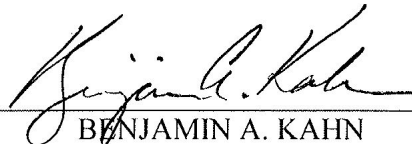


SO ORDERED.

SIGNED this 5th day of May, 2014.




BENJAMIN A. KAHN

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)	
)	
RONALD L. TRUESDALE,)	Case No. 13-10941C-7G
)	
)	
)	
Debtor.)	
_____)	

ORDER

This case came before the Court on the Motion filed on March 5, 2014 [Doc. #37] (the "Sale Motion") by James C. Lanik, Chapter 7 Trustee (the "Trustee") to sell certain real property located at 3 Highgate Court Court, Greensboro, Guilford County, North Carolina (the "Property") free and clear of liens pursuant to 11 U.S.C. §§ 363 and 724. Due and proper notice of the Sale Motion was given. No objections to the Sale Motion were filed. Having considered the record before the Court, the submissions of the parties, and the arguments of counsel, the Court will grant the Sale Motion for the reasons and under the conditions set forth herein.

Procedural Background

1. On July 18, 2013 (the "Petition Date"), the Debtor filed a Voluntary Petition under Chapter 7 of the United States Bankruptcy Code.

2. The Trustee subsequently was appointed as the duly appointed, qualified, and serving Chapter 7 trustee in this case.

3. On March 13, 2014, and after filing the Sale Motion, the Trustee filed his Supplement to Motion Pursuant to 11 U.S.C. § 363 and 724 for Private Sale of Real Property and to Transfer Liens, Claims and Interests to Proceeds of Sale [Doc. #40] (the "First Supplement").

4. The Court conducted an initial hearing on this matter on April 8, 2014 (the "Initial Hearing"). At the Initial Hearing, James C. Lanik appeared as Trustee, and Robert E. Price, Jr. appeared on behalf of the United States Bankruptcy Administrator. No other parties appeared.

5. At the conclusion of the Initial Hearing, the Court expressed its doubts as to whether the Sale Motion could be granted under the then-current posture of the matter,¹ but took the matter under advisement. The Court further authorized the Trustee and the Bankruptcy Administrator to file additional supplemental materials in

¹ Specifically, the Court stated at the Initial Hearing that the failure to respond or object to the Sale Motion by lienholders does not constitute "consent" to a sale free and clear of their liens pursuant to 11 U.S.C. § 363(f)(2). See, e.g., In re DeCelis, 349 B.R. 465 (Bankr. E.D. Va. 2006). The Court further indicated its belief that, in order for a sale to be free and clear of liens pursuant to 11 U.S.C. § 363(f)(3), the sale price must be equal to or exceed "the full face amount of the claims secured by the liens." In re Canonigo, 276 B.R. 257, 263 (Bankr. N.D. Cal. 2002). The Court hereby affirms its oral rulings on those issues for the reasons articulated by the courts in DeCelis and Canonigo.

support of the Sale Motion to address the concerns expressed by the Court at the Initial Hearing.

6. On April 18, 2014, the Bankruptcy Administrator filed his Memorandum of the United States Bankruptcy Administrator [Doc. # 46] (the "BA's Memorandum"), supporting the relief requested in the Sale Motion.

7. Also on April 18, 2014, the Trustee filed his Second Supplement to Motion Pursuant to 11 U.S.C. § 363 and 724 for Private Sale of Real Property and to Transfer Liens, Claims and Interests to Proceeds of Sale [Doc. #47] (the "Second Supplement").

8. On or about April 14, 2014, and in light of the Court's comments at the Initial Hearing, the Bankruptcy Administrator and the Trustee requested that the matter be put back on for further argument.

9. Pursuant to the parties' request, the Court conducted a further hearing on the matter on April 22, 2014 (the "Second Hearing").

10. On April 23, 2014, the Trustee filed his Third Supplement to Motion Pursuant to 11 U.S.C. § 363 and 724 for Private Sale of Real Property and to Transfer Liens, Claims and Interests to Proceeds of Sale [Doc. #48] (the "Third Supplement").

Facts

11. Among the assets included in the estate is the Property.² The Debtor scheduled the value of the Property at \$700,000, and the tax value of the Property is \$755,900. However, according to the

² According to the Motion, the Property is the only asset available for administration in this case. (Sale Motion ¶ 16).

Trustee, the Property is in substantial disrepair, and needs significant mold remediation.

