

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,)
)
)
 Plaintiff,)
)
 v.)
)
 EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,)
)
 Defendants.)

Case No. 18 C 5587
Judge John Z. Lee

ORDER

Before the Court are numerous objections [359][362][363][398][455][502][504][505] to Magistrate Judge Young B. Kim’s orders of May 2, 2019 [352], May 22, 2019 [382], July 9, 2019 [447], and August 19, 2019 [483]. For the reasons stated herein, the Court overrules the objections and adopts Magistrate Judge Kim’s rulings in full.

Background

On August 15, 2018, the United States Securities and Exchange Commission (“SEC”) filed a complaint against Defendants Equitybuild, Inc. (“Equitybuild”); Equitybuild Finance, LLC (“Equitybuild Finance”); Jerome H. Cohen; and Shaun D. Cohen. *See* Compl., ECF No. 1. According to the complaint, Defendants operated a Ponzi scheme through which they fraudulently induced more than 900 investors to invest at least \$135 million in residential properties on the south side of Chicago. *Id.* ¶¶ 1–2. Shortly after the filing of the complaint, the Court appointed a Receiver to marshal and preserve Defendants’ assets. *See* Receivership Order, ECF No. 16.

The Receivership Order grants the Receiver “all powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers, members, and general and limited partners” of the Equitybuild Defendants. *Id.* ¶ 4. It also authorizes the Receiver to “take all necessary and reasonable actions” to sell or lease “all real property in the Receivership Estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.” *Id.* ¶ 38.

In February 2019, the Receiver filed a second¹ motion for court approval of a sealed-bid public auction process so that the Receiver could market and sell certain residential apartment buildings that were included in the Receivership Estate. *See* ECF No. 228. Certain non-party

¹ The Receiver’s first motion was granted in November 2018. *See* ECF Nos. 130, 164.

creditors (“the Lenders”) objected, arguing in part that the proposed sale process did not provide them the right to credit bid² to secure their interests to the extent that the proposed sale of a property was for less than the amount owed. *See* ECF Nos. 232, 235, 240. The Lenders did not, however, specify the procedures they wanted to be followed with respect to the credit-bidding process. The motion was referred to Magistrate Judge Kim, who granted the motion on May 2, 2019 (“the May 2 Order”) and granted the Lenders the right to credit bid. *See* ECF No. 352.

In the meantime, the Receiver had filed several additional motions for court approval, and on May 22, Magistrate Judge Kim granted the fifth motion for court approval, again over the objections of certain Lenders. *See* ECF No. 382 (“the May 22 Order”).

On June 9, 2019, Magistrate Judge Kim ordered the parties and certain Lenders to establish credit-bidding procedures by June 17, 2019. *See* ECF No. 406. One Lender, Liberty EBCP, LLC (“Liberty”) was able to come to an agreement with the Receiver, but the others were not. *See* ECF Nos. 415, 418. Accordingly, on June 17, 2019, the Lenders filed a motion to amend the May 2 Order, seeking certain modifications to the credit-bidding procedures. *See* ECF No. 418. Magistrate Judge Kim denied the motion on July 9, 2019 (“the July 9 Order”), ECF No. 447.

The next month, certain Lenders filed an emergency motion, arguing that they needed additional time to submit credit bids with respect to certain properties, and seeking to extend the deadline by which to do so. *See* ECF No. 478. Magistrate Judge Kim largely granted the motion on August 19, 2019, over Liberty’s objections. *See* ECF No. 483 (“the August 19 Order”).

Certain Lenders have filed objections to the May 2, May 22, July 9, and August 19 Orders. The Court will address each order and its corresponding objections in turn.

Legal Standard

When a magistrate judge rules on a nondispositive motion, the “district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). “The clear error standard means that the district court can overturn the magistrate judge’s ruling only if the district court is left with the definite and firm conviction that a mistake has been made.” *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 943 (7th Cir. 1997).

² Credit bidding is a “means [for lenders] to protect themselves from the risk that the winning auction bid will not capture the asset’s actual value. If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset. In essence, by granting secured creditors the right to credit bid, the [Bankruptcy] Code promises lenders that their liens will not be extinguished for less than face value without their consent.” *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 650 (7th Cir. 2011).

Analysis

I. The May 2 Order

Liberty objects to the May 2 order for several reasons. Since filing that objection, however, Liberty has reached an agreement with the Receiver and has notified the Court that its objection is moot unless the agreed-upon resolution is modified adversely by the objections to the July 9 Order. *See* ECF No. 463. As explained below, the resolution is not so modified, so the objection is moot as to Liberty. That said, certain Lenders³ have joined in the objection and have separately filed their own objection raising the same concerns.⁴ *See* ECF Nos. 362, 363. Therefore, the Court will address the arguments set forth in Liberty's submission.

