

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re:

Ingersoll Financial, LLC

Chapter 11

Case No.: 6:17-bk-07077-KSJ

Debtor.

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**MEMORANDUM OF LAW**

The Debtor in Possession, Ingersoll Financial, LLC, files this Memorandum of Law in Support of its Motion to Sell Free and Clear of all Liens and Interests (Doc No. 177) and says:

**The Parties in Interest Received Adequate Notice of the Sale**

1. Section 363(b)(1) states that the “Trustee after notice and a hearing may sell...other than in the ordinary course of business property of the estate....” The phrase “after notice and hearing” is a defined term in Section 102(1) of the Bankruptcy Code. That section provides:

(1) “after notice and a hearing” or a similar phrase-

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances....

2. The Debtor retained the firm of BCHH Inc. (Doc. No. 140), as its Title Agent who thoroughly searched every available resource for parties in interest including the public records, performed municipal lien searches, and home owner association records.

3. The Debtor employed BMC, Inc. (Doc. No. 147) as its Noticing Agent to provide notice to all parties in interest identified by BCHH of the Sale. BMC has filed certificates of service of the notices given:

Doc. No. 185                      Sale Motion

Doc. No. 186                      Sale Motion

Doc. No. 201                      Sale Motion

Doc. No. 214                      Sale Motion

4.        Moreover, because the details of the Auction Sale were included in the Plan and Disclosure Statement (Doc. No.'s. 206 and 207) as well as the Sale Motion (Doc. No. 177) The which were both served on all parties in interest is separate mailings, all parties in interest received notice of the method, details, timing and procedures of the sale multiple times. The following proofs of service were filed:

Doc. No. 218                      Plan and Disclosure Statement

Doc. No. 222                      Plan and Disclosure Statement

Doc. No. 226                      Plan and Disclosure Statement

Doc. No. 239                      Plan and Disclosure Statement

5.        The Auction Sale was widely advertised (See Proffer of Todd Wohl Doc. No.    ) to give notice to all unknown parties.

6.        Accordingly, adequate and appropriate notice under the circumstances has been given to all parties in interest and all parties in interest have been afforded ample notice and opportunity to object to the Auction Sale and request to have any objections heard by this Court.

7.        No objections have been filed to the Auction Sale or its methodology.

**The Price of Property Sold in a Commercially  
Reasonable Sale is the Proper Determination of the Value of the Property**

8. The record will show that the Auction Properties were sold in commercially reasonable manner. Under those circumstances, the sales price is a proper determination of value for Section 506(a) of the Bankruptcy Code. *In re Kids Stop of America, Inc.*, 64 B.R. 397, 401 (Bankr.M.D.Fla.1986) “If there is to be a disposition of the property, then the valuation of the collateral should be based on the funds received from the disposition so long as the disposition is commercially reasonable.”. *See also 4 Collier on Bankruptcy*, ¶ 506.01 at 506.03[6][b] (16th ed.) “[R]egardless of the purpose of the valuation, if an actual sale (or equivalent disposition) is to occur, the value of the collateral should be based on the consideration to be received by the estate in connection with the sale, provided that the terms of the sale are fair and were arrived at on an arm’s-length basis.” *See also, In re Toy King Distributors*, 256 B.R. 1, 191 (Bankr. M,D, Fla. 2009)

**The Auction Sale Qualified as a Sale Free and Clear of all Liens under Section 363(f)**

9. A court may authorize a sale free and clear of an interest in property if the sale fits within the categories listed in Section 363(f) of the Bankruptcy Code. If the sale fits into just one of the five categories, it will qualify for a sell a property free and clear of an interest.

**Failure to Object After Adequate Notice is Consent Under Section 363(f)(2)**

10. Section 363(f)(2) permits a sale free and clear of an interest in property if the holder of the interest consents. Those creditors that have voted for the plan, including the creditor who is the largest creditor, RS Lending, have consented to the sale. However, no objections were filed to the Auction Sale, though there was great care to notify all parties in interest. Such failure to object is consent for purposes of §363(f)(2) *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, (7th

Cir. 2002), cert. denied, 538 U.S. 962, 123 S. Ct. 1769, (2003) (failure to object may constitute consent, if there was adequate notice); *Veltman v. Whetzal*, 93 F.3d 517, (8th Cir. 1996) (failure to object to proposed sale free and clear of all liens and interests constitutes consent); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343 (E.D. Pa. 1988) (failure to object after notice constitutes implied consent); *Hargrave v. Pemberton; In re Tabore, Inc.*, 175 B.R. 855 (Bankr. D.N.J. 1994) (failure to object to notice of sale or attend hearing deemed consent to sale for purposes of section 363; *In re Gabel*, 61 B.R. 661, (bank. W.D. La. 1985) (notice and failure to object constitutes consent under §363(f)(2)). But see *In re Roberts*, 249 B.R. 152, (Bankr. W.D. Mich. 2000) (Consent cannot be implied from failure to object).

