UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	**Civil Action No. 18-cv-5587**
v.	**Judge John Z. Lee**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	**Magistrate Judge Young B. Kim**
Defendants.	

RECEIVER'S REPLY TO OBJECTIONS TO NINTH MOTION TO CONFIRM THE SALE OF CERTAIN REAL ESTATE AND FOR THE AVOIDANCE OF CERTAIN MORTGAGES, CLAIMS, LIENS, AND ENCUMBRANCES

Michael Rachlis
Jodi Rosen Wine
Rachlis Duff & Peel, LLC
542 S. Dearborn St., Suite 900
Chicago, IL 60605
Phone (312) 733-3950
Fax (312) 733-3952
mrachlis@rdaplaw.net
jwine@rdaplaw.net

Attorneys for Receiver, Kevin B. Duff

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The latest objections to the Receiver's Ninth Motion to Confirm Sales (Dkt. No. 749) (the "Objections" or "Objectors' Response" (Dkt. No. 769)) are rehashed arguments and alternative facts. The Objections are advanced by two claimants, Fannie Mae and Citibank as Trustee (referred to as the "Objectors"), who have been at the forefront of objecting to practically every aspect of this proceeding.[1] Despite their length, the Objections only focus on two properties. No matter how often repeated, the objections do not change fundamental truths or prior rulings in this matter either as they relate to the two properties or more generally. Notably, the Objections are *not* joined by most of the institutional lenders nor any of over 700 investor lenders. Instead, the submission is largely an *ad hominem* attack on the Receiver and his handling of the sales and claims process that is frequently inconsistent with other positions they have taken. For instance, the Objectors scold the Receiver for a purported failure to determine priority and invalidate other claimants' positions, although when arguing and briefing the ongoing claims process, they vehemently object to the Receiver taking any position on the issue of priority. But as Judge Kim recognized hundreds of docket entries ago, these unrelenting tactics have caused the delay and expense associated with this matter. (Dkt. No. 483) Sadly, for all stakeholders, that remains the case.

Undeterred, the Objectors repeat their previously-rejected objections, demanding that priority must be determined before the sales occur, a position repeatedly rejected in favor of establishing a claims process where such issues will be addressed, and which has been the subject of considerable work by the Receiver, the SEC, other claimants, and the Court. In such circumstances, the law is clear that the Court has the authority and discretion to approve the sales

[1] The Court has already granted the Ninth Motion to Confirm Sales with respect to the other 12 properties that were the subject of the motion. (*See* Dkt. No. 789). In addition, the SEC has replied to the Objectors' Response, which the Receiver also joins. (*See* Dkt. No. 787)

of such properties free and clear of liens. This is the law of the case and has been repeatedly recognized and applied by this Court, including in connection with 43 other properties that have already been approved for sale and sold.

Further, there is no injury to the Objectors from the Court approving the sale of the two properties at issue. Consistent with the sale of other properties with competing secured claims, the Receiver has proposed holding the sales proceeds in separate accounts pending the Court's determination of priority to the funds. If the Objectors are entitled to the funds, then they will have the opportunity to receive them. But there are real and present costs and risk to not approving these sales, including substantial costs of carrying the properties while Objectors resubmit objection after objection. Those costs include property expenses, receivership fees, and continuing risk, which unfortunately between the longest government shut down on record and the global pandemic all reveal are real and legitimate concerns. The Objections should be overruled.

I. Fannie Mae's Alleged "Undisputed" Lien Is Not a Proper Objection to the Proposed Sale, and the Existence of Disputed Secured Interests For Both Properties Subject To The Objections Must Be Evaluated in Accordance with the Claims Process, as the Court Has Previously Ruled.

The same Objectors have previously tried and failed to derail all sales of properties – to "stop the sale process from moving forward until … the court has approved, final judgments and lien priority" (*see, e.g.*, Dkt. No. 447 at 5-8, *affirmed by* Dkt. No. 540) – as they attempt again now for the two properties at issue. Indeed, the Objectors previously filed repeated stay motions to stop these properties from being sold, which were also denied. (*See* Dkt. Nos. 668, 677, 694, 704) And Fannie Mae again objects to the sale on the basis that it has first priority and that priority should be determined before a sale occurs.

But the Court has repeatedly ruled that priority will be resolved during the claims process, and will not interrupt the sales process. Indeed, as the Court recently noted:

> As the Court has repeatedly stated—including *supra* in discussing the sixth motion for approval of the process for sale of certain real estate—an orderly claims process is the proper way of adjudicating competing claims that exist as to the properties.

(Dkt. No. 676, at 6; *see also* Dkt. No. 540, at 5) Put differently, the priority disputes are not a proper basis for objecting to or delaying the sale of the two properties at issue.

Equally important, Fannie Mae's claim that there are no other claimed secured interests in 1131-41 E. 79th Place is false. (*See* Objectors' Response at 32) In addition to a $1,319,255.08 claim submitted by Fannie Mae, thirty-one (31) investor claimants submitted claims totaling approximately $1,562,756.00 against 1131-41 E. 79th Place. (*See* Dkt. No. 757, Exhibit 8 to 7/30/2020 Status Report; *see also* Dkt. No. 693 (claims organized by property)) All 32 of these claims are reflected in the master claims spreadsheet that the Receiver has submitted to the Court on several occasions. (*See, e.g., id.*) Two-thirds of those investor claimants identify themselves as investor-lenders while the other third identify themselves as equity investors. (*Id.*) Eleven of the investor-lender claimants identify their loan as secured. (*Id.*)