12. On September 17, 2013, this Court entered its Order [Doc. #17] (the "Listing Order") authorizing the Trustee to enter into a listing contract for the property with Kerri Ledbetter and her firm, The Property Source, Inc. Pursuant to the Listing Order, the Property was listed for sale at \$499,900, and has been listed at that price since that time.

13. The Trustee contends that the fair market value of the Property is approximately \$430,000, and, subject to approval of the Sale Motion, has entered into a contract to sell the Property for \$415,000. The buyer is unrelated to the Debtor or the Trustee and the contract represents an arms' length transaction.

14. Prior to the Petition Date, the Property was subject to a foreclosure proceeding commenced by the United States of America, seeking to foreclose its tax liens as set forth below, United States v. Truesdale, et al., Case No. 12-cv-01054 (the "Foreclosure Action"). The Foreclosure Action was stayed with respect to the relief sought against the Debtor and the Property by the filing of this bankruptcy case and the imposition of the automatic stay.

15. The claims bar date in this case has passed. The following claims were filed: (a) Internal Revenue Service, secured in the amount of \$642,518.06 and general unsecured in the amount of \$1,495,730.03; (b) Graybar Electric ("Graybar"), general unsecured in the amount of \$1,598.21; and (c) Guilford County Tax Collector, secured in the

amount of \$10,601.50 and priority unsecured in the amount of \$151.14 pursuant to 11 U.S.C. § 507(a) (8).

16. The Property is subject to the following liens (in descending order of priority):³

<u>Lienholder</u>	<u>Approx. Dollar Amount⁴</u>	<u>Date of Lien</u>
Guilford County Ad Valorem Taxes	10,813.53	2013
Carrington Mortgage Loan Trust, Series 2006-NC3 Asset-Backed Pass-Through Certificates (Deed of Trust, Bk. 6540, Page 1753)	251,276.40	May 25, 2006
United States of America (Tax Lien, 07 M 2599)	359,835.00	July 7, 2007
United States of America (Tax Lien, 07 M 2669)	681,929.91	July 19, 2007

³ The Property previously was subject to judgment liens in favor of Graybar Electric Co. (dated August 14, 2006), Tyson Raynor, Sr. (dated November 30, 2006), and Carruthers & Roth, P.A. (dated August 1, 2007). In the Sale Motion, the Trustee proposed to satisfy the judgment liens of Mr. Raynor and Graybar from the proceeds at closing. However, as set forth in the Supplements, each of these judgment liens either has been released or has been avoided by judgment. The judgment liens of Mr. Raynor and Carruthers & Roth, P.A. were avoided by entry of Default Judgments by the United States District Court for the Middle District of North Carolina in the Foreclosure Action on August 30, 2013. On April 18, 2013, Graybar recorded a Release of Judgment Lien on Specific Real Property in the Guilford County Register of Deeds, Book 7471, Pages 2959-2961, which released its previous judgment lien solely as to the Property.

Adams Farm Community Association, Inc. ("Adams Farm") also previously held a lien against the Property pursuant to a filed Claim of Lien against the Property on August 10, 2011. On May 3, 2013, Adams Farm cancelled the Claim of Lien by filing a Cancellation of Claim of Lien with the North Carolina General Court of Justice, District Court Division, Guilford County, North Carolina, Case No. 11-M-4098.

⁴ The amounts listed in this column are based upon the best information currently available to the Trustee. Nothing in this Order shall be deemed to determine the amount necessary to satisfy the liens under non-bankruptcy law.

Moses H. Cone Memorial Hospital Operating Corp. (Judgment)	23,839.46	August 17, 2007
State of North Carolina (Tax Lien, 07 M 3126)	4,563.68	August 30, 2007
City of Greensboro (08 M 9152)	471.45	April 9, 2008
United States of America (Tax Lien, 09 M 2337)	72,981.13	April 20, 2009
United States of America (Tax Lien, 09 M 2372)	949,413.19	April 23, 2009
United States of America (Tax Lien, 09 M 2951)	643.20	June 15, 2009
State of North Carolina (Tax Lien, 10 M 1408)	325,722.86	February 25, 2010
United States of America (Tax Lien, 11 M 2196)	39,389.29	March 25, 2011
United States of America (Tax Lien, 11 M 1078)	3,245.40	January 7, 2011
United States of America (Tax Lien, 12 M 4038)	10,878.97	September 18, 2012* ⁵
United States of America (Tax Lien, 12 M 4039)	152,886.85	September 18, 2012*
United States of America (Tax Lien, 12 M 4040)	399,591.71	September 18, 2012*
United States of America (Tax Lien, 12 M 4041)	118, 592.38	September 18, 2013*

17. On July 26, 2013, Carrington Mortgage Loan Trust ("Carrington") filed a Motion for Relief from the Automatic Stay with respect to the Property [Doc. #6] ("Carrington's Stay Motion"). The

⁵ According to the Trustee, the tax liens marked with an asterisk appear to be refilings of the tax lien filed at 07 M 2669.

hearings on Carrington's Stay Motion have been repeatedly continued with the consent of Carrington due to the apparent equity in the Property.

