and has been subject to considerable criticism, both from commentators and in judicial opinions). Moreover, this court does not believe it is bound by *Clear Channel*. "BAP decisions are not binding on bankruptcy courts, as district court decisions are not." *In re Rinard*, 451 B.R. 12, 21 (Bankr. C.D. Cal. 2011).

"Several courts and commentators have identified state law foreclosure as a qualifying proceeding under the facts of the *Clear Channel* case." *See* Bolnick at 525. "[A] properly conducted foreclosure sale extinguishes all liens which are junior to that of the foreclosing lender (though the junior lienholders will be paid in their order of priority with any surplus remaining after the senior lien is satisfied)." *Id.* at 525-26, *see also Streiff v. Darlington*, 68 P.2d 728, 729 (Cal. 1937)("Assuming the appellants to have been the purchasers at the sale, they acquired title to the real property free from all claims subordinate to their deed of trust or subject to all prior liens and titles."). *See also* Bolnick at 525-26, n. 81("George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 251-52 (2002) ("[F]oreclosure sales are commonly recognized hypothetical proceedings that can satisfy § 363(f)(5).") (footnote omitted)); Joel H. Levitan, Stephen J. Gordon & Richard A. Stieglitz, *Ninth Circuit BAP Dresses Down Lienstripping: Could This Be the Last Dance for Section 363 Sales?*, 27 Am. Bankr. Inst. J., Oct. 2008, at 52. ("Presumably it is clear that in the context of a foreclosure proceeding, if nothing else, a senior secured creditor can credit bid and eliminate the liens of junior secured creditors."); *accord* Frank A. Oswald & Andy Winchell, *Missing the Forest for the Trees in § 363: How the Ninth Circuit's Bankruptcy Appellate Panel Neglected the Big Picture in the Clear Channel Decision*, Norton Bankr. Law Adviser, April 2009, 4, 8 ("[A] cursory review of discussions on the topic unsurprisingly suggests that a real estate foreclosure under state law almost certainly would satisfy the criteria of § 363(f)(5).").

Other courts in the Ninth Circuit since *Clear Channel* have held that it should indeed apply to sales insufficient to clear all liens.

First, consider *In re Hassen Imports P'ship*, 502 B.R. 851, 858-59 (C.D. Cal. 2013). While the interest in *Hassen* was an equitable servitude and not a lien, it was for only this reason that the court concluded that, unlike a lien, the holder could not be compelled to accept a money satisfaction and was therefore outside the language of

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the statute. At the conclusion of the opinion the *Hassen* court makes clear that had the interest been a lien, it could be removed as a sold-out junior in a foreclosure and therefore fit within the meaning of §363(f)(5). *Id.* at 862-63

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 accept money satisfaction.

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"); *Darlington* at 729. To the same effect is Code of Civil Procedure §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

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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 *Boston Generating* 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. *See also In re Gulf States Steel*, 285 B.R. 497, 509 (Bankr. N.D. Ala. 2002)("In this case, each of the claims, liens or interests identified in the Sale Motion could be compelled to accept a money satisfaction...Moreover, the DIP Financing Orders provide that Ableco has a lien on the Proeprty that is senior in priority to such claims, liens or interests. Thus, the holders thereof **would be compelled as a matter of law to release the same in a judicial or non-judicial foreclosure** of the senior liens held by Ableco. See Ala. Code § 35-10-5.")(emphasis added).

The unifying precept of all of these authorities, *Hassen*, *Jolan* and *Boston Generating* and others 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 such 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 claim in the subject property, § 363(f)(5) is satisfied. California has such law that if such a "proceeding" were initiated the junior lien could be stripped from the property to the extent monies resulting were insufficient.