Similarly, and as conceded (but ignored) in the Objections, there are competing secured interest claims submitted against 6250 S. Mozart, the other property that is the focus of the Objections. Twenty-nine (29) other investor claimants beyond the institutional lender (Citibank), submitted claims totaling approximately $1,577,882.00 against 6250 S. Mozart. All 30 of these claims are reflected in the master claims spreadsheet that the Receiver has submitted to the Court. (*Id.*) Twenty-five (25) of the investor claimants identified their claim as secured and all but one of them identified themselves as investor lenders.[2] (*Id.*)

[2] Moreover, even if there were no competing mortgages here, other issues remain to be resolved during the initiated claims resolution process, including without limitation the alleged balance due in connection with the corresponding loan, the propriety of all of the component amounts of the claims asserted, and the entitlement of the Receiver to an administrative lien. The Court has already indicated that it intends to conduct an orderly claims process to resolve *all* issues relating to the disposition of the properties and the

While quick to invoke the importance of due process, the Objectors pay no heed to the due process rights of the other claimants who have asserted an interest in these properties (and who have not objected to this motion). The case relied upon by the Objectors, *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992), demonstrates why the objection is groundless. *Elliott* instructs that *all* claimants are entitled to procedural protections and an adequate opportunity to dispute facts and present defenses – precisely the objective of the proposed claims process but the opposite of the result the Objectors seek. Contrary to *Elliott*, the positions advanced by the Objectors seek to dispatch those protections for the other claimants. As such, not only is a key premise of the Objectors' motion simply false, the arguments advanced are contrary to the rulings set forth by the Court and contravene the due process rights of these other claimants.

Similarly, the Objectors' argument that the sale of these two properties constitutes an unconstitutional taking is equally unavailing. The argument is unsupported by legal citation, because it does not exist. Indeed, the Seventh Circuit has noted the lack of authority for the argument that judicial decisions act as takings. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 626 & n.10 (7th Cir. 2014). To the contrary, courts have recognized that "adjudication of disputed and competing claims cannot be a taking." *In re Lazy Days' RV Ctr., Inc.* 724 F.3d 418, 425 (3d Cir. 2013). Further, simply because the Court and the Receiver are respecting a claims process that provides a right to be heard to all allegedly competing secured claimants to resolve priority issues does not mean the Court and the Receiver are ignoring the Objectors' asserted due process rights or exercising a taking – the law and facts reflect the exact opposite.

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funds resulting from their sales. (Dkt. No. 676, at 6 n.2 ("Though there are no competing mortgages for four of the properties at issue, … the Court is persuaded that, with respect to these properties, "other issues remain to be resolved during the initiated claims resolution process, including without limitation the alleged balance due in connection with the corresponding loan, the propriety of all of the component amounts of the claims asserted, and the entitlement of the Receiver to an administrative lien on a portion of the proceeds, if warranted.") (internal citations omitted))

Finally, Fannie Mae's position – that the Receiver has created delay because he should have, but has not, adjudicated existing priority disputes and find that the other claimants have no valid secured interests – is directly contrary to its repeatedly advocated position that the Receiver has no role to play in priority determinations. It is disingenuous for Fannie Mae to criticize the Receiver for delay in resolving disputed claims when its position has been that the Receiver should not be involved in that process. It is also improper for Fannie Mae to make this argument when it is well aware, but makes no mention of the fact, that the Court has determined and repeated on numerous occasions that such priority determinations will be resolved in the claims process. In any case, as the Court has reserved such priority determination issues for the claims process, Fannie Mae's remaining arguments have either been previously overruled or are premature.

II. The Receiver May Sell the Properties Free and Clear, Especially Where All Secured Claims Are Preserved as to the Sales Proceeds for Subsequent Determination by the Court.

A large portion of the Objections is devoted to argument that the two properties should not be sold free and clear of existing liens because the sale price is not above the amount of Objectors' alleged secured interest. But, again, the issues regarding sales price being below alleged secured interest levels has been specifically raised and rejected previously and the Court has approved dozens of properties for sale, including when the sales amounts were less than the alleged secured claims. (*E.g.*, Dkt. No. 352 at 10, *affirmed by* Dkt. No, 540 at 4-5) The previous overruling of this objection was neither novel nor surprising given the authority the court has in administering a federal equity receivership, and when remembering that the Cohens' scheme involved overinflated values of the various properties and promises of multiple first secured interests in the same property that have impacted hundreds of victims and involve thousands of claims. In context,

there is also no surprise that the amounts generated from sales (based on actual market values) would not coalesce with the inflated figures and fabric of liens created by the Cohens.

This Court's prior rejection of the position again advanced by the Objectors is consistent with Judge Learned Hand's discussion of the issue, recognizing that there is not a "rigid" rule prohibiting any such sales. *See Spreckels v. Spreckels Sugar Corp.,* 79 F.2d 332, 334 (2d Cir. 1935). Indeed, that logic has been applied for nearly a century:

> Free-and-clear sales of receivership assets that will not satisfy debts to secured creditors are generally disfavored because creditors may sometimes achieve more significant recoveries through their own foreclosure efforts. **There is no outright ban on the practice, however which would deprive courts of the flexibility essential to administering a receivership estate. Accordingly, whether to allow such sales usually turns on the facts of the case.**

KeyBank Nat'l Assoc. v. Fleetway Leasing Co., 2019 WL 5102206, at *10 (E.D. Pa. Oct. 11, 2019) (citing *Spreckels*, 79 F.2d at 334) (emphasis supplied).