18. The Trustee has agreed to carve out \$12,000 from his estimated \$24,000 commission to be paid pro rata to unsecured creditors. In addition to his commission and the broker's commission of five percent (5%), the Trustee estimates administrative claims in the amount of \$8,500.

19. From the sale proceeds, the Trustee proposes to pay the broker's commission in the amount of five percent (5%) and to satisfy the following liens at closing: (a) the Guilford County ad valorem taxes; (b) the Carrington mortgage; and (c) the City of Greensboro (08 M 9152).

20. According to the Third Supplement, Moses H. Cone Memorial Hospital Operating Corp. ("Moses Cone") has consented to the sale of the Property free and clear of its lien pursuant to 11 U.S.C. § 363(f)(2) in exchange for payment in the amount of \$5,000. The Court further understands from the Trustee that the lien of the City of Greensboro (08 M 9152) will be paid in full.⁶

⁶ The Third Supplement does not indicate how either the \$5,000 to be paid to Moses Cone or the approximately \$471.45 to be paid to the City of Greensboro will be funded. No commissions, fees, and/or expenses have been requested or approved by the Court for the Trustee in this case. The authority to sell the Property therefore will be conditioned upon the Trustee obtaining written consents from Moses Cone and the City of Greensboro that are not conditioned upon any payment at closing or the ultimate approval of any commission, fees, and/or expenses in favor of the Trustee. To the extent such commissions, fees, and/or expenses are allowed in favor of the Trustee, any amounts to be paid to Moses Cone and the City of Greensboro by agreement with the Trustee shall be funded solely from an additional carve out from the Trustee's commission or other attorney for the trustee fees to which the Trustee or the attorney for the Trustee otherwise is allowed by the Court as a priority claim pursuant to 11 U.S.C. §§ 326, 330, 503(b), and/or 507(a)(2), unless

21. Therefore, the only two remaining, non-consenting lienholders whose liens will not be satisfied in full at closing are the State of North Carolina and the United States. Each of these liens arises out of unpaid taxes. While neither North Carolina nor the United States filed a response to the Sale Motion, neither has affirmatively consented to the sale free and clear of interests. Such affirmative consent is required in order for the sale to be free and clear of their liens under 11 U.S.C. § 363(f)(2). DeCelis, 349 B.R. at 468-69. As such, the Trustee must avail himself of another section of the United States Bankruptcy Code (the "Code") if he seeks to sell the Property free and clear of the recorded tax liens on the Property in favor of North Carolina and the United States.

Analysis

The Trustee argues in the Motion and the supplements thereto that he should be permitted to sell the Property free and clear of the tax liens of the United States and North Carolina pursuant to 11 U.S.C. §§ 363(f)(2), (f)(3), and (f)(5). For the reasons stated at the hearings and as set forth in footnote 1 above, the Court finds that the Trustee may not sell the Property free and clear of the tax liens under either section 363(f)(2) or section (f)(3).

Having failed to persuade the Court that the Property may be sold free and clear of the tax liens under either of these sections, the

either of these claims are independently entitled to priority payment and such priority is separately allowed by the Court pursuant to sections 507(a) and 724(b)(2). Nothing in this Order should be construed to approve the payment of any proceeds to Moses Cone or the City of Greensboro as an additional or independent administrative expense or priority claim, or to otherwise grant priority for such amounts under 11 U.S.C. §§ 503 and 507.

Trustee, with the support of the Bankruptcy Administrator, argues that the Property may be sold free and clear of the tax liens pursuant to section 363(f)(5). Under the circumstances of this case, the Court agrees, but not for all the reasons argued by the Trustee and the Bankruptcy Administrator.