A. Compliance with 28 U.S.C. § 2001(a)

The Lenders joining in Liberty's objection argue that the proposed sealed-bid process does not comply with 28 U.S.C. § 2001(a), which provides:

Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court

³ The Lenders joining in Liberty's objection are: (1) Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; (2) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB30; (3) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; (4) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; (5) Wilmington Trust, National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16; and (6) Federal National Mortgage Association. *See* ECF No. 463.

⁴ The objection was filed on behalf of (1) Federal Home Loan Mortgage Company; (2) Midland Loan Services, a division of PNC Bank, National Association; (3) UBS AG; (4) BMO Harris N.A.; and (5) BC57, LLC; in addition to the Lenders who joined in Liberty's objection. Like Liberty, these Lenders object to the May 2 Order insofar as it does not set out the "manner, timing and methodology for placing credit bids" or the "timing and manner of providing . . . letters of credit." Lenders' Obj. May 2 Order at 2, ECF No. 362.

directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

The Lenders argue that § 2001(a) requires a sale “on the courthouse steps” or at the properties in question and, therefore, the Receiver’s proposed sealed-bid process “in no way includes the requirements” of that section. Liberty’s Obj. May 2 Order at 2–4, ECF No. 359.

Liberty previously raised the same objection before Magistrate Judge Kim, who “[found] that [§] 2001(a) is not as limiting as Liberty suggests.” May 2 Order at 4, ECF No. 352. The Court finds that such a conclusion is neither clearly erroneous nor contrary to existing law. The Seventh Circuit has recognized that under § 2001(a), “sales of real property shall be upon such terms and conditions as the court directs,” and “confirmation of a judicial sale rests in the sound discretion of the district court and will not be disturbed on appeal except for abuse.” *United States v. Peters*, 777 F.2d 1294, 1298 n.6 (7th Cir. 1985) (quotation marks omitted) (citing *United States v. Branch Coal Corp.*, 390 F.2d 7, 10 (3d Cir. 1968) (“There can be no doubt that Congress has authorized the federal judiciary to use sound discretion in setting the terms and conditions for judicial sales.”)); *see also Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, No. 14-cv-7581, 2015 WL 5180678, at *7 (N.D. Ill. Sept. 4, 2015) (approving receiver’s sale procedures that did not “strict[ly] compl[y]” with § 2001(a), finding that the proposed process achieved better results than the “archaic procedures” of the statute). Accordingly, it was well within the magistrate judge’s discretion to determine that a sealed-bid process was warranted here, and his decision was not contrary to law.

The Court notes that the Lenders rely almost exclusively on cases construing the statutory language of § 2001(b). *See* Liberty’s Obj. May 2 Order at 3–4. But as Magistrate Judge Kim explained in the May 2 Order, that section applies only to private sales and is inapplicable to this case. May 2 Order at 4 n.1. The Court agrees that the Lenders’ continued reliance on cases interpreting § 2001(b) is unpersuasive.

B. Other Objections to the Credit-Bid Procedures

The Lenders further object to the May 2 Order on the grounds that it does not “specify the timing and manner for placing [a credit bid].” Liberty’s Obj. May 2 Order at 7; *see also* Lenders’ Obj. May 2 Order at 2, ECF No. 362 (“[W]hile the May 2 Order authorizes the lenders to submit credit bids, it does not set forth the manner, timing, and methodology for placing credit bids.”). In the May 2 Order, Magistrate Judge Kim explained that “the court [did] not intend to dictate the Receiver’s every move, absent a concrete showing that he is exceeding his authority or otherwise violating the Receivership Order.” May 2 Order at 8–9. Given the broad grant of authority to the Receiver under the Receivership Order, the Court finds that it was not clearly erroneous for the magistrate judge to grant the Lenders the right to credit bid without setting specific procedures by which such bids should be placed. This is especially true given that when the Lenders objected to the Receiver’s second motion for court approval, they did not propose any credit-bidding procedures to the magistrate judge.

For the same reasons, the Court overrules the Lenders’ objections concerning (1) the timing and mechanics of posting a letter of credit; (2) whether a Lender who purchases a property will be

entitled to free and clear ownership as if a cash bid had been placed; (3) whether managers of the properties should be deemed eligible bidders; and (4) the Lenders' access to property managers during the sale process. Given that the Receiver is empowered to "take all necessary and reasonable actions" to sell or lease the properties at issue, *see* Receivership Order ¶ 38, and that the Court enjoys considerable discretion in approving what procedures should be employed, the magistrate judge's disposition of these issues was not clearly erroneous or contrary to law. There has been no showing by any of the Lenders that the Receiver's proposed procedures exceed his authority or violate the terms of the Receivership Order. Accordingly, the Court overrules the Lenders' additional objections.