Indeed, in *KeyBank*, the court rejected similar arguments to those raised here as it concluded (applying Judge Hand's decision and others) that the receiver "must have the authority to sell Fleetway's assets free and clear of all liens in the absence of a surplus." Other courts agree, holding that a court "in its discretion may . . . order properties sold free and clear of liens, even though the amount of the recorded mortgages equals or is greater than the value of the property, especially where there is a possibility of the mortgages being held invalid, thus leaving an equity for general creditors." *Coulter v. Blieden*, 104 F.2d 29, 32 (8th Cir. 1939) (quoting 6 Remington on Bankruptcy, Sec. 2583). "The fact that the appraised value of the property is less than the recorded lien is not decisive, where the incumbrance is questioned. The referee exercises judicial authority and discretion in the determination whether there will be an equity which will add to the

assets of the estate. Such discretion and power should not be disturbed unless it is manifest that it has been improvidently exercised." *Coulter*, 104 F.2d at 32.

Similarly, in *SEC v. Capital Cove Bancorp LLC*, 2015 WL 9701154, at *3 (C.D. Cal. Oct. 13, 2015), the court evaluated a receiver's proposal to sell certain properties "free and clear" of all liens at a value less than the aggregate value of the existing liens. The *Capital Cove* court found that it could authorize the free and clear sale even if the price was insufficient to cover the aggregate value of all existing liens because the liens were in bona fide dispute under Section 363(f)(4). *Capital Cove*, at *5.[3]

A dispute between mortgagees, as presented here, was and is itself a sufficient basis for the Court to authorize the Receiver to sell a property free of liens and encumbrances although the secured claims exceed the sales proceeds. *See, e.g.*, *Coulter*, 104 F.2d at 32 ("A sale free and clear from liens may be ordered before the validity and priority of the liens have been determined, the controversies being transferred to the funds."). Cases such as the one at bar, where there is a controversy over the validity and priority of liens, are precisely the type of case where courts encourage and approve the exercise of this authority. As discussed earlier, the Objectors recognize that certain investors have claimed competing secured interests with respect to 6250 S Mozart through proofs of claim submitted against the Receivership estate. Further, as to the property at 1131-41 E. 79th against which Fannie Mae has asserted a lien, the Receiver has also received twenty-nine other proofs of claims, the majority of which self-identify as "investor lenders" and/or affirmatively represented under oath that their loan was secured by the property.

[3] The *Capital Cove* court also rejected the lender's argument that the free and clear sale was improper because the Receiver had yet to bring an action to avoid the disputed liens, finding that "the disputed liens 'need not be the subject of an immediate or concurrent adversary proceeding' to raise a bona fide dispute under Section 363(f)(4)." *Id.* at *7, n.8 (quoting *In re Kellogg–Taxe*, 2014 WL 1016045, at *6 (Bankr. C.D. Cal. March 17, 2014) (citing *In re Gaylord Grain LLC*, 306 B.R. 624, 627 (8th Cir. 2014))).

Separately, the Objectors rely heavily on *SEC v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271 (D. Utah 2009), which, remarkably, they represent as "almost identical to the case before this Court" and "exactly on point." (Objectors' Response, at 12, n.4 & 16-17) Although *Madison* and the present case both relate to real estate Ponzi schemes, there is a fundamental difference that is directly relevant to the issue now before the Court. In *Madison*, the defendant had formed limited partnerships with itself as general partner and the claimants had acquired ownership interests in one or more of the limited partnerships based on the amount of their investments. All of the *Madison* investors thus held an equity interest in the properties, and stood to earn a return only from profits generated from their respective properties. But the Ponzi scheme in the case before the Court is profoundly different, at least for many of the investor claimants. Instead of buying equity interests in LLCs which owned properties, many of the investors in this case loaned funds to EquityBuild in exchange for a percentage of a secured promissory note and mortgage based on the amount of their investments. As such, these investors assert that they are mortgagees, just like the Objectors, making the Utah district court's analysis simply irrelevant.

Tellingly, at page 17 of their brief, the Objectors set forth a lengthy quote from the *Madison* decision but omit the bolded portions from the quoted portion of the decision, magnifying the reasons why the case and its holdings are inapplicable:

> **Unlike the investors, the Interveners are secured creditors.** "It is well-established that a 'receiver appointed by a federal court takes property subject to all liens priorities or privileges existing or accruing under the laws of the State.' " Consequently, the Interveners' priority interest remains intact despite the Receivership. **Because "one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors."** While this court may have broad powers to carry out the purpose of the Receivership, the court is disinclined to put the interests of the buyers and the Receivership over the interests of secured creditors.

Id. at 1277.

Likewise, there were no competing secured claims in the other case principally relied on by the Objectors. *See Pennant Mgmt., Inc. v. First Farmers Financial, LLC*, 14-CV-7581, 2015 WL 4511337 (N.D. Ill. July 24, 2015). In that case, the court merely set forth the general rule from 2 Clark on Receivers (3d ed. 1959) that a "property should not be sold free of liens unless it is made to appear that there is a reasonable prospect that a surplus will be left for general creditors or, in other words, that a substantial equity is to be preserved." *Pennant Mgmt.*, 2015 WL 4511337, at *6. The court, however, also recognized that under appropriate circumstances "the Court may authorize a sale of real property free and clear of liens despite asserted lien amounts that are greater than the sale price." *Id.* Accordingly, the court found that it had the authority to order a free and clear sale in appropriate circumstances, and extended to the receivers the authority to proceed with the sale process subject to a hearing to determine whether the sales were in the best interest of the receivership estates. *Id.* When the *Pennant Mgmt.* court was called upon to confirm the property sales, however, all objections had been withdrawn and no claimants challenged the adequacy of the sales prices. *Pennant Mgmt., Inc. v. First Farmers Financial, LLC*, 14-CV-7581, 2015 WL 5180678, at *3, *5 (N.D. Ill. Sept. 4, 2015). That is very different from the present case.