11 U.S.C. § 363(f)(5)

Section 365(f)(5) provides that a "trustee may sell property under section (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 entity could be compelled, in a legal or equitable proceeding, to accept money satisfaction of such interest." Unfortunately, the courts and commentators have struggled with determining the limitations and scope of the authority conferred by this Code provision. See Canonigo, 276 B.R. at 264 (quoting David G. Epstein et al., bankruptcy §§ 4-7 ("Epstein"), at 403 (West Publishing Co. 1992), for his observation that 363(f)(5) is "a bit of an enigma").

Are Liens "Interests" Under 11 U.S.C. § 365(f)(5)

As most commentators and courts agree, read literally, section 365(f)(5) would permit the sale free and clear of any security interest, since any security interest can be satisfied by payment in full upon sale or otherwise. This literal reading, however, would "render sections 363(f)(1)-(f)(4) superfluous, at least with respect to liens." See Canonigo, 267 B.R. at 264 (citing Epstein at p. 404). The court in Canonigo observes three options in order to avoid this "absurdity:" (i) interpret the section to require that the sale price

must be sufficient to pay the full face amount of the lien unless the lien is avoided (the interpretation suggested by Epstein); (ii) interpret the section to require that the sale price must be sufficient to pay the full face amount of the lien unless the holder could be compelled to accept less than full payment through some legal or equitable proceeding (the solution suggested by 3 Collier on Bankruptcy § 363.06[6], at 363-48-49 (15th ed. 2001)); or (iii) interpret the section not to apply to liens at all (the solution reached by the court in Canonigo). Canonigo, 267 B.R. at 264-65.

In reaching the conclusion that "section 363(f)(5) was not intended to apply to liens at all, only other types of interests in property," the court in Canonigo found that, if section 363(f)(5) were interpreted to apply to liens and were read literally, such a reading would "'swallow-up (f)(1)-(f)(4).'" Id. (quoting In re Beker Industries Corp., 63 B.R. 474, 478 (Bankr. S.D.N.Y. 1986)). While this Court agrees that reading section 363(f)(5) literally would "swallow-up" sections 363(f)(1)-(f)(4) and that the section should not be read literally since such a reading would result in an "absurdity," see U.S. v. McLymont, 45 F.3d 400, 401 (11th Cir. 1995) ("the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results"), this Court does not believe that section 363(f)(5) must be read to exclude liens in order to avoid such absurdity and to have all five subsections work effectively and have non-redundant application.

First, there is no indication that Congress intended to exclude liens from the types of "interests" addressed in section 363(f)(5),

and the plain reading of the statute, along with the use of the term "interest" elsewhere in the Code, demonstrates that liens are among those interests contemplated by section 363(f)(5). See Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 41-42 (9th Cir. BAP 2008).⁷ As observed by the court in Clear Channel, the introductory sentence in section 363(f) refers broadly to "any interest," and each subsection then refers back to "such interest." Id. at 42. Section 363(f)(3) itself says it applies if "such interest is a lien," thereby making clear that liens are among the "interests" contemplated by the lead-in sentence. Id. If Congress intended to exclude liens from "such interests" in each other subsection, or at least in section 363(f)(5), it easily could have done so expressly. Id.

Moreover, it is unnecessary to exclude liens from section 363(f)(5) in order to give each subsection of 11 U.S.C. § 363(f) meaningful, non-redundant operation. Section 363(f)(5) only would "swallow-up" section 363(f)(3) if it is assumed that section 363(f)(3) requires that all liens be paid in full from the proceeds of any such sale in every instance, which is the assumption that the Court in Canonigo makes. See Canonigo, 267 B.R. at 263. Based upon this assumption, the court in Canonigo states that, "[i]f section 363(f)(5) is read to apply to liens, read literally, it is puzzling why that section does not require that the sale price be sufficient to provide a money satisfaction of the secured claim." Id. This Court does not

⁷ Clear Channel has been criticized for its interpretation of 11 U.S.C. § 363(m). See, e.g., In re Thorp Insulation Co., 2011 W.L. 1378537, at * 1 (Bankr. C.D. Cal. 2011) (and cases cited therein). This Court, however, finds its discussion of the inclusion of liens among those "interests" contemplated by section 363(f)(5) persuasive.

find it puzzling, however, because neither section 363(f)(3), nor section 363(f)(5) requires full satisfaction of any liens in order for the court to approve the sale free and clear of such liens.