II. The May 22 Order

Liberty also filed an objection to the May 22 Order, which raises the same issues as its objection to the May 2 Order. Because Liberty has reached an agreement with the Receiver, which has not been modified by the objections to the July 9 Order, Liberty's objection to the May 22 Order is overruled as moot.

III. The July 9 Order

Certain Lenders have filed an objection to the July 9 Order, in which Magistrate Judge Kim denied their motion to amend the May 2 Order. The Lenders' motion to amend proposed various modifications to the credit-bid procedures agreed upon by Liberty and the Receiver. But, the magistrate judge explained, the motion "essentially amount[ed] to a request barring the Receiver from proceeding with the sale of all mortgage-encumbered properties—a request [the Lenders] should have raised much earlier." July 9 Order at 4.

The Court finds that Magistrate Judge Kim did not clearly err in reaching this conclusion, for several reasons. First, as the magistrate judge pointed out, the Lenders have waived this objection by failing to raise it in their previous objections to the Receiver's second motion for court approval, in which they "never argued that in order to credit bid, they would first require the court to enter final judgment amounts and lien priority determinations." *Id.* The Lenders now argue that the magistrate judge's rejection of their proposed modifications "curtails [their right to credit bid] to such a degree that it threatens to be eliminated." Lenders' Obj. July 9 Order at 5, ECF No. 455. But if that is true, it is a problem of the Lenders' own making. The Lenders could have raised this issue when they sought the right to credit bid, but they did not.

Additionally, as Magistrate Judge Kim explained in the July 9 Order, this Court has already denied the Lenders' request to make a priority determination prior to the administration of the claims process. Previously, when the Lenders requested an expedited priority determination, this Court denied the request, stating that priority determinations must take place in the course of an "orderly claims process." *See* 4/23/19 Tr. at 14:3–16, ECF No. 444. To the extent the Lenders argue that this prior rejection of their argument has no effect because it occurred before they were granted the right to credit bid, *see* Lenders' Obj. July 9 Order at 6, the Court agrees with Magistrate Judge Kim that this is "a distinction . . . without a difference." July 9 Order at 5.

But even if these objections had not been waived or previously ruled on, the Court finds that Magistrate Judge Kim did not clearly err in rejecting the Lenders' proposed modifications. The Lenders argue that "[c]onditioning [their] rights to credit bid upon the procurement of a letter of credit while requiring them to credit bid without knowing the amount of their 'credit' defeats the purpose of a credit bid." Lenders' Obj. July 9 Order at 5. Under § 363(k) of the Bankruptcy Code, they contend, such a requirement can only be set "for cause." *Id.* at 6 (citing 11 U.S.C. § 363(k)). But as Magistrate Judge Kim explained, neither Illinois nor federal law "mandates the right to credit bid *along with the procedures [the lenders] propose . . .* in a Receivership case." July 9 Order at 6 (emphasis added). Rather, the fact that a court may limit the right to credit bid "for cause" demonstrates that such a right "is not absolute." *Id.* Here, the Court agrees with Magistrate Judge Kim's conclusion that certain limitations—such as the letter-of-credit requirement—are warranted. As the magistrate judge explained, in this case, "fairness requires the claims process to proceed before priority is determined," and the Court "must endeavor to balance all of the parties' interests given that there are a number of investors and creditors who assert competing claims." July 9 Order at 7. Given the Court's substantial discretion to direct the administration of the Receivership Estate, such a determination was not clearly erroneous or contrary to law.

The Lenders also argue that their proposed procedures—which would require lien priority and debt amount to be determined before the sale of any property—could "run in tandem" with the Receiver's claims process. Lenders' Obj. July 9 Order at 8. The Lenders primarily rely on the fact that the claims-bar date, July 1, 2019, has come and gone. *Id.* at 9. But as the Receiver points out, the claims process is still in its early stages, and there are approximately 2,000 claims submissions that must be reviewed and analyzed. *See* Receiver's Resp. Opp. Lenders' Objs. at 6–7, ECF No. 476. Accordingly, the Court agrees with Magistrate Judge Kim's determination that "the Lenders' priority claims—and, for that matter, final judgment amounts—are not ripe for adjudication at this point." July Order at 8.

Finally, the Lenders "request that the court clarify the exact procedures [for] credit bidding, including the manner, timing, and methodology of placing credit bids," asserting that it is "unclear what terms and conditions currently control credit bidding." Lenders' Obj. July 9 Order at 9. But the record reflects that the procedures to which Liberty and the Receiver have agreed are currently being followed. *See* Receiver's Resp. at 7; Liberty's Status Report, ECF No. 415. This demonstrates that the terms and conditions currently governing credit bidding are not overly ambiguous or undefined.