The Objectors also spend much of their brief on the unremarkable (and undisputed) proposition that the receiver takes property subject to all valid, pre-existing liens. There is no dispute that that the Receiver takes the property subject to all existing liens and priorities. However, *all* claimants asserting liens and priorities must be treated fairly and their due process rights must be respected so that priority may be finally determined. *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 552 (6th Cir. 2006) ("To the extent that a party has a colorable claim against a receiver or the entities in receivership, due process demands that the claimant be heard, but the district court exercises significant control over the time and manner of such proceedings.").

Here, consistent with the Court's previous rulings, the sale of these two properties free and clear of all liens, claims and encumbrances will not extinguish the Objectors' mortgages or release their claims. All competing mortgages will continue to attach to the proceeds of sale with equal force and effect as they did to the property; and the proceeds will be held in a segregated account until priority is resolved by the Court following additional discovery and briefing, once the Court determines what the claims process will look like. As in *Pennant*, this will maximize the potential recoveries of the alleged defrauded investors while still protecting the rights of claimants with interests in the sold properties, while at the same time preventing the continued diminishment of the estate through the carrying costs of owning and maintaining these properties.

The Objectors cite *Bravata* and *Northridge Holdings* for the notion that the Receiver should be required to pay off their debt in full upon sale of the properties, or, if there is no equity, abandon the properties and let the mortgagees foreclose. That is wrong. Courts have recognized that a sale free of encumbrances where the asserted liens are transferred to the proceeds may be appropriate even where the proceeds may not be sufficient to satisfy the interests of all lienholders. *E.g.*, *U.S. v. Parish Chem. Co.*, 2017 WL 4857547, at *11 (D. Utah Oct. 24, 2017) (court "can order the sale of property free and clear, even if a junior interest holder would not receive satisfaction of its interest, where good cause and equitable circumstances exist to justify such a sale").

Moreover, the abandonment issues have been raised and properly overruled,[4] because abandonment of the properties is not appropriate – not only because of the nature of the fraudulent scheme which involved overinflating the values of the properties and impacting hundreds of small,

[4] *See, e.g.*, Dkt. No. 342, at 10 (institutional lenders arguing that "[a]bandonment on the other hand would relieve the Receiver of the need to borrow funds, which will incur unnecessary interest and legal costs"), as well as 4/23/19 Tr. at 15-19, 31-34. These arguments were rejected by this Court as it affirmed the Magistrate Judge's April 8th Report and Recommendation (Dkt. 331) and other relief requested by the Receiver (Dkt. No. 344).

unrepresented claimants, but also because a multitude of claimants have submitted claims against the properties that they allege to be secured.

Among the Receiver's roles, and the District Court's purpose in the appointment of the Receiver, is to assist the district court in the administration of claims and achieving a final, equitable distribution of the assets in these circumstances. *Pennant Mgmt.*, 2015 WL 4511337 at *4 (citing *Liberte Capital Grp.*, 462 F.3d at 551 (6th Cir. 2006)). For this reason, the Receiver may not pay off the debt of one claimant upon sale if the claims of others claiming a secured interest in the sold properties have not been adjudicated.

Given the totality of the circumstances present in this case, the Court's grant of authority to the Receiver to sell and transfer clean title to all real property in the Receivership Estate is consistent with the law and eminently sensible. (*See* Dkt. No. 16, ¶ 39)

III. The Receiver Has Sought Approval to Sell the Properties on Terms and in the Manner the Receiver Deems Most Beneficial to the Receivership Estate and with Due Regard to the Realization of Their True and Proper Value.

Everything the Receiver has done to market and sell the properties at issue has been to realize the true and proper value for the properties. (Dkt. No. 16, ¶¶ 38-39) To that end, the Receiver has implemented a process to sell the properties that was thoroughly vetted and recommended by his real estate advisors (*see, e.g.*, Dkt. No. 670, Ex. 1, ¶¶ 9, 14-15) and repeatedly approved by the Court (*e.g.*, Dkt. Nos. 164, 351, 352, 422, 635, 681, and 682). In approving those activities, the Court has recognized that the Receiver has been exercising his reasonable business judgment in regards to the management, preservation and sale of the properties which are part of the Receivership Estate. (*See, e.g.*, Dkt. No 342, at 10, *affirmed by* Dkt. 540, at 5-6) The Objectors have not identified anything exceptional with regard to the sale of the two properties that are subject to the Objections that should lead the Court to rule differently on the pending motion.