By its plain terms, section 363(f)(3) does not involve a payment or satisfaction test at all. Instead, it requires that, in order for a court to authorize a sale free and clear of liens, the sale "price at which such property is to be sold [must be] greater than the aggregate value of all liens on such property" 11 U.S.C. § 363(f)(3). While the Court fully agrees with the court in Canonigo (and for the reasons stated therein) that a court should not authorize a sale free and clear of liens pursuant to section 363(f)(3) "unless the sale price is greater than the full face amount of all claims secured by the liens . . . ," Canonigo, 276 B.R. at 261 (emphasis added),⁸ the Court does not believe that this provision requires the sale price to be sufficient to ensure that the liens actually and ultimately are paid in full from the proceeds of the sale.

For example, and as discussed below, by authorizing the subordination of certain tax liens to certain unsecured priority claims, 11 U.S.C. § 724(b) specifies a disbursement scheme by which the proceeds of property which is subject to certain tax liens may be insufficient to pay all such liens in full even though the sale price might have exceeded the aggregate face amount of the liens. If section 363(f)(3) required the sale price to be sufficient to pay the aggregate amount of the liens (along with paying the priority claims

⁸ Since the sale price in this case is less than the aggregate face amount of all liens on the Property, the Court may not authorize this sale free and clear of liens pursuant to 11 U.S.C. § 363(f)(3).

under section 724(b)), then there would be no need for section 724(b) to subordinate the tax liens to ensure payment of priority claims. On the contrary, and pursuant to a disbursement under section 724(b), a sale price may be greater than the aggregate face amount of all claims secured by liens (and thereby meet the requirements of section 363(f)(3) for a sale free and clear of such liens), but still ultimately be insufficient to result in the full payment of such liens, because the Code specifically authorizes the subordination of such liens to payment of other claims. Therefore, the assumption made by the court in Canonigo that the liens must be paid in full under section 363(f)(3) is inaccurate. It was this assumption, coupled with its parallel assumption that section 363(f)(5) similarly required satisfaction in full of the affected interest, that led the court in Canonigo to conclude that applying section 363(f)(5) to liens would render section 363(f)(3) superfluous. Canonigo, 276 B.R. at 265. Congress easily could have required the sale price be sufficient to ensure the actual payment of the full face amount of all allowed claims which are secured by liens on the property, but it did not.⁹

If section 363(f)(3) is read in this way, and if section 363(f)(5) similarly does not require full payment of liens, the application of either of these sections does not "swallow-up" the other, and, in fact, all five subsections of 363(f) work cohesively,

⁹ If Congress intended for this section to require actual full payment, it could have written section 363(f)(3) to provide: ". . . 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 and any additional amounts to be distributed under section 724(b) of this Title." Of course, if it had done this, subordination of any tax lien(s) as provided in section 724(b) would have been entirely unnecessary.

cooperatively, and without redundancy, as illustrated by the facts in this case. For example, if the sale price were sufficient to equal or exceed the face amount of all liens, section 363(f)(3) would permit the sale free and clear of such liens even in the absence of consent of both the tax and non-tax lienholders (section 363(f)(2)) and even in the absence of a legal or equitable procedure by which a court could compel the tax and non-tax lienholders to accept satisfaction of their liens for less than the full face amount (363(f)(5)). The proceeds then would be distributed pursuant to applicable provisions of the Code, which might or might not result in payment in full of the tax liens. However, in this case, the sale price is not greater than the face amount of all the liens, and therefore it is insufficient to permit the Court to authorize the sale free and clear of liens under section 363(f)(3).

When the sale price is insufficient to cover the face amount of the liens (and therefore section 363(f)(3) does not apply), a court still may authorize the sale under section 363(f)(5) if the lienholder at issue can be compelled to have its lien satisfied in a legal or equitable proceeding. See Clear Channel, 391 B.R. at 43 ("it is not the amount of the payment that is at issue, but whether a 'mechanism exists to address extinguishing the lien or interest without paying such interest in full'" (quoting In re Gulf States Steel, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002))). Conversely, if there is no such mechanism, as there likely is not in this case with respect to liens other than the tax liens, section 363(f)(5) would not permit the sale

even if the sale price were greater than the face amount of the liens. In that case, a trustee would have to rely upon section 363(f)(3).

For the reasons set forth below, solely with respect to the tax liens at issue in this case, section 724(b) provides just such a mechanism as contemplated by section 363(f)(5), but not with respect to any non-consenting, non-tax lienholders. In order to sell the Property free of the liens of non-tax lienholders, the Trustee must obtain their consent pursuant to section 363(f)(2), which he contends he has done in this case. The limited application of the "carve-out" under section 724(b) to tax liens demonstrates that this interpretation does not swallow-up the authority otherwise conferred under section 363(f)(3), since section 724(b) does not provide any mechanism for subordinating non-tax liens. See In re A.G. Van Metre, Inc., 155 B.R. 118, 122 (Bankr. E.D. Va. 1993) (explaining that section 724(b) "sets forth a definite exception" to the rule that the sale price must satisfy all liens in full by subordinating payment of statutory tax liens to the payment of administrative expenses up to the amount of the tax liens while leaving senior and junior non-tax lienholders undisturbed).