For these reasons, the objections to Magistrate Judge Kim's July 9 Order are overruled.

IV. The August 19 Order

Finally, Liberty objects to the August 19 Order. Certain Lenders have joined the objection.⁵

⁵ Those Lenders are: (1) Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; (2) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-

Liberty states that on August 15, 2019, the Receiver notified the Lenders of the highest bids received on certain properties that had been marketed for sale (“the August 14 Properties”), and demanded that the Lenders notify the Receiver within twenty-four hours as to whether they would place a credit bid higher than that of the highest sealed bid received. Liberty’s Obj. Aug. 19 Order at 2–3, ECF No. 502. Certain Lenders filed an emergency motion on August 16, seeking an extension of the deadline. *See* ECF No. 478. The motion was set for hearing on August 19. *See* ECF No. 479. Liberty, for its part, filed a “Credit Bid Modification Motion” on August 19, which was set for hearing on August 22. *See* ECF No. 82. The motion, however, was also decided by Magistrate Judge Kim on August 19.

As noted above, Liberty reached an interim resolution with the Receiver, pursuant to which “[a]dditional details governing the terms and conditions of credit bids [would] be made available by the Receiver upon request.” *Id.* at 5. Accordingly, when Liberty was notified of the Receiver’s twenty-four-hour deadline, it sent the Receiver a request for the following:

1. “A copy of the winning bidder’s Asset Purchase Agreement, as to each of the August 14 Properties”;
2. The “additional details governing the terms and conditions of credit bids, including a good faith estimate of the Seller’s expenses at closing”;
3. When and how the sale of the August 14 Properties had been published;
4. When and how the August 14 Properties had been marketed;
5. When the means and portals for marketing had “gone live” or been otherwise communicated;
6. The number of people who had visited the due-diligence room as to each of the August 14 Properties, as well as the number of bidders who had conducted site visits;
7. The offers received on each of the properties, including the bidders and dollar amounts;
8. The way in which the highest and best offer for each of the properties had been determined, and whether any of the properties had a bid higher than the one that was accepted;

SB30; (3) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; (4) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; (5) Wilmington Trust, National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16; (6) Federal National Mortgage Association; and (7) UBS, AG. *See* ECF Nos. 504, 505.

9. The efforts that were made to “circle back with other bidders” to “top the selected bid”; and
10. The relationships, if any, between the successful bidders, the Receivership Defendants, and the property management companies.

Id. at 6.

The Receiver declined to provide the requested information, prompting Liberty to file its motion. At the August 19 hearing, Magistrate Judge Kim granted Liberty’s motion with respect to Item No. 2, but denied it in all other respects. *See* Liberty’s Obj. Aug. 19 Order, Ex. A, Aug. 19 Hearing Tr., ECF No. 502-1.

In its objection, Liberty argues that the other requests fall within the “catch-all” provision of the interim resolution with the Receiver, which states that “additional details governing the terms and conditions of credit bids will be made available by the Receiver upon request.” Liberty’s Obj. Aug. 19 Order at 10. And, to the extent they do not fall within this provision, Liberty seeks to amend the interim resolution to require the delivery of this information.

The Court finds, however, that Magistrate Judge Kim did not clearly err in determining that the credit-bid procedures to which Liberty and the Receiver have agreed do not require the Receiver to provide the information Liberty now seeks. Indeed, Liberty conceded as much at the August 19 hearing. *See* Aug. 19 Hearing Tr. at 24:23–25:4. It was within Magistrate Judge Kim’s discretion to hold Liberty to the terms of the resolution to which it agreed. Furthermore, it was not clearly erroneous for the magistrate judge to conclude that, while the additional information requested “might provide Liberty some information regarding the market climate,” it was not necessary for Liberty to place a credit bid. *Id.* at 22:22–23:1, 38:18–24. Credit bidding inherently involves a level of risk, and it is up to Liberty to determine whether—based on the information it has received from the Receiver and through its own due diligence—it will accept that risk.

For the same reasons, the Court rejects Liberty’s request to amend the terms of the agreed resolution to include these requests. Liberty’s objection to the August 19 Order is overruled.

Conclusion

For the reasons stated herein, the Court overrules the objections to Magistrate Judge Kim’s orders of May 2, 2019; May 22, 2019; July 9, 2019; and August 19, 2019, and adopts in full the rulings therein. A status hearing is set for October 8, 2019, at 9:00 a.m.

IT IS SO ORDERED.

ENTERED: 10/4/19



JOHN Z. LEE
United States District Judge