The Objectors argue that the Receiver has not proffered appraisals or other valuations. But because these two properties are public sales under 28 U.S.C. § 2001, appraisals were not required, as they would have been for a private sale. The Objectors also argue that the Receiver has not provided any information to show that he has given due regard to the realization of the true and proper value of the properties. But this is false. They ignore that, upon the advice of his real estate professionals, these properties were marketed in a manner designed to generate interest in the marketplace and achieve a market price for the properties. (*See* Baasch Decl., ¶¶ 10-12)

The Objectors next argue that the Receiver did not identify the number of bidders. (Objectors' Response, at 26) This too is false. The motion expressly identifies the number of bids for each property. (Dkt. No. 749, at 20 & 21, ¶¶ 33 & 36) In addition, the highest bid was provided to each institutional lender together with an opportunity to credit bid (which neither did).[5] While it is of no moment here, the Receiver notes that as to 1131-41 E. 79th Place, nine groups toured the property, while for 6250 S. Mozart, 17 groups toured the property. (Baasch Decl., ¶¶ 13-14) In any event, for 1131-41 E. 79th Place, the Receiver achieved a price that was 92% of the list price; and for 6250 S. Mozart, the Receiver achieved nearly 109% of the list price. (*Id.* ¶ 18)

The Objectors wrongly assert that the Receiver has not worked with any of the mortgagees to help market or otherwise be involved in the sales process. Putting aside the fact that no such requirement exists and the argument was previously rejected (Dkt. No. 352, at 8-9; Dkt. No. 540, at 4-5), it is also inaccurate. Over the course of the Receivership, the Receiver has worked with various of the institutional lenders in regards to the sales process, most recently demonstrated by

[5] Of course, the institutional lenders also have additional information available to them regarding the value and performance of the properties. They receive monthly financial reports from the property manager and monthly property expense reports from the Receiver. With respect to these properties, they also requested and received information from the Receiver regarding lease renewals in June 2020. (Baasch Decl., ¶ 16) And they requested and received access to 6250 S. Mozart in order to perform an appraisal (which they never shared with the Receiver). (*Id.*)

the Receiver and his real estate professionals' extensive and collaborative work with institutional investor Midland stretching over many months to prepare the single family residence portfolio for marketing and sale, accounting for nearly one-third of the properties in the estate. (Baasch Decl., ¶ 19; *see also, e.g.*, Dkt. No. 476, at 7 ("the Receiver reached out to institutional lenders' counsel to solicit their comments before finalizing and implementing the sales procedures that the Receiver is currently using to sell properties")) In any event, the Receiver has been working closely with real estate and other professionals every step of the way to work towards the realization of the true and proper value of the properties.[6]

The Objectors' citation to issues regarding the Ventus contracts (Objectors' Response at 27) does not advance their position. Ventus defaulted on its purchase agreement with the Receiver, and gave as the reason that its financing fell through, even though it had made (and the Receiver had accepted) a cash offer from Ventus. As a result of Ventus' default, the Receiver terminated the agreement with Ventus, and entered a contract with the next highest bidder. After that, Ventus returned and filed an objection to the sale to the next highest bidder, but had not provided another written offer to the Receiver. The Objectors' position is in essence advocating that the Receiver breach the contract with the next highest bidder in favor of an offer that was never made, and all of which was necessitated by Ventus' default, an untenable position for the Receiver. The Objectors also ignore the fact that the Receiver required the deposit of earnest money to protect the estate in the event that a purchaser like Ventus were to breach its contract. But all of these issues are already before the Court on separate motions, so the Receiver relies on those prior submissions and incorporates them by reference. (*E.g.*, Dkt. No. 739)

[6] Furthermore, nothing has prevented the lenders from communicating with their business and industry contacts to bring attention to the properties as they are on the market. Nor has anything precluded the Objectors from sharing information with the Receiver that they believe could assist with the marketing and sale of the properties.

The Objectors also resurrect previously overruled arguments regarding insolvency. (*See* Dkt. No. 597 (motion filed for a transfer to bankruptcy)) As to the request for a receiver's lien, such a mechanism is part of federal equity receiverships, and properly allows for the allocation of receivership costs and expenses. A receiver's lien is not novel but appropriate in cases like this, as seen by the *Elliot* decision, referenced *supra*. These issues also are already before the Court on separate motions, so the Receiver relies on those submissions and incorporates them by reference.

Along those same lines, the Objectors' argument regarding the corporate status of the Receivership entities owning the properties at issue is of no moment. (Objectors' Response, at 28). They have not identified any harm nor explained why incurring the cost to reinstate the corporate status of administratively dissolved entities, which are in the wind down process and subject to Court supervision, is necessary. Nothing precludes the Court from approving the sale of the properties without the need to reinstate the corporate entities. The Objectors have not cited any law requiring the entities to be reinstated in connection with the sales of these properties. In fact, under Illinois law, a person winding up a limited liability company's business may dispose of and transfer a company's property, which is consistent with the duties prescribed for the Receiver in the Order Appointing Receiver. *See, e.g.*, 805 ILCS 180/35-4; *compare* Dkt. No. 16, ¶ 40. And incurring additional costs to reinstate the corporate entities is more likely to cause harm to the estate and to those claimants who have priority to the entities' assets.

IV. The Court Already Approved the Credit Bid Process and Overruled the Objections.

The Objections regarding the Receiver's credit bid procedures are well-known. The Receiver's credit bid procedures have been extensively reviewed and briefed before Judge Kim and this Court, and have repeatedly been overruled, and are law of the case.[7] (*E.g.*, Dkt. Nos. 352,

[7] The Objectors neither acknowledge nor address the Court's prior rulings on the credit bid issues.

382, 447, 483, 540, 676) Significantly, the Court already overruled an earlier iteration of the same objections the Objectors voiced to the credit bid procedures in the Receiver's sixth motion for Court approval of the process for public sale of *the same properties* that are the subject of the current motion. (*See* Dkt. No. 676, at 4-6; Dkt. No. 628, at 14-16)

Nevertheless, the Objectors complain that they cannot credit bid if they do not know the amount of their lien or whether it is first priority. (Objectors' Response, at 28) In addition to the prior rulings of the Court, and myriad reasons set forth by the Receiver and the SEC in prior filings, there are many reasons these objections should be overruled.