11 U.S.C. § 365(f)(5)

Determining the extent and precise type of legal or equitable proceeding that provides a sufficient mechanism to extinguish a lien without paying the interest in full has proven to be a Gordian Knot for the courts and commentators.

The Bankruptcy Administrator argues that North Carolina's foreclosure process, see N.C. Gen. Stat. § 45-21.31, and the cramdown

provisions of section 1129(b), each provide independent and sufficient mechanisms for selling property free of junior liens to satisfy the requirements of section 363(f)(5). These arguments find some support in case law. See, In re Boston Generating, LLC, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010) ("the Court finds that because the Second Lien Lenders could be compelled under state law to accept general unsecured claims to the extent the sale proceeds [of a foreclosure sale] are not sufficient to pay their claims in full, section 363(f)(5) is satisfied"); and In re Gulf States Steel, Inc. of Alabama, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (finding that the cramdown provisions of section 1129(b) constitute the type of procedural mechanism contemplated by section 363(f)(5)). But see Clear Channel, 391 B.R. at 45-46 (disagreeing with those courts, and finding that the cramdown provisions of section 1129(b) do not satisfy section 363(f)(5) without requiring any of the procedural and substantive protections of confirmation). With respect to cramdown, regardless of which line of cases is correct, cramdown under section 1129(b) is not applicable or available in a Chapter 7 case, and therefore is not such a mechanism available in this case. For the same reason, this Court doubts that the fact junior liens can be wiped out by the occurrence of a foreclosure in state court satisfies section 365(f)(5). Foreclosure is not a remedy available to the Trustee in a Chapter 7 case any more than cramdown is. Moreover, if a sale could be made free and clear of any lien that could be wiped out by foreclosure of a senior lien in a hypothetical state court foreclosure, there never would be any circumstance to which section 363(f)(3) would apply, and that section

would be rendered entirely superfluous. Nevertheless, even if foreclosure or cramdown were available in a Chapter 7 case, which they are not, the Court need not decide whether state foreclosure law or the cramdown provisions under section 1129(b) are two of the potential types of proceedings contemplated by Congress under section 363(f)(5) to permit sale free and clear of junior liens because the Court determines that section 724(b) provides a sufficient procedural mechanism with respect to the tax liens at issue in this case.¹⁰

11 U.S.C. § 724

Section 724(b) provides as follows:

Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than . . . a . . . tax lien . . . in connection with an ad valorem tax . . .) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed -

- (1) first, to any holder of an allowed claim secured by a lien on such property . . . that is senior to such tax lien;
- (2) second, to any holder of a claim of a kind specified in section 507(a)(1)(C) or 507(a)(2) . . . , 507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;
- (3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;
- (4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

¹⁰ See PDK Labs., Inc. v. Drug Enforcement Admin., 362 F.3d 786, 799 (C.A.D.C. 2004) ("'[T]he cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'") (Roberts, J., concurring in part and concurring in the judgment).

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

11 U.S.C. § 724.

In In re A.G. Van Metre, Jr., Inc., 155 B.R. 118 (Bankr. E.D. Va. 1993), aff'd 16 F.3d 414 (Table), 1994 W.L. 12028 (4th Cir. 1994), the court permitted a sale of property free and clear of liens pursuant to section 363(f)(3) though it was unclear if the sale would result in the satisfaction in full of the tax liens on the property. While the sale price of the property in that case appeared to be sufficient to pay the liens in full even after subordination of the lien to all priority claims allowed and paid under section 724(b), the court determined that the actual occurrence of such full payment was not required by section 363(f)(3) or section 363(e) in order to authorize a sale free and clear of liens. Id. at 121-23.