### **The Value of All Liens is Determined by the Value of the Property as of the Sale**

11. Section 363(f)(3) permits the Debtor to sell free and clear of an interest in property if the 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. There is a split of authority on the meaning of the phrase “value of all liens.” One line of cases interprets the phrase to mean the face amount of the lien. See, e.g., *In re PW, LLC*, 391 B.R. 25, (9<sup>th</sup> BAP 2008). The other line of cases point out that if the sale free and clear must be enough to pay the face amount of all liens, the subsection would not permit any interest to be removed from the property. As stated by *In re Bay Circle Properties, LLC* 2017 WL 639769, at 3 (Bankr. N.D. Ga 2017) “If Section 363(f)(3) were held to require payment in full of the face amount of all liens, there would seem to be little reason for the provision. A sale which results in the payment in full of the liens, of course, is free and clear of them.”

12. Moreover, the statute uses the word “value,” and hold that the “value of the lien” seems to be a reference back to Section 506(a) of the Bankruptcy Code. Section 506(a) provides in relevant part:

An allowed claim of a creditor secured by a lien on property [of the estate] ... is a secured claim to the extent of the *value* of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the *value* of such creditor's interest ... is less than the amount of such allowed claim. Such *value* shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

13. In *In re Beker*, 63 B.R. 474, 476 (Bankr. S.D.N.Y.) the court was persuaded that the term “value” in §506(a) informed the meaning of “value” in §363(f)(3). It found the language in the last sentence of Section 506(a) simply too compelling to come to another interpretation. *Id.* at 477.

14. The Court did go on to recognize that there was a general rule that property of estate should not be sold for less than the total of all liens. *Id.* However,

In determining whether there are special circumstances, it is to be remembered that the purpose of the general rule is to protect the secured creditor from a debtor cashing out its collateral and leaving it with an unsecured deficiency claim in the absence of special circumstances, and the determinations noted above. The cases that invoke the general rule usually concern secured creditors who desire foreclosure. *Id.* at 478

15. Here RS Lending is in support of the sale. The alternative of foreclosure would be a disaster for RS Lending, requiring it to engage in over 200 foreclosures in over 20 states. The other creditors in this case are also in a position to gain. Those creditors, largely taxing authorities, are saved going through a time-consuming forfeiture process that will make it years before the properties are again functioning tax payers. These circumstances of these properties themselves, justify the sale for less than the total amount of the liens.

16. In *Beker* the court also found the deteriorating nature of the collateral was also recognized by the court as a special circumstance. *Id.* Accord, *In re Lake Oneida Development, Inc.*, 114 B.R. 352, 357, (Bankr. N.D.N.Y. 1982). The Auction Properties are vacant residences which deteriorate more every day. Accordingly, even if there was an objection, or if a creditor

files an objection at the last minute, circumstances exist to justify a sale for less than the value of all liens.

17. Both the *Beker* and the *Oneida* courts found that the sale of the property was a fair determiner of the value of the property, and adequately protected the interests of the secured creditors, even those who were not fully paid by the sale.

**The Holders of Interests in the Property Could be  
Compelled to Take a Monetary Satisfaction Under Section 363(f)(5)**

18. Section 363(f)(5) permits the debtor to sell property free and clear of an entity's interest in property "if such entity could be compelled in a legal or an equitable proceeding to accept a monetary satisfaction of such interest." Some courts hold that to fit under this section the claim must be subject to monetary valuation and bound to accept a monetary distribution in a Chapter 7 case. See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290-291 (3d Cir. 2003). *In re Jolan*, 403 B.R. 866 (Bankr. Wash. 2009) points out that there are several non-bankruptcy proceedings which permit a sale to occur even if a lienholder is not paid in full. For instance, a senior secured party's disposition of collateral after under the default remedies provided in part VI of Article 9, a Federal tax lien sale 26 U.S.C. §§ 6335, 6339(c), and 6342(c). Another line of reasoning is that a creditor may be compelled to accept less than the full amount of their claim through cramdown in Section 1129(b)(2) in Chapter 11. *In re Terrace Chalet Apartments, Ltd*, 159 B.R. 821 (Bankr. N.D. Ill. 1993), or under Section 724(b) in a Chapter 7 case. *In re Grand Slam USA, Inc.* 178 B.R. 460 (Bankr. E.D. Mich. 1995). But see, *In re PW, LLC*, 391 B.R. 25, (9<sup>th</sup> BAP 2008).

Accordingly, there is ample authority for this court to approve the Auction Sale free and clear of all liens and interests, and determine that those liens that are junior liens have a secured lien only to the extent of the value of the property determined by the purchase price less the value of the senior liens.

**CERTIFICATE OF SERVICE**

I certify that a copy of this memorandum of law, with all attachments, has been served on November 7, 2018, on all “filing users” through the CM/ECF filing system.

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