First of all, each of the Objectors was offered an opportunity to credit bid on the properties in question and neither did so. (Baasch Decl., ¶ 17) If they are both correct about the priority of their liens and concerned that the Receiver has not achieved sufficient value in selling any property as professed, they had the opportunity to protect their interests by taking the property through a credit bid. Second, the professed uncertainty over the amount of their lien is feigned. Fannie Mae has submitted a claim and knows the amount it has claimed; it has even foreshadowed an intention to amend its claim to update the amount it seeks to recover. Third, the procedures allow the lender to determine the amount of its bid. Nothing in the procedures precludes a credit bidding lender from submitting a credit bid up to the full amount it claims.[8] In fact, the procedures allow a credit bidding lender to add cash on top of its credit bid if it seeks to be the highest bidder and the amount of its lien is not enough. In any event, all of this is irrelevant because, as a result of Fannie Mae's

[8] The credit bid procedures provide for the lender to "submit along with its offer an explanation regarding the computation of the alleged payoff amount as of the date of submission of the credit bid (specifically itemizing principal, contract interest, default rate interest, fees, penalties, or other charges) if the credit bid includes an amount other than a portion of the principal then due to the Credit Bid Lender." (Dkt. No. 415, Ex. A, ¶ 11) Moreover, there is no mystery as to the amount of the credit bid, as the minimum amount to be bid is specified in the credit bid procedures (*i.e.*, "at least 2% higher than the highest offer the Receiver has received through the bid process"). (*Id.*)

declining to credit bid, the Receiver was neither required nor got to the point of agreeing with or disputing a credit bid from Fannie Mae as to priority, amount, or otherwise.[9]

The Objectors argue that guessing as to their priority status and adjudicated lien amount exposes them to risk. (Objectors' Response, at 28) But the Court already addressed and rejected a similar prior objection, noting: "Credit bidding inherently involves a level of risk, and it is up to [the mortgagee] to determine whether—based on the information it has received from the Receiver and through its own due diligence—it will accept that risk." (Dkt. No. 540, at 8)

The Objectors next argue that they ought not pay for closing costs. Once again, the Court has already rejected this argument relative to the resolution of the credit bid issues. (Dkt. No. 447 at 8-9, affirmed Dkt. No. 540 at 5-6) But even if one puts that aside, this is a non-issue, as none of them made a credit bid and none of them actually paid for the closing costs. They do not cite any authority for the proposition that they ought not be required to cover the closing costs in a proceeding such as this, namely a federal equity receivership where the public auction process using sealed bids (consistent with 28 U.S.C. § 2001) has been approved and utilized. The Objectors also are wrong in arguing there is no benefit to the estate from the marketing and sale efforts of SVN. In fact, SVN generated substantial interest in the sales at issue through its efforts, the result of which was to maximize sales proceeds that will be available to whomever the Court determines is entitled to the funds. (Baasch Decl., ¶ 11)

Further, contrary to the objection, SVN's commissions are customary and reasonable. The Receiver has requested that SVN receive a broker's commission of 3.87% for the sale of 1131-41

[9] Fannie Mae's citation of *FDIC v. Meyer*, 781 F.2d 1260 (7th Cir. 1986), is unpersuasive. The language Fannie Mae plucked from the court's opinion is dicta. The court was neither addressing how nor when to determine the amount a foreclosing lender can credit bid. Fannie Mae's citation of *Partel, Inc. v. Harris Trust & Sav. Bank*, 106 Ill. App. 3d 962 (1st Dist. 1982) is similarly unavailing. Contrary to the suggestion, *Partel* does not stand for the proposition that a court is required to adjudicate priority status before a credit bid can occur. *Partel* neither so holds nor addressed that issue.

E. 79th Place and a commission of 4.00% for the sale of 6250 S. Mozart. These percentages are well below the commissions that other district courts in SEC receivership actions have recognized as reasonable and appropriate. *See, e.g., SEC v. Schooler*, 3:12-CV-2164-GPC-JMA, 2020 WL 5203379, at *4 (S.D. Cal. Sept. 1, 2020) (6% commission approved); *SEC v. Schooler*, 3:12-CV-2164-GPC-JMA, 2020 WL 4260819, at *4 (S.D. Cal. July 24, 2020) (6% commission approved); *SEC v. Champion-Cain*, 3:19-CV-1628-LAB-AHG, 2019 WL 6827473, at *4 (S.D. Cal. Dec. 11, 2019) (5% commission approved, "consistent with industry standards"); *U.S. v. Brewer*, 3:07-CR-90-J-33HTS, 2009 WL 1748504, at *4-5 (M.D. Fla. June 19, 2009) (7% commission approved). And, in addition to providing brokerage services to the Receiver within this commission structure, the SVN also is providing asset management services to the Receiver at no additional cost. Thus, the value to the Receivership Estate of compensating SVN through the proposed commissions is substantial and goes beyond the sales at issue.

Finally, while raising issues that have been repeatedly rejected, the Objectors again give no recognition to the carrying costs and risks of continuing to preserve, manage, and hold the properties—costs that will come to an end following the approval of the sale and associated closings for these properties. Rather than extinguishing their asserted security interest, the Receiver's efforts are intended to maximize the available funds to be available for distribution to the claimants who are entitled.