The taxing authority in Van Metre argued that permitting such a sale, and then permitting its interest to be satisfied by the disbursement scheme under section 724(b), violated the requirement to provide it with adequate protection as required by section 363(e). Id. at 119. Section 363(f) permits a sale free and clear of liens only if the sale is authorized under sections 363(b) or (c), and section 363(e), in turn, requires that the court provide adequate protection to any entity with an interest in the property to be sold under those sections. 11 U.S.C. § 363. The Van Metre court previously had determined that the transfer of all liens to proceeds satisfied the requirement for adequate protection. Van Metre, 155

B.R. at 119. The taxing authority argued that to satisfy the transferred lien under section 724(b) without full payment thereof after the fact would be inequitable, implying that permitting this would have the effect of rendering the purported adequate protection illusory. Id. The court rejected this argument.

In coming to this conclusion, the court observed that “[i]t would be illogical to require full satisfaction of statutory tax liens as a condition to the approval of sales pursuant to § 363(f)(3) when § 724(b) explicitly provides otherwise.” Id. at 121. The court further noted that the claim secured by the tax lien would be rendered unsecured “if sale proceeds are exhausted during payment of junior consensual lienholders.” Id. at 123. The Fourth Circuit affirmed the decision of the bankruptcy court in Van Metre in an unpublished decision, stating that the taxing “Board’s central argument is that a trustee’s sale of encumbered property free and clear of a tax lien pursuant to 11 U.S.C. § 363 precludes subordination of the tax lien under section 724(b). We disagree, and affirm on the reasoning of the bankruptcy court.” In re A.G. Van Metre, Jr., Inc., 16 F.3d 414 (Table), 1994 W.L. 12028, at *1 (4th Cir. 1994).

While the court in Van Metre was considering the requirements for section 363(f)(3), its rationale supports a finding that the distribution scheme under section 724(b) is a type of mechanism that can be used in a Chapter 7 case to compel satisfaction of a tax lien as contemplated by section 363(f)(5).¹¹ It is important that the court

¹¹ While the court in Van Metre was applying section 363(f)(3), its rationale directly indicated that the same result would occur under section 363(f)(5). In reaching its decision, the court in Van Metre rejected the holding in In

in Van Metre did not use section 363(f)(3) to satisfy any interest or lien of the taxing authority. By transferring that lien to the proceeds, the interest (in that case a lien) was preserved in the proceeds. The court correctly reasoned that it was the distribution scheme under section 724(b) that permitted and effectuated (and, by use of the term "shall," in fact required) the satisfaction of the interest through the subordination mechanism in that section. Id. at 121-23.

The court in Clear Channel did not address section 724(b), but reasoned that allowing either section 1129(b) or any other Code section to satisfy section 363(f)(5) relies upon circular reasoning. Clear Channel, 391 B.R. at 46. This observation, however, conflates effectuating a sale free and clear of liens to "satisfaction" of the affected interest through a legal or equitable procedure as contemplated by section 363(f)(5).¹² As set forth above, when liens are transferred to proceeds, while removing those tax liens from the property to be sold, the court is not "satisfying" the tax liens under section 363(f)(5). The tax liens will be satisfied pursuant to the

re Stroud Wholesale, Inc., 47 B.R. 999, 1003 (E.D.N.C. 1985), which held that full payment of liens is required in order to satisfy section 363(f)(5). The court in Van Metre noted that the Fourth Circuit had affirmed the result in Stroud, while "not necessarily agree[ing] with all that was said in the opinion . . . ," 11 U.S.C. § 363(f)(1), and also noting that section 724(b) provided an exception to this general rule in any event. Id. at 121 and n. 4.

¹² The court in Clear Channel stated further that the procedure to compel satisfaction of the lien must be found outside the Bankruptcy Code. Id. This Court sees no logical or textual reason for such a conclusion. In fact, section 363(f)(1) specifically contemplates that a sale may be free and clear of liens and interests if "non-bankruptcy law permits sale of such property free and clear of such interests." Therefore, if Congress intended to limit section 363(f)(5) to non-bankruptcy law, it obviously could have done so as it expressly did in section 363(f)(1).