To the extent any argument is raised that the sales free and clear of liens amount to impermissible lien stripping, there does not appear to be much cause for concern:

"[A] sale free and clear of liens can be reconciled with the Supreme Court's opinion in Dewsnup, especially under the facts in this case. First and foremost, the Dewsnup majority went out of its way to make clear that the holding was limited to the facts before it...Given that the Court was concerned that its holding not be applied even to other issues arising under § 506(a) or (d), it

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seems clear that the holding should not be exported to sales under § 363(f)(5) ...[T]he gravest concern expressed by the Dewsnup Court was the fact that the interpretation of § 506(d) that would authorize lien stripping would lead to situations where the collateral of secured creditors would be taken away from the secured creditor and redistributed to the debtor or unsecured creditors. In a § 363 sale of collateral, however, that does not occur. There is no judicial determination of value, there is no judicial reduction in the value of the lien or the extent to which the lien attaches to the collateral. Instead, the value is determined by the marketplace, the collateral is reduced to cash proceeds (in most cases), and the lien attaches to the proceeds to the same extent and with the same priority that the lien attached to the collateral...[T]he lien stripping prohibited by Dewsnup has no corollary in bankruptcy or non-bankruptcy law. To the contrary, the minor alterations of the rights of secured creditors effected by § 363(f)(5) can only be accomplished if the same thing could happen to the secured creditor under established bankruptcy or non-bankruptcy law ("such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.")... Lastly, the process embodied in § 363 of removing liens from one form of collateral and granting replacement liens in another form of economically equivalent collateral is much closer to the universally accepted practice of providing secured creditors with adequate protection for the use, sale or lease of collateral by the trustee on the condition that the trustee provide the affected secured creditor with adequate protection of its interest in the collateral, than it is to the lien stripping prohibited in the Dewsnup case. If the Dewsnup prohibition on lien stripping were to be inappropriately expanded beyond the facts of the Dewsnup case and extended to § 363 sales on the theory that such a sale strips the undersecured creditor of its lien (of course, ignoring the replacement lien on the proceeds of the collateral), that same theory would dictate that authorizing the trustee to use cash collateral upon the condition that the secured creditor be provided with a replacement lien on economically equivalent collateral would also constitute lien stripping prohibited by Dewsnup. Such a theory and result is patently absurd."

In re Gulf States Steel, 285 B.R. 497, 512-14 (Bankr. N.D. Ala. 2002).

The court views the efforts of the Trustee in wringing some value from a property seemingly over encumbered as is the Property a key distinction from cases

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like *Dewsnup*. "Generally, a trustee should not sell property subject to a security interest unless the sale generates funds for the benefit of the unsecured creditors." U.S. Trustee Manual, Handbook for Chapter 7 Trustees, page 4-16, available at <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials>. We do not have a debtor looking to achieve some benefit not generally available in Chapter 7s, like the *Dewsnup* lien stripping. Instead, the Trustee seeks to realize the value created under the Seay Agreement which would otherwise be stymied unless one of the five subsections of §363(f) could apply. The court assumes that in most cases trustees in Chapter 7 will not be selling over encumbered property, and so §363(f)(3) is the end of the story. It is a precept of long standing that Chapter 7 trustees do not sell merely to provide lien creditors proceeds with nothing to go to the unsecureds. But in the more unusual case such as this one there is no logical impediment to viewing foreclosure of senior liens as a "proceeding" sufficient to permit the estate to sell free of valueless liens, since outside of bankruptcy the same result would follow. In the end a lien securing only payment of money, such as trust deed or judgment lien, only gets the holder the value of that relative position, nothing more. In a foreclosure or sheriff's sale by a senior the "waterfall of proceeds" will only go so far, and liens out of the money will get nothing. There is no logical reason why a sale in bankruptcy for market value should be any different. While the court respects the *Clear Channel* analysis in dealing with the awkward language of the statute, the court disagrees that the plain meaning of § 363(f)(5) must therefore be ignored under a precept that some distinction must logically be attributed because of the overlap with subsection (f)(3). As is demonstrated in this case, there can indeed arise logical reasons for that different approach to maximize the trustee's power in extracting value from troubled assets.

For these reasons the Property can be sold free and clear of both the Seay and the Remar liens, with those liens attaching to proceeds; and if and when the winner of that priority struggle is finally determined, the remaining proceeds distributed even though they will not be sufficient to pay all of the liens.

Grant pursuant to §§ 363(f)(4) and (5).

Tentative for 10/25/16:

This is Trustee Thomas H. Casey's ("Trustee") Motion for Order Authorizing

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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 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-

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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 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

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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 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

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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 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

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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. 13, 2015).

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).

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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. 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*

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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 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

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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 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*

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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-Tax* 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. 851, 858–59 (C.D. Cal. 2013).

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

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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 accept money satisfaction.

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

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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 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

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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 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

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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 \$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.

Party Information

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