V. The Receiver's Ability to Sell Properties to a Property Manager Is Proper and Law of the Case.

The Objectors next argue, again, that the Court should deny approval of the sale of 1131 E. 79th Place to Longwood Development, LLC because it is an affiliate of property manager, WPD Management. This objection, too, has been repeatedly raised and rejected. In its October 4, 2019

Order, the Court again made clear it overruled this objection and adopted Magistrate Judge Kim's rulings in full.[10] (Dkt. No. 540, at 1)

None of the authorities now cited change that result. *In re Roussos*, 541 B.R. 721, 730 (Bankr. C.D. Cal. 2015) involved an active fraud on the court including a conspiracy to fraudulently transfer properties into the names of secretly controlled entities of the seller in order to own the properties themselves and extinguish other interests and the submission of false declarations. *Id.* at 725. However, Longwood is not an insider. It is not the seller, nor did it control the seller, and has no role in the marketing and sale of the properties, nor for that matter did the property manager. Instead, the Receiver retained an independent broker, SVN, to market and sell the properties through a public sealed-bid auction process. SVN undertook and performed the marketing, the property showings,[11] the dissemination of due diligence materials, and negotiations with potential purchasers with and on behalf of the Receiver. Moreover, Longwood had no direct communications with the Receiver regarding the marketing and sale of the property, as all communications with respect to offers and negotiations came through SVN. No bidder asserted that its bid should have been the winning bid or should be accepted in opposition to the

[10] Judge Kim observed over 16 months ago that, because the District Court adopted his order and recommendation on this issue, it "stands as the law of the case." (Dkt. No. 352, at 8 n.3; *see also, e.g.,* Dkt. No. 311 at 6; Dkt. No. 344; Dkt. No. 422)

[11] The Objectors assert, with no evidentiary basis, that "[t]he property manager controls the type of units that may be seen and inspected by potential third party purchasers …." (Objectors' Response, at 30) This is simply not true; SVN selected the units to be seen and inspected by potential third party purchasers. (Baasch Decl., ¶ 15) They also assert that the property managers had "access to property information, including rents, operating expenses, tenant delinquencies, property condition, etc." (Objectors' Response, at 30). But SVN provided such information to all prospective purchasers in due diligence materials and made the property available for two showings so that all prospective purchasers could gather additional information regarding the condition of the property. (Baasch Decl., ¶ 16) Finally, the Objectors assert that "the Receiver has not shared with the Mortgagees what due diligence has been provided to any of the prospective purchasers" (Objectors' Response, at 30) but that also is not true; the due diligence materials were equally available to the mortgagees as potential credit bidders as they were for all prospective purchasers. (Baasch Decl., ¶ 17)

Receiver's motion. Simply put, Longwood Development LLC outbid the competition in a sealed bid auction. (*See* Baasch Decl., ¶ 18)

Also distinguishable is *In re Family Christian, LLC*, 533 B.R. 600, 604, 618 (Bankr. W.D. Mich. 2015), where the court found that the winning bidder was an indisputable insider, including because its principal was in close regular contact with the debtors' CEO, spoke with the debtors CEO and another insider during the auction process, and he expected to continue as CEO of the winning bidder if it purchased the debtors' assets. The court did not approve the sale because the debtors did not account for the value of insider releases. *Id.* at 625. The court noted that the insider releases could have impacted the value of the winning bid and they had not been accounted for in connection with the sale. And the court was extremely troubled by direct contact between the selling debtor and the winning bidder at 11:00 p.m. during the auction process in which the winning bidder made an *ex parte* request to increase its bid, and leaving the court with the impression that inside information may have been conveyed that it would be declared as the winning bidder. *Id.*

Here, Fannie Mae has not presented any evidence (and there is none) to show that Longwood is an insider, but note only that Longwood is an affiliate of the property manager. By contrast, the Receiver's sealed bid sale process ensured that neither Longwood (nor any other bidder) had inside information that could have allowed it to know that its bid would be the winning bid, in contrast to the scenario in *Family Christian*.

Moving even further from fact to innuendo, Fannie Mae relies on its "suspicion" that the property manager is getting a sweetheart deal. But suspicions are not facts. And the fact that the property was exposed to the marketplace and Longwood outbid the other potential purchasers who participated in the *sealed bid* process, belie that notion.

Finally, it is more than a little ironic that the Objectors would object to the sale to Longwood, where the alternative would be less money available to compensate them should they be entitled to the sale proceeds. The Receiver has sought approval of the highest bid in an effort to realize its true and proper value, which the Objectors apparently now oppose. It does nothing to advance those interests, and the delay of the sale of the property and increase in the costs of the receivership further undermine such interests.

CONCLUSION

For the reasons set forth herein and in his Ninth Motion for Approval of Sale, the Receiver respectfully requests that the Objections be overruled forthwith so that the sales can proceed as quickly as possible.

Dated: September 15, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

Michael Rachlis
Jodi Rosen Wine
Rachlis Duff & Peel, LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
Phone (312) 733-3950; Fax (312) 733-3952
mrachlis@rdaplaw.net
jwine@rdaplaw.net

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, I electronically filed the foregoing **Receiver's Reply To Objections To Ninth Motion To Confirm The Sale Of Certain Real Estate And For The Avoidance Of Certain Mortgages, Claims, Liens, And Encumbrances** with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system. A copy of the foregoing was served upon counsel of record via the CM/ECF system.

I further certify that I caused a true and correct copy of the foregoing **Reply**, to be served upon the following individuals or entities by electronic mail:

- Defendant Jerome Cohen (jerryc@reagan.com);
- All known EquityBuild investors; and
- All known individuals or entities that submitted a proof of claim in this action (sent to the e-mail address each claimant provided on the claim form).