subordination and disbursement procedure set forth in section 724(b). Several courts have recognized this distinction, and concluded that section 363(f)(5) authorizes the court to approve a sale of property free and clear of tax liens in a Chapter 7 case, with satisfaction of the interest effectuated by the procedure in section 724(b). See Grand Slam U.S.A., Inc., 178 B.R. 460, 464 (E.D.N.C. 1995) (reversing the bankruptcy court, and holding that "Section 724(b)(2) . . . falls squarely within the language of Section 363(f)(5), inasmuch as it creates a mechanism by which lien creditors are compelled to receive less than full payment for their interest"); In re Oglesby, 196 B.R. 938, 944 (Bankr. E.D. Va. 1996) (per Judge Tice, following up his previous decision in Van Metre; concluding that the court could approve a sale free and clear of a tax lien over the objection of a taxing authority pursuant to sections 363(f)(5) and 724(b)); In re Healthco Intern, Inc., 174 B.R. 174, 177 (Bankr. D. Mass. 1994) ("[S]ubparagraph (f)(5) is satisfied here. The interest in question is a tax lien. Section 724(b) . . . subordinates tax liens to administrative expense priority debt and liens which are otherwise junior to the tax lien. . . . [T]he subordination can be a full or partial subordination. That means the County could be compelled to accept a money satisfaction of its interest by payment of less than the full amount of the debt."). This is the correct distinction, and the Court therefore concludes that section 724(b) is the type of legal or equitable proceeding contemplated by section 363(f)(5) under which the tax lienholder can be compelled to accept satisfaction of its lien.

11 U.S.C. § 363(b)

Just because a court may permit a sale free and clear of liens under one of the subsections of section 363(f) does not mean that it must or should approve the sale. In considering whether to approve a proposed sale, a bankruptcy court must ensure that the sale maximizes the value of the estate, and must determine that the sale is consistent with the purposes of the Code. See In re Lahijani, 325 B.R. 282, 288-89 (9th Cir. BAP 2005) (noting that, in approving sales under section 363(b), a bankruptcy court's obligation is to ensure optimal value is realized by the estate under the circumstances of the particular case, and, while deference is given to the trustee, ultimate responsibility of determining that the sale is consistent with the purposes of the Code lies with the court); and In re Montgomery Ward Holding Corp., 214 B.R. 147, 153 and 154-55 (Bankr. D. Del. 1999) (holding that the bankruptcy court has considerable discretion in approving and tailoring sale orders under section 363(b), and should be allowed substantial freedom to tailor its orders to meet the circumstances of the case).

This is an unusual case. There only were three proofs of claim filed. One of these claims was filed by the Internal Revenue Service, and another was filed by Guilford County, North Carolina for property taxes. The only non-tax general unsecured claim was filed by Graybar. Nevertheless, what is clear in this case is that there is a damaged piece of property with limited marketability, a ready and willing buyer who has signed a contract, and that a sale outside of bankruptcy through the Foreclosure Action, if any such sale is even feasible

other than through a credit bid by the IRS, would result in no recovery whatsoever to unsecured creditors or to the non-tax junior lienholders. By voluntarily carving out funds from his commission and fees, the trustee will obtain value for a non-tax lienholder and unsecured creditors in this case, two constituencies that undoubtedly will recover nothing from a tax or foreclosure sale outside of the bankruptcy. In addition, while silence does not constitute consent for the purposes of section 363(f)(2), no party in interest has objected to the relief requested. Therefore, the Court is persuaded in this case that it should approve this sale, and that it may approve it free and clear of liens pursuant to 11 U.S.C. § 363(f)(5) for the reasons stated herein.

NOW, THEREFORE, IT HEREBY IS ORDERED, ADJUDGED, AND DECREED as follows:

1. The Sale Motion will be GRANTED, provided that the Trustee files within ten (10) days of this entry of this Order written evidence of the consent to the sale free and clear of liens by Moses Cone and the City of Greensboro ("Consents"), which Consents do not require any payment to those entities at closing. Those Consents may indicate an understanding and agreement with the Trustee that when and if he is allowed a commission and/or other fees and expenses, that any such authorized payments will be distributed: (a) first to the payment of any claims allowable under section 507(a) other than commissions, fees, and expenses payable to the Trustee; (b) second, in the amount of \$12,000, to the estate for the benefit of general unsecured creditors; (c) third, to make the agreed upon payments to these

lienholders; and (d) fourth, to the Trustee in satisfaction of any remaining unpaid amounts of his approved fees, commissions, and expenses, if any. However, the Consents shall not be contingent upon any amounts actually being allowed to the Trustee or any such allowed amounts being sufficient to make the agreed payments to the lienholders.

2. If the Consents required by paragraph 1 are not timely filed, the Sale Motion will be denied without further notice or hearing.

3. If the Consents are timely filed and comply with the provisions of this Order, the Court will promptly enter an Order granting the Sale Motion without further notice or hearing authorizing the sale of the Property free and clear of liens and interests, authorizing the satisfaction of the ad valorem tax liens of Guilford County and the lien of Carrington Mortgage at closing, and transferring all remaining liens and interests to the remaining proceeds.

[END OF DOCUMENT]

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