I further certify that the **Reply** will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

/s/ Michael Rachlis

Rachlis Duff & Peel, LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
Phone (312) 733-3950
Fax (312) 733-3952
mrachlis@rdaplaw.net

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	**Civil Action No. 18-CV-5587**
v.	**Hon. John Z. Lee**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	**Magistrate Judge Young B. Kim**
Defendants.	

DECLARATION OF JEFFREY BAASCH

I, Jeffrey Baasch, under penalty of perjury and in accordance with the requirements of 28 U.S.C. § 1746, hereby declare and state as follows:

1. I am over 18 years of age and a resident of the State of Illinois.

2. I have personal knowledge of the facts stated herein and if called as a witness could testify competently thereto.

3. I am Senior Vice President at SVN Chicago Commercial ("SVN"). Prior to working for SVN, I worked for JMB Institutional Realty/Heitman Capital Management, Transwestern Commercial Services, and KPMG Peat Marwick.

4. I am a licensed real estate broker in Illinois with over thirty years of experience in commercial real estate. I am a Certified Public Accountant (CPA). I have a Master of Business Administration (MBA) degree and a Bachelor of Science degree in Accounting.

5. I possess more than 30 years of experience in commercial real estate. I specialize in the sale of multifamily property in the greater Chicagoland area. My experience allows me to

oversee all aspects of the transactional process including valuation, marketing, due diligence, and negotiations. I am not just a real estate broker. I am a real estate expert with significant experience in asset management, property management, accounting, and strategic planning.

6. I lead one of the most active brokerage teams in the South Side multifamily market. Over the last five years we have sold, procured contracts to sell, or are now actively marketing over $100 million in South Side multifamily properties containing in excess of 2,700 dwelling units.

7. I was recognized as the top multifamily broker in Chicago in 2019 by the Chicago Association of Realtors, which bestowed upon me the Commercial Forum Platinum Sales Award for Multi-Family 5+ Sales Dollar Volume.

8. SVN maintains strong relationships and possesses experience with all known active buyers of multifamily properties in the Chicago South Side market. SVN also operates a leading national marketing platform that it uses to reach potential buyers. SVN fully cooperates with other brokerage firms and uses its cooperation policies as a strength to maximize marketing exposure nationally and to provide increased access to less active local buyers.

9. The Receiver, Kevin B. Duff, retained SVN to serve as real estate broker in connection with the marketing and sale of the Chicagoland properties within the EquityBuild Receivership Estate, and I am the broker principally responsible for providing real estate services to the Receiver in connection with his efforts to market and sell those properties. I have actively participated in the development and execution of the marketing strategies for the properties in the EquityBuild portfolio, including the pricing of the properties and the preparation of the bid procedures.

10. Our marketing effort is designed to create buyer urgency, generate competition, and allow all offers to be reviewed at the same time to maximize offer prices. SVN's marketing effort uses various websites which are recognized as the best sources of listing information in the multifamily commercial real estate industry. Additionally, SVN maintains an extensive database of local, national, and international owners and investors in multifamily properties to whom we consistently transmit marketing information, all of which were used for SVN's marketing efforts here.

11. The marketing efforts have proven successful. There has been great interest generated in properties even within the challenging pandemic environment. Further, the vast majority of the properties that SVN has marketed for the Receiver have garnered contracts at or above the asking price.

12. As for the properties located at 1131-41 E. 79th Place and 6250 S. Mozart Ave., SVN undertook and performed the marketing, the property showings, the dissemination of due diligence materials, and negotiations with potential purchasers with and on behalf of the Receiver. The marketing efforts for those properties were consistent with what is described above and with the sales approved by the Court, and designed to realize the true and proper value for the properties.

13. For 1131-41 E. 79th Place, nine groups toured the property; and as part of the process, the Receiver solicited bids through second and third rounds of bidding.

14. For 6250 S. Mozart, seventeen groups toured the property; and, as part of that process, the Receiver solicited a second round of bidding.

15. At each of these properties, SVN selected the units to be seen and inspected by potential third party purchasers. The property managers did not determine which of the units could

be seen and inspected by potential third party purchasers, and had no involvement whatsoever in such matters.

16. SVN provided information regarding the properties, including detailed information on the property, current rent rolls, operating expenses, and tenant delinquencies to prospective purchasers in due diligence materials, and also made the property available for showings so that all prospective purchasers could gather additional information regarding the condition of the properties. SVN made arrangements for access to the institutional lender involved at 6250 S. Mozart for purposes of performing an appraisal, and also assisted in regards to a request for lease renewals.

17. Fannie Mae and Citibank for those two properties, respectively, were provided the same due diligence information that was provided to all of the prospective purchasers. I note that while credit bids were invited, no credit bids were received for the properties that are the subject of the Receiver's ninth sales motion. Indeed, for the entirety of the sales process to this point, there has been only one credit bid received.

18. Longwood Development, LLC ("Longwood"), the winning bidder for both the property located at 1131-41 E. 79th Place and the property located at 6250 S. Mozart Ave., played no role in the evaluation or acceptance of bids for either property. Longwood received no information about other bids prior to the Receiver's selection of its bid as the winning bid. The sealed bid process was run through SVN, and communications in regards to bidding was done solely through SVN. Longwood provided the highest bids for each of the properties through that sealed bid process, and is precisely why it was the winning bidder for these properties.

19. In regards to working with claimants, I note that colleagues at SVN who work on single family homes have worked collaboratively with institutional lender Midland Loan Services

for many months as well as counsel for the Receiver to prepare the single family residence portfolio for marketing and sale.

20. Further declarant sayeth not.

Jeffrey